EMPLOYMENT TRIBUNALS

Claimant: **Mr B Vaidya**

Respondent: **Secretary of State for Justice**

Heard at: **Reading** **On: 7, 8, 9, 10 May 2024**

Before: **Employment Judge Shastri-Hurst, Mr A Kapur and Dr C Whitehouse**

Representation
Claimant: **Ms Godwins (solicitor)**
Respondent: **Mr Canning (counsel)**

RESERVED JUDGMENT

1. All the claimants' claims are not well founded and fail.

REASONS

Introduction

1. The claimant has been working for the respondent since January 1997 at the Feltham Young Offenders Institute. His position is one of Operational Support Grade ("OSG"). The claimant is an Asian Indian man. Early conciliation commenced on 16 December 2022 and concluded on 23 January 2023. The claimant presented his claim form on 22 February 2023, presenting claims of direct discrimination on the grounds of religion/belief and race, of harassment also on the grounds of religion/belief and race, and victimisation. At a preliminary hearing on 7 July 2023, the claimant indicated that he wanted to withdraw his complaints of religion/belief discrimination/harassment however, by the time of the final merit hearing, no judgment had been issued to reflect this. We therefore issued a judgment on the first day of the hearing before us.

2. The claimant's claim focuses around treatment he allegedly received from Ms Tracey Adam ("TA") (Custodial Manager and the claimant's line

manager for part of the chronology) and Mr Chris Payne ("CP") (Principal Officer, and the claimant's line manager for part of the chronology). This treatment allegedly began in 2018, culminating primarily in the manner in which the claimant's partial retirement application in August 2021 was dealt with. The claimant remains employed by the respondent and works full-time; he is yet to take partial retirement.

3. The respondent accepts that most of the factual acts said to have been done by the respondent were in fact done. However it robustly denies that these acts occurred in any way because of the claimant's race or the bringing of any grievances. It therefore denies the claims in their entirety.

4. In order to assist in our decision-making, the Tribunal had in front of it a bundle of 593 pages including the index. We also had the benefit of a statement with various exhibits from the claimant, as well as five witness statements from the respondent as follows:

    4.1. Faye Reilly ("FR") - Administrative Officer;
    4.2. Chris Payne ("CP") – Principal Officer, the claimant's manager for part of the chronology
    4.3. Dean Barden ("DB") – Deputy Head of Communications
    4.4. Dean Donoghue ("DD") – Deputy Governor;
    4.5. Tracey Adam ("TA") – Custodial Manager, the claimant's manager for part of the chronology

5. We also had a cast list and chronology produced by the respondent. Although these documents were not formally agreed by the claimant, no particular issue was taken with them.

6. In terms of witnesses, unfortunately FR and CP were unable to attend to give evidence orally due to their ill health. We expand upon this later in our decision, but for now evidently this meant that those two witnesses were not able to be cross-examined and we have given their statements such weight as we feel able to in the circumstances.

7. As mentioned above, this claim was case managed in July 2023, following which a list of issues was produced that now appears at page 73 of the bundle. With the amendment that the protected characteristics relied upon now have been reduced to being solely race, we adopted this list, which is set out below for ease of reference.

Issues

8. The below are the issues as agreed between the parties and the Tribunal on the first morning of the hearing. There were some minor alterations that were not contentious, and we have recorded below the specific individuals alleged to have been perpetrators for each allegation.

Direct race discrimination

1. The Claimant relies on the protected characteristic of race. He relies on being "non-White" as a protected racial characteristic.

Claim 1: *Rejecting requests for annual leave*

2. *Between 21 March 2018 and 26 June 2018, did TA reject the Claimant's request for annual leave and record the leave as an unauthorised absence? ("**Claim 1A"**)*

3. *Between February 2019 and 4 April 2019, did TA reject the Claimant's request for annual leave? ("**Claim 1B**")*

4. *If so, in so doing:*

    4.1. *Did the Respondent treat the Claimant less favourably than it would treat others because of his race? The Claimant relies on a hypothetical comparator.*

Claim 2: *Governor Emma Laws (EL) failed to respond to the appeal made by the Claimant for attendance management (the identity of the alleged perpetrator only became clear during the claimant's closing submissions).*

5. *Did the Respondent (EL) fail to respond to the Claimant's appeal made on or around 23 January 2020 against an Attendance Improvement Warning Stage 1 issued on 10 January 2020?*

6. *If so, in so doing:*

    6.1. *Did the Respondent treat the Claimant less favourably than it would treat others because of his race? The Claimant relies on a hypothetical comparator.*

Claims 3 and 4: *20 December 2021 application for partial retirement*

7. *On 20 December 2021:*

    7.1. *Did TA reject the Claimant's application for partial retirement? (**Claim 3)***

    7.2. *Did TA reject the Claimant's suggested roster accompanying his application for partial retirement? (**Claim 4**)*

8. *If so, in so doing:*

    8.1. *Did the Respondent treat the Claimant less favourably than it would treat others because of his race? The Claimant relies on 7 white OSGs who applied for partial retirement in 2021 as comparators.*

Claim 5: *Failed or refused to undertake a Stress Risk Assessment*

9. *On or after 22 March 2022, did CP deliberately fail to undertake a stress risk assessment?*

10. *If so, in failing to do so:*

10.1. Did the Respondent treat the Claimant less favourably than it would treat others because of his race? The Claimant relies on a hypothetical comparator.

Claim 6: *Applied the sanction of an Attendance Warning*

*11. On 10 January 2020 (**Claim 6A**) and 7 July 2022 (**Claim 6B**), did CP issue an Attendance Improvement Warning stage 1?*

12. If so, in so doing:

12.1. Did the Respondent treat the Claimant less favourably than it would treat others because of his race? The Claimant relies on a hypothetical comparator.

Claim 7: *DD failed or refused to implement the Claimant's part time hours and/or partial retirement on or after 12 December 2022*

13. Did the Respondent (DD) fail to implement the Claimant's part time hours and/or partial retirement application as an outcome of the grievance appeal from 12 December 2022?

14. If so, in so doing:

14.1. Did the Respondent treat the Claimant less favourably than it would treat others because of his race? The Claimant relies on a hypothetical comparator.

Harassment

15. Was the Respondent responsible for the alleged acts or omissions set out in paragraphs 2, 3, 5, 7, 9, 11, 13 (i.e. claims 1 to 7 above) and/or 20.1 above/below?

16. If so, did that constitute unwanted conduct?

17. If so, was that conduct related to the Claimant's race?

18. If so, did that conduct have the purpose or effect of (a) violating the Claimant's dignity or (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

Victimisation

19. Did the Claimant's grievances lodged on 26 June 2018 and 11 February 2022 constitute protected acts within the meaning of section 27 of the Equality Act 2010? At the commencement of the final merits hearing, the respondent conceded that both grievances did amount to protected acts.

20. Did the Respondent carry out the following:

20.1. In or around January 2020, did TA fail to deliver a £30 voucher to the Claimant? The Claimant relies on the grievance lodged on 26 June 2018.

20.2. On 20 December 2021:

20.2.1. Did TA reject the Claimant's application for partial retirement? The Claimant relies on the grievance lodged on 26 June 2018;

20.2.2. Did TA reject the Claimant's suggested roster accompanying his application for partial retirement? The Claimant relies on the grievance lodged on 26 June 2018;

20.3. On 6 May 2022 did DB refuse the Claimant's grievance of discrimination and the refusal to reject his part-time hours/partial retirement? The Claimant relies on the grievance lodged on 11 February 2022.

20.4. On or after 12 December 2022, did DD fail to grant the Claimant's part-time hours/partial retirement request? The Claimant relies on the grievance lodged on 11 February 2022

21. If so, did it subject the Claimant to a detriment because the Claimant did the alleged protected act?

Jurisdiction

22. Did the Claimant bring his claims after the end of the period of (a) three months starting with the date of the act to which the complaint relates or (b) such other period as the Tribunal thinks just and equitable?

Remedy

23. What remedy, if any, is the Claimant entitled?

9. The Tribunal notes that Claims 3 and 4 are the same factual allegations as paragraph 20.2, and Claim 7 is the same factual allegation as paragraph 20.4.

Findings of fact

Background

10. The claimant commenced work at Feltham Young Offenders Institute in January 2007. He was employed as an OSG.

11. DD was able to give us some statistics about the make-up of staff at HMP Feltham. As deputy governor DD is responsible for 380 members of staff: his responsibility covers inmates between the ages of 18 and 30. There are other staffing groups for other age groups.

12. DD's staff team of 380 is made up of approximately 205 office group members, 80 OSGs, 22 custodial managers and a number of middle managers. In terms of the racial profile of all staff at HMP Feltham (not just those for whom he is responsible), DD told us that around 40% to 45% are

black and minority ethnicities. We accept this evidence; it was unchallenged and we note that DD chairs the diversity and inclusion meetings for HMP Feltham and therefore we accept he would be alive to these statistics. He also informed us that there are up to 10 middle managers from black and minority ethnicities, and that there was some representation from those same ethnicities within those appointed as custodial managers.

The production of shift patterns

13. Within the claimant's function, around the time of the claimant's application for partial retirement in 2021, there were 34 OSGs. A computer system called "Invision" (often referred to interchangeably as "Detail"), managed by a team known as "Detail", is responsible primarily for producing the shift patterns for those 34 individuals. Historically there was room for more human input and more manager discretion within the production of shift patterns. However, there came a time in January 2020 when it was recognised by the Workforce Planning Committee ("WFPC") that changes to shift patterns in the form of partial retirement requests needed to be subject to a more formal and stringent policy. This was because more and more people were applying and being granted their own desired shift pattern for partial retirement. This inevitably meant that there was a lack of cover over weekends and at the beginning and end of each week, and for unsociable hours. Weekend working and unsociable hours were (and are still) referred to together as "red hours".

14. It was therefore decided by the WFPC at a meeting on 16 January 2020, that any subsequent requests for partial retirement would be placed in a queue, and would only be approved if red hours were sufficiently covered and the proposed shift pattern met business need – page 404.

15. At the 16 July 2020 WFPC meeting, EL noted that there were a lot of OSGs on part-time hours. She therefore asked TA and Mark Hollier ("MH") (Prison Officers Association representative) to undertake a review of all OSGs' hours – page 442.

16. At the 17 September 2020 WFPC meeting, a new policy was put in place that (page 449);

> "going forward all WLB [work-life balance] applications must be approved via line manager, detail and finally J_ L_ V_ [name redacted] prior to final sign off in the WFP[C] meeting"

17. We find that the communication and dissemination about the implementation of this new policy was poor to say the least. We have no evidence that there was any dissemination of this policy to members of staff, such as a governor's notice, other than DD informing us that the minutes of WFPC meetings were available to be read by any member of staff. We find that this does not absolve the respondent of the need to formally disseminate not only this new policy, but the start date for when the new policy was to take effect. We also note that it does not appear that the Exit Management Policy, which deals with partial retirement obligations, was altered to reflect this change: the only Exit Management Policy we have within the bundle was due to expire on 18 April 2015 – page 110.

18. We also find that the wording as recorded in the above cited WPFC minutes is not crystal clear. We accept that what was meant by the WFPC was as follows: it was intended that any proposed new roster accompanying a work-life balance or partial retirement application would need to be approved or indeed produced by Detail as a precondition of approval of said applications from 17 September 2020. We find this based on having heard evidence from TA before us and seen others' understanding of this new policy within the bundle; for example Leon Hubbard ("LH") (Prison Officers Association representative) within the grievance interview at page 232.

Claim 1A – TA refused the claimant's annual leave request 2018

19. There is a general rule put in place by Detail regarding annual leave that, when there are already 4 OSGs booked as being away on leave, no further annual leave for any other OSGs will be granted (referred to during Tribunal proceedings as "the Rule of Four"). Line managers may overrule Detail and allow leave even when it would break the Rule of Four. DD's evidence on line manager's discretion to swap shifts to enable leave was that this power should be used very sparingly due to the knock-on complications it can cause to the underlying shift pattern. DD said in evidence:

> "I don't encourage discretion as I need to ensure the safe running of the prison".

20. We accept this evidence: it seems to us that, where 34 shift patterns are so integrally linked, the changes to those shift patterns need to be kept to a minimum, where necessary and/or in extenuating circumstances, so as to avoid any knock-on ramifications for other shift patterns.

21. The claimant made a request on 21 March 2018 for two weeks' leave between 29 April 2018 and 13 May 2018. His request went through Detail, which granted him the first week annual leave. However, it refused the request for leave from 7 to 13 May 2018, due to the fact that there were already 6 OSGs on leave for that period. It was TA, as his then Custody Manager (line manager), who informed the claimant that he would be unable to take the second week of requested leave, given the Rule of Four.

22. The claimant alleges that TA refused his leave request because of his race or for a reason in relation to his race. It was said by his representative that OSGs 5 and 6, who were permitted to take leave despite there already being 4 OSGs away, were white. These are the alleged facts concerning **Claim 1A**. We are not satisfied that the two OSGs who were granted leave beyond the Rule of Four (OSGs 5 and 6) were indeed white. There is no mention of their race within the claimant's grievance at page 127, although we accept that his general complaint is one of discrimination. We also note that there is no reference to the race of OSGs 5 and 6 within the claimant's witness statement. Neither did the claimant tell us the race of OSGs 5 and 6 during his oral evidence to the Tribunal. Although we understand it to be the claimant's case that OSGs 5 and 6 were white, no evidence of this has been produced to us. We also note that the race of OSGs 5 and 6 is not mentioned in the Grounds of Complaint. Their race (white) has only been referred to in submissions/representations.

23. It was TA's evidence that, when considering the claimant's leave request, she consulted the Invision system and saw that 6 OSGs were off already.

She did not look at their names, and did not know their race. She told us that she rejected the claimant's request because it fell foul of the Rule of Four. We accept this evidence from her: we find that TA's general approach to the respondent's policies is to enforce them in a strict fashion, and she has been referred to by the claimant's representative as meticulous. We find that it was in fact the Invision system/Detail that made the decision to reject the claimant's application for leave for the second week; TA was simply standing by that decision. We accept that this is her general approach in that she stands by decisions made by the computer system, and is slow to exercise discretion to diverge from such a decision. Here, the claimant had presented no extenuating circumstances as to why TA should waive the Rule of Four. She (TA) was not the decision-maker in relation to OSGs 5 and 6: we have heard no evidence as to their certain circumstances and why their custody manager determined that it was correct to exercise discretion in their individual cases.

24. Following this decision of Detail and TA, the claimant approached Governor Dixon, who confirmed that leave was oversubscribed and the claimant could not have his second week off. The claimant went to another custody manager, Custody Manager Lewis, who suggested that he took unpaid leave which could be authorised. Lewis and Dixon latterly went back on this decision, and so the claimant asked Dixon if it would be possible for him to try swapping shifts with colleagues to cover his second week of requested leave. Dixon approved of this process and Lewis provided the claimant with a list of names of staff who were willing to swap shifts with the claimant. Having spoken to some members of staff, the claimant emailed Lewis to inform him that two colleagues were willing to swap shifts with him, meaning that he could go on his second week's holiday. Those members of staff were Chris Dell (CD) and Nicky Bukari (NB).

25. The claimant then went on holiday without taking any steps to check with Detail that the proposed shifts were workable. The claimant told us that he relied upon Lewis's list: he understood that, at a local level, there was no need to go to Detail and that Lewis's list would only include staff who were in fact able to swap shifts with him.

26. We find that it was the claimant's responsibility to check with Detail that his two colleagues who agreed to cover his shifts were in fact able to do so. However we have some sympathy with the claimant accepting the word of Custody Manager Lewis, given his position at local level. We also remember that TA said that, with changes at a local level, it was the line manager's responsibility to inform Detail. We therefore have sympathy with why the claimant did not approach Detail to check the shift swaps were practicable.

27. When the claimant returned from holiday, he was informed by CD and NB they had been refused the shift swaps. The claimant noticed that the two days to which shift swaps related had been marked as unauthorised unpaid leave.

28. The claimant raised a complaint about the refusal of the request on 26 June 2018; that grievance can be found at page 127. This grievance is **Protected Act 1** for the purposes of the claimant's victimisation claim.

29. James Wise-Ford ("JWF") (Head of Behaviour Management) was appointed as Grievance Officer and received the grievance on 21 September 2018. Having reviewed the evidence and spoken to the claimant in person, in his decision of 25 October 2018 JWF partially upheld the grievance. However he specifically rejected the allegations of discrimination and victimisation. The grievance was partially upheld on the basis that the annual leave process can be confusing in light of how the system works; this was reflected in JWF's recommendations set out at page 133. One recommendation was that the claimant's records on Invision be updated to reflect authorised unpaid leave for the period in question. This was done.

Claim 1B – TA refused the claimant's annual leave request 2019

30. On 18 February 2019, the claimant applied for leave between 19 and 26 February 2019. This leave request was refused by detail, and so the claimant approached TA who in turn refused his leave request. The claimant alleges that this refusal by TA is another act of discrimination/harassment (**Claim 1B**). The reference to the 4 April 2019 date relates to a complaint the claimant made about this refusal, and does not reference a second request for annual leave, or a fresh decision on annual leave, in this time period.

31. The claimant told us that he needed this leave due to his wife's poor health at the time. He relies upon this extenuating circumstance as demonstrating that TA's refusal to grant leave was unreasonable.

32. The claimant complained about TA's refusal to grant annual leave by email of 4 April 2019 – page 140. In that complaint, he did not reference that he told TA that his wife was ill. He relies now upon his wording in that email that he "explained the situation" as meaning that he explained his wife's ill health to TA at the time. We weigh this up against the complete lack of reference to his wife's ill-health in any contemporaneous documentation around this time, and find that, on balance, that he did not inform TA that his wife was ill. The first time the claimant referenced his wife's ill-health is in his grievance three years later – page 277.

33. This finding is supported by the detail given within his complaint email at page 140, namely that he wrote that:

> "she also refused stating that A/L quota is given and she cannot approve it… I showed her details of the above dates and draw her attention towards staffing levels".

34. Given that there is a level of detail of the conversation recorded in this email, and yet a lack of reference to the claimant's wife's ill-health, this supports our finding that no such comment was made to TA at the time of the request. Furthermore we note that TA's evidence was that she simply could not remember whether the claimant had informed her of his wife's ill-health.

35. We make it clear that we make no finding as to whether or not the claimant's wife was in fact ill in 2019.

36. The claimant's request for leave was made less than 24 hours before it was due to start. CP recorded in his statement at paragraph 4 that leave requests should normally be made 48-hours before the leave is due to start.

37. We accept the reason TA gave for her refusal of this application for leave in February 2019, namely that she was upholding the decision by Detail/Invision. We note the exchange recorded in the claimant's email at page 140 between himself and TA: the claimant asked TA whether she always follows annual leave criteria for granting leave and TA replied yes. Although in his complaint email the claimant declared that this statement is untrue he did not at the time, nor has he before us, provided any evidence of instances where TA herself has breached the annual leave criteria or specifically the Rule of Four. In his email at page 140 the claimant only recorded that he has known of "many instances where managers have breached this criteria".

Claim 6A – CP applied the sanction of an attendance warning on 10 January 2020

38. The claimant had a prolonged spell of sickness absence, starting 18 November 2019 and returning to work on 30 December 2019. This period of sickness absence commenced with the claimant having a biopsy in relation to a mole. This was a diagnostic surgery, from which it was fortunately found that there was no malignancy within the mole. His recovery from surgery was complicated due to contracting an infection following surgery – see his sickness record at pages 153-154, and his return to work documentation at page 155.

39. The claimant's sickness record demonstrated to us that CP was keeping in touch with the claimant throughout his period of illness. It also showed us that CP referred the claimant to occupational health on or around 23 December 2019 – page 154.

40. The claimant was invited to attend a formal attendance meeting under the respondent's Attendance Management Policy ("AMP") - [80]. The AMP sets out that the policy will be triggered by, amongst other things, an absence of eight working days within any rolling 12 month period – paragraph 2.45 page 91. The policy also makes it clear that the default position where the AMP has been triggered will be to impose a written improvement warning – paragraph 2.49 page 92.

41. There are some exceptions to the rule regarding imposition of a warning. These are found at paragraphs 2.53 to 2.55 on pages 92 and 93, and relate to situations that are not relevant in this particular circumstance. There is however an overriding discretion available to a line manager to decide not to impose a warning. This is found at paragraph 2.56 at page 93, which states as follows:

> "The line manager may use their discretion to decide not to give a written improvement warning. For further guidance on using discretion to issue a warning see My Services [hyperlink]. The line manager should consider the circumstances of the absence and the employee's absence history. If they decide not to give a Written Improvement Warning, they should record their decision and the reasons for it."

42. Unfortunately we do not have the My Services document referred to above. The claimant purports to quote from that document within his appeal against this warning - [page 160]:

> "As in the Unsatisfactory Attendance Exclusions and Manager's Discussion document it states "a written improvement warning should not be given in the case of an operation or treatment which could help to improve attendance or prevent sickness absence"."

43. In winter 2019 the claimant had had 35 days of sick leave following his biopsy surgery. CP dealt with the claimant's attendance meeting, and determined to issue him with an unsatisfactory attendance warning stage 1 notice – exhibit BV-06 to the claimant's statement.

44. The claimant alleges that CP's decision to impose a warning was an act of direct race discrimination and harassment (**Claim 6**).

45. We accept that there is a level of discretion available for managers to exercise in relation to the issuing of a warning, albeit we do not have the full guidance in evidence before us. We also accept that some managers would not have issued a warning in the claimant's circumstances. This was the evidence given to us by DD who said that some managers would give a warning where some would not. DD's own evidence was that, in CP's position, he would have given a warning as well. He added that he would have, if necessary, exercised his discretion and been more lenient with any future absences. DD told us, and we accept, that 35 days is a significant amount of absence.

46. CP's evidence on this point is unfortunately of little use. He simply says in his statement that he cannot remember anything about imposing this warning – witness statement paragraph 31. We therefore do not have evidence before us as to what was acting on his mind at the time of his decision-making. We find that in reality there is a band of reasonable responses open to managers dealing with the AMP as to whether to impose warnings or not. Although some managers may not have imposed a warning in the way that CP did, we find that CP's action fell within that band of reasonable responses. We are satisfied that the outcome, namely the imposition of a warning, was not incompatible with the AMP.

Claim 2 – EL failed to respond to the appeal made by the claimant for attendance management on 23 January 2020

47. The claimant appealed CP's decision to impose a Stage 1 warning under the AMP on 23 January 2020 – page 159. The claimant never received a response to this appeal in any form.

48. This allegation is not in the claimant's witness statement. However, we consider the evidence we have on this matter.

49. The respondent's formatting means that the Attendance Management Appeal Notification Form, or SOP-UAA01, contains various parts. Part A is completed by the employee raising an appeal. At the end of that Part, at page 161, there are then instructions for submitting the form electronically.

50. The claimant duly emailed his appeal form on 23 January 2020, as can be seen from page 168. A response was received from Hayley Coles (HC) (HR Team Leader – Performance Management) stating:

> "Thank you for your email. In order to register the appeal Part B of the form must be completed by the hearing manager and submitted to Shared Services by them".

51. It is clear from the paperwork included within the bundle at page 161 that no Appeal Manager was ever appointed to deal with the claimant's appeal. No-one ever completed Part B.

52. The reason why there was a failure to respond to the claimant's appeal was that no Appeal Manager was ever assigned and the SOP-UAA01 never reached Shared Services, meaning it was never progressed.

53. The identity of the alleged perpetrator of **Claim 2** was unknown until the claimant's closing submissions, at which point Governor Emma Laws ("EL") was identified. We have no evidence to suggest that EL was in any way involved in the process surrounding the appeal. We cannot be satisfied that she was in any way involved. We have no further evidence as to how the assigning of Appeal Managers works. We are satisfied that, on the balance of probabilities, this was a case of the claimant's appeal falling through a computer system gap, and that no-one deliberately prevented the claimant from having his appeal dealt with.

Claim at para 20.1 – in or around January 2020, TA failed to deliver a £30 voucher to the claimant

54. On 28 January 2020, the claimant and some of his colleagues were informed by MH that they had been awarded some vouchers by EL in the amount of £30 each. This was due to their quick thinking and reaction to a disturbance that occurred in the Gate House. He informed them that he would arrange for those vouchers to be picked up "on Thursday" and then they would be issued – page 167.

55. The claimant never received his £30 voucher. He did chase the issuing of the voucher by email on 14 May 2020 with Diane Meek ("DM"). DM replied as follows – page 170:

> "Yes I gave the vouchers to CM Adams she has not returned them to me".

56. The claimant did not attempt to chase in any other way, neither did he seek to ask TA for the vouchers directly. We therefore have no further contemporaneous evidence about the vouchers.

57. The claimant raised in his second grievance of 11 February 2022 (**Protected Act 2**) that he believed TA failed to give him the vouchers as an act of discrimination/victimisation – page 277. The Grievance Officer dealing with this grievance was DB. In the process of this grievance, DB explained to the claimant that he would not investigation TA's failure to pass on the voucher, as the allegation was over 2 years old by this stage – page 281. We therefore do not have the benefit of any further information or investigation from 2022 regarding this allegation.

58. TA's evidence on this matter is in her witness statement at paragraphs 40 to 42. In short, she stated that she could not remember anything about the vouchers. She however raised the point that this was just before the outbreak of the COVID-19 pandemic. During the extended lockdown period,

TA took on the role of Temporary Governor. We accept that this was a pressurised time for the prison service, and her role of Temporary Governor would have placed on TA a great deal of responsibility.

59. We accept that, on the balance of probabilities, TA forgot to issue the vouchers, and they have been lost in the mist of time.

Claims 3 and 4, and paragraph 20.2 – on 20 December 2021, TA rejected the claimant's application for partial retirement and his accompanying suggested roster

60. The claimant completed a Partial Retirement Application Form, or CSP15, on 10 August 2021, with a planned start date of 2 January 2022 – pages 182 to 184.

61. CP asked the claimant to draw up his 19.5 hour roster. All partial retirement rosters are for half a full time equivalent work pattern: the claimant had been working a 39 hour week, and so his partial retirement roster would be for 19.5 hours.

62. On 19 September 2021, CP sent the claimant's partial retirement request to FR. FR responded the following day, asking:

> "Has he had a shift pattern done as well?".

63. We understand from this that FR was enquiring as to whether Detail/Invision had produced a proposed shift pattern for the claimant. CP responded to this stating that the shift pattern was a "work in progress", to which FR responded – page 192:

> "As he is applying for 24 hours I won't be able to submit it to workforce planning until he has a shift pattern approved and [TA] is happy with it".

64. On 23 September 2021, the WFPC rejected the claimant's application due to the lack of accompanying shift pattern. This is recorded in the minutes of that WFPC meeting at page 503:

> "Partial retirement – OSG Bharat Vaidya – 19.5 hours – no shift pattern submitted – *not approved*".

65. On 29 September 2021, FR chased CP for the claimant's proposed shift pattern, reminding CP that she would be unable to send his forms off until such time and a shift pattern was agreed – page 196. The same day, CP responded that the claimant was working on a shift pattern with his Prison Officer Association ("POA") representative.

66. All was quiet until 12 October 2021, when FR chased the claimant directly for a shift pattern – page 195. He replied on 14 October 2021, stating that he had submitted a shift pattern to the POA and was awaiting a response. The claimant remarked that, as soon as he had it back from POA he would forward it to CP for his approval – page 195.

67. Later on 14 October 2021, the claimant received his shift pattern back from the POA and forwarded it to CP. This is the shift pattern, produced with the

help of LH (POA representative), that appears at page 200. This was not a rota produced by Detail/Invision.

68. CP rejected the shift pattern, stating – page 198:

> "Bharat, this shift pattern does not meet the business need, you need to work weekends and not work Tuesdays and Thursdays as they are currently over staffed. When you have made adjustments please send back to me, Chris".

69. On 23 October 2021, LH sent another version of the shift pattern to CP, copying in the claimant – page 201. LH in his cover email said that he believed that this amended shift pattern fits the business need. That shift pattern is at page 202.

70. In terms of LH's assessment that this shift pattern met the business need, we accept that he had the requisite knowledge to assert this view. His job required him to have knowledge of the day to day shifts of OSGs, despite not working in Detail. This meant he had a ground level opinion which is valid, but we accept that he does not have the high level overview held by Detail. On this basis, we understand why the claimant would think that LH was in a position to state that the shift pattern met business need, particularly given that CP had encouraged the claimant to work with LH on the proposed shift pattern.

71. However, we find that LH's involvement was not a substitute for Detail/Invision. LH's involvement could not circumvent the need to have any proposed rota approved or produced by Detail/Invision. LH accepted, in the grievance investigation meeting he had on 11 April 2022, that "meeting the needs of the business" meant applications would have to go through Detail – page 232:

> "…midway through the process of the application it became apparent that meeting the needs of the business now meant applications would have to go through Detail, WFP[C] and fit on lines generated by the computer, not shift pattern that he or staff could produce. Leon said that [CP] and himself did again try and explain this to [the claimant]".

72. CP in his witness statement at paragraph 16 stated that the shift pattern at [202] still had the claimant working Tuesdays and Thursdays, and as such his view at the time of writing his statement would be that this would still not meet business need. This view is consistent with the advice he gave the claimant in his email on page [198].

73. On 18 November 2021, the claimant's application was discussed at another WFPC meeting – page 516. MH, as a POA representative,

> "asked if a shift pattern can be agreed for [the claimant] as he wants to apply for partial retirement. He was advised [the claimant] will need to speak to detail and his manager for this".

74. On 9 December 2021, CP sent the claimant an email stating – page 213:

> "Bharat, please find your partial retired shift pattern (19.5 hrs) attached, it's on the tab "19.5hrs 1". I have not as yet confirmed the proposed start date or which line you will start on, any concerns please contact me"

75. On 13 December 2021, the claimant responded the above email from CP, asking "at which stage my proposed shift pattern was rejected?". We understand from this that the shift pattern sent by CP to the claimant was one that was not produced by the claimant. The rota sent by CP appears at page 214 and is a rota produced by Detail. The claimant was therefore asking why the shift pattern he (the claimant) had produced at page 202, had not been accepted.

76. On 20 December 2021, the claimant had a conversation with CP in which the claimant asked about the progression of his own proposed shift pattern at page 202. CP explained that it was not supported by TA as it did not meet the business need. The claimant asked CP to confirm his in writing, hence the email at page 213 confirming that the proposed shift pattern was not supported by TA "due to not meeting the business need as directed by the [WFPC]" – page 213.

77. TA's evidence on this point is at paragraph 31 of her statement. She told us that she discussed the claimant's proposed pattern with CP and told CP that:

> "there was now a requirement that all rotas were produced by Detail, as pr the instructions from the [WFPC] meeting….As the pattern proposed by [the claimant' had not been produced in this way, I was not able to approve this pattern. This was not in any way related to the fact that this was an application from the claimant. I was simply passing on the instructions that I had been given from Workforce Planning".

78. It was CP's communication of 20 December that led to the date of 20 December 2021 being attached to **Claims 3 & 4 and the claim at paragraph 20.2**.

79. We find that the reason the claimant's proposed shift pattern on page 202 was rejected was because it did not comply with the new policy; specifically, the proposed rota had not been approved by Detail. In fact, to be precise, the claimant's proposed rota was not rejected by the WFPC, but was never put forward for a final decision by the WFPC, on the basis of TA's indication that it would not be approved.

80. We accept that this view of TA was based on the fact that the claimant had not complied with the requirement to get a rota from Detail. We have already found that TA is someone who follows the rules, stands by policies and procedure, and does not easily exercise her discretion. We find that all TA did in her conversation with CP on or around 20 December was to confirm what the new policy was, that the claimant had not complied with it, and as such his application and rota would not be approved by the WFPC.

81. It is common ground that the claimant at no stage went to Detail/Invision to ask them to produce a 19.5 hour shift pattern to support his partial retirement application. Although a Detail rota was produced at [214], the claimant never agreed to this rota, and so it was never submitted along with his partial retirement application. The rota produced by Detail is a 34 week rota.

82. The claimant said that he had suspicions about the decision to reject the shift pattern on page 202 due to the lack of the WFPC meeting notes from the meeting that took place on 16 December 2021, just a few days prior to CP's communication to the claimant. However, these are suspicions unsupported by any further evidence, and are therefore baseless.

83. The need to get a rota produced by Detail had been decided upon on 17 September 2020. Although the information had not been clearly disseminated, we have already found that this was the policy as of September 2020, and had therefore been in place some time prior to the claimant's application for partial retirement.

84. As for the allegation that TA rejected the claimant's partial retirement application, we reject this allegation on the facts. The application was not rejected on 20 December 2021; in fact, we are not satisfied that it has ever been formally rejected. In reality, the application is in limbo because the claimant had not, at the time of this hearing, approved the Detail proposed shift pattern, or sought to engage with Detail over a shift pattern.

The claimant's knowledge of the change in policy

85. Turning to the claimant's knowledge of this change in policy, the claimant denied to the Tribunal that LH had told him of the change, specifically the need to get a rota passed Detail as a pre-condition. He told us he only found out about the change in policy after the rejection in December 2021. Despite having had this knowledge, on his case since December 2021, the claimant has still not been to Detail to obtain a proposed shift pattern to support his application. The claimant told us that this is because he felt humiliated, disappointed, and believed he was being treated differently, and so did not go to Detail as "the others never had to go to Details" (from the claimant's cross-examination).

86. However, we find that LH did tell him of the change in policy. This is on the basis that LH was a POA representative and would have had to be aware of policy changes that affected his day to day work as a representative. We can see no good reason why LH would withhold this information from the claimant. Also, as we have set out above, LH told DB during the grievance process that he and CP had tried to explain this new policy to the claimant. Again, we can see no evidence of any reason why LH would lie during this meeting; the claimant in cross-examination was unable to suggest why LH may lie about this.

87. We do however find that it was not unreasonable for the claimant to have failed to take in this information regarding the change in policy. This is particularly in light of our findings about the lack of clear communication/dissemination of this policy change.

88. LH stated in the grievance investigation that the claimant did not understand the new process and was "fixated" on his colleagues' successful applications – page 232. This we consider understandable; he had, by this time, seen several colleagues apply for partial retirement and been granted shift patterns produced to their specification, albeit these were prior to his application. He became focused on what he perceived as an unfairness in how his application was being treated compared to theirs.

Comparator table

89. The actual comparators that the claimant relies upon in relation to **Claims 3 and 4 and paragraph 20.2** are as follows:

Name	Partial retirement	Page reference	Shift pattern page reference
Cherree Bristow	16 March 2023 Line manager signed off first application 9 July 2023 Initial proposed date of partial retirement 28 June 2023 Line manager signed off second application 1 March 2024 Proposed date of partial retirement	592/593	393/394
Karen Browne	2 June 2021 date of application 3 October 2021 planned date of partial retirement	338	345
Yvonne Hicks	This was a work life balance application, not a partial retirement application 20 March 2020 Date application was authorised 5 April 2021 Proposed start date	590	376
Paul Jewitt	26 January 2021 Date application signed off by CP 6 June 2021 planned date of partial retirement	591	395
David Knox	3 June 2020 Date the respondent confirmed content with shift pattern	356	357
Darren Light	3 May 2020 Partially retired from this date	589	396
June McDiarmid	22 July 2020 Date of partial retirement application	364	369

90. Although we have used the term "shift pattern" in the table above, we at this stage consider it important to set out how these shift patterns were produced. The shift patterns referenced in the Comparator Table were produced by the claimant, from his observations of his colleagues' working hours. An individual's observations and anecdotal evidence is only ever going to be a partial, and therefore unreliable, view of (in this case) individual shift patterns. We therefore approach these shift patterns produced by the claimant with a level of caution.

91. We do not have the Detail/Invision produced shift patterns for these officers, which we understand are generally on 34 week rotations, due to there being 34 OSGs. TA informed us that, post-September 2020, it is an exception to the rule to have a repeating shift pattern of less than 34 weeks.

The claimant's grievance against TA

92. On 7 March 2022, DB received a grievance raised by the claimant against TA – page 280. The Notification of Formal Grievance – Stage 1 Form (SOP-GRV1) is at page 275. The grievance form was signed by the claimant on 11 February 2022 – page 279.

93. The claimant categorised his grievance using the pre-set categories within the SOP-GRV1 form as follows:

    93.1. "Diversity and equality";
    93.2. "Harassment – Race and Religion or Belief";
    93.3. "Bullying – Ethnic Origin and Religion or Belief", and,
    93.4. "Victimisation – Ethnic Origin and Religion or Belief".

94. The main complaint that the claimant raised was TA's rejection of his suggested rota to support his partial retirement application; namely the allegation in these proceedings at **Claim 4 and paragraph 20.2.2**– page 277. The claimant alleged that there were seven OSGs who went to partial retirement or part-time working during 2021 and that they all got to choose their rotas. The claimant raised three other matters as background to demonstrate that, in his view, this was not the first time he had been discriminated against – page 277. These three matters are the factual complaints that now form **Claims 1A and 1B and the claim at paragraph 20.1**.

95. On 23 March 2022, DB, the grievance officer, held a grievance meeting with the claimant: the notes are at page 222 onwards. DB also interviewed TA, CP and LH.

    On 30 March 2022, FR sent to DB the details of the claimant's named comparators and the managers responsible for them – page 576. This showed that the only application that TA had had any involvement with, besides the claimant's, was OSG Bristow's. That application had started as an ill health adjustment, leading to the application of March 2023 – page 593. TA told us that she was directed to support OSG Bristow by Governor Emily Martin. Once OSG Bristow started this new rota, she soon realised it was still too much for her to cope with. This understanding then triggered the second application dated June 2023 – page 592.

96. DB's response to the grievance is set out at page 281, and is signed and dated 6 May 2022. He concluded that TA had not harassed, bullied or victimised the claimant. As set out above, DB determined that he could not deal with the three background examples that the claimant had raised, due to them having occurred more than two years prior to the grievance process.

97. DB found, as have we, that a change in process had occurred, but that there had been poor communication to staff of those changes – page 281. He concluded:

> "There was a failure to notify staff of direction from the Work Force Planning meeting of any reviews or changes to Partial Retirement and Part Time applications. This Review was commissioned in August 2020 and completed on [sic] October 2020 and required shift patterns meet the needs of the business and go through Central Detail.
>
> Out of this review it has become a requirement that staff go through Detail Office who would then generate a shift pattern that meets the needs of the business. … It is clear to see why [the claimant] felt managers had contradicted themselves when his shift patterns were rejected because of the confusion and poor communication of the new instructions".

98. The grievance was partially upheld, on the basis of DB's findings regarding the poor communication about the change in policy – page 282.

99. The claimant then appealed the outcome of the grievance on 28 June 2020, at page 284; the outcome he sought at this point was to be permitted to work either his first rota (page 200) or his last rota (page 202).

100. DD held a grievance appeal hearing with the claimant on 12 December 2022. This delay was due to the claimant being off on sickness absence. The outcome, dated 12 December 2022, is at page 288. In short, DD partially upheld the claimant's appeal, but specifically did not uphold the allegations of harassment, bullying and victimisation.

101. DD made the following remarks in his conclusions, which we consider to be of note:

> "I do believe there are elements of your grievance and this was certainly supported by how you presented to me, that indicate there is a lack of understanding in this case that it could and should have been handled more sensitively and compassionately".

102. DD also made some recommendations, including training on Diversity and Inclusion and unconscious bias, a mentoring scheme. In terms of the claimant's application for partial retirement, DD recorded – page 289:

> "I would welcome that you work with your Head of Function to resubmit what you believe is a suitable working pattern for submission at the next Work Force Planning meeting".

103. We find that this was not a suggestion that the need for Details' involvement could be circumvented. The claimant was simply being encouraged to continue with his partial retirement application. In the event,

the claimant has not resubmitted a shift pattern to date, nor presented a shift pattern produced or approved by Detail.

Claim 6B – CP issued an attendance improvement warning Stage 1 on 7 July 2022

104. On 27 June 2022, the claimant was invited to a formal attendance meeting – page 257.

105. We remind ourselves that the AMP provides a trigger for a formal AMP process upon an employee having a period of 8 working days' absence within a 12 month rolling period. By 27 June 2022, the claimant had been off sick for 56 days – see paragraph 33 of CP's statement, supported by the letter at page 257.

106. We therefore find that it was reasonable for CP to start the AMP process.

107. Following the attendance management meeting on 7 July 2022, a Stage 1 warning was imposed: it appears at pages 259. CP's evidence at paragraphs 34 and 35 of his statement was that there was no reason for discretion to be applied to move away from the default of a Stage 1 warning being imposed.

108. As with the Stage 1 warning imposed in January 2020, we find that CP's decision to impose a warning was not unreasonable in the circumstances of such a long absence. It was in line with the AMP.

109. The claimant did not address this allegation in his witness statement. Neither was this allegation explored much in cross-examination of the respondent's witnesses. The only point made was in DD's evidence, in which he was asked whether he agreed with the outcome of the appeal.

Claim 5 – on or after 22 March 2022, CP deliberately failed to undertake a stress risk assessment

110. There is no evidence about this allegation within the claimant's witness statement.

111. The relevant background here is that the claimant had a period of illness, suffering from stress, anxiety and depression. The claimant was off work from 5 April 2022 to 21 June 2022 – pages 240, 233, 234, 238.

112. An Occupational Health Report was completed by Ms Jo Donoghue, Wellbeing Practitioner, dated 22 March 2022; the claimant had been referred by CP. Ms Donoghue recommended a stress risk assessment be completed – page 220.

113. Despite this recommendation, CP did not do a stress risk assessment. In his witness statement, CP stated that the suggestion of a stress risk assessment was not a "must do", and in any event, the claimant was off work until 22 June 2022 – paragraph 26 of CP's statement.

114. It is correct that the claimant returned on a phased basis on 22 June 2022 – page 239. CP held a return to work meeting with the claimant, the

notes of which are at page 240. CP remarked in his witness statement that the claimant made no reference in this meeting that a stress risk assessment would be beneficial to him – CP statement paragraph 27. In short, CP's view, from his witness statement, was that an assessment was not necessary.

115. The allegation here is that CP deliberately failed to do a stress risk assessment. Factually, this allegation is made out, as CP did not undertake such an assessment.

116. The claimant appealed the formal attendance warning on 19 July 2022 – page 261. That appeal was upheld and the warning overturned purely on the basis that CP had not undertaken a stress risk assessment – page 265. Therefore, a stress risk assessment was carried out following that appeal outcome on 19 July 2022 – page 268.

Claim at paragraph 20.3 – on 6 May 2022, DB refused the claimant's grievance of discrimination and the refusal to reject his part-time hours/partial retirement

117. We have set out the facts related to DB's chairing of the claimant's grievance at paragraphs 97 to 99 above.

118. We find that DB's investigation was reasonable and thorough in all the circumstances. He interviewed all the relevant personnel involved in the process of the claimant's partial retirement application and associated shift patterns. He also went to the extent of asking FR to find out what she could about the claimant's alleged comparators. This demonstrates to us that DB conducted a fair and reasonable investigation prior to reaching his conclusion.

119. We note that his decision also chimes with our own: we have found that TA did not act in a discriminatory manner towards the claimant, but that there were failings in the communication of the changes in the policy regarding partial retirement.

120. We find that DB made the decision to reject the claimant's grievance of discrimination as this was the conclusion to which he was led by the reasonable investigation he undertook.

Claim 7 and claim at paragraph 20.4 – DD failed or refused to implement the claimant's part time hours and/or partial retirement on or after 12 December 2022

121. We have set out the facts related to DD's chairing of the claimant's grievance appeal at paragraphs 101 to 103 above.

122. The claimant's claim in reality is that DD should have unilaterally imposed the claimant's preferred shift pattern following the grievance appeal.

123. DD was asked about his failure to do this in his evidence. His answer was:

> "If I had said "yes" to the claimant's shift pattern that then became unworkable in a few months, the claimant would be stuck on a pattern that was unworkable";
>
> "I could change someone's shift pattern, but would never do it "just because I can". I would need to make sure the shift pattern is workable with the Detail. Resource management is really important within the service; there would need to be some process".

124. DD was asked to explain the implication of approving one shift pattern that was "irregular" (i.e. had not been approved by Detail), and accommodating the claimant's desired pattern. DD answered:

> "There would be impacts. You have to be fair and equal to everyone. If you give anyone the opportunity to change, then you open it up to everyone. We try to be flexible; it really is difficult to accommodate sometimes. That is the reason why we have the process we have".

125. We accept this evidence and reasoning from DD. His oral evidence was consistent with his written evidence – see paragraphs 34 and 47 in particular of DD's witness statement. Having heard evidence that a standard OSG's rota works on a 34 week cycle, we accept that to impose a shift pattern that has not been through the computer Detail system could cause a problem for that finely balanced shift pattern at some point in that 34 week cycle. We accept that there is a real need to have the correct number of OSGs covering each shift, and that a computer function is required to ensure that, across 34 OSGs, this need is met.

126. We find that the reason why DD did not permit the claimant to adopt either his first or last suggested shift pattern was that it had not been produced by Detail. As such no-one could be satisfied that a glitch would not occur in the shift patterns across the 34 week cycle of the OSGs combined work rota. Any such glitch would in all probability lead to the prison experiencing insufficient levels of staff, if the claimant's desire pattern was adopted.

127. We make an observation at this point. Both TA and DD were asked whether, once a rota was produced by Detail, there was any scope of tweaking it manually. TA's answer was "no", it could not be tweaked. DD's answer differed. He told us that it may be possible to work with Detail to make some minor adjustments. This difference just demonstrated to us that the intricacies of the new policy regarding Detail's involvement with proposed shift patterns was not universally understood. This enforces our finding that the change in the policy regarding Detail's production of shift patterns for part time working was not well communicated.

128. Following the outcome of the claimant's appeal on 12 December 2022, the claimant started the ACAS early conciliation process and presented his claim on 22 February 2023. At the time of this hearing, he remained employed by the respondent on a full time contract. At the time of this hearing, he had not pursued his application for partial retirement any further.

Facts relevant to time limits

129. The claimant commenced the ACAS early conciliation process on 16 December 2022. That process finished on 23 January 2023, and the claimant presented his claim form on 22 February 2023.

130. Therefore, any complaint that allegedly occurred prior to 17 September 2022 is, on the face of it, out of time. Thus, all claims, other than **Claim 7/paragraph 20.4** are out of time.

Continuing act

131. The claimant argued that all the claims in fact form one continuous act.

132. There are several different alleged perpetrators involved in the various allegations: TA, CP, DB, DD and EL.

133. We also find that there were large chunks in the chronology when no alleged discrimination occurred: for example, between 2018 and February 2019, then February 2019 to January 2020, then January 2020 to December 2021, then December 2021 to March 2022.

134. The claimant made the argument that there was unconscious bias and/or institiutional racism running through the respondent. We refer back to the numbers given to us by DD in terms of the ethnic make-up of the prison staff. We find that these numbers rebut any such suggestion.

135. We return to the issue of continuing act in our Conclusions.

The just and equitable test

136. The claimant provided us with some limited evidence as to the delay in presenting his ET1 claim form. This point was not covered in his witness statement, and so was addressed by way of supplementary question in her evidence in chief. He told us, in summary, that he sought to exhaust all internal procedures before approaching the Employment Tribunal. We accept that he was genuine in his evidence on this point. However certainly the internal process regarding the acts forming the basis of his first grievance in 2018 (**Claim 1A**) were exhausted through the first grievance process in June 2018. In relation to various of the other allegations, the claimant did not seek to bring an internal grievance about those matter; or at least not in a timeous manner. Therefore, although we accept that exhausting internal procedures was the claimant's reason, it is not a particularly persuasive one in those circumstances.

137. This is one fact for us to consider. Other relevant facts are as follows:

137.1. The claimant approached ACAS over four years after his first allegation in 2018, and over 7 months after his last allegation that is out of time. This means the out of time claims were presented between 4.5 years and 4 months out of time;

137.2. The reason why CP has been unable to attend to provide evidence is that he is indisposed due to serious and recent health issues. The respondent is therefore prejudiced in its ability to provide evidence of non-discriminatory reasons for his actions. Had the

claims against him been brought in time, it is more likely than not that CP would have been well enough to attend to give evidence;

137.3. We accept the general point that, over several years, memories fade. A substantial amount of both TA and CP's evidence was that they were unable to remember aspects of the chronology or reasons why things happened due to the passage of time. This is in fact a detriment that applies to the claimant as well, however we find this is of particular detriment to the respondent in answering the historic allegations against TA and CP;

137.4. We accept that there would be some prejudice to the claimant in not being able to pursue all ten of his allegations, and being limited instead to just one allegation.

Law

Direct race discrimination

138. Employees are protected from discrimination by s39 EqA:

> "(2) An employer (A) must not discriminate against an employee of A's (B) -
> …
> (d) by subjecting B to any other detriment."

139. Direct discrimination is set out in s13 EqA:

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

140. There are two parts of direct discrimination: (a) the less favourable treatment and (b) the reason for that treatment. Sometimes however it is difficult to separate these two issues so neatly. The tribunal can decide what the reason for any treatment was first: if the reason is the protected characteristic, then it is likely that the claim will succeed – Shamoon v Constable of the Royal Ulster Constabulary [2003] UKHL 11.

"Because of": reason for less favourable treatment

141. In terms of the required link between the claimant's race and the less favourable treatment he alleges, the two must be "inextricably linked" - Jyske Finands A/S v Ligebehandlingsnaevnet acting on behalf of Huskic: ECLI:EU:C:2017:278.

142. The test is not the "but for" test; in other words it is not sufficient that, but for the protected characteristic, the treatment would not have occurred – James v Eastleigh Borough Council [1990] IRLR 288.

143. The correct approach is to determine whether the protected characteristic, here race, had a "significant influence" on the treatment – Nagarajan v London Regional Transport [1999] IRLR 572. The ultimate question to ask is "what was the reason why the alleged perpetrator acted as they did? What, consciously or unconsciously, was the reason?" - Chief Constable of West Yorkshire Police v Khan [2001] UKHL 48. This is a

question of fact for the Tribunal to determine, and is a different question to the question of motivation, which is irrelevant. The Tribunal can draw inferences from the behaviour of the alleged perpetrator as well as taking surrounding circumstances into account.

144. If there is more than one reason for the treatment complained of, the question is whether the protected characteristic (in this case, race) was an effective cause of the treatment – O'Neill v Governors of ST Thomas More Roman Catholic Voluntary Aided Upper School [1996] IRLR 372.

Burden of proof under the Equality Act 2010

145. The burden of proof for discrimination claims is set out in s136 EqA:

> "(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".

146. In Laing v Manchester City Council and anor [2006] ICR 1519, Mr Justice Elias held that:

> "the onus lies on the employee to show potentially less favourably treatment from which an inference of discrimination could properly be drawn".

147. This requires the Tribunal to consider all the material facts without considering the respondent's explanation at this stage. However, this does not mean that evidence from the respondent undermining the claimant's case can be ignored at stage one – Efobi v Royal Mail Group Ltd 2021 ICR 1263. It is not enough for the claimant to show that there has been a difference in treatment between him and a comparator, there must be "something more". In Madarassy v Nomura International plc 2007 ICR 867, Lord Justice Mummery held:

> "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".

148. In terms of comparators, the definition is at s23 EqA:

> "(1) On a comparison of cases for the purposes of section 13, 14, 19 or 19A there must be no material difference between the circumstances relating to each case".

149. In Virgin Active Ltd v Hughes 2023 EAT 130, it was highlighted by the Employment Appeal Tribunal that the consideration of whether there are material differences in the circumstances of an actual comparator compared to those of the claimant needs to take place before applying the shift in the burden of proof. Regarding a hypothetical comparator, the claimant must show that the comparator would have been treated more favourably. This

requires the Tribunal to be able to draw inferences of likely treatment of a hypothetical comparator from the evidence before it.

150. It is only if the initial burden of proof is reached that the burden shifts to the respondent to prove to the Tribunal that the conduct in question was in no sense whatsoever based on the protected characteristic – Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 2005 ICR 931.

Harassment related to race

151. The definition of harassment is set out at s26 EqA:

> "(1) A person (A) harasses another (B) if –
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of –
> (i) Violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, mediating or offensive environment for B.
>
> …
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –
>
> (a) the perception of B;
> (b) the other circumstances of the case;
> (c) whether it is reasonable to have had the effect."

Unwanted conduct

152. It is for the individual to set the parameters as to what they find acceptable, and what is unwanted: "it is for each person to define their own levels of acceptable" – Reed v Stedman [1999] IRLR 299, and more recently Smith v Ideal Shopping Direct Ltd UKEAT/0590/12.

Purpose or effect

153. S26 makes it clear that it is sufficient for the unwanted conduct to have the effect set out in s26(1)(b): it is not necessary for that to be the purpose of the alleged perpetrator. For example, harassment may still be made out where there is teasing, also called banter, without any malicious intent.

154. In terms of effect, the alleged perpetrator's motive is again irrelevant. The test is both subjective and objective. First, it is necessary to consider what the effect of the conduct was from the claimant's perspective (subjective element). If it is found that the claimant did suffer the necessary effect set out in s26(1)(b), the next stage is to consider whether it was reasonable for the claimant to feel that way.

155. Furthermore, it is not necessary for the conduct to be aimed directly at the claimant. A claim can succeed if it was reasonable for the claimant to feel that their environment had been made intimidating, hostile, degrading,

humiliating or offensive, whether or not any language or conduct is specifically aimed at them.

Related to the protected characteristic

156. The causal link required for harassment is much broader than that for direct discrimination. The requirement is that the conduct must be related to the protected characteristic, in this case race. There is no protection from general bullying within the EqA; harassment will not be proven where someone is picked on or singled out, unless that treatment is related to a protected characteristic.

157. There is limited guidance from the appellate courts as to what is meant by "related to". Some guidance has been given by the Court of Appeal in the case of UNITE the Union v Nailard [2018] EWCA Civ 1203. The facts of this case were that the respondent had failed to deal with the claimant's sexual harassment complaint. The Employment Tribunal found that, because the failure related to a grievance regarding harassment, that was sufficient to find that the failure was itself an act of sexual harassment. The Court of Appeal found the tribunal had got it wrong. The tribunal had not made findings as to the thought processes of the individuals who failed to deal with the grievance; therefore, it could not be found that the failure itself was an act of sexual harassment. A finding would have to be made that those who failed to deal with the grievance were guilty of sexual harassment. The tribunal had, in effect, used the "but for" test; in other words, they found liability on the basis that, but for the grievance, there would have been no failure. This is not the correct legal test under section 26.

158. In Tees Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495, HHJ Auerbach reminded tribunals that the claimant's perception that conduct is related to a protected characteristic is relevant, albeit not determinative, of the issue. The tribunal must:

> "articulate distinctly, and with sufficient clarity, what feature or features of the evidence or facts found have led it to the conclusion that the conduct is related to the characteristic as alleged".

159. It therefore follows that a claimant's understanding and a respondent's intention are not strictly relevant to the issue of causation. The context in which the alleged harassment occurs is a key factor in determining whether the conduct was related to the relevant protected characteristic – Warby v Wunda Group plc EAT 0434/11.

Victimisation

160. S27 EqA sets out:

> "(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."

161. The relevant subsections in the present claim are ss27(2)(c) & (d).

162. Regarding "*doing any other thing for the purposes or in connection with this Act*", this is the catch-all provision. Under pre-Equality Act legislation, it was held that the requirement that something be done "*in reference to*" the Race Relations Act would be met if it was done by reference to that Act "*in the broad sense, even though the doer does not focus his mind specifically on any provision of the Act*" – Aziz v Trinity Street Taxis Ltd and ors [1988] ICR 534.

163. In terms of "*making an allegation...*", although it is not necessary for the Equality Act to be mentioned, it is vital that the facts as set out by the claimant would be capable of amounting to a breach of that Act.

164. The meaning of detriment is set out above. For a detriment to be *because of* a protected act, it is necessary that it had a significant influence on the perpetrator, where significant simply means "more than trivial" – Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases [2005] ICR 931.

Time limits

165. Section 123 of the EqA provides as follows:

"(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of –

(a) The period of 3 months starting with the date of the act to which the complaint relates, or
(b) Such other period as the employment tribunal thinks just and equitable.

(2) …

(3) For the purposes of this section –

(a) Conduct extending over a period is to be treated as done at the end of the period;
(b) Failure to do something is to be treated as occurring when the person in question decided on it.

(4) …"

Continuing act

166. There is a difference between a one off discriminatory act that has ongoing consequences, and a continuing act. This comes from the case of Barclays Bank plc v Kapur and others [1991] ICR 298, HL, in which the House of Lords held that, in a situation in which an employer operates a discriminatory regime, rule, practice or principle, then such arrangement will amount to a continuing act. Conversely, where no such arrangement exists, there will be no continuing act under s123(3), even though the effects of an act may be continuing.

167. The requirement of a policy or regime must not be taken too literally, In Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530, CA, the Court of Appeal moved away from the approach of identifying a regime, and instead focused on whether the Police Commissioner was responsible for a continuing state in which (in that case) women of ethnic minorities were treated less favourably than other officers. The decision in Hendricks was later confirmed in Lyfar v Brighton and Sussex University Hospitals Trust 2006 EWCA Civ 1548, CA. The Tribunal must therefore consider the substance of each allegation, not whether there is a regime or policy in place.

168. One factor that can be weighed in to the question of a continuing act is whether the alleged individual acts of discrimination involved the same or different people – Aziz v FDA 2010 EWCA Civ 304.

169. In South Western Ambulance Service NHS Foundation Trust v King 2020 IRLR 168, EAT, the Employment Appeal Tribunal held that, if any of the acts in an alleged chain of conduct extending over a period are found to be non-discriminatory, they cannot be part of that chain. Those acts must be ruled out of any consideration under s123(3).

Just and equitable extension

170. The issue as to whether a claim is brought within such time as is just and equitable has been established to be one of fact for the first instance tribunal.

171. It is well established that, despite the broad scope of the "just and equitable" test, it remains the case that time limits should be applied strictly, and to extend time remains an exception to the rule – Robertson v Bexley Community Centre [2003] EWCA Civ 576. The burden is therefore on the claimant to demonstrate to the Tribunal that time should be extended.

172. However, the tribunal's discretion is wide: the Court of Appeal commented in recent years that "Parliament has chosen to give the employment tribunal the widest possible discretion" - Abertawe Bro Margannwg University Local Health Board v Morgan [2018] EWCA Civ 640.

173. The Employment Appeal Tribunal in the case of Miller and ors v Ministry of Justice and ors and another case EAT 003/15 held that the prejudice suffered by the respondent in having to answer an otherwise time barred claim is of relevance to the Tribunal's decision.

174. HHJ Tayler, in the case of Jones v Secretary of State for Health and Social Care 2024 EAT 2, remarked that the comments from Robertson are

often cited out of context by respondents. He held that Robertson in fact is authority for the principle that the Tribunal has a wide discretion when it comes to the "just and equitable" test; Auld LJ's comments in Robertson should be reviewed within that framework and not taken out of context.

175. The accepted approach to be taken to exercising the tribunal's discretion is to take into account all the factors in a particular case that the tribunal considers relevant, including the length of and reasons for delay – Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23. The strengths and weaknesses of the claim may also be relevant (but not definitive) to a decision on extending time – Lupetti v Wrens Old House Ltd 1984 ICR 348.

176. The tribunal must consider the balance of prejudice to the parties if the extension is granted or refused – Rathakrishnan v Pizza Express (Restaurants) Ltd 2016 ICR 283.

Conclusions

Claim 1A – TA's refusal of annual leave 2018 – ss13 & 26

177. We have found at paragraph 23 above that the reason why the claimant's leave request was rejected in relation to the dates of 7-13 May 2018 was due to:

177.1. The Rule of Four already having been breached by the time of his request (there were in fact 6 OSGs on leave during that period);
177.2. The Invision system rejecting his request on that basis; and,
177.3. TA upholding Invision's decision, instead of exercising her discretion to override Invision.

178. The claimant has produced no evidence from which we could draw an inference that TA's refusal was discriminatory. He relies on a hypothetical comparator. Although he (or his representative) has sought to rely on evidential comparators (OSGs 5 and 6) who are allegedly white, we are not satisfied that we have evidence upon which we can find that they were indeed white. In any event, the decision makers in relation to the annual leave requests of OSGs 5 and 6 were not TA. We therefore do not consider that OSGs 5 and 6 help us as evidential comparators.

179. Turning to the appropriate hypothetical comparator, this would be an OSG who is white, who requested the same leave as the claimant at the same time, in a situation where there were already 6 OSGs booked on leave.

180. The claimant says that we can infer discrimination from the unreasonableness of TA's failure to exercise her discretion and permit the leave request. We are satisfied that there is nothing so unreasonable in TA's decision-making from which we could safely infer that the reason for her refusal was the claimant's race. The claimant had not put forward any extenuating circumstances to TA as to why his leave request should be granted against the Rule of Four. Further, there is no evidence to demonstrate that, for a hypothetical white OSG, TA would have exercised

her line manager discretion and permitted the leave, against Details' initial decision.

181. We therefore conclude that the initial burden of proof has not been met, and so the burden does not shift to the claimant. In any event, if we are wrong, the respondent has met its burden of proof in demonstrating that, on the balance of probabilities, the reason for TA's decision was that she simply enforced the decision made by Detail and Invision (see above paragraph 23).

182. We therefore reject this claim of direct race discrimination.

183. As for the harassment claim, we repeat our conclusions above. There is no good evidence from which we could draw an inference that TA's refusal of annual leave was in relation to the claimant's race. In any event, we accept the non-discriminatory reason presented by the respondent.

Claim 1B – TA's refusal of annual leave request 2019 – ss13 & 26

184. We have already found the reason why TA refused the claimant's request was because she was abiding by the Rule of Four and was upholding Detail/Invision's decision – see paragraph 37 above.

185. In terms of the direct discrimination claim, the claimant relies upon a hypothetical comparator. We consider an appropriate comparator must be a white OSG, who applies for leave less than 24 hours before requiring time off, in a situation where that request is gone through Detail and been rejected on the basis of the Rule of Four.

186. The claimant relies solely on the submission that the failure by TA to exercise her discretion to allow leave was so unreasonable that we must infer that the reason was his race.

187. We do not find that TA's failure to exercise discretion here was so unreasonable that it is evidence from which we could safely infer discrimination. We simply have no good evidence from which we could draw such inferences. Further, we have no good evidence from which we could conclude that the hypothetical comparator we have identified would have been treated any differently.

188. We therefore conclude that the burden of proof does not shift to the respondent. However, if we are wrong on that, we have already accepted the respondent's non-discriminatory reason for TA rejecting the claimant's request. That being that she was upholding the decision of Detail/Invision in light of the application of the Rule of Four.

189. We therefore reject the claim of direct race discrimination.

190. In terms of the harassment claim, we repeat our conclusions that there is no good evidence from which we could draw inferences of discrimination. In any event, we accept the respondent's non-discriminatory reason for the refusal of the request. We therefore reject the harassment claim.

Claim 6A – CP applied the sanction of an attendance warning on 10 January 2020 – ss13 & 26

191. In relation to the direct race discrimination claim, the Tribunal asked Miss Godwins in her closing submissions what evidence it was that she relied upon to prove that there would be something more than just a difference in race and the difference in treatment between the claimant and a hypothetical comparator (the Madarassy requirement).

192. The Tribunal understood that the claimant was relying upon his assertion that CP's imposition of the warning was so unreasonable that we could draw inferences of race discrimination from it. Miss Godwins confirmed that there was nothing further relied upon by the claimant in order to enable us to draw inferences of race discrimination.

193. The appropriate hypothetical comparator in this scenario is a white OSG who had been off for a period of 35 days having had an operation to take a biopsy, and then suffered with an infection. They would also have the same sickness absence history as the claimant, and have given the same answers in the formal attendance management meeting with CP.

194. We have found above at paragraphs 45 and 46 that CP's decision to impose a warning was within a band of reasonable responses and was compatible with the AMP used by the respondent. It follows that we conclude that CP's imposition of the warning was not so unreasonable that it could allow us to safely draw inferences of race discrimination.

195. There is no good evidence before us that a hypothetical comparator would have been treated any differently by CP, let alone that any difference in treatment would have been because of race. As such the claimant's claim does not get over the initial burden of proof.

196. The claim for direct race discrimination therefore fails at this first hurdle.

197. If we are wrong, and the burden of proof does shift to the respondent, we conclude that we cannot be satisfied as to CP's rationale for issuing the warning. This is because CP in his witness statement stated that he could not remember anything about that warning and therefore we cannot safely conclude what the reason was as to why CP imposed the warning in question.

198. In terms of the harassment claim, we repeat our conclusions above. There is no evidence from which we can safely draw inferences that CP imposed a written warning for any reason related to the claimant's race.

199. The harassment claim therefore fails also.

Claim 2 – EL failed to respond to the appeal made by the claimant for attendance management on 23 January 2020 – ss13 and 26

200. For this allegation, the appropriate hypothetical comparator would need to be a white OSG who filled in the appeal form in the same way as the claimant, and whose appeal form progressed in the same way as the claimant's did. This would include being told by HC that, in order to register

the appeal Part B would need to be completed by the manager hearing the appeal.

201. We have no good evidence to suggest that this hypothetical comparator would be treated any differently to the claimant.

202. We have no good evidence that EL, as the alleged perpetrator, was involved in this appeal process.

203. Furthermore, we have no good evidence from which we could infer that the failure to progress the appeal was discriminatory. The claim therefore fails as the claimant has not passed the initial burden of proof.

204. In any event, we have found that the reason for the failure of the respondent to deal with the claimant's appeal was that his appeal fell through the gaps, and no Appeal Manager was ever appointed – see paragraphs 52 and 53 above. We are therefore satisfied that the reason for the conduct was non-discriminatory.

205. As such, we reject the direct discrimination claim, as well as the harassment claim.

Claim at paragraph 20.1 – in or around January 2020, TA failed to deliver a £30 voucher to the claimant – ss26 and 27

206. We have already found that, on balance, the reason why the claimant did not receive those vouchers is because TA forgot about them, and the matter was overridden by COVID-19 – see paragraphs 58 and 59.

207. We are not aware as to whether the other officers who were promised vouchers ever received them either. We are therefore not satisfied that the claimant suffered any detriment distinct from his other officers who were promised vouchers.

208. The claimant alleges that TA's failure to pass on the vouchers was because he had raised a grievance on 26 June 2018, some 18 months prior to him being made aware of the vouchers.

209. We have no evidence that TA was in any way influenced by that grievance. In fact the claimant does not even suggest as much in his witness statement – see paragraphs 11 and 13 of that statement which cover this allegation.

210. We therefore reject this victimisation allegation.

211. In terms of the harassment claim, again, we have no good evidence to suggest that TA's conduct in failing to pass on the vouchers was in any way connected to the claimant's race. We have accepted in any event the respondent's reasoning for this failure, which is that TA forgot and was sidetracked by the pandemic.

212. As such, the harassment claim fails.

Claims 3 & 4 and claim at paragraph 20.2 – TA rejected the claimant's application for partial retirement and his accompanying suggested roster on 20 December 2021 – ss13, 26 and 27

213. As a fact, TA did not reject the claimant's application for partial retirement, as we have set out at paragraph 84 above. Therefore, **Claim 3/paragraph 20.2.1** fails on its facts.

214. Regarding **Claim 4/paragraph 20.2.2**, as a fact, TA did effectively reject the claimant's suggested shift pattern. We have already set out our findings as to the reason for that rejection – see paragraphs 79 to 83 above. In short, the claimant's proposed rota did not comply with the new policy in place from September 2020, that all rotas had to be approved/produced by Detail.

Direct race discrimination

215. The claimant relies on seven comparators; their details are set out in the comparator table above. We consider that these are not in fact appropriate comparators:

215.1. OSG Hicks' application was for work life balance, not for partial retirement;
215.2. The applications of OSGs Hicks, Knox, Light and McDiarmid were all made prior to the change in policy (in September 2020;
215.3. None of the applications were made at the same time at the claimant's. This is important, as the claimant's application fell at such a time as to be one of the first to be dealt with under the new policy;
215.4. Only one application out of the seven was dealt with by TA, the alleged perpetrator, for reasons set out at paragraph 96 above. OSG Bristow's application was made in very particular and extenuating circumstances.

216. Given that we have no appropriate actual comparators, we turn to consider a hypothetical comparator. An appropriate hypothetical comparator would be someone who applied for partial retirement at the same time as the claimant, but had not produced a rota approved by Detail by 20 December 2021.

217. There is no good evidence from which we could infer that TA's lack of support for the claimant's application could be discriminatory, or that a hypothetical comparator would have been treated any differently. As set out in paragraph 82 above the claimant's own case is based purely on suspicions.

218. As such, we conclude that the claimant has not met the initial burden of proof. In any event, we are satisfied that the reason for TA's conduct was that the claimant's shift pattern did not comply with the new policy. We have set out our full findings on the reason for TA's conduct at paragraphs 79 to 83 above.

219. As such, the direct race discrimination claim fails.

Harassment

220. In terms of the harassment claim, we repeat that we accept the respondent's reason for TA's conduct, and so conclude that her actions were not in any way related to the claimant's race.

221. The harassment claim therefore fails.

Victimisation

222. Finally, in terms of the victimisation claim, the claimant alleges that TA's conduct is because of her grievance lodged on 26 June 2018. There is a large gap of over 3 years between the grievance and TA's conduct here. There is no good evidence that TA was in any way motivated in her lack of support for the claimant's rota by that grievance. In any event, we have already found the reason for TA's actions to be that the claimant's proposed rota did not comply with the new policy.

223. The victimisation claim therefore fails.

Claim 6B – CP issued an attendance improvement warning Stage 1 on 7 July 2022 – ss13 and 26

224. As a matter of fact, a Stage 1 warning was imposed by CP on 7 July 2022.

225. We turn then to consider the reason for that warning, in light of the applicable burden of proof in the EqA at s136.

226. We look to a hypothetical comparator, who would be a white OSG who had been off on sickness absence for stress for 56 days and given the same answers in the AMP meeting on 7 July 2022.

227. The claimant has not presented us with evidence from which we could draw an inference that the reason why CP imposed a warning was discriminatory. There is no good evidence to suggest that a hypothetical comparator would have been treated any differently. CP's action in imposing a Stage 1 warning was not so unreasonable as to enable us to draw an inference of discriminatory conduct.

228. We therefore consider that the claimant has not met the initial burden of proof, and as such the claim fails at that stage.

229. CP, as the alleged perpetrator, has answered this allegation at paragraphs 33 to 35 of his statement. However he was not in attendance to be cross-examined. As such, we cannot go so far as to find what his rationale was for imposing this warning. As such, if we are wrong and the burden of proof does shift to the respondent, we are not satisfied of the respondent's non-discriminatory reason for imposing the warning on 7 July 2022.

230. We dismiss both the direct discrimination and the harassment claims, as the claimant has not satisfied the initial burden of proof.

Claim 5 – on or after 22 March 2022, CP deliberately failed to undertake a stress risk assessment – ss13 and 26

231. We have found, at paragraph 115, that CP did not complete a stress risk assessment for the claimant.

232. The issue then is why this failure occurred. As mentioned above, the claimant did not raise this allegation in his witness statement. The claimant did not assert in his oral evidence to us that CP's failure was an act of discrimination.

233. There is no evidence to suggest to us that a white OSG, suffering with stress, anxiety and depression, with the same OH report, and having communicated to CP in the same manner as the claimant at the return to work meeting on 22 June 2022, would have been treated any differently.

234. There is no evidence that has been placed before us from which we could draw inferences that CP was acting in a discriminatory way by not undertaking a stress risk assessment.

235. As such, the initial burden of proof under s136 EqA is not met, and the claims of direct discrimination and harassment fail.

236. If we are wrong on this, and the initial burden has been met, we are not satisfied that the respondent has provided a non-discriminatory reason, given that CP, the alleged perpetrator here, was not available for cross-examination, and his evidence has not been sworn to or tested.

Claim at paragraph 20.3 – on 6 May 2022, DB refused the claimant's grievance of discrimination and the refusal to reject his part-time hours/partial retirement – s27

237. It is factually correct that DB rejected the claimant's grievance. We have found at paragraph 120 above that the reason for this was that this was the conclusion to which DB's fair and reasonable investigation led.

238. The claimant alleges that DB was influenced by the claimant's grievance of 11 February 2022. There is no good evidence from which we could draw an inference that DB was influenced by the grievance being one of discrimination/victimisation as opposed to it being a grievance of any other nature.

239. As such, we reject this claim.

Claim 7 – DD failed or refused to implement the claimant's part time hours and/or partial retirement on or after 12 December 2022 – ss13, 26 and 27

240. Factually, DD did not implement the claimant's desire shift pattern following his grievance appeal on 12 December 2022. We have found that the reason for this was that the shift patterns produced by the claimant had not been approved by Detail, and as such there was a risk that, over the course of several weeks or months, there would be a glitch with the overall provision of resource of OSGs – see paragraphs 125 and 126 above.

241. We conclude that DD was in no way influenced by the claimant's race, or the grievance raised on 11 February 2022.

242. To break this down, firstly, we considered a hypothetical comparator. This would need to be a white OSG who had been through the same grievance and appeal process as the claimant, and had produced suggested shift patterns that were not approved by Detail. There is no evidence to suggest that DD would have treated that comparator any differently.

243. There is no good evidence from which we could safely draw an inference that DD's actions were in any way because of, or in relation to, the claimant's race.

244. In terms of the grievance of 11 February 2022, the only link between that grievance and DD's action is that his action arose in his role as grievance appeal officer. There is no good evidence to demonstrate that he was motivated in his actions by the fact that the claimant had entered a grievance specifically about harassment or victimisation.

245. As such, the claims of direct discrimination, harassment and victimisation all fail.

Time limits

246. We have rejected all the claims on their merits. We therefore do not need to address the issue of time limits, but we will do so for completeness.

Continuing act

247. As set out at paragraphs 131 to 134 above, we have found:

247.1. There were several alleged perpetrators involved;
247.2. There were significant gaps in the chronology between alleged acts of discrimination;
247.3. The evidence of the ethnic make-up of the respondent's staff rebuts any assertion of institutional bias.

248. In light of the above, we conclude that there is no good evidence before us of a state of affairs in which non-white OSGs are treated less favourably. As such, we conclude that there is no continuing act in this case. Therefore, the claims that are out of time do not form part of a continuing act, ending with **Claim 7**, which is in time. All claims other than **Claim 7** therefore remain out of time.

249. We specifically address the claimant's point of unconscious bias. This is not a legal test, but something that has, rightly, found some prominence in the workplace generally over recent years. We have set out the relevant causative tests for ss13, 26 and 27 EqA in the "Law" section above.

Just and equitable extension

250. We have set out our findings regarding the relevant factors for us to consider at paragraphs 136 and 137 above.

251. The desire to exhaust internal proceedings prior to starting Tribunal proceedings is one factor we can weigh into the balance as to whether the time in which the claim was presented was just and equitable. This was the only reason given by the claimant for the delay in presenting his claim to the Tribunal.

252. Other factors include the length of delay and the prejudice to each side in allowing/refusing the extension.

253. We have found that there is real prejudice to the respondent, given the lack of attendance of CP and the fading of memories particularly in relation to allegations against TA and CP. In short, the cogency of evidence before us has suffered as a result of the delay,

254. Although there would be some prejudice to the claimant in not allowing an extension, in that she would only be allowed to pursue one of her claims, we are able to take into account the merits of the claims. It is less prejudicial for the claimant to be unable to pursue a claim with low merits.

255. Here, we have concluded that none of the claimant's claims succeed. The merits of all claims are therefore low. As such, there is limited prejudice (if any) in refusing to extend time for claims that have little (if any) merit.

256. On balance, weighing up the relevant factors, particularly the length and reason for delay, and the prejudice to each side, we therefore refuse to exercise our discretion to extend time under s123 EqA.

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Employment Judge Shastri-Hurst

_____

Date 15 July 2024
RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON
25 July 2024
.....

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FOR EMPLOYMENT TRIBUNALS