



EMPLOYMENT TRIBUNALS

Claimant: Mr S El Fath

Respondents: Secretary of State for Justice

Heard at: Watford (by video)

On: 14-18 November 2022

Before: Employment Judge S Shore
NLM – Mr C Grant
NLM – Ms A Carvell

Appearances

For the claimant: In person

For the respondent: Mr G Molyneux, Counsel

JUDGMENT AND REASONS ON LIABILITY

The unanimous decision of the Tribunal is that:

1. The claimant's claims of direct discrimination because of the protected characteristic of race (contrary to section 13 of the Equality Act 2010) are determined as follows (identifying each individual in the order they were listed in the case management order of EJ Ord dated 1 June 2022):
 - 1.1. **Allegation 1** – “Continue to place the Claimant on “B Wing” and not comply with workplace Health and Safety Risk Assessments between December 2018 and 28 November 2019” fails.
 - 1.2. **Allegation 2** – “Refusing to endorse the Claimant’s application for a Band 4 Business Administrator Specialist Analyst role (“the Analyst role”) on 11 February 2020” fails.
 - 1.3. **Allegation 3** – “At the same time CM Clark questioning the Claimant’s integrity (either of their own volition or at the instigation of Deputy Governor Nethercott)” fails.

- 1.4. **Allegation 4** - “Failing to investigate the Claimant’s Line Manager, CM Clark, for lack of integrity for his alleged misconduct relating to the investigation on 11 February 2020” fails.
 - 1.5. **Allegation 5** - “Failing to treat the Claimant’s sickness absence as work related stress and anxiety on or around 23 March 2020” fails.
 - 1.6. **Allegation 6** - “Deputy Governor Nethercott failing to properly investigate the break in to the Claimant’s locker, up to and including 15 April 2020 when Deputy Governor Nethercott replied to the Claimant’s complaint” fails.
 - 1.7. **Allegation 7** - “Failing to acknowledge the Claimant’s Grievance in accordance with the Respondent’s Policies and Procedures in or around May 2020” fails.
 - 1.8. **Allegation 8** - “Delaying the process of the Claimant’s Grievance contrary to the Respondent’s Policies and Procedures between 10 May 2020 and 28 August 2020” fails.
 - 1.9. **Allegation 9** - “On or around 14 May 2020, appoint the Claimant’s Line Manager to investigate the Claimant’s grievance dated 10 May 2020, that Grievance being made against the same Line Manager” fails.
 - 1.10. **Allegation 10** - “Subsequently appointing a person (CM Wheeler) on or about 25 May 2020, to investigate the Claimant’s Grievance, CM Wheeler being the same grade as the Claimant’s Line Manager (CM Clark)” fails.
 - 1.11. **Allegation 11** - “CM Wheeler failing to investigate the Claimant’s Grievance properly on or around 28 August 2020” fails.
 - 1.12. **Allegation 12** - “Using PSI12/2013 as a reason not to endorse the Claimant’s Application for the Analyst role on 28 August 2020” fails.
 - 1.13. **Allegation 13** - “Not being selected for interview for the position of “Prevent Lead” fails.
2. The claimant’s claims of direct discrimination because of the protected characteristic of religion (contrary to section 13 of the Equality Act 2010) are determined as follows (identifying each individual in the order they were listed in the case management order of EJ Ord dated 1 June 2022):
- 2.1. **Allegation 1** – “Continue to place the Claimant on “B Wing” and not comply with workplace Health and Safety Risk Assessments between December 2018 and 28 November 2019” fails.
 - 2.2. **Allegation 2** – “Refusing to endorse the Claimant’s application for a Band 4 Business Administrator Specialist Analyst role (“the Analyst role”) on 11 February 2020” fails.

- 2.3. **Allegation 3** – “At the same time CM Clark questioning the Claimant’s integrity (either of their own volition or at the instigation of Deputy Governor Nethercott)” fails.
 - 2.4. **Allegation 4** - “Failing to investigate the Claimant’s Line Manager, CM Clark, for lack of integrity for his alleged misconduct relating to the investigation on 11 February 2020” fails.
 - 2.5. **Allegation 5** - “Failing to treat the Claimant’s sickness absence as work related stress and anxiety on or around 23 March 2020” fails.
 - 2.6. **Allegation 6** - “Deputy Governor Nethercott failing to properly investigate the break in to the Claimant’s locker, up to and including 15 April 2020 when Deputy Governor Nethercott replied to the Claimant’s complaint” fails.
 - 2.7. **Allegation 7** - “Failing to acknowledge the Claimant’s Grievance in accordance with the Respondent’s Policies and Procedures in or around May 2020” fails.
 - 2.8. **Allegation 8** - “Delaying the process of the Claimant’s Grievance contrary to the Respondent’s Policies and Procedures between 10 May 2020 and 28 August 2020” fails.
 - 2.9. **Allegation 9** - “On or around 14 May 2020, appoint the Claimant’s Line Manager to investigate the Claimant’s grievance dated 10 May 2020, that Grievance being made against the same Line Manager” fails.
 - 2.10. **Allegation 10** - “Subsequently appointing a person (CM Wheeler) on or about 25 May 2020, to investigate the Claimant’s Grievance, CM Wheeler being the same grade as the Claimant’s Line Manager (CM Clark)” fails.
 - 2.11. **Allegation 11** - “CM [Wheeler failing to investigate the Claimant’s Grievance properly on or around 28 August 2020” fails.
 - 2.12. **Allegation 12** - “Using PSI12/2013 as a reason not to endorse the Claimant’s Application for the Analyst role on 28 August 2020” fails.
 - 2.13. **Allegation 13** - “Not being selected for interview for the position of “Prevent Lead” fails.
2. The claimant’s claim of automatic unfair dismissal for the reason that he made a protected disclosure fails. He did not make a protected disclosure and he was not dismissed.
 3. The claimant’s claim of unfair dismissal fails. The claimant was not dismissed.
 4. The claimant’s claims of detriment short of dismissal contrary to section 47B(1) of the Employment Rights Act 1996 fail because the claimant did not make a protected disclosure.

5. The Tribunal does not need to consider remedy because all the claimant's claims have been dismissed.

REASONS

Introduction and History of Proceedings

1. The claimant was employed as a Prison Officer, principally at HMP Whitemoor, by the respondent from 30 April 2018 to 28 January 2021, which was the effective date of termination of his employment following his resignation on notice. The claimant is of Italian and Egyptian heritage. He is of the Muslim faith.
2. The claimant alleges that his work locker on B-Wing at HMP Whitemoor was broken into and the combination lock and contents were removed on 27 January 2020. In his ET1, the claimant alleged that his report to the police on 29 January 2020 that his work locker had been broken into was a protected disclosure. He says that following the disclosure, he was subjected to detriments short of dismissal that, taken together, were a breach of the implied duty of trust and confidence that entitled him to resign. Mr El Fath also alleges that he was subjected to direct discrimination because of race and/or religious belief, which were also breaches of the implied duty of trust and confidence. Details of the claims are set out in the List of Issues below and the Judgment above.
3. The claimant also claims in the alternative that he was unfairly dismissed because the principal reason for his dismissal was that he made a protected disclosure. This is one of the categories of dismissals that are deemed to be automatically unfair.
4. In the alternative, he claims a straightforward (which for the purposes of these reasons, we shall call a "plain") unfair dismissal.
5. The claimant started early conciliation with ACAS on 31 October 2020 and obtained a conciliation certificate on 2 November 2020. The claimant's ET1 was presented on 22 January 2021.
6. The claimant presented claims of:
 - 2.1. Direct race discrimination contrary to section 13 of the Equality Act 2010 as set out in the Judgment above;
 - 2.2. Direct religious belief discrimination contrary to section 13 of the Equality Act 2010, as set out in the Judgment above;
 - 2.3. Automatic unfair dismissal for the reason or principal reason (if there was more than one reason for dismissal) contrary to section 103A of the Employment Rights Act 1996;
 - 2.4. "Plain" constructive unfair dismissal contrary to section 94 of the Employment Rights Act 1996; and

- 2.5. Detriments short of dismissal on the ground that he made a protected disclosure contrary to section 47B(1) of the Employment Rights Act 1996.
3. The claims were case managed on:
 - 3.1. 23 November 2021 by Employment Judge Welch, who listed the final hearing dates, ordered the claimant to produce further information about his claims, made some case management orders and listed the case for a further preliminary hearing in an order dated 23 November 2021 [38-44].
 - 3.2. 1 June 2022 by Employment Judge Ord, who identified the claims made by the claimant set out a draft list of issues at paragraph 6 and made further case management orders dated 20 July 2020 [45A-45H].

Issues

4. The preliminary hearing before EJ Ord on 1 June 2022 [45A-45H] set out a draft List of Issues [45B-45D]. A List of Issues is a vital document at any final hearing as it sets out the questions that the Tribunal has to answer and provides a framework for the hearing.
5. Paragraph 6.1 of the case management order [45F] required the respondent to provide the claimant with a List of Issues (if different from the draft) by 30 September 2022. The respondent did not do what was ordered, but produced a document titled "El Fath v SSJ – list of issues.docx." that set out four proposed amendments to the draft list that had been produced by EJ Ord. We discussed the draft list and the respondent's comments as a preliminary matter on the first morning of this hearing. As a result of the discussion, the Tribunal produced a list that was sent to the parties during the break in which we completed our reading. Mr Molyneux suggested a few amendments that were discussed and agreed. The final agreed list is as follows:

Direct Discrimination – on the ground of race and / or religion / belief (Equality Act 2010, ss.4, 13 and 39)

1. *The claimant is of mixed Italian and Egyptian heritage. He is of the Muslim faith.*
2. *Did the respondent do the following things:*
 - 2.1. *Continue to place the claimant on "B Wing" and not comply with workplace Health and Safety Risk Assessments between December 2018 and 28 November 2019;*
 - 2.2. *On or around 14 May 2020, appoint the claimant's Line Manager to investigate the Claimant's Grievance dated 10 May 2020, that Grievance being made against the same Line Manager;*

- 2.3. *Subsequently appointing a person (CM Wheeler) on or about 25 May 2020, to investigate the claimant's Grievance, CM Wheeler being the same grade as the claimant's Line Manager (CM Clark);*
 - 2.4. *Failing to treat the claimant's sickness absence as work related stress and anxiety on or around 23 March 2020;*
 - 2.5. *Deputy Governor Nethercott failing to properly investigate the break in to the claimant's locker, up to and including 15 April 2020 when Deputy Governor Nethercott replied to the claimant's complaint;*
 - 2.6. *Delaying the process of the claimant's Grievance contrary to the respondent's Policies and Procedures between 10 May 2020 and 28 August 2020;*
 - 2.7. *Failing to acknowledge the claimant's Grievance in accordance with the respondent's Policies and Procedures in or around May 2020;*
 - 2.8. *Refusing to endorse the claimant's application for a Band 4 Business Administrator Specialist Analyst role ("the Analyst role") on 11 February 2020;*
 - 2.9. *At the same time CM Clark questioning the claimant's integrity (either of their own volition or at the instigation of Deputy Governor Nethercott);*
 - 2.10. *Using PSI12/2013 as a reason not to endorse the claimant's Application for the Analyst role on 28 August 2020;*
 - 2.11. *Failing to investigate the claimant's Line Manager, CM Clark, for lack of integrity for his alleged misconduct relating to the investigation on 11 February 2020;*
 - 2.12. *DM Wheeler failing to investigate the claimant's Grievance properly on or around 28 August 2020; and*
 - 2.13. *Not being selected for interview for the position of "Prevent Lead".*
3. *Was that less favourable treatment? The Tribunal will decide whether the claimant was treated less favourably than someone else was or would have been treated. There must be no material difference between their circumstances and those of the claimant.*
 4. *The claimant relies on a hypothetical comparator for all of the allegations, save for the allegation relating to his not being selected for interview for the position of "Prevent Lead" where he relies on those who were so selected as direct comparators.*
 5. *If the claimant did receive less favourable treatment than either the hypothetical or actual comparators, was it because of race or alternatively because of religion or belief?*

Detriment / Dismissal for making Protected Disclosures (Employment Rights Act 1996, s.43A-L and s.47B)

6. *Did the claimant make a qualifying disclosure on or about 29 January 2020 when he complained in writing to Cambridgeshire Police regarding a break in to his locker at work? Specifically, did the claimant make a disclosure of information which, in the claimant's reasonable belief, was made in the public interest?*
7. *Did the claimant reasonably believe that any disclosure of information tended to show one or more of the following:-*
 - 7.1. *That a criminal offence had been committed, is being committed or is likely to be committed;*
 - 7.2. *That a person has failed, is failing or is likely to fail to comply with any legal obligation to which they are subject;*
 - 7.3. *That a miscarriage of justice has occurred, is occurring or likely to occur;*
 - 7.4. *That the health or safety of any individual has been, is being or is likely to be endangered;*
 - 7.5. *That the environment has been, is being or is likely to be damaged; or*
 - 7.6. *That information tending to show any matter falling within any one of the preceding paragraphs has been or is likely to be deliberately concealed.*
 - 7.7. *Was any qualifying disclosure made in accordance with any of Sections 43C – 43H of the Employment Rights Act 1996; and*
 - 7.8. *If the claimant made a protected disclosure, and he has suffered a detriment, the Tribunal will consider whether he was subjected to the detriment "on the ground that" he had made the protected disclosure. See section 47B(1) ERA 1996. The claimant says that he suffered detriments set out about above in respect of his claim for direct race discrimination and / or direct religion / belief discrimination other than the continuation to list the claimant on "B Wing" which occurred prior to his disclosure.*

Unfair Dismissal (including automatically unfair dismissal)

8. *Did the claimant terminate the contract in circumstances in which he would have been entitled to terminate it without notice by reason of the respondent's conduct?*
9. *Did the respondent do the following things:*
 - 9.1. *Continue to place the claimant on "B Wing" and not comply with workplace Health and Safety Risk Assessments between December 2018 and 28 November 2019;*

- 9.2. *On or around 14 May 2020, appoint the claimant's Line Manager to investigate the claimant's Grievance dated 10 May 2020, that Grievance being made against the same Line Manager;*
 - 9.3. *Subsequently appointing a person (CM Wheeler) on or about 25 May 2020, to investigate the claimant's Grievance, CM Wheeler being the same grade as the claimant's Line Manager (CM Clark);*
 - 9.4. *Failing to treat the claimant's sickness absence as work related stress and anxiety on or around 23 March 2020;*
 - 9.5. *Deputy Governor Nethercott failing to properly investigate the break in to the claimant's locker, up to and including 15 April 2020 when Deputy Governor Nethercott replied to the claimant's complaint;*
 - 9.6. *Delaying the process of the claimant's Grievance contrary to the respondent's Policies and Procedures between 10 May 2020 and 28 August 2020;*
 - 9.7. *Failing to acknowledge the claimant's Grievance in accordance with the respondent's Policies and Procedures in or around May 2020;*
 - 9.8. *Refusing to endorse the claimant's application for a Band 4 Business Administrator Specialist Analyst role ("the Analyst role") on 11 February 2020;*
 - 9.9. *At the same time CM Clark questioning the claimant's integrity (either of their own volition or at the instigation of Deputy Governor Nethercott);*
 - 9.10. *Using PSI12/2013 as a reason not to endorse the claimant's Application for the Analyst role on 28 August 2020;*
 - 9.11. *Failing to investigate the claimant's Line Manager, CM Clark, for lack of integrity for his alleged misconduct relating to the investigation on 11 February 2020;*
 - 9.12. *DM Wheeler failing to investigate the claimant's Grievance properly on or around 28 August 2020; and*
 - 9.13. *Not being selected for interview for the position of "Prevent Lead", which is alleged to be the "final straw".*
10. *Did that breach the implied term of trust and confidence? The Tribunal will need to decide:*
- 10.1. *whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and*
 - 10.2. *whether it had reasonable and proper cause for doing so.*

11. *If the claimant was dismissed, what was the reason or if more than one the principal reason for the dismissal? The claimant says that there was no potentially fair reason for dismissal and / or that the sole or principal reason for dismissal was that he had made protected disclosures.*

Time limits

Discrimination

12. *Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 21 October 2020 may not have been brought in time.*

13. *Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:*

13.1. *Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?*

13.2. *If not, was there conduct extending over a period?*

13.3. *If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?*

13.4. *If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:*

13.4.1. *Why were the complaints not made to the Tribunal in time?*

13.4.2. *In any event, is it just and equitable in all the circumstances to extend time?*

Public Interest Disclosure Detriment

14. *Was the public interest disclosure detriment claim made within the time limit in section 48 of the Employment Rights Act 1996? The Tribunal will decide:*

14.1. *Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act complained of?*

14.2. *If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?*

14.3. *If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?*

14.4. *If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?*

Remedy

15. *In the event that the claimant succeeds in any or all of his claims:-*

15.1. *What is the appropriate Remedy to which he is entitled in respect of:*

- 15.1.1. *injury to feelings (if applicable);*
- 15.1.2. *automatically unfair dismissal (if applicable); and*
- 15.1.3. *unfair dismissal (if applicable).*

6. In making changes to the draft List of Issues produced by EJ Ord, we were mindful that it was not a final or definitive list and that it gave both parties the opportunity to make changes to it. We also considered the guidance of the Employment Appeal Tribunal (“EAT”) in the case of **Liverpool Heart and Chest Hospital NHS Foundation Trust v Poullis** [2022] EAT 9 on the question of when a case management order may be varied. We found that there had been a material change in circumstances that required a change to EJ Ord’s draft list because the list was in draft and the interests of justice required a more complete and comprehensive List.
7. As we did not find in favour of the claimant on any of his claims, we do not have consider any issues concerning remedy.

Law

8. The statutory law relating to the claimant’s claims of race and religion discrimination is contained in the Equality Act 2010 (EqA). The relevant sections of the EqA were sections 13 (direct discrimination); section 123 (time limits) and 136 (burden of proof). The relevant provisions are set out here:

13. Direct discrimination

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.

If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.

The relevant protected characteristics are—

- (a) age;*
- (b) disability;*
- (c) gender reassignment;*
- (d) race*
- (e) religion or belief;*
- (f) sex;*
- (g) sexual orientation.*

123. Time limits

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

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

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

(2) *Proceedings may not be brought in reliance on section 121(1) after the end of—*

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

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

(3) *For the purposes of this section—*

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

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

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

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

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

136. Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) This section does not apply to proceedings for an offence under this Act.

(6) A reference to the court includes a reference to—

(a) an employment tribunal...

9. For the purposes of both of the unfair dismissal claims, the relevant sections of the Employment Rights Act 1996 are section 95, which defines “dismissal” as including where ‘the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer’s conduct.’ This is known as “constructive dismissal”.
10. “Plain” unfair dismissal claims are determined under section 98 of the Employment Rights Act (“ERA”):

“Section 98 Employment Rights Act 1996

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show-

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it-

(a) Relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) Relates to the conduct of the employee,

(c) Is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(3) In subsection (2)(a)—

(a)“capability”, in relation to an employee, means his capability assessed by reference to skill, aptitude, health or any other physical or mental quality, and

(b)“qualifications”, in relation to an employee, means any degree, diploma or other academic, technical or professional qualification relevant to the position which he held.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal was fair or unfair (having regard to the reason shown by the employer)-

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case."

11. Section 103A of the Employment Rights Act 1996 states:

103A Protected disclosure.

"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."

12. A 'protected disclosure' is defined by section 43B of the Employment Rights Act 1996:

Disclosures qualifying for protection.

"(1) In this Part a "qualifying disclosure " means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—

(a) 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, is being or is likely to be deliberately concealed.

(2) For the purposes of subsection (1), it is immaterial whether the relevant failure occurred, occurs or would occur in the United Kingdom or elsewhere, and whether the law applying to it is that of the United Kingdom or of any other country or territory.

(3) A disclosure of information is not a qualifying disclosure if the person making the disclosure commits an offence by making it.

(4) A disclosure of information in respect of which a claim to legal professional privilege (or, in Scotland, to confidentiality as between client and professional legal adviser) could be maintained in legal proceedings is not a qualifying disclosure if it is made by a person to whom the information had been disclosed in the course of obtaining legal advice.

(5) In this Part “the relevant failure”, in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1).”

13. The relevant section of the ERA in respect of the detriment on the ground of a protected disclosure is section 47B, which states that “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.”

14. The time limits in respect of such claims are set out in section 48(3) and (4):

(3) An employment tribunal shall not consider a complaint under this section unless it is presented—

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months

(4) For the purposes of subsection (3) —

(a) where an act extends over a period, the “date of the act” means the last day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on;

and, in the absence of evidence establishing the contrary, an employer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

15. Mr Molyneux referred us to a number of precedent cases that we considered when making our decision:

15.1. **Porter v Bandridge Ltd** [1978] 1 WLR 1145 (CA);

- 15.2. **W.E. Cox Toner (International) Ltd v Crook** [1981] ICR 823 (EAT);
- 15.3. **Vento v Chief Constable of West Yorkshire Police** [2002] EWCA Civ 1871, [2003] ICR 318;
- 15.4. **London Borough of Harrow v Knight** [2003] IRLR 140 (EAT);
- 15.5. **Babula v Waltham Forest College** [2007] EWCA Civ 174, [2007] ICR 1026;
- 15.6. **Serco Ltd v Dahou** [2016] EWCA Civ 382, [2017] IRLR 81
- 15.7. **Chesterton Global Ltd v Nurmohamed** [2017] EWCA Civ 979, [2018] 1 All ER 947;
- 15.8. **Royal Mail Group Ltd v Jhuti** (EAT, 19 March 2018)
- 15.9. **United First Partners Research v Carreras** [2018] EWCA Civ 323;
- 15.10. **Kaur v Leeds University Teaching Hospitals NHS Trust** [2018] EWCA Civ 978, [2019] ICR 1;
- 15.11. **Kilraine v Wandsworth London Borough Council** [2018] EWCA Civ 1436, [2018] ICR 1850;
- 15.12. **Jesudason v Alder Hey Children's NHS Foundation Trust** [2020] EWCA Civ 73, [2020] ICR 1226;
- 15.13. **South Western Ambulance Service NHS Foundation Trust v King** [2020] IRLR 168;
- 15.14. **Efobi v Royal Mail Group Ltd** [2021] UKSC 33, [2021] 1 WLR 3863; and
- 15.15. **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 23.

16. Mr El Fath referred us to the following cases, which we considered when making our decision:

- 16.1. **Igen v Wong** [2005] ICR 9311 CA;
- 16.2. **Hewage v Grampian Health Board** [2010] ICR 1054 SC; and
- 16.3. **Law Society v Bahl** [2003] IRLR 640 (§83).

Housekeeping and Hearing

17. The claimant is unrepresented. On the first morning of the hearing, we reminded him that the Tribunal operates on a set of Rules. Rule 2 sets out the overriding objective of the Tribunal (its main purpose), which is to deal with cases justly and fairly. It is reproduced here:

The overriding objective of these Rules is to enable Employment Tribunals to deal with cases fairly and justly. Dealing with a case fairly and justly includes, so far as practicable —

- (a) ensuring that the parties are on an equal footing;*
- (b) dealing with cases in ways which are proportionate to the complexity and importance of the issues;*
- (c) avoiding unnecessary formality and seeking flexibility in the proceedings;*
- (d) avoiding delay, so far as compatible with proper consideration of the issues; and*
- (e) saving expense.*

A Tribunal shall seek to give effect to the overriding objective in interpreting, or exercising any power given to it by, these Rules. The parties and their representatives shall assist the Tribunal to further the overriding objective and in particular shall co-operate generally with each other and with the Tribunal.

18. We strived to ensure that Mr El Fath was given every opportunity to put his case and ask any questions he had about procedure and the law.
19. The parties produced a joint bundle of 133 documents, but some copies of the bundle were not numbered in the same way as others. If we refer to pages in the bundle, the page number(s) will be in square brackets (e.g. [43]) and will refer to the page numbers in the bundles used by Mr El Fath, Mr Molyneux and me, as all three were consistently numbered.
20. If we refer to a particular paragraph in a document, we may use the silcrow symbol (§) with any paragraph number. If we refer to more than one paragraph, we will use two silcrows (§§).
21. The respondent produced a number of documents that were agreed by the claimant and which we found useful:
- 21.1. A cast list;
 - 21.2. A chronology;
 - 21.3. A list of recommended reading;
 - 21.4. A draft timetable;
 - 21.5. Comments on the List of Issues in the order of EJ Ord; and
 - 21.6. A skeleton argument.

22. The claimant gave evidence in person and produced a witness statement dated 26 September 2022 that ran to 53 paragraphs.

23. Evidence was given in person on behalf of the respondent by:

23.1. Stephen Clark, a Custodial Manager at HMP Whitemoor and who was the claimant's line manager at the time of the incidents that are relevant to this case. His witness statement, which was approved digitally on 19 September 2022, ran to 30 paragraphs.

23.2. Craig Nethercott, who is a Deputy Governor at HMP Whitemoor. His witness statement, which was digitally approved on 12 September 2022, ran to 11 paragraphs.

23.3. Bettina Marshall, who is Head of Security and Intelligence at HMP Whitemoor. She heard the claimant's appeal against the outcome of his grievance. She produced two witness statements. The first was digitally approved on 23 September 2022 and ran to 16 paragraphs. The second was dated 8 November 2022 and ran to four paragraphs. The respondent sought leave (permission) to rely on the second witness statement. The claimant gave his consent and the Tribunal gave leave for it to be used, as it provided more information about the case and leave was therefore in furtherance of the overriding objective. The claimant did not ask Ms Marshall any cross-examination questions about her second witness statement.

23.4. Peter Wheeler, who was "acting up" as Custodial Manager at HMP Whitemoor when he was asked to carry out an investigation into the claimant's grievance and make a determination. His witness statement, which was digitally approved on 28 September 2022 consisted of 16 paragraphs.

24. The claimant was cross-examined by Mr Molyneux in some detail.

25. Mr El Fath cross-examined all the respondent's witnesses in some detail.

26. At the end of his evidence in chief, Mr El Fath was given the opportunity to clarify or expand upon any of the answers he had given to questions he had been asked. Mr Molyneux was offered the opportunity to ask re-examination questions of the respondent's witnesses.

27. At the start of the hearing, we discussed preliminary matters with Mr El Fath and Mr Molyneux, which included:

27.1. the overriding objective;

27.2. the list of issues;

27.3. the timetable for the hearing;

- 27.4. the claims, which the claimant confirmed were as set out in our Judgment above; and
- 27.5. the documents.
28. The case had been listed for 5 days to include remedy. We were able to complete the hearing in the time allocated. We finished the evidence on the afternoon of the third day.
29. Mr Molyneux relied on his skeleton argument and Mr El Fath produced written submissions. Both were offered to opportunity to speak to their submissions.
30. At the end of closing submissions, we decided to conduct our deliberations and deliver the Judgment and Reasons on the fifth morning.
31. As we have not found for the claimant on any part of his claim, there was no need to hear any evidence on remedy.

Findings of Fact

Preliminary Comments

32. All findings of fact were made on the balance of probabilities. If a matter was in dispute, we will set out the reasons why we decided to prefer one party's case over the other. If there was no dispute over a matter, we will either record that with the finding or make no comment as to the reason that a particular finding was made. We have not dealt with every single matter that was raised in evidence or the documents. We have only dealt with matters that we found relevant to the issues we have had to determine. No application was made by either side to adjourn this hearing in order to complete disclosure or obtain more documents, so we have dealt with the case on the basis of the documents produced to us and the claim as set out in the list of issues.
33. We would add that the scope of this hearing was as defined by the two preliminary hearings conducted by EJs Welch and Ord. That is one of the main purposes of a preliminary hearing – to identify the claims and list the issues (questions that the Tribunal will have to answer). At times, Mr El Fath gave the impression that he believed the task of the Tribunal was to undertake a holistic review of his entire working relationship with the respondent from 27 January 2019 to the date he left the organisation. As we made clear at the hearing, our task was to hear the evidence and then make findings of fact that led us to answer the questions raised by the List of Issues.
34. We make the following findings.

Undisputed Facts

35. We should record as a preliminary finding that a number of relevant facts were not disputed, not challenged or actually agreed by the parties. We therefore make the following findings:

- 35.1. The respondent is a UK government minister who is responsible, among other things, for running the prison service in England. HMP Whitemoor is one of the prisons under the respondent's purview.
- 35.2. Prior to the events covered by this claim, the claimant had worked for the respondent as a Prison Officer from 30 April 2018. It was agreed evidence that he spent some time on detachment to other prisons before the incident that triggered this claim, but that he was based at HMP Whitemoor. The claimant was assigned to B Wing.
- 35.3. There was no suggestion in his claim or in either preliminary hearing by the claimant that he had been subjected to any unlawful act or omission by the respondent prior to December 2018, so there was no requirement for us to consider any event that predated that date.
- 35.4. The claimant's evidence that he was threatened by prisoners in 2018 and that this had an adverse effect of his mental health was unchallenged. It was also his unchallenged evidence that he worked on detached duties at other prisons. His last period of detachment was from 30 July 2019 to 5 November 2019, after which, he returned to B Wing.
- 35.5. The claimant's evidence that he began to feel unwell on 7 November 2019 and that he called the Prison's EAP provider was unchallenged. The claimant met with Steve Clark, his Custodial Manager and Harpreet Singh-Bisla - Supervising Officer – on 7 November 2019, advised them how he was feeling and took sick leave until 9 November 2019.
- 35.6. The claimant returned to work on 9 November 2019, but his health worsened and he took sick leave from 11 November 2019. On 10 November 2019, the claimant completed a Stress Risk Assessment form [52-61] and Mr Clark referred him to Occupational Health ("OH"), who provided a report dated 6 January 2020 [337-338]. Mr El Fath saw his GP and was prescribed anti-depressant medication. We should comment that there is no claim of disability discrimination before us.
- 35.7. Mr El Fath met Custodial Manager Ronald Harnden on his return to work on 13 November 2019. His evidence that he discussed his mental health was unchallenged.
- 35.8. On 14 November 2019, the claimant was assigned work on B Wing. He discussed his health with Mr Clark on 15 November 2019 and met with Governor Paul Benson on 18 November 2019 to discuss the situation of working on B Wing. The claimant was absent due to ill health on 22 to 24 November 2019.
- 35.9. It was agreed that on 22 November 2019, Mr Harnden wrote to the claimant and offered him a move to another Wing [63]. The claimant returned to work on 26 November 2019 and was detailed to B Wing. His health failed and he was escorted off the premises.
- 35.10. On the same day, Governor Benson emailed managers and notified them that the claimant was to be moved to D Wing and requested an OH assessment [65].
- 35.11. The claimant had a meeting with Mr Clark on 14 January 2020. There is a dispute in the evidence about what the respondent knew about the claimant's

condition. Mr El Fath says that the respondent was aware that his stress and anxiety were caused by being on B Wing. Mr Clark's evidence was that the respondent knew that the claimant had mental health issues, but was not aware of the cause until he received the OH report dated 6 January 2020 [337-338].

- 35.12. Mr Clark gave the claimant a warning about his attendance on 17 January 2020 [69].
- 35.13. The claimant was due to return to work on 27 January 2020. On 23 January, he was asked to return to B Wing on a night shift. He agreed to do so, as night shifts meant that the inmates were locked in their cells.
- 35.14. On 27 January 2020, the claimant returned to work on B Wing. He alleges that on his return, he found that his work locker on B Wing had been "broken into and emptied of its contents".
- 35.15. The claimant emailed managers about the locker, alleging that "I came in for my first night shift of the week to discover that my locker had been burgled." [71]
- 35.16. Mr El Fath made an online report to Cambridgeshire Police regarding the locker on 29 January 2020 [294-297]. Mr El Fath says that this was his protected disclosure for the purposes of his claims of automatic unfair dismissal and detriment on the grounds of making a protected disclosure
- 35.17. Craig Nethercott, Deputy Governor, instructed Mr Clark to conduct an investigation into the claimant's allegation about the locker on 31 January 2020 [76]. Mr Clark carried out an investigation. We shall deal with that in the disputed facts section.
- 35.18. The claimant submitted an expression of interest in the role of Business Administrator Specialist Intelligence Analyst and approached Mr Clark to provide an endorsement of his application. Mr Clark declined to provide the endorsement. We will deal with that more fully in the disputed facts section. The claimant was advised that his application for the role was unsuccessful on 24 February 2020 [98].
- 35.19. Mr Clark's investigation into the locker incident had raised a question about whether the claimant had been truthful when he had said that he had reported the locker incident to the police. The question was raised because when Mr Clark spoke to the two police liaison officers based at the prison about the report, no reference to it could be found at the time in the police records. It has never been the claimant's claim that a report was found and then "hidden" by the police or Mr Clark.
- 35.20. On 19 March 2020, Mr Clark concluded his investigation into the locker incident [116-121].
- 35.21. On 2 April 2020, Mr Nethercott advised the claimant that no further action would be taken in relation to his allegations about the locker [125].
- 35.22. On 10 May 2020, Mr El Fath was permanently transferred to D Wing.

- 35.23. On the same day, Mr El Fath submitted a grievance regarding Mr Clark's refusal to endorse his application for the Analyst role [130-135]. Bettina Marshall acknowledged the grievance on the same day.
- 35.24. On 10 May 2020, Ms Marshall asked Mr Clark to "process/action" the claimant's grievance [150].
- 35.25. On 15 May 2020, Mr El Fath wrote to Ms Marshall objecting to the appointment of Mr Clark to investigate a grievance against himself. [154].
- 35.26. On 26 May 2020, Ms Marshall appointed Custodial Officer Wheeler to investigate the grievance [153 and 156]. We note that the claimant raised an issue about the fact that Mr Wheeler was, at the time, "acting up" as a Custodial Officer, but we find that that fact had no material effect on the fairness or lawfulness of the appointment of Mr Wheeler, as he was qualified to do the job.
- 35.27. The claimant accepted the decision at the time and commented that the choice of Mr Wheeler was "excellent".
- 35.28. On 27 May 2020, the claimant sent Mr Nethercott an email [202-204] that was stated to be an appeal against Mr Clark's finding that there was no evidence to support the allegations that the claimant had made about the locker incident.
- 35.29. On 13 July 2020, the claimant wrote to Governor Ruth Stephens setting out a narrative history of his experiences, which he asked her to consider as either "racism or incompetence?" [175-178]. Governor Stephens replied on 10 August 2020 [179-180].
- 35.30. On 28 August 2020, the claimant was advised that his grievance against Mr Clark was not upheld [137-139]. He appealed the decision on 11 September 2020 [140-145 and 210].
- 35.31. The grievance appeal was heard by Ms Marshall on 6 October 2020 [147]. The claimant was notified on 26 October 2020 [242] that his appeal was not upheld [242 and 259-262].
- 35.32. The claimant began early conciliation with ACAS on 31 October 2020 and obtained an early conciliation certificate on 2 November 2020 [1].
- 35.33. The claimant was not invited for interview for a role as Prevent Lead and had an email exchange with Governor Stephen Machin about the situation on 18 November 2020 [279-280].
- 35.34. The claimant submitted his resignation on 31 December 2020, giving notice to terminate his employment on 28 January 2021. The claim form in this case was submitted on 22 January 2021.
36. There was not much dispute about what happened. The disputes between the evidence of the parties is about a few points of evidence and the interpretation that the parties put on events that were largely agreed.

Points of Dispute

General Points

37. We have focused our attention on the facts in dispute that relate to the issues in the case. We have dealt with the issues in dispute in the order that they we find best serve the interests of justice by addressing some of the substantive allegations raised by the claimant before addressing the time points relating to some of those claims.
38. In focusing on the facts and the issues, we should make it clear that we in no way dispute or reject the effect that the experiences that the claimant had at HMP Whitemoor between December 2018 and the end of his employment had on his mental health. However, as we explained in the hearing, the effect on his health is a matter that is reflected in remedy, not a matter that corroborates or supports his assertions of facts.
39. We make the following findings.

Direct Discrimination

40. We find that the claimant's claims of direct discrimination because of the protected characteristics of race and/or religion were not set out in his witness statement with any degree of clarity. When he was asked about this by Mr Molyneux, Mr El Fath said words to the effect that he had no direct evidence to point to, but the only plausible explanation for the way that he was treated was because of his race or religion.
41. In his closing submissions, he referred us to the cases of **Igen v Wong**, **Hewage v Grampian Health Board** and **Law Society v Bahl**. All of these cases speak to the burden of proof in discrimination cases that is enshrined in section 136 of the Equality Act 2010. The case law on the point is best set out in the case of **Efobi v Royal Mail Group Limited** at §30:

“...an employment tribunal may only find that “there are facts” for the purpose of section 136(2) of the 2010 Act if the tribunal concludes that it is more likely than not that the relevant assertions are true. This means that the claimant has the burden of proving, on the balance of probabilities, those matters which he or she wishes the tribunal to find as facts from which the inference could properly be drawn (in the absence of any other explanation) that an unlawful act was committed. This is not the whole picture since, as discussed, along with those facts which the claimant proves, the tribunal must also take account of any facts proved by the respondent which would prevent the necessary inference from being drawn. But that does not alter the position that, under section 136(2) of the 2010 Act just as under the old provisions, the initial burden of proof is on the claimant to prove facts which are sufficient to shift the burden of proof to the respondent.”

42. We find that it was significant that the claimant had to be prompted to challenge the respondent's witnesses on his allegations of race and/or religion discrimination and detriment/dismissal on the grounds of having made a protected disclosure.
43. We find that it is significant that the claimant never raised a grievance in respect of race or religious discrimination during his employment and never raised a grievance about suffering detriment because he made a protected disclosure. Ms Stephens' response to the claimant's document that questioned "racism or incompetence" invited the claimant to take matters further. He did not do so with the respondent until he issued these proceedings.
44. The case of **Efobi** is clear that it is not enough for a claimant to point to a difference in treatment and a difference in status (i.e. the claimant's race and/or religion) for a Tribunal to draw an inference that the reason for the difference in treatment was the claimant's protected characteristic.
45. In this case, we find that the claimant does not meet the threshold to show that any of the 13 allegations of direct discrimination because of race and/or religion to show that there are facts from which we could conclude, in the absence of any other explanation, that the respondent contravened section 13 of the Equality Act 2010. We therefore find that there were no facts that lead us to conclude that the contravention of section 13 occurred as alleged.
46. The claimant has identified 13 incidents that he alleges were acts of discrimination. We accept that each of the acts or omissions constitute treatment that he would not have wished to experience. However, we find that he almost completely failed to link any of the acts to the protected characteristics of race or religion. All those claims are dismissed on the findings of facts. We will address the time points below.

Public Interest Disclosure Claims

47. In order to succeed with a claim that he was subjected to detriment on the grounds of making a protected disclosure or that he was dismissed for the reason (or if there was more than one reason for dismissal, the principal reason) that he made a protected disclosure, the claimant has to show that he made a protected disclosure.
48. We find that the claimant did not show on the balance of probabilities that his report to Cambridgeshire Police on 29 January 2020 was a protected disclosure, so both PID claims must fail. We make that finding because:
 - 48.1. Mr El Fath accepted under cross-examination that he did not believe that there was any public interest in his report to the police. He went on to say that his motivation was to put on record what had happened and to bring to the public attention what had happened to him at HMP Whitemoor;
 - 48.2. In his closing submissions, Mr El Fath said "The report to the police in itself may not amount to a PD, however, having worked in the prison service, which is rather an enclosed community, I believe the actual case presented is in the public interest." Unfortunately, the bringing of the case cannot be a protected disclosure in the circumstances of this case; and

- 48.3. We agree with Mr Molyneux's submissions in paragraphs 18 to 26 of his skeleton argument. There is no need to repeat them here.
49. The claimant's claim of automatic unfair dismissal for the reason that he made a protected disclosure is dismissed. The claimant's claims of detriment on the grounds that he made a protected disclosure are dismissed.

"Plain" Unfair Dismissal

50. The decision we have made on the discrimination claims does not require us to make findings on the facts of each of the 13 allegations. However, we do need to make findings on the allegations, as they relate to the constructive unfair dismissal claim:
- 50.1. **Allegation 1** – We find that the evidence of Mr Clark was more credible than the evidence of Mr El Fath on the question of what the respondent knew about the cause of the claimant's anxiety and depression. The height of Mr El Fath's evidence was that the respondent ought to have made the connection between working on B Wing and his ill health. We find that, on the balance of probabilities, it was more likely that the respondent became aware of the link only on receipt of the OH report dated 6 January 2020. We take into consideration the fact that the claimant returned to work on B Wing on 27 January 2020 and remained there until his permanent transfer to D Wing;
- 50.2. We find that the respondent acted reasonably throughout and the way in which it dealt with the claimant's placement on B Wing from December 2018 to 28 November 2019 was not a fundamental breach of the duty of trust and confidence or a breach at all;
- 50.3. **Allegations 2 and 3** – We find that Mr Clark refused to endorse the claimant's application for the Analyst role, but as we have found that this was not an act of discrimination and that it was not a detriment on the grounds that he made a protected disclosure, we find that it was an example of Mr Clark exercising a discretion that he was entitled to do. It was not a fundamental breach of the duty of trust and confidence or a breach at all;
- 50.4. We prefer the evidence of Mr Clark to that of Mr El Fath as to what was said at the meeting also attended by Mr Wellbourne when it was agreed that Mr Clark said he would not endorse the claimant's application for the Analyst role. We find that the claimant gave the correct incident number relating to the report to the police on 29 January 2020 to Mr Clark. We find that Mr Clark asked the liaison officers to search the correct number, the claimant's address and the address of HMP Whitemoor and, for whatever reason, the claimant's report did not come up. No blame attaches to Mr Clark for the failure;
- 50.5. We have reservations about the delay on the part of Mr Clark in telling Mr El Fath what the full reason for not endorsing him was, and regret the impact that Mr Clark telling the claimant that he could not endorse Mr El Fath's application because of a lack of integrity, but the claimant had the solution in his own

hands. He had a copy of the police report. He did not deny that his trade union representative advised him to disclose it and it does the claimant's case no good at all that he failed to do so at the very earliest opportunity;

- 50.6. We find that the respondent acted reasonably in investigating the claimant's integrity, given the position he held in a high security prison housing dangerous criminals, and that, in the circumstances, it was reasonable for Mr Clark to draw the conclusion that he did;
- 50.7. We find that it was not a fundamental breach of the duty of trust and confidence or a breach at all. We find that Mr Clark had reasonable and proper cause to take the action he did;
- 50.8. **Allegation 4** – We find that there was no reason why the respondent should have investigated Mr Clark for an alleged lack of integrity on his part relating to the investigation. We repeat our findings on Allegations 2 and 3;
- 50.9. **Allegation 5** – We prefer the evidence of Ms Marshall to that of claimant on this point. We find that the claimant has not shown on the balance of probabilities that the application was sent. We make that finding because we accept Ms Marshall's evidence that it was not received and note the claimant's own evidence that the form was submitted online. The form itself requires the claimant to print it out, complete it and return a scanned copy by email. He had no proof of taking any of these steps. It was not a fundamental breach of the duty of trust and confidence or a breach at all;
- 50.10. **Allegation 6** – We find that Mr Nethercott did not fail to properly investigate the locker incident. The claimant did not agree with the outcome of the investigation, but we find that in the light of the evidence of Mr Wylie and Mr Coe, it was reasonable for the respondent to come to the conclusion that the claimant's locker had not been secured with a locked combination lock. It was not a fundamental breach of the duty of trust and confidence or a breach at all;
- 50.11. **Allegation 7** – We find that the claimant's grievance was acknowledged on the date of receipt [130] as shown by the documents. This was not a fundamental breach of the duty of trust and confidence or a breach at all;
- 50.12. **Allegation 8** – We find that there were delays in processing the claimant's grievance – Mr Molyneux conceded as much. However, we find that the delays were reasonable in all the circumstances. There was a delay because Mr Clark was replaced by Mr Wheeler – a change that the claimant requested. There was a delay when the claimant said he was not ready for the first meeting with Mr Wheeler. However, there was not a fundamental breach of the duty of trust and confidence or a breach at all;
- 50.13. **Allegation 9 and 10** – We find that it was an error on the part of Ms Marshall to appoint Mr Clark to carry out a grievance investigation into a complaint about him, but we find that this error was a genuine mistake and was rectified by Ms Marshall as soon as it was brought to her attention by the claimant. It was not a fundamental breach of the duty of trust and confidence or a breach at all;

- 50.14. We find no fault in appointing Mr Wheeler to investigate the claimant's grievance. We find that there was no requirement in the respondent's policies or procedures that required a manager of higher rank to conduct the investigation. It was not a fundamental breach of the duty of trust and confidence or a breach at all;
- 50.15. **Allegation 11** – We find that whilst Mr Wheeler made some mistakes in the way that he conducted the investigation (for example, we feel he ought to have interviewed Mr Wellbourne), we could not find that the way he conducted the investigation was a way that no reasonable employer would have conducted it. This is the test in **Sainsbury's Supermarkets Limited v Hitt** [2003] IRLR 23, which we find is appropriately used in this case. There was not a fundamental breach of the duty of trust and confidence or a breach at all;
- 50.16. **Allegation 12** – We find that there was no evidence to suggest that the erroneous reference to PSI 12/2013 by Mr Wheeler had any impact on Mr Clark's decision not to endorse the claimant for the Analyst role. We have already found that Mr Clark's decision was a legitimate exercise of his managerial discretion. It was not a fundamental breach of the duty of trust and confidence or a breach at all; and
- 50.17. **Allegation 13** – We have found that this was not an example of discrimination or a detriment on the ground that that claimant had made a protected disclosure. We find, therefore that the decision was the exercise of managerial discretion. The claimant challenged that the applications were marked blind because he had identified his faith on the monitoring form. We take judicial notice that the monitoring forms would not be given to the selection panel as to do so would have completely undermined the blind making. We find that the claimant was not selected because his application was not as strong as some of the others.
51. We therefore find that there was no fundamental breach of the duty of trust and confidence or any breach at all. Therefore, we find that the claimant was not constructively dismissed.
52. We should add that if we had found that there had been a fundamental breach of the implied duty, the claimant waived that breach because the final straw was on 18 November 2020. The claimant did not resign until 31 December 2020 and gave a further 4 weeks' notice.

Time Limits

53. We agree with Mr Molyneux's submissions on time limits contained in paragraphs 31 to 33 of his skeleton argument. There is no need to reproduce them here.
54. We have found that Allegation 13 was not an act of direct discrimination. It was the only discrimination allegation that was in time. The other 12 allegations cannot, therefore benefit from being part of a series of continuing acts that are tethered to Allegation 13.

55. The claimant wrote to Governor Stephens on 13 July 2020, making a series of allegations of discrimination very similar to the ones he presented to the Tribunal. He was clearly contemplating a claim, as he had indicated as much. It is therefore an exercise in balancing the prejudice to the respondent in allowing Allegations 1-12 to proceed against the prejudice to the claimant of refusing them. We have to take into account the fact that on our findings, the claimant could not meet the threshold to put the burden of proof on the respondent, so we find that the balance of prejudice tips in favour of the respondent.
56. The claims of detriment on the grounds of making a protected disclosure relate to allegations 2-13 only. Only Allegation 13 was in time. We have found that the claimant did not make a protected disclosure, so we find that the balance of prejudice tips in favour of the respondent.

Applying Findings of Fact and Law to the Issues

Direct Discrimination – on the ground of race and / or religion / belief (Equality Act 2010, ss.4, 13 and 39)

57. Findings:

- 57.1. The respondent did not continue to place the claimant on B Wing **and** not comply with workplace Health and Safety Risk Assessments between December 2018 and 28 November 2019;
- 57.2. The respondent appointed the claimant's Line Manager to investigate the claimant's Grievance dated 10 May 2020, that Grievance being made against the same Line Manager;
- 57.3. The respondent appointed CM Wheeler on or about 25 May 2020, to investigate the claimant's Grievance, CM Wheeler being the same grade as the claimant's Line Manager (CM Clark);
- 57.4. The respondent failed to treat the claimant's sickness absence as work related stress and anxiety on or around 23 March 2020;
- 57.5. Deputy Governor Nethercott did not fail to properly investigate the break in to the claimant's locker, up to and including 15 April 2020 when Deputy Governor Nethercott replied to the claimant's complaint;
- 57.6. The respondent did not unreasonably delay the process of the claimant's Grievance contrary to the respondent's Policies and Procedures between 10 May 2020 and 28 August 2020;
- 57.7. The respondent did not fail to acknowledge the claimant's Grievance in accordance with the respondent's Policies and Procedures in or around May 2020;
- 57.8. CM Clark refused to endorse the claimant's application for a Band 4 Business Administrator Specialist Analyst role ("the Analyst role") on 11 February 2020;

- 57.9. At the same time, CM Clark questioned the claimant's integrity (of his own volition);
- 57.10. The respondent did not use PSI12/2013 as a reason not to endorse the claimant's application for the Analyst role on 28 August 2020;
- 57.11. The respondent failed to investigate the claimant's Line Manager, CM Clark, for lack of integrity for his alleged misconduct relating to the investigation on 11 February 2020;
- 57.12. DM Wheeler did not fail to investigate the claimant's Grievance properly on or around 28 August 2020; and
- 57.13. The claimant was not selected for interview for the position of "Prevent Lead".
58. The Tribunal did not find any of the above to be less favourable treatment because of the protected characteristics of race or religion.

Detriment / Dismissal for making Protected Disclosures (Employment Rights Act 1996, s.43A-L and s.47B)

59. The claimant did not make a qualifying disclosure on or about 29 January 2020 when he complained in writing to Cambridgeshire Police regarding a break in to his locker at work. The claimant did not make a disclosure of information which, in the claimant's reasonable belief, was made in the public interest. No further consideration of the issues is required.

Unfair Dismissal (including automatically unfair dismissal)

60. The claimant did not terminate the contract in circumstances in which he would have been entitled to terminate it without notice by reason of the respondent's conduct.
61. Did the respondent do the following things:
- 61.1. The respondent did not continue to place the claimant on B Wing **and** not comply with workplace Health and Safety Risk Assessments between December 2018 and 28 November 2019;
- 61.2. The respondent appointed the claimant's Line Manager to investigate the claimant's Grievance dated 10 May 2020, that Grievance being made against the same Line Manager;
- 61.3. The respondent appointed CM Wheeler on or about 25 May 2020, to investigate the claimant's Grievance, CM Wheeler being the same grade as the claimant's Line Manager (CM Clark);
- 61.4. The respondent failed to treat the claimant's sickness absence as work related stress and anxiety on or around 23 March 2020;

- 61.5. Deputy Governor Nethercott did not fail to properly investigate the break in to the claimant's locker, up to and including 15 April 2020 when Deputy Governor Nethercott replied to the claimant's complaint;
 - 61.6. The respondent did not unreasonably delay the process of the claimant's Grievance contrary to the respondent's Policies and Procedures between 10 May 2020 and 28 August 2020;
 - 61.7. The respondent did not fail to acknowledge the claimant's Grievance in accordance with the respondent's Policies and Procedures in or around May 2020;
 - 61.8. CM Clark refused to endorse the claimant's application for a Band 4 Business Administrator Specialist Analyst role ("the Analyst role") on 11 February 2020;
 - 61.9. At the same time, CM Clark questioned the claimant's integrity (of his own volition);
 - 61.10. The respondent did not use PSI12/2013 as a reason not to endorse the claimant's application for the Analyst role on 28 August 2020;
 - 61.11. The respondent failed to investigate the claimant's Line Manager, CM Clark, for lack of integrity for his alleged misconduct relating to the investigation on 11 February 2020;
 - 61.12. DM Wheeler did not fail to investigate the claimant's Grievance properly on or around 28 August 2020; and
 - 61.13. The claimant was not selected for interview for the position of "Prevent Lead".
62. None of the above breached the implied term of trust and confidence. The respondent did not behave in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent without reasonable and proper cause.

Time limits

Discrimination

63. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 21 October 2020 may not have been brought in time.
64. Allegations 1-12 of the discrimination complaints were not made within the time limit in section 123 of the Equality Act 2010. The Tribunal decided:
 - 64.1. Allegations 1-12 were not made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates.
 - 64.2. There was not conduct extending over a period.

- 64.3. The claims were not made within a further period that the Tribunal thinks is just and equitable.
- 64.4. The complaints were not made to the Tribunal in time because the claimant said he was in an internal grievance process, but this ended on 26 October 2020 and he had already indicated that he was contemplating a Tribunal claim and had made allegations of discrimination to Ruth Stephens.
- 64.5. It was not just and equitable in all the circumstances to extend time.

Public Interest Disclosure Detriment

- 65. The public interest disclosure detriment claim was not made within the time limit in section 48 of the Employment Rights Act 1996.
- 66. The claim was not made to the Tribunal within three months (plus early conciliation extension) of the act complained of.
- 67. There were not a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one.
- 68. It was reasonably practicable for the claim to be made to the Tribunal within the time limit.
- 69. The claim was not made within a further reasonable period.

Remedy

- 70. As the claims failed, there is no requirement to deal with remedy.

Employment Judge Shore
21 November 2022

Sent to the parties on:

16/12/2022

For the Tribunal Office:

N Gotecha.