THE EMPLOYMENT TRIBUNALS

Claimant:	**Mr Amos Kadema**
Respondent:	**Comfort Call Limited**
Heard at:	Teeside Hearing Centre
On:	28, 29, 30 September 2020 1 October 2020 9, 10, 11 November 2020
Before:	Employment Judge Jeram sitting with members Mr S Heslop and Ms E Wiles
Representation	
Claimant:	In person
Respondent:	Mr P Wilson, Counsel

JUDGMENT having been sent to the parties on 24 November 2020 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

REASONS

1. By claim presented on 6 November 2019, the claimant complains of unfair dismissal, race discrimination and victimisation.

2. The issues that fell to be considered by the Tribunal, as discussed at outset of the hearing, refined further during the hearing and confirmed by both parties immediately before closing submissions as set out below.

Alleged unlawful conduct

3. Allegations against Claire Darby ('CD')
    a. Did CD alter the way she allocated shifts to the claimant between August 2018 until September 2018 by taking shifts away from the claimant and giving them to another carer?
        i. Specifically, this relates to the claimant's contention that in the week commencing 13 August 2018 the number of hours he was allocated was reduced and allocated to his colleague Jade Butler, and that remained the case until December 2018
    b. Did CD refuse or resist the claimant's requests for annual leave/holidays, making it harder for him to get his holidays and insisting that he provide a copy of his contract?
        i. Specifically, this relates to the claimant's request in July 2018 to take leave in August 2018 and his request in October 2018 to take leave in November 2018
    c. Did CD isolate the claimant and/or give him the cold shoulder and/or refuse to engage with him personally preferring to contact him by phone and/or email?
        i. Specifically, this relates to the incidents alleged to have taken place on 19 October 2018 and 7 February 2019
    d. Did CD telephone the claimant a number of times within less than 5 minutes repeating the same thing?
        i. This relates to the period February to March 2019 it is agreed that CD contacted the claimant about proof of his right to remain and work in the UK visa
    e. Did CD during a telephone call on 14 March 2019 put the claimant on loudspeaker so that others were able to listen to what should have been a personal and private conversation regarding his visa renewal?
    f. Did CD not afford the claimant the same opportunities as others?

i. Specifically, this relates to the claimant's contention that he was not afforded the same opportunities he says were afforded to Phil Wilde, Rebecca Hayley and Kim

g. It is accepted that CD dismissed the claimant.

4. Allegations against Christine Noble ('CN')
   a. Did CN tamper with evidence?
      i. Specifically, the claimant alleges that CN:
         (i) created the document at page 209.2 to 209.3
         (ii) created or tampered with the document at 176 to 209 and
         (iii) tampered with document at page 129
   b. Did CN deliberately undermine the claimant?
      i. Specifically, the claimant alleges that CN refused to provide the claimant with his personnel file
   c. Did CN write things which did not correspond with the claimant's contract?
      i. Specifically, the claimant alleges that CN said that the claimant had requested more than 14 days holiday, when he had not
   d. Did CN fail to uphold the claimant's grievance and effectively bury his complaint of discrimination? This was clarified as:
      i. The claimant says that there was plenty of evidence to uphold his grievance
      ii. Refusing to provide the file in the grievance meeting
      iii. After investigating it, she realised that something unlawful going on so forged evidence to cover for CD
      iv. Questions biased towards CD
   e. Did CN speak to the claimant poorly in relation to the Service Care Solutions Ltd reference?

5. Allegations against Hayley Wells ('HW')
   a. Did HW delay the grievance appeal process?
      a. Specifically, this relates to the length of time it took for HW to send the claimant the grievance appeal outcome letter
   b. Did HW cover up the discrimination of CD and CN by refusing the claimant's appeal?

a. The claimant contends that there was plenty of ground for upholding the claimant's grievance

c. Did HW refuse to provide the claimant with copies of 3 letters used in the grievance process, thereby covering up for CD?
    a. The claimant confirmed that by this he means that HW did not give the claimant the witness statements of CD, DD and JH.
    b. Also, the claimant requested, but did not receive his personnel file.

Direct Discrimination

6. Does any conduct found to have been done by CD, CN and HW amount to less favourable treatment?
7. If so, was it because of the claimant's race? The claimant is a black African, specifically Zimbabwean.

Harassment

8. Did any of the acts found to have been committed by CD amount unwanted conduct?
9. Was CD's purpose to violate the claimant's dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
10. Alternatively, did the conduct of CD have the above effect, taking into account the claimant's perception and the circumstances of the case?

Victimisation

11. The respondent accepts that the claimant made protected disclosures within the meaning of section 27 (2) Equality Act 2010 in his written grievance dated 22 May 2019 as well during the meetings on 6 June 2019 and 14 August 2019.
12. Where conduct on the part of CN is established, did CN subject the claimant to detriment?
13. If so, was it because the claimant did a protected act?

Evidence

14. We had before us an agreed bundle comprising of 565 pages. Although the respondent's witness statements were well prepared, the same could not be said of the bundle. We were given no reason by the claimant to believe that any fault for the state of the bundle was to be laid at the door of the respondent, rather than its professional representative.

15. We heard from the following witnesses:
    a. The claimant. We found the claimant to be as tenacious in his approach to his case generally as he was reluctant to focus upon and address each specific allegation, theme or line of enquiry to its logical conclusion;
    b. For the respondent. We found the respondent's witnesses gave evidence in an unremarkable, and direct manner. They were:
        i. Claire Darby - Branch Manager of Stockton Tower House from February 2018;
        ii. Christine Noble - Regional Manager, based at Thornton House in Middlesbrough and Grievance Chair;
        iii. Hayley Wells - Regional Manager and Grievance Appeal Officer.

Background Facts

16. The respondent is a provider of domiciliary care and extra care services for a broad range of clients with various conditions across the UK. In 2013, the respondent was acquired by City and County Healthcare Group; it is one of 21 companies in the Group.

17. The claimant was employed as a care assistant at the respondents Stockton Tower House. He is a black person of Zimbabwean nationality. He commenced employment on 16 January 2017 with a zero hours contract.

18. There were at the relevant time approximately 80 to 90 care workers at Stockton Tower House, of which approximately 10% were foreign nationals; we heard no evidence that there were any black care workers other than the claimant.

Relationships with management

19. On a day-to-day basis, care workers such as the claimant report to a shift coordinator or shift supervisor. Shift coordinators / supervisors are responsible for setting the shifts, rotas, and therefore the hours, of care workers. They are also the staff that care workers liaise with in respect of day-to-day issues arising in work as well as the carrying out of supervisions and appraisals of care workers. It is not the role of the branch manager to prepare rotas or allocate shifts.

20. At the relevant time the shift coordinator was Helen Turner (HT) and from early 2019, Danielle Darby (DD). The claimant had a good relationship with both women (pages 222, 231, 271). Each coordinator/supervisor has approximately 30 to 40 care workers reporting to them.

21. Any matters that required further or more senior input would be raised by either DD or HT on the care worker's behalf with the branch (and registered) manager.

22. Prior to February 2018 branch manager was Nicola Beach (NB). The claimant had no expressed difficulties with NB; she had an open and laid-back style of management. In February 2018, Claire Darby (CD), who had previously been employed as deputy manager at a branch in Hartlepool became branch (and registered) manager.

23. Since care workers work 'in the field', CD held drop-in sessions for care workers, arranged on an approximate monthly basis; other methods of reaching her included telephoning or emailing her directly, or simply popping in to see her if the care worker happened to visit the office, e.g. to drop off their time sheet. We accept CD's evidence that other care workers approached her freely and directly, there being no evidence before us to suggest otherwise.

24. In the period February 2018 to February 2019 the claimant did not attend a drop-in session to meet CD, nor did he make or attempt to make any contact

with her; in fact, we find that there was no discernible contact between the claimant and CD until February 2019.

25. In those circumstances we find that the claimant may well have perceived CD to be somewhat distant in terms of her managerial style, but we note that he did not express this is a concern, to anyone, until after his contract of employment was terminated. On the evidence before us it was also the perception of HT and DD that he raised very few issues with them, either (pages 227, 228).

Hours

26. The claimant was engaged on a zero hours contract, but he was in practice on what the parties described as 'stable hours', the interpretation of which phrase we will return to.

27. The claimant ordinarily worked Wednesday through to Sunday. He, like other care workers, was generally assigned the same service users on a week by week basis, not least those to assist with continuity of care. The claimant received a rota, planned by the shift coordinator and sent to him by email or by post on a Friday or Saturday, in respect of the following week's work. In the intervening days, and indeed throughout the following week, those planned hours were subject to change, since they were dependant on the needs of the service users and the service more generally. So changes would be made to the rota when shifts were no longer required because of, for example, hospital visits, holidays or death.

28. The rotas are therefore, at best, a guide to the hours that the claimant was expected to work; they are not definitive proof of the hours that he did in fact work.

29. A care worker then completes a timesheet, to confirm the shifts that he or she has worked and submits it to Stockton Tower House. The timesheets are

checked by the manager and information sent to payroll to arrange payment of wages to the care worker.

30. The respondent keeps for its own records data which, once submitted to the local authority for payment, are not capable of being accessed or altered, except by a restricted number of personnel, which do not include the respondent's witnesses.

31. We had before us no definitive evidence of the hours that the claimant worked in any particular week or month, but note that:
    a. In the year preceding August 2018, the claimant earned between £996.45 gross (page 151) and £1541.94 gross (page 160). This is therefore the degree of variance in the claimant's income that the respondent described as "stable", a description that the claimant does not disagree with;
    b. In the period August to December 2018 i.e. the period complained about:
        i. the claimant accepts that his income in August 2018 was lower than he would ordinarily expect because of the death of service user DB – his gross monthly income for August 2018 was £1143;
        ii. The claimant's gross monthly income was in September 2018 and December 2018, £905 and £903 respectively;
        iii. In October and November 2018, he earned gross figures of £1039 and £1028 respectively;
    c. In the months January to March 2019, which are not the subject of complaint, the claimant's gross monthly income was: £1013 to £1176.

Appraisals and Supervision Records

32. We were taken to the claimant's appraisals and supervision records; they all relate to the period after CD was appointed branch manager. They show that the claimant was a valued member of staff who got on well with service users and generally had good reports.

33. In his appraisal record of 9 May 2018, conducted by DD, the claimant noted that he was able to *'communicate with the right people in the right way at the right time'* and DD described the claimant's communication skills as *'brilliant'*. (Page 103).

34. In an office-based supervision, also conducted by DD on 9 May 2018, she noted that the claimant was not happy with his rota and complained that his hours *"have been reduced again to give to other people and Amos is losing hours for example taking calls off [sic] to give to other people."* (Emphasis applied). DD noted that she would pass on his concerns to HT.

35. The claimant doubled up on some shifts with a colleague, Jade Butler ('JB') in relation to client DB. On an unidentified date she told him that she was going to go to *'the manager'* in order to *'get his hours'.* She did not tell him which of his client's hours she intended to obtain at his expense, or on which particular days. The claimant's planned hours in the week commencing 13 August 2018 reduced by around 4-5 hours compared to the preceding week.

36. In an appraisal on 30 August 2018, conducted by HT, the claimant repeated his wish to acquire NVQ Level III. In his office-based supervision, of the same date, it was noted that *"Amos feels things are going okay. . rotas hours and shifts: wanting around 30 hours a week".*

37. The claimant did not ask HT at his appraisal on 30 August 2018 or any other time about the reduction in his hours or his suspicion that JB had gained those same hours, because as he confirmed in cross examination, he believed she was 'just boasting'.

38. In an office-based supervision, conducted on 19 December 2018 by HT, the claimant described that he *"feels all is so far so good"* and that the claimant had requested to have Sundays off to which HT explained that she could look at this after the Christmas period and in respect of which she offered the claimant *"possible alternate weekends as I have another male who can alternate. Amos will consider."*

39. We note that in these discussions, as documented in the claimant's appraisals and supervisions, and which all relate to the period after CD was appointed branch manager, the claimant's concerns about his hours were not only being readily raised but also discussed with a shift coordinators and supervisors, without any apparent recourse to CD.

Vacancies

40. Vacancies for senior care worker roles within the respondent were advertised internally by, for example, notices being placed on the staff noticeboard, or information sent out to care workers with the rotas. Three vacancies for senior care roles were advertised in the period when NB was branch manager: 23 February 2017, 17 August 2017 and 11 January 2018. The claimant did not apply for any of those vacancies; we accept his evidence that he felt relatively inexperienced at the time.

41. No senior care worker roles were advertised from February 2018 until the claim was dismissed in March 2019.

42. The claimant contended that he had mentored Phil Wilde in February 2018 who had only recently been recruited and who then, the claimant contends, was unaccountably promoted to supervisor. The claimant relied on an article in the 'Stockton on Tees News' of July 2018 to illustrate his point.

43. The person the claimant mentored in February 2018 was Jonathan Wilde (page 568). In making this finding, we take at face value the mentoring records between the claimant and Jonathan Wilde in February 2018.

44. We also note from documents before us that the claimant had also mentored Phil Wilde, Jonathan's brother, in November 2017. Phil Wilde commenced employment on 7 November 2017 which, we note, would place him in employment when the senior care worker role was advertised in January 2018.

Training Opportunities

45. There was no issue between the parties that the claimant had completed and passed all mandatory training for his role. The respondent supports non-mandatory training for personal and career development purposes. Requests for voluntary training are generally raised with the supervisor who will pass on any such request to the branch manager/CD.

46. In the claimant's appraisal of 9 May 2018, DD noted that the claimant held an NVQ Level II in Health & Social Care and that his objective was to sign up to an NVQ Level III; she noted that it would be actioned *'when funding becomes available'* (page 103). CD did not learn of this aspiration on the part of the claimant either from DD or any other person.

47. CD did not authorise any training courses whilst she was employed as branch manager and the claimant was employed. She did not enrol anyone on any new training courses in this period because of a lack of funding and, from early 2019, specifically because of an instruction at regional level to suspend any plans to enrol care workers on new training courses from early 2019 whilst a decision was taken to change training provider; any ongoing training commitments, however, would still be honoured.

48. CD did not authorise any courses attended by Hayley and Rebecca; they were already enrolled onto courses prior to CD commencing her role in February 2018. Kim had already been promoted to senior carer and acquired her NVQ Level III before she arrived at Stockton Tower House. CD had no involvement in Phil's promotion to senior carer or any associated training requirements.

49. That the claimant heard of colleagues attending training courses in Newcastle is not inconsistent with the respondent's evidence and findings above.

Annual leave

50. Before and after acquisition by City & County Healthcare Group in 2013, the respondent's annual leave year was October to September.

51. The Group Management of Leave and Absence Policy provided that *"unless otherwise specified, each employee's leave year runs from January to December"* (page 415).

52. The claimant was provided with a contract of employment by NB, in which his annual leave year ran from January to December.

53. The standard procedure for applying for leave was not materially in dispute. As with any care worker, the claimant was required to submit an annual leave request by completing a form and submitting it for approval from the branch manager i.e. initially NB and subsequently CD. The claimant is expected to provide a minimum of 4 weeks' notice of the leave requested. A single period of leave should not, or at least not ordinarily, exceed 14 days.

54. On 2 July 2018 the claimant submitted to CD an annual leave request in which he confirmed that he sought leave for total of 21 days and set out the dates as being from 8 August 2018 to 29 August 2018.

55. We did not find the claimant's position about this particular leave request altogether easy to understand. At the outset of the hearing, the claimant simply expressed surprise that he would have made an error in seeking leave in excess of usual maximum of 14 days, and queried whether the form had been "*edited*". In his own oral evidence, the claimant accepted that the document may have been genuine i.e. he may have requested 21 days' leave as indicated on the request form. In cross-examination of CD he accused her of altering the end date on the form (which dates were altered and from what original date remained unclear to us) and put to her that she was lying when she denied doing that. By his closing submissions, the claimant alleged that CD and CN had in their possession all the documents during his grievance process, and their actions served to substantiate a defence to his complaint that she had failed to grant him leave.

56. We accept the document at face value i.e. that the claimant had submitted an annual leave request for the dates in question in the absence of any evidence that the document was tampered with, aside from the claimant's own increasingly firm belief that it was.

57. On 3 July 2018 CD respond to the claimant by saying *"I can offer you 8 August 2018 to 19 August 2018 any dates after this are not available"* (Page 129).

58. We accept CD's evidence that the reason she was unable to grant the request in its totality was because: the respondent operates on a *'first come, first served'* basis; the claimant made his request at relatively short notice; the summer holidays are a popular time to take leave and requests are made early in the year. We note that the part of the request that was declined i.e. 20 – 29 August included the bank holiday weekend.

59. Whilst the claimant submitted his request with the 4 weeks minimum notice required of him, that was the minimum period of notice required of him, it did not guarantee that his request will be granted.

60. There is no issue between the parties that that response from CD should have been sent to the claimant on or soon after 3 July 2018; we have no reason to believe that it was not sent to the claimant soon after 3 July 2018, although the claimant did not respond to it until 6 August 2018.

61. On 6 August 2018, that is, 2 days before the indicated start date, the claimant contacted DD, on his own account for the first time, about his holidays. That exchange prompted DD to email CD on the same day stating *"Amos has said he has holidays in full this week but on the sheet he got it doesn't say he has them it states you can't offer them dates but you could offer a different 11 days but he hasn't confirmed then he rang saying they had been accepted and they haven't. Only problem is its Elm tree and there's loads off on holiday in that area xx".* Twenty minutes later, CD replied to *DD "if they have been declined he won't be able to have them"* (Page 371-1). We find that that email from DD

accurately encapsulates the nature of the claimant's contact with her on that day.

62. In making the findings above, we reject the claimant's contention that the emails of 6 August 2018 as set out above were fraudulently created in an effort to bolster the respondent's defence to either his grievance or his tribunal claim. Aside from his expressed conviction that this was the case, together with an explanation of how he understands that emails can be fraudulently created, we had no evidence before us to accept the claimant's case that this particular email was anything other than authentic.

63. On 15 August 2018, the claimant submitted another leave request a CD, this time for a period of 14 days from 12 September 2018 to 26 September 2018; CD granted the holiday request in full.

64. On 10 October 2018, the claimant submitted a third annual leave request to CD, for 14 days from 7 November 2018 to 20 November 2018. In his form, the claimant stated that he wished for his request to be prioritised because *"family issues and also these are my last 2 weeks holidays of 2018".*

65. We accept that soon after the claimant submitted this request he received a telephone call from CD, querying the suggestion that these were the last holidays for in 2018 annual leave year; since the respondent's leave year ran from October to September, so the claimant's request for leave in November would, or at least should, fall into the new annual leave year.

66. We also accept that there was an exchange about what the claimant's contract stipulated in terms of the annual leave year. CD did not refuse the leave, but she did state that the requested leave fell into a new annual leave year commencing in October 2018.

67. On 27 October 2018 CD granted the claimant holiday request in full stating *"new holiday entitlement runs from October 2018".*

68. Seventeen days had passed between the submission of the request form and CD's response. We find on the balance of probability that this delay was due to CDs workload. We do not accept the claimant's contention that in the intervening days, on 19 October, he had been required by CD to physically attend the office, with his contract, which when he arrived, was taken off him and that in the office he could hear people shouting *'oh it's the wrong contract'*, that the contract was photocopied, and/or that he was shouted at generally. We reject it because the claimant was able to adduce no evidence, other than his conviction, that this had occurred, and we prefer CD's evidence that had she wished to check the contents of the claimant's contract for the truth of what he claimed, she could have much more easily checked the copy of his contract that was kept on file.

69. It was around this time that CD became aware of a number of employees' contracts which raised similar concerns to those raised by the claimant i.e. that their annual leave year was said to run from January to December and not the respondent's leave year i.e. from October to September. CD, on instruction from Christine Noble ('CN'), Regional Manager, conducted an audit of all the contracts of care workers in her branch. This exercise took place over a period of weeks towards the end of 2018 into the beginning of 2019. During this exercise, CN emailed CD on 23 January 2019 at 10:55 a document containing the identity and personal details of 111 care workers, and which identified that 60 employees had contracts which reflected the respondent's standard annual leave year i.e. from October to September, and 51 who did not.

70. That email, together with attached documents, contained the details of 110 care workers as well as that the claimant and appears in redacted form at pages 201-1 to 209-3 of our bundle. We accept that document was authentic, the claimant having failed to adduce anything other than his own expressed conviction that it was fabricated.

71. In the meantime, on 14 January 2019, HT received a request for a reference in respect of the claimant; she enquired of him why he wanted to leave and he said he needed more hours but that if the respondent could provide more hours,

he would stay. The reference should have been directed at CD; HT discussed it with CD on CD's return from annual leave and HT said that more hours could be given to claimant. The claimant confirmed he would stay and the reference was no longer required.

72. CD was instructed by CN, at regional level, to ensure that (a) make amendments to the contracts of care workers contracts so as to ensure that all workers' contracts stipulated an annual leave year from October to September and (b) no employee should be disadvantaged by agreeing to this amendment.

73. In accordance with that instruction, all employees whose contracts stipulated the 'incorrect' leave year were invited to agree to the relevant amendment to their contract. There was no particular combination of management staff who met with the affected care workers, and that it depended on who, as between CD, the shift coordinators and Janice Holpin ('JH'), the compliance administrator, was available.

74. All affected staff agreed to the proposed amendment, including the claimant. The circumstances in which the claimant agreed to amend his contract set out as follows, although as he accepted in cross-examination, he was not at the time concerned that he was in danger of losing any accrued leave entitlement, only that CD left her office to address him directly.

75. On 7 February 2019, the claimant was invited to a supervision meeting with DD; we accept that he was not forewarned that the purpose of this meeting was to discuss his contract. On arrival, the claimant spoke with both DD and JH. He was verbally reassured that he would not suffer any disadvantage by agreeing to the amendment sought and he was given additional reassurance by DD who made a signed a manuscript note on the new contract stating *'24 holidays to take'.*

76. The claimant remained unhappy and so DD sought assistance from CD, who had hitherto been engaged on an emergency call to a social worker. CD

explained the position to the claimant who then agreed to the amendment. Nothing further was said by the claimant at the time.

77. In making the findings above, we reject the claimant's contention that when he attended the office on 7 February 2019, and that when he presented himself at the open office door, CD chose to disregard him. We accept that he stood at the office door as he says he did, but we do not accept that the person he saw, who he describes as sitting back in her chair scrolling through her phone and paying him no heed, was CD. Our reasons for doing so are that when interviewed during the investigation of the claimant's grievance, both DD and JH stated that CD was on the phone and emerged from her office after finishing her *"phone call"* (pages 234, 235). Furthermore, we accept CD's undisputed evidence that her desk is in fact located behind the door of the office and that the desk immediately in front of the door is used by the manager of Aspen Gardens who is not only female but, also like CD, blonde. Finally, since on the agreed facts, the claimant and CD had had minimal face to face contact, we consider that there was plenty of scope for the claimant to be confused.

Right to Work Visa

78. The respondent's Employee Handbook specifies as a condition of service, the employee's right to work in the UK. It states *"if you do not have the legal right to work permanently in the UK, we will ask you to provide evidence of your right to work every year. We reserve the right to remove you from assignments and even terminate your employment if we are not satisfied that you are entitled or eligible to work."*

79. On 18 February 2019, CD received an email from Rochelle Jackson (RJ) of Human Resources stating that the claimant's right to remain and work in the UK was due to expire on 15 March 2019. CD was asked whether she knew the claimant was applying to extend his visa, and if so the paperwork needed to be received before the expiry date. The email contained a number of links that might assist someone in the claimant's position. Having heard evidence from CD we are satisfied that what RJ required was either definitive proof that the

claimant's visa had been extended, or at the very least, proof that his application for an extension was pending at the Home Office.

80. CD telephoned the claimant regularly between 18 February and 15 March 2019, to reiterate that she required from him paperwork to prove his right to remain work in the UK beyond 15 March 2019. We accept that, as the claimant describes, he received between one to three calls a week from either CD or HT. On each occasion the claimant spoke to CD he reassured her that he was aware of the situation, using comments such as *"that's fine", "I know", "I have it all sorted",* and *"I'll send it to you".*

81. The claimant accepted in evidence that he understood that the deadline by which he needed provide the written evidence of his right to remain and work in the UK beyond 15 March 2019 needed to be received by the respondent by 5pm on 15 March 2019, otherwise his contract of employment would be terminated. He told CD that he would *"get it to her".*

82. On at least 2 occasions in the period 26 February to 4 March 2019, the claimant told CD that he had applied for his visa and would bring it to CD as soon as it arrived/later that week (page 473 to 477).

83. On the claimant's own case, he did not complete his first, paper, application to extend his visa until 11 March 2019; he knew therefore that the respondent could not be expected to receive any confirmation of the fact of his application, much less any extension to his visa before 11 March 2019.

84. This was the first occasion that CD had encountered this particular situation. She took the claimant's reassurances at face value and did not forward to the claimant the Internet links contained in the email from RJ and nor did she follow RJ's advice to invite the claimant to a meeting in order to terminate their employment in the event that he failed to provide the paperwork.

85. Similarly, although the claimant had been resident in the country for over 15 years, this was the first occasion that he had been required to renew his visa; he continued to reassure CD that all was in hand.

86. CD enquired with RJ whether it was necessary to terminate the claimant's contract and whether it is possible to simply remove him from work; JR responded in the negative.

87. We accept that on at least one occasion during this period of time that the claimant received 2 calls in quick succession i.e. within the space of 5 minutes and both about the claimant's visa. Having heard from the claimant we remain unclear whether on his own case it was CD who called him twice, or whether one of those calls was from HT; we accept that both calls were made if not by, then on behalf of CD.

88. We accept that during telephone calls, the claimant may have heard people in the background of the office, since we accept that the office is used by 5 to 6 people. We are not, however, satisfied that during her call to the claimant CD place the phone on loudspeaker thereby allowing others to overhear their conversation. In fact, having regard to the claimant's cross-examination of CD, we are not satisfied that the claimant himself is clear whether the allegation is one that he makes against CD, or one that he ought to have been made of HT. We note that the claimant told HW during his grievance appeal that *'Helen would ring me and ask me questions then I could hear Claire in the background asking more questions or saying that what I am trying to supply is not enough'* (page 262).

89. On 13 March 2019 that is to say, two days after the claimant submitted a paper application to the Home Office, CD received directly from the *'Right To Work Service'* an email - we find the most likely explanation being that the claimant himself inserted her email address into a portal - wherein the subject header *was 'view Amos Kadema's right to work details'*. The email contained a share code. CD forwarded that email to RJ. On checking, the share code revealed a right to remain and work in the UK until only 15 March 2019.

90. On 14 March 2019, both CD and HT telephoned the claimant regarding his visa. CD told him in her call that the share code did not reveal a pending application to extend his visa. The claimant was abrupt with CD and adamant that the share code was all that was required by the respondent.

91. On 15 March 2019, the claimant received a letter from the Home Office, dated 14 March 2019, stating that his paper application was not valid and gave him a further 10 days in which to submit his application online (page 501).

92. On 15 March 2019 CD made one further telephone call to the claimant, repeating her requirement that evidence of his application needed to be received before the close of business that same day. The claimant did not tell CD that his application had been rejected by the Home Office and that he was required to resubmit it.

93. At 19:50 on Friday, 15 March 2019, the claimant received an email from the UK Visa Immigration Service confirming receipt of payment for his visa application, together with confirmation that the application had now been submitted. Under the heading *"What you need to do next"* the email continued *stating "your application may not be successful in the event that you do not complete the mandatory actions"* (page 502). The claimant did not share that email with the respondent at any stage until his grievance was being investigated by CN in June 2019.

94. On Monday, 18 March 2019, the HR department sent to the claimant a letter to his home address, ostensibly written by CD, informing him that his employment had been terminated *"for some other substantial reason namely, your failure to provide the company with acceptable documentation to demonstrate your right to work"* which termination was said to be effective from 15 March 2019. The claimant was invited to raise any queries regarding the letter directly with Human Resources and he was provided with a telephone number for that purpose. He did not contact the respondent about his dismissal on receipt of the letter.

95. The claimant was not surprised to receive the letter, and said that he could not recall when he received the dismissal letter. Given his lack of surprise about the contents of the letter when he did receive it, his lack of complaint before us about any delay in receiving the letter, and the fact that had he not been dismissed, he would ordinarily have expected to resume work on Wednesday 20 March, we infer that he received and read the dismissal letter on Tuesday 19 March 2019.

Grievance

96. On 17 May 2019 the claimant contacted the respondent by telephone in order to raise his grievance and on 22 May 2019 he submitted his written grievance.

97. In his grievance, the claimant alleged that CD had (a) refused to provide him with the support of letter to support his application for a visa (an allegation that he no longer pursued before us) (b) that he had applied to the Home Office on 7 March and that his visa was still valid on 15 March as he had a further 10 days to resubmit his application (c) that CD sought information of the type that the Home Office had stopped producing and refused other documents he had sought to produce and that he had received a visa on 10 May 2019 (d) unlawfully sacked him and therefore by law he said he was still employed by the respondent (e) refused holiday requests and required him to produce contractual evidence of this entitlement to the same. He also contended that he was owed a week's holiday pay and he required interest to be paid on that sum.

98. The claimant stated that he was taking action in respect of discrimination, for which he was claiming injury to feelings and aggravated damages. He made these assertions because by this date he had researched in both books and online, his employment rights. He knew he that there was a 3-month time limit within which to present his claims of 'unlawful dismissal' and discrimination to the Tribunal, but he misunderstood its effect at the time, he said in evidence,

because he believed he had to commence and exhaust 'internal procedures' before the time limit began to run.

99. CN was appointed to act as grievance officer. CN made preliminary enquiries of CD and HT about the claimant's grievance. CD told CN that the information she had requested of the claimant was the pin that would enable RJ to check the online service, however the only information that he provided was the share code. HT told CN that the claimant had reassured her that the application had been done and that when she, HT, asked for a receipt, the claimant told her that he had not received one.

100. On 6 June 2019 the claimant attended a grievance meeting with CN. The meeting commenced since the claimant arrived. No discussions were had before the meeting commenced and in particular, the claimant did not ask for a copy of his personnel record during this alleged, undocumented moment. The meeting was minuted by RJ; is not a verbatim record but it is evident from the minutes that CN covered each of the areas raised by the claimant in his grievance, including asking him to clarify which of his complaints he said amounted to race discrimination.

101. At that meeting, the claimant produced three documents, the first of which was an email from the Visa Immigration Service dated 7 March 2019 confirming *"your visa application has been saved. Use this link to sign into your application"* (page 499a). The second document was the share code that he provided to CD on 13 March 2019. The third document was an email timed at 19:50 on 15 March 2019, see paragraph 93 above. When asked by CN whether the claimant had ever provided the first and third documents to CD, he replied in the negative because *"Claire didn't want it".* He told CN that he did not send these documents to HT or to Human Resources *"because Claire had already made up her mind"/ "Claire had already decided she wanted rid of me".*

102. RJ apologised to the claimant in that meeting, in the event that the calls from CD and HT about his visa made him feel *harassed "they are only doing what I ask them, we have a deadline and they need to give me the information,*

so I was emailing them and contacting them daily, so I am sorry but they were only doing what I asked". This was an assertion that the claimant himself appeared to accept as being accurate; he repeated it during his grievance appeal hearing (page 271).

103. CN asked the claimant if he wanted to continue to work for the respondent, now that she could see that he had a right to remain a work in the UK; the claimant declined.

104. When CN asked the claimant to describe his allegations of harassment, he described them variously as CD having made her mind up, CD refusing to deal with him, that he had received lots of harassing calls and that he, the claimant, was becoming a stranger to the respondent.

105. CN told the claimant that she would need to check to see how much the respondent owed the claimant in unused holiday pay.

106. The claimant told CN that CD had refused his holiday requests and imposed upon him a new contract, and that CD had written on his holiday form "new holiday year" and that this was different treatment.

107. CN replied that she would need to look at the forms of other people, if he was saying he had been treated differently to which the claimant responded *"go check now you will have my file".* CN continued that she would look into any further evidence or information as part of her investigation to which the claimant retorted *"well my file should be here go and get it you will see".* CN responded to the effect that the file may have been achieved and the claimant laughed in response.

108. We accept that the words used and impression given by the claimant did not convey a request on his part to see his own personnel file, but rather either encouragement to CN that she should check his file or perhaps criticism that she did not have it already.

109. The claimant added that CD had refused to give him references; CN immediately went to check and provided him with a response, although the claimant maintained that the prospective employer was maintaining it had not received that reference.

110. CN investigated the claimant's grievance by (a) obtaining a statement from JH (B) interviewing CD, HT and DD (c) conducting an audit of the claimant's personnel file (d) liaising with payroll and Human Resources and (e) reviewing the applicable policies.

111. The questions put to CD in her interview were open in style and wide-ranging in territory.

112. In relation to the allegation that CD had refused to provide the claimant with a supporting letter for his right to work application, CD when interviewed by CN denied the claimant had ever asked her for such a thing (page 227).

113. In relation to the allegation that CD had refused to accept Home Office documentation to prove his right to remain and work in the UK, CD told CN that the only document he had provided her with was the share code on 13 March 2018 (page 227, 240) and HT said that when the claimant had told her that he had submitted an application and she requested a receipt he told her that he did not receive one (page 228).

114. In relation to the allegation that CD had denied the claimant leave, requiring him to produce a contract to prove his entitlement to it, CD, DD and JH all gave evidence about the circumstances in which the claimant was asked to agree to an amendment was contract. CD explained to CN the reason she had declined the August 2017 annual leave request and offered him alternative dates was because *"there was too many staff on leave at the time".*

115. On 17 July 2019 CN sent to the claimant a four-page letter setting out her findings. In that letter, she:

a. Dismissed the allegation that CD had failed to provide him with a letter of support for his visa application;
b. Dismissed the allegation that CD had refused to accept any relevant documentation relating to his right to work. She noted that on 14 March 2019 the Home Office was still writing to the claimant stating that he had not submitted a valid immigration application and that payment was not confirmed online until 19:50 on 15th March. Furthermore, she noted that his visa permit was not issued until 10 May 2019;
c. Dismissed the contention that the claimant remained lawfully employed by the respondent, noting that her offer to him at the meeting on 6 June to reinstate his employment was declined;
d. Dismissed the allegation that CD had refused him annual leave until he showed her his contract, the evidence disclosing that a high number of annual leave requests have been confirmed prior to his request being submitted and that therefore the fact that CD did not authorise his annual leave in August 2018 as requested was due to the needs of the business, noting that CD had offered alternative dates;
e. Upheld his claim for holiday pay, identifying that the claimant was owed one week's holiday, and which would be paid forthwith, but declined his claim that it should be accompanied by payment of interest at the rate of 5%;
f. CN said she found no evidence of discriminatory treatment and confirmed that the company ended his employment for failure to provide it with acceptable documentation to demonstrate his right to work. In response to the broader allegations about CD, CN stated that she had no evidence before her to suggest a breakdown in relationship between himself and CD.

116. On 17 July 2019 at approximately 09:35 both CN and CD were individually contacted by Service Care Solutions Ltd, seeking a reference for the claimant. CN responded to the request within a matter of minutes and within an hour thereafter, the claimant telephoned CN, expressing dissatisfaction with CD who, he said, had been asked by Service Care Solutions Ltd for a reference in mid-May in respect of which she had still failed to respond. For the avoidance

of doubt, we are far from satisfied that there was in fact any such request made of CD in mid-May (pages 496 and 495-1 suggests to us that the delay was in the making of the request to, not any response from, CD) but the claimant told CN that he believed there had been. CN told the claimant that any delay may be due to CDs workload and that the needs of the business and their service users would be prioritised above any request for reference. The claimant was unhappy with the suggestion that the respondent would prioritise the running of the service above the need to provide his prospective employer with a reference.

117. On 23 July 2019 the claimant submitted his appeal against the grievance outcome (page 251). The document included extracts of his research into employment law and immigration law; the claimant made explicit reference to litigation.

118. In his letter of appeal, the claimant raised new allegations to the effect that:

a. His shifts had been allocated (by CD) to JB at JB's request (page 257); and
b. CD was not on annual leave when the request for a reference from Service Care Solutions Ltd was received.

119. On 9 August, the claimant was invited to a meeting on 14 August 2019. The appeal meeting was chaired by Hayley Wells (HW), Regional Manager. Also in attendance was Katie Brown (KB), notetaker and HR officer. As with CN's experience, HW found it challenging to establish and maintain clarity and focus on the claimant's specific complaints, although it is evident on a general reading that he maintained each strand of his original grievance. Of the allegation that CD contacted the claimant on a number of occasions, the claimant in response to a direct question estimated that he had spoken to CD *"over 3 times*". He described HT telephoning the claimant and that they could hear CD in the background pressing HT to ask him specific questions. Of his dismissal, he claimed he had provided adequate information about his visa application but reflected that he could have approached HT with it, stating *"I*

know another care worker the company did very well dealing with his application. He had no issues". He asserted to HW, contrary to his evidence to us, that he had never been told by either CD or HT that he had until 15 March 2018 to submit his evidence of a right to remain a work in the UK. Of his allegation that CD had given JB his shifts, he said he *'just thought that's fine, let them get on with it' (*page 264).

120. HW declined to deal with the new matters set out at paragraph 118 above as well as his contention that he was required to produce a contract to CD to prove his entitlement to annual leave, because, she said, they were new; she was mistaken about the last point, which was not a new point – see paragraph 97(e) above.

121. The claimant was pressed 3 times by HW to provide specific examples of how he felt discriminated against. He stated that: he was required to return the office to sign a new contract and that CD refused to leave her office and speak with him; that his first and second annual leave requests were declined and that he had not received his request form back and was given no explanation regarding his holiday entitlement. Finally, he stated that he was *"constantly getting pestered by phone calls"* and furthermore that CD had dismissed him over the phone, declining to provide a date of the alleged verbal dismissal when he was asked *"as you may use this".*

122. The claimant asked for a copy of his personnel file, as he wished to see his holiday before commenting *"it is now too late as it has probably already been tampered with"*. KB advised the claimant that he would need to submit a subject access request. That advice, whilst ordinary and unsurprising, was in fact wrong; paragraph 6.18 of the Group's Information Governance policy dispenses with the need to make a formal request or pay a fee.

123. On 19 August 2019, the claimant was emailed to inform him that investigations were underway. On 11 September 2019, the claimant was invited to a meeting on 13 September to discuss the outcome of the grievance appeal, HW having identified the face-to-face meeting to discuss the outcome

of her investigation would be beneficial to the claimant. The meeting was postponed at the claimant's request to 20 September 2019.

124. On 20 September 2019 HW and KB met with the claimant. The minutes of meeting are not particularly coherent and are clearly incomplete; we accept that HW attempted to talk the claimant through her findings, but that there was a significant element of disengagement on the part of the claimant during the meeting, for example, when he took two telephone calls during the meeting.

125. At that meeting, the claimant, upon being referred to the statement of JH, agreed that CD had come out of her office to speak to the claimant on the occasion that the amendment to his contract was being discussed.

126. HW confirmed that the claimant's outstanding holiday pay had been paid via payroll; she acknowledged that there should have been a meeting at which the claimant's employment and its termination was to be discussed; she asked claimant to confirm whether he would consider a job at a different branch – the claimant having indicated in the earlier meeting that had such an offer been made, he would have accepted - he declined the offer.

127. HW decided to end the meeting without relaying all her findings.

128. At the end of the meeting, the claimant asked for copies of the witness statements of CD, DD and JH. He asked who JH was. The Human Resources office at the meeting, Samantha Clappison (SC), told the claimant that it was not normal practice to provide statements and HW said she would liaise with CN about the statements and who JH was.

129. On 27 October 2018, the claimant initiated ACAS early conciliation; it was completed and he received a certificate by email on 31 October 2018.

130. The formal grievance appeal outcome letter was drafted in the week of 20 September 2019; HW assumed that SC had sent it to the claimant soon thereafter by her HR officer. In fact, it had not, and the officer was subsequently

absent on sick leave. Once the delay was drawn to HW's attention, the outcome letter was sent to the claimant soon after, on 7 November 2019. The letter explained at length why, for legal reasons, the respondent had no choice but to dismiss him in circumstances where it did not possess satisfactory information to demonstrate his right to remain and work in the UK. The letter stated that how it failed to do so, it would have exposed the respondent to a fine of up to £20,000 as well as imprisonment.

131. Paragraph 7.5 of the Group's Grievance policy states that the chair of a grievance meeting "should notify the complaint in writing (not normally later than 5 days after the meeting) of the outcome of the grievance".

132. On 6 November 2019 the claimant presented his claim form to the Tribunal.

133. In preparation for the Final Hearing of the claimant's claim, CN was asked to produce the document at page 176 - 209, which confirms the claimant's shifts between 1 August 2018 and 30 September 2018; she obtained the information printed the document on 20 April 2020 at 10:20. The document is accessible in a read-only format for all but a select few staff, of which CN is not one, because it is the data which forms the basis of the respondents claim for payment from the local authority. The document has a print stamp at the bottom of the page: *"Printed: 20/04/2020 10:20:55 by NobleC".* The document shows that for that 2-month period, the claimant's total planned hours were 552:31, and that he actually worked 386 hours.

The Law

Unfair Dismissal – EDT and Time Limits

134. The Effective Date of Termination is when the claimant actually received and read the letter, or at least had a reasonable opportunity of doing so: Gisda CYF v Barratt [2010] ICR 1475, SC.

135. Section 111(2)(a) and (b) of the Employment Rights Act 1996 provides that an Employment Tribunal shall not consider a complaint of unfair dismissal unless it is presented before the end of the period of three months beginning with the effective date of termination, or within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

136. 'Reasonably practicable' means something like 'reasonably feasible': Palmer v Saunders and Southend-on-Sea Borough Council [1984] IRLR 119.

137. The burden of proof is on the claimant to show that it was not reasonably practicable for him or her to have submitted the claim within the applicable limitation period: Porter v Bandridge Ltd [1978] IRLR 271.

138. A claimant who knows of his or her rights to bring a complaint of unfair dismissal is under an obligation to seek information and advice about how to enforce that right: Wall's Meat Co. Ltd v Khan [1979] ICR 52.

Discrimination

139. Section 9 of the Equality Act 2010 defines race as a protected characteristic where race includes colour, nationality, ethnic or national origins.

140. Section 13 of the Equality Act 2010 ('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'.

141. In a claim of direct discrimination, section 23 of the Equality Act 2010 states that *'there must be no material difference between the circumstances relating to each case'.*

142. Sometimes, especially where the identity of the comparator is in issue, the question of whether there has been less favourable treatment cannot be resolved without, at the same time, deciding the reason why the claimant received that treatment: Shamoon v Chief Constable of the RUC [2003] UKHL 11, [2003] IRLR 285, [2003] ICR 337 at [7]–[12].

143. Section 26 Equality Act 2010 provides as follows:

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

i. violating B's dignity, or

ii. creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

. . .

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

144. We had regard to the guidance given by the EAT in Richmond Pharmacology v Dhaliwal [2009] IRLR 336 as reviewed by the CA in Pemberton v Inwood [2018] EWCA Civ 564 per Underhill LJ at [85-88].

145. Pursuant to section 15 of the Immigration Asylum and Nationality Act 2006 an employer is liable for a civil penalty if he employs an individual aged 16 or over who is subject to immigration control and including where that individual has not been granted leave to enter or remain in the UK, or the individual's leave to enter or remain is not valid and subsisting.

Penalty

15 (1) It is contrary to this section to employ an adult subject to immigration control if—

a. he has not been granted leave to enter or remain in the United Kingdom, or

b. his leave to enter or remain in the United Kingdom—

is invalid,

(ii) has ceased to have effect (whether by reason of curtailment, revocation, cancellation, passage of time or otherwise), or

(iii) . . .

(2) The Secretary of State may give an employer who acts contrary to this section a notice requiring him to pay a penalty of a specified amount not exceeding the prescribed maximum.

(3) An employer is excused from paying a penalty if he shows that he complied with any prescribed requirements in relation to the employment.

(4) But the excuse in subsection (3) shall not apply to an employer who knew, at any time during the period of the employment, that it was contrary to this section.

(5) . .

(6) . .

(7) . .

146. Section 21 of the 2006 Act creates a criminal offence of knowingly employing an illegal worker. Under s 21(1) an employer commits a criminal offence if he employs an individual aged 16 or over whom he knows is subject to immigration control and knows that that individual has not been granted leave to enter or remain in the UK or the individual's leave to enter or remain is not valid and subsisting.

Offence

21 (1) A person commits an offence if he employs another ("the employee") knowing that the employee is an adult subject to immigration control and that—

he has not been granted leave to enter or remain in the United Kingdom, or

his leave to enter or remain in the United Kingdom—

is invalid,

(ii) . . .

(iii) . .

(2) A person guilty of an offence under this section shall be liable—

on conviction on indictment—

to imprisonment for a term not exceeding two years,

(ii) to a fine, or

(iii) to both, or

(b) on summary conviction—

to imprisonment for a term not exceeding 12 months in England and Wales or 6 months in Scotland or Northern Ireland,

(ii) to a fine not exceeding the statutory maximum, or

(iii) to both.

(3) . . .

(4) . . .

147. Section 196 of the Equality Act 2010 provides that there are general exceptions to the Act. Schedule 23 of the Act contains some exceptions:

SCHEDULE 23 General Exceptions

Section 196

Acts authorised by statute or the executive
1 (1) This paragraph applies to anything done—

(a) in pursuance of an enactment;

(b) in pursuance of an instrument made by a member of the executive under an enactment;

(c) to comply with a requirement imposed (whether before or after the passing of this Act) by a member of the executive by virtue of an enactment;

(d) in pursuance of arrangements made (whether before or after the passing of this Act) by or with the approval of, or for the time being approved by, a Minister of the Crown;

(e) to comply with a condition imposed (whether before or after the passing of this Act) by a Minister of the Crown.

(2) A person does not contravene Part 3, 4, 5 or 6 by doing anything to which this paragraph applies which discriminates against another because of the other's nationality.

Victimisation

148. Section 27 of the Equality Act 2010 ('EA 2010') provides: *'A person (A) victimises another person (B) if A subjects B to a detriment because – (a) B does a protected act, or A believes that B has done, or may do, a protected act.'*

Proving Discrimination

149. Section 136(2) 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. However, section 136(3) provides that subsection (2) does not apply if A shows that A did not contravene the provision.

150. A difference in treatment and a difference in protected characteristic is not enough to establish that the difference in treatment was caused by the difference in protected characteristic*; "something more*" is required: Madarassy v Nomura International [2007] IRLR 246. The Tribunal needs evidence from which it could draw an inference that race was the reason for the difference in treatment.

151. Unreasonable or unfair behaviour is not enough to allow for an inference of discrimination: Bahl v The Law Society [2004] IRLR 799.

UNFAIR DISMISSAL

152. We find that the letter dismissing the claimant was received by him the following day i.e. Tuesday 19 March 2019 and that he had a reasonable opportunity to read it by that date; the claimant was at home at all times, and whilst he was unable to say when he received it, he did not complain about any delay in receiving it; he expressed no surprise upon receiving it and he did not suggest that there was any uncertainty in his mind about attending work on the Wednesday, which we find there would have been had he not received the letter before then.

153. In order to have jurisdiction to entertain the unfair dismissal claim, therefore, the claim should have been presented by 18 June 2019 unless the claimant can satisfy us that it was not reasonably practicable to present it before

that date. In fact, he presented the claim on 6 November 2019, some 4.5 months late.

154. The claimant accepts that he knew he was subject to a 3-month time limit but that he had misunderstood when it began, believing it necessary to exhaust internal procedures before commencing litigation.

155. Approaching the question of whether it was 'practicable', adopting a liberal approach in favour of the claimant, we find that it was practicable for him to present the claim within the primary time limit because he was put on inquiry into his rights; his principal contention in his original grievance was that his dismissal was unlawful; he was able to research and assert that he was discriminated against, and sought awards for injury to feelings as well as aggravated damages; the question of when the time limit runs from is information that is widely available online.

156. In those circumstances, we find that the claimant ought to have known that the time limit began on the effective date of termination of his employment and he has not satisfactorily explained to us why he did not know that.

157. We note that in his closing submissions, the claimant expanded on his account and sought to blame incorrect advice given by the Citizen's Advice Bureau; the claimant had not in his evidence mentioned that he had even consulted the CAB, much less that it had given him advice in relation to time limits. We disregard that account.

158. The unfair dismissal claim having been presented outside the ordinary 3-month time limit in circumstances where it practicable to do so, the Tribunal has no jurisdiction to entertain the claim.

DISCRIMINATION

Allegations against Claire Darby ('CD')

Altering Shift Allocations and giving hours to JB in August to September / December 2018

159. It was the role the shift coordinator/supervisor to design rotas and allocate shifts and there was no evidence that CD ever set, nor altered the claimant's shift allocations.

160. The claimant was on a zero hours contract and his hours were subject to a significant degree of variation each month in any event; on his own case, the death of service user DB caused a reduction in income in August 2018. Other than to express his opinion that "the manager", should be responsible for all matters in her remit, the claimant gave us no basis as to why CD should even have been aware of the hours that he had been allocated by HT.

161. We do not accept that the claimant ever believed that JB had ever been allocated 'his hours' or that they had been allocated by CD as an act of discrimination. The claimant was noted to be a good communicator and raised with his HT and DD concerns he had had in recent history, including in May 2018, that his hours were being given to a colleague 'again'. Had he believed that JB had sought and was being given, 'his hours' the evidence suggests he would have raised the matter much sooner than his grievance appeal for example at his appraisal / supervisions in August or December; even when he did raise the point at his grievance appeal, he did not suggest that CD had any involvement, nor that it was motivated by his race. The evidence from the claimant himself does not suggest he was taking his own allegation very seriously; when asked by HW why he had not raised his concerns with HT at the time, he told her that he would let her i.e. JB, *'get on with it';* in cross examination of on the same point, he said that JB was *'boasting'.*

162. Furthermore, the claimant suffered no significant reduction in work in the period August to December 2018. The claimant himself provides an explanation for his income in August 2018; his salary in October and November is very similar to that he received in January to March (and in respect of which he has no complaints), leaving only September and December, both of which

are not lower than, his lowest monthly income in the previous year. We fail to see any significance in the variations in his salary such as to draw any adverse inference and the claimant was able to assist, other than to repeat his conviction in his belief.

163. Finally, for reasons we set out below at paragraph 166 below, we reject the claimant's alternative contention that CD had the motivation to 'punish' the claimant for allegedly having the audacity to submit his request for annual leave in August 2018.

164. The allegation of race discrimination or harassment is rejected, the claimant having failed to establish that CD altered his shifts.

Refusing or resisting the claimant's request for annual leave making it harder for him to get his holidays and insisting that he provide a copy of his contract. This relates the requests for leave to be taken in August and November 2018.

165. That the reason the claimant was granted only part of the leave he sought in August 2018 was due to the respondent's 'first come first served' system of allocating leave together with the popularity of taking leave over the August bank holiday is consistent with CD's reply to the claimant on 3 July 2018 and consistent with the email of DD to CD on 6 August 2018 (neither of which we found had been falsified, fabricated or tampered with in any way).

166. We further note that no part of the respondent's reason for declining part of his leave request was because he had requested leave in excess of the usual maximum period of 14 days. There was no evidence that this exchange was considered by CD to be anything out other than the ordinary day to day tasks she was required to undertake.

167. We have regard to the fact that the claimant's second request for leave i.e. the request the claimant made in August for leave to be taken in September was granted by CD without demur and without comment or complaint by the claimant.

168. In relation to the claimant's request for leave, made in October, in respect of time off in November, the claimant wrote on his request form that the leave was his last in the leave year; he physically drew CD's attention to an issue that his contract shared with tens of other contract workers. Given that CD had arrived from a post in Hartlepool and this was the occasion when the issue of the correct leave year arose since she started in February, it is not surprising that she chose to query the claimant's assertion that this was the last leave he would be taking in his leave year. We note that, aside from assigning the leave requested to the following leave year, CD granted the claimant's request in full. CD did not refuse or resist his claim for annual leave; she was clarifying which leave year the leave she did grant should be counted against.

169. For the reasons we have set out at paragraph 68 above, the claimant was not, in response to this request for leave, required to produce his contract at a meeting in October 2018 to prove either the contents of it, or his entitlement to leave more generally; the events alleged by the claimant did not happen.

170. Finally, there was no evidence before us as to why CD's response to either of the leave requests in issue were in any way motivated by or related to the claimant's race, other than his own repeated conviction that it was. The allegation of race discrimination and/or harassment is rejected.

<u>CD isolating the claimant and/or giving him the cold shoulder, refusing to engage with him personally and preferring to contact him via phone and/or email – specifically 19 October and 7 February 2019.</u>

171. On his own case the claimant did not contact, or even attempt to contact CD at any stage, much less did she ignore any such attempts. Conversely, there is no evidence before us that CD sought out and made contact with any other case worker. CD did not generally isolate the claimant or give him 'the cold shoulder'.

172. We have already set out our reasons at paragraph 68 above why we do not accept that the alleged event on 19 October 2019 did not take place.

173. As for events on 7 February 2019, it was not CD who did not pay the claimant attention, for the reasons we have given at paragraph 77 above, the person the claimant thought was CD was in fact the manager of Aspen Gardens. Furthermore, when the claimant sought CD's attention before agreeing to sign his amended contract, she emerged from her office when she was able to do so and spoke to him, to his satisfaction.

174. There was no evidence at all that CD had given the claimant 'the cold shoulder' or 'refused to engage with him personally' on either of the dates he complains of.

175. The claimant adduced no evidence to support his contention that the matters as he perceived them to be were in any way connected to his race. The claims of direct discrimination and/or harassment are dismissed.

<u>Telephoning the claimant, a number of times, within less than 5 minutes repeating the same thing</u>

176. Turning to the allegation of harassment, the claimant adduces no evidence to satisfy us that conduct he complains of was in any way related to colour, but we accept that the conduct was unwanted and was 'related to' the claimant's nationality, in the broad meaning of the phrase.

177. It was not CD's purpose to harass the claimant; she was telephoning him:

a. at the instruction of JR and Human Resources;
b. To chase the claimant for proof of his application / extended visa, because he told her he would get it to her.

178. We consider whether the conduct is said to have the proscribed effect, in the alternative. We have no difficulty accepting that receiving repeated calls, at the rate of one to three times per week amounted to unwanted conduct and that he perceived himself to have suffered the effect at ss.(1)(b) and 26(4)(a).

179. However, when considering whether it was reasonable for the conduct to be regarded as having that effect and taking into account all the other circumstances of the case, s.26(4)(b) and (c), we reject the claimant's claim. Whilst we consider there to be considerable overlap between these questions we attempt to address them separately.

180. We do not consider it reasonable for the conduct to have had the proscribed effect for the following reasons:

a. The claimant knew that it was a serious matter that he had no right to work in the UK after 15 March 2019 – and he knew that his employer was aware of that;
b. The up to date information about the claimant's immigration status rested entirely with the claimant; the respondent and CD were entirely dependent on what he told them;
c. The claimant told CD, by 26 February 2019 that he had applied for an extension to his visa when he did not do so until 11 March 2019; he caused CD to chase for proof of a visa application pending or a granted visa in respect of an application that he knew he had not made;
d. The claimant did not tell CD that he had only submitted his application on 11 March 2019;
e. The claimant knew as of the morning of 15 March 2019 that any share code he had sent to the respondent could not be valid, since the letter he received that morning from the Home Office told him that his paper application had been rejected – he did not share with CD that as at that morning he had, in fact, no valid application to extend his visa.

181. The other circumstances of the case are: that all the calls related only to the claimant's visa status; it was an important matter for both parties: the

respondent would be committing a civil and criminal offence if it continued to employ the claimant after 15 March 2019

182. The claim of harassment fails.

183. Turning to the alternative claim of direct discrimination. We find that the reason why CD was telephoned the claimant on several occasions between 18 February and 15 March 2019 and the reason why he received two telephone calls in quick succession from or on behalf of CD was because:

a. The claimant's right to remain and work in the UK was about to expire on 15 March 2019, making it a civil and criminal offence for the respondent to continue to employ him;
b. CD had been instructed by Human Resources to obtain from the claimant proof of his right to remain and work in the UK beyond 15 March 2019;
c. The claimant told CD by 26 February 2019 that he had submitted his visa application to the Home Office when that was untrue; he knew that the respondent could not receive confirmation that his visa had been extended before 11 March when he made his first paper application;
d. The claimant did not complete a valid visa application, as required by the Home Office until an undetermined point after 5pm 15 March 2019.

184. Put another way, we are satisfied that the treatment was not because of the claimant's race, but because of his visa status and his failure to tell the respondent the truth of his failure to apply for an extension until the last moment. We are far from satisfied that someone of a different race (colour or nationality), for example a white South African or Australian in materially the same circumstances, would have been treated any more favourably.

185. The claim of direct race discrimination fails.

<u>Did CD during a telephone call on 14 March 2019 put the claimant on loudspeaker so that others were able to listen to what should have been a personal and private conversation regarding his visa renewal?</u>

186. For the reasons set out at paragraph 88 above, we are not satisfied that CD placed the claimant on loudspeaker so that others could listen to a private conversation; we consider it much more likely that calls made to the claimant from that office contained background noise generated by other occupants of that same office.

187. The allegation of direct discrimination and/or harassment fails.

Failing to afford the claimant the same opportunities as Phil Wilde, Rebecca Hayley and Kim

188. We reject this allegation on its facts; we have accepted that CD did not agree to any new courses being undertaken by anyone between her taking the role of branch manager in February 2018 and the claimant's dismissal in March 2019. We have already accepted that Kim already held her NVQ Level III in Health and Social Care before arriving at Stockton Tower House and that CD did not authorise any courses to be undertaken by Phil Wilde or Rebecca Hayley. On the evidence before us, the reason that the claimant was not permitted to commence his NVQ Level III on the only occasion he asked i.e. May 2018, was for a non-discriminatory reason, i.e. lack of funding.

189. The claim of direct discrimination and/or harassment fails.

CD dismissed the claimant

190. Dealing first with the claim of harassment. We accept that the claimant's dismissal amounted to unwanted conduct. The claimant has adduced no evidence to support his claim that the dismissal was related to his colour: that he was the only black person employed at Stockton Tower House or even by the respondent generally is not, of itself, evidence of discrimination: Madarassy.

191. We accept that his dismissal can be said to be related to his nationality and we accept that the claimant perceived that conduct had the effect of creating the proscribed environment.

192. CD's purpose in dismissing the claimant was not to harass him:

a. It was a condition of the claimant's employment is that he had a right to remain and work in the UK as set out in the Employee Handbook; he had adduced no evidence to CD that he did have such a right beyond 15 March 2019.
b. she did not want to dismiss him - she first enquired of Human Resources whether it was strictly necessary to dismiss the claimant in the circumstances and simply not deploy him, only to be told that it was necessary to dismiss him – paragraph 86 above;
c. we agree with the observation of CN that it would seem odd that CD had it in her mind to terminate the claimant's contract but nevertheless continued to contact him to obtain the information that would avoid his dismissal;

193. Whilst the claimant may have felt that the conduct had the proscribed effect, it was not reasonable for the conduct to be regarded as having that effect and taking into account all the other circumstances of the case, s.26(4)(b) and (c) i.e.

a. The claimant knew that his visa was to expire on 15 March 2019;
b. On the morning of 15 March 2019 he knew, because the Home Office had told him, that he had not submitted a valid application;
c. He had not submitted a complete and valid application for an extension to his visa, much less obtained proof of his right to remain in the UK before 5pm 15 March 2019.

194. Turning to the claim of direct discrimination. The claimant adduced no evidence that someone who was not black or of a different nationality, and in materially the same circumstances i.e. unable to produce proof of, or even an application in respect of, the right to remain and work in the UK beyond 15 March 2019, would have been treated more favourably.

195. As HW recognised, CD should have called the claimant to meeting to discuss termination of his contract; it was wrong of her not to do so but we have

regard to the fact that CD was at the time an inexperienced branch manager who was facing repeated reassurances from the claimant that the evidence was soon to be provided to her. We remind ourselves that unreasonable conduct in and of itself does not give rise to an inference of discrimination has occurred: Bahl.

196. The claimant's claims of harassment and direct discrimination fail.

197. In any event, if contrary to our findings above, the respondent did discriminate because of the claimant's nationality contrary to either s.13 or s.26 Equality Act 2010 by dismissing the claimant, it is exempt from those provisions, given our findings that it did so in pursuance of s.15 and 21 of the Immigration Asylum and Nationality Act 2006.

Allegations against Christine Noble ('CN')

198. All allegations against CN are dismissed on their facts for the reasons given below; accordingly, all allegations of direct discrimination and/or victimisation are not well founded and are dismissed.

Tampering with Evidence

199. We have already found that the claimant did not create or tamper with the document at:

a. Page 209.2 to 209.3 i.e. the list of care workers with contracts containing the standard annual leave year and those with the Group annual leave year;
b. Page 176 to 209 i.e. the documents which show which hours worked by the claimant that the respondent billed the local authority for;
c. Page 129 i.e. the claimant's annual leave request form for August 2018.

200. The claimant has failed to satisfy us of the relevant facts and the claims of direct discrimination and victimisation are dismissed.

Deliberately Undermining the Claimant

201. This comprised of an allegation that CN refused to provide the claimant with his personnel file. We have already found that the claimant did not ask for his personnel file from CN, rather he asserted that she should already have it. In the circumstances, she did not refuse to give him his personnel file: the claimant has failed to satisfy us of the relevant facts and the claims of direct discrimination and victimisation are dismissed.

CN writing things which did not correspond with the claimant's contract

202. This was an allegation that CN said that the claimant had requested more than 14 days holiday, when he had not. It is a repeat of the allegation that CN tampered with his leave request form. For the same reasons above, it is dismissed on its facts.

Did CN fail to uphold the claimant's grievance and effectively bury his complaint of discrimination.

203. This was an allegation said to comprise of the following matters:

a. There was plenty of evidence to uphold his grievance;
b. After investigating his grievance, CN realised something unlawful was going on and forged evidence to cover for CD;
c. Her questions towards CD were biased.

204. Of the contention that there was plenty of evidence to support his grievance, we consider the essence of this allegation to be based in the claimant's disagreement with the stated outcome. We take into account:

a. That CN conducted a perfectly reasonable investigation into the claimant's grievance and the claimant does not suggest she did not;
b. The claimant does not advance before us that CD failed to provide him with a letter of support for his visa application;
c. That the claimant was unable to adduce any evidence of having made a valid application to the Home Office before 15 March 2019, much less provide details of it to CD;

d. That the claimant produced no evidence to CN, or indeed to us, that CD required him to produce his contract as a pre-condition to giving him leave;
e. That despite stating he was still in the respondent's employment, he declined an offer to be reinstated;
f. That CN did uphold his claim that he was owed a week's accrued but untaken holiday pay.

205. We find that there was not ample evidence to uphold those parts of the claimant's grievance that CN did not uphold.

206. Of the contention that CN failed to provide him with his personnel file, we have already dealt with this point above; it is rejected.

207. Of the contention that the CN during her she realised that something unlawful going on so forged evidence to cover for CD, we have already dealt with that above; it is rejected.

208. Of the contention that CN asked CD biased questions, we have already found to the contrary; they were wide ranging in terms of the ground they covered and open in their nature; it is rejected.

<u>Did CN speak to the claimant poorly in relation to the Service Care Solutions Ltd reference?</u>

209. This is based solely on the claimant's dislike of being told by CN that any reference request would not be afforded priority by the respondent, whether by CD or otherwise. It is a simple difference of opinion and cannot amount to an allegation, much less an act of discrimination; it is rejected.

Allegations against Hayley Wells ('HW')

210. All allegations against HW are dismissed on their facts; accordingly, all allegations of direct discrimination are not well founded and are dismissed.

Did HW delay the grievance appeal process?

211. HW prepared her outcome letter in the same week as she met with the claimant i.e. 20 September 2019 and she believed her HR officer had sent the letter out to the claimant. She was mistaken in that belief, but she had not delayed. The allegation is dismissed as factually incorrect.

Did HW cover up the discrimination of CD and CN by refusing the claimant's appeal?

212. This contention, namely that there was plenty of evidence to support his appeal, is essentially a disagreement on the claimant's part with the grievance outcome decision; he produced no new or additional evidence to that which adduced to CN.

213. In making that finding, we are mindful of the fact that HW told the claimant that she would not deal with three matters which, she said, were raised for the first time during the appeal stage, namely, the contention that his hours had been given to JB, that he had been denied his personnel file and that he had been required to produce his contract before he was granted leave by CD. She was correct about the first two matters and incorrect about the last matter, which the claimant had raised in his initial grievance. We have no evidence before us that this was anything other than a mistake on the part of HW, particularly given her expressed difficulties to keep the claimant focussed on the specific issues raised in his grievance.

Did HW refuse to provide the claimant with copies of 3 letters used in the grievance process, thereby covering up for CD

214. We have found that at the end of the meeting on 20 September 2019, the claimant had an exchange with Samantha Clappison, HR officer and not HW, about obtaining copies of the witness statements of CD, DD and JH. Further and in any event, there was no refusal on the part of SC, only that it was not unusual to share the documents and that permission would need to be obtained first.

215. Of the contention that HW refused to provide him with his personnel file, again, the exchange was with SC, not HW; HW cannot be liable for advice given by KB. KB's advice, for the avoidance of doubt, was mistaken, not discriminatory.

CONCLUSION

216. For all the reasons above, the claimant's claims of direct race discrimination, harassment, victimisation and unfair dismissal are not well founded and are dismissed.

_____

EMPLOYMENT JUDGE JERAM

REASONS SIGNED BY EMPLOYMENT JUDGE ON 30 MARCH 2021