THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE BALOGUN**

MEMBERS: **Ms C Bonner**
Ms CL Oldfield

BETWEEN:

MR R EWUJOWOH

Claimant

And

WILLIAM HILL ORGANIZATION LIMITED

Respondent

ON: **23 – 25 March 2021**
In Chambers 12 April 2021

APPEARANCES:

For the Claimant: In Person
For the Respondent: Ben Williams, Counsel

RESERVED JUDGMENT

All claims fail and are dismissed.

REASONS

1. By a claim forms presented on 29.12.17 and 26.5.18, the claimant complains of constructive unfair dismissal; race discrimination; disability discrimination; victimisation and whistleblowing detriment. All claims were resisted by the respondent.

2. The Tribunal heard evidence from the claimant. The respondent gave evidence through Catrina Craviero, former Business Performance Manager; James Anderson, former Area Manager; Tara Green, former Business Performance Manager and; Jason Sharp, Area Manager.

3. The parties presented a joint electronic bundle and references in square brackets are to pages within that bundle.

The Issues

4. The issue are set out in a List of Issues document prepared by the respondent. The issues narrowed as the hearing progressed and as allegations were abandoned. The specific issues remaining will be referred to in our conclusions.

The Law

Constructive dismissal

5. Section 95(1)(c) of the Employment Rights Act 1996 (ERA) provides that an employee shall be taken to be dismissed by his employer where the employee terminates the contract, with or without notice, in circumstances in which he is entitled to do so by reason of the employer's conduct.

6. The case; Western Excavating Limited v Sharp 1978 IRLR 27 provides that an employer is entitled to treat him or herself as constructively dismissed if the employer is guilty of conduct which is a significant breach of the contract or which shows that the employer no longer intends to be bound by one or more of its essential terms. The breach or breaches must be the effective cause of a resignation and the employee must not affirm the contract.

7. The case: Malik v Bank of Credit and Commerce International SA 1997 IRLR 462 provides that the implied term of trust and confidence is breached where an employer, without reasonable or proper cause, conducts itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

8. In London Borough of Waltham Forest v Omilaju [2005] ICR 481, the Court of Appeal stated that a final straw should be an act in a series whose cumulative effect amounts to a breach of trust and confidence and it must contribute to the breach. An entirely innocuous act on the part of an employer cannot be a final straw, even if the employee

genuinely, but mistakenly, interprets the act as hurtful and destructive of his trust and confidence in his employer. The test of whether the employee's trust and confidence has been undermined is objective.

Direct Race Discrimination

9. Section 13 of the Equality Act 2010 (EqA) provides that a person (A) discriminates against another (B) if because of a protected characteristic (in this case race), A treats B less favourably than A treats or would treat others.

Harassment

10. Section 26 EqA provides that a person (A) harasses another (B) if – A engages in unwanted conduct related to a relevant protected characteristic…….and 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.

11. In deciding whether the conduct has the effect referred to above, account must be taken of: a) the perception of B; b) the other circumstances of the case; c) whether it was reasonable for the conduct to have that effect.

Victimisation

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

13. The protected acts in question are listed at section 27(2) EQA.

Failing to make reasonable adjustments

14. Section 20 EqA provides that where a person (A) applies a provision, criterion or practice (PCP) which puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled it is the duty of (A) to take such steps as it is reasonable to have to take to avoid the disadvantage.

15. Section 21 EqA provides that a failure to comply with a section 20 duty constitutes discrimination against a disabled person.

Discrimination arising in consequence of disability

16. Section 15 of the EqA provides that 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.

Protected Disclosure (Whistleblowing) detriment

17. Section 43B of the Employment Right Act 1996 (ERA) provides that a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the matters listed in sub-sections (a)-(f).

18. Section 47B ERA provides that a worker has a right not to be subjected to any detriment by his employer on the ground that the worker has made a protected disclosure.

Findings of Fact

19. The respondent operates a UK retail gambling and gaming business. The claimant was employed by the respondent between 3 August 2015 and 5 January 2018, latterly as a Customer Experience Manager, reporting to Catarina Craveiro (CC), Business Performance Manager.

20. The claimant is Nigerian. In his particulars of claim he makes a number of allegations of direct race discrimination and these are identified in the List of Issues as 8 separate acts of less favourable treatment. However, during cross examination, he abandoned the majority of these. Those that remain are dealt with further on in the judgment.

21. By a letter dated 10 December 2017, the claimant tendered his written resignation. The stated reason given for the resignation was the manner of his suspension from work, However, his case before us is that this was the last straw in a series of incidents which, cumulatively, amounted to a fundamental breach of his contract. These are dealt with below.

22. The claimant was originally employed as a Customer Service Assistant. In January 2017, the claimant was appointed Customer Experience Manager. The position was as a relief manager within a geographical location called Cluster 46 which covered South London. The claimant's revised terms and conditions, which he signed on 1.2.17 contained the following clause:

    Whilst your normal place of work is at the location above, you may be required to work in any Company shop or location within reasonable travelling time of this or your home. When necessary you will also be required to move from one shop to another, including performing relief duties. [228]

23. Under the terms of his contract the claimant could be required to work in any shop that was within reasonable travel time of his base location or home. Relief workers cover shops where there is a staff shortage or urgency, usually at short notice.

24. Upon the claimant's appointment, CC became his line manager.

25. When the claimant was appointed to his new role, he lived in Lewisham but in April 2017, he moved to Dartford, Kent. One of the shops within his cluster was in Peckham, South London and CC would often instruct him to open up the shop at 6.45am. The claimant claims that he repeatedly told CC that he was unable to open the shop because he did not live locally and was threatened with disciplinary action when he refused to do so. The respondent contends that the claimant was objecting to a reasonable management instruction to work specific shifts. In the view of the respondent, travel by train from Dartford to Peckham was within reasonable travel distance.

26. In or around August 2017, the claimant was diagnosed with osteoarthritis in his right knee [302] The claimant relies on this as his qualifying disability. By a judgment dated 12 February 2019, Employment Judge Morton found that at the material time, the claimant was a disabled person within the meaning of section 6 EqA [660] There remains a dispute however as to the respondent's knowledge of disability.

27. The claimant contends that CC knew of his condition on 17 March 2017 because he told her verbally. The claimant had an appointment with his consultant on that day, who told him that he would need an operation on his knee and physio. The claimant says that he relayed this information to CC and kept CC informed of his condition by giving her copies of letters from his doctor and physio appointments at the hospital. CC accepted that the claimant had conversations with her regarding his health generally and would sometimes ask for time off for hospital or doctor's appointments or send her letters but he never told her about his disability.

28. It is clear from text messages between CC and the claimant in May 2017, that she was aware that he had a bad knee, that it was swollen and that he might need physio [134]. However, none of the messages refer to osteoarthritis. When it was put to the claimant in cross examination that he did not tell CC that he had osteoarthritis, he replied that he could not recall. The appointment letters the claimant provided to CC do not refer to his osteoarthritis either [89, 90, 97]. We accept CC evidence that the claimant did not tell her that he had osteoarthritis at this time.

29. The claimant accepted in evidence that the respondent was unaware of his disability as at 17 January 2017 (the claimant exchanged a number of texts with CC on this date) because he did not have the results of his diagnosis.

30. The first documentary reference to osteoarthritis provided to the respondent was the claimant's sick note of 22 August 2017, which recorded the reason for absence as "*Right knee osteoarthritis, awaiting operation*" [302]

31. In light of the above, we find that the respondent had knowledge of the claimant's disability from 22 August 2017.

32. The claimant contends that in February 2017, he was physically threatened with shooting by a regular customer at the North Cross LBO and because of this, he had requested not to work alone at that branch. However, CC told him that he had to work alone in that store. The claimant says that this amounted to a failure to have regard for his health and safety at work. Apart from stating that a threat was made towards him, the claimant has not provided any other details of the incident. However, there is reference to it in the notes of his grievance meeting on 7 November 2017. The claimant's account on that occasion was that a customer became irate after accusing him of short-changing

him by £10. The customer attempted to hit him and threatened to shoot him. CC deals with this at paragraph 14 of her statement. She states that although she tried to be flexible when the claimant had an issue working in a particular location, this was not always possible operationally. CC also says that there was no evidence to back up the complaint. CC was not challenged by the claimant on this and we have seen no evidence of the matter being reported at the time.

33. On 28 April 2017, the claimant forwarded a video clip to James Anderson (JA) Area Manager, under the respondent's whistleblowing policy [115]. The clip showed an employee of the respondent, Miss A, abusing a customer. The claimant relies on this as a protected disclosure. JA also received a separate complaint about the same matter from a customer as Miss A had posted images about the incident on social media.

34. JA brought the matter to CC's attention as she was the Business Performance Manager for Alisha. The matter was investigated and Miss A was dismissed.

35. The claimant contends that in breach of the whistleblowing policy, JA disclosed to CC his involvement in reporting the incident. The claimant contends that CC and Miss A were close friends and that CC subjected him to the detriments listed at (e) to (j) in the List of Issues. CC's evidence was that JA did not tell her that the claimant was the whistleblower and she did not know. JA told us that because the complaint came via the whistleblowing policy, he would not have divulged the claimant's name. There is no evidence at all that CC was told or was aware of the claimant's involvement and we find that she was not.

36. From mid-August 2017, the claimant was off work due to sickness.

37. On 17 August 2017, the claimant raised a formal grievance against CC alleging failure to pay outstanding overtime, unlawful deduction from pay and victimisation in relation to his refusal to open a shop at 6.45am [298] Jason Sharp (JS) Area Manager, was tasked with dealing with the grievance.

38. As the claimant was off sick, JS had a few conversations with him over the phone to discuss his complaint. During one of those conversations, JS asked the claimant to send him the documents relating to his pay issues and upon receipt, JS dealt with that matter on the papers. JS concluded that the claimant had in fact been overpaid and informed him of his decision on the phone. JS had planned to meet with the claimant on 28 September 2017, his proposed return to work date, to explain his decision on pay but this was overtaken by the claimant's suspension, which is dealt with below.

39. On 28 September 2017, the claimant resumed work and attended a return to work meeting with CC. After the meeting, CC told the claimant that Tara Green (TG) Business Performance Manager, wanted to discuss a work issue with him. Immediately, following the return to work meeting, TG met with the claimant and conducted and investigatory interview with him, in the presence of Kieron O'Donovan, a note-taker.
There were two matters that were put to the claimant. The first was a written complaint from a Helpdesk employee, LVS, that the claimant had been rude to her and had put the phone down on her [296] The claimant denied this. The second matter was an allegation that the claimant had made unauthorised use of petty cash to pay for taxis on 9th, 10th 11th 13th and 20th August 2017, totalling £125. The investigation of this matter was instigated by JA, who came across the transactions and queried them with CC, who

said that she was not aware of them. The claimant said that the payments had been authorised by CC. TG adjourned the meeting to take a statement from CC. CC provided a statement in which she denied authorising the payments [322]

40. TG felt that there was insufficient evidence to pursue the first allegation. However, in relation to the second, she felt that there was a disciplinary case to answer. Hence, on resuming the meeting, TG suspended the claimant on full pay pending a disciplinary hearing [328]

41. On 1 October 2017, the claimant wrote to TG expressing concerns about the investigatory meeting and alleging that his suspension was an act of victimisation because of his grievance against CC. "Victimisation" was used in the colloquial sense and not by reference to the EqA. [344-345]. This was treated as a further grievance and JS arranged a grievance meeting for 7 November 2017 [382-383]

42. The claimant claims that Marc Corfield (MC) Business Performance Manager, refused to provide him with document to enable him to prepare his defence for the disciplinary hearing scheduled for 13 October 2017 and threatened to stop his pay. The claimant relies on this as an act of direct race discrimination.

43. On 12 Oct 2017, there was an email chain between the claimant and MC relating to documents. At 9:14, the claimant sent an email to MC stating that he would not be attending the disciplinary meeting scheduled for the following day because he had not been provided with various documents [359]. At 9:17 MC replied that he had provided all the necessary documents by email and that the claimant should contact him if he was having trouble accessing them [360].

44. On 10 October 2017, MC had sent an email to the claimant with the heading "*disciplinary invite and attaching documents*". The email read:

"*hi ruebenem*

attached is the disciplinary invite letter for friday and attaching documents from previous meeting

regards"

45. Attached to the email was the Invite letter and a case History Report [346]

46. The claimant accepted in cross examination that he received the email. He said that he could open the attached case history report but not the documents that were with it. Being unable to open documents that has been provided by email is very different from being refused documents . We accept MC's evidence that the claimant did not tell him of his difficulties and find that MC did not refuse to provide documents.

47. A disciplinary hearing was arranged for 13 October 2017, before MC but the claimant failed to attend or notify the respondent of his non attendance. As a result, MC wrote to the claimant on 16.10.17 informing him that he was to be placed on unpaid suspension until he attended a re-arranged meeting. [368-369]

48. On 16 October 2017, the claimant sent in a doctor's note signing him off work from 16.10.17 to 5.11.17 with knee osteoarthritis [370-371].

49. On 18 October 2017, MC wrote to the claimant re-arranging the disciplinary meeting for 6 November 2017. The claimant was informed that in light of his sick note, he was no longer suspended and company sickness rules would apply. He was also told that company sick pay would be withheld for this period because he was subject to the disciplinary process and that he would receive statutory sick pay only. [380]
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50. On the pay date of 27 October 2017, the claimant did not receive any pay or SSP. The claimant alleges that when he contacted the HR department to query this he was told that his pay had been stopped because MC had instructed them to record his absence as unauthorised. The claimant did not say who he spoke to in HR and we did not hear from MC. It is unclear from the claimant's evidence whether the alleged instruction from MC pre-dated the receipt of the claimant's doctor's certificate on 16.10.17 or post-dated it. In our view, it is likely to have pre-dated it as MC's letter of 18 October makes clear that the decision to suspend him without pay had been reversed and that he would receive SSP going forward [380] The claimant's SSP (£62.44) was paid on 10 November 2017.

51. On 27 October 2017, the claimant wrote to JS confirming that he would be attending the grievance meeting on 7 November but complained that his August grievance against CC had not been dealt with and that this amounted to race discrimination. He relies on this letter as a protected act. [395-396]. JS thought that the claimant's original grievance was just about his pay and that he had dealt with it in September. However, on being told that there were matters outstanding, JS arranged to deal with those on 7 November 2017 with the later grievance.

52. Also on 27 October 2017, the claimant emailed MC claiming that the decision to suspend his pay amounted to direct race discrimination and victimisation. The claimant relies on this communication as a protected act. [386]

53. On 30 October 2017, the claimant wrote to the respondent stating that he would not be attending the re-scheduled disciplinary hearing, that he was taking legal action against the respondent and he did not have any confidence that the hearing would be conducted impartially and fairly. [398-399]

54. The grievance hearing duly took place on 7 November [408] On 16 November, JS provided his outcome. The grievance was partially upheld in that it was found that CC had failed to deal with the claimant's pay query in a timely manner and that the timescales were not in line with company expectations. However, the rest of the grievance was not upheld [433-435].

55. On 17 November 2017, the respondent wrote to the claimant again to re-arrange the disciplinary meeting for 23 November [438-439]. In response, the claimant sent a doctor's certificate signing him off work from 30 October 2017 until January 2018 [441-442]

56. The claimant claims that JS failed to respond to enquiries from the department of work and pensions (DWP) in relation to his claim for Employee Support Allowance (ESA) and that as a result, his application for ESA was refused. JA could not recall what he did with the DWP letter but speculated that he would have directed the claimant to HR

though there is no evidence that he did so. The information requested of the claimant from DWP was an SSP1 form or P45 [420]. The respondent was not in a position to provide either document as the claimant was still employed and by the date of the request, his SSP had been reinstated. The reason given by the DWP for refusing the claimant ESA was because he had no legal entitlement to it. [463-464]

57. While off sick, the claimant applied for and was offered a job with Jennings Bet as Duty Manager. On 12 December 2017, Jennings wrote to the claimant confirming his appointment and enclosing his contractual documentation. The contract gave a commencement date of 27 November 2017. The claimant told us that the date was wrong and that the offer was withdrawn on 30 November and then reinstated. He said that his actual commencement date was 12 December. Regardless, the claimant confirmed in evidence that he knew he was going to Jennings on 8 December 2017 and had attended an induction between the 4-7 December.

58. On 12 December 2017, the claimant emailed the respondent his letter of resignation citing the disciplinary investigation and the reduction in his pay during suspension as the reasons [460-462]

Submissions

59. The parties made oral submissions. These are summarised below.

Respondent's Submissions

60. There is no evidence that the claimant was forced to open shops at 6.45am. He was asked to do so, in accordance with his contract and there is evidence that he did so willingly. The respondent routinely changed the claimant's start time to accommodate him. The respondent was entitled to deduct pay when the claimant unreasonably refused to attend the disciplinary hearing. The claimant had exhausted his entitlement to company sick pay, which was in any event discretionary. There is no evidence that the claimant was placed in an unsafe work position or of any breach of a legal duty on the part of the respondent. There was no evidence that the respondent failed to respond to enquiries from the DWP. The disciplinary investigation was not a sham. It was instigated by JA, who had no axe to grind against the claimant. TG dispensed with the allegation that the claimant had been rude to LVS. The whistleblowing complaint was investigated and appropriate action taken. The claimant did not resign for another 3 weeks after receiving the outcome of his grievance. The claimant resigned because he had found another job not because of any fundamental breaches by the respondent.

61. The claimant's allegation that he was subjected to a campaign of race discrimination and bullying by CC has not been corroborated by evidence. There is also no evidence that MC racially discriminated against the claimant by refusing to provide him with documents. The respondent had no knowledge of the claimant's disability until his sick note of 22.8.17. The reason the claimant's wages were stopped during suspension was not because he was sick but because he was taking issue with the process. In relation to the reasonable adjustments claim, the claimant has not explained the PCP and accepted that his difficulty opening the shop at 6.45am was not related to his disability. There was no evidence to support the harassment claim . On victimisation, the protected act did not occur until 27 October 2017, the matters relied on as detriments occurred

before that date so cannot relate to the protected act. CC was unaware of the claimant's whistleblowing complaint so could not have subjected him to a detriment because of it.

Claimant's Submissions

62. The Tribunal should look at the texts between the claimant and CC between January and November 2017. He has never been accused of financial impropriety. The Tribunal will be able to assess CC credibility and whether she is a reliable witness. The claimant was assisting CC in August 17 in agreeing to open shops early. CC knew that the claimant lived in Dartford and it was unreasonable to require him to open shops at 6.45am. CC gave the claimant oral authorisation to take taxis and reclaim the cost from the respondent. The Tribunal should take into account CC's dislike of the claimant. Their relationship was very fraught from January 2017 following the hospital incident. The Tribunal is invited to look at conversations from 13 August 2017 and the time it took for the pay issues to be resolved. CC was aware that the claimant was going to raise a grievance. The Tribunal should look at the evidence surrounding the disciplinary hearing and how the investigation proceeded. Mr Lennox who was to chair it is the same person that accompanied CC to her disciplinary hearing. He was not independent. The investigatory hearing was staged so that the claimant could be dismissed before his grievance was heard.

63. The complaint against CC was not to do with race. The word victimisation was used in a general sense and not in a race discriminatory sense. The events from October 2017 led the claimant to conclude that the way he had been dealt with until he was paid in November 2017 was done to victimise him. CC accepted that she knew about the claimant's operation and physio, which showed that she was kept informed of his condition. Despite this, she refused to give him flexible working forms. The claimant was entitled to claim constructive dismissal because of the way he was treated by the respondent, which amounted to an irretrievable breakdown of the relationship. Because the respondent stopped his pay, he was forced to seek alternative employment. It was not his intention to initially leave the respondent but he was forced to find another job because of his treatment. Although there is not written evidence that CC was aware that the claimant blew the whistle, immediately after Miss A was dismissed, the claimant was told by colleagues to watch his back as CC was trying to get rid of him. Between May-July 2017, there was a pattern of CC sending the claimant to open shops at 6.45am out of cluster 46. The claimant felt harassed and under a lot of stress.

Conclusions

64. Having considered our findings of fact, the parties' submissions and the relevant law, we have reached the following conclusions on the agreed issues.

Constructive Dismissal

Being forced to open a shop at 6.45am when he did not live locally

65. See paragraphs 22-25 above. The instruction to open a shop at 6.45am was one which the respondent was entitled to give to the claimant under the terms of his contract and we are satisfied in all the circumstances that such instruction was reasonable.

Being refused full pay while on suspension

66. This refers to the matters at paragraphs 47 to 50. We are satisfied that the entitlement to company sick pay was discretionary. The sick pay policy provides:

    "*We reserve the right to withhold the payment of discretionary CSP during notice periods, where your attendance record is unsatisfactory, where you have not followed correct procedures and under any circumstances where your Manager does not believe payment is warranted. You will receive a full written explanation in these circumstances*" [637]

67. The reasons for withholding company sick pay was because the claimant was subject to a formal disciplinary process [380]. We are satisfied that this was a reasonable and proper exercise of the respondent's discretion.

68. In the circumstances, we find that the claimant did not have an entitlement to full pay while on suspension.

Being refused outstanding wages (14 days)

69. This is a reference to the delayed receipt of statutory sick pay. When the original decision was taken to suspend the claimant's pay, the respondent was justified in doing so as the claimant had failed to attend work for his disciplinary hearing for no apparent reason. However, upon receiving the claimant's sick note, the claimant was notified that the decision was reversed and that he would receive statutory sick pay. This was received, albeit 14 days after the pay date. The delayed receipt of SSP of £62.44 was not, in our view, a fundamental breach.

Failing to make the claimant's working environment safe

70. This is a reference to the matter at paragraph 32. This allegation is vague. There was no evidence before us to support the claimant's contention that his work environment was unsafe or that the incident referred to was anything other than a one off.

Refusing to respond to the enquires of the DWP

71. For the reasons set out at paragraph 56 above, we find that there has been no breach.

Conducting a sham investigation

72. This refers to the matters at paragraphs 39 and 41. Based on the evidence of JA and TG, we are satisfied that the respondent had a reasonable suspicion that the claimant had used company funds to pay for taxis to work without authorisation. The claimant accept that he used company funds for this purpose, the only disputed matter was whether the expenditure had been authorised. Given the absence of any documentary evidence that authorisation had been received and CC's denial that she had authorised this, it was reasonable for the respondent to instigate disciplinary proceedings and require the claimant to respond to the allegations. The claimant's assertion that the investigation was a sham is not supported by any evidence.

Failing to investigate the claimant's complaint of whistleblowing

73. Based on our findings at paragraphs 33 and 34, this complaint is not made out.

74. None of the above matters, either individually or collectively amount to fundamental breaches of the claimant's contract. The constructive dismissal claim therefore fails.

75. Even if we are wrong on that, we are not satisfied that the claimant resigned in response to any fundamental breaches. The claimant tendered his resignation on 12 December 2017 after having commenced alternative employment and having attended an induction in the new role between 4-7 December 2017, while signed off sick from the respondent's employment. It is more likely that it was the potential adverse outcome of the disciplinary process that was the trigger for the claimant's resignation. In other words, he "*jumped before he was pushed"*.

Race Discrimination

76. Of the 8 allegations of direct race discrimination originally pursued, the claimant abandoned 6 of them during his evidence. The remaining allegations are:

    (1) Investigating a complaint made by a female Caucasian member of staff at the Helpdesk against the claimant on 28.9.17 but failing to investigate C's complaint against CC from 17.8.17

    This is referred to at paragraphs 51 above. Whilst it is right that the part of the claimant's grievance relating to CC was not initially dealt with. We accept JS' explanation that he had overlooked this in error, believing that the grievance was wholly about pay and that he had dealt with it. We are satisfied that this had nothing to do with the claimant's race; indeed, we doubt that the claimant believes that it did. The claimant told us that he got on well with JS and had never accused him of discrimination. However, JS has accepted responsibility for not dealing fully within the grievance initially. If JS is not the subject of the claimant's discrimination complaint, then it is unclear who is.

    (2) MC refusing to provide documents to the claimant to enable him to prepare his defence for the disciplinary hearing on 13.10.17 and threatening to stop his pay. MC allegedly contacting HR and asking them to record the claimant's absence as unauthorised

    In relation to the documents, based on our findings at paragraphs 42-46, this complaint is not made out on the facts. On the second matter, the claimant has not explained why this amounts to race discrimination. He told the Tribunal that he had never met or spoken to MC. His allegation is, effectively, that he is a black man who has been subjected to detrimental treatment and it must therefore be because of his race. As is clear from the case of Madarassy v Nomura International PLC [2007] IRLR 246 a difference in treatment and a difference in race is not enough to discharge the burden on the claimant to prove facts from which the Tribunal could conclude that there may have been discrimination. As is clear from our findings, the original decision to treat the claimant as on unauthorised absence was because he did not turn up for his disciplinary hearing and did not provide a reason. When the

respondent subsequently received a doctors' certificate, the decision was reversed. That had nothing to do with race.

77. The race discrimination complaints are not made out.

Harassment

Investigating a complaint made by a female Caucasian member of staff at the Helpdesk against the claimant on 28.9.17 but failing to investigate C's complaint against CC from 17.8.17

78. This is the same factual allegation as at 76 (1) above. For the reasons already stated, we find that the failure to initially investigate the claimant's complaint against CC was not related to race. We also find that it was not reasonable for the claimant to perceive it as harassment. The complaint is not made out.

Discrimination arising in consequence of disability

Failure to pay the claimant's full wages while on suspension

79. See paragraphs 66-68. Those decisions do not arise in consequence of the claimant's disability.

JA directing that the claimant not be paid company sick pay

80. Our conclusions are as per paragraph 79 above.

JA failing to respond to enquiries of the DWP

81. The claimant has not shown how this arises in consequence of his disability. JS' evidence was that he could not recall why he did not respond. There was no evidence before us showing a causal link between JA's inaction and the claimant' disability.

MC refusing to provide documents to the claimant to enable him to prepare his defence for the disciplinary hearing on 13.10.17 and MC allegedly contacting HR asking them to record his absence as unauthorised

82. We have already found as a fact that documents were not refused. In relation to the recording of his absence as unauthorised, this did not arise in consequence of disability, it arose because the claimant failed to follow the reporting procedures in the respondent's sickness absence policy, which required him to telephone his manager at least an hour before he was due at work to report his sickness absence [636]

83. The section 15 claim is not made out.

Failure to make reasonable adjustments

84. The claimant has not identified any PCPs, either in his claim form or subsequently. The respondent has attempted to do so in its List of Issues, although not successfully as it seems to have conflated PCPs with the complaint. However, working with what has been provided:

JA agreeing with CC that the claimant should not be moved to a less busy store than North Cross LBO where he had previously been threatened

85. This appears to be something very specific to the claimant. There was no evidence before the Tribunal that this was a practice or policy applied to his non disabled comparators. Furthermore, the claimant has not explained why his disability would put him at a substantial disadvantage compared to his non disabled colleagues.

CC insisting that the Claimant should work alone in a large busy shop where a customer had previously threatened to shoot him and refused to allow him o move shops including to a cluster closer to home

86. This seems to be the same as the first matter and our conclusions are the same.

CC sending C to different shops across South London at short notice with no consideration as to where the claimant lived or how he would get home

87. Although at first glance, this would appear to be something that relates specifically to the claimant, based on our findings at paragraph 23 above, we are satisfied that the respondent operated a PCP that relief workers were required to work in any shop within reasonable travel time of their base location or home. The claimant was very clear in his evidence that the difficulties he had with this requirement had nothing to do with his disability. It was to do with childcare.

Making the Claimant wait until 1.30am in a shop in Brixton because there was no key to lock the shop

88. This allegation appears to be a one off incident specific to the claimant. It was not a PCP applied by the respondent. Furthermore, the claimant has not explained how it put him at a substantial disadvantage because of his disability compared to his non disabled comparators.

Stating in the grievance outcome letter dated 16.11.17 that it was reasonable for the claimant to take a train at 5am from Dartford to Peckham

89. Again, this is specific to the claimant – his grievance outcome. He has not identified a PCP. In any event, this relates to the claimant's complaint about having to open up shops at 6.45am and the disadvantage related to childcare, not his disability.

90. In the circumstances, the reasonable adjustment claim fails.

Victimisation

91. We are satisfied that the claimant's email to MC of 27.10.17 [386] and his letter to JS of the same date [395-396] are protected acts.

Detriments

Failure to pay the claimant his full wages whilst on suspension between Oct-Dec 17

92. As is clear from paragraph 49 above, the decision not to pay the claimant his full wages was taken before he did the protected act so could not have been related to it. even though the effect of the decision continued after the protected act.

Failure to pay company sick pay during his suspension

93. This is the same as the first detriment and our conclusions are the same.

MC refusal to provide documents to the claimant to enable him to prepare his defence for the disciplinary hearing on 13.10.17.

94. We have already rejected this allegation on the facts but it any event, it predates the protected acts.

95. The victimisation claim fails.

Whistleblowing

96. The respondent accepts and the Tribunal so finds that the video sent by the claimant to to JA on 28/4/17, referred to at paragraph 33, was a qualifying disclosure.

Detriments

97. The detriments all relate to alleged conduct by CC. However, we have found as a fact that CC did not know that the claimant had made the disclosure. In those circumstances, none of the alleged conduct can amount to detriments because of the disclosure.

98. The whistleblowing detriment claim fails.

Judgment

99. The unanimous judgment of the Tribunal is that all claims fail and are dismissed

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Employment Judge Balogun
Date: 27 July 2021

Sent to the parties on
Date: 8 August 2021