Case No. 2303805/2018 and 2300150/2021

EMPLOYMENT TRIBUNALS

Claimant: Mr C Afari

Respondent: Mar Facilities Support Services Limited

Heard at: London South (By CVP) **On:** 7, 8 ,9,10,13, and 14 June 2022

Before: Employment Judge Self
Mrs C Wickersham
Mrs K Omer

Appearances

For the Claimant: In Person

For Respondent: Mr L Varnam - Counsel

JUDGMENT

1. All claims of Disability Discrimination are not well-founded and are dismissed.

2. All claims of Victimisation are not well founded and are dismissed.

3. The Claim pursuant to Regulation 7 of the Working Time Regulations 1998 is dismissed on account of the tribunal not having any jurisdiction over that provision.

4. One claim of detriment pursuant to section 45(1)(b) and section 48(1ZA) of the Employment Rights Act 1996 is well founded and the Claimant is awarded **£1,000** for injury to feelings in respect of that detriment. All other detriment claims are dismissed.

5. The unlawful deduction of wages claim relating to 21 June 2018 is well-founded and the Claimant is awarded **£17.10** less deductions for tax and national insurance in respect thereof. All other unlawful deduction claims are dismissed.

6. The Claimant's holiday pay claim is well-founded and the Claimant shall be paid **£1793.50** less deductions for tax and national insurance in respect thereof.

7. By consent the Claimant was unfairly dismissed. The Tribunal finds that the Claimant should be paid a basic award of **£1386** and no compensatory award.

8. By consent the Claimant was wrongfully dismissed. The Tribunal finds that Claimant should be paid **£1160.50** less deductions for tax and national insurance in respect thereof.

WRITTEN REASONS

(As requested by the Claimant)

1. The Claimant has lodged two claims. The first was lodged on 22 October 2018 and the second was lodged on 14 January 2021. Orders have been made so that they have been heard together.

2. At a previous Open Preliminary Hearing the Claimant was found to be a disabled person pursuant to section 6 of the Equality Act 2010 (EqA) on account of his hypertension and was deemed to be such from 17 August 2018.

3. We have heard oral evidence from the Claimant on behalf of his case and from Miss Rice, Ms Skorek, Mr Holmes, and Ms Banks on behalf of the Respondent. All of these witnesses were challenged by way of cross examination. Mr Tapping produced a statement for the Claimant but he was not cross examined and so we can give it little weight. His evidence was in our view largely peripheral in any event.

4. The first two days were spent reading into the case and then trying to clarify the issues which sadly had not received the attention that one would have expected. On days 3 and 4 we heard the oral evidence and considered the written closing submissions of both parties and on days 5 and 6 the tribunal deliberated and delivered a full oral judgment. The Claimant sought written reasons immediately after the oral judgment was given indicating that he wished to lodge an appeal. The Claimant also applied for a Reconsideration of the Judgment on the following day even though no written Judgment had been sent. That application was rejected on account of it being premature and the Claimant will no doubt consider this Judgment with written reasons and make such applications as he considers fit.

5. Judgment took over an hour to deliver. Where there is any difference between the Oral Judgment and the Written Judgment it is the Written judgment that should take precedence.

6. One of the curiosities in the case is that the original employer was Mitie Limited (Mitie) and then there was a transfer of undertaking on 1 August 2019 to Mar Facilities Support Services Limited (Mar). I have referred to both as the Respondent but any reference to Respondent pre 1 August 2019 is relating to Mitie and after that date it is Mar.

7. As stated this Tribunal had two claims before it and six days allocated to consider them. It was unfortunate that time was needed to try and arrive at an acceptable List of Issues for the Tribunal to consider. That is especially remarkable on the basis that the first Claim has been running since 2018 and has been before the tribunal on no less than five occasions.

8. There was no finalised List of Issues when the papers were sent through. On the first morning a request was made for one and the parties produced a List of Issues helpfully put together by counsel for the Respondent who effectively combined two previous lists of issues that appeared on previous case management orders.

9. Whilst helpful to have the issues combined in this way it was clear to the Tribunal that there was very little particularisation in terms of the dates of alleged discriminatory incidents and the identity of the alleged perpetrators. These matters should have been resolved long before the final hearing but unfortunately they have fallen to us to determine at the start of this hearing wasting time that could have been used for the hearing itself.

10. Certain issues have arisen from seeking those further particulars and this Judgment provides our final findings on the same. To understand fully the position some background is required. It should be noted that none of those issues affect the 2021 claim and only affect the 2018 claim.

11. On 22 October 2018 the Claimant lodged his claim against Mitie who were his initial employer. On 1 August 2019 the contract for security at the Woolwich Ferry moved to Mar by way of a TUPE transfer and they took on ownership of the claim as it passed to them.

12. The Claimant has undertaken this litigation as a litigant in person and at all times we have borne that in mind. We also bear in mind that the Claimant has brought three other Tribunal claims and therefore has some knowledge of how the Tribunal system works. We also note that within his letters to the Respondent he wished to express his knowledge of employment law matters and his rights and how to use them thereunder on a regular basis. He is a

litigant in person who is seemingly more experienced that other litigants in person might be. This claim was his second in time.

13. In his Claim Form he set out that he had been discriminated against because of his race and his disability and also set out that he was making other claims the Tribunal could deal with namely "Health and Safety, Victimisation, bullying and harassment, detriment, working time regulations".

14. To the Claim Form is attached a Particulars of Claim which contains 24 paragraphs. What the document does well is to provide a chronology from the point in time the Claimant starts work with Mitie as a security officer on the Woolwich Ferry through to 19 September 2018 when the Claimant states that he contacts ACAS to start his early Conciliation.

15. The Claimant does not make any specific and clear allegations of discrimination and does not cite any particular sections of the Equality Act 2010. This is far from unusual and we do not seek to criticise the Claimant for this but none of the matters he is clearly complaining about over this period are characterised as being direct or arising from his disability and any proposed reasonable adjustment claim is not done by identifying the PCP, substantial disadvantage, and proposed adjustment. Again, this is no criticism of the Claimant but merely an observation that as with many claims there would be work to be done to marshal the chronology into a form that would be acceptable to clearly identify the issues in the case.

16. So far as the race claim is concerned there is little more than the following statement at paragraph 1.15 stating that ***"I can establish that I have been treated as a slave due to my race as a black man with history of my ancestors being enslaved"***

17. The first eighteen paragraphs of the document deal with matters prior to 17 August 2018 and the last six paragraphs deal with matters on or after that date. That date turns out to be highly relevant because it is the date that the Claimant was deemed to be a disabled person at a later preliminary hearing. I will deal with that hearing later in this Judgment.

18. A Response is filed by the Respondent which relates to a period up to 12 November 2018 on the basis that some of the issues with the Claimant were ongoing. That Response was filed on 19 December 2018 which means that the Respondent would have received the Claim at the latest by around 21 November 2018. The Response sets out the chronology as it sees it and states that the claim needs to be further particularised before it can respond to specific heads of claim. That seems reasonable on what was before them.

19. The matter was listed for a Case Management Hearing on 9 April 2019 before EJ Spencer. It would appear that the parties attend and the Respondent is represented by counsel.

20. The Order (so far as is relevant) states as follows:

"The Claimant who is still employed by the respondent claims disability discrimination (failure to make reasonable adjustments and discrimination because of something arising from disability); direct race discrimination: unpaid wages: holiday pay and detriment on the ground that the claimant refused to forgo a right conferred on him by the Working Time Regulations 1998 (section 45A1B of the Employment Rights Act 1996 and a claim under Reg 7 of the Working Time Regulations 1998.

The Respondent denies the claims. At present disability is not conceded.

The Claimant presented his claim on the 22nd of October 2018. On the 4th of March 2019 he wrote to the tribunal seeking to add to his claim a number of matters which largely appeared to relate to matters which post-dated the ET1. While he refers to this as a new claim it is not on a prescribed form and I have therefore treated this as an amendment application.

Mr Singer had not seen this (though he had seen something similar sent on the 22nd of February). Both the claim and the additional material were not the easiest documents to follow and I agreed that if and to the extent it needed permission to amend that matter would be deferred to the next preliminary hearing. The Respondent will make its position on this clear in the amended response.

I have set out in the schedule at the end of this document the issues as I understand them from the pleadings and the Claimants explanation today. These relate to both the claim and the additional material. If this does not accurately reflect the claim or if further clarification is needed before the final hearing the issues will be considered at the preliminary hearing. This has been scheduled for a whole day to allow more time than the one hour that was allowed today."

21. In addition, the matter was listed for an Open Preliminary Hearing to deal with:

a) Whether the claimant was at the relevant time (October 2017 to date) by reason of his high blood pressure a disabled person as defined in the Equality Act 2010;
b) To determine any other preliminary matters set out in the Respondent's amended response;
c) To further identify the issues and make Case Management Orders and to list the case for a final hearing.

22. It appears therefore that EJ Spencer who only had one hour to deal with this matter determined that an OPH was required to deal with the issues of whether or not the Claimant was a disabled person from October 2017 which she clearly understood was the date of the first allegation of disability discrimination and the Claimant's proposed amendment application.

23. We have seen the document which sought to amend the Claim (p.20) which deals with matters running from 31 December 2018 to 25 February 2019. Again, it is by way of a chronology and the Claimant asks a Judge to consider it carefully.

24. EJ Spencer also sets down the issues as she understands them to be from the pleadings and from the Claimant's explanations at the hearing including on the matters proposed to be added. She makes it clear in her order that these relate to both the Claim and the additional material (4 March amendment application).

25. Each Judge does things differently and has their own style. An alternative way would have been to simply deal with the issues that were set out in the Claim form as they were definitely before the Tribunal and then allow any additional issues from the amendment to be added at the next hearing if permission was given. A further alternative way would have been to leave all of the identification of the issues until the next hearing so that they were all in one place post amendment application. As stated what EJ Spencer did was to list all issues as described to her and from the pleadings including those for the proposed amendment.

26. It follows therefore that the issues as set out by EJ Spencer were the best that the Claimant could hope for and incorporated all claims that he wished to bring from October 2017 until February 2019 within both the claim and the amendment application.

27. EJ Spencer only had an hour for her hearing and no doubt had other hearings on that day. It is unfortunate that the List of issues was not, in my view, complete with the requisite detail necessary. There is a lack of dates for the allegations of discrimination and a general failure to name the perpetrator. As there were time limit points the dates of incidents are important and it is also very helpful to pin parties to commit to those details to avoid issues such as have arisen at this hearing.

28. The matter comes before EJ Morton on 24 June 2019. She determines that the Claimant is a disabled person from 17 August 2018. That is some ten months after the Claimant contended for and only two months before the Claim was made.

29. EJ Morton then deals with the amendment application and states in her order as follows:

"The Claimant is permitted to amend his claim in order to incorporate the additional matters attached to his e-mail to the tribunal of the 4th of March 2019 although there remains a live issue as to whether the Claimant presented his claims in time as regards these additional matters. It is the Claimant's case that he was advised by ACAS that he did not need to send an additional claim form to the tribunal and his claims therefore were technically presented on the 24th of June 2019 in respect of the additional material. There was not time to hear evidence on this point at the preliminary hearing and it was therefore held over until the final hearing of the case.

The relevant issues are those set out in paragraphs 3E, 7C, 14A and 15A of the draft list of issues attached the case management order of Judge Spencer dated 9 April 2019. That list of issues should be amended so that paragraph 14B becomes paragraph 16 C but shall otherwise stand as the list of issues in the case".

30. Directions were then given for disclosure bundles etc and the matter was due to be listed for 4 days on 5 October 2020.

31. The Spencer List of issues was contributed to by the Claimant and there was no attempt to change them after the hearing. There was no attempt by either party to amend the issues after the Morton hearing. There was a failure to particularise the List of Issues to an adequate level by either party or indeed either Judge. There have been other hearings at which this fundamental task should have been done but the opportunity was not taken.

32. At the start of this hearing, we asked for a joint agreed List of Issues and over the course of the morning Counsel for the Respondent produced a document that welded the 2018 Issues as amended to the 2021 issues set out in a later Case Management Order. We considered that the List of issues was deficient in a number of ways and tried to elicit information from the Claimant orally so as to primarily populate the who and when of his complaints within the issues. The Claimant confirmed to us that the issues in the List provided by the respondent's counsel was correct.

33. That was a difficult process with the Claimant seemingly keen to give evidence about each point in elongated responses. After discussion with the parties, it was decided that a more productive way forward was for the Judge to set down what required attention on the List of Issues by drafting what was in effect a request for further particulars and the parties would answer it before the start of day two. At that point we would review where we were in respect of the issues vis a vis what was properly before the Tribunal.

34. That task was duly completed and both parties provided answers that sought to provide the required additional information required. The task was done adequately from both sides. The bulk of that work was undertaken by the Claimant. The purpose of the task was to have a fully particularised List of Issues and it was not to add further claims. There were claims that the Claimant intimated he wished to bring which were after the application to amend and indeed some were after the Morton determination. I explained to the Claimant that he was limited to the claims he had initially pleaded pre 22 October 2018 and those matters that had been allowed by EJ Morton in her consideration of the amendment application. That decision had not been appealed and would not be revisited. The Claimant was told that if he wished to bring in any additional claims then he would have to apply to amend. There was no such application and accordingly the case proceeded on the issues set out below with the agreement of the parties.

Disability

1. C has been found to be a disabled person from 17 August 2018 by reason of hypertension (decision of EJ Morton, dated 24 June 2019).

Discrimination Arising From Disability (section 15 Equality Act 2010)

2. Were the following "something arising in consequence of C's disability?

a. C's difficulty in working 6 10-hour night shifts a week.

b. C's inability to work in a tunnel or on the north side of the Woolwich ferry.

c. C's inability to, or difficulty with, travel to R's head office for a grievance meeting.

3. If so, did R treat C unfavourably because of any of those things, when it:

a. Failed to deal with his 17 August 2018 and 19 September 2018 grievance properly?

b. Failed to pay him an enhanced rate of pay from 1 January 2019?

4. If so, has R shown that the alleged unfavourable treatment was a proportionate means of achieving a legitimate aim. So far as 3 (b) is concerned the Legitimate Aim relied upon is (i) Giving effect to the Respondent's agreement with its client, under which payment of the enhanced rate of pay was contingent upon security guards being willing and able to work on both sides of the River Thames; (ii) Maintaining operational flexibility, by ensuring that security guards could meet the Respondent's client's requirements on either side of the river. It was proportionate because (i) there was no other way of giving effect to the agreement with the Respondent's client, or of ensuring the desired operational flexibility; (ii) the disadvantage to the Claimant (if

any) was minimal, as the Claimant had a number of means of accessing the northern terminal and thereby qualifying for the enhanced rate of pay.

5. The Respondent does not rely on the statutory defence so far as 3(a) is concerned.

6. Alternatively, has R shown that it did not know, and could not reasonably have been expected to know, that C had the disability?

Discrimination by a failure to make reasonable adjustments (sections 20 and 21 EA 2010)

7. Did R not know and could it not reasonably have been expected to know that C was a disabled person?

8. A 'PCP' is a provision, criterion, or practice. Did R have the following PCP(s):

a. That C should travel to R's [Mitie's] head office at Limeharbour Court for a grievance hearing (letters of 13 September 2018 and 9 November 2018?)

b. That C work 50 hours a week rather than 40 hours?

9. Did any such PCP put C at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time?

10. If so, did R know or could it reasonably have been expected to know that C was likely to be placed at any such disadvantage?

11. If so, were there steps that were not taken that could have been taken by R to avoid any such disadvantage?

Direct Disability Discrimination (section 13, Equality Act 2010)

12. Did R dismiss C by letter dated 21 December 2020?

13. Was that less favourable treatment?

C relies upon a hypothetical comparator.

14. If so, was it because of C's disability?

Victimisation

15. Did C do the following protected act, namely bringing and continuing with the 2018 claim?

16. Did R do the following things:

a. Fail to pay C an enhanced rate of pay (£10.55 per hour) from January 2019?

b. Dismiss C by letter dated 21 December 2020?

c. Send the letter of dismissal on 21 December 2020 at 9.18pm, which was late and outside of working hours?

17. By doing so, did R subject C to detriment?

18. If so, was it because C did the protected act?

19. Did C do the following protected act, namely bringing and continuing with the 2021 claim?

20. Did R delay in sending C's P45 to him and send it late in the evening on 26/27 January 2021?

21. By doing so, did R subject C to detriment?

22. If so, was it because C did the protected act?

Unpaid Wages (Employment Rights Act 1996, section 13)

23. Did R make unauthorised deductions from C's wages by:

a. Failing to pay him an enhanced rate of pay from 1 January 2019 (including paying holiday pay at the lower rate)?

b. Failing to pay him for time spent waiting on 21 June 2018?

Detriment (section 45A(1)(b) ERA 1996)

24. Did R subject C to a detriment by:

a. Not handling his grievance seriously in August / September 2018?

b. Denying C a period of extended annual leave when C's wife was pregnant?

25. Was that done on the ground that C refused to forgo a right conferred on him by the Working Time Regulations 1998 when he revoked his agreement to opt out of the 48-hour working week?

Holiday Pay

26. Does R owe C holiday pay – namely 20 days' holiday accrued at the date of his dismissal?

R accepts that 17 days' holiday was owed.

Wrongful Dismissal

27. What was C's notice period?

28. Was C paid for that notice period?

Time Issues

29. Did C bring his complaints in time? Were any presented outside the relevant time limits?

30. If so, should time be extended on the basis that it would be just and equitable to do so, or that it was not reasonably practicable to bring the claim within the time limit and that the claim has been brought within such further period as the Tribunal considers reasonable?

Remedy for Unfair Dismissal

31. What basic and compensatory awards are payable to C?

The Facts

35. On 14 August 2017 the Claimant commenced employment with the Respondent as a Security Officer at the site of the Woolwich Ferry in London. On 16 August 2017 the Claimant was sent a Job Offer letter which stated that his hourly rate of pay would be £8.55 and enclosed a contract of employment.

36. That contract stated so far as is relevant that (you being the Claimant);

    a) You will be paid at the rate of pay that is agreed for the assignment /, site at which you are carrying out your duties. Should you be required to work on a different assignment / site, the rate of pay will change to that for that specific assignment / site. (para 2b)

    b) If you are employed as Relief Officer we will ensure you will always paid in accordance with the National Living Wage as the minimum. (Para 2(iii))

c) You will be paid four weekly, one week in arrears, by credit transferred directly into your bank or building society account. This will normally be paid on the following Friday or brackets by the latest closed brackets Monday following the pay week . This procedure will apply when joining and leaving the company.

d) You will be guaranteed minimum hours of work of eight hours per week averaged over a 12-week period. Your anticipated hours of work at the date of this contract will be Monday to Friday night and Saturday night (60 hours per week) including break times, that will be allowed in accordance with the appropriate legislation and may be paid or unpaid depending on the client contract agreement. (para 3(a))

e) You are engaged on the understanding that you may be available to work day, night and weekend shifts and at times and locations as directed by the company. Due to the nature of the company's business the company reserves the right to vary your working hours and location of duties to meet the needs of the business at any time. You will be required to work at any place nominated by the Company within a reasonable travelling distance. (para 3(d)).

f) The company would prefer that you work a maximum of 48 hours per week. However, it accepts that in accordance with the Working Time Regulations 1998 you can, if you wish, work more than 48 hours per week. Before being rostered to do this you must confirm this wish in writing by completing a waiver form. You will not be rostered to work more than 48 hours per week unless you have advised the company of this wish. If you decide to work more than 48 hours per week and change your mind later you must give the company 28 days written notice of your change of mind. (para 3(f)).

37. The contract was signed by the Claimant on 21 August 2017 and on the same day the Claimant indicated that he wished to work in excess of 48 hours per week. We were told that at interview the Claimant had indicated that his preferred hours was 50 hours per week but it had been explained to him that the offer was on the basis of 60 hours and the Claimant accepted that at the time.

38. It appears that the Claimant raised the issue again in early October 2017 within a short time of accepting the offer of employment, i.e., that he wished to work 5 nights a week (Monday to Friday) and not 6 days as contracted. In a follow up email on 21 November 2017 the Claimant stated the hours he was working was “stressing” him and he felt he was neglecting his family. His

letter though was inconsistent as on the one hand he was asserting that he wanted to cancel the opt out (i.e., work 48 hours or less) but on the other hand the Claimant still wanted to work 50 hours a week which he could only do if the opt out was in place.

39. The Claimant forwarded the letter to Mr Tapping, a People Support Advisor, because he did not get a response from Mr Holmes. He responded that the Claimant was entitled to apply for other Mitie security roles that might suit the Claimant better.

40. In January 2018 the Claimant raised issues about inadequate heating in his office and it was accepted as a grievance. He also indicated that he wished to raise a grievance about his hours. He was referred back to Mr Tapping's previous letter re the hours. In fact, at this point there were a number of issues involving the Claimant which were being raised by him relating to his work conditions and situation.

41. In respect of the hours the Claimant was offered an alternative role in Bermondsey or to accept a role as a Support Officer where the Claimant could select the roles and hours he wanted. Consistently however it was reiterated that the Woolwich Ferry role was for the sixty hours a week the Claimant had accepted at the outset of his contract. On 12 March 2018 Mr Holmes asked the Claimant whether he was going to stay on the existing terms and conditions he was recruited on or whether he was going to remove his permission to work more than 48 hours. It was not unreasonable for clarity to be sought.

42. There was an option for the Claimant to work on another site in Woolwich but that site was due to be TUPE'd to G4S in the near future and the Claimant expressed a view that he did not wish to work for that Company. The Claimant then asserted that he has taken legal advice and demanded that his hours are reduced to 50.

43. In order to work as a Security Guard, the Claimant needed a current Security Guarding SIA Licence. The matter is dealt with at paragraph 4 of the Claimant's contract where the personal responsibility of obtaining and retaining such a licence was spelled out. Under paragraph 9, however the Respondent states that it would pay for a renewal and as the Respondent was a "licence management business" that gave them the responsibility to manage the licensing process on behalf of individual licence holders.

44. On 1 April 2018 the Claimant received an email stating that his licence was due for renewal on or before 21 July 2018. The Claimant emailed Mr Holmes to make an appointment to deal with his Licence as soon as possible. On 18

June Mr Holmes wrote to the Claimant asking him to meet him on site on 21 June at "**approximately 1800-1900**" asking him to bring completed forms and certain identification documents. On 5 July the Claimant asked if he could be paid for two additional hours as he had attended at 1800 but Mr Holmes did not turn up until approximately 2100. There does not seem to be any dispute about this factual situation actually occurring.

45. On 11 July there was a discussion between the Claimant and Mr Holmes about a temporary reduction in the Claimant's hours (possibly until November) on account of the client (Briggs Marine Limited) indicating that there was to be a reduction of hours on the North side of the ferry. By way of explanation under the contract there was 75 hours scheduled on the South side and 40 hours on the North side. The Claimant worked on the south side and another security guard worked on the north side with Relief guards stepping in for uncovered hours and/or holidays. Mr Holmes told us and we accept that he was mindful of the Claimant wanting to work less hours and as hours were being taken away from the North guard he was attempting to equalise out the situation so that the Claimant would give one shift to the North guard. We are satisfied that this was known to be a temporary situation. As it turned out Briggs changed their mind relatively soon thereafter and no changes were required.

46. It is noteworthy that contractually the Respondent was entitled to make changes (see para 36(e) above) but still elected to ask the Claimant if he was willing to make the change. The Claimant became very animated and affronted when the proposed change was not implemented but we accept that it was Briggs who were calling the shots and the Respondent merely seeking to comply with those requests in an even-handed way. When there was an opportunity there it was offered and when the opportunity was withdrawn it was rescinded. The Claimant did not have any form of contractual right for the temporary move to be held in place if the business needs did not demand it.

47. Around the same time the Claimant also made an enquiry about paternity leave and Mr Holmes informed the Claimant what he was required to do to apply for the same.

48. As stated the Claimant was unhappy at the reduction in hours not going through and there was an email dialogue over that issue. Mr Holmes sought advice from HR and in essence they relied upon the fact that the agreement had not been implemented and under the contract of employment they were entitled to direct the Claimant to work the hours he had always done. That was a correct analysis.

49. The Claimant however did not see it that way and on 13 July the Claimant informed Mr Holmes in a slightly confusing email that although he believed the Respondent's position was baseless he was going to desist from bringing a legal action against the Respondent and he would work his contracted hours of sixty. In response to the suggestion that a failure to work the contracted hours might lead to disciplinary action the Claimant told Mr Holmes not to threaten him with the same again "as am professional law student who understand the legal terms in employment" (sic).

50. It is clear from the correspondence we have seen that the relationship between the Claimant and Mr Holmes was far from harmonious. Any employee is quite entitled to raise issues and queries about his employment but from what we can see the Claimant was at all times concerned about something and his manner of communication can only be described as confrontational. His attitude was not appreciated by Mr Holmes who would have far preferred an employee who simply came to work and did his contracted hours rather than regularly seeking a reduction and then raising numerous other issues.

51. On 18 July Mr Holmes wrote to the Claimant that he could not pay him the two hours the Claimant was claiming for coming in early as the licence was the Claimant's and not Mitie's. The Claimant's case was that that sum was due to be paid on 13 July 2018 and we accept that evidence for time purposes on this unlawful deduction of wages claim.

52. The Claimant's response was to accuse Mr Holmes of being a bully and a racist bully at that. He enquired of Mr Holmes as to whether he thought that **"we are in the slavery era in which people just instruct black people as slaves or what?"** He concluded that Mr Holmes did not like black people and if similar issues continued to arise he would brand Mr Homes as **"a racist manager"**. That was, of course, something that he had already seemingly done.

53. It should be noted at this point that the only issue that the Claimant had cited as discriminatory because of his race within the original issues was that the Respondent refused to allow the Claimant to work fifty hours a week at the south side site. That claim was not permitted to proceed because following the Claimant's response it post-dated the original Claim Form and was not an amendment that was allowed by EJ Morton. If the Claimant wished to have the Tribunal consider that matter he should have applied for an amendment which he was informed of and did not do.

54. For the avoidance of any doubt despite the serious allegations he made at the time the Claimant has elected to only pursue the pay he says was due from

his early attendance on 21 June as an unlawful deduction of wages and not as an allegation of race discrimination. We have heard no evidence that would support the Claimant's allegations against Mr Holmes that there was a racial motive nor indeed has it been suggested in this tribunal for any other act.

55. Mr Holmes responded, professionally in our view, that the Claimant could raise a grievance if he wished.

56. On 23 July the Claimant sought 2 weeks paternity leave from 12 November until 25 November and sought 3 weeks annual leave following on from that time. Three days later the Claimant asserted that Mr Holmes was deliberately ignoring him and Mr Holmes responded stating that he had sent the request onto HR as he was bound to do. So far as Annual Leave was concerned Mr Holmes told the Claimant that the maximum annual leave that could be requested was a two-week block and so the most days off he could offer him was 12 based on the 6 days a week the Claimant was working. That is not reflected in the contract document. There is mention of this issue in the Employee Handbook which was within the bundle and we will return to what is said there in our conclusions.

57. On 28 July 2018 the Claimant raised a formal grievance. The document itself is written in a stream of consciousness style but in broad terms our best interpretation is that:

    a) He considers Mr Holmes to be a bully who is now victimising him;

    b) He foreshadows a claim to the employment tribunal;

    c) He considers Mr Holmes has been dishonest about the paternity leave;

    d) He is upset about the refusal of all three weeks' annual leave;

    e) He is upset about the about turn on his hours;

    f) He indicates that he is finding all of the above stressful.

58. On 29 July the Claimant added to his grievance the issue of the non-paid two hours on 21 June which he attributed to his race.

59. On 30 July, HR via Ms Hardwidge, sent an email to Mr Draber (Mr Homes line manager) appointing him as grievance investigator and indicating that once Mr Draber provides time scales for a meeting then she will assist him with setting them up. We have not seen a response from Mr Draber to that email.

60. On 10 August 2018 the grievance was acknowledged by Ms Godlewska of HR and she states that she is very busy at that time and is "in the process of identifying an appropriate manager for the grievance and that she would be in touch shortly with further details. That seems to be in conflict with the email to Mr Draber of 30 July but we have heard no evidence as to the levels of knowledge between different members of HR and precisely when Mr Draber accepted responsibility.

61. On 17 August 2018 the Claimant emailed HR and Mr Holmes as follows:

"Attach is medical reports from my GP. As my blood pressure have rise very high in which I have been sent to hospital today to do numerous of test. As a matter of facts and law. As I have explained to my GP I work six nights a week on night shifts in which I have previously informed my line manager and my HR team in which they threaten me with dismissal or moving me from site and if I did not fulfil my contractual hours I will be called for disciplinary action. As a matter of facts and law as well as personal injury as a whole I can establish my blood pressure that has gone up and as from today my GP had put me on blood pressure medication in which I can establish it is caused by your task of work I have been working continuously 6 nights a week. As from today I have been advised from my GP is best if I can reduce it to five days in which as from today I'm not working every Friday night. As a matter of facts and law and seeking advice from my solicitor regarding this matter. (sic)"

62. The Claimant provided a Fit Certificate in which he included the level for his blood pressure and his request to work only 5 nights a week (50hours) which he implemented himself immediately without further ado.

63. There was a previous hearing in this case in which EJ Morton determined that the Claimant was a disabled person as from 17 August 2018. That Judgment notes that hypertension is the only impairment relied upon.. Having perused the judgment there are no findings of fact as to what impact the condition or the Claimant's medication had upon the Claimant's day to day activities. Whilst that is perhaps odd it leaves a blank canvas for this Tribunal. There is no mention whatsoever within the judgment, for instance of claustrophobia arising from the Claimant's impairment.

64. The Claimant must have chased the grievance and Ms Godlewska told him that she had passed on the grievances to Mr Draber. The Claimant emailed chasing Mr Draber for action and indicated that if he did not hear anything by 14 September he would contact ACAS and start Early Conciliation. Pausing there the Tribunal accepts that the Respondent's response had been

somewhat tardy and the Claimant's position in respect of moving matters on externally can be readily understood up to 13 September.

65. On 13 September Mr Draber invited the Claimant to a grievance meeting at 5 Limeharbour Court, Limeharbour, E14 9RH at 1400 on Friday 21 September 2018. The Claimant was told that non-attendance may lead to the grievance being done in his absence. The distance from the Claimant's home to the address was 14.8 miles.

66. The Claimant responded that he had spoken to HR and told them that his blood pressure medication which he took every morning rendered it ***"not advisable for me to drive during the day after taking it"*** and as a consequence he wanted the meeting held on site at the Woolwich Ferry or on one of the Respondent's sites in Abbey Wood. The South Terminal at Woolwich would be a 6.8-mile drive. The Claimant made an allegation that the Respondent was failing to make a reasonable adjustment.

67. Pausing there for a moment at this point the Respondent had limited knowledge at their disposal at that time which was the Claimant had high blood pressure for which he was on medication and had been signed off for a while. He had told them that he could not do 60 hours anymore and would only work 50 hours in future which was had happened when he returned to work. There had been no other indication that the Claimant had any other restrictions on normal day to day activities. In the Tribunal's view there was nothing unreasonable or improper in asking the Claimant to attend his own grievance at the office where Mr Draber was situated.

68. Mr Draber responded on 19 September that the Limeharbour address was the only suitable venue and so the meeting would not go ahead pending an OH assessment after which alternative options would be considered. He pointed out that on public transport his research had shown that the journey to Limeharbour was only 16 minutes longer. At that point all Mr Draber knew was that the Claimant asserted that the medication caused him a restriction on his ability to drive and he pointed out that public transport was available as a viable alternative to attend the grievance meeting.

69. This leads to another lengthy email from the Claimant in which he seeks to raise a further grievance that he had worked the 60 hours a week over 6 nights for just over a year.

70. Mr Draber writes to the Claimant expressing concern that there would be a delay in waiting for the OH report and that he would like to hear the grievance

on 28 September at 1400 and that he would arrange a taxi to collect the Claimant and to drop him home. He asks the Claimant to let him know if that is feasible. On each occasion Mr Draber is addressing the issue raised by the Claimant and providing to him a workable solution to the specific problem the Claimant is raising.

71. The Claimant responded and indicated in trenchant terms that it was not feasible because the medication that he took for his hypertension made him feel dizzy and he could not travel far because of that and he continued to ask if he could have the meeting at the Woolwich Ferry or at his home address. Whilst the Tribunal acknowledge that dizziness can be a side effect of the Claimant's medication from information presented to us we do not accept that the Claimant was unable to travel because of that dizziness. We have no medical evidence to support that at all and certainly do not have anything to suggest that travelling by taxi door to door was not possible because of the Claimant's medical condition. Indeed, the OH report states that there would be no restrictions on travel. We conclude therefore that the Claimant was fit to travel to LimeHarbour Court for a meeting by public transport and certainly by taxi. By this time, he was working 50 hours a week and driving to work each night which was only 8 miles closer.

72. On 3 October 2018 the Claimant attended a telephone Occupational Health appointment. The Claimant told us that he was able to disclose all that he wished to about his condition. The material information from that report is as follows:

a) The Claimant was fit to continue in his current role;

b) The diagnosis was hypertension which the Claimant attributed to his 60-hour working week but the OH practitioner does not confirm this alleged causation. We have in fact seen no medical report suggesting a causal link bet ween the number of hours worked and the high blood pressure. What we have seen is the Claimant asserting the same;

c) The Claimant disclosed a number of concerns about his current work situation which the OH practitioner could not comment upon;

d) The OH practitioner recorded that the Claimant could not attend a meeting in Central London for his grievance because of "working nights and needing his sleep." We are satisfied that a substantial part of the reason was that he worked nights and wanted to / needed to sleep in the day but that was not linked in any way to his disability on the

evidence we have. Later in the report dizziness is also mentioned It is also questionable as to whether the office he was requested to go to is in Central London.

e) The medication would, in all likelihood, need to taken for life which would seem to indicate an inherent susceptibility to the condition as opposed to the single stressor the Claimant has alleged. Once the 60 hour a week was gone if that was the sole cause one would think that the Claimant's blood pressure would reduce and the hypertension would go. This in the tribunal's mind is far more redolent of the Claimant being predisposed in some way to hypertension;

f) A side effect of the medication on a short-term basis may be dizziness and fatigue;

g) Mr Afari is content to and fit to work at his present location for fifty hours a week i.e., 5 nights a week;

h) The Claimant is reported as saying he is not "inclined" to go to the meeting by taxi by which the Tribunal take that the Claimant does not want to but the OH practitioner certainly does not say that he cannot do it because of his condition. This supports the Tribunal's view that he was making a choice not to go to the head office as opposed to being actually unable to do so;

i) The OH practitioner concludes that the Claimant will ever be fit to work 60 hours because of his hypertension and if it remains unstable a further cut to 40 hours may be necessary. The Tribunal do not see that as a recommendation for a reduction as of the date of the report but one that may be necessary in the future if circumstances dictate.

j) The Claimant is recorded as wanting to remain on 50 hours and to stay at his current location;

k) It is specifically recorded that there should not be any interference with the Claimant's normal day to day activities or, importantly, to travel;

l) A work-related stress assessment was recommended. There is no evidence that this was undertaken.

73. On 19 September 2018 the Claimant entered Early Conciliation. On 22 October 2018 the Claimant cancelled his paternity leave as he wished to work

his normal shifts and on the following day the Claimant was sent his OH report.

74. An issue is then raised multiple times about holidays and how much the Claimant has due and Mr Holmes responds. It is readily apparent and had been for some time that the relationship between the Claimant and Mr Holmes is poor. Mr Holmes appears to be dealing with matters by dealing with queries in a functional way if at all possible. He has realised that dialogue with the Claimant simply spawns further allegations and complaints written in a somewhat confrontational style.

75. On 29 October 2018 the Claimant is invited to his grievance hearing at the Abbey Wood Sainsburys which is 4.1 miles away from the Claimant's home address on Friday 9 November at any time between 1400 and 1700. Whilst the Claimant would be working the Thursday night shift he would not be working on the Friday because he had unilaterally removed himself from that shift and the Respondent had done nothing about it. Consequently, the Claimant would not have to do a night shift after the grievance hearing. The Tribunal considers that Mr Draber was making a genuine attempt to further the grievance and had sought to ameliorate still further any possible restriction in the Claimant not attending by providing a possible later time for the meeting on a suitable day of the week and moving the location to one which in terms of an area of London the Claimant had himself had indicated was favourable to him (Abbey Wood – see para 66 above). It should be recalled that there was nothing in the OH report that suggested that there was any need for adjustments to travelling on account of the hypertension.

76. The Claimant's response is that he has brought a claim to the Employment Tribunal and he considers it better that the Respondent focus on filing their ET3 as opposed to dealing with the grievance. The Claimant's reason for not wishing to go to a grievance hearing is that that time has now passed. Mr Draber responds the same day pointing out that he has offered to meet the Claimant twice previously and it is unfortunate that the Claimant will not give him an opportunity to hear the grievance. The Claimant responds in effect by saying that the respondent should "explain it to the Employment Judge".

77. The only conclusion is that as of 29 October 2018 the Claimant has withdrawn all his grievances internally and is seeking to have them considered externally via the employment tribunal. There is some further correspondence about the Claimant possibly sending a representative to a grievance meeting and the grievance being heard anyway but the Claimant remains insistent that the tribunal is now the place for matters to be considered. We are quite satisfied that the reason why the Claimant's grievances were not considered was

because the Claimant failed to attend meetings he could have attended and by acting in the manner he did, effectively withdrew them internally.

78. As stated previously there had been a split of the hours that meant that there were more hours at the South side of the Ferry. In the latter part of 2018, there was discussion with Briggs (instigated by the client TfL and Briggs) of a need to shift the emphasis with more hours moving to the North side. In return for flexibility Briggs were prepared to increase the rate of pay by about 20%. That was clearly conditional upon the Claimant being flexible and undertaking his Sunday night shift at the North terminal as opposed to the South. We are satisfied that this was all dictated by Briggs.

79. On 31 December the Claimant refused to work at the North terminal as he was unable to walk through the tunnel under the Thames for "health reasons" and that he would remain working doing 40 hours per week Monday to Thursday. Mr Holmes tried to set up a welfare meeting to discuss matters which were initially rebuffed by the Claimant because he, again, did not wish to travel to Head Office. On 1 February Mr Holmes summarised the reasons why the Claimant was not entitled to the pay rise.

80. At this time the Claimant's employment is being dictated by his own unilateral actions in respect of where and when he worked. Within the contract there was flexibility in terms of hours and location that could have been dictated by management. Instead, it was the Claimant making the calls:

    a) It was the Claimant who unilaterally reduced his hours from 60 to 50 when he returned from sickness absence after his hypertension was diagnosed – the Respondent did not force him to work 60 they covered his shifts with other staff;

    b) Again, it was the Claimant who, when asked to work one shift North of the river per week decided that he was not doing it and unilaterally reduced his hours went down to 40 hours from 50. The Respondent did not force him to do it and covered his shift with other staff.

81. In evidence the Claimant confirmed that he did not wish to work on the North side because he felt claustrophobic and that the claustrophobia had only come on since he had been diagnosed with hypertension. Claustrophobia is not a stand-alone impairment in this case that has been deemed to amount to a disability. Indeed, claustrophobia was not even mentioned within EJ Morton's Judgment on the same. We have no evidence that the claustrophobia was caused by the hypertension from a medical practitioner and nor is it a known side effect of the medication and nor was it mentioned in the OH report as being relevant.

82. Is the Claimant claustrophobic? He says that he is but that is as good as the evidence gets. The Tribunal were puzzled that he said he could not get the ferry which sails on the wide waters of the Thames and under the blue skies of London because of his claustrophobia and it seemed to the Tribunal that the Claimant was simply trying to make excuses as to why he should not go North of the river to work as opposed to there genuinely being a health restriction. The Tribunal held a similar level of scepticism about the Claimant's dizziness and concluded that it was more that the Claimant did not want to travel to LimeHarbour as opposed to not being able to because of a medical condition.

83. On 7 February the Claimant attended a Welfare meeting at the Woolwich Ferry during one of his shifts. Miss Rice attended along with Mr Holmes. Miss Rice told us that she is parachuted in for HR situations beyond the abilities of normal HR representatives.

84. Be that as it may the meeting was not a great success. The Claimant was described as obstructive, aggressive, and evasive in his responses and he did not challenge that assessment of him when cross examining either Miss Rice or Mr Holmes. The notes of the meeting which again were not challenged show the Respondent trying to consider welfare issues linked to the Claimant's health and the Claimant bringing up matters that had previously been the subject of his grievance. We remind ourselves that the grievance had not been pursued through the normal channels despite reasonable attempts by the Respondent.

85. Ms Rice sent a letter to the claimant following the meeting. It has to be said that the letter itself makes little sense in the context of what was going on. It talks about a future reduction to 40 hours but in actual fact that was what had been happening since the start of the year because the Claimant would not do the Sunday shift north of the river. The Claimant was invited to a further welfare meeting but the claimant replied on 12 March to say that he did not see the point (again in trenchant terms) whilst making a number of comments about the dishonesty he perceived in Miss Rice. Whilst the Tribunal cannot find much that Miss Rice did bring to the situation save for an attempt to engage with the Claimant there was absolutely no indication on what we read or heard that she was in any way dishonest and that she simply tried to assist with an issue between employee and employer that was not getting any better.

86. The Tribunal were given very little information as to what happened in the immediate aftermath. There was a transfer of undertaking between Mitie and Mar on 1 August 2019. At that point in time a decision was taken to increase the Claimant's salary to £10.55 per hour. The existing Employment Tribunal

claim was moving slowly in the background and Mar picked up responsibility for it. Those who had previously managed the Claimant including Mr Holmes no longer held that responsibility moving forward.

87. The Claimant was signed off sick by his GP between 2 April and 3 May 2020 on account of "high blood pressure, anxiety and depression". On 1 May the Claimant was informed that he would be being placed on furlough. The letter stated:

"As you know the current situation with the Coronavirus pandemic is having a detrimental effect on businesses across the country. It is also negatively affecting employees with long term health issues such as yourself who may be at higher risk of their condition deteriorating during the pandemic.

As discussed and agreed due to the severe impact of COVID-19 on your health status you will be placed on furlough leave with effect from the 1st April 2020 until further notice. If your health improves during this time please let me know and we will reinstate you at work at the Woolwich ferry site as soon as possible.

The government introduced a Coronavirus job retention scheme which will enable the company to pay 80% of your wages whilst your employment status will be classified as "furloughed worker".

88. The Claimant remained on furlough until the end of his employment. There was no evidence offered as to the Claimant being negatively affected by Covid on account of his hypertension and the link between the two was not immediately clear to the Tribunal. As there is no complaint about this action the Tribunal do not need to consider it further.

89. The Claimant remained absent from work. On 2 October 2020 the Respondent was informed by Briggs that the agreements relating to cleaning and security services would conclude on 31 December 2020. On 20 October 2020 Ms Skorek wrote to Briggs formally acknowledging the end of the contracts and set out her understanding that the action described would give rise to a TUPE transfer and that staff would transfer to Transport for London (TfL) and she sought a contact at TfL to comply with the transferor's (her) obligations.

90. That was supplied by Briggs on 27 October 2020 and Ms Skorek made contact with the TfL individual, Mr Twohy, the following day sending through the ELI data. She asks, ***"In order to aid a smooth transfer for the employees concerned, I would be grateful if you could provide the***

information as soon as possible". There is no indication at all that her view as to the legal situation was anything other than a genuine one arising from the situation as she saw it and she appears to be seeking to identify individuals who may be able to provide answers required.

91. On 2 November Mr Twohy responded suggesting that the staff would not TUPE into TfL but into ABM and copied in ABM Cleaning. Later on, the same day Ms Skorek asked if both cleaning and security was moving to ABM or whether there was **"another incumbent dealing with the security element".** Again, her actions are timely and appropriate.

92. There was a delay in TfL replying. It could be said that Ms Skorek should have chased them in the interim but whether that would have yielded a quicker answer is a question of speculation. On 1 December TfL replied so far as was relevant re security staff:

"There is no transfer of undertaking between TfL and MAR. Whilst the Woolwich ferry will become an inhouse operation from 1 January 2021 and staff employed by Briggs will TUPE across the TfL staff employed by Briggs' subcontractors will not TUPE into TfL.

Specifically, with regards to the services MAR provide to Briggs:

Security Services - The operation of the ferry service will change so that maintenance activities will be undertaken at night, therefore there will be no longer be a requirement for night-time security at the site, so no TUPE obligation arises in relation to these services.

It should be noted that cleaning staff were accepted by TfL as being TUPE across to the new cleaning contractor."

93. On 16 December Ms Skorek disputed TfL's position and suggested that the logical conclusion was that the security staff would transfer to TfL as opposed to a contractor. Again, we have no explanation as to why two weeks were required to respond in this way especially as the change was becoming increasingly imminent. Two days later TfL reiterated their view that the two security guards Mr Draoucek and the Claimant would not TUPE over.

94. On 21 December the Respondent stated that it had taken legal advice and that they still believed that there would be a TUPE transfer and they would proceed on that basis. There was stalemate between TfL and Mar as to their view and there did not appear there would be any further movement. It is regrettable that this finalised view was only reached so close to the change and there is some culpability on both Mar's and TfL's part for that delay. Having said that the reality is that it is unlikely that this was the only thing

going on in both organisations and there is no suggestion that Mar's belief that there would be a TUPE transfer was anything other than their genuine belief and whilst the delay was unfortunate it was not delayed deliberately to inconvenience / upset the Claimant and Mr Draouek.

95. At 2118 on 21 December the Claimant was emailed a letter in which he was advised that the Respondent would not be providing services to Briggs at the Woolwich Ferry from 1 January 2021 and indicated that the delay in the consultation process had been caused by a lack of timely information from TfL. The letter states that it is the belief of the Respondent that TUPE applies but it also makes clear that TfL hold a different view. The letter states in the final paragraph:

"There may be opportunities within Mar that you would like to consider and if you wish to find out more please discuss this with your line manager. This will mean that you will not transfer across but will remain an employee with Mar should we have a position that would be of interest to you".

96. The Claimant spoke to his Trade Union representative and on the following day the TU Rep wrote asking TfL for their position stating that the Claimant ***"does have a preference to transfer as part of the TUPE process"***. TfL replied that there was no longer a need for a security guard on the site and pushed the Claimant and his TU Rep back to the Respondent for further guidance.

97. On 4 January Ms Skorek reiterated the Respondent's position that a transfer had taken place. On 11 January TfL legal wrote back stating so far as is relevant:

"We are aware that the employees provided overnight security, a service that was sub-contracted by Briggs to ourselves when it was necessary due to the site being unoccupied overnight. As our Kevin Twohy has explained to your Ms Skorek, security services are no longer being provided for the Woolwich ferry. This is because maintenance works now take place at night so the site is never unmanned. Consequently, there is no need for specialist security. That particular activity has ceased and TUPE does not apply. We have also made this position clear to (Briggs).

Under TfL's contract with Briggs any liability in respect of alleged transferring employees not included in the list of transferring staff sits with Briggs rather than TfL. As such we would ask you to contact Briggs

to discuss your position. We have written an e-mail notifying them of TfL's position and we have copied this letter to Briggs".

98. Also, on 4 January the Claimant's TU Rep wrote to Ms Skorek asserting that as TfL had not taken responsibility then the Claimant remained an employee of the Respondent. Ms Skorek reaffirmed the Respondent's position that they believed a transfer had not taken place and that the Claimant had not been dismissed. This was confirmed on 8 January again. On 26 January 2021 the Claimant was sent his P45 at 2119 in the evening.

99. On 13 January 2021 a letter was sent from the Respondent's solicitors setting out their position was that a transfer had taken place with a leaving date of 31 December 2020. The Respondent had taken legal advice on the matter and that had reaffirmed what they had thought throughout. We consider that the Respondent held that view in good faith. From the outside the situation was not clear and there was limited information being passed back by TfL. The position was held up until some late disclosure of documents which led to a concession after significant legal costs had been presumably expended. This factual background supports our view that the Respondent sought to deal with the matter in a genuine way.

100. The Claimant brought a claim on 14 January 2021 against the Respondent and TfL. Issuing against both was a sensible course but also shows that the Claimant was not sure whether a transfer had taken place or not. One of the claims he brought was for unfair dismissal. He did not fill out the part of the form where he should place his dates of employment but asserted at this hearing that he believed he had been dismissed upon receipt of the letter on 21 December. The Respondent in their Response stated that the employment ended on 31 December 2020 by virtue of a TUPE transfer.

101. The issue of the TUPE transfer was originally listed for 17-18 August 2021. The Claimant acted in person, Mr Draoulec's claim was joined to this claim for the purposes of the TUPE point and both the Respondent and TfL were represented by separate counsel. The hearing was postponed on the second day as TfL had located a number of documents (possibly up to 1300) which had become relevant because of evidence tendered by the Claimant.

102. When the matter returned to the Tribunal the Respondent conceded that there was no TUPE transfer and the claims against TfL were withdrawn and dismissed. The unfair dismissal of the Claimant was conceded and an application to amend partially permitted.

103. **The Law**

Section 15 Equality Act 2010 reads as follows:

A person (A) discriminates against a disabled person (B) if:

a) A treats B unfavourably because of something arising in consequence of B's disability, and

b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

104. Section 15(2) deals with knowledge…..

105. In **Basildon & Thurrock NHS Foundation Trust v Weerasinghe UKEAT/0397/14**, Langstaff J, held that there were two steps to the test to be applied by tribunals in determining whether discrimination arising from disability had occurred:

a) Did the claimant's disability cause, have the consequence of, or result in, "something"?;

b) Did the employer treat the claimant unfavourably because of that "something"?.

106. In **Pnaiser v NHS England and another [2016] IRLR 170** the EAT summarised the proper approach to claims for discrimination arising from disability as follows:

a) The tribunal must identify whether the claimant was treated unfavourably and by whom;

b) It then has to determine what caused that treatment, focusing on the reason in the mind of the alleged discriminator, possibly requiring examination of the conscious or unconscious thought processes of that person, but keeping in mind that the motive of the alleged discriminator in acting as he or she did is irrelevant;

c) The tribunal must then determine whether the reason was "something arising in consequence of [the claimant's] disability", which could describe a range of causal links. That stage of the causation test involves an objective question and does not depend on the thought processes of the alleged discriminator;

d) The knowledge required is of the disability; not knowledge that the "something" leading to the unfavourable treatment was a consequence of the disability.

107. There is no statutory definition of “unfavourable treatment”. However, the Supreme Court has given some guidance (**Williams v Trustees of Swansea University Pension and Assurance Scheme and another [2018] UKSC 65)** and it requires tribunals to answer two simple questions of fact namely what was the relevant treatment and was it unfavourable to the claimant?

108. The concept is broadly analogous to the concepts of disadvantage and detriment. The court commented that there was little to be gained in trying to differentiate between these terms, or by distinguishing between an objective assessment of the treatment, on the one hand, and a blended subjective and objective approach on the other. The court considered the EHRC Code to be helpful, although noting that it could not supplant the statutory provisions. There is a relatively low threshold for demonstrating that treatment was unfavourable. It should be remembered that no comparator is required in a section 15 claim.

109. As to the defence of objective justification at sub-section (b) to be proportionate, the unfavourable treatment has to be both an appropriate means of achieving the legitimate aim and a reasonably necessary means of doing so (**Homer v Chief Constable of West Yorkshire [2012] UKSC 15**).

110. It is for the Tribunal to balance the reasonable needs of the business against the discriminatory effect of the employer's actions on the employee and the tribunal must undertake a fair and detailed assessment of the employer's business needs and working practices.

111. **Failure to make Reasonable Adjustments**.

Section 20 EqA provides as follows:

The first requirement is a requirement, where a provision, criterion or practice of A's puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, to take such steps as it is reasonable to have to take to avoid the disadvantage.

112. In light of the above definition, an employment tribunal must identify the PCP applied by or on behalf of the employer, the identity of non-disabled comparators (where appropriate), and the nature and extent of the substantial disadvantage suffered by the claimant (**Environment Agency v Rowan [2008] IRLR 20**).

113. The Tribunal should not consider whether a PCP has been applied to the Claimant. That is not a requirement of the EqA. The PCP need only put the claimant to a disadvantage, irrespective of whether it was actually applied to them: **Roberts v North West Ambulance Service ([2012] UKEAT/0085/11**).

114. The Tribunal must also make findings identifying any step which it would have been reasonable for the employer to take: **Secretary of State for Work and Pensions v Higgins [2014] ICR 341**.

115. As to knowledge, under paragraph 20 of Schedule 8 to the EqA, an employer is not under a duty to make reasonable adjustments if it does not know, and could not reasonably be expected to know, that the individual concerned has a disability and is likely to be at a substantial disadvantage compared with persons who are not disabled. The use of the word 'likely' in this context is important. Likely means something that "could well happen" not something that is probable or more likely than not. For the duty to make adjustments to arise, it is therefore sufficient for an employer to have constructive knowledge that an individual could well be placed at a substantial disadvantage. It is not necessary to show actual or constructive knowledge that the individual would be placed at that disadvantage.

116. In **Secretary of State for the Department for Work and Pensions v Alam UKEAT/0242/09**, the EAT posed the required questions in the following terms:

a) Did the employer know both that the employee was disabled and that his disability was liable to disadvantage him substantially?;

b) Ought the employer to have known both that the employee was disabled and that his disability was liable to disadvantage him substantially?.

117. Employers will not avoid the duty to make reasonable adjustments where they did not know, but should reasonably have known, about an individual's disability and substantial disadvantage. Therefore, they should take reasonable steps, and have systems in place, to find out the relevant information.

118. The PCP, properly construed, has been described as the "base position": [The PCP] ***"represents the base position before adjustments are made to accommodate disabilities. It includes all practices and procedures which apply to everyone but excludes the adjustments. The adjustments are the steps which a service provider or public authority takes in discharge of its statutory duty to change the [PCP]. By definition, therefore, the [PCP] does not include the adjustments"*** (**Finnigan v Chief Constable of Northumbria Police [2014] 1 WLR 445)**

119. As to substantial disadvantage, "substantial" is defined by section 212(1) of the EqA 2010 as "more than minor or trivial". This is a low threshold. A

substantial disadvantage is one which must exist in comparison with persons who were not disabled.

120. There must also be a causal connection between the PCP and the substantial disadvantage so identified. It is not sufficient merely to identify that an employee has been disadvantaged, in the sense of badly treated, and to conclude that if he had not been disabled, he would not have suffered; that would be to leave out of account the requirement to identify a PCP. The substantial disadvantage must arise out of the PCP **(Nottingham City Transport Ltd v Harvey UKEAT/0032/12**).

121. The making of reasonable adjustments may necessarily involve treating a disabled employee more favourably than the employer's non-disabled workforce. 'Steps' for the purposes of section 20 encompasses any modification of, or qualification to, the PCP in question which would or might remove the substantial disadvantage caused by the PCP: **Griffiths v Secretary of State for Work and Pensions [2016] IRLR 216.**

122. It will be a reasonable adjustment if there is 'a prospect' – which need not even be a 'good' or 'real' prospect – that doing so would prevent the claimant from being at the relevant substantial disadvantage.

123. The efficacy of an adjustment is a factor for the tribunal to take into account when considering its reasonableness. However, to uphold a claim, it is not necessary for the tribunal to be satisfied that a proposed adjustment would have been completely effective. As expressed in **Griffiths:**

"So far as efficacy is concerned, it may be that it is not clear whether the step proposed will be effective or not. It may still be reasonable to take the step notwithstanding that success is not guaranteed: the uncertainty is one of the factors to weigh up when assessing the question of reasonableness".

124. The tribunal need not be satisfied that the adjustment, if made, would have removed the disadvantage in its entirety. As **per Noor v Foreign & Commonwealth Office [2011] UKEAT/0470/10:** ***"…although the purpose of a reasonable adjustment is to prevent a disabled person from being at a substantial disadvantage, it is certainly not the law that an adjustment will only be reasonable if it is completely effective"***.

125. The duty to make adjustments arises by operation of law. It is not essential for the claimant to identify what should have been done, although commonly this will be the basis on which a claim arises: **Cosgrove v Caesar and Howie [2001] IRLR 653**. Going further, the EAT held in **Southampton City College**

v Randall [2006] IRLR 18 that a tribunal may find a particular step to be a reasonable adjustment even in the absence of evidence that the claimant had asked for this at the time.

126. The statutory duty is to take steps which are reasonable and would avoid a substantial disadvantage to which an employee is subject. The duty is not to investigate or consider what steps should be taken: **Tarbuck v Sainsburys Supermarkets [2006] IRLR 664**. Nonetheless, the EAT in that case issued a warning to employers of the dangers of failing adequately to consider possible adjustments: ***"..it will always be good practice for the employer to consult and it will potentially jeopardise the employer's legal position if he does not do so because the employer cannot use the lack of knowledge that would have resulted from consultation as a shield to defend a complaint that he has not made reasonable adjustments."***

127. This is advice echoed in the **EHRC Code of Practice on Employment (2011) (CoP) at para 6.32**, where it states: ***"It is a good starting point for an employer to conduct a proper assessment, in consultation with the disabled person concerned, of what reasonable adjustments may be required"***.

128. The two-stage burden of proof contained in s.136 EqA applies equally to reasonable adjustments claims. If the burden shifts at the first stage, a failure by the employer to discharge the burden at the second stage must result in the claim being upheld. Its particular application to reasonable adjustments was discussed by the EAT in **Project Management Institute v Latif [2007] IRLR 579** where it held: ***"…the claimant must not only establish that the duty has arisen, but that there are facts from which it could reasonably be inferred, absent an explanation, that it has been breached. Demonstrating that there is an arrangement causing a substantial disadvantage engages the duty, but it provides no basis on which it could properly be inferred that there is a breach of that duty. There must be evidence of some apparently reasonable adjustment which could be made".***

129. **Victimisation**

Section 27 of the Equality Act 2020 reads as follows:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

130. The first question is to consider whether or not the Claimant has done a protected act as defined at sub-section (1) and then to consider whether or not the Claimant has been subjected to a detriment because of that protected act.

131. **Section 45A Employment Rights Act 1996 (ERA)** (so far as is relevant)

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker…..

(b) refused (or proposed to refuse) to forgo a right conferred on him by those Regulations.

132. The start point under this section is whether or not the Claimant has refused, or proposed to refuse, to forgo a right conferred on him by the Working Time Regulations 1998. If he has then the Claimant has aright not to be subjected to any detriment on the ground that he has foregone or proposed to forgo that right.

133. Section 48(2) of the ERA makes it clear that it is for the employer to show the ground on which any act or deliberate failure to act was done. In order to show that it needs to show that it played no part whatsoever in the decision that was taken.

133. **Conclusions**

We start with the 2018 claim. The first claim under consideration is the section 15 Equality Act claim wherein the Claimant asserts he has been discriminated against because of something arising from his disability.

134. For ease of reference these allegations are set out again:

Discrimination Arising From Disability (section 15 Equality Act 2010)

2. Were the following "something arising in consequence of C's disability?

a. C's difficulty in working 6 10-hour night shifts a week.

b. C's inability to work in a tunnel or on the north side of the Woolwich ferry.

c. C's inability to, or difficulty with, travel to R's head office for a grievance meeting.

3. If so, did R treat C unfavourably because of any of those things, when it:

a. Failed to deal with his 17 August 2018 and 19 September 2018 grievance properly?

b. Failed to pay him an enhanced rate of pay from 1 January 2019?

4. If so, has R shown that the alleged unfavourable treatment was a proportionate means of achieving a legitimate aim. So far as 3 (b) is concerned the Legitimate Aim relied upon is (i) Giving effect to the Respondent's agreement with its client, under which payment of the enhanced rate of pay was contingent upon security guards being willing and able to work on both sides of the River Thames; (ii) Maintaining operational flexibility, by ensuring that security guards could meet the Respondent's client's requirements on either side of the river. It was proportionate because (i) there was no other way of giving effect to the agreement with the Respondent's client, or of ensuring the desired operational flexibility; (ii) the disadvantage to the Claimant (if any) was minimal, as the Claimant had a number of means of accessing the northern terminal and thereby qualifying for the enhanced rate of pay.

5. The Respondent does not rely on the statutory defence so far as 3(a) is concerned.

6. Alternatively, has R shown that it did not know, and could not reasonably have been expected to know, that C had the disability?

135. The first allegation of unfavourable treatment is that the Respondent did not deal with his August and September grievance "properly". The Tribunal accepts that there was a delay before the first invitation letter which has not been adequately explained. Mr Draber was appointed on 30 August and did not do anything until 13 September when he sent the first invitation. Whilst the tribunal are mindful that in any workplace there are many things to deal with on a day-to-day basis and the Claimant is but one cog in the working wheel as opposed to the centre point the communication with the Claimant could have been more timely and the delay simply increased the Claimant's dissatisfaction (which was already exceptionally high) against the Respondent.

140. Having said that the Claimant was invited to a meeting shortly thereafter which he declined to attend. Prior to that invitation there was nothing that had been said that would suggest the claimant could not travel the 14.5 miles to Head Office and when the Claimant refused citing his medication he was not forced to attend there. Mr Draber made a sensible and reasonable referral to Occupational Health and invited the Claimant to attend for a second time via a taxi pending that referral. In the tribunal's view a taxi door-to-door at the Respondent's expense would have ameliorated any objection medical or otherwise the Claimant could put forward. In fact, the OH report later stated that there were no travel restrictions for the claimant at all and Mr Draber tried to have a meeting at a venue only 4 miles away from the Claimant's house.

141. It was the Claimant who called off the grievance and so the grievance was only live between 17 August and 29 October. The grievance could and should have been completed by 28 September but the Claimant refused to attend which led to it not being completed. The Tribunal accepts the evidence from the OH report that the Claimant did not have trouble travelling and so could have attended Head Office notwithstanding his medication. There is no medical evidence supporting the Claimant's position and so and in any event the taxi offer was a perfectly reasonable one which would have removed any barrier caused by the Claimant's health or medication. We reject the Claimant's assertion that he was unfit to travel because of his disability.

142. Any failure to conduct the grievance "properly" is therefore limited to the initial delay in responding to the grievance. That is the full of the grievance not being dealt with properly. We are quite satisfied that this primarily down to pressure or work and certainly the delay did not arise from the Claimant's disability. We do not accept that the claimant was unable or would have had difficulty to going to Head Office at all and/or especially by taxi. That claim fails as a section 15 EqA claim.

143. Factually it is correct that the Claimant was not paid an enhanced rate of pay from 1 January 2019. We accept that he wanted to be paid at the higher rate and accordingly that amounts to unfavourable treatment.

144. The Claimant was not paid it because he would not work at the North Terminal. The precise form of something arising in consequence is the **"inability to work in a tunnel or on the north side of the Woolwich Ferry"**. We are mindful that the Claimant is a litigant in person, despite his suggestion in correspondence with the Respondent that he is a law student, and so we are prepared to be flexible about the construction of this as it is clear that what the Claimant was really saying was that he could not work at the North side because he could not use the tunnel which would be the most convenient way of going on account of his claustrophobia which had arisen at the same time as the diagnosis of his hypertension.

145. We have received no evidence that claustrophobia is a manifestation of the hypertension and there is no evidence to say that claustrophobia is a side effect of the medication. The Claimant links the two but there is no medical evidence in support of the hypertension or the medication causing it. Further it makes no sense that the claustrophobia only came on at the point of diagnosis. The Claimant cannot have just had hypertension on 17 August for the first day. He must have had the condition before and he did not suffer from claustrophobia then. It is possible that the Claimant is exaggerating his claustrophobia but on the balance of probabilities we are prepared to accept he does have the condition. We are not prepared to accept that it is part of the disability however in the absence of clear medical evidence.

146. In any event the claustrophobia of itself was not a good reason not to work at the North Side Terminal. All it does is prevent one means of getting to the North Terminal via the Tunnel. The Claimant could have accessed the north side via the ferry itself or have driven round by roads with a longer commute. We are not satisfied that his disability prevented the Claimant working at the North side. We form the view that the Claimant simply was not prepared to consider the alternative means available which were perfectly reasonable and ultimately he was not paid the supplement because of his refusal to be flexible which did not arise from his disability. This section 15 claim fails.

147. In any event we are satisfied that the legitimate aims set out by the Respondent in their statutory defence are made out on the facts and consider that asking the Claimant to work there one night a week was a proportionate means of achieving those aims especially as there were adequate alternatives to the tunnel to get across the river such as the ferry itself which would have delivered the claimant just before his shift started and/or driving round.

148. The Claimant's difficulty in working six ten-hour shifts need not be considered further because no unfavourable treatment was linked to that.

149. We now move onto the Reasonable Adjustment claims which were pleaded as follows:

7. Did R not know and could it not reasonably have been expected to know that C was a disabled person?

8. A 'PCP' is a provision, criterion, or practice. Did R have the following PCP(s):

a. That C SHOULD travel to R's [Mitie's] head office at Limeharbour Court for a grievance hearing (letters of 13 September 2018 and 9 November 2018?

b. That C work 50 hours a week rather than 40 hours?

9. Did any such PCP put C at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled at any relevant time?

10. If so, did R know or could it reasonably have been expected to know that C was likely to be placed at any such disadvantage?

11. If so, were there steps that were not taken that could have been taken by R to avoid any such disadvantage?

150. The Respondent should have been alerted to the fact that the Claimant could be a disabled person when it received notice that the Claimant had such a high blood pressure reading on 17 August 2018 even if the precise restrictions, if any, would not have been neither clear nor obvious.

151. The Reasonable adjustments claim fail. There was no PCP that the Claimant should travel to Limeharbour Court for the grievance hearing. The Claimant was asked to attend there but he was not compelled to do so. When the claimant said he could not get there by his own steam he was offered a taxi and when that was declined he was offered an alternative venue only four miles away from his home.

152. In any event as stated earlier we do not accept that the Claimant could not travel to Head Office and so there was not the required disadvantage. He did not want to travel there as opposed to not being able to. The OH report states that there were no travel problems arising from the condition or the medication and we note he was able to travel to and from work regularly.

153. Further, in any event, upon being alerted by the Claimant that he could not travel to Head Office which the Respondent could not initially reasonably have anticipated, the Respondent did make adjustments that were reasonable by offering a taxi and/or offering to hold the grievance meeting in Abbey Wood. That Reasonable adjustment claim fails for those reasons.

154. There was no PCP that the Claimant work 50 hours and not 40. The Claimant started by working 60 hours. On 17 August he unilaterally reduced it to 50 and that was tacitly accepted by the Respondent in that they made other arrangements to cover that Friday shift. From January 1, 2019 the Claimant lost his Sunday shift because he would not work the North side and thereby further reduced it down to 40 hours from that point on and never returned to 50. Before January 1 the situation was from OH that there might be a need to reduce the hours in the future but not that it was needed at that time. The Claimant has produced no advice from a doctor that he should reduce his hours because of medical need. The best he has is that he told a doctor that he wanted to do it and the doctor repeats that request. The doctor does not assert there is a medical need for it.

155. The Respondent did not have a PCP that the Claimant should work 50 hours after 1 January. They appear to have accepted that he was working 40 hours as the Claimant simply did not work the Sunday shift on the North side. The Claimant unilaterally reduced from 60 to 50 upon the diagnosis of his condition and then reduced it from 50 to 40 at the start of the year when he decided he did not wish to work North of the river. Whilst the respondent would have wanted him to do as many hours as he could they did not take any steps to force the issue. There was no such PCP applied.

156. In any event, before that point, the Claimant asserted he was content and perfectly able to work 50 hours. Even if we have erred in concluding there was no PCP we have no evidence that any provision to work 50 hours placed the Claimant at the required disadvantage and in any event from January 2019 the adjustment, if one was required, was made. The fact that it also fitted in with operational requirements is irrelevant but from that point on the Claimant worked 40 hours.

157. The Reasonable adjustment claims are not well-founded and are dismissed.

158. The Claimant brings detriment claims undersection 45A (1) (b) as follows:

24. Did R subject C to a detriment by:

a. Not handling his grievance seriously in August / September 2018?

b. Denying C a period of extended annual leave when C's wife was pregnant?

25. Was that done on the ground that C refused to forgo a right conferred on him by the Working Time Regulations 1998 when he revoked his agreement to opt out of the 48-hour working week?

159. The start point is that the Claimant needs to show that he has "***refused or proposed to forgo a right conferred on him by the (Working Time) Regulations (1998)***". The Claimant has a right not to work more than 48 hours per week under **Regulation 4** save with written agreement. The Claimant sought to withdraw that agreement although that request was equivocal as he still wanted to work 50 hours. In our view the Claimant does meet the condition precedent when he proposed to forgo his right to opt out in the early part of 2018.

160. We do not consider that there was any link whatsoever between his proposal to remove his waiver to work more than 48 hours and the grievance. The number of hours he worked was an issue between him and his line manager. Although the wording used in this allegation differs from that in the earlier section 15 claim we are satisfied that there is no difference in real terms between taking a grievance seriously and dealing with it properly. The detriment seems the same and we treat them as such.

161. There is no evidence to suggest that either HR or Mr Draber knew anything about the Claimant's request to reduce his hours and in any event we are quite satisfied that the delay at the start of the grievance which in our view would be the only basis for suggesting that it had not been taken seriously was on account of the many matters going on at that time and the busy environment in which all worked. Although unfortunate a delay at the outset of a grievance is far from unusual.

162. We are quite satisfied that had no bearing whatsoever on the alleged 2018 detriments as the enhanced rate was not paid because the Claimant refused to work on the North side and therefore did not fit with Briggs' preconditions for the pay rise. It had nothing to do with the previous issues about working hours. That claim is dismissed.

163. The situation is somewhat different in respect of the refusal of the extended holiday leave the Respondent did reject the Claimant's request for three weeks leave instead offering him 2 week's leave. As stated the Claimant's contract is silent on the issue but in the handbook at page 261 of the bundle it states:

"Normally people can take up to two weeks of annual leave at one time. We also allow people who have worked with mighty for longer than one year to request a longer period of absence from work in special circumstances such as to attend events outside the UK or to fulfil personal commitments. Such requests may be made once in any 12-month period and would be authorised in line with business requirements".

164. It is clear however that Mr Holmes rejects the three-week holiday and at that time the Claimant had not been with the company one year. We do not see Mr Holmes as being very flexible or pointing out to the claimant that if he applied post 17 August 2018 he would be obliged to consider it on a discretionary basis. We consider that he did not do so because of his irritation with the Claimant at this point who he perceived as being a difficult employee for a considerable period. We form the view that at least part of that irritation was caused by the Claimant being awkward about the hours he was going to do and suggesting that he was going to opt out of his opt out! Whilst that did not go anywhere ultimately it was something he proposed and which Mr Holmes had to deal.

165. We are not satisfied that the Respondent has satisfactorily explained itself in this area. Indeed, it has not really explained itself at all. We are satisfied that Mr Holmes was motivated by the difficult worker the Respondent had become and part of the difficulty was on account of issues arising from the hours and whether he was going to opt out.

166. In the context of the strained relationship between the two men we are satisfied that his failure to apply the handbook calls for an explanation in order to satisfy the obligation placed upon the Respondent pursuant to the requirement at section 48(2) of the Employment Rights Act 1996. We consider that this claim is made out and we will deal with matters of compensation later in these Reasons.

167. **Unlawful Deduction of Wages**

23. Did R make unauthorised deductions from C's wages by:

a. Failing to pay him an enhanced rate of pay from 1 January 2019 (including paying holiday pay at the lower rate)?

b. Failing to pay him for time spent waiting on 21 June 2018?

168. Dealing with the first of those (23a), we consider that there was no unlawful deduction of wages. Section 13 (3) of the Employment Rights Act states that the wages need to be "properly payable" to the Claimant. The pay rise on 1

January was available to the Claimant if he was prepared to work flexibly i.e., to do shifts on the North side of the river. As the Claimant did not meet that precondition the wages were not properly payable and so there has been no deduction. That claim fails.

169. The second unlawful deduction of wages claim (23b) is more carefully nuanced and we consider on balance that if an employer asks an hourly employed employee to attend two hours before his shift starts to undertake a task that has been delegated to the Respondent (i.e., gaining the licence) then we consider that that should be deemed working time and the claimant should be paid.

170. It is not relevant in our view as to whether Mr Holmes was late or not. We find that the Claimant should have been paid two hours wages for that day and as the claim has been lodged in time we make a declaration to that effect. We are satisfied that the payment should have been made to the Claimant on 13 July. ACAS EC was started on 19 September and ran to 16 October and the claim was brought in time later that month. The Claimant is awarded £17.10 less any appropriate deductions for tax and national insurance.

171. We now move to the 2021 claim. We start with the claims that are still contested.

172. The first matter is to determine when the Claimant was dismissed as there is no actual letter of dismissal within the bundle. The Claimant asserted that he was dismissed on 21 December 2020 and the Respondent stated his dismissal was on 31 December 2020. We consider that the Claimant was told on 21 December that he would no longer work for the Respondent on 31 December 2021. That may have been on the basis that he would be transferred (which was an erroneous as it turned out) but the Claimant certainly understood that he would be no longer working for the Respondent in 2021. The Respondent may not have thought they dismissed him on that date but we find 31 December 2021 to be the effective date of termination.

173. **Direct Disability Discrimination**

The only direct disability discrimination claim is the Claimant's dismissal. The reason for the dismissal was solely the transfer of undertaking. We note that both the Claimant (a disabled man) and Mr Draoulec were dismissed by letters identical in all but name and within two minutes of each other. The Claimant has relied upon a hypothetical comparator but it would appear to the tribunal that we have an actual non-disabled comparator who was treated exactly the same because of the Briggs contract coming to an end. We believe that a hypothetical comparator would have been treated the same and

the reason was the ending of the Woolwich Ferry contract. The direct discrimination claim is, without hesitation, dismissed.

174. **Victimisation**

The victimisation claim is as follows:

15. Did C do the following protected act, namely bringing and continuing with the 2018 claim?

16. Did R do the following things:

a. Fail to pay C an enhanced rate of pay (£10.55 per hour) from January 2019?

b. Dismiss C by letter dated 21 December 2020?

c. Send the letter of dismissal on 21 December 2020 at 9.18pm, which was late and outside of working hours?

17. By doing so, did R subject C to detriment?

18. If so, was it because C did the protected act?

19. Did C do the following protected act, namely bringing and continuing with the 2021 claim?

20. Did R delay in sending C's P45 to him and send it late in the evening on 26/27 January 2021?

21. By doing so, did R subject C to detriment?

22. If so, was it because C did the protected act?

175. The victimisation claims rely upon the issuing and continuing of the claims and we accept that those at 15 and 19 are both valid protected acts. There is however no link whatsoever between the protected acts and the alleged detriments. We note that Mr Draulec who had not brought a claim was treated in precisely the same way and we are quite satisfied that the 21 December letter of dismissal was sent solely because the Briggs contract was ending and that the timing of the email was simply a manifestation of the long hours which were being put in at the time. We accept the Respondent's clear evidence on this point.

176. We are also satisfied that this was the reason for sending the P45 at the time it was and certainly do not accept that it was linked to the bringing of 2021 claim. We accept Ms Skorek's evidence that the Claimant's P45 followed normal procedure.

177. We have already explained that it was the Claimant's refusal to work flexibly and north of the river that led to him not getting the pay uplift and are again satisfied that the bringing of claims made no difference whatsoever. The victimisation claims are rejected.

178. **Holiday Pay**

The Claimant asserts he is due 20 days annual leave. The Respondent has taken us through the basis for why they contend it was 17 by an analysis of the leave cards. We prefer the Respondent's analysis and the documentation thye have produced supports their figure. Accordingly, the Claimant will be paid 17 days holiday pay or 170 hours pay at the prevailing hourly rate (**1793.50 at £10.55 per hour**).

179. **Wrongful Dismissal**

The Claimant was entitled to 4 weeks' notice or 28 days' notice. He remained furloughed for 10 days. Had he worked until the end of his notice (which would have been 19 January) he would have worked a further 11 days so that yields a sum of 110 hours - **£1160.50**.

180. **Regulation 7 Working Time Regulations 1998**

The Claimant brought a claim under this provision in respect of health assessments of night workers. Such a claim comes under the auspices of the Health and Safety Executive pursuant to Regulation 28 of the Working Time Regulations and the Tribunal has no jurisdiction to consider any application under this statutory provision

180. Finally, we have the unfair dismissal. The Claimant worked 40 hours a week at £11.55 an hour. His gross wage was £462 per week. At the point of dismissal, he had been working for three years and so his basic award is **£1,386**.

181. We do not consider that the Claimant is entitled to any loss of earnings in a compensatory award. His primary job as a security officer for Mar ceased to exist on the day of his dismissal and he had no role to undertake on account of the transfer of undertakings. He was dismissed because his contract came to an end.

182. We are satisfied that whilst he was not consulted about alternative roles within the Respondent, his unequivocal evidence was that he would have only taken a security role in the immediate geographical area and the Respondent's evidence, which we accept, was that there was nothing available closer than Hammersmith, West London which the Claimant confirmed in evidence he would not have taken. There were no other roles that he could have undertaken and even with consultation he would have been dismissed on the same date.

183. We have considered whether the Claimant should be entitled to an award for loss of statutory rights which is normally values at around £500. We have found that the Claimant would have been fairly dismissed on 31 December 2021 even if consultation had taken place. The issue was considered in **Puglia v C James and Son (1996) ICR 301**. The purpose of an award for loss of statutory rights is to reflect the fact that a Claimant will have to work for two years in fresh employment before reaching the qualifying threshold for unfair dismissal rights. As we have found that the Claimant would have been dismissed at the same time even if the process was conducted fairly means that, even if there had been no unfairness, he would have found himself in the same position where he was looking for a new job with no statutory protection for two years.

184. There is no compensatory award and the Claimant is awarded **£1,386** for the unfair dismissal.

185. We finally come to deal with the award for Injury to Feelings in relation to section 45A claim. It is clear that the Claimant was unhappy and upset with the Claimant about a substantial number of matters which have been the subject of this claim and indeed which were not the subject of this claim. In those circumstances whilst we are able to identify that the Claimant was unhappy at the refusal of his three weeks leave he ultimately chose to take no leave at all. We are satisfied that there was some effect on the Claimant's feelings but it was just another layer upon injuries he felt for which no compensation is available. It was a temporary exacerbation of the situation.

186. We invited the Claimant to make representations about the actual effect this specific breach caused to the Claimant but he declined to do so. The Tribunal considers that an award at the very bottom of the scale is appropriate in all the circumstances where we are satisfied that there was a small effect on the Claimant. The award is **£1,000**.

Employment Judge Self
25 July 2022