

Case No: 2307175/2020  
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2307179/2020



## EMPLOYMENT TRIBUNALS

**Claimants:** Mr E Ibhadiyi  
Mr E Morris  
Ms M Avram; and  
Mr R Riley

**Respondent:** Ballymore Asset Management Ltd

**Heard at:** London South Employment Tribunals

**On:** 17, 18, 19, 20, 21 April, 9, 10, 11 May (12 and 15 May in chambers) 2023

**Before:** Employment Judge Burge  
Ms H Bharadia  
Mr W Dixon

### Representation

Claimant: Mr E Ibhadiyi (claimant representing all Claimants)  
Respondent: Mr C Johnson, Consultant

## RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is:

1. The Respondent subjected the Claimants to harassment related to race in unjustifiably treating them as a group of poor performing individuals and calling them a “beleaguered bunch”, “useless” and deciding this was “miscommunication”; and
2. The remainder of the Claimants’ complaints of direct discrimination and harassment fail and are dismissed.

## REASONS

### Introduction

1. In a claim form presented to the Tribunal on 28 June 2020, 11 Claimants brought a claim for race discrimination against their former employer. Since then 6 Claimants have withdrawn and Mr Wozniacki withdrew his claim at the start of the final hearing. There were 4 remaining Claimants: Mr Ibhadiyi, Mr E Morris, Ms M Avram and Mr R Riley.

## **The Evidence**

2. Edmund Ibhadiyi, Earl Morris, Hilario Nunes, Mihaela Avram and Ronald Riley gave evidence on behalf of the Claimants. Khalid Jama (Operations Manager), James Watson (Property Director) and Rod Lilley (former Resort Director) gave evidence on behalf of the Respondent. Jennifer Zigova and Omar Messari also provided witness statements to the Tribunal but as they did not attend to be cross examined on them the Tribunal attached no weight to them.
3. The Tribunal was referred during the hearing to documents in a hearing bundle of 901 pages. 16 additional pages were added to the bundle on the second day of the hearing. Mr Ibhadiyi had electronic bundle at home but did not have paper copy. It was agreed that he would have a copy that had been provided to the Tribunal's and that Mr Johnson would helpfully arrange for another copy to be prepared and couriered to the Tribunal.
4. Mr Ibhadiyi expressed frustration at the Respondent's approach to disclosure throughout the proceedings. The Tribunal asked if he felt that a postponement was required, whether it was fair to continue but he said it was fair to continue. The Tribunal explained that he could think about it and make applications for costs and/or a postponement if he would like but he did not do so.
5. Mr Wozniacki was the only Claimant not to be represented by Mr Ibhadiyi. While the alleged acts of direct discrimination/harassment were being discussed, he withdrew his allegations that related to discrimination/harassment. Prior to the hearing he had provided a document seeking to argue for equal pay. The Tribunal gave an opportunity to Mr Wozniacki to make an application to amend his claim but he withdrew by email to the Tribunal.
6. The final hearing had originally been listed for 14 days. Given the withdrawal of some Claimants and the withdrawal of some allegations, the Tribunal decided, and the parties agreed, that 8 days would be sufficient for the liability part of the hearing.
7. The cross examination of Mr Ibhadiyi had intended to take just over half a day. That time estimate had to be revised to an additional half a day. The same happened for the cross examination of Mr Lilley, his cross examination was also extended by half a day.

8. A member of the Tribunal was taken ill on the fifth day of the hearing and so the second half of the hearing took place later in May.
9. On the first day of the reconvened hearing a supplementary bundle of 52 pages was produced by the Claimant and a 2 page letter in relation to Mr Morris' termination of employment was provided. Further disclosure was later provided by the Respondent in relation to internal job vacancies.
10. Both Mr Ibhadiyi and Mr Johnson provided the Tribunal with written and oral closing submissions.

### Issues for the Tribunal to Decide

11. The Claimants rely on the protected characteristic of race/nationality.
  - Mr Ibhadiyi identifies as Black
  - Mr Riley identifies as Black Caribbean
  - Ms Avram identifies as Romanian
  - Mr Morris identifies as Black Caribbean.
12. The list of issues, agreed by the parties prior to the final hearing, in relation to liability was:
  1. Did the Respondent directly discriminate against one or more of the Claimants in accordance with s.13 Equality Act 2010 on the ground of their race?
  2. Did the Respondent harass one or more of the Claimants in accordance with s.26 Equality Act 2010?
  3. Have the allegations been presented in time?
  4. If not, should time be extended?
13. There was a list of 49 allegations. The first morning of the hearing was spent going through the alleged complaints of direct discrimination and/or harassment. The Claimants did not have legal input and the Tribunal had not considered the list previously other than generally over the telephone at the Preliminary Hearing on 1 February 2022. There was considerable overlap between the allegations. Further explanation was given for some and others were withdrawn or withdrawn but referred to as background. The list of allegations for the Tribunal to decide were agreed to be as follows:

1	<p>Memo from Mr Lilley. Written by Mr Lilley but signed by Olivia Hanson.</p> <p>Directed to all in- house security. Olivia harassing in house security staff and mentioning that its an order from Mr Lilley. Based on the content of the Memo.</p>
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2	<p>A Resident's car was smashed by Motorbike thugs.        Mr Lilley blaming in-house security for the occurrence even though Fortified Freedom security were on- site. Their responsibilities were to manage the commercial areas and external environment. Mr Lilley said this bunch of useless people and I don't even know why we are keeping them.        He was angry and cursing, swearing. Mr Lilley directed his comments to security officers in general. This went on for days after the incident. Having Altercation with Riley, Ali, Earl, Edmund</p>
3	<p>Incident of Managing Director (Simon Pratt) lying to a resident of Ambassador E31. According to Simon Pratt, Fortified Freedoms were bought in to cover the gaps in the in-house security team, to cover absences, sicknesses. According to the Resort director Mr Lilley, they were brought in to rub off on our skills.        They never rub off; they harassed us and racially abuse us. Where is the evidence of them covering gaps, sicknesses, absences? Or staff shortages</p>
4	<p>Memo from Olivia supported by Mr Lilley to all security. Memo focus on raising complaints verbally and not on emails.        Harassments complaints were reported but Ms Hanson and Mr Lilley never took action.        This has to do with Fortified freedom and their behaviour. Shouting uncontrollably to give orders in abusive and swearing manner.        Edmund, Riley, Mihaela, have encountered this on different shifts.</p>
5	<p>Mr Lilley refer to security staff (Claimants) as Beleaguered bunch, also used other unwanted comments to describe the in- house security team who he never introduced himself to, who he disrespected so much, who he puts blames on, who he concluded that are less experienced and should learn from Fortified freedom.</p>
6	<p>Mr Lilley harassing Mr Ibhadiyi. Using derogatory terms. Saying you can't do half of what Fortified Freedom securities are doing a comment to us all. Saying you either do as I say or leave the company. 5 Nov</p>
7	<p>Mr Lilley harassing Mr Morris. Using derogatory terms.        Saying I don't care whether it's noisy or if the construction site is noisy, put on your ear piece or you will regret it.</p>
8	<p>Fortified freedom and Mr Lilley harassing Ms Avram. Another incident where Mr Lilley was tapping Ms Avram's head in an uncomfortable manner. Saying to her why are you wearing this?        Mr Lilley saying making a mockery of her appearance and saying it doesn't fit into the brand. Fortified freedom officer laughing at her.</p>

9	<p>Fortified freedom harassing Edmund Ibhadiyi. Racially abusive. Mark following Edmund Ibhadiyi everywhere in phase 2 in a stalking manner and looking for faults to report to Mr Lilley. Mark swearing, cursing and saying is there anything you can do. Because their aggressive behaviour has been on-going and no action taken. This came across as because you are black, there's nothing you can do as a security officer.</p>
10	<p>Mr Lilley making unwanted comments about Ronald Riley's appearance and beliefs as a Rastaman. Making comments about his hair and using sarcastic comments.</p>
11	<p>Mr Lilley approach Edmund Ibhadyi making unwanted comments about the complaints raised and making threats</p>
12	<p>Fortified freedom Mark using Unwanted comments to security staff Edmund Ibhadiyi and all security after a situation of locked fire exit door that could not be opened. Mark was claiming that Edmund and others were incompetent even though it was an issue involving negligence from Ballymore. Mark saying if you can't jump simply because of who you are, I will jump over the bridge into the apartment A1 3. Mark was arguing with the acting manager who was giving him instructions.</p>
13	<p>Memo from Olivia to all security forcing us to train Fortified Freedom in the control room after stating that their skills should rub off on the in-house team 08/08/2019</p>
14 and 15	<p>Internal vacancies situation not open to staff and security but advertised on Fortified Freedom linkedIn page. All security staff (including claimant) restricted from applying. Some of the vacancies were not passed on to HR as they were not on the Ballymore website. Team leader vacancies advertised on Fortified Freedom online page. All security staff (including Claimants) restricted from applying</p>
16	<p>On-going complaints of staff shortage and incidents with bike riders. All security staff (including Claimants) whereas Fortified Freedom are fully staffed and working independently by standing outside and reporting to Mr Lilley. 5 in- house security running two phases, no appreciation, no acknowledgement whereas fortified freedom are over hyped. This is about an unfair treatment</p>
17	<p>Email from Olivia restricting staff from using front of house toilet and security in particular whereas the opposite is the case for Fortified Freedom staff.</p>

18	Liz Cave interrupting during Grievance investigation/appeal
19	James Watson investigating a grievance that was raised against himself and providing a biased outcome.
20	Memo about Fortified Freedom reduction. Staff shortage impacting on in house staff and no recruitment of new staff. This was explained by Mr Ibhadiyi as a failure to ensure security and valet were fully staffed – there were 10 vacancies and yet only 6 Fortified Freedom staff and not performing full duties.
21	Verbal complaints to management from all security about the health and safety issue of poor lighting on Capital podium and New Mill Road. Fortified freedom don't work nights so we were subjected to risk.
22	An incident of Mr Lilley blaming the in-house security after CAP B41 resident bags was smashed, Fortified freedom officers were on- site when the residents encountered the theft. Blaming the same group of individuals for every incident/s can only mean he has hatred for the group. As he was in Bagdad, Iraq, a proud member of a military group as seen on his LinkedIN page
23	Mr Lilley harassing in- house security whenever the fire alarm gets activated. Also whenever the access control stops working and fire exit doors not functioning, Mr Lilley calling in-house security useless. Running from his management office to the control room with his blazers off and aggressive.
24	Mr Watson and Ms Cave delivered outcome of collective grievance investigation. Mr Watson highlighting that his shows that there was a miscommunication between Mr Lilley, Fortified Freedom and the in-house team. Incidence of Fortified Freedom calling Mr Lilley and Ms Hanson on their personal mobile phones.
25	Email to all staff about Mr Lilley leaving the business. At first, we were told Mr Lilley was on holiday and senior management continued to insist he was on annual leave. Ballymore asset management employed an abuser, an aggressor, someone who has caused an emotional trauma to all of us and dismissed him after months of injuries to our feelings. The claim here is, the management saying he has left after the damages he caused to individuals that he had altercations with and disrespect for their religions and culture. The Ballymore Group let him off with no apology to affected individuals and then replaced him with a new Resort Director who was offering regular bribes, food, to security and staying at nights to cheer up the team. This is an acknowledgement of wrong doings.

26	<p>On-going verbal and email harassment from Ms Hanson with regards to some absence of Edmund Ibhadiyi. Edmund absence was due to caring for a family dependent who was vulnerable. Olivia stating that Edmund is pulling the "dependent card" and escalating issues.</p> <p>I felt targeted even though my attendance was over 90% in the past 3 years.</p>
27	<p>Mr Lilley mentioning that he was glad that Ballymore was seeking advice from a solicitor after referring to us as the beleaguered bunch and said we were clamouring for an audience.</p>
28	<p>Ms Hanson also making it difficult for Ronald Riley to work permanent days after reporting his eye condition.</p> <p>This is an unfair treatment as she was flexible with Fortified Freedom. Olivia made us feel less of a human by stressing us. This indicates unfair treatment. There are flexibility with those from white origins and not to those from ethnic origin.</p>
29	<p>Ms Hanson and Mr Lilley highlighting constantly that orders must be taken from Fortified Freedom.</p> <p>This led to so many incidents. Mr Lilley greeting Omar (Salamanaiku) Fortified freedom mentioning Asulamanaiku) randomly to musli, staff. Greeting Zahid, Fortified Freedom and Mr Lilley saying Asulamanaiku)</p>
30	<p>Verbal complaints of why Fortified Freedom have their own radios, staff room, canteens, treated differently from us, paid more to do less work.</p> <p>Residents satisfactions was impacted and Mr Lilley blaming the in-house team. This is about the unfair treatment from the company. Fortified freedom used the same canteen as all in-house security previously and then suddenly it was changed.</p>
31	<p>Ronald Riley, after 10 years of service at Ballymore, was been told by Mr Lilley that he lacks competency and the necessary security skills and also that he should take orders from Fortified Freedom or face disciplinary action. This really hurt his feelings because a memo was put up and also he was forced to listen to the Fortified Freedom officers whereas they have no knowledge of the site.</p>

### Findings of fact

14. The Respondent runs property schemes including Embassy Gardens where the Claimants worked, a flagship development. In 2019 it consisted of approximately 1400 units of mixed private, social, shared ownership and

commercial units. Stakeholders included freeholders, construction and development and the residents' association.

15. Mr Lilley started work as a Resort Director in Embassy Gardens in May 2019. The Tribunal accepts Mr Lilley's evidence that he had approximately 60 staff reporting to him with few management structures.
16. The Tribunal finds as a fact that the security and valet team, where the Claimants worked, had 20 employees in 2019/2020, all from ethnic minority backgrounds. There were 10 vacancies within the security and valet team and so the team was very short staffed. The Tribunal accepts Mr Lilley's evidence that both he and Ms Hanson carried out recruitment fairs. His recruitment fair only resulted in the offer of three security jobs of which only one was accepted and his recollection was that Mr Hansons' recruitment fair was done later in the year with similar results. The Tribunal further accepts that the shortage of staff without a successful recruitment exercise was the reason why an external contractor was to be brought in.
17. There were two contractors considered – Fortified Freedom and Ward Security. Mr Pratt had worked with Ward Security previously. Mr Lilley had a history of working with Fortified Freedom at a previous role in Knightsbridge. The Tribunal accepts Mr Lilley and Mr Watson's evidence that Fortified Freedom were the preferred contractor as they were cheaper and Mr Lilley had worked with them before. This is reflected in an email sent from Mr Pratt to the residents' association dated 17 February 2020.
18. The Tribunal finds that all of the Fortified Freedom contractors were "white", they were mainly "white" British. The Tribunal accepts Mr Lilley's evidence that the Respondent had no control over the ethnicity of the Fortified Freedom team, as they were contractors/employed by Fortified Freedom, they were not the Respondent's employees.
19. Mr Jama explained during the grievance procedure what Fortified Freedom's role was and this is accepted by the Tribunal (see paragraph 63 below). He said that they could not work in the Fire Control Centre due to data protection law and they were not insured to work as valet. They were placed in static positions to be present in the areas that were vulnerable, in order to meet and greet and reassure the residents. Mr Lilley gave evidence, that is accepted, that there had been a complaint by the residents' association that security was not visible and so this was why they were stationed at static positions in entrance points. The Tribunal accepts Mr Lilley's evidence that it was too costly for Fortified Freedom to provide cover at night and therefore they were not on a rota system, unlike the security and valet team. The Tribunal finds that while Fortified Freedom were brought in to help address the staff shortage in the security and valet team, their roles were different to existing security and valet staff.
20. The Claimants gave evidence, that is accepted, that Fortified Freedom reported straight into Mr Lilley whereas they had to raise their issues with



their duty managers and for them to be escalated upwards. Fortified Freedom had meetings with Mr Lilley, sometimes in the Eagle Lounge where the security and valet team were not allowed to go. A photograph was supplied to the Tribunal showing Mr Lilley getting coffee from a machine in the Eagle Lounge. In evidence to the Tribunal Mr Lilley accepted that he would also have got one for the person he was having a meeting with. The Tribunal finds that Mr Lilley did use the Eagle Lounge on occasion and when he had meetings with a member Fortified Freedom he would have a coffee with them.

21. The parties agreed that staff were not allowed to use the front of house toilet as this was for residents only. The Claimants gave evidence that Fortified Freedom did use the front of house toilet. There was no evidence that Fortified Freedom had permission to use the front of house toilet or that an exception had been made for them. The Tribunal finds that if Fortified Freedom used the front of house toilet it was not because they had special permission to do so.
22. The Tribunal accepts the evidence of Mr Jama who said in relation to radios that all security members were issued with radios but as the Respondent did not have enough radios when Fortified Freedom joined they had to procure more, they had to order new radios and Fortified Freedom were given some used and some new radios.
23. Fortified Freedom were given an area to work from, it was classed as a void space. It was not furnished and did not have a tap and so bottled water was brought in. The Claimants' canteen space was inadequate at that time – it had a computer on the draining board of the sink. The Tribunal finds that at that time the buildings were still under construction and so both areas were far from ideal.
24. The Claimants' unchallenged evidence was that the security and valet team nearly all had SIA licences for door supervision, some also had SIA licences for cctv or security guarding and also had various other training such as insight security training, fire warden training, customer service, and health and safety training. Mr Jama gave evidence, that is accepted, that at the relevant time SIA licences were not required. Mr Lilley gave evidence, that is accepted, that when he arrived he had a handover from the outgoing resort manager who had told him there were issues with the security and valet team. He also received feedback from the residents' association that security was not visible.
25. On 26 March 2019 Mr Pratt had reported that the residents' feedback on "...the friendly and professional service of our people" was 94.3% of residents. This applied to all staff working in Embassy Gardens including the security and valet team. Mr Pratt continued:

*"Team, you should all be extremely proud of this feedback as it is you and your care, attention, passion, professionalism and attitude that*

*brings our Embassy Gardens residential resort to life and gives it heart and soul.” [original emphasis]*

26. Mr Jama worked as the security manager for one month in July 2019 before Olivia Hanson joined. In cross examination Mr Jama said of the security and valet team that “everyone performed and did their job”. The Tribunal accepts the evidence of Mr Nunes that as acting duty manager his assessment of the Claimants was that they were “highly capable when it comes to customer service, security and the overall operations of Embassy gardens” and that the Claimants “were performing 100% under my management.”
27. The Tribunal finds that Mr Ibhadiyi had significant levels of absence in 2019. No evidence was provided to the Tribunal to suggest that the other 3 Claimants had poor absence. The Tribunal accepts Mr Lilley’s evidence that absence was an issue in the security and valet team. This is quoted in the Monthly Operation and Financial Review Meeting in September 2019 “There are 5 members of security with questionable sickness issues”.
28. Mr Lilley gave evidence that he did not do any individual reviews, nor were any appraisals carried out or were shown to him in relation to the security and valet team. The Tribunal finds that Mr Lilley did not look into whether each individual was appropriately trained or performing and instead perceived them as not performing.
29. The Tribunal accepts Mr Nunes’ evidence that:

*“a decision was made for a company to provide securities that apparently were tasked with an assignment. According to [Mr Lilley] these individuals were super competent which again brings me back to my argument – [Mr Lilley] making stereotypical assumptions of people’s competencies.*

*I started covering the acting duty manager’s role after 1 year of service and I never heard any senior manager making gibberish statements. I was inside the office one day and [Mr] Lilley said Fortified Freedoms are going to put these Claimants to shame and straighten them out.”*

30. A memo from August 2019 was posted on at least one notice board in Embassy Gardens (allegation 1):

**“EXTRA SECURITY ON SITE PROVIDED BY FORTIFIED FREEDOM**

*To all staff members, please note the rationale behind the enhanced security presence:*

- 1. It gets EG to best in class for security*

2. *It has been done to tie in with the opening of phase 2 (AO5) and the impact it will have on residents*
3. *The presence of trained security operatives will, in time, rub-off on our team members and raise their skill profile*
4. *It will reassure current residents that we take security and all aspects of it very seriously*
5. *It will deter low-level crime and any potential crime*

*Should any resident ask any question or express any concern, I do trust that all of you will convey reassurance to them.”*

31. The Tribunal finds as a fact that the memo was written by Ms Hanson based on an email she had received from Mr Lilley.
32. Various members of the security and valet team complained and the memo was taken down. The Tribunal accepts the Claimants’ evidence that they experienced the memo as humiliating and degrading.
33. On 13 September 2019 Ms Hanson wrote a memo to all security saying

*“FORTIFIED FREEDOM*

*MOVING FORWARD PLEASE FEEL FREE TO CONTACT ME DIRECTLY, SHOULD YOU WISH TO DISCUSS ANYTHING IN RELATION TO FORTIFIED FREEDOM.*

*I AM HAPPY TO PROVIDE YOU WITH ANY CLARIFICATION .*

*OTHERWISE I'D APPRECIATE YOUR RESPECT, DISCRETION AND COOPERATION WHILE THE COMPANY IS PROVIDING A SERVICE TO BALLYMORE AND EMBASSY GARDENS*

*WITH THANKS AS ALWAYS FOR YOUR SUPPORT”*

34. The Claimants alleged that Ms Hanson wrote a memo telling the security and valet team to train Fortified Freedom in the control room which was at odds with the previous memo saying that Fortified Freedom’s skills should “rub off” on them (allegation 13).
35. The Claimants also alleged there was a failure to ensure security and valet were fully staffed – there were 10 vacancies and yet only 6 Fortified Freedom staff and they were not performing full duties (allegation 20). The Tribunal finds that there were 10 vacancies but only 6 Fortified Freedom staff.
36. Mr Ibhadiyi gave evidence that he had to train 3 Fortified Freedom staff on the Fire Control Centre despite the fact that he earned £11.73 per hour and they earned £25 per hour. Others from the security and valeting team continued the training. The Tribunal finds that there had been a memo to

say that Fortified Freedom should “rub off” their skills on the security and valet team (see above) and that the Claimants were asked to train Fortified Freedom staff in the Fire Control Centre.

37. The Tribunal finds that in mid-September 2019 a resident’s car was smashed by “Motorbike thugs” (allegation 2). The Claimants’ allege that Mr Lilley was angry and cursing, swearing. However, the witnesses’ recollections of this incident were vague and did not align. In Cross examination Mr Morris said that Mr Lilley called them “f\*cking useless”. Mr Riley said he did not recall Mr Lilley calling them useless/questioning why they were keeping them nor Mr Lilley being angry and cursing, swearing at them. Mr Ibhadiyi said that Mr Lilley had said “what are you doing here” but he could not explain what he thought Mr Lilley had meant when he said it. Mr Lilley recalled a car being smashed but said it had happened during the night when he was not on site. On the balance of probabilities the Tribunal finds that the incident did happen but that it did not happen as described in the list of allegations, and in particular there were no angry or derogatory language used by Mr Lilley.
38. It was common ground that Fortified Freedom reported directly to Mr Lilley whereas the security and valet team did not. Sometimes Fortified Freedom communicated with Ms Hanson and Mr Lilley on their mobile phones. It was also common ground that Mr Lilley did not introduce himself to individuals in the security and valet team.
39. Mr Lilley was a credible witness, he was thoughtful in his answers. Mr Jama was also credible. Neither recognised the Claimants’ portrayal of Mr Lilley as being harassing in his interactions with the Claimants. The Claimants found it hard to articulate what had been said to them, they often relayed to the Tribunal a general assertion that they had been spoken to badly without being able to say what words had been used. The Tribunal finds as a fact that Mr Lilley did not meet and greet the individuals in the security and valet team. They had very limited interactions. Mr Lilley would issue instructions if he saw them like “you need to wear your earpiece” or in relation to Ms Avram to ask her why she was wearing a beret with her uniform (allegation 8).
40. Mr Morris alleged that Mr Lilley harassed him by using derogatory terms “I don’t care whether it’s noisy or if the construction site is noisy, put on your ear piece or you will regret it”. Both Mr Ibhadiyi and Mr Morris gave evidence that they could not wear the earpiece because of noise pollution. In cross examination Mr Ibhadiyi said that Mr Lilley had used a normal voice, he was not shouting. Mr Morris gave evidence that Mr Lilley had not said “or else”. Mr Lilley gave evidence that he did not recall the incident although he did ask security to wear their earpieces when he saw they were not in. The Tribunal finds on the balance of probabilities that Mr Lilley gave management instructions as appropriate, that allegation 7 did not occur as described in the allegation.

41. Mr Ibhadiyi said that Mark from Fortified freedom followed him everywhere in a stalking manner, looking for faults to report to Mr Lilley. His allegation was that Mark was swearing, cursing and saying is there anything you can do (allegation 9). When questioned about this incident in the Tribunal, Mr Ibhadiyi did not provide an account of any words that were used nor any racial slurs that were used, nor could he answer why Mark was following him around when he was supposed to be static. The Tribunal finds that on the balance of probabilities the Claimant's allegation did not happen.

42. Mr Lilley gave evidence to the Tribunal that is accepted, that:

*"at no time did I state that orders must be taken from Fortified Freedom nor do I believe that Olivia did. I wanted a collaboration between the different teams. It is correct that I would on occasion greet Arabic speaking employees with "As-salaam alaykum". This was a respectful greeting; one I was familiar with having spent time in Arabic speaking countries. No disrespect was intended nor do I believe that any disrespect was taken. It is an extremely respectful greeting, and I would use it when greeting colleagues who I knew spoke Arabic."*

43. In September 2019 Mr Lilley put together a Monthly Operation and Financial Review Meeting Agenda after input from his managers. In relation to the security and valet team he said:

*"The introduction of Fortified Freedom has impacted the Security Team, who appear (in small numbers) to be disengaged and bordering on troublesome."*

...

*"Stars and Challengers.. Security/Yardmen - they need some stars"*

...

*• There are 5 members of security with questionable sickness issues and are a department characteristic of no leadership, no structure, no energy and are causing frustration. I plan to sit with Olivia and look at this holistically so we can get them on the right track, noting Fortified Freedom cannot be around forever. I would hope with the planned out- sourcing of security that we politely say 'farewell' to some of those underperforming. We currently have investigations underway within this team that need resolving."*

...

*"The security and valet department (as mentioned above) are nowhere near a 'Best in Class' (BIC) and this is an area I will support Olivia so that we gain some momentum. I will speak with Craig Ainsworth on this and attempt to get some collaboration with Fortified Freedom, so that some element of professional ability shines through. The department is crying out for structure, leadership, and energy. I think Moss would add value as the department manager and he has certainly earned his spurs within the company to be deserved of a shot. His 3 team leaders will be crucial to getting this*

*beleaguered bunch to where they need to be and where I expect a BIC performance to sit.”*

44. The Tribunal finds that the Claimants were aware of some of the derogatory language in this memo, in particular “beleaguered bunch” because it is mentioned in the grievance hearing on 22 January 2020. The Tribunal finds that the Claimants experienced the term “beleaguered bunch” as humiliating and degrading.
45. Mr Riley alleged (allegation 10) that Mr Lilley made “unwanted comments about [his] appearance and beliefs as a Rastaman”. However, in cross examination Mr Riley could not recall any comments made about his appearance and beliefs as a Rastaman. He gave evidence that Mr Lilley said “My hair reminded him of some boxer in the past, a British boxer” to which Mr Riley just smiled. Mr Lilley did not recall the incident. Mr Riley did not complain about it at the time and the cross examination was the first time that he had provided the detail of the allegation.
46. Ms Avram alleged that Mr Lilley tapped her head asking her why she was wearing a beret (allegation 8). Ms Avram gave evidence that she had not drafted this allegation and that what had happened was that Mr Lilley had been amused about her wearing a beret and that he had not tapped her head hard. Ms Avram could not remember if Mr Lilley asked her not to wear the beret. Mr Lilley did not recall the detail of the incident but thought she had worn a bright beret which was not part of the uniform and that he spoke to her and perhaps mentioned it to Mr Jama. The Tribunal finds that Mr Lilley tapped Ms Avram lightly on her beret and asked her why she was wearing it as it was not part of the uniform.
47. Mr Ibhadiyi alleged that Fortified freedom Mark used unwanted comments after there was a locked fire exit door that could not be opened (allegation 12). Mr Ibhadiyi alleged that Mark was claiming that he was incompetent and that he would jump over the bridge into the apartment. The evidence given by Mr Ibhadiyi was that a resident had been trapped and Mark from Fortified Freedom had wanted to jump over a bridge whereas he wanted to reset the access systems. No complaint was made at the time. The Tribunal finds that on the balance of probabilities they had disagreed about the best course of action to take when access systems needed to be reset.
48. The Claimants alleged that internal vacancies were not open to staff and security but were advertised on Fortified Freedom linkedIn pages and that team leader vacancies were advertised on Fortified Freedom’s online page (allegations 14 and 15). The Tribunal finds as a fact that there was one week where the internal vacancies sheet said that existing staff could not apply. After that week the position returned to normal and existing staff were allowed to apply for internal roles. It is not clear from the evidence whether the week where staff could not apply was deliberate or not. In any event, the only relevant vacancies on the internal vacancies sheet where they could not apply was for 6 security/valet positions at Embassy Gardens

which the Claimants already held.

49. The Tribunal accepts the evidence from Mr Watson that there had been discussion about creating three team leader posts and that Mr Ainsworth had advertised them without the Respondent's permission. Mr Watson spoke to Mr Ainsworth and told him to take them down.
50. The Claimants allege that there was an incident of Mr Lilley blaming the in-house security after resident bags were smashed and that the security and valet team were blamed for it (allegation 22). In evidence Mr Lilley did not recall the incident. Mr Ibhadiyi gave evidence to the Tribunal that there was a standard policy saying that if a vehicle was approaching, they should approach them. He did not recount anything that Mr Lilley had said to him in relation to this but only that he thought he had hatred for the black minority group due to Mr Lilley having served in Iraq. The Tribunal finds that this incident did not happen as alleged.
51. The Claimants alleged that Mr Lilley harassed them whenever the fire alarm was activated and that whenever the access control stopped working and the fire exit doors were not functioning, he called them "useless" (allegation 23).
52. Mr Lilley's evidence was that he was not aware of when the fire alarms were activated as he did not sit near the control panel. Mr Ibhadiyi said Mr Lilley came running from his office and called them "useless". Mr Nunes gave evidence, that is accepted, that Mr Lilley called security and valet team "useless". The Tribunal finds on balance that Mr Lilley was not aggressive but did call the Claimants "useless".
53. The Tribunal accepts Mr Riley's evidence that when he requested to work day shifts only, he was asked to get evidence from the doctor and once he had done so he work day shifts only from mid-2019.
54. Some individuals from the security and valet team emailed complaints about their treatment. A collective letter was sent by Mr Ibhadiyi to Mr Lilley, Mr Pratt, Mr Watson and others highlighting that over the past 2 /3 weeks over 7 emails had been sent to management about unfair treatment and discrimination since the arrival of Fortified Freedom.
55. The Claimant alleged (allegation 11) that Mr Lilley had approached him and made "unwanted comments about the complaints raised and making threats". To the Tribunal Mr Ibhadiyi said that having sent some emails about his frustration, he was having his lunch in the canteen when Mr Lilley walked in and stood in front of him and said "what are all these emails you are sending". Mr Ibhadiyi said that it was intimidatory and threatening and that he thought Mr Lilley should have waited until after his lunch. Mr Lilley did not recall the incident. The Tribunal finds that, on the balance of probabilities, the incident did happen, although there were no threats as Mr Ibhadiyi had been sending emails and Mr Lilley probably raised that with

him.

56. The Claimants raised a “formal grievance against senior management” on 19 December 2019 and set out a detailed account of the ways in which the security and valet team had been treated badly since the arrival of senior management and Fortified Freedom. The grievance stated that as most of the team were from an ethnic minority background, the treatment from management was discriminatory.

57. On 23 December 2019 Mr Lilley wrote to Human Resources:

*“I have tried twice to get an appointment with the security team and it has proved elusive. I am going to aim for the early part of January and hope we can get somewhere. They are clamouring for an audience to 'vent' but I am glad we are looking to engage with some employment lawyers! All the help - the better.”*

58. A meeting took place on 17 January 2020 with Liz Cave but as some of the security and valet team could not attend the meeting was reconvened for 22 January 2020. Those in attendance were Mr Iqbal, Mr Riley, Mr Morris, Mr Isik, Ms Bagum, Ms Avram, Mr Yusuf, Mr Ibhadiyi, Mr Messari, Mr Watson (Area Property Manager), Ms Cave (Independent HR Consultant), Ms Haran (Administrator, Minuet Taker). One of the allegations (18) is that Ms Cave interrupted them during the grievance investigation. No evidence was given to the Tribunal about this. Having reviewed the minutes of the meeting the Tribunal decides on the balance of probability that Ms Cave did not interrupt but that she appeared to be trying to bring back into focus the meeting which lasted 2 hours 45 minutes. The Tribunal finds that those in attendance had an opportunity to raise their concerns, and the concerns were discrimination by management and in respect of Fortified Freedom, particularly that they were paid more to do less work.

59. On 21 January 2020 Mr Watson sent a message to all staff:

*“am writing to make you all aware that [Mr] Lilley has left Ballymore and will no longer continue as Resort Director for Embassy Gardens and as such will not be returning to the resort.*

*...*

*Be assured that operationally efforts will be made to further strengthen the management team swiftly but more importantly with the inclusion of strong, experienced individuals.”*

60. The Tribunal accepts the Respondent’s evidence that Mr Lilley was dismissed from the Respondent and that this was kept confidential at the time. In his letter of dismissal one of the reasons for dismissal was:

*“Although you had inherited some outstanding HR/ER case when taking up the position of RD at Embassy Gardens, it is clear that particularly with respects to the Security & Valet teams that matter had become worse. There has been a failure to correctly man mange*



*individuals within the management team, causing confrontations between you and others within the management team.”*

61. Mr Lilley’s termination date was 31 January 2020. The Tribunal accepts Mr Lilley’s evidence that no one at the Respondent contacted him to be interviewed or have an informal discussion about the Claimants’ grievance.
62. On 24 January 2020 Mr Watson summarised the complaints that the security and valet team had raised:

*The areas of grievance I am investigating are as follows:*

- 1. Why it was necessary to bring in an external security contractor specifically Fortified Freedom when a security & valet team is already employed by Ballymore at Embassy Gardens?*
  - a. at the meeting it was stated that those in attendance believed that they are being discriminated on the grounds of race.*
  - b. that the duties of Fortified Freedom were unclear and in fact that Fortified Freedom did not respond to emergency situations.*
  - c. that the skill set and duties of Fortified Freedom are comparable to those of the security & valet team at Embassy Gardens, so what was the need for an external company?*
  - d. That Fortified freedom have flexibility regarding their working hours and shift patterns but Embassy Gardens Security & Valet team do not.*
- 2. Pay - you ( the security & valet team) have stated that you believe that you are underpaid in comparison to;*
  - a. Fortified Freedom*
  - b. Other resort security teams within the Ballymore portfolio.*
- 3. Resort management, namely [Mr] Lilley (Resort Director) and [Ms] Hanson (Operations Manager) behaved unprofessionally towards the security & valet team specifically;*
  - a. They did not communicate with the security & valet team regarding the appointment of Fortified Freedom.*
  - b. The resort management team refused to engage with the security & valet team when the security team approached them with their concerns regarding Fortified Freedom, specifically that Fortified Freedom did not respect the security & valet team and did not support the security & valet team during emergency situations.*
  - c. The contract was awarded to Fortified Freedom based on the friendship between [Mr] Lilley and the Head of Fortified Freedom.*
- 4. The security & valet team is currently short staffed.*
- 5. The security & valet team require the following working areas to be addressed;*

- a. Another computer added to the security team, currently there is only 1 .
- b. More company email addresses added.
- c. The lights to be fixed on the podium areas.

To achieve resolution the Embassy Gardens Security team have asked for;

- A. An apology
- B. Answers to the above
- C. Improved communication and respect from Resort Management to the team.
- D. Financial provision regarding the disparity of pay between;
  - 1 . Fortified Freedom and the security & valet team.
  2. Other Ballymore security & valet teams and Embassy Gardens security & valet teams.”

63. On 31 January 2020 Mr Jama was interviewed by Liz Cave as part of the investigation.

*“security personal was needed for static positions and at the time because that was where we were lacking and it was highlighted by a few members of residents that we was lacking static positions and we were not visible.”*

64. The Claimants allege that Mr Watson investigated a grievance that was raised against himself and that he provided a biased outcome (allegation 19). The Claimants did not think that Mr Watson should have been deciding the grievance as he had allegations against him. The Tribunal finds that there were no allegations that Mr Watson had said anything, he had only started with the Respondent on 20 September 2019, although he was part of strategic management. In response to the allegation that he was biased the Respondent brought in an external lawyer to conduct the appeal process. The Tribunal finds that it was appropriate for Mr Watson to conduct the grievance process.

65. The grievance outcome letter was sent on 10 February 2020 to the Claimants. Mr Watson decided that there had been no discrimination and that Fortified Freedom were not in comparable roles. Mr Watson went on:

*“I am however able to offer an apology on behalf of Ballymore **if you think** that communication regarding Fortified Freedom was not sufficient at the time and as I say I would like for us to move forward now with the new Resort Director and look at ways we can improve our communication in the future.” (Tribunal’s emphasis)*

66. The Claimants appealed by email on the same day as the outcome was received, 10 February 2020. The appeal was lengthy and focused on Mr Watson being part of the grievance, Mr Watson’s approach to the investigation, the daily occurrence book not being reviewed, that residents

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were not happy with Fortified Freedom, justification of Fortified Freedom when they are expensive and do not work nights, the finding of “miscommunication” rather than discrimination despite evidence, the vision of “best in class”, incidents with Fortified Freedom, flawed investigation and job opportunities.

67. The Appeal was heard by a solicitor Justin Terry on 26 March 2020 who concluded that:

*“It does appear that Fortified Freedom Officers were instructed under a contract of limited scope. They were required to only provide static security and were not instructed to carry out other duties which you are required to perform, such as valet duties (as they were not insured on residents' vehicles), patrols or CCTV monitoring (due to data protection issues).*

*Given the lack of communication and direction regarding Fortified Freedom officers' introduction and presence on site, it is somewhat understandable that the Team felt aggrieved by their presence, particularly given your belief that the Fortified Freedom officers earned over double your pay for carrying out fewer duties. This was exacerbated by the fact that Mr Lilley's management of the Team was at times sub-optimal. This point has been accepted by the senior management at Ballymore and steps have been taken to ensure management issues such as these are not repeated. Indeed, it is my understanding that the current Resort Director, who has been in place for almost three months, has a positive and constructive working relationship with you all.*

*With regards to the treatment (pay, hours and duties) that Fortified Freedom received in comparison to you, as set out above, Fortified Freedom officers were:*

- engaged and paid by Fortified Freedom, not Ballymore;*
- self-employed contractors, not employees of Fortified Freedom;*
- and*
- provided as part of a commercial contract between Ballymore and Fortified Freedom which dictated there hours and duties.*

*As such, their pay, hours and duties were not related to race and their material circumstances not comparable to yours.”*

68. The Claimants contacted ACAS on 4 March 2020 and a certificate was issued on 4 April 2020. The Claimants submitted their claim on 4 May 2020 but it was rejected on 26 June 2020 because there was an issue with the ACAS Early Conciliation numbers. On 28 June 2020 the Claimants wrote to the Tribunal with an amended form rectifying the errors.

**The Law**

## Race Discrimination

69. Section 4 of the Equality Act 2010 (“EqA”) provides that race is a protected characteristic. Section 9(1) sets out that race includes colour, nationality and ethnic or national origins.
70. S.39(2) EqA prohibits an employer from discriminating against one of its employees by subjecting the employee to a detriment.
71. S.212(1) EqA provides that the concept of ‘detriment’ does not include conduct that amounts to harassment.
72. S.136 of the EqA sets out the burden of proof:
- “(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...”*
73. The burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another (*Hewage v Grampian Health Board* [2012] IRLR 870, SC).
74. Guidelines on the burden of proof were set out by the Court of Appeal in *Igen Ltd v Wong* [2005] IRLR 258. Once the burden of proof has shifted, it is then for the respondents to prove that they did not commit the act of discrimination. To discharge that burden it is necessary for the respondents to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic, since ‘no discrimination whatsoever’ is compatible with the Burden of Proof Directive. Since the facts necessary to prove an explanation would normally be in the possession of the respondents, a tribunal would normally expect cogent evidence to discharge that burden of proof.
75. The Court of Appeal in *Madarassy*, a case brought under the then Sex Discrimination Act 1975, states:
- “The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal ‘could conclude’ that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.”*
76. This approach was approved in *Hewage v Grampian Health Board* [2012] UKSC 37 and in *Royal Mail Group Ltd v Efofi* [2021] ICR 1263.
77. Where there is a difference of treatment and a difference of status it does not take much more to shift the burden of proof. In *Deman v Commission*

for Equality and Human Rights Commission & others [2010] EWCA Civ 1279, Sedley LJ held:

*“We agree with both counsel that the “more” which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred.”*

78. Case law recognises that very little discrimination today is overt or even deliberate. Witnesses can be unconsciously prejudiced.

### **Direct Discrimination**

79. Under s.13(1) of the EqA read with s.9 direct discrimination takes place where a person treats the claimant less favourably because of race/nationality than that person treats or would treat others. Under s.23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

80. It is often appropriate for a tribunal to consider, first, whether the Claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race. However in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the ‘reason why’ the Claimant was treated as he was (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285).

81. In *London Borough of Islington v Ladele (Liberty intervening)* 2009 ICR 387, EAT, Mr Justice Elias (then President) confirmed the principal in *Shamoon* and said that a strict reliance on the comparator test can be positively misleading where the protected characteristic contributes to, but is not the sole or principal reason for, the employer’s act or decision.

82. Decisions are frequently reached for more than one reason. Provided the protected characteristic had a significant influence on the outcome, discrimination is made out (*Nagarajan v London Regional Transport* [1999] IRLR 572, HL).

### **Harassment**

83. Section 26 EqA provides:

“(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.”

84. In *Hartley v Foreign and Commonwealth Office Services* 2016 UAEAT/0033/15/LA, the Employment Appeal Tribunal stated that the alleged harasser’s knowledge or perception of the victim’s protected characteristic is relevant but should not be viewed as in any way conclusive and that:

“[23] The question posed by s.26(1) is whether A’s conduct related to the protected characteristic. This is a broad test, requiring an evaluation by the Employment Tribunal of the evidence in the round – recognising, of course, that witnesses will not readily volunteer that a remark was related to a protected characteristic... the Equality Code says (paragraph 7.9):

7.9 Unwanted conduct “related to” a protected characteristic has a broad meaning such that the conduct does not have to be because of the protected characteristic ...”

85. *Warby v Wunda Group plc* EAT 0434/11 stated that the context in which unwanted conduct takes place is an important factor in determining whether it is related to a relevant protected characteristic.

86. In *Tees Esk and Wear Valleys NHS Foundation Trust v Aslam* [2020] IRLR 495 HHJ Auerbach gave further guidance:

“[21]... whether or not the conduct is related to the characteristic in question, is a matter for the appreciation of the Tribunal, making a finding of fact drawing on all the evidence before it and its other findings of fact. The fact, if fact it be, in the given case that the complainant considers that the conduct related to that characteristic is not determinative.

[25] Nevertheless, there must be still, in any given case, be some feature or features of the factual matrix identified by the Tribunal, which properly leads it to the conclusion that the conduct in question is related to the particular characteristic in question, and in the manner alleged by the claim. In every case where it finds that this component of the definition is satisfied, the Tribunal therefore needs to articulate, distinctly and with sufficient clarity, what feature or features of the evidence or facts found, have led it to the conclusion that the conduct is related to the characteristic, as alleged. Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be.”

### ***Time limits for discrimination***

87. S. 123 EqA provides:

*“(1) Proceedings on a complaint within section 120 may not be brought after the end of—*

- (a) the period of 3 months starting with the date of the act to which the complaint relates, or*
- (b) such other period as the employment tribunal thinks just and equitable.*

...

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

- (a) conduct extending over a period is to be treated as done at the end of the period;*
- (b) failure to do something is to be treated as occurring when the person in question decided on it.*

...”

88. Section 140B sets out the extension of time limits to facilitate conciliation before bringing a claim:

*“(1) This section applies where a time limit is set by section 123(1)(a) or 129(3) or (4).*

*(2) In this section—*

- (a) Day A is the day on which the complainant or applicant concerned complies with the requirement in subsection (1) of section 18A of the Employment Tribunals Act 1996 (requirement to contact ACAS before instituting proceedings) in relation to the matter in respect of which the proceedings are brought, and*
- (b) Day B is the day on which the complainant or applicant concerned receives or, if earlier, is treated as receiving (by virtue of regulations made under subsection (11) of that section) the certificate issued under subsection (4) of that section.*

*(3) In working out when the time limit set by section 123(1)(a) or 129(3) or (4) expires the period beginning with the day after Day A and ending with Day B is not to be counted.*

*(4) If the time limit set by section 123(1)(a) or 129(3) or (4) would (if not extended by this subsection) expire during the period beginning with Day A and ending one month after Day B, the time limit expires instead at the end of that period.*

*(5) The power conferred on the employment tribunal by subsection (1)(b) of section 123 to extend the time limit set by subsection (1)(a) of that section is exercisable in relation to that time limit as extended by this section.”*

89. In *Hendricks v Commissioner of Police for the Metropolis* [2003] IRLR 96 the Court of Appeal confirmed that in deciding the question of conduct extending over a period:

*“The focus should be on the substance of the complaints ... was there an ongoing situation or a continuing state of affairs in which officers ... were treated less favourably. The question is whether that is “an act extending over a period” as distinct from a succession of unconnected or isolated specific acts”.*

90. In considering whether separate incidents form part of an act extending over a period, “one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents” (*Aziz v FDA* 2010 EWCA Civ 304, CA).

91. There is a “very broad general discretion” conferred on tribunals to decide whether it is just and equitable to extend time *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23 per Underhill LJ at [37]. The “best approach” is for the Tribunal to “assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular ... ‘the length of, and the reasons for, the delay’” (paragraph 37).
92. In the EAT in *Secretary of State for Justice v Johnson* 2022 EAT 1 the EAT decided that an employment tribunal had erred in extending time for a harassment claim as it had failed to identify the specific conduct constituting harassment and when it ceased and it had failed to consider the prejudice to the employer in allowing the claim to proceed when it concerned events that had happened several years before.
93. In *Concentrix GVC Intelligent Contact Ltd v Obi* [2022] EAT 149 the EAT held that not providing a reason for the delay was not determinative but that the Tribunal had erred when it confined its consideration of whether any prejudice had been caused to the employer to the fact that the overall claim was only one day out of time where there had been a series of complaints by the employee and so had failed to take account of its specific finding in respect of prejudice caused by an earlier claim of racial harassment.

## Analysis and Conclusions

Perception of the group as being useless and poor performing (allegations 1, 5, 23 and 31) and Grievance procedure being dealt with by M Watson and describing the harassing characterisation of the Claimants as “miscommunication” (allegation 23). Mr Watson was biased (allegation 19 and 24).

94. Mr Lilley did know that it was only some who are creating problems for the security and valet team “*who appear (in small numbers) to be disengaged and bordering on troublesome*”, yet Mr Lilley refers to the group as being “useless” orally and a “beleaguered bunch” and says that there are “no stars” in security.
95. Mr Lilley perceived Fortified Freedom as being “best in class” as described in a memo from August 2019 signed off by Ms Hanson but contents by Mr Lilley:

“...the enhanced security presence:

1. It gets EG to best in class for security

...

3. The presence of trained security operatives will, in time, rub-off on our team members and raise their skill profile...”



96. The Tribunal concludes that Mr Lilley had a view of the security and valet team as being poor performing despite not having looked into whether any of them were in fact performing or not. The individuals in the security and valet team also had appropriate qualifications and training. Yet Mr Lilley treated the whole security and valet team as a “useless”, “beleaguered” group. The team comprised of individuals from ethnic minorities. Mr Ibhadiyi was Black, Mr Riley was Black Caribbean, Ms Avram was Romanian and Mr Morris was Black Caribbean. Fortified Freedom staff were White and were perceived to be “best in class”. Mr Lilley thought they could “rub off” their skills on the security and valet team. The Tribunal concludes that the Claimants have satisfied the first stage of the burden of proof – they have shown facts from which the court could decide, in the absence of any other explanation, that the Respondent contravened the provision concerned and the burden therefore shifts to the Respondent to show that, on the balance of probabilities, that the treatment was in no sense whatsoever related to the protected characteristic.
97. Mr Lilley gave evidence to the Tribunal that he had been told there were issues in the security and valet team by his predecessor and that he had been told by the residents’ association that security was not visible. A small number of the security team did have significant absence. Yet the assumption that the existing security and valet team were not trained or performing well was not founded on anything. Mr Lilley did not seek to find out if they were trained or performing, he did not look at appraisals and did not speak to the individuals themselves. They were performing well, as both Mr Nunes and Mr Jama gave evidence.
98. In cross examination Mr Lilley said that he thought that because of Fortified Freedom’ skills there could be a skills transition. Mr Lilley said that he should have used the word “supported”. It is this unsupported view that the entire security and valet team are useless and the contrast with the assumption that the Fortified Freedom team are best in class and so can “rub off” their skills on the security and valet team that is unexplained by the Respondent.
99. Discrimination is rarely overt or deliberate and the Tribunal concludes that the Respondent has not discharged the burden that the treatment of assuming that the whole team was not performing and not sufficiently trained was in no sense whatsoever on the grounds of race/nationality. The Claimants were told that they were “useless”, that the “trained” contractors’ skills would “rub off” on them to get them to “best in class”. They were described as a “beleaguered bunch”. This had the effect of violating their dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for them. It was reasonable for it to have that effect. They experienced it as such and complained.
100. Mr Watson did not recognise any discrimination or harassment yet the treatment was related to race as described above. His outcome includes the offer of an apology *“if you think that communication regarding*

*Fortified Freedom was not sufficient at the time” (Tribunal emphasis).* Again, the burden has shifted and the Respondent has not shown that the treatment was in no sense whatsoever related to race/nationality. This was a further act of harassment, as was the appeal decision for the same reasons, which characterised the treatment as “miscommunication”. This had the effect of violating their dignity and creating an intimidating, hostile, degrading, humiliating or offensive environment for them. It was reasonable for it to have that effect. They experienced it as such and complained.

101. The Tribunal therefore concludes that the Claimants’ claim for harassment is successful.
102. In respect of whether it was an act of discrimination for Mr Watson to conduct the grievance, he had only joined the Respondent on 20 September 2019. The Tribunal concludes that he was new in the business and the decision for him to hear the grievance was not related to or because of race. This complaint (allegations 19 and 24) therefore fails and is dismissed.

#### *Time limits*

103. The harassment was a continuing act from when Mr Lilley joined in July 2019. The Claimants soon began to complain and so the Respondent was aware of the issues. The grievance and appeal procedure were by different people but continued the harassment by characterising the harassment as “miscommunication”.
104. The appeal decision was dated 10 February 2020, ACAS was contacted on 4 March 2020, a certificate was issued on 4 April 2020 which meant that the Claimants’ last day to issue the claim was 9 June 2020. The Claimants had submitted their claim on 4 May 2020 but it was rejected on 26 June 2020 because there was an issue with the ACAS Early Conciliation numbers. Two days later, on 28 June 2020 the Claimants wrote to the Tribunal with an amended form rectifying the errors. They acted promptly. The Respondent did not identify any particular consequences of the delay. The Tribunal concludes that it was just and equitable to extend time.

#### *Direct discrimination*

105. S.212(1) EqA provides that the concept of ‘detriment’ does not include conduct that amounts to harassment. Having found that the Claimants were subjected to harassment, it follows that they cannot also claim direct discrimination for the same acts.

Ambassador A73 Resident car was smashed by Motorbike thugs.  
Mr Lilley blaming in-house security for the occurrence even though Fortified Freedom security were on- site. Their responsibilities were to manage the commercial areas and external environment. Mr Lilley said this bunch of useless people and I don't even know why we are keeping them. He was angry and cursing, swearing.  
Mr Lilley directed his comments to security officers in general. This went on

for days after the incident. Having Altercation with Riley, Ali, Earl, Edmund (allegation 2)

106. The Tribunal has found that on the balance of probabilities a resident's car was smashed by "motobike thugs" but that it did not happen as described in the list of allegations, and in particular there was no angry or derogatory language used by Mr Lilley. It was not related to or because of race. The complaint therefore fails and is dismissed.

The appointment of contractors and their different duties (allegations 3 and 16)

107. There were 10 vacancies in the security and valet team and issues with existing staff absences. The Tribunal has accepted Mr Lilley's evidence that he and Ms Hanson carried out recruitment fairs that only resulted in the offer of three security jobs of which only one was accepted. However, the contractors addressed the "visibility" issue by being static and they did not work nights due to cost. Further, they could not perform the valeting function as they were not insured and they initially could not perform the Fire Control Centre functions prior to training.

108. The Claimants thought the set up was unfair – they got paid less and had additional duties. However, the reason for treatment was that the contractors were limited in what they could do and also to address the visibility issue. It was dealt with insensitively. While the Respondent could not demand that Fortified Freedom choose staff of different ethnicities, an all-white group of contractors were being paid more and doing less. Management did not take time to explain the difference.

109. As is the usual situation with contractors (as they do not enjoy the same employment rights as permanent employees and have to account for their own taxes), Fortified Freedom were paid higher hourly rates than the Claimants. The Tribunal concludes that retaining Fortified Freedom was a way of covering the vacancies on a short term basis as recruitment had not succeeded. It was not related to or because of race. This complaint therefore fails and are dismissed.

Fortified Freedom being abusive (allegations 3 and 4)

110. The Claimants also contend in allegation 3 that Fortified Freedom harassed and racially abused them. However, the details of who said what and when was lacking. It had not been witnessed by Mr Lilley nor Mr Jama. The collective grievance dated 19 December 2019 was detailed and yet it did not set out allegations of incidents of harassment or racial abuse by Fortified Freedom.

111. In Cross examination Mr Riley said that Fortified Freedom said things like "you have to do what we say" and "you don't you go and do it yourself" and Ms Avram said that they were polite but passive aggressive about personal details and tasks. The Tribunal therefore finds that Fortified Freedom did not shout uncontrollably to give orders in abusive or swearing manner as alleged. The complaint therefore fails and is dismissed.

Memo asking staff to speak to her directly (allegation 4)

112. The Tribunal concludes that the memo requesting staff to “feel free to contact [her] directly should you wish to discuss anything in relation to Fortified Freedom” is not capable of constituting facts from which the Tribunal could decide that discrimination has occurred. This complaint therefore fails and is dismissed.

Mr Lilley harassing Mr Ibhadiyi (allegation 6)

113. The Tribunal has found that Mr Lilley did not interact much with the individuals in the security and valet team and he would simply issue instructions such as “you need to wear your earpiece” when he saw them. The Tribunal therefore concludes that on the balance of probabilities Mr Lilley did not “use derogatory terms to Mr Ibhadiyi such as “you can’t do half of what Fortified Freedom securities are doing”. The facts alleged did not arise and so the complaint fails and is dismissed.

Mr Lilley harassing Mr Morris (allegation 7)

114. The Tribunal has found that Mr Lilley gave management instructions as appropriate, the incident did not occur as described in the allegation. The facts alleged did not arise and so the complaint fails and is dismissed.

Mr Lilley harassing Ms Avram (Allegation 8)

115. The Tribunal has found that Mr Lilley tapped Ms Avram lightly on her beret and asked her why she was wearing it as it was not part of the uniform. The “reason why” was that she was wearing a piece of clothing that was not uniform. The Tribunal concludes that the conduct was not related to or because of nationality and so this complaint fails and is dismissed.

Mark from Fortified freedom (allegation 9)

116. The Tribunal has found that the Claimant’s allegation as described did not happen and so this complaint fails and is dismissed.

Mr Lilley making unwanted comment about Mr Riley’s appearance and beliefs as a Rastaman (allegation 10)

117. In cross examination Mr Riley could not recall any comments made about his appearance and beliefs as a Rastaman. He gave evidence that Mr Lilley said “My hair reminded him of some boxer in the past, a British boxer” to which Mr Riley just smiled. Mr Lilley did not recall the incident. He did not complain about it at the time and the cross examination was the first time that he had provided the detail of the allegation.

118. The Tribunal concludes that this is not conduct related to or because of race, it is an innocuous comment about one person reminding the other

of a sports figure. Further, Mr Riley did not complain about it at the time and did not give the detail of the allegation until he was at the Tribunal. The Tribunal therefore concludes that Mr Riley did not experience it as violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment. This complaint therefore fails and is dismissed.

Fortified freedom Mark used unwanted comments after there was a locked fire exit door that could not be opened (allegation 12).

119. The Tribunal has found that on the balance of probabilities Mr Ibhadiyi and Mark had disagreed about the best course of action to take when access systems needed to be reset. The conduct was not related to or because of race and so this complaint fails and is dismissed.

The Claimant alleged that Mr Lilley had approached him and made “unwanted comments about the complaints raised and making threats” (allegation 11)

120. The Tribunal has found that Mr Lilley walked and said to Mr Ibhadiyi “what are all these emails you are sending”, although there were no threats. However, the Tribunal concludes that the “reason why” was that Mr Ibhadiyi had been sending emails and so Mr Lilley raised that with him. The conduct was not related to or because of race and so this complaint fails and is dismissed.

Memo from Olivia Memo from Olivia to all security forcing us to train Fortified Freedom in the control room after stating that their skills should rub off on the in-house team (allegation 13)

121. Mr Ibhadiyi gave evidence that he had to train 3 Fortified Freedom staff on the Fire Control Centre despite the fact that he earned £11.73 per hour and they earned £25 per hour. It was the difference in pay that he thought was unfair as well as the fact that the original memo had said that Fortified Freedom’s skills should “rub off” on them.

122. The “rub off” memo having been considered above, the Tribunal understands why it would be concerning to Mr Ibhadiyi that it was unfair that the contractors earned more than double per hour and yet he had to train them. However, the “reason why” was that contractors earn more than permanent staff who have job security because they can be terminated at any time, as they were in this case. The “reason why” the Claimants were asked to train Fortified Freedom in the Fire Control Centre was that they needed to be trained. The Tribunal concludes that the conduct was not related to or because of race and so this complaint fails and is dismissed.

The Claimants alleged that internal vacancies situation not open to staff and security but were advertised on Fortified Freedom linkedIn page and that team leader vacancies advertised on Fortified Freedom online page (allegations 14 and 15).

123. The Tribunal has found as a fact that there was one week where the internal vacancies sheet said that existing staff could apply but that the vacancies were not relevant to the Claimants and that after that week the position returned to normal and existing staff were allowed to apply. The Tribunal has also found that there had been discussion about creating three team leader posts and that Mr Ainsworth from Fortified Freedom had advertised them without the Respondent's permission. Mr Watson then spoke to Mr Ainsworth and told him to take them down. The Tribunal concludes that the conduct was not related to or because of race and so this complaint fails and is dismissed.

Liz Cave interrupting during Grievance investigation/appeal (allegation 18)

124. The Tribunal has decided that Ms Cave did not interrupt but that she appeared to be trying to bring back into focus the meeting which lasted 2 hours 45 minutes. The facts alleged therefore did not arise and so this complaint fails and is dismissed.

Failure to ensure security and valet were fully staffed – there were 10 vacancies and yet only 6 Fortified Freedom staff who were not performing full duties (allegation 20).

125. The Tribunal has found that there were 10 vacancies in the security and valet team but only 6 Fortified Freedom staff and they were not carrying out the same breadth of duties as the Claimants. However, the Tribunal concludes that the conduct was not related to or because of race and so this complaint fails and is dismissed.

Incident of Mr Lilley blaming the in-house security after resident bags were smashed and that the security and valet team were blamed for it (allegation 22).

126. The Tribunal has concluded that this incident did not happen as alleged and in any event do not agree with Mr Ibhadiyi's assumption that serving in the armed forces meant that Mr Lilley had hatred for the black minority groups. This complaint therefore fails and is dismissed.

Mr Lilley leaving the Respondent without making him apologise to affected individuals and then replaced him with a new Resort Director who was offering regular bribes, food, to security and staying at nights to cheer up the team. (allegation 25)

127. The Tribunal has found that Mr Lilley was being performance managed and was dismissed from the Respondent. It is common practice that other employees would not know that was happening. While it is correct that Mr Lilley was not interviewed or asked to apologise this is not conduct that is related to race or because of race. This claim therefore fails and is dismissed.

128. No evidence was given that the new resort director was bribing the staff as an acknowledgement of wrong doings and so this complaint fails and is dismissed.

On-going verbal and email harassment from Ms Hanson with regards to some absence of Edmund Ibhadiyi. Edmund absence was due to caring for a family dependent who was vulnerable. Ms Hanson stating that Edmund is pulling the "dependent card" and escalating issues. MR Ibhadiyi felt targeted even though his attendance was over 90% in the past 3 years (allegation 26)

129. The Tribunal has found that Mr Ibhadiyi had significant absences in 2019. It was therefore appropriate for Ms Hanson to address the absence issues. No evidence of harassment was provided to the Tribunal and so this complaint fails and is dismissed.

Mr Lilley mentioning that he was glad that Ballymore was seeking advice from a solicitor after referring to us as the beleaguered bunch and said we were clamouring for an audience (allegation 27)

130. The Claimants were wanting to be heard and "clamouring for an audience" is a way of describing this. Being glad that the Respondent was engaging with employment lawyers is reasonable, the Tribunal concludes that the conduct was not related to or because of race and so this complaint fails and is dismissed.

Ms Hanson also making it difficult for Mr Riley to work permanent days after reporting his eye condition. This is an unfair treatment as she was flexible with Fortified Freedom. Ms Hanson made us feel less of a human by stressing us.

This indicates unfair treatment. There are flexibility with those from white origins and not to those from ethnic origin (allegation 28)

131. The Tribunal has found that when Mr Riley requested to work day shifts only, he was asked to get evidence from the doctor and once he had done so the Respondent allowed him to change in shifts in mid-2019. Mr Riley told the Tribunal that he thought it was unfair that he had to request to work days and had to provide medical evidence, yet Fortified Freedom only worked day shifts without needing evidence.

132. As discussed above, Fortified Freedom worked differently to the Claimants, cost and visibility were two of the reasons why Fortified Freedom worked day shifts only. The Tribunal concludes that Ms Hanson was accommodating of Mr Riley's medical needs and agreed to change his shift patterns. The Tribunal concludes that the conduct was not related to or because of race and so this complaint fails and is dismissed.

Ms Hanson and Mr Lilley highlighting constantly that orders must be taken

from Fortified Freedom. This led to so many incidents. Mr Lilley greeting Omar (Salamanaiku) Fortified freedom mentioning Asulamanaiku) randomly to muslim, staff. Greeting Zahid, Fortified Freedom and Mr Lilley saying Asulamanaiku) (allegation 29)

133. Mr Lilley gave evidence to the Tribunal that is accepted, that:

*“at no time did I state that orders must be taken from Fortified Freedom nor do I believe that Olivia did. I wanted a collaboration between the different teams. It is correct that I would on occasion greet Arabic speaking employees with “As-salaam alaykum”. This was a respectful greeting; one I was familiar with having spent time in Arabic speaking countries. No disrespect was intended nor do I believe that any disrespect was taken. It is an extremely respectful greeting, and I would use it when greeting colleagues who I knew spoke Arabic.”*

134. None of the Claimants gave evidence that Mr Lilley or Fortified Freedom greeted them in this way. The Tribunal concludes that the way Mr Lilley and Fortified Freedom greeted staff who spoke Arabic (none of whom were Claimants in this litigation) was not unwanted conduct related to a relevant protected characteristic that had the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. This complaint therefore fails and is dismissed.

Verbal complaints of why Fortified Freedom have their own radios, staff room, canteens, treated differently from us, paid more to do less work. Residents satisfactions was impacted and Mr Lilley blaming the in- house team. This is about the unfair treatment from the company.

Fortified freedom used the same canteen as all in-house security previously and then suddenly it was changed (allegation 30)

Email from Olivia restricting staff from using front of house toilet and security in particular whereas the opposite is the case for Fortified Freedom staff (allegation 17)

Verbal complaints to management from all security about the health and safety issue of poor lighting on Capital podium and New Mill Road. Fortified freedom don't work nights so we were subjected to risk. (allegation 21)

Incidence of Fortified Freedom calling Mr Lilley and Ms Hanson on their personal mobile phones (allegation 24)

135. The Tribunal has found that while Fortified Freedom were brought in to help address the staff shortage in the security and valet team, their roles were different to existing security and valet staff including the Claimants. It was too costly for Fortified Freedom to provide cover at night and therefore they were not on a rota system, unlike the Claimants. The Claimants were upset by these differences. They saw Fortified Freedom as working in easier roles and being paid more. This was compounded by Mr Lilley's



perception of them as being “best in class” and that their skills would “rub off” on the existing security and valet team.

136. Fortified Freedom reported straight into Mr Lilley, sometimes communicated with Ms Hanson and Mr Lilley on their mobile phones whereas the security and valet team had to raise their issues with their duty managers and for them to be escalated upwards. Fortified Freedom had meetings with Mr Lilley, sometimes in the Eagle Lounge with coffee where the security and valet team were not allowed to go. This appeared very unfair to the Claimants who never had meetings with Mr Lilley.
137. If Fortified Freedom used the front of house toilet it was not because they had special permission to do so. All security members had been issued with radios but as the Respondent did not have enough radios when Fortified Freedom joined they had to procure more, they had to order new radios and Fortified Freedom were given some used and some new radios. At that time the buildings were still under construction and so both the security and valet team and Fortified Freedom areas were far from ideal.
138. The Tribunal concludes that the communication to existing staff about Fortified Freedom’s role and reporting structures was inadequate. It appeared to the Claimants as unfair and degrading. In this instance, however, the Tribunal conclude that the “reason why” Fortified Freedom were treated differently is that they were a group of contractors brought in to work for a short space of time, with difference reporting structures and different roles. The reason was not race/nationality and so the Claimants’ complaints fail. To further test this conclusion the Tribunal have also considered whether the Claimants would have been treated any differently if they had white or English employees in their group, and the Tribunal concludes that they would not have been. These complaints therefore fail and are dismissed.

Employment Judge **Burge**

Date: 23 May 2023

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