EMPLOYMENT TRIBUNALS

Claimant: **Mr A Akintayo**

Respondent: **Ballymore (Millharbour) Ltd**

Heard at: **East London Hearing Centre**

On: **23, 24, 25 November 2022**

Before: **Employment Judge Park**

Members: Mrs J Henry
Mr L O'Callaghan

Representation

Claimant: **In person**
Respondent: **Mr P Collyer (Employment Law Advocate)**

JUDGMENT having been sent to the parties on 29 November 2022 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013.

REASONS

Claims and issues

1. At a preliminary hearing held on 14 June 2021 the issues in the claimant's claims had been identified. The claimant was pursuing claims for direct discrimination on the grounds of race, harassment on the grounds of race, victimisation, automatic unfair dismissal due to whistleblowing and detriments due to whistleblowing.

2. The alleged less favourable treatment that the claimant said was direct discrimination was:

    2.1 In February 2020 the site Manager, Mr Aminul, was unsympathetic to the claimant's request for a shift change and stated with an aggressive tone of voice *"that's the door"*.

2.2 In June 2020, Mr Aminul made statements that Mr Abdul Rahman needed money so he had to work at the security and valet section and someone has to leave to enable him to work in the section.

2.3 On 4 July 2020 Mr Aminul forced the claimant to buy a bed from him for the price of £20.

2.4 On 22 July 2020 the claimant was not given a Coca Cola drink, unlike his colleagues.

2.5 On 26 July 2020 Mr Aminul shouted at the claimant during a discussion on a radio transmitter.

2.6 On 30 July 2020 the claimant realised that his pay had been deducted by one hour in respect of a shift on the 17 July 2020. The claimant contends that he was only 14 minutes late and should not have had an hour's pay deducted.

2.7 On 4 August 2020 the Claimant's colleague, Moin Rasaq, reported that the claimant did not allow him to reset the alarm panel. This was incorrect.

2.8 On 4 August 2020 at about 18:42 Mr Aminul shouted at the claimant regarding the shift he should have been working. Mr Aminul proceeded to speak to the claimant in an angry loud and fierce tone that the claimant should leave the staff room and go upstairs.

2.9 On 5 August 2020 Mr Aminul drafted a file note wrongly accusing the claimant of playing pool in the staff room during working hours.

2.10 On 10 August 2020 the claimant was dismissed following a probation review. His employment was terminated by Antonio Osorio on the 18 August 2020.

2.11 On 25 August 2020 the claimant appealed against his dismissal and submitted a grievance. His appeal was dismissed on the 17th of September 2020 by Edward James.

3 The conduct the claimant says was harassment related to race was

3.1 In February 2020 the site Manager, Mr Aminul, was unsympathetic to the claimant's request for a shift change and stated with an aggressive tone of voice "that's the door".

3.2 In June 2020 Mr Aminul made statements that Mr Abdul Rahman needed money so he had to work in the security and valet section and someone had to leave enabled to enable him to work in the section.

3.3 On 4 July 2020 Mr Aminul forced the claimant to buy a bed from him for the price of £20.

3.4 On 22 July 2020 the claimant was not given a Coca Cola drink, unlike his colleagues.

3.5 On 26 July 2020 Mr Aminul shouted at the claimant during a discussion on a radio transmitter.

3.6 On 30 July 2020 the claimant realised that his pay had been deducted by one hour in respect of the shift on the 17 July 2020. The claimant contends that he was only 14 minutes late and should not have had an hour's pay deducted.

3.7 On 4 August 2020 the Claimant's colleague, Moin Rasaq, reported that the claimant did not allow him to reset the alarm panel. This was incorrect.

3.8 On 4 August 2020 at about 18:42 Mr Aminul shouted at the claimant regarding the shift he should have been working. Mr Aminul proceeded to speak to the claimant in an angry loud and fierce tone that the claimant should leave the staff room and go upstairs.

3.9 On 5 August 2020 Mr Aminul drafted a file note wrongly accusing the claimant of playing pool in the staff room during working hours.

3.10 On 10 August 2020 the claimant was dismissed following a probation review. His employment was terminated by Antonio Osorio on the 18 August 2020.

3.11 On 25 August 2020 the claimant appealed against his dismissal and submitted a grievance. his appeal was dismissed on the 17th of September 2020 by Edward James.

4 In respect of his victimisation claim, the claimant said the following were protected acts:

4.1 On 23 July 2020 the Claimant informed Mr Aminul that he felt disrespected and degraded by the way in which he was spoken to.

4.2 On 10 August 2020 the Claimant raised his complaints and concerns about Mr Aminul during the probation review.

4.3 On 25 August 2020 the Claimant sent a pre-action letter.

5 In respect of the victimisation claim, the claimant said the following were detriments:

5.1 On 26 July 2020 Mr Aminul shouted at the claimant during the discussion on a radio transmitter.

5.2 On 30 July 2020 the claimant realised that his pay had been deducted by one hour in respect to the shift on the 17 July 2020. The claimant contends that he was only 14 minutes late and should not have had an hour deducted.

5.3 On 4 August 2020 the Claimant's colleague, Moin Rasaq, reported that the claimant did not allow him to reset the alarm panel. This was incorrect.

5.4 On 4 August 2020 at about 18:42 Mr Aminul shouted at the claimant regarding the shift he should have been working. Mr Aminul proceeded

to speak to the claimant in an angry loud and fierce tone that the claimant should leave the staff room and go upstairs.

5.5 On 5 August 2020 Mr Aminul drafted a file note wrongly accusing the claimant of playing pool in the staff room during working hours.

5.6 On 10 August 2020 the claimant was dismissed following a probation review. His employment was terminated by Antonio Osorio on the 18 August 2020.

5.7 On 25 August 2020 the claimant appealed against his dismissal and submitted a grievance. His appeal was dismissed on the 17th of September 2020 by Edward James

6 The claimant says he made qualifying disclosures as defined by section 43B of the Employment Rights Act 1996 on the following occasions:

6.1 To Mr Osorio on 10 August 2021 regarding the corruption of Mr Aminul and discrimination and harassment.

6.2 The Claimant's appeal and letter before action.

7 The claimant says that his dismissal was automatically unfair as the reason or principal reason for dismissal was his qualifying disclosure.

8 The claimant also says that the following were detriments due to having made protected disclosures;

8.1 On 10 August 2020 he was dismissed following a probation review. His employment terminated by Antonio Osorio on the 18 August 2020.

8.2 On 25 August 2020 the claimant appealed against his dismissal and submitted a grievance. His appeal was dismissed on the 17th of September 2020 by Edward James.

9. The Tribunal needed to make findings of fact on all of the above. The issues to then be determined in each claim are set out in the issues as clarified at the preliminary hearing in June 2021.

10. At the outset of the hearing the claimant confirmed that the claims he was pursuing were those set out above. The claimant had initially indicated he was also pursuing a claim for indirect discrimination on the grounds of race. The claimant confirmed he was not pursuing that claim and this was dismissed on withdrawal.

Procedure, documents and evidence heard

11. The claimant appeared in person. The respondent was represented.

12. A bundle of documents had been prepared. On the second day of evidence the claimant provided some additional documents that he thought should have been included in the bundle. The claimant provided copies to the respondent, who had no objections to the documents being considered by the Tribunal.

13. The claimant had prepared a witness statement and was cross examined. The claimant had also sent to the respondent statements for two additional witnesses who did not attend in person. At the outset the claimant asked that the Tribunal send an email to these witnesses to confirm they are required to attend. The claimant said one witness was working elsewhere and could not take time off and the other had issues with the respondent and did not wish to attend voluntarily. We explained to the claimant that it is not possible for the Tribunal to just send an email requesting witnesses attend. It was the claimant's responsibility to ensure that his witnesses attend the hearing. If the witnesses could not attend voluntarily the claimant needed to apply for a witness order explaining why those witnesses needed to attend, why their evidence was relevant and why they were unable to attend. The claimant had not made any application for a witness order.

14. We reviewed the statements that had been provided and informed the claimant we were not going to make any witness order for either of his two witnesses. It was not clear why their evidence was directly relevant to the issues to be determined by the Tribunal. We also explained to the claimant that if a witness order is made there can be serious consequences for the individual if they do not attend in breach of the order. We explained to the claimant the Tribunal can still consider what is in the statements but less weight will be attached to that evidence if the witnesses are not present so cannot be cross-examined.

15. The respondent called two witnesses who were cross examined. They were Mr Islam Aminul and Mr Antonio Osorio. At the start of the hearing the claimant said he also wanted another of the respondent's employees to give evidence, Mr Moin Rasaq. We explained that it is up to each party to decide who to call as their own witnesses. The respondent was not obliged to call any other witnesses. Had the claimant wanted Mr Rasaq as a witness he would need to have arranged this himself or apply for a witness order.

Findings of Fact

16. The claimant was employed by the respondent as a Security Valet Officer. His employment started on 16 December 2019. We accepted Mr Osorio's evidence that he was responsible for recruiting the claimant.

17. The claimant's employment was subject to a probationary period and he had regular reviews. His first review was held on 27 Jan 2020. At this he mostly met the required standard but there were three areas identified where he required improvement. The second review was on 25 February 2020. There had been a slight improvement by then. The third was held on 28 March 2020. The outcome was similar. At each review some problems with were raised about the claimant's communication with his team and management.

18. The claimant said that he started to be treated harshly by Mr Aminul from February 2020 onwards. An incident occurred where the claimant asked to change one shift, but Mr Aminul refused to make the change. On this incident we accepted Mr Aminul's explanation for the refusal. Mr Aminul explained that changes could not just be made as all the shifts were already covered. However, Mr Aminul explained that if the claimant took some of his annual leave then the shift could be offered to someone else as overtime. We found this

explanation credible. We also heard that in any event the situation was resolved as another manager arranged a shift change for the claimant.

19. In this respect, we also noted that the claimant did not complain about this issue at the time. In evidence when asked the claimant also said that he did not think this incident occurred due to his race.

20. The claimant was then placed on furlough on 6 April 2020. On 23 April 2020 Mr Osorio informed the claimant that his probation review period was extended due to pandemic. The claimant's probationary period had been due to finish in June but it was extended until 10 August 2020.

21. The claimant returned to work from furlough on 1 June 2022. He attended a further probationary review meeting on 16 June 2020. This meeting was more formal than the earlier reviews as the respondent had various specific concerns to discuss with the claimant. Mr Osorio sent the claimant a letter dated 10 June 2020 setting out these concerns. Mr Osorio also warned the claimant that these allegations could amount to misconduct and a potential outcome was summary dismissal. The four allegations related to programming fobs, relaying wrong messages to valet drivers, handing the wrong driving licence to a guest and damaging a car and not following the correct procedures to report the damage.

22. We did not make any detailed findings of fact in respect of those specific allegations. This did not form part of the claimant's case as he made no specific allegations of discrimination about those allegations or the meeting. However, the fact that this correspondence was sent and this meeting took place is relevant background to subsequent events which do form the basis of the claimant's claims. To that extent we have made the following findings about these events:

    22.1 Although Mr Osorio stated in the letter that poor performance had been discussed previously we were not provided with any evidence that was the case. On the contrary, the evidence we had indicated the respondent had no real concerns about the claimant's performance before this point.

    22.2 At least one of the allegations, relating to the driving licence, occurred a number of months previously and does not seem to have been raised as a concern previously, or at the earlier probationary reviews.

    22.3 The concerns in the letter are all described as potential gross misconduct, but a number appeared to relate to the claimant's knowledge of aspects of his role so were performance concerns rather than conduct.

23. The claimant disputed the respondent's findings on the allegations that were made in June 2022. However, we noted that there was no real dispute about whether the incidents had occurred, just about exactly what had happened. We found there was no reason to doubt that the respondent had genuine concerns about these incidents. As a result, by June 2020 the respondent genuinely doubted the claimant's suitability for his role.

24. The outcome of the meeting in June 2020 is that the claimant's probation was formally extended until 10 August 2020. A letter was sent to him on 26 June setting out the respondent's concerns. The respondent also warned the

claimant that if there were further concerns, he would be invited to another meeting to discuss the issues and it was also likely that he would fail his probationary period and be dismissed.

25. We did note that there was a slight lack of clarity on the position of the claimant's probationary period at this point. Due to the claimant being on furlough his probationary period had already been extended until August. The consequence was the same, that the claimant remained on probation until August and he was warned in June that he was at risk of failing his probationary period.

26. For completeness, we also noted that during the June meeting the claimant complained he was being bullied by two other employees and this was discussed. The claimant did not subsequently make any other allegations about those employees and those complaints were not part of the claimant's case. During this meeting the claimant did not make any complaints about Mr Aminul. Neither did he make any suggestion that he was complaining about discrimination on the grounds of race.

27. The claimant alleged that at some other point in June he had a conversation with Mr Aminul in which he said Mr Aminul made a statement about his brother in law needing more money so needing a job in security. The claimant was unsure exactly when this conversation occurred but suggested in oral evidence it may have been around 22 June 2020. We cannot be sure when this conversation was supposed to have taken place but we find it appears likely that if it did happen it was after the probationary hearing.

28. We were faced with conflicting accounts of this allegation. Mr Aminul denied ever having such a conversation with the claimant. He explained that his brother in law already had a job as a concierge with the respondent. The brother in law had applied for a security role previously but was then happy to remain in the role he had been offered.

29. We are not satisfied that the claimant has shown on the balance of probabilities that the conversation did occur as he has now described. It was agreed that Mr Aminul's brother in law had initially wanted to work in security. We accepted that the claimant was probably aware of this. However, we were not persuaded that a conversation occurred as the claimant described in which Mr Aminul threatened the claimant's job security. The claimant did not say anything about this at the time. We found that the first time the claimant mentioned anything about Mr Aminul's brother in law was in the probationary review period on 10 August 2020. At that point he just suggested this was why Mr Aminul wanted the claimant to be dismissed, he did not describe a conversation. The first record of the claimant alleging there had been a conversation was in his ET1.

30. We did accept though that the Claimant genuinely thought that Mr Aminul wanted him to be dismissed. We also accepted that the claimant believed this was so Mr Aminul's brother in law could have the claimant's job. We did not accept this was due to a conversation where Mr Aminul threatened the claimant. However we accepted that from around this time there was some tension between the claimant and Mr Aminul.

31. On 4 July a resident was getting rid of a fold up bed. Mr Aminul took the bed and paid the resident £20. The claimant ended up buying this bed from Mr Aminul. The claimant says that Mr Aminul pressured him into buying the bed from him although he did not really want it. It was not disputed that Mr Aminul had originally bought the bed from the resident and the claimant then bought it from him. Mr Aminul denied putting any pressure on the claimant and instead said that the claimant asked to buy it as he had family staying.

32. Having heard from both the claimant and Mr Aminul we decided we did not accept the claimant's version of this incident. In evidence Mr Aminul explained that he initially bought it as he had family coming to stay. He then allowed the claimant to have the bed as he thought the claimant's need was greater. We found this explanation credible. We also struggled to understand why Mr Aminul would try and force the claimant to buy a bed he did not want. This account of events seemed unlikely and the claimant was unable to provide any further explanation of why this may happen. We did acknowledge though that the claimant seemed genuinely to have been upset by this incident and consider it possible that there may have been some misunderstanding during the transaction.

33. On 22 July 222 the claimant was given a pack of Coca-Cola by a delivery driver. The claimant's manager, Jake Sheedy, told him he could accept the gift. The claimant then offered the Coca-Cola to be shared among his colleagues. This was all undisputed.

34. The claimant did not have any of the drinks immediately as he was on shift. When he returned there was none left. The claimant went to speak to Mr Sheedy and Mr Aminul. Mr Aminul said that he had been in a handover meeting with Mr Sheedy. We accepted this account, given that Mr Sheedy and Mr Aminul were both managers and it was around the time one shift ended and another started. We also accepted Mr Aminul's account that the claimant interrupted a conversation he was having with Mr Sheedy.

35. The claimant's complaint was about how he says Mr Aminul spoke to him during this incident. The claimant said that Mr Aminul rudely told him that he could not help him. Mr Aminul's said that had told the claimant not to interrupt. He also said that the claimant said to him that he was not talking to him but to Mr Sheedy, which the claimant acknowledged in evidence. We concluded that there was an interaction between the claimant and Mr Aminul during which both spoke abruptly to each other. It was not a case of just Mr Aminul being rude to the claimant.

36. The following day the claimant spoke with Mr Sheedy about this incident. We have no reason to doubt that there was a conversation with Mr Sheedy. In evidence the claimant said that he told Mr Sheedy he did not like how Mr Aminul spoke to him. The record of the meeting on 10 August 2020, when the claimant raised this incident, shows the claimant saying that he told Mr Sheedy that Mr Aminul had not been fair. We find this is the extent of what the claimant said at the time and he did not make any complaint of discrimination then.

37. The claimant then spoke with Mr Aminul. According to the claimant he told Mr Aminul that he felt disrespected, degraded and humiliated by him. Mr Aminul

accepted that there was a discussion but his account differed. Mr Aminul said that he had apologized to the claimant but this was about there being no Coca-Cola left the day before. Mr Aminul did not expressly deny that the claimant complained about how he was spoken to. We found it was likely that the claimant did complain to Mr Aminul about how he felt he was being treated. However, on the claimant's own account of this discussion there is no evidence he complained of discrimination of any type at this time.

38. The Claimant alleges that on 26 July 2020 Mr Aminul shouted at him over the radio and was aggressive. Mr Aminul had no recollection of the incident. The Claimant did not raise this as a concern at the time, or even on 10 August when he made a number of other complaints. The first time the claimant said anything about this incident was at his appeal. We find it is likely there was an incident in which Mr Aminul raised his voice and the Claimant probably perceived this as aggressive. However, we also find that it was not as serious as described as the claimant now, given that the claimant did not raise concerns until much later and Mr Aminul just could not remember it at all. We do not accept that Mr Aminul shouted or was aggressive, as alleged now by the claimant.

39. On the 17 July the claimant was late due to bad traffic. He arrived on site 14 minutes late. On 30 July 2020 the claimant found out from Mr Sheedy that he was going to have an hour's pay deducted due to the lateness. The claimant raised the issue with the respondent and the deduction was not made.

40. The evidence on this incident was limited. We were not provided with any time sheets or similar documents relevant to the incident itself, other than the final pay statement. Neither were we provided with any evidence relating to the actual contractual position on pay and time keeping. We accept that it was Mr Aminul who provided the information to payroll about the claimant's lateness (contrary to Edward James' conclusion in the appeal), as this was accepted by Mr Aminul. We accepted his account that he just provided the information to payroll and did not make any other decision.

41. The claimant asserted that he was treated differently and others would not have any money deducted if late. This was just an assertion and he provided no evidence to support this argument. We were not satisfied that the treatment of the claimant was different to how anyone else would be treated in the same circumstances. We also found that the situation was swiftly resolved and no money was actually deducted from the claimant.

42. On 4 August an incident occurred that triggered the fire alarm. The Claimant was working with another security officer, Moin Rasaq. We do not need to make detailed findings of facts of exactly what occurred on 4 August. It is the events immediately after that are relevant to the claimant's case.

43. Mr Rasaq made a report by email in which he described the claimant interfering as he tried to reset the alarm. The claimant has since alleged that Mr Rasaq's report was incorrect and it was made as part of a conspiracy to dismiss him. In his evidence the claimant says that Mr Rasaq told him that Mr Aminul had told him to complain about the claimant.

44. We did not accept the claimant's assertion that the complaint about him was not genuine. We saw the email from the time from Mr Rasaq setting out the complaint. The account in the email is similar to the account of the incident given by the claimant when asked about it during his probationary review meeting on 10 August 2020. The claimant's account at the time indicated he had intervened when Mr Rasaq was trying to reset the alarm.

45. We accept it is likely that Mr Rasaq may have been asked to put his account in writing. It is also credible that Mr Rasaq apologized to the Claimant. This does not show that there was any conspiracy or that the respondent's concerns about the claimant's conduct on that day were not genuine. It was clearly a serious incident, so it is reasonable that Mr Rasaq's manager would ask him to provide a written account. It is also understandable that Mr Rasaq would be apologetic, because he knew that there may be consequences for the claimant. That does not mean there was a conspiracy and the complaints were not genuine.

46. Later on 4 August the claimant was on shift and Mr Aminul found the claimant playing pool with another employee, Oliver Isiuwa. Mr Isiuwa was not on shift at the time. The claimant has always accepted he was playing pool and that he was still on his shift. He said that he did not think it was a problem as he had finished his patrol.

47. The claimant's complaint about this incident was that Mr Aminul shouted at him. Mr Aminul accepted he was annoyed and spoke in a firm manner, but he denies shouting. This incident was discussed in the probationary review on 10 August. At that time the claimant did not allege that Mr Aminul shouted. During the investigation after that meeting the other employee present, Mr Isiuwa, described Mr Aminul as being upset but he did not say he shouted. Mr Isiuwa just said that Mr Aminul asked the claimant to stop playing pool. On the balance of probabilities, we concluded that the claimant has not shown Mr Aminul shouted at him that day. This account is not consistent with what he said at the time and was only suggested by the claimant much later.

48. On 5 August 2020 Mr Aminul tried to give the claimant a file note about the pool incident the day before. The claimant refused to sign this note. The claimant does not dispute that Mr Aminul prepared a file note and that he refused to sign it. The claimant asserted that this file note was given to him wrongly. However, as a matter of fact we have already found that the claimant had been playing pool while he was still on shift and Mr Aminul saw him doing this and asked him to stop. On this basis we do not accept that the file note was given to the claimant wrongly. On the contrary, as the claimant's manager, this was something Mr Aminul was entitled to do.

49. The claimant's probationary period was due to end on 10 August 2020. Mr Osorio gave the claimant a letter dated 8 August 2020 inviting him to the meeting on 10 August 2010. Mr Osorio included 3 specific allegations to be discussed. These were:

    49.1 the fire alarm incident on 4 August;

    49.2 the claimant playing pool when on shift on 4 August; and

49.3 it was alleged that the claimant had approached Mr Aminul's brother in law and told him to tell Mr Aminul to *'stay away from him'*.

50. The probationary review meeting took place on 10 August. This was recorded and then notes were written up. These notes of the meeting form part of the evidence we have referred to throughout this judgment in respect of some of our findings of fact in relation to earlier incidents. In evidence the claimant suggested the notes were not completely accurate but the only specific issue he raised was about the method of taking the notes. He did not identify any specific points in the notes that he says are wrong or inaccurate. We were satisfied the notes are an accurate reflection of the meeting.

51. During the meeting all 3 allegations from Mr Osorio's letter were discussed. The claimant said he disputed the three allegations, but his explanations during the meeting of the incidents were consistent with what the respondent had said happened. The claimant described how he started to reset the fire alarm, as Mr Rasaq had alleged, so in that respect he was intervening. The claimant also accepted he was playing pool and that it was before the end of his shift. He also described approaching Mr Aminul's brother in law and asking him to tell Mr Aminul to leave him alone.

52. During this meeting the claimant also made complaints about Mr Aminul. He complained that Mr Aminul had been bullying him and discriminating against him. At this point the claimant specifically complained about the bed incident and the Coca-Cola incident.

53. With respect to the complaints that Mr Aminul was discriminating him, we find that that the claimant did use the term 'discrimination'. However, he then said that this discrimination was because Mr Aminul wanted the claimant dismissed so his brother in law could have his job. At no point did the claimant make any suggestion that Mr Aminul's actions were due to the claimant's race. Neither did the claimant mention race or discrimination on the grounds of race in any other context.

54. Mr Osorio did not provide the claimant with an outcome immediately. He first undertook an investigation into the allegations that the claimant had raised during the meeting. Mr Osorio interviewed 9 other employees on 14 August 2020 and on 17 August 2020 he interviewed Mr Aminul. None of them provided evidence to support the claimant's allegations.

55. On 18 August 2020 Mr Osorio wrote to the claimant informing him of his decision. Mr Osorio found the claimant had interfered on 4 August as alleged and he had also been playing pool while on shift. Mr Osorio did not accept the claimant's explanations for those incidents. We found that Mr Osorio's conclusions were genuine and there was no evidence to suggest otherwise. We also noted that these findings were also consistent with what the Claimant had said during the meeting on 10 August 2020.

56. Mr Osorio informed the claimant that he had found no evidence to support the allegations of bullying by Mr Aminul. We found that Mr Osorio's decision was genuine as it was consistent with the evidence he had gathered.

57. Mr Osorio informed the claimant he had not made satisfactory progress during his probation and he was dismissed with immediate effect and paid in lieu of notice. Again, we accepted that Mr Osorio's conclusion was genuine. It was based on concerns that had been raised both in June and the recent incidents in early August 2020.

58. The claimant instructed solicitors who sent the respondent a lengthy letter on 25 August 2020. This was described as a pre-action letter and appeal. It sets out a detailed account of allegations by the claimant, which subsequently formed the basis of this claim. In this it was argued that the claimant had been discriminated against on the grounds of race. This is the first time within the evidence we have seen or heard that the protected characteristic of race was mentioned by the claimant. It was also the first time the Claimant made allegations to the Respondent about the following:

    58.1 the problem changing shifts in February 2020;

    58.2 the allegation that Mr Aminul said to the claimant he wanted his brother in law to have a security role; and

    58.3 that Mr Aminul had shouted at the claimant on 26 July 2020.

59. The claimant was invited to an appeal hearing which was held on 3 September 2020. This was chaired by Edward James, the respondent's Resort Director. Mr James then undertook a further investigation and interviewed Mr Aminul, David Kargo and Dylan Starr, who were other security officers. He wrote to the claimant on 17 September informing him that the appeal was unsuccessful and providing the reasons.

60. We did not hear any evidence from Mr James. During this hearing the claimant suggested that there were flaws in the procedure because Mr James had suggested that only he had authority to dismiss. The claimant's implication was that Mr Osorio did not have authority to dismiss him. We were unclear exactly the claimant was suggesting. Nonetheless, we found there was no evidence to indicate Mr Osorio did not have authority to dismiss the claimant initially. Neither was there any evidence that indicated Mr James' decision to uphold the dismissal was not genuine.

The Law

61. The Claims pursued by the Claimant are:

    61.1 Direct race discrimination

    61.2 Harassment on the grounds of race

    61.3 Victimisation

    61.4 That he made a protected disclosure and the dismissal was automatically unfair because the reason or principal reason was that disclosure

    61.5 He was subjected to a detriment because of the disclosure.

Direct Discrimination – Section 13 Equality Act 2010

62. Direct discrimination takes place where a person treats the claimant less favourably because of race than that person treats or would treat others. Under s23(1) Equality Act 2010, when a comparison is made, there must be no material difference between the circumstances relating to each case. 'Race' includes nationality or national origins.

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

64. Section 136 of the Equality Act 2010 sets out the burden of proof. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision.

65. Accordingly, where a claimant establishes facts from which discrimination could be inferred then the burden of proving that the treatment was in no sense whatsoever unlawful passes to the respondent. Guidelines on the burden of proof were set out by the Court of Appeal in **Igen Ltd v Wong [2005] EWCA Civ. 142; [2005] IRLR 258**. Once the burden of proof has shifted, it is for the respondents to prove that they did not commit the act of discrimination. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive. Since the facts necessary to prove an explanation would normally be in the possession of the respondents, a tribunal would normally expect cogent evidence to discharge that burden of proof.

66. The Court of Appeal in **Madarassy v Nomura International plc [2007] EWCA Civ 33; [2007] IRLR 246**, a case brought under the then Sex Discrimination Act 1975, states:

> *'The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that on the balance of probabilities, the respondent had committed an unlawful act of discrimination.'*

67. Inferences can only be drawn from established facts and cannot be drawn speculatively or on the basis of a gut reaction or 'mere intuitive hunch' (**Chapman v Simon [1994] IRLR 124)** or from 'thin air' (***Chief Constable of the Royal Ulster Constabulary*** **[2003] ICR 337**). Discrimination also cannot be inferred only from unfair or unreasonable conduct (**Glasgow *City Council v Zafar*** **[1998] ICR 120)**. .

68. This means that to succeed with any of his claims for direct discrimination the claimant must first show that he has been treated less favourably than others in the same circumstances. The claimant must also have shown facts from which

we can infer that the reason for the less favourable treatment may have been due to the claimant's race. Only after this does the burden shift to the respondent who must show that there is a different non-discriminatory reason for the treatment, that it is in no way due to the claimant's race.

Harassment – Section 26 Equality Act 2010

69. Under section 26 Equality Act 2010

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

70. With a claim for harassment the claimant must prove on the balance of probabilities that the conduct he has complained of occurred.

71. The test of whether the conduct amounted to harassment is part objective and part subjective. The Tribunal must take into account the claimant's subjective perception but it is also required to look at that objectively to see if it was reasonable for the claimant to have considered his dignity to be violated or that it created an intimidating, hostile, degrading, humiliating or offensive environment.

72. In **Grant v HM Land Registry [2011] EWCA Civ 769** the Court of Appeal said that:

> *"Tribunals must not cheapen the significance of the words "intimidating, hostile, degrading, humiliating or offensive environment". They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."*

73. In **Richmond Pharmacology v Dhaliwal [2009] ICR 724** the EAT stated:

> *"Dignity is not necessarily violated by things said or done which are trivial and transitory, particularly if it should have been clear that any offence was unintended. While it is also important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive*

> *comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."*

74. Whether or not the conduct is related to a protected characteristic is a matter of fact for the Tribunal drawing on all the evidence before it.

Victimisation – Section 27 Equality Act 2010

75. Section 27 of the Equality Act 2010 provides as follows:

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

        (a) B does a protected act, or

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

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

        (a) bringing proceedings under this Act;

        (b) giving evidence or information about proceedings under this Act;

        (c) doing any other thing for the purposes of or in connection with this Act;

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

76. In a victimisation claim there is no need for a comparator. The Act requires the Tribunal to determine whether the claimant had been subject to a detriment because of doing a protected act. As Lord Nicholls said in **Chief Constable of the West Yorkshire Police v Khan [2001] IRLR 830**:-

> *"The primary objective of the victimisation provisions ... is to ensure that persons are not penalised or prejudiced because they have taken steps to exercise their statutory right or are intending to do so."*

77. The Tribunal has to consider (1) the protected act being relied on; (2) the detriment suffered; (3) the reason for the detriment; (4) any defence; and (5) the burden of proof.

78. To benefit from protection under the section the claimant must have done or intended to or be suspected of doing or intending to do one of the four kinds of protected acts set out in the section. The allegation relied on by the claimant must be made in good faith. It is not necessary for the claimant to show that he or she has a particular protected characteristic but the claimant must show that he or she has done a protected act. An act can be protected even if the individual does not expressly make reference to a breach of the Equality Act 2010. However, the facts that are asserted must be capable of being a breach of the Equality Act 2010.

79. The question then to be asked by the tribunal is whether the claimant has been subjected to a detriment. The protected act must be the reason for the treatment which the claimant complains of, and the detriment must be because of the protected act. There must be a causative link between the protected act and the victimisation and accordingly the claimant must show that the respondent knew or suspected that the protected act had been carried out by the claimant, (**South London Healthcare NHS Trust v AlRubeyi EAT0269/09**). Once the Tribunal has been able to identify the existence of the protected act and the detriment the Tribunal has to examine the reason for the treatment of the claimant. This requires an examination of the respondent's state of mind. Guidance can be obtained from the cases of **Nagarajan v London Regional Transport [1999] IRLR 572** and **Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830**, **and St Helen's Metropolitan Borough Council v Derbyshire [2007] IRLR 540**. In this latter case the House of Lords said there must be a link in the mind of the respondent between the doing of the acts and the less favourable treatment. It is not necessary to examine the motive of the respondent **see R (on the application of E) v Governing Body of JFS and Others [2010] IRLR 136**. In **Martin v Devonshires Solicitors EAT0086/10** the EAT said that

> *"There would in principle be cases where an employer had dismissed an employee in response to a protected act but could say that the reason for dismissal was not the act but some feature of it which could properly be treated as separable."*

80. What this means is the claimant must first show that he has done something which is a protected act under the Equality Act 2010. Having established a protected act, the claimant must show there has been a detriment. The issue for the Tribunal to determine is whether or not there is a causal connection between the act and detriment

Whistleblowing

81. Under s. 43A ERA 1996, a "protected disclosure" is a qualifying disclosure (as defined by s. 43B) which is made by a worker in accordance with any of sections 43C – H.

82. Section 43B(1) provides as follows, so far as is relevant:

> (1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following –
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject…
>
> (c) that the health or safety of any individual had been, was being or was likely to be endangered…
>
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

83. In **Cavendish Munro Professional Risks Management Ltd v Geduld [2010] ICR 325**, the EAT held that s. 43B(1) requires that there be a disclosure of "information", not simply an "allegation". An explanation of what is meant by "information" appears at [24]:

> *"the ordinary meaning of giving "information" is conveying facts. In the course of the hearing before us, a hypothetical was advanced regarding communicating information about the state of a hospital. Communicating "information" would be: "The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around." Contrasted with that would be a statement that: "You are not complying with health and safety requirements." In our view this would be an allegation not information."*

84. In **Kilraine v London Borough of Wandsworth [2018] ICR 1850 at [35]** – [36]:in order for a disclosure of information to become a "qualifying disclosure", the claimant must show:

(a) that at the time of making the disclosure, he genuinely believed that (i) it was made in the public interest and (ii) it tended to show one or more of the matters set out in s. 43B(1)(a) – (f); *and*

(b) that his belief in limbs (i) and (ii) was objectively reasonable,

85. Section 47B(1) and (1A) ERA 1996 provide that a worker has the right:

(a) not to be subjected to any detriment by any act or any deliberate failure to act by his employer; and

(b) not to be subjected to any detriment by any act or any deliberate failure to act done by another worker of his/her employer done in the course of that other worker's employment,

done on the ground that the worker has made a protected disclosure. In the situation set out at (b) above, the act of the other worker will be treated as done by the worker's employer (s. 47B(1B) ERA 1996).

86. Section 48(2) provides that, in a complaint made under s. 47B, it is for the employer to show the ground on which any act or failure to act was done; although it remains for the employee to show that she made a protected disclosure, that there was a detriment, and that the employer subjected her to that detriment. Liability will arise where the protected disclosure is a material (i.e. more than trivial) factor in the employer's decision to subject the claimant to a detrimental act (**Fecitt v NHS Manchester [2012] ICR 372 at [43]).**

87. Section 103A of the Employment Rights Act provides that:

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

88. The burden of proof in a s. 103A case was set out in **Kuzel v Roche [2008] ICR 799 at [58]- [60]** as follows:

(a) The employee must produce some evidence to suggest that his dismissal was for the principal reason that he made the protected disclosure;

(b) The burden then shifts to the employer to show the dismissal was for a potentially fair reason;

(c) If the employer fails to show the reason for dismissal, then the employment tribunal may draw an inference (where such inference is appropriate) that the true reason for the dismissal was as suggested by the employee.

(d) The identification of the reason or principal reason turns on direct evidence and permissible inferences from it. It may be open to the tribunal to find that, on a consideration of all the evidence in the particular case, the true reason for dismissal was not that advanced by either side. An employer may fail in its case of fair dismissal for an admissible reason, but that does not mean the employer fails in disputing the case advanced by the employee on the basis of an automatically unfair dismissal on the basis of a different reason.

Discussion and conclusions

89. The claimant made eleven specific allegations of fact that formed the basis of his claims. In the list of issues all eleven different allegations were asserted to be both harassment and direct discrimination on the grounds of race. In this judgment we first will address the claims based on those allegations of fact. We will then turn to the whistleblowing and unfair dismissal claims.

Direct discrimination and harassment

90. All the factual allegations in this section were argued to be both direct discrimination on the grounds of race and harassment on the grounds of race.

91. To succeed with any of the claims for direct discrimination on the grounds of race the claimant must first have proved on the balance of probabilities the factual basis of the claim, i.e. what happened that he says is less favourable treatment. The claimant must then show facts from which the Tribunal could conclude that the reason for the less favourable treatment was race. As set out in **Madarassy** and other cases referred to above, the claimant must establish facts from which such inferences can be inferred and it is not sufficient for the claimant to just show he has a particular protected characteristic.

92. Below we set out our conclusions about each individual claim of direct discrimination. As an initial point, we have also considered whether the claimant has established any facts generally from which we could infer anything that occurred to him, less favourable or otherwise, may have been due to his race. We have concluded within our findings of facts set out above there is nothing from which any such inference could be drawn. The claimant accepted in cross-examination that the first allegation of less favourable treatment was not due to his race in any event. With regard to later events, the claimant put forward no

evidence that suggested that anything that occurred may be due to his race. We accepted that the claimant genuinely felt animosity from Mr Aminul. The claimant in this claim has suggested this is due to his race, but he provided no evidence to support this contention and it was just an assertion. This conclusion applies in respect of all the claims for direct discrimination, which are considered individually below along with more conclusions that are particular to that claim.

93. The claimant alleged that in February 2020 the site Manager Mr Aminul was unsympathetic to the claimant's request for a shift change and stated with an aggressive tone of voice *"that's the door"*. We accepted that initially Mr Aminul refused to change the claimant's shift, though the situation was subsequently resolved. This could be less favourable treatment, if another employee would have been allowed to change their shift.

94. However, the claimant provided no evidence at all from which it could be inferred that the reason Mr Aminul refused to allow the shift change was o may have been race. In cross examination the claimant also accepted that his race was not a factor in this incident. We also found that Mr Aminul had a credible explanation for the decision, so we did not accept that the claimant was treated less favourably than any actual or hypothetical comparator. Therefore, the direct discrimination claim fails.

95. The claimant has also said that this incident was harassment on the grounds of his race. We do not find that this incident amounts to harassment. While the claimant may have been upset by the refusal, we do not accept it is an incident that could be said to have the proscribed effect. It was a normal day to day management decision by Mr Aminul. Based on the evidence we heard, there was also nothing connecting the incident to the claimant's race. Therefore, the harassment claim also fails.

96. The claimant alleged that in June 2020 Mr Aminul made statements that Mr Abdul Rahman needed money, that Mr Rahman had to work at the security and valet section and therefore someone else had to leave to enable Mr Rahman to work in the section. This was alleged to be direct discrimination or harassment on the grounds of race. We did not accept the Claimant's account that this incident occurred. The claimant has not proved on the balance of probabilities the alleged less favourable treatment or unwanted conduct occurred as he described. Therefore, both claims related to this allegation fail.

97. The claimant alleged that on 4 July 2020 Mr Aminul forced the claimant to buy a bed from him for the price of £20. We accepted that the claimant did buy a bed from Mr Aminul, but we did not accept the claimant's account that Mr Aminul forced him to do so. The Claimant has not shown on the balance of probabilities the less favourable treatment or unwanted conduct that he complains of actually occurred. Therefore, the claims for direct discrimination and harassment both fail.

98. The claimant alleged that on 22 July 2020 he was not given a Coca-Cola drink, unlike his colleagues. When we heard evidence on this it became apparent that the claimant's actual complaint was that Mr Aminul had shouted at him and was rude. This is different to what had been identified within the list of issues. We concluded there was an incident surrounding the Coca-Cola. However, we

found that both Mr Aminul and the Claimant equally were abrupt with each other. This is different to what has been claimed by the claimant in the list of issues.

99. The claimant has not proved on the balance of probabilities that the factual allegation set out within the list of issues. He provided no evidence on that point. His evidence only related to the revised complaint about how Mr Aminul acted during the interaction that day.

100. In terms the evidence about this incident, the claimant also did not provide any evidence that indicated that his race was in any way a factor. He has not provided any evidence from which we could infer that the way Mr Aminul acted during this interaction was worse than he would have acted with another employee of a different race. We also do not accept it could be viewed as harassment. We have found that it was a two-way discussion where both participants were equally rude with the other. It was also trivial in nature, being a brief discussion where Mr Aminul was abrupt with the claimant who had interrupted and also been rude. Therefore, the claims for direct discrimination and harassment fail. This is the case based on the claim as identified in the list of issues and based on how the claimant framed the complaint and presented evidence during the hearing.

101. The claimant alleged that on 26 July 2020 Mr Aminul shouted at him during a discussion over a radio. We accepted there may have been an incident on 26 July 2020. However, we did not accept on the balance of probabilities it occurred as the claimant has since described. We have concluded that any incident that did occur was not serious, but was relatively trivial. We find that it does not have the proscribed effect so does not meet the definition of harassment. We also conclude there is also no evidence that shows anything that occurred was in any way related to the claimant's race. Therefore, we also find that the claimant has not shown he was treated less favourably than any actual or hypothetical comparator due to his race in respect of this allegation.

102. The claimant has alleged that on 30 July 2020 the claimant realised that his pay had been deducted by one hour in respect of a shift on the 17 July 2020. The claimant contends that he was only 14 minutes late and should not have had an hour's pay deducted. We concluded that initially the claimant was informed that a deduction was going to be made from his pay. However, we have also concluded the issue was resolved promptly so no deduction was actually made. Therefore, the claimant has not proved that what occurred is as he has alleged in his claim.

103. We have also considered whether the threat of a deduction in these circumstances could have been less favourable treatment. On this we found that there was no evidence that the claimant was treated any differently from anyone else in a similar situation. The claimant has not shown on the balance of probabilities any less favourable treatment. He has also not shown that even the threat of a deduction may have been due to his race. Therefore, his direct discrimination claim fails. We also find as a relatively trivial incident that would be a normal management decision, it does not meet the definition of harassment. The finding that there are no facts connecting this incident to the claimant's race also apply to the harassment claim. Therefore, both these claims fail.

104. The claimant has said that on 4 August 2020 his colleague, Mr Rasaq, reported that the claimant did not allow him to reset the alarm panel and it was incorrect for him to do so. We accepted that Mr Rasaq did make a report about the claimant. We did not find that it was incorrect of Mr Rasaq to have done so, as alleged by the claimant. This may have been less favourable treatment, as Mr Rasaq was critical of the claimant's conduct. However, the claimant has not provided any evidence that Moin may have acted this way due to the claimant's race. On the contrary, we concluded there was substantial evidence that the report was made because there had been a serious incident involving the claimant that needed to be investigated. Therefore, the direct discrimination claim fails. As we have concluded this incident was wholly unrelated to the claimant's race the harassment claim also fails.

105. The claimant has said that on 4 August 2020 at about 18:42 Mr Aminul shouted at him. The claimant alleged that Mr Aminul proceeded to speak to him in an angry loud and fierce tone that the claimant should leave the staff room and go upstairs. While it is undisputed that an incident occurred, we have not accepted the claimant's account of events. We found on the balance of probabilities the claimant has not proved that Mr Aminul shouted at him so he has not shown that the alleged unfavourable treatment or harassment occurred.

106. With regard to this incident we have also noted that the claimant did not dispute that he had been playing pool and that this was before the end of his shift. This is not something he should not have been doing. It is apparent from this that the reason why Mr Aminul reprimanded the claimant. The claimant has not provided any evidence to suggest that the way that Mr Aminul reacted to him playing pool was worse than he would have treated someone else doing the same. The claimant has not proved any facts that indicate that the way Mr Aminul's conduct may have been due to the claimant's race, as opposed to the claimant's own conduct. Therefore, both the direct discrimination and harassment claims fail.

107. The claimant says that on 5 August 2020 Mr Aminul drafted a file note wrongly accusing the claimant of playing pool in the staff room during working hours. It is undisputed that Mr Aminul wrote a file note about the incident. However, the claimant has not proved that there was anything wrong with Mr Aminul doing this, as he has alleged. On the contrary the file note was written because the claimant had been playing pool while on shift, which the claimant accepts had happened. The claimant has not proved the facts that he says are either less favourable treatment or harassment, therefore these claims both fail. We also note that the reason the file note was the pool incident and the claimant has not proved any facts that indicate he may have been treated less favourably in relation to this to others due to his race.

108. The claimant was then dismissed on 10 August 2020 following a probation review. His employment was terminated by Antonio Osorio on the 18 August 2020. The claimant has said this was both direct discrimination and harassment.

109. As a matter of fact, the claimant was dismissed which could be less favourable treatment. To be less favourable treatment the claimant would need to prove

that he was treated less favourably than others in the same circumstances, either an actual person or a hypothetical comparator. He must also prove some facts from which the Tribunal can infer that the reason for that less favourable treatment may have been his race.

110. Based on our findings of fact we find that that the claimant has not shown he was treated any different to any other employee in the same circumstances. The relevant circumstances would be an employee who was still in their probationary period about whom the respondent had similar concerns about their conduct and performance. We are satisfied that the respondent has more than adequately shown that they had several legitimate concerns about the claimant's conduct and performance by August 2020. His probation had been extended a number of times already. There had then been the incidents on 4 and 5 August, which were relatively serious. We have found as a matter of fact that Mr Osorio's decision was genuine.

111. To succeed with his claim the claimant would need to show that the respondent would have acted more leniently to a similar employee who did not share the claimant's protected characteristic of race. The claimant has not proved this. He has just asserted that this was the case. The claimant has not proved any facts which would support a finding that the dismissal may in any way have been due to his race. On the contrary, it is apparent from the findings we have reached that it was due to the claimant's performance and conduct being unsatisfactory. For the same reasons, i.e. the factual conclusions we have reached, the harassment claim fails.

112. On 25 August 2020 the claimant appealed against his dismissal and submitted a grievance. His appeal was dismissed on the 17th of September 2020 by Edward James. The claimant has said the rejection of his appeal was discrimination and also harassment. As a matter of fact, the claimant's appeal was rejected and the decision to dismiss him was upheld. Also, his grievance was not upheld. While the outcome of the appeal could be less favourable treatment the claimant did not prove any facts that suggested in any way that his race may have been the reason for this. On the contrary, we concluded there was no evidence that indicated that Mr James' decision was anything other than genuine. The claim for direct discrimination fails.

113. Due to the lack of evidence connecting this to his race in any way the harassment claim also fails. We also do not consider that the decision not to uphold the appeal amounts to harassment. This may have been unwanted and upsetting to the claimant. However, this decision in itself looked at objectively does not amount to harassment. To amount to harassment there would need to be something else about that decision that created the proscribed effect, such as the manner in which it was delivered or specific things that were said during the process or in the decision. This was not the claimant's case and there was nothing within the evidence that would support such a finding.

<u>Victimisation</u>

114. The claimant said that he had done three things which were protected acts. There were:

a) On 23 July 2020 the claimant informed Mr Aminul that he felt disrespected and degraded by the way in which he was spoken to.

b) On 10 August 2020 the claimant raised his complaints and concerns about Mr Aminul during the probation review.

c) On 25 August 2020 the claimant sent a pre-action letter.

115. We accepted that in July 2020 there was some discussion between the claimant and Mr Aminul about how the claimant felt. We did not accept that at this point the claimant complained of discrimination. In the claimant's subsequent accounts of this discussion, that occurred while he was still employed, he did not say he was being discriminated against by Mr Aminul. His complaints were more generic about poor treatment. The claimant has not proved on the balance of probabilities that he said anything during this conversation that could be a protected act under the Equality Act 2010.

116. On 10 August the claimant did make complaints of discrimination. However, the documentary evidence from the time shows that when he described what he meant by this he said that it was favouritism towards Mr Aminul's brother in law. He does not mention any protected characteristic at this time. An assertion of favouritism is not in itself an allegation of discrimination or a breach of the Equality Act 2010. It would need additional allegations or information that could be interpreted to be about a protected characteristic to be understood as being such. Therefore, we find that anything the claimant said on 10 August 2010 did not amount to a protected act.

117. The appeal letter of 25 August 2010 does overtly mention race discrimination so we accept this was a protected act.

118. The claimant says the following factual allegations all amount to victimisation:

a. On 26 July 2020 Mr Aminul shouted at the claimant during the discussion on a radio transmitter.

b. On 30 July 2020 the claimant realised that his pay had been deducted by one hour in respect to the shift on the 17 July 2020. The claimant contends that he was only 14 minutes late and should not have had an hour deducted.

c. On 4 August 2020 the Claimant's colleague Mr Rasaq reported that the claimant did not allow him to reset the alarm panel. This was incorrect.

d. On 4 August 2020 at about 18:42 Mr Aminul shouted at the claimant regarding the shift he should have been working. Mr Aminul proceeded to speak to the claimant in an angry loud and fierce tone that the claimant should lead the staff room and go upstairs.

e. On 5 August 2020 Mr Aminul drafted a file note wrongly accusing the claimant of playing pool in the staff room during working hours.

f. On 10 August 2020 payment was dismissed following a probation review. His employment terminated by Antonio Osorio on the 18 August 2020.

g. On 25 August 2020 the claimant appealed against his dismissal and submitted a grievance. His appeal was dismissed on the 17th of September 2020 by Edward James.

119. Allegations 113a-f all predate the only communication that we have accepted was a protected act. Irrespective of our findings on the factual allegations, anything that occurred cannot be because of a protected act. Therefore, these victimisation claims all those claims fail.

120. The only complaint that post-dates the protected act is the appeal outcome, which was not successful. We have already found that Mr James' decisions were genuine. The grievance was investigated and it was not upheld. There is no evidence it was not upheld because it contained an allegation of discrimination. There is no evidence that the reason the decision to dismiss was upheld was the fact the claimant had complained about discrimination. On the contrary, by raising the grievances in the appeal the respondent carried out further investigation that it may not have done otherwise. Our conclusion is there is no causal connection between the complaints of discrimination and the appeal outcome therefore this claim fails.

Whistleblowing

121. The claimant has said that he made two qualifying disclosures that form the basis of these claims. They are:

a. a disclosure to Mr Osorio on 10 August 2020 regarding the corruption of Mr Aminul and discrimination and harassment; and

b. the claimant's appeal and letter before action.

122. We find that the claimant made no qualifying disclosures to Mr Osorio on 10 August 2010. The claimant complained about Mr Aminul and provided some information about specific incidents, such as the one with the Coca Cola. These are relatively trivial matters. There is nothing that can easily be identified as being a disclosure of a breach of a legal wrongdoing and due to the relatively trivial nature of the complaints we do not find that the claimant could reasonably have believed that is what he was disclosing. Other complaints were quite general in nature such as a general complaint of bullying. These complaints are purely about the claimant's own situation. We have not found anything the claimant said at the time that suggests he believed he was making any disclosure in the public interest.

123. The appeal letter is more detailed and in this the claimant does expressly make complaints about discrimination. This is a breach of a legal obligation and so this letter could include qualifying disclosures. However, again we find that the letter was completely focused on the claimant's own situation. The purpose of the letter was to appeal against the decision to dismiss him. There is nothing within it which could be interpreted as being in the public interest and the claimant has not provided any evidence otherwise to suggest that he reasonably believed that he was making his appeal in the public interest.

124. As we have found that the claimant did not make any qualifying disclosure both his claims for detriment and his automatic unfair dismissal claim fail. For completeness, we note that the claimant alleges the dismissal was automatically

unfair as the reason or principle reason was the protected disclosure and then the decision not to uphold his appeal and grievance were detriments. In the context of other claims, we have already found those decisions by the respondent were genuine. We note that based on the evidence we have heard there was no reason for us to conclude that the either of these decisions may have been due to the either of the alleged qualifying disclosures. The claimant was dismissed because he was still within his probationary period and the respondent had several legitimate concerns about his performance and conduct. There was no evidence to suggest anything he said on 10 August may have been a factor in Mr Osorio's decision. Likewise, there was no evidence that Mr James' decision was anything other than genuine.

Employment Judge S Park
Date: 7 September 2023