EMPLOYMENT TRIBUNALS

Claimant: Mr C Stewart

Respondent: Concentrix CVG Intelligent Contact Limited

Heard at: Manchester **On:** 22-25 November 2021
26 November 2021
(in Chambers)

Before: Employment Judge Slater
Mr A Egerton (I/P)
Ms J A Beards (CVP)

REPRESENTATION:

Claimant: In person
Respondent: Ms Niaz-Dickinson

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The Tribunal has jurisdiction to consider the complaints of direct race discrimination.

2. The complaints of direct race discrimination in relation to an allegation made by a security guard and the respondent investigating the claimant are not well-founded.

3. The complaint of direct race discrimination about the issuing of the claimant with a final written warning is well-founded.

4. The complaint of direct race discrimination in relation to the claimant's dismissal is not well-founded.

5. The complaint of unfair dismissal is not well-founded.

6. The respondent made unauthorised deductions from the claimant's wages in the sum of £169.13. The respondent is ordered to pay this amount to the claimant.

7. The complaint of failure to pay the claimant in lieu of annual leave on termination of employment under the Working Time Regulations 1998 is not well-founded.

8. The complaint of breach of the Working Time Regulations in relation to a refusal of request to take annual leave in 2018 or 2019 is not well-founded.

9. There will be a remedy hearing on 13 May 2022 to determine the remedy for the successful complaint of direct race discrimination about the issuing of the claimant with a final written warning.

REASONS

Complaints and Issues

1. The parties confirmed at the start of the hearing that the complaints and issues remained as set out in the notes of a case management preliminary hearing on 2 March 2021. These are as follows:

Direct Discrimination on grounds of race – section 13 Equality Act 2010

(a) Did the respondent do the following things:

(i) February 2019 - a security guard made an allegation about the claimant;

(ii) February 2019 - the respondent investigated the claimant.

(iii) February 2020 – the respondent issued the claimant with a final written warning after resurrecting the complaint and investigation.

(iv) October 2020 – the respondent dismissed the claimant.

(b) Was this less favourable treatment? The claimant identifies his manager Darren, as the appropriate comparator.

(c) If so, was it because of the claimant's race?

(d) Was the complaint made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

(i) Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

(ii) If not, was there conduct extending over a period?

(iii) If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

(iv) If not, were the claims made within a further period that the Tribunal thinks is just and equitable?

Unfair Dismissal

(e) Was the claimant dismissed?

(f) If the claimant was dismissed, what was the reason or principal reason for the dismissal?

(g) Was it a potentially fair reason?

(h) Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

Unlawful deduction from Wages

(i) Did the respondent make unauthorised deductions from the claimant's wages?

(j) If so, how much was deducted?

Annual Leave/Breach of the Working Time Regulations

(k) Did the respondent refuse the claimant's requests to take annual leave in the years 2018 or 2019?

(l) If so, did the claimant lose that leave at the end of the annual leave year?

(m) On termination of employment, was the claimant paid for all annual leave and/or pay in lieu of annual leave to which he was entitled under the Working Time Regulations 1998?

Remedy

Unfair Dismissal

(n) If there is a compensatory award, how much should it be?

(o) What basic award is payable to the claimant, if any?

Discrimination

(p) What financial losses has the discrimination caused the claimant?

(q) What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

(r) Should interest be award?

(s) How much?

Holiday Pay

(t) Did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when his employment ended?

(u) If so, how much holiday pay is the claimant entitled to?

Unauthorised deductions

(v) Did the respondent make unauthorised deductions from the claimant's wages?

(w) If so, how much was deducted?

Application to amend claim

2. During the course of the claimant's evidence, it appeared to the Judge that the claimant might be seeking to claim victimisation in relation to the issue of the final written warning. After considering the matter overnight, the claimant confirmed that he did wish to make an application to amend his claim to include such a complaint as an alternative to the complaint of direct race discrimination in relation to the issue of the final written warning. The respondent objected to this application. After hearing from both parties, the Tribunal decided not to allow the claimant to amend his claim to add a complaint of victimisation. We gave reasons orally for this decision, which were as follows:

2.1 The complaint of victimisation was not contained in the original claim, so this required an amendment if it was to be pursued.

2.2 The claimant had had an opportunity at two case management preliminary hearings to clarify his case. No complaint of victimisation was identified.

2.3 The respondent has prepared for the hearing on the basis of the complaints as identified at those case management preliminary hearings. If victimisation had been identified as a complaint, the respondent may have chosen to call additional evidence e.g. from Ed, relating to whether there was a protected act. The Tribunal had considered the possibility of postponing the hearing to enable the respondent to obtain further evidence but considered this would be in neither party's interests.

2.4 The claimant already had a complaint about the final written warning being an act of direct race discrimination.

3. Taking all matters into consideration, the Tribunal considered the balance of prejudice to be against allowing the amendment.

Evidence

4. The Tribunal had a bundle of documents which ran to 223 pages, including additional documents which were added at a late stage before the start of the hearing. In addition to these documents, a number of other documents were provided by the respondent during the course of the hearing up to and including during the evidence of the last witness. The claimant also added documents taken from the Trust Pilot and Indeed websites.

5. The Tribunal heard evidence from the claimant and from Benjamin Pinkney, Team Leader; Lee Diggle, Team Leader; Matthew Green, Operations Manager; Michelle Bridle, People Solutions Generalist 1; and Gemma Brennan (also referred to in documents as Gemma Oddie), formerly People Solutions Senior Manager for the respondent. There were written statements for all the witnesses.

6. The claimant informed the Tribunal that he wished to rely on a number of documents sent as attachments to an email to the Tribunal dated 15 November 2021 as constituting his witness statement. These were attachments, 1, 2, 8 and 9 to that email. As set out in the Tribunal's Reasons the Tribunal. having considered these statements again following hearing evidence, has formed the view that attachment 9 was, in fact, a document sent to the respondent in response to Gemma Brennan sending him the minutes of the grievance hearing.

7. On the third day of the hearing, the claimant made an application for the Tribunal to listen to a recording of a meeting with Mr Diggle. The claimant told the Tribunal the whole recording was one hour and 47 minutes long but he wished to refer to two parts – the opening of the meeting to demonstrate that he had not shouted as alleged by Lee Diggle, and the point in the meeting where Lee Diggle listens to a recording which the claimant had made of an earlier meeting with Abbie Benjamin of HR and Benjamin Pinkney. The claimant said he no longer had the recording of the meeting with Abbie Benjamin. The Tribunal decided that we would finish hearing the evidence of the respondent's witnesses and then give the respondent's representative an opportunity to listen to the recording before the claimant made his formal application and Ms Niaz-Dickinson responded with any objections. In the event, during a break, Ms Niaz-Dickinson was able to have a conversation with the claimant about the recording and was able to listen to part of the recording. The parties were able to agree that, in that recording, Mr Diggle had acknowledged that Abbie Benjamin had referred to "disciplinaries" in the plural. Mr Diggle had clarified that the allegation of the claimant shouting had been in relation to 6 December when the meeting did not proceed, and the claimant went home unwell, rather than 9 December, which was the meeting the claimant recorded. The claimant did not then pursue his application to put the recording in evidence.

Facts

8. The respondent employed around 481 staff where the claimant worked in Salford. The majority of these were Customer Service Advisers handling queries from customers in relation to banking queries. The respondent had HR advisers.

9. The claimant joined the respondent as a Customer Service Adviser on 8 May 2017. It is agreed that he was good with the customers.

10. In 2018 the claimant raised concerns about the air conditioning and felt he was being specifically targeted by cold air being directed on him. We make no findings about whether this was the case since it is not necessary to do so for our decisions on the issues before the Tribunal, but note that it remained a concern and he brought it up again in the grievance in 2020.

11. In July 2018, the claimant was paid a large lump sum for sick pay after there had been delays in paying sick pay. The claimant felt there was a deliberate failure to pay

him. We make no findings on whether this was the case since it is not necessary to do so for our decisions on the issues before the Tribunal. However, we note that this previous experience contributed to the claimant's feelings that the respondent was stealing his money when they later failed to pay the sick pay which he was expecting to receive in 2020.

12. On 8 February 2019, there was an incident where the claimant was smoking in a non-designated area outside the building. He lit his cigarette when he was on his way to the smoking shelter. A security guard (TB) called him back to speak to him when the claimant was on his way back to work. It is agreed that there was a reference to not being able to smoke in the car. There is a difference between the claimant's account and the guard's, in the guard's witness statement, as to whether this conversation was initiated by the guard or by the claimant. It is agreed that the claimant said that, when the guard pays his insurance and road tax, he could tell him he could not smoke in his car. The guard alleged that the claimant then grabbed his groin and said, "they can have all this". The claimant denies making this remark but said in the investigation meeting, first, that he did not grab his groin but may have touched it, and, later in the meeting, that he was adjusting himself.

13. We find that it was not uncommon for people to smoke where they were not meant to smoke and the security guards did not always speak to them about that.

14. The claimant said, a number of times in the hearing, that people were snorting cocaine in their cars and smoking marijuana but that no action was taken against them. This evidence was not challenged. The claimant has not satisfied us that this was brought to the respondent's attention at the time. The notes of the meeting do not record the claimant mentioning this in the investigation meeting or the disciplinary hearing. The claimant has no alternative notes of these meetings and we do not consider that the claimant's witness statement, made some years after the event, that he mentioned this in the investigation meeting, is reliable. The claimant did not ask any of the witnesses whether they were aware of people snorting cocaine or smoking marijuana in the car park or area around the building. We make no finding as to whether this occurred as we do not feel it is necessary for our decision to do so.

15. On 8 February 2019 at 10:24, the claimant sent an email to his manager, Benjamin Pinkney, about the incident. He wrote:

> "I just had a run-in with Tony from security. He tried to lecture me about smoking. He reckons I'm not allowed to smoke in my car. I assured him that when he pays my insurance and road tax, he can tell me that. *[Part indistinct]* received an email about it. I walked away saying, 'sorry I can't get uptight about that'. I'm sure he'll get on to you. Just a heads up."

16. The claimant said in evidence that he could not have put the name of the guard into this email since he did not know his name, but he did not dispute the rest of the contents of the email. We find that the email is a genuine contemporaneous email and it is likely that the claimant had found out the first name of the security guard at the time but has since forgotten that he knew that.

17. Later that morning, another security person, who Benjamin Pinkney understood to be the Head of Security, spoke to Claire Scully, the Head of Operations, about the

incident. She went to find Benjamin Pinkney because he was the claimant's line manager, and the security person told them what the security guard had told him. They then arranged for the security guard (TB) to give a statement to Darren Hannah, a manager who was on the rota to deal with disciplinary matters that day.

18. The security guard (TB) made a statement at 12:59. In this statement he alleged that the claimant had lit his cigarette outside the entrance to the building. The guard said that he had shouted “Oi you” to catch the claimant's attention and explain to him that there was no smoking outside of the smoking area. He alleged that the claimant said he would go to his car and have a smoke, and the guard told him that was not allowed, and the claimant replied, “yes I can, I pay my tax and insurance, it’s my car”. The security guard alleged that the claimant then grabbed his groin and said, “they can all have this”.

19. The security guard is not employed by the respondent. The respondent has a lease on part of the building and security is arranged by the landlord. We did not hear evidence as to whether the landlord directly employed the security guard or whether the security guard’s services are provided via a contract with another organisation.

20. Darren Hannah called the claimant to an investigation meeting which began at 14:07 on 8 February 2019. He put to the claimant allegations of smoking and unacceptable behaviour, including the use of foul or abusive language. The allegations were categorised as gross misconduct on the form which Darren Hannah completed. The claimant denied that he had made the comment alleged. He said he may have touched his groin and said later in the meeting that he was adjusting himself. The claimant questioned why others were allowed to smoke and he was “in here”. He said he had been pulled up for smoking and told where he needed to smoke two or three times. We note that no complaint was made by security to the respondent on the previous occasions and no disciplinary action taken. The claimant asked if there was a policy that said anyone who does what he did gets investigated. Darren Hannah said “yes”. It is not clear which allegation this answer relates to. The claimant asked if anyone else had been sacked for smoking. Darren Hannah said he could not discuss that with him. There was CCTV footage at the time which was viewed by Darren Hannah and some others at the respondent. The claimant was offered in the meeting the opportunity to view this but refused after he was told that this would be with HR. The claimant did not want anything to do with a particular member of HR (Tatender) whom he did not trust for reasons which are not clear to us.

21. The CCTV footage was no longer available by the time of the disciplinary hearing and this Tribunal hearing. However, in the Tribunal’s experience, CCTV is unlikely to have a soundtrack and, therefore, would not have assisted with whether the claimant made the disputed comment. Given the claimant accepted touching his groin, the visual element would have been unlikely to assist. Darren Hannah, who had viewed the CCTV, when asked by the claimant whether it showed him grabbing his groin, said it was “up to interpretation”. The claimant was told by Darren Hannah that this would proceed to a disciplinary hearing and that the matter was considered gross misconduct.

22. Benjamin Pinkney knew by this time that the claimant was due to start long-term sick leave to have an operation and to recuperate. The long-term sick leave was due

to start on 13 February 2019 but there may have been some non-working days between 8 and 13 February.

23. On one of the days shortly before the claimant began his long-term sick leave, there was what has been described as a "welfare meeting" between the claimant, Abbie Benjamin of HR and Benjamin Pinkney. The claimant covertly recorded this meeting. He no longer has the recording. He did, however, still have the recording at the time of the disciplinary hearing in December 2019 and he played it to Lee Diggle during that meeting. It is agreed that Mr Diggle heard Abbie Benjamin say on this recording that there would be "no disciplinaries" (plural).

24. Based on what is written in the notes of the disciplinary hearing about the recording, we find that Abbie Benjamin was assuring the claimant that there would be no disciplinaries on his return to work. It is clear from the way that the claimant raised the matter on many occasions subsequently that this what the claimant understood. We find that Benjamin Pinkney is incorrect in his recollection that Abbie Benjamin told the claimant that he would not face disciplinaries during his absence, but that these could take place on his return to work.

25. If the claimant had not been told that there would be no disciplinary on his return to work, we would have expected to see documentation informing the claimant that the disciplinary hearing would be postponed during his absence on sick leave but would be held on his return. No such documentation was shown to the Tribunal. The lack of such documentation further supports our finding of fact that the claimant was assured that there would be no disciplinaries on his return to work.

26. On 11 February 2019, the claimant was sent an invitation to a disciplinary hearing on 13 February by Tatender in HR. We found it surprising that the invitation was sent when there was knowledge within HR (Abbie) that the claimant was planning to start long-term sick leave on the date set for the disciplinary hearing.

27. The claimant began long-term sick leave on 13 February 2019 as planned. This was for surgery and his subsequent recovery.

28. Around six days after the claimant came out of hospital after major surgery, and during his sick leave, the claimant attended a meeting with Benjamin Pinkney and Tatender at the office. We find the claimant thought he was being required to attend this meeting and, therefore, attended, although he was still very unwell. We find that Mr Pinkney did not make it clear to the claimant that it was optional for the claimant to attend. We find it is unlikely that the claimant would have attended the meeting in the office given his condition had he understood his attendance to be optional.

29. The claimant returned to work on 12 November 2019 and had around two months' training before beginning to take calls again. The claimant felt he was being targeted, after his return, by the security guard (TB) following him on CCTV and standing by his car. We find that the claimant made complaints about this to his trainer (Ed). The claimant mentions this in a number of meetings. We have no evidence that the respondent investigated these complaints.

30. The respondent has not provided us with any documents about the arrangement of the disciplinary hearing for 9 December 2019.

31. A disciplinary hearing took place on 9 December 2019 with Lee Diggle and Aisha Jabeen. The claimant said in this meeting that he understood that he was there because the security guard was a racist. The claimant alleged that it was unfair because he was the only one who had been pulled up for smoking. The claimant said the security guard walked past him when he was having lunch in his car and then said something to another person. The claimant said he was being followed by the security guard and alleged that, ten months in, he was still trying to get the claimant into trouble. In the outcome of the meeting it is recorded that the claimant considered the security guard has it in for him.

32. During the disciplinary hearing, the claimant played a recording of a meeting he had with Abbie Benjamin. The notes record that Abbie Benjamin said there were no disciplinaries on his return. Mr Diggle sought advice from HR, including Gemma Brennan, before and after listening to the recording. HR said that Mr Diggle and Aisha Jabeen should listen to the recording. After they had listened to the recording, Mr Diggle was given the advice from HR that he should go ahead with the disciplinary. The notes of the meeting record that Mr Diggle said that he understood that what Abbie Benjamin referred to was only the disciplinary about AWOL.

33. Based on the evidence from Mr Diggle, we find that the allegation about the groin incident was dropped because it was too late to view the CCTV. However, the claimant was not told expressly that this allegation had been dropped.

34. Mr Diggle and Aisha Jabeen got advice from HR, after deciding that the allegation about the groin incident was dropped, about how the remaining allegation should be categorised. Gemma Brennan gave them the advice that the remaining allegation (about smoking outside the designated area) would still fall under gross misconduct.

35. At this Tribunal hearing, Gemma Brennan informed the Tribunal, in answer to questions from the judge, that the smoking allegation would potentially fall under misconduct rather than gross misconduct. Her view was that smoking was minor if it was a first offence.

36. The respondent gave no evidence that others had been given any type of warning for smoking in a non-designated area.

37. Mr Diggle and Aisha Jabeen decided to issue the claimant with a final written warning based on the advice they had received that this was a gross misconduct matter. They informed the claimant in the meeting of their decision. Although the outcome related solely to the smoking offence, the claimant was not told expressly that they had not upheld the allegation about his conduct towards the security guard. They advised him of a right of appeal. The completed form went to HR to write the letter to the claimant confirming the outcome in accordance with the respondent's procedure at the time.

38. Krystal Walsh in HR wrote the claimant a letter dated 11 December 2019 confirming the final written warning. It appears from that letter, incorrectly, that both allegations against the claimant were upheld. Mr Diggle accepted in evidence that the second bullet point dealing with the allegation of conduct against the security guard should not be in the letter. The claimant could not reasonably have understood from the letter that the allegation about the conduct towards the security guard was not

upheld. The letter set out expectations of ensuring that the claimant smoked in the correct area, avoided confrontation and should report any issues with security to the line manager, HR or OM. The expectation of avoiding confrontation appears to relate more to the allegation which was not upheld than the smoking allegation which was upheld. The claimant took the advice to report any issues with security to the line manager, HR or OM as an instruction that he could not speak to the security guard and ask for the security guard's SIA number. The claimant did not appeal against the final written warning.

39. Some time in January 2020, one of the claimant's scheduled day's off (RDO) was to be swapped, at the suggestion of Mr Pinkney, for a day when the claimant had a medical appointment, to avoid the claimant having to use leave for this appointment. The claimant did not attend work on the original RDO because it still showed up on the system as a non-working day. When the claimant returned to work following the original RDO, Mr Pinkney asked the manager on the disciplinary rota to complete an AWOL investigation.

40. When the claimant attended for work after the original RDO, the day which should have been swapped was still showing on his computer as a non-working day. The claimant was approached by the disciplinary manager and asked why he was not at work the day before. The claimant said it was an RDO. He said to look at the system. They looked at this. It now showed the RDO with a red line across it. The claimant asked Mr Pinkney why it looked like that. Mr Pinkney did not reply. The disciplinary officer tried to have a meeting with the claimant, but the claimant left.

41. The claimant went to find Mr Pinkney in the canteen. The claimant believed that Mr Pinkney had lied. He made a comment to Mr Pinkney, "I let you live". The claimant walked out of the building and never returned to work. No disciplinary action was taken about the comment made by the claimant to Mr Pinkney.

42. On 29 January 2020, Krystal Walsh sent an email to the claimant when he did not return to work on a scheduled work day. The claimant replied on 3 February 2020 to say that he would not be in that day, "I cannot face the now daily abuse. I informed my manager". Krystal Walsh replied, asking for further information. The claimant sent an email on 6 February 2020 alleging that abuse had been ongoing for a long time but asserting that it had taken a sinister turn in that his manager was now an active participant. The email, which was something over two pages, included an allegation that, since he had returned to work, he had had the security guard continuing his racist abuse attempting to get him sacked. The claimant said he had complained and the result was that he was put on a cancelled disciplinary and punished for smoking outside of the shelter, and, even though every single other smoker at the respondent was allowed to smoke wherever they chose, he was punished with a final written warning. Other complaints included that Benjamin Pinkney had lied in saying that HR had stated that his disciplinary would continue when he returned, which the digital recording proved was a lie. The claimant alleged that the respondent was the most racist abusive company that he had worked for in the last 40 years.

43. With the consent of the claimant, the claimant's email of 6 February 2020 was forwarded by Crystal Walsh to Gemma Brennan as a formal grievance.

44. The claimant's sick leave is recorded as having begun on 31 January 2020. The claimant remained on sick leave until his dismissal. We have been shown two fit notes – one from May 2020 and one from the end of June 2020, both giving the reason for absence as "stress at work".

45. During the claimant's 2019 absence, Mr Pinkney had reminded the claimant by text when his next sick note was due. The claimant then obtained a new sick note and sent a photo it to Benjamin Pinkney, who then submitted the fit note in time.

46. Benjamin Pinkney ceased to be the claimant's line manager in early 2020. From the time he ceased to be the claimant's line manager, he did not text the claimant when the claimant's sick notes were about to expire. The claimant was not reminded by Mr Pinkney, during his 2020 absence, when sick notes were about to expire.

47. From a timeline prepared by the respondent, it appears that, during the claimant's sickness absence in 2020, the claimant supplied some sick notes late, only after disciplinary action was threatened. Prior to September 2020, invitations to a disciplinary hearing were sent within a couple of days of the sick note expiring.

48. By a letter dated 10 March 2020, the claimant was required to attend a disciplinary hearing on 13 March 2020 for unauthorised absence because his sick note had expired on 8 March 2020. It appears from that letter that another letter had been sent on 9 March 2020 requiring the claimant to provide documentation for his absence by 2.00pm on 10 March otherwise his absence would be recorded as unauthorised. The sick note was provided on 11 March 2020, so the disciplinary hearing did not go ahead.

49. The respondent's chosen method of communication with the claimant was email. This was in accordance with its standard practice. The claimant chose not to read some emails from the respondent because he found any contact from the respondent stressful, although he did respond to some emails. He was aware from notifications on his phone when he had received an email. It appears that the claimant must have read some of the emails from the respondent and provided his sick notes in response to these.

50. The claimant notified ACAS of a potential claim on 6 April 2020 and the early conciliation certificate was issued on 8 April 2020. The claimant presented his claim on 29 April 2020. This was sent by the Tribunal to the respondent on 5 May 2020.

51. On 14 May 2020 the respondent began an investigation into the claimant's grievances. A grievance meeting was held with the claimant on 14 May 2020 conducted by Matthew Green and Gemma Brennan by telephone due to the pandemic. Gemma Brennan made the comment at the beginning of the meeting that she was independent. However, as noted in our previous findings of fact, Gemma Brennan had previously been involved in advising Lee Diggle on the issue of the final written warning.

52. The claimant, at the grievance meeting, alleged that the allegation by the security guard was racist. The matters raised by the claimant included a concern about the security guard following him on CCTV and the claimant saying he had raised this with Ed (his trainer). Mr Pinkney and Gemma Brennan did not interview Ed. There is no evidence that they tried to do so. Gemma Brennan could not recall why they did not

interview Ed but said the evidence they had suggested that there was no evidence of racism. Gemma Brennan did not think that they had asked anyone specifically about the allegation about the security guard following the claimant on CCTV.

53. Although the claimant identified a complaint about the guard's conduct after his return to work in his grievance email and at the meeting with Matthew Green and Gemma Brennan, the respondent did not investigate this complaint or identify it as a complaint. After the claimant set out his allegation in the meeting about the security guard Matthew Green's response was to say, "We didn't discuss that as that wasn't part of your original grievance email". The respondent miscategorised the claimant's complaint in point nine of the outcome letter as being about racist comments. The claimant never alleged that anyone made racist comments.

54. The respondent took offence at comments made by the claimant about white people not being able to understand racism and comments about sexism. Matthew Green in his witness statement said that these comments were "deemed inappropriate". The notes of the grievance hearing record the claimant as saying the following:

> "When a black person is trying to explain racism to a white person they will never know. The closest will be what women go through with men as women experience sexism. No man will know what sexism is because we're men. It's difficult for a white person to understand racism, so I will try to explain and please excuse the profanity. If you call me a 'nigga' it's not racism it's name calling, it's like you calling me 'skinny' or 'scouse lover' as I'm a Liverpool fan. Racism is the power you have to affect another's life. Racism is the power you have to affect a woman's life. Even black people don't understand what it means. But women understand sexism. White men have no chance."

55. Matthew Green described in his witness statement comments by the claimant about a culture of racism and discrimination within the respondent's workplace as "a bold statement to make when taking into account the supporting evidence provided within the hearing."

56. In the investigation report the following comment was made:

> "During the grievance meeting it was noted that CS view of white males was they wouldn't understand racism which at points was inappropriate and could've [sic] offensive."

57. Gemma Brennan sent the claimant the notes of the meeting. The claimant sent comments on these notes by way of reply. It appears to the Tribunal that the claimant's attachment 9 to his email to the Tribunal of 15 November 2021, which was taken as part of his witness statement, are his comments on these notes. Gemma Brennan said in evidence that she had replied to the claimant's comments, acknowledging them and saying that she had saved his notes on file, but the respondent did not provide a copy of that letter. The claimant reiterates in those notes a complaint about the subsequent conduct of the security guard and that raising a complaint about this had resulted in the disciplinary against the claimant being resurrected. It is clear from the claimant's complaints that he is not complaining about racist comments.

58. The investigation report limits mention of the security guard incident to what happened in February 2019. The report concludes, "There is no evidence found to suggest racist behaviour by the security guard or how Concentrix handled the matter". However, the respondent did not investigate the claimant's complaints; they did not review the security guard's subsequent behaviour and so did not get the whole picture.

59. What is said in the grievance report about the recording of the HR conversation is inconsistent with the record of the disciplinary hearing. The grievance report states that the recording was played at the disciplinary hearing and that Lee Diggle and Aisha Jabeen had provided statements that there was nothing to cause concern and no reference to the disciplinary meetings being voided. The statements provided by Lee Diggle and Aisha Jabeen and other witnesses investigated as part of the grievance investigation have not been provided to the Tribunal. Lee Diggle had sought advice from Gemma Brennan, after listening to the recording, so Gemma Brennan would have known from this that there was cause for concern relating to what Abbie Benjamin had said about there being no disciplinaries on the claimant's return to work. Notwithstanding this, HR had advised Lee Diggle and Aisha Jabeen to go ahead with the disciplinary hearing.

60. In relation to the AWOL investigation, the claimant's notes suggested that Gemma Brennan could look at who had access to the system. It is clear from the grievance report that they did not look into this. There is a statement that there is no evidence that Benjamin Pinkney treated the claimant differently, but the respondent did not follow all lines of investigation.

61. On 4 June 2020, the claimant was sent an outcome letter from the grievance. This letter was disclosed to the Tribunal right at the end of evidence. The letter states, incorrectly, that the claimant's final written warning was given for behaviour as well as smoking. The Tribunal have rejected the suggestion that the reference to behaviour was the same as the reference to smoking. The letter incorrectly states that the recording was nothing of concern. The letter refers to there being no evidence provided to suggest racist comments had been made. As previously noted, the claimant had never made any allegations about racist comments. The Tribunal was not persuaded by Lee Diggle's attempts to explain this as a grammatical error.

62. In relation to the AWOL matter, the respondent, in its outcome letter, missed the point that the claimant was saying that someone had changed the system during the day. They made a reference to a return to work document, but this has not been provided to the Tribunal, and this was not raised with the claimant in the grievance hearing.

63. On 1 July 2020, the claimant was sent a letter by email about the failure to provide an up-to-date sick note. The claimant's sick note had expired on 29 June 2020. The claimant then provided a further sick note for two months up to 31 August 2020. The claimant's sick note expired on 31 August 2020. The claimant asserted that he had provided sick notes for all his absences, but he has not provided documentary evidence that he provided fit notes for the period after 31 August 2020. The claimant did not agree in cross examination that he had not sent sick notes for the period after 31 August 2020. During cross examination, he had said that he had the original sick notes at home. The following day he sent the Tribunal a copy of one sick note, but this was a duplicate of the sick note for the period ending 31 August 2020. It is unclear

from his submissions whether he was then accepting that he had not sent them. We find that the claimant did not provide sick notes for absences after 31 August 2020.

64. The claimant was not paid any sick pay after 31 August 2020. Michelle Bridle said this was because the claimant did not provide sick notes. However, the Tribunal takes judicial notice that the maximum entitlement to SSP is 28 weeks and this would have expired by this point. The claimant would still have needed to provide fit notes to his employer to cover his absence, even if he was no longer receiving sick pay.

65. By a letter dated 15 September 2020, the respondent informed the claimant that his absence was unauthorised and required a sick note by 5.00pm on 17 September 2020. By a letter from Michelle Bridle dated 25 September 2020, the claimant was required to attend a disciplinary hearing on 29 September 2020 for unauthorised absence. The claimant was warned that this could result in his dismissal. In accordance with the respondent's normal practice, these letters were all sent by email. The claimant says he did not read these.

66. The claimant failed to attend the disciplinary hearing on 29 September 2020 and a further letter was sent on 29 September 2020 rescheduling the disciplinary hearing for 1 October 2020.

67. We find that Gemma Brennan made a telephone call on 30 September 2020 to the claimant. The claimant did not recall this telephone call. Gemma Brennan did not make a note of the telephone call. We find that the call was made because this is consistent with what followed – rescheduling the disciplinary hearing which had been set for 1 October 2020, before 1 October, for a later date of 6 October 2020, to give the claimant more time to supply a sick note.

68. Gemma Brennan gave evidence that she gave instructions to reschedule the disciplinary hearing and that she emailed Michelle Bridle on 30 September 2020. There is no copy of this email in the bundle. However, we have seen a letter sent to the claimant dated 30 September 2020 rescheduling the hearing until 6 October 2020. This letter was sent both by email and by post.

69. The disciplinary hearing took place on 6 October 2020 with Alex Ettles. The claimant did not attend the disciplinary hearing. We find that Mr Ettles tried to call the claimant, but he did not answer. This finding is supported by a reference to the attempt to call the claimant in the outcome letter. We find that Alex Ettles decided to dismiss the claimant because the claimant had not provided a fit note when his fit note expired on 31 August 2020 and had not responded to emailed invitation letters, as recorded in the outcome letter.

70. By a letter dated 6 October 2020 sent by Michelle Bridle by email, the claimant was informed that he was dismissed and advised of a right of appeal. The claimant did not appeal against his dismissal. The effective date of termination was 6 October 2020. We find that the claimant did not read the dismissal letter at the time, which was sent by email. The claimant would have got a notification of the email on his phone, but we find that he decided not to open it. He subsequently found out that he had been dismissed when he was sent his P45 in the post.

71. The claimant was made a further payment on 23 October 2020. The claimant did not know what the payment was for. However, had he logged into Workday he would have been able to access his payslips, including the one for this payment. There is no evidence that the claimant informed the respondent that he was not able to log into Workday to access his payslips. We find that the payment on 23 October 2020 was for holiday and sick pay as indicated on the payslip.

72. The claimant has challenged the authenticity of the payslips provided by the respondent. We find these are authentic documents. The figures on the payslips correspond exactly with the figures given by the claimant for the net payments he received. The different format of the payslips might be explained by them being printed off from the payroll system subsequently.

73. On 10 December 2020, at a case management preliminary hearing, the claimant was given leave to amend his claim to include a complaint of unfair dismissal and to pursue a complaint of direct discrimination in relation to that dismissal.

74. Michelle Bridle's evidence, in her supplemental witness statement, which we accept, was that, on three occasions, there were shortfalls in the amounts paid to the claimant: £18.85 on 5 June 2020, £18.85 on 17 July 2020 and £131.43 on 31 July 2020 (the last one consisting of less than was due being repaid to the claimant, after incorrect deductions being made on 4 occasions). The claimant was overpaid occupational sick pay in the total amount of £406.34 in April and May 2020, but the respondent did not recover this overpayment during the claimant's employment.

Submissions

75. Ms Niaz-Dickinson produced written submissions on behalf of the respondent and made additional oral submissions. Ms Niaz-Dickinson emailed these to the Tribunal and the claimant the evening before oral submissions were heard.

76. Mr Stewart emailed written submissions to the Tribunal on the morning submissions were heard. The Tribunal copied these for Ms Niaz Dickinson and allowed time for Ms Niaz-Dickinson to read the claimant's written submissions before oral submissions were made.

77. We do not seek to summarise the written submissions, which can be read, if required.

78. In response to a question raised by the judge, Ms Niaz-Dickinson, submitted, in oral submissions, that the security guard was not acting as agent for the respondent so there was no legal basis on which to find that the respondent could be liable for the acts of the security guard. The security guard was acting as agent for the landlord.

79. The respondent submitted that the claimant had not proved facts from which the Tribunal could conclude that the final written warning was issued because of race. This was separate from the issue of the penalty being unduly harsh. Ms Niaz Dickinson agreed that the undue harshness of the penalty could form part of the overall picture from which the Tribunal could consider drawing inferences.

80. The claimant made oral submissions relating to the facts. He also submitted that there were no time limit issues, referring to his dismissal being in October 2020.

The Law

Direct race discrimination

81. Section 13(1) Equality Act 2010 (EqA) provides: "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others".

82. Race is a protected characteristic: s.4 EqA. "Race" is defined by section 9(1) as including colour, nationality, ethnic or national origins.

83. Section 23(1) EqA provides that "on a comparison of cases for the purposes of section 13….there must be no material difference between the circumstances relating to each case."

84. Section 39(2) provides, amongst other things, that an employer must not discriminate against an employee by subjecting that employee to a detriment.

85. In **Ministry of Defence v Jeremiah [1980] ICR 13***,* Lord Justice Brandon, in the Court of Appeal, thought "any other detriment" meant "putting under a disadvantage". The House of Lords in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337***,* said a sense of grievance which is not justified is not sufficient to constitute a detriment.

Proving discrimination

86. Section 136 EqA provides:

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

87. The tribunal makes findings of fact, having regard to the normal standard of proof in civil proceedings, which is on a balance of probabilities. A party must prove the facts on which they rely. A claimant must prove they suffered the treatment alleged, not merely assert it.

88. Once the relevant facts are established, the tribunal must apply section 136 in deciding whether there is unlawful discrimination.

89. The Court of Appeal in **Ayodele v CityLink Ltd and another [2017] EWCA Civ 1913***,* reaffirmed that there is an initial burden of proof on the claimant; the claimant must show that there is a prima facie case of discrimination which needs to be answered. The Court of Appeal concluded that previous decisions of the Court of Appeal, such as **Igen Ltd v Wong [2005] IRLR 258***,* remained good law and should continue to be followed by courts and tribunals. The Supreme Court in **Efobi v Royal**

Mail Group Limited 2021 ICR 1263 held that the enactment of section 136 EqA did not change the requirement on the claimant to prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an unlawful act of discrimination.

90. The effect of the authorities is that the tribunal must consider, at the first stage, all the evidence, from whatever source it has come, in deciding whether the claimant has shown that there is a prima facie case of discrimination which needs to be answered.

91. The EAT in **Talbot v Costain Oil, Gas and Process Ltd and others UKEAT/0283/16/LA** summarised, in paragraph 15, principles to be derived from the authorities in approaching the issue of whether there has been unlawful discrimination under the EqA as follows:

> "(1) It is very unusual to find direct evidence of discrimination;
>
> (2) Normally the Tribunal's decision will depend on what inference it is proper to draw from all the relevant surrounding circumstances, which will often include conduct by the alleged discriminator before and after the unfavourable treatment in question;
>
> (3) It is essential that the Tribunal makes findings about any "primary facts" which are in issue so that it can take them into account as part of the relevant circumstances;
>
> (4) The Tribunal's assessment of the parties and their witnesses when they give evidence forms an important part of the process of inference;
>
> (5) Assessing the evidence of the alleged discriminator when giving an explanation for any treatment involves an assessment not only of credibility but also reliability, and involves testing the evidence by reference to objective facts and documents, possible motives and the overall probabilities; and, where there are a number of allegations of discrimination involving one personality, conclusions about that personality are obviously going to be relevant in relation to all the allegations;
>
> (6) The Tribunal must have regard to the totality of the relevant circumstances and give proper consideration to factors which point towards discrimination in deciding what inference to draw in relation to any particular unfavourable treatment;
>
> (7) If it is necessary to resort to the burden of proof in this context, section 136 of the Equality Act 2010 provides in effect that where it would be proper to draw an inference of discrimination in the absence of "any other explanation" the burden lies on the alleged discriminator to prove there was no discrimination."

92. A finding of less favourable treatment, without more, is not a sufficient basis for drawing an inference of discrimination at the first stage: **Madarassy v Nomura International plc [2007] ICR 867, CA**. In **Dedman v Commission for Equality and**

Human Rights and others [2010] EWCA Civ 1279 CA*,* Lord Justice Sedley said that "the 'more' which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred."

93. The fact that a claimant has been subjected to unreasonable treatment is not, of itself, sufficient as a basis for an inference of discrimination so as to cause the burden of proof to shift: **Glasgow City Council v Zafar [1998] ICR 120 HL***.* In that case, the House of Lords held that a tribunal had not been entitled to infer less favourable treatment on the ground of race from the fact that the employer had acted unreasonably in dismissing the employee.

94. If the claimant establishes facts from which the tribunal could conclude there was unlawful discrimination, the burden passes to the respondent to provide an explanation for its actions. The tribunal must find that there was unlawful discrimination unless the respondent provides an adequate, in the sense of non-discriminatory, explanation for the difference in treatment.

95. Less favourable treatment will be because of the protected characteristic if the characteristic is an "effective cause" of the treatment; it does not need to be the only or even the main cause. The motivation may be conscious or unconscious: **Nagarajan v London Regional Transport [1999] IRLR 572 HL***.*

96. In some cases, particularly those involving a hypothetical comparator, it may be appropriate for the tribunal to proceed straight to the second stage, considering the reason why the respondent acted as it did. In **Laing v Manchester City Council [2006] ICR 1519 EAT***,* Mr Justice Elias commented: "it might be sensible for a tribunal to go straight to the second stage…where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator – whether there is a prima facie case – is in practice often inextricably linked to the issue of what is the explanation for the treatment."

<u>Liability for the acts of others</u>

97. The EqA sets out when acts of discrimination are unlawful and when individuals, companies or other legal entities can be held liable for acts of discrimination committed by others.

98. An employer will normally be liable for acts of discrimination committed by one of its employees against another employee: section 109(1) EqA.

99. An employer will also be liable for anything done by an agent for them, with their authority: section 109(2) EqA.

100. The cases of **Yearwood v Commissioner of Police of the Metropolis** [2004] ICR 1660 EAT**, Ministry of Defence v Kemeh**, [2014] ICR 625 deal with the meaning of agency in the EqA and its predecessor legislation.

101. In **Yearwood** the EAT concluded that, where "agent" and "principal" were used in the discrimination Acts which were the precursors to the Equality Act 2010, the terms

were not used in a general sense, but in the particular sense of an agency as understood in common law, with the only change being that, in accordance with the discrimination legislation, both principal and agent would be liable for the act of discrimination (the EAT were held by the Court of Appeal in **Ministry of Defence v Kemeh** to be wrong in saying the agent would not also be liable at common law, but the Court said this did not undermine the EAT's reasoning). Judge McMullen QC quoted from *Bowstead and Reynolds on Agency* for the common law meaning of agency. The judge noted, at paragraph 39, that an important incident of the relationship is that an agent may be appointed to do any act on behalf of the principal which the principal might do himself or herself.

102. In **Ministry of Defence v Kemeh**, the Court of Appeal considered the concept of agency in section 32 of the Race Relations Act 1976 (RRA) in the context of a claim brought by a soldier about racially abusive comments by the employee of a company providing catering services to the Army. Elias LJ reviewed the case of **Yearwood**. He agreed with the conclusion of the EAT that, on the facts, there was no agency relationship but commented, at paragraph 36, that this conclusion did not turn on the particular concept of agency employed. He wrote:

> "The officers were independently exercising an authority conferred by the Regulations. The chief constable chose them for the task but he was not thereafter the source of their authority. It could not sensibly be inferred, in the face of the Regulations, that the disciplining officers were exercising their powers by virtue of any authority conferred by the chief constable. No implied authority from the chief constable was needed to explain why they had the power they did."

103. Elias LJ expressed doubt about how significant the differences between the two concepts of agency advanced in **Yearwood** are.

104. In paragraph 38, Elias J wrote:

> "The concept of agency at common law is not one which can be readily encapsulated in a simple definition. As the editors of *Bowstead & Reynolds* point out, no-one has the correct use of this or any term. Moreover, Judge Peter Clark appears to have had reservations about the requirement, considered to be an essential part of the definition by the appeal tribunal in the *Yearwood* case, that an agent must have power to affect the principal's legal relations with third parties. In fact the authors of *Bowstead & Reynolds* (see para 1—04) recognise that someone might quite properly be described as an agent even where this feature is missing."

105. At paragraphs 39 and 40, Elias LJ wrote:

> "39 Even in the so-called "general concept of agency" advanced in the *Yearwood* case, it would be necessary to show that a person (the agent) is acting on behalf of another (the principal) and with that principal's authority. Once it is recognised that the legal concept does not necessarily involve an obligation to affect the legal relations with third parties, I doubt whether the concepts are materially different.

> "40 But ultimately it is not necessary for the purposes of appeal to resolve that question. Whatever the precise scope of the legal concept of agency, and whatever difficulties there may be of applying it in marginal cases, I am satisfied that no question of agency arises in this case. In my view, it cannot be appropriate to describe as an agent someone who is employed by a contractor simply on the grounds that he or she performs work for the benefit of a third party employer. She is no more acting on behalf of the employer than his own employees are, and they would not typically be treated as agents. (That is not, of course, to say that employees can never be agents; they might well be, depending on the obligations cast on them, such as where a senior manager is authorised to contract with third parties. He will be an employee but will also act as an agent when exercising the authority to deal with third parties.)"

106. At paragraph 46, he concluded that, whatever, the precise scope of the agency concept in section 32 RRA, "in my view it must at least reflect the essence of the legal concept".

107. Lewison LJ agreed with the EAT in Yearwood that Parliament must be taken to have intended the legal concept of agency in the discrimination statutes to be interpreted in accordance with ordinary legal parlance.

108. Kitchin LJ agreed with the judgments of both Elias LJ and Lewison LJ.

<u>Time limits for complaints of discrimination</u>

109. Section 123 EqA provides that proceedings may not be brought after the end of the period of 3 months starting with the date of the act to which the complaint relates, or such other period as the employment tribunal thinks just and equitable. Section 123(3) provides that conduct extending over a period is to be treated as done at the end of the period.

110. Time limits are extended to take account of time spent in the early conciliation process with ACAS, if notification to ACAS is made within the normal time limit.

<u>Unfair dismissal</u>

111. The law in relation to unfair dismissal is contained in the Employment Rights Act 1996. Section 94(1) of this Act provides that an employee has the right not to be unfairly dismissed by his employer. The fairness or unfairness of the dismissal is determined by application of Section 98 of the 1996 Act. Section 98(1) of this Act provides that, in determining whether the dismissal of an employee is fair or unfair, it is for the employer to show the reason for dismissal and, if more than one, the principal one, and that it is a reason falling within Section 98(2) of the 1996 Act or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. Conduct is one of these potentially fair reasons for dismissal.

112. Section 98(4) provides that where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair, having regard to the reason shown by the employer, depends on whether, in the

circumstances, including the size and administrative resources of the employer's undertaking, the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissal and this is to be determined in accordance with equity and the substantial merits of the case. In considering the reasonableness or unreasonableness of the dismissal the Tribunal must consider whether the procedure followed and the penalty of dismissal were within the band of reasonable responses. The burden of proof is neutral in deciding on reasonableness.

113. In relation to a conduct dismissal, the Tribunal is guided by the authority of ***British Home Stores v Burchell*** *[1979] IRLR 379*. When considering whether the respondent has shown a potentially fair reason for dismissal, the Tribunal must decide whether the respondent had a genuine belief in the claimant's guilt. In considering the fairness or otherwise of the dismissal, the tribunal must consider the other parts of the ***Burchell*** test: was this belief was based on reasonable grounds and formed after a reasonable investigation?

<u>Unauthorised deduction from wages</u>

114. Section 13(1) of the Employment Rights Act 1996 (ERA) provides that an employer shall not make a deduction from wages of a worker employed by him unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction.

115. "Wages" includes statutory sick pay: s.27(1) ERA.

116. An employee has a right to complain to an Employment Tribunal of an unlawful deduction from wages pursuant to s.23 ERA.

<u>Rights to annual leave under the Working Time Regulations 1998</u>

117. The Working Time Regulations 1998 (WTR) provide for minimum periods of annual leave and for payment to be made in lieu of any leave accrued but not taken in the leave year in which the employment ends. The Regulations provide for 5.6 weeks leave per annum. The leave year begins on the anniversary of the start of the claimant's employment, unless a written relevant agreement between the employee and employer provides for a different leave year.

118. The WTR do not normally allow untaken leave to be carried over from one leave year to the next but case law has established various circumstances in which the 4 weeks leave of European origin (regulation 13 leave) may be carried over, if the employee was unable to take the leave during the relevant leave year e.g. because of sickness.

119. Regulation 14 provides that the worker is entitled to be paid, on termination of employment, in lieu of leave accrued but untaken in the leave year in which termination occurs.

Conclusions

<u>Direct race discrimination</u>

120. We take the approach of dealing with the merits of the complaints first. Once we have decided whether there were any acts of discrimination, we will return to the jurisdictional issue of time limits, where applicable.

121. The first complaint is that, in February 2019, a security guard made an allegation about the claimant. The respondent could only be liable for the acts of the security guard if the guard was an employee of the respondent or acting as their agent. The security guard was not an employer of the respondent. There is no evidence which suggests the security guard was acting as agent of the respondent within the meaning in the EqA. The security guard was not acting on behalf of the respondent and with the respondent's authority, in carrying out his work. We conclude, therefore, that there is no basis, within the Equality Act 2010, for holding the respondent liable for the acts of the security guard. We conclude that the complaint is not well founded. We do not, therefore, need to find whether or not the security guard was motivated, consciously or unconsciously, by race when making the allegations. We do not need to make findings about the truth or otherwise of the allegation made by the security guard about what was said by the claimant. We have not heard evidence from the security guard and, since we do not need to make findings on these factual allegations, we do not do so. We deal with the time limit issue in relation to this complaint later in these reasons.

122. The second complaint is that, in February 2019, the respondent investigated the claimant. The investigation arose from the complaint made by the security guard. We consider this an appropriate situation in which to move straight to the reason why, assuming (without deciding) that the claimant has satisfied the initial burden of proof. We conclude that the respondent has provided a satisfactory non-discriminatory explanation: a complaint had been made by the security guard which, on its face, required investigation. The complaint about the alleged comment by the claimant was serious in nature. We conclude that the complaint about the respondent investigating the claimant is not well founded. We deal with the time limit issue in relation to this complaint later in these reasons.

123. The third complaint is about the issue of the final written warning in February 2020. We consider first whether the claimant has satisfied the initial burden of proof: has he proved facts from which we could conclude that there was less favourable treatment because of race? Although the list of issues identified the claimant's manager, Darren, as a comparator for all his complaints of direct race discrimination, we are unclear why he was named as a comparator and we do not consider that Darren was an appropriate comparator. The relevant circumstances of the claimant and Darren were not the same. Darren was not facing similar accusations to the claimant. We, therefore, consider how a hypothetical comparator would have been treated. The relevant characteristics of an appropriate hypothetical comparator are, we conclude, that the person was of a different race to the claimant but was facing an allegation about smoking in a non-designated area, with another, more serious, allegation about conduct towards a security guard having been dropped.

124. We consider that the following are matters from which we could legitimately draw an inference that the claimant was treated less favourably than such a hypothetical comparator and that race was a material factor in the decision to issue the claimant with a final written warning.

124.1. The respondent's failures in relation to disclosure. A number of clearly relevant documents were disclosed very late, or not at all (e.g. see paragraphs 30 and 59). No satisfactory explanation was provided for these failures.

124.2. The respondent's reaction to the claimant's attempt to explain racism, using an analogy of sexism. They reacted very negatively to this attempt, describing this as inappropriate, which we consider could be indicative of a closed mind. (See paragraphs 54-55).

124.3. Matthew Green's description of the claimant's comments about a culture of racism and discrimination in the respondent's workplace as "a bold statement" (see paragraph 55). This is a dismissive way of describing the claimant's comments, even if Mr Green thought, without proper investigation, that the claimant was mistaken. This could be suggestive of a closed mind towards the possibility of race being an influencing factor in the treatment of the claimant.

124.4. Miscategorising the claimant's complaints of racism as allegations of "racist comments." The claimant never made accusations that racist comments had been made. The respondent did not listen carefully to the allegations made by the claimant. (See paragraph 53).

124.5. Failing to investigate the claimant's complaints about the security guard's behaviour towards him, following his return to work, despite the claimant raising this in the disciplinary hearing, in his grievance letter, in the grievance meeting and in his response to the minutes of the meeting. This is in contrast to their response to some other complaints, not about racist behaviour, where they interviewed relevant people. The least investigation conducted was in relation to complaints of racism. Gemma Brennan gave the explanation that she did not question Ed because there was no evidence of racism, but the respondent would not know if there was any evidence unless they investigated the claimant's complaints. (See paragraphs 29, 31, 42, 52-53, 57-58).

124.6. There is no evidence of anyone else being given any type of warning, let alone a final written warning, for smoking in a non-designated area, although it was not in dispute that others smoked in non-designated areas (see paragraph 36). HR's role in disciplinary proceedings was, in part, to try to ensure consistency of treatment. They would know whether others had been given warnings for smoking, but gave the advice to the disciplinary officers to categorise the remaining allegation of smoking in a non-designated area as gross misconduct.

124.7. Holding a disciplinary hearing relating to the security guard's allegations when the claimant returned to work despite the claimant having been told before he began sick leave that he would not face any disciplinaries on his return to work. (See paragraph 24).

124.8. Omissions of significant evidence in the respondent's witness statements. A striking example of this is Gemma Brennan's failure to mention her involvement in the final written warning; where she was giving advice to the disciplinary officers which included the advice to categorise the allegation of smoking in a non-designated area as gross misconduct.

124.9. Misleading evidence from the respondent. Lee Diggle writes in his witness statement of the playing of the recording of the meeting with Abbie and Benjamin Pinkney but says it is of no relevance, although, at the time, it was so relevant that he sought advice from HR as to whether they should continue with the disciplinary hearing. In paragraph 4 of Lee Diggle's statement, he alleged that the claimant was shouting and being troublesome in the meeting on 9 December but, in oral evidence, said this had been the meeting on 6 December. There was no evidence that the claimant behaved inappropriately in the disciplinary hearing on 9 December. We consider that the incorrect suggestion that the claimant was behaving aggressively at the hearing on 9 December could be indicative of stereotyping of black men as aggressive.

124.10. The respondent's failure to interrogate Genesys about the AWOL incident, although the claimant raised this in his grievance. The respondent did not look at evidence which might have suggested that Benjamin Pinkney was treating the claimant less favourably than others. (See paragraph 60).

124.11. Not telling the claimant at the disciplinary hearing, or after, that they had dropped the allegation about the clutching of the groin and comment to the security guard, which was the most serious allegation and the one of most concern to the claimant. (See paragraphs 33 and 38).

124.12. Gemma Brennan advising during the disciplinary proceedings that the remaining allegation of smoking in a non-designated area should be categorised as gross misconduct, although she informed the Tribunal, during this hearing, that it would not be gross misconduct. (See paragraphs 34-35)

124.13. Issuing a final written warning for conduct which was, in the Tribunal's view, and in the evidence of Gemma Brennan at this hearing, not gross misconduct, after advice from Gemma Brennan in HR during the disciplinary process that it was gross misconduct. (See paragraph 37).

124.14. The same person, Gemma Brennan, giving the advice leading to the final written warning, being involved in the grievance and the failure to investigate the claimant's allegations of racism, and being one of those taking offence at the claimant's attempts to explain racism, using the analogy of sexism.

125. We conclude that all these matters, taken together, are facts from which we could conclude, in the absence of a satisfactory non-discriminatory explanation from the respondent, that the claimant was subjected to less favourable treatment, because of race, than would have been given to a person of a different race in comparable circumstances.

126. We turn, therefore, to the respondent for its explanation as to why the claimant was given a final written warning. The respondent has not explained satisfactorily to us why a final written warning was given for an offence which was properly categorised as misconduct, rather than gross misconduct. We conclude that the respondent has failed to prove that race did not play a material part in the decision to issue the warning and this complaint succeeds on its merits. We return shortly to the issue of jurisdiction and time limits.

127. The fourth and final complaint of direct race discrimination is that, in October 2020, the respondent dismissed the claimant. In relation to this complaint, we move straight to the reason why (assuming, without deciding, that the burden of proof passed to the respondent to provide a non-discriminatory explanation). We conclude that the respondent has provided a satisfactory non-discriminatory explanation for the claimant's dismissal; the claimant was dismissed because he was absent without providing sick notes to cover his absence after 31 August 2020. We conclude that this complaint is not well founded. This complaint was presented in time, being added by way of amendment at the preliminary hearing on 10 December 2020.

128. We consider now the issue of jurisdiction and time limits in relation to the first three complaints of direct race discrimination which, if considered individually, were presented out of time. We deal first with the complaint about the issue of the final written warning, which we have concluded is well founded on its merits. The claimant was informed on 9 December 2019 that a final written warning was being issued; this was confirmed in writing on 11 December 2019. For time to be extended by early conciliation, the claimant would have had to notify ACAS no later than 10 March 2019, the last day of the primary time limit. He did not do so. He notified ACAS on 6 April 2020 and presented the claim on 29 April 2020. The complaint in relation to the final written warning was presented out of time, unless part of a continuing act of discrimination ending with an act in respect of which the claim was presented in time. We have not found there to be any subsequent act of discrimination. It cannot, therefore, form part of a continuing act of discrimination and was presented out of time. We only have jurisdiction to consider the complaint if we consider it just and equitable to do so in all the circumstances. The claimant was signed off work with stress from 31 January 2020. He pursued a grievance, including about the circumstances of the warning, from February 2020, to which there was no outcome until May 2020. From the submissions the claimant made, it appears that he did not understand that his complaint in relation to this matter (and other matters earlier than the dismissal) was presented out of time, believing that, because his complaint about his dismissal was in time, so were all his complaints. We find that, at the time the claimant presented his claim, he thought that there was a continuing course of conduct which carried on up until his dismissal, although he later dropped some allegations as being pursued as separate acts of discrimination. One example is the complaint about being falsely accused of being AWOL on his rota day off. The claimant's evidence, which we accept, was that he was unable to deal with matters, getting stomach pains when he had to respond to contact from the respondent. We consider, in all these circumstances, that it is just and equitable to consider the complaint about the final written warning out of time.

129. We do not consider the first two complaints of direct race discrimination to form part of a continuing course of discrimination, having found these complaints to be not well founded on their merits. There was a big gap between the incidents and the claim being presented but the claimant was off sick for much of this time and he was led to understand, prior to his sickness absence beginning, that no disciplinary action would be taken against him on his return. We conclude, in these circumstances and taking account of the factors referred to in the previous paragraph, that it is just and equitable to consider the complaints out of time on their merits.

Unfair dismissal

130. We have found that the respondent dismissed the claimant because the claimant had not provided a fit note when his fit note expired on 31 August 2020 and had not responded to emailed invitation letters, as recorded in the outcome letter. We conclude that the respondent has shown that the dismissal was for the potentially fair reason of conduct.

131. Before deciding to dismiss the claimant, the respondent sent the claimant letters, telephoned him and postponed the disciplinary hearing to give him a further opportunity to provide a sick note and to attend the hearing. The claimant did not respond. We conclude that, in all the circumstances, the respondent acted within the band of reasonable responses in dismissing the claimant for misconduct. We conclude that the complaint of unfair dismissal is not well founded.

Unauthorised deductions from wages

132. The claimant has not proved, on a balance of probabilities, that he was due sick pay after 31 August 2020. He did not provide sick notes covering absence after this date so would not have been entitled to statutory sick pay (SSP) because of this failure, had the period for which SSP is payable not already expired. Our understanding is that entitlement to SSP had expired, the claimant having exhausted the entitlement of 28 weeks SSP.

133. The respondent accepted in evidence that there was a shortfall of £169.13 in total, with three payments made of less than the claimant was entitled to be paid. Although, during employment, the respondent could have exercised a right to make deductions for overpayments of occupational sick pay, it did not do so and there is no right to set off overpayments against unauthorised deductions. We, therefore, conclude that the respondent made unauthorised deductions in the total sum of £169.13 and the respondent is ordered to pay this amount to the claimant.

134. We conclude that there was no unauthorised deduction of pay in lieu of accrued but untaken holiday on termination of employment. The respondent made a payment to the claimant in October 2020 and the claimant has not shown us why he believes that payment to have been wrong.

Annual leave/breach of the Working Time Regulations

135. We have heard and seen no evidence to support a complaint about requests to take annual leave in the years 2018 or 2019 being refused. If this complaint is separate to the complaint about failure to pay in lieu of accrued but untaken leave on termination of employment, which we have dealt with under the heading of “unauthorised deduction from wages”, we conclude that the complaint is not well founded.

Employment Judge Slater
Date: 31 December 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
7 January 2022

FOR THE TRIBUNAL OFFICE

Public access to employment tribunal decisions

Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990

Tribunal case number: **2403945/2020**

Name of case: **Mr C Stewart** v **Concentrix CVG Intelligent Contact Ltd**

The Employment Tribunals (Interest) Order 1990 provides that sums of money payable as a result of a judgment of an Employment Tribunal (excluding sums representing costs or expenses), shall carry interest where the full amount is not paid within 14 days after the day that the document containing the tribunal's written judgment is recorded as having been sent to parties. That day is known as "*the relevant decision day*". The date from which interest starts to accrue is called "*the calculation day*" and is the day immediately following the relevant decision day.

The rate of interest payable is that specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as "the stipulated rate of interest" and the rate applicable in your case is set out below.

The following information in respect of this case is provided by the Secretary of the Tribunals in accordance with the requirements of Article 12 of the Order:-

"the relevant judgment day" is: 7 January 2022

"the calculation day" is: 8 January 2022

"the stipulated rate of interest" is: **8%**

Mr S Artingstall
For the Employment Tribunal Office

INTEREST ON TRIBUNAL AWARDS

GUIDANCE NOTE

1. This guidance note should be read in conjunction with the booklet, 'The Judgment' which can be found on our website at www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, paper copies can be obtained by telephoning the tribunal office dealing with the claim.

2. The Employment Tribunals (Interest) Order 1990 provides for interest to be paid on employment tribunal awards (excluding sums representing costs or expenses) if they remain wholly or partly unpaid more than 14 days after the date on which the Tribunal's judgment is recorded as having been sent to the parties, which is known as "the relevant decision day".

3. The date from which interest starts to accrue is the day immediately following the relevant decision day and is called "the calculation day". The dates of both the relevant decision day and the calculation day that apply in your case are recorded on the Notice attached to the judgment. If you have received a judgment and subsequently request reasons (see 'The Judgment' booklet) the date of the relevant judgment day will remain unchanged.

4. "Interest" means simple interest accruing from day to day on such part of the sum of money awarded by the tribunal for the time being remaining unpaid. Interest does not accrue on deductions such as Tax and/or National Insurance Contributions that are to be paid to the appropriate authorities. Neither does interest accrue on any sums which the Secretary of State has claimed in a recoupment notice (see 'The Judgment' booklet).

5. Where the sum awarded is varied upon a review of the judgment by the Employment Tribunal or upon appeal to the Employment Appeal Tribunal or a higher appellate court, then interest will accrue in the same way (from "the calculation day"), but on the award as varied by the higher court and not on the sum originally awarded by the Tribunal.

6. 'The Judgment' booklet explains how employment tribunal awards are enforced. The interest element of an award is enforced in the same way.