EMPLOYMENT TRIBUNALS

Claimant: **Mr L Bakare**

Respondent: **G4S Secure Solutions (UK) Limited**

Heard at: **London South Employment Tribunal (hybrid hearing)**

On: **15 – 16 September 2022, in chambers 30 September 2022**

Before: **Employment Judge Dyal, Ms C. Edwards and Mr J. Hutchings**

Representation:

Claimant: **In person**

Respondent: **Mr Brown, Counsel**

RESERVED JUDGMENT

1. The complaints fail and are dismissed.

REASONS

Introduction

1. The matter came before the tribunal for its final hearing.

The issues

2. The issues were identified at a preliminary hearing before Employment Judge Mason on 21 May 2021 and were confirmed at the outset of the final hearing:

Appendix A
Agreed List of Issues

Time Limits

1. Was the complaint of direct race discrimination made within the time limit in s123 Equality Act 2010 (EqA)?

1.1 Was the claim made to the Tribunal within three months of the act to which the complaint relates?

1.2 If not, was there conduct extending over a period?

1.3 If so, was the claim made to the Tribunal within three months of the end of that period?

1.4 If not, was the claim made within such further period as the Tribunal thinks is just and equitable?

(i) Why was the complaint not made to the Tribunal in time?

(ii) In any event, is it just and equitable in all the circumstances to extend time?

Direct Race discrimination (s13 EqA)

2. Was the Claimant paid £1 less per hour since around 2016?
3. If so, has the Claimant proved facts from which the Tribunal could conclude that in any of those respects the Claimant was treated less favourably than someone in the same material circumstances of a different colour or ethnic origin was or would have been treated (having regard to the Claimant's two comparators namely Ivan Hillard and Luke Ahmed)?
4. If so, has the Claimant also proved facts from which the Tribunal could conclude that the less favourable treatment was because of his race (colour or ethnic origin)?
5. If so, has the Respondent shown that there was no less favourable treatment because of race?

Remedy:

6. What financial losses has the discrimination caused the Claimant?
7. What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

Unlawful deduction from wages

8. Did the Respondent make unauthorised deductions from the Claimant's wages by paying him £1 less per hour since 2016?
9. Was the Respondent justified in paying the Claimant £1 less per hour?

The hearing

3. *Documents before the tribunal*:

3.1. Agreed bundle running to 301 pages;
3.2. Witness statements for the witnesses identified below;
3.3. Skeleton argument of the Respondent.

4. *Witnesses the tribunal heard from*:

4.1. For the Claimant
4.1.1. The Claimant

4.1.2. Mr Abdirizaq Abdullahi Mohamed, former employee of Respondent (written evidence only)
4.1.3. Nabeel Pervez, former employee of Respondent (written evidence only)
4.1.4. Kwame Brantuo-Boateng, former employee of Respondent (written evidence only)
4.1.5. Sara Undre, worked at the Bentall Centre but not employed by the Respondent (written evidence only)

4.2. For the Respondent:

4.2.1. Mr Nicholas Batchelor, Account Director

5. This hearing was originally listed as an in-person hearing. On 14 September 2022 the Respondent made an urgent application to convert it to a remote hearing by video-link because its counsel had symptoms of Covid-19. That application was granted by the tribunal's administration without reference to either the Claimant or a judge. When the file was passed to Judge Dyal at around 4.30pm, he was not content with that arrangement because the Claimant required the services of an interpreter. There is no facility with the video-hearing technology that the tribunal has to allow for simultaneous interpretation. Thus, the interpretation on a video-hearing has to be, at all times, consecutive. Consecutive interpretation takes a long time and breaks up the flow of the hearing. The better solution was for the hearing to take place in hybrid form and Judge Dyal so ordered.

6. The hearing thus took place in person save that the Respondent's counsel joined by video-link.

7. We note that Ms Undre was willing to give oral evidence and we were of course willing to hear her. However, she did not attend in person and was unable to join remotely owing to what appeared to be technical problems at her end. The Respondent in any event indicated that it did not have any questions for Ms Undre and all parties were therefore content to proceed in her absence.

8. At the outset of the hearing, Judge Dyal asked the Claimant whether he would like the interpreter to interpret everything or whether he wanted to simply use the interpreter when he had a difficulty understanding or articulating something in English. The Claimant preferred the latter approach. He sought the assistance of his interpreter regularly during the hearing. Judge Dyal reminded him periodically that he could and should use the interpreter whenever he needed to.

Findings of fact

9. The tribunal made the following findings of fact on the balance of probabilities.

10. The Respondent is a large employer that provides outsourced security services to its clients. Jones Lang Lasalle (JLL) was one of its clients. JLL was a managing agent for the owners of The Bentall Centre in Kingston (a large shopping centre). The Respondent won the contract for providing security

services at the Bentall Centre in 2015 and commenced doing so on 1 June that year.

11. The existing workforce on the contract transferred to the Respondent on 1 June 2015 under the *Transfer of Undertakings (Protection of Employment) Regulations 2006.* Among that workforce was the Claimant.

12. The Claimant is black, African. His continuous employment began in or around 2009 and had been the subject of several transfers prior to transfer to the Respondent.

13. The Claimant's contract of employment gave his job title as 'Customer Care Officer'. The contract did not identify his actual role save in generic unilluminating terms and did not state his rate of pay. Indeed, there is no document in the bundle from the Respondent to the Claimant stating his rate of pay. There are pay slips but these do not identify the hours of work completed nor the rate of pay per hour. There is also no role description for any role whether the Claimant's or his comparators'. The absence of basic documentation of this sort of course made our task harder. A further difficulty is that the Claimant's rate of pay increased periodically over time and he was not told what his rate of pay actually was nor when or that it had changed.

14. In practice the Claimant had a specific role related to a car park known informally as 'the Evening Carpark' because it remained open late at night (as well as being open in the day). Some of the details of his duties are controversial but it is uncontroversial that they included:

    14.1. Responding to intercom queries from customers;
    14.2. Patrolling the car park;
    14.3. Responding to customer queries;
    14.4. Locking up.

15. At the relevant times, the Evening Carpark was principally staffed by three people.

    15.1. The Claimant, who worked the night shift Thursdays to Mondays;
    15.2. Mr Ahmad, whose normal hours were the day shift but who also covered the evening shift quite often;
    15.3. Mr Hillard, whose normal hours were the day shift and who did not work the evening shift.

16. Mr Ahmad is British and has some Pakistani heritage. The Claimant's evidence is that in his appearance Mr Ahmad is not obviously from an ethnic minority background. We accept that. Mr Hilliard's is white, British.

17. Until the latter stages of the Claimant's employment, the nightshift work was conducted from a hut in the carpark whereas the dayshift work was based in the control room in the shopping centre. In the latter stages of the Claimant's employment the base for the nightshift moved to the control room. We were not given a precise date for this but doing our best we infer it was around late 2016.

18. It was not unusual for other members of the Respondent's staff, whose usual roles were elsewhere in the Bentall Centre, to provide cover on the nightshift at the Evening Carpark. There was a practice of paying staff the rate of pay they received for their substantive role when covering other roles. This was not, however, ever explained to the Claimant.

19. The Respondent's management team and management structure at the Bentall Centre varied over time. At the relevant times Mr Norris was Security Manager and beneath him Mr Nobel was Assistant Security Manager.

20. It is unclear how much either the Claimant or his comparators were paid at the moment of the transfer to the Respondent. The pay data in the bundle does not go back that far. The Claimant believes his hourly rate was less than the comparators' going back to 2015. Mr Batchelor also thought that was the case. We find that the Claimant was paid less but cannot say by exactly how much.

21. There is evidence before us that at one time the Claimant and others received a specific night allowance, £12 per shift, for working night shifts. The evidence as to when this allowance was abolished is imprecise. Doing our best, it appears that at some point, probably before the Claimant transferred to the Respondent, the night allowance ceased to be a separate element of pay and was amalgamated into the hourly rate. We think this must have been prior to the transfer to the Respondent because Mr Batchelor had no knowledge of a night allowance as an element of the staff at the Bentall Centre's pay and he is likely to have if the Respondent had paid it. However, the Claimant was never told that the night allowance had been amalgamated into hourly rates and it is unsurprising therefore that he did not know this.

Restructure

22. In early 2016 there was a restructure of the Respondent's security operation at the Bentall Centre. It took effect in April 2016. The restructure followed a complete review of the service that concluded that the service could be streamlined. One of the roles that was cut was that of Car Park Manager. Another effect of the restructure was that there was a reduction in the overall number of hours of security work.

23. The restructure documents identified a variety of different roles, among them (p174):

    23.1. 'Controller 2 (Car Parks)' with a total of 77 weekly hours. This is the name given to Mr Ahmad and Mr Hillard's roles in this document.
    23.2. 'Car Park Night Officer' with a total of 49 hours. This is the name given to the Claimant's role in this document.

24. The rates of pay for all roles were reviewed at this time. The restructure documents identified proposed rates of pay for all roles including these ones. For

the Controller 2 (car park) the pay was £9.75 per hour. For the Car Park Night Officer it was £9.00.

25. The rates were set by Mr Batchelor. He set the rates following: a benchmarking exercise against local rates of pay for comparable jobs, consultation with the senior management of the Bentall Centre, and with the G4S managers beneath him. That included getting some input from Mr Norris though Mr Batchelor cannot now recall what that input was.

26. Mr Batchelor's evidence was that while there was a significant overlap between the Controller 2 (Carparks) role and the Car Park Night Officer role there were also significant differences.

    26.1. Firstly, he says that the carpark was far busier in the daytime so there was much more work to do. There would be more customers with more issues that required resolution compared to the nightshift which was generally only busy for the first hour and then very quiet.

    26.2. Secondly, he says that in the restructure some of the duties previously carried out by the Carpark Manager, whose role was deleted, were passed to the comparators. These duties were:

        26.2.1. carrying out audits on the ticket machines.
        26.2.2. running reports and entering data into a spreadsheet, annotated with exceptions; and
        26.2.3. accompanying the cash in transit security person.

    26.3. Thirdly, in his oral evidence he added that another difference was that the comparators' job involved assisting the main controller in the control room. This involved tasks such as coordinating deliveries, deploying people to incidents and moving people around. These tasks can be described as control and command tasks.

27. The Claimant's position was that in practice his work was essentially the same as Mr Ahmad's and Mr Hillard's. His evidence was that his duties included:

    27.1. Auditing the ticket machines. This involved emptying them of cash and recording the cash collected.
    27.2. Working on a spreadsheet which audited cars in and cash collected.
    27.3. Emptying cash from the ticket machines and storing it in the night safe ready for it to be collected.

28. We accept the Claimant's evidence that he conducted these tasks. We found his evidence on these matters to be credible. The account of his duties also seemed inherently plausible. Mr Batchelor had no direct knowledge of how things

operated in practice as he was sufficiently senior that he was removed from the Claimant's workplace and its day to day running.

Pay

29. In its Grounds of Resistance the Respondent admitted that the Claimant was paid £1 less per hour than his comparators. That admission was made again at the case management stage. However, on analysis of the data it is not entirely correct. Mr Brown's position was that the Respondent had simply made an error in describing the differential in pay at the earlier stages of the proceedings.

30. Two types of comparison are needed.

    30.1. Comparing the comparators' pay for the dayshift with the Claimant's pay for the nightshift. The Claimant was paid less than the comparators. The difference was in the region of 50p - £1.00 per hour but it varied over time.

    30.2. Comparing on the one hand the Claimant's pay for the nightshift and on the other the comparators' pay for the nightshift and other employees' pay for the nightshift:

        30.2.1. The hourly rate the Claimant was paid from April 2016 to November 2018 was consistently lower than the amount Mr Ahmad was paid when he worked on the nightshifts. In that period Mr Ahmad was paid up to 75p more per hour than the Claimant. However, from December 2018 onwards, the Claimant and Mr Ahmad were paid the same amount for the nightshift. The Claimant's pay was increased from £9.52 per hour to £9.77 while Mr Ahmad's was reduced from £10.54 to £9.77. Mr Batchelor did not know why this happened nor was there any other explanation for it.
        30.2.2. A handful of other employees worked occasional nightshifts. For the most part they were paid the same amount as the Claimant or less. However, there are examples of other employees being paid more than the Claimant (e.g. Mr Murphy).
        30.2.3. Mr Hillard did not work the nightshift.

31. There is a range of pay data in the bundle, the most important of which is the table at p186. We find, though with some hesitation, that the pay data at p186 is broadly accurate. We did have some concerns about it because it is a document that was produced manually by Mr Batchelor; we do not have all of the underlying source pay data and there is a general lack of documentation. On balance, however, we accept it is broadly accurate.

32. The Claimant relied quite heavily on p48 of the bundle. It is a printed document but in handwriting the words '*Company Salary Structure*' have been added. On an analysis of the document, and consistently with Mr Batchelor's evidence, this document is not a company salary structure. It simply sets out the code-names for particular employees to be used over the radio.

Claimant's internal complaints about pay

33. On 21 October 2016 the Claimant made a written complaint by email to his manager Mr Norris. He complained that his hours had been cut from 45 to 40 per week and that his hourly rate was £7.50, whereas it used to be £7.50 plus night allowance of £12 hours per shift. (In fact the Claimant's hourly rate at this time was £9.00 with no separate night allowance. He worked 8 hour shifts thus it seems to us what was once a distinct night allowance had been incorporated into his hourly rate.)

34. The core of his complaint was that there were three members of staff working in the carpark doing the same job as him. Himself, working the nightshift, and two colleagues working the day shift. The dayshift colleagues were paid more than him for doing what he said was the same job. Further they were paid more than him when they worked the nightshift. He referred to this as being a "*mistake or discrimination*".

35. There are no documents evidencing any response to this complaint. The Claimant's evidence is that he was told by Mr Norris that the reason he was paid less was because his CCTV license had expired. He says the Respondent normally paid for its employees to renew their license but that Mr Norris refused to in his case. The Claimant therefore renewed the license at his own cost. However, once he got his license he was then told that he did not need a CCTV license so his pay would not increase.

36. On 28 October 2016, the Clamant emailed Mr Norris chasing an increase in his hourly rate. There is no evidence of a response save that Mr Norris said he would speak to the Claimant on the coming Saturday. However, the Claimant's evidence is that Mr Norris did not do so and we accept that. The Respondent simply failed to deal with the Claimant's complaint about pay.

37. On 15 December 2016 the Claimant, evidently dissatisfied, asked to transfer to a different site. He was not transferred.

38. On 15 January 2018 the Claimant emailed Mr Norris, complaining that he was not paid a night allowance and complaining that he was not paid equally with his colleagues. He complained that when he first raised the matter he had been told it was a CCTV license issue but that having renewed his CCTV license he was told that he did not need a CCTV license and his pay was not increased.

39. There is no documentary evidence of any response to this complaint. We accept the Claimant's evidence that he received no response.

40. On 8 November 2018, the Claimant raised a grievance in relation to his annual leave allowance, the fact his booked leave had twice been cancelled and that he had outstanding leave left to take but little time to take it before the year's end. There is correspondence in the bundle evidencing how the Respondent dealt with this matter. Essentially, the Claimant had 9 days of leave remaining. He was

swiftly authorised to take 7 of them with the remaining two to be dealt with at site level by the local management.

41. On 19 November 2018, the Claimant raised a further grievance by email. The essence of it was that:

    41.1. his colleagues got paid more than him for the same shift;
    41.2. he had been told that he was paid less because he needed to renew his CCTV license, had done so but was not then paid more;
    41.3. the Equality Act 2010 and discrimination were referred to.

42. The grievance was sent to an HR email address. There is a response from Mr Rudd, HR Advisor to Mr Baldock stating that his advice is for the grievance to be dealt with formally. There is no evidence of any response save that Mr Baldock passed the grievance to Mr Kahn to investigate. However, there is no evidence of what, if anything, Mr Khan did. Mr Batchelor said he had looked into the matter and found nothing on file. We accept the Claimant's evidence that he did not receive any response or follow up to this grievance.

43. On 10 December 2018, the Claimant's trade union representative emailed the Respondent, chasing a response to the Claimant's grievance and proposing a meeting to discuss the Claimant's complaint about pay on 19 December 2018. There was no response to this.

44. In around May 2019, the Claimant ceased attending work and commenced a long-term period of absence. The reasons for, and circumstances of this absence are not matters we need to resolve.

45. On 14 February 2020 the Claimant had a meeting with Mr Paul Howes. The purpose of this meeting was to discuss the reason for the Claimant's absence. In the course of that meeting the Claimant complained that he had been paid less than his colleagues, that it was discrimination, that he had raised a grievance about the matter but that he had been ignored. There is no evidence that the Respondent did anything with this information.

46. The Claimant was dismissed by the Respondent in November 2020. The dismissal is not a matter that is before us.

47. We record that Mr Norris and Mr Nobel left the Respondent's employment in 2019. Mr Khan has also since left. In Mr Norris' case his departure from the Respondent's employment was preceded by a period of serious illness that sadly led to his death in 2020.

Presentation of the claim

48. The claim was presented on 8 May 2019. The Claimant gave evidence as to why the claim was presented then and not before, given that his concerns about pay had been ongoing since he discovered there was a difference in pay in 2016.

49. The Claimant's evidence was not always easy to follow on this point but ultimately it was this:

    49.1. The Claimant initially attempted to present a claim in 2016 but it was rejected because he had not contacted ACAS prior to presenting it. (The tribunal's records of rejected claims do not go back this far so can shed no light on the matter).
    49.2. The Claimant swiftly then contacted ACAS within a matter of a couple of weeks of the claim being rejected, thus in 2016. His evidence is that he did not then hear anything from ACAS until 2018 when they contacted him by telephone. They inquired whether he wanted to pursue the matter and he said that he did.
    49.3. The Claimant did not chase ACAS in the intervening two years. That is because he was trying to deal with the problem internally with the Respondent. He did this both through his own efforts and through his union's efforts.
    49.4. The Claimant had further contact with ACAS in 2019. He could not recall the details of that contact which resulted in the Early Conciliation certificate being produced.

50. There are some unusual details in the above chronology of events, but for the reasons we give we accept most but not all of it.

    50.1. The Claimant is a litigant in person and it is plain that he had difficulty in understanding the detail around presenting claims to the Employment Tribunal, ACAS's role in that (Early Conciliation) and ACAS's other services such as advice.
    50.2. The Claimant speaks English as an additional language and his level of English is such that it created an additional barrier to understanding how things worked.
    50.3. We accept that the account he has given is true to the best of his recollection but we do not accept all of it is in fact accurate. We find that:
        50.3.1. The Claimant did attempt to present a claim in 2016 but it was rejected;
        50.3.2. The Claimant did make some contact with ACAS in 2016 after the claim was rejected but for reasons that are unclear – probably the result of some misunderstanding or miscommunication - it did not come to anything;
        50.3.3. We think it is implausible that ACAS responded to the self-same contact in 2016 two years later in 2018. We thus infer that the Claimant made further contact with ACAS in around 2018 for some sort of advice;
        50.3.4. The Claimant started and completed early conciliation in 2019 in accordance with the EC Certificate (day A was 5 April 2019 and day B was 23 April 2019).

50.3.5. After the 2016 claim was rejected, the reason that the Claimant did not present a tribunal claim more swiftly than May 2019 was that he was trying to deal with his pay complaint internally through the attempts to raise a grievance described above.

Law

Direct discrimination

51. Section 13 Equality Act 2010 is headed "Direct discrimination". So far as relevant it provides:

> *"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."*

52. Section 23 (1) provides*:*

> *"On a comparison of cases for the purposes of section 13…there must be no material difference between the circumstances relating to each case."*

53. The phrase 'because of' has been the subject of a significant amount of case-law. In ***Page v NHS,*** Underhill LJ said this:

> *29. There is a good deal of case-law about the effect of the term "because" (and the terminology of the pre-2010 legislation, which referred to "grounds" or "reason" but which connotes the same test). What it refers to is "the reason why" the putative discriminator or victimiser acted in the way complained of, in the sense (in a case of the present kind) of the "mental processes" that caused them to act. The line of cases begins with the speech of Lord Nicholls in Nagarajan v London Regional Transport [2000] 1 AC 501 and includes the reasoning of the majority in the Supreme Court in R (E) v Governing Body of the JFS ("the Jewish Free School case") [2009] UKSC 15, [2010] 2 AC 728. The cases make it clear that although the relevant mental processes are sometimes referred to as what "motivates" the putative discriminator they do not include their "motive", which it has been clear since James v Eastleigh Borough Council [1990] UKHL 6, [1990] 2 AC 751, is an irrelevant consideration: I say a little more about those terms at paras. 69-70 of my judgment in the magistracy appeal, and I need not repeat it here.*

54. In ***Page v Lord Chancellor*** [2021] ICR 912, Underhill LJ said this:

> *69. … is indeed well established that, as he puts it, "a benign motive for detrimental treatment is no defence to a claim for direct discrimination or victimisation": the locus classicus is the decision of the House of Lords in James v Eastleigh Borough Council [1990] ICR 554; [1990] 2 AC 751 . But the case law also makes clear that in this context "motivation" may be used in a different sense from "motive" and connotes the relevant "mental processes*

of the alleged discriminator" (Nagarajan v London Regional Transport [1999] ICR 877 , 884F). I need only refer to two cases:

(1) The first is, again, Martin v Devonshires Solicitors [2011] ICR 352 . There was in that case a distinct issue relating to the nature of the causation inquiry involved in a victimisation claim. At para 35 I said:
"It was well established long before the decision in the JFS case that it is necessary to make a distinction between two kinds of 'mental process' (to use Lord Nicholls' phrase in Nagarajan v London Regional Transport [1999] ICR 877 , 884F)—one of which may be relevant in considering the 'grounds' of, or reason for, an allegedly discriminatory act, and the other of which is not." I then quoted paras 61–64 from the judgment of Baroness Hale of Richmond JSC in the Jewish Free School case and continued, at para 36: "The distinction is real, but it has proved difficult to find an unambiguous way of expressing it … At one point in Nagarajan v London Regional Transport [1999] ICR 877 , 885E–F, Lord Nicholls described the mental processes which were, in the relevant sense, the reason why the putative discriminator acted in the way complained of as his 'motivation'. We adopted that term in Amnesty International v Ahmed [2009] ICR 1450 , explicitly contrasting it with 'motive': see para 35. Lord Clarke uses it in the same sense in his judgment in the JFS case [2010] 2 AC 728, paras 137–138 and 145 . But we note that Lord Kerr uses 'motivation' as synonymous with 'motive'—see para 113—and Lord Mance uses it in what may be a different sense again at the end of para 78. It is evident that the contrasting use of 'motive' and 'motivation' may not reliably convey the distinctions involved—though we must confess that we still find it useful and will continue to employ it in this judgment …"
(2) The second case is Reynolds v CLFIS (UK) Ltd [2015] ICR 1010 . At para 11 of my judgment I said:
"As regards direct discrimination, it is now well established that a person may be less favourably treated 'on the grounds of' a protected characteristic either if the act complained of is inherently discriminatory (e g the imposition of an age limit) or if the characteristic in question influenced the 'mental processes' of the putative discriminator, whether consciously or unconsciously, to any significant extent: … The classic exposition of the second kind of direct discrimination is in the speech of Lord Nicholls of Birkenhead in Nagarajan v London Regional Transport [1999] ICR 877 , which was endorsed by the majority in the Supreme Court in R (E) v Governing Body of JFS [2010] 2 AC 728 . Terminology can be tricky in this area. At p 885E Lord Nicholls uses the terminology of the discriminator being 'motivated' by the protected characteristic, and with some hesitation (because of the risk of confusion between 'motivation' and 'motive'), I will for want of a satisfactory alternative sometimes do the same."

70. As I acknowledge in both those cases, it is not ideal that two such similar words are used in such different senses, but the passages quoted are sufficient to show that the distinction is well known to employment lawyers, and I am quite sure that when Choudhury J (President) used the term "motivation" he did not mean "motive".

55. In ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** [2003] ICR 337 at [11-12], Lord Nicholls:

> *'[…] employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others.*
>
> *The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment Tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the Claimant […]'*

56. The circumstances in which it is unlawful to discriminate against an employee are, so far as relevant, set out in s.39 Equality Act 2010. In that regard something will constitute a 'detriment' where a reasonable person would or might take the view that the act or omission in question gave rise to some disadvantage (see ***Shamoon v Chief Constable of the RUC*** [2003] IRLR 285, §31-35 per Lord Hope). There is an objective element to this test. For a matter to be a detriment it must be something which a person might reasonably regard as detrimental.

57. In assessing the 'reason why' it is the decision maker's mental processes that are in issue. That is so even if the decision maker has unknowingly received and been influenced by tainted information ***(CLFIS (UK) Ltd v Reynolds*** [2015] ICR 1010).

<u>*The burden of proof and inferences*</u>

58. The burden of proof provisions are contained in s.136(1)-(3) EqA:

> *(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*.

59. In ***Igen Ltd & Others v Wong*** [2005] IRLR 258 the Court of Appeal gave the enduring guidance on the burden of proof. Although that was a case brought under the Sex Discrimination Act 1975, it has equal application to all strands of discrimination under the EqA:

(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.
(2) If the claimant does not prove such facts he or she will fail.
(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.
(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.
(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.
(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.
(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.
(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need

to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

60. In ***Madarassy v Nomura Bank*** 2007 ICR 867, a case brought under the then Sex Discrimination Act 1975, Mummery LJ said:

> *"The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination."*

61. The operation of the burden of proof was helpfully summarised by Underhill LJ in ***Base Childrenswear Ltd v Otshudi*** [2019] EWCA Civ 1648 at [18]:

> *'It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in Madarassy. He explained the two stages of the process required by the statute as follows:*
>
> *(1) At the first stage the Claimant must prove "a prima facie case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):*
>
> *"56. … The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.*
> *57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"*
>
> *(2) If the Claimant proves a prima facie case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues: "He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim." He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'*

62. In ***Deman v Commission for Equality and Human Rights*** [2010] EWCA Civ 1279, Sedley LJ observed at [19]: *'the "more" which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by a non-response, or an evasive or untruthful answer, to a statutory*

questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred.'

63. The Court of Appeal in ***Anya v University of Oxford*** [2001] ICR 847 at [2, 9 and 11] held that, in a discrimination case, the employee is often faced with the difficulty of discharging the burden of proof in the absence of direct evidence on the issue of the causative link between the protected characteristics on which he relies and the discriminatory acts of which he complains. The Tribunal must avoid adopting a 'fragmentary approach' and must consider the direct oral and documentary evidence available and what inferences may be drawn from all the primary facts.

64. It is not permissible to infer discrimination simply from unreasonable treatment. However, it can be permissible to infer discrimination from the failure to explain unreasonable treatment (***Bahl v The Law Society*** [2004] IRLR 799).

65. In ***Wisniewski (a minor) v Central Manchester Health Authority*** [1998] EWCA 596 Brooke LJ said this:

> *(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.*
> *(2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.*
> *(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.*
> *(4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.*

66. In ***Efobi v Royal Mail Group Ltd*** [2021] UKSC 33, Lord Leggatt said:

> *So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules (paragraph 41).*

Time limits in discrimination law

67. S.123(1)(a) EqA provides that a claim must be brought within three months, starting with the date of the act to which the complaint relates.

68. The three-month time limit is paused during ACAS early conciliation: the period starting with the day after conciliation is initiated, and ending with the day of the ACAS certificate, does not count (s.140B(3) EqA). If the ordinary time limit would expire during the period beginning with the date on which the employee contacts ACAS, and ending one month after the day of the ACAS certificate, then the time limit is extended, so that it expires one month after the day of the ACAS certificate (s.140B(4) EqA).

69. S.123(3)(a) EqA provides that conduct extending over a period is to be treated as done at the end of the period. In ***Hendricks v Commissioner of Police of the Metropolis*** [2003] ICR 530, the Court of Appeal held that Tribunals should not take too literal an approach: the focus should be on the substance of the complaint that the employer was responsible for an ongoing situation or a continuing state of affairs, in which an employee was treated in a discriminatory manner.

70. S.123(1)(b) EqA provides that the Tribunal may extend the three-month limitation period, where it considers it just and equitable to do so. That is a very broad discretion. In exercising it, the Tribunal should have regard to all the relevant circumstances, which may include factors such as: the reason for the delay; whether the Claimant was aware of his right to claim and/or of the time limits; whether he acted promptly when he became aware of his rights; the conduct of the employer; the length of the extension sought; the extent to which the cogency of the evidence has been affected by the delay; and the balance of prejudice (***Abertawe Bro Morgannwg University Local Health Board v Morgan*** [2018] ICR 1194).

Unauthorised deduction from wages

71. There is a statutory right not to suffer unauthorised deductions from wages. Section 13 Employment Rights Act 1996 among other things as follows:

> *(3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.*

72. Wages are properly payable if there is a legal obligation to pay them. This may be a contractual obligation but it need not be: *New Century Cleaning Co Ltd v Church 2000 IRLR 27, CA*.

Discussion and conclusion

73. In this case the Claimant's complaint is that he was paid a lower hourly rate than his comparators. The difference in pay was of longstanding.

74. The claim form does not say to what period the complaint relates. Understandably the Respondent's sought further particulars from the Claimant. The Claimant was ordered to answer the request for further particulars at a preliminary hearing before Employment Judge Truscott on 16 September 2020.

75. The Claimant was asked, and respectively answered, as follows:

    75.1. What date did the discrimination start? He answered: *22.10.20216*
    75.2. What periods did the less favourable treatment take place? He answered: *22.10.2016 – 2019.*
    75.3. However, in the context of particularising the wages claim he was asked what period this related to and he answered. *The underpayment has been going on since 2015 but I find out 2016.*

76. In the Preliminary Hearings of 17 March 2021 and 17 May 2021, discrimination complaint was said to date from about/around 2016.

77. Strictly speaking, the pleaded complaint of discrimination relates to 22 October 2016 onwards. However, out of an abundance of caution we think it right to deal with the preceding period from 2015 onwards too.

78. It is convenient to start our analysis with the restructure in April 2016 which followed the transfer of the Bentall Centre contract to the Respondent in 2015.

79. At the time of the restructure there was a wholesale review of pay for the security staff including the Claimant and his comparators. Mr Batchelor decided what the incumbents of the *Controller 2 (Carparks)* role (Mr Ahmad and Mr Hillard) would be paid and what the incumbent of the Car Park Night Officer role (the Claimant) would be paid going forwards. The former was paid more than the latter. This was a fresh decision following a broad structural review, benchmarking exercise and consultation (with senior managers).

80. It is plain that the Claimant was treated less favourably than Mr Ahmad and Mr Hilliard, but what is less clear is whether there was any material difference between his circumstances and theirs.

81. The Respondent's case is that:

    81.1. There was a material difference between the Claimant and the comparators when comparing his nightshift work with their dayshift work. Namely material differences in their duties. The Respondent says that whether or

not in practice there was a difference in duties, it was Mr Batchelor's understanding that there was such a difference in duties and that is a material difference of circumstance between the nightshift work and dayshift work.

81.2. There was a material difference between the Claimant working the nightshift and the comparators working the nightshift in that the comparators were paid more because their substantive role was the dayshift, the dayshift attracted a higher rate of pay and the practice was to pay at the rate of the substantive role.

82. It is ultimately impossible to divorce the question of whether these differences of circumstances were material ones from the question of whether they were, or were part of, the reason for the treatment.

83. It is plain to us that the Claimant has proved facts from which we could conclude, in the absence of an explanation, that the reason or a material part of the reason, for the difference of treatment between him and the Respondent was race. We say that for the following reasons:

83.1. The *starting* point is that there is a difference of treatment and difference of racial status. He was paid less than the comparators for what was at the very least similar work. That is not itself enough to shift the burden, but there is more.

83.2. The most significant factor is the way in which the Claimant's multiple complaints about pay and discrimination were (not) handled. Astonishingly, his complaints were never dealt with and he barely received any response. That was staggering and all the more so given that in 2018 the HR advice was to deal with the grievance formally. To leave the Claimant's complaints repeatedly unanswered was grossly unreasonable treatment. The Respondent says that since Mr Morris has passed away and Mr Khan has left the business, in this case we ought not to infer discrimination from the lack of explanation for the unreasonable treatment. We do not accept that. Although Mr Khan has left the business that of itself is not a barrier to his instructions being taken or him being called as a witness. There is no evidence of any such barrier. In any event, it is staggering that there are no written documents recording some response to the Claimant's complaints (save for HR's advice to deal with it as a formal grievance.). This cannot be explained away by the passage of time. The Claimant raised complaints at the beginning and end of 2018. The claim was presented in 2019. These matters are all sufficiently recent that if the complaints had been dealt with there would surely be a paper trail and the material parts (e.g. interview notes, outcome letters) would be available. In our view the unreasonable treatment has not been explained and this does infer, absent an explanation for the difference of pay, discrimination. That is enough, in combination with the difference of treatment and status to shift the burden of proof.

83.3. We would add further matters too:

83.3.1. The Claimant was once told that he was being paid less because he did not have a CCTV qualification. When he obtained the CCTV qualification he was told that he did not need it and his pay did not increase. The explanation he was given was untrue.

83.3.2. There is a lack of documentation identifying what each relevant employee's job comprises and stating his rate of pay. More generally, contemporaneously there was real opacity in pay information and role delineation.

84. The matter turns, then, on the explanation for the difference in pay.

85. There is a different explanation for the disparity in pay when (1) comparing the Claimant's nightshift work with the comparators' dayshift work and (2) on the other comparing the Claimant's nightshift pay with the comparators' nightshift pay.

86. Dealing with the former matter first, Mr Batchelor was the relevant decision maker.

87. Mr Batchelor's explanation for the difference of treatment is that he considered the Claimant on the one hand and the comparators on the other to have similar but materially different roles. As set out in the evidence above Mr Batchelor's view was that there were numerous additional duties for the dayshift and as a result that the rate of pay should be higher than on the nightshift. He did not know the more junior staff at the Bentall Centre and his decision was based upon his understanding of the roles rather than the incumbents of the roles, still less the protected characteristics of the incumbents of the roles.

88. We found Mr Batchelor's evidence about this credible and ultimately accept it. However, before accepting it, we tested it against the other evidence in the case.

89. Our own finding of fact is that the difference between the nightshift work and the dayshift work was not as significant as Mr Batchelor's evidence suggested. However, we do accept that the evidence he gave reflects his actual beliefs both now and when he took the pay decisions. He was not close to the ground at the Bentall Centre and he therefore did not know the detail of how things worked in practice. Further, it is not at all unusual for there to be some differences between how roles are delineated when a structure is designed and how they then operate in practice.

90. We also considered whether the matters that caused us to shift the burden of proof should cause us to reject Mr Batchelor's explanation. On balance they did not. There is no evidence that the Claimant's complaints, which were not dealt with, came to Mr Batchelor's attention contemporaneously, nor is there anything to suggest that Mr Batchelor had any role in the Claimant being told that the reason for the difference in pay was that he did not have a CCTV qualification.

91. Ultimately, we accept that the reason why the Claimant was paid less for his nightshift work than the comparators were for the dayshift work was because Mr Batchelor believed that the roles were materially different and a slightly higher rate of pay was merited for the dayshift. That is what fixed the Claimant's and his comparators' rates of pay from April 2016 onwards and explains the difference in pay when comparing nightshift and dayshift work thereafter.

92. We now turn to the explanation for the difference in pay between the Claimant's nightshift work and Mr Ahmad's nightshift work.

93. There is no doubt that the Claimant did the same work when working on the nightshift as Mr Ahmad did. There is also no doubt that Mr Ahmad was paid more than the Claimant for the nightshift work until December 2018 when their pay for nightshift work equalised.

94. The Respondent's explanation for the difference of treatment is that there was a practice of paying employees at the rate of the substantive role when they did overtime in another role.

95. We considered this explanation to be highly plausible. It is also well supported by the pay evidence before us. This shows that there was a range of different rates paid for the nightshift and that the Claimant was paid more than some of the others who were doing overtime on the nightshift and less than some of the others doing overtime on the nightshift.

96. One matter that has not been explained is that Mr Ahmad's and the Claimant's pay for the nightshift equalised in 2018. It is therefore unclear why this happened. Mr Ahmad continued to be paid more than the Claimant when he did his dayshift. We take that into account, along with all of the other evidence, including the factors that led us to shift the burden of proof. However, we remain satisfied that where the Claimant was paid less than others, including Mr Ahmad, for nightshift work, this was because of the practice of paying employees at the rate of their substantive role.

Pre-restructure period

97. If there is a complaint about the Claimant's level of pay prior to the implementation of the restructure in April 2016 then we would reject it.

98. On the evidence we have, the Respondent did not alter the pay arrangements for the Claimant and his comparators between the transfer in June 2015 and the restructure in April 2016. Thus the pay arrangements that were in place prior to those arising from the restructure which we have analysed above, were fixed *prior* to the transfer. If those arrangements were discriminatory then the Respondent would inherit liability for them under regulation 4 of TUPE. However, the Claimant's witness statement opens by saying *"The discrimination started*

immediately <u>after</u> G4S took over the Bentall Site" [emphasis added]. His evidence thus does not actually even allege that there was discrimination prior to the transfer.

99. There is no evidence about who took the pay decisions prior to the transfer nor why. We do not think that the factors which caused us to shift the burden of proof in respect of the Respondent's pay decisions in 2016 can shift the burden of proof in respect of pay decisions taken by the transferee some time prior to the transfer in 2015. Those factors (other than the bare difference of treatment and the difference of status) just have no bearing on and shed no light on the reason for the transferee's historical decision making.

100. In any event we have found that from April 2016 onward, the pay arrangements were not discriminatory. That means that any complaint about the prior period would be very substantially out of time (there being no possibility of a continuing act beyond April 2016). We do not think it would be just and equitable to extend time.

100.1. The length of the delay in presenting the claim is very long indeed albeit that there is some explanation for the delay as set out in our findings of fact;
100.2. If we are considering pay decisions made prior to April 2016, the length of the delay is so long that it has inevitably affected the availability and cogency of evidence.
100.3. The pay arrangements in the period before April 2016 were fixed prior to the transfer in 2015 and it is not even alleged that there was discrimination prior to the transfer.

Wages claim

101. The wages clam must fail. There is no evidence of a legal obligation upon the Respondent to pay the Claimant more in wages per hour than it did.

Closing remarks

102. We really do have considerable sympathy for the Claimant. The Respondent's repeated failure to respond to his grievance was grossly unreasonable. If he had simply been given a clear explanation for the reason for the difference in pay between himself and his colleagues he may never have raised formal grievances, and if his formal grievances had been dealt with in a reasonable way he may well never have presented a claim.

_____

Employment Judge Dyal

_____

Date 10/10/2022