EMPLOYMENT TRIBUNALS

Claimant: Mr Balwant Chopra

Respondent: Vardens Contracts Limited

FINAL HEARING

Heard at: Birmingham

On: 23 to 26 & (deliberations with no parties) 27 October 2023

Before: Employment Judge Camp; Dr M Stewart MBE; Mrs D Hill OBE

Appearances
For the Claimant: in person
For the Respondent: Mr S Jagpal, consultant

RESERVED JUDGMENT & ORDER

1. The Claimant's complaints of direct discrimination, discriminatory harassment and victimisation fail and are dismissed.

2. The Respondent made unauthorised deductions from the Claimant's wages totalling £550 during the last 10 weeks of his employment and must pay that sum to him. All other complaints of unauthorised deductions from wages fail and are dismissed.

3. When these proceedings were begun the Respondent was in breach of its duty to the Claimant under section 1(1) of the Employment Rights Act 1996.

4. **ORDER:** The Tribunal is proposing to order the Respondent to pay the Claimant no more and no less than 2 weeks' pay (£660) under section 38 of the Employment Act 2002 because of the Respondent's breach of duty identified in paragraph 3 above. If the

Claimant or the Respondent objects to this proposal they must provide their detailed objections in writing to the Tribunal and the other side within 10 days of the date this Order is sent to the parties. They may respond to any objections made within the 10 day deadline within 7 days of receiving them. Any such objections and response received within the 10 day and 7 day deadlines will be considered by the Tribunal and a decision will be made as to what award, if any, to make under that section without a further hearing.

REASONS

Introduction & issues

5. By way of introduction to this unanimous decision, we – the full Tribunal – adopt the summary of the background to this case that is set out in the written record of the preliminary hearing that took place on 2 May 2023 before Employment Judge Faulkner:

> *4. The Respondent is a commercial vehicle cleaning specialist. The Claimant was employed from 10 August 2021 until 6 June 2022 as a Vehicle Washer/HGV Shunter, based at premises occupied by Wolverhampton City Council* [the "Council"]*. He confirmed that he describes his race as British-born Indian and says that he has no religion.*
>
> *5. After ACAS Early Conciliation from 5 August to 16 September 2022, the Claimant submitted a Claim Form on 3 October 2022, alleging race and religion or belief discrimination contrary to the Equality Act 2010* ["EQA"]*, and unauthorised deductions from wages and unfair dismissal contrary to the Employment Rights Act 1996 ("ERA"). He also made reference to "whistleblowing" and to the Respondent having failed to provide him with written particulars of his employment.*
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> *6. The details of the complaints were not wholly clear from the Claim Form. We therefore spent some time discussing them. The details as explained by the Claimant are evident from the list of issues for the Final Hearing set out below. The Respondent resists the complaints in their entirety. In relation to the dismissal it says, in summary, that the Council refused to have the Claimant back on site, the Claimant refused work elsewhere and therefore it had no option but to dismiss him.*

6. One of the things that happened at that preliminary hearing was the Claimant withdrawing his complaints of unfair dismissal and protected disclosure detriment and those complaints being dismissed upon withdrawal. That left the complaints set out in

"*the list of issues for the Final Hearing set out below*" ("List of Issues") that Employment Judge Faulkner referred to: racial and religious harassment (based on an alleged false perception that he is Muslim); direct race discrimination (based on skin colour – he self-identifies as black); direct religion and belief discrimination; victimisation; unauthorised deductions from wages; failure to provide a written statement of particulars of employment in accordance with section 1 of the Employment Rights Act 1996 ("ERA").

7. A copy of the List of Issues, extracted from the written record of the preliminary hearing, is for ease of reference attached to this Reserved Judgment and Reasons – from page 35 below – and is part of our decision. We shall refer to particular issues using the paragraph numbering Employment Judge Faulkner used (e.g. "issue [or "complaint" or "paragraph"] 9.1", "issue [or "complaint" or "paragraph"] 9.2", and so on), which is reproduced in the copy of the List of Issues that is attached.

8. Employment Judge Faulkner commented in relation to the List of Issues: "[it is] *helpfully agreed to be the issues the Tribunal will be required to decide at the Final Hearing – which it was agreed should be in relation to liability only … The Respondent accepts that all of the complaints set out* [in the List of Issues] *should be deemed to have been brought when the Claimant presented his Claim Form.*"

9. At the start of the hearing, we asked the Claimant and the Respondent's representative, Mr Jagpal, to confirm they agreed that the List of Issues was indeed accurate and complete from their points of view. Although neither side disputed its accuracy, the Claimant raised the following two matters about its completeness, which were dealt with in the following way:

   9.1 the Claimant raised a concern as to whether what he referred to as "*vicarious liability*" was adequately dealt with in the List of Issues. We explained to him that he did not need to worry about that, because (contrary to what was suggested in the List of Issues) the Respondent was not raising the so-called statutory defence under EQA section 109(4), nor was it suggesting that anything relevant was done other than in the course of employment in accordance with EQA section 109(1), and it accepted it was liable for any discrimination, harassment or victimisation by those the Claimant accuses as part of his claim;

   9.2 the Claimant said he wanted to add what he described as a "*health and safety*" claim. After some discussion, it became clear that what he meant was a claim to the effect that the Respondent failed to take reasonable care for his and others' health and safety by allegedly failing to train him adequately to operate machinery. He did not suggest that this alleged failure to train was discrimination, harassment or victimisation. We explained that he could not bring such a claim in the employment tribunals.

10. Finally in relation to the issues, as directed by Employment Judge Faulkner, this hearing has been to deal with liability only. However, in order to decide that there was unauthorised deductions from wages we had to work out the amount of those deductions and we have given judgment in that amount because it would be pointless for us not to do so. In addition, we made order 4 above, for reasons we shall explain later.

The law

11. This is a case where factual rather than legal issues predominate. In relation to the Claimant's complaints of harassment, for example, the key question is: are the Claimant's allegations true? If we had decided that they were true then those complaints would have succeeded, subject only to time limits issues that we have not addressed because we did not need to.

12. So far as concerns the relevant law, which is reflected in the wording of the List of Issues, we have not had to go very much further than considering the relevant legislation, in particular: EQA sections 13, 23, 26, 27 and 136; ERA sections 13 and 14. We have also considered, in terms of case law, paragraph 17 (part of the speech of Lord Nicholls) of the House of Lords's decision in **Nagarajan v London Regional Transport** [1999] ICR 877 and paragraphs 9, 10 and 25 of the judgment of Sedley LJ in **Anya v University of Oxford** [2007] ICR 1451. In relation to complaints of discrimination and victimisation where the question is less what happened than why did it happen, we have tried to identify the 'reason for the treatment', as recommended by appellate courts on many occasions, e.g. by the EAT in **Islington Borough Council v Ladele** [2009] ICR 387 EAT at paragraph 40(5). As to the burden of proof and EQA section 136 more generally, we have sought to apply the law as set out in paragraphs 36 to 54 of the decision of the Court of Appeal in **Ayodele v Citylink Ltd & Anor** [2017] EWCA Civ 1913.

Summary of the facts

13. In this section of the Reasons, we shall be outlining the facts without making factual findings on important matters that are in dispute. We shall be making those findings later in these Reasons, when we come to decide the issues.

14. The evidence before us consisted of witness statements and oral evidence from, on the Claimant's side, the Claimant himself and from his wife, Mrs Anita Chopra, and, on the Respondent's side, from:

    14.1 Mr Dean Varden, one of the Respondent's directors, dealing mainly with non-operational matters;

14.2 Mr Mark Varden, another of the Respondent's directors and Dean Varden's brother, dealing mainly with operational matters;

14.3 Mr Alan Smith, a subcontractor of the Respondent, undertaking mobile washing and valeting of commercial vehicles for the Respondent on a self-employed basis. He interviewed the Claimant to assess his suitability for the role he undertook for the Respondent. From time to time he worked with the Claimant;

14.4 Mr D Burrows – was and is employed by the Respondent as a Refuse Vehicle Washer and Shunter, broadly doing the same job the Claimant did. He routinely worked with the Claimant. He is accused by the Claimant of racist and Islamophobic verbal abuse.

15. The Claimant had provided the statement from Mrs Chopra only a week or so before the first day of the hearing. Mr Jagpal for the Respondent initially objected to evidence from her being permitted, but ultimately he withdrew his objections, expressing the view that the contents of her statement did not substantially advance the Claimant's case. Mrs Chopra's evidence did not in fact assist us. This was mainly for two reasons.

16. First, all or almost all of the evidence in her statement, to the extent that it was potentially relevant at all, could only have been based on what Mr Chopra told her; she had no direct personal knowledge of what happened to Mr Chopra when he was at work as she wasn't there. This was reflected in the fact that she was not asked any questions in cross-examination, nor did any of the three of us on the Tribunal panel feel the need to ask her anything. (Her evidence would have been relevant only, really, to the value of the Claimant's claim for damages for injury to feelings, something we did not have to concern ourselves with because none of the Claimant's complaints under the EQA succeeded).

17. Secondly, Mrs Chopra appeared to have a limited knowledge of English. Her witness statement, which was in English, had evidently been written for her by Mr Chopra. Despite her and Mr Chopra's protestations to the contrary, we were not satisfied that her grasp of English was sufficient for her to be able to give reliable written or oral evidence without the assistance of an interpreter. (None had been requested, nor had any issue with Mrs Chopra's fluency in English been flagged up before she came to give her evidence, on day 2 of the hearing). If her evidence had been relevant to the issues we decided, substantial and potentially significant, this would have been of considerable concern to us; but as it was not all of those things, the fairness of the hearing was not impacted.

18. Later in these Reasons, we shall explain why, in relation to particular factual disputes, we have preferred the evidence of the Respondent's witnesses to that of the Claimant.

We should, however, note here, at the outset, that our findings of fact will include findings that the Claimant has fabricated evidence. This gives us grave concerns about his honesty generally, and therefore about the reliability of all of his uncorroborated evidence. This is not, then, the usual kind of case where the Tribunal accounts for differences of recollection between two witnesses by deciding that one is mistaken and has a genuine but inaccurate memory of what occurred. The Claimant's (misplaced) sense of grievance against the Respondent does appear to be genuine, but our conclusion is that the Claimant has, in a number of respects, simply made things up.

19. In addition, we note that the way the Claimant gave his oral evidence was at times rather unsatisfactory. He was unduly defensive and combative and often unwilling or unable to give short and straightforward answers to what should have been simple questions for him to deal with. He seemed to think it appropriate to take issue with most of what Mr Jagpal put to him, however uncontroversial, and was extremely reluctant to make concessions that ought sensibly to have been made. For example, near the start of his cross-examination, he was being asked about the conversations he had had with Mr Smith at interview and/or near the start of his employment about leaving work early. His case had previously been understood to be – by us anyway – that he had had just such conversations with Mr Smith. However, when it was put to him that that was what he was saying, he denied it, going so far as to suggest that he had never had a conversation with Mr Smith about leaving early.

20. As it was understood to be an important part of his case that he had had such conversations with Mr Smith, it appeared to me [Employment Judge Camp] that the Claimant was reflexively denying things simply because they were being put to him by the Respondent's representative. I therefore intervened in a bid to assist him, by taking him to a page of a transcript of a conversation he had with Mr Smith (page 101 of the hearing 'bundle') in November 2021 in which he put to Mr Smith that Mr Smith had told him in a previous conversation that he could leave early if his work was finished. Even then, he would not confirm it was his case – as clearly it was – that he had had one or more conversations with Mr Smith just before and/or shortly after he started working for the Respondent in which Mr Smith had allegedly said he could leave early.

21. In fact, the Claimant reacted to my intervening by questioning my authority and my ability to ask him any questions at all. He did this a number of times, even though I had explained on each previous occasion that I was the Employment Judge chairing the hearing and that I could and would intervene and ask questions whenever and however I felt it was in accordance with the overriding objective for me to do so, and that I was intervening for a particular reason that I gave to him. (Invariably, it was to clarify an unclear answer the Claimant had given and/or to try to get the Claimant to answer a question where he had not done so and/or to reframe a question asked by Mr Jagpal

that had not been adequately answered). When he did it again near the start of day 2 of the hearing, I particularly took him to task and told him he was being rude and disrespectful. That was the last time he did it. I assume this is what he was referring to at the start of his written closing submissions where he apologised for his "*lack of court etiquette*".

22. Similarly, the Claimant was sometimes rude and aggressive when questioning the Respondent's witnesses. In submissions, he sought to suggest that it had been the other way around: that, in particular, both Mr Vardens had "*attempted to intimidate me even in cross examination by their aggressive nature*" (page 4 of his written submission). That was not what happened.

23. We should also mention that the Claimant complained of health problems during the hearing. We did not question what the Claimant said about them. Once we realised there was a potential issue, we made sure to check with the Claimant that he felt well enough to continue, or whether he wanted a short break or a longer adjournment, and we always respected his wishes in relation to this. When, shortly after lunch on day 3 of the hearing, after we heard the Claimant having a conversation with Mrs Chopra about his medication and with him appearing to be unwell, we on our own initiative took a break and then had a conversation with him about whether he was well enough to proceed, and when he was equivocal about this we concluded that it would be best if we adjourned for the day (at 2.40 pm).

24. In addition to the witness evidence, there was a file or 'bundle' of documents of 469 pages, including the index. As is common to virtually all cases that come before the Employment Tribunals, there were many documents in the bundle to which we were not taken and/or which were of no relevance or assistance to us. Notable documents in the bundle included transcripts of recordings the Claimant covertly made of conversations with various people, the important and relevant ones being of conversations with Mr Burrows, Mr Smith, and Mark Varden.

25. The Claimant had also at the last minute produced 24 pages of additional documents that he wanted to rely on. These were ultimately dealt with in a similar way to Mrs Chopra's evidence, with the Respondent agreeing to them being admitted in evidence but submitting that they were not relevant and/or that they took the case no further. It was a valid submission.

26. Turning to the facts, the job the Claimant was employed by the Respondent to do was cleaning Wolverhampton City Council bin lorries on Council premises, 5 days a week, Monday to Friday, on a 3 pm to 9 pm shift (i.e. 30 hours per week) at £11.00 per hour. After the Claimant was interviewed by Mr Smith and Mr Smith told the Respondent he deemed the Claimant suitable, the Claimant worked in that job, mainly with Mr Burrows,

from around 10 August 2021 until around 15 March 2022, when he was removed from the Council site for reasons and in circumstances that are in dispute.

27. It is common ground that the Claimant was never given an employment contract or statement of employment particulars in accordance with ERA section 1. It is also common ground that the Claimant in practice regularly left work well before 9 pm and tended to work fewer than 30 hours per week, that he submitted timesheets to the Respondent which suggested he did work until 9 pm and did work 30 hours a week, and that he was until December 2021 paid £330 per week gross every week, i.e. 30 hours x £11.00 per hour.

28. The Claimant's case, as set out in the List of Issues, is that between September 2021 and March 2022 he was regularly subjected to racist and (sometimes) Islamophobic verbal abuse by Mr Burrows. He alleges that he complained about this to Mr Smith orally on 19 November 2021, by letter to the Respondent on 15 December 2021, and by letter to Dean Varden on 18 February 2022. He goes on to allege that as a result of complaining, he was victimised in various ways. Later in these Reasons, we shall explain why we have concluded that none of that is true, in that: he has invented the allegations of racist and Islamophobic verbal abuse; he did not complain about racist abuse to Mr Smith, but about other things; he did not write and send the letters he relies on at the time – they are later fabrications.

29. In early December 2021 the fact that the Claimant was submitting timesheets showing him working more hours a week than he was actually working came to the attention of the Mr Vardens. He had one or more conversations with Mark Varden about this around 10/11 December 2021 in which he alleges he was dismissed. We have a transcript of a conversation on 11 December 2021 from which it is clear that even if Mr Varden did not in terms dismiss him, he suggested that the Claimant was guilty of gross misconduct and was liable to be dismissed. Over the next few days, the Claimant sent various letters and messages via WhatsApp to Mark Varden. In that correspondence, amongst other things, the Claimant sought to suggest that Mr Burrows was at least as guilty of gross misconduct as he was by claiming money for time he had not worked. He continued to correspond to that effect for some time.

30. In a letter sent by WhatsApp on 11 December 2021, the Claimant offered to pay or to have deducted from his wages a sum equivalent to the difference between pay for 30 hours per week and pay for the hours he had in fact been working. The Respondent decided, in light of that offer, that he could keep his job. The Respondent took him up on that offer and reduced the Claimant's pay by the relevant amounts. Those reductions are the basis of the first part of the Claimant's claim for unauthorised deductions from wages. The other part of the unauthorised deductions claim concerns the undisputed

fact that the Claimant was regularly paid less than £330 per week from January 2022 onwards. His case, which we shall examine in more detail later in these Reasons, is to the effect that he was contractually entitled to be paid as if he had worked 30 hours per week irrespective of whether he in fact did so; he accepts he mostly did not work 30 hours per week.

31. In early March 2022 there was an incident at the Council site between the Claimant and Mr Burrows, characterised as a health and safety incident, in which the Claimant allegedly operated the lifting mechanism at the back of a bin lorry while Mr Burrows was close by, causing Mr Burrows to be lifted into the air. Although the fact of an incident is admitted by the Claimant, doing anything dangerous is not. On 15 March 2022, Dean Varden told the Claimant by telephone that the Council did not want the Claimant to attend the site because of the incident. The Claimant's case is that this was an act of victimisation leading to his dismissal, for which he seems to blame Mr Burrows. The Respondent's case – which we accept for reasons we give below – is that the Claimant had been banned from site by the Council on the Council's own initiative because a manager at the Council called Lee Platt believed the Claimant was guilty of a gross breach of health and safety.

32. We shall go into more detail in relation to parts of this later, but in summary:

32.1 the Claimant was given alternative duties – mostly doing vehicle moves – and for the rest of his employment was paid a sum equivalent to 25 hours work per week at £11.00 per hour;

32.2 the Respondent undertook a brief investigation into the health and safety incident;

32.3 the Claimant provided his version of the incident on 6 April 2022 by WhatsApp message, in a statement signed by him and dated 5 April 2022. Within that statement, he admitted to raising the 'hopper' at the back of the lorry whilst Mr Burrows was standing at the back of it and doing so despite Mr Burrows shouting at him not to do it. He also admitted to joking about it afterwards;

32.4 in April and May 2022, there were meetings between the Claimant and Dean Varden about the incident and about the Claimant's future with the Respondent;

32.5 the Claimant was told the Council's position was that he could not return to the Council site and therefore he could no longer do the job he had originally been employed to do;

32.6 there were discussions about possible alternative employment. The Respondent's position was that the various jobs the Claimant had been doing since mid-March

2022 were not permanent and were not something the Claimant could continue to do in the medium to long-term;

32.7 at a meeting on 19 May 2022 Dean Varden told the Claimant that the only vacancy the Respondent had at that time was (to quote from Mr Varden's statement), "*for a washer shunter in Stoke, between 5pm and 8pm, Monday to Friday although it was ad hoc*". The Claimant was formally offered the job in writing by email on 20 May 2022 and the Claimant refused the offer by letter the same day;

32.8 the Claimant was dismissed with one week's pay in lieu of notice by a letter from Dean Varden of 6 June 2022. We refer to that letter, which is at page 231 of the bundle. The given reason for dismissal was that the Council no longer wished the Claimant to work on the Council site and that the Claimant had been offered and had rejected the only available alternative work;

32.9 the Claimant appealed the decision to dismiss him and there was an appeal process, involving an external HR Consultant, at the end of which, by a letter of 18 July 2022, the Claimant's appeal was rejected. There is no claim about the appeal.

Decisions on the issues #1 – the terms of the contract of employment

33. We shall now set out our main findings in a roughly chronological way and consider the impact of those findings on the issues in the List of Issues as we go along.

34. As explained above, the Claimant was employed, at least nominally, to do a 30 hour week at £11 per hour. The question we start with is: what was agreed between the Claimant and the Respondent, expressly or by implication, about pay and hours of work? In particular, was it, as the Claimant alleges, that he was entitled to be paid £330 per week regardless of his actual working hours, so long as he had, in his view, completed the work he had to do?

35. The Claimant's case is that he was told on the first or second day of work that the Respondent operated on what he labelled a 'task and go' basis. We are prepared to accept that he might have been told something along those lines. However, what the Claimant seems, or purports, not to understand is that, at least in relation to a non-salaried worker like him, there is a distinction between task and go in the sense of being allowed to leave work early when you have finished the tasks that you were set; and task and go in the sense of being entitled to leave work early when you have finished your work and still be paid as if you had stayed until the end of your shift.

36. The suggestion that the Claimant was told, at any stage, by anyone, that he was entitled to be paid for 30 hours of work per week whatever time he left and however many hours

he worked is simply not plausible and the documentary evidence we have is inconsistent with it.

37. The transcript of a conversation between the Claimant and Mr Smith on or about 19 November 2021, which starts at page 101 of the bundle, includes the following from the Claimant: *"… you said, when we finished all the trucks… we can go home can't we. You know, like say if we finish about eight o'clock we can go home.*" Mr Smith is shown in the transcript as having replied, *"Yeah, that's what they've done before.*"

38. Similarly, a conversation between Mr Smith and the Claimant on 11 December 2021, the transcript of which begins at page 106 of the bundle, includes the following exchange:

    Mr Smith: What time are you putting on your time sheet?

    Claimant: I just put 3 to 9 every day and just send it in.

    Mr Smith: But you've been going at half seven.

    Claimant: Ah, I said, do you remember, when you said, like, once you finish you can go. Cos we don't…

    Mr Smith: I didn't mean to put in to 9'clock. That's where he's got you.

    Claimant: Oh, right, a misunderstanding. Then I'm pretty sure Dave did the first couple and he put 9 o'clock and we went to about half-eight then, an[d] *8.*

39. Those exchanges are consistent with Mr Smith having told the Claimant that the Claimant could leave early if he finished work and also consistent with the Claimant having misunderstood from what Mr Smith had told him that he was entitled to leave work early and then falsely claim money for time he had not worked on his timesheet. It is also consistent with the Claimant having been told he could leave a bit early – at 8 o'clock – and not consistent with the Claimant having been told he could leave significantly earlier than that.

40. We also ask ourselves what the point was of filling in timesheets, and what the Claimant thought the point of filling them in was, if the custom and practice was – as the Claimant alleges – to write the same thing in every timesheet, namely that he had worked from exactly 3 until exactly 9 even though that was untrue. Conversely, if the Claimant really thought he was doing nothing wrong by leaving early, and he thought he was entitled to be paid as if he worked until 9 o'clock regardless of when he actually left work, why did he feel the need to write on the timesheets that he had in fact worked until 9 o'clock when he had not done so?

41. Following on from the previous point, we do have one timesheet pre-dating this issue coming to light that the Claimant completed – for the week beginning 6 December 2021; page 296 of the bundle – where the Claimant did not simply write on the face of the timesheet that he had started at 3 and finished at 9 and on which he did not simply claim for 30 hours despite having worked for fewer hours than that. That timesheet was inconsistent with the Claimant's case, which was to the effect that he understood that the proper thing to do was simply to put 3 to 9 on every timesheet whatever hours he worked. If he thought that what was recorded on the timesheet needed to bear no relationship to reality, we cannot understand why he would have written 4pm as his start time.

42. When asked by me at the end of his evidence to explain that apparent inconsistency, the Claimant said something like: it didn't make sense to him to say he was in work when he wasn't. He also suggested that the Respondent's office was aware on that day that he had not come into work on time. If it didn't make sense for him to indicate on the timesheet that he was in work when he wasn't in work, then why was he doing just that with all or most of his timesheets by writing his finish time as 9 o'clock? We think that the answer to the question, "why did the Claimant put his start time at 4pm on that day?" is that the Respondent knew he was coming in late on that day and he knew that he couldn't get away with pretending otherwise.

43. That timesheet is inconsistent with the Claimant's case that he believed he had a contractual right to be paid for 30 hours per week regardless of the amount of work he actually did. If he thought he had such a contractual right, he would not that week have claimed for 29 hours and would have claimed for 30 hours.

44. Returning to the transcript of the Claimant's conversations with Mr Smith, the Claimant's case is that Mr Smith told him in August 2021, just after he started, that he would be paid as if he had worked until 9 o'clock regardless of when he had in fact worked to and that he would receive full pay as if he had worked 30 hours per week regardless of how many hours he had in fact worked. If that is what Mr Smith had told the Claimant or, more particularly, what the Claimant thought Mr Smith had told him, he would have reminded Mr Smith of that alleged conversation when he was speaking to Mr Smith in November and December 2021. We can see from the transcripts that he did not do so.

45. We believe we can deduce what was really going on from what the Claimant said to Mr Smith that is recorded in the transcript of the conversation between them on 19 November 2021, near the top of page 102 of the bundle: "*Come on, mate, you know we all f***ing play the game, you know what I mean?*" That suggests to us that the Claimant knew that he was recording hours that he was not working; perhaps that he thought that everyone else was doing likewise; that he thought he and Mr Smith shared a common

understanding of what they were doing, namely '*playing the game*'. This is also an indication that the Claimant knew that what he was doing was not right.

46. That brings us to the contents of the conversation between the Claimant and Mark Varden on 11 December 2021, the transcript of which begins at page 108 in the bundle. In that conversation with Mark Varden, the Claimant gives an account of a conversation between him and Mr Smith earlier that day and a conversation between the two of them at interview. Nowhere in that account does the Claimant suggest he was led to believe by Mr Smith that he could go home early and still be paid for the full 30 hours. We think that if that was what the Claimant thought Mr Smith had said to him in August 2021, he would have made Mr Varden aware of that in this conversation. Instead, the Claimant wrote the letter to Mark Varden on 11 December 2021 admitting his guilt and offering to repay sums that he had been paid for hours of work he had not done. This is, we think, consistent only with him accepting he had not been told by Mr Smith that he was entitled to put in timesheets claiming for hours of work he had not in fact worked and claiming pay for those unworked hours.

47. If the Claimant believed he was entitled to leave early and be paid for 30 hours come what may, he would not have made the offer to repay to the Respondent that he made. What he would have been saying and writing to the Respondent was that he had a right to those wages and should not be expected to repay them.

48. The Claimant's approach at the time was not to say that he had done nothing wrong. It was instead: to suggest that he had only done wrong because he was encouraged to do so by Mr Burrows; and to attempt to prove that Mr Burrows was a worse offender than him. (We note that his attempts to smear Mr Burrows in this respect were made in circumstances where the Claimant could have had no idea of the times that Mr Burrows left and the exact hours that Mr Burrows had worked, as the Claimant habitually left before Mr Burrows and also because Mr Burrows employment started long before the Claimant's did).

49. Further, in the letter to Mark Varden of 11 December 2021, the Claimant wrote that Mr Smith was "*not at fault*". That can be contrasted with the Claimant's position in these proceedings, which is effectively that it is at least as much Mr Smith's fault as it is Mr Burrows's, if not more so.

50. One thing it is worth noting about all of these conversations which we have transcripts of is that the Claimant knew he was making a recording at the time, and that, evidently, he was recording them with a view to using those recordings in the future as evidence to support his own version of events. This will have caused him to choose his words carefully and there are a number of examples in the transcripts of him clearly trying to steer the conversation in a particular direction in an unnatural way and trying to get the

people to whom he is speaking to say particular things. The people the Claimant was speaking to, however, did not know that they were being recorded. This gives an authenticity to what they said, in what were for them for the most part casual conversations, that is lacking from the Claimant's utterances. (The Claimant suggested they, or some of them, did know, but when this suggestion was probed during cross-examination, it turned out to amount to no more than the Claimant having told Mr Burrows in conversations on 13 and 23 December 2021, respectively, that he was contemplating starting to record conversations and that he had recorded conversations with others).

51. For example, if we look at the part of the conversation between the Claimant and Mr Smith of 11 December 2021 that we quoted earlier, it does seem very unlikely that Mr Smith would have said what he said, given that he did not know he was being recorded and therefore was not watching his words in the way that the Claimant was, if he had previously advised the Claimant that the Claimant could make a claim on his timesheets as if he were working to 9 o'clock.

52. Even if there were nothing else, it is inherently highly unlikely, and simply not credible, that the Claimant believed he was entitled to leave regularly at 7pm (as we find he did), four hours into a six-hour shift, meaning he was working 25 or fewer hours per week, and was entitled to be paid as if he worked 30 hours a week.

53. In conclusion on this question as to what was expressly or implicitly agreed between the parties about working hours and pay, in light of all the above, including the fact that the Claimant was an hourly paid worker, that he was expected to fill in timesheets, and that, as we have found, he was not told by anyone at any relevant time that he was entitled to be paid in the unusual way he suggests he was, that he was simply entitled to be paid for the hours of work he did. He could leave early if he wanted to, so long as he had completed his work, and he was not entitled to pay for hours he had not worked. So far as concerns timesheets, the common expectation or agreement between him and the Respondent was that the Claimant would fill them in accurately.

Discriminatory verbal abuse & protected acts

54. It is convenient to deal with the Claimant's allegations that Mr Burrows' racially and Islamophobically verbally abused him and that he did protected acts in accordance with EQA section 27(2) by complaining about that verbal abuse together.

55. We note that the Claimant's case was, consistently, that he was victimised because he did a protected act. It was not that it was because the Respondent thought he had done or might do a protected act and such a suggestion was not put to any of the Respondent's witnesses.

56. In the List of Issues, the Claimant's complaints about discriminatory verbal abuse are: harassment allegations 9.1 to 9.6; direct race discrimination allegation 15.1, direct religion and belief discrimination allegations 18.1 and 18.2. The protected acts relied on for the purposes of the victimisation claim are set out in paragraph 23 of the List.

57. These verbal abuse allegations first appeared in the claim form, in section 8.2 of it, as *"August 2021 – started work at Vardens after a few days Mr David Burrows my colleague started racially abusing me and was not happy working with me as being of a different race."* That is inconsistent with what the Claimant wrote in his witness statement, in paragraph 5: *"The first ten days or so of working with Mr David Burrows were tolerable but I was noticing that he only spoke when I asked a question about the work, if I mentioned anything else he would not answer and was starting to exhibit signs of frustration and anger towards me when I was not completing work to his satisfaction or maybe because of the colour of my skin and race.*"

58. Also in the claim form, the Claimant wrote: "*November 2021 – Made a few complaints via phone call to* [Mr Smith] *(the person who gave me the job) that David* [Burrows] *was abusing me daily and if he could have a word with him to make him stop. Alan said "It's just banter".*" The Claimant's case at this final hearing was not that there were a "*few complaints*" to Mr Smith about Mr Burrows's alleged racial abuse but that there was a single telephone call about this with Mr Smith. The Claimant's oral evidence around this was at times rather unclear, but considering it as a whole, it was to the effect that that single conversation with Mr Smith was the one of 19 November 2021 of which we have a transcript. Nowhere in the transcript does Mr Smith seek to excuse any racial abuse by Mr Burrows as being "*just banter*", nor, as we shall explain shortly, does the Claimant in it complain about Mr Burrows racially/Islamophobically[1] abusing him.

59. In his witness statement, in paragraph 6 (at the top of page 4), the Claimant stated: *"On a daily basis since early September* [i.e. not within a few days of him starting work in August 2021] *he* [Mr Burrows] *would always call me Paki, Blacky, TaliBal (Bal* [is] *my name), Curry Munchers etc.*" The Claimant's case was therefore that he was severely racially abused by Mr Burrows every single day. The Claimant continued in his statement, at paragraph 7, *"Finally I decided to call Mr … Smith… to complain about Mr David Burrows's behaviour towards me.*" In the statement, the Claimant gave the date of that conversation as being 19 October 2021, but he explicitly refers in the statement

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[1] All bar one of the religion and belief discrimination complaints is also made as a racial harassment / discrimination claim. From this point onwards, purely for stylistic reasons, we shall use the words "*racial*" and "*racist*" and their variants to describe all of the alleged racial and/or Islamophobic verbal abuse.

to the transcript of the conversation which was actually on 19 November 2021 and there was no dispute at this hearing that that was the conversation he was referring to.

60. What the Claimant was clearly saying in his statement was that the purpose of the call to Mr Smith was to complain specifically about the racial abuse he was allegedly being subjected to by Mr Burrows. However, what the transcript reveals was that it was not a conversation about racial abuse at all.

61. The Claimant was asked during his evidence why, if the conversation was to complain about Mr Burrows racially abusing him (particularly bearing in mind that he was recording the conversation with a view to using that recording to back up his version of events later), he did not in fact say to Mr Smith that Mr Burrows was racially abusing him. The Claimant's explanation was to this effect: that one doesn't go making allegations like that straightaway and out of the blue; that he felt he needed to sound Mr Smith out about it to see how he would react. We do not accept that explanation. It makes no sense at all as the whole purpose of the conversation was, supposedly, to complain to Mr Smith about Mr Burrows' racial abuse of the Claimant. Also, if that was the reason why the Claimant did not put his allegations of racial abuse forward, we would have expected the Claimant also to be holding back on making other serious allegations against Mr Burrows and he did not do so. On the contrary, the Claimant was very vocal and forthright in his criticisms of Mr Burrows, amongst other things calling him a *"mad man"* and *"f***ing crazy".*

62. Further, even if the Claimant were holding back to some extent from telling Mr Smith what Mr Burrows had allegedly been doing and saying and was reluctant to give chapter and verse about it, given that the whole purpose of the call was supposedly to report racial abuse, we would have expected racial abuse at least to have been mentioned.

63. The purpose of the call was something else. We can see why the Claimant was calling Mr Smith from what he said to Mr Smith at the start of the call: that instead of being allowed to go *home "if we finish about 8 o'clock",* Mr Burrows "*doesn't say anything… If my job ain't right, you should say, hey, Bal, you ain't doing the wheels properly… He just does the whole truck again and then like one day I had to go early… and I said to him … I've got to go. About seven like. He intentionally took 45, 50 minutes and made me go about half past eight. He's just playing silly buggers like a little kid.*" In short, the purpose of this call was to complain about Mr Burrows not allowing the Claimant to go home early.

64. The only mention of race was this exchange at the end of the conversation:

Claimant: I have a chat with him if he don't like me, if he's racist, you know I mean I couldn't care less, you know

Mr Smith: he's not racist

Claimant: No I'll be racist with him you know what I mean? Nobody is born a racist but if you get treated like a dog, you're going to bite back, aren't you?

In the context, that is the Claimant wondering aloud whether the reason Mr Burrows apparently doesn't like him or may not like him is Mr Burrows having racist feelings towards him. That is inconsistent with the Claimant's position at this hearing, which is that by the time this conversation with Mr Smith took place, he had been racially abused by Mr Burrows in the most vile way for months.

65. There are other things that are inconsistent with what the Claimant says his relationship with Mr Burrows was at this time. For example, in the same conversation with Mr Smith, he complained about Mr Burrows not offering to give him a lift home. It is not at all likely that the Claimant would want to get into a car with Mr Burrows if Mr Burrows had on a daily basis been saying the sorts of things that the Claimant accuses him of having said.

66. Another example is that on 18 December 2021, a matter of days after the Claimant had supposedly sent the letter dated 15 December 2021 which he relies on as a protected act in which he complains about Mr Burrows racially abusing him, the Claimant emailed the Respondent's office (the email is at page 130 of the bundle) stating that he had made an agreement with Mr Burrows for Mr Burrows to send in the Claimant's timesheets on a regular basis on the Claimant's behalf *"to prevent any mistrust".*

67. In addition, we note the contents of the conversation the Claimant had with Mr Burrows on 17 December 2021, the transcript of which runs from page 126 of the bundle. In that conversation, amongst other things, the Claimant complained to Mr Burrows about Mr Smith and/or the Respondent allegedly 'having it in' for him. The Claimant said: *"I don't know what I've done to him. I think it is just my colour.*" We think the whole conversation is an unlikely one for the Claimant to be having with someone who had been making his life a misery for months by racist abuse; and we think he definitely would not be introducing race and racism into a conversation with somebody who had themselves been racist towards him in the way the Claimant accuses Mr Burrows of having been.

68. The gist of the Claimant's evidence was that Mr Burrows racially abused him all the time, something that if true would mean that Mr Burrows habitually used racial epithets and racist language in conversation. It is, however, notable that in none of the transcripts of the conversations between the Claimant and Mr Burrows that we have did Mr Burrows use racist language or otherwise hint that he had racist feelings towards the Claimant. This is despite the Claimant using extremely provocative and offensive language towards Mr Burrows. We again note that Mr Burrows did not know that he was being recorded in these conversations.

69. On 21 December 2021, the Claimant had a conversation with Mr Burrows during which he called Mr Burrows a c-word and a "*whore*". This evidently and understandably angered Mr Burrows to some extent and Mr Burrows's reaction was to threaten to wash the Claimant's beard. Such a threat might in other contexts have racist and/or Islamophobic overtones, but in this context, and in circumstances where Mr Burrows is someone who himself has and had long beard, significantly longer than the Claimant's, it does not in our view have those connotations. The transcript of the conversation between the Claimant and Mr Burrows on 24 December 2021 reveals the Claimant being extremely provocative towards Mr Burrows, and Mr Burrows displaying no particularly aggressive verbal reaction, let alone a racist one.

70. It is highly unlikely, to the extent of being almost inconceivable, that if Mr Burrows were as the Claimant has described him, he would not have used racially abusive language at some point in at least one of the conversations we have a transcript of.

71. Further, the Claimant did not complain about Mr Burrows allegedly racially abusing him in any of his conversations with other people that we have transcripts of, nor in any contemporaneous correspondence other than the letters of 15 December 2021 and 18 February 2022 that are relied on as two out of the three alleged protected acts.

72. The first thing relied on as a protected act is the contents of the conversation between the Claimant and Mr Smith of 19 November 2021 that we discussed at length above. We have already explained that that conversation contains no complaint of discrimination, or anything else that would make any part of its contents a protected act. We have also already explained that, for reasons we shall come onto later, we do not accept the authenticity of the letters of 15 December 2021 and 18 February 2022 and that we think they were created after the event to bolster the Claimant's case.

73. There are a number of items of correspondence from the Claimant in which, if the Claimant's allegations about Mr Burrows racially abusing him were true, we would have expected the Claimant to mention it and the Claimant does not do so.

74. For example, in a letter the Claimant sent to Mark Varden on 21 December 2021, a copy of which is at pp 135-6 of the bundle, the Claimant was evidently seeking to get Mr Smith and Mr Burrows into trouble. The main point the Claimant was trying to make in that letter was that Mr Burrows and Mr Smith were equally guilty of leaving work early and claiming payment as if they had not left early (of course, the Claimant did not know at the time, and evidently did not know until evidence of this emerged at the hearing, what Mr Burrows and Mr Smith were claiming from the Respondent for the hours that they worked; he just assumed they were doing the same as him). The letter concluded: *"Please leave me and David* [Burrows] *alone to do a good job as we are not at fault and hope to carry on working for Vardens for the future."*

75. If the Claimant's evidence about the racial abuse (and, for that matter, about having written and sent the 'protected act letter' of 15 December 2021 at the time) were true, what the Claimant would surely have written in his letter of 21 December 2021 would have been along these lines: "*As you know from my previous letter, Mr Burrows has been racially abusing me and he has been fiddling his timesheets, so you should take money off him too and dismiss him.*"

76. The racial abuse is not mentioned in any of the many WhatsApp messages the Claimant sent. For example, on 15 December 2021, the very same day the Claimant supposedly sent the first protected act letter, the Claimant was sending WhatsApp messages to Mark Varden in an apparent attempt both to clear his own name and to get Mr Burrows into trouble. Once again, it is striking that there is no mention of racial abuse.

77. Going back to the transcripts of recorded conversations, it is similarly striking that in the Claimant's conversation with Mark Varden on 11 December 2021 (from page 108 of the bundle), although the Claimant was clearly trying to divert blame onto Mr Burrows, and although he complained about Mr Burrows allegedly saying to him *"shut your mouth if you don't like it"* and *"f*** off",* there was no mention of racial abuse, let alone many months of the awful abuse the Claimant now complains about. The same could be said for the series of WhatsApp messages the Claimant sent to Mark Varden on 11 December 2021, in which the Claimant was seemingly doing his level best to get Mr Burrows into trouble.

78. It is in this context that we consider the protected act letter dated 15 December 2021. It, and the letter dated 18 February 2022 relied on as the third and final protected act, are the only letters that the Claimant says he sent by post only. Asked in cross-examination to explain why, uniquely, he sent these by post rather than by WhatsApp message, he suggested that the reason was that they were particularly important letters. That is not an adequate explanation and we do not accept that it is true. The idea that those letters were, or the Claimant thought they were, more important than, say, his letter to Mark Varden of 11 December 2021 which he sent by WhatsApp message on that date offering to pay back money in an ultimately successful attempt to persuade the Respondent to let him keep his job, is far-fetched. Further, as an explanation doesn't make sense in its own terms, because the Claimant did not send either of those letters by recorded delivery or anything like that, so he would not even have confirmation that they were sent.

79. There is in our view no plausible explanation consistent with the Claimant's case for him sending those two letters – of 15 December 2021 and 18 February 2022 – and only those two letters by regular post and only by regular post.

80. A further reason why we have concluded that this letter of 15 December 2021 was not in fact sent by the Claimant at or around the time it purports to have been is that it exists in a complete evidential vacuum. Despite frequently communicating with the Respondent after 15 December 2021, particularly in the days and weeks immediately afterwards, it was not mentioned again, except in the protected act letter of 18 February 2022. If it had been sent, we are sure there would have been follow-up to it well before then, with the Claimant saying something like, "*What have you done about this; the racial abuse I'm getting from Mr Burrows is as bad as ever.*"

81. The letter dated 15 December 2021 as a whole looks to us as if it has been written after the event to strengthen the Claimant's claim. It looks that way not just in relation to the Claimant's complaints about racial abuse but also in relation to his complaints about other things as well. Amongst other things, it includes this: *"I don't know of any of your procedures into anything because I still have no contract, written statement of employment, health and safety, handbook etc even though I have asked, emailed and text to Sophie a fair few times."* There are in fact no emails or text messages prior to 15 December 2021 about any of those matters. There are messages about a lack of a statement of employment particulars, but the first of those is those on 30 January 2022, approximately one and a half months later, and in that message of 30 January 2022 (an email at page 163 of the bundle), there is no suggestion that the Claimant had asked for one before.

82. We have similar things to say about the second and final alleged protected act letter, of 18 February 2022. It does not fit in with the documentation or events around it. It was not mentioned in correspondence with the Respondent during the Claimant's employment. It was not mentioned in the claim form, where the Claimant mentioned other alleged complaints about discrimination and where the Claimant alleged he had complained about other things and that those complaints were not properly responded to, e.g. "*November 2021 to February 2022 – I had asked on 4/5 occasions via call/ text and email for a statement of employment particulars but never received it.*"

83. Looking at the correspondence and other communications after 18 February 2022, what we note is that when the Claimant had something important to write to the Respondent, he sent the relevant letter by WhatsApp message and/or email and not by post. There are also further examples of the Claimant failing to mention the alleged race discrimination and/or the supposed complaints about it in circumstances where we would have expected him to do so.

84. For example, in an emailed letter to Dean Varden dated 18 May 2022 (page 210 of the bundle), in the final substantive paragraph, the Claimant complained, "*that since commencing employment with your company the staff at your offices have only replied*

to my emails and texts maybe 15% of the time", but he made no complaint about the Mr Vardens's personal failure to reply to the letters of 15 December 2021 and 18 February 2022. This was one of a number of letters where the Claimant was trying to protect his position by threatening the Respondent with legal consequences should they dismiss him. If at that point in time he believed he was the victim of race discrimination by comments made by Mr Burrows, that he had complained about those comments, and that nothing had been done in response to his complaints, we think he would definitely have mentioned it.

85. The first time the Claimant made allegations of race discrimination to the Respondent that we can definitively pin-point was in a meeting between the Claimant and Dean Varden of 19 May 2022. The allegation he made there was that he might have been treated differently from Mr Burrows because of his race rather than that Mr Burrows was racist towards him; and no allegation was made that he had previously complained about race discrimination and had his complaints ignored. He also spoke about a conversation he had allegedly had about Mr Burrows – that a third party (possibly Mr Platt from the Council) *"said to me have you spoke to Dave. I said I don't speak to him, he is not really interesting, about as interesting as a bit of paper. We go into work, say hello and go a little bit in between while the machines are going. Then I have Dave braving up to me saying that I was trying to kill him and stuff like that, like stupid like between ourselves a bit of banter and that.*" If the Claimant had been racially abused over an extended period by Mr Burrows and had twice written to the Mr Vardens complaining about this, and had they done nothing about his complaints: he would not have had a conversation about Mr Burrows like the one he described; and he would have been having quite different discussions with Dean Varden during the meeting in May 2022 from those he in fact had.

86. The first time the Claimant clearly raised an allegation that one or more racist comments were made towards him was after dismissal, on 8 June 2022, in his *"Appeal against Termination of Employment",* which runs from page 233 of the bundle. It is notable that even there, he did not complain about the Respondent allegedly ignoring prior complaints of discrimination.

87. Even as late as the end of June 2022, the Claimant was speaking and writing to the Respondent: without making the allegation that he complained in writing to the Vardens about Mr Burrows verbally racially abusing him and that they did nothing in response; and saying things that are inconsistent with that allegation.

88. During the dismissal appeal meeting on 28 June 2022, the Claimant is recorded in the transcript as having said, *"I don't honestly think in fairness to Dean, Mr Varden. I don't think he has received any of the information in the emails, I would say 80% of my emails, written statement, contract f employment, dbs check, etc etc never actually replied to*

which I have mentioned in one of my letters. In all fairness I don't actually think Dean knew anything that was going on until someone had a phone call from the council saying that there had been an incident and there wasn't actually an incident." We also note that if the Claimant actually believed that his emails, or the majority of them, were being ignored by the Respondent's office, he would not have posted letters to the Mr Vardens care of the office but would have WhatsApped them directly, something he had been doing frequently.

89. There is a particularly striking example of the Claimant not mentioning the letter dated 15 December 2021 in a letter from him to Dean Varden that he sent electronically on 30 June 2022. At the end of the third paragraph of the first page of that letter, the Claimant reminded Mr Varden of the things he had sent to Mr Varden in and around mid-December 2021: "*Just to remind you that I also sent Letters to Mark Varden on 11th December 2021. Time sheet for David burrows on 15th December 2021. Letter and Voice recording on 21st December 2021 all via WhatsApp.*"

90. Our conclusion is that neither of the alleged protected act letters, dated 15 December 2021 and 18 February 2022, was written or sent at the time and that they were both put together by the Claimant significantly later to support his employment tribunal claim.

91. In summary:

    91.1 there was no discriminatory verbal abuse – it simply did not happen;

    91.2 there was no relevant protected act, so all victimisation complaints fail.

December 2021 wages & 'dismissal'

92. The next complaints to arise chronologically after the 15 December 2021 date of the first [alleged] protected act letter concern the Respondent stopping the Claimant's pay and contemplating dismissing him in mid-December 2021. These are direct race discrimination complaints 15.2 to 15.3, victimisation complaints 22.1 and 22.2, and wages / unauthorised deductions complaints 26.1, 26.2 to and one of the first of the two weeks covered by 26.3.

93. What the Respondent says occurred is entirely plausible and consistent with the contemporaneous evidence; and, indeed, with the Claimant's evidence about what happened that he has direct personal knowledge of. It is this: the Claimant himself contacted the Respondent's office to complain about the fact that Mr Burrows had been preventing or inhibiting him from leaving early; it appeared from what the Claimant was saying when looked at in conjunction with the Claimant's timesheets, which were

processed by the Respondent's office, that the Claimant had been claiming money from the Respondent for hours of work he had not done.

94. The Claimant's allegations around this are inconsistent and make little sense. He appears to be suggesting something to the effect that following his conversation with Mr Smith on 19 November 2021 previously discussed, Mr Smith or someone else at the Respondent, perhaps one of the Mr Vardens, fabricated evidence in an attempt to frame the Claimant for something he hadn't done. The gap in time between 17 November 2021 and this issue coming to the fore three weeks or so later means the chronology does not support what the Claimant is alleging. More importantly, there was no need for any evidence to be fabricated in circumstances where the Claimant was openly admitting to not working until 9 o'clock on a regular basis. The Claimant wasn't 'framed' for anything: he was, by his own admission, guilty of doing the thing the Respondent was accusing him of. The Claimant's point at the time was not that he was innocent but that other people – Mr Smith and Mr Burrows – were doing exactly the same as him.

95. It is correct that, as is alleged by the Claimant, Mark Varden made a decision to withhold payment to the Claimant of pay on or around 10 December 2021. We unhesitatingly accept the Respondent's explanation for why this was done: it appeared to the Respondent that the Claimant had been claiming for hours he had not worked; the Respondent did not know what hours he had actually worked; the Respondent therefore did not know how much, if anything, it owed the Claimant (or vice versa) and it needed to undertake some investigations in order to work this out. It turned out that the Claimant had been overpaid. ERA section 14(1)(a) provides that a deduction from wages is not an unauthorised deduction, "*where the purpose of the deduction is the reimbursement of the employer in respect of an overpayment of wages*". When the respondent stopped the Claimant's pay it was reimbursing itself in respect of an overpayment of wages. There was therefore no unauthorised deduction from wages here.

96. We only have to look at the contemporaneous documentation to see why the Respondent continued to make deductions from the Claimant's wages: the Claimant had been leaving early and submitting timesheets and claiming pay as if he were working to 9 pm, meaning he had been overpaid; the Claimant admitted he was doing this and said he would pay back the money or that the Respondent could deduct it from his wages.

97. As part of his conversation with Mark Varden on 11 December 2021, the Claimant made the following comments: *"I am prepared to give the money back. And I mean I don't want no trouble. I police trouble like that we've stole your money… like I know that you have took two weeks, or three weeks now, or this week is three weeks. If you have got to keep it, keep it. You know what I mean?*" On the same day, after that conversation, the Claimant WhatsApped his letter to Mark Varden that has already been discussed, in

which the Claimant stated, *"I feel I owe net £688 to Vardens and I can work two weeks to pay it off or I will transfer into your bank account whether you keep me on or not."* The Claimant has sought to suggest at this hearing that the payments that he effectively made to the Respondent by the Respondent deducting sums from his wages were paid under protest. That simply isn't so. There was no protest at the time and, even later during the Claimant's employment, he did not suggest that he had paid those sums under protest.

98. That brings us onto the Claimant's alleged dismissal. We think it makes no practical difference whether the Claimant was or was not technically dismissed. In the transcript of the Claimant's conversation with Mark Varden on 11 December 2021, he was told by Mr Varden that as things stood, he was being dismissed for gross misconduct and the only issue is whether it was something he was told was going to happen or whether what he was told was what had already happened. Either way, if he was told this because of his race or because he did a protected act, the relevant part of his claim would succeed. For convenience sake, we shall from this point onwards refer to this as the Claimant being dismissed and to the Respondent deciding not to go through with it as him being reinstated, because that is the wording used in the List of Issues.

99. Why, then, was the Claimant 'dismissed'? The answer is: for the same reason that the deductions from wages were made – he confessed to claiming money for work he had not done, which was something the Respondent legitimately deemed to be fraud.

100. What happened when the Claimant was 'reinstated' was that Dean Varden persuaded Mark Varden that the Claimant should be given another chance, in light of the Claimant's offer to pay / repay the money, which was taken as a sign of contrition.

101. The allegation that wages were deducted and that the Claimant was dismissed because of his race is almost nonsensical in circumstances where the Respondent could reasonably, had it wanted to, have dismissed the Claimant for gross misconduct without notice even if he had had two years' service at that point in time; and where he in fact only had a few months' service, meaning the respondent could have dismissed him at any time for no reason at all. If the Respondent were racially prejudiced towards the Claimant, it would in all likelihood have dismissed him for gross misconduct without notice in December 2021 and not reinstated him.

102. In reality, the sole basis for any allegation that the Claimant was less favourably treated and less favourably treated because of race is the comparison he seeks to draw between his situation and that of Mr Burrows. However, Mr Burrows is not a valid comparator in accordance with section 23 of the EQA. Mr Burrows had not, unlike the Claimant, confessed to regularly leaving early; he had denied doing so; he had not apparently accepted he had submitted false timesheets and been overpaid; he was a relatively

longstanding and trusted employee with accrued employment rights with whom the Respondent had had no previous significant difficulties. Apart from that invalid comparison, there was nothing else in the evidence to suggest a discriminatory motive on the part of the Respondent.

103. In fact, looking at the evidence and, in particular, the fact just mentioned that the Respondent did not take the opportunity permanently to dismiss the Claimant summarily for gross misconduct in December 2021 that it could legitimately have taken, it positively suggests an absence of racial prejudice or other ill-feeling towards the claimant (other than ill-feeling caused by the Claimant submitting false timesheets). Other factors suggesting a lack of racial prejudice in relation to who the Respondent wanted to employ are: the fact that the Respondent employed the Claimant in the first place; Dean Varden's unchallenged evidence about the racial makeup of the Respondent's workforce – paragraphs 6 and 7 of his witness statement.

104. To rebut the argument that the Respondent can't have been racially prejudiced because it employed him in the first place, the Claimant alleged he was told by Mr Burrows that he was only recruited because the Respondent was at that time – August 2021 – desperate for staff. If that is truly what Mr Burrows said (and we don't accept it is), it was a statement from Mr Burrows rather than anyone else with more seniority and authority in the Respondent. It was also a statement about the position in August 2021 and there is no suggestion, let alone evidence to support this as a proposition, that the Respondent was [allegedly] so desperate for staff in December 2021 that the Mr Vardens, although supposedly wanting to dismiss him because of racial prejudice, chose not to take the gilt-edged opportunity that was presented to them to dismiss the Claimant summarily for gross misconduct. It was not put to any of the Respondent's witnesses that the Respondent was particularly short-staffed at any time, nor that that explained the decision to reinstate him.

105. The absence of evidence to support the suggestion that the Respondent had a racial motive for mistreating the Claimant applies to the whole of his employment. Even if there were nothing else, all of the Claimant's race discrimination complaints would fail for this reason.

106. In summary direct race discrimination complaints 15.2 and 15.3, victimisation complaints 22.1 and 22.2, and wages / unauthorised deductions complaints 26.1 to the first part of 26.3 fail because:

    106.1 no unauthorised deductions were made because the reason for such deductions as were made was that the Respondent was recovering prior overpayments of the Claimant's wages;

106.2 the reason the Respondent made deductions from the Claimant's wages and 'dismissed' the Claimant in December 2021 was that the Claimant had falsified timesheets and claimed pay for hours of work he had not done;

106.3 these discrimination and victimisation complaints would anyway fail because there were no protected acts and there was no racist motivation to any of the respondent's actions (conscious or unconscious).

Holiday pay

107. The next thing to arise chronologically about which a complaint is made is the Claimant being paid for the holiday that he took during the week beginning 27 December 2021 at a lower rate than a rate equivalent to pay for six hours each working day that week. This is the second half of unauthorised deductions complaint 26.3. The reason why this might be a deduction from the Claimant's wages even though his previous unauthorised deductions complaints are not made out is that the right to holiday pay comes from legislation – the Working Time Regulations 1998 – rather than what was in the Claimant's (unwritten) contract and is calculated on that basis.

108. What the Claimant was entitled to be paid as holiday pay was his normal pay. We do not think that, properly analysed, the Claimant's normal pay was his hourly rate multiplied by six hours a day, even though that is what the Claimant had been paid up to the week commencing 22 November 2021. The Claimant had been overclaiming for hours worked since the start of his employment by his own admission and the Respondent had therefore been overpaying him since the start of his employment. The Employment Judge during the hearing asked the Claimant whether, if he had timesheets going back to the start of his employment that accurately reflected the hours he was actually working, they would look like the timesheets we have for the period from when he started accurately recording his working hours (or purporting to) and he said that they would. We also have what the Claimant wrote to Mark Varden on 11 December 2021: "*I have worked a total of 18 hours per week @ £11 per hour. 15 weeks worked 125 hours overpaid = £1375 gross. 3 weeks not paid 57 hours worked = £627 gross*". If that is right, during that 18 week period the claimant worked a total of 382 hours. That works out as just under 21 ¼ hours per week on average.

109. In circumstances where he was overpaid (at least before deductions were made from his wages), the Claimant's normal pay should be calculated by reference not to what he was actually paid but to what he should have been paid.

110. The method of calculation the Respondent used to calculate the Claimant's holiday pay for the week commencing 27 December 2021, for which the Claimant was paid £264 gross (£11 x 24), was to look at timesheets the claimant produced for November and

December 2021 and decide that that equated to roughly 24 hours per week. By our calculation – see above – that was in fact an over-payment by just over 2 ¾ hours' worth of pay.

111. Even if the Claimant had a potentially valid claim for this pay, there is a time limits issue which means the Tribunal has no jurisdiction to consider his claim. He was paid his holiday pay in the first week of January. The limitation period for making a claim for any underpayment expired in April of 2022. The Claimant's own case is that he was advised by the Citizens Advice Bureau that he had three months to make claims for wages. He has not begun to satisfy us that it was not reasonably practicable for him to make the claim on time. Given the findings we have made and will make as to whether there was any other related unauthorised deduction from wages, this complaint would fail because of time limits.

Deductions from wages from January 2022 onwards

112. Here we are looking at complaint 26.4 in the List of Issues: that unauthorised deductions were made from the Claimant's wages, "*by paying him for twenty-five hours instead of thirty per week*".

113. From January 2022 to around mid-March 2022 the Claimant was in fact paid on the basis of the hours he worked – which varied and were not twenty-five each week – and that is what he was contractually entitled to. No deductions, authorised or unauthorised, were made.

114. Based on the payslips, it was not until the week commencing Monday, 27 March 2022, after the Claimant was banned from site by the Council, that he started to be paid £550 (2 weeks x 25 hours x £11 per hour) per fortnight every fortnight. This was regardless of whether he actually worked as many as 25 hours per week and regardless of whether or not there was work available for him to do.

115. From this point onwards, the Respondent would have made unauthorised deductions from the Claimant's wages unless there was a variation of the Claimant's contract of employment. The reason this is the case is that from the start of the Claimant's employment he was, as we have explained, employed to work 30 hours per week. Other than in special circumstances that don't apply here, where a worker who is employed to work a particular number of hours a week and says that they are willing and able to work those hours, but is unable to do so because the employer does not give them the opportunity, they are entitled to be paid as if they were working those hours. To put it another way, it was an implied term of the Claimant's contract of employment that the Respondent would permit him to work 30 hours per week. Absent a contractual variation, then, the Claimant, who was putting in timesheets claiming for 30 hours per week from

18 March 2022, was entitled to be paid as if he was working 30 hours per week but was in fact being paid as if he was working 25 hours per week.

116. There is no basis for saying that the Claimant's contract was varied between the start of his employment and mid-March 2022. His contractual rights had not changed and were, as we explained earlier, to be paid for the hours he worked, but with a 30 hour basic working week.

117. An argument that there was a contractual variation in mid-March 2022 could be based on a submission that in return for the Respondent permitting his employment to continue (which was real consideration in circumstances where he had no right not to be unfairly dismissed and the Respondent could simply have dismissed him with one week's notice): either there was a new employment contract; or there was a variation of his existing employment contract. In both scenarios it would be a term of the new or varied contract that the Claimant would be given up to 25 hours per week of work and would get paid for 25 hours' worth of work a week however many hours he was actually given and did. In law there would need to be 'offer' and 'acceptance' and, looking at the matter objectively, an apparent intention formally to vary the contract or enter into a new one.

118. This is not a question of whether the Respondent acted reasonably or unreasonably, fairly or unfairly; given our overall decision on the point, this will come as cold comfort to the Respondent, but we have considerable sympathy for the company. It would have been entirely within its legal rights to dismiss the Claimant immediately when the problem came to light, with just pay in lieu of notice and any accrued holiday pay. It did not do so because Dean Varden was bending over backwards to keep the Claimant in work, for the Claimant's benefit rather than the Respondent's. Unfortunately for the Respondent, though, the issue is one purely of the common law of contract.

119. Our sympathy for the Respondent is tempered by the fact that the Respondent could have avoided this problem arising, if it wanted to vary the contract, by complying with its statutory obligations under ERA sections 1 and 4 to provide the Claimant with a statement of employment particulars and a statement of change to those employment particulars, and saying to the Claimant that he had to choose between agreeing to the changes and dismissal. In fact, the Respondent did not even write a letter to the Claimant in March 2022 when this issue arose explaining to the Claimant the gist of what it was intending to do, let alone provide all of the information those sections of the ERA were required to provide. And we don't even know with absolute certainty from what date the Claimant was taken off the Council contract and when the Respondent started paying him not for the hours he worked or was theoretically willing to work but for 25 hours per week. We think it would be unduly artificial to say that the Respondent implicitly made an offer to the Claimant which the Claimant implicitly accepted by continuing to work.

There was no offer – there was a unilateral decision by the Respondent as to what it would do – and there was no acceptance of that offer – the Claimant simply continued to work doing what he was told to do by the Respondent. His only other option would have been to resign.

120. Further, this was, on the face of it, a temporary arrangement. The Respondent told the Claimant in terms on 4 April 2022 that he had been "*temporarily removed*" from his position. His situation was, we think, akin to that of someone who was suspended pending a disciplinary investigation where, absent an express contractual provision to the contrary, they would be entitled to full pay. Moreover, although the Claimant did not say he was working under protest as such, he evidently did not accept he was only entitled to be paid for 25 hours a week because he put in timesheets claiming for 30 hours per week.

121. Had the Claimant worked for a long time under this 25-hours-per-week arrangement the Respondent had imposed upon him, there would in all probability have come a point when, by implication, his contract of employment would had been varied or a new contract would have come into place. However, there was not enough time between this arrangement starting and the Claimant's dismissal for that to be the case here.

122. It follows that the Respondent made unauthorised deductions from the Claimant's wages at the rate of £55 per week from 28 March to 6 June 2022 (10 weeks): £550.

Written particulars of employment

123. Because the claim for unauthorised deductions has partially succeeded, and because the Respondent failed to provide the Claimant with a written statement of employment particulars before the claim form was presented, the Claimant is entitled to claim under section 38 of the Employment Act 2002 ("section 38"). Because we were dealing with liability only and did not invite submissions on this, it would not be appropriate for us to reach a final decision on it. It would, though, be wholly disproportionate to have a further hearing purely to deal with this point. What we have therefore decided to do is to express a preliminary and provisional view and to give the parties an opportunity to write in to say that they disagree and to provide written submissions if they do so. That is why we made order 4 above.

124. Our preliminary and provisional view is that the Claimant should be awarded 2 weeks' pay (£660) under section 38. This is because:

    124.1 there are no exceptional circumstances making an award unjust or inequitable in accordance with section 38(5);

124.2 in accordance with sections 38(2) and (4) we therefore have to award 2 weeks' pay or 4 weeks' pay;

124.3 as to whether it should be 2 or 4 weeks' pay, there was a complete failure to provide any written employment particulars and that failure was part, albeit a small part, of the reason why the Claimant and Respondent ended up in the Tribunal;

124.4 however: the Respondent is and was a relatively small company; the failure to provide employment particulars was not deliberate or exploitative; the Respondent bent over backwards to help the Claimant and that was what led to them underpaying the Claimant for a limited time and to a limited extent; less than two weeks' worth of wages were deducted by the Respondent; almost all of the Claimant's claim failed; and most of the claim was based on lies and/or manufactured evidence.

Failure to "*reply to … complaints about his pay between 11th December 2021 and 18th February 2022*"

125. We had jumped forward in time in order to look at all of the Claimant's complaints of unauthorised deductions from wages. We now go back to late December 2021 to consider the allegation – complaints 15.4 (race discrimination) and 22.3 (victimisation) in the List of Issues – about a supposed failure to reply to complaints about pay. In summary, our decision on these complaints is that there was no such failure to reply as a matter of fact.

126. The only complaint about pay the Claimant made between 11 December 2021 and 18 February 2022 that we can identify and that we are satisfied the Respondent actually received was contained in an email exchange between the Claimant and the Respondent's office on 20 and 21 December 2021 (pp 140-141 of the bundle). We note, in passing as it were, that the Claimant's disclosure in relation to this did not include the Respondent's reply to him, but only his email to them, on which he had written "*NO REPLY*" (page 131 of the bundle). We think this was an example of the Claimant being at the very least disingenuous, rather than him having made an honest mistake.

127. Arguably, an email sent by the Claimant on 21 January 2022 in which he queried the pay he had received is also a complaint about wages. He received a reply to that email in less than 20 minutes.

128. We assume the reason the time period to which these complaints relates ends on 18 February 2022 is that that is the date of the second and final [alleged] protected disclosure letter. We have already found that that letter was not sent to the Respondent at the time and was produced by the Claimant after the event to help his claim.

129. In conclusion, it is simply untrue that, "*The Respondent did not reply to his complaints about his pay between 11 December 2021 and 18 February 2022*".

June 2022 dismissal

130. The one remaining complaint is a victimisation complaint that does not in the List of Issues have a paragraph number of its own but that comes between paragraphs 22.3 and 23: "*The Claimant also says that his dismissal on 6 June 2022 was an act of victimisation*". We have already decided that all complaints of victimisation fail because no relevant protected act was done. We shall nevertheless consider this complaint as if the Respondent did do a relevant protected act. The questions we are asking ourselves when considering it include in particular: was the Claimant in fact banned from the Council site; if so, why so? The reason those are relevant questions is that it was the site ban that indirectly led to dismissal.

131. On or shortly before 15 March 2022, the Council came to the Respondent with a very serious allegation that earlier in the month the Claimant had operated the rear lifting gear of a refuse truck that he and Mr Burrows had been cleaning when Mr Burrows was standing at the back of it, causing Mr Burrows to be lifted from the ground. There was a telephone conversation about this incident between the Claimant and Dean Varden on 15 March 2022, which there is a transcript of. Mr Varden told the Claimant that he didn't want him back on site "*until we get these things sorted*" and that the Claimant would be offered alternative employment in the meantime.

132. According to the Respondent, it was the Council – specifically Mr Platt – who ordered that the Claimant be removed from site. The Claimant's case was or seemed to be that the Respondent invented the allegation that the Council wanted him off site, that the Council had not made any allegation or complaint about this incident, and that the reason he was taken off the work for the Council he had been doing since the start of his employment was that Mr Burrows had complained about him. It is a case for which there is no support in the evidence. There is no doubt at all that the Council did indeed make a complaint about this incident. This is shown by, amongst other things, the email that was sent by Mr Platt to Dean Varden on 27 May 2022 (page 227 of the bundle) and by various emails sent by the Respondent to the Council which are consistent only with the Respondent's version of events and which would have produced an extremely negative response from the Council if what was said in them was incorrect. For example, there was an email from Dean Varden to Mr Platt of 30 March 2022 (page 184 of the bundle) which begins, *"I've banned Balwant Chop from site as requested.*"

133. The allegation the Claimant seems to be making that the Respondent colluded with Mr Burrows and encouraged him to make a false complaint about this incident with a view to providing grounds for the Claimant to be dismissed makes no sense. If the

Respondent had wanted to, as it were, 'get rid' of the Claimant, the Respondent could have done so for no reason at all given that the Claimant had less than two years' service and would have done so as soon as the allegation was made in March 2022, if not beforehand.

134. This is not something the Claimant argued before us, but often in cases like this the claimant says something like: the respondent made up an allegation of misconduct to provide an excuse for dismissing me, because it would look bad to dismiss for no apparent reason. In the present case:

134.1 why would the Respondent pretend that a complaint had been made by the Council if it had in fact come from Mr Burrows, given that the incident as reported by Mr Burrows and a complaint from him would have been excuse enough to dismiss the Claimant?

134.2 the Respondent imposed no disciplinary sanction on the Claimant, let alone dismissed him for alleged misconduct, something it could easily have done. He was dismissed when he refused an offer of alternative employment;

134.3 on any view it was unnecessary for the Respondent to take the trouble to find alternative employment for the Claimant and to keep him on until June 2022.

135. It is evident that the Claimant was very keen to obtain from the Council something saying that he had not been banned from site permanently. He seems to have persuaded himself that what was said and written back to him by the Council was to that effect. However, the Council's messages were in reality carefully worded so as to avoid making any clear statement either way in relation to whether he had or had not been banned, e.g. an email from an Operation Manager from the Council called Kate Jespers of 12 April 2022 replying to an email from the Claimant. Those messages do, though, make clear that he was not welcome on site, e.g. the email from Kate Jespers begins: *"As you are no longer working on our contract, you will not be authorised to enter the depot at this time.*"

136. Not only does the contemporaneous documentary evidence show that it was the Council that banned the Claimant from site, it also shows that the Respondent was discussing with the Council the possibility of him being un-banned, without success. We note, for example, email and telephone discussions between the Mr Vardens and Mr Platt in late April / early May 2022. In an email of 25 April 2022 (page 207 of the bundle), Dean Varden stated: *"I've investigated the incident that had been reported and as you might have imagined the two accounts given by our staff are very different. Without CCTV footage, it's very difficult to apportion blame…. With regards to Balwant Chopra, would you be able to confirm that he has been banned permanently from site please?*". There

was then a telephone conversation between Mark Varden and Mr Platt in which Mr Platt told Mark Varden that the Respondent's contract with the Council would be in jeopardy if the Respondent brought the Claimant back on site. We can see this from Mark Varden's email to Mr Platt of 4 May 2022 (page 208 of the bundle): "*Further to our conversation the other day about Balwant. We take on board your comments and advice, as we wouldn't want to put the renewal of our contract at risk, Balwant will not be returning to site.*"

137. By late May 2022, the Claimant was suggesting that he had a letter from the Council saying he wasn't banned from site. If such a letter has ever existed, the Claimant has never produced it. The extent to which the Respondent was bending over backwards to try and get the Claimant back on site, notwithstanding Mr Platt's clear message to the Respondent that he wasn't welcome from the Respondent's point of view, is shown by Dean Varden's email to Mr Platt of 27 May 2022, which is at page 226 of the bundle: *"As per your instruction we have banned Balwant from site, however he says he has a letter from the council to say he is not banned. Is this true, if so we can have a copy please?*"

138. In relation to this, and in relation to the Claimant's case generally that him being removed from the Council's site was not a response to any complaint by anyone from the Council but was instead the Respondent acting on its own initiative for its own nefarious reasons, it is instructive to look at the letter the Claimant himself sent to the Council by email on 7 June 2022 in which he stated, amongst other things: "*Mr Lee Platt … is responsible for my dismissal from my employment … he wrote to my employer… that I had caused a Health & Safety issue without any proof (of which I have a copy). Further to this, he advised my employer that Wolverhampton City Council no longer wish for me to work at the site after I had words with him. My employer attempted to persuade Mr Lee Platt to reconsider his decision but he refused … Then in March/April I spoke to Kate Jespers (Operations Manager) … and she stated verbally and in writing that NO such policy exists and that Mr Lee Platt or any other member of staff can NOT issue a ban against another person as only persons employed or under official capacity as a visitor can enter the site.*" (Kate Jespers did no such thing, or if she did, she did not do so in any of the messages from her that the Claimant has disclosed). There is nothing in the evidence to explain why the Claimant might have changed his mind about who – Mr Platt or the Respondent – was responsible for him being banned from site. The Claimant has certainly produced no evidence to the effect that he received a response to this email of 7 June 2022 denying that Mr Platt was in any way responsible, or anything like that.

139. In light of the above, even if the Claimant now genuinely thinks it was the Respondent who banned him from the Council site, costing him the job he was doing for the Respondent, he is clearly mistaken. Mr Platt was responsible for the ban. And, as Dean Varden told us, the reason Mr Platt did this was that the Claimant had apparently been

witnessed joking about the fact that he had lifted Mr Burrows up with the 'hopper' at the back of a bin lorry. Given this, and given the obvious efforts the Respondent made to keep the Claimant in gainful employment, the only plausible explanation for the Claimant's dismissal is the one the Respondent has given: that in light of the ban from the Council site, it had limited work for the Claimant to do, that the Claimant was offered what was available, and that he turned it down.

140. In conclusion, the evidence is entirely consistent with what is in the Respondent's letter of dismissal of 6 June 2022; we have no reason to doubt that the reasons given in that letter for the decision to dismiss were the Respondent's genuine reasons; there is no evidence of any substance to support the Claimant's allegations as to the reasons for dismissal, or, indeed, for any other decision the Respondent took or thing the Respondent did in relation to the Claimant that the Claimant is bringing a Tribunal complaint of discrimination, harassment or victimisation about.

EJ Camp

30th January 2024

LIST OF ISSUES

FROM THE RECORD OF THE PRELIMINARY HEARING OF 2 MAY 2023

Harassment

9. The Claimant relies on the following (giving the gist of the words used in each relevant case):

9.1. He says that in September 2021, a colleague called David Burrows said to him in connection with a stain on the side of a lorry, “You should be good at removing it because you eat curries”.

9.2. He says that in September 2021, Mr Burrows said to him, “If you don’t like your job here, fuck off. Why don’t you get a job with the Muslim Pakis around here?”.

9.3. He says that on the same occasion, when he replied that he did not know any such companies, Mr Burrows said, “Just go down to the mosque, there’s about six hundred standing outside there”.

9.4. He says that in September and October 2021, Mr Burrows said to him, “You fucking black bastard”, threatened to punch him, and then said, “Coming to our country, taking our jobs. The [Respondent] only took you on in an emergency; they don’t like Blacks”.

9.5. He says that in October 2021, when complaining about the Claimant’s work, Mr Burrows repeated the comment, “the Company don’t like Blacks”.

9.6. He says finally that Mr Burrows made regular and repeated comments about the Claimant’s colour from October 2021 to March 2022 when the Claimant ceased working at the same site as him.

10. The Tribunal will first be required to determine whether what the Claimant alleges took place.

11. If any of the alleged conduct did take place, the next question will be whether it was unwanted.

12. If any proven conduct was unwanted, the next question will be whether in relation to any of the above conduct it was related to race, and in relation to that summarised at paragraphs 9.2, 9.3 and 9.6 above, whether it was related to religion (the Claimant says Mr Burrows perceived him to be a Muslim).

13. If any unwanted conduct was related to race or religion, the final question will be whether it had the purpose or effect of violating the Claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him (s.26(1)(b) of the Act). Where it is said that the conduct did not have that purpose, but had that effect, the Tribunal will take

into account the matters at section 26(4) of the Act, including whether the Tribunal thinks it was reasonable for it to have the required effect.

14. The Respondent clearly required permission to file an Amended Response in light of the clarification of the Claimant's complaints (see the Orders below). In relation to the complaints which concern Mr Burrows' alleged conduct, if the Respondent raises the statutory defence under section 109(4) of the Act, in order to argue that it is not liable for Mr Burrows' conduct, the Tribunal will also have to decide whether the Respondent took all reasonable steps to prevent Mr Burrows from doing what is alleged or from doing anything of that description.

Direct race discrimination

15. The first issue in relation to direct race discrimination will be whether the Claimant was treated as follows and if so, whether (except in relation to what is stated at paragraph 15.3) he was thereby subjected to one or more detriments. He alleges that:

15.1. (As an alternative to his complaints of harassment) Mr Burrows did the things set out at paragraphs 9.1 to 9.6 above.

15.2. The Respondent dismissed him (he was later reinstated) on or around 10 December 2021.

15.3. The Respondent withheld three weeks' pay (that is the amount he said was withheld, though this differs somewhat from the content of the wages complaints below) on or around 10 December 2021.

15.4. The Respondent did not reply to his complaints about his pay between 11 December 2021 and 18 February 2022.

16. To the extent that the Tribunal determines that he was treated as set out above and that (as far as relevant) he was thereby subjected to a detriment, the second issue will be whether the Claimant was thereby treated less favourably than the Respondent would have treated a hypothetical White comparator in relation to the matters at paragraphs 15.1 and 15.4 and Mr Burrows in relation to the matters at paragraphs 15.2 and 15.3. In any case, the comparator must be someone in not materially different circumstances to the Claimant (section 23 of the Act).

17. If the Claimant was less favourably treated than his comparator in any of the above respects, the next question will be whether that was because of race. If the Respondent raises the statutory defence in relation to Mr Burrows' alleged conduct, the issue referred to in paragraph 14 above will arise.

Direct religion and belief discrimination

18. The first issue in relation to direct religion or belief discrimination will be whether the Claimant was treated as follows and, if so, whether he was thereby subjected to one or more detriments. He alleges that:

18.1. (As an alternative to his complaints of harassment) Mr Burrows treated him as set out at paragraphs 9.2, 9.3 and 9.6 above.

18.2. In December 2021, Mr Burrows said to the Claimant that he (the Claimant) would not be celebrating Christmas.

19. To the extent that the Tribunal determines that he was treated as set out above and that he was thereby subjected to a detriment, the second issue will be whether the Claimant was thereby treated less favourably than the Respondent would have treated a comparator who was not perceived as Muslim, who must be someone in not materially different circumstances to the Claimant (section 23 of the Act).

20. If the Claimant was less favourably treated than his comparator in any of the above respects, the next question will be whether that was because of religion or belief.

21. Again, if the Respondent raises the statutory defence in relation to Mr Burrows' alleged conduct, the issue referred to in paragraph 14 above will arise.

Victimisation

22. As an alternative to the complaints of direct race discrimination set out at paragraphs 15.2 to 15.4 above, the Claimant says that:

22.1. The Respondent dismissed him (he was later reinstated) on or around 10 December 2021.

22.2. The Respondent withheld three weeks' pay (that is the amount he said was withheld, though this differs somewhat from the content of the wages complaints below) on or around 10 December 2021.

22.3. The Respondent did not reply to his complaints about his pay between 11 December 2021 and 18 February 2022.

The Claimant also says that his dismissal on 6 June 2022 was an act of victimisation.

23. The first issue for the Tribunal to decide will be whether the Claimant did one or more protected acts (see section 27 of the Act). He relies on:

23.1. A complaint to Alan Biggle-Smith on or around 19 November 2021.

23.2. A complaint to the Respondent on 15 December 2021.

23.3. A complaint to Dean Vardens on 18 February 2022.

24. It being accepted that the Claimant was dismissed in June 2022, the Tribunal will then be required to decide whether he was dismissed on or around 10 December 2021 and in relation to the matters at paragraphs 22.2 and 22.3 above whether he was subjected to a detriment.

25. The Tribunal will then be required to decide whether this was because the Claimant had done one or more of the protected acts.

Wages

26. The Claimant says that the Respondent failed to pay him what was properly payable as follows:

26.1. On 10 December 2021 by not paying him at all for weeks ending 26 November and 3 December 2021.

26.2. On 24 December 2021 by not paying him at all for weeks ending 10 and 17 December 2021.

26.3. On 7 January 2022, by not paying him at all for weeks ending 24 December and 31 December 2021.

26.4. From January 2022 until 6 June 2022, by paying him for twenty-five hours instead of thirty per week.

27. In his Claim Form, the Claimant stated expressly that the Respondent had "deducted [his] pay for four weeks". Mr Fuller did not take any issue with the clarification that this included the complaint at paragraph 26.3 above, but submitted that the complaint at paragraph 26.4 was not within the Claim Form as there was no reference to regular deductions of pay to June 2022. The Claimant confirmed to me that the total value of his wages complaints is £2,640. In the Claim Form he stated that he wanted "£2,640 for wage deduction".

28. I am comfortably satisfied that what is set out at paragraph 26.4 above is no more than a clarification of what the alleged deduction is comprised of. The complaint is expressly stated in the Claim Form in the way just described and therefore no permission to amend is required as such; all that the Claimant has done is to provide the relevant dates and the specific amounts that he says were deducted. That clarification of his complaint is permitted; there is evidently no prejudice to the Respondent in permitting it; and there is no time limit issue which would mitigate against doing so.

29. The Tribunal will therefore be required to determine:

29.1. Whether the Claimant was paid less than was properly payable to him on any or all of the above occasions.

29.2. If he was, whether the deduction was authorised by a relevant provision of the Claimant's contract of employment or because the Claimant had previously signified in writing his agreement or consent to the making of the deduction (see section 13(1) ERA).

29.3. If not, whether any of the deductions were within section 14 of the ERA because they were in respect of an overpayment of wages.

Written particulars of employment

30. The Claimant clarified that in addition to claiming four weeks' additional compensation (under section 38 of the Employment Act 2002) should any of his complaints set out above succeed, he also seeks a declaration from the Tribunal of the written particulars of employment that should have been provided to him under section 1 and following of the ERA. The Tribunal will therefore be required to decide:

30.1. Whether the Respondent failed to provide any such particulars.

30.2. If so, what those particulars should have been.

Time limits

31. There appears to be no time limit issue in relation to the Claimant's complaint that his dismissal on 6 June 2022 was an act of victimisation nor in relation to his request for written particulars of employment. Depending of course on which if any succeed, in relation to his other complaints, the Tribunal may be required to decide time limit issues under the Act or under the ERA.

32. In relation to the complaints under the Act, the Tribunal may be required to determine whether any discrimination the complaint about which was brought outside the usual time limit constituted conduct extending over a period ending with discrimination the complaint about which was brought in time. It may also be required to determine whether any complaint was brought within such further period as it considers just and equitable.

33. In relation to the complaints about wages, the Tribunal may be required to determine whether:

33.1. They are complaints about a series of deductions.

33.2. If not, whether in relation to any complaint that was brought out of time, it was not reasonably practicable to bring it in time.

33.3. If so, whether it was brought within such further period as the Tribunal considers reasonable.