# EMPLOYMENT TRIBUNALS

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| **Claimant:** | **Mr. Mohammed Usman** |
| **Respondent:** | **Bidvest Noonan (UK) Limited** |
| **Heard at:** | **Birmingham Employment Tribunal** |
| **On:** | **11 – 15 December 2023 in person with some witnesses giving evidence via CVP video link.** |
| **Before:** | **Employment Judge Smart**<br>**Mr. Z Khan**<br>**Mr. Ian Morrison** |
| **Representation** | |
| Claimant: | For himself |
| Respondent: | Ms Gazahleh Rezaie (Counsel) |

# JUDGMENT

The unanimous Judgment of the Tribunal is:

1. The Claimant's claims of harassment related to race are not well founded and are dismissed.

2. The Claimant's claims of direct discrimination because of race are not well founded and are dismissed.

Written reasons have been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013. These are provided below.

# REASONS

## BACKGROUND

1. By claim for presented on 4 September 2021 in the Watford Employment Tribunal, the Claimant brought claims of race related harassment and direct discrimination because of race.

2. The Respondent defended the claims by its response presented on 15 October 2021.

3. Further particulars of the Claimant's case were provided by the Claimant following the Tribunal's order of 23 February 2022. These appear in the bundle at pages 26 – 31. The Respondent says it received these on 13 April 2022.

4. On 12 May 2022, in response to the further information, The Respondent submitted an amended Grounds of Resistance at pages 45 – 47 in the bundle.

5. On 15 June 2022, there was a case management preliminary hearing before Judge Hanning. At this hearing the claims were discussed, clarified and the list of issues for the Tribunal to determine was fixed.

6. It had also been agreed between the parties and ordered by the Tribunal that the case would be transferred from Watford to Birmingham after the case management hearing and this was so ordered.

7. Nothing further of note happened in the preparation of this case until the final hearing.

## THE ISSUES

8. The issues for the Tribunal to determine were clarified at a case management hearing before Employment Judge Hanning sitting in Watford employment Tribunal.

9. The only amendment to the issues at the final hearing was that the issues refer to a Mr. K Eldred as having done certain things. However, it was common ground that this was supposed to refer to Mr. Neil Eldred.

**Harassment**

10. Those issues are as follows:

10.1. That on or about the 22nd of March 2021 the Respondent caused or permitted a person unknown to take a picture of the Claimant without his consent;

10.2. That by the actions of Mr N Eldred, the Respondent criticised the Claimant to say that the Claimant should be doing his part of the job and threatened to take statements from other security officers on site;

10.3. That by the actions of Mr N Eldred, on or about the 28th of March 2022 the Respondent cancelled 3 shifts which the Claimant was scheduled to work;

10.4. That by the actions of Mr N Eldred the Respondent threatened the Claimant that if the Claimant complained about the cancellation of the shifts, then Mr Eldred would use the photograph taken on or about 22nd of March 2021 against the Claimant;

10.5. That by the actions of Mr N Eldred, the Respondent telephoned the Claimant and left voice and text messages between around 29th and 30th of March 2022;

10.6. That the Respondents ignored the Claimant's complaints and/ or grievance;

10.7. That the Respondent failed to undertake a thorough investigation into the Claimant's grievance;

10.8. That during the Claimant’s grievance hearing, the Respondent refused to respond to the Claimant’s allegations of racism;

10.9. That the Respondent failed to conclude the Claimant’s grievance fairly;

10.10. That the Respondent failed to provide the Claimant with HR support by delaying the outcome of the Claimant's grievance, not responding to an e-mail about an appeal hearing and delaying that appeal hearing.

11. If the Respondent is found to have done the alleged acts or omissions, was that unwanted conduct?

12. If so, did it relate to race?

13. If so did the unwanted conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

14. When considering whether it had this purpose or effect the Tribunal must take into account the perception of the Claimant, all of the circumstances of the case and whether it was reasonable for the conduct to have that effect.

**Direct discrimination**

15. Alternatively, the Claimant alleges that the above listed incidents amount to less favourable treatment because of the Claimant's race.

16. The Claimant describes himself to be of Asian/ Pakistani heritage and of Kashmiri heritage.

17. The Claimant does not identify any actual comparators in his claim and therefore the relevant comparator is a hypothetical comparison who does not share the Claimant's race or heritage who is in circumstances that are not materially different when compared to the Claimant's circumstances.

18. Did any of the above listed incidents amount to less favourable treatment?

19. If so was that less favourable treatment because of race?

20. If so did any of the Respondents treatment of the Claimant amount to a detriment in employment in accordance with section 39 of the Equality Act 2010?

**Jurisdiction**

21. The last pleaded act of discrimination was the delay of the appeal hearing which took place 4th October 2021.

22. The claim form was presented to the employment Tribunal on 4th September 2021.

23. The ACAS conciliation notification was received on the 23rd of June 2021 on the date of issue of the early conciliation certificate was 4th August 2021. The ACAS conciliation period was therefore 42 days.

24. This means that any discrete acts or omissions that are alleged to be discrimination from before 24th of March 2021 would be out of time unless it is made out that there is a continuing course of conduct by the Respondent which amounted to a series of acts of discrimination to bring the historic complaints in time or it is just and equitable to extend time.

25. Consequently, the Tribunal must ask was the claim made to the Tribunal within three calendar months less one day plus any early conciliation extensions of the last act to which the complaint relates?

26. Was there a series of discriminatory act or omissions that amounted to conduct extending over a period by the Respondent?

27. If not and any of the claims are out of time, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

    27.1. The reasons for the complaints not being made to the Tribunal in time;

    27.2. In any event whether it is just and equitable in all the circumstances to extend time.

## THE HEARING

### Representation

28. The Claimant attended alone and had advisors. He was a litigant in person. Steps were taken by the Tribunal to try to place the parties on an equal footing. Each step of the case was explained to him such as the giving of evidence, how that would be done. How to cross examine and the importance of covering all aspects of the list of issues was also explained to him. We also explained all the legal tests as best we could without using technical language and how closing submissions was to be performed reminding the Claimant to focus on why he believed he should win his case about the claims brought in the list of issues.

29. It was explained that the Tribunal would offer all reasonable assistance that it could to the Claimant, but this did not amount to putting a positive case forward for the Claimant. Where the Claimant had not questioned a witness about a specific issue, we asked the relevant witnesses open questions based on the list of issues and the points made in the Claimant's witness statement.

30. By the end of the hearing after the assistance given above, we are content that the Claimant was at much less of a disadvantage than he would have been given he was not represented and the Respondent had solicitors and counsel. No objections were raised by the Respondent to any of the above approaches during the hearing.

**Suggestion of an amendment application**

31. The hearing commenced with the Claimant initially stating that he may wish to apply to amend his claim to add allegations of victimisation. We explained that situation to him and, as this was objected to by the Respondent, he would need to apply formally to amend his claim with precise details of what that amendment would be and that this may delay the determination of his case.

32. Upon asking the Claimant whether he wished to make a formal application to amend the claim, he decided to carry on with the list of issues as already written, without making an amendment application.

**Additional documents**

33. The Claimant wanted to include a few documents that were not in the bundle. These documents consisted of:

    33.1. The Claimant's employment offer letter dated 29 August 2014 from Advance Security (now page 183 – 184 in the bundle);

    33.2. A clearer version of page 84 in the bundle (now page 185 in the bundle);

    33.3. An email and attached correct version of the appeal outcome letter sent to the Claimant on 5 November 2021 at 14:04 referencing that grievance point 3 is upheld (page 186 onwards in the bundle);

34. We requested the parties discuss these documents to see if they could come to an agreement about them.

35. The Respondent returned and had no objection to any of them being admitted as evidence. The documents were therefore added to the bundle by consent.

## The Respondent's application for specific disclosure on day 2

36. At the end of the first day, whilst Mr. Usman was being cross examined, an issue arose about the appeal meeting notes disclosed to the Respondent. The last few pages were missing.

37. The Respondent accused Mr. Usman of deliberately deleting or failing to disclose these pages. Mr. Usman said that the notes were taken and forwarded to him by his Union rep from GMB. When they were emailed to him the scan of the handwritten notes was already missing the last few pages.

38. This prompted the Respondent to make an application for specific disclosure of the email from GMB to the Claimant attaching the notes. The Claimant confirmed he had the email in his possession.

39. We decided to hear the application the next day as it was already past 16.00. In the meantime, we requested Mr. Usman to provide the email and attachment to the Respondent so that, if possible, an agreement could be sought about the document if possible. We could then look at hearing the application, if required, the following day.

40. As this was now the second issue with documents on the first day of the hearing, both parties were asked to revisit disclosure because, in our view, that should now be the final time disclosure is revisited unless something exceptional happened.

41. We commenced the hearing on day 2 and it appeared that the Respondent's accusations towards the Claimant were misconceived. The attachment from the GMB was how the Claimant had described. It was sent to him missing the final few pages of the notes.

42. The Respondent therefore withdrew its application.

43. Nothing else of note happened at the hearing and the case ran relatively smoothly thereafter.

## Written reasons

44. Written reasons were requested on 29 December 2023.

## THE EVIDENCE

45. We were provided with a bundle of documents of 182 pages and the additional documents added to the bundle by consent.

46. We heard evidence from the following witnesses for the Claimant:

    46.1. The Claimant himself;
    46.2. Mr. Awais Zamir via CVP a security colleague of the Claimant;
    46.3. Mrs. Sabiha Ally via CVP a security colleague of the Claimant.

47. We heard from the following witnesses for the Respondent:

    47.1. Mr. Kevin Cooney – Account Director;
    47.2. Mr. John Rendal – Regional Manager for Warehouse and Distribution in North of England at the material times in the case.

## THE FACTS

48. The Respondent is a Commercial services company offering, amongst other things, site management services such as security officers. It is a very big company with thousands of employees. It has its own HR department and multiple sites in the UK.

49. By offer letter dated 29th of August 2014, the Claimant wars offered employment as a security officer at pages 183 in the bundle.

50. On the 1st of September 2014, the Claimant signed the Respondent's contract of employment at page 68 in the bundle.

51. The contract of employment contained a number of relevant clauses. These were:

    51.1. *6.2.1 you will protect and guard the premises and property of the group's clients in accordance with the group's procedures and to the standard required by the group;*

    51.2. *6.3 you will at all times carry out all of your duties diligently and faithfully and act in the best interests of the company and the Cordant Group and its clients;*

51.3. *7.1 your hours of work will vary according to the work requirements of the business. It is a condition of your employment that you work flexibly in accordance with the working arrangements we operate;*

51.4. *7.4 there is no obligation on the company to make available all or part of the minimum hours in any particular months or weeks or to spread them evenly over the year or to provide them at particular intervals. You acknowledge that there may be periods when no work is allocated to you;*

51.5. *7.8 any payment in respect of a failure to meet the minimum obligation will be at the national minimum wage rate;*

51.6. *7.9.1 your hours of work will vary from assignment to assignment. The company may change the shift pattern that you are required to work. You will be given reasonable notice of any such change;*

51.7. *8.1 you have no permanent place of work but will be required to work at a series of customers sites in accordance with the demands of the business. In accordance with the security procedures of the company, you can expect to be sent to different customer sites on a regular basis;*

51.8. *8.3 you agree, having regard to the nature of the company's business, the company may at anytime change your place of work to suit the needs of the business and its clients.*

52. The company also had in effect as of 2019 onwards an employee handbook. Extracts of the Handbook were in the bundle at pages 69 to 78.

53. One of the policies in the bundle, was the equality and diversity policy, which describes types of discrimination and who is responsible for ensuring the policy is upheld at page 70 – 71.

54. There was also a bullying and harassment policy at the end of page 71 in the bundle.

55. The Claimant's team had Black and Asian heritage colleagues making up about 75% of the workforce.

56. At all material times, the Claimants line manager was an account manager by the name of Neil Eldred. By the time of the Tribunal hearing, Mr Eldred had left the Respondents employment and he therefore gave no evidence at the hearing.

57. Mr Eldred's line manager was a regional manager by the name of Kevin Cooney who gave evidence at the final hearing and who had investigated the Claimant's grievance.

58. It was clear that the relationship between the Claimant and both customers and his colleagues had not always been rosy. For example, there was an incident at the Wayfair customer site where a customer had taken exception to the fact that in their view the Claimant had failed to react quickly enough to a driver who had attended the site and had gone missing for 30 minutes. It turned out that the member of staff at the customer site who had dealt with the situation, dealt with it inappropriately and the customer later apologise to the Claimant about this incident at pages 79 to 81 in the bundle and page 84 - 85. Here the customer's Sandra Rutkowska said:

*"Thank you very much for your explanations. I fully agree with you that she is not in a place to make such statements. First of all she should report that to L2 rather than doing something on her own. Ellernay has been instructed already. I apologise for any inconvenience."*

59. This had resulted in the Claimant's line manager Neil Eldred having a documented conversation with the Claimant about what he viewed as abrupt responses to the client and also an issue with talking to the client directly which the Respondent stated no security guard should be doing when it comes to issues such as complaints. This conversation is documented at pages 82 to 83 in the bundle.

60. There were also documented performance concerns. Mr. Eldred raised the following criticism of C's performance:

    60.1. Being on time
    60.2. Wearing appropriate uniform
    60.3. An issue about a patrol of the ASOS site, which was then a building site and

60.4. Taking excessive breaks.

61. These allegations were all made between 24 June 2020 and 29 March 2021 according to the texts in the bundle at pages 105 – 114.

62. When considering the Claimant's punctuality and uniform, Mr. Eldred had texted the Claimant to say:

*"please be on time for shifts on my sights and be dressed fit for work. I'm getting complaints in the early hours. It is your responsibility to be in time and wearing uniform. If you are not in uniform in the next hour once shift change over I will be coming to site today to carry out an investigation"* at page 105 in the bundle.

63. On a separate occasion, Mr. Eldred sent another text message about breaks and a text conversation happened at pages 112 – 113 in the bundle:

*Mr. Eldred: "Can you please [n]ot take excessive brakes o[n] my site in your car"*

*Claimant: "Okay no worries I only took 35min"*
*"I thought it's okay to take a break in the car that[s] why I had it in the car"*

*Mr. Eldred: "Please take you[r] break times where ever you want to but do not exceed them"*

*Claimant: "I did not exceed come back from reception 12:05 come in to gatehouse 12:35*

*Mr. Eldred: "Ok thanks [2x thumbs up emojis].*

64. Then there were texts about the sleeping and photo which we will come onto later.

**Incident of 22 March 2021 - the photograph and sleeping incident**

65. On 22 March 2021, the Claimant was working at the ASOS site. He had been assigned there for temporary sickness absence cover.

66. At one point whilst he was on shift, it had appeared to a female colleague of the Claimant's that he was asleep whilst on shift.

67. The Claimant's colleague had taken a photograph of the Claimant using her phone and had reported this to the Claimant's manager at the time Mr. Eldred.

68. We were not assisted by having a copy of the picture, because it was common ground that, at the Claimant's request during his grievance procedure, the Claimant had asked the Respondent to delete the photo because he said it was a breach of privacy and the Respondent had deleted it.

69. Some confusion had therefore crept in about whether the Claimant was in his car at the time this incident took place or whether he was in the gatehouse. However, we have been greatly assisted by the contemporaneous report made by Mr. Eldred at the time the incident was reported to him. The report is in the bundle at pages 153 – 154.

70. This report is known as a *"Banned Tracker"* report. The Claimant was asked about this document in cross examination and we were referred to it several times during the hearing. It was common ground that this was the report produced by Mr. Eldred after the sleeping incident was reported to him. The relevant parts of the document are below:

70.1. *"Officer name: Mohammad Usman"*

70.2. *"Reason for ban: Suspected of falling asleep in gatehouse witnessed and reported by 113702"*

70.3. *"Confirmed with HR to check if Officer is on guaranteed hours? No*
*Why the Officer is not on: Support"*

70.4. *"Officer informed of ban by Ops Manager? Yes*
*Date informed: 29/03/2021*

*Time informed 13:06"*

70.5. *"Disciplinary action required? No*
*Please advi[s]e reason no action: Officer denies allegations. Asked to take breaks in car in future to avoid confusion. Photo of guard suspiciously looking asleep."*

71. We therefore conclude having heard all the evidence on this issue that the Claimant was on a break in the Gatehouse whilst on shift. He had fallen asleep or was dozing off on his break. The officer reporting this, after taking the photo, believed he was working and on shift because he was present in the gatehouse. This was reported to Mr. Eldred on 29 March 2021. As soon as Mr. Eldred was informed of the issue, he removed the Claimant from site by speaking to him about this incident and completed the Banned Tracker report.

72. There appears to be nothing improper about this document. We accept the Respondent's evidence that the way Mr. Eldred behaved was in its view standard procedure and in our experience reflects the procedure that would be carried out at a lot of security employers.

73. At the final hearing, for the first time in the proceedings, the Claimant alleged that the Banned Tracker at page 153 in the bundle had been fabricated by the Respondent to back up the reason they were pushing forward as to why his shifts had been cancelled when the real reason was in fact race discrimination.

74. We found no evidence that this was the case and the Claimant had not led any evidence in his witness statement to that effect. For the avoidance of doubt, we did not find any evidence to support that any documents in this case had been fabricated by the Respondent.

75. The Claimant alleged that the Respondent caused or permitted this photograph to be taken of him as an act of race harassment or direct race discrimination. Unhelpfully, neither the Claimant's colleague or Mr. Eldred gave evidence so we had to make a decision about what happened based on the documents and the evidence from Mr Usman and the Respondent's witnesses.

76. When it came to how the photo had been taken, it was clear to us that the Claimant's colleague had taken the photograph by herself without seeking permission to take it from either the Claimant or the Respondent's management and without informing anyone that she had taken it until the report was made to Mr. Eldred.

77. There was no evidence at all that the Respondent had caused or permitted the photograph to be taken. We find that the cause of the photo was the Claimant being asleep in the gatehouse and the Claimant's colleague had acted entirely alone when she took the photograph.

78. Consequently, based on the facts alone, the allegation in the issues at paragraph 10.1 above fails.

**The shift cancellations**

78. A few days before 29 March 2021, the Claimant had the following text exchange with Mr. Eldred:

*"Claimant: hi mate just been told I was caught sleeping that's why I've been taken off my shift which is load of carp.*

*Mr. Eldred: Hi I have seen photographic proof that you were either resting your eyes and I'm being generous there in what I have seen. If I saw you in the position I have seen you in I would after strongly believed you were totally out of it and not in a very good place. If the client would have seen you it would be a different matter to be honest you're lucky we just took you off the shifts at ASOS."*

79. It was common ground between the parties that the shifts had been cancelled. The Claimant alleges that they were cancelled because of Mr Eldred continuing to discriminate against him on grounds with race either directly or via harassment. The Respondent argued that Mr Eldred had taken the Claimant off those shifts purely as a result of this allegation and another two allegations of time keeping and failing to wear uniform at the ASOS site, which in its view it had the contractual right to do.

80. We agree with the Respondent. It had a contractual right to take the Claimant off his shifts. This was in the contract of employment at clause 8.3. Having been found to be asleep by a colleague in the customer's gatehouse, there was no doubt in our mind that the Respondent needed to remove the Claimant from that site as a business need.

81. The Claimant also argued that Mr Eldred did not have the authority to take a security officer off shift without conducting an investigation. The evidence of both Mr Randall and Mr Cooney was clear and supported by the contract of employment namely at clause 8.3, that the account managers of the Respondent could change a person's place of work to meet the needs of the business.

82. In addition, the Claimant was a Mobile Security Officer/ Mobile Relief Officer where there was a general and reasonable expectation that, on any given shift, the job role meant that the employee could be working at a different site each shift. We believe the Respondent's witnesses when they said that the point of

having MSO is to fill shifts at short notice that have been vacated because of sickness absence other absence or because of what they call a "blowout" where they have not been able to fill that particular shift after trying to cover it with all other security officers.

83. In addition, we asked the Claimant what would normally happen if a security officer was found to be asleep whilst on shift. The Claimant responded by saying it would normally be an investigation and suspension. It is therefore significant that although the Claimant is arguing that Mr. Eldred effectively had it in for him because of his race, Mr. Eldred had an opportunity to potentially instigate the Claimant's dismissal for sleeping, yet he chose to deal with the situation informally and in our view gave the Claimant the benefit of any doubt.

84. On 26 April 2021, once the Claimant had submitted his grievance about the shift cancellations to the Respondent, Mr. Cooney asked Mr Eldred by email to explain what had happened about these shifts. This is by an email chain at page 89 in the bundle that says:

*"Hi Neil,*

*Please tell me how many times and what dates you removed Mohammad Usman from the ASAO site whilst he was providing temp sickness cover please. He claims that you cancelled his x3 allocated shifts.*

*Cheers*

*Kev"*

And

*"Hi Yes,*

*I cancelled approx three shifts I believe that he was due to work, due to the issues highlighted to me.*

*I didn't want any noise on ASOS by a officer scheduled to provide cover.*

*Kind regards*

*Neil"*

79. Consequently, no evidence has been provided by the Claimant to challenge the reason put forward by the Respondent for Mr. Eldred cancelling the shifts, namely that he cancelled them in response to the Claimant being found asleep in the gatehouse, which would have caused embarrassment and possible customer relations difficulties with ASOS.

**Mr. Eldred making threats generally**

80. The Claimant complains that Mr. Eldred had threatened to the Claimant to the effect that if he complained about the cancelled shifts, Mr. Eldred said he would use the photograph against the Claimant.

81. The Claimant was asked how this threat had been made. The Claimant said all the threats were made by voicemails and text messages.

82. We were referred to the text message the Claimant relies upon in the bundle. There is only one text that we considered to be a threat and that was the message where the Claimant had been reported as not having had the correct uniform on and Mr. Eldred said that if the Claimant was not in his uniform by next shift changeover, he would come onto site to conduct an investigation. Was this a rather blunt communication? Of course it was. However, if a manager has received reports of poor conduct like Mr. Eldred had, then we don't think the threat of conducting an investigation was over the top or improper.

83. The other part of the alleged threats to take statements is contained within the further particulars at page 27 in the bundle where the Claimant describes a phone call he says happened, when there were disagreements on site about how things should be done. IT says as follows:

*"On the 24th March 2021 there were some disagreements on site with other 2 guards where I spoke to Neil about it and discussion was over the phone and texts messages and Neil and I had addressed certain things and I was told by Neil I should be doing my part of the job? I told him I am doing what I supposed to be doing as part of my job. He then threatened me about statements from other staff. I told him if that is the case you should go ahead and get the written statements."*

84. This is repeated word for word in his witness statement. Mr. Eldred was not here to contest what was said during this conversation. We believe it was likely that a

conversation to this effect took place. However, we can see no problem with Mr. Eldred saying he would come in and take statements when there is quite clearly, on the Claimant's case, an employee relations issue brewing between members of the same team. That situation would need to be effectively managed before the team started to become inefficient or things started to escalate.

85. There is no other evidence that the Claimant was threatened by Mr Eldred. When it came to the voice notes that were alleged to have contained threats by Mr. Eldred, the Claimant was asked whether he had kept these voice messages. His answer was no - they had been automatically deleted.

86. We found that answer to be significant. If the Claimant had thought, at the time, he was being seriously mistreated and discriminated against as he now alleges, there was no doubt in our minds that he would have kept the voice notes or at least noted them down in some way. The fact he hasn't done that, not only casts doubt on the plausibility of his discrimination claims but also means he cannot factually prove these additional threats actually happened.

**The Claimant's grievance procedure**

87. On 8 April 2021, the Claimant submitted his grievance by email and word attachment. It complained about the following issues:

    87.1. That his three shifts had been cancelled by Mr. Eldred
    87.2. That someone had taken his photograph without consent
    87.3. That there were safety issues that had not been looked into by Mr Eldred
    87.4. That he had been bullied and harassed on numerous occasions
    87.5. There was favouritism towards others
    87.6. That removing him from site without an investigation was unjustifiable and unfair.

88. On 9 April 2021, the complaint was forwarded by Anna Krakowska to Cordant HR at page 86 in the bundle. This was then picked up by Kirsty Black Regional HR Adviser on 16 April 2021.

89. On 20 April 2021, the grievance was forwarded to Kevin Cooney by email enquiring about whether he could hear the grievance next week again at page 86 in the bundle.

90. On the same date, Mr Cooney states that he is free at various times on 27 and 29 April 2021 the following week.

91. The hearing was eventually organised for 15.00 on 27 April 2021 at page 87 on the bundle.

92. The invite was sent to the Claimant. However, he was on paternity leave when the invite was sent to him as logged in Ms Black's email of 26 April 2021 at page 88 in the bundle.

93. The Claimant asked whether the date could be booked on 10 May 2021 instead. The meeting was then set up for 10 May 2021 at 10am again at page 88 in the bundle.

94. We have already discussed that Mr Cooney then asked Mr, Eldred about the three cancelled shifts by email.

**The allegations that the Respondent failed to conclude the Claimant's grievance fairly and failed to undertake a thorough investigation into the Claimant's grievance;**

95. Significantly, Mr. Cooney asked Mr. Eldred to undertake some of the investigation for him. This is confirmed at paragraph 26 in Mr. Cooney's statement. He says as follows:

*"I felt that I needed to discuss Neil's actions further with him and so, I reached out again. I recall asking Neil about all aspects of his decision, what he had done to investigate and whether there was anyone on the site that could substantiate Mohammed's claims of discrimination and unfair treatment. Neil went away and interviewed the officer on the team but no evidence was found and no one came forward to support Mohammed's claims of discrimination, neither as being common place at Bidvest nor in direct relation to Neil. Neil told me that he was hurt by the claims Mohammed had made. My professional and personal opinion of Neil is that he was a fair and unbiased manager who worked with a diverse team and had never, whilst under my management, been accused of any kind of racism, discrimination or favouritism."*

96. It's fair to say that this was a grossly unsatisfactory situation for the Claimant. He had complained about unfair and biased treatment by Mr. Eldred. Mr. Eldred had then been asked to investigate these concerns about him by himself. It is therefore unsurprising to us that Mr. Eldred could not find any evidence to substantiate the complaints against himself.

97. It was grossly unfair to the Claimant that Mr. Eldred was asked to investigate these issues. The investigation into the issues was therefore seriously flawed from the outset. An independent manager should have investigated these complaints or indeed Mr. Cooney should have investigated them himself. To his credit, when this was put to Mr. Cooney, he accepted that this was not the appropriate way of going about an investigation.

98. To make matters worse, there are no notes of any of the conversations Mr. Eldred and Mr. Cooney had verbally or any notes of any of the investigations conducted by Mr. Eldred.

99. When considering the investigation that Mr. Cooney undertook himself, the only evidence we could find of any documented investigation, was a review of the text messages presented late on the process by the Claimant and an email from Mr. Cooney to Mr. Eldred asking him the reasons for the three cancelled shifts.

100. What is striking is what is missing. There are no witness statements from any interviewed colleagues. There are no interview notes where Mr. Eldred, the key witness in these complaints apart from the Claimant, was interviewed about these allegations.

101. In addition, on appeal Mr. Rendall appears to have failed to see the problem with the procedure that Mr Cooney followed in asking the alleged perpetrator to investigate the complaints made against themselves or the problem with the lack of witness interview notes. This meant that this flaw in the process was not remedied at appeal stage either.

102. It was therefore clear to us, that the grievance process was not fairly concluded as the Claimant correctly alleged nor was the investigation anywhere near thorough enough.

**The allegation that the Respondent refused to respond to the Claimant's allegations of racism during the grievance meeting.**

103. On 25 May 2021, the grievance meeting took place. The Claimant attended with his Union representative from GMB Roy Watkins. Mr. Cooney was accompanied by Kirsty Black from HR and Alex Young, Operations Manager, who took the notes.

104. The Respondent's notes of the meeting are in the bundle at pages 90 – 93. The Claimant's notes of that meeting are at pages 95 – 103.

105. Towards the end of the grievance meeting, the Claimant alleged for the first time that he believed his treatment by Mr. Eldred was motivated by his colour and that Mr. Eldred treated minorities differently.

106. In response to this, Mr. Cooney asks the Claimant to provide evidence to support these allegations. At page 93 in the bundle.

107. Similar words are noted at page 102. Here the Claimant mentions he believed he was being treated differently because of his colour. In response, Mr. Cooney askes the Claimant to explain this to him. The Claimant agrees to provide any additional evidence about the grievance the following day.

108. What is significant here is that rather than gloss over the allegations of race discrimination, Mr. Cooney is documented in the Claimant's own notes as asking the Claimant to explain why he believes this and to provide further evidence about it.

109. There is no refusal to respond. Mr. Cooney actively enquires about the allegations.

110. Consequently, the allegation at paragraph 10.8 of the issues (above) fails on the facts. There was no refusal to respond as the Claimant describes.

**The allegation that the Respondent ignored the Claimant's complaints and/or grievance.**

111. The Claimant provided the text messages at pages 117 – 127 as evidence of the discrimination, bullying and harassment he says he suffered. These are the same texts that are in the bundle at pages 104 – 114.

112. By this point, the outcome to grievance was nearly written and as a result of the text messages, Ms Black asked Mr. Cooney by email, whether there were any amendments that needed to be made to the draft outcome letter at page 115 in the bundle.

113. On 7 June 2021, Mr. Cooney sent the Claimant his outcome letter. It is in the bundle at pages 129 and 130. It responds broadly to all the Claimant's concerns that he originally complained about.

114. The outcome letter is however silent about the race discrimination issue. Mr. Cooney explained in evidence that he had not responded to that in the letter because HR advised him that he had done everything he needed to do to respond to the grievance.

115. When looking at the evidence as a whole, the meeting notes and the emails and correspondence about the grievance and how it was conducted, we are not persuaded that the Respondent ignored the Claimant's grievance or ignored the Claimant's complaints.

116. All of the complaints were looked into and whilst the procedure adopted by Mr. Cooney was defective, it cannot fairly be said that he ignored any of the complaints or the grievance as a whole. Indeed some of the grievance was upheld.

117. Consequently, the allegation at paragraph 10.6 in the issues listed above fails on the facts. The Respondent simply did not ignore the grievance or the complaints within it.

118. After parts of the grievance were upheld, we believe Mr. Cooney where he stated that he took steps to follow HR's advice that taking pictures of a colleague without permission was not appropriate and that steps were then taken to delete and destroy all copies of the photo as per his witness statement at paragraph 47.

119. The Claimant was also issued with an apology from Mr. Cooney because he found that there appeared to have been some miscommunication about breaks and he felt things could have been explained more clearly at page 130 in the bundle.

**The allegation that the Respondent failed to provide the Claimant with HR support by delaying the outcome of the Claimant's grievance, not responding to an e-mail about an appeal hearing and delaying that appeal hearing.**

120. Once drafted the outcome letter was sent to Ms Black in HR by Mr Cooney for her to send out.

121. By 12 June 2021, the Claimant had not received the outcome to his grievance. He therefore sent an email to Ms Black chasing this at page 131 in the bundle. Significantly, this was not copied to Mr. Cooney.

122. Unfortunately, Ms Black again failed to send out the outcome letter. Mr. Cooney became aware of this when he received email contact from Jack Timmington on 1 July 2021, from GMB who informed hm the letter had not been sent out at page 132 in the bundle.

123. Mr. Cooney immediately contacted Ms Black to find out what had happened and the letter was then sent out the same day within an hour by email again at page 132 in the bundle.

124. In his witness statement, Mr. Cooney said at paragraph 57 that the reason for the delay in the outcome letter from the grievance was "…*owing to an increased workload within the HR department following several individuals leaving the business and the pressures of the pandemic."*

125. However, by the time of the hearing, Kirsty Black was said to have left the Respondent's employment and Mr. Cooney's evidence had changed. During questioning, he said as follows *"When I first knew of the issue with the outcome letter not being sent, Kirsty Black said she would look into it. I was mortified and then it was sent out within a few hours. Kirsty Black was poor at her job to the point of incompetence. I believe the outcome letter was delayed because of her failing to send it out at the correct time when she was sent the final amendment to it at the relevant time."*

126. These paragraphs are starkly different. The Judge asked Mr. Cooney why things were not said like this in his witness statement and Mr. Cooney responded with *"I don't know".*

127. Then Mr. Rendall, in his statement, says as follows about the situation at paragraph 30 *"…I did not think this was a deliberate attempt to ignore Mohammed but more a reflection of the pressures the business was facing as a result of the pandemic and at that time, a lot of people within the HR team had left the business. This had resulted in an increased workload for individuals, such as Kirsty, who assisted Kevin with Mohammed's grievance."*

128. Here, the more plausible answer is what is contained within both the original witness statements. Mr. Cooney's evidence about Ms Black appeared to us to be an attempt to deflect blame onto an absent HR colleague, who was not present to explain themselves.

129. We therefore found that where Ms Black had missed things in either the grievance or the appeal, the real reason for these mishaps was genuine mistake due to the pressure of work caused by the pandemic combined with colleagues leaving. There was no other credible evidence to the contrary and certainly no persuasive evidence was put forward by the Claimant, that this was because of his race or because Ms Black had any sort of issue with Mr. Usman.

130. By email of 4 July 2021, the Claimant appealed against his grievance outcome at page 132 in the bundle. This email was again sent to Kirsty Black without copying in Mr. Cooney.

131. Ms Black then appears to have failed to do anything with the appeal. After waiting for several weeks, the Claimant then wrote to the Respondent on 3 September 2021 to explain how he felt about the situation and the fact that he knew of others who had apparently submitted grievances about the company and these had not been adequately responded to at pages 135 – 136 in the bundle.

132. The letter was initially forwarded to Mr. Cooney, but he correctly identified that this was an appeal not a fresh grievance and he should not deal with it because he made the original decision at page 137 in the bundle.

133. On 8 September 2021, the Respondent's Dana-Lynn Meyer (HR Adviser) sent a message to the Claimant to try to clarify what had happened because of how late the appeal appeared to be. The Claimant did not respond to that email.

134. On 23 September 2021, after hearing nothing from the Claimant, Ms Meyer organised an appeal meeting for 27 September 2021 at 11am as per her email to the Claimant at page 142 in the bundle.

135. On 25 September 2021, the Claimant responded saying he would need to change the date of the meeting for 4 October 2021. The meeting was then changed to 4 October 2021 by Ms Meyer as per her email at page 143 in the bundle.

136. On 30 September 2021, the Claimant was invited to attend an appeal meeting due to take place on 4 October 2021 as per pages 140 – 141 in the bundle.

137. On 4 October 2021, the meeting took place. Apart from the fact that the appeal manager failed to spot the flaws in the previous process conducted by Mr. Cooney (already discussed above and also below), it is not necessary to go into the detail of the appeal.

138. On 3 November 2021, Dana Lyn Meyer, Regional HR advisor, wrote to the Claimant with the outcome of the appeal confirming what she says Mr. Rendall's findings were at pages 158 – 160 in the bundle.

**The evidence of Mr. Zamir and Mrs. Ally**

139. The Claimant sought to call Mr. Zamir and Mrs. Ally to support the fact that his colleagues were also treated poorly when they complained about the company in support of his race discrimination complaint.

140. It is important to note here that the Claimant relies on the following in support of his race claim:

    140.1. His Pakistani heritage;
    140.2. His Kashmiri heritage;
    140.3. His Asian heritage.

141. When the claim was clarified and the list of issues produced, the Claimant did not rely on the colour of his skin and he did not rely on any religion or belief. He relies on a hypothetical comparator who does not share his Pakistani, Kashmiri or Asian heritage who was in the same or not materially different circumstances to him.

142. However, by the time of the hearing, he also relied on the colour of his skin.

143. Mr. Zamir's evidence was that he had submitted a verbal complaint about being taken off site unfairly. He thought this was treatment because of his colour. His evidence went no further than this.

144. We found Mr. Zamir's evidence to be unreliable. We say this because at one point and in his statement, he said he raised concerns verbally in a zoom meeting, then said he had submitted written complaints, then admitted he had not submitted any written complaints when challenged about those.

145. Mrs. Ally was a more reliable witnesses and said she was treated unfairly when she raised a complaint about a colleague who had allegedly stated that they did not like Muslims. She said that the Respondent had failed to respond to her complaint about this treatment at all after it had been submitted.

146. However, whilst Mrs. Ally sounded credible and honest, we were presented with no written complaint and no evidence of how this was chased up. We would have expected this complaint to have been disclosed as with other documentary evidence.

147. Both Mr. Zamir and Mrs. Ally therefore alleged that their written complaints had not be handled fairly, but we had no evidence to prove this other than their say so.

148. In addition, although the Claimant and his colleagues were alleging they had all been treated in a similar way by the Respondent when they had made complaints, absolutely no evidence was put forward showing that a person who did not share the Claimant's heritage, or who was not of Pakistani Asian complexion and who was in circumstances not materially different from his own, would have been treated more favourably.

149. The Claimant did seek to rely upon the white female security guard as being treated more favourably to him in that she was not disciplined for taking a photo of him, but he was removed from site. However, the guard taking a photo of the Claimant and the Claimant being asleep on shift were two entirely different circumstances and differed because the taking of the photo would not have cause client relationship difficulties whereas the Claimant sleeping in the gatehouse was very likely to. In addition, the Claimant sleeping was gross misconduct and the taking of the photo to evidence him sleeping on shift was, in our view, not gross misconduct.

150. Having heard from the Respondent's witnesses and seen how the grievance procedure was dealt with, we concluded that anyone would have had the same experience regardless of race.

## THE LAW

151. In coming to our decision, we have taken into account the Equality Act Statutory Code of Practice for Employment.

### Burden of proof

152. Section 136 of the Act provides as follows:

*"(1) This section applies to any proceedings relating to a contravention of this Act.*

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

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

153. Direct evidence of discrimination is rare and Tribunals frequently have to consider whether it is possible to infer unlawful conduct from all the material facts. This has led to the adoption of a two-stage test, the workings of which were described in the annex to the Court of Appeal's judgment in **Wong v Igen Ltd (formerly Leeds Careers Guidance) [2005] ICR 931**, updating and modifying the guidance that had been given by the Employment Appeal Tribunal in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205.**

154. The Claimant bears the initial burden of proof. The Court of Appeal held in **Ayodele v Citylink Limited and anor [2017] EWCA Civ. 1913**

155. At the first stage, the Tribunal does not have to reach a definitive determination that there are facts which would lead it to the conclusion that there was an unlawful act. Instead, it is looking at the primary facts to see what inferences of secondary fact could be drawn from them.

156. As was held in **Madarassy v Nomura International plc [2007] IRLR 246**, "could conclude" refers to what a reasonable Tribunal could properly conclude from all of the evidence before it, including evidence as to whether the acts complained of occurred at all. In considering what inferences or conclusions can thus be drawn, the Tribunal must assume that there is no adequate explanation for those facts.

157. Unreasonable behaviour of itself is not evidence of discrimination – **Bahl v The Law Society [2004] IRLR 799** – though the Court of Appeal said in **Anya v University of Oxford and anor [2001] ICR 847** that it may be evidence supporting an inference of discrimination if there is nothing else to explain it.

158. In a harassment case, the first stage of the burden of proof is particularly relevant to establishing that the unwanted conduct was related to the protected characteristic.

159. A mere failure to investigate a complaint of harassment will not in and of itself be an unlawful action. **Home Office v Coyne [2000] IRLR 838.**

160. It is clear that the inaction of an employer can be unwanted conduct. However, if that decision is taken on grounds unrelated to the protected characteristic, then it will not be harassment **Conteh v Parking Partners Limited [2011] ICR 341.**

161. If the burden of proof moves to the Respondent, it is then for it to prove that it did not commit, or as the case may be, is not to be treated as having committed, the allegedly discriminatory act.

162. To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the prohibited ground. That would require that the explanation is adequate to discharge the burden of proof on the balance of probabilities, for which a Tribunal would normally expect cogent evidence.

163. All of the above having been said, the courts have warned Tribunals against getting bogged down in issues related to the burden of proof – **Hewage v Grampian Health Board [2012] ICR 1054**.

164. In some cases, it may be appropriate for the Tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, in the absence of a satisfactory explanation, would have been capable of amounting to a prima facie case of discrimination **Laing v Manchester City Council UKEAT/0128/06/DA**. Here Elias P as he then was said this at paragraphs 75 and 76:

*"75. The focus of the Tribunal's analysis must at all times be the question whether or not they can properly and fairly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the Employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race*

*76. Whilst, as we have emphasised, it will often be desirable for a Tribunal to go through the two stages suggested in Igen, it is not necessarily an error of law to fail to do so. There is no purpose in compelling Tribunals in every case to go through each stage. They are not answering an examination question, and nor should the purpose of the law be to set hurdles designed to trip them up. The reason for the two stage approach is that there may be circumstances where it would be to the detriment of the employee if there were a prima facie case and no burden was placed on the employer, because they may be imposing a burden on the employee which he cannot fairly be expected to have discharged and which should evidentially have shifted to the Employer. But where the Tribunal has effectively acted at least on the assumption that the burden may have shifted, and has considered the explanation put forward by the employer, then there is no prejudice to the employee whatsoever."*

**Harassment**

165. Section 40 of the Act renders harassment of an employee unlawful. Section 26 defines harassment as follows:

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

*(a) A engages in unwanted conduct related to a relevant protected characteristic; and*

*(b) the conduct has the purpose or effect of:*
*(i) violating B's dignity, or*
*(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.*

*(2) …*
*(3) …*
*(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account:*

*a) the perception of B;*
*b) the other circumstances of the case;*
c) *whether it is reasonable for the conduct to have that effect".*

166. The Tribunal is therefore required to reach conclusions on whether the conduct complained of was unwanted and, if so, whether it had the necessary purpose or effect and, if it did, whether it was related to the protected characteristic.

167. If the Claimant proves any of the conduct they complain about, it was unwanted. There is no need to say anything further about that.

168. It is clear that the requirement for the conduct to be "related to" the protected characteristic needs a broader enquiry than whether conduct is "because of the protected characteristic" like direct discrimination **Bakkali v Greater Manchester Buses (South) Limited UKEAT/0176/17**.

169. What is needed is a link between the treatment and the protected characteristic, though comparisons with how others were or would have been treated may still be instructive. In assessing whether it was related to the protected characteristic, the form of the conduct in question is more important than why the Respondent engaged in it or even how either party perceived it.

170. The question of whether the Respondent had either of the prohibited purposes – to violate the Claimant's dignity or create the requisite environment – requires consideration of each alleged perpetrator's mental processes, and thus the drawing of inferences from the evidence before the Tribunal **GMB v Henderson [2016] EWCA Civ 1049**.

**Direct discrimination**

171. The Equality Act 2010 defines direct discrimination as:

*"13. Direct discrimination*

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

*(2)…*

*(3)If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.*

*(4)If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.*

*(5)If the protected characteristic is race, less favourable treatment includes segregating B from others.*

*(6)…*
*(7)…*
*(8)…"*

172. There are two aspects to direct discrimination that must be considered by the Tribunal. One is less favourable treatment and the other is the reason for the treatment complained about with the associated causal link between the two.

173. Less favourable treatment is based on equality and is not about being "good" to people. You can be good to both men and women, but if you are less good to either person because of their sex, then that will be discrimination. Consequently, if a person behaves equally badly to everyone regardless of their characteristics, then that will not usually be discrimination. Unreasonable behaviour should not give rise to an inference of discrimination **Strathclyde Regional Council v. Zafar [1997] UKHL 54** it is usually an irrelevant factor.

174. However, it has been held by the EAT that unreasonable behaviour can go to the credibility of a witness who is trying to argue that their motives were not motivated by the characteristic in question **Law Society v Bahl [2003] IRLR 640 EAT.**

175. In the same way that less favourable treatment does not mean unreasonable treatment, it also does not mean detrimental treatment or unfavourable treatment **T-System Ltd v Lewis UKEAT/0042/15 (22 May 2015, unreported)** or simply different treatment **Shmidt v Austicks Bookshops Limited [1977] IRLR 360 EAT**. There must be a comparison either actually or hypothetically that shows less favourable treatment.

176. Whether less favourable treatment is proven requires a comparison to a suitable comparator. There is a general requirement that there be no material difference between the people being compared either actually or hypothetically. Section 23 Equality Act 2010 says:

> *"23 Comparison by reference to circumstances*
>
> *(1)On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.*
>
> *(2)The circumstances relating to a case include a person's abilities if—*
> *(a)on a comparison for the purposes of section 13, the protected characteristic is disability;*
> *(b)…*
>
> *(3)If the protected characteristic is sexual orientation, the fact that one person (whether or not the person referred to as B) is a civil partner while another is married ... is not a material difference between the circumstances relating to each case.*
>
> *(4)If the protected characteristic is sexual orientation, the fact that one person (whether or not the person referred to as B) is married to [or the civil partner of,] a person of the same sex while another is married to [or the civil partner of,] a person of the opposite sex is not a material difference between the circumstances relating to each case.*

177. The comparators need not be identical **Hewage v Grampian Health Board [2012] UKSC 37** because if every single aspect of a comparator was the same between the complainant and comparator, then the less favourable treatment could only be because of the protected characteristic, which would be make it almost impossible to defend a direct discrimination claim.

178. Following the case of **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11**, it will often be appropriate to consider the reason

for the treatment first and then decide whether that reason meant the treatment was less favourable. Therefore if the reason for the treatment was because of the protected characteristic, then it might be that the finding of less favourable treatment is inevitable.

179. The comparison in direct discrimination cases must be a comparison focussing on the individual claiming to have been discriminated against. Therefore, in **Her Majesty's Chief Inspector of Education, Children's Services and skills v Interim Executive Board of C School [2017] EWCA Civ 1426** where an Islamic faith school segregated boys and girls the comparison was not whether girls as a group had been treated less favourably because of their sex, it should be whether an individual girl who wanted to socialise with boys had been treated less favourably because of her sex. The Court of appeal said at paragraph 50 of the judgment:

> *"…The starting point is that EA 2010 s.13 specifies what is direct discrimination by reference to a "person". There is no reference to "group" discrimination or comparison. Each girl pupil and each boy pupil is entitled to freedom from direct discrimination looking at the matter from her or his individual perspective."*

180. Whether something is less favourable treatment is an objective test **Burrett v West Birmingham Health Authority [1994] IRLR 7 EAT.**

181. When considering hypothetical comparators, it is necessary for evidence to be put forward about how actual comparators who are in different but not wholly dissimilar situations have been treated to build the neighbourhood from which it can be determined how a hypothetical comparator in the same or similar circumstances would have been treated **Vento v The Chief Constable of West Yorkshire [2001] IRLR 124 EAT.**

182. In all cases, it is irrelevant whether the alleged discriminator has the same protected characteristic as the complainant s24 Equality Act 2010.

183. When considering whether the less favourable treatment was because of the protected characteristic, the Equality Act wording of "because of" has exactly the same meaning as the old legislation wording of "on grounds of" **Onu v Akwiwu [2014] EWCA Civ 279.**

184. Where there is more than one reason put forward for why the alleged discriminator treated the Complainant how they allegedly did, following the case of **Barton v Investec Henderson Crosthwaite Securities limited [2003] IRLR 332,** the characteristic should not play any part in the reason(s) for the treatment complained of, but if it does, it must be a significant factor in being more than trivial.

185. Also, following **R v Commission for Racial Equality, ex parte, Westminster City Council [1984] IRLR 230,** the characteristic needs to be a substantial of effective cause of the discriminatory treatment, but doesn't need to be the sole or intended cause of it.

186. In addition, there is no legal causal link as such. Instead the Tribunal should focus on the "real reason" why the alleged discriminator subjected the complainant to the treatment they allege was direct discrimination **Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48,** which is a subjective rather than legal test.

187. To sum up the current situation about causation in direct discrimination cases, Underhill LJ said in the case of **CLFIS (UK) Limited [2015] IRLR 562:**

*"As regards direct discrimination, it is now well-established that a person may be less favourably treated "on the grounds of" a protected characteristic either if the act complained of is inherently discriminatory (e.g. the imposition of an age limit) or if the characteristic in question influenced the "mental processes" of the putative discriminator, whether consciously or unconsciously, to any significant extent…"*

**ANALYSIS AND CONCLUSIONS**

**That on or about the 22nd of March 2021 the Respondent caused or permitted a person unknown to take a picture of the Claimant without his consent;**

195. We have already determined that factually, the Respondent did not cause or permit the female security guard to take the picture in question. She was working entirely alone and in our view, that settles this claim.

196. If in the alternative, the Respondent is to be treated as having caused or permitted this picture to be taken, we conclude that the sole reason for why this photo was taken was because the Claimant was found by the guard to be asleep in the gatehouse. That reason is unrelated to the Claimant's race in any way and was not done because of his race.

197. Consequently, applying **Laing,** we accept the Respondent explanation for this incident as being a non-discriminatory reason. This claim fails.

**That by the actions of Mr N Eldred, the Respondent criticised the Claimant to say that the Claimant should be doing his part of the job and threatened to take statements from other security officers on site;**

198. The words said by the Claimant to be harassing in nature were alleged to be recorded in voicemails. However, those voicemails had not been disclosed and the Claimant said they had been automatically deleted after 28 days by the phone company. Consequently, there is simply no evidence of harassing voice messages.

199. There is also simply no evidence that any threats to take statements have been done by Mr. Eldred for a reason related to race or because of race.

200. No sufficient evidence was put forward by the Claimant either in his statement or when asked questions by the Tribunal or Counsel for the Respondent, that another person either actual or hypothetical would have been treated any more favourably than the Claimant who did not share his characteristics.

201. We therefore conclude applying **Igen,** the Claimant has not shifted the burden of proof about this part of his claim and the claim fails.

**That by the actions of Mr N Eldred, on or about the 28th of March 2022 the Respondent cancelled 3 shifts which the Claimant was scheduled to work**

202. It was common ground between the parties that the shifts had been cancelled.

203. The Claimant alleges they were cancelled because of Mr Eldred continuing to discriminate against him on grounds with race either directly or via harassment. The Respondent argued that Mr Eldred had taken the Claimant off those shifts purely as a result of the sleeping on shift allegation and another two allegations of poor time keeping and failing to wear uniform at the ASOS site, which in its view it had the contractual right to do.

204. We prefer the evidence of the Respondent on this point. The Respondent had the contractual right to take the Claimant off site.

205. The Claimant has failed to provide sufficient evidence to convince us that these decisions were made either because of or related to the Claimant's race.

206. In addition, applying **Khan,** it seems abundantly clear to us from the documentation in the bundle that Mr Eldred's principal real reason for the removal of the Claimant was the incident where he fell asleep in the gatehouse, which is a non-discriminatory reason.

207. Consequently, applying **Igen,** he has failed to shift the burden of proof to the Respondent, and even if he had the Respondent met its burden and this claim therefore fails.

**That by the actions of Mr N Eldred the Respondent threatened the Claimant that if the Claimant complained about the cancellation of the shifts then Mr Eldred would use the photograph taken on or about 22nd of March 2021 against the Claimant**

208. The Claimant alleges this threat took place in either text messages or telephone conversations that were later referred to as being voicemail messages.

209. We have no difficulty in rejecting this allegation simply because there is no evidence except the Claimant's say so, to suggest that these text messages, phone calls or voicemail messages happened.

210. The Claimant has failed to provide a text message evidencing the threat or any other recordings or notes.

211. Consequently, this claim fails on the facts.

**That by the actions of Mr N Eldred, the Respondent telephoned the Claimant and left voice and text messages between around 29th and 30th of March 2022**

212. It is clear from page 112 of the bundle onwards, that text messages were exchanged between Mr Eldred and the Claimant at this time.

213. The text messages were about complaints that had been received about the Claimant's conduct, for example the Claimant had been caught sleeping. This is the same text message exchange that occurs about the sleeping issue that caused the cancellation of three shifts which we have already discussed.

214. Further text message exchanges occurred where the Claimant thinks that there is a video that has been submitted of him sleeping. However, Mr Eldred states there is no video.

215. Dealing with harassment first as we have found that this conduct occurred it was clearly unwanted conduct to the Claimant.

216. However, we are not persuaded that any of the texts were sent relating to the Claimant's race. They have clearly been raised in response to performance concerns and the Claimant falling asleep. These are the real reasons for why they were sent as per **Khan.**

217. When considering less favourable treatment, the Claimant has failed to persuade us that there is a case of discrimination on the face of it. We say this for the following reasons:

    217.1. First, when comparing the Claimant to someone who does not share his race who hypothetically would be in the same or similar circumstances as the Claimant, namely, a colleague who had the same performance concerns as the Claimant, the Claimant has adduced no evidence that a non-Pakistani, non-Asian and/or non-Kashmiri colleague would have been treated any more favourably.

    217.2. Secondly, because of this less favourable treatment has simply not been proven, and

    217.3. thirdly this means that the Claimant has failed to shift the burden of proof to the Respondent about this claim.

    217.4. Finally, when looking at page 89 in the bundle, when Mr Eldred was asked to explain what happened about the cancellation of shifts, he was asked to tell Mr Cooney what dates he removed the Claimant from the ASOS site. In response, Mr Eldred said as follows "*hi yes, I cancelled approx 3 shifts I believe that he was due to work, due to the issues highlighted to me. I didn't want any noise on ASOS by [an] officer scheduled to provide cover."* No evidence has been submitted to challenge that view or which appears to us to contain the sole reason why Mr. Eldred behaved as he did. Applying **Khan,** we find this was the real reason for the Claimant's treatment.

218. We therefore accept the Respondent had a non-discriminatory reason for its behaviour regardless of the Claimant's failure to shift the burden of proof and this claim fails.

**That the Respondent ignored the Claimant's complaints and/ or grievance**

219. When considering this allegation, it is clear that whilst the Respondent may not have done the best job it could have done and investigating the Claimant's grievances, which we will come onto in a moment, it is not correct to say that they ignored the claims complaints or grievance.

220. It is clear that in response to both the grievance family appeal that was submitted by the Claimant the Respondent did look into aspects of those documents did meet with the Claimant to discuss those documents with the Claimant's union rep present and did provide outcome letters in an attempt to address the points made by the Claimant.

221. To the extent that new points were raised at the grievance meeting before Mr Cooney, such as the Claimant raising for the first time in the timeline that he believed his treatment had been racially motivated, rather than Mr Cooney simply ignore that and sticking with points that had been raised in the initial grievance, he asks the Claimant to provide evidence in support of what he was alleging.

222. Consequently, simply on the facts as we have found them, this claim fails.

**That the Respondent failed to undertake a thorough investigation into the Claimant's grievance and the Respondent failed to conclude the Claimant's grievance fairly**

223. When considering this allegation, we agree with the Claimant, there was a failure to undertake a thorough investigation of the grievance and for a significant part of the investigation that took place, it was inadequate. We say this for a number of reasons:

    223.1. First, Mr Cooney allowed Mr Eldred to investigate the allegations that have been made against him. This meant that Mr Eldred was effectively investigating himself.

    223.2. When Mr Eldred reported back to Mr Cooney about what he had discovered as part of the investigation into himself, namely that no other complaints had been raised against him for bullying and harassment or any other

issues, Mr Cooney appears to us to have entirely failed to look into those matters himself.

223.3. The allegations raised against Mr Eldred in the first grievance letter, despite the fact that this does not mention race discrimination, were still serious allegations of bullying harassment against an employee. These could and should have been treated with the required level of diligence, detail and good practice their seriousness required. This is especially so given that the Respondent is a large organisation with a dedicated HR Team. We find that the allegations were not treated in this way by Mr. Cooney or the Respondent as a whole.

223.4. Mr. Cooney in our view showed a distinct lack of ownership about the entire grievance process and seemed to rely on, and then blame, HR for any shortcomings in the procedure. Ultimately though, this was Mr. Cooney's decision and his procedure and he should have gone to HR for advice only. He was the decision maker in this process.

223.5. Notes of any conversations, other than the grievance meeting notes, were not kept. We believe Mr Cooney when he said he spoke to various people as part of the investigation including human resources. However, if this was being treated with the level of seriousness and diligence that we would expect for such serious allegations, then we would have expected to have seen hand written or type notes of these conversations, or both, for all interviews of relevant witnesses or staff. These were entirely absent.

223.6. We would also have expected to have seen formal meetings set up for these interviews with others and, again, these are entirely missing.

223.7. In addition, when race discrimination allegations then emerge from the grievance meeting, we would have expected Mr. Cooney to have actively looked into those allegations with members of the Claimant's team rather than simply rely on the Claimant to provide documents to prove it or just speak to HR. He should also at that point have sought to satisfy himself whether what Mr. Eldred had told him about the results of Mr. Eldred's investigation were in fact reasonably accurate. This was not done.

223.8. Mr. Cooney also failed to deal with the allegation of race discrimination at all, in his outcome letter.

224. Consequently, we had no difficulty in finding that the grievance had not been thoroughly investigated given the seriousness of the allegations raised. This was unreasonable and unfair generally to the Claimant. Without any documented notes being provided at least by appeal stage, the Claimant had no way of fairly analysing or contesting anything that the Respondent had done during stage one of the grievance process.

225. Looking at Harassment, the Claimant has proven that the lack of a thorough investigation was unwanted conduct.

226. However, unreasonable and unfair behaviour is not enough to draw an inference of race discrimination. There needs to be at least facts related to race proven by the Claimant to shift the burden of proof following the case of **Bahl.**

227. Inaction about an allegation can be unwanted conduct and we find it was for the Claimant. However, it will only be harassment if related to race following **Conteh.**

228. Additionally, a failure to investigate a matter will also not be unlawful by itself following **Coyne.**

229. We did not find that Mr. Cooney was in any way dishonest in the evidence he gave about the investigation. We believe him when he says he thought, at the time, he had done enough to have conducted a fair investigation having followed HR advice.

230. We took into account the unchallenged fact that he says he had been taking advice from HR about the situation and process and that we are now looking at the investigation with the benefit of hindsight. Mr. Cooney admitted, when it was put to him, that the process he conducted probably wasn't as good as he thought it was.

231. We have concluded that Mr. Cooney genuinely but erroneously believed he had conducted a thorough investigation and that his actions or inactions were in no way whatsoever related to the Claimant's race. He simply did not take sufficient ownership of the process.

232. Moving to direct discrimination, we needed to compare the treatment of the Claimant against people who did not share the Claimants race who had also put in a grievance complaint in circumstances not materially different from him.

233. The Claimant put forward evidence from Mrs Ally and Mr. Zamir about this point.

234. However, whilst their evidence could be argued as evidence that colleagues from ethnic minority groups all had their grievances handled poorly, Mrs Ally was not from the same heritage as the Claimant and she was treated the same way.

235. Even taking the Claimant's witnesses' case at its highest in that they submitted complaints that were not responded to or thoroughly looked into, there were people from both the Claimant's heritage as well as those who did not share the Claimant's heritage being treated in the same way.

236. This proved to us that after **Zafar,** regardless of the racial characteristics the Claimant's colleagues had, they would have been treated in the same way meaning there was no less favourable treatment because of race. We are supported in this that in our view, the HR advice would have been the same regardless, despite appearing to be slow and dubious, and it was inherently unlikely that at the time these events took place Mr. Cooney would have conducted things any differently in our judgment.

237. The Claimant has also entirely failed to provide any evidence that someone not sharing his racial background and colour would have been treated any more favourably. He has therefore failed to shift the burden of proof here and even if he had, we think Mr. Cooney got things wrong because he did not take ownership of the investigation and procedure, relied too heavily on others to do the work that he should have done himself and made poor decision as a result. Applying **Khan,** these were the real reasons for why Mr. Cooney behaved how he did. None of his decisions in our view were tainted by race. They were simply unfair and unreasonable decisions.

238. Could the decisions made be argued as being different, unfavourable or detrimental treatment? Yes they could, but following **Lewis** and **Schmidt,** that too does not amount to less favourable treatment.

239. Consequently, whilst the Claimant has been treated poorly during his grievance process, that treatment was not discrimination and his claim here fails.

**That during the Claimant's grievance hearing, the Respondent refused to respond to the Claimant's allegations of racism**

240. To conclude on this part of the Claimant's race claim is relatively straightforward. It is clear to us that in no way has the Respondent refused to respond to his allegations of racism.

241. In support of his argument, the Claimant has relied on the fact that Mr Cooney's outcome letter does not make any reference to the allegations of race discrimination raised at the grievance meeting. However, omitting to include a response to an allegation raised in a grievance meeting from an outcome letter is not a refusal. When race was raised for the first time in the grievance meeting, Mr. Cooney asked the Claimant to provide evidence in support of them. If he was refusing to consider them at all, then we believe he would have said so and there would have been absolutely no further investigation evidenced in the bundle or in witness evidence about the race discrimination allegations.

242. Consequently, this allegation fails on the facts as we have found them.

**That the Respondent failed to provide the Claimant with HR support by delaying the outcome of the Claimant's grievance, not responding to an e-mail about an appeal hearing and delaying that appeal hearing**

243. We believe Mr Randall 's explanation for why the first submitted appeal of 4 July 2021 was not responded to, namely because of it being missed by the HR department. This was the real reason why there was a delay following **Khan.** There was no evidence presented by the Claimant to infer or prove that this delay was because of his race.

244. Naturally, there having been a delay in responding to the letter submitted by the Claimants, this had a knock-on effect of delaying the appeal hearing.

245. The appeal letter, once resent, was acknowledged by the Respondent on the 8 of September 2021 at page 142 in the bundle by MS Meyer. In that e-mail Ms Meyer asked for further clarification because the appeal letter appeared to have been sent outside of the five working day timeframe. It appears that the Claimant did not respond to that e-mail.

246. Consequently by 23 September 2021, Ms Meyer again emails and simply organises the meeting. The meeting is then postponed until the October 2021 because the Claimant's union representative was not available for the meeting.

This delay was nothing to do with the Respondent. It was caused by the Claimant's representative's unavailability.

247. Again, whilst the initial failure by HR to process the appeal was unsatisfactory and unfair to the Claimant, we do not believe that this delay was in any way because of or related to the Claimant's race.

248. We accept the evidence of Mr Randall where he stated that the delayed response to the appeal being initially submitted and delays to the appeal meeting were because of the workload or incompetence of HR, rather than because of anything to do with the Claimant's race.

249. We are supported by this given that at the time of the appeal, both in internal emails and in the appeal meeting with the Claimant, Mr Randall conceded that the delay was unsatisfactory and offered to pay the Claimant an amount of money equivalent to 3 shifts to try to resolve his grievances.

250. The Claimant has failed to shift the burden of proof here and this claim therefore fails.

**Institutional racism**

251. Throughout the documentation, the Claimant uses the phrase institutional racism, yet his claims have been clarified as direct discrimination and harassment.

252. To the extent that this is relied upon as a separate direct discrimination claim, group comparisons are impermissible for direct discrimination claims after **C School.**

**Disposal**

253. Consequently, whilst the Claimant has been unfairly treated, none of the allegations either as direct discrimination or as harassment have been proven by the Claimant.

254. It is the unanimous view of the Tribunal that all claims for race discrimination therefore fail.

255. As we have found against the Claimant on all claims, the out of time points are academic.

256. All the Claimant's claims are therefore dismissed and this concludes the proceedings.

Employment Judge G Smart

24 March 2024