



## **EMPLOYMENT TRIBUNALS (SCOTLAND)**

**Case No: 4107379/2020 & 4109435/2021**

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**Held by Cloud Video Platform (CVP) on 4-8 & 12 April 2022**

**Employment Judge: A Strain  
Members: Dr S Singh & Mr G Coyle**

10 **Mr L Isah**

**Claimant  
In Person**

**Secretary of State for The Home Department**

**Respondent  
Represented by:  
Ms McGrady -  
Solicitor**

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### **JUDGMENT OF THE EMPLOYMENT TRIBUNAL**

20 The Judgment of the Employment Tribunal is that:

1. the Claimant's claims of direct discrimination, victimisation and harassment are unsuccessful and are dismissed;
2. the Respondent is ordered to pay the Claimant £1000 in respect of accrued holiday pay.

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### **REASONS**

#### **Background**

3. The Claimant represented himself. He asserted claims of Direct Race Discrimination, Victimisation and Harassment under sections 13, 26 and 27 of the **Equality Act 2010 (EA 2010)** and also accrued unpaid holiday pay.  
30 The Claimant sought a Compensatory Award, damages for injury to feelings and payment as detailed in his schedule of loss.

4. The Respondent was represented by Ms McGrady, Solicitor.

5. The Parties had lodged a Bundle of Documents with the Tribunal for the purposes of the Hearing.
6. As a preliminary matter the Claimant sought amendment of the Scott Schedule he had lodged. On the second day of the tribunal the Claimant sought to make further amendment to the Scott Schedule. Both amendments were with regard to who made the racist statements founded upon and what protected acts motivated them. The amendments were allowed by the tribunal.
7. The Tribunal heard evidence from the Claimant, Gillian Cooper, Maria Dynes, Karen Ferguson, Mark Nicol and Kirsteen McCann for the Respondent.

### Findings in fact

8. Having heard the evidence and considered the documentary evidence before it the Tribunal made the following findings in fact:
- a. The Claimant is of Black African race.
  - b. The Claimant was employed by the Respondent as a Grade 3 Passport Examiner from 18 November 2019 until the termination of his employment on 8 February 2021. He worked at the Respondent's premises, HM Passport Office, 96 Milton Street, Glasgow.
  - c. The Claimant had no previous experience in the role and required training, which was provided by the Respondent.
  - d. All Passport Examiners were subject to quality checking. This referred to the percentage of the Examiner's work subject to review by a quality checker. The Examiner's individual checking rate could fluctuate from 2 to 25, 50, 75 or 100% dependent on experience and levels of competence.
  - e. New Passport Examiners were subject to a 100% checking rate until their competence levels improved.
  - f. The responsibility for altering an individual Examiner's checking rate was with the "desk trainer" and specified managers.

- g. The Respondent did not have any written policy or guidance with regard to criteria to be applied for Examiners to move from 2% checking rate upwards to 100% or downwards. Movement was, in the main, discretionary and subjective.
- 5 h. The consequences of an error by an Examiner could be serious as it could lead to a passport being issued to someone not entitled to one.

*January 2020*

- i. The Claimant was assigned to Gillian Cooper's team along with his comparator (Ms E Wood) who was a white European female and part of the Claimant's training cohort. Ms Cooper was their line manager and an Executive Officer within the Respondent.
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- j. The Claimant was assigned a "buddy" (Karen O'Brien) to assist and mentor him. This was established practice within the Respondent.

*February 2020*

- 15 k. The Claimant's checking rate was reduced to 50% on 7 February 2020. This decision was made by the lead desk trainer and on the basis of the relatively low level of errors in his work.
- l. On 24 February 2020 the Claimant's checking rate was reduced to 2%. At this time his comparator's checking rate was 50%.
- 20 m. On 24 February 2020 the Claimant made a serious error in an application which he had approved. Karen O'Brien discussed the error with the Claimant and with colleague Adam Thomas. Adam Thomas and Karen O'Brien formed the view that the Claimant did not appreciate the seriousness of the error (it could have led to a passport being issued to someone who was not entitled to one). This, along with other minor errors,
- 25 led Adam Thomas (not Karen O'Brien) to suggest to Maria Dynes (Manager responsible for checking rates) to increase the Claimant's checking rate.

- n. Maria Dynes did not increase the checking rate as she considered to do so at a time when his checking rate had just been decreased would be detrimental to the Claimant, his confidence and performance.
- 5 o. The Respondent's expect Passport Examiner's to process 125 applications per week (pro rata for part timers). This was communicated to the Claimant at his probation review meeting on 17 February 2020 (Production 14). The Respondent's do not have any written policy/targets setting out expectations for productivity.
- 10 p. In February the Claimant processed 29 and 20 applications respectively in the first two weeks (Production 10).
- q. Elspeth Donnelly was assigned in February 2020 to mentor and coach the Claimant as Karen O'Brien was leaving the team.

#### *March 2020*

- 15 r. In March 2020 the Claimant's checking rate was increased to 50% (Production 19 & 20). His comparator's rate at this time was also 50%.
- s. The Claimant's checking rate was increased due to concerns about the Claimant's performance.
- t. On 9 and 10 March 2020 the Claimant processed 7 applications. 5 of the applications had errors.

#### 20 *April 2020*

- u. On 29 April 2020 the Claimant submitted a grievance which complained that the reason for his checking rate being increased to 50% was the colour of his skin. He complained that he was being treated less favourably than white colleagues in the same team.
- 25 v. The Respondent appointed Richard Hooley (Chief Immigration Officer) to investigate the grievance. Richard Hooley interviewed the Claimant, Gillian Cooper and Danielle Nobbs (Gillian Cooper's line manager). He also considered the written evidence of the Claimant, Gillian Cooper and Maria

Dynes. He produced a 20 page Report (Production 29). The Report found that the Claimant's checking rate had not been increased by Gillian Cooper but by others acting on factual records. The Report further found that the same measures were applied consistently across the board.

5 *September 2020*

- 10 w. Following production of the Report the Claimant was invited By Helen Ray (Assurance Manager) by letter of 7 September 2020 (Production 30) to a grievance hearing on 14 September 2020. The Hearing was conducted by Helen Ray who had no prior involvement in the matter and did not know the Claimant. The Claimant participated in the grievance hearing and presented his case.
- 15 x. On 22 September 2020 Helen Ray wrote to the Claimant by email and informed him that his grievance was not upheld (Production 32). The email also sent updated Grievance Notification Form (Production 33). This form detailed the outcome of the grievance and the procedure for appeal. In particular, at Page 10 of the Form, it detailed that any appeal should be submitted to Kim Dowie (Head of Customer Experience) and at Page 12 that the whole of the Form should be submitted to the Appeal Manager.
- 20 y. On 23 September 2020 the Claimant wrote to Danielle Nobbs to complain about Maria Dynes and Karen O'Brien. This complaint related to their evidence detailed in the Report prepared by Richard Hooley. As Danielle Nobbs was on leave Kirsteen McCann (Service Delivery Manager) informed the Claimant by email of 28 September 2020 that this complaint related to the grievance, should form part of any appeal against that
- 25 grievance and were not new complaints. He was also informed that Mark Nicol (Change and Engagement Manager) had been appointed to consider the remaining elements of his complaint and would be in touch to discuss matters informally (Production 43).

October 2020

- z. On 1 October 2020 the Claimant completed a grievance appeal notification form (Production 36). He submitted this by email of the same date to a shared services email address ([pm-homeoffice@sgov.sscl.com](mailto:pm-homeoffice@sgov.sscl.com)) (Production 35). He also posted a copy to Shared Services on 1 October 2020 (Production 34). This was signed for by Shared Services on 5 October 2020.
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- aa. Mark Nicol invited the Claimant (by email of 5 October 2020) to an informal meeting to talk through the Respondent's probation policy and any "issues you may have" (Production 37). The informal meeting took place with the Claimant on 7 October 2020. He did not inform the Claimant in advance that the grievance was to be discussed. He informed the Claimant that he didn't consider the Claimant had sufficient evidence to support the allegations and should withdraw them. If he did intend to pursue them he would need to produce more specific allegations and supporting evidence.
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- bb. On 14 October 2020 Mark Nicol wrote to the Claimant and asked if he intended to proceed with the grievance (Production 41). The Claimant responded that he did and completed a grievance form (Production 48). The Claimant submitted the grievance on 23 October 2020 to Kirsteen McCann. The Claimant complained that Karen O'Brien and Maria Dynes had treated him differently from a white colleague by asking for his checking rate to be downgraded and by having concerns over his lack of understanding of a particular error he made. He also complained that Maria Dynes discriminated against him by not rejecting pressure from Gillian Cooper and Karen O'Brien to downgrade his checking rate.
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- cc. On 21 October 2020 the Claimant agreed to hit acceptable levels of output with regard to processing applications in his Probation Objective Setting Form (Production 44).
- dd. On 23 October 2020 the Claimant submitted a formal grievance against Maria Dynes and Karen O'Brien (Production 48).
- 30

*November 2020*

ee. On 2 November 2020 Kirsteen McCann wrote to the Claimant and informed him that the grievance of 23 October 2020 was not being accepted as the matters within it had been covered by the previous grievance. The Claimant was informed that if he wished to pursue the matters raised he should do so in the context of an appeal against the findings of the previous grievance (Production 52).

*December 2020*

ff. On 3 December 2020 the Claimant discussed and agreed with Karen Ferguson that he needed to increase his production levels with regard to applications in his monthly probation review (Production 55).

gg. Karen Ferguson did not have the authority to change the Claimant's checking rate. In December 2020 she approached her manager Adele Hogard to request the Claimant's checking rate be reduced. Ms Hogard had the authority to determine whether the checking rate should be changed.

hh. Kim Dowie confirmed by email of 8 December 2020 that she did not receive the grievance appeal notification form (Production 56). The appeal had been sent to shared services and not directly to her.

*20 January 2021*

ii. On 21 January 2021 Gill Straiton wrote to the Claimant and informed him that a grievance had been raised against him by Karen O'Brien (Production 57). The Claimant was invited to a formal grievance investigation interview by letter of 25 January 2021 (Production 58).

*25 February 2022*

jj. On 8 February 2021 the Claimant resigned (Production 59). As at that date the Claimant had accrued holiday leave of 88 hours which equated to £1000 (net).

## The Relevant Law

### *Direct racial discrimination*

9. Direct discrimination occurs where "*because of a protected characteristic, A treats B less favourably than A treats or would treat others*" (section 13(1), EA 2010).
10. The less favourable treatment must be because of a protected characteristic. This requires the tribunal to consider the reason why the claimant was treated less favourably: what was the Respondent's conscious or subconscious reason for the treatment?
11. The tribunal will need to consider the processes which led A to take a particular course of action in respect of B, and to consider whether a protected characteristic played a significant part in the treatment.
12. If the treatment of B puts them at a clear disadvantage compared with others, then it is more likely that the treatment will be less favourable.
13. There must be no material difference between the circumstances of B and the comparator (section 23(1), EA 2010).

### *Burden of Proof*

14. A two-stage approach to the burden of proof applies [**Royal Mail Group Ltd v Efobi [2021] UKSC 33**]:
- 20 Stage 1: can the Claimant show a prima facie case? If no, the claim fails. If yes, the burden shifts to the Respondent.
- Stage 2: is the Respondent's explanation sufficient to show that it did not discriminate?
15. The burden will shift where there are facts from which a tribunal could decide, in the absence of any other explanation that a breach has occurred. In that situation a respondent is required to show a non-discriminatory explanation for the primary facts on which the prima facie case is based [**Glasgow City Council v Zafar [1998] IRLR 36 (HL)**].
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*Victimisation*

16. Section 27(1) of the EA 2010 provides:

*Victimisation occurs where a person (A) subjects another person (B) to a detriment because either:*

5 *B has done a protected act.*

*A believes that B has done, or may do, a protected act.*

17. Section 27(2)(a) provides that bringing proceedings under the EA 2010 is a protected act.

18. Section 27(2)(d) provides that alleging (whether or not expressly) that another  
10 person has contravened the EA 2010 is a protected act.

19. Victimisation may be established where an employee is subjected to a detriment "because" the employee has done (or might do) a protected act.

20. Victimisation need not be consciously motivated. If A's reason for subjecting  
15 B to a detriment was unconscious, it can still constitute victimisation  
[**Nagarajan v London Regional Transport and others [1999] IRLR 572**].

21. A protected act need not be the main or only reason for the treatment; victimisation will occur where it is one of the reasons (paragraph 9.10, EHRC Services Code).

22. However, the protected act must be more than simply causative of the  
20 treatment (in the "but for" sense). It must be a real reason.

23. Detriment is not defined in the EA 2010. **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11** held that a worker suffers a detriment if a reasonable worker would or might take the view that they have been disadvantaged in the circumstances in which they had to work.

25 24. An "unjustified sense of grievance" is not enough [**Barclays Bank plc v Kapur (No.2) [1995] IRLR 87**].

*Harassment*

25. Section 26(1) of the EA 2010 provides:

26. *A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic which has the purpose or effect of either:*

- 5
- (i) Violating B's dignity, or*
  - (ii) Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

27. Section 26(4) EA 2010 provides:

10 In deciding whether conduct shall be regarded as having the effect referred to the following must be taken into account:

- (a) The perception of B;*
- (b) The other circumstances of the case;*
- (c) Whether it is reasonable for the conduct to have that effect.*

*Compensation*

15 28. Section 124(2)(b) of EA 2010 makes provision for the Tribunal to award compensation where it finds there has been a contravention of sections 13, 26 and 27.

29. An award in discrimination cases can include:

*i. Financial Loss*

20           Such as past and future loss of earnings.

*ii. Injury to Feelings*

30. A Tribunal may make an award of compensation for injury to feelings in a discrimination case. The guidelines for awarding compensation for injury to feelings are set out in the case of ***Vento v Chief Constable of West***

***Yorkshire Police [2003] IRLR 102 CA (updated by Simmons v Castle [2012] EWCA Civ 1039).***

31. Factors a Tribunal will take into account when assessing the level of an award for injury to feelings is the impact of the discriminatory behaviour on the individual affected rather than the seriousness of the conduct of the employer or the individual responsible for the discrimination.

**Submissions**

32. The Claimant made oral submissions at the conclusion of his case. The Respondent lodged written submissions which were spoken to.

*The Claimant*

33. The Claimant submitted that he had been racially discriminated against, victimised and harassed by reference to each of the incidents specified in his Scott Schedule.

34. He was entitled to compensation in respect of the loss of his employment and injury to feelings.

35. In so far as the holiday pay was concerned the tribunal should prefer and accept his calculation.

*The Respondent*

36. The Respondent submitted that the claims advanced should be dismissed for the reasons stated in the written submissions. In addition there was an issue of time bar in relation to the discrimination claims.

37. The Claimant had received payment of all holiday pay due and the tribunal should accept the email from the Respondent's HR Department setting out the calculation.

**Observations on the evidence**

38. The Claimant had cause for concern with regard to the apparent lack of clarity and transparency in the Respondent's assessment process. There was no

written policy detailing how examiners moved up and down the checking rates. The Respondent's witnesses were clear that much was left to discretion and subjective assessment.

39. The position was broadly the same when it came to productivity targets. Nothing was written down. Targets were "known" and communicated to individuals.
40. The tribunal understood and appreciated why the Claimant had his concerns about the reasons for his checking rate being increased and the productivity targets set however he was unable to present anything more than speculation/suspicion on his behalf that the motivation for this was racial discrimination.
41. The Claimant's suspicion and distrust was reflected in his evidence. The dates, acts and people involved in the allegations were a moving feast and were amended as late as the first and second days of the tribunal hearing to "fit" with the case to be asserted.
42. There were a large number of unconnected perpetrators within the Respondent all of whom the Claimant asserted were acting in a discriminatory manner towards him due to his race.
43. The Claimant asserted acts allegedly undertaken by individuals which were clearly contradicted by the evidence.
44. The tribunal doubted the credibility and reliability of the Claimant's evidence in light of this.
45. The tribunal found all of the Respondent's witnesses to be, on the whole, credible and reliable.

## 25 **Decision and Reasons**

46. The Tribunal then considered the various claims advanced.

*Direct Race Discrimination*

47. The Tribunal considered the incidents in the Scott Schedule that the Claimant asserted were alleged less favourable treatment on the basis of his race:

48. Allegation 1 – *on or about 25 February 2020 Gillian Cooper caused my checking rate to be increased from two percent to one hundred percent without justification. The reason Gillian Cooper increased my rate was because of my race, colour of my skin, and ethnic origin.*

49. The Claimant uses Mary Wood as a comparator for this allegation.

50. The tribunal found that Gillian Cooper did not change the checking rate. Karen O'Brien raised concerns about the Claimant's performance with Maria Dynes. Maria Dynes did not change the Claimant's checking rate at this time either.

51. The Claimant's checking rate had not changed at this time. It remained at 2%. The tribunal did not consider the allegation to have been established.

52. Allegation 2 - *Karen O'Brien sometime in September 2020 stated to Maria Dynes that I did not understand the consequences of some of the errors I made during my training. This is a racist trope that means that my understanding of English is limited because I am black African.*

53. The tribunal accepted Karen O'Brien's evidence that she had left the Claimant's team in March 2020 and had no further involvement with him. The tribunal find and accept that she did not make any statements or representations to Maria Dynes in September 2020. The tribunal also accepted and found (with regard to the comments made in February 2020) that she thought that the Claimant understood English perfectly well and that she was concerned that he did not appreciate the seriousness of errors he was making. The latter was her point of concern and motivation to report to Maria Dynes in February 2020.

54. The tribunal did not consider the statement to Maria Dynes related to the Claimant's race or that it constituted less favourable treatment in any event.

It related to the Claimant's performance. His comparator would have been treated in the same manner.

55. Allegation 3 - *Karen O'Brien sometime in March 2020 pressured Maria Dynes into increasing my checking rate without justification. Karen O'Brien's action was motivated by her hatred for me due to my race, colour of my skin and ethnic origin. Mary Wood, a white female trainee did not face this detriment.*
56. The tribunal considered that Karen O'Brien did not pressure Maria Dynes into increasing the Claimant's checking rate. It was clear from both their evidence that Maria Dynes was 3 grades more senior to Karen O'Brien and highly unlikely that Karen O'Brien could exert pressure on Maria Dynes in any event. Furthermore, it appeared that the Claimant was relying on the comments made by Karen O'Brien to Maria Dynes in February 2020 referred to above. The tribunal did not consider that Karen O'Brien's comments were in any way motivated by race nor did she, in fact, ask for the Claimant's checking rate to be increased. The request to do so was by Adam Thomas.
57. When the checking rate was increased this was due to concerns about the Claimant's performance. His comparator would have been treated in the same manner.
58. Allegation 4 - *Maria Dynes in March 2020 succumbed to pressures from Karen O'Brien to increase my checking rate without justification. Maria Dynes participated in actions that made me suffer detriment due to my race, colour of my skin and ethnic origin.*
59. The tribunal have found that Karen O'Brien did not exert pressure on Maria Dynes to increase the Claimant's checking rate. Further, the tribunal found that Maria Dynes did not, in fact, increase the Claimant's checking rate in February 2020. Maria Dynes refused to do so.
60. In February 2020 Adam Thomas and Karen O'Brien approached Maria Dynes to raise their concerns over the fact the Claimant was making errors and did not appear to understand the severity of these errors. It was Adam Thomas (not Karen O'Brien) who suggested that the Claimant's checking rate should

be increased. Maria Dynes refused to do so at that stage as she thought it might be detrimental to the Claimant's progress.

61. The Claimant's checking rate was increased in March 2020 to 50% due to concerns about his performance. His comparator would have been treated in the same manner. He did not suffer less favourable treatment.

*Allegation 5 - Resignation*

62. The Claimant alleged his resignation was as a consequence of the acts of direct racial discrimination referred to above.

63. The tribunal has found that the Claimant's allegations of direct race discrimination are unsuccessful. His claim for direct race discrimination on the basis that he resigned due to these alleged incidents is accordingly unsuccessful.

*Victimisation*

64. Allegation 1 - The Claimant asserts that he raised a grievance against Gillian Cooper (this was the protected act). He asserts he suffered detriment in that "During October and November 2020, Mark Nicol and Kirsteen McCann refused to deal with my racial discrimination grievance against Karen O'Brien and Maria Dynes."

65. The tribunal accepted Mark Nicol's evidence that he did not know of the grievance against Gillian Cooper. On the basis of this evidence the allegation against Mark Nicol cannot be successful.

66. The tribunal found that Kirsteen McCann did know of the grievance against Gillian Cooper but dealt with the racial discrimination grievance against Karen O'Brien and Maria Dynes in accordance with advice from HR and was not in any way motivated by (*because*) the fact that the Claimant had brought a grievance against Gillian Cooper. The tribunal accepted her explanation that she came to the conclusion that the Claimant's grievance against Karen O'Brien and Maria Dynes did not pass grievance consideration because the matters raised in that grievance had already been investigated and a decision

had been reached in the grievance against Gillian Cooper. Kirsteen Mccann explained to the Claimant that he had the option of submitting an appeal against his first grievance and that this was the appropriate way for him to raise the issues complained of.

- 5 67. The tribunal accordingly find that the allegation of victimisation by Kirsteen McCann is unsuccessful.

Allegation 2 - the Claimant asserts that he had lodged an Employment Tribunal claim (the protected act). The Claimant asserts that he suffered detriment because of that protected act as *“On 5 October 2020, Kim Dowie, Head of Customer Experience, refused to deal with my appeal against the outcome of my grievance against Gillian Cooper.”*

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68. The tribunal found that Kim Dowie had never received the Claimant’s appeal. Accordingly, this allegation of victimisation by her is unsuccessful.

Allegation 3 - the Claimant asserts that The Claimant alleges that he had lodged an Employment Tribunal claim (the protected act). Mark Nicol had threatened the Claimant (as set out in the allegation of harrassment below) and the Claimant suffered detriment because of that protected act as *“Gill Straiton on 21 January 2021 sent me a letter notifying me of a formal grievance investigation which was the fulfilment of Mark Nicol’s threat to me.”*

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- 20 69. The letter of 21 January 2021 to which the Claimant referred was the letter notifying him that a grievance had been lodged against him by Karen O’Brien.

70. The tribunal accepted Mark Nicol’s evidence that he did not know that the Claimant had lodged an Employment Tribunal claim and that he had nothing to do with the grievance lodged by Karen O’Brien against the Claimant.

Allegation 4 - The Claimant alleges that he had lodged an Employment Tribunal claim (the protected act). The Claimant alleges that he suffered detriment because of that protected act as *“on 7 December 2020, Karen Ferguson refused to reduce my checking rate to severtyfive percent even though I had met the requirement”*.

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71. The tribunal accepted Karen Ferguson's evidence that she did not know that the Claimant had lodged an Employment Tribunal claim and had, in fact, tried to get his checking rate reduced. Karen Ferguson did not have any power or authority to change the checking rate.

5 72. The tribunal accordingly find this allegation of victimisation to be unsuccessful.

#### *Harrassment*

73. The Claimant asserts that on 14 October 2020, *"Mark Nicol called me to his office and asked me to drop my grievance against Karen O'Brien and Maria Dynes. Failing which, he would consider my grievance as malicious in which case I would suffer the consequences and that I should not expect to continue to work at HM Passport Office Glasgow if I proceed with my grievance."*

74. Mark Nicol had called the Claimant into a meeting without notification that the grievance was to be discussed and did try to persuade the Claimant not to pursue his grievance against Karen O'Brien and Maria Dynes. Whilst the tribunal is critical of this approach it did not find that Mark Nicol's actions were in any way related to a protected characteristic. The tribunal accepts Mark Nicol's evidence that he did not think there was sufficient evidence to support the Claimant's allegations.

#### *Time bar*

20 75. As the tribunal found that the discrimination claims were unsuccessful there was no need to address the issue of time bar.

#### *Holiday pay*

76. The Claimant produced a breakdown of his accrued and used holiday pay at termination. The tribunal accepted the calculation set out by the Claimant at page 310 of the joint bundle. The Respondent's evidence in response to this calculation was contained within an email from HR (page 311). This email simply asserted that the Claimant's last 3 payslips had been checked and what his annual leave allowance was. This evidence was deficient and

unsatisfactory. It did not detail leave accrued, leave taken and any balance. The tribunal preferred and accepted the Claimant's evidence and calculation.

77. The tribunal accordingly award the Claimant the sum of £1000 in respect of accrued and outstanding holiday pay.

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Employment Judge: Alan Strain  
Date of Judgment: 10 August 2022  
Entered in register: 23 August 2022  
and copied to parties

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