EMPLOYMENT TRIBUNALS

Claimant: Mr D Amponsah

Respondent: Vinci Construction UK Limited

Heard at: London South Employment Tribunal, Croydon (by video)

On: 1, 2, 3 and 4 July 2024

Before: Employment Judge Abbott, Mrs S Dengate and Ms E Thompson

Representation
Claimant: representing himself
Respondent: Mr C Kelly, barrister

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The complaint of automatic unfair dismissal on the ground that the claimant made a protected disclosure is not well-founded and is dismissed.

2. The complaint of direct race discrimination is not well-founded and is dismissed.

3. The complaint of harassment related to race is not well-founded and is dismissed.

4. The complaint of victimisation is not well-founded and is dismissed.

5. The complaint of wrongful dismissal (breach of contract in respect of notice pay) is not well-founded and is dismissed.

REASONS

Introduction / conduct of the hearing

1. The claimant was employed by the respondent as a Helpdesk Administrator

from July 2021, having previously worked in the same role as an agency worker. His employment ended on 12 October 2021. This claim was presented on 22 November 2021, early conciliation having taken place between 21 October 2021 and 10 November 2021.

2. Aside from an 'ordinary' unfair dismissal complaint which was withdrawn at an earlier stage, the claimant pursued the following complaints:

    a. automatically unfair dismissal under section 103A of the Employment Rights Act 1996 ("**ERA**") (*i.e.* on the grounds that the claimant made a protected disclosure);
    b. direct race discrimination under section 13 of the Equality Act 2010 ("**EqA**");
    c. harassment related to race under section 26 EqA;
    d. victimisation under section 27 EqA; and
    e. wrongful dismissal (*i.e.* breach of contract in respect of notice pay).

3. The claim came before the Tribunal for Final Hearing commencing on 1 July 2024 with a 5 day time estimate. The Tribunal had before it a bundle running to 322 numbered pages, witness statements from the claimant and Mr Daniel Coster and Ms Kellie Hockings for the respondent, and a written skeleton argument and authorities bundle prepared by the respondent's barrister, Mr Kelly. References below to [x] are to the numbered pages of the hearing bundle.

4. There was some initial confusion over the format of the hearing due to mixed messages having been sent to the parties by the Tribunal administration. On the first morning, the respondent's representatives and witnesses were present at the Tribunal venue in Croydon, whereas the claimant was at home expecting the hearing to be conducted remotely. After a short opening session in this 'hybrid' format (11:25 to 11:42) to confirm the documents before the Tribunal, settle the list of issues and explain how the hearing would proceed, the Tribunal directed that the remainder of the hearing would be conducted with both parties attending remotely – to avoid the claimant having to travel a long distance each day, and to seek to ensure both parties were on an equal footing. The Tribunal took the remainder of the first day for reading.

5. The claimant gave his evidence on the second day of the hearing, 2 July 2024, beginning at 10:00. Early on in his evidence, it emerged that the claimant did not have copies of the respondent's witnesses' statements to hand. He denied ever having read these statements. This was surprising, given that the Tribunal Judge had gone through the documents that were before the Tribunal on the first morning and the claimant had not suggested that he did not have those statements, and had offered time estimates for his cross-examination of the respondent's witnesses during that same session. There was correspondence in the hearing bundle indicating the statements were sent to the claimant on 20 March 2024 [273] with the password following on 13 May 2024 [283]. Nonetheless, the Tribunal took at face value the claimant's indication that he had not read the statements and allowed a 1 hour break in the claimant's cross-examination so that he could do so. Once the claimant's evidence finished at around 14:15, he indicated he wished to have the remainder of the day and overnight to prepare his

cross-examination. The respondent did not object to this, and the Tribunal acceded to the claimant's request.

6. The respondent's witnesses, Mr Coster and Ms Hockings, gave their evidence on the morning of the third day, 3 July 2024, which started at 09:40. Also on the morning of the third day, the respondent provided sickness records relating to Mr Daniel Martin (one of the claimant's alleged comparators), which the Tribunal allowed into the proceedings but which it emerged in evidence was unlikely to be fully accurate and therefore the Tribunal ultimately put no weight on it. The Tribunal then heard submissions from Mr Kelly and (after a 15 minute break) the claimant that afternoon. The Tribunal then deliberated for the rest of the afternoon and in the course of the morning of the fourth day, 4 July 2024.

7. Oral reasons for dismissing all of the complaints were provided from 14:00 on 4 July 2024. The Claimant requested written reasons immediately after the oral reasons had been provided – these are those reasons. They are the unanimous reasons of the Tribunal.

The issues

8. A list of issues was prepared by EJ Leith in May 2023 [73-78], and the parties agreed at the beginning of this hearing that it fully reflected the pleaded issues that were live before us, save that it was conceded by the respondent that, for the purposes of the victimisation claim, the claimant did do the protected acts identified in EJ Leith's list. Taking account of that concession, the final list of issues in relation to liability was therefore as follows:

1. **Protected disclosure**

1.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

1.1.1 What did the claimant say or write? When? To whom? The claimant says he made disclosures on these occasions:

1.1.1.1 8 September 2021, by text message to Daniel Coster, alleging racial harassment;

1.1.1.2 9 September 2021, by email to Daniel Coster, alleging racial harassment;

1.1.1.3 9 September 2021, allegation of corruption at TfL Commercial, made verbally to Daniel Coster, specifically alleging that TfL Commercial staff were giving cheap housing to their family members.

1.1.2 Did he disclose information?

1.1.3 Did he believe the disclosure of information was made in the public interest?

1.1.4 Was that belief reasonable?

1.1.5 Did he believe it tended to show that:

1.1.5.1 a criminal offence had been, was being or was likely to be committed;

1.1.5.2 a person had failed, was failing or was likely to fail to comply with any legal obligation;

1.1.6 Was that belief reasonable?

1.2 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

2. **Automatically unfair dismissal (Employment Rights Act 1996 section 103A)**

2.1 It is common ground that the Claimant was dismissed on 12 October 2021.

2.2 Was the sole or principal reason for the Claimant's dismissal that he had made a protected disclosure?

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

3.1 Did the respondent do the following things:

3.1.1 Dismissing the Claimant on 12 October 2021 – in particular:

3.1.1.1 Taking into account a client complaint in making the decision to dismiss the Claimant? The Claimant compares himself to Daniel Martin, a white colleague who was subject to client complaints but was not dismissed.

3.1.1.2 Accusing the Claimant of inappropriate email communication with a client? The Claimant denies that he engaged in inappropriate email communication, and relies on a hypothetical comparator.

3.1.1.3 Accusing the Claimant of having a poor attitude, without any basis? The Claimant compares himself to Daniel Martin, a white colleague who decided not to turn up to work or to leave half way through the day, but who was not accused of having a poor attitude.

3.1.1.4 Accusing the Claimant of failing to demonstrate productivity while working from home? The Claimant denies that he failed to demonstrate productivity. In the alternative, he compares himself to Daniel Martin, a while colleague, and Annie Simpkin, a white colleague who was unreachable while working from home and was not accused of failing to demonstrate productivity.

3.1.1.5 Taking into account the Claimant's sickness absence levels in making the decision to dismiss him? The Claimant compares himself to Daniel Martin, Jan Thompson and Francisco Trigo, white colleagues who each had worse sickness absence records than the Claimant but were not dismissed.

3.1.1.6 Accusing the Claimant of poor time keeping? The Claimant compares himself to Jason Randall and Daniel Martin, colleagues who were consistently late for work. The Claimant was never spoken to about his timekeeping before it was given as a reason for dismissal.

3.1.1.7 Purporting to dismiss the Claimant at the end of his probationary period, although his probationary period had already been completed on 9 September 2021? The Claimant compares himself to Daniel Martin, Annie Simpkin, and Jason Randall, who all became permanent at the end of their six month probationary period.

3.2 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

3.3 If so, was it because of race?

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

4.1 Did the respondent do the following things:

4.1.1 On 28 September 2021, Brock Bergius telling colleagues not to interact with the Claimant and joking that the Claimant would not be able to find work again?

4.2 If so, was that unwanted conduct?

4.3 Did it relate to race?

4.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

4.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

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

5.1 It is common ground that the Claimant did the following protected acts:

5.1.1 8 September 2021, by text message to Daniel Coster, alleging racial harassment;
5.1.2 9 September 2021, by email to Daniel Coster, alleging racial harassment.

5.2 Did the respondent do the following things:

5.2.1 Dismiss the claimant on 12 October 2021? It is common ground that the Claimant was dismissed.
5.2.2 On 28 September 2021, Brock Bergius telling colleagues not to interact with the Claimant and joking that the Claimant would not be able to find work again?
5.2.3 On 28 September 2021 and other dates between 9 September 2021 and the Claimant's dismissal, staff of TfL (the Respondent's client) joking about the Claimant being dismissed?
5.2.4 Fail to take steps to protect the Claimant from being harassed by TfL staff after he had raised his concerns with Daniel Coster? The Claimant says he discussed it with Jason Randall and Daniel Coster.

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

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

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

6. **Wrongful dismissal / Notice pay**

6.1 What was the claimant's notice period? It is common ground that the claimant was given 1 week's pay in lieu of notice. The claimant says that he was entitled to four weeks paid notice (whether or not he worked his notice period). The respondent says that he was only entitled to 1 week's paid notice.

6.2 Was the claimant paid for that notice period?

6.3 If not, did the claimant do something so serious that the respondent was entitled to dismiss without notice?

9. Two other matters relevant to the list of issues arose in the course of the hearing.

    a. The claimant raised in paragraph 6 of his witness statement that he felt the claim should be uncontested since the respondent missed the initial deadline to file a response. An extension of time for the response was granted by a Legal Officer on 7 June 2022 [53-54] and the response was presented by that extended deadline. The claimant did not apply for the Legal Officer's decision to be reconsidered by a Judge (despite his right to do so being set out in the Tribunal's letter itself). The time for this issue to be raised had long since passed.

    b. The claimant raised in his oral evidence that he felt he had not been fully paid in respect of outstanding holiday pay. No holiday pay claim is identified in the ET1 claim form nor in the list of issues. Therefore there is no such claim before the Tribunal for determination. No application to amend the claim was made by the claimant; in any event, there is no particularity as to what is alleged not to have been paid, and such a claim would be a long way out of time with no evident basis for why it was not reasonably practicable for it to be brought in time, so such an application would have no reasonable prospects of success.

<u>The facts</u>

General comments on the evidence

10. The role of the Tribunal is to consider all of the evidence, and the documentary materials we have been referred to, and form a view as to what is most likely to be the true position on the balance of probabilities. It is important to say that, simply because we may disbelieve the evidence of a witness on a particular point, does not mean that we consider they are deliberately seeking to mislead – nor does it mean we must automatically disbelieve them on other points. Ultimately we have to weigh up all the evidence on all different points and assess it on its merits.

11. In this hearing we have heard live evidence from the claimant and from 2 witnesses on behalf of the respondents: Daniel Coster and Kellie Hockings.

12. The nature of many of the allegations are such that it is appropriate to make some general comments as to the evidence given by the witnesses. It is the reliability or credibility of the witness evidence (in particular that of the

claimant) that is key for large parts of this case.

13. We have not found ourselves able to accept the evidence of the claimant on many of the factual points of dispute. Our main reasons for this are as follows.

14. There have been inconsistencies and shifts in the claimant's account over time. We will give two examples. The first concerns the claimant's probationary period.

    a. It is plain from the message sent to the claimant by Mr Bergius at 14:11 on 12 October 2021 (shortly after the call in which the claimant was informed of his dismissal) that the respondent considered the claimant was being terminated during his probation period [156]. Nevertheless, no point was raised in the grievance filed by the claimant later that day around whether the probation period was already completed. However, in his appeal against dismissal the claimant did argue that his "probation period of 6 month ended in October 9th" [173]. The basis for the 6 month period was not spelled out.

    b. In the ET1 claim form the claimant initially stated he was "terminated on the day I was scheduled to become a permanent staff member after 3 months of probation" (i.e. 12 October 2021). However, later in the same document the claimant argued "my start of service with Vinci was the 9th April 2021 meaning probation period ended October 9th 2021". The basis for this 6 month period was not spelled out in the ET1. At the preliminary hearing before EJ Leith, the claimant told the judge "he had already completed his probationary period over a month before his dismissal" [72]. The same is reflected in para 3.1.1.7 of the List of Issues, which refers to the probationary period allegedly being completed on 9 September 2021.

    c. In paragraph 7 of his witness statement for this hearing, the claimant says his official start date was 9 April 2021 which (on his case) confirms his 6-month probation period ended on 8 October 2021. He says Mr Bergius had wrongly calculated the 6-month period as ending on 12 October 2021, which is why he dismissed the claimant on that day. The basis for the 6-month period is not spelled out in the statement. In oral evidence, the claimant asserted that he had been told by Vinci management, including Lucy Muran, on starting as an agency worker that he would have a 6-month probationary period. When presented with his terms of employment which set out a 3-month probationary period, his answer was that this was included because he had already been working as an agency worker for 3 months. Although he maintained as his primary case that the probation period was 6 months from 9 April 2021, he also put forward an alternative argument that, if the terms of the written contract were correct, the 3-month period ran from when he signed the contract (3 July 2021) and not from what appears in the contemporaneous emails was the agreed start date for his employment (19 July 2021).

15. The second concerns factual allegations of racial insults and harassments in the workplace. New allegations appeared in the evidence for this hearing that

had not been raised before. One instance is the allegation that the claimant was called a "fat nigger", which appears in the claimant's witness statement at paragraph 11. It does not however appear in his complaint of 9 September 2021 (though the complaint does discuss alleged acts of the same perpetrator – a brown-haired white man in his mid-30s). Nor is it in the claim form. Another such instance is the allegation in paragraph 16 of the claimant's witness statement that Brock Bergius had allegedly told the claimant that gay people were more oppressed than black people. That these had not been raised earlier undermines the evidence that they happened at all, but it also casts doubt on the claimant's evidence more generally as, in the view of the Tribunal, it demonstrates a willingness to exaggerate or fabricate allegations to bolster his case.

16. Another reason why we have been largely unable to rely on the claimant's evidence is the lack of corroborative support in documents or other witnesses. We do not, of course, expect to find documentary evidence to support every allegation – particularly in a case where many things are alleged to have been said in face-to-face encounters. However, there are areas of the claimant's case where we would expect to see documentary support. The claimant has argued that his treatment at the hands of TFL and Vinci in some way follows-on from a social media campaign against him that led to him experiencing targeted racial harassment at two previous employers. However, he has presented no evidence to this Tribunal of any social media campaign against him, let alone sought to demonstrate any awareness within TfL and/or Vinci of such a campaign. Similarly, in a case where the claimant disputes the date on which he started employment with the respondent, we would have expected him to produce *e.g.* payslips that supported his case that his employment with the respondent began earlier than the contemporaneous email correspondence indicates. He has not done so. In terms of other witnesses, the best the claimant could point to is a text message from Jason Randall at [174]; however, that message (which says no more than "Yes It's a shame it came to this" in response to the claimant making allegations about the respondent "falsely making up reasons to dismiss someone") does not come close to providing adequate support for the allegations the claimant has made.

17. Finally regarding the claimant's evidence generally, it is the view of the Tribunal that many of the factual allegations made by the claimant are, on their face, outlandish and incredible. By way of illustration, the claimant suggests he was, on more than 50 occasions prior to 9 September 2021, looked at and laughed at within an open plan office environment with the effect that a bullying environment was created for him. If this were true, this would have been witnessed by very many people, all of whom have conspired to keep quiet about it or deny it happened – this is a fantastical allegation. Similarly, the idea that in an open plan office environment things were said like "make his life hell every day till he breaks" (as the claimant alleges) is also fantastical.

18. As regards the evidence of the respondent's witnesses, the Tribunal considered that both Mr Coster and Ms Hockings were honest witnesses genuinely seeking to assist the Tribunal to the best of their ability. Both witnesses, in particular Ms Hockings, had limitations on what direct evidence they could give because of the nature of their involvement and the lack of

documentary records. That said, Mr Coster did have a lot of relevant evidence to give in light of his role as direct line manager of the claimant. Both witnesses, to their credit, were prepared to accept there were flaws in how the respondent handled matters relating to the claimant and, indeed, stated that they may have dealt with things differently had they themselves been involved in key decisions. It would, of course, have been better to have been able to hear from Mr Bergius and Ms Patel, who were directly involved in the decision to dismiss, but the fact they are not here to give evidence is explicable by the fact they have left the employment of the respondent some time ago. The lack of documentary records is more of a concern, and Ms Hockings fairly accepted that this was a failing on the part of the respondent. However, we consider that the more likely explanation for a lack of documentation is ineptitude on the part of those involved at the time, rather than a conspiracy to suppress evidence that would support the claimant's case.

Findings

19. Having made those general comments, the relevant facts are, we find, as follows. We have only made findings of fact necessary for the disposal of the live issues in this case. We have not referred to every document we have read and/or were taken to during the hearing, but we have considered all such documents. We have not considered documents that were not referred to in the written or oral evidence or in submissions.

20. Starting on 9 April 2021, the claimant was an agency worker assigned to the respondent by a temp agency, working as part of the customer service team. The respondent provided engineering and maintenance services to TfL. The claimant was assigned primarily to work for the respondent's TfL helpdesk based at the Palestra building, with his role involving receiving calls from TfL staff and raising tasks for the respondent's engineers and maintenance staff to respond to. The claimant's immediate line manager was Daniel Coster, the Customer Service and Performance Manager, who had joined the respondent in the same month. Mr Coster reported to Brock Bergius, the TFM Account Manager.

21. The claimant alleges that he was told on starting his temp role by Lucy Muran (the respondent's Mobilisation Manager) and Annie Simpkin (the Facilities Co-ordinator) that he was subject to a 6-month probationary period. We reject this evidence. At that time, the claimant was an agency worker, not an employee. Moreover, Ms Hockings confirmed in her evidence that 6-month (rather than, *e.g.*, 3-month) probationary period would typically only be used at director level. We accept Ms Hockings' evidence on this point. The claimant's account is not credible.

22. From an early stage of his agency engagement, the claimant was in discussions with Mr Coster about becoming a permanent employee. We accept Mr Coster's evidence that he felt the claimant performed well on the phones so would be an asset to the team, but that he had some reservations about his manner with people in person. These reservations did not, however, stop Mr Coster from facilitating the recruitment of the claimant as a full-time employee.

23. A contract of employment was prepared and signed by the claimant on 3 July 2021. The contract itself does not state a start date. It provides that service with any previous employer is not deemed to be continuous with the respondent. The contract provides for the first three months of the appointment to be considered as probationary. The notice provisions require one week's notice during the probationary period, or one calendar month thereafter (up to 5 years' service), and provides that payment may be made in lieu of notice. The contract also includes a requirement that, where unable to attend work due to sickness, the employee must call the dedicated VINCI Sickness Absence Line, even if the respondent has been notified of absence by other means.

24. Following the signing of the contract, there were several emails exchanged regarding the claimant's start date. Those emails make clear, and we find, that the claimant's start date was agreed to be 19 July 2021. The claimant was added to the respondent's payroll on that date [228]. The claimant referred to the 19 July 2021 start date in one of his own emails [105]. We reject the claimant's oral evidence that the start date was the date he signed the contract.

25. On 2 August 2021, the respondent's Senior Account Manager for TfL, Michael Harris, received a complaint from TfL regarding the conduct of the claimant on 29 July 2021. The complaint is at [108]; in brief, it was alleged that the claimant was aggrieved at a group of TfL employees who were hosting a client for making noise, and demanded that they give him their names. This was regarded by the TfL employees as inappropriate and intimidating.

26. We accept Mr Coster and Ms Hockings' evidence that a complaint of this nature, in which TfL singled out an individual Vinci employee, was highly unusual and indicative of the seriousness with which TfL had taken the incident. Nevertheless, no formal action was taken against the claimant.

27. It was the claimant's evidence that what actually happened on 29 July 2021 was that one of the TfL staff, a female, was encouraging other staff to "harass" and "embarrass" the claimant, and he had politely approached them to ask for their names. The female staff took offence at being asked to give her name, grabbed his ID badge off his chest and asked aggressively who he was and who he worked for. He says he had intended to report this to his line manager the following day, but instead was called to speak to Mr Harris about the complaint. In his discussion with Mr Harris, the claimant says Mr Harris agreed that TfL is a difficult client with horrible staff and that the complaint was probably made up by the female staff member to cover herself and to get the claimant in trouble. We reject this evidence. First, the claimant's timeline does not fit – as is clear from the contemporaneous emails, the complaint was not identified to Mr Harris until 2 August 2021, so it is improbable that the claimant spoke with Mr Harris about it on day after the alleged incident happened. Second, it is not credible that Mr Harris (who had overall responsibility for the TfL account) would have described his client in the terms the claimant describes.

28. The best evidence we have is the contemporaneous emails, in particular those at [107-108]. We find it is more likely than not that the 29 July 2021

incident happened as described in the TfL complaint. We find that, on or around 6 August 2021, Mr Harris spoke to the claimant about the alleged incident. The claimant provided his version of events. Whether or not the claimant accepted he had been in the wrong, that conversation ended with Mr Harris agreeing to provide an apology to TfL on the claimant's behalf and a warning that such behaviour should not be repeated.

29. At 18:43 on 8 September 2021 the claimant sent a text message to Mr Coster [123]. It reads as follows: "If I feel I am being targeted for harassment by TFL staff where can this be brought up? Jason advised I should report it since it has been happening." Mr Coster replied asking the claimant to provide details in an email, stating "any harassment is unacceptable and will be treated accordingly".

30. The following morning, the claimant again texted Mr Coster reporting that he had neck pain and could not attend work, but would be able to work from home. Mr Coster agreed to this, and encouraged the claimant to prioritise sending his email regarding harassment. The claimant did send his email at 11:59 [118-119]. In summary, it alleged that the claimant was being harassed and targeted for bullying by TfL staff. The claimant recognised a pattern with his treatment at the hands of a former employer who had settled a claim out of court having admitted inciting this via social media. The claimant gave examples of his mistreatment – the first concerned the 29 July 2021 incident; the second alleged at least 50 occasions of the claimant being looked at and laughed at in the open plan office; the third stated a "very senior TfL staff who I do not wish to name right now" had said "make it a war" and "make his life hell every day till he breaks"; the fourth concerned a brown-haired man in his mid-30s making consistently snide and insulting remarks including saying "I guess I am a racist because I am going to keep harassing him". The email concludes by saying the toxic environment is making the claimant ill.

31. We set out our findings as to the claimant's reasonable belief in the truth of these allegations when we come onto address the issues.

32. Mr Coster rapidly escalated the claimant's complaint to Mr Bergius, copying the HR Manager Priya Patel.

33. The claimant also gave evidence that, on 9 September 2021, in a conversation with Mr Coster he made allegations of corruption at TFL Commercial concerning staff giving cheap housing to family members. Mr Coster denied this in his witness statement and was not challenged on that denial in cross-examination. In any event, we accept Mr Coster's evidence on this point. We find that the claimant never made these allegations to Mr Coster. Had he done so, Mr Coster would without doubt have escalated them, just as he had escalated the claimant's harassment complaint.

34. The claimant relied heavily on subsequent email exchanges between Mr Bergius and Ms Patel, in particular those on 13 September 2021 [115-116]. Mr Bergius reported to Ms Patel that he had given Scott Debenham (the Senior Facilities Manager at TfL) the heads-up on the issues that had been reported. We find he did so because, as his email states, TfL would in due course need to investigate since it was their staff being implicated. We reject the claimant's suggestion that this was some kind of tip-off – notably the

claimant's complaint does not identify any alleged perpetrators by name so Mr Bergius would have no obvious reason to think Mr Debenham was the "senior TfL staff" that the claimant was speaking of in his email.

35. Mr Bergius's email also notes he had asked for confirmation of when the claimant's probation period was due to end. We find that he had asked this question because the claimant had himself raised in his complaint email the point that he had 1 month of his probation period left. We reject the claimant's argument that this evidences Mr Bergius having already decided to dismiss the claimant for raising his complaint.

36. Ms Patel's reply email also on 13 September 2021 notes her understanding that there may be concerns with the claimant's performance. For context, as already mentioned, the claimant had been working remotely whilst sick on 9 September, and this carried on to 10 and 13 September. We accept Mr Coster's evidence that he was aware that the claimant had not been working as productively as normal on these days (albeit he had not done any detailed analysis at this time), but we cannot be sure whether this is what Ms Patel is referring to in her email. We have no evidence as to the discussions Mr Bergius and Ms Patel had had in this respect.

37. The claimant's complaint was referred to be investigated by a senior Vinci manager outside of the claimant's team, Richard Pace. Mr Pace was senior to both Mr Bergius and Mr Coster. There was some delay in an investigation meeting taking place because the claimant was not ready to meet Mr Pace. He was off sick on 14 and 15 September 2021 (Mr Coster having informed him that we would be better to take sick leave than continue to try to work from home whilst sick, and informed him to call the absence line) and was on annual leave on 16 and 17 September 2021.

38. Eventually the investigation meeting took place on 23 September 2021. A notetaker, Rochelle Mackey, was present and we find that a note was taken. However, for reasons unknown, the note was not provided to the claimant after the meeting, nor has a copy subsequently been found. What we do know is that Mr Pace asked the claimant to identify the TfL staff who were allegedly openly joking about the claimant being dismissed for raising his complaint, and the claimant sent him some photos by email, though those photos do not greatly assist matters.

39. Ultimately, Mr Pace concluded that the claimant's complaints were not substantiated and did not recommend any further investigation, as set out in his outcome letter of 7 October 2021 [147].

40. Whilst the claimant had returned to work on 20 September 2021, it is apparent that he had some difficulties attending on time. For example, on 27 September 2021 he texted Mr Coster to say he would be 20 mins late for work as he had to take his mum to hospital. On 28 September 2021 he was again delayed, purportedly due to issues with the Tube.

41. The claimant alleges that on 28 September 2021, Mr Bergius told colleagues not to interact with the claimant and joked that he would not be able to find work again. We reject this evidence. Had it happened as the claimant suggests, he would have had no problem informing Mr Pace that Mr Bergius

was the instigator; yet instead he sent Mr Pace an email with photos and no names. We accept Mr Coster's evidence that he was in the office that day and saw and heard nothing of this nature. We find it did not happen. We also reject the claimant's account that jokes had openly been made that the claimant would be dismissed prior to 28 September 2021 but after his complaint was made – this is an uncorroborated allegation that is inherently incredible.

42. On 4 October 2021, at 07:12, the claimant texted Mr Coster [128]. I will quote the message in full: "My mum is going to be in hospital for a week due to complications. To be honest I don't think I am in the right frame of mind to come in given the toxic environment. Would it be possible to work from home and transfer the calls to me."

43. Mr Coster's response was, in the view of the Tribunal, a sympathetic one. He asked for details of any further incidents that the claimant said were making the environment toxic. He reiterated what he had said previously that the position was not a work-from-home position so, if the claimant could not come in, he would need to be off sick. He advised the claimant to call the absence line. He also directed the claimant to the Employee Assistance programme (as he had previously done). We reject the claimant's argument that this amounted to Mr Coster failing to take steps to protect the claimant from harassment. On the contrary, Mr Coster was trying to obtain information about any further alleged harassment and was sympathetic to the claimant being off sick rather than coming in to work.

44. The claimant's reaction to this was to complain that a colleague, Daniel Martin, was never required to call the absence line. Mr Coster responded that everyone is required to. He did mention that, on some occasion, Mr Martin had not turned up and his absences had to be recorded retrospectively, but we do not find this to be evidence of differential treatment. We accept Mr Coster's evidence that Mr Martin had his own issues that, ultimately, led to him being asked to leave Vinci.

45. On 5 October 2021 the claimant reported to Mr Coster that he was still unable to work for the rest of the week, now due to stress. Mr Coster enquired if the claimant had gone to the doctors, and the claimant said he would do that day.

46. On 11 October 2021, the claimant again reported he was unable to work, now due to a throat infection. He sent further messages on the morning of 12 October 2021 stating doctors had diagnosed a throat infection. The text messages says it is "probably related to stress" though it is not clear from the messages whether that was the claimant's opinion or a medical opinion. At this stage, Mr Coster asked the claimant to provide a doctor's note in view of the, now lengthy, absence.

47. In the meantime, Mr Bergius and Ms Patel had been in discussions regarding the claimant. We have no evidence as to those discussions. However, given that the claimant was approaching the end of his probationary period, we can infer that was the context of the discussions. It is evident that Mr Bergius, in consultation with Ms Patel, had decided that the claimant would not pass his probation and would be dismissed. Mr Bergius reached out to the claimant by text at 14:03 on 12 October 2021 [155]. There was then a short phone call

during which the claimant was informed he was going to be dismissed.

48. There is a dispute over what was said in the phone call. The claimant says he was told the only reason for dismissal was his sickness absence. The respondent's position is that the claimant was told there were multiple reasons, but only the sickness absence had been specifically mentioned before the claimant terminated the call. We accept the respondent's argument on this point. It is supported by the contemporaneous documents, in particular Mr Bergius's text message which was read by the claimant at 14:11 [156] which refers to a letter to follow "listing all elements regarding the termination of your employment during your probation period".

49. Later on 12 October 2021, the claimant raised a grievance regarding his dismissal [149-150]. The promised dismissal letter was sent to the claimant on 14 October 2021 [168-169] and set out Ms Patel's account of what had happened on the call on 12 October 2021, and gave a list of 6 reasons why the claimant's employment was being terminated. These were (1) client complaint; (2) inappropriate email communication with the client; (3) poor attitude; (4) failing to work productively when working from home; (5) sickness absence levels; and (6) poor timekeeping.

50. There was considerable debate during the hearing and in the evidence over whether the evidence available to the Tribunal properly supports each of these 6 points. It is not helpful nor necessary to make findings on that. It suffices for us to say that the claimant has shown evidence from which we could conclude that the true reason for his dismissal was because he had made his complaint of harassment or was because of his race. We accept the respondent's case that the letter sets out the true reasons for dismissal which were genuinely held by the decision maker, Mr Bergius.

51. The claimant did appeal his dismissal but having indicated his intention to pursue a Tribunal claim and no genuine desire to be reinstated, neither the appeal nor grievance were taken forward. This claim was presented on 22 November 2021, early conciliation having taken place between 21 October and 10 November 2021.

Discussion of the issues

Issue 1: protected disclosures

52. Section 43A ERA defines a 'protected disclosure' as a qualifying disclosure made to a number of identified classes of person, including employers (section 43C ERA).

53. Section 43B ERA defines a 'qualifying disclosure', insofar as relevant, as follows:

> "(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
>
> (a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject, […]"

54. The EAT summarised the correct approach to the application of section 43B ERA in *Williams v Brown* UKEAT/0044/19/OO, at [9]:

"It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held."

55. As set out by the Court of Appeal in *Kilraine v London Borough of Wandsworth* [2018] EWCA Civ 1436, an allegation will not necessarily "disclose information" as required by the statutory test. To qualify, the disclosure must have a sufficient factual content and specificity such as is capable of tending to show one of the matters listed in section 43B(1). The worker must also reasonably believe that the disclosure did show one or more of those matters, and reasonably believe that the disclosure was in the public interest.

56. The first alleged protected disclosure is the claimant's text message to Mr Coster at 18:43 on 8 September 2021 [123]. It reads: "If I feel I am being targeted for harassment by TFL staff where can this be brought up? Jason advised I should report it since it has been happening."

57. Read on its own, the Tribunal finds that this message does not "disclose information" as required by section 43B. There is insufficient factual content and specificity – it is an unsubstantiated allegation that the claimant felt he was being targeted for harassment. No details of the alleged acts of harassment are provided; alleged perpetrators are not identified. We therefore find that this message, of itself, is not a protected disclosure.

58. The second alleged protected disclosure is the claimant's email to Mr Coster at 11:59 on 9 September 2021 [118]. we have already summarised its contents. The respondent accepts it discloses information.

59. We find that the claimant had no reasonable belief that the information tends to show either a criminal offence had been committed, was being or was likely to be committed, or that any person had failed, was failing or was likely to fail to comply with any legal obligation. It is not objectively believable that the acts described in the claimant's email happened as he alleges. As we have already said, the allegations are outlandish and incredible. They describe an open culture of racism and abuse in an open plan workspace. Yet there are no other witnesses to corroborate the claimant's account, nor any documentary evidence. Mr Coster, who was present in the workplace for large parts of the claimant's time there, denies having seen such a culture and we accept his evidence. We therefore find that the email was not a protected disclosure. It is not necessary to consider public interest.

60. The third alleged protected disclosure is a conversation the claimant says he had with Mr Coster on 9 September 2021 in which he says he made

allegations of corruption at TFL Commercial concerning staff giving cheap housing to family members. We have rejected on the facts that these allegations were made by the claimant to Mr Coster and therefore it follows that there is no protected disclosure in this regard.

Issue 2: automatically unfair dismissal

61. We have found that none of the claimant's disclosures were 'qualifying disclosures' for the purposes of section 43B ERA. Issue 2 therefore does not arise for determination. However, since we have made relevant factual findings, we will deal with issue 2 in any event.

62. The key issue for the Tribunal to decide is that identified at issue 2.2, *i.e.* was the sole or principal reason for the claimant's dismissal that he had made a protected disclosure? In other words, is there a causal link between any of the three disclosures that are identified at 1.1.1 in the list of issues and the dismissal.

63. As noted by the Supreme Court in *Royal Mail Group Ltd v Jhuti* [2019] UKSC 55 at [60], the Tribunal need generally look no further than at the reasons given by the appointed decision-maker. It is, of course, necessary to consider the possibility that the reasons given have been confected in order to disguise the true reasons, which is effectively the claimant's case here. The burden of showing the automatically unfair reason in this case, where the claimant has less than 2 years' service, falls on the claimant (*Maund v Penwith DC* [1984] IRLR 129).

64. The claimant has not presented evidence sufficient to prove, on the balance of probabilities, that the true reason (or principal reason) for his dismissal was related to him having raised the matters he did with Mr Coster on 8 & 9 September 2021. We have found on the facts that the letter of dismissal sets out the true reasons. Accordingly, even had we found any of the disclosures to be protected disclosures, the automatically unfair dismissal claim would still fail.

Issue 3: direct race discrimination

65. Section 9 EqA defines 'race' as a protected characteristic.

66. Section 13(1) EqA reads as follows:

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

67. Section 23(1) EqA addresses comparators and provides as follows:

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

68. The essential question is this: "what was the reason why the respondent did the act complained of": *Chief Constable of Greater Manchester Police v Bailey* [2017] EWCA Civ 425 at [49]. In other words, there must be some causal link between the protected characteristic (here, race) and the unfavourable treatment (here, the dismissal).

69. Section 136 EqA deals with the shifting burden of proof in discrimination (and victimisation) claims:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

70. In summary, this sets out a two-stage process. First, the burden is on the claimant to show primary facts from which the Tribunal could decide, in the absence of any other explanation, that discrimination took place. Or in other words, that a reasonable tribunal could properly conclude on the balance of probabilities that there was discrimination. It is important for the Tribunal to draw inferences from the primary facts (*Igen v Wong Ltd* [2005] ICR 931, CA). Something more than the mere fact of a difference in protected characteristic and a difference in treatment must be shown (*Madarassy v Nomura International plc* [2007] ICR 867, CA). A claimant must establish the reason for differential treatment, not just the fact of differential treatment, to show a prima facie case: *Efobi v Royal Mail Group Ltd* [2019] EWCA Civ 18. If this first stage is passed, then the burden shifts to the respondent to show that its treatment was in no sense whatsoever because of the protected characteristic.

71. To succeed in this claim, then, the claimant first needs to show a discriminatory reason for differential treatment. He addresses each of the reasons for dismissal separately. Taking them in turn:

    a. The claimant says the TfL complaint was held against him, but compares himself to Daniel Martin (a white employee in the same role) who was not dismissed because of client complaints. There are several difficulties with the claimant's argument. First, the evidence of Mr Coster and Ms Hockings is that Daniel Martin did not have client complaints against him. We accept that evidence. Second, it is common ground that Daniel Martin was effectively dismissed because of a serious workplace incident. We therefore find Mr Martin was not, in this regard, an appropriate comparator as he was in materially different circumstances. Third, in any event, the claimant has not advanced anything to justify a conclusion that race played a part in any differential treatment between himself and Mr Martin (or any hypothetical comparator).

    b. The claimant says that the accusation of inappropriate email communication is unfounded. We simply have no evidence to say whether it had foundation or not. But equally, we have no basis to find that it is a fabricated allegation based on the claimant's race. There are no primary facts from which we could conclude on the balance of probabilities that was so.

    c. Regarding poor attitude, the claimant said this was unfounded and again compared himself to Daniel Martin. We have accepted Mr

Coster's evidence that the claimant could have a difficult manner with people in person, which is supported by the fact of the TfL complaint. For the same reasons already set out under a., we find Mr Martin was not an appropriate comparator in this regard. In any event, the claimant has not advanced anything to justify a conclusion that race played a part in any differential treatment between himself and Mr Martin (or any hypothetical comparator).

d. Regarding productivity, we accept Mr Coster's evidence that there were concerns about the claimant's productivity when working from home prior to dismissal (even though his more detailed analysis was done after the dismissal). The claimant compares himself to Mr Martin and Annie Simpkin, both white employees. However, we accept the evidence of Mr Coster that any productivity concerns in respect of them (albeit we have no reliable evidence of such concerns) could properly be ascribed to them being under a disciplinary investigation. Moreover, both ended up being effectively dismissed for other reasons. Neither are, in our judgement, appropriate comparators in this regard as their circumstances were materially different to the claimant's. In any event, the claimant has not advanced anything to justify a conclusion that race played a part in any differential treatment between himself and Mr Martin / Ms Simpkin (or any hypothetical comparator).

e. Regarding sickness absence, the main issue relied upon by the respondent was the claimant's failure to report his absences in accordance with policy, rather than his absence levels *per se* (which therefore eliminates Jan Thompson and Francisco Trigo as potentially appropriate comparators). The high point of the claimant's case on this is the acknowledgement from Mr Coster that Mr Martin had not always followed this procedure. However, we have accepted Mr Coster's evidence that Mr Martin had his own issues that ultimately led to his dismissal. For the reasons already set out, he is not an appropriate comparator in this regard. In any event, the claimant has not advanced anything to justify a conclusion that race played a part in any differential treatment between himself and Mr Martin (or any hypothetical comparator).

f. Regarding poor timekeeping, we consider this is essentially tied up with the productivity point above, so repeat what we have said in that regard.

g. The claimant's final point is that the dismissal purported to be within the probation period when in fact the period had already finished – this allegation fails on the factual premise. We have rejected the claimant's evidence that he had a 6-month probation period starting from 9 April 2021. We find that he had a 3-month probation period (as per his written contract) starting on 19 July 2021 (as per his agreed start date as set out in the contemporaneous emails). He was therefore dismissed within his probation period.

72. Drawing all of this together, the claimant has failed to show primary facts from which the Tribunal could decide, in the absence of any other

explanation, that discrimination took place in respect of his dismissal. On the contrary, we find on the evidence before us that there was reasonable basis in at least some of the points so as to justify the decision that the claimant would not pass probation, and nothing to indicate the decision was because of the claimant's race. The direct race discrimination complaint therefore fails.

Issue 4: harassment

73. Section 26(1) EqA provides as follows:

> "A person (A) harasses another (B) if—
>
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
>
> (b) the conduct has the purpose or effect of—
>
> (i) violating B's dignity, or
>
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B."

74. We can deal with this issue shortly. The only conduct relied upon for this complaint is the alleged incident on 28 September 2021 where Mr Bergius told colleagues not to interact with the claimant and joked that the claimant would not be able to find work again. We have rejected on the facts that this happened. The harassment claim therefore fails.

Issue 5: victimisation

75. Section 27(1) EqA provides as follows:

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

76. As for the direct discrimination claim, the essential question is this: "what was the reason why the respondent did the act complained of": *Chief Constable of Greater Manchester Police v Bailey* [2017] EWCA Civ 425 at [49]. To succeed, there must be some causal link between the protected acts (which are admitted) and the detriments.

77. The same burden of proof provisions apply as for the direct discrimination and harassment complaints.

78. Taking the alleged detriments (list of issues, para 5.2) in turn.

    a. We have dealt with the reason for dismissal already, and accept that the true reasons for dismissal are as set out in the letter of 14 October 2021. The claimant has failed to show primary facts from which the Tribunal could decide, in the absence of any other explanation, that his dismissal was because of him having raised the matters he did

with Mr Coster on 8 & 9 September 2021.

b. We have rejected on the facts that the incident on 28 September 2021 happened.

c. We have rejected on the facts that the incidents between 9 and 28 September 2021 happened.

d. We reject that Mr Coster acted in a way detrimental to the claimant further to his text message of 4 October 2021 seeking to be removed from the "toxic environment". As already said, Mr Coster's response was, in the view of the Tribunal, a sympathetic one. He asked for details of any further incidents that the claimant said were making the environment toxic. He reiterated what he had said previously that the position was not a work-from-home position so, if the claimant could not come in, he would need to be off sick. He advised the claimant to call the absence line. He also directed the claimant to the Employee Assistance programme (as he had previously done). We reject the claimant's argument that this amounted to Mr Coster failing to take steps to protect the claimant from harassment. On the contrary, Mr Coster was trying to obtain information about any further alleged harassment and was sympathetic to the claimant being off sick rather than being forced to come in.

79. It follows therefore that the detriments the claimant relies upon either did not happen at all or, in respect of the dismissal, did not happen because of his protected acts. The victimisation claim therefore fails.

Issue 6: wrongful dismissal

80. In order to succeed in his wrongful dismissal claim (which is brought as a breach of contract complaint), the claimant must show that he has a contractual right to more weeks' paid notice than the 1 week of paid notice that it is common ground he received. This complaint turns on the question of whether notice of termination was given within the claimant's probationary period (in which case the contract clearly provides for one week's notice) or afterwards (in which case the contract clearly provides for one calendar months' notice). If it is the latter, a separate question arises as to whether the respondent was entitled to dismiss the claimant without notice because he was, in fact, guilty of a fundamental breach of contract which would have justified summary dismissal, even though the respondent did not actually dismiss him summarily (see, e.g., *Boston Deep Sea Fishing and Ice Co v Ansell* 1888 39 ChD 339, CA).

81. The Tribunal finds that the contract of employment sets out the agreed probationary period – that being 3 months from the date the claimant's employment began. We have rejected the claimant's evidence that any other period applied. Such evidence is unsupported by any corroborative evidence and sits at odds with the terms of the employment contract the claimant accepts he signed.

82. We have found on the facts that the start date for employment was 19 July 2021. He was dismissed on 12 October 2021, which was within the probationary period. He was therefore contractually entitled to 1 weeks'

notice pay and was paid this. The wrongful dismissal claim therefore fails.

Conclusion

83. For the reasons set out above, the Tribunal unanimously found that none of the claimant's complaints were well-founded and all should be dismissed. Issues of remedy did not, therefore, arise for determination.

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Employment Judge Abbott
Dated: 23 July 2024