Case Number: 2207852/2020
2204336/2021
2201372/2021

THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mrs V Armoniene	**v**	**(1) Endersham Limited** **(2) Fleetcor Europe Limited**

Heard at: London Central

On: 1-3 and 6-9 March 2023
In chambers 10 March and 20 April 2023

Before: **Employment Judge Glennie**
Ms J Cameron
Ms L Moreton

Representation:
Claimant: Ms Donaldson
First Respondent: Ms Evans-Jarvis
Second Respondent: Mr Dear and Mr Mukulu

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. **The claim against the Second Respondent is dismissed on withdrawal.**

2. **The claim against the First Respondent is dismissed.**

REASONS

1. By her three claims to the Tribunal the Claimant, Mrs Armoniene, made the following complaints:

   1.1 Direct discrimination because of race.

   1.2 Harassment related to race and/or disability.

1.3 Victimisation.

1.4 Discrimination because of something arising in consequence of disability.

1.5 Failure to make reasonable adjustments.

1.6 Failure to pay holiday pay.

1.7 Unlawful deduction from wages (other than holiday pay).

1.8 Unfair constructive dismissal.

1.9 Wrongful dismissal (breach of contract).

1.10 Failure to provide a written statement of employment particulars.

1.11 Unfair dismissal relating to removal from Fleetcor's site.

1.12 Failure to provide a written statement of reasons for dismissal in relation to removal from Fleetcor's site.

1.13 Breach of contract in relation to furlough leave.

1.14 Failure to pay a guarantee payment.

1.15 Breach of the right of an agency worker in relation to access to employment (regulation 13 of the Agency Workers Regulations 2010).

1.16 Breach of the right to receive information (regulation 16 of the Agency Workers Regulations 2010).

1.17 Detriment contrary to regulation 17 of the Agency Workers Regulations 2010.

2. The Respondents, Endersham Limited and Fleetcor Europe Limited, resisted those complaints.

3. The Tribunal is unanimous in the reasons that follow.

Procedural and preliminary matters

4. The Claimant was assisted throughout the proceedings by Russian translators. (There were different translators at different points during the hearing). It was not possible to provide a Russian translator on day 3. On that day, a Lithuanian translator was present to assist one of the witnesses. The Claimant understands Lithuanian sufficiently well for translation into that language to be adequate for the purposes of understanding the

proceedings, although it would not have been sufficient for the purposes of giving her own evidence. The hearing on day 3 was therefore restricted to procedural matters and the evidence of the witness who was assisted by the Lithuanian translator.

5. A number of other procedural matters arose for determination by the Tribunal.

6. The hearing had originally been listed to take place in person at the Tribunal's offices. A few days before day 1 of the hearing, both Ms Evans-Jarvis and Ms Donaldson applied for the hearing to be conducted by video, for separate reasons that were personal to them. The Employment Judge who was then managing the case refused the applications. These were renewed, in Ms Evans-Jarvis' case with the support of a GP note. The Employment Judge who had been allocated to the hearing (namely, Employment Judge Glennie) directed that day 1 would take place by video and that in the first instance there would be a preliminary hearing in private to determine how the hearing would proceed.

7. Ms Evans-Jarvis and Ms Donaldson asked for the hearing to take place by video. Mr Dear (representing the Second Respondent at this stage) said that his client's preference was for the hearing to take place in person, but that if that meant that the hearing could not proceed at this time, the preference would be for it to be conducted by video in the current allocation.

8. The Employment Judge found that the hearing could not, in practical terms, proceed in person because Ms Evans-Jarvis was unable to travel to the Tribunal for medical reasons. It was not practicable for a different representative to be found and to take up the case as such short notice: they would need several days to prepare. This meant that there was a consensus between all parties that it was better to proceed by video than to postpone the hearing. The Employment Judge agreed that a postponement should be avoided if possible, and directed that the hearing proceed by video.

9. The remainder of day 1 was used by the Tribunal for reading. On the morning of day 2 Ms Donaldson and Mr Mukulu (representing the Second Respondent at this stage) asked for time as settlement discussions between the Claimant and the Second Respondent were well advanced. There was no objection from Ms Evans-Jarvis, and the Tribunal adjourned in order to allow the discussions to continue. In the afternoon of day 2 those discussions were concluded and the claim against the Second Respondent was withdrawn.

10. A consequence of the claim against the Second Respondent being withdrawn was that the Second Respondent would no longer be calling Mr Sessions to give evidence. (He was the subject of a witness order obtained by the Second Respondent). Ms Evans-Jarvis applied for a witness order to secure his attendance on behalf of the First Respondent, saying that his

evidence was important to the First Respondent's reason for their SOSR (some other substantial reason) proceedings and later disciplinary proceedings involving the Claimant. Ms Evans-Jarvis submitted that the First Respondent's actions were entirely in reaction to Mr Sessions, and that the Claimant's case was that the disciplinary proceedings had been brought without reason.

11. The Tribunal decided not to make a witness order. We found that it was not necessary to do so, as Ms Donaldson had confirmed that there was no challenge to the genuineness of the relevant contemporaneous documents, and these set out what it was that Mr Sessions had communicated to the First Respondent. Now that the Second Respondent was no longer involved in the proceedings, the focus of the issues was on what the First Respondent did and the reason or reasons why these things were done. It was unlikely that Mr Sessions' evidence would assist with the First Respondent's reasons for doing what they did, as it was unlikely that it could go beyond confirming that he sent the correspondence that is in the bundle. Requiring Mr Sessions to attend would be onerous for him and would tend to increase the length and therefore the cost of the hearing.

12. The first witness to be called (on day 3 of the hearing) was Mr Andijitis, on behalf of the Claimant. Ms Donaldson asked for Ms Taylor, the witness to be called on behalf of the First Respondent (by this time, the sole Respondent) to be excluded from the hearing while evidence was being given on behalf of the Claimant. Ms Donaldson submitted that if Ms Taylor were to hear the evidence of those witnesses, she could intentionally mislead the Tribunal. Ms Evans-Jarvis described the application as "absurd" and said that Ms Taylor was her client, in the sense of the person from whom she was taking instructions.

13. The Tribunal decided not to exclude Ms Taylor. The usual practice in Employment Tribunals in England and Wales is to allow witnesses to be present during the evidence. This practice can be departed from in appropriate circumstances, but the Tribunal found no reason to do so on this occasion.

14. A further matter arose on the morning of day 7 of the hearing. Ms Donaldson's cross-examination of Ms Taylor began at around 2.25 on day 5 and continued until the Tribunal rose at around 4.20, with a 10-minute break. On day 6 there was again a difficulty with the arrangements for an interpreter to assist the Claimant, and the start of the hearing was delayed until around 10.50. The cross-examination of Ms Taylor then continued for the rest of the day, with a mid-morning break, a lunch break of one hour, and a mid-afternoon break, the Tribunal rising at about 4.20. On day 7 cross-examination resumed at around 10.20. At around 11.35 Ms Taylor became distressed and the Tribunal took a break for 10 minutes.

15. Ms Taylor did not return from this break. Ms Evans-Jarvis informed the Tribunal that Ms Taylor felt unable to continue with her evidence and would not be returning to the hearing. The Tribunal asked the representatives for

their observations about how the hearing should proceed in the light of this development. Ultimately, there was a consensus, with which the Tribunal agreed, that it should give the parts of Ms Taylor's witness statement on which she had not been cross-examined such weight as it considered appropriate. In agreeing with this approach, the Tribunal reflected that Ms Donaldson's cross-examination of Ms Taylor had been more assertive than was necessary, and had been repetitive at times.

16. The Tribunal will also comment on the quality of the witness statements. On both sides, these were in a form that was unhelpful. The Claimant's statement was verbose and at times over-stated saying, for example, in paragraph 51 that she felt like "a hunted animal in safari" and in paragraph 97 about a particular communication from Mr Sessions "it is not understandable how a sober-mind and not mentally ill person could write it….." By contrast, the Respondent's statements tended to say very little about the issues in the case. In neither case did the form of the statements assist the Tribunal in its task. The Tribunal found greater assistance in the contemporaneous documents.

The issues

17. The issues were set out by Employment Judge Brown at a preliminary hearing on 21 and 23 September 2021 and were repeated by EJ Brown in a case management summary sent to the parties on 18 June 2022 following a preliminary hearing on 15 and 16 June 2022. The Tribunal makes the following observations about the list of issues:

    17.1 The issues as between the Claimant and the Second Respondent no longer arise for determination.

    17.2 The list is long and repetitive. As will be explained, some of the issues raise only general complaints (e.g. issues 6, 19 and 49 complained of the Claimant being "diminished" by 5 individuals, without identifying any dates or giving any description of what was alleged to have happened by way of "diminishing" her). Some factual issues appeared on multiple occasions under different causes of action. The most notable example of this was the complaint about the Claimant being removed from the Second Respondent's site. This was presented as an act of direct race discrimination (in 2 formulations); as harassment related to race and disability (3 formulations); victimisation; discrimination because of something arising in consequence of disability; failure to make reasonable adjustments; constructive unfair dismissal from the whole of her employment; and (separately) unfair dismissal from that part of her employment.

    17.3 The parties' representatives, however, made closing submissions in a relatively general way, without a great deal of analysis based on the issues.

17.4 The numbering of the issues does not lend itself to easy identification of the individual issues in these reasons. Given the need to identify what remains in issue as between the Claimant and the First Respondent, the Tribunal has re-numbered the issues with simple consecutive numbers.

17.5 The way in which the issues had been expressed led on occasions to difficulties of interpretation. The Tribunal has, however, retained the expression of the issues as recorded by EJ Brown, on the assumption that the words used are those put forward on behalf of the Claimant, rather than EJ Brown's interpretation and drafting of what was being said. Additionally, it was established at the commencement of the present hearing that these were the issues to be decided, and there was no further discussion of their content or the way in which they were expressed.

17.6 Given that there had already been two preliminary hearings for case management, and that a certain amount of time was taken up at the commencement of the hearing with preliminary issues as outlined above, the Tribunal considered that, rather than seeking to further refine the issues, it should proceed to hear the evidence and submissions and return to the issues as listed in the light of that.

17.7 In the issues, and in the remaining paragraphs of these reasons, the Tribunal will refer to the Respondent (being the First Respondent, Endersham Limited) and "Fleetcor" (the Second Respondent).

17.8 Any additional observations on the issues by this Tribunal will be shown *in italics.*

18. The issues are as follows:

Direct discrimination because of race: section 13 Equality Act 2010

(1) Were any of the complaints presented out of time. (Given its findings on the merits, the Tribunal has not further refined this aspect).

(2) The Claimant relies on both a real and hypothetical comparator. The real comparator is Yesmi. Yesmi is relied on in relation to the allegation that the Claimant was dismissed by the Respondent and was removed from Fleetcor's site.

(3) Was the Claimant treated less favourably than a real or hypothetical comparator, in any of the following alleged ways.

(4) The Claimant received lower wages for the same work than others of different origins.

(5) The Claimant was treated less favourably than others of different origins *in the following ways.*

(6) She was diminished by Cristina Nunez, Victoriya Shtanko, Maria Cueva, Laura Taylor and Jamie Godsave.

(7) She was substituted by another employee of different origin on Fleetcor's site.

(8) She was removed from the Job Retention Scheme *(furlough)* without her knowing and consent, and by that the Claimant was deprived of the whole or any part of a guarantee payment to which the Claimant was employee is entitled *(the Tribunal takes this to mean to which the Claimant as an employee was entitled).* No one employee of different race suffered the same.

(9) The Respondent organised against the Claimant disciplinary proceedings without any reason. No one employee of different race suffered the same.

(10) The Respondent organised against the Claimant SOSR proceedings without any "substantial reason". No one employee of different race suffered the same.

(11) She was provided with falsified documents and was prohibited to contact the hirer, Fleetcor, to find the true information. No one employee of different race suffered the same.

(12) The Respondent stated that the Claimant resigned on 23/10/2020 without any notice of resignation from her. They would never treat anyone by such way.

(13) Her contract was amended unilaterally by the Respondent by reducing her working hours in 5 times, without the Claimant's knowing or consent, and the Claimant was left finally without any funds to survive. No one other employee treated by such unfair way.

(14) The Claimant was unfairly dismissed by the Respondent from Fleetcor's site because Yesmi needed the Claimant's work at Fleetcor's site. Yesmi is the more suitable origin than the Claimant, the Claimant *(this must mean Yesmi)* is a friend of Maria Cueva and Cristina Nunez and the same origin as Maria and Cristina.

(15) The Respondent did not provide the Claimant with reasonable notices of meetings for any investigations. The Claimant has never heard that the Respondent acted by this way regarding other people of different origin.

(16) In 2019 the Respondent increased the Claimant's scope of work in two times, but her payment remained the same. They did not treat other workers by this way.

(17) If so, was that less favourable treatment because of a protected characteristic, of race. The Claimant relies on her Lithuanian national origin. *In the course of the hearing, the Claimant's case was also put in terms of being "Eastern European", and not being Spanish or Spanish speaking.*

Harassment: section 26 Equality Act

(18) Did the Respondent engage in any of the unwanted conduct stated below? The Claimant experienced the following unwanted conduct from the Respondent that violated her dignity and/or created an intimidating, hostile, degrading, humiliating or offensive environment for her

(19) She was diminished or harassed by Cristina Nunez, Victoriya Shtanko, Maria Cueva, Laura Taylor and Jamie Godsave.

(20) In 2019 the Respondent increased the Claimant's scope of work in two times, but her payment remained the same.

(21) In October 2020, the Respondent's manager Cristina Nunez tried to force the Claimant to clean stairs and toilets knowing that the Claimant's health conditions do not allow her to clean stairs.

(22) On 23/10/2020 the Respondent removed the Claimant from the furlough scheme without her knowing and consent.

(23) The Respondent initiated against the Claimant disciplinary proceedings without any reason (in November 2020 and April-June 2021)

(24) In November 2020 the Respondent initiated against the Claimant SOSR proceedings without any "substantial reason" to remove the Claimant from Fleetcor's site, arguing that in 2019 Fleetcor's manager Marc Sessions allegedly complained about the Claimant that was not true.

(25) The Respondent did not provide the Claimant with reasonable notices of meetings for any investigations.

(26) She was provided with falsified documents, the Respondent refused to provide her the requested documents and the Claimant was prohibited to contact the Hirer, Fleetcor, to find the true information.

(27) The Respondent stated that the Claimant resigned on 23/10/20 without any notice of resignation from her.

(28) The Respondent sent threatening text messages to the Claimant.

(29) The Respondent appointed meetings with only one target – to force the Claimant to agree voluntary to be removed from Fleetcor's site.

(30) Her contract was amended unilaterally by the Respondent by reducing her working hours in 5 times, without the Claimant's knowing and consent, and the Claimant was left finally without any funds to survive.

(31) The Claimant was unfairly dismissed by the Respondent from Fleetcor's site.

(32) The Respondent sent to the Claimant diminishing and harassing messages, emails and letters. Cristina Nunez, Victoriya Shtanko, Maria Cueva, Laura Taylor and Jamie Godsave.

(33) The Respondent rejected on 17/03/2021 the Claimant's grievance dated 09/02/2021 and 10/02/2021 which set out the basis on which the Claimant believed the Respondent has seriously breached her contract and the Respondent did not provide her with an opportunity to appeal the grievance outcome by withholding documents which were referred to.

(34) The Respondent did not reimburse underpayments of the Claimant's wages for 2019.

(35) The Respondent underpaid the Claimant's furlough payment and her holiday pay for unknown reason.

(36) The Respondent ignored the Claimant's grievances dated 24/11/2020, 06/01/2021, 02/03/2021, 26/04/2021 and 07/06/2021 and refused to consider the Claimant's grievance dated 20/05/2021.

(37) The Respondent finally initiated new groundless disciplinary proceedings due to the Claimant's request to Fleetcor regarding email dated 04/12/2020 that was falsified by the Respondent threatening the Claimant with summary dismissal for gross misconduct. The Respondent denied the Claimant's right to investigate the Respondent's evidence against her.

(38) The Claimant was prohibited to write to the Respondent's Director her grievance regarding managers, and her question whom the Claimant can complain to regarding managers was left without any answer.

(39) If so, was the conduct related to the Claimant's race or disability? The harassment allegations which relate to disability are allegations 22, 24 and 37, *being* removal from furlough, removal from Fleetcor contract, and dismissal.

(40) The Claimant relies on her stress and anxiety condition from summer 2019 in her disability complaints.

(41) If so, did the conduct have the purpose or effect of violating the Claimant's dignity or created an intimidating, hostile, degrading, humiliating, or offensive environment. *(This re-formulates part of issue 18).*

Victimisation: section 27 Equality Act

(42) Did the Claimant do any of the following protected acts?

(43) Did the Claimant complain about discrimination (race and/or disability) against her by Marc Sessions to her manager Rasa?

(44) Did the Claimant state that the Claimant cannot clean stairs due to her health problems (disability)?

(45) Whether the Claimant brought grievances regarding discrimination and harassment against her?

(46) Whether the Claimant made an allegation that managers of the Respondent and Fleetcor have contravened the Equality Act 2010?

(47) Did the Respondent subject the Claimant to any of the following detriments?

(48) Underpayment of the Claimant's wages and holiday pay (unlawful deductions of wages).

(49) Diminishing the Claimant and her dignity.

(50) Bullying the Claimant.

(51) Removal of the Claimant from the Job Retention Scheme *(furlough)* without the Claimant's knowing or consent.

(52) Initiation of unreasonable disciplinary proceedings against the Claimant.

(53) Initiation of SOSR proceedings against the Claimant without any "substantial reason".

(54) Unfair dismissal of the Claimant from Fleetcor's site on 08/03/2021.

(55) Unilateral amendments of the Claimant's employment contract by the Respondent with reducing of the Claimant's working hours.

(56) Forcing the Claimant to perform unpaid work and to work outside of her working hours, even when the Claimant was on holiday.

(57) Increasing the Claimant's scope of work in two times without appropriate pay (since 2019).

(58) Violation of the Claimant's right to receive reasonable notice of meetings for any investigations.

(59) The Respondent's refusal to provide the Claimant with the requested documents regarding allegations against her.

(60) Prohibition to the Claimant to contact the Hirer (Fleetcor) to find the true information

(61) Forcing the Claimant to resign.

(62) Wrong statement of the Respondent about the Claimant's resignation on 23/10/2020 without any notice of the Claimant about such resignation.

(63) The Respondent's threatening text messages to the Claimant.

(64) The Respondent's diminishing and harassing messages, emails and letters.

(65) The Respondent's refusal on 17/03/2021 the Claimant's grievance dated 09/02/2021 and 10/02/2021.

(66) The Respondent's underpayment of the Claimant's furlough payment.

(67) The Respondent's ignoring of the Claimant's grievances dated 24/11/2020, 06/01/2021, 02/03/2021, 26/04/2021 and 07/06/2021 and refusal to consider the Claimant's grievance dated 20/05/2021.

(68) Denial of the Claimant's right to investigate the Respondent's evidence against her.

(69) Deprival of the Claimant of her right to complain regarding the Respondent's managers.

(70) If so, did the Respondent subject the Claimant to any of the above detriments because the Respondent believes that the Claimant had done, or may do, a protected act?

Disability Discrimination: section 15 Equality Act

(71) The Claimant relies on her stress and anxiety condition from summer 2019 in her disability complaints.

(72) Does the Respondent concede or dispute that the Claimant had the alleged disability at the relevant time, pursuant to the criteria set out in section 6 of the Equality Act? *The Respondent disputed disability, which was therefore an issue to be determined.*

(73) Did the Respondent have knowledge, actual or constructive, of the Claimant's alleged disability?

(74) The something arising from disability is the Claimant's refusal and/or inability to clean the stairs;

(75) And/or the Claimant's reporting to the Respondent that she was stressed by Mr Sessions' treatment of her.

(76) Did the Respondent subject the Claimant to the following unfavourable treatment because of something arising from disability.

(77) Subjecting the Claimant to continued texts and contact.

(78) Removing the Claimant from the Fleetcor contract.

(79) Removing the Claimant from the furlough scheme.

Failure to make reasonable adjustments

(80) Did the Respondent apply the PCPs of requiring employees to clean stairs;

(81) And/or of transferring employee's from Fleetcor's site.

(82) Did those PCPs put the Claimant at the substantial disadvantage of having her stress and anxiety condition exacerbated.

(83) Were the following reasonable adjustments for the Respondent to have to make to avoid the substantial disadvantage, namely returning the Claimant to Fleetcor's site;

(84) And/or not requiring the Claimant to clean stairs.

Holiday pay

(85) At the effective date of termination, how many accrued holidays did the Claimant have?

(86) At the effective date of termination, how many holidays had the Claimant been paid for?

Unlawful deduction from wages

(87) How much is the Claimant owed by the Respondent? *(The issues include calculations which are not reproduced here. The claim is for £1,106.90).*

(88) Did the Respondent make any deductions from the Claimant? *(The issue include calculations which are not reproduced here. The claim is for £1,316.40).*

(89) If so, were the deductions permitted by statute / consented to in writing by the Claimant.

(90) If not, how much is the Claimant owed.

Unfair constructive dismissal

(91) Did the Respondent engage in the following conduct?

(92) The conduct listed above in sections 1-4 *(i.e. direct discrimination because of race; harassment, victimisation, disability discrimination and failure to make reasonable adjustments).*

(93) The Respondent unilaterally changed the Claimant's contract significantly by being removed from the Fleetcor contract.

(94) The Respondent failed to carry out the grievance procedures.

(95) The Respondent discriminated against the Claimant as listed above.

(96) The Respondent informed the Claimant that she would be subjected to an SOSR procedure.

(97) Did any of the Respondent's actions above constitute a breach – actual or anticipatory – of the Claimant's contract of employment?

(98) If so, were the breaches sufficiently important or fundamental to justify the Claimant resigning or terminating her contract of employment?

(99) Did the Claimant affirm any of the alleged breaches by virtue of her delayed resignation?

(100) Did the Claimant resign in response to the breaches or for some other reason unconnected with the breach?

(101) If the Claimant was dismissed, was there a fair reason for dismissal?

(102) If the Tribunal finds that the Claimant was dismissed, the Respondent contends that the Claimant was dismissed for some other substantial reason / conduct due to her continued failure to

comply with a reasonable management request of not contacting / harassing Fleetcor which jeopardised the Respondent's relationship with the client.

(103) Regardless of the procedure followed, would the Claimant have been dismissed in any event, in accordance with the principle in **Polkey**?

(104) Did the Claimant contribute to her dismissal in any way and if so, should her compensation be reduced or extinguished?

Wrongful dismissal

(105) Was the Claimant dismissed in breach of her contract?

(106) Is the Claimant entitled to notice pay?

(107) If so, how much notice pay does the Respondent owe to the Claimant?

Written statement of employment particulars (section 1 Employment Rights Act) and statement of changes (section 4)

(108) Did the Respondent fail to issue the Claimant with a written statement of employment particulars before proceedings begun?

(109) During the Claimant's employment, was there a change in any of the matters, particulars of which are required by sections 1 to 3 of the Employment Rights Act? If so, when?

(110) If so, did the Respondent fail to provide the Claimant with a written statement of change.

Unfair dismissal *(relating to Claimant's "removal" from Fleetcor's site)*

(111) *Did the "removal" of the Claimant form Fleetcor's site amount to a dismissal*

(112) Whether the Respondent had a reason to dismiss the Claimant from Fleetcor's site?

(113) If yes, what was the reason.

(114) Was the reason for dismissal of the Claimant from Fleetcor's site fair? *(Did the Respondent act reasonably or unreasonably in treating this as a sufficient reason for dismissing the Claimant).*

Failure to provide a written statement of reasons for dismissal: section 92 of Employment Rights Act

(115) Did the Respondent provide a written statement of reasons for the dismissal from Fleetcor's site?

Breach of contract

(116) Whether the employment Contract was breached by the Respondent?

(117) If yes, was this breach significant?

(118) Whether the agreement for furlough leave was in breach by the Respondent? *The Tribunal had some difficulty understanding what was meant by this issue. At the conclusion of the case the only complaint about furlough that the Tribunal could identify was about being taken off furlough in October 2020, and so we assumed that the issue referred to this.*

Failure to pay the whole or any part of a guarantee payment to which the employee is entitled: section 28 Employment Rights Act

(119) Did the Respondent fail to pay the Claimant a correct amount of a guarantee payment under the Job Retention Scheme?

(120) Whether the Respondent had a right to terminate a furlough leave for the Claimant in respect of Fleetcor's site.

Violation of the right of an agency worker in relation to access to employment – regulation 13 Agency Workers Regulations 2010

(121) Did the Respondent violate the right of the Claimant as an agency worker in relation to access to employment?

Violation of the right of an agency worker to receive information: regulation 16 Agency Workers Regulations 2010

(122) Did the Respondent violate the right of the Claimant as an agency worker to receive information?

Violation of the right of an agency worker not to be subjected to detriment: regulation 17 Agency Workers Regulations 2010

(123) Did the Respondent violate the right of the Claimant as an agency worker not to be subjected to detriment by failing to provide her with information in relation to disciplinary proceedings against her, and by falsifying documents?

<u>Evidence and findings of fact</u>

19. The Tribunal was provided with the following witness evidence on behalf of the Claimant:

19.1 Mr Antanas Andijitis (an acquaintance of the Claimant).

19.2 The Claimant, Mrs Armoniene.

19.3 Ms Marina Beremovitch (an acquaintance of the Claimant).

19.4 (Statements only) Inga Baranauske, Daiva Ivanauskiene, Rasa Kybartaite.

20. The Tribunal was provided with the following witness evidence on behalf of the Respondent:

20.1 Ms Laura Taylor (Business Support Manager).

20.2 Mr Ricardo Tiglla (Manager).

20.3 (Statements only) Maria Cueva, Cristina Nunez, Paula Halliday.

21. Where witnesses did not give oral evidence, the Tribunal read their statements, giving these such weight as we considered appropriate.

22. There was an agreed bundle of documents containing around 1260 pages. Page numbers in these reasons refer to that bundle. The numbers are those which appear on the physical pages rather than the PDF numbers for the electronic version (the latter being consistently 2 greater than the former).

23. The Claimant is of Lithuanian national origin. She began employment as a cleaner with the Respondent company, which provides cleaning services to its clients, on 28 April 2016. Her line manager was Ms Rasa Kybartaite.

24. The Claimant worked at the premises of a number of the Respondent's clients, including (from January 2017) Fleetcor. The job involved cleaning Fleetcor's offices and, from June 2017 onwards, a flat which Fleetcor maintained for employees and officers who needed to stay overnight in London. The agreement with Fleetcor was originally that 3 hours were allowed for cleaning a single office floor. From June 2017 onwards the arrangement was that the flat would be cleaned as and when required, and that 3 hours would be allowed for this.

25. In April 2018 Mr Sessions became Fleetcor's point of contact with the Respondent and the Claimant. The Claimant's evidence was that Mr Sessions sent her large numbers of text messages about her work, both during and out of working hours. In January 2019, Mr Sessions informed the Claimant that Fleetcor would be taking on another office floor in April, and asked whether she would be able to clean both floors within the existing 3 hours. An agreement was reached between Fleetcor and the Respondent that 4 hours would be allowed for the two floors. Additionally,

on 1 February 2019 Mr Sessions reduced the allowance for cleaning of the flat to 2 hours, when required.

26. It is apparent from various parts of the correspondence between Fleetcor and the Respondent, and text messages from Mr Sessions to the Claimant, that he regarded her cleaning as being of a high standard. In November 2018 Mr Sessions enquired about sending a Christmas gift to the Claimant. Some difficulty had, however, arisen by June 2019.

27. On 7 June 2019 at page 293 Mr Sessions sent an email to Mr Daw of the Respondent making a number of points. Mr Sessions said that Fleetcor really liked the Claimant, and that she did a good job, but the way in which she spoke to other contractors and her text messages to him were "getting too much." He said that the Claimant complained about matters such as the office being dirtier than usual, or there being empty bottles in the flat after a party. He put this in the context of Fleetcor having no issue with the Claimant leaving early if she got the work done in less than 4 hours. He said that the Claimant would threaten to quit if she did not like something and said that "the moaning and complaints really have to stop or be directed to Rasa, because it's beginning to become an issue." There was a meeting on 10 June 2019 involving Mr Sessions, Ms Kybartaite and the Claimant at which the issues seemed to be resolved.

28. In addition, the Claimant said in paragraph 36 of her witness statement that Mr Sessions often told her that she could not understand English culture, rules or mentality because she was from Lithuania and that her country had lower standards. She said that this caused her to feel diminished and in deep stress. In paragraph 39 she said that she "told [Ms Kybartaite] again about that", and that Ms Kybartaite advised her to turn off her phone at weekends. In paragraph 10 of her witness statement Ms Kybartaite said that the Claimant told her that Mr Sessions "mentioned her origin in context with her lack of understanding of the UK rules, standards, culture, and English people's mentality. She told me that he several times advised her to go back to Lithuania".

29. The Claimant's evidence about this was not challenged in cross-examination. The Tribunal accepted her evidence about what she told Ms Kybartaite. Beyond this, the Tribunal did not find that the Claimant told Ms Kybartaite that Mr Sessions had advised her to go back to Lithuania: the Claimant's evidence did not include this and the Tribunal gave little weight to Ms Kybartaite's statement about this, given that she did not give oral evidence at the hearing.

30. In about February 2020 Ms Cueva replaced Ms Kybartaite as the Claimant's line manager. The Claimant's evidence was that Ms Kybartaite said that the Respondents were replacing East European workers with those of Spanish or Portuguese origin (Ms Kybartaite confirmed this conversation in her witness statement, although without reference to "Portuguese"). Ms Kybartaite subsequently left the Respondent's employment, referring in her witness statement to a "discriminatory reason"

without explaining this any further. The Tribunal found Ms Kybartaite's stated opinion to be of no real evidential value. Without further explanation, it could be no more than an impression that she had formed, or a suspicion that she had. It was not possible for the Tribunal to know what "discriminatory reason" she was suggesting she had for leaving the Respondent's employment.

31. From March 2020 onwards the covid-19 pandemic severely affected the use of offices in London and elsewhere. Fleetcor closed its offices from 23 March 2020. On 31 March 2020 the Claimant commenced a period of furlough from the Fleetcor role under the government's Job Retention Scheme, under which she was to receive 80% of her normal pay while remaining off work.

32. On 16 July 2020 Ms Rowley of the Respondent sent an email to Mr Sessions at page 322 referring to a conversation he had had with Ms Cueva. There had been discussion about the Respondent's proposal that Fleetcor might "top up" the Claimant's pay while she was on furlough by paying the remaining 20%, and about whether the Claimant was working elsewhere at the time.

33. Mr Sessions responded on 22 July 2020 with a long email at pages 319 to 321, making a number of points about the cleaning arrangements, hours and payments. The elements of this email which are relevant to the issues before the Tribunal are that Mr Sessions repeated that the Claimant was a very good cleaner but that he considered that her attitude was "far from acceptable on numerous occasions." He referred to the meeting in June 2019 and said that the Claimant had toned down her behaviour, but had continued to complain on occasions. He said that, although he had no issue with the Claimant leaving early if the work was completed, she was still complaining even though she was never on site for the full 4 hours. He questioned why Fleetcor was paying for 4 hours when the average the Claimant had been doing was nearer 2.5 hours.

34. Mr Sessions also stated that he had had a conversation with Mr Manjura of the Respondent in which he had raised concerns about the Claimant's conduct and behaviour and that he was "happy to replace her". Mr Sessions continued:

> "In summary I am happy with her cleaning but if she is to return we have to agree to a 2 hour per day contract moving forward certainly in the short term and that she must raise all concerns with Endersham and not send me abrupt messages threatening to quit or being unhappy with additional dirty dishes!"

Mr Sessions also said that there were no plans for a general return of staff to the office before January 2021, but that there would be the need of the odd clean of the office once weekly.

35. On 27 July 2020 the Claimant asked Ms Cueva via text (page 310) whether Fleetcor would be open from August. Ms Cueva replied "It is client decision, no ours. Will let you know if Marc contact us to open."

36. On 5 August 2020 Ms Rowley sent an email to Mr Sessions at page 317 proposing a daily clean of 2.5 hours from August, and saying that it would be made clear to the Claimant that she must refrain from contacting him and must utlise the allocated time each day. Mr Sessions replied on the same day at page 316 saying that they were not coming into the office, so that only a weekly clean was required, and asking when the Respondent proposed to return the Claimant from furlough.

37. On 6 August 2020 Ms Rowley sent an email to Mr Sessions at page 315 stating that the Claimant would remain furloughed until there was an increase in service, and that Ms Nunez had arranged for the weekly clean to be done by an operative who was already cleaning the common parts of the building. That arrangement was confirmed in an email of the same date from Ms Nunez (on page 314), who identified the operative confirmed as Yesmi. Ms Taylor confirmed in her oral evidence that Yesmi speaks Spanish. Subsequently on 10 August 2020 Mr Sessions wrote praising Yesmi's work and asking that she should carry out the weekly clean for the foreseeable future (page 311).

38. On 25 August 2020 the Claimant sent a text message to Mr Sessions asking him whether he could say when his office would re-open (as confirmed in paragraph 70 of her witness statement). On 8 September 2020 Mr Sessions sent an email to Ms Rowley at page 328 referring to the message and to his understanding that the Claimant would be spoken to about making direct contact with him, and stating " I would be grateful if it could be clearly explained to her that she must take guidance and instruction from Endersham and refrain from contacting me direct."

39. There followed an email of 9 September 2020 at page 327 from Ms Nunez to Ms Rowley and Ms Taylor in which she wrote:

    "I spoke to Vaida and says that the client contacted her first.

    I made it clear that communication regarding the job at Fleetcor it should only be through myself or any other manager from Endersham and that it's strictly forbidden to be in contact with the client…"

    Ms Nunez also asked Ms Taylor to send a formal letter, although it appears that this was not done.

40. On 1 October 2020 Ms Nunez sent an email to Mr Sessions at page 330 which included the following:

    "Regarding the office clean, would you consider partially un-furloughing Vaida, the scheme is almost coming to an end and really want to bring

some reassurance to our operatives. Yesmi is available but thought Vaida should be back to her job, let me know your thoughts."

41. There evidently followed a telephone conversation between Mr Sessions and Ms Nunez, as the latter wrote in an email of 2 October 2020 at page 332: "As per our call, if you could please send me an email for a site removal request for the operative assigned to your site Vaida Armoniene to proceed with query."

42. On 13 October 2020 Mr Sessions sent an email to Ms Nunez at page 342 in which he stated that Fleetcor would be reducing their office space to one floor as from 1 December, and that until then they wished to continue with the current arrangement with Yesmi. He continued that the requirement from 1 December would be for 2 hours cleaning, and that "In the light of the past issues, we feel that a clean break is prudent, so prefer to have a new operative from 1 December to clean our office." An internal email of the same date from Ms Nunez shows that she understood this as meaning that Mr Sessions had terminated the Claimant's service at Fleetcor. She sent a further email to Mr Sessions on 19 October 2020 confirming that Yesmi would continue until the end of November, and a new permanent operative would then be assigned.

43. At this time, it was generally anticipated that the furlough scheme would come to an end at the end of October 2020. The Claimant was sent a generic letter about this on 22 October 2020 at page 343.

44. There was then an exchange of text messages between the Claimant and Ms Nunez on 23 October 2020 at page 346. This began with Ms Nunez asking the Claimant to return her call, and then sending details of a job offer at premises near Oxford Street. The Claimant asked whether she could check the office and received the answer: "It's not office, it's common areas, stairs and toilets. I am not available today but need an answer ASAP."

45. The Claimant replied:

"Sorry, but I not take this job. I will clean the flat last time in Monday. You have to give notes for me two weeks before. I want my holiday and will cancel contract with Endersham. Sorry and thanks."

46. In paragraph 80 of her witness statement the Claimant said that she had texted Mr Sessions asking whether Fleetcor had cancelled their contract with the Respondent (this text can be seen at page 1098). Several messages passed between the Claimant and Mr Sessions, with the latter saying that there was no need of cleaning with no one coming in to the office. His final message in the sequence read: "Please talk to Endersham. We don't pay them as no cleaning. It's up to you if you work for them. Sorry no more text messages as I am under pressure today."

47. The Claimant made a number of points about this aspect of the matter. One was that when Mr Sessions referred to being "under pressure", this meant something to the effect that he was under pressure from the Respondent to say that he did not want the Claimant to return to the site. The Tribunal found that this was an improbable reading of the text, which was more likely to have been referring to pressure of work, as a polite way of saying that he was not going to correspond any further.

48. The Claimant also referred in paragraph 80 of her witness statement to a document at page 344 headed "Flexible Furlough - Employee Agreement" which had been completed with regard to her by Ms Nunez. The document is dated 23.10.20 and records that the process was carried out between 12.03 and 12.10. It includes an entry "Employee resigned, sent a text to C. Nunez". The Claimant's text on page 346 was sent at 15.36. The Claimant observed that "they accepted unexpressed resignation even 3.5 hours before my statement that I would rather 'cancel contract'. Thus, it was fraud." The Tribunal found this suggestion unrealistic. It would seem to involve Ms Nunez having somehow foreseen the text that the Claimant would send later in the day, and having made use of that when completing the form. Although the Tribunal heard no evidence on the point from Ms Nunez, we found it more likely that there was some other explanation, for example that she had filled in part of the form before receiving the text, and part after.

49. When asked about her text in cross-examination, the Claimant said that "it was a discussion only" and that "I didn't state the date I was resigning." The Tribunal concluded that the text meant that the Claimant was resigning and that she intended it to mean that. The references to cleaning the flat for the last time and cancelling the contract with the Respondent are clear. Beyond this, Miss Nunez replied: "your resignation has been accepted……all accrued holidays will be paid and will issue a P45", to which the Claimant responded: "Ok. Thanks. The flat I will finish at 12.30 – 13.00 pm in Monday." Then, on 2 November 2020 the Claimant sent another text to Ms Nunez which read: "Hello, government still pay again. What will you do with me? Thanks". The Tribunal found that this was a reference to the extension of the furlough scheme beyond 31 October 2020.

50. The Tribunal found that the Claimant had intended to resign, that the Respondent reasonably understood that she had done so, and that she subsequently sought to reverse her decision when she learned that the furlough scheme was continuing.

51. In the event, the Respondent did not act on the Claimant's resignation. On 10 November 2020 Ms Taylor sent a letter to the Claimant at pages 1150-1151 which read in part as follows:

"As you are aware our clients Marc Sessions from Fleetcor have contacted the company requesting that you be removed from the Fleetcor due to the following matters of concern:

- Not completing contractual hours
- Behaviour issues

"Your manager, Cristina Nunez has already contacted you to request that you do not attend the site while we investigate this matter. I will arrange for your wages to be processed from 02.11.2020 until such time as this matter is concluded.

"You are therefore, officially on authorised paid leave from 02.11.2020. This action is not to be regarded in any way as disciplinary action, but as a holding measure while we speak to the client on your behalf.

"The company has no alternative but to respect Fleetcor wishes as it is part of the contractual arrangements that they can insist that our employees are removed from their premises when there are on-going issues of concern to investigate……."

There followed proposed arrangements for investigation of the matter.

52. Ms Nunez sent an email to Mr Sessions on 11 November 2020 at page 347 referring to his "verbal and written request to remove" the Claimant and asking for the details behind the request so that the matter could be investigated further. Mr Sessions replied on the same day saying that he had been told that the Claimant had resigned from the Respondent, and that he had asked whether she could be swapped for another operative. He wrote: "We don't need Vaida back and furthermore the reason we asked you to try to swap her was due to her behaviour towards me and my other staff….." Mr Sessions sent a further email a few minutes later in which he said that the Claimant's "misunderstanding, abrupt and rude messaging and all the other issues…." were "just too much to deal with". Mr Sessions added that he had not asked for the Claimant to be removed, but to be swapped for another cleaner.

53. Mr Sessions sent another email to Ms Nunez in similar terms later on 11 November 2020 at pages 349-350. This made a number of observations, including the following:

"As I have stated before Vaida's standard of cleaning has never been in question, the cleaning has always been performed to a high standard (other than a couple of matters; namely leaving the site early…….)

"However, her attitude and rude/sometimes aggressive text messages to me has been ongoing for some time and why the meetings (both by telephone and in person) were called.

"……Despite insisting that she should be paid for 5 hours, we agreed on 4 hours, she often left site around 2 hours before her end time. Furthermore on one occasion she was called at 9pm (after leaving site after only 90 minutes) to tell us she was at her next job (whilst she was

supposed to be cleaning for us and we were paying her). To be frank Endersham should have taken care of these issues previously and not let it get to this point.

"For the record, I did not ask for Vaida to be removed, I asked if it was possible for her to be swapped with another operative.

"The pandemic was an opportunity to review. I am no longer prepared to accept the aggressive texts, the consistent moaning about her workload (when I know she leaves the site hours before her end time), the complaints of being underpaid, threats that she will be leaving the job, etc. Even when Endersham asked her to refrain from contacting me recently she was calling and texting me whilst I was on holiday. She simply does not listen and does not follow instruction from Endersham (her employer)>

"It would be in the best interests of all parties to swap her with another Endersham operative once we are back to some normality and have a need for an office cleaning contract. I cannot see anything improving after numerous previous meetings and discussions/instructions for which she simply ignores."

54. On 16 November 2020 Ms Taylor sent an email to the Claimant at page 351 saying that she could not receive furlough payments as the work was still available. Ms Taylor continued that: "The matter of concern falls to discuss your removal from the client's site for alleged rude and inappropriate behaviour as per the letter given to you. We have on a few occasions requested that the client reconsiders their request however it has not proven successful." The email continued that this was to be discussed "tomorrow (Tuesday 17th) at the scheduled meeting. It appears that this was intended to be a reference to the meeting previously set for "Tuesday 18th November" (18 November 2020 being in fact a Wednesday).

55. There was some dispute about why the meeting did not go ahead and who was responsible for this. The Tribunal ultimately did not need to reach any conclusions about this, because the meeting was rescheduled for 23 November 2020 and took place on that date. In a letter to the Claimant dated 18 November 2020 at pages 360-361 Ms Taylor wrote that this was to be a disciplinary meeting to consider the following:

"It is alleged that you have conducted yourself unprofessionally on client site which has resulted in you being removed from Fleetcores site. The client has refused on two occasions to accept that you return to work on this site due to your rude attitude and behaviour towards management."

56. The letter continued that the hearing would be conducted by Ms Nunez and that Ms Taylor would be in attendance as note taker. Perhaps confusingly, given that the letter was signed by Ms Taylor, it continued:

"At the end of the disciplinary hearing, I will adjourn it to consider my response. No decision will be made at that stage. Pending that decision,

however, we will immediately hold a separate meeting to discuss the client's request to move remove you from their site. This will ensure I can establish all of the facts and give you the opportunity to put forward your own explanation. I will then be able to make formal representations on your behalf to the client with the aim of having you reinstated.

"We have no alternative but to respect the client's wishes. It is part of our contractual arrangement with them that they have the right to request exclusion of any of our staff from their sites.

"After I have spoken to the client I will contact you again to discuss their decision in writing. I must warn you that if we are unable to persuade the client to allow you to continue work on their site we have no alternative employment for which you can be considered, your employment may be terminated. This dismissal would be termed as a "some other substantial reason" (SOSR) dismissal, third party pressure. However, we will seek to avoid this if possible."

57. Meanwhile, on 20 November 2020 at page 442 Mr Sessions sent an email to Ms Nunez, copied to others including Ms Shtanko, saying that the Claimant had contacted him previously to say that she would "go out from Endersham", suggesting that she was leaving, but that she had now contacted him again threatening that a lawyer was going to be contacting him about a new letter she had received. Mr Sessions continued:

"Vaida is not our employee and this matter should be being dealt with between her and Endersham (as her employer). Fleetcor have a contract for a cleaning operative (it could be Vaida, Yesmi, or any other cleaner that you offer us)."

He then referred to Fleetcor not currently needing a cleaner for 4 hours per day, and continued:

"…….Endersham cannot complain that my complaints dating back to some 13-14 months ago are the reason that she cannot attend the Fleetcor office anymore, as that is simply not accurate…."

58. The meeting took place on 23 November 2020, although in the event it was chaired by Ms Shtanko. In the outcome letter dated 26 November 2020 at pages 372-373 Ms Shtanko wrote that Fleetcor had retracted their request to remove the Claimant, so that there was no longer a need to investigate a third party pressure process. Ms Shtanko stated that the Claimant's behaviour had nonetheless been unacceptable, in support of which she set out a timeline of events between 23 October and 23 November 2020. The letter concluded:

"On this particular occasion I have decided not to proceed with formal disciplinary action. However, this letter is to be treated as confirmation that I have discussed my concerns with you and that you are expected to make every effort to address the shortcomings that have been identified.

"This letter is not intended to be a formal warning and does not form part of the company's disciplinary procedure, however, it will be kept in your personnel file and thus takes the form of what I consider to be a reasonable written management instruction.

"Should there be any repeat of this conduct, or indeed any misconduct in general you may be subject to formal disciplinary action……"

59. On 21 December 2020 a letter at pages 376-377 was sent to the Claimant by the Respondent's HR team stating that the intention had been to place her on furlough until work became available again, but that she had remained on paid leave because new concerns had been sent by Fleetcor on 4 December. (The Tribunal was unable to find a document of that date in the bundle, and this was an aspect that was not canvassed with Ms Taylor). The letter stated that the Claimant was therefore on authorised paid leave, and that she was required to attend an investigation meeting on 23 December 2023. It also contained the following:

"You should direct all communications to Endlesham directly, you should not contact the client at Fleetcor as it has been suggested that you are damaging the relationship between the business and the contract."

60. There followed some email correspondence in which the Claimant said that she needed 3 days' notice of the meeting, in particular because she was also working elsewhere and needed to notify her other employer about her absence from work (page 386). The meeting was rearranged for 30 December 2020, to be chaired by Ms Cueva, who wrote to the Claimant on 23 December 2020 (page 392) stating among other things that the client (Fleetcor) "had refused our request" (that the Claimant should return to their site).

61. The meeting was recorded, and there was a transcript of the recording at pages 410-428. There was an issue about the use of a translator, as the Respondent provided a translator for the Claimant, but she also brought her own translator whom she wished to use. Ms Cueva decided that the individual provided by the Respondent should be used. In her witness statement, Ms Cueva said about this meeting only that "the issues were addressed, which the Claimant denied". The transcript shows that there was discussion about the issues as to leaving early, the hours that the Claimant worked, what she was paid, her resignation, furlough, and the contact between her and Mr Sessions. It is evident that the Claimant defended her position on all points, although the simple statement that she denied the issues does not really do justice to the discussion.

62. The Claimant had meanwhile presented her first claim to the Tribunal on 27 December 2020, naming only the Respondent, and under a claim for "other payments", seeking a return to furlough leave.

63. Ms Cueva sent an outcome letter for the 30 December meeting at page 431 on 7 January 2021. This read as follows:

> "Further to recent meetings on 30th December 2020 which were held due to the request from Fleetcor that you be removed from the site I am now writing to offer you an alternative role whilst we await Fleetcor's final decision on their return to opening from 11 January 2021.
>
> "Should Fleetcor still wish for your removal off site, I am pleased to confirm that alternative employment has been found for you at FORE Partnership, New Bond Street, London W1S, Monday to Friday 2 hours per day at £10.75 per hour. Please can you write to me confirming your wish to engage in alternative work so that we do not have to consider a termination of employment via third party pressure?
>
> "This will mean that your engagement with Fleetcor will cease and you will be fully engaged at FORE partnership as cleaner operative from that date. There will be no break in service and your terms and conditions of employment will remain the same, unless otherwise mutually agreed.
>
> "If Fleetcor agree to your return to work, you may have already been informally made aware that their contract has changed from four hours to two hours per day. I should point out that the company has no alternative but to respect Fleetcor's wishes as it is part of the service level agreement that they can instruct that our employees terms and conditions are changed if the needs of Fleetcor require this.
> A refusal to respect their wishes could ultimately result in the loss of the entire contract, which could have severe consequences for the survival of our business. If Fleetcor confirm from 11 January 2021 that they wish for you to return to site you would be in agreement to work two hours per day or alternative agree to the alternative employment as offered above before we must consider a termination of employment without your agreement [sic]. Where it is possible, we wish to retain you with the group.
>
> "If you have any queries with regards to the content of this letter, please do not hesitate to let me know."

64. The Claimant replied with an email of 7 January 2021 stating that she was not interested in alternative options and would wait for a decision. She asked: "When Endersham will stop ignoring my questions and answer them?"

65. The Tribunal was not certain why Ms Cueva had written that the Respondent was waiting for Fleetcor's final decision, as it did not appear that anything was awaited from them at this point. That said, there was evidently a further conversation between Mr Sessions and Ms Cueva on around 12 January 2021, as on that date the latter wrote to the former at page 449 referring to a conversation and continuing:

"……Vaida has recently denied all concerns presented to her during investigations and I wondered if there was any reconsideration on your part to allow Vaida to return on site?

"We do have a duty to our employee to clarify the exact reasons behind the request so we can investigate this matter further. With this in mind I would be grateful if you could confirm, in writing, why this request has been made and what your exact concerns are in relation to Vaida's continued work on your site."

66. Mr Sessions replied on 18 January 2021 at pages 438-439 referring to the Claimant making complaints to him, abrupt and rude communications, and leaving the site early. He said that the Claimant was still continuing to engage with him and that:

"I conclude that as mentioned her cleaning abilities are satisfactory so it would probably be in the best interests of all parties that Endersham redeploy Vaida to another client site and we have a replacement cleaner appointed once we require the service to be operational again."

67. Ms Cueva wrote to the Claimant again on 20 January 2021 at page 447. She stated that: "Despite our additional written request to the client (Fleetcor) they have still insisted that you are removed." The Tribunal found that this was somewhat stronger than the actual terms of the correspondence, but essentially a realistic statement of the position. The letter continued with an offer of alternative employment at an address in Welbeck Street at a rate of £9.75 per hour for 2 hours, 5 days per week. The letter concluded: "If you refuse this alternative role given that Fleetcor have insisted you be removed from their site we will have no option but to consider your employment terminated through Some Other Substantial Reason by third party pressure."

68. On 22 January 2021 Ms Donaldson (on behalf of International Law Connection Limited) wrote to the Respondent at pages 453-454. She stated that International Law Connection Limited had been retained by the Claimant in a professional capacity, made a number of assertions (including reference to suspected "discriminatory issues") and asked for copies of various documents.

69. The Respondent invited the Claimant to a third party pressure meeting to take place on 4 February 2021. Seemingly in answer to this (it was not clear from the documents and not covered in the witness evidence) the Claimant sent an email on 1 February 2021 at page 459 in which, among other things, she said that her lawyer would contact Mr Sessions. In an email of the same date signed "HR" the Respondent wrote: I must remind you that you are directly employed by Endersham. You should not make direct contact with our client Fleetcor, all communication should be sent to your point of contact Cristina or you may also contact HR……"

70. At 23.12 on 2 February 2021 the Claimant emailed to Mr Sessions (page 463) two documents. One, at page 464, was headed "Employment with Endersham and working for Fleetcor" and contained authority to Ms Donaldson to act on the Claimant's behalf. The other, at pages 465-7, was a letter from Ms Donaldson to Mr Sessions. This began:

"We have been retained in a professional capacity by our above client to consider your complaints regarding our client, her employment disputes connected with her work for you and your request for her to be removed from Fleetcor's site. This is an extremely delicate issue concerning our client's life and survival."

71. The letter continued with an account of events up to that point, and then posed 3 questions about complaints that Mr Sessions might have made since June 2020, whether there had been a written request to remove the Claimant from the site, and whether Fleetcor's contract with the Respondent had been amended with regard to the cleaner's working hours. The letter concluded:

"I hope to your support with these issues because the future work, decisions, life and survival of our client depends on your answers."

72. Mr Sessions did not immediately reply to Ms Donaldson's letter, but instead sent an email to Ms Shtanko at page 485 attaching the letter and saying that he could not discuss the matter with the Claimant's legal representative. At 09.36 on 4 February 2021 Ms Donaldson sent Mr Sessions a WhatsApp message at page 469 which read as follows:

"Dear Marc,
Sorry to bother you again. However, your ignorance of my approaches to you just makes the situation even worse.

1. We are found that elements of the race discrimination against Vaida exist in this case and the claim can be issued in the Employment Tribunal against both Fleetcor as the hirer and Endersham as the employer.
2. Because I did not receive any reply from you, I should write now to your Company Directors mentioned at the Companies House website with appropriate questions.

We should receive answers to the questions and, possibly, we will reach settlement, but with your avoidance of any contacts we just need to go further to understand the situation. It cannot stay as it is.
I am expecting your reply by 12pm tomorrow, 05 February 2021.
If I do not receive any reply by designated time, you will not leave me other options except to write to your CEO.

73. Later on 4 February 2021 Mr Sessions sent an email at page 484 to Ms Shtanko referring to the WhatsApp message and saying: "This harassment must really stop today. Endersham need to make it clear to both of them that they should not be contacting me….." Ms Shtanko replied apologising. On 5 February 2021 at page 483 Mr Sessions sent a further email stating

that he had blocked Ms Donaldson on WhatsApp but "she is now sending me text messages saying that if I refuse to reply to her by 12pm today she will be contacting our directors…." He continued that "this harassment and now threatening behaviour is continuing" and that he would have to consider seeking legal advice.

74. While appreciating that Ms Donaldson was not writing in her first language, the Tribunal found aspects of this correspondence unfortunate. In the Tribunal's view, it was excessive to complain at 9.36 am on 4 February about not having received a reply to an email sent at 11.12 pm on 2 February, and to threaten to go to the CEO. It may have been an inadvertent use of language, but suggesting that the Claimant's life and survival were at stake was overstating the situation.

75. The third party pressure meeting took place by video conference on 9 February 2021, chaired by Ms Cueva and attended by the Claimant and Ms Donaldson. Ms Nunez took notes (pages 506-543). At pages 507-508 Ms Donaldson was recorded as asking why the Respondent wanted to remove the Claimant from the Fleetcor contract. Ms Cueva said that the client had requested to remove her due to her conduct, and Ms Donaldson replied that all the documents produced were falsified. Ms Cueva continued at page 509 that the Respondent had offered the Claimant alternative sites, and did not want to leave her without a job. There was discussion of the furlough arrangements and the Claimant's resignation text of 23 October 2020.

76. At page 521 Ms Donaldson asked about Yesmi, and suggested that she was a relative of Ms Cueva, which the latter denied. There was further discussion of the offer of alternative sites and of the situation regarding Fleetcor. Towards the end of the meeting, Ms Donaldson again asserted that the documents produced were falsified.

77. Also on 9 February 2021 the Claimant submitted a grievance at pages 501-505. (It is not clear whether this was sent before or after the meeting with Ms Cueva, although in her witness statement the Claimant puts it before the meeting). The letter referred to various statutory provisions; to the rate at which the Claimant was paid; and to the issues concerning Fleetcor. The letter concluded with a complaint of discrimination, for which £10,000 compensation was sought; a complaint of harassment, for which £10,000 was also sought; and a request for payment of underpaid wages and holiday.

78. Ms Nunez conducted a grievance hearing on 16 February 2021. Ms Taylor took notes, which are at pages 557-592. There was extensive discussion of the Claimant's interactions with Mr Sessions, her resignation text, and how Yesmi came to be working at the Fleetcor site.

79. Returning to the third party pressure meeting, Ms Cueva sent her outcome letter relating to this on 8 March 2021 at page 598. This read as follows:

"Further to our letter of 10th November 2020 and our meetings of 30th December 2020 and 9th February 2021, I am writing to confirm our discussions and my decision.

"As a result of the above concerns, our client Fleetcor had written to us informing us that they no longer wish for you to continue working in your current capacity, on their site. We conducted a full investigation into the issues raised and have sought to persuade Fleetcor that you should be allowed to work on their site however, they have insisted that you are removed.

"In our second meeting we also discussed alternative employment and you chose not to accept or decline the roles given you believe you have not been submitted with all of the relevant paperwork regarding Endersham's investigations. There is no further paperwork or evidence to be offered, therefore you have not responded to the two alternative roles offered to you by the timeline given. Endersham has rescheduled these meetings whilst you remained on full pay to ensure that all opportunities were given to you to retain this contract engagement. I regret to inform you that your contract of employment is being terminated as a result of third party pressure with Fleetcor only.

"Your removal from Fleetcor and your refusal to accept our offer of alternative work is "some other substantial reason" which justifies your dismissal from Fleetcor's contract. Given you are still employed with Endersham we are pleased we can continue working with you in this capacity. You will continue on furlough paid absence until the work within your engagement with Hambro Perks is available for you to return to work and will continue being engaged with the ad hoc work with Hadley flat.

"You have the right of appeal against my decision….."

80. The Tribunal considered the reason or reasons for this decision. The Claimant's case is that this was an act of direct discrimination because of race and/or disability. The Respondent's case is that the reason for the decision was the complaints received from Mr Sessions.

81. Ms Donaldson argued that inconsistencies in the Respondent's evidence meant that it should not be accepted. The Tribunal found that there was a degree of exaggeration in what had been represented to the Claimant about the Respondent's efforts to persuade or encourage Mr Sessions to change his mind. When Ms Taylor wrote on 16 November 2020 that the Respondent had on several occasions asked for a reconsideration of the request, what had in fact happened up to that point had been a request for the reasons behind this. As we have already observed, Ms Cueva's letter of 20 January 2021 had been put in slightly stronger terms than those used by Mr Sessions. The Tribunal did not, however, consider that these matters meant that the evidence about the reason for the decision should not be accepted. They were not serious enough to warrant that.

82. The Claimant's evidence (and an aspect of her complaints of race discrimination) was that documents provided to her were falsified. It is evident from the correspondence referred to above that the gist of what was meant by this was that the Respondent was misrepresenting what Mr Sessions had said about wanting the Claimant to be removed from Fleetcor's site. As noted above, at an early point in the hearing, when the question of ordering Mr Sessions to attend to give evidence was being considered, Ms Donaldson stated that there was no challenge to the genuineness of the documents originating from him. In any event, the Tribunal found that the emails purporting to be from Mr Sessions were genuine: there was no reason to believe that they were not. We concluded that what had probably happened was that, when contacted by or on behalf of the Claimant, Mr Sessions had given her a modified account of what he had said to the Respondent, presumably because he felt uncomfortable about saying to her in terms that he had asked for her to be removed.

83. Ms Donaldson also submitted that there was a "very obvious" conspiracy between the Respondent and Fleetcor. The Tribunal did not accept this submission. It is the case that we did not hear oral evidence from any of Mr Sessions, Ms Cueva or Ms Nunez. We found, however, that the correspondence showed a relatively straightforward situation. Mr Sessions had asked for a different cleaner to be allocated to Fleetcor because he found the Claimant difficult (albeit a good cleaner). The Respondent could not, ultimately, insist that Fleetcor had to accept the Claimant. As Mr Sessions continued to maintain that he did not want the Claimant to return, the Respondent could not do otherwise than remove her from that contract.

84. The Tribunal asked itself whether there was any evidence that the Claimant's race had played a part in the decision. As noted in relation to issue 17 in the list of issues, the Claimant originally relied on her Lithuanian national origin in this regard, although in the course of the hearing her case was also put in terms of being "Eastern European", and not being Spanish or Spanish-speaking.

85. We concluded that there was no evidential basis on which we could find that the Claimant's national origin (whether expressed as Lithuanian or Eastern European) had been relevant to the decision, or that there was some form of bias in favour of Spanish or Spanish-speaking employees. The evidence showed only that the Respondent had rational grounds for removing the Claimant from Fleetcor's site, namely that Fleetcor required that; that the Claimant is of Lithuanian or Eastern European origin; and that all of Yesmi, who took on the cleaning at Fleetcor, Ms Cueva and Ms Nunez are Spanish-speakers. It was wholly improbable that the Respondent would not have taken away from the site a non-Lithuanian, or non-Eastern European, or Spanish-speaking employee whose removal had been requested. The request provided the complete explanation for why this was done. The correspondence, including from Ms Donaldson, to Mr Sessions, gave ample reason for the Respondent to accede to the request.

86. Similar reasoning led the Tribunal to conclude that the complaints and grievances relied on by the Claimant as protected acts had not been a factor in the decision. The request by Fleetcor was a plausible, and complete, reason for it.

87. On 17 March 2021 Ms Nunez sent the Claimant a letter at pages 611-616 giving her findings on the grievance. Ms Nunez did not uphold any of the complaints. She concluded that the documents provided in connection with the SOSR process were genuine; that she could not identify any underpayment of wages or non-payment of holiday pay; that the Claimant had remained on furlough while this was appropriate and thereafter had received full pay while on authorised leave; and that she found no evidence of discrimination, bullying or harassment.

88. Ms Nunez found that there had been a breakdown in communication, and recommended that the Claimant be provided with a up to date and accurate copy of her main terms of employment, and that communication regarding any client request should be communicated with all staff clearly. She stated that the Claimant had the right to appeal.

89. Although Ms Nunez's evidence was not tested in cross-examination, the Tribunal found nothing in her conclusions that suggested that she had done other than give the Claimant's complaints genuine consideration on their merits. Ms Nunez did not dismiss the grievance out of hand: she also made recommendations for action to be taken by the Respondent.

90. The Claimant had appealed against Ms Cueva's decision to remove her from the Fleetcor contract. On 19 March 2021 a meeting to discuss the appeal took place, conducted by Ms Bath of the Peninsula organisation. It is not necessary for the Tribunal to say a great deal about this appeal, as it is not relied on as giving rise to any complaint in the issues. Ms Bath's report, at pages 695-705, dismissing the appeal, was sent to the Claimant at 12.29 on 10 May 2021 by Ms Shtanko.

91. Meanwhile, on 23 March 2021, the Claimant presented her second claim to the Tribunal, naming the Respondent and Fleetcor, and making complaints of race discrimination, constructive dismissal, breach of contract, non-payment of wages and holiday pay, and other complaints.

92. Also on 10 May 2021, at 17.49, the Claimant sent an email at page 728, to Mr Sessions which read as follows:

> "Proof it please!!! Endersham pressing me from October. They forbade me to contact you. All 6 months they have been to prove that you are complaining, you are asking me to remove. I just want to know the truth. I have brought them to the Tribunal because I do not believe you have done so. It is very important for me to know the truth so that I know how to proceed. Please confirm or deny this. With the utmost respect I tell YOU thanks a lot!!!!"

93. The Claimant sent a further email to Mr Sessions at 08.24 on 11 May 2021, at page 729, saying:

"I am so sorry, that you didn't want to help me. You let Endersham continue to make fun of me. They removed me from furlough, from Fleetcor. Left just 200£ per month for food only. I suspect they fake even your emails. Meeting was 30th December and this email was different how it looking now. Please check it and confirm me it is your email or not. Help me please, I was not bad cleaner why did you change your mind about me?...I am in a desperate position because I cannot find the truth. Thanks for understanding. Have a nice day Marc!"

94. Mr Sessions replied at 8.53 on 11 May 2021 at page 728 as follows:

"I acknowledge your emails of 10 May.
Unfortunately I am not permitted to discuss the matter with you.
You should direct any queries you have to your employer 'Endersham Limited'.
I would be grateful if you could respect the process that you must follow.
I will be unable to respond to any further communication."

The Claimant's reply at page 730 was:
"I am so sorry! I respect your decision. Good luck!!!"

95. Mr Sessions evidently brought this exchange to the Respondent's attention, because on 13 May 2021 at page 731 a letter was sent to the Claimant requiring her to attend an investigation meeting on 20 May 2021 in relation to the following:

"It is alleged that you have refused to follow a reasonable management request. Namely on 11 May 2021, you have made contact with one of Endershams clients harassing them with correspondence whilst also directing correspondence to other contacts across Endersham rather than directly contacting HR internally. This has resulted in a client complaint which further damages the relationship with the business and consequently your colleagues employment and future success of the business."

96. The meeting was chaired by Ms Zuraulyte, and notes (pages 756-758) were taken by Mr Tiglla. The Claimant accepted that she had contacted Fleetcor and said that she had done this in order to check whether Fleetcor's email of 4 December 2020 was genuine.

97. On 2 June 2021 Mr Tiglla sent a letter to the Claimant at pages 763-764 requiring her to attend a disciplinary meeting on 8 June to discuss the following:

"It is alleged that you fail to comply to a reasonable management request which has jeopardised Endersham's client relations and reputational damage. Namely, your conduct has now been brought into question, due to the nature in which you refused to follow out the reasonable request and

the language that you used was inappropriate in correspondence sent to Fleetcor, this is deemed as unprofessional conduct towards a member of management disregarding their request."

The letter said that if the allegations were substantiated they would be regarded as serious misconduct, and that if the Claimant could not provide a satisfactory explanation, she might be given a written warning or a final written warning.

98. The meeting in fact took place on 15 June 2021, chaired as planned by Mr Tiglla. Ms Taylor took notes at pages 781-786. There was discussion about the issue of contacting the client, and the Claimant reiterated that she did so because she wanted to find out the truth. There came a point where the Claimant handed over her keys, uniform and a pre-prepared letter (at pages 1077-1079) in which she gave her resignation. In the letter the Claimant went through much of the history and said that she had been constructively dismissed. Mr Tiglla said that he could not accept the letter as he was not the right person to do so.

99. On 17 June 2021 Ms Shtanko wrote in response to the Claimant's resignation at page 791. The letter included the following:

"I believe you may have reached this decision in the heat of the moment since your comments made within the recent disciplinary hearing. I am concerned you have suggested that the allegations were of gross concern which may have resulted in your termination of employment which is not correct. Referencing the outcome offered along with the invite letter you received the allegations suggested that if they were upheld may warrant a warning being issued, not a termination of employment."

The letter continued that a grievance hearing to address the issues in the Claimant's resignation letter had been arranged (this never in fact took place), and continued:

"If you wish to reconsider your decision, please contact me within the next 5 days, and by Friday 25 June at the latest.

"If you decide not to retract your resignation, then we will respect your wishes and process the termination of your employment and forward any monies which may be outstanding. I sincerely hope you wish to reconsider your decision so that we can review alternative job roles across the business if you are looking to take on more work….."

100. Also on 17 June 2021 at page 792 Mr Tiglla wrote with the outcome of the disciplinary meeting. He said that he found the Claimant's explanation for contacting the client unsatisfactory, and that he decided that a verbal warning was the appropriate sanction.

101. On 18 June 2021 Ms Donaldson wrote various people within the Respondent complaining of harassment of the Claimant, and saying that any contact should be made through her.

102. The third claim was presented to the Tribunal on 19 July 2021, naming the Respondent and Fleetcor, and making complaints of race and disability discrimination, unfair dismissal, non-payment of wages and holiday pay, and other matters.

103. The Claimant maintained that the Respondent's managers had been determined to drive her out of her job, and that they finally succeeded when she resigned. The Tribunal found this to be an unrealistic view: Mr Tiglla had imposed the modest sanction of a verbal warning in circumstances where (in the Tribunal's judgement) another employer might reasonably have taken a more severe view; and Ms Shtanko had positively encouraged the Claimant to retract her resignation. This further strengthened the Tribunal in its finding that the Claimant's assertion of a plan or conspiracy to favour Spanish or Spanish-speaking employees was unrealistic: the approach taken by Mr Tiglla and Ms Shtanko was inconsistent with the existence of this.

104. There remains the evidence relied on by the Claimant in relation to the issue of disability. The Claimant's witness statement about this, dated 12 January 2022 was at pages 943-947. Much of this statement referred to matters of substantive complaint rather than to the issue of disability. However, in paragraph 7 the Claimant stated that between April/May 2019 and March 2020 she did not sleep, her hair fell out, she lost a lot of weight and was afraid to answer the phone. In paragraph 8 she described "a constant feeling of heaviness in her soul and anxiety in her heart" and of experiencing nightmares. She attributed all of this to Mr Sessions. She said that the problems then seemed to be resolved.

105. In paragraph 14 the Claimant said that she lost weight again between October 2020 and July 2021, and in paragraph 15 that her stress issues could be increased by stair work because of her weakness and shortness of breath when walking up stairs. Paragraph 23 stated that in January-February 2021 she was "very ill", and paragraph 27 said that she was flooded with documents, her hands and feet were shaking, it was hard for her to breathe and her blood pressure was jumping. The Claimant said that she was afraid to open her eyes in the morning and afraid to go the mailbox or open emails. She said that on 18 June 2021 on receiving the Respondent's letter she suffered a strong emotional shock, felt dizzy and almost fainted. In paragraph 30 she stated these problems continued and concluded "the Claimant has long-term conditions of stress and anxiety caused by the Respondents' discrimination and harassment".

106. The medical evidence produced by the Claimant was as follows. At page 1222 there was a certified translation of a letter written in Russian by Dr Nyagu of Moldova which referred to a medical consultation in Moldova on 30.06.2019. This stated that the Claimant was complaining of severe

headache, dizziness, insomnia, pressing pains in the heart and a state of anxiety. The Claimant had stated that she had problems at work in England. Diagnoses of post-traumatic stress disorder and depression with situational anxiety disorder were given, and it was recorded that the Claimant underwent an intensive course of treatment, although no further details were given.

107. At page 948 there was a letter from Dr Baroniene dated 27/10/2020. This stated that the Claimant had attended on that date and "previously since May 2019" (it was not clear whether this meant once or more than once). The letter continued:

"Feels stressed and not sleeping due to work.
"She feels especially stressed due to one client who keeps sending her private messages, keeps calling her including weekends and even when she is on holidays.
"We recommend to have some counselling, self help for Mrs V Armoniene".

108. At page 949 there was a letter dated 18/06/2021 from Dr Balciuviene which read:

"Presented…without prebooking complaining of palpitations, headache. Condition worsened today after email from employer.
"Long lasting stress and pressure at work from November 2020.
"I have seen this lady in February 2021.
"Mrs Vaida reports permanent headaches, disturbed sleep, weight loss.
"I recommend psychologist consultation and treatment"

109. Dr Balciuviene provided a further report dated 18/02/2022 at pages 950-951. This recorded complaints of anxiety, mood swings, nervousness, irritability and obsessive thought. The symptoms were said to have started in 2019. There was a diagnosis of depression and a recommendation of a consultation with a psychologist.

110. The Tribunal's findings of fact on this aspect are the following:

110.1 There is no medical evidence of an impact on the Claimant's ability to carry out normal day to day activities, save for the record of insomnia / not sleeping / disturbed sleep, which says no more than that, and is unquantified.

110.2 The Claimant's own evidence on the impact on her ability to carry out normal day to day activities in her witness statement was that between April / May 2019 and March 2020 she did not sleep and was afraid to answer the phone; and that in January – February 2021 she was afraid to open her eyes in the morning and afraid to go to the mailbox or open emails. Again, the degree of sleep disturbance was not quantified, and it was not clear whether the Claimant's fear of opening her eyes, etc was intended to mean that

she felt reluctant to do these things, or was actually restricted in doing them.

110.3 When cross-examined with reference to Dr Balciuviene's report of 18/02/2022 at page 950, the Claimant said that she was not sleeping at night, and was unable to walk or go to work. She said that her health issues had started in 2019 and denied lying about the issues continuing, saying that when the issues with Mr Sessions had been sorted out, the stress remained.

110.4 The Tribunal found that the Claimant had not shown a substantial effect on her ability to carry out normal day to day activities. Disturbed sleep might amount to such an effect, or it might not, depending on the extent and frequency of the disturbance. The Claimant had not provided any further details about those matters. Her evidence that she was "not able to work" could not be taken literally, as she had been working up to the onset of the pandemic in Spring 2020. While on furlough, and afterwards, she was not suggesting that she could not work. In December 2020 she had asked for additional notice of a meeting because she was working elsewhere. Her stance in 2021 had been that she should return to work at the Fleetcor site. Whatever the situation might have been in 2022, the Tribunal found that it was not the case that the Claimant's condition had rendered her unable to work during the period of her employment with the Respondent.

The applicable law and conclusions

111. It is convenient to set out the Tribunal's conclusions on disability first. Section 6 of the Equality Act 2010 provides as follows:

(1) A person (P) has a disability if –

(a) P has a physical or mental impairment, and
(b) The impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

112. In **Anwar v Tower Hamlets College EAT 0091/10** the Employment Appeal Tribunal held that it was not an error for a Tribunal to find that the effect of an impairment was "more than trivial" but still "minor" as opposed to "substantial" (as required by section 6(1)). The Tribunal has already found above that the Claimant had not shown a substantial effect on her ability to carry out normal day-to-day activities. The Tribunal revisited that conclusion in the context of the statutory requirement and found that it was not fulfilled. For this reason, the Claimant was not a disabled person at the relevant time.

113. The Tribunal will set out its other conclusions by reference to the numbered issues in paragraphs 17 above.

114. In relation to the complaints under the Equality Act, the Tribunal reminded itself of section 136, which makes the following provision about the burden of proof:

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

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

115. In **Royal Mail Group v Efobi [2021] UKSC 33** the Supreme Court confirmed that the test under section 136 was unchanged from the two stage test identified in the well-known cases of **Igen v Wong** and **Madarassy v Nomura** under the earlier anti-discrimination legislation. In paragraph 38 of his judgment Lord Leggatt JSC, with whom the other justices agreed, referred to and approved Lord Hope's observation in **Hewage v Grampian Health Board [2012] UKSC 37** to the effect that it is important not to make too much of the role of the burden of proof provisions. Lord Hope said:

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

116. In many instances, the Tribunal has been able to make findings on the evidence without reference to the burden of proof provisions. The occasions when we have relied on those provisions will be identified in the reasons that follow.

Direct discrimination because of race

117. Section 13 of the Equality Act includes the following provision about direct discrimination:

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

118. Issue (1) (time limits) does not arise for determination given the Tribunal's decisions on the merits of the substantive issues.

119. Issues (2) and (3) are points of clarification of the Claimant's case, as opposed to issues that require determination.

120. Issue (4) (lower wages for the same work). The Tribunal found nothing in the evidence to support this allegation, and concluded that it was not made out on the facts. (Paragraph 161(e) of the Claimant's witness statement referred to a complaint to the effect that the Respondent increased the

amount that it charged Fleetcor for cleaning services without increasing the amount that she was paid, but that seems to be a different point).

121. Issue (5) introduces the allegations that follow, beginning with issue (6) (being diminished by 5 named individuals). The Tribunal found that this allegation was expressed in vague terms, and that there was no evidential basis for a finding that the Claimant had been "diminished". The allegation was therefore not made out on the facts.

122. Issue (7) (substituted by another employee of different origin on Fleetcor's site). It is the case that, to the extent that the work was still required at the relevant time, Yesmi replaced the Claimant on Fleetcor's site. It is also the case that Yesmi is of a different origin to the Claimant: although there was no evidence of her national origin, Yesmi is Spanish-speaking and so, on the balance of probability, not of Lithuanian or East-European origin. The Tribunal's finding on the facts, however, is that the reason why Yesmi replaced the Claimant was the simple one that the client required that the Claimant be replaced because of the difficulty Mr Sessions said he was having with her, and it was convenient for Yesmi to be the replacement as she was already working in the relevant building.

123. That reason was unconnected with race. The Tribunal's conclusion on the facts was that this was the sole reason for the decision. Alternatively, applying the two-stage approach, the facts were not such that, in the absence of another explanation, the Tribunal could properly find that discrimination had occurred. What the facts showed was a difference in treatment (i.e. Yesmi replaced the Claimant) and a difference in the protected characteristic of race, but no more than that.

124. Issue (8) (removal from furlough). The sequence of events with regard to this allegation, as found by the Tribunal, was that the Claimant was sent a generic letter on 22 October 2022 about the anticipated ending of the furlough scheme; she then sent a text on 23 October 2022 to Ms Nunez stating that she was resigning. On 2 November 2022 the Claimant sent a text pointing out that the furlough scheme had in fact been extended and asking what the Respondent was going to do. On 16 November 2022 Ms Taylor informed the Claimant that she could not receive furlough payments as the work was still available (although Fleetcor did not want her to return to the site).

125. The Tribunal concluded that the Claimant was not, in fact, removed from furlough. She gave her resignation before the furlough scheme reached its anticipated end. Although in the first instance Ms Nunez accepted the resignation, ultimately, the Respondent (through Ms Taylor) did not act on it. The Claimant then (impliedly, at least) enquired whether she could return to furlough and was told that she could not as the work was still available.

126. If (which the Tribunal doubted) it could be said that not returning the Claimant to furlough after her "resignation" amounted to removing her from

the scheme, the Tribunal found that it should take Ms Taylor's explanation for doing so at face value. Ms Taylor may or may not have been right about it not being possible to return the Claimant to the furlough scheme, but the Tribunal found no reason to doubt that what she wrote was a true representation of what she believed. If it were not true, this would mean that for some reason (presumably adverse to the Claimant), Ms Taylor had decided that, rather than return the Claimant to the government-funded scheme, or accept her resignation, the Respondent would instead place her on authorised absence, during which they paid her salary. That seemed implausible. The Tribunal therefore found that the reason for the decision was as given by Ms Taylor, and that this was unconnected with the Claimant's race.

127. Issue (9) (organising disciplinary proceedings without reason). The list of issues does not explicitly identify the disciplinary proceedings by date, but in any event is not organised chronologically. Issue (10) refers to the SOSR proceedings (which at times were referred to as being "disciplinary" by the Claimant and/or Ms Donaldson). Issue 23 makes a similar allegation with reference to the proceedings in November 2020 which resulted in no formal action and May / June 2021 which resulted in Mr Tiglla's decision to issue a verbal warning. The Tribunal will therefore address issue (9) with reference to all of these.

128. The Tribunal found that these processes were not organised "without any reason". They were organised as a result of Fleetcor's complaints and (after November 2020) because the Claimant had been instructed not to contact the client but had nonetheless done so, both in her own capacity and via Ms Donaldson. The Tribunal also found that Ms Tiglla gave the verbal warning for the same reason, and that he found the Claimant's explanations for contacting the client unsatisfactory. The organising of the processes and their outcomes were, the Tribunal found, unconnected with the Claimant's race. The issue observes that no other employee of a different race suffered the same: but for that to be relevant, there would have to be evidence that someone else had been in a similar situation, which there was not. The Tribunal considered that the correct approach was that there was no evidence that a person of a different race, who had done the same things, was or would have been treated more leniently.

129. Issue (10) (organising SOSR proceedings without any substantial reason). The Tribunal found that there was a substantial reason for these proceedings, namely that Mr Sessions had said that he did not want the Claimant to return to the site. Again, the issue observes that no employee of a different race suffered the same, and again the Tribunal considered that the correct approach was that there was no evidence that a person of a different race, who was the subject of a similar request, was or would have been treated differently.

130. Issue (11) (being provided with falsified documents and being prohibited from contacting Fleetcor). The Tribunal has found against the Claimant on the facts regarding the first element of this allegation, in that the documents

were not falsified. It is the case that the Claimant was prohibited from contacting Fleetcor. The Tribunal accepted that the reason for this was as stated in the letter of 21 December 2020, namely that her continuing to contact Mr Sessions was damaging, or could damage, the relationship with the client. It was entirely plausible that the Respondent would take this view. There was no evidence that a person of a different race, who had acted in the same way, was or would have been treated differently.

131. Issue (12) (stating that the Claimant resigned on 23/10/20). It is the case that Ms Nunez indicated that she accepted the Claimant's resignation, and that someone on the Respondent's side evidently told Mr Sessions that she had resigned. The Tribunal found that the reason why these things occurred was that Ms Nunez reasonably understood that the Claimant had resigned. There was no evidence that a person of a different race, who had acted in the same way, was or would have been treated differently.

132. Issue (13) (unilaterally amending the Claimant's contract). It was not entirely clear to the Tribunal, but this seems to refer to reducing the Claimant's hours because Fleetcor requested her removal from the site. The Tribunal's conclusions on the issues about that are therefore applicable here.

133. Issue (14) (unfairly dismissing the Claimant from Fleetcor's site). The Tribunal has found that the reason why the Claimant was removed from Fleetcor's site was Mr Sessions' request that this should be done, and that considerations of race played no part in the decision.

134. Issue (15) (failing to provide reasonable notice of meetings). The Tribunal has identified issues about the timing of two meetings. One was that set for 17 / 18 November 2020 and about which there was some confusion as to the date. This was ultimately resolved by the fixing of a new date, 23 November. The other was the meeting originally set for 23 December, in respect of which the Claimant asked for 3 days' notice. This was re-arranged for 30 December. The Tribunal found that there had not, in the event, been any failure to provide reasonable notice for meetings, as any potential difficulties had been resolved. This allegation was not therefore made out as a matter of fact. Nor was there any basis on the evidence for a finding that what had happened had been in any way influenced by the Claimant's race.

135. Issue (16) (increasing the Claimant's work in 2019 without increasing her pay). The Tribunal was not able to find an evidential basis for this particular complaint. In paragraphs 26 to 31 of her witness statement the Claimant complained about limitations in the hours allocated to cleaning Fleetcor's premises (also referred to in paragraph 24 above). This is, however, a somewhat different point, and in any event was not an act of the Respondent (Mr Sessions having required the limitations). This allegation was not, therefore, made out on the facts.

136. Issue (17) contains a generic question which the Tribunal has answered in relation to each individual allegation.

Harassment related to race (all issues) or disability (issues 22, 24 and 37)

137. Section 26 of the Equality Act includes the following provisions about harassment:

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

(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) The conduct has the purpose or effect of –
(i) Violating B's dignity, or
(ii) Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) ……..

(3) ……..

(4) In deciding whether the conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

(a) The perception of B.
(b) The other circumstances of the case.
(c) Whether it is reasonable for the conduct to have that effect.

138. Issue (18) introduces the allegations of harassment. For reasons of proportionality, given the number of issues in the case and the degree of repetition, the Tribunal will not attempt to apply every element of the definition of harassment to every allegation, but will concentrate on its main findings.

139. Issue (19) (diminished or harassed by Ms Nunez, Ms Shtanko, Ms Cueva, Ms Taylor and Mr Godsave). The Tribunal was unable to discern what this allegation was intended to add to the other 19 factual allegations of harassment (issues 20-38) and took this also to be introductory.

140. Issue (20) (the same as issue (16) above). For the reasons given under issue (16), this allegation is not made out on the facts.

141. Issue (21) (Ms Nunez trying to force the Claimant to clean stairs and toilets knowing that her health conditions did not permit this). This issue refers to the exchanges on 23 October 2020 about the offer of work at premises near Oxford Street. The Tribunal found that it was not correct to say that Ms Nunez had tried to force the Claimant to do this. She described this in her text as a "job offer". The Claimant declined the offer, and gave her resignation. The Tribunal could not see how this amounted to trying to

"force" the Claimant to do clean stairs and toilets. This allegation therefore failed on the facts. The Tribunal also found that, while it would be disproportionate to analyse this allegation in terms of all of the elements of harassment, there was nothing in the facts established that could provide a proper basis for a finding that the making of this offer was in any way related to the Claimant's race.

142. (Issue 22) (removing the Claimant from furlough). The factual basis of this allegation is the same as under issue 8, and the Tribunal's conclusions under that issue are applicable here. The allegation fails on the facts, as the Claimant was not removed from furlough. In similar terms to issue 21, the Tribunal also found that there was nothing in the facts established that could provide a proper basis for a finding that the Respondent's actions were related to the Claimant's race. We have separately found that the Claimant was not disabled at the material time, but if wrong about that, we would also find that there was nothing in the facts established that could provide a proper basis for a finding that the Respondent's actions were related to that.

143. (Issue 23) (initiating disciplinary proceedings in November 2020 and April-June 2021). The factual basis for this allegation is covered by issue (9) above, and the Tribunal's conclusions on that issue are relevant here. The Tribunal has found that the Respondent's reasons for initiating disciplinary proceedings were the complaints made by Fleetcor and the fact that the Claimant had continued to contact Mr Sessions when instructed not to do so. The Tribunal has also found that these matters were unconnected with the Claimant's race: for the same reasons we find that they were not related to the Claimant's race.

144. (Issue 24) (initiating SOSR proceedings without any "substantial reason"). The factual basis for this is the same as under issue 10. The findings under that issue are applicable here. The allegation fails on the facts as the Tribunal has found that there was a substantial reason. Additionally, and without addressing the whole of the test for harassment, the Tribunal found that the facts established did not provide a proper basis for a finding that the decision to initiate the proceedings was related to the Claimant's race. The Tribunal has found that the Claimant was not at the relevant time disabled: but if we are wrong about that, we would also find that the facts do not provide a proper basis for a finding that the decision to initiate the proceedings was related to her disability.

145. (Issue 25) (failing to provide the Claimant with reasonable notice for meetings). For the reasons given in relation to issue (15), this allegation was not made out on the facts, and there was no basis for a finding that what occurred was related to the Claimant's race.

146. (Issue 26) (being provided with falsified documents and prohibited from contacting Fleetcor). For the reasons given in relation to issue (11), the allegation about falsified documents is not made out on the facts. Similarly, the Tribunal has found that the reason the Claimant was prohibited from

contacting Fleetcor was as stated by the Respondent, and there was no basis for a finding that this was related to the Claimant's race.

147. (Issue 27) (stating that the Claimant resigned on 23/10/20). This covers the same ground as issue (12). The Tribunal has found that Ms Nunez reasonably understood that the Claimant had resigned. There was no basis for a finding that this was related to the Claimant's race.

148. (Issue 28) (sending threatening text messages). The text messages that the Tribunal was taken to in the course of the hearing were those at page 346 from Ms Nunez about the offer of a job near Oxford Street and the Claimant's resignation. The Tribunal found nothing threatening in the content or expression of those texts, and this allegation therefore failed on the facts. Again, the Tribunal also found that the facts established did not provide a proper basis for a finding that the content, expression, or sending of these texts were in any way related to the Claimant's race.

149. (Issue 29) (arranging meetings with the target of forcing the Claimant to agree to be removed from Fleetcor's site). The Tribunal has found that the Respondent was not seeking to secure or engineer the Claimant's removal from the Fleetcor site. This allegation therefore fails on the facts.

150. (Issue 30) (amending the contract so as to reduce the Claimant's working hours). The Tribunal's conclusions on issue (13) (which in turn refers to the reason why the Claimant was removed from Fleetcor's site) are applicable here.

151. (Issue 31) (unfairly dismissing the Claimant from the Fleetcor site). As under issue (14), the Tribunal has found that the reason why the Claimant was removed was Mr Sessions' request that this should be done. There was no basis for a finding that this was related to race.

152. (Issue 32) (diminishing and harassing messages, emails and letters from 5 named individuals). This is essentially the same as issue (6) above, and the Tribunal's conclusion on that issue is relevant here. The allegation is expressed in vague terms, and there is no evidential basis for a finding that the Claimant had been "diminished" or "harassed" by any particular piece of correspondence – indeed, no particular items were identified in connection with this issue. The allegation therefore fails on the facts.

153. (Issue 33) (rejecting the Claimant's grievance and not providing her with an opportunity to appeal by withholding documents). It is the case that Ms Nunez did not uphold the Claimant's grievance. The Tribunal asked itself whether, in the absence of another explanation from the Respondent, the facts were such that it could properly find that the decision to reject the grievance was related to race. We found that they were not. Although the Claimant's case was that the Respondent generally favoured Spanish or Spanish-speaking employees, and looked with disfavour on her because she was neither of these and/or was Lithuanian or Eastern European, the Tribunal found nothing in the evidence to support this. The evidence shows

only that the Claimant is of Lithuanian or Eastern European origin and/or not Spanish or Spanish speaking, and that her grievance was not upheld. The ”something more” that could support a finding of discrimination is not present.

154. As to the second element of this issue, the Tribunal was not able to discern what was meant by the allegation of withholding documents in relation to an appeal, and accordingly this was not made out as a matter of fact.

155. (Issue 34) (not reimbursing underpayments of wages from 2019). It is the case that one of the complaints in the Claimant's grievance which was not upheld by Ms Nunez was that the Respondent had found that the Claimant was owed £420 from 2019 and that only £210 of this had been paid. In her outcome letter Ms Nunez stated that she could find no evidence of an underpayment. In her witness statement Ms Taylor referred to this and said that she too had checked the Respondent's records and could find no evidence of an underpayment. Perhaps unsurprisingly given the extent of the issues, this aspect was not the subject of cross-examination of either the Claimant or Ms Taylor (whose evidence had come to an end unexpectedly in the circumstances described above). The Tribunal concluded that the Claimant had not established that there was an underpayment, and that this allegation was not made out on the facts.

156. (Issue 35) (underpaying furlough and holiday pay). Again, this aspect was not given any prominence in the hearing, perhaps understandably. The Tribunal found that there was no evidence of underpayment of furlough – it may be that this was a complaint about receiving only 80% of normal pay under the furlough scheme, but that was the entitlement under the scheme. The Tribunal was not able to ascertain that there had been any underpayment of holiday pay. This allegation was not therefore made out on the facts.

157. (Issue 36) (ignoring grievances dated 24/11/20, 06/01/21, 02/03/21, 26/04/21 and 07/06/21 and refusing to consider grievance dated 20/05/21). This issue brought together 6 communications. That of 24/11/20 was a text message to Jamie Godsave to which it appears there was no answer. On 06/01/21 there was a text to Lolita Godsave at page 433 about furlough pay. She replied that Cristina (Ms Nunez) would be in touch. The date 02/03/21 was referred to in paragraph 163 of the Claimant's witness statement, but no page reference was given and the Tribunal was unable to find a document of that date.

158. On 26/04/21 there was an email to Jamie Godsave at page 688 in which the Claimant said that the “conflict” had stalled and that it seemed that the problem was not being taken seriously. There did not appear to be a reply to this. There was an email of 07/06/21 to Jamie Godsave at page 768 about the lack of time to prepare for the forthcoming meeting: that meeting was re-arranged, so it appears that the request was not ignored. There was no grievance dated 20/05/21: that was the date of the meeting. The grievance outcome has been dealt with above.

159. The Tribunal concluded that the allegation that grievances were ignored was not made out on the facts in respect of the given dates 06/01/21, 02/03/21, 07/06/21 and 20/05/21. There remained the two communications dated 24/11/20 and 26/04/21 to Mr Godsave, which were not answered. Given the number of communications from the Claimant to various individuals within the Respondent, the Tribunal doubted that it could fairly said that any two were being "ignored" purely because they went unanswered. Beyond this, however, the Tribunal considered that there was no evidential basis on which it could properly find that Mr Godsave's failure to respond was in any way influenced by the Claimant's race. The only suggestion as to why this might be the case was that it was accepted by Ms Taylor that Mr Godsave speaks Spanish. That would not, in the Tribunal's judgment, be a proper basis on which to infer that he might have failed to answer the Claimant's communications because she was not a Spanish speaker, or was of Lithuanian / East European origin.

160. (Issue 37) (initiating disciplinary proceedings). This appears to cover the same ground as issue 23, although this version is identified as constituting harassment related to disability as well as race. As with issue 23, the Tribunal's findings under issue 9 are relevant here, and for the same reasons the Tribunal has concluded that the decision to initiate disciplinary proceedings was not related to race.

161. The Tribunal has concluded that the Claimant was not disabled. Should it be wrong about that, there was equally no basis on which the Tribunal could properly conclude that the decision was related to disability. The Claimant's own conduct provides a complete explanation for the decision.

162. (Issue 38) (prohibited from writing to the Respondent's Director). The Tribunal was not taken to any particular document or conversation relied upon as containing this prohibition. As set out in relation to issue 36 above, the Claimant communicated with two directors, Lolita and Jamie Godsave. The Tribunal therefore found that this allegation failed on the facts.

163. (Issues 39-41) These do not contain any separate factual allegations.

Victimisation

164. Section 27 of the Equality Act includes the following provisions about victimisation:

(1) A person (A) victimises another person (B) if A subjects B to detriment because –

(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act –

(a)…….
(b)……
(c)……
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

165. Issue 42 introduces the question whether there were protected acts, beginning with (Issue 43) (did the Claimant complain about discrimination (race and/or disability) against her by Mr Sessions to her manager Ms Kybartaite. The Tribunal has found that the Claimant told Ms Kybartaite that Mr Sessions said that she could not understand English culture, rules and mentality because she was from Lithuania, and that her country had lower standards. The Tribunal found that this was an implied allegation of harassment related to race, and was therefore a protected act.

166. (Issue 44) (did the Claimant state that she could not clean stairs due to her health problems). The Claimant's evidence about her refusal to clean stairs did not include any assertion that she made reference to her health problems. Even if she did, however, this did not involve any allegation (express or implied) of a contravention of the Equality Act, and so would not amount to a protected act.

167. (Issues 45 and 46) (whether the Clamant raised grievances about discrimination and made allegations of contraventions of the Equality Act). The Claimant's grievance of 9 February 2021 at page 501 alleged that she had been discriminated against and, the Tribunal found, amounted to a protected act. Ms Donaldson's letter of 22 January 2021 at page 453 was less clear in that it expressed a suspicion that there were "discriminatory issues", but for the purposes of this part of the claim, the Tribunal assumed in the Claimant's favour that this too was a protected act.

168. Issue 47 asks whether the Respondent subjected the Claimant to any of the detriments, which begin with (issue 48) (underpayment of wages and holiday pay). For the reasons given under issue 35, the allegation that there was an underpayment has not been made out on the facts.

169. (Issue 49) (diminishing the Claimant and her dignity and (Issue 50) (bullying the Claimant) were expressed in general terms, such that the Tribunal was unable to identify the particular acts complained of. That being so, the allegations failed on the facts.

170. (Issue 51) (removing the Claimant from furlough). This allegation mirrors issues 8 and 22, and the Tribunal's conclusions under issue 8 apply here. The Tribunal has accepted Ms Taylor's explanation of why she removed the Claimant from furlough. The Tribunal found that this was the entire explanation for the decision, and that this was not in any way influenced by any protected acts that the Claimant may have done.

171. (Issue 52) (initiation of disciplinary proceedings). In a similar way to issue 51, this mirrors issues 9 and 23. The Tribunal's finding that the disciplinary

proceedings were initiated because of Mr Sessions' complaints is equally applicable here. Again, the Tribunal found that this was the entire explanation for the decision, and that this was not in any way influenced by any protected acts.

172. (Issue 53) (initiation of SOSR proceedings without any substantial reason). This allegation has the same basis as issue 10 and 24. The Tribunal has found that there was a substantial reason (i.e. Mr Sessions' requests) for the SOSR proceedings, meaning that this allegation fails on the facts. Further to this, the Tribunal found that this substantial reason provided the entire reason why the Respondent initiated these proceedings, and that the decision to do so was not influenced by any protected acts.

173. (Issue 54) (unfair dismissal of the Claimant from Fleetcor's site). This issue in turn mirrors issues 31 and 14. The Tribunal has found that the reason for this decision was that Mr Sessions had asked that the Claimant should be removed (or "replaced"), and again finds that this was the entire reason for the decision, which was not influenced by any protected acts.

174. (Issue 55) (amending the Claimant's contract so as to reduce her hours). This covers the same factual ground as issue 13, and therefore issue 7. Again, the Tribunal has found that the entire reason for the decision to remove the Claimant from the Fleetcor site (and therefore the consequential reduction in hours) was that the client required this. This was not, therefore, influenced by any protected acts.

175. (Issue 56) (forcing the Claimant to do unpaid work outside of her working hours). The Claimant's evidence about this allegation, in paragraphs 23-25, 33, 37, 42, 45 and 50 of her witness statement was that her complaint was about Mr Sessions, and that her manager Ms Kybartaite tried to sort things out for her. So far as the Respondent is concerned (as opposed to Fleetcor), this allegation was not therefore made out on the facts.

176. (Issue 57 (increasing the Claimant's work without appropriate pay). This effectively repeats issue 16, and is not made out on the facts.

177. (Issue 58) (not giving reasonable notice of meetings). This effectively repeats issues 15 and 25, and is not made out on the facts.

178. (Issue 59) (refusing to provide documents regarding the allegations against the Claimant). The Tribunal found this allegation difficult to understand. In issue 26 the complaint was that the Claimant was provided with falsified documents, which is different from not being provided with documents. The Tribunal was not able to identify any documents which it was said should have been provided, but were not. If this is intended to reflect part of issue 26 (i.e. a complaint of providing falsified documents), for the reasons already given, this is not made out on the facts.

179. (Issue 60) (prohibiting the Claimant from contacting Fleetcor). The Tribunal's finding under issue 11 are applicable here. The Tribunal has

found that the reason why the Claimant was prohibited from contacting Fleetcor was that the Respondent took the view that her continuing contact with Mr Sessions was damaging, or could damage, the relationship with the client. We found that this was the entire explanation for the prohibition, and that the decision to impose this was not influenced by any protected acts.

180. (Issue 61) (forcing the Claimant to resign). The Tribunal's findings about the circumstances of the Claimant's resignation are not consistent with the proposition that the Claimant was "forced" to resign. The Respondent was entitled to treat the Claimant's continued contact with the client in the face of an instruction not to do this as a disciplinary matter. It was made clear that the Claimant was not facing dismissal as a possible sanction. Ms Shtanko offered the Claimant the opportunity to reconsider and retract her resignation. The Tribunal concluded that the Claimant was not forced to resign, but decided of her own free will to do so.

181. Furthermore, the Tribunal has found that the disciplinary proceedings were instigated because the Claimant had continued to contact Mr Sessions in spite of being instructed not to do this. We found that this was the entire reason for the decision, such that to the extent that the Claimant's case is that the disciplinary proceedings were the immediate cause of her resignation, the decision to instigate them was not influenced by any protected acts.

182. (Issue 62) (Wrong statement about the Claimant's resignation 23/10/2020). The Tribunal's conclusions under issue 12 are applicable to this issue. The Tribunal has found that Ms Nunez reasonably understood that the Claimant had resigned. That was the entire reason for Ms Nunez referring to the Claimant's resignation, and her doing so was not influenced by any protected acts.

183. (Issue 63) (threatening text messages). The findings under issue 28 above apply here, and the allegation fails on the facts.

184. (Issue 64) (diminishing and harassing messages, emails and letters). This is essentially the same as issues (6) and (32). For the reasons given in relation to those issues, this allegation fails on the facts.

185. (Issue 65) (refusing the Claimant's grievances of 09/02/2021 and 10/02/2021). The Tribunal has previously found that there was nothing in Ms Nunez's conclusions on the grievance to suggest that she did other than give it proper consideration. We have found that the grievance was itself a protected act, and have asked ourselves whether the facts were such that, in the absence of a further explanation, we could properly find that that rejecting the grievance was an act of victimisation done because of that or the other protected acts. We found that they were not. There was no evidence that Ms Nunez knew about what the Claimant had said to Ms Kybartaite. The facts showed only that Ms Nunez knew that the Claimant's grievance included an allegation of discrimination, and that she

rejected the grievance: that would not be a sufficient basis on which to make a finding of victimisation.

186. (Issue 66) (Underpayment of furlough). For the reasons given in relation to issue 35, this was not made out on the facts.

187. (Issue 67) (Ignoring of grievances and refusal of grievance dated 20/05/21). Under issue 36 the Tribunal has found that the Claimant's grievances were not ignored. There were 2 emails to Mr Godsave that were not answered. Even if (which the Tribunal doubts) this could fairly be regarded as "ignoring" them, there was no evidential basis for finding that Mr Godsave's failure to answer them was influenced by any protected acts.

188. (Issue 68) (denial of right to investigate evidence) This allegation is put in general terms and has not been further explained. The Tribunal took it as referring to the instruction not to contact Fleetcor. As explained with reference to issue 60 above, the Tribunal has found that the entire reason for this instruction was that the Respondent took the view that continuing contact was damaging, or could damage, the relationship with the client. The giving of the instruction was not, therefore, influenced by any protected acts.

189. (Issue 69) (deprived of the right to complain regarding the Respondent's managers) This allegation is non-specific and it is not apparent to the Tribunal what is being complained of. The Claimant did in fact complain about the Respondent's managers: to the extent that this allegation means that the complaints were not heeded or upheld, it adds nothing to the particular allegations of that nature.

190. (Issue 70) This relates to the reason why any of the alleged detriments were done, and has been answered where arising in the Tribunal's reasons addressing the individual allegations.

Disability discrimination (section 15 of the Equality Act and failure to make reasonable adjustments

191. Section 15 of the Equality Act includes the following provision:

(1) A person (A) discriminates against a disabled person (B) if –

(a) A treats B unfavourably because of something arising in consequence of B's disability.

192. (Issues 71 and 72) The Tribunal has concluded that the Claimant was not disabled.

193. (Issues 73 – 84) These all depend on a finding that the Claimant was disabled at the material time: the Tribunal has determined that she was not. Given the length of these reasons, and the repetitive nature of many of these issues, the Tribunal found that it would be disproportionate to go

through all of these making detailed findings on the alternative assumption that the Claimant was disabled.

194. The Tribunal, however, makes the following observations about this aspect:

194.1 (Issue 74) There is no evidence that any inability on the Claimant's part to clean stairs was something that arose in consequence of a condition of stress and anxiety.

194.2 (Issue 77) (texts and contact) seems to relate to Mr Sessions, and not to the Respondent.

194.3 (Issues 78, 79, 81 and 83) The Tribunal's earlier findings about these aspects also apply here.

Holiday Pay

195. (Issues 85 and 86) ask whether there was holiday pay outstanding when the Claimant's employment came to an end. The Claimant's evidence did not include anything about outstanding accrued holiday. The only evidence on it on the Respondent's side was Ms Taylor's assertions in paragraph 24 of her witness statement that she investigated any underpayments in July 2022 and found none, and that all outstanding holidays for 2020 were paid in February 2021. The Tribunal found that this complaint had not been made out.

Unlawful deduction from wages

196. (Issues 87-90) ask whether there is any unpaid salary outstanding to the Claimant. Under issues 34 and 35 the Tribunal has concluded that the complaint of non-payment or underpayment is not made out on the facts. That conclusion is also applicable here.

Unfair constructive dismissal

197. (Issue 91) Introduces the factual issues that follow.

198. (Issue 92) This relies on all of the allegations of direct discrimination because of race, harassment, victimisation, disability discrimination and failure to make reasonable adjustments. All of the Tribunal's earlier findings in these respects are applicable here.

199. (Issue 93) (removing the Claimant from the Fleetcor contract). This covers essentially the same ground as issue 7 above. As the Tribunal has found under that issue, the reason why the Claimant was replaced by Yesmi was that the client required that she be replaced. The Respondent had no realistic alternative to this: they could not insist that Fleetcor allow the Claimant to return to their premises.

200. (Issue 94) (failing to carry out the grievance procedures). This allegation is not made out on the facts. The grievance process was carried out, albeit the Claimant was not satisfied with the result.

201. (Issue 95) (discriminating against the Claimant) This repeats issue 92.

202. (Issue 96) (informing the Claimant that she would be subjected to an SOSR procedure) As with issue 93, the Respondent had no real alternative to this, given Fleetcor's refusal to allow the Claimant to return.

203. (Issue 97) (whether a breach of contract). A constructive dismissal occurs when an employee resigns in circumstances where she is entitled to treat herself as having been dismissed. That in turn arises where there has been a breach of the contract by the employer that is sufficiently serious as to justify that.

204. Neither representative undertook any analysis of the unfair constructive dismissal complaint in their submissions: again, this is perhaps not surprising given the extent and nature of the issues. The Tribunal understood the term of the contract in issue to be the implied term of trust and confidence. This is usually defined as a term that the employer will not, without reasonable cause, act in a way that is calculated or likely to destroy or seriously damage the relationship of trust and confidence with the employee. A breach of this term is generally regarded as fundamental and as justifying the employee treating herself as dismissed.

205. All of the Tribunal's conclusions on the Equality Act complaints are relevant here. The Tribunal will not repeat these, but finds that they do not provide any basis for a finding that the Respondent breached the implied term. The various reasons why the Tribunal has found that the Equality Act complaints fail (including the allegations not being made out on the facts; the Respondent having no real alternative to removing the Claimant from Fleetcor's site; there being complete non-discriminatory explanations for the decisions; etc) also mean that there was not a breach of the implied term. The Tribunal concluded that the Respondent had not acted in a way which was calculated or likely to destroy or seriously damage trust and confidence; and (should it be necessary to decide this) that there was reasonable cause for acting as they did.

206. (Issues 98 – 104) These depend on a finding that there was a breach of contract. The Tribunal has found that there was not, and considers that it would be disproportionate to make findings on the alternative assumption that there was.

Wrongful dismissal

207. (Issues 105 – 107) The Tribunal's findings regarding unfair dismissal mean that there was no dismissal: the complaint of wrongful dismissal cannot therefore succeed.

Written statement of employment particulars

208. (Issues 108-110). This complaint was not addressed by the parties in the course of the hearing. The Tribunal noted that there was an initial contract of employment dated 10 May 2016 at pages 211-213 and that this contained particulars including hours, pay, holidays and notice periods. At page 298 there was an agreement for furlough leave dated 1 April 2020. In the absence of any further explanation of the complaint, the Tribunal found that it was not made out on the facts.

Unfair dismissal (removal from Fleetcor's site)

209. (Issue 111) (did the removal of the Claimant from Fleetcor's site amount to a dismissal). The Tribunal considered that the essential question here was whether there was a single contract of employment with divisible parts or two or more separate contracts between the parties. In the former case, it is possible for the employer to terminate part of the contract with notice without dismissing the employee (as in **Land v West Yorkshire Metropolitan Council [1981] ICR 334**. In the latter case, termination of one contract is a dismissal as far as that contract is concerned (as in **Lewis v Surrey County Council [1987] ICR 982**.

210. The Tribunal noted that Ms Taylor's letter of 16 November 2020 seeking to arrange the SOSR meeting was written in terms of a potential dismissal and termination of employment for some other substantial reason (a term applicable to a dismissal). Ms Cueva's outcome letter of 7 January 2021 was not, however, expressed in those terms. She stated that alternative employment had been found, and that if the Claimant were to accept it, there would be no break in service and the terms and conditions of employment would remain the same. On 20 January 2021 Ms Cueva stated that Fleetcor were insisting that the Claimant not return to their site, and made reference to another possible alternative site. Finally, in her letter of 8 March 2021 Ms Cueva referred to "dismissal" from Fleetcor's contract but also to being "still employed" with the Respondent and remaining on furlough from the other site at which she worked.

211. The Tribunal found that, although terms were used at times that suggested that the Fleetcor engagement was a separate contract from which the Claimant was dismissed, there was a single contract between the Claimant and the Respondent. The initial written contract referred to above contained provision for the Claimant to work at different client sites and stated that she could be required to work at any client site within a reasonable travelling distance of her home. Nothing in it suggested that there were separate contracts applying to different sites. The Tribunal considered that Ms Cueva (and so far as relevant) Ms Taylor had erroneously used language that suggested that there were separate contracts.

212. (Issues 112 and 113) The Tribunal's conclusion that the Claimant's removal from the Fleetcor site did not amount to a dismissal means that this

complaint cannot succeed. If, contrary to this conclusion, the Claimant was dismissed, the Tribunal finds that the reason for this was that Fleetcor had required the Respondent to replace her with another employee, and that this amounted to some other substantial reason within the meaning of section 98(1)(b) of the Employment Rights Act.

213. The Tribunal also finds that, if there was a dismissal, the Respondent acted reasonably in treating this as a sufficient reason for dismissing the Claimant (issue 114). Our reasons for so holding are:

213.1 Ultimately the Respondent had no choice in the matter if, as was the case, the client maintained that they did not wish the Claimant to return to the site.

213.2 The Respondent offered the Claimant alternative work (at the FORE and Welbeck Street sites).

213.3 The Respondent followed a reasonable procedure in having a meeting with the Claimant and making some attempt to canvas with Fleetcor the possibility of her returning.

Written statement of reasons for dismissal

214. (Issue 115) This complaint cannot succeed in the light of the Tribunal's decision that there was no dismissal. Furthermore, if the Tribunal is wrong about this, the Respondent provided a written statement of the reasons for the Claimant's removal from Fleetcor's site in Ms Cueva's letters of 7 and 20 January and 8 March 2021.

Breach of contract

215. (Issues 116 – 118) As indicated above in its discussion of the issues, the Tribunal found some difficulty understanding this complaint, and assumed that it related to the Claimant being taken off furlough in October 2020. The agreement for furlough leave at page 298 described itself as a variation to the contract of employment. Clause 2 provided that furlough leave would end on the earliest of:

(a) The government coronavirus job retention scheme ending.
(b) The Claimant or the Respondent ceasing to be eligible for funding under the scheme.
(c) The Respondent deciding to cancel furlough and bring the Claimant back to work.

216. The Tribunal has found that the Respondent did not in fact remove the Claimant from furlough. If we are wrong about that, we find that the circumstances fall within clause 2(c), and that the Respondent decided to cancel furlough for the Claimant and bring her back to work – albeit on authorised absence, being paid in full. There was not, therefore, a breach of contract.

Failure to pay a guarantee payment

217. (Issues 119 and 120). Section 28 of the Employment Rights Act 1996 includes the following:

> *(1) Where throughout a day during any part of which an employee would normally be required to work in accordance with his contract of employment the employee is not provided with work by his employer by reason of –*
>
> *(a) A diminution in the requirements of the employer's business for work of the kind which the employee is employed to do, or*
> *(b) Any other occurrence affecting the normal working of the employer's business in relation to work of the kind which the employee is paid to do,*
> *the employee is entitled to be paid by his employer an amount in respect of that day.*

218. There follow further provisions about the calculation of a guarantee payment, including a limit of £35 per day, and to a maximum of 5 days in any period of 3 months.

219. This was another aspect of the claim which was not addressed by the parties in the course of the hearing, or made the subject of any analysis in submissions. As explained to and recorded by EJ Brown on page 153, the nature of the guarantee payment complaint was that the Claimant was entitled to be paid furlough payments when not provided with work. She was paid these while on furlough. (Issue 120) suggests that the complaint is about being taken off furlough. As found above, the Claimant was not able to insist on remaining on furlough if the Respondent decided to bring her back to work. When she "returned" to work on authorised absence, she was paid her salary in full. If, therefore, the complaint is that she should have been paid a guarantee payment in addition to this, that proposition would be caught by section 32 of the Employment Rights Act, which includes the provision that:

> (2) *Any contractual remuneration paid to an employee in respect of a workless day goes towards discharging any liability of the employer to pay a guarantee payment in respect of that day……..*

220. This complaint therefore failed.

Right of an agency worker in relation to access to employment

221. Regulation 13 of the Agency Workers Regulations 2010 provides that:

> *(1) An agency worker has during an assignment the right to be informed by the hirer of any relevant vacant posts with the hirer, to give that agency*

worker the same opportunity as a comparable worker to find permanent employment with the hirer.

222. (Issue 121) asks whether this right was violated by the Respondent. The Tribunal found that there was no evidence of the existence of any relevant posts, and that in any event the obligation to inform the agency worker lies with the hirer (in the present case, Fleetcor). The complaint therefore failed.

Right of an agency worker to receive information

223. (Issue 122) Ms Donaldson's submission about this complaint was that the right to information meant that the Claimant should not have been prohibited from seeking information from Mr Sessions about the complaints he was said to have made. The Tribunal did not consider that the regulation relied on applies to that situation. Regulation 16 of the Agency Workers Regulations 2010 provides that:

(1) An agency worker who considers that the hirer or a temporary work agency may have treated that worker in a manner which infringes a right conferred by regulation 5, may make a written request to the temporary work agency for a written statement containing information relating to the treatment in question.

224. Regulation 5 is concerned with ensuring that agency workers have the same basic working and employment conditions as they would have, had they been recruited by the hirer other than through a temporary work agency. Regulation 16 continues with detailed provisions about requesting information and inferences that may be drawn if it is not provided. All of this is specific to the rights under regulation 5, and does not give rise to a general right to seek information in the way suggested by Ms Donaldson.

Right of an agency worker not to be subjected to detriment

225. Regulation 17 of the Agency Workers Regulations 2010 includes the following provisions:

(2) An agency worker has the right not to be subjected to any detriment by, or as a result of, any act , or any deliberate failure to act, of a temporary work agency or the hirer, done on a ground specified in paragraph (3).

226. Paragraph 3 then continues with provisions that are similar in form (although not identical to) those defining protected acts under the Equality Act.

227. (Issue 123) (asks whether the Claimant as an agency worker was subjected to detriment in not being provided with information in relation to disciplinary proceedings against her and by the Respondent falsifying documents). The Tribunal has previously found that the allegations of failing to provide documents (which is presumably what is meant by the allegation here of

not providing information) and of falsifying documents have not been made out on the facts: those findings are also applicable here.

Overall Conclusion

228. The outcome, therefore, is that all of the complaints against the First Respondent are dismissed, and the complaints against the Second Respondent are dismissed on withdrawal.

Employment Judge Glennie

Dated: ……25 July 2023……..

Judgment sent to the parties on:

…25/07/2023

…….....
For the Tribunal Office