RESERVED JUDGMENT

EMPLOYMENT TRIBUNALS

Claimant:	Mr A Aylmer
Respondents:	1) Dnata Catering UK Limited 2) Dnata Limited
Heard at:	Leeds Employment Tribunal (by CVP)
Before:	Employment Judge Deeley
On:	13 and 14 June 2024
Representation **Claimant**:	In person
Respondents:	First Respondent: Mr Nuttman (Solicitor) Second Respondent: did not attend

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The Judgment of the Tribunal is as follows:

1. The claimant's complaint of victimisation under s27 of the Equality Act 2010 fails and is dismissed.
2. The claimant's complaint of unauthorised deductions from wages under s13 of the Employment Rights Act 1996 fails and is dismissed.

REASONS

Respondents to this claim

3. The claim was originally presented against two other respondents. The claimant withdrew his claim against those two respondents and they were dismissed as parties to the claim.

4. Dnata Catering UK Limited states that they employed the claimant and that Dnata Limited is a separate company. The Tribunal's decision on the correct identity of the claimant's employer is set out in the section later in this Judgment headed "Findings of Fact". The Tribunal concluded that the correct respondent to the claim is Dnata Catering UK Limited. Therefore, in this Judgment, all references to the "**respondent**" are to Dnata Catering UK Limited.

Tribunal proceedings

5. This claim has been the subject of two previous preliminary hearings on:

   5.1 30 November 2023 – case management hearing held by Employment Judge Lancaster; and

   5.2 9 January 2024 – public preliminary hearing held by Employment Judge Maidment (the "**January Hearing**").

6. The preliminary hearing records prepared by Judge Lancaster and Judge Maidment set out the background to these proceedings in detail. Judge Maidment's preliminary hearing record, deposit order and judgment striking out part of the claimant's claim also provide detailed reasons of his decisions.

7. The parties informed the Tribunal that the claimant has made previous applications for reconsideration and presented appeals to the Employment Appeal Tribunal in respect of the preliminary hearings and other Tribunal correspondence.

8. The parties provided several files and documents to the Tribunal at the start of the final hearing, including:

   8.1 the claimant's file of documents;

   8.2 the respondent's file of documents (which included documents provided by the claimant that were not included in the respondent's original file of documents);

   8.3 additional documents from the respondent, consisting of companies house records for the two named respondents to this claim;

   8.4 the claimant's submission documents, which included five documents dated 13.6.24 and titled:

      8.4.1 "Final Hearing – Submission"'

      8.4.2 "Final Hearing – Additional Submission";

      8.4.3 "Email Sent & Received Under Normal Business Process";

      8.4.4 "Concerning the treatment of the Claimant in this proceeding"; and

      8.4.5 "Amendment for 09.01.24 FBP (para a to m)…"

   8.5 the respondent's summary of procedural matters up to the final hearing;

   8.6 a brief witness statement from the claimant, which cross-referred to other documents including the claimant's submission documents;

8.7 witness statements from the respondent for Mr William McGinty, Mr Malcolm McGinty and Ms Amima Talha.

9. The claimant also sent to the Tribunal on the morning of the second day of this hearing:

   9.1 a document dated 14 June 2024 and headed "Final hearing – Third submission (CMO and Cross examination)"; and

   9.2 print outs of Facebook timesheets.

10. The Tribunal included the Facebook roster screenshots in the hearing file with the respondent's consent.

Claimant's applications during the final hearing

11. The claimant applied shortly before the final hearing to recuse Employment Judges Lancaster and Maidment from the final hearing. He also applied to recuse Employment James and the members (Mrs D Winter and Mr G Corbett) who had formed the Tribunal Panel at the hearing on 26 January to 2 February 2023 of his previous Tribunal claim against another former employer (the "**2023 ET Claim**"). None of those Judges or Members were due to here this claim.

12. The claimant made two further applications at the outset of this final hearing:

   12.1 **an application to amend his claim**, to include the complaints that Employment Judge Maidment had refused to amend and/or struck out at the January Hearing; and

   12.2 **an application to strike out the respondent's response** under Rule 37 of the Employment Tribunal's Rules of Procedure, for reasons related to the respondent's conduct around providing copies of their witness statements to the claimant.

13. The claimant had also presented a further claim under case reference 1806174/24 to the Tribunal on 7 May 2024 (the "**Second Claim**"). However, the Second Claim had not been served on the respondent as at the date of the final hearing of this claim and was not heard as part of these proceedings.

Application to amend claim

14. The Tribunal read the parts of the documents referred to by the claimant and the respondent relating to this application.

15. The Tribunal concluded that the Tribunal was unable to interfere with Judge Maidment's decision to refuse to amend and/or strike out the complaints at the January Hearing. The Tribunal noted that the claimant had already applied for reconsideration of Judge Maidment's decision and that this had been refused.

Application to strike out response

16. The Tribunal heard oral submissions from both parties in relation to the claimant's application to strike out the respondent's response. The Tribunal concluded that it

would not be appropriate to strike out the respondent's response at this stage in the proceedings for the following key reasons:

16.1 the respondent had prepared a hearing file for this claim several weeks before the final hearing, which had been updated with additional documents provided by the claimant. Both parties had had ample opportunity to consider the documents relevant to this claim;

16.2 the claimant's statement was very brief (less than half a page) and did not set out his account of the events on which he relied in support of his complaints. Instead, the claimant's statement cross-referred to his other documents, but these did not contain a proper account of the events of which he complained either. As a result the claimant would need to provide additional oral evidence regarding his complaints;

16.3 the respondent sent password protected copies of their statements to the claimant a week before the final hearing, however they had refused to provide the password until the day before the final hearing on the basis that the claimant had failed to send a proper witness statement;

16.4 the respondent's statements were relatively brief (consisting of a few double-spaced pages for each of the three witnesses).

17. The Tribunal also notes that the claimant represented himself in 2023 during a six day hearing relating to his previous employer, which included victimisation complaints. The claimant was aware of the Tribunal process, albeit that he had not received legal advice on this claim.

18. However, the Tribunal was concerned that the claimant had not yet read the respondent's witness statements. The Tribunal noted that the claimant would have the opportunity to read the respondent's statements during the Tribunal's reading time and lunch break. The Tribunal therefore proposed two options:

18.1 to hear the claimant's evidence on the afternoon of the first day of the hearing, then to adjourn until 12pm on the second day of the hearing so that the claimant had time to prepare his cross-examination from 4pm on the first day of the hearing until 12pm on the second day of the hearing; or

18.2 to postpone the final hearing so that the claimant had additional time to prepare his cross-examination.

19. The claimant stated that he would prefer to continue with the final hearing. The respondent did not object to the Tribunal's proposal. The Tribunal therefore heard evidence from the claimant, including cross-examination, on the afternoon of the first day of the hearing.

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Events on the second day of the final hearing

20. The hearing re-started at 12pm on 14 June 2024. The claimant emailed a nine page document headed "Final hearing – Third submission (CMO and Cross examination)" over night to the Tribunal.

21. The claimant then stated at the start of the second day that he 'had done his cross-examination in writing'. The Tribunal queried what he meant by this and explained that cross-examination involved one party asking questions of the other party's witness to challenge the witness' version of events. The Tribunal noted that the claimant knew what the cross-examination process involved, because:

    21.1 he had represented himself during the 2023 ET Claim;

    21.2 the Tribunal had explained on the first day of this hearing what the process involved; and

    21.3 the claimant had been cross-examined by the respondent's representative on the first day of this hearing.

22. The claimant asked what would happen if he did not ask any questions of the respondent's witnesses. The Tribunal explained that the evidence of the respondent's witnesses would be treated as unchallenged. The claimant stated that he would ask questions of the respondent's witnesses.

23. The respondent called its first witness, Ms Talha. The Tribunal reminded the claimant that any questions asked by either party must be relevant to the list of issues. The questions raised by the claimant were plainly irrelevant to the issues that the Tribunal had to decide – one related to Ms Talha's current maternity leave and the other to her maiden name, neither of which was relevant given the issues raised by this claim. The claimant then stated that he did not wish to ask any further questions of Ms Talha or the respondent's other witnesses.

24. The claimant also asked what would happen if he left the hearing. The claimant referred to Rule 47 of the Employment Tribunal Rules. The Tribunal explained that the hearing may continue in his absence or the respondent may seek to apply to strike out his claim, on the basis he was failing to pursue it. The Tribunal offered the claimant the alternative options of remaining in the hearing, leaving the hearing room and attending via an audio or videolink instead. The claimant stated that he would remain in the hearing.

25. After hearing witness evidence, the Tribunal considered oral submissions from both parties, together with the submission documents provided by the claimant and the respondent's skeleton argument document.

26. Throughout the hearing, the claimant repeatedly stated that he intended to appeal against the Tribunal's decision. The Tribunal reminded the claimant that he could raise an appeal after he had received the Tribunal's written judgment, if he wished to do so.

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Claims and issues

27. The purpose of this final hearing was to decide the claims and issues set out in Employment Judge Maidment's Case Management orders from the January Hearing:

1. Victimisation (Equality Act 2010 section 27)

1.1 Did the claimant do a protected act as follows:

1.1.1 on 28 May 2023 the claimant emailed Mr McGinty regarding his use of the name "Willy" stating: "*if you don't remove it and keep insisting on being called that – I considerate* [sic] *as sexual harassment"*

1.1.2 in an email to Ms Talha, HR adviser, on 8 June 2023, the claimant referred to the use of the respondent's absence management policy saying: *"in addition to that you focus on the probation review and away from the true reason which is discriminatory and the other one right?… I suspect this is being done before which is dangerous because this encourages those within management to be more discriminatory in their behaviour toward present and future employees."*

1.2 Did the respondent do the following things:

1.2.1 Mr McGinty removed the claimant from the respondent's Facebook chat site on 29 May 2023

1.2.2 the claimant maintains that the removal from Facebook amounted to a dismissal, but that he was retained without being informed of the dismissal

1.2.3 Ms Talha's emails to the claimant of 30 May, 1 June and two emails from her on 5 June 2023, including in an email of 5 June 2023 providing inaccurate information regarding the identity of the claimant's employer

1.2.4 On 8 June 2023, Ms Talha inviting the claimant to a probation review meeting

1.2.5 Ms Talha writing to the claimant on 20 June 2023 in terms which amounted to a dismissal of him by the respondent

1.2.6 the respondent's use of its absence management policy as a reason for dismissing the claimant for failing his probation period and failing to consider this as a conduct issue under the respondent's disciplinary procedure

1.2.7 the respondent failing to respond adequately to the claimant's two subject access requests including, on 8 August 2023, providing information in an encrypted form, stating that it could

not download CCTV footage and that it did not have an employee handbook

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

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

1.5 Was it because the respondent believed the claimant had done, or might do, a protected act?

2. Remedy for discrimination or victimisation

2.1 What financial losses has the discrimination caused the claimant?

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

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

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

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

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

2.7 Did the respondent or the claimant unreasonably fail to comply with it?

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

2.9 By what proportion, up to 25%?

2.10 Should interest be awarded? How much?

3. Unauthorised deductions

3.1 Did the respondent make unauthorised deductions from the claimant's wages and, if so, how much was deducted? The claimant maintains that he was overpaid by 0.75 of an hour in his first week of employment which commenced on 9 May 2023 and for 1.5 in his second week. However, he maintained that in the third week of his employment he was recorded as having worked 5.75 hours instead of 11.75 hours which were worked on Friday 26 May 2023. From that 6 hour shortfall was to be deducted the 2.25 hours overpaid leaving an amount outstanding and unpaid to the claimant of £40.875, representing 3.75 hours at an hourly rate of £10.90.

4. Remedy

4.1 When these proceedings were begun, was the respondent in breach of its duty to give the claimant a written statement of employment particulars or of a change to those particulars?

4.2 If the claim succeeds, are there exceptional circumstances that would make it unjust or inequitable to make the minimum award of two weeks' pay under section 38 of the Employment Act 2002? If not, the Tribunal must award two weeks' pay and may award four weeks' pay.

4.3 Would it be just and equitable to award four weeks' pay?

Unauthorised deductions – payment made

28. The respondent confirmed at the start of the hearing that they had made a payment to the claimant, relating to his complaint of unauthorised deductions from wages of £40.87. The respondent stated that the amount paid was higher than that claimed by the claimant because of the recent increases in the National Minimum Wage.

29. The respondent stated that they did not accept that the claimant had suffered any deduction from his wages, but had made the payment in the interests of saving the time expense of dealing with this complaint in evidence during the final hearing.

30. The claimant confirmed he had received this payment but refused to withdraw his wages complaints.

FINDINGS OF FACT

Background

31. The respondent employs around 4000 staff in the UK, providing airside catering services on an outsource basis. The respondent requires five years' references and

background checks for any new employees, due to the stringent security requirements for airside staff.

32. The claimant was employed by the respondent as a warehouse operative, contracted to work 40 hours per week at its Leeds site. The claimant reported into his line manager (Mr William McGinty). Mr William McGinty reported into the Unit Manager (Mr Malcolm McGinty, who was not related to Mr William McGinty).

33. The initial timeline of events relating to this claim can be summarised as set out in the table below. The claimant did not attend work after 18 May 2023.

9 – 16 May 2023	Claimant started work and undertook training and attended work, as per his roster
17 May 2023	Respondent gave the claimant a lift to/from work, claimant worked from 11am-5pm
18 May 2023	Mr William McGinty spoke to the claimant because the claimant had not worked eight hours on the previous day
19 May 2023	Claimant was absent from work.
20 - 22 May 2023	Claimant was not rostered to work.
Tuesday 23 May 2023	Claimant was absent from work. Claimant did not call the respondent, stating in his email on the evening of 23 May 2023 that there was a signal issue with his phone. Claimant emailed the respondent's HR team at 8.12pm.

Thursday 25 May 2023 – Mr Malcolm McGinty's email

34. The claimant emailed the respondent's HR team to state that he was still absent due to a family emergency and that he would be back in work on Monday. HR forwarded the claimant's email to Mr Malcolm McGinty who replied stating:

"As he is on probation and not followed sickness procedure for 3 days and also not meeting his KPI times could we please let him go."

35. We accept Mr Malcolm McGinty's evidence to the Tribunal that:

35.1 all new employees received a week's training and were subject to a six week probationary period;

35.2 the respondent had a high staff turnover because many individuals started working for the respondent, then decided that the work was not for them;

35.3 he wanted the respondent to terminate the claimant because the claimant was absent without authorisation and had failed to meet the target number of bars to load per day;

35.4 HR did not wish to terminate the claimant's employment at that time because they wanted to give him more time after his family emergency.

Sunday 28 May 2023 – claimant's emails to Mr William McGinty and HR

36. Mr William McGinty was not working on Sunday 28 May 2023. The claimant emailed Mr William McGinty (copied to HR) at 4.30pm on that day stating:

    "…

    Not comfortable with using my main Facebook account but other employees use it as well.

    Can you put your real name William McGinty on the time sheet and not "Willy" a term for penis. We have female employees here. And you wanted to be called "Willy" instead of William because you said "my mother gave me that name", something like that so change it please.

    If you don't remove it and keep insisting on being called that – I considerate [sic] *as sexual harassment.*

    …"

37. The claimant later emailed Mr McGinty again at 9.57pm on the same day stating:

    "William you are not communicating with me at all.

    Perhaps you are waiting for at work (verbal) and I feel it's a trap and you have done nothing to reduce this.

    So to reduce tension and create a possible solution to this I am putting myself in voluntary suspension (solicitor advice). As this is a small company (based in Leeds) within a larger company.

    If you agreed/disagreed with this, I wait a reply from your or HR (if they want to be involved (not call)

    If I don't get a response from this I consider this as accepting the suspension"

38. On Monday 29 May 2023, Mr William McGinty forwarded the claimant's emails to Mr Malcolm McGinty, who in turn forwarded the email to Ms Amima Talha (respondent's HR).

39. The claimant also emailed HR on 28 May 2023, stating:

    "HR deal with this person please – William as he provoke me

    Ref: email 28.05.23, 23.05.23"

40. We accept Mr William McGinty's evidence that:

    40.1 he has always been known as "Willy", just as his Father and Grandfather were also known as "Willy";

    40.2 "Willy" is a common abbreviation or nickname for "William";

    40.3 the roster original referred to him by his full name, but it was later shortened before the claimant started working for the respondent (as was the case with other employee's names on later rosters).

41. The claimant stated in his oral evidence that he regarded calling someone "Willy" involves *"treating them as less than human"* and that he did not want to call Mr

McGinty that because *"it's disrespectful".* However, we do not accept the claimant's evidence that calling someone by their name is disrespectful. The claimant failed to explain why he believed that Mr McGinty's name amounted to discrimination – he instead stated that Mr McGinty was *"degrading the whole workplace"*.

Tuesday 30 May 2023 – emails between Ms Talha and the claimant

42. Ms Talha emailed the claimant, stating that the respondent needed the claimant to provide some context to the concerns that he raised. Ms Talha suggested arranging a phone call with Mr Malcolm McGinty or holding an informal meeting. Ms Talha also stated:

"Please can you explain what you mean by a voluntary suspension as we have not suspended you. If you do not attend work when you are rostered to be on shift, then you are absent without authorisation and this is unpaid.

Please advise how you would like to address the issues you have raised."

43. The claimant responded by email, stating:

"I did not initiated [sic] *a grievance…*

You understand the issue (emails)..

Context? – you understand

I'm confused. Why don't you deal with the issues yourselves? You provide alternatives and your experience with this kind of thing when I have done my part.

Wait, that's a grievance also? – Why are you turning this into a grievance? And are you forcing me to start one?

…

"Voluntary Suspension" – you read the emails so that's fine and more to it (stress and others stuff)…"

Thursday 1 and Friday 2 June 2023 – emails between Ms Talha and the claimant

44. The claimant emailed Ms Talha again on 1 June 2023, querying whether the respondent was going to 'apply its procedures and policies' to Mr William McGinty. Ms Talha replied to the claimant on 1 June 2023, stating that the respondent was not 'forcing' the claimant to raise a grievance and again asking him to clarify his concerns. Ms Talha also stated:

"With regards to the voluntary suspension, this is not something that can be applied. If you are unable to attend work due to sickness, then you will need to provide a medical certificate to cover your absence. Otherwise, if you fail to attend your rostered shifts, your absence will be considered an unauthorised absence which will be unpaid."

45. The claimant responded on the same date stating:

"There is now no trust and confidence between us and cannot be repaired.

Dismissed [sic] *me please."*

46. The claimant emailed again on 1 June 2023 and stated:

"When I mean "dismissed me please" it's not constructive dismissal

You have to do it"

47. The claimant emailed Ms Talha on 2 June 2023 and stated:

"Stop prolonging it and start the proceeding against me, unless you don't want to?"

Monday 5 June 2023 – emails between Ms Talha and the claimant

48. Ms Talha emailed the claimant stating:

"As mentioned in my previous email, we are not in a position to dismiss you and we want to understand the issues you have raised. However, it is ultimately your decision if you wish to resign."

49. Ms Talha also responded to the claimant's email of 4 June 2023, in which he asked her to confirm his employer's identity. Ms Talha responded stating that the claimant was employed by "dnata Catering UK" and referred him to the address on her email sign off, which was stated to be: Building 319, World Cargo Centre, Manchester Airport, Manchester M90 5EX.

Probationary review meeting invitation

50. Ms Talha sent a letter signed by Mr McGinty to the claimant on 8 June 2023, which invited him to attend a Probation Review meeting. The letter stated that:

    50.1 the claimant had been absent without authorisation since 29 May 2023;

    50.2 the claimant had refused to meet with the respondent to discuss the concerns that he raised;

    50.3 one possible outcome of the review meeting was the termination of the claimant's employment.

51. The claimant responded by email that evening, stating:

"You put a company absence management policy?? Under probation review which is separate to the other one which you and I know.

In addition to that you focus on the probation review and away from the true reason which is discriminatory and the other one right?

You chose to possibly make it fair? Which I suspect is to avoid unfair dismissal, correct?

I suspect this has been done before which is dangerous because this encourages those within the management to be more discriminatory in their behaviour towards present and future employees.

Based on your conduct I would not be attending so put your reasoning in the probation review meeting."

52. The claimant also emailed separately asking for a copy of the employee handbook and contract.

20 June 2023 letter

53. Ms Talha emailed a letter signed by Mr Malcolm McGinty the claimant on 20 June 2023 and stated that:

    "Based on the fact that you have not returned to work and are refusing to attend any scheduled meeting, we have no alternative but to conclude that you no longer wish to work for dnata and have resigned from your position. As such, we will process you as a leaver."

54. The claimant sent further emails to Ms Talha. However, on 26 June 2023 his email accepted that he was a 'former employee' and requested his P45.

Documents sent to the claimant as part of his subject access request

55. The claimant received the emailed letter on 20 June 2023 he referred to it in his email that evening. The claimant also questioned the terms of the contract provided by the respondent and asked for his subject access request information.

56. Ms Talha responded on 21 June 2023, stating that the respondent does not have an Employee Handbook. The respondent stated in its evidence to the Tribunal that they have employee policies, but no handbook. We note that the claimant provided the front page of a handbook as part of his disclosure. However, the front page carried the logo "dnata Ltd". We accept the respondent's evidence that this was the handbook for Dnata Limited, rather than for the respondent.

57. The claimant complained on 21 July 2023 that his subject access requests had not been properly acknowledge and stated that:

    "I would be waiting for SAR letter and documents/video via file transfer. Also add the Employee Handbook and Dnata Catering UK Limited HR, DPO contact email as well"

58. Ms Charlotte Buckle (respondent's HR) emailed a password protected folder of documents to the claimant on 8 August 2023, along with the password in a separate email. We accept that this information was encrypted because it could only be access using the appropriate password.

59. We accept Mr Malcolm McGinty's evidence that he watched the CCTV footage requested by the claimant and attempted to download the CCTV footage onto a disk and gave the disk to HR. However, the CCTV footage was corrupted and could not be viewed.

Correct respondent to this claim

60. Dnata Catering UK Limited's Government Companies House details are:

    60.1 company number - 08005515;

    60.2 registered office - Building 319, World Cargo Centre, Manchester Airport, Manchester M90 5EX;

    60.3 persons with significant control – Alpha Flight Group Limited (with the same registered office as Dnata Catering UK Limited);

    60.4 nature of business categories:

60.4.1 other retail sale not in stores, stalls or markets;

60.4.2 event catering activities;

60.4.3 public houses and bars.

61. Dnata Limited did not present a response to the claim. Dnata Limited's solicitors wrote to the Tribunal on 11 June 2024, stating that they would not attend this hearing. Dnata Limited's Government Companies House details are:

61.1 company number - 03091040;

61.2 registered office – Dakota House, Poyle Road, Colnbrook, Berkshire, SL3 0QX;

61.3 persons with significant control – Dnata Aviation Services Limited (with the same registered office as Dnata Limited);

61.4 nature of business categories:

61.4.1 operation of warehousing and storage facilities for air transport activities;

61.4.2 service activities incidental to air transportation; and

61.4.3 cargo handling for air transport activities.

62. We note that both companies share one common director, Hana Mohammad Azim Ahmad Alawadhi, resident in the United Arab Emirates. However, both companies are registered separately at Companies House and are controlled by different legal entities.

63. We note that the claimant's contract of employment dated 14 June 2023 states that he was employed by "Dnata Catering UK and I". The respondent's representative stated that this was an error and that the correct name of the respondent is Dnata Catering UK Limited.

64. We accept the respondent's evidence that the claimant was employed by Dnata Catering UK Limited and not by Dnata Limited because this was consistent with the claimant's contract of employment and the address on Ms Talha's email sign off. The claimant provided no evidence to suggest that he was employed by Dnata Limited.

RELEVANT LAW

VICTIMISATION

65. The provisions relating to harassment are set out at s27 of the Equality Act 2010 (the "**EQA**"):

27 Victimisation
(1) A person (A) victimises another person (B) if A subjects B to a detriment because -
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act –
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is give, or the allegation is made, in bad faith.

66. There are four key sets of questions which the Tribunal must bear in mind when considering a claim for victimisation:

    66.1 First:

        66.1.1 did the claimant do something which might be a protected act or did the respondent believe that the claimant had done or might do something which might be a protected act?

        66.1.2 if so, did that potential protected act involve giving false evidence or information or making a false allegation which was in bad faith?

    66.2 If so, did the claimant suffer a detriment (or detriments)?

    66.3 If so, what was the reason for such detriment (or detriments)?

    66.4 Did the respondent subject the claimant to such detriment (or detriments) because the claimant did (or might do) a protected act?

67. The Court of Appeal noted in Aziz v Trinity Street Taxis Ltd and ors 1988 ICR 534 CA, the meaning of 'doing something' should be given a wide interpretation. Whether a general complaint of discrimination amounts to a protected act for this purpose will depend on the facts of the case (see, for example, *Durrani v London Borough of Ealing EAT 0454/12*.)

68. Protection from victimisation under s27(2)(d) is available even if the allegation turns out to be untrue. However, s27(3) provides that making a false allegation will not be protected if it is done in 'bad faith'. In *HM Prison Service and ors v Ibimidun 2008 IRLR 940, EAT*, a case brought under the equivalent provisions in the race discrimination legislation, the EAT confirmed that the victimisation provisions are designed to protect bona fide claims only. Accordingly, the EAT held that dismissing an employee for making numerous claims of race discrimination against his employer and his colleagues in order to harass the employer into offering him a settlement did not amount to victimisation.

69. In *Saad v Southampton University Hospitals NHS Trust 2019 ICR 311, EAT*, the EAT considered the 'bad faith' test under s27(3) EqA. The EAT held that the primary question for victimisation purposes is whether the employee has acted honestly in giving the evidence or information, or in making the allegation, that is relied on as a protected act. The EAT stated that the tribunal needs to determine whether the employee has given the evidence or information, or made the allegation, honestly. The falsity of the allegation does not mean the employee acted in bad faith but may

be a relevant consideration in determining that question: the more obviously false the allegation, the more a tribunal might be inclined to find it was made without honest belief. That said, the EAT did not rule out that an employee's motivation for making the allegation in issue might be relevant to the tribunal's determination of bad faith under S.27(3). For example, the tribunal might conclude that the employee dishonestly made a false allegation because he or she wanted to achieve some other result, or that the employee was wilfully reckless as to whether the allegation was true (and thus had no personal belief in its content) because of some collateral purpose in making it. Motivation can be part of the relevant context in which the tribunal assesses bad faith, but the primary focus remains on the question of the employee's honesty.

70. In *Shamoon v Chief Constable of the Royal Ulster Constabulary* 2003 ICR 337, HL, the House of Lords established that a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his or her disadvantage. The House of Lords felt that an unjustified sense of grievance could not amount to a detriment but did emphasise that whether a claimant has been disadvantaged is to be viewed subjectively.

71. The EAT also considered the relevant test in *Warburton v Chief Constable of Northamptonshire Police 2022 ICR 925*. The EAT held that the test has both subjective and objective elements. The situation must be looked at from the claimant's point of view (see *Chief Constable of West Yorkshire Police v Khan* 2001 ICR 1065, HL), but the claimant's perception must be 'reasonable' in the circumstances (see *Shamoon*). Therefore it is sufficient if a reasonable worker might take the view that the conduct in question was detrimental.

72. In terms of causation, for the purposes of a victimisation complaint the respondent must subject the claimant to a detriment because he did (or might do) a protected act. The Court of Appeal held in Greater *Manchester Police v Bailey* [2017] EWCA Civ 425 that the 'but for' test applicable to direct discrimination cases does not apply.

73. If detriment is established, the issue of the respondent's state of mind is relevant to establishing whether there is a necessary link in the mind of the alleged discriminator between the doing of the protected acts and the less favourable treatment (see *Nagarajan v London Regional Transport* [1999] IRLR 572 and *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830). However:

    73.1 there is no requirement for the claimant to show that the alleged discriminator was wholly motivated to act by the claimant's protected act (*Nagarajan*). Where there is more than one motive in play, all that is needed is that the discriminatory reason should be of 'sufficient weight' (*O'Donoghue v Redcar and Cleveland Borough Council* [2001] IRLR 615, CA); and

    73.2 the respondent will not be able to escape liability by showing an absence of intention to discriminate if the necessary link between the doing of the acts and less favourable treatment exists.

Burden of proof

74. The burden of proof is set out at s136 EQA for all provisions of the EQA, as follows:

> **136 Burden of proof**
> …
> (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.
> …
> (6) A reference to the court includes a reference to -
> (a) an employment tribunal;
> …

75. The Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 approved guidance given by the Court of Appeal in *Igen Limited v Wong* [2005] ICR 931, as refined in *Madarassy v Nomura International plc* [2007] ICR 867. In order for the burden of proof to shift in a case of direct disability discrimination it is not enough for a claimant to show that there is a difference in disability status and a difference in treatment. In general terms "something more" than that would be required before the respondent is required to provide a non-discriminatory explanation.

76. Mummery LJ stated in *Madarassy*: *"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination"*

77. In addition, unreasonable or unfair behaviour or treatment would not, by itself, be enough to shift the burden of proof (see *Bahl v The Law Society* [2004] IRLR 799). The House of Lords held in *Zafar v Glasgow City Council* [1998] IRLR 36) that mere unreasonable treatment by the employer "casts no light whatsoever" to the question of whether he has treated the employee "unfavourably".

78. The guidance from caselaw authorities is that the Tribunal should take a two stage approach to any issues relating to the burden of proof. The two stages are:

78.1 the Tribunal must consider whether the claimant has proved facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This can be described as the prima facie case. However, it is not enough for the claimant to show merely that he has been treated less favourably than those identified or than he hypothetically could have been (but for his disability); there must be "something more".

78.2 if the claimant satisfies the first stage, out a prima facie case, the burden of proof then shifts to the respondent. Section 123(2) of the Equality Act 2010

> provides that the Tribunal must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. The standard of proof is again the balance of probabilities. However, to discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever because of the protected characteristic.

79. However, we note that the Supreme Court in also stated that it is important not to make too much of the role of the burden of proof provisions. Those provisions will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they are not required where the Tribunal is able to make positive findings on the evidence one way or the other.

UNAUTHORISED DEDUCTIONS FROM WAGES

80. The provisions relating to unauthorised deductions from wages are set out at s13 of the Employment Rights Act 1996 (the "**ERA**"). Section 13 of the Employment Rights Act 1996 (ERA) states as follows:

> (1) An employer shall not make a deduction from wages of a worker employed by him unless –
>
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
>
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction."
>
> (2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised –
>
> (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
>
> (b) in one or more terms of the contract (whether express or implied and, if express whether or not in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such occasion.
>
> (3) Where the total amount of wages paid on any occasion by an employer employed by him is less than the total amount of the wags properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer form the worker's wages on that occasion.

APPLYING THE LAW TO THE FINDINGS OF FACT

81. We applied the law to our findings of fact and reached the conclusions set out below.

VICTIMISATION COMPLAINTS

Protected act?

82. The first question we have to consider is whether or not the claimant did a protected act for the purposes of s27 of the EQA. The claimant relies on two emails which he states were protected acts:

    82.1 on 28 May 2023 the claimant emailed Mr William McGinty regarding his use of the name "Willy", which he states he regarded as 'sexual harassment'; and

    82.2 in an email to Ms Talha, HR adviser, on 8 June 2023, the claimant referred to the use of the respondent's absence management policy saying: *"in addition to that you focus on the probation review and away from the true reason which is discriminatory and the other one right?… I suspect this is being done before which is dangerous because this encourages those within management to be more discriminatory in their behaviour toward present and future employees."*

1) Email to Mr McGinty on 28 May 2023

83. The Tribunal concluded that the claimant's email of 28 May 2023 did not amount to a protected act because the claimant did not have a genuine belief that Mr William McGinty's use of his first name amounted to sexual harassment. The claimant had not previously complained of Mr McGinty's use of his first name and did not provide any evidence of complaints from other members of staff regarding Mr McGinty's first name. The Tribunal accepts Mr McGinty's evidence that his nickname is a common abbreviation and accepted his evidence that his father and grandfather use the same nickname.

84. The claimant stated in his oral evidence that he regarded calling someone "Willy" as *"treating them as less than human"* and that he did not want to call Mr McGinty that because *"it's disrespectful".* However, we do not accept the claimant's evidence that calling someone by their name is disrespectful. The claimant failed to explain why he believed that Mr McGinty's name amounted to "*giving evidence or information"* or *"making an allegation"* related to the Equality Act for the purposes of s27 of the Act – he instead stated that Mr McGinty was *"degrading the whole workplace"*.

2) Email to Ms Talha on 8 June 2023

85. The Tribunal concluded that the claimant's email to Ms Talha on 8 June 2023 did not amount to a protected act because:

    85.1 the claimant used the word 'discriminatory', but did not provide any evidence or information to suggest that he was complaining of discrimination for the purposes of the Equality Act in his email of 8 June 2023;

    85.2 the claimant's other emails to Ms Talha between 30 May and 5 June 2023 did not provide any context to his use of the word 'discriminatory' in his email of 8 June 2023 – they consisted of emails during which the claimant stated that he regarded himself as being on 'voluntary suspension' and asked for the respondent to dismiss him.

Did the claimant suffer any detriments?

86. However, if we are incorrect in our conclusion that the claimant did not do any protected acts for the purposes of s27 of the EQA, then we have concluded that the claimant did not suffer any detriments as a result of such protected acts.

87. The claimant has alleged that he suffered from seven detriments. We will consider each alleged detriment in turn.

Detriment (1) and (2) - Mr McGinty removed the claimant from the respondent's Facebook chat site on 29 May 2023, which the claimant maintains amounted to a dismissal (but states that he was retained without being informed of the dismissal)

88. The Tribunal concluded that these allegations did not amount to detriments because:

    88.1 Mr McGinty removed the claimant from the respondent's Facebook chat page on 29 May 2023 because the claimant had complained in his email of 28 May 2023 that he was connected to this page via his personal Facebook account. The claimant was therefore removed in response to his own request for the respondent not to use his personal Facebook account for roster purposes;

    88.2 the claimant could still access the roster in the normal way – i.e. by looking at the respondent's notice board for his shifts. In addition, the claimant was in frequent email contact with the respondent at that time and could have asked them to provide details of his shifts by email;

    88.3 Mr McGinty's actions did not amount to a dismissal. The claimant did not provide any evidence proving that he regarded himself as dismissed at that time. Indeed, the claimant's emails to Ms Talha at this time demonstrate that he regarded himself as being on 'voluntary suspension' and was asking the respondent to dismiss him.

Detriment (3) - Ms Talha's emails to the claimant of 30 May, 1 June and two emails from her on 5 June 2023, including in an email of 5 June 2023 providing inaccurate information regarding the identity of the claimant's employer

89. The Tribunal concluded that Ms Talha's emails did not in fact provide inaccurate information regarding the identity of the claimant's employer:

    89.1 Ms Talha's emails of 30 May, 1 June and 12.29pm on 5 June 2023 do not contain any reference to the identity of the claimant's employer, other than her email sign off which referred to "dnata Catering UK" and the respondent's office address in Manchester;

    89.2 Ms Talha's email of 1.27pm on 5 June 2023 stated (in response to a request form the claimant) that the claimant was employed by "dnata Catering UK"

and that the correct address was the respondent's office address in Manchester on her email sign off;

89.3 Ms Talha's email of 1.27pm on 5 June 2023 did not state the respondent's full legal name (Dnata Catering UK Limited). However, the claimant provided no evidence to suggest that this email was in any way misleading or that she did so because of his two alleged protected acts. .

Detriment (4) - Ms Talha inviting the claimant to a probation review meeting on 8 June 2023

90. The Tribunal concluded that the reason why Ms Talha emailed the letter inviting the claimant to a probation review meeting on 8 June 2023 was because the claimant was still within his probationary period and had failed to follow the respondent's absence procedures. The claimant did not challenge Ms Talha's evidence on this point.

Detriment (5) Ms Talha writing to the claimant on 20 June 2023 in terms which amounted to a dismissal of him by the respondent

91. The Tribunal concluded that Ms Talha emailed a letter signed by Mr Malcolm McGinty to the claimant confirming his dismissal on 20 June 2023 because the claimant had:

91.1 Refused to attend his probationary review meeting;

91.2 Failed to follow the respondent's absence procedure; and

91.3 When he was working up to 19 May 2023, had failed to meet the respondent's KPI targets.

92. The Tribunal also notes that Mr Malcolm McGinty had in fact emailed HR on 25 May 2023 asking if the respondent could dismiss the claimant. Mr McGinty's email of 25 May 2023 cannot have been because of any of the claimant's protected acts because it was sent before either of the claimant's emails which the claimant alleges amounted to protected acts.

Detriment (6) - the respondent's use of its absence management policy as a reason for dismissing the claimant for failing his probation period and failing to consider this as a conduct issue under the respondent's disciplinary procedure

93. The Tribunal concluded that the respondent concluded that the claimant had breached its absence management procedure because the claimant was absent from work and had not provided a doctor's note regarding his absence. The Tribunal concluded that it was appropriate for the respondent to refer to its absence management policy in these circumstances. In any event, the claimant failed to

provide any evidence to suggest that the reason for using the absence management policy was because of his alleged protected acts.

Detriment (7) - the respondent failing to respond adequately to the claimant's two subject access requests including, on 8 August 2023, providing information in an encrypted form, stating that it could not download CCTV footage and that it did not have an employee handbook

94. The Tribunal concluded that Ms Buckle sent a password protected folder of the claimant's personal data by email to the claimant on 8 August 2023. This consisted of encrypted information because the data could only be accessed with the appropriate password.

95. The Tribunal accepted Mr Malcolm McGinty's evidence that he viewed the CCTV footage and downloaded it onto a disk, which he gave to HR, however the CCTV footage was corrupt and could not be viewed from the disk.

96. The Tribunal accepted Ms Talha's evidence that the respondent did not have an employee handbook. Instead, the respondent had policies available to view on its intranet. The front page of the handbook provided by the claimant in the hearing file consisted of the front page for a different company that did not employ the claimant.

97. In any event, the claimant did not provide any evidence to suggest that the reasons for the respondent's response to his subject access requests related to his alleged protected acts.

98. The claimant's complaints of victimisation detriments therefore fail and are dismissed.

UNAUTHORISED DEDUCTIONS

99. The respondent paid the claimant more than the amount that he claimed on the first day of the hearing, stating that they had increased the amount in line with the current National Minimum Wage rate. The claimant stated that he had received the payment, but did not want to withdraw his wages complaint.

100. However, the claimant failed to provide any evidence regarding the alleged unauthorised deductions and how he had calculated these. The claimant's complaint of unauthorised deductions from wages therefore fails and is dismissed.

CONCLUSIONS

101. The Tribunal concluded that the claimant's complaints of:

101.1 Victimisation under s27 of the EQA 2010; and

101.2 Unauthorised deductions from wages under s13 of the Employment Rights Act 1996;

fail and are dismissed.

Employment Judge Deeley
16 July 2024