



EMPLOYMENT TRIBUNALS

Claimant: Mr R. Mohanan

Respondent: Avery of Leicester (Operations) Limited

Heard at: Midlands East

On: 11,12,13,14,15 October 2021 and 9, 10 & 15 November 2021
and deliberations 19 November 2021.

Before: Employment Judge Rachel Broughton
sitting with Members; Mrs K Srivastava and Mr M Alibhai.

Representatives

Claimant: In Person

Respondent: Ms Hale – solicitor

RESERVED JUDGMENT WITH REASONS

The unanimous judgment of the Tribunal is that:

1. The application to strike out the claim is not well founded and is refused.
2. The Claimant does not have the necessary qualifying service pursuant to section 108 Employment Rights Act 1996 (ERA) to bring a claim of ordinary unfair dismissal pursuant to section 94 and 98 ERA and that claim is therefore not well founded and is dismissed.
3. The claim of automatic unfair dismissal under section 103A ERA is not well founded and is dismissed.
4. The claims of harassment and direct discrimination on the grounds of religion and/or belief and/or age discrimination are not well founded and are dismissed.
5. The claim for wrongful dismissal is not well founded and is dismissed.
6. The Claimant's claim for unpaid holiday for the holiday year 2019 is not well founded and is dismissed.
7. The claim for unpaid holiday for the holiday year 2020 is well founded and

succeeds and the Respondent is ordered to pay the Claimant the sum of **£254.80 (gross)**.

8. The claim for unlawful deduction of wages in connection with the period when the Claimant was on suspension is in part, well founded and succeeds and the Respondent is ordered to pay the Claimant the sum **£245.70 (gross)**.
9. The claim for unlawful deductions for unpaid wages for the period 17th to 19 February 2020 is **£40.40 (gross)**.
10. The claim for unlawful deduction of wages for overtime worked on public holidays in 2019 is dismissed on withdrawal by the Claimant.
11. The Claimant is liable for any statutory deductions if any, payable on the gross sums awarded.

The Issues

1. The parties had been ordered but had not prepared a list of issues. The Employment Tribunal Judge therefore spent time on the morning of the hearing discussing the claims and the issues. The Claimant was unrepresented and was assisted throughout the hearing by an interpreter.
2. The Judge prepared a provisional list of issues on the morning of the hearing and provided those to the parties to consider. After some discussion with the parties, those issues were amended. The Claimant identified on the first day of the hearing,, that the protected disclosures he alleges he made to Yvonne Jacobs, are set out in the documents at pages 99 / 101 and 122 in the bundle however, when the Judge looked at those documents with the Claimant, he then reconsidered his case and informed the Tribunal that the information contained in the documents at pages 101 and 122 were not protected disclosures but just complaints and hence he was withdrawing his allegation that these documents amounted to protected disclosures under section 43A Employment Rights Act 1996 (ERA). The list of issues was accordingly amended by agreement to reflect this.
3. The Judge prepared and presented a typed copy of the amended list of issues and claims to the parties on the morning of the second day of the hearing. The Claimant requested further time to go through the written list of issues with the interpreter, after an hour he indicated that he was in a position to proceed and confirmed that he did not want to make any changes to the issues as set out.
4. The issues which were agreed were as follows;
 1. ***Time limits***
 - 1.1 *Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before **14 December 2019** may not have been brought in time.*

A) *Discrimination and harassment claims*

- 1.2 *Were the discrimination and harassment complaints made within the time limit in section 123 of the Equality Act 2010?*

The Tribunal will decide:

- 1.2.1 *Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?*
- 1.2.2 *If not, was there conduct extending over a period?*
- 1.2.3 *If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?*
- 1.2.4 *If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:*
- a) *Why were the complaints not made to the Tribunal in time?*
 - b) *In any event, is it just and equitable in all the circumstances to extend time.*

B) *Unauthorised deductions claim: section 13 ERA*

Unauthorised deductions *was the complaint presented within the time limit in section 23 of the Employment Rights Act 1996?*

The Tribunal will decide:

- 1.2.5 *Was the claim made to the Tribunal within three months (plus early conciliation extension) of the date of payment of the wages from which the deduction was made etc?*
- 1.2.6 *Unauthorised deductions If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?*
- 1.2.7 *If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?*
- 1.2.8 *If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?*

2. **Unfair dismissal**

2.1 What was the effective date of termination?

- The Respondent says it was 14 February 2020
- The Claimant says it was 21 February 2020 when he found out that his employment had been terminated.

2.2 Did the Claimant have 2 years qualifying service as at the date of termination as required pursuant to section 108 ERA?

- The Respondent says the Claimant started employment on 12 March 2018
- The Claimant says his employment started on the 8 January 2018 – this was his first day working and he was paid in cash in February 2018.

2.3 Was the Claimant dismissed?

- Dismissal is not in dispute.

2.4 If he was dismissed, what was the reason or principal reason for dismissal ?

2.5 Was it a potentially fair reason?

- The Respondent relies on conduct.
- The Claimant says the real reason was one or more of his protected disclosures

2.6 Did the Respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the Claimant, including following a fair procedure?

2.7 Was the reason or principal reason for dismissal that the Claimant made a protected disclosure?

If so, the Claimant will be regarded as automatically unfairly dismissed.

2.8 What was the reason or principal reason for dismissal? The Respondent says the reason was conduct . The Tribunal will need to decide whether the Respondent genuinely believed the Claimant had committed misconduct.

2.9 If the reason was misconduct, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant?

The Tribunal will usually decide, in particular, whether:

- 2.9.1 *there were reasonable grounds for that belief;*
- 2.9.2 *at the time the belief was formed the Respondent had carried out a reasonable investigation;*
- 2.9.3 *the Respondent otherwise acted in a procedurally fair manner;*
- 2.9.4 *dismissal was within the range of reasonable responses.*

British Home Stores Ltd v Burchell 1980 ICR 303, EAT

2.10 *Did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the Claimant?*

3. Remedy for unfair dismissal

3.1 *Does the Claimant wish to be reinstated to their previous employment?*

3.2 *Does the Claimant wish to be re-engaged to comparable employment or other suitable employment?*

3.3 *Should the Tribunal order reinstatement? The Tribunal will consider in particular whether reinstatement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.*

3.4 *Should the Tribunal order re-engagement? The Tribunal will consider in particular whether re-engagement is practicable and, if the Claimant caused or contributed to dismissal, whether it would be just.*

3.5 *What should the terms of the re-engagement order be?*

3.6 *If there is a compensatory award, how much should it be? The Tribunal will decide:*

3.6.1 *What financial losses has the dismissal caused the Claimant?*

3.6.2 *Has the Claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?*

3.6.3 *If not, for what period of loss should the Claimant be compensated?*

3.6.4 *Is there a chance that the Claimant would have been fairly dismissed anyway if a fair procedure had been followed, or for some other reason?*

3.6.5 *If so, should the Claimant's compensation be reduced? By how much?*

3.6.6 *Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?*

3.6.7 *Did the Respondent or the Claimant unreasonably fail to comply with it by a specific alleged breach?*

3.6.8 *If so is it just and equitable to increase or decrease any award payable to the Claimant? By what proportion, up to 25%?*

3.6.9 *If the Claimant was unfairly dismissed, did s/he cause or contribute to dismissal by blameworthy conduct?*

3.6.10 *If so, would it be just and equitable to reduce the Claimant's compensatory award? By what proportion?*

3.6.11 *Does the statutory cap of fifty-two weeks' pay or £88,519 apply?*

3.7 *What basic award is payable to the Claimant, if any?*

3.8 *Would it be just and equitable to reduce the basic award because of any conduct of the Claimant before the dismissal? If so, to what extent?*

4. **Wrongful dismissal / Notice pay**

4.1 What was the Claimant's notice period?

The contract of employment states 4 weeks.

It is not in dispute that the notice period was 4 weeks

4.2 Was the Claimant paid for that notice period?

It is not in dispute that the Claimant was summarily dismissed.

4.3 *If not paid for the notice period; was the Claimant guilty of gross misconduct? did the Claimant do something so serious that the Respondent was entitled to dismiss without notice?*

5. **Protected disclosures : section 103A ERA**

5.1 *Did the Claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996?*

The Tribunal will decide:

5.1.1 *What did the Claimant say or write? When? To whom?*

*The Claimant says he made **3 disclosures** on these occasions:*

a) *He relies on the content of 2 letters he handed, to a Residential Manager, employed by the Respondent called Penny Tilley **on or around 14 November 2019** in which he raised concerns about health and safety standards in the kitchen used by the Respondent to prepare food for its elderly relatives;*

Disclosure 1

a) *He made a disclosure in a letter on or around 14 November 2019– he does not have a copy of it. He has set out at paragraph 4 of his witness statement what he says he said in the letter;*

“2019, chef Nathan cooked pork sausage and served residents, residents and service staff complaints sausage is not cooked property. Restaurant manager Ms Pankhania came to kitchen in the middle of service Nathan got angry he threw chief- ing dish towards me”[sic]

Disclosure 2

b) *He made a second disclosure to Penny Tilley by letter on 11 December 2020 [should read 2019] : he does not deal with this in his witness statement but relies on the document itself which is document P. 80 of the bundle. It refers to raw meat dripping into desserts and burnt food (the Claimant explained that the burning of food is a H & S risk because of the carbon)*

b) *The Claimant does not deal in his witness statement with alleged disclosures to Yvonne Jacobs, a Deputy Manager at the Respondent;*

Disclosure 3

- a) Document at 99 : this appears to relate not to a H & S issue but to the Claimant's own personal situation regarding him leaving the premises – the Claimant stated that he believed it was H & S because; "I was worried that it would affect the health of the residents."

(NB: The Claimant identified on Day 1 in trying to clarify the issues, that the protected disclosures he made to Yvonne Jacobs which he relies on, are set out in the documents at pages 99 / 101 and 122 however, when looking at those documents with him, he then stated that the information in documents 101 and 122 were not protected disclosures but just complaints)

5.1.2 Did he disclose information?

5.1.3 Did he believe the disclosure of information was made in the public interest?

Claimant relies on his belief that the issues related to health and safety of affected elderly residents.

5.1.4 Was that belief reasonable?

5.1.5 Did he believe it tended to show that (subjective test) ?

- a) a person had failed, was failing or was likely to fail to comply with any legal obligation;

The Claimant does not identify a specific legal obligation but relies on legal obligations relating to health and safety

- b) the health or safety of any individual had been, was being or was likely to be endangered;

5.1.6 Was that belief reasonable (objective test) ?

5.2 If the Claimant made a qualifying disclosure, it was a protected disclosure because it was made to the Claimant's employer?

5.3 was the protected disclosure the reason of if more than one, the principal reason for dismissal? : section 103A ERA?

The Claimant says that they dismissed him because they were angry about his disclosures

6. **Direct discrimination (Equality Act 2010 section 13)**

6.1 The Claimant defines 'age' as 50 -year-olds'.

6.2 The Claimant is Hindu – his religion is Hinduism .

6.3 Did the Respondent do the following things (R did not object and ET permitted C to include as supplemental evidence to his statement, all the claims he

identified at the case management hearing before EJ Faulkner although not included in his witness statement):

- 6.3.1 On 7 November 2019, Nathan Kirkpatrick call the Claimant a “ dirty old pig” who was unable to do his job. *Direct Age discrimination*
- 6.3.2 On 7 November 2019, Nathan Kirkpatrick call the Claimant “ you idiot” : *Direct Age discrimination*
- 6.3.3 On 7 November 2019, Nathan Kirkpatrick said to the Claimant “ all Indian people eat pork” :*Direct discrimination based on religion or belief*
- 6.3.4 On 7 November 2019, Nathan Kirkpatrick said to the Claimant “ you talk bullshit”; *Direct discrimination – Age and/or religion and belief*
- 6.3.5 Late December 2019 Nathan Kirkpatrick threw kitchen implements at the Claimant when Claimant raised something about the cooking of pork: *Direct discrimination – religion or belief*

6.4 Was that less favourable treatment?

The Tribunal will decide whether the Claimant was treated worse than someone else – a “comparator” – was treated. There must be no material difference between their circumstances and the Claimant’s.

If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether s/s/he was treated worse than someone else would have been treated.

The Claimant says he was treated worse than Jude Philips (Commis Chef) who he believes to be younger than him (circa 45) and a Christian.

6.5 If so, was it because of age / religion or belief?

6.6 If disputed: Did the Respondent ’s treatment amount to a detriment?

7. Harassment related Age and (Equality Act 2010 section 26)

7.1 Did the Respondent do the following things: (Claimant has the burden to establish on balance of probabilities)

- 7.1.1 On 7 November 2019, Nathan Kirkpatrick call the Claimant a “ dirty old pig” who was unable to do his job. **Age - harassment**
- 7.1.2 On 7 November 2019, Nathan Kirkpatrick said to the Claimant “ all Indian people eat pork” : **religion or belief – harassment**
- 7.1.3 **Late December 2019** Nathan Kirkpatrick threw kitchen implements at the Claimant when Claimant raised something about the cooking of pork: **religion or belief – harassment**

7.2 If so, was that unwanted conduct?

7.3 Did it relate to age or religion or belief? (Claimant needs to adduce to suggest reason is related to protected characteristic)

7.4 Did the conduct have the purpose of violating the Claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

7.5 *If not, did it have that effect? The Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.*

8. Remedy for discrimination

8.1 *Should the Tribunal make a recommendation that the Respondent take steps to reduce any adverse effect on the Claimant? What should it recommend?*

8.2 *What financial losses has the discrimination caused the Claimant?*

8.3 *Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?*

8.4 *If not, for what period of loss should the Claimant be compensated?*

8.5 *What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?*

8.6 *Has the discrimination caused the Claimant personal injury and how much compensation should be awarded for that?*

8.7 *Is there a chance that the Claimant's employment would have ended in any event? Should their compensation be reduced as a result?*

8.8 *Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?*

8.9 *Did the Respondent or the Claimant unreasonably fail to comply with it by specify breach?*

8.10 *If so is it just and equitable to increase or decrease any award payable to the Claimant?*

8.11 *By what proportion, up to 25%?*

8.12 *Should interest be awarded? How much?*

9. Holiday Pay (Working Time Regulations 1998)

9.1 *Did the Respondent fail to pay the Claimant for annual leave the Claimant had accrued but not taken when their employment ended?*

The Respondent accepted that the Claimant is owed the sum of £236.60 gross (26 hours accrued leave) : has this been paid?

The Claimant asserts the amount owed was £405 for 6 days and thus there is a disputed amount of £167.40

9.2 *What was the Claimant's leave year?*

9.3 *How much of the leave year had passed when the Claimant's employment ended?*

- ***The Claimant now concedes that the holiday year ran from 1 January 2020.***
- ***The Claimant believes that he is entitled to holiday up to 21 February 2020 (when he found out his employment had been***

terminated): Respondent calculates this to be 7 weeks x 7.5 hours per day @ £9.10 = £259.35

- **The Respondent's case is that the holiday accrual ended on 14 February 2020 and equates to £236.60**
- **[R says an amount has been paid – C denies receiving a payment – R to check and confirm on morning of Day 2]**

- 9.4 *How much leave had accrued for the year by that date?*
- 9.5 *How much paid leave had the Claimant taken in the year?*
- 9.6 *Were any days carried over from previous holiday years?*
- 9.7 *How many days remain unpaid?*
- 9.8 *What is the relevant daily rate of pay?*

10. Unauthorised deductions : unpaid wages

- 10.1 *Did the Respondent make unauthorised deductions from the Claimant's wages and if so how much was deducted?*

Claimant claims;

Mid December 2019 to mid-January 2020 : underpaid £357(gross)

Mid-January 2020 to 14 February 2020 : underpaid £923 (gross) .

Claimant's case is that he remained entitled to be paid full pay during suspension from 8 Jan 2020 to 21 Feb 2020.

Respondent case is that he was only entitled to SSP when suspension ended and he was on sick leave but concede that he should have been paid full pay from 17 to 21 January 2020 and he was not hence there is , they admit some wages unpaid (suspension did not end until 22 Jan 2020) [Respondent to confirm on Day 2 sum they accept is owed]

- 10.2 *Were the wages paid to the Claimant on less than the wages he should have been paid?*
- 10.3 *Was any deduction required or authorised by statute?*
- 10.4 *Was any deduction required or authorised by a written term of the contract?*
- 10.5 *Respondent's case is that the Claimant was on suspend but then went on sick leave and thus was from that point only entitled to statutory sick pay.*
- 10.6 *Did the Claimant have a copy of the contract or written notice of the contract term before the deduction was made?*
- 10.7 *Did the Claimant agree in writing to the deduction before it was made?*
- 10.8 *How much is the Claimant owed?*

11. Breach of Contract

- 11.1 *Did this claim arise or was it outstanding when the Claimant's employment ended?*

11.3 *Was that a breach of contract?*

11.4 *How much should the Claimant be awarded as damages?*

Background

5. The Claimant was employed by the Respondent as a Chef at the Respondent's care home at South Lodge Care Home (**Home**).
6. When the Claimant started working at the Home, it was then owned by a company called Signature Senior Lifestyle Limited (**Signature**). The Home was acquired by the Respondent in around May 2018. The Respondent's witnesses were not able to give direct evidence about the date the Claimant was recruited, they had been employed by the Respondent since his recruitment and the transfer of the business to the Respondent.
7. The Claimant started the ACAS early conciliation process on the 13 March 2020. The certificate was received on 2 April 2020. The claim was presented to the Employment Tribunal on 24 April 2020.

Evidence

8. The Claimant had exchanged a witness statement, it was however brief, running to just over one side of A4 and failed to address all the allegations he was making. He was given a reasonable level of assistance by the Tribunal in light of the fact that English is not his first language and he was without any legal representation. The claims identified in the case management hearings, although not all addressed in his witness statement, it was agreed with the parties would be included in the list of issues and he was given an opportunity to comment on them in oral evidence. The Respondent raised no objection to the assistance provided. He was cross examined by the Respondent.
9. The Respondent called 3 witnesses; Mr Noor Khan, Regional Manager of the Respondent, Nathan Kirkpatrick, Head Chef at the Respondent, Tracy Archer, Regional Manager. The witnesses attended the hearing, gave their evidence under oath and were cross examined by the Claimant.
10. The Claimant had a copy of the agreed bundle however he repeatedly attempted to use his own loose copy versions of the documents which created some difficulties during the course of the hearing. He was reminded repeatedly by the Employment Judge to use the joint bundle.

Additional disclosure

Evidence of Ms Pankhania

11. At the outset of the hearing, the Tribunal noted that an email was on the Tribunal file which appeared to be from an individual who had been contacted by the Respondent to be a witness. The email was raised with the parties to establish whether this was a document either party was intending to apply to admit into evidence. Neither party claimed to be aware of the email and neither party claimed to be relying on that individual as a witness or to have any knowledge of why that person would be contacting the Tribunal. The name at the foot of the email dated 7 October 2021 was Chetna, Restaurant Manager.
12. The content of the email was subsequently presented to the parties so that they were aware of what had been seen by the Tribunal. The Claimant on seeing the content of the email, made an application for this document to be admitted into

evidence, as it appeared to include evidence/information supportive of his claim. That application for reasons given orally to the parties at the hearing, was granted. The parties were warned of the weight which could be attached to the email, the sender had not come forward as a witness and the document was an email, rather than a signed statement, the provenance of the document therefore could not be established to any satisfactory extent.

13. The case went part heard and at the reconvened hearing, the Respondent was granted leave to admit into evidence a witness statement from Ms Chetana Pankhania, formerly the Restaurant Manager at the Respondent. The Respondent also produced a copy of what it claimed and appeared to be, pages from Ms Pankhania's passport, birth certificate and driving licence to evidence that she had provided the statement and evidencing the correct spelling of her name, which was **not** the same as the spelling of the name at the foot of the 7 October 2021 email and in the address bar i.e. Chetana not Chetna.
14. An application was made by the Respondent to admit those documents. The application was granted and reasons were given orally to the parties at the hearing. A written statement on its own is a form of hearsay evidence. In order for it to have the status of evidence, the person has to attend to swear an oath as to its veracity. The parties were therefore informed that the tribunal would accord this evidence less weight than direct oral testimony.

Findings of fact

15. All findings of fact are based on a balance of probabilities. All the evidence has been considered however, this judgment sets out the evidence the Tribunal considers relevant to the determination of the issues. References to numbers are to pages within the agreed bundle.

Date employment started

16. The Claimant asserts that his employment with the Respondent started on **8 January 2018**. The Respondent's case is that his employment started **12 March 2018**. If the Respondent is correct and the Claimant's employment did not commence until 12 March 2018, he had not accrued two years continuous service as at the effective date of termination and thus there is no jurisdiction for this Tribunal to determine his complaint of 'ordinary' unfair dismissal.
17. The Claimant in his claim form stated that his employment started on **26 January 2018** and not the 8 January 2018. His explanation for putting this date in the claim form, is that he had not read the form, that however made little sense as he had prepared it himself and further, the Claimant repeated that date to Employment Judge Broughton at the preliminary hearing on 18 August 2020 (p.29).
18. In the Claimant's evidence in chief, the Claimant asserts that the date his employment started was 8 January 2018 and relies on a letter from Signature dated 11 April 2018 sent to him from Ms Dearling the HR Manager (p.65 to 68) which states;

*"You are employed as Chef de Partie with Signature Senior Lifestyle Ltd ("Signature ") with effect from **8th January 2018**. Your period of continuous employment with signature began on **12 March 2018** in this role you will report to the Head Chef". Tribunal stress*
19. The Respondent avers that the reference to the 8 January 2018 was obviously a mistake and that the start date was 12 March 2018.

20. The Respondent produced in the bundle a copy of this letter of the 11 April 2018 (p.65). The Claimant refuted however that the declaration attached to the copy letter in the bundle and stapled to the letter produced (p.69), was signed by him. The declaration attached to the letter produced by the Respondent was on Signature letter head, confirmed acceptance of the terms and conditions of employment and was signed and **dated 19 April 2018**. The Claimant alleged under cross examination that the signature on the declaration (p. 69) dated 19 April 2018, was his signature but believed the document had been 'created' and denied that the date had been written in by him. However, later in cross examination the Claimant changed his evidence and maintained that this was not his signature.
21. The Claimant produced another version of the 'declaration' on Signature letter head, signed by him and dated **8 January 2018**, but with a different signature (a long form signature) to the one on the declaration produced by the Respondent (page 69a).
22. There was some discussion about the staple marks in the declaration produced by the Respondent (p.69) which appeared to correspond to those on the copy 11 April 2018 letter and the Claimant pointed to the same staple marks on his copy of the declaration he had produced (p.69a).
23. The Claimant was initially unclear what letter the declaration he had disclosed, had originally been attached to, but then produced from a pile of papers he had brought with him what appeared to be an original copy of this signed declaration of the 8 January 2018 which was stapled to a copy of the offer letter of the 11 April 2018; the first page of the letter was a photocopy and the remaining pages appeared to be the original pages. The Respondent had no objection to the Claimant admitting this document into evidence .
24. There is no dispute that the signature is the Claimant's on the 8 January 2018 declaration. The signature is a long form signature and the Tribunal notes that other documents in the bundle, signed by the Claimant were signed with a different 'shorthand' signature (including a statement produced in connection with the disciplinary proceedings dated 8 January 2020 (p. 98 and 100) and a complaints letter sent to the Respondent allegedly on 11 December 2019 (p. 80), which corresponds with the signature on the declaration produced by the Respondent an dated 19 April 2018.
25. The Claimant's signature on the declaration dated 19 April 2018 the Tribunal therefore find, was consistent with the version of his signature which appeared on other documents disclosed during these proceedings.
26. Taking into consideration other examples of documents bearing his signature in the bundle and his initial acceptance that it was his signature, the Tribunal find on a balance of probabilities that the declaration dated 11 April 2018 was signed by the Claimant.
27. Further, the way the date is written on the declaration of the 11 April 2018, is the Tribunal find, consistent with other examples in the bundle of how the Claimant writes his numbers (particular 4s). Comparing it to his manuscript handwriting on the reverse of the document at page 126.
28. On a balance of probabilities, the Tribunal find that the declaration of the 11 April 2018 was signed and dated by the Claimant and attached to the original offer letter of the 11 April 2018.

29. The Respondent produced a significant number of other documents in support of its case that the Claimant's employment started on 12 March 2018 and after the Claimant challenged their authenticity on the basis the Respondent had produced only copies, the Respondent brought the original documents to the hearing for the Tribunal and the Claimant to have sight of those.

30. The Tribunal was taken to a new starter checklist (p.63) which sets out on the left hand side a pro forma list of documents relevant to the different stages in the recruitment process, on the right are corresponding handwritten dates with the signature of the Human Resources Manager. The document includes the following information;

Start date: 12 March 2018

Section 1 – Pre- employment documents

Job application form – signed appropriately . CV : 29 January 2018

Interview notes - signed by both interviewers : 23 January 2018

References x2- Legal requirement : 12 March 2018

Section 2 – New starter documentation

New starter form : 4 April 2018

P45: 29 January

Principal statement of terms and condition: 19 April 2018

DBS Capita report : 9 March 2018

31. When taken to this document and these dates, the Claimant disputed that his interview took place on the 23 January but could not recall the date it took place other than to allege that it was before 8 January 2018.

32. The Claimant under cross examination also disputes that the date of the offer letter (p.64) of the 26 January 2018 was correct however, the Tribunal find that this date is consistent with the date of the interview in the new starter checklist. The offer letter refers to; "*your recent interview*" and the new starter checklist records the interview as taking place 3 days before i.e. on 23 January 2018.

33. The Claimant gave evidence that he began working for the Respondent on 8 January 2018 before references were taken and a DBS check carried out.

34. At the second preliminary hearing on 24 November 2020, before Employment Judge Faulkner, the Claimant is recorded as stating that he started work on or around 5 January 2019 and the Claimant indicated that this could be established by reference to payments received from the Respondent into this bank account. (p.55). However, his evidence before this Tribunal when he was asked about that, was that he was paid in cash for the work he did before April 2018 and therefore the payments would not be shown in his bank account. He gave no explanation for why he had previously alleged otherwise. It was pointed out to the Claimant by the Tribunal that he could at least have produced bank statements to show equivalent cash deposits during February and March 2018, however he did not seek to introduce copies of his bank statements for that period.

35. The Respondent was granted leave (reasons for which were provided during the hearing), to admit into evidence additional documents relating to the recruitment process (p.147 – 167) which indicated that the interview with the Claimant took place on 23 January 2018 with the Claimant, Ms Darling and Ms Pratt.

36. The Respondent produced a job application form which the Claimant did not deny was completed by him. The document is dated 29 January 2018 (page 156- 157), he confirmed all the details on the form were correct but he could not recall the date of the 29 January 2018; “ *I don’t know when I signed*”. In cross examination the Claimant gave evidence that he was interviewed for the role after he made the application, which according to the date on the form, would have been after 29 January 2018 . He gave evidence under cross examination that the Respondent were short staffed at the time and asked him to start work before the reference and DBS checks were completed. The Respondent refutes that being a heavily regulated industry, Signature would have permitted the Claimant to work before references were taken and he had received DBS clearance.
37. The application form includes details of employment at Jubilee Hospitality from 2 May 2017 to “*Till date*”. However, the Claimant’s evidence under cross examination is that he was an agency worker and had remained registered with them but there was no work hence he applied for the role with the Respondent, he denies that he was employed as at the 2 May 2017 and with no evidence to rebut his evidence, the Tribunal on a balance of probabilities accept his evidence on this point.
38. There is also an email and letter dated 5 February 2018 from Ms Dearling, the HR Manager at South Lodge to Ms Saxty at Jubilee Hospitality (p. 160). There is a signature at the foot of the completed reference page which seems to indicate that the reference form was received by the Respondent on the 12 March 2018.
39. There is a further request for a reference (p. 166) by letter from Ms Dearling dated 7 March 2018 to another former employer. The completed reference (page 167) is signed and dated, indicating it was received back on 12 March 2018.
40. There is also a DBS document in the name of the Claimant with an issue date of 2 March 2019 (page 164).
41. Weighing up the Claimant’s oral evidence and the documents produced by both parties, the Tribunal find on a balance of probabilities that the Claimant’s employment commenced on the **12 March 2018** and that the Claimant is seeking to advance the argument that his employment commenced on 8 January 2018 by relying on a date in the offer letter of 11 April 2018 (p. 65), which the Tribunal find on a balance of probabilities, to be an erroneous date and included in error.
42. There is a dispute which we shall address further in this judgment, about the effective date of termination, the Claimant does not assert however that the termination date was any later than 22 February 2020. The Respondent’s case is that it is the 14 February 2020. Even on the Claimant’s own case therefore the Claimant (even adding on one week statutory notice under section 97 (2) ERA were it to be determined that there was no right to dismiss summarily) had not accrued two years service as at the effective date of termination.
43. The Tribunal therefore have no jurisdiction to determine the ‘ordinary’ unfair dismissal claim brought in reliance on section 94 and 98 ERA.

The Tribunal find that on a balance of probabilities that the Claimant started his employment on the 12 March 2018 and the ‘ordinary’ unfair dismissal claim under section 84 and 98 is not well founded and is therefore dismissed.

Protected Disclosures

44. The Claimant had a clean disciplinary record prior to the events leading to the termination of his employment however, he had attended a staff supervision meeting on 19 September 2019 where issues with his conduct were discussed. The notes of that meeting record as being in attendance Noor Khan, Tracy Archer, Nathan Kirkpatrick and the Claimant (pages 78- 79). The Claimant disputes this anyone other than Mr Khan was in attendance, however the evidence of Mr Kirkpatrick and Ms Archer is that they were in attendance. The notes confirm their attendance and the Tribunal find on a balance of probabilities that they were also present. The Claimant confirmed under cross examination accepted the accuracy of the document as a record of what was discussed.
45. The agreed actions arising from that meeting included in summary the following;
- *That the Claimant remain professional at all the times while communicating with other members of staff*
 - *The Claimant to be aware of his body language while communicating and ensure the tone of voice is kept low*
 - *The Claimant was reminded not to raise his voice and not point fingers to colleagues*
 - *The Claimant to ensure his personal phone is not used on premises while on duty. The only place when he can use the phone is when he is on a break in the staff room.*
46. The review document stated that it would be reviewed in 4 weeks however it is not in dispute that no review took place. There was no disciplinary outcome. There is also no record of any issues or concerns raised by the Claimant about the conduct of Mr Kirkpatrick toward him at this time.

7 November 2019

47. The Claimant alleges that on 7 November 2019, Mr Kirkpatrick called him a “*dirty old pig*” who was unable to do his job and that during the same incident he also called the Claimant an “*idiot*” and made the comment that the Claimant talks “*bullshit*” and that “*all Indian people eat pork*”.
48. The Claimant made another complaint about an incident which he had stated at the start of the hearing when agreeing the list of issues, took place in late December 2019 however under cross examination he confirmed that this second incident had actually taken on 14 November 2019.
49. The ACAS early conciliation process started on 13 March and the certificate was issued on 2 April 2020. The claim was issued on **24 April 2020**. If the last alleged act of discrimination was 14 November 2019, the primary time limit expired on **13 February 2020**. The ACAS early conciliation period would not extend time for and the claims of discrimination, even if a continuing act, were issued over 2 months (circa 10 weeks) out of time. .
50. The Tribunal therefore have no jurisdiction to determine the claims of harassment and direct discrimination unless it considers it just and equitable to extend time under section 123 (1)(b) EqA. The facts relating to the discrimination allegations,

nonetheless, form part of the factual background. The submissions and evidence on time limits is dealt with later in this judgment.

Direct discrimination and harassment

7 November 2019 and 14 November 2019 : verbal comments

Comments

51. The Claimant complains that Mr Kirkpatrick called him a “*dirty old pig*” on 7 November 2019 . Under cross examination he gave evidence that he was not complaining about being called an “*idiot*” or being told he talked “*bullshit*” in isolation, he found those words offensive because he believed they were related to his age because of the use of the inclusion of the word “*old*” and the “*bullshit*” comment he complains related to or was because of his religion and belief.
52. The Claimant does not allege that the reference to “*pig*” was because of his race or religion.
53. The Claimant did not call any witnesses to testify that the comments were said.
54. The Claimant had not raised a grievance during his employment about these incidents.
55. The Claimant complains that Jude Philips a Comme Chef was treated better than he was. The Respondent informed the tribunal that the Respondent believes Ms Philips to be 50, the Claimant states believes her to be “*45 or so*” and his undisputed evidence is that she is a Christian.
56. The Claimant alleged under cross examination, that such similar comments had been said on previous occasions before the 7 November 2019, however he did not identify when, what was said or in what context. He does not allege that he had mentioned Mr Kirkpatrick’s language toward him during the review hearing which had taken place about 6 or so weeks before these November incidents, on the 19 September 2019 when the Regional Managers were present and there was a discussion about his own verbal and body language.
57. The Claimant under cross examination stated that he could not recall the context in which these things on 7 November 2019 were said but that it would have been a response to a complaint about food and that;

“*..he does not do his job on time or properly and gets angry **with us** if not served on time – if not serving on time he will shout **at us**”.* Tribunal Stress
58. The Claimant alleges that he complained before 7 November about Mr Kirkpatrick’s behaviour and that; “*sometimes Jude reported*”.
59. In his evidence in chief the Claimant complains that Mr Kirkpatrick;

“*...his attitude **towards staff** not acceptable. He is very short tempered person...*”
60. He also refers in his evidence in chief to Mr Kirkpatrick “*calling in front of staff idiots*”. Which implies that Mr Kirkpatrick called other kitchen staff idiots also.
61. The Claimant also alleged that Mr Kirkpatrick would shout not only at him but at “*us*” and that Ms Philips had also reported his behaviour .

62. The Claimant in his witness statement also referred to Mr Kirkpatrick putting the blame for things that happened in the kitchen on “*others*”.
63. The picture presented by the Claimant in his evidence was that Mr Kirkpatrick was short to temper and would shout at the kitchen staff generally. That does not of course mean that Mr Kirkpatrick may not have used particularly offensive language related to the Claimant’s age, religion or race, toward the Claimant.

“You talk bullshit” and “idiot” comment

64. The record of the preliminary hearing on 18 August 2020 records the Claimant alleging that Mr Kirkpatrick had said ; “***Indian people are talking bullshit***”. However the Claimant does not repeat the allegation in this way at the preliminary hearing on the 24 November 2020 (p.54); where he alleges that Mr Kirkpatrick had made the comment; “ ***you talk bullshit***” and that is the allegation the Claimant confirmed should be recorded in the list of issues at the start of this hearing.
65. Mr Kirkpatrick under cross examination accepted that he could have used the word “*bullshit*” and that if he had, he would have said this to the Claimant because he alleges that the Claimant had a habit of believing that “*he knew everything*”. Mr Kirkpatrick in his evidence in chief referred by contrast to Jude Philips being a team player, a junior employee who was happy to learn.
66. Mr Kirkpatrick however denies making the comment about the Claimant being a “*dirty old pig*” . He also denies knowing that the Claimant was Hindu, he gave evidence that he understood him to be Christian, the same religion as another member of staff who is from the same region in India as the Claimant.
67. Mr Kirkpatrick also conceded that there is swearing in the kitchen but denied directing it at people or calling the Claimant an “*idiot*”.

“All Indian people eat pork” comment

68. When discussing the list of issues, the Claimant stated that on 7 November 2019 Mr Kirkpatrick had said that; “***all Indian people eat pork***”, that is what the Claimant confirmed should be recorded in the list of issues and that is consistent with what he had said at the preliminary hearing on 24 November 2020.
69. However, in his evidence in chief , the Claimant alleged that Mr Kirkpatrick had said; “***you Hindu, you guys eating pork***”. That is a very different allegation, it is directed at the Claimant and at his religion.
70. In cross examination, the Claimant however changed his account of events again and alleged that what was said was: “***all fucking Indian people eat pork***” but did not allege that there was a reference to “*you*” or any express reference to his religion or beliefs as a Hindu.
71. The Claimant gave evidence to the Tribunal, regarding the incident on 7 November 2019, that he recorded what had happened in a diary and that he had a “*habit*” of writing a diary . When asked by the Tribunal where his diary was, he then contradicted himself and stated he did not write it in a diary but on a piece of paper. When asked where that piece of paper, he stated he reported the incident to the Restaurant Manager, Ms Pankhania who said she would report it and then he put the paper in the bin.
72. The Claimant did not call any witnesses in support of his account that these things were said. It is his word against Mr Kirkpatrick’s. The Tribunal has therefore

considered whether there is any further evidence or inferences which it may be reasonable to draw from the primary findings of fact.

73. Ms Pankhania provided a statement about the email of the 7 October 2021, however no application was made by the Respondent to introduce evidence from her about these allegations, despite her evidently being prepared to assist the Respondent in the provision of a statement. There was no real explanation for the decision not to ask her to address in her statement these serious allegations when she was contacted after the first hearing.
74. The Respondent has also not called any of the kitchen staff to testify as to the behaviour of Mr Kirkpatrick in the kitchen. The Claimant could but has not applied for a witness order or otherwise explained what if any efforts he has made either to arrange for the attendance of witnesses.
75. However, we also take into account that the Claimant had a number of opportunities to raise this matter with the Respondent's HR team or the Home Manager.
76. The Claimant, alleges that he made a protected disclosure in a letter on or around 14 November 2019 to Penny Tilley, the Home Manager. For reasons which we set out below, we have made a finding that this disclosure/complaint was not made however, even if it was, this alleged disclosure was made only a week after these alleged acts of discrimination and harassment on 7 November 2019 and yet makes no mention of them.
77. On 11 December 2019 the Claimant made a disclosure to Ms Tilley (which as set out in the findings of fact below the Tribunal find on a balance of probabilities, was made) (page 80). This refers to an argument about burnt soup and the Claimant refers to Mr Kirkpatrick "*abusing*" him and refers to the "*kitchen atmosphere very bad*". There is however no mention in this complaint in December 2019 about what it is alleged Mr Kirkpatrick said to him on 7 November 2019 or indeed about the incident on 14 November 2019.
78. Further, the Claimant gave evidence that he raised issues with Mr Khan about Mr Kirkpatrick but he gave evidence that this was only about an incident where he alleges Mr Kirkpatrick followed him to the toilets. Mr Kirkpatrick accepts he did go to the toilets to check where the Claimant was when he was not present in the kitchen during a shift and that Mr Khan had called Mr Kirkpatrick to an office to discuss the complaint made by the Claimant.
79. The Claimant also alleged during cross examination that he raised concerns about health and safety in the kitchen with Mr Khan in December 2019 but did not allege that he mentioned these allegations of discrimination and to him at that point.
80. The Claimant later in his evidence contradicted himself and alleged that he had raised all the issues about Mr Kirkpatrick with Mr Khan at the disciplinary hearing, which Mr Khan denies however, confusingly he later gave evidence under cross examination that Mr Khan had not allowed him to explain what his complaints were because he was told that this was not the purpose of the disciplinary hearing.
81. The Respondent has not produced the disciplinary notes of the hearing (addressed further below). The allegation by the Claimant that he had raised these issues at the disciplinary hearing, was not made before the Respondent had informed the Tribunal that the disciplinary notes could not be located. The Claimant's evidence on this point was also contradictory and the Tribunal find,

was unreliable. The Claimant's appeal letter also makes no mention of these complaints of discrimination. Further, the Tribunal accept Mr Kirkpatrick's undisputed evidence that when an issue was raised about his behaviour toward the Claimant in going to the toilets to look for him, Mr Khan dealt with it.

82. The Tribunal find on a balance of probabilities, that Ms Philips is a Christian and accept the Claimant's evidence that she is about 45. The Respondent was in a position to confirm if her age was 50 and had not done so, and the Tribunal therefore consider it reasonable to draw an adverse inference from their failure to adduce evidence on this issue.
83. The Tribunal also find that it is reasonable to draw an inference adverse to the Respondent, from the failure by the Respondent to call or produce a witness statement from Ms Pankhania commenting on the environment in the kitchen and these allegations of discrimination and harassment.
84. The Tribunal find on a balance of probabilities that there was swearing in the kitchen and unprofessional language, Mr Kirkpatrick himself admits that.
85. The Tribunal weighing up all that evidence find on a balance of probabilities that Mr Kirkpatrick did use unprofessional language toward the Claimant and the kitchen staff generally which included the use of the term "*bullshit*". Further, taking into account Mr Kirkpatrick's evidence about his opinion about the things the Claimant would say, on a balance of probabilities the Tribunal also find on a balance of probabilities, that he also called him an "*idiot*".
86. The Tribunal also find on a balance of probabilities that while Mr Kirkpatrick may not have used these particular terms toward Ms Philips, the Tribunal find that on a balance of probabilities, he used similar language to her and other kitchen staff. Further, that when he used these terms toward the Claimant this was not directed at the Claimant's religion or belief or age but directed to what the Claimant had said or done at the time, in an environment which was at times stressful and as supported by the comments at the supervision meeting, Mr Kirkpatrick at times found the Claimant's attitude difficult. Ms Philips was younger however, the Tribunal find that it was her attitude the Tribunal accept which Mr Kirkpatrick found easier to work with and that was the reason for the difference in treatment.
87. However, weighing up all the evidence, including the fact that there were a number of opportunities for the Claimant to raise these allegations with the Respondent, his own inconsistent evidence about what was said, his lack of satisfactory explanation for not mentioning these allegations in his various complaints to the management team and his evidence about recording an incident in his diary which evolved into evidence of noting it down on paper only to destroy that record, the Tribunal do not find that Mr Kirkpatrick called the Tribunal a "*dirty old pig*".

Allegation : On 7 November 2019, Nathan Kirkpatrick said to the Claimant "*all Indian people eat pork*" :

88. The Claimant did not allege under cross examination that Mr Kirkpatrick had said "*you Hindu's, you guys eating pork.*" The Claimant under cross examination gave evidence that Mr Kirkpatrick had actually said; "*all fucking Indians are eating pork*". The word "*fucking*" however, was not mentioned in his evidence in chief
89. When asked whether he was complaining about the reference to Indian people which is about race, he gave undisputed evidence that he was offended because of the reference to pork and his religious preference or belief as a Hindu is not to

eat pork and he felt this comment about pork was offensive. He alleges that Mr Kirkpatrick knew he is a Hindu.

90. Mr Kirkpatrick denied saying that all Indian people eat pork but if someone had asked him whether Indian people eat pork his evidence was that his answer would probably have been that they can. He denies knowing that the Claimant is a Hindu, he understood that he was the same religion as another member of staff from the same region in India who is a Christian.
91. The Claimant did not give evidence or put to Mr Kirkpatrick how he would have known that that the Claimant was a Hindu. He did not allege that this had ever been discussed or mentioned to Mr Kirkpatrick. The Tribunal find on a balance of probabilities, that Mr Kirkpatrick did not know that the Claimant was a Hindu.
92. The Claimant could not recall the context in which this comment was said, did not complain in his evidence in chief that he was offended by this particular comment and did not complain about it to the management team although he complained to management about other matters. The Claimant does not complain that this comment was said more than once or that he had mentioned to Mr Kirkpatrick that he was offended or otherwise upset by it.
93. The Tribunal find that the comment “ all Indian people eat pork” or “ can eat pork” but the Tribunal do not find that Mr Kirkpatrick said “ *you Hindu’s, you guys eating pork*” or “*all fucking Indians are eating pork*”.

14 November 2019 incident : Throwing serving dish at the Claimant

94. The Claimant gave evidence under cross examination that as a strict Hindu he does not eat pork and that he “*cannot accept pork on my body ...*”. He complains that on 14 November 2019, Mr Kirkpatrick threw a dish at him which he had used to cook sausages and the Claimant ended up with pork blood and juices on his clothes which was an act of direct discrimination and harassment.
95. The Tribunal take into account that this allegation is denied by Mr Kirkpatrick who asserts that if something as serious as this had happened in the kitchen involving throwing dishes with blood/oil, it would amount to a serious health and safety issue and Ms Pankhania would have reported it at the time or someone else would have done so.
96. We take into account that the Claimant had occasions to raise this when he was fully prepared to make complaints about Mr Kirkpatrick; in the 11 December 2020 alleged disclosure (page 80), the statement to Ms Jacobs on 8 January 2020 and directly to Mr Khan, but he did not do so.
97. The Claimant alleges that he raised this with Ms Tilley, the then Home Manager in a disclosure on or around 14 November 2019 when this happened. However, as set out in our findings below, the Tribunal find that this disclosure did not happen.
98. The Claimant was also aware he could raise matters confidentially with the CQC but does not allege he did so. Under cross examination the Claimant referred to raising health and safety issues with Mr Khan in December 2019 but referred to an incident with re-heating beef only..
99. Further, the Claimant alleges that it amounted to discrimination and harassment because pork blood/juices ended up on his clothes, however he makes no mention of the dish containing pork juices and his clothes becoming soiled when he describes the incident in his evidence in chief (although he does refer to Mr

Kirkpatrick cooking sausages that day) or at the preliminary hearing on 24 November 2020. Further in his further and better particulars, he referred to the incident with the sausages (p.50) but makes no mention of a dish with pork blood/ being thrown.

100. There is reference in the Further and Better particulars to Mr Kirkpatrick throwing kitchen items but not in the context of the cooking of sausages which is dealt with separately at page 50 and which complains only that Mr Kirkpatrick had not cooked the meat properly (p.49).
101. We do not find on a balance of probabilities that Mr Kirkpatrick, threw a dish at the Claimant as alleged containing pork blood/ juices which soiled the Claimant's clothes.

Findings of fact – from 14 November 2019

First Alleged Protected Disclosure: on or around 14 November 2019

102. The Claimant confirmed under cross examination that he was familiar with the Respondent's whistleblowing policy which is how he knew how to raise a complaint.
103. The policy (page 134 – 139) refers to raising a complaint with the employee's immediate Line Manager or Home Manager. It states that;

“ Once we have heard or received your concern we will tell you who will be handling the matter, how you can contact them, and what further assistance we may need from you and agree a timetable for feedback”.
104. The policy also provides that if the employee has followed the channels in the policy and still has concerns, there are confidential reporting methods and telephone and email addresses are provided (p. 135). The Claimant does not allege he contacted any of those.
105. The Claimant alleges that he made a disclosure in a letter on or around 14 November 2019 to Penny Tilley. The Claimant had not retained a copy of the letter.
106. The Claimant set out at paragraph 4 of his witness statement what he alleges he said in the letter;

“2019, chef Nathan cooked pork sausage and served residents, residents and service staff complaints sausages [sic] is not cooked properly. restaurant manager Ms Pankhania came to kitchen , in the middle of service Nathan got angry he threw chefing dish towards me, I was reported residents managers”.
107. The Claimant under cross examination gave evidence that he had reported this incident to Penny Tilley , who was the Home Manager and that he set out his disclosure in a letter which he gave to Penny Tilley and it is the contents of that letter he confirmed he relies upon. The Claimant alleges that Ms Tilley informed him that she would investigate and come back to him but that she never did.
108. The Claimant mentioned that he had also complained to Ms Yvonne Jacobs but when reminded of what he had said about this disclosure at the start of the hearing, the Claimant informed the Tribunal; *“ Yes it was Penny, my mistake, it was Penny that one, sorry”.*

109. The Claimant under cross examination gave evidence that sausages should be cooked at 50 centigrade but on this occasion they had not been cooked properly and when the care workers cut into them to feed the residents, they complained that there was blood in the middle of the sausages. He alleges that they complained to the kitchen staff that they were raw and that the Restaurant Manager came to the kitchen and discussed this with the Chef, Mr Kirkpatrick who then threw a serving dish. What was on the serving dish including blood from the pork sausages, the Claimant complains spilt onto his clothes. The Claimant is a Hindu and he complains separately about this as part of his complaint of discrimination (above).
110. The Claimant under cross examination referred to the work “*not like a job, its compassion*” and that most of the residents are his “*very good friends*” of his. However, when no action was taken, his evidence was that he did nothing to chase it up.
111. The Claimant alleges in cross examination that about 1 to 2 weeks after this incident, Mr Kirkpatrick began criticising everything that he did in the kitchen and that Mr Kirkpatrick one on occasion followed him to the toilet, closed the toilet door behind him and shouted at him. Mr Kirkpatrick, accepted that he had gone to the toilet looking for the Claimant because he was not in the kitchen working but denies going into the toilet. The Claimant complained about this incident on 8 January 2020 to Ms Jacobs, which was the date he was suspended. It is not in dispute that Ms Yvonne Jacobs asked the Claimant to write out his complaint and this appears in the bundle (page 122). The document he wrote out appears to have the time it was written at the top of the page, which is consistent with the Claimants’ account i.e. 12:15. It alleges;
- “during my work time I went to Toilet for urine my manager came towards me in Toilet ... and shouting, very badly, abusive language he used. This is first time... Nathan kitchen manager came and look me in toilet,, He came and followed me. this is second time, I was scared very badly... I complained Resident Manager Noor about this ...(second time).”*
112. The Claimant’s evidence is that he raised this complaint before the act of suspension but he conceded that when he wrote out the letter he was aware of the pending disciplinary action.
113. The Claimant accepted under cross examination that on the 8 January 2020, he made no mention to Ms Jacobs of making the alleged protected disclosure to Ms Tilley on 14 November 2019.
114. The Claimant under cross examination asserted that Ms Jacobs who would later carry out the disciplinary investigation and Mr Khan, who would act as Chair of the disciplinary hearing; would have both been aware of the first alleged protected disclosure to Ms Tilley because: “*The two letters would be in Penny’s file.*”
115. The Claimant in response to a question from the Tribunal, gave evidence that during the disciplinary process, he informed Mr Khan that he had made a complaint to Ms Tilley (and a complaint to Ms Jacobs) . When asked by the Tribunal what he was alleging he had said to Mr Khan and whether he had explained what to Mr Khan what it was about Mr Kirkpatrick’s behaviour he was complaining about, his answer indicated that he did not do so but that Mr Khan was already aware; “*I discussed with Khan complaint previously*”. The Tribunal

gave the Claimant a further opportunity to clarify his evidence on this point, and he asserted that;

“ I told them I had made a complaint about Nathan to Yvonne and Penny and not been an outcome so far.”

116. After asking the Claimant several times to clarify what he had complained about to Mr Khan, the evidence of the Claimant was that he had complained to Mr Khan about the alleged bullying by Mr Kirkpatrick and following him into the toilet as set out in his letter at page 122 and that Mr Khan had said he would investigate it. When asked by the Tribunal directly whether this was the only complaint raised with Mr Khan, the Claimant's evidence was;

“We talked about health and safety before this. I said health and safety was not being followed and will become an issue for us if we do not do something about it.”

117. The Claimant in response to a question from the Tribunal, gave evidence that this conversation about health and safety was in **December 2019** and what they discussed was as follows;

“ I remember now, when cooked beef for the residents, something was put in the freezer, I said once cook cannot put in freezer and re-use – I discussed with Mr Khan. Sometimes cooked beef that is leftover and Nathan [Kirkpatrick] would say cover it up and will give to them later and I would say you cannot do it, not fully cooked in first place – would be bacteria – not good”

118. The Claimant accepted that he had not alleged that this issue about beef was a protected disclosure and that he was dismissed for making this disclosure. He informed the Tribunal he had only just i.e. in cross examination during this hearing, remembered what he had discussed with Mr Khan in December 2019. He did not therefore allege that he had mentioned the disclosure to Ms Tilley on 14 November 2019 and her failure to act on it or the alleged acts of discrimination and harassment on the 7 and 14 November 2019.
119. It was explained to the Claimant that either party may make an application to amend the claim at any point during the hearing and how such an application is made and considered. The Claimant did not apply to amend his claim to include any alleged further disclosure, he confirmed that he did not wish to do so.
120. Despite the alleged seriousness of the allegation of raw sausage being served to residents, and the comments the Claimant had made about how serious he considered this issue to be and of his closeness with the residents, it is therefore surprising to the Tribunal that as he admitted, he took no steps to follow this complaint up with Ms Tilley or anyone else. Even when he was complaining later about bullying by Mr Kirkpatrick on 8 January 2020, he never mentioned this incident to Ms Jacobs.
121. There is no documentality record of this complaint being made to Ms Tilley. The evidence of Mr Khan is that Ms Jacobs who took over as the Home Manager on 29 January 2020 (having been Deputy Manager since 29 September 2019) carried out with him a review of the files to check if a complaint had been logged before by the Claimant (following his complaint about the toilet incident) but despite checking the files and the emails on Ms Tilley work computer, nothing was found.
122. The evidence of Mr Kirkpatrick is that he had never served sausages which were under cooked to the residents. He denies this incident occurred including denying

that he had thrown a serving dish. He also denied being aware of any complaint made by the Claimant to Ms Tilley until these Tribunal proceedings.

123. The Claimant stated in response to a question from the Tribunal that he had not mentioned to Mr Kirkpatrick the complaint he had made.
124. There is no evidence of any complaint being raised about undercooked sausages by any other member of staff and the Claimant does not allege that anyone else made a complaint, whether care workers, other kitchen staff or the Restaurant Manager.
125. Further, it is also surprising that after allegedly raising the undercooked sausage concern with Ms Tilley on or around 14 November 2019, that even though he alleges he discussed an issue with re-using cooked meat with Mr Khan in December 2019, only few weeks later, he does not allege that he mentioned this previous incident with uncooked sausage to Mr Khan at that time. The Claimant did not seek to explain his reasons for not doing so.
126. Mr Khan gave undisputed evidence that Ms Tilley left the Respondent employment with immediate effect and it was no longer possible to contact her.
127. Ms Archer gave evidence that she was the Regional Manager when Ms Tilley was in post and the normal process is that local complaints are discussed with her and then sent on to the Operations Director and that neither disclosure 1 or 2 were referred to her by Ms Tilley.
128. Further, in relation to a later disclosure, the Claimant alleges that Ms Tilley photocopied his letter and handed a copy to him to keep however, he does not allege that she had applied the same practice on this occasion of providing him with a copy of his complaint.
129. The Tribunal have weighed up carefully all the evidence as it is required to do, including the absence of any written record of this disclosure and the lack of any later reference to it by the Claimant (despite the number of opportunities he had to do so) which the Tribunal finds particularly compelling (not least given the alleged seriousness of the health and safety risk to the residents), and the Tribunal find on a balance of probabilities, that this alleged disclosure was **not** made to Ms Tilley.

The Tribunal find on a balance of probabilities, that the Claimant did not make the alleged disclosure of information to Ms Tilley on or around 14 November 2019.

Causation

130. The Claimant when questioned in cross examination about the connection between the alleged complaint in or around 14 November 2019 and the decision to dismiss, did not point to any evidence to link the complaint and merely asserted that he believed the reason was because he had wrote a complaint to Ms Tilley and Ms Jacobs about; *“wrong things in the kitchen”*.
131. When it was put to him in cross examination that no one would have been aware of his complaint to Ms Tilley on 14 November 2019 because there was no record of it, the Claimant gave evidence that;

“ I wrote a letter – I did not mention I had given to Penny – I am not saying I had complained before”.

132. The Claimant under cross examination gave evidence that he had mentioned raising a complaint to Ms Tilley and Ms Jacobs to Mr Khan at the disciplinary hearing on 14 February 2020 but that Mr Khan had said that they were not there to discuss that. The claimant did not allege that he had told Mr Khan at the disciplinary hearing what the complaints were about.
133. The Tribunal take into consideration that the Claimant's own case is that Ms Tilley did not report back to him as she allegedly agreed to do and as far he was aware, took no steps to address his complaint..
134. The Tribunal find that neither Ms Jacobs, Mr Khan or Mr Kirkpatrick were in any event, even if such a disclosure had been made, aware of it at the time of the dismissal or that Ms Archer was aware of it at the time of the appeal.

Second Alleged Protected Disclosure : 11 December 2020

135. The Claimant alleges that he made a second disclosure to Ms Tilley by letter on 11 December 2020.
136. The Claimant does not deal with this allegation in his witness statement however he had disclosed a copy of the relevant letter within the bundle and the Respondent had no objection to allowing him to adduce oral evidence on this issue (page 80).
137. The relevant parts of that letter are as follows;

"I start work at 11pm today, me and Jude and chef Nathan I working today. Nathan made soup today, soup was burn't [sic] not edible, I told Chet Nathan I couldn't give this to our residents, we need to make again new one. Chef got angry , he starts to abuse me. He served soup. Residents and Residential Manager Ms Pankhania complained.

Told Ms Pankhania, its not me, its made by Nathan.

Nathan and Ms Pankhania had arguments starts.

Madam , kitchen atmosphere is very bad .you please need to sort out.

One more thing Nathan stored Raw meat [sic] in Fridge upper shelf blood is dripping down. Down [sic] shelf dessert, ready for serve. Jude said to Nathan we cant give to residents. We have lots of issue in this kitchen..."

138. The Claimant's evidence is that burnt food is a health and safety risk to residents because of the ingestion of carbon . The Claimant produced no evidence to support that belief.
139. The Claimant also gave evidence that raw meat dripping into desserts served to residents is also a health and safety risk.
140. The Respondent disputes that the document in which the Claimant had recorded this incident (page 80) was received by the Respondent . The document appears to be a page from an A4 pad or notebook , headed 'Notes'. There is nothing to identify the note book that the page was taken from as a document belonging to the Respondent . The Claimant's evidence, however, is that he sat in Ms Tilley's office and she asked him to write out his complaint and gave him the paper. The Claimant has written under his signature on the document, a date; 11/12/2019.

141. The Tribunal has taken into consideration that if the Claimant had created this document for the purposes of this hearing, he could, but has not, produced a similar document for the alleged disclosure made on or around 14 November 2019.
142. There are other documents received by the Respondent (p. 99/101/122) which the Respondent accepts it received from the Claimant and which contain at the top of the page a signature by the manager who had received the written complaint with confirmation of the date and time received. No such information was contained at the top of this document to Ms Tilley (page 80) however, the Tribunal attach little weight to the Respondent's argument that this is evidence that the document was not received by them because those documents were received not by Ms Tilley but by Ms Jacobs. The Respondent has not produced any documents received by Ms Tilley from staff to evidence what her personal practice was and the Respondent could have easily done so.
143. The Claimant's evidence is that he did not receive a response from Ms Tilley, she did not report back to him with reference to any steps or investigation she had carried out and neither did he chase her.
144. The Respondent's evidence is that no such letter was received by it and Mr Khan denies being told about this issue by the Claimant. As Regional Manager Mr Khan gave undisputed evidence is that he would go around and check on care and did discuss various things with the Claimant but never discussed the matters relating to the alleged disclosures. Part of Mr Khan's role is to increase quality. He is not based at the Home, he was responsible at the time for 30 homes and provided support where needed between them. His evidence was that if this had been mentioned to him he would have addressed it personally and the Tribunal find that this is consistent with him addressing the 'toilet' incident directly with Mr Kirkpatrick..
145. Weighing up all the evidence, the Tribunal find on a balance of probabilities that the Claimant did make this disclosure to Ms Tilley, that he set out his concerns as requested in writing on 11 December 2019 but this was never followed up by her.

The Tribunal find on a balance of probabilities, that the Claimant did make the alleged disclosure of information to Ms Tilley on 11 December 2019.

Causation

146. The Claimant when asked why he believes Mr Khan dismissed him because of this disclosure of the 11 December 2019, gave evidence that all the management team were trying "*to push him out*" and when asked why he believed they waited until February 2020 to do so, alleged that this was because;
- "I made complaint and said I would go to the CQC .."*
147. Under cross examination however the Claimant contradicted himself again by giving evidence that he never actually mentioned to Mr Khan that he would contact the CQC and when pressed to confirm when he had said this and to whom, his evidence was that he had **not** said it to anyone but he had written it down.
148. When the Claimant was asked by the Tribunal where he alleges he had written down that he was going to contact the CQC, his evidence was; "*I don't know - somewhere*". The Respondent does not accept that any such comment or written statement to that effect was communicated by the Claimant.

149. There is no reference to the Claimant raising any health and safety issues to the CQC in the note to Ms Tilley on 11 December 2019 (p. 80) or in the statements he gave to Ms Jacobs on 8 January 2020 (p.99.100/122) or in his letter of appeal (p. 119).
150. The Tribunal find on a balance of probabilities, given the vagueness of the Claimant's evidence, and the absence of any documents recording any such intention to contact CQC and the evidence of the Respondent's witnesses, that the Claimant did not write anything down about contacting the CQC and if he did, he did not communicate this intention to the Respondent .
151. The Claimant under cross examination alleged that he had raised the issues about the cold soup and dripping blood set out in the letter of 11 December 2020 with Mr Khan, that Mr Khan "*knows everything* because "*he was the only one willing to listen*".
152. The Claimant alleged in response to a question from the Tribunal that he raised this issue with Mr Khan on 11 December 2019, that he took the document he had written out and given to Ms Tilley and showed it to Mr Khan.
153. The Claimant's case evolved during the course of the hearing. It was expressly stated by the Tribunal to the Claimant at this point in his evidence, that if he wanted to amend his claim to add this alleged protected disclosure to Mr Khan, he may make that application and it was explained what he would need to do. The Claimant confirmed he understood but informed the Tribunal that he did; "*not want to take that route*" stating ; "*I'm not going to amend anything now – had enough with what is already here.*"
154. In response to a question from the Tribunal the Claimant then contradicted himself again and stated that he had not discussed this disclosure with anyone other than Ms Tilley.
155. The Claimant then alleged during cross examination that Mr Kirkpatrick had told a colleague Harsha, that he would have the Claimant "*kicked out before this Christmas*". The Claimant alleged that Mr Kirkpatrick was behind the decision to dismiss him because; "*he would go to department and speak badly fo me – that's what I believe – thought I was a troublermkaer so get rid of me*"
156. In response to a question from the Tribunal, the Claimant stated that it was Mr Kirkpatrick who he was complaining had victimised him for making the first and second disclosures.
157. Mr Kirkpatrick was involved in reporting his absence on boxing day but the Claimant does not allege that he was involved in the allegations of taking company property. The Claimant does not allege that Mr Kirkpatrick was involved in the decision about what level of disciplinary sanction to apply, only that he believes he wanted him out of the business and spoke about him "*badly*", he does not however allege that he knows what was said by Mr Kirkpatrick, to whom and when.
158. The Claimant does not allege that he told Mr Kirkpatrick that he had made a written complaint about the incident to Ms Tilley or that he was aware that Ms Tilley had mentioned it to him.
159. Mr Khan denies that he was aware of this disclosure at or prior to dismissing and gave evidence that he would have dealt with anything to serious. Further, in his witness statement although the Claimant refers to reporting certain matters to Mr

Khan, he does not allege that he reported this issue. Further the Claimant's own evidence is that it was only Mr Khan who would listen to the issues he raised, which is supported of Mr Khan's evidence that he took such complaints seriously and would act on them.

160. The Tribunal do **not** find on a balance of probabilities that the Claimant mentioned the incident reported to Ms Tilley on 11 December 2019, to Mr Khan or Mr Kirkpatrick or Ms Jacobs or that they were otherwise aware of prior to the decision to dismiss or that Ms Archer was aware of it when upholding the appeal.

Third Alleged Protected Disclosure 3: 8 January 2020

161. The third alleged disclosure is contained in a document (page 99). The statement was prepared as part of the disciplinary investigation (addressed further below) into the Claimant leaving during his shift and allegedly not returning on time and not clocking in.
162. It is not in dispute that the statement was written by the Claimant during a meeting with Ms Jacobs on the 8 January 2020.
163. The Claimant alleges that this is a protected disclosure about health and safety of the residents as a result of his absence from the Home;

"please note that on boxing day I got a message from Home, my son is not well , I asked my manager Nathan , I need to go out from here some reason. I have 30 mts [minutes] break on that day . I went outside from the Building with the permission from my manager. I come back very Kitchen 48 mts later. This is your information"

164. This disclosure appears to relate not to a health and safety issues but to the Claimant's own personal situation, regarding whether or not he complied with his managers instructions about leaving the premises. The Claimant gave evidence that he believed it was a health and safety issue, because; *"I was worried that it would affect the health of the residents."*
165. The Claimant was asked by the Tribunal to clarify the health and safety concern he alleges he had and he alleged that when he returned to work at 2.45pm, Mr Kirkpatrick had not prepared the food in the right way for the residents. He did not elaborate on what was not prepared correctly.
166. There is no mention of any concern he had about how the food had been prepared on his return, within his evidence in chief, within his claim form or indeed within this statement which he gave to Ms Jacobs.
167. Under cross examination the claimant conceded that the disclosures was ; *"not a food issue"* and *" this is not health and safety"*. He gave evidence that when he returned from his extended break food was not prepared in the right way but accepted that this was not mentioned in the statement he prepared (page 99).

Disciplinary Process – misconduct

168. We now turn to the disciplinary process and the dismissal of the Claimant.
169. The Tribunal does not have jurisdiction to deal with the claim of unfair dismissal however, it is relevant when determining whether there is a causal link between the making of the protected disclosure and the act of dismissal, whether it is reasonable for the Tribunal to draw any adverse inferences from primary findings

of facts including in connection with the disciplinary process. It is also relevant to the wrongful dismissal claim.

Absence from work : Boxing day 2020

170. Mr Kirkpatrick sent an email to Ms Tilley on the 30 December 2019 (page 96), complaining that the Claimant had asked him to leave site for his break and asked for an extra **15 – 20 minutes** to which he agreed ; *“I told him to clock in and go and was expecting him back about 14:45 but he did not appear, he eventually turned up at 15:50” : Tribunal Stress*
171. The email from Mr Kirkpatrick was not sent immediately after the incident, Mr Kirkpatrick gave evidence that this was because the managers were on leave over Christmas. He waited a few days before sending it which would seem to indicate that he did not consider this incident to be particularly serious or urgent. The tone of the email itself is casual, he does not express any serious concern the Tribunal find or request that any action is taken.
172. The email also does not complain that the Claimant had failed to clock in or out and in fact it makes no mention of Mr Kirkpatrick having instructed the Claimant to do so.
173. No action was taken it appears by Ms Tilley before she left the Respondent’s employment in early January 2020.
174. Mr Khan’s evidence is that before any investigation could take place into the complaint from Mr Kirkpatrick, the Respondent was informed by Usha Patel, Restaurant Assistant, that the Claimant had taken a Christmas decoration belonging to the Home without permission.
175. A statement was provided by Ms Patel on 8 January 2020 (p.102) in which she alleged that on Sunday 5 January 2020, the Claimant asked her what the Home were doing about some star Christmas decorations, that she had told him that Ms Pankhania would store them for the next year but that he had said he wanted to take some home. Ms Patel alleges that she had told him not to do that ; *“ because it was stealing and that he shouldn’t take anything”* to which she alleges he said; *“ yeah yeah I know what I am doing”*. She alleges that that afternoon she told him again not to take any when he was also looking into a carrier bag where smaller stars where.
176. Ms Patel it is not in dispute, is at the same level of seniority as the Claimant.
177. The Claimant does not dispute that he took a Christmas decoration from the Home, it was a star and he intended to take it home. His case is that he left with it to put it on his scooter however, when he got it outside, he realised it was ripped and brought it back. He alleges that he had permission to take it and that he had told Mr Khan this at the disciplinary hearing.
178. An investigation then took place both into the alleged unauthorised absence and the alleged attempt to steal the star.

Investigation

Absence

179. The Claimant provided a statement about the events of Boxing day (p. 99). In this statement he alleges he left after getting a message from home that his son was not well. It is not in dispute that his son is disabled.
180. Ms Jacobs then had a meeting with him on 8 January 2020 (p.103)
181. According to the notes he was not asked by Ms Jacobs about whether he clocked in or out or whether his manager asked him to .
182. He does not allege that he told Mr Kirkpatrick why he needed to leave in this statement. He alleges that he returned **45 minutes later**, 15 minutes after his normal 30 minute break time and he had permission to do so.
183. A statement was taken from a colleague, Alexander Dyer on 8 January 2020 (p. 97). The evidence which he gave was that he had spoken to the Claimant about televisions and that the Claimant had told him he was going on his break to order one. He states that he had heard that the Claimant had been gone for nearly 2 hours without apologising but again he is not asked who had told him this. This witness had not himself observed the time the Claimant had returned to work.
184. A statement was taken from a colleague, a Kitchen Assistant, Mr Kylam Talbot on 9 January 2020 (page 106) and later on 14 January 2019 (p.95) in which he states that he had heard the Claimant telling another member of staff that he was going to buy a television and when he asked him where he was going, he told him that he was going to look for work .
185. There is an interview with Mr Kirkpatrick on 9 January 2020 (p. 105). Mr Kirkpatrick's account of events was that the Claimant asked him on 26 December 2020 if he could leave site but did not give him a reason. Mr Kirkpatrick does not complain that he was not told the reason and nor does he allege he asked for one. His evidence is that the Claimant was entitled to a break of 30 minutes but he allowed him an extra 20 minutes, **a total of 50 minutes**. He alleges that the Claimant returned at about 3: 50pm,. He alleges that when the Claimant returned he told him; "*you could be in trouble*". He also comments that the Claimant arrived through the back door.
186. It is not in dispute between the parties that there is no clocking in and out machine at the back door where the Claimant is alleged by Mr Kirkpatrick to have returned.
187. The Claimant could not recall the conversation with Mr Talbot nor could he recall the conversation with Mr Dyer but accepted that they talk about a lot of things in the kitchen.
188. The Claimant under cross examination stated that the clock in/out machine would prove that he had only been absent for 45 minutes, the 30 minute break plus an extra 15 minute.
189. When asked about his understanding of how unauthorised absences are treated he stated; "*if someone leave the building there is always disciplinary action*".
190. The Claimant referred to being ' very confident' that he had clocked in and out on that occasion and that he had been in the Industry a long time and with reference to not clocking in and out; "*if I break the law I know consequences*" and disciplinary action should be taken if he had failed to clock in and out and he knew "*very well*" that he could be dismissed for that.

Taking of Property

191. The Claimant provided a statement about the Christmas star on 8 January 2020 (p.101) in which the Claimant alleged that ; “ *...some stars fall down in the premises tear one we put in dust bin. I took one start and keep and put in my bike. I noticed that star is tear one. So I put back in to kitchen. One of the kitchen staff Harsha has witnesses that “ Roma don’t take it, got problem, you knew these people”. “ I realised its give a chance someone can play dirty game”*
192. Within the same interview with Ms Jacobs on 8 January 2020, when asked about the star, he admits he took it and Usha Patel said ; “ *...no don’t take its not yours”*. He is recorded as stating that he took the star anyway; “ *Yes I took it, you have lots, you don’t need them”*. He then goes on according to the notes to state that he brought it back and put it in the bin because it was ripped.
193. The Claimant under cross examination denied the notes were accurate about what is recorded about what Ms Patel said to him however did not deny the accuracy of other matters recorded in the interview but when asked by the Tribunal about whether he had said this in the meeting, he replied; “ *I don’t recall it – I don’t know”*.
194. However, in the claim form the Claimant alleges Usha Patel handed a star to him which is not consistent with his evidence now that he never had any discussion with her about it .
195. The Claimant in cross examination stated that Ms Pankhania had given the star to him because it was torn, and that she was decorating the place and giving Christmas costumes to staff but he does not allege that he mentioned this in the interview with Ms Jacobs.
196. In his evidence in chief the Claimant had referred to taking the star on Saturday 4 January 2020.
197. The Tribunal find on a balance of probabilities, that the Claimant did refer to Usha Patel in that meeting but even if he had not and he had mentioned Harsha and this was mistaken for Usha, he told Ms Jacobs he had been told not to take it, and he did not mention that he had been given permission from either Ms Pankhania or from Ms Patel.

Suspension

198. The Claimant was suspended on full pay on 8 January 2020. Ms Jacobs then carried out interviews with staff on 9 and 13 January 2020.
199. Ms Jacobs interviewed Ms Patel again. No one else is interviewed in connection with the alleged taking of property.

Taking of property

200. In the interview on 11 January 2020 (p.107) with Ms Patel, she expands on her evidence and states that she told the Claimant not to take the decoration as it was not worth getting into trouble for and that it was would be stealing if he took them. She goes not to comment that he had replied stating ok but later told her that he had already taken some home and was going to take some more and that she then went to speak to Penny Tilley.
201. An investigation report was prepared by Yvonne Jacobs (page 89 – 94).

Disciplinary hearing

202. The first disciplinary hearing was arranged for 17 January 2020.
203. The letter inviting the Claimant to the disciplinary hearing dated 13 January 2020 (p.111) does not refer to any enclosures. It states that the allegations are twofold; absence from the business while on shift and taking property without authorisation. He is informed that if proven it could be considered gross misconduct and result in dismissal or demotion.
204. The evidence of Mr Khan was that there was a disciplinary hearing arranged for the 17 January 2020 and Ms Jacobs hand delivered the letter and investigation pack and put it through the Claimant's letter box a few days before this. The Claimant did not attend the hearing and when Mr Khan telephoned him, the Claimant said that he was not aware of the hearing and had not received the investigation pack and that the pack was then sent out to him on 17 January by email and the disciplinary hearing was arranged for the 21 January 2020. There is no email confirming that the documents were sent. Mr Khan gave evidence that the old emails could not be retrieved and the only ones in the bundle are ones sent from his own device where he retains emails.
205. The Claimant under cross examination could not recall the reason why the hearing did not go ahead on the 17 January 2020 but denies any discussion with Mr Khan about it.
206. The Claimant denied under cross examination being sent a copy of the investigation report, the witness statements or the CCTV stills, prior to the disciplinary hearing or indeed the appeal. His evidence is that he received it only during these Tribunal proceedings.
207. The Claimant then submitted a further sick note (p.83 – 85) for stress and therefore the hearing on the 21 January 2020 did not go ahead.

Suspension lifted

208. The suspension was then lifted on receipt of the sickness certificate and the Claimant paid statutory sick pay.
209. The Claimant contacted Mr Khan on 3 February 2020 (p.112) asking about when he could return to work and he wrote again on 9 February 2020 stating that he was available to attend a disciplinary hearing the following day on 10 February 2020. It went ahead on 14 February 2020.

Disciplinary hearing - rearranged

210. There is an email to the Claimant dated 11 February 2020 (p.117) which refers to the Claimant already having been provided with the investigation report and relevant documents. The Claimant did not deny having received the email, his explanation for not responding and mentioning that he had not received the documents, was because he had not read all the email. However, the Tribunal do not find that explanation credible given that the email is very short email and the investigation documents are referred to in the second sentence.
211. The outcome letter of the 14 February 2020 also refers to the investigation report and statements having been reviewed during the hearing and the Tribunal note that the Claimant sent emails asking for the disciplinary notes but does not state

that he had not had the investigation report or statements prior to the hearing or at all.

212. Further, within the investigation pack was the CCTV stills showing the Claimant outside with building with the star. The Claimant alleges that he only had this footage a week before the Tribunal hearing along with the rest of the investigation pack and statements. However, the claim form issued on 24 March 2020 makes reference to the CCTV footage. When this was put to him in cross examination the Claimant stated that the building is covered by CCTV, implying that he had commented on there being CCTV footage because he knew there would be however, the Tribunal did not consider this explanation credible because what he states is quite specific about what the CCTV stills actually showed;

“You can see CCTV, I am holding (not hiding) the used Christmas star.” (page 11)

213. When this was put to the Claimant, his explanation was that he did not remember what he had put in his claim form and that when he had come to the hearing had had not read “all these things”.
214. The Tribunal did not consider the Claimant’s evidence credible and on a balance of probabilities prefers the evidence of Mr Khan, that the pack was sent out and received by the Claimant prior to the disciplinary hearing.

Disciplinary Hearing

215. The hearing took place on 14 February 2020. The Claimant did not attend with a companion but had been told he accepts, that he could have had a companion. He did not request an interpreter.
216. The Claimant was provided with the investigation report and witness statements.
217. The Respondent had not provided a copy of the disciplinary notes to this Tribunal and there is a dispute over what was discussed at that hearing.
218. The evidence of Mr Khan is that the disciplinary notes were prepared and provided for the appeal . They were on the Claimant’s file and he could offer no explanation where they had gone other than that they had been taken out to copy for these proceedings.
219. When asked to confirm what was discussed at the disciplinary hearing, under cross examination the Claimant accepted that he had discussed with Mr Khan in that meeting leaving the premises on the 26 December 2019 and that he “*may*” have discussed the taking of the star with him also. That he was uncertain whether the star was discussed at all is at odds with his evidence under cross examination that he is certain that he told Mr Khan in the disciplinary hearing that Ms Pankhania had given him the star.
220. The Claimant denied that Mr Khan had discussed the various statements with him, he could not recall if the CCTV stills were discussed. He recalled being asked if he had clocked in and out and he alleged he had said that he had.
221. The evidence of Mr Khan is that the Claimant never mentioned during the hearing that Ms Pankhania had given the star to him and that if he had, he would have adjourned and interviewed her. His evidence which was not disputed, is that Ms Pankhania was still working for the Respondent at the time so he could have interviewed her and would have if her name had been mentioned. He gave

- undisputed evidence that she left the Respondent's employment at around Easter time 2020.
222. Mr Khan also gave evidence that the Claimant did not tell him that he had clocked in and out, in fact he told him that he had not done so.
223. The Claimant was informed of the decision to terminate his employment summarily (without notice) for gross misconduct.
224. The disciplinary outcome letter dated 14 February 2020 made no mention of the Claimant not clocking in and out on 26 December 2019, (p. 118) it states that;
- "It is clear that you left the building without authorisation for a long period of time . You also took the care Home property without management authorisation";*
225. The Claimant requested the disciplinary notes on 14 February 2020 and refers to having requested them also in the meeting itself (p.127). They were not provided to him.
226. The Tribunal is concerned at the failure by the Respondent to produce the notes of the disciplinary hearing and consider that given the lack of any real explanation , it is reasonable to draw an adverse inference from the failure to do so.
227. Mr Khan and Ms Archer's evidence is that the Respondent's normal practice is not to provide a copy of the disciplinary notes to an employee even when they are appealing the decision. That is a practice which is likely to render a disciplinary appeal process unfair and offends natural justice, not least where an employee such as the Claimant, is required to communicate during such important hearings in English which is not their first language and where the consequences for the employee are so serious.
228. It is fundamentally unfair not to provide an employee with a copy of disciplinary notes to check that what they have said has been properly recorded, what they had intended to communicate has been captured , to be able to recall what has been discussed and to obtain advice in order to challenge the decision on appeal.
229. The Claimant did not allege and there is no evidence to rebut, the evidence presented by the Respondent's witnesses that this is their normal policy however, the Respondent should reflect on what is clearly a fundamentally unfair practice and which is outside the Tribunal find, the range of reasonable responses test.
230. Mr Khan's evidence under cross examination is that the email from the Claimant requesting the disciplinary notes went to the Home and would have been dealt with by the administrator, Ms Haggerty and he alleges that he was not made aware of the request.
231. The email of the 14 February 2020 was, it appears from the email address, sent to the Home's administration email at 3.45pm (p.127) .
232. Mr Khan's evidence is that he reviewed the notes which had been made on 14 February when coming to his decision to dismiss and he had met with Ms Haggerty at about 2.45pm on 14 February 2019 to review them. His meeting with Ms Haggerty he alleges was for about 45 minutes. It appears quite remarkable to this Tribunal that he can recall the timings so vividly so long after the event. Those timings if correct, would conveniently mean that his meeting had finished just before the email requesting the notes was sent into Ms Haggerty.

233. Mr Khan gave evidence that his decision would have been made at about 5pm before Ms Haggerty left for the day and she would have printed out his letter and posted it . Therefore according to those timings, Ms Haggerty would have been sent the email from the Claimant before Mr Khan sent her the outcome letter to send out and yet Mr Khan invites the Tribunal to accept that she never mentioned the email requesting a copy of the notes to him. The Tribunal do not find Mr Khan's evidence on this point convincing.
234. The Claimant also produced another email of the 17 February 2020 (p.189) which was sent direct to Mr Khan's email address and asked again for the disciplinary minutes. Mr Khan could not recall whether he replied or not and that if he had been aware of the request his instruction would have been to send the notes which he would have instructed to Ms Haggerty to do. He admitted he had not taken any steps then or before these proceedings to check whether the Claimant had been sent the notes.
235. The Tribunal do not find Mr Khan's evidence credible and the Tribunal find on a balance of probabilities, that he was aware of the request for the notes and disregarded it.
236. Mr Khan alleged that he had checked on the electronic Care Blox system which records clocking in and out times and this showed that the Claimant had not clocked in and out on 26 December 2019 and that the Claimant had admitted that he had not done so in the hearing.
237. However, if this was admitted and considered such a serious issue, it is surprising the Tribunal find that there was no mention of this in Mr Khan's evidence in chief or indeed in his outcome letter.
238. The outcome letter refers to the dismissal being because the Claimant was away from the building without authorisation for a long period of time but made no mention of him failing to clock in and out.
239. The print out showing the clocking in and out times was not contained in the bundle because it was alleged that the Respondent did not appreciate that it was in dispute but it was produced at the reconvened hearing (p. 218 – 222).
240. The print out does not show the length of any break, only that no break was registered on the system.
241. The payroll print out presented appears to show the Claimant was working a shift 11am to 7pm and did not clock out during the shift. The Tribunal find on a balance of probabilities, that in fact the Claimant did not clock in and out on the day in question
242. Mr Khan gave evidence that there was no way to check the time the Claimant returned from his break because he had not come in through the front door which is the staff entrance where the clocking in machine is located and where there are CCTV cameras.
243. However, Mr Khan then accepted that the Respondent had obtained CCTV footage from the back door and relied on this as evidence to show that the Claimant had left the building with the star, and this was the same door he had come in through when coming back from his break. Mr Khan denied appreciating at the time that the CCTV footage of the Claimant with the star was from the same/back door and this is why he had not asked for the CCTV footage, implying he otherwise would have done.

244. Mr Khan gave evidence that he treated the offence so seriously because the Claimant had not followed a reasonable management instruction to clock in and out and that is why he considered it a gross misconduct issue. His evidence was that if the Claimant had been back late but clocked in and out, whether he treated it as gross misconduct would depend on the circumstances, and the outcome may have been different if he had been able to offer an explanation.
245. However, nowhere does Mr Kirkpatrick say in his statement given during the investigation that he had instructed the Claimant to clock in and out, that the Claimant had failed to do so or that he had given or asked for the reason why the Claimant needed the break. He complained only of the period of time he was gone.
246. Mr Kirkpatrick's gave evidence before this Tribunal (that he had not asked the Claimant whether he had clocked in and out because he admitted that when he returned he was very cross with him. He assumed he had not done as he came in through the back door and the staff entrance is at the front. Mr Kirkpatrick gave evidence that his understanding was that it was important to clock in and out for payroll purposes only because for fire safety there is a separate fire record book. Mr Kirkpatrick also gave evidence that if staff forget to clock in there is a '*forgot to fob*' form under the machine that staff can fill in or they can report to the office and this sometimes happens. He gave evidence that he is not aware of any disciplinary action taken against someone who has failed to clock in or out.
247. In terms of the impact of his absence, Mr Kirkpatrick's evidence was that he meant he could not do his paperwork, they had finished serving food and were starting the evening service.
248. Mr Kirkpatrick gave evidence that if he had known the Claimant wanted time to look after his son it would 'without a doubt' have made a difference to how he would have reacted. He was aware the Claimant's son was disabled and he had been late on occasion into work because he needed to wait for the babysitter and that he would not have been annoyed had he known the reason related to his son. He accepted when the Claimant returned he never asked him the reason and he 'possibly' did not give him a chance to give him the reason because he was annoyed with him
249. Mr Kirkpatrick gave evidence in response to questions from the tribunal that he works a shift of 8am to 4pm and on 26 December 2020 he was aware the claimant returned at 3:50pm because he was clock watching. As he was due to clock off and he was going to have to stay behind if the Claimant did not return. He told the claimant he was in trouble and left.
250. The Tribunal consider that it is reasonable to draw an inference adverse to the Respondent about what was discussed at the disciplinary hearing because of the failure to disclose the disciplinary notes in circumstances where the explanation is so unsatisfactory. On a balance of probabilities, the Tribunal find that Mr Khan did not check whether the Claimant had clocked in or out during this meeting and this did not factor in his decision making at the time hence he made no mention of this in the outcome letter. He relied on the evidence of Mr Kirkpatrick that the Claimant was very late back and his lateness that was the sole reason and the only evidence he considered when deciding what action to take. He also did not the Tribunal find, come to any decision about what the real reason was for the Claimant taking the break and being late back, in his evidence in chief he refers to discussing this but not to making any finding about the reason and again, he made no reference to any such finding in his outcome letter.

Taking of Property

251. The investigation report from Ms Jacobs referred to this incident happening on **Sunday 5 January 2020** (p93). Ms Patel's in her statement (p.102) stated that she had spoken to the claimant on Sunday 5 January 2020.
252. Mr Khan gave evidence that following the disciplinary hearing he was satisfied that Ms Patel had spoken to the Claimant on Sunday 5 January 2020 about not taking the star and the CCTV stills showed the Claimant taking the star later that same day.
253. However, during the hearing Mr Khan conceded that the CCTV stills were recorded on Saturday 4 January 2020, the date was clearly visible on the stills.
254. Ms Patel according to the payroll print out, Ms Patel was not working on Saturday 4 January 2020 and therefore could not have spoken to Mr Khan that day.
255. The Claimant alleged during cross examination that in essence, Ms Patel held a grudge against him because she was cooking something in the kitchen and he had told her to leave the kitchen because she was kitchen staff and was not allowed for health and safety reason to cook in the kitchen. He does not allege he raised this during the disciplinary hearing however.
256. The Claimant does not deny that the CCTV footage is of him holding the star and taking it outside to his scooter.
257. However, regardless of whether Ms Patel spoke to the Claimant on Saturday before he took the star or Sunday after he had done so, the Claimant does not dispute that during the disciplinary proceedings he admitted taking it and returning it only because it was torn.
258. Further, the Claimant's own evidence at the time was that his colleague Harsha had advised him not to take it.
259. The Claimant does not deny that he told Mr Khan that he had taken the paper Christmas decoration, that he intended to take it but returned it because it was damaged.
260. The only real issue in dispute is whether the Claimant informed Mr Khan that he had been give permission to take it.
261. Mr Khan's evidence is that this was not mentioned to him and he would have interviewed her if it had been
262. Despite the adverse inference from the non-disclosure of the disciplinary notes, there is other evidence which seriously undermines the Claimant's account of what was discussed at the disciplinary hearing.
263. The Claimant in his claim form states;
- "6 January I took one used Christmas star (given by restaurant manager Ms Pankhania **and Ushha Patel hand over one star to me**) .."*
264. The Claimant appears alleges that Ms Patel handed him a star however, he does not allege that he had mentioned this in the disciplinary hearing and in cross examination denied that he had any discussion with Ms Patel at all about the star.

265. The Tribunal take into account that in the statement the Claimant produced on that 8 January 2021, (p.101) he admits to taking the star and returning it because it was damaged but he makes absolutely no mention of Ms Patel handing it to him or to Ms Pankhania giving it to him either.
266. The Tribunal find on a balance or probabilities that the Claimant did not tell Mr Khan at the disciplinary hearing that he had been given permission to take the star.
267. Mr Khan gave evidence that his reason for making the decision that it was gross misconduct was that Harsha had told the claimant not to take the star according to his own account and he was captured on CCTV taking it and that during the disciplinary meeting the Claimant's reaction had been ; "*so what if I had taken it, it is cheap, you can buy it very cheap*". He was without remorse.
268. That response from the Claimant the Tribunal finds chimes with what the Claimant had said at the preliminary hearing on 18 August 2020, that the item was something he could have bought for 99 pence in a market. There was no reflecting in his statement of the 8 January 2020 regarding whether it had been right to take it.
269. There is no dispute that the decoration is of little financial value but in terms of why it was treated as gross misconduct, Mr Khan gave evidence that the Home is a residential care home for vulnerable people, some suffer with Dementia and Alzheimer's and residents leave their personal property on display. Staff taking any property which does not belong to them without authorisation is a serious matter, the value of it is not the concern. The Respondent need to trust that staff will not take any personal property of the residents. Mr Khan's evidence was that the Claimant had shown no understanding that taking anything even of low value which did not belong him, was wrong.
270. Mr Khan gave evidence that he made the decision to dismiss because of an absence of remorse and insight.
271. It is not in dispute that the contractual notice the Respondent was required to give to terminate the contract outside of a repudiatory breach, was 4 weeks.

Termination date

272. It is not in dispute that the decision to dismiss was not communicated at the disciplinary hearing on 14 February 2020.
273. The decision to dismiss was communicated in a letter dated **14 February 2020** which confirmed gross misconduct and dismissal (p.118).
274. The Respondent's case is that the letter of the 14 February 2020 was actually sent that day by email because the Claimant preferred to correspond by email however, there is no copy of the covering email disclosed by the Respondent. Mr Khan's evidence is that he asked an administrator to send the email.
275. On a balance of probabilities, given the absence of disclosure of a covering email confirming it was sent by email and that Mr Khan had not himself sent it and there is no statement from Ms Haggerty about whether she emailed or posted it and given the Claimant's oral evidence that it was received in the post, the Tribunal find it was sent by post.

276. There is a letter from the Claimant on 17 February 2020 (p. 189) to Mr Khan asking for the “*disciplinary meeting result*” and a copy of the disciplinary notes.
277. The Claimant sent in a sick note and received an email on 21 February 2020 explaining that he did not need to send in more sick notes because;
- “As per our **last correspondence** your contract with South Lodge was terminated following your disciplinary hearing...” Tribunal Stress*
278. The Claimant’s case is that he received the letter of dismissal dated 14 February 2020 **by post** but he could not recall when but under cross examination stated that he got the letter on the 21 or 22 February 2020 because he recalled receiving it after the email of the **21 February** (p.120).
279. Under cross examination when asked why he did not respond to the 21 February 2020 to explain that he had not received any correspondence about dismissal, he then gave evidence that he did not see the email of the 21 February straightaway, “*I must have checked it on 22 or 23 February – by that time I got the letter through the post*”.
280. The Claimant denies emailing his letter of appeal to Ms Archer. His case is that he posted it out after the received the letter on 21 February.
281. The Respondent ’s case is that the letter of appeal was received on **20 February 2020** and thus, the Claimant must have received the letter confirming dismissal with the details of who to contact about an appeal, on or before 20 February 2020.
282. The Claimant accepts that he could only have submitted his appeal after he received the letter of the 14 February 2020 (p. 118).
283. His appeal letter (page119) states; “**Today** I received a mail from Noor Gam ...stating I have been dismissed from work”. Tribunal stress
284. There is a letter from Ms Archer to the Claimant which refers to receiving the Claimant’s appeal letter dated 20 February 2020 (p.121) and an internal email between Ms Archer an, Isabel Crawford, Registration and Administration Manager on 20 February 2020 referring to the Respondent receiving the appeal (p.142).
285. The Respondent has produced copy of the Claimant’s letter of appeal date stamped 20 February 2020 (p.143).
286. There is also a letter dated 20 February 2020 from Ms Crawford to the Claimant dated 20 February 2020 referring to his letter received that day, requesting an appeal.
287. On being taken to these documents in cross examination, the Claimant conceded that he could have received the dismissal letter on the 19 or 20 February 2020.
288. The Claimant does not allege that he was away from his home between 14 and 20 February 2020 and does not have any evidence to support his initial assertion that he did not receive the dismissal letter until 21 or 22 February 2020.
289. The Tribunal consider the Claimant’s evidence unreliable on this issue and finds on a balance of probabilities, weighing up all the evidence that the letter was received **prior to the 20 February 2020** which would have enabled the Claimant to post his letter of appeal and for his letter of appeal to be received by Respondent by post on the 20 February 2020. The latest he could have received it

would have been therefore the 19 February 2020 and the Tribunal find that this was the effective date of termination.

Appeal

290. In his letter of appeal (p.119) the Claimant sets out his grounds ;

" I am an honest person, I haven't stolen anything from Avery, I got permission from my line managers (my son was sick) chef Nethan (sic). I am entitled to a break of 30 minutes, he allowed me an extra 15 minutes, and I was given permission, The reason I left Avery premises during meeting, I have already explained everything to Noor Khan on 14/2/20".

291. It is not clear from this appeal whether the permission he is referring to is about taking the star or about the absence from work but appears on a reasonable reading of it objectively, to be referring to his absence and Ms Archer's evidence is that this is how she understood it. The outcome of the appeal set out Ms Archers understanding of the Claimant's grounds of appeal (page 121) which confirms this understanding and the Claimant did not respond disputing the accuracy of her understanding of his grounds.

292. Ms Archer carried out a desk top review/ an appeal on the papers only which is provided for in the Respondent's appeal policy however, given the Claimant's first language is not English and his ability to communicate we find both in writing and verbally is to an extent restricted by this, the Tribunal consider that it was outside the band of reasonable responses not to give him the option of a face to face meeting so that he could at least better communicate his grounds of appeal. There was clearly no consideration about whether given his circumstances, that should have been offered.

293. Ms Archer's evidence was that clocking in and out was essential because the Respondent need to know who was present not just for payroll purposes but health and safety, which is at odds with Mr Kirkpatrick's understanding.

294. On being taken to the payroll information printout (p.219) the Tribunal noted that it appeared that two other employees had not clocked out on 27 December 2019. On being taken to these entries, Ms Archer stated that one individual was agency staff but the other was Ms Haggerty. Ms Archer stated that regarding Ms Haggerty's failure to clock out, there was; *"no excuse for that"*.

295. She went on to give evidence when asked by the Tribunal about how the Respondent normally deals with a failure to clock in and out, that the Home Manager would normally discuss with an individual if they had not clocked out and it would be looked at and ;*"if it became a **regular occurrence** action would be taken"* but that it would usually be dealt with by way of a written supervision about expectations, which is less than a formal disciplinary sanction. There appears to be from the payroll information provided 3 occasions when people had not clocked in/out and Ms Archer gave evidence that she did not know what if any action had been taken.

296. Ms Archer gave evidence however that the issue with the Claimant was not the fact he had not clocked in and out but that his Manager had told him to do so. However there is nothing in the investigation pack including the statement from Mr Kirkpatrick, which makes any mention of him telling the Claimant to clock in and out, he complains only about the length of his break.

297. Ms Archer gave evidence that there was also a concern about the reasons the Claimant gave for leaving, that he had told Mr Kirkpatrick that his son was sick but

that he had told the kitchen assistant he wanted to buy a television and he told another employee he had gone for a job. However, Mr Kirkpatrick in his complaint and witness statement during the investigation does not allege that any reason was given or indeed any reason asked for by him. Ms Archer does not allege that the Claimant was obliged to tell colleagues he worked with his reason for needing an extended break.

298. Ms Archer gave evidence that this different account of the reasons he gave for leaving, added to her concerns about the Claimant's *integrity* when it came to the decision about taking the property and that giving different reasons for his absence; "*did influence our decision*".
299. The Claimant had mentioned that his reason for leaving in his statement for the investigation was that his son was not well (p.99) but he does not allege in his statement that he gave this reason to his line manager. Mr Khan had not set out in his outcome letter that the dismissal had anything to do with his reason for taking a break or that he had made any finding on what that was .
300. Ms Archer accepted that the company handbook does not state that taking an extended break is treated as gross misconduct. Her undisputed evidence was that whether to dismiss is taken on an individual case basis and the length of time which is unacceptable depends on the impact on the service however, she accepted she had not discussed the impact on the service with the Claimant's line manager, she applied her own knowledge of the service as it was Boxing day it would have been busy.
301. The notes of the disciplinary hearing Ms Archer stated are not normally given out, they had never been asked for before and has did not provide them to the Claimant. When the Tribunal asked Ms Archer to explain why she did not provide the Claimant with the notes of the hearing, because in his appeal he referenced having asked for them, her answer was; "*I don't know*"
302. Ms Archer accepted that particularly as English is not the Claimant's first language it was even more important that he saw the notes of the disciplinary hearing for his appeal, so that he could check not just what he had said had been recorded but that what was recorded reflected what he had meant to convey.
303. Ms Archer denied any knowledge of the protected disclosures . The Claimant put it to Ms Archer which she denied that she was persuaded by Mr Khan to uphold the decision because of a number of things; that he had said he would complain to the CQC, he had made the three disclosures and because he had complained about Mr Kirkpatrick following him to the toilet, all of which was denied by Ms Archer.

Absence

304. Ms Archer upheld the finding that the Claimant had been absent from work for 110 minutes and in her letter confirming her decision referred to "*witnesses*" confirming that the Claimant was off site for approximately 110 minutes" leaving he catering department without adequate support"
305. However, Ms Archer confirmed in response to a question from the Tribunal that actually there were no witnesses to the Claimant's return other than Mr Kirkpatrick and therefore the reference to plural witnesses is not accurate.
306. Ms Archer also refers to previous concerns about the Claimant's performance and failure to follow management instructions and yet accepted that there had been no

disciplinary action and this was not a matter mentioned in the outcome letter from Mr Khan as a consideration at the disciplinary stage. The Claimant had not therefore had a chance to make representations on this being taken into account.

307. Ms Archer refers to the investigation and disciplinary meetings being witnessed by a note taker and appearing to be fair and appropriate however, this is despite the fact that the Claimant's request for the disciplinary notes had been denied and he had not a chance to confirm if they were accurate.

Claim for unpaid accrued annual leave

308. It is not in dispute between the parties that the holiday year runs from 1 January to 31 December each year.
309. The contract of employment provides that holiday entitlement is 28 days per year (28 days) and holiday is calculated based on normal contractual weekly hours of work and his normal hours of work are 37.5 per week. He works 5 days per week over a 7 day rota.

Holiday pay for Holiday year 2020

310. The Tribunal and Respondent had understood Claimant to be claiming accrued but unpaid holiday for the period 1 January 2020 to the termination date which the Respondent had conceded was owed.
311. During the course of the hearing however, the Claimant informed the Tribunal that the claim he had presented, was for unpaid holiday for the holiday year 2019 (he believed 6 days are owed) and not for the holiday year 2020. The Claimant being unrepresented, was reminded that the Respondent had conceded that he was owed outstanding holiday pay for 2020. The Claimant was informed again of his right to make an application to amend and in light of the Respondent's concession, the Claimant applied to include a claim for unpaid holiday for 2020.. The Claimant made his application orally and the Respondent confirmed that it was not opposing that amendment application.
312. The Respondent confirmed that the Respondent had not paid holiday pay due to the Claimant for the holiday year in which his employment terminated and they claim it is 26 hours of £236.60 based on a termination date of 14 February 2020.
313. The Claimant accepted that the Respondent's calculation to be correct if the leave year ended on 14 February 2020 however, he argues it should be calculated with an end date of 19 or 20 February 2020.

Holiday Pay for the year : 2019

314. The Claimant alleges that he was owed 6 days holiday for the previous holiday year January 2019 to 31 December 2019 which in his schedule of loss he had calculated as 7.5 hours x 6 days (45 hours) (p.124).
315. The Claimant was taken under cross examination to his payslips and he confirmed however that he had been paid for 210 hours holiday for holiday year 2019. The Claimant checked his bank statements to make sure those payments were actually received and he then confirmed they were and that he had been paid his holiday in full for 2019 and accepted therefore that he was not due any further payment.

Unlawful deduction of wages claims

Claim 1: overtime worked on public holidays in 2019

316. The Claimant claimed that that he was entitled to unpaid wages from 2019 for time worked on; bank holidays; Christmas, new years day and boxing day which amounted on total to 22.5 hours payable at double time.
317. On being taken to the payslips (p. 88) he realised however that he had been paid the correct amount. The payslip showed a payment of 22.5 hours when he had expected to see a figure of 45 hours, however the payslips showed that he was paid £18.20 per hour rather than £9.10 and therefore had received payment at double time.
318. The Claimant confirmed that he had been paid what was owed and nothing further was due to be paid from the Respondent.

Claim 2: payment while on suspension

319. The Claimant asserts that he was entitled to be paid full pay during his suspension from 8 January 2020 to the termination date of 19 February 2020 on the grounds that he was informed that suspension was on full pay.
320. The Claimant submitted fit notes from 22 January 2020.
321. The Respondent wrote on 22 January 2020 stating that his suspension was lifted (p82).

22 January to 16 February 2020

322. The Claimant complains that he should still have been paid full pay regardless of sending in sickness certificates because he had been told he was on suspension.
323. The suspension letter does not address this situation and the Respondent does not seek to rely on any contractual term of the contract that permits them to pay sick pay during suspension however what the Respondent did was lift the suspension hence any continued absence from work was then classed as sickness absence.
324. The Respondent accepts however that his payslip confirms (p.88) that he was paid statutory sick pay not from 22 January, but in error from **17 January 2020** and that the Respondent is liable for the difference between full pay and statutory sick pay between 17 January and 22 January 2020.

Period 16 February to 19 February 2019

325. The Claimant was paid statutory sick pay from 17 January 2020 to **16 February 2020** as shown in his payslip (p. 88).
326. His last fit note was due to expiry on 29 February 2020.

Strike Out Application : Rule 37

327. Before turning to the submissions on the substantive claim, at the end of the hearing, the Respondent made an application to strike out the claim in its entirety and we must determine that application first.
328. The Respondent made an application to strike out the claim on the grounds that a fair trial was not possible and/or the unreasonable conduct of the Claimant because the Claimant was complicit in sending the email of the 7 October 2020 which was not in fact sent from Ms Pankhania. The submissions have been considered in full and are only set out below in summary.

Submissions

329. Respondent's

330. The Respondent submits that the Tribunal can reasonably conclude that the Claimant must have been involved in the provision of the email because;
- i. Only he benefits from its contents
 - ii. Before he was aware of it, the Claimant gave oral evidence on 14 October 2021 that Ms Pankhania had given out gifts to staff and that was not raised by the Claimant in his claim or witness statement
 - iii. The signature block matches the format used by the Claimant
 - iv. Ms Pankhania's name is spelt incorrectly consistent with his misspelling of her name
 - v. It contains details of the claim which would generally only be available at this stage to the parties
 - vi. Ms Pankhania has confirmed the information is false

331. The Respondent submits that if the Tribunal find that the Claimants was complicit in the provision of false information, the Tribunal should conclude that a fair trial is not possible and /or amounts to unreasonable conduct of the case . It undermines the ability of the tribunal to have trust in the Claimant's veracity and the claim should be struck out under rule 37 (1)(b)(e) of the Tribunal Rules. The Respondent referred to the following authorities ; **Sud v The Mayor and Burgesses of The London Borough of Hounslow UKEAT/0156/14/DA** and **Arrow Nominees Inc & Anr v Blackledge and others [2000] EWCA Civ 200**

Claimant's submissions

332. The Claimant submitted that he has no idea why Ms Pankhania sent in the email . He had not tried to contact Ms Pankhania even though he knows where she lives and he stated; "*I don't believe anyone can influence Ms Pankhania she is like a Judge*".
333. He disputed that the email was of any real benefit to him given the indication about the weight to be attached to it and he did not feel the need for Ms Pankhania to support him and does not accept the photocopy of her ID is authentic.

The Legal Principles – strike out application

334. Employment Tribunals must look to the provisions of Rule 37 Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 when considering whether to strike out a claim. Rule 37 provides as follows:

“At any stage of the proceedings, either on its own initiative or on the application of a party, the Tribunal may strike out all or part of a claim or response on any of the following grounds:

- (b) That the manner in which the proceedings have been conducted by or on behalf of the Claimant or the Respondent (as the case may be) has been scandalous, unreasonable or vexatious;*
- (c) That the Tribunal considers it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out.)”*
- (d)*

Conclusions and Analysis – strike out

335. Although there is circumstantial evidence presented by the Respondent for asserting that the Claimant had sent the email or been involved in sending it and thus presenting false evidence to mislead the Tribunal, the Tribunal do not find that evidence compelling.
336. The allegation of presenting false evidence is a serious one and the Tribunal accept the importance attached to the impact of such conduct as set in the cases of **Sud** and **Arrow Nominees** and accept that the Tribunal has the power to strike out the claim if it finds that the Claimant was involved in the sending of this email.
337. The Claimant had not raised the issue of the email until it was raised by the Tribunal. The email could have commented on a number of other issues including the allegations of discrimination and harassment but commented only on the one incident concerning the star.
338. The Tribunal take into account the statement provided by Ms Pankhania however the Tribunal does not attach significant weight to that statement given that Ms Pankhania did not attend the hearing and despite the statement being prepared by solicitors, it was for reasons not given, not presented as an affidavit sworn under oath.
339. The Tribunal also take into account that it was Mr Kirkpatrick who met with Ms Pankhania. It seems unusual to this Tribunal that someone so close to these proceedings and against whom serious allegations are made, would be the person considered appropriate to contact a witness rather than say an HR person and did so without anyone else present to witness what was discussed. We do not find that there was undue pressure placed on Ms Pankhania, there is no evidence to suggest that however we do consider it is appropriate to be cautious when being invited to make such a serious finding against the Claimant based on untested evidence obtained in these circumstances.
340. The signature block is also not compelling. There is evidence in the bundle of others including Mr Khan using the same signature block in emails, it may simply be a practice developed from working for the Respondent .
341. Further, the Claimant has spelt the name Chetana names in various ways throughout the documents therefore because the email has one misspelling, the Tribunal does not find that persuasive evidence.

342. There are possible other explanations, including that someone sympathetic to the Claimant or unsympathetic to the Respondent, sent the email. While the Tribunal take into account that the email bore the case number the Tribunal cannot rule out that someone perhaps within the Respondent organisation had access to the Tribunal paperwork or elicited the number from the Tribunal office itself.
343. The Claimant candidly accepted that he had not spoken to Ms Pankhania and that he had not requested this email from her. He did not attempt to argue that this email was in response to any approach that he had made to Ms Pankhania so as to validate its provenance, even prior to the Respondent producing the statement from Ms Pankhania in rebuttal.
344. Had the IP address been proven to be the Claimant's than that would have been compelling evidence however that evidence was not available.
345. The Tribunal are not satisfied that on a balance of probabilities, the evidence supports a finding that the Claimant was complicit in the sending of this email although the Tribunal do find on a balance of probabilities, that it was not sent by Ms Pankhania herself.
346. The unanimous decision of the Tribunal is to refuse the application to strike out the claims.

Submissions – on the substantive claim

Respondent

347. The Respondent produced written submissions and expanded upon those in oral submissions. The Tribunal have taken those submissions fully into account but sets out below only a summary;
- Dates of employment
348. In brief the Respondent submits that if the claimant had been paid cash in hand that period of employment should not count in any event toward his continuous service, he would have been a casual worker at that stage. Its primary position is that this did not happen however.
349. The Respondent does not dispute that disclosure 1 and 2 qualify as protected disclosures and the only matters in dispute therefore with regard to the whistleblowing claims are;
- i. Whether the Claimant made the disclosure at all; and
 - ii. The issue of causation .
350. The Respondent disputes the the third disclosure qualifies as a protected disclosure .
351. The Respondent submits that Mr Kirkpatrick did not influence Mr Khan's decision and the Claimants has failed to really explain apart from the fact he believes he was seen as a troublemaker, why he says the reason for dismissal was because of his disclosures, he was invited by the Tribunal to explain and did not do so.
352. In terms of the fairness of the dismissal, the Respondent's primary position is that the Claimant does not have the necessary qualifying service but further refers the Tribunal to the Burchell principles. It submits that the Claimant had admitted in

the claim form that he was late returning after his extended break and hence apologised. That the Claimant had informed Mr Khan that he had not clocked in and out and although not a reason given in his outcome letter, invites the Tribunal to accept that it formed part of his reasoning and that Claimant admitted in cross examination that he knew he could be dismissed for unauthorised absence. There was no need to check the CCTV footage because it was reasonable to accept Mr Kirkpatrick's evidence over the Claimants.

353. That the Tribunal is invited to find that Ms Pankhania had not authorised the Claimant to take the star and she did not work that weekend in question. That she had received the investigation pack and in any event the Claimant prepared his statements understanding the allegations against him.
354. With respect to the claims of harassment and discrimination, the Respondent submits that the treatment did not happen and in any event was not related to his alleged protected characteristic and Jude Philips is not a suitable comparator because she is a more junior member of staff and hence there are materially different circumstances.
355. The Claimant also did not set out in any detail the impact of the alleged harassment.
356. The Respondent refers the Tribunal to the authorities of *of; Igen v Wong [2005] ICR 9311 CA, Shamoon v Chief Constable of the Royal Ulster Constabulary [2008] UCE 396 , Burchell*

Claimant

357. The Claimant was given time to go through the Respondent's written submission with an interpreter 10 November 2020 however, he stated that he required more time and therefore the hearing was relisted for 1 hour on the next available date which was 5 days later, to hear his submissions and he was directed again to the issues to be determined.
358. The Claimant made oral submissions on 15 November 2021 which with the assistance of an interpreter, took over 3 hours to deliver.
359. Those submissions were comprehensive and the Tribunal made a careful and full note and have considered those. They are not set out in detail here but in summary only.
360. The Claimant refers to the lack of original documentation to support his case that his employment began on 12 March 2018.
361. With respect to the unfair dismissal claim, the Claimant referred to the supervision meeting being taken into account but that submits this is not relevant to the alleged misconduct and there was no formal disciplinary warning on his file.
362. He submits there was insufficient evidence to dismiss and refers to the absence of CCTV and the lack of notes for the disciplinary hearing and refutes that there had been a reasonable investigation.
363. With reference to the allegations of harassment and discrimination the Claimant reminded the Tribunal of the admissions made by Mr Kirkpatrick about the language he would use and that the comments "*wounded his pride*". He referred to the allegation of throwing a dish at him and that he found it offensive to his beliefs and regardless of what was thrown it was still threatening behaviour.

364. The Claimant to a large extent repeated the evidence in his submissions which we have a full and careful note of.

Legal Principles – substantive claims

Unfair dismissal – qualifying service

365. To qualify for the right to claim unfair dismissal, employees must generally show that they have been continuously employed for at least two years pursuant to section 108 (1) Employment Rights Act 1996 (ERA).

Termination Date.

366. The ‘ordinary course of post’ rule i.e. that a document sent by post will be taken to have been received on the day on which it would have been delivered in the ordinary course of post, unless the contrary is proved. That was affirmed by the Court of Appeal in **Consignia plc (formerly the Post Office) v Sealy 2002 ICR 1193, CA**
367. The Supreme Court has held that, in the absence of any specific contractual provision, contractual notice sent by post does not take effect until the employee has read the letter containing the notice or had a reasonable opportunity of doing so. The notice is not effective on any earlier deemed service date or on delivery to the employee’s address if he or she is not there: **Haywood v Newcastle upon Tyne Hospitals NHS Foundation Trust 2018 ICR 882, SC.**

Ordinary Unfair dismissal – section 94 and 98 ERA

368. The starting point is the statute and section 98 of the Employment Rights Act 1996 (ERA) provides that;:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

.....

(b) relates to the conduct of the employee,

.....

(3) In subsection (2)(a)—

(4) [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)—

(a) 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 dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

The reason for dismissal

369. A 'reason for dismissal' has been described as 'a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee' :**Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA.**
370. Tribunals must also take account of the genuinely held beliefs of the employer at the time of the dismissal. However, what a Tribunal must not do is put itself in the position of the employer and consider how it would have responded to the established reason for dismissal. : Court of Appeal explained in **Foley v Post Office; HSBC Bank plc (formerly Midland Bank plc) v Madden 2000 ICR 1283, CA.,**
371. The standard of the hypothetical reasonable employer is central to the S.98(4) assessment of reasonableness.

Conduct

372. Conduct is a potentially fair reason for dismissal under Section 98(2)(b) of the Employment Rights Act 1996.
373. In relation to conduct dismissals the leading authority on fairness is the case of **BHS v Burchell [1978] IRLR 379**, which sets out a three part test namely –
- (1) *Did the employer have a genuine belief in the employee's guilt?*
 - (2) *Was that belief based on reasonable grounds?*
 - (3) *Were those grounds formed from a reasonable investigation?*
374. The case of **Iceland Frozen Foods Ltd v Jones [1982] IRLR 439** makes it clear that the test which the tribunal must apply is whether dismissal was within the band of reasonable responses that a reasonable employer in the circumstances might have adopted

Disciplinary hearing

375. Where misconduct is admitted or the facts are not in dispute, it may not be necessary to carry out a full investigation: **Boys and Girls Welfare Society v McDonald [1996] IRLR 129.**
376. The range of reasonable responses' test applies both to the decision to dismiss and to the procedure by which that decision is reached: **Sainsbury's Supermarkets Ltd –v- Hitt [2003] IRLR 23.**
377. The ACAS Code of Practice on Disciplinary and Grievance Procedures contains guidance on the procedures to be undertaken in relation to a dismissal for conduct. Although compliance with the ACAS Code is not a statutory requirement, a failure to follow the Code should be taken into account by a Tribunal when determining the reasonableness of a dismissal.

Procedural Fairness

378. The House of Lords' decision in **Polkey vAE Dayton Services Ltd 1988 ICR 142, HL** establishes procedural fairness as an integral part of the reasonableness test under S.98(4).

Appeal

379. House of Lords in **West Midlands Co-operative Society Ltd v Tipton 1986 ICR 192, HL**, :the employer’s actions at the appeal stage are relevant to the reasonableness of the whole dismissal process.
380. Nothing in principle prevents an employer’s appeal panel upholding a decision to dismiss on a different basis from that on which the original decision was made. For the dismissal to be fair, though, the employer must ensure that whatever grounds remain still justify dismissal. In **Perry v Imperial College Healthcare NHS Trust EAT 0473/10**

Contributory fault

381. Section 123(6) and section 122 (2)of the Employment Rights Act 1996 (ERA) deal with contributory fault.

Polkey

382. **Polkey v AE Dayton Services Ltd 1988 ICR 142, HL**: when assessing the compensatory award payable in respect of the unfair dismissal, tribunal is to consider whether a reduction should be made on the ground that the lack of a fair procedure made no practical difference to the decision to dismiss.

Automatic Unfair Dismissal : section 103A ERA

Disclosures qualifying for protection

383. The term “protected disclosure” is defined in sections 43A-43H of the 1996 Act. The basic structure of those provisions is as follows:

- (1) Section 43A defines a protected disclosure as a “qualifying disclosure” which is made by a worker in accordance with any of sections 43C to 43H .
- (2) Section 43B defines a qualifying disclosure essentially by reference to the subject-matter of the disclosure..
- (3) Sections 43C to 43H prescribe six kinds of circumstances in which a qualifying disclosure will be protected, essentially by reference to the class of person to whom the disclosure is made.

384. The opening words of section 43B of ERA provide that:

“(1) In this Part a “qualifying disclosure” means any disclosure of information which, in the reasonable belief of the worker making the disclosure is made in the public interest and tends to show one or more of the following –.”

Section 43B then lists of six categories of wrongdoing. The categories relevant relied upon by the Claimant are those set out within section 43B(1)(a)(b) and (d);

...

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject

...

(d) that the health and safety of any individual has been, is being or is likely to be endangered. person has failed, is failing, or is likely to fail to comply with any legal

obligation to which he is subject”.

Disclosure of information: section 43B ERA

385. The disclosure must be of *information*. This requires for conveying of facts rather than the mere making of allegations: **Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325 EAT**.

Reasonable belief

386. Section 43B (1) requires that, in order for any disclosure to qualify for protection, the disclosure must, in the *‘reasonable belief’* of the worker: be made in the public interest, and tends to show one or more of the types of malpractice set out in (a) to (f) has been or is being or is likely to take place.

Public Interest

387. The worker must have a reasonable belief that the disclosure is in the public interest but that does not have to be the worker’s predominant motive for making the disclosures; see Lord Justice Underhill’s comments **Chesterton Global Ltd. v Nurmohamed [2018] ICR 731 CA** at paragraphs 27 to 30.

Reasonable belief in the wrongdoing

388. To qualify for protection the disclosure, the whistle-blower must also have had a reasonable belief that the information disclosed tended to show that the alleged wrongdoing had been/was being/was likely to be, committed. It is not relevant however whether or not it turned out to be wrong, the same principles as to reasonableness apply to the wrongdoing as to the public interest requirement.
389. As the EAT put it in **Soh v Imperial College of Science, Technology and Medicine EAT 0350/14** The EAT observed as long as the worker reasonably believes that the information tends to show a state of affairs identified in S.43B(1), the disclosure will be a qualifying disclosure for the purposes of that provision even if the information does not in the end stand up to scrutiny.

Endangerment of health and safety

390. ‘Health and safety’ is a well understood phrase and so it will usually be obvious whether the subject matter of the disclosure has the potential to fall within Section 43B(1)(d).

Disclosure to employer

391. In relation to the first and second alleged protected disclosures, the Claimant relies upon Section 43C (1)(a) which provides that a qualifying disclosure that is made to the worker’s employer will be a protected disclosure.

Automatic Unfair Dismissal

392. An employee will only succeed in a claim of unfair dismissal if the Tribunal is satisfied, on the evidence, that the ‘principal’ reason is that the employee made a protected disclosure.
393. The principal reason is the reason that operated on the employer’s mind at the time of the dismissal. Lord Denning MR in **Abernethy v Mott, Hay and Anderson 1974 ICR 323, CA**. If the fact that the employee made a protected

disclosure was merely a subsidiary reason to the main reason for dismissal, then the employee's claim under section 103A will not be made out.

Reason – causation

394. The Tribunal has considered the Court of Appeal decision in **Co-Operative Group Ltd v Baddeley 2014 EWCA Civ 658, CA** and the Supreme Court decision in **Royal Mail Group Ltd v Jhuti 2020 ICR 731, SC**: Lord Wilson reasoned that if this is limited to a person placed by the employer in the hierarchy of responsibility above the employee, there is no conceptual difficulty about attributing to the employer that person's state of mind rather than that of the deceived decision-maker.
395. When Jhuti was before the Court of Appeal, Underhill LJ considered four different circumstances in which it might be argued that the unlawful motivation of a 'manipulator' should be imputed to an innocent decision-maker and the Tribunal has considered the application of those to this case.

Burden of Proof

396. Where the employee has less than the requisite continuous service to claim ordinary unfair dismissal, as in the case before us, he or she will acquire the burden of showing, that the reason for dismissal was an automatically unfair reason on the balance of probabilities: **Smith v Hayle Town Council 1978 ICR 996, CA**. EAT in **Ross v Eddie Stobart Ltd EAT 0068/13** confirmed that the same approach applies in whistleblowing claims.

Drawing inferences.

397. Given the need to establish a sufficient causal link between the making of the protected disclosure and the act of dismissal, a Tribunal may draw inferences as to the real reason for the employer's action on the basis of its principal findings of fact. In **Kuzel v Roche Products Ltd**
398. In the words of Lord Justice Mummery in **ALM Medical Services Ltd v Bladon 2002 ICR 1444, CA**: '[T]he alleged unfairness of aspects of [the employee's] dismissal, which would be central to a claim for "ordinary" unfair dismissal, are of less importance in a protected disclosure case. The critical issue is not substantive or procedural unfairness, but whether all the requirements of the protected disclosure provisions have been satisfied on the evidence.'
399. In **Habinteg Housing Association Ltd v Holleron EAT/0274/14** the EAT observed held that it is a 'sound principle' that a party's case is to be determined not just by the evidence produced but by the evidence which it is within the power of either party to produce. A party's failure to call a witness whose evidence is critical on a particular issue may lead a tribunal to draw adverse conclusions about the strength of the party's case on that issue.

Wrongful Dismissal

400. A claim of wrongful dismissal, is a dismissal said to be in breach of a statutory or contractual right to notice.
401. The Tribunal has jurisdiction to consider such claims under the Employment Tribunals (Extension of Jurisdiction) England & Wales Order 1994.

402. The Tribunal is required to undertake an evaluation of the evidence before it and to reach its own conclusions as to what took place.
403. The Tribunal must then go on to consider, having reached conclusions as to what **in fact** took place, whether that was sufficiently serious as to amount to gross misconduct and to permit the employer to terminate the contract of employment without notice: ***Phiri v Surrey & Borders Partnership NHS Foundation Trust UKEAT/0025/15 and Cameron v East Coast Mainline Company Ltd UKEAT/0301/17***.

Unlawful deduction from wages: section 13 ERA

404. Section 13 deals with the right not to suffer unauthorised deductions and provides as follows;

(1)An employer shall not make a deduction from wages of a worker employed by him unless—

(a)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

(b)the worker has previously signified in writing his agreement or consent to the making of the deduction.

(2)In this section “relevant provision”, in relation to a worker’s contract, means a provision of the contract comprised—

(a)in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or

(b)in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

*(3)Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages **properly payable** by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker’s wages on that occasion.*

Direct Discrimination

Section 13 Equality Act 2010

(1)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.

(2)If the protected characteristic is age, A does not discriminate against B if A can show A’s treatment of B to be a proportionate means of achieving a legitimate aim.

405. **Harassment**

Section 26 Equality Act 2010

(1)A person (A) harasses another (B) if—

(a)A engages in unwanted conduct related to a relevant protected characteristic, and

(b)the conduct has the purpose or effect of—

(i)violating B's dignity, or

(ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(4)In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a)the perception of B;

(b)the other circumstances of the case;

(c)whether it is reasonable for the conduct to have that effect.

Direct discrimination

406. The House of Lords in **Nagarajan v London Regional Transport 1999 ICR 877, HL** : where a protected characteristic has had a 'significant influence on the outcome', discrimination is made out'.
407. The EHRC Employment Code notes that 'the [protected] characteristic needs to be a cause of the less favourable treatment, but does not need to be the only or even the main cause'
408. Where the employer behaves unreasonably, that does not mean that there has been discrimination, but it may be evidence supporting that inference if there is nothing else to explain the behaviour : **Anya v University of Oxford and anor 2001 ICR 847, CA**
409. S.23(1) provides that on a comparison for the purpose of establishing direct discrimination there must be 'no material difference between the circumstances relating to each case'.**Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL** Lord Scott explained that this means that 'the comparator required for the purpose of the statutory definition of discrimination must be a comparator 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'.

Harassment

410. Harassment can arise regardless of intent and regardless of whether or not the alleged harasser knows that the victim has a particular protected characteristic.
411. The EHRC Employment Code makes the point that 'a serious one-off incident can also amount to harassment' — para 7.8. The question whether an act is sufficiently 'serious' to support a harassment claim is essentially a question of fact and degree: **Insitu Cleaning Co Ltd v Heads 1995 IRLR 4, EAT.**

Holiday pay

412. The Claimant seeks a payment for unpaid annual leave. The Working Time Regulations 1998 deal with the entitlement to annual leave in regulations 13 through to 16.
413. Regulations 13 and 13A deal with the entitlement to the domestic leave of 4 weeks and regulation 13 A to the additional leave of 1.6 weeks. Regulation 14 sets out how holiday leave is to be calculated and regulation 16 provides as follows;

16.—(1) A worker is entitled to be paid in respect of any period of annual leave to which he is entitled under regulation 13 and regulation 13A , at the rate of a week's pay in respect of each week of leave.

(2) Sections 221 to 224 of the 1996 Act shall apply for the purpose of determining the amount of a week's pay for the purposes of this regulation, subject to the modifications set out in paragraph (3).

(3) The provisions referred to in paragraph (2) shall apply—

a) as if references to the employee were references to the worker;

(b) as if references to the employee's contract of employment were references to the worker's contract;

(c) as if the calculation date were the first day of the period of leave in question; and

Conclusions and Analysis

Ordinary Unfair Dismissal - Dates of employment and termination

414. The Tribunal have found as set out in its findings of fact, that on balance of probabilities, the Claimant's employment started on 12 March 2018 and the effective date of termination is the 19 February 2020.
415. Not much turns on whether the termination date was 14 or 19th February 2020, other than entitlement to holiday pay because either way the Claimant had not accrued sufficient continuity of service by the termination date pursuant to section 108 ERA, to bring a claim of ordinary unfair dismissal under section 94 and 98 ERA .
416. However, the Tribunal has have nonetheless considered the way the Respondent conducted the disciplinary process and whether any inferences should be drawn from that in terms of the automatic unfair dismissal claim.
417. The investigation process was largely satisfactory however, we have considered whether the failure to check the CCTV of the back door in circumstances where CCTV stills were obtained and relied on in relation to the alleged taking of property, rendered the process unfair in respect of investigating the unauthorised absence issue.
418. In the circumstances, where there was a dispute over the length of time taken and where there had been an issue raised by the Claimant about the behaviour of his Line Manager toward him, given CCTV stills were obtained and relied upon as evidence in relation to the alleged theft, the Tribunal find that it was outside the band of reasonable responses for Mr Khan not to make similar enquiries to resolve the factual dispute over the time the Claimant returned from his break in circumstances where he alleges it was also a gross misconduct issue. Had he made reasonable enquiries, he would have been aware that there was also CCTV footage available.
419. In terms of the disciplinary hearing, the failure to provide the Claimant with a copy of the disciplinary notes was the Tribunal consider fundamentally unfair and a breach of natural justice. The Claimant was without an interpreter and was communicating in a stressful situation in English which is not his first language. To

deny him the right to at least check the record of not only what he had said and to remind himself of what had been discussed prior to submitting his grounds of appeal, but to deny him the right to check that he had been able to convey what he intended, rendered that disciplinary and appeal process fundamentally flawed. It was outside the band of reasonable responses.

420. There was no justification for refusing to provide the Claimant with the notes of the meeting after he had made requests for copies. Putting aside any issues of contributory fault or Polkey, which we do not have to address, that failing alone would the Tribunal conclude, have rendered the Claimant's dismissal unfair had he acquired two years service.
421. Further, Mr Khan gave evidence that he took into account the failure by the Claimant to clock in and out as a factor operating on his mind at the time of the dismissal and his evidence is that he had checked the payroll information before the disciplinary hearing which confirmed that the Claimant had not clocked out and that the Claimant then admitted he had not in the meeting. However, this was not a reason which was given in his outcome letter, it was purely the length of his absence.
422. As set out in the Tribunal's findings, the Tribunal are not persuaded that Mr Khan had checked the payroll information before the hearing and do not find that this was operating on his mind when he decided to dismiss.
423. The Tribunal do not find that based on the evidence of Mr Kirkpatrick and Ms Archer, not clocking in and out was normally treated so seriously and but that it would normally (despite what the Claimant's experience was elsewhere) have resulted in no more than an informal supervision but find that on a balance of probabilities, it was added to give weight to the sanction imposed.

Appeal

424. The Tribunal consider that given the Claimant's limitations in communicating in English, it was outside the band of reasonable responses not to offer him a meeting to discuss his appeal.
425. Ms Archer upheld the dismissal in part because with reference to the unauthorised absence, although she accepted normally it would not be dealt with as a disciplinary offence, she understood that the Claimant has been expressly directed by his line manager to clock in and out however, that was not the evidence of Mr Kirkpatrick, he never complained that he had given any such instruction.
426. Further, Ms Archer complains that what was also operating on her mind when upholding the decision, was that the Claimant had given inconsistent reasons for his absence to his manager. However, Mr Kirkpatrick did not allege he had been given any reason and he did not allege during the investigation process, that he had ever asked for one.
427. Ms Archer was also influenced in her decision to uphold the dismissal on the grounds of the taking of the Christmas decoration she said by the supervision review in September 2019, however that did not result in any formal warning and although she referred to this as influencing her view of his *integrity*, the supervision meeting was not concerned with matters of honesty. The Claimant

was also not given any prior warning that this would be taken into account and not therefore given a chance to make representations.

428. These were issues which were operating on Ms Archer's mind when deciding to uphold the decision, that were not supported by the evidence and flawed. Her reasoning was not sound and her belief therefore not based on reasonable grounds.
429. Ms Archer the Tribunal conclude, did not carry out the appeal within the range of reasonable responses. Her belief was not based on reasonable grounds. Ms Archer the Tribunal consider 'rubber stamped' the disciplinary decision of Mr Khan without carrying out any meaningful analysis and as the appeal officer that was her function.
430. Ms Archer did not make further enquires of the Claimant to understand fully his grounds of appeal despite the limitations arounds his written English and carried out a superficial review of the evidence and the decision of Mr Khan and did so in manner which was outside the band of reasonable responses.
431. Had the Claimant accrued two years service, the Tribunal would have held that his dismissal was unfair.

Wrongful dismissal

Did the Claimant as a matter of fact commit the misconduct as alleged?

Absence

432. In his claim form the Claimant alleges that he received a call from his daughter who needed him to return home to help change his sons nappy and that Mr Kirkpatrick allowed him an extra 30 minutes.
433. According to the Claimant's claim form therefore, the Claimant took not 45 minutes as he asserted during the investigation process, but **1 hour and 10 minutes** (30 minute break, plus extra 30 minutes plus the 10 minutes he was late due to traffic).
434. The Claimant maintained under cross examination that he returned at 2:45pm but when taken to his claim form and asked why he had apologised if he was not late back, the Claimant then asserted that Mr Kirkpatrick had only agreed to give him a **20 minute break** and not 30 minutes that is why he apologised for taking a 30 minute extension .
435. In cross examination the Claimant asserted that he saw Mr Kirkpatrick at between 3:30 and 4pm because Mr Kirkpatrick was not present in the kitchen when he returned.
436. The Tribunal find on the evidence now before it, that weighing up all the evidence, on a balance or probabilities, the Claimant was allowed an extension of 20 minutes but that he did return much later and in all likelihood it was about 3.50pm. The Claimant's evidence is contradictory and not reliable on this issue. The Tribunal are persuaded that Mr Kirkpatrick was 'clock watching' because he wanted to complete his paperwork and finish his shift on time.
437. The Tribunal find that the Claimant had not given Mr Kirkpatrick a reason for leaving and nor was he asked for one.

438. The Tribunal find on the evidence including the payroll/time sheet information that the Claimant did not clock in and out and he knew he was required to do however, this was not normally treated by the Respondent as a serious disciplinary matter or indeed a disciplinary matter at all unless there was a repeated failure to do so.
439. This offence alone of a long authorised break, the Tribunal find was a serious matter however as Mr Khan himself admitted, how it was treated would depend on the explanation.
440. The Claimant stated that his son was sick, he stated on his claim form that he needed to change his nappy. He indicated other reasons to staff at the time . The Claimant alleges he received a text about his son but he did not produce it during the disciplinary investigation or during this hearing.
441. However, there is no direct evidence to rebut the Claimant's account that he used that time to go home and look after his son. The evidence of the witnesses interviewed during the investigation meeting were not called as witnesses before this Tribunal but we have nonetheless considered their evidence, however it is not the Tribunal find compelling. The Claimant had supposedly said he was going to look for a television and also that he was going to look for work. When the Claimant was interviewed during the disciplinary investigation his explanation concerned only his son . The Tribunal also take into account that there had been other occasions when he had required flexibility around his work to attend to his sons care needs.
442. On a balance of probabilities, we accept the Claimant's sworn evidence that he needed the break to attend to his son but find that as a fact, he took much longer than his manager had authorised and he did not clock in or out..

Taking of Property

443. In cross examination the Claimant intimated that Ms Pankhania had given him the star the same day he had taken it. The Tribunal find as a fact that he took the star on Saturday 4 January 2020 according to his own evidence in chief and the CCTV stills.
444. There is a rota within the bundle (p. 123) which shows that Ms Pankhania was not in work on 4 or 5 January 2020 and Ms Patel was not in work on Saturday 4 January but was in work on Sunday 5 January 2020.
445. The allegation about the grudge Ms Patel held about the Claimant, may have been the reason why Ms Patel reported this incident but the Claimant does not deny taking the decoration.
446. In response to a question from the Tribunal the Claimant was adamant that there had never been any discussion between him and Ms Patel about the Christmas star ; "*not about the star or stealing or anything*"
447. On balance of probabilities the Tribunal do not accept his confused and inconsistent account that Ms Pankhania gave him the star. Under cross examination he was vague about when this had happened, he could not recollect the date however when taken to his witness statement, where he had indicated that Ms Pankhania had given him the star on 4 January 2020, when the rota shows her as not working that day, he stated that he could not clearly remember if it was on the 4 January and that he had not read his own witness statement.

448. The Tribunal accept on a balance of probabilities, that Ms Pankhania had not sent the email of the 7 October 2020 and that she had send the statement confirming that she had not given him permission to take the star. Regardless of that evidence, the Claimant's own evidence is not persuasive. Had he had permission there is no reason why he would not have mentioned it during his interview on 8 January 2020, in his statement of the same date or in his appeal.
449. We find on balance of probabilities that the Claimant thinking that the stars were of little value, decided that it would not be an issue to take one home as they were being packed away and some torn ones put in the bin. He was not given permission but he took it only to return it when he realised it was torn. The next day he discussed this with Ms Patel when she was working because he planned to take another (perhaps because he had returned the torn one) and mentioned he had already taken one but that he did not on that occasion take another after being told not to.
450. **Was the acts of the employee sufficiently serious as to amount to gross misconduct and to permit the employer to terminate the contract of employment without notice?**
451. We have gone on to consider whether the conduct justified the summary termination of the Claimant's employment. Was it so serious it amounted to a repudiatory breach?
452. The Tribunal conclude that the Respondent did not consider a failure to clock in and out as disciplinary matter normally. The Tribunal conclude that given his reason for leaving which the Tribunal find was to care for his son and which was not properly explored with him such that no findings were reached by Mr Khan, that this would not have amounted to conduct so serious as to constitute a repudiatory breach of contract. There may have been some disciplinary action but not dismissal for gross misconduct. The seriousness attached to it by the Respondent is also evidenced by the lack of any action until the 8 January 2020 when Ms Patel complained about the taking of property, only then was anything done about it.
453. With regards to the taking of property, this is a more nuanced issue. The Tribunal take into account that the item was of little value, the Claimant had been open about taking one of the stars, mentioning it to colleagues and not attempting to hide it which indicates that he saw it of little significance.
454. The Tribunal take into account however the points raised by Mr Khan about the importance of trusting staff not to take property which is not theirs because of the vulnerability of their residents. Staff must be trusted around the property of others no matter what the value of that property . That is a compelling point as is the lack of insight shown by the Claimant and lack of contrition.
455. The Tribunal do not consider that the Claimant considered that what he was doing was serious or that he intended by doing what he did, to repudiate the contract of employment. The star was of little value however, the Tribunal have considered the environment in which the Claimant worked, the requirement to be able to trust those around vulnerable people to act with integrity and that while this was not property something belonging to a resident, what has persuaded the Tribunal that the actions were so serious as to undermine trust and confidence is the lack of insight shown by the Claimant even at the disciplinary stage to apologise and accept that it was inappropriate to take it without asking first.

456. The Tribunal conclude therefore that the Claimant in taking the star, but not in taking an unauthorised break, repudiated the contract of employment such that the Respondent was entitled to terminate the contract of employment without notice.

Whistleblowing claims

First Alleged Protected Disclosure: 1

457. For the reasons set out in our findings of fact, the Tribunal find that the Claimant did **not** make the alleged disclosure to Ms Tilley on or around 14 November 2019.
458. If this disclosure was made, for the reasons set out in the Tribunal's findings of fact, the Tribunal conclude that there is no evidence to support the Claimant's stated belief, which amounts to no more than conjecture, that Ms Tilley was diligent enough to record this complaint and that Mr Khan and/or Ms Jacobs was made aware of this complaint from seeing this letter on a file or elsewhere.
459. As set out in the Tribunal's findings of fact, neither Mr Kirkpatrick, Ms Jacobs nor Mr Khan or Ms Archer were aware of this disclosure at the time of the dismissal proceedings or appeal hearing.
460. Regardless of the Tribunal's finds about the unreasonable of the disciplinary and appeal process, it does not consider given its clear findings of fact about knowledge, that this alleged disclosure was the sole or principal reason for the decision to dismiss and uphold the dismissal on appeal, or indeed formed any part of the reason for dismissal at all.
461. The Tribunal find that the sole reason for dismissal were the incidents of unauthorised absence and the taking of the Christmas decoration.

Alleged Second Protected Disclosure

462. What the Claimant wrote in the note of the 11 December 2019, was not a bare allegation. It set out facts, namely that the residents had been served soup which was burnt and that blood from raw meat was dripping onto desserts. The Respondent accept that if it was made, it qualified as a protected disclosure and therefore the Tribunal do not have to deal with the various requirements of section 43A ERA.
463. **The Respondent does not dispute that the disclosure satisfies the test under section 43A ERA and qualifies as a protected disclosure.**

Third Alleged Protected Disclosure

Was it a disclosure of information

464. The Claimant wrote in the document of 8 January 2020 facts about the incident on boxing day when he left work to care for his disabled son. It did not contain any allegations. It is a statement containing facts or information.
465. However for the reasons set out below the Tribunal do not conclude that it is information tending to show wrongdoing.

Was it in the reasonable belief of the Claimant a disclosure that the health and safety of any individual has been, is being or is likely to be endangered?

466. The Tribunal conclude that it was not reasonable for the Claimant, applying an objective standard to the personal circumstances of the Claimant, to form the belief that the information contained in the statement of the 8 January 2020 (page 99) tended to show that the health and safety of the residents at the time; had been, was being or was likely to be endangered.
467. The Claimant at no point in that statement made reference to any wrongdoing or risk to the residents. He simply alleges that he left work and returned within the time permitted. He does not allege that the health and safety of the residents were put at risk by his absence and nor does he make any reference to food not having been prepared for the residents on his return. The Claimant conceded in cross examination that the statement did not raise a health and safety issue.

Was it in the reasonable belief of the Claimant a disclosure which is made in the public interest?

468. For completeness we address this point; the information contained in his statement was not in the public interest, it was very much a private matter concerning whether the Claimant had returned to work within the authorised time. There is no public interest in the information disclosed in this statement.

Was it made to the employer ?

469. It is not in dispute that the disclosure was to the Claimant's employer pursuant to section 43C ERA.
470. **The Tribunal therefore conclude that the statement of the 8 January 2020 was not a protected disclosure under section 43A ERA.**

Causation

471. The Tribunal now turn to the issue of causation.
472. The Claimant has found as set out above in its findings, that that neither Mr Khan, Ms Archer nor Ms Jacobs had any knowledge of either of the disclosures prior to the decision to dismiss and that the only complaint raised with Mr Khan was about Mr Kirkpatrick following the Claimant into the toilets, which he had spoken to Mr Kirkpatrick about.
473. The Tribunal have concluded that the Claimant made one disclosure, namely what the Claimant wrote in the note of the 11 December 2019 (the second disclosure) namely that blood from raw meat was dripping onto desserts in the fridge and burnt soup.
474. The Tribunal have made a finding that the Claimant had not mentioned this incident to Mr Khan or Ms Jacobs and neither was Mr Khan or Ms Jacobs made aware of it from Ms Tilley or otherwise. The Claimant also conceded that he never mentioned it to Mr Kirkpatrick.

475. We have however considered whether it is reasonable to draw any inferences from the manner in which the disciplinary hearing was dealt with and whether there is any basis for drawing any inference that Mr Khan dismissed because he was aware somehow of the second protected disclosure or whether any inference can be drawn regarding the conduct of Mr Kirkpatrick in reporting the Claimant's absence from work and the extent to which this may have 'infected' the investigation or disciplinary process.
476. The Claimant during the course of the hearing went from alleging that all the management team wanted to remove them for raising health and safety concerns to being robust in his assertion that it was Mr Kirkpatrick who was behind it and had fed information about him to Mr Khan that persuaded Mr Khan to dismiss him.
477. Mr Kirkpatrick denies this allegation and there is no evidence that Mr Kirkpatrick influenced the process as alleged. Mr Kirkpatrick did raise a complaint about the Claimant but the Tribunal find that on a balance of probabilities, the Claimant was late back from an extended break and Mr Kirkpatrick was annoyed about that. He complained to Ms Tilley and that the Tribunal find was a reasonable step. Mr Kirkpatrick did not suggest any sanction or push for any sanction. The matter was followed up by Ms Jacobs. Mr Kirkpatrick did not allege that the Claimant had not clocked in and out in his statement and he did not allege that he had been given any false reason for his absence, his complaint was brief and to the point about the absence.
478. Mr Kirkpatrick was the Claimant's line manager but with no authority to carry out disciplinary proceedings and he had no involvement in the disciplinary process in respect of the taking of the star. He did not allege he had any knowledge about it and there is no evidence and the Claimant does not assert, that he had any input into the disciplinary process beyond the statement which he gave.
479. This is not case where the claimant has established that Mr Kirkpatrick had any alleged motivation because of the alleged protected disclosures which can be attributed to the employer and resulted in the Claimant's dismissal. The Claimant alleged Mr Kirkpatrick said "bad" things about him to Mr Khan but did not clarify what he was alleging he said or when and there was no evidence to support this allegation.
480. The unfairness of aspects of dismissal, which would be central to a claim for "ordinary" unfair dismissal, are of less importance in a protected disclosure case. The Tribunal's focus must be on what was the reason or principal reason for dismissal. As set out above the Tribunal find that the dismissal process was unfair however it has not found that the allegations of taking property or unauthorised absence were unfounded.
481. It was within the band of reasonable responses for the Respondent to investigate these issues and in the circumstances take disciplinary action, and in respect of the taking of property, for one outcome to be dismissal where there is no acceptance shown that this was not appropriate.
482. The Tribunal do not conclude that there it is reasonable to infer from the procedural failings that the reason or principal reason for the investigation, disciplinary action, dismissal or outcome of the appeal was the protected disclosure where the Tribunal has made clear findings of fact that Mr Khan, Ms Kirkpatrick and Ms Archer were not aware of the proven protected disclosure and that further, the dismissal was solely because of the two allegations of misconduct.

483. The burden is on the Claimant to show that the dismissal was for a prohibited reason and the tribunal conclude that he has failed to satisfy that burden ; and thus his claim is not well founded and cannot succeed.. **Smith v Hayle Town Council 1978 ICR 996 CA**

Discrimination and Harassment Claims

484. Time Limits

485. The claims of harassment and discrimination are brought outside the primary time limit

Findings of fact - time limit

486. The Claimant gave evidence under oath about his reasons for not submitting his claims in time. He gave evidence that he was unwell. He referred to being mentally distressed, of about 35 members of staff asking what had happened about him stealing something and he talked about being down about what happened and having to see his GP. He also mentioned having to go to the library to type out his claim.
487. He found out about ACAS through the CAB but he could not recall when and gave evidence that he had not known he could complain about the discrimination.
488. There is no medical evidence produced by the Claimant to evidence that he was too unwell to issue a tribunal claim. He did not give evidence that he was on medication at any point.
489. The Claimant submitted a statement of fitness for work forms from his GP from 22 January 2020 to 29 February 2020 to (page 83 – 87) which refer to the Claimant; “ *feeling stressed*”.
490. The Claimant does not complain that he was unwell prior to the suspension from work in January 2020.
491. The Claimant did not submit a grievance. He raised a complaint but not until 8 January 2020.
492. He was able to attend the disciplinary hearing on 14 February 2020 and submit an application for an appeal.
493. The Claimant raised various issues with Ms Tilley about what was happening in the kitchen but did not allege these were acts of discrimination in his alleged complaint or his disclosure on the 11 December 2019.
494. The Claimant alleges that he disclosed an incident in the kitchen when pork sausage meat got on his clothes but does not refer to the other allegations he now relies upon.
495. The Claimant alleges that he raised complaints of discrimination with Mr Khan but the Tribunal have found as fact that he only raised an issue about re-heating beef and being followed to the toilet by Mr Kirkpatrick.

Submissions

Respondents

496. The Respondent set out its submissions in writing and we have considered those in full. In brief it submits that the reasons given by the Claimant are not sufficient, he had merely stated that he had been unwell after the disciplinary and dismissal and it is for him to convince the tribunal to extend time.

497. The Respondent submits that the only evidence that we have about his alleged ill health are the sick notes (p.83 and 87) which suggest he was unwell from 22 January 2020 until 29 February 2020 . He has not shown any evidence of being unwell between 7 November 2019 and 22 January 2020 nor after 29 February 2020 . He complains of the impact of the disciplinary investigation and the termination of his employment, but the allegations of discrimination and harassment pre date the disciplinary investigation.

498. The Respondent argues that the passage of time has prejudiced the Respondent in that;

- The allegations were not in the Claimant's claim form and only set out at the case management hearing on 18 August 2020 but not particularised until further and better particulars and at the case management hearing on 24 November 2020. Thus details were not known until some 9 months after the alleged incidents.
- It is difficult for witnesses to recall events so long after the incidents

499. The Respondent submits that the Claimant is no stranger to complaints but had not raised these at any stage and he took advice from the CAB and would have known of these complaints at the time.

Claimants

500. The Claimant made brief submissions on the time limit point, he referred to not being mentally well at the time , of having trouble sleeping and his daughter taking him to his GP.

Legal Principles – time limits

501. The applicable time limit in respect of the claims of discrimination is set out in section 123 EqA. The relevant provisions provide as follows;

(1) Proceedings on a complaint within section 120 may not be brought after the end of—

*(a) the period of **3 months starting with the date of the act to which the complaint relates, or***

*(b) such other period as the employment tribunal thinks **just and equitable.***

*(3) **For the purposes of this section—***

*(a) conduct **extending** over a period is to be treated as done at the end of the period;*

(b) failure to do something is to be treated as occurring when the person in question decided on it

502. The Tribunal have had regard to the following case authorities: **Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA**, **British Coal Corporation v Keeble and ors 1997 IRLR 336, EAT**), **Department of Constitutional Affairs v Jones 2008 IRLR 128, CA** and **Adedeji v University Hospitals Birmingham NHS Foundation Trust 2021 EWCA Civ 23, CA**.

503. 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.

504. **Aziz v FDA 2010 EWCA Civ 304, CA**: in considering whether separate incidents form part of an act extending over a period, 'one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents'.

Conclusions

505. The delay in issuing the claims is quite significant, a delay of almost 10 weeks, which is almost equivalent to the primary 3 month time limit and there is an important public interest in having finality in litigation and enforcing time limits.

506. Applying **Aziz v FDA**, the Tribunal conclude that as the allegations of discrimination all relate to Mr Kirkpatrick and are similar in nature it is right to treat them as forming part of an act extending over a period up to 14 November 2019.

507. The reason for the delay remains unclear. While the Claimant was stressed during the latter part of January and February 2020, this illness could not have been a reason for not issuing a claim, starting the ACAS process or raising a grievance in November and December 2019.

508. The Claimant had the ability and access to resources to find out about time limits because he ultimately did so in connection with his complaint arising from his dismissal and brought that claim within time.

509. The explanation therefore is not satisfactory however the Tribunal have considered the relative prejudice to the parties of refusing or granting the extension of time.

510. The Respondent does not identify any forensic prejudice. It has responded to the allegations and the key witnesses remain employed by the Respondent and were in a position to give evidence. They did not in their evidence complain of an inability to recall events. If the Respondent was hampered at all in its evidence, the most material prejudice was its failure to be able to provide the disciplinary notes however, the Tribunal have little sympathy on that point given that the Claimant had made repeated requests for the notes immediately after the disciplinary hearing and the Respondent had unreasonably refused to let him have a copy.

511. The Claimant identified these allegations in the further and better particulars of his claim and while the Respondent complains about the delay in clarifying the claims, the Respondent still had the means to contact the Restaurant Manager, Ms Pankhania and did so during the course of the hearing. No application was made however to admit evidence from her about these allegation or submit evidence from other restaurant staff and no explanation was given for not doing so but it is not asserted that this is because they have since left the Respondent's employment.

512. The allegations of discrimination and harassment if established on the facts are serious, are alleged to be incidents of direct discrimination and harassment and

to not permit those claims to be ventilated in this hearing would deny the Claimant the chance of redress.

513. The delay is significant and we have taken into account the reasons however we have also considered the relative prejudice, taking into account the seriousness of the allegations and the ability of the Respondent to respond to the allegations. The main alleged discriminator is still employed by the Respondent and in attendance to give evidence. We take into account that the Respondent has not pleaded any specific forensic prejudice, it only in broad and unspecific terms refers to the impact on the recollection of witnesses without identifying which witnesses it is alleged have been hampered and how.
514. The Tribunal conclude that the prejudice favours the Claimant and taking all the circumstances into account the Tribunal consider that it is just and equitable to exercise its discretion to permit these claims to proceed and be determined on the facts.

Conclusions and analysis of allegations

Direct discrimination (Equality Act 2010 section 13)

515. The circumstances of the Claimant and comparator need not be identical in every way (EHRC para 3.23) what matters is that the circumstances "*which are relevant are the same or nearly the same*".
516. The relevant circumstances are that Ms Philips worked in the kitchen alongside Mr Kirkpatrick. Ms Philips worked in a junior position to the Claimant but the Respondent has not explained why it asserts that her being junior was a "relevant" material difference. The Tribunal consider that Ms Philips is a suitable comparator in respect of the claims.
517. Mr Kirkpatrick in his evidence in chief commented on his working relationship and clearly he found it easier to work with Ms Philips and give her instructions than the Claimant because of her attitude and willingness to learn.
518. Even on the Claimant's own evidence, Ms Philips had cause to complain about Mr Kirkpatrick's temper in the kitchen and the Claimant refers to his behaviour effecting the kitchen staff in general terms.

On 7 November 2019, Nathan Kirkpatrick called the Claimant a "dirty old pig" who was unable to do his job. Direct Age discrimination

519. For the reasons set out above in the findings of fact, the Tribunal do not find that this comment was made to the Claimant by Mr Kirkpatrick.

On 7 November 2019, Nathan Kirkpatrick call the Claimant "you idiot" and "you talk bullshit" : Direct Age discrimination

520. As set out in the findings of fact, the Tribunal find that on a balance of probabilities Mr Kirkpatrick did comment that the Claimant was talking "*bullshit*" or words to the affect and called him an "*idiot*".
521. Mr Kirkpatrick does not allege he had said these things to Ms Philips and thus there is a difference in treatment however, the Tribunal have found that there was generally a culture of swearing in the kitchen.

522. Mr Kirkpatrick explained that he may have used the term “*bullshit*” because the Claimant says things thinking he knows better but denies that he made this comment because of the Claimant’s religion or belief or age.
523. As set out in the Tribunal’s findings of fact, the Tribunal conclude that there was a tension in the working relationship between the Claimant and Mr Kirkpatrick. As evidenced in the supervision review, there were issues about the Claimant following Mr Kirkpatrick’s instructions. The reference to the Claimant “*talking bullshit*” and that he was an “*idiot*” was not the Tribunal conclude because of the Claimant’s religion, belief or age, it was because Mr Kirkpatrick found his attitude aggravating at times.
524. The Tribunal therefore conclude that these terms were not used *because* of the Claimant’s age or religion or belief or for reasons related to it and conclude that this the use of these terms was not an act of direct discrimination.
525. It is nonetheless unacceptable behaviour which may amount to bullying and a breach of the implied duty of mutual trust and confidence.

On 7 November 2019, Nathan Kirkpatrick said to the Claimant “all Indian people eat pork” : Direct discrimination based on religion or belief

526. Mr Kirkpatrick denied making this comment specifically but conceded that if he had been asked he may have said that all Indian people can eat pork.
527. The Tribunal has made a finding as set out in its findings of fact, that Mr Kirkpatrick did not state “*all fucking Indians eat pork*” or “*you Hindu’s, you guys eating pork*”. The Claimant’s evidence was inconsistent about the words used . This was not the allegation contained in his evidence of chief or the words agreed to be recorded in the list of issues.
528. As set out in the findings of fact, the Tribunal find that Mr Kirkpatrick did not know the Claimant was a Hindu. The Claimant does not in his evidence and did not put it to Mr Kirkpatrick how he would have known his religion.
529. Further, Claimant failed to explain in what context this comment had been made. He could not recall and does not allege that it was said to him directly or in relation to his particular belief or religion.
530. The Tribunal conclude that commenting that Indian people can eat pork does not amount to less favourable treatment of the Claimant because of his religion or belief. .
531. The Tribunal do not find that if said, if was said *because* of the Claimant’s own religion or beliefs and do not conclude that this was an act of direct discrimination.

Late December 2019 Nathan Kirkpatrick threw kitchen implements at the Claimant when Claimant raised something about the cooking of pork: Direct discrimination – religion or belief

532. For the reasons set out in our findings, we do not find that this incident took place.

Harassment related Age and (Equality Act 2010 section 26)

On 7 November 2019, Nathan Kirkpatrick call the Claimant a “dirty old pig” who was unable to do his job. Age – harassment

533. As set out above we do not find that this comment on a balance of probabilities, was said.

On 7 November 2019, Nathan Kirkpatrick said to the Claimant “all Indian people eat pork” : religion or belief – harassment

534. As set out in our findings, we accept that there may have been a discussion about whether Indian people eat pork . For reasons set out in the Tribunal’s findings of fact, the Tribunal find that he Claimant was not offended by this comment or had any of the impacts required by section 26 (1) EqA.

535. The Claimant had not sought to explain in what context this was said and neither does he allege that it happened more than once or that he explained that he considered it offensive to comment on Indian people eating pork.

536. The Tribunal conclude that even if the effect of this comment was offensive to the Claimant, (and harassment can arise regardless of whether or not Mr Kirkpatrick knew that the Claimant was Hindu), the Claimant does not allege that he had made it clear to Mr Kirkpatrick on previous occasions that such comments were unwanted and offensive.

537. The Tribunal conclude that it would not have been reasonable to be effected as prescribed by section 26 (1) EqA where the Tribunal find no evidence that it was said in a derogatory manner, where the Claimant has failed to explain the context. In any event the Tribunal do not consider that such a comment is sufficiently serious as a one off incident (and the Claimant only complains that it was said on 7 November 2019) ‘to amount to harassment.

Late December 2019 Nathan Kirkpatrick threw kitchen implements at the Claimant when Claimant raised something about the cooking of pork: religion or belief – harassment

538. For the reasons set out in our findings, the Tribunal do not find that this incident took place. If it had, the Tribunal consider that regardless of whether Mr Kirkpatrick was aware that the Claimant was a Hindu, for him to throw a dish containing pork blood at someone and they have pork blood / juices on their clothes, this would not only be a reckless and aggressive act, it would have been reasonable even as a one off incident, for someone who is either a Hindu or for example a vegetarian or vegan, to have been upset and find that offensive and/or humiliating and would have constituted an act of harassment on the grounds of religion or belief.

Holiday pay for Holiday year 2020

539. For the reasons set out in the Tribunal’s findings the Claimant is entitled to a payment for accrued annual leave for the year 2020.

540. Based on the Tribunal conclusion that the effective date of termination was 19 February 2020 the sum therefore due to the Claimant is **£254.80 gross**. The

Claimant did not dispute the calculation put forward by the Respondent which is as follows ;

- $31 + 19 = 50 \text{ days} = 7.1 \text{ weeks}$
- $7.1/52 \times 28 = 3.64 \text{ days}$
- $3.8 \times 7.5 \text{ hours} = 27.3 \text{ hours}$
- $\text{Rounded to } 28 \times \text{£}9.10 = \text{£}254.80 \text{ gross}$

Holiday Pay for the year : 2019

541. For the reasons set out in the Tribunal's findings, the Claimant conceded during the hearing that he had been paid for the holiday due to him in the holiday year 2019 in full.

Unlawful deduction of wages claims

Claim 1: overtime worked on public holidays in 2019

542. As set out above in the Tribunal's findings, the Claimant confirmed that he had been paid in full what was owed to him.

Claim 2: payment while on suspension

17 January to 22 January 2020

543. For the reasons set out in the Tribunal's findings of fact the Claimant is entitled to be paid the difference in full pay and statutory sick pay between 17 January and 22 January 2020. The Claimant did not dispute the Respondent's calculation of what was owed which is as follows;

- $5/7 \times 37.5 \text{ (weekly hours worked on a rota)} = 26.25 \text{ hours}$
- $\text{Rounded to } 27 \text{ hours} \times \text{£}9.10 = \text{£}245.70 \text{ (gross)}$

22 January to 16 February 2020

544. From the period 22 January to 19 February 2020, the Claimant complains that he should still have been paid full pay regardless of sending in sickness certificates because he had been told he was on suspension.
545. For the reasons set out in its findings of fact, in the absence of any company enhanced sick pay, the Tribunal conclude that the Claimant was entitled to statutory sick pay only once the suspension was lifted.

Period 16 February to 19 February 2019

546. The Claimant was paid statutory sick pay from 17 January 2020 to **16 February 2020** as shown in his payslip (page 88). However, the Tribunal has determined that the date of termination was 19 February 2020 and therefore there was a period of 3 days when the Claimant was not paid.
547. His last fit note was until 29 February 2020 therefore had he been paid it would have been at the rate of statutory sick pay. Neither party put forward any calculations. The Tribunal calculates that for those 3 days, his statutory sick pay entitlement would have been **£40.40 gross**.

Employment Judge Broughton

Date: 15 February 2022

JUDGMENT SENT TO THE PARTIES ON

FOR THE TRIBUNAL OFFICE