EMPLOYMENT TRIBUNALS

Claimant: Mr M Jabang

Respondent: Elite Security Manned Guarding Ltd

Heard at: **Bristol** **On:** **5, 6, 7, 8 and 9 July 2021**

Before: **Employment Judge Livesey**
Mr H Launder
Mrs LB Simmonds

Representation:
Claimant: Mr O'Callaghan, counsel
Respondent: Mr Wyeth, counsel

JUDGMENT having been sent to the parties on 19 July 2021 and written reasons having been requested in accordance with rule 62 (3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Claims

1.1 By a claim dated 8 March 2019, the Claimant brought complaints of discrimination on the grounds of race and detriment under the Working Time Regulations.

1.2 The claim was amended at a Case Management Preliminary Hearing which took place on 10 October 2019 and a complaint of unfair dismissal was added together with different aspects of the complaints of discrimination.

2. Evidence

2.1 The Claimant gave evidence and he called Mr Marong to give evidence in support. Mr Marong attended under a witness order.

2.2 On behalf of the Respondent, the following witnesses were called;

Mr Mainprice, Site Manager;
Mr Johnson, Contracts Manager;

Mr Huntley, Director of Support Services;
Mr Dest, former Contracts Manager;
Mr Grice, Operations Director.

2.3 The Tribunal was provided with the following documentation;
C1 Claimant's supplemental bundle;
C2 Agreed Opening Note;
C3 CCTV footage of the Plot 40 gatehouse from 21 June 2019;
R1 An agreed hearing bundle;
R2 An agreed Chronology and Cast List;
R3 CCTV footage of the Plot 40 gatehouse from 19 June 2019.

3. Issues

3.1 An agreed List of Issues was discussed, confirmed and attached to the Case Management Order of 16 December 2019 (pages 93-9 of the bundle, R1). The List was confirmed as accurate at the start of the hearing although it was also confirmed that paragraphs 12 n. and o. were effectively the same allegation and the List was renumbered accordingly.

4. Background

4.1 The litigation had a rather long and convoluted history. There had been four Case Management hearings and the claim had previously been listed for a final hearing. Paragraph 45 of the Case Summary of 7 August 2020 and paragraph 26 of the Summary of 28 August 2020 set out several of the defaults which had been identified in the parties' conduct which had contributed to the delays.

5. Hearing

5.1 The Tribunal read the documents referred to in the Opening Note, the witness statements and anything else identified in the course of cross examination.

5.2 The parties recognised in their opening note that the proposed timetable for the hearing was 'tight'. It was discussed at the start of the hearing and a timetable which was close to original one which had been set in December 2019, was agreed. Counsel managed to keep to those timings.

5.3 The case was heard in person, save that the parties made their closing submissions and received judgment by video (CVP) at their choice.

6. Facts

6.1 The Tribunal reached the following factual findings on the balance of probabilities. It attempted to restrict its findings to matters which were relevant to the issues which had to be determined. Any page references within these Reasons are to pages within the hearing bundle R1 unless otherwise stated and have been cited in square brackets. References to the Claimant's supplemental bundle have been cited thus; [C1;..].

<u>Introduction</u>

6.2 The Respondent is a security business which provides manned security services to a range of clients and sites around the M4 corridor between

London and Swansea. It has a head office in Swindon and employs approximately 300 staff, the majority of whom are security guards.

6.3 It has a Disciplinary and Grievance Policy [163-171] and an Employee Handbook which incorporated policies on recruitment and training [C1; 52-3] that have been referred to below where necessary.

6.4 The Claimant is black and of Gambian origin. He commenced employment with the Respondent on 7 May 2016. Nearly a third of the Respondent's workforce is drawn from BAME groups.

6.5 The Claimant mainly worked at a location known as Plot 40, the Mitsubishi Import Centre Security Office at Portbury Dock, near Bristol. At that site, Mitsubishi store imported vehicles which are transported from and to it by staff of British Car Auctions ('BCA'). Two other guards worked there at the time; Ms Lasson and Mr Lee, who was later replaced by Mr Tudhope. The Claimant's manager was Mr Kelly to start with but, in July 2017, Mr Mainprice took over that role. He was the site manager for about 6-7 plots in the Avonmouth and Portbury area for Mitsubishi, including Plot 40. His immediate supervisor was Mr Johnson, the Contract Manager for that client. The Claimant's work involved him manning the gatehouse and conducting specific checks and patrols around the site.

<u>Mr Mainprice</u>

6.6 The Claimant's case was that Mr Mainprice did not like him, treated him differently because of his race, harassed him and discriminated against him in several respects, some of which were reinforced by the Respondent's conduct generally. He also claimed that Mr Mainprice treated a fellow Gambian, Mr Marong, in a similar fashion.

6.7 In general terms, the Respondent suggested that Mr Mainprice had actively tried to assist the Claimant on a number of occasions and, in doing so, had exceeded his duties as a manager; he had offered to arrange transport for him to get to work when his own car had broken down [231], he had attempted to obtain a significant advance on the Claimant's wages at his request [273] and had succeeded in squashing a client complaint about the Claimant having told somebody to 'fuck off' [257]. There was evidence that Mr Johnson considered the Claimant to have been a valued employee [193].

6.8 The Claimant, however, considered that the proposed help with his transport was nothing more than Mr Mainprice acting in the Respondent's own interests so that his shift was covered. He had to accept, however, that getting to and from work was his responsibility and that the Respondent could have asked him to get a lift or taxi himself. In relation to the advance of wages, the Claimant alleged that that was an attempt on the part of Mr Mainprice to make amends for previous injustices and, in relation to the issue concerning the

complaint [257], he said that he did not know that he had been defending him because the matter was not discussed.

6.9 In broad terms, we found that the Claimant was evasive during his evidence. On several occasions, he had to be asked the same question more than once because, instead of answering it, he had attempted to address some other issue. He also appeared dogmatic; he failed to accept even the simplest of things, for example that minutes or records said what they appeared to say. In the Tribunal's judgment, his evidence was strongly discredited by the objective documentary evidence. His position in relation to the salary advance, for example, was further inconsistent with his case on victimisation.

6.10 Mr Mainprice, on the other hand, gave his evidence in a calm and relatively measured fashion. He conceded ground on some issues where it was justified but, on others, he held his ground firmly. Where there were areas of doubt or disagreement, we preferred his evidence, unless we have said otherwise.

6.11 In terms of the allegations of harassment, the following factual complaints were addressed and determined as set out within paragraph 12 of the List of Issues [95-7];

a. *Mr Richard Mainprice, the Site Manager, would only check on the welfare of white employees (James Tudhope, Ian Holder, Alan Light, Anita Miller, Tony, Sarah Larson) only instructing them to pass on the site managers' (Richard Mainprice) instructions to the Claimant;*

   This was a broad allegation which Mr Mainprice could only deal with in broad terms; he denied any form of preferential treatment in relation to the welfare of staff. The fact that he may not always have dealt with the handover for night staff was not indicative of harassment or discrimination. It was because he worked day shifts and their shifts would not necessarily have always coincided or crossed.

b. *The Claimants' calls for assistance were ignored by the same manager Mr Richard Mainprice;*

   In general terms, the Tribunal accepted Mr Mainprice's explanations for the lack of replies to many of the Claimant's emails; he typically responded by telephone if he could. He is dyslexic and did not like to write emails if he could avoid doing so. He did not have remote access to his emails and could only reply if he was at his desk. He explained that he may have replied to some emails but he did not have a habit of clicking 'reply' and so a response would not have been shown in a chain. He accepted that he was inexperienced in his role and the consistency of communication may not have been at the same level as that of Mr Kelly, his predecessor.

c. *Around November 2018* [the date was accepted to have been an error and ought to have been May 2018] *the site manager Mr Richard Mainprice ignored the Claimant's emailed question about a missing 'Left off Load' sheet (paragraph 64 of the Claimant's witness statement);*

There was a system in place for the Claimant and his colleagues to record a reason why a vehicle was left off a transporter load which left site. The information went to Mitsubishi and/or BCA. The Claimant's case here was that the Respondent also created a second sheet to complete which was not available when he had looked for it. He had asked Mr Mainprice for a copy, which was ignored ([185] and [187]).

The lack of a reply to the email of 14 May 2018 [185] was, according to Mr Mainprice, nothing sinister. Whether he responded orally or not, this appeared to have been a tiny administrative issue.

d. *On or around July 2018 the Claimant asked several times Mr Richard Mainprice for help with staff who were moving vehicles without the required paperwork. Again, he was ignored (paragraph 65);*

The Claimant alleged that vehicles which had to be moved required designated 'gate release' paperwork which many did not have. When he sought assistance on the issue from Mr Mainprice, it was ignored [194].

Mr Mainprice stated that a gate release had not been needed on that occasion as the cars were only leaving site temporarily and that a senior member of BCA, Mr Forbes, had directed them to allow the cars through the gate without a formal release document. He considered that this information was passed to the Claimant orally, even though the Claimant had not specifically asked for a reply.

The Tribunal considered this to have been another very minor operational issue.

e. *On or around July 2018 the Claimant asked the site manager Mr Richard Mainprice to amend a mistake on the roster. The Claimant was listed by the site manager on the roster that he had 'caused a blow out' (deliberately not turning up at work). He ignored the request (paragraph 66)*

There was some doubt, during closing submissions, about the accuracy of the date within this allegation. Both counsel considered that it was the same allegation as that within paragraph (m). We revisited the Claimant's statement and concluded that it was a different allegation.

The Claimant had complained that 'U/P' had been marked on the roster against him (meaning 'unpaid', i.e. a period of leave or absence for which no pay was due) [201]. Having been alerted to the administrative error, a correction was made on the roster for 1 November which the Claimant would have been able to see [225]. What the Claimant was complaining about was that he did not get an additional, separate notification to the effect that a correction had been made. Mr Mainprice did not dispute the fact that a separate notification had not been sent but he did not think that it had been necessary, given that the work was four months away and was visible to the Claimant in its corrected form. The email [201] was not ignored. The change was made.

f. *On or around August 2018, the Claimant asked the site manager Mr Richard Mainprice a question about ordering his uniform. Again he was ignored (paragraph 67);*

It was clear from the evidence that the Claimant made his request to Mr Johnson, not Mr Mainprice [204]. He then suggested that the query ought to have been directed to Mr Bond and it was resolved between Mr Johnson and the Claimant directly [209-210].

g. *On or around August 2018, he complained to the site manager Mr Richard Mainprice and the senior manager about a fridge containing maggots. Nothing was done (paragraph 68);*

Mr Mainprice accepted that he received the Claimant's notification and directed the Claimant to clean the fridge. Although it was not the Respondent's equipment, it was provided for the use of the Respondent's staff and therefore ought to have been maintained by them if it had become dirty.

h. *On or around September 2018, the Claimant asked the site manager Mr Richard Mainprice to help with his work computer a request which he ignored (paragraph 6*9);

The Respondent denied that the Claimant had ever made such a request, but had simply highlighted an IT issue in his email of 28 September 2018 [215]. Any such queries were referred to the IT department, as Mr Mainprice did with this one and as the Claimant had anticipated in the email.

i. *On or around October 2018, the Claimant asked the site manager Mr Richard Mainprice for help in briefing new starters and was ignored (paragraphs 70-1);*

The Claimant alleged that he asked for assistance in briefing new starters 'several times' and that his requests were ignored [220-1].

Mr Mainprice did not regard the Claimant's email of 5 October 2018 as a request for assistance. It was an observation as to the standard of training which he was invited to act upon. Mr Mainprice was, in our judgment, correct in his reading of the email.

The Claimant further alleged that a direction to new starters which had been on the noticeboard in the gatehouse, had been taken down [C1; 27]. Mr Mainprice did not dispute that may have happened. He had not seen the notice, he did not work in the gatehouse all of the time and was not aware that it had either been up or taken down.

j. *On 24 January 2018, the Claimant was again ignored when he called his site manager Mr Richard Mainprice seeking assistance with a broken Plot 40 compound gate (paragraph 61);*

The Tribunal accepted that Mr Mainprice did not ignore the issue which the Claimant had raised with him [174]. It had been referred to Mitsubishi to deal with.

The damage had either been caused by Mitsubishi or BCA and it was a matter for them to sort out, as the Claimant well knew.

k. *On or around December 2018 the Claimant sought assistance from his site manager Mr Richard Mainprice that CCTV was not working. Again the claimant in the first instance was ignored (paragraph 72);*

   The Claimant alleged that, when he was working nights on 11 December, he sought assistance because his site's CCTV was not working due to the effect of heavy wind and rain. He alleged that Mr Mainprice ignored the request [C1; 22-3].

   Mr Mainprice acknowledged that there were problems with CCTV on two sites, but the equipment belonged to the clients and they were considering the cost of replacement, which the Claimant had been told. Mitsubishi had been reluctant to spend the money needed to repair the kit.

l. *On or around November 2018 the site manager kept calling and texting the claimant unfairly asking him why he was not at work (paragraphs 75-6);*

   Mr Mainprice alleged that it was entirely within his rights to try and discover the Claimant's whereabouts. He alleged that the Claimant had failed to appear for work on several occasions or gave short notice of his non-attendance (for example [218-9]).

m. *The site manager Mr Richard Mainprice added false records against the Claimant's name on the roster system 'blow out' (paragraphs 77-85);*

   A 'blow out' (or 'BLO') was a recorded incident of a member of staff failing to attend for work. Mr Mainprice alleged that it was entered on 5 November because the Claimant did not turn up for a shift that he had been rostered to work. Such a record was not any form of disciplinary sanction or reprimand, nor did it go to Head Office or HR. Rather, it was for his reference only.

   The Claimant accepted in cross-examination that he had requested to work on 5 November [222]. He did not, however, attend on that day and a 'BLO' was subsequently recorded [225]. In an earlier version of the roster, however, 'DFS' was recorded against the Claimant's name for the 5th [224]. 'DFS' meant 'Day Foreshore', i.e. that the Claimant had worked a day shift at Mitsubishi's Foreshore site. Both sides agreed that that was incorrect. Having realised his mistake, Mr Mainprice corrected the roster from 'DFS' [224] to 'BLO' [225].

   The real issue here was that the Claimant alleged that he had made several phone calls to his manager to say that he would not be able to make 5 November shift. He alleged that Mr Mainprice had said that he would 'get it sorted', i.e. ensure that the shift would have been covered. The Claimant therefore took great offence to a 'BLO' having been recorded against him for that day when he had not attended.

   Mr Mainprice maintained that cancellations were rare but that, if they occurred, the rosters would have been corrected immediately. That did not happen with

regard to 5 November and he believed that no cancellation had been communicated to him. The 'BLO' was therefore correctly recorded.

We considered that there was nothing sinister here; either Mr Mainprice had made a genuine mistake at failing to record the Claimant's cancelled shift, or the Claimant had failed to cancel it.

n. *Harassing a black Gambian Colleague 'Bubacarr Marong'. Mr Marong was shouted at unfairly in a public place and threatened by the site manager, which created a hostile work environment for the Claimant who is black and Gambian. When a white colleague refused to change from their normal line of work duties they were not threatened and shouted at publicly; He was told to 'shut up' and told; 'I am your boss and you have to do what I ask you to do otherwise it could be classed as refusal to work which could mean disciplinary action against you' (paragraph 86);*

   This incident was alleged to have occurred in December 2017 when Mr Marong was working with the Claimant. Mr Mainprice telephoned to inform them that there had been a 'blowout' at Plot 40 and he requested that Mr Marong attended as cover. He stated that he had not been trained to cover Plot 40 and felt that Mr Mainprice would not listen to his objections. He ultimately told him to 'shut up' and directed him to 'go to Plot 40 because he was his boss and had to do what he was required otherwise it would be classed as a refusal to work'.

   Mr Mainprice alleged that the request to Mr Marong on that day had had nothing to do with his race, but everything to do with the need to cover a more important site. He stated that he would have asked any other colleague in the same position to have done the same and his ultimate direction to Mr Marong reflected the terms of the Respondent's approach to discipline.

   There was a degree of disagreement over the precise nature of the words used. Mr Marong asserted that he had been told to 'shut up', whereas Mr Mainprice accepted that he had asked him not to talk over him. Mr Marong's evidence was extremely confused; at one point, he was asked whether he had ever raised a grievance against Mr Mainprice. He said that he had raised a complaint and that the matter had been dealt with as a disciplinary allegation against *him*. He could not remember which date that had been.

   To the extent that there were differences between Mr Marong's account and Mr Mainprice's, we again preferred the evidence of Mr Mainprice; he was desperate to get the BLO covered and became frustrated when faced with such obduracy. He issued a reasonable management instruction.

o. *The manager challenged the Claimants' holiday bookings unnecessarily on or around; March 2018; May 2018; July 2018; December 2018; March 2019; June 2019; July 2019 (paragraphs 87-99);*

   There were several instances here to consider and our findings were as follows;

   - Hospital appointment (paragraphs 88-9);

This event occurred in March 2018 [176]. Mr Mainprice's response was not a refusal but, rather, an indication to the Claimant that he would see if his absence could be covered, which was sent minutes after the request had been made. The Claimant sought to compare this treatment to that of Ms Lasson whose leave request was granted six hours after it was made [326].

The Claimant further complained that he was telephoned when he did not return from his appointment as expected. As we understood it, instead of requiring him to take a day off, Mr Mainprice agreed to cover for him for an hour or two over his appointment but, when he was late in returning, he was telephoned over his whereabouts. The Tribunal noted the supportive approach taken by the Respondent in that respect.

- The Claimant applied for two days holiday in June 2018, which he subsequently tried to change (paragraphs 90-1) [181-4];

The Claimant's request was made on 23 April 2018 and was related to the celebration of Eid [184]. Mr Mainprice informed him verbally that his request for 15 June could have been accommodated, but not that for the 14th as there were 2 other members of staff already booked off. Some staff booked their holidays up to a year in advance. Leave was granted on a first come, first served basis and it was clearly shown on the roster for all to see.

Despite the unavailability of leave on the 14th, Mr Mainprice alleged that the Claimant said that he would take the time as unauthorised leave and was then informed that, if he did so, it might have become a disciplinary issue. The Claimant then expressed his "*total disgust*" about that response [183-4];

> "*I want to advise you not to be quick and threatening me with disciplinary action for a planned holiday simply because you don't have cover.. Holidays are staff entitlement and I have given you a my line manager ample time to look for cover. Please be informed that I am entitled to take my holidays whenever I want and feels appropriate to take them* [sic]".

The Tribunal considered this to have been an intemperate and inappropriate response to Mr Mainprice's stated position.

His manager replied calmly and carefully [183];

> "*I try extremely hard to give everyone what they want here at our Mitsubishi site and most of the time I do. Mustapha you have first hand experience with this as you wanted to do nights and I arranged and agreed with Paul for you to swap shift so you have some night I know it's not fully night but that is all I could do that this present time and in conjunction with this other thing was that you couldn't work weekend day as your wife is back at work now so we have agreed that you can have weekend days off as paid or unpaid holiday up to you, but this still means we have to find cover for this but I don't mind as it is helping out a member if my staff* [sic]."

Mr Mainprice had checked the ACAS guidance on holiday entitlements for religious events. The Tribunal considered that his email was detailed, clear, balanced but firm;

- The Claimant emailed Mr Mainprice in respect of leave in August 2018 [195-6]. He claimed that he felt harassed when his need to book the leave was challenged (paragraph 93); Mr Mainprice explained that he only asked the Claimant because he was wanting to *help* him, as clearly explained in his email of 16 July [195]. This exchange stood to the credit of Mr Mainprice;

- The Claimant applied for 10 days of leave in December 2018 [245] which was approved but which Mr Mainprice subsequently queried over the telephone, stating that the Respondent would only have been able to pay for 2½ days at that point (paragraphs 94 to 97);

  This issue was explained in paragraph 43 of Mr Mainprice's statement; it was the Respondent's policy not to pay for lengthy holidays taken at the beginning of leave years to avoid employees leaving, having taken more holiday than they had accrued. That, he considered, was standard practice within the industry and had been his previous employer's approach. It was explained to the Claimant that he had only accrued 2.5 days at the point that his holiday was to have been taken. However, he was not refused the leave and was nevertheless later offered the full 10 days to have been paid in view of his length of service and helpfulness, but he cancelled his request in any event [246-7].

<u>Working hours</u>

6.12 When the Claimant had started work in 2016, he initially signed a contract in which he had opted out of the maximum 48 hour week under the Working Time Regulations. On 25 June 2018, however, he gave notice that he no longer wanted to opt out of that protection and expressed the hope that the Respondent could accommodate the change [189]. That letter was not directed to Mr Mainprice or Mr Johnson and they did not see it. It went to Head Office.

6.13 The Claimant's case, as it was put to Mr Mainprice in cross-examination, was that, when the Claimant had asked him if he could reduce his hours, he had said 'you can't do that' and/or that 'the Company would not allow it'. That evidence was strongly denied by Mr Mainprice. The Claimant also stated that, following that conversation, Mr Mainprice believed that he might have been leaving and messaged him regularly to ask him what his future intentions were [243]. No such evidence was produced to us.

6.14 In a text message to Mr Johnson on 3 July, the Claimant made it clear that he was undecided whether he wanted to progress his opt in request [190] but Mr Johnson pointed out later that day that the change could have been accommodated, although perhaps not all of his hours would have been at the Mitsubishi site going forward; he may have had to work elsewhere to get his 48 hours [191]. The matter was not progressed.

6.15 We did not find that the proposed opt in was ever hindered or refused. The implications of the possibility were made clear to him.

6.16 The Claimant raised a number of other complaints which were said to have amounted to acts of direct discrimination.

2018 Assistant Manager's role

6.17 The Claimant alleged that Mr Johnson, the Contract Manager, informed him that an Assistant Manager's role was to have become available at the site where he worked. The role commanded a higher salary and a greater status. Mr Mainprice was to have overseen the recruitment for the role.

6.18 The Respondent alleged that no such role existed. There was an informal position of 'Second In Command', or '2IC', who was responsible for covering for the Site Manager when he was on leave or sick, but that role did not command any additional salary, save for a slight increase when acting up. The role required flexibility (both day and night) to cover whichever shifts the Site Manager was absent from. No interviews took place because there was no formal position that was being recruited to. Mr Mainprice did not know of and/or apply the provisions of the Recruitment Policy [C1; 53].

6.19 The Claimant showed his interest in the role on 5 September 2018 when it was advertised. At that time, he had nearly 2½ years' experience [206-7]. He replied to Mr Mainprice's email in which the role was 'advertised' [211-2], as did a white colleague, Mr Tudhope [213].

6.20 On 14 November 2018, the Claimant was informed by Mr Mainprice he had not been successful in his application [214]. Mr Tudhope was appointed. The Claimant alleged that the successful candidate had only four months' experience.

6.21 The Respondent accepted that the Claimant applied for the 2IC role but was not appointed because he was not as flexible as Mr Tudhope; Mr Mainprice believed that the Claimant was often unable to cover day shifts as a result of his family commitments and other reasons (for example [216-7] and [243]). Mr Tudhope was flexible and his rota already included several day shifts. Mr Bond, the previous incumbent, had also worked mixed day and night shifts. Mr Mainprice stated that he also took into account the client's views; Ms Suddell at Mitsubishi expressed a preference for Mr Tudhope. There had also, he said, been verbal complaints about the Claimant's conduct from BCA staff and others on site. He did not therefore consider that the Claimant was the best person to fulfil the client-facing 2IC role.

6.22 In cross-examination, the Claimant accepted that he had been in education all through the period of his employment (paragraph 2 of his witness statement). Although he had worked some day shifts, he had mainly worked nights and had demonstrated a desire to keep it that way (see [182] and [235]). The Tribunal accepted that he had given both Mr Mainprice and Mr Johnson the clear impression of his desire to work nights for family and educational reasons. Indeed, he had swapped shifts with Mr Lee in order to get night shifts. He had not challenged the Respondent's understanding of his desired work pattern and the difficulties which he had had with staff when they were raised at the grievance meeting on 7 December [243].

Courthouse Farm

6.23 In February 2019, the Respondent gained a new contract at Courthouse Farm which was a location within a mile of Plot 40.

6.24 The Claimant's case was that white colleagues were driven to and shown around the new site whereas he was simply told to rely upon a map which did not show the patrol, or 'tag', points [278]. He claimed that he could not do his job properly and was exposed to a risk of disciplinary action and/or dismissal. He alleged that even those white employees who were permanently based at the site had the induction that he missed out on (Mr Holder and Mr Light).

6.25 As a result, he stated that he was criticised for having failed to 'tag' his patrols correctly in February 2019 (ie sign in at the various patrol points on the way around) [276-7]. He therefore felt compelled to cancel four 12 hour shifts.

6.26 Mr Marong, the Claimant's Gambian colleague, also complained that he was required to work at the site with little induction or understanding of the lay-out. Further, he complained that he was not instructed how to deal with the difficulties that there were with the opening and closing of the three gates on site, a task which, he claimed, caused him injury. Mr Marong did not, however, suggest that other, white colleagues had received training that he had not.

6.27 The Respondent's case was that there was no formal training or induction given in relation to the work at that site. Some sub-contracted staff from Surrey Security were given an informal drive around the site, but only because they were not familiar with the layout because they were not based there. It was alleged that the training was not necessary for the Claimant because he was already familiar with the geography.

6.28 A map was provided to all on site which, it was accepted, did not initially show the 'tag' points, but they were added by Mr Mainprice as soon as the points were set up. The Claimant was informed that each point should have been tagged two or three times per night.

6.29 Mr Mainprice did not understand the Claimant's allegations that he was unable to work at the site safely. He visited the compound daily to do patrols himself and would have been aware of any problems if they had existed. He attended monthly health and safety meetings with the clients and no issues have been raised then either. Had the Claimant been concerned about health and safety issues, he did not understand why they were not raised with him and he was not aware of anybody within the Respondent who had been disciplined or dismissed for having raised such concerns in the past.

6.30 Again, we considered the Claimant's position on this evidence surprising. On 22 February 2019, the Claimant informed Mr Mainprice that he '*could not do that place*' because he had not been properly trained [276]. That was in response to an email asking why the site was not properly tagged [276-7]. Mr

Mainprice then sent a long email in which set out the expectations; that two or three patrols were expected each night, that a map in the gatehouse showed the location of the farm and the rough locations of each tagging point, that, even though the patrols had not been achieved properly thus far, no sanction would apply but the Claimant would need to patrol three times a night going forward and that, if he needed any help, he should ring Mr Mainprice [276]. The map (a much clearer copy of [278], [278a-b]) was simple enough in terms of the plot's location and the placing of the tag points and Mr Mainprice's evidence, that the site was extremely well lit and had a safe, new tarmac base, was compelling.

6.31 Nevertheless, his email provoked an extremely obstructive and argumentative response in which the Claimant stated that he could not rely upon the map and that his colleagues had not been patrolling as many times as he had. He concluded;

> "*Please do not contact me on this as any contact or attempted contact will be viewed as harassment. I trust that this is clear.*"

6.32 Having considered all of the evidence, we did not accept the thrust of the Claimant's case here. His evidence that others were trained at the site was weak. He alleged that he had seen Mr Holder and Mr Light in Mr Mainprice's car about to have been driven to site (paragraph 6 of his witness statement), which was strongly denied. Even if that was right, and we had very strong doubts that it was, he was not able say what the nature of any training they might have received had been. The Claimant's difficulties with that site were very difficult to understand.

Grievance

6.33 The Claimant issued a grievance on 26 November 2019 about his relationship with Mr Mainprice and the manner in which he claimed that he had been treated [232-8]. It appeared to have been received on 28 November [239]. It referred to his sense of having been belittled and poorly treated by his manager, harassment and bullying. It did not refer to the Claimant's race or that of anybody else or differential treatment on the grounds of race, as he accepted in cross-examination. Quite the contrary, he appeared to allege that he *and* his colleagues were treated poorly;

> "*It is my contention that the site manager's unpredictable, unwanted, unprofessional and autocratic conducts* [sic] *poses a palpable threat to both myself and my colleagues within our working environment.*"

6.34 The grievance was referred to Mr Huntley to deal with [239] and, within a few days, he was invited to a grievance meeting on 7 December with Mr Johnson [241], which he attended [242-4].

6.35 The grievance meeting concluded with the suggestion from Mr Johnson that a mediation session should take place in the New Year and that he was copied into future correspondence between the Claimant and Mr Mainprice going forward in order to monitor it.

6.36 The Claimant complained, however, that the mediation with Mr Mainprice, which was not scheduled until the New Year, did not follow the published chronology in the Respondent's policy; there was to have been a grievance hearing within five days of the receipt of the written complaint [171]. Mr Johnson had indicated, on 20 December, that, because it was '*silly season*' at work (referring to staff absences at that time of year), it was probable that a mediation meeting would not have been fixed until the New Year [248] but, in any event, he pointed to the fact that the grievance hearing had taken place within five days of receipt of the complaint, excluding a weekend (the meeting on 7 December). Mr Johnson also pointed out that the Claimant had not objected to those timescales at that time.

6.37 On 28 January 2019, the mediation meeting was held by Mr Johnson with the Claimant and Mr Mainprice [253-9]. According to the Respondent, the Claimant had been content with the outcome and the fact that all matters had been covered and addressed. That was broadly reflected within the minutes [259]. An outcome letter followed on 30 January in confirmation; Mr Johnson concluded that the "*fundamental issue at hand appears to be communication. Or mis-communication*". He recommended that Mr Mainprice complete several ACAS supported training courses which were designed to improve his communication skills. Other steps towards better communication were also laid out (more formal instructions by email and regular team meetings) [260-5].

6.38 The mutually agreed outcome to the mediation was, the Claimant said, '*false*' (paragraph 47 of his witness statement). He alleged that he had never been satisfied with what had been discussed, as suggested in the minutes.

6.39 The Tribunal considered that the notes of the meeting were likely to have been reasonably accurate. The allegation of falsity made by the Claimant within paragraph 47 of his statement was directed at the Amended Response which did appear to have been supported by the minutes. He did not specifically address the accuracy of the minutes.

6.40 On 6 February, however, the Claimant filed an appeal against the decision outcome [266-269]. That document did refer to 'discrimination' and incidents which could only properly have been understood as allegations of race discrimination [268].

6.41 Mr Grice was tasked with dealing with the grievance appeal. At that point, the Claimant had issued these proceedings but Mr Grice said that he had not been aware of them then. That evidence was unchallenged.

6.42 Mr Grice initially asked the Claimant what outcome he was looking for [270]. The Claimant's ultimate response to that question was simply to allege that he was "*now working under protest*" and he referred back to his original grievance letter [282]. We did not consider that to have been particularly constructive.

6.43 The Respondent had initially arranged a meeting for 1 March [279-280]. Mr Grice attended on that day but the Claimant was surprised to see him [C1; 35]. There appeared to have been confusion over the Claimant's address for the notification. A new date was set for 6 March, notice of which was sent to the Claimant on 1 March [281]. He then indicated that he would only attend if his night shift could be given to him as paid holiday [284-5]. The meeting was then duly re-arranged to 13 March [284].

6.44 The appeal was chaired by Mr Grice and was dismissed [288-290]. An outcome letter was sent on 2 April [291-5].

<u>Dismissal</u>

6.45 The Claimant alleged that, ever since he had raised complaints of discrimination, he felt that the atmosphere had changed at work (paragraph 107 of his witness statement). Weeks after he submitted his Claim Form in these proceedings, he was invited to a disciplinary meeting [348-350]. The events leading to the Claimant's dismissal were as follows.

6.46 The Respondent required regular contact from its security officers in the field in order to ensure their safety, particularly in the case of lone workers at night. The system which was followed was as follows; each employee was required to make regular check calls to indicate their continued safety. This was an automated system; the guard called and the system logged the call automatically. If they did not, the Control Room was alerted by the lack of contact. Those in the Control Room would then have attempted to contact the officer and, if that failed, a mobile patrol would have been sent to site.

6.47 On 19 June 2019, in the absence of a check call from the Claimant at 2.12 am, the Respondent logged 10 unanswered calls to him [297]. Mr Light, a colleague, subsequently attended and attempted to gain access to the site. He had to wait outside the gate for 5 minutes before he was let in. The Respondent alleged that Mr Light tried to get the Claimant to open the gatehouse door but he would not do so. He made the Claimant aware of the importance of replying to check calls but he then failed to take a further call later on in the shift [297].

6.48 A further similar incident occurred on 21 June [307-9].

6.49 On 21 June, once the allegations had come to light, the Claimant gave a detailed explanation of the events of the night and alleged that he *had* made the calls and that there were faults with the line and the technology in the gatehouse [324-5];

> "*Please, please can the reported problem with the office line records not corresponding with that of time gate be looked into and addressed as it is quite annoying to be accused of missing a check call(s) when in fact I have completed it.*"

6.50 Mr Huntley received an email from the Control Room about the events of 19 and 21 June. He was then sent the audio files of the relevant calls and conversations which were transcribed ([298-303] and [307-9]). Their

accuracy was not challenged during the hearing. It revealed, in the Tribunal's view, that the Claimant had behaved in an abrasive and obstructive manner. For example, when he had been warned by a manager that his conduct could have caused him to have been disciplined, he stated that he would "*welcome to face whatever consequences Elite if throwing at me* [sic]." [303].

6.51 A few days later, on 25 June, Mr Huntley was informed by the Chief of Police at the Port of an incident in which the Claimant had allegedly driven dangerously on site. CCTV footage of that incident was also obtained. Since the Claimant was not ultimately dismissed in relation to that allegation, it was not considered further in evidence and did not need to be explored by the Tribunal.

6.52 It was important to note that it was Mr Huntley who initiated the investigation and disciplinary process on the basis of information which he had received from the Control Room, the police and/or other objective evidence. It was not, for example, an investigation that was launched on the suggestion of Mr Mainprice or anyone else.

6.53 The Claimant was invited to an investigatory meeting on 4 July in respect of those two allegations [328]. Mr Huntley showed him the evidence which had been gathered to that point, including the transcript of the calls in relation to the check calls allegation [332-340]. It was important to note that the transcripts clearly showed the date of the events. Although the Claimant accepted that the audios had been played, he denied having seen transcripts *during* the meeting. They were given to him at the end. Mr Huntley seemed open to that as a possibility and we noted that the transcripts had not been cross-referenced during the meeting in the minutes.

6.54 Mr Huntley informed the Claimant of the outcome of his investigation [341-7]. At that point, the report covered the same two matters for which he had been originally invited to the meeting.

6.55 However, the Claimant had asked that further investigations be undertaken. Specifically, he urged Mr Huntley to obtain CCTV footage of the relevant events on 19 June. Having done so, Mr Huntley took a rather different view of the Claimant's account; he considered that he had been lied to. The Claimant's account of the events of 19 June was significantly different from the CCTV and transcript evidence. Some examples were as follows;

- The Claimant asserted that the key had been taken from the gatehouse later on on 19 June which he needed to lock the door [301-2]. However, he had previously stated that he never locked the door and he ought to have had no reason to have locked it;
- Further, he asserted that Mr Light *had* been able to gain access to the gatehouse which the footage clearly demonstrated had been false [334]. When asked in cross-examination why he had said that, he claimed that he had been confused between the dates of 19 and 21 June at the investigatory meeting. Mr Light had gained access on 21 June (see the CCTV footage [C3]). However, at the subsequent appeal hearing, it was

made very clear to him on two occasions that he was being asked for his position in relation to the events of 19 June and he still said that Mr Light had gained access [410];
- The suggestion that there had been telephony problems was further cast into doubt by the fact that a colleague, Ms Lasson, had made check calls using the same equipment;
- See the further examples at [345-6].

6.56 The Claimant was then invited to attend a disciplinary hearing in order to face four allegations; two relating to the events of 19 June and two relating to alleged dishonesty and breach of trust and confidence in relation to his evidence to the investigation [348-350]. Although the Claimant could not recall it, the Tribunal was satisfied that he was provided with the CCTV footage at that stage on a memory stick as Mr Huntley alleged.

6.57 The Claimant's case was that Mr Huntley "*intentionally, deliberately and blatantly gave untrue investigatory findings to sway investigative process to his favour to victimise, intimidate and threaten me with dismissal*" (paragraph 128 of his witness statement). As an example of the Claimant's dogmatism, he denied in cross-examination that he had called Mr Huntley a liar. It was evident that that had been his line during the disciplinary process. He had repeatedly accused Mr Huntley of lying and collaborating with others to lie ([356], [376], [379] and [384-5]).

6.58 The first scheduled disciplinary hearing was delayed at his request but it eventually took place on 6 August 2019 with Mr Dest, a Black British manager, in the chair [353-366].

6.59 The Respondent maintained that the Claimant did not offer any real defence to the allegations or mitigation. Further, he showed no contrition and, in light of those features, the nature of the allegations themselves, Mr Dest decided to dismiss, which was confirmed in writing [367-374].

6.60 The Tribunal considered that his letter was detailed and well written. He considered that there was sufficient evidence to support the allegation that the Claimant had "*repeatedly lied and failed to tell the truth in relation to the allegations against* [him]" and had "*attempted to deflect and misdirect*" and "*misrepresent events*" [368]. Mr Dest considered the check calls issue itself to have been serious in view of the health and safety implications. He cited an example of an individual whose heart attack had been spotted as a result of a missed check call. However, taking each matter at its lowest, he considered that a final written warning might have been appropriate but, considering the cumulative effects of his conduct, his lies and dishonesty and the exacerbatory effect of his conduct at the investigatory and disciplinary hearings, he considered dismissal to have been an appropriate sanction [364]. He was dismissed for gross misconduct, but with notice, with effect on 12 August [374].

6.61 The Claimant appealed on 17 August [375-389]. The appeal hearing was held in front of Mr Grice. It first took place on 30 August but the Claimant was

unwilling to engage because Mr Grice wanted to record the meeting so that the minutes were accurate [391-3]. Despite that, the Claimant was given another chance and he was invited to a further appeal hearing on 11 September [394-5]. Although the Claimant again questioned the need for the meeting to have been recorded, it went ahead as scheduled [405-433].

6.62 Mr Grice considered that the CCTV footage and the transcript did not correspond with the Claimant's explanations of the events of the evening and he ultimately dismissed the appeal [434-440].

6.63 The Claimant alleged that he had never been formally trained in relation to the alleged importance of check calls. However, he accepted that they were 'imperative' (paragraph 116 of his witness statement) and other documentation made it clear that the Respondent had previously impressed the importance of such procedures upon him (for example, [177]). The Claimant had himself acknowledged that missing check calls was regarded as a 'sackable offence' [181].

6.64 The Claimant further claimed that he had missed check calls in the past without consequence (paragraphs 112-4). He also alleged that others were not disciplined for similar misdemeanors, specifically Ms Lasson.

6.65 As to the general point about others missing check calls, the Claimant relied upon the documents at [C1; 69-112]. He explained that the middle column had been created by him from raw data which had been obtained through disclosure from Mitsubishi. That data had not been seen by the Respondent and they were not in a position to challenge the tables. Nevertheless, it was broadly accepted that check calls had been missed by others from time to time on a sporadic basis. People had, however, been disciplined in the past for having failed to comply with that policy, Mr Light for example. What set this incident apart was the fact that the Claimant had failed to respond so many times and had then behaved in such an obstreperous and obstructive fashion when a mobile patrol had visited. The Claimant had accepted in the appeal hearing that he had not answered the Control Room calls out of frustration [426].

6.66 With regards to Ms Lasson, the Timegate Summary Report showed that her check call compliance record was 98.86%, as against the Claimant's of only 85.35% [441]. The Claimant's representative had sought a larger timespan for comparison through the disclosure process which produced the further document at [468]. Even then, the Claimant's compliance rate was still significantly below his comparators'. Mr Johnson pointed out that his nearest comparator, Mr Chenkov, worked days and was not actually required to make check calls. No complaint had ever actually been made against Ms Lasson and she did not face the further allegations faced by him in relation to the events of 19 June.

7. Conclusions.

7.1 The Tribunal addressed each of the issues in the List, but not necessarily in the same order that they had been presented.

Direct Race Discrimination

Legal test

7.2 Some of the Claimant's claims were brought under s. 13 of the Equality Act 2010:

> "*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.*"

The protected characteristic relied upon was race.

7.3 The comparison that we had to make under s. 13 was that which was set out within s. 23 (1):

> "*On a comparison of cases for the purposes of sections 13, 14 or 19, there must be no material difference between the circumstances relating to each case.*"

We approached the case by applying the test in *Igen v Wong* [2005] EWCA Civ 142 to the Equality Act's provisions concerning the burden of proof, s. 136 (2) and (3):

> "*(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.*"

7.4 In order to trigger the reversal of the burden, it needed to be shown by the Claimant, either directly or by reasonable inference, that a prohibited factor may or could have been the reason for the treatment alleged. More than a difference in treatment or status and a difference in protected characteristic needed to be shown before the burden would shift. The evidence needed to have been of a different quality, but a claimant did not need to have to find positive evidence that the treatment had been on the alleged prohibited ground; evidence from which reasonable inferences could be drawn might suffice. Unreasonable treatment of itself was generally of little helpful relevance when considering the test. The treatment ought to have been connected to the protected characteristic. What we were looking for was whether there was evidence from which we could see, either directly or by reasonable inference, that the Claimant had been treated less favourably than others not of his race, because of his race.

7.5 The test within s. 136 encouraged us to ignore the Respondent's explanation for any poor treatment until the second stage of the exercise. We were permitted to take into account its factual evidence at the first stage, but ignore explanations or evidence as to motive within it (see *Madarassy-v-Nomura International plc* [2007] EWCA Civ 33 and *Osoba-v-Chief Constable of Hertfordshire* [2013] EqLR 1072). At that second stage, the Respondent's task

would always have been somewhat dependent upon the strength of the inference that fell to be rebutted (*Network Rail-v-Griffiths-Henry* [2006] IRLR 856, EAT).

7.6 If we had made clear findings of fact in relation to what had been allegedly discriminatory conduct, the reverse burden within the Act may have had little practical effect (per Lord Hope in *Hewage-v-Grampian Health Board* [2012] UKSC 37, at paragraph 32). Similarly, in a case in which the act or treatment was inherently discriminatory, the reverse burden would not apply.

7.7 As to the treatment itself, we always had to remember that the legislation did not protect against unfavourable treatment per se but *less* favourable treatment. Whether the treatment was less favourable was an objective question. Unreasonable treatment could not, of itself, found an inference of discrimination, but the worse the treatment, particularly if unexplained, the more possible it may have been for such an inference to have been drawn (*Law Society-v-Bahl* [2004] EWCA Civ 1070).

Conclusions

7.8 The complaints of direct discrimination which the Claimant brought were set out in paragraph 8 of the List of Issues [94-5] which the Tribunal addressed in turn.

a. *The Claimant alleges that, unlike his white colleagues, he was not driven around and inducted at a new working site, 'Courthouse Farm'. The Claimant was unable to work at the site at night safely or at all and could not scan the patrol points requested of him. This left the Claimant's position vulnerable to being dismissed or disciplined. In addition, the Claimant felt compelled to cancel for 12 hour shifts;*

   We found that the Claimant had not been treated differently from his white colleagues in respect of his work at Courthouse Farm for the reasons stated above. He was not 'prevented' from working at the site nor was he 'unable' to work there safely. He had a sufficient map showing the location of the site, not far from Plot 40, and the locations of the tagging points and Mr Mainprice had offered him further help if he had required it. He became intransigent and obstructive and created barriers to his effective work there.

b. *On 5 September 2018, the Claimant applied for an assistant manager role. On 14 November 2018, he was informed that he had been unsuccessful in obtaining the position. Instead a white male, Mr James Tudhope, whom the Claimant had trained and who had only been in the company for 4 months, was given the role;*

   The first point to address was the Claimant's concern about the Recruitment Policy which was not one, we noted, which had been raised within the Claim Form or his witness statement. The Tribunal considered that, when read properly, the Policy was designed to apply to new recruits

into the business, not the nature of the internal appointment that was the subject of the complaint [C1; 53].

In any event, the real question here was whether the Claimant had been the victim of discrimination when Mr Tudhope had been chosen ahead of him for the 2IC role.

The Tribunal considered that the Claimant's case *did* reveal sufficient evidence to demonstrate a prima facie case of discrimination; he had far greater experience than Mr Tudhope and, on the face of their respective applications, his was stronger ([212] opposed to [213]). He had initially been viewed by Mr Johnson as the first choice. The appointment process and the basis of Mr Mainprice's decision was not clear and was not explained to the Claimant in his letter [214].

Did the Respondent rebut the inference of discrimination?

It was clear that Mr Mainprice had genuinely believed that Mr Tudhope had been better equipped to carry out the role; he had been more flexible than the Claimant, who had only wanted to work nights because of his childcare and educational commitments, and he had not experienced some of the friction with other users of the site which the Claimant had. Those were sensible, objective reasons for the appointment which had nothing to do with the Claimant's race.

The lack of clarity and transparency around the process was probably, we concluded, because of the informality of the role and Mr Mainprice's inexperience of recruitment or appointment processes. That had clearly contributed to the decision to require him to undergo training in relation to communication. This was the first time that he had ever run any form of recruitment process and he had been naïve and had left the Claimant with a genuine, wrangling sense of injustice.

c. *The Claimant was unable to benefit from a grievance procedure which, according to the Respondent's disciplinary and grievance policy, should have involved the convening of a grievance hearing within 5 days of the grievance being submitted. In November 2018, the grievance was submitted. Instead the Claimant had to threaten to stop work before a 'mediation meeting' was arranged in January 2019. In addition, the Claimant lodged an appeal in February 2019 and again this was not heard until March only again the Claimant had to threaten to stop work. The Claimant was not allowed to avail himself of a timely and fair internal grievance procedures. The Claimant relies upon a hypothetical comparator of a white worker who had submitted a grievance and appeal to the Respondent*;

The grievance was, in fact, heard within five days of its receipt by the Respondent, excluding the weekend, in accordance with the Policy [171]. It was, as the Respondent asserted in closing submissions, a 'nonsense' for the Claimant to have expected a full resolution of his grievance within

5 days. We concluded that the mediation meeting which was set up as an outcome to it was not the grievance meeting anticipated by the Policy.

Although there was a delay between the grievance meeting and the mediation in late January, that delay was entirely explicable on grounds not related to race. The Tribunal could not see any grounds for the suggestion that, had the Claimant not been black Gambian, this matter would have been dealt with along different timescales.

7.9 Paragraph 9 of the List of Issues (the allegation that dismissal was also an act of direct discrimination) has been dealt with below.

Harassment On Grounds Of Race

Legal test

7.10 Not only did the conduct have to have been ‘unwanted’, but it also had to have been ‘related to’ a protected characteristic, which was a broader test than the ‘because of’ or the ‘on the grounds of’ tests in other parts of the Act (*Bakkali-v-Greater Manchester Buses* [2018] UKEAT/0176/17).

7.11 As to causation, we reminded ourselves of the test set out most recently in the case of *Pemberton-v-Inwood* [2018] EWCA Civ 564. In order to decide whether any conduct falling within sub-paragraph (1) (a) has either of the prescribed effects under sub-paragraph (1) (b), a tribunal must consider both whether the victim perceived the conduct as having had the relevant effect (the subjective question) and (by reason of sub-section (4) (c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). A tribunal also had to take into account all of the other circumstances (s. 26 (4)(b)). The relevance of the subjective question was that, if the Claimant had not perceived the conduct to have had the relevant effect, then the conduct should not be found to have had that effect. The relevance of the objective question was that, if it was not reasonable for the conduct to have been regarded as having had that effect, then it should not be found to have done so.

7.12 It was important to remember that the words in the statute imported treatment of a particularly bad nature; it was said in *Grant-v-HM Land Registry* [2011] IRLR 748, CA that “*Tribunals must not cheapen the significance of these words. They are important to prevent less trivial acts causing minor upset being caught by the concept of harassment.*” See, also, similar dicta from the EAT in *Betsi Cadwaladr Health Board-v-Hughes* UKEAT/0179/13/JOJ.

Conclusions

7.13 The Tribunal found that the allegations of harassment determined above fell into one or more of the following three categories which prevented them from succeeding as allegations under s. 26;

(i) Those allegations which the Tribunal did not find had occurred as the Claimant had alleged as a matter of fact;

This category included the allegations in paragraphs (a)-(f), (h)-(k), (n) and (o);

(ii) Those which were so trivial such that they could not properly have been defined as acts of harassment (see *Grant-v-HM Land Registry* above); This category included the allegations in paragraphs (c)-(e), (h), (j)-(m) and (o);

(iii) Those which could not, on a proper interpretation of the evidence, be said to have been related to the protected characteristic;
Although the Tribunal recognised that, if proven, all of the allegations could have created the prohibited environment envisaged by s. 26, particularly if taken together, none of them, excluding paragraph (n), had any connection or flavour that related to the protected characteristic.

Working Time Regulations

<u>Legal test</u>

7.14 The issue here had been expressed in the List of Issues as follows (paragraph 13) [97]:

> "*The Claimant claims that he was treated detrimentally for having withdrawn his consent to work more than 48 hours per week. Did the Respondent breach s. 45A (1) of the Employment Rights Act 1996 and Regulation 4 of the 1998 Regulations provides, so far as is material, that unless his employer has first obtained the worker's agreement in writing to perform such work, a worker's working time, including overtime, in any reference period which is applicable in his case shall not exceed an average of 48 hours for each seven days [the absolute duty].*"

7.15 The burden of proof was determined by s. 48 (2) and it was for the Respondent to demonstrate the ground upon which the conduct occurred.

<u>Conclusions</u>

7.16 The Claimant claimed to have suffered the following alleged deliberate acts or failures to act or detriments after giving notice of his desire to only work 48 hours a week (paragraph 15 of the List of Issues [98]):

a. The Claimant's role and site were changed; this was accepted to have been an error in the List of Issues and the allegation was not pursued;
b. The Claimant was further isolated and not spoken to; there was no evidence tying any 'further' or distinct act of 'isolation' to the exchange regarding the Claimant's working week. Further, the allegation appeared inconsistent with other elements of the claim in which the Claimant had complained of having been harassed/contacted unnecessarily (see above);
c. The Claimant was threatened that he would lose his job if he did not work more than 48 hours; the text message at 3 July 2018 [191] was not a threat that the Claimant would lose his job. The Tribunal did not find that any threat had been made otherwise.

The reason for dismissal

7.17 There were several different alleged prohibited reasons for the dismissal which were relied upon by the Claimant;
   (i) It was said to have been an act of direct discrimination under s. 13 (paragraph 9 of the List of Issues [95]);
   (ii) It was said to have been an act of victimisation under s. 27 (paragraph 23 [99]);
   (iii) It was said to have been for an automatically unfair reason under s.104 ERA (paragraph 19 [98]).

Legal principles

7.18 The legal test that the Tribunal had to apply under s. 13 has already being considered and set out above.

7.19 In relation to the test under s. 27, the Respondent did not deny that there had been protected acts, both through the prosecution of the Claimant's grievance and the issuing of the Claim Form.

7.20 As to the question of detriment (the act of dismissal here only), the test of causation under s. 27 was similar to that under s. 13 in that it required the Tribunal to consider whether the Claimant has been victimised '*because*' he had done a protected act, but we were not to have applied the 'but for' test (*Chief Constable of Greater Manchester Constabulary-v-Bailey* [2017] EWCA Civ 425); the act had to have been an effective cause of the detriment, but it did not have to be the principal cause. However, it had to have been the act itself that caused the treatment complained of, not issues surrounding it. In order to succeed under s. 27, a claimant needed to show two things; that he was subjected to a detriment and, secondly, that it was because of the protected act(s). We have applied the 'shifting' burden of proof s. 136 to that test as well.

7.21 Finally, there was the claim under s.104. The Claimant alleged in his Claim Form that the Respondent had breached his statutory rights under the Working Time Regulations [15-6]. Section 104 (1) (a) and/or (b) applied.

Conclusions

7.22 The Tribunal accepted that the Claimant had been dismissed for a fair reason under s. 98 of the Employment Rights Act relating to his conduct.

7.23 There were no grounds to accept the bald proposition that he had been dismissed as an act of direct discrimination because of his race. That point was not actually put to Mr Dest, the dismissing officer, although it may have been somewhat difficult to have done so given his own ethnicity. There was insufficient evidence to create an inference of discrimination and, even if the Tribunal was wrong to reach that conclusion, the inference was rebutted by the Respondent producing clear evidence of an objective reason related to conduct. The extent to which the Claimant's comparator, Ms Lasson, was alleged to have been treated differently has been dealt with below.

7.24 The claim of victimisation had, however, perhaps drawn the Tribunal's greatest attention at the start of the hearing. The correlation between the commencement of proceedings and of the disciplinary action was notable. Once the Tribunal was fully aware of the allegations which the Claimant had faced, however, it became clear that the real reason for his dismissal had related to his conduct and not the fact that he had commenced tribunal proceedings five months earlier. It was important to note that it had been Mr Huntley who had initiated the investigation unilaterally without having known the Claimant or having been led to do so by Mr Mainprice or anyone else.

7.25 Although Mr Dest was asked whether he had known of the tribunal proceedings at the point of dismissal, it was not put to him in terms that that knowledge had led him to dismiss. The question was put to the appeal officer, Mr Grice, who strongly denied any such link.

7.26 The case under s. 104 was weaker still. Again, this was not put to Mr Dest as any reason for his decision to dismiss.

Unfair Dismissal

<u>Fairness of the dismissal (s. 98 (4))</u>

7.27 Two issues had been raised in the List of Issues; whether the Respondent had followed a fair procedure prior to the Claimant's dismissal (paragraph 16 (b)) and whether the decision to dismiss was within a band responses available to a reasonable employer (paragraph 16 (c)) [98]. What was missing from the List was any mention of the *Burchell* test; whether the Respondent had genuinely believed that the Claimant was guilty of the misconduct alleged, whether that belief had been based upon reasonable grounds and whether there had been a reasonable investigation prior to the Respondent reaching that view?

7.28 The first limb of the test was met by our finding that the Respondent had a genuine, fair reason for dismissal related to the Claimant's conduct. The fact that the Claimant did not challenge the reasonableness and scope of the investigation was telling but, for the avoidance of doubt, the Tribunal considered that the belief had been based upon reasonable grounds and the investigation had been adequate, in particular following the obtaining of the audio and CCTV recordings.

7.29 As to paragraph 16 (b) of the List of Issues, no particular issues had been identified. The points which were raised during cross-examination of the Respondent's witnesses and/or closing submissions were as follows;

(i) That the disciplinary investigation widened from two initial allegations to four which were put at the disciplinary hearing ([341] as against [348]);

The Tribunal did not see any difficulty with the Respondent's approach on this point. An employer was entitled to broaden or narrow the charges which an employee faced at a disciplinary hearing if an investigation unearthed evidence which warranted such a change.

(ii) Mr Huntley did not go back to the Claimant on the allegations of dishonesty when they were revealed by the CCTV footage;

Again, the Tribunal did not accept that that was a procedural failing which caused unfairness to the process as a whole. The CCTV footage was obtained at the Claimant's suggestion. He then had ample opportunity to address it at the disciplinary hearing and the subsequent appeal.

(iii) Mr Dest was likely to have been led by the views of Mr Huntley, as a relatively inexperienced and junior employee;

Mr Dest was unsure of his ground in respect of certain aspects of his evidence, for reasons which were accepted by the Claimant's counsel to have related to his nervousness at giving evidence before the Tribunal. There were some parts of his evidence upon which he was, however, very clear and one of them concerned the suggestion that he had been led by and/or scared of Mr Huntley. He was quick and firm in his denouncement of that suggestion. His evidence was straightforward in that respect and resolute.

7.30 As to the decision to dismiss (paragraph 16 (c) [98]), the Tribunal was not permitted to impose its own view of the appropriate sanction. Rather, it had to ask whether it fell somewhere within the band of responses available to a reasonable employer in the circumstances (*Foley-v-Post Office, HSBC-v-Madden* [2000] ICR 1283). An employer had to consider any mitigating features which might have justified a lesser sanction and the ACAS Guidance was useful in this respect since it set out factors which might have fed into that issue. Section 98 (4)(b) of the Act required the Tribunal to approach the question in relation to sanction "*in accordance with equity and the substantial merits of the case*". It was entitled to find that a sanction *was* outside the band of reasonable responses without being accused of having taken the decision again; the "*band is not infinitely wide*" (*Newbound-v-Thames Water* [2015] EWCA Civ 677).

7.31 There was an additional angle here; that of inconsistency, both in relation to the Claimant's own treatment and when compared to his colleagues.

7.32 Although an employer had to consider each case on its merits, inconsistency in similar circumstances is an entirely legitimate challenge to the fairness of a dismissal under s. 98 (4). In *Hadjiannous-v-Coral* [1981] IRLR 352, the EAT held that arguments of inconsistency were to be limited to situations which were "*truly parallel*";

"*Industrial Tribunals should scrutinise arguments based upon disparity with particular care and there will not be many cases in which the evidence supports the proposition that there are other cases which are truly similar, or sufficiently similar, to afford an adequate basis for argument. It is of the highest importance that flexibility should be retained*

> *and employers and Tribunals should not be encouraged to think that a tariff approach to industrial misconduct is appropriate.*"

More recently, in cases such as *Paul-v-East Surrey DC* [1995] IRLR 305, *Honey-v-City of Swansea* [2010] UKEAT/0465/09 and *General Mills-v-Glowacki* [2011] UKEAT/0204/12, the EAT has restated the approach; that the question should simply be whether a reasonable employer could, within the bounds of reasonable responses, have treated them differently.

7.33 The Tribunal concluded that the Respondent had been entitled to dismiss the Claimant in these circumstances. The Respondent's policy enabled it to dismiss in circumstances of gross misconduct [166]. The Claimant had faced allegations of gross misconduct [367] and had been found to have repeatedly lied during the investigation which Mr Dest concluded had been sufficient on its own to have warranted dismissal [373]. Further, he had missed check calls which the Claimant had acknowledged may have been 'sackable' [181], he had shown no remorse or contrition and had accused others in order to try and deflect the blame. It was clear that Mr Dest had considered a range of sanctions [373], but the Claimant had committed a fundamental breach of his contract and, thereby, gross misconduct.

7.34 What of the arguments of inconsistency? The Claimant maintained that he had been treated differently in 2019 in respect of missed check calls than on earlier occasions. No clear examples were provided to us but, as has already been stated, occasional missed check calls were not the issue here. The Respondent accepted that sporadic instances of that sort did occur without sanction. What the Claimant faced was a series of more serious allegations on the back of an initiating missed check call.

7.35 The Claimant further argued that he had been treated differently from others in respect of missed check calls. His evidence was in two forms; general evidence of missed check calls [C1; 69-112], which was a self-completed document which the Respondent had not been able to test, and specific evidence in relation to Ms Lasson.

7.36 In relation to other employees, the Respondent made the point already covered; that occasional check calls were missed without sanction but, where the problem became more serious, others were disciplined. Mr Light's sanction was cited as an example.

7.37 In relation to the position of Ms Lasson, we need do no more than refer back to our factual findings; her compliance levels were far better than the Claimant's and his dismissal had been for reasons other than a simple missed check call. This was not a comparison of like with like.

<u>Polkey/contributory conduct</u>

7.38 Had the Claimant somehow succeeded in demonstrating that the dismissal was procedurally unfair, given the nature of the objective evidence, the Tribunal considered that there was a high likelihood that he would have been dismissed in any event.

7.39 Further, had the Tribunal had to consider the application of ss. 122 (2) and 123 (6), we thought it likely that we would have found that the Claimant had contributed to his dismissal by his conduct to a significant extent.

7.40 More detailed findings were not warranted as a result of our other findings.

Time Limits

7.41 The claims within several paragraphs of the List of Issues were potentially out of time (paragraphs 8 (b), 12 (d)-(j) and 15 for example).

7.42 Those in paragraphs 8 and 12 were covered by s. 123 of the Equality Act. Those in paragraph 15 were covered by s. 48 (3) and (4) of the Employment Rights Act. They were very different tests.

7.43 In light of the Tribunal's findings, it was not necessary to deal with our findings here in any great detail, but the following is a summary;

(i) Paragraphs 8 and 12;
The acts which were out of time were accepted to have been conduct extending over a period within the meaning of s. 123 (3) (a) of the Act *if* they had been proved. Since some acts within the same course of conduct were in time, all complaints were likely to have been in time;

(ii) Paragraph 15;
All of these complaints appeared to have been brought out of time, even if it could have been said that they had been a series of acts when taken together. The Claimant had not demonstrated why it had not been reasonably practicable for that claim to have been brought within time.

Employment Judge Livesey
Date 1 September 2021

Reasons sent to parties: 11 October 2021

FOR THE TRIBUNAL OFFICE