EMPLOYMENT TRIBUNALS

Claimant: Mr F Aliyu

Respondent: Tesco Stores Limited

Heard at: London South Employment Tribunal, Croydon
On: 28 November – 2 December 2022

Before: Employment Judge Abbott, Mrs F Whiting and Mr S Townsend

Representation
Claimant: in person
Respondent: Mr Joel Wallace, barrister, instructed by Pinsent Masons LLP

JUDGMENT having been sent to the parties on 8 December 2022 (reasons having been delivered orally on 2 December 2022) and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

Introduction

1. The Claimant, Mr Frank Aliyu, was employed by the Respondent, Tesco Stores Limited from 6 December 2019. His employment ended with him being summarily dismissed with effect from 20 August 2021.

2. The Claimant brought the following complaints: (1) Victimisation contrary to s.27 Equality Act 2010; (2) Race discrimination contrary to s.13 Equality Act 2010; (3) Harassment contrary to s.26 Equality Act 2010; (4) Public Interest Disclosure detriment contrary to s.47B Employment Rights Act 1996; (5) Unfair dismissal contrary to s.98 and/or s.103A Employment Rights Act 1996; (6) Unpaid holiday pay. The Respondent denied the Claimant's complaints.

Conduct of the hearing

3. The case came before the Tribunal for Final Hearing on 28 November to 2 December 2022. The hearing was listed to take place in-person at the Tribunal venue in Croydon. At the request of the Claimant, the hearing was

converted to a hybrid one in order that the Claimant's witnesses (other than himself) could give their evidence by video-link.

4. At the beginning of the hearing, the Tribunal was provided with a paginated bundle running to 612 pages, a bundle of witness statements (6 for the Claimant and 5 for the Respondent), a draft list of issues prepared by the Respondent based on the orders made at the most recent Preliminary Hearing, and a cast list & chronology prepared by the Respondent.

5. Before beginning to hear evidence on the first day of the hearing, the Claimant sought permission for, and was granted permission, to rely on a covert video recording he had taken of an incident with Mr Bargery in the early hours of 7 October 2020. The Tribunal watched this video and took account of it when making our findings.

6. There were also discussions with the parties regarding documents relating to the Claimant's holiday pay claim, which had not been covered in the Claimant's evidence. In that regard, the Tribunal was satisfied it was in the interests of justice to allow the Respondent to produce, during the course of the hearing, documents relevant to that complaint to enable a proper determination to be made – one alternative being that the complaint would have to be dismissed for lack of evidence. Such documents were produced on the second and third days of the hearing, and admitted on that basis. The Claimant clarified, in the course of the hearing, that the basis of his holiday pay complaint was that he should have been paid in respect of unused holiday pay for the duration of his suspension, which bridged two leave years. The Respondent's position was that there was no basis for untaken leave to be carried forward from the 2020-21 leave year and the Claimant was paid in full for his holiday entitlement in the 2021-22 leave year.

7. In addition to documents relating to the holiday pay claim, the Respondent also produced during the hearing a small number of other documents. The first set of documents, provided on the second morning, included (other than holiday pay related documents) a copy of the Respondent's Grievance Policy, a copy of the Claimant's terms and conditions of employment confirming his start date, and a document purporting to be the notes of a meeting between Ms Ijaz and Mr Miah on 10 March 2021. The Tribunal determined that these documents should be admitted: the Grievance Policy was unobjectionable, the contract of employment was highly relevant to the jurisdiction of the Tribunal to hear an 'ordinary' unfair dismissal complaint (see further below) and to the holiday pay claim, and the meeting notes related to a key factual dispute in the case and a *prima facie* satisfactory reason was advanced for why the notes had not been identified sooner (being that this interview was the only one conducted with the interviewer, interviewee and note taker all in different locations via telephone).

8. On the morning of the third day of the hearing, after the Claimant's witnesses had finished giving evidence, the Claimant sent to the Tribunal emails from two further witnesses concerning historic allegations against Mr Bargery that do not form part of the issues in this case. The Tribunal did not consider it was, on balance, fair or consistent with the overriding objective to allow this evidence to be relied upon given the timing of its arrival and its lack of direct

relevance to the issues in the case. The Claimant was, nevertheless, given some leeway to put some of the unpleaded allegations to Mr Bargery in cross-examination.

9. On the fifth and final day of the hearing, the Tribunal deliberated in chambers in the morning and then delivered an oral judgment with reasons shortly after 3pm, the Claimant and Mr Wallace for the Respondent appearing via video rather than in person. It was the unanimous judgment of the Tribunal that all of the Claimant's complaints be dismissed. Following delivery of the judgment, the Claimant commented that he felt the decision to be biased. No complaint of bias in the conduct of the hearing or otherwise on the part of the Tribunal had been raised at any point of the hearing prior to that.

10. These written reasons were produced following a request made by the Claimant on 12 December 2022.

The issues

11. The issues to be determined were settled by EJ Siddall at a Preliminary Hearing on 18 May 2022 and confirmed with the parties at the beginning of the hearing. The list is as follows.

JURISDICTION

1. In relation to the discrimination/Equality Act claims raised below:

(a) Did any of the acts complained of occur before 16 November 2020 (first claim) or 24 June 2021 (second claim) (being three months prior to the commencement of ACAS early conciliation in relation to each claim)?

(b) If so, did any or all of those acts form part of a continuing act extending up to those dates or later?

(c) If not, would it be just and equitable to extend the time limit in relation to any such complaints?

2. In relation to whistleblowing detriment claims raised below:

(a) Did any of the acts complained of occur before 16 November 2020 (first claim) or 24 June 2021 (second claim) (being three months prior to the commencement of ACAS early conciliation in relation to each claim)?

(b) If so, did any or all of those acts form part of a series of similar acts or failures extending up to those dates or later?

(c) If not, was it reasonably practicable for the complaint in relation to such acts to have been present within three months?

(d) If so, would it be reasonable to extend the time limit in relation to any such complaints to include permit them to be brought?

VICTIMISATION CONTRARY TO s.27 EQUALITY ACT 2010

3. Did the Claimant do any protected acts? He says he did as follows:

(a) On 5 October 2020 the Claimant made complaints about Mr White and Paul

Howes to the Protector Line:

(i) Sexual harassment of a female colleague - Paul Howes harassed DM;

(ii) Mr White sent nude pictures to a female colleague RM.

(b) On 15 October 2020, the Claimant made complaints in a telephone interview with Jamie Popely:

(i) That Mr Bargery had victimised the Claimant since making his complaint of 5 October 2020:

1. Changing the Claimant's route;

2. Left the Claimant in the hub to carry out extra duties alone while all other employees were outside;

3. Told the Claimant that he would change the Claimant's hours and while doing so invaded the Claimant's personal space leaning close to him.

(ii) Mr Bargery promoted Lewis White, Jerome and Shakur in order to get them on side to undermine the Claimant (the Claimant having trained those individuals);

(iii) On 15 October 2020, Mr Bargery did a heil Hitler salute at the Claimant in the early hours of the morning;

(iv) Repeated the information on 5 October 2020 about sexual harassment and the sending of a nude picture.

(v) Mr Bargery had told the Clamant not to clock in between April and July 2020, and instead clocked the Claimant in himself and mis-recorded the Claimant's hours so as to underpay him. He did not do this to white colleagues (Allen, Jason, Paul).

(vi) Mr Bargery had stolen stock.

4. Was the Claimant subjected to any detriment because of doing a protected act? He says he was as follows:

(a) On 15 October 2020, Daniel Bargery made a Heil Hitler salute at the Claimant.

(b) On 15 October 2020, Mr Popely claimed that a Hitler salute was not a racist gesture and that Hitler had copied it from someone else.

(c) On 28 October 2020 the Claimant was suspended. He was not given any details of basis of the suspension.

(d) Ms Ijaz's investigation was flawed in that Mr Bargery, the person the Claimant complained about, interviewed/obtained evidence from 4 of the witnesses rather than Ms Ijaz doing so (Ramona, Shakur, Mark (manager for Makro), Allen).

(e) Ms Ijaz made a false counter allegation against the Claimant after he sent her a text message to the effect she had caused him stress and difficulty and he wished the same on her. She alleged that this message was contrary to Tesco's values.

(f) The investigation concluded there was a disciplinary case to answer.

(g) The Claimant was dismissed.

RACE DISCRIMINATION CONTRARY TO s.13 EQUALITY ACT 2010

5. Was the Claimant treated less favourably that a relevant comparator was or would have been, and if so was that because of race? The treatment complained of is the same as that complained of under the heading of victimisation.

6. The Claimant relies upon a hypothetical comparator and/or Mr White in relation to being suspended, investigated and disciplined. The Claimant says that Mr White was not suspended, investigated or disciplined despite there being a serious allegation against him.

HARASSMENT CONTRARY TO S.26 EQUALITY ACT 2010

7. Was the Claimant subjected to unwanted conduct? The conduct complained of is the same as that complained of under the heading of victimisation.

8. If so, was such unwanted conduct related to his race?

9. If so, did such conduct have the purpose or effect of:

(a) violating his dignity, or

(b) creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

PUBLIC INTEREST DISCLOSURE DETRIMENT CONTRARY TO s.47B EMPLOYMENT RIGHTS ACT 1996

10. Did the Claimant make a public interest disclosure? He relies upon the complaints of 5 and 15 October 2020 described above.

(a) Did the Claimant disclose information?

(b) In his reasonable belief was the disclosure of information in the public interest?

(c) In his reasonable belief did the disclosure tend to show that there had been a breach of a legal obligation?

11. Was the Claimant subjected to a detriment on the grounds of making a public interest disclosure. He says he was as follows:

(a) The detriments under the heading of victimisation (save for dismissal) are repeated.

UNFAIR DISMISSAL CONTRARY TO S.98 AND/OR 103A EMPLOYMENT RIGHTS ACT 1996

12. What was the reason or principal reason for the Claimant's dismissal?

(a) The Claimant says it was making a public interest disclosure.

(b) The Respondent says it was conduct.

13. If there was a potentially fair reason for the dismissal was the dismissal fair in all the circumstances?

HOLIDAY PAY

14. The Claimant says that he was not paid for holiday that he accrued during his period of suspension. He estimates that this amounted to 15 days being outstanding on termination.

(a) Did the Claimant have accrued but untaken holiday upon termination?

(b) If so how much?

(c) Is he entitled to compensation in respect of those days?

BREACH OF CONTRACT

15. This complaint is not pursued on the basis that it adds nothing to the complaints of discrimination and/or unfair dismissal. The essence of it would have been that the Respondent failed to follow internal policies including the equal opportunities policy.

12. On the morning of the second day of the hearing, the start date of the Claimant's continuous employment with the Respondent was clarified. This had the consequence that it was common ground the Claimant did not have 2 years' continuous service within the meaning of s.108 Employment Rights Act. We therefore dismissed the complaint of 'ordinary' unfair dismissal contrary to s.98 Employment Rights Act on the basis that the Tribunal has no jurisdiction to hear such a complaint. Issue 13 above accordingly fell away.

Relevant law

VICTIMISATION CONTRARY TO s.27 EQUALITY ACT 2010

13. Section 27 of the Equality Act 2010 (**EQA**) provides, so far as is relevant:

"(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."

14. A "protected act", therefore is, in essence, raising an issue of discrimination.

15. In order for a disadvantage to qualify as a "detriment", the Tribunal must find that, by reason of the act or acts complained of, a reasonable worker would or might take the view that they had thereby been disadvantaged in the circumstances in which they had thereafter to work. The test must be applied by considering the issue from the point of view of the victim. If the victim's opinion that the treatment was to their detriment is a reasonable one to hold, that ought to suffice. While an unjustified sense of grievance about an allegedly discriminatory act cannot constitute detriment, a justified and reasonable sense of grievance may well do so (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11).

16. The provisions relating to the burden of proof are found in Section 136(2) and (3) EQA:

> "(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."

17. It is thus for the Claimant to prove facts from which the Tribunal could conclude, in the absence of any evidence from the Respondent, that the Respondent committed an act of discrimination. Only if that burden is discharged is it then for the Respondent to prove that the reason for the treatment was not because of a protected act or characteristic (see, e.g., *Royal Mail Group Ltd v Efobi* [2021] UKSC 33). This will typically be based upon inferences of discrimination drawn from the primary facts and circumstances found by the Tribunal to have been proved on the balance of probabilities. Such inferences are crucial in discrimination cases as it is unlikely there will be direct, overt evidence that a Claimant has been treated less favourably because of a protected act or characteristic (see, e.g., *Anya v University of Oxford* [2001] IRLR 377, CA).

18. Notwithstanding the above, in *Efobi*, Lord Leggatt repeated Lord Hope's reminder in *Hewage v Grampian Health Board* [2012] UKSC 37 that it is important not to make too much of the role of the burden of proof provisions:

> "They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."

RACE DISCRIMINATION CONTRARY TO s.13 EQUALITY ACT 2010

19. Section 13 EQA prohibits direct discrimination. Section 13(1) EQA states:

> "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."

20. Race (including colour, nationality and/or ethnic or national origins) is a protected characteristic (section 9 EQA).

21. The primary focus in a direct discrimination case is on identifying why the claimant was treated as he was, before coming back to whether it was less favourable treatment because of the protected characteristic (see e.g. *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11). It is well established law that a respondent's motive is irrelevant and, indeed, the possibility of unconscious discrimination is recognised (see e.g. *Nagarajan v London Regional Transport* [1999] IRLR 572, HL). Moreover, the protected characteristic need not be the sole or even principal reason for the treatment as long as it is a significant influence or an effective cause of the treatment.

22. The bare facts of (i) a difference in status and (ii) a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal could conclude that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination (*Madrassy v Nomura International plc* [2007] EWCA Civ 32). Something more is needed.

23. The provisions relating to burden of proof have been covered in the "Victimisation" section above.

HARASSMENT CONTRARY TO S.26 EQUALITY ACT 2010

24. Section 26 EQA provides, so far as is relevant:

> "(1) A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
>
> […]
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
>
> (a) the perception of B;
>
> (b) the other circumstances of the case;
>
> (c) whether it is reasonable for the conduct to have that effect."

25. Race is a relevant protected characteristic: section 26(5) EQA.

26. The wording of section 26(1)(b) is important – as it requires conduct that is more than merely upsetting to B.

27. The provisions relating to burden of proof have been covered in the "Victimisation" section above.

28. While a claimant is entitled to put harassment and victimisation claims in the alternative, the Tribunal can only uphold one or other of the claims by virtue of section 212 EQA.

PUBLIC INTEREST DISCLOSURE DETRIMENT CONTRARY TO s.47B EMPLOYMENT RIGHTS ACT 1996

29. Under section 47B of the Employment Rights Act 1996 (**ERA**), a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer (or a fellow worker of the same employer) done on the ground that the worker has made a protected disclosure.

30. Detriment for the purposes of section 47B ERA has the same meaning as in discrimination law (see the discussion under "Victimisation" above), save that dismissal is expressly excluded from being a detriment: section 47B(2).

31. "On the ground that" means that the protected disclosure must materially influence the employer's treatment of the worker, in the sense of being more than a trivial influence (*Fecitt v NHS Manchester* [2012] ICR 372, CA).

32. A "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H. Qualifying disclosures made to the employer are protected under Section 43C.

33. Section 43B(1) ERA 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, is being or is likely to be deliberately concealed."

34. In *Cavendish Munro Professional Risks Management Limited v Geduld* [2010] IRLR 38 it was held that there is a difference between conveying information (*i.e.* facts) and making an allegation. However, in *Kilraine v London Borough of Wandsworth* [2018] ICR 1850, CA, the Court of Appeal

held that the conveying of information in the context of section 43B can cover statements that could also be categorised as allegations. This is a question of fact for the Tribunal. In order for a statement or disclosure to be a qualifying disclosure according to the statutory language, it has to have sufficient factual content and specificity to be capable of tending to show one of the matters listed in subsection (1).

35. The Tribunal has to determine whether the worker's belief is reasonable. The EAT confirmed in *Soh v Imperial College of Science, Technology and Medicine* UKEAT/0350/14/DM that there is a distinction between saying, "I believe X is true", and, "I believe that this information tends to show X is true". So long as the worker reasonably believes that the information tends to show a state of affairs identified in section 43B(1) , the disclosure will be a qualifying disclosure. There can be a qualifying disclosure even if the facts relied upon subsequently turn out to be wrong (*Darnton v University of Surrey* [2003] ICR 615, EAT).

36. The Tribunal must also determine whether the worker reasonably believed that the disclosure was in the public interest. In *Chesterton Global Limited v Nurmohamed* [2018] ICR 731, CA, the Court of Appeal held it is a question of fact for the Tribunal and suggested the following might be relevant: (a) the numbers in the group whose interest the disclosure, (b) the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed, (c) the nature of the wrongdoing disclosed and (d) the identity of the alleged wrongdoer.

UNFAIR DISMISSAL CONTRARY TO S.103A EMPLOYMENT RIGHTS ACT 1996

37. Section 94(1) ERA provides that an employee has the right not to be unfairly dismissed by their employer. It is not in dispute that the Claimant was a qualifying employee and was dismissed by the Respondent.

38. Section 103A ERA provides that:

> "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."

The meaning of "protected disclosure" is addressed in the "Public Interest Disclosure Detriment" section above.

39. The burden is on the employer to show the reason for dismissal was a potentially fair one (section 98(1) ERA).

HOLIDAY PAY

40. Workers are entitled to be paid in lieu of accrued but untaken holiday on termination of employment pursuant to the Working Time Regulations 1998 (***WTR***). The general rule is that the worker is only entitled to be paid in lieu of holiday accrued but untaken in the final leave year, on a *pro rata* basis: reg 13(9)(a). The terms of the employment contract will determine if there is a contractual right to carry over leave from one year into the next.

41. Case law has developed limited exceptions to allow the carry over of some leave including, of potential relevance here, where a worker has been prevented from taking leave because the employer has refused to provide paid holiday (*King v Sash Window Workshop* [2018] ICR 693, ECJ).

Findings of fact

42. The Tribunal heard live evidence from the Claimant (in person) and two of his witnesses (by video): Ms Matei and Mr Miah. There were also three unchallenged statements, from Mr Meade, Ms Mukamba and Ms Fletcher, which we read and took into account in making our findings of fact. On the Respondent's side, we heard live evidence from five witnesses (all in person): Mr Bargery, Ms Etwareea, Ms Ijaz, Mr Somadas and Ms Whelan.

43. The relevant facts are, we found, as follows. Where it was necessary for us to resolve any conflict of evidence, we indicate how we have done so at the relevant point. Only findings of fact relevant to the issues, and those necessary for the Tribunal to determine, have been referred to in these reasons. We have not referred to every document read by the Tribunal in the findings below, but that does not mean such documents were not considered if referred to in the evidence and/or in the course of the hearing.

44. The Claimant's continuous employment with the Respondent started on 6 December 2019. Immediately prior to that he had worked on an agency basis, and before that for Tesco.com. During his time as an agency worker, the Claimant had worked with a team led by Daniel Bargery, and it was this team that moved over to Charlton Bakery Hub around the time his continuous employment began.

45. Prior to October 2020, C had a generally uneventful employment, in the sense that there were no complaints about his work or his conduct.

46. The Hub workplace was an isolated structure within the Tesco organisation, being based within a site operated by one of Tesco's subsidiaries. From the evidence we heard it is clear there was a fairly relaxed management regime, and there were certain less-than-professional behaviours which appear to have been tolerated by management, in particular by Mr Bargery. Examples include the applying of stickers to colleagues' backs, and a degree of "racial and sexist banter" that seems to have been broadly tolerated by all (such as Mr Bargery's admitted "dodgy Romanians" remark).

47. Around June-July 2020, one of C's colleagues, Denisa Miron, was communicating with the Claimant regarding concerns she had over how she was being treated by one of the shift leaders, Paul Howes. The Claimant raised Denisa's concerns with Mr Bargery; however, no action was taken against Mr Howes. The Claimant was upset about this, as evidenced by his message to Mr Bargery at page 84 of the hearing bundle, dated 28 July 2020, which read:

> "Dan i tink ur mistaken the natural respect I've 4u as oppose to the job, i didnt like ur statements last night despite i ve verbally reported paul to u in regards to denisa atleast twice. U shud know i wnt accept bullying n abnormal behaviours from paul

n i dnt run either from bullies. U hurt my respect 4u n it's a thin line between RESPECT N DISRESPECT, all I ask is a proper working environment 2 do my job. I can deal with paul if u cnt deal with him"

48. There were also other issues that had surfaced and caused some friction between the Claimant and colleagues, in particular, Mr Bargery. One was around the process of clocking-in, given the Claimant was due to start his shifts at midnight. Another concerned the designation of Lewis White, Shakur Sheikh and Jerome Johnson as "gold CAs", in respect of which the Claimant was aggrieved given that he had trained each of these individuals but had not, himself, been given that designation.

49. On 5 October 2020, the Claimant made a complaint via the Respondent's "Protector Line". The complaint raised allegations of sexual harassment, favouritism, intimidation, and harassment of black and foreign nationals, against Mr Bargery and Mr Howes.

50. The complaint was forwarded by email to, among others, Mr Jamie Popely (the People Partner responsible for the Hub) at 11:09am on 6 October 2020, as shown at page 86 of the hearing bundle. There is no evidence to suggest that Mr Popely would have been made aware of the complaint earlier than this email.

51. During the Claimant's shift that night (6 to 7 October 2020), Mr Bargery challenged the Claimant regarding his uniform. The Claimant was resistant to this criticism about his uniform, and raised issues with Mr Bargery regarding possible problems with his van, that there was a problem with his sat-nav, and hygiene issues with the vans. There was also a stand-off at around 3.15am, which the Claimant captured covertly on video, when Mr Bargery asked the Claimant to help lay-up baked goods, and the Claimant had refused to do so until other colleagues would assist whereas Mr Bargery indicated that those other colleagues were on a break. Subsequently, the Claimant asked for, and was eventually provided with a grievance form, which he completed and left with Mr Bargery (page 606 of the hearing bundle).

52. Mr Bargery reported the incidents with the Claimant in a series of emails to Mr Popely at 3.55am, 5.44am, 10.46am and 10.56am on 7 October 2020.

53. There were further disagreements during the course of the following night shift (7-8 October 2020), which again Mr Bargery reported to Mr Popely by email at 4.56pm on 8 October 2020.

54. During the time after filing his complaint, the Claimant says he tended to be isolated at work, and just come in, do his job, and leave again. We have no reason to reject that evidence, which is consistent with the tense atmosphere that the incidents just mentioned demonstrate.

55. At some point between 5 and 15 October 2020, Mr Bargery changed the Claimant's delivery route to avoid the road closure on Vauxhall Bridge. We accept Mr Bargery's evidence that the route change was a reasonable instruction, intended to ensure the Claimant was not back late from his deliveries.

56. The Claimant alleges that, at around 3.30am on 15 October 2020, Mr Bargery made a "heil Hitler" salute to the Claimant. Mr Bargery denies that he made such a salute, and says he was simply waving to the Claimant to indicate that he should leave in his van. All other witnesses, who were interviewed months later rather than contemporaneously, supported Mr Bargery's version of events. The incident was captured on CCTV, but the recording was not requested to be retained beyond the usual 28 day retention period. The only evidence we have on that is an email from Mr Mark McGuffin in March 2021 in which he states that he viewed the CCTV at the time and saw nothing untoward. We took account of the delay in obtaining statements in weighing up the evidence. Considering all the evidence, in particular the Claimant's own demonstration of what he considered to be Mr Bargery's gesture, we find on the balance of probabilities that the gesture made by Mr Bargery was not a Hitler salute. The more plausible explanation is that Mr Bargery was gesturing to wave away the Claimant, rather than seeking to provoke the Claimant. This conclusion is supported by the fact that there is no mention of a Hitler salute in the message that the Claimant sent to Mr Bargery at 4.05am that morning, a very short time after the incident, which read:

> "Dan dnt ever speak to me in a derogatory manner like that again especially in front of your white friends, dnt start what u cnt win. Learn how 2 talk next time you want to use your discretion.."

57. We also reject the Claimant's allegation that Mr Bargery had, on several previous occasions, made Hitler salutes. We do not consider it plausible that, if Mr Bargery had been making such gestures regularly, it would not have been complained of by the Claimant or another colleague sooner given the gravity of such an action.

58. As part of the same incident on 15 October 2020, there was a verbal exchange between the Claimant and Lewis White, in which the Claimant told Mr White to "stay out of it". Mr White made a complaint against the Claimant relating to this and other issues regarding the Claimant's work ethic almost immediately, by email, to Mr Popely at 3.55am (page 101 of the hearing bundle).

59. Shortly afterwards, Mr Bargery also reported the incident to Mr Popely, by email at 06:02am (page 103 of the hearing bundle), including a screenshot of the message the Claimant had sent to him at 4.05am.

60. Later that same day (15 October 2020), the Claimant attended an informal meeting with Mr Popely to discuss his grievance. A transcript has been provided and considered by the Tribunal. It is alleged that, during this meeting, Mr Popely asserted that the heil Hitler salute was not a racist gesture and that Hitler copied it from someone else. We have considered the transcript at pages 144-146 of the hearing bundle, the relevant excerpts (omitting matters not directly relevant to the alleged gesture) being as follows:

> "FA: He just shouted with his and he this is not the first time okay, he shouted across the car park, go like with a funny hand gesture like almost like you know heil Hitler, you know like putting your hand upwards like you know you know like that, you know go and he usually does this in front of his friends …

JP: Why do you see it as a racist manner?

FA: His hand gestures.

JP: Alright it is rude, 100% rude like that hand gesture like, it's like he's shooing you away. Yeah, and it's not a racist gesture, mate. I'm not going to if you other features obviously racist mentioned in your complaint but shooing you away and saying how racist gesture is two different things mate, you got to be mindful because like listen I will support you 100% if there's things that he's done, that's racist and stuff like that I will listen to you but shooing you away rudely that that's not acceptable, but it says in a racist way. That's not what I get what you're trying to say, but that actually heil Hitler sign does not come from come from the original thing of that is actually from the Bible where it's the sign from the Archangel Gabriel. I don't know if you're aware of that but the then it's certainly been. It's been taken and used in the wrong way. The shooing you away bit is definitely rude. 100% is rude and I support you with that, but that's not a racist gesture.

FA: Jamie, what, why you even try to explain the word? …

JP: I'm saying it's not because you said the shooing away and the heil sign are two different things, so and in modern day language … And if for example he put his hand up in front of himself at an upward angle and just held it there without moving his hand yes, I would say to you that's a heil salute and that's not acceptable. … but to say that he shoo's you away in a rude gesture I will back up …

FA: Look he did it…

JP: … will back up that with you. However, I cannot say from a racist point of view."

61. We find that what Mr Popely said in this regard was inappropriate and, to an objective observer, makes him come across as being an apologist for such actions. It is important to bear in mind that, at this point, there had been no investigation of whether or not Mr Bargery had made such a gesture. However, as ill-judged as his comments were, it is evident that Mr Popely understood what the Claimant was describing not to be a heil Hitler salute, and that was at the heart of what Mr Popely was commenting upon.

62. On 18 October 2020, a meeting was convened, intended to be an informal mediation meeting between the Claimant and Mr Bargery, facilitated by a Store Manager, Ravinthini Sivasuthan (in Mr Popely's absence on annual leave). It is clear from the evidence that Ms Sivasuthan was ill-prepared for this meeting, given she seemingly had no knowledge of the majority of the Claimant's complaints, apart from having a copy of the grievance form the Claimant completed on 7 October 2020 (as is confirmed at page 184 of the hearing bundle). The mediation was not successful, and C expressed his wish to resolve his grievance formally.

63. On 20 October 2020, Ms Sivasuthan emailed Stacey Etwareea (a People Partner who was covering Mr Popely's work whilst he was on leave) to request assistance to investigate the grievance further. The email also alleges that the Claimant made a racial comment toward Mr Bargery,

although there is no indication that this matter was taken further.

64. Ms Etwareea's evidence was that she believes she responded to Ms Sivasuthan to tell her she should take things further, but it is clear that Ms Etwareea herself provided no further assistance in doing so. It does not appear Ms Sivasuthan took things forward at this stage either.

65. On the night shift 26-27 October 2020, it is alleged that that Claimant made a racist remark to his colleague Jason Richardson about another colleague, Shakur Sheikh along the lines of "turn off the lights so we can't see Shak". We have considered all of the investigation notes and emails reporting on this incident, but have not had the benefit of live evidence from anyone (other than the Claimant) who was present. According to the written evidence, four individuals (Jason Richardson, Lewis White, Reece Lee and Paul Howes) heard the comment and two others (Jerome Johnson and Shakur Sheikh himself) did not. The Claimant denies making the comment, but also sought to explain in his oral evidence why, in his view, the alleged comment was not a racist comment. Taking account of all of the evidence, on the balance of probabilities, we find that the Claimant did make some kind of remark which was interpreted by, in particular, Mr White as being racist. We consider it implausible that all of the witnesses could have conspired to create an entirely false allegation, in view of the fact that the complaint was made by Mr White to Mr Bargery on the following day. We make no finding as to whether the comment made was, in fact, racist.

66. At 15:22pm on 28 October 2020, the Claimant called Ms Sivasuthan to request that Mr Popely be removed from his grievance process, given the apparent lack of any progress being made. We have seen no evidence to suggest, and therefore find, that nothing else that happened that day was motivated by the Claimant having made this request.

67. During the course of 28 October 2020, Mr White reported the Claimant's alleged racial remark to Mr Bargery, in a telephone call followed up with an email at 18:36pm. Mr Bargery called Ms Etwareea, in her capacity as Mr Popely's cover, to discuss the matter. The outcome of the short conversation was that it was agreed the Claimant should be suspended, but that Mr Bargery should organise for another manager to inform the Claimant of his suspension. There was some dispute in the oral evidence about whether the decision was Ms Etwareea's or Mr Bargery's, but it was clear that Ms Etwareea advised a suspension based on the limited information she had, and we find based on the evidence that it would be unusual for someone in Mr Bargery's position to go against such advice. Ms Etwareea was not aware at this time of the nature of the Claimant's grievance (though she was aware there was a grievance outstanding) nor was she aware that a Protector Line complaint had been made.

68. At 11.50pm on 28 October 2020, the Claimant met with Samson Munir, Shift Leader, and was suspended. He was informed that the suspension was for an alleged racial comment, but no further details were provided either in that meeting, or in the suspension letter that followed.

69. Little then happened in respect of the Claimant's grievance or the

investigation into the allegation against him. We find that Mr Popely failed, on his return from leave, to advance the investigation, or to promptly reallocate the work to someone else given the Claimant's objection to him being further involved. This resulted in a delay that the Respondent's witness Ms Whelan, accepted in her oral evidence was wrong.

70. Eventually in December 2020, Subramaniam Somasundaram was appointed to take the grievance and investigation forward. However, the Claimant refused to meet with Mr Somasundaram until he was in receipt of the notes of his meeting with Mr Popely on 15 October 2020 (which he had requested from Mr Popely himself on 21 November 2020 and from Ms Ross on 08 December 2020). This resulted in further delay, as those notes were not provided to the Claimant until 1 February 2021 (despite yet further contact being made by the Claimant with the Respondent during this time), and then Mr Somasundaram was on annual leave.

71. On 23 February 2021, another People Partner, Nikki Antoine, was designated as the Claimant's point of contact, and around this time Ms Rabia Ijaz was appointed to take over the investigation of the grievance and of the alleged racial comment. At some point in February 2021, the Claimant discussed holiday pay issues with Ms Antoine.

72. It was determined that Ms Ijaz would complete the grievance investigation first, before dealing with the disciplinary investigation. Ms Ijaz conducted a series of fact-finding meetings with various witnesses in the early part of March 2021, and the notes of those meetings have been provided. The only key dispute in this regard concerns whether or not she interviewed Mr Mosh Miah, with notes taken by Mr Atiq Rahman: Ms Ijaz says she did, and the Respondent has provided (late – in the course of the hearing) meeting notes; Mr Miah gave oral evidence that he had not spoken to Ms Ijaz. Having considered all the evidence, on the balance of probabilities, we find that Ms Ijaz did interview Mr Miah. It is implausible that Ms Ijaz would have gone to the trouble of fabricating interview notes which, on their face, do not take the investigation any further forward, since they show Mr Miah had nothing of substance to contribute. The handwritten notes are similar in appearance to the other notes, and a credible explanation was provided for why the notes had not been included in the original pack (that being that this was the single interview conducted with all parties in different places by telephone). The fact Mr Miah had been interviewed is stated in the contemporaneous grievance outcome report. We think it is more plausible that Mr Miah has simply not remembered the conversation, given the passage of time and the essential lack of any useful evidence he had to offer.

73. We find that Ms Ijaz conducted her grievance investigation without undue influence from others, in particular from Mr Bargery. There is no credible evidence to suggest otherwise. It was suggested by the Claimant that Ms Ijaz effectively delegated part of the fact-finding to Mr Bargery, but we do not find this was the case. It is correct that Ms Ijaz did rely on some evidence that was procured by Mr Bargery, specifically emails from Ramona Matei and Mark McGuffin. Whilst this is not a 'gold standard' investigation, we did not consider, on balance, that it undermined the process or rendered it flawed. It is also unfortunate that Ms Ijaz did not interview Lewis White given he was

complained of in the Claimant's grievance, but we do not consider this affected the outcome.

74. Ms Ijaz produced her grievance outcome report on 16 March 2021 and met with the Claimant to discuss it on 24 March 2021. She did not uphold the grievance.

75. The Claimant reacted badly to this outcome. He sent a series of messages to Ms Ijaz on 24 March 2021 (pages 284-285 of the hearing bundle), including stating "I pray GOD/ALLAH reward you accordingly now or in the future" and a email to Ms Ijaz on 25 March 2021 in which he wished she be "cursed with the pain of 1000 widows" (page 293). He separately complained to Ms Antoine on 25 March 2021 regarding Ms Ijaz's investigation and made a Protector Line complaint in the same regard on 31 March 2021.

76. Unsurprisingly, the decision was taken that another manager, Mr Somadas, would take forward the disciplinary investigation against the Claimant rather than Ms Ijaz. The disciplinary complaint was extended to also address the messages that the Claimant had sent to Ms Ijaz.

77. The Claimant appealed the grievance outcome, but did not substantively participate in the appeal because he had no faith in the process. The appeal was unsuccessful.

78. The Claimant also did not substantively participate in Mr Somadas' disciplinary investigation, which was largely based on the interview notes from Ms Ijaz's investigation of the grievance. The outcome of the investigation was to refer the Claimant to a disciplinary. We find this was a reasonable conclusion to draw based on the evidence before Mr Somadas. We find that Mr Somadas conducted his investigation without undue influence from others, in particular from Mr Bargery. There is no credible evidence to suggest otherwise.

79. On 1 April 2021, the Claimant contacted Mr Bargery regarding his holiday allowance. It is evident that, at this time, the Claimant was aware of the need to use his holiday before the end of the holiday year (which coincides with the tax year).

80. The disciplinary process was conducted by Muhammed Waseem Akram. Again, the Claimant did not participate because he refused to attend meetings without a lawyer, which the Respondent says could not be facilitated because it is against policy. Mr Akram interviewed Ms Sivasuthan, Ms Etwareea, Mr Popely and Mr Bargery and otherwise relied on Ms Ijaz's interviews of other witnesses. The outcome of the disciplinary process was that both complaints (i.e. the racial comment on 27.10 and the threatening and inappropriate messages to Mz Ijaz) were upheld as gross misconduct, and the Claimant was summarily dismissed with effect from 20 August 2021. We find this was a reasonable conclusion to draw based on the evidence before Mr Akram. We find that Mr Akram conducted his investigation without undue influence from others, in particular from Mr Bargery. There is no credible evidence to suggest otherwise.

81. On termination, the Claimant was paid a sum of £1,127.95 in respect of holiday for the 2021-22 leave year. There was no evidential basis to doubt that the correct sum was paid for that leave year, and we therefore find that it was.

82. The Claimant appealed against dismissal by email dated 01 September 2021. The appeal was conducted by Ms Whelan, an Area Manager. Ms Whelan fairly accepted that there were problems with the process and conducted further interviews with Jerome Johnson, Jason Richardson, Reece Lee and Lewis White. She sought a meeting with the Claimant, but he would not attend without a lawyer. Ms Whelan upheld the decision to dismiss, which we find was a reasonable conclusion available to her based on the evidence. We find that Ms Whelan conducted her appeal without undue influence from others, in particular from Mr Bargery. There is no credible evidence to suggest otherwise. Ms Whelan also apologised to the Claimant for the procedural errors, but considered they did not affect the outcome, which again we find to be a reasonable conclusion for her to draw.

Determination of the issues

83. The Tribunal decided to come back to the jurisdiction issues (issues 1 and 2) only if necessary having considered the other issues. We therefore start with the victimisation claim.

VICTIMISATION CONTRARY TO s.27 EQUALITY ACT 2010

Issue 3: Did the Claimant do any protected acts?

84. We find that the complaints contained within the Protector Line complaint and those made during the interview with Mr Popely clearly include allegations that member of staff, specifically Mr Bargery and Mr Howes, had engaged in behaviours that would contravene the Equality Act 2010 – specifically discrimination on the basis of race and/or sex. We therefore find that the Claimant had done a protected act.

85. We do not find it necessary in the circumstances to break down in granular detail which of the allegations were protected acts and which were not, save to say that there clearly were some protected acts.

Issue 4: Was the Claimant subjected to any detriment because of doing a protected act?

86. We deal with the alleged detriments in turn.

87. Point (a) is the alleged Heil Hitler salute. We have found on the facts that there was no Hitler salute made, and therefore this cannot be a detriment.

88. Point (b) is Mr Popely's explanation of the origins of the Hitler salute. We have found on the facts that what Mr Popely said in this regard was inappropriate and, to an objective observer, makes him come across as being an apologist for such actions. However, to qualify as a detriment there must be shown some kind of a disadvantage. We cannot see what disadvantage this comment can reasonably have caused the Claimant, and the Claimant gave

no evidence to suggest this particular comment can cause him emotional impact. It was immediately followed by a debate about the meaning of other terms. In addition, whilst it was done in a clumsy and inappropriate way, we consider that Mr Popely's intentions when making this comment were not malicious or because the Claimant had done a protected act, but to seek to smooth over the differences between the Claimant and Mr Bargery in his role as a People Partner.

89. Point (c) relates to the Claimant's suspension and the failure to give reasons. We find both of these to clearly qualify as detriments. The question is whether the reason for the detriments was the protected acts. We find they were not. We have found that Ms Etwareea was not aware of the protected acts and gave her advice independent of that knowledge. Mr Bargery acted on that advice, but it would have been unusual for him to do otherwise. Whilst there were clearly flaws here, in particular in the failure of anyone to review the suspension or to give the Claimant details of the reasons earlier, this was not as a consequence of the protected acts.

90. Point (d) relates to the alleged flaws in Ms Ijaz's investigation. Whilst we have found that the investigation was not 'gold standard', we have also found that the flaws did not affect the outcome. There was therefore no disadvantage, and therefore no detriment, here. Moreover, there is no basis for a finding that the flaws happened because the Claimant had done a protected act.

91. Point (e) relates to an alleged false counter allegation made by Ms Ijaz. We find that the allegation made by Ms Ijaz was not false, as is evidenced by the messages and email sent by the Claimant to Ms Ijaz, which can reasonably be seen as threatening and offensive. There is clearly no detriment to the Claimant here.

92. Point (f) concerns the conclusion of the investigation that there was a disciplinary case to answer. We have found that was a reasonable conclusion open to Mr Somadas on the evidence before him and he would have come to that conclusion regardless of the protected acts.

93. Point (g) relates to the dismissal and the same applies – we have found that dismissal was a reasonable conclusion based on the evidence before Mr Akram and, on appeal, Ms Whelan, and was done irrespective of the protected acts.

94. It therefore follows that none of the detriments have been proved, and the complaint of victimisation therefore fails.

RACE DISCRIMINATION CONTRARY TO s.13 EQUALITY ACT 2010

Issue 5: Was the Claimant treated less favourably that a relevant comparator was or would have been, and if so was that because of race?

95. The alleged less favourable treatments are those listed under issues 3 and 4 insofar as they are concerned with actions against the Claimant. We deal with them in turn.

96. The first relates to the change of the Claimant's route by Mr Bargery. We

have found that this change was not motivated by race, but was a reasonable instruction intended to ensure the Claimant returned from his deliveries on time by avoiding the closure on Vauxhall Bridge.

97. The second relates to alleged extra duties placed on the Claimant by Mr Bargery. The evidence does not support that the Claimant was singled out to perform extra duties because of his race. We considered the video of the incident on 6-7 October 2020 which is consistent with Mr Bargery's account of how he managed his staff. We considered Mr Bargery to have been calm and reasonable during that encounter, which he was not aware was being filmed.

98. The third relates to alleged change of the Claimant's hours and Mr Bargery invading the Claimant's personal space. Based on the evidence, we find that this incident did not happen and accept Mr Bargery's account, which is plausible, in particular given the ongoing COVID pandemic at that time.

99. The fourth is the alleged promotions of other staff to "gold CA" over the Claimant. We find no unfavourable treatment on the basis of race. Mr Bargery's explanation for why the Claimant, as a driver, was not suitable to be designated as a "gold CA" is a plausible one. Moreover, the comparators identified include Shakur (who is of African descent) and Jerome (who is of African descent from Ethiopia), so to link this decision to race does not follow.

100. The fifth is the alleged Hitler salute by Mr Bargery. We have already dealt with the Hitler salute, and found on the balance of probabilities that it did not happen.

101. The sixth concerns issues around the Claimant clocking in. We found no credible evidence to support that allegation, and nor has the Claimant brought a complaint that he was underpaid (save in respect of holiday during his suspension). In addition, the comparators identified include people with different shift patterns.

102. The seventh regards Mr Popely's explanation of the origins of the Hitler salute. We find that Mr Popely would likely have given the same explanation to anyone raising this issue, inappropriate as that explanation is, regardless of their race. At the heart of his comments was Mr Popely understanding that what the Claimant was describing was not actually a heil Hitler salute but a shooing motion. There is therefore no less favourable treatment here.

103. The eighth regards the Claimant's suspension and details thereof. This is, on its face, less favourable treatment. However, we find that it was not done on the basis of race. Ms Etwareea was essentially responsible for making this decision, and she did not know and had never met the Claimant, so there is no basis to find she was motivated by his race. The comparison made to the failure of the Respondent to suspend Mr White is not an appropriate one, because the allegation against Mr White was one concerning an act that, as detailed by the Claimant in his meeting with Mr Popely on 15 October 2020, was arguably a consensual one.

104. The ninth regards the alleged flaws in Ms Ijaz's investigation. There is no evidential basis on which to find that they were because of the Claimant's

race.

105. The tenth regards Ms Ijaz's counter allegation. We have already said that was not false. Her reporting of the messages she received from the Claimant was entirely appropriate, and she would have done the same regardless of the race of the Claimant.

106. The eleventh regards the conclusion of the investigation that there was a case to answer. As we've already said, that was a reasonable conclusion to be drawn on the evidence, and there is no basis to conclude that it was motivated by the Claimant's race.

107. Finally, regarding dismissal, again there was a reasonable basis for dismissal being the Claimant's conduct, and there is no basis to consider that the dismissal was motivated by the Claimant's race. A person of another race facing the same evidence would have met the same outcome.

108. The complaint of race discrimination therefore fails.

HARASSMENT CONTRARY TO S.26 EQUALITY ACT 2010

Issue 7: Was the Claimant subjected to unwanted conduct?

Issue 8. If so, was such unwanted conduct related to his race?

109. We can deal with this shortly, given that the Claimant relies upon the same conduct as complained of under the victimisation and race discrimination complaints. We have already explained why that conduct did not amount to detriments nor to less favourable treatment because of the Claimant's race. For the same reasons already given, we conclude that none of the conduct complained of amounts to unwanted conduct related to the Claimant's race. Strictly speaking, "related to a relevant protected characteristic" in section 26 EQA is broader than "because of a protected characteristic" in section 13 EQA but, on the facts here, this difference has no impact, nor does the lack of a necessity to consider comparators. Issue 9 does not arise.

110. The complaint of harassment therefore fails.

PUBLIC INTEREST DISCLOSURE DETRIMENT CONTRARY TO s.47B EMPLOYMENT RIGHTS ACT 1996

Issue 10: Did the Claimant make a public interest disclosure?

Issue 11: Was the Claimant subjected to a detriment on the grounds of making a public interest disclosure.

111. In respect of this complaint, the Claimant relies upon (i) the same complaints as were alleged to be protected acts in the victimisation complaint and (ii) the same detriments as in the victimisation complaint, save for his dismissal. We have already found that none of the acts relied upon were detriments because of the protected acts for the purpose of the victimisation complaint, and the same therefore applies to this complaint.

112. The complaint of public interest disclosure detriment therefore fails.

UNFAIR DISMISSAL CONTRARY TO S.103A EMPLOYMENT RIGHTS ACT 1996

Issue 12: What was the reason or principal reason for the Claimant's dismissal?

113. Following the dismissal of the 'ordinary' (s.98) unfair dismissal complaint during the hearing, the only question that arises is the reason for dismissal. We have found as a fact that the actual reason for dismissal was the Claimant's misconduct. That the Claimant had made a complaint about his manager and colleagues was not a reason (or principal reason) for the dismissal.

114. Accordingly, the unfair dismissal complaint fails.

HOLIDAY PAY

Issue 14(a): Did the Claimant have accrued but untaken holiday upon termination?

115. As clarified during the hearing, the Claimant argues that he should have been paid in respect of unused holiday pay for the duration of his suspension. The suspension bridged two leave years. We have found as a fact that the Claimant was paid the correct sum in respect of his holiday allowance for the 2021-22 holiday year. The question therefore is whether the Claimant is entitled to be paid in respect of leave not taken in the previous 2020-21 holiday year.

116. The general rule is that a worker is only entitled to be paid in lieu of holiday accrued but unused in their final leave year, unless there is a contractual right or agreement to carry over. No such right has been identified here. Otherwise, there are limited exceptions in the case law, including (of potential relevance here) where a worker has been prevented from taking leave because the employer refused to provide paid holidays.

117. It was the Claimant's case that, because of his suspension and the instruction not to contact anyone in the Respondent business, he was effectively prevented from taking annual leave while suspended. However, as we have found, the Claimant was able to and did contact many people within the Respondent during his suspension, including Ms Antoine in February 2021 and Mr Bargery in April 2021 specifically regarding holiday pay. In the circumstances, we find that the Claimant was not genuinely prevented from taking leave such that any of the case law exceptions would apply.

118. Therefore, the holiday pay complaint also fails.

JURISDICTION

119. Given our conclusions on the other issues, there is no need to address the jurisdictional points under issues 1 and 2.

Overall conclusion

120. For these reasons, the unanimous judgment of the Tribunal was that all of

the Claimant's complaints (being for victimisation, race discrimination, harassment, public interest disclosure detriment, unfair dismissal and unpaid holiday pay) be dismissed.

121. The Tribunal appreciates that this is not the outcome that the Claimant wished for. That is not to say that the Respondent is beyond criticism for its handling of the Claimant's grievance and disciplinary – and the Tribunal has recognised the flaws in the process in our reasons. Ms Whelan was right, in both the appeal outcome and in her oral evidence, to acknowledge and apologise for those flaws. However, for the reasons given, they do not mean that the Claimant succeeds in this action.

Employment Judge Abbott

Date: 11 January 2023

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