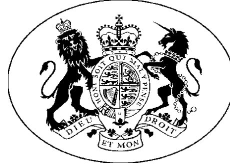
Case Nos: 2200509/2019, 2203079/2019 & 2201562/2020



EMPLOYMENT TRIBUNALS

Claimant: Mr E Androne-Alexandru

Respondent: First Greater Western Limited

Heard at: London Central

On: 4, 5, 6, 9 – 13 November 2020

In chambers: 16 and 17 November 2020

Before: Employment Judge Khan
Mr G Bishop
Mr S Hearn

Representation
Claimant: Mr J Singh, Senior Paralegal
Respondent: Mr R Fitzpatrick, Counsel

JUDGMENT

The unanimous judgment of the tribunal is that:

(1) The victimisation complaint at issue 8 (g) succeeds in part.

(2) All other complaints fail and are dismissed.

REASONS

1. In three claims, presented on 13 February 2019, 20 August 2019 and 14 March 2020, the claimant brought complaints of direct race discrimination, race-related harassment and victimisation under the Equality Act 2010 (EQA) and detriment on the ground of making a protected disclosure under the Employment Rights Act 1996 (ERA). The respondent resists these complaints.

2. On day six of the hearing the claimant withdrew one of the allegations of victimisation.

The issues

3. The issues we were required to determine were set out in the appendix to tribunal's Order dated 6 October 2020 and amended during the hearing following discussion with the parties. These issues, which have been rearranged under each of the complaints brought for ease of reference, are as follows:

A. Direct race discrimination (section 13 EQA)

(The first claim)

1. Was the claimant subjected to the following treatment?

   a. The claimant's supervisors (specifically Tony Murphy and Martin Graver) regularly and inordinately monitoring (through CCTV and mobile phone visual images) the claimant whilst he went on toilet breaks or short rest breaks during his work shift and reporting these as unauthorised absences from gateline duties to station managers on:
      (i) 7 March 2018;
      (ii) 12 April 2018;
      (iii) 19 April 2018.

   b. The claimant being pressed by supervisors and management officials to complete an 'Irregular Occurrence Investigation Form' about these alleged unauthorised absences on:
      (i) around 7 March 2018 (Mr Murphy);
      (ii) 12 April 2018 (Mr Murphy);
      (iii) 19 April 2018 (Fred Ellis).

   c. Various station managers at Paddington Station questioning and probing the claimant about these alleged unauthorised absences, following reports from supervisors (Mr Murphy and Mr Graver), on:
      (i) 18 August 2017 (Mr Law and Mr MacGinnis);
      (ii) 18 February 2018 (Rodney Seelal);
      (iii) 7 March 2018 (Tom Law);
      (iv) 8 March 2018 (Mr Law);
      (v) 12 April 2018 (Mr Law);
      (vi) 16 April 2018 (Mr Seelal);
      (vii) 19 April 2018 (Mr Ellis).

   d. On 16 April 2018, Mr Seelal issuing the claimant with a formal notice of an investigation meeting (to be held on 24 April 2018) about his alleged unauthorised absence from the gateline on 12 April 2018.

2. Does this amount to less favourable treatment? The claimant relies on the following comparators: Fred Ellis; Alan Lee-Bing; Danny Bran; Joel Brannigan; Brian MacDonald; John Levit; Adrian; Remi Awoshile. Each comparator is white and British save for Mr Awoshile who is African and British.

3. If so, was this because of the claimant's Romanian-Jewish ethnicity and race?

B. Harassment (section 13 EQA)

(The first claim)

4. Alternatively, did the conduct alleged at paragraph 1 (a) to (d) amount to unwanted conduct?

5. If so, did it relate to the claimant's race as a Romanian-Jewish person?

6. Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment?

C. Victimisation (section 27 EQA)

(The first, second and third claims)

7. It is accepted that the claimant did the following protected acts:

    a. He submitted a formal complaint to his employer on 19 September 2018, in which he raised allegations of race discrimination and race related harassment (PA1).

    b. He submitted an ET1 on 13th February 2019 raising claims of race discrimination and harassment (PA2).

    c. He submitted a second ET1 on 20 August 2019 raising claims of victimisation under the EQA (PA3).

8. Did the respondent subject the claimant to the following detriments?

    (The first claim)

    a. The claimant not being allowed to return to work on 16 October 2018 due to a decision by Adam Field on 15 October 2018 that the claimant must stay off work until his formal complaint submitted on 19 September 2018 had been dealt with; causing: further prolonged absence from his work at Paddington Station; general distress; financial loss due to the claimant exceeding the six-month absence limit which caused his pay to be reduced to half-pay; loss of usual opportunities to earn additional income from overtime and Sunday working.

    b. An unreasonable delay in commencing a formal investigation into the claimant's formal complaint with the first investigation hearing being held on 5 November 2019 but being cancelled midway and no further initial complaint hearing being held until 30 January

2019 with resulting further significant delay in the investigation process.

c. A decision by Steven Hawker and Klaudia Czechowicz to stop the complaint investigation hearing on 5 November 2018 midway, and cancel the hearing based on their oral allegation made to the claimant that they suspected that he was audio recording the hearing, and a connected failure to formally explain these reasons in writing for terminating the hearing and failure to provide any minutes of this formal hearing.

d. On 20 November 2018, Dean Haynes deliberately and erroneously stating in an Occupational Health referral form about the claimant that he was *'unwilling to talk to management at London Paddington'*, to misinform about and undermine the claimant.

(The second claim)

e. An unreasonable prolongation of the formal investigation process without an outcome being given from 30 January 2019 to 28 August 2019.

f. The claimant being temporarily relocated to Maidenhead Station from 12 March 2019; following the refusal to allow him to return to Paddington on 16 October 2018 following his wish to return to work after several months of sick leave (from 20 April 2018).

g. An ongoing continuation of this temporary relocation for five months and more without any end or conclusion and the claimant being limited to basic contractual duties at Maidenhead; causing isolation and disruption to the claimant from his rightful and normal place of work and unreasonable, and systematic prevention of the claimant from working at his contracted location of work i.e. Paddington.

h. Not being permitted to do any overtime or Sunday working at Maidenhead; causing resulting ongoing financial loss compared to overtime and Sunday working at Paddington.

i. A complaint by Ms Czechowicz against the claimant about him 'covertly recoding a meeting' on 5 November 2018. A deliberate refusal by Martin Cliff to disclose the actual complaint made internally by Ms Czechowicz and only giving to the claimant, orally, at a formally investigation meeting held on 11 March 2019 an obscure and imprecise explanation of the complaint (which placed the claimant at an unfair and unreasonable disadvantage in addressing the complaint).

(The third claim)

j. A biased investigation and outcome in relation to the claimant's substantive complaint of race discrimination by John Lanchester and David Crome.

k. The failure to address and resolve the prolongation of the claimant's relocation to Maidenhead station by Mr Lanchester and Mr Crome.

l. A refusal by Mr Crome to consider the transcripts of the audio recordings made by the claimant.

m. A failure by Mr Lanchester and Mr Crome to provide evidence of the actual enquiries and interviews conducted at stage 1.

9. If so,

    a. Did the respondent subject the claimant to detriments (a) to (d) because of PA1?

    b. Did the respondent subject the claimant to detriments (e) to (i) because of PA1 and / or PA2?

    c. Did the respondent (Mr Lanchester) subject the claimant to detriments (j), (k) and (m) because of PA1 and / or PA2?

    d. Did the respondent (Mr Crome) subject the claimant to detriments (j) to (m) because of PA1 and / or PA2 and / or PA3?

D. Protected disclosures (sections 43A – H & 47B ERA)

(The first, second and third claims)

10. Did the claimant make a protected disclosure? The claimant relies on paragraphs 73 and 74 of his formal complaint dated 19 September 2018.

11. Did the claimant disclose information within the meaning of section 43B(1) ERA?

12. Did the claimant reasonably believe that the disclosure tended to show that the respondent failed and was failing to comply with a legal obligation namely:

    a. Failure to perform job duties in a correct and diligent manner (paragraphs 73 (a) to (e)).

    b. Breach of confidentiality (paragraph 73 (f)).

13. Did the claimant reasonably believe that the disclosure was made in the public interest?

14. If the protected disclosure is proved, was the claimant, on the ground of this protected disclosure subjected to the detriments set out above at paragraph 8 (a) to (m) and also:

    a. The deliberate and unreasonable avoidance of his protected disclosure complaint by Mr Lanchester and Mr Crome *(the third claim)*?

E. Jurisdiction (sections 123 EQA / 48 ERA)

15. Does the tribunal have jurisdiction to hear the complaints in light of the applicable time limits?

    a. In respect of the complaints brought under the EQA:
       (i) Are they part of a course of conduct extending over time?
       (ii) If not, would it be just and equitable to extend time in respect of them?

    b. In respect of the complaints brought under the ERA:
       (i) Are they part of a series of similar acts or failures?
       (ii) If not, the claimant does not advance any grounds for why it was not reasonably practicable to have brought these complaints in time and the tribunal will not have jurisdiction to consider them.

16. In respect of the first claim, the claimant notified ACAS twice before presenting the claim on 13 February 2019, on 16 July 2018 and 13 December 2018 for which early conciliation certificates were issued on 16 August 2018 and 13 January 2019 respectively.

17. In respect of the second claim which was presented on 20 August 2019, the claimant notified ACAS on 20 June 2019 and a certificate was issued on 20 July 2019.

18. In respect of the third claim presented on 14 March 2020, the claimant notified ACAS on 14 February 2020 and a certificate was issued on the same date.

Relevant legal principles

Direct discrimination

4. Section 13(1) EQA provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

5. The protected characteristic need not be the only reason for the treatment but it must have been a substantial or “effective cause”. The basic question is “What, out of the whole complex of facts before the tribunal, is the ‘effective and predominant cause’ or the ‘real or efficient cause’ of the act complained of?” (O’Neill v Governors of St Thomas More RC Voluntarily Aided Upper School and anor 1997 ICR 33, EAT).

6. The test is what was the putative discriminator's conscious or subconscious reason for treating the claimant unfavourably (see Nagarajan v London Regional Transport 1999 ICR 877, HL). The decision-maker responsible for the impugned treatment must be aware of the protective characteristic relied on.

7. Under section 23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

Harassment

8. Section 26(4) EQA provides that:

> (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 section (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.

9. In deciding whether the conduct "related to" a protected characteristic consideration must be given to the mental processes of the putative harasser (see GMB v Henderson [2016] IRLR 340, CA).

10. In Pemberton v Inwood [2018] IRLR 542, CA Underhill LJ re-formulated his earlier guidance in Richmond Pharmacology v Dhaliwal [2009] IRLR 336, EAT, as follows:

> "In order to decide whether any conduct falling within sub-paragraph (1)(a) of section 26 EqA has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

11. The claimant's subjective perception of the offence must therefore be objectively reasonable.

Victimisation

12. Section 27(1) EQA provides that a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act, or A believes B has done, or may do a protected act.

13. Section 27(2) EQA enumerates the four types of protected act as follows:

    (a) bringing proceedings under the Act (i.e. EQA)
    (b) giving evidence or information in connection with proceedings under this Act
    (c) doing any other thing for the purposes or in connection with this Act
    (d) making an allegation (whether or not express) that A or another person has contravened this Act.

14. As to causation, the tribunal must apply the same test to that which applies to direct discrimination i.e. whether the protected act is an effective or substantial cause of the employer's detrimental actions.

15. In a victimisation complaint, as essential element of the prima facie case is that the claimant must show that the putative discriminator knew about the protected act on which the complaint is based or believed that a protected act was done by the claimant (see Chief Constable of Kent Constabulary v Bowler UKEAT/0214/16/RN).

Detriment

16. Section 39(2) EQA provides that:

    An employer (A) must not discriminate against an employee of A's (B) –
    …

    (a) by subjecting him to any other detriment.

17. A complainant seeking to establish detriment is not required to show that he has suffered a physical or economic consequence. It is sufficient to show that a reasonable employee would or might take the view that they had been disadvantaged, although an unjustified sense of a grievance cannot amount to a detriment (see Shamoon v Chief Constable of RUC [2003] IRLR 285, HL).

18. The EHRC Employment Code provides that "generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage".

19. Any alleged detriment must be capable of being regarded objectively as such (see St Helens MBC v Derbyshire [2007] ICR 841).

Discrimination – Burden of proof

20. Section 136 EQA provides that 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.

21. Section 136 accordingly envisages a two-stage approach. Where this approach is adopted a claimant must establish a prima facie case at the first stage. This requires the claimant to prove facts from which a tribunal could conclude that on the balance of probabilities the respondent had committed an unlawful act of discrimination. This requires something more than a mere difference in status and treatment (see Madarassy v Nomura International plc [2007] ICR 867, CA).

22. The two-stage approach envisaged by section 136 is not obligatory and in many cases it will be appropriate to focus on the reason why the employer treated the claimant as it did and if the reason demonstrates that the protected characteristic played no part whatsoever in the adverse treatment, the complaint fails (see Bowler). Accordingly, the burden of proof provisions have no role to play where a tribunal can make positive findings of fact (see Hewage v Grampian Health Board [2012] IRLR 870).

23. In exercising its discretion to draw inferences a tribunal must do so based on proper findings of fact (see Anya v University of Oxford [2001] IRLR 377, [2001] ICR 847, CA).

24. Tribunals must be careful to avoid too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such ground (see Igen Ltd v Wong [2005] IRLR 258, para 51).

Mutually exclusive complaints under the EQA

25. A tribunal cannot find both direct discrimination under section 13 EQA and harassment under section 26 EQA in respect of the same treatment. This is because section 212(1) EQA provides that:

> ‘detriment’ does not, subject to subsection (5) include conduct which amounts to harassment

Protected disclosure

26. For there to be a protected disclosure, a worker must make a qualifying disclosure, as defined by section 43B ERA, and do so in accordance with sections 43C – 43H ERA, where relevant.

27. Section 43B(1) ERA provides that a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following six prescribed categories of wrongdoing:

> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c) that a miscarriage of justice has occurred is occurring or is likely to occur,

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

(e) that the environment has been, is being or is likely to be damaged, or

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

28. Section 43L(3) ERA provides that where the information is already known to the recipient, the reference to the disclosure of information shall be treated as a reference to bringing the information to the attention of the recipient.

29. A qualifying disclosure must accordingly have the following elements:

(1) It is a disclosure (taking account of section 43L(3), if relevant).

(2) It conveys information. This requires the communication of sufficient factual content or specificity to be capable of tending to show a relevant failure (see Kilraine v Wandsworth LBC [2018] ICR 1850, CA). Where the failure is said to relate to a legal obligation, save in cases where the breach is patent (see Bolton School v Evans [2006] IRLR 500, EAT), the worker is required to have disclosed sufficient information to enable the employer to understand the complaint at the time the disclosure is made (see Boulding v Land Securities Trillium (Media Services) Ltd UKEAT/0023/06).

(3) The worker has a reasonable belief that this information tends to show a relevant failure. This has both a subjective and objective element so that the worker must have a subjective belief and this belief must be reasonably held (see Kilraine). In considering this the tribunal must take account of the individual characteristics of the worker (see Korashi v Abertawe Bro Morgannwg Local Health Board [2012] IRLR 4, EAT). In making an assessment as to the reasonableness of the worker's belief that a legal obligation has not been complied with a tribunal must firstly identify the source of the legal obligation that the worker believes has been breached (see Eiger Securities LLP v Korshunova [2017] IRLR 115, EAT).

(4) The worker also has a reasonable belief that the disclosure is made in the public interest. A tribunal must first ask whether the worker believed that the disclosure was in the public interest, at the time that it was made, and if so, whether that belief was reasonably held (see Chesterton Global Ltd v Nurmohamed [2017] IRLR 837, CA). There is no legal definition of "public interest" in this context. The question is one to be answered by the tribunal on a consideration of all the circumstances of the particular case. Relevant factors could include: the numbers in the group whose interests the disclosure served; the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed; the nature of the wrongdoing disclosed; and the identity of the alleged wrongdoer (see

Chesterton). Public interest need not be the only motivation for making the disclosure.

30. Whether the information amounts to a disclosure and whether the worker had a reasonable belief that this information tended to show a relevant failure must be considered separately by a tribunal but these issues are likely to be closely aligned (see Kilraine). If a statement has sufficient factual content and specificity such that it is capable of tending to show a relevant failure then it is likely that the worker's subjective belief in the same will be reasonable. The reverse is equally applicable.

31. A qualifying disclosure is protected if it is made to the employer (section 43C ERA).

Protected disclosure – Detriment

32. Section 47B ERA provides that a worker has a 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 made a protected disclosure.

33. Once it is established that a worker has made a protected disclosure and that he was subjected to a detriment, it is for the employer to show the ground on which any act, or deliberate failure to act, was done (section 48(2) ERA).

34. The correct approach on causation is for the tribunal to consider whether the making of the detriment materially influenced, in the sense of being a more than trivial influence, the employer's treatment of the worker (see NHS Manchester v Fecitt [2012] IRLR 64, CA).

The evidence

35. For the claimant, we heard evidence from the claimant himself and Stuart St Jean, also a Gateline Assistant.

36. For the respondent, we heard from: Frederick Ellis, Gateline Supervisor; Tom Law, Duty Station Manager (DSM); Charles MacGinnis, DSM; Rodney Seelal, DSM; Billy White, DSM; Dean Haynes, Station Manager; Adam Field, Assistant Station Manager; Steven Hawker, Regional Station Manager; Martin Graver, Gateline Supervisor; Martin Cliff, Senior Guards Manager, currently Senior Revenue Protection Manager (secondment); John Lanchester, Regional Station Manager, currently Head of Western Alliance (secondment); David Crome, Head of On Board.

37. Mr Graver gave evidence by video using Zoom. After an initial connectivity issue which was resolved there were no technical problems.

38. It was necessary to recall the claimant to give evidence on day seven of the hearing because Mr Singh, for the claimant, clarified one the legal obligations which the alleged protected disclosure was contended to show (issue 12 (a)) to enable the respondent to cross-examine the claimant on this. The claimant did not object to this.

39. There was a hearing bundle which exceeded 700 pages. By agreement, we also admitted into evidence: approximately 40 pages of unredacted correspondence which replaced partially redacted documents which were already in the bundle; 10 pages of documents relating to comparators. We read the pages to which we were referred.

40. We considered the written and oral submissions made by both parties.

<u>The facts</u>

41. Having considered all the evidence, we make the following findings of fact on the balance of probabilities. These findings are limited to points that are relevant to the legal issues.

42. The respondent is a train operating company which operates the Greater Western railway franchise.

43. The claimant is Romanian and Jewish and identifies for the purposes of these claims as being of Romanian-Jewish ethnicity and race.

44. He has been employed by the respondent since 30 July 2012 as a Gateline Assistant on a full-time basis working 35 hours each week. He is based at Paddington Station ("Paddington"). This is a customer-facing role the purpose of which is summarised in the Role Profile in the following terms:

    > "To assist in the day to day operation of the automatic ticket barriers and deliver a high level of service to customers in respect of enquiries, ticket checking and revenue."

45. The ticket barriers are known as the 'gateline'. Paddington has seven gatelines and 15 platforms. We accepted the respondent's unchallenged evidence that 14 gateline assistants are deployed on each shift. This tallies with two gateline assistants being assigned to each gateline.

46. The claimant is one of 55 gateline assistants working at Paddington. They are managed by six gateline supervisors. Two of the five duty station managers at Paddington are responsible for managing the Gateline Department. They are overseen by Dean Haynes, Station Manager, and Adam Field, Assistant Station Manager.

<u>Rest breaks</u>

47. Gateline assistants at Paddington are rostered to work on either day shifts, from 0620 to 1420, or afternoon / evening shifts, from 1400 to 2200.

48. In each eight-hour shift, they are permitted to take one 30-minute paid break. This incorporates the designated walking time of 10 minutes. This additional time was agreed in recognition that some of the gatelines, the overbridge in particular, are situated farther away from the staff room. Breaks are not permitted to be taken during peak hours i.e. 0620 and 1000.

Irregular Occurrence Investigation (Please Explain) forms

49. At the start of each shift, gateline assistants are booked onto duty by a Gateline Supervisor in the Excess Fare Office when they are allocated their gateline for the day. If a member of staff is late on duty, not wearing the correct uniform or is patently unfit for duty the supervisor will discuss this with them, make a record, and ask them to complete an Irregular Occurrence form. Being late on duty is one of the seven specified reasons for which this form must be completed. A member of staff could also be asked to complete such a form during a shift if one of the other reasons applied, such as being 'AWOL'.

50. The Irregular Occurrence Investigation form is referred more commonly by staff as a 'Please Explain' form and also as a 'late on duty form' the latter being a hangover from the previous system (hereafter referred to as a 'Please Explain' form). This form originated from the need to record any incident relating to the safety-critical despatch of trains. The current iteration of the form is a consolidation of the separate forms which had previously been issued for each separate reason. There is one Please Explain form for gateline staff and one for despatchers (SDA) the purpose of which is to record the explanation given by a member of staff for the irregular occurrence at issue.

51. In his evidence which we accepted, Tom Law, Duty Station Manager (DSM), and one of the line managers for the Gateline Department until March 2018, said that when he joined the management team at Paddington there was an obvious issue with lateness. In October 2016 it was decided to redouble the focus on these forms as a means of recording and identifying any problematic patterns so that management could address them. Staff were told they would need to complete these forms as and when required. Mr Law oversaw this process. Billy White, another DSM, also stated that this form was in use at Paddington from 2016.

52. This coincided with a collective complaint made in or around August 2016 by six gateline assistants, including the claimant, about the behaviour of other colleagues which included taking excessively long unauthorised breaks and leaving colleagues single-handed at busy times, and poor timekeeping. Noting the impact this had on their morale, motivation and the ability to complete their duties, they asked the respondent to take action and remind colleagues of their work duties. Being left single-handed at a gateline during peak times not only presented a health and safety risk to the lone worker, for example, in the event of an assault or altercation, it could also result in the gateline becoming congested which affected the ease with which customers could gain access and egress from platform and station. The claimant was therefore aware of the impact that such behaviour had on the service as well as colleagues.

53. As Fred Ellis, a Gateline Assistant who was promoted to Gateline Supervisor in April 2018, explained, an unauthorised absence during peak hours was more noticeable because of the effect this had on colleagues.

54. In evidence, Stuart St Jean, also a Gateline Assistant, agreed that it was necessary for him to inform a colleague and supervisor if he required any

additional time away from the gateline. He also agreed that gateline assistants had access to a radio or mobile phone from which they could communicate with their supervisors. This meant that gateline staff had a ready means of communicating their movements whilst on duty. He agreed that supervisors gave Please Explain forms to other colleagues, including himself, regardless of their race.

55. Gateline supervisors were responsible for the safety of gateline staff and for ensuring that they were performing their duties as required. This included making sure that the gatelines were operational and fully staffed, monitoring and when necessary, enforcing breaks and other Gateline standards, together with DSMs.

56. The claimant complains that two of his supervisors, Tony Murphy and Martin Graver, who are both white and British, singled him out in that they monitored his breaks, questioned him about his movements and reported him for taking unauthorised absences to the station managers. We accepted Mr Law's unchallenged evidence that both supervisors had flexible working arrangements which meant they worked on the day shifts. As such, they were more often on duty when the claimant was also working an early shift.

18 August 2017 (allegation 1 (c)(i))

57. The claimant complains that Mr Law and Charlie MacGinnis, another DSM, spoke to him about an unauthorised absence from duty on 18 August 2017. Although neither manager had any recollection of this, we find that this discussion took place. The claimant did not refer to this in his witness statements but he make reference to this incident, albeit summarily, in his formal complaint dated 19 September 2018. It was, as the claimant noted, a short discussion. However, on the claimant's own evidence this intervention arose because of a complaint made by another gateline assistant, Suzanne, and neither Mr Murphy nor Mr Graver were involved. In the absence of any evidence to the contrary, we find it likely that this was due to the fact that the claimant was absent from the gateline on this occasion. We do not therefore find that this was because of the claimant's race or that it related to the claimant's race.

58. Rodney Seelal, DSM, returned to work from long-term sick leave in February 2018. He recommenced work on light duties initially and resumed operational duties in late March 2018.

Unauthorised absences in March and April 2018

59. Complaints about the claimant being on unauthorised absence from duty were made on 7 and 8 March, and 12, 18, 19 and 20 April 2018. We find that these complaints were all well-founded.

60. In an attendance note dated 7 March 2018, Mr Law recorded that: the claimant and another Gateline Assistant, Michael Pravda, were late on duty on 12 February 2018; he had asked Tell Adeniya, a Gateline Supervisor, to monitor their punctuality; the claimant had been late for duty the next day, on 13 February 2018, and again, on 7 March 2018.

7 March 2018 (allegations 1 (a)(i), (b)(i) and (c)(iii))

61. Mr Adeniya had reported this third incidence of impunctuality to Mr Law in an email sent at 0717 on 7 March 2018, when he referred to a second colleague who was also late on duty and two other colleagues who had attended for duty without the correct uniform. Mr Adeniya recorded the claimant as having reported for duty at 0631. We find that Mr Adeniya reported the claimant as his contemporaneous email confirmed because he had been asked by Mr Law to monitor lateness. The claimant was late. He was not the only one to have been reported to Mr Law.

62. The claimant completed a Please Explain form in relation to being late on duty. We find that Mr Adeniya gave the claimant this form to complete and not Mr Law as the claimant contends. This is consistent with the email sent by Mr Adeniya at 0717 in which he confirmed that the claimant had completed a 'late on duty form' and our finding below that the claimant did not meet with Mr Law to discuss this issue until after 0900.

63. The discussion between the claimant and Mr Law was treated as a 'Suitable Conversation' i.e. an informal discussion to be recorded and placed on the claimant's personnel file. The reason for this Suitable Conversation was that Mr Law had not seen the claimant at his designated gateline (B) at 0805. The claimant had not returned to his post when Mr Law returned 40 minutes later. When he enquired about the claimant's whereabouts with Mr Graver and Mr Murphy they told him that they had not seen him since 0815. The claimant returned to his post at 0900. When Mr Law spoke to the claimant subsequently, he did not deny being away from the gateline. He explained that he had gone to the toilet and had also dealt with a minor injury to his toe. In his record of this meeting, Mr Law noted that he had discussed the claimant's recent lateness as well as his unauthorised absence from the gateline that morning.

64. Mr Law did not ask the claimant to complete a Please Explain form in relation to his unauthorised absence. However, he reminded the claimant that his break was 30 minutes. He told the claimant that excessive absence from the gateline if unauthorised was unacceptable. The claimant was warned that if he continued to arrive late on duty or to take unauthorised absences he would face potential disciplinary action or performance management. Mr Law also told the claimant that he was required to inform his supervisors if he left the gateline for any extended period. In telling the claimant this, Mr Law was reminding the claimant of an obligation which applied to all his colleagues equally and one which the claimant was fully cognisant of.

8 March 2018 (allegation 1 (c)(iv))

65. On 8 March 2018 Mr Murphy emailed station managers, including Mr Law and Mr Haynes to report that the claimant and Mr Pravda had taken excessive unauthorised breaks for a second consecutive day. He said that the claimant had left the overbridge gateline (H) more than three times which he had denied when questioned. Referring also to the claimant's unauthorised absence the previous morning, Mr Murphy wrote "This Member of staff is often late and not at his position and is not performing to

the standard we expect and I am getting complaints from his colleagues". As Mr Murphy noted, the claimant's actions had put his colleagues under pressure. Mr Murphy also discussed this with Mr Law when he told him that the claimant's unauthorised absences had exceeded two hours that day.

66. Mr Law spoke to claimant informally about this issue on the overbridge. The claimant covertly recorded this discussion. Noting that Mr Murphy had a tendency to exaggerate, Mr Law emphasised that he wanted to hear the claimant's explanation. The claimant denied taking any additional breaks. He complained that he was being singled out and felt harassed although he did not refer to race. This was the second successive day when the claimant was reported as having taken unauthorised breaks for an extended period. Although he denied being absent on 8 March 2018, we find that it is likely that he took unauthorised leave because we do not find it likely that Mr Murphy would have invented this and we take account of the other dates when the claimant took unauthorised absences. Nor do we find that the claimant was being singled-out: like Mr Pravda he had been recorded as having taken unauthorised breaks and this had been reported to the managers.

Gateline notice on 20 March 2018

67. A Gateline Notice was circulated to staff on 20 March 2018 in relation to "Breaks, punctuality, gateline standards and leaving gates at the end of your shift". Staff were reminded that they were expected to arrive on time; their 30-minute break had to be taken outside peak hours; they were required to obtain permission for any additional absence from duty from a Gateline Supervisor. Staff were warned this would be monitored and supervisors, and managers would be conducting regular checks. Although the claimant said he did not see this notice at this time, Mr Law had recently discussed this issue with him and the consequences of any further impunctuality or unauthorised absences. As we have noted, Mr St Jean agreed that staff were required to inform a colleague and supervisor if they required any additional time away from the gateline. Gateline staff, including the claimant, already knew what these standards were and now understood there was a renewed focus on their enforcement.

68. In April 2018, Mr Seelal and Charles MacGinnis, DSM, took over management of the Gateline team.

12 April 2018 (allegations 1 (a)(ii), (b) (ii) and (c)(v))

69. On 12 April 2018 Mr Graver and Mr Murphy reported that the claimant had taken an unauthorised break of 30 minutes i.e. between 0818 and 0848 to Mr Law, Mr Haynes and Mr Field. They noted that staff were complaining about being left to work on their own during peak hours.

70. When Mr Murphy discussed this issue with the claimant, he explained that he had been to the toilet. Mr Murphy reported this to Mr Law who instructed him to ask the claimant to complete a Please Explain form when he returned to the gateline. The claimant refused to complete a form and told Mr Murphy that if Mr Law wanted him to complete one then he should ask him directly.

When the claimant refused to go up to Mr Law's office, Mr Murphy reverted to Mr Law.

71. Mr Law came down to the gateline and asked the claimant to come up to his office. The claimant covertly recorded this discussion. He did not deny being absent. He explained that he had taken a toilet break. This was the second time when the claimant had given this reason for taking an extended break. When the claimant said "you don't know how the body works" Mr Law suggested an Occupational Health (OH) referral. The claimant said that was not necessary. Mr Law told the claimant that Mr Murphy had made a reasonable management request in asking him to complete the form. Mr Law asked Mr Murphy to join the meeting so that he could hear both sides. When Mr Murphy explained that the claimant had been absent for almost half an hour the claimant did not deny it. Mr Law explained that the purpose of the form was to give the claimant the opportunity to explain why he had been absent. Although the claimant agreed that this was a reasonable request he refused to complete the form. Mr Law therefore completed the form instead as he explained he would.

72. In his evidence to the tribunal, the claimant said that he had not seen this form before nor did he know what the purpose of it was. We do not find that this evidence was credible. The form used was the same form that the claimant had completed on 7 March 2018 apart from a minor and insignificant detail. As the claimant's transcript of this discussion illustrated, Mr Law explained the purpose of the form to him. They had also discussed this on 7 March 2018. The claimant therefore knew what this form was and why he had been asked to complete it. As noted, he agreed that this was a reasonable management instruction.

73. At one point in this discussion, Mr Murphy alleged that he had CCTV evidence which showed that the claimant had been absent from the gateline. We find that Mr Murphy said this in the heat of the moment to prompt the claimant to admit he had been absent. We do not find that Mr Murphy actually had access to CCTV. As the respondent's CCTV Policy provided, only authorised station managers and other authorised personnel were trained and had access to CCTV systems. We accepted the respondent's evidence that this did not include supervisors. The station CCTV system was controlled by Network Rail and the monitors located in a control room were accessible by key and code. Permission was required and a form had to be completed. The CCTV Policy also provided that access to CCTV could be given in connection with an ongoing investigation but "will not be used to proactively monitor colleague performance issues". There was no active investigation into the claimant at this date.

<u>The decision to investigate the claimant</u>

74. Mr Law decided that the claimant should be investigated under the Disciplinary Procedure because of his refusal to follow a reasonable management instruction. As he explained in an email he sent to Mr Haynes and Mr Field, by taking these unauthorised absences the claimant was "deliberately not doing what he is supposed to after several warnings…"

75. The next day, on 13 April 2018, Mr Field asked one of the DSMs to investigate this incident. Mr Seelal agreed because he was one of the claimant's line managers.

Formal notice of investigation on 16 April 2018 (allegations 1(c)(vi) and (d))

76. Mr Seelal wrote to the claimant on 16 April 2018 to invite him to attend an investigation meeting on 24 April 2018 in relation to an allegation that he had left the gateline without permission on 12 April 2018 which the respondent treated as a refusal to follow a reasonable management instruction. We find that the reason for this decision was that there had been three instances when the claimant was alleged to have taken extended unauthorised absences during peak hours, two of which the claimant had accepted and the third we have found it likely he also took. The claimant had persisted in this conduct despite being told by Mr Law, on 7 and 8 March, that this was not acceptable and could lead to disciplinary action. A further issue was that the claimant had refused to comply with the reasonable management instructions of Mr Murphy and Mr Law to complete the Please Explain form on 12 April 2018 (the second of which the claimant agreed was reasonable). We do not therefore find that this was because of or related to the claimant's race.

77. The claimant did not adduce any evidence in relation to a discussion between himself and Mr Seelal when it is alleged he was questioned and probed on the prompting of Mr Murphy or Mr Graver. Nor did he put this allegation to Mr Seelal in cross-examination. We do not therefore find that such a discussion took place.

18 April 2018

78. At 0715 on 18 April 2018 Mr Murphy saw there was only one gateline assistant, Nick Tsakas, at the gateline (A) at 0715. The claimant had also been allocated to this gateline but was absent. The claimant returned 15 minutes later. However, at 0742 Mr Graver had to assist Mr Tsakas as the claimant was absent again. When the claimant returned and was asked by Mr Graver where he had been he told him that he was not required to inform his supervisors when he wanted to leave the gateline. This was a surprising response coming only two days after Mr Seelal's letter and one week after the claimant's discussion with Mr Law. When Mr Graver asked the claimant to complete a Please Explain form he refused.

79. Mr Murphy emailed his managers when he stated that the claimant had little respect for his supervisors. He also showed Mr MacGinnis a photograph he had taken with his phone of gateline A which showed that the claimant was not on duty. He was no doubt motivated to do this because the claimant had denied being away from the gateline during the discussion with Mr Law the week before. This was not a picture of the claimant but of his absence. We find that the taking of this photo is consistent with Mr Murphy's lack of access to the CCTV system.

80. Because the claimant was refusing to engage with his supervisors Mr Graver contacted Mr MacGinnis to inform him that the claimant had disappeared twice. Mr MacGinnis came down to speak to the claimant. The

claimant covertly recorded this discussion. He did not deny being absent. Mr MacGinnis told the claimant that he was required to let his supervisors know if he was going to leave the gateline, including to go to the toilet. The claimant insisted on seeing the policy for this. In evidence, he agreed that he was knew that he was required to inform his supervisors of any absences he took from the gateline. The claimant refused to complete a Please Explain form. Mr MacGinnis told the claimant that he was refusing a reasonable management request which could lead to disciplinary action. The claimant asked several times if he was going to be suspended. Mr MacGinnis said that this was not a suitable step. The meeting continued in the Excess Fare Office when it was agreed that the claimant would meet with a DSM accompanied by his union representative. Mr MacGinnis's expectation was that the claimant would then agree to complete the form.

81. We accepted Mr MacGinnis's evidence that the transcript of their discussion which the claimant disclosed was incomplete and therefore potentially misleading. It did not refer to the claimant's repeated questions about whether he was going to be suspended which was recorded by Mr MacGinnis in his contemporaneous attendance note whose veracity we accept.

82. Mr MacGinnis handed this issue over to Mr Seelal because of other commitments. Mr Seelal went down to the gateline to speak to the claimant. He hoped that the claimant would agree to sign the Please Explain form as this would avoid the need for such a meeting. We find that this shows that Mr Seelal was invested in resolving this issue informally. However, the claimant was absent from duty. When Mr Seelal found the claimant on his second attempt he asked him to sign the form which the claimant refused to do. He wanted to know who had reported him.

83. At around 1400 the claimant, accompanied by his RMT representative, Kenneth Mutabaazi, met Mr Seelal in his office. Once again this was covertly recorded by the claimant. Mr Seelal confirmed that the Please Explain form applied to everyone at Paddington. He provided the claimant with a copy of the brief issued in March 2018. Mr Seelal noted that the claimant had taken an authorised absence on another occasion, which we find was a reference to 12 April 2018 about which he had already written the claimant, and that he had been absent from duty twice that day. Although the claimant did not deny this he refused to complete the Please Explain form. Mr Seelal warned the claimant that this could lead to disciplinary action.

84. We find that this meeting took place on 18 April 2018 not 18 February 2018 as the claimant contends. Mr Seelal did not return to operational duties until late March 2018 and did not take over line management of the Gateline Department until April 2018. He referred the claimant to the brief which had not been reissued and circulated until 20 March 2018. We also find that Mr Seelal and Mr MacGinnis gave consistent and credible evidence in relation to the timeline. This included Mr MacGinnis' attendance note on 18 April 2018. Although the transcript of the meeting provided by the claimant referred to the February 2018 date we do not accept that this is the correct date for the reasons we have given.

85. Following this meeting, Mr Seelal discussed the option of suspending the claimant with Mr MacGinnis and Billy White, DSM. This was the fourth time he had been absent without authority from the gateline during peak times and the second date when he had refused to complete a Please Explain form against instructions from two of his supervisors (Mr Murphy and Mr Graver) and three DSMs (Mr Law, Mr MacGinnis and Mr Seelal). This was a persistent and escalating pattern of behaviour in which the claimant was failing to follow Gateline standards. Mr White wrote to Mr Haynes and Mr Field to set out his intention to suspend the claimant the next day pending an investigation "on the grounds of failing to follow a reasonable request from a manager and insubordination".

19 April 2018 (allegations 1 (a)(iii), (b)(iii) and (c)(vii))

86. The claimant was absent from the gateline (B) the next day between 0725 and 0750. This was reported by Mr Ellis. Once again the claimant refused to complete a Please Explain form. This was Mr Ellis' first week in the job having previously been a Gateline Assistant. He was aware that the claimant had taken unauthorised absences from his time working alongside the claimant on the gateline. We accepted his evidence that by this date the claimant was taking unauthorised breaks more often than his colleagues. This was an issue because these breaks were being taken during peak hours for extended periods and sometimes several times a day. Mr Ellis asked the claimant to complete a Please Explain form. We find that he did so because he had seen that the claimant was absent from the gateline. We do not therefore find that he was prompted by Mr Graver or Mr Ellis as the claimant contends. We accept Mr Ellis's evidence that he did not demand that the claimant completed this form but left it with him in the expectation that he would complete and return it. At the end of his shift, Mr Ellis reported to his managers that the claimant had not returned this form to him.

87. The claimant's persistently disruptive behaviour was discussed at a meeting between the gateline supervisors, Mr Seelal and Mr MacGinnis. The supervisors were finding the claimant an increasing challenge to manage. Mr MacGinnis sought to reassure the supervisors by stating that action would be taken against colleagues who were persistently refusing to follow gateline standards. Afterwards, Mr Seelal joined a separate meeting between Mr Field, Mr White and Klaudia Czechowicz, HR Business Partner, to discuss the claimant's recent conduct. When Mr Seelal noted that there appeared to be a pattern of the claimant taking extended toilet breaks during peak times, Ms Czechowicz advised that before any other steps were taken it was necessary to conduct a welfare meeting with the claimant to explore whether his unauthorised absences were connected to an underlying personal or medical reason. He was not therefore suspended.

20 April 2018

88. Mr Graver reported the claimant's absence from the gateline (H) from 0810 and 0842 the next day, 20 April 2018. Another gateline assistant, Henry Travasso, complained about the claimant's absence to Mr Graver whilst he was doing his walkaround. This was the third consecutive day when the claimant had taken an unauthorised break during peak hours.

89. As instructed by Ms Czechowicz, Mr MacGinnis and Mr Seelal arranged a welfare meeting with the claimant that day. This meeting was covertly recorded by the claimant. Before going into it the claimant noted to himself that he had left the gateline earlier thar day to go to the toilet. Mr MacGinnis asked the claimant if there an underlying cause for what had become a daily occurrence. We accept Mr Seelal's evidence that had the claimant explained that there was a medical reason for his persistent absence from the gateline he would have postponed the impending investigation meeting in order to obtain OH advice. However, the claimant refused to engage with his managers. He wanted to know who had reported his absence that morning and refused to continue the meeting without a union representative. It was agreed that this meeting would reconvene at 1400 when Mr Mutabaazi was back on duty. This meeting did not take place because the claimant went on sick leave at around 1300. As the claimant left work he saw that Mr Graver was issuing a Please Explain form to another colleague, Alan Lee-Bing, one of the claimant's named comparators.

Welfare meetings on 8 June, 7 and 31 August 2018

90. The respondent's Welfare Guidance for Managers provided that an affected employee was responsible for maintaining contact and updating their manager on the reasons for their absence, their likely length of absence and to discuss any support they needed. Notably, the claimant emailed Mr Law on 2 May 2018 when he told him that he did not wish to speak to anyone at Paddington. Mr Law replied to remind the claimant of his obligation to maintain regular contact. This guidance also provided that a welfare meeting was required in the event of long-term sickness absence, defined as an absence of four weeks or more. The purpose of such a meeting was to provide support to the affected employee, find out more about their situation and discuss any welfare issues. The claimant was referred for an OH assessment in early June 2018 consider whether he could be supported to return to work ahead of which Mr Haynes arranged a welfare meeting with him on 8 June 2018. He wanted to gain a better understanding of the reasons for the claimant's sickness absence.

8 June 2018

91. The claimant attended this welfare meeting with Mr Haynes and Ms Czechowicz on 8 June 2018. It was covertly recorded by him. The claimant confirmed that he was on sick leave because of work-related stress. When Mr Haynes asked him to elaborate the claimant said that he had already told him, once in 2016 and twice in 2017. He said that it concerned the behaviour of management i.e. Mr Field, the DSMs and supervisors. He refused to provide further detail and told Mr Haynes "You are the manager, so you're supposed to know" and also that he should talk to the DSMs and supervisors if he wanted to know more. This was the claimant's opportunity to explain what was causing his stress. He instead refused to engage and was confrontational. Mr Haynes felt, with some justification in our view, that the claimant was questioning his abilities as a station manager and being increasingly disrespectful. When he told the claimant that he would not tolerate being spoken to in this way, the claimant said he would leave. Mr

Haynes asked him to. Mr Field, based in an adjacent office, overhead voices and saw the claimant walk out of Mr Haynes' office.

92. Mr Haynes subsequently submitted a grievance about the claimant when he complained that the claimant's conduct had been confrontational and bullying. This grievance did not appear to be followed up by the respondent nor Mr Haynes. Nevertheless this signalled that the working relationship between Mr Haynes and the claimant had broken down.

93. The claimant was assessed by Nicola Hide, OH Advisor, on 12 June 2018. The resulting OH report confirmed that the claimant remained unfit to work with depression which he said had been triggered by workplace stress. This report also stated that the claimant felt "victimised and inappropriately treated by senior colleagues". No further detail was provided. Management were advised to maintain contact with the claimant with the aim of resolving these underlying issues. Following a review of the claimant by Ms Hide on 9 July 2018, she reported that the claimant had stated that these unresolved issues were a "barrier to him returning to work" and was willing to attend another meeting at Paddington.

7 August 2018

94. A second welfare meeting was held with Mr Field on 7 August 2018 when the claimant was accompanied by Mr Mutabaazi. A note taker was also present. It is likely that the claimant also covertly recorded this meeting because he was able to produce a very extensive written record of it. Notably, Mr Field explained at the outset that the previous welfare meeting had not gone well and his aim was to understand the root cause of the claimant's work-related stress with "fresh eyes". This was also consistent with recent OH advice. In evidence, the claimant agreed that he refused to engage with Mr Field during this meeting. The claimant adopted the same confrontational and obstructive approach he had taken with Mr Haynes in June. He told Mr Field that he should know what the issue was because there was a management team at Paddington. The claimant refused five times to explain the cause of his stress. He said that Mr Haynes knew about the most recent issues and he called Mr Haynes, Mr Field and management liars.

95. The claimant also complained that the way he had been treated by management at Paddington since 2015 was "anti-Semitic because of my background as a Jew". Other than the welfare meeting with Mr Haynes he provided no further detail. This was the claimant's first reference to his religion which was several months after the interventions by the claimant's supervisors and DSMs in relation to his unauthorised breaks. Mr Field referred the claimant to the grievance process.

96. When the claimant told him that he did not trust the management at Paddington, Mr Field suggested that another meeting was arranged with a manager from outside the region.

31 August 2018

97. Mr Field arranged for an external manager, Ben Swan, Guards Manager, East, to conduct a third welfare meeting with the claimant. He wrote to Ms Czechowicz and Mr Swan on 17 August 2018 to emphasise that this was a welfare meeting "to ascertain what exactly the issue is that is causing stress for us to be able to help resolve and help him to return to work." Although he suspected the issue was that the claimant had been managed over lateness and unauthorised absences, Mr Field could not be certain of this, nor discount that there were any other factors involved, because of the claimant's refusal to engage with him.

98. This welfare meeting took place on 31 August 2018 when the claimant was accompanied by Mr Mutabaazi. The claimant was again confrontational. He began by stating that he was unhappy that a note-taker from HR was not present and questioned whether Mr Swan was able to conduct the meeting and take notes simultaneously. The meeting did not proceed because the claimant refused to continue without someone from HR present. As agreed, Mr Swan sent his record of this meeting to the claimant later that day which contained his electronic signature. The claimant subsequently forwarded an amended record which also included Mr Swan's signature. We found that this was misleading because it suggested that this was an agreed version. We were taken to correspondence in the bundle which showed that Mr Swan was astounded by the changes which the claimant had made.

99. We find that Mr Haynes, Mr Field and Mr Swan were genuinely motivated to understand more about the reasons for the claimant's work-related stress and to support him to returning to work. However, these efforts were thwarted by the claimant's refusal to engage with his managers. We also find that because of the claimant's conduct at these welfare meetings in addition to his refusal to follow management instructions prior to going on sick leave, Mr Haynes and Mr Field concluded that the claimant had lost trust in the station managers at Paddington. Indeed, this was what the claimant had told Mr Field on 7 August 2018.

<u>The claimant's formal complaint on 19 September 2018</u>

100. The claimant submitted a formal complaint headed "Grievance and Whistle-blowing complaint" on 19 September 2019 to Mark Hopwood, Managing Director, via his legal representative, Mr Singh. The focus of this grievance was that the claimant had been singled out in relation to his breaks: he had been monitored and questioned by Mr Murphy and Mr Graver who had reported him to the DSMs without discussing this with him, and he had been required to complete Please Explain forms. He complained that this treatment had caused his sickness absence which had been compounded by Mr Haynes during the welfare meeting in June 2018. He contrasted this treatment with 'workplace malpractices' which he alleged continued to be tolerated by managers. He refuted any misconduct on his part: he did not deny taking 30-minute breaks to go to the toilet, have a hot drink and change clothes; he said this was a common practice.

101. Referring to his "race of Romanian nationality and Romanian-Jewish ethnicity" the claimant complained that this was a "pattern of hostile and

racist treatment that I as a Romanian-Jewish member of staff am being subjected to…" Elsewhere he stated that he was being targeted because of "my Romanian racial status, plus other factors". He also wrote that his colleagues and managers knew that he was "a person of Romanian race and ethnic background". He made no such assertion in relation to his Romanian-Jewish ethnicity. This is consistent with the evidence of Mr Ellis, Mr Law, Mr MacGinnis, Mr Graver and Mr Seelal, which we accept, that they knew that the claimant was Romanian but not that he was Jewish.

102. The claimant also referred to two alleged racist statements made, in the wake of the Brexit referendum in June 2016, one of which was said to have been made by Mr Graver.

103. The respondent accepts that in making this formal complaint the claimant did a protected act (for the purposes of the EQA) in that he raised allegations of race discrimination and race-related harassment. It does not concede that this complaint also included a protected disclosure (for the purposes of the ERA) in respect of which the claimant relies on paragraphs 73 and 74 of his complaint.

104. At paragraph 73 the claimant enumerated seven allegations of 'workplace malpractice' (from (a) to (g)) in which he complained that: other staff left the gateline to smoke ((a)); Mr Murphy and Mr Graver spent most of their time in the Excess Fare Office, little time carrying out their duties, they left the station to eat or to go to the bookmakers located nearby ((b) and (c)); other colleagues spent time with the supervisors in the Excess Fare Office whereas he was told to leave when he entered ((d)); a half-day of leave he took in 2017 to care for his child was treated as annual leave and not emergency leave ((e)); Mr Haynes failed to respond to the concerns he raised about "this matter" although he did not specify what matter this related to ((f)); and his complaint about a confidential letter addressed to him being left "in an open and exposed manner, for all to see" in the gateline office in August 2016 had been investigated and concluded that colleagues had not been aware of it ((g)).

105. The claimant complained that not only had the practices listed at (a) to (f) persisted for several years without intervention by senior management, they evidenced an inconsistency of treatment compared with his own. He referred to being treated differently ((b) and (e)), and specifically to racial discrimination ((d)). At paragraph 74, the claimant complained that these practices "are sloppy, inconsistent and irregular" and because Paddington had a "large number of employees, involved, of mixed racial backgrounds there is a clear need to take corrective action and to be seen to be acting with equality across all."

106. The claimant agreed in evidence that paragraphs (a) to (d) were about other colleagues "skiving off".

107. In the final paragraph (76) of the complaint, the claimant stated that he would provide specific "details, dates and documents about the above mentioned incidents". It is likely that this referred more widely to the claimant's race as well as workplace malpractice allegations.

108. The respondent acknowledged this complaint on 21 September 2018. The respondent's Individual Grievance Policy provides that an initial meeting will be arranged within 14 working days of its acknowledgement which can be varied in complex cases. If this is not possible then an explanation for the delay will be given and a meeting arranged. A week later, Ms Czechowicz asked Steven Hawker, Regional Station Manager, East, to investigate. Mr Hawker then wrote to the claimant on 15 October 2018 to invite him to a welfare meeting on 22 October 2018. Although this was 16 working days after the claimant's grievance was acknowledged and Mr Hawker failed to explain the reason for this delay, we accept his evidence, that the approach taken, as informed by HR, was based on an understanding that the complaints which the claimant had now made were the underlying cause of his ongoing sickness absence. The respondent's initial focus was therefore to investigate these causes. We find that neither this approach nor the short delay were unreasonable. This welfare meeting did not proceed because the claimant sent a fit note later that day which referred to "Depression" and confirmed that he was fit to commence a phased return to work the next day. The respondent was initially unsure whether this signalled that the issues which had triggered the claimant's ill-health and which he had set out in his grievance remained live. This required further investigation.

<u>The delay in the claimant's return to work (allegation 8 (a))</u>

109. Mr Field therefore responded to the claimant on the same date, 15 October 2018, in Mr Haynes's absence. Noting that the claimant had reported having work-related stress, he asked the following three questions: was he ready to ready to return to work; if so, had the work-related issues been resolved; and did he agree to an OH assessment for advice on his return to work?

110. The respondent's Guide to Absence and also its Welfare Meetings Guidance for Managers stipulated that a 'resumption medical' conducted by OH was required before a member of staff was permitted to return to work from long-term sickness absence. On the same date, 15 October 2018, Ms Hide emailed Mr Haynes, Mr Field and Ms Czechowicz to say that the claimant had contacted her to request an OH review. We find that the claimant was therefore aware that a resumption medical was necessary before he was able to return to work. In his response, Mr Field explained that he had written to the claimant and he queried whether the claimant's work-related stress was resolved: the claimant had refused to explain the underlying cause of this illness and he was not communicating with his management team. He was concerned that without this resolution the claimant would become unwell again and go back on sick leave (which he misunderstood would revert to full sick pay).

111. We accepted Mr Field's evidence that he did not see the content of the claimant's formal complaint before these proceedings. We found Mr Field to be a credible and reliable witness.

112. Mr Field emailed the claimant again to chase a response so that arrangements could be made to facilitate his return to work. The claimant replied through Mr Singh who confirmed that the claimant was ready to commence a phased return to work, the underlying issue remained

unresolved and was now the subject of a formal complaint, and the claimant agreed to an OH assessment.

113. Ms Czechowicz replied on the same date to confirm that the claimant would remain on sick leave pending OH clearance. This would mean that his pay would go down to 50% on 20 October 2018 (when he had exhausted six months' full pay) pending OH clearance. She explained that the claimant had failed to give the respondent sufficient notice of his intended return to arrange a resumption medical. In evidence, the claimant agreed that what prevented his return to work on 16 October 2018 was that he had given the respondent one day's notice of his intention to return to work and therefore insufficient notice to arrange an OH review. This was not therefore because of the claimant's complaints about race discrimination or materially influenced by his complaints about work malpractices.

114. In her email, Ms Czechowicz encouraged the claimant to contact his managers at Paddington to explore a resolution of "any existing issues" prior to his return to work. She noted that the claimant had not responded to Mr Field directly. Mr Singh replied on the claimant's behalf to complain that it was "not proper or fair" to expect the claimant to address his concerns with the managers against whom he had complained; the claimant's complaint had been directed to Mr Hopwood so that he could take charge of the investigation and it could not be resolved by Paddington management. The claimant therefore continued to communicate through his legal representative and remained intent on a resolution via external managers.

115. Mr White completed an OH referral for the claimant the next day, on 21 October 2018 in which he sought advice on whether the claimant was fit to return to work, whether the issues which had caused the claimant stress had resolved, if not whether there were any adjustments which could be made to facilitate his return to work.

116. In an email on 22 October 2018 to Mr White, HR and Ms Hide, Mr Field reiterated his concerns set out in his previous email (which is referred to above at paragraph 110). As we have found, Mr Field had not seen the contents of the claimant's complaint and was not therefore cognisant of the allegations made about race discrimination or workplace malpractices. His concerns reflected the perceived difficulty in managing the claimant in circumstances in which he was refusing to engage with his managers to resolve his underlying condition and the attendant risk of the claimant reverting to sick leave (on full pay). Ms Hide replied to suggest the option of redeployment and she shared the concern about the risk of further sickness absence if the claimant returned to the same situation he had left. In his response, Mr Field explained that his preference was to try and resolve the issue first with the claimant. He remained committed to resolving the issue locally and getting the claimant back to Paddington. A difficulty, however, was that the claimant was not prepared to engage directly with local management to resolve his complaints as Mr Singh had already confirmed.

Arranging the grievance investigation meeting (allegation 8 (b))

117. The welfare meeting on 22 October 2018 was postponed because of the claimant's fit note. Mr Field had written to clarify the position and the

respondent now understood via Mr Singh that the claimant wanted to proceed with his formal complaint. Mr Hawker wrote to the claimant again on 22 October 2018 to invite him to a stage 1 grievance meeting on 5 November 2018. He was on annual leave in the meantime and could not meet with the claimant any sooner.

118. We find that the delay between 15 October and 5 November 2018 was caused by the respondent's confusion about whether the issues which the claimant had complained about remained unresolved and also Mr Hawker's availability. It was not therefore because of / materially influenced by the claimant's complaints about discrimination or workplace malpractice.

<u>The grievance investigation meeting on 5 November 2018 (allegations 8 (c) and (i))</u>

119. This meeting was chaired by Mr Hawker who was supported by Ms Czechowicz. Natalie Greenwood, Customer Ambassador at Paddington, was also present as note-taker. The claimant was accompanied by Mr Mutabaazi. This was a lengthy meeting when the claimant was given the opportunity to explain his complaints. There were several adjournments. During the third adjournment, Ms Greenwood knocked the table and saw that the claimant had left two phones on the table. She could see the face of one phone and saw that it was recording. When the meeting resumed, Mr Hawker asked the claimant whether he was covertly recording the meeting. The claimant refused to answer despite being asked this question several times. The meeting was brought to an end. In evidence, the claimant agreed that Mr Hawker told him that he was stopping the meeting because of the concern that he was covertly recording it. He therefore understood the reason why this action was taken.

120. We find that this grievance meeting was abandoned because Mr Hawker and Ms Czechowicz genuinely believed that the claimant had covertly recorded the meeting and one or more of their adjournments. We do not therefore find that this was because of / materially influenced by the claimant's complaints about discrimination or workplace malpractice.

121. The claimant covertly recorded this meeting. He subsequently produced a partial transcript of the final adjournment and end of the meeting. All this revealed in relation to the discussion during the final adjournment, was an assumption held by Mr Hawker, Ms Czechowicz and Ms Greenwood that whilst it was likely that other gateline staff failed to comply with gateline standards it was also likely that the claimant was the most persistent offender, he had been caught and was unhappy about this.

122. Following this meeting, Mr Hawker completed a statement and Ms Czechowicz reported the claimant's conduct to Ruth Busby, HR Director, when she explained that this meeting, arranged to deal with the claimant's allegations and to support his return to work, had to be abandoned because the claimant had covertly recorded the private discussion between herself, Mr Hawker and Ms Greenwood and the claimant had refused to respond to this allegation when it was put to him. She noted this issue would need to be transferred to a different HR advisor and independent manager for investigation. We find that Ms Czechowicz escalated this issue to her senior

manager because of the claimant's conduct at the meeting which she felt warranted investigation. We do not therefore find that this was because of / materially influenced by the claimant's complaints about discrimination or workplace malpractice.

123. The claimant was not sent a copy of the minutes until February or March 2019 by HR. Nor did Mr Hawker or Ms Czechowicz provide the claimant with a written explanation for the reason why this meeting was terminated. We find that neither omission amounted to a detriment. The respondent's delay in providing the minutes caused no disadvantage to the claimant because he had a covert recording which he transcribed. Nor did the failure to provide the claimant with a written explanation amount to a detriment because the reason why the meeting ended was made clear to the claimant at the meeting.

124. The claimant sent an audio file to Ms Greenwood via WhatsApp together with the following message: "This is for you to listen. This is just some from many I have. Want to let you know that all I have with you will be heard in court by the barista [sic] and judge". We find that this was an attempt to intimidate Ms Greenwood. As the claimant said in evidence, he knew that Ms Greenwood had been given a new job and felt she had been rewarded for "denigrating" him at the meeting on 5 November 2018. He wanted this to stop.

<u>OH advice on 7 November 2018</u>

125. The claimant was assessed by Ms Hide on 7 November 2018, who confirmed in her report of the same date that the claimant was medically fit to begin a phased return to work as soon as the underlying issues that had triggered his stress were resolved. She advised that without such resolution there was a risk of a recurrence of ill-health.

126. We find that Mr Haynes and Mr Field understood this OH advice to mean that the claimant was not fit to return to Paddington until these issues had been resolved because of the risk of a relapse in his health. The claimant's grievance remained outstanding. As Mr Singh had written, this required resolution by senior and independent managers and not the managers at Paddington. Mr Haynes therefore felt it was necessary to explore the option of redeployment which Ms Hide had originally suggested as a means of getting the claimant back to work. In this he was supported by Ms Czechowicz

<u>OH referral on 20 November 2018 (allegation 8 (d))</u>

127. Mr Haynes completed an OH referral on 20 November 2018 in which he sought advice on whether redeployment would be suitable for the claimant "Until we can conclude the grievance and also assist with Emil's return to work, as well as taking Emil's welfare into account". Unlike Mr White, Mr Haynes did not contact the claimant before he completed this referral. On the form, he explained that he had not done so because the claimant "is unwilling to talk to management at London Paddington". By this date he knew that the claimant had complained about the managers at Paddington which was now being investigated.

128. We do not find that this statement amounted to a deliberate misrepresentation and attempt to undermine the claimant as he contends. Although Mr Haynes did not attempt to contact the claimant and agreed in evidence that he should have done, we find that his statement reflected accurately his view and explained why he had not discussed this referral with the claimant. We accept Mr Haynes' evidence that he had formed this view based on the claimant's conduct prior to his sickness absence and during the welfare meetings, including his difficult meeting with the claimant in June 2019, when the claimant refused to engage with his managers to discuss the reasons for his work-related stress. The claimant was communicating with his managers through Mr Singh, who had complained that it was neither proper nor fair to expect the claimant to contact his managers at Paddington to resolve matters. Nor do we find that Mr Haynes' entry amounted to a detriment because it did not put the claimant, objectively, to any disadvantage. Following the claimant's review by Ms Hide on 30 November 2018 her advice remained the same and she referred to her previous report completed before Mr Haynes' referral.

<u>The claimant's temporary redeployment</u>

129. We accepted Mr Haynes's evidence that he concluded that redeployment was a means of supporting the claimant to return to work pending the resolution of the issues which were now the subject of investigation. He felt based on OH advice that the claimant should not return to Paddington whilst these issues remained outstanding. We therefore find that the decision to focus on redeployment which was made by Mr Haynes with input from Ms Czechowicz was a welfare-driven consideration. The claimant had been on sick leave for six months because of work-related stress. His managers had tried and failed to understand the cause of this stress via welfare meetings. The claimant had refused to cooperate but had since made a formal complaint in which he had set out his grievances with management at Paddington which needed to be investigated. The OH report dated 7 November 2018 warned that there was a risk of a relapse if the claimant returned to Paddington without resolution of these issues. The OH report dated 30 November 2018 confirmed that this remained the case. Although this report also stated that the claimant was willing to meet Mr Haynes this was unlikely to resolve the issues which the claimant wanted to be investigated by external managers and without which there remained the risk of a relapse. Another factor was the claimant's demonstrable lack of trust in the Paddington managers which predated his formal complaint. This was both a practical consideration in relation to the management of the claimant whilst his complaint was being investigated and one which highlighted the risks to the claimant's health if he returned to the same situation in Paddington as he had left in April 2018, as Ms Hide had advised. We also accepted Mr Haynes's evidence that other staff had been redeployed temporarily to enable investigations to be conducted. We do not therefore find that this was because of the claimant's complaints about race discrimination or materially influenced by his complaints of workplace malpractice.

130. Mr Haynes arranged for Alison Hanscomb, Station Manager for Slough and Maidenhead, to contact the claimant about a temporary relocation. The claimant wrote to Ms Czechowicz on 12 December 2018 to confirm that he

was "agreeable" to moving to either station if he received written confirmation of the reason for this move, its duration and his job role. Ms Hanscomb telephoned the claimant the next week to discuss a potential move to Maidenhead. Ms Hanscomb brought this call to an end when she realised that the claimant had not been told to expect her call. The claimant covertly recorded this short telephone call.

131. As will be seen, Mr Haynes played no further part in the process which culminated in the claimant's temporary redeployment nor did he actively review this deployment and consider whether the claimant should return to Paddington during the grievance process.

<u>The delay in commencing a formal investigation (allegation 8 (b))</u>

132. John Lanchester, Interim Regional Station Manager, Central, was asked by Ms Czechowicz to investigate the claimant's grievance. Having agreed to this on 4 December 2018 he contacted the claimant a week later to arrange a grievance meeting later that month. The claimant replied to complain about the cancellation of the meeting with Mr Hawker. He requested an explanation for this decision and the minutes of the meeting in November 2018. He also noted that Ms Hanscomb had contacted him about potential redeployment. He failed to respond with a date to meet. Mr Lanchester wrote again, on 12 December 2018, when he asked the claimant to confirm that he wished to meet noting that there was availability the next week. He explained that there had been a two-week delay in taking over conduct of this grievance because of training. The claimant agreed to meet. Mr Lanchester replied to suggest a meeting in the week commencing 7 January 2019 because of the availability of rooms and note-takers at Paddington. They agreed to meet on 11 January 2019 at 1300. Mr Lanchester confirmed that the meeting would take place in Swindon, when Zoe Marlow, HR Business Partner, and a separate note-taker would be in attendance. However, despite knowing why, when, where and with whom this meeting was taking place, the claimant failed to attend because of an inadvertent delay in sending him a formal letter confirming these details (at 1143 on 11 January 2019). This meeting did not proceed and was rescheduled on 30 January 2019.

133. We have found that the grievance investigation meeting on 5 November 2018 was abandoned because of the claimant's conduct. Because of this it was necessary for the respondent to identify a new investigating manager to reset the process. The handover to Mr Lanchester was delayed by two weeks because of training. The availability of meeting rooms and note-takers at Paddington, and the Christmas holidays meant that a meeting could not be arranged until 11 January 2019. The additional delay in scheduling the meeting until 30 January 2019 was caused by the claimant's refusal to attend the 11 January 2019 meeting in the absence of a formal invite. We do not therefore find there was an unreasonable delay in scheduling this stage 1 grievance meeting nor that the reason for this delay was because of / materially influenced by the claimant's complaints of discrimination / workplace malpractices.

Stage 1 grievance meeting on 30 January 2019

134. The stage 1 grievance meeting took place on 30 January 2019 at Reading Station between the claimant and Mr Lanchester, Ms Marlow, and a note-taker. The claimant attended unaccompanied and agreed to proceed. At the start of the meeting the claimant asked to record it. Mr Lanchester refused because a note-taker was present.

135. When asked what outcome he sought the claimant told Mr Lanchester "I'm not ready to share that yet". He said that HR and Mr Haynes had lied, the latter in relation to his OH referral. He alleged that a note-taker from Paddington would manipulate the record. Mr Lanchester concluded that further investigation was needed. The claimant was asked to provide any evidence to support his allegations. They agreed to meet again.

136. They also discussed the claimant's potential redeployment. As neither Mr Haynes nor Ms Hanscomb had taken any further action, Mr Lanchester assumed responsibility for this. The claimant agreed to move but said that he also wanted those whom he had complained about in his grievance to be relocated. Mr Lanchester told him that this not realistic. He explained that this move was about the claimant's welfare.

Relocation of the claimant to Maidenhead Station from 12 March 2019 (allegations 8 (f) and (h))

137. Keen to get the claimant back to work, Mr Lanchester contacted Mr Hawker in early February 2019 in relation to the claimant's potential redeployment to Maidenhead or Slough stations which were within Mr Hawker's purview. He then wrote to the claimant to update him on his grievance on 11 February 2019 when he invited him to provide further evidence, including minutes, in relation to any relevant meetings and the claimant's allegation that he had been photographed and recorded. Mr Lanchester returned to the issue of redeployment. He explained this would enable the claimant to get back to paid work following his lengthy absence. In his reply, the claimant agreed to bring the evidence he had to their next meeting. He also agreed to move if he received written confirmation of the information he had requested from Ms Czechowicz in December 2018. Mr Lanchester responded to confirm that this would be temporary move, initially for three months, to enable Mr Lanchester to complete his investigation, to aid the claimant's welfare, support him financially and get him back into the workplace. The claimant would remain in the same role but would be required to work according to the local roster pattern. The claimant clearly understood the reason for this move: as he wrote on 18 February 2019, "what station and what date I have to go to work for this short period while you finish the investigation into my grievance?"

138. It was agreed that the claimant would move to Maidenhead Station where he commenced a phased return to work on 12 March 2019. The claimant did not receive formal confirmation of this redeployment which we find was inadvertent and reveals a lack of management, and HR oversight. We accepted Mr Lanchester's evidence that the reason for this move was to support the claimant in returning to work and full pay whilst his grievance remained outstanding and the underlying issues which had triggered his

stress remained unresolved. This was welfare-based decision and not one taken because the claimant had complained about race discrimination or one that was materially influenced by his complaints of workplace malpractices.

139. By this date, on 12 February 2019, the claimant had submitted his first tribunal claim. The respondent received notice of the claim from the tribunal on 11 April 2019.

140. In acknowledgement of the extended period over which the claimant had remained on half-pay whilst his redeployment had been arranged, the respondent agreed to reinstate full company sick pay for these 19 weeks.

141. The claimant's additional travel time to Maidenhead was treated as part of his working time. He continued to receive London weighting. It is agreed that there was not the same opportunity to work overtime at Maidenhead as at Paddington. The claimant did not return to full-time hours until September 2019 so he would not have been able to work any overtime until then.

142. We find that the claimant did not have a contractual right to overtime. The claimant's offer letter which set outs the main conditions of employment provided that Sundays were additional to his contracted hours. Nor do we find that the claimant had worked overtime regularly. The respondent's attendance records showed that the claimant worked four Sundays in 2016, 11 in 2017 and only one Sunday between January and 20 April 2018. We were not taken to any evidence of any overtime, other than Sundays, which the claimant worked at Paddington prior to his sickness absence in 2018.

<u>Investigation in relation to the claimant's conduct on 5 November 2018 (allegation 8 (i))</u>

143. Martin Cliff, Interim Senior Revenue Protection Manager, East, was tasked with investigating the incident on 5 November 2019. This was a discrete investigation which was separate from the one being conducted by Mr Lanchester. Mr Cliff wrote to the claimant in February 2019 to invite him to a factfinding meeting later that month in relation to an allegation that he had covertly recorded the meeting with Mr Hawker and Ms Czechowicz, and their adjournments. This meeting was rescheduled on 11 March 2019 at Reading Station.

144. Mr Cliff began the meeting by reminding the claimant that the purpose of the meeting was to investigate the allegation that the claimant had covertly recorded the meeting on 5 November 2018 using a mobile device. This was another clear explanation of the allegation under investigation. We find that the claimant clearly understood the allegation under investigation, which was neither obscure nor imprecise as he contends.

145. The claimant refused to engage with this investigation. He wanted to know who had complained and who had appointed Mr Cliff to investigate. Mr Cliff confirmed both. The claimant requested a copy of Ms Czechowicz's complaint and refused to confirm or deny the allegation without sight of it.

146. As we have noted, the claimant covertly record the hearing and at least one of the adjournments on 5 November 2018. Unaware of this at the time, and unable to progress his investigation without the claimant's cooperation, Mr Cliff decided to give the claimant the benefit of the doubt and issued a 'Suitable letter of advice' in which he confirmed that his investigation would be closed and no further action taken. The claimant was reminded that the respondent did not condone covert recording and he would not in future be permitted to record any meetings unless he was able to identify a specific need for doing so.

147. Mr Cliff did not refuse to disclose Ms Czechowicz's complaint because he sent the relevant part of Ms Czechowicz's complaint letter to the claimant on 9 April 2019, having obtained advice from Ryan Jones, Data Protection Officer. We do not find that this understandable delay put the claimant at any disadvantage because Mr Cliff did not take any formal action.

148. Whilst Mr Cliff knew that the claimant had submitted a grievance because the allegation centred on the grievance investigation meeting on 5 November 2018 he was not aware of the contents of the claimant's formal complaint. Nor was he aware that the claimant has submitted a tribunal claim. We accept his evidence. He was a credible witness. There was no reason for him to have had sight of the claimant's grievance nor the first claim.

Stage 1 grievance investigation (allegation 8 (e))

149. As part of his investigation, Mr Lanchester interviewed:

    a. Ms Hanscomb, Mr Haynes and Ms Czechowicz on 25 February 2019;
    b. Mr MacGinnis on 1 March 2019;
    c. Mr Field on 15 May 2019;
    d. Mr Graver and Mr Graham Burston, another gateline supervisor at Paddington, on 20 August 2019.

150. We accept Mr Lanchester's evidence that the delay in arranging interviews after March 2019 was because of annual leave and his availability as well as that of a note-taker and meeting rooms. This is what Mr Lanchester explained in an email on 8 May 2019. He was aware of the claimant's first claim by this date. He then updated the claimant on 24 May 2019 that the notes from a meeting earlier that month had been completed and he was now in a position to finalise his investigation. Chased again by the claimant in early July 2019, Mr Lanchester apologised for the delay, explained that he had been very busy and suggested a meeting to discuss a "few items" before reporting his findings. He was on leave for two weeks from late July 2019. In August 2019, having reviewed the information he had gathered, Mr Lanchester decided it was necessary to interview Mr Graver and Mr Burston. Having completed his investigation, he dismissed the claimant's grievance. This stage 1 outcome was sent to the claimant on 28 August 2019. We accept Mr Lanchester's evidence that having completed his interviews he felt a second meeting with the claimant was unnecessary and would cause further delay. Although he failed to update the claimant, the claimant had had the opportunity to send his evidence to Mr Lanchester. This was not provided nor had the claimant told Mr Lanchester what it was.

151. We therefore find that Mr Lanchester's investigation was delayed because of diary commitments, the availability of note-takers and meeting rooms at Paddington and by Mr Lanchester's own limited availability. In the result, he overpromised and under-delivered. We do not find that this delay was deliberate nor do we find that the investigation or outcome were prolonged unreasonably.

<u>Disclosure of stage 1 grievance investigation material (allegation 8 (m))</u>

152. The Individual Grievance Policy provides for disclosure of the interview notes or statements obtained during an investigation which is subject to consent being given by the relevant witness and to the respondent's discretion to withhold information in "certain circumstances" including to protect a witness. The claimant did not ask Mr Lanchester for copies of the interviews he conducted. Nor did Mr Lanchester voluntarily disclose his 81-page investigation report which included the minutes of all investigation meetings he conducted. In his evidence, which we accepted, Mr Lanchester said that it was his practice not to disclose this information as he felt this was necessary to protect witnesses and aid harmonious working.

<u>Stage 1 grievance outcome (allegations 8 (g), (j), (k) and 14 (a))</u>

153. We find that Mr Lanchester addressed the claimant's race discrimination complaint. Although he concluded that the use of Please Explain forms had been inconsistent over time, in that there had been periods when forms had not been issued (as we have found, managers refocused on gateline standards and their enforcement in October 2016 and March 2018), he did not find that this was related to any protected characteristics but rather the result of changing management focus. The claimant had admitted to taking time away from the gateline. Being questioned about this was consistent with the management of other colleagues. There was no evidence of a sustained campaign by any supervisor or DSM against the claimant. Mr Lanchester explained that this was evidenced by a comparison he had made based on a random sample of five personnel files. Nor was there any evidence of the claimant being under constant surveillance. Management had attempted to manage the claimant's attendance and performance in a consistent manner. What the claimant perceived as being harassment was performance management. However, finding that there was some confusion surrounding the length of breaks, Mr Lanchester made several recommendations in relation to the enforcement of breaks at Paddington; although he made no reference to this in his stage 1 outcome document, we accept Mr Lanchester's evidence that because of this he concluded that no further action should be taken in relation to the claimant's alleged unauthorised absences.

154. The claimant agreed in evidence that Mr Lanchester addressed the Brexit-related incidents and this part of the claim was withdrawn.

155. We also find that Mr Lanchester considered the allegations which the claimant relies on as protected disclosures. His focus was on the management of the claimant and not that of any other individuals which he considered to be outside the scope of this grievance investigation. We accepted his evidence that he treated (a) to (d) as allegations of

inconsistency of treatment which he investigated. He considered (e) which he concluded had been dealt with in accordance with the Leave Policy. He understood that (f) was related to (e) so felt it unnecessary to make any separate findings on this. He did not investigate (g) because the claimant told him that this allegation had already been investigated in 2016 and not upheld. He concluded that it would not be reasonable to re-investigate it.

156. In relation to the claimant's temporary move, Mr Lanchester concluded that there had been an initial failure by local management to communicate with the claimant. He made no reference to the claimant's ongoing redeployment to Maidenhead. Although this move had preceded the date of the claimant's formal complaint and the investigation meeting in January 2018, and was not therefore within the ambit of his investigation, Mr Lanchester had been instrumental in facilitating this move and he had told the claimant that it would continue whilst he conducted his investigation. In his evidence to the tribunal, Mr Lanchester said that he did not feel that it would be appropriate for the claimant to return to Paddington whilst the grievance remained outstanding because of the perceived risk of a recurrence of work-related stress. We accepted that this was his genuinely-held view notwithstanding that it had been 10 months since the last OH assessment. We also find that whilst Mr Lanchester could have recommended that the claimant returned to Paddington, had this been his view, this was not his decision to take as it fell to be made by Mr Haynes and HR.

157. For his part, Mr Haynes did not consider nor take any steps to establish whether it was safe or feasible to bring the claimant back to Paddington, including obtaining updated OH advice. The claimant therefore remained in Maidenhead pending his anticipated stage 2 grievance (appeal).

<u>Stage 2 grievance (allegations 8 (j), (l), (m) and 14 (a))</u>

158. The deadline for the claimant to bring an appeal under stage 2 of the grievance process expired on 6 September 2019. The claimant submitted an appeal to HR on 26 September 2019 via Mr Singh who requested an extension of this deadline earlier that month as well as copies of the interview records. These records were not provided.

159. The claimant complained that Mr Lanchester's findings were biased, he had failed to address all his race discrimination complaints and allegations of workplace malpractice. He also complained about: his ongoing and open-ended deployment to Maidenhead; the delay in dealing with his complaint at stage 1 which included a complaint about the hearing on 5 November 2018 and the allegation of covert recording.

160. The respondent received notice of the claimant's second claim from the tribunal on 17 October 2019.

161. David Crome, Head of On Board, was appointed to investigate this stage 2 grievance in November 2019. He was aware of the claimant's first two claims. He wrote to HR on 19 November 2019 to request all the documents necessary to complete his task when he referred to this litigation. We accept his evidence that he made this allusion for no other reason than this was the basis on which he anticipated that the material which he needed to see

was already being collated. We do not find that this meant that Mr Crome was focussed on the tribunal claim itself. We also accept his evidence that his focus was to deal with the stage 2 grievance which was within his remit as distinct from tribunal proceedings which he knew were not. He then emailed the claimant three days later to introduce himself and to confirm that a stage 2 hearing would be arranged.

162. The claimant's stage 2 grievance was heard over two meetings on 17 December 2019 and 8 January 2020. At both meetings, Mr Crome was assisted by an HR adviser and a note-taker. The claimant chose to attend unaccompanied.

163. During the first meeting, Mr Crome refused to disclose the investigation notes gathered by Mr Lanchester although he agreed to give the claimant a broad outline of what each witness said. He explained that he was unable to disclose the exact contents without breaking confidences. The claimant told him that this was "ok" and thanked Mr Crome for this explanation. In his evidence, the claimant agreed that he accepted this explanation. We accepted Mr Crome's evidence that it was his normal practice not to disclose this material. In addition to the need to maintain confidentiality, he felt that disclosing this material would not assist the claimant's return to Paddington. We do not therefore find that this was because of the claimant's protected acts or materially influenced by his complaints of workplace malpractice but related to the concern to avoid further conflict and, like Mr Lanchester, this was Mr Crome's usual practice.

164. At the second meeting, they discussed the transcripts of the meetings that the claimant had recorded covertly which he had supplied at their first meeting. Noting the prospect of a stage 3 grievance which would prolong the grievance process, Mr Crome also asked the claimant several times whether he was content to remain at Maidenhead for the duration of the grievance process. The claimant refused to answer.

165. As part of his investigation, Mr Crome contacted Mr Hawker to discuss the abandonment of the meeting on 5 November 2018; Shelley Clark, HR Business Partner; Mr Lanchester including in relation to his data analysis; Ms Hanscomb; and finally Mr Haynes with whom he sought clarification about the circumstances surrounding the claimant's temporary move.

166. Having completed his investigation, Mr Crome dismissed the claimant's grievance appeal and he wrote to the claimant on 24 January 2020 to confirm this outcome. He concluded: whilst the claimant evidently disagreed with Mr Lanchester's findings he had produced no evidence of bias; Mr Lanchester had made his findings based on a thorough investigation in which he had interviewed all but two of the individuals which the claimant cited, and there were sound reasons for these two omissions; his data analysis was reliable and credible, and he explained the methodology used; there was evidence that the claimant had often been absent from the gateline without authority which explained why he had been asked to complete Please Explain forms.

167. Mr Crome did not treat the claimant's complaints about workplace malpractice as whistleblowing complaints. We accept his evidence that he

understood that the claimant had made these allegations to support his allegations of differential treatment and not to report these misdemeanours. In making this assessment he reviewed the respondent's Whistleblowing Policy and Procedure which provided that:

> "This policy should not be used for complaints relating to your own personal circumstances, such as the way you have been treated at work. In those cases, you should use the Grievance Procedure or workplace harassment and prevention policies as appropriate."

168. We find that Mr Crome considered the covert recordings which the claimant had provided. Although Mr Crome felt that this evidence was inadmissible because it had been obtained covertly, we accept his evidence that he reviewed this evidence and concluded it was not relevant and did not support the claimant's complaints. This was set out in his report. The claimant accepted in evidence that Mr Crome read the transcripts of these recorded meetings.

169. This included the transcript of the meeting on 5 November 2018 in respect of which and the claimant's related complaint Mr Crome commented in the following terms:

> "I find it very confusing that you would record the meeting, refuse to confirm that you had recorded the managers during a break when asked, complain formally about being accused of recording the meeting, factor that into your grievance and then provide a transcript of the meeting confirming that you had recorded the meeting".

We find that there is much force in this.

170. Mr Crome confirmed that no action would be taken in relation to the claimant's unauthorised absences and refusal to comply with management instructions. An investigation had not taken place because the claimant's sickness absence had intervened and Mr Crome felt that it was neither reasonable nor practicable to revisit this investigation.

The claimant's ongoing redeployment (allegation 8 (k))

171. Mr Crome considered the claimant's ongoing redeployment to Maidenhead. He had discussed this with the claimant on 8 January 2020. He had also asked Mr Haynes about the claimant's move when he queried "Is there a plan in place to re-locate him back to Paddington or is it entirely centred on his grievance case being resolved?" In his response, Mr Haynes provided a timeline. He noted that the claimant's move was temporary whilst the "issue that prevents him from working at Paddington is resolved – this is still unresolved". He also noted that the claimant's grievance and tribunal proceedings remained ongoing.

172. Mr Crome concluded that it was not appropriate to recommend the claimant's return to Paddington. The claimant has been redeployed on welfare grounds to enable him to return to work whilst the grievance was investigated. Now that stage 2 was complete the claimant had the right to bring a further appeal under stage 3. In his outcome letter, Mr Crome

suggested a potential way forward. He wrote that the claimant's return to Paddington "is being delayed by the continuation of this process…My view is that if you wish to return to Paddington immediately (whether or not you continue to stage 3 stage), you will need to have a meeting with Dean Haynes and an HR manager to agree a way forward". This was sensible. Stages 1 and 2 of the grievance process had been concluded. If the claimant wanted to return to Paddington then he would need to engage with station management, including Mr Haynes. As we have found in relation to Mr Lanchester, this was ultimately a decision for Mr Haynes and HR and not Mr Crome.

173. There is no evidence of any contact between the claimant, Mr Hayes or HR in the immediate aftermath of this stage 2 grievance outcome. We find it likely that as before, the respondent took no action to return the claimant to Paddington in the expectation that he would proceed to the next grievance stage.

Return to Paddington (allegation 8 (g))

174. Mindful of the additional time it had taken the claimant to submit a stage 2 grievance, Mr Crome chose not to stipulate a deadline for submission of a stage 3 grievance in his outcome letter. The claimant did not appeal Mr Crome's findings.

175. Steps were taken by the respondent to facilitate the claimant's return to work only once it was clear that he was not proceeding with a stage 3 grievance. Following an OH referral on 7 May 2020, the claimant was reviewed by telephone a week later by OH when it was confirmed that the claimant was fit to return to Paddington without adjustments. We accept the respondent's evidence that the COVID19-pandemic and resulting lockdown intervened and impeded these arrangements to some extent. The claimant did not return to Paddington for another three months, on 18 August 2020, following a meeting conducted via Zoom, with Mr Haynes, HR and a note taker, a week earlier. This was two weeks after the respondent received notice from the tribunal of the claimant's third claim. The respondent's explanation for this further delay was that the emergency measures which remained in place precluded the availability of the support and refresher training necessary for the claimant's reintegration. We found this explanation lacked specificity particularly in light of this extended delay. This was almost a year since stage 1, and almost seven months after stage 2 of the grievance process had been concluded.

Conclusions

Race

176. The claimant contends that allegations 1 (a) to (d) amount to either less favourable treatment because of his race or harassment related to his race.

177. Although the first claim refers to the "racial status" of "Romanian-Jewish by ethnicity and Romanian nationality" the claimant relies on the racial characteristic of Romanian-Jewish ethnicity and race:

(1) This is what the list of issues which was prepared by the claimant and annexed to the tribunal's Order dated 6 October 2020 refers to.
(2) This is consistent with the claimant's witness statement which refers only to "Romanian-Jewish race".
(3) This is what Mr Singh confirmed on the first day of the hearing when the list of issues was reviewed.
(4) This is what the claimant confirmed when he gave evidence under oath.

Knowledge of race

178. During closing submissions Mr Singh also confirmed that these complaints were brought on the basis of the claimant's Romanian-Jewish ethnicity and race, however, he contended that it was only necessary for the claimant to show that the putative discriminators knew that he was Romanian. We agree with Mr Fitzpatrick's submission that because of the way the claim was brought the Jewish component was an integral and therefore indivisible element of the racial identity which the claimant claimed was the reason for the treatment complained of. It is therefore necessary for the claimant to establish knowledge of both components of the racial identity he relies on. We have found that none of the relevant supervisors or DSMs knew that the claimant was Jewish. For this reason the complaints of direct race discrimination and race-related harassment must fail.

179. For completeness, we note that the claimant's evidence was that his colleagues knew that he visited Jerusalem each year, that he discussed his Jewish heritage with Mr Ellis and that Mr Haynes made an antisemitic comment to him in 2017, however, this was not put to any of the respondent's relevant witnesses. We have also highlighted above that whilst the claimant contended in his formal complaint that his colleagues knew that he was Romanian he made no such assertion in relation to being Jewish. Nor do we find it likely that those respondent's witnesses to whom this assertion was put more widely (i.e. that they knew he was Jewish), whose evidence we found to be credible, would have denied knowing that he was Jewish. An additional consideration was that we did not find that the claimant was always a credible or reliable witness. He refused to accept propositions that were put to him in evidence which appeared to us to be self-evidently true (paragraph 72). He gave misleading evidence: he disclosed documents which were partial (paragraph 81), another which he purported to be an agreed document but which he had in fact modified and had not been agreed (paragraph 98). We did not therefore accept the claimant's evidence that his colleagues knew that he was Jewish.

180. Notwithstanding this finding we set out below our findings in relation to these complaints had we found that the alleged perpetrators knew that the claimant was Jewish as well as Romanian.

Direct race discrimination / race-related harassment

181. We would not have upheld these complaints for the following reasons:

(1) Issues 1 (a)(iii), (b)(i), (c)(i), (ii) and (vi) fail on the facts.

(2) In respect of 1 (a)(i) and (ii) we have found that the claimant was reported by Mr Murphy and Mr Graver on 7 March and 12 April 2018 to the station managers; we do not find that this amounts to regular and inordinate monitoring. Nor do we find that the claimant's absences on these dates were short rest breaks: the claimant was absent for between 45 and 55 minutes on 7 March 2018 and for 30 minutes on 12 April 2018. He did not deny either absence. Nor have we found that the claimant's supervisors monitored the claimant by using CCTV footage. We have found that there was one occasion when Mr Murphy took a photograph but this was of the gateline and not of the claimant himself.

(3) In respect of 1 (b) (ii) and (iii) we have found that the claimant was asked to complete Please Explain forms in relation to his unauthorised absences on 12 and 19 April 2018.

(4) In respect of 1 (c) (iii), (iv), (v) and (vi) we have found that the claimant was questioned about his unauthorised absences 7 and 8 March, 12 and 19 April 2018.

(5) For completeness: whilst we have found that the claimant was questioned about an unauthorised absence on 18 August 2018, we have found that this arose because of a complaint by another colleague and neither Mr Murphy nor Mr Graver; we have also found that the claimant was questioned about his unauthorised absence on 18 April 2018 and not 18 February 2018.

(6) We have found that the respondent has provided cogent reasons for this treatment. The claimant was repeatedly absent without authority from the gateline for extended periods during peak times. These were not short breaks and the claimant had not gone through his managers before he left the gateline as he knew he was required to do. This was the reason why: his supervisors reported the claimant to their managers (1 (a)); he was required to complete Please Explain forms (1 (b)); and his managers questioned him (1 (c)). In addition, the claimant repeatedly refused to complete Please Explain forms. In both respects we find that the claimant had failed to comply with reasonable management instructions. This was the reason why he was invited to an investigation meeting (1(d)).

(7) We would therefore have found that this treatment / conduct was because of the claimant's conduct and not because of or related to his race.

(8) For completeness, the claimant did not provide any evidence to show that the eight comparators relied on were in materially the same circumstances as him i.e. that they also took extended unauthorised

breaks during peak hours with the same frequency nor that they also refused repeatedly to complete Please Explain forms.

Victimisation

182. Save for issue 8 (g) which we uphold in part (our findings on this are at paragraph 183), the remainder of this complaint fails for the following reasons:

(1) Issues 8 (b), (d), (e), (j) and (l) fail on the facts.

(2) In respect of 8 (a), the claimant accepted and we have found that the reason for Mr Field's decision on 15 October 2018 was that the claimant gave the respondent insufficient notice to arrange a resumption medical to enable him to return to work on 16 October 2018. We have also found that Mr Field was unaware of the contents of the claimant's formal complaint.

(3) In respect of 8 (c), we have found that the meeting had to be abandoned as a result of the claimant's conduct in covertly recording it and at least one of the adjournments. We have also found that the failure to provide the claimant with a formal explanation for this decision (which the claimant clearly understood) and the delay in providing him with the meeting minutes (in circumstances in which he had recorded this meeting and had produced a transcript) do not amount to detriments. We found that this complaint is misconceived. As we have noted, we found much force in the comment which Mr Crome made in relation to this issue (paragraph 169).

(4) In respect of 8 (f), we have found that the reason for the claimant's temporary relocation to Maidenhead was to safeguard the claimant's welfare and not because he had complained about race discrimination or race-related harassment: Mr Haynes relied on the OH advice that returning the claimant to Paddington without a resolution of the issues which had caused his work-related stress would put him at risk of a relapse; the claimant's demonstrable trust in the Paddington managers which predated his formal complaint was also a practical consideration in relation to the management of the claimant whilst his complaint was being investigated and one which highlighted the risks to the claimant's health if he returned to the same situation in Paddington; and Mr Lanchester agreed that this was a welfare-related issue and he acted to support the claimant in returning to work and pay in another location whilst he completed his stage 1 investigation.

(5) In respect of 8 (h), we have found that the reason that the claimant did not work any overtime at Maidenhead Station was that this was not available at this station. This was therefore a consequence of the claimant's redeployment and was not because the claimant did a protected act. We have also found on the evidence before us that the claimant did not work overtime regularly at Paddington and it is

therefore unlikely that he would have worked overtime regularly at Maidenhead even had this been available to him when he returned to full-time hours in September 2019.

(6) In respect of 8 (i), we have found that Ms Czechowicz complained about the claimant because she genuinely believed that he had covertly recorded a private discussion and felt that this conduct warranted investigation. We have not found that Mr Cliff gave the claimant an obscure and imprecise explanation of Ms Czechowicz's complaint. He had set out the allegation in writing twice and reiterated this at the meeting on 11 March 2019. He then provided the claimant with a partially redacted copy of this complaint having sought specialist advice. Nor have we found that the delay in providing this complaint to the claimant was a detriment. The claimant understood clearly what the allegation against him was and was in a position to address it. When he refused to engage with Mr Cliff's investigation it ended with no formal action being taken. For these reasons, we find that the allegations made against Mr Cliff are misconceived. Nor was Mr Cliff cognisant that the claimant had done a protected act.

(7) In respect of 8 (k), we have found that Mr Crome addressed the issue of the claimant's ongoing redeployment to Maidenhead whereas Mr Lanchester did not. However, we find that this would not have made any material difference and did not therefore put the claimant at a disadvantage because neither Mr Lanchester nor Mr Crome could resolve the claimant's return to Paddington as this was a decision for Mr Haynes to take with HR input. We have also found that the reason why neither manager recommended that the claimant returned to Paddington was due to their concern about the claimant's welfare and not because he had done a protected act.

(8) In respect of 8 (m), we have found that the claimant did not ask Mr Lanchester for this material and when the claimant asked Mr Crome for these statements, he explained why he would not agree to this and he instead agreed to summarise what was said. The claimant accepted this. We have also found that it was the practice of both managers not to disclose such material when conducting a grievance investigation. This means that even were we to have found this this amounted to a detriment we would not have concluded that this was because the clamant had done a protected act.

(9) As we have found that the respondent provided cogent reasons for this treatment it is not necessary to apply the burden of proof provisions.

183. We uphold allegation 8 (g) in part. We have found that the decision to move the claimant to Maidenhead Station was not an act of victimisation. Nor do we find that the continuation of this redeployment whilst the stage 1 grievance investigation was being conducted was one. We have accepted Mr Lanchester's non-discriminatory explanation for the claimant's move to Maidenhead which he explained would last for the duration of his

investigation. The claimant understood and agreed to move to Maidenhead on this basis. We find, however, that the respondent has failed to provide a cogent explanation for the continuation of this redeployment once the stage 1 grievance concluded on 28 August 2019. Applying the burden of proof provisions to the following facts which we have found, we conclude that in the absence of a cogent explanation, the claimant's extended exclusion from Paddington from late August 2019 amounts to an act of victimisation:

a. Mr Haynes, having delegated the arrangements for the claimant's potential redeployment to Ms Hanscomb, in December 2018, failed thereafter to consider or assess the claimant's return to Paddington until an OH review was arranged in May 2020.
b. An OH update was not obtained when the stage 1 grievance was concluded when there was some likelihood that the OH advice which the respondent had obtained ten months earlier, in November 2018, was no longer accurate.
c. There was accordingly a wholesale absence of any local management and HR activity nor any OH input in relation to the claimant's deployment for around 18 months.
d. Following the stage 2 grievance outcome in January 2020 an OH review was not arranged until May 2020.
e. Having obtained this OH clearance it took a further three months before the claimant was able to return to Paddington.
f. The delay in obtaining this OH advice and facilitating the claimant's return were only partially explicable by reference to COVID19-related contingencies.
g. In explaining the reasons for the claimant's ongoing redeployment to Mr Crome in January 2020, Mr Haynes noted that there were ongoing grievance and tribunal proceedings.

Protected disclosures

184. We find that the disclosures of information which the claimant relies on do not amount to protected disclosures for the reasons set out below.

185. Mr Singh contended that the information which was disclosed by the claimant in paragraph 73 (together with 74) of his formal complaint tended to show that there had been a breach of the following legal obligations: a failure to perform job duties in a correct and diligent manner i.e. being present on the premises and performing designated duties (paragraph 73 (a) to (f)) and a breach of confidentiality (paragraph 73 (g)).

Performing duties in a correct and diligent manner

(1) In relation to paragraphs (a) to (f), the information disclosed by the claimant lacked sufficient factual content or specificity to enable the respondent to understand that he was complaining about the legal obligation contended for, at the time when he made this disclosure. This information did not refer to the legal obligation which the claimant purports had been and was being breached. Nor was this patent. As we have found, Mr Lanchester and Mr Crome understood that the

claimant's complaints related to his allegations of disparate treatment and not to a wider concern in relation to workplace malpractice. As we have noted, the claimant agreed that paragraphs (a) to (d) were about other colleagues "skiving off"; and we have found that (e) was about the claimant being treated differently in relation to leave and (f) was concerned Mr Hayne's alleged refusal to respond to an email in which the claimant noted he had raised "this matter" without specifying what this related to. This lack of specificity is underscored by the claimant at paragraph 76 of his complaint in which he stated that he would provide specific "details, dates and documents about the above mentioned incidents". No other information is relied on as being part of the protected disclosure contended for.

(2) Nor do we find that the claimant had a subjective belief that this information tended to show that the purported legal obligation had been and was being breached. We infer from the claimant's evidence that he did not accept that his own actions in leaving the gateline for extended periods during peak hours amounted to a breach of a legal obligation. We find that it follows that the claimant similarly lacked the belief that conduct which he viewed as being comparable to his own and which he had highlighted to assert disparate treatment amounted to a breach of a legal obligation. Even had we found that the claimant had such a subjective belief we would not therefore have found it was reasonably held because of this and also due to lack of specificity of the information disclosed.

Breach of confidentiality

(3) In relation to (g), we find that the information disclosed also lacked the requisite factual content or specificity to enable the respondent to understand that the claimant was complaining about a breach of confidentiality. This information did not identify that the claimant's confidentiality had been breached. In fact, it confirmed that a formal investigation of this issue had concluded there had been no breach. We do not therefore find that even if the claimant had a subjective belief that his disclosure tended to show that there had been such a breach and / or this was ongoing, this was reasonably held.

Public interest

(4) Had we been required to make findings, we would have found for the same reasons that even if the claimant had a subjective belief that this information was disclosed in the public interest, such a belief was not reasonably held: the information lacked specificity, did not tend to show that the respondent had breached the legal obligations contended for and related to the claimant's central allegation of disparate treatment in relation to the management of breaks.

186. The complaints of protected disclosure detriment therefore failed.

Remedy

187. If required, a preliminary hearing will be held to make any necessary case management orders and to list a remedy hearing. The parties are ordered to write to the tribunal within 28 days of the date that this judgment is sent to them to confirm whether they wish to proceed to a remedy hearing or seek additional time in which to reach agreement on remedy.

Employment Judge Khan

25.02.21

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

01/03/2021.

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FOR EMPLOYMENT TRIBUNALS