EMPLOYMENT TRIBUNALS

Claimant:	Mr. M. Osemene
Respondent:	Mitie Limited
Heard at:	London South Employment Tribunal (via CVP video conference)
On:	6th, 7th, 8th, and 9th May 2025[1]
Before:	Employment Judge Sudra
	Sitting with non-legal members, Mr. S. Townsend and Ms. N. Murphy
Appearances:	
Claimant:	Mr. A. Otchie of Counsel
Respondent:	Mr. K. Harris of Counsel

(References in the form [XX] are to page numbers in the Hearing bundle. References in the form [XX,para.X] are to the paragraph of the named witness' witness statement)

JUDGMENT

The unanimous decision of the Tribunal is that the Claimant's complaints of,

(i) 'Ordinary' unfair dismissal is well founded and is upheld.

(ii) Direct race discrimination is not well founded and is dismissed.

[1] Deliberations in Chambers on 8th and 9th May 2025 and oral judgment on 9th May 2025.

(iii) Victimisation is not well founded and is dismissed.

REASONS

1. These written reasons are being provided following a request from the Claimant. An oral judgment was delivered on 9th May 2025.

2. The Claimant began Acas early conciliation on 29th December 2023 ('Day A') and was issued with an Acas early conciliation certificate on 25th January 2024 ('Day B'). On 28th January 2024 the Claimant presented his ET1 claim form number 2301747/2024. The Respondent defended the claims by way of an ET3 and Grounds of Resistance on 7th March 2024 and further amended Grounds of Resistance on 28th August and 9th October 2024.

The Issues

3. The Claimant's claims are for:

   (i) 'Ordinary' unfair dismissal (ss.94 and 98 Employment Rights Act 1996 ('ERA');
   (ii) direct race discrimination (s.13 Equality Act 2010 ('EqA'); and
   (iii) victimisation (s.27 EqA).

   An agreed List of Issues was contained within the Case Management Order of Employment Judge Dyal (as he then was) [152] and is as follows:

   '**1. Unfair dismissal**

   1.1 Was the claimant dismissed? It is not in dispute that he was.
   1.2 What was the reason or principal reason for dismissal?
   1.3 Was it a potentially fair reason?
   1.4 Did the respondent act reasonably or unreasonably in all the circumstances, including the respondent's size and administrative resources, in treating that reason as a sufficient reason to dismiss the

claimant?

1.5 The Tribunal's determination whether the dismissal was fair or unfair must be in accordance with equity and the substantial merits of the case.

2. Direct race discrimination (Equality Act 2010 section 13)

2.1 The Claimant identifies as Black, African.

2.2 Did the respondent do the following things:

2.2.1 Pay the Claimant a lower hourly rate than Mr Reginald Robins (a white man) from 2016 onwards

2.2.2 Dismiss the Claimant

2.3 Was that less favourable treatment?

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

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

The claimant says they were treated worse than Reginald Robins in relation to the pay issue. He relies on a hypothetical comparator only in relation to dismissal.

2.4 If so, was it because of race?

3. Victimisation (Equality Act 2010 section 27)

3.1 Did the claimant do a protected act as follows:

3.1.1 In August 2020, complaining to his MP that he had been discriminated against because of race by his employer;
3.1.2 In January 2022, raising a grievance with the Respondent complaining of discrimination and harassment.

3.2 Did the respondent do the following things:
3.2.1 the Respondent manufactured a reason to dismiss him by arranging for someone to falsely allege he had fallen asleep at work;
3.2.2 The Respondent dismissed the Claimant.

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

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

4. Time limits

4.1 Were the discrimination and victimisation complaints about pay made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

4.1.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
4.1.2 If not, was there conduct extending over a period?
4.1.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
4.1.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
4.1.4.1 Why were the complaints not made to the Tribunal in time?

4.1.4.2 In any event, is it just and equitable in all the circumstances to extend time?'

Preliminary Matters

4. At the outset of the Hearing the Tribunal discussed the List of Issues with both the Claimant and Respondent; they agreed that the List of Issues at [151] accurately captured the Claimant's claims.

5. The Tribunal also explored timetabling with the parties and was content that the matter would be completed within the allotted Hearing days.

6. The Claimant, unfortunately, had recently been involved in a road traffic accident and brought to our attention that he may require additional breaks which we assured him he would receive. The Claimant also explained that he may need to stand or 'stretch' during his evidence. Again, we assured him he would have the opportunity to do so and encouraged him to speak up whenever he felt uneasy. The Claimant was provided with an adjustable chair for his extra comfort.

Claimant's Renewed Application for Specific Disclosure

7. On 19th February 2025, the Claimant had submitted an application for specific disclosure of documents. On 19th March 2025, the Respondent objected to the Claimant's application. The application was refused by Employment Judge Wright on 4th April 2025 in the following terms:

> *'Claimants' application for specific disclosure is refused. It appears the relevant documents are in the bundle, and it is not clear how these additional documents will assist the tribunal in the issues it will determine.'*

8. On the morning of the first day, the Claimant renewed his application for specific disclosure relying on the same grounds as stated on 19th February 2025. We heard oral submissions from both the Claimant and Respondent and were not persuaded that there had been a material change in circumstances which

allowed us to interfere with Employment Judge Wright's decision. Therefore, the Claimant's renewed application was refused.

9. Mr. Otchie informed us that there was closed circuit television '(CCTV') footage which the Claimant would seek to rely upon. Mr. Harris stated that the CCTV footage had been provided to the Claimant. We informed the parties that we would entertain an application to adduce the CCTV footage once the Claimant had viewed it. Subsequently, Mr. Otchie confirmed to us that the Claimant had indeed viewed the CCTV footage during an adjournment provided by us. Mr. Harris had also sent us the CCTV footage which we viewed.

Procedure and Documents

10. We had before us:
    (a) An agreed Hearing bundle consisting of 808 pages;
    (b) a bundle of 19 additional pages from the Claimant; and
    (c) CCTV footage of circa 23 minutes.

11. We also had written witness statements and heard live evidence from:

    For the Claimant
    (i) The Claimant;

    For the Respondent
    (ii) Paul Burden;
    (iii) Fraser Cranshaw;
    (iv) Lee Read; and
    (v) Andrew Spranger.

12. The Claimant and Respondent made oral and written closing submissions at the conclusion of the evidence and provided authorities[2], which we read.

[2] *Hewston v. OFSTED* [2025] EWCA Civ 250 from the Claimant and *Sougrin v. Haringey Health Authority* [1992] IRLR 416, *ILEA v. Gravett* [1988] IRLR 497, *Hope v. British Medical Association* [2022] IRLR 206, and *Charalambous v. National Bank of Greece* [2023] EAT 75 from the Respondent.

13. We notified the parties at the outset of the Hearing that we would only read documents that were specifically referred to and would only read documents referred to in witness statements *insofar as they were relevant*.

Relevant Findings of Fact

14. The following findings of fact were reached by us, on a balance of probabilities, having considered all of the evidence given by witnesses during the Hearing, including the documents referred to by them, and taking into account our assessment of the witness evidence.

15. Only findings of fact relevant to the issues, and those necessary for us to determine, have been referred to in this Judgment. It has not been necessary, and neither would it be proportionate, to determine each and every fact in dispute. We have not referred to every document read and/or were taken to in the findings below but that does not mean it was not considered if it was referenced to in the witness statements/evidence and considered relevant.

16. As agreed by the parties respective Counsel, the facts in this matter are not complicated and many facts are agreed. Therefore, our focus was on the disputed facts and we have made relevant findings on these.

Employment History

17. The Claimant was employed by the Respondent as a security officer on 26th October 2013 and at the material times, he was sub-contracted to Jones Lang Lasalle (a client of the Respondent) and worked at Renaissance House in Croydon, south London. The Respondent is a large facilities management and professional services provider and employs approximately 68,000 staff in the United Kingdom.

18. On 1st August 2019 the Claimant was TUPE transferred from Emcor to OCS. On 4th October 2019 the Claimant was TUPE transferred from OCS to G4S. On 1st March 2022 the Claimant was again TUPE transferred from G4S to the Respondent. The Claimant's continuity of service remained intact.

19. In his role as security officer, the Claimant's duties involved (but were not limited to) safeguarding the safety and security of the premises he was based at, monitoring access to the premises, screening visitors and ensuring they had a legitimate reason to enter the premises, and responding to any security-related incidents. The Claimant was paid the security officer rate of pay which was £10.85p per hour at the material time.

20. On-site at Renaissance House was a 'welfare room' which was equipped with a fridge, microwave oven, facilities to make beverages, and chairs. Staff were expected to take breaks in the room which also had mirror CCTV monitoring screens which enabled then to continue surveillance whilst taking a break. Due to the nature of the role and the requirement for premises to be constantly monitored, security officers were paid for lunch and break times as their duties continued. Staff were expected to take lunch and breaks in the welfare room so that they could view the mirror CCTV screens.

Reginald Robins

21. Reginald Robins was previously employed as a supervisor at Minster Court with EMCOR.

22. Mr. Robins was transferred to the Renaissance House site via G4S and then to the Respondent (Mitie Limited) maintaining his title of supervisor throughout these transfers. As a supervisor, Mr. Robins received a higher pay rate compared to other security officers due to his supervisory role. Mr. Robins received the supervisor rate of pay at £13.74p per hour at the material time. If any other security officer covered his shift on a normal working day – Monday to Friday during the day shift – they would receive the supervisor pay rate. This

applied to the Claimant and when he worked Mr. Robins' shifts, he was paid at the same rate Mr. Robins was paid.

23. As a supervisor, Mr. Robins' duties included: Managing daily operations; dealing with contractors; issuing permits to work; managing access cards and visitors; checking emergency points and pull cords, weekly; conducting weekly fire alarm checks; and covering the reception desk when required. He also conducted additional patrols of the upper roof during the day, which was not feasible for the night team for obvious reasons.

24. Security officers did not perform the range of Mr. Robins' duties and for this reason they were not paid the rate of pay Mr. Robins received (unless they covered his shift during a normal working day).

First Protected Act

25. On 17th August 2020, the Claimant wrote to his local Member of Parliament ('MP') and complained of racial discrimination [217]. The Claimant stated that Mr. Robins (whom he described as 'White race') was paid approximately £3.00 more than himself and other black colleagues. The Respondent's witnesses were unaware until *after* the Claimant submitted his ET1 that he had made a complaint of race discrimination to his MP.

Second Protected Act

26. On 27th and 30th January 2022, the Claimant submitted grievances alleging that he was being discriminated against on grounds of race. The Claimant alleged that there was a pay disparity between him and Mr. Robins and that it was 'one rule' for a *'white race security officer'* and another for a *'black race security officer.'* The Claimant also alleged in his grievances that Mr. Robins had introducing *'bullying and harassment content'* into assignment instructions ('AI').

27. AI are guidelines which summarise given duties, responsibilities, and procedures that security officers are required to adhere to whilst on duty. Mr. Robins had no input or influence regarding the AI despite the Claimant's belief that he did.

28. On 17th February 2022 the Claimant attended a grievance meeting with Andrew Spranger (account manager) and the Claimant was represented by Keith Henderson his, trade union representative.

29. Mr. Spranger sent the Claimant his grievance outcome on 28th February 2022 [524]. The relevant aspects of the grievance outcome for our purposes were the findings on:

    (i) Pay disparity between security officers and Mr. Robins; and

    (ii) the dispute over whether or not Mr. Robins was engaged in a supervisory role.

30. Mr. Spranger found that there were two rates of hourly pay: £10.85p for a security officer and £13.74p for a supervisor. He further confirmed that the Claimant had received the correct rate of pay for the work he did and that his work was different from the work of a supervisor and cited examples of *'the day to day running of the property, dealing directly with our client, the tenants and their staff including reasonable requests from the client during the day time hours Monday to Friday.'* [525]

31. In respect of the supervisor role, Mr. Spranger explained that Mr. Robins had retained his supervisor role when he was transferred from his previous employer to G4S and that his position was supported by the TUPE information which had been provided when staff had transferred to G4S. Mr. Spranger further explained to the Claimant that he (the Claimant) had already discussed the matter with Kevin Gifford and it had been addressed in the grievance outcome of March 2021.

32. The employment data in respect of Mr. Robins confirms that he was a *'Security Team Leader II'* which is distinct from the Claimant's security officer role. We accepted that the Claimant did not agree with the Respondent's position but we found that that was the case and Mr. Robins was performing a supervisory role whereas the Claimant was not. This being the actual situation, it was unreasonable for the Claimant to expect to be paid a supervisors wage for performing a security guard role.

33. The fact that Mr. Robins was called a 'security team leader II' and not 'supervisor' does not alter the fact that he was, indeed, a supervisor.

34. On 12th May 2022 the Claimant appealed the grievance outcome. Although the appeal document was lengthy, the thrust of the Claimant's appeal was that he did not accept the Respondent's explanation as to why Mr. Robins received a higher rate of pay than him and he maintained that his role and Mr. Robins' role were not materially different. The Claimant continued to allege that the pay disparity was due to his race but the allegation was unfounded and lacked any evidence supportive of the Claimant's notion.

35. Lee Read (reginal account manager) was tasked with hearing the Claimant's grievance appeal. Following a meeting on 12th May 2022, Mr. Read wrote to the Claimant on 23rd June 2022 with the grievance appeal outcome. The points of the grievance appeal outcome relevant to this matter i.e. that Mr. Robins was not a supervisor and that he was paid more than the Claimant as he is white and the Claimant is black, were not upheld.

Relevant Events Preceding the Incident of 11th June 2023

36. At some point in 2023 (prior to 11th June 2023) an employee of Morgan Stanley, Heather Nieass, had attended Renaissance House with her partner. They each had a dog. The Claimant advised Ms. Nieass that it was against policy to bring dogs into the building but his advice was ignored by her and she proceeded to

her office with the dogs in tow. The Claimant was annoyed with Ms. Nieass for ignoring his request not to bring dogs into the building.

Incident of 11th June 2023

37. On 11th June 2023 (a Sunday) the Claimant was on duty and situated at the reception desk. At around 12.36pm the Claimant was captured on CCTV with his chin on his chest and 'nodding off[3]' to sleep. The Claimant nodded off at 12.36pm, 12.38pm,12.40pm, and 12.43pm after which he remained in a still state with his head bowed towards his chest.

38. At 12.53pm Shyam Parmar (external IT engineer) came through the buildings internal barriers (using a pass card to facilitate his exit) toward the reception desk where the Claimant was sat, asleep. Mr. Parmar saw the Claimant with his eyes closed, head bowed, and observed him snoring. Mr. Parmar said '*hello'* two to three times but received no response from the Claimant. At 12.54pm, Mr. Parmar re-entered the internal barriers unnoticed by the Claimant.

39. At exactly 1.00pm, the Claimant raised his head and stretched out his two arms; as one would usually do when emerging from a slumber.

40. On 13th June 2023, Mr. Parmar emailed what he had observed to Ms. Nieass [579]. Mr. Parmar's email was measured and undramatic. He relayed what he saw in straightforward terms, without embellishment or exaggeration. Mr. Parmar's email was sent to the Respondent.

Investigation

41. Paul Burden (operations manager) set about investigating the allegation that the Claimant was asleep on duty and that this was witnessed by a client's staff member. Having read Mr. Parmar's email and after viewing the available CCTV

[3] That is to involuntarily cause his head to slump down as one would do when falling asleep in an upright position.

footage, Mr. Burden had a meeting, on 31st July 2023, with the Claimant to investigate the allegation that he was found sleeping on duty.

42. Mr. Burden sought to show the Claimant the CCTV footage of 11th June 2023 but it was too small to view. Not long into the meeting the Claimant said that he did not wish to continue without his trade union representative and the meeting ended.

43. On 3rd August 2023, Mr. Burden wrote to the Claimant informing that he was suspended on full-pay with effect from 1st August 2023 whilst the investigation into his conduct continued.

44. On 11th August 2023, the Claimant attended an investigation meeting conducted by Fraser Cranshaw (security contract manager). When the allegation was discussed with the Claimant he told Mr. Cranshaw that he does not get breaks, works 12-hour shifts and meditates whilst at the reception desk.

45. The Claimant also stated that there was a *'personal vendetta'* against him as on 8th July 2023, he had refused engineers entry to the building (whom had been sent by Mr. Parmar) as they did not have passes and as he had challenged Ms. Nieass when she had brought dogs into the building.

46. The Claimant denied sleeping and said that he was meditating. The Claimant was also resolute that *'I don't snore'* and the meeting concluded.

47. On 24th August 2023, the Claimant was invited to attend a disciplinary hearing, to be held remotely, scheduled for 29th August 2023 [597]. The disciplinary hearing commenced but was aborted due to poor connectivity issues.

48. On 15th September 2023 the Claimant was invited to a disciplinary hearing scheduled for 20th September 2023. The Claimant was informed of his right o be represented and that the disciplinary hearing may proceed in his absence if he failed to attend without good reason.

49. On 18th September 2023, Mr. Read emailed the Claimant regarding the in-person disciplinary hearing and the Claimant's trade union representative, Keith Henderson, responded to Mr. Read on the same day advising that he will only be able to attend the hearing remotely as he would be in Suffolk. Mr. Henderson also informed him that if the hearing needs to be in-person, he would be available to attend on 25th or 27th September 2023. The Claimant responded to the email chain and stated that he preferred a face-to-face hearing so Mr. Read suggested the hearing proceeded on 20th September 2023, as planned, with the Claimant present in-person and Mr. Henderson attending remotely. The Claimant reiterated that he would rather all attendees were present in-person and that he was quite uncomfortable with Mr. Henderson attending remotely.

50. Mr. Read did not respond to the Claimant's email sent at 12.39pm on 18th September 2023 and proceeded with the disciplinary hearing in the Claimant and Mr. Henderson's absence.

51. On 28th September 2023, Mr. Read sent the Claimant a disciplinary hearing outcome letter informing that he had been summarily dismissed and that he could appeal the decision by 5th October 2023.

52. The outcome letter, which had been emailed, went to the Claimant's junk folder and was not read by him until 1st October 2023. Despite being within time to appeal, the Claimant did not appeal the decision to dismiss him summarily for gross misconduct.

Relevant Law

Time limits for EqA claims

53. The s.123 EqA states:

> **(1) Subject to proceedings on a complaint within section 120 may not be brought after the end of—**

> **(a) the period of 3 months starting with the date of the act to which the complaint relates, or**
>
> **(b) such other period as the employment tribunal thinks just and equitable.**
>
> **…**
>
> **(3) For the purposes of this section—**
>
> **(a) conduct extending over a period is to be treated as done at the end of the period;**
>
> **(b) failure to do something is to be treated as occurring when the person in question decided on it.**
>
> **(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—**
>
> **(a) when P does an act inconsistent with doing it, or**
>
> **(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.**

54. In terms of case law:

i. For the "*conduct extending over a period*" to be relevant, something that is found to have been the relevant discrimination must be in time for it to render the out of time claims justiciable by virtue of "*conduct extending over a period*" (**South Western Ambulance Service NHS Foundation Trust v King** UEAT/0056/19 at [33]);

ii. with respect to the just and equitable extension arguments:

1. It is for the Claimant to show discretion to extend time should be exercised and that there is no presumption to exercise the discretion – extension is the exception not the rule: **Robertson v Bexley Community Centre**[4] [2003] EWCA Civ 576, [2003] IRLR 434 at [25]

[4] Indeed prior to this case the EAT already made clear that just because a fair trial is still possible it does not automatically to lead time being extended: **Newnham v Transco plc** EAT/125/00, EAT/126/00 & EAT/844/00 at [29]

2. it is always necessary for Tribunals, when exercising their discretion, to identify the cause of the complaint's failure to bring the claim in time: **Accurist Watches Ltd v Wadher**[5] (EAT/102/09) at [15];

3. moreover, as the purpose of time bars is to ensure finality and certainty, it is difficult to see how a Claimant can discharge such a burden of showing that it is just and equitable to extend time if either (a) he/she does not explain the delay or (b) the explanation is disbelieved: **Edomobi v La Retraite RC Girls School** UKEAT/0180/16 at [31].[6]

Unfair Dismissal

55. This important right is set out in s.94 Employment Rights Act 1996 ('ERA'), and by s.98, the employer has first to show a fair reason for the dismissal, in this case conduct. If that is shown, then the test of fairness under s.98(4) depends in part on the respondent's size and administrative resources. The Respondent is clearly a large organisation and so a very high standard of fairness is to be expected.

56. The question in unfair dismissal cases is not therefore whether the employee was guilty of the misconduct, but – broadly speaking – whether it was reasonable of the employer to conclude that he was, and that he should be dismissed as a result.

57. As is well established from the case of *British Home Stores Ltd v Burchell* [1978] ICR 303 that question can be broken down further as follows:

[5] Langstaff J, without making any citation or reference to this case, equally reaches the same conclusion in **Abertawe Bro Morgannwg University Local Health Board v Morgan** UKEAT//0305/13 at [52] also stated that "'*The first question in deciding whether to extend time is why it is that the primary time limit has not been met…*"

[6] Indeed, the Court of Appeal in **Abertawe Bro Morgannwg University Local Health Board v Morgan** [2018] EWCA Civ 640; [2018] ICR 1194 accepted that whilst the test is broad with no specific list of factors to be considered, with lack of a good reason for delay not operating as an absolute bar, two factors that are always relevant: the reason for the delay and any prejudice caused to the other parties (at [18]-[20], and [24]-[26]).

(a) Was there a genuine belief on the part of the decision-maker that the Claimant did what was alleged?
(b) Was that belief reached on reasonable grounds?
(c) Was it formed after a reasonable investigation?
(d) Was the decision to dismiss within the range of reasonable responses open to an employer in the circumstances?

58. This 'range of reasonable responses' test (sometimes referred to as the 'band of reasonable responses') reflects the fact that whereas one employer might reasonably take one view, another might with equal reason take another. Tribunals are cautioned very strictly against substituting their view of the seriousness of an offence for that of the decision maker and we were mindful not to fall into a substitution mindset.

59. That applies not just to the reasonableness of the decision to dismiss but also to the process followed in coming to that conclusion. If a failing is identified in the disciplinary process it is necessary to ask whether the approach taken was outside that range, i.e. whether it complied with the objective standards of the reasonable employer: *Sainsbury's Supermarkets Ltd v Hitt* [2003] ICR 111.

60. However, it is well established that where an employee admits an act of gross misconduct and the facts are not in dispute, it may not be necessary to carry out a full-blown investigation at all: *Boys and Girls Welfare Society v Macdonald* . The Employment Appeal Tribunal in that case said that it was not always necessary to apply the test in *Burchell* where there was no real conflict on the facts.

61. Procedural fairness is nevertheless an important aspect and in considering it, Tribunals are required to take into account the guidance in the ACAS Code of Practice for Disciplinary and Grievance Procedures (2015).

Direct Race Discrimination

62. Section 13 of the Equality Act 2010 ('EqA') provides that (so far as material),

> ***'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.'***
> **…**

63. Under section 23(1) EqA, where a comparison is made, there must be no material difference between the circumstances relating to each case. It is possible to compare with an actual or hypothetical comparator.

64. In order to find discrimination has occurred, there must be some evidential basis on which we can infer that the Claimant's protected characteristic is the cause of the less favourable treatment. We can take into account a number of factors including an examination of circumstantial evidence.

65. We must consider whether the fact that the Claimant had the relevant protected characteristic had a significant (or more than trivial) influence on the mind of the decision maker. The influence can be conscious or unconscious. It need not be the main or sole reason, but must have a significant (i.e. not trivial) influence and so amount to an effective reason for the cause of the treatment.

66. In many direct discrimination cases, it is appropriate for a Tribunal to consider, first, whether the Claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race. However, in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the Claimant was treated as he was.

67. Section 136 of the EqA sets out the relevant burden-of-proof that

must be applied. A two-stage process is followed. Initially it is for the Claimant to prove, on the balance of probabilities, primary facts from which we could conclude, in the absence of an adequate explanation from the Respondent, that the Respondent committed an act of unlawful discrimination.

68. At the second stage, discrimination is presumed to have occurred, unless the Respondent can show otherwise. The standard of proof is again on the balance of probabilities. In order to discharge that burden of proof, the Respondent must adduce cogent evidence that the treatment was in no sense whatsoever because of the Claimant's race. The Respondent does not have to show that its conduct was reasonable or sensible for this purpose, merely that its explanation for acting the way that it did was non-discriminatory.

69. Guidelines on the burden of proof were set out by the Court of Appeal in *Igen Ltd v Wong* [2005] EWCA Civ 142; [2005] IRLR 258 and we have followed those as well as the direction of the Court of Appeal in the well-known case of *Madarassy v. Nomura International plc* [2007] IRLR 246, CA. The recent decision of the Court of Appeal in *Efobi v Royal Mail Group Ltd* [2019] ICR 750 confirms the guidance in these cases applies under the EqA.

70. The Court of Appeal in *Madarassy*, stated:

> '*The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal 'could conclude' that on the balance of probabilities, the Respondent had committed an unlawful act of discrimination.'* (56)

71. It may be appropriate on occasion, for the Tribunal to take into account the Respondent's explanation for the alleged discrimination in determining whether the Claimant has established a prima facie case so as to shift the burden of proof. (*Laing v Manchester City Council and others* [2006] IRLR

748; *Madarassy*.) It may also be appropriate for the Tribunal to go straight to the second stage, where for example the Respondent assert that it has a non-discriminatory explanation for the alleged discrimination. A Claimant is not prejudiced by such an approach since it effectively assumes in his favour that the burden at the first stage has been discharged (*Efobi v Royal Mail Group Ltd* [2019] ICR 750, para 13).

72. We are required to adopt a flexible approach to the burden of proof provisions. As noted in the cases of *Hewage v GHB* [2012] ICR 1054 and *Martin v Devonshires Solicitors* [2011] ICR 352, they will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. However, they may have little to offer where we in a position to make positive findings on the evidence one way or the other.

73. Allegations of discrimination should be looked at as a whole and not purely on the basis of a fragmented approach (*Qureshi v London Borough of Newham* [1991] IRLR 264, EAT. This requires us to "see both the wood and the trees" (*Fraser v University Leicester* UK EAT/1055/13 at paragraph 79).

Victimisation

74. S.27 EqA provides (so far as material),

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

75. The alleged detriments must be capable of being objectively regarded as such. Any unjustified sense of grievance cannot amount to a detriment: *St Helens Metropolitan Borough Council v. Derbyshire* [2007] IRLR 540.

76. A causative link must be established between the detriments and the protected act. Whilst this does not require a Respondent to have been wholly motivated to act by reason of a protected act(s), the unlawful motivation must be of sufficient weight in the decision-making process to be treated as the cause. It is enough that the protected acts have a 'significant influence' on the employer's decision making: *Villalba v. Merrill Lynch and Co Inc and others* [2007] ICR 469. Victimisation may be by reason of an earlier protected act if the discriminator consciously or subconsciously permitted that act to determine or influence his or her treatment of the complainant.

Conclusions and Analysis

Credibility of Evidence

77. We find that the Claimant's evidence was not straight forward. Frequently during cross-examination he did not ask the Q asked but proceeded to answer a question *he* wanted to answer. We also found that the Claimant's distinction between meditating and sleeping to be irrelevant. It is undisputed that the Claimant was not alert nor performing his role. He failed to be vigilant to a visitor even when the visitor spoke to him from approximately three-feet away. We also do not accept that the Claimant had nowhere to take a break. If he wanted a break he could have utilised the welfare room where he could have had a nap away from the public or a client's gaze. A security officer who is asleep at his desk would cause the Respondent reputational embarrassment and may well damage relations with clients in that they were not getting the service they were paying for and entitled to expect.

78. The Claimant was also inconsistent. In sworn evidence before Employment Judge Dyal on 11th September 2024, the Claimant stated that he had read the disciplinary hearing outcome letter on 1st October 2023. He did not say '*on or around'* 1st October 2023. The Claimant dissembled from this in cross-examination and during Tribunal questions. In his oral evidence the Claimant reneged on his earlier evidence and said that he only said 1st October 2023 as

the Employment Judge wanted an answer. We do not accept that. The Claimant was represented by Counsel and had no reason to give an answer he was unsure of. The Claimant, in this Hearing, stated that he could not remember when he read the outcome letter but was sure that it was after 5th October and before 15th October 2023.

79. The Claimant changed his evidence as he would then be out-of-time to appeal his dismissal and use that as a reason for not appealing. The Claimant could, and should, have appealed his dismissal if he thought that it was unfair.

80. We found the Respondent's witnesses' evidence to be credible. Where there was a dispute, we preferred the evidence of the R witnesses.

Unfair Dismissal

81. It is clear from the evidence before us that,

(a) There a genuine belief on the part of the Respondent's decision-maker that the Claimant did what was alleged i.e. fall asleep in public view whilst on duty.

(b) That belief was reached on reasonable grounds as the R had scrutinised the evidence before it namely Mr. Parmar's w/s, photographic evidence, and CCTV footage.

(c) The R's belief was formed it had undertaken a reasonable investigation.

(d) The decision to dismiss was harsh, but within the range of reasonable responses open to an employer in the circumstances so we have been mindful not to substitute our view with that of the Respondent.

82. We have also considered the provisions of the Acas Code of Practice on disciplinary and grievance procedures, in particular, paragraphs 13 to 17 which states (so far as material):

> ***'16. If a worker's chosen companion will not be available at the time proposed for the hearing by the employer, the employer must postpone the hearing to a time proposed by the worker provided that the alternative time is both reasonable and not more than five working days after the date originally proposed.'***
>
> **…**

83. The Respondent clearly erred in this regard. Mr. Read was aware on 18th September 2023 that the Claimant wanted his trade union representative to attend in-person and was uncomfortable with a hybrid hearing. Also on 18th September 2023, Mr. Henderson had proposed alternative dates on which he could attend in-person, the 25th or 27th September 2023.

84. It would have reasonable for Mr. Read to have postponed the disciplinary hearing to a date proposed by Mr. Henderson so he could attend in-person as the Claimant desired. At 8.58am on 20th September 2023 Mr. Read was aware that Mr. Henderson was unable to even attend remotely as he had not been sent a calendar invite so had now made other appointments. Mr. Henderson again asked if the hearing could be held on 25th or 27th September 2023 but Mr. Read decided to proceed with the hearing in the Claimant's absence.

85. By not postponing the disciplinary hearing the dismissal was procedurally unfair and the Claimant's complaint of unfair dismissal is upheld. However, we are in also no doubt that had a fair procedure been adopted, the Claimant would have been dismissed in any event by 27th September 2023 and therefore, we will be making a *Polkey* reduction.

Direct Race Discrimination

86. It was patently obvious from the witness and documentary evidence that the Claimant received a lesser hourly rate of pay than Mr. Robins because Mr. Robins was a supervisor and the Claimant was not. The Claimant's race played no part in the reason for the disparity in pay and the burden did not pass to the Respondent to show a non-discriminatory reason for the alleged unfavourable treatment.

87. As the Appellate Courts have consistently found, a mere difference in treatment or the sheer possession of a protected characteristic does not, without more, mean that an action is because of discriminatory reasons.

88. Due to the findings we have made in respect of the unfair dismissal complaint (*supra*) we do not accept that the reason or principal reason for the Claimant's dismissal was his race. It was squarely because of the Claimant's conduct. The burden has not passed to the Respondent and this complaint fails.

Victimisation

89. Whilst the Claimant did do protected acts (in August 2020, complaining to his MP that he had been discriminated against because of race by his employer and in January 2022, raising a grievance with the Respondent complaining of discrimination and harassment) what he failed to do was show any causation between the protected acts and alleged detriments,

90. The Claimant's belief that the Respondent *'manufactured a reason to dismiss him by arranging for someone to falsely allege he had fallen asleep at work'* was far-fetched and unconvincing. There was no false allegation that the Claimant had fallen asleep because he had, de facto, fallen asleep. Mr. Parmar had no reason to falsify allegations against the Claimant and had no influence exerted on him to 'frame' the Claimant so as to structure a case for his dismissal.

91. The Claimant's dismissal was due to his misconduct and dereliction of duty, not because he had done protected acts. The Claimant's victimisation complaint is not well founded and fails.

Remedy

Basic Award

3 x 1 week x £588 = £1,764.00p
6 x 1.5 weeks x £588 = £5,292.00p

TOTAL **£7,056.00p**

Compensatory Award

Five days pay = £588.00p
Pension Loss = £ 22.60p
LOSR = £400.00p

TOTAL **£1,010.60p**

Deduction of 15% for breach of the Acas code by the Claimant for not appealing his dismissal = **£859.01p**

TOTAL AWARD = £7,056.00p + £859.01p = £7,915.01p

Approved by:

Employment Judge Sudra

Date: 18th SEPTEMBER 2025

Sent to Parties.
18 November 2025