Case Numbers: 2204640/2021
2204646/2021

Reserved Judgment

EMPLOYMENT TRIBUNALS

BETWEEN

Claimants	**and**	**Respondent**
(1) Mr B Ahmed **(2) Mr M Ellahi**		**Royal Mail Group Ltd**

REASONS FOR THE JUDGMENT SENT TO THE PARTIES ON 22 FEBRUARY 2023

Introduction

1 The Respondent is the corporate vehicle of the primary postal service in the UK.

2 The Claimants, Mr Bashir Ahmed and Mr Mohammed Ellahi, to whom we will refer by name, were at all material times employed by the Respondent as part-time postal staff[1] working 'weekend' shifts spanning Saturdays, Sundays and Mondays at the Mount Pleasant Mail Centre on Farringdon Road in central London. Mr Ahmed's employment began in 2003 and Mr Ellahi's in 2000. Both remain in the Respondent's employment.

3 By his claim form presented on 14 August 2021 Mr Ahmed, then unrepresented, who describes himself as of Bangladeshi ethnicity, brought claims for direct race discrimination, race-related harassment and detrimental treatment on health and safety grounds. The claims were resisted on jurisdictional and substantive grounds.

4 By his claim form presented on 16 August 2021 Mr Ellahi, also unrepresented, who describes himself as Pakistani, brought a claim for race discrimination, complained of being required to work in a dangerous environment in circumstances where others of different ethnicity were not and, it seems, alleged less favourable treatment on the ground of part-time employee status.

5 On 29 November 2021 Mr Ahmed's claim came before EJ Stout in the form of a preliminary hearing for case management. At that stage he was legally represented, as was the Respondent. The judge recorded the withdrawal of the health and safety claim (which was dismissed by a judgment issued the same day) and her grant of permission to add by amendment complaints of indirect race discrimination and less favourable treatment on the ground of part-time employee status. She went on to summarise the claims and issues as they stood at the end

[1] They were/are designated Operational Postal Grade ('OPG') workers.

of the case management hearing and set a directions timetable leading to a final hearing to be held by CVP over three days commencing on 14 June 2022.

6 In the meantime, on 9 November 2021, EJ Elliott had held a preliminary hearing in Mr Ellahi's case, which he had attended in person and the Respondent through a solicitor. Having dismissed the Respondent's application for part of the case to be struck out, she recorded that the claims were for direct race discrimination, detrimental treatment on health and safety grounds and less favourable treatment on the ground of part-time employee status, defined the issues and set a directions timetable leading to a final hearing in person over five days commencing on 6 June 2022.

7 On 27 January 2022 the two claims were listed together for a public preliminary hearing before EJ Walker. The Claimants were jointly represented by a solicitor and the Respondent was also legally represented. The judge made an order for consolidation, dismissed the Respondent's application for part of Mr Ahmed's case to be struck out, and directed that both cases be heard together over six days commencing on 6 June 2022. She also issued a judgment by consent dismissing on withdrawal so much of Mr Ahmed's direct race discrimination claim as concerned the Respondent's alleged refusal to allow him time off during fire alarm tests on 31 January and 7 March 2021.

8 EJ Walker held a further preliminary hearing, this time in private for case management, on 17 February 2022. On that occasion she made a deposit order in respect of Mr Ahmed's indirect race discrimination claim and directed that the final hearing on 6-13 June be held face to face (rather than by CVP).

9 In circumstances which do not reflect adversely upon either of the Claimants or the Respondent, the hearing on 6 June 2022 had to be postponed and was re-listed as a face-to-face appointment on 13 February 2023, to determine liability only, with five days allowed.

10 That hearing came before us. Mr Ahmed and Mr Ellahi attended in person. The Respondent was represented by Ms M Dalziel, a solicitor. The Claimants presented their cases, which involved a degree of legal complexity, effectively and with courtesy. Ms Dalziel conducted the Respondent's case with due regard to the disadvantage which her opponents faced as unrepresented litigants.

11 We devoted day one to reading into the case. On the morning of day two Ms Dalziel pressed an ambitious application for the claims to be struck out on the ground that the Claimants had conducted them in a scandalous and/or vexatious way. For reasons given orally, we had no hesitation in dismissing the application. We were then occupied with hearing evidence on the merits up to the lunchtime break on day four, at which point we adjourned to the following morning to allow time for the preparation of closing argument. On the afternoon of day five, having heard the submissions of the parties and deliberated in private, we gave an oral decision dismissing all claims.

12 These reasons are given in writing pursuant to timely written requests by both Claimants.

The Relevant Law

Direct discrimination

13 By the Equality Act 2010 ('the 2010 Act'), s13, direct discrimination is defined thus:

> **(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**

14 In *Nagarajan* v-*London Regional Transport* [1999] IRLR 572 Lord Nicholls construed the phrase 'on racial grounds' in the Race Relations Act 1976, s1(1)(a), in these words:

> **If racial grounds … had a significant influence on the outcome, discrimination is made out.**

In line with *Onu v Akwiwu* [2014] ICR 571 CA, we proceed on the footing that introduction of the 'because of' formulation under the 2010 Act (replacing 'on racial grounds', 'on grounds of age' etc in the pre-2010 legislation) effected no material change to the law.

Indirect discrimination

15 2010 Act, s19, so far as material, provides:

> **(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a protected characteristic of B's.**
>
> **(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if –**
>
> **(a) A applies, or would apply, it to persons with whom B does not share the characteristic,**
> **(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,**
> **(c) it puts, or would put, B at that disadvantage, and**
> **(d) A cannot show it to be a proportionate means of achieving a legitimate aim.**

16 By s23(1) it is provided that, for the purposes of claims under ss13 and 19, there must be no material difference between the circumstances of the Claimant's case and that of his or her comparator.

Harassment

17 The 2010 Act defines harassment in s26, the material subsections being the following:

> **(1) A person (A) harasses another (B) if –**

> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
> **(b) the conduct has the purpose or effect of –**
> **(i) violating B's dignity, or**
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
> **…**
>
> **(3) In deciding whether conduct has the effect referred to in sub-section (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.**
>
> **(4) The relevant protected characteristics are –**
> **…**
> **race …**

18 The EHRC Code of Practice on Employment (2011), which does not claim to be an authoritative statement of the law (see para 1.13), deals with the 'related to' link at paras 7.9 to 7.11. It states that the words bear a broad meaning and that the conduct under consideration need not be 'because of' the protected characteristic. We adopt this guidance as correct.

Protection under the 2010 Act

19 Workers are protected from discrimination in the form of detrimental treatment and harassment under the 2010 Act, ss39(2)(d) and 40(1)(a) respectively.

20 The effect of the 2010 Act, s212(1) is that complaints of harassment and direct discrimination based on the same act must stand as alternatives: an act of harassment cannot also constitute an actionable detriment.

21 In the employment law context, a detriment arises where, by reason of the act(s) complained of, a reasonable person would or might take the view that he or she has been disadvantaged in the workplace. An unjustified sense of grievance cannot amount to a detriment (see *eg Shamoon v Chief Constable of the RUC* [2003] IRLR 285 HL).

22 The 2010 Act, by s136, provides:

> **(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.**

23 On the reversal of the burden of proof we have reminded ourselves of the case-law, including *Igen Ltd v Wong* [2005] IRLR 258 CA, *Madarassy v Nomura International Plc* [2007] IRLR 246 CA and *Hewage v Grampian Health Board* [2012] IRLR 870 SC. In the last of these, Lord Hope warned (as other distinguished judges had done before him) that it is possible to exaggerate the importance of the burden of proof provisions, observing (judgment, para 32) that they have "nothing to offer" where the Tribunal is in a position to make positive findings on the evidence. But if and in so far as it is necessary to have recourse to the burden of proof, we take as our principal guide the straightforward language of s136. Where there are facts capable, absent any other explanation, of supporting an inference of unlawful discrimination, the onus shifts formally to the employer to disprove discrimination. All relevant material, other than the employer's explanation relied upon at the hearing, must be considered.

24 By the 2010 Act, s123(1) it is provided that proceedings may not be brought after the end of the period of three months ending with the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable. 'Conduct extending over a period' is to be treated as done at the end of the period (s123(3)(a)). The 'just and equitable' discretion is to be used with restraint: its exercise is the exception, not the rule (see *Robertson v Bexley Community Centre* [2003] IRLR 434 CA).

Health and safety detriment

25 Mr Ellahi's complaint of detrimental treatment on health and safety grounds seeks to engage the Employment Rights Act 1996 ('the 1996 Act'), s44(1A)(a),[2] which (relevantly) gives protection from suffering detriment:

> **… done on the ground that that in circumstances of danger which the worker reasonably believed to be serious and imminent and which he could not reasonably be expected to avert, left or proposed to leave … his place of work, or any dangerous part of it, or took appropriate steps to protect himself or other persons from the danger.**

26 The usual three-month time limit applies to the presentation of claims for detrimental treatment under the 1996 Act, subject to a power to extend where it was 'not reasonably practicable' to commence proceedings within the primary period (s48(3)). An act which 'extends over a period' is treated as being done at the end of the period (s48(4)).

Part-time workers detriment

27 The claims under the Part-time Workers (Prevention of Less Favourable Treatment) Regulations 2000 ('PTWR') invoke the right of a part-time worker, "not to be treated by his employer less favourably than the employer treats a comparable full-time worker … by being subject to any … detriment" (reg 5(1)). The protection is limited by the further stipulation that it attaches only where the treatment is "on the ground that" the worker is a part-time worker and is not "justified on objective grounds" (reg 5(2)).

[2] S48(1XA) gives the Tribunal the necessary jurisdiction.

28 PTWR, reg 2(1) defines a full-time worker as:

> **… a worker [who] is paid wholly or in part by reference to the time he works and, having regard to the custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contract, is identifiable as a full-time employer.**

By reg 2(2), a part-time worker is described as:

> **… a worker [who] is paid wholly or in part by reference to the time he works and, having regard to the custom and practice of the employer in relation to workers employed by the worker's employer under the same type of contract, is not identifiable as a full-time employer.**

29 The standard limitation period of three months applies, subject to a 'just and equitable' discretion to extend (reg 8(2) and (3)).

The Claims and Issues

30 As ultimately pursued before us the claims of the two Claimants and the core issues to which they gave rise were as follows.

Mr Ahmed's claims

31 Mr Ahmed pursued claims for race-related harassment, direct race discrimination, indirect race discrimination and detrimental treatment under PTWR.

32 The harassment claim poses two questions.

(1) Did the act of sending a letter of 26 March 2021 to Mr Ahmed have a purpose or effect satisfying the language of the 2010 Act, s26(1)(b)?
(2) Was the act of sending the letter 'related to' Mr Ahmed's race (or race generally)?[3]

33 The direct discrimination claim also raises two issues.

(1) In sending the letter of 26 March 2021, did the Respondent (through Mr Bal) treat Mr Ahmed less favourably than in like circumstances it would have treated an hypothetical comparator of different race?[4]
(2) Was such treatment 'because of' Mr Ahmed's race, or race generally?

34 For the purposes of indirect discrimination, the legislation poses these questions:

(1) Did the Respondent apply to Mr Ahmed and the group with which he compares himself (the "full-time" weekend workers) the same or equivalent

[3] Ms Dalziel did not dispute that the conduct was 'unwanted'.
[4] Likewise, there was no contest on whether detrimental treatment was shown.

provision, criterion or practice ('PCP') concerning working hours on 31 January and 7 March 2021?[5]

(2) Did the PCP put persons with whom Mr Ahmed shared his personal characteristic of race at a particular disadvantage in comparison with persons with whom he did not share it?

(3) Did the PCP put Mr Ahmed at that disadvantage?

(4) If Mr Ahmed succeeds on issues (1), (2) and (3), can the Respondent justify the PCP as a proportionate means of achieving a legitimate aim?

35 The points to which the PTWR claim gives rise are:

(1) Did the Respondent subject Mr Ahmed to a detriment by requiring him on 31 January and 7 March 2021 to work all, or at least seven hours, of his eight-hour shift?

(2) If there was a detriment, did it amount to less favourable treatment than that applied by the Respondent to a comparable full-time worker?

(3) In so far as there was less favourable treatment, was it done on the ground that Mr Ahmed was a part-time worker?

(4) If Mr Ahmed succeeds on issues (1), (2) and (3), can the Respondent show that the treatment was justified on objective grounds?

Mr Ellahi's claims

36 Mr Ellahi pursued claims for direct race discrimination, health and safety detriment and detrimental treatment under PTWR.

37 The direct discrimination claim raises two questions.

(1) In ending Mr Ellahi's temporary Deputy Manager status, did the Respondent (through Mr Bal) treat him less favourably than in like circumstances it would have treated an hypothetical comparator of different race?[6]

(2) Was such treatment 'because of' Mr Ellahi's race, or race generally?

38 The health and safety detriment claim poses these questions.

(1) Did circumstances of danger arise on 31 January and/or 7 March 2021?

(2) Did Mr Ellahi reasonably believe such circumstances to be serious and imminent?

(3) Were they circumstances which Mr Ellahi could not reasonably be expected to avert?

(4) Did Mr Ellahi leave or propose to leave his place of work, or any dangerous part of it?

[5] EJ Stout recorded on 29 November 2021 that the PCP proposed by Mr Ahmed was that "part-timers" were required to work their full hours and "full-timers" were not, and that the Respondent's position was that both groups were required to work their contractual hours. By the time the matter came before us, the parties were agreed that Mr Ahmed was broadly correct on the facts: there *was* a material difference between the Respondent's treatment of the two groups. This is developed in our narrative below.

[6] Here again, there was no contest on whether detrimental treatment was shown.

(5) Did Mr Ellahi take appropriate steps to protect himself or other persons from the danger?
(6) Did the Respondent subject Mr Ellahi to a detriment on the ground of any matter referred to in (4) or (5)?

39 The issues raised by Mr Ellahi's PTWR claims are the same as those identified above in relation to Mr Ahmed.

Jurisdiction

40 Time-based challenges to the cases of both Claimants require us to consider two further questions.

(1) Are Mr Ahmed's indirect discrimination and PTWR claims excluded from the Tribunal's jurisdiction on time grounds?
(2) Are Mr Ellahi's the direct discrimination claim and health and safety and PTWR detriment claims based on the events of 31 January 2021 (only), excluded from the Tribunal's jurisdiction on time grounds?

Oral Evidence and Documents

41 We heard oral evidence from the Claimants and their supporting witness, Mrs Fatima Hagi (who gave evidence by video), and, on behalf of the Respondents, Mr Harminder Bal, Shift Manager (weekend shift) and Mrs Kulvinder Sharma, Work Area Manager (weekend shift). We also read statements tendered on behalf of the Claimants in the names of Ms Vilma March and Ms S Ryan.

42 In addition to oral evidence we read the documents to which we were referred in the agreed bundle of documents which ran to some 600 pages.

43 We were also assisted by the helpful written closing submissions of both Claimants.

The Facts

44 The evidence was detailed and extensive. We have had regard to all of it. Nonetheless, it is not our function to recite an exhaustive history or to resolve every evidential conflict. The facts essential to our decision, either agreed or proved on a balance of probabilities, we set out below.

Facts relevant to both claims

45 The Claimants were members of a group of workers who worked 20-hour 'weekend' shifts consisting of Saturdays 12:00-20:00, Sundays 10:00-18:00 and Mondays 18:00-22:00. The group was almost exclusively non-white and of diverse ethnicity. They tended to be referred to as the "weekend part-time" staff.

46 There was another group of workers who worked 28-hour weekends consisting of two 14-hour shifts on Saturdays (06:00-20:00) and Sundays (08:00-22:00). They tend to be referred to as "weekend full-time" staff. This working pattern is being phased out through natural wastage and of the original cohort of

286, only some 15 remain. It consists mostly of white employees of very long standing.

47 The Respondent's full-time working week was given to us variously as 37, 37.5 or 38 hours. It was common ground that it was not shorter than 37 hours. The "weekend full-time" staff are paid the equivalent of a full week's pay for their grade and their HR and pay documentation quite wrongly states that they work 38 hours per week. The reason for this surprising fiction was not explained to us.

48 31 January and 7 March 2021 fell on Sundays. Intermittent fire alarm tests were scheduled to start at the Mount Pleasant site between about 16:00 and 17:00 on both days. Typically, tests last about 40 minutes. The alarms are unpleasantly noisy and many staff members objected to the idea of being required to work while the tests were running. Following discussions with the recognised trade union (the CWU), the Respondent agreed special arrangements for the "weekend part-time" and "weekend full-time" staff to cover both dates. The "weekend part-time" workers were permitted to start work two hours early (08:00) and so complete their working day (at 16:00) before the testing began. Those unable or unwilling to start early were allowed to leave an hour early (at 17:00), and be paid for a full eight-hour day, provided that their tasks had all been completed.[7] The "weekend full-time" cohort were allowed to attend two hours early (06:00)[8] and leave at 16:00 provided that they also forfeited their second main break (of about 45 minutes). This enabled them to receive full pay for a 14-hour shift despite being excused 3.25 hours' work.

49 The Respondent's witnesses told us that due notice of the fire alarms was given and that staff were made aware that suitable protective equipment was made available on site while the tests were underway. The Claimants challenged that evidence. The dispute does not bear directly upon any issue which we have to decide and we make no findings upon it.

50 The Claimants did not elect to attend early on 31 January 2021[9]. They told us without challenge that they left the workplace some time after 16:00 on that day, to avoid the fire alarm test. They felt that it was fair to do so because they were aware that the "full-time" weekend staff had left at 16:00. It seems that no manager was around. Neither Claimant suffered any penalty for leaving early. Each was paid as if he had worked his full shift.

51 On 7 March 2021 the Claimants were among a group of four "part-time" weekend workers who did not take up the opportunity to attend early. They approached Mrs Sharma and asked for permission to leave work early to avoid the fire alarm. They pointed out that the "full-time" staff were allowed to leave at 16:00 and argued that they should be too. The request was refused in terms which

[7] The rationale for the one-hour dispensation for those starting at the normal hour (which, it seems, cannot have been intended to ensure that they were not working while the fire alarm tests were underway) was not explained to us.
[8] For a variety of uncontroversial reasons, it was out of the question to start the "full-time" shift before 06:00.
[9] Mr Ahmed told us that he could not have done so, owing to child care responsibilities.

caused them to think that they might be faced with disciplinary action if they left early.

52 Some time later, after the fire alarm test had started, Mr Ahmed appeared to collapse or faint. Paramedics were called. After a time he recovered sufficiently to be able to make his own way home, assisted by a colleague.

Facts specific to Mr Ahmed's claims

53 On 8 March 2021 Mr Ahmed reported sick. He was later diagnosed with severe depression and post-traumatic stress disorder and was signed off for an extended period (certainly more than a year).

54 Mr Bal saw Mr Ahmed immediately after his apparent collapse. He suspected him of faking illness. He carried out an investigation, interviewing several witnesses. These did not include Mr Ellahi (who had been present throughout), apparently because he did not think that he had been behaving in a "co-operative" way at the time of the relevant events (witness statement, para 42). Some time later Mr Bal produced a brief undated report which was critical of Mr Ahmed for his objection to being required to work after 16:00 and his alleged failure to make use of available protective equipment, and seemed to suggest that his display of indisposition had been manufactured.

55 In the days following 7 March 2021, Mr Ahmed was not receptive to Mr Bal's attempts to contact him, emphasising that he was distressed by the events of that day and that his ill-health was being aggravated by Mr Bal's messages.

56 On 26 March 2021, having taken advice from an HR practitioner, Mr Bal sent a letter to Mr Ahmed. It was based on a template document drawing attention to the Respondent's sickness absence management rules (particularly those concerning keeping in touch), but included this paragraph:

> **Please note we do have an obligation to investigate the external criminal case under our internal disciplinary procedure in order to ascertain whether there has been any misconduct which may impact on your role. You will be contacted in due course regarding this.**

57 The letter was drafted by the HR practitioner. We do not think it necessary in this forum to make a specific finding as to whether Mr Bal read it before signing it. He certainly offered us no coherent explanation for sending the letter in that form. There never was any "external criminal case". There never was any prospect of an "external criminal case."

58 Mr Ahmed maintains that receipt of the letter caused him a severe psychiatric injury and that he has expert medical evidence to that effect. It is not for us, in a liability-only hearing in this forum, to make findings on those matters.

Facts specific to Mr Ellahi's claims

59 The Respondent operate a scheme by which workers interested in the possibility of progressing to the position of Deputy Manager ('DM') can undergo training under the guidance of a manager with a view to learning relevant skills

and, if suitable, developing a career in management. Once accredited as a DM, a worker may be substituted on a temporary basis to fill managerial gaps as they arise. Such work does not connote any change of grade but does attract an enhanced rate of pay for so long as it lasts.

60 In or around January 2020 Mr Ellahi was given the opportunity to apply under the trainee DM scheme. He was required to complete a personal development plan and an online personal development course. On Mr Bal's recommendation, he was accepted as a trainee. Mr Bal was assigned as his supervising manager.

61 The training began with a four-week course commencing on 24 February 2020 covering various work functions and identifying learning outcomes.

62 Mr Ellahi attended a further two-week training course commencing on 22 June 2020.

63 In July 2020 Mr Bal confirmed Mr Ellahi's DM status but he remained under an obligation to contribute to his development and fulfil the tasks which Mr Bal set him.

64 Unfortunately, Mr Ellahi was consistently unreceptive to Mr Bal's instructions and responded negatively to his guidance. On 21 September 2020 Mr Bal sent an email to him which included the following:

> **I am somewhat concerned with your constant questioning and sceptical view of work area performance, which is now worrying.**
>
> **The hourly sort rates are available … [with] which you would have familiarised yourself whilst you were training for a number of weeks. Furthermore, you should be completing your hourly performance measures to enable you to understand what is going on in your area …**
>
> **I have given you a number of options to capture this data. Nothing has come forward other than excuses.**
>
> **Today I provided you with a 30 minute resources v workload sheet which on my second visit to the work area was not complete.**
>
> **You simply cannot manage a work area without reliable data. Hence the reason why you are not completing work area clearances within the specified timescales.**
>
> **I am happy to help you with any support you need, but I would like to see some return from you as well in order to give me some confidence that you are serious about the role of deputy manager and what it entails.**

65 In a lengthy document dated 26 September 2020 Mr Bal identified certain key goals[10] which had been set for Mr Ellahi and the steps required to achieve them. In relation to each, he found no evidence of action taken to achieve the goal, despite the support and guidance offered. One entry read:

[10] The goals were related to matters such as safety, efficiency, productivity, cost control and the like.

> **No evidence provided or seen in the work area. Mo does not provide any evidence to demonstrate how he is using hours provided and often ends up challenging you about why he thinks that [steps] are not achievable or a waste of time. Very poor at accountability.**
>
> **Mo was set up with a comprehensive learning plan that allowed him to go to other shifts prior to taking over the [DM] role on the weekend shift. This provided Mo clear learning guidelines. Nothing has been done or presented to me to date.**

In the 'Overall Assessment' section of the document Mr Bal gave Mr Ellahi a 'predicted marking' of "U: Underperformance". He offered specific instances of tasks that had been set for Mr Ellahi and not carried out. He also remarked:

> **Mo's views are often either negative or very sceptical. … He does not demonstrate any accountability as a leader.**
>
> **For example, when challenged about staff in his work area arriving for duty late and/or leaving early, his view is that nothing can be done as Royal Mail should have a clocking in-out system. When asked about clearances, he does not have any plans to show when this will happen.**
>
> **Often putting pressure on other work areas, I have supported Mo by developing simple methods … Mo does not use these and finds [them] tedious.**
>
> **I have also coached Mo to develop something he finds suitable, but nothing has transpired. Whilst he is learning I have had to get other work areas to send in resources to support Mo and this tap is not unlimited and will come to an end if Mo does not take the role of a manager seriously.**
>
> **…**
>
> **I will support Mo for a further 3 weeks by providing coaching events at 12:30 on Saturdays … this being the first one, for which Mo arrived 20 minutes late.**

66 Mr Bal provided Mr Ellahi with further support and guidance at a meeting on 3 October 2020 and recorded a set of specific actions which he was to complete

67 At a further meeting on 10 October 2020 Mr Bal asked Mr Ellahi about his failure to respond to emails (one of the action points agreed the week before). He replied that he was not sure what password to use.[11] Mr Bal pressed him on whether he was really interested in the DM role. He said that he was. What else was he expecting from Mr Bal? He replied that he was getting sufficient support and did not need anything else at present. Did he understand his responsibilities? His answer was that he did and, to the extent that he was not living up to them, he would make amends.

68 At a further meeting on or about 17 October 2020, Mr Bal noted that there was no sign of any improvement from Mr Ellahi and said that he intended discontinue his DM status. Mr Ellahi resisted, insisting that he was prepared to make a real effort to deliver what was asked of him. Accordingly, Mr Bal relented and gave him a last chance, over the forthcoming fortnight, to demonstrate an improvement. He also assigned Mrs Sharma to provide extra support during that period as his "buddy manager" or "mentor".

[11] Later in the same conversation Mr Ellahi said that he did not have time to look at emails.

69 On 24 October 2020 Mr Bal met Mr Ellahi again. His log of the meeting includes details of continuing failure to complete basic tasks, communicate with colleagues or read emails. There was no improvement thereafter.

70 The meeting scheduled for 31 October 2020 did not take place because Mr Ellahi was "running late".

71 In November 2020 Mr Bal took the decision to discontinue Mr Ellahi's status as a DM and confirmed his decision at a meeting on 28 November 2020.

72 In response to Mr Ellahi's email of 29 November, Mr Bal supplied his reasons in writing in a detailed document sent somewhat belatedly on or about 10 January 2021. The information it contained was consistent with the documents generated in October to which we have referred.

73 In a long email of 1 February 2021 Mr Ellahi challenged all, or almost all, of Mr Bal's points and accused him of directly discriminating against him. He did not identify any relevant personal characteristic. He did, however, provide a reasonable summary of the meaning of direct discrimination and explain that it was forbidden under the Equality Act 2010.

74 Mr Ellahi later presented a grievance about Mr Bal's decision on his DM status, which was unsuccessful. He did not appeal.

75 Mr Bal had management responsibility for only one other trainee DM, Mr Mark Attridge, who was described before us without challenge as of Filipino descent. He underwent training some two years or so before Mr Ellahi and was successful. In 2021, having been a DM for some time, he secured promotion to a substantive managerial post. The evidence before us, which we have no reason to doubt, was that Mr Attridge performed strongly and entirely merited elevation to DM and beyond.

Miscellaneous and 'background' facts

76 The Claimants' cases on race discrimination were confused. They seemed to allege that Mr Bal and/or 'management' generally were disposed (consciously or subconsciously) to treat white staff more favourably than non-white staff in the matter of allowing time off on 31 January and 7 March 2021.[12] But we were presented with no evidence to substantiate any pattern of discriminatory conduct favouring white workers over non-white and no reason to subscribe to a theory (if one was really being advanced at all) that predominantly non-white managers[13] would be motivated to behave in that way.

77 The Claimants also made allegations of direct discrimination by Mr Bal and other managers of Indian descent against persons not of Indian descent, but these amounted to mere generalised assertion. The claim that 'Indian' managers

[12] As we will explain, this was the thrust of what Mr Ahmed mistakenly pursued as his complaint of *indirect* race discrimination.

[13] We were given no statistics but the Claimants' contention that there was a preponderance of managers of Indian descent at Mount Pleasant did not appear to be challenged.

favoured their own hung in the air but we were provided with no concrete examples. No statistical information was before us.

Secondary Findings and Conclusions

Mr Ahmed's claims

78 It is convenient to consider first, and together, the alternative complaints of direct race discrimination and race-related harassment. As we have noted, they arise out of the same event, namely Mr Bal's act of sending to Mr Ahmed the letter of 26 March 2021 which referred to an investigation into suspected criminal activity. Moreover, they are for present purposes almost identical. Although harassment requires only a 'related to' link to the protected characteristic, Mr Ahmed's case on harassment is that the letter was sent 'because of' his ethnicity as a person of Bangladeshi descent – precisely the nexus specified by the 2010 Act, s13 in claims for direct discrimination.

79 The letter of 26 March 2021 was, in our view, a deplorable and outrageous document. We have no doubt that it had the effect of creating for Mr Ahmed an intimidating, humiliating and hostile environment. Sending it to him was obviously a severely detrimental act. On his case, which (although we make no finding) we see no reason to question, it caused him to suffer a serious psychiatric injury.[14] But the problem with the claims (whether put as allegations of harassment or direct discrimination) is that there is no evidence pointing to Mr Ahmed's race as having had anything to do with the treatment of which he so justifiably complains. As we have found, the drafting was done by an HR practitioner and Mr Bal accepted it uncritically and signed and dispatched the letter. In doing so, he woefully failed to live up to his managerial responsibilities. But we accept that the author was attempting (in her deeply inept way) to convey that Mr Bal had doubts about the genuineness of Mr Ahmed's explanation for his absence from work and intended to investigate whether he had claimed company sick pay without good cause. There is nothing in the story, or in the wider evidence, to suggest that considerations of race played any part in influencing the way in which the draft was worded or Mr Bal's action in adopting it. Nor is there any evidential basis for the notion that someone of different race would have been treated less favourably in comparable circumstances than Mr Ahmed was. The complaints, sincere as they undoubtedly are, rest on mere assertion. Claims under the 2010 Act, like any other, require more than that. They require an evidential foundation.

80 Mr Ahmed's claim under PTWR faces an insurmountable difficulty. That legislation protects any part-time worker from being treated less favourably than a "comparable full-time worker" as regards any term of his contract or by being subjected to any detriment (reg 5(1)). Mr Ahmed's claim rests on a comparison with the so-called (weekend) "full-timers", but they were not full-time workers as defined by reg 2(1). Under the Respondent's custom and practice the weekend "full-timers" were not "identifiable" as full-time workers. They were part-time employees, working under the same type of contract as Mr Ahmed save that their weekly hours were 28, rather than 20. Those identifiable as full-time workers were

[14] As we pointed out in our oral judgment, claims for personal injuries are not brought in the Employment Tribunal but in the County Court or High Court.

employees working the Royal Mail full-time week, which seems to be 37.5 hours and is certainly not less than 37 hours. The practice of referring to weekend staff on 28-hour contracts as "full-timers" adopts a convenient shorthand but self-evidently cannot affect that group's status under PTWR. If authority were needed, the Scottish case of *Advocate General for Scotland v Barton* [2015] CSIH 92 (15 December 2015), albeit not strictly binding south of the border, puts the matter beyond doubt. Giving the judgment of the Inner House of the Court of Session, Lady Smith observed (para 32):

> **… the PTWR do not provide protection for workers against less favourable treatment when compared to part-time workers who are not full time but work longer hours than they do.**

The comparison set up by Mr Ahmed does not work and it inevitably follows that his claim under PTWR fails.

81 We turn next to the indirect race discrimination claim. Here again, Mr Ahmed is faced with an obstacle which he cannot overcome. As is clear from the 2010 Act, s19(2) (cited above), the essential requirements of a successful indirect discrimination claim are: (a) the uniform application by the employer of an apparently neutral provision, criterion or practice ('PCP') to the complainant, the protected group of which he or she is a member and a wider cohort of people; (b) consequential disadvantage to the complainant and his/her group relative to the wider cohort; and (c) a failure by the employer to justify the PCP as a proportionate means of achieving a legitimate aim. Only if the complainant makes out limbs (a) and (b), does the burden of showing justification ((c)) pass to the employer; if the complainant fails on limb (a) and/or (b), the case does not get off the ground and there is nothing for the employer to justify.

82 Mr Ahmed fails on (a). As we have found, on undisputed evidence, there was no single, uniform PCP applied 'across the board'. The two groups proposed for comparison were not treated the same. The "part-timers" were excused at most one hour of their eight-hour shifts. The "full-timers" were excused some 3.25 hours of their 14-hour shifts. In percentage terms, the "part-timers" were released from serving up to 12.5% of their working days, the "full-timers" some 23% of theirs. That very difference in treatment was the central ground for his understandable complaint of unfair treatment.

83 Where an employer treats workers, or groups of workers, *differently*, there is no room for a complaint of indirect discrimination. If there is discrimination at all, it is direct discrimination. Here, there was a claim for direct discrimination, but it was withdrawn. It faced obvious difficulties of its own and we have little doubt that Mr Ahmed had good grounds for his decision not to persist with it. At all events, that claim has gone and it would not be helpful for us to pass further comment upon it.

84 Finally, we must address the question whether any part of Mr Ahmed's case is defeated on the jurisdictional ground that it was presented out of time. It is common ground that the harassment and direct discrimination claims, being based on the letter of 26 March 2021, are in time. But Ms Dalziel did maintain a time-based challenge to the claims under PTWR and the 2010 Act, s19 added by amendment on 29 November 2021. On that occasion EJ Stout granted the

amendment without prejudice to the Respondent's right to argue that the new claims had been brought out of time. We have found no legal substance in either. Both are, on their face, a long way out of time (on the basis of a notional presentation date of 29 November 2021). And it would plainly be idle for the Tribunal to consider exercising its 'just and equitable' discretion to bring within the jurisdiction claims already found to be without merit. Accordingly, the two claims added by amendment also fail on time grounds.

Mr Ellahi's claims

85 The direct discrimination claim turns on the true reasons for Mr Bal's decision to end Mr Ellahi's temporary status as a DM. We accept his explanation as true and accurate. Although Mr Ellahi sees the matter otherwise, we are satisfied that Mr Bal judged that, despite considerable coaching and support, he had failed to deliver what was required of him and had not shown himself to be suited to, or even genuinely interested in, the DM role. There is before us much persuasive documentary evidence lending support to that belief, to some of which we have referred above. Conversely, there is no evidence tending to support the theory that Mr Bal was in any way motivated by considerations of race. The theory rests on mere assertion and we reject it. The comparison with Mr Attridge goes nowhere because Mr Bal gave entirely credible evidence that he performed satisfactorily as a DM, whereas Mr Ellahi did not. There is simply no evidence to suggest that Mr Bal would have treated an hypothetical comparator differently. And the suggestion that Mr Bal was motivated to act as he did because Mr Ellahi had challenged him on a matter to do with the logging of parcel traffic, if it was true, would only serve to undermine the complaint of discrimination by setting up an alternative, non-racial ground for the treatment complained of. In those circumstances, we see no need to make explicit findings on that point. For all of these reasons, we conclude that, in so far Mr Ellahi establishes that the termination of his temporary DM status was a detriment, it was not 'because of' his race or anything to do with race and any DM of different race would in like circumstances have been treated exactly as he was.

86 The direct discrimination claim fails for the further reason that it was presented many months out of time. It is plain that Mr Bal's decision to end Mr Ellahi's DM status cannot sensibly be regarded with the unrelated events of 31 January and 7 March 2021 as together amounting to 'conduct extending over a period'. Accordingly, time ran from 28 November 2020. The proceedings were not commenced until 16 August 2021. In all the circumstances, it would not be 'just and equitable' to extend time to admit to the jurisdiction a very late claim which has already been rejected as without legal merit.

87 The health and safety claim under the 1996 Act, s44(1A) is entirely unsustainable. In so far as any claim is made about 31 January 2021, it is doomed because there was no detriment. On their own cases, both Claimants say that they left work early on that date and suffered no adverse consequences for doing so. As for the claim based on the events of 7 March 2021, at least three ingredients essential to such a claim are missing. First, Mr Ellahi has not shown circumstances of danger on that date, let alone circumstances of danger which he reasonably believed to be serious and imminent and/or which he could not reasonably have

been expected to avert. He has shown the prospect of a noisy fire alarm test, for which protective equipment was available. Second, he has not shown that he left, or proposed to leave. He did not leave. He did ask for permission to leave but, in our view, "proposed" connotes more than a request. It requires a statement of intent. There was none.[15] Third and in any event, the detriment complained of (being subjected to the noise of the alarm) was not applied to him 'on the ground that' he had left or proposed to leave (if, contrary to our view, that requirement is met). To the contrary, it would make rather more sense to say that it was applied to him because he did *not* leave. With due respect to Mr Ellahi, this element of his case is incoherent and hopeless.

88 Mr Ellahi's health and safety detriment claim, in so far as it rests on the events of 31 January 2021, fails also on the jurisdictional ground that it was brought out of time. The (patently non-detrimental) treatment on that date cannot sensibly be seen as amounting, with the events of 7 March 2021, to a single piece of 'conduct extending over a period. And it would self-evidently not be 'just and equitable' to bring within the jurisdiction a claim based on the earlier events which we have found groundless.

89 Mr Ellahi's third claim, brought under PTWR, corresponds exactly with Mr Ahmed's claim under the same Regulations and fails for the same reasons.

90 In so far as it is based on acts which occurred on 31 January 2021, the PTWR claim is also defeated on time grounds. The reasons given above in relation to the health and safety claim are repeated.

Outcome and Postscript

91 For the reasons stated, all claims fail and the proceedings are dismissed.

92 We have reached our decision without applying the burden of proof provisions in relation to the claims under the 2010 Act because we have been provided with the evidence to enable us to make all necessary findings. Had we applied them, we would have held that the onus had not transferred to the Respondent and that, even if we were wrong about that, it had been amply discharged.

93 While this may offer the Claimants little comfort, the case may be seen as illustrating the truism that not all instances of unfair or unreasonable treatment attract legal remedies.

94 Although the Respondent has succeeded, it would do well to learn lessons from this unhappy story. As a minimum, we suggest two. First, unequal treatment of different cohorts within the workplace will inevitably attract complaints and, where groups are or appear to be defined by protected characteristics such as race, the risk of damaging allegations of discrimination becomes obvious. Managers and their advisers should be trained to find intelligent ways of avoiding such dangers. Second, managerial training should address the evident deficit of

[15] And Mr Ellahi did not claim to have taken any other 'appropriate step' to protect himself or others from the alleged danger.

awareness on the part of managers[16] and advisers of the importance of careful communication with their subordinates, and the real harm which careless or insensitive language may inflict.

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EMPLOYMENT JUDGE – Snelson
9th March 2023

Reasons entered in the Register and copies sent to the parties on: 09/03/2023

For Office of the Tribunals

[16] To our astonishment, Mr Bal offered Mr Ahmed no recognisable apology for the letter of 26 March 2021, merely granting that it might have been more happily phrased.