RESERVED JUDGMENT

EMPLOYMENT TRIBUNALS

BETWEEN: Mr R Hussain **and** Lifeways Community Care limited

Claimant **Respondent**

Heard at: Leeds

On: 12-16 June 2023

Before: Employment Judge Deeley, Mrs P Pepper and Mr M Lewis

Representation:

Claimant: Mr K Andani (legal representative)

Respondent: Mr J Hurd (Counsel)

RESERVED JUDGMENT

1. The claimant's claims of:

   1.1 Detriment because of protected disclosure under s48 of the Employment Rights Act 1996;

   1.2 Automatically unfair constructive dismissal (protected disclosure) under s103A of the Employment Rights Act 1996; and

   1.3 Direct race discrimination under s13 of the Equality Act 2010;

   fail and are dismissed.

RESERVED JUDGMENT

REASONS

INTRODUCTION

Tribunal proceedings

1. This claim was case managed during preliminary hearings:

   1.1 10 May 2022 by Employment Judge Martin;

   1.2 22 August 2022 by Employment Judge Lancaster, during which the parties agreed a draft list of issues (subject to an order requiring the claimant clarifying his alleged protected disclosure); and

   1.3 5 January 2023 by Employment Judge Maidment, during which the protected disclosure was clarified as being a report that the claimant said he made on or around 15 October 2021 to the CQC via their website.

2. The claimant was represented at each of the preliminary hearings by Mr Andani. I note that the final hearing of this claim was originally due to take place starting on 30 January 2023, but was postponed due in part to the claimant's failure to clarify his alleged protected disclosure within the time limit set out by Employment Judge Lancaster at the August 2022 preliminary hearing.

3. We considered the following evidence during the hearing:

   3.1 a joint file of documents and the additional documents referred to below;

   3.2 witness statements and oral evidence from:

      3.2.1 the claimant and the claimant's witnesses:

Name	Role at the relevant time
1) Mr Saddam Malik	Service Manager
2) Miss Shanaz Mais	Support Worker
3) Mrs Pat Simpson	Team Leader

      3.2.2 the respondent's witnesses:

Name	Role at the relevant time
1) Mrs Joanne Nelson	HR Manager
2) Mrs Paula Smith	Service Manager
3) Mr Richard Kenney	Area Manager

4. The claimant's witness statement did not contain any evidence regarding time limit issues. The Tribunal asked supplemental questions regarding the time limit issues of the claimant before cross-examination started, with the respondent's consent.

RESERVED JUDGMENT

5. The claimant and the respondent both provided additional disclosure documents during the hearing up to the close of witness evidence. Neither party objected to the inclusion of these documents in the hearing file. The claimant sought to disclose further documents after the respondent had given their oral submissions. We refused to permit disclosure of those further documents because they were disclosed too late in the proceedings and did not appear to be relevant to the claimant's claims.

6. We also considered the helpful oral submissions made by both representatives.

Adjustments

7. We asked both parties if they wished us to consider any adjustments to these proceedings and they confirmed that no such adjustments were required. We reminded both parties that they could request additional breaks at any time if needed.

CLAIMS AND ISSUES

8. Employment Judge Lancaster identified the claims and issues at the August 2022 case management hearing. The list of issues was amended by Employment Judge Maidment at the January 2023 case management hearing, to clarify that the claimant's only alleged disclosure was that he made a report to the CQC on or around 15 October 2021 that patients' records had been forged within the respondent.

9. The Tribunal provided the parties with another copy of the list of issues at the start of this hearing, which included a summary of the factual allegations. The respondent requested one amendment to the remedy issues for unfair dismissal (i.e. that the claimant would have been fairly dismissed in relation to subsequently discovered misconduct, i.e. his DBS check information). The claimant did not object to that amendment.

10. The final list of issues that the Tribunal considered is set out below:

Summary of factual allegations

Date	People involved	C's allegations about what was said or done	Type of legal complaint
1. 15 October 2021	CQC, Saddam Malik	The claimant states that he raised a concern through the CQC's website that patients' records had been forged within the respondent.	Protected disclosure
2. 18 October 2021	DK MA (Support Worker for Care2Care,	DK failed to support C at a team meeting, following a dispute between the claimant and MA.	Direct race discrimination

	supporting service user at Hird Road)		
3. Late November (after C resigned) *[as confirmed by C on the first day of the hearing]*	DK, Shanaz Mais (supervisor)	On a separate occasion DK referred to him to another supervisor as a "black bastard".	N/A – C relies on this as background evidence for his discrimination complaint
4. 6 – 15 November 2021	DK	The claimant accepts that he stood down from his contractual post as team leader but asserts that he nonetheless remained employed on a full-time (40 hours) contract as a support worker. He says that the change to a "zero hours contract" at that time was without his knowledge and without any consultation and that he only became aware of the alteration on 15th November, whereupon he resigned.	**Contract change:** Protected disclosure – detriment Employment status **Resignation**: Automatically unfair dismissal Employment status
5. Up to April 2022		The claimant states that he continued to be offered sessional shifts, although he did not attend work after 15 November 2021.	Employment status

The Complaints

1. The claimant is making the following complaints:

    1.1 Automatically unfair constructive dismissal/protected qualifying disclosure detriment;

    1.2 Direct race discrimination about the following:

        1.2.1 Not being properly supported by his manager in a meeting on 18th October 2021.

The Issues

2. The issues the Tribunal will decide are set out below.

1. Employment status

1.1 Was the claimant continuing as an employee of the respondent within the meaning of section 230 of the Employment Rights Act 1996 between 6th November and 15th November 2021?

1.2 Or, was the claimant between these dates a worker of the respondent within the meaning of section 230 of the Employment Rights Act 1996?

1.3 The claimant accepts that he stood down from his contractual post as team leader but asserts that he nonetheless remained employed on a full-time (40 hours) contract as a support worker. He says that the change to a "zero hours contract" at that time was without his knowledge and without any consultation and that he only became aware of the alteration on 15th November, whereupon he resigned.

1.4 The respondent asserts that upon his standing down there were no full-time support worker posts available and that the Claimant was therefore re-engaged only as a casual/sessional worker.

1.5 Was the claimant continuing as an employee of the respondent within the meaning of section 230 of the Employment Rights Act 1996 between 15th November 2021 and the date of the exit interview in December 2021?

1.6 Or, was the claimant between these dates a worker of the respondent within the meaning of section 230 of the Employment Rights Act 1996?

1.7 Although the claimant submitted an unequivocal letter of resignation with immediate effect on 15th November 2021, he asserts that he continued to be offered sessional shifts. Although he did not actually ever attend to work any of these shifts he says that because he was still on occasions contacted by the respondent about work matters there was effectively an agreed recission of his resignation so that he continued to regard himself as being employed and entitled to his full salary. This continued until the date of the exit interview arranged following his letter of resignation, at which he asserted that the failure to pay him at all since 15th November was a fundamental breach of contract so that he "resigned" again.

1.8 The respondent asserts that although it wished the claimant to reconsider his "resignation" he declined to do so, and did not ever in fact work after 15th November 2021

2. Time limits

2.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 17th November 2021 may not have been brought in time.

2.2 The discrimination complaint in respect of 18th October 2021 was therefore not made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

2.2.1 was the claim made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

2.2.1.1 Why were the complaints not made to the Tribunal in time?

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

2.3 Was the unfair dismissal / detriment complaint made within the time limit in section 111 / 48 / 23 etc of the Employment Rights Act 1996? The Tribunal will decide:

2.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination / act complained of?

2.3.2 The detriment, being the alleged unilateral change to a zero hours contract effected on 6th November and of which the Claimant in any event became aware on or before 15th November 2021, is out of time.

2.3.3 If the effective date of termination was 15th November 2021 the unfair dismissal claim will similarly be out of time. If it was a date in December 2021, it will be in time.

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

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

3. Protected disclosure

3.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996?

From EJ Maidment's PH summary of 5/1/23 (paragraph 10):

The sole protected disclosure relied upon is said to have been the claimant on or around 15 October 2021 raising a concern through the CQC's website that patients records had been forged within the respondent. When the claimant submitted his concerns electronically, no record was generated or retained by him of this disclosure. It is the claimant's case that the information he provided to the CQC, as a prescribed person, tended to show in his reasonable belief that there had been a breach of health and safety i.e. patient safety. Furthermore, he contends that he reasonably believed such disclosure to be in the public interest.

The Tribunal will decide:

3.1.1 Did the claimant make a report to the CQC on or around 15 October 2021? If so, what did the claimant write?
3.1.2 Did he disclose information?
3.1.3 Did he believe the disclosure of information was made in the public interest?
3.1.4 Was that belief reasonable?
3.1.5 Did he believe it tended to show that:
3.1.5.1 a person had failed, was failing or was likely to fail to comply with any legal obligation; and/or
3.1.5.2 the health or safety of any individual had been, was being or was likely to be endangered?
3.1.6 Was that belief reasonable?

3.2 If the claimant made a qualifying disclosure, the respondent accepts that it was made to a 'prescribed person' (i.e. the CQC) for the purposes of s43F of the Employment Rights Act 1996.

4. Detriment (Employment Rights Act 1996 section 48)

4.1 Did the respondent do the following things:

4.1.1 Without any consultation changed the contract to a zero hours contract?

4.2 By doing so, did it subject the claimant to detriment?

4.3 If so, was it done on the ground that he made a protected disclosure?

5. Remedy for Protected Disclosure Detriment

5.1 What financial losses (if any) has the detrimental treatment caused the claimant?

5.2 If not, for what period of loss should the claimant be compensated?

5.3 What injury to feelings has the detrimental treatment caused the claimant and how much compensation should be awarded for that?

5.4 Has the detrimental treatment caused the claimant personal injury and how much compensation should be awarded for that?

5.5 Is it just and equitable to award the claimant other compensation?

5.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

5.7 Did the respondent or the claimant unreasonably fail to comply with it?

5.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

5.9 Did the claimant cause or contribute to the detrimental treatment by their own actions (ie by stepping down from his substantive post so necessitating a variation of contract in any event)and if so would it be just and equitable to reduce the claimant's compensation? By what proportion?

5.10 Was the protected disclosure made in good faith?

5.11 If not, is it just and equitable to reduce the claimant's compensation? By what proportion, up to 25%?

6. Unfair dismissal

6.1 Was the claimant dismissed?

[Constructive dismissal]

6.1.1 Did the respondent do the following things:

6.1.1.1 without any consultation DK changed the claimant's contract to a zero hours contract with effect from 7 November 2021?

6.1.2 Did that breach a continuing full time contract of employment, the claimant having already stood down from his substantive post as team leader contract?

6.1.3 Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

6.1.4 Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

6.1.5 The Claimant denies that he was ever in fact required to attend for drug testing on 15th November 2021. If he was required to do so, but failed to attend, that would provide an obvious potential real reason for his resignation.

6.1.6 Did the claimant affirm the contract before resigning? The Tribunal will need to decide whether the claimant's words or actions showed that they chose to keep the contract alive even after the breach.

6.1.7 The Claimant's own case is that he did continue in "employment" but only resigned again upon not payment of wages after 15th November 2021. Did that failure to pay when the Claimant did not actually attend at work, constitute a fundamental breach of contract?

6.2 If the claimant was dismissed, what was the reason or principal reason for dismissal - i.e. what was the reason for the breach of contract?

6.3 Was the reason or principal reason for the breach of contract that the claimant made a protected disclosure? *NB because the claimant does not have 2 years' qualifying service he will have to prove that the reason for the change in terms and conditions was in fact because he had made a protected qualifying disclosure, and not, for instance, that it reflected the voluntary demotion to a support worker only.*

If so, the claimant will be regarded as unfairly dismissed.

6.4 Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant?

7. Remedy for unfair dismissal

7.1 If there is a compensatory award, how much should it be? The Tribunal will decide:

7.1.1 What financial losses has the dismissal caused the claimant?
7.1.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?
7.1.3 If not, for what period of loss should the claimant be compensated?
7.1.4 Is there a chance that the claimant would have been fairly dismissed anyway for some other reason, namely:
7.1.4.1 the subsequently discovered misconduct found proven against him in his absence following resignation;
7.1.4.2 the failure to attend a drugs test; and/or
7.1.4.3 the matters disclosed as part of the claimant's DBS check?
7.1.5 If so, should the claimant's compensation be reduced? By how much?
7.1.6 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?
7.1.7 Did the respondent or the claimant unreasonably fail to comply with it by [specify alleged breach]?
7.1.8 If so is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

8. Direct race discrimination (Equality Act 2010 section 13)

8.1 The claimant is black.

8.2 Did the respondent do the following things:

8.2.1 The claimant not being properly supported by his manager, DK, in a meeting on 18th October 2021.

8.3 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

8.4 If so, was it because of colour?

8.5 The Claimant will seek to prove as a fact that on a separate occasion DK referred to him to another supervisor as a "black bastard" from which it

could be inferred that she was directly discriminating against him by failing to support him.

9. Remedy for discrimination

9.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

9.2 What financial losses has the discrimination caused the claimant?

9.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

9.4 If not, for what period of loss should the claimant be compensated?

9.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

9.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

9.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

9.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

9.9 Did the respondent or the claimant unreasonably fail to comply with it?

9.10 If so is it just and equitable to increase or decrease any award payable to the claimant?

9.11 By what proportion, up to 25%?

9.12 Should interest be awarded? How much?

RESERVED JUDGMENT

FINDINGS OF FACT

Context

11. This case is heavily dependent on evidence based on people's recollection of events that happened some time ago. In assessing the evidence relating to this claim, we have borne in mind the guidance given in the case of *Gestmin SGPS -v- Credit Suisse (UK) Ltd* [2013] EWHC 3560. In that case, the court noted that a century of psychological research has demonstrated that human memories are fallible. Memories are not always a perfectly accurate record of what happened, no matter how strongly somebody may think they remember something clearly. Most of us are not aware of the extent to which our own and other people's memories are unreliable, and believe our memories to be more faithful than they are. External information can intrude into a witness' memory as can their own thoughts and beliefs. This means that people can sometimes recall things as memories which did not actually happen at all.

12. The process of going through Tribunal proceedings itself can create biases in memories. Witnesses may have a stake in a particular version of events, especially parties or those with ties of loyalty to the parties. It was said in the *Gestmin* case:

    "Above all it is important to avoid the fallacy of supposing that because a witness has confidence in his or her recollection and is honest, evidence based on that recollection provides any reliable guide to the truth."

13. We wish to make it clear that simply because we do not accept one or other witness' version of events in relation to a particular issue does not mean that we consider that witness to be dishonest or that they lack integrity.

Background

14. The events set out in these findings of fact took place against the backdrop of the Covid-19 lockdowns in the UK. We note that the care sector faced multiple challenges during this time, particularly around staffing.

15. The respondent provides supported living services and residential homes to vulnerable adults with complex needs in the UK.

16. The respondent employs around 10,500 staff across the UK, including at the relevant time:

Name	Role at the relevant time
1) DK	Service Manager (Area 10) and claimant's line manager
2) Mr Saddam Malik	Service Manager (Area 10)
3) Mrs Paula Smith	Service Manager (Area 10)
4) Miss Shanaz Mais	Support worker (Area 10)
5) Mrs Pat Simpson	Team Leader (Area 10)
6) SL	Area Manager (Area 10 - Halifax)

Name	Role at the relevant time
7) SH	Area Manager (Area 18 – North Yorkshire)
8) Mr Richard Kenney	Area Manager (Castleford) and disciplinary officer
9) Mrs Joanne Nelson	HR Manager for Region 2 (Northern England and Scotland)
10) Mr Alan Smith	Regional Director for Region 2
11) Mr Charles Coney	Chief Operating Officer
12) Mr Justin Tydeman	Chief Executive Officer

17. We note that DK, SL and SH are no longer employed by the respondent.

18. SL and SH had dual registration with the CQC as the registered managers for Area 10 (known as the Halifax area, but which also included the Bradford services where the claimant worked) and Area 18 (North Yorkshire). They frequently covered each other's roles during the claimant's employment with the respondent.

19. The claimant was initially engaged as a Support Worker on a zero hours basis, following an interview with the respondent in early June 2021. The claimant said that he was not interviewed in person but could not recall if he was interviewed remotely. We concluded that the interview took place online because the detailed handwritten interview notes referred to several matters that were specific to the claimant, including matters relating to his DBS check.

20. The claimant was not given a copy of his contract. However, he did provide his DBS check documents to the respondent on 31 August 2021. The claimant then exchanged emails with Mrs Smith on 1 September 2021. Mrs Smith stated that she would risk assess his DBS check and asked if he would be working at Riding Gardens or at Mr Malik's service. Mrs Smith approved the claimant's DBS check in September 2021 and sent it to the respondent's recruitment officer, who forwarded it on to the Area Manager. Mrs Smith checked with SH whether the claimant's DBS check had been approved and SH confirmed that it had. SH did not seek further sign off of the DBS check risk assessment from Mr Smith (Regional Director), which was normally required under the respondent's internal processes.

21. However, the claimant did not in fact work any shifts as a Support Worker for the respondent at any time between June and October 2021.

22. Miss Mais was a Team Leader in DK's team. However, she wished to step down from the Team Leader role to become a Support Worker. DK discussed this with Mr Malik and Mr Malik told DK that the claimant would be keen to apply for the role. We accept the claimant's evidence that he was appointed by DK to the role of Team Leader with effect from 4 October 2021 without any interview, although he did have a brief discussion with DK regarding the role. We were provided with

typed interview notes in the hearing file, however we concluded that these were forged because:

22.1 both the claimant and Miss Simpson (who was named as an interviewer) said that no interview took place; and

22.2 some of the contents of the typed interview notes were inconsistent with the handwritten notes from the claimant's June 2021 interview.

Team Leader role

23. The claimant was not provided with a contract of employment for his Team Leader role. The Team Leader contract that was included in the hearing file was dated 17 November 2021 (i.e. after the claimant resigned), electronically signed by HR and was not sent to or signed by the claimant.

24. However, it is common ground that the claimant's first shift was on 7 October 2021 and that the key terms of his Team Leader role included:

24.1 that he was a permanent member of staff, reporting to DK; and

24.2 that he would be paid for working basic hours of 37.5 hours per week at the rate of £9.50 per hour.

25. The main services that the claimant worked at as a Team Leader during October and November 2021 were all based on the western side of the Bradford area and included:

25.1 **Reevylands** - a residential home in Wibsey, around 35 minutes' drive from the claimant's home. X was the only service user living at Reevylands at that time;

25.2 **Hird Road** – a residential home in Low Moor with facilities for four service users. (MA, an employee of a third party care agency, provided personal services to one of the four service users); and

25.3 **Oaks Lane** – a residential home in Allerton with three users.

Each of these was called a 'service' and was managed by DK in her role as Service Manager.

26. DK also managed three other services. Mrs Simpson was the Team Leader for the other services that DK managed.

27. Mr Malik and Mrs Smith were also Service Managers in Area 10. The claimant did not work at the services that either of them managed during his employment.

28. The claimant carried out shifts as a Team Leader for the respondent for around one month in total. The respondent disclosed the claimant's timesheets at the Tribunal's request during the hearing. We have summarised the timesheets in the table below because it is relevant to our findings of fact on several issues relating to this claim.

Date	Location (rota)	Hours worked	Notes
OCTOBER 2021			
Thursday 7	Not stated	9am – 4pm	**Training**
Friday 8	Not stated	9am – 4pm	**Training**
Saturday 9	Not stated	9am – 4pm	**Training** The claimant states that this was the first time that he met DK.
Sunday 10	Reevylands	10am – 5pm	
Monday 11	Office	9am – 4.30pm	
	Reevylands	7pm – 8pm	
Tuesday 12	Hird Road	10am – 2.30pm	
	Reevylands	2.30pm – 10pm	The claimant also received a sleep unit based payment.
Wednesday 13	Reevylands	7am – 8am	
	Hird Road	3pm – 10pm	The claimant also received a sleep unit based payment.
Thursday 14	Hird Road	7am – 10am	
	Reevylands	10am – 10pm	The claimant also received a sleep unit based payment.
Friday 15	Reevylands	7am – 10am	
	Reevylands	7pm – 8pm	
Saturday 16	Reevylands	3pm – 9pm	
Sunday 17	N/A		
Monday 18	Hird Road	1.30-3.30pm	Team meeting at Hird Road
Tuesday 19	Reevylands	2pm – 10pm	The claimant also received a sleep unit based payment.
Wednesday 20	N/A		
Thursday 21	N/A	Team Meeting	10am – 12pm
	Reevylands	2.30pm – 10pm	The claimant also received a sleep unit based payment.
Friday 22	N/A		
Saturday 23	Reevylands	11am – 10pm	

Date	Location (rota)	Hours worked	Notes
Sunday 24	Oaks Lane	9pm – 10pm	The claimant also received a sleep in payment.
Monday 25	N/A		
Tuesday 26	Reevylands	10am – 10pm	The claimant also received a sleep unit based payment.
Wednesday 27	Oaks Lane	9am – 5pm	
Thursday 28	N/A		
Friday 29	Oaks Lane	3pm – 10pm	The claimant also received a sleep in payment.
Saturday 30	Oaks Lane	7am – 1pm	
Sunday 31	Oaks Lane	12pm – 10pm	The claimant also received a sleep in payment.
NOVEMBER 2021			
Monday 1	Oaks Lane	7am – 10pm and 3pm – 10pm	The claimant also received a sleep in payment.
Tuesday 2	Oaks Lane	7am – 10pm	
	Reevylands	Sleep unit only	The claimant received a sleep unit based payment.
Wednesday 3	Oaks Lane	3pm – 10pm	
Thursday 4	N/A		
Friday 5	N/A		
Saturday 6	Oaks Lane	10am – 8pm	
No further shifts worked after Saturday 6 November			

29. At the time of these events, the claimant lived north west of Bradford. DK lived north east of Bradford, approximately ten miles from the claimant's home. The services where the claimant worked were all based to the west of Bradford. The claimant's witnesses stated that DK did not drive and that she forced several members of staff to pick her up, take her to the respondent's services, 'chauffeur' her between the services and drop her off at her home at the end of the working day. This required staff to drive significant additional distances in order to assist DK.

30. We note in terms of the timeline of events:

    30.1 the claimant stated that the first time he met DK was at the Reevylands service on Saturday 9 October 2021;

30.2 the claimant worked his first shift for the respondent (other than training) at the Reevylands service on Sunday 10 October 2021;

30.3 the claimant's first shift at the Hird Road service was on Tuesday 12 October 2021; and

30.4 the claimant did not work at Oaks Lane until Sunday 24 October 2021.

31. We accept Mr Malik's and Mrs Simpson's evidence that the claimant and DK had a good working relationship for the first two weeks that they worked together.

32. Mr Malik stated when asked by the Tribunal when DK's 'campaign' against the claimant (as he described it) started:

"She really liked the idea of the claimant at the start because he was a car driver…I'd say after about 2 weeks from when he started job role – he started confiding in me."

33. Mrs Simpson stated during cross-examination:

"When the claimant first came on board with Lifeways, DK was very happy. I don't know what changed – but it changed after two weeks.

…

DK made it clear that the claimant had queried some of the work practices and some of how documents were presented."

34. We note that the claimant first worked for the respondent on Thursday 7 October 2021 and that he and DK first met on Saturday 9 October 2021. We have concluded that their good working relationship continued until around Thursday 21 to Saturday 23 October 2021 based on Mr Malik and Mrs Simpson's evidence.

35. The claimant was questioned during cross-examination regarding the reasons for the deterioration in his working relationship with DK. He gave several reasons, including:

"As soon as I've come in, I started challenging practices. Things needed to be done – I looked at old CQC reports [so that] the shifts that I was covering for services were not to get compromised…

It was a mixture of my race, my belief, my work ethic that she did not like – I was questioning DK why is this out of date etc…

The moment it started was when she forced me to pick her up – I was like a taxi all day long. Not only pick up DK but to go to each and every service being her chauffeur. I asked about mileage [forms] *– she said there isn't one, you don't fill it out. At that point – DK thought she would get rid of me."*

36. The claimant also stated at paragraph 7 of his witness statement that:

"My relationship with DK was a difficult relationship because I was the [Team] *Leader and as such responsible for a team of individuals. DK, on the other hand, would*

make plans with individuals under my supervision without informing me and thereby marginalizing me from my direct reports. Effectively, this would undermine my authority and reduced my performance at work."

37. In addition, Miss Simpson stated that DK wanted the claimant to work shifts so that she and her husband (who also worked for the respondent) could work additional shifts at Oaks Lane.

Discriminatory language - DK

38. The claimant alleged as part of his list of issues that DK had referred to him as a *"black bastard"* during a conversation with Miss Mais. The claimant clarified during his evidence that Miss Mais told him that DK had made that comment in late November 2021, i.e. after his resignation email on 15 November 2021.

39. Other witnesses also reported DK using offensive and racially discriminatory language regarding employees of Asian ethnicity, including the claimant, MA and Mr Malik. For example:

39.1 Mr Malik stated that DK and he were friends. Mr Malik said that he and DK *"used to banter with each other"*. He stated that: *"DK would call me a 'black cunt' quite often – I didn't think she would say it to anyone else. We had that relationship."*

39.2 Miss Simpson stated that:

39.2.1 DK referred to colleagues of Asian ethnicity as 'black'. Miss Simpson said that DK never made similar comments regarding colleagues of African ethnicity;

39.2.2 DK used to call MA a *"black bastard"*;

39.2.3 when they had a discussion after the meeting on 18 October 2021 (which Miss Simpson did not attend), DK called the claimant a *"cocky bastard"* and then said *"the black bastard, he thinks he knows it all"*;

39.2.4 DK also referred to Mr Malik as a *"black bastard"* and a *"Paki piece of shit"*;

39.2.5 Miss Simpson complained about DK's language and told DK that she was mixed race. DK said: '*I didn't know*'.

39.3 Miss Mais said that DK referred to both MA and the claimant as a 'black bastard' all the time. Miss Mais said she confronted DK about this language. She pointed out to DK that she was mixed race, to which DK replied: *"I don't see you like that"*. Miss Mais stated that it was colleagues who were *"Asian Pakistanis"* that DK made offensive comments about.

40. We have concluded that DK regularly made racist comments about several members of staff of Asian ethnicity, including the claimant and Mr Malik. She also made similar comments about MA. These comments are highly offensive and racially discriminatory. Many of the witnesses stated that the respondent had a 'zero

tolerance' policy towards racist language. However, it is clear that DK used such language on a regular basis and that it was not addressed by the respondent.

41. We note that the claimant has not brought a complaint of direct discrimination and/or harassment relating to the racist comments made about him by DK to Miss Mais, Mr Malik or Miss Simpson. The claimant has been represented since the first preliminary hearing by his current representative. The claimant could have applied to bring such a claim at any point during these proceedings but has chosen not to do so, despite being given the opportunity to provide further particulars of claim and opportunities to comment on the list of issues to be decided at this hearing.

Meeting on 18 October 2021

42. The claimant stated that DK did not 'properly support' him at a team meeting on 18 October 2021 during an argument with a third party employee, MA. The claimant contends that DK failed to support him due to his race. He relied on a hypothetical comparator for the purposes of this complaint.

43. We note that MA was employed by Care 2 Care and not by the respondent. Care 2 Care were contracted to provide personal service to a single service user (whom we will refer to as 'Y' at the Hird Road residential home). MA had worked at the Hird Road residential home for around six years before the claimant worked for the respondent. The respondent did not have any line management responsibility for MA, who reported directly to Care 2 Care. We accept Mr Malik's evidence that he telephoned Care 2 Care to complain about MA's conduct and behaviour, after Mr Malik heard of the incident on 18 October 2021.

44. We also accept Miss Mais' evidence that MA had previously been aggressive towards both herself and to DK. Miss Mais stated:

    44.1 MA was 'aggressive' towards her and that she had put in a grievance about this; and

    44.2 DK was 'scared' and 'frightened' of MA. She said that DK *"would not confront MA. That's why he was allowed to get away with certain things"*.

45. Mr Malik also said that *"I know what MA is like – he's horrible – I've worked with him"*. He also stated:

    "I think there was something not right between DK and MA – something going on between them two. She had his back because he knew something no one else did. She was very cautious with him – she always defended him when I raised allegations…She needed MA on side to support her."

46. We note in relation to the arrangements for the meeting on 18 October 2021

    46.1 the claimant had only worked four shifts in total at Hird Road on 12 October, 13 October (two shifts) and 14 October before 18 October 2021;

    46.2 the claimant discussed working arrangements at Hird Road with DK because he had only just started working for the respondent. The claimant arranged (with

DK's agreement) to hold a team meeting at Hird Road on Monday 18 October 2021. The claimant stated during cross-examination that:

"Having come in, reviewed certain files, spoke to certain staff – I was a new Team Leader. I'd done some shifts at the service as well. I was recognising things needed to be addressed as a Team Leader would. I spoke to DK and set up a team meeting – it was all about introduction, knowing where we're at and where we need to be."

46.3 the claimant was not working a shift at Hird Road on 18 October 2021 – he attended Hird Road in order to be present at the team meeting;

46.4 the attendees at the meeting included:

46.4.1 the claimant, DK and MA;

46.4.2 SS, AO and at least two other members of staff (T and K).

47. The claimant's account of the meeting conflicts with written statements provided by MA, SS and AO in November 2021 and during the investigation into the claimant's grievance. However, it is common ground that

47.1 there had been no previous arguments or altercations between the claimant and MA;

47.2 MA did not attend all of the meeting on 18 October 2021;

47.3 the claimant sent AO to fetch MA to join the meeting; and

47.4 there was some conflict between the claimant and MA during the meeting on 18 October 2021.

48. The claimant stated in his witness statement:

"I recall one incident where a staff meeting organized by myself on 18 October 2021, at [Hird Road]. During that meeting, an Agency worker known as [MA] verbally abused and threatened me, in the presence of [DK]. I sought protection from [DK] but [DK] remained silent in the face of this onslaught of abuse.

During the same meeting, [DK] stated that [MA] is not obliged to share his notes with the support staff and that he can electronically send his daily notes to the company, thereby side stepping the [Team] Leader, namely myself."

49. The claimant also set out his version of events on 18 October 2021 in his email of 15 November 2021 (with our underlining):

"I WOULD SPEAK TO MY MANAGER [DK] REGARDING EACH SERVICE AND A LSO TALK ABOUT PLAN OF ACTION OF WHAT NEEDS TO BE PRIORITISED, DONE & COMPLETED. [DK] ON SEVERAL OCCASIONS WOULD AGREE WITH ME ON THIS BUT ULTIMATELY DO THE OPPOSITE. SHE WOULD CONTACT SUPPORT STAFF SEGREGATING ME, MAKE ARRANGEMENTS WITHOUT MY KNOWLEDGE.

A PRIME EXAMPLE OF THIS WAS AT A STAFF MEETING WHICH I ORGANISE D WITH STAFF AT [HirdRoad] ON MONDAY 18TH OCTOBER 2021. IN THAT ME

ETING THERE WAS AN AGENCY MEMBER OF STAFF NAMED [MA] WHO CA ME IN TO THE MEETING AND INFRONT OF THE WHOLE STAFF TEAM INCLUDING [DK] VERBALLY ABUSED ME AND THEN THREATENED ME MANY TIMES. IN THIS MEETING I SPOKE OUT TO [DK] SAYING "ARE YOU GOING TO LET HIM THREATEN AND VERBA LLY ABUSE ME LIKE THIS?" [DK] IN FRONT OF THE WHOLE STAFF TEAM DID NT REPLY, JUST IGNORED ME AND DIDNT DO ANYTHING TO STOP THIS SIT UATION FROM ESCALATING INSTEAD SHE JUST ALLOWED IT TO HAPPEN R IGHT IN FRONT OF HERE.

[DK] DID SAY IN THE MEETING THAT SHE HAS SPOKEN BOTH TO [SH] AND [SL] AND THEY HAVE SAID [MA] THE AGENCY WORKER IS NOT OBLIGED TO SHARE HIS DAILY NOTES WITH THE SUPPORT STAFF.

[MA] SENDS HIS DAILY NOTED ELECTRONICALLY TO HIS COMPANY THAT HE WORKS FOR. NOW I DO NOT BELIEVE THIS IS TRUE AND WITH THIS THE RE ARE MANY SAFEGUARDING CONCERNS AND BREACHES OF SEVERAL P OLICIES AND PROCEDURES BUT I WILL BE ESCALATING THIS TO CQC AND OTHER LEGAL PARTIES.

I WALKED OUT CRYING. I BELIEVE I REMAINED COOL, CALM & COLLECTIVE AND LATER [DK] PRAISED ME FOR THIS BUT THEN I QUESTIONED [DK] RE GARDING HER LACK OF INPUT IN THE MEETING, ATTRIBUTES AND HER D UTY OF CARE OVER ME. I TOLD [DK] I WAS GOING TO INSTANTLY PUT A GR IEVANCE WITH WHAT HAD HAPPENED. [DK] REASSURED ME THAT SHE WIL L SPEAK TO [SL] IN THE HALIFAX OFFICE. LATER THAT EVENING [DK] CALL ED ME AND ASSURED ME THAT [SL] HAS BEEN MADE AWARE AND HE IS DE ALING WITH IT. I THEN REFUSED TO WORK AT THAT SERVICE UNTIL THIS MATTER WAS NOT DEALT WITH IN AN APPROPRIATE, PROFESSIONAL & EF FECTIVE MANNER. [DK] AGREED AND I ACTUALLY FEARED FOR MY LIFE G OING INTO THAT SERVICE WITH THAT MEMBER OF STAFF.

THE AGENCY WORKER [MA] INFORMED ME ON THE FIRST FEW DAYS OF W ORKING FOR LIFEWAYS THAT "I HAVE ALOT OF THINGS THAT I CAN PUT A GAINST [DK]. IV PICKED HER UP FROM HOME, DROPPED HER OFF. IV SEEN HOW SHE PLAYED THE SYSTEM AND BEND THE RULES. IF I WANA SCREW HER I CAN SCREW HER WITH MY EYES CLOSED. IM UNTOUCHABLE HERE AND IF YOU HAVE ANY PROBLEMS DONT HESITATE IN APPROACHING ME." [sic]

50. The claimant stated during the grievance investigation meeting (with our underlining):

RH "You've come in, not been here long and got a lot to say about me". I had only spoken to [DK] about him. She has breached confidentiality. I asked him to calm down and he didn't and [DK] was happy to let it continue as they are very close and he picks her up and drops her off. Quite a few people have had a few run ins. Shaz (acting team leader) and Saddam Malik. [DK] gives him instructions and you just do what you need to do. "Do you know who the fuck I am?".

JH What was his reason for this?

RH All because I had a lot to say about this.

JH How did he threaten you? What made you feel threatened?

RH What he was saying and how he was saying it.

JH What was his reason for this?

RH Me asking him to complete notes and asking about him

JH What staff members were at the meeting?

RH A lot of staff.

JH Was this meeting recorded and minutes taken?

RH The minutes were handwritten and then handed to [DK] as she requested this and nothing about the altercation was put in. As I wanted to keep an eye on [MA] as I feared for my life. I did not raise my voice and [DK] praised me when alone for the handling of the situation. She also spoke to Pat about it and assured me she had spoken with Scott and he was dealing with this.

What I thought were her truths were lies. On my first day, [MA] was pushy. "The walls have ears". He sat in the office with me and talked about having control over [DK] and said "I have too much against her". "I do so many favours for her". He always talked about other staff (Kirsty) and said he can tell me because "you're a male". I did not appreciate him continuing to call me 'bro' and thought it was not professional. My first impression, and from what came from [DK], was that I needed to watch him.

JH Has there ever been previous aggressiveness towards yourself prior to this incident?

RH no"

51. We have also considered the statements from MA, SS, AO provided by email in November 2021 and as part of the grievance investigation. We note that:

51.1 AO and SS (who were both support workers employed by the respondent) stated that the meeting was arranged because staff had informed DK that they were unhappy with the changes to paperwork that the claimant was proposing and other matters (e.g. hoist training);

51.2 SS said that she was unhappy that the claimant tried to order her to take the service users for a trip when she did not have business insurance. She says that this issue was raised by another member of staff with the claimant at the meeting and that the meeting then became heated;

51.3 MA states that he left the meeting because they were dealing with matters that did not relate to the service user that his employer was required to care for. He heard shouting coming from downstairs (where the meeting took place) before AO fetched him;

51.4 AO was sent to fetch MA because he was not present throughout the meeting;

51.5 MA, SS and AO all state that DK brought the meeting to a close.

52. We note that Miss Mais stated that she had faced problems when working with DK and MA and that was why she stepped down from the Team Leader role (which the claimant subsequently was employed in). She stated during her oral evidence:

"I was a Team Leader originally, I stepped down – that's where Rashid come into it – I stepped down because of bullying and everything going on at service. I tried to implement things which were better for service users and staff - I was hitting a brick wall with MA and DK. I was trying to make good changes and I was just getting fight all the time – they didn't like change – so I stepped down.

…[The claimant] was facing the same problems – it all stemmed from MA."

53. Mr Malik said that after the meeting on 18 October 2021, DK spoke to him about the meeting. He said:

"She said she felt really sorry for Rashid – she knew I would speak to Rashid, she was being careful. She said she tried to support and defend him."

54. We concluded that:

54.1 the claimant spoke with DK and asked if he could arrange a team meeting at Hird Road, to deal with working arrangements including the paperwork at the service;

54.2 in the meantime, some staff at Hird Road had raised concerns about the changes that the claimant was proposing and other matters;

54.3 we note from the claimant's grievance meeting notes that there had been no prior incidents between the claimant and MA;

54.4 the claimant wanted MA to complete patient notes, but MA was not employed by the respondent and the claimant did not have line management responsibility for MA;

54.5 part way through the meeting, the claimant and MA had a heated argument regarding the procedures around notes. DK intervened to calm the meeting down;

54.6 as the claimant himself stated, DK did not take MA's side. However, the claimant's view was that DK failed to 'back him up' during his argument with MA;

54.7 DK later told the claimant that he had handled things well and that he did not 'lose his cool'.

55. The claimant has alleged that DK failed to 'properly support' him in the meeting and he has stated that this is an allegation of direct race discrimination. The claimant clarified what he meant by DK's lack of 'proper support' in his further Particulars of Claim sent to the Tribunal by the claimant's representative on 10 November 2022 where the claimant stated at paragraphs 8 and 9 (with our underlining – the words set out below are a direct quote form the claimant's particulars of claim, including his reference to "coloured people"):

"8. To illustrate the point, the Claimant narrates the example of a staff meeting organized by himself on 18 October 2021, at 34 Hird Road, Bradford. During that meeting, an Agency worker known as [MA] *verbally abused the Claimant and threatened the Claimant, in the presence of* [DK]*. The Claimant effectively sought protection from* [DK] *but* [DK] *remained silent in the face of this onslaught of abuse. During the same meeting,* [DK] *stated that* [MA] *is not obliged to share his notes with the support staff and that he can electronically send his daily notes to the company, thereby side stepping the* [Team] *Leader – the Claimant.*

9. The Claimant contends that this cannot be part of Company policy or the Regulator's position because the [Team] *Leader must be given the opportunity to identify training and development issues. He contends that this strategy was designed to cause humiliation and indirectly pass on the message that coloured people lack capacity to supervise."*

56. The claimant therefore alleges that DK did not 'back him up' during the argument with MA in order to:

    56.1 humiliate him; and

    56.2 demonstrate that he lacked capacity to perform his Team Leader role;

57. The claimant states that the reason why DK behaved in this way was because of his race. (The claimant's claim of race discrimination is based on colour and he has described himself as 'black' for the purposes of his race discrimination claim (see list of issues).)

58. We concluded that:

    58.1 on the claimant, Mr Malik's and Mrs Simpson's evidence, the claimant and DK had a good working relationship as at 18 October 2021 (which was within the first two weeks of the claimant's employment);

    58.2 the claimant and DK liaised over the meeting agenda in advance of the meeting;

    58.3 there was no pre-meditated plan by DK and MA regarding the meeting – the claimant sent AO to fetch MA before they had their argument. If he had not done so, the argument would not have taken place;

    58.4 the argument centred on whether or not MA was making proper notes of the tasks that he carried out for the service user. The claimant did not have responsibility for managing MA (who was employed by a different organisation) and they clashed over the issue of keeping notes;

    58.5 DK intervened to calm the meeting down, but she did not instruct MA to comply with the claimant's views on procedures regarding Y's notes;

    58.6 there was no evidence that DK intended that the argument would 'humiliate' the claimant. In fact, she stated afterwards that the claimant had handled things well;

58.7 there was also no evidence that DK was trying to suggest that people of the claimant's race *"lack capacity to supervise"*. In particular, we note that:

58.7.1 it is highly likely that DK would have been aware of the claimant's race at the time he was appointed, given the claimant's name;

58.7.2 we accept that DK used highly offensive racist language regarding the claimant, Mr Malik, MA and other employees of Asian ethnicity and referred to all of them as 'black'. However, DK had previously managed Mr Malik, who was promoted from support worker to Team Leader and again to Service Manager (i.e. the same level as DK) whilst they worked together; and

58.7.3 Miss Mais and Mr Malik gave evidence that DK was 'very cautious' with MA and that she was 'frightened' of him. We also note that Miss Mais had also previously had difficulties with MA and raised a grievance relating to his conduct.

Alleged disclosure

59. The claimant's claim is that on or around 15 October 2021, he made a report to the CQC (via their website) which amounted to a protected disclosure. The claimant stated that:

59.1 Mr Malik was at the claimant's house and sat with him whilst the claimant entered the information into the form on the CQC's website. The report was around one page long;

59.2 the claimant made the report on an anonymous basis, provided a false email address and phone number. As a result, the claimant did not receive an acknowledgement from the CQC of the report made; and

59.3 neither the claimant nor Mr Malik retained a copy of the information entered on the CQC's website.

60. Neither the claimant nor Mr Malik could recall the precise date on which any such report to the CQC was made. They also struggled to recall the contents of the report. The claimant stated during cross-examination:

"I've tried to contact CQC – I have got screenshots on the device of 2021 where I have gone on search engines – on or around Oct/Nov 2021 where I've written 'how long does it take for CQC report' or 'how do you submit to CQC'

The only thing I've got is the time when I've done it and what I put in search engines. The device I was using in 2021 – I tried to keep it alive. But because the SIM card finished, I was not topping it up."

61. Paragraph 15 of the claimant's witness statement stated that his report referred to forged signatures on documents. The claimant's witness statement did not refer to any other concerns that he states were reported to the CQC. The claimant's statement described events how the report was made as set out below:

"Given the above events and incidents, I approached [Saddam] *Malik at some point in October 2021. I told him of what had happened to me and he said that he would assist me to make an anonymous disclosure to the Quality Care Commission. Together we logged on to the website of the Quality Care Commission and made the disclosure of forged signatures."*

62. The claimant stated during his cross-examination that the report also included other matters:

"I raised my concerns about how there was fraudulent things that I'd come across – a lot of corners being cut by management, how my manager was talking about other managers in the service because she didn't know that I knew one of service managers (Mrs Smith) prior to working at Lifeways – I'd worked with Mrs Smith prior to working for Lifeways.

DK said if I don't like anybody, I will get rid of them – whole demeanour of DK of having to pick her up and drop her home on almost a daily basis. I wasn't confident enough to stand up to her. There were a lot of mishaps from DK…

…

I spoke about racial discrim, being racially abused, physically offered a combat fight by a member of staff (MA). Whatever I missed from my grievance – I was very direct and very open with CQC about being racially attacked. When I had put in my letter of grievance – after the grievance it all came out that all this vendetta about pre-meditating.

What I put in the CQC was direct incidents – been racially abused, verbally abused and these are the witnesses. Hence the reason why CQC went into these services – CQC reports a lot of the things I'd raised. On there it states raised by family, friends and colleagues."

63. The claimant also stated during cross-examination that he had made multiple reports to the CQC at other times when Mr Malik was not present. However, he was unable to recall the dates of any of these or the precise number of such reports. We do not accept the claimant's evidence that he had made other reports to the CQC because he did not refer to any other such reports in his pleadings or in his witness statement. In addition, none of the other witnesses gave evidence regarding any such additional disclosures.

64. Mr Malik stated during cross-examination that the report was made in October or November. He could not recall the day on which they met at the claimant's house, but stated that it was around 7pm in the evening.

65. Paragraph 15 of the claimant's statement also said (with our underlining):

"<u>Given the above events and incidents</u>, I approached [Saddam] *Malik at some point in October 2021. I told him of what had happened to me and he said that he would assist me to make an anonymous disclosure to the Quality Care Commission.*

Together we logged on to the website of the Quality Care Commission and made the disclosure of forged signatures."

66. We note that the events and incidents referred to in the paragraphs of the claimant's witness statement leading up to paragraph 15 included events up to the claimant's supervision with AO (a support worker based at Oaks Lane) which the claimant stated took place on 28 October 2021.

67. The claimant also stated during cross-examination that his report to the CQC included a report that DK had forged his signature on documents at Oaks Lane.

68. Mrs Simpson agreed with the claimant stating that the claimant told her that his report to the CQC included:

"Forging signatures – that was in Oaks Lane. It was on paperwork and in files – DK forged a lot of signatures."

69. Miss Simpson thought that the claimant had made a report to the CQC at the end of October 2021:

"I can't give you a specific date - maybe the back end of October".

70. The claimant stated at point 9 of in his email of 15 November 2021 (in which he resigned and raised concerns) with our underlining:

"*AUDIT- <u>THERE WAS A RECENT AUDIT THAT TOOK PLACE AT ONE OF THE SERVICES 41a OAKS LANE</u>. DK DID A SLEEP SHIFT THERE AND CLAIMED THAT SHE SLEPT AT 2AM THAT NIGHT. SHE ACTUALLY WENT THROUGH LITERALLY EVERY FILE FORGING SIGNATURES ON LEGAL BINDING DOCUMENTS AND USING BACKDATED DATES TO CORRESPOND WITH PAPERWORK. <u>I WAS COMPLETELY SHOCKED TO SEE MY NAME AND SIGNATURE BEING FORGED ON MORE OR LESS EVERY LEGAL BINDING DOCUMENT IN FILES AS DK WAS AWARE THAT I WAS STILL WORKING THROUGH THE PAPERWORK AND FILE & DATING, SIGNING IT ACCORDINGLY."</u>*

71. We note from the claimant's timesheets that:

    71.1 the claimant's first shift at Oaks Lane did not take place until Wednesday 27 October 2021. We concluded that it was highly unlikely that the claimant would have had chance to review working practices and arrange a supervision with AO during that single shift;

    71.2 the claimant did not work on Thursday 28 October 2021;

    71.3 on Friday 29 October 2021, the claimant was working until 10pm at Oaks Lane and could not have met with Mr Malik around 7pm that evening; and

    71.4 the earliest that the claimant could have met with Mr Malik after his supervision with AO was Saturday 30 October 2021 (the claimant's shift at Oaks Lane finished at 1pm that day).

72. We have therefore concluded that even if the claimant did make a report to the CQC, the earliest that this could have been made was Saturday 30 October 2021. The

claimant could not have made a report to the CQC on or around Friday 15 October 2021 because:

72.1 he was working at the respondent's services on every evening from Monday 11 to Saturday 16 October 2021 and would not have arrived home in time to meet Mr Malik at around 7pm;

72.2 the claimant states that his report to the CQC included his discovery that DK had forged his signature at Oaks Lane, but the claimant did not work his first shift at Oaks Lane until Wednesday 27 October 2021; and

72.3 the claimant stated in his witness statement that he had had a supervision with AO at Oaks Lane before he made his report to the CQC. We concluded that it was highly unlikely that the supervision would have taken place before Friday 29 October 2021.The claimant worked until 10pm that evening.

73. However, we note that the claimant stated three times in his resignation and concerns email of 15 November 2021 that he was going to report matters to the CQC after sending the email on 15 November 2021 – this implied that he had not already made a report to the CQC. The claimant's email of 15 November 2021 stated (with our underlining):

73.1 in relation to the incident at the meeting on 18 October 2021 (which is considered in more detail later in this judgment):

"[DK] *DID SAY IN THE MEETING THAT SHE HAS SPOKEN BOTH TO* [SH] *AND* [SL] *AND THEY HAVE SAID* [MA] *THE AGENCY WORKER IS NOT OBLIGED TO SHARE HIS DAILY NOTES WITH THE SUPPORT STAFF.* [MA] *SENDS HIS DAILY NOTED ELECTRONICALLY TO HIS COMPANY THAT HE WORKS FOR.*

NOW I DO NOT BELIEVE THIS IS TRUE AND WITH THIS THERE ARE MANY S AFEGUARDING CONCERNS AND BREACHES OF SEVERAL POLICIES AND P ROCEDURES BUT I WILL BE ESCALATING THIS TO CQC AND OTHER LEGAL PARTIES.

73.2 in relation to his medication competency training:

"NOW I AM AWARE THAT MANAGEMENT HAS RISKED THE LIVES OF THE PE OPLE WE SUPPORT HERE. THIS IS AN ESSENTIAL CQC REQUIREMENT, AGAIN I WILL BE LIASING WITH CQC REGARDING THIS AND THE LEGISLATIONS AROUND THIS."

73.3 the claimant concluded:

"I WILL BE TAKING ALL THE COLLATED EVIDENCE TO THE CQC, LOCAL AUTHORITY AND THE MEDIA."

74. The claimant stated when he was cross-examined on his reference to the future tense in this email:

"Because this letter was not to DK – this letter was notifying [the respondent] *- I was angry and upset."*

75. The claimant was also asked why he did not say that he had already raised concerns with the CQC and the claimant replied:

"Because I didn't think that was a legal requirement."

76. The respondent disclosed documents in the hearing file and during the course of this hearing relating to the reports that the CQC received regarding Area 10 during October and November 2021. These documents included:

76.1 an email from the CQC confirming that they did not receive any complaints regarding the respondent's services between 15-18 October 2021;

76.2 a spreadsheet detailing all CQC complaints sent to the respondent.

77. The spreadsheet demonstrates that:

77.1 the CQC informed the respondent of over 25 complaints across all of the respondent's areas between 4 October and 25 November 2021;

77.2 of those complaints, five complaints related to Area 10:

77.2.1 **5 October 2021** – this complaint was raised before the claimant's first shift for the respondent and related to a service that he did not work at;

77.2.2 **19 October 2021** – a complaint stating that a female member of staff was working under the influence of alcohol and was also a drug user;

77.2.3 **8 November 2021** – a complaint stating that a female member of staff was drunk when attending work for a night shift and smoked cannabis;

77.2.4 **9 November 2021** – a complaint from an anonymous person stating that *"Rashid Hussain comes into work all the time smelling of cannabis and with blood shot eyes. He always goes off alone around the corner and the smell is bad when he says he's having a fag, defo not having a fag"*;

77.2.5 **24 November 2021** – a complaint from a different service provider (who ran a social group) that stated that a service user attending the group raised concerns that he was being 'belittled' by the respondent's staff.

78. There were no complaints on the spreadsheet relating to Area 10 between 4 October and 25 November 2021 that alleged that signatures had been forged on documents or of race discrimination.

79. We accept Mrs Nelson's evidence that the CQC required the respondent to investigate and respond to any complaints within five working days:

79.1 the CQC sends the complaints to the respondent's CEO (as the nominated CQC officer for the respondent) and the Quality Alerts team;

79.2 the Quality Alerts team then forward the complaints to the Regional Director for investigation. The respondent had seven regional directors at that time, all of whom reported into Mr Coney (Chief Operating Officer). Mr Smith was the respondent's Regional Director for the North and Scotland at that time;

79.3 Mr Smith would then liaise with the Area Managers to investigate any complaints.

80. The claimant contends that his report to the CQC in October 2021 led to them inspecting the respondent in August 2022 and grading it as 'inadequate'. However, we accept Mrs Nelson's evidence that this inspection in fact related to the North Yorkshire area of the respondent's services, for which SL and SH were dual registered managers. In any event, we find it highly unlikely that the CQC would have waited over nine months before carrying out any inspection arising from a specific report given that they required a response to reports within five working days.

81. We note that the claimant did raise the issue of forged signatures as part of his resignation and concerns email of 15 November 2021, which is considered in more detail later in this Judgment. However, the claimant's email of 15 November 2021 was not sent to the CQC; instead it was sent directly to a HR Advisor for the respondent. The HR Advisor forwarded the email on to SH and Mrs Nelson on the same date, stating:

"Please see below email from Rashid Hussain, he has raised some concerns regarding the service he recently joined. He has also verbally told me on the phone that he would like to resign…

He wanted me to forward this to yourself and the Chief executive as the emails from his personal email address are bouncing back."

82. We have concluded that the claimant did not make a report on the CQC website at any time between 4 October and 25 November 2021. The key reasons for our conclusion that the claimant did not make a report on the CQC website include:

82.1 neither the claimant nor Mr Malik was able to recall any precise date when a report was made to the CQC;

82.2 the claimant pleaded that the report was made on or around 15 October 2021, however during oral evidence he stated that he could not recall the date and that it was submitted at some point in October 2021;

82.3 the claimant stated in his witness statement that the report related to forged signatures. However, he expanded on the concerns that he states he raised in the report during cross-examination but he was not clear on whether those concerns were raised at the time when Mr Malik was present or dates when the claimant said he made further reports to the CQC;

82.4 the claimant expressly stated on three occasions in his email of 15 November 2021 that he would be raising matters with the CQC in the future. At the start of this email, the claimant stated he was resigning with *"immediate effect"*. The email listed the claimant's concerns regarding DK and other matters in detail. We concluded that if the claimant had already reported matters to the CQC by 15 November 2021, then he would have said that he had done so in his email;

82.5 the respondent's spreadsheet of complaints received from the CQC contains a wide range of concerns raised, but none of the entries refers to forged signatures on documents; and

82.6 when the claimant raised concerns in his email of 15 November 2021, the respondent took disciplinary action shortly afterwards in relation to DK. The respondent suspended DK in relation to allegations of gross misconduct, regarding matters including the concerns that the claimant raised regarding forged signatures. DK subsequently resigned in order to avoid undergoing those disciplinary proceedings. We concluded that if the respondent had received a similar report from the CQC in October 2021, they would have commenced disciplinary proceedings at an earlier stage, particularly given that those reports were sent to the respondent's senior managers outside of the claimant's area.

Change from Team Leader to Support Worker role

83. The claimant stated at paragraph 15 of his witness statement:

"Suddenly, my contract of employment had become a zero hours contract and my signature had appeared on the zero hours contract without my knowledge. Effectively, I was demoted from the role of [Team] *Leader to support worker; I say that I was demoted to an inferior position because* [DK] *had secretly changed my contract into a zero hours contract as punishment for a protected disclosure to the Care Quality Commission. I did not sign this document and I have requested a copy of the contract but the Defendant has failed to provide a copy of the contract to me. Once again, I reiterate this request"*

84. However, this part of the claimant's statement conflicted with his resignation and concerns email of 15 November 2021 which stated that the claimant had himself decided to step down from the role of Team Leader to Support Worker, but had not agreed to a change in his working hours from 37.5 hours per week to a zero hours contract (with our underlining):

"FROM THAT MOMENT I THOUGH THIS IS NOW BECOMING A JOKE WITH THE AMOUNT OF DELIBERATE FAILINGS I'D SEEN ALREADY SO I DECIDED TO STEP DOWN FROM A TEAM LEADER TO A SUPPORT WORKER. [DK] *AGR EED THEN LAST WEEK PRIOR TO HER ANNUAL LEAVE WENT INTO THE OFF ICE AND WITHOUT MY CONSENT OR PERMISSION CHANGED MY HOURS FR OM 37.5 TO ZERO CONTRACTED BANK HOURS TO WORK AS BANK STAFF. I STRICTLY DID NOT CONSENT, SIGN ANY DOCUMENT OR GAVE PERMISSIO N FOR ANYONE TO ALTER OR AJUST MY HOURS OR CONTRACT. THIS IS A BREACH OF CONTRACT."*

85. The claimant confirmed during his evidence that he was in fact complaining about the change to his working hours from full time (37.5 hours per week) to a zero hours or bank contract. The claimant stated that he was not complaining about the change of his role from Team Leader to Support Worker.

86. The respondent provided two documents regarding the change in the claimant's role:

86.1 a 'change of contract' form that DK dated as completed and emailed on 2 November 2021. The claimant had not seen a copy of this form and his signature was not required on the form; and

86.2 a new Support Worker contract which HR signed on 18 November 2021 (i.e. after the claimant's resignation). The respondent did not send a copy of this contract to the claimant.

87. The claimant produced screenshots of WhatsApp messages, all of which were undated save for one message which was dated 3 November 2021. He was unable to retrieve the original messages. The undated messages stated:

87.1 Claimant: *"*[Can't] *afford 2 be off 4 a week. If I had known then I wudnt go from 37.5 to zero contracted hours"*

87.2 DK: *"don't know what to do as* [SL] *and you have been in same situation, its cause you stepped down and* [H] *started as a support worker"*

87.3 Claimant: *"Ok il call office 2moro as I can't afford 2 be off for a week so I'd rather stick to my 37.5 contracted hours"*

87.4 DK: *"Don't know what they will as change of details was done yesterday for you stepping down, so I can't change you back team leader as they will think I'm messing them around, I'll send email to* [SL] *to see what can be done"*

88. The change of details form that DK states she completed 'yesterday' in her last message was emailed by DK on 2 November 2021. The claimant did not see a copy of this form because it was sent by DK to HR. In addition, the claimant provided copies of further messages that were dated 3 November 2021 in relation to these discussions. We therefore concluded that the undated messages set out in the paragraph above were sent on 3 November 2021.

89. The claimant worked his last shift as a Team Leader on Saturday 6 November 2021. He did not work any further shifts for the respondent after 6 November 2021, either as a Team Leader or as a Support Worker.

90. DK was on annual leave the week of 8 November 2021, as noted in the claimant's email of 15 November 2021.

CQC report re claimant

91. The respondent received a CQC complaint regarding the claimant on 9 November 2021 (see paragraph 77.2.4 above). The complaint was sent from an anonymous source who alleged that the claimant had been attending work whilst under the influence of drugs. The respondent had received similar complaints regarding two female members of staff during October and November 2021 (see paragraph 77.2).

92. The respondent decided to arrange a drugs test for the claimant on the afternoon of 15 November 2021. They did not notify the claimant that he would undertake a drugs test. However, Mr Malik informed the claimant on the morning of 15 November 2021 that the respondent wanted him to undertake a drugs test later that day.

93. We accept the respondent's evidence that they carried out drugs tests of employees in the workplace. We note that each of the contracts of employment disclosed in the hearing file contain a clause relating to drugs and alcohol tests. For example, the contract regarding the claimant's initial Support Worker role stated:

"21. Drugs & Alcohol - Where the Company has reasonable grounds for believing that you are under the influence of alcohol, illegal drugs or other substances whilst at work, you may be required to undergo a drugs and/or alcohol test. The Company reserves the right to carry out random drugs and/or alcohol testing and the right to request you to participate in random testing, where there is reason to believe that performance or attendance is being affected or drugs or alcohol are being consumed whilst at work or prior to attending work. This will be conducted by a registered medical professional who will provide the results to the Company. Refusal to submit to a drug or alcohol test may result in your removal from the Casual worker register."

94. We accept the claimant's evidence that the respondent did not provide him with any copies of his various contracts of employment. However, Mr Malik gave evidence that he had also been asked to undertake a drugs test by the respondent.

95. We note that the drugs test was arranged by SH and by HR. DK was on annual leave when the CQC report regarding the claimant was received and was not involved in the arrangements for the drugs test.

96. We concluded that it was reasonable for the respondent to arrange for a drugs test of the claimant

Claimant's resignation – 15 November 2021

97. The claimant sent an email to a HR advisor of the respondent at 10.48am on 15 November 2021. We have already referred to this email earlier in this Judgment in our conclusions regarding the claimant's alleged report to the CQC.

98. The email started by saying:

"TO WHOM IT MAY CONCERN

I RASHID HUSSAIN, AM WRITING THIS LETTER OF RESIGNANTION AS OF IMMEDIATE EFFECT. I FEEL LIKE I HAVE BEEN PUSHED OUT, DISCRIMINAT ED & HUMILIATED WITH MY TIME WORKING AT LIFEWAYS. THERE HAVE BEEN A CATALOGUE OF FAILINGS, BREACHES, ABUSE & NEGLECT."

99. The conclusion of the email stated

" I JOINED LIFEWAYS TO MAKE A DIFFERENCE WITH THE PEOPLE WE SUPP ORT AND TO ENHANCE THEIR LIFE SKILLS BUT UNFORTUNETLY I WAS PRE VENTED, DEPRIVED AND DISCRIMINATED FROM DOING THIS. I FEEL WOUNDED AND HEARTBROKEN."

100. The claimant did not attend work on 15 November 2021 or at any time after that date, although he did participate in grievance meetings.

101. We concluded that the reasons why the claimant resigned included:

101.1 the claimant was unhappy with DK's management. He wanted to step down from the role of Team Leader to that of Support Worker. However, he did not realise that this would involve becoming a casual worker on a zero hours contract;

101.2 the claimant was also unaware that the respondent's normal practice in such situations was that staff were required not to work for a week, which we understand was intended to break their continuity of service for the purposes of statutory rights;

101.3 the claimant was upset that he would be required to attend a drugs test. The claimant was not aware of the CQC complaint relating to him and regarded the drugs test as part of DK's 'campaign' to get rid of him;

101.4 we accept the claimant's oral evidence that he does not take drugs and that he was not trying to 'avoid' a drugs test. However, we concluded that it was reasonable for the respondent to follow up on the CQC complaint that named the claimant as taking drugs.

Events after the claimant's email of 15 November 2021

Correspondence re claimant's resignation

102. The respondent treated the claimant's email of 15 November 2021 as an email of resignation from his employment with immediate effect. SH wrote to the claimant by letter on 16 November 2021 stating:

"I write to you following receipt of your email resignation sent on 15th November 2021, whereby you resigned with immediate effect.

I am concerned that you may have decided to resign in haste following the content of your resignation email. I can confirm that we are taking the allegations raised very seriously and I will arrange for an independent manager to meet with you, as per our grievance policy, which I have sent under separate cover.

I would like to give you an opportunity to reconsider your resignation.

…

I would ask that you email me at [email address] *to confirm if you do wish to reconsider.*

If I do not hear from you by Friday 19th November 2021, I will assume that you do not wish to return to work and will confirm acceptance of your resignation with effect from 15th November 2021."

103. The claimant stated that he did not receive SH's letter until 24 November 2021. He emailed SH on that date stating:

"I have only just received your notification regarding the reconsideration regarding my resignation.

By the time iv received and read this yesterday the time period of reconsider has already passed.

I spoke with the investigating office whom spoke to HR and advise was given that I need to liaise with you regarding this and that its in your discretion?"

104. We note that the claimant and SH exchanged emails and SH attempted to call the claimant. However, the claimant did not inform the respondent that he wished to withdraw his resignation and return to work, including at his grievance meeting by Teams with JH on 1 December 2021 which lasted over two and a half hours. The claimant did not work any shifts for the respondent after 6 November 2021.

105. We note that Mrs Smith emailed the claimant and several others on 10 March 2022 regarding support worker cover for the Riding Gardens service. However, we accept Mrs Smith's evidence that she was using an old email list and that this was not because she (or anyone else within the respondent) believed that the claimant was still employed by the respondent on that date. If this were the case, then the claimant would have received and/or sent other correspondence from the respondent regarding potential shifts.

Claimant's grievance

106. The respondent also treated the claimant's email of 15 November 2021 as a grievance and investigated it. JH (Service Manager – Learning Disabilities) met with the claimant on 1 December 2021 to discuss the claimant's grievance.

107. The outcome letter for the claimant's grievance was sent to the claimant on 15 February 2022. The letter upheld parts of the claimant's grievance and rejected other parts.

108. The claimant has not raised any complaints regarding the respondent's grievance process. We have therefore not made any findings of fact in relation to the process.

Service user's sofa purchase and financial abuse allegations

109. The mother of a service user (X) at Reevylands complained by email on 30 November 2021 that the claimant had purchased an unsuitable sofa for X on 19 October 2021. She stated:

"I was made aware of a new sofa that had been purchased with X's money by Rashid (former Team Leader) on a visit approx, a month to 6 weeks ago. Rashid informed me that he had purchased this from a 'mate'. I thought that it wasn't an appropriate sofa for X as its not in keeping with the house décor and it is very hard to sit on and not very wide back to front. I have attached a photo of the sofa.

I have just been down to visit X this morning and was voicing my concerns about the sofa to the member of staff on duty who informed me that Rashid had spent £500 on this. I feel that X has been taken advantage of and his money wasted on something that isn't fit for his purpose to help out a staff member's mate. For this amount of money being spent I would expect an approval process to be in place to make sure that a vulnerable client's money is being spent in a proper manor with their interests at the forefront.

I am concerned that the sofa hasn't been bought from a reputable supplier, with a full guarantee and meets fire regulations as well as not being suitable for X's needs.

This should be return to the supplier or sold and then replaced with something more suitable for X and any money returned to him.

I would like this situation investigating as this really isn't acceptable. I look forward to your response."

110. The respondent interviewed another colleague (DJ) on 4 January 2022 who stated:

"I am not aware of where RH purchased the sofa, all I know it was off a mate, the receipt was hand written and didn't have where it came from or who it came from, just the sofa and the amount and that's it and signed by RH.

… I think the manager at the time had agreed to this but this was not for the sofa that arrived, she agreed to another sofa which looked really nice, but when I came on shift it was not the sofa that was shown on the picture.

… the sofa that arrived it is not good condition and not worth the money that was paid for it, That's all I know, I don't know any more about the sofa or where it came from or what mate it came from of RH."

111. The respondent wrote to the claimant on 9 December 2022, stating that they had commenced an internal investigation into this allegation which they termed as 'potential financial abuse'.

112. The claimant was invited to attend an investigation meeting on 11 January 2022. He did not respond to that invitation and did not respond when the investigating manager (LD) attempted to contact him on the day of the meeting. LD wrote to the claimant in a letter that appears to be sent on 12 January 2022 (although it was dated 7 December 2022) stating:

"I write further to my letter dated 6th January 2022 inviting you to attend a meeting on the 11th January 2022 at 1pm via Teams to discuss the ongoing investigation in to the alleged allegation of financial abuse on the 30th November.

You failed to attend this meeting and failed to contact me or answer any of my calls..

As part of the internal investigation you were advised that you may be asked to attend an investigation meeting to provide your account or events.

You were made aware that if you failed to respond or attend the meeting the investigation would still continue and that the outcome would be sent to you in writing.

After conducting my investigation, I can now inform you that you have not followed the correct protocol and procedures and that you were in breach of the finance Policy and safeguarding policy within Lifeways.

Therefore, the decision has been made that you will be removed permanently from the casual workers register with immediate effect from today 12th January 2022

Due to the outcome of the investigation and the evidence available, A DBS referral will be made in line with our statutory obligation."

113. The claimant also refused to attend the disciplinary meeting, chaired by Mr Kenney. The claimant informed Mr Kenney that he would not attend. Mr Kenney recorded this in disciplinary outcome letter dated 25 January 2022 to the claimant which stated:

"Despite being invited into discuss the matter at the investigation stage and disciplinary stage you failed to attend either meeting, you then contacted me at 14.27 on 21.01.2022 via telephone asking why you had been invited into a meeting when you no longer work for the company, I explained to you that due to the matter being reported to the safeguarding adults board the matter must be fully investigated, you

went onto state that you had sought advice from your union and they have told you that you do not need to engage in any meetings so as far as you are concerned the matter is dealt with, you went onto explain that you had evidence that the service manager had seen the sofa and was more than happy with it and that they had signed off on the purchase.

You explained that requesting you to attend meetings is harassment and that you would like this to stop, you further went on to say that the decision has already been made due to a "massive whistleblowing" you had raised which was swept under the carpet by Lifeways, I explained that my role was to look at any and all evidence provided and make a decision based on probability as to whether something happened or not, I went onto mention that by not providing any evidence or being involved in meetings to get your point across will ultimately result in a decision being made with the evidence I currently have and have sent to yourself so it is in your best interest to engage and send any information to myself.

You explained that you would send me over proof that the service manager authorised the expenditure and that they were happy with the sofa purchased, I asked that you do this via email and stated that I would send you my work email as previously I sent the disciplinary pack via email however this bounced back from your account, you stated that this would be sent by 23.01.2022.

Despite you agreeing to send any further information to myself I haven't received anything so a decision will be made on information available to me."

114. Mr Kenney concluded that:

114.1 the £550 of X's personal money spent on the sofa was above the limit that a Service Manager could authorise, but no second line manager had authorised the spend (which would normally be done using an FF08 form);

114.2 the sofa was second hand and was not worth £550;

114.3 the sofa was bought from one of the claimant's friends;

114.4 if the claimant was still employed by the respondent, he would have been dismissed for gross misconduct.

115. We heard evidence from the claimant and Mr Kenney during the hearing. We note that the brief invoice that the claimant produced in relation to the sofa lacked the following details which would normally be expected on any business invoice:

115.1 the name of the shop or store from which it was bought and/or any contact information for the store (the claimant stated he bought it from a business which traded on Facebook);

115.2 any VAT charged on the purchase; and

115.3 any product information regarding the sofa (e.g. the make or model of the sofa, any guarantee or warranties, any fire safety information and any returns information).

Disclosure and Barring Service ("DBS") checks

116. The respondent submitted a safeguarding concern regarding the claimant on 1 December 2021 in relation to the financial abuse investigation regarding the purchase of a sofa for X (service user). The 'details of abuse' stated:

"Details of the alleged abuse, neglect and/or acts

of omission:

A sofa has been brought for the value of £550

which if from a mate [there] *is no company receipt*

apart from a petty cash slip and the sofa is not

suitable for the person we support the mum has

raised concerns of the origin of the sale

What impact is this having on the adult at risk?

Sofa is not appropriate for service user and

concerns of [where] *it has been* [bought]

117. The DBS confirmed by letter to the claimant on 15 December 2022 that he would not be placed on the barred list. The DBS letter stated:

*"**What this means for you***

You can continue to engage in regulated activity with children and adults…Our decision has no bearing on your former employer's decision to dismiss you.

It will be up to any potential employer to decide whether they wish to use your services. Our decision has no bearing on this."

Claimant's evidence re time limits

118. The claimant did not include any evidence regarding time limits in his witness statement. With the respondent's agreement, the Tribunal asked the claimant questions regarding time limits at the start of his oral evidence to enable the respondent to cross-examine the claimant on this issue.

119. The claimant stated in response to the Tribunal's questions that:

119.1 he was awaiting the grievance outcome letter before speaking to ACAS;

119.2 he was 'fully aware' that he was a few days late when speaking to ACAS;

119.3 he had spoken to Unison who told him that they could not represent him;

119.4 he tried to contact the Citizen's Advice Bureau, but because of the pandemic there were no face to face appointments and their online appointments were fully booked;

119.5 he attempted to contact half a dozen solicitors' firms, but many were fully booked;

119.6 when he was making enquiries of solicitors and others, they told him that there was a time limit to submit his claim but did not tell him what the time limit was;

119.7 he was under a lot of stress and pressure at the time, in part due to the events that form part of this claim.

120. During cross-examination, the claimant stated that:

120.1 he found out about the three month time limit in early February 2022 (i.e. a week to two weeks before the grievance outcome letter was sent to him);

120.2 he did not contact ACAS at that time because he *"was giving the respondent the benefit of the doubt"*.

121. We also note that:

121.1 the claimant corresponded with the respondent throughout the period up to receipt of his grievance outcome letter on 16 February 2022;

121.2 the claimant attended his grievance meeting on 1 December 2021 with JH;

121.3 the claimant had received advice from Unison not to attend his disciplinary hearing on 21 January 2023, which is recorded in Mr Kenney's outcome letter of 25 January 2023; and

121.4 the claimant's email of 15 November 2021 did not refer to any race discrimination.

RELEVANT LAW

122. The Tribunal has considered the legislation and caselaw referred to below, together with any additional legal principles referred to in the parties' oral submissions.

123. The Employment Rights Act 1996 is referred to as the "**ERA**" and the Equality Act 2010 is referred to as the "**EQA**".

Qualifying disclosures

124. A protected disclosure is defined by s43A ERA as a 'qualifying disclosure' under s43B ERA:

43B Disclosures qualifying for protection

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

(a) that a criminal offence has been committed, is being committed or is likely to be committed,
(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
(c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
(d) that the health or safety of any individual has been, is being or is likely to be endangered,
(e) that the environment has been, is being or is likely to be damaged, or
(f) that information tending to show any matter falling within any one of the preceding paragraphs has been, or is likely to be deliberately concealed.

125. S47B of the ERA sets out a worker's right not to be subjected to a detriment on the ground that they have made a protected disclosure.

47B Protected disclosures

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

…

(2) …this section does not apply where –

…

(b) the detriment in question amounts to dismissal…

….

126. In *Blackbay Ventures Ltd v Gahir* 2014 IRLR 416 EAT, Judge Serota noted that the Tribunal must make the following factual findings regarding each potential disclosure:

"a. Each disclosure should be separately identified by reference to date and content.

b. Each alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered as the case may be should be separately identified.

c. The basis upon which each disclosure is said to be protected and qualifying should be addressed.

d. Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. It is not sufficient as here for the Employment Tribunal to simply lump together a number of complaints, some of which may be culpable, but others of which may simply have been references to a checklist of legal requirements

or do not amount to disclosure of information tending to show breaches of legal obligations. Unless the Employment Tribunal undertakes this exercise it is impossible to know which failures or likely failures were regarded as culpable and which attracted the act or omission said to be the detriment suffered. If the Employment Tribunal adopts a rolled up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest act or deliberate failure to act relied upon and it will not be possible for the Appeal Tribunal to understand whether, how or why the detriment suffered was as a result of any particular disclosure; it is of course proper for an Employment Tribunal to have regard to the cumulative effect of a number of complaints providing always they have been identified as protected disclosures.

e. The Employment Tribunal should then determine whether or not the Claimant had the reasonable belief referred to in s 43B(1) of ERA 1996, under the "old law" whether each disclosure was made in good faith; and under the "new" law introduced by s 17 Enterprise and Regulatory Reform Act 2013 (ERRA), whether it was made in the public interest.

f. Where it is alleged that the Claimant has suffered a detriment, short of dismissal it is necessary to identify the detriment in question and where relevant the date of the act or deliberate failure to act relied upon by the Claimant. This is particularly important in the case of deliberate failures to act because unless the date of a deliberate failure to act can be ascertained by direct evidence the failure of the Respondent to act is deemed to take place when the period expired within which he might reasonably have been expected to do the failed act.

g. The Employment Tribunal under the "old law" should then determine whether or not the Claimant acted in good faith and under the "new" whether the disclosure was made in the public interest."

127. The Court of Appeal in *Kilraine v London Borough of Wandsworth* [2018] IRLR 846, held that a disclosure must contain sufficient information if it is to form a 'qualifying disclosure' for the purposes of s43B of the ERA.

128. The individual must also reasonably believe that the disclosure tends to show one or more of the categories set out under s43B(1). The Tribunal must consider:

    128.1 whether the claimant genuinely believed that the disclosure tended to show one of the categories listed in s43B (*Darnton v University of Surrey* [2003] IRLR 133); and

    128.2 whether such belief was objectively reasonable in the circumstances (see, for example, *Phoenix House Ltd v Stockman* [2017] ICR 84 EAT).

129. The term 'likely' (eg in 'likely to be endangered' under s43B(1)(d)) was considered in Kraus v Penna Plc [2004] IRLR 260 to mean 'probable or more probable than not'. The Court of Appeal held that this was a higher standard than simply 'a possibility or a risk'.

What amounts to a detriment?

130. The test of whether an act or omission could amount to a 'detriment' is the same as for a discrimination complaint. The House of Lords in Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 held that whether an act amounts to a detriment requires the Tribunal to consider:

    130.1 would a reasonable worker take the view that he was disadvantaged in terms of the circumstances in which he had to work by reason of the act or acts complained of?

    130.2 if so, was the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?

131. We note that the Court of Appeal in *Deer v University of Oxford* [2015] IRLR 481, held the conduct of internal procedures can amount to a 'detriment' even if proper conduct would not have altered the outcome.

132. However, the House of Lords in *Shamoon* also approved the decision in *Barclays Bank plc v Kapur & others (No.2)* [1995] IRLR 87 that an unjustified sense of grievance cannot amount to a 'detriment'.

133. We also note that in the context of whistleblowing, a detriment for the purposes of the legislation can occur even *after* the relevant relationship with the employer has been ended or terminated (see *Woodward v Abbey National plc* [2006] EWCA Civ 822, [2006] IRLR 677, [2006] ICR 1436).

Reason for the detriment

134. The key question is whether the making of a protected disclosure materially influenced (in the sense of being more than a trivial influence) the employer's treatment of the individual (*Fecitt v NHS Manchester* [2012] IRLR 64). This requires the Tribunal to consider the mental processes (conscious and unconscious) of the person who either acted or deliberately failed to act in respect of the detriment.

135. In certain cases, the courts have drawn a distinction between the making of a disclosure and the manner in which the complaint was made or pursued. For example, in *Panayiotou v Chief Constable of Hampshire Police* [2014] IRLR 500, the EAT upheld a decision by a tribunal that a police officer's dismissal was because of his long-term sickness absence and his obsessive pursuit of complaints. The EAT said that his dismissal 'in no sense whatsoever' connected with the public interest disclosures that he had certainly made earlier. The judgment of Lewis J stresses that such a finding is entirely logical and is not confined to 'exceptional cases':

    "There is, in principle, a distinction between the disclosure of information and the manner or way in which the information is disclosed. An example would be the disclosing of information by using racist or otherwise abusive language. Depending on the circumstances, it may be permissible to distinguish between the disclosure of the information and the manner or way in which it was disclosed. An employer may be able to say that the fact that the employee disclosed particular information played no part in a decision to subject the employee to the detriment but the

offensive or abusive way in which the employee conveyed the information was considered to be unacceptable. Similarly, it is also possible, depending on the circumstances, for a distinction to be drawn between the disclosure of the information and the steps taken by the employee in relation to the information disclosed."

Burden of proof and drawing of inferences – detriment claims

136. In *International Petroleum Ltd and others v Ospiov and others* EAT 0058/17, the EAT set out the correct approach to whistleblowing detriment complaints as follows:

136.1 the burden of proof lies on a claimant to show that a ground or reason (that is more than trivial) for detrimental treatment to which he is subject is either his health and safety complaint and/or his protected disclosure;

136.2 s48(2) ERA then requires the employer to show why the detrimental treatment was done. If the employer fails to do so, inferences may be drawn against the employer. However, these inferences must be justified by the Tribunal's findings of fact.

Automatically unfair (constructive) dismissal

Constructive dismissal

137. In order to bring a claim for automatically unfair dismissal under s111 of the ERA, the claimant must first show that his resignation amounted to a 'dismissal', as defined under s95(1) ERA.

s95 - Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) and section 96, only if)—…

…

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

138. The claimant must show the following key points to demonstrate that her resignation amounted to a dismissal under s95(1) of the ERA:

138.1 that a fundamental term of his contract was breached;

138.2 that he resigned in response to that breach; and

138.3 that he did not waive or affirm that breach.

139. Employees sometimes rely on a particular act or omissions as being the 'last straw' in a series of events. In the case of *Omilaju v Waltham Forest Borough Council* [2005] IRLR 35 it was held the last straw may not always be unreasonable or

blameworthy when viewed in isolation. But, the last straw must contribute or add something to the breach of contract.

Mutual trust and confidence

140. The implied term of mutual trust and confidence was held in the cases of *Malik v Bank of Credit and Commerce International SA* [1997] IRLR 642 (as interpreted by the EAT in *Baldwin v Brighton and Hove City Council* [2007] IRLR 232) as follows:

"The employer shall not without reasonable and proper cause conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee."

141. It is not necessary for the employer to intend to breach the term of trust and confidence (*Leeds Dental Team Ltd v Rose* [2014] IRLR 8*)*: *"The test does not require an ET to make a factual finding as to what the actual intention of the employer was; the employer's subjective intention is irrelevant. If the employer acts in such a way, considered objectively, that his conduct is likely to destroy or seriously damage the relationship of trust and confidence then he is taken to have the objective intention…"*.

142. In *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] IRLR 833, Underhill LJ considered previous caselaw and held that the Tribunal must consider the following questions:

"(1) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

(2) Has he or she affirmed the contract since that act?

(3) If not, was that act (or omission) by itself a repudiatory breach of contract?

(4) If not, was it nevertheless a part…of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the Malik term? (If it was, there is no need for any separate consideration of a possible previous affirmation…)

(5) Did the employee resign in response (or partly in response) to that breach?"

Respondent's reason for dismissal

143. If the claimant's resignation amounted to a dismissal, then we must consider whether the respondent is able to establish a fair reason for that dismissal, together with the fairness of any procedure followed regarding such dismissal.

144. The right not to be automatically unfairly dismissed for making a protected disclosure is set out at s103A of the ERA.

103A Protected disclosure

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

145. The key question is whether the reason or principal reason for the claimant's dismissal falls under s100(c) or (d) and/or under s103A of the ERA. This test is more stringent than the test for detriment claims, which requires the alleged ground to be a 'material influence' on the detrimental treatment.

146. The employee bears the burden of proof in automatically unfair dismissal claims where the employee does not have the two years' service required to bring a claim for ordinary unfair dismissal (see, for example, *Parks v Lansdowne Club* EAT 310/95).

Effective date of termination

147. s97 of the ERA defines the effective date of termination (the "**EDT**") as follows (subject to the provisions regarding statutory minimum notice at s86 of the ERA):

> "(b) in relation to an employee whose contract of employment is terminated without notice, means the date on which the termination takes effect…"

148. The EDT is a statutory concept which the Tribunal must determine on an objective basis. (see *Fitzgerald v University of Kent at Canterbury* [2004] EWCA Civ 143, [2004] IRLR 300). In *Newman v Polytechnic of Wales Students Union* [1995] IRLR 72 the EAT stated that the EDT has to be determined in a *'practical and common sense manner'*, having regard particularly to what the parties understood at the time of the purported dismissal.

TIME LIMITS - ERA

149. The time limit for bringing detriment complaints is set out at s48(3) of the ERA as follows:

> **S48 – Complaints to employment tribunals**
>
> **…**
>
> (2) An employment tribunal shall not consider a complaint under this section unless it is present –
>
> (a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or
>
> (b) within such further period as the tribunal consider reasonable in a case where it is satisfied it was not reasonably practicable for the complaint to be presented before the end of that period of three months.
>
> (3) For the purposes of subsection (3) –
>
> (a) Where an act extends over a period, the "date of the act" means the last day of that period and

(b) A deliberate failure to act shall be treated as done when it was decided on;
And, in the absence of evidence establishing the contrary, an employer…shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected to do the failed act if it was to be done.

150. The Tribunal must consider the point in time at which the detriment is said to have occurred. The time limit starts to run from the date of the act (or failure to act) on which the detriment complaint is based, not from the date that the employee becomes aware of that act or failure to act (*McKinney v Newham London Borough Council* 2015 ICR 495, EAT). The Court of Appeal stressed the need for tribunals to identify precisely the act or deliberate failure to act that is alleged to have caused the detriment (*Flynn v Warrior Square Recoveries Ltd* 2014 EWCA Civ 68, CA).

151. Where an act extends over a period of time:

151.1 the date on which it will be deemed to have been done for the purposes of calculating when the time limit begins to run is the last day of that period — S.48(4)(a);

151.2 where there has been a deliberate failure to act, the time limit will begin to run on the date when the deliberate failure to act was 'decided' on — S.48(4)(b); and

151.3 a respondent will be taken to decide on a failure to act when it does an act inconsistent with doing the failed act. If there is no inconsistent act, the failure to act will be deemed to take place when the period expires within which it might reasonably have been expected to do the failed act if it was to be done — S.48(4)(b).

152. The time limit for bringing complaints of unfair dismissal is set out at s111 of the ERA as follows:

111 Complaints to employment tribunal

…

(2) Subject to subsection (3), an employment tribunal shall not consider a complaint under this section unless it is presented to the tribunal—

(a) before the end of the period of three months beginning with the effective date of termination, or

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

153. The test for considering whether a time limit should be extended under both the detriment and dismissal provisions of the ERA is therefore:

153.1 whether or not it was reasonably practicable for the individual to present their claim within the three month time limit; and

153.2 if not, within what further period was it reasonable for such claim to be presented.

154. The burden of satisfying the Tribunal that it was not reasonably practicable to present the claim on time rests firmly on the claimant (*Porter v Bandridge Ltd* [1978] IRLR 271 EWCA). In addition, the Tribunal must consider what would be a reasonable time within which to present a late claim taking into account the circumstances of the case. These circumstances include the claimant's knowledge (or what they reasonably ought to have known) of time limits and the reason for the further delay in presenting the complaints.

155. The Court of Appeal in *Palmer and Saunders v Southend-on-Sea Borough Council* [1984] IRLR 119, [1984] ICR 372, CA noted that the correct enquiry is into: *"what was the substantial cause of the employee's failure to comply".*

156. Richardson J in *Inchcape Retail Ltd v Shelton* UKEAT/0142/19 stated (with our underlining for emphasis):

*"**[29]** an essential question for the ET to consider in a case of this kind is whether and to what extent the Claimant ought to have made enquiries into how and within what period he should exercise his right to claim unfair dismissal. As a matter of practical common sense an applicant who knows of his right to claim unfair dismissal can generally be expected to seek information or advice about the enforcement of those rights; see Porter v Bandridge Limited[1978] ICR 943and Trevelyans (Birmingham) Limited v Norton[1991] ICR 65.*

***[30]** In these circumstances a mistaken belief that an unfair dismissal claim need not be brought until after an internal appeal procedure has been exhausted cannot of itself render it not reasonably practicable to commence proceedings. It will depend what enquiries the Claimant ought to have made and what knowledge he ought to have acquired. Thus, in Bodha v Hampshire Area Health Authority Browne-Wilkinson J said:*

"There may be cases where the special facts (additional to the bare fact that there is an internal appeal pending) may persuade an industrial tribunal, as a question of fact, that it was not reasonably practicable to complain to the industrial tribunal within the time limit. But we do not think that the mere fact of a pending internal appeal, by itself, is sufficient to justify a finding of fact that it was not "reasonably practicable" to present a complaint to the industrial tribunal."

***[31]** Whether it is reasonable for a claimant to make enquiries and to what extent will be case specific. Claimants in ETs vary enormously. On the one hand there are claimants with a good education and command of English and ready access to the Internet and sources of advice. It will generally be reasonably practicable for them to find out about the enforcement of their rights, not least by using the Internet. It is not difficult for an educated person to find out from official websites that there is a strict time limit for bringing a complaint of unfair dismissal.*

[32] On the other hand, there are many claimants with very limited education and English, health difficulties and disabilities, and virtually no access to the Internet and sources of advice. It may be much more difficult for them to obtain advice."

157. The courts have considered the position on time limits where a claimant has received legal advice from any adviser. Lord Denning MR set out the principles to be considered when determining time limits in the case of *Dedman v British Building and Engineering Appliances Ltd* [1974] ICR 53 EWCA (restated in *Wall's Meat Co Ltd v Khan [1979] ICR 52*), including:

157.1 the reasons for the failure to meet the deadline;

157.2 whether there was acceptable ignorance of the fact, either by the claimant or her advisers; and

157.3 other factors, such as awaiting information from the employer, physical impediments, illness etc.

158. The test set out in *Dedman* may appear harsh where a claimant has sort legal advice from a skilled adviser, such as a trade union representative. However, it has been affirmed, for example by the Court of Appeal in *Marks and Spencer plc v Williams-Ryan* [2005] ICR 1293.

159. The Tribunal must determine is whether the adviser's failure to give correct advice was itself reasonable, thus rendering it not reasonably practicable for the claimant to bring a claim in time. For example:

159.1 in *Northamptonshire County Council v Entwhistle* [2010] IRLR 740, the Council had informed the claimant of an incorrect time limit and the claimant's solicitor failed to spot this error. The EAT held that the claimant's solicitor had acted negligently in failing to check the date the time limit expired and it was therefore reasonably practicable for the claimant to present his claim within the time limit;

159.2 in *Paczkowski v Sieradzka* [2017] ICR 62, EAT, the claimant sought to bring a complaint of automatic unfair dismissal one month after the time limit expired. She had received advice previously from the Citizen's Advice Bureau, ACAS and her trade union that she could not bring a complaint of unfair dismissal because she did not have two years' service. The EAT held that the question for the Tribunal to consider was whether the adviser's failure to give complete advice was reasonable and that this depended on the status of the adviser, the context in which the advice was given, the information that the claimant provided and the questions that the adviser asked of her.

DIRECT DISCRIMINATION (s13 EQA)

160. Section 13 of the Equality Act 2010 provides that:

"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."

161. Section 39(2) of the Equality Act 2010 provides that an employer must not discriminate against an employee. It sets out various ways in which discrimination can occur in the employment context, which includes the employer dismissing the employee or subjecting the employee to any other detriment.

162. There are two key questions that the Tribunal must consider when dealing with claims of direct discrimination:

162.1 was the treatment alleged 'less favourable treatment', i.e. did the respondent treat the claimant less favourably than it treated or would have treated others in not materially different circumstances;

162.2 if so, was such less favourable treatment because of the claimant's protected characteristic?

163. However, the Tribunal can, in appropriate cases, consider postponing the question of less favourable treatment until after they have decided the 'reason why' the claimant was treated in a particular way (*Shamoon v Chief Constable of the Royal Ulster Constabulary* 2003 ICR 337 HL).

164. In relation to less favourable treatment, the Tribunal notes that:

164.1 the test for direct discrimination requires an individual to show more than simply different treatment (*Chief Constable of West Yorkshire Policy v Khan* 2001 ECR 1065 HL);

164.2 an employee does not have to experience actual disadvantage for the treatment to be less favourable. It is sufficient that an employee can reasonably say that they would have preferred not to be treated differently from the way an employer treated or would have treated another person (cf paragraph 3.5 of the EHRC Employment Code); and

164.3 the motive and/or beliefs of the parties are relevant to the following extent:

164.3.1 the fact that a claimant believes that he has been treated less favourably does not of itself establish that there has been less favourable treatment (see, for example, Shamoon);

164.3.2 in cases where the conduct is not inherently discriminatory, the conscious or unconscious 'mental process' of the alleged discriminator is relevant (see, for example, *Amnesty International v Ahmed* 2009 ICR 1450 EAT); and

164.3.3 for direct discrimination to be established, the claimant's protected characteristic must have had a 'significant influence' on the conduct of which he complains (*Nagarajan v London Regional Transport* 1999 ICR 877 HL).

165. The Tribunal also notes that if an employer treats all employees equally unreasonably, it is not appropriate to infer discrimination (see, for example, *Laing v Manchester City Council & another* 2006 ICR 1519 EAT and *Madarassy v Nomura International plc* 2007 ICR 867 CA).

Comparators

166. To be treated less favourably implies some element of comparison. The claimant must have been treated differently to a comparator or comparators, be they actual or hypothetical, who do not share the relevant protected characteristic. The cases of the complainant and comparator must be such that there must be no material difference between the circumstances relating to each case (section 23 Equality Act 2010 and see *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285).

167. It is for the claimant to show that any real or hypothetical comparator would have been treated more favourably. In so doing the claimant may invite the tribunal to draw inferences from all relevant circumstances and primary facts. However, it is still a matter for the claimant to ensure that the tribunal is given the primary evidence from which the necessary inferences may be drawn. The Tribunal must, however, recognise that it is very unusual to find direct evidence of discrimination. Normally, a case will depend on what inferences it is proper to draw from all the surrounding circumstances.

168. When considering the primary facts from which inferences may be drawn, the Tribunal must consider the totality of the facts and not adopt a fragmented approach which has the effect of 'diminishing any eloquence the cumulative effects of the primary facts' might have on the issue of the prohibited ground (*Anya v University of Oxford* [2001] IRLR 377).

BURDEN OF PROOF

169. The burden of proof is set out at s136 EQA for all provisions of the EQA, as follows:

136 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.

…

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

(a) an employment tribunal;

…

170. The Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 approved guidance given by the Court of Appeal in *Igen Limited v Wong* [2005] ICR 931, as refined in *Madarassy v Nomura International plc* [2007] ICR 867. In order

for the burden of proof to shift in a case of direct discrimination it is not enough for a claimant to show that there is a difference in status and a difference in treatment. In general terms "something more" than that would be required before the respondent is required to provide a non-discriminatory explanation.

171. Mummery LJ stated in *Madarassy*: *"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination"*

172. In addition, unreasonable or unfair behaviour or treatment would not, by itself, be enough to shift the burden of proof (see *Bahl v The Law Society* [2004] IRLR 799). The House of Lords held in *Zafar v Glasgow City Council* [1998] IRLR 36) that mere unreasonable treatment by the employer "casts no light whatsoever" to the question of whether he has treated the employee "unfavourably".

173. The guidance from caselaw authorities is that the Tribunal should take a two stage approach to any issues relating to the burden of proof. The two stages are:

173.1 the Tribunal must consider whether the claimant has proved facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This can be described as the prima facie case. However, it is not enough for the claimant to show merely that he has been treated less favourably than those identified or than he hypothetically could have been (but for his disability); there must be "something more".

173.2 if the claimant satisfies the first stage, out a prima facie case, the burden of proof then shifts to the respondent. Section 123(2) of the Equality Act 2010 provides that the Tribunal must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. The standard of proof is again the balance of probabilities. However, to discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever because of the protected characteristic.

174. However, we note that the Supreme Court in also stated that it is important not to make too much of the role of the burden of proof provisions. Those provisions will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they are not required where the Tribunal is able to make positive findings on the evidence one way or the other.

TIME LIMITS - EQA

175. The provisions on time limits under the EQA are set out at s123 EQA:

123 Time limits

(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.

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

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

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

APPLICATION OF THE LAW TO THE FACTS

176. We applied the law to our findings of fact and reached the conclusions set out below.

PROTECTED DISCLOSURE – DETRIMENT AND AUTOMATICALLY UNFAIR DISMISSAL

Did the claimant make a disclosure?

177. The only protected disclosure that the claimant alleged he made as part of these proceedings was that he submitted a report to the CQC on or around 15 October 2021 relating to forged signatures. The claimant told us in oral evidence that he had submitted other reports to the CQC, but he did not set these out when ordered by

Judge Lancaster to identify his protected disclosures or at the third preliminary hearing with Judge Maidment in January 2023.

178. If the claimant had submitted a report to the CQC on or around 15 October 2021 complaining that his manager had forged signatures on internal records, that may have amounted to a protected disclosure.

179. However, we concluded that the claimant did not in fact submit a report to the CQC at any time during his employment between 4 October 2021 and 15 November 2021. We reached this conclusion for the reasons set out in detail in our findings of fact at paragraphs 59 to 82 of this Judgment. The key reasons for our conclusion that the claimant did not make a report on the CQC website include:

179.1 neither the claimant nor Mr Malik was able to recall any precise date when a report was made to the CQC;

179.2 the claimant pleaded that the report was made on or around 15 October 2021, however during oral evidence he stated that he could not recall the date and that it was submitted at some point in October 2021;

179.3 the claimant stated in his witness statement that the report related to forged signatures. However, he expanded on the concerns that he states he raised in the report during cross-examination but he was not clear on whether those concerns were raised at the time when Mr Malik was present or dates when the claimant said he made further reports to the CQC;

179.4 the claimant expressly stated on three occasions in his email of 15 November 2021 that he would be raising matters with the CQC in the future. At the start of this email, the claimant stated he was resigning with *"immediate effect"*. The email listed the claimant's concerns regarding DK and other matters in detail. We concluded that if the claimant had already reported matters to the CQC by 15 November 2021, then he would have said that he had done so in his email;

179.5 the respondent's spreadsheet of complaints received from the CQC contains a wide range of concerns raised, but none of the entries refers to forged signatures on documents; and

179.6 when the claimant raised concerns in his email of 15 November 2021, the respondent took disciplinary action shortly afterwards in relation to DK. The respondent suspended DK in relation to allegations of gross misconduct, regarding matters including the concerns that the claimant raised regarding forged signatures. DK subsequently resigned in order to avoid undergoing those disciplinary proceedings. We concluded that if the respondent had received a similar report from the CQC in October 2021, they would have commenced disciplinary proceedings at an earlier stage, particularly given that those reports were sent to the respondent's senior managers outside of the claimant's area.

180. The claimant's claims that:

180.1 he suffered a detriment, which was materially influenced by his protected disclosure; and

180.2 the reason or principal reason for his dismissal (if indeed his resignation amounted to a constructive dismissal), was that he had made a protected disclosure;

therefore both fail and are dismissed because we have concluded that he did not make a protected disclosure to the CQC.

Employment status/effective date of termination

181. We were asked to decide the claimant's employment status during October and November 2021 as part of the list of issues. The matter was complicated by the fact that the claimant's case regarding the date on which his employment terminated changed several times during:

181.1 the claimant's pleaded case was that his employment terminated on an unspecified date in April 2022 (see paragraph 1 of his Particulars of Claim), on the basis that he continued to be offered shifts with the respondent;

181.2 the claimant stated during cross-examination that his employment terminated on 1 December 2021, when he attended the grievance investigation meeting. However, he was unable to explain why he believed it terminated on that date other than saying that he had not worked any shifts after 6 November 2021; and

181.3 the claimant's representative stated during his closing submissions (having been given a break at the Tribunal's suggestion to take instructions) that the claimant's employment terminated on 15 February 2022 when he received the outcome of his grievance. The claimant's representative stated that:

"The claimant says that he did not stop being a full time employee in November 2021 because he did not affirm the breach of contract – he handed in a letter of resignation [i.e. the email of 15 November 2021]*, but it was also a letter of concern. He said his resignation becomes effective once the grievance investigation was concluded."*

182. The respondent's position was that the claimant's employment terminated when his Team Leader contract ended on 6 December 2021 (i.e. the date of his last shift as Team Leader). The respondent submitted, in the alternative, that the claimant's employment ended when he resigned by email on 15 November 2021.

183. We do not need to reach a conclusion on this issue, because the claimant's complaint of automatically unfair dismissal failed. However, if we had needed to reach a decision then we would have concluded that the claimant's employment terminated with immediate effect when he sent his email on 15 November 2021. The key reasons for this conclusion included:

183.1 the claimant did not 'resign' from his employment on 6 November 2021. He agreed with DK that he would step down to the role of Support Worker. However, his understanding was that he would continue to be employed on a full time basis by the respondent;

183.2 the was not aware of the terms of his new casual support worker contract because HR did not produce that contract until after 15 November 2021. He was therefore unaware of any requirement to cease working for the respondent for a week before starting a new contract;

183.3 the claimant resigned unequivocally in his email of 15 November 2021, which stated:

"I RASHID HUSSAIN, AM WRITING THIS LETTER OF RESIGNATAION AS OF IMMEDIATE EFFECT. "

183.4 the claimant's email of 15 November 2021 did not state that his resignation was subject to the outcome of any grievance process that the respondent may follow;

183.5 the respondent wrote to the claimant and offered that he could reconsider his resignation by 19 November 2021. The claimant stated he did not receive that letter until 25 November 2021. Even then, the claimant did not respond and state either:

183.5.1 the position put forwards in these proceedings that he had not resigned and was still employed by the respondent; or

183.5.2 that he wanted the respondent to re-employ him;

instead, the claimant asked the respondent to exercise its 'discretion';

183.6 the claimant did not say to JH during the grievance process that he believed he was still employed by the respondent and/or that his resignation was dependent on the outcome of the grievance process; and

183.7 Mrs Smith mistakenly emailed the claimant and others on 10 March 2022 regarding cover for Riding Gardens. However, we accept Mrs Smith's evidence that she was using an old email list and that this was not because she (or anyone else within the respondent) believed that the claimant was still employed by the respondent on that date. If this were the case, then the claimant would have received and/or sent other correspondence from the respondent regarding potential shifts. There was no evidence provided of any other emails offering the claimant work after 15 November 2021.

Time limits

184. We do not need to reach a conclusion on whether the time limits for submitting the claimant's complaints of protected disclosure detriment and automatically unfair dismissal should be extended because both of those complaints failed. However, we would have concluded that it was reasonably practicable for the claimant to have submitted both complaints within the primary time limit. We would therefore have concluded that the claimant's claims of protected disclosure detriment and automatically unfair dismissal were submitted outside of the time limits in the ERA.

185. The key reasons for our conclusion include:

185.1 the detriment alleged by the claimant took place by 3 November 2021 at the latest, when he was informed by DK that going forwards he would be a casual support worker (after a week's break in employment). We note that according to *McKinney v Newham London Borough Council* 2015 ICR 495, EAT, time runs from the date of the detriment regardless of whether the claimant had knowledge of the act or not;

185.2 we concluded that the claimant's effective date of termination was 15 November 2021;

185.3 the primary time limits were therefore (respectively):

185.3.1 detriment claim - 2 February 2022; and

185.3.2 automatically unfair dismissal claim – 14 February 2022;

185.4 the claimant did not contact ACAS until 16 February 2022 and submitted his claim form on 28 February 2022 (which was also the last day of ACAS early claim conciliation);

185.5 during the period from 3 November 2021 to 16 February 2022, the claimant corresponded frequently with the respondent, attended a two and a half hour grievance meeting on 1 December 2021, sought advice from Unison and attempted to seek advice from various solicitors and the Citizen's Advice Bureau;

185.6 the claimant stated that he was aware that there were time limits having spoken to various solicitors' firms and he became aware of the three month time limit in early February 2022;

185.7 the claimant stated that he did not speak to ACAS before 16 February 2022 because he wanted to give the respondent the 'benefit of the doubt' in relation to his grievance outcome;

185.8 the test as to whether it was 'not reasonably practicable' to submit a claim within the primary time limit is a stringent test (as set out in the section on Relevant Law earlier in this judgment) and the claimant has not met the requirements of that test.

DIRECT RACE DISCRIMINATION

186. The claimant submitted one complaint of direct race discrimination, i.e. that DK did not 'properly support' him at a meeting on 18 October 2021. The claimant clarified what he meant by this in his Further Particulars of Claim when he stated (with our underlining – the words set out below are a direct quote form the claimant's particulars of claim, including his reference to "coloured people"):

"8. To illustrate the point, the Claimant narrates the example of a staff meeting organized by himself on 18 October 2021, at 34 Hird Road, Bradford. During that meeting, an Agency worker known as [MA] *verbally abused the Claimant and threatened the Claimant, in the presence of* [DK]*. <u>The Claimant effectively sought</u>*

protection from [DK] *but* [DK] *remained silent in the face of this onslaught of abuse. During the same meeting,* [DK] *stated that* [MA] *is not obliged to share his notes with the support staff and that he can electronically send his daily notes to the company, thereby side stepping the* [Team] *Leader – the Claimant.*

9. The Claimant contends that this cannot be part of Company policy or the Regulator's position because the [Team] *Leader must be given the opportunity to identify training and development issues. He contends that this strategy was designed to cause humiliation and indirectly pass on the message that coloured people lack capacity to supervise."*

187. The claimant therefore alleges that DK did not 'back him up' during the argument with MA in order to:

187.1 humiliate him; and

187.2 demonstrate that he lacked capacity to perform his Team Leader role;

188. We concluded that DK did not fail to support the claimant during the meeting in order to humiliate him or demonstrate that he lacked capacity to perform his Team Leader role. Our detailed findings of fact on this point are set out at paragraphs 42 to 58 of this Judgment. In summary, we concluded that:

188.1 on the claimant and Mr Malik's own evidence, the claimant and DK had a good working relationship as at 18 October 2021 (which was within the first two weeks of the claimant's employment);

188.2 the claimant and DK liaised over the meeting agenda;

188.3 there was no pre-meditated plan by DK and MA regarding the meeting – the claimant sent AO to fetch MA before they had their argument. If he had not done so, the argument would not have taken place;

188.4 the argument centred on whether or not MA was making proper notes of the tasks that he carried out for the service user. The claimant did not have responsibility for managing MA (who was employed by a different organisation) and they clashed over the issue of keeping notes;

188.5 DK intervened to calm the meeting down, but she did not instruct MA to comply with the claimant's wishes regarding the notes;

188.6 there was no evidence that DK intended that the argument would 'humiliate' the claimant. In fact, she stated afterwards that the claimant had handled things well;

188.7 there was also no evidence that DK was trying to suggest that people of the claimant's colour (he described himself as black for the purposes of his race discrimination claim) *"lack capacity to supervise"*. In particular, we note that:

188.7.1 it is highly likely that DK would have been aware of the claimant's race at the time he was appointed, given the claimant's name;

188.7.2 we accept that DK used highly offensive racist language regarding the claimant, Mr Malik, MA and other employees of Asian ethnicity. However, DK had previously managed Mr Malik, who was promoted from support worker to Team Leader and again to Service Manager (i.e. the same level as DK) whilst they worked together; and

188.7.3 Miss Mais and Mr Malik gave evidence that DK was 'very cautious' with MA and that she was 'frightened' of him. We also note that Miss Mais had also previously had difficulties with MA and raised a grievance relating to his conduct.

189. The claimant's complaint of direct race discrimination therefore fails because we concluded that DK did not fail to 'property support' the claimant at the meeting on 18 November 2021. The claimant's complaint of direct race discrimination is dismissed.

190. We note that the claimant has not brought a complaint of direct discrimination and/or harassment relating to the racist comments made about him by DK to Miss Mais, Mr Malik or Miss Simpson. The claimant has been represented since the first preliminary hearing by his current representative. The claimant could have applied to bring such a claim at any point during these proceedings but has chosen not to do so, despite being given the opportunity to provide further particulars of claim and the opportunity to comment on the list of issues to be decided at this hearing.

CONCLUSIONS

191. The claimant's complaints of:

191.1.1 Protected disclosure detriment;

191.1.2 Automatically unfair dismissal; and

191.1.3 Direct race discrimination;

fail and are dismissed for the reasons set out in this Judgment.

Employment Judge Deeley

Date: 13 July 2023

JUDGMENT SENT TO THE PARTIES ON

Date: 13th July 2023

.....

.....
FOR THE TRIBUNAL OFFICE