Case Number: 2200386/2022

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS: **MR P MADELIN**
MR P DE CHAUMONT-RAMBERT

BETWEEN:

Mr F Emueze

Claimant

AND

GSL Dardan Ltd trading as Dardan Security

Respondent

ON: **26, 27 and 28 October and 7 November 2022**
(In Chambers: 7 November 2021)
Appearances:
For the Claimant: **Mr L Ogilvy, claimant's friend**
For the Respondent: **Mr T Sheppard, counsel**

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that:

1. The claim is out of time and the tribunal did not have jurisdiction to hear it.
2. Even if the tribunal had jurisdiction, the claim would have failed in any event.

REASONS

1. By a claim form presented on 17 January 2022 the claimant Mr Felix Emueze brings a claim of direct race discrimination.

2. The claimant has worked for the respondent as a security officer since 8 December 2017 and his employment is continuing. The respondent is a security company employing around 420-430 people, with its Head Office in Cambridge. The claimant worked in London.

The claimant's application for a postponement

3. On 20 October 2022 the claimant's representative applied for a postponement on grounds of a family bereavement affecting himself. The respondent opposed the application for a number of reasons set out in an email of 20 October 2022.

4. The application was refused by Regional Judge Freer for the reasons set out in the respondent's email of 20 October 2022.

5. The claimant further pursued the application and this was again refused by Regional Judge Freer.

This remote hearing

6. The hearing was a remote public hearing, conducted using the cloud video platform (CVP) under Rule 46. The parties agreed to the hearing being conducted in this way.

7. In accordance with Rule 46, the tribunal ensured that members of the public could attended and observe the hearing. This was done via a notice published on Courtserve.net. A member of the public joined after the reading break on day 1.

8. The parties and members of the public were able to hear what the tribunal heard and see the witnesses as seen by the tribunal. From a technical perspective, there were no difficulties of any substance.

9. No requests were made by any members of the public to inspect any witness statements or for any other written materials before the tribunal.

10. The participants were told that was an offence to record the proceedings.

11. The tribunal ensured that each of the witnesses, who were all in different locations, had access to the relevant written materials which were unmarked. The claimant and his representative were in the same room so they both appeared on the same camera whilst the claimant gave his evidence. The respondent's witness Ms Golovina had two colleagues with her until she gave her evidence. She turned her device around to show her colleagues leaving the room and confirmed that she was on her own when she gave her evidence. Counsel for the respondent was satisfied with the arrangements made for the claimant and the claimant's representative was satisfied with the arrangements made for Ms Golovina's evidence.

12. We were satisfied that none of the witnesses was being coached or assisted by any unseen third party while giving their evidence.

The issues

13. The issues were set out in a list of issues following a preliminary hearing before Employment Judge Klimov on 13 April 2022 and were confirmed with the parties at the outset of this hearing. The issues were clarified with the parties at the start of the hearing and before the evidence commenced.

14. The claimant complained that "Jurisdiction" namely time limits had been added after the preliminary hearing. We explained that the matter of time limits went to the tribunal's jurisdiction and we were bound to consider it, whether or not it was in the list of issues. The List as it appeared, only included the just and equitable extension so we added the issue of continuing act.

15. The claimant also wished to have one of the issues, which was in two parts, splitting into two and the respondent did not object.

Direct race discrimination

16. The claim was for direct race discrimination under section 13 Equality Act 2010. At the preliminary hearing on 13 April 2022 the claimant said he relied upon his colour, black, and his ethnic origins of being of African descent (Case Summary paragraph 2).

17. Was the claimant treated less favourably, because of his race, by the respondent/its employees or agents, than the respondent treats or would treat others? The claimant relies on the following alleged treatment:

    a. Requiring him to attend a site alone on 18 February 2021 and check calls being introduced on the Telme App which other colleagues did not have to complete.
    b. Site Manager, Tracy- Ann Samms, requiring him to complete hourly check calls and requiring him to report all absences to 24/7 control room.
    c. Around 12 March 2021, the respondent's client's Site Facilities Manager, Ruan Davel, requesting the claimant to investigate an incident at the Frestonian Building.
    d. In May 2021, the claimant's overtime shifts being removed by Tracy-Ann Samms and Ms Samms then advising him that David Leonard was responsible for cancelling these shifts.
    e. Failure to conduct an interview either with Tracy-Ann Samms or Dion Allen.
    f. Failure to interview or escalate the matter to Savills. This issue was withdrawn during submissions on day 3.
    g. The claimant not receiving a condolences letter from David Leonard on the passing of his father and not receiving 5 days paid compassionate leave, like one of his colleagues. This issue was withdrawn by the claimant at the end of his evidence on day 1.

Time limits

18. Have the complaints for race discrimination been submitted in time? Did the acts relied upon amount to conduct extending over a period to be treated as being done at the end of that period? If the complaints have not been submitted in time, would it be just and equitable to extend time?

Remedy

19. Is the claimant is entitled to any relief as sought or at all?

    a. Should the claimant be awarded compensation for injury to feelings and if so, within which of the Vento Bands?

    b. Should any recommendations be made? If so, what?

Witnesses and documents

20. There was an electronic bundle of 264 pages.

21. Documents were introduced on day 1 by the claimant as 6 "Exhibits" to his witness statement. The respondent did not object to the introduction of those documents at such a late stage.

22. For the claimant the tribunal heard from 3 witnesses: (i) the claimant, (ii) Mr Aminadokiari Eferebo, a former colleague of the claimant, who no longer works for the respondent and (iii) Mr Emmanuel Ebunam, a former colleague of the claimant who has since taken voluntary redundancy.

23. On day 1 the claimant introduced a new witness statement from his former line manager Ms Tracy-Ann Samms. We were told that Ms Samms had only come forward the previous night. The respondent had time to read this statement on the morning of day 1 and was prepared to continue with the introduction of this evidence, despite the extremely late presentation. Ultimately the claimant did not call Ms Samms so we could attach very limited weight to her statement which was unsworn and untested in cross-examination.

24. It became clear towards the end of day 1 that the claimant's witnesses did not have access to the documents so we said that arrangements should be made overnight for the documents to be provided to them and this took place.

25. For the respondent the tribunal heard from 3 witnesses: (i) Ms Rita Golovina, Head of HR and the grievance officer, (ii) Mr David Leonard who was the claimant's line manager from January 2022 and who left their employment on 19 August 2022 and (iii) Mr Andrew Buxton, a Director and the grievance appeal officer.

26. We had written submissions from both sides to which they spoke. All

submissions together with any authorities referred to were fully considered, whether or not expressly referred to below.

Findings of fact

27. The claimant works for the respondent as a security guard and his employment is continuing. His employment commenced on 8 December 2017. He TUPE-transferred to the respondent in July 2020.

28. The claimant worked at a site called The Yellow Building on a complex called Notting Dale Campus in West London. There were four other security officers working at the Yellow Building, two of whom we heard from in evidence, Mr Eferebo and Mr Ebunam. Their evidence was that they were "*like a family*"; they got on well together. Like the claimant, Mr Eferebo and Mr Ebunam are both of black African heritage.

29. The Yellow Building was part of the respondent's client's site that included other buildings; the White Building, the George Building and the Frestonian Building. It was a plaza complex.

30. The claimant agreed in evidence and we find, that prior to an incident which took place on 18 February 2021 he had a good working relationship with his managers and he "*did not have an issue with anyone*". It was the incident on 18 February 2021 that led to the change.

18 February 2021

The introduction of check calls

31. Issue a: The claimant's case was that he was required to attend site alone on 18 February 2021 and he was required to make check calls on the respondent's Telme App which he said other colleagues did not have to do.

32. On 18 February 2021 the claimant commenced his night shift at 7pm and was working overnight until 7am on 19 February 2021. The claimant was due to be working the shift with his colleague Mr Eferebo, who for personal reasons was not able to attend for work that night. That meant that the claimant was due to work alone on that shift. Mr Eferebo's evidence (statement paragraph 8) was that he had personal family reasons for not attending for that shift.

33. When the claimant arrived and found that Mr Eferebo was not at work, he tried to text Mr Leonard, who was his line manager's manager. Both the claimant and Mr Eferebo tried to contact managers but neither of them contacted the Control Room direct. There was a requirement to contact Control and this was set out in the Assignment Instructions for the site (page 74) which said: "*If anyone is running late or hasn't turned up for duty, then the Dardan Security Control room must be contacted".*

34. We find that the reason that the claimant had to work alone on that shift

was because his colleague had not attended for work. It was not a requirement as such that he work alone, but a consequence of his colleague being unavailable for work. The fact that the claimant had to work alone on that shift was not because of his race, it was because his colleague was unable to attend.

35. It is not in dispute that security officers had to sign in and out at the beginning and end of their shifts. They report to the Control Room which is based at the respondent's Headquarters in Cambridge. It operates 24 hours a day and 365 days of the year.

36. Both Mr Leonard and Ms Golovina, the Head of HR, gave evidence that the requirement for call checks was introduced at the Yellow Building from 19 February 2021 for those working on nights or weekends. The claimant's night shift spanned 18/19 February. It was a system by which the security officer had to check in with Control every hour. It was introduced for night shifts and weekend shifts when the respondent considered that the security officer was potentially most vulnerable on site, rather than during the working week and the working day. The reason for the procedure was the safety of the security guard so that the Control team would know that the officer was on site and safe and if they did not hear from the officer they could take action.

37. The claimant's colleague Mr Salim, a member of cover staff, also worked a shift on 19 February 2021. We were told he is of Indian origin. The respondent said that he was required to check in every hour and he did so. We saw at page 116 a record of Mr Salim's calls, taken from the respondent's People Hours record, showing that he phoned in every hour of his shift. The claimant said that the reason Mr Salim had to call in was because he was lone working.

38. Mr Eferebo worked a night shift on 19 February 2021 into 20 February 2021. It appeared from the record at page 119 that he made the check calls roughly every hour, with a slight gap towards the end of the shift. In evidence Mr Eferebo said he was not sure whether he made the calls or not. He did not deny making the calls, he said he was not sure whether he did.

39. Mr Ebunam was on holiday when the call check system started and could not remember when he returned, so he could not assist with the manner of its introduction. He said by the time he returned, it had already been introduced.

40. Mr Leonard denied that the claimant was the only member of staff required to use the Telme App to make check calls in as he said this was rolled out for all security staff on night shifts and weekend shifts. The staff on those shifts are of different racial groups and it is a diverse workforce.

41. We saw an email from Mr Leonard sent on Tuesday 23 February 2021 at 14:08 (page 121) sent to the security staff at the Yellow Building and the

George Building. It was sent to generic email addresses not to individually named officers. It was headed *"Safety and Well Being: Hourly Check Calls – ACTION REQUIRED"* and said as follows:

> *"In the last 2 weeks we have had a significant amount of change, not least because of the furlough of a number of our colleagues at the George and White buildings.*
>
> *This change has created a situation where the risk dynamic on site, specifically at night and over the weekends has altered. Coupled with a few of thankfully minor incidents in the last week have highlighted the need to take steps to ensure the continued safety and well-being of those working during these quieter periods.*
>
> *From now on along with your normal book on/off process via the TellMe App, you will be required to complete an hourly call check. If the app is unavailable, this will need to be completed manually by calling the control room. I have requested that this be in place from 19:00 to 07:00 (Monday to Sunday) and 07:00 to 19:00 (Saturday and Sunday).*
>
> *I realise that this may otherwise appear to be an inconvenience, but it is designed to support your safety. Over the course of the next few weeks I will be reviewing this, and will solicit feedback from yourselves in due course."*

42. On the face of the document alone, it appeared that check calls were not introduced until 23 February 2021.

43. Mr Buxton who is a Director of the respondent company, said he would have preferred it if Mr Leonard had sent the email of 23 February 2021 prior to the introduction of the check calls, but it was introduced over the weekend and they do not require their managers to work 24/7. Outside normal working hours and at weekends, management is handed over to the Control Room in Cambridge. Mr Buxton said that the system was introduced over the weekend.

44. It was put to Mr Buxton that this was poor management. Mr Buxton denied this but said that the quality of management outside the normal working week was not to the same standard as that of their managers who work during the normal working week and that sometimes the quality of the communications was not as good.

45. Mr Buxton dealt with the issue in the claimant's grievance appeal outcome in a letter dated 20 December 2021, at page 242, saying:

> *"During our meeting you accepted that the introduction of check calls for lone workers was to ensure safety. Having reviewed the data I agree that rolling out of this safety measure was haphazard and not centrally managed, however I did not observe any evidence of discrimination. As part of our learning from this event, in future, all policy changes will be*

centrally managed to ensure clear communication for staff affected by the introduction of new policies."

46. We saw the People Records the check calls. The first record we saw was for Friday night 19 February 2021 into Saturday 20 February (page 116) which was the weekend. We saw that both the claimant and Mr Salim carried out check calls on that shift. We also saw that officer Ms Abraha carried out check calls on 19 February 2021. We find that the claimant was not singled out. He had been working alone on the night shift starting on 18 February 2021 so for his safety, he was asked to carry out the check calls starting on 18th. On our finding this was not because of his race, but for his safety.

47. Mr Leonard's evidence was that he told the Control Room prior to his email of 23 February, to introduce the check calls. The Telme App on the officers' phones was proactive so when they were due to make a check calls, the Telme App prompted them to do this. Mr Leonard asked Control to introduce the system which they activated on the 19 February and there was a time delay before his email of 23 February was sent. The introduction on the 19 February was as a result of Mr Leonard's instruction to the Control Room. It was introduced for the shift and not the individual. It was also accepted in the appeal outcome letter that it was introduced in a haphazard manner. The respondent has since appointed a Control Room Manager.

48. We find that the system was introduced across the board for all the security officers. On our finding it included Mr Eferebo, as he did not deny this, he simply did not remember. It included Mr Salim who was of a different racial group and Ms Abraha on 19 February. Our finding is that the claimant was not singled out and the system was introduced across the security staff and was not because of the claimant's race. The change on 19 February was to include the need to make check calls when not working alone because of the reduced staffing arrangements on the campus.

49. We had no difficulty with the fact that we did not hear from any witness from the Control Room. We heard from Mr Leonard who gave the instruction and from a Director of the company, Mr Buxton, both of whom we found to be credible witnesses.

50. The claimant did not show us any facts from which we could conclude in the absence of any other explanation, that there was race discrimination in the way in which the check call system was applied, either to him or anyone else. The burden of proof did not pass to the respondent.

51. Issue b: The claimant's case was that the site manager, Ms Samms, required him to complete hourly check calls and required him to report all absences to the 24/7 Control Room. In her witness statement, Ms Samms denied that she required the claimant to complete hourly checks and she said that Mr Leonard, gave these instructions. We did not hear from Ms

Samms so her evidence was not tested. The claimant did not allege any discrimination on the part of Ms Samms.

52. In relation to reporting absences to the Control Room, as we have found above, there was a requirement set out in the Assignment Instructions (page 74) to contact Control if anyone was running late or had not turned up for duty.

53. Our finding above is that the instructions for the check calls came from Mr Leonard and not from Ms Samms. We repeat our findings of fact on issue (a) above as to the reasons for the introduction of the check calls and we find that this was not because of race.

54. The reporting of absences was a requirement set out in the Assignment Instructions, as quoted above. It was put to the claimant in evidence that this was applied to all security staff and he answered "*yes".* We find it would be sensible and practical for there to be a need to report the fact that another officer had not turned up for work, for safety reasons. We could not find any facts from which we could conclude in the absence of any other explanation, that there was race discrimination in the way in which the claimant was asked to report absences to the Control Room. The burden of proof did not pass to the respondent.

55. Issue c: The claimant's case was that on 12 March 2021, the respondent's client's Site Facilities Manager, Mr Ruan Davel, asked him investigate an incident at The Frestonian Building. A private tenant in the building had reported a possible intruder and Mr Davel asked the claimant to investigate. The claimant accepts that Mr Davel was not an employee of the respondent, he was employed by their client, the managing agent of the site, Savills.

56. In March 2021 the pandemic was still very much ongoing. As a result of the pandemic, the respondent furloughed a number of staff and did not staff the George or White buildings on the complex. After furlough they brought staff back to those buildings during daytime hours only.

57. Due to lower staffing levels the claimant and his colleagues were told not to go to the Frestonian Building. The claimant accepted that the request to go there came from Mr Davel and not from anyone at the respondent. As a result of the instructions from the respondent, his employer, the claimant did not want to go to the Frestonian Building, although he did so. as we saw from his email on page 160.

58. Mr Leonard agreed with the claimant that his response was correct. We saw Mr Leonard's email of 16 March 2021 (page 160) in which he said that they were "*on the [same] page here. Well done and thank you all the same*". Mr Leonard considered that this was a police matter and not a matter for the claimant to deal with.

59. We make our finding below in our Conclusions as to liability on this issue.

60. Issue d: In May 2021, the claimant's overtime shifts being removed by Tracy-Ann Samms and Ms Samms then advising him that David Leonard was responsible for cancelling these shifts. In her witness statement, Ms Samms said she was not responsible for cancelling the claimant's shifts, but this was untested in evidence.

61. In the list of issues that arose from the Case Management Hearing on 13 April 2022, the claimant put his case as to the removal of his overtime shifts, against Ms Samms and that she passed the blame to Mr Leonard. During this hearing, he no longer made this case against Ms Samms, against whom he alleged no race discrimination. By the date of this hearing the claimant put his case solely against Mr Leonard, that it was he who removed the shifts.

62. The process for compiling the rota was explained in evidence by Mr Eferebo, Mr Leonard and Mr Buxton from which we make the following findings. The officers who worked at the Yellow Building would put the rota together one or two months ahead, taking account of the shifts they wanted, holiday and overtime and they would submit it to Ms Samms. If there were queries, Ms Samms would raise it with them. She then submitted it to Control. If no-one came back to them, Mr Eferebo said they considered that it had been approved.

63. The respondent's position was that it was Ms Samms who had dealt with the rotas and that Mr Leonard did not have access to the system. The claimant did not accept this. He said that someone in Control had told him it was Mr Leonard who was responsible. The claimant did not give the name of the person who told him this and we did not have evidence from anyone in the Control room.

64. In her witness statement, to which we could attach little evidential weight as it was unsworn and untested in evidence, Ms Samms said: "*wherever my name has been mentioned for taking decisions inimical to my former staff, I confirm that I did not take such decisions".* In that statement she denied personal responsibility for the removal of the overtime shifts, but she did not say in her statement that Mr Leonard did it or that she told the claimant that Mr Leonard did it.

65. The claimant did not raise this issue at the time, for example by saying "*where is my overtime on the rota?".* His former colleague Mr Eferebo said that they could raise such a query if the rota did not show what they were expecting. Mr Ebunam confirmed this and said if the overtime did not show up, the officer can make a call to Control and say "*why is my overtime not showing any more?"* and they would take it to Ms Samms or Mr Leonard. The claimant raised it for the first time in his grievance on 15 September 2021 (page 184), during a disciplinary process, four months after he found the overtime missing from the rota.

66. Ms Golovina's evidence was that they welcome staff coming forward with

offers of overtime as it helps them as a business to have an experienced officer on site rather than relying on cover staff. They always prefer to rely on the core team rather than cover.

67. Mr Leonard said he was not in the habit of removing staff overtime shifts and he could think of no reason why he would do so. He said he did not handle the staffing schedule, as this was left to Ms Samms and the team. He was asked about this by Ms Golovina in the grievance investigation and denied that he had been responsible for removing the overtime. Mr Buxton's evidence was that Mr Leonard had no access to the system to change the overtime shifts as it was done by the resourcing team in Cambridge.

68. We could find no evidence to support the claimant's contention that Mr Leonard removed his overtime in May 2021. We accepted Mr Leonard's evidence that he did not have access to rostering system and this evidence was supported by Mr Buxton. We also find that Mr Leonard left the scheduling to Ms Samms and the team. The evidence of both the claimant's witnesses was that they sorted the rotas out together and if there was an error or an omission they would raise it straight away with Control. We find on a balance of probabilities that security officers are much more likely to raise missing overtime at the time, when the work is due to be done, rather than four months later in a grievance. There was no contemporaneous email from the claimant complaining about the removal of his overtime.

69. This allegation fails on its facts.

70. Issue e: This was put as the failure to conduct an investigatory interview either with Ms Samms or Mr Dion Allen.

71. The claimant's grievance was dealt with by the Head of HR, Ms Rita Golovina. There was no dispute that as the grievance officer Ms Golovina did not carry out investigatory interviews with Ms Samms or Mr Allen, a day officer at the Yellow Building.

72. The claimant's evidence was that he thought that Ms Golovina was "*less than thorough"* and it was for the tribunal to decide whether this was less favourable treatment because of his race. In written submissions his representative said that it was "*far from thorough".*

73. The claimant's position was that we could find that poor management, as he put it, was evidence of race discrimination. We considered the reason why Ms Golovina did not interview Ms Samms or Mr Allen. It was not put to Ms Golovina that the reason she did not interview them was because of the claimant's race. The claimant's position was that it was for the tribunal to decide whether the failure to interview them was less favourable treatment because of his race. We could not jump to this conclusion and the claimant presented us with no facts from which we could conclude in the absence of any other explanation, that the failure to interview them

was because of his race. We had no evidence or submission as to how a hypothetical comparator would have been treated. The claimant did not pass the initial burden of proof and we find no discrimination on the failure to interview these two employees.

74. Ms Golovina's grievance outcome letter dated 6 October 2021 was at page 200 and the claimant agreed in evidence and we find that he received it on 6 October 2021. The claimant lodged his appeal on 14 October 2021 with detailed Grounds of Appeal starting at page 204.

75. On 21 October 2021 the claimant was informed by an HR Adviser (page 209) that the respondent would not be proceeding with the disciplinary matter and no further action would be taken on it.

76. It was also not in dispute that Ms Samms and Mr Allen were interviewed by Mr Buxton in his handling of the grievance appeal and we find that the failure to interview them at the first stage of the grievance was corrected on appeal. The interview with Ms Samms was on 6 December 2021 and with Mr Allen on 10 December 2021 (interview notes at pages 234 and 239).

77. Issue f: This issue was withdrawn during submissions on day 3.

78. Issue g: This issue was withdrawn on day 1 at the end of the claimant's evidence.

The time point

79. The claimant relied upon the decision on the grievance appeal which he submits was on or about 10 December 2021 with the outcome being sent on 20 December 2021. It was submitted for the claimant that "*the last act of discrimination was the shambolic manner of the appeal process".*

80. Early Conciliation commenced and ended on 11 January 2022 (Certificate, bundle page 4). The claim was presented on 17 January 2022.

81. The claimant did not give any evidence as to why he did not present his claim any earlier. The claimant's representative was given an opportunity to ask further question in chief of the claimant to deal with this issue if he wished. In the absence of any evidence on the point, we were unable to make any finding that it was just and equitable to extend time. Our finding is that it is not just and equitable to extend time.

82. We deal in our conclusions below as to when the last act of discrimination occurred.

The relevant law

Direct race discrimination – section 13 Equality Act

83. Direct discrimination is defined in section 13 of the Equality Act 2010 which provides that 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.

84. Section 23 of the Act provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

85. Bad treatment per se is not discriminatory; what needs to be shown is worse treatment than that given to a comparator - ***Bahl v Law Society 2004 IRLR 799 (CA).***

The burden of proof

86. Section 136 of the Equality Act deals with the burden of proof and provides that 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. This does not apply if A goes on to show that it did not it did not contravene the provision, namely where it gives a non discriminatory explanation for the treatment.

87. One of the leading authorities on the burden of proof in discrimination cases is ***Igen v Wong 2005 IRLR 258***. That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved, the burden passes to the respondent to prove that it did not discriminate.

88. Lord Nicholls in ***Shamoon v Chief Constable of the RUC 2003 IRLR 285*** said that sometimes the less favourable treatment issues cannot be resolved without at the same time deciding the reason-why issue. He suggested that Tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the claimant was treated as he was, and postponing the less favourable treatment question until after they have decided why the treatment was afforded.

89. In ***Madarassy v Nomura International plc 2007 IRLR 246*** it was held that the burden does not shift to the respondent simply on the claimant establishing a different in status or a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase "*could conclude*" means that "*a reasonable tribunal could properly conclude from all the evidence before it that there may have been discrimination*".

90. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court endorsed the approach of the Court of Appeal in ***Igen Ltd v Wong*** and ***Madarassy v Nomura International plc***. The judgment of Lord Hope in ***Hewage*** shows that it is important not to make too much of the role of the burden of proof provisions. They require careful attention

where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other

91. The courts have given guidance on the drawing of inferences in discrimination cases. The Court of Appeal in ***Igen v Wong*** approved the principles set out by the EAT in ***Barton v Investec Securities Ltd 2003 IRLR 332*** and that approach was further endorsed by the Supreme Court in ***Hewage*****.** The guidance includes the principle that it is important to bear in mind in deciding whether the claimant has proved facts necessary to establish a prima facie case of discrimination, that it is unusual to find direct evidence of discrimination.

92. More recently in ***Efobi v Royal Mail Group Ltd 2021 IRLR 811*** the Supreme Court confirmed the approach in ***Igen v Wong*** and ***Madarassy***.

93. The clamant relied on the decision of the Court of Appeal in ***Wisniewski (A Minor) v Central Manchester Health Authority 1998 EWCA Civ 596*** in support of the proposition that in the absence of a witness a judge is entitled to draw an inference adverse to that party and to find that matter proved. This was a medical negligence case in which the CA held that the first instance Judge was entitle to treat a doctor's absence as a witness, in the face of a charge that his negligence had been causative of the catastrophe, as strengthening the case against him on that issue.

94. The claimant also relied on the decision of the EAT in ***X v Y 2012/EAT/0322*** which held at paragraph 60 that poor management itself might be a symptom of discriminatory conduct and the tribunal needed stand back and look at matters cumulatively and take a holistic view of the facts.

Time limits

95. Section 123 of the Equality Act 2010 provides that:

> *(1) ……..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.*
>
> *(3) 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.

96. The just and equitable test is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. It is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit and the tribunal has a wide discretion. There is no presumption that the Tribunal should exercise that discretion in favour of the claimant - ***Bexley Community Centre (t/a Leisure Link) v Robertson 2003 IRLR 434***.

97. When exercising discretion under section 123(1)(b) EqA 2010, Tribunals should assess all relevant factors in a case which it considers relevant to whether it is just and equitable to extend time, including in particular the length of and reasons for, the delay – see ***Adedeji v University Hospitals Birmingham NHS Foundation Trust 2021 EWCA Civ 23*** (judgment paragraph 37).

98. The leading case on whether an act of discrimination it to be treated as extending over a period is the decision of the Court of Appeal in ***Hendricks v Metropolitan Police Commissioner 2003 IRLR 96.*** This makes it clear that the focus of inquiry must be not on whether there is something which can be characterised as a policy, rule, scheme, regime or practice, but rather on whether there was an ongoing situation or continuing state of affairs in which the group discriminated against (including the claimant) was treated less favourably. The CA said: "*The question is whether that is "an act extending over a period" as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed*" (paragraph 52).

99. The burden is on the claimant to prove, either by direct evidence or inference, that the alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of an act extending over a period.

Conclusions

<u>The time point</u>

100. We had to consider firstly what was the last act of alleged discrimination relied upon and secondly, if that was within time, were any earlier acts of proven discrimination part of a continuing act culminating in that final act of discrimination.

101. Issues (f) and (g) were withdrawn so did not fall within our consideration. Of the remaining issues, (a) to (e), it was not in dispute that the last act relied upon was in issue (e), the failure to carry out an investigatory interview with Ms Samms and Mr Allen.

102. As we have found above, there is no dispute that Ms Golovina did not

interview these two members of staff and that Mr Buxton as the appeal officer, did carry out interviews with them.

103. The respondent's submission was that the failure to carry out those interviews crystallised with Ms Golovina's grievance outcome which was on 6 October 2021. This was when she gave her outcome and her part of the process was complete.

104. The claimant submitted that this was a continuing act of discrimination until the appeal process when these two employees were interviewed by Mr Buxton. The interviews were on 6 and 10 December 2021 and if we found that the claimant's submission was correct, then this would bring that final act within time.

105. We considered section 123(3)(b) Equality Act which says that the failure to do something is to be treated as occurring when the person in question decided on it. Ms Golovina decided not to interview Ms Samms and Mr Allen. The latest point at which that decision could have been made was 6 October 2021 when she sent her outcome letter and her part in the process concluded.

106. When turning to Mr Buxton, he can not be taken as having made a decision not to interview Ms Samms or Mr Allen. He made the decision to interview them.

107. We accept the respondent's submission that the failure to interview Ms Samms and Mr Allen crystallised on 6 October 2021 with Ms Golovina's grievance outcome. Once the appeal process began, that decision changed and Mr Buxton carried out those interviews.

108. We find that the last act of discrimination relied upon by the claimant crystallised on 6 October 2021. This means that the primary time limit expired on 5 January 2022. Early Conciliation was not commenced until 11 January 2022 when the claim was already out of time, so it provided no assistance with extending time. The claim was presented on 17 January 2022 and was out of time.

109. We considered whether it was just and equitable to extend time. The claimant's representative was given an opportunity to ask further questions in chief of the claimant, in the event that he had not fully understood that he needed to deal with this.

110. We had no evidence or submissions from the claimant as to why it was just and equitable to extend time. The burden lies on the claimant to satisfy the tribunal of this and he did not do so. We were not in a position to make any finding that it was just and equitable to extend time and as such we find that the last act of discrimination relied upon was on 6 October 2021. The entire claim is out of time and we had no jurisdiction to hear it.

111. Had we been required to make a finding on the continuing act point, we would have found that issues (a) to (d) did not form a continuing act with issue (e) as the issue about the failure to interview Ms Samms and Mr Allen did not form a continuing act with the operational issues (a) to (d) and were conducted by a member of HR and not line management.

112. In the event that we were wrong about this, we went on to make our findings as set out above and we set out our conclusions below.

The issues (a) to (g)

113. Issue a: Requiring him to attend a site alone on 18 February 2021 and check calls being introduced on the Telme App which other colleagues did not have to complete. Our finding above is that the claimant was not required to attend the site alone on 18 February, it was a consequence of his colleague not being able to attend work. We have also found that the introduction of check calls was not because of his race but for the reasons we have set out above.

114. Issue b: Site Manager, Tracy-Ann Samms, requiring him to complete hourly check calls and requiring him to report all absences to 24/7 control room. The check call issue was covered under issue (a) and we found that the reason for requiring the reporting of absences was because of the Assignment Instructions and this applied to all security staff. It was not because of race.

115. Issue c: This was the request from the respondent's client Mr Davel, on or about 12 March 2021, that the claimant should go to investigate an incident at the Frestonian Building. The claimant did not want to comply with Mr Davel's request, but did so and was supported in his actions by Mr Leonard.

116. We asked the claimant in submissions how he said that the respondent was liable for Mr Davel's actions? The claimant's representative said "*there could be vicarious liability"* but he accepted that he did not have any authority to support this. It was submitted that someone who is not an employee of the respondent could be vicariously liable.

117. We could find no legal basis upon which the respondent could be liable for the actions of Mr Davel, a third party and an employee of Savills. This allegation fails because the request to attend the Frestonian Building did not come from the respondent or any of its officers, employees or agents and we find as a matter of law, that the respondent is not liable for Mr Davel's actions. It was not contended by the claimant that Mr Davel was acting as an agent for the respondent.

118. Issue d: In May 2021, the claimant's overtime shifts being removed by Tracy-Ann Samms and Ms Samms then advising him that David Leonard was responsible for cancelling these shifts. This allegation failed on its facts. We found that Mr Leonard did not cancel the claimant's overtime

and he no longer placed the allegation against Ms Samms.

119. Issue e: Failure to conduct an interview either with Tracy-Ann Samms or Dion Allen. It was not in dispute that Ms Golovina did not interview these two employees and that Mr Buxton did so at the appeal stage. We found above that the claimant did not pass the initial stage of the burden of proof and we found no race discrimination on the failure to conduct these interviews at the first stage of the grievance.

120. Issue f: This was withdrawn in submissions.

121. Issue g: This was withdrawn on day 1.

_____

Employment Judge Elliott
Date: 7 November 2022

Judgment sent to the parties and entered in the Register on: 07/11/2022

For the Tribunal