Case No: 3331220/2018
2302376/2019

EMPLOYMENT TRIBUNALS

BETWEEN

CLAIMANT	**V**	**RESPONDENT**
Mr M Zaib		**Mitie Custody and Care Ltd**

Heard at: London South Employment Tribunal **On:** 14,15,16,19, 20 & 21 April 2021 In Chambers on 5 and 6 May 2021

Before: Employment Judge Hyams-Parish
Members: Ms V Blake and Ms K Omer

Representation:
For the Claimant: Mr M Sprack (Counsel)
For the Respondent: Mr H Zovidavi (Counsel)

RESERVED JUDGMENT

It is the unanimous judgment of the Employment Tribunal that:

(a) The claim of disability discrimination contrary to s.13 EQA fails and is dismissed.

(b) The claim of disability discrimination contrary to s.15 EQA fails and is dismissed.

(c) The claims of direct race discrimination contrary to s.13 EQA fails and are dismissed.

(d) The claims of racial harassment contrary to s.26 EQA fails and are dismissed.

(e) The claims of unlawful deduction from wages fails and are dismissed.

REASONS

Claims and issues

1. By two claim forms presented to the Employment Tribunal on 8 July 2018 and 18 June 2019, the Claimant brings the following claims against the Respondent:

   1.1. Disability discrimination contrary to s.13 and s.15 Equality Act 2010 ("EQA").

   1.2. Race discrimination contrary to s.13 and s.26 EQA.

   1.3. Unlawful deduction from wages contrary to s.13 Employment Rights Act 1996 ("ERA").

2. Both parties agreed at the outset of the hearing that the issues to be determined by the Tribunal were those set out at paragraphs 21-30 of the case management order dated 23 October 2020 [111] and are repeated below.

(a) Disability discrimination

3. The claim for disability discrimination concerns what the Claimant alleges was a regular pattern of him being assigned complex cases about twice a week but then those cases being systematically removed from him. He says that this continued from the start of his employment on 27 January 2014 until 30 December 2019. He said that complex cases involved more hours' work for which he would, as a result, have received more pay.

4. The allegation was pleaded as a claim of direct discrimination (s.13 EQA) and unfavourable treatment because of something arising from a disability (s.15 EQA).

5. The Respondent conceded, for the purposes of this hearing, that the Claimant was at all material times a disabled person, but the issue of knowledge was disputed.

6. The Claimant's disability is a genetic condition called Neurofibromatosis. One feature or effect of the condition is a smaller body size. The Claimant alleges that because of this, and the perception that because of his size he would not have the physical strength to deal with difficult detainees, he was treated less favourably.

7. Accordingly, the questions which the Tribunal needs to answer in order to

determine the disability discrimination claims are as follows:

(i) Direct discrimination

7.1. Did the Respondent treat the Claimant less favourably than it would have treated[1] others?

7.2. Was that treatment because of disability?

(ii) Unfavourable treatment arising from disability

7.3. Did the Claimant treat the Claimant unfavourably because of something arising in consequence of his disability? The "something" is the Claimant's size, or perception of his size and the effect on his ability to deal with difficult detainees.

(b) Race discrimination

8. The race discrimination claims fell under two groups: those allegations that were pleaded as direct discrimination and harassment (paragraph 9 below); and those that were pleaded as harassment only (paragraph 11 below).

Group 1: Direct discrimination and harassment

9. The allegations which were claimed as both acts of direct discrimination and harassment were as follows:

9.1. Instigation of disciplinary proceedings against the Claimant in March 2018 and continuing until June 2019.

9.2. The non-payment of a medical bill incurred on 17 January 2018 when the Claimant fell ill in Washington DC for work reasons.

9.3. On 9 February 2018, on the Claimant's return from the USA, Mr Heath referred the Claimant to Occupational Health ("OH") asking them to consider whether the Claimant should be restricted to UK duties only so as to avoid the disruption and cost arising from falling ill abroad.

9.4. On 12 February 2018, after the Claimant had a flu vaccination at his own expense, Mr Heath rebuked him in an email as to who had given him authority to have the vaccination.

10. In relation to each of the allegations at paragraph 9 above, the Tribunal

[1] The reference to "would have treated others" is because the Claimant relied on hypothetical comparators. The Claimant relied on hypothetical comparators for all direct discrimination claims.

has to ask itself:

(i) Direct discrimination

10.1. Did the Respondent treat the Claimant less favourably than it would have treated others?

10.2. Was that treatment because of race?

(ii) Harassment

10.3. Did the Respondent engage in unwanted conduct related to race?

10.4. Did the above conduct have the purpose or effect of (i) violating B's dignity; or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

10.5. If the above conduct did not have the purpose stated, but had the effect, was it reasonable for it to have had that effect?

Group 2: Harassment

11. The allegations which were claimed as acts of racial harassment only, are as follows:

11.1. By a letter dated 2 April 2019 (which the Claimant did not receive until ACAS sent him a copy on 9 April 2019) Gregory Ashton fabricated a letter of concern.

11.2. By an email on 7 May 2019 the Respondent misled the Claimant to say the Respondent had full clearance from the Home Office when this was incorrect.

11.3. On or around 3 May 2019 the Respondent provided information to the Home Office about the disciplinary investigation with the intention that the Claimant's accreditation to work would be revoked.

11.4. After four weeks of an Initial Training course which started on 13 May 2019, the Respondent withdrew the Claimant from that course.

11.5. The Respondent dismissed the Claimant on 4 June 2019 (albeit he was later reinstated).

12. In relation to each of the above allegations at paragraph 11 above, the Tribunal has to ask itself the same questions as set out at paragraph 8(c)-

(e).

(a) Unlawful deduction from wages

13. The claims for unlawful deductions from wages arises from the following allegations:

    13.1. A claim for 6 weeks' holiday pay as the Claimant was unable to take holiday whilst suspended.

    13.2. Nonpayment of flying allowances during the Claimant's period of suspension.

    13.3. Underpayment of wages for July 2019. The Claimant says that he was underpaid by £1,200 basic pay for that month.

    13.4. Non-payment of £160 in respect of two days, 22 February 2018 and 19 March 2018, which the Claimant says is owed as wages for work done but which, because of errors on the part of the Respondent, he was underpaid.

Practical and preliminary matters

14. During the hearing, the Tribunal heard evidence from the Claimant and two witnesses:

    14.1. Linda Basiony, Detention Custody Officer for Mitie Care and branch secretary for Community Union; and

    14.2. Denise Heslop, Detention Custody Officer Manager.

15. Ms Basiony attended the hearing under a witness order made on the first day of the hearing as she was still employed by the Respondent and required an order to be made before she would attend.

16. On behalf of the Respondent, the Tribunal heard evidence from the following witnesses:

    16.1. Carl Jackson, Service Delivery Manager, Family & High-Risk Returns.

    16.2. Gregory Ashton, Deputy Head of Overseas until November 2020.

    16.3. Carl Blackford, Head of ICE, Escorting Services.

    16.4. Donna Lang, Overseas Charter Service Delivery Manager.

16.5. Stacy McClymont, HR business Partner from May 2018 to June 2020.

17. The Respondent had intended to call Mr James Heath, but the Tribunal was informed he was not well enough to attend the hearing. Having looked at the sick certificate, the Tribunal was concerned by the period of sickness absence, covering the period of the hearing, and the less than compelling reasons for his non-attendance. Mr Zovidavi asked for his witness statement to be considered by the Tribunal. The Tribunal agreed to do so but warned Mr Zovidavi that it was likely the Tribunal could give little or no weight to his evidence given that he could not be cross examined.

18. At the outset of the hearing Mr Zovidavi wanted it to be noted that the claim for disability discrimination extended over a period postdating the date the Claimant's claim was presented.

19. Mr Sprack also suggested that claims under paragraphs 11.1-11.5 above must, by implication and logic, also be claims of direct discrimination particularly when considered against the allegation at 9.1. However, the Tribunal took a different view when considered what was actually being alleged; they were different matters. Mr Zovidavi also pointed out that the Claimant had made their position absolutely clear at a previous case management discussion from which the order referred to at paragraph 2 above followed. That order, recording what had been agreed at a hearing at which both parties were legally represented, stated quite clearly that allegations at paragraphs 11.1-11.5 above were allegations of harassment only – and not direct discrimination claims.

20. During the hearing, the Tribunal was referred to documents in a bundle extending to 866 pages. Numbers in square brackets below are references to page numbers in the hearing bundle.

Findings of fact

Introduction and background

21. Findings of fact have been reached on the balance of probabilities, having considered all of the evidence given by witnesses during the hearing, together with documents referred to by them. The Tribunal has only made those findings of fact that are necessary to determine the claims. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.

22. The Claimant has been employed as an Overseas Detainee Custody Officer ("DCO") since 27 January 2014. When the Claimant commenced his employment, his employer was Tascor Services Ltd ("Tascor"). Both the Respondent and Tascor contracted with the Home Office to arrange

the removal of those not lawfully in the UK who needed to be returned to their home country. Prior to 1 May 2018 that contract was held by Tascor but from 1 May 2018 the contract has been held by the Respondent.

23. The Claimant was part of a team of approximately 200 DCOs. The core duties of a DCO are to escort immigration detainees back to their home country in circumstances where their continued stay in the UK has been refused. It is the DCO's responsibility to ensure that detainees are transferred in an orderly way and with minimal disruption. DCOs are trained how to physically restrain a detainee where this becomes necessary.

24. There are generally three types of removals:

- "Scheduled" removals where an individual is escorted out of the UK on a regular flight which may contain members of the public.
- In Country Escorting ("ICE") which are scheduled movement of detainees internally within the UK.
- "Charters" which involve multiple detainees escorted by a team of DCOs on a private plane.

25. Generally, DCOs can expect to do a mix of in-country transfers and overseas transfers (i.e., removals from the UK) as part of their role. The allocation of work varies across the different work types. The allocation of Scheduled and ICE removals is handled by the Respondent's Operational Control Centre (the "OCC" team).

26. A number of transfers are categorised "complex" because one or more of the following factors about the job or the detainees are present:

- highly disruptive
- medical cases
- serious food and fluid refusers
- limited routings to the final destination
- high profile and likely to attract media attention
- history of serious criminal activity
- history of previous concealment or use of blades
- protesters

- national security

27. The decision who to assign jobs to is dependent on a number of factors including:

    - Home Office conditions as to who can escort a detainee (a detainee must be escorted at all times by at least two DCO's of the same gender, and a child detainee by a female senior DCO "SDCO" or DCO);

    - Which DCOs have more deficit hours;

    - Availability of DCOs, taking into account holiday and rest periods;

    - Whether DCOs have specific training for high-risk destinations;

    - Whether DCOs have the relevant visas;

    - The results of any risk assessment.

28. As part of the work allocation process, the Respondent operates a 'banding' system. The different destinations to which the Respondent escorts detainees are assigned different bandings linked to how long an assignment to that particular destination will take, based on geographical location and ease of access. The different bandings are as follows:

Band	Length of assignment
A	Less than 26 hours
B	Less than 36 hours
C	Less than 60 hours
D	More than 60 hours

29. Employees assigned to the different bands are not paid at different rates, but the longer the assignment the more individuals receive given they are working for a longer continuous period.

30. Allocation of work was done manually before moving to an automated system at the end of 2019. Since that point, allocation of work has been managed using what was referred to at the hearing as an 'auto picker tool'. Details are manually imputed into the system, including information about the number of detainees, gender, past history etc. The online system will recommend both the number of staff per job and will automatically assign staff. The auto generated teams produced are still open to review and assessment to ensure that the overall composition of the team is suitable. However, the Tribunal accepts that changes made as a result of such a review were the exception rather than the rule, perhaps where a job had

very specific requirements.

31. From Autumn 2018, Mr Jackson had overall responsibility for assigning cases. Prior to this involvement, that task was undertaken by Adam Stothard. During the hearing, the Tribunal heard evidence as to the number of complex cases handled by the Respondent. The Tribunal accepts the evidence of Mr Jackson that between 45 and 51 complex requests are received each month and that between 7 and 20 are completed. The Tribunal further accepts that there is a high cancellation rate of jobs, which applied also when Tascor had the contract. This means that there are relatively few complex jobs to be shared amongst a large number of DCOs.

32. The Claimant was contracted to work 1950 hours each year. Generally, the Claimant worked a shift pattern of 10 days on and 4 days off. If he worked in excess of 1950 hours he was paid at a flat hourly rate [125]. If he was scheduled on duty for less than 1950 hours, he would still be paid as though he had been on duty for 1950 hours. Deficit hours (where employees were under ultilised as against the hours they were being paid for) were monitored by the Respondent. The main point of monitoring deficit hours is to ensure that there is a focus on giving priority to utilisation of employees who have accrued deficit hours. On top of their base salary, DCOs can earn allowances, such as flying allowances, which accrue from hour to hour whilst on duty. Complex cases, involving longer flights, resulted in larger flying allowances being paid to DCOs.

33. The Tribunal heard evidence from Ms Basiony about the ethnic breakdown of the workforce. Her information was based purely on members of her union. This represented a high proportion of all DCOs and Senior DCOs – 193 in total. Of that number, Ms Basiony said 13% were non-white and 25-28% of DCOs and SDCOs were female. The Respondent also provided some diversity statistics but theirs was across all escort services and was less useful in terms of being able to draw useful conclusions.

34. During the hearing, the Claimant suggested that there was a culture of racism within the Respondent where racist banter was commonplace. Ms Basiony told the Tribunal that she was aware of the use of racist banter and derogatory comments directed at black and non-white members of staff, from individual white members of staff. Such comments included the phrase ‘cotton picker’ which had been used towards a number of black employees. Ms Basiony said that the use of racially derogatory comments and verbal abuse, such as that referred to above, seemed to go unpunished and there was a pattern of complaints being ignored or little to no action being taken in respect of the perpetrators. She said that many non-white members of staff felt that they were being mistreated by the predominantly white managers at investigations and disciplinary hearings because of their race. When asked whether the allegations of a racist

culture had been raised by the union, Ms Basiony suggested that she had only recently become concerned about the problem.

35. Denise Heslop said in evidence that she heard second hand that the term ‘cotton picker’ had been used. In terms of her own direct experience, she told the Tribunal that in July 2018, she was bluntly and directly told by a colleague “*you're nuttink but a cotton picker*”.

36. The Tribunal concluded that both Ms Basiony and Ms Heslop were credible and honest witnesses. The Tribunal accepted their evidence about the racist banter they had experienced. Whilst the Tribunal stopped short of concluding that there was a racist culture within the Respondent, it was deeply concerned, firstly that such offensive comments were being made by employees, but also that they appeared not to be isolated incidents. It appeared to the Tribunal, from the evidence heard, that there was a reluctance on the part of those subject to such banter, to complain. Of further concern was that the Respondent appeared to prioritise equality and diversity training to those working on Home Office contracts, due to it being a requirement of the contract, but there did not appear to be much, if any, equality and diversity training for employees not working on such contracts. Regarding training for managers, Mr Jackson said that some form of e-learning was available for managers but in her evidence, Ms McClymont said that management training, as far as equality and diversity training is concerned, was not tracked.

Chronology of events prior to investigation for misconduct

37. On 22 December 2017, the Claimant had been scheduled to do a transfer to Istanbul. The Respondent's evidence was that the job was cancelled and all those involved, including the Claimant, were informed by text on 21 December 2017. That text [874] read as follows:

> ***Dear escorts***
>
> ***Please be advised that your job <u>56185</u> for tomorrow to ISTANBUL has been cancelled due to DEFERRED – granting a stay of removal. However, you have been utilised to do in country. Please continue to muster as normal.***
>
> ***Regards OSE Co-Ords***

38. The importance of the above text, said the Respondent, was that those affected would be utilised to do ‘in country’ work and they should continue to muster as normal.

39. The Claimant did not report for duty as requested and when asked about this, produced a text that was different to that which the Respondent claims to have sent [185]. The Claimant said that the words “*However, you have*

been utilised to do in country. Please continue to muster as normal" were missing from the text he received.

40. The Tribunal found the Claimant's account on this issue not credible and most unlikely. Whilst it could accept that a part of a text could be missing, here it was being alleged that two sentences in the middle of the text were missing. The Tribunal finds as fact that the Claimant received the same text that others received and therefore knew that he was required to work.

41. On 17 January 2018 the Claimant was taken ill whilst on a removal flight to Washington. He was admitted to hospital with flu, hemorrhoids and vomiting [193], where he stayed for monitoring and treatment. The Claimant was discharged from hospital on 24 January 2018 and returned to the UK on 25 January 2018. A bill for the Claimant's treatment was sent to the Respondent who forwarded it to their insurers. However, there was a delay in the invoice being paid, which resulted in the hospital resending their bill to the Claimant direct. The bill was eventually paid by the Respondent's insurers.

42. As a result of the above incident, the Claimant was referred to OH for a medical review in February 2018. One of the questions which the Respondent asked OH was whether the Claimant should be redeployed to 'in-country' escorting and avoid flying [218]. The Respondent stated, when asking this question "*going sick abroad causes disruption to the business and cost and we cannot have another episode?"*

43. On 12 February 2018, the Claimant used a rest day to arrange for himself to receive a flu jab at his own cost. Later that day, Mr Heath sent the Claimant the following email [sic]:

> ***Good Afternoon Muqqadas***
>
> ***I understand you attended a Medical Centre today to have your inoculations, can you please tell me who authorised the time and date for your appointment?***
>
> ***Kind Regards***

44. On 14 February 2018, a coach that was being used for a charter job burst into flames on the M25. The Claimant was on the coach. He and others claimed to have lost personal property in the fire. Everyone was asked to provide receipts for property they were claiming had been damaged. On 5 February 2018 the Claimant sent the following email [219] to senior manager, Mr Friydon ("Freddy") Monavaris:

> ***Hi Freddy***
>
> ***I lost my staff bag on the charter coach yesterday night due to the***

Inferno fire, that completely destroyed the charter coach, Please find below the list of items I lost:

1. 1 x Samsung Tablet

2. 1 x Apple Ipod Touch

3. 1 x Jabra Wireless Headphones

4. 1 x Ralph Lauren T Shirt

5. 1 x EA7 Gym Bag, which I used for charter.

6. 1 x Washbag, which contained my Gillette razor, toothpaste, shaving cream, hair gel and toothbrush.

7. 1 x Travel Pillow

8. 1 x Blanket

9. 1 x Powerbank and 1 x Samsung Plug

10. 2 x charging leads for above electric items.

11. Travel Wallent, which contained $250 and £250.

I have copied Donna Lang into this e-mail.

Kind Regards

Mr M Zaib

45. In his investigation report (see below) Mr Jackson referred to allegations that the Claimant had made a fraudulent claim for compensation following the above coach fire and that he uploaded a video of the incident on social media. The allegations were not, however, discussed with the Claimant during the investigatory meeting.

46. On 23 February 2018, the Claimant wrote to Mr Monavaris [224] as follows [sic]:

Hi Freddy

I hope all is well. I gave you a call yesterday but you didn't answer, I don't know where to start from, the last few weeks at work have been a nightmare for me and I am very upset about these incidents that have taken place. It's like my line manager James Heath, does he have a vendetta against me as he always says I am in the wrong when things go pear shaped.

Firstly, it was my medical report when he referred me to Occupational Health, the doctor informed me that your manager has asked the question, that you are costing the business money, for going sick abroad and we can't have another episode, am I the only one that's

been sick abroad, are my other colleagues, who have been sick abroad, being asked the same question.

I had in injection on the 12th of February 2018 at my own expense on my day off and he emailed me saying who authorized you to have an injection, was he thinking I had it at the company expense again, it's clearly showing he's picking on me or is he harassing me. I am deeply concerned.

Unfortunately on the 14th of February 2018 I lost my property on that coach fire on the M25, I don't know whats happening with this situation and it's still on-going. James rang me, I believe on Tuesday to say that I had Gatwick fire training. On Thursday 22nd I get a text for a job to Dublin, my muster time was 01.00am. During the day at about 8:40am I get a phone call from Michelle saying that I was supposed to be at Gatwick, I thought it was for the 23rd and said I am on a 01.00 am muster for a job, she goes ok, I will into this.

James rang shortly and had a go at me saying why I wasn't at the training as I was given plenty of notice in advance. Its not my fault if he can't make upstairs aware of this, or why would the cord's text me for the job.

Just say if I have done the training, I would have left my house around midday to get to Gatwick for about 3pm as the traffic is a nightmare at times on the M25. I would have finished my training at 7pm, then muster again at 1am for a job, that's 6 hours and would have breached the 9 hour rule agreed by the union and company.

I am not happy with James, I want answers or it leaves me no option to raise a grievance.

I wait your response.

47. On 1 January 2018, the Claimant requested annual leave for the period 25 February 2018 to 18 March 2018. This request was approved. The Claimant was therefore due to report back to work on 19 March 2018 [254]. He failed to do so, and when asked why he had not reported for duty, claimed that he was still on annual leave. The Claimant's pay was deducted for this day.

48. On 18 March 2018 at 13.33, Michelle Dixon wrote to Mr Heath and Mr Monovaris [245] about the above matter, saying the following about the Claimant:

The above has just called me following a conversation with the OCC regarding him carrying out work for tomorrow, which is showing him as taskable from 0500hrs.

RECOS is showing him as available from 0500 from tomorrow 19th March.

As it is Sunday I have had to give him the benefit of the doubt and have asked the Co ords to remove him from whatever tasking he was

due to carry out tomorrow.

I believe that him and Ben had an exchange of words, and that in my opinion Max was trying to get out of what it was they wanted him to do, by saying he is up north and can't get back, but also he does not have any passes as they were destroyed in the coach fire. His Gatwick Driver permit has been here at Gatwick since about 4 days after the fire occurred, and It has not been collected.

This is not the first time there has been issues with this particular escort, and it has nothing to do with his name/race/religion or other, he is a particularly difficult escort.

Please can one of you confirm and send me the email trail granting this section of AL that he has just currently taken.

If It comes to light that Max has not been truthful, then I will expect him to be dealt with in the correct way please.

Many Thanks

Michelle

49. When Ms Dixon referred to it not being the first time, she was referring to the incident at paragraphs 37-40 above.

50. On 19 March 2018, Mr Jackson wrote to the Claimant as follows [239][sic]:

Dear Muqaddas

Re: Posting of company documents on a social media platform.

Following the above an investigation is being undertaken into the reason why company documents were posted on a social media platform, which Is against the company social media policy.

We would like to discuss this with you, and you are therefore invited to attend an investigative meeting on Monday 26th March at 10:00hrs at Victory House, Heaton, MB 9N5.

The purpose of this meeting is to discuss in detail the reasons for this course of action, and to ensure that you are fully able to state your case and respond from your perspective.

You are entitled to have a trade union representative or work colleague present at this meeting. I will be accompanied by a note taker.

If It Is your intention to be accompanied, please inform me prior to the meeting.

Once you have been interviewed and all the Investigations are complete, you will be notified as to the outcome of the investigation and whether it will progress to disciplinary.

> ***Please be assured that we will endeavour to progress this issue as quickly as possible, but If you do have any questions regarding the process please contact me.***

51. The document the Claimant was alleged to have posted on social media was an internal memo to all overseas staff from Andy Barber, Head of Overseas Operations for Tascor. The memo addressed concerns by employees that the company was breaching health and safety and working time legislation related to inadequate rest time provided. The Claimant denied in evidence that he was responsible for posting the memo.

52. On 29 March 2018 at 01.30 [259] Ms Dixon wrote to Mr Jackson raising a complaint about the Claimant. She said the following [sic]:

> ***I wish to formally complain about the above escort. Below is an email trail of the reason why I am complaining. This is not the first time that Max has lied to me, which shows a total lack of integrity on his part and a total lack of respect for a Manager. Both occasions, this one and the other time he was found out to be lieing. He cannot continually lie to his peers.***

53. On 5 April 2018, the Claimant was interviewed by Mr Jackson about the social media post of the internal memo (paragraph 51 above). The Claimant denied posting the memo, saying that his social media account must have been hacked. He was also questioned about those matters referred to at paragraphs 37-39 and 47-48 above.

54. On 6 April 2018, the Claimant followed up his meeting with Mr Jackson by sending the following email at 10.48 [272][sic]:

> ***Hi Carl***
>
> ***Further to the meeting yesterday that was arranged by you in relation to the posting of company documents on a social media platform, I am deeply concerned that this will not be a fair hearing as it's being dealt with in the office.***
>
> ***In relations to the text message from December 2017, incident on the 19th March 2018, 22nd February 2018. I am adamant now that this is turning into a personal matter, these topics are irrelevant to the investigation, as it's got nothing to do with the social media investigation. If I remember correctly yesterday this information about the text message and other issues came to you at the last minute from upstairs, which I stated that they have been resolved. These incidents should be removed from the investigation.***
>
> ***Have I been suspended on the grounds of integrity?***
>
> ***The company has failed on its own policies, as I have a grievance pending from the 23rd February 2018 against James Reath, which still hasn't been heard by any manager. I have sought advice from ACAS. I am now adamant I am being watched by a certain individual from***

work, I fear for my safety, I have moved away from home address for safety reasons to a location locally, which I am not going to disclose, I feel unsafe sometimes at work.

Any timescale on how long this will take and will I receive my average hours?

I need a full disclose. I personally believe I am being targeted by the company, someone has a vendetta against me or is it age discrimination, bullying or I am afraid to say, its due to my ethnicity and race, which falls under the equality act 2010.

55. On 6 April 2018, the Claimant was suspended. The letter of suspension [277] included the following extract [sic]:

We have concerns regarding allegations of; Posting of company documents on a social media website, falsifying of e-texts to management after failing to muster for an ICE shift and your overall integrity, which is a fundamental part of your DCO accreditation.

As a consequence of this, you will be suspended pending an investigation. This suspension does not constitute formal disciplinary action and is necessary to ensure a fair and timely investigation.

During the investigation you will remain suspended on full pay and should not come into the office or contact any members of staff, or clients, without prior permission from myself as the investigating manager.

56. On 17 April 2018 at 11.00, [321] the Claimant wrote to Mr Monavaris following up his grievance. He wrote [sic]:

Hi Freddy

I don't where to start from if the matter was dealt with informally, in relation to my grievances I raised on the 23rd February 2018. Then why where half the issues raised again with Carl Jackson on the initial investigations meeting and I was challenged.

In relation to the ICE text message in December, you pulled me into the office and asked me what happened, after a discussion you said no further action will be taken and you will deal it. Why has it been brought up after 5 months again?, Then I have to answer about why I didn't attend LOW Fire training on the ?2nd February, where I had money taken from my wages unfairly, as other people didn't and there was another incident on the 19th March 2018.

I am completely frustrated and stressed over this and it doesn't help my medical condition that I suffer from. I spoke to Andy Barber who stated that employees should feel safe and secure in the work environment, but I disagree as I feel I been singled out here.

So that's why I feel my grievance hasn't been dealt with?, I feel my

grievance is being used against me as I raised some concerning issues, where the office has messed up. I have copied my union rep Debbie from Unite into this email.

57. Later on 17 April 2018 at 15.56, Mr Monavaris replied as follows [sic]:

Hi Max

As you are now raising a formal grievance and it is linked to the current investigation, if the case progresses to disciplinary then your grievance will be discussed at the disciplinary hearing as per the Capita disciplinary policy.

58. On 19 April 2018 at 18.31, the Claimant emailed Mr Monavaris as follows [sic]:

Hi Freddy

I don't understand why my grievance is linked with the current investigation; it was raised on the 23 February 2018. I thought once a employee raises a concern at work and puts in a grievance, it should be investigated and looked into, It's adamant that my issues that I raised in February are being used against me.

59. On 18 April 2018, Mr Jackson produced an investigation report [313] which included the following conclusions and recommendations [sic]:

Conclusions

<u>Facebook post</u>
From the Investigation meeting held and review of the evidence provided, I believe Muqaddas did post the company document on Facebook. Muqaddas stated he believed he was probably hacked, I don't believe this to be accurate due to the fact it's a specific company document, and posted on a group page which is supposed to be only for overseas staff. in the statement from Fyrldon Monavaris (Duty Manager), he states Muqaddas has a history of posting controversial stuff on Facebook in order to get a reaction out of others. I believe this to be true in this instance, due to the sensitivity surrounding the whole WTR and banding policy. The Duty Manager Fyridon Monavaris was initially shown the Facebook original page, so no question of alleged Photoshop or amending. Muqaddas as part of the investigation provided evidence of other DCOs that have posted documents or sensitive information on that page. This information has been received and will be investigated separately. It should be noted that all staff have been previously warned about posting in the private group as it is still deemed as a breach of the Social Media Policy. in addition there seems to a growing trend with this closed group on Facebook, which is being used to openly discuss work items and issues. There are also group members who form part of this that are no longer employees of the company. It appears to insight hatred and the need to try arid wind as many of the other members up as possible.

Falsified E-Text
In relation to the edited e-txt message submitted by Muqaddas, I also find this to be fraudulent. I've checked the e-txt system and have a copy of the message sent, this has also been checked with others who were sent the same message. The part of the message that Muqaddas submitted to the Duty Manager was missing the part which detailed the re tasking to ICE, which appears to be a deliberate attempt to avoid doing ICE work. I've looked at the message to see if some parts may have been missing, but the final part of the message Is there which means it has been edited. I asked Muqaddas to show me in the investigation meeting the original e-txt, but he was only able to show the edited text that was sent to the Duty Manager, the original message was missing. Texts are easily edited and resent on various devices, be that iPhones, Samsung etc the evidence solely points in the direction that Muqaddas has done this and submitted to the Duty Manager.

Failure to attend fire training
In regards to the missed fire training, It appears that there may have been an error with the entry onto RECOS which allowed the tasking to Dublin to take place for the following day. Although that may have been the case Muqaddas should've still attended as planned, and queried with the Duty Manager. The comment made that he thought it was the following day doesn't make sense, as he'd accepted the tasking to Dublin so knew it couldn't have taken place at the same time.

The reoccurring pattern seems to be that Muqaddas will try to avoid all non-flying duties as best as he can, this isn't an option and a DCO should be expected to fulfill all aspect of his/her role.

The evidence and statements would point that Muqaddas is an extremely difficult member of staff, whose integrity is highly questionable.

Fraudulent claim
A claim was also submitted my Muqaddas following the coach fire, in that Muqaddas has claimed £300 & $250 and various other electrical items. I find this highly questionable as to why a DCO would be carrying this amount of cash in his belongings on a charter operation, as there is no requirement or necessity for someone to carry this amount of cash on them. There Is also a video of the fire which was uploaded onto Youtube which Is alleged to of been recorded by Muqaddas which you can hear his voice in the recording.

Muqaddas has denied all aspects of the allegations, be that the post on facebook or the manipulation of the etxt, or purposely missing driver training at LGW.

Recommendation

I recommend that this proceeds to a disciplinary hearing based on the above facts, and the other items explored further at a disciplinary hearing for:

Breaching the Capita social media policy by posting a sensitive

company document

Falsiying an e-text after missing a removal

Dishonesty and integrity issues in the DCO role

60. The Tribunal's view on the investigation was that it was cursory and lacked the basic procedural steps that one would expect to see in a thorough investigation. For example, Mr Jackson did not interview anyone prior to writing his report. The report seems to have been based largely on the interview with the Claimant, in circumstances where the Claimant was not even questioned about certain matters appearing in the report.

61. In order to perform the Claimant's role, it is necessary to have approval from the Home Office, which is done through a certification process. That certification process is carried out by a third-party company called Cataphract Ltd ("Cataphract"). The Tribunal was shown a guidance document produced by the Home Office regarding the certification process. The said guidance states at paragraph 69, that a certificate may be suspended where a DCO faces allegations of gross misconduct. Paragraph 73 states that "*the manager's decision to suspend a certificate must always be independent from any precautionary or disciplinary action on the part of the employer*". The Claimant's certificate was suspended on 9 May 2018 [364]. The Claimant appealed against the suspension of his certification by letter dated 28 April 2018 [334].

62. The Claimant was assessed by OH on 28 May 2018 and deemed unfit to attend a disciplinary hearing due to him suffering from depression and anxiety.

63. By letter dated 4 June 2018, the Respondent invited the Claimant to a disciplinary hearing on 8 June 2018 to answer the following allegations of misconduct:

   - Breaching the Capita social media policy by posting a sensitive company document;
   - Falsifying an e-text after missing a removal; and
   - Dishonesty and integrity issues in the DCO role.

64. By letter dated 6 June 2018, the disciplinary hearing was postponed on the Claimant's request and a new date of 22 June 2018 was given.

65. The Claimant was referred to OH again and assessed on 17 July 2018. The OH report stated that the Claimant was still unfit to attend a disciplinary hearing due to anxiety and depression.

66. The Claimant remained absent from work and unable to attend any disciplinary hearing. The Claimant's case was reviewed by Mr Ashton in March 2019 when the Claimant was still absent from work. Mr Ashton was employed as Overseas Operation Manager. Mr Ashton considered the OH reports received about the Claimant and took advice from HR on whether disciplinary action should be pursued in the circumstances and given the delay.

67. Mr Ashton reviewed the disciplinary investigation pack prepared by Mr Jackson. He took the view that he did not think the investigation was as thorough as it could have been. He was concerned that the investigation started off as just being about the posting of a company document on social media but then widened out into something bigger, with multiple strands to it. He said he had to consider whether, almost a year later, he should pursue the allegations, some of which originated in in 2017.

68. Mr Ashton decided to discuss matters with the Claimant to see if they could draw a line under the disciplinary issues and get him back to work. His view at that point was that the allegations were very old and he wanted to move things forward.

69. Mr Ashton met with the Claimant on 28 March 2019 and followed this up with a letter dated 2 April 2019 [423] which said as follows [sic]:

> ***Dear Muqaddas,***
>
> ***Further to the formal discussions held on Thursday 28th March 2019 regarding an incident that occurred in December 2017, I am writing to confirm the outcome.***
>
> ***You were suspended whilst you were still working in Tascor. During your TUPE into Mitie in May 2018, you remained suspended pending an investigation. You were initially invited to a disciplinary hearing by Donna Lang, SDM. You were paid on suspension; however you did not attend this meeting as throughout the suspension you were being assessed by Occupational Health on a couple of occasions due to ill health.***
>
> ***You confirmed to me that you understood the purpose of the meeting and to discuss the incident that occurred in December 2017 and the subsequent events that followed. I highlighted that I had gone through your investigation pack and noted you held a copy from your invite letter back in May/June 2018. We both agreed that the pack was insufficient and could be better presented.***
>
> ***We did agree that an incident relating to social media use had occurred and you acknowledged that moving forward you must ensure that you adhere to the policies and procedures from the company, specifically you must be mindful of how you use social media. I duly note you have taken steps to minimise any negative***

association in the future by removing yourself from work related social media.

We discussed the management structure and individuals that had previously worked prior to your suspension have left the business. We were honest with you that there were still areas that we were working through and improving but we feel that the business has changed and will continue to do so for the better.

We understand that you have submitted a claim relating to lost possessions during the coach fire in February 2018 under Tascor. We agreed that we will assist in contacting the coach provider and Tascor/Capita insurance to progress your claim, however this will be your responsibility to progress to a conclusion.

I understand you are now aware that you need to attend an ITC course which is approx. 6 weeks from the. 13th May 2019 at Heathrow.

In relation to your current suspension, you are now permitted to work at Spectrum House, Gatwick, reporting to SDM Jackson. However you are unable to carry out any DCO (E) duties whatsoever until such time a decision is taken by the Home Office relating to your DCO accreditation.

On this particular occasion I have decided not to proceed with formal disciplinary action as a result of your assurances that you will be able to resolve the issues of concern. Therefore, this letter is to be treated as confirmation that I have discussed the concerns above with you and you have accepted responsibility and will ensure to make every effort to address the shortcomings we have identified.

This letter is not intended to be a formal warning and does not form part of the Company's disciplinary procedure. It simply draws a point in time at which we have informed you that we require an immediate and sustained improvement in the areas that we have discussed and as such, takes the form of what we consider to be a reasonable written management instruction not to repeat these actions in the future.

Although this is not a formal warning, should there be any repeat of this conduct, or indeed any misconduct in general you may be subject to formal disciplinary action. Please find enclosed a copy of the company's disciplinary rules and procedures in this regard.

If you have any queries regarding the content of this letter please do not hesitate to contact me. We are really looking forward to your return to the business.

Yours sincerely

Gregory Ashton Overseas Operations Manager

70. The Respondent then started the process of attempting to get the Claimant's Home Office certificate reinstated. They submitted to Cataphract the original investigation report prepared by Carl Jackson and

the letter from Mr Ashton. The Claimant was unhappy that what he considered "*the old disciplinary information*" had been sent to Cataphract and wrote to Ms McClymont with his concerns. She informed him that it was standard procedure to send the documentation.

71. Both Ms McClymont and Ms Marchant (HR) both had a conversation with Cataphract and they were lead to believe it was likely that the Claimant's certificate would be reinstated, but that they should wait for confirmation. However, Ms Marchant informed the Claimant, by email dated 7 May 2019, that his certificate *had* been reinstated. Ms McClymont, in her evidence to the Tribunal, considered this to be a misunderstanding and error on the part of Ms Marchant. The Tribunal considered this to be the most likely explanation, namely that Ms Marchant had misunderstood what she heard from Cataphract.

72. What in fact happened was that the certification was revoked on 10 May 2019. The revocation letter said as follows:

> ***In accordance with the terms of paragraph 7 of Schedule 11 of the Immigration and Asylum Act 1999, I am revoking your certification as a DCO with immediate effect. The reason for this revocation is that on the 18/04/2018 the Home Office manager suspended your certification after being informed that you were subject to an investigation relating to an allegation of posting company documents on social media. I have read and reviewed the documents relating to this case and after careful consideration, I am not satisfied that you are a fit and proper person to continue custodial duties.***

73. Faced with the revocation of the Claimant's certificate and the realization that the Claimant could not perform his role, he met with Mr Blackford on 4 June 2019 to discuss the potential termination of his employment. At the meeting the Claimant expressed his concern that the Home Office had not been given confirmation that the Respondent was not proceeding with disciplinary action in respect of the allegations for which he was suspended. He carried out his own investigations and ascertained that the letter of concern, written by Mr Ashton, as well as the original investigation report prepared by Mr Jackson, had been submitted to the Home Office.

74. By letter dated 4 June 2019, the Claimant's employment was terminated with immediate effect due to the revocation of his Home Office certificate and his inability, therefore, to do the job which he was employed to do.

75. The Claimant appealed against his dismissal. The appeal was heard by Mr Paul Morrison on 4 July 2019. By this time, the Claimant's appeal against the revocation of his certificate had been successful. In light of these changing circumstances and taking on board the points made by the Claimant, Mr Morrison allowed the Claimant's appeal and reinstated him. His pay was backdated so that he suffered no financial loss as a result of

the original decision to dismiss.

Law

Direct discrimination

76. The EQA sets out provisions prohibiting direct discrimination. Section 13 EQA states:

> ***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.***

77. The focus in direct discrimination cases must always be on the primary question "*Why did the Respondent treat the Claimant in this way?"* Put another way, *"What was the Respondent's conscious or subconscious reason for treating the Claimant less favourably?"* It is well established law that a Respondent's motive is irrelevant and that the protected characteristic need not be the sole or even principal reason for the treatment as long as it is a significant influence or an effective cause of the treatment. In ***R v Nagarajan v London Regional Transport [1999] IRLR 572*** it was said that "*an employer may genuinely believe that the reason why he rejected the applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim, members of an Employment Tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, that race was the reason why he acted as he did*".

78. The provisions relating to the burden of proof are set out at Section 136(2) and (3) of EQA which state:

> ***(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.***
>
> ***(3) But subsection (2) does not apply if A shows that A did not contravene the provision.***

79. It is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of any evidence from the Respondent, that the Respondent committed an act of discrimination. Only if that burden is discharged would it then be for the Respondent to prove that the reason it dismissed the Claimant was not because of a protected characteristic. Therefore, it is clear that the burden of proof shifts onto the Respondent only if the Claimant satisfies the Tribunal that there is a 'prima facie' case of discrimination. This will usually be based upon inferences of discrimination drawn from the primary facts and circumstances found by the Tribunal to have been proved on the balance of probabilities. Such inferences are

crucial in discrimination cases given the unlikelihood of there being direct, overt and decisive evidence that a Claimant has been treated less favourably because of a protected characteristic.

80. When looking at whether the burden shifts, something more than less favourable treatment than a comparator is required. The test is whether the Tribunal "*could conclude*", not whether it is "*possible to conclude*". In ***Madarassy v Nomura International plc 2007 ICR 867, CA*** it was said that the bare facts of a difference in treatment only indicates a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal "*could conclude*" that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination. However, 'the "more" that is needed to create a claim requiring an answer need not be a great deal. In some instances, it can be furnished by non-responses, an evasive or untruthful answer to questions, failing to follow procedures etc. Importantly, it is also clear from case law that the fact that an employee may have been subjected to unreasonable treatment is not necessarily, of itself, sufficient as a basis for an inference of discrimination so as to cause the burden of proof to shift.

81. Notwithstanding what is said above, in ***Laing v Manchester City Council and anor 2006 ICR 1519, EAT***, the point was made that '*it might be sensible for a tribunal to go straight to the second stage… where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question where there is such a comparator — whether there is a prima facie case — is in practice often inextricably linked to the issue of what is the explanation for the treatment*'.

Discrimination arising from disability

82. Section 15 EQA provides as follows:

> ***(1) A person (A) discriminates against a disabled person (B) if (a) A treats B unfavourably because of something arising in consequence of B's disability, and (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.***
>
> ***Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.***

83. Section 15 EQA therefore requires an investigation into two distinct causative issues: (i) did the Respondent treat the Claimant unfavourably because of an (identified) 'something'?; and (ii) did that something arise in consequence of the Claimant's disability? The first issue involves an examination of the state of mind of the relevant person within the Respondent ("A"), to establish whether the unfavourable treatment which is in issue occurred by reason of A's attitude to the relevant 'something'.

The second issue is an objective matter, whether there is a causative link between the Claimant's disability and the relevant 'something'. The causal connection required for the purposes of s.15 EQA between the 'something' and the underlying disability, allows for a broader approach than might normally be the case. The connection may involve several links; just because the disability is not the immediate cause of the 'something' does not mean to say that the requirement is not met. It is also clear from case law that it is only necessary for the Respondent to have knowledge (actual or constructive) of the underlying disability; there is no added requirement that the Respondent have knowledge of the causal link between the 'something' and the disability.

84. The distinction between conscious/unconscious thought processes which are relevant to a Tribunal's enquiry on a S.15 claim, and the employer's motives for subjecting the claimant to unfavourable treatment, which are not, was described by Simler J in ***Secretary of State for Justice and anor v Dunn EAT 0234/16*** in the following terms: "*Counsel for the claimant asserts that motive is irrelevant. Moreover, he submits that the claimant did not have to prove the reason for the unfavourable treatment but simply that disability was a significant influence in the minds of the decision-makers. We agree with him that motive is irrelevant. Nonetheless, the statutory test requires a tribunal to address the question whether the unfavourable treatment is because of something arising in consequence of disability… [I]t need not be the sole reason, but it must be a significant or at least more than trivial reason. Just as with direct discrimination, save in the most obvious case, an examination of the conscious and/or unconscious thought processes of the putative discriminator is likely to be necessary*" [emphasis added].

85. Turning to the issue of knowledge, HHJ Eady QC in ***A Ltd v Z [2020] ICR 199, EAT***, summarised the authorities as follows (at [23]):

> ***"(1) There need only be actual or constructive knowledge as to the disability itself, not the causal link between the disability and its consequent effects which led to the unfavourable treatment, see City of York Council v Grosset [2018] EWCA Civ 1105, [2018] IRLR 746, [2018] ICR 1492 CA at para 39.***
>
> ***(2) The Respondent need not have constructive knowledge of the complainant's diagnosis to satisfy the requirements of s 15(2); it is, however, for the employer to show that it was unreasonable for it to be expected to know that a person (a) suffered an impediment to his physical or mental health, or (b) that that impairment had a substantial and (c) long-term effect, see Donelien v Liberata UK Ltd (2014) UKEAT/0297/14, [2014] All ER (D) 253 (Dec) at para 5, per Langstaff P, and also see Pnaiser v NHS England (2016) UKEAT/0137/15/LA, [2016] IRLR 170 EAT at para 69 per Simler J.***
>
> ***(3) The question of reasonableness is one of fact and evaluation, see [Donelien v Liberata UK Ltd] [2018] EWCA Civ 129, [2018] IRLR 535 CA***

at para [27]; nonetheless, such assessments must be adequately and coherently reasoned and must take into account all relevant factors and not take into account those that are irrelevant.

(4) When assessing the question of constructive knowledge, an employee's representations as to the cause of absence or disability related symptoms can be of importance: (i) because, in asking whether the employee has suffered substantial adverse effect, a reaction to life events may fall short of the definition of disability for EqA purposes (see Herry v Dudley Metropolitan Council (2016) UKEAT/0100/16, [2017] ICR 610, per His Honour Judge Richardson, citing J v DLA Piper UK LLP (2010) UKEAT/0263/09, [2010] IRLR 936, [2010] ICR 1052), and (ii) because, without knowing the likely cause of a given impairment, "it becomes much more difficult to know whether it may well last for more than 12 months, if it is not [already done so]" [sic], per Langstaff P in Donelien EAT at para 31.

(5) The approach adopted to answering the question thus posed by s 15(2) is to be informed by the Code, which (relevantly) provides as follows:

"5.14 It is not enough for the employer to show that they did not know that the disabled person had the disability. They must also show that they could not reasonably have been expected to know about it. Employers should consider whether a worker has a disability even where one has not been formally disclosed, as, for example, not all workers who meet the definition of disability may think of themselves as a 'disabled person'.

5.15 An employer must do all they can reasonably be expected to do to find out if a worker has a disability. What is reasonable will depend on the circumstances. This is an objective assessment. When making enquiries about disability, employers should consider issues of dignity and privacy and ensure that personal information is dealt with confidentially."

(6) It is not incumbent upon an employer to make every enquiry where there is little or no basis for doing so (Ridout v T C Group (1998) EAT/137/97, [1998] IRLR 628; Alam v Secretary of State for the Department for Work and Pensions (2009) UKEAT/0242/09, [2010] IRLR 283, [2010] ICR 665).

(7) Reasonableness, for the purposes of s 15(2), must entail a balance between the strictures of making enquiries, the likelihood of such enquiries yielding results and the dignity and privacy of the employee, as recognised by the Code."

86. If section 15(1)(a) is resolved in the Claimant's favour, then the Tribunal must go on to consider whether the Respondent has proved that the unfavourable treatment is a proportionate means of achieving a legitimate aim. As stated expressly in the EAT judgment in ***City of York Council v Grosset UKEAT/0015/16*** the test of justification is an objective one to be applied by the tribunal; therefore while keeping the respondent's 'workplace practices and business considerations' firmly at the centre of

its reasoning, the ET was nevertheless acting permissibly in reaching a different conclusion to the respondent, taking into account medical evidence available for the first time before the ET. The Court of Appeal in ***Grosset*** ***[2018] EWCA Civ 1105***, upheld this reasoning, underlining that the test under s 15(1)(b) EqA is an objective one according to which the ET must make its own assessment.

87. The EAT in ***Hensman v Ministry of Defence UKEAT/0067/14/DM*** applied the justification test as described in ***Hardy and Hansons Plc v Lax [2005] ICR 1565, CA*** to a claim of discrimination under s.15. Singh J held that when assessing proportionality, while an ET must reach its own judgment, that must in turn be based on a fair and detailed analysis of the working practices and business considerations involved, having particular regard to the business needs of the employer.

88. In terms of the burden of proof, it is for the Claimant to prove that he has been treated unfavourably by the Respondent. It is also for the Claimant to show that 'something' arose as a consequence of his or her disability and that there are facts from which it could be inferred that this 'something' was the reason for the unfavourable treatment.

Harassment

89. Harassment is defined under s.26 EQA 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"***

90. Unwanted conduct means "*conduct which is unwanted by person B*"; ***Thomas Sanderson Blinds Ltd v English UKEAT/0317/10/JOJ*** at [28]. Consequently, this requirement is a subjective one which depends on the state of mind of the Claimant.

91. The Equality and Human Rights Commission Code of Practice on Employment (2011) ("the Code")) suggests the term "unwanted" means essentially the same as "unwelcome" or "uninvited". "Unwanted" does not mean that express objection must be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment.

92. The final element to consider is whether the purpose or effect of the conduct was to violate the Claimant's dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

93. The purpose requirement is a subjective one with respect to the harasser. With respect to the 'effects' requirement however, the Court of Appeal in ***Pemberton v Inwood [2018] I.C.R. 1291*** held at [88]

> ***In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of subsection (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, 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.***

94. This test is therefore a mixed subjective and objective one, with it being necessary to consider both elements.

95. Whether or not the conduct is related to the characteristic in question is a matter for the tribunal, making findings of fact and drawing on all the evidence before it; ***Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and anor EAT 0039/19***. The fact that the complainant considers that the conduct related to a particular characteristic is not necessarily determinative, nor is a finding about the motivation of the alleged harasser. Nevertheless, in any given case there must still be some feature or features of the factual matrix identified by the tribunal which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged in the claim.

Analysis, conclusions and associated findings of fact

(a) Disability discrimination

Being assigned complex cases and then having them removed (paragraphs 7.1-7.3 above)

96. The Claimant gave evidence that the pattern of assigning him complex cases and then withdrawing them, went back to 2014 when he started working for the Respondent. Indeed, he said that he had never completed a complex case. His case was that this was because of his size and the perception of his ability to do complex cases due to his size. He claims his size is due to his disability, a condition called Neurofibromatosis.

97. The Claimant accepted in evidence that the first time he informed the Respondent of his disability was when he completed the post offer health questionnaire on 19 May 2018. He also accepted that in a health declaration he answered no to the following questions: (i) Are you aware of any medical condition, disability* or inherited disorder, which may prevent you from fulfilling your contract of employment without reservation now or in the foreseeable future? and (ii) Do you consider yourself to have a disability?

98. When asked about his height under cross examination, the Claimant said he was 5 foot 7 inches tall. Yet in his witness statement the Claimant said he was 5 foot 5 inches tall, which he said under cross examination was incorrect. It was also put to the Claimant that in a post-offer health questionnaire dated 19 May 2018, he said he was 5 foot 8 inches tall. The Tribunal concluded that the more reliable measure was that contained in his post-employment questionnaire.

99. Mr Sprack argued that whilst 19 May 2018 was the point the Respondent had ‘actual’ knowledge of the Claimant's disability, they had constructive knowledge in 2015. The Tribunal disagreed, concluding that there was nothing from which the Respondent ought to have known that the Claimant was disabled prior to 19 May 2018. The fact that the Claimant was shorter than average, on its own, was certainly not enough to persuade the Tribunal that the Respondent had constructive knowledge of disability.

100. The Tribunal was referred to documentary evidence during the hearing which showed that the Claimant completed complex cases to Poland on 25 August 2019 and Afghanistan on 6 September 2019. Data provided by Mr Ashton also showed an allocation of complex cases. Against that background, the Tribunal considers it inconceivable that the Claimant would not have complained or raised a grievance much earlier had he been unhappy about the number of complex cases he had completed. The Tribunal was shown an email from the Claimant in which he complained that he had not done a long-haul job since December 2017. Had he been unhappy that he had not done any complex cases since 2014, the Tribunal believes he would have said so. The Tribunal found the Claimant very

evasive when being questioned by Mr Zovidavi about destinations he had travelled to, e.g., a trip to China. On balance, the Tribunal finds that the Claimant must have completed some complex cases between the period 2014-2018, contrary to what he stated during the hearing.

101. Considering all of the evidence, the Tribunal concluded that both disability discrimination claims must fail. There was insufficient evidence from which the Tribunal could conclude that the Claimant had been less favourably treated than a hypothetical comparator or treated unfavourably due to his size or a perception about any limitations due to his size. There was little evidence from which the Tribunal could conclude that the Claimant received less complex jobs than his colleagues and certainly none that supported the Claimant's case that he was treated differently on account of his size. The Respondent did not know about the Claimant's disability until 19 May 2018, and by that time was not working in any event due to sickness absence. For this reason also, the claims brought by the Claimant pursuant to s.13 and s.15 EQA must fail.

(b) Race discrimination

Instigation of disciplinary proceedings against the Claimant in March 2018 and continuing through to 2019 (paragraph 9.1 above)

102. The Tribunal considered the evidence of Mr Jackson very carefully. The Claimant invited the Tribunal to consider not only Mr Jackson's mindset at the time of making the decision to start disciplinary proceedings, but the extent to which others played their role in that process, notably Mr Heath, Mr Monavaris and Ms Duke. In effect the Claimant was alleging that there was a conspiracy between Mr Jackson and these individuals.

103. The Tribunal considered the failings of Mr Jackson in conducting a thorough and fair investigation, as well as the complaints about racist comments that were clearly being made by certain employees of the Respondent about their colleagues. The Tribunal concluded that such matters were capable of shifting the burden of proof. The Tribunal therefore looked closely at the reasons for the disciplinary action put forward by the Respondent in order to decide whether they had proved that there was a non-discriminatory reason for their actions.

104. The Tribunal concluded that the Respondent's reason for starting disciplinary proceedings was not because of the Claimant's race. The Tribunal is satisfied that the Respondent had good reason to take steps to initiate a disciplinary process against the Claimant and that such decision was in no sense whatsoever because of the Claimant's race. The Claimant noted the following points in particular, which led it to that conclusion:

104.1. It was accepted by the Claimant that posting the internal memo in

question would be a breach of the social media policy and potentially an act of gross misconduct. Whilst the Claimant denies he was responsible for the post, the Tribunal concluded that it was reasonable for the Respondent to assume, at least for the purposes of having good reason to invite the Claimant to a disciplinary hearing, that it was an authentic post.

104.2. The Tribunal was satisfied that the Respondent treated such matters seriously and had taken disciplinary action against other white employees previously, leading to dismissal. The Tribunal found it difficult, therefore, to conclude that the Claimant was being treated any less favourably.

104.3. The Tribunal concluded that the Respondent's concerns regarding the second allegation of misconduct (the matter referred to at paragraphs 37-40 above) was completely justified. Not only did the Claimant not report for duty when he should have done, but there was evidence that he had tampered with the text message to support his reason for not reporting. The Respondent clearly had concerns about the Claimant's integrity, which then fed into the third allegation.

105. The Tribunal accepted Mr Gregory’s evidence that the reason he decided against continuing formal action against the Claimant was due to the flaws in the investigation process and the time that had elapsed since the process started. That is not to say, however, that the Respondent was not justified in taking the action it did. The Tribunal was satisfied that the Respondent had taken the disciplinary action against the Claimant for the reasons it stated and not because of race. The Tribunal was not satisfied that Mr Jackson was in any sense motivated to take action because of the Claimant's race, as opposed to the misconduct referred to above, and neither was it satisfied that there was any conspiracy between him and Mr Heath, Mr Monavaris or Ms Duke.

106. For the above reasons, the Claimant's claim of direct discrimination fails. With regards the claim of harassment, the taking of disciplinary action neither had the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. It was also not related to race.

Non-payment of medical bill (paragraph 9.2 above)

107. The Tribunal relies on its findings of fact at paragraph 41 above. The Tribunal concluded that the problems here were caused by administrative delays as between the Respondent and their insurers. It had nothing to do with Mr Heath or the Claimant's race. The claims of direct discrimination and harassment therefore fail.

Referral to OH (paragraph 9.3 above)

108. The Tribunal relies on its findings of fact at paragraph 42 above. The Tribunal concluded that there was not the slightest evidence that the referral was because of the Claimant's race or that someone of a different race to the Claimant would have been treated any differently. The referral to OH cannot be said to be related to race. For these reasons the claims of direct discrimination and harassment must fail.

Being rebuked for having a flu vaccination (paragraph 9.4 above)

109. The Tribunal relies on its findings at paragraph 43 above. The Tribunal read the email from Mr Heath but could not conclude that the Claimant had been rebuked as alleged, or at all. Mr Heath was simply enquiring of the Claimant who authorized the visit. There is no evidence whatsoever from which the Tribunal could conclude that such action was because of the Claimant's race. As such the claims of direct discrimination and harassment must fail.

Greg Ashton fabricated a letter of concern (paragraph 11.1 above)

110. The Tribunal relies on its findings of fact at paragraphs 67-69 above. The Claimant’s case is that Mr Ashton “*fabricated*” his letter because it contained what the Claimant referred to as “*incorrect statements*”. The Tribunal concluded that Mr Ashton did not fabricate his letter, as alleged or at all. The Tribunal notes that Mr Ashton was not questioned as to ‘racial’ motives for taking the action he did. Having listened to Mr Ashton and having considered the allegation, the Tribunal was not satisfied that what Mr Ashton did in writing his letter was related to race. Neither did it have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. For these reasons, the Tribunal concluded that this claim of harassment must fail.

The Respondent misled the Claimant to say the Respondent had full clearance from the Home Office when this was incorrect (paragraph 11.2 above)

111. The Tribunal relies on its findings of fact at paragraph 71 above. The Tribunal accepted the Respondent's evidence that this arose from a misunderstanding. There is no evidence from which the Tribunal could conclude that such actions were related to the Claimant's race. Neither was what Ms Marchant did, done with the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. It was not

reasonable for it to have had that effect. This claim of harassment must therefore fail.

The Respondent provided information to the Home Office about the disciplinary investigation with the intention that the Claimant's accreditation to work would be revoked (paragraph 11.3 above)

112. The Tribunal is satisfied that the Respondent provided information to the Home Office that it was required to do. There is no evidence from which the Tribunal could conclude that such actions were related to the Claimant's race. Neither was what Ms Marchant did, done with the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. This claim of harassment must therefore fail.

After four weeks of an Initial Training course which started on 13 May 2019, the Respondent withdrew the Claimant from that course (paragraph 11.4 above)

113. The Claimant accepted in oral evidence that at the time he was withdrawn from the course his Home Office accreditation had been withdrawn and he could no longer perform his duties. In the circumstances the Respondent had a valid reason for withdrawing the Claimant from the Initial Training Course. There is no evidence from which the Tribunal could conclude that such actions were related to the Claimant's race. Neither was what Ms Marchant did done with the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. This claim of harassment must therefore fail.

The Respondent dismissed the Claimant on 4 June 2019 (paragraph 11.5)

114. At the time of dismissal, the Claimant had lost his Home Office certification and there was no indication as to how long the Claimant's appeal might take to decide, nor whether the appeal would succeed. Ms McClymont told the Tribunal that appeals can take as long as 12 weeks to determine and that in her experience of around 20 cases, there had only been one other successful appeal. The Claimant was offered redeployment but did not find the alternative roles of interest. There is no evidence from which the Tribunal could conclude that such actions were related to the Claimant's race. Neither was what Ms Marchant did, done with the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. The claim of harassment must therefore fail. Had the Respondent's actions been racially motivated, it is difficult to see why they would have re-instated the Claimant. For the above reasons, this claim of harassment must fail.

115. Given the above conclusions, it was not necessary to consider, in the alternative, the time points raised in respect of these claims by the Respondent.

(c) Unlawful deduction from wages

Holiday pay (paragraph 13.4 above)

116. The Claimant accepted that this claim had been resolved and therefore is no longer in issue.

Flying allowances (paragraph 13.2 above)

117. Although the Claimant sought to expand this claim considerably during the hearing, claiming losses going back to 2014, there was no application during the hearing to amend the pleadings. The Tribunal has therefore treated this as a claim for lost flying allowances during his suspension. Mr Jackson said in evidence that the Respondent paid average hours (240 hours per month). The Tribunal was shown correspondence from Ms Merchant to the Claimant confirming that the Claimant had been paid the correct amounts during suspension. The Claimant had not demonstrated in evidence that the Respondent had paid him less than he was entitled to. The Tribunal accepted the Respondent's evidence and concluded that the Claimant was paid everything he was owed. Accordingly, this claim must fail.

Underpayment of wages for July 2019 (paragraph 13.3 above)

118. This claim related to the period between dismissal in 2019 and the Claimant's reinstatement. However, it is clear that the Claimant suffered no loss in wages at all because he was paid in lieu of notice when he was dismissed. The payment in lieu covered the period between dismissal and reinstatement. There was no deduction of wages and therefore this claim must fail.

Non-payment claim of £160 in respect of 22 February 2018 and 19 March 2018 (paragraph 13.4 above)

119. The Respondent alleges that on 22 February 2018, the Claimant did not attend scheduled training. When asked why he did not attend, he is alleged to have replied "*I thought it is for tomorrow*" despite having confirmed his availability for a transfer. The Tribunal relies on its findings of fact at paragraph 47 above in respect of the 19 March 2018 claim.

120. The Claimant accepted that he did not do paid work or training on either 22 February 2018 or on 19 March 2018. The Tribunal concluded there was no good reason for this and that the Claimant could have no claim for

payment for such days in these circumstances. For this reason, this claim must fail.

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Employment Judge Hyams-Parish
4 June 2021

SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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