# EMPLOYMENT TRIBUNALS

**Claimant:** Mr N Igiehon

**Respondent:** Nationwide Care (Finchley) Limited

**Heard at:** Watford Employment Tribunal (In public; In person)

**On:** **7 to 11 April 2025**

**Before:** Employment Judge Quill; Ms A Brown; Ms S Johnstone

**Appearances**
For the Claimant: Mr T Atanda, unregistered
For the Respondent: Ms V von Wachter, counsel

The written judgment having been sent to the parties on **23 April 2025** and written reasons having been requested, these are those reasons.

# WRITTEN REASONS

**The Hearing and The Evidence**

1. We had three written witness statements on the Respondent' side and one on the Claimant's side.

2. The Respondent's witnesses were:

2.1 Farah Yatally

2.2 Nick Berlevy

2.3 Olufemi Taylor

3. Ms Yatally and Mr Berlevy describe themselves as co-founders of the Respondent and they are a married couple. Mr Taylor worked for the Respondent.

4. The Claimant was the only witness on his side.

5. We had a bundle originally numbered up to page 606. During the course of the hearing, some further items were disclosed, being a three page job description numbered 607-609 and an invoice dated 30 August 2022 which was number 610.

6. For whatever reason, the full form ET1 was not included in the hearing bundle. The missing pages were accessed from HMCTS records and added to the bundle

7. On Day 1, we had a strike out application from the Claimant's side and refused it. Our decision was firstly, that it was not true that the Respondent had breached the unless order. Secondly, it was not appropriate to strike out under rule 38. Our reasons were given at the time.

8. We received a strike out bundle from the Claimant's side and a strike out bundle from the Respondent's side and returned those documents to the respective parties after we had made the decision on strikeouts. However, during cross-examination, it became apparent that the Claimant's representative wished to refer to some documents that were in the strike out bundle (and not the main bundle), and so we allowed that, and we took back a copy of the Claimant's strike out bundle.

9. References below to [Bundle XXX] are to page XXX from the main bundle.

**The Litigation and the Issues**

10. We are not going to go through in detail everything that happened in the history of the litigation, and in particular, we are not going to comment on all the correspondence between the parties. Suffice it to say that there had been two preliminary hearings previously.

11. The first was a case management hearing by telephone before Employment Judge Tobin.

    11.1 The parties' respective representatives at that hearing were the same as at the final hearing. The document is in the hearing bundle at [Bundle 38a]

    11.2 In that document, EJ Tobin set out what he thought the issues were based on the claim form and he also stated that he believed that there was a draft list of issues.

11.3 After receiving that document, the Claimant's representative wrote to the tribunal with a copy to the other side on 21 September 2023.

11.4 One of the points made was that the Claimant's representative did not think that EJ Tobin's summary and orders document should be included in the final hearing bundle. Although there was no cross examination on that point, that does mean that paragraph 49 of the Claimant's witness statement is unfair to the Respondent's representatives.

11.5 More relevantly, the letter asserted that the proposed list of issues that EJ Tobin had referred to was not merely a draft but was something that had already been agreed between the parties.

12. That is the list of issues document that appears at [Bundle 39] and on Day 1. The Respondent confirmed that it was an agreed document.

13. As noted by EJ Tobin, it had been his understanding that there were two possible suggested complaints of protected disclosure detriment within the Grounds of complaint. As we pointed out on Day 1, there were no detriment complaints in the list of issues and, in the circumstances, we would proceed on the basis that that was intentional. That is, that the parties' (and most specifically, the Claimant's via his representative) stance was that EJ Tobin was wrong and the list of issues document was right.

14. We pointed that out again on Day 3 that there were no Employment Rights Act detriment complaints to correspond the respective automatic unfair dismissal complaints before us, according to list of issues.

15. On Day 4, during closing submissions, the Claimant's representative confirmed that:

15.1 it was **not** the case that detriment claims had been brought and should be treated as being dismissed on withdrawal, but

15.2 it **was** the case that, while the word "detriment" had been used in the claim form, the Claimant had only intended those paragraphs to be by way of background information supporting his argument that there had been an automatic unfair dismissal.

15.3 Therefore, there were no the Employment Rights Act detriment complaints for us to decide.

16. We also pointed out on Day 1 that one of the things mentioned in the claim form was about holiday pay, and that - since this was also in the Claimant's witness statement – it seemed that, as far as the Claimant was concerned, it was a complaint for us to resolve even though it was not mentioned in the list of issues.

17. The Claimant's representative confirmed that it was intended that we would deal with the holiday pay claim. There was no objection from the Respondent to adding that to the list of issues.

18. In due course, that complaint was resolved by consent

19. On Day 3, we raised with the parties that the box for notice pay had been ticked in the claim form and queried whether that was a claim that we had to deal with. We gave the Respondent's representative the opportunity to take instructions. We said we would hear each side's respective arguments about it during closing submissions, and make a decision about whether such a complaint had been presented (and, if not, whether an amendment would be allowed) as part of our substantive deliberations).

20. Our decision was that there is a live claim alleging breach of contract by failure to give notice, and we have therefore decided that complaint on the merits.

## The Findings of Fact

General Points about Credibility

21. We make the following findings of fact on the balance of probabilities having considered all of the evidence presented during the hearing.

22. We have assessed the evidence as a whole, taking into account both the inherent plausibility of things asserted by witnesses, and how the witnesses' assertions compare to what was written in contemporaneous documents

23. Where we have decided that something a witness said was on the balance of probabilities not accurate. It does not automatically follow that the witness was lying.

24. Paragraphs 15 to 22 of Gestmin SGPS S.A. v (1) Credit Suisse (UK) Limited (2) Credit Suisse Securities (Europe) Limited [2013] EWHC 3560 (Comm) contain a useful summary of the factors that can potentially cause a witness to believe that they have a genuine and accurate recollection of a particular event or incident, but where, in fact, unbeknownst to the witness the memory is inaccurate.

25. That being said, where there is a particular alleged act or omission upon which one of the complaints is based, we do have to make a finding of fact - on the balance of probabilities - about whether the act/omission did occur or not. We could not avoid making that decision even if we wanted to.

26. We can only base our decision on the evidence that is available to us. When there is no contemporaneous documentary evidence, our decision has to be based on one witness saying that the incident did happen and the other witness

saying that it did not happen. In such a situation, when we have to decide which account is more likely to be accurate, one of the things that we can take into account is whether we have found the respective witnesses' evidence to be accurate on other matters.

27. It might therefore be that we have to make a decision about whether a witness lied about one particular incident (for which we think there is strong evidence) in order to assess the likelihood of that witness having lied about another incident (for which neither side has corroboration other than it being one witness's word against another).

28. We do of course, take into account that even if we decide a particular witness lied about one particular matter, then it does not follow that they lied about everything in their statement / oral answers.

29. Similarly, where we decide that a witness's evidence was inaccurate, then, regardless of whether that was an innocent mistake or a deliberate lie, it does not follow that that the witness's evidence was inaccurate on all other points.

30. However, lies and inaccuracies on one or more matters are things that that we potentially take into account when assessing other parts of that witness's evidence

31. For the reasons we will explain in more detail, we have decided that the Claimant has been deliberately dishonest when asserting that he never contacted Solaris Property for any reason. Our finding is that he did contact them. We do not think that he did, and had then forgotten about by the time of this hearing. If he did it at all (and we find that he did), then it was not long prior to 22 August 2022. When he was dismissed on 22 August 2022, one of the reasons given was that he had allegedly contacted another organisation and we are satisfied that his contact with Solaris was fresh in his mind at the time. We accept that the specific name of Solaris is not mentioned in the dismissal letter, nor in the grounds of resistance. However, if Solaris is the only organisation contacted by the Claimant, he would have known that Solaris was the contact which the Respondent was talking about. If (contrary to the Claimant's denials), he had contacted several different organisations of which Solaris was only one, then he, the Claimant, would not have known that Solaris was the specific organisation which had come to the Respondent's attention. In those hypothetical circumstances, even if he did not remember the name of every organisation he contacted (if there were many) then he would certainly remember that he had been making many such calls, and his denial would be deliberately false.

32. The Claimant's denial of having contacted any third party (whether that be named Solaris or otherwise) is not truthful, because he did contact Solaris. We have taken that untruthful evidence into account in our fact finding

33. We find it suspicious that the Respondent has been unable to produce the alleged written agreements referred to in the County Court Claimant, and we have taken that into account.

34. We find it suspicious that, in oral evidence, Ms Yatally stated that documents potentially existed which showed that the Claimant had taken more leave than shown on [Bundle 59]. This was not something mentioned in her witness evidence, but also if such documents existed, then the Respondent would be in breach of its duty to disclose them. We received a purported explanation - via the legal representatives - that some documents in the Respondent's former accountant's possession were not accessible to the Respondent because of a dispute between the Respondent and that accountant. However, the County Court claim began in November 2022 and the notice of claim letter was sent to the Respondent on 20 December 2022, and it filed a response in January 2023. Even apart from this employment tribunal litigation, if such documents did exist, then the Respondent had ample opportunity to obtain them, even if that required an order from the County Court and/or the Employment Tribunal. For avoidance of doubt, we are not necessarily persuaded that the documents could not have been obtained in the absence of such an order; we are merely saying that, even if it is true that the accountant was refusing to voluntarily supply documents to the Respondent, the Respondent still could have obtained them, disclosed them to the Claimant and placed them in the hearing bundle.

35. We also find it suspicious that the two directors each referred to an invoice of around £16,000 in their respective witness evidence, but such an invoice was not disclosed until after Ms Yatally had been cross-examined.

35.1 Mr Berlevy was on oath overnight and provided a copy of a documents on Day 3 of the hearing which was said to be the item which Ms Yatally and he had had in mind.

35.2 That assertion was slightly inconsistent with paragraph 21 of his written statement because the invoice date was 30 August 2022, and he said it had been received by the Respondent while he was away in Mauritius. We accept his assertion that he did not usually personally deal with invoices; however, that still implies that his written statement was not prepared with sufficient care as to the accuracy of the contents.

35.3 More relevantly, however, we do not see how the evidence can be reconciled with paragraphs 26 and 27 and 28 of Ms Yatally's witness statement. This is because she claims to have received the invoice on 19 August 2022 which was a Friday and to have spoken to the Claimant about it, and she gives a specific account of what his alleged response was.

36. At paragraph 10 of her witness statement, Ms Yatally says she felt bullied by the Claimant. The Claimant's representative suggested that, in fact, this was a reference to the way she felt about the alleged protected disclosures. We reject each of those points. The contemporaneous written correspondence demonstrates that, as Ms Yatally said in oral evidence, Ms Yatally and the Claimant were on reasonably good terms. They were professional work colleagues and Ms Yatally felt that she could speak frankly to him in the WhatsApp messages, including criticising other people. It is clear that Ms Yatally was not worried that the Claimant might go behind her back and let other people know what she said about them. Our finding is that Ms Yatally was not at all intimidated by the Claimant and that she has made deliberately false assertions about having felt bullied.

37. Paragraph 32 of Ms Yatally's witness statement is extremely misleading. When cross-examined, it transpired that the relevant matter was about a year after the end of the Claimant's employment, give or take a few months. Either way, it was not about somebody who had been a service user of the Respondent's but rather it was a service user of a different organisation whom the Respondent had hoped would transfer from that organisation to the Respondent. Our finding is that this was a deliberate attempt to mislead the Tribunal into thinking that that the Claimant was actively seeking to poach the Respondent's clients, and that he had done so either during or not long after his period of employment.

38. There were various challenges made by the Claimant's representative in relation to Mr Taylor's evidence.

    38.1 Ultimately, our assessment that what Mr Taylor says is only relevant to the credibility issues in relation to each of the other three witnesses. He has no important evidence that is directly relevant to the substantive issues that we have to determine.

    38.2 At one extreme, if Mr Taylor's evidence is entirely accurate, and all the assumptions and interpretations he made were correct, and if everything Isidore Omijeh (Mr Omijeh) said to Mr Taylor was true, then the Claimant was guilty of very unreasonable conduct of the litigation with the deliberate intention of preventing a fair trial of these employment tribunal proceedings.

    38.3 That being said, even if much of what Mr Taylor said was accurate, it could be true that only Mr Omijeh (who has not given evidence, and who has therefore not had the opportunity to respond to, or comment on, Mr Taylor's accusations) was involved in an attempt to create false evidence, and that the Claimant was unaware of Mr Omijeh's conduct.

    38.4 At the other end of the spectrum, if Mr Taylor was lying and Mr Omijeh never sought to get Mr Taylor to send an untrue letter to CQC, or make a false

claim to the Tribunal, then that might imply that Mr Taylor had conspired with the Respondent's directors (or someone else acting on behalf of the Respondent), with the deliberate intention of preventing a fair trial of these employment tribunal proceedings.

38.5 However, even if much of what Mr Taylor said was a lie, it could also be true that only Mr Taylor was involved, not the Respondent, and that the Respondent was simply duped into believing him.

39. It is sufficient to say the following.

39.1 We believe Mr Taylor when he says that he did not receive a written contract from the Respondent when he first started working for the Respondent. He only received one when there was going to be an application by Mr Taylor in connection with his immigration status which the Respondent was going to support.

39.2 Neither side has presented sufficient evidence that the other side conspired with Mr Taylor – or sought to conspire with Mr Taylor – to attempt to thwart a fair trial of these proceedings, or to commit perjury, or to create false documents.

39.3 We will say that Mr Taylor's account is undermined by the WhatsApp trail in the Claimant's strike out bundle. As a minimum, that shows – as the witness accepted in cross-examination – that he sent a version of the document on [Bundle 529a] to Mr Omijeh on 15 March 2023. That is an important fact not mentioned in his written statement.

39.4 Furthermore, even on the hypothesis that Mr Omijeh did create a template, and Mr Omijeh sent a template to Mr Taylor, it is implausible that Mr Taylor would have returned the document by WhatsApp to Mr Omijeh (with some additional information added) if everything in Mr Taylor's written statement was true. Mr Taylor's assertion is that he rejected Mr Omijeh's offer out of hand, and wanted nothing to do with it. On any view, that assertion is inconsistent with the fact that he sent the 15 March 2023 message.

39.5 Since Mr Omijeh has not come to give evidence, we are reluctant to place too much weight on what the Claimant's side suggests that we should infer about "missed calls" in the WhatsApp extract. Even on the assumption that this is evidence that Mr Taylor did call Mr Omijeh on 9 and 11 January, and on 15 March, that assumption does not add much to what is stated in the previous subparagraph.

39.6 We cannot infer from these "missed calls" (even on the assumption that, as the Claimant's representative suggests, they were evidence of Mr Taylor trying to contact Mr Omijeh) that it is definitely false that Mr Taylor was

offered the inducements he mentioned in his evidence. Rather the arguments about (allegedly) missed calls in January do not lend weight to either side's case, whereas a missed call on 15 March 2023 would be just as consistent with having been offered the inducement, and being willing to contemplate it, as with the theory that the document on [Bundle 529a] does genuinely represent something that Mr Taylor wrote of his own initiative (and because it was true) rather than something produced as part of a collaboration with Mr Omijeh (containing assertions which Mr Taylor did not believe to be true).

40. We are entirely satisfied that paragraph 10 of Mr Taylor's written statement is false. Further, there was a failure by the Respondent to obtain from Mr Taylor, and to disclose to the Claimant (prior to Mr Taylor's oral evidence) the email purportedly from Mr Omijeh or the Whatsapp exchange. That being said, the letter of 27 March 2023 (Strike Out Bundle: page 41) makes it abundantly clear that, two years ago, Mr Atanda and the Claimant had knowledge of the Respondent's allegations, and had sight of the portion of the Whatsapp exchange that is in the Strike Out Bundle. The Claimant did not receive the Whatsapp exchange from the Respondent, but he had the opportunity to seek it from Mr Omijeh and check the whole of it. He also had the opportunity to ask Mr Omijeh to attend as a witness in these proceedings.

41. It is clear that the Claimant cannot seek to argue that Mr Taylor's evidence is a recent fabrication, and nor can he argue that he has been taken by surprise by the assertions made.

42. Ultimately, the Respondent, despite having full knowledge – from the 27 March 2023 letter from Mr Atanda to the Respondent's representative – of the Claimant's stance on the matter, has failed to satisfy us that the assertions made by Mr Taylor are true. That is the only firm conclusion we need to make about Mr Taylor's account in order to make findings of fact on the substantive issues.

Background

43. The Respondent is a limited company. Two of its directors are Ms Yatally and Mr Berlevy who were two of its witnesses. They are husband and wife.

44. It was incorporated in September 2019. It is a supported living organisation and it provides care and support to vulnerable people and those who are severely disabled.

45. Mr Berlevy's role largely is acquiring properties and converting them into supported living homes. His prime focus is on business growth and expansion.

46. As mentioned in paragraph 1 of the Grounds of Complaint, the Claimant identifies as a black Nigerian male.

47. Ms Yatally had worked in the care industry prior to the incorporation of the Respondent. She was previously familiar with a company called Gem Corporations Ltd.

48. One of the individuals associated with Gem Corporations Ltd ("Gem") was Isidore Omijeh. The Respondent had a business association with Gem and Mr Omijeh and was an important point of contact between the Respondent and Gem.

49. The Respondent's business model is that it has direct employees on zero hours contracts. When it has work for them to do, it allocates shifts to those employees. However, when it requires work to be done and - for one reason or another - it does not have a suitable employee available to cover a particular shift, it used Gem to supply staff to provide emergency cover, and Gem would invoice the Respondent for those staff.

50. The Claimant and Ms Yatally knew each other from when the Claimant was working elsewhere as a registered manager. There came a time when the Respondent needed a registered manager (or a new registered manager) and they engaged the Claimant.

51. One of the Respondent's promises premises was Dollis Park. Another one of the Respondent's premises at the time that the Claimant started employment was 1392b High Road, Whetstone.

52. Both in section 5 of the ET1 claim form and also in paragraph 6 of the attached Grounds of Complaint, the Claimant suggests that he started employment with the Respondent on 23 June 2021.

53. In his written witness statement, he stated as of 1 May 2021 his role was ad hoc staff akin to bank staff not as registered manager.

54. In paragraph 12, the Grounds of Complaint he refers to having been employed for 14 months. Since it is common ground that his employment ended at the end of August 2022, that would also imply a start date around the end of June 2021.

55. The Claimant was actually employed in May 2021. He accepted in oral evidence that his employment began around 1 May. The payslip at [Bundle 44] shows that, for pay date 28 May 2021, he received £2500 basic pay. That would imply an annual salary of £30,000, if £2500 is the payment for 1 to 31 May 2021.

56. The only two payslips that we have in the bundle are that one and – at [Bundle 601] - the payslip of August 2022.

57. We accept that paragraph 15 of the Grounds of complaint was intended as a reference to the fact that the Claimant had been employed in May and June prior

to the production of the document on [Bundle 45] which was CQC's certification that Claimant was the registered manager.

58. We also accept that paragraph 15 of the Grounds of complaint is misleading, as it suggests that the Claimant first began employment in a different role entirely on an ad hoc zero hours contract, and it was only as a result of a suggestion by the CQC that he became appointed as registered manager. He had been registered manager elsewhere and we accept it been the Claimant's and the Respondent's common intention that he would work as a registered manager for the Respondent. During this hearing, it was the parties' shared position that the Claimant could not technically/formally be a registered manager until this CQC certification was obtained. We do not need to decide if the parties are correct about that, but that was their joint and mutual understanding of the situation.

59. In the Grounds of Complaint, the Claimant says he was notified of working hours, 40 per week, 8am to 5pm Monday to Friday with salary being £3083 per month plus £200 bonus. So that would be £36,996, or approximately £37,000 per year with the Claimant's contention that there was to be £2400 bonus on top of that.

Alleged Written Contract

60. There is a document in the bundle which purports to be the Claimant's contract of employment. It starts at [Bundle 47].

61. The Claimant flatly denies that he received this document at any time whatsoever.

62. On the face of the document, it says it is dated 30 April 2021 and that the period of employment starts on 1 May 2021. On the last page of the document, [Bundle 56], it is signed by Mr Berlevy. The signature is not dated. The space for the Claimant's signature is blank. Neither side alleges that the Claimant signed it.

63. In the grounds of resistance and in closing submissions, it is asserted that this document was handed to the Claimant on the first day of employment.

64. In paragraph 5 of his written statement, Mr Berlevy said it was on or around the Claimant's start date.

65. For a short time after the start of the Claimant's employment started, so for a short time around 1 May 2021, the Claimant was based at the Dollis Park office. At this time, the Whetstone office was undergoing some refurbishment. Mr Berlevy owned the entire building at 1392 High Road, but the ground floor had previously been let out as a retail unit and its was being refurbished with the intention of the Respondent operating from the ground floor, having previously and used the upstairs only (1392b) as the respondent company's premises.

66. At various points of his oral evidence, Mr Berlevy was argumentative and appeared more interested in seeking to criticise the Claimant or the Claimant's representative than in focussing on the actual question that had been put, and seeking to give a specific answer to it. We did not find his account of the alleged conversation about a written contract to be convincing.

67. Mr Berlevy asserted that the Claimant was sitting at a desk and that Mr Berlevy handed the Claimant a contract, and the Claimant smiled and said he did not need to sign its and said something about trust.

68. Mr Berlevy first answer was that the Claimant was sitting at "his desk" in head office in other words, Whetstone. Upon being challenged about the fact that the Claimant was based at Dollis Park for the first few weeks of employment, Mr Berlevy changed his answer to say he was not sure which one of the Respondent's several premises the incident occurred in, and he was not sure at whose desk the Claimant had been sitting However, he was sure that the Claimant was at some desk, and sitting down and he, Mr Berlevy had approached the Claimant, and the conversation took place while Mr Berlevy was standing by the desk, with the Claimant seated.

69. We prefer the Claimant's evidence on this point, and our finding of fact is that the document at [Bundle 47] was never given to him or shown to him.

    69.1 We do not think there is any relevance in Claimant's point about the address for the Respondent in the document being Whetstone rather than Dollis Park. Whetstone was still the Respondent's address (or one of them) regardless of the Claimant's place of work.

    69.2 There is also a reference to a different company within the body of the contract at paragraph 11.1(n) [Bundle 52]. That is a previous company that Ms Yatally had been involved in. In itself is fairly neutral as to whether the document was handed to the Claimant. It is clearly a clerical error presumably based on the fact that this is a template borrowed from a different company. The clerical error having occurred around 30 April 2021 is just as likely as it having occurred on some other – much later - date.

    69.3 However, Mr Berlevy's account is inherently implausible and inconsistent with the other evidence.

    69.4 We do not think it is plausible that, if the Claimant had smiled and refused to sign the contract, that the Respondent would have left it at that.

    69.5 Our finding is that Mr Berlevy would have probably taken offence if the Claimant had actually behaved in the manner alleged.

69.6 However, regardless of whether Mr Berlevy would have been offended or not, it makes no sense that, if Mr Berlevy was standing by the Claimant's desk and this interaction happened the way he described it, Mr Berlevy would have walked away holding the document. For that to happen, it would either have to be true that just from the Claimant being told what the document was, the Claimant refused to sign it, and Mr Berlevy walked away with it, without having handed it over, and without the Claimant reading it, or else it would have to be true that Mr Berlevy did hand over the document, stood there while Claimant at least glanced at it, and then was willing to accept it back, unsigned, with the Claimant saying that he was not willing to sign it.

69.7 We find it is implausible that the Claimant would not have wished to read the document if Mr Berlevy was stating the document was a contract of employment. The Claimant would have wanted to know what the document said about salary, hours of work, etc, to see if he thought it was accurate.

69.8 The Respondent points out – correctly - that it operated in a regulated industry. It asks us to infer from that that it is likely that they would have given a written contract to the Claimant.

69.9 In fact, what we do infer, is that if it was true that the employer had gone to the trouble of creating a written contact, and had given that contract to the Claimant and told him to sign it, then the Respondent would not have reacted in the manner described by Mr Berlevy to the Claimant's alleged refusal to sign.

69.10 If the Claimant had refused to give a signed copy to Mr Berlevy, then our inference is the Respondent would have decided that it needed to have some evidence of the contract having been issued. Possibly it would have taken steps to try to force the Claimant to sign it and return it. However, as a bare minimum, if the Respondent had in mind that it was a regulated industry, and proof of employment contracts was important, then it would have sent him the contract by email so that there was documentary evidence that it had been supplied.

69.11 Our finding is that the reason that there is no electronic evidence of the document having been supplied, and the reason that there is no signature on the document, is that it was not given to the Claimant or shown to him at any time.

70. The Claimant was given a job description in June and he did sign it. For one thing, this undermines the Respondent's assertion that the Claimant was in some way reluctant to sign documents about his employment. Furthermore, this was an opportunity for the Respondent to have the employment contract signed, had the Claimant actually refused to sign it in May.

Loan

71. The parties agree that there was a loan made by the Respondent to the Claimant and throughout the pleadings and witness statements that has been referred to as a loan of £8000 exactly.

72. For example, in paragraph 16 of the Grounds of complaint, the Claimant states that the loan was £8000 and also states that he offered to repay at a monthly rate of £800.

73. The Claimant does also assert that he only had to pay £800 per month for so long as he was employed. However, whereas his written witness statement simply says that he was happy to repay at £800, our decision is that it was not the case that first, the Respondent started deducting £800 per month (without agreement) and second the Claimant decided not to object. Rather, our decision is that the parties agreed orally (or at least we have no written record of any written agreement in the evidence presented to us) that the loan payment would be made on the basis that the Claimant would have £800 per month deducted from his salary to repay the loan.

74. [Bundle 534] is a document created after the end of the employment, and after the parties were in dispute. It contains the Respondent's assertions about what the loan was and what the repayments for the loan were. According to that document, the Claimant received two payments, one of £7200 and one of £1000. So that would be a total of £8200. When the Respondent made its county court claim (in around November 2022), it stated a figure similar to that on [Bundle 534] as the outstanding amount. So, to summarise, according to [Bundle 534], the assertion is:

    74.1 An aggregate loan of £8200 was made.

    74.2 There were two repayments of £800 each by deducting those sums from the Claimant's June and July payments.

    74.3 There was then a further "repayment" by the Respondent deducting £2304.08 from the Claimant's August 2022 salary.

    74.4 Thus the outstanding amount (according to the Respondent) was £4295.92 (being £8200 minus aggregate repayments of £3904.08).

75. A curious feature of the document is that the £1000 part of the loan was supposedly made (i) two months after the first tranche of the loan and (ii) after the first two repayments of £800 each had been taken. However, we do not need to resolve that (and the parties did not supply specific evidence about payment dates).

76. It is not necessary for our decision to decide whether the amount that was loaned to the company to the Claimant by the company was £8200 or £8000. But we will refer to an £8000 loan for ease of reference, because that is what the witnesses described.

77. The circumstances were that the Claimant requested the loan and he offered in writing and to repay £500 per month by way of deductions from his salary. He also agreed that those deductions could commence from May 2022.

78. In fact, the Respondent says in the county court claim that there were two written agreements about the loan, and that these were dated respectively 4 May and 14 May (according to what is in the county court document).

79. Mr Berlevy says he cannot remember what those documents say, and nor could he give a clear explanation for why they have not been produced during this litigation other than to say that he thought that they had been.

80. The Respondent's legal representatives informed the Tribunal that they have not received them.

81. In any event, on the Respondent's own case, those alleged written documents were only that confirming that £500 per month deductions would be made, not a higher amount.

82. It is the Respondent's case that what led to the decision that £800 per month not £500 would be deducted was the document on [Bundle 58]. That is dated 27 May 2022 and is an email from the Respondent's accountants to the Claimant, Ms Yatally and Mr Berlevy explaining that a loan would have to be repaid within a year to avoid the company having to pay interest. A loan of £8000 or £8200 would take more than a year to repay at £500 per month.

83. It is not clear what direct question to the accountant prompted the response. It came about a month after the Claimant's email to Ms Yatally on 26 April 2022, which had said:

> Hi Farah,
>
> Following our previous discussion on the matter, Can I use this opportunity to formally request for a loan of £8,000.00 (Eight Thousand Pounds only). This is to enable me complete the renewal of my family's visa and working status in the UK.
>
> I will repay this by deductions of £500.00 (Five Hundred Pounds only) from my monthly pay commencing from May 2022.
>
> Your support in this matter is highly appreciated.

84. Our decision is that orally (at least) the Claimant he agreed with the Respondent that if they made the loan to him, the deductions would be £800 per month.

85. Even to the extent that it is argued that there was no formal agreement in advance of the deductions, the deductions started at the rate of £800 per month in both June and July. On the Claimant's own case, his reasons for not challenging those deductions when they were made is that he was happy with that amount.

Torkan Care Ltd ("Torkan")

86. A company named Torkan Care Ltd was incorporated on 28 June 2022, according to the documents in the bundle.

87. The Claimant was one of the shareholders owning approximately 30% of the company, and he was also appointed as a director.

88. One of the other directors was Mr Omijeh.

89. The registered office address is stated in the registration documents, and we accept Mr Berlevy's evidence that that address is only a couple of miles or so from the Respondent's head office

90. As per [Bundle 586], the principal activity is described as social work activities without accommodation for the elderly and disabled.

91. At paragraph 1 of the key responsibilities in the Claimant's job description for the Respondent's it was stated that it was for the Claimant to ensure the provision of high-quality supported living car services to vulnerable people living in the Respondent's premises.

92. We take into account that Torkan's companies house documents referred to "without accommodation" and that the Respondent's activities included accommodation, but taking the evidence as a whole it is our finding that the company set up by the Claimant was going to be performing similar activities to those of the Respondent.

93. Within the Claimant's job description, it stated the "purpose of the position" was:

> To manage and grow an effective and efficient home care service within a defined geographic region, through a team of suitable, qualified and supported staff, to the economic benefit of Nationwide Care.

94. It was put to the Claimant, and he accepted, that he had never been told that the Respondent would carry out work only in Barnet.

95. The Claimant states that it was his intention that Torkan would only operate in Hertfordshire and Harrow, and he did not believe therefore that it was in competition with the Respondent.

96. Our finding is that, while the signed job description refers to "a defined geographic region", there had no agreement as to which specific areas the Respondent might operate in, or into which the Claimant might assist the Respondent to "grow".

97. It is common ground that the Claimant did not inform the Respondent either that he had set up this company or that he was going into business with Mr Omijeh.

98. The Claimant states that the company had not yet started trading and he believes that there would have come a time when he would have told the Respondent about this company.

99. The Claimant's position in the litigation appears to be that he thought that potentially once Torkan was operating and perhaps after he had informed the Respondent about it, it would have been feasible and legitimate for him to be a registered manager for both companies.

100. Taking the evidence as a whole, we do not believe that the Claimant's intention was to work for both companies. We are satisfied that he and Mr Omijeh were putting things in place so that Torkan could become operational. We are satisfied that it was the Claimant's intention that, when Torkan became operational, he would leave the Respondent and work for Torkan.

Solaris Property Ltd / Solomon James

101. We accept Mr Berlevy's testimony that – unexpectedly - on Saturday 20 August 2022 – he got a call from someone and that he asked that person to send an email to confirm what they had told him on the phone.

102. The email he received was [Bundle 521]. It had subject line of "3 viewings available in the week beginning 22/08/22", and the signature stated it was from "Solomon James, Head of Sourcing, Solaris Property Ltd" and it read:

> Nick just to confirm your business partner Nosakhare Igiehon expressed desire to expand your supported living business via the acquisition of properties (although he did not specify whether for purchase or let.) Nonetheless, we have a number of high quality properties available both for let and purchase.
>
> Could you please read and sign the NDA I am about to send so that I can send you specific deals as it maintains a level of professionalism and outlines the nature of this potential collaboration.

103. The email expresses that Mr James and the Claimant had actually spoken. Therefore, on balance, this was not simply a cold call made to Mr Berlevy by someone who had obtained the Claimant's name and the Respondent's phone number by their own research and who was calling the Respondent for the first time.

104. We say this because, while cold calls are sometimes made to drum up business, and while misleading tactics are sometimes used to get a conversation started, it is not likely to be a successful sales tactic in general to falsely tell the person who does answer the phone (in this case, a director) that there had already been a conversation with another specific person with an identifiable name. That is a point that can easily be checked, and if the Respondent's director were to decide that Solaris was telling a bare-faced lie, they be would unlikely to do business with Solaris.

105. To the extent that it is argued that the email is a forgery, we reject that. Companies House documents in the bundle show that Solaris Property Ltd does exist and that someone named Solomon James is connected to it. The Claimant and his representative have had ample opportunity to investigate and to seek to produce positive evidence that the document is a forgery.

106. To the extent that it is argued that Mr Berlevy persuaded Mr James to send an email with a concocted story (in order, presumably to create a pretext to dismiss the Claimant), we reject that. The Respondent did not need a pretext to dismiss him (subject, at least, to the Claimant's protected disclosure arguments which we discuss in the analysis) because he did not have two years' service. The Respondent's only saving would be avoiding costs of giving notice (or payment in lieu of notice) instead of summary dismissal.

107. Our finding is that Mr Berlevy's account of what Mr James said on the phone is sufficiently accurate, and the reasons for Mr James phoning the Respondent that day, are that the Claimant had previously contacted him, and this was a call back.

108. We do not know exactly what was said when the Claimant phoned Mr James, but clearly the fact that the Claimant currently worked for the Respondent was one of the points mentioned.

109. It is possible that the Claimant contacted Mr James during working hours and also possible that he so in a lunch break. The Claimant's working days were Monday to Friday. On balance of probabilities, the Claimant was at the Respondent's work premises when he made a call to Mr James. He wanted to be called back, so he gave Mr James the Respondent's landline number expecting that the call back would be between Monday and Friday, and he would be there to answer it.

110. However, Mr James phoned the Respondent's number on a Saturday, when the Claimant was not working. Mr Berlevy was working, answered the phone, and they had a conversation.

111. What we have just described is not necessarily the only possibility for how Mr James got the phone number which he used which resulted in the conversation

between Mr James and the Claimant, it is just the possibility that we think is most likely. For completeness, if the Claimant did not give Mr James that phone number, then at least one of the following would have to be true:

111.1 The Claimant used the Respondent's landline to make the call, and Mr James made a note of the number from "caller display", and/or

111.2 The Claimant told Mr James that he was calling on behalf of the Respondent and Mr James performed some search for the Respondent's landline number.

112. However, on balance the Claimant probably did give the Respondent's landline number to Mr James, because if he had instead supplied only his own personal number, then Mr James would probably have used that number to contact the Claimant.

113. We have rejected the Claimant's evidence that he never contacted Mr James at all. It follows, therefore, that the Claimant has not provided an innocent explanation for why Mr James phoned him on the Respondent's landline number. That is, if it is hypothetically true that the Claimant phoned Mr James on his own time, the Claimant has not given an innocent explanation for (i) the fact that he must have told Mr James that he worked for the Respondent and/or (ii) that Mr James called him back on the office landline and/or (iii) Mr James' understanding of the situation, as conveyed by Mr James to Mr Berlevy.

114. Regardless of whether Mr Berlevy first spoke to Ms Yatally and then phoned Solaris back and asked for an email to be sent, or whether Mr Berlevy spoke to Ms Yatally after he had received the email from Solaris we accept that the email from Solaris is genuine.

115. The email was not dictated by Mr Berlevy but it contained Mr James own choice of words.

<u>Decision to Dismiss the Claimant</u>

116. The email from Solaris, prompted Mr Berlevy and Ms Yatally to look into the Claimant by carrying out internet searches.

117. They discovered Torkan Care Ltd. The combination of what Mr James had said and the existence of Torkan Care Ltd led them to believe that the Claimant was making arrangements to set up a rival business.

118. They decided that they would dismiss the Claimant's

119. They prepared the letter that is on [Bundle 522].

120. We accept Mr Berlevy's evidence that he was not physically scared of anything that the Claimant might do to him when he handed the Claimant the letter, which they planned would happen on the Monday, 22 August 2022.

121. Mr Berlevy and Ms Yatally had discussions over the weekend. They were now suspicious about the loan, and wondered if the purpose had not been so that the Claimant could pay to assist his family move to the UK, but so that he had funds to start the rival business. During these discussions, Ms Yatally told Mr Berlevy that she felt intimidated by the Claimant.

122. Mr Berlevy said to the tribunal that no specific examples were given to him of anything that the Claimant had done, but rather that his wife's account to him had been that the Claimant had made her feel uncomfortable psychologically. In particular, he said that men can intimidate women in many different ways (though he gave no specific examples of anything the Claimant had done), and he said "*he is a big man, and she is a small lady*".

123. Mr Berlevy asked an acquaintance of his named Johnny Mitchell to accompany him to the office on the Monday so as to be present when Mr Berlevy handed the dismissal letter to the Claimant. Mr Berlevy knew that the Claimant was going to be told to leave the premises because his employment was terminated with immediate effect.

124. Mr Berlevy says that part of the reason for asking Mr Mitchell to accompany him was to ensure that Mr Berlevy did not lose his temper and take any kind of violent action towards the Claimant.

125. We do accept that that was part of the reason and as we already said, we do not think that part of the reason was because Mr Berlevy was worried about any attempted assault on him by the Claimant.

126. Ms Yatally was not going to be there and the reason for having Mr Mitchell present was nothing to do with protecting Ms Yatally from any alleged intimidation.

<u>22 August 2022</u>

127. It is common ground that Mr Berlevy met the Claimant and told him he was dismissed with immediate effect. There is a dispute about exactly what was said and done.

128. One of the Claimant's assertions is that he had personal property amounting to an estimated £500 and he was prevented from taking with him. We reject that. Our finding is that the Claimant had the opportunity to take his personal belongings with him and, furthermore, it is common ground that having left the

premises promptly after being dismissed, he returned a short time afterwards to hand over the keys and/or the work phone.

129. In the Grounds of Complaint, it is asserted that “heavy security men” were present. In paragraph 42 of the witness statement, the Claimant also uses the word witnesses plural.

130. We accept Mr Berlevy’s evidence in paragraph 37 of his witness statement and confirmed orally that Johnny Mitchell is a personal friend and that he is black, Jamaican and male. He is not someone that the Respondent has used as a security officer, though he has worked as a security officer.

131. We are not going to attempt to make any specific findings about Mr Mitchell’s height, or weight but we do find that the Claimant has exaggerated the situation. The truth is that one person (in addition to Mr Berlevy) was present not several.

132. Our finding is that Mr Mitchell was not there because Mr Berlevy anticipated having to have a physical confrontation to remove the Claimant from the premises.

133. The Claimant asserts that Mr Mitchell was making a video recording on his phone. Mr Berlevy denies that. No video has been supplied to the Claimant during this litigation, and the Respondent asserts that is because such a video was not made.

134. The Grounds of Complaint assert:

> 32) When the claimant objected to this treatment Mr Berlevy insisted it was necessary because the claimant was a big black male and a threat,

135. Neither of these allegations are contained in the Claimant’s written witness statement. The Grounds of complaint was produced in December 2022. That was after the county court claim had been issued. As far as we are aware, the Grounds of Complaint is the first time the allegation was made, and it is certainly the earliest document in the bundle which contains the allegation.

136. The allegations are contained in the list of issues and the Claimant was cross examined about them.

137. An apparently clear account is set out in the grounds of complaint. The Claimant did not give such a clear account during his oral evidence. He could not specifically recollect the exact details of the conversation that surrounded the alleged words, but did stand by his assertion that he had been told he was a big black male and a threat.

138. As the Respondent is aware the Claimant had sought to have Johnny Mitchell attend as a witness on the Claimant's behalf, and Mr Mitchell declined to do so. The Respondent has not called Mr Mitchell or sought a witness order for him.

139. If Mr Mitchell had attended then there are two important disputes between the parties which he could have commented on.

    139.1 One is whether or not he made a video recording of the Claimant and if so, why.

    139.2 The other is whether he heard Mr Berlevy say either that the Claimant was a big black male and/or that the Claimant was a threat.

140. We do not have a video recording to look at and on the Respondent's case that is because none exists. It is therefore slightly circular.

    140.1 If it is true that a video recording was made, then the non-production of it for this litigation would be suspicious. It might show that the Respondent had something to hide.

    140.2 However, of course, that takes was no further because if no recording was made, then that is the full explanation for why no such recording was produced. Given that Mr Berlevy denies using the words in question, it follows that, on the Respondent's case if such a video recording existed then it would actually support the Respondent's position and contradict the Claimant's.

141. We are therefore in the position of having to weigh up the fact that we have rejected the Claimant's evidence on a particular point (namely the contact with Solaris) and we have rejected Mr Berlevy's evidence on another particular point (namely whether a written contract was handed to the Claimant).

142. On Mr Berlevy's own evidence, he was furious on the day in question. We have also taken into account the conversation he had with his wife over the weekend in which she told him that she felt intimidated by the Claimant.

143. On the balance of probabilities, we are persuaded that Mr Berlevy said that the Claimant was a big black male and a threat. Our finding is that he was not cool and calm and collected during the discussion, but rather was angry with the Claimant because of what he saw as a breach of trust, but also because his wife had told him that she felt intimidated by the Claimant.

144. Furthermore, we do accept the Claimant's account that he was video recorded. The suggestion is not inherently implausible in the circumstances. The notion that the Respondent might want some record that the Claimant had not been assaulted during the encounter is not inconsistent with Mr Berlevy's professed

reason for wanting Mr Mitchell to be there. Furthermore, the assertion would be quite a bold invention. If inventing the allegation, he would have had no way of knowing that the Respondent was not going to call Mr Mitchell as a witness. Furthermore, the Claimant has made clear that he did want Mr Mitchell to be called as a witness.

145. To the extent that it was suggested that Mr Mitchell might just have been holding his phone at a particular angle, and that the Claimant mistakenly interpreted that as filming him, we reject that. Our finding is that the Claimant did assert (and object to), at the time, that he was being video recorded. Mr Berlevy did not say that the Claimant was mistaken, but rather supplied the Claimant with an asserted reason as to why the filming was appropriate.

Dismissal Reason

146. The dismissal letter included:

> 1 . It is noted that on the 28th of June 2022 you were appointed director and a 30% shareholder of a limited company Torkan Care Registration number 14200557 at Companies' house and registered as a care company. This action as we see it has created a conflict of interest and leave your position in our company untenable.
>
> 2. We are informed by a separate professional entity of your attempt to acquire supported living properties using The Nationwide Care name and impersonating a Director of this company.
>
> 3. Another conflict of interest is that you are using a staff supply agency to Nationwide care who is also a Shareholder of Torkan Care ltd, Isidore Kayode Omijeh. In addition, there is a manipulation of rotas, giving agency staff more working hours than our own full-time staff.
>
> 4. We now have concerns that the substantial loan taken by you from our company, has been used to open Torkan Care Ltd. This action makes your role untenable with Nationwide care.

147. Our finding of fact Is that the Respondent's directors did believe that all of the accusations written in paragraphs numbered 1 to 4 in the dismissal letter were justified. Those were the actual conscious reasons for dismissing the Claimant.

148. It was not their opinion that the Claimant had raised any matters with them that asserted that either the directors, the company, any of its employees or contractors, or anyone else had breached legal obligations.

149. Furthermore, nothing that the Claimant had written in the WhatsApp exchanges with Ms Yatally was the reason for the dismissal or part of the reason for the dismissal.

150. We comment in the analysis on whether the contents of the exchanges include any protected disclosures.

Pay

151. The documents on [Bundle 601] of the bundle accurately shows that the Claimant received zero for the final months pay for August and accurately shows what it had been calculated as the deduction. At the remedy phase, we will hear evidence about whether or not the amount shown for basic pay was for the period 1 August to 31 August, or for some other period.

**The Law**

Equality Act 2010 ("EQA")

152. The burden of proof provisions are codified in s136 EQA and s136 is applicable to all of the contraventions of the Equality Act which are alleged in these proceedings.

> (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.

153. It is a two stage approach.

153.1 At the first stage, the Tribunal considers whether the Tribunal has found facts - having assessed the totality of the evidence presented by either side and drawn any appropriate factual inferences from that evidence - from which the Tribunal could potentially conclude - in the absence of an adequate explanation - that a contravention has occurred.

At this first stage it is not sufficient for the Claimant to simply prove that the alleged treatment did occur. There has to be some evidential basis from which the Tribunal could reasonably infer that there was a contravention of the act. The Tribunal can and should look at all the relevant facts and circumstances when considering this part of the burden of proof test.

153.2 If the Claimant succeeds at the first stage then that means the burden of proof is shifted to the Respondent and the claim is to be upheld unless the Respondent proves the contravention did not occur.

154. In Efobi v Royal Mail [2021] UKSC 33, the Supreme Court made clear that the changes to the wording of the burden of proof provision in EQA compared to the wording in earlier legislation do not represent a change in the law. Thus when assessing the evidence in a case and considering the burden of proof provisions, the Tribunal can have regard to the guidance given by the Court of Appeal in, for

example, Igen v Wong [2005] EWCA Civ 142 and Madarassy v Nomura International [2007] EWCA Civ 33.

155. As per paragraph 57 of Madarassy, "could decide" in section 136(2) EQA is equivalent to: a reasonable tribunal could properly decide from all the evidence before it.

156. The burden of proof does not shift simply because, for example, the Claimant proves that there was a difference in treatment (in comparison to someone whose relevant protected characteristics were different). Those things only indicate the possibility of discrimination. They are not sufficient in themselves to shift the burden of proof; something more is needed.

157. It does not necessarily have to be a great deal more: Denman v Commission for Equality and Human Rights 2010 EWCA Civ 1279. For example - depending on the facts of the case - an evasive or untruthful answer from a Respondent or an important witness, could be the "something more" that is required. In some circumstances, it may simply be the context of the act itself. In SRA v Mitchell EAT 0497/12, the EAT upheld a tribunal's decision that the burden of proof shifted based on a finding that the employer had given a false explanation for the less favourable treatment. That being said, it is important for us to remind ourselves that the mere fact alone that a Tribunal rejects the employer's explanation for some particular act or omission does not mean that the burden of proof necessarily shifts, see for example Raj v Capita Business Services EAT 0074/19.

158. Recent EAT cases have re-emphasised the importance of actually adhering to the two stage approach set out in section 136. We have taken note of the comments in Field v Steve Pye and Co (KL) Limited and ors [2022] EAT 68 and of the fact that several subsequent EAT decisions have cited those comments with approval.

159. As per Essex County Council v Jarrett [2015] UKEAT 0045/15/0411, where there are multiple allegations, the Tribunal has to consider each allegation separately when determining whether the burden of proof has shifted in relation to each one.

159.1 That does not mean that we must ignore the rest of the evidence when considering one particular allegation.

159.2 The opposite is true. When there are multiple allegations, and/or a lot of facts found as part of the background information, a Tribunal has to stand back and consider all of the evidence in the round to consider whether any inference of discrimination/victimisation should be drawn: see Qureshi v Victoria University of Manchester. There must be no failure to consider 'the

bigger picture', as it was described in Humby v Barts Health NHS Trust [2024] EAT 17.

159.3 We assess separately, for each allegation, whether the burden of proof shifts or not, taking into account all of the facts which we have found.

Time Limits for EQA complaints

160. In EQA, time limits are covered in s123. Taking account of early conciliation, all the Claimant's discrimination complaints are in time.

Definition of Direct Discrimination – section 13 EQA

161. Direct discrimination is defined in s.13 EQA.

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

162. There are two questions: whether the Respondent has treated the Claimant less favourably than it treated others ("the less favourable treatment question") and whether the Respondent has done so because of the protected characteristic ("the reason why question").

163. For the less favourable treatment question, the comparison between the treatment of the Claimant and the treatment of others can potentially require decisions to be made about whether another person is an actual comparator and/or the circumstances and attributes of a hypothetical comparator. Paragraphs 54 to 65 of Martin v The Board Of Governors Of St Francis Xavier 6th Form College [2024] EAT 22 provide a recent and clear summary of the types of arguments about comparators (and the proper role of section 23 EQA) that might be presented to us, and we have taken it into account.

164. When considering the "reason why question" for the treatment we have found to have occurred, we must analyse both the conscious and sub-conscious mental processes and motivations of the decision makers which led to the Respondent's various acts, omissions and decisions.

165. The mere fact alone that a Respondent, or a particular individual, has behaved unreasonably and/or treated the Claimant badly or unfairly will not, in itself, be sufficient to cause the burden of proof to shift. For one thing, there may also need to be consideration of whether the "bad" treatment is comparable to the way in which others were treated. However:

165.1 The greater the difference between the Claimant's treatment and that of another employee in similar circumstances, the more likely it is that the Tribunal will decide that an inference of discrimination could be drawn. Likewise, the more closely the circumstances of the Claimant and the alleged

comparator match, and/or the greater the number of comparators who have had "better" treatment, the more likely it is that the burden of proof will shift.

165.2 The more unreasonable the treatment, the more likely it is that the Tribunal will decide that it calls for an explanation and the more likely that the Tribunal might decide that it is possible to infer that a hypothetical comparator would have been treated differently.

165.3 Where the Respondent offers an explanation for the Claimant's treatment (and/or the differences between the Claimant's treatment the alleged comparator's treatment), then the burden of proof might shift where the Tribunal decides that the explanation is dishonest, and/or if different explanations have been put forward which are contradictory to each other.

Protected Disclosures

166. As per section 43A ERA "protected disclosure" means a "qualifying disclosure" which is made by a worker in accordance with any of sections 43C to 43H

167. Section 43B defines "qualifying disclosure":

> (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,
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
>
> (e) that the environment has been, is being or is likely to be damaged, or
>
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

168. In order for a communication to be a qualifying disclosure

168.1 Firstly, there must be a disclosure of information.

168.2 Secondly, the worker must believe that the disclosure is made in the public interest.

168.3 Thirdly, if the worker does hold such a belief, it must be reasonably held.

168.4 Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f) of section 43B(1).

168.5 Fifthly, if the worker does hold such a belief, it must be reasonably held.

Unless all five of these conditions are satisfied there will be not be a qualifying disclosure. See Williams v Michelle Brown AM UKEAT/0044/19/OO.

169. There must be a disclosure of information. A disclosure of information can be made as part of making an allegation, see for example Kilraine v London Borough of Wandsworth [2018] EWCA Civ 1436.

169.1 The information disclosed has to have sufficient factual content and specificity such as to be capable of satisfying all of the requirements mentioned in the previous paragraph.

169.2 However, the worker does not need to specifically use the words from the section in order for the disclosure to qualify.

170. The public interest parts of the requirement were considered in Chesterton Global Ltd v Nurmohamed. Neutral Citation Number: [2017] EWCA Civ 979. Some of the relevant points that were highlighted are:

170.1 The Tribunal has to ask whether the worker believed at the time that they were making it that the disclosure was in the public interest and whether, if so, that belief was reasonable.

170.2 The Tribunal must not substitute its own view of whether the disclosure was in the public interest for that of the worker. The Tribunal might need to form its own view on that question as part of its analysis of what (on the balance of probabilities) the employee, in fact, did believe at the time. However, it is not the Tribunal's view of the public interest that is determinative of this point.

170.3 The necessary belief is simply that the disclosure is in the public interest. The particular reason(s) that the worker believes that it is in the public interest are not of the essence. What matters is that the Claimant's subjective belief was objectively reasonable.

170.4 While the worker must have a genuine and reasonable belief that the disclosure is in the public interest, that does not have to be the predominant motive for making the disclosure.

170.5 Parliament has deliberately chosen to not define the phrase "in the public interest" and the reason for that is that it is Parliament's intention to leave it to Employment Tribunals to apply that phrase as a matter of educated impression. There is, therefore, no "checklist" of factors that will determine whether it was reasonable for the worker to believe that the disclosure was in the public interest. However, the type of things that might often be relevant include:

170.5.1 the number in the group affected by the wrongdoing;

170.5.2 how the wrongdoing affected people and the extent to which they are affected;

170.5.3 the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people;

170.5.4 the identity of the alleged wrongdoer.

171. Where a qualifying disclosure is made to an employer, it is a protected disclosure. (Section 43C).

172. Where the disclosure is not in the circumstances, set out in any of Sections 43C to 43F, the Tribunal has to either be satisfied that sections 43G or 43H applied or else the disclosure (even if it is qualifying) is not a protected disclosure.

Unfair Dismissal: dismissal because of protected disclosure

173. Within Part X of the Employment Rights Act, s.103A specifically deals with dismissal where the principal reason is that the employee has made a protected disclosure.

> An employee who is dismissed shall be regarded for the purposes of this Part as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

174. The dismissal reason in this sense is the set of facts known to the person taking the decision on behalf of the employer (or the set of beliefs held by that person) which cause the employer to dismiss the employee. See the court of appeal decision in Abernethy v Mott [1974] I.C.R. 323.

175. When an employee has less than two years' service, and presents a claim of unfair dismissal, the onus is on them to persuade the tribunal that the dismissal reason was one of the reasons for which two year's continuous employment is not required. That is the general rule, and, in Ross v Eddie Stobart Ltd UKEAT/0068/13/RN, the EAT specifically confirmed that it applied when the reason relied upon is that described in section 103A of the Employment Rights Act 1996.

176. We might make a decision, on the balance of probabilities, that the Claimant was dismissed for the reason which the Respondent is relying on, or for the reason that the Claimant is relying on. We are not obliged to choose just between those two options only, and to decide which of those is more likely than the other. It is open to us to reject both proposed reasons, and to decide that neither side has proven, on the balance of probabilities, that the reason was the one that they argued for.

177. In other words, it is open to the Tribunal to decide that the dismissal was not for the reason asserted by the employer but also that it was not because of the protected disclosure either (see Kuzel v Roche Products Ltd [2008] ICR 799).

178. A crucial part of deciding on the reason for dismissal is to decide which person or persons took the decision to dismiss.

179. If the Tribunal accepts the Respondent's case about the identity of the decision maker, and where that person attends the hearing and gives evidence, then the decision about the dismissal reason will be largely about whether that person's evidence on oath is believed, including an analysis of whether that evidence is consistent with the contemporaneous documents, and whether there was any unconscious motivation.

180. Evidence about whether that person knew about the disclosure, and/or evidence about whether anyone else sought to encourage them to dismiss the Claimant is likely to be relevant and important.

181. If the employer is found to have lied about the identity of the decision-maker, or claims not to know the identify the decision-maker, and/or if the decision-maker does not give evidence, then the Tribunal will have to decide whether or not to draw adverse inferences. It does not follow that the Claimant succeeds by default in these circumstances; however, nor does it follow that we are unable to make decisions about the reason why the employee was dismissed if we are unable to hear first hand evidence from the person who made the decision.

182. Where the decision-maker has been identified, and their subjective reason for deciding to terminate employment has been identified, the Supreme Court decision in Royal Mail Group Ltd v Jhuti [2019] UKSC 55 might be relevant in some cases. If an investigator or senior manager deceived the decision-maker about the true facts, and the dismissal decision was taken because the decision-maker believed that false version of the facts, then the motivation for the deception can be attributed to the employer as the dismissal reason. In other words, a potential route for a Claimant to succeed under s.103A is to show that someone else, other than the decision-maker, was motivated by the protected disclosures and successfully tricked the decision-maker. The deception could consist of positively making up false facts, or of concealing some relevant true facts.

183. However, the mere fact alone that a Claimant has made a protected disclosure and that one or more colleagues has been aggrieved by it and/or complained about it, is not necessarily enough for the Claimant to succeed in showing that their later dismissal fell within section 103A. In the absence of the Jhuti type scenario, the opinions or beliefs of people other than the dismissing officer are not necessarily relevant to the Tribunal's decision about what was the "real

reason" for the dismissal. It will be up to the Tribunal to analyse the actual decision maker's reasoning and to decide whether that decision maker made the decision to dismiss (for the reasons which they have claimed or for some other reason or) because of the protected disclosure.

Deductions from Wages

184. Part II of the Employment Rights Act 1996 deals with Protection of Wages. The right not to suffer unauthorised deductions is described in section 13. Wages are defined by section 27. Employees (and other workers) have the right to receive the wages properly payable on each pay date. Deciding what wages are actually properly payable may require the Tribunal to analyse the meaning of the contract, and to find facts.

185. The Employment Rights Act 1996 provides a right against unauthorised deductions, and exceptions:

> **13. Right not to suffer unauthorised deductions:**
>
> (1) An employer shall not make a deduction from wages of a worker employed by him unless -
>
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract or
>
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
>
> (2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—
>
> (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
>
> (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.

186. Section 14 contains some exceptions to section 13, but none are relevant in this case. In particular, a loan is not an "overpayment of wages".

187. The meaning of "wages" is set out in section 27 ERA. There is no dispute in this case that there was a deduction from wages. The dispute is about whether it was authorised or not.

188. Sub-paragraphs (a) and (b) of section 13(1) are alternatives. That is, the Respondent only needs to show that one of them applies to the deduction in question, rather than both.

189. (Ignoring "statutory provision", which is not relevant in this case), an employer has three methods of showing that the deduction is lawful because of sub-paragraphs (a) and (b) of section 13(1). They are not mutually exclusive, so more than one might apply, and the employer can argue in the alternative.

189.1 That there was a written term of the worker's contract (which permitted the deduction).

189.2 That there was some other term of the worker's contract which the worker had been notified of (which permitted the deduction).

189.3 The worker had previously given written consent to the deduction.

190. The third requirement was discussed in Potter v Hunt Contracts Ltd [1992] IRLR 108, [1992] ICR 337, EAT:

190.1 The employer paid £545 to a third party when the employee joined.

190.2 A loan contract was drawn up between the Respondent and Mr Potter to the effect that the loan would diminish at the rate of £22 per month but that if Mr Potter left the company within 24 months, he would be required to return the outstanding balance. Mr Potter's employment terminated after only five weeks at which time the amount outstanding under the loan agreement was £523. This exceeded the wages due to him (£278.50) with the consequence that he was paid nothing at all on the termination of his employment.

190.3 The central part of the loan agreement read "should you leave the company within 24 months from the date of your joining, you shall be required to return the fee on a diminishing basis based on £22 per month".

190.4 The EAT decided that this did not satisfy the requirements of what is now s13(1)(b). To fulfil the condition that the employee should have previously signified in writing his agreement or consent to the making of a deduction. The EAT rules that there must be a document which states that the deduction is to be made from the employee's wages. The document must also make clear that the employee agrees to the deduction being made from that source.

191. In order to succeed on the argument that it had written authorisation within the scope of s13(1)(b) ERA the employer does not need to go as far as showing that the precise amounts that it did in fact deduct on each occasion had been precisely authorised by the written authorisation. It would, however, have to

show that whatever amount it did deduct had been properly authorised once the written document was correctly interpreted

Employee's Contractual Obligations

192. The common law implies a duty of good faith and fidelity on the part of the employee into every contract of employment. This duty imposes an obligation on the employee to provide honest, loyal and faithful service during employment.

193. This means, among other things, that an employee must not compete with his or her employer, must not make secret profits from his or her employment, must not make preparations to compete with the employer during working hours, and must not disclose the employer's confidential information.

194. Breach of the implied duty of fidelity and good faith will normally entitle the employer to dismiss the employee summarily for gross misconduct at common law: Boston Deep Sea Fishing and Ice Co v Ansell 1888 39 ChD 339, CA.

195. The same case is often cited as authority for the propositions that a defendant to a claim for notice pay is entitled to argue that the Claimant had repudiated the contract by actions that have been discovered by the time of the court or tribunal hearing even though they were not discovered until after the dismissal had taken place; and/or several months prior to the dismissal.

196. As the Court of Appeal pointed out in Wessex Dairies Ltd v Smith 1935 2 KB 80, an employee is employed to look after the interests of the employer, not his or her own individual interests. The implied contractual duty of fidelity requires employees, during working hours, to devote the whole of their time and attention to the job they are employed to do. Thus, an employee who works either for him or herself or for another during those hours, without the consent of the employer, will almost certainly be acting in breach of the duty of fidelity whatever the type of work involved.

197. The implied duty of fidelity will prevent employees who wish to compete with their employer once their employment has ended from taking preparatory steps towards that end during working hours.

198. Provided done outside working hours, there are certain preparatory steps that an employee may be permitted to take without breaching the implied duty of fidelity. The case law gives examples where setting up of an off-the-shelf company for competition purposes, arranging finance and premises, and ordering necessary equipment and materials (while done on employee's own time) do not breach the duty of fidelity: Balston Ltd v Headline Filters Ltd 1990 FSR 385, ChD.

199. Each case turns on its own specific facts, including consideration of whether a single employee is acting alone, or with other employees, and the seniority/roles

of the employees involved. See, for example: Shepherds Investments Ltd v Walters 2007 IRLR 110, ChD.

Breach of contract

200. The Tribunal has jurisdiction to consider complaints of breach of contract, subject to the conditions, requirements and limitations set out in the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994.

201. The Tribunal will take a similar approach to other courts, including interpreting the contract to decide what obligations existed, and whether they have been breached.

202. Where the employer terminates the contract without good cause, or without providing the employee with sufficient notice, the Claimant may have grounds to succeed in a claim for wrongful dismissal.

203. The amount of notice to which an employee is entitled is determined by the contract, subject to the statutory minimum. It is an objective question for the Tribunal to consider whether the Respondent did, in fact, have good cause to dismiss the Claimant for committing a repudiatory breach of contract. Where there is a dispute about whether the Claimant did, in fact, commit certain acts (or make certain omissions) then the tribunal is required to make findings of fact about the Claimant's relevant conduct. In so doing, the tribunal is not limited to considering only the evidence which had been available to the Respondent when it made its decision to terminate. Any relevant evidence presented at the hearing can be taken into account.

204. To assess the seriousness of any breach which is found to have occurred, it is necessary for the Tribunal to consider all of the relevant circumstances including the nature of the employment contract, the nature of the term which was breached, the nature and degree of the breach, and also the nature of the Respondent's business and of the Claimant's position within that business. Having assessed the seriousness, the tribunal will decide if the breach was such that the Claimant had no entitlement to be given notice of dismissal (and no entitlement to a payment in lieu of notice).

205. To amount to conduct which entitles the employer to dismiss without notice, the conduct must be such that it "*must so undermine the trust and confidence which is inherent in the particular contract of employment that the master should no longer be required to retain the servant in his employment*" Neary v Dean of Westminster [1999] IRLR 288. So called "gross misconduct" may be established without proving dishonesty or wilful conduct and so called "gross negligence" that undermines trust and confidence may also suffice to justify summary dismissal. Whether it does so is a question of fact and judgment for the Tribunal, taking into

account the damage that the acts/omissions caused to the employment relationship. Adesokan v Sainsbury's Supermarkets Ltd [2017] EWCA Civ 22.

206. In Hovis Ltd v Lowton, Case No: EA-2020-000973-LA, the EAT considered what type of evidence an employer might need to present at a Tribunal hearing, if seeking to persuade the Tribunal that the employee had, in fact, acted in the manner alleged (and thereby lost the entitlement to notice of dismissal). On the facts of that case, the Tribunal had not been obliged to accept the employee's denials (or decide that the employer had failed to prove that the misconduct had been committed) merely because the Respondent did not call a live witness to the (alleged) event who disputed the Claimant's version. The Tribunal can, and must, take account of all the evidence presented to it, including contemporaneous documents and/or hearsay accounts. It was noted that:

> The fact that a hearsay statement has not been given under oath, or tested … at trial, are considerations that may of course inform the judge's assessment of its reliability or credibility, or otherwise of what weight to attach to it, …. They are also not necessarily the only considerations that may affect the evaluation of hearsay evidence. The tribunal needs to consider all the relevant circumstances in the given case, such as the particular circumstances in which the statement was made, the nature of the record of that statement, and so forth.

**Analysis and conclusions**

207. We now answer the questions in the list of issues.

> *1 Statement of initial employment particulars under section 1 ERA 1996*
>
> *1.1 Did the Respondent provide the claimant with a written statement of particulars of employment and/or an employment contract? [Par 10 – 12 GoC]*
>
> *1.2 The Respondent contends that the Claimant was issued with his contract of employment on his first day of work but accepts that the Claimant did not sign this contract. [Par 5 – 6 GoR]*

208. Our decision is as set out in the findings of fact. The Respondent did not give the Claimant the document which appears at [Bundle 47] or any other document that would either be a written statement of particulars of employment or a written employment contract.

209. The Claimant was not given the item on the first day of his employment, or early in his employment, or at all prior to termination.

> *2 Right not to suffer unauthorised deductions under section 13 ERA 1996*
>
> *2.1 Did the Respondent have a statutory provision or a relevant provision of the worker's contract to deduct £2,304.08 from the claimant's August 2022 salary?*
>
> *2.4 The Respondent asserts that the claimant's contract of employment made provision for deductions to be made from pay at Clause 6.3 of the contract. [Par 7 GoR]*

210. There was no statutory provision authorising a deduction from the August 22 salary (other than for tax and national insurance about which there is no complaint).

211. We have rejected the Respondent's arguments that there was a relevant provision of the worker's contract. The Respondent had neither supplied the Claimant with a written employment contract, and nor had it drawn his attention to any other term of the employment contract by writing to him.

*2.2 Did the claimant previously signify in writing his agreement or consent to the making of £2,2304.08 deduction from his August 2022 salary?*

212. This is a typo. The paragraph was intended to match paragraph 2.1 and say £2,304.08.

213. That being said, the amount of the actual deduction depends on what amount was "properly payable". If the Claimant was entitled to £3083.33 gross, with deductions for tax, national insurance and pension as shown in the payslip on [Bundle 601], then it follows that the deduction allegedly for "loans repayment" was £2304.08. However, if the wages "properly payable" were different, then it follows that the deduction was different.

214. The document on [Bundle 57] was written authorisation to deduct up to £500 per month. While it is true that, later, the Claimant orally agreed that the deduction could be £800 per month, the written authorisation is specific and is limited to £500 per month.

215. The written authorisation does meet the criteria set out in section 13(1)(b) as explained in Potter because it does specifically say that the deduction can be from pay. However, the document neither authorises any amount higher than £500 in any one month and nor does it say that the full balance could be taken from the final salary.

216. Thus, to the extent that the deduction exceeds £500, it is unauthorised.

*2.3 The Claimant asserts as follows:*

*2.3.1 The £8,000 was not a loan but support from the respondent to the claimant in recognition of the claimant's work contribution [Par 15 GoC]*

217. The sum in question was a loan, rather than a gift or bonus or "recognition" payment. That is true whether it was £8000 exactly or £8200 in total.

*2.3.2 The claimant offered to repay the £8000 at £800 per month on two conditions (a) it is interest free (b) so long as he was employed with the respondent. [Par 16 GoC]*

218. If there is litigation elsewhere, then that litigation will decide the argument - if it is pursued by the Claimant - that the actual true agreement was that he only had to

repay the loan, while he was employed and that termination of employment meant that the debt was cancelled.

219. All that we need to decide and we do decide, is that when the Respondent made the deduction in August 2022, there was in excess of £500 still owing to the Respondent and the Respondent was authorised to deduct up to £500 (but not more than that).

*2.3.3 The claimant did not authorise the deduction of £2,2304.08 from his August salary [Par 17 GoC]*

*2.3.4 The respondent did not provide loans for immigration purposes, only had licences to recruit overseas/foreign workers [Par 18 GoC]*

220. Item 2.3.3 is covered by our earlier decisions and item 2.3.4 is not relevant. Regardless of what persuaded the Respondent to lend a sum of money to the Claimant, it did make a payment to him on the basis that he agreed to repay it.

*3 Protected disclosures under section 47B ERA 1996*

221. The Claimant has failed to prove that any of the information he disclosed tended (in his opinion) to show breach of a legal obligation.

222. Having considered all of the correspondence that we were taken to, our analysis is that Ms Yatally and the Claimant had a lot of correspondence about various matters. As far as far as work was concerned, they had a good working relationship. She trusted the Claimant.

223. He raised routine matters with her, such as someone querying with him whether or not they had been paid the right amount of money.

224. As a matter of routine, he forwarded pay queries on to the director for her attention and her action as necessary. These were routine business matters. We find it inconceivable that there were no similar routine business communications from May 2021 until the end of June 2022. One thing that changed at the end of June 2022, was that, unbeknownst to Ms Yatally the Claimant had incorporated a limited company

225. However, that fact:

225.1 would not cause Ms Yatally to start breaching legal obligations that she had not previously breached.

225.2 did not cause the Claimant to genuinely believe that Ms Yatally had started to breach legal obligations that she had not previously breached

226. Looking at [Bundle 250], the Claimant simply asks a question about whether it was okay to continue with a particular female employee, given that she was on a student visa and that meant there was a 20 hour limit during semester time.

227. It seemed from Ms Yatally's witness evidence that she might not have a clear understanding of what "semester time" means. The Claimant was the registered manager and if he wished to communicate to Ms Yatally or to the Respondent that there might be a breach of a legal obligation (or a breach of maximum permitted working time for this employee), he would have had to explain himself more clearly than he did in that particular WhatsApp message.

228. Ms Yatally's response was simply to say that it should be okay and that the registered manager (that is, the Claimant) would need to check all of the employee's documents to ensure that the Respondent was compliant with any right to work obligations.

229. The exchange was around 26 July 2022, and so it is unclear from the evidence available to us, whether that was during the employee's semester time or not. There is no suggestion in the evidence available to us that the registered manager (the Claimant) having checked the documents went back to Ms Yatally to say it would be breach of legal obligation to continue with this employee (whether because this would breach rules about semester time, or at all).

230. The message that is on [Bundle 390] is also shown at the bottom of [Bundle 86] and is dated 18 July 2022. Again, this is simply a routine business matter. As the registered manager, the Claimant was informing the director that he had taken some steps to verify a particular individual's eligibility to work in the United Kingdom.

231. That is not the same thing as suggesting that the Respondent was breaching a legal obligation. In any event, in accordance with the Claimant's job description, if he thought that the individual did not have the right to work in the United Kingdom, then he should have made sure they were not allocated any shifts. Our finding is that the Claimant was not stating or implying that the director or anybody else, had overridden his authority. This was not a disclosure which stated or implied that the Respondent was using any worker despite the fact that the Claimant had decided they should not be used (pending clarification of right to work status, or at all).

232. The item we were taken to most frequently in the evidence is the message at 18:08:49 on 5 August 2022, which appears at [Bundle 137], as well as at [Bundle 319].

233. It does not seem to be alleged that the screenshot that appears on [Bundle 319] was related to the message at 18:08:49. In any case, our inference is that it was

that screenshot (and not the 18:08:49 message) which prompted Ms Yatally to reply:

> [05/08/2022, 18:26:04] Farah: Is she for real!

234. It is also important to note that the Claimant sent a further message at 18:11:08 before Ms Yatally did reply to the message at 18:08:49.

235. Ms Yatally's 3 replies to those two messages are at the bottom of [Bundle 137]. The relevant exchange was, therefore:

> [05/08/2022, 18:08:49] Nationwide Oncall Work1: Hi. I would like to strongly express my dissatisfaction with the current recruitment process at Nationwide Care. While it is not my business and I am only an employer albeit registered manager (not that it makes any difference), I have to say that it is wrong both procedurally and professionally.
>
> I am also aware that there is nothing I can do about it, I will like it to be on record that I have expressed how wrong this is been done.
>
> Have a good evening
>
> [05/08/2022, 18:11:08] Nationwide Oncall Work1: I also think that if my services are no longer needed or appreciated at Nationwide Care or you think that I am in obstruction of the direction you want to take your company, please come out and say rather than trying to frustrate me so I make that decision on my own.
>
> …
>
> [05/08/2022, 18:26:56] Farah: Why are u talking to me like that?
>
> [05/08/2022, 18:27:00] Farah: What did I do?
>
> [05/08/2022, 18:30:10] Farah: I I'll like a dog ! And u talk to me continuously as a piece of shit ! What have I done nosa??? Apart from continuously support u!

236. So Ms Yatally's replies are not just because the Claimant (at 18:08:49) had said that something about the recruitment process had dissatisfied him and that he wanted to place on record that he how wrong something was. He also followed it up by saying that he believed his services were no longer needed or appreciated and invited Ms Yatally to confirm.

237. We do take account of everything that Ms Yatally wrote in the three messages quoted above. It is clear that she did not like the two messages the Claimant had sent; however, it also clear that she did not understand what point the Claimant was trying to make.

238. To the extent that the Claimant says, in this hearing, that he meant race discrimination in recruitment, that is not something that was referred to in the message. If he did mean race discrimination, then Ms Yatally did not know he meant that, and no reasonable person, even possessed of all the information Ms Yatally had, could interpret the Claimant's message as being a reference to race discrimination.

239. On the contrary, his complaint at 18:32:47 shows that his complaint was that he believed that he was being undermined and other people were given more authority than he was. His comments could not reasonably be interpreted as tending to show breach of any legal obligation.

240. Our decision is that the Claimant did not actually believe that these messages tended to disclose breach of a legal obligation. However, even if we are wrong about that - and that was his actual belief - then that belief was not a reasonable one.

241. Furthermore, we do not accept that the Claimant actually believed he was making these disclosures in the public interest.

242. If it were true that the Claimant had been making disclosures about unlawfully underpaying staff, or employing people who had no right to work, and/or who were not suitable for the work, then it may not have been unreasonable to believe that such disclosures were in the public interest. However, it would have been unreasonable to think that any of the communications shown to us made disclosures that were actually in the public interest.

> *3.3 Was the claimant dismissed principally for making disclosures on health and safety (s.100 ERA); WTR (s.101A ERA); protected disclosures (s.103A)? [Par 24 GoC]*

243. The burden of proof requires the Claimant to persuade us that it was more likely than not that the principal reason for his dismissal was that he had made protected disclosures. [The other two automatic unfair dismissal arguments mentioned in paragraph 3.3 were withdrawn.]

244. However, the burden of proof is irrelevant because we are satisfied to a very high degree that the Respondent's reasons for dismissing the Claimant's were those reasons set out in the letter on [Bundle 522]. The principal reason was that the directors had formed the opinion that the Claimant had set up a company, and was either already competing, or was about to start competing. with the Respondent.

245. For the section 103A complaint, it does not matter if the directors were right or wrong about the Claimant's intentions, and it does not matter whether Torkan was actually going to compete with the Respondent. We are satisfied that the directors genuinely believed that it was going to do so, and genuinely believed that the Respondent should dismiss the Claimant because of that.

246. The contents of the exchanges between the Claimant and Ms Yatally (which, as we have said, were about routine matters) were not even part of the reason for the dismissal, let alone the principal reason.

Breach of Contract – Notice Pay

247. The Respondent is not confined to arguing that the matters raised in the dismissal letter entitled it to dismiss without notice, or confined to relying only on facts that it was aware of at the time. However, it is convenient to discuss the matters raised in the dismissal letter as part of the analysis.

> *4. We now have concerns that the substantial loan taken by you from our company, has been used to open Torkan Care Ltd. This action makes your role untenable with Nationwide care.*

248. The Respondent has failed to prove that the Claimant was dishonest about the loan, or that he did not use the loan for the purposes mentioned in the email which he sent requesting the loan.

249. We do not ignore the fact that the Claimant has failed to disclose any receipts to show that he did indeed spend it on immigration matters related to his family, but that lack of disclosure in itself is not sufficient for us to conclude he spent the money on setting up Torkan.

250. It is obviously possible that the Respondent's speculation is correct (and that he used the money to fund the start up of Torkan), but it also possible that it incorrect. There is nothing implausible about somebody setting up a business at the same time that they have other reasons for needing money.

> *3. Another conflict of interest is that you are using a staff supply agency to Nationwide care who is also a Shareholder of Torkan Care ltd, Isidore Kayode Omijeh. In addition, there is a manipulation of rotas, giving agency staff more working hours than our own full-time staff.*

251. This raises two separate issues. We deal with the issue about the connection with Mr Omijeh below. We do accept that the directors were not lying in the second sentence of that letter in that they had looked at rotas and been able to glean from the rotas that there were more agency staff being used, than they would have expected.

252. It seems that by the time they have produced their witness evidence for the tribunal, the directors have conflated the fact that later in August, they received a £16,000 invoice. They did not know about the invoice at the time that they wrote this 22 of August 2022 letter. However, as of 22 August they had access to sources of information which meant that they were able to form the opinion - whether it was right or wrong - that there had been manipulation of rotas.

253. However, the Respondent has failed to prove that the Claimant actually did manipulate the rotas. It failed to prove, for example, the availability of their other staff in the relevant month, which, according to Mr Berlevy would have been July 2022.

254. We do agree with the Respondent's position that ultimately the Claimant was responsible for the rotas as the registered manager, regardless of whether other people-assisted with its creation. The Claimant's argument that other people played important roles in putting the rota together would not, in itself, have prevented a finding of dishonesty if, otherwise, the evidence showed that the Claimant had improperly sought to benefit his secret business associate, Mr Omijeh, at the expense of the Respondent's business. However, there is insufficient evidence that he did so.

> *1 . It is noted that on the 28th of June 2022 you were appointed director and a 30% shareholder of a limited company Torkan Care Registration number 14200557 at Companies' house and registered as a care company. This action as we see it has created a conflict of interest and leave your position in our company untenable.*
>
> *2. We are informed by a separate professional entity of your attempt to acquire supported living properties using The Nationwide Care name and impersonating a Director of this company.*

255. The other points overlap with each other and need to be taken together. They are:

255.1 the suggestion that there was a breach of contract in getting into business with Mr Omijeh and

255.2 the suggestion that Torkan was competing with the Respondent and

255.3 the suggestion that the Claimant had contacted somebody else using the Nationwide Care name. (In passing, we would say, the Respondent has failed to prove that he impersonated a director of the respondent company).

256. The Respondent has proved that the Claimant contacted Solaris during work hours and also that he used the name of the Respondent. The precise reasons for using the Respondent's name is a matter of speculation given the Claimant denies it, and we have found that denial is untrue. However, it seems likely that at least part of the reason was that the Claimant thought that he was more likely to be shown suitable properties if Solaris believed that he was representing a business that was already viable, as opposed to a brand-new business. There might have been other reasons too, such as not wanting to use the name Torkan too early, before he was ready to start operating.

257. In any event, regardless of his reasons for telling Solaris that he was looking for properties for the Respondent, we are satisfied:

257.1 Firstly, that he did so.

257.2 Secondly, that he phoned Solaris from his work landline (so using the Respondent's phone).

257.3 Thirdly, that either he phoned Solaris when he was working for the Respondent, and/or that he expected Solaris to call him back during the time he was working for the Respondent. If he wanted/expected to be called back in his own time, there was no reason to give the Respondent's landline number as opposed to his own phone number.

258. Our decision is that the Claimant was taking preparatory steps to get Torkan's business up and running (that is, to acquire properties for Torkan's use) while he was employed by the Respondent and during working time.

259. It is irrelevant that the information at companies house stated that Torkan was not involved in the provision of accommodation. The evidence persuades us that the enquires made to Solaris were with the intention of benefiting Torkan.

260. The Claimant invites us to decide that there would have been a sufficient geographical gap between were Torkan was going to operate and where the Respondent operated. The Claimant accepted in evidence that there was no particular geographical restriction on where the Respondent could trade.

261. The Claimant breached a fundamental term of the contract (the implied duty of fidelity) and, in all the circumstances, was not entitled to receive notice of dismissal or payment in lieu of notice. The breach of contract claim fails.

*4 Discrimination- sections 9, 11, 13 & 39 Equality Act 2010*

*4.1 Did the Respondent treat the Claimant less favourably than it treated or would treat others because of his race?*

*4.2 Did the Respondent treat the Claimant less favourably than it treated or would treat others because of his sex?*

*4.3 The Claimant relies on the following in respect of his direct sex and race discrimination claim:*

*4.3.1 The claimant being told by Mr Berlevy that he was big black male and a threat [Par 32 GoC]*

*4.3.2 Invitation of heavy security men because the claimant is a big black male and a threat*

*4.3.3 The claimant being recorded on a video recording device because the claimant is a big black male and a threat*

*4.3.4 The claimant being escorted out of the building without being allowed to take his personal property worth c.£500*

262. In findings of fact, we have already addressed what words were used on 22 August 2022, and that it is true that a video recording was made.

263. We have to decide whether the burden of proof shifts, and, if so, whether the Respondent has discharged it.

264. The "personal property" element of allegation 4.3.4 fails on the facts. He was not prevented from taking his personal property.

265. Taking into account our decisions on paragraphs 4.3.1-4.3.3, the burden of proof shifts in relation to manner in which he was required to leave the premises. However, the Respondent has discharged the burden. The reason why he was told to leave the premises is that he had been summarily dismissed. The Respondent has satisfied us that a hypothetical comparator (a woman and/or a person who was not black or who was not Nigerian, but who was dismissed for the same reason) would also have been told to leave promptly. This particular part of the interaction was nothing to do with sex or race.

266. The complaints based on allegations 4.3.2 also fail. The Respondent has proven that the reason that Mr Mitchell was invited to be there was not because Mr Berlevy actually perceived the Claimant as a threat, but was because the Respondent wanted there to be a witness to the events, and wanted someone to be able to calm down Mr Berlevy if necessary. The Respondent has proven that the reason Mr Mitchell was there (and it was only him, not "men" plural) had nothing to do with sex or race.

> *4.3.1 The claimant being told by Mr Berlevy that he was big black male and a threat [Par 32 GoC]*
>
> *4.3.3 The claimant being recorded on a video recording device because the claimant is a big black male and a threat*

267. The burden of proof shifts for each of these allegations and for each protected characteristic.

268. The expression "big black male" was used and it was used in the context of stating that the Claimant was a threat. The fact that we have accepted Mr Berlevy's evidence to this tribunal that he did not genuinely regard the Claimant as a physical threat does not change the fact that he uttered those words. He would not have used those words to a woman or to a person who was not black. Nor was he simply stating facts. The detriment was that he stated that the Claimant was a "threat" and that (in context) he was stating that the Claimant was being treated differently to someone who was not a "threat". The Respondent has not discharged the burden of showing that the treatment was in no sense whatsoever because of sex or because of race.

269. Similarly, for the video recording, the burden shifts. There is "something more". For one thing, we have decided that Mr Berlevy has lied by falsely denying that there was a video recording. For another, the video recording occurred in close proximity in time and place to the Claimant's being told that he was "big black male" and a threat. There are facts from which we could reasonably find that

there was a link between what was said orally, and the act of video recording the Claimant.

270. The Respondent has failed to discharge the burden of proof. It has simply denied that the recording was made (as it also denied that the words were used).

271. The Claimant was subjected to detriments. The fact that he did not want to be referred to as a "threat" and did not want to be video recorded do not amount to an unjustified sense of grievance.

272. We reject the Respondent's argument that these matters should have been pleaded as harassment rather than discrimination. Section 212 EQA means that a claimant cannot succeed on both harassment and discrimination for the same act; however, where harassment is not pleaded, the discrimination complaint does not fail simply because a harassment might have been successful.

273. Thus the direct discrimination claims based on allegations 4.3.1 and 4.3.3 succeed for each of sex and race.

**Outcome and next steps**

274. If the parties fail to agree remedy, there will be a remedy hearing on the dates that were fixed in the hearing.

**Approved by:**

**Employment Judge Quill**

on Date: 7 July 2025

JUDGMENT & REASONS SENT TO THE PARTIES ON

8 July 2025

FOR EMPLOYMENT TRIBUNALS