



EMPLOYMENT TRIBUNALS

Claimant: Mr S Kinkela

Respondent: Bouygues E & S Solutions Ltd

Heard at: London South Croydon, in person, public hearing

On: 23-31 May 2022 (in chambers the afternoon of 31 May)

Before: Employment Judge Tsamados
Mr M Cann
Ms B Leverton

Representation

Claimant: Mr W Brown, Solicitor
Respondent: Mr A Mathur, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is as follows:

The Claimant's complaints of direct race and age discrimination, harassment related to race and age, victimisation and unauthorised deductions from wages are unfounded and his claim is dismissed.

REASONS

The claim

1. By a claim form presented to the Employment Tribunal on 25 September 2020, following a period of Early Conciliation between 8 and 24 August 2020, the claimant has brought complaints of unfair dismissal, race and age discrimination, detrimental treatment because of protected interest disclosures and unauthorised deductions from wages against his former employer, the respondent. He originally brought the claim against two individual respondents but they were subsequently removed from the

- proceedings, the respondent indicating that it was not relying on the statutory defence under The Equality Act 2010.
2. In its response presented on 2 March 2021, the Respondent denies the claim in its entirety.
 3. A preliminary hearing on case management was held on 9 April 2021, conducted by Employment Judge (“EJ”) Richardson. At that hearing, EJ Richardson set these hearing dates (unaware that on two of the dates the Employment Tribunal would be closed for Regional Training and which was not picked up by our Listing Section), removed the names of the two individuals as Respondents, agreed the claims and issues to be dealt with at the full hearing, ordered the Claimant to provide a Scott Schedule setting out the factual details and legal basis of the allegations relied upon and gave the Respondent time to respond to it. She also set various other case management orders so as to prepare the case for this hearing.

Evidence

4. It would appear that the Claimant was not actively involved in the preparation of the hearing bundle and so we have before us a bundle plus a number of documents provided by each party entitled “missing pages”. In addition, Mr Mathur indicated that additional matters had been raised for the first time in the Claimant’s witness statement and he sought leave to ask limited and discrete supplemental questions of his witnesses. We saw no reason to disagree with this request.
5. We were provided with the following documents: an electronic bundle of consisting of 493 pages (which I will refer to as “B” followed by the relevant page number); missing pages to the bundle pages 494-543 by the respondent; missing pages to the bundle 1-47 from the claimant (the same pages as provided by the respondent); a black Frontline Probationary Review Record including Appendix A: Scoring Criteria from the respondent; email correspondence between dated 13 May 2020 between Mr Buckman and others from the respondent; a electronic witness statement bundle of 99 pages; an opening note from the respondent; and a chronology from the respondent.
6. We heard evidence from the claimant by way of a written statement and in oral testimony. We heard evidence on behalf of the respondent from Daniel Buckman, Tommy Harvey, Emma Thomas, Dennis Galer, Daniel Smith, Ash Quraishi and Carl Goard by way of written statements and in oral testimony.
7. Mr Mathur advised that Mr Harvey’s health was affected as a result of a bike accident. This affected his ability to focus and concentrate and we were told that he may require frequent breaks. Mr Mathur further advised that Mr Buckman has an underlying health condition and may need more time to read documents, especially long stretches of text. We agreed to bear these matters in mind when each of them gave evidence.

Conduct of the hearing

8. The hearing was listed for seven days to be heard in person. Mr Brown stated that the Claimant had asked for it to be converted to a CVP hearing. I said that unless there were compelling reasons to do so it will proceed in person. I was not provided with a response.
9. I explained that we only have 3 days this week on which we can sit because unfortunately the case has been listed on 2 days that the Employment Tribunal is closed for Regional Training. So we have 5 days in total. We looked at whether we could sit on 1 June (2 and 3 June being bank holidays) and on 6 June to make up the time, but unfortunately we are not all available those dates. The next dates we can do are from 15 July 2022 onwards.
10. We had a discussion as to timetabling and on this basis I determined that we would deal with liability only, given the lack of evidence on remedy, allow half a day for reading, 3.5 days for evidence and submissions and then 1 day for the Employment Tribunal to deliberate, reach and give its decision.
11. In the event, we spent the whole of the first day reading, heard evidence over 3 days, submissions the morning of the 5th day and spent the afternoon in chambers. As a result had insufficient time to reach our decision and to deliver it and so we indicated that we would give a reserved Judgment.

The complaints and issues

12. The list of issues are at B69-71. The Scott Schedule is at pages 80-99 of the bundle. This contains all of the issues and the factual basis of the claim that the Tribunal is required to deal with and we will not depart from it unless there are exceptional circumstances.
13. The Tribunal's administration had coded the claim as including a complaint of unfair dismissal. Mr Brown clarified that this was incorrect, the Claimant not having sufficient service to bring such a complaint. I pointed out that the list of issues and the Scott Schedule did not include dismissal as an act of discrimination. On this basis I queried how the Claimant was going to get an award of compensation for loss of earnings (as the Schedule of Loss included) if his discrimination complaints were successful, without seeking leave to amend. Mr Brown responded that the loss flows from the dismissal. I reiterated that this would only be if we find that the dismissal was discriminatory and it has not been pleaded as an act of discrimination. So it would come down to the extent to which our findings on the acts pleaded gave rise to any loss of earnings.

Opening note

14. Mr Mathur relied on his opening note which in essence described the Claimant's claim as wholly unmeritorious and listed a series of matters attacking the Claimant's credibility. Mr Brown objected to the labelling of

the claimant's case as wholly unmeritorious. He added that the case turned on evidence, particularly the conversation in which it is alleged that Mr Harvey made a racist comment to the Claimant and to sweep this up with a series of other issues in the way that Mr Mathur had done was grossly misleading. Mr Mathur in turn denied this.

15. I said that we had obviously not yet formed a view of the case and that it was rare to get an opening note. I also said that I thought it was perhaps somewhat inflammatory of Mr Mathur to dub the claim wholly unmeritorious before we had even started our reading. However, I added that I took the view that Mr Mathur was putting his client's case as was Mr Brown. I did not accept that the opening note was misleading, it was the respondent's view, but it was perhaps unnecessary. I then said that I wanted to draw a line under the matter and move on.

Findings of fact

16. We decided all the findings referred to below on the balance of probability, having considered all of the evidence given by the witnesses during the hearing, together with documents referred to by them. Any failure to mention any specific part of the evidence should not be taken as an indication that we failed to consider it.
17. We have only made those findings of fact necessary to determine the issues. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.
18. We decided to deal with our findings as far as possible in chronological order and by reference to the allegations set out within the Scott Schedule by reference to their box numbers.
19. The Claimant is described as a Black person of African descent. At the time of the events in question he was aged 50. Unless otherwise stated the protagonists in these events are white.
20. He was employed by the Respondent as a Mobile Electrical Craftsperson from 29 November 2019 until his resignation on 10 July 2020.
21. The Claimant asserted that he was employed as a Mechanical & Electrician Craftsperson but was paid at the rate of a Mobile Electrical Craftsperson. This forms the allegations of less favourable treatment on grounds of race at box 1 of his Scott Schedule at B80.
22. The Respondent's evidence was that whilst a Mobile Electrician Craftsperson would perform some mechanical tasks on occasion, such as testing for Legionella, these were not jobs for which there was a need to be mechanically qualified and the performance of which made an employee a Mechanical & Electrician Craftsperson, and the Claimant was not employed on that basis.
23. The Claimant's Principal Statement of Employment Particulars, whilst unsigned, records that he was employed as a Mobile Electrical

Craftsperson. We were not directed to any evidence that indicated that the Claimant raised objection to this or his pay during the course of his employment.

24. Having considered the matter on balance of probability, we prefer the Respondent's evidence in this regard.
25. The Respondent is a company that provides facilities management to various corporate clients. This includes the provision of electrical services. Some of the Respondent's clients are external to the business and some are internal, having static, that is, on-site maintenance teams.
26. The Claimant was part of the Mobile Services Team of 25 which included 5 electrical engineers who responded to jobs as notified by the Respondent's Helpdesk. His role was to attend sites to carry out general Planned Preventive Maintenance ("PPMS") and sometimes reactive or quoted works.
27. The Claimant's original line manager was Bill Kesby. From January 2020 onwards the Claimant's supervisor from approximately January 2020 onwards was Mr Tommy Harvey. Above Mr Harvey was Mr Daniel Buckman, the Operations Manager from August 2019 until December 2019 and then he became the Senior Operations Manager from January 2020 onwards.
28. The Claimant has an impressive list of qualifications as set out within the Particulars of Claim at B23-24.
29. Mr Kesby and Mr Harvey interviewed the Claimant. Mr Harvey's evidence was that the Claimant was very confident and seemed to know what he was talking about. He performed very well and answered all of the questions asked of him almost perfectly. He was very impressed by his CV. After interviewing all prospective applicants, Mr Kesby and Mr Harvey quickly decided to offer the Claimant the job.
30. We were referred to the Respondent's Probationary Review Procedure at B474-476 and the Grievance Policy and Procedure at B480-482. We were also referred to a blank copy of the Respondent's Frontline Probationary Review Record forms for the first and second reviews and Appendix A: Scoring Criteria.

Tools

31. It is common ground that basic tools were provided to the Claimant at the start of his employment (B210-215). The Claimant's case is that he required additional specialist tools but these were intentionally not provided to him. This is the alleged less favourable treatment on grounds of race at box 2 of his Scott Schedule at B80). He identified these in his witness statement as being a thermometer, drill, nanometre, spanner, wrench and a laptop.

32. The Respondent did not accept that these were specialist tools and in any event it was unaware that he required them. Its general position was that the Claimant had the tools necessary to do his job. However, had he needed these items or anything else he would have been provided with them had he asked.
33. The Claimant states that he gave a list of tools to Mr Harvey in the form of a hard copy of an email between Wesley Peterson and Shaunna Powe (Office Manager) dated 8 January 2020 (at B100).
34. The Respondent's position is that it was first aware of the issue regarding tools when the Claimant raised this at his first probation review in April 2020. He was told to provide a list of the tools he required to Mr Harvey or Mr Buckman but he did not do so. He was later asked to do so by Danial Smith (the General Manager) during his later grievance investigation meeting but he did not do so.
35. We were not taken to any emails in the bundle in which the Claimant queried non-receipt of tools. There was nothing to indicate that the withholding of tools, if that were the case, was intentional. Further, whilst the Claimant relies on Mr Harvey, Ryan Craghwell, Mr Peterson and Lisa Murrow as actual comparators in respect of the non-provision of specialist tools, we were not provided with any evidence in support of this contention.

WGC - wall sockets

36. The Claimant attended the Respondent's Street Lighting Division site in Welwyn Garden City ("WGC") on 31 January 2020 to install two electrical plug wall sockets. In his grievance dated 11 May 2020, the Claimant alleged that he was not provided with the required tools for the job and this led to Mr Harvey spreading a false rumour that he was "very slow". In his email, the Claimant expands upon this allegation at B129 (which deals with his Probation Review where the issue of being too slow was discussed).
37. In his Scott Schedule at box 3, at B81, the Claimant cites this as less favourable treatment on grounds of race: that on a date between 31 January and 14 February 2020, Mr Harvey spread a false rumour to the Mobile Division that he was to blame for the delay in carrying out that installation.
38. At box 28 (B98) he cites it as an act of direct age discrimination: that Mr Harvey told the Mobile Division that he was to blame for the delay in carrying out the work (erroneously said to be at "Newlyn Garden") because he was "very slow" and because he was "too old".
39. In evidence Mr Harvey did not recall exactly what was said but did not believe he told the Claimant that any delay in completing work was because he was too old, although he accepted that he did explain to the Claimant that clients had complained that he was slow. In his written evidence, Mr Harvey stated that he told the Claimant that the clients had complained that he was working too slow, that the job should not have taken as long as it did, unless there were unforeseen issues, and the Claimant denied that he

worked too slow and started to explain why it had taken him so long. Mr Harvey's further written evidence was that he explained that if the Claimant kept in good communication with him and Mr Buckman then they would know if he was having any issues and they could have helped. However, the Claimant replied, laughing, "no, I won't communicate like that", like he knew best. Mr Harvey deals with this in an email to Mr Buckman dated 23 March 2020 at B107.

40. In his written evidence, Mr Buckman stated that the general issue was not so much the delay in undertaking jobs but the Claimant's approach which was obstructive and wanting to do things all his own way. His further written evidence was that this led to an excessive amount of time being spent because he was not taking advice from others and not working efficiently and he made the work environment very awkward for the whole team.

The City of London Academy

41. The Claimant alleges that he was falsely blamed for delays in carrying out a job at the City of London Academy on 3 February 2020. This is at box 4 of his Scott Schedule at B 81.
42. The Respondent's position is that Mr Harvey had received reports from clients that the Claimant was too slow in completing jobs leading to delays and he genuinely believed this to be the case.
43. The only evidence we heard that these reports were given to was Mr Buckman, not the Mobile division. Further, there was nothing to suggest that these were false reports, albeit the Claimant did not accept them to be true, or that they had anything to do with the Claimant's race or age.

Allegations against Leon Neal (at boxes 5, 6 and 7 of the Scott Schedule – B82-84)

44. On 7 February 2020, the Claimant attended a site in Rainham to carry out a hot water test for Legionella's Disease. The test indicated that the water was not at the required temperature and he advised that the client needed to remove and install a new water heater.
45. Mr Neal, the Window Cleaning Manager, told the Claimant that they had just used all the hot water and he needed to wait for it to reheat. Thereafter an argument ensued in which it appears that the Claimant was rude to Mr Neal and in response Mr Neal told him to "fuck off".
46. Mr Harvey became aware that Mr Neal had complained about the Claimant. He spoke to both individuals, took no further action and the matter was left with Mr Buckman. Mr Buckman did not uphold the complaint from Mr Neal. Whilst the Claimant complained that Mr Neal racially abused him, there was nothing to suggest that this was the case.
47. The Claimant alleges that during his discussion with Mr Harvey as to the complaint by Mr Neal, Mr Harvey said "*black people always complain about*

racism, because they are black, because they are black, this is nothing to do with being black”.

48. However, in the Scott Schedule at box 7, at B84, the Claimant alleges that Mr Neal said this.
49. In oral evidence the Claimant was unable to specify the context within which this alleged statement had been made and so it appeared to have arisen apropos of nothing. The Claimant further alleges in box 7 of his Scott Schedule that Mr Neal said “you are incompetent, stupid, fuck off, you are incompetent like Ismail Omar and you won’t cost us money”. Ismail Omar is of ethnic minority origin and is an AC Engineer.
50. The Respondent states that it was not made aware of these allegations until 1 June 2020 when the Claimant raised a grievance.
51. The Claimant alleges that Ash Quraishi (who is of ethnic minority origin and at the time was the Respondent’s General Manager) failed to investigate his allegations of race discrimination. Ms Quraishi offered to meet with the Claimant on 10 February. He cancelled that meeting. The meeting eventually took place on 6 May, at which the Claimant denied that there were any racial issue and said that Mr Neal had told him to “fuck off”.
52. After the email, Ms Quraishi emailed the Claimant and summarised their discussion at the meeting (at B140). This includes the following:

“...at no point during the discussion were you able to give us any evidence of racial abuse towards you or in the document/emails that you have sent over, you had indicated although nothing was actually said that would be classed as racism towards you, you assumed that this was the reason that they were making you feel uncomfortable.”
53. The email also stated that the next step would be to arrange a mediation session between the Claimant, Mr Harvey and Mr Buckman and that the Claimant’s bullying and harassment complaints would be passed onto an independent manager who is not part of the Mobile team to investigate.
54. In response the Claimant replied an hour later with the word “thanks” at B493. The Claimant said in evidence that he was merely being polite and was thankful that Ms Quraishi said the matter would be investigated.
55. We formed the view that if the Claimant had raised or had concerns as to racism he would have challenged this email and it goes to his credibility that he did not. Whilst the Claimant may have had concerns about his job given what he had already raised and what he claimed he had raised this does not seem a credible explanation for his alleged reticence.
56. Ms Quraishi was unaware of the specific allegations which the Claimant sets out in box 7 of his Scott Schedule which were not raised until 1 June 2020 as part of his grievance. So she could hardly be accused of not investigating matters of which she was unaware.
57. We were concerned about the credibility of the Claimant’s evidence. In particular, as to the lack of context of the remark, that the remark is

attributed to different people, that initially the Claimant had the opportunity to meet with Ms Quraishi on 10 February 2020 to expand on his concerns and he cancelled that meeting, that when he did meet with Ms Quraishi on 6 May 2020 he told her that Mr Neal told him to “fuck off” and nothing further, that he has assumed racism in the absence of anything discriminatory being said, that he was then given the opportunity to provide further allegations, but these further allegations were not raised until 1 June 2020, we do not find on balance of probability that the alleged racist remarks were made.

Thermometer incident (boxes 8 and 9 of the Scott Schedule – B84-85)

58. On 25 February 2020, Mr Harvey told the Claimant to go to the Respondent’s Barking depot to collect a box of thermometers because the Claimant required them for a particular job. When the Claimant collected the thermometer box and opened it, he discovered it was empty.
59. The Claimant alleges at box 8 of the Scott Schedule that he had been set up by Mr Harvey: he was working in Slough at the time and required to go to Barking at the end of the working day and so would be unable to return to Slough, but Mr Harvey insisted he go. He further alleges that no other white member of the team was set up like this by Mr Harvey.
60. The Respondent’s position is that this happened on occasions; that equipment was not returned to the box.
61. The Claimant further alleges at box 9 of the Scott Schedule that no action was taken to investigate this incident, having emailed Shanna Powe, the Respondent’s Office Manager, on 6 March 2020 enclosing a photograph of the empty thermometer box (at B102). He stated in evidence that Ms Powe asked him to return the empty box to the office and she would pass the complaint onto Mr Buckman. He said he returned the box but did not receive any response from Mr Buckman.
62. The email does not indicate that the Claimant requested the matter be investigated but simply that he was informing the office of what he found when he opened the box. Mr Buckman and Mr Harvey were unaware of the issue at the time. Mr Harvey denied the allegations made against him.
63. Accused of being a thief and assaulted by Wesley Peterson (box 10 of the Scott Schedule – B85)
64. Mr Buckman’s position is that whilst the Claimant raised issues of 20 March he did not raise this at the time or in his lengthy email of 23 March 2020, which contains an oblique reference to being “abused by Wesley” (at B106).
65. In oral evidence the Claimant said that Mr Peterson did not assault him but could see he could see that he wanted to. He said he had been abused, he disrespected him and called him a thief. When asked why he had not stated that he was called a thief, he said it was not investigated and the email was done quickly in work hours. We were again concerned about the credibility of the Claimant’s evidence in this regard.

European Space Agency Quote (box 11 of the Scott Schedule – B86)

66. On 5, 13 and 20 March 2020, the Claimant attended the European Space Agency (“ESA”) site to carry out PPN and reactive work. He discovered that the Air Handling Unit (“AHU”) filters needed replacing and reported this to the onsite manager, Ian, and was asked whether it was him or the Mobile team who would buy the filters and said that he would contact the Mobile team to find out. The client (Ian) then contacted Mr Buckman asking for AHU filters to be ordered.
67. The Claimant raised his concerns about this incident in his email of 23 March 2020 at B105 because he had been accused of providing a quote to the client. The Claimant denies providing a quote.
68. Mr Buckman’s evidence is that the Claimant told him in a telephone conversation that he had provided costings to the client.
69. The Respondent’s position is that rather than coming through the Respondent the Claimant went straight to the client and allowed the wrong costings to be provided. This was in breach of the quoting procedure which had been explained to the Claimant on a number of occasions.
70. In an email dated 20 March 2020, at B103, Mr Buckman, having been contacted directly by the client, asked the Claimant to explain how he had been told to quote by Mr Harvey and reminded him of the procedure.
71. In evidence it was clear that the Claimant believed that when he was working on a site where there was a Bouygues’ supervisor he reported to that person and not to his actual line managers. Mr Buckman’s position was that the quotation process required any quotes to come through him or Mr Harvey and not through a local site supervisor.
72. Whilst the Claimant alleges that this was a false allegation we do not find on balance of probability that it was. Mr Buckman’s email is attempting to aid the Claimant in understanding the quote procedure by explaining it once again.

Failure to investigate the false allegation (box 12 of the Scott Schedule at B86-87)

73. As we have found, this was not a false allegation. The Respondent’s position is that they did not investigate the issue but in any event it was not necessary to do so because it was a day to day matter, the Claimant showed that he still did not understand the procedure and they explained it to him. Thus it was dealt with.

Probation Review (box 13 of the Scott Schedule – B87)

74. The Claimant is alleging that on 24 March 2020 Mr Harvey decided to review his probation when he told him that it would be unsafe to complete a Portable Applicant Test (“PAT test”) at the Street Lighting Division at Welwyn Garden City. The Claimant sent an email on 24 March 2020 to Mr

Buckman explaining why it would be wrong to carry out the PAT test (at B110). The Respondent accepts that the Claimant was right to raise an issue with the PAT test and this was not in any way related to his probation review which in fact did not take place until 27 April 2020.

75. There was no evidence of what happened on 24 March 2020 or any other date to give rise to this allegation.
76. The Claimant did give oral evidence that he overheard Mr Buckman and Mr Harvey talking, although he did not say what he overheard, where they were or on what date. But from this alone he appears to conclude by of assumption that they were conspiring to hold a probation review by way of retaliation for raising his concerns about the PAT test.
77. By this date the review was already overdue (it should have been held in February 2020). When it was put to him that if that was the case, then they would have arranged the review meeting sooner, he replied that they could not because of Covid. However, we note that the review meeting when it did take place in any event was by telephone.
78. These oral allegations were not put to Mr Buckman in cross examination. When it was put to Mr Harvey in cross examination that the probation review was a retaliatory act, he denied it and said that the Claimant was right to raise the PAT test issue.

False allegations raised at the probation review (box 14 of the Scott Schedule – B87-88)

79. As we have indicated above, the Claimant's probation review was overdue. It was conducted by telephone with him by Mr Buckman and Mr Harvey on 27 April 2020. The handwritten record of the review (the Frontline Probationary Review Record) is at B111-112. We note that the Key Skills/Quality Assessment are rated by reference to criteria numbered 1 to 5 set out at Appendix A: Scoring Criteria which we were provided with in a separate document.
80. The Claimant's position is that he scored himself 5's for each of the Key Skill/Quality Assessment and he said that he had nothing to learn, he had a law to work to (the electrical installation rules) and he was okay. Looking at the actual review, we formed the view that the scores given by Mr Buckman and Mr Harvey were not that bad but the Claimant's complaint was more as to the comments that they made which he believes amount to false allegations.
81. We heard evidence as to the Claimant's speed of work, as to checking of materials and planning corrects, as to work output, which are all related to the complaints of slowness being fed back to Mr Buckman and Mr Harvey. That the Claimant argued with members of the team relates to the Leon Neal incident. As to Communication, this relates to the Claimant not keeping in contact with Mr Harvey. We could not see anything that was obviously discriminatory or even unfair in the comments. They were balanced with some positive comments as well. The Development

Required (on B112) sets out clearly what the Claimant needs to do to improve.

82. Given the Claimant's own view of his competence, which on any assessment is overstated when one views this against a score of 5 in each category, it simply seems to be the case that he disagreed with what was said because it did not match his own view of his abilities.

Pressured to sign the probation form against his will (box 15 of the Scott Schedule – B88)

83. The Claimant initially refused to sign the Frontline Probationary Review Record (the probation form he refers to) at B111-112. Mr Buckman said it was normal process for the employee to sign the form. The Claimant eventually signed the form and left but it was clear he was angry. We note that the employee's signature was only required to sign that he received a copy of the form but this was not raised by either party.
84. We did not view the Claimant as someone who would be pressured into signing a document against his will. We did not hear evidence from the Claimant as to how he was pressured. It was clear from the Respondent's evidence that he was simply asked to sign it as part of the normal process.

HR failed to investigate his complaint raised on 10 May 2020 (box 16 of the Scott Schedule – B88-90)

85. The Claimant raised a complaint about Mr Buckman and Mr Harvey in an email to Ms Quraishi dated 5 May at B115 (and B171). The subject box of his email is "Racial discrimination, bullying and harassment". This appears to raise issues of racial abuse, racism and of bullying and harassment and refers to the incident with Mr Neal, the false allegations, the lack of tools and materials and as to his probation review.
86. We have dealt with this sequence of events above but set this out in more detail below in the context of this allegation.
87. The Claimant attended a meeting by way of a conference telephone call with Ms Quraishi and Emma Thomas, the Respondent's HR Manager on 6 May. The notes of this meeting are at B117-120. It is evident that the Claimant moved away from a complaint of racism or racial abuse during the meeting although he does allege treatment amounting to bullying and harassment.
88. The meeting concluded with Ms Quraishi stating that she will arrange mediation sessions and that she will refer the allegations of bullying and harassment to an independent manager.
89. The Claimant sent an email to Ms Quraishi timed at 08:35 on 11 May 2020 in which he apologised for not having sent his complaint against Mr Harvey in writing (B140). Ms Quraishi replied later that morning in an email timed at 10:01 in which she thanked him for attending the meeting on 6 May and of next steps to speak to Mr Harvey and Mr Buckman and then arrange a

mediation session between the three of them (at B140). Her email also states as follows:

90. *"I would also like to point out that at no point during the discussion were you able to give us any evidence of racial abuse towards you or in the document/emails that you have sent over, you had indicated although nothing was actually said that would be classed as racism towards you, you assumed that this is the reason that they were making you feel uncomfortable. In reference to you bullying and harassment claims, you will be hearing from an independent Manager who is not part of the Mobile team to further investigate."*
91. The Claimant replied to this email later that morning by an email timed at 11:18 with the sole word "thanks" at B493. As we have said, the Claimant's explanation for this was that he was merely being polite and was thankful that Ms Quraishi said the matter would be investigated but on balance of probability we do not accept this explanation.
92. Ms Quraishi's email indicates that everything the Claimant raised was dealt with on 6 May and on 11 May she confirmed that this had taken place. The Claimant did not provide any evidence of racial abuse, she arranged to hold a 3-way mediation session and for an independent manager to look further into his allegations of bullying and harassment.
93. The Claimant sent a further email at B128-131 which is undated but we were told it was sent on 11 May 2020 although not at what time. This raises complaints about Mr Buckman and to an extent against Mr Harvey and refers to being racially discriminated, harassed and bullied at an unplanned probation meeting held on 27 April 2020. The email sets out some detail of that meeting, to being racially abused by Mr Neal, that Mr Buckman supported this unfair treatment, as to the false allegations being levied against him and it asserts that Mr Buckman and Mr Harvey are conspiring and conducting a "witch hunt" against him. The email also refers to incidents in Chippenham and at City of London Academy.
94. We do not know whether it was sent before or after Ms Quraishi's email to the Claimant on 11 May.
95. The closest we got to it was in Ms Quraishi's written evidence. In her witness statement, she stated that the email at B128-131 was sent following their meeting on 6 May and that it contained some points that the Claimant had not raised before and fresh allegations. She further stated that the Claimant did not mention any racist comments or actions or behaviours from Mr Buckman or Mr Harvey "that were usual". Her statement goes on to state that she referred the complaint of bullying and harassment to Dennis Galer, an independent Manager (he is Maintenance Manager) and that having spoken to the Claimant at length and having received the further email, she did not ask Mr Galer to investigate any specific racial discrimination complaints. Ms Quraishi further set out in her statement that her rationale for this was that the Claimant could not provide any examples of racial or discriminatory comments and/or behaviour. Further, when he was pressed to provide further detail or evidence, he could not do so and he also confirmed that there was no race element to his allegations. Ms Thomas very much echoed Ms Quraishi's evidence in this regard in her own witness statement.

96. Mr Brown did not pick up on this evidence in cross examination or use it to diminish the effect of the word “thanks” in response to Ms Quraishi’s email.
97. We know from the “thanks” email that the Claimant did not challenge what Ms Quraishi said in her email. However, as we have said we are unclear whether his further email of 11 May at B128-131 came before or after her email or before or after his “thanks” email.
98. We also wondered why, given the email at B128-131 and the reference to racial discrimination and abuse, Mr Galer was not tasked to deal with race as well? However, we do note that this email does not set out any specifics of the racial abuse.
99. Mr Brown did not pursue these matters in re-examination of the Claimant or cross examination of the Respondent’s witnesses or in his closing submissions.
100. We have also taken into account the following. The initial racial complaint was about Mr Neal and harassment and bullying by Mr Buckman and Mr Harvey. The Claimant then resiled from the racial complaint at the meeting on 6 May. In his subsequent email of 11 May at B128-131 he again raises the complaint of racial abuse by Mr Neal and of race discrimination although without any specifics. Mr Galer did not deal with the race element and it was not even put to him whether he had seen the Claimant’s email of 11 May at B128-131 or not.
101. As box 16 of the Scott Schedule is pleaded, there is no evidence that Ms Thomas has failed to investigate the complaint. If anything it is Ms Quraishi who has not dealt with the further allegations of racism made on 11 May and those matters are not tasked to Mr Galer.
102. We make the following findings.
103. The Claimant raised a grievance to Ms Quraishi by email on 5 May 2020. The email stated that the Claimant was a victim of racial discrimination, harassment and bullying from Mr Harvey and Mr Buckman who had organised an unplanned appraisal meeting (the Claimant’s probation review of 27 April 2020). The grievance stated that the appraisal was a false representation, that he had not received the necessary tools to do his job and that Mr Harvey and Mr Buckman were conspiring against him to make him fail in his task as a competent electrician. It ended by stating that the Claimant would write to Ms Quraishi later that day with a full explanation and evidence providing more details of the on-going unfair treatment that he was a victim of.
104. Ms Quraishi and Ms Thomas spoke with the Claimant on 6 May 2020 to allow him to substantiate and clarify the alleged incidents of racial harassment, discrimination, and bullying. The Claimant clarified that he did not like Mr Buckman’s and Mr Harvey’s management style but that he felt they were making him feel uncomfortable on the grounds of race. The Claimant indicated on the call that nothing racist had been said. As the Claimant could provide no prima facie basis (such as unfavourable

treatment, a reference to terminology or gestures used towards him) to suggest that any racial discrimination had taken place in organising the probation meeting, the meeting concluded with Ms Quraishi proposing to arrange a mediation session to resolve the issues informally. The Claimant indicated that he would provide documentation to support his grievance which the Respondent waited for before summarising their conversation on 6 May 2020 in an email to the Claimant – that sent on 11 May 2020.

105. On 11 May 2020 the Claimant provided details of several complaints relating to Mr Harvey and the Claimant's first probation review. None of the allegations related to racist terminology or gestures by Mr Harvey or Mr Buckman.
106. The allegations of bullying and harassment were subsequently dealt with by Mr Galer.

Public Health England, Harlow, falsely accused of making direct contact with Leo Ayre to provide a quote (boxes 17 and 19 of the Scott Schedule – B90-91)

107. On 6 May 2020, the Claimant sent an email to David Jewell, the Respondent's on-site supervisor at Public Health England ("PHE"), in which he provided a "quote" for works, in as far as he had identified what was needed (at B123). Whilst this might not strictly be a quote, it is against the Respondent's procedure because he has contacted the client (Mr Jewell rather than Mr Ayre, the Operations Manager [who is black]) directly rather than Mr Buckman and Mr Harvey.
108. Mr Jewel then emailed Mr Ayre on 7 May 2020 in which he included the Claimant's email of 6 May (at B122).
109. Later on 7 May 2020, Mr Ayre then emailed Mr Buckman asking for a quote for the work surveyed by the Claimant and also included the Claimant's email of 6 May (at B121).
110. Mr Buckman then emailed Ms Thomas that same day in which he states that although it a fantastic report from the Claimant:

"it is not protocol to be sending information and quotes to the client. I have just been through this with Sam (the Claimant) and Tommy at his appraisal" (at B121).
111. Mr Harvey then emailed the Claimant that same day at B125 in which he states that in follow up to their telephone conversation:

"we need you to quote for this job you gave all the information for please".
112. On 7 May 2020, Mr Buckman sent an email to Claimant and to Mr Harvey at B124 in which he states:

"As previously discussed in your appraisal Tommy is you (sic) line manager and needs to be informed of all quoted works going forward. It is highly embarrassing when the client has to chase."
113. Mr Buckman subsequently sent a general email to all the mobile engineers on 11 May 2020, in which he states that there seems to be some confusion

in terms of the quoting process he expects and he then sets out the quotation process to “clear this up for all” (at B148).

114. The Claimant replied to Mr Harvey’s email on 12 May 2020 raising his concerns about what he labels the “Miscommunication or Request of Quote” raises his concerns in the subject box (at B150):

“I am writing to acknowledge that I received your email dated 11 May at 6:13. I found it disingenuous when you stated: “It seems somewhere there may have been miscommunication”. I very much want to clear things up. You called me on Thursday 7 May in which you falsely accused me that I made a quote. I explained to you that I had never made quote in reference to Mobile Team Solution in which you referred to PHE Bouygues Supervisor David Jewell’s email. Also, I explained that my email message was intended solely for the person to whom it was addressed. This means that the email was addressed to David Jewell. Considering that, he requested me to carry out some work and to report to him by email in which I did.

In reference to your email, you stated: “when quoting, you need to obtain as much information as possible while onsite, such information could be height needed for access equipment for example”. However, you demonstrated yourself that my email to David was not a quote for the purpose of quotation, but a work report. I left all issues open without exactness to avoid any false accusation that I made a quote to the client as usual. I ended the work report by stated that if you need more details, please do not hesitate to contact me.

If indeed it was miscommunication as you stated in your email and I do not accept it was, one would have expected you to explain it. In the event, the reasonable conclusion is that you tried to mislead Daniel.”

115. In essence, the Claimant denies any miscommunication and accuses Mr Harvey of trying to mislead Mr Buckman as to what happened.

116. We also take into account Mr Harvey’s email to Mr Buckman of 7 May 2020 at B126 which we set out in full below:

“As you know I’ve been struggling with Sam, he doesn’t contact me when doing quotes, he doesn’t come to me when he has issues.

I phoned him today regarding the quote for PHE Harlow, he was really difficult to talk to, I asked him multiple times to quote for the job the appropriate way, the same way we had told him in the probation meeting we had with him.

He said there were more issues and that I didn’t understand and he was going to phone the helpdesk, then he would phone me with an update.

After getting off the phone with him, I sent him a follow up email to which you was cc’d into, I’ve not had a phone call or an email response back regarding anything we have spoken about today. I’ve attached a I’ve screenshot of my call list from yesterday and today.

Yesterday morning it was difficult to speak with him to ask him to go to PHE from escp too.”

117. This appears to be a cry for help from Mr Buckman.

118. On balance of probability, we form the view that the Claimant is, if anything, not being accused of making a quote but of providing information direct to the client (but without pricing it). The Claimant relies on the telephone call on 7 May with Mr Harvey in his email of 12 May and refers to Mr Harvey’s email of 11 May at B147.

119. Nothing happens on 6 May 2020 but it is on 7 May 2020 and it appears more that the issue should be directed to Mr Harvey and not Mr Buckman

and Ms Thomas as per the less favourable treatment set out in box 17 Scott Schedule.

120. Moreover, there is nothing that indicates that the Claimant was accused of making direct contact with Mr Ayre to provide a quote either by Mr Buckman, Ms Thomas or Mr Harvey for that matter.
121. Whilst box 19 does relate to Mr Harvey we do not find that any false allegation was made against the Claimant.

Falsely accused of not responding to phone calls (box 18 of the Scott Schedule – B90-91)

122. The Claimant alleges that he was falsely accused of not responding to phone calls, even though he had received up to six phone calls on his company phone and two calls on his private phone on the day in question (which the Claimant had answered).
123. We were unclear when this allegation actually took place. Box 18 states that it was on 7 May 2020. However, we know that the issue was raised at his Probation Review on 27 April 2020 at B133. In addition, there was a telephone conversation between the Claimant and Mr Harvey on that date and Mr Harvey sent an email to Mr Buckman which in part relates to this issue (at B126) and a screen shot of his phone showing 8 missed calls to the Claimant over 6 and 7 May 2020 at B127. There are also references to the Claimant not responding to phone calls and texts in Mr Harvey's email dated 11 May to Mr Buckman (at B145) and a screenshot from WhatsApp showing messages to the Claimant on 11 May which he has read (at B146). In that email, Mr Harvey states:

"I have called sam a couple of times this morning and I text and WhatsApp him for him to call me asap so we can get the quote for PHE but he hasn't replied. He has read my message because I can see it tells me. I have attached this to the email for you to look at.

I don't know how else I can try to contact him.

This is starting to stress me out, as I have to try to chase him as well as doing my own work and quotes etc. I don't know what else I can do."

124. There are also telephone records in the additional pages at B539-541 showing a series of calls within a short succession of time on 6 May 2020 to the Claimant's phone presumably from Mr Harvey.
125. It is clear that generally the Claimant did not respond to phone calls and specifically on certain days in May 2020. It is also clear from the emails that Mr Harvey was finding this very difficult to cope with and at the time there were concerns as to the PHE quote.
126. On balance of probability, we accept the Respondent's evidence.
127. In evidence, the Claimant said he was phoned eight times in the space of three minutes and for all the Respondent knew he could have been on the toilet. Even if that were the case, it does not make the allegation of not answering the phone false.

Ignoring and not considering his complaints of race discrimination on 1 June 2020 (box 20 of Scott Schedule – B91-94)

128. This allegation is brought against Mr Galer. This date would appear to be the date on which Mr Galer conducted the initial grievance outcome telephone meeting. No complaint of race discrimination was put to Mr Galer so he could not investigate it. When however it was put to Ms Quraishi the matter was then investigated by Mr Smith, the General Manager.

Ms Thomas was dismissive of the Claimant's objections to her involvement in the meeting and his request to call Mr Ayre as a witness and shouted at him during the meeting and prevented him from setting out his case (boxes 21 and 22 of the Scott Schedule – B95)

129. This refers to the telephone outcome meeting conducted by Mr Galer with Ms Thomas in attendance on 1 June 2020. These allegations relate to Ms Thomas intervening when the Claimant attempted to speak and clarified the purpose of the meeting. This arose because the Claimant did not appear to appreciate that it was an outcome meeting and not the opportunity to discuss his case. He would have had this opportunity to do so if he appealed.

130. We have some sympathy with the Claimant because this does seem an unusual way to conduct a grievance but that is the Respondent's procedure and there was no evidence to indicate that white employees would have been treated any differently.

Mr Galer failed to investigate the Claimant's complaint of race discrimination (box 23 of the Scott Schedule – B96)

131. We have dealt with under box 20.

The Claimant was shouted at during the investigation meeting, was prevented from advancing his case, and was threatened with dismissal (box 24 of the Scott Schedule – B96)

132. Again this relates to the grievance outcome meeting held by telephone on 1 June 2020. Ms Thomas denied threatening the Claimant with dismissal. On balance of probability we prefer her evidence given that the Claimant appears to have misunderstood the nature of the meeting as we have said above and in view of our concerns as to the Claimant's general credibility.

Mr Smith failed to investigate and/or carried out a biased investigation into the Claimant's allegations that he had not been provided with tools to do his job (box 25 of the Scott Schedule – B96-97)

133. This is specifically about the provision of tools. In his written evidence, Mr Smith stated that he interviewed Mr Harvey who explained to him how tools were provided and that if the Claimant felt he needed additional tools he only needed to identify them and send details to him but never did. Mr Smith's further evidence was that he also asked the Claimant for a list of tools that he was not provided with but he never provided this to him either.

He concluded that the Claimant had not provided such a list to Mr Harvey. Further he concluded that there did not appear to be anything racially motivated in this situation.

134. We accept the Respondent's evidence in this regard.

Harassment related to race (box 26 of the Scott Schedule – B97)

135. The Claimant alleges that on 6 February 2020, he was called a "*fucking nigger*" in a telephone call with Mr Harvey in which they discussed a job which had been undertaken at City of London Academy in Shoreditch.

136. In evidence, we heard that this is alleged to have been said by Mr Harvey at the end of a telephone conversation with the Claimant on 6 February 2020. Mr Harvey flatly denied making such a remark. The telephone conversation was overheard by Leisha Byrne, the Respondent's Operations Manager, who was later interviewed as part of Mr Smith's investigation and she confirmed that Mr Harvey had not made such a comment during the call. Ms Byrne was not called as a witness at our hearing.

137. The Claimant said in evidence that the day after the event he told Bill Kesby, the Respondent's Senior Operations Manager. Mr Kesby was not called as a witness either. The Claimant further states that he told Ms Quraishi the day after the event, during the telephone conversation he had in which he told her about the incident with Mr Neal. The Claimant further states that he told Mr Buckman.

138. In oral evidence Mr Buckman stated that the first he was aware of this allegation was 1 June 2020. Ms Quraishi also stated in evidence that the Claimant did not mention this allegation until 1 June 2020.

139. Having heard evidence from Ms Quraishi we find on balance of probability that if she had been told of the allegation on 7 February as is claimed then she would have done something about it given her immediate response to the Claimant's complaint on 1 June 2020. We further find on balance of probability that the Claimant did not tell Mr Buckman of this allegation until 1 June 2020.

140. We also take into account Mr Smith's written evidence that he found it very curious that throughout the Claimant's complaints and emails about Mr Buckman and Mr Harvey after his Probation Review, he did not mention this allegation. This included the Claimant's almost two hour long phone call with Ms Thomas and Ms Quraishi on 6 May 2020 in which they were probing him for evidence of racism and he stated that nothing was actually said that would be classed as racism.

141. Further, on balance of probability we find that if, as the Claimant states, he had already told Ms Quraishi of the allegation on 7 February, then when he received her email of 11 May recording that he provided no specific evidence of racial abuse at their meeting on 6 May, one would reasonably have expected him to have raised this apparent discrepancy then.

142. Whilst we can understand that victims of racism can be reticent in raising allegations of race discrimination, as Mr Brown submitted, the Claimant had already raised allegations of racial abuse and was not reticent.
143. In addition, in his oral evidence the Claimant was unable to provide the context in which this alleged comment arose.
144. We have also taken into account our general concerns about the Claimant's credibility.
145. On balance on probability we find that this comment was not made.

Harassment related to race (box 27 of the Scott Schedule B97-98)

146. The Claimant alleges that on 7 February 2020, Tommy Harvey said to him *"black people are always complaining about racism, because I am black, because I am black, this is nothing to do with being black"*.
147. At one point the Claimant had alleged that Mr Neal made this comment rather than Mr Harvey. In evidence, Mr Harvey flatly denied making such a comment. The Claimant was unable to provide the context in which such a comment would have been made.
148. On balance of probability give these matters and our concerns about the Claimant's general credibility we find that this comment was not made.

Age discrimination (box 28 of the Scott Schedule – B98)

149. The Claimant alleges that between 31 January and 14 February 2020, Mr Harvey said to the Mobile Division that he was to blame for a delay in carrying out the work at the Street Lighting Division at Newlyn Garden (sic) because he was "very slow" and because he was "too old".
150. We have already dealt with this allegation under box 3 of the Scott Schedule.

Victimisation (boxes 29 to 31 of the Scott Schedule – B99)

151. The Claimant relies on two protected acts as set out at boxes 29 and 30 of the Scott Schedule. These are as follows:
- (a) On 29 May 2020, the Claimant wrote to Mr Buckman to complain about ongoing racial discrimination and harassment received from Mr Harvey and from Mr Buckman himself (at B193); and
 - (b) On 1 June 2020, the Claimant complained about ongoing racial discrimination by Human Resources and in particular, Emma Thomas (B224).
152. The Respondent accepts that these are protected acts for the purpose of section 27 of the Equality Act 2010.

153. The three alleged detriments are set out at box 31, at B99, that the Respondent failed to investigate the Claimant's complaints adequately or at all, did not allow him to advance his case at the investigation meeting and threatened him with dismissal if he sought to press his case.
154. The date of the detriments is said to be 6 July 2020 which appears to be the date on which Mr Smith sent his report into the Claimant's grievance (his email attaching the report is at B303 and the report itself is at B373-447 including appendices).
155. These detriments seem to be alleged to flow from the complaint of 1 June 2020 which was investigated by Mr Smith. The allegations that Ms Thomas threatened the Claimant with dismissal was made in relation to the outcome meeting on 1 June 2020 and not Mr Smith's involvement. We do not find that these detriments occurred as a matter of fact in any event.
156. But it is unclear how these detriments are connected to the email of 29 May 2020. The Claimant prefaced his concerns with the words "further to the on-going racial discrimination, racial hatred, harassment and bullying by Mr Buckman in conspiracy with Mr Harvey. However, the email complains about the proposed review meeting notified in Mr Buckman's letter of 26 May 2020 (at B186). He alleged that the proposed review meeting was deliberately organised with the objective to "enforce the prejudice" and requested that it be cancelled. It was cancelled. No second review meeting ever took place.
157. In his written submissions, Mr Brown quoted additional protected acts. We decided not to consider these. They have been added at the close of evidence in submissions. There are no exceptional circumstances as to why we should allow the Claimant to depart from the agreed list of issues and the Scott Schedule already containing 31 allegations. The Respondent is prejudiced by these late additions which were not canvassed in evidence with its witnesses.

The Claimant's resignation

158. Beyond reference within the Claimant's witness statement to his resignation and his resignation letter by way of providing details of the various incidents he relies upon above, and reference within the Respondent's witnesses witness statements to the Claimant resigning, we were not provided with any detailed evidence of the resignation and it was not relied upon or pursued in oral questioning by either party. Indeed, as we have identified above it was not pleaded as an act of discrimination.

Relevant law

159. Section 13 of the Equality Act 2010:

"(1) 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.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim."

160. Section 26 of the Equality Act 2010:

- “(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...*
- ... (3) A also harasses B if—*
- (c) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,*
 - (d) the conduct has the purpose or effect referred to in subsection (1)(b), and*
 - (e) because of B’s rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.*
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—*
- (f) the perception of B;*
 - (g) the other circumstances of the case;*
 - (h) whether it is reasonable for the conduct to have that effect.”*

161. Section 27 of the Equality Act 2010:

- “(1) A person (A) victimises another person (B) if A subjects B to a detriment because—*
- (a) B does a protected act, or*
 - (b) A believes that B has done, or may do, a protected act.*
- (2) Each of the following is a protected act—*
- (c) bringing proceedings under this Act;*
 - (d) giving evidence or information in connection with proceedings under this Act;*
 - (e) doing any other thing for the purposes of or in connection with this Act;*
 - (f) making an allegation (whether or not express) that A or another person has contravened this Act.*
- (3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith...”*

Burden of Proof

162. Under section 136 of the Equality Act 2010, if there are facts from which an Employment Tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision. We have taken account of the guidelines set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof.

163. We have also taken into account Madarassy v Nomura International plc [2007] IRLR 246, CA which found that the mere fact of a difference in protected characteristic and a difference in treatment will not be enough to shift the burden of proof. There needs to be “*something more*”. There has to be enough evidence from which a reasonable tribunal could conclude, if unexplained, that discrimination has (not could) occurred.

164. In Qureshi v (1) Victoria University of Manchester (2) Brazie [2001] ICR 863, the Employment Appeal Tribunal stated that a Tribunal should find the primary facts about all the incidents and then look at the totality of those facts, including the Respondent’s explanations, in order to decide whether to infer the acts complained of were because of the protected characteristic. To adopt a fragmented approach “would inevitably have the effect of diminishing any eloquence that the cumulative effect of the primary facts

might have” as to whether actions were because of the protected characteristic.

165. We have considered the evidence that was put before us and have reached findings of fact as indicated having looked at the matters individually and then gone back and looked at the matters in their totality, drawing inferences from the primary facts if we felt it appropriate to do so.

Time limits

166. Section 123 governs time limits under the Equality Act 2010. It states as follows:

(1) [Subject to sections 140A and 140B,] proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable...

(2) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(3) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

167. A Tribunal may allow a claim outside the time limit if it is just and equitable to do so. This is a wider and therefore more commonly granted discretion than for unfair dismissal claims. This is a process of weighing up the reasons for and against extending time and setting out the rationale. Case law has suggested that a Tribunal ought to consider the checklist under section 33 of The Limitation Act 1980, suitably modified for tribunal cases.

168. The factors to take into account (as modified) are these:

- (a) the length of, and reasons for, the worker’s delay;
- (b) the extent to which the strength of the evidence of either party might be affected by the delay;
- (c) the employer’s conduct after the cause of action arose, including his/her response to requests by the worker for information or documents to ascertain the relevant facts;
- (d) the extent to which the worker acted promptly and reasonably once s/he knew whether or not s/he had a legal case;
- (e) the steps taken by the worker to get expert advice and the nature of the advice s/he received. A mistake by the worker’s legal adviser should not be held against the worker and appears to be a valid excuse.

169. The Tribunal should consider whether the employer is prejudiced by the lateness, ie whether the employer was already aware of the allegation and so not caught by surprise, and whether any harm is done to the employer or to the chances of a fair hearing by the element of lateness.

170. Where the delay is because the worker first tried to resolve the matter through use of an internal grievance procedure, this is just one factor for the Tribunal to take into account (Apelogun-Gabriels v Lambeth LBC and

another [2002] IRLR 116, CA).

171. If the delay was because the worker tried to pursue the matter in correspondence before rushing to Tribunal, this should also be considered (Osaje v Camden LBC UKEAT/317/96).

172. Where a claim is outside the time limit because a material fact emerges much later a tribunal should consider whether it was reasonable of the worker not to realise s/he had a prima facie case until this happened (Clarke v Hampshire Electro-Plating Co Ltd [1991] IRLR 490, EAT)

Submissions

173. We received written submissions which both representatives spoke to on the morning of 31 May 2022. We do not propose to recite those submissions in our Judgment but have fully taken them into account in reaching our conclusions.

Conclusions

Time limits

174. Paragraph 1.2 of the agreed list of issues at B69 sets out the issues in relation to time by reference to the requirements under section 123 of the Equality Act 2010.

175. Given the date of presentation of the claim and the dates of Early Conciliation the earliest act that could be in time would have to have occurred on 10 June 2020.

176. Neither party addressed the issue of time limits adequately. Mr Brown briefly submitted that this was a case of discriminatory conduct extending over a period of time the last act of which was in time. Mr Mathur did not address the issue.

177. We have taken the view that we will not consider the time limit issues unless the need arises from our conclusions in respect of the allegations of unlawful conduct.

Direct race discrimination

178. Under section 13 of the Equality Act 2010, it is unlawful to treat a worker less favourably because of a protected characteristic, in this case disability, by reference to an actual or hypothetical comparator in the same or similar circumstances.

179. Unlike all other protected characteristics, there is a potential defence to direct age discrimination. Employers can justify direct discrimination if they can prove the less favourable treatment is a proportionate means of achieving a legitimate aim.

180. Having considered each alleged act individually and then standing back and taking an overview we simply do not find that the Claimant has shown that there are primary facts from which unlawful conduct could have occurred.
181. We have been asked to draw a series of general inferences from the primary facts but it is simply inappropriate for us to do so. At its highest, the Claimant has done no more than point to what he views as a difference in treatment and a difference of protected characteristic. We do not find that this is made out. But in any event he has not shown us that something more exists linking the two.
182. He provided no evidence beyond assertion in support of a difference in treatment when compared with his actual comparators or with hypothetical comparators.
183. We did not accept that the race specific remarks were made.

Harassment related to race

184. Harassment is defined under section 26 of the Equality Act 2010. A person “A” harasses another “B”, if “A” engages in unwanted conduct related to a protected characteristic, which has the purpose or effect of violating the dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. In deciding whether the unwanted conduct has such purpose or effect, the Tribunal must consider the perception of B, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.
185. For the reasons indicated above we find on the balance of probability that the acts of harassment at boxes 26 and 27 of the Scott Schedule did not take place.
186. We did not accept that the alleged racist remark was made.

Age discrimination – direct and harassment

187. We would refer to the definitions of direct discrimination and harassment set out above.
188. For the reasons indicated above we find on balance of probability that the alleged remarks that the Claimant was too old were not made or that there was any inferred link to age from the Respondent’s concerns that the Claimant worked too slow.

Victimisation

189. It is unlawful to victimise a worker because he has done a “protected act”. In other words, a worker must not be punished because he has complained about discrimination in one or other of the ways identified under section 27 of the Equality Act 2010.

190. Whilst the respondent accepts the protected acts as pleaded we do not find that the Claimant was subjected to the detriments that he has pleaded and has not shown any causal link between the two.

Unauthorised deductions from wages

191. Under section 13 of the Employment Rights Act 1996 a worker is entitled to receive his wages as properly payable without any unauthorised deductions being made. Authorised deductions are broadly those agreed in advance and for income tax and national insurance.

192. Paragraph 3 of the agreed list of issues sets out the matters to be determined, at B71.

193. In evidence we heard the following:

(a) The Claimant was required to work at a job in Bristol for one week and stayed there for 5 nights. He alleges that he is entitled to payment of expenses of £30 per night which is a total of £150.

(b) The Respondent does not dispute that employees are entitled to reimburse of expenses on production of receipts but has no record that the Claimant ever made a claim or provided any receipts.

(c) The Claimant stated that he had provided receipts but has not produced any documentary evidence in support of this.

194. The burden of proof is on the Claimant to show what is properly payable to him.

195. Expenses are excluded from the definition of wages within section 27 of the Employment Rights Act 1996 and so this complaint cannot succeed.

196. In any event the evidence does not satisfy the burden of proof and we cannot find that the amount was properly payable to the Claimant as required under section 13.

197. Whilst we could consider this as a damages for breach of contract complaint under the Employment Tribunals Extension of Jurisdiction (England & Wales) Order 1994 had it been pleaded as such, the Claimant faces the same difficulty in the context of satisfying us that there is a breach of contract from which an entitlement to damages arises.

198. Whilst the Claimant originally sought unpaid holiday pay in his Particulars of Claim at B32 we heard no evidence on this matter and it was not pursued in submissions.

Judgment

199. In conclusion, we therefore find that all of the Claimant's complaints are unfounded and as a result his claim is dismissed.

The Claimant's Credibility

200. We have made reference to the Claimant's general credibility which has troubled us and we have taken into account when having to determine any contentious matter, not least the allegations of racial remarks. We felt it best to set these out in one place.
201. We found the Claimant to be vague and evasive in giving evidence. He did not listen to questions properly, despite my repeated reminders to focus on what was being said and to structure his answers accordingly. His allegations shifted over time and were not consistent or clearly set out within the pleadings and contemporaneous documents. It quickly became apparent that he was quick to reach unreasonable assumptions of the motivation behind words and actions.
202. Whilst this case involved numerous allegations including extremely serious allegations of racial abuse, the Claimant's evidence was not compelling and at times was extremely confused and lacked context.
203. We have found that he did not raise the most extreme of the alleged remarks at the time they were alleged to have been made but he did raise issues of racial abuse more generally.
204. Mr Brown invited us to find that victims of racial discrimination were often reticent to raise such matters for fear of victimisation and losing their jobs. We accept that. However, we did not see that here. The Claimant did not appear shy or lacking in confidence and raised a plethora of emails detailing accusations of discrimination of a less serious nature and yet not the most serious of his accusations at the time that they occurred.

Preparation and presentation of the case

205. We make the following comments because our task was made all the more difficult because of these matters.
206. We did feel that there was a degree of disorganisation and lacking in the way that Mr Brown presented the Claimant's case as we have indicated above.
207. There was also a lack of attention to detail in drafting the matters set out in the Scott Schedule:
- (a) the alleged racist comment made on 6 February 2020 is raised as an act of harassment but not also as a potential act of direct race discrimination;
 - (b) the quote in box 7 is attributed to Mr Neal whereas in contradiction the Claimant also attributed this to Mr Harvey;
 - (c) box 28 refers to "Newlyn Gardens" and not Welwyn Garden City;

- (d) box 14 states that the probation review took place on 27 March and not 27 April when it in fact took place;
- (e) box 16 refers to the date of 10 May as being when the incident took place and in fact it was on 6 May;
- (f) boxes 21 and 24 refer to 1 July when it was 1 June; and
- (g) box 31 does not indicate which of the alleged detriments applied to which of the protected acts.

208. In addition, dismissal was not pleaded as an act of discrimination and no attempt was made to seek leave to amend when we pointed out the impact this had on our ability to award compensation in the event that the complaints succeeded.

209. Further, the complaint of unlawful deductions in respect of wages for unpaid expenses was (notwithstanding the evidential problems) never going to succeed in law and really should have been pleaded as a damages for breach of contract complaint. The holiday pay complaint was effectively abandoned.

210. Neither party addressed the issue of time limits either adequately, as in the case of Mr Brown or at all, as in the case of Mr Mathur.

Employment Judge Tsamados
Date 21 October 2022

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