EMPLOYMENT TRIBUNALS

Claimant: Mr M Humed

Respondent: Sight & Sound Security Limited

Heard at: London South (by video) **On:** 25, 26, 27, 28 and 29 September 2023

Before: Employment Judge Evans
Mrs Dengate
Mr Dixon

Representation
Claimant: in person
Respondent: Mr C McDevitt, Counsel

WRITTEN REASONS PROVIDED FOLLOWING A REQUEST MADE PURSUANT TO RULE 62(3)

The Tribunal gave oral judgment with reasons in this claim on 29 September 2023. On 4 October 2023 the claimant made a request for written reasons pursuant to Rule 62(3) of the Employment Tribunal's Rules of Procedure. Those written reasons are set out below.

The Tribunal's judgment given on 29 September 2023 was that the respondent had not victimised the claimant. Therefore his claim of victimisation failed and was dismissed.

REASONS

Preamble

1. On 15 February 2019 the claimant presented a claim to the Tribunal following his dismissal on 18 December 2018. That claim was struck out in its entirety by an Employment Judge at a hearing on 31 July 2020. The claimant appealed to the Employment Appeal Tribunal ("EAT"). His appeal was partially successful: on 30 November 2022 the EAT concluded that the claimant's claim of victimisation should not have been struck out. The EAT did not reverse the striking out of the claimant's other claims and so the claim of victimisation was the only claim before us.

2. **Bundle**: the parties had agreed a bundle of 353 pages prior to the hearing and all page references are to that bundle unless otherwise stated. In addition, the claimant's witness statement was contained in a bundle containing 43 pages. Any references to page numbers in that bundle are prefaced by "CWSB" (claimant witness statement bundle). Finally, during the course of the hearing the claimant produced a further pdf file running to 21 pages. The respondent made no objection to it being admitted. Any references to page numbers in that file are prefaced by "CSD" (claimant's supplementary documents).

3. **Other documents**: the respondent had prepared a reading list, chronology and cast list.

4. **Witnesses**: the following witnesses gave evidence by reference to witness statements prepared and exchanged before the hearing:

   4.1. The claimant;

   4.2. Mr Purchase, the managing director of the respondent at the time of the events about which the claimant complains.

5. The Tribunal's decision in relation to the claim as set out in the judgment was unanimous. These reasons were given at the conclusion of the hearing after the Tribunal had spent a day deliberating.

Discussion at the beginning of the hearing and the issues for the Tribunal to decide

6. Further to an order made by the EAT (page 57), Counsel who had represented the claimant *pro bono* in the EAT had drafted particulars of his victimisation claim (page 59). As noted above, that was the only claim before us.

7. The claimant was not entirely clear that this was the case (see section D of his witness statement) and so the Tribunal spent some time at the beginning of the hearing on 25 September 2023 going through the procedural history of his claim. When this had been done the claimant indicated that he understood that the only claim that remained and that the Tribunal would consider was his victimisation claim as set out in the particulars.

8. In light of the particulars of the victimisation claim, it was agreed at the beginning of the hearing that the issues for us to decide would be as follows:

   8.1. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 21 September 2018 may not have been brought in time.

   8.2. Were the victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

      8.2.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

8.2.2. If not, was there conduct extending over a period?

8.2.3. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

8.2.4. If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

8.2.4.1. Why were the complaints not made to the Tribunal in time?

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

9. Did the claimant do protected acts as follows:

a) Reporting to the Respondent (on or about 6th/7th September 2017) that the Respondent's Site Manager at the college where the Claimant worked at that time ("the Site Manager") had used racist insults and conduct towards a black colleague of the Claimant (a fellow security officer);

b) Similarly reporting to the Respondent (on or about 12th/13th September 2017) that the Site Manager had used racist remarks (black stereotyping) and conduct towards the Claimant.

10. Did the respondent do the following things:

a) In September 2017 (after the first Protected Act) the Site Manager threatened that he would put the Claimant on two Saturday shifts per month because of the Claimant's stated opinion regarding the unlawful behaviour of the Site Manager (all security officers being otherwise required to work only 1 Saturday shift per month);

b) On 11 September 2017 the Site Manager unjustifiably criticised the Claimant and shouted at the Claimant's face and pointed his radio antenna at his face at a distance of 1 inch from the face;

c) From September 2017 (after the first Protected Act) the Site Manager harassed the Claimant by repeatedly pointing and calling him with a gesture of his finger and sending him back with his finger on numerous occasions, and needlessly sent the Claimant backwards and forwards, and threatened to call the Claimant for a Disciplinary Hearing (without any valid justification or cause);

d) On or about 12th/13th September 2017 the Site Manager used racist remarks (black stereotyping) and conduct towards the Claimant. Specifically the Site Manager approached the Claimant and said "I do not like black people because they are lazy."

e) In late October 2017 the Site Manager demanded that the Claimant sign an agreement to work 2 Saturdays per month, and after the departure of the Site

Manager, Mr Sebastian Charlery ("the Line Manager") demanded that the Claimant sign such agreement (against the Claimant's wishes);

f) When the Claimant refused to sign the agreement referred to in e above, the Line Manager threatened the Claimant with dismissal, and thereafter the Line Manager nevertheless forced the Claimant to work 2 Saturdays per month (against his wishes) until September 2018, whilst the remaining security officers were only required to work on 1 Saturday per month;

g) In January 2018 the Line Manager unjustifiably commenced a disciplinary process against the Claimant in respect of an incident in which college staff were briefly locked in a college building, for which the Claimant was not in fact personally responsible (whereas the Line Manager had ignored a recent previous such incident (on 14.12.2017) which involved other security officers). Out of 5 Security Officers and the Site Manager, the Line Manager directed his questioning to the Claimant with the intention of involving his name in the complaint.

h) On 16 February 2018 the Claimant was moved to another college site, at Colindale, which was much less convenient for the Claimant in terms of travel to work, without discussing the matter with the Claimant. The Respondent picked upon the Claimant only for such transfer. ***The claimant withdrew this allegation during the course of his oral evidence, conceding that Colindale was more rather than less convenient for him. It is therefore not considered further below.***

i) The Line Manager ignored the Claimant and failed to take any action when the Claimant reported (by email dated 3 March 2018) material misconduct by a fellow security officer (Mr Lisan) who used bullying language to a mature adult female student;

j) In around March 2018 the Line Manager unnecessarily questioned the Claimant regarding the whereabouts of the keys of the college, criticising the Claimant without justification;

k) In May 2018 the Line Manager artificially raised a dispute with the Claimant regarding the Claimant's working hours in April (to 6pm or 7pm). The Line Manager demanded an email from the former Facility Manager of the College in an attempt to escalate the issue and harass the Claimant;

l) On 24 August 2018 the Line Manager unreasonably confronted the Claimant regarding working early shifts at the Colindale campus. The Line Manager had asked the Claimant to do early shifts for one week, which involved the Claimant having to take a mini cab to travel to the site on time at 06.00am. The Claimant had agreed to work such shifts for 1 week to assist the Respondent. On 24 August 2018 the Claimant told the Line Manager that he could not continue doing early shifts because of the transportation costs and showed him a copy of the bus timetable. The Line Manager responded aggressively by pushing the Claimant's bus timetable with his thumb and demanding that the Claimant

work the shift starting at 6.00am. The Respondent did not reimburse the Claimant his extra travel expenses;

m) In October 2018 the Line Manager unreasonably and aggressively questioned the Claimant regarding another ex-staff member's (Manuel's) uniform. The Line Manager picked upon the Claimant even though the Claimant had no connection with the uniform;

n) During the first 3 weeks of October 2018 the Claimant was intimidated, harassed and bullied (by being shouting at and unnecessarily questioned and criticised about his appearance (i.e. his uniform) and working practices) by a newly appointed Site Supervisor, Mr Julien Mbeleck (whom the Line Manager had appointed). On 22/10/2018 the Claimant reported to the Line Manager (and copied to the Respondent) the deliberate abuse and misconduct of Mr Mbeleck. The Line Manager and the Respondent ignored the Claimant's complaints. On 23 October 2018 the Line Manager visited the site and immediately called the Claimant to a meeting but refused to deal with the issue of Mr Mbeleck's abuse and misconduct. Instead, the Line Manager shouted at the Claimant and sought to intimidate him. Thereafter the Line Manager failed to address any of the legitimate issues raised by the Claimant regarding the behaviour of Mr Mbeleck;

o) On 1st November 2018 the Respondent's Site Supervisor (Mr Mbeleck) artificially created a disciplinary issue against the claimant in respect of an innocent incident which had occurred the previous day when the Claimant was checking a ladies' toilet at the college. The Claimant had (as was the correct practice) made a loud noise outside the toilet to ensure that no-one was inside before going inside to check that the toilets were empty before the premises were locked up. There was no response from inside, but upon opening the door to check that the toilets were empty, the Claimant found a lady who worked in the Café inside. The lady (with whom the Claimant had had an altercation previously in the café) went downstairs and told the college Caretakers and other staff that the Claimant had "nearly given her a heart attack". The Claimant apologised to her. Yet on 1st November 2018 the Site Supervisor called the Claimant for a meeting and alleged that the lady had made a complaint and allegation against the Claimant. The Claimant believes that the Site Supervisor had encouraged the lady to complain in an effort to create trouble for the Claimant;

p) On 5th November 2018 the Site Supervisor artificially created an allegation against the Claimant, suggesting that a former student who was visiting the college had stated that the Claimant was behaving strangely towards him. In fact that was a lie by the Site Supervisor. Another student had heard the conversation between the ex-student and the Site Supervisor, and in fact the ex- student had said that the Claimant was a good person;

q) On 6th November 2018 the Site Supervisor aggressively questioned the Claimant (without justification) regarding the claimant changing his work security password;

r) On 14th November 2018 the Line Manager visited the site and refused to discuss with the Claimant the ongoing harassment by the Site Supervisor;

s) In December 2018 the Respondent (acting upon the instigation of the Line Manager and the Site Supervisor) summarily dismissed the Claimant, without legitimate cause and without following any fair or appropriate disciplinary process. Although the decision to dismiss the Claimant (and to refuse to give the Claimant any fair opportunity to contest the allegation made against him) was purportedly taken by the Respondent's director, the Claimant believes and understands that the director acted at the instigation of the Line Manager. The Claimant contends that this dismissal was the culmination of the Line Manager's victimisation of the Claimant arising from the Protected Acts. Specifically, on 7th December 2018 the Line Manager purported to suspend the Claimant from work from Monday 10/12/2018, allegedly on the basis of an allegation of sexual harassment by the lady who worked in the café. The ladies who worked in the café were in fact friends of the Security Officer (Mr Lisan) referred to at i. above, and had fallen out with the Claimant previously. The Claimant believes that the purported sexual harassment complainant was encouraged to make a false allegation against the Claimant by the Line Manager and/or the Site Supervisor. The Respondent (acting by its director) refused the Claimant's reasonable request for an opportunity to take legal advice from the Citizen Advice Bureau, and dismissed the Claimant at a "hearing" without the Claimant present.

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

12. If so, was it because the claimant did a protected act?

The law

Victimisation

13. In broad terms, the Equality Act 2010 ("the EqA 2010") prohibits various forms of discrimination by employers against employees with certain protected characteristics. It also prohibits victimisation.

14. Victimisation is defined in section 27 of the EqA 2010 Act:

> *(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 in connection with 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. …*

15. The causal connection required is essentially the same as in a direct discrimination claim. It is not a "but for" test but an examination of the real reason for the treatment. As such, it is necessary to consider the employer's motivation (conscious or unconscious).

16. Section 136 of the Equality Act 2010 provides for a shifting burden of proof:

> *(1) This section applies to any proceedings relating to a contravention of this Act.*
> *(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*
> *(3) But subsection (2) does not apply if A shows that A did not contravene the provision.*

17. The correct approach to the shifting burden of proof remains that set out in the guidance contained in Barton v Investec Securities ltd [2003] IRLR 332 approved by the Court of Appeal in Igen Ltd v Wong [2005] IR 931 and further approved recently in Efobi v Royal Mail Group Ltd [201] ICR 1263.

18. There is a two-stage process. In the first place, the claimant must prove facts from which the tribunal could conclude in the absence of any other explanation that the respondent had committed an act of victimisation against the complainant.

19. In Efobi the Supreme Court confirmed the point that a Tribunal cannot conclude that "there are facts from which the court could decide" unless on the balance of probability from the evidence it is more likely than not that those facts are true. All the evidence as to the facts before the Tribunal should be considered, not just that of the claimant.

20. In Madarassy v Nomura International plc [2007] ICR 867 the Court of Appeal stated that "could conclude" must mean "a reasonable Tribunal could properly conclude" from all the evidence before it. The Court of Appeal also pointed out that the burden of proof does not shift simply on proof of a difference in treatment and the difference in status. This was because it was not sufficient to prove facts from which a Tribunal could conclude that a respondent could have committed an act of discrimination.

21. In the context of a victimisation claim, the mere fact of a protected act and a detriment would be insufficient to shift the burden of proof. There would need to be some evidence from which the Tribunal could infer a causal link between the protected act and the detriment.

22. If the claimant does prove facts from which the tribunal could conclude in the absence of any other explanation that the respondent had committed an act of victimisation, the burden shifts to the employer to prove that it did not commit an act of victimisation.

Time limits in the EqA

23. Section 123 of the Equality Act 2010 provides where relevant as follows.

> *(1) Subject to sections 140B, proceedings on a complaint within section 120 may not be brought after the end of –*
>
> *(a) the period of 3 months starting with the date of the act to which the complaint relates, or*
>
> *(b) such other period as the employment tribunal thinks just and equitable…*
>
> *… (3) For the purposes of this section –*
>
> *(a) conduct extending over a period is to be treated as done at the end of the period;*
>
> *(b) failure to do something is to be treated as occurring when the person in question decided on it.*
>
> *(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—*
>
> *(a) when P does an act inconsistent with doing it, or*
>
> *(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.*

24. Turning first to the question of whether there is a "continuing act" (i.e. conduct extending over a period of time), there is a continuing act when the employer is responsible for an "an ongoing situation or a continuing state of affairs" in which the acts of discrimination occurred, as opposed to a series of unconnected or isolated incidents (Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686). The focus of the Tribunal should be on the substance of the complaint not on whether there was a discriminatory policy, rule, practice, scheme or regime – these are just examples given in the authorities of when an act extends over a period of time.

25. Turning secondly to the “just and equitable” extension, it is for the claimant to show that it would be just and equitable to extend time. However, the discretion given to the Tribunal to extend time is a wide discretion to do what it thinks is just and equitable in the circumstances. The Tribunal should assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time.

26. Although the discretion is wide there is no presumption that it should be exercised so as to extend time. Indeed, the exercise of discretion is the exception rather than the rule (Bexley Community Centre (t/a Leisure Link) v Robertson [2003] EWCA Civ 576). Further, the burden, which is one of persuasion, is on the claimant to persuade the Tribunal it is just and equitable to extend time

Submissions

27. Mr McDevitt for the respondent made succinct submissions. He set out why in his submission the claimant was not a "reliable historian" and explained, by contrast, why we should find Mr Purchase to have been a credible witness. He went on to submit that there was no protected act; further, if there were a protected act, the claimed detriments had not taken place; further, if any of the claimed detriments had taken place, it was not because of any protected act. Finally he submitted that in any event anything that had happened prior to 21 September 2018 was out of time.

28. The Tribunal offered to summarise Mr McDevitt's submissions back to the claimant so that he could respond to them in a focused manner. The claimant declined this offer. Instead he gave a chronological account of events as he saw them from September 2017 through to his dismissal in December 2018. This was, essentially, a repetition of some of the information contained in his witness statement and grievance.

29. During the course of his submissions, the Tribunal reminded the claimant of the legal issues that it would consider (as set out above) and we invited him to address us in particular in relation to any evidence which he said might cause us to conclude (perhaps as a result of an inference that we might draw) that the reason for the alleged detriments was the alleged protected acts. However the claimant chose not to do this other than in the most general of terms.

Findings of fact

30. In making these findings of fact the Tribunal has taken into account all of the evidence before it although of necessity it does not refer to each element of it in these reasons.

General background findings and credibility findings

31. The claimant was employed by the respondent as a security officer from 30 August 2017 until he was dismissed without notice on 18 December 2018. Throughout his employment the claimant worked at two campuses of Barnet & Southgate College ("the College") with which the respondent had a contract for the provision of security services.

32. Initially the claimant worked at the Southgate campus under the Site Manager. Mr Charlery was the claimant's line manager throughout his employment and was more senior than the Site Manager. Mr Mbeleck was the claimant's supervisor at the Colindale campus from October 2018. The claimant had moved to the Colindale campus in February 2018 (there was no site manager at that campus).

33. We have no doubt that the claimant believes himself to have been the victim of significant injustice at the hands of the respondent. We find that he was honest in his evidence. However, our overall assessment is that his recollections of events were excessively shaped by the narrative that he has developed concerning his

employment with the respondent and that he was not a reliable and credible witness. We reached this overall assessment for the following reasons:

33.1. The claimant's answers often related only tangentially to the questions asked. Questions in relation to a particular theme would trigger a recitation of his theory in relation to that theme rather than an answer referencing clearly the evidence. The Tribunal asked him on a number of occasions to focus on the actual questions asked but he clearly found this very difficult and often did not manage to do so;

33.2. The claimant on occasion preferred to understand events by reference to conspiracy theories which, we found, took little account of the available evidence. We return to this point below in particular in relation to the events leading to the claimant's dismissal. This reflected his general reluctance to focus on the evidence when it did not reflect his narrative;

33.3. More generally, the claimant was not prepared to make sensible concessions. For the reasons set out below, it is clear that the documents relied upon by the respondent in relation to the issue of which Saturdays were worked by the claimant are more likely to be a reliable record than those relied on by the claimant, but the claimant was unable or unwilling to recognise this;

33.4. At times the claimant has been inconsistent. For example, the claimant's email of 7 September 2018 (page 186) in which he suggests (its second paragraph) that he has experienced significant problems at work since September 2017 is inconsistent with his email to his immediate manager on 22 October 2018 (page 197) in which he suggests (its third paragraph) that there have been no problems at the site where he worked since February 2018. Although it is possible to explain away this and other inconsistencies to some extent, and we do not attach a large amount of weight to them, nevertheless their overall effect is to reduce our confidence in the claimant's evidence generally.

34. In making these findings we have taken careful account of the fact that, although the claimant clearly understands and speaks English very well, his English is far from perfect and this affects the precision with which he expresses himself. However we find that such limitations in his spoken English cannot explain the matters we have focused on above.

35. By contrast, we found Mr Purchase to be a reliable and consistent witness. His evidence was essentially internally and externally consistent. He enhanced his credibility by accepting that there were certain areas where he had imperfect recollections and, also, by recognising that his knowledge might be incomplete – for example, he noted that whilst he had never received a complaint from the claimant about his pay being incorrect, it was of course possible that the claimant had made a complaint to the HR department.

36. A feature of this case which has affected the quality of the evidence available to us has been the delay between the events giving rise to the claim (which took place in 2017 and 2018) and its final hearing in autumn 2023. The delay is not the fault

of either party: its single biggest cause was the claim being struck out in 2020 and a period of more than two years before the EAT reinstated the victimisation claim in late 2022. However, the delay has affected the quality and nature of the evidence available to us. First, a delay of five years inevitably affects the quality of recollections of witnesses. Secondly, three of the respondent's possible witnesses are no longer its employees: Mr Charlery, the Site Manager and Mr Mbeleck. Further, Mr Charlery, the most significant of these, has told the respondent that he is unable to attend because his wife is seriously ill and, as a result of this, he is currently on compassionate leave from his current employer.

37. Taking all relevant facts into account, including in particular the delay in the claim reaching a final hearing and the fact that none of these individuals remains employed by the respondent, we find that it would not be appropriate to draw adverse inferences from the respondent's failure to obtain witness statements from them and to call them to give evidence.

38. Another effect of the delay was to reduce the quantity of documentation available. For example, the respondent explained that it had not retained disciplinary records from hearings in late 2017/early 2018 and that equally it no longer had complete time sheet and similar data from that period. Whilst it might be said that the respondent should have preserved all potentially relevant documentation once the claim had been issued in early 2019, we take the view that this would be an unrealistic criticism given that the reality was that the claim was unclear when it was begun and remained unclear up to the point when it was struck out in 2020. This was doubtless why the EAT ordered further particulars of that part of the claim which it reinstated. As such, again, we do not draw adverse inferences which count against the respondent from gaps in the documentation.

Findings in relation to the claimed protected acts

The first protected act: Reporting to the Respondent (on or about 6th/7th September 2017) that the Respondent's Site Manager at the college where the Claimant worked at that time ("the Site Manager") had used racist insults and conduct towards a black colleague of the Claimant (a fellow security officer);

39. The claimant's witness statement (page 3 paragraph 2) did not clearly reflect the first protected act as set out in the particulars. Rather it referred to "degraded language" being used against the college principal and director of finance. It does not refer to "racists insults and conduct towards a black colleague". (The section beginning "In addition the Site Manager said…" relates to the second protective act to which we turn below.)

40. The claimant's oral evidence also did not reflect the first protected act as set out in the particulars. He said that the Site Manager had sent an agency worker away for being five minutes late and had then said "did you see how the fucker was talking?". The claimant said that at the same time the Site Manager had insulted the college principal and director of finance using the same word. Both the college principal and its director of finance are white.

41. The claimant's relatively contemporaneous emails of 13 and 19 September 2017 (pages 140 and 142) also did not reflect the first protected act as set out in the particulars. Nor did his grievance of 13 December 2018 (page 221) ("the grievance").

42. We find that the claimant was concerned before 6 or 7 September 2017 that the Site Manager had behaved inappropriately by sending the agency worker away and by referring to the college principal and its director in the manner set out above. In light of the references in his email of 13 September to "other unprofessional behaviour that I have informed you regarding the supervisor" we also find that he may well have informed Mr Charlery of what he had seen.

43. However, we find that the claimant did not report "racist insults and conduct towards a black colleague of the Claimant (a fellow security officer)" to Mr Charlery on or about 6th or 7th September because, taken in the round, the claimant's evidence does not support his contention that there had been any such insults or conduct before 6th or 7th September 2017. The insults and conduct described by the claimant which he says he reported in the first protected act were not "racist" in nature and indeed the claimant did not really contend that they were in his oral evidence. Rather he deflected questions concerning this so as to focus on the second alleged protected act. For the reasons set out more fully in our conclusion, we therefore find that the first alleged protected act was not a protected act as defined in the EqA 2010.

The second protected act: Similarly reporting to the Respondent (on or about 12th/13th September 2017) that the Site Manager had used racist remarks (black stereotyping) and conduct towards the Claimant.

44. In his witness statement the claimant said "In addition the Site Manager said to the Appellant that he does not like black people because they are lazy. The Claimant challenged the Site Manager and told him that, he is a black. The Site Manager responded and said to the Claimant, look to your face and look to their faces".

45. In the grievance the claimant said "the Site Manager has been racially abused [sic] black people" (its page 3) and then at paragraphs 31 & 32 "Next day, the Site Manager out of no reason he came close to me and said, I do not like black people. I responded to him and said, I am black, he said no, no, no, you are different. He added and said look to their faces and how they look like and look to your face". Then, at paragraph 34, "I informed Mr Sebastian regarding my conversation with the Site Manager and his racial comments. Again, similarly Mr Sebastian answered with a laugh". (Sebastian is the first name of Mr Charlery and the claimant often refers to him as Mr Sebastian.)

46. There is a slight inconsistency in the claimant's account of what the Site Manager said. In answer to questions asked in cross-examination, the claimant said that his failure to mention that the Site Manager said that he did not like black people because they were "lazy" was because it "may have slipped from my mind" but asserted that was what the Site Manager had said.

47. Mr Purchase said that Mr Charlery did not accept that the claimant had reported the use of racist language to him. We attach only a little weight to this evidence given that it is hearsay and in light of the absence of any kind of witness statement from Mr Charlery.

48. On the balance of probabilities we find that the Site Manager made comments along the lines that the claimant attributes to him. In so finding we note that the evidence of the claimant in relation to his conversation with the Site Manager had the ring of truth about it. However, we find that the claimant did not report these comments to Mr Charlery by phone as he contends. We make this finding for the following reasons:

    48.1. For the reasons set out above we did not generally find the claimant to be a reliable and credible witness. We find that by December 2018 he is unlikely to have had an accurate recollection of what he said to Mr Charlery in September 2017.

    48.2. Further and separately, we find that if the claimant had reported such racist comments to Mr Charlery by telephone then he would have been likely to refer to this expressly in his emails of 13 and/or 19 September 2017 (pages 140 and 142) but he did not. There is nothing in either email which refers obviously to any concern about racist behaviour by the Site Manager.

    48.3. Further and separately, we find that if the claimant had raised the complaint with Mr Charlery at the time and had been brushed off as he claims, he would have pursued it further. We do not accept that he spoke to Ashley in HR about the matter, noting that the first time he suggested that he had done this was during cross-examination.

    48.4. Further and separately, we find that the fact that the claimant only raised the allegation - that he had made a complaint about racist behaviour by the Site Manager to Mr Charlery who had done nothing - in writing for the first time in the grievance on 13 December 2018 is of significance. This was shortly after the claimant had been suspended from duty on 7 December 2018 (page 205) following allegations of misconduct. The suspicion raised by the timing of the detail contained in the grievance cannot be satisfactorily answered by referring to the claimant's letter of 7 September 2018 (page 186) given that that contains very little detail. We find, given the claimant's approach to difficulties at work, that if he had raised concerns about the racist behaviour of the Site Manager with Mr Charlery on 12 or 13 September 2017 and these had been ignored, he would have referred to this in writing before December 2018.

49. We therefore find on the balance of probabilities that the claimant did not telephone Mr Charlery as he claims on 12 or 13 September 2017 in relation to the comments made by the Site Manager. We therefore find that the second protected act did not take place.

<u>Findings in relation to the claimed detriments</u>

50. Because we have found that there was no protected act, the claim of the claimant necessarily fails. Further, our findings and conclusions in relation to the first protected act seem to us to be very clear cut indeed. The alleged first protected act was not a protected act even on the basis of the account put forward by the claimant at the hearing.

51. However, although on the balance of probabilities we have also found that the second alleged protected act was not a protected act, the evidence in relation to it was not as clear cut as that in relation to the first protected act, and so we set out below what our findings would have been in relation to the alleged detriments if we had concluded that, although the first alleged protected act was not a protected act, the second alleged protected act was. We have to a considerable degree done this because it seems unsatisfactory to us that the claim should be dismissed nearly five years after the claimant's employment ended without the claimant knowing what a Tribunal made of his factual allegations.

Detriment a: In September 2017 (after the first Protected Act) the Site Manager threatened that he would put the Claimant on two Saturday shifts per month because of the Claimant's stated opinion regarding the unlawful behaviour of the Site Manager (all security officers being otherwise required to work only 1 Saturday shift per month);

52. The claimant accepted in his oral evidence that this had occurred after the first alleged protected act and before the second. In light of our findings above that the first alleged protected act was not in fact a protected act, and what we have said at [51] above, we do not make findings in the alternative in relation to it.

Detriment b: On 11 September 2017 the Site Manager unjustifiably criticised the Claimant and shouted at the Claimant's face and pointed his radio antenna at his face at a distance of 1 inch from the face;

53. The claimant accepted in his oral evidence that this had occurred after the first alleged protected act and before the second. In light of our findings above that the first alleged protected act was not in fact a protected act, and what we have said at [51] above, we do not make findings in the alternative in relation to it.

Detriment c: From September 2017 (after the first Protected Act) the Site Manager harassed the Claimant by repeatedly pointing and calling him with a gesture of his finger and sending him back with his finger on numerous occasions, and needlessly sent the Claimant backwards and forwards, and threatened to call the Claimant for a Disciplinary Hearing (without any valid justification or cause);

54. There is no evidence of significance in relation to this allegation in the claimant's witness statement or the grievance. There is also no clear reference to it in the contemporaneous documents, in particular the emails that he sent in September 2017 (pages 140 and 142). We find that the Site Manager did not call the claimant to a disciplinary hearing and had no power to do so – indeed the claimant did not contend otherwise. Overall, in light of our findings about the claimant's general credibility, and in light of the vagueness of the allegations, we find that the Site Manager did not treat the claimant as alleged in this allegation.

Detriment d: On or about 12th/13th September 2017 the Site Manager used racist remarks (black stereotyping) and conduct towards the Claimant. Specifically the Site Manager approached the Claimant and said "I do not like black people because they are lazy."

55. This is in fact the second protected act. Given that we have found above that the first alleged protected act was not in fact a protected act, this cannot have been an act of victimisation. Our findings in relation to it as a protected act are set out above.

Detriment e: In late October 2017 the Site Manager demanded that the Claimant sign an agreement to work 2 Saturdays per month, and after the departure of the Site Manager, Mr Sebastian (the Line Manager) demanded that the Claimant sign such agreement (against the Claimant's wishes);

56. The claimant contends that he was required to work two to three Saturdays per month from January to September 2018 (paragraph 6 of his witness statement at its page 4) and he has provided a list of the number of Saturdays that he says he was required to work from January to September 2018 in paragraph 6 b) of his witness statement (its page 11). There was also a significant amount of documentary evidence concerning Saturdays worked. At page 164 there was a document headed "Employee Pay Details" which showed the hours for which the claimant had been paid between 3 April 2018 and 12 December 2018 created on 21 January 2020. Then there was the Duties Scheduled document (page 172 to 180) for the period 1 June to 28 October 2018 printed in April 2019. Finally, in the claimant's supplementary documents there was a partial TimeGate report covering the period 5 March to 4 April 2018 printed on 5 March 2018 (CSD page 6) and printouts from the TelMe app covering the period 3 April to 31 August 2018 (CSD page 7-21 printed on 15 July 2018).

57. We find that the Duties Scheduled document and the documents contained in the claimant's supplementary documents were documents produced *before* the claimant worked the shifts in question. They are rotas relating to the future and as such liable to change caused by the illness of employees or other unanticipated events. This is reflected in the final words on CSD page 21: "Total Duties **Scheduled**" (our emphasis).

58. We find that it is inherently more likely that the "Employee Pay Details" document showing the hours for which the claimant was actually paid is accurate than that the supplementary documents produced by the claimant are accurate. This is because the "Employee Pay Details" document was produced after the event rather than before it and there is no suggestion that at the time the claimant complained he had been paid incorrectly (as we find he would have done if it were inaccurate). Consequently, we find that the claimant worked the following number of Saturdays in the months where he and the respondent disagreed about the number of Saturdays worked in 2018:

May 2018	1 (12th)
June 2018	1 (23rd)
July 2018	1 (7th)
August 2018	0

October 2018	1 (6th)
November 2018	1 (3rd)
December 2018	0

59. Accordingly the information in relation to the number of Saturdays worked contained in paragraph 6 b) of the claimant's statement is inaccurate in respect of 4 of the 9 months it covers, overstating in each of these 4 months the number of Saturdays actually worked by the claimant.

60. Returning to the specifics of alleged detriment e, there is no evidence of significance in relation to this allegation in the claimant's witness statement. However, the email sent by the claimant on 13 September 2017 to Mr Charlery does suggest that an issue has arisen in relation to Saturday working ("I have accepted to work one Saturday each month… Apart from above agreement, I can not or will not do more than above our agreements"). He raises the issue again in his email of 19 September to Mr Charlery, complaining that he had been scheduled to work on Saturday 23 September 2017 and stating "I will only work Single Saturday each month".

61. We therefore find that there was an issue between the Site Manager and the claimant about Saturday working. However we find that neither the Site Manager nor Mr Charlery demanded that the claimant sign an agreement requiring him to work two days a month. This is for the following reasons:

    61.1. In his oral evidence the claimant said that he had signed an agreement requiring him to work two Saturdays a month after the Site Manager had left at the insistence of Mr Charlery. This is inconsistent with the alleged detriments e and f as set out in the particulars (in which he says he *refused* to sign);

    61.2. The number of Saturdays actually worked by the claimant is inconsistent with the respondent having a strong desire for the claimant to work two Saturdays a month and, as we have found above, the claimant's account of how many Saturdays he actually worked is inaccurate. We should emphasise that we do not believe the claimant has lied about this – rather he relied on the rota documents prepared in advance. He did not when questioned purport to have a precise recollection of exactly which Saturdays he had worked 5 years ago;

    61.3. The contractual documentation produced does not suggest that there would have been any need to require the claimant to sign an agreement in order to require him to work two Saturdays a month. We refer in this respect to the hours of work provision in the claimant's contract at page 146 and section 4.1 of the Staff Handbook at page 90;

    61.4. We accept the evidence of Mr Purchase that during holiday periods there was a reduced need for security guards to work weekends at the Colindale site where the claimant worked from February 2018, and so the claimant's contention that the respondent nevertheless insisted that he work at least two a month every month is unlikely to be correct.

Detriment f: When the Claimant refused to sign the agreement referred to in e above, the Line Manager threatened the Claimant with dismissal, and thereafter the Line Manager nevertheless forced the Claimant to work 2 Saturdays per month (against his wishes) until September 2018, whilst the remaining security officers were only required to work on 1 Saturday per month;

62. In light of our findings above we find that Mr Charlery did not threaten the claimant with dismissal after he refused to sign the agreement. We also find that the claimant was not forced to work two Saturdays a month until September 2018.

Detriment g: In January 2018 the Line Manager unjustifiably commenced a disciplinary process against the Claimant in respect of an incident in which college staff were briefly locked in a college building, for which the Claimant was not in fact personally responsible (whereas the Line Manager had ignored a recent previous such incident (on 14.12.2017) which involved other security officers). Out of 5 Security Officers and the Site Manager, the Line Manager directed his questioning to the Claimant with the intention of involving his name in the complaint.

63. There was some confusion, caused by the respondent, about the "locking in" incident for which the claimant had been given a written warning. The position was clarified by the claimant's evidence and CSD pages 1 to 5. In summary, the claimant was given a written warning (CSD page 1) on the basis that he had failed "to carry out your duties on the 4th January 2018 during a lock up patrol you failed to check all the rooms, which subsequently resulted in a class of students being locked in a building".

64. The claimant's position was that he should not have been disciplined because (1) he had still been on site and as the students had left through a fire exit they had not really been locked in; (2) following an incident in December 2017 when a teacher and student had been locked in no security officer had been disciplined. Consequently, he had been disciplined because of the protected acts not because of the events of 4 January 2018.

65. There was some confusion concerning the incident in December 2017 (which did not involve the claimant) however we make the following findings in relation to it:

    65.1. The incident involved security guards locking a member of staff and a student in the college car park (the email sent on the day of the incident at page 154 makes this clear).

    65.2. The security guards concerned were disciplined. We make this finding because we accept the evidence of Mr Purchase in this respect: he recalled that various locking-in incidents had caused significant complaints from the client (see for example the email at page 154 from Mo Bokth to Mr Purchase) and had resulted in guards being retrained and also disciplinary proceedings. We prefer it to that of the claimant in light of our findings above about their respective reliability as witnesses.

66. Taking the evidence in the round, whilst it is clear that the incidents involving the claimant in early January 2018 and that of December 2017 were different, it is

unsurprising that the respondent found the claimant to be sufficiently at fault in respect of the January incident to warrant a written warning and indeed we find that a second employee was disciplined in respect of the same incident. We therefore find that the Line Manager did not "unjustifiably" commence a disciplinary process.

Detriment h: On 16 February 2018 the Claimant was moved to another college site, at Colindale, which was much less convenient for the Claimant in terms of travel to work, without discussing the matter with the Claimant. The Respondent picked upon the Claimant only for such transfer.

67. The claimant withdrew this allegation during the course of his oral evidence, conceding that Colindale was more rather than less convenient for him. It is therefore not necessary for us to make findings in relation to it.

Detriment i: The Line Manager ignored the Claimant and failed to take any action when the Claimant reported (by email dated 3 March 2018) material misconduct by a fellow security officer (Mr Lisan) who used bullying language to a mature adult female student;

68. The email concerned is at page 163 and in it the claimant raises two concerns with Mr Charlery about another security officer, Mr Lisan. The first is a minor issue concerning a change to rotas. The second concerns Mr Lisan's treatment of a female student in relation to her ID. The email does not ask Mr Charlery to do anything.

69. Mr Purchase did not know what if any action Mr Charlery had taken. However, we find that if Mr Charlery had taken action the claimant would not necessarily have known anything about this because it would have been a matter between Mr Charlery and the security guard.

70. The claimant has not provided any significant evidence in relation to why he believes Mr Charlery failed to take any action in his witness statement or grievance.

71. We find that the claimant has not proved on the balance of probabilities that Mr Charlery "failed to take any action". The reality is that he does not know what Mr Charlery did or did not do but instead has made an assumption.

Detriment j: In around March 2018 the Line Manager unnecessarily questioned the Claimant regarding the whereabouts of the keys of the college, criticising the Claimant without justification;

72. This allegation again concerns Mr Charlery (the claimant clarified this in his oral evidence). The claimant does not provide any significant information in relation to this issue in his witness statement. In the grievance, he says "I have a question for you and asked where I put the keys of the college when we lock the college… Amazing! This is exactly as somebody asks him where he put the keys of his car when he parks the car". In his oral evidence the claimant clarified that Mr Charlery would have known that the claimant took the keys home with him and that therefore Mr Charlery had only asked him the question to "wind him up".

73. Mr Purchase's evidence was that a conversation about keys would have been reasonable and unsurprising given that Mr Charlery was the claimant's line manager.

74. We find that Mr Charlery did ask the claimant where he put the keys when he had locked up the college and that this irritated the claimant. However, Mr Charlery managed several campuses and a number of security guards. We find that whereas the answer to the question was obvious to the claimant it would have been less so to Mr Charlery. We find consequently that Mr Charlery did not "unnecessarily" question the claimant. Given the paucity of evidence, we also find that Mr Charlery did not criticise him without justification, given that no significant details of the alleged criticism has been provided and in light of our findings above about the claimant's reliability as a witness.

Detriment k: In May 2018 the Line Manager artificially raised a dispute with the Claimant regarding the Claimant's working hours in April (to 6pm or 7pm). The Line Manager demanded an email from the former Facility Manager of the College in an attempt to escalate the issue and harass the Claimant;

75. The claimant does not provide any significant information in relation to this issue in his witness statement. He deals with it between paragraphs 3 and 10 of section III of his grievance (page 227). In his oral evidence the claimant explained that his complaint was that Mr Charlery had called him on a day when there had been no students at the college and had asked the claimant to ask the maintenance manager to email him to confirm that the claimant and the other security guards had attended site.

76. In summary, the claimant's evidence is that it was unnecessary for Mr Charlery to ask him to ask the maintenance manager to send an email concerning the hours he and the other security guards had worked because they recorded their hours by clocking on and off by phone. Mr Purchase confirmed that there was such a system, that it involved geolocation, and that consequently the attendance records generated by the phone system were always correct.

77. We note that the claimant's oral evidence in relation to this point was inconsistent with the allegation: in his oral evidence the claimant said that Mr Charlery was "raising a dispute between me and maintenance manager" but the allegation suggests that Mr Charlery sought to raise a dispute between himself and the claimant.

78. The claimant has not explained clearly why any such request amounted to Mr Charlery "artificially raising a dispute regarding the claimant's working hours in April (to 6pm or 7pm)" and so we do not find that it was. Equally, we find that any request by Mr Charlery that the claimant ask the "former Facility Manager" to email him was not an attempt to escalate any issue or harass the claimant, because the claimant has not explained with any clarity why it was. However, we find that the claimant was irritated by what he regarded as Mr Charlery unnecessarily checking up on him and on the other security officers on duty that day.

Detriment L: On 24 August 2018 the Line Manager unreasonably confronted the Claimant regarding working early shifts at the Colindale campus. The Line Manager

had asked the Claimant to do early shifts for one week, which involved the Claimant having to take a mini cab to travel to the site on time at 06.00am. The Claimant had agreed to work such shifts for 1 week to assist the Respondent. On 24 August 2018 the Claimant told the Line Manager that he could not continue doing early shifts because of the transportation costs and showed him a copy of the bus timetable. The Line Manager responded aggressively by pushing the Claimant's bus timetable with his thumb and demanding that the Claimant work the shift starting at 6.00am. The Respondent did not reimburse the Claimant his extra travel expenses;

79. The claimant does not provide any significant information in relation to this issue in his witness statement or grievance. In his oral evidence he explained that (1) he lived a 10-15 minute walk from the Colindale campus but did not feel that it was safe to walk there in time for a 5.55am start; (2) if he travelled by bus, he would need to take two buses and the earliest bus combination would not get him there until around 6.15am; (3) he objected to having to get a mini-cab because this cost £5 per day; (4) he thought a better way for the respondent to deal with the situation was for Mr Akwasi, his fellow security guard to open the campus alone at 5.55am following which he would join him around 20 minutes later.

80. The evidence of Mr Purchase was that the respondent required two security guards to open up the campus for safety reasons. We note that the claimant's contract of employment states ("Rate of Pay", page 146): "It is the responsibility of all employees to get to his/her designated place of work. Should you require transportation to and from work by the Company, you will be charged accordingly".

81. We find that the respondent was entitled to require the claimant to be at the Colindale campus at 5.55am to open up with Mr Akwasi and to pay for his own transport. We find that the respondent's own practices and procedures also meant that in principle two security officers rather than one would open up.

82. We therefore find that there was a disagreement between the claimant and Mr Charlery about this on 24 August 2018. We find that the context for such a disagreement was the respondent requiring the claimant to work as a supervisor for a short period (two weeks) and to begin work at 6am during that period. We find that Mr Charlery did not "unreasonably" confront the claimant. Rather he was requiring the claimant to attend at a time when he was entitled to require him to attend and the claimant did not like this. We find that Mr Charlery is likely to have been irritated or even exasperated by the claimant's position. However, in light of our findings about the claimant's reliability as a witness, we find that Mr Charlery did not behave aggressively. In making this finding we take account of the fact that throughout his evidence the claimant showed very little ability to see events from the perspective of others.

Detriment m: In October 2018 the Line Manager unreasonably and aggressively questioned the Claimant regarding another ex-staff member's (Manuel's) uniform. The Line Manager picked upon the Claimant even though the Claimant had no connection with the uniform;

83. The claimant does not provide any significant information in relation to this issue in his witness statement. He deals with it briefly in the grievance between 16 and 22

in Section III (pages 227-228). In his oral evidence he explained he thought that it was unnecessary for Mr Charlery to speak to him by telephone about the return of Manuel's uniform: the query could have been dealt with by any of the guards on site and yet Mr Charlery had required another guard to contact the claimant by mobile phone so that the claimant could deal with the query.

84. We find that Mr Charlery wished to speak to the claimant about the return of Manuel's uniform because he knew that the claimant and Manuel were good friends ("best" friends according to the claimant) and that therefore the claimant was more likely to know about the issue than other guards. We find that there was nothing inappropriate or unpleasant about the enquiry made by Mr Charlery.

Detriment n: During the first 3 weeks of October 2018 the Claimant was intimidated, harassed and bullied (by being shouting at and unnecessarily questioned and criticised about his appearance (i.e. his uniform) and working practices) by a newly appointed Site Supervisor, Mr Julien Mbeleck (whom the Line Manager had appointed). On 22/10/2018 the Claimant reported to the Line Manager (and copied to the Respondent) the deliberate abuse and misconduct of Mr Mbeleck. The Line Manager and the Respondent ignored the Claimant's complaints. On 23 October 2018 the Line Manager visited the site and immediately called the Claimant to a meeting but refused to deal with the issue of Mr Mbeleck's abuse and misconduct. Instead, the Line Manager shouted at the Claimant and sought to intimidate him. Thereafter the Line Manager failed to address any of the legitimate issues raised by the Claimant regarding the behaviour of Mr Mbeleck;

85. The claimant does not deal with this issue in any detail in his witness statement. He touches upon it in Section I (page 222) of his grievance. The thrust of his oral evidence was that Mr Charlery had sent Mr Mbeleck to "harass and bully me" because of the protected acts and that he was offended that Mr Mbeleck had asked him to clean his shoes on the first day when Mr Mbeleck had attended the Colindale campus.

86. The claimant complained about Mr Mbeleck in his email of 22 October 2018 to Mr Charlery. The only significant complaint in this email in relation to how Mr Mbeleck has treated *the claimant* is at the bottom of the first page in which he says he was surprised that Mr Mbeleck implied that he was dressed inappropriately because his jacket and trousers did not match. Otherwise his complaint is about deficiencies in the way that Mr Mbeleck performed various aspects of his role.

87. We consequently have very limited evidence in relation to the first part of this allegation concerning the first three weeks of Mr Mbeleck's performance of the site supervisor role. We accept that Mr Mbeleck suggested that the claimant should clean his shoes and that he raised an issue about the claimant's jacket and trousers not matching. However, we find that in all the circumstances this did not amount to intimidation, harassment or bullying.

88. So far as the response of Mr Charlery to the incident is concerned, he did not ignore the claimant's complaints because he arranged a meeting with him on 23 October 2018. Further, we find that Mr Charlery did not shout at the claimant or seek to intimidate him at the meeting on 23 October 2018. We so find because the

claimant's allegation in this respect as set out above does not obviously reflect what he wrote in his grievance in section A paragraphs 1 to 9. Indeed in that section he describes himself as having become angry and as having left the meeting. Although he talks about a "deep heated confrontation", he does not say either that Mr Charlery shouted at him or that he intimidated him and, indeed, says that after leaving the meeting in anger he, the claimant, returned to it.

89. Finally, we find that the claimant has failed to prove that Mr Charlery "failed to address legitimate issues raised" with Mr Mbeleck. The claimant simply does not know what Mr Charlery did or did not say to Mr Mbeleck.

90. Overall, we find that the reality is that Mr Charlery engaged with the concerns raised by the claimant in his letter of 22 October 2018 but that the claimant did not agree with his response to them.

Detriment o: On 1st November 2018 the Respondent's Site Supervisor (Mr Mbeleck) artificially created a disciplinary issue against the claimant in respect of an innocent incident which had occurred the previous day when the Claimant was checking a ladies' toilet at the college. The Claimant had (as was the correct practice) made a loud noise outside the toilet to ensure that no-one was inside before going inside to check that the toilets were empty before the premises were locked up. There was no response from inside, but upon opening the door to check that the toilets were empty, the Claimant found a lady who worked in the Café inside. The lady (with whom the Claimant had had an altercation previously in the café) went downstairs and told the college Caretakers and other staff that the Claimant had "nearly given her a heart attack". The Claimant apologised to her. Yet on 1st November 2018 the Site Supervisor called the Claimant for a meeting and alleged that the lady had made a complaint and allegation against the Claimant. The Claimant believes that the Site Supervisor had encouraged the lady to complain in an effort to create trouble for the Claimant;

91. Following the claimant having given oral evidence, it is clear that his complaint is that (1) Mr Mbeleck required the claimant to check whether the ladies' toilets were occupied at the end of the day; (2) having done so, he requested a female canteen employee to go into the ladies' toilets around the time that they would be checked, to say nothing when the claimant called out to see if the toilets were occupied, and to then complain when he entered the toilets and found her there; (3) the purpose of Mr Mbeleck in doing these things was to get the claimant into trouble.

92. We find that the claimant's hypothesis is far-fetched and unsupported by any significant evidence. Further, the claimant's own case is that following this incident he met with Mr Mbeleck on 1 November 2018 and "[Mr Mbeleck] confirmed to me that the Lady of the Café … has no case against me" (the grievance at page 221). If Mr Mbeleck had "artificially created a disciplinary issue" and then "encouraged the lady to complain" it is most unlikely that he would have said that there was "no case" against the claimant in respect of the incident when he met him on 1 November 2018. We therefore conclude that Mr Mbeleck did not conduct himself in relation to this incident as the claimant contends.

93. We have referred above in our credibility findings about the tendency of the claimant to understand events by reference to conspiracy theories. This is a good example of that.

Detriment p: On 5th November 2018 the Site Supervisor artificially created an allegation against the Claimant, suggesting that a former student who was visiting the college had stated that the Claimant was behaving strangely towards him. In fact that was a lie by the Site Supervisor. Another student had heard the conversation between the ex-student and the Site Supervisor, and in fact the ex- student had said that the Claimant was a good person;

94. The claimant does not deal with this issue in his witness statement in any significant way but mentions it briefly in the grievance at its paragraphs 21, 1, 2 and 3 (page 229).

95. The claimant's grievance does not support his contention that Mr Mbeleck "artificially created an allegation against him". Rather he says "the supervisor told that, the student said I behave little very strange and I better watch out". These words suggest that Mr Mbeleck was simply suggesting to the claimant that he should be careful in his dealings with the student concerned. The claimant does not suggest that Mr Mbeleck sought to progress matters in any way, as one would have expected him to do if he was making an "allegation".

96. The claimant says that another unnamed person contradicted Mr Mbeleck's account of what the former student had said. Given our findings above about the reliability of the claimant as a witness, we attach little weight to this evidence because it is the claimant's account of what an unnamed third person told him about a conversation that the third person had overheard between two other people.

97. We therefore find on the balance of probabilities that Mr Mbeleck did not artificially create an allegation against the claimant on this occasion.

Detriment q: On 6th November 2018 the Site Supervisor aggressively questioned the Claimant (without justification) regarding the claimant changing his work security password;

98. Having heard evidence from the claimant and Mr Purchase, we find that the claimant had prior to November 2018 used his log-in details on the computer used by security officers and then had remained logged-in. That meant that Mr Mbeleck could access the systems used by the security officers. We find in accordance with the claimant's evidence that it was his account that was generally used in this way because the other security guards "don't like to use the computer".

99. We find in accordance with Mr Purchase's evidence that whilst officers would not have access to one another's accounts and passwords, supervisors tended to access all security officers' accounts so that they could if necessary monitor/check what they had done when logged in.

100. We find in accordance with the claimant's grievance (paragraph 5) page 229) that the claimant "changed my password in the system so the Supervisor could not use the computers".

101. We find that Mr Mbeleck was angry about this, unsurprisingly so in light of the respondent's practices as set out above, and accept the claimant's evidence that he jumped out of his chair and said that he would contact Mr Charlery. We find that in doing so he acted aggressively. He did not, however, act entirely without justification when objecting to what the claimant had done. In making this finding we are not, of course, approving any practice which led to passwords being shared, and indeed such a practice strikes us as fundamentally unsatisfactory.

Detriment r: On 14th November 2018 the Line Manager visited the site and refused to discuss with the Claimant the ongoing harassment by the Site Supervisor;

102. The claimant did not include any significant evidence about this allegation in his witness statement or in the grievance. For example, he mentions 14 November 2018 on pages 5 (paragraph m) and 10 (paragraph e) but does not refer to a refusal to discuss harassment. The claimant did not provide any further significant detail of this allegation in his oral evidence either. He did, however, mention it in the "Detailed Claimant's agenda" prepared in February 2020. Here, he did not suggest that Mr Charlery had refused to discuss harassment by Mr Mbeleck but rather says that when Mr Charlery asked him about his grievance he said "I am not in a position to discuss with you about my grievance…" (paragraph 2.3 on page 262).

103. In light of our findings above in relation to alleged detriment n, and the findings in the previous paragraph, we find that the claimant has failed to prove that Mr Charlery "refused to discuss with the Claimant the ongoing harassment by the Site Supervisor" on 14 November 2018.

Detriment s: In December 2018 the Respondent (acting upon the instigation of the Line Manager and the Site Supervisor) summarily dismissed the Claimant, without legitimate cause and without following any fair or appropriate disciplinary process. Although the decision to dismiss the Claimant (and to refuse to give the Claimant any fair opportunity to contest the allegation made against him) was purportedly taken by the Respondent's director, the Claimant believes and understands that the director acted at the instigation of the Line Manager. The Claimant contends that this dismissal was the culmination of the Line Manager's victimisation of the Claimant arising from the Protected Acts. Specifically, on 7th December 2018 the Line Manager purported to suspend the Claimant from work from Monday 10/12/2018, allegedly on the basis of an allegation of sexual harassment by the lady who worked in the café. The ladies who worked in the café were in fact friends of the Security Officer (Mr Lisan) referred to at i. above, and had fallen out with the Claimant previously. The Claimant believes that the purported sexual harassment complainant was encouraged to make a false allegation against the Claimant by the Line Manager and/or the Site Supervisor. The Respondent (acting by its director) refused the Claimant's reasonable request for an opportunity to take legal advice from the Citizen Advice Bureau, and dismissed the Claimant at a "hearing" without the Claimant present.

104. In summary, in this allegation the claimant contends that Mr Charlery and Mr Mbeleck conspired with various employees of the College (not the respondent) with the result that one of those employees made false allegations against the claimant and that subsequently Mr Purchase dismissed the claimant following an unfair disciplinary process. The claimant's position in relation to whether Mr Purchase was an active participant in this conspiracy has evolved over time. The allegation as set out above suggests that the claimant saw Mr Purchase as having been deceived by the conspiracy of Mr Charlery and Mr Mbeleck but in his oral evidence his position, ultimately, was that Mr Purchase was a part of the conspiracy.

105. We find that there was no "conspiracy". Rather we find that the respondent dismissed the claimant following a genuine complaint by the College and following the claimant refusing to attend an investigatory meeting or a disciplinary hearing. The disciplinary process was in summary as follows:

105.1. The College contacted the respondent on 7 December 2018 saying that it had received an allegation of harassment against the claimant (page 203). This was sent to Mr Charlery who passed it on to Ms Harper-Booth without comment (page 203). It is clear, therefore, that the original cause of the investigation into the claimant was contact from the College. The claimant was suspended from work on the same day (page 205).

105.2. On 10 December 2018 the College required the claimant to be removed from all duties at its premises (page 206).

105.3. On 10 December 2018 Mr Purchase sought details of the allegations (page 208). On the same date three "statements" concerning incidents involving the claimant and a member of canteen staff were provided by the College (pages 210-213). The respondent began to make contact with the members of canteen staff involved to interview them but Mr Gould of the College contacted the respondent to say that this was not permissible.

105.4. The respondent invited the claimant to attend an investigatory meeting on 11 December on that same day. The claimant declined because he wished to first attend an appointment with the CAB on 20 December 2018.

105.5. The respondent refused to postpone the investigatory meeting and on 14 December 2018 invited him to a disciplinary hearing on 18th December 2018 (page 232). The letter of 18 December 2018 set out the allegations against him.

105.6. The claimant did not attend the disciplinary hearing on 18 December 2018 but it went ahead in his absence. The allegations were upheld and the claimant was dismissed by a letter dated the same date (page 241) on the basis that he had committed gross misconduct.

105.7. The claimant appealed his dismissal on 20 December 2018 after receiving advice from the CAB (page 243) and an appeal was scheduled for 4 January 2019 (page 246). However, on 2 January 2019 (page 248) the claimant purported to resign and the appeal did not go ahead.

106. We find that the respondent's approach *might* have been criticised in the context of an unfair dismissal claim: the decision not to wait just a few days until after the claimant had met with Acas was unsympathetic and queries might have arisen over the extent of the respondent's efforts to obtain evidence from the College once it had been told that it could not speak to the College's employees directly.

107. However, this is not an unfair dismissal claim and the overwhelming weight of the evidence points to the respondent, ultimately in the form of its managing director Mr Purchase, responding to what it took to be a genuine complaint by the College about the claimant in circumstances where the College was refusing to have him back on site.

108. By contrast, there is very little evidence indeed to support the claimant's conspiracy theory. For example, he contends that the canteen staff were happy to participate in the conspiracy because the claimant had made a complaint 8 months before in March 2018 about their "favourite" security officer but, in the absence of further evidence, we find this to be improbable. Further, if there were a conspiracy, it seems strange that Mr Mbeleck would not have sought to pursue the first of the allegations which the College referred to the respondent when this had first arisen (see our findings in relation to allegation o above).

109. We should make further brief findings in relation to the grievance. In summary, the claimant intimated that he would bring a grievance by his brief letter of 7 September 2018 (page 186). However, despite prompting by the respondent, he did not finally send the grievance to the respondent until 13 December 2018, after the disciplinary process against him had begun. He was invited to attend a grievance meeting on 18 December 2018 at 2pm (i.e. before the disciplinary hearing). He sought a postponement so that he could first meet with the CAB on 20 December (page 231) but that was refused. The grievance was then decided in his absence and rejected by a letter dated 18 December 2018 (page 240).

110. We find that the respondent acted impatiently by refusing to permit the claimant to attend his CAB appointment before hearing his grievance. However, this impatience must be seen in context: the claimant had taken more than three months to present his grievance following his email of 7 September 2018 and had not done so at all until after disciplinary proceedings against him had begun. Further, an employee does not have a legal right to obtain legal advice in advance of a grievance hearing and the respondent correctly offered him the right to be accompanied at it.

Conclusions

<u>The claimed protected acts</u>

111. Did the claimant do protected acts as follows:

The first protected act: Reporting to the Respondent (on or about 6th/7th September 2017) that the Respondent's Site Manager at the college where the Claimant worked

at that time ("the Site Manager") had used racist insults and conduct towards a black colleague of the Claimant (a fellow security officer).

The second alleged protected act: Similarly reporting to the Respondent (on or about 12th/13th September 2017) that the Site Manager had used racist remarks (black stereotyping) and conduct towards the Claimant.

112. In light of our findings of fact above, we find that the first alleged protected act was not a protected act as defined by section 27 of the EqA 2010 because what the claimant reported to Mr Charlery did not come within section 27(2). Clearly no proceedings were brought under the EqA and he had not given evidence or information in connections with proceedings under the EqA 2010. Equally, what he said was not doing any other thing for the purpose of or in connection with the EqA 2010 and, further, he made no allegation (whether express or not) that somebody had contravened the EqA 2010. His complaint concerned a different kind of behaviour.

113. So far as the second alleged protected act is concerned, we have found above that the claimant did not report the racist comments of the Site Manager to Mr Charlery. The second alleged protected act did not therefore take place.

114. Consequently, there was no protected act and the claimant's claim fails.

<u>The detriments</u>

115. Because there was no protected act, the claimant's claim necessarily fails and is dismissed. However, for the reasons set out at [50] to [51] above, we set out below what our conclusions would have been in relation to the various claimed detriments *if we had concluded* that the second alleged protected act was a protected act. **We emphasize that this was of course not our conclusion**.

116. We turn first to whether the claimant has established on the balance of probabilities that the various detriments alleged to have followed the second protected act <u>as set out in the particulars of victimisation</u> took place:

116.1. Detriment a – we do not reach conclusions about this in the alternative for the reasons set out at [52] above;

116.2. Detriment b – we do not reach conclusions about this in the alternative for the reasons set out at [53] above;

116.3. Detriment c – conduct of site manager – in light of our findings of fact at [54] above, we conclude that this alleged detriment as set out in the particulars of victimisation did not in fact take place;

116.4. Detriment d – we do not reach conclusions about this in the alternative for the reasons set out at [54] above;

116.5. Detriment e - in light of our findings of fact at [56] to [61] above, we conclude that this alleged detriment as set out in the particulars of victimisation did not in fact take place;

116.6. Detriment f - in light of our findings of fact at [55] to [60] and [62] above, we conclude that this alleged detriment as set out in the particulars of victimisation did not in fact take place;

116.7. Detriment g – in light of our findings of fact at [63] to [66] above, we conclude that this alleged detriment as set out in the particulars of victimisation did not in fact take place;

116.8. Detriment h – the claimant withdrew this allegation.

116.9. Detriment i - in light of our findings of fact at [68] to [71] above, we conclude that this alleged detriment as set out in the particulars of victimisation did not in fact take place;

116.10. Detriment j - in light of our findings of fact at [72] to [74] above, we conclude that this alleged detriment as set out in the particulars of victimisation did not in fact take place;

116.11. Detriment k - in light of our findings of fact at [75] to [78] above, we conclude that this alleged detriment as set out in the particulars of victimisation did not in fact take place;

116.12. Detriment l - in light of our findings of fact at [79] to [82] above, we conclude that this alleged detriment as set out in the particulars of victimisation did not in fact take place;

116.13. Detriment m - in light of our findings of fact at [83] to [84] above, we conclude that this alleged detriment as set out in the particulars of victimisation did not in fact take place;

116.14. Detriment n - in light of our findings of fact at [85] to [90] above, we conclude that this alleged detriment as set out in the particulars of victimisation did not in fact take place;

116.15. Detriment o - in light of our findings of fact at [91] to [93] above, we conclude that this alleged detriment as set out in the particulars of victimisation did not in fact take place;

116.16. Detriment p - in light of our findings of fact at [94] to [96] above, we conclude that this alleged detriment as set out in the particulars of victimisation did not in fact take place;

116.17. Detriment q - in light of our findings of fact at [98] to [101], we find that Mr Mbeleck acted aggressively and so this allegation was partially proven;

116.18. Detriment r - in light of our findings of fact at [102] to [103] above, we conclude that this alleged detriment as set out in the particulars of victimisation did not in fact take place;

116.19. Detriment s - in light of our findings of fact at [104] to [110] above, we conclude that this alleged detriment as set out in the particulars of victimisation did not in fact take place. The respondent did not dismiss the claimant "without legitimate cause". There was a clearly documented and evidenced complaint against the claimant from the respondent's most important client. Further, we conclude that there was no conspiracy as the claimant alleges. However, it is arguable that the underlying detriment is simply being dismissed, which the claimant was, and so we return to this below.

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

117. There is no need for us consider this issue in light of our conclusions that there was no protected act. However, if we had concluded that there had been a protected act, we would have gone on to conclude in light of our conclusions about the alleged detriments that claimed detriment q was a "detriment". Equally, being dismissed is a detriment.

If so, was it because the claimant did a protected act?

118. The claimant has waited nearly five years for a hearing. As we have noted above, we decided that in these circumstances it would be unsatisfactory if his claim were disposed of without him knowing what the Tribunal made of his primary factual allegations. We have therefore considered above whether the treatment claimed to amount to "detriments" after the second protected act happened as the claimant contends. This is despite the fact that, strictly speaking, there was no need for us to do so: **the claim fails in any event because we have found that there was no protected act.**

119. Given that we have concluded that, with the exception of detriment q and the possible exception of detriment s (dismissal), to which we return below, the treatment said to amount to detriments did not occur as set out in the particulars of victimisation, it would be a highly artificial exercise for us to reach further conclusions in the alternative in relation to the reason for such treatment.

120. However, there are broadly two reasons for us finding that the treatment said to amount to detriments did not occur. The first reason is that we have concluded that the event in question simply did not happen (for example, detriment e). The second reason, which applies to the majority of the claimed detriments, is that whilst we accept that in broad terms the event in question happened (for example, a discussion about keys in detriment j), its characterisation by the claimant is so far from our findings of fact in relation to it that we have concluded the treatment complained of did not in reality occur. This reflects the loaded way in which many of the alleged detriments were set out in the particulars of victimisation, using words such as "unjustifiably", "without justification", "unnecessarily", "unreasonably", "artificially", "without legitimate cause".

121. The loaded way in which such detriments were framed has meant that our factual findings in relation to them often set out at least implicitly our view on the reason for the treatment concerned. An example of this would be our findings in

relation to detriments j or k. Overall, we are satisfied that in no case was the cause of the underlying event anything that happened in September 2017.

122. So far as the claimant's dismissal is concerned, we accept that criticisms may be made as set out at [106] above of the process the respondent followed prior to dismissing the claimant. However, at the time the claimant had no right not to be unfairly dismissed and we conclude that there is really no evidence of significance which suggests that the reason for the claimant's dismissal was not the reason put forward by the respondent (which is supported by a considerable weight of evidence). That is to say, the burden of proof would not have shifted to the respondent. In fact we are able to conclude that the reason put forward by the respondent was indeed the reason that the claimant was dismissed. We conclude that the dismissal was wholly unrelated to any events that took place some 15 months earlier in September 2017.

123. Returning briefly to the part of detriment q that was proved, we conclude that the aggression on the part of Mr Mbeleck was caused by his frustration at the claimant changing his password in order to prevent Mr Mbeleck's accessing the system. We conclude it was wholly unrelated to any events that took place some 15 months earlier in September 2017, sometime before Mr Mbeleck's employment began.

Time limits

124. Given that we have concluded that there was no act of victimisation it is not necessary and indeed would be artificial to engage with an analysis of section 123 of the EqA and the question of whether in the event that we had reached different conclusions we would have concluded that there was continuing act and, if not, whether it would be just and equitable to extend time (so far as allegations in respect of the period prior to 21 September 2018 are concerned). We therefore carry out no such analysis.

Overall conclusion

125. The respondent did not victimise the claimant and his complaint of victimisation fails and is dismissed.

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Employment Judge Evans

Date reasons signed: 13 October 2023

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