EMPLOYMENT TRIBUNALS

COVID-19 Statement on behalf of Sir Keith Lindblom, Senior President of Tribunals
"On the application of the claimant, the hearing was converted to a hybrid hearing for reasons set out in the reasons for the postponement of the hearing sent to the parties with these written judgment and reasons. A face to face hearing was not held because it was not practicable and the purposes of the hearing could be achieved at a remote hearing."

Claimant **Respondent**

Mr Y Hassan El-Nahla **v** **Top Discount Electrical Stores Limited**

Heard at: Watford Employment Tribunal **On**: 16 & 17 August 2022

Before: Employment Judge George
Members: Mr D Sagar
Ms A Brosnan

Appearances
For the Claimant: in person (by CVP)
For the Respondent: Ms S Kamal, counsel

JUDGMENT

1. By a majority, Mr Sagar the employer's side non-legal member dissenting, the respondent subjected the claimant to religious related harassment by

    1.1. on 18 June 2018, by Phil Kurland of the respondent saying "Mecca, do you mean that place where people go round and round and never get anywhere"; and

    1.2. on 19 July 2018, by Phil Kurland, on seeing the claimant kneeling down, saying "Are you kneeling towards Mecca?"

2. By a unanimous decision, the respondent subjected the claimant to a detriment on grounds of protected disclosure by

    2.1. telling him, on about 27 September 2018, that he would have to take annual leave in order for them to investigate the allegation he had raised against a colleague;

    2.2. failing to take any action to ensure that the claimant was safe at work after he reported the colleague's behaviour on 27 September 2018; and

2.3. failing to communicate the outcome of any investigation into the claimant's complaint.

3. The employment tribunal has jurisdiction to consider the harassment claims even though they were presented more than three months after the act complained of because it is just and equitable to extend time in order to do so.

4. All other claims are dismissed.

CASE MANAGEMENT ORDERS
Under Employment Tribunals Rules of Procedure 2013

1. All remaining issues as to remedy will be considered at a remedy hearing to take place on **4 November 2022** at the Employment Tribunal, **3rd Floor, Radius House, 51 Clarendon Road, Watford, Hertfordshire, WD17 1HP**.

2. No later **21 October 2022**, the claimant is to send to the respondent and the Tribunal

    a. a statement explaining how the acts which the Tribunal has found to be unlawful have affected him. He is to include any medical evidence upon which he intends to rely.

    b. an updated statement of the losses he is claiming to the respondent and the Tribunal.

REASONS

1. The procedural history of this case and our decision and reasons for acceding to the claimant's application for a postponement are set out in the written record of that decision. We postponed the hearing, for reasons given at the time, from the original listed start date of 15 August to 16 August and converted it to a hybrid format. That separate written record is send to the parties at the same time as these written reasons for our judgment on the substantive issues.

2. As we record in that written record of our decision on 15 August, the claimant was apparently not in a position to exchange witness statements as directed by Employment Judge McNeill KC and, after an unless order was made, he indicated that he did not have further information to provide than had been set out in the four page document attached to his claim form. That, therefore, stood as his witness statement, he adopted it in evidence and was cross-examined on it. The respondent sent the claimant witness statements setting out the evidence to be given by Philip Kurland, the Managing Director of the respondent, and Chris Kurland, his son, who is the Manager. They did not attend to give evidence but the respondent relied upon their statement evidence.

3. We also had the benefit of a joint bundle of documents which ran to 142 pages and page numbers in these reasons refer to that bundle.

The issues

4. The issues to be determined were set out in the record of preliminary hearing conducted by Employment Judge McNeill KC on 10 September 2019 and in the further and better particulars that are set out at page 19. They are as follows (paragraph numbering retained for ease of reference):

Time limits / limitation issues

(i) Were the claimant's complaints of harassment and/or race-related or whistleblowing-related detriment presented within the time limits set out in sections 123(1)(a) of the Equality Act 2010 (EqA) and/or 48(3)(a) of the Employment Rights Act 1996 (ERA)?

(ii) Did the harassment and or race-related detriment relied on constitute conduct extending over a period within the meaning of section 123(3)(a) of the EqA and, if so, when did that period come to an end?

(iii) Did the whistleblowing-related detriments relied on constitute an act extending over a period within the meaning of section 48(4)(a) of the ERA and, if so, what was the last day of that period?

(iv) If the claimant's claim for harassment was made out of time, is it just and equitable to extend time pursuant to section 123(1)(b) of the EqA?

(v) If the claimant's claim for whistleblowing-related detriment was out of time, was it not reasonably practicable for the claim to be presented in time and, if so, within what further period was it reasonable to present the claim?

(vi) It is not in dispute that the claimant's claims arising out of his dismissal were brought within time.

Unfair dismissal – section 103A of the ERA

(vii) Did the claimant disclose the following information to the respondent, that on 21 September 2018 his colleague, Mr Mark Hurst, in the course of his work, had driven a van and made a delivery to a customer after drinking beer and had then lifted his hand as if to hit the claimant and had threatened to throw the claimant down the stairs?

(viii) Did the claimant disclose the following information to the respondent on 27 September 2018 and/or the police on 28 September 2018, that the claimant was threatened at work with a Stanley box cutter knife by a colleague Mr Richard Dunbar?

(ix) If so, were such disclosures or either of them qualifying disclosures. In particular, did the claimant make such disclosures reasonably believing that they were in the public interest and tended to show that the health or safety of individuals had been or was likely to be endangered and/or in

the case of the incident on 27 September 2018, that a criminal offence had been committed?

(x) Was the reason or principal reason for the claimant's dismissal that he had made one or more of those protected disclosures?

Detriment – section 47B of the ERA and/or section 39(2) of the EqA

(xi) Did the respondent subject the claimant to all or any of the following detriments:

a. By Mr Phil Kurland, making discriminatory comments to the claimant concerning his Muslim faith, background, mental capabilities and race:
b. By Mr Phil Kurland, questioning the claimant in a sarcastic manner and making distasteful comments about his beliefs and political opinions in relation to his family's country of origin (Egypt);
c. On 18 June 2018, by Mr Phil Kurland making disparaging comments about Mecca and, in particular, the Tawal;
d. On 19 July 2018, by Mr Phil Kurland asking the claimant, when he was kneeling in the course of his work, whether he was "kneeling towards Mecca", and then laughing;
e. By Mr Phil Kurland referring to the claimant as "crazy" and questioning the claimant's sanity in front of staff and customers;
f. By Mr Phil Kurland not acknowledging the claimant's presence when the claimant wished him "good morning";
g. Not paying the claimant his due commission payments on time;
h. Not providing the claimant with a contract of employment until 6 weeks after the end of his probation period;
i. Failing to deal with the claimant's complaint about Mr Hurst on or after 21 September 2018;
j. Failing to take any action to ensure that the claimant was safe at work after he reported Mr Dunbar's threatening behaviour on 27 September 2018;
k. Requiring the claimant to take five days' annual leave while his complaint against Mr Dunbar was investigated;
l. Taking unjustified disciplinary action against the claimant;
m. Failing to conduct the disciplinary process fairly, in particular by holding the disciplinary hearing at a location which failed to respect the claimant's privacy;
n. Failing to complete or communicate the outcome of any investigation into the claimant's complaint against Mr Dunbar;
o. Refusing to facilitate the claimant's request for part-time work;
p. Terminating the claimant's employment?

(xii) If so, were such detriments on the ground that the claimant made one or more of the protected disclosures set out at paragraphs (vii) and (viii) above? The claimant acknowledges that any detriments pre-dating 21 September 2018 cannot have been on the ground of making protected disclosures.

(xiii) If any of the alleged detriments are made out, did those detriments amount to less favourable treatment because of the claimant's race and/or religion? The claimant relies on the respondent's perception that he was not of British origin and on his Muslim faith. He relies on hypothetical comparators.

Harassment relation to race and/or religion: section 27 of the EqA

(xiv) Did the respondent engage in all or any of the conduct set out at paragraph (xi) a. to p. above?

(xv) If so, was that conduct unwanted?

(xvi) If so, did it relate to the protected characteristics of race and/or religion?

(xvii) Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Remedy

(xviii) The claimant seeks compensation for unfair dismissal. If his claim succeeds, to what is he entitled by way of (a) a basic award; and (b) a compensatory award?

(xix) If the claimant's claims for discrimination and/or whistleblowing-related detriment succeed, he claims compensation for injury to feelings, personal injury and financial losses. To what amounts is he entitled?

(xx) If the claimant succeeds in his direct discrimination and/or harassment claims, what if any recommendation should be made?

The law relevant to the issues

5. The claimant complains of a number of breaches of the EQA. Section 136, which applies to all claims brought before the Employment Tribunal under the EQA, reads (so far as material):

> "(1) This section applies to any proceedings relating to a contravention of this Act.
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

6. Section 13 (1) of the EQA reads:

> "A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

7. The Claimant complains that he has suffered direct discrimination on grounds of the protected characteristic of race and/or religion. In the alternative, the claimant complains of race and/or religious related harassment. By s.39(2) of the EQA it is unlawful for an employer (among other things) to discriminate against an employee by subjecting them to a detriment. By reason of s.212(2) EQA, if an act is found to amount to harassment then it falls outside the definition of a detriment for the purposes of s.39(2). In other words, s.212(2) has the effect that an act cannot be found both to amount to harassment and to amount to direct discrimination.

8. The definition of harassment is contained in section 26 of the Act and, so far as relevant, provides as follows:

> "(1) A person (A) harasses another (B) if—
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of—
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
> (2) …
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
> (a) the perception of B;
> (b) the other circumstances of the case;
> (c) whether it is reasonable for the conduct to have that effect."

9. What is and what is not harassment is extremely fact sensitive. So, in Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336 EAT at paragraph 22, Underhill P said:

> "We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (…), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

10. The importance of giving full weight to the words of the section when deciding whether the claimant's dignity was violated or whether a hostile, degrading, humiliating or offensive environment was created for him was reinforced in Grant v HM Land Registry [2011] IRLR 748 CA. Elias LJ said, at paragraph 47:

> "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."

11. Furthermore, in Weeks v Newham College of Further Education [2012] EqLR 788 EAT, Langstaff P said:

> "17....Thus, although we would entirely accept that a single act or a single passage of actions may be so significant that its effect is to create the proscribed environment, we also must recognise that it does not follow that in every case that a single act is in itself necessarily sufficient and requires such a finding.
> ...
> 21. However, it must be remembered that the word is 'environment'. An environment is a state of affairs. It may be created by an incident, but the effects are of longer duration. Words spoken must be seen in context; that context includes other words spoken and the general run of affairs within the office or staffroom concerned."

12. In Pemberton v Inwood [2018] EWCA Civ 564; [2018] ICR 1291, Underhill LJ set out guidance on the relevant approach to a claim under section 26 of the EQA as follows [at para 88]:

> "In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so."

13. The EAT provided guidance on ways in which actions might be "related to" the protected characteristic relied on in Bakkali v Greater Manchester Buses (South) Ltd [2018] ICR 1481 EAT paragraph 31

> "Conduct can be "related to" a relevant characteristic even if it is not "because of" that characteristic. It is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected characteristic would not be related to that protected characteristic of a claimant. However, "related to" such a characteristic includes a wider category of conduct. A decision on whether conduct is related to such a characteristic requires a broader inquiry. In my judgment the change in the statutory ingredients of harassment requires a more intense focus on the context of the offending words or behaviour. As [counsel] submitted, "the mental processes" of the alleged harasser will be relevant to the question of whether the conduct complained of was related to a protected characteristic of the claimant. It was said that without such evidence the tribunal should have found the complaint of harassment established. However such evidence from the alleged perpetrator is not essential to the determination of the issue. A tribunal will determine the complaint on the material before it including evidence of the context in which the conduct complained of took place."

14. The application of the burden of proof in direct discrimination claims has been explained in a number of cases, most notably in the guidelines annexed to the judgment of the CA in Igen Ltd v Wong [2005] ICR 931 CA. In that case, the Court was considering the previously applicable provisions of s.63A of the Sex

Discrimination Act 1975 but the guidance is still applicable to the equivalent provision of the EQA.

15. When deciding whether or not the claimant has been the victim of direct race discrimination, the Employment Tribunal must consider whether he has satisfied us, on the balance of probabilities, of facts from which we could decide, in the absence of any other explanation, that the incidents occurred as alleged, that they amounted to less favourable treatment than an actual or hypothetical comparator did or would have received and that the reason for the treatment was race. If we are so satisfied, we must find that discrimination has occurred unless the respondent proves that the reason for their action was not that of race.

16. We bear in mind that there is rarely evidence of overt or deliberate discrimination. We may need to look at the context to the events to see whether there are appropriate inferences that can be made from the primary facts. We also bear in mind that discrimination can be unconscious but that for us to be able to infer that the alleged discriminator's actions were subconsciously motivated by race we must have a sound evidential basis for that inference.

17. The provisions of s.136 have been considered by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054 UKSC – and more recently in Efobi v Royal Mail Group Ltd [2021] ICR 1263 UKSC. Where the Tribunal is in a position to make positive findings on the evidence one way or the other, the burden of proof provisions are unlikely to have a bearing upon the outcome. However, it is recognized that the task of identifying whether the reason for the treatment requires the Tribunal to look into the mind of the alleged perpetrator. This contrasts with the intention of the perpetrator, they may not have intended to discriminated but still may have been materially influenced by considerations of, in the present case, race. The burden of proof provisions may be of assistance, if there are considerations of subconscious discrimination but the Tribunal needs to take care that findings of subconscious discrimination are evidence based.

18. Although the law anticipates a two-stage test for direct discrimination under s.136, it is not necessary artificially to separate the evidence adduced by the two parties when making findings of fact (Madarassy v Nomura International plc [2007] ICR 867 CA). We should consider the whole of the evidence when making our findings of fact and if the reason for the treatment is unclear following those findings then we will need to apply the provisions of s.136 in order to reach a conclusion on that issue.

19. Additionally, the structure of s.13 EQA invites us to consider whether there was less favourable treatment of the claimant compared with another employee in materially identical circumstances, and also whether that treatment was because of the protected characteristic concerned. However, those two issues are often factually and evidentially linked (Shamoon v Chief Constable of the RUC [2003] IRLR 285 HL). This is particularly the case where the claimant relies upon a hypothetical comparator. If we find that the reason for the treatment complained of was not that of race (or religion), but some other reason, then that is likely to be a strong indicator as to whether or not that treatment was less favourable than an appropriate comparator would have been subjected to.

20. In order to find that an act complained of was to the detriment of an employee, the Tribunal must find that, by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work: De Souza v Automobile Association [1986] IRLR 103, CA. This was explained in Shamoon to mean that the test should be applied from the point of view of the victim: if their opinion that the treatment was to their detriment was a reasonable one to hold, that ought to suffice, but an unjustified sense of grievance was insufficient for the claimant to have suffered a detriment.

21. The EHRC Code of Practice on Employment (2011) advises in para 9.8 that a detriment is "anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage."

22. The tribunal may not consider a complaint under ss.39 or 40 of the Equality Act 2010 which was presented more than 3 months after the act complained of unless it considers that it is just and equitable to do so. The discretion to extend time for presentation of the claim is a broad discretion and the factors which are relevant for us to take into account depend on the facts of the particular case. Conduct extending over a period is to be treated as done at the end of the period. A failure to act is to be treated as occurring when the person in question decided upon the inaction and that date is assumed to occur, unless the contrary is proved, when the alleged discriminator does an act inconsistent with the action which it is argued should have been taken or when time has passed within which the act might reasonably have been done. The Tribunal may extend time for presentation of complaints if it considers it just and equitable to do so.

23. The discretion in s.123 to extend time is a broad one but it should be remembered that time limits are strict and are meant to be adhered to. There is no restriction on the matters which may be taken into account by the Tribunal in the exercise of that discretion and relevant considerations can include the reason why proceedings may not have been brought in time and whether a fair trial is still possible. The Tribunal should also consider the balance of hardship, in other words, what prejudice would be suffered by the parties respectively should the extension be granted or refused?

24. In British Coal Corporation v Keeble [1997] IRLR 336 the EAT advised that tribunals should consider in particular the following factors: (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had cooperated with any requests for information; (d) the promptness with which the claimant had acted once he or she had known of the facts giving rise to the cause of action; and (e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she had known of the possibility of taking action. However the factors to be taken into account depend upon the facts of a particular case. Furthermore, one of the most significant factors to be taken into account when deciding whether to set aside the time limit is whether a fair trial of the issue is still possible (Director of Public Prosecutions v Marshall [1998] ICR 518). In Baynton v South West Trains Ltd [2005] ICR 1730 EAT, it was observed that a tribunal will err if, when refusing to exercise its discretion to extend time, it fails to recognise the absence of any real prejudice to an employer. This is part of considering the balance of prejudice

25. The structure of the protection against detriment and dismissal by reason of protected disclosures provides that a disclosure is protected if it is a qualifying disclosure within the meaning of s.43B ERA and (for the purposes of the present case) is made by the employee in one of the circumstances provided for in s.43C ERA. In the present case, the claimant relies upon a single communication made or alleged to have been either directly to his employer.

26. Section 43B(1), as amended with effect from 25 June 2013, so far as relevant, reads as follows,

> "In this Part a 'qualifying disclosure' means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following —
>
> (a)…,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c)…."

27. In Kilraine v London Borough of Wandsworth [2018] ICR 1850, Sales LJ rejected the view that there was a rigid dichotomy between communication of information and the making of an allegation, as had sometimes been thought; that was not what had been intended by the legislation. As he put it in paragraphs 35 and 36,

> "35. …In order for a statement or disclosure to be a qualifying disclosure according to this language, it has to have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1). …
>
> 36. Whether an identified statement or disclosure in any particular case does meet that standard will be a matter for evaluative judgment by a tribunal in the light of all the facts of the case. It is a question which is likely to be closely aligned with the other requirement set out in section 43B(1), namely that the worker making the disclosure should have the reasonable belief that the information he discloses does tend to show one of the listed matters. As explained by Underhill LJ in [Nurmohammed], this has both a subjective and an objective element. If the worker subjectively believes that the information he discloses does tend to show one of the listed matters and the statement or disclosure he makes has a sufficient factual content and specificity such that it is capable of tending to show that listed matter, it is likely that his belief will be a reasonable belief."

28. The structure of s.43B(1) therefore means that the tribunal has to ask itself whether the worker subjectively believes that the disclosure of information, if any, is in the

public interest and then, separately, whether it is reasonable for the worker to hold that belief.

29. Similarly, we need to ask ourselves whether the worker genuinely believes that the information, if any, tends to show that one of the subsections is engaged and then whether it is reasonable for them to believe that.

30. The reference to Nurmohammed is to Chesterton Global Ltd v Nurmohammed [2017] I.R.L.R. 837 CA, where the Court of Appeal gave guidance to the correct approach to the requirement that the Claimant reasonably believed the disclosure to have been made in the public interest at paragraphs 27 to 31 of the judgment. Those paragraphs can be summarized as follows:

a. The Tribunal has to ask, first, whether the worker believed, at the time that he or she was making it, that the disclosure was in the public interest and secondly whether, if so, that belief was reasonable.

b. The second element in that exercise requires the Tribunal to recognize that there may be more than one reasonable view as to whether a particular disclosure was in the public interest; and that is perhaps particularly so given that that question is of its nature so broad-textured.

c. The tribunal should be careful not to substitute its own view of whether the disclosure was in the public interest for that of the worker. That does not mean that it is illegitimate for the tribunal to form its own view on that question, as part of its thinking but only that that view is not as such determinative.

d. The necessary belief on the part of the worker is simply that the disclosure is in the public interest. The particular reasons why the worker believes that to be so are not of the essence. That means that a disclosure does not cease to qualify simply because the worker seeks to justify it after the event by reference to specific matters.

e. While the worker must have a genuine (and reasonable) belief that the disclosure is in the public interest, that does not have to be his or her predominant motive in making it.

f. The essential distinction is between disclosures which serve the private or personal interest of the worker making the disclosure and those that serve a wider interest.

31. If the employee has made a protected disclosure then they are protected from detriment and dismissal by s.47B and s.103A of the ERA respectively. So far as material, s.47B provides,

"47B.— Protected disclosures.

> (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 has made a protected disclosure."

32. In this context, detriment has a broad meaning, as it does in the definition applicable in Equality Act 2010 cases which is discussed above. An employee may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B: s.48(1A) ERA.

33. By reason of s.48(2) ERA it is for the respondent to show the grounds on which the act was done. This does not mean that a claimant merely has to assert that they have been subjected to a detriment. The claimant has to show that there was a protected disclosure, that there was a detriment and that the respondent subjected the claimant to that detriment. Then it is for the respondent to prove the grounds for the detrimental act. If they fail to do so then inferences may be drawn against them, including that the grounds included that the claimant had made a protected disclosure.

34. Section 103A, so far as is relevant, provides that:

> "An employee who is dismissed shall be regarded … as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure"

35. This involves a subjective inquiry into the mental processes of the person or persons who took the decision to dismiss. The classic formulation is that of Cairns LJ in Abernethy v Mott Hay and Anderson [1974] ICR 323 at p. 330 B-C:

> "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him which cause him to dismiss the employee."

36. The reason for the dismissal is thus not necessarily the same as something which starts in motion a chain of events which leads to dismissal.

37. The legal burden of proving the principal reason for the dismissal is on the employer although in protected disclosure claims the claimant may bear an evidential burden: See Kuzel v Roche Products Ltd [2008] IRLR 534 CA at paragraphs 56 to 59

> "… There is specific provision requiring the employer to show the reason or principal reason for dismissal. The employer knows better than anyone else in the world why he dismissed the complainant. …
>
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>
> I agree that when an employee positively asserts that there was a different and inadmissible reason for his dismissal, he must produce some evidence supporting the positive case, such as making protected disclosures. This does not mean, however, that, in order to succeed in an unfair dismissal claim, the employee has to discharge the burden of proving that the dismissal was for that different reason. It is sufficient for the employee to challenge the evidence produced by the employer to show the reason advanced by him for the dismissal and to produce some evidence of a different reason.

> 58
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> Having heard the evidence of both sides relating to the reason for dismissal it will then be for the ET to consider the evidence as a whole and to make findings of primary fact on the basis of direct evidence or by reasonable inferences from primary facts established by the evidence or not contested in the evidence.
>
> 59
>
> The ET must then decide what was the reason or principal reason for the dismissal of the claimant on the basis that it was for the employer to show what the reason was. If the employer does not show to the satisfaction of the ET that the reason was what he asserted it was, it is open to the ET to find that the reason was what the employee asserted it was. But it is not correct to say, either as a matter of law or logic, that the ET must find that, if the reason was not that asserted by the employer, then it must have been for the reason asserted by the employee. That may often be the outcome in practice, but it is not necessarily so."

38. As can be seen from the quotations from the relevant sections, the test of causation is different when one is considering unlawful detriment contrary to s.47B ERA to that applicable to automatically unfair dismissal contrary to s.103A ERA.

39. Section 47B will be infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower: Fecitt v NHS Manchester [2011] EWCA Civ 1190, [2012] I.R.L.R. 64 CA.

Findings of fact

40. We make our findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. We do not set out in this judgement all of the evidence which we heard but only our principle findings of fact, those necessary to enable us to reach conclusions on the remaining issues. Where it was necessary to resolve conflicting factual accounts we have done so by making a judgment about the credibility or otherwise of the witnesses we have heard based upon their overall consistency and the consistency of accounts given on different occasions when set against contemporaneous documents where they exist.

41. The first matter that we set out are our conclusions on the weight to be given to the respondent's statement evidence. Unusually, the respondent has not tendered any live witnesses to give oral evidence or to be cross examined upon their witness statements. As we say above, an indication was given that the respondent was going to rely upon the evidence of Philip Kurland, the Managing Director of the respondent, and Chris Kurland, his son, who was the claimant's Manager. Witness statements approved by Messrs. Kurland were signed on 15 August 2022 but we accept that they were prepared originally in time to be exchanged as first directed prior to the original scheduled hearing time of June 2020.

42. The claimant argues that we should infer that Mr Kurland senior in particular has deliberately not attended in order to avoid lying on oath. We do not go so far as to

draw that inference. However, it is extremely disrespectful to the tribunal and to the process for them not to attend. We asked for an explanation for their non-attendance and none was provided. No criticism is made of Ms Kamal in this respect who was acting on instructions.

43. We remind ourselves of the terms of rule 41 of the Employment Tribunals Rules of Procedure 2013. The Tribunal is not bound by any rule of law relating to the admissibility of evidence in proceedings before the courts. Therefore, although written statements are hearsay evidence, they are admissible in evidence before the Employment Tribunal when they would not necessarily be admissible in other court proceedings.

44. We have decided that we should admit the signed statements into evidence and then it is a question of what weight to be given to them. What we have decided is that where the claimant's evidence conflicted with that of the respondent's witnesses, then there needed to be contemporaneous documents or some other reason such as consistency, to doubt and therefore to reject the claimant's evidence. Although we decide to admit the witness statements of Messrs. Kurland, whether we accept what is in those statements must be tested against all the evidence in the case. As will be seen, although that was the approach of all members of the tribunal, it has led the three panel members to make different findings.

45. So far as the claimant's credibility generally is concerned, he contrasted his own willingness not only to attend but to make concessions where he felt he had to do so with that position taken by the respondent.

46. The minority view, that of Mr Sagar, the employer's side non-legal member, is that the claimant's account of important events was not credible and was undermined by the following:

    46.1 Firstly, by delay in his complaint. There is an oblique refence to the problems that the claimant now explains were attendant on his employment in the appeal letter at page 86 but it is only in the grievance letter at page 97, which post-dated his dismissal, that the claimant made a clear allegation of harassment. Mr Sagar considers that this undermines the claimant's credibility.

    46.2 Mr Sagar also takes into account inconsistencies in the claimant's account, for example, in relation to the incident with MH where, in paragraph 21 of the ET1 which is relied on by the claimant as a statement, he uses the word "throw" as in MH went to throw him downstairs, but in cross-examination he disputed that that was what he had said and described MH's act as a kick.

    46.3 Mr Sagar also considers that the claimant supplemented his account with additional details that had not been foreshadowed such as comments that Mr Phil Kurland senior was said to have made against Carl and a description of there being many other comments that had been made but not previously referred to by the claimant. Mr Sagar accepts the respondent's submissions that this embellishment damages the claimant's credibility.

    46.4 Finally, the claimant's explanation for not including those additional details sooner was that he was not able to give a particular date and had been told not

to use that date. Mr Sagar considers that explanation is not consistent with the inclusion, in particular, of the allegation that he had been repeatedly referred to as "crazy". For that reason, Mr Sagar rejected the claimant's explanation.

47. The majority view as to the plausibility of the claimant's explanation for not previously including additional details (that of the Employment Judge and Mrs Brosnan, the employee's side non-legal member) is that the explanation should be judged in context, namely that the allegation that he had repeatedly been referred to as crazy was included before the hearing at which the claimant says he was told he should not rely on incidents for which he did not have a date. That is the claimant's account of the instruction given by the Judge at the preliminary hearing and the majority accept that an order to provide dates of the acts relied on could have been understood by the claimant in that way.

48. The majority view, is that the claimant's evidence about the three occasions of which particular detail was given that overtly related to race or religion, namely the discussion about historical political matters concerning Egypt, that dated 18 June 2018 and that dated 19 July 2018, are broadly reliable despite the matters which caused Mr Sagar concerns. The claimant made concession where he needed to in his evidence generally, and that is to his credit. The majority find the explanation for the delay in complaining plausible. He said that he was a new employee among long-serving employees including Phil Kurland's son, who was the manager, the previous owner of the business and PK's brother-in-law.

49. The majority considers that the additional details and the inconsistencies are not so significant as to undermine the credibility on those key points in general in the absence of cogent evidence of rebuttal from the respondent. The majority is also influenced by the detail provided by the claimant in his ability to articulate the reasons why he was offended by the alleged comments. The evidence he gave was credible but also inconsistent with the incidents having happened merely as described by Phil Kurland in his written statement.

50. The claimant's employment as Sales Consultant/Logistic Assistant started on 14 May 2018.

51. On analysis and as evidenced before us, the first allegation referred to in the list of issues (LOI) at paragraph (xi)(a), does not add anything to the other allegations that are set out in other parts of the particulars of complaint. The specific incidents that refer to faith, background or race are those in LOI paragraph (xi)(b) to (d) and the only matter that was said to be a comment relating to the claimant's mental capabilities overlaps entirely with the allegation at LOI paragraph (xi)(e), that of referring to the claimant as "crazy" (although he did use alternately the word "retarded" in his evidence to this tribunal). So, in reality, allegation LOI paragraph (xi)(a) does not add anything to the rest of the complaints and was not pursued as a distinct allegation.

52. The next complaint (LOI paragraphs (xi)(b)) concerns the allegation that is referred to in paragraph 14 of the claimants statement - the rider to the ET1 claim form. In it he describes an incident where he says he was questioned by Phil Kurland about Gamal Abdel Nasser, Anwar Sadat and his thoughts regarding the 1979 peace treaty. The contrary evidence is provided by Mr Kurland at paragraph 11 of his witness statement. The majority (Judge George and Mrs Brosnan) find the claimant's evidence to be

credible for reasons already explained and accept that the incident happened broadly as outlined above and as described by the claimant.

53. The claimant explained in oral evidence that his complaint was that he suffered intrusive questioning by Mr Kurland about those historical and political matters concerning the country of origin of his parents. The reason the claimant thought it was intrusive and had the harassing effect seemed to us to have more to do with the repetition of the questions than it did the wording itself. The only specific quote that the claimant said in oral evidence was "Why wouldn't you be happy about a peace treaty." He said that he sought to make clear that he found the discussion unwelcome by saying that he agreed with all peace and was not interested in politics and said that these comments made him feel uncomfortable. The claimant's perception was that he was being pressed about sensitive matters concerning the politics of the Middle East because PK expected him, as a Muslim not to expect that a peace treaty was a good thing.

54. The claimant also alleges that he had started to feel uncomfortable by a number of matters that were going on and started to make a note of dates and therefore is aware of the specific date of 18 June 2018. The majority find that as set out in 15 on page 16 of the claimant's ET1 (LOI para(xi)(c)), on 18 June 2018 Mr P Kurland said to the claimant "Mecca, do you mean that place where people go round and round and never get anywhere". The majority considers the claimant to be credible for reasons already explained.

55. Dealing with the next specific allegation of religious related harassment on 19 July 2018, the majority finds that when Mr P Kurland came upon the claimant kneeling to affix or adjust a label on an appliance he said "Are you kneeling towards Mecca? The allegation set out in paragraph 16 on page 16, is made out and that the comment was made (LOI para.(xi)(d)).

56. Also in July, although on a date unspecified, there was a discussion between Mr Phil Kurland and the claimant about some perceived misconduct by another van driver, Carl. The discussion described by the claimant, which to some extent is accepted by Mr Kurland in his paragraph 12, portrays Mr Kurland as a divisive manager who sets people against each other but this incident does not seem to the panel in any way to be related to race or religion. The effect of this is that the claimant describes Carl as being something of a target. That is reason to accept the respondent's evidence in that paragraph 12 and a reason why we conclude that there was no less favourable treatment on grounds of race in relation to objectionable comments directed to the claimant which were not specifically related to race or religion.

57. The claimant made a request for amended hours. The shop opened between the hours of 9 am and 6 pm although it appears that the warehouse may have opened sooner. Those opening hours amounted to 40 hours a week and were the hours that the claimant had been offered and accepted when he started work. Mr Kurland says in his paragraph 13, that the request was made in July 2018 although the claimant also refers to a meeting which he says was supposed to take place on 14 September 2018. Although that means we are not adhering strictly to chronological order, we deal with both events at this point.

58. The claimant's evidence, even taken at its height, it did not amount to a formal request for amended hours. At its height he said there was a vague comment by Mr Kurland that he would consider it. However it is clear that the claimant knew that the store opening hours were 9 am to 6 pm, he knew that it was a full-time job when he accepted it and, although he had expressed a wish at the job interview for him to work part-time, he had accepted what was offered to him. He accepted as much in his oral evidence.

59. The next in time are allegations set out in paragraphs 17 and 18 of the original particulars of claim at page 16. That at paragraph 17 is the allegation that from time to time Mr Kurland had referred to him as "crazy" (LOI(xi)(e)). So far as we can tell, this specific incident bears no relationship to race or religion and the evidence of Mr Kurland 's behaviour to others, including Carl, suggests that it was not less favourable treatment particularly given the likely context of the claimant's explanations that for his lateness. This was that he needed to attend the gym, in essence, to mentally prepare himself to go to work. We do not pass any judgement on the claimant's decision to do that but, having concluded that Mr Kurland was generally somewhat unreasonable, we find it likely that he was provoked by the explanation which is something entirely unrelated to race or religion.

60. This is also true of the allegation set out in LOI para(xi)(f), because this is the allegation that Mr Kurland did not respond when the claimant said "Good morning". This complaint is raised as a harassment complaint. The claimant accepts that he was late frequently and even the majority consider that he has a degree of sensitivity to the events that occurred that means that his evidence about the frequency of this needs to be reached with some circumspection. In this instance we unanimously find that the claimant has not satisfied us that this happened on occasions other than in response to him being late and the claimant's acceptance that he was frequently late supports the hearsay evidence of the reason why Mr Kurland did not acknowledge him.

61. At the end of July, on 27 July 2018, the claimant appears to have signed his contract. One of his complaints was that the written contract was provided to him late (LOI para(xi)(h)). There was some dispute about whether the contract was actually signed on 27 July or the following month and about whether it bore a date earlier than the date on which it was actually signed. The new handbook, which includes a requirement for a breathalyser test, bears a signature and the same date. The claimant may have wanted his written particulars sooner but the new handbook date suggests that, as alleged by the respondent, there was a connection between preparing an amendment to the handbook and the delay in the contract beyond the normal statutory period. The fact that both documents appear to have been signed on the same date supports the respondent's hearsay evidence of the reason for delay. The contract was certainly not signed before 27 July 2018. However, even taking into account the statutory requirement that there should be particulars within one month of starting employment, and the respondent's absence and therefore the lack of direct oral evidence, we are satisfied that the reasons for any delay were entirely non-discriminatory.

62. The claimant complains of a repetitive failure to pay commission on time. However, in oral evidence he accepted that there were frequently either mistakes with his commission claims including by including of orders which had not been paid and

therefore were not payable. His own evidence supports a finding that there were satisfactory reasons why commission on particular transactions should not be immediately payable. He accepted that Mr Kurland needed some time to check these matters. There is no credible comparator evidence on this point and we are not satisfied that the allegation of a repetitive failure without good reason to pay commission on time is made out.

63. The claimant gave evidence in paragraphs 10 and following of his further and better particulars about an incident where a young man entered the shop and was behaving erratically. In particular, in the further and better particulars at paragraphs 12 and 13, the claimant refers to remarks made by Mr Kurland after the young man had left when he said that he (i.e. PK) was connected and that he knew "people who could make the young man disappear". The claimant's evidence did not clearly explain how these remarks were insulting to him or how they were less favourable treatment on grounds of or related to race or religion.

64. The conduct of Mr Kurland towards the claimant is only part of the incident. Although the claimant confirmed in oral evidence that the comments had been made, he also went on to say orally that he had not taken Mr Kurland seriously. Viewed objectively, there did not seem to us to be reasonable grounds for the claimant (or indeed for us) to conclude that Mr Kurland was indeed speaking to the claimant or about the claimant, in a way that was threatening in connection with him. Even on the claimant's case, the comments in no way appeared to be targeted at the claimant - although he says he feels that they were. This is another instance of us considering that his sensitivity has influenced his perception of events. Given that he did not take them seriously at the time and all the rest of the circumstances we think this does not meet the test of harassment. Even on the claimant's case there is nothing to indicate that Mr Kurland was acting in a way that was related to race or religion or that he would have acted differently had any other member of staff been the individual who had had to guide the young man out of the shop.

65. The claimant had the misfortune to be attacked at a Tube station on 4 August 2018. He raises an allegation that, when he attended for work the following day and then left to get medical treatment for his injuries and subsequently went to make a statement to the police, he was not permitted to take annual leave. The allegation of any irascible behaviour by Mr Kurland in the alleged conversation between him and the claimant when the latter was at the police station is not the allegation with which we are concerned and we do not need to make any findings about that.

66. We do note that on page 77, the list subsequently prepared for disciplinary proceedings as the alleged dates of lateness, the date of 10 August and 13 August refer to occasions where the claimant is said, first, to have taken "a day to report and make statement to police re attack" and then secondly, "Took day off to visit GP failed to notify crime number re attack". This potentially refers to this incident although the dates are not quite consistent with the other evidence that we have been given.

67. This is an instance where we, as a tribunal, have been put in some difficulty by the lack of explanation from the respondent and a lack of pay records that the respondent might have produced to demonstrate what they paid to the claimant by way of leave. Such records might have confirmed whether, as the respondent alleges, they say they gave him compassionate leave on these dates or whether, as alleged by the claimant,

he was refused annual leave and unreasonably marked as late. On the other hand, the claimant could have requested that documentation.

68. Doing the best we can with the evidence we have got, we conclude that on the balance of probability, the claimant was probably paid compassionate leave for this period. His allegation is that he was not permitted annual leave and he may well have been told that. In Mr Kurland's reaction to the claimant's allegations in his appeal letter (page 90 of the bundle), he sets out his response to this which is where he states that the respondent paid compassionate leave. It is likely that the claimant was told he could not have annual leave because he was still within his probationary period and he had not accrued it, but accepting as we do, on the basis of the contemporaneous evidence that he was ultimately paid compassionate leave, he was not disadvantaged by that.

69. On 16 August 2018 the claimant was invited to a disciplinary hearing on allegations of lateness. The claimant, realistically, does not seriously pursue his allegation of unreasonable disciplinary action, certainly in relation to this original invitation, because he accepts that he was late on a number of occasions. That hearing was due to take place on 30 August 2018 and it was postponed due to staff shortages. The extent of the lateness even at that point in time was considerable as we see from the document at page 77. The claimant does not disagree with the amount of lateness set out in that document to any significant extent.

70. Page 77 is not the only evidence of the dates of lateness. There are also text messages sent on a number of dates from 18 June 2018 onwards which indicate that the claimant was texting to say that he would be late (rather than telephoning as required) and was doing so after his official start time. So, there is good independent contemporaneous evidence that the claimant was regularly late for work and reporting his lateness in accordance with the respondent's required communication method. Not only does the claimant not dispute this, but he attributes it in part to his reaction to what he says he was experiencing at work at the time – not all of which have we found to be unlawful.

71. The specific allegation about the failure to meet with the claimant regarding negotiating the amendment to contract from 14 September has already been dealt with and we explain why we reject any allegation of discrimination or harassment based on that in paragraph 120 below.

72. On 21 September 2018 the claimant saw one of the van drivers, MH, driving after having drunk beer. He then says that, later that day, MH shouted and raised his hand to the claimant as if to hit him and threatened to throw or kick him downstairs. The incident is referred to in paragraph 20 and 21 of the original claim form.

73. The claimant reported this to Mr Kurland and the disclosure that is relied on is at page 67 of the bundle. The respondent accepts that that communication was made. It was made in writing.

74. The claimant alleges in LOI para.(xi)(i) that PK did not deal with his complaint about MH. We reject that. Our findings are that the respondent did investigate the complaint by taking statements and it is probable that, in respect of MH, Mr Kurland did reach the conclusion he sets out in his statement. Although in his paragraph 20 he

does not say that he gave the outcome in relation to Mr Hurst, the claimant accepted that he was told he would not be asked to work with MH again - although he says in his paragraph 24 that this undertaking was breached.

75. On balance the evidence is that PK did deal the claimant's complaint against MH up to a point but his the actual failing was in not consistently adhering to the outcome decided upon. We have reached the conclusion that the underlying facts alleged in paragraph LOI(xi)(i) are not made out.

76. In the further and better particulars the claimant referred to an incident on 26 September where he said he saw RD taking extra money The respondent's response is that any money that was taken was authorised. This particular incident does not seem to be relied on by the claimant as a protected disclosure. What the claimant says or reported does not affect him in any way and we do not see how any sustainable argument of race or religious related harassment or discrimination can arise in relation to it.

77. The claimant alleges that he was threatened with a Stanley knife by RD on 27 September 2018 in circumstances which he sets out in more detail in the statement that he provided on request to Mr Kurland which is at page 70 of the bundle. He also reported this the following day to the police and this is also relied on as an alleged protected disclosure. Again, it is not disputed by the respondent that the information that was provided was in fact communicated on both occasions.

78. The claimant alleges that he was required to take five days annual leave in order for Mr Philip Kurland to review CCTV footage and deal with the incident with RD. We accept that the claimant was told that he should take five days annual leave. Page 82 is the dismissal letter and it includes in the explanation of this sums that would be payable to the claimant on dismissal, the following:

> "We have decided not to deduct any holidays due to you so you will be paid all that is owed to you in holiday pay.

79. The phrase "We have decided not to deduct …" suggests a change of position. If there had never been a requirement to take annual leave, why would there need to be any reference to a decision not to deduct holidays – the normal position on termination of employment regardless of the reason for it the employee should be paid for holidays which have accrued and not been taken. In the absence of any explanation of that statement, we unanimously think it is right to draw the inference that the claimant had previously been told that he was required to take annual leave but then was told that there had been a change of position and no deductions would be made from the holiday pay he was due.

80. Ultimately, we accept that the claimant was, as set out in the dismissal letter, paid his annual leave entitlement on termination of employment in full. There is no unauthorised deduction from wages claim. We will therefore need to decide whether it was a detriment originally to be told that he would have to take annual leave in order that Mr Kurland could investigate his complaint against RD (see para.117 below for our conclusions on this).

81. There is an allegation by the claimant that the respondent failed to tell the claimant the outcome of the investigation into this incident with RD. Mr Kurland, in his paragraph 30, says that a verbal communication was made. However, the claimant did not return to work except for the disciplinary hearing itself and there is no reference in the minutes at page 78, to him being told of that outcome. If one reads paragraph 6 of the claimant's appeal letter at page 85, he raises that very point and repeats it in paragraph 7, making clear that at that point he has not received any outcome.

82. The relevant parts of the script that is prepared by Mr Philip Kurland for the appeal to be conducted by his son is at page 91. At the point where he prepares an answer to this point in his comments on paragraph 7, that answer ignores the question about what the outcome of the investigation was. Based upon that, the claimant does not seem to have been provided with an outcome at the appeal. The script certainly does not clearly say "we have provided you with an outcome verbally". Similarly, if one looks at the notes of the appeal hearing itself, there is nothing either in the script at page 93 or the notes that start at page 94, to suggest that the claimant was told then. Therefore, it sees to us, contrary to what is in the statement of Mr Kurland, on the basis of the documentary evidence as well as the claimant's own account that the claimant was indeed not given an outcome of this complaint.

83. We take the factual allegations in list of issues, paras.(xi)(j) and (n) together. Para.(xi)(j) is the allegation of failing to take any action to ensure the claimant's safety after the reported incident involving RD and the complaint of failing to communicate the outcome of the investigation is LOI paragraph (xi)(n).

84. Mr Kurland's paragraph 32 causes us to conclude that the investigation was probably carried out, as appears from the documents, and that Mr Kurland reached the conclusion that it was one person's word against another and that there was no available CCTV evidence. However, we reject that what he says in his paragraph 30 about the claimant's own behaviour because this was not put to the claimant and Mr Kurland has not attended to be cross examined and challenged about that statement.

85. As we have already explained, the respondent appears to have taken no action to inform the claimant of the outcome of the investigation into the incident with RD or to try to reconcile the parties. We reject the evidence in Mr Philip Kurland's statement that the claimant did not inform him that he felt unsafe. It is absolutely apparent from the last paragraph on page 71 of the claimant's statement (which we accept) that he made his feelings of insecurity plain. There is no explanation by the respondent of a reason for the failure to do anything to resolve the dispute that there obviously was between these two individuals.

86. There was no second written invitation to the disciplinary hearing, which was ultimately reconvened on 8 October 2018. We refer again to the evidence of instances of lateness that is set out on page 77. This shows that the claimant was repetitively late after the abortive meeting that should have taken place on 30 August. The claimant was absent from 27 September onwards because he considered himself to be unsafe at work.

87. The allegation that is in paragraph (l) is that of taking unjustified disciplinary action. We have decided that it was not unjustified disciplinary action because the claimant had continued to be late and had made clear that he was not going to be on time

unless his hours were changed. So, the question is whether the claimant has made out the detriment that he has alleged and it is important to focus on the specific allegation which is that of unjustified disciplinary action.

88. As far as the allegation in LOI para.(xi)(m) is concerned, that of an alleged failure to hold the disciplinary process fairly, the alleged unfairness was the location of the hearing. The claimant, in his oral explanation, suggested that the kitchen in which it was conducted was, in fact, part of the showroom. We accept that that is where the disciplinary hearing was held, it was clearly not an appropriate place, however, equally, deciding to hold it in that place was not related to religion or to race or anything to do with the earlier complaints by the claimant that were in the form of a protected disclosure.

89. Finally, we come to the decision of the respondent to terminate the claimant's employment. The respondent wrote to the claimant on 10 October 2018 informing him that they had decided to terminate his employment on grounds of misconduct and would pay him in lieu of notice. The claimant appealed that decision on 17 October 2018 (page 84) and Mr Chris Kurland was appointed to hear the appeal (page 87). A few days later the date of the appeal was set for 9 November 2018. On the same day, the claimant presented a grievance.

90. Mr Kurland jnr. dismissed the appeal on 13 November 2018 (page 103) and on the same day invited the claimant to a grievance hearing which he would conduct (page 107). On 23 November 2018 the claimant wrote to say that he did not consider Mr Kurland to be impartial and would not attend the grievance hearing (page 109). The following day Mr Chris Kurland rescheduled the grievance hearing to be conducted by BM, who was the previous owner of the business. By then, the claimant had contacted ACAS.

Conclusions on the issues

91. We now set out our conclusions on the issues, applying the law as set out above to the facts which the majority have found. We do not repeat all of the facts here since that would add unnecessarily to the length of the judgment, but we have them all in mind in reaching those conclusions.

Protected disclosures

92. We start by considering whether the claimant made any protected disclosures and then go on to consider each of the alleged detriments/incidents of unwanted conduct and analyse whether they were unlawful detriments under s.47B of the ERA and/or s.39(2) of the EQA or whether they were unlawful harassment under s.40 of the EQA.

93. The claimant told Mr Kurland that he had seen MH driving a van after having drunk beer and that he had subsequently shouted at the claimant and threatened to throw or kick him downstairs. This communication was made in writing (page 67 of the bundle) and was made to his employer. Therefore the question for the tribunal is to decide whether this was a qualifying disclosure because, if it was, then it was a protected disclosure.

94. The argument as to why it was a qualifying disclosure is set out in the list of issues at page 40 (vii) and (ix). We accept that it was the genuine and reasonable belief of the claimant that the information he communicated tended to show that the health and safety of an individual was being endangered and that it was also his genuine and reasonable belief that his communication was in the public interest. He was informing his employer that a driver for whom the respondent was responsible was carrying out his job of driving after having consumed alcohol. There is an obvious risk that a person might have impaired facilities because of having drunk alcohol and that this might put other road users at risk of injury, serious injury or even worse.

95. That risk to the public we accept, gives this communication the necessary public interest element, in the claimant's genuine and reasonable belief and we find that this was a protected disclosure.

96. The second alleged protected disclosure is by the statement concerning RD's behaviour on 27 September 2018 which is at page 70 of the bundle. The repetition of this report to the police on 28 September 2018 is also relied upon as a protected disclosure. We take into account the statements as a whole and accept that the information in each does tend to suggest that the health and safety of an individual, namely the claimant, had been put at risk and also tended to suggest that the criminal offence of assault had occurred and, potentially, some other more serious offence against the person. No specific other criminal offence has been identified by the claimant. In reaching this conclusion, we are aware that RD put forward a very different account of the incident. Our conclusions that the statement communicated by the claimant tended to suggest that the criminal offence of assault had occurred necessarily takes the contents of the claimant's version at face value and should not be taken as any decision about what, in fact, occurred.

97. The public interest aspect of this is said by the claimant to be that he was threatened with a knife and knife crime was, at the time in London, a serious problem.

98. On the face of it, this was an altercation between two work colleagues but the claimant felt sufficiently strongly about it to go to the police. The fact that he went to the police is evidence from which we infer that he did genuinely believe that it was in the public interest to report it. In the light of the nature of the allegation we accept that that was a reasonable belief for the reasons that the claimant gave and accept that this was a protected disclosure.

Unlawful detriments/unwanted conduct

99. On the basis of the findings of fact of the majority, the Tribunal goes on to consider whether the incident set out in LOI para.(xi)(b) (see para.52 above) was unwanted behaviour.

100. The claimant accepted that PK's questioning was innocuous to start with but the majority accepts that the conversation was prolonged and, because it was prolonged, it became unwanted as a matter of fact. Mr Sagar accepts that on the basis of the finding of fact of the majority, that is the right conclusion as a matter of law. The claimant did not expressly state he found the questioning unwelcome and did not give clear evidence that he had asked Mr Kurland to stop asking such questions. In the absence of that, we reject any suggestion that Mr Kurland intended to cause the

harassing effect to the claimant. We go on to consider whether the incident had the effect of harassment and whether it was reasonable to do so.

101. In the context as a whole, we decide, unanimously, that it was not reasonable to for it to have the harassing effect even taking into account the claimant's perception that Mr Kurland was pushing him as though expecting the claimant as a Muslim to have a different reaction to he himself on whether a peace treaty was a good thing. Objectively, what was said by Mr Kurland, on the claimant's account, falls short of something that would satisfy the test of harassment. To find otherwise would be to cheapen the significance of the words of the statutory test: See Grant para.47. We are not satisfied that this exchange could reasonably be regarded as going so far as to create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant.

102. We do not consider that the reasonable employee would consider themselves to have been disadvantaged in their employment by facing those questions and the alternate claim that LOI para(xi)(b) was direct race/religious discrimination is not made out because the questioning did not amount to a detriment.

103. As to LOI para.(xi)(c), The finding of the majority is that Mr Kurland made a derogatory comment about a core practice that is of such significance to Muslims and that as the claimant described, their faith requires them to carry out on one occasion at least in their life. The panel is unanimous that, on the basis of this factual finding, the comment was clearly unwarranted behaviour as it was obviously offensive.

104. As a reference to a core practice of those who practice Islam, the comment was related to religion rather than to race.

105. The panel then goes on to consider whether that obviously offensive comment, had the purpose of creating the harassing atmosphere of effect. On the basis of the majority finding of fact that the comment was made, our unanimous view is that such a comment is particularly serious and very likely and liable to give offense because it trivialises a deeply spiritual aspect of the pilgrimage. We unanimously infer from the fact of the comment that the intention of Mr Kurland must have been to cause the offense which was the natural and probable cause of the comment and we find that Mr Kurland intended the claimant to be harassed by that comment. That is the basis on which we conclude that the section 26 EQA claim of religious related harassment is made out in relation to LOI para.(xi)(c). We do not need to go on to consider whether it had the effect and whether it was reasonable to do so although, had we been required to consider this, we would have unhesitatingly concluded that the second limb of the test was made out.

106. By the same reasoning the panel unanimously concludes on the basis of the factual finding of the minority that comment made by Mr Kurland on 19 July 2018 (LOI para.(xi)(d)) was unwanted and was related to religion. We also conclude that Mr Kurland had the purpose of causing the harassing effect and therefore that the section 26 religious related harassment complaint is made out.

107. We consider that these comments are more appropriately regarded as religious related harassment and not as race related harassment. We dismiss that alternative complaint. Since we have found LOI para.(xi)(c) and (d) to be religious related

harassment, those particular acts are excluded from the definition of detriment for the purposes of s.13 of the EQA and cannot amount to direct race or religious discrimination.

108. Having reached that conclusion, we have considered whether our judgment in relation to 18 June and 19 July incidents (that they were intended by Mr Phil Kurland to harass the claimant and were clearly religious specific), inevitably means that all of his actions about which the claimant complains were similarly motivated. We do not think it is right to draw that conclusion although we will scrutinize the evidence in relation to each of the other matters carefully to see whether there is evidence of other non-discriminatory circumstances or motives.

109. The claimant did say that he could have perfectly normal work-related conversations with Mr Kurland and even in his evidence is quite open that not all of the matters which he complains about were race or religious related harassment or discrimination.

110. Although the majority accepts the claimant's evidence that Mr Kurland had referred to him as "crazy", for reasons we set out above (para.59) we are quite satisfied that there was no relationship between that conduct and either race or religion. Indeed there was evidence which causes us to conclude that Mr Kurland did or would have reacted similarly to anyone who was late for work and gave a similar explanation.

111. There is no obvious link between the failure of Mr P Kurland to respond when the claimant said "good morning" (LOI para(xi)(f)) and race or religion. In order to find that the conduct has had the harassing effect we would need evidence from which we might infer that there was targeting of the claimant by what appears to have been mere incivility. We have unanimously found that Mr P Kurland did not fail to respond to the claimant's greeting other than on occasions when he was late, which the claimant accepts to have been a frequent occurrence. We reject that this was either direct discrimination or harassment – the conduct is unrelated to race or religion and there is every reason to think that Mr Kurland snr. would also have failed to respond to any other employee who was frequently late and the entire reason was the claimant's lateness.

112. We set out our findings in relation to the alleged late payment of commission in para.62 above. We are not satisfied that the allegation of a repetitive failure without good reason to pay commission on time is made out. Furthermore, the evidence as a whole does not cause us to think that there are facts from which we could in the absence of any explanation infer that the claimant was treated less favourably than any other employee whose commissions claims contained similar inaccuracies or needed to be verified or that any delay was on grounds of race or religion. Neither is there an evidence basis from which to conclude that any failure was related to race or religion.

113. For reasons which we explain in para.61 above, we are persuaded that the reason why the claimant's contract was presented for signature later than the statutory maximum period was entirely non-discriminatory and unrelated either to religion or race. The allegations of harassment and direct discrimination based upon allegation LOI para(xi)(h) is dismissed.

114. The next allegation (LOI para(xi)(i) is that of failing to deal with the claimant's complaint about MH on 21 September 2018. As we explain in para.74 & 75above, we found that this allegation was not made out on the facts. The respondent did not fail to deal with the claimant's allegation against MH.

115. The claimant further alleges that the respondent failed to take any action to ensure that he was safe at work after he reported RD's behaviour on 27 September 2018 (LOI para.(xi)(j)) and failed to complete the investigation or to tell him the outcome of any investigation (LOI para.(xi)(n). We have found (see para.83 to 85 above) that the claimant was not given any outcome to his complaint about RD's behaviour and rejected the respondent's evidence to the contrary. There is no credible evidence of actions taken beyond seeking statements within the investigation to deal with the claimant's reported concerns about his safety.

116. Section 48(2) of the ERA shows that it is for the respondent to show the grounds on which the act was done once the claimant has proved the other elements of the claim. Since the respondent's position was that they did communicate a verbal outcome, the respondent has failed to show the reason for failing to do so and we have rejected such evidence as has been provided. We infer that the grounds for this action were the protected disclosure about RD's behaviour. This allegation is made out as a detriment claim on grounds of protected disclosure.

117. We accept that the claimant was originally told that he would have to take annual leave in order that Mr Kurland could investigate his complaint against RD. We think that a reasonable employee would consider that that disadvantaged them even thought the claimant was in a position where he had decided and had communicated through the body of the statement at page 70, his intention not to return to work and that it was a very serious matter and he did not feel safe. Annual leave is of real value to an employee. The reasons why he was told to take annual leave, not at a time of his own choosing, included the fact of the disclosure about RD and because it was said to be to enable investigation into the allegation. We have concluded that that disclosure was a protected disclosure. We therefore find that these allocations (LOI para.(xi)(j) and (n) are made out as allegations of detriment on grounds of protected disclosure contrary to s.47B of the ERA.

118. The allegation in LOI para.(xi)(l) is that of taking unjustified disciplinary action against the claimant. For reasons which we explain in para.79, we find that the disciplinary action was justified by the claimant's persistent lateness. Given that, we do not find that the claimant has made this allegation out as a matter of fact and it was not a detriment to commence disciplinary action in August 2018 or to recommence it in October 2018. The specific action complained of is that of taking unjustified disciplinary action and, indeed, it could be said that it is not a detriment to subject an employee to justified disciplinary action.

119. As we explain in para.88 above, there is no basis to conclude that the reason why the disciplinary hearing was conducted in the showroom kitchen was that of race, religion or the claimant's protected disclosure. Although this was plainly an inappropriate place for a confidential meeting, we see no evidence from which to infer that it was unlawful under s.47B ERA or that it amounted to unlawful discrimination or harassment. The allegation set out in LOI para.(xi)(m) fails.

120. There was no formal request for made to reduce hours (see para.50 above) so, although the respondent did not agree to it and did not facilitate the request, there was no formal refusal. Even on the claimant's case there is reason to believe that the way that the respondent dealt with this informal request to amend his hours was nothing to do with religion or race and to the extent that LOI para.(xi)(o) remains part of the claimant's case and is pursued, his complaints of discrimination and harassment both on grounds of race or religion are rejected because the lack of connection with either of those characteristics would not meet either statutory test. The reason for the respondent's actions were entirely business related. Furthermore there is no basis to conclude that anyone who was not Muslim who asked to reduce hours from the full time hours to which they had so recently been appointed would have been treated any differently and, in circumstances where the role's hours mirrored the shop opening hours it would not be reasonable to regard a refusal as having the adverse harassing effect.

121. As we explain in paras.108 to 109 above, we have considered whether it is right to infer from our conclusions that PK intended to create the harassing effect by his unwanted comments which were related to religion that any other detrimental acts were related to or motivated by religion. We do not think the evidence supports making such an inference. Against the background of that conclusion, we consider whether those acts which we accept the claimant has proved (LOI (xi)(j), (k)and (n)) succeed additionally as allegations of race or religious related harassment or direct race or religious discrimination.

122. Since we do not think the inference can be drawn that all actions of PK towards the claimant were motivated by the claimant's religion regardless of whether there was a religious element to the incident or not, we conclude that there is no evidence from which we can infer that the failure to respond appropriately to the claimant's complaints against RD or to give him an outcome to that investigation were related to or on grounds of race or religion. We conclude that the grounds for Mr Kurland's actions included the nature of the complaint against RD and that is the reason why we have upheld the protected disclosure claim. However we do not think that there is evidence from which we could infer that a non-Muslim who made a similar complaint would have been treated more favourably.

123. The final allegation is that based upon the decision to terminate the claimant's employment. We consider first whether the claim that this was either harassment related to race or religion or discrimination on grounds of race or religion succeeds.

124. There is powerful evidence other than the hearsay evidence of Chris Kurland and Phil Kurland for non-discriminatory reasons that entirely explains the decision to terminate the claimant's employment. It may seem somewhat surprising that we then reach the conclusion that cogent evidence has been adduced by the respondent despite the absence of Phil Kurland and Chris Kurland to be cross-examined upon their statement. However, there are the texts which demonstrate lateness, there is the catalogue of lateness at page 77, and there is the claimant's own evidence. This amounts to cogent evidence that the claimant was guilty of the misconduct of which he was accused and that that misconduct had occurred even after the claimant was aware that disciplinary action had been commenced.

125. The extent of the lateness is such in a relatively short employment makes it more plausible that it was the claimant's lateness and not any unlawful reason which was the entire grounds for the respondent's actions. The respondent has discharged the burden upon them that the reasons for the claimant's dismissal were not in any way those of race or religion. The claims of race and religious related harassment and direct race and religious discrimination based upon dismissal fail.

126. So far as the protected disclosure claim is concerned, the claimant has to show some evidence that the reason, or principal reason, was the protected disclosure. We do not think that that burden is satisfied. The start of disciplinary action pre-dated the protected disclosure and that points to the respondent considering that the lateness was sufficiently problematic to need addressing by formal action. In any event, the documentary evidence of lateness that the respondent was unwilling to tolerate is compelling. We have concluded that the dismissal was not automatically unfair under s.103(A) of the Employment Rights Act.

127. The chronology after that event was broadly accepted and we have seen nothing in the appeal documents to suggest that any unlawful motivation played a part in Chris Kurland's decision and what we say about the cogent evidence applies equally to his part in the dismissal process.

128. Given our conclusions, the three successful complaints of protected disclosure detriments cover a period from 27 September 2018 (when the claimant reported the allegations against RD) to the appeal hearing on 9 November 2018 (when the claimant was not given information about the outcome of the investigation despite raising a complaint). These acts amount to conduct extending over a period and the claim based upon them is in time. ACAS was conducted on 23 November 2018 and the claim presented on 13 December 2018.

129. However, the complaints based upon LOI para.(xi)(c) and (d), which date from 18 June 2018 and 19 July 2018, were the subject of an ET1 presented more than three months after the second of those. Any contact with ACAS would have had to be made by 18 October 2018 in order for the claimant to benefit from any extension of time due to early conciliation. We accept that there was a continuing act that links the two. So, the question is whether it is just and equitable to extend time for presentation of the claim which should have been presented by 18 October 2018 to 13 December 2018.

130. The claimant began to seek advice about the time of those incidents in Summer 2018. He explained that he noted the dates because he had been advised to do so. He sought advice firstly, from a friend and then, online and through the Citizen's Advice. He was relatively new in the job which had only started on 14 May 2018. We accept that he wanted to get on and not to "rock the boat" as it were. He also suffered an assault in August 2018 which was unrelated to the subject matter of this claim but which affected his health. He has given us some evidence about being mentally affected by the circumstances at work.

131. We do not think this is a particularly long delay, ACAS should have been contacted in respect of these incidents by the 18 October and they were in fact contacted on 23 November 2018. The claim was just under two months late. An apparently reasonable explanation for the delay has been provided. It would clearly cause

prejudice to the claimant not to be able to be compensated for incidents of relatively serious and upsetting religious related harassment.

132. There is no evidence before us of prejudice to the respondent. It was argued by Ms Kamal on their behalf that the delay before the incidents were first referred to would have caused difficulty in recollection. However, that has not being evidenced and certainly, there is no suggestion in the witness statements that they were unable to recall conversations of this kind, quite the contrary. Furthermore, it seems difficult to reach a decision that there is prejudice to the respondents when they have not attended to give any evidence of that.

133. Taking all that into account, we unanimously conclude that it is just and equitable to extend time for the claimant to present his claims which the majority have found to be religious related harassment until 13 December 2018.

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Employment Judge George

Date: …14 October 2022……..

Sent to the parties on:

17 October 2022

For the Tribunal Office