



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr G Oluokun  
**Respondent:** Birdsall Services Limited

**Heard at:** Bury St Edmunds by CVP      **On:** 4-7 December 2023

**Before:** Employment Judge Manley  
Ms S Laurence-Doig  
Mr G Page

## Representation

**Claimant:** In person  
**Respondent:** Ms B Dennis, counsel

**JUDGMENT** having been sent to the parties on 15 January 2024 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided:

## REASONS

### Introduction and issues

- 1 By a claim form presented on 29 November 2021 the claimant brought various claims arising from the termination of his employment with the respondent in July 2021. Further information of the discrimination and victimisation complaints was provided by him and the response was filed on 14 April 2022. At a preliminary hearing in November 2022 a list of issues was set out. The claims included claims for unfair dismissal (although the claimant did not have two years' service); direct race discrimination; harassment related to race; victimisation; holiday pay and unlawful deduction of wages.

- 2 The issues were recorded as follows:-

### Time limits

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

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

1.1.2 If not, was there conduct extending over a period?

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

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

1.1.4.1 Why were the complaints not made to the Tribunal in time?

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

1.2 Was the unfair dismissal complaint made within the time limit in section 111 of the Employment Rights Act 1996? The Tribunal will decide:

1.3 Was the unauthorised deductions complaint made within the time limit in section 23 of the Employment Rights Act 1996?

1.4 In each case the Tribunal will decide:

1.4.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the effective date of termination / act complained of / date of payment of the wages from which the deduction was made?

1.4.2 If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

1.4.3 If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?

1.4.4 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

1.4.5 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

## 2. Unfair dismissal

2.1 Does the Claimant have sufficient service to bring a claim of unfair dismissal under section 94 Employment Rights Act 1996?

2.2 If not, are there any circumstances as set down in section 108(3) Employment Rights Act 1996 that allow a claim for unfair dismissal to be brought without the requisite period of qualifying service?

2.3 If the claimant has sufficient service to bring a claim of unfair dismissal under section 94 Employment Rights Act 1996, was the dismissal for a potentially fair reason under section 98 Employment Rights Act 1996. The respondent says the potentially fair reason is conduct?

2.4 If so, did the Respondent act reasonably in all the circumstances in treating that as a sufficient reason for dismissal?

2.5 If so, did the Respondent follow a fair and reasonable process on the basis of the size and administrative resources of the business?

2.6 If so, did the Respondent follow a fair and reasonable process on the basis of the size and administrative resources of the business

2.7 Should any financial award made to the Claimant be reduced in light of point 5 above?

3. Direct race discrimination (Equality Act 2010 section 13)

3.1 The claimant is of black African Nigerian origin.

3.2 Did the respondent do the following things:

3.2.1 On 4 February 2020 the Claimant's supervisor, Mr Patrick Abel, told the Claimant that he was "a fucking useless idiot", that he was "a stupid idiot" and that he was "damaged and not worth anything". Mr Stanley Tembe, another employee of the respondent, was present at the time?

3.2.2 After the incident on 4 February 2020 the claimant sent his manager, Mr Alistair Macleoin, an email about the incident (the first grievance) but received no response?

3.2.3 After the incident on 4 February 2020 the claimant was given cleaning jobs in the energy centre by Mr Abel which lasted 4 hours and which were not part of his duties?

3.2.4 On 18 March 2020 Mr Abel said to the Claimant "are you deaf or dumb". Mr Tembe was present?

3.2.5 In January 2021, in the respondent's office, Mr Abel told the Claimant that he has to shut up when Mr Abel is speaking to Mr Tembe and that Mr Abel does not want to hear from the Claimant?

3.2.6 On 6 January, 13 January and 24 January, all 2021, Mr Abel told the claimant that he is "fucking useless" and that his

mouth was smelling and asked the Claimant to use chewing gum. These comments were made in front of the client Metropolitan?

3.2.7 In February 2021 the Claimant sent Ms Lynne Culliford, HR, a grievance about his treatment by Mr Abel (the second grievance). At the grievance meeting, Mr Maclein said he and the Claimant should go and drink in the pub?

3.2.8 The Claimant's second grievance was not upheld by the respondent?

3.2.9 In April and May 2021, the claimant was given cleaning jobs to do by Mr Abel, which were not part of his duties?

3.2.10 On 5 April 2021 the claimant was criticised and abused on the WhatsApp group for his actions?

3.2.11 On various dates Mr Abel refused to send the Claimant to other substations to work.

3.2.12 On 5 July 2021 the Claimant was given one month's notice of dismissal?

3.3 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's. The claimant says he was treated worse than Mr Stanley Tembe and Mr Ross Kahn.

3.4 If so, was it because of race?

3.5 Did the respondent's treatment amount to a detriment?

#### 4. Harassment related to race (Equality Act 2010 section 26)

4.1 Did any of the following events occur:

4.1.1 On 4 February 2020 the Claimant's supervisor, Mr Patrick Abel, told the Claimant that he was "a fucking useless idiot", that he was "a stupid idiot" and that he was "damaged and not worth anything". Mr Stanley Tembe, another employee of the respondent, was present at the time?

4.1.2 After the incident on 4 February 2020 the claimant sent his manager, Mr Alistair Maclein, an email about the incident (the first grievance) but received no response?

4.1.3 After the incident on 4 February 2020 the claimant was given cleaning jobs in the energy centre by Mr Abel which lasted 4 hours and which were not part of his duties?

4.1.4 On 18 March 2020 Mr Abel said to the Claimant “are you deaf or dumb”. Mr Tembe was present?

4.1.5 In January 2021, in the respondent’s office, Mr Abel told the Claimant that he has to shut up when Mr Abel is speaking to Mr Tembe and that Mr Abel does not want to hear from the Claimant?

4.1.6 On 6 January, 13 January and 24 January, all 2021, Mr Abel told the claimant that he is “fucking useless” and that his mouth was smelling and asked the Claimant to use chewing gum. These comments were made in front of the client Metropolitan?

4.1.7 In February 2021 the Claimant sent Ms Lynne Culliford, HR, a grievance about his treatment by Mr Abel (the second grievance). At the grievance meeting, Mr Macleoin said he and the Claimant should go and drink in the pub?

4.1.8 The Claimant’s second grievance was not upheld by the respondent?

4.1.9 In April and May 2021, the claimant was given cleaning jobs to do by Mr Abel, which were not part of his duties?

4.1.10 On 5 April 2021 the claimant was criticised and abused on the WhatsApp group for his actions?

4.1.11 On various dates Mr Abel refused to send the Claimant to other substations to work.

4.1.12 On 5 July 2021 the Claimant was given one month’s notice of dismissal?

4.2 If so, are any of them related to the Claimant’s race?

4.3 If so, did any of them have them have the purpose or effect of:

4.3.1 violating the claimant’s dignity; or

4.3.2 creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

## 5. Victimisation (Equality Act 2010 section 27)

5.1 The Respondent acknowledges the Claimant raised a grievance in February 2021 that contained an allegation of discrimination, and that this is capable of being a protected act.

5.2 Did the Claimant submit a complaint to the Respondent on 4 February 2020 and, if so, did this constitute a protected act for the purposes of section 27 (2)(d) EqA 2010?

5.3 Did the respondent do the following things:

5.3.1 After the incident on 4 February 2020 the claimant sent his manager, Mr Alistair Maclein, an email about the incident (the first grievance) but received no response?

5.3.2 After the incident on 4 February 2020 the claimant was given cleaning jobs in the energy centre by Mr Abel which lasted 4 hours and which were not part of his duties?

5.3.3 On 18 March 2020 Mr Abel said to the Claimant “are you deaf or dumb”. Mr Tembe was present?

5.3.4 In January 2021, in the respondent’s office, Mr Abel told the Claimant that he has to shut up when Mr Abel is speaking to Mr Tembe and that Mr Abel does not want to hear from the Claimant?

5.3.5 On 6 January, 13 January and 24 January, all 2021, Mr Abel told the claimant that he is “fucking useless” and that his mouth was smelling and asked the Claimant to use chewing gum. These comments were made in front of the client Metropolitan?

5.3.6 In February 2021 the Claimant sent Ms Lynne Culliford, HR, a grievance about his treatment by Mr Abel (the second grievance). At the grievance meeting, Mr Maclein said he and the Claimant should go and drink in the pub?

5.3.7 The Claimant’s second grievance was not upheld by the respondent?

5.3.8 In April and May 2021, the claimant was given cleaning jobs to do by Mr Abel, which were not part of his duties?

5.3.9 On 5 April 2021 the claimant was criticised and abused on the WhatsApp group for his actions?

5.3.10 On various dates Mr Abel refused to send the Claimant to other substations to work.

5.3.11 On 5 July 2021 the Claimant was given one month’s notice of dismissal?

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

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

6. Remedy for discrimination or victimisation

6.1 What financial losses has the discrimination caused the claimant?

6.2 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

6.3 If not, for what period of loss should the claimant be compensated?

6.4 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

6.5 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

6.6 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

6.7 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

6.8 Did the respondent or the claimant unreasonably fail to comply with it by [specify breach]?

6.9 If so, is it just and equitable to increase or decrease any award payable to the claimant?

6.10 By what proportion, up to 25%?

6.11 Should interest be awarded? How much?

#### 7. Holiday Pay (Working Time Regulations 1998)

7.1 The Respondent acknowledges the Claimant is owed £1,053.78 (less deductions for tax and NI) in relation to seven days accrued untaken holiday. If the Claimant is asserting further holiday payments are owed:

7.1.1 What are these?

7.1.2 Are these owed to the claimant?

#### 8. Unauthorised deductions

8.1 Has the Respondent made any deductions from the Claimant's wages?

8.2 If so, what are these?

8.3 Were they authorised deductions?

8.4 If not, when were the deductions made?

8.5 Is the claim within time?

#### The hearing

6 The hearing took place over four days and was held by CVP as had been agreed. Shortly before the hearing the tribunal received various documents. There was a bundle of documents of just over 400 pages, witness statements, a chronology and cast list. During the hearing, the claimant also supplied a document which was entitled "particulars of claim" dated January 2023 (which included, for the first time the allegation referred to at paragraph 14 below) and a schedule of loss.

- 7 There was some discussion at the commencement of the hearing in an attempt to clarify the holiday pay and unlawful deduction of wages claim. The respondent had calculated holiday pay owing to the claimant but he disputed that calculation because he alleged he had carried 5 or 6 days over from 2020/2021. Before we concluded the respondent's representative produced another calculation which showed carried over days of 11 days added to his entitlement, less the days taken as holiday and 2 days for which he had received payment on termination. The new calculation, which the tribunal accepted as correct, showed the sum due as £803.88.
- 8 The claimant's schedule of loss suggested a figure of over £35,000 as unpaid wages. When asked for clarification at the beginning of the hearing, he stated that he believed he was also entitled to payment for emergency calls and overtime which he had calculated at £510 x £25 and also Saturday and Sunday working. The tribunal could not understand his case and he was asked to clarify before we concluded.
- 9 The tribunal heard evidence from the claimant and a trade union representative witness on his behalf as well as two witnesses for the respondent; Ms Culliton, HR director and Mr Clarke, Operations Director. The claimant and the respondent's representative made submissions and we gave oral judgment on the fourth day.

### **The facts**

- 10 The claimant's employment with the respondent started on 4 December 2019. We have seen an offer letter and a contract of employment which are at pages 42 to 47 of the bundle. In short, the claimant was a Static Maintenance and Electrical Engineer on a salary of £38,000 pa. There was to be overtime pay if worked and set amounts for any weekend work. It was to be shift work and because the site where he was located was new to the respondent, it was set out in his offer letter that there would be a short and medium long-term arrangement about shifts which would change over time. His place of employment was Wembley Park. There was holiday entitlement of 23 days as well as bank holidays. We have seen a job description which sets out the tasks which the claimant was expected to carry out under the maintenance and electrical engineer title but they were said to be not limited and the claimant has accepted that cleaning would be part of the job he was expected to carry out. Mr Abels was the claimant's supervisor, and his line manager was Mr MacNeil.
- 11 The offer letter stated that weekend days would be paid at the rate of £50 per day with £100 for out of hours calls.
- 12 The claimant also worked with some colleagues and he has named two of those as his comparators; Mr Tembe, who the claimant says is Black African but not from Nigeria, and Mr Khan, who is, as far as the claimant understands, Asian.
- 13 On 4 February 2020, the claimant's evidence as set out in issue 3.2.1 was that Mr Abels said that the claimant was, "*a fucking useless idiot*" that he was "*a stupid idiot*" and that he was "*damaged and not worth anything*". It is said in the list of issues that Mr Tembe was present. We have had no other direct evidence about any such conversation on 4 February from anyone else who



was said to be there. We have not heard from Mr Abels as we understand he left the respondent's employment not that long after the claimant was dismissed. The tribunal therefore has to assess whether those words were said. The burden of proof is on the claimant to satisfy the tribunal that those comments or something like them were said.

- 14 The claimant did not mention that these words had been said to him when he sent an email a few days later, on 9 February 2020, even though he raised various other issues about Mr Abels in that email. Nor did he mention it in a second grievance which he put in on 8 February 2021 or at the grievance meeting which was held on 15 February 2021. Furthermore, he did not mention it after he had been dismissed at the dismissal appeal hearing. It was not in the claim form as presented and it was not until the claimant was asked to provide further information about his discrimination claim that he mentioned comments similar to those quoted above. What is more, by January or February 2023, the claimant had added another abusive comment to those alleged above, claiming that Mr Abels referred to him as "*a black monkey*".
- 15 The tribunal have considered the evidence carefully and have decided that we are not satisfied that those comments were made. We believe that, if those comments had been made, the claimant would have mentioned them to the respondent over this long period of time, not least because he was complaining about Mr Abels' behaviour in other ways and there is absolutely no explanation from the claimant as to why he would not have alerted the respondent to this serious language and in particular to abusive and potentially racist language. The claimant has not been able to satisfy us that these comments were made.
- 16 On 9 February 2020, as stated, the claimant emailed Mr McNeil (page 83). This is an email which raises a number of issues about Wembley Park. It is really a mixture of concerns about operational matters and also contains some concerns about Mr Abels. As we understand it, Mr McNeil forwarded that email to Mr Clarke who was Mr McNeil's line manager, and he suggested a meeting should be held. The tribunal has not heard any evidence about any meetings being held about this although it seems that Mr McNeil did speak to Mr Abels who said that he was keeping an eye on the claimant's work as he was his supervisor. There is no evidence that the claimant was told any of this and there is no evidence that there was any response, either formal or informal, to that email. Nothing more happened about that and Mr Clarke gave evidence that he understood the matter was concluded. Ms Culliton, who is the HR Director, did not know anything about that email at that point. She found out about it later.
- 17 Between February 2020 and January 2021, the claimant has suggested some other matters of concern happened at work. In the list of issues (at 3.2.4 and 3.2.5) there is a suggestion that Mr Abels asked whether he was deaf and dumb and told him to shut up. The claimant gave no evidence with respect to the deaf and dumb comment, and we cannot find that that was made. There is a potential reference to Mr Abels asking him to shut up and the tribunal find that it is possible that such a comment was made by Mr Abels in his contact with the claimant.

- 18 There was another alleged comment by Mr Abels which the claimant complains about (issue 3.2.6) that the claimant's breath was smelling and that he asked him to perhaps take some chewing gum to deal with that. It was explained to the tribunal, and we accept, that that was a concern about the claimant being client facing although there is no evidence that any clients complained about it.
- 19 The claimant was given cleaning tasks, as he was from the beginning of his employment. The tribunal accepts that it is likely that the cleaning tasks that the claimant was given may well have increased over this period of time although we are not entirely sure when. We accept that that was because there were concerns about the claimant's ability to carry out other tasks and that therefore, these were cleaning tasks that the claimant might well have been asked to carry out.
- 20 The claimant then put in a second grievance (page 93), headed "Grievance" sent to Ms Culliton on 8 February 2021. His concerns were summarised by Ms Culliton when she had a meeting with the claimant under the grievance procedure on 15 February 2021. She sets out there 12 matters which the claimant raised in his grievance; these are about holidays, more concerns about operational matters and Mr Abels' attitude to the claimant as well as a number of concerns raised about his colleague Mr Tembe. In particular, he raised a matter about his qualifications being questioned and whether Mr Tembe had suggested that he bought or got those qualifications in Nigeria. Ms Culliton also noted that the claimant felt isolated in the team. At this hearing, the claimant agreed that the note covered the same things as he had raised in his grievance, but he did not agree the contents of that summary.
- 21 In any event, a mediation meeting was suggested and the claimant agreed to attend such a meeting on 4 March 2021. In attendance were Mr Abels, the claimant, Mr McNeil and Ms Culliton. Again, we have seen a note of what happened at that meeting prepared by Ms Culliton. The claimant disputes that he agreed some of the items where it is noted that he agreed, but the tribunal cannot really see why Ms Culliton would note such a thing if it did not occur. In any event, it does not touch particularly on the issues the tribunal has to decide and we have taken the note pretty much at face value.
- 22 The respondent hoped the mediation meeting would resolve matters with Mr Abels being in attendance. There still needed to be a formal outcome of the grievance and that was provided on 8 March 2021. Unfortunately, we had the wrong version of the grievance outcome letter in the bundle at page 105 and that led to the claimant being uncertain as to whether he received that document. Another document was therefore provided during the hearing which was the correct version with some relatively minor changes which Ms Culliton believed might have been carried out by the respondent's legal advisers. In any event, the claimant was not able to say whether that was definitely the letter he got but there is no doubt that that letter says that his grievance was not upheld and the claimant was aware of that. The claimant was told of his right of appeal, but he did not appeal that grievance outcome.
- 23 The claimant does not agree that he accepted that mistakes had been made about a holiday request, nor does he accept that he agreed that Mr Tembe had not said that he had bought the qualification in Nigeria. In his witness

statement, a bit confusingly, the claimant says that Mr Tembe said that he had forged the qualification rather than that he had bought it. In any event, this concern is not included in the list of issues, and we are not sure what discussion took place about that aspect.

- 24 The claimant's performance was and continued to be a cause for concern for Mr Abels. The tribunal have seen in the bundle of documents emails about various instances where the claimant was not performing the role as expected. On 19 March 2021, for instance, is an email where those matters were set out (page 109).
- 25 Between March and July 2021 the claimant alleges that he continued to be given cleaning jobs and he was particularly concerned about one which took him some time and he believed caused an injury to him. As indicated, the tribunal does accept that the claimant appeared to be doing quite a lot of cleaning duties and perhaps more than his colleagues. Although we are not sure about that, it seems likely that that is the case because Mr Abels was concerned about the claimant's ability to carry out the more technical tasks.
- 26 The claimant has also raised issues about some WhatsApp messages, and he has taken us to some which he feels support his case. He says that they were critical and abusive, but the tribunal is unable to see that from the content of those messages. We can see that, at its highest, there appear to be lighthearted jokes with smiley faces, emojis and so on, but there is nothing could remotely be called abusive or that criticises the claimant.
- 27 The tribunal has seen evidence that around April 2021, Ms Culliton and Mr Abels were discussing the possibility of dismissing the claimant, but it seems, from all the information before the tribunal, that that was based on his ability or otherwise to carry out the work that he was employed to do.
- 28 There was an appraisal with Mr McNeill in May 2021 (page 69). Although the claimant's case at this hearing was that the document we have seen was a fabricated document, the tribunal has no reason to believe that that was fabricated. The claimant accepts that he had such a meeting and that matters were discussed with him. It is clear to the tribunal that the respondent still had concerns about the claimant's ability to do his job.
- 29 There was a particular incident on 5 April 2021 which we have referred to in the tribunal as a loss of "Scada", at pages 118 and 119, which is a summary of Mr Abels' concerns. In summary, without going into technical detail, the tribunal accepts that Mr Abels was most concerned about the delay in the claimant responding to that computer programme not working and the slowness he exhibited in taking any action. That was the main concern about that incident.
- 30 As indicated, the claimant believed that he had been caused injury by some of the cleaning duties he had been given and when he raised that he was asked to fill in an accident reporting form which he did in June 2021. The claimant complains further that Mr Abels did not send him to other substations but the respondent says that was because he had no transport and his place of work was Wembley Park.
- 31 The respondent, through Mr McNeil, decided to dismiss the claimant because

of poor performance and that was communicated to him in a letter from Mr McNeil. Unfortunately, we have not heard from him, but we take the letter at face value. The claimant was not able to say that this was definitely the letter he received because he says that he appealed even though there is no suggestion that he had the right to appeal in this letter.

- 32 We do not think that is a particular concern and the claimant has not been able to supply any different letter so, we find that this was the letter that the claimant received. It is dated 9 July, which was a Friday, and it says:

*“Dear Godwin*

*It is with regret that we have to terminate your employment with this company on the grounds of unsuitability due to your capability due to poor performance.*

*The reasons that the company considers that you are not suitable for your position as Static Engineer is that you have failed to show levels of competency expected in your role.”*

- 33 He appealed that decision (page 129). In summary, the claimant states in that appeal that he had no idea that there were concerns about his performance and he believed it was linked to the fact that he brought a grievance earlier in the year. He also later sent a number of photographs which are in the bundle and the claimant believes show Mr Abels allegedly sleeping and a considerable number of photographs of the claimant's cleaning work.

- 34 An appeal meeting was arranged. Ms Culliton said that the claimant was not necessarily entitled to an appeal, but they decided to allow him to have one and he attended with a colleague, Mr Ajao. The meeting was held on 26 July and there are notes from that at page 158. Again, as stated above, the tribunal notes that there is no suggestion there from the claimant, even though his employment had ended, of Mr Abels using abusive language such as is now contained in the list of issues.

- 35 There were discussions about the claimant's capabilities at work and whether he had had any warning about the respondent's concerns. The respondent's views on the claimant's ability to carry out his tasks were set out in the appeal outcome letter which was sent on 11 August 2021 (page 170). It says:

*“The decision has been taken that the dismissal stands because your capability/competency has been in question for some time. In addition to the informal discussion please find below summary of three previous meetings we have held.*

*1) A discussion meeting with your supervisor on 19 March 2021 on site to address poor work quality.*

*2) Appraisal meeting to address performance issues that occurred on 5 May 2021.*

*3) Meetings around 20-24 May addressing the ‘Loss of Scada’ incident.*

*The most serious concern was the incident of 'Loss of Scada' where you were given a verbal warning from your line manager Alistair McNeil."*

It is worth recording that the claimant denies getting such a verbal warning.

36 In any event, that was the end of the claimant's employment. After approaching ACAS, the claimant presented an ET1 on 29 November 2021. The claim form mentioned claims for unfair dismissal, race discrimination and other matters but it did not include the details that we now have. The claimant was asked to provide details of the discrimination, harassment and victimisation complaints and he has provided that in a document we have seen (page 23) although we do not know the date that that was sent. As far as the tribunal can make out, that is the first time there was reference to the abusive language such as we have seen in the list of issues.

### **Submissions and the law**

37 The parties were able to make submissions. Ms Dennis provided written submissions which she also sent to the claimant, and she added to those orally.

38 The claimant had sent further information on his unlawful deductions claim which he had been asked to do. This document was a further schedule of loss which included reference to allegations not raised before and not given in evidence, namely that he worked overtime; that he started early and/or finished late; that there was "*money owed cancelled for call out hours*" now calculated at  $510\text{hours} \times \text{£}37 = \text{£}18,700$  and a further calculation of " $386.84 \times 28 = \text{£}10,831.52$ " (there then appeared various apparent calculations for early arrivals or late finishes which justified that calculation). The claimant then, as did Ms Dennis, went through the list of issues suggesting how the tribunal should find in relation to each of those issues.

39 The law which we need to apply as far as the unfair dismissal, holiday pay and unlawful deduction of wages claims are concerned, is contained in the Employment Rights Act 1996 (ERA). In particular, for the unfair dismissal complaint, we are concerned with the claimant's length of service as he does not have the two years' service required by section 108 ERA. So, we need to consider whether he can bring an automatic unfair dismissal claim for which two years' service is not required.

40 With respect to the unlawful deduction of wages complaint for both holiday pay and wages, we have to consider what further sums, if any, are due to the claimant. The right not to suffer unlawful deduction of wages appears in Part 11 ERA. The burden of proof is on the claimant to show that there have been such deductions.

41 The discrimination, harassment and victimisation claims are brought under the Equality Act 2010 (EQA). Sections 13, 26 and 27 contain the provisions for direct race discrimination, harassment related to race and victimisation where matters have been raised under EQA, to be unlawful. For the most part, the tests for the tribunal to consider such claims is as set out in the list of issues. The burden of proof provisions as set out in s.136 EQA which reads:-

“136 Burden of proof

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

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

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

(4)-

(5)-

(6) *A reference to the court includes a reference to—*

*(a) an employment tribunal”;*

42 In relation to the direct discrimination claim, taken with the burden of proof provisions, we look first to see whether the claimant has shown primary facts from which we could conclude discrimination has arisen. If the burden of proof does shift to the respondent we look to it for an explanation of any difference in treatment.

43 We first have to make findings of primary fact and to determine whether those show less favourable treatment and a difference in race. The case of Madarassy v Nomura International plc 2007 EWCA Civ 33 makes it clear that the claimant must show more than a difference in the protected characteristic and difference in treatment. In essence, the claimant must show more than the mere possibility of discrimination before the burden shifts. The test is: are we satisfied, on the balance of probabilities, that this respondent treated this claimant less favourably than he treated or would have treated an applicant without his protected characteristic of race. When establishing whether there has been less favourable treatment, comparisons between two people must be such that the relevant circumstances are the same or not materially different. The tribunal must be astute in determining what factors are so relevant to the treatment of the complainant that they must also be present in the real or hypothetical comparator in order that the comparison which is to be made will be a fair and proper comparison.

44 If we are satisfied that the primary facts prove a difference in the protected characteristic and less favourable treatment, we proceed to the second stage. We direct ourselves in accordance with s136 EQA and ask whether there are facts from which the tribunal could decide, in the absence of any other explanation, that the provision has been contravened. There may be facts from which inferences can be drawn and the EHRC Code of Practice in Employment may assist. If the answer here is that we could so conclude, the burden shifts to the employer. The employer’s explanation will often be considered at the first and second stage as the tribunal considers all evidence presented.

45 For the harassment complaint, once the primary facts are established, the tribunal must consider whether any of those facts amount to unwanted conduct and are related to the claimant’s race. He does not need to identify

an actual or hypothetical comparator. If he shows that they are related to race, we need to look at whether they had the purpose or effect of violating his dignity or creating the environment described in the section. In assessing this, we consider whether it was reasonable for him to consider it has had that effect.

46 For the victimisation complaint, we first consider whether the claimant has made a protected act and, if he has, whether any detrimental treatment as found arose from the fact of him making that protected act.

## Conclusions

47 These are our conclusions, which are provided by reference to the list of issues.

48 We start with the first point under Issue 1 which is the time limit issue. Our findings with respect to the other issues make it unnecessary for us to consider this in the detail set out between Issues 1.1 to 1.4. For completeness, we find that most of the claimant's claims are brought in time or would amount to conduct extending over a period.

49 We turn to item 2 which is the unfair dismissal claim. At 2.1 we are asked whether the claimant had sufficient service to claim unfair dismissal; he does not. There is no question about that. The dates of employment are agreed, and they are not in dispute. He does not have two years' service. Unless the claimant can satisfy us under 2.2 that he can bring a claim without two years employment, that claim cannot proceed. The claimant has not put forward any evidence of any exceptions to the two years' service rule under s.108; there is no evidence whatsoever that he can bring such a claim. The claimant referred in his submissions to his belief that the dismissal was premeditated. Even if it was, that still not sufficient for him to be able to bring a claim. So, there is no need to answer issues 2.3 to 2.7 because the claimant simply cannot bring such a claim. The tribunal has no jurisdiction to hear that claim and it is dismissed.

50 Turning then to Issue 3, this is the direct race discrimination, we accept the claimant's description of his race as black African Nigerian origin. Turning then to the issues listed between 3.2.1 and 3.2.12, we summarise our findings of the allegations of the claimant.

51 At Issue 3.2.1 the tribunal finds that the claimant has not shown that those comments were made.

52 At Issue 3.2.2, we accept that the claimant did send that email and received no response.

53 At Issue 3.2.3, the claimant was given cleaning duties, but the tribunal finds that they were part of his role.

54 At Issue 3.2.4, we have heard no evidence of Mr Abels asking if the claimant was "*deaf and dumb*" and that is not found. The claimant has not satisfied us that that was said.

55 At Issue 3.2.5, that is that Mr Abels asked the claimant to "*shut up*." As indicated earlier, although we have not heard from Mr Abels, we find that it is

possible that something like that may well have been said.

56 At Issue 3.2.6, this is in two parts; there are dates where it is alleged Mr Abels said that the claimant was "*fucking useless*". As stated above, we do not find that was said. The claimant has simply not satisfied us that that comment was made. The second part of 3.2.6 is dealt with in the facts and it is accepted that something may have been said about the claimant's breath, so he has made that part out of 3.2.6.

57 At Issue 3.2.7, the claimant did put in a grievance on 8 February 2021, and it is possible that Mr McNeil made reference to people going to the pub together although, as I have indicated, we did not hear from Mr McNeil.

58 At Issue 3.2.8, the grievance was not upheld.

59 Issue 3.2.9 relates to cleaning duties. Although as indicated, the tribunal accepts that cleaning duties were part of his job, we have also accepted that they probably did increase as time went on given the comments by Mr Abels in emails and his concerns about the claimant's technical abilities.

60 Issue 3.2.10 is about the WhatsApp group messages. We do not find any abuse or criticism in those WhatsApp messages. At the most these are lighthearted jokes or comments.

61 Issue 3.2.11 is about the alleged failure to send the claimant to other substations. That is correct but his place of work was set out in his contract, and we accept the respondent's reasons for that that the claimant did not have a car.

62 At Issue 3.2.12 the claimant was dismissed with one months' notice so that of course did occur.

63 We therefore turn to Issue 3.3 which is the question of whether any of those facts as found amounted to less favourable treatment. The problem with this issue is that the claimant appears to have compared his treatment to that of Mr Tembe and Mr Khan. As we understand it, although we have no very clear evidence on this, Mr Tembe is probably Black African and Mr Khan is possibly Asian. In any event, those people are not in the same position as the claimant and there is no evidence whatsoever that any concerns were raised about their ability to do their work. We cannot find any less favourable treatment.

64 On those matters we have found to have occurred or possibly have occurred (Issues 3.2.2; 3.2.3; possibly 3.2.5; part 3.2.6; possibly 3.2.7; 3.2.8; 3.2.11 and 3.2.12), we cannot say that that was less favourable treatment than those comparators because they were not in similar circumstances. The one aspect that the tribunal considered was the possibility that the claimant may well have been asked to carry out more cleaning than others (although we have little direct evidence of that). So, it is possible that he does have some different treatment to them. But, as indicated, in any event, they are not in the same position as the claimant, and he cannot show less favourable treatment.

65 In case we are wrong about that and there is some less favourable treatment, we consider Issue 3.4. That is whether any less favourable treatment was



because of the claimant's black African Nigerian origin. If we pass the burden of proof to the respondent, we are satisfied that what happened to the claimant was entirely for non-discriminatory reasons, namely the continued smooth running of the business and the claimant's lack of ability to carry out his work and not for any other reason connected to his race.

66 At Issue 3.5, although we accept some of those matters might be detrimental to the claimant, there is no connection to the claimant's race which he needs to show to succeed in this claim.

67 The claimant's case on direct discrimination must fail.

68 We turn to the harassment allegation under Issue 4. The allegations between 4.1.1. and 4.1.12 are identical to those above and the facts do not need to be repeated.

69 At Issue 4.2, we consider whether any of the matters found to have occurred related to the claimant's race. The claimant has not shown any connection between the facts as found and his race.

70 At Issue 4.3, there is a final question on harassment related to whether it had the purpose or effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. Given that the claimant cannot show that any of the matters found related to race, we do not need to answer that question. Suffice it to say that it is clear to the tribunal that the claimant did feel uncomfortable and that he believed there was a hostile environment, and he may well genuinely have felt that to be the case but that does not make it racial harassment under the EQA. So that claim must also fail.

71 We turn to the victimisation complaint. The first question at Issue 5.1 and 5.2 is whether the claimant made a protected act in February 2020 and/or February 2021. The tribunal concludes that the 2021 grievance was a protected act for the purposes of s.27 EQA partly because the language used by the claimant reflects some of the language in EQA. Issue 5.2 asks us to consider whether the 2020 grievance was a protected act and we have found that it was not. There is no hint of anything under the EQA in that email to Mr McNeil.

72 The Issues between 5.3.1 and 5.3.11 mirror those in 3.2.2 and 3.2.12 and 4.1.2 and 4.1.12 and the facts do not need to be repeated.

73 At Issue 5.4 we consider whether there was a detriment. The tribunal accepts that the grievance not being upheld could amount to a detriment as, of course, is a dismissal and rejection of appeal against dismissal. The tribunal is also of the view that the claimant may well have felt the increase in his cleaning duties to be a detriment.

74 What we then have to consider at Issue 5.5 is whether any detriments that we have found were because he had raised a grievance earlier in 2021. The tribunal accepts that the reason for those detriments were not connected to the fact that he had brought a grievance but are connected to the respondent's reasonable belief in his capability to carry out his role. These are identified clearly in the dismissal and the appeal letter, and this means the

claimant's claim under the victimisation heading must also fail.

75 We do not need to consider Issue 6 which is a question of remedies for discrimination or victimisation as the claimant has not succeeded.

76 We now turn to Issue 7 with respect to holiday pay. The claimant is entitled to further payment for holidays, but this must be based on the respondent's calculation which on the facts of the case as found and to a large extent at least accepted by the claimant. The claimant accepts that he took 10 days holiday in 2021; he said that he carried forward a number of days he said less than 11, but that is the number the respondent has given and is to his favour, and that he would be entitled to 23 for the full year. Although the claimant was unable to agree the calculation, it is quite clear to the tribunal that the calculation shown to us is an accurate one and the amount outstanding to the claimant is that set out there which is £803.88.

77 Finally then, turning to the unlawful deduction of wages claim under Issue 8. This was a matter which was very difficult for the tribunal and the respondent to understand the claimant's case. At the outset of the hearing, we attempted to clarify this claim with the claimant, and we looked at his schedule of loss. In that schedule of loss the claimant has suggested a figure of £35,000 and he mentioned to the tribunal, when asked, that it related to call outs and working at weekends. He then supplied another document, which he was requested to do, just before submissions on the third day, with a figure of around £10,000 which he confirmed related to an allegation that he attended work before the start time of his shifts. He had not raised this before and there is no other evidence about this. The claimant is not able to show that he is entitled to any other sums by way of unpaid wages and his claim for unlawful deductions on that ground must therefore fail.

78 All his claims, with the exception of the holiday pay claim, must therefore fail and are dismissed.

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Employment Judge Manley

Date: 3 April 2024

Judgment sent to the parties on  
3 April 2024

For the Tribunal office

#### **Recording and Transcription**

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