EMPLOYMENT TRIBUNALS

Claimant: Mr S Gillani

Respondent: Secretary of State for Justice

Heard at: London Central Employment Tribunal (in public, by CVP)

On: 19, 20, 21, 22, 25, 28 July 2022

Before: Employment Judge Adkin
Ms C Ihnatowicz
Dr V Weerasinghe

Appearances
For the Claimant: In person
For the Respondent: Mr Dalaimi, (counsel)

JUDGMENT

(1) The claim of failure to provide rest breaks under regulation 12 the Working Time Regulations 1998 brought under regulation 30(1) **succeeds** in respect of rest breaks from **3 April 2021 onward**.

(2) The following claims are not well founded and are dismissed:

a. Claim of Less Favourable Treatment of the Part-Time Worker (Regulation 5 Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2000).

b. Claim of indirect discrimination under section 19 of the Equality Act 2010.

c. Claim of victimisation under section 27 of the Equality Act 2010.

REASONS

Procedure

1. This was a fully remote hearing by CVP.

2. The Tribunal allowed an amendment of the claim at the suggestion of the Respondent to allow correct comparators for the part-time worker claim to be identified.

3. The Tribunal also allowed the Respondent's application to amend its Response, in reliance on a short supplementary statement from Ms Claire Farquhar relied upon in relation to the claim for failure to provide rest breaks. It had been envisaged that she would give evidence first for the Respondent. In order to give the Claimant the opportunity to prepare to cross-examine her, she was moved down the witness order to the penultimate witness for the Respondent, i.e. commencing on the afternoon of day four of the hearing.

4. The hearing took longer than had been listed, with the need to add an additional day on 28 July 2022. At the request of both parties we did not push on at the conclusion of the evidence on day 5 to hear oral submissions, but rather gave the parties time to work on their written submissions. By agreement, to enable the Tribunal to make reasonable progress in the time remaining, oral submissions on 28 July 2022 were confined to answers to questions rather than full oral submissions.

Evidence

5. The bundle of documents of some 494 pages was not fully compliant with the paragraph 24 of the Presidential Guidance on Electronic Bundles for Remote Hearings issued on 14 September 2020. There was a discrepancy between the hardcopy numbering and the electronic numbering of the bundle. Mr Dilaimi diligently and efficiently made electronic page numbers available during the course of the hearing, including when the Claimant was cross-examining, which lessened the impact, but parties are reminded that the Presidential Guidance is there for a reason. Time was spent during deliberation attempting to find the correct page references.

6. Some additional documents were introduced during the course of the hearing, specifically: Service Specification Document for Unpaid Work / Community Payback Service (2017): [pp.433-437]; Job Description for CP Health and Safety Officer: [pp.448-449]; Email from Keely Brown to Parmjit Rai (31 March 2021): [pp.450-451]; Email in relation to First Aid Training (11.06.2019): 1 page, unpaginated; 2013 Year-end performance review (December 2013): 2 pages, unpaginated - the Respondent admits that this last document shows that C made an express request for rest breaks to his employer in December 2013. Finally PI 24/2015 (Permanent Transfers): 49 pages, unpaginated and Email from Keely

Brown to Claire Farquhar (13.08.2021) with two attachments 4 pages, unpaginated.

7. The Tribunal heard from the Claimant himself and from colleagues:

   7.1. Parmjit Rai;

   7.2. Maureen Swaby.

8. From the Respondent, the Tribunal heard from:

   8.1. Ms Claire Faquhar, Head of Interventions;

   8.2. Ms Keely Brown, the Claimant's line manager;

   8.3. Ms Kellie Finch, Senior Probation Office;

   8.4. Ms Joanna White, Head of Unpaid Work, who dealt with the grievance;

   8.5. Mr Steven Calder, Head of Service who dealt with the grievance appeal.

Claim

9. The Claimant commenced his claim on 26 August 2021 following a period of ACAS Early Conciliation between 2 July and 9 August 2021.

Findings of fact

Overview & contract of employment

10. The Claimant Mr Gillani's contract of employment suggests that his employment commenced on 9 July 2005. The Claimant says that he has been employed since 1 November 2004 in the Probation Service as a Project Supervisor. The precise commencement of employment is not relevant for the purposes of this decision.

11. The Claimant was at the time of the hearing still in employment. He works part-time (3 days per week) in its Community Payback/Unpaid Work Department supervising offenders doing community work.

12. On 1 July 2007 according to the Claimant's contract of employment he commenced his current job of "Project Supervisor - Unpaid Work" based at the Unpaid Work Unit, 15 Belton Road, Forest Gate, London E7 9PF, required to work 21 hours a week.

Historic rest breaks

13. The Claimant's employment was transferred to Serco in or around 2012. He says that around that time he challenged the fact that his rest breaks were removed. This, the Respondent now accepts was a topic of conversation in a management meeting in 2013, when the Claimant complained about the absence of rest break. The Claimant's evidence is that enjoyed these breaks at the end of his shift which

ran 9-3:30 with the final half hour as a break. Ms Farquhar's view was that this was a locking up period not a break.

14. The Claimant's employment was transferred to the his present employer the National Probation Service on 26 June 2021 on the renationalisation of the probation service.

Claimant's duties

15. Although the Claire Farquhar doubted whether this document was the right document or fully up-to-date, given that it appears to have been created on 5 September 2003, the description of Supervisor tasks on page 431 – 432 is the best evidence we have of what the Claimant did at work. His evidence is that this describes what he did.

16. The document contains the following:

> 5.1 To prepare offenders for CP work and to encourage them to complete the Order and see the relevance of learning opportunities.
>
> 5.2 To ensure placements comply with safe working practices, do not deprive others of paid work and take into consideration other non-rehabilitative considerations.
>
> 5.3 To maintain productive and positive relationships with placement providers and beneficiaries.
>
> 5.4 To ensure that offenders are working within the requirements of Health and Safety legislation.
>
> 5.5 Where relevant meet the required Health and Safety standards for Workshops
>
> 5.6 To encourage a learning environment for participants
>
> 5.7 To reinforce offenders motivation to participate in and learn from the Order
>
> 5.8 To model, reinforce and reward pro-social attitudes, behaviour and feelings and challenge anti-social attitudes.
>
> 5.9 To adhere to the ECP manual, Guidelines and Quality Standards.
>
> 5.10 To attend and participate in performance management and supervision sessions and other opportunities to develop and improve practice.
>
> 5.11 To represent LPA to courts
>
> Main duties and responsibilities:
>
> 5.12 To organise and oversee work placements including the maintenance, provision and transportation of materials and equipment.

5.13 To supervise offenders on work placements and influence offenders through pro-social modelling.

5.14 To maintain discipline in groups and manage the maintenance of the CP rules.

5.15 To deliver the "Problem-Solving at Work" programme material for offenders with poor problem-solving skills.

5.16 To deal with any difficulties or crises constructively without disruption to the work session and refer appropriately to the relevant Case Manager.

5.17 To complete the Attendance and Participation Log and to record the offenders performance and progress.

5.18 To inform the relevant Case Manager of any absences.

5.19 To assist with the delivery of the Health and Safety Work Module and the Guided Skills Learning in employment related skills in appropriate cases.

5.20 To deliver the Pre-Placement Work Session within 10 days of sentence including imparting general health and safety information which offenders must receive before they start work

5.21 To maintain Attendance and Participation Logs and the Case Management Database including details of contact, content of work sessions, progress made, issues to be followed up at the next contact, changes in offenders circumstances, unacceptable absences etc

17. There has been a change in terminology over time from "offenders" to "service users" to "POPs" (people/persons on probation). All of these terms refer to people who are subject to a Court Order to carry out unpaid work as an alternative to a custodial or another sentence.

18. Regarding "Beneficiary" – this denotes an organisation that is the beneficiary of work carried out on unpaid basis by teams supervised by the Respondent's staff.

Working days

19. The Claimant worked on Thursday, Saturday and Sunday.

20. Additionally for a period of four years he worked on a Wednesday, although this never recognised as a formal written contractual commitment.

Historic reason

21. The Claimant worked on Thursday, Saturday and Sunday. Additionally for a period of four years he worked on a Wednesday, although this was not a contractual commitment.

First aid training course 3 June 2019

22. On Monday 3 June 2019 the Claimant attended a First Aid training course. The Claimant submitted an expense claim form for the time spent attending the course and the time spent travelling to the course. This was not a working day.

23. We have never actually seen the claim documentation itself and surprisingly neither party is able to confirm whether it was submitted by paper or electronically. It seems to be common ground that the claim made by the Claimant was for 7 hours.

24. In the grievance outcome document Mr Calder says that he had been provided with a written letter of instruction for the Claimant to attend the First Aid Course. We have not seen this document, despite the Tribunal asking if it could be made available during the course of the hearing.

25. The Tribunal was provided as an additional document during the course of the hearing with a written instruction sent to one of the Claimant's full-time comparators Hocine Dib, sent on 11 June 2019 for a training session on 20 June 2019. On the balance of probabilities the Tribunal finds that the instruction to the Claimant to attend his course on 3 June 2019 would have been in a similar format. This instruction provides details of the date, time, address, parking availability, facilities, but it does not provide or explain how expenses may be claimed and what time or expenses may be claimed for.

26. The Claimant's case is that he told management that he had lost out on a day's work somewhere else to attend the training.

27. Hocine Dib attended same course on a different day later the same month. What we do not have is evidence of the amount of the basis of payment made in that caes.

28. There is insufficient evidence to prove or even to conclude whether the comparators Austin Hewlett and Hocine Dib received the training on exactly the same day as the Claimant. As to disclosure of documentation on this point, in fairness to the Respondent, the precise comparators were only identified during the course of the final hearing.

29. It is not in dispute that in principle full time colleagues, including the comparators were paid for travel time on a non-working day, even if not actually on 3 June 2019.

Expense claim rejected

30. On 6 July 2019 the Claimant's expense claim form for the First Aid training course was rejected.

31. Although the Tribunal, and indeed the grievance and grievance appeal managers have not had the benefit of seeing the claim submitted at the time, we infer from the circumstances that the Claimant claimed a figure of 7 hours without breaking this down to explain what it represented.

32. As part of his claim to the Tribunal the Claimant says that he was told that as a part-time employee could only claim for 3 hours for first aid training. He says that full-time employees were not subjected to that treatment and they were all paid for the whole day. The Claimant says he lost wages.

33. In his grievance the Claimant described the circumstances of the rejection as follows:

> "To my surprise, my then people's manager attended my project (Selby Centre) and informed me that, he/she has refused my claim form as I can only claim for 3 hours for the course, further adding that, "this would look as stealing from the company" – effectively calling me a thief!. I was shocked at this level of bullying and abuse of power. The people's manager forgot that, there were certain supervisors at the course who were contracted to work on that day and they were paid for their travelling as well as their expense and there was a supervisor like I who did not only attend the course on his non – working but also lost his full day's wage in order to attend that course. I told my people's manager that, I have lost the whole days of work in order to attend this course on my non-working day. Hence, if the company is not going to pay me my rightful money, I would not amend my claim form for money and I will leave it on the record and would not claim 3 hours. The manager's response was "as you wish, you will lose your three hours too".

34. The stated ground for rejection is that the form should not contain a claim for time spent travelling. The Claimant was particularly upset because he felt as if he was being accused of something akin to stealing. We understand that this had particular significance when his employer was the Ministry of Justice.

35. In any event the rejection appears to conflict with how the Respondent's witnesses to the Tribunal understand the policy. They have explained to us that travel expenses and time spent travelling on a non-working day *should* have been reimbursed.

<u>New manager: Keely Brown</u>

36. In March 2020 Ms Keely Brown became the Claimant's line manager.

37. On 16 April 2020 the Claimant had a one-to-one meeting with Keely Brown. In that meeting the Claimant raised various issues, including that he was not paid for a full day in relation to the First Aid training course. He promised to provide more detail in writing.

38. On 26 November 2020 the Claimant sent an email which contained complaints about a variety of topics, including the question of rest breaks:

> "Lastly, Nabila [Ms Alam, Project health & safety officer] should have concentrated on Health and Safety at Work Act 1974; in particular, to the breaks for the staff members whom are required to work for more than 6 hours. According to a government website,

https://www.nidirect.gov.uk/articles/rest-breaks, we (supervisors) are entitled to 20 minutes break (away from work)."

Christmas closing 2020

39. During Christmas 2020 the Respondent shut on 25, 26, 27, 28 December 2020. The 28 December was a bank holiday given that Boxing Day (26th) fell on a Saturday.

Canal & River Trust project

40. On 10 February 2021 Keely Brown instructed the Claimant, Paul Wood and Abidemi Fadojutimi to attend a training session for the Canal & River Trust project on 25 February 2021. The Claimant attended as instructed.

41. Ms Brown's oral evidence was that six individuals in total had been trained for this but the Claimant was the only person ever allocated to it.

Grievance

42. On 8 March 2021 The Claimant raised a grievance in which he complains about the following:

    42.1. The extra fourth day each he has worked regularly for 4 years had never become contractual;

    42.2. He was a victim of discrimination, bullying and harassment at work. As a result of this pattern of alleged illegal treatment, he said he suffered from anxiety, depression that resulted in many sleepless nights that also affected my private family life as well;

    42.3. There was nepotism in the allocation of project supervisor jobs;

    42.4. He had been precluded from working in London Borough of Newham due to an incident where he had been the victim of violence;

    42.5. He was being made to work in areas that were not part of his employment contract (which were Hackney, Newham & Tower Hamlets), and his complaint about long journey times ignored;

    42.6. Being allocated to a project in Barking & Dagenham, despite the fact that "Asian" SUs (service users) were not sent there because visitors did not welcome them

    42.7. Managers took insufficient action when Service Users "make punching bag from me";

    42.8. The complaint about a date on which he had claimed for 7 hours, without claiming for travel expenses and was told by a manager that this would look as if it was stealing;

    42.9. A complaint that he had to carry his work tablet to work.

> "For example, if I am asked to carry tablet to the project which starts at 9am and I have to leave home at 7am with the tablet, effectively it means that, I have started working for the company from 7am because before 9am is my private time and I am allowed to carry/refuse to carry whatever I wish for. It is worth noticing that, I don't mind using the tablet as long as I find it on the project. Storing the tablet in my private address and carrying it in my private time is not within the ambit of my employment contract and I am well within my employment rights to refuse to carry something in my own time."

43. The Tribunal has not been required to deal in detail with this final element of the complaint, however, bearing in mind that the Claimant remains in employment with the Respondent we would make the observation that this came across to the Tribunal as rather trivial, unnecessarily disputatious and not the sort of argument that would lead to good relations in the workplace. It suggests that the Claimant was looking for an argument with his employer.

44. On 9 March 2021 Anita Shields forwarded the grievance to Keely Brown.

45. On 19 March 2021 Joanna White wrote to the Claimant to acknowledge his grievance and to ask for further information.

Easter 2021 closure

46. At a supervision on 4 March 2021 the Claimant booked 7 days off between 1 – 15 April 2021. Ms Brown confirmed that he had booked 1st, 3rd, 4th, 8th, 10, 11 and 15 April 2021, but subsequently retracted or cancelled the booking for the last three of these dates. Ms Brown noted:

> "Syed has had to postpone his wedding plans until later in the year due to current travel restrictions. He has forwarded the revised leave dates to me for approval"

47. On 17 March 2021 Claire Farquhar emailed Linda Neimantas to make a case for closure of the Community Payback service on Saturday and Sunday of the Easter Bank Holiday weekend (i.e. Saturday 3 April 2021 and Sunday 4 April 2021).

48. The following day Linda Neimantas agreed to the closure of the Community Payback service on Saturday 3 April 2021 and Sunday 4 April 2021. Claire Farquhar informed managers, including Keely Brown. Keely Brown informed her team, including the Claimant, Parmjit Rai and Maureen Swaby. As set out above the Claimant had already booked leave.

49. The business case for the Easter closure was set out in an email by CF:

> * Historically we know that attendance is low and enforcement is difficult when people put it down to religious reasons linked to Easter
>
> * The reinstruction is really labour intensive on the case operations and logistics some projects close and service users need to be notified not to attend others are open and we need to remind them to attend. It generally becomes chaotic and messy and in usual times I would persevere with it. However currently they are making high

> numbers of weekly calls, carrying higher caseloads, validating cases for extension purposes, instructing via the priority tool and if I am being honest contacting multiple cases themselves to try and speed up the allocation to spaces.
>
> * We have high volumes of carry over leave from the supervisor workforce and this is an opportunity for leave to be taken by supervisors
>
> * We also have supervisors wellbeing days outstanding and the impact of these on the operation is really quite difficult in a time where we have limited resource and I think it would be an opportunity for those contracted to weekend working to take their well-being day if they have not done so already.
>
> * We know we have 38 weekend sessions to offer currently but on past experience we know that we tend to lose 40% of our projects on this weekend based on beneficiaries decisions and leave requests from our team. If I take out the Schools and the Churches which we year on year suffer with closures on it brings us down to 21 actual placements, working out at 103 spaces. This isn't taking into account other projects where the beneficiaries may not want to come in and open up for us.
>
> * Given the output for potential gain and the fact the team are feeling quite exhausted I think 4 straight days off would really do us all some good and give us time to recharge. CPOMs returning on the Tuesday to no weekend enforcement, reinstructions or reallocations I think would be really appreciated and supervisors will not have leave rejected due to us not having enough resource.
>
> I really support that we close, unfortunately I cannot compare to last year's data as we were in lockdown but based on experience Easter weekend presents similar challenges and poor compliance as Christmas

50. The Tribunal was told by Ms Farquhar that consideration was given to offering work over the Easter weekend to those that did not want to take holiday. In fact however this was never communicated to staff.

51. On 23 March 2021 Mr Parmjit Rai emailed Keely Brown in relation to the closure of the Community Payback Service over the Easter Bank Holiday weekend. He said:

> "we have barely had our noses to the grindstone at the coalface this year, if you get my meaning. So I for one do not feel any need for a respite right now"

52. The thrust of his email was that he did not wish to be compelled to take annual leave now and would rather save it for later when he would be more likely to need it. He also mentioned that this is not been done before.

Grievance further information

53. On 26 March 2021 the Claimant provided further information in relation to his grievance.

Easter closure

54. On 2 April 2021 Bank holiday (Good Friday) the Community Payback service closed and remained closed on 3-4 April 2021 (i.e. the Saturday and Sunday of the Easter Bank Holiday weekend). Supervisors, including the Claimant were required to take leave and/or their wellbeing day.

55. On the 5 April 2021 Bank holiday (Easter Monday) the Community Payback service remained closed.

56. In 2021 Ramadan fell 13 April - 12 May 2021 and Eid was celebrated on 13 May 2021 Eid. The Claimant applies for and was granted annual leave for this date.

Grievance hearing

57. A grievance meeting took place on 15 April 2021, at which the following were attendees: Joanna White; Anita Shields (HR); the Claimant; Rachael Lloyd (notetaker).

Canal River Trust project commences for Claimant

58. On 16 April 2021 Ms Brown wrote to Claimant

> "Thursday 22 April 2021 - NEW Canal River Trust - The Lock Keepers Cottage, Old Ford lock (off Dace Road), E3 2NN - 09:00 to 16:00.
>
> This is an interesting and high profile project and I would really like you to fully embrace the work schedule, adhering to the health & safety training and of course, be our ambassador to instil confidence with this influential beneficiary and the users of the public spaces and amenities."

59. It not suggested to Ms Brown nor to the Tribunal that this enthusiastic presentation of this project was disingenuous. We do not find that she was. This is a new project. We have no reason to believe that Ms Brown had advance knowledge that the toilet facilities at this project would turn out to be poor.

60. The project started on 22 April 2021. The Claimant begins working on it one day a week. Keely Brown explained that the Claimant was selected as the project was close to his home. This was not disputed during her oral evidence.

61. The toilet facility provided by the beneficiary for the use of supervisors were shared with others on the canal. The toilet had a key, and so was not a truly “public” toilet, but nevertheless there were a number of users of this facility. It is not clear to the Tribunal how many there were. It seems from what we have understood that many of these users were not under the control either of the beneficiary or the Respondent. This toilet facility was on some occasions in a poor state, with waste matter and soiling not properly cleared away.

62. On 3 June 2021 Keely Brown emailed Dean Smith at Canal & River Trust to tell him that the toilets were unusable that day and that, if the situation is not rectified, the project would need to be closed early.

Grievance outcome

63. There was an outcome to the grievance process on 26 April 2021. Joanna White did not uphold any of the Claimant's grievance.

Grievance appeal

64. Following on from the outcome of the appeal, on 4 May 2021 the Claimant appealed the outcome. He asserted that the questions posed by him in the grievance were ignored and that Ms White had exhibited a "degree of concealment". He suggested that she failed to "mind her role boundary" and intervened in his private life thereby breaching his human rights. He reiterated points made in the early grievance and quoted employment case law.

65. The grievance appeal meeting took place on 27 May 2021. The attendees were Mr Steven Calder; Ms Marion Acworth (HR); the Claimant; Ms Devena Patel (notetaker).

66. On 14 June 2021 a grievance appeal outcome was sent to the Claimant. The grievance appeal officer Mr Steven Calder upheld the Claimant's complaint about non-payment in relation to the First Aid training course, and told the Claimant to submit an expense claim form by 25 June 2021. Mr Calder dismisses the remainder of the Claimant's grievance appeal.

Re-submission of the expense claim form

67. The Claimant did not submit an expense claim form by the given deadline.

Renationalisation of Probation Services

68. On June 2021 the probation services were renationalised.

69. The Claimant's employment transferred to the Respondent by way of the Staff Transfer Scheme 2021 under the Offender Management Act 2007.

Over-allocation of service users

70. In June 2021 six service users were assigned to the Canal & River Trust project, which the Claimant raised in an email dated 23 June 2021 to Ms Brown and Ms Alam. Ordinarily there should have been five service users.

71. The Claimant suggested that this was a Covid-19 breach and also a compromise to his health and safety. He stated that he was a man of colour, hence more affordable to the disease.

72. Ms Kellie Finch updated Matthew Chaplin. Mr Chaplin was Head of Unpaid Work (North East) the Claimant's second line manager. The update read as follows:

> It appears that additional SU's have been assigned to CRT for today, and ca confirm that this was a genuine oversight, driven by the workload and that at we are working across 2 systems with various access challenges, etc.
>
> I note that he copied in Nabila and so the chair issue will need to be addressed, but this is the first that we were made aware

73. Mrs Finch says telephoned the Claimant with regard to the number of service users assigned to the project. She apologised for the error, but discussed with him that one of the six service users was coming to the end of their sentence in two weeks' time and suggested that if he was comfortable with it he could supervise six which would naturally reduce to two weeks. She says he told her that he was okay with it. The Claimant disputes that he said this.

74. There is also a text from Mrs Finch in similar although not identical terms, sent on 1 July which the Claimant admits he received. She said she was asking him massive favour and to keep this extra person for this week and next. She makes the point that they were outside and the weather forecast did not show rain. By implication therefore the Covid-19 transmission risk would be thought to be lower. She signed off this text in pleasant terms "Hope to see you tonight at the team meal".

75. It was a point of dispute before the Tribunal as to whether the Claimant had ultimately agreed to take the additional service users. It is clear from his contemporaneous email sent on 23 June that he was not happy about it. Ultimately we have not needed to resolve this factual dispute, since our focus is on the actions of Mrs Finch and the reason or reasons for that action.

76. Mrs Finch's evidence, which the Tribunal accepts, was that she had made this same error in the case of other supervisors.

<u>Flooding – 7 August 2021</u>

77. On 7 August 2021 there was flooding in parts of London.

78. The Claimant attended a project at St Peter's School in Tower Hamlets. He texted Keely Brown to say that he would be closing the project because no service users had attended.

79. Ms Brown telephoned the Claimant to discuss the situation There is some dispute about what was said.

80. The Claimant admitted during cross examination that Ms Brown did not direct him to stand in the rain but rather that was his interpretation of what he should do in the circumstances. The fact that he made this allegation and brought it as an allegation of victimisation in the Employment Tribunal suggests that he was upset with Ms Brown to the point where he was blaming her for things were really outside of her control.

81. Ms Brown's evidence was that her note of a conversation on that date in the agreed bundle was written on the day of the conversation. On the balance of probability

the Tribunal finds that this note was written partly on the day and partly afterward, not least because the content of the note, suggests that some of it was written on 8 August or even later, specifically the last bullet point on 248, which refers to absence of communication regarding the Claimant's absence on Monday. This final comment can only have been looking back in time and must have been written later on.

82. The note reads:

> When I asked SG what his intentions were for the remainder of the day, he informed me that he had to get 2 cabs to the project this morning, as public transport had been compromised due to the heavy rain/local flooding, and that the traffic/roads were chaotic.
>
> • I suggested that once SG was ready to leave the site, he had my permission to take half day leave for the remainder of the day.
>
> • SG was unwilling to agree to this and so I suggested that he could make his way to the next nearest operational project or if he preferred, he could attend a project nearer to home.
>
> • e.g: From St Peters School E1 to George Green School E14: Shadwell DLR to Manchester Road E14 @thirty minutes or 135 bus @forty-three minutes (TFL journey planner researched on 08.08.21). 4 miles

83. We find that the situation was not managed particularly well. Other parts of the note suggest that Ms Brown seemed intently focused in ensuring that the Claimant understood that he could not claim for a taxi in circumstances where he was telling her that there were no public transport options available and yet he was expected to go to another site or claim annually leave. The fact that this point is repeated several times in Ms Brown's note suggest that it was probably repeated several times in the conversation. Whatever the rights and wrongs relating to travel expenses, we can certainly see that from the Claimant's perspective this seemed bureaucratic and unhelpful in the rather difficult and slightly exceptional situation in which he found himself.

84. Contrary to Ms Brown's evidence to the Tribunal, it must have been clear to her that the Claimant was reporting that there were difficulties with public transport. The problem with public transport was recorded within her own notes "as public transport had been compromised due to the heavy rain/local flooding, and the traffic/roads were chaotic". The fact that she denied in her evidence this when it was contained within her own note rather suggests that she was trying to minimise the information she had about the public transport problem because with the benefit of hindsight her position was extremely inflexible.

85. Both participants in the conversation came away unhappy.

86. Ms Brown's note, and extract of which is above, was were sent by email of 13 August 2021. Surprisingly this document was not initially contained within the agreed bundle.

From: Brown, Keely <Keely.Brown@justice.gov.uk>

Sent: 13 August 2021 09:16

To: Farquhar, Claire <Claire.Farquhar@justice.gov.uk>

Subject: Syed Gillani (CMA 264866)

Importance: High

Morning Claire

Apologies for having to bother you with this, but further to Syed's behaviours on Saturday 7 August 2021, I have been assigned an HR case worker, Gemma Tate.

The recommendation following the enclosed allegations:

Failure to follow a reasonable management request

Threatening behaviour/Unreasonable conduct

Failure to report his sickness absence to me for Sunday 8 August 2021 (SG informed Logistics, but neither myself or the roving Supervisor were advised)

My next line Manager or someone appropriate should be assigned to have a further follow up conversation with Syed, and then an informed decision can be made as to whether the allegations require a formal process to be initiated.

In the absence of both Matthew and yourself, I did speak with Jo White on Monday 9 August 2021, to make her aware of the situation.

87. We did not receive a satisfactory explanation for what CMA 264866 in the email title referred to.

Rest breaks

88. It was common ground that during his shift the Claimant had to continue to supervise service users during rest breaks. He could have a very short break of a minute or two to use toilet facilities, but no more.

89. Initially the Claimant try to suggest that he did not eat anything at all. He conceded after questions on this point that he had snacks but nothing substantial. We do not find anything turn on exactly what it is the Claimant usually had for lunch.

Claim

90. The ACAS Early Conciliation period was 2 July 2021 - 9 August 2021.

91. The Claimant presented a claim to the Employment Tribunal on 26 August 2021.

The Law

92. We are grateful to both parties for their closing submissions and in particular to Mr Dilaimi for his full and careful submissions on the applicable legal principles.

Working Time Regulations/rest breaks

93. Regulation 12 of the Working Time Regulation 1998 provides:

> Rest breaks
>
> 12.—(1) Where an adult worker's daily working time is more than six hours, he is entitled to a rest break.
>
> (2) The details of the rest break to which an adult worker is entitled under paragraph (1), including its duration and the terms on which it is granted, shall be in accordance with any provisions for the purposes of this regulation which are contained in a collective agreement or a workforce agreement.
>
> (3) Subject to the provisions of any applicable collective agreement or workforce agreement, the rest break provided for in paragraph (1) is an uninterrupted period of not less than 20 minutes, and the worker is entitled to spend it away from his workstation if he has one.

94. Regulation 21 of the Working Time Regulation 1998 provides, in relevant part, as follows:

> Other special cases
>
> 21.
>
> Subject to regulation 24, regulations 6(1), (2) and (7), 10(1), 11(1) and (2) and 12(1) do not apply in relation to a worker–
>
> (a) where the worker's activities are such that his place of work and place of residence are distant from one another, including cases where the worker is employed in offshore work, or his different places of work are distant from one another;
>
> (b) where the worker is engaged in **security and surveillance activities** requiring a permanent presence in order to protect property and persons, as may be the case for security guards and caretakers or security firms; [emphasis added]
>
> (c) where the worker's activities involve the need for continuity of service or production, as may be the case in relation to–
>
> (i) services relating to the reception, treatment or care provided by hospitals or similar establishments [(including the activities of doctors in training)], residential institutions and prisons;
>
> (ii) work at docks or airports;

> (iii) press, radio, television, cinematographic production, postal and telecommunications services and civil protection services;
>
> (iv) gas, water and electricity production, transmission and distribution, household refuse collection and incineration;
>
> (v) industries in which work cannot be interrupted on technical grounds;
>
> (vi) agriculture;
>
> (vii) [the carriage of passengers on regular urban transport services;]

Compensatory rest

24. Where the application of any provision of these Regulations is excluded by regulation 21 or 22, or is modified or excluded by means of a collective agreement or a workforce agreement under regulation 23(a), and a worker is accordingly required by his employer to work during a period which would otherwise be a rest period or rest break—

> (a) his employer shall wherever possible allow him to take an equivalent period of compensatory rest, and
>
> (b) in exceptional cases in which it is not possible, for objective reasons, to grant such a period of rest, his employer shall afford him such protection as may be appropriate in order to safeguard the worker's health and safety.

Case-law on reg 21(b) security and surveillance activities

95. Regulation 21(b) WTR 1998 does not apply only to security guards, caretakers or security firms. In **Union Syndicale Solidaires Isère v Premier Ministre and ors** [2011] IRLR 84, ECJ, the European Court of Justice held that Article 17(3)(b) of the Working Time Directive (on which Regulation 21(b) WTR 1998 is based) is capable of applying to casual and seasonal staff working at children's leisure and holiday centres.

96. As the ECJ noted at paragraph 45 of its judgment,

> "[w]hile it is true, as maintained by the Union syndicale and the Czech government, that the members of staff at holiday and leisure centres carry out activities designed to educate and occupy children accommodated in those centres, it is equally true, as asserted by the French government, that it is also the responsibility of such staff to ensure continual supervision of those children. Since those children are not accompanied by their parents, they are, in order to ensure their safety, under constant supervision by the staff working in those centres."

Time limits

97. In **Scottish Ambulance Service v Truslove** EATS 0028/11 (unreported, 12 January 2012), Lady Smith held that time started running on each occasion that the Claimants did not receive the daily rest or compensatory rest to which they were entitled. Lady Smith wrote as follows at paragraph 31 of her judgment:

> "Mr Edwards [for the Claimants] did not suggest that workers in the position of the Claimants had perpetual rights to claim because they had continuing rights to rest. His position was that each time a worker did not actually receive the rest to which he was entitled under WTR (a right which was not dependent on having specifically asked for it), a fresh time bar period started to run. He fully accepted that they could not extend their claims back further than three months (save for where the statutory grievance procedures had the effect of extending that period to six months). I agree that that approach is in accordance with the provisions of Regulation 30(2)."

Whether express request by worker necessary

98. There have been conflicting authorities on whether a refusal to permit rest breaks can arise in the absence of an express request by the worker. It seems the settled position is that it can be. IDS handbook contains the following:

> *Grange v Abellio London Ltd 2017 ICR 287, EAT*. There the Appeal Tribunal held that an employer's failure to make provision for rest breaks can amount to a 'refusal' to permit them, *even in the absence of an express request by the worker*. In the EAT's view, it was clear from the ECJ's decision in *Commission of the European Communities v United Kingdom* (above) that the entitlement to rest breaks under the Working Time Directive was intended to be actively respected by employers for the protection of workers' health and safety. In light of the language and purpose of the Directive, and applying a commonsense construction to Reg 30(1), the EAT considered that the approach in the *Truslove* case was to be preferred to that in the *Miles* case

Nature of rest break

99. The normal provision for rest during a working day of more than 6 hours is found in regulation 12 WTR: a worker is entitled to a rest break of an uninterrupted period of not less than 20 minutes away from his workstation (a "Gallagher rest break" after **Gallagher v Alpha Catering Services** [2005] IRLR 102).

Compensatory rest break (reg 24(a))

100. What is a compensatory rest break within the meaning of regulation 24(a) WTR 1998? The Court of Appeal provided the following guidance in the case of **Hughes v Corps of Commissionaires Management Ltd (No. 2)** [2011] IRLR 915, CA, (para. 54, per Elias LJ):

> "it must have the characteristics of a rest in the sense of a break from work. Furthermore, it must so far as possible ensure that the period which is free from work is at least 20 minutes. If the break does not display those characteristics then we do not think it would meet the criteria of equivalence and compensation".

'Exceptional' (reg 24(b))

101. In **Hughes**, Elias LJ confirmed that "exceptional" in the context of regulation 24(b) did not provide a separate hurdle for the employer to establish. It simply meant that the derogation was narrow and should be restrictively applied. This is contained in paragraph 66 set out below.

102. We have accepted that this interpretation is binding on us, notwithstanding the fact that some European jurisprudence suggests that "exceptional" should mean that it is difficult to fall within this section.

Protection as may be appropriate in order to safeguard health & safety (reg 24(b))

103. We have not been referred to comprehensive guidance as to the question of what protection may be appropriate in order to safeguard the employee's health and safety.

104. In **Hughes** this point is referred to as follows:

> 38. The EAT limited the scope of reg. 24(b) to cases where no para. 24(a) rest could possibly be provided during the shift. In those circumstances the employer would have to afford such protection as was appropriate to safeguard health and welfare. The EAT gave by way of example **structuring the way in which the work is organised during the shift and providing health checks for workers**.
>
> …
>
> 66. … In our view para. (b) merely requires that there should be objective reasons why an equivalent period of compensatory rest cannot be provided. Cases where the employer can provide neither a Gallagher rest break nor a compensatory alternative will perforce be exceptional. The reference to exceptional circumstances, as the tribunal observed, confirms the fact that the derogation is narrow and should be restrictively applied. But we do not accept that the provision sets two hurdles of exceptional circumstances and objective reasons; the presence of the latter establishes the former.

> 67. The second ground under this head repeats the submission, rejected by the EAT, that the arrangements could not properly be considered to be appropriate within the meaning of reg. 24(b) without the employers first **conducting a specific health and safety assessment as to the specific risks arising** from the fact that there was the potential for the rest break to be interrupted.
>
> 68. Like the EAT, **we are wholly unpersuaded by this submission**. There is nothing in the Directive which requires this.

105. In summary it seems that structuring the way the work is organised during the shift and providing safety checks for workers might be examples of "protection" falling within the meaning of regulation 24(b). By implication such protection must be directed to the health and safety risks arising from lack of breaks. There is no need for a risk assessment however.

Indirect discrimination

106. Section 19 of the Equality Act 2010 sets out the statutory definition of indirect discrimination.

107. Of relevance for claims of indirect discrimination, in **Ishola v Transport for London** [2020] EWCA Civ 112, the Court of Appeal confirmed that one off events are not necessarily provisions criteria or practices (i.e. PCPs) and must be examined carefully to see whether it could be said that they are likely to be continuing. Earlier case law suggested that a PCP can arise from a one-off or discretionary decision (e.g. **British Airways plc v Starmer** [2005] IRLR 862, EAT). This proposition has been supported by the EHRC Employment Code at para 4.5.

Victimisation

108. Section 27 EqA provides:

> 27 Victimisation
>
> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act—
>
> (a) bringing proceedings under this Act;
>
> (b) giving evidence or information in connection with proceedings under this Act;
>
> (c) doing any other thing for the purposes of or in connection with this Act;
>
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.

109. As to the meaning of detriment the EHRC Employment Code contains a useful summary of treatment that may amount to a 'detriment':

> 'Generally, a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage. This could include being rejected for promotion, denied an opportunity to represent the organisation at external events, excluded from opportunities to train, or overlooked in the allocation of discretionary bonuses or performance-related awards… A detriment might also include a threat made to the complainant which they take seriously and it is reasonable for them to take it seriously. There is no need to demonstrate physical or economic consequences. However, an unjustified sense of grievance alone would not be enough to establish detriment' — paras 9.8 and 9.9.

CONCLUSIONS

110. The issues the Tribunal will decide are set out below numbered e.g. 1.1 etc, and indented, with the Tribunal's conclusions in numbered paragraphs following.

(1) Time limits

1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 3 April 2021 may not have been brought in time.

111. All of the allegations of victimisation detriment appear to be in time, as is the claim of indirect discrimination.

112. The Part-Time less favourable treatment claim is on the face of it out of time, subject to any extension, which is considered below.

1.2 Were the victimisation/part-time workers discrimination complaints made within the time limit in section 123 of the Equality Act 2010 / reg 8 of the Part-Time Workers (Prevention of Less Favourable Treatment) Regulations 2001? The Tribunal will decide:

1.2.1 *Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?*
1.2.2 *If not, was there conduct extending over a period?*
1.2.3 *If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?*

1.2.4 *If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:*
1.2.4.1 Why were the complaints not made to the Tribunal in time?
1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

113. Starting first with the claim of Part-Time worker less favourable treatment relating to the incident on 3 June 2019, the Tribunal accepted the Respondent's submission that the delay has been very lengthy and cogency of the evidence has been affected in respect of this allegation. That has caused prejudice to the Respondent's ability to defend the claim.

114. This allegation had been subject to an internal grievance and grievance appeal process. As to our just and equitable discretion, we have considered the fact that the Claimant was offered a resolution as an outcome of the grievance appeal process, and invited to resubmit the claim form. He did not pursue this. In our view has not provided any good reason why. The onus is on the Claimant to show why time should be extended. We do not consider that he has shown that it should be.

1.3 Was the Working Time Regulations 1998 (WTR 1998) claim been brought within the time limit in regulation 30(2)(a) of the WTR 1998? If not, should time be extended under reg 30(2)(b)?

115. This requires consideration of whether it was "not reasonably practicable" (in other words reasonably feasible) to present within the time limit and if so whether the claim was presented within such further time as was reasonable.

116. We note that this is a stricter test and more difficult to satisfy than the "just and equitable" test in the case of other types of claims.

117. The claim in relation to compensatory rest is in time insofar as it relates to the period between 3 April 2021 and the presentation of the claim on 26 August 2021. It seems that following ***Truslove*** that the Claimant cannot go any further back unless it was not reasonably practicable to present before this time.

118. It is clear that the Claimant has been aware in general terms of his employment law rights for some time. This is not a case in which he has only just become aware of the circumstances giving rise to the ability to bring a claim.

119. We have not found that it was not reasonably practicable to present a claim. It follows that the successful claim only relates period from **3 April 2021 onward**.

(2) Working Time Regulations 1998

*1.4 Has the Respondent failed to comply with the requirement for rest breaks in regulation 12 of the Working Time Regulations 1998 (WTR 1998), having regard to whether the Claimant is while travelling to and from work on 'working time' (see Federacion de Servicios Privados del sindicato Comisiones obreras (CC OO) v **Tyco** Integrated Security SL (the Claimant-266/14), [2015] ICR 1159)?*

Is travel time work time?

120. The Claimant worked a seven hour day, even before taking account of travel time. We find, following the **Tyco** case that in the Claimant's case, as a peripatetic worker with no fixed place of work, travel time did count towards working time for the purposes of the Working Time Regulations.

121. It does not appear to be in dispute that the Claimant's hours, taking account of travel time, were significantly over 6 hours so regulation 12(1) is therefore engaged.

Did the Claimant receive Gallagher rest breaks?

122. Mr Diliami realistically and appropriately acknowledges that in view of the evidence that Project Supervisors are required during those breaks "to be present at the project location with the service users who need to be supervised at all times" ([Claire Farquhar w/s para. 3]), the Tribunal might consider that any breaks that the Respondent gives to the Claimant do not constitute a **Gallagher** rest break.

123. Based on this evidence from Ms Farquhar and the Claimant's own evidence about the nature of those breaks, that is our finding. He did not have an uninterrupted period of less than 20 minutes away from his workstation.

124. Our assessment is that stopping to drink or eat a snack but to continue to supervise service users, did not amount to a **Gallagher** rest break. This did not have the characteristics of a rest in the sense of a break from work per **Hughes**.

Did the Claimant's work fall within regulation 21(b) & (c) exceptions?

1.5 If the Claimant's work falls within regulation 21(b) or regulation 21(c) WTR 1998…

125. We have asked ourselves whether the Claimant was engaged in security and surveillance activities requiring a permanent presence in order to protect property and persons.

126. The Claimant not unreasonably makes the point that he was not a security guard. He was not tasked with "surveillance" per se.

127. We note that the wording of the regulation suggests that it is not only security guards and caretakers or security firms. These are merely examples of these types

of activities. The ECJ in the **Isère** case in relation to the underlying European Part-Time Workers Directive draws the scope of this exception broadly. In that case so as to include members of staff at children's and leisure set and holiday homes fell within the definition in the Directive.

128. Looking at the matter broadly in line with the approach in Isère, the Claimant was present in part to ensure the safety of service users, and others. It is clear from the September 2003 document describing the tasks of Supervisor, that safety was a central element of his responsibility. This responsibility was not precisely the same, but was, looked at broadly, comparable with continual supervision of children to ensure their safety. This was to protect persons.

129. Ensuring the safety of service users and ensuring positive relationships with beneficiaries necessarily entailed to some extent protection the property of the beneficiary, although this was ancillary to the tasks described in his job description. That was the nature of his supervisory task. We find that there was an element of surveillance to protect property and persons.

130. The Claimant's activities did require a permanent presence, certainly for the currency of the supervised sessions with service users.

131. We find that this was is a case falling within regulation 21(b).

132. We have not needed to go on to find whether or not the activities also fell within regulation 21(c), but we see the force in the Respondent's submission that this was activity involving a need for continuity of service.

Possibility of compensatory rest

1.5.1 *was it possible for the Respondent to grant the Claimant an equivalent period of compensatory rest under regulation 24(a) WTR 1998?*

133. In her supplementary witness statement Ms Farquhar at paragraph 2 referred back to paragraphs 3, 4 & 5 of her original witness statement as being "why it is not possible for objective reasons to grant a complete rest break for project supervisors".

134. The reasons, in summary are service users must be continually supervised, save for a minute or two for a supervisor's toilet break. We accept this part of the reasoning, which appears to be common ground. Ms Farquhar further contends that it was logistically and administratively impossible to provide cover for a full break and additionally there is the question of cost.

135. We accept the Claimant's evidence that, prior to Serco becoming his employer he did enjoy rest breaks taken at the conclusion of his shift, but before returning home, which is part of his working time.

136. The Tribunal does not accept, based on the evidence we have heard, that providing rest breaks is logistically or administratively impossible. The Tribunal forms the view that this significantly overstates the difficulty. The Respondent has approached this question on the assumption that the rest break would need to be

given by someone providing "cover", which would necessitate someone else coming to the same site that the Claimant was working at. This to us does not appear to be necessary.

137. Earlier on in his employment the Claimant enjoyed a rest break at the conclusion of the session, after the service users had left. We cannot see that this would be logistically or administratively impossible to achieve. We find that such a break would be an equivalent period of compensatory rest. We find it was possible to offer this rest.

138. If we are wrong about a rest break at the end being equivalent compensatory rest, we still do not accept that providing "cover" would be logistically or administratively impossible. The Claimant is rostered to attend various sites on different days of the week. To provide cover what would be required would be for some other employee to travel from site to site to offer cover. Realistically they could offer cover more than one site during the course of the day. This would require some additional rostering. We do not consider that this would approach being logistically or administratively impossible as the Respondent asserts.

139. We do not find that the Respondent has established an objective reasons in respect of logistics or administration.

140. As to cost, (which the working time directive says cannot be the only reasons for the exception) the Tribunal accepts in principle that there would be likely some additional cost in providing for breaks. The cost of an additional 20 minutes wages at the conclusion of a shift is fairly minimal. We do not find that this cost would have made impossible to grant such a break.

141. We have not received detailed evidence on the cost of providing "cover", so we have not been able to deal with this in any detailed way. For clarity however our principal finding is that this would not be necessary for the reasons given above.

142. We do not accept the evidence of Ms Farquhar that it was logistically or administratively impossible, nor that the cost was prohibitive. It was simply a case of paying for the Claimant to take a 20 minute rest break.

143. It follows that the Respondent has demonstrated that it is "not possible" within the meaning of regulation 24(b) to provide compensatory rest breaks.

Did the Claimant receive compensatory rest?

144. If so, did the Respondent grant the Claimant equivalent periods of compensatory rest under regulation 24(a) WTR 1998?

145. We are not satisfied that there were equivalent periods of compensatory rest. Taking a drink or a lunchbreak but continuing to supervise service users was not a break in the sense of Gallagher.

Respondent's regulation 24(6) defence

> *1.6 If it was not possible for objective reasons, has the Respondent afforded such protection as may be appropriate in order to safeguard*

the Claimant's health and safety, as required by regulation 24(b) WTR 1998?

Safeguarding health and safety

146. There is no need for the Tribunal to consider this point, since we do not find that the Respondent has demonstrated that it was not possible for objective reasons to provide compensatory rest (see 2.2.1 above).

147. Considering this in the alternative, in case we are wrong about that, the majority (Employment Judge Adkin and Ms Ihnatowicz) consider that we ought to go on to consider the safeguarding point. Dr Weerasinghe does not consider as a matter of principle that the Tribunal needs to or should go on to consider point in view of our finding above.

148. We have considered the matters set out in Ms Farquhar's supplementary witness statement which are as follows:

148.1. That there are project risk assessments which determine for example how many service users are assigned to one project supervisor and information about the welfare facility and any site-specific information relevant;

148.2. Supervisors are provided with a "lone working device" which is worn around the neck and monitored by an external call centre. This device can be used to notify a call centre with a "person down" scenario;

148.3. Each project site has a "welfare facility" where supervisors have access to tea, coffee and water;

148.4. Placement coordinator's "float around" the projects delivering equipment such as PPE and tools. The individuals may be contacted by phone or email as a backup there are operation managers. Project supervisors are provided with a tablet and iPhone;

148.5. Staff have access to Health Assured the employee assistance provider;

148.6. Staff have access to an Occupational health provider.

149. We have considered the health and safety purpose of rest breaks, which we see as giving employees time to physically and mentally recover from their work. In the case of supervising some quite challenging service users we find that the time and space to recover in a rest break is something which will help supervisors to physically and perhaps more importantly mentally recover from their work.

150. The list of matters set out in Ms Farquhar's witness statement are each appropriate elements of the Respondent's provision for the welfare of its staff generally. We recognise that depending on the circumstances, an employer's general welfare provision might amount to such protection as may be appropriate in order to safeguard the Claimant's health and safety arising from the lack of breaks.

151. The project risk assessments referred to do not focus specifically on rest breaks, although we acknowledge the guidance of the EAT that this is not a necessary element.

152. In his submission Mr Dilaimi puts some emphasis on the lone working device, providing assistance for the Claimant if he was unwell or unconscious or threatened and require backup. This is a type of safeguard for the Claimant, this is a mechanism for alerting the Respondent when things have gone (perhaps quite badly) wrong. We see this as being some way away from a protective measure safeguarding health and safety arising from lack of breaks.

153. Other than the project risk assessments all of the other matters relied upon by the Respondent are essentially reactive rather than proactive. We accept Mr Dilaimi's submission that the task of the Tribunal is not to ask whether another system might be better, but whether the Respondent had at the material time such protection as might be appropriate.

154. The Respondent also highlights that there are breaks of sorts, albeit non-Gallagher breaks. We have taken account of that submission, but our finding is that there was little scope for the Claimant to take a meaningful break because of the need to supervise service users.

155. We do not understand the EAT in the case of **Hughes** to be saying that structuring the way the work is organised during the shift or providing health checks is necessarily required in every case. However, we consider that these are the kind of protective measures which we consider are required for an employer to satisfy regulation 24(b).

156. In the circumstances of this case we are not satisfied that the essentially reactive measures put forward by the Respondent, which are general welfare measures do afford such protection as may be appropriate. We cannot identify within the measures put forward by the Respondent any preventative and proactive measures to monitor and support individuals who have to work without rest breaks. We find that this falls short of being "such protection as may be appropriate to safeguard the worker's health and safety".

157. We should emphasise that these comments are in the alternative in this case, since we find that it was possible to offer compensatory rest. We do not see our observations on this point as setting any wider precedent.

Remedy

1.7 If so, to what remedy is the Claimant entitled under reg 30(3) of the Working Time Regulations 1998?

158. This is a matter for the remedy hearing.

159. Given the Claimant's quantification of this claim as 20 minutes each day of work, amounting to one hour per week, this ought to be capable of the parties resolving it without the involvement of the Tribunal.

3. Part-time workers less favourable treatment (reg 5 Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000)

1.8 The Claimant complains that he was not paid for attendance at First Aid Course for which he claimed by an additional work payment claim form dated 3 June 2019.

160. We found that this claim was brought significantly out of time, and the reasons set out above, we do not consider would be just and equitable to extend.

4. Indirect discrimination (Equality Act 2010 section 19)

PCP

1.9 A "PCP" is a provision, criterion or practice. Did the Respondent have the following PCP:

1.9.1 In 2021 closing the business over Easter but not over other religious periods.

161. The Tribunal did consider whether this was merely a one-off event (**Ishola**), given that the closure in Easter 2021 was due to particular circumstances of the Covid 19 Pandemic and the policy occurred once and has not been repeated in 2022.

162. The Claimant argues following **British Airways v Starmer**, that this was as PCP. The Respondent confirmed in closing oral questions that it was apt to be considered as a PCP but was not made out on the facts.

163. We have given the Claimant the benefit of the doubt from this point and treated this as a PCP albeit that it was essentially one-off.

Particular disadvantage for non-Christians

1.10 Did the PCP put non-Christian persons at a particular disadvantage when compared with Christian persons, in that they could not work over Easter if they wished to and did not have automatic time off work for their own religious festival(s)?

164. Particular disadvantage is not the same as different treatment. The Tribunal doubted that non-Christians were placed at a particular disadvantage. They were obliged to take a day or two holiday which another circumstances they might not done. We do not find that this passes the threshold of particular disadvantage.

Particular disadvantage for Claimant personally

1.11 Did the PCP put the Claimant at that disadvantage?

165. The fatal flaw in the Claimant's claim of indirect discrimination was that he was already booked to take leave on the relevant dates in Easter 2021. He was not placed at a personal disadvantage at all. This claim therefore cannot succeed.

Justification defence

1.12 Was the PCP a proportionate means of achieving a legitimate aim? The Respondent will identify what the legitimate aim is within 21 days and send that to the Claimant and the Tribunal.

166. It has not been necessary to deal with the Respondent's "defence" given our finding at 4.3 of the list of issues.

5. Victimisation (Equality Act 2010 section 27)

Protected act

1.13 Did the Claimant do a protected act as follows:

1.13.1 Grievance of 8 March 2021

167. The Respondent admits that this is protected act.

ALLEGED DETRIMENTS

Additional offender

1.14 Did the Respondent do the following things:

1.14.1 *On 24 June 2021 and for two subsequent weeks the Claimant was required by Kellie Finch to supervise more offenders than allowed by the project risk assessment (para 22)*;

168. That this occurred is not in dispute.

169. Ms Finch essentially asked the Claimant to do her favour. We find that this was, practically speaking, no more than an minor inconvenience to the Claimant, albeit one that he was not particularly comfortable about. Some colleagues might have taken this in their stride. In the case of the Claimant it did cause him some concern.

170. We doubt that this passes the threshold to amount to being "*subjected* to a detriment".

1.14.2 *The Claimant also relies by way of background evidence on an incident on 19 September 2021 when he says he was required by Nabila Alam to supervise more offenders than allowed by the project risk assessment*;

171. The Tribunal notes this background point. It rather suggests that this happened from time to time. We accepted Mrs Finch's account that this had happened in the case of other supervisors.

172. We did not draw the inference that this was detrimental treatment directed at the Claimant.

Toilets

1.14.3 *Required by Keely Brown to work at the Canal River Trust where no toilets are available rather than on another project since June 2021*;

173. Ms Brown made a complaint about the state of the toilets to the beneficiary on 3 June 2021, stating that if the situation was not rectified the project would need to be closed early. She was, we find, trying to take steps to draw this unsatisfactory situation to the attention of the beneficiary.

174. We do not wish to minimise the Claimant's discomfort caused by the state of the toilets on some occasions. We have seen photographic evidence. They were in an unpleasant and unhygienic state on the dates on which the photographs were taken.

175. It was simply the feature of this particular beneficiary's site that the facilities were not in a particularly good order and crucially in respect of the toilet that they were shared with others. It is not the case that the Respondent took no action about it. Ms Brown wrote to the beneficiary in clear terms.

176. We have considered the EHRC guidance on detriment, which includes examples of the sorts of treatment which influence an individual's career.

177. Whilst acknowledging the Claimant's concern about this, do not find that he was being "subjected to a detriment".

Torrential rain incident – 7 August 2021

1.14.4 *Made to stand in torrential rain by Keely Brown on 7 August 2021 for 45 minutes* (para 24);

178. The Claimant admitted during cross examination that he made himself stand in torrential rain so as to greet potential service users (in fact none attended). This was not on the instruction of Ms Brown at all but normal operating.

179. This allegation is not made out.

180. There was no detrimental treatment in this respect.

1.14.5 *Made by Keely Brown to go to a different project when there was no transport service available because of flooding* (para 24);

1.14.6 *Bullied on phone by line manager Keely Brown for 31 minutes and forced to take half a day's leave* (para 24).

181. It is convenient to take these substantially overlapping allegations together.

182. Ms Brown offered the Claimant the opportunity either to take half a day annual leave or alternatively go to a different project. It seems that the local public transport options were limited, although Ms Brown sought to downplay that in her evidence to the Tribunal. She explained to the Claimant several times that the Respondent would not approve expenses for a taxi.

183. The Claimant became upset. We have also borne in mind that the circumstances of torrential rain such as to cause flooding and affect public transport were not totally extraordinary, but were not a run-of-the-mill situation.

184. We found that Ms Brown was responding to a rather unusual event and the Claimant was upset. Her management of the situation might be characterised as being unsympathetic and might have been more supportive. She was placing an unhelpful emphasis on telling the Claimant that he could not claim for a taxi in circumstances where he was telling her that there was no public transport available.

185. We would not characterise this bullying, but we do find that the Claimant was not given the kind of support he might have expected from a manager and was thereby subject to a detriment. We have gone on to consider the reason for this below.

1.15 By doing so, did it subject the Claimant to detriment?

186. We have dealt with the question of detriment under each individual factual allegation, for convenience and ease of comprehension.

Detriment because of protected act?

1.16 If so, was it because the Claimant did a protected act?

1.17 Was it because the Respondent believed the Claimant had done, or might do, a protected act?

187. We have found that allegations relating to 7 August 2021 (5.2.5 and 5.2.6) did amount to a detriment.

188. There was a protected act. Ms Brown was aware of it, because she was originally invited to deal with the grievance. We find she appropriately queried whether she should deal with it in those circumstances. We do note however that the grievance submitted on 8 March 2021 was not by any means solely directed at or about Ms Brown. It was a wide-ranging set of complaints, which included matters that were

historic and in some case predated her management of him which commenced in March 2020.

189. We have considered carefully whether Ms Brown's approach on 7 August 2021 was to any extent influenced by the submission of the grievance. The Tribunal has formed the impression that the relationship between the two generally was not a particularly good one. Each of them might be perhaps have been little kinder and more flexible in relation to the other. It is our impression that Ms Brown found the Claimant difficult to deal with, and was not inclined to be particularly accommodating toward him.

190. We do not find however that the detriment treatment set out above, alleged to be detriment, was because of the Claimant's grievance. Rather we find that this incident, and Claimant's particularly negative perception of these events was a manifestation of the less than happy working relationship between the two of them.

191. Had we found that the other treatment set out above was detrimental, we would have formed the same conclusion, that this was not because of the Claimant's grievance, but that it was again simply a manifestation of the nature of the working relationship.

REMEDY HEARING

Remedy hearing

1. The remedy hearing will take place by video (CVP on **Monday 14th November 2022**. The hearing will start at **10.00 am**. You will receive joining instructions the working day before the hearing.
2. The parties are encouraged to seek to resolve this matter, without the need for a hearing, especially given that the Claimant remains in employment, and the value of the claim is limited and easily calculated. The parties are requested to notify the Tribunal as soon as any settlement is reached.
3. The Claimant is ordered to provide to the Respondent and Tribunal an updated Schedule of loss, relating only to the successful claim by **19 October 2022**.
4. The Respondent shall confirm to the Claimant and Tribunal by **28 October 2022** in a counter-schedule or other convenient format if any of the updated Schedule of loss is in dispute and why.
5. The parties shall confirm to the Tribunal by the latest **4 November 2022** whether the remedy hearing is needed. In the event that it is needed the Respondent is requested to file a draft list of outstanding issues.

Employment Judge Adkin

7 October 2022

Sent to the parties on:

07/10/2022
For the Tribunal Office:

Reasons for any decision made at the hearing, to the extent not set out above, were given orally at the hearing and written reasons will not be provided unless they are asked for by a written request presented by any party within 14 days of the sending of this written record of the hearing.