EMPLOYMENT TRIBUNALS

Claimant: Phillip Kallay (deceased)

Respondent: CGI IT UK Ltd

Heard at: Watford (in person) **On:** 17 – 19 December 2024

Before: Employment Judge Margo, Ms K Turquoise and Mrs J Hancock

Appearances
For the claimant: Mr Howard Ogbonmwan, family member of the deceased claimant (lay representative)

For the respondent: Ms Coutts (solicitor)

JUDGMENT having been sent to the parties on 16 January 2025 and written reasons having been requested by the claimant, the following reasons are provided:

REASONS

Introduction

1. The claimant was employed as a Site Security Officer from 17 October 2019 until 5 January 2021 when he sadly passed away. The claimant contacted Acas on 7 October 2020 with the Acas certificate being issued on 7 November 2020. The claimant then presented his claim on 25 November 2020. Accordingly, any claims relating to matters that took place before 8 July 2020 have prima facie been brought outside the three month limitation period.

2. The claim has been pursued by the claimant's estate with the procedural history of the case being set out in the Record of Preliminary Hearing conducted by EJ Tuck KC on 22 March 2023 (the "**Record of Preliminary Hearing**").

3. The Record of Preliminary Hearing was not initially in the Bundle for the hearing although it was included in a separate correspondence bundle that had been sent by the respondent to the Tribunal and to Mr Ogbonmwan, who has

represented the claimant throughout these proceedings. The Record of Preliminary Hearing was therefore added to the back of the Bundle.

4. The Record of Preliminary Hearing contained the list of issues in the case and the lengthy process that had been necessary in order to identify those issues. The list of issues sets out a claim of direct discrimination on the grounds of race with the claimant's race being recorded as African and of Sierra Leone descent. In addition, the claimant brings claims of harassment related to race, victimisation, and claims of whistleblowing detriments.

5. There were also further documents added to the back of the Bundle; namely, documents setting out the outcome of the disciplinary proceedings that were conducted in respect of two other Site Security Officers, Mr Antony Kamau and Mr Sanjeev Khanal.

6. On behalf of the claimant, the Tribunal heard evidence, from Mrs Mariatu Bangura, the widow of the claimant and the Administratrix of his estate.

7. On behalf of the respondent there was evidence from Mr Guy Newton who was an Area Facilities Manager at the relevant time and the claimant's line manager, Mr Conor Price who at the relevant time was also an Area Facilities Manager and conducted the investigation into the missing keys, as explained later in these Reasons, and Helen Goodway who is an HR Consultant and who provided assistance in relation to the disciplinary process that was followed in respect of all three of the Site Security Officers.

Applications and Mr Newton's evidence

<u>Application to amend the list of issues</u>

8. At the start of the hearing Mr Ogbonwman made an application to amend the list of issues. The application was rejected for the following reasons.

9. There were Preliminary Hearings in this case on 16 August 2022, 22 March 2023 and 21 August 2023. The list of issues was produced by EJ Tuck KC at the Preliminary Hearing on 22 March 2023. EJ Tuck KC said as follows in the Record of Preliminary hearing about the production of that list of issues:

> "*By use of the "List of Issues" prepared by Mr Ogbonmwan I sought to clarify the claims being pursued. I considered it appropriate to limit the issues to those enunciated by Mr Ogbonmwan in circumstances where he attended a preliminary hearing for this purpose in August 2022, had been ordered on two separate occasions to complete a list of issues after that hearing, and had attempted to do so in advance of today's hearing. The discussion is summarised in this paragraph, and the list of issues for the final hearing is set out below.*" (para 12)

10. EJ Tuck KC then went on to set out how Mr Ogbonmwan had described the claim in the course of the hearing and the issues that had thereby been identified.

11. At the next Preliminary Hearing (in August 2023), EJ Cowan said as follows as paras 5 and 6 of the Record of Preliminary Hearing:

> "*The claims are listed in the Case Summary at paragraph [1] of the Case Management Order made by Employment Judge Tuck KC on 22 March 2023. The List of Issues prepared at that hearing may be found at paragraph [13] of Employment Judge Tuck's Case Management Order.*
>
> *The parties were instructed to review the list of issues carefully in the Case Management Order made by Employment Judge Tuck KC. No correspondence has been received indicating that the List of Issues is incorrect or complete. The List of Issues will be treated as final unless the Tribunal decides otherwise.*"

12. On 16 December 2024 at 19:09, Mr Ogbonmwan emailed the Tribunal and the respondent with a completely revised list of issues. He said as follows: "*the Claimant has directed that we put in an amendment having had opportunity to consider the evidence in the bundle including new evidence provided by the Respondent. The revised list of issues and or addition to the current list of issues are attached in a word document for the consideration of the tribunal. The Respondent will not suffer any profound detriment to their response having regard to the issues are informed by the evidence in the bundle*. "

13. Accordingly, the application to amend the list of issues was expressly put on the basis that it was necessary to do so in light of new evidence that was in the Bundle. When asked in the course of his oral submissions to explain the nature of the new evidence, Mr Ogbonmwan accepted that the evidence he was referring to was the contents of the Bundle that had been in his and Mrs Bangura's possession for well over a year.

14. The Tribunal entirely understands and appreciates that Mrs Bangura has had an exceptionally difficult time since the death of her husband but she was able to produce a detailed witnesses statement in October 2023 and has had ample time to consider the contents of the Bundle in the course of the year in which it was in her possession.

15. Further, in his oral submissions Mr Ogbonmwan said that the new list of issues should be adopted because it was merely a "rephrasing" of the current list. This was clearly not the case because, amongst other things, the new list contains a whole list of issues under the hearing "procedural fairness" that do not appear in the list of issues identified at the Preliminary Hearing and that contain issues that would more obviously be relevant to an unfair dismissal claim rather than to a discrimination claim.

16. The Tribunal has considered the principles set out in the cases of *Mervyn v BW Controls Ltd* [2020] ICR 1364 and *Hassan v British Broadcasting Corporation* [2023] EAT 48. Importantly, in the course of the Preliminary Hearings, the Tribunal has carried out the task required of it as elucidated in *Cox v Adecco Group UK & Ireland and ors* [2022] ICR 1307. It has rolled up its sleeves and identified in reasonable detail the list of issues. That list of issues has stood for

nearly 21 months in the run-up to this hearing and the basis of Mr Ogbonmwan's application to amend it, namely that there was new evidence that meant the amendment was necessary is misconceived. There is no such new evidence.

17. Accordingly, it would, in the Tribunal's judgment, be contrary to the overriding objective and the interests of justice for the list of issues, which forms the basis upon which the respondent has prepared its case, to be amended at this late stage.

<u>Application for specific disclosure</u>

18. At the start of the hearing Mr Ogbonmwan also made an application for specific disclosure, that had originally been set out in an email of 6 December 2024.

19. The Record of the Preliminary Hearing on 21 August 2023 states as follows at para 3.1 – 3.2:

> "*The Respondent has already provided documents which they suggest should be used at the final hearing. The Claimant has not sought to add any documents to that bundle. The bundle prepared by the Respondent will be the bundle used at the final hearing unless the Tribunal decides otherwise*.
>
> *The Respondent must send to the Claimant its witness statements by 13 November 2023."*

20. The respondent's witness statements were sent to the claimant in November 2023.

21. The application for specific disclosure was made 16 months after the Bundle was agreed and eleven days before the start of the Final Hearing. It is not targeted in any way but is very wide-ranging spanning twelve different categories of documents and without any limitation as to the extent of the search that it is said should be made. For example, there are requests for communications between individuals with no date limit provided and in circumstances where a number of such documents are already in the Bundle. Further, the application is not supported by any evidence.

22. As part of the overriding objective it is necessary for the Tribunal to ensure that cases are dealt proportionately and that includes the need to avoid delay so far as is compatible with consideration of the issues.

23. This application has been made very late in the day and in circumstances where the claimant has known exactly what respondent's disclosure and evidence is for well over a year. Indeed, the Bundle for the hearing was produced in September 2023. There is no good reason why this application could not have been made earlier. In the Tribunal's judgment it would not be in the interests of the overriding objective to grant this application now. Quite apart from the fact that it is unsupported by evidence, the nature and extent of it

is such that it would necessarily delay the hearing, potentially very significantly, if the respondent was ordered to comply with it now.

24. The parties were nonetheless reminded at the hearing of the continuing duty to comply with disclosure obligations. Further, the respondent was asked to search for documents relating to the disciplinary outcomes of the two other Site Security Officers, Anthony Kamau and Sanjeev Khanal. Those documents were provided.

Application to give evidence remotely

25. At the end of the first day of the hearing, Ms Coutts informed the Tribunal that Ms Goodway had norovirus and asked that she be allowed to attend via CVP the next day. Mr Ogbonmwan objected on the basis that no medical evidence had been disclosed.

26. The Tribunal agreed to Ms Goodway attending remotely via CVP. Giving evidence via CVP is a well-accepted and effective way for evidence to be given and in the Tribunal's judgment Mr Ogbonmwan would have no difficulty in cross-examining Ms Goodway and in putting the claimant's case to her. There was no obligation on a party to produce medical evidence to support an application of this sort. In any event, the Tribunal accepted that Ms Goodway was indeed unwell. In the circumstances, the Tribunal decided that it was in accordance with the overriding objective and in the interests of justice to grant the application.

Mr Newton's evidence

27. For a very short period of time during his evidence, Mr Newton had his own copy of the Bundle in front of him at the witness table. When Ms Coutts noticed she drew it to the Tribunal's attention. EJ Margo flicked through the file. It was tabbed up but there were no annotations or notes on the documents themselves and the Tribunal was satisfied that the fact that it had been in front of Mr Newton and that he had referred to some of the documents in that copy of the Bundle, rather than the one available on the witness table, had no impact on the answers he gave or the reliability of his evidence.

Findings of fact

28. The relevant facts are set out below. Any references to page numbers are to pages of the Bundle of documents unless indicated otherwise.

29. The claimant attended an interview with Mr Newton on 3 May 2019 for a role as a Security Officer at the respondent's site in Reading which is a "List X" facility which means that it is approved to hold classified information designated as "Secret" for the UK government.

30. The invitation to the interview stated as follows in the heading of the meeting request: "*Face to face interview Philip Kallay Site Security Officer (Part-time)*".

31. The notes of the meeting record the rate of pay was stated in the meeting as being £9/hr [p.108].

32. The claimant was not originally successful in securing the role but was subsequently offered the role of Site Security Officer (working a 32hr week) after the person who had been offered it, and who was already working for the respondent, handed in their notice.

33. There was an internal email sent from Lottie Howie of the respondent to Glyn Watts also of the respondent on 12 September 2019 asking for a contract to be raised for £9 p/h with the "FTE" (i.e. the full-time equivalent) being 32 hours. As set out above, the claimant had in fact been offered a "part-time" role for 32 hours a week.

34. The contract that was drawn up recorded the claimant's work hours as "*Min 32 hours per week*…"[p.89]. However, the contract had an error in it because the contract listed an "*Annual Salary (full-time equivalent)"* of £28,152.00 – which in fact would amount to 60h hours a week based on an hourly rate of £9/hr. Further, the contract listed the Work Type as "*Permanent Full time*". These errors were at least part of the reason why, in the event, the claimant's pay was logged incorrectly by the payroll team with the result that he was overpaid in the first month of his employment.

35. We find as a fact that the claimant knew that his rate of pay of £9/hour as stated by Mr Newton in the interview and that his normal working week was 32 hours.

36. Jacki Fabian (Regional HR Member Services) emailed the claimant on 25 October 2019 to explain that payroll had logged the incorrect working hours for him and so he had been overpaid. She informed him that he had been overpaid by £359.04 for the month [p.131].

37. The error was therefore spotted after the first month's pay had been paid to the claimant. The fact that a genuine error was made, and that the reason why it was corrected was that the respondent understood a genuine error to have been made, is also shown by the email exchanges at [p.128-129] between the respondent's payroll and HR teams.

38. The claimant replied to Ms Fabian on 28 October 2019 to say he did not understand the message and asked what his October salary would have been.

39. Mr Newton replied on 30 October and said as follows:

    "*Hi Philip,*

    When the payroll team set you up, you were mistakenly added under a 37.5 hours per week full-time contract(when in fact your salary is 32 hours per week).

    This is why you have the overpayment of £359.04 in your bank account this month.

Please do not spend this money Philip *– put it to one side in a savings account and transfer back to your main account at the end of November.*

You will have a deduction of £359.04 at the end of November, so you will then be no worse off." (emphasis in the original) [p.130]

40. The claimant did not raise any further queries about his pay thereafter until he raised a grievance in October 2020. The claimant did not ask Mr Newton to conduct any further investigations in the period from 30 October 2019 until October 2020 and Mr Newton did not tell the claimant that he would conduct any further investigations.

41. The claimant received a basic salary of £1,251.12 (gross) per month in December 2019, January 2020, February 2020 and March 2020 [pp.286 289]. The salary payments made to the claimant in this period were correct.

42. The claimant received a pay rise in April 2020. His basic salary increased to £1,289.60 (gross) per month from that time, again based on a 32-hour working week but at an increased rate of £9.30 per hour.

43. The claimant was not at any time issued with an accurate contract clearly setting out the pay to which he was entitled.

<u>The broken dishwasher</u>

44. As well as general security duties, the respondent's of Site Security Officers were regularly tasked with turning on the dishwashers.

45. On 21 February 2020, the claimant emailed Mr Newton and said as follows:

"*Hi Guy,*

The dishwashers in the SDI room and the second floor are not working properly. They are not completing the cleaning processes I have to do it over and over yet the mugs are not clean.

Please can you support us, so that the dishwashers be properly repaired or replaced. It's difficult working in this environment…" [p.144]

46. On 26 February 2020, Tracie Anderton, Assistant Facilities Manager sent an email to the Site Security Officers that acknowledged that the dishwashers on the ground floor and in the "proposal centre" were not working and said that she had carried out hand washing that morning. She continued as follows:

"*…I know it's not ideal but for now, I need you to hand wash in the day until we get the problem fixed. We have Brites working tonight to cover [the claimant] so I know they will not wash them up. Please do the best you can until the problem is resolved…"* [p.147]

47. Accordingly, we find as a fact that because the dishwasher was broken, Ms Anderton had hand-washed items herself and had also asked the other Site Security Officers to do the same. In particular, they were asked to do so given that a company called Brites was covering for the claimant that night as he was not working.

48. The claimant replied on 26 February 2020 and said he was sorry but he was not keen to hand-wash the mugs and that he was sure a solution for so many broken dishwashers would be found quickly.

49. There were no further requests for the claimant to carry out dishwashing after that time.

<u>The opening and closing of rooms</u>

50. On 17 March 2020 Tracie Anderton sent an email to the claimant that said:

    "*Occasionally requests are placed for Opening /Closures of rooms, if you are not sure how to do this please ask Antony on handover* ." [p.152]

51. "Anthony" was to Anthony Kamau, another of the Site Security Officers.

52. This was a reference to the opening and closing of folding partition doors on the first floor. The task involved sliding and locking the doors and was a standard if occasional part of the duties of the Site Security Officers.

53. The claimant replied the same day: "*Hi Tracie, I have told Anthony that I will not be able to open those doors as I have a fobia [sic] in doing such work. Please exempt me from doing it.*" [p.152].

54. Ms Anderton replied: "*What do you mean a phobia, I don't understand do you struggle in confined spaces ?"*.

55. The claimant replied "*Sorry for the spelling mistake, yes I do. Please exempt me from that job*".

56. Mr Newton, who was copied into this email exchange, responded the same day and said as follows:

    "*From a conversation with Antony I understand that it is not a phobia you have rather it being that you feel it is too much work? This is a very simple 2 minute task and not something that is regularly required but certainly will be when Antony goes on annual leave.*

    Suggest that you go through the process with Antony to ensure you understand the very simple process to complete this task."

57. The claimant responded and said that he had been struggling with Mr Kamau who was "*being very bossy*" and that the claimant would resign if he was forced to do "*what I can't do*" [p.150].

58. Mr Newton replied and said as follows:

“*I would kindly advise you to come into the office to have a conversation with myself and Tracie regarding this situation.*

Antony is a senior member of the team and he is instructed by Tracie to handover details of assignments required for the night shift, this is not being bossy, he is following instructions.

By not carrying out duties such as this you will be falling short of what is expected as a standard of a site support officer.

If you have physical or mental incapability’s to carry out such tasks these should have been disclosed upon your appointment.

If you have a metal incapability to open up a sliding partition door, then please make bring to me a medical certificate declaring this from a medical practitioner – I can then asses this with HR and make reasonable adjustments to your work assignments.

You need to understand that any task required of a night officer which is not carried out has a huge knock on effect to our day team, and if they have to spend time catching up on tasks not completed they then do not have sufficient time to complete their own assignments. All of sudden the system falls down and we are no longer providing the service to the members that we need to.

Please attend site tomorrow to discuss in person – if you do not then I will have no option but to pass the below email on to HR to initiate your resignation.

Please consider this carefully – you currently have a good working position in a great company to work for – would be a shame for you to leave that scenario.” [p.149]

59. The claimant replied:

“*Hi Guy, I dont want to have issues with colleagues at work but I have to be honest with you that they are not helpful and supportive apart from Tracie.*

I am sorry that I am not going to discuss this further. I will be happy for you to forward my resignation to HR”.

60. Mr Newton said in evidence that he could not remember what happened thereafter save that the claimant continued working for the respondent. However, in his submission for his grievance appeal hearing in October 2020, the claimant said at paragraph 37 of the submission document that he was advised to withdraw the resignation by Ms Anderton and Mr Newton and that he did so [p.221].

61. We find as a fact that the claimant did withdraw his resignation and continued working for the respondent. Additionally, the claimant did not complain further at that time about the work on the partition doors and continued to attend work as normal.

Disciplinary investigation and missing keys

62. The claimant's role as a Site Security Officer was primarily to ensure the physical security of the building and its personnel. His duties included locking down floors, setting alarms, monitoring surveillance equipment, patrolling the building, allowing access (where appropriate), investigating security breaches, and logging his observations.

63. His working pattern 4 days on, 4 days off.

64. As part of their duties, the Site Security Officers had to complete a Security Daily Log detailing the checks that had been undertaken throughout their shift. Part of this process involved the handover of the keys.

65. On 6 August 2020 it was reported to Alan Mole (Operations Director) that the main security keys for the building were missing.

66. In summary, Mr Kamau was the Site Security Officer who had misplaced the keys and who had therefore failed to pass them to the claimant who had in turn not passed them to Sanjeev Khanal.

67. The keys were the main tool for the Site Security Officers and had the master alarm fob on them. They allowed the Site Security Officers to patrol the whole site.

68. We accept the evidence of Mr Newton that the loss of the keys for the external doors of the building was a major security risk. Further, the claimant should have known at the start of his shift where the keys were and should have ensured that the keys were handed over to him at the start of his shift.

69. An investigation was undertaken by Conor Price, National Operations Manager. Mr Price spoke to the claimant, Mr Kamau and Mr Khanal and concluded that all three employees had failed to comply with security protocols.

70. Ultimately Mr Kamau was issued with a final written warning in relation to this incident.

71. Mr Khanal was dismissed as he was already in receipt of a final written warning.

72. Mr Price's initial meeting with the claimant took place at 5am on 12 August 2020.

73. Mr Price did not give the claimant any notice of that meeting which lasted 19 minutes. Similarly, Mr Price did not give any notice to Mr Kamau or Mr Khanal who he also interviewed in relation to the incident. Mr Price conducted the meeting in this way because he understood, correctly, that his approach was

consistent with the respondent's standard procedure for investigatory interviews of this sort.

74. Mr Price did not know the claimant and had not met him prior to the interview. He carried out the investigation because he had been asked to do so by Alan Mole (Operations Director, Real Estate).

75. Mr Price did not view any CCTV footage in preparation for the interview or at any time thereafter nor was any CCTV footage viewed by anyone at the respondent as part of the disciplinary process. Further, prior to raising the issue as part of this claim, the claimant did not request sight of any CCTV evidence.

76. In the claimant's meeting with Mr Price, he confirmed that the main security keys are normally in the drawer but he hadn't checked the drawer during his shift.

77. We find as a fact that the findings of Mr Price's investigation were as set out in his witness statement and as confirmed by him in evidence; namely, that the claimant had (a) failed to carry out the correct handover procedure; (b) failed to maintain the security of the building (with the reception pedestal left unlocked containing keys, alarm fobs and security passes) (c) failed to lockdown secure areas in the building, and (d)failed to carry out sufficient patrols.

78. On 10 September 2020, Kate Wisniewski invited the claimant to attend a disciplinary hearing on 14 September [p.157]. The letter said that the meeting concerned serious breaches of security procedures. The letter also said that if an allegation of gross misconduct was upheld dismissal without notice was a possible penalty.

79. Given the investigation meeting that the claimant had attended with Mr Price, we find that the claimant understood what the disciplinary hearing was about.

80. On 13 September 2020, the claimant wrote to Ms Wisniewski in order to raise a grievance in respect of the invitation to the disciplinary meeting on the basis that the letter was ambiguous and unclear. The claimant said that as a result it was not reasonably practicable for him to attend the meeting. He also complained about the categorisation of the conduct as potentially gross misconduct and about the fact that the interview with Mr Price at 5am had taken place when he was exhausted and was therefore oppressive. No allegation of discrimination was made as part of that grievance [pp.159-160].

81. Ms Wisniewski replied and, amongst other things, said she would cancel the meeting and refer matters to HR [p.160].

82. Ms Goodway emailed the claimant on 14 September 2020. She confirmed that the allegation was in relation to a failure follow security procedures and she set out the specific matters as set out at paragraph 77 above [p.163].

83. Ms Goodway also offered the claimant the chance to attend another investigation meeting so that he could have another opportunity to answer relevant questions. The claimant did not respond to that email.

84. On 16 September, Ms Goodway sent the claimant a Teams invite for a meeting on 18 September. The claimant did not respond.

85. On 18 September, Ms Goodway phoned the claimant to ask if he was going to attend the meeting. The claimant said he had not received the correspondence. This is despite the fact that the claimant had a company laptop and regularly corresponded with the respondent over email.

86. On 19 September the claimant raised a further grievance complaining about the handling of his first grievance. The claimant said that his grievance had not been properly addressed. He accused Ms Wisniewski of not acting in good faith. Amongst his complaints he said that he thought the reason that allegations had been escalated "*was because of my protected characteristics which to the best of my own assessment could be because I am a black of*ficer." The claimant complained that management had pre-judged his guilt and that the decision had already been made to dismiss him. Ms Wisniewski and Ms Goodway were named in the grievance but the claimant did not name Mr Newton as the subject of his complaint [p.168].

87. Mr Newton was appointed to hear the grievance. He was an appropriate person to hear the grievance as it was not apparent from the face of the claimant's grievance that his complaint was in any way about Mr Newton and Mr Newton had not been involved in the disciplinary process.

88. The grievance meeting had to be rearranged a number of times but ultimately went ahead on 2 October 2020. This was one of claimant's days-off, but it took place that day because in an email of 27 September 2020, the claimant had requested that it took place during the day and during his day-off [p.177]. In the run-up to that meeting, the claimant raised no complaint about the fact that the grievance was being heard by Mr Newton.

89. At the 2 October meeting, the claimant said that Mr Kamau had said at the relevant handover that he, the claimant, did not need to do anything and that Mr Kamau had alarmed the building. The claimant said he felt the allegations had been escalated because of his race and he emphasised that no security breach occurred.

90. Mr Newton said that the security procedures were the same for all the buildings and that due diligence was required.

91. The claimant also went on to say that he understood and acknowledged that he should have realised that he did not have the keys, he said he had only been in the role for one year and was still learning and that his initial training had been provided by an agency officer and one day with another officer called "Dolphi".

92. Further, by this time, the claimant knew that Mr Khanal had been dismissed – that dismissal having taken place on 29 September 2020. In the grievance meeting he said he felt Mr Kamau should take responsibility. He then went on to

say "*For my own integrity if I am responsible, I take responsible. I should have checked and I felt very guilty about any impact on Sanjeev.*"

93. It is clear, therefore, that the claimant accepted in the grievance meeting that he was responsible for failing to check that he had the keys when handing over from Mr Kamau.

94. The claimant was sent the outcome of the grievance on 5 October 2020. The outcome letter was thorough and fair and covered in turn all of the complaints set out in claimant's two grievances. In summary, the claimant's grievances were dismissed.

95. By letter dated 5 October 2020, the claimant was invited to a further disciplinary hearing. The claimant responded to say that he could not attend whilst the outcome of the grievance, that the claimant had not yet received, was still pending. The claimant received the outcome of the grievance later that day.

96. The claimant then raised a third grievance relating to what he claimed was an unlawful deduction from wages. Ms Goodway looked into the complaint and decided that the disciplinary process was unconnected to this new complaint and so could proceed.

97. On 10 October 2020, the claimant appealed against the outcome of his first and second grievances.

98. The appeal hearing took place on the morning 19 October 2020 and was chaired by Johan Raubal, Director Consulting Quality & Regulatory Assurance. The claimant attended that hearing but did not attend the disciplinary hearing that had been scheduled for that afternoon.

99. The claimant's appeal was not upheld as confirmed in a letter of 22 October 2020.

<u>Absent without leave</u>

100. On 21 October 2020, Mr Newton emailed the claimant, copying in Ms Anderton and said:

    "*Tracie has mentioned you have called her to inform that you will not be attending your next set of shifts, commencing this Thursday?*

    Can you please contact me directly (as your line manager) to discuss as I will need to process any absences on your behalf."

101. We find as a fact that the claimant had told Ms Anderton that he was not going to be attending his next set of shifts but he did not tell her that it was because of sickness and Ms Anderton did not tell Mr Newton that this was the reason why the claimant would not be attending those shifts. Further, the claimant did not contact Mr Newton directly in respect of his absences.

102. Mr Newton then sent a further email to the claimant on 23 October 2020 that said:

     "….*I am aware you did not fulfil your scheduled shift in Reading last night. You have not contacted me personally (as your line manager) to discuss any potential absences and the reasons as such for not being able to attend your shift which has caused great operational difficulties to overcome. As per company process you must contact your line manager to notify of absences in advance of the occurrence. Therefore I will now need to raise a case to HR declaring that you are AWOL (absent without leave). Please by reply extend the courtesy to your line manager and explain your reasons for not attending your shift so I can review and make operational changes to the site team.*

     (I have replicated this message to your mobile phone as well as a text message in case you are not able to access your personal email account for any reason)."

103. Mr Newton initially reported to HR that the claimant was absent without leave but ultimately the claimant was paid his full salary across the relevant period.

104. The claimant subsequently provided a sickness certificate that was backdated to cover the relevant period.

<u>Other grievances</u>

105. On 28 October 2020, the claimant raised a fourth grievance in relation to the email that Mr Newton had sent on 23 October referring to the claimant being recorded as "AWOL". That grievance was acknowledged by Ms Goodway on 30 October 2020.

106. On 25 November 2020, the claimant was invited to attend a further rescheduled disciplinary hearing on 30 November 2020 at 11am [pp.236-237]. The claimant was informed of his right to be accompanied by a colleague or trade union official. On 26 November 2020, the claimant emailed stating he was unable to attend and attached a copy of a letter from Mr Ogbonmwan that stated, amongst other things, that the disciplinary hearing should not go ahead until the grievance of 28 October had been heard. The letter attached the ET1.

107. Mr Chris Trickett, Director, Corporate Real Estate, was appointed to hear the third grievance. On 28 November 2020, the claimant was invited to a hearing on 30 November 2020 and was informed of his right to be accompanied by a colleague or trade union official. The letter of invitation specifically referred to the grievance of 5 October 2020 – that being the grievance relating to unlawful deductions from wages [p.196].

108. On 28 November 2020, the claimant requested a postponement to the hearing of at least 5 days on the grounds that he had been given short notice of the hearing and he wanted to exercise his right to be accompanied. This request was granted and the hearing was postponed.

109. Mr Trickett met with the claimant on 7 December 2020. The claimant thought the hearing was to discuss his grievance appeal and complained by email of the same date that Mr Trickett had been unprepared for the hearing [p.254]. Mr Trickett replied the same day to say that he wanted to investigate the unlawful deduction of wages allegation and wanted to give the claimant the chance to provide more detail.

110. Mr Trickett met with the claimant again over Teams on 17 December 2020 but the hearing did not progress because Mr Trickett was concerned that the claimant was accompanied by someone who was neither a Trade Union representative nor a workplace colleague.

111. On the same day, the claimant raised a fifth grievance, this time against Mr Trickett, in relation to the cancellation of the meeting that same day.

112. The claimant reported unfit for work on 1 January 2021 and very sadly passed away on 5 January 2021.

113. At the time of his death, the third, fourth and fifth grievances were yet to be resolved and the claimant had not yet attended a disciplinary hearing.

The law

<u>Direct discrimination</u>

114. A claim of direct discrimination within the meaning of s.13 of the EqA 2010 is of less favourable treatment, because of a protected characteristic, than would have occurred if the claimant had not had that protected characteristic. This is a claim of an unlawful motivation, the motivation being the fact that the claimant had the protected characteristic in question. Proving a person's motivation is usually difficult, for obvious reasons. That is why s.136 of the EqA 2010 was enacted. It provides:

> "*(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.*"

115. When applying s.136, it is possible, when considering whether or not there are facts from which it would be possible to draw the inference that the respondent did what is alleged to have been less favourable treatment because of a protected characteristic, to take into account the respondent's evidence about, but not its explanation for, the treatment. That is clear from paragraphs 19-47 of the judgment of Leggatt JSC (with which Lord Hodge, Lord Briggs, Lady Arden

and Lord Hamblin agreed) in the Supreme Court in *Efobi v Royal Mail Group Ltd* [2021] UKSC 33, [2021] ICR 1263.

116. However, as the House of Lords said in *Shamoon*, in some cases the best way to approach the question whether or not there has been direct discrimination within the meaning of s.13 of the EqA 2010 is by asking what was the reason why the conduct or omission in question occurred.

Harassment

117. Section 26 of the EqA 2010 provides as follows:

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

118. The statutory protection from harassment (which only applies if the conduct is "related to" a protected characteristic) is not designed to protect claimants from trivial acts that cause upset. In *Land Registry v Grant* [2011] ICR 1390, Elias LJ said as follows at paragraph 47:

> "*Furthermore, even if in fact the disclosure was unwanted, and the claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The claimant was no doubt upset that he could not release the information in his own way, but that is far from attracting the epithets required to constitute harassment. In my view, to describe this incident as the tribunal did as subjecting the claimant to a "humiliating environment" when he heard of it some months later is a distortion of language which brings discrimination law into disrepute."*

Victimisation

119. Section 27 of the EqA 2010 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.*
>
> *(2) Each of the following is a protected act—*
>
> *(a) bringing proceedings under this Act;*
> *(b) giving evidence or information in connection with proceedings under this Act;*
> *(c) doing any other thing for the purposes of or in connection with this Act;*
> *(d) making an allegation (whether or not express) that A or another person has contravened this Act…"*

120. Victimisation claims are subject to the reverse burden of proof in s.136 of the EqA.

121. In order to determine whether a respondent has subjected a claimant to a detriment "because of" a protected act the key question is the same as in respect of a claim of direct discrimination: what, consciously or subconsciously, motived the employer to subject the claimant to the detriment. The claimant will succeed if she can show that the protected act had a 'significant influence' on the employer's decision making: see *Nagarajan v London Regional Transport* [1999] ICR 877.

122. A 'significant influence' means one that is more than a trivial: see *Villalba v Merrill Lynch and Co Inc and others* [2007] ICR 469, EAR (applying the test established in Nagarajan).

Time limits for discrimination claims

123. The time limits for EqA claims are set out in s.123 of the EqA 2010:

> *"(1)…Proceedings on a complaint within section 120 may not be brought after the end of*
>
> *a. the period of 3 months starting with the date of the act to which the complaint relates or*
> *b. such other period as the employment tribunal thinks just and equitable*
>
> *(2) …*
> *(3) For the purposes of this section –*

a. *conduct extending over a period is to be treated as done at the end of the period;*
b. *failure to do something is to be treated as occurring when the person in question decided on it.*

124. The burden of persuading the Tribunal to exercise its discretion to extend time is on the claimant: Chief Constable of *Lincolnshire Police v Natasha Caston* [2009] EWCA Civ 1298. The granting of an extension is the exception rather than the rule. Auld LJ said as follows in *Robertson v Bexley Community College* [2003] IRLR 434, CA at paragraph 25:

"*It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule*."

125. In *British Coal Corporation v Keeble* [1995] UKEAT 413/94/0607 the EAT considered the meaning of "just and equitable" (in the context of the Sex Discrimination Act 1975) and made clear that the Tribunal's discretion is as wide as that of the civil courts under s33 of the Limitation Act 1980. Holland J concluded (at paragraph 10):

"*We add these observations with respect to the discretion that is yet to be exercised. Such requires findings of fact which must be based on evidence. The task of the Tribunal may be illuminated by perusal of Section 33 Limitation Act 1980 wherein a check list is provided (specifically not exclusive) for the exercise of a not dissimilar discretion by common law courts which stars by inviting consideration of all the circumstances including the length of, and the reasons for the delay. Here is, we suggest, a prompt as to the crucial findings of fact upon which the discretion is exercised*."

126. Section 33(3) of the Limitation Act 1980 provides (as is relevant) that the court "shall have regard to all the circumstances of the case" and, in particular to:

" *a. the length of, and the reasons for, the delay on the part of the claimant;*
b. the extent to which, having regard to the delay, the evidence adduced or likely to be adduced by the claimant or the defendant is or is likely to be less cogent than if the action had been brought within the normal time limit;
c. the conduct of the defendant after the cause of action arose, including the extent (if any) to which he responded to requests reasonably made by the claimant for information or inspection for the purpose of ascertaining facts which were or might be relevant to the claimant's cause of action against the defendant;

d. *the duration of any disability of the plaintiff arising after the date of the accrual of the cause of action;*
e. *the extent to which the claimant acted promptly and reasonably once he knew whether or not [the Respondent's conduct]…might be capable…of giving rise to an action for damages;*
f. *the steps, if any, taken by the claimant to obtain…legal or other expert advice and the nature of any such advice he may have received*."

127. However, the Court of Appeal in *DCA v Jones* [2008] IRLR 128, CA said that the relevance of such factors depends on the facts of the particular case. The factors which have to be taken into account depend on the facts, and the self-directions which need to be given must be tailored to the facts of the case as found.

128. In *Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA Civ 23, the Court of Appeal further cautioned against tribunals rigidly adhering to the checklist of potentially relevant factors in section 33 of the Limitation Act 1980, and advised against the adoption of a mechanistic approach.

<u>Whistleblowing</u>

129. Parts IVA and V of the ERA 1996 gives workers the right not to suffer a detriment from their employer or its staff on the grounds that they have made a "protected disclosure".

130. A disclosure will (under s43A) be protected if it is a "qualifying disclosure" (as governed by s43B of the Act) which is made to the right recipient in the right way (as governed by ss43C-43H).

131. For a worker to have made a qualified disclosure, the disclosure must tend to show one or more of the matters falling within s.43B(1)(a)-(f).

132. Following *Babula v Waltham Forest College* [2007] EWCA Civ 174, [2007] ICR 1026 at paragraphs 74-82, reasonable belief (whether in the tendency to show one of the matters set out in s.43B(1)(a)-(f) or in the public interest of the disclosure) requires the Tribunal:

    a. to consider whether the worker genuinely held the belief in question; and,
    b. if so, to assess whether it was reasonable for them to have done so.

133. The assessment of belief is subjective. As such, the worker's belief may be genuine even if, in fact, they are mistaken (*Darnton v University of Surrey* [2003] ICR 615 EAT at paragraph 32).

134. The belief must, however, have arisen at the time of making the disclosure rather later: see *Kilraine v LB Wandsworth* [2018] EWCA (Civ) 1436 at paragraph 46.

135. The assessment of reasonableness is objective – albeit that it should be assessed from the point of view of the particular worker (*Babula* at paragraph 82).

136. Where a worker has made several disclosures, each must be considered separately in order to establish whether it is a "qualifying disclosure": *Fincham v HM Prison Service* UKEAT/0925/01/RN at paragraph 6; *Barton v Royal Borough of Greenwich* UKEAT/0041/14/DXA at paragraphs 80 and 92.

137. The protection for workers who have made protected disclosures is set out in s.47B(1) of the ERA 1996.

> "*A worker has the right not to be subject to any detriment by any act or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure*."

138. A "detriment" occurs when a reasonable worker would or might take the view that he had been disadvantaged: *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337, per Lord Hope at paragraph 34.

139. An unjustified sense of grievance cannot amount to "detriment", but it is not necessary to demonstrate some physical or economic consequence: *Shamoon* at paragraph 35.

140. Whether a detriment is "on the ground" that the worker has made a protected disclosure involves an analysis of the mental processes (conscious or unconscious) of the employer acting as it did. This point was reiterated by the EAT in *Chatterjee v Newcastle Upon Tyne Hospitals NHS Trust* UKEAT/0047/19/BA. It is not sufficient to demonstrate that, "but for" the disclosure, the employer's act or omission would not have taken place. The test is similar to that used in direct discrimination cases, except that there is no statutory requirement for a comparator.

141. Section 47B of the ERA 1996 is infringed if the protected disclosure materially influences (in the sense of being more than a trivial influence) the employer's treatment of the whistleblower: *Fecitt v NHS Manchester* [2012] ICR 372, per Elias LJ at paragraph 45.

142. The claimant must prove that she has been subject to detrimental treatment in line with the general proposition that it for a claimant to prove their case on the balance of probabilities.

143. The time limit for bringing a complaint for detriment is set out at s.48(3) ERA 1996:

> "*(3) An employment tribunal shall not consider a complaint under this section unless it is presented—*
>
> *(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that*

act or failure is part of a series of similar acts or failures, the last of them, or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

(4) For the purposes of subsection (3)—

(a) where an act extends over a period, the "date of the act" means the last day of that period, and

(b) a deliberate failure to act shall be treated as done when it was decided on;…"

144. The time limit relates not to when the detriment was suffered but when the act, or deliberate failure to act, which gave rise to the detriment occurred: *Warrior Square Recoveries Limited v Flynn* (2012) UKEAT/0154/12/KN at paragraph 4.

145. As to the reasonably practicable extension, the onus is on the Claimant to show that presentation in time was not reasonably practicable: *Porter v Bandridge Ltd* [1978] ICR 943 at 948.

146. "Reasonably practicable" means something in-between "reasonable" and "physically possible" – perhaps more like "reasonably feasible": *Palmer v Southend-on-Sea Borough Council* [1984] WLR 1129 at 1141. It is a question of fact for the tribunal to decide.

147. In *Wall's Meat Co. Ltd v Khan* [1979] ICR 52 Brandon LJ gave the following guidance regarding factors that are relevant to the question of reasonable practicability:

> "…*the performance of an act, in this case the presentation of a complaint, is not reasonably practicable if there is some impediment which reasonably prevents, or interferes with, or inhibits such performance. The impediment may be physical, for instance illness of the complainant or postal strike; or the impediment may be mental, namely the state of mind of the complainant in the form of ignorance of, or mistaken belief with regard to essential matters. Such states of mind can, however, only be regarded as impediments making it not reasonably practicable to present a complaint within three months if the ignorance on the one hand or the mistaken belief on the other, is itself reasonable."*

<u>Conclusions</u>

148. References to paragraph numbers are unless stated otherwise, to paragraphs of the list of issues as set out in the Record of Preliminary Hearing.

149. As set out above, claims relating to matters that took place before 8 July 2020 are prima out of time.

Direct discrimination

Time limits

150. The allegations from 30 October 2019 and March/April 2020 (paragraphs 2.2.2 – 2.2.4) have been brought outside the three-month time limit and are not part of any continuing act of discrimination (all discrimination claims having failed for the reasons set out below). As to whether it would be just and equitable to extend time, no explanation for the failure to lodge a claim by July 2020 has been provided, the claims have been brought significantly out of time and there was no reason why the claimant could not have presented the claims in time. Accordingly, although, for the reasons set out below, those claims would not have succeeded in any event, the Tribunal does not have jurisdiction to consider them.

Failed to pay the claimant in accordance with the contract (para 2.2.1)

151. The allegation that the claimant was not paid in accordance with his contract is a discrimination claim and not a claim for unlawful deduction from wages, the latter having been struck out at the Preliminary Hearing. It is therefore not a claim that depends primarily on the correct construction of the contract.

152. The claimant was not paid in accordance with the contract but the details on the contract were incorrect and the claimant understood and had agreed that he would be paid at £9 and would work a standard 32-hour week.

153. There is no evidence that the claimant was treated less favourably than an actual comparator. The claimant has not identified any comparators that were paid the rate of pay that is contended that the claimant should have been paid for carrying out the same work.

154. The claimant has not established facts from which it is possible to conclude that he was treated less favourably than a hypothetical comparator because of his race. The simple fact of the level of payments is not enough to shift the burden of proof and, as set out above, the pay set out in the contract was incorrect and did not accord with the claimant's understanding of what his pay was and should have been.

155. After the issue was raised in October 2019 by the respondent, the claimant accepted the correction to his pay and continued to work. This again demonstrates that the claimant understood what his pay was and should have been. Further, even if there had been a contractual entitlement to be paid a higher wage, the claimant waived that entitlement and/or agreed a variation to his contract in October 2019 onwards by accepting the correction to his pay and continuing to work without complaint. The claimant did not raise the issue again until his third grievance in October 2020.

156. Additionally and in any event, it was the respondent's genuine understanding was that the claimant was being paid correctly and in line with what he was entitled to receive.

157. The respondent genuinely believed that the claimant was being paid the incorrect pay in his first month of employment due to an error in the information that was entered into the payroll system.

158. If the claim of direct discrimination in relation to pay had been a good one then the Tribunal would have held that the claim had been brought in time as all the relevant payments would have been part of a continuing act of discrimination.

159. Finally, it was in our judgment a clear mistake on the part of the respondent not to issue the claimant with an amended contract that clearly set out the pay to which he was entitled. In our judgment stating a "FTE" salary without setting out the agreed hourly rate of pay or the relationship between the FTE salary and the pay to which the claimant was entitled was inevitably likely to cause confusion for the claimant, or indeed for any employee.

Mr Newton on 30 October 2019 telling the claimant he would investigate his complaint about incorrect wage payments, but failing to do so (para 2.2.2)

160. Mr Newton did not tell the claimant on 30 October that he would investigate any complaints about wage payments and so the claims fails at that first hurdle.

On or about March/April 2020 initiated disciplinary proceedings against the claimant which put him in fear of dismissal. The claimant resigned but later withdrew his resignation (para 2.2.3)

161. There was no threat of or initiating of disciplinary action in relation to the partition doors incident in March/April 2020 – Mr Newton was trying to understand why the claimant could not perform that task and the claimant maintained that if he had to perform that task he would resign.

The claimant lodged a grievance on 17 March 2020. Mr Newton failed to invite the claimant to a grievance hearing to consider it (para 2.2.4)

162. The claimant did not raise a grievance on 17 March 2020 in relation to the opening and closing of partition doors. He told Mr Newton that he would be happy for his resignation to be forwarded to HR – but that did not itself amount to a grievance. It follows that there was no failure on Mr Netwon's part to investigate any such grievance or to invite the claimant to a grievance hearing.

The respondent took much longer to investigate the claimant's grievances than it did for other employees (para 2.2.5)

163. There was no evidence presented to the Tribunal that established that the respondent took longer to investigate the claimant's grievances than it did for other employees. In any event, the respondent did try to progress the claimant's grievances in reasonable timeframes.

In August 2020 respondent initiated further disciplinary proceedings. Mr Newton and Mr Price concealed the reason for the disciplinary investigation and evidence that would be relied upon including CCTV from 5 August 2020 (para 2.2.6)

164. Disciplinary proceedings were initiated in August 2020. The reason for the investigation was not concealed nor was the evidence relied upon. At no time had the respondent relied on CCTV footage nor did it need to given the available evidence as to what had occurred. Ultimately, however, no disciplinary meeting took place and the disciplinary process did not reach a conclusion with the result that it cannot be known what evidence the respondent would ultimately have relied upon.

165. The claimant has not established facts from which it could be concluded that the initiating of the disciplinary proceedings in August 2020 was discriminatory. The claimant himself accepted at both the investigation meeting with Mr Price and in the grievance meeting with Mr Newton that he should have noticed that the keys were missing when he had his handover with Mr Kamau.

166. It was entirely understandable that the respondent would take this incident seriously and view it as potential gross misconduct given the status of the Reading site as a ‘List X’ facility that was approved to hold classified information designated as ‘Secret’ for the UK government. This is further supported by the fact that Mr Kamau was given a final written warning for his part in the missing keys incident and Mr Khanal was dismissed as he was already on a final written warning. However, no decision had been made as to any disciplinary sanction that the claimant might receive. There was no pre-determination on the part of the respondent. All that had been decided was that there were allegations that were potentially serious enough to amount to acts of gross misconduct.

167. In any event, the Tribunal accepts the respondent’s explanation that the disciplinary proceedings were initiated due to a genuine belief on the part of the respondent that there had been breaches of procedure in relation to the missing keys.

Mr Price sought to interview the claimant at 6am without notice on 12 August 2020 (para 2.2.7)

168. Mr Price interviewed claimant at 5am 12 August 2020, not 6am as set out in the list of issues. He did so without notice and within the claimant’s working hours as is entirely normal in a first investigatory interview of that sort. The interview was 19 minutes long as so ended well before the end of the shift.

169. In the premises, the claimant has established no facts from which discrimination could be inferred. In any event, the Tribunal has found as a fact that Mr Price conducted the investigation without notice and within working hours as that was consistent with the respondent’s standard practice. His decision to do so was not in any way connected to the claimant’s race.

<u>Failing to pay the claimant for days on which he attended grievance meetings when he was not on the rota to work on those days (para 2.2.8).</u>

170. The claimant was not paid for attending the grievance meetings.

171. However, the claimant requested that grievance meetings took place on his days off and during the day-time. The claimant has established no facts from which discrimination could be inferred and, in any event, the reason the claimant was not paid for his attendance at those meetings was because, at his request, they took place on his days off.

<u>Mr Newton conducting the hearing on 2 October 2020 when he was the subject of the claimant's grievance. The outcome of that 2 October 2020 meeting is also alleged to be an act of less favourable treatment because of race (para 2.2.9)</u>

172. Mr Newton was not named in, nor was he the subject of, either the first or second grievances. Mr Newton had not investigated the missing key incident and had not been involved in any part of the disciplinary procedure. Accordingly, the alleged detriment did not take place.

173. Further, the claimant has established no facts from it could be inferred that Mr Newton did not uphold the grievance because of the claimant's race. Mr Newton provided a full, detailed and fair response to each of the complaints raised by the claimant.

<u>Mr Newton recorded the claimant as absent without leave on 23 October 2020 when he was on sick leave notified to Ms Tracy Anderson (para 2.2.10)</u>

174. Mr Newton did record the claimant as absent without leave.

175. The claimant had not informed Mr Newton or HR that he would not be attending work for the relevant shifts. The claimant had told Ms Anderton that he would be coming-in but he had not given a reason. When the sick certificate was provided the record of the claimant having been AWOL was removed from his file and he received his full pay. Accordingly, the claimant has not established any facts from which discrimination could be inferred and the respondent's explanation for its conduct, as set out above is, in any event, accepted.

Harassment

<u>Time limits</u>

176. The three claims made of harassment at paras 3.1.1 – 3.1.3 have been brought out of time and they are not part of a continuing act with any other in-time claims of discrimination. As to whether it would be just and equitable to extend time, no explanation for the failure to lodge a claim by July 2020 has been provided and there was no reason why the claimant could not have presented the claims in time. Accordingly, although, for the reasons set out below, those claims would not have succeeded in any event, the Tribunal does not have jurisdiction to consider them.

Guy Newton sent an email of 26 February 2020 (para 3.1.1)

177. The claimant's case concerned the sending of an email relating to the dishwashing incident. There was no email from Mr Newton relating to dishwashing in February 2020. There was an email from Ms Anderton on 26 February in which she said that she had done the washing-up herself and asked the three Site Security Officers to help-out.

178. The fact of asking for the mugs to be washed was unwanted but it did not relate to the claimant's race. The request was made to all three Site Security Officers and it was simply made because the mugs needed to be washed.

179. Further, the request did not have the purpose of creating nor could it reasonably have created the prohibited environment. It was a reasonable request made simply because the washing up needed to be done.

Tracy Anderson's sent an email of 17 March 2020 (para 3.1.2)

180. Ms Anderton sent an email on 17 March 2020 [p.151] but it was unrelated to the claimant's race. It was an understandable and reasonable response to the claimant saying that he could not open and close partition doors due to a phobia. It is not clear or obvious what phobia would prevent a person from opening and closing partition doors and Ms Anderton's email has to be understood in that context. It follows that as well as being unrelated to race the request did not have the purpose of creating nor could it reasonably have created the prohibited environment.

181. In respect of Mr Newton's email of the same day, again, it was unrelated to claimant's race. Mr Newton's understanding was that the claimant simply did not want to carry out the task and the purpose of his email was to ask for medical evidence of any phobia that would prevent the claimant from carrying out the task. Further, given the context of this email; namely, that the claimant had said he would resign if he needed to carry out this task but he had not provided any evidence of the alleged phobia the email, as well as not having the purpose of creating the prohibited environment, could not reasonably have created that environment.

In March / April 2020 expecting the claimant to "hand wash the respondent's kitchen" when the dishwasher did not work (para 3.1.3)

182. This expectation was in February 2020 rather than in March/April 2020.

183. As already explained above, the claimant and the Site Security Officers were asked to wash up the mugs because the dishwasher was broken and that task needed to be carried out. The request had nothing to do with and was unrelated to the claimant's race. Further that request did not have the purpose of and could not reasonably have created the prohibited environment.

<u>Commence disciplinary proceedings against the Claimant in August / September 2020 concerning an alleged breach of security procedures relating to keys (para 3.1.4)</u>

184. The commencement of the disciplinary proceedings were unrelated to race for the reasons already given in relation to the equivalent allegation of direct discrimination (para 2.2.6). Further and in any event, that request did not have the purpose of and could not reasonably have created the prohibited environment. The respondent had reasonable grounds for commencing the proceedings and the claimant should reasonably have understood that fact.

<u>In the grievance hearing of 2 October 2020, Mr Newton "denied the claimant the privilege of hearing his view to defend of unauthorised deduction from wages claims" (para 3.1.5)</u>

185. The grievance meeting on 2 October was arranged to deal with the claimant's first and second grievances that related to the investigation and disciplinary process. Its purpose was not to deal with any allegation of an unlawful deduction from wages and the fact that Mr Newton did not allow the claimant to raise that issue in the meeting was unrelated to claimant's race and in any event did not have the purpose of and could not reasonably have created the prohibited environment. The claimant should reasonably have understood that any issue relating to wages was not being dealt with by Mr Newton as he was dealing with the first and second grievances.

Victimisation

186. The grievance of 13 September 2020 was not a protected act – it contained no reference to the EqA 2010 or to discrimination of any sort.

187. The grievance of 19 September 2020 was a protected act because the claimant alleged that the disciplinary matters had been escalated because he was black.

188. The two detriments relied upon are: (1) declaring the claimant was "AWOL" on 23 October 2020 (para 4.2.1); and, (2) not giving the claimant the evidence of CCTV footage from 5 August 2020, during the period of October to December 2020 (para 4.2.2).

189. Mr Newton did not record claimant as AWOL in October 2020 because of claimant's protected act. Mr Newton did so because, as set out above, the claimant had not informed him or HR that he would not be attending work for the relevant shifts and although he had told Ms Anderton that he would be absent he had not given any reason for the absence at that time.

190. The respondent did not give the claimant the CCTV footage because any such footage had not been considered as part of the investigation and, in any event, the claimant had not requested it at the time. This therefore had nothing to do with the claimant having done a protected act and, further, the claimant has not established that there was any detriment. The claimant had admitted to mistakes on his part in respect of the missing keys incident and the claimant has not established the relevance of any CCTV footage or what it would have shown.

Whistleblowing

Time limit

191. The one detriment relied upon is the claimant being threatened with disciplinary action on 17 March 2020 (para 6.1.1) – this supposedly being in relation to the claimant saying he could not open and close the partition doors due to a phobia, his statement that he would have to resign if he had to perform that work and and Mr Newton's email of that same day at 14:29 [p.149].

192. This detriment took place over six months before the claimant contacted Acas. Further, there is no evidence to suggest that it was not reasonably practicable for the claimant to have submitted a claim within the three-month limitation period. Accordingly, this claim is brought out of time and the Tribunal does not have jurisdiction to consider it.

193. In any event, the claim would have failed for the reasons set out below.

Analysis of the whistleblowing claim

194. In respect of the alleged qualifying disclosure in October 2019 (para 5.1.1.1), the claimant did not complain about not receiving the correct rate of pay. The claimant's email of 28 Oct 2019 simply said: "*I don't understand this message, what would have been my actual October salary*".

195. This was not a disclosure of information that tended to show one of the matters set out in s.43B of ERA 1996 – nor could the claimant reasonably have believed it was in the public interest. As such it is not a qualifying disclosure.

196. The other alleged qualifying disclosure is the claimant's email of 21 February 2020 to Mr Newton regarding the dishwasher (para 5.1.1.2). That email contains no information relating to the safety of the dishwasher. The claimant was simply stating that it was not working and asking for it to repaired or replaced. Again, this was not a disclosure of information that tended to show one of the matters set out in s.43B of ERA 1996. In particular, there was no information that tended to show that that the health and safety of any individual has been, is being or is likely to have been endangered – nor could the claimant reasonably have believed it was in the public interest.

197. Further, and in any event, the alleged detriment did not in fact occur because, as already explained, Mr Newton did not threaten the claimant with disciplinary action on 17 March 2020 and, moreover, that email was unconnected to either of the allegedly protected disclosures.

Conclusion

198. For all these reasons the claims are dismissed.

APPROVED BY:

Employment Judge Margo

25 February 2025

REASONS SENT TO THE PARTIES ON
27 February 2025

…………………………………………………..
FOR THE TRIBUNALS