# EMPLOYMENT TRIBUNALS

**Claimant:** Mr E Awe

**Respondents:** Meridian Integrated Systems Limited (1)
L'Oreal (UK) Limited (2)

**Heard at:** Midlands East Tribunal via Cloud Video Platform

**On:** 11, 12, 13, 14 and 15 October 2021

**Before:** Employment Judge Brewer
Ms C Hatcliffe
Ms H Andrews

**Representation**

Claimant: In person
First Respondent: Mr G Cheetham, Counsel
Second Respondent: Ms R Kight, Counsel

# JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claim of breach of contract fails and is dismissed.
2. The claim of unauthorised deductions from wages fails and is dismissed.
3. The claims of direct race discrimination fail and are dismissed.
4. The claims of harassment related to race fail and are dismissed.
5. The claims of victimisation fail and are dismissed.

# REASONS

**Introduction**

1. This case was heard over 5 days by a full tribunal via Cloud Video Platform. The claimant represented himself. The first respondent (R1) was represented

by Mr Cheetham of counsel. The second respondent (R2) was represented by Ms Kight of counsel.

2. The first morning was set aside for reading. The hearing of the evidence started at 2.00 PM. We heard oral evidence until mid-morning on day five. We then heard submissions from the parties. Both counsel, as requested, provided written submissions which we heard prior to hearing the claimant's final oral submissions.

3. As well as an agreed bundle which was just short of 1000 pages, the claimant provided a supplemental bundle of just over 1000 pages. There was no order for a supplemental bundle. In the event the claimant referred to very few pages in the supplemental bundle and given that neither respondent objected to the use of those documents we were content to allow them to form part of the evidence in the case. Below we refer to pages from the agreed bundle as to the "FHB" and to pages from the supplementary bundle as to the "SB".

4. We are grateful to the parties and to R1's instructing solicitors who assisted the tribunal by providing extra documents as we requested during the hearing.

5. In coming to our judgment, we have considered all of the evidence and the parties' submissions.

**Issues**

6. The claimant claimed:

    a. Breach of contract;
    b. Unauthorised deductions from wages;
    c. Direct race discrimination;
    d. Harassment; and
    e. Victimisation.

7. There was an agreed list of issues which we have set out in an appendix to this judgment. In our judgment below we have adopted the numbering of the issues used in the agreed list. The parties agreed that in the discrimination claims there was a general issue as to time limits and if any claim was out of time, whether time should be extended on a just and equitable basis.

**Law**

8. We set out here a summary of the relevant law.

***Breach of contract***

9. In short, R1 says that the claimant was dismissed for gross misconduct. The claimant says that he did not commit gross misconduct. The burden of proof is on the claimant to prove that R1 acted in breach of his contract.

10. Gross misconduct is a contractual concept dependent on a finding of fact about what happened — **West v Percy Community Centre** EAT 0101/15. Exactly

what type of behaviour amounts to gross misconduct is difficult to pinpoint and will depend on the facts of the individual case. However, it is generally accepted that it must be an act which fundamentally undermines the employment contract (i.e. it must be repudiatory conduct by the employee going to the root of the contract) — **Wilson v Racher** 1974 ICR 428, CA. Moreover, the conduct must be a deliberate and wilful contradiction of the contractual terms or amount to gross negligence — **Laws v London Chronicle (Indicator Newspapers) Ltd** 1959 1 WLR 698, CA, and **Sandwell and West Birmingham Hospitals NHS Trust v Westwood** EAT 0032/09.

11. It is possible for a series of acts demonstrating a pattern of conduct to be of sufficient seriousness to undermine the relationship of trust and confidence between an employer and employee to justify summary dismissal, even if the employer is unable to point to any particular act that, on its own, amounts to gross misconduct — **Mbubaegbu v Homerton University Hospital NHS Foundation Trust** EAT 0218/17. In that case, the EAT held that there was no authority to suggest that there must be a single act of gross misconduct to justify summary dismissal or any authority which states that it is impermissible to rely on a series of acts, none of which would, by themselves, justify summary dismissal.

***Unauthorised deductions from wages***

12. In relation to a claim for unauthorised deductions from wages, the general prohibition on deductions is set out in section 13(1) Employment Rights Act 1996 (ERA), which states that:

> *'An employer shall not make a deduction from wages of a worker employed by him.'*

13. However, it goes on to make it clear that this prohibition does not include deductions authorised by statute or contract, or where the worker has previously agreed in writing to the making of the deduction (section 13(1)(a) and (b)).

14. Section 27(1) ERA defines 'wages' as:

> *'any sums payable to the worker in connection with his employment'*

15. This includes *'any fee, bonus, commission, holiday pay or other emolument referable to the employment'* (section 27(1)(a) ERA). These may be payable under the contract 'or otherwise'.

16. According to the Court of Appeal in **New Century Cleaning Co Ltd v Church** 2000 IRLR 27, CA, the term *'or otherwise'* does not extend the definition of wages beyond sums to which the worker has some legal, but not necessarily contractual, entitlement.

17. There is a need to determine what was 'properly payable' on any given occasion and this will involve the Tribunal in the resolution of disputes over what the worker is contractually entitled to receive by way of wages. The

approach tribunals should take in resolving such disputes is that adopted by the civil courts in contractual actions — **Greg May (Carpet Fitters and Contractors) Ltd v Dring** 1990 ICR 188, EAT. In other words, tribunals must decide, on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasion.

***Direct race discrimination***

18. In relation to direct race discrimination, for present purposes the following are the key principles.

19. Under section 13 Equality Act 2010 (EqA), there are two issues: (a) less favourable treatment and (b) the reason for that less favourable treatment. These questions need not be answered strictly sequentially (**Shamoon v Chief Constable of the Royal Ulster Constabulary** 2003 ICR 337).

20. Given the treatment must be "less favourable" a comparison is required, and a comparator must "be in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class" (**Shamoon** above).

21. The burden of proof is set out in section 136 EqA. The leading cases on the burden of proof pre-date the Equality Act (**Igen Ltd v Wong** 2005 EWCA Civ 142 and **Madarassy v Nomura international Plc** 2007 EWCA Civ 33, [2007] IRLR 246) but in **Hewage v Grampian Health Board** 2012 the Supreme Court approved the guidance given in **Igen** and **Madarassy**.

22. By virtue of section 136, it is for a claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, absent any explanation from the respondent, that the respondent has discriminated against the claimant. If the claimant does that, the burden of proof shifts to the respondent to show it did not discriminate as alleged.

23. In **Madarassy** the Court of Appeal held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. sex) and a difference in treatment. This merely gives rise to the possibility of discrimination. Something more is needed. Any inference about subconscious motivation has to be based on solid evidence (**South Wales Police Authority v Johnson** 2014 EWCA Civ 73).

24. One aspect of the case which became clear as the hearing progressed was that some issues revolved around what the claimant described as his command or use of English.

25. Section 9 EqA 2010 so far as material provides

> *"9 Race*
>
> *(1) Race includes—*
> *(a) colour;*

*(b) nationality;*
*(c) ethnic or national origins.*
*..."*

26. Language is not an element of race under section 9 EqA 2010. It was submitted by the respondents that, therefore, if an employer for example dismisses an employee because of poor language skills, this cannot without more amount to direct race discrimination. In that context we were taken to, by way of example, the first instance decision in **Toth v CW Publishing Ltd** ET Case No.2202919/15.

***Harassment***

27. The general definition of harassment set out in S.26(1) EqA states that a person (A) harasses another (B) if:

    a. A engages in unwanted conduct related to a relevant protected characteristic — S.26(1)(a); and
    b. the conduct has the purpose or effect of (i) violating B's dignity; or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B — S.26(1)(b).

28. There are three essential elements of a harassment claim under S.26(1):

    c. unwanted conduct;
    d. that has the proscribed purpose or effect; and
    e. which relates to a relevant protected characteristic.

29. Mr Justice Underhill, then President of the EAT, expressed the view that it would be a 'healthy discipline' for a tribunal in any claim alleging unlawful harassment specifically to address in its reasons each of these three elements — **Richmond Pharmacology v Dhaliwal** 2009 ICR 724, EAT (a case relating to a claim for racial harassment brought under the Race Relations Act 1976 (RRA)). Nevertheless, he acknowledged that in some cases there will be considerable overlap between the components of the definition — for example, the question whether the conduct complained of was unwanted may overlap with the question whether it created an adverse environment for the employee. An employment tribunal that does not deal with each element separately will not make an error of law for that reason alone — **Ukeh v Ministry of Defence** EAT 0225/14.

30. The Equality and Human Rights Commission's Code of Practice on Employment ('the EHRC Employment Code') notes that unwanted conduct can include 'a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour' — para 7.7. The conduct may be blatant — (for example, overt bullying) — or more subtle (for example, ignoring or marginalising an employee). An omission or failure to act can constitute unwanted conduct as well as positive actions (see, for example, **Marcella and anor v Herbert T Forrest Ltd and anor** ET Case

No.2408664/09 below and Owens v Euro Quality Coatings Ltd and ors ET Case No.1600238/15, in which an employer's failure to remove a picture of a swastika for some weeks amounted to unwanted conduct).

31. In order to constitute unlawful harassment under S.26(1) EqA, the unwanted and offensive conduct must be 'related to a relevant protected characteristic'. However offensive the conduct, it will not constitute harassment unless it is so related, and a tribunal that fails to engage with this point will err — **London Borough of Haringey v O'Brien** EAT 0004/16.

32. Whether or not the conduct is related to the characteristic in question is a matter for the appreciation of the tribunal, making a finding of fact drawing on all the evidence before it – **Tees Esk and Wear Valleys NHS Foundation Trust v Aslam and anor EAT** 0039/19.

33. The words 'related to' in S.26(1)(a) have a broad meaning and holding that conduct that cannot be said to be 'because of' a particular protected characteristic may nonetheless be 'related to' it — **Hartley v Foreign and Commonwealth Office Services 2016** ICR D17, EAT.

***Victimisation***

34. Section 27(2) EqA defines a "protected act" as

    a. Bringing proceedings under this Act
    b. Giving evidence or information in connection with proceedings under this Act;
    c. Doing any other thing for the purposes of or in connection with this Act;
    d. Making an allegation (whether or not express) that A or another person has contravened this Act.

35. It is necessary to do more than make an allegation that amounts to a criticism, grievance or complaint. The allegation has to suggest that "the criticism, grievance or complaint was in some sense an allegation of discrimination or otherwise a contravention of the legislation." (**Beneviste v Kingston University**, EAT 0393/05).

***Time limits***

36. The three-month time limit for bringing a discrimination claim is not absolute: employment tribunals have discretion to extend the time limit for presenting a complaint where they think it 'just and equitable' to do so — S.123(1)(b) EqA. In **Robertson v Bexley Community Centre t/a Leisure Link** 2003 IRLR 434, CA, the Court of Appeal stated that when employment tribunals consider exercising the discretion under what is now S.123(1)(b) EqA, 'there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.' However, this does not mean that exceptional circumstances are required before the time limit can be

extended on just and equitable grounds. The law does not require this but simply requires that an extension of time should be just and equitable — **Pathan v South London Islamic Centre** EAT 0312/13.

37. In exercising their discretion to allow out-of-time claims to proceed, tribunals may also have regard to the checklist contained in **S.33 of the Limitation Act 1980** (as modified by the EAT in **British Coal Corporation v Keeble and ors** 1997 IRLR 336, EAT). S.33 deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice that each party would suffer as a result of the decision reached and to have regard to all the circumstances of the case — in particular,

    a. the length of, and reasons for, the delay;
    b. the extent to which the cogency of the evidence is likely to be affected by the delay;
    c. the extent to which the party sued has cooperated with any requests for information;
    d. the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

38. In **Department of Constitutional Affairs v Jones** 2008 IRLR 128, CA, the Court of Appeal emphasised that these factors are a 'valuable reminder' of what may be taken into account, but their relevance depends on the facts of the individual cases, and tribunals do not need to consider all the factors in each and every case. However, while a tribunal is not required to go through every factor in the list referred to in Keeble, a tribunal will err if a significant factor is left out of account — **London Borough of Southwark v Afolabi** 2003 ICR 800, CA. A tribunal considering whether it is just and equitable to extend time is liable to err if it focuses solely on whether the claimant ought to have submitted his or her claim in time. Tribunals must weigh up the relative prejudice that extending time would cause to the respondent on the one hand and to the claimant on the other.

39. Much of the case law on time limits in discrimination cases has centred on whether there is continuing discrimination extending over a period of time or a series of distinct acts. Where there is a series of distinct acts, the time limit begins to run when each act is completed, whereas if there is continuing discrimination, time only begins to run when the last act is completed.

40. In **Commissioner of the Police of the Metropolis v Hendricks** 2003 ICR 530, CA. the Court of Appeal made it clear that it is not appropriate for employment tribunals to take too literal an approach to the question of what amounts to 'continuing acts' by focusing on whether the concepts of 'policy, rule, scheme, regime or practice' fit the facts of the particular case. Those concepts are merely examples of when an act extends over a period and should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period'. The focus should be on the substance of the claimant's allegations that the respondent was responsible for an ongoing

situation or a continuing state of affairs in which the discrimination was suffered. The question is whether there was an act extending over a period, as distinct from a succession of unconnected or isolated specific acts for which time would begin to run from the date when each specific act was committed. **Hendricks** was approved by the Court of Appeal in **Lyfar v Brighton and Sussex University Hospitals Trust** 2006 EWCA Civ 1548, CA.

41. The claimant is expected to lead evidence as to why the discretion should be exercised and applying **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23 Lord Justice Underhill para 37 "the best approach for a tribunal in considering the exercise of discretion under s.123(1)(b) is to assess all the factors of the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular "the length of and reasons for the delay".

42. One of the issues in the case concerns the alleged actions of a 3rd party contractor and in that context we refer to the judgment of Lord Justice Underhill in **Unite the Union v Nailard** [2019] ICR 28, CA in which the proposition that liability for third party harassment was implicitly present in section 26 EqA 2010 notwithstanding the repeal of sections 40(2)-(4) EqA 2010 was rejected and it was determined that employers are not liable for failing to protect employees from third-party harassment save in circumstances in which could be said that inaction on the part of the employer to address allegations of harassment was of itself motivated by the protected characteristic in question. It was noted that this was not the claimant's pleaded case.

43. Finally, while referencing the claimant's pleaded case, we note and accept the respondents' point that throughout the hearing, that is in his witness statement, under cross-examination, when cross-examining the respondents' witnesses and in submissions, the claimant attempted to introduce new claims. The Tribunal notes the guidance of Langstaff LJ in **Chandhok and anor v Tirkey (Race Discrimination)** [2014] UKEAT 0190/14/1912 on the primacy of the pleadings. We accept the respondents' point that it was not open to the claimant to adapt his claim to suit the way in which the evidence played out during the hearing.

**Credibility**

44. The Tribunal accepts the proposition that in most cases the credibility of a witness is not "all or nothing". That is no more than to say that part of a witness's evidence may be deemed not credible whereas the rest of his or her evidence may be entirely credible. There are, however, perhaps exceptional, cases where it is possible to say the Tribunal did not find a witness at all credible. In this case the Tribunal has concluded that the claimant was not a credible witness in respect of any of the relevant parts of his evidence.

45. We make that finding for a number of reasons.

46. The first is that the evidence showed that each time the claimant met with his employer, shortly afterwards he was sent what are referred to as loose minutes of the meeting; it was agreed that these were intended to be no more than

notes capturing the key points from the particular meeting. At no point until his cross-examination did the clamant take issue with the substance of any of those loose minutes despite accepting that he had every opportunity to do so.

47. At points in the hearing the claimant appeared to both accept that documents were an accurate reflection of what happened and then he subsequently claimed that they were not, or vice versa, (for example [140-142 FHB], [509-510 FHB]).

48. The claimant had particular difficulty accepting the obvious from the documents. Some examples are:

    a. An email to a contractor, Motivair, was clearly not a request to attend site to look at a compressor whereas the claimant insisted it was [530 FHB]
    b. An email to a "Paula" clearly contained an instruction to count batteries which the claimant simply denied in cross-examination [732 FHB]
    c. The claimant quite clearly lied to Serveco (discussed further below) when he ticked a box on a new starter form to say his employment with Serveco was his only employment [152 FHB]. It was not because at the time he was also employed by R1 yet the claimant denied he had lied.

49. On a large number of occasions, the claimant had to be reminded to answer the question he had been asked because his habit was to default into making lengthy statements unrelated to what he had in fact been asked about.

50. In relation to paragraph 48c above, R1 became aware that the claimant had a second full time job while working for them. The claimant's position was that he was not obliged to tell R1 about this despite a clear contractual requirement on him to do so. Further, as stated above, the claimant was asked by Serveco to confirm by ticking a box on a form, whether his job with Serveco was his only job. Other options were that this was not his only job, that he was a student etc. That information was required by Serveco as they needed to inform HMRC of the position. The claimant ticked the box to say that his employment with Serveco was his only employment. That was untrue and thus he not only lied to his second employer, Serveco, he caused Serveco to at best misinform HMRC of that. The claimant had considerable difficulty accepting what he had done during cross-examination.

51. Finally, we refer to the way the case was put generally. In short, the claimant's case was that there was a conspiracy, which started on day one of his employment, between Mr Shaun Stubbs, a senior employee of R2, a number of other employees of R2, Mr John Simpson, Owner and Managing Director of R1, Mr James Simpson, Director of R1 and several 3rd party contractors engaged by R2 through R1, to racially discriminate against the claimant for the purpose of forcing the claimant out of his job. The central character in this conspiracy was Shaun Stubbs. It was put to the claimant that as Shaun Stubbs was the key contact for R1 under their contract with R2, and as Shaun Stubbs was a senior employee in R2, had Shaun Stubbs wanted to get rid of the claimant, as the claimant asserted, he simply had to tell John Simpson to remove the claimant from the contract and replace him with someone else. There was no apparent need for Shaun Stubbs to conspire to force the claimant out. The

claimant's response was that R1's contract with R2 was their only contract and so there was no other role for him, however we accept the evidence of Mr John Simpson which was that this was not correct, there was other work the claimant could have done. But even if we are wrong about that, it does not change the reality of the situation that, as the customer, if Shaun Stubbs was so keen to ensure he did not work with the claimant he could simply have demanded that the claimant be removed from site and in the Tribunal's judgment R1 would have had no choice other than to comply.

52. Thus, the Tribunal have concluded that where there was a conflict of evidence as between the claimant or the witnesses of either R1 or R2, we have preferred the evidence of the respondents' witnesses.

**Findings of fact**

53. We make the following findings of fact.

54. The claimant describes his race as either black or black African.

55. The claimant has a 2:1 degree in law from Nigeria, he has never practised law but he is well educated and articulate. The claimant has brought two previous sets of Tribunal proceedings although neither went to a full hearing.

56. In late June 2018 the claimant, then as an employee of Interserve, commenced work as facilities coordinator at R2's Nottingham Distribution Centre (NDC).

57. In July 2018 Shaun Stubbs, R2's Environmental, Health and Safety, Quality and Facilities Manager at the NDC complained to Interserve about the claimant's time keeping [388 – 391 FHB].

58. In July 2018 the claimant worked in an office with Shaun Stubbs and two other employees of R2, one of whom was in the office for 2.5 days per week. One of R2's managers was due to return from maternity leave and wished to sit with a senior manager to assist her reintegration back into work. In considering seating arrangements going forward it was proposed to move the claimant out of the office, thus freeing up a desk for R2's returning employee, and instead have his desk in the reception area. The rationale for that move was that given it was part of the claimant's role to greet contractors when they arrived on site, he would be well-placed to do that from reception. The claimant complained about that proposal, and it was never implemented, although he was moved out of the office he had been sharing up to that point and into the general office.

59. In February 2019 R1 won the contract to provide facilities management services for R2 at its distribution centres including NDC where the claimant was based. Once R1 took over the provision of facilities management services on 1 April 2019, former Interserve employees transferred their employment to R1 under the Transfer of Undertakings (Protection of Employment) Regulations 2006. R1 had not been provided with a copy of any contract of employment between Interserve and the claimant and therefore on 14 March 2019 the claimant was issued with a contract of employment between him and R1 [130 - 137 FHB]. That contract of employment contains the following clauses:

a. “you represent and warrant to the company, that by entering into this agreement or performing any of your obligations under it, you are not in breach of any… express or implied terms of any contract or other obligation binding on you…”
b. “you are employed as FM coordinator and will report to the contracts manager. Full details of your duties are set out in the job description. You may be required to undertake other duties from time to time as the company may reasonably require”
c. “you must not accept… appointments which may cause a conflict with the companies interests… without the prior written approval of the company”
d. “your normal place of work is L'Oreal Nottingham, all such other place within a reasonable area as we may reasonably require for the proper performance and exercise of your duties”
e. “the company is entitled to dismiss you at anytime without notice or payment in lieu of notice if you commit a serious breach of your obligations as an employee, or if you cease to be entitled to work in the United Kingdom”

60. The claimant signed and returned the contract of employment with R1 indicating his acceptance of it prior to his transfer to R1.

61. On 20 May 2019 the claimant was offered a role by Serveco working at the Worksop YMCA. The claimant accepted that role on 14 June 2019 [see 145, 151 and 152 FHB]. R1 was not aware of this at the time.

62. On 26 June 2019 R2 raised a complaint with the claimant which was copied to R1 concerning his performance and his communications [674 – 677 FHB].

63. On 3 July 2019 there was an email exchange between the claimant, R1 and R2 regarding the claimant’s communication and time keeping [678 – 684]. As a result, on 4 July 2019 there was a meeting between the claimant and John Simpson. The issues discussed at the meeting included the claimant’s performance. The claimant alleges that at this meeting his use of the English language was criticised. Loose minutes of that meeting are at [688 – 690 FHB]. No issue around the claimant’s use of the English language was raised. What was of concern was that the claimant should avoid ambiguity in his communications [point 5 @ 688 FHB].

64. In July 2019 one of the two air conditioning units in R2’s server room broke down. The claimant was asked by Sean Regan, another contractor on site, to arrange for it to be fixed. The matter should have been dealt with urgently. No such arrangement was made. When the second unit broke the temperature in the server room almost reached a critical melt down point which would have had a significant adverse effect of R2’s business.

65. On 15 July 2019 R1 advised the claimant that a complaint had been raised with R1 about his conduct and performance in respect of his management of contractors, in particular leaving site while a contractor was still working and who was thus unsupervised [786 FHB].

66. On 17 July 2019 Laura Northard, Order Preparation Manager, an employee of R2, complained about the claimant's response to her request to change shoppeur batteries [400 FHB].

67. On 18 July 2019 there was a meeting between the claimant, John Simpson and Shaun Stubbs during which the claimant's timekeeping, performance and other matters were discussed. The claimant denied that he was not working his full contractual hours and indeed suggested that he was working in excess of his contractual hours, and that he was neither being paid overtime nor getting time off in lieu. Given the disparity between what Shaun Stubbs and the claimant were suggesting about the claimant's timekeeping, it was agreed that the claimant should use his swipe card at reception and that this would feed into the time and activity system (T&A) operated by R2 which would, in turn, give an accurate picture of the actual hours the claimant was working. But it should perhaps be explained that the claimant, along with everyone else working at the NDC used a swipe card to enter and exit, but this only showed when they entered the site and left it, not when they started or finished work. On the same day the claimant left work feeling unwell and was signed off with stress. Loose minutes of the 18 July 2019 meeting are at [402 – 404 FHB] and the claimant's sick note is at [154 – 155 FHB].

68. in August 2019 it was intended that the claimant take annual leave from 19 August to 31 August. The claimant asked R1 to extend his leave so that it commenced on 15 August and ended on 4 September. R1 agreed [405 – 410 FHB]. The claimant went on sick leave on 14 August 2019 [155 FHB] and on annual leave on 15 August as planned. On 20 August 2019 the claimant informed R1 that sadly his father had passed away [406 FHB]. On 25 August 2019 the claimant asked R1 to be allowed to extend his leave to 5 September 2019 and then to be allowed to take further leave between 7 and 27 September 2019 [405 FHB]. R1 agreed to all of this. In fact, the claimant did not return to work until 30 September 2019 but R1 did not make an issue of this.

69. On 3 October 2019 Shaun Stubbs Raised concerns about the claimant's performance with R1 [419].

70. On 11 October 2019 Shaun Stubbs again raised the issue of the claimant's performance with R1 [421 FHB].

71. On 14 October 2019 R1 discussed with the claimant his communications and his use of certain words [703 FHB].

72. On 15 October 2019 the claimant attended an informal meeting with John Simpson.

73. Between 16 and 23 October 2019 there were issues regarding battery maintenance and ordering [704 – 710 FHB].

74. On 21 October 2019 the issue was again raised about the claimant's communications [711 – 713 FHB].

75. On 23 and 24 October 2019 contractors were seen working at height whilst not wearing the correct PPE and without having the appropriate approval [457 –

458 FHB]. On the same day R1 received a formal complaint about the claimant's work from R2's NDC manager [424 – 425 FHB].

76. On 29 October 2019 concerns were raised by Shaun Stubbs with the claimant regarding his failure to provide an update regarding a shredder [459 FHB]. On the same day R1 held and internal facilities coordinators' meeting [474 FHB] and the claimant attended an informal meeting with John Simpson. Minutes of the internal facilities coordinators' meeting were circulated on 30 October 2019 [162 and 165 FHB] and the claimant exchanged emails with John Simpson around his communications [721 FHB].

77. On 30 October 2019 R2 complained to R1 about the claimant's actions around battery chargers [468 – 473 FHB].

78. On 31 October 2019 R2 raised further complaints about the claimant's performance with R1 and the claimant [476 – 479 FHB].

79. On 1 November 2019 there was an exchange of emails between the claimant and R1 about the claimant's conduct [480 – 494 FHB]. A member of kitchen staff, Lisa, had complained to Shaun Stubbs about the claimant's behaviour towards her. This was passed to John Simpson who investigated further. He was told by Kitchen staff that the claimant was often abrupt with them. Staff said that they did not wish to formalise a complaint [495 FHB].

80. On 4 November 2019 R2 received a complaint about the claimant's conduct towards a member of kitchen staff. Details of that complaint were passed to R1 [495, 499 and 733 FHB]. Further issues were raised by R2 regarding the claimant's performance and conduct [497 – 498 FHB].

81. On 5 November 2019 further issues about the claimant's performance were raised by R2 and there was correspondence between the claimant and R1 about his performance and conduct [501, 741 – 742 FHB]. On the same day the claimant raised issues with R1 about the contractor, Philip Owles, commonly referred to as Alf [745 FHB].

82. On 7 November 2019, given Shaun Stubbs' concerns regarding the claimant's time keeping, he obtained and analysed a report on the claimant's attendance at site [507 – 511 FHB].

83. Following the above, the claimant attended a meeting with John Simpson on 8 November 2019 to discuss his underperformance. The outcome of that meeting was that the claimant was issued with a notice of unsatisfactory performance [167 – 170 FHB]. Minutes of the meeting of 8 November 2019 were circulated to the claimant on 13 November 2019 [171 – 172 FHB]. On the same day R2 raised further concerns with the claimant about his performance [515 – 521 FHB].

84. On 19 November 2019 the claimant was due to arrive on site by around 08:00 AM to be available to meet contractors coming onto the site to undertake work. He had not arrived by 08:30 AM at which point he rang to say that he had locked himself out of his car and that he was going to get a lift into work with his

wife. The claimant lived around 30 minutes' drive from the NDC. In the event he did not arrive at work until 11:25 AM [524 – 528 FHB].

85. On 20 November 2019 R2 raised further issues with R1 regarding the claimant's performance [529 FHB].

86. On 29 November 2019 there was correspondence between the claimant and R1 about both Alf and the claimant's performance [533 - 535 FHB].

87. On 5 December 2019 R2 raised further issues regarding the claimant's performance with R1 [536 – 540 FHB]. On the same day feedback was received from Paula Prince of R2 regarding the claimant's performance [545 FHB].

88. 17 December 2019 R2 again raised issues about the claimant's performance [546 – 559 FHB].

89. On 18 December 2019 R2 raised further issues with the claimant's performance and confirmed that this would be raised with R1 [560 – 563 FHB].

90. On 20 December 2019 R2 had to chase the claimant for an update in respect of work on battery chargers [564 – 570 FHB].

91. On 23 December 2019 it became apparent to R2 that instructions given to the claimant between 17 and 20 December 2019 had not been actioned and R2 dealt with this directly [571 – 577 FHB].

92. On 2 January 2020 R2 complained about the claimant's lack of clarity in his communications [578 – 580 FHB].

93. On 3 January 2020 R2 challenged the claimant over his performance and requested updates on various issues [594 – 608 FHB].

94. On 7 January 2020 the claimant provided incomplete details in respect of a project which led to a complaint internally in R1 [609 FHB]. Following this the claimant was invited to an informal review meeting on 9 January 2020 [785 FHB].

95. The claimant attended the informal review meeting on 9 January 2020 which considered his performance subsequent to the issue of the underperformance notice. Minutes of the meeting of 9 January 2020 were circulated to the claimant on the same day [610 FHB].

96. On 10 January 2020 R2 chased the claimant about incomplete work and the claimant confirmed that the work had indeed not been completed [583 – 584 FHB].

97. On 13 January 2020 R2 again raised issues regarding the claimant's work with both R1 and the claimant [623 – 625 FYHB].

98. Issues were raised by R2 around the claimant's conduct, his honesty, and his communications on 14 and 15 January 2020 [626 & 628 FHB]. On 15 January 2020 the claimant was Informed that he would be required to assist another

contractor, Sean Regan, in refitting the office. This essentially required the claimant to assist in installing monitors and tidying up once the work had been completed [651 FHB].

99. On 19 and 20 January 2020 the claimant and R2 exchanged emails regarding holes in the warehouse floor and their repair [779 – 780 FHB].

100. On 24 January 2020 R1 received a complaint about the claimant not responding or completing tasks assigned to him [668 FHB].

101. Between 24 and 26 January 2020 the claimant and Sean Regan were involved in refurbishment of the office. Sean Regan, updating Shaun Stubbs, informed him that the claimant had installed 2 monitors and left before the bulk of the work had been completed. Shaun Stubbs himself had to assist in completing the refurbishment [654 FHB].

102. On 27 January 2020 Shaun Stubbs sent the claimant 2 emails complaining about his conduct and performance [647 & 656 FHB]. On the same day Shaun Subbs complained to R1 regarding the claimant's failure to assist as required with the office refurbishment [654 & 657 FHB] and the claimant was told by Mr Simpson that there would be a formal review meeting about his performance.

103. On 28 January 2020 the claimant was invited to a performance review meeting [182 FHB].

104. On 29 January 2020 R1 notified the claimant of the requirement to attend the performance review meeting [659 – 660 FHB].

105. The formal performance review meeting took place on 30 January 2020. In attendance where the claimant, John Simpson and Nicola Callaghan of HR Caddy, an independent HR advisor to R1. During that meeting the claimant expressed his loss of trust in R1. Mr Simpson, having listened to the claimant, determined that given what he had said about how he felt about both R1 and R2, it would in fact be impossible for the claimant to go back to work at the NDC and that there needed to be further investigation and in those circumstances, he should be suspended. The claimant was in possession of a laptop computer, an external hard drive, and a mobile phone all of which were the property of R1. it was determined that the claimant should return the laptop and hard drive although he was allowed to keep his mobile phone. The claimant requested time to retrieve personal information from the computer and he was allowed to do so. He was observed doing this by Ms Callaghan. After around 30 minutes Ms Callaghan became concerned that the claimant may have been deleting information from the computer and that this may have been company information and therefore the claimant was prevented from further access to the computer and the meeting ended. The claimant was told that arrangements could be made in the future for him to access the laptop again should he wish to do so.

106. Ms Callaghan wrote to the claimant on 31 January 2020 confirming his suspension [229 FHB]. The purpose of the suspension was to enable R1 to

carry out an investigation into the various concerns raised about and by the claimant.

107. On 7 February 2020 Ms Callaghan wrote to the claimant inviting him to an investigatory meeting on 13 February 2020 [231 FHB].

108. That investigatory meeting duly went ahead. Minutes of the meeting were circulated to the claimant on 17 February 2020, and he was invited to provide his comments on those minutes. He did not do so, and he was again invited to provide any comments on 21 February 2020 [787 & 788 FHB].

109. Having retrieved the claimant's laptop R1 accessed it in order to see what work needed to be done in the claimant's absence. Whilst retrieving company information from the laptop a number of documents which were not labelled were accessed and one of those was the new starter form which the claimant had completed in respect of a second full time job he had been undertaking with Serveco [245 FHB], and furthermore it became apparent the claimant had in fact had two jobs since October 2018. As a result of this and in discussions with HR Caddy, Mr Simpson considered that the claimant may have been in breach of his contract in undertaking a second full time job without telling or getting permission from R1. At that point Mr John Simpson handed the matter over to James Simpson to deal with and dealing with issues around the claimant's performance was put on hold.

110. On 27 February 2020 the claimant was invited to a disciplinary hearing on the grounds that he had breached the Working Time Regulations. The claimant was advised that the investigation into his performance issues was on hold [246 FHB].

111. The disciplinary hearing took place on 4 March 2020. James Simpson chaired the hearing, and he was supported by a representative from HR Caddy. After the hearing the claimant was dismissed for gross misconduct without notice or payment in lieu of notice. That decision was confirmed in writing on 9 March 2020 [260 FHB].

112. The claimant appealed against his dismissal but there are no allegations in relation to the appeal and we need say no more about that other than that the appeal was unsuccessful.

113. The claimant commenced early conciliation on 28 March 2020, and he received his early conciliation certificate on 12 April 2020 [67 FHB].

114. The claimant presented his claim form on 5 May 2020 [1 FHB].

## Discussion and conclusions

115. We note several matters that have informed our conclusions in this case.

116. The claimant's demeanour when giving evidence, and when cross-examining the respondents' witnesses was that he would very quickly raise his voice. He was allowed some latitude given that he was a litigant in person and no doubt he found the procedure quite stressful, however on a significant

number of occasions he had to be asked to stop shouting at Counsel or the witnesses. He was always apologetic but invariable reverted to shouting afterwards. This is noteworthy because one of the recurring complaints about the clamant was around his poor interactions with colleagues. Indeed, the claimant himself accepted, during his cross-examination of Shaun Stubbs, that it was his "nature" to shout at people when he is under pressure.

117. We also note that the claimant's invariable response to any suggestion that any criticism of him may have been valid was to simply say that it was not and that every single criticism was part of a racist conspiracy to remove him from work. As we have said above, the claimant says this conspiracy started from day one of his work for R2. The claimant implied that the conspiracy was led by Shaun Stubbs. When it was put to the claimant that Shaun Stubbs had no need to conspire to get rid of the claimant because, as the customer of R1, he could simply have told Mr Simpson that he did not want to work with the claimant, the claimant agreed stating that "Shaun Stubbs was not obliged to have me", but then he said that John Simpson had no other work to give him as the contract with R2 was R1's only contract. We reject that and prefer the evidence of John Simpson that the claimant could have been moved. However, even if we accept the claimant's evidence, the commercial reality was that had Shaun Stubbs wished to have the claimant removed, R1 would have had no choice even if that meant having to dismiss the claimant.

118. As to the conspiracy itself, according to the claimant this involved everyone who raised any complaint about him. His evidence was that every complaint was untrue and fabricated so this included at least a number of contractors, John Simpson, James Simpson, Nicola Callaghan, Shaun Stubbs, Sean Regan, Laura Northard and her colleague in Order Preparation along with a number of R2's kitchen staff.

119. Whilst we would not reject the idea of a conspiracy out of hand, the evidence in this case suggests strongly that there were genuine concerns about the claimant's behaviour and performance. On the other hand, the claimant's conspiracy allegation does stretch credibility in some respects. First, as mentioned above, there is the claimant's simple assertion that his work was faultless and if there were any problems, he was always blameless. In the Tribunal's experience and considering the wealth of evidence, that would be surprising. Second, the content of some of the claimant's evidence bordered on the absurd. He said that Shaun Stubbs, literally constantly, went around the canteen telling staff that the claimant was smelly. He said that Shaun Stubbs told staff that the claimant was a health risk. The claimant asserted on a number of occasions that every time Shaun Stubbs spoke to him, Shaun Stubbs would hold his nose. When it was put to the claimant that this could not be correct, he said that it was. He was at one point cross-examined about a meeting between himself, John Simpson and Shaun Stubbs which lasted for over 2 hours, and he said that Shaun Stubbs held his nose throughout that meeting. The Tribunal found this evidence literally incredible.

120. We also note that during his cross-examination, and often when he was cross-examining the respondents' witnesses, the claimant would take issue with what is in the notes of the various meetings held with him, even though he

accepted that he had received copies of the notes shortly after each meeting and he had at no point taken issue with their correctness.

121. We note that the claimant asserts that John Simpson was part of the racist conspiracy. However, there are clear instances of John Simpson supporting the claimant in communications with R2. See for example [424 FHB] and [438 FHB]. The claimant himself took the Tribunal to [566 SB] when cross-examining John Simpson who pointed out that this was an example of John Simpson supporting the claimant. In this case John Simpson argued that the particular criticism of the claimant was not justified as the problem was with R1, not the claimant.

122. The claimant also criticises John Simpson's mentoring meetings with the claimant as instances of discrimination. On the other hand, the claimant accepted that R1 had acted considerately and flexibly in provision of time off after the claimant went off with stress and following the death of his father and his trip to Nigeria which resulted in that in absence of around 2.5 months. This was at least in part, paid and the claimant accepted that R1 (in essence John Simpson) went above and beyond any legal or contractual obligation R1 had towards the claimant. We agree with the submission of Mr Cheetham that the support given by R1 to the claimant runs entirely contrary to the claimant's allegation that John Simpson was party to what Mr Cheetham refered to as a "grand racist conspiracy" to get rid of him.

123. We find as a fact that there was no conspiracy (racist or otherwise) to remove the claimant from his role as Facilities Co-ordinator at R2's NDC.

124. We turn now to the specific allegations as set out in the agreed list of issues [22 et seq FHB]. We have dealt with these in what we hope is a logical order, not in the precise order the issues are set out.

**Unauthorised deductions**

125. The claimant accepted that he had failed to particularise this claim notwithstanding his agreement in the agreed list of issues so to do. The burden of proof is on the claimant to prove what the unauthorised deductions were. Although he has produced a document entitled 'Schedule of Unauthorised Deductions' [20 FHB] this fails to address the required issues.

126. The basis of the claimant's claim seems to be an invoice at [180 FHB] which in fact is an invoice between R1 and R2 for the provision of engineers and equipment over the weekend of 24 to 27 January 2020. The claimant has entirely failed to explain why this invoice has any relevance whatsoever to any claim he has for unauthorised deductions from his wages.

127. For the above reasons this claim fails.

**Direct race discrimination and harassment**

128. We are satisfied that we can deal with direct race discrimination and harassment together because each of the allegations is said to amount to direct

race discrimination and harassment related to race. In either case our conclusions all the same. We deal with time points at the end of this judgment.

**Allegation 5(a)**

129. The 1st allegation is that the claimant was not formally introduced to the entire DC in June 2018 at a monthly site brief when he commenced his employment.

130. This allegation is against R2 only. The claimant relies on an actual comparator who we shall refer to as MR. MR was employed as an HR manager directly by R2. The claimant was of course employed by R1 and in that sense MR was not in materially the same circumstances as the claimant. We were taken to a number of slides which formed part of an introduction which included introducing new starters. It is not in dispute that all the people on the slides in the bundle (taken from site briefs in the period June-Sept 2018) were direct employees of R2 [158 – 162 FHB]. We also note that Mr Owles, 'Alf' (also not a direct employee of R2) was not introduced at a site brief. The claimant produced no evidence to support his assertion that he was unhappy about not being introduced at a site brief nor that other non-employees of R2 had been introduced during site briefs. We do not accept the claimant's explanation for the conduct that this was because he was the only black person in the NDC and we prefer the evidence of Shaun Stubbs that only direct employees of R2 were introduced at site briefs because of the large volume of agency workers who were working on a short-term basis.

131. We find that the claimant has not proved facts from which we could conclude that discrimination or harassment as alleged took place. Even if we are wrong about that we accept the respondent's explanation and for those reasons this allegation fails.

**Allegation 5(b)**

132. The 2nd allegation is that the claimant's workspace was moved by Shaun Stubbs of R2 from the office to the DC reception.

133. In fact, the claimant's workspace was never moved to reception and for that reason alone this allegation fails. To be fair to the claimant Ms Kight pointed us to the narrative which the claimant has appended to each of the headline allegations and she suggested that his complaint could be read as being about the proposal to move him. Having read the claimant's narrative we do not accept that. The issue is quite clearly set out and all the claimant says in his narrative is that "the intention was certainly communicated with the claimant by SS".

134. Having said that, for the avoidance of doubt the Tribunal's view is that even if this allegation could be read as either the moving of the claimant's workspace or the proposal to do so, the allegation fails in any event. It fails for two reasons. First because the Tribunal does not accept that there was any detriment to the claimant in moving his workspace or in proposing to do so. The move or proposed move to reception was in fact to enable the claimant to be

present at reception when contractors arrived on site which was a key part of the claimant's role. The claimant would continue to have a workspace, he gave no evidence why he asserts that the move was a detriment. He did not suggest for example that he would have less access to Shaun Stubbs who was his direct contact with R2 and significantly, given the claimant's evidence about the way he said Shaun Stubbs behaved towards him, a move out of the office would have been a positive benefit. Second, we accept the evidence of Shaun Stubbs that the office contained four desks and the desk occupied by the claimant, the only non-R2 employee in the office, was required by an employee of R2 returning from long-term absence. That was the reason why the proposal was made, and we note that the claimant did move his workspace to the general office about which he makes no complaint. It follows therefore that his complaint was not about moving out of the office it was only about moving to reception, but he gave no explanation as to why that move, or that proposed move was motivated by race but the move to the general office was not. The better view of course is that the key issue was the move out of the office not any proposed new location for the claimant's workspace and as we have said he makes no complaint about that.

135. We find that the claimant has not proved facts from which we could conclude that discrimination or harassment took place. Even if we are wrong about that we accept the respondent's explanation and for those reasons this allegation fails.

**Allegations 5(c) and (d)**

136. It is convenient to deal with the 3rd and 4th allegations together. The 3rd allegation is that Shaun Stubbs told other individuals at the DC that "C stinks" (allegation 5(c)). The 4th allegation is that Shaun Stubbs commented that the claimant's lunches had an offensive odour (allegation 5(d)).

137. There is no date specified in respect of these allegations. The claimant alleges that Shaun Stubbs made these comments throughout the claimant's time at the NDC.

138. There is of course a direct dispute of fact as between what the claimant says and what Shaun Stubbs says about this. The claimant said that he had been told by his manager, RC, during his time with Interserve that Shaun Stubbs had told him, RC, that the claimant's lunches had an offensive odour. There is no documentary or other evidence supporting this assertion. There are no emails or notes of any meeting whether made by the claimant or RC about this. The Tribunal notes that there were a number of occasions during the claimant's oral evidence about his time with Interserve where he alleged that he had been told things by RC but in respect of which he produced no other evidence. Considering our assessment of the claimant's credibility we prefer the evidence of Shaun Stubbs. We note that there was no evidence that the claimant ever raised a complaint about what the claimant alleged Shaun Stubbs had said (and of course this is linked to the nose holding allegation we have referred to and rejected above) and this evidence does not sit well with the evidence given in relation to the first allegation which suggests that the claimant wished to remain sharing an office with Shaun Stubbs.

139. In our judgement the claimant has not met the burden of proving facts from which the Tribunal could conclude that he was subjected to discrimination related to race. We agree with Ms Kight's submission that the claimant's explanation in cross-examination for why this alleged conduct was because of or related to his race was because, as he said, African food is spicy and his food smelled of African spice, but the claimant also said that his lunch did not smell which appears to be inconsistent if not entirely nonsensical.

140. We find that the claimant has not proved facts from which we could conclude that discrimination or harassment took place. Even if we are wrong about that we accept the respondent's evidence and for those reasons this allegation fails.

**Allegation 5(e)**

141. The 5th allegation is that the claimant was made to feel that other individuals at the DC saw him as a health risk.

142. The date of this alleged act was 11 July 2019. Central to this allegation is the claimant's assertion that he had a conversation with Shaun Stubbs following the claimant's appointment with a dietitian and that during the conversation Shaun Stubbs disclosed to the claimant that he, Shaun Stubbs, like the claimant had an undiagnosed medical condition. The claimant says that following this conversation Shaun Stubbs gossiped with staff telling them that the claimant was a health risk and that thereafter staff saw him as a health risk which resulted in kitchen staff banning the claimant from the kitchen.

143. It is not disputed that the claimant attended an appointment with a dietician on 11 July 2019 [307 – 308 SB]. there is however a dispute of fact as to whether the claimant told Shaun Stubbs details of his medical condition following his appointment such that Shaun Stubbs could then have gossiped about them to others.

144. We note that the claimant was only in work from 11:47 to 17:12 on 11 July 2019 and was off the following day [510 FHB], which the claimant accepted meant that he was busy on 11 July 2019 catching up on work and getting prepared for being off the next day. The claimant also accepted that Shaun Stubbs was in back-to-back meetings all day on 11 July 2019 [346 SB].

145. Shaun Stubbs' oral evidence was that he noticed that the claimant held his stomach and there was then a conversation with the claimant, which lasted no more than 30 seconds, during which he asked the claimant whether he was ok and the claimant did not tell him anything about his medical conditions but instead pointed to Shaun Stubbs' hands and said they looked uncomfortable. We note that Shaun Stubbs suffers from contact dermatitis, a diagnosed medical condition.

146. We accept the evidence of Shaun Stubbs that he did not discuss his hands with the claimant and that he does not recall the claimant telling him anything about being lactose intolerant or having a "gastro-problem". We also

accept Shaun Stubbs' evidence that he did not say anything to anyone on site about the claimant's medical conditions, he did not tell kitchen staff to not let the claimant into the kitchen.

147. We accept the submission of Ms Kight that there is no explanation from the claimant as to why this allegation itself, even if the Tribunal were to find it was true, was related to the claimant's race. This of course holds true for much of the claimant's case. It is perhaps in the nature of this racist conspiracy theory that one has to accept the basic premise that those involved were motivated by race to behave in the ways alleged by the claimant which therefore inevitably explains why those alleged to have behaved in the way the claimant says, so behaved. It is an entirely circular argument. Each time the claimant was asked to explain the connection between the behaviour he complains of and his race he simply fell back on the assertion that those who have been accused of discriminating against him are racist. As Ms Kight submitted, that remains an entirely unsubstantiated allegation.

148. In our judgement the claimant has not met the burden of proving facts from which the Tribunal could conclude that he was subjected to discrimination or harassment in relation to this allegation and the allegation fails.

**Allegation 5(f)**

149. The 6th allegation is that the claimant's command of English was criticised.

150. The claimant's evidence was that his use of English was second only to that of Mr. John Simpson within R1. The claimant asserted that his use of English and his communication skills in general were excellent and that therefore any criticism of those skills was, by definition, race discrimination.

151. This allegation presents something of a legal and perhaps philosophical difficulty. The legal difficulty is that English is not within the definition of race in the Equality Act 2010. There is no allegation the claimant's accent made him difficult to understand nor that he did not speak "good English". That leads to the philosophical difficulty, which is that taking the allegation at face value, we would be required to find evidence that the claimant's "command of English was criticised" and to make findings about what was or might have been meant by "command of" English. In fact, it was not alleged during the evidence that at any point anyone said to the claimant that he did not have good "command of" English, rather the criticism was that his emails were unclear which, given his role, which involved health and safety, was perceived to be a problem.

152. During the claimant's cross-examination of the respondents' witnesses he took the tribunal to two or three emails of employees of R2 which he asserted were unclear. In particular he took Shaun Stubbs to an email sent by employee E. That email is at [571 SB]. The claimant's assertion was that the email contained grammatical errors. Shaun Stubbs' evidence, which we accept, was that notwithstanding that employee E was Polish, her emails were clear even though she might "miss the odd word". The point Shaun Stubbs made was that the claimant's emails were not being criticised because of some idea of

lack of command of, or poor standard of English, but rather because they were often too wordy and consistently lacking in clarity.

153. The Tribunal's experience of the claimant was that his oral communications often lacked clarity. He would commence answering a question only to stop answering it and in the same breath move to start a different point and often then to start a third point without ever concluding any particular point, and he fairly frequently had to be told that he had not answered the question, questions had to be re-put, often more than once, and it took some time to elicit clear answers to fairly straightforward questions.

154. All of the emails we were taken to in which the claimant was being criticised in this context refer to the lack of clarity in either what he wanted or what he was instructing others to do [see for example 384. 141, 400, 395 422/423 and 536 to 540 FHB]. None of the criticism relates to the claimant's command of English, and even if we read that allegation broadly to encompass any criticism of the claimant's communications, considering the content of those emails we do not find that there is any evidence of any relationship between the criticism and the claimant's race.

155. In our judgement the claimant has not met the burden of proving facts from which the Tribunal could conclude that he was subjected to discrimination or harassment in relation to this allegation and the allegation fails.

**Allegation 5(g)**

156. The 7th allegation is that Shaun Stubbs and/or R1 issued the claimant with a readable access card to monitor the claimant's working hours.

157. This allegation is said to have occurred between 18 July 2019 and 8 November 2019.

158. As we have referred to above, along with everyone else who accessed the NDC, the claimant had a swipe card to allow entry to and exit from the site. The principal purpose of swiping in and out was so that at anytime R2 knew who was on site in case of an emergency, for example a fire which might require site evacuation. But R2 also operated a specific time keeping system for its employees known as T&A. This was used to provide details of actual working hours rather than merely time spent on site.

159. Shaun Stubbs was concerned that the claimant was not undertaking his full hours and given that R2 was paying for the claimant to be available for work he raised the matter with John Simpson. The claimant asserted that not only was he working his full contractual hours but very often he was working more hours than he was paid for and not receiving the appropriate time off in lieu (TOIL).

160. A meeting took place between the claimant, Shaun Stubbs and John Simpson on 18 July 2019 at which this was discussed. A loose note of that meeting is at [140 – 141 FHB]. the claimant received a copy of the note and at no point until the hearing of this case suggested that the note was anything but accurate. That note clearly records that the claimant and Shaun Stubbs had a

difference of view on the claimant's working time and therefore it was agreed that the claimant would swipe in and out at reception and thus his time would show up in the T&A report which would then give an accurate account of his working time.

161. The claimant said that he had used the system, John Simpson's evidence was that no data could be found on the system for the claimant and the assumption was that he had not used the swipe card as suggested. However, in the Tribunal's view nothing turns on that because the allegation is about the issuing of the card in order to monitor the claimant's hours not about whether in fact the card was used or whether the hours were in fact monitored.

162. The Tribunal's judgement is that this allegation involves no detriment to the claimant. The point was put to the claimant during the hearing that the proposal to monitor his working hours was to his benefit if he was correct that he was working excessive hours which were not being picked up and for which therefore he was not receiving the correct TOIL, which of course was his complaint which gave rise to the proposal in the first place. The claimant seemed to disagree with this proposition, but it is difficult to see how he could disagree given the contemporaneous documentary evidence.

163. In our judgement the claimant has not met the burden of proving facts from which the Tribunal could conclude that he was subjected to discrimination or harassment in relation to this allegation and the allegation fails.

**Allegation 5(h)**

164. The 8th allegation is that the claimant was accused of poor time keeping. The claimant has not specified when this allegation took place, but it cannot have gone beyond the date the claimant was suspended which was 30 January 2020.

165. In many respects it is difficult to understand the nature of this allegation insofar as it is said to relate to or be because of race. At pages [509 – 510 FHB] There are details from the swipe card system showing that even considering only the times the claimant entered and left site, more often than not he was not working his full contractual hours. Rather oddly the claimant appeared to dispute this, but he could not explain why or how the record from his own swipe card could be wrong.

166. One thing the claimant did suggest was that in some cases where the claimant did not work his full hours, he had permission from Shaun Stubbs to, for example, leave early. Shaun Stubbs' evidence, which we accept, was that he would from time to time be told by the claimant that he was going to leave early for, for example a medical appointment. Shaun Stubbs did not consider that he was in a position to prevent the claimant leaving early. Insofar as that amounted to permission then in some cases it would be true to say that the claimant did leave early with permission. The claimant seemed to be of the view that therefore this meant that he was not failing to work his full hours. It was put to the claimant several times the fact that he was off site with permission was irrelevant to the question of whether he was working his full contractual hours,

but the claimant seemed to have considerable difficulty understanding or accepting this point.

167. The clear and indeed unchallenged evidence from R2's system was that the claimant was regularly not working his full contractual hours and we accept the respondents' evidence this was the reason for the claimant being accused of poor time keeping and this had nothing to do with his race.

168. In our judgement the claimant has not met the burden of proving facts from which the Tribunal could conclude that he was subjected to discrimination or harassment in relation to this allegation, but even if he had, we accept the explanation given by the respondents and the allegation fails.

**Allegation 5(i)**

169. The 9th allegation is that Shaun Stubbs was critical and made allegations about the claimant, which the claimant claims were false, at a meeting on 18 July 2019. The claimant's narrative to this allegation [26 FHB] states that he is concerned with four specific criticisms as follows:

a. Leaving contractors on site
b. Keys in scissor lift
c. Lack of clear communication
d. Report of becoming irate and shouting at others (this refers to the complaint by an employee of R1, Laura Northard).

170. It is not disputed that Shaun Stubbs raised concerns about these matters. As with all the allegations, the claimant did not explain why he says these matters were raised because of or for a reason related to his race other than they were part of a racist conspiracy to get rid of him.

171. In relation to the complaint about the claimant leaving contractors on site, the claimant accepted in cross examination that it was a significant part of his job to be on site for contractors arriving to undertake planned work and to supervise them so doing. He accepted that there were occasions when he did leave contractors on site (a contractor known as Ritehite and an electrical contractor) [140 FHB].

172. The claimant's evidence was that when he did leave contractors on site that they were not unattended, and he had left site with Shaun Stubbs' permission. In practical terms it is correct that when the claimant left site early contractors who were on site, we're not left unattended because that would have created a health and safety problem for R2 given that they had to be attended and therefore Shaun Stubbs ensured that the claimant's work was covered. But that need to ensure coverage of the claimant's work resulted from the claimant not being available because he had left early and it makes no difference to that point that he did so with "permission" (and we have dealt with the issue of permission above which findings equally apply here). The Tribunal can see that from the claimant's perspective, given that contractors were attended when he was not there, the criticism is not justified, but in the Tribunal's judgement the claimant has missed the point. The criticism by Shaun

Stubbs was that it was the claimant's job to attend contractors when they were working on site and there were occasions on which he failed to do that, and that failure is not justified by the fact that R2, in effect the claimant's customer, filled in for the claimant.

173. In the circumstances it was entirely appropriate for the matter to be raised at the meeting during which the claimant and his work was being discussed and there is no evidence that the claimant's race played any part in that.

174. In relation to the scissor lift keys, the claimant accepted in cross-examination that keys were left in a scissor lift after it was delivered and that this was a safety issue. The claimant's case was that he was not responsible for the scissor lift because a contractor had arranged for it to be delivered and once it had been delivered security saw to it being parked, although he conceded that if he saw such equipment in an unsafe condition, he would act upon it. When this was discussed during the meeting on 18 July 2019 the claimant's explanation was listened to, and a solution was found which was that the claimant would in future ensure that security guards were aware that keys should not be left in machinery delivered to site.

175. In short, this was a legitimate matter for Shaun Stubbs to raise with the claimant because health and safety was one of his responsibilities along with dealing with contractors, notwithstanding that he did not arrange delivery of the scissor lift. The argument was that he should have checked that having been delivered it was in a safe state. But in the end, as we have said above, the claimant's point of view was accepted, and a solution was found. No action was taken against the claimant. There was a genuine reason for Shaun Stubbs raising the matter in the meeting and there is no evidence that the claimant's race played any part in that.

176. In relation to communication issues, we repeat the findings set out above about that.

177. In relation to the Laura Northard complaint, the claimant accepted in cross examination that Shaun Stubbs himself did not make a false allegation because he did in fact receive a written complaint the day before (17 July 2019) from Laura Northard [400 FHB]. That complaint described what happened and described the claimant as being irate.

178. In relation to the substance of the Northard allegation, the Tribunal notes that on a number of occasions in the hearing the claimant was asked to stop shouting as he became more agitated during not just his cross-examination but also when he was cross-examining the respondents'' witnesses and it was apparent to the Tribunal that the claimant had not realised that he was shouting, from which we infer that it is not always obvious to him how his communication style is perceived by others from which we conclude that it was likely that while he might not have perceived himself as shouting at the time, he could well have been. The Northard complaint also referred to the claimant's manner towards her and her team as "unacceptable".

179. The Tribunal's conclusion is that the Northard complaint was clearly something that it was reasonable for Shaun Stubbs to raise in a meeting with the claimant and his reason for so doing was because there had been a complaint which needed to be discussed with him and not because of race.

180. In our judgement the claimant has not met the burden of proving facts from which the Tribunal could conclude that he was subjected to discrimination or harassment in relation to this allegation, but even if he had, we accept the explanation given by the respondents and the allegation fails.

**Allegation 5(j)**

181. The 10th allegation is that a maintenance engineer said to the claimant that he did not speak good English, he could not understand the claimant and that the claimant was a liar.

182. The claimant says that this event took place on 17 October 2019 and the maintenance engineer concerned is a Mr Philip Owles, commonly known as Alf.

183. In evidence, the claimant accepted that Mr Owles was a self-employed contractor of R1, that he was what is commonly referred to as a third party. The Court of Appeal in **Nailard v Unite the Union** [2018] EWCA held that an employer cannot be held liable for the acts of a third party, in this case Mr Owles, and therefore this allegation cannot succeed even if the Tribunal was satisfied that on the evidence the claimant has met the initial burden of proving that there was a prima facie case that Mr Owles discriminated against him.

184. For those reasons this allegation fails.

**Allegation 5(k)**

185. The 11th allegation is that comments were made by R1 about the claimant's understanding of and ability to speak English in the meeting in the NDC canteen. The claimant says that this meeting took place on 4 July 2019 and the claimant says that John Simpson said that English was not the claimant's first language and that he had poor command of English.

186. We have dealt with much of the evidence around the general allegation in relation to the claimant's communications above in relation to allegation 5(f).

187. In evidence, the claimant accepted the need for clarity in his communications given that he worked in a health and safety critical environment and was often dealing with health and safety critical matters. Issues around the claimant's communication had been raised by Shaun Stubbs with RC, the claimant's line manager at Interserve, his original employer, [394 FHB] and continued to be raised after the claimant's TUPE transfer to R1 [141, 403 FHB]. These concerns were not raised only by Shaun Stubbs but also by colleagues. However, at no point did the claimant grasp the nettle and seek to improve because he did not accept that there was a problem. At the meeting on 18 July 2019 between the claimant, John Simpson, and Shaun Stubbs, called to discuss the claimant's performance, the minutes at [141 FHB] contain

a list of 'Meridian Improvements' which starts with a lack of clear communication from the claimant stating that he needed to send clear and concise emails. The claimant appears to reject this criticism, as the notes record that '[The claimant] thought that his communication was clear and objected to the point being raised'.

188. The claimant's case seems to amount to an assertion that the mere fact of criticising his use of language was an instance of direct race discrimination. He does not explain why. On considering all the evidence, including the way the claimant gave evidence and the way his witness statement was drafted, we are, on balance, satisfied that the reason his communication was criticised was because it was considered to be unclear and not straightforward and not because of or related to race. We remind ourselves that in s.9 EqA 2010 'language' is not part of the definition of race, and we accept Mr Cheetham's submission that the act of criticising (or indeed dismissing) on the basis of an inability to use English is incapable in and of itself of amounting to race discrimination.

189. In our judgement the claimant has not met the burden of proving facts from which the Tribunal could conclude that he was subjected to discrimination or harassment in relation to this allegation, but even if he had, we accept the explanation given by the respondents and the allegation fails.

**Allegation 5(l)**

190. The 12th allegation is that the claimant was issued with a poor performance notice by R1 on 9 January 2020. In this case he relies on named comparators being MN, Philip Owles, JH and James Simpson.

191. Perhaps the first point to note is that Mr Owles is a contractor and not in a comparable position to the claimant in relation to his employer, R1. James Simpson is a director of R1 and not an appropriate comparator. In any event the claimant gave no evidence whatsoever in relation to the performance of James Simpson.

192. The poor performance notice was issued following a review meeting on 8 November 2019. The minutes of that meeting show that a number of performance concerns were discussed with the claimant following his return to work after his extended leave. The notes of that meeting are at [171 FHB]. The poor performance notice [167 FHB] was accompanied by a performance improvement plan (PIP) which appears at [169 FHB].

193. There are two difficulties with the claimant's evidence about this allegation. The first is that he has failed to explain why he says being issued with the notice of poor performance and/or the PIP was because of or related to race, and second, he has not explained why having performance issues drawn to his attention and being given a plan to improve amounted to a detriment.

194. A further difficulty is that it was accepted by the claimant in cross-examination that none of his comparators had been the subject of concerns about their performance either at all or to the same extent as he was. The

claimant failed to challenge the evidence of John Simpson on this point. See for example paragraphs 66 and 68 of John Simpson's witness statement.

195. There is ample evidence of a number of complaints being received by R1 about the claimant's poor performance including in relation to the server room air conditioning which we have referred to above. Another example can be seen in the email from Shaun Stubbs dated 31 October 2019 [FHB 476] which was sent a short time before the performance review. He stated that:

> *"I asked for the crocodile clips to be swapped for the universal connectors weeks ago. This was only requested in reaction yesterday. (These were the chargers he'd put in the Plant Room out of the way rather than deal with them).*
> *• Emmanuel is now asking the operation to count batteries. Matt/Alf have done this work already.*
> *• Alf organised chargers to be collected last week to be repaired and Emmanuel cancelled this for some reason saying no need to collect.*
> *• Edyta a Supervisor is missing from the email. My feeling is that this can't continue as too many things are being missed."*

196. We have also referred above to another seemingly significant incident which occurred on 19 November 2019 when John Simpson was called because the claimant had not turned up for work and a number of contractors were waiting on site for him to issue permits so that they could start their work (including one, Blobel, who had flown in from Germany). This was the day on which the claimant says he had lost the keys to his car, he telephoned work to say that he would be late, and the presumption was that he would arrive around 30 minutes later, by around 09.00 AM, although in the event he did not arrive until around 11:25 AM.

197. In relation to the work that was due to be done on that day, it transpired that the German contractors were unable to complete their work because of another failing by the claimant. As Shaun Stubbs set out in an email to John Simpson on 20 November 2019 [FHB 529]:

> *"Just to share with you the sequence of events that have contributed to Blobel Not being able to complete the air leak fix this week. I asked [the claimant] to call out Motivair on Sunday 11th. I told him I was concerned about the compressor making noises I have not heard before. I also chased him on this last week too (all of this was verbally). Yesterday Blobel Have been on site and were not able to fix the leak because the compressor was not fixed. Looking at the email thread below it looks like [the claimant] emailed them on the 15th making them aware that they may be needed. I am not sure why he didn't call Motivair from the outset."*

198. The claimant's email which Shaun Stubbs was referring to is at [530 FHB]. this was sent four days after he was asked by Shaun Stubbs to deal with the matter which was clearly urgent. It is entirely apparent from the content of the email that it does not require Motivair to attend but rather suggests that they may be asked to attend at some point. Despite the fact that this is plain from the

content of the email the Tribunal notes that when the claimant was being cross-examined about this, he refused to accept that the email did not ask the engineer to attend.

199. There are of course other concerns which are apparent throughout the large number of documents in this case, and we have referred to some in this judgement including the office refit, the issue of the keys being left in the scissor lift and issues around batteries and battery chargers.

200. The way the claimant puts his case means that his view is that none of the criticisms of him/his work were valid or justified, rather they were fabricated as part of a racist conspiracy to remove him from his job. If one rejects the conspiracy theory, and the Tribunal does reject it for the reasons we have set out above, we are left with the considerable body of evidence suggesting that the claimant was nowhere near as good at his job as he thought he was and that this was a concern to a number of people not least Shaun Stubbs who consistently raised those concerns both with the claimant directly and with John Simpson his manager and of course the Managing Director of R1. That finding leads to the conclusion that the performance concerns were raised because there were genuine performance issues and not because of or for reason related to the claimant's race.

201. In our judgement the claimant has not met the burden of proving facts from which the Tribunal could conclude that he was subjected to discrimination or harassment in relation to this allegation, but even if he had, we accept the explanation given by the respondents and the allegation fails.

**Allegation 5(m)**

202. The 13th allegation is that on 9 January 2020 comments were made by John Simpson of R1 about the content of the claimant's emails, suggesting that the claimant sought help in preparing them. the claimant relies as comparators on MN, JH, CS and Philip Owles.

203. The tribunal considers that this is the same allegation as those contained in allegations 5(f) and (k) and we repeat the findings set out above in relation to those allegations.

204. In our judgement the claimant has not met the burden of proving facts from which the Tribunal could conclude that he was subjected to discrimination or harassment in relation to this allegation, but even if he had, we accept the explanation given by the respondents and the allegation fails.

**Allegations 5(n), (o) and (p)**

205. The 14th allegation is that the claimant was suspended on 30 January 2020 and R1 confiscated the claimant's laptop (5(n)). the 15th allegation is that R1 obstructed the claimant from retrieving personal information from the laptop (5(o)). The 16th allegation is that R1 accessed personal files on the claimant's confiscated laptop. It is convenient to consider these allegations together

because the claimant says that they all occurred on 25 March 2020 and they were all part of the same meeting.

206. It is not of course in issue that the claimant was suspended from his employment and that as part of his suspension his company laptop and hard drive were taken from him, although we note that he was allowed to retain his company mobile phone.

207. The suspension took place during a previously arranged review meeting. The claimant attended that meeting along with John Simpson and Nicola Callaghan of HR Caddy. Minutes of that meeting are at [183 FHB]. The background to the review meeting was that there remained a number of concerns about the claimant's performance and, significantly, the claimant had arranged for a meeting between himself and Stacy Squire who was the general manager for the NDC, and in that capacity was the most senior person on site. The purpose of that meeting was so that the claimant could complain to Ms Squire about Shaun Stubbs. During cross-examination the claimant could not accept that in going directly to the general manager of his employer's key client, and bypassing his own line manager, John Simpson, in order to complain about the person with whom he had to work on a daily basis, the claimant was putting John Simpson in an almost impossible position.

208. We accept John Simpson's evidence thathe considered that this was entirely inappropriate and potentially damaging to R1's business. The Tribunal notes that the claimant's evidence was that he had permission from John Simpson to have the meeting with Stacy Squire. However, on further cross-examination it became apparent that what the claimant meant was that given that he regularly saw Stacy Squire and talked to her, all that John Simpson had said to him was that he could not prevent the claimant from speaking to her. That was a long way short of permission to complain to one senior manager of R1's main client about another senior manager of that client who also happened to be R1's main contact.

209. The Tribunal also notes that on the day before the review meeting the claimant spoke to John Simpson telling him that he has lost trust in R1/John Simpson to the extent that he wanted the meeting recorded [659 FHB]. We note that this request was declined by John Simpson but the claimant felt so strongly about this that he covertly recorded the meeting in any event.

210. We accept the evidence of John Simpson that given how the claimant had expressed loss of trust in both him and Shaun Stubbs and given that the claimant felt that in effect everyone was against him, those matters needed to be investigated, the claimant could not return to work at the NDC in those circumstances and therefore he should be suspended. The claimant accepted in cross-examination that he had been suspended because he had expressed that there had been a breakdown in trust and in that context the claim that the reason for the suspension was because of or related to race fails.

211. It is part of the above allegation that the claimant's laptop was "confiscated". Strictly speaking the laptop and hard drive were confiscated in that they were taken with authority and that is the case because the laptop and

hard drive were the property of R1. Given that they were provided for work purposes and that following his suspension the claimant was not working, he did not require either the laptop or the hard drive. R1's Computer Use and Data Protection Policy appears at [286 FHB]. It contains the following:

> *"1.4 In general, Company computers, Company provided USB sticks and External Hard drives are for Company use and not for personal use. Where Company computers are used for personal use during lunch breaks and out of hours, it is advisable not to retain such information as it will be considered as Company property. This general rule is extended to, but not exclusively to, Social media sites, chat groups and any personal correspondence. Any views expressed by the user should have a disclaimer stating that it is not the official view of the Company."*

212. The tribunal finds that it was entirely reasonable for John Simpson to require the claimant to return the laptop and hard drive. We find that there is no evidence proving, or from which we could draw an inference that the reason why the laptop and hard drive were confiscated was race. In fact we draw an inference from the fact that the claimant was allowed to retain his company mobile phone that R2 was not motivated by race to deprive the claimant of company equipment which is what is implied in this allegation.

213. In our judgement the claimant has not met the burden of proving facts from which the Tribunal could conclude that he was subjected to discrimination or harassment in relation to this allegation, but even if he had, we accept the explanation given by R1 and the allegation fails.

214. Turning to the allegation that the claimant was prevented from accessing his personal information on the laptop, We have set out above our findings of fact in relation to what took place at the meeting at which the claimant was suspended. We repeat that the claimant was allowed around 30 minutes access to the laptop to retrieve personal information but that he appeared to be deleting data and given that Ms Callaghan, who was watching the claimant, could not see what was being deleted that was stopped. We do note however that the claimant's own evidence was that he had access to all of his personal emails on his mobile phone in any event, so it is unclear what personal information he ceased having access to. Furthermore, it was agreed evidence that the claimant would be allowed access to the laptop and hard drive by arrangement although that never transpired.

215. We find that the reason why the claimant was prevented from further access to his personal information was not related to or because of race but for the reasons we have set out above. In the circumstances allegation 5(o) fails.

216. The final allegation relates to R2 accessing the claimants' personal files on the laptop. We accept John Simpson's evidence about this. He says that he was bound to look at the laptop to assess ongoing and future work which would have to be reallocated given the claimant's suspension from work. In looking at the laptop he noted several folders which were unnamed and which therefore he was bound to look through and in doing so he discovered the evidence which appears in the bundle regarding the claimant's other employments during

his employment with R2 including most recently his full-time job working night shifts for Servco at the YMCA.

217. We find that the reason why the claimant's personal data was accessed was not because of or related to race and this allegation fails.

**The claimant's dismissal**

218. The claimant claims that his dismissal was an act of direct race discrimination and harassment.

219. The claimant was dismissed by James Simpson a director of R2. his evidence was that not only did the claimant's race play no part in his decision to dismiss, but he was also only generally aware of the matters which have given rise to the allegations we have dealt with above. He was not aware of any details and not involved in any decisions regarding the claimant until he was asked to deal with the disciplinary hearing.

220. At this point we again come up against the difficulty created by the way in which the claimant puts his claim. He says that the real reason for his dismissal is his race. There is no evidence of that and no evidence from which we could infer that. The reality is that all the direct evidence we have and all of the evidence from which we could draw inferences shows that the reason given by James Simpson for his dismissal of the claimant is exactly as he says.

221. There were five allegations put to the claimant as part of the disciplinary hearing which was set out in the invitation to the disciplinary hearing at [246 FHB]. The invitation letter says as follows:

> *"Specifically, it is alleged that you:*
> *• Failed to inform your employer that you were working elsewhere as a Night Shift Housing support officer for at least 40 hours per week, and have failed to follow both express and implied terms and conditions of your employment*
> *• Intentionally withheld information to prevent your employer from knowing about your additional job*
> *• Prevented your employer from accurately monitoring your working hours in line with the Working Time Directive*
> *• Placed both yourself and others at significant risk by failing to take the legally required rest periods*
> *• Significantly compromised your ability to carry out your role and failed to take sufficient measures to ensure you were fit and ready to complete the contractual duties of your job…"*

222. It was not in dispute in this case that the claimant had a second full time job with Servco working night shifts at the YMCA. The claimant's evidence was that this was a sleep-in shift and he seemed to imply that he was being paid to sleep. However, the Tribunal has significant experience of such work and in reality the individual is paid to be available for work during the night shift as and when necessary and therefore it could not be guaranteed that on any night the claimant would either be allowed to sleep all night or indeed any part of it and

the claimant was being somewhat disingenuous when he suggested he was being paid to sleep.

223. The respondent found that the claimant was guilty of the allegations set out in the invitation letter and that this amounted to gross misconduct for which they imposed the sanction of summary dismissal.

224. There is no doubt that the claimant failed to inform his employer that he was working full time each night prior to coming to work at the NDC to do a full day's work in a health and safety critical environment. Despite some detailed questioning of the claimant, he appeared to fail to understand why this would be a concern to his employer. He could not accept that in failing to inform his employer about the second job he deprived R2 of information relevant to the question whether on any given day the claimant was fit to do his job.

225. It is also clearly true that R1 was not aware of and therefore could not monitor claimant's working time in accordance with the Working Time Regulations.

226. it was not unreasonable of R1 to conclude that the above matters placed the claimant and others with whom he worked at risk and that the claimant's ability to do his work was compromised.

227. Just in relation to the failure to inform R1 of the second job, the claimant asserted that he had no express obligation to do so and therefore was not in breach of contract. Whether that is a significant matter the Tribunal doubts because even if that was not the case the other allegations were clearly made out and the Tribunal is of the view, given the nature of the claimant's role, that R2 was entitled to treat that as gross misconduct. Furthermore even if there was no express term requiring the claimant to seek permission to undertake and/or to disclose the second job, and we do not accept that point based upon a consideration of the express wording of the contract, the reality is that it is an implied term of the contract of employment that an employee shall act in the best interests of their employer and in the Tribunal's view, in a case such as this, that would encompass telling an employer working in a health and safety critical environment that something the employee is doing outside of work might impinge on their ability to do the work safely and that therefore in such a case permission ought to be sought and there need not be an express term to that effect in order for an employee in that position to be in fundamental breach of contract if no permission is sought. In short, the claimant had an implied duty, in the circumstances, to advise R2 of the new role and check to see if R2 had any objection to him taking up the position.

228. We find that there is no evidence from which we could conclude or from which we could infer that the reason for the claimant's dismissal was because of or related to race. we are entirely satisfied that the reason James Simpson dismissed the claimant was as his evidence said which is that he concluded that the claimant was in fundamental breach of contract.

229. In our judgement the claimant has not met the burden of proving facts from which the Tribunal could conclude that he was subjected to discrimination

or harassment in relation to his dismissal, but even if he had, we accept the explanation given by R1 and the allegation fails.

**Breach of contract**

230. This allegation is that the claimant should be paid notice pay because R1 dismissed him in breach of contract.

231. It follows from our findings above in relation to the reason for dismissal that we find the claimant has not proved that R1 acted in breach of contract in dismissing him and therefore this claim fails.

**Victimisation**

232. The victimisation claim is based on the claimant having made two protected acts as follows:

a. On 29 October 2019 during a meeting with our R1, he raised concerns about being subjected to discrimination by virtue of him being asked to "clock in and out" at the NDC;
b. Raising concerns with John Simpson of R1 about what had been said to the claimant regarding his use of the English language.

233. If the claimant did do either of the protected acts was the claimant subjected to the following detriments:

a. on 29 October 2019 John Simpson called the claimant names and threatened to dismiss him;
b. the use of allegations against the claimant to find a way to remove him from the business?

234. At the hearing the claimant amended the dates set out above from 29 October 2019 to 8 November 2019.

235. If the claimant did suffer any detriment, the final issue will be whether this was because the claimant did one or more of the protected acts.

236. Under cross-examination John Simpson accepted that the claimant raised the question of race discrimination on 8 November 2019. He said that there may have been a previous occasion when the claimant raised the question of discrimination, but he could not put a date on that, and it is noted that neither does the claimant, and in our view there was only one protected act in this case and that took place on 8 November 2019.

237. As to the first alleged detriment we accept the evidence of John Simpson that he did not call the claimant names. The claimant said in his evidence that Mr Simpson called him "a mole" but we find that Mr Simpson did not do that.

238. The allegation that John Simpson threatened to dismiss the claimant was, we find, based on a misunderstanding by the claimant. What John Simpson said to the claimant was that he could not see how the claimant could

return to work at the NDC because of the way he had expressed his loss of trust in both respondents in this case. The claimant jumped to the conclusion that this meant he would be dismissed whereas he could of course have been found other work. It must be remembered that at this stage John Simpson was unaware of the claimant's second job and the potential gross misconduct.

239. As to the second detriment it is difficult to understand the sense of this claim. The claimant's evidence, and clearly his very firm belief because he expressed it on a number of occasions, was that there was a day one conspiracy between the respondents to get rid of him and therefore if that is correct it was not an act of victimisation because it was not in response to any allegation that either respondent had breached the Equality Act 2010.

240. In short, we find that the claimant was not subject to any detriment by reason of his allegation of race discrimination made at the meeting on 8 November 2019 and this claim fails.

**Time limits**

241. Mr Cheetham submitted that as between the claimant and R1, any alleged act of discrimination before 16 January 2020 is *prima facie* out of time and the Tribunal has no jurisdiction to hear the same. He submitted that claimant has advanced no argument as to why there should be a just and equitable extension of time in relation to any of his claims nor did he set out with any particularity an argument as to any continuing act and that in the circumstances the only issues above which perhaps fall to be decided by the Tribunal are those in relating to the claimant's suspension and dismissal.

242. Ms Kight submitted that given that the claim was submitted: 5 May 2020, that Day A was 16 April 2020 and Day B was 20 April 2020 and that three months before Day A was 17 January 2020, any claim based upon an allegation that occurred before that date is prima facie out of time and the Tribunal has no jurisdiction unless it forms part of a continuing act of discrimination which extends beyond that date, or it would be just and equitable for time to be extended.

243. Ms Kight correctly pointed out that in evidence the claimant confirmed that the last date he was on site at R2 and had any interaction at all with employees of R2 was 30 January 2020, because thereafter he was suspended and had no further contact with R2 [229 FHB]. Therefore, if the Tribunal finds that R2 did not commit any act of discrimination during the period 17-30 January 2020, then there was no last act within time, no continuing act and C can only rely upon the just and equitable extension.

244. The claimant provided no explanation whatsoever for the delay in submitting his claim. He confirmed in evidence that:

a. He has a law degree and although he has not practised law in the UK, he is familiar with the Tribunal process and procedure, having previously pursued a claim in the Tribunal. One would expect therefore that the

claimant could research his employment rights and crucially make himself aware of the time limits.

b. As early as 8 November 2019 he was threatening ET proceedings for discrimination and so by this date at very latest, he was aware of the claims process, yet he did not pursue a claim for a further 6 months, even though by this date the claimant claims that R2 had already committed the majority, of the discriminatory behaviour alleged against it.
c. In evidence the claimant's explanation for why he did not pursue a claim at this point was that "he felt no need to institute ET proceedings" – this suggests that means the claimant must have been of the view that nothing which had gone before then had amounted to unlawful discrimination.

245. Ms Kight therefore submitted that the Tribunal does not have jurisdiction to determine the claimant's claims against R2 which occurred before 17 January 2020 because, they are *prima facie* out of time, the claimant's claim that R2 committed acts of discrimination between 17-30 January 2020 is unfounded and there is no basis upon which it would be just and equitable to extend time.

246. The first point to note is that we find it is inherent in the notion of a conspiracy that all of the allegations are connected by an underlying policy – in this case to get rid of the claimant. It is thus inherent in the way the claim is put that there was an act of discrimination extending over a period culminating in the claimant's dismissal. Whether that encompassed both R1 and R2 throughout is a moot point and it was not addressed by the claimant whether in chief or in his cross-examination of Shaun Stubbs.

247. We also accept that at no point did the claimant address why, if any claim was out of time, it would be just and equitable to extend time.

248. Having said that, it follows from our findings above that this is not a matter we need to address further as we have not upheld any of the claimant's claims.

_____

Employment Judge Brewer

Date: 26 October 2021

# Appendix

# Agreed list of issues[1]

Breach of contract

1. Was R1 entitled to summarily dismiss the claimant? Specifically:

    a. Did the claimant act in breach of contract?
    b. If so, was that a repudiatory breach?
    c. Did R1 terminate the claimant's employment as result of such breach?

Unauthorised deduction from wages

2. What's the claimant paid less than was properly payable to him on any occasion

Race discrimination

3. The claimant describes his race for the purposes of the Equality Act 2010 as follows:

    a. His skin colour: black
    b. His national origin: Nigerian
    c. His ethnic origin: black African

Direct race discrimination

4. Was the claimant Subjected to the following detriments?

    a. Not being formally introduced to the entire DC in June 2018 at a monthly site brief when he commenced his employment
    b. the claimant's workspace was moved by Shaun Stubbs of R2 From the office to reception
    c. Shaun Stubbs told other individuals at the DC that the claimant "stinks"
    d. Shaun Stubbs commented the claimant's launches had an offensive odour

[1] This is a summary of the relevant issues in the agreed list of issues and does not contain the claimant's narrative. A full schedule of agreed issues is in the bundle.

e. The claimant was made to feel the other individuals at the DC saw him as a health risk
f. The claimant's command of English was criticised
g. Shaun Stubbs (and/or R1) Issued the claimant with a readable access card to monitor the claimant's working hours
h. The claimant was accused of poor time keeping
i. Shaun Stubbs was critical of and made allegations about the claimant which the claimant claims were false at a meeting on 18 July 2019
j. A maintenance engineer said to the claimant that he did not speak good English; He could not understand the claimant and that the claimant was a liar
k. Comments were made by R1 about the claimants understanding of an ability to speak English in a meeting in the DC canteen
l. The claimant was issued with a poor performance notice by R1 on 9 January 2020
m. On 9 January 2020 comments were made by John Simpson of R1 about the content of the claimants emails, suggesting that the claimant sought help in preparing them
n. R1 suspending the claimant on 30 January 2020 and confiscating the claimant's laptop
o. R1 obstructed the claimant from retrieving personal information from the laptop
p. R1 accessed personal files on the claimant's confiscated laptop.

5. In relation to his dismissal, and in relation to any of the above detriments the claimant is able to establish that he was subjected to, the second question for the tribunal to decide will be whether he was treated less favourably than the relevant respondent treated or would have treated someone in not materially different circumstances to the claimant. This person is known as a comparator.

6. If in any of these respects the claimant was treated less favourably than his comparator, the final question for the tribunal will be whether this was because of race.

Harassment

7. The claimant relies on his dismissal and the allegations at 4(a) – (p) above. The first question is whether any of the conduct was unwanted.

8. If so the second question will be whether any such conduct related to the claimant's race.

9. if so the third question is will be whether that conduct had the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating, or offensive environment for the claimant.

10. if not the fourth question will be whether it had that effect.

Liability for 3rd party discrimination

11. in respect of allegation 5(j) above insofar as it is pursued by the claimant, if he is able to establish it on the facts, the tribunal would be required to decide whether R1 and/or R2 can be held liable for the acts of a third party in the event that the maintenance engineer concerned was not an employee.

Victimisation

12. the first issue for the tribunal to decide is whether the claimant did one or more of the following protected acts:

    a. On 8 June 2019 during a meeting with R1 raising concerns about being subjected to discrimination by virtue of in being asked to "clock in and out" of the DC
    b. Raising concerns with John Simpson of R1 About what had been said to the claimant regarding his use of the English language.

13. If so the second issue will be whether the claimant was subjected to the following alleged detriments

    a. On 29 October 2019 John Simpson calling the claimant names and threatening to dismiss him
    b. the use of allegations against the claimant to find a way to remove the claimant from the business

14. If so the final issue will be whether this was because the claimant did one or more of the protected acts.

Burden of proof (section 136 Equality Act 2010)

15. The initial burden lies with the claimant to prove facts from which the tribunal could conclude in the absence of an adequate explanation that he was discriminated against, harassed and victimised.
16. If he does the burden will shift to the respondents to prove that they did not discriminate.

Statutory defence

17. [NOT RELEVANT]

Time limits

18. [NOT RELEVANT]

Remedy

19. [NOT RELEVANT]