EMPLOYMENT TRIBUNALS

Claimant: **Mr I Hussain**
Respondent: **OCS Group UK Ltd**
Heard at Leeds ET **On: 20, 21, 22, 23, 26 and 27 June 2023**

Before: **Employment Judge Brain**
Members: **Mr R Stead**
Mr M Brewer

Representation
Claimant: **Miss M Rashid (the claimant's wife)**
Respondent: **Mr J Boyd, Counsel**

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The claimant's complaints of discrimination because of race (brought pursuant to sections 13 and 39(2)(d) of the Equality Act 2010) fail and stand dismissed.
2. Upon the claimant's complaints that the respondent made unauthorised deductions from his wages brought pursuant to Part II of the Employment Rights Act 1996:
   (1) The complaint about the respondent's failure to pay a bonus in the form of an attendance allowance stands dismissed upon withdrawal.
   (2) The respondent paid to the claimant the wages properly payable to him for the period between 14 September 2021 and 30 June 2022. Accordingly, the complaint stands dismissed.
3. Upon the claimant's complaint brought pursuant to the Working Time Regulations 1998:
   (1) It is declared that the respondent failed to afford the claimant the opportunity of availing himself of his right (pursuant to Regulation 13 of the 1998 Regulations) to four weeks' annual leave in the annual leave year ended 31 March 2022.

(2) Accordingly, the right referred to in paragraph 3(1) carried over into the annual leave year ending on 31 March 2023.

(3) Remedy issues arising out of the declaration in paragraph 3(1) shall be discussed at the case management hearing listed for 14 August 2023 *(in relation to case number 1803152/2023).*

REASONS

Introduction and preliminary issues

1. The Tribunal heard this case over six days in June 2023. The first day of the hearing (held on 20 June 2023) was utilised by the Tribunal for the purposes of case management and the Tribunal's reading into the case. The Tribunal then heard the parties' evidence over the next four days (on 21, 22, 23 and 26 June 2023). Helpful written and oral submissions were received from the parties on 27 June 2023. The Tribunal then reserved judgment. The Tribunal deliberated in chambers for the remainder of the morning and into the afternoon of 27 June 2023.

2. By way of introduction and background, the respondent is an outsourcing company that provides facilities management and property related services for a large portfolio of both public and private sector clients throughout the UK. One of the respondent's clients is HM Courts and Tribunals Service *('HMCTS')*. The respondent employees around 1200 staff who service their contract with HMCTS.

3. The claimant worked for the respondent as a Courts and Tribunals Service Officer *('CTSO')*. He is British Pakistani.

4. The respondent took over the management of services within the courts and tribunals with effect from 1 April 2020. They took over from the previous provider (G4S). This was a service provision change within the meaning of the Transfer of Undertakings (Protection of Employment) Regulations 2006 ('*TUPE*'). The claimant's employment transferred from G4S to the respondent with effect from 1 April 2020.

5. The claimant commenced working for G4S in the summer of 2016. The claimant gives his date of commencement as 11 July 2016. The respondent gives his start date as 30 June 2016. The latter appears to be correct as this date is given in the information which G4S was required to provide to the respondent pursuant to Regulation 11 of TUPE. This regulation requires the transferor to provide to the transferee with *"employee liability information"* as defined in Regulation 11(2). The employee liability information pertaining to the claimant is in the hearing bundle at pages 96 to 105. At page 98, we see that the commencement is given as 30 June 2016. In any case, nothing turns upon the 11 days' discrepancy between the parties as to the commencement date. No contract of employment of statement of employment particulars was in the hearing bundle.

6. Arising from his employment with the respondent, the claimant pursues complaints of:

6.1. Discrimination upon the grounds of race. This is a complaint of direct discrimination brought pursuant to section 13 when read in conjunction with section 39(2)(d) of the Equality Act 2010.

6.2. That the respondent made unauthorised deductions from his wages. This is a complaint brought pursuant to Part II of the Employment Rights Act 1996.

6.3. That the respondent was in breach of their obligations to afford the claimant the right to take annual leave. This is a claim brought pursuant to the Working Time Regulations 1998.

7. The Tribunal shall consider the issues in the case in more detail later in these reasons. Before doing so, we shall consider the case management issues which arose during the hearing. We shall then make findings of fact following which we will set out the relevant law. We shall then look at the issues in the case before going on to reach our conclusions by applying the relevant law to the facts as found.

8. Before commencing our reading into the case on the morning of 20 June 2023, the Tribunal heard from the parties. It was confirmed that the issues in the case remained those as identified by Employment Judge Maidment at a case management hearing (heard by telephone) on 31 October 2022. (This was in fact the second case management hearing held in the case. The first came before Employment Judge Parkin on 27 July 2022. Employment Judge Parkin gave directions for the claimant to give further information upon his claim. This enabled the issues to be identified when the matter came before Employment Judge Maidment three months later).

9. At the time that the claimant presented his claim form (on 16 May 2022) and when the matter came before Employment Judges Parkin and Maidment the claimant remained in the respondent's employment. The claimant has since been dismissed by the respondent. The effective date of termination was 2 February 2023. Arising from the dismissal, the claimant has presented a second claim against the respondent (proceeding with case number 1803152/2023).

10. The Tribunal raised with the parties the question of whether the hearing of this claim should be adjourned and combined with case number 1803152/2023. (For convenience, we shall now refer to the former as *'the first claim'* and the latter as *'the second claim'*).

11. On 24 May 2023, Miss Rashid had applied for a postponement of the first claim and for it to be joined with the second claim for hearing. This application was met with an objection by the respondent. On 5 June 2023 Employment Judge Jones refused the application upon the basis that, *"it is not in the interest of justice to delay the hearing in June, which would be necessary if the cases were combined."*

12. When making her application of 24 May 2023, Miss Rashid referred to the second claim as an unfair dismissal case. The Tribunal took the opportunity (on 20 June 2023) of considering the file for the second claim. It includes not only an unfair dismissal complaint but also complaints of discrimination related to the protected characteristic of disability pursuant to the Equality Act 2010.

13. The second claim is at a very early stage. A telephone case management hearing had been listed for 3 August 2023. The respondent's response is due by 6 July 2023.

14. The Tribunal was concerned about the prospect of there being inconsistent decisions between the cases. A different panel hearing the second claim would not be bound by the Tribunal's findings of fact in the first claim save for those upon any issue forming a necessary ingredient of a cause of action in the second claim. In **Arnold v National Westminster Bank Plc** [1991] 2 AC 93, HL, Lord Keith said that *"Issue estoppel may arise where a particular issue forming a necessary ingredient in a cause of action has been litigated and decided and in subsequent proceedings between the same parties involving a different cause of action to which the same issue is relevant, one of the parties seeks to reopen that issue."*

15. Each party was prepared to have the first claim heard as listed. The Tribunal adjourned for deliberations upon the issue. The Tribunal decided that the first claim should be heard now for the reasons in paragraphs 16 to 23.

16. The Tribunal was concerned that it appears to form part of the claim in the second claim that the claimant's ill health (which led to capacity issues and ultimately his dismissal) was caused or contributed to by the actions of the respondent with which the Tribunal is concerned in the first claim. Recognising that there has been no case management yet of the second claim, the Tribunal's preliminary view is that the cause of the claimant's incapacity which led to his dismissal may well be an issue forming a necessary ingredient of the claims which the claimant has brought in the second claim.

17. Illness caused by the employer does not preclude the employer from fairly dismissing the employee for the purposes of the law of unfair dismissal in the Employment Rights Act 1996. (The Tribunal wishes to emphasise that, of course, no such findings have been made and that is a matter for evidence in the second claim). That said, if the employer was in any way responsible for the employee's illness that led to the dismissal, this may be a factor that to take into account by a tribunal when deciding on the fairness of the dismissal – **Royal Bank of Scotland v McAdie** [2008] ICR 1087, CA.

18. In the second claim, the claimant has also brought a complaint of unfavourable treatment for something arising in consequence of disability. This is a claim brought pursuant to section 15 when read in conjunction with section 39(2)(c) of the 2010 Act. Were the issue of justification of the unfavourable treatment to arise, the Tribunal should, in weighing the proportionality of the unfavourable treatment, take into account (if it be the case) that the claimant's illness has been caused in some way by the respondent.

19. The Tribunal referred the parties to the case of **Unison v Kelly and another** [2012] IRLR 442, EAT. In that case, the Employment Appeal Tribunal held that the two Employment Tribunal decisions in question were dealing with different time periods and different decisions by the union. The first complaint was of belief discrimination for action having been taken against the claimants upon the grounds of their beliefs. The second claim was one of unjustified discipline by

their trade union brought pursuant to the Trade Union and Labour Relations (Consolidation) Act 1992. It was held that no issue estoppel arose.

20. In our judgment in contrast to **Kelly,** features of the first claim may impact upon the Tribunal's conclusions upon issues of fairness and justification in the second claim. The features of the first claim may well form a necessary ingredient of the second claim.

21. Pragmatically, a solution was suggested by the Tribunal of the same panel hearing the second claim. There was no objection to this course of action from the parties.

22. The parties were prepared and ready for the Tribunal to hear the first claim. Findings of fact need to be made by the Tribunal in any case to determine the issues in the first claim. The second claim effectively picks up where the first claim leaves off. The Tribunal therefore was persuaded that it was consistent with the overriding objective in Rule 2 of Schedule 1 to the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 for this hearing to go ahead. Doing so avoids delay, saves the expense of an adjournment and is proportionate, being a good use of tribunal resources.

23. This finding therefore renders moot to the question of whether the Tribunal was able to depart from the ruling of Employment Judge Jones. Upon the authority of **Serco v Wells** [UK EAT/0330/15] a change of circumstances needs to be identified to warrant the departure from an interlocutory ruling of an Employment Judge. The Tribunal tentatively suggested that Miss Rashid's (doubtless inadvertent) omission to mention that the claimant has in the second claim brought a case under the 2010 Act as well as one of unfair dismissal in her application of 24 May 2023 was a change in circumstance.

24. The other principle interlocutory issue with which the Tribunal was concerned on 20 June 2023 was the question of anonymisation. Two issues arose from this.

25. The first issue is that one of the allegations (as we shall see) of misconduct against the claimant was of behaviour amounting to sexual assault of a fellow employee within the meaning of the Sexual Offences (Amendment) Act 1992. We emphasise at the outset that this allegation was wholly unproven. Nonetheless, the individual in question (whom we shall now refer to as *"X"*) has a lifetime right to anonymity under the 1992 Act. This arises regardless of the fact that the allegation is unproven.

26. Mr Boyd, on behalf of the respondent, indicated that the respondent has no instructions as to whether X waives his right to anonymity. That being the case, the safest course is to anonymise him in these reasons.

27. The second issue concerned the anonymisation by the respondent's solicitor of the full names of those involved in the matter. This has been achieved by way of redaction to documents within the bundle and referring to those involved in the matter in the respondent's witness statements by their first or given names. This unilateral step was an inappropriate course for the respondent's solicitor to take.

28. It is well known that open justice is a fundamental principle. The general rule is that hearings are carried out in public, and that judgments and orders are public. Derogation from the general principle can only be justified in exceptional

circumstances, when they are strictly necessary as measures to secure the proper administration of justice. Where departure from the common law principle of open justice is warranted, the exclusion must be no more than the minimum strictly necessary to ensure justice is done.

29. Parties cannot waive or give up the rights of the public to open justice. It appears to the Tribunal that this is precisely what the respondent has sought to do.

30. In **Scott v Scott** [1913] AC 417, Lord Atkinson observed that the need for matters to be aired in public may produce inconvenience and even in some cases injustice to individuals. However he said that "*The hearing of a case in public may be, and often is, no doubt, painful, humiliating or deterrent both to parties and witnesses, and in many cases, especially those of a criminal nature, the details may be so indecent as to tend to injure public morals, but always is tolerated and endured, because it is felt that in a public trial is to be found, on the whole, the best security for the pure, impartial and efficient administration of justice, the best means for winning for it public confidence and respect."* In short, public scrutiny is a guarantor of the quality of justice. This is also the rationale for the right to a public hearing protected by the European Convention on Human Rights (incorporated into English law by Article 6 of Schedule 1 to the Human Rights Act 1998).

31. The problem which presented to the Tribunal and the parties was how to deal with this issue. In the Tribunal's judgment, it would be disproportionate to order the respondent's solicitor to prepare fresh hearing bundles removing the redactions and to produce fresh witness statements incorporating the first or given names and family names of those mentioned within them. The pragmatic and proportionate response was for the production of a cast list so as to enable the identity of the individuals in question to be ascertained. The Tribunal is obliged to Mr Boyd and to his solicitor for the efforts made in this regard.

32. The final preliminary issue was that redactions were made by the respondent to page 444 of the bundle. Miss Rashid applied for an unredacted copy of it. The respondent said that the redaction was of information protected by legal professional privilege. There was no objection to the Tribunal reading the unredacted version of page 444. (The alternative was for it to be read by a different Employment Judge to rule upon the issue. This step was viewed as disproportionate. The parties were assured that if ruled as privileged, the Tribunal was sufficiently experienced to put the matter out of their minds). Having read page 444, we are satisfied that it is protected by litigation privilege (which is one of the kinds of legal professional privilege) and the redacted parts should not be disclosed to the claimant absent waiver of privilege by the respondent.

33. The Tribunal heard evidence from the claimant. On his behalf, we heard evidence from:

    33.1. Zeeshan Mahmood. He was employed by the respondent as a CTSO. He resigned from his employment on 7 October 2021.

    33.2. Zubair Saleem. He is employed by the respondent as a CTSO.

34. On behalf of the respondent, the Tribunal heard evidence from:

34.1. Ian Brimicombe. He is employed by the respondent as an area security manager in North and West Yorkshire. He conducted preliminary investigations into the conduct of the claimant and Mr Mahmood.

34.2. Marc Gibson. He is employed by the respondent as a senior regional manager for HMCTS in the South of England. He conducted further investigations into the matter.

34.3. Dougie Wilson. He is employed by the respondent as a senior manager for HMCTS. He heard the claimant's disciplinary hearing.

34.4. Christopher Cant. He is employed by the respondent as quality and performance manager. He heard the claimant's appeal against Mr Wilson's decision following the disciplinary hearing.

34.5. Craig Rowe. He is employed by the respondent as a senior regional manager for HMCTS for the Midlands and Wales region. He chaired the claimant's grievance hearing.

34.6. Paul Horton. He is employed by the respondent as a training manager. He chaired the grievance appeal hearing.

35. We now turn to make our findings of fact. Many of the facts are not in dispute. Where a factual dispute arises, we shall give reasons as to why we have preferred one party's account for that of another.

Findings of fact

36. Mr Brimicombe, in paragraphs 7 to 16 of his witness statement, gives helpful background evidence. This is not controversial. It was, rightly, unchallenged by Miss Rashid.

37. Mr Brimicombe tells us (and we accept) that the respondent is the sole provider of security services across the UK to HMCTS. These services are provided at around 345 sites. 1200 members of staff are employed to service the contract. One of the sites serviced by the contract is Bradford Magistrates' Court. It was at that court where the claimant was based.

38. The matters with which the Tribunal are primarily concerned began in September 2021. At this time, six CTSOs worked at Bradford Magistrates' Court. These were: the claimant, Mr Mahmood, X, Tariq Aziz, Khuram Ditta, Tanveer Hussain. They reported to the CTSO security supervisor who at the time was Amanda Knowles.

39. The claimant, Mr Aziz, Mr Ditta, Mr Hussain, Mr Mahmood are all Asian British. X is Middle Eastern. Amanda Knowles is white British.

40. Mr Brimicombe also gave an unchallenged account (which again we accept) of the ethnic background of the CTSOs in the North and Yorkshire region. 36% are Asian or Asian British, 16% are black, black British, Caribbean or African, 40% are white and the remaining 8% is made up of mixed or multiple of ethnic groups. When giving evidence under cross-examination, Miss Rashid did not challenge the accuracy of Mr Brimicombe's evidence upon this issue.

41. It was also not in dispute that the respondent sought to impose higher standards than had prevailed with G4S. Mr Brimicombe said in paragraph 15 of his witness statement that Amanda Knowles "*appeared to be too relaxed about standards*

and procedures and seemed to take a back seat to supervision. It appeared to me that Zeeshan [Mahmood] took control of day-to-day matters, as it was always him who phoned me with issues on site".

42. Mr Brimicombe goes on to say in the same paragraph that *"These concerns about Amanda were part of a wider problem across other sites in the North and West Yorkshire whereby CTSS [Courts and Tribunals Security Supervisors] were not properly supervising their teams. This issue had arisen prior to the company [the respondent] taking over the contract from G4S on 1 April 2020. I am aware that, across the contract, supervisors had not felt unsupported whilst working for G4S and had avoided making decisions and taking responsibility. These issues had been transferred to the company and I was putting plans in place to try to resolve these issues."*

43. Mr Brimicombe then gives some further evidence about these matters in paragraphs 108 to 110 of his witness statement. HMCTS had raised with him an issue that Amanda Knowles would often excessively monitor CCTV while remaining in her office. Training was rolled out across the supervisors to address the issues of concern to the respondent. It appears from the document at page 443A that Amanda Knowles received her training in May 2022.

44. The claimant did not challenge Ian Brimicombe's characterisation of matters under G4S. Mr Boyd put to him the proposition that the respondent was *"running a tighter ship."* The claimant was in agreement with this.

45. Mr Wilson gave evidence corroborative of that of Mr Brimicombe. We refer to paragraphs 41 to 43 of his witness statement. His account is that supervisors including Amanda Knowles were not supervising their teams properly and had been allowing staff to leave site during their working hours. Mr Wilson attributed the problems to supervisors not feeling supported by their area managers and avoiding making decisions and taking responsibility. Mr Wilson explains that the respondent considered the best way of dealing with matters was to *"support a mindset change"* and deal with the matter as a training issue. Mr Wilson (in paragraph 43 of his witness statement) gives some further detail about the training which the supervisors were required to complete. The training began towards the end of 2021. He confirms that Miss Knowles received training in May 2022.

46. It is right to observe that Mr Brimicombe and Mr Wilson both gave evidence (under cross-examination from Miss Rashid) that was critical of the culture which had been allowed to prevail under G4S. Mr Wilson said that a practice had developed of security officers being allowed to leave site 15 minutes early. Mr Rowe was also aware of this practice. We are satisfied that the respondent was determined to improve standards all round.

47. The claimant was contracted to work for 27 hours per week, working Monday, Tuesday and Wednesday of each week. The employee liability information says (at page 98) that his location of work was Bradford Magistrates' Court.
Mr Brimicombe says that the claimant was employed to work as a Courts and Tribunals Security Officer/Area Relief Officer. In paragraph 20 of his witness statement, he says that this meant that the claimant was *"principally an area relief officer which meant that he was required to provide shift cover when a CTSO was*

unavailable to work their designated shift. An ARO is not permanently assigned to a particular court or tribunal, and they are expected to travel and make themselves available to provide security services at any court or tribunal in their locality at any given time. However, during his employment at the company, Ikhlaq [the claimant] was assigned to provide relief to the court."

48. The parties did not produce a written contract of employment or statement of terms and conditions of employment. The claimant said in evidence given under cross-examination that he was employed part time and that he shared shifts with David Wilson, another CTSO. However, Mr Wilson who was absent from work due to ill health and therefore the claimant covered his shifts most of the time. Within the bundle at pages 460E to 460O is a print-out of the hours worked by the claimant between 1 April 2020 and 10 September 2021. From this we see that the claimant was for much of the time working full time hours of around 40 or 42.5 hours per week spread over five days over this period. All of this time was spent at the Bradford Magistrates' Court.

49. The CTSOs are responsible for maintaining order and ensuring the security and safety of the buildings in the HMCTS estate, the employees who work within the buildings and court users. In paragraph 22 of his witness statement Mr Brimicombe says that *"The role of the CTSO is over and above that of any other security operative that might be employed to, for example, guard a commercial office building or shopping centre. A CTSO is subject to rigorous vetting and must hold a licence to be able to carry out their duties. The crucial difference between a CTS and any other security officer is that CTSOs are empowered with special privileges to allow them to carry out activities more akin to a police officer. For example, they are allowed to search people and remove them from a court building in appropriate circumstances."*

50. Against the background as just described, we now turn to the events with which the Tribunal is primarily concerned. This starts with an incident which took place at the Bradford Magistrates' Court on 9 September 2021. It was described in an email from Nicola Lyman (delivery manager) of Bradford and Keighley Magistrates' Court, addressed to Mr Brimicombe dated 10 September 2021 as follows. The email is in the bundle at pages 124 and 125:

"I'm currently investigating an incident that happened at Bradford Magistrates' Court yesterday which involved an issue between a defendant's sister and an usher. I have a major concern regarding the security guards, during this incident there was not one officer upstairs on the concourse and after looking at the CCTV three guards were sat downstairs on the chairs outside witness service and I believe on mobile phones, the one officer that was on the concourse prior to the incident walked past all three guards and went on his break, which happened to be for a smoke outside the main entrance. I would like to meet as a matter of urgency to discuss this matter further as soon as possible".

Mr Brimicombe responded promptly the same day. He said that he was going to be in Bradford on 13 September 2021 and offered to meet with her to discuss the matter. His email to that effect is at page 124.

51. Mr Brimicombe is responsible for managing the rotas for the courts and tribunals in North and West Yorkshire. In that capacity, the claimant had sent him a text message on 8 September 2021 (page 120). This was to the effect that the

claimant was going to be leaving work on 9 September 2021 at 2pm to attend a hospital appointment. It is common ground that the claimant was not one of the four security guards involved in the incident referred to by Nicola Lyman. He was not on the premises at the time.

52. On 13 September 2021 Mr Brimicombe received an email from Louise Holmes, operations manager. She referred to the incident of 9 September 2021. She referred to having concerns "*regarding trust in the security team and the safety and security of our staff/stakeholders and the building."* She also raised a concern about the apparent lack of respect shown to Amanda Knowles by the CTSOs.

53. On 14 September 2021 Mr Brimicombe received an email from Phoebe Oliver, acting team leader (building and ushers) at page 127. She referred to the incident of 9 September 2021. She found out about it on 13 September 2021 having been on leave on 9 September. The court usher had discussed the matter with Phoebe Oliver. She (Ms Oliver) reported to Mr Brimicombe that she and Nicola Lyman had overheard Mr Mahmood speaking forcefully to the usher. Afterwards, the usher informed Phoebe Oliver that Mr Mahmood *"had taken her into that office and was questioning her about her actions following the incident, particularly that she had been shown CCTV footage of the original altercation by CTSO X. She felt he was threatening her with this fact to protect the other security officers."*

54. On 14 September 2021 Phoebe Olivia emailed Mr Brimicombe (page 128). (This was a separate email to that referred to in paragraph 53). She referred to *"our conversation yesterday"* before going on to make a formal complaint against Mr Mahmood. Phoebe Oliver thus raising concerns about Mr Mahmood's conduct.

55. Mr Brimicombe attended the court on 14 September 2021. (*In his email of 10 September 2021 Mr Brimicombe said he was attending the Bradford Magistrates' Court on 13 September 2021. Presumably this was an error. Phoebe Oliver referred to her and Mr Brimicombe having had a conversation "yesterday" in the email of 14 September 2021. This may of course have been by telephone. There was no suggestion that he attended the court on two consecutive days. At all events, it seems not to be in dispute that Mr Brimicombe did attend the court on 14 September 2021 with a view to conducting investigations about matters which had taken place on Thursday 9 September 2021).*

56. Mr Brimicombe says that he arrived at about 9am in the morning. He then met with Mr Hussain, Mr Ditta and Mr Aziz. They were the three security guards who had been downstairs and who were, according to Louise Holmes, occupied on their mobile telephones, leaving X alone upstairs.

57. Mr Brimicombe says that after he had convened the three CTSOs who had been downstairs he *"began to ask them about the events that had taken place during the incident. However, they refused to say anything to me. I felt that all three individuals were acting strangely and appeared to be very scared. One of the individuals, Tariq [Aziz] was visibly sweating. I was confused by their reaction because I was only there to talk to them about a relatively low level conduct issue. Ordinarily when I deal with these types of issues, CTSOs do not react in this way. I therefore found their reaction to be quite unusual."*

58. Mr Brimicombe therefore sought advice as to what to do. He contacted Ben Hartley-McEvoy, employee relations partner within the respondent's employee relations team. (This is known as "*MyER"*). Mr Brimicombe was advised to meet the three individuals again.

59. Mr Brimicombe says in paragraph 40 of his witness statement that he then invited the three CTSOs back into the room. He says that "*During our conversation they raised serious allegations in relation to Ikhlaq and Zeeshan [Mahmood's] conduct, in particular that they had been subjected to bullying and threatening behaviour. I did not take a note of this meeting."* Mr Brimicombe asked them if they would be prepared to attend a formal witness meeting in order to make statements. He says in paragraph 41 that, *"I reassured them that their statements did not need to contain their names and if the statements were presented to Zeeshan or Ikhlaq, we could agree that they would not be told who had made them."* Mr Brimicombe took the view that the three CTSOs were not trying to divert attention away from their conduct on 9 September 2021.

60. Mr Brimicombe then sought further advice again from MyER. Mr Hartley-McEvoy endorsed Mr Brimicombe's view that the claimant and Mr Mahmood should be suspended. Mr Brimicombe prepared suspension letters. The one addressed to the claimant is at pages 132 and 133. This informed the claimant that whilst on suspension he would be paid his normal basic rate of pay and all contractual benefits would continue to accrue. The claimant was invited to attend an investigation meeting to be held on Thursday 16 September 2021 at the Bradford Combined Court. This was to be conducted by Mr Gibson in the presence of a note taker.

61. Mr Brimicombe then met with the claimant and Mr Mahmood. He informed of them their suspensions and handed to them the suspension letters. Mr Brimicombe did not make a note of the suspension meetings. It is not in dispute that the claimant and Mr Mahmood were not furnished with any details of allegations against them.

62. In paragraph 46 of his witness statement, Mr Brimicombe said that he, *"did not go into any further detail about the allegations at this stage [ie at the suspension meeting]. I had been advised by Ben to meet with the witnesses and capture more information, so I wanted to do this before relaying any further detail about the allegations to Zeeshan and Ikhlaq. I was aware that details of the allegations would be provided in the subsequent investigation process".*

63. Following the suspensions, Mr Brimicombe then conducted investigation meetings with Mr Aziz, Miss Knowles, Mr Hussain and Mr Ditta. These meetings took place at 12.15pm, 1.15pm and 2pm and 3pm respectively. The notes are at pages 135 to 149. Mr Brimicombe then met with X at 5pm the same day. The notes are at pages 135 to 149.

64. The claimant accepted in evidence given under cross examination that he was not suspended for anything to do with the incident involving the usher which had taken place on Thursday 9 September 2021. He said that when he was suspended, he was not aware who had made the allegations or the nature of the accusations against him. This is not in dispute.

65. The notes of Mr Brimicombe's interview of 14 September 2021 with Mr Aziz is at pages 147 and 148. Mr Brimicombe informed him that Mr Mahmood and the claimant had been removed from site that day. Mr Aziz was concerned as Mr Mahmood and the claimant knew his home address. Mr Aziz said that, "*they can do things at odd hours."*

66. Mr Brimicombe met with Amanda Knowles. Those notes are at pages 135 to 137. She said that she found her role at Bradford Magistrates' Court to be frustrating. She accused the claimant and Mr Mahmood of *"childlike behaviour".* Mr Brimicombe asked if she had witnessed any threatening behaviour on the part of Mr Mahmood or the claimant. She referred to an incident involving the *"Atlas cleaner"* who had apparently been involved in an incident involving the claimant. She also said that the cleaner (an individual named Darren) had also been *"staring at Zeeshan".* Mr Brimicombe raised as a concern that Mr Mahmood was known to be leaving work early. Amanda Knowles said that she was aware of this, but this occurred after she had finished her shift and she had only found out about it "*third hand".*

67. Mr Brimicombe raised concerns that the calls he was receiving about operational issues at Bradford Magistrates' Court were emanating from Mr Mahmood and not her. Amanda Knowles said that Mr Mahmood *"calls for little things where I would only call if absolutely necessary."* She went on then to say that *"all the Asians seem to stick together".*

68. The notes of the meeting between Mr Brimicombe and Mr Hussain can be found at pages 138 to 140. Mr Brimicombe assured Mr Hussain that *"two suspensions had been carried out today."* Mr Hussain said that the claimant and Mr Mahmood

    "were uncontrollable, like children always laughing and joking and fooling around." He said that nothing had been aimed at him personally. He complained that the claimant and Mr Mahmood were "*uncontrollable".*

69. The notes of the meeting with Mr Ditta are at pages 144 to 146. He too complained about *"childish behaviour".* He said that he was *"fearful whilst at work as I am aware of the threatening situations."* He said that Amanda Knowles was aware of the position and, *"we can see the fear on her face when [Mr Mahmood] is overriding her decisions and she goes with it …"* He said that the claimant and Mr Mahmood *"are always together when on site and do more or less as they please as they take no instructions from anyone as they are ruling the site."* Mr Brimicombe asked if there had been any suggestion that the claimant and Mr Mahmood may go to his house outside of working hours. After being prompted in this way, Mr Ditta said that *"this has been said, potentially in a joking manner, or maybe the opposite."*

70. The notes of the meeting with X are at pages 141 to 143. He recounted a specific incident from several months ago. He alleged that the claimant and Mr Mahmood had been hitting him on his back and when he objected, he said that the reply was *"we will come to your house and kick the fuck out of you."* He said that there had been bullying over the radio by calling him "*little chilli",* making noises over the radio and saying that X *"stinks".* X also accused the claimant and Mr Mahmood of *"touching my private parts and slapping me, this could potentially be on CCTV."* He said that he took the view that Amanda Knowles was *"scared to death".* He said that he thought that the claimant and Mr Mahmood were

"dangerous" as they *"threaten they will come to your home, on the radio and face to face."* He believed that witnesses had effectively lied in their statements about the incident from several months prior out of fear from the implications of speaking out.

71. Mr Brimicombe then looked at CCTV footage. He did this on 14 September 2021. He says that he obtained verbal permission from HMCTS to view it. In paragraph 72 of his witness statement, he says that *"when I viewed the CCTV footage, I could see that Zeeshan and Ikhlaq went up close to X, however due to the angle of the camera, I could only see the backs of their heads and I could not identify any touching of private parts. I did not take a copy of the CCTV footage and concluded that this did not assist the investigation."*

72. Miss Rashid questioned Mr Brimicombe as to the veracity of his account of the events of 14 September 2021 and whether he held collective meetings with Mr Hussain, Mr Ditta and Mr Aziz on two occasions as claimed. She made the valid point that if true, these meetings must have taken place at the busiest time for the court staff as most people arrive at the court building at around 9am. Mr Brimicombe said he was satisfied that the security archways and the concourse were adequately covered when he met the three CTSOs. He also mentioned being accompanied by the note taker, Joan Stead, who was also with him at the individual meetings later that day. He said that Joan Stead had taken notes of the collective meetings but had been unable to find them.

73. On balance, we accept Mr Brimicombe's account that he held two collective meetings with the three CTSOs. In cross-examination, the claimant accepted that he was aware Mr Brimicombe had held two collective meetings with the three CTSOs and in-between times had sought advice as to how to proceed. It is surprising that, if it is the claimant's case that the meetings did not take place, the claimant did not say so when being questioned by Mr Boyd about Mr Brimicombe's activities that morning and did not say that the three CTSOs were continuously present doing their security duties at the time that Mr Brimicombe claimed to have met with them.

74. On 15 September 2021, Mr Gibson was asked by MyER to conduct investigations into the incident of 9 September 2021 and to take over the conduct of an investigation into allegations of misconduct against the claimant and Mr Mahmood. Mr Gibson was provided with the notes of Mr Brimicombe's meetings with the five witnesses to which we have just referred.

75. Mr Gibson attended site on 16 September 2021. He met with Nicola Lyman. She emailed to him an account of the incident involving Mr Mahmood and the usher. This email is at page 150 and is dated 16 September 2021. Mr Gibson also met with Phoebe Oliver. She too informed Mr Gibson about the incident with the usher and raised other issues concerning Mr Mahmood's conduct. This account is at page 186 to 188. She said that the claimant had taken to imitating some of Mr Mahmood's behaviour.

76. Mr Gibson then met with the CTSOs and with Amanda Knowles. All of these meetings took place on 16 September 2021. Mr Brimicombe attended as note taker.

77. The investigation notes of the meeting with Mr Aziz are at pages 152 and 153.

Mr Aziz said that for the first six months of his employment at Bradford Magistrates' Court he was picked on *"by Zeeshan and Sal A".* (Mr Gibson said that the reference to *"Sal A"* was a typographical error and it should have referred to the claimant. This appears not to be in dispute. There was never any suggestion that somebody by the name of Sal A was being investigated). Mr Aziz said that he wished to remain anonymous *"because of the repercussions".* He said that he was afraid of repercussions because *"Zeeshan and Ikhlaq they are capable of bad things."* He went on to say that they know where he (Mr Aziz) lives. He complained that the G4S had *"repeatedly let them get away with [things]".* Mr Aziz said that he believed that the claimant and Mr Mahmood would harm him. He had heard them issue threats in the direction of Mr Hussain.

78. The interview with X is at pages 158 to 159. When asked if there had been any issues on site, X said, "*yes, the recent radio issues, when I go to the WC Zeeshan and Ikhlaq make farting noises over the radio and say that there is a bad smell, sometimes they try to provoke me by calling me little chilli (means private parts) and more than 15 times they have touched my private parts. I always tell them no, they make it like it's a joke but I'm serious. They also slap my bum, these were recent, the other thing with the cleaner, the cleaner said Zeeshan and Ikhlaq insisted that they bring them drinks every day or he would not keep its job, I said why don't you go to the court manager to tell them what they are making you do, that's four drinks per day, two in the morning and two in the afternoon, so I told them to report it, he was scared, the court usher reported it to management, and this got back to Zeeshan and Ikhlaq, they just said that he was offering to bring the drinks, the cleaner is vulnerable, they are taking advantage of him it's not fair, every month they insist officers must bring treats in for them but they will never bring anything for anyone else, we feel as if we have to bring them. Mostly on the radio, when there are serious cases in interrupting, inappropriate singing aimed towards people in the building, that was Ikhlaq, they have also been known to hold the trigger button in on the radio when specific officers are calling for backup to attend an incident, they are dangerous."*

79. X also referred to the incident on the concourse where the claimant and Mr Mahmood allegedly hit him on the back and pinched his skin and during which they threatened to go to his house and *"kick the fuck out of me".* X also complained about the duties that he was given. He was happy to waive his anonymity.

80. The notes of the meeting with Mr Hussain are at pages 170 and 171.

81. Mr Hussain complained that the claimant and Mr Mahmood, *"when they are together, their work ethics, they disappear from their positions, then they take the piss out of someone, they never know when to stop, to them it could be normal but to the victims we know they don't like it".* He complained that Amanda Knowles was ineffectual in stopping the conduct. He attributed most of the blame to Mr Mahmood, observing that the claimant had been influenced by him. Mr Gibson asked if the claimant and Mr Mahmood have ever *"mentioned any harm towards yourself or anyone else".* Mr Hussain said that he could not recall anything.

82. The notes of the meeting with Mr Ditta are at pages 161 and 162 of the bundle. He spoke of being *"a bit fearful"* of the claimant and Mr Mahmood. He too

observed that Amanda Knowles appeared unable to deal with the matter. Mr Gibson asked Mr Ditta if he had ever been threatened by either of them. He said that he had not. He also said that he had not witnessed them threatening anybody else. He complained about their work ethic on site. He described Mr Mahmood as "*evil and undermining".*

83. The note of the meeting with Amanda Knowles are at pages 176 to 177. She said that her main issue on site was with the claimant and Mr Mahmood arriving late and leaving early. She said that "*if you piss them off you know about it, I've had two run-ins with Zeeshan and he can be evil".* She attributed most of the issues to Mr Mahmood. She commented that, *"I've not had much from Ikhlaq".* She said that Mr Mahmood *"is undermining and very threatening."* She mentioned the incident with X involving the radio and threats made to visit X at his house. Amanda Knowles said that *"this has been going on for a while now, Zeeshan definitely acts like he is in control, and Ikhlaq is like his henchman."* She also said that she had heard (second hand) about issues with the Atlas cleaner. (As mentioned, this individual is named Darren. The Tribunal was not furnished with his surname). She said that she had raised the issue with Mr Mahmood. She said to Mr Mahmood that it was costing Darren about £100 a month to buy drinks for him and the claimant. Mr Mahmood claimed that Darren was doing this *"out of the goodness of his heart"*. She said that the claimant had threatened to *"kick his head in*" if the cleaner reported anything to management.

84. Mr Gibson noted that all of the witnesses (except for X) wished to remain anonymous. He sought advice from MyER. It was agreed that the witnesses would remain anonymous. The respondent sought to balance that wish against the need for the claimant to know of the allegations against him.

85. On 20 September 2021 Mr Gibson wrote to the claimant (pages 202 and 203). He was invited to attend an investigation meeting to discuss allegations of *"threatening behaviour".* This was scheduled to take place on 24 September 2021 at the Bradford Combined Court centre. The claimant was informed that upon conclusion of the investigation a decision would be made regarding whether there was a case to answer at a disciplinary hearing. A copy of the respondent's disciplinary policy and procedure was enclosed. This is in the bundle at pages 108 to 115. A similar letter was sent to Mr Mahmood (pages 214 and 215).

86. In the event, the meeting with the claimant took place on 28 September 2021. The notes of the investigation meeting are pages 217 to 219.

87. Mr Gibson said that upon investigation, complaints had been made about the claimant *"bullying and picking on people on site".* The claimant quite reasonably asked for *"specifics".* He said he was not seeking *"names [but] more allegations".* Mr Gibson was able to give a specific allegation of the issue concerning Darren (the cleaner). (While he had been described as the Atlas cleaner hitherto, Mr Gibson referred to his employer as Engie). The claimant said that Darren's allegations were "*completely false".* He said that he had had lots of complaints about Darren over the last two years and that, *"he is a problem for me and others doing their duties."* He complained that Darren "*is always in the way, responding to panic alarms and also a second cleaner, not mentioning names. 14 September 09:30 he was not social distancing, gaslighting, he walked over my feet to try to cause conflict."* He said that he had only been given one can of Red Bull by

Darren for which he paid. The claimant said that he was scared of Darren and had been prevailed upon to provide cigarettes for fear that otherwise Darren would follow him home. He said that he and Darren had had *"heated conversations".*

88. The claimant said that he had discussed the matter with the *"Engie manager".* (This was Daniel Colbeck). He said this was to no avail. Similarly, he said he was unable to prevail upon Amanda Knowles to do anything and that these matters were affecting his mental health.

89. He denied that Amanda Knowles was fearful of him. He said that he had been asked by her to obtain a car for her as he buys and sells cars at the weekend. He also said that he had helped her to obtain parts for her car.

90. With reference to the allegations from X, he said that it was in fact X who had mentioned *"little chilli".* He also denied the allegations made against him by Phoebe Oliver.

91. Mr Gibson raised the issue of the claimant leaving site early before his schedule finish time. The claimant replied "*not going to say no, not going to say yes, don't need to answer, not related but because I usually work three days it was agreed when doing five days if courts finished I can leave early. It has been like that for five years. It's not special treatment for me everyone does it."*

92. Mr Gibson met with Mr Mohammed the same day. The notes of that meeting are at pages 221 to 224.

93. On 1 October 2021 the claimant emailed Mr Gibson (pages 231 and 232). He asked Mr Gibson to obtain CCTV footage for the following dates:

    93.1. 24 August 2021 – this was to show the claimant and Amanda Knowles leaving site to go to visit a garage "*for Mandy [Knowles'] car".*

    93.2. 6 September 2021 – this was to demonstrate that the claimant had spoken to Daniel Colbeck about his concerns over Darren.

    93.3. 9 September 2021 – this was to show that the claimant was not on site after 1pm (on the day of the incident involving the usher).

    93.4. 13 September 2021 – this was to show that Amanda Knowles had sent the claimant to pick up some parts for her car.

    93.5. 14 September 2021 – this was to demonstrate the incident involving Darren *"gaslighting"* the claimant and not following social distancing by walking over the claimant's legs.

94. Mr Gibson forwarded the claimant's email to Mr Hartley-McEvoy. In paragraph 58 of his witness statement, Mr Gibson sets out his justifications for not obtaining the CCTV footage requested by the claimant. (It does not appear as if these justifications were ever relayed to the claimant. Indeed, on 1 October 2021 Mr Gibson emailed Mr Hartley-McEvoy. He said*, "This guy …".* We agree with the claimant that this demonstrates a sceptical attitude towards him on the part of Mr Gibson. Mr Gibson could simply have forwarded the email of 1 October 2021 to Mr Hartley-McEvoy without such a tendentious comment).

95. That said, there is some merit in Mr Gibson's justifications for not obtaining the CCTV footage as set out in paragraph 63 of his witness statements. In reply to

the points at paragraph 93 above Mr Gibson responded (taking matters in the same order):

95.1. That the CCTV footage would be automatically overwritten after 28 days. The incident of 24 August 2021 was more than 28 days prior to the claimant's request.

95.2. Mr Gibson accepted that the claimant had raised concerns over Darren with Daniel Colebeck. There was therefore no need for the claimant to have to prove this.

95.3. It was accepted by the respondent the claimant was not involved in the incident involving the usher on the afternoon of 9 September 2021. Similarly, therefore there was no need for the claimant to prove something which had been accepted by the respondent.

95.4. Mr Brimicombe was dealing with Amanda Knowles' conduct as a supervisor as part of the wider issues to which we referred above. It does not appear to be in dispute that the claimant was asked by Amanda Knowles to leave the court premises to pick up some car parts for her and that she accompanied him to look at a car.

95.5. Again, it was not disputed that the claimant had raised concerns over Darren's conduct with Mr Colebeck. Again, this appears to be accepted by the respondent.

96. Mr Gibson then conducted investigation meetings pertaining to the incident of 9 September 2021. The meeting notes are at pages 189 to 200. This, of course, was not a matter which concerned the claimant.

97. Mr Gibson issued letters of concern to X, Mr Ditta, Mr Hussain and Mr Aziz. Copies of the letters of concern are at pages 250 to 257. This was to the effect that having one member of staff on the upstairs concourse during court sittings is unacceptable, as is the use of personal mobile phones while on duty.

98. On 5 October 2021 the claimant was invited to a disciplinary hearing. This was to take place on 8 October 2021 at Bradford Combined Court. The allegation faced by the claimant was described as *"threatening behaviour towards OCS/HMCTS colleagues".* He was informed that the hearing was to be conducted by Dougie Wilson.

99. On 7 October 2021 Mr Mahmood resigned. He too had been invited to a disciplinary hearing in front of Mr Wilson which was also to be held on 8 October 2021.

100. Mr Mahmood gave evidence (in paragraph 8 of his witness statement) that shortly after receiving the invite he received an anonymous telephone call in which he was advised that his best option would be to resign from his position rather than face dismissal. He expanded upon this in evidence before the Tribunal. He said he did not recognise the caller. He feared being dismissed and the difficulty that this would present in searching for alternative work.

101. During his evidence, Mr Mahmood commented that Amanda Knowles said that there were *"too many Asians"* working at the court and that there was a need to *"mix up the teams".* The Tribunal accepts that Amanda Knowles commented that there were *"too many Asian"* employees. The Tribunal did not benefit from

hearing evidence from her. An adverse inference is therefore drawn against the respondent. Further, it is consistent with the sentiments recorded in the respondent's own notes of the meeting with her of 14 September 2021 when she is recorded is saying that *"all the Asians seem to stick together".* We do not accept Mr Mahmood's evidence that she went on to say that there was a need to *"mix up the teams".* After the claimant and Mr Mahmood were suspended on 14 September 2021 (after which neither of them returned to work at Bradford Magistrates' Court) they were replaced by two Asian employees. This is inconsistent with a wish to "*mix up the teams".*

102. On 7 October 2021 the claimant wrote to Mr Hartley-McEvoy. He said that he felt that the *"whole case is biased."* We refer to page 245. He asked if he could be represented at the hearing by his solicitor. Mr Wilson replied the same day (page 244) to inform him that he was entitled to be represented by a workplace colleague or a trade union representative. Mr Wilson's advice was in accordance with the Employment Relations Act 1999 pursuant to which an employee facing disciplinary action may be represented either by a trade union representative or a workplace colleague. This right does not extend to anybody else.

103. The disciplinary hearing went ahead on 8 October 2021. It was adjourned part way through that day and continued on 12 October 2021. The notes of this are at pages 261 to 266. The claimant was accompanied by Mr Saleem. Mr Wilson was accompanied by Mark Kiddy, area security manager, who attended as note taker.

104. In his letter of 5 October 2021 convening the hearing, Mr Wilson said that he was enclosing for the claimant's information copies of *"all relevant documents, which will be reviewed during the hearing."* It is unfortunate that Mr Wilson did not list them. In paragraph 21 of his witness statement Mr Wilson said that he enclosed the disciplinary policy and procedure (at pages 108 to 115) and redacted versions of the investigating meeting notes obtained by Mr Gibson on 16 September 2021 (pages 152 to 181). He also enclosed redacted emails and statements from HMCTS (at pages 122 to 123, 126 to 128 and 186 to 188).

105. It is not the case that, in fact, the claimant was supplied with all of the witness investigation meeting notes at pages 152 to 181. This is because, within this section of the bundle, the respondent has enclosed a partly redacted and fully redacted version of each meeting. The partly redacted versions are to obscure the full name of each of the witnesses such that only the first or given name is visible. Plainly, this is an incorrect way of proceeding as we said in the introduction to these reasons. It was the fully redacted versions with which the claimant was supplied at the disciplinary hearing.

106. By way of example, we may contrast pages 152 to 154 with pages 155 to 157. These are two versions of investigation notes of the interview with Tariq Aziz. Pages 155 to 157 were those with which the claimant was supplied. Mr Aziz's name was fully redacted as was a passage about Mr Aziz's career. The respondent reasonably discerned the claimant would be able to identify him from this, hence the redaction.

107. X's note was handed to the claimant in unredacted form given that he had waived his anonymity. As has been said, these notes are at pages 158 to 160.

108. There are some discrepancies between the two versions of some of the statements (at pages 161 to 166). For example, in the case of Mr Ditta, there is a difference in the start time of the meetings and a mistake as to names (in the second line): the claimant is referred to incorrectly as Khuram in the partially redacted version whereas he is referred to correctly as Ikhlaq in the fully redacted version.

109. There is a more substantive difference in the two versions of the notes of the interview with Mr Hussain. In the fully redacted version with which the claimant was supplied (at pages 173 to 175), Mr Gibson is recorded as having asked him whether Mr Mahmood and Mr Hussain threatened others with harm. This Mr Hussain denied. The partially redacted version at pages 170 and 171 omits this exchange.

110. The respondent led no evidence as to these discrepancies. The Tribunal may have expected to hear evidence from somebody within MyER (or at any rate somebody from within the respondent) to explain the provenance of the two versions of each note and an account of the discrepancies. As it is, the Tribunal (and Mr Boyd) were left to speculate. It does appear probable that somebody simply retyped the notes in partially or lesser redacted form for the benefit of the Tribunal. In so doing, mistakes have been made in the transcription.

111. That said, there is merit in Mr Boyd's point in paragraph 2(b) of his written submissions that the only substantive discrepancy (which is in relation to the passages in the interview with Mr Hussain) was in fact to the claimant's benefit. Mr Hussain's denial that he and Mr Mahmood threatened others was included within the version supplied to the claimant at the disciplinary hearing but omitted from the partial redacted version which was supplied to the Tribunal. (The Tribunal has of course seen the version that was provided to the claimant in any case). It was not suggested by or on behalf of the claimant that material exculpatory of him had been hidden from the claimant at the time of the disciplinary hearing.

112. The claimant said during the disciplinary hearing that he had not received a statement from X or from Darren the cleaner. Mr Wilson was unable to supply a statement from Darren, none having been taken. The respondent took the view that the issues between the claimant and Darren were a matter for Engie, Darren's employer.

113. In evidence given under cross-examination, Mr Wilson said he could not recall whether the claimant was provided with a copy of X's witness statement at pages 198 to 200. This reinforces our point about the need to list enclosures to avoid this kind of uncertainty. In any case, Mr Wilson fairly accepted that he had taken into account X's evidence when making his decision in the disciplinary proceedings against the claimant. He acknowledged that this was unfair to the claimant by taking a decision upon material which the claimant had not had the opportunity to challenge or comment upon. He said that he had given little weight to the allegations raised against the claimant by the cleaner Darren. Mr Wilson said that *"it was mainly about the issues between our employees, OCS colleagues".*

114. Mr Wilson said that he did not think it necessary to pursue any kind of action against Miss Knowles arising out of her comment that the Asian employees *"stick together".* He justified this upon the basis that the claimant did not appear to have any concerns over her. There is merit in Mr Wilson's observation given that the claimant's position was that he and Amanda Knowles were on friendly terms (as evidenced by the assistance that he was giving her in connection with her car). The claimant's case was that she would hardly have got into a car with him had she been afraid of him. This was a good point. Mr Wilson said that he gave Amanda Knowles' account more weight to the allegations against Mr Mahmood than the claimant. He acknowledged that her performance as supervisor was substandard and that this was being dealt with as a training issue as a training issue *"across the estate".*

115. Mr Wilson was then asked by Miss Rashid about the *"henchman"* comment made by Miss Knowles. Mr Wilson paid this little heed. He said he had made no finding that the claimant intimidated the others.

116. Mr Wilson concluded, as he says in paragraph 47 of his witness statement, that *"overall there was no physical evidence to support the allegations of threatening behaviour against Ikhlaq. It was not, therefore, possible to determine precisely what incidents of bullying behaviour had taken place, although I was satisfied that some bullying and intimidating behaviour had occurred. Ikhlaq himself had acknowledged that he could come across as intimidating or in a way that he had not intended due to his appearance."* Mr Wilson said in evidence before us that there was a perception of intimidation. He had not himself raised the issue of the claimant's physique as a point against the claimant. He went on to say in paragraph 48 that, "*as the allegations could not be supported by physical evidence, I did not feel appropriate sanction was dismissal."*

117. On 13 October 2021 (the day after the conclusion of the disciplinary hearing) Mr Wilson emailed Mr Hartley-McEvoy and Mr Brimicombe (page 260). He said that "*at the moment I do not feel there is sufficient evidence to secure the accusation of bullying and harassment. I would want to revisit the complaint made by the touchpoint cleaner as this officer suggested it was he being bullied. Ian, further to our brief discussion today we will need to look at the potential outcome of this not being a dismissal and the process for getting the officer back to work."*

118. When asked about his deliberations by Miss Rashid, Mr Wilson said that *"there was sufficient evidence to show there was an issue of bullying and harassment, but I felt it was not all the claimant, and I couldn't interview Mr Mahmood. I've dealt with a number of cases of bullying and harassment, in this case, gross misconduct was not the appropriate sanction."*

119. On 20 October 2021 Mr Wilson wrote to the claimant (pages 279 and 280). He informed the claimant that, *"I do not consider there to be enough direct evidence to dismiss you from the service."* He went on to say that he was *"however concerned that several site based colleagues have felt concerned enough to raise this within the business and that relationship on site had been strained as a result. Consequently, I do not belief it to be in the interest of both parties that you return to duties at Bradford Magistrates' Court. I, therefore, as part of this outcome intend to locate you within the security team at Bradford Combined*

Court where you will report into the site supervisor and complete your regular duties."

120. Mr Wilson also said in the disciplinary outcome letter that during the disciplinary hearing the claimant had said that he had a "*habit of advising colleagues when they don't appear to be doing things correctly and letting them know how it should be done. From a colleague's perspective that could be seen as potentially interfering and intimidating, so I expect you in future to raise any concerns in the correct manner with the site supervisor and all the senior persons on site to rectify the situation."* Mr Wilson went on to say that as the claimant himself accepted he can be *"an intimidating figure, so this needs to be borne in mind when dealing with others."* Mr Wilson advised the claimant that he should not assist Amanda Knowles with her personal issues during work time. He said that it was his intention to raise the issue around the cleaner with Daniel Colebeck. The claimant was given a written warning to remain on his file for a period of 12 months.

121. Mr Wilson set out his rationale for giving the claimant a warning in paragraph 46 of his witness statement. In summary, Mr Wilson concluded that the allegations were serious, there was a genuine fear amongst colleagues, that six witnesses had given evidence against the claimant and Mr Mahmood and that the atmosphere at the Magistrate's court had improved following the suspensions.

122. Mr Wilson accepted under questioning from Miss Rashid that it would be reasonable to take out of account X's allegations upon the basis that there was no evidence seen by Mr Brimicombe on CCTV of inappropriate touching of private parts (or any other improper behaviour). Mr Wilson said that he could not recall whether he had been informed by Mr Brimicombe that he (Mr Brimicombe) had watched the CCTV footage. On any view, any conclusion adverse to the claimant around X's allegations was unsafe upon the basis that the claimant had not had the opportunity of commenting upon X's witness statement and the CCTV footage was inconclusive. Mr Wilson accepted that no weight (or at any rate little weight) could be given about the cleaner's allegations against the claimant.

123. This therefore only left the allegations against him from Amanda Knowles and the other three CTSOs. We agree with the claimant and Miss Rashid that Amanda Knowles' allegations (such as they were) against the claimant were undermined by her friendliness with him, her willingness to accompany him in a car to travel to a garage and for her to turn to him for assistance with acquiring a car and car parts.

124. It is the case that the evidence showed that CTSOs felt intimidated and threatened. However, no specific instances or allegations were raised. The impression the Tribunal has is that Mr Wilson may have taken the view that there was *'no smoke without fire'* given the generalised allegations raised against the claimant by the three CTSOs such that he felt some sanction was warranted and that some action needed to be taken.

125. The Tribunal is of course conscious that this is not a complaint of unfair dismissal. Had it been, there may well have been a question over the Tribunal being satisfied that the respondent had reasonable grounds to believe that the claimant was guilty of threatening behaviour. The issue for the Tribunal in this claim is whether the decision was tainted by discrimination. We shall of course revert to this later in these reasons.

126. For now, we continue with the chronology of events. The claimant did not in fact go to work in the Bradford Combined Court centre. We accept the respondent's evidence that on the face of it this was a suitable alternative location. It is very near to the Bradford Magistrates' Court. Therefore, the claimant's travel time and any commuting costs would not be increased by the move. There can be no sensible criticism of the respondent's decision to move the claimant away from Bradford Magistrates' Court and in particular, the four CTSOs who had raised complaints against him.

127. In paragraph 87 of his witness statement, Mr Brimicombe says that he was *"tasked with the administrative side of Ikhlaq to return to work. Dougie asked me to make enquiries with the client [HMCTS] about whether they permitted a Ikhlaq to return to the court, and if not, which sites they agreed for Ikhlaq to return to. I recall that I spoke to the client about this on numerous occasions between October 2021 and during the first quarter of 2022. The client did not agree for Ikhlaq to return to work at the court. At first, they told us that they permitted him to return to Bradford Combined Court, a nearby court, however they soon decided they did not want Ikhlaq to work there. I understand the reasons for this are that these are high profile buildings and in light of the issue with Ikhlaq's conduct, they did not trust him to be placed in a CTSO role there."*

128. On 12 January 2023, Mr Brimicombe held a meeting with HMCTS. He reported upon this in his email of 16 January 2022 addressed to Mr Wilson (pages 311 and 312). HMCTS were not prepared to allow the claimant to return to either of Bradford's courts. It appears that they were prepared to countenance him working in the Leeds Combined Court or the Leeds Magistrates' Court.

129. The Employment Judge asked Mr Wilson what had become of the claimant between 20 October 2021 and January 2022. Mr Wilson said that the respondent was dealing with the claimant's appeal against his disciplinary decision and a grievance raised by him. Mr Wilson said that *"we maintained the suspension."* He confirmed that HMCTS had not said that the claimant could not return to work at all. Mr Wilson said that *"we could have returned him. I accept it got a bit untidy."*

130. On 26 October 2021 the claimant emailed Mr Wilson (pages 282 to 283). This was treated as an appeal against Mr Wilson's decision.

131. On 8 November 2021 the claimant emailed Mr Wilson to complain that he had been underpaid (page 288). He said that *"when I was suspended, I was advised that I will be paid full wages therefore there should be no change in the amount I would be paid while suspended but I have been paid a lower amount for both months."* The claimant said that prior to his suspension he had been working 8.5 hours a day, five days a week (which plainly is a total of 42.5 hours per week). He also complained that he had not been paid his attendance allowance during his suspension.

132. As Mr Wilson explains in paragraph 61 of his witness statement, the respondent operates an incentive scheme whereby they award attendance allowance as a contractual benefit to employees for positive attendance. Employees are paid an additional £1 for every hour worked each month if they meet the eligibility criteria in the attendance allowance policy at pages 116 to 119J of the bundle.

133. Mr Horton explains in paragraph 124 of his witness statement that the attendance allowance is not payable during a period of suspension. However, the respondent accepted the attendance allowance should have been restored after the delivery of the disciplinary outcome on 20 October 2021. Mr Horton therefore arranged for this to be paid to the claimant. Miss Rashid said on the claimant's behalf that the claimant was satisfied that this had been paid this and no claim is maintained upon it. Therefore, this aspect of the claimant's complaint that the respondent made an unauthorised deduction from his wages was withdrawn by the claimant. This complaint therefore stands dismissed upon withdrawal.

134. Mr Brimicombe emailed the claimant on 1 December 2021. He maintained that the claimant had been paid correctly given that his contractual hours were 27 per week. He therefore had no entitlement to be paid upon the basis of a 42.5 hours' working week.

135. The claimant disagreed. He emailed to this effect on 2 December 2021 (pages 290 to 292). The claimant maintained his entitlement to be paid upon the basis of a 42.5 hours' week together with his attendance allowance. The claimant said that Mr Brimicombe was *"targeting and bullying me due to my race."* The claimant complained that these matters were having an impact upon his mental health. The claimant emailed in similar terms in a second email sent on 2 December 2021 (pages 340 to 341).

136. Upon the question of the disciplinary appeal, Mr Cant says in paragraph 5 of his witness statement that on 21 January 2022 he was made aware that the claimant had appealed. Mr Cant sent a letter to the claimant inviting him to attend a disciplinary appeal hearing on 10 March 2022. The letter of invite is dated 2 March 2022 and is at pages 388 to 389.

137. The respondent's explanation for the delay in dealing with the claimant's appeal after it was made on 26 October 2021 appears largely to rest upon the basis that the pay issue *"blew up".* It was suggested to the claimant by Mr Boyd that it was the respondent's intention to meet with the claimant to discuss his pay issues: at page 294 is an email dated 14 December 2021 where Mr Wilson says he will meet with the claimant to discuss the pay issue. Then, on 13 January 2022 there is an email making reference to a meeting between the claimant and Mr Wilson of 12 January 2022 (page 308). The claimant said he could not recall a meeting. Mr Wilson likewise says in paragraph 65 of his witness statement that *"due to the passage of time, I cannot recall whether I subsequently met with Ikhlaq. I do not hold any note of such a meeting."* At all events, Mr Wilson emailed the claimant on 14 February 2022 (pages 361 and 362). In the email, he makes no reference to a meeting held on 12 January 2022. This suggests to the Tribunal that one did not take place.

138. However, in the email of 14 February 2022 Mr Wilson maintained the respondent's position that the claimant was contracted to work for 27 hours per week. It was accepted of course that he frequently worked 42.5 hours per week with the additional hours being by way of non-contractual, voluntary overtime. Mr Wilson says the claimant was suspended for the last 15 weeks of 2021. He was erroneously paid for 42.5 hours for the first month of the suspension period. The respondent agreed not to seek to recovery of the overpayment as a gesture of goodwill.

139. On 15 February 2022 the claimant protested that he was not working the extra hours voluntarily and had been *"practically begged"* by Miss Knowles to work the additional time. He also maintained that *"at the time of my suspension Ian [Brimicombe's] exact words to me were that there would be no change to the pay I was receiving and that all benefits including bonus will be paid."*

140. Meanwhile, the claimant's grievances of 2 December 2021 (pages 290 to 292 and 340 to 341) found their way to Mr Rowe. Mr Rowe says in paragraph 8 of his witness statement that Eleanor Hill, employee relations manager forwarded a copy of the grievances to him on 1 February 2022. She confirmed that Mr Wilson was dealing with the pay queries. Mr Rowe then sent a letter to the claimant to invite him to attend a grievance hearing. The invite letter is at page 353. The claimant was invited to attend a grievance meeting with Mr Rowe to be held on 17 February 2022.

141. Eleanor Hill prepared a useful document which is at pages 353B to 353E. This was sent to Mr Cant and Mr Rowe on 7 February 2022. She highlighted (by way of colour coding) those matters which fell within Mr Cant's jurisdiction as the disciplinary appeal officer and those matters which were for Mr Rowe as the grievance officer. She also colour coded the pay issues which were being dealt with by Mr Wilson. There is no need to go into any great detail about Miss Hill's document. Her intention was clearly to arrive at a demarcation between the appeal issues and the grievance issues.

142. The grievance hearing before Mr Rowe took place on 17 February 2022 as scheduled. He was accompanied by Ella Shinkwin, HR co-ordinator. She was there to act as a note taker. She attended by video.

143. Mr Rowe's evidence is that the claimant asked to record the hearing. Mr Rowe declined this upon the basis that Miss Shinkwin was there to take a note and in any case recording is *"outside of the OCS usual policy".*

144. Mr Rowe says that he found the meeting difficult as the claimant *"wanted to talk about the disciplinary process."* Mr Rowe, understandably, wished to keep the disciplinary issue (with which Mr Cant was dealing) separate from the grievance issue. That said, the Tribunal can understand why the claimant was raising those matters before Mr Rowe as there was a degree of overlap. In particular, the claimant was contending that the disciplinary process (and in particular, Mr Brimicombe's investigation of it) was tainted by race discrimination.

145. The claimant says in paragraph 30 of his witness statement that *"From the outset Craig [Rowe] was very aggressive in the tone he used and very early on advised me that he was offended that I believed I'd been discriminated against due to the colour of my skin."* The claimant goes on to say in paragraph 31 of his witness statement that, "*as the meeting continued Craig became more and more aggressive over the point I felt I was being discriminated against and smacked his hands on the table aggressively shouting that I was only doing this for an ET claim. At this point I felt very intimidated and scared but continued to advise him that I did not do it for an ET claim but to put forward my case to highlight the difference in treatment."*

146. Mr Saleem corroborates the claimant's account. He accompanied the claimant to the grievance hearing. He says in paragraph 12 of his witness statement that,

"*Craig was aggressive in his tone throughout the meeting. I felt intimidated/fearful and I was not the one who was talking. I could see that Ikhlaq also felt the same but continued to try to make his point and proceed with the meeting."* Mr Saleem says in paragraph 14 of his witness statement that, *"Craig was becoming more and more angry until he finally snapped and stated to Ikhlaq that he is only doing this for an ET claim."*

147. The minutes of the grievance hearing are at pages 363 to 381. They have been signed by the claimant (albeit with a caveat that he would email any corrections in due course).

148. The minutes corroborate the claimant's account that he was prevented from recording the meeting. Mr Rowe also accepts that he said that the claimant was seeking to *"build an ET claim"* against the respondent. We refer to paragraph 16 of Mr Rowe's witness statement where he accepts saying this.

149. In evidence given under cross-examination, Mr Rowe denied being aggressive. However, he says he may *"come across as stern and dour."* He accepted Miss Rashid's description of the meeting as "*combative".*

150. The Tribunal finds that this was a difficult meeting for both sides. Things appear to have got off on the wrong foot from the claimant's perspective when he was denied the opportunity of recording the meeting. We accept that Mr Rowe was seeking to keep the issues raised in the claimant's grievance separate from those which were a matter for Mr Cant as part of the disciplinary hearing process. Mr Rowe's wish to keep matters on track may have been perceived by the claimant as an attempt to shut down points which he wished to make (but which were properly for Mr Cant). It was perhaps unfortunate that Mr Rowe accused the claimant of seeking to garner evidence to build an ET case. This was a comment unlikely to calm the tensions within the meeting.

151. We accept that all of these factors, coupled with Mr Rowe's self-description of being stern and dour may have led the claimant and Mr Saleem to the conclusion that Mr Rowe was acting aggressively. We accept this to be a perception which was reasonably held by the claimant and by his witness. We do not accept that Mr Rowe was aggressive or set out with the intention of being aggressive towards the claimant. As we say, a combination of factors led to this being a difficult meeting.

152. The claimant complained about Mr Rowe's conduct on 20 February 2022. The email is at page 384. The claimant also mentioned that the note taker was in fact not present in the room. As we have said, she attended by video. This resulted in the claimant having to repeat himself so that she could take a note. The respondent's decision to proceed in this way was hardly conducive to making the meeting any easier.

153. Eleanor Hill responded to the claimant on 21 February 2022 (page 386). She defended Mr Rowe's conduct upon the basis that he was seeking to keep separate the grievance and the disciplinary matters.

154. Mr Rowe wrote to the claimant on 31 March 2022 with the grievance outcome (pages 419 to 424). The delay was accounted for by the fact that Mr Rowe conducted some further investigations.

155. He has arranged to meet with Mr Brimicombe and Mr Wilson to look into some of the issues raised by the claimant. Mr Rowe wrote to the claimant on 4 March 2022 to account for the delay and to explain what he was doing to further his grievance investigation (pages 392 to 393).

156. Mr Rowe met with Mr Brimicombe on 9 March 2022 (pages 396 to 401). Mr Brimicombe confirmed that he had gone to Bradford Magistrates' Court on 14 September 2021 to investigate the incident with the usher. It was in the course of this investigation that the other CTSOs had raised concerns about the claimant which warranted a separate investigation. A decision was therefore taken, in conjunction with MyER, to suspend the claimant and Mr Mahmood and investigate matters.

157. Mr Rowe met with Mr Wilson to discuss his involvement with the claimant's disciplinary process. There are no notes of this meeting. As Mr Rowe explains in paragraph 25 of his witness statement that he "*could not find anyone to attend the meeting with me to act as a note taker and I did not make any notes myself. Key points from my discussion with Dougie are referenced below in respect of my deliberations."*

158. Mr Rowe decided not to uphold the claimant's grievance. He was satisfied with Mr Wilson's handling of the pay issue. He was satisfied with Mr Gibson's explanation for not obtaining the CCTV footage as had been requested by the claimant. He rejected the claimant's contention that the description of him by Amanda Knowles as a *"henchman"* was tainted by race discrimination. There was no difference in treatment between the claimant and others upon the question of leaving site early. Mr Rowe was satisfied with Mr Brimicombe's decisions to investigate the allegations from the other CTSOs and to suspend him and Mr Mahmood.

159. Concurrently with Mr Rowe's grievance investigations, Mr Cant was progressing the claimant's disciplinary appeal. The claimant was invited to attend the appeal hearing scheduled for 10 March 2022 by way of a letter dated 2 March 2022 (pages 388 and 389).

160. The notes of the appeal hearing are at pages 402 to 414. The claimant was again accompanied by Mr Saleem. Nicola Jones, people and communications officer, accompanied Mr Cant as note taker.

161. In essence, the claimant's appeal was upon the basis that he had done nothing wrong. He alleged that witnesses had been coerced into giving evidence against him.

162. After the appeal hearing had taken place, Mr Cant met with Amanda Knowles on 26 April 2022. There are no notes of this meeting. He was satisfied from what she said that she had given her witness statement freely and had not been under any pressure to give evidence against the claimant.

163. There was still the outstanding issue of when and where the claimant could return to work. Mr Cant made enquiries about this on 13 May 2022 (pages 432 and 433). Mr Wilson confirmed to Mr Cant on 25 May 2022 that HMCTS was still not prepared to entertain the claimant returning to any of the Bradford courts (page 441).

164. Mr Cant wrote to the claimant with the outcome of his disciplinary appeal. Mr Cant refused the claimant's appeal. The appeal outcome letter is at pages 451 to 453.

165. Mr Cant dealt with the claimant's appeal points. The first of these concerned access to CCTV footage. The claimant had said himself that the CCTV footage would not show the claimant in a different light in any case. Mr Cant appeared to be satisfied with Mr Gibson's rational for not accessing the CCTV.

166. Mr Cant said he was satisfied that Mr Brimicombe's actions were not in any way motivated by the claimant's race. There was no evidence, he found, of coercion. He did not uphold the claimant's contention that describing him as a "*henchman"* was tainted by race.

167. Mr Cant acknowledged that the claimant's point that matters had not been dealt with in a reasonable timescale. For this, he apologised. However, he said the delay had no bearing on the outcome of the process.

168. Upon the question of returning to court, Mr Cant confirmed that HMCTS did not wish the claimant to return to the Bradford cluster but they were comfortable with him working on other sites. He said, *"within your original G4S contract there is a mobility clause that allows for movement to various sites within a reasonable distance."* The Tribunal has not seen that contract. It is surprising that this was not produced for the benefit of the Tribunal if it is available.

169. Mr Cant concluded by saying that a first written warning was an appropriate sanction. The claimant was told that the respondent was to contact him shortly with a view to discussing a return to work.

170. In the event, the claimant did not return to work. He was signed off as unfit to work on 21 June 2022. A long-term sickness welfare meeting form is in the bundle at pages 454C to H. This records the claimant saying that he is suffering with work related stress, anxiety and depression as a result of his disciplinary action and *"ongoing Tribunal".*

171. A welfare report dated 1 September 2022 was prepared and certified the claimant not to be currently fit to return to work by reason of work-related stress, anxiety and depression.

172. In the meantime, the claimant appealed against Mr Rowe's grievance outcome. The email containing his grievance appeal and dated 5 April 2022 is at pages 426 to 428. The claimant sent a subsequent email dated 8 April 2022 which is at page 425.

173. The grievance appeal process was put on hold due to the claimant's ill-health. Eleanor Hill wrote to the claimant on 20 September 2022 suggesting a postponement of the grievance appeal hearing until after the claimant had attended an appointment with the respondent's occupational health provider, Medigold, to confirm his fitness to attend. This email is at page 454J.

174. On 26 September 2022 the claimant requested the grievance appeal to be considered upon the papers after the occupational health assessment had taken place (pages 454K to 454L).

175. Medigold provided a further occupational health report on 12 October 2022. This recommended proceeding with the appeal by an alternative to a face-to-face meeting (pages 454O to 454Q). We refer to the answer to question 6 at page 454P.

176. On 23 November 2022 Mr Horton wrote to the claimant with the grievance appeal outcome. This is at pages 455 to 459. Mr Horton's conclusions were:

176.1. That the claimant was not treated differently or discriminated against due to race in connection with his suspension, the handling of the CCTV footage issue and by not being paid an attendance allowance payment. Although finding the non-payment of the attendance allowance not to be upon the grounds of race, Mr Horton did find that the claimant should have been paid it after 20 October 2022. As we have already said, this has been attended to.

176.2. Mr Horton rejected the claimant's contention that Amanda Knowles referring to him as a *"henchman"* was related to race.

176.3. Mr Horton acknowledged that Mr Rowe had said that the claimant was seeking to build an ET claim. He considered that he conducted a professional hearing and sought to speak to relevant witnesses afterwards (in particular, Mr Brimicombe and Mr Wilson).

176.4. Mr Horton said that the issue of Amanda Knowles referring to the claimant as a *"henchman"* would be dealt with as a management issue. *(A more serious matter concerning Amanda Knowles was in fact dealt with in November 2022. A disciplinary hearing was held on 17 November 2022 following an allegation that a court user had gained entry to Bradford Magistrates' Court concealing a bladed article on 26 October 2022, under her supervision. It was also alleged that she had failed to escalate or notify line management of this incident which resulted in an unacceptable delay, causing unnecessary risk to colleagues. These allegations were upheld. She was issued with a written warning to remain on her personnel file for a period of 12 months).*

177. Subject to paragraphs 213 to 217 below, this concludes our findings of fact.

The relevant law

178. We now turn to a consideration of the relevant law.

179. We shall start with consideration of the law as it relates to the claimant's complaint of race discrimination. This is a complaint brought upon the basis of direct discrimination. By section 13 of the 2010 Act, 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.

180. The prohibited conduct of direct discrimination is made unlawful in the workplace pursuant to provisions to be found in Part 5 of the 2010 Act. By section 39(2)(d) an employer (A) must not discriminate against an employee of A's (B) by (amongst other things) subjecting B to a detriment.

181. By section 23 of the 2010 Act, on a comparison of cases for the purposes of section 13 there must be no material difference between the circumstances relating to each case.

182. The word "*detriment"* is not defined in the 2010 Act. In **Ministry of Defence v Greimah** [1980] ICR 13, Brightman LJ said that "*a detriment exists if a reasonable worker would or might take the view that the treatment was in all the circumstances to his detriment."* In a similar vein, in **D'Souza v Automobile Association** [1986] ICR 514, May LJ said that *"The court or tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work."*

183. The Equality and Human Rights Commission's *Employment Code* (at paragraphs 9.8 and 9.9) says *"Generally, a detriment is anything which the individual concerned might reasonably consider changes their position for the worse or put them at a disadvantage … however, an unjustified sense of grievance alone would not be enough to establish detriment."*

184. Direct discrimination is based on the concept of less favourable treatment and therefore envisages a comparative exercise and consideration of appropriate comparators. The critical question in this case is whether the reason for the less favourable treatment (if less favourable treatment is established) is the claimant's race.

185. Comparators can take two forms. There may be a real live comparator. Alternatively, the Tribunal may have to hypothesise as to how a comparator of (in this case) a different race in the same or similar circumstances as the claimant would have been treated. There is also the concept of an evidential comparator. As it was put in **Shamoon v Chief Constable of The Royal Ulster Constabulary** [2003] ICR 337 (Lord Nicholls), *"The fact that a particular chosen comparator cannot because of material differences, qualify as the statutory comparator by no means disqualified it from an evidential role. It may, in conjunction with other material, justify the Tribunal drawing the inference that the victim was treated less favourably than she would have been treated if she had been the … comparator."* Plainly, the more material the differences between the evidential comparator on the one hand and the claimant on the other, the less determinative of the issue will be the treatment of them.

186. The characteristics of a hypothetical comparator should, in an appropriate case, be finally determined at the end of a case once the evidence on the *"reason why"* has been heard. In **D'Silva v NATFHE** [2008] ARLR 412, Underhill P deprecated the use of a hypothetical comparator in circumstances where the Tribunal had made findings of fact that the reason for the respondent's actions wholly excluded any link with discrimination. He held that where the Tribunal makes such a finding *"it necessarily answers also the question whether he would have been treated more favourably if he had been white … it is accordingly unnecessary to consider in detail the passages in which the Tribunal referred to the nature of the hypothetical comparator."*

187. By section 136 of the 2010 Act, if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision of the 2010 Act concerned, the court must hold that contravention occurred. However, that does not apply where A shows that A did not contravene the provision.

188. In **Hewage v Grampian Health Board** [2012] ICR 1054, Lord Hope said*, "… it is important not to make too much of the role of a burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other."* Therefore, assuming that the reason why cannot be determined on the evidence, the initial burden is on the claimant to prove, on a balance of probabilities, a *prima facie* case of discrimination. The burden does not shift to the employer to explain the reasons for their treatment of the claimant unless the claimant is able to prove, on the balance of probabilities, those matters which they wish the Tribunal to find as a fact from which (in the absence of any other explanation) an unlawful act of discrimination can be inferred.

189. The Court of Appeal in **Madarassy v Nomura International Plc** [2007] EWCA Civ 33 said (Mummery LJ) that, "*the bare facts of a difference in status and a difference in treatment only indicates a possibility of discrimination. They are not, without more, sufficient material from which a tribunal conclude that on the balance of probabilities, the respondent has committed an unlawful act of discrimination."*

190. The *"something more"* than the difference in treatment and difference in protected characteristic may be present where there is an appropriate comparator. It may also be found in such circumstances as a lack of transparency, inconsistent explanations and unreasonable behaviour.

191. We now turn to the unauthorised deduction from wages complaint. By section 13 of the Employment Rights Act 1996, an employer shall not make a deduction from wages of a worker employed by them unless the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or the worker has previously signified in writing their agreement to consent to the making of the deduction. By section 13(3) where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions) the amount of the deficiency shall be treated for the purposes of Part II of the 1996 Act as a deduction made by the employer from the worker's wages on that occasion.

192. By section 24 of the 1996 Act, where a tribunal finds a complaint well founded, it shall make a declaration to that effect and shall order the claimant to pay to the worker the amount of any deduction made in contravention of section 13.

193. The term *"wages"* is defined in section 27 of the Act as any fee, bonus, commission, holiday pay or other emolument referable to employment, whether payable under his contract or otherwise.

194. The question of what wages are *"properly payable"* to the worker under section 13(3) of the 1996 Act is critical to determining whether an unlawful deduction has been made. In **New Century Cleaning Co Limited v Church** [2000] IRLR 27, CA the Court of Appeal concluded that for a payment to fall within the definition of wages properly payable, there must be some legal entitlement to the sum in question. In **Church**, the Court of Appeal held that the term *"otherwise"* in section 27 does not extend the definition of wages beyond sums to which the worker has some legal, but not necessarily contractual, entitlement. One example of a

noncontractual payment to which a worker may *"otherwise"* be legally entitled is holiday pay under the Working Time Regulations 1998.

195. We now turn to the issue around the claimant's holiday pay. This is a complaint brought, as identified by Employment Judge Maidment, pursuant to the Working Time Regulations 1998. Regulation 16(1) provides that a worker is entitled to be paid at the rate of a week's pay in respect of each week of annual leave to which they are entitled under Regulation 13 and Regulation 13A. Regulation 13 provides an entitlement to four weeks' annual leave in each year. Regulation 13A provides that a worker is entitled in each leave year to a period of annual leave determined in accordance with paragraph (2). In the case of a worker working five days a week, this an additional 1.6 weeks' leave.

196. For a worker employed to work for five days a week, the total annual leave entitlement under the 1998 regulations is therefore 28 days. This is 20 days of

basic leave under Regulation 13 and then eight further days of additional leave under Regulation 13A. The latter provides additional leave of 1.6 weeks per year in any leave year beginning on or after 1 April 2009.

197. A "*weeks' pay"* is calculated in accordance with sections 221 to 224 of the Employment Rights Act 1996. There is no statutory maximum on a week's pay. The 12 weeks' reference period normally used for calculating a week's pay under the 1996 Act was extended to 52 weeks for the purposes of calculating statutory holiday pay under Regulation 16 by the Employment Rights (Employment Particulars and Paid Annual Leave) (Amendment) Regulations 2018. These were brought into effect from 6 April 2020. These provisions now require sections 221 to 224 of the 1996 Act to be read as if references to 12 weeks were references to 52 weeks (or to the number of weeks that a worker has been in employment, if less than 52) for the purposes of calculating holiday pay.

198. Where a worker receives regular additional payments such as overtime, commission or bonuses, these are not always included in the statutory calculation under section 221 to 224 of the 1996 Act. A series of decisions of the Court of Justice of the European Union (**British Airways Plc v Williams and Others** [2012] ICR 847, ECJ and **Lock v British Gas Trading Limited** [2014] ICR 813, ECJ) has established that the statutory method of calculating holiday pay under the 1996 Act is not fully compliant with the Working Time Directive (93/104/EC) of which the 1998 Regulations are the domestic implementation.

199. Following **Williams** and **Lock**, the Employment Appeal Tribunal's decision in **Bear Scotland Limited v Fulton and others** [2015] ICR, EAT and the Court of Appeal's Judgment in **British Gas Trading Limited v Lock** [2017] ICR 1, CA, have confirmed that, in the light of the CJ EU case law, all elements of a worker's normal remuneration must be taken into account when calculating holiday pay for the basic four weeks' leave provided for in Regulation 13 of the 1998 Regulations and guaranteed by Article 7 of Council Directive 93/104/EC and the domestic provisions in the 1998 Regulations must be construed to achieve that result in respect of the four weeks' basic entitlement provided for in Regulation 13 of the 1998 Regulations. (This is sometimes called *"Euro Leave"*). However, sections 221 to 224 continue to apply without modification by the inclusion of

noncontractual payments to the 1.6 weeks' additional leave under Regulation 13A of the 1998 Regulations.

200. The obligation to give a purposive construction to the 1998 Regulations continues following Brexit by virtue of section 6(3) to (6) of the European Union (Withdrawal) Act 2018. Therefore, the courts and tribunals (with the exception of the Supreme Court, the Court of Appeal, the equivalent courts elsewhere in the UK, and the High Court when acting as a final Court of Appeal) must decide any questions as to the meaning of any retained EU law in accordance with that pertaining on 31 December 2020 until one of the higher domestic courts departs from a relevant CJEU decision or until domestic legislation modifies the retained EU law. It follows therefore that the position *per* **Bear Scotland** and **Lock** (in the Court of Appeal) continues to pertain.

201. In **East of England Ambulance Service NHS Trust v Flowers and others** [2019] ICR 1454, CA NHS employees complained that the calculation of their holiday pay failed to take account of overtime within two categories, known as *"non-guaranteed"* overtime and "*voluntary"* overtime. Payment for voluntary overtime was held to be capable of forming part of a worker's remuneration where the payment (even if for voluntary overtime) is broadly regular and predictable. Regularly worked voluntary overtime should therefore be included in the calculation of the holiday pay for the Euro Leave weeks.

202. The general rule is that statutory annual leave cannot be replaced by a payment in lieu. Regulations 13(9)(b) and 13A(6) of the 1998 Regulations so stipulate. The main exception to this arises where the worker is owed outstanding holiday on the termination of their contract. In these circumstances, a payment in lieu is permitted by Article 7(2) of the Working Time Directive.

203. In **Smith v Pimlico Plumbers Limited** [2022] IRLR 347, CA, the Court of Appeal confirmed that the employer must not only give the worker the opportunity to take paid annual leave but must also encourage the worker to do so. In addition, it must inform the worker that the right will be lost at the end of the relevant leave period. If the employer does not do so, the right does not lapse but carries over and accumulates until termination of the contract, at which point the worker is entitled to a payment in respect of the untaken leave.

204. At paragraph 102 of the Court of Appeal's judgment in **Pimlico Plumbers**, the Court of Appeal said that *"Although domestic legislation can provide for the loss of the right at the end of each leave year to lose it, the worker must actually have had the opportunity to exercise the right conferred by the Working Time Directive. A worker can only lose the right to take leave at the end of the leave year (in a case where the right is disputed and the employer refuses to remunerate it) when the employer can meet the burden of showing it specifically and transparently gave the worker the opportunity to take paid annual leave, encouraged the worker to take paid annual leave and informed the worker that the right would be lost at the end of the leave year. If the employer cannot meet that burden, the right does not lapse but carries over and accumulates until termination of the contract, at which point the worker is entitled to a payment in respect of the untaken leave."*

Discussion and conclusions

205. We now turn to apply the relevant law to our factual findings to arrive at our conclusions upon the issues in the case. Again, we shall start with the claimant's complaint of race discrimination. There are 11 complaints of direct race discrimination raised by the claimant. These are set out in paragraph 2 of Employment Judge Maidment's case management order dated 31 October 2022 (at pages 88 and 89 of the bundle).

206. We shall take the issues one by one. The first is that "*On 14 September 2021, the respondent (Mr Ian Brimicombe) suspended the claimant where there was no complaint made against him and he had not been at the relevant location."*

207. The relevant factual findings pertaining to the decision to suspend the claimant are at paragraphs 57 to 64 above.

208. Mr Boyd quite rightly reminded the Tribunal of the principle to be derived from the case of **Chandhok v Tirkey** [2014] UK EAT 0190/14. Langstaff P said (at paragraph 16) that *"The claim, as set out in the ET1, is not something just to set the ball rolling, as an initial document necessary to comply with time limits which is otherwise free to be augmented by whatever the parties choose to add or subtract merely upon their say so. Instead, it serves not only a useful but a necessary function. It sets out the essential case. It is that to which a respondent is required to respondent. A respondent is not required to answer a witness statement, nor a document, but the claim that is made – meaning, under the Rules of Procedure 2013, the claim as set out in the ET1".*

209. It is unclear whether the first issue is just about the incident of 9 September 2021. If it is, then plainly the allegation has been brought, as Mr Boyd has said, upon the wrong premise. There was never any suggestion by the respondent (Mr Brimicombe or any of the others involved) that the claimant had any involvement in the incident of 9 September 2021.

210. If the first issue is read more generally to include any behaviour, then it is plain that there was a complaint against the claimant and that he was in the location when the behaviour complained about took place. The CTSOs complained about him in the course of Mr Brimicombe's initial investigations of 14 September 2021.

211. The question to address, therefore, is the reason why Mr Brimicombe decided to suspend the claimant. On any view, it was plainly because he took the view that in order to properly investigate allegations of bullying and intimidation it would be prudent to procure the removal from site of the claimant and Mr Mahmood. There was nothing to suggest that a white CTSO in the same or similar circumstances as the claimant would have been treated any differently. The claimant conceded under cross-examination that he was not saying that he would not have been suspended had he been white. This claim therefore fails.

212. The second allegation is that "*On suspension the claimant was not provided with information about the allegations against him."* It is right to say that Mr Brimicombe's investigation was at a very early stage. He was not in a position to furnish the claimant with details of the allegations against him. That was the reason why the claimant was not provided with that information. Mr Brimicombe simply did not have it. Again, under cross-examination, the claimant said that he

was not suggesting that if he was white, he would have been provided with more information. This claim therefore fails.

213. The third allegation is that *"Other employees were coerced into making statements against the claimant."* In paragraph 5 of his witness statement the claimant says that he was contacted between the suspension meeting (on 14 September 2021) and the investigation meeting (on 28 September 2021) by individuals telling him that they had been called into meetings on multiple occasions and coerced into making statements.

214. In evidence given under cross-examination the claimant said that he was not referring here to the four CTSOs (Messrs Hussain, Ditta, Aziz and X) but rather a couple of colleagues from other courts. The claimant said that he was telephoned by Darren Mazey, a CTSO at Huddersfield but did not speak to him. The claimant says that he was contacted by a CTSO at Huddersfield named Faizan Choudry. Mr Choudry told the claimant that Mr Brimicombe had asked him (Mr Choudry) if he had experienced any problems with the claimant or Mr Mahmood. He believed that Amanda Knowles and Ian Brimicombe were trying to prevail upon Mr Choudry to give evidence against him.

215. It was the respondent's position that Mr Brimicombe had not spoken to Mr Choudry. Mr Brimicombe was not asked about this by Miss Rashid. When asked during cross-examination as to why Amanda Knowles would seek to coerce Mr Choudry, the claimant said, "*I can't say why she would do that."*

216. Mr Boyd put to the claimant the proposition that had he and Mr Mahmood been white, Mr Brimicombe and Amanda Knowles may still have asked others if there had been problems between the security officers. The claimant conceded that he was not saying that he would have been better treated were he to be of a different race.

217. Again, the Tribunal is compelled to the conclusion that the reason why enquiries were made of others was in order that Mr Brimicombe could investigate the matter properly. We find as a fact that no approach was made by him to Faizan Choudry. The claimant's account, as we said in paragraph 215, was unconvincing.

218. That said, it is clear from the notes of the meetings conducted by Mr Brimicombe of 14 September 2021 that he was asking open questions of the witnesses as to whether they had encountered any difficulties with the claimant and Mr Mahmood. The reason why he was doing this was to investigate a serious issue which had been raised with him when he attended court to investigate the incident with the usher. There is simply nothing to suggest that a different approach would be taken were it to be a white CTSO whose name had been mentioned in connection with such a serious matter.

219. The fourth issue is that, *"At a fact finding meeting on 28 September 2021 the respondent refused to provide some statements of witnesses to the claimant and information about the allegations."* The factual findings upon this are at paragraphs 86 to 94 above. It is right to say that Mr Gibson was being circumspect as to what he said to the claimant for fear of betraying the anonymity of which he had assured some of the CTSOs. It is accepted by the respondent that copies of the witness statements garnered by Mr Gibson on 16 September

2021 were not provided to the claimant prior to the fact finding meeting of 28 September 2021. The claimant says that nonetheless he provided him with sufficient information to enable him to understand the complaints raised.

220. Mr Gibson was treading a difficult path. On the one hand, he had given assurances of anonymity. On the other, there was a requirement for fairness to the claimant. Again, we are satisfied that the reason why Mr Gibson conducted matters as he did was nothing to do with race but rather as to how he had chosen to conduct the investigation. The claimant accepted, under cross-examination, that it was not the respondent's practice to provide witness statements at investigation stage. He accepted that he would have been treated the same had he been white.

221. The fifth allegation is that *"the respondent refused to obtain CCTV footage at the claimant's request."* Our factual findings upon this are at paragraph 93 to 95 above. As we have said, we are satisfied that Mr Gibson has given reasonable and non-discriminatory explanations as to why CCTV footage was not obtained. The claimant was asked whether he is saying that if he was white CCTV footage would have been provided. The claimant said that he was saying that but was unable to give any basis for what amounted to no more than an assertion. Mr Gibson's approach was properly reasoned and rational and, in our judgment, was in no way tainted by discrimination.

222. The sixth allegation is that "*The respondent refused to investigate the claimant's suggestions of misconduct by others including a cleaner called Darren and a supervisor, Amanda [Knowles]".*

223. It is right to say that the respondent did not investigate Darren's alleged misconduct. However, there is a non-discriminatory explanation which is that he was not an employee of the respondent. It would therefore have been inappropriate for the respondent to seek to discipline him. That was a matter for Darren's employer. They were notified of the matter by the respondent as early as practicable.

224. The claimant did not accept that the issues involving Amanda Knowles were as serious as those alleged against the claimant. However, the respondent is right to say that the allegations against her (of management failure) were not as serious as allegations of bullying and intimidation. This was being dealt with by the respondent as a training issue. Further, Amanda Knowles was in any case disciplined when a more serious incident occurred in November 2022 (of failing to prevent an individual bringing a bladed article into the court). From this, the Tribunal draws an inference that Amanda Knowles would have been treated in much the same way as was the claimant had she been accused of bullying and intimidation. It follows therefore that the reason why Amanda Knowles was not subjected to disciplinary action (until November 2022) was because the allegations against her were not of the same order as those against the claimant. This was unrelated to race.

225. The seventh allegation is that *"The matter was progressed to a disciplinary hearing on 8 and 12 October 2021 whereas it should not have been in circumstances where the claimant was not involved in the allegations and there was no evidence against him".* This gives rise to a similar issue as with the first

allegation. The claimant was simply not disciplined for the incident with the usher on 9 September 2021. Therefore, if the complaint is about that, then it is brought on the wrong premise.

226. Allowing the claimant the benefit of the doubt, if the allegation is that he should not have been subjected to a disciplinary hearing because of the allegations that were made against him, then such a complaint must fail. There was simply no evidence that a white comparator in the same or similar circumstances would have escaped disciplinary action were similar issues of alleged bullying and intimidation were to be raised. The disciplinary action taken against Amanda Knowles allows a favourable inference to be drawn in the respondent's favour.

227. The eighth allegation is that *"The claimant was given a disciplinary sanction of a written warning and being re-located to a different area."* We have already said that were this to be an unfair dismissal complaint the Tribunal would take some convincing that the respondent had a reasonable basis upon which to believe that the claimant had acted as alleged. It is right to say that the evidence against the claimant consisted in a large part of generality and unspecified allegations. That said, the claimant was identified as being party to inappropriate conduct (albeit that Mr Mahmood was the principal instigator). The claimant protested in evidence that, "*it is all hearsay. There was no hard evidence."* He went on to say that Mr Hussain had attended his father's funeral following his sad passing and congratulated the claimant on the birth of his daughter. The claimant said this is an attempt to underline the veracity of Mr Hussain's account. In some respects, this may be seen as double edged. Why would Mr Hussain lend his name to serious allegations against the claimant if he was friendly with him?

228. What particularly tells against the administration of a written warning claimant being related to race is that Mr Gibson contented himself with a first written warning only. Mr Boyd made a compelling argument on behalf of the respondent that were the respondent really out to procure the claimant's removal, the opportunity would have been taken to dismiss him. Indeed, when this point was put to the claimant he said, *"it's not directly towards colour".* The claimant therefore did not appear to believe in his own case that the disciplinary sanction was related to race.

229. Further, Mr Watson wished to provide the claimant with a fresh start in a court other than Bradford Magistrates' Court. It was his idea for the claimant to be relocated to the Combined Court nearby. Had he really been motivated against the claimant, a less commodious alternative venue may be expected to have been chosen.

230. The decision to relocate the claimant within the Bradford cluster was one taken out of the respondent's hands by HMCTS. That was the reason why the claimant was not moved to the Bradford Combined Court centre. It was nothing to do with the claimant's race. The eighth allegation therefore fails.

231. The ninth allegation is that the claimant's appeal launched on 26 October 2021 was delayed. It is right to say that there was a delay in progressing the matter. Indeed, it is right to say that this was an unreasonable and unacceptable delay. The question for the Tribunal is the reason why the delay occurred. There is merit in the respondent's case that matters got side tracked by the wages issue and

the grievance proceedings. There was nothing to suggest that a white comparator in the same or similar circumstances would have their appeal hearing dealt with any quicker. Mr Cant did deal with matters with reasonable despatch once he had been instructed to deal with the case following a delay attributable to the colleague originally assigned to the appeal being unable to deal with it within a reasonable time for business reasons. It is clear that Mr Cant took the claimant's appeal seriously. He went to the trouble of carrying out further investigations by interviewing Amanda Knowles and Dougie Wilson afterwards. The delay was nothing to do with the claimant's race.

232. The tenth allegation is that "*The claimant having raised a grievance on 2 December 2021, he attended a hearing on 17 February 2022 before Mr Craig Rowe, who was aggressive to the claimant (stating that the claimant was only there to make a claim), raised his voice to the claimant then losing his temper, interrogated the claimant and did not listen to the claimant's concerns. He took the position simply of defending the respondent's treatment of the claimant."*

233. The factual findings about this are at paragraphs 140 to 158 above. It is right that the grievance hearing was a difficult meeting. The claimant's agenda and that of Mr Rowe appeared to conflict (as accepted by Mr Saleem in cross examination). The claimant accepted, under cross-examination, that he was not saying that Mr Rowe would have behaved like that had the claimant been white. His complaint was really about a perception of bullying unrelated to race. The claimant said that he was discomforted by Mr Rowe's opening remark that he was "*ex police on military, something like that".* It is the case that Mr Rowe has enjoyed a career in the army and in the police. It is credible therefore that he may have said something along these lines. However, there was no suggestion (by the claimant) that a white employee would have been treated more favourably nor was any evidence led by the claimant to that effect.

234. Mr Rowe conducted further investigations after the grievance hearing. He informed the claimant of what he was doing to explain the delay in getting back to him. This points away from him being dismissive of the claimant. A favourable inference is drawn in the respondent' favour on account of these actions.

235. The eleventh and final allegation of race discrimination is "*The rejection of the claimant's appeal by Mr Christopher Cant on 9 June after a delay following an appeal hearing on 10 March 2022".* The factual findings about this are at paragraphs 159 to 169. It is right to say that the claimant did not get the disciplinary outcome until 9 June 2022 following the disciplinary appeal hearing of 10 March 2022. Mr Cant conducted further investigations, as has been said, following the appeal hearing. Under supplemental questioning, Mr Cant said that he had overturned disciplinary outcomes before (including those from Mr Wilson).

236. The reason why the appeal was rejected had a firm foundation. There is nothing to suggest that the appeal process would have been shorter had the claimant been white. Upon this basis therefore this allegation of race discrimination stands dismissed.

237. We now turn to the unlawful deduction from wages claims. There were two elements to this. The first of these concerned the attendance allowance. The second concerns the claimant's pay following his suspension on 14 September 2021.

238. We can quickly pass over the attendance allowance issue. Miss Rashid confirmed that this had been resolved. As has been said, this complaint therefore stands dismissed upon withdrawal.

239. We now turn to the more difficult question of the claimant's pay following his suspension. This may be looked at in three phases. The first of these is for the period of suspension between 14 September 2021 and 20 October 2021. There is then period following the disciplinary decision. This takes us to 21 June 2022 at which point the claimant went on sick leave. Miss Rashid confirmed that the issue of sick leave is not for this Tribunal but is one which arises in the second claim.

240. The respondent's case is that during the suspension period the claimant was entitled only to his basic pay. This is what was communicated to the claimant by Mr Brimicombe in the letter of 14 September 2021 (at pages 132 and 133). In the fifth paragraph of the letter Mr Brimicombe clearly tells the claimant that, *"whilst on suspension you will be paid your normal basic rate of pay and all contractual benefits will continue to accrue"*- (emphasis added).

241. The claimant's case is that he had understood the position to be that he would not suffer financially during the suspension period and that he would be paid his normal weekly pay. The Tribunal can accept that this is what the claimant understood he was being told by Mr Brimicombe. By this stage, the pattern of the claimant's work was such that he was regularly working 42.5 hours per week. Therefore, while we can accept that Mr Brimicombe told him he would receive his normal or basic pay, it is easy to see how the claimant understood the position to be that he would not simply be paid the equivalent of a 27 hours working week.

242. The difficulty for the claimant is that there is simply no evidence that he has a contractual entitlement to more than 27 hours per week during a period of suspension. There is only an unauthorised deduction from wages in circumstances where the employer makes such a deduction from the wages properly payable to the claimant. There is no contractual entitlement for the claimant to work anymore than 27 hours per week. Any additional hours depend upon the happenchance of cover being needed. The payment for 27 hours a week is the amount properly payable to him unless he actually works overtime on a voluntary basis. Therefore, we find that for the suspension period there was no unauthorised deduction from wages. In any case, the respondent made an overpayment for the first month which they have not sought to recover.

243. The next issue concerns a period after 20 October 2021 until the claimant went on sick leave in June 2022. The claimant was not on suspension over this period. Effectively what the respondent did was place him on a form of gardening leave. He was relieved of the obligation to work pending them liaising with HMCTS to find the claimant a work location. The claimant was employed as a CTSO area relief officer. It was in that capacity that he was covering for his absent colleague

David Wilson. That colleague was assigned to work at Bradford Magistrates' Court. Once the claimant was removed from working there (at the behest of the respondent's client and not the respondent) then plainly his opportunity to provide relief cover for the absent colleague at Bradford Magistrates' court disappeared. There was no breach of contract by the respondent in removing the claimant from his work there. It was their client's prerogative to request his removal.

244. The respondent was not in breach of contract in placing the claimant on gardening leave. The wage/work bargain requires the employer to provide work and/or pay for work. Save in certain circumstances (which do not apply here) there is no obligation (express or implied) upon the employer to allow the claimant to undertake work provided the employee is paid for their time. There was only an obligation upon the claimant to work overtime were it to be offered to him and were he to accept the offer. The contractual obligation was to make himself available for 27 hours per week. The contractual obligation upon the respondent was to pay for that time. This the respondent did. There therefore was no unauthorised deduction from wages as nothing was properly payable to the claimant other than for the 27 hours per week from 20 October 2021.

245. Were the respondent to have offered the claimant overtime which the claimant accepted and were the respondent then to have refused to pay for the overtime there would be an unauthorised deduction as wages would then be properly payable to the claimant. However, that was not the situation which pertained.

246. We now turn to the claimant's holiday pay claim. We accept that overtime was offered to the claimant with sufficient regularity that it became an intrinsic part of the claimant's remuneration up to the date of his suspension. It became sufficiently regular so as to be a predictable part of his remuneration and should be taken into account in calculating his holiday pay for the Euro leave upon the authority of **Lock**, **Williams** and **Flowers**.

247. As the remuneration for the additional 15.5 hours was by way of regular but voluntary overtime, it follows that holiday pay ought to be calculated upon the basis of 27 hours per week in respect of the additional leave under Regulation 13(A) and 42.5 hours a week for the Euro leave over a 52 weeks' reference period. The higher amount inclusive of the regular voluntary overtime should form the basis of the calculation for the four weeks of Euro leave.

248. We are satisfied that the respondent did not lose his annual leave entitlement for the holiday year 2021/2022. He appears to have taken no holiday between 1 April 2021 and 31 March 2022. The respondent was unable to point to any evidence to satisfy the burden upon them *per* **Pimlico Plumb**ers to show they sufficiently and transparently gave the claimant the opportunity to take paid annual leave after his suspension on 14 September 2021. There is nothing to show that the respondent encouraged the claimant to designate some of the weeks between 14 September 2021 and the end of March 2022 as annual leave. It is right to say that the claimant was paid throughout this period. However, this was only at the basis rate based upon a 27 hours' working week. The claimant therefore missed the benefit of four weeks of Euro leave at the higher rate of remuneration taking into account the predictable and regular voluntary overtime. There is nothing to show that the respondent informed the claimant that this right would be lost at the end of the leave year.

249. It is plain from paragraph 102 of **Pimlico Plumbers** that the onus is upon the employer to inform the worker of their rights. The respondent has failed to discharge the burden upon it. It follows therefore that the claimant's annual leave entitlement for 2021/2022 has not been lost. It may be paid to him but only following termination.

250. We know that the contract has been terminated with effect from 6 February 2023. A difficulty for the claimant is that the termination occurred after he presented the first claim. He appears not to have applied to amend the first claim to include compensation for accrued annual leave untaken as at the date of termination. This may of course become an issue in the second claim.

251. It follows therefore that the Tribunal is able to make a declaration that the claimant preserved his annual leave entitlement for the holiday year 2021/2022 but cannot, in these proceedings, make an order for the respondent to pay compensation given that the right for it to be paid only accrues upon termination pursuant to the 1998 Regulations.

252. The Tribunal proposes to discuss this aspect of the first claim when the parties return to the Tribunal on 14 August 2023 for the case management hearing in respect of the second claim.

253. It follows therefore that:

    253.1. The complaints of race discrimination stand dismissed.

    253.2. The complaints that the respondent made an unauthorised deduction from the claimant's wages stands dismissed.

    253.3. There shall be a declaration in respect of the claimant's rights under the 1998 Regulations.

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Employment Judge Brain

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Date 31 July 2024