



# EMPLOYMENT TRIBUNALS

**Claimants:** (1) Mr G Brighty (3200346/2021)  
(2) Mr W Butt (3200811/2021)  
(3) Miss A Fountain (1401186/2021)

**Respondent:** Elevate Staffing Ltd

## JUDGMENT OF THE EMPLOYMENT TRIBUNAL

**Heard at:** Southampton **On:** 22 to 28 November 2022

**Before:** Employment Judge Gray **And Members:** Mrs C Date  
Mr J Shah MBE

### Appearances

For the Claimants: All in person  
For the Respondent: Mr Piddington (Counsel)

### RESERVED JUDGMENT (LIABILITY ONLY)

The unanimous judgment of the tribunal is that:

- The First Claimant's complaint of breach of contract is dismissed on withdrawal.
- The First Claimant's complaints of automatic unfair dismissal for making a protected disclosure and direct sex discrimination, fail and are dismissed.
- The Second Claimant's complaint of direct race discrimination as to matters on the 9 December 2020 succeeds.
- The Second Claimant's complaints of automatic unfair dismissal and detriment for making a protected disclosure, direct sex discrimination and for unauthorised deductions, fail and are dismissed.
- The Third Claimant's complaint of direct sex discrimination in respect of matters on the 9 December 2020 succeeds.
- The Third Claimant's complaints of direct sex discrimination in respect of matters on the 17 December 2020 and victimisation, fail and are dismissed.

## REASONS

1. This hearing was to determine matters of liability in these claims.
2. By way of background to these claims there have been two previous case management preliminary hearings, the most recent before Employment Judge Livesey on the 14 July 2022.
3. As is recorded from the case management process it was by claim forms presented on 27 January 2021 for Mr Brighty (with an ACAS certificate dated 20 January 2021 to 20 January 2021), on 15 March 2021 for Mr Butt (with an ACAS certificate dated 5 March 2021 to 8 March 2021) and on 21 March 2021 for Miss Fountain (with an ACAS certificate dated 20 January 2021 to 25 February 2021) that the Claimants made their complaints to the Tribunal.
4. The First and Second Claimants made complaints of automatic unfair dismissal for whistleblowing. All three Claimants claimed direct sex discrimination. The First Claimant also claimed for breach of contract. The Second Claimant also claimed for detriment for whistleblowing, direct race discrimination and for unauthorised deductions. The Third Claimant also claimed victimisation. No time limit jurisdictional matters arise in respect of these complaints.
5. At the preliminary hearing before Employment Judge Livesey two **deposit orders** were made as follows:
  - 5.1 The Second Claimant's claim of dismissal and/or detriment on the grounds of having made a public interest disclosure has little reasonable prospect of success within the meaning of rule 39 and he is ordered to pay a deposit in the sum of £100.00 not later than 21 days from the date this Order is sent as a condition of being permitted to continue to advance the claim. The Judge had regard to the information available as to the Claimant's ability to comply with the Order in determining the amount of the deposit.
  - 5.2 The Respondent's response to the Third Claimant's complaint of discrimination on the grounds of sex has little reasonable prospect of success within the meaning of rule 39 and it is ordered to pay a deposit in the sum of £1,000.00 not later than 21 days from the date this Order is sent as a condition of being permitted to continue to advance the response. The Judge had regard to the information available as to the Respondent's ability to comply with the Order in determining the amount of the deposit.
6. The deposits have been paid.
7. For reference at this hearing, we were presented with:

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- 7.1 An agreed bundle of 408 pages (to which two further pages were then added)
- 7.2 Additional disclosure from the Second Claimant consisting of 18 pages which, after hearing from the parties was permitted, save for page 18 of that.
- 7.3 Additional disclosure from the Third Claimant consisting of 40 pages which, after hearing from the parties was permitted, save for pages 39 and 40 of that.
- 7.4 Witness statement of Miss Morrison on behalf of the Respondent (the version originally submitted to the Tribunal had a blank paragraph 8 and so was replaced with a re-numbered version before Miss Morrison gave her oral evidence).
- 7.5 A preliminary note on behalf of the Respondent.
- 7.6 Witness statement of the Second Claimant.
- 7.7 Supporting witness to Second Claimant, Ms Pashova.
- 7.8 Witness statement of the Third Claimant.
- 7.9 The First Claimant applied to submit his witness statement on the morning of the first day, it not having been exchanged with the Respondent or other Claimants. This was permitted after hearing submissions from all the parties, with summary oral reasons given at the time, and following confirmation from the Claimant that he did not intend to supplement that statement further.
- 7.10 The Third Claimant applied to submit two supporting witness statements on the morning of the first day, those not having been exchanged with the Respondent or the other Claimants. The Third Claimant confirmed that she did not expect these witnesses to attend the hearing. The submission of these further statements was refused after hearing submissions from all the parties, with summary oral reasons given at the time. It was not in the interests of justice to permit the late submission of unexchanged statements for witnesses who had not confirmed their attendance.
8. The Hearing timetable was originally proposed as follows over a four-day listing. However, at the start of the hearing it was confirmed that liability matters should be addressed first in view of the volume of evidence and number of parties:

Day 1	2 hours	Tribunal reading and preliminary matters
	3 hours	Claimants' evidence
Day 2	2 hours	Claimants' evidence
	3 hours	Respondent's evidence
Day 3	2 hours	Respondent's evidence

	1½ hours	Closing submissions
Day 4	1½ hours	Tribunal deliberations
	2 hours	Judgment
	3 hours	Dealing with compensation or other remedies if appropriate

9. Unfortunately, it was not possible for this timetable to be met. All three Claimants were representing themselves, so all wanted to ask questions of each witness. This meant that at the conclusion of day four there was approximately an hour of evidence still to be heard as well as the parties closing submissions on the questions of liability.
10. Fortunately, it was possible to list a fifth day concurrently. This enabled evidence and submissions to be concluded at just after 13:00 on the fifth day. As had previously been indicated this did not leave sufficient time for deliberations and then delivery of an oral judgment, so judgment was reserved.

## **THE ISSUES**

11. The issues had been agreed with Employment Judge Livesey and were discussed with the parties at the commencement of this hearing. They were confirmed as follows with clarifications/amendments as permitted/agreed highlighted in **bold underlined italics**.

### **1. Employment status and/or identity of the Respondent(s)**

1.1 It is admitted by the Respondent that all three Claimants were and/or are its employees.

#### **The First Claimant – Mr Brighty**

### **2. Protected disclosure ('whistle blowing')**

2.1 Did the Claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

2.1.1 What did the Claimant say or write? When? To whom? The Claimant says he made disclosures on these occasions:

2.1.1.1 To Ms Stephens on 9 December **2020** [**note this is referred to as 2021 in the list of issues within the case management summary, but that is a typographical error and corrected within these list of issues**] in writing (WhatsApp) [**it was confirmed that this is the WhatsApp messages at pages 346 and 347**], that the Third Claimant and a colleague were being ill-treated and/or threatened the by the Second Claimant;

2.1.1.2 To Mr Kerr on 9 December 2020 in writing, a repeat of the above [**it was confirmed that this is at page 257**].

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2.1.2 Were the disclosures of 'information'?

2.1.3 Did he believe the disclosure of information was made in the public interest?

2.1.4 Was that belief reasonable?

2.1.5 Did he believe it tended to show that:

2.1.5.1 A person had failed, was failing or was likely to fail to comply with any legal obligation, relating to the Equality Act;

2.1.5.2 The health or safety of any individual had been, was being or was likely to be endangered, relating to the two female employees affected by the Second Claimant's conduct.

2.1.6 Was that belief reasonable?

2.2 If the Claimant made a qualifying disclosure, was a protected disclosure because it was made to the Claimant's employer? The Respondent accepts that.

**3. Dismissal (Employment Rights Act s. 103A)**

3.1 Was the making of any proven protected disclosure the principal reason for the Claimant's dismissal?

3.2 The Claimant did not have at least two years' continuous employment and the burden is therefore on him to show jurisdiction and therefore to prove that the reason or, if more than one, the principal reason for the dismissal was the protected disclosures.

**4. Direct sex discrimination (Equality Act 2010 section 13)**

4.1 Did the Respondent's servant or agent, **Ms Morrison**, dismiss the First Claimant?

4.2 Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The Claimant says that he was treated worse than he would have been had he not been in a relationship with the Third Claimant which was defined by his sex as a man.

**5. Breach of Contract (Extension of Jurisdiction Order 1994)**

5.1 Was the Claimant dismissed? Did this claim arise or was it outstanding when the Claimant's employment ended?

5.2 Did the Respondent pay the Claimant his notice? He claims that he was paid for 2 shifts (1 day), but ought to have been paid for 2 days.

5.3 Was that a breach of contract?

5.4 How much should the Claimant be awarded as damages?

## **The Second Claimant – Mr Butt**

### **6. Protected disclosure ('whistle blowing')**

6.1 Did the Claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

6.2 What did the Claimant say or write? When? To whom? The Claimant says he made disclosures on these occasions:

6.2.1.1 To Mr Stoodly both before and on 9 December 2020 in writing (email [***this was confirmed as being on pages 259 and 260***]). He alleged that Sandy [***also referred to in the evidence of the parties as Sandra and Sandie***] (in the earlier disclosure) and the Third Claimant (on 9 December) were accused of having been in breach of their contractual duties to the Respondent. It was specifically alleged that the Third Claimant had been late to work and/or had been sleeping at work;

6.2.1.2 To Ms Stephens orally on 9 December; he repeated the disclosure made to Mr Stoodly but provided more details of the Third Claimant's alleged non-adherence to her contractual duties.

6.3 Were the disclosures of 'information'?

6.4 Did he believe the disclosure of information was made in the public interest?

6.5 Was that belief reasonable?

6.6 Did he believe it tended to show that:

6.6.1.1 A person (two people in fact) had failed, were failing or were likely to fail to comply with any legal obligation, their contractual duties to the Respondent.

6.7 Was that belief reasonable?

6.8 If the Claimant made a qualifying disclosure, was a protected disclosure because it was made to the Claimant's employer? The Respondent accepts that disclosures, if made, were made to the employer.

### **7. Dismissal (Employment Rights Act s. 103A)**

7.1 Was the making of any proven protected disclosure the principal reason for the Claimant's dismissal?

7.2 The Claimant did not have at least two years' continuous employment and the burden is therefore on him to show jurisdiction and therefore to prove that the reason or, if more than one, the principal reason for the dismissal was the protected disclosures.

### **8. Detriment (Employment Rights Act 1996 section 47B)**

8.1 Did the Respondent, it's servant or agent, Ms Stephens, do the following things:

8.1.1 Accuse the Second Claimant of having been a ***liar*** and/or manipulator on 9 December 2021 and/or use racist language on that day.

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

8.3 If so, was it done on the ground that he had made the protected disclosures set out above?

### **9. Direct sex and/or race discrimination (Equality Act 2010 section 13)**

9.1 Did the Respondent, it's servant or agent Ms Stephens, do the following things:

9.1.1 Accuse the Second Claimant of being a manipulator and/or a liar with reference to his race and/or nationality on 9 and/or 11 or 12 December 2021 (on the grounds of race);

9.1.2 Dismissed him (on the grounds of sex).

9.2 Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The Claimant says;

9.2.1 In respect of 9.1.1, he was treated worse than a hypothetical non-Pakistani comparator;

9.2.2 In respect of 9.1.2, he was treated worse than the Third Claimant. In essence, he asserts that her account of the events of 9 December was believed and his was rejected.

9.3 If so, was it because of race or sex?

### **10. Unauthorised deductions (Part II of the Employment Rights Act 1996)**

10.1 Did the Respondent make unauthorised deductions from the Claimant's wages and if so how much was deducted? The Second Claimant alleges that his pay in respect of the month of November was £270 short.

### **The Third Claimant - Miss Fountain**

#### **11. Direct sex discrimination (Equality Act 2010 section 13)**

11.1 Did the Respondent's servant or agent, the Second Claimant, do the following things:

11.1.1 Abuse and demean the Third Claimant verbally on 9 December 2021. This has been admitted by the Respondent (paragraph 1 of the section of its response relating to the Third Claimant of 1 June 2022);

11.1.2 Further abuse and demean the Third Claimant verbally on 17 December 2021

11.2 Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated. The Claimant says she was treated worse than a hypothetical male comparator.

11.3 If so, was it because of sex?

#### **12. Victimisation (Equality Act 2010 s. 27)**

12.1 Did the Claimant do a protected act as follows:

**The Third Claimant applied to also refer to what she says to Ms Stephens on the 28 November 2020 as being a protected act pursuant to section 27(2)(d). The Third Claimant confirmed that her evidence on this is within paragraph 7 of her witness statement. This addition was objected to by the Respondent. However, after hearing submissions from the parties on the matter and understanding that the Respondent would rely on the same evidence already submitted to challenge the alleged protected act to Ms Stephens on 9 December, it was permitted. Summary oral reasons for this were given at the time.**

12.1.1 Raise complaints about the Second Claimant's treatment to Ms Stephens on 9 December;

12.1.2 Raise complaints about the Second Claimant's treatment to Mr Kerr on 9 December;

12.1.3 Raise complaints about the Second Claimant's treatment to a lady who can only be identified as 'Georgia' in a shift report/form.



12.2 Did the Respondent do the following things:

12.2.1 Dismiss her.

12.3 By doing so, did the Respondent subject the Claimant to detriment?

12.4 If so, was it because the Claimant had done the protected acts?

### **THE DEPOSIT ORDER REASONS**

12. The reasons that Employment Judge Livesey made the Deposit Orders he did are set out in full in his case management summary. For ease of reference, we include the specific reasoning from the following paragraphs of his case management summary:

“62.3 The Second Claimant’s complaint of whistleblowing detriment and/or dismissal was less strong. It was difficult to see how his alleged disclosures about the conduct of two employees had been in the public interest. It was difficult to see how the fact that the Respondent’s work was indirectly publicly funded would have been sufficient in those circumstances. Further, in relation to the detriment claim, the Judge noted that the Claimant alleged that similar conduct had occurred *before* he had made any disclosure. Finally, in relation to the dismissal claim, since the Respondent had taken the view that the Second Claimant had been guilty of the conduct alleged on 9 December, it seemed far more likely that he had been taken off the campaign as a result of it having reached that view rather than as a result of his disclosures.”

“64.1 In light of the Respondent’s concession in relation to the Second Claimant’s conduct towards the Third Claimant on 9 December 2021, both in its response to the further information and its application under rules 37 and 39, it was difficult to see how it would defend the Third Claimant’s complaint of discrimination. It stood vicariously liable for the Second Claimant’s acts and did not seek to run a defence under s. 109 (4). Whilst it was possible that a Tribunal might conclude that the events somehow occurred outside the Second Claimant’s employment and/or had not included comments of an overtly sexist nature, that seemed unlikely on the facts as set out in the respective pleadings at present. A deposit order was warranted in all of the circumstances.”

### **THE FACTS**

13. We heard evidence from all three Claimants, Ms Pashova in support of the Second Claimant and Miss Morrison on behalf of the Respondent.
14. We found the following facts proven on the balance of probabilities after considering the whole of the submitted evidence, both oral and documentary, and after considering and listening to the factual and legal submissions made by and on behalf of the respective parties.

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15. The Respondent is a company which places employees with clients who are carrying out projects.
16. As detailed in paragraph 3 of Miss Morrison's ("LM") witness statement the Claimants were working on a campaign, a Hauliers Outreach Programme (HOP) of the Respondent's client, Identity. It was partly funded and supported by the Department of Transport. The purpose of the project was to try and speak with HGV and lorry drivers at motorway service stations to provide an understanding on the changes impacting Hauliers as a result of Brexit changing legislation.
17. It is not in dispute (as detailed in paragraph 6 of LM's statement) that the Claimants were engaged on zero-hour contracts being booked on a campaign when one is available, however there may be periods where there is no work available. As was confirmed by LM in cross examination, at the times material to these claims (12 November 2020 to 20 December 2020) the Respondent only had the HOP campaign, its usual volume of other business being impacted by COVID.
18. The Claimants all registered for work with the Respondent and set up their own profiles (as can be seen from pages 338 to 343). As is detailed in paragraph 7 of LM's statement once the profiles are approved and accepted, the Claimants can receive information on jobs available.
19. In paragraph 8 of LM's statement she explains about the job alert process where those with profiles are emailed and texted about available jobs. If they apply and are successful, they are then booked onto a job. Prior to the applicants accepting it they are briefed on the role location and pay.
20. All three Claimant's started working for the Respondent on the HOP campaign from the 12 November 2020.
21. LM says in her evidence (paragraph 10 of her statement) that the Claimants all knew each other before and wanted to be on the same shifts (referring us to pages 380 to 387 of the bundle). This was challenged by the First Claimant who suggested he didn't really know the Second Claimant before. It is clear though that they got to know each other on the HOP campaign as they are in a WhatsApp group together and the First Claimant could give the Second Claimant a lift when the Third Claimant couldn't (see for example page 264). It is not in dispute that the First and Third Claimants were in a relationship when they started work for the Respondent. We were also informed that the Third Claimant had moved in with the First Claimant around this time to make a COVID bubble.
22. The Respondent asserts the Claimants were then removed from the HOP campaign verbally by LM on the 20 December 2020 and this was then confirmed by emails to the Claimants from LM dated 21 December 2020.
23. The relevant email to the First Claimant is at page 290 and says ... "As discussed in our call yesterday, the decision has been made to remove you from

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the In it for the Long Haul activity as we have received reports that your behaviour and conduct has fallen below that we would expect on such an important and high profile activity for Elevate. You will be paid for all shifts booked in for the upcoming 48 hours, and you will remain on Elevates books.”.

24. The relevant email to the Second Claimant is at page 288 and says ... “As discussed in our call yesterday, we thank you for the information you provided to us in regards to your fellow staff conduct on site. The decision has been made to remove you from the In it for the Long Haul activity due to your behaviour on site following on from this as we have received reports that your behaviour and conduct as fallen below that we would expect on such an important and high profile activity for Elevate. You will be paid for all shifts booked in for the upcoming 48 hours, and you will remain on Elevates books.”.
25. The relevant email to the Third Claimant is at page 293 and says ... “As discussed in our call yesterday, the decision has been made to remove you from the In it for the Long Haul activity as we have received reports that your behaviour and conduct has fallen below that we would expect on such an important and high profile activity for Elevate. You will be paid for all shifts booked in for the upcoming 48 hours, and you will remain on Elevates books.”.
26. There is a dispute as to whether this was a dismissal or not. The Claimants all assert it was. The Respondent asserts not with LM explaining in paragraph 11 of her statement that the Claimants have never been removed from the Respondent’s database or had their employment terminated. Further, that the Claimants have been sent messages and emails with regard to new projects and assignments which they could join (we were referred to pages 397 to 408 of the bundle). LM explained in her oral evidence that the invitations to apply are distributed based on the address the applicant has on their profile. After application the suitability of the candidate is then considered. As the Claimants did not apply for any other role, the subsequent consideration of suitability was not required.
27. It is not in dispute that when assigned to a client an individual can be provided with 48 hours’ notice to change working hours (we were referred to pages 172 to 179 and 190 of the bundle) and the relevant clause is on page 172:

“You are obliged to work when we the Employer require you to do so. We do not guarantee that there will always be a suitable Client assignment to which you can be allocated, and you acknowledge that there may be periods when no work is available for you. However, when there is work available the Company will do its best to allocate work to you and the Company will endeavour to seek relevant assignments for you at all times. You also acknowledge that the hours of work within each assignment may increase or decrease subject to the needs of our Clients. We will provide you with 48 hours’ notice of any changes to your working hours. Finally, you agree to provide Elevate Staffing with 7 days’ notice to cancel any booked shifts.”

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28. The parties are in dispute as to the meaning of this clause. The Claimants asserting that it is provided to enable the variation of hours on a campaign (i.e., increase and decrease those), not for their removal from a campaign entirely.
29. LM maintained in her oral evidence that it allows for the removal of all hours with 48 hours' notice, which has the effect of removing the Claimant's from the campaign. LM maintained though that this did not result in the Claimants being dismissed from their employment with the Respondent.
30. We note that the variation of hours mechanism appears to be linked to the needs of the Respondent's clients. This suggests it is led by the client, i.e., they need more work or less work on a particular campaign. However, it does state that the Respondent can change working hours with 48 hours' notice and as this is a zero-hour contract, that can result in no hours being given.
31. The provisions relating to the termination of employment are on page 174 of the bundle. Neither the Claimants nor the Respondent communicated either verbally or in writing that they were terminating the employment relationship in accordance with those notice provisions. Further, none of the Claimants have presented evidence to support an assertion that they were constructively dismissed by the removal of all the hours on the HOP campaign.
32. We accept the submissions of Respondent's Counsel about this as set out in his written submissions at paragraphs 59 to 67. The burden of proof is on the Claimants to establish a dismissal occurred. It is not in dispute that the Claimants were engaged under a zero hours contract. None of the Claimants confirmed in evidence that they had received a P45 from the Respondent, nor that they had requested it. We were also presented evidence that the working position between the Respondent and the First and Second Claimants was clarified on the 22 December 2020 expressly stating they ... "have not been dismissed from Elevate's employment" (pages 299 and 300).
33. During the course of the evidence in this hearing it was clear that there was unlikely to be an ongoing working relationship between the parties based on what they have now said. In short, the Claimants didn't want to work for the Respondent (the First Claimant acknowledged in cross examination that he was offered opportunities to apply for other roles, confirming he did not apply as he did not think he would be successful and he did not need to anyway, he was busy elsewhere), and the Respondent knowing what it now knows wouldn't be intending to offer anything even if applied for. This is also indicated with reference to paragraph 56 of LM's statement where she says about the Claimant's not being offered 'high end' work. In her oral evidence LM explained that no offer was made because none of the other job opportunities were applied for. However, if they had the Respondent would not be offering high end work, based on what it knew about their behaviours and performance. LM confirmed that they would not be offered anything based on what they now know.

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34. We would accept based on this evidence that there does not appear to be an ongoing employment relationship between the parties. This though is different to us finding the Claimants were dismissed on the 20 December 2020.
35. It is not in dispute that the Third Claimant albeit through a different profile resumed work on the HOP campaign. This is counter to her being dismissed by the Respondent on the 20 December 2020.
36. We therefore do not find that it has been factually proven on the balance of probability that the Claimants were dismissed on the 20 December 2020.
37. The reason for what the Respondent did is also in dispute between the parties, with the First and Second Claimants asserting they were “dismissed” for making protected disclosures or because of their sex. The Third Claimant asserting it was because she did protected acts.
38. We have therefore gone on to consider carefully the evidence presented to us by the Respondent as to the reason they did what they did.
39. LM sets out in paragraph 16 of her statement that concerns were raised by regional managers at the Respondent about the First and Third Claimants professionalism, work ethic and compliance with COVID regulations on the 18 and 23 November 2020. We are referred to emails contemporaneous to that period at pages 226 to 229 of the bundle and accept what LM says about this.
40. Further, that on the 24 November 2020 LM is made aware of those concerns, as set out in paragraph 17 of her statement and with reference to page 227 of the bundle being an email dated 24 November 2020 forwarding a copy of the concerns email dated 23 November 2020.
41. Ms Stephens meets with the Third Claimant on the 27 November 2020 (see page 251) raising concerns about the Third and Second Claimants’ conduct (as is recorded in a first draft and then complete email at pages 242 to 245).
42. The concerns raised about the Second Claimant were discussed with him by the Third Claimant on the 28 November 2020 (paragraph 19 of LM) as requested by the regional manager Ms Stephens. The Second Claimant’s response to those concerns is sent by an email dated 28 November 2020 timed at 08:33 to his regional manager Ms Stephens (pages 239 and 240). In that he says ... “My team leader came up to me today with a few complaints from your side which I would like to respond though I’ve been wanting to contact you earlier about a complain I have against Sandie.”. It is clear from this email that the concerns about the Claimant exist before he articulates his concerns about Sandy.
43. This timing was put to the Second Claimant in cross examination that the concerns he has about Sandy, postdate the concerns raised about him. The Second Claimant confirmed in oral evidence that he had raised the matter with The Third Claimant. He may have done so and there is reference to the Third Claimant mentioning her concerns about Sandy in an email dated 29 November

2020 (pages 244 to 245) which records what was said between the Third Claimant and Ms Stephens when they met on the 27 November 2020 (see page 251). It does not record the Third Claimant relaying any concerns the Second Claimant may have to Ms Stephens. It has not been proven therefore on the balance of probability that the conduct concerns Ms Stephens had about the Second Claimant did not exist before he made any alleged disclosure to Mr Stoodly or Ms Stephens.

44. There is an email dated 28 November 2020 timed at 13:49 drafted by Ms Stephens that notes a call to her from Sandy informing her that the Second Claimant had accused her of spying on him and telling tales and that she was a racist. The email then notes a phone call Ms Stephens has with the Second Claimant where it notes ... "I asked him if he wished to continue working on the campaign if he felt he was being singled out and as far as I'm aware he said no and that he wanted to continue!" ... "He brought up about Racism and then promptly withdrew the comment however that's when I decided to end the phone call". The email confirms that in Ms Stephens view the phone connection was too poor to continue.
45. It is also on the 28 November 2020 that the Claimant now asserts she did a protected act relying on section 27(2)(d) of the Equality Act, that is making an allegation (whether or not express) that A or another person has contravened the Equality Act 2010 and the evidence in paragraph 7 of her witness statement:

"7. I confirmed the comments were inappropriate which has been acknowledged by the respondent (*B47-top, twice B245- 8*) and passed on in her report (*B243-10*). It was extremely difficult to go into further detail at this stage as the cabin walls were thin and you could easily hear other people's conversations through the walls as I had told Waqar in an earlier conversation (AF) and to Tia when Waqar was orchestrating a story about us to Tara (*B361*). I did not feel comfortable opening up at this stage when I was so worried, he could hear the conversation and make life difficult for me. Respondent accepts that complaints were of a sexist nature 'inappropriate comments towards woman' (*B46-6*) further proved by Sandie, in likely gossip from Tara on being reported by Glenn (*B239*). Gossip was also a breach of client contract terms in which I don't believe Tara or Sandra was ever held responsible (*B187/4*)."
46. With reference to Ms Stephens note of what was said by the Third Claimant (see page 245) it records the Third Claimant saying ... "the comments he made were sometimes inappropriate but she wasn't offended by them."
47. Also, what the Third Claimant says she communicates at this time, that the comments were inappropriate and that it was extremely difficult to go into further detail and she did not feel comfortable opening up at that stage, do not support that she is making an allegation (whether or not express) that the Second Claimant has contravened the Equality Act 2010.
48. We do not find from this that the Third Claimant has proven facts on the balance of probability that she did a protected act on the 28 November 2020 as she asserts.

49. At paragraph 23 of the statement of LM she explains her concerns about the Claimants around this time ... “By 30 November, only 2 and half weeks after the Claimants had been assigned to the campaign, I was concerned about the number of allegations and the seriousness of the complaints that were being made about the Claimants’ conduct. We needed to ensure the client, Identity was happy with the quality of the employees we were providing to work on their campaign. I was also concerned about the stress and management time that the Claimants’ continued conduct was causing the Regional Managers. They were regularly calling me to highlight their concerns which had been expressed in their emails and I needed to consider their welfare as well. As a result I wanted to discuss the matter with our HR consultant so I could ensure that the Claimant were dealt with fairly and appropriately [247 – 249].”.
50. Considering then the alleged disclosures of the Second Claimant which chronologically follow this. The Second Claimant says he made two disclosures:
  - 50.1 To Mr Stoodly, both before and on 9 December 2020 in writing (which we understand to be the emails at pages 259 and 260). It is stated in the list of issues that the Claimant alleges that Sandy (in the earlier disclosure) and the Third Claimant (on 9 December) were accused of having been in breach of their contractual duties to the Respondent. It was specifically alleged that the Third Claimant had been late to work and/or had been sleeping at work.
  - 50.2 And to Ms Stephens orally on 9 December 2020; where the list of issues states that he repeated the disclosure made to Mr Stoodly but provided more details of the Third Claimant’s alleged non-adherence to her contractual duties.
51. Considering the disclosure to Mr Stoodly prior to the Second Claimant’s email to him, this appears to relate to a potential oral disclosure which is recorded at pages 248 and 249 of the bundle. It is an email from Mr Stoodly dated the 30 November 2020 timed at 10:51 that records him speaking with the Second Claimant that morning (so on 30 November 2020) recording the Second Claimant’s complaints about Sandy. The Second Claimant complains about inappropriate conduct towards him and of Sandy promoting her own surgery/cosmetic business while at work.
52. This appears to record a verbal disclosure of information by the Second Claimant as at the 30 November 2020. It is not clear though from the evidence presented by the Second Claimant what contractual duties to the Respondent it is tending to show that Sandy had failed, was failing or was likely to fail to comply with. His witness statement focuses on his email to Ms Stephens dated 28 November 2020 and not on what he verbally told Mr Stoodly on the 30 November 2020.
53. We note that it post-dates a similar allegation the Claimant makes about the conduct of Ms Stephens at a meeting he has with her on the 28 November 2020 to that of his complaints of detriment and race discrimination on the 9 December

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2020 (issues 8.1.1 and 9.1.1). The similar allegation is referred to in paragraph 4 of the Second Claimant's statement with him saying that Ms Stephens ... "used the phrase "I know you people" several times during the conversation which I find quite racist."

54. Considering then the email the Second Claimant sends to Mr Stoodly on the 9 December 2020 this is at page 260. It says ... "Hello Joe, hope you are warm and well, I need to have a word with you about the past complain and some more issues, if you and when you have time please do ring me."
55. This is clearly not a disclosure of information.
56. It is the Second Claimant's next email sent on the 10 December 2020 at 01:14 (pages 259 and 260) that includes details about First and Third Claimant's conduct.
57. The email on the 10 December 2020 does allege that the Third Claimant had been late to work, sleeping at work and bunking off, not appearing for the whole shift. It refers to the First Claimant covering for the Third Claimant and informing her about checks by the Regional Managers. It attaches a number of screen shots of WhatsApp messages. It also attaches some pictures including one appearing to show the Third Claimant asleep at the desk (page 261).
58. One of the attached WhatsApp messages is from the Third Claimant which reads ... "Hey Waqar, Glenn is going to pick you up today. I'm going back to bed then will get my tyre repaired/ buy new one as soon as all the car garages open this morning then will come to the shift straight away!! If a manager turns up tell them that I've gone to sort my tyre and will be back straight after – if one does come it won't be till 9 anyway – keep me updated if anyone rings turns up asks where I am etc and send me a picture of the cabin when its all set up please! I'll do all the reports just sit pretty and tell me everythingggg. So basically story to managers is.... I came this morning to shift but left to fix the tyre because it's a slow puncture deflating more and more over time and wouldn't be able to get home if I left it. Tia you can obviously tell her the truth just keep me informed. Glenn is gonna be at yours at 5:20 Waqar – be ready! He has a grey BMW and you now have his phone number from the chat".
59. This message clearly indicates the Third Claimant, with the knowledge of the First and Second Claimants, was intending to mislead the Respondent as to her attendance at work.
60. The Second Claimant's email does not expressly say that the Third Claimant is in breach of her contractual duties, but we accept that it is a disclosure of information from which that could be inferred.
61. The Second Claimant also says that he denies the allegations raised against him.
62. There is no reference to Sandy in this email.



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63. Next considering the second alleged disclosure by the Second Claimant that to Ms Stephens he disclosed orally on 9 December 2020, which is noted in the list of issues as a repeat of the disclosure made to Mr Stoodly but with more details of the Third Claimant's alleged non-adherence to her contractual duties. It is clear though from our review of the Second Claimant's emails at this time that his written disclosure to Mr Stoodly is after his alleged verbal disclosure to Ms Stephens.
64. About this there is the written account of Ms Stephens where she records what the Second Claimant says when asked about the allegations against him (pages 265 to 267). They note that the Second Claimant showed Ms Stephens texts and photographs, one of the Third Claimant sleeping in the cabin and another text of them arranging to close up the cabin at 7:30 at night so that the Second Claimant could get a train at 8 o'clock. It also records that the Second Claimant told her that the Third Claimant never does her shifts, she turns up late she finishes early and that she is doing three jobs whilst on Elevates time. It is noted him saying that there have been occasions where the Third Claimant had asked him to cover up that she was not at work and that even the photographs taken first thing in the morning are sometimes old ones that she saves as they've had to ask Hauliers and passers by to take the photographs to make it look as if she is taking them. A text message was then attached referring to one such occasion. This does appear to be greater detail of the Third Claimant's alleged non-adherence to her contractual duties.
65. We note that the alleged disclosures on the 9 and 10 December 2020 are raised after the 9 December 2020 allegations about the Second Claimant's conduct towards the Third Claimant have been raised with him. We note the submissions of Respondent's Counsel about this apparent cause and effect, with the Second Claimant raising matters in reaction to allegations against him. This is consistent with what the Second Claimant expressed in cross examination when it was put to him that when he was having his discussions with Ms Stephens on the 9 December 2020, he was not raising it because there was a public interest in the matters he was raising. The Claimant confirmed that the reason he complained was because he didn't want to lose his job and it is not fair and also bad as it's a tax funded campaign. The reference to the tax funding does appear to be an afterthought by the Claimant. It is not something he articulates at the time of the disclosures.
66. The allegation of detriment by the Second Claimant is against Ms Stephens and relates to the discussion he had with her on the 9 December 2020. The Second Claimant complains that the Respondent, its servant or agent, Ms Stephens, accused him of having been a liar and/or manipulator on 9 December 2021 and/or used racist language on that day. This is repeated as a complaint of direct race discrimination as well albeit referenced slightly differently saying ... "Accuse the Second Claimant of being a manipulator and/or a liar with reference to his race and/or nationality on 9 and/or 11 or 12 December 2020 (on the grounds of race)". We would note here that we have not been presented evidence to support that such matters occurred on the 11 or 12 of December 2020 as well as the 9 December 2020.

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67. The Second Claimant explains what happened on the 9 December 2020 meeting with Ms Stephens at paragraph 7 of his witness. He says ... “her bias was surely towards AF and I very soon realised she wasn’t there to listen to my side of the story or take any evidence or proof. The bias could be women to women or British to British or due to my previous complaint against her seemingly friend Sandra C. I believe it was a mixture of all 3.”.
68. Then at paragraph 9 of his statement he says Ms Stephens said ... “You are lying Waqar, you never worked as a TL I work in the office I know”.
69. Then at paragraph 13 ... “kept calling me “liar” and “sexist” and phrases like “I know you people” or “I’ve deal with people like you”, which were quite racist and shown her prejudice, her biased (women to women or/and British to British) was very visible towards AF.”.
70. A contemporaneous articulation of the Second Claimant’s concern is in his email to Mr Stoodly on the 10 December 2020 which notes ... “I would like to mention just like the last time I found Regional Manager Tara biased, taking words of the other party more truthfully than mine, not giving me enough time to explain myself, one of the reasons I had to record my concerns with you.” (page 260).
71. Ms Stephens did not attend this Tribunal to give any evidence on this matter. There is no documentary evidence presented by the Respondent that shows Ms Stephens’ account of that particular matter. This is surprising as it became clear to this Tribunal during the oral evidence, and in particular that of LM, that there were a number of references to the Claimant complaining of racism and a common member of staff, Stacey Cullen, being tasked with investigating matters.
72. We have seen a copy of an email dated 6 December 2020 from Ms Stephens that records her recollections from the meeting between her and the Second Claimant on the 28 November 2020. It is a different account to that presented by Second Claimant in paragraphs 4 and 5 of his witness statement. It is asserted by the Second Claimant in paragraph 4 of his witness statement that on the 28 November Ms Stephens used the phrase “I know you people” several times. There is no contemporaneous record of this being said on the 28 November 2020. The Claimant in his reply to cross examination about this matter said he told Mr Stoodly in his call with him, but we note that it is not recorded in Mr Stoodly’s account of the call (see pages 248 and 249), which appears to be a very full account of the Second Claimant’s concerns. However, Mr Stoodly did not attend this Tribunal to give evidence on the matter and there are no details or notes of any investigation process seeking his account of events.
73. From the email at pages 248 to 249 dated 30 November 2020, sent by Mr Stoodly it records that the Second claimant has ... “confirmed that the RM he complained to was Tara, and he said he is shocked with the way that she handled it.”.

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74. Mr Stoodly also attaches an email the Second Claimant sent to Ms Stephens (referred to at page 249) which is the email at page 239 dated 28 November 2020 that the Second Claimant had sent to Ms Stephens (which the Second Claimant refers to in paragraph 1 of his witness statement) which gives his responses to the conduct issues raised with him and the concerns he has about Sandy.
75. We note here as well that at page 249 Mr Stoodly asks Stacey Cullen if she knows if Ms Stephens has logged the Second Claimant's complaint anywhere as he is worried, she has just swept it under the rug.
76. There is also an email account of phone calls between Ms Stephens and Sandy and then the Second Claimant on the 29 November 2020 (page 241) which references the words "racist" and "racism" which is sent to Stacey Cullen. In her oral evidence LM confirmed that when she became aware that the Second Claimant was making a complaint of racism based on his email dated 20 December 2020 (page 284) she instructed Stacey Cullen to investigate the matter. LM confirmed that Stacey had then told her verbally there was nothing to support racist conduct by Ms Stephens. Unfortunately, despite numerous references to the word racism and the apparent awareness of Stacey Cullen about these various issues no direct evidence has been presented by the Respondent on these matters.
77. We also note what the Second Claimant says in his witness statement at paragraph 21 where he refers us to the further particulars of the First Claimant at paragraph 90 of the bundle which record a comment made to him by Ms Stephens when referring to her previous days at British Airways... "Don't worry Glenn, I've dealt with Pakistanis I've dealt with his sort.". Further, he refers to page 2 of his additional documents which record the First Claimant recalling racist remarks about the Second Claimant. The First Claimant did not retract this evidence from the Tribunal's consideration.
78. We also heard from the Second Claimant's supporting witness, Ms Pashova and although her evidence focuses upon her own circumstances, we note the general view she expresses of Ms Stephens in paragraphs 14 and 18 of her witness statement such as ... "Tara has befriended and protected staff members who are of White British origin, while those of Eastern European heritage have not enjoyed such privilege".
79. Having considered all of this we find that the Second Claimant has presented sufficient material from which we "could conclude" that, on the balance of probabilities, the Respondent had committed an act of race discrimination on the 9 December 2020.
80. As the comment of "I know you people" as asserted by the Second Claimant occurs pre and post the asserted protected disclosures, this in our view breaks the factual connection between the alleged detriment and the alleged disclosure. This is consistent with the reasons that Employment Judge Livesey relied upon to make the Deposit Order against the Second Claimant ... "... in relation to the

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detriment claim, the Judge noted that the Claimant alleged that similar conduct had occurred before he had made any disclosure.”

81. However, in respect of the concerns over racist conduct towards the Second Claimant, him not being believed by Ms Stephens and being told that because of his race, we accept what the Second Claimant has told us in evidence about this matter and this would therefore be less favourable treatment as he asserts. There is sufficient in our view from the racial connection to the comments “I know you people” and “I’ve deal with people like you”, and how Ms Stephens is perceived by others to move the burden of proof to the Respondent.
82. The Respondent has not proven facts on the balance of probability that such conduct was absolutely nothing to do with the Second Claimant’s race.
83. The First Claimant says he made two disclosures about matters on the 9 December 2020.
84. The first alleged disclosure being to Ms Stephens on 9 December 2020 in writing by WhatsApp (at page 346), that the Third Claimant and a colleague were being ill-treated and/or threatened by the Second Claimant.
85. About this the First Claimant confirmed when cross examined that the WhatsApp messages do not refer to the Equality Act 2010 and the part he relates to being Health and Safety related are the words “verbally attacking”.
86. The second alleged disclosure to Mr Kerr on 9 December 2020 in writing, said in the agreed issues to be a repeat of the above is at page 257. This is actually an email to Ms Stephens marked “FAO Rob” timed at 15:22. This email goes into a lot more detail.
87. The First Claimant maintained in oral evidence that he had sent this raising Equality Act and Health & Safety related matters and he did so because he was concerned about the Health & Safety of the staff and public, noting it could have spilled out into the public car park.
88. We note from the email it says ... “Staying very calm, both Tia and Ashleigh took a tirade of personal and nasty insults, ‘you’re a basic bitch’, ‘you only have this job because of me’”.
89. The First Claimant then explains in the email that the Second Claimant based his questioning of the Third Claimant on her being a woman. The Second Claimant confirmed in his oral evidence that this was his interpretation and that he had only heard the words he had included in quotations.
90. The First Claimant also says in this email ... “Unfortunately Waqar will only see his perspective and has turned this into a personal attack on two members of staff, and even ranted at the interpreter who also had a door slammed in her face.” ... “I was personally close to travelling to the site to ensure the safety of both Ashleigh and Tia, alternatively I was tempted to call the Police as you simply

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cannot guarantee their safety at this point.”. ... “I hope that both Ashleigh and Tia get the correct support to ensure their safety while at work and other members of staff that Waqar has quite clearly brought into disrepute.”

91. The alleged conduct of the Second Claimant forms the basis of the Third Claimants complaint of sex discrimination.
92. The Third Claimant asserts that the Respondent’s servant or agent, the Second Claimant, did the following things:
  - 92.1 Abused and demeaned the Third Claimant verbally on 9 December 2021. It is noted in the agreed list of issues that this has been admitted by the Respondent (paragraph 1 of the section of its response relating to the Third Claimant of 1 June 2022); and
  - 92.2 Further abuse and demean the Third Claimant verbally on 17 December 2021.
93. In view of the understanding as articulated in the list of issues the Third Claimant addresses the matters of the 9 December 2020 as follows in her witness evidence at paragraphs 9 and 10:

“9. Not long after, was the incident on 9th December, which has been heavily detailed and referred to multiple times (*B10 paragraph 11/B12 paragraph 11/B23 paragraph 7/B61/B72–9/B90/96/255/256/257/265/266/359*)”

“10. Elevate Staffing agree I was discriminated on the basis of sex/gender. This was detailed by the respondent in their reply to further and better particulars (*B112–1*) ‘It is accepted that Ms Fountain was the victim of inappropriate conduct by Waqar Butt and comments of a sexual nature were made.’ Again (*B113–4*) ‘Mr Butt was removed from the project due to his own conduct towards two female members of staff. Mr Butt did make unpleasant comments about Ms Fountain to her in relation to her being a woman and her professional abilities on site being inferior due to being a woman’ Also by Sophie O’Connor verbally at the Preliminary hearing. This conduct being also confirmed several times throughout the bundle (*B39–4.1/B46–3/B102–4*) and the respondent acknowledges the basis of misconduct is directly related to the incident on December 9th (*B25–15/B47–11/B72–9/B74–19/B111-6*) and in particular (*B94–6 lines up*) ‘sexual harassment’ and (*B73–13*) ‘He used discriminatory and offensive language and was removed from the campaign as a result’.”
94. The most contemporaneous first-hand account of what is alleged to have happened between the Second and Third Claimant is the Third Claimant’s email on the 9 December 2020 timed at 15:12 at pages 255 to 256 of the bundle.
95. It refers to there being a disagreement on travel costs between them, which is consistent with the WhatsApp messages we were presented at pages 376 to 379 of the bundle. It refers to comments about the Third Claimant not being a natural selection for team leader. We note that what is quoted in the email is a direct match for what is written in the WhatsApp message on page 377. The

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Third Claimant suggested in cross examination that these matters were said to her verbally as well, but the contemporaneous email does not make this clear. The Second Claimant denied saying such things verbally to the Third Claimant and in cross examination explained his reference to natural selection in the WhatsApp being to do with his greater previous experience as a team leader.

96. The email refers to the Second Claimant slamming the cabin door in the interpreter's face. It then writes "Blocked our exit to the cabin whilst shouting derogatory comments to intimidate Tia; 'Basic Bitch' 'Ugly' 'Greedy' 'Unthankful' Told to 'get ourselves in line' Coupled with other personal comments about appearance, make up and stature ie what have we achieved in life". Also, ... "wouldn't move out the door way when politely asked despite knowing the covid rule of 2 per cabin".
97. The Second Claimant denied saying such things to the Third Claimant, explaining in his oral evidence that he had no verbal interaction at the time it is alleged to have taken place between 8:30ish and 9:30ish that day. He also referred to the Third Claimant sending him a smiley with love heart eyes by WhatsApp at 12:08 on the 9 December 2020 which he asserted was inconsistent with what the Third Claimant alleges. In cross examination the Third Claimant said this was sent in response to the good work the Second Claimant had indicated being done in his previous WhatsApp message.
98. The Second Claimant said in his oral evidence that he only communicated with the Third Claimant over WhatsApp that morning. We note though that the time window of when what the Third Claimant alleges is consistent with what the First Claimant says in his WhatsApp messages timed at 9:18 and 9:42 (page 346). It is also consistent with a break in the WhatsApp messages between the Second and Third Claimants as shown on page 378, where after a message timed at 8:28 the Second Claimant replies at 9:49 to an extract from the Third Claimant's message ... "I didn't like the tone so I didn't read the full message but I made myself clear enough".
99. We also note what the Second Claimant is recorded to say about the matter by Ms Stephens as noted in her email at pages 265 and 266 ... "I asked Waqar what had happened and he said Ashleigh had antagonised him and was not being a good friend! Apparently they had had an agreement about Ashleigh giving Waqar lifts to work and therefore that's why they bid for the same shifts. Waqar has also been giving Ashleigh £15 per day to drive him to from the station or his home. Waqar also said that he had been offered the TL job by Joe one of the Bookers, but because she was going to drive him he had given her the job instead and that he owed everything to her. ... I asked him to confirm the words he had used at the girls during the argument earlier in the day, i.e. basic bitch etc. Waqar denied he had said anything like that ... Waqar said that Tia had got involved with the argument and I tried to make out he was sexist and that he was Criticising her lips. He said he would never do that that sort of thing as he is a gentleman. Waqar then went back to the conversation about Ashleigh not doing her job properly and how she was never there. I tried to bring him back to today's events soo many times but he didn't want to talk about it he just said that I needed to sack Asheligh and Tia as the were not professional enough for the

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campaign and put him in charge and that he wasn't going to lose his job because of their sexist allegations and lies.”

100. We note from this account that it suggests the Second Claimant acknowledges that he did have a verbal interaction with the Third Claimant and Tia, in particular ... “I asked him to confirm the words he had used at the girls during the argument earlier in the day, i.e. basic bitch etc. Waqar denied he had said anything like that ... Waqar said that Tia had got involved with the argument”.
101. We also note that Ms Stephens when raising matters with the Second Claimant refers to him perceiving Ms Stephens was trying to make out he was sexist.
102. For completeness we also note from this email (at page 266) what Ms Stephens says she heard the Second Claimant say to the Third Claimant when they were going to the cars ... I heard raised voices ! Waqar was shouting at Ashleigh and as he walked away with Patrick to Patrick's car he said “you're going to be sacked you will have to go back to your stripping job as that's all you're good for” she shouted back “Do not talk to me”.
103. The Second Claimant denies he said this. The Third Claimant does not address it directly in her witness statement. What the Third Claimant says about it in her claim form is inconsistent with what Ms Stephens' email records as highlighted to us by LM in her statement at paragraph 29 ... “This is different to the account provided by the Third Claimant in her ET1 (sometime after the event) where she stated the Second Claimant said “that a stripper job would be more suited” to her “as a lusty woman” [61].”.
104. We find from the evidence presented that it is proven on the balance of probability that there was a verbal exchange between the Second Claimant, Third Claimant and Tia in the morning of the 9 December 2020 and accept what the Third Claimant's email records ... “... whilst shouting derogatory comments to intimidate Tia; ‘Basic Bitch’ ‘Ugly’ ‘Greedy’ ‘Unthankful’ Told to ‘get ourselves in line’ Coupled with other personal comments about appearance, make up and stature ie what have we achieved in life”. Also, ... “wouldn't move out the door way when politely asked despite knowing the covid rule of 2 per cabin”.
105. Further, we accept the contemporaneous account as contained in Ms Stephens email that the Second Claimant shouted at the Third Claimant ... ““you're going to be sacked you will have to go back to your stripping job as that's all you're good for”.
106. We find that these are abusive and demeaning verbal references related to sex made on the 9 December 2020 by the Second Claimant towards Tia and the Third Claimant. This is less favourable treatment when compared to a hypothetical male comparator as we accept that such comments would not be made to a man, and we have not been presented evidence by the Respondent to show that they would be. This is also in our view connected to work as it arises initially from a disagreement over travel to and from work, aired in the workplace

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during the working day, and addressed by managers at the Respondent. Then, the Second Claimant making the comment to the Third Claimant of her having to go back to a stripping job, on the basis she was going to be sacked, him having raised concerns about her, perceiving he was being accused of being sexist.

107. The Third Claimant asserts that she did two protected acts at this time, firstly that she raised complaints about the Second Claimant's treatment to Ms Stephens on 9 December. Having considered the evidence we have as set out above we can see that the First Claimant has complained about derogatory comments to intimidate Tia.
108. The second protected act on the 9 December 2020 is the Third Claimant raised complaints about the Second Claimant's treatment to Mr Kerr on 9 December. It is not in dispute that the Third Claimant communicated with Mr Kerr at this time and action is taken.
109. It is also clear in respect of both of these asserted protected acts, that there is recorded a "sexist allegation" connotation being perceived by the Second Claimant when matters are raised with him by Ms Stephens (page 266).
110. From this we find that there are allegations (whether or not express) that the Second Claimant has contravened the Equality Act 2010, so would amount to protected acts.
111. About the allegation that the Second Claimant further abused and demeaned the Third Claimant verbally on 17 December 2021 the Third Claimant addresses what happened on the 17 December it in paragraphs 17 and 18 of her statement:

"17. The morning did pass with little to report apart from my distress and anxiety on my part as Waqar and I didn't talk much (B362/AF). It wasn't until lunchtime, after Waqar learnt I'd reported the situation to the office, and Tara was coming, that he again turned abusive. (B61/B96/B97) He called Natasha to get her on side not knowing she was my sister, twisting what had happened on the 9th December to her and relaying new sexist remarks he obviously forgot he hadn't initially said. Tara took her time in coming down to site but I did inform her (B97)."

"18. Waqar was being difficult, refusing to move to another site despite agreeing previously on a few dates in early December (B47-8/B72-9/B94-half way down/B112-2) and instead got paid to go home while I worked for the complete shift! (B47-9). Elevate regularly breached their own COVID rules as they proudly say they operated (B47-9) and this was noticed by other members of staff (AF)."
112. It was noted that there is a significant difference between the Third Claimant's witness statement and her claim form at page 61 where the Claimant says about the 17 December 2020 ... "I was verbally abused again, called a dumb blonde and a typical woman playing the sex card when I confronted to his face that he was sexist before and eventually my manager and her superiors intervened and sent him home."



113. During the cross examination of the Third Claimant by the Second Claimant, when challenged about this she explained that she had confronted the Claimant first on the 17 December 2020. The Third Claimant said that she had engaged with him as she had heard from the north bound side that the Second Claimant was saying he got moved as he was the man and not the woman and she wanted to hear that from the Second Claimant herself. She confirmed that the Second Claimant denied it. The Third Claimant then said that she had told the Second Claimant that Tara was coming, and the Second Claimant then flipped the switch, then saying the things she details in her claim form (page 61).
114. The Second Claimant's account is different to this as set out in paragraph 23 of his witness statement ... "AF tried chatting with me but I ignored her as she previously put a harassment allegation against me and I had fear she could do again and didn't talk to her all day and worked in separate cabins and performed my duties, which she accepted in her whatsapp messages of that day with Tia L (Bundle page # 362 and Aliyah (extra Bundle page # 3). I did have a chat during the day with another girl, Natasha, which I wasn't aware at the time is Ashleigh's sister."
115. The Second Claimant's account was not challenged by the Third Claimant in cross examination.
116. We also note that the contemporaneous reports of matters on the 17 December 2020 that the Third Claimant seeks to rely upon as a protected act make no reference to the allegations she makes in her claim form about the Second Claimant. We do not find that the Third Claimant has proven on the balance of probability that Second Claimant acted in the way she alleges on the 17 December.
117. Considering the Third Claimant's asserted protected act at this time that she says she raised complaints about the Second Claimant's treatment to a lady who can only be identified as 'Georgia' in a shift report/form. This is referred to in paragraph 16 of the Third Claimant's witness statement:
- "16. I flagged my concern at 06:45 via the proper channels incident reporting form on site as did Natasha just prior via phone after Waqar arrived (B271/272/276). Emails from Georgia at 08:15 (B275/276) were hardly them acting swiftly and effectively as Elevate Staffing claim they did (B73-12) and Waqar was still on same site as me at 10:41am (B366-368/AF) and the rest of the morning."
118. None of the incident reports (pages 271, 272 and 276) refer to the Third Claimant being abused and demeaned by the Second Claimant. They do not record the Third Claimant making allegations (whether or not express) that the Second Claimant has contravened the Equality Act 2010. The Third Claimant appeared to acknowledge this when cross examined recognising the reports made no reference to discrimination.

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119. We do not find from this that Third Claimant has proven facts on the balance of probability that she did a protected act on the 17 December 2020 in the way she asserts.
120. Considering the explanation given by LM as to her reasons for then doing what she did on the 20 December 2020, removing the Claimants from the HOP campaign, we note and accept that LM had concerns about the Claimants based on their conduct before the alleged disclosures and protected acts were done.
121. As already noted, LM is made aware of further concerns following matters on the 9 December 2020 as detailed in the email she gets from Ms Stephens dated 14 December 2020 (pages 265 to 267). This includes the photographs and screen shots of WhatsApp messages showing the Third Claimant apparently sleeping and indicating that the Third Claimant, with the knowledge of the First and Second Claimants, was intending to mislead the Respondent as to her attendance at work.
122. There is also the comment made by the Second Claimant to the Third Claimant as reported by Ms Stephens to LM as LM refers to in paragraph 28 of her witness statement ... "Tara provided me with a written account of what happened on 9 December 2020, via an email on the 14 December 2020 [265 – 267]. It appeared from the accounts that the Second Claimant behaved inappropriately and was very angry over being told that he would no longer have a lift to work with the Third Claimant. The Second Claimant had shouted at the Third Claimant whilst Tara was there stating that she would be sacked and would have to "go back to her stripping job as that's all she was good for" [266].".
123. There is a reported confession by the Third Claimant which LM refers to in paragraph 29 of her statement. It is recorded on page 266 by Ms Stephens ... "At this point I said to her that she had to tell me the whole truth about what had been going on she said that there had been times when she had been late for work and covered it up but it was for valid reasons i.e. her care tyre needed to be replaced and she needed to get to the pharmacy for medical reasons one day. I asked if she had been moonlighting and doing other jobs while she was on Elevate's time and she said no never. I made her aware of the photographs and text messages that Waqar had sent me one was of her sleeping. She said She didn't know when that could have been taken.".
124. We also note the conclusion of Ms Stephens at the end of her email dated 14 December 2020 (page 267) that she feels that the three Claimants should be taken off the campaign. As highlighted by Respondent's Counsel this does not suggest discriminatory treatment as all three are being treated in the same way.
125. LM confirmed in her oral evidence that after advice from HR (see pages 268 to 270) that she decided that the three Claimants should be removed from the campaign on the 15 December 2020 but wasn't able to communicate it to them until the 20 December 2020. As LM also sets out in paragraph 42 of her statement ... "I called the Claimant's on 20 December 2020 to confirm that they were being removed from the campaign immediately. This was due to the First and Third Claimant under performing and the Second Claimant's behaviour all

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contrary to our Code of Conduct [180 – 184] and their signed agreements [200, 211, 216]. I had discussed this at length with our HR Consultant to ensure that I was taking the appropriate steps in the circumstances [282 – 283].” LM confirmed in her oral evidence that it was her decision to remove the Claimants.

126. As then detailed in paragraph 43 of LM’s statement she confirmed their removal from the campaign by emails dated 21 December 2020 (referring us to pages 288, 290, 293 and 294) making it clear that they would remain on the Respondent’s books for future work.
127. Then at paragraph 44 of her statement LM says ... “All three Claimant’s pushed back and were not happy. The First and Third Claimant felt that we had been deceived by the Second Claimant [289 – 293]. It had been their position that anything that the Second Claimant had said about them was not true. I understood this but the Second Claimant did share some photographic evidence to support his complaint [261 – 264] and I also had complaints raised by both Regional Managers 2 – 3 weeks prior which I had to consider when deciding whether or not to keep them on the campaign (see paragraphs 16 to 22). The Third Claimant was also aware of prior performance concerns given her conversation with her Regional Manager on 27 November 2020 [242 – 246].”.
128. LM maintained these reasons when cross examined about them. LM also sets out her concerns in more detail in paragraph 54 of her statement concluding that ... “This type of conduct and behaviour could amount to gross misconduct but the Respondent had made a decision to keep them as employees, in the hope that they would reflect and grow when they start their next campaign.”.
129. We have also noted from the email of the First Claimant dated 21 December 2020 at page 289, that the First Claimant does not say what has happened is because of the protected disclosure he relies upon in this claim. The First Claimant articulates that he is of the opinion that Second Claimant has is it in for them, he thinks the Respondent is doing what they are doing because they have been misled by the Second Claimant, not because he reported the Second Claimant’s actions on the 9 December 2020.
130. We accept the evidence of LM about her reasons for doing what she did to the Claimants.
131. The Second Claimant also makes a complaint of unauthorised deductions from wage asserting as recorded in the list of issues that that his pay in respect of the month of November was £270 short. The Second Claimant clarified in his oral evidence that he was in fact claiming £160 for unpaid travel expenses and an £80 underpayment. The Second Claimant was not able to present any evidence that he was contractually entitled to the travel expenses when considering page 173 of the bundle which details that the Claimants are expected to cover their own cost of travel to and from local assignments. Further, ... “There may be certain occasions when you will be reimbursed your travel expenses, but this will always be agreed with you prior to the booking and confirmed in writing.”. The Second Claimant has not presented any evidence of such prior approval in writing.

132. As to the £80 underpayment, the Respondent submitted a copy of the relevant payslip during the course of the hearing (added as page 409) and it shows the amount paid after deductions, including a contribution to the employer's pension. It does not evidence any unauthorised deductions as asserted by the Claimant. The Claimant has not evidenced that he was paid less than the net pay amount shown on the payslip. The Second Claimant has not proven on the balance of probability that an amount of £80 was deducted from him without authorisation.
133. As to the First Claimant's complaint of breach of contract, no evidence was presented by the First Claimant in support of this and this was highlighted in the written closing submissions of Respondent's Counsel. The First Claimant was asked about this when he gave his oral closing submissions, and he confirmed no evidence had been presented and that the breach of contract complaint could be dismissed on withdrawal.

### **THE LAW**

134. We were provided with a helpful summary of the relevant law by Respondent's Counsel in his closing written submissions which we also refer to as relevant in our summary of the relevant law set out below:

#### **Protected disclosures (relevant sections from 43A to 43L ERA 1996)**

135. Under section 43A of the ERA 1996 a protected disclosure is a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H. Section 43B(1) provides that a qualifying disclosure means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following – (a) that a criminal offence has been committed, is being committed or is likely to be committed, (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, (c) that a miscarriage of justice has occurred, is occurring or is likely to occur, (d) that the health or safety of any individual has been, is being or is likely to be endangered, (e) that the environment has been, is being or is likely to be damaged, or (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.
136. Under Section 43C(1) a qualifying disclosure becomes a protected disclosure if it is made in accordance with this section if the worker makes the disclosure – (a) to his employer, or (b) where the worker reasonably believes that the relevant failure relates solely or mainly to – (i) the conduct of a person other than his employer, or (ii) any other matter for which a person other than his employer has legal responsibility, to that other person. It is not in dispute that the asserted disclosures, if made, were made to the Claimants' employer.
137. A disclosure of information can still amount to a qualifying disclosure if the information was already known to the recipient (section 43L (3)).

138. As is summarised by Respondent's Counsel in order for us to conclude that a protected disclosure was made, we must establish that:

138.1 There was a disclosure of information (as opposed to making an allegation). This generally requires the conveying of facts as opposed to assertions or opinions; see **Cavendish Munro Professional Risks Management Ltd -v- Geduld 2010 ICR 325, EAT** and **Kilraine v London Borough of Wandsworth 2018 ICR 1850, CA.**

138.2 That the discloser believed that the information disclosed was substantively true.

138.3 That at the time of making the disclosure, the discloser subjectively believed it to be in the public interest and believed that it tended to show one of the limited factors in s.43B (1) (a) – (f).

138.4 That it was objectively reasonable for the discloser to believe that it would be in the public interest and to believe that it tended to show one of the limited factors in s.43B (1) (a) – (f).

139. Although it is not possible to draw a clear dichotomy between information and a mere 'allegation' or expression of opinion, in order to amount to a 'disclosure of information' the statement relied on 'must have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in subsection (1) (**Kilraine**).

140. Disclosures must be viewed in the context in which they are made, and any context relied on as forming part of the basis on which a claimant says they made a protected disclosure should be set out in the claim form and clearly in evidence (**Kilraine**).

141. The focus is on whether in the reasonable belief of the worker (at the time) the information provided tended to show one or more of the matters relied on. It is not whether the worker genuinely / reasonably believed that there had been such a failure. The worker must also believe at the time that the disclosure is made in the public interest.

#### **Dismissal – section 95 ERA 1996**

142. Section 95 of the ***Employment Rights Act 1996*** defines the circumstances in which an employee is dismissed. The relevant provision of that section as considered against the facts presented in these claims is section 95(1)(a) ... "the contract under which he is employed is terminated by the employer (whether with or without notice)," as none of the Claimants assert they terminated the contract.

#### **Automatically unfair Dismissals – section 103A ERA 1996**

143. Section 103A provides:

***An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.***

144. As summarised by Respondent's Counsel to establish such a dismissal it is necessary to establish that:
- 144.1 A qualifying disclosure had been made.
- 144.2 That the Claimant was dismissed.
- 144.3 That the principal reason for the dismissal was the making of the protected disclosure.
145. We were referred to **Royal Mail Group Ltd -v- Jhuti [2019] UKSC 55, [2022] ICR 731.**
146. Also, where an employee lacks the requisite continuous service to claim ordinary unfair dismissal, they had the burden of proving, on the balance of probabilities, that the reason for the dismissal was an automatically unfair reason; see **Smith -v- Hayle Town Council [1978] ICR 996, CA** and **Ross -v- Eddie Stobart Ltd EAT 0068/13.**

**Detriment on the ground of a protected disclosure (section 47B ERA 1996)**

147. Under Section 47B a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure. This provision does not apply to employees where the alleged detriment amounts to dismissal.
148. Under section 48(2) of the Act, on a complaint to an employment tribunal it is for the employer to show the ground on which any act, or deliberate failure to act, was done.
149. Section 47B and Section 48(2) provides:

***...47B Protected disclosures***

***(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.***

***(1A) A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—***

***(a) by another worker of W's employer in the course of that other worker's employment, or***

*(b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.*

*(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.*

*...48 Complaints to [employment tribunals]*

*(2) On a complaint under subsection (1) ...(1A) ... it is for the employer to show the ground on which any act, or deliberate failure to act, was done.*

150. As is summarised by Respondent's Counsel with reference to **London Borough of Harrow -v- Knight 2003 IRLR 140, EAT**, in order for us to find a protected disclosure detriment we need to find that:

150.1 The claimant made a protected disclosure.

150.2 The claimant suffered some identifiable detriment (other than dismissal).

150.3 The respondent subjected the claimant to that detriment by some act, or deliberate failure to act; and

150.4 The act or deliberate failure to act must have been done on the ground that the claimant made a protected disclosure.

151. As is summarised by Respondent's Counsel by virtue of section 48(2) Employment Rights Act 1996, the burden of proof remains upon the claimant to establish all the components of a protected disclosure detriment claim, save for the reason of any act or omission. Only once all the other necessary elements of a claim have been proved on the balance of probabilities by the claimant does the burden shift to the respondent to prove that the worker was not subjected to the detriment on the ground that he or she had made the protected disclosure.

152. As outlined in **Ibekwe -v- Sussex Partnership NHS Foundation trust EAT 0072/14**, even if the tribunal cannot find any evidence as to the reason for particular treatment, it does not automatically mean the claim is made out.

### **Direct discrimination – section 13 Equality Act 2010**

153. This complaint is alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The Claimants complain that the Respondent has contravened a provision of part 5 (work) of the EqA. The Claimants allege direct discrimination.

154. The protected characteristics relied upon are race and sex as set out in sections 4, 9 and 11 of the EqA.

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155. For a claim for direct discrimination, under section 13(1) of the EqA 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.
156. As we are reminded by Respondent's Counsel, direct discrimination claims require a comparison as between the treatment of different individuals i.e., individuals who do not share the protected characteristic in issue. In doing so there must be no material difference between the circumstances relating to each individual (section 23 EqA). The Tribunal therefore must compare 'like with like'.
157. Also, as submitted by Respondent's Counsel, in determining whether any alleged treatment was because of the protected characteristic we must ask ourselves:
- 157.1 If the treatment was inherently discriminatory, what were the facts that the discriminator considered to be determinative when making the relevant decision?
- 157.2 If the treatment was not inherently discriminatory, what were the mental processes, conscious or subconscious, of the alleged discriminator and what facts operated on his or her mind; **R (on the application of E) -v- Governing Body of JFS and the Admissions Appeal Panel of JFS and ors [2010] IRLR 136, SC.**
158. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which 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. However, this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
159. As summarised in the written submissions of Respondent's Counsel in respect of the burden of proof, there is a two-stage process for analysing the complaint. At the first stage, the Claimant must prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent had committed an unlawful act of discrimination against the Claimant. At the second stage, if the Claimant is able to raise a prima facie case of discrimination following an assessment of all the evidence, the burden shifts to the Respondent to show the reasons for the alleged discriminatory treatment and to satisfy the tribunal that the protected characteristic played no part in those reasons (**Igen -v- Wong [2005] EWCA Civ 142** as affirmed in **Ayodele -v- CityLink Ltd [2018] ICR 748**).
160. We also note the recent decision of **Efobi v Royal Mail Group Ltd (2021) ICR 1263** which confirmed that the reverse burden of proof remains good law under the EqA.
161. Considering **Madarassy v Nomura International Plc [2007] ICR 867**, Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument



that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent “could have” committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal “could conclude” that, on the balance of probabilities, the respondent had committed an act of discrimination”.

162. The burden of proof does not shift to the Respondent simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal “could conclude” that the Respondent had committed an unlawful act of discrimination (***Madarassy***). “Could conclude” must mean that “a reasonable Tribunal could properly conclude” from all the evidence before it. This would include evidence adduced by the Claimant in support of the allegations of discrimination. It would also include evidence adduced by the Respondent contesting the complaint.
163. In ***Igen*** the Court of Appeal cautioned tribunals ‘against too readily inferring unlawful discrimination on a prohibited ground merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such ground’ but made it clear that a finding of ‘unexplained unreasonable conduct’ is a primary fact from which an inference can properly be drawn to shift the burden.

#### **Victimisation – section 27 Equality Act 2010**

164. Section 27 EqA 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—***

***(a) bringing proceedings under this Act;***

***(b) giving evidence or information in connection with proceedings under this Act;***

***(c) doing any other thing for the purposes of or in connection with this Act;***

***(d) making an allegation (whether or not express) that A or another person has contravened this Act.***

***(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.***

**Deduction from wage – section 13 ERA 1996**

165. The Second Claimant also claims in respect of deductions from wages which he alleges were not authorised and were therefore unlawful deductions from his wages contrary to section 13 of the Employment Rights Act 1996.

166. Section 13 states:

***Right not to suffer unauthorised deductions.***

***(1) An employer shall not make a deduction from wages of a worker employed by him unless—***

***(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or***

***(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.***

***(2) In this section “relevant provision”, in relation to a worker's contract, means a provision of the contract comprised—***

***(a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or***

***(b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.***

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

***(4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.***

*(5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.*

*(6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.*

*(7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.*

167. Section 27 of the Employment Rights Act defines what wages are and we note that section 27(2)(b) excludes any payment in respect of expenses incurred by the worker in carrying out his employment from that definition.

### **Breach of Contract**

168. We have not summarised the relevant law in respect of a breach of contract claim as that complaint was withdrawn by the First Claimant.

### **THE DECISION**

169. Having made the findings of fact as set out above and considered the relevant law as summarised above, we now confirm our decision by addressing the questions raised in the agreed list of issues as follows:

#### **The First Claimant - Mr Brighty**

##### **170. Protected disclosure ('whistle blowing')**

171. The Claimant says he made two disclosures. The first being to Ms Stephens on 9 December 2020 in writing (page 346), that the Third Claimant and a colleague were being ill-treated and/or threatened by the Second Claimant.

172. About this the First Claimant confirmed that the WhatsApp messages do not refer to the Equality Act 2010 and the part he relates to being health and safety related are the words "verbally attacking".

173. The second being to Mr Kerr on 9 December 2020 in writing, said in the agreed issues to be a repeat of the above (page 257). This is actually an email to Ms Stephens marked "FAO Rob". This email goes into a lot more detail. The First Claimant maintained that he had sent this raising Equality Act and health and safety related matters, and he did so because he was concerned about the health and safety of the staff and public, noting it could have spilled out into the

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public car park. We can read that it does raise equality and safety concerns referring to “a tirade of personal and nasty insults”, quoting ‘you’re a basic bitch’ and ‘you only have this job because of me’”. Also, we note that the First Claimant explains that it was his interpretation that the Second Claimant based his questioning of the Third Claimant on her being a woman. Further, it says that ... “Unfortunately Waqar will only see his perspective and has turned this into a personal attack on two members of staff, and even ranted at the interpreter who also had a door slammed in her face.”. And, ... “I was personally close to travelling to the site to ensure the safety of both Ashleigh and Tia, alternatively I was tempted to call the Police as you simply cannot guarantee their safety at this point.”. Also ... “I hope that both Ashleigh and Tia get the correct support to ensure their safety while at work and other members of staff that Waqar has quite clearly brought into disrepute.”.

174. We need to consider whether these were disclosures of ‘information’. That is a disclosure of information, as opposed to making an allegation, which generally requires the conveying of facts as opposed to assertions or opinions. Both asserted disclosures contain more than mere allegations.
175. So, to consider whether the First Claimant believed the disclosure of information was made in the public interest. The First Claimant maintains that it was him being concerned for public safety. This though is not apparent from his first asserted disclosure in the WhatsApp message, but it is apparent from his second disclosure, being what is set out in the email as referred to above.
176. Was that belief reasonable? Based on the evidence presented by the First Claimant, in particular the location of the incident being accessible by the public, we accept that it was.
177. Did the First Claimant believe it tended to show that:
  - 177.1 A person had failed, was failing or was likely to fail to comply with any legal obligation, relating to the Equality Act. The First Claimant accepts the WhatsApp disclosure does not show that, but asserted that the email does, and we accept that it does with his interpretation being added around the “personal and nasty insults” he quotes.
  - 177.2 The health or safety of any individual had been, was being or was likely to be endangered, relating to the two female employees affected by the Second Claimant’s conduct. We accept there is sufficient within the WhatsApp messages and the email to support what the First Claimant says about this.
178. Was that belief reasonable? Based on the evidence presented by the First Claimant, as to what he understood was going on at the other site, we accept that it was.
179. It is accepted that the qualifying disclosures made were protected disclosures because they were made to the First Claimant’s employer.

**180. Dismissal (Employment Rights Act s. 103A)**

181. The First Claimant did not have at least two years' continuous employment and the burden is therefore on him to show jurisdiction and therefore to prove that the reason or, if more than one, the principal reason for the dismissal was the protected disclosures.
182. As detailed in our fact find we do not find that the Claimants have proven a dismissal. We accept the submissions of Respondent's Counsel about this as set out in his written submissions at paragraphs 59 to 67. The burden of proof is on the Claimants to establish a dismissal occurred. It is not in dispute that the Claimants were engaged under a zero hours contract. None of the Claimants confirmed in evidence that they had received a P45 from the Respondent, nor that they had requested it. We were also presented evidence that the working position between the Respondent and the First and Second Claimants was clarified on the 22 December 2020 expressly stating they ... "have not been dismissed from Elevate's employment" (pages 299 and 300). We do not find that it has been proven on the balance of probability that the Claimants were dismissed on the 20 December 2020.
183. However, we have gone on to consider the evidence presented to us as to the reason for what did happen.
184. Considering the explanation given by LM as to her reasons for then doing what she did on the 20 December 2020, removing the Claimants from the HOP campaign, we note and accept that LM had concerns about the Claimants based on their conduct before the alleged disclosures and protected acts were done.
185. LM is made aware of further concerns following matters on the 9 December 2020 as detailed in the email she gets from Ms Stephens dated 14 December 2020 (pages 265 to 267). This includes the photographs and screen shots of WhatsApp messages showing the Third Claimant apparently sleeping and indicating that the Third Claimant, with the knowledge of the First and Second Claimants, was intending to mislead the Respondent as to her attendance at work.
186. There is also the comment made by the Second Claimant to the Third Claimant as reported by Ms Stephens to LM as LM refers to in paragraph 28 of her witness statement. Further, a reported confession by the Third Claimant which LM refers to in paragraph 29 of her statement.
187. LM confirmed in her oral evidence that after advice from HR (see pages 268 to 270) that she decided that the three Claimants should be removed from the campaign on the 15 December 2020 but wasn't able to communicate it to them until the 20 December 2020. As LM also sets out in paragraph 42 of her statement ... "I called the Claimant's on 20 December 2020 to confirm that they were being removed from the campaign immediately. This was due to the First and Third Claimant under performing and the Second Claimant's behaviour all contrary to our Code of Conduct [180 – 184] and their signed agreements [200,

211, 216].”. LM confirmed in her oral evidence that it was her decision to remove the Claimants.

188. Then at paragraph 44 of her statement LM says ... “All three Claimant’s pushed back and were not happy. The First and Third Claimant felt that we had been deceived by the Second Claimant [289 – 293]. It had been their position that anything that the Second Claimant had said about them was not true. I understood this but the Second Claimant did share some photographic evidence to support his complaint [261 – 264] and I also had complaints raised by both Regional Managers 2 – 3 weeks prior which I had to consider when deciding whether or not to keep them on the campaign (see paragraphs 16 to 22). The Third Claimant was also aware of prior performance concerns given her conversation with her Regional Manager on 27 November 2020 [242 – 246].”.
189. LM maintained these reasons when cross examined about them. LM also sets out her concerns in more detail in paragraph 54 of her statement concluding that ... “This type of conduct and behaviour could amount to gross misconduct but the Respondent had made a decision to keep them as employees, in the hope that they would reflect and grow when they start their next campaign.”.
190. We have also noted from the email of the First Claimant dated 21 December 2020 at page 289, that the First Claimant does not say what has happened is because of the protected disclosures he relies upon in this claim. The First Claimant articulates that he is of the opinion that the Second Claimant has is it in for them, he thinks the Respondent is doing what they are doing because they have been misled by the Second Claimant, not because he reported the Second Claimant’s actions on the 9 December 2020.
191. We accept the evidence of LM about her reasons for doing what she did to the First Claimant. The First Claimant has not proven on the balance of probability that the reason or principal reason, if he were dismissed, was that he had made a protected disclosure.
192. **Direct sex discrimination (Equality Act 2010 section 13)**
193. Did the Respondent’s servant or agent, LM dismiss the First Claimant? As detailed above we do not find that there was a dismissal as asserted by the Claimants. However, we have gone on to consider the evidence presented to us as to the reason for what did happen.
194. We have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The Claimant says that he was treated worse than he would have been had he not been in a relationship with the Third Claimant which was defined by his sex as a man.

195. As the Third Claimant was treated the same way, this is an actual comparator meaning the First Claimant has not demonstrated a difference in status or treatment on the basis of sex. The First Claimant has not raised a prima facie case of discrimination following an assessment of all the evidence, so the burden does not shift to the Respondent to show the reasons for the alleged discriminatory treatment and to satisfy the tribunal that the protected characteristic played no part in those reasons. We also accept the evidence of LM about her reasons for doing what she did to the First Claimant.

196. **Breach of Contract (Extension of Jurisdiction Order 1994)**

197. This complaint has been dismissed on withdrawal.

### **The Second Claimant - Mr Butt**

198. **Protected disclosure ('whistle blowing')**

199. The Second Claimant says he made the following disclosures:

199.1 To Mr Stoodly, both before and on 9 December 2020 in writing (which we understand to be the emails at pages 259 and 260). It is stated in the list of issues that the Claimant alleges that Sandy (in the earlier disclosure) and the Third Claimant (on 9 December) were accused of having been in breach of their contractual duties to the Respondent. It was specifically alleged that the Third Claimant had been late to work and/or had been sleeping at work.

199.2 And to Ms Stephens orally on 9 December 2020; where the list of issues states that he repeated the disclosure made to Mr Stoodly but provided more details of the Third Claimant's alleged non-adherence to her contractual duties.

200. Considering the disclosure to Mr Stoodly prior to the Second Claimant's email to him, this appears to relate to a potential oral disclosure which is recorded at pages 248 and 249 of the bundle. It is an email from Mr Stoodly dated the 30 November 2020 timed at 10:51 that records him speaking with the Second Claimant that morning (so on 30 November 2020) recording the Second Claimant's complaints about Sandy. The Second Claimant complains about inappropriate conduct towards him and of Sandy promoting her own surgery/cosmetic business while at work.

201. This appears to record a verbal disclosure of information by the Second Claimant.

202. Considering then the email the Second Claimant sends to Mr Stoodly on the 9 December 2020 which is at page 260. It says ... "Hello Joe, hope you are warm and well, I need to have a word with you about the past complain and some more issues, if you and when you have time please do ring me.". This is clearly not a disclosure of information.

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203. It is the Second Claimant's next email sent on the 10 December 2020 at 01:14 (pages 259 and 260) that includes details about First and Third Claimant's conduct. It does allege that the Third Claimant had been late to work, sleeping at work and bunking off, not appearing for the whole shift. It refers to the First Claimant covering for the Third Claimant and informing her about checks by the Regional Managers. It attaches a number of screen shots of WhatsApp messages. It also attaches some pictures including one appearing to show the Third Claimant asleep at the desk (page 261). One of the attached WhatsApp messages clearly indicates that the Third Claimant, with the knowledge of the First and Second Claimants, was intending to mislead the Respondent as to her attendance at work.
204. The Second Claimant's email does not expressly say that the Third Claimant is in breach of her contractual duties, but we accept that it is a disclosure of information from which that could be inferred. There is no reference to Sandy in this email.
205. Next considering the second alleged disclosure by the Second Claimant that to Ms Stephens he disclosed orally on 9 December 2020, which is noted in the list of issues as a repeat of the disclosure made to Mr Stoodly, but with more details of the Third Claimant's alleged non-adherence to her contractual duties. It is clear though from our review of the Second Claimant's emails at this time that his written disclosure to Mr Stoodly is after his alleged verbal disclosure to Ms Stephens.
206. About this there is the written account of Ms Stephens where she records what the Second Claimant says when asked about the allegations against him (pages 265 to 267). This does appear to be greater detail of the Third Claimant's alleged non-adherence to her contractual duties.
207. We need to consider whether these were disclosures of 'information'. That is a disclosure of information, as opposed to making an allegation, which generally requires the conveying of facts as opposed to assertions or opinions. We find that all of the asserted disclosures, save for the email to Mr Stoodly dated 9 December 2020, contain more than mere allegations.
208. So, to consider whether the Second Claimant believed the disclosure of information was made in the public interest and whether that belief was reasonable. We note that the alleged disclosures on the 9 and 10 December 2020 are raised after the 9 December 2020 allegations about the Second Claimant's conduct towards the Third Claimant have been raised with him. We note the submissions of Respondent's Counsel about this apparent cause and effect, with the Second Claimant raising matters in reaction to allegations against him. This is consistent with what the Second Claimant expressed in cross examination when it was put to him that when he was having his discussions with Ms Stephens on the 9 December 2020, he was not raising it because there was a public interest in the matters he was raising. The Claimant confirmed that the reason he complained was because he didn't want to lose his job and it is not fair and also bad as it's a tax funded campaign. The reference to the tax



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funding does appear to be an afterthought by the Claimant. It is not something he articulates at the time of the disclosures.

209. We do not find when considered subjectively and objectively that the Second Claimant made these disclosures in the public interest.
210. In respect of the first disclosure being a verbal disclosure of information by the Second Claimant on the 30 November 2020, it is not clear from the evidence presented by the Second Claimant what contractual duties to the Respondent it is tending to show that Sandy had failed, was failing or was likely to fail to comply with. His witness statement focuses on his email to Ms Stephens dated 28 November 2020 and not on what he verbally told Mr Stoodly on the 30 November 2020.
211. We do accept though that he believed, and that it was reasonable for him to do so due to his involvement in the same in respect of the Third Claimant's activities, that a person (the Third Claimant) had failed, was failing or was likely to fail to comply with any legal obligation, being their contractual duties to the Respondent.
212. As already noted, and with reference to the agreed list of issues it is accepted that disclosures, if made, were made to the employer. We do not find however, that the first asserted verbal disclosure tended to show a breach of a legal obligation, nor were the asserted disclosures made in the public interest, instead being a reaction to allegations against the Second Claimant which he makes to stop him losing his job. However, for the avoidance of doubt, if that conclusion were incorrect, we have gone on to consider if the Second Claimant has proven on the balance of probability that the asserted disclosures are the reason or principal reason for what happened to him, or they were the grounds of the alleged detriment.
213. **Dismissal (Employment Rights Act s. 103A)**
214. The Second Claimant did not have at least two years' continuous employment and the burden is therefore on him to show jurisdiction and therefore to prove that the reason or, if more than one, the principal reason for the dismissal was the protected disclosures.
215. As detailed in our fact find we do not find that the Claimants have proven a dismissal.
216. Also, we do not find that the Second Respondent has proven the reason or, if more than one, the principal reason for the dismissal was the protected disclosures. Further, we have set out in detail our factual findings as to why LM did what she did, and we accept those.
217. We accept the evidence of LM about her reasons for doing what she did to the Second Claimant. The Second Claimant has not proven on the balance of probability that the reason or principal reason, if he were dismissed, was that he had made a protected disclosure.

**218. Detriment (Employment Rights Act 1996 section 47B)**

219. The asserted detriment on the grounds of making a protected disclosure is also asserted as an act of less favourable treatment on the grounds of race.

220. As the alleged comment of “I know you people” as asserted by the Second Claimant occurs pre and post the asserted protected disclosures (as referred to in paragraph 4 of the Second Claimant’s witness statement), this in our view breaks the factual connection between the alleged detriment and the alleged disclosure. This is consistent with the reasons that Employment Judge Livesey relied upon to make the Deposit Order against the Second Claimant ... “... in relation to the detriment claim, the Judge noted that the Claimant alleged that similar conduct had occurred before he had made any disclosure.”.

221. We therefore do not find that it was done on the ground that he had made the asserted protected disclosures.

**222. Direct sex and/or race discrimination (Equality Act 2010 section 13)**

223. Considering the Second Claimant’s allegations of direct sex and race discrimination which is the Respondent, it’s servant or agent Ms Stephens, did the following things:

223.1 Accused the Second Claimant of being a manipulator and/or a liar with reference to his race and/or nationality on 9 and/or 11 or 12 December 2021 (on the grounds of race);

223.2 Dismissed him (on the grounds of sex).

224. We accept the Second Claimant’s evidence about what happened to him on the 9 December 2020 in particular what he sets out in paragraph 13 of his witness statement ... “kept calling me “liar” and “sexist” and phrases like “I know you people” or “I’ve deal with people like you”, which were quite racist and shown her prejudice, her biased (women to women or/and British to British) was very visible towards AF.”.

225. There is also a contemporaneous articulation of the Second Claimant’s concern in his email to Mr Stoodly on the 10 December 2020 which notes ... “I would like to mention just like the last time I found Regional Manager Tara biased, taking words of the other party more truthfully than mine, not giving me enough time to explain myself, one of the reasons I had to record my concerns with you.” (page 260).

226. There is no evidence presented that it happened on the 11 or 12 December 2020 as well.

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227. Was that less favourable treatment? We have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The Claimant says he was treated worse than a hypothetical non-Pakistani comparator.
228. Ms Stephens did not attend this Tribunal to give any evidence on this matter. There is no documentary evidence presented by the Respondent that shows Ms Stephens' account of that particular matter. This is surprising as it became clear to this Tribunal during the oral evidence, and in particular that of LM, that there were a number of references to the Claimant complaining of racism and a common member of staff, Stacey Cullen, being tasked with investigating matters.
229. We have seen a copy of an email dated 6 December 2020 from Ms Stephens that records her recollections from the meeting between her and the Second Claimant on the 28 November 2020. It is a different account to that presented by Second Claimant in paragraphs 4 and 5 of his witness statement. It is asserted by the Second Claimant in paragraph 4 of his witness statement that on the 28 November Ms Stephens used the phrase "I know you people" several times. There is no contemporaneous record of this being said on the 28 November 2020. The Claimant in his reply to cross examination about this matter said he told Mr Stoodly in his call with him, but we note that it is not recorded in Mr Stoodly's account of the call (see pages 248 and 249), which appears to be a very full account of the Second Claimant's concerns. However, Mr Stoodly did not attend this Tribunal to give evidence on the matter and there are no details or notes of any investigation process seeking his account of events.
230. From the email at pages 248 to 249 dated 30 November 2020, sent by Mr Stoodly it records that the Second Claimant has ... "confirmed that the RM he complained to was Tara, and he said he is shocked with the way that she handled it."
231. We have noted as well that at page 249 Mr Stoodly asks Stacey Cullen if she knows if Ms Stephens has logged the Second Claimant's complaint anywhere as he is worried, she has just swept it under the rug.
232. There is also an email account of phone calls between Ms Stephens and Sandy and then the Second Claimant on the 29 November 2020 (page 241) which references the words "racist" and "racism" which is sent to Stacey Cullen. In her oral evidence LM confirmed that when she became aware that the Second Claimant was making a complaint of racism based on his email dated 20 December 2020 (page 284) she instructed Stacey Cullen to investigate the matter. LM confirmed that Stacey had then told her verbally there was nothing to support racist conduct by Ms Stephens. Unfortunately, despite numerous references to the word racism and the apparent awareness of Stacey Cullen

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about these various issues no direct evidence has been presented by the Respondent on these matters.

233. We also note what the Second Claimant says in his witness statement at paragraph 21 where he refers us to the further particulars of the First Claimant at paragraph 90 of the bundle which record a comment made to him by Ms Stephens when referring to her previous days at British Airways... "Don't worry Glenn, I've dealt with Pakistanis I've dealt with his sort.". Further, he refers to page 2 of his additional documents which record the First Claimant recalling racist remarks about the Second Claimant. The First Claimant did not retract this evidence from the Tribunal's consideration.
234. We also heard from the Second Claimant's supporting witness, Ms Pashova and although her evidence focuses upon her own circumstances, we note the general view she expresses of Ms Stephens in paragraphs 14 and 18 of her witness statement such as ... "Tara has befriended and protected staff members who are of White British origin, while those of Eastern European heritage have not enjoyed such privilege".
235. Having considered all of this we find that the Second Claimant has presented sufficient material from which we "could conclude" that, on the balance of probabilities, the Respondent had committed an act of race discrimination on the 9 December 2020.
236. In respect of the concerns over racist conduct towards the Second Claimant, him not being believed by Ms Stephens and being told that because of his race, we accept what the Second Claimant has told us in evidence about this matter and this would therefore be less favourable treatment as he asserts. There is sufficient in our view from the racial connection to the comments "I know you people" and "I've deal with people like you", and how Ms Stephens is perceived by others to move the burden of proof to the Respondent.
237. The Respondent has not proven on the balance of probability that such conduct was absolutely nothing to do with the Second Claimant's race.
238. As to the second allegation, we do not find that the Claimant was dismissed. However, we have gone on to consider whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.
239. The Claimant says that he was treated worse than the Third Claimant. In essence, he asserts that her account of the events of 9 December was believed and his was rejected. There is no evidence to support this, however. The Respondent (in the form of LM who decided to remove the Claimants) has believed the complaints made by the Second Claimant about the Third Claimant and she was then treated in the same way as the Second Claimant. There is no difference in status or treatment.

240. In respect of this allegation the Second Claimant has not raised a prima facie case of discrimination following an assessment of all the evidence, so the burden does not shift to the Respondent to show the reasons for the alleged discriminatory treatment and to satisfy the tribunal that the protected characteristic played no part in those reasons. We also accept the evidence of LM about her reasons for doing what she did to the Second Claimant.
241. **Unauthorised deductions (Part II of the Employment Rights Act 1996)**
242. The Second Claimant clarified in his oral evidence that he was claiming £160 for unpaid travel expenses and an £80 underpayment.
243. The Second Claimant was not able to present any evidence that he was contractually entitled to the travel expenses when considering page 173 of the bundle which details that the Claimants are expected to cover their own cost of travel to and from local assignments. Further, ... "There may be certain occasions when you will be reimbursed your travel expenses, but this will always be agreed with you prior to the booking and confirmed in writing." The Second Claimant has not presented any evidence of such prior approval in writing. We also recognise that in any event even if he could, expenses do not fall within the definition of wages that can be claimed for.
244. As to the £80 underpayment, the relevant payslip (page 409) shows the amount paid after deductions, including a contribution to the employer's pension. It does not evidence any unauthorised deductions as asserted by the Claimant. The Claimant has not evidenced that he was paid less than the net pay amount shown on the payslip. The Second Claimant has not proven on the balance of probability that an amount of £80 was deducted from him without authorisation.

### **The Third Claimant - Miss Fountain**

245. **Direct sex discrimination (Equality Act 2010 section 13)**
246. The Third Claimant asserts that the Respondent's servant or agent, the Second Claimant, did the following things:
- 246.1 Abused and demeaned the Third Claimant verbally on 9 December 2021. It is noted in the agreed list of issues that this has been admitted by the Respondent (paragraph 1 of the section of its response relating to the Third Claimant of 1 June 2022); and
- 246.2 Further abuse and demean the Third Claimant verbally on 17 December 2021.
247. There is a dispute of fact about these allegations, so we have carefully considered the contemporaneous documentation that exists around that time. This includes the most contemporaneous first-hand account of what is alleged to have happened between the Second and Third Claimant being the Third

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Claimant's email on the 9 December 2020 timed at 15:12 at pages 255 to 256 of the bundle.

248. We find from the evidence presented that it is proven on the balance of probability that there was a verbal exchange between the Second Claimant, Third Claimant and Tia in the morning of the 9 December 2020 and accept what the Third Claimant's email records ... "... whilst shouting derogatory comments to intimidate Tia; 'Basic Bitch' 'Ugly' 'Greedy' 'Unthankful' Told to 'get ourselves in line' Coupled with other personal comments about appearance, make up and stature ie what have we achieved in life". Also, ... "wouldn't move out the door way when politely asked despite knowing the covid rule of 2 per cabin".
249. Further, we accept the contemporaneous account as contained in Ms Stephens email that the Second Claimant shouted at the Third Claimant ... "you're going to be sacked you will have to go back to your stripping job as that's all you're good for".
250. About the allegation that the Second Claimant further abused and demeaned the Third Claimant verbally on 17 December 2021 there is a significant difference between the Third Claimant's witness statement, her oral evidence to this hearing and her claim form at page 61. It is also different to the second Claimant's account as set out in paragraph 23 of his witness statement and this was not challenged by the Third Claimant in cross examination. The Second Claimant denies what the Third Claimant accuses him of. Considering then the contemporaneous documents created at the time. We note that the contemporaneous reports of matters on the 17 December 2020 that the Third Claimant seeks to rely upon as a protected act make no reference to the allegations she makes in her claim form about the Second Claimant. We do not find that the Third Claimant has proven on the balance of probability that Second Claimant acted in the way she alleges on the 17 December.
251. Are the matters proven on the balance of probability to have occurred on the 9 December 2020 less favourable treatment? We have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether she was treated worse than someone else would have been treated. The Claimant says she was treated worse than a hypothetical male comparator.
252. We find that the matters proven on the balance of probability to have occurred on the 9 December 2020 are abusive and demeaning verbal references on the grounds of sex by the Second Claimant towards Tia and the Third Claimant. This is less favourable treatment when compared to a hypothetical male comparator as we accept that such comments would not be made to a man, and we have not been presented evidence by the Respondent to show that they would be. This is also in our view connected to work as it arises initially from a disagreement over travel to and from work, aired in the workplace during the

working day, and addressed by managers at the Respondent. Then, the Second Claimant making the comment to the Third Claimant of her having to go back to a stripping job, on the basis she was going to be sacked, him having raised concerns about her, perceiving he was being accused of being sexist.

253. We also note what was recorded by Employment Judge Livesey when making his deposit order against the Respondent ... "64.1 In light of the Respondent's concession in relation to the Second Claimant's conduct towards the Third Claimant on 9 December 2021, both in its response to the further information and its application under rules 37 and 39, it was difficult to see how it would defend the Third Claimant's complaint of discrimination. It stood vicariously liable for the Second Claimant's acts and did not seek to run a defence under s. 109 (4). Whilst it was possible that a Tribunal might conclude that the events somehow occurred outside the Second Claimant's employment and/or had not included comments of an overtly sexist nature, that seemed unlikely on the facts as set out in the respective pleadings at present. A deposit order was warranted in all of the circumstances."
254. **Victimisation (Equality Act 2010 s. 27)**
255. Considering the four asserted protected acts. We find as follows:
256. As to whether on the 28 November 2020 the Third Claimant did a protected act by making an allegation (whether or not express) that the Second Respondent has contravened the Equality Act 2010. We do not find from our findings of fact that the Third Claimant has proven on the balance of probability that she did a protected act on the 28 November 2020 as she asserts.
257. There are then the two asserted protected acts on the 9 December 2020.
258. The first, that the Third Claimant raised complaints about the Second Claimant's treatment to Ms Stephens on 9 December. Having considered the evidence we have as set out above we can see that the First Claimant has complained about derogatory comments to intimidate Tia. It is also clear that there is recorded a "sexist allegation" connotation being perceived by the Second Claimant when matters are raised with him by Ms Stephens (page 266).
259. The second protected act on the 9 December 2020 is that the Third Claimant raised complaints about the Second Claimant's treatment to Mr Kerr on 9 December. It is not in dispute that the Third Claimant communicated with Mr Kerr at this time and action is taken. There is also recorded a "sexist allegation" connotation being perceived by the Second Claimant when matters are raised with him by Ms Stephens.
260. From this we find that there are allegations (whether or not express) that the Second Claimant has contravened the Equality Act 2010, so they would amount to protected acts.

261. Considering the Third Claimant's asserted protected act on the 17 December 2020 that she says she raised complaints about the Second Claimant's treatment to a lady who can only be identified as 'Georgia' in a shift report/form. None of the incident reports (pages 271, 272 and 276) refer to the Third Claimant being abused and demeaned by the Second Claimant. They do not record the Third Claimant making allegations (whether or not express) that the Second Claimant has contravened the Equality Act 2010. The Third Claimant appeared to acknowledge this when cross examined recognising the reports made no reference to discrimination.
262. We do not find from this that Third Claimant has proven on the balance of probability that she did a protected act on the 17 December 2020 in the way she asserts.
263. As detailed above we do not find that there was a dismissal as asserted by the Claimants. However, we have gone on to consider the evidence presented to us as to the reason for what did happen.
264. We accept the evidence of LM about her reasons for doing what she did to the Third Claimant. The Third Claimant has not proven on the balance of probability that the reason or principal reason, if she were dismissed, was that she had done the protected acts.
- 265. The unanimous judgment of the tribunal is therefore that:**
- 265.1 The First Claimant's complaint of breach of contract is dismissed on withdrawal.**
- 265.2 The First Claimant's complaints of automatic unfair dismissal for making a protected disclosure and direct sex discrimination, fail and are dismissed.**
- 265.3 The Second Claimant's complaint of direct race discrimination as to matters on the 9 December 2020 succeeds.**
- 265.4 The Second Claimant's complaints of automatic unfair dismissal and detriment for making a protected disclosure, direct sex discrimination and for unauthorised deductions, fail and are dismissed.**
- 265.5 The Third Claimant's complaint of direct sex discrimination in respect of matters on the 9 December 2020 succeeds.**
- 265.6 The Third Claimant's complaints of direct sex discrimination in respect of matters on the 17 December 2020 and victimisation, fail and are dismissed.**
266. Matters of remedy for the complaints that have succeeded remain to be determined.



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267. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 11; the findings of fact made in relation to those issues are at paragraphs 13 to 133; a concise identification of the relevant law is at paragraphs 134 to 168; how that law has been applied to those findings in order to decide the issues is at paragraphs 169 to 265.

Employment Judge Gray  
Date: 12 December 2022

Judgment sent to the parties: 15 December 2022

FOR THE TRIBUNAL OFFICE