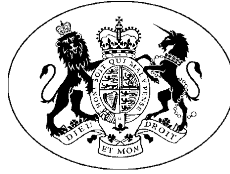

EMPLOYMENT TRIBUNALS

Claimant: **Mr MS Raj**

Respondent: **Royal Mail Property and Facilities Solutions Limited**

Heard at: **Leeds** **On:** **18, 19, 20 and 21 September 2023 and, in chambers, on 4 October 2023**

Before: **Employment Judge Bright**
Ms H Brown
Mr M Elwen

Representation
Claimant: In person
Respondent: Mr Chaudhry (solicitor)

RESERVED JUDGMENT

1. The respondent fairly dismissed the claimant. The complaint of unfair dismissal is dismissed.

2. The complaints of direct race discrimination, harassment related to race and victimization are not well-founded and are dismissed.

3. The complaint of unpaid holiday pay is dismissed on withdrawal.

4. The respondent made unauthorised deductions from the claimant's wages. The respondent shall pay to the claimant the sum of £1,771.

REASONS

Background

1. The claimant was employed by the respondent as a Business Support Coordinator on 13 January 2020, following a period working as a temporary worker through an employment agency. His employment with the respondent ended on 30 June 2022. Early conciliation started on 6 September 2022 and

ended on 17 October 2022. The claim form was presented on 8 November 2022.

2. There was a preliminary hearing on 17 February 2023, at which Employment Judge Lancaster dismissed the claimant's complaint that the failure to award him a pay rise from April 2022 was an unauthorised deduction from his wages, on grounds that it had no reasonable prospect of success. On the same grounds, Employment Judge Lancaster refused leave to amend the claimant's claim to include, within the allegations of discrimination because of race and harassment related to race, complaints that:
   2.1. the claimant was issued with a warning on 8 October 2021 for admitted persistent late attendance on over 200 occasions over a period (including whilst working from home) and/or
   2.2. his appeal against that warning was dismissed. Employment Judge Lancaster also refused leave to advance an allegation of victimization other than that set out in the list of issues below.

3. Employment Judge Lancaster issued a Deposit Order in respect of allegations of discrimination and harassment relating to direct race discrimination and/or harassment related to race.

Amendments

4. At the outset of this hearing, the claimant confirmed that he was not seeking to argue that his dismissal was an act of direct discrimination or harassment, but that he did seek to argue that it was an act of victimization, something which would require an amendment to his claim. The facts setting out the basis for that allegation were contained in the claim form and prior amendments and Mr Chaudhry confirmed that the respondent was prepared to defend that point at the hearing and had no objection to that amendment. As the amended grounds of response were already sufficiently all-encompassing to defend that point, we granted leave to amend the claim to include the dismissal itself as an alleged detriment in the victimization complaint. We did not consider that decision ran contrary to Judge Lancaster's previous decision.

5. The claimant withdrew his complaint of unpaid holiday pay at the outset of this hearing, and that complaint is dismissed.

6. At the outset of the hearing the claimant also made an application to add a complaint of breach of contract relating to his hours of work. We refused leave to amend the claim for the reasons explained at the hearing. In short, this complaint was not contained in the claim form and the claimant had left it until the start of the final hearing to raise the matter, despite having had an opportunity to provide further particulars of his complaint in writing and at the preliminary hearing with Employment Judge Lancaster at which his complaints were discussed and defined. In addition, this claim was significantly out of time, it had been reasonably practicable to present it in time and it had not been presented within a further reasonable period. Finally, we considered that the complaint had no reasonable prospect of success and there appeared to be no loss flowing from any breach in any event.

The issues

7. It was agreed that the issues for us to decide were:

8. Time limits

8.1. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 7 June 2022 may not have been brought in time.

8.2. Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? In particular:

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. Unfair dismissal

9.1. What was the reason or principal reason for dismissal? The respondent says it was 'some other substantial reason' or capability.

9.2. Was it a potentially fair reason?

9.3. Did the respondent act reasonably in all the circumstances in treating it as a sufficient reason to dismiss the claimant?

9.4. In particular, did the respondent genuinely believe in the reason for which it dismissed the claimant?

9.5. Did the respondent adequately consult the claimant?

9.6. Did the respondent carry out a reasonable investigation, including finding out the up-to-date medical position, if relevant?

9.7. Could the respondent reasonably be expected to wait longer before dismissing the claimant?

9.8. Did the respondent consider alternatives to dismissing the claimant?

9.9. Was dismissal within the range of reasonable responses?

10. Direct race discrimination

10.1. Did the respondent do the following things:

10.1.1. Place an unduly onerous workload on the claimant following a restructure in April 2021;

10.1.2. Micro-manage the claimant;

10.1.3. Set the claimant up to fail by allocating him unsuitable work, when others were more competent in that area;

10.1.4. Not award a pay increase in April 2022?

10.2. Was that less favourable treatment? The claimant says he was treated worse than white colleagues? Was there no material difference between their circumstances and the claimant's?

10.3. If so, was the less favourable treatment because of race (the claimant is Asian)?

10.4. In particular, can the claimant prove as a primary fact from which discrimination could be inferred, absent any other explanation, in the earlier treatment that he was expressly told that he could not have a pay rise because he was "a P***" (the racist comment)?

Alternatively:

11. Harassment related to race

11.1. Did the respondent do the following things:

11.1.1. Place an unduly onerous workload on the claimant following a restructure in April 2021;

11.1.2. Micro-manage the claimant;

11.1.3. Set the claimant up to fail by allocating him unsuitable work when others were more competent in that area;

11.1.4. Not award a pay increase in April 2022?

11.1.5. Use the racist comment to the claimant?

11.2. If so, was that unwanted conduct?

11.3. Did it relate to race?

11.4. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

11.5. If not, did it have that effect, taking into account the claimant's perception, the other circumstances of the case and whether it was reasonable for the conduct to have that effect?

12. Victimisation

12.1. Did the claimant do a protected act by informing Mr Eadie at the dismissal meeting on 26 May 2022 that he was alleging that he had been discriminated against because of his race, and particularly complain about the racist comment at 10.4 above?

12.2. Did the respondent:

12.2.1. Dismiss the claimant;

12.2.2. Not properly consider/dismiss the claimant's appeal against dismissal on 4 August 2022?

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

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

13. Unauthorised deductions from wages

13.1. Were the wages paid to the claimant by way of sick pay after 13 January 2022 less than the wages he should have been paid?

13.2. Was the bonus contractual or discretionary?

13.3. If contractual, had the claimant in fact met the criteria for entitlement in 2021?

13.4. If he had, was he entitled to be paid that bonus in July 2022 after he had ceased to be an employee?

13.5. How much is the claimant owed?

The evidence

14. The claimant gave evidence from a written witness statement and called no further witnesses. The respondent called the following witnesses, who all gave evidence from written witness statements:
    - 14.1. Ms Laura Milbourne, Business Support Coordinator and Team Leader, the claimant's line manager;
    - 14.2. Mr Simon Walker, Independent Case Manager, who heard the claimant's grievance;
    - 14.3. Ms Chloe Thomas, Independent Case Manager, who heard the claimant's appeal against dismissal;
    - 14.4. Ms Dawn Tate, FM Works Team Manager, the claimant's line manager;
    - 14.5. Mr Graham Eadie, National Service Centre Manager, who made the decision to dismiss the claimant.

15. The parties presented an agreed file of documents, of 432 pages. The claimant presented further pages, which were added by consent on the first day of the hearing at pages 433 to 442 and on day three of the hearing at page 443. Page numbers in these reasons refer to the page numbers in the file of documents used at the hearing.

Submissions

16. Both parties presented written submissions, supplemented with oral submissions at the end of the evidence. It is not necessary to rehearse those submissions in full here, but we make reference to the relevant points in our deliberations below.

Findings of fact

17. We made the following unanimous findings of fact. Where there was a conflict of evidence we have determined it on the balance of probabilities in accordance with the following findings.

18. The claimant commenced work with the respondent at the Leeds Mail Centre on 4 November 2019 as a temporary agency worker. On 13 January 2020 he became employed by the respondent on a permanent contract as a Business Support Co-ordinator.

19. It was not disputed that, in April 2021, following a restructure, the claimant's role was renamed Works Support Administrator and Ms Laura Milbourne became his line manager. Ms Dawn Tate, who had previously line managed the claimant, became Ms Milbourne's line manager.

20. It was not disputed that the claimant's role was an administrative one which included general administrative duties such as completing timesheets, inputting overtime, answering phone calls and ad hoc duties. The claimant alleged that, following the restructure, the respondent placed an unduly onerous workload on him. We heard evidence from the claimant that he was given a lot of new duties, although he did not clearly state in his claim form or witness statement the nature of the new duties. We accepted the evidence of Ms Milbourne (paragraphs 11 and 13 of her witness statement) that there was a slight

increase in his duties relating to cleaning administration and that all members of his team had a slight increase. We accepted Ms Milbourne's evidence (much of which was supported by the questions the claimant asked of the respondent's witnesses in cross examination) that the claimant complained to her that he did not want to be on her team because there were fewer administrators on that team. He felt that the work was not shared out fairly between the teams and wanted to be on a team with more administrators because they had more experience than him (paragraph 14 of her witness statement). We accepted the evidence of Ms Tate, paragraph 15 of her witness statement, that the South Team, to which the claimant was allocated after the restructure, was smaller because there were fewer tasks in the south region. We accepted the evidence of Ms Milbourne and Ms Tate that asking the claimant to do tasks, such as the RMTV (Royal Mail television) task frequently required lengthy conversations with him and persuasion, because he would refuse and was often reluctant to take on new tasks.

21. There was insufficient evidence for us to find that the claimant was set up to fail by allocating him unsuitable work when others were more competent in that area. We accepted the evidence of Ms Tate (paragraph 19 of her witness statement) that in September 2021 she asked the claimant to help with chasing suppliers by telephone to find out when they would deliver (the "Chaser task"). The claimant agreed and was added to a training session to take place in the week commencing 13 September 2021. However, on 17 September 2021, having completed the training, the claimant telephoned Ms Tate and told her he did not want to do the task. We accepted Ms Tate's evidence that she notified Mr Eadie because the claimant's withdrawal presented her with a problem covering the Chaser task. We accepted the evidence of Mr Eadie that the claimant was not forced to do the Chaser task, nor sanctioned for refusing to do the Chaser task.

22. On balance, there was insufficient evidence of an unduly onerous workload placed on the claimant in April 2021. Nor was there sufficient evidence for us to find that the claimant's workload was different to that of any of his colleagues in the South Team. The picture appeared rather to be one of a role in which duties and tasks changed from time to time, as might be expected in an administrative support role. There appeared to be training available and offered to the claimant when new tasks were asked of him.

23. There was also insufficient evidence for us to find that there was micromanagement of the claimant. The claimant did not clearly identify acts of micromanagement in his claim form, nor in the further information he provided or in his witness statement. In cross examination he made a number of non-specific new allegations. For example he told Ms Milbourne, "You micro-managed me and made my life hell on the team" and "you put obstacles in my way so I would fail and you could take me down the performance route". When asked why details of these allegations were not in his previous pleadings or evidence, his response was that he could not put everything in his claim form or witness statement.

24. Allowing for the fact that he was a litigant-in-person, we made an extra effort to hunt in his evidence for details of alleged micromanagement but found none. When expressly asked in cross examination, "What do you mean by 'micro-managing'?", he was unable to answer. When it was suggested that he was very vague on what micro-management meant and Mr Chaudhry told him that

the respondent did not know what he meant by micro-management, the claimant failed to volunteer any details and responded, "there might be a lot of information I missed out". Ultimately, as with his evidence regarding his unduly heavy workload, we were left guessing at what he might mean.

25. There was therefore insufficient evidence for us to find that there was any micromanagement of the claimant either by Ms Milbourne or Ms Tate. From the evidence of Ms Tate and Ms Milbourne, which we accepted, we find that the claimant was not prepared to take management decisions or direction on trust. He appeared to require clear explanations, reasons and justification for instructions given to him. We accepted that he was sometimes a difficult employee to manage, leading to disagreements, in particular with Ms Milbourne. We accepted Ms Milbourne's evidence (paragraph 25) that she tried to support him with his work.

26. During 2021 it was not disputed that the respondent commenced a disciplinary investigation into the claimant's recurrent incidents of lateness. The claimant argued for the first time at this hearing that the respondent was wrong to criticize him for lateness because his contract of employment made no reference to start or finish times, only his total weekly hours. However, we accepted the evidence of Ms Tate that his hours of work were agreed with his line manager at the start of his employment, and were 9am to 5pm. Her evidence was corroborated by the claimant's contract of employment, which recorded (page 108), "Your normal working week and hours of attendance will be determined by your line manager and notified to you". We did not accept the claimant's evidence that, had he agreed to start work at 9am the contract would have explicitly stated so.

27. The claimant complained that he was treated differently to his colleagues James and John, who also arrived at work late but were not subject to the same investigation. It was not disputed that the respondent's business standards and conduct policy identified lateness as behaviour which was unacceptable (page 89, 92). However, we accepted Ms Tate's evidence that the respondent had an informal system of 'acceptable' lateness, whereby certain reasons for lateness were permitted, for example, lateness caused by traffic or train delays. In these cases, if there were repeated issues, the line manager had an informal conversation with the employee and asked them to leave home a little earlier to allow for such contingencies. This is what Ms Tate did with the claimant and his colleagues James and John in relation to their lateness during 2020, prior to the Covid pandemic. We accepted Ms Tate's evidence that, following informal conversations of this nature, in most cases, lateness would improve and formal action was unnecessary. In the case of James and John, once the Covid pandemic required home working, there were no more recognized instances of lateness.

28. We accepted the evidence of Ms Tate and Ms Milbourne that, in the claimant's case however, it was brought to Ms Milbourne's attention during 2021 that the claimant was consistently late logging-on when he was working from home and was logging-off during the day. Ms Milbourne therefore began monitoring the claimant's attendance and became aware of a pattern of lateness and absence during the day when working from home. We accepted the respondent's evidence that the claimant blamed internet issues and various fixes were suggested and tried. Ultimately, however, on 8 October 2021, the claimant was

issued with a two year serious warning for his late attendance on over 200 occasions, including while working remotely from home.

29. When the claimant continued to be late logging on, Ms Milbourne gave him a deadline to sort out his internet and told him if it was not sorted he would have to work from the office. When the claimant continued to exhibit lateness and intermittent attendance during the day while remote working, Ms Milbourne sent him a letter requesting that he return to working in the office five days per week from 29 December 2021.

30. On 29 December 2021, the day he was expected to return to the office, the claimant commenced sickness absence, citing 'workplace stress'. When it was put to him at the hearing that he went off sick because he was asked to return to the office, he denied any connection, but did not offer any other explanation for the timing. We accepted his evidence that he was stressed and under considerable pressure in his personal life. However, he accepted that he received Ms Milbourne's letter asking him to return to the office before he went off sick on 29 December 2021. When it was put to him that he had a problem coming into the office 5 days per week, he explained that he objected to being treated differently to his colleagues, who were only expected to return to the office two days per week. He explained that he refused to come into the office five days per week because it was "one rule for them and a different rule for him". We accepted the respondent's evidence that the claimant was treated differently to other employees and asked to return to work in the office five days per week because of his ongoing problem with lateness which had persisted when working from home, even after his serious two-year warning. In our judgment, it was the request to return to the office which caused the claimant to go off sick on 29 December 2021.

31. On 7 January 2022 Ms Milbourne invited the claimant to a management meeting on 11 January 2022. We find that the respondent was following its attendance procedure (page 98 – 102) and, subsequently, when the claimant had been absent for more than 14 days, its long-term absence procedure (page 103 – 105). The latter procedure set out that the employer and employee have a responsibility to maintain contact, to ensure that the employee is provided with the support and help necessary whilst off sick: "this may be face to face through visiting the employee at home, with prior notice and agreement, in writing or by telephone as and where appropriate" (page 104). The procedure stated that where an absence has lasted for more than 14 days the employee and manager should meet to discuss the cause of absence, identify the likely length of the absence and if/when a return to work may be possible.

32. The claimant did not attend the management meeting on 11 January 2022. He communicated with the respondent to say that he would not come to the meeting because he was off sick. On 13 January 2022 the claimant was invited to a further meeting (page 137) which was held on 24 January 2022. On 28 January 2022 he was invited to a further meeting, which he did not attend on 1 February 2022.

33. At a weekly catch up meeting with Ms Milbourne on 1 February 2022 the conversation became heated and Ms Milbourne became upset when she perceived that the claimant was aggressive towards her. The claimant denied being aggressive and accused Ms Milbourne of aggression. On the evidence before us it appeared that they had a difficult relationship and, having observed

the claimant giving evidence, we could see how his tendency under pressure to speak fast, interrupt, raise his voice and bang his finger on the desk for emphasis may have appeared aggressive to Ms Milbourne. From this point in time, Ms Tate took over management of the claimant's sickness absence.

34. The claimant refused to attend an occupational health (OH) appointment on 7 February 2022 but attended an OH appointment on 1 March 2022. A report was prepared by the OH practitioner (page 150 – 152). That report stated:

    Current health issues: As you are aware Mr Raj is absent from work. He tells me that he has gone off sick due to what ***he perceives*** *as work related stress…*
    Current capacity for work: Based on the information provided to me today, in my opinion Mr Raj's return to work is based on his GP's assessment.
    Current outlook: Mr Raj's symptoms are on going and he remains under the care of his GP who he has regular reviews with. In my opinion the issues in this case are ***not primarily medical*** *although Mr Raj is being treated for a condition that* ***he feels*** *has been caused by the workplace issues that he has been exposed to.* ***Resolution of these issues is best achieved by management intervention.*** *Therefore, in my opinion* ***there needs to be a full frank dialogue between Mr Raj and his employer about the issues in the workplace.*** *This may need to escalate to formal mediations.* ***I think that without this management intervention absence sanctioned by his GP is likely to continue in the longer term****. In my professional opinion* ***an early resolution to the workplace issue will be fundamental in his recovery, return and continued attendance at work****. Management may wish to consider changing Mr Raj to a different team at work.* [Our emphasis in bold].

35. We noted that the phrases we have highlighted in bold indicated an assessment by the OH practitioner that the cause of the claimant's absence was not primarily medical, but rather the claimant's perception that he was suffering work related stress, caused by issues in the workplace. The OH practitioner put emphasis on the need for the respondent to engage quickly and fully with the claimant to establish the nature of the workplace issues, to resolve them or face continued long-term absence sanctioned by the claimant's GP. We noted also that there was nothing in the OH report which suggested that the claimant was not fit to attend a meeting to discuss his barriers to returning to work. On the contrary, the OH report suggested that the claimant's recovery would be dependent on an early resolution of the workplace issues. That, by implication, would be impossible without the 'full and frank dialogue' with the claimant which the OH report recommended. Nor have we seen any evidence from the claimant's GP or other medical evidence to suggest that the claimant was not fit to attend a meeting or engage with the respondent about the cause of his absence or his return to work. The OH report therefore supported the evidence of Ms Milbourne, Ms Tate and Mr Eadie, which we accepted, that they believed the appropriate course of action was to try to engage with the claimant as soon as possible to find out what was making him unwell and preventing him being able to return to work.

36. On 10 March 2022 the respondent received the OH report, and Ms Tate emailed the claimant the following day, asking to talk about the report's recommendations on 14 March 2022. The claimant initially agreed to talk to Ms Tate (page 153). However, on 14 March 2022 the claimant told Ms Tate he

did not want to talk about any work-related issues and told her he would be raising a formal complaint.

37. On 16 March 2022 the claimant refused to attend a meeting regarding his behaviour towards Ms Milbourne and confirmed that he would not attend a rescheduled meeting. On 17 March 2022 Ms Tate gave the claimant a deadline of 24 March 2022 to discuss the OH report with her. On 23 March 2022 the claimant wrote (page 154) to refuse to attend a rescheduled meeting on 25 March on the grounds that he was not well enough. Following further correspondence with the claimant, in which he again indicated he was intending to lodge a grievance, Ms Tate wrote to the claimant on 29 March 2022 inviting him to a meeting on 4 April 2023 (page 155 – 156), saying:

    I am sorry that you are currently unwell and unable to attend work. I understand your condition may make it difficult to discuss your absence with us however I am keen to support you. The most recent OH report states that the issues of your case are primarily not medical, and resolution of these issues is best achieved by management intervention. We would also like to discuss your current absence and the steps you are talking to improve your condition as well as what medical intervention you are seeking to help improve your condition. At this point the most recent OH report states you are well enough and should engage with management to resolve your issues and facilitate a return to work so there is no requirement for a further OH referral to assess your ability to attend formal management meetings. We will also be looking to undertake a further workplace risk assessment with you to identify and again reasonably resolve any perceived work issues…. The meeting will also be an opportunity to discuss any other support options we could offer to help facilitate a return to work given the reasons you have stated are keeping you from resuming to work being relating to perceived issues with management and alleged bullying and harassment by management. You have been prompted by management on numerous occasions most recently Thursday 17th March to formalize your concerns so they can be investigated under the most suitable process. At this point a formal complaint has not been forthcoming and we cannot wait indefinitely for this while you refuse to return to your role under your current manager.

    To be clear your current absence is linked to work related issues and perceived bullying however you so far have refused to enter meaningful dialogue with management about your work related issues or raise a formal complaint regarding the alleged bullying and harassment. Until you engage with management your workplace issues cannot be explored or resolve and you will be unable to return to work your current stance is drawing out your absence and I am now at a point where I can no longer satisfy myself that your absence is necessary, a criteria that must be met to remain entitled to the Royal Mail element of your sick pay. From our most recent discussion about your refusal to work under your line manager or engage with management to discuss the workplace issues I believe that you do not intend to return to work in the foreseeable future. Continued refusal to engage with management to discuss your workplace issues will be treated as non-cooperation and may result in stoppage of pay and/or further more serious sanctions.

38. The claimant notified Ms Tate on 1 April 2022 that he would not be attending because he was not feeling well enough and his trade union representative was on leave. Ms Tate sent him a further invitation to a meeting on 12 April 2022 (page 159 – 161), which the claimant failed to attend. On 21 April 2022 the claimant told Ms Tate that he would not take part in any meeting with her, so she passed his case on to Mr Eadie.

39. The claimant's claim includes a complaint that he was not awarded a payrise in April 2022. We accepted Ms Tate's evidence at paragraphs 64 to 73 of her witness statement, that the claimant was not awarded a payrise in April 2022 because the annual pay increase was performance-related and the claimant had not achieved the performance markers required. There were three other employees in the administration team who also did not meet their objectives and also did not receive pay rises that year. The claimant did not offer an alternative explanation for the failure to pay him a pay rise, other than to suggest that the respondent's witnesses were confusing pay rises with bonuses.

40. On 21 April 2022 Mr Eadie wrote to the Claimant inviting him to attend a meeting on 5 May 2022. The claimant failed to attend (page 221), so on 11 May 2022, Mr Eadie invited the claimant to a formal meeting on 19 May 2022 (page 178 – 179):

> *Further to your failure to attend our meeting on 5 May 2022 I continue to be dissatisfied with the prospects for your absence from work due to your continued refusal to engage with management about the non-medical work related issues keeping you from work.*
> *I am now giving consideration to terminating your employment on the grounds that:*
>
> 1. *The business has no reasonable prospect of knowing when you will be fit to return to work, and in what capacity.*
> 2. *The business is not satisfied that you intend to return to your employment with Royal mail Group in the foreseeable future.*
>
> *…should you fail to provide a response to this letter within 3 days of receipt we will proceed to make a decision based on the facts available.*

41. The claimant, in his complaints of race discrimination and harassment related to race before this Tribunal, alleged that, on 18 May 2022, Ms Tate told him he could not have pay rise "because he was a P***" (the racist comment). However, having carefully considered all the evidence available to us, on the balance of probability, we find that the racist comment did not occur. As Employment Judge Lancaster noted in his deposit order dated 20 February 2023, the telephone conversation in which it was later alleged that the racist comment was made was originally detailed in paragraph 16 of the claimant's bullying and harassment complaint, which was also attached to his claim form in this case. No reference whatsoever was made in that document, or in the claim form itself to the use of the racist comment. The claimant noted in the bullying and harassment complaint, at paragraph 16, the precise time and date of the telephone call; 14.51 on 24 June 2022. That was plausible because it was highly likely that the claimant would have been seeking to clarify the amounts which would be due to him on termination on 30 June 2022, during his notice period. His account of the conversation in his bullying and harassment complaint was detailed:

Dawn given me call on 24th June at 14.32. I missed her call then called Dawn Back at 14.51 on the same day and she mentioned to myself have you spoken HR payroll team and I said yes regarding my Pay rise in April she goes you're not entitled to it because you have not hit yearly Goals What was set for myself by Laura and I said I have been hitting my targets and Pay rise does not have anything to do with Yearly Goals as I was try to explain to her How the process works and answer her Question she did not want to listen and said bye put the phone down on me which was very Rude of Dawn if you don't want to listen to myside of the story why call me in the first place and I did try given call back she did not Answer.

42. It was only in a document dated 16 February 2023, in the course of these Tribunal proceedings that the claimant for the first time recorded a different version of his conversation with Ms Tate, including the allegation that she made the racist comment. Moreover, he did not mention the racist comment in his meeting with Mr Eadie on 26 May 2022 (see our comments on the accuracy of the meeting minutes below) nor at his appeal with Ms Thomas on 4 August 2022 nor during his grievance meeting with Mr Walker on 18 August 2022. He therefore had a number of opportunities to complain to the respondent and the Tribunal that his line manager had made such an egregious remark to him, but failed to do so. It was only when he became aware that his claim of race discrimination and/or harassment may have been presented out of time and he would need to show that there was conduct extending over a period, concluding with a more recent event, to proceed with his claim, that the new version and date of the conversation with Ms Tate was presented. We agreed with Employment Judge Lancaster that this had all the hallmarks of fabrication.

43. The claimant referred us to a document at page 430 of the hearing file, which was a copy bill from his mobile phone provider. He identified a call made at 15.10 on 18 May 2022 to a number which Ms Tate accepted was her mobile phone number. The claimant submitted that this was the last time he spoke to Ms Tate and was the telephone call in which the racist comment was made. However, we were unable to reach any conclusions from that document. In particular, we noted that a copy bill is a document produced by a mobile phone provider for billing purposes and is not therefore a full call log. For example, it does not show calls which were made but did not connect. It also does not show calls made from other numbers and does not prove that the claimant did not make the call to Ms Tate on a telephone other than her mobile phone number, for example a work number.

44. The claimant was unable to explain why he did not include reference to the alleged racist comment in his bullying and harassment complaint submitted on 20 May 2022, nor why he referred to the date as being 24 June 2022 in his later bullying and harassment complaint. When it was put to him in cross examination, he stated that he must have made a mistake about the date. The claimant's evidence was therefore inconsistent with his own prior accounts of events. In cross examination he was vague about whether or not he called Ms Tate back or had missed a call from her and his evidence on this point was unconvincing. He recalled detail when it supported his allegation but was vague and his memory apparently sketchy when he was challenged with inconsistencies. He told us that both he and his trade union representative forgot to mention the racist comment at the grievance meeting with Mr Walker on 18 August 2022.

45. We accepted the evidence of Ms Tate and Mr Eadie that the payrise letters , which would plausibly have caused the conversation between Ms Tate and the claimant to take place, were only issued on 26 May 2022, meaning that the conversation could not have taken place before that date. The claimant's initial recollection of the conversation recorded in his bullying and harassment complaint appeared to be accurate therefore in respect of the date and content of that conversation. His evidence at the hearing was not consistent with the documentary evidence. We concluded, on the balance of probabilities, that Ms Tate did not make the racist comment alleged. In our judgment, the claimant fabricated that allegation when he became aware there was a risk his race discrimination and/or harassment complaints were potentially out of time.

46. The claimant did not attend the meeting on 19 May 2022 and Mr Eadie sent a letter on 19 May 2022 to the claimant, inviting him to a meeting on 26 May 2022 (pages 182 – 183), repeating the wording of his previous letter (pages 178 – 179) and adding, "*To be clear this will be a formal meeting and I will be giving consideration to terminating your employment. No further invites will be sent so I strongly encourage you to attend".* He also offered the claimant the option of a remote meeting or meeting at a different venue.

47. The claimant wrote a 'Bullying and harassment complaint' (page 274 – 275) on 20 May 2022, setting out a series of 15 allegations, including allegations against Mr Eadie, mainly relating to the sickness absence process. The only allegation against Mr Eadie which did not relate to the sickness absence process was that Mr Eadie had stood behind him and watched him and what he was doing on the computer at work. Although the complaint was dated 20 May 2022, there was a document in the bundle showing an initial complaint call form dated 26 May 2022 setting out the claimant's complaint in the form of a phone call. From the timing and wording of the claimant's bullying and harassment complaint, we find that it was in response to Mr Eadie's invitation dated 19 May 2022 to the meeting on 26 May 2022. It was not clear exactly why the respondent did not immediately identify that the claimant had raised a complaint, but we accepted that, at the commencement of his meeting with the claimant on 26 May 2022, Mr Eadie did not know that the claimant had made a complaint about him.

48. The claimant told Mr Eadie, approximately one third of the way through the meeting on 26 May 2022, that he had raised a grievance against him. We accepted Mr Eadie's evidence that, up until that moment, he was not aware of the claimant's bullying and harassment complaint. On learning of the complaint, the minutes (page 192 and 193) show that Mr Eadie adjourned the meeting to seek advice from the respondent's Human Resources department. We accepted Mr Eadie's evidence that they advised him that the bulk of the claimant's complaint related to the sickness process and was therefore material for an appeal and that, as Mr Eadie felt he was able to deal with the claimant's meeting objectively, he was able to continue. Mr Eadie therefore reconvened the meeting and continued.

49. The claimant attended the meeting on 26 May 2022 with Mr Eadie, accompanied by his trade union representative and in the presence of a note taker for the respondent. The notes of the meeting are in the file of documents at pages 187 to 202. The claimant asked us to find that those notes are not an accurate record of the meeting in a number of regards:

49.1. The claimant said he told Mr Eadie he had been subjected to race discrimination and the use of the racist comment by Ms Tate;

49.2. The claimant said he and his trade union representative were given assurances by Mr Eadie that updated medical information would be obtained before any decision was taken to dismiss him;

49.3. The claimant said Mr Eadie gave the claimant and his trade union representative assurances that he would delay his final decision on termination of the claimant's employment.

49.4. The claimant said 50% of the discussion during the meeting was not recorded in the minutes of the meeting.

50. We accepted the evidence of Mr Eadie that the notes of the meeting at pages 187 - 202 were accurate and comprehensive for the following reasons. The minutes were 15 pages of closely-typed, size 8 or 10 font typed notes, accounting for a meeting which apparently lasted for a period of 2 hours and 16 minutes. They appeared to be detailed and verbatim. It was not disputed that they were typewritten by Mr Jack Beaumont, during the meeting. We accepted Mr Eadie's evidence that he did not give the claimant a copy of the typed minutes of the meeting immediately after the meeting because it was towards the end of the working day, it had been a tiring meeting and he wanted to allow Mr Beaumont time to ensure his notes were grammatically correct and formatted. Instead, he sent the draft minutes to the claimant (page 186) on 30 May 2022, inviting him to attach "a signed statement of the points you wish to comment on", if he disagreed with the minutes. There was insufficient evidence to support the claimant's allegation that Mr Eadie intentionally withheld the minutes in order to falsely amend them.

51. The claimant objected to the draft minutes (page 205). On 29 May 2022 Mr Eadie therefore wrote to the claimant to give him a further opportunity to make written representations about the allegedly missing content of the meeting minutes, but the claimant did not provide the missing content. Instead on 7 June 2023 the claimant stated that a further meeting was required (page 205). In cross examination, when asked why he did not provide the allegedly missing information, the claimant responded, "Why should I provide my own version of the information?" Even at this hearing the claimant was unable or unwilling to tell us precisely what was said in the meeting but missing in the minutes. We inferred, from the claimant's reluctance to provide the missing information that he was, in fact, unable to provide the missing information from the minutes, because there was no information missing. If the claimant genuinely considered that the meeting minutes did not accurately represent what was said at the meeting, we believe he would have responded to Mr Eadie's repeated invitations to provide the missing information. Instead, the claimant insisted that the only appropriate course of action in the circumstances was to have another meeting. We agreed with Mr Chaudhry that it appeared that the claimant was trying to dictate a process of his own devising, for which there was no policy or precedent.

52. There was no record in the minutes of the claimant telling Mr Eadie in the meeting on 26 May 2022 that he had been subjected to race discrimination or that Ms Tate made a racist comment. We accepted Mr Eadie's evidence at the hearing that neither the claimant nor his trade union representative mentioned either of these allegations in the meeting. We also accepted Mr Eadie's evidence that, when the claimant's trade union representative requested a fresh OH referral, Mr Eadie said he would consider it, but gave no assurances

that it would be obtained before a decision was taken. The outcome of his consideration was that it was not required. There was insufficient evidence to find that Mr Eadie gave the claimant or his trade union representative any assurance there would be a delay before he took a decision about dismissal. The minutes of the meeting record Mr Eadie repeatedly asking the claimant to explain what was causing his stress and preventing him being able to return to work and the claimant ultimately responding “we’re not at that stage; that’s for a future meeting”. There was some discussion in the meeting regarding options for a change of site, team and manager, but Mr Eadie was only prepared to consider these once the claimant had agreed to return.

53. On 30 June 2022 Mr Eadie wrote to the claimant dismissing him (pages 208 – 210). Mr Eadie wrote:

> *It has been made clear throughout your absence that you must engage with management to resolve these issues. Management have tried to engage with you on numerous occasions to discuss your return to work and any remaining perceived work-related issues, however you have failed to engage. Without your engagement, management have been unable to understand or attempt to address any of your concerns or the perceived barriers preventing your return to work. At the meeting on 26/05/22 I asked you on several occasions what was causing you stress and your response was ‘I can’t answer that because we’re not at that stage’. It is my view that we are beyond that stage as you’ve been offered multiple opportunities to explain your concerns.*
>
> *You have now been absent from work for 184 days. It has now reached a point where I have no confidence that you have any intention to cooperate with the management team or to support us to effectively manage your absence from work. This situation is unacceptable to the business and I believe that you have had ample opportunity since December to contact the business in order to discuss your work related issues you feel are contributing to your ongoing absence in a constructive manner. I also offered you the opportunity to facilitate your return to work during the meeting on 26/05/22. You requested a change of site, team and manager. I stated that I would consider this only when you had returned to work and attained the required levels of performance and productivity.*
>
> *The responses you gave to my questions on 26/05/22 provided me with enough information to make a decision regarding the matter of your attendance issues. My decision is that you will be dismissed form employment with Royal Mail due to your ongoing non-cooperation with Royal Mail sick absence procedures. Specifically, the issues are:*
>
> - *Failure to engage with management to discuss your work-related issues after sending 8 letters to your home*
> - *I believe that there is no prospect of you returning to work any time soon*
> - *I believe that there is no prospect of you resolving your work-related issues*
> - *You have refused to engage with management regarding the formal conduct investigation in your behaviour*

54. The letter went on to set out a full rationale for the decision, including Mr Eadie’s deliberations. Among those Mr Eadie concluded that the claimant, ‘rather than change his behaviour and attitude to his role, had decided to use his sick

absence as a way to avoid being challenged' and had 'made himself unmanageable'. The letter concluded:

Conclusions:

- *Loss of trust in faith in Mr Raj based on his actions*
- *Lack of belief that Mr Raj will change his behaviour*
- *Lack of belief that Mr Raj will improve his attitude towards management*
- *Lack of belief that Mr Raj will improve his attendance or time keeping*
- *Lack of belief that Mr Raj will return to work in his existing role any time soon*

55. We are required to find as a fact the reason for the claimant's dismissal. Somewhat unusually, in this case, the respondent itself appeared to be somewhat unclear in its pleadings what its own reason was for dismissing the claimant. The documentary evidence also contained a number of different explanations. The reasons set out above in Mr Eadie's letter of dismissal did not match the reasons for which the meeting with the claimant was called to discuss his absence (see paragraph 39 above). The minutes of the meeting (pages 187 to 202) recorded Mr Eadie repeatedly asking the claimant to explain what the barriers were to his return to work but the conclusions Mr Eadie set out in the dismissal letter were not mentioned or put to the claimant. However, we considered that the various allegations and formulations in the evidence were variations on the same theme: the single most significant factor in all of the correspondence and evidence was the need for the claimant to identify the barriers to his return to work, so that the respondent could find ways to move matters forward to enable the claimant to return to work. This was the key which the Occupational Health report identified would unlock the door to getting the claimant back to work. It was in order to achieve that goal that the respondent was so keen to meet with the claimant and why the claimant's failure to attend meetings had been so problematic. Until the barriers were known, the respondent was powerless to help the claimant resolve them. The claimant's failure to engage and identify those barriers led to an impasse. The reason why the claimant failed to identify the barriers was secondary. In our judgment therefore, on the evidence before us, the principal reason for dismissing the claimant in Mr Eadie's mind at the time he dismissed the claimant, was Mr Eadie's genuine belief that the sickness absence process had stalled and could be taken no further because the claimant was not engaging with it and there was therefore no realistic prospect of the claimant returning to work within a reasonable time frame. A secondary reason, but not the principal reason, for dismissing the claimant was, in our judgment, Mr Eadie's belief that the claimant's failure to engage with the sickness absence process was a deliberate act of non-cooperation, as set out in the 'conclusions' of the dismissal letter.

56. The claimant re-issued his bullying and harassment complaint on 12 July 2022 (pages 276 – 277), adding further allegations 16 to 19, including his original account of his conversation with Ms Tate on 24 June 2022. The Claimant also appealed against his dismissal (page 238 – 239), in part on the grounds that Mr Eadie had promised, but not sought further occupational health advice. He explained at this hearing that he was referring to the Long-Term Absence Procedure, which stated (page 105):

Dismissal on grounds of capability: Should an individual not return to work after an absence of nine months or more then consideration of dismissal on the grounds of capability may be necessary with individuals receiving lump sum compensation in line with IHR terms. Before reaching any decision then Occupational Health advice should be sought on prognosis and any expected return to work date.

57. Ms Thomas heard the claimant's appeal on 4 August 2022. It was not disputed that Ms Thomas was an independent appeal manager with no prior knowledge of or contact with any of the parties to the dismissal decision. The claimant did not challenge the minutes of the appeal meeting (pages 240 to 257) other than one minor correction (page 259) and did not dispute the minutes at this hearing. We accepted Ms Thomas' evidence that she re-heard the case and gave full consideration to everything that was put forward at the appeal. At page 256, Ms Thomas was recorded in the minutes asking the claimant when he thought he could return to work. The claimant responded, "*I cannot give you a date… It might be a week, it might be a month or two months' time. It would be wrong for me to put a deadline on it so I am not willing to give a date*". We accepted that Ms Thomas reached the conclusion that, even at the end of the appeal process, there was no prospect of knowing when he would be able to return to work or in what capacity (paragraph 16 of her witness statement). We accepted she genuinely reached the conclusions she set out in the outcome letter below.

58. Ms Thomas informed the claimant of her decision to uphold the decision to dismiss him by email dated 17 August 2022, enclosing a copy of her Conduct Appeal Decision Document (pages 262 to 273). Ms Thomas concluded:

Fundamentally Shafique's refusal to engage and respond had closed down the options available to us as a business to support and facilitate a return to work. By his lack of engagement in meetings with management and refusal to discuss his work-related stressors, Shafique had made his continued employment in effect untenable. I therefore do believe that the notifications as levied are met:

1. *The business has no reasonable prospect of knowing when you will be fit to return to work and in what capacity.*
2. *The business is not satisfied that you intend to return to your employment with Royal Mail Group in the forceable future.*

59. After the appeal hearing, the claimant issued a further updated bullying and harassment complaint, adding a final 20th allegation (pages 278 – 279).

60. Mr Walker held an investigation interview with the claimant on 18 August 2022 to investigate his allegations that:

    60.1. Mr Eadie had intimidated him during 2021 by watching him and his computer screen when Mr Eadie was walking around the office;

    60.2. Ms Tate spoke inappropriately to the claimant during a telephone conversation on 24 June 2022, saying to him "You have an attitude problem and a chip on your shoulder".

61. The accuracy of the minutes of Mr Walker's interview (pages 280 to 287) were confirmed by the claimant (page 288). Mr Walker produced a Bullying and Harassment case report (pages 297 to 302) setting out his conclusions,

although for the respondent's policy reasons, this was not sent to the claimant as his employment had terminated. The claimant was merely sent a letter stating that his case had been closed (page 303). Mr Walker did not uphold the claimant's complaint and concluded that the claimant's complaint had been submitted in bad faith.

62. Following the conclusion of the claimant's employment and appeal and grievance processes, the respondent accepted that it had made unauthorised deductions from the claimant's wages after 13 January 2022, in that it had paid him 13 weeks' half pay when it should have paid full pay during the period in question. However, the parties have not been able to agree about the sums involved. The respondent calculated that the deduction was for a sum of £1,771, while the claimant said the sum was £2,500. We found both parties' submissions as to the basis for their calculations unclear. Working with the figures presented by the parties and the wages breakdown at pages 307 – 311 our rough calculations were closer to the respondent's figure, however, we were at a loss as to how the precise figures were arrived at by either party. We concluded, having tried to do the calculation ourselves and in the absence of any better explanation by either party, that the difference in the figures presented by the parties was probably a result of the way the respondent's payroll department had calculated the statutory deductions for tax and national insurance on the claimant's wages.

63. The claimant also claimed that he was contractually entitled to a bonus payment in July 2022, after the termination of his employment. However, there was insufficient evidence for us to find that he had a contractual entitlement to a bonus, there being no mention of such in his contract. We preferred the respondent's evidence, which was in keeping with the other terms of the contract relating to pay (page 107) that any bonus was discretionary, that the claimant did not meet the criteria for entitlement and was not entitled to be paid the bonus after he had ceased to be an employee.

The law

Unfair dismissal

64. Section 98 of the Employment Rights Act 1996 ("ERA 1996") provides that:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

65. In **Abernethy v Mott, Hay and Anderson** [1974] IRLR 213, [1974] ICR 323 Cairns LJ said: "A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee'.

66. This famous definition has been cited and approved in many subsequent cases, including **West Midlands Co-operative Society v Tipton** [1986] AC 536, [1986] IRLR 112, where the House of Lords added that the 'reason' must

be considered in a broad, non-technical way in order to arrive at the 'real' reason. In **Beatt v Croydon Health Services NHS Trust** [2017] EWCA Civ 401, [2017] IRLR 748, Underhill LJ observed that Cairns LJ's precise wording in **Abernethy** may not be perfectly apt in every case but the essential point was that the 'reason' for a dismissal connotes the factor or factors operating on the mind of the decision-maker which causes them to take the decision or what 'motivates' them to do what they do.

67. In **Kelly v Royal Mail Group Ltd** UKEAT/0262/18 (11 June 2019, unreported), the EAT held that, in addition to possible overlap with misconduct, a capability dismissal may also overlap with some other substantial reason, a label is not conclusive.

68. Capability, conduct and 'some other substantial reason' are all potentially fair reasons for dismissal falling within section 98(2) ERA 1996.

69. In determining whether the employer acted reasonably or unreasonably in dismissing for the reason given, the burden of proof is neutral and it is for the tribunal to decide. Section 98(4) ERA 1996 states:-

> *"The determination of the question whether the dismissal was fair or unfair, having regard to the reason shown by the employer, shall depend upon whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee; and that question shall be determined in accordance with equity and the substantial merits of the case".*

70. The test of whether or not the employer acted reasonably is an objective one, that is Tribunals must determine the way in which a reasonable employer in those circumstances in that line of business would have behaved. The Tribunal must determine whether the employer's actions fell within the range of reasonable responses open to a reasonable employer in the circumstances (**Iceland Frozen Foods Limited v Jones [1983] ICR 17** (approved by the Court of Appeal in **Post Office v Foley, HSBC Bank PLC (formerly Midland Bank PLC v Madden [2000] IRLR 827**)). The Tribunal must not substitute its decision for that of the Respondent. The range of reasonable responses test (the need for the Tribunal to apply the objective standards of the reasonable employer) must be applied to all aspects of the question whether the employee was fairly and reasonably dismissed (**Sainsbury Supermarkets Limited v Hitt [2003] IRLR23**). That test should be applied in considering all questions concerning the fairness of the dismissal.

71. In determining the reasonableness of a dismissal for long-term ill health, a fair procedure generally requires an employer to:
    - 71.1. consult with the employee;
    - 71.2. conduct a thorough medical investigation to establish the nature of the illness/injury and its prognosis and act in accordance with the medical advice;
    - 71.3. consider other options, such as alternative employment.

72. Other factors affecting reasonableness can include:
    - 72.1. the nature, length and effect of the illness;

72.2. whether the illness was caused by the employer;
72.3. the employee's length of service;
72.4. the importance of the job and the effect on other employees;
72.5. the size of the employer and nature of the employment.

73. In determining the reasonableness of an employer's decision to dismiss, the Tribunal may only take account of those facts or beliefs which were known to the employer at the time of the dismissal.

Race discrimination

74. Section 39(2) of the Equality Act 2010 ("EQA") reads

An employer (A) must not discriminate against an employee of A's (B) –
…
(c) by dismissing B;
(d) by subjecting B to any other detriment.

75. Section 39(3) EQA reads

An employer (A) must not victimise an employee of A's (B) –
…
(c) by dismissing B;
(d) by subjecting B to any other detriment.

76. Section 13 EQA reads

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

77. Section 23(1) EQA reads

On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.

78. Section 40 EQA reads,

An employer (A) must not, in relation to employment by A, harass a person (B) –

(a) who is an employee of A's;
(b) who has applied to A for employment.

79. Section 26 EQA reads,

(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.

80. Section 27 EQA reads

(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 –

…

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

81. Section 136(2) EQA reads

…

(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.*

82. We have had regard to the guidance in **Igen v Wong [2005] ICR 935** on the operation of the burden of proof provisions and the conclusions of the Court of Appeal in **Madarassy v Nomura International Plc [2007] ICR 867** that "*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent committed an unlawful act of discrimination*" and that a Tribunal, in relation to the first stage of the burden of proof should consider all the relevant evidence including the reasons for any differential treatment. We have also had regard to the guidance in **Shamoon v The Chief Constable of the Royal Ulster Constabulary [2003] ICR 337** that , although Tribunals normally take the two stages of the burden of proof sequentially, "*Sometimes the less favourable issue cannot be resolved without, at the same time, deciding the reason why issue*."

Time limits

83. Section 123 EQA provides that a claim of discrimination, harassment or victimization may not be presented after the end of the period of 3 months starting with the date of the act to which the complaint relates or such other period as the Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period.

Determinations

Unfair dismissal

84. What was the reason or principal reason for the claimant's dismissal? Our task is to determine what was in Mr Eadie's mind when deciding to dismiss the claimant. We found as a fact that the principal reason for dismissing the claimant was that the sickness absence process had stalled and could be taken no further because the claimant was not engaging with it and there was therefore no realistic prospect of the claimant returning to work within a reasonable time frame. We found that there was a secondary reason for dismissing the claimant which was Mr Eadie's belief that the claimant's failure to engage with the sickness absence process was a deliberate act of non-cooperation but that was not the principal reason.

85. Was the principal reason for dismissal a potentially fair reason for dismissal in accordance with section 98(1) and (2) ERA? In the case management orders from the preliminary hearing on 17 February 2023 Employment Judge Lancaster recorded that the respondent said that the reason for dismissal was some other substantial reason ('SOSR') but that the claimant said it should more properly be treated as capability (long term absence). In its amended response, the respondent recorded the reason for dismissal as capability or, in the alternative, SOSR, in that the respondent had a reasonable belief that there was no reasonable prospect of knowing when the claimant would be fit to return to work and in what capacity, nor was it satisfied that he intended to return to his employment (paragraph 47, page 73-74). In the respondent's submissions before us at the hearing, Mr Chaudhry submitted that the question of whether it was capability or SOSR was linked and it was difficult to separate them. We noted also that the secondary reason for dismissal, not the principal reason, in Mr Eadie's mind appeared to take on the character of a conduct dismissal. However, since we found that was not the principal reason, that was not in issue.

86. On balance, weighing the evidence, we concluded this was most sensibly a dismissal for 'some other substantial reason', rather than capability. The respondent did not dismiss the claimant because he was incapable of returning to work or incapable of attending meetings. It genuinely believed that the sickness absence process had stalled and could be taken no further because the claimant was not engaging with it and there was therefore no realistic prospect of the claimant returning to work within a reasonable time frame. He had been off work for 184 days and there was no prospect of getting to the bottom of what as preventing his return. This was no frivolous or trivial. It was substantial and in our judgment the respondent has shown that this was a substantial reason of a kind such as to justify the dismissal of an employee holding the position the claimant held and was therefore a potentially fair reason under section 98(1) ERA 1996.

87. We were not unduly troubled by the confusion in the pleadings around the label given to the reason for dismissal. The allegation that the claimant was not engaging with the absence management process and that there was no realistic prospect of his return to work within a reasonable time frame, which led the respondent to dismiss the claimant, was known to the claimant at the time of his dismissal and was fully aired in these Tribunal proceedings. There

was no disadvantage to the claimant caused by the use of different labels in the pleadings or during the proceedings.

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

89. The issues agreed at the outset of the hearing were:

    89.1. Did the respondent genuinely believe in the reason for which it dismissed the claimant?
    89.2. Did the respondent adequately consult the claimant?
    89.3. Did the respondent carry out a reasonable investigation, including finding out the up-to-date medical position, if relevant?
    89.4. Could the respondent reasonably be expected to wait longer before dismissing the claimant?
    89.5. Did the respondent consider alternatives to dismissing the claimant?
    89.6. Was dismissal within the range of reasonable responses?

90. In the course of his cross examination and pleadings the claimant's allegations crystallized to the following specific counts of unreasonable actions: The allegation that he had failed to engage in the absence procedure was false; the respondent did not obtain the proper medical evidence before dismissing him; the respondent did not wait sufficient time for him to recover; Mr Eadie was biased against him; that it was inappropriate for Mr Eadie to decide the dismissal because he was the subject of the claimant's grievance; and that the dismissal was procedurally unfair because the minutes of the dismissal meeting did not accurately reflect the meeting.

91. Did the respondent genuinely believe in the reason for which it dismissed the claimant? We found as a fact that the claimant was dismissed because the respondent genuinely believed the sickness absence process had stalled and could be taken no further because the claimant was not engaging with it and there was therefore no realistic prospect of the claimant returning to work within a reasonable time frame. We found that the respondent's belief was genuine. That belief was formed by Mr Eadie following the meeting on 26 May 2022 in which the claimant failed to respond to Mr Eadie's repeated attempts to establish what was preventing the claimant returning to work. The claimant had failed to attend a series of meetings and, even when he did attend meetings, he failed to provide the information that the OH report indicated would be needed to move matters forward, despite having been warned on 29 March 2022 that this may be treated as non-cooperation. The claimant failed to give any indication of when he might be fit to return to work. We therefore concluded that Mr Eadie's belief that the sickness absence process had stalled and could be taken no further because the claimant was not engaging with it and there was no realistic prospect of the claimant returning to work within a reasonable time frame was formed on reasonable grounds following a reasonable inquiry during the meeting on 26 May 2022 and the sickness absence process up to that point.

92. Did the respondent adequately consult the claimant? We agreed with Mr Chaudhry's submissions that the claimant was repeatedly invited to discuss the causes of his sickness absence, as recommended in the OH report, culminating in the repeated attempts by Mr Eadie to prompt the claimant to provide that information in the meeting on 26 May 2022. The claimant simply

failed to provide that information, ultimately telling Mr Eadie "I can't answer that because we're not at that stage". The claimant knew, from Ms Tate's letter on 29 March 2022 that the respondent needed that information. He also knew that his failure to provide the information or failure to engage with the absence management process could result in his dismissal as this was clearly set out in the letters from Mr Eadie. In our judgment, he and his trade union representative were given a number of opportunities to explain his position to the respondent. Even though the reason for dismissal may not have been clearly identified as capability, conduct or 'some other substantial reason', in our judgment the respondent acted within the range of reasonable responses of a reasonable employer in making clear to the claimant what the problem was that it needed to resolve, what the potential outcomes might be, and gave him several opportunities to explain himself and propose solutions or alternatives. It also considered what representations he made, for example, asking for a further OH report and a further meeting. We find that the respondent's consultation with the claimant was within the range of reasonable responses.

93. Did the respondent carry out a reasonable investigation including finding out the up-to-date medical position if relevant? The claimant submitted that Mr Eadie promised in the meeting on 26 May 2022 to obtain a further OH report but failed to do so and that the respondent acted unreasonably in failing to obtain up to date medical evidence. We found as a fact, above, that Mr Eadie did not make that promise. The respondent submitted that it was entitled to rely on the OH report dated 1 March 2022 and there was no requirement to obtain an updated report, given that the source of the claimant's concerns were non-medical and were to do with his workplace. In our judgment, the wording in bold in the quote from the OH report in paragraph 34 above, suggested that no further change in the claimant's condition would be likely without the management intervention and resolution of the workplace issues which the report recommended. Since the respondent had attempted to make those interventions but been thwarted by the claimant's failure to explain what the issues were, there had been no resolution of the workplace issues. Without that resolution, the claimant's condition was unchanged. The respondent therefore concluded that obtaining a further OH report was pointless, since it would presumably merely repeat what the OH report from 1 March 2022 said. Moreover the report was only a month old and we accepted that the GP evidence did not suggest any change in the claimant's condition.
In those circumstances, we concluded that it was reasonable to reach that conclusion.

94. Could the respondent reasonably be expected to wait longer before dismissing the claimant? The claimant had been absent for 184 days. Mr Eadie had made numerous efforts to establish the issues causing the claimant's work-related stress, but was unable to do so. There was no indication if or when the claimant would provide that information to enable the respondent to resolve those issues, which the OH report indicated was the only likely way of procuring a return to work. Mr Eadie noted the 17 attempts to engage with the claimant from 7 January 2022 to 29 June 2022 (page 208) and the claimant's failure to engage in discussions to enable management to understand and address his perceived barriers to return. The respondent is a large national employer with significant resources. It could, of course, have waited longer before dismissing the claimant. But that is not the question before us, nor should we substitute our view for that of the respondent. Some employers might have waited longer. In our view, in these circumstances, where the situation had reached an

impasse and the claimant could not identify a return date nor was any progress being made in identifying the barriers to his return, we consider the respondent did not act outside the range of reasonable responses of a reasonable employer, even of such a large national employer, in dismissing the claimant when it did.

95. Did the respondent consider alternatives to dismissing the claimant? There were options for a change of site, team and manager, but Mr Eadie was only prepared to consider these once the claimant had agreed to return in principle. We had some concerns that the allegation that the claimant had a bad attitude to management and that his past behaviour made his return untenable (the secondary reason for dismissal) were not put to the claimant in the meeting on 26 May 2022, although they were taken into account in relation to whether alternative roles/transfers to other team were a viable alternative to dismissal. However, we concluded from Mr Eadie's evidence that it was the words of the OH report which were key to his decision on this point. He understood that the cause of the claimant's absence was largely not medical in nature, but was down to a perception of work-related stress due to issues at work which required the respondent to find the causes and work to resolve them. Until he could find out from the claimant what the causes were, it would be impossible to determine what course of action would be appropriate. Hence, it was not unreasonable to leave consideration of alternatives until a later stage. We find that his actions were therefore within the range of reasonable responses of a reasonable employer.

96. In our judgment the dismissal was within the range of reasonable responses of a reasonable employer in all the circumstances of the case, including the size and administrative resources of the respondent.

97. We did not find that Mr Eadie was biased against the claimant in any way and we considered that it was not inappropriate for Mr Eadie to decide the dismissal despite being the subject of the claimant's grievance, as alleged. Mr Eadie had barely had any contact with the claimant prior to the dismissal meeting, did not know of the grievance until a third the way through the meeting, took advice from HR and did not consider himself compromised by the one allegation (that he looked over the claimant's shoulder at his computer screen) levelled against him.

98. In our judgment the dismissal was procedurally fair. The minutes of the dismissal meeting were accurate and fairly reflected the meeting and the respondent followed its sickness absence process. We find that the claimant was informed he was potentially facing dismissal and knew it was in connection with his absence from work and non-engagement with the sickness absence process. He was allowed the right to be accompanied, given the opportunity to address the issues raised and the respondent's concerns in full on a number of occasions. We find that the claimant had repeated opportunities to explain to the respondent what the barriers were to his return to work and/or to obtain medical evidence to show that he was not fit to attend meetings if that was what he was saying (in fact, he was saying he wanted further meetings). He was given two opportunities to correct the minutes of the meeting on 26 May 2022, provided with the right of appeal and full documentation, and detailed decision outcomes to both the dismissal and the appeal. We find that this process was within the range of reasonable responses.

99. Even if we are wrong and Mr Eadie's actions in relation to the dismissal rendered the claimant's dismissal unfair, for instance, if his failure to step down on learning of the grievance against him were judged to be outside the range of reasonable responses or if the allegations regarding the decision to dismiss were not properly put to the claimant, we would find these were remedied on appeal. Ms Thomas heard the claimant's appeal, which was a full opportunity to address any and all complaints about his dismissal and/or the process, the claimant had no complaints about the appeal, other than its outcome, and Ms Thomas was independent and thorough.

100. In conclusion, in our judgment the claimant's dismissal was fair. The complaint of unfair dismissal is dismissed.

Direct race discrimination/harassment time limits

101. The claimant approached ACAS on 6 September 2022 for early conciliation. The Early Conciliation Certificate was dated 17 October 2022. The claim form was presented on 8 November 2022. Any complaint about something which happened before 7 June 2022 was therefore not brought in time. The claimant has not shown that there was conduct extending over a period and that the claim was made to the Tribunal within three months plus early conciliation extension of the end of that period. We found that the alleged racist comment on 18 May 2022 did not happen and, even if it did occur on 18 May 2022 as the claimant now alleges, the claim would still have been out of time. The other allegations of race discrimination and/or harassment significantly pre-dated that alleged occurrence.

102. We find that the claim was not made within a further period that we considered just and equitable. The claimant had trade union representation throughout his employment and had had previous Employment Tribunal proceedings in the past. He was aware of the time limits for race discrimination complaints and could have presented the complaint in time. We concluded that the discrimination complaints were not made within the time limit in section 123 of the Equality Act 2010.

103. However, having heard all the evidence and submissions in the claim, we also record our conclusions in the race discrimination and harassment complaints for completeness.

Direct Race Discrimination

104. We found as a fact that the respondent did not place an unduly onerous workload on the claimant following a restructure in April 2021, nor micro-manage the claimant, nor set the claimant up to fail by allocating him unsuitable work. We found that these instances of alleged treatment did not occur. However, it was agreed that the claimant did not receive a pay increase in April 2022. The respondent's evidence was that the reason was because the claimant did not achieve the performance related indicators required to achieve the payrise. We accepted the respondent's evidence that other team members also did not receive the pay rise for the same reason. There was no evidence presented regarding the race of the other team members.

105. The claimant alleged more broadly that he was treated less favourably than his white colleagues (the claimant identifies as Asian). He referred in particular to his two year serious warning for lateness and compared himself with his white colleagues James and John who did not receive such a warning but whom he says were also regularly late. This was not one of the allegations which formed part of the pleadings in his race discrimination complaint and was also a historic complaint, relating to a period prior to the claimant's sickness absence which commenced on 29 December 2021. Nevertheless, since the claimant was a litigant in person, we considered whether a historic difference in treatment of this nature might be a fact from which we could infer discrimination in respect of the more current allegation relating to the payrise. In our judgment however, the respondent's explanation for the difference in treatment of James and John was convincing, comprehensive and not because of race. The situation of James and John was not materially the same as the claimant's situation in that they did not have over 200 instances of lateness. They were not appropriate comparators for section 23(1) of the Equality Act 2010 ("EQA").

106. Applying the burden of proof provisions in section 136 EQA, we find that the claimant has not shown facts from which we could conclude that the respondent committed discrimination. The claimant did not plead a hypothetical comparator but, as he was a litigant in person , for the sake of fairness to him, as a non- legal person, we considered whether his case was in fact that, had he been white, he would have received a payrise. In other words, following **Shamoon** was the reason he did not receive a payrise because he was Asian? In this case, the alleged racist comment would have provided the 'reason why', had it happened. However, as we set out above, we concluded it was a fabrication. There were insufficient facts to find a difference in treatment: when complaining about Mr Eadie's treatment of him he complained that Mr Eadie treated everyone badly. There were certainly no facts which gave any hint from which we could infer a difference in treatment on grounds of race and, following **Madarassay,** a difference in treatment and a difference in race are not sufficient on their own: "*They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent committed an unlawful act of discrimination"*.

107. In our judgment, there was insufficient evidence for us to find any facts from which we might conclude that the reason for the failure to award the claimant a payrise was an act of discrimination. Even if the burden of proof were shifted to the respondent, we would find, on the facts that the respondent had a non-discriminatory explanation for the decision not to pay the claimant the payrise: his failure to hit the targets which the respondent and the claimant's trade union had agreed.

108. In conclusion, the claimant's complaint of direct race discrimination fails and is dismissed.

Harassment related to race

109. As set out above, we found as a fact that the respondent did not place an unduly onerous workload on the claimant following a restructure in April 2021, nor micro-manage the claimant, nor set the claimant up to fail by allocating him unsuitable work.

110. However, it was agreed that the claimant did not receive a pay increase in April 2022. It was not disputed that that was unwanted conduct, but we find that it did not relate to race. The claimant's cross examination and submissions on this point suggested that the respondent's witnesses were confusing pay rises with bonuses, on the basis that only the latter could be performance related. However, we accepted the respondent's evidence that the reason the claimant did not receive the annual payrise in 2022 was precisely because it was performance-related and the claimant had not achieved the performance markers required. Although we did not have evidence relating to the race of the other employees in the administration team, the fact that there were three other employees in the team who also did not meet their objectives and also did not receive pay rises that year persuaded us that the treatment of the claimant was not personal. We concluded, on the balance of probability that it was not related to race and did not have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

111. We found as a fact that Ms Tate did not make the racist comment alleged. The complaint of harassment fails and is dismissed.

Victimisation

112. We found as a fact that the claimant did not inform Mr Eadie at the dismissal meeting on 26 May 2022 that he had been discriminated against because of his race, nor did he complain that Ms Tate had made the racist comment. There was therefore no protected act for the purposes of section 27(2)(c)EQA. In our judgment therefore, the decisions of Mr Eadie's to dismiss the claimant and/or of Ms Thomas to uphold the dismissal could not therefore be acts of victimization under section 27(1) EQA, because of a protected act. The complaint of victimization fails and is dismissed.

Unauthorised deductions from wages

113. The respondent accepted that it had made an unauthorised deduction from the respondent's wages after 13 January 2022, when it paid the claimant 13 weeks' sick pay at half pay instead of 13 weeks at full pay.

114. However, there was a dispute about the amount of the deduction, as set out above at paragraph 62 of our findings of fact. Applying the burden of proof, which ultimately rests with the claimant, and with our calculations somewhat closer to the respondent's, we concluded that the respondent's figures were more likely to be correct. However, it seemed most likely that the difference in the figures presented by the parties was a result of the way the respondent's payroll department had calculated the statutory deductions for tax and national insurance on the claimant's wages. Any discrepancy would therefore be a matter for Her Majesty's Revenue and Customs. We concluded that the respondent shall pay to the claimant the sum of £1771.00 net, which is the sum it calculated is owed after tax and national insurance are deducted.

115. In respect of the claimant's complaint that the respondent has failed to pay him a contractual bonus in July 2022, following termination of his employment, there was insufficient evidence for us to find that there was any contractual entitlement and we accepted the respondent's evidence that the bonus was discretionary, the claimant did not meet the criteria for entitlement and there

was no entitlement post termination. The complaint of unauthorised deductions from wages relating to bonus fails and is dismissed.

Employment Judge Bright
Date: 16 November 2023