Case Number: 2204300/2020
and 2203378/2021

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr R Taiwo		Mitie Limited

Heard at: London Central (by video) **On**: 5, 6, 7, 8 and 11 July 2022 and (in chambers) on 8 August 2022

Before: Employment Judge H Stout
Tribunal Member D Carter
Tribunal Member D Keyms

Representations
For the claimant: Esther Godwins (solicitor)
For the respondent: Benjamin Uduje (counsel)

JUDGMENT

The unanimous judgment of the Tribunal is that:

(1) The Claimant's claim of unfair dismissal under Part IX of the ERA 1996 is not well-founded and is dismissed.
(2) The Claimant's claims of harassment under ss 26 and 40 of the EA 2010 are dismissed.
(3) The Claimant's claims of working time detriment under s 45A of the ERA 1996 are not well-founded and are dismissed.
(4) The Claimant's claims of victimisation under ss 27 and 39 of the EA 2010 are dismissed.
(5) The Claimant's claim of wrongful dismissal is dismissed.

REASONS

1. Mr Taiwo (the Claimant) was employed by Mitie Limited (the Respondent) from 21 April 2018 until he was dismissed summarily on 15 December 2020 for what the Respondent contends was gross misconduct. In these proceedings, the Claimant claims (in outline) that his dismissal was unfair and that during his employment, and in relation to his dismissal, the Respondent discriminated against him because of his race or disability, subjected him to detriments for asserting his right to annual leave and victimised him.

The type of hearing

2. With the consent of the parties, has been a remote electronic hearing by video under Rule 46.

3. The public was invited to observe via a notice on Courtserve.net. No members of the public joined, but there were a number of observers connected to the parties. There were major issues with connectivity on the afternoon of Day 4, which delayed the hearing while they were resolved, and a fire alarm at the Claimant's counsel's location meant that the hearing had to be adjourned at 3.30pm on Day 4.

4. The participants were told that it is an offence to record the proceedings. The participants who gave evidence confirmed that when giving evidence they were not assisted by another party off camera.

The issues

5. The issues to be determined had been agreed to be:

1. Race Discrimination

1.1. The Claimant is Black Nigerian African. He relies on racial grounds of his race and ethnic origin.

2. Disability Discrimination – Section 6 Equality Act 2010 (EQA)

2.1. The Respondent concedes that the Claimant suffered from physical impairments (1) haemorrhoids from 2008 (2) lower back pain from 2011 and agrees these conditions are disability within the meaning of section 6 of the Equality Act 2010.

2.2. From what date did the Respondent have knowledge of the Claimant's disability?

3. Harassment - s26 EQA

3.1. Did the Respondent engage in the following unwanted conduct on the grounds of the Claimant's race or disability:

3.1.1. On or around October 2018, Mr Funmilayo said to the Claimant this is

not a village meeting (related to race)

3.1.2. On or around 11 March 2019 and 24 July 2019 Mr Funmilayo subjecting the Claimant to a disciplinary process about his extended toilet use despite knowing about the Claimant's medical condition (related to disability)

3.1.3. On or around 3 October 2019, Mr Roney laughing at the Claimant when he disclosed his medical condition (related to disability)

3.1.4. On or around 15 October 2019, Mr Funmilayo discussed the Claimant's confidential medical condition with colleagues and the reason for his absence (related to disability)

3.1.5. On or around 17 October 2019, the Claimant received a get-well card with several messages in the card from colleagues making fun of the claimant for having what they called bum surgery (related to disability)

3.1.6. On or around November 2019 when the Claimant returned to work and until the submission of his ET1 on 16 July 2020, whenever the Claimant would go to the toilet, his colleagues would laugh at his bum and make fun of him about his medical condition (related to disability)

3.1.7. On 28 February 2020, Mr Aslam called the Claimant a nigger and gandu (related to race)

3.1.8. Between 16 July 2020 and 10 November 2020, Mr Funmilayo and Mr Aslam would make snide remarks about claimant when he went to toilet. (related to disability)

3.1.9. On 7 November 2020, Mr Aslam called the Claimant nigger and gandu (related to race).

3.2. If yes, having regard to all the circumstances including the perception of the Claimant is it reasonable for the conduct to have the effect of violating the Claimant's dignity or creating an intimidating or offensive environment for him.

4. Working Time Detriment – Section 45A Employment Rights Act 1996

4.1. Did the Claimant refuse to forgo his right to annual leave as conferred on him by Working Time Regulations 1998 and did the C allege that the employer had infringed such a right

4.2. Did the Respondent subject the Claimant to the following detriments due to this refusal and the C's complaints about the refusal to grant him holidays:

4.2.1. Between October 2018 until 14 July 2020, Mr Funmilayo would refuse the Claimant's holiday requests, or would make it difficult for the Claimant to get holiday or would tell the Claimant take the holiday as unpaid

4.2.2. Would only give the Claimant an 8-hour working shift instead of the 12-hour shift he started with. The Claimant was not placed on 12 hour shift until April 2019

4.2.3. Refused to pay the Claimant the supervisor's rate when the Claimant covered supervisor position

4.2.4. Made it difficult for the Claimant to work overtime, by refusing the Claimant when he requested overtime, not always paying overtime and not offering overtime to the Claimant when it was available

4.2.5. Between September2018 to March 2020, subjected the Claimant several times to disciplinary process on false allegations

4.2.6. Did not investigate or subject Mr Aslam to disciplinary action when Claimant reported Mr Aslam to him for calling him nigger and gandu.

5. Victimisation

5.1. The protected act is a grievance made on the 12th or 13th of March 2020 in which the claimant alleged discrimination because of race (paragraph 35, further and better particulars of claim).

5.2. The further protected acts are:

5.2.1. On 23 April 2020 in the grievance hearing with Peter Rumbold the

Claimant complained about the racist language directed at him by Mr Aslam and reported that Mr Funmilayo had told his colleagues about his haemorrhoid condition and Mr Roney had laughed about his medical condition

5.2.2. On 24 April 2020, claimant sent email to Mr Rumbold with further information about the racial and disability discrimination

5.2.3. On 16 July 2020 claimant's ET1 complaining of discrimination

5.2.4. On 26th November 2020, at the preliminary hearing the Claimant complained that he had been subjected to disability discrimination

5.3. The unfavourable treatment alleged is:

5.3.1. delay in handling the grievance, in particular, the delay of six weeks until there was a hearing, and a delay of two months between the hearing and the outcome.

5.3.2. On 20 August 2020, disciplinary outcome not upholding allegation of misconduct but still threatening/warning the Claimant that he would be dismissed

5.3.3. On 10 November 2020, suspending the claimant

5.3.4. Failing to carry out a fair investigation into the disciplinary allegations. The Claimant submits that the investigation was unfair based on the following assertions:

5.3.4.1 Mr Funmilayo was not an impartial investigator into the incident;

5.3.4.2 Mr Dicks failed to carry out further investigation as part of the disciplinary by looking at CCTV or considering the evidence provided by the Claimant.

5.3.5. Mr Funmilayo and Mr Dicks failing to provide the claimant with copies of the evidence relied on which had been gathered during the investigation stage and disciplinary proceedings

5.3.6. Subjecting the claimant to disciplinary proceedings

5.3.7. On 15 December 2020, dismissing the claimant

6. Unfair Dismissal

6.1. Was the Claimant dismissed for a potentially fair reason pursuant to s.98(1) ERA, namely conduct?

6.2. Was the Claimant's dismissal fair or unfair in all the circumstances?

7. Wrongful Dismissal

7.1. Was the Claimant's contract of employment terminated in circumstances in which the Respondent was entitled to terminate it without notice due to the Claimant's conduct?

8. Remedy

8.1. If the dismissal was unfair, should the Claimant's compensation be reduced on the basis that he may have been dismissed if a fair procedure have been followed? ('Polkey')

8.2. If the dismissal was unfair, what are the appropriate basic and compensatory awards?

8.3. If the dismissal was unfair, was the dismissal to any extent caused or contributed to by any action of the Claimant, such that his compensation ought to be reduced per s.123(6) ERA 1996?

8.4. If the dismissal was unfair, should there be any reduction in compensation in respect of the Claimant's failure to follow the Acas Code of Practice on Disciplinary and Grievance Procedures by failing to appeal the disciplinary outcome?

8.5. If the Claimant was discriminated against, what is the appropriate remedy, including any compensation and injury to feelings (in accordance with the Vento guidelines as amended)?

8.6. Has the Claimant taken reasonable steps to mitigate his loss?

9. Time Limits/Jurisdiction

9.1. The Claim for was presented on 16 July 2020. The Claimant contacted ACAS to commence Early Conciliation on 2 June 2020. Any acts or omission which took place before 3 March 2020 is potentially out of time.

9.2. The second claim was presented on 13 May 2021. The Claimant contacted ACAS to commence Early conciliation on 3 March 2021. Any acts or omission which took place before 4 December 2021 is potentially out of time.

9.3. With respect to the Claimant's discrimination complaints under the Equality Act 2010:

9.3.1. Does the Claimant prove that there was conduct extending over a period of time which is to be treated as done at the end of the period? Is such conduct accordingly in time?

9.3.2. Where any of the acts complained of are found to be out of time, would it be just and equitable for the Tribunal to extend the time limit?

9.4. With respect to the Claimant's working time detriment complaint under the Employment Rights Act:

9.4.1. Does the Claimant prove that the act or failures to act were part of a series of similar acts or failures and is accordingly in time?

9.4.2. Where any of the acts complained of are found to be out of time, are the Tribunal satisfied that it was not reasonably practicable to present it by 3 March 2020 and it is reasonable to extend time?

The Evidence and Hearing

6. We received from the parties a main trial bundle and a supplementary bundle.

7. We received a witness statement and disability impact statement from the Claimant and, for the Respondent, witness statements for the following witnesses:

a. Mr Aslam (Control Room Supervisor);
b. Ms Ayre (Senior Operations Manager);
c. Mr Dicks (Account Director, previously Account Manager);
d. Mr Funmilayo (Contract Operations Manager);
e. Mr Pandey (Security Supervisor);
f. Mr Rumbold (Head of Operations of Strategic Accounts).

8. All the witnesses gave oral evidence and were cross-examined, save for Mr Pandey who we were told was abroad and uncontactable. We admitted his statement, but have given it less weight because he was not tendered for cross-examination.

9. We explained to the parties at the outset that we would only read the pages in the bundle which were referred to in the parties' statements and skeleton arguments and to which we were referred in the course of the hearing. We

did so. We also listened to recordings of various conversations supplied by the parties.

10. The supplementary bundle grew daily. This included some disclosure by the Respondent which on any view should have happened long before the hearing including the notes of one of the investigation meetings in the investigation that led to the Claimant's dismissal (Mr Funmilayo's investigation interview with Mr Aslam on 9 November 2020), an email complaint from Mr Aslam about the Claimant dated 3 March 2020 and a number of policy documents. The late disclosure disrupted and delayed the hearing and meant that time was probably wasted pursuing lines of cross-examination (in particular with Mr Dicks) that would not have been pursued had disclosure of the investigation meeting been given in a timely manner. We gave the Respondent an opportunity in closing submissions to address us on why, if there was doubt about any matter to which late-disclosed document related, we should not draw an adverse inference against the Respondent because of the failure to disclose. We have borne the lateness of the Respondent's disclosure in mind in making our findings of fact below. Where we have drawn an adverse inference on a particular matter, we explain our reasons for doing so in the course of this judgment.

11. At the hearing, we explained our reasons for various case management decisions carefully as we went along.

Adjustments

12. No adjustments were required, save for breaks as requested by the witnesses.

The facts

13. We have considered all the oral evidence and the documentary evidence in the bundle to which we were referred. The facts that we have found to be material to our conclusions are as follows. If we do not mention a particular fact in this judgment, it does not mean we have not taken it into account. All our findings of fact are made on the balance of probabilities.

Background

14. The Claimant commenced employment with Vision Security Group (VSG) on 21 April 2018. The Claimant's employment TUPE transferred to the Respondent security company with effect from 26 October 2018.

15. The Claimant had previously worked as a security officer for another company since 2013.

16. The Claimant is Black Nigerian African of the Yoruba tribe and can speak the Yoruba language as well as English.

17. In circumstances we detail below, the Claimant was, from shortly after the start of his employment, based at Riverbank House, where the site manager was Mr Funmilayo who was also Nigerian and from the Yoruba tribe. The Claimant's supervisor was Mr Aslam who grew up in Pakistan and speaks Urdu and Punjabi.

The Claimant's disability and the Respondent's knowledge of that

18. The Claimant has suffered from haemorrhoids since 2008 and lower back pain since 2011. The Respondent accepts these impairments mean the Claimant at all times satisfied the definition of disability in EA 2010, s 6.

19. The Claimant's condition means that he may spend a long time in the toilet. He tries to avoid going to the toilet (other than urination) and does not go every day. When he does go, at times when his condition is not severe he may spend 30-40 minutes in the toilet, when it is severe he has to spend up to an hour in the toilet due to constipation, blood loss and dealing with the consequences. He is often in pain and finds it hard to be at ease around others.

20. The Claimant disclosed his haemorrhoid condition on his pre-employment medical questionnaire with the Respondent. However, he did not tick to indicate that this condition should be disclosed to his manager, so it was not. The Claimant also omitted to tick the box to say he had a difficulty with his back, so this was not disclosed at this time.

21. The Claimant in his statement stated that he made Mr Funmilayo aware of his health conditions and that it meant he could not stand for long periods in a conversation in Yoruba shortly after he started at Riverbank House. The Claimant was vague on the date in oral evidence, saying it was late 2018 or early 2019. This accords with his Further and Better Particulars where he says that he informed Mr Funmilayo confidentially 'in late 2018 and early 2019'. That would have been about six months after he started rather than at the outset.

22. Mr Funmilayo denies this. He says he was unaware of the Claimant's medical condition until October 2019 when the Claimant was off work for a haemerrhoid operation. In his statement, Mr Funmilayo said that in advance of that operation the Claimant showed him a hospital letter that detailed the

operation, but that he had not understood the medical terms in it. In oral evidence, Mr Funmilayo corrected this at the start of his evidence, saying he had not actually read the letter at all, but only looked across the room at it 'at eye level' and seen that it was a hospital letter. In oral evidence, Mr Funmilayo maintained that he had first heard that the Claimant was having a haemorrhoid operation from Ms Ganczak-Wolska, a receptionist employed by Rapport (another company operating in the same building as the Respondent).

23. We prefer the evidence of Mr Funmilayo as to his awareness of the Claimant's disability. We do not accept the Claimant's evidence of the conversation in Yoruba as he has been inconsistent about the date of that conversation, non-specific about its contents and it is more consistent with his failing to tick the box authorising disclosure of his condition to his manager at the outset of employment that, contrary to his evidence in these proceedings, he did not tell Mr Funmilayo about his condition. We have also, in general, found the Claimant to be a less reliable witness than Mr Funmilayo as detailed elsewhere in this judgment.

The Claimant's shifts

24. The Claimant commenced employment on 23 April 2018 at the Shard pursuant to a contract (94) which stated he was an External Patrol Officer. The Claimant did not consider that this role suited him because of his medical conditions, so he emailed Ms Ayre on 24 April 2018 to say he could not do the role (although he did not mention his medical condition as the reason). She offered him an alternative at Park House. The Claimant attended training there, but did not want that role either, so he was found a role at Riverbank House, which he started in late April/early May 2018.

25. The Claimant's Shard contract was a 48-hour per week contract at £11.47 per hour, although the contract stated that the number of hours worked and shifts would vary.

26. When he moved to Riverbank, the Claimant was working 48 hours per week, Monday to Fridays 7am-7pm, sometimes also on Saturdays. At this time the site was short-staffed and all staff were working overtime. The Claimant was not at this time part of Mr Funmilayo's 'core team', but was in substance working in a 'relief role'. As such, issues to do with his shifts and holidays were referred in the first instance to Ms Ayre, who in turn would liaise with Mr Funmilayo as site manager.

27. Ms Ayre's recollection was that the role at Riverbank that she had offered to the Claimant was a 6am-2pm shift, five days per week, i.e. 40 hours per week, and she maintained that this was what the Claimant was offered from

the outset, although she was aware that he wanted a 4 days on, 4 days off pattern (which would equate to a 42-hour week on average over the year).

28. Emails in the bundle from 30/31 July 2018 (234-236) indicate that there was a consultation with staff about shifts around that time and that the Claimant was 'set to start' on the 6am to 2pm shift the following week, but had expressed an interest in a 4 days on 4 days off pattern of 12-hour shifts.

29. The Claimant was not provided with any contract for the Riverbank 6am-2pm shift. He was sent two letters on 8 and 9 October 2018 confirming the role as a move from the Shard with effect from 2 October 2018 (149-150). These letters formally mark the Claimant's transfer to becoming a core member of Mr Funmilayo's team, but do not reflect reality in terms of the start date in the role. Nor did all administrative arrangements immediately fall in line, with some of the Claimant's holiday requests still going to other managers.

30. The Claimant says that it was Mr Funmilayo who changed his shift to 6am to 2pm. The Claimant says he was unhappy about this as it cut his hours, but Mr Funmilayo maintains that the Claimant had initially he said he was pleased as it meant he could go to the gym and pick up his daughter from school and this is what Mr Funmilayo wrote in his reply to the Claimant's email of 12 October 2018 where the Claimant complained about being allocated the shift (154) in the following terms: *"Coming to the issue of shifts, you imposed on me 6am to 2pm which am doing now. I asked you why can't I have 4 on 4 off as promised by Steve and [Ms Ayre] to that you replied '[Ms Ayre] said that's the shift I will be doing". Now all of the newly employed staff have 4 on 4 off which I believe is completely unfair because it was promised and not given to me"*. The Claimant maintains in these proceedings that Mr Funmilayo was not telling the truth in saying that it was Ms Ayre who allocated him the 6am to 2pm shift, although Ms Ayre was clear in oral evidence that it was her who did this.

31. On this issue of the Claimant's shifts, we prefer the evidence of Ms Ayre and Mr Funmilayo, which is consistent with their emails at 234-236. It is consistent with the Claimant having been allocated and agreed a 6am to 2pm shift with Ms Ayre that he was 'set to start' on that shift in July 2018, the shift system not having been set up when he first transferred as a result of there being insufficient staff, Likewise, it is consistent with those emails that the Claimant accepted this at the time as he is not listed on Ms Ayre's email at pp 235-236 as a member of staff who has raised any complaint about shift allocation at that point. Mr Funmilayo's acknowledgment in his email at p 234 that the Claimant has expressed an interest in the '4 on 4 off' role is consistent with Ms Ayre's evidence to the same effect, and also with that not being an option for the Claimant at that point as a result of his prior allocation to the 6am to 2pm shift. We also accept that the Claimant probably did say to Mr Funmilayo, making the best of the situation, that there were personal

advantages to him of the fixed 6am to 2pm shift. By the time of the Claimant's complaint of 12 October 2018, we find he had either forgotten what happened previously, or was twisting it to fashion a list of complaints at that point.

32. After the Claimant complained on 12 October 2018, when a '4 on, 4 off' shift became available in April 2019, the Claimant was moved onto it.

33. In his grievance with Mr Rumbold, the Claimant identified his complaint about the shift as being the point at which his relationship with Mr Funmilayo deteriorated (348). That has not been his case in these proceedings. In these proceedings, he maintains that it was what happened with holiday requests that was the tipping point. We now deal with those.

Holiday requests

34. The Claimant alleges that Mr Funmilayo in around June 2018 said that no one was allowed to take holiday until the site was at full capacity, although Mr Funmilayo was taking holidays at that point himself. Mr Funmilayo denies that he was taking holidays at this point. We accept Mr Funmilayo's evidence as he has in general proved to be the more reliable witness, and we also consider that if the Claimant really knew that Mr Funmilayo had been taking holidays during the period that the site was not fully operational, he would have made that complaint in the paragraph of his email of 12 October 2018 dealing with holiday during that period (153). His failure to mention this point in his email suggests that this allegation is an after-the-even invention.

35. The Respondent accepts that for several months after the Claimant started employment with the Respondent holiday was restricted because they were short-staffed. Thereafter, Mr Funmilayo, Mr Aslam and Ms Ayre maintain that the Respondent's policy was followed and that annual leave would normally be permitted only if another core officer had not already booked the time off. It was 'first come, first served'. When an officer had booked holiday they were supposed to mark it on the wall chart in the office, but they did not always do this so sometimes it would appear that a date was available when in fact it was not. Also, sometimes officers made requests to Mr Funmilayo that he did not deal with immediately so there might be a delay in requests being approved and put on the system. Mr Aslam confirms that this was the system and that he had holiday refused on numerous occasions, 'many more than 5 or 6 times', and that to avoid this he would try to plan ahead, check the chart and negotiate with colleagues.

36. The Claimant requested to take holiday for a week in August 2018 which Mr Funmilayo refused. In his later email to Mr Funmilayo of 12 October 2018 (the *"Treat to sack"* email) (155) the Claimant acknowledges that Mr Funmilayo told him that the reason for this was that he could not have

holidays until the site was in full operation. However, the Claimant heard that he could use the VSG portal to request holiday, so he did and his holiday request was approved for 14-20 August 2018 without reference to Mr Funmilayo. This was only possible because the Claimant was at that time formally a relief officer rather than a core officer for whom Mr Funmilayo had full line management responsibility.

37. The Claimant also used the VSG portal to request (and be granted) 1 day's holiday on 1 August.

38. Mr Funmilayo learned of this on 24 July 2018 and emailed South Ops raising concerns about how it had come about that the Claimant had managed to bypass him and book holiday without it being checked with him as site manager. Mr Funmilayo tried to get South Ops to provide the necessary cover for the Claimant as they had approved his holiday (226). He also pointed out that the Claimant had given less than the required 1 month's notice to South Ops.

39. Mr Funmilayo found what the Claimant had done frustrating and undermining. The Claimant now feels that what happened with holiday set Mr Funmilayo against him and that after this Mr Funmilayo was 'out to get him' (although this is not what the Claimant said in his grievance to Mr Rumbold: see below). Mr Funmilayo denies the Claimant's case in these proceedings. He felt that their relationship soured at a later date.

40. The Claimant in a meeting with Mr Funmilayo on around 14 September 2018 that he secretly recorded complained about him refusing his holiday requests and said that holiday is *"not a privilege, it's a right – everybody has got entitlement"* and *"You don't have any right to reject anybody holiday at any point in time"* (456N).

41. In the *Treat to Sack* email of 12 October 2018 (below) the Claimant complained about Mr Funmilayo's refusals of his holiday requests and alleged differential treatment in comparison to another employee (who he did not name). Mr Funmilayo in reply explained the reasons why holiday requests had been refused and offered to look into the allegation of differential treatment if the Claimant would supply the name of the individual. The Claimant did not supply the name in his reply.

42. Between October 2018 and 14 July 2020, the Claimant alleges Mr Funmilayo would refuse the Claimant's holiday requests, or would make it difficult for the Claimant to get holiday or would tell the Claimant to take the holiday as unpaid. Mr Funmilayo denies this. We reject the Claimant's case on this. We find that Mr Funmilayo dealt with each request in accordance with his general

policy at all times: during the period that they were short-staffed, holiday was refused; thereafter it was granted on a first come, first served basis and the examples that the Claimant has put in evidence all show Mr Funmilayo explaining the reasons for any refusal in accordance with that policy, and then granting amended requests. Sometimes it did not appear to the Claimant that the policy was being followed because he was not aware of other's requests and/or of delay in recording holiday on the system and/or other officers failing to enter holiday on the office chart. Mr Funmilayo was understandably frustrated by the Claimant going 'over his head' to get holiday approved for 1 August, but in this respect it was the Claimant who acted unreasonably as he refused to accept that Mr Funmilayo had authority to determine holiday requests in accordance with business needs. Mr Funmilayo's expressed frustration about the Claimant's conduct on this occasion was in our judgment justified. It was also measured, and limited to the unreasonable element of the Claimant's conduct. Mr Funmilayo continued despite this to deal with the Claimant's holiday requests in an even-handed way.

43. On 31 December 2018 the Claimant requested holiday on 14 and 15 February 2019 (164). Mr Funmilayo refused this on 4 January 2019 *"due to another day officers on annual leave … please choose another and put in your request"*.

44. On 8 January 2019 the Claimant requested leave for 11 March 2019, Mr Funmilayo refused it because (he said) two other officers were booked off that day. Mr Funmilayo also said that three other officers (including him) were off on 8 March 2019. Mr Funmilayo had permitted two officers to be off on those dates because one was day shift and one night shift. In cross-examination, it was suggested that this was inconsistent with Mr Funmilayo's email of 4 January 2019, but it is not as Mr Funmilayo's email is clear that only one 'day' officer can be off at once. He said nothing about 'night' officers and it makes obvious sense that having two 'day' officers off at once is much more difficult cover-wise than one 'day' and one 'night' officer as other existing employees are likely to be able to cover the latter situation.

45. The Claimant said in his statement that when he asked the officers mentioned by Mr Funmilayo they said they were not on holiday that day (171), but there is no corroborative evidence of this assertion and we do not accept it as we have not found the Claimant's evidence to be wholly reliable on other points.

46. The Claimant by email of 15 January 2019 (181) complained saying, *"I have been requesting for my holidays since October but for some reason you have refused to approve my request for the fact that I have given you more than enough time despite always giving enough notice on the VSG portal. Your excuses are the days have chosen is been taken by other officers which I have to cancel my holiday request on several occasions. … Am taking my week off so I have accurate rest of work."*

47. The Claimant then made a request for 27 and 28 February and 12, 13, 14, 15 and 18 March. Mr Funmilayo had 3 officers off already on 27 and 28 February so those days were refused. The Claimant's request for 13, 14 March was approved, but 12, 15 and 18 March were not approved because two officers were on holiday. Mr Funmilayo urged the Claimant to liaise with his supervisor on dates that could be taken.

48. The Claimant then contacted Ms Woods to see what dates were still available to take. She replied (179) stating (contrary to what Mr Funmilayo had said previously) that 8 March was available to take (although all the other dates Mr Funmilayo had said were not available were marked not available by Ms Woods, including 11 March which was the date the Claimant had first requested). The Claimant then requested 4-8 March 2019 and Ms Wood updated the schedule to reflect that. However, Ms Woods had been unaware of the full picture. Mr Funmilayo explained that there were already too many officers off that day, which information had not made it to the rota yet. Mr Funmilayo had to get special authorisation to grant annual leave to a further officer. He did so and notified the Claimant that his request was approved on 15 February 2019.

49. By email of 4 February 2019 Adrian Moore (Operations Director) gave instructions to managers to be robust in the run-up to the holiday year end and refuse all late leave requests and scrutinise others (197A).

50. On 11 August 2019 the Claimant requested leave on Christmas Day (246), which Mr Funmilayo refused, explaining that *"due to the company policy and operational requirements, ie getting relief officers or agency cover in over the bank holiday periods can be very onerous and could incur substantial loss to the business across board hence the reason that your holiday have been refused"*. He suggested that the Claimant shift-swap. Mr Funmilayo in his witness statement incorrectly referred to Mr Moore's email of 4 February 2019 in support of this policy, but that is not relevant. In oral evidence Mr Funmilayo explained that holiday is normally refused between 15 December and 5 January as this is a holiday restriction period. We accept this as it is supported by the calendars at pp 451 and 451A of the bundle which indicate no leave booked for anyone between 18 December and 5 January. Mr Funmilayo said the Claimant could complain to Mr Roney *"or any higher authority in the company if you are not happy with the decision I made".* The Claimant complained to Mr Roney by email of 14 August 2019 (247), who referred the complaint onto Ms Ayre (306), but she never noticed this email and took no action.

51. The Claimant was due to have haemorrhoids surgery in October 2019. He requested annual leave for the dates in question. Mr Funmilayo says the

Claimant did not initially give the reason for the request and as it was short notice and he did not have adequate cover, he said the Claimant could take it unpaid. The Claimant then said it was for medical reasons. Mr Funmilayo was uncertain whether annual leave could be taken for medical reasons or whether it should be sick leave, so consulted with HR who confirmed annual leave could be used for an operation and that if he needed more time off he could have more sick leave.

52. In July 2020 Mr Funmilayo realised that the Claimant had booked holiday on a day he was not scheduled to be working. This was disadvantageous to the Claimant and so Mr Funmilayo mentioned this to him. The Claimant says that Mr Funmilayo had done this deliberately to disadvantage him. On 14 July 2020 the Claimant complained to Mr Rumbold about Mr Funmilayo's handling of this request (366). The Claimant's email is very unclear, but threatens Mr Funmilayo that if he does not sort it out by doing what he (the Claimant) has requested he will take the matter to HR. Mr Funmilayo endeavoured to set out his understanding in his reply to the Claimant (363), which was that the Claimant had mistakenly booked 2 and 10 August as paid holiday when they were in fact his days off, but these had been approved, that he wanted to swap 2 and 10 August for 6 and 14 August, and that the Claimant was suggesting his absence could be covered by Mr Aslam or Mr Coleman or a relief officer. Mr Funmilayo explained that as the holiday had already been approved, he could now take 6 August off but only as unpaid holiday as this had been booked by others in the meantime, while 14 August could be paid holiday as no one else was away that day. The Claimant complained about this response as he was planning to travel to Nigeria and so could not return to work on 6 August to work if he was unhappy about not being paid (362). Mr Funmilayo replied explaining the position again, but maintaining his stance. The Claimant's view was that Mr Funmilayo could get Mr Coleman to cover as he did on other occasions, but that he refused because it was him. Mr Funmilayo denied any differential treatment.

53. We find that Mr Funmilayo handled the foregoing incident reasonably. The Claimant made a mistake booking holiday. Mr Funmilayo reasonably drew that to his attention and made suggestions as to how the matter could be resolved so as to enable the Claimant still to have the time off work (now at short notice). The Claimant, however, was ungrateful for the offered assistance and blamed Mr Funmilayo for his own mistake. There is nothing here from which we could draw an inference that Mr Funmilayo deliberately sought to disadvantage the Claimant by failing to point out his error when the holiday was first booked.

<u>October 2018 allegation 3.1.1.</u>

54. The Claimant complains that in early September 2018 he went to challenge Mr Funmilayo about the rota issues and alleges that Mr Funmilayo said to him *"this is not a village meeting that you can just come and talk to me"*. The Claimant felt that this was ridiculing him and referring him to an illiterate as a stereotypical Nigerian village person. The Claimant first complained to Mr Funmilayo about this in the meeting of 14 September 2018.

55. The transcript of the Claimant's recording of the meeting between him and Mr Funmilayo on 14 September 2018 shows the Claimant complained to Mr Funmilayo that he had ridiculed him about reading and the Claimant accused Mr Funmilayo of saying *"this is not town hall meeting*" (456G). The Claimant accepted that this was the same allegation as what became in his subsequent email an allegation that Mr Funmilayo said *"this not a village meeting"*. Later in the transcript of the 14 September meeting he accused Mr Funmilayo of saying *"it's not a factory conversation, can you read and stuff like that"*, which in oral evidence the Claimant confirmed was also supposedly a reference to the same allegation.

56. The transcript also shows that the Claimant said to Mr Funmilayo in the course of this meeting, *"this is not a banana republic"*, suggesting that this was how Mr Funmilayo is running the office. This is a phrase that the Claimant has used to describe Mr Funmilayo's management style on a number of occasions. We asked the Claimant whether he considered that phrase to be insulting, but the Claimant did not agree that it was.

57. On 20 September 2018 Mr Funmilayo gave the Claimant a verbal warning about his conduct because he had been using his mobile phone in reception. He showed the Claimant the Code of Conduct and emphasised the need to comply with it. On this occasion the Claimant had also sought to blame another officer for reporting him about this when in fact it was Mr Funmilayo who had seen the Claimant on the CCTV using his mobile phone. There is a discrepancy in Mr Funmilayo's account of this incident between his witness statement (where he said that the Claimant had accused his then supervisor Mark Nguyen of 'telling on him') and his account in the *Treat of Sack* email (to which we return below) where he wrote that he was told by *"a superior officer who was told by an officer you spoke to blaming him for being caught using your mobile phone in the reception"*, which sounds like a message had been passed on rather than there being a direct complaint. We acknowledge that there is thus a discrepancy between Mr Funmilayo's statement and his email at the time, but we do not consider the discrepancy to be material and attribute it to misremembering on Mr Funmilayo's part. It is a minor point and does not detract from his general credibility as was contended by Ms Godwins.

58. The *Treat of Sack* email was sent by the Claimant to Mr Funmilayo on 12 October 2018 accusing Mr Funmilayo of bullying him and threatening to sack him, although the Claimant confirmed in oral evidence that the title of the email (a misspelling of "threat of sack" which reflects the way that the Claimant pronounces "treat") was a reference to Mr Funmilayo's giving him a

verbal warning and showing him the Code of Conduct. The Claimant does not allege that Mr Funmilayo actually threatened to sack him, but he wrote in the email: *"I feel ridiculed i will not take any forms of bullying or treat of sack from you"* (sic).

59. Among other things, the Claimant in the *Treat to sack* email accused Mr Funmilayo of saying *"this is not a village meeting"* to him (155). He explained he felt this was a way of ridiculing him. He links it to Mr Funmilayo's question on another occasion about whether he could read, which Mr Funmilayo explained in his email of 12 October 2018 was misunderstood by the Claimant: he was just asking if the Claimant could read what was on his screen, which was difficult because there was a reflection on it. Mr Funmilayo is clear that he knows the Claimant can read.

60. Mr Funmilayo in his email response denied the *"village meeting"* allegation. In his witness statement, Mr Funmilayo says that what he remembers saying on the occasion the Claimant was complaining about was *"this is not a market place"* and that this relates to an occasion when the Claimant was shouting at Mr Aslam. Mr Funmilayo was trying to get him to calm down and not shout as you would do in a marketplace.

61. Mr Funmilayo added in his email, *"What I have noticed not just with me but also with the rest of your colleagues is your countenance and demeanour when you are addressing them* [i.e. his colleagues]*. On many occasions I have had to tell you not to talk over them and to lower your voice over the simplest of issues like the movement sheet. In an instance, in front of a client being served and I have officers that will corroborate the incident. This I have mentioned to you in the past that it is not way to conduct and comport oneself in a high profile site as ours. Sophistry, decorum, guided and gentle expression is the professional way to go"*. This exhortation did not have much impact on the Claimant who in oral evidence denied that Mr Funmilayo had ever raised anything with him about his tone and manner, but he did point to what Mr Funmilayo said here as being indicative of Mr Funmilayo's derogatory attitude to him.

62. Having reviewed the evidence, we do not accept the Claimant's allegation that Mr Funmilayo said to him *"this is not a village meeting"* as the Claimant when he first complained to Mr Funmilayo about what he had said did not use those words but two other expressions (*"town hall meeting"* and *"factory meeting"*). We further find that the expression used by Mr Funmilayo, and the reference to whether the Claimant could read, was not derogatory but was made in the context that Mr Funmilayo describes of asking whether he could read what was on a screen with a reflection on it, and was an effort to moderate the Claimant who has a tendency to become agitated when speaking, as is described elsewhere in the evidence and by witnesses, and as we saw at the hearing. Mr Funmilayo in contrast tends to maintain a level mode of expression when speaking and this was shown at the hearing as well as through the written and audio materials with which we were provided. We also observe that the Claimant was himself rude to Mr Funmilayo as accusing him of running the team *"like a banana republic"* is on any

reasonable view insulting and it is plain from the context that the Claimant intended it to be rude at the time, whatever he now says.

63. There is another matter in the *Treat to sack* email we must mention. The email begins with the Claimant complaining about being required to wait for relief before leaving his post. It is evident from the email that he has recently been spoken to about this and is unhappy about it, and we heard evidence of him leaving his post before cover had arrived on a number of other occasions. Mr Funmilayo's reply to this email explains that it is industry standard practice to wait for cover to arrive before leaving post (because, we understand, it is a security role and must be filled at all times). Mr Funmilayo explained that an employee is paid for any overtime while they wait for cover. The Claimant's position, maintained in subsequent complaints to the Respondent (including his formal grievance of 11 March 2020) and in his witness statement in these proceedings, was that it was unreasonable to expect him to wait when another member of staff was late, sometimes (he says) by up to 30 minutes or an hour. This is a topic to which we return.

64. In the subsequent emails in the *Treat to Sack* chain, the Claimant informed Mr Funmilayo that he had *"got voice recordings of most of his conversations with him and I will not be taking any form of bullying from you or treat of sack"*. Mr Funmilayo replied saying that was fine by him and emphasising some of the building rules (including *"no … mobile phone use at all on either external and internal patrols"* and that there will be *"zero tolerance to bullying and insubordination from any team member on site"*), to which the Claimant replied: *"Am not the type you can bully or victimised. I do my job to the best of my knowledge and with the code and conduct of VSG. Am keep all voice recoding as prove of your unprofessional way of dealing with my issue. And I repeat I will not take any form bullying from you or treat of sack"* (sic) (151). We observe that this email exchange reinforces our observation that in general it is the Claimant who becomes excitable and verbally aggressive, while Mr Funmilayo maintains a moderate position.

Late 2018 / early 2019

65. On or around 18 December 2018 the Claimant was given another verbal warning by Mr Funmilayo about vacating his front of house position without waiting just 6 minutes for his relief by Ms Woods (Claimant paragraph 80; p 163).

66. On 4 and 5 February 2019 Ms Wood (one of the Claimant's supervisors) emailed Mr Funmilayo and Ms Ayre raising informal complaints from other staff about the Claimant's overuse of bathroom facilities, which was preventing clients, visitors and disabled clients and partners from using the facilities (198). She expressed concern about whether this was happening out of choice rather than need. It appears from this email that Ms Wood was unaware of the Claimant's medical condition. Mr Aslam told us in oral

evidence that he believed the Claimant to be on the telephone when in the toilet on these occasions as he could hear him talking.

67. On 6 February 2019 Mr Funmilayo told the Claimant that Ms Wood had complained that he had left his post before she got there (Claimant, para 85). In response, on 6 February 2019 the Claimant complained about Ms Wood's conduct (199), alleging that she had said she would get him sacked for no reason and that she was racially discriminatory. Regarding leaving his post, the Claimant wrote that Ms Woods was supposed to have got there by 11.30. She had called to ask him to stay as she was on the phone to her bank, but at 11.32 the Claimant left for his break anyway. He described how she was still engaged with the bank 'some time later'. He felt that she should not have been two minutes late because she was dealing with a personal matter.

68. We observe that these incidents illustrate further unreasonable conduct by the Claimant: the Respondent's policy on requiring him to wait for his relief even if they are late is an obviously reasonable and necessary one in the security industry, and it had been previously explained to the Claimant, but he still refused to adhere to it, even where his colleague was only two minutes late. This demonstrates an unreasonable intolerance of others by the Claimant, as well as a failure to follow reasonable management instructions, and the Claimant's suggestion that lateness of this sort by colleagues should have been treated as a disciplinary matter is also in our judgment unreasonable.

Disciplinary process (allegation 3.1.2)

69. On 18 February 2019 Ms Wood raised a formal grievance about the Claimant being 'abusive' towards her (201). The Claimant provided a statement (203), in which he accused Ms Wood of being unprofessional to him and threatening to get him sacked and racially discriminating against him and bullying him. Ms Okoro (205) and Mr McDermott (212, continued on 204) also provided statements. It has been submitted on behalf of the Claimant that the accounts of witnesses do not support the allegation that the Claimant had become 'abusive' on this occasion. While the statements do not perhaps go that far, in our judgment they do provide evidence that the Claimant became agitated and heated in the exchange and was discourteous to Ms Wood as his supervisor.

70. Brendan McDermott, who gives the fullest account of the incident, describes how the problem was the Claimant reacting to a question he had asked about newspapers as if he had *"attacked"* him when in fact he was just asking a question. He described the Claimant becoming *"animated", "talking loudly"* and *"becoming increasingly hard to understand"* and not listening to him (Brendan). Ms Wood intervened to try to get the Claimant to listen, at which the Claimant said, *"I don't care what you say why are you even talking to me, you can't tell me nothing I am talking to Brendan not you".* Ms Wood said: *"Brendan is trying to find out what happened with the newspapers and you are talking nonsense whilst he is trying to explain".* This made the Claimant

angry, his voice became louder he was saying to Ms Wood *"you can't speak to me like that, who do you think you are, you can't talk to me"*, at which point Ms Okoro entered and Mr McDermott left shortly afterwards.

71. Ms Okoro's account is not wholly consistent with Mr McDermott. She says she was there before the Claimant arrived and the conversation *"became heated"*, that Mr Woods asked the Claimant to *"stop being stupid"* which upset the Claimant who retorted *"Who are you calling stupid, you can't even do your job"*, that Mr McDermott then left and she had to intervene and tried to calm both parties down by standing between them.

72. On 20 February 2019 Ms Wood provided details of further issues with the Claimant over the previous two days (207), including that on 20 February he had left reception saying he was going to get water but in fact entered the bathroom and started shouting on his mobile, and later left his post and would not return to post when Ms Wood asked.

73. On 21 February 2019 the Claimant complained again about Ms Wood's lateness (accusing her of coming in 30 minutes or 1 hour late and leaving early) and accused Mr McDermott of using his mobile phone at reception (209).

74. Mr Funmilayo liaised with HR regarding the statements (214).

75. Mr Funmilayo held an informal meeting with the Claimant on 1 March 2019. A letter of concern dated 11 March 2019 (216) concerning the impact of extended frequent breaks to use the toilet. The letter made clear that the Claimant was entitled to comfort breaks as required, but asked him to make sure that adequate cover was in place and to let the Respondent know if there was an underlying medical condition it ought to be aware of. The Claimant did not reply to this letter because he felt that Mr Funmilayo was lying when he said he was not aware of an underlying medical condition. He said in oral evidence this was because he had just 'had enough' of Mr Funmilayo. We do not accept this. We find that Mr Funmilayo's letter is consistent with his evidence (which we accept) that he was unaware of the Claimant's medical condition at this point and the Claimant's non-response to the letter is likewise consistent with him *not* having told Mr Funmilayo at this stage (contrary to his evidence in these proceedings).

76. The other allegations were dealt with by Mr Carpenter in Mr Funmilayo's absence. No action was taken against the Claimant in relation to Ms Wood's other allegations, or the counter-allegations he had made against her and Mr McDermott.

<u>Appraisal and further issues</u>

77. On 19 July 2019 the Claimant had his appraisal with Mr Aslam with Mr Funmilayo in attendance (222). No performance issues were raised with him

during this. Mr Funmilayo explained that this is because the appraisal process at the Respondent is supposed to be a supportive process focused on the individual employee's professional development.

78. On 19 July 2019 Mr Funmilayo emailed HR with a list of issues that had arisen with the Claimant. This was because he had discussed with HR various complaints that had been received about the Claimant (including a complaint from a client about the way he had spoken to her on the phone: 222) and HR advised him to proceed to formal disciplinary. In this email he wrote: *"I am starting to think that all these act of insubordination is deliberate as he had mentioned in the past that he wants to get sacked so that he can be paid compensation by taking the company to tribunal"*. The Claimant denies that he said this to Mr Funmilayo, or having had any knowledge of the right to take a complaint to tribunal at this point. He says it was not until he spoke to his union in around March 2020 that he had that awareness.

79. On 24 July 2019 the Claimant met with Mr Funmilayo to discuss his performance and conduct (Mr Funmilayo's notes at 228; C's recording of part of the meeting at 456P). Mr Funmilayo says he typed notes of the meeting as he went, printed out a copy at the end and asked the Claimant to sign the notes, but the Claimant refused as he usually did. The Claimant, however, says that Mr Funmilayo 'fabricated' the notes of the meeting and never showed them to him. Mr Funmilayo's notes indicate that at one point in the meeting the Claimant said he was going to record the meeting 'because he knew where this was going'. Mr Funmilayo's notes record the Claimant as saying: *"If you are trying to get me sacked don't be in a hurry I will be leaving very soon, this job means nothing to me … it is not my main career but what I will not do is allow myself to be bullied or intimidated by nobody. I will sue the company and take them to court. You don't know who you are dealing with"*. The Claimant says this part of the notes (and other parts) are 'fabricated'. He did not record this part of the meeting. In oral evidence, he accepted that he said most of what is in Mr Funmilayo's notes, but continued vehemently to deny that he said anything about suing the company.

80. At the meeting Mr Funmilayo put to the Claimant a specific allegation about him abandoning front of house from 13.20-13.55 to go to the toilet without seeking cover. Mr Funmilayo noted that the Claimant at the time replied *"no comment"* but the Claimant says this part of the notes is also a fabrication. It was also put to the Claimant that on 24 June he left front of house to go to the control room without arranging cover; the Claimant's explanation was that he was getting a plaster for a customer. There was another allegation about not fixing faulty taps on 24 June. It was alleged that on 17 July the Claimant was not answering the control room phones in a professional manner. The Claimant denied this. On 18 July it was alleged the Claimant failed to hand over properly to a colleague and was also not answering the phone properly. The Claimant denied all of this. An allegation about eating smelly food in the control room was also put, which Mr Taiwo considered was race discrimination.

81. The part of the meeting that the Claimant recorded is somewhere in the middle of the meeting, beginning roughly around p 231 in Mr Funmilayo's notes and stopping mid-sentence. Other than some coincidence of topic (discussion about answering phone and eating food in the office) there is very little correlation between Mr Funmilayo's notes and the recording to the extent that if the parties were not presenting their cases on the basis that the recording and notes relate to the same meeting, we would have concluded they did not. However, we reject the Claimant's allegation that Mr Funmilayo 'fabricated' the notes. The notes are not verbatim and differ to the recording, but we see no reason not to accept that they reflect Mr Funmilayo's genuine understanding and summary of the conversation. On the specific point about whether the Claimant had threatened to sue the company, we note that the Claimant had said something like that previously in his email of 12 October 2018 (151) when he wrote: *"Am not the type you can bully or victimised. … Am keep all voice recoding as prove of your unprofessional way of dealing with my issue. And I repeat I will not take any form bullying from you or treat of sack"* (sic) (151). Although he does not in that email explicitly mention suing the Respondent, anyone reading or hearing such remarks might reasonably draw the inference that this was the threat being made. When questioned about this, the Claimant said that he was keeping the recordings for proof for the purposes of internal proceedings, and not contemplating legal proceedings. We do not accept this. The Claimant's evidence has been unreliable in other respects and we find it plausible that in addition to the written threat in the 12 October email, he would have made verbal threats to similar effect, including to the point of threatening to sue. A further reason why we find that Mr Funmilayo did not 'fabricate' the notes is because there is no dispute that the Claimant did start recording the meeting and told Mr Funmilayo he was doing so. It is implausible that Mr Funmilayo would then deliberately fabricate the notes of a meeting he knew was being recorded.

82. Mr Funmilayo subsequently recommended an impartial manager be appointed to chair the disciplinary as he believed there had been insubordination and failure to follow instructions, including repeatedly abandoning his post, and other matters (251).

83. By letter of 7 August 2019 the Claimant was invited by Mr Pandey to a disciplinary hearing to discuss misconduct allegations, specifically *"you have failed to follow reasonable management instructions regarding your unprofessional conduct and completion of your expected duties alongside leaving your post without authorisation on a number of occasions"* (239). The letter stated that documents were enclosed, including the minutes of the 24 July 2019 meeting and an email from Ms Belghazi dated 18 July 2019. The Claimant denies receiving these documents and he told Mr Pandey that in the hearing on 9 August 2019 (243). The email from Ms Belghazi has not been produced for this hearing, but we infer from the Claimant's corrections to the notes of the disciplinary hearing that he had that email and that it was the client complaint about his handling of a telephone call.

84. The hearing took place on 9 August 2019 and was conducted by Raj Pandey [242-245]. The Claimant did not have a companion with him, but he was given

an opportunity to comment on the notes of the meeting and did so. The notes of the meeting show that Mr Pandey went through each of the allegations with the Claimant. The Claimant not only denied having received notes of the 24 July 2019 meeting, but also having discussed with Mr Funmilayo most of the issues that Mr Funmilayo claimed to have discussed with him at that meeting, including the allegation about leaving his post before relief arrives. Mr Pandey's evidence (on which he was not cross-examined) was that he had sent the minute of the 24 July meeting to the Claimant with the disciplinary invitation (para 3.6), but we do not accept Mr Pandey's evidence in this respect as he has not been cross-examined and it is inconsistent with his own notes of the meeting (242-243). The Claimant denied all allegations. He said that he had not left his position without informing a colleague or his supervisor to cover his position. Mr Pandey asked him about his toilet breaks. The Claimant did not disclose his medical issue to Mr Pandey. He told Mr Pandey that he did not have any reason to require frequent breaks, he just went to the toilet for one or two minutes same as everyone eslse (244). The Claimant says he showed his *Treat of sack* email to Mr Pandey and complained that Mr Funmilayo had been bullying him. This is not shown on the meeting notes, but Mr Pandey accepts in his witness statement that it happened and that he took from it that the Claimant was not telling the truth when he told him that he had never been pulled up previously for leaving his post before relief arrives. From the evidence before us, of course, it is clear that the Claimant did not tell the truth to Mr Pandey about this as the issue of his leaving his post before relief arrives had arisen on a number of previous occasions. He also failed to tell Mr Pandey the truth about his need for toilet breaks. The Claimant's obvious lies in this meeting are part of the reason why we have found him to be an unreliable witness.

85. Mr Pandey emailed HR after the meeting questioning whether the Claimant had been sent the notes of the 24 July meeting, and noting that the Claimant had asked for the evidence. He said, *"During his meeting he appears cool and normal and showed some respect"*. HR in response said that Mr Funmilayo should have sent the Claimant the notes; there is no reference (249) from HR to it being something that should be sent with the disciplinary invite letter. No further evidence was identified or provided.

86. The outcome was that the Claimant was issued on 14 August 2019 with a First Written Warning (254/5) for *"failing to follow reasonable management instructions regarding your unprofessional conduct, the issues of which had been raised with you previously by your manager, Mr Funmilayo, alongside you failing to complete your expected duties and leaving your post without authorisation on a number of occasions"*. The warning was stated to apply for a period of 12 months from the date of the letter. Mr Pandey did not investigate the Claimant's complaints about Mr Funmilayo.

<u>Disciplinary appeal (allegation 3.1.3)</u>

87. On 21 August 2019 the Claimant appealed to Mr Roney against the First Written Warning (258) on grounds that there was no evidence for it and his 'counterclaims' against Mr Funmilayo were not investigated. The Claimant wrote that if he did not hear back in 14 days he would seek legal advice and that he had *"extensive recordings and emails to support my claims of bullying, which no one has asked about, and I will continue to record and note future incidences to that effect"*. Although he did not get a response within 14 days, he did not seek legal advice at this time because he said in oral evidence he had no real intention of doing so.

88. The appeal meeting took place on 3 October 2019. The Claimant was not provided with an outcome to the appeal. Mr Roney left the company in December 2019.

89. The Claimant alleges that in this meeting, Mr Roney laughed at him when he disclosed his medical condition and said that his sister had got haemorrhoids too. In his grievance to Mr Rumbold the Claimant wrote about this incident (349): *"I told [Mr Roney] about my medical condition, he laugh and said that can be so painful, he his sister as suffer from the same medical condition"*.

90. While we accept the Claimant's evidence that Mr Roney did laugh on this occasion, we infer from the Claimant's own account of the incident that it was not a malicious or derogatory laugh, but a sympathetic/nervous one, immediately followed as it was by expression of understanding of the painful nature of the condition and reference to his own sister's suffering.

Further disciplinary investigation

91. On 3 October 2019 Mr Funmilayo says that he found that the Claimant had left his post of duty in the control room without notifying his supervisor or Mr Funmilayo, and before the night shift officer Mr Jallow arrived. Mr Funmilayo followed the Claimant down to the loading bay where he was changing his clothes to go home and reiterated that the Claimant should not leave without permission. Mr Funmilayo says that the Claimant said: *"I don't give a fuck go and discipline me like you do … do what the fuck you want .. write in your little black book".* Mr Coleman gave an email statement on 9 October 2019 (273) which was consistent with Mr Funmilayo's account. This email was sent from the generic SecurityRiverbank email address and not signed, but the parties agreed that the email must have come from Mr Coleman because of the way the last line was worded. In any event, it is clear from both tone and substance that it was not written by Mr Funmilayo which is what matters so far as this case is concerned. Mr Coleman (assuming it to be him) alleged that the Claimant became agitated shouting things such as, *"I won't be bullied by you"* and *"I'm out of here soon. I don't give a ****"* (273). Mr Funmilayo asked Mr Aslam to investigate. Mr Aslam met with the Claimant for an investigation, but the Claimant refused to answer questions from Mr Aslam without a union representative present. The Claimant was then absent for surgery and the investigation was not picked up on his return.

92. The Claimant by email of 13 October 2019 to Mr Roney complained that Mr Funmilayo had given him permission to leave and then retracted that permission and made up the whole complaint (274). Mr Funmilayo says that was a lie and we agree. Mr Funmilayo's account of the incident is supported by Mr Coleman's email of 9 October 2019, which shows no signs of fabrication and is plausible in terms of the details provided. The Claimant also did not allege that he had had permission from Mr Funmilayo to leave until 10 days after the incident happened, and after he had sat through a 'no comment' interview with Mr Aslam. This was a fabricated after-the-event excuse by the Claimant.

93. The Claimant had a meeting with Mr Roney on 3 October 2019 at which he asked about a transfer to another site. He was disappointed that this came to nothing when he checked with Ms Ayre in April 2020 (Claimant, para 135).

Claimant surgery (allegations 3.1.4-3.1.5)

94. On 15 October 2019 the Claimant had surgery. He had time off for it as holiday. When he first asked Mr Funmilayo about time off, Mr Funmilayo had said he thought it needed to be taken as sick leave, but on checking with HR he was told he could approve it as holiday and he did. He asked the Claimant for a letter confirming the surgery appointment and the Claimant provided a letter dated 2 September 2019 (125). This refers to haemorrhoids and the *"need for surgery for his anal canal fistula"*, but Mr Funmilayo maintains he did not take in what was said in the letter as he saw it across the room 'at eye level'. He says the first time he realised what the surgery was for was when a receptionist (Ms Ganczak-Wolska) approached him to sign a get well soon card.

95. The Claimant alleges that Mr Funmilayo discussed the Claimant's medical condition with colleagues and the reason for his absence. He says that this is because Mr Funmilayo is the only person he had shared his medical condition with and that he had not told the receptionists. Mr Funmilayo denies this. Mr Aslam said he first heard about the Claimant's condition from the receptionists, in particular Ms Ganczak-Wolska who was employed by Rapport (a separate company) who bought a get-well card and asked everyone to sign it. Mr Funmilayo spoke to the head receptionist, Ms Gesteira, about this allegation on 13 April 2021 (as part of evidence gathering on this case) and his notes of his conversation with her indicate that her understanding was that Mr Taiwo had told the receptionists and they told Ms Gesteira.

96. Around 17 October 2019 a get well soon card was delivered to the Claimant's home by his friend and colleague Joseph (who is employed by the Respondent). Most of the comments on the card are unobjectionable, but the card does include comments: *"I hope you are well after your bum surgery – get well soon 😊"* about being able to *"sit comfortably"*, and *"hope everything is ok down there 😊"* (453-455). The Claimant agrees that these potentially more offensive entries were made by the Rapport receptionists not the

Respondent's employees. Mr Funmilayo did not see their comments as he signed the card before them. Nor did Mr Aslam. Their comments are straightforward good wishes.

97. We accept the Respondent's case that it was the Claimant who had told the receptionists about his condition. We have already explained why we accept Mr Funmilayo's evidence that the Claimant had not told him about his condition earlier. We further find that it is plausible that it was the Claimant who told the receptionists, because it is the receptionists who put the more detailed and humourous comments in the card, along with smiley faces, in a way that suggests that they believed the Claimant was comfortable with them knowing about the condition and gently teasing him about it, while also wishing him well. If the Claimant had been upset about the card, we would have expected him to complain about it to someone. However, not even he alleges that he complained about it at any point prior to commencing these proceedings. We therefore find that he was not offended by the card at the time but saw it for what it was evidently intended to be: genuine expressions of sympathy by concerned work colleagues.

98. The Claimant was due to return to work on 5 November 2019. On 31 October 2019, Mr Aslam invited the Claimant to a return to work interview following his surgery, but the Claimant refused to attend (277).

<u>November 2019 making fun (allegation 3.1.6)</u>

99. The Claimant alleges that after he returned to work in November 2019, and until 16 July 2020, whenever he went to the toilet, his colleagues would laugh at his bum and make fun of his medical condition. Mr Aslam denies that. So does Mr Funmilayo.

100. There is no written record of the Claimant making any complaint about this, either before 16 July 2020 or in his claim or until he provided Further and Better Particulars in these proceedings on 5 February 2021 (i.e. after he had been dismissed). In oral evidence he said he did complain about this to Mr Funmilayo in 2019, to Mr Rumbold as part of his grievance and to Ms Ayre, but he was unclear about the details.

101. We reject the Claimant's case in these respects too. If he had complained at the time, there would have been some documentary evidence of this prior to him commencing his claim in these proceedings. We find he did not complain because it did not happen and/or he was not upset by it because, as we have found, he did himself tell the receptionists about his condition.

<u>28 February 2020 incident involving Mr Aslam (allegation 3.1.7)</u>

102. On 28 February 2020 Mr Aslam made allegations of misconduct against the Claimant, alleging that he failed to carry out a patrol when required, failed to

follow reasonable management instructions to put his phone away and take personal earphones out whilst on site and was rude to him, his supervisor.

103. Mr Aslam said in oral evidence that he emailed Mr Funmilayo about this on the day, but this email (if it exists) has not been disclosed by the Respondent. Mr Funmilayo said he thought that Mr Aslam had actually sent a text message (this has not been disclosed either) and that he then asked him to put it in an email. What was alleged to be Mr Aslam's email was disclosed and provided to the Tribunal on the afternoon of Day 4, in the form of an email from Mr Funmilayo's mitie email address to his man.com email address, but purporting to be an email from Mr Aslam to Mr Funmilayo dealing with the incident of 28 February 2020. Although the email is written as if it relates to an incident on 2 March 2020, we accept that it concerns the incident on 28 February 2020 and is consistent with the evidence about that incident that Mr Aslam has given in these proceedings. Although we did not get a clear explanation from Mr Funmilayo as to why this email was not disclosed previously or how it comes to be in the form of an email to and from himself, the text of the email itself shares the stylistic hallmarks of Mr Aslam's other emails and we accept that it is a genuine Mr Aslam email. We infer Mr Funmilayo must have 'cut and paste' the text of Mr Aslam's email into an email to himself in order to get it onto his work computer. The Claimant suggests that this has been produced in order to thwart his argument that Mr Aslam's allegations are always counter-allegations to his, but we do not accept this argument: it is clear that on all previous occasions when matters have been drawn to his attention, the Claimant has responded by making counter-allegations against those who complain against him. If the email is genuine, as we find it to be, this occasion was no different.

104. On 4 March 2020 the Claimant attended an investigation meeting conducted by Mr Coleman in relation to Mr Aslam's allegations. The Claimant did not have a companion with him, but signed the notes of this meeting. The only allegations put to him in that meeting were about using his phone when on duty and not carrying out a patrol when asked. The Claimant asserted the allegations were malicious and that Mr Aslam and Mr Funmilayo wanted to get rid of him. He also accused Mr Aslam of being aggressive towards him and calling him *"gandu"*, which he explained is a derogatory Pakistani word for a homosexual. The Claimant also alleged that *"on several occasions in the past he has used derogatory terms including 'gandu' and 'nigger'"* (280-282).

105. The complaint to Mr Coleman was the first time the Claimant raised this allegation. He then referred to it in his grievance of 13 March 2020. He provides much fuller details in his witness statement (para 185) than he provided at the time, including elaborating the allegation into *"fucking nigger"* rather than just *"nigger"*. He did not raise it as an allegation in these proceedings until providing further and better particulars. The Claimant believes that Mr Aslam used the term *"gandu"* towards him because of his haemerroids.

106. Mr Aslam provided an email statement to the investigation on 11 March 2020 (prior to the Claimant raising his grievance) (283). Mr Aslam's statement describes the Claimant making extended use of his phone and refusing to stop when asked. It sets out that on that day they were doing patrols every hour as there were protests happening. The Claimant was asked to do an external patrol before 4.30pm. The Claimant agreed to do the patrol, but then got on his personal phone arguing with someone. Mr Aslam reminded him to do the patrol, and he said he would, but in the end 'stormed out' of the control room at about 4.30pm still arguing on the phone. At 5pm Mr Aslam asked a colleague if he had seen the Claimant do an external patrol and he said 'no', so Mr Aslam tried to contact him but got only a muffled response. He went to look for him and found him still on his personal phone (using personal headphones under the radio headset). Mr Aslam told the Claimant he did not want a scene but he should not be on his personal mobile, at which the Claimant was aggressive saying *"NO! (Kissed his teeth) … WHO DO YOU THING YOU ARE? … GO DO YOUR JOB MAN!".* The statement ends with Mr Aslam saying he did not feel he could work with the Claimant again because of his challenges to authority and failure to follow work procedures. The Claimant says this statement contains 'malicious allegations' and is inconsistent with the daily occurrence book (DOB) entries (278). He also says that it was not possible to fit his personal headphones under the radio headphones (456W).

107. Mr Aslam provided a statement about the incident on 11 March 2020 (283). It was put to him in cross-examination that he only wrote the statement because he had heard that the Claimant had alleged he called him "nigger" and "gandu". Mr Aslam denied this. He said he had emailed Mr Funmilayo on the day itself with his complaint, but this document was not in the bundle and that the first he had heard about the *"nigger"* and *"gandu"* allegations was when asked about it by Mr Rumbold when he was investigating the Claimant's grievance (i.e. later in the year). The statement does not deal with the *"nigger"* or *"gandu"* allegations, suggesting that Mr Aslam was unaware of them at this point.

108. Ms Leon was also interviewed in connection with the incident of 28 February 2020. She confirmed she could see the Claimant had earbuds in and appeared to be talking on the telephone, and that this was why he had not answered Mr Aslam's radio call, that the Claimant reacted aggressively to Mr Aslam, raised his voice and his arms it looked like they were actually going to fight (289). The Claimant says this was 'all lies'.

109. The Claimant has produced pictures of the radio earpieces. It is not possible to tell from the photos whether 'bud' earphones could be worn under them as the photo is taken from the front rather than the back where Mr Aslam said the Claimant had placed the earphones.

110. Reviewing all the evidence on the *"nigger"* and *"gandu"* allegations, we find that Mr Aslam did not use those words. The Claimant made them up in order to get Mr Aslam into trouble and in order to provide the foundations for a complaint of race discrimination against him. We so find because what he

says about this when first raising the allegation is inconsistent, it is him making counter-allegations to the allegations made against him by Mr Aslam (as we have found happened on previous occasions too for reasons we have already set out). We have already found the Claimant lied in response to the previous allegation made against him by Mr Funmilayo in October 2019 (i.e. when he falsely alleged Mr Funmilayo had given him permission to leave). On this occasion, the Claimant delayed two weeks in putting in his grievance formally complaining about *"nigger"* and *"gandu"*. Had these things really been said, it is inconceivable that the Claimant would not have raised the complaint immediately. We further accept Mr Aslam's evidence about when he first heard of the allegations, which is consistent with the Claimant having delayed in raising them.

111. Having considered the evidence, we also reject the Claimant's contention that everyone else is lying about this 28 February incident. It is not plausible. The allegations against the Claimant are supported by the contemporaneous documentary evidence and corroborate each other. On the balance of probabilities, the Claimant had bud earphones in and was talking on the telephone as observed by witnesses. The Claimant is not telling the truth or is, at best, mistaken about this part of the incident too.

Grievance and disciplinary

112. On 13 March 2020 the Claimant submitted a grievance to HR [308-310] about Mr Funmilayo and Mr Aslam, including alleging that Mr Aslam had used the terms "gandu" and "nigger" on 28 February 2020. He had at that point notified his union and indicated that he intended to seek legal advice. He said in oral evidence he waited a further three months to bring a claim as he received no response to this email and he had no intention when sending the grievance of commencing a claim as he was expecting a response.

113. On 17 April 2020 the Claimant was invited to disciplinary hearing conducted by Ms Ayre [296] about the allegation that he had displayed inappropriate behaviour towards work colleagues and failed to follow reasonable management instructions, specifically:-

    a. *"Refused to carry out an external patrol when asked as part of a standing instruction to step up security measures by your supervisor following a protest going on in the city. Despite being brief that two of the site tenants were specific targets.*
    b. *Being rude to your supervisor [Mr Aslam] when he approached yourself to remove your hidden mobile headphones under the radio earpiece.*
    c. *Making derogatory comments to you supervisor when he approached you to desist from using your personal headphone in the reception.*
    d. *Repeatedly use your personal telephone headphone in the front of house by hiding it under the radio earpiece. Despite being told on numerous occasions by the Site Manager and the supervisor to*

remove them. You removed it when told but only to put them back once their back is turned."

114. The letter wrongly stated that the Claimant was on a final written warning for misconduct, rather than a first written warning. Ms Ayre drew up the letter on the basis of having been sent the material by Mr Funmilayo. There was no specific decision by Mr Coleman (of which Ms Ayre was aware) to progress the matter to disciplinary. It appears to have been Mr Funmilayo's decision, albeit with advice from HR (295).

115. The Claimant replied stating that he had raised a grievance but had no response. Ms Ayre had not realised this. She then contacted Ms Bragg, People Support, about the grievance on 18 April 2020. Ms Bragg contacted Mr Rumbold (315) suggesting that the grievance had been referred to Mr Rumbold. He replied on 20 April 2020 stating that *"despite several attempts, unfortunately due to availability issues Ramon and I have not managed to meet up"*. However, there is no documentation indicating that any written acknowledgment of the Claimant's grievance was sent to him at all. Mr Rumbold's email of 20 April indicates that he was unable at that point to locate the Claimant's grievance (313). We find that no action was taken by Mr Rumbold on the Claimant's grievance prior to 20 April; the suggestion that action had been taken was Mr Rumbold trying to 'cover his back'.

116. The disciplinary process was then paused to deal with the grievance raised by the Claimant and Ms Ayre informed the Claimant of that (311).

117. On 20 April 2020 Mr Rumbold emailed the Claimant acknowledging his grievance and inviting him to a meeting (327).

118. On 23 April 2020 the Claimant and his union rep attended a grievance hearing conducted by Mr Rumbold (338-343). Notes were taken by the Respondent and corrected by the Claimant (345) In the grievance hearing he complained about the racist language he alleges was directed at him by Mr Aslam and reported that Mr Funmilayo had told his colleagues about his haemorrhoid condition and Mr Roney had laughed about his medical condition. He accused Mr Aslam of running the place like *"a banana republic"*. He identified the beginning of the deterioration in the relationship as being when the shifts changed and he challenged his 6am to 2pm shift and others being granted 4 on, 4 off shifts. (We observe that in his case before us he suggested that the relationship deteriorated as a result of the issue over holidays rather than the shift issue.)

119. On 24 April 2020 the Claimant sent an email to Mr Rumbold with further information about the alleged racial and disability discrimination. In his witness statement he states that he sent a copy of the card he received from colleagues, the voice recordings from September 2018 and July 2019, and the DOB rota, but there is no documentary evidence of this and Mr Rumbold denied having received these materials, he said that what he had received from the Claimant were previous emails from him making allegations (and his response in that respect is consistent with his email to Ms Bragg of 9 July

2020, so we accept it: 354). We therefore accept Mr Rumbold's evidence on this point. The Claimant did not at this point seek to complain about the other matters or provide them to Mr Rumbold. The Claimant provided detailed comments on the minutes, not all of which were accepted by the minute-taker, Ms Hetherington (SB, 23).

120. Mr Rumbold interviewed Mr Aslam, Mr Funmilayo, visited the site and spoke to other officers and viewed CCTV footage. He did not keep notes of any of these conversations, despite the Respondent's policies being clear that notes and evidence should be kept and shared with employees.

First claim

121. Around this time the Claimant's trade union representative advised him to bring a claim because of time limits and helped the Claimant to contact ACAS and bring a claim. The Claimant contacted ACAS on 2 June 2020 and was issued with a certificate on 17 June 2020.

122. On 16 July 2020 the Claimant presented his first claim to the Tribunal. This included claims of discrimination, harassment and victimisation against Mr Funmilayo, particularly focused on the written warning and his grievance, but with limited particulars. The notice of claim was not sent to the Respondent until 4 September 2020 and there is no reliable evidence (or none that we accept) that anyone at the Respondent was aware of the claim before that date.

Grievance outcome

123. On 28 July 2020 Mr Rumbold sent the Claimant the grievance outcome with no explanation for the three-month delay. Mr Rumbold in his witness statement says the delay was owing to annual leave and sickness absence.

124. Mr Rumbold had prepared a draft response to the grievance by annotating the Claimant's original grievance text in red font and sending this to Ms Bragg on 9 July 2020 (354) who compiled a response letter which was sent out on 28 July 2020 (370-372). Mr Rumbold dismissed the nigger and gandu allegations on the basis of 'no evidence', and the other allegations the Claimant had made. His findings regarding the Claimant's complaints about shifts, holidays and overtime were consistent with the Respondent's case in these proceedings. He upheld the Claimant's complaint that Mr Roney had never provided him with a disciplinary appeal outcome or investigated his previous grievance.

125. Mr Rumbold's red comments on the Claimant's grievance include the following: *"There is no evidence of favouritism on the site, no evidence has been supplied by [the Claimant] to support this claim and it is evident from this investigation the reason why [the Claimant] may find himself involved in the company disciplinary process ie the above point relating to holiday*

authorisation" (359). It was suggested in cross-examination that this indicated that Mr Rumbold recognised the Claimant was being subjected to disciplinary proceedings for having challenged Mr Funmilayo in relation to his right to holidays, but it is clear on reading the document that the *"above point relating to holiday authorisation"* is the preceding paragraph in which Mr Rumbold describes how the Claimant had gone over Mr Funmilayo's head to Workplace administration to book holiday that he knew his line manager had not authorised. As Mr Rumbold explained in oral evidence, when given a chance to re-read this document, what he described there was something for which the Claimant could have been subject to disciplinary action. In other words, it was an example of the sort of conduct that might lead the Claimant to end up the subject of disciplinary action, and that was what Mr Rumbold meant by his comment in red.

126. There is no explanation at all for HR's delay between 9 July when Mr Rumbold prepared his draft response and 28 July 2020 when the outcome was sent out. As to the delay prior to that point, we accept that annual leave and sickness absence may have accounted for some of the delay between the grievance meeting on 23 April and 9 July 2020, but not for all of it. There has not been an adequate explanation for the length of this delay (especially given the lack of notes from Mr Rumbold's investigation process) and we consider the delay was unreasonable given the relatively simple nature of the grievance. However, the delay could be said to have advantaged the Claimant by delaying the disciplinary proceedings. We do not infer that the reason for delay was an attempt to render the Claimant out of time for bringing proceedings. This was denied by Mr Rumbold and it is not plausible in a case where it would not have been obvious from the materials before Mr Rumbold that legal proceedings were being contemplated and the Claimant himself denied contemplating them when he brought the grievance (despite the reference to an intention to take legal advice).

Disciplinary outcome

127. Following the grievance outcome, Ms Ayre re-started the disciplinary process (373) and invited the Claimant to attend a meeting on 11 August 2020. The meeting was rescheduled to 20 August 2020. The Claimant provided Ms Ayre with the DOB (278). This shows the Claimant as having recorded Mr Funmilayo as undertaking an External Patrol at 16.02 and the Claimant at 18.00. Ms Ayre was not on site at this point owing to lockdown. She did not check CCTV.

128. By letter of 20 August 2020 (381) Ms Ayre informed the Claimant that no disciplinary action would be taken against him in relation to the allegations because the Claimant had shown that he was not refusing to complete the external patrols as he had completed them during the day, the Claimant had been told that patrols were to be completed every hour and as Mr Funmilayo had completed an external patrol at 4:00 PM there was no need to complete one at 4:30 PM, the Claimant had completed than external patrol at 6:00 PM and there were inconsistencies in the evidence. Ms Ayre did not deal with all

the allegations against the Claimant, but concluded the letter by stating: *"any repetition of the above, or similar, or failure to maintain the required improvements is likely to lead to an escalation of the disciplinary process that could ultimately lead to your dismissal"*. This was understandably confusing to the Claimant who felt that he had been exonerated but nonetheless was being warned against further conduct of which, so far as appeared from the letter, he had been found 'not guilty'.

129. Ms Ayre in her witness statement explains that in some respects she misunderstood the evidence and allegations against the Claimant and in hindsight she would have upheld the allegations. As it was, she *"felt that there was a bit of a witch-hunt against the Claimant … due to a personality clash, not discrimination"*. She felt that people were too hard on the Claimant because he was *"challenging"* and *"hot headed"* and she felt he needed to be given a bit of *"grace"*. Essentially, she 'gave the Claimant the benefit of the doubt', but did not believe he was wholly innocent of misconduct, hence the letter still included a warning.

130. We observe that Ms Ayre's decision in this case was, as she now recognises, generous to the Claimant. It is in fact clear from the DOB that the Claimant provided that he had not carried out a patrol at 4.30pm as Mr Aslam had said he had requested. As a result, there were no patrols for 2 hours between 4 and 6pm on a day when patrols were supposed to be carried out every hour because of risk from protesters. There were no inconsistencies of substance in the evidence because Ms Leon's evidence supported Mr Aslam's evidence that the Claimant had been on his personal phone and not answering his radio and had reacted aggressively when challenged.

<u>July-November 2020 Allegation against Mr Funmilayo and Mr Aslam (allegation 3.1.8)</u>

131. The Claimant alleges that between 16 July 2020 and 10 November 2020, Mr Funmilayo and Mr Aslam would make snide remarks about him when he went to the toilet. Mr Funmilayo and Mr Aslam deny this. As with the similar previous allegation by the Claimant we reject it for the same reasons.

132. On 4 September 2020 notice of the Claimant's First Claim was sent to the Respondent.

<u>Altercation with Mr Aslam and disciplinary proceedings (allegation 3.1.9)</u>

133. On 7 November 2020 the Claimant had another altercation with Mr Aslam in the control room. Mr Aslam had been off for 14 days of isolation as he had been in contact with someone with Covid-19. On return to work, Mr Aslam was (he says) clearing his throat as he has hayfever or coughing (as the Claimant perceived it) and (although there was a plastic screen and 2 metres between them) the Claimant objected as he feared that Mr Aslam was going

to give him Covid-19 and asked him to put on a face mask. Mr Aslam refused saying clearing his throat was 'natural'. According to Mr Aslam's account, he also assured the Claimant that he had had a negative Covid test before returning to work.

134. The Claimant in his witness statement provides two different accounts of this incident: one at paragraph 188 and one at paragraphs 257-264. In his first account he alleges that after Mr Aslam said it was *"natural"*, he replied *"so if I'm farting constantly and said its natural will he like it"* and that Mr Aslam then stood up and went out for a bit, and then came back in again and came near him and started coughing again. The Claimant complained again and Mr Aslam said he could leave the office if he did not like it. The Claimant alleges he said that the Claimant's *"days here are numbered"* and called him (the Claimant) *"fucking nigger and gandu"* at which point the Claimant took out his phone, started recording and asked him to call him that again.

135. In his second account, the Claimant describes how he *"knew"* Mr Aslam had Covid because he had been off for being in contact with someone with Covid and he was not wearing a facemask, and that he said to Mr Aslam that he expected him to try to prevent harm to others by wearing a face mask. The Claimant says that *"in order to diffuse the situation"* he started talking on his phone to his friend in Yoruba, and that Mr Aslam then started recording him. The Claimant says that Mr Aslam came up and stood near him coughing and sneezing, that the Claimant said that he was now 'taking the piss' and that he *"started calling me nigger and gandu and talking in his language swearing"*, that the Claimant was angry at this and brought out his own phone and started recording, and that it was only at this point that Mr Aslam left the office and came back with Mr Funmilayo on the phone, who spoke to the Claimant and asked him to send an email setting out his side of the story, so the Claimant sent the email at p 388 at 15.33.

136. In the email at p 388 the Claimant does not mention speaking on his phone to his friend, or mention that he recorded Mr Aslam. He accuses Mr Aslam of *"speaking in his own language"* when the Claimant complained about him coughing, and saying *"your days are number"*. He refers to his previous complaint about Mr Aslam calling him *"nigga and gandu"*, but does not allege he did so again on this occasion. In his email, he asked Mr Funmilayo to tell Mr Aslam to *"stop using F word and calling me names in his language and he should try and cover his mouth when sneezing and cough"*.

137. Mr Aslam's account in his witness statement is that when he was eating his lunch and clearing his throat (because of his allergies) the Claimant started shouting saying, *"stay away from me .. don't give COVID"* and *"get the fuck out of here you're so annoying boy"*. Mr Aslam then asked him if he was talking to him as he was not looking at him. He told the Claimant he should not talk to him like that as it was rude and he had no control over his allergy. The Claimant replied *"who the fuck do you think you are?"*. Mr Aslam said again he could not talk to him like that. The Claimant then came towards him saying that he would, *"thump me one"*. Mr Aslam then started to record the Claimant, who made a phone call in the control room in Yoruba. While doing

so the Claimant continued to look at him and talk about him, staring at him and intimidating him. Mr Aslam then called Mr Funmilayo who asked the Claimant to work from the loading bay for the rest of the day. The Claimant did not go as requested, but stayed in the control room for a while and spent the rest of the afternoon coming in and out. Mr Aslam does not mention the Claimant recording him.

138. At Mr Funmilayo's request, Mr Aslam sent an email to him with his account of the event at 16.03 (p 388). His account is consistent with his witness statement, save that he does not mention the Claimant being on the phone to his friend when he was recording. The email ends with a complaint that working with the Claimant is affecting his physical and mental health and requesting a change of shift pattern.

139. There is no dispute that after speaking to both of them and after receiving the Claimant's email (but before receiving Mr Aslam's) Mr Funmilayo asked the Claimant verbally to work the rest of his shift from the loading bay office, and not to come to work the next day. He confirmed this by email to the Claimant at 15.54 (p 387).

140. The Claimant's recording of Mr Aslam that day consists of a lengthy rant by the Claimant towards Mr Aslam in which, in a verbally aggressive manner, the Claimant asks Mr Aslam to talk, to say the words 'gandu' and 'nigger' and accuses him of bullying and harassment. Mr Aslam can be heard faintly in the background asking the Claimant to leave him alone (456V).

141. There are competing translations/transcripts of Mr Aslam's recordings of the Claimant that day at 455A and B (Claimant's version) and 456 (Respondent's version). Both appear to be recordings of telephone calls. The Respondent's transcript includes the Claimant saying that he said to Mr Aslam, *"get the fuck out of here and do whatever you have to do outside"* and *"stared at his mother … you a degenerate pauper?"*, that he said *"I am letting him know that I am intimidating him as I am here. I am staring at him, I am staring at him"*, and that he said *"once I finish work on Tuesday, I am not doing any work for the rest of this month and I don't pray that come back here in December as I hope the streetlight people will have found work for me. That is my plan to start work for them. I will not back here no more. What a degenerate pauper"*. The Claimant's translation/transcript is broadly similar but does not include all the swearing or the bit about him intimidating Mr Aslam. It does include him saying that, *"I am just making him feel silly ... I am looking at him as I am, I am looking at him as I am here",* that he said to Mr Aslam, *"take your madness outside … don't you know that's nasty? … just like me farting and keep saying to him it's natural … come on get the fuck out of here"* and *"I am not working this month again I don't even pray to come back here in December … he's found a job for me … I don't want to come back here at all…"*.

142. 7 November 2020 was a Saturday. Mr Aslam describes in his witness statement how over the weekend he began to feel even worse. Mr Aslam had been suffering from stress for some time as a result of the way the Claimant

behaved towards him at work, and had seen his GP and been prescribed medication for this. At 9am on Monday, 9 November 2020, he emailed Mr Funmilayo again (the email having evidently been prepared by Mr Aslam on Sunday) to inform him about his blood pressure problems, anxiety and stress. He wrote, *"The threats [the Claimant] made to hit me yesterday was actually the indication that this is only going to get worse with time as yesterday he threatened me tomorrow he can actually act on it and on top of it he will accuse me of doing all that because this has happened in the past."* He stated that he could not work with the Claimant again, that it was *"a constant hell working with [the Claimant] to the point it has affected my Family life which I realise when I spend the two weeks at home off from work to only realise that my Anxiety levels and stress Started to reduce and I was calm and not agitated at all. And after yesterday my sugar levels are up and my anxiety is out of control agains as I have to face him on Monday and God knows what is he going to accuse me of this time round. He has no respect for authority he always do what he likes and when told to do something he will refuse and in some cases he will do it but will not do it properly examples are the Patrols he will go on patrols but instead of doing patrols either he will sit upstairs or will go on 7th floor and play darts. Kindly sort it out."*

143. On 9 November 2020 Mr Funmilayo held an investigation meeting with the Claimant (391). Mr Funmilayo took notes and both of them signed the notes. The Claimant at this meeting gave an account broadly consistent with the account he gives at paragraph 188 of his statement in these proceedings, i.e. that he had challenged Mr Aslam about not coughing and giving him Covid-19 and that Mr Aslam had started speaking in his own language and called him *"gandu"* and *"nigga"*. The Claimant said he had a recording of this. The Claimant said he had done nothing in response when Mr Aslam refused to put a face mask on, other than to put his own face mask on. He alleged that Mr Aslam said *"your days are numbered anyways"* and repeated the words *"nigger"* and *"gandhu"* again. The Claimant accused Mr Aslam of not wearing the right shoes when on duty, in response to which Mr Funmilayo asked the Claimant if he had been wearing the appropriate uniform and the Claimant said that he was not as he had forgotten his shirt. Mr Funmilayo asked if Mr Aslam had confronted him about that, and the Claimant said he had not.

144. Mr Funmilayo also interviewed Mr Aslam on 9 November 2020. The Respondent failed to disclose the notes of this meeting to the Claimant until Day 4 of the hearing, when the judge asked about where Mr Dicks (who did the disciplinary hearing) had got the information for a *"precis"* of the interview that he had included in his personal notes. Despite this disclosure failure, we accept the notes as genuine as they have all the hallmarks of being so (i.e. rushed writing, corrections) and their content is reflected in Mr Dicks' typed notes so it is obvious he had seen these notes when preparing for the disciplinary. In his interview, Mr Aslam added a few details that were not in his previous emails, including that at the beginning of the incident the Claimant had been sparying aerosols in the air and that he had reassured the Claimant that he had done a negative Covid test. His allegations about what the Claimant said to him remained broadly consistent with what he had alleged in his emails, and his witness evidence in these proceedings, save

that he added that when he started to record the Claimant, the Claimant also said that he was going to record Mr Aslam and got out his phone and said he had called him *"nigga"* and *"gandu"*. Mr Aslam said that the Claimant then walked out of the control room mimicking and clearing his throat as well as saying things in his language which Mr Aslam recorded on his phone. Mr Aslam then phoned Mr Funmilayo to complain. The Claimant later came back in, now talking on the phone to someone else and Mr Aslam recorded him again. Mr Funmilayo reminded Mr Aslam that he was not supposed to record other officers, and Mr Aslam explained he had done so out of fear for his safety as he did not think that as supervisor he would leave the control room, but as the Claimant continued Mr Aslam was feeling sick and so did walk out of the control room and call Mr Rumbold, that Mr Rumbold was concerned and advised him to write an email setting out his account of events. He said that after the Claimant had been instructed by Mr Funmilayo to go to the loading bay it took him 30 mins to 1 hour to go because he was writing his own email of events and then kept coming in and out of the control room. Mr Funmilayo asked whether there was anything else that Mr Aslam wanted to add, at which point Mr Aslam mentioned that the Claimant had not been wearing his unifom all day and that when he tried to challenge him about this he did not want to listen. Also at 6pm he had been asked to do a patrol, but all he did was go up to the 7th floor to play darts, which Mr Aslam knew because he had tried to call him on the radio and he did not answer but could be seen on CCTV playing darts.

145. The Respondent's Managing Investigations policy indicates that the investigating officer *"should not be a close acquaintance of any of the individuals involved or have had any complaints made against them …. By any of the individuals involved"*. Mr Funmilayo did not fit this description. Mr Rumbold said that it was normal for the site manager to carry out an investigation. We observe that although Mr Funmilayo should not have carried out the investigation according to the Respondent's policy, there was nothing objectionable about the way he conducted the investigation meetings. He asks both the Claimant and Mr Aslam a series of impeccably open questions about the incident and expresses no judgment at all.

146. On 10 November 2020, in the light of Mr Aslam's further email of 9 November 2020, Mr Funmilayo decided that in order to protect Mr Aslam's mental health he needed to suspend the Claimant pending investigation, which he did [397/8]. He did not suspend Mr Aslam because as the supervisor he needed Mr Aslam at work. We infer that he also suspended the Claimant because, given the history of the Claimant's employment, he reasonably viewed the Claimant as the aggressor. The suspension letter specified the disciplinary allegations as follows:-

    a. Serious insubordination: You refused to wear your standard uniform issued while on site despite being requested by your supervisor (Mr Aslam).
    b. Aggressive or other unacceptable behaviour towards your supervisor Mr Aslam where you threatened to thump him one as well as refusing

to carry out reasonable request by not answering your radio while on patrol.

c. Acts of bullying or violence, including threat of physical assault on your supervisor Mr Aslam by squaring up to him at his seat and being on the phone making calls and laughing disrespectfully and derogatorily at him.
d. Harassment, victimisation of your supervisor while on shift to the point where he felt unsafe and had to make recordings of events to protect himself and call up the Site and Strategic operations Manager to resolve the issues on the 7 November 2020.

147. After discussion with HR, Mr Rumbold decided that the matter should proceed to a disciplinary.

148. On 17 November 2020, the Claimant had an operation and was subsequently signed off work.

149. On 25 November 2020 Mr Rumbold prepared a letter inviting the Claimant to a disciplinary hearing on allegations of gross misconduct [401/2].

150. On 26 November 2020 there was a preliminary hearing in these proceedings before Employment Judge Walker. At this hearing, the Claimant complained that he had been subject to disability discrimination.

151. The disciplinary invitation letter was sent to the Claimant on 27 November 2020 (401, 404). It informed him of his right to be accompanied. It stated that it enclosed ”Investigation Notes”, but was not specific about what was enclosed and the Claimant has denied receiving any documentary evidence other than the notes of his own investigation meeting with Mr Funmilayo. The Claimant asked at the disciplinary hearing to be provided with Mr Aslam’s recordings, but these were not provided to him. He also several times asked, non-specifically, for *“evidence"* of the allegations against him. As these sound like generic references to denying allegations, it is understandable that these references were not understood by Mr Dicks to be requests for specific documents. We have considered carefully whether we should accept the Claimant’s contention that he was not provided with other documentary evidence because of our finding that his evidence on other issues has been unreliable, but on this point we find he is correct. There is no evidence before us that the investigation meeting notes of Mr Aslam were sent to him, or any of the other emails or Mr Aslam’s recordings. These should have been sent by Mr Rumbold with the invitation letter, but he gave no evidence that he had done so and there is no documentary trace of these being sent. Given the Respondent’s very late disclosure of Mr Aslam’s investigation meeting notes, we draw the inference that none of this documentary evidence was provided at the time.

152. The Claimant complained about Mr Rumbold hearing the disciplinary as he did not have confidence in Mr Rumbold’s judgment, so Mr Rumbold withdrew and the Respondent appointed Mr Dicks (Account Director) instead who had no prior knowledge of the Claimant or Mr Funmilayo or Mr Aslam. Mr Dicks

was a former police officer with 32 years' experience. Mr Dicks spoke to Mr Funmilayo and Mr Rumbold before the hearing. He made notes on the two investigation meetings. Mr Dicks also had what he believed to be Mr Funmilayo's Yoruba transcriptions and translations of Mr Aslam's recordings (which file data indicates were prepared on 30 November 2020, although this is unlikely given that Mr Dicks recalls having had difficulty finding someone to transcribe it). Mr Dicks was unsure whether the transcripts had been shared with the Claimant. We find that he did not send the transcripts to the Claimant either as if he had done, he said he would have arranged a second interview, and we find that the Claimant would have disputed the transcripts, as he has in these proceedings.

153. The disciplinary hearing took place on 1 December 2020 [411-416]. Mr Dicks emailed the Claimant 3 hours before to let the Claimant know that he was hearing the disciplinary [417]. Notes were taken of the meeting, and these were sent to the Claimant after the meeting and he provided comments on the parts he did not agree with. The Claimant did not have a representative at the meeting.

154. At the start of the meeting, the Claimant said he was recovering from an operation and not feeling well but was willing to continue with the meeting. Mr Dicks found (as we did in this hearing) that the Claimant had difficulty focusing on the question and often answered at length with complaints about matters other than that with which the question was concerned. So far as the disciplinary allegations were concerned, the Claimant denied that he had done anything wrong, including specifically denying threatening, bullying or thumping Mr Aslam. He did accept he was wearing the wrong shirt, but pointed in mitigation to his feeling stressed and the fact that Mr Aslam was not wearing the proper shoes. Regarding the incident with Mr Aslam, the Claimant gave an account of events which differs again to that which he has given in these proceedings. In particular, he said that Mr Aslam was in and out of the office during the incident, that he had not sworn at Mr Aslam. He said that he had recorded Mr Aslam on his phone calling him *"nigga"* and *"gandu"*. He said (implausibly, as it was pre-pandemic) that in October 2019 when he returned to work after surgery Mr Aslam had required him to prove he did not have Covid. Regarding the patrol allegation, the Claimant urged Mr Dicks to check CCTV. He said that during the patrol he played darts only for a moment, but 'everyone does it'. Mr Dicks put to the Claimant key points of evidence, such as that Mr Funmilayo had said that a patrol normally takes 25 minutes, that Mr Aslam had alleged he threatened to hit him, and that he swore at Mr Aslam. The Claimant denied the allegations, and made counter-allegations of bullying and harassment against Mr Funmilayo and Mr Aslam and Mr Dicks said he should send him the details.

155. After the meeting Mr Dicks carried out further investigation.

156. By email of 2 December 2020 he asked the Claimant to send *"details and documents"* so he could complete his interview notes (418). The Claimant in response sent to Mr Dicks about 100 pages of emails (420) dealing with his previous concerns and grievances in relation to Mr Funmilayo and Mr Aslam.

Mr Dicks read the documents but did not see these as relevant and considered that the Claimant should raise a grievance about those matters if he wished.

157. Mr Dicks then attended the site on 3 December 2020 and reviewed CCTV. He kept no notes of what he viewed on the CCTV and did not share the footage with the Claimant (in breach of the Respondent's Managing Investigations policy: 89). He recorded his findings in the outcome letter, which included that the Claimant completed the patrol he was required to carry out that day in 12 minutes (when 25 minutes is normal), and spent 6 minutes of that time playing darts on the 7th floor. Mr Dicks did not consider it important whether the Claimant had spent 1 minute (as the Claimant contends) or 6 minutes (as Mr Dicks noted when viewing the footage). Either way, Mr Dicks considered he should not have been doing it. We asked Mr Dicks whether he investigated whether it was customary for other officers to play darts as the Claimant asserted. Mr Dicks said in oral evidence that he had asked Mr Funmilayo about that, but we do not accept he did as the outcome letter states *"Even though there is no policy regarding playing darts, I believe this is something that all security officers will understand is a breach of requirements and professional standards to play darts when not on a break and in the middle of a patrol"*. It does not identify the source of Mr Dicks' belief in this regard as it would if he had investigated.

158. Mr Dicks also listened to recordings provided by Mr Aslam and the Claimant, and read the translations/ transcripts prepared (he thought) by Mr Funmilayo (he had tried to find someone else to do it, but had been unable to find anyone else who spoke Yoruba). He did not share Mr Aslam's recordings with the Claimant, or the translations/transcripts because he thought they were 'clear', 'obvious', 'black and white' (his terminology). When we asked whether it had occurred to him that there might be a dispute about the translation of Yoruba, he said that it had, but we infer from his forthright assertion prior to this question that the transcripts were clear that it did not occur to him at the time.

159. Mr Funmilayo forwarded to Mr Dicks an email from Ms Woolfrey of 31 October 2020 (431) containing general complaints about working with the Claimant. This was not shared with the Claimant either.

160. Mr Dicks investigated the allegation about Mr Aslam wearing trainers and found this had been authorised because of his diabetes. He did not investigate what the Claimant said about Florence not wearing uniform on night duty. He did not ask the Claimant for more details about this. If he had, we find that there is no reason why he could not also have viewed CCTV in relation to her in order to investigate it, given that the case was a potential dismissal case so far as the Claimant was concerned and thus of importance.

161. Mr Dicks also did not provide the Claimant with copies of the evidence gathered either before or after the meeting on 1 December 2020. This is contrary to the Respondent's Disciplinary Policy: Manager's Guide (88). Evidence gathered in any further investigation is also to be provided to the employee and they should be provided with a further meeting at which to

discuss it (90). The Claimant was not provided with a further meeting because Mr Dicks thought the case was clear, there was nothing of significance that had come up on further investigation and there was therefore no point in a further meeting.

162. Mr Dicks sent a draft of the outcome letter to Ms Williams of HR on 6 December 2020 (Supp Bundle, 38) and she drew it together into letter format. He discussed with HR whether it was an appropriate case to dismiss, and HR agreed. Formal approval for dismissal was then sought from senior HR on or around 10 December 2020.

163. Mr Dicks informed the Claimant on 6 and 10 December that he was 'continuing with his investigation' (429), although in fact he had by that time concluded his investigation and (by 10 December) had decided to dismiss. While Mr Dicks might have chosen his words more carefully so as to avoid an untruth, we do not consider there was any harm in this email, which only needed to be a holding email. There was no prejudice to the Claimant.

Dismissal

164. By letter of 15 December 2020 (433-436) the Claimant was informed that he was dismissed on grounds of gross misconduct. The specific findings were:

    a. The Claimant had failed to wear the correct uniform without reasonable excuse. The occasion when Mr Aslam had attended work in training shoes had been authorised in advance.
    b. The Claimant had behaved aggressively unreasonably and disrespectfully towards Mr Aslam including threatening to thump him on 7 November 2020. (As the Claimant has submitted that there was no finding that the Claimant had threatened to thump Mr Aslam, we observe here that there was: the thump threat was one of the specific allegations put to the Claimant, which he denied at the hearing, but Mr Dicks preferred Mr Aslam's evidence as is clear from the disciplinary outcome letter which details Mr Aslam's evidence in this regard, and proceeds to a finding that Mr Aslam *"should be able to attend work without the fear of violence"*.)
    c. The Claimant had failed to leave the control room when requested by Mr Funmilayo. There was no justification for this because the Claimant had been provided with alternative facilities on which to work in the loading Bay. This was a new allegation that was not included in the list of allegations put to the Claimant at the disciplinary. Mr Dicks did not think it necessary to do so as it was all about not following reasonable management instructions.
    d. The Claimant had failed to complete a regular internal patrol, which should have taken at least 25 minutes but took the Claimant only 12 minutes of which six minutes was spent playing darts on the 7th floor. The Claimant had also during this time failed to respond to Mr Aslam's calls on the radio. This was a particular problem on this occasion as it was only the Claimant and Mr Aslam on site.

e. The Claimant's allegation against Mr Aslam in respect of him calling him nigger and gandu were not upheld because the recording that the Claimant had produced did not include Mr Aslam audibly saying those words.
f. No other evidence of the harassment the Claimant alleged had been found.

165. Mr Dicks decided that dismissal was the appropriate response. He also found that the Claimant's conduct had resulted in a breakdown of trust and confidence in the working relationship. His letter gives detailed reasons for his findings and we do not repeat it here.

166. In oral evidence Mr Dicks made clear that dismissal was for all the allegations together. He would not have dismissed for the uniform issue alone. He said he would probably have dismissed, or given at least a final written warning, for the threat of violence alone. Although it had been important to him that the Respondent's translation of Mr Aslam's recording included the Claimant admitting that he was trying to *"intimidate"* Mr Aslam, he did not consider that the Claimant's translation would have made much difference to his decision as the essential elements were the same.

167. The Respondent's policy provides that a disciplinary manager should check for consistency between a particular case and decisions taken in past cases. Mr Dicks liaised with HR regarding sanction, which we find provided that necessary reassurance in accordance with the policy.

168. The Claimant was informed of his right of appeal but did not appeal because he says he had lost faith in the Respondent's processes and just wanted to leave and *"not to return back to a work environment of bullying, victimisation and threat of sack"*.

169. For the most part we do not have to make findings of fact about what happened in the last altercation between the Claimant and Mr Aslam for which the Claimant was dismissed for the purposes of the issues we have to decide. Our role is confined to reviewing the Respondent's decision by reference to the reasonable responses test. However, we do have to decide whether Mr Aslam in the course of the altercation called the Claimant *"nigger"* and "*gandu"*. We found that the Claimant lied about this when he made the allegation the first time in February 2020 and for the same reasons we find he was lying again this time. Indeed, his account on the second occasion has further inconsistencies as we have identified.

Supervisor cover rates

170. The Claimant alleges that Mr Funmilayo refused to pay the Claimant the supervisor's rate when the Claimant covered Mr Aslam's supervisor position. The Claimant complained about this in his email to Mr Roney of 14 August 2019 (247). In his witness statement he asserts that a colleague, Kennedy was being paid a supervisor rate. The Claimant asked Mr Funmilayo about

29 August 2020 about getting the supervisor rate when covering. Mr Funmilayo replied on 3 September 2020 stating *"we are in the middle of getting the site cost model to where we need to be currently. As soon as this is finalised, the pay rates issues will be addressed accordingly"* (386). The Claimant said in his witness statement that after this he was paid the supervisor rate, but in oral evidence he said he was never paid at the supervisor rate. We find his oral evidence to be correct as there is no documentary evidence that he was paid the supervisor rate and the Respondent's position is that he was not because he was never undertaking the supervisor role. As we have found the Claimant on most issues of dispute to be an unreliable witness we do not accept his assertions as to differential treatment.

Overtime

171. The Claimant alleges Mr Funmilayo made it difficult for the Claimant to work overtime, by refusing the Claimant when he requested overtime, not always paying overtime and not offering overtime to the Claimant when it was available. The Claimant says that Mr Funmilayo or Mr Aslam always did the overtime and around September / October 2020 everyone got overtime, but not the Claimant. Mr Funmilayo says that all staff had the same opportunity to work overtime as vacant shifts were put on the board for everyone to sign up. Mr Aslam confirms this.

172. The Claimant was asked by the Respondent to provide specifics about overtime and supervisor rate allegations, but did not do so (51). In the absence of specifics, we accept the Respondent's evidence that he was treated the same way as the rest of the team regarding overtime.

Second claim

173. The Claimant provided further particulars in the First Claim on 5 February 2021, and the Respondent provided a response on 25 February 2021.

174. There was a Preliminary Hearing before Employment Judge Goodman on 3 March 2021.

175. The Claimant filed a second claim on 13 May 2021. This relied on a second ACAS Certificate, which is not in our bundle.

176. There was a further Preliminary Hearing on 10 August 2021 before Employment Judge Nicolle. The Final Hearing was listed for January 2022, but then postponed to this hearing.

Conclusions

Harassment (EA 2010, ss 26 and 40)

The law

177. By s 40 EA 2010 an employer must not harass any employee or applicant for employment. By s 26(1) of the EA 2010 a person harasses another if: (a) they engage in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of (i) violating the claimant's dignity or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. By s 26(4), in deciding whether conduct has the requisite effect, the Tribunal must take into account: (a) the perception of the claimant; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect. In *Land Registry v Grant* [2011] EWCA Civ 769, [2011] ICR 1390 at [47] Elias LJ focused on the words of the statute and observed: *"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment"*. As the EAT explained at [31] in *Bakkali v Greater Manchester Buses (South) Ltd* [2018] ICR 1481, harassment involves a broader test of causation that discrimination which requires a *"more intense focus on the context of the offending words or behaviour"*. The mental processes of the putative harasser are relevant but not determinative: conduct may be 'related to' a protected characteristic even if it is not 'because of' a protected characteristic. The provisions on harassment take precedence over the direct discrimination provisions: conduct which amounts to harassment does not (save where the harassment provisions are disapplied for the specific protected characteristic) constitute a detriment for the purposes of ss 13 or 27: see EA 2010, s 212(1).

178. The burden of proof is on the Claimant initially under s 136(1) EA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has acted unlawfully. The burden then passes to the Respondent under s 136(3) to show that the treatment was not discriminatory: *Wong v Igen Ltd* [2005] EWCA Civ 142, [2005] ICR 931. The Supreme Court has recently confirmed that this remains the correct approach: *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] 1 WLR 38

Conclusions

179. Taking each of the allegations of harassment in turn, we find as follows:-

On or around October 2018, Mr Funmilayo said to the Claimant this is not a village meeting (related to race)

180. We found as as fact that these words were not used, so the claim fails.

On or around 11 March 2019 and 24 July 2019 Mr Funmilayo subjecting the Claimant to a disciplinary process about his extended toilet use despite knowing about the Claimant's medical

condition (related to disability)

181. We found as a fact that Mr Funmilayo was unaware of the Claimant's medical condition and the Claimant chose at this point not to make him aware. This claim therefore fails.

On or around 3 October 2019, Mr Roney laughing at the Claimant when he disclosed his medical condition (related to disability)

182. While we accept this incident happened as a matter of fact, the context of the laughter was such that we find it is unreasonable for the Claimant to have regarded this as crossing the threshold for harassment. It is clear from the Claimant's own evidence that Mr Roney was being sympathetic and his words and conduct cannot reasonably have been regarded as violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. This claim therefore fails.

On or around 15 October 2019, Mr Funmilayo discussed the Claimant's confidential medical condition with colleagues and the reason for his absence (related to disability)

183. This allegation fails on the facts as Mr Fumilayo did not discuss the Claimant's confidential medical condition with colleagues or the reasons for his absence. We find as a fact that it was the Claimant who told the receptionists about it. This claim therefore fails.

On or around 17 October 2019, the Claimant received a get-well card with several messages in the card from colleagues making fun of the claimant for having what they called bum surgery (related to disability)

184. The colleagues who wrote the messages in the card that the Claimant now claims to regard as objectionable were those made by the receptionists that the Claimant had himself told about his condition. The receptionists were not employed by the Respondent, but we do not base our decision on that as the card was delivered to him by an employee of the Respondent. However, the messages themselves are sympathetic and only mildly humourous and we found as a fact that they did not offend the Claimant at the time. In the circumstances, they did not amount to harassment. This claim fails.

On or around November 2019 when the Claimant returned to work and until the submission of his ET1 on 16 July 2020, whenever the Claimant would go to the toilet, his colleagues would laugh at his bum and make fun of him about his medical condition (related to disability)

185. This allegation also failed on the facts we found.

On 28 February 2020, Mr Aslam called the Claimant a nigger and gandu (related to race)

186. This allegation also failed on the facts. Those words were made up by the Claimant and not said by Mr Aslam.

Between 16 July 2020 and 10 November 2020, Mr Funmilayo and Mr Aslam would make snide remarks about claimant when he went to toilet (related to disability)

187. This allegation also failed on the facts we found. It did not happen.

On 7 November 2020, Mr Aslam called the Claimant nigger and gandu (related to race).

188. This allegation failed on the facts. Those words were made up by the Claimant and not said by Mr Aslam.

189. The harassment claims are therefore dismissed.

Working time detriment (ERA 1996, s 45A)

The law

190. Section 45A(1) of the ERA 1996 provides as follows:-

> **45A.— Working time cases.**
>
> (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–
> (a) refused (or proposed to refuse) to comply with a requirement which the employer imposed (or proposed to impose) in contravention of the Working Time Regulations 1998,
> (b) refused (or proposed to refuse) to forgo a right conferred on him by those Regulations,
> (c) failed to sign a workforce agreement for the purposes of those Regulations, or to enter into, or agree to vary or extend, any other agreement with his employer which is provided for in those Regulations,
> (d) being–
> (i) a representative of members of the workforce for the purposes of Schedule 1 to those Regulations, or
> (ii) a candidate in an election in which any person elected will, on being elected, be such a representative, performed (or proposed to perform) any functions or activities as such a representative or candidate,
> (e) brought proceedings against the employer to enforce a right conferred on him by those Regulations, or
> (f) alleged that the employer had infringed such a right.
>
> (2) It is immaterial for the purposes of subsection (1)(e) or (f)–
> (a) whether or not the worker has the right, or
> (b) whether or not the right has been infringed,
> but, for those provisions to apply, the claim to the right and that it has been infringed must be made in good faith.
>
> (3) It is sufficient for subsection (1)(f) to apply that the worker, without specifying the right, made it reasonably clear to the employer what the right claimed to have been infringed was.
>
> (4) This section does not apply where a worker is an employee and the detriment in question amounts to dismissal within the meaning of Part X.

191. It is notable that the section provides at sub-s (2) that it is immaterial for the purposes of sub-s (1)(e) or (f) whether or not the worker has the right in question or whether or not the right has been infringed (provided that the

claim or allegation is made in good faith), but the same caveat is not included for any of the other sub-paras of sub-s(1), including sub-s(1)(b) 'refusal to forgo a right conferred on him by the regulations' on which the Claimant relies in these proceedings. As a matter of statutory construction, we consider (and the parties agree) that in order to rely on that sub-para the Claimant must have refused to forgo a right that he actually had under the regulations.

192. The parties are further agreed that an employer does not deny an employee the right to annual leave under regulation 13 of the *Working Time Regulations 1998* merely by refusing to grant leave on particular days requested. By virtue of regulation 15 an employee requesting leave must give at least the specified period of notice to be entitled to take leave at all, and the employer may give an employee notice refusing leave on specified days, provided the requisite period of notice is given. Case law has established that the employer's right under this provision to refuse leave is subject only to the limitation that it cannot be used to postpone leave outside the relevant leave year (*Kigass Aero Components Ltd v Brown* [2002] IRLR 312 at [29] per Lindsay J). Nor may it be *"operated by an employer in an unreasonable, arbitrary or capricious way so as to deny any entitlement lawfully requested"* (*Lyons v Mitie Security Ltd* [2010] IRLR 288 at [34]).

193. We have not been taken to any legal authority on the point, but we assume that, consistent with the approach to whistle-blowing detriments in the ERA 1996, in deciding the cause for the alleged detriments we must decide whether the refusal to forgo the right played any material part in the decision-maker's conscious or unconscious reasons for subjecting the Claimant to the detriment, applying the same principles as set out in relation to victimisation below.

Conclusions

194. We have considered first whether the Claimant refused to forgo his right to annual leave as conferred on him by the WTR 1998. We do not consider that he did. The Claimant has not brought evidence that he was not permitted to take his annual leave entitlement at some point during the leave year. When he was refused annual leave in August 2018, that was not the Respondent acting unreasonably arbitrarily or capriciously because the evidence before us is that all employees were being refused holiday at that point while the Respondent was short-staffed. Nor was it the Respondent refusing to allow him to take his annual leave entitlement at all, because he was permitted to take annual leave later in the year. All the examples provided to us showed that the Claimant was granted or refused holiday on the same basis as other employees. He at no point therefore was denied the right to annual leave conferred on him by the Regulations, and cannot therefore have 'refused to forgo' that right for the purposes of s 45A(1)(b).

195. We have then considered whether the Claimant at any point alleged that his right to annual leave had been infringed for the purposes of s 45A(1)(f). Although the Claimant made complaints about the handling of his holiday requests on a number of occasions, the only one that is explicitly an allegation

of infringement is that on 14 September 2018 where he complained about Mr Funmilayo refusing his holiday requests and said that holiday is *"not a privilege, it's a right – everybody has got entitlement"* and *"You don't have any right to reject anybody holiday at any point in time"* (456N). That is clearly an allegation of infringement of rights and there is no reason to doubt it was made in good faith. The Claimant's *Treat of Sack* email of 12 October 2018 does not refer explicitly to 'rights' but does complain about differential treatment in relation to holiday requests. We accept that this is sufficient to convey to the reasonable reader that the Claimant is alleging his rights have been infringed. Likewise, the Claimant's email of 15 January 2019 in our judgment reasonably conveys an allegation of infringement of rights by complaining about ongoing refusal of holiday requests and asserting the need for an *"accurate rest of work"*. We take these therefore to be the three relevant allegations for the pursposes of s 45A(1)(f).

196. We now deal with the question of whether the Claimant was subjected to the alleged detriments because he had made those allegations.

Between October 2018 until 14 July 2020, Mr Funmilayo would refuse the Claimant's holiday requests, or would make it difficult for the Claimant to get holiday or would tell the Claimant take the holiday as unpaid

197. We find that there is no link between the Claimant's allegations and the way that Mr Funmilayo dealt with his holiday requests. Mr Funmilayo at all times dealt with the Claimant's requests in accordance with the Respondent's normal policy.

Would only give the Claimant an 8-hour working shift instead of the 12-hour shift he started with. The Claimant was not placed on 12 hour shift until April 2019

198. The allocation to the shift happened before the Claimant made the allegations about holidays that he relies on so this claim fails.

Refused to pay the Claimant the supervisor's rate when the Claimant covered supervisor position

199. The reasons why the Claimant was not paid the supervisor rate were wholly explained by the fact that, so far as the Respondent was concerned, he was never acting as supervisor. It had nothing to do with his complaints about holiday entitlement.

Made it difficult for the Claimant to work overtime, by refusing the Claimant when he requested overtime, not always paying overtime and not offering overtime to the Claimant when it was available

200. This claim fails on the facts as we accepted the Respondent's evidence that the Claimant was treated the same as everybody else regarding overtime.

Between September 2018 to March 2020, subjected the Claimant several times to disciplinary process on false allegations

201. Our factual findings regarding the disciplinary allegations and disciplinary processes to which the Claimant was subjected between September 2018 and March 2020 are set out above. The Claimant was not in our judgment subject to "false allegations" at any point. In any event, save for the disciplinary in October 2019, all of those disciplinary processes were commenced in response to employee complaints by people other than Mr Funmilayo. There is no evidence that those complainants were motivated by any allegations the Claimant had made about holiday in communications with Mr Funmilayo. We find that Mr Funmilayo was not motivated by the Claimant's holiday allegations at any point. In relation to the October 2019 disciplinary process, there was good and immediate cause because of the Claimant's behaviour for Mr Funmilayo to refer the Claimant to disciplinary investigation by Mr Aslam. The Claimant's prior complaints about holiday had nothing to do with it.

Did not investigate or subject Mr Aslam to disciplinary action when Claimant reported Mr Aslam to him for calling him nigger and gandu.

202. The Claimant's allegations in this regard were investigated by Mr Rumbold as part of the grievance and not upheld. Having so found, disciplinary action would have been inappropriate. This was nothing to do with the holiday allegations as the Claimant's allegations against Mr Aslam calling him 'nigger' and 'gandu' were not even made to Mr Funmilayo and there is no evidence that those who did deal with the 'nigger' and 'gandu' allegations were even aware of the holiday allegations that the Claimant relies on for the purposes of this claim.

203. The working time detriments claims are therefore dismissed.

Victimisation (EA 2010, ss 27 and 39(4)(c)/(d))

The law

204. Under ss 27(1) and s 39(4)(a)-(d) EA 2010, the Tribunal must determine whether the Respondent has treated the Claimant unfavourably by subjecting him to a detriment because he did, or the Respondent believed he had done, or may do, a protected act.

205. A protected act includes (so far as relevant in this case) bringing proceedings under this Act or making an allegation (whether or not express) that a person has contravened this Act (ss 27(2)(a) and (c)). An act is not protected if it is done in bad faith (s 27(3)).

206. In considering whether an act is a protected act, we must remember that merely referring to 'discrimination' or 'harassment' in a complaint is not necessarily sufficient to constitute a protected act as defined. The EA 2010 does not prohibit all discrimination/harassment, it only prohibits discrimination/harassment on the basis of a proscribed list of protected characteristics. The Tribunal must determine whether, objectively, the

employee has done enough to convey, by implication if not expressly, an allegation that the Act has been contravened. In *Durrani v London Borough of Ealing* UKEAT/0454/2012/RN, that was not the case where the employee, when questioned, explained that the 'discrimination' complaint was really a complaint of unfair treatment, not of less favourable treatment on grounds of race or ethnicity. The EAT, the then President, Langstaff P, observed as follows at paragraph 27:

> 27. This case should not be taken as any general endorsement for the view that where an employee complains of "discrimination" he has not yet said enough to bring himself within the scope of Section 27 of the Equality Act . All is likely to depend on the circumstances, which may make it plain that although he does not use the word "race" or identify any other relevant protected characteristic, he has not made a complaint in respect of which he can be victimised. It may, and perhaps usually will, be a complaint made on such a ground. However, here, the Tribunal was entitled to reach the decision it did, since the Claimant on unchallenged evidence had been invited to say that he was alleging discrimination on the ground of race. Instead of accepting that invitation he had stated, in effect, that his complaint was rather of unfair treatment generally.

207. A detriment is something that a reasonable worker in the Claimant's position would or might consider to be to their disadvantage in the circumstances in which they thereafter have to work. Something may be a detriment even if there are no physical or economic consequences for the Claimant, but an unjustified sense of grievance is not a detriment: see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] ICR 337 at [34]-[35] per Lord Hope and at [104]-[105] per Lord Scott. (Lord Nicholls ([15]), Lord Hutton ([91]) and Lord Rodger ([123) agreed with Lord Hope.)

208. In deciding whether the reason for the treatment was the protected act, we apply the same approach as for discrimination, i.e. whether the protected act was subconsciously or consciously a more than minor or trivial influence on the act complained of: *Chief Constable of West Yorkshire Police v Khan* [2001] UKHL 48, [2001] ICR 1065 at [29] per Lord Nicholls. The protected act must be a material (i.e non-trivial) influence or factor in the reason for the treatment (*Nagarajan v London Regional Transport* [1999] ICR 877, as explained in *Villalba v Merrill Lynch & Co Inc* [2007] ICR 469 at [78]-[82]).

209. In relation to all these matters, the burden of proof is on the Claimant initially under s 136(1) EA 2010 to establish facts from which the Tribunal could decide, in the absence of any other explanation, that the Respondent has acted unlawfully. The burden then passes to the Respondent under s 136(3) to show that the treatment was not discriminatory: *Wong v Igen Ltd* [2005] EWCA Civ 142, [2005] ICR 931. The Supreme Court has recently confirmed that this remains the correct approach: *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] 1 WLR 38

210. This does not mean that there is any need for a Tribunal to apply the burden of proof provisions formulaically. In appropriate cases, where the Tribunal is in a position to make positive findings on the evidence one way or another, the Tribunal may move straight to the question of the reason for the

treatment: *Hewage v Grampian Health Board* [2012] UKSC 37, [2012] ICR 1054 at [32] per Lord Hope.

211. However, a claim of victimisation cannot succeed unless the alleged victimiser is at least either aware of the protected act, or believes that a protected act has been done (or may be done). In *South London Healthcare NHS Trust v Dr Bial-Rubeyi* (UKEAT/0269/09/SM), the EAT found that there was no evidence from which the Tribunal could have concluded that the alleged victimiser was aware that the claimant had made a complaint of discrimination. In those circumstances, the EAT (McMullen J) substituted a finding that the Respondent did not victimise the Claimant.

Conclusions

212. In this case there is no dispute that the protected acts relied on by the Claimant are protected acts, namely:
    a. grievance made on the 12th or 13th of March 2020 in which the claimant alleged discrimination because of race (paragraph 35, further and better particulars of claim);
    b. on 23 April 2020 in the grievance hearing with Peter Rumbold the Claimant complained about the racist language directed at him by Mr Aslam and reported that Mr Funmilayo had told his colleagues about his haemorrhoid condition and Mr Roney had laughed about his medical condition;
    c. on 24 April 2020, claimant sent email to Mr Rumbold with further information about the racial and disability discrimination;
    d. on 16 July 2020 claimant's ET1 complaining of discrimination;
    e. on 26 November 2020, at the preliminary hearing the Claimant complained that he had been subjected to disability discrimination.

213. As regards each allegation of unfavourable treatment, we find as follows:-

Delay in handling the grievance, in particular, the delay of six weeks until there was a hearing, and a delay of two months between the hearing and the outcome.

214. We found that there was an inadequate explanation for the delays in dealing with the grievance and that the delay was unreasonable, but we find that the Claimant has not adduced evidence that would lead us to infer that the fact that the Claimant's grievance included allegations of discrimination made any difference at all to the way Mr Rumbold dealt with it. We infer that the reasons for the delay were simply that Mr Rumbold's mind was on other things and he was inefficient and not focused on the Claimant's case.

On 20 August 2020, disciplinary outcome not upholding allegation of misconduct but still threatening/warning the Claimant that he would be dismissed

215. The reason why Ms Ayres included the warning were because she was not satisfied that the Claimant was wholly innocent of the misconduct alleged and was giving the Claimant the benefit of the doubt. We find no scope here for

an inference that she was influenced by any allegation of discrimination. Indeed, this was not even put to her with any real conviction.

On 10 November 2020, suspending the claimant

216. The reasons for the suspension were clear and the decision is wholly explained by the circumstances, which were that there were serious allegations and counter-allegations, Mr Aslam's health was suffering and he was the supervisor, and the Respondent was perceived (reasonably, given the history) of being the likely aggressor. There is no scope for an inference of victimisation.

217. We take the allegations about the final disciplinary allegations as a group, i.e.

Failing to carry out a fair investigation into the disciplinary allegations, including:

Mr Funmilayo was not an impartial investigator into the incident;

Mr Dicks failed to carry out further investigation as part of the disciplinary by looking at CCTV or considering the evidence provided by the Claimant.

Mr Funmilayo and Mr Dicks failing to provide the claimant with copies of the evidence relied on which had been gathered during the investigation stage and disciplinary proceedings

Subjecting the claimant to disciplinary proceedings

On 15 December 2020, dismissing the claimant

218. We do not find there is any evidence to suggest that Mr Funmilayo was influenced in his approach to the disciplinary investigation by any allegations of discrimination made by the Claimant or the fact that he had commenced proceedings. As we have noted in our findings of fact above, although it was a breach of the Respondent's policy for Mr Funmilayo to carry out the investigation given the complaints the Claimant had made about him previously, Mr Funmilayo's conduct of the investigation meeting, as reflected in the notes, was impeccable. Thereafter, there is no evidence that Mr Funmilayo sought to influence Mr Dicks at all.

219. As to Mr Dicks, although there were a number of shortcomings in his handling of the investigation and disciplinary decision, including the failures to share the CCTV footage with the Claimant, or provide him with all the evidence as the Claimant complains under this legal heading, but in our judgment such failures as there were in Mr Dicks' approach were attributable to his view that there was clear evidence of misconduct by the Claimant and that further investigation was unnecessary. There is nothing that suggests he was influenced by any discrimination complaints the Claimant had made.

220. The victimisation claims therefore fail.

Unfair dismissal (ERA 1996, Part IX)

The law

221. The test for unfair dismissal is set out in section 98 of the Employment Rights Act 1996. Under section 98(1), it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal, and that it is a potentially fair reason falling within subsection (2), i.e. conduct, capability, redundancy, or some other substantial reason (SOSR) of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason for dismissal is the factor or factors operating on the mind of the decision-maker which cause them to make the decision to dismiss (cf *Abernethy v Mott, Hay and Anderson* [1974] ICR 323, 330, cited with approval by the Supreme Court in *Jhuti v Royal Mail Ltd* [2019] UKSC 55, [2020] ICR 731 at [44]). (There are exceptions to that approach, as identified in Jhuti, but it is not suggested they are relevant here.)

222. Once a potentially fair reason for dismissal is established, the Tribunal must consider whether it was fair in all the circumstances, taking into account the size and administrative resources of the employer, to dismiss the employee for that reason: s 98(4).

223. Where conduct is relied on as the reason for dismissal, in determining whether dismissal is fair in all the circumstances under s 98(4), the Tribunal must be satisfied that the employer has a genuine belief that the employee committed the misconduct in question, and that that belief is held on reasonable grounds, the employer having carried out such investigations as are reasonable in all the circumstances of the case: *BHS Ltd v Burchell* [1980] ICR 303 and *Foley v Post Office* [2000] ICR 1283.

224. Not every procedural error renders a dismissal unfair, the fairness of the process as a whole must be looked at, alongside the other relevant factors, focusing always on the statutory test as to whether, in all the circumstances, the employer acted reasonably or unreasonably in treating the reason for dismissal as a sufficient reason for dismissing the employee: *Taylor v OCS Group Ltd* [2006] ICR 1602 at [48]. In *Sharkey v Lloyds Bank plc* UKEAT/0005/15 the EAT (Langstaff J) applied the *Taylor v OCS* approach to hold that a Tribunal had not erred in law concluding that a dismissal was fair, notwithstanding the significant procedural failings that, at both the dismissal and the appeal stages, the respondent in that case had not shared witness statements with the employee, or interviewed two witnesses identified by the employee as being able to give relevant evidence.

225. A failure to afford the employee a right of appeal may render a dismissal unfair (*West Midlands Cooperative Society v Tipton* [1986] AC 536), and a fair appeal may cure earlier defects in procedure (*Taylor v OCS Group* ibid), but an unfair appeal will not necessarily render an otherwise fair dismissal unfair. It follows from *OCS* that a fair appeal may remedy even wholesale unfairness at the first stage, but whether it does or not is a question of fact to be determined by the Tribunal in all the circumstances of the particular case.

226. In this case, the Claimant was offered the right of appeal but did not appeal because he felt an appeal would have been 'futile'. In the light of this, we invited the parties' submissions on whether, if we considered any procedural failings at the dismissal stage could have been remedied if the Claimant appealed, we could conclude that the dismissal was fair under section 98(4), or whether our consideration of what would (or might) have happened if the Claimant had appealed was relevant only to *Polkey* or a decrease in compensation for failure to follow the ACAS Code of Practice. Mr Uduje for the Respondent submits that it can go to any of these elements, emphasising the principles from *OCS* and *Sharkey* above. Ms Godwins for the Claimant relies on *Hoover Ltd v Forde* [1980] ICR 239 which was a case where the employee had not appealed a misconduct dismissal, in which the tribunal concluded the dismissal was unfair, but reduced his compensation by 50% for contributory fault in not appealing. At 244-245 the EAT (Talbot J) held that the tribunal had not been required by law to take into account the failure to appeal in deciding whether the dismissal was unfair. The EAT said this:-

> In reaching a decision on this point we would like to make it crystal clear that in the pursuit of good industrial relations an employee should take the benefit of grievance and appeal procedures that are open to him; and of course, if he does so, then matters relating to those procedures may be taken into account when considering the necessary matters under [what is now section 98(4) ERA 1996]. However, we are driven to the conclusion that, where there is dismissal and there is an appeal against such dismissal which may result in its rescission, the employee is not bound in law before making a complaint of unfair dismissal to exercise his rights of appeal. In such circumstances the question under [section 98(4)] has to be considered in the light of the circumstances obtaining at the time of the employer's decision to dismiss. No doubt, in many instances of a grievance procedure a dismissal is not effective when an employee pursues an appeal. In such cases no doubt it would be right for the appeal procedures and all circumstances concerned with it to be taken into account by an industrial tribunal. Our answer, therefore, to Mr. Morison's submission on this point is that the industrial tribunal were not required in the circumstances of this case to take into account the employee's failure to appeal.

227. We observe that *Hoover v Forde* does not preclude the taking into account the failure to appeal as relevant to the question of overall fairness under section 98(4); it simply does not mandate it. The EAT went on to hold that the Tribunal had, however, erred in law in regarding the failure to appeal as 'culpable or blameworthy' conduct capable of constituting contributory fault, but speculated that it could form the basis of an argument that the Claimant had failed to take all reasonable steps to mitigate his loss.

228. In reaching a decision, the Tribunal must also take into account the ACAS Code on Disciplinary and Grievance Procedures. By virtue of section 207 of the Trade Union and Labour Relations (Consolidation) Act 1992, the Code is admissible in evidence and if any provision of the Code appears to the tribunal to be relevant to any question arising in the proceedings, it shall be taken into account in determining that question.

Conclusions

229. We find the principal reason for the Claimant's dismissal was conduct, which is a potentially fair reason.

230. We find that the investigation carried about by the Respondent was reasonable as regard the 'core' allegations that the Claimant had behaved aggressively towards Mr Aslam and threatened to 'thump' him, as regard the Claimant's failure to follow instructions by refusing to answer his radio on patrol and his failure to complete an internal patrol properly. Each of those allegations was, we find, put to the Claimant in a way that enabled him to understand and respond to the allegation, even though he did not have copies of the notes of the interview with Mr Aslam, and Mr Dicks' subsequent further investigation of those core allegations was appropriate to the nature of the allegation. We have no reason to doubt that Mr Dicks saw on the CCTV what he said he saw on the CCTV. It was wrong not to have shared that with the Claimant, but ultimately Mr Dicks had reasonable grounds for his conclusion that the Claimant had done each of these things alleged. Indeed, as we set out below in relation to the wrongful dismissal claim, we would have reached the same conclusions on these core allegations.

231. Although it was a breach of the Respondent's policy for Mr Funmilayo to carry out the investigation interviews because the Claimant had previously complained about him, the way he conducted the interviews by asking impeccably open questions meant that this breach of policy had no impact on the fairness of the process. Mr Funmilayo had not previously 'threatened to sack' the Claimant. That was the Claimant's interpretation of Mr Funmilayo explaining the disciplinary policy to him two years previously, which is a factor that supports the fairness of his ultimate dismissal, not unfairness contrary to the submissions advanced on the Claimant's behalf.

232. We find that there was insufficient investigation by Mr Dicks in relation to the allegation that the Claimant was not wearing the correct uniform as Mr Dicks did not review the CCTV to see what Florence was wearing. Failure to investigate this was unreasonable because it makes all the difference to whether there should be a disciplinary sanction for something like that whether the policy was being enforced in relation to other employees. It was also unfair not to accept as mitigation for this allegation that the Claimant had not been warned about failure to wear proper uniform before. However, the failure to deal properly with this allegation makes no significant difference to the fairness of the Claimant's dismissal overall as the uniform allegation alone would not have warranted dismissal and Mr Dicks would not have dismissed the Claimant for it.

233. The same is not true of Mr Dicks' failure to investigate whether other employees played darts while on duty. Although it was not fair for Mr Dicks to hold the darts issue against the Claimant to the extent that he appears to have done in the dismissal letter, where he assumes (having done no investigation at all as to practices at the site) that *"all security officers will understand"* it is a *"total breach of requirements … and professional standards"*, the allegation against the Claimant was of not carrying out a

patrol properly. The darts were incidental to that. On any view spending 6 minutes of a 12 minute patrol playing darts when the whole patrol should have taken 25 minutes without any dart-playing is not carrying out a patrol properly.

234. There were aspects of procedural unfairness in relation to the Claimant's dismissal which have given us considerable pause for thought. There were a number of significant procedural failings in the way that Mr Dicks carried out his investigation and reached his decision, some of which we have already mentioned above, but in particular:

    a. Not providing interview notes, emails, recordings and translations to the Claimant, or sharing CCTV evidence;
    b. Failure to obtain Claimant's translation of the Yoruba or, at least, a wholly independent translation of the Yoruba;
    c. Adding in the allegation about failure to leave the control room without putting it to the Claimant.

235. Each of the above failures would in our judgment normally be regarded as being outside the range of reasonable responses as breaching basic principles of fairness that an employee accused should be told the allegations they face in advance and provided with the evidence against them and given a chance to respond. In most cases, especially those involving large employers such as this, serious procedural failures such as these would have led us to conclude that the dismissal was itself outside the range of reasonable responses. However, after much deliberation, we have decided that these failures do not in this case mean that it was unfair to dismiss for the conduct in question.

236. This is because we are satisfied that, as regards the 'core' allegations, the investigation and conclusions of Mr Dicks were sufficient, and because these procedural failings made no difference to the outcome. We conclude they made no difference to the outcome principally because the Claimant has had the benefit of all the evidence that the Respondent had at the time of the dismissal at this hearing, but has not identified anything in that which gives us any cause for concern that Mr Dicks reached any incorrect conclusions, notwithstanding the inadequacies in the process. The Claimant has even had the opportunity of cross-examining as part of this hearing Mr Aslam who was the chief witness against him, and even that has not altered the factual picture significantly.

237. In short, the picture is much the same with or without the evidence that the Claimant was missing at the time of the disciplinary hearing.

238. This goes for even the Yoruba translations. It is true that the Claimant does not come across quite so badly in his own translation as he does in Mr Funmilayo's, but the difference is one of degree rather than anything fundamental.

239. Finally, the allegation about failure to leave the control room ought to have been put to the Claimant, but he has not had any particular response to it in these proceedings. Indeed, on the basis of the evidence we have heard, we would find as a fact that he did refuse to leave the control room when asked as he has proved to be an unreliable witness and refusal to leave the control room fits with both parties accounts of him having returned to the control room, the recordings, and his preparation of his email in the control room. All this notwithstanding, the allegation does not add much to the 'core' allegations: it is 'grist to the mill'.

240. In the circumstances of this particular case, therefore, we are satisfied that the Respondent's decision to dismiss the Claimant for conduct was fair in all the circumstances. It was well within the range of reasonable responses for the Respondent to dismiss the Claimant for the 'core' allegations, notwithstanding the procedural failings. Indeed, we find it hard to imagine a security company that would not dismiss an employee for threatening to 'thump' their manager and refusing to answer their radio and carry out a patrol in a proper manner. It was also well within the range of reasonable responses to classify this conduct as gross misconduct.

241. We should add that we note that Mr Dicks did not give any weight to the Claimant's professed fear that Mr Aslam might give him Covid-19 by coughing/clearing his throat. In principle such a fear, if genuine, could have provided some mitigation (albeit not for a threat to 'thump'), but in context it seems to us to have been reasonably clear that the Claimant's professed fear was not genuine. Mr Aslam had in fact returned to work after a 14-day period of isolation so the Claimant ought to have been aware that he was unlikely to be infectious even if he was not aware of the negative Covid test, screens were in place to lessen the risk and the Claimant himself out of choice remained in the control room during the day, thus placing himself deliberately in the same room as Mr Aslam. In those circumstances, we consider it reasonable for Mr Dicks not to have placed any weight on this claimed mitigation.

242. We should also add that although the Claimant was concerned about his health and the operation he had had, he did not advance this to Mr Dicks as mitigation for the incident itself. He mentioned it at the start of the disciplinary hearing, but agreed to carry on. There was no unfairness in this respect.

Polkey

The law

243. If the Tribunal concludes that the dismissal was unfair but is satisfied that if a fair procedure had been followed (or that as a result of some subsequent event such as later misconduct or redundancies) the employee could or might have been fairly dismissed at some point, the Tribunal must determine when that fair dismissal would have taken place or, alternatively, what was the percentage chance of a fair dismissal taking place at that point: the *Polkey*

principle as explained in *Contract Bottling Ltd v Cave* [2015] ICR 46. The same principle applies in discrimination claims: the Tribunal must determine what would have happened if there had been no discrimination on percentage change basis: see *Chagger v Abbey national plc* [2009] EWCA Civ 1202, [2010] ICR 397.

244. The EAT has recently confirmed in *Shittu v South London and Maudsley NHS Foundation Trust* [2022] EAT 18 that a loss of chance basis should be used, and that the decision in *Perry v Raleys Solicitors* [2020] AC 352, concerning a balance of probabilities test for losses which depended on what the claimant would have done, should not be applied to employment cases.

Conclusions

245. For the reasons already set out above in relation to our conclusions on liability for unfair dismissal, if we had not concluded that the Claimant's dismissal was fair, we would have concluded that this was one of those unusual cases in which there was a 100% chance that the Claimant would have been dismissed in any event even if all the procedural failings were corrected. Had we not dismissed the Claimant's claim on liability, accordingly, we would have made a 100% deduction under *Polkey*.

Contributory fault

The law

246. Section 122(2) ERA 1996 provides that:

> Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly.

247. Section 123(1) ERA 1996 provides that, subject to the provisions of that section (and sections 124, 124A and 126) *"the amount of the compensatory award shall be such amount as the tribunal considers just and equitable in all the circumstances having regard to the loss sustained by the complainant in consequence of the dismissal in so far as that loss is attributable to action taken by the employer"*.

248. Section 123(6) further provides:

> Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding.

249. It should be noted that while s 123(6) requires an element of causation before a deduction can be made under that section, there is no such requirement in relation to a reduction of the basic award under s 122(2). Nor is there any such limitation on the Tribunal's 'just and equitable' discretion under s 123(1) as to what compensation, overall, is appropriate. Reductions can, therefore,

be made for conduct which did not causally contribute to the dismissal, such as may be the case where misconduct occurring prior to the dismissal is discovered after dismissal: see *W Devis and Sons Ltd v Atkins* [1977] ICR 662 and cf *Soros v Davison* [1994] ICR 590. However, in cases where the conduct is known about prior to dismissal, the Tribunal must generally be satisfied that the conduct caused or contributed to the dismissal to some extent: see *Nelson v British Broadcasting Corporation (No. 2)* [1980] ICR 110 per Brandon LJ at p 122 and *Frith Accountants Ltd v Law* [2014] ICR 805 at para 4.

250. Further, in every case, it must be established that there has been culpable or blameworthy conduct on the part of the employee. Giving the leading judgment of the Court of Appeal in *Nelson v British Broadcasting Corporation (No. 2)* [1980] ICR 110 Brandon LJ gave further guidance at pp 121-122 as follows on what constitutes culpable or blameworthy conduct and how contributory fault should be approached by Tribunals:

> It is necessary, however, to consider what is included in the concept of culpability or blameworthiness in this connection. The concept does not, in my view, necessarily involve any conduct of the complainant amounting to a breach of contract or a tort. It includes, no doubt, conduct of that kind. But it also includes conduct which, while not amounting to a breach of contract or a tort, is nevertheless perverse or foolish, or, if I may use the colloquialism, bloody-minded. It may also include action which, though not meriting any of those more pejorative epithets, is nevertheless unreasonable in all the circumstances. I should not, however, go as far as to say that all unreasonable conduct is necessarily culpable or blameworthy; it must depend on the degree of unreasonableness involved.
> It follows from what I have said that it was necessary for the industrial tribunal in this case, in order to justify the reduction of Mr. Nelson's compensation which they made, to make three findings as follows. First, a finding that there was conduct of Mr. Nelson in connection with his unfair dismissal which was culpable or blameworthy in the sense which I have explained. Secondly, that the unfair dismissal was caused or contributed to to some extent by that conduct. Thirdly, that it was just and equitable, having regard to the first and second findings, to reduce the assessment of Mr. Nelson's loss ….

Conclusions

251. Had we not dismissed the claim on liability, we would for the same reasons have concluded that the Claimant 100% contributed to his dismissal in this case. That is so in relation to his conduct in connection with the specific incident that led to his dismissal, in respect of which we find the Claimant was 100% to blame. Mr Aslam's coughing was entirely blameless and does not constitute mitigation as, for the reasons we have already set out, the Claimant's fear of Mr Aslam's coughing was not genuine. He was, in our judgment, simply unreasonably irritated by Mr Aslam's cough. It would also be so in relation to the Claimant's wider case that he was, in effect, subject to a 'witch hunt' and that Mr Funmilayo and Mr Aslam were looking for ways to dismiss him because of his prior complaints. In our judgment, for the reasons set out in our findings of fact, that is not what happened here. If and to the extent there was any momentum towards dismissal of the Claimant in this case that was attributable to anything other than the last incident that was considered by Mr Dicks, in our judgment it was because of the Claimant's

conduct towards his colleagues over the years that he was employed. We have in mind in particular the evidence that we have heard about repeated failures to follow management instructions to stay in post until cover arrived, his verbally aggressive behaviour towards supervisors and his making up of racist allegations against Mr Aslam.

ACAS Code of Practice

The law

252. Section 207A(2) of the Trade Union and Labour Relations (Consolidation) Act 1992 (TULR(C)A 1992) provides that (in cases such as this to which that section applies) "it appears to the employment tribunal that - (a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies, (b) the employer has failed to comply with that Code in relation to that matter, and (c) that failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%". Likewise, under s 207A(3), the Tribunal may decrease any award by no more than 25% where it is the employee who unreasonable fails to comply.

253. In this case, a relevant Code of Practice, namely the ACAS Code of Practice on Disciplinary and Grievance Procedures (March 2015) applies.

Conclusions

254. Given our conclusions on liability, we do not have to decide this point either, but we record that if we had been required to do so, we would have found the Claimant's failure to exercise his right of appeal was unreasonable. It may, indeed, have been 'futile' to appeal in the sense that it was highly unlikely to change the outcome, but many employees are in that position. It is still reasonable to appeal where an employee can see that there are defects in the decision-making process at the dismissal stage, as there were here. There is a purpose to an appeal in that situation because it gives both parties an opportunity to put right things such as missing evidence and enables the employee to reflect before deciding whether to pursue legal claims. Not exercising a right of appeal is a serious failure to follow the procedure. We would accordingly have reduced the Claimant's compensation by 20% for failure to exercise his right of appeal if he had succeeded on liability.

Wrongful dismissal

255. The Claimant was dismissed without notice, which was only lawful if he had committed gross misconduct justifying summary termination. We are satisfied that the Claimant's conduct for which he was dismissed constituted gross misconduct and he is not therefore entitled to notice pay.

256. In this respect, we have considered for ourselves whether, as a matter of fact, the Claimant did the things alleged, and not restricted ourselves to a range

of reasonable responses review of the Respondent's decision. We have identified in the course of our judgment how the Claimant has proved to be unreliable in his evidence, including (by way of example and not a complete list) not telling the truth about what he told Mr Funmilayo about his medical condition at the start of employment, making up the racist allegations of "gandu" and "nigger" against Mr Aslam, falsely alleging in the October 2019 disciplinary that Mr Funmilayo had given him permission to leave the control room, falsely telling Mr Pandey in the August 2019 disciplinary that he had not been warned previously about leaving the control room before cover arrived and that he had no medical conditions requiring him to use the toilet more frequently. We therefore prefer Mr Aslam's evidence in relation to this final incident to that of the Claimant. Mr Aslam's account also fits better with the factual picture that we have from the recordings, which themselves show the Claimant to be the aggressive party. We also accept Mr Dicks' evidence of what he saw on the CCTV as there is no reason to doubt his honesty about that. What he saw in any event fits with the general picture of the Claimant's conduct that we have over the previous two years as it has appeared to us in this case (of which Mr Dicks was unaware).

Overall conclusion

257. The unanimous judgment of the Tribunal is:

(1) The Claimant's claim of unfair dismissal under Part IX of the ERA 1996 is not well-founded and is dismissed.
(2) The Claimant's claims of harassment under ss 26 and 40 of the EA 2010 are dismissed.
(3) The Claimant's claims of working time detriment under s 45A of the ERA 1996 are not well-founded and are dismissed.
(4) The Claimant's claims of victimisation under ss 27 and 39 of the EA 2010 are dismissed.
(5) The Claimant's claim of wrongful dismissal is dismissed.

_____

Employment Judge Stout

28/09/2022

JUDGMENT & REASONS SENT TO THE PARTIES ON

…28/09/2022

FOR THE TRIBUNAL OFFICE