Case No: 2201252/23

EMPLOYMENT TRIBUNALS

Claimant: **Mr. M. Sow**

Respondent: **Bidvest Noonan (UK) Ltd**

London Central **9, 10 January 2024**

Employment Judge Goodman
Ms C. Aslett
Ms L. Jones

Representation:
Claimant: in person
Respondent: Ghazaleh Rezaie, counsel

RESERVED JUDGMENT

1. The respondent refused to permit the claimant to exercise his right to annual leave under regulation 13 of the Working Time Regulations 1998.

2. The respondent is ordered to pay the claimant £2,500 compensation for that.

3. The parties may write to the employment tribunal by **29 January** making representations on whether the award of compensation should be increased because of any failure to follow the ACAS Code.

4. The race discrimination claim fails.

5. The race harassment claim fails.

REASONS

1. The claimant is employed by the respondent as a relief officer providing security at client sites. This claim is about his attempts to take holiday in the

autumn of 2022.

2. The claims and issues were clarified at case management hearings in April and June 2023. They are:

   (1) Failure to permit the Claimant to take holiday and failure to pay holiday pay, contrary to the Working Time Regulations.
   (2) Direct race discrimination or harassment in failing to permit the Claimant to take holiday and failing to pay him holiday pay
   (3) Insults and abuse by HR when the Claimant tried to raise the holiday matter with him.

3. The race claim of discrimination and harassment for refusing holiday was added by amendment. Amendment to add other treatment (delay issuing uniform) was refused. The claimant made a further application to amend to add this at the start of the final hearing. It was refused, on ground that there had been no material change in circumstances, alternatively because the balance of prejudice in amending at this stage was against the claimant; full reasons were given orally.

4. At the June hearing Judge Glennie noted the following clarification of the claims:

   3.1 the complaint about holiday / holiday pay is that on 1 September 2022, 17 September 2022 and 10 December 2022 the Claimant asked his line manager for 2 weeks holiday. This was not approved and the result was that he took no holiday in 2022. What he was trying to do was to arrange his holidays so as not to work in a month when he took holiday, as he wished to ensure that his earnings in any particular month did not take him above the limit for being paid Universal Credit and Housing Benefit. In February and April 2023, without warning, he was paid sums on account of holiday pay in months when he had worked. The result was that he lost Universal Credit Housing Benefit payments that he would otherwise have received, without having had the benefit of his holiday.

   3.2 The Claimant says that this was discriminatory because white people received the holiday that they asked for

   3.3 The complaint about HR is that the Claimant had been to the Respondent's head office 6 times before 21 November 2022 to try to sort out the problem about holiday but no one would see him. On 21 November 2022 he saw Habbie Bartock of HR who said that she would sort it out. His complaint about being insulted concerns 30 November 2022 when he returned once again in an effort to see someone from HR. The Claimant gave the following details about what he complains of:

      3.3.1 He spoke to someone whose name he does not know, but who he

describes as a white female wearing the Respondent's uniform, age around 25-35, about 5 feet 9 tall, quite large, with brown hair. She was not a receptionist. There was then a conversation as follows, set out in the Claimant's document on page 72 of the bundle, between the Claimant (C) and the white female (A):

C: Good afternoon, can you help me. Please can I use the toilet.
A: The toilets are for customers.
C: Please I need to speak to HR from Bidvest Noonan.
A: Can you explain to me what HR stands for? Do you know about HR?
C: Most of the people who work here know who are HR people how come you don't know HR.
A: Please don't come too close to me. You don't know nothing about HR why you are asking something that you don't know. Please when you come here you should know where you are going, we are very busy and don't waste our time. Do you know how to manage your work?
C: Please I need to see anyone from Bidvest Noonan HR people only. (I defused the conflict and smiled and went to sit down).

3.4 In terms of remedies, the Claimant claims as financial loss the Universal Credit and Housing Benefit that he otherwise would have received but did not, as shown in his schedule of loss at page 79 of the bundle. The total is £5,348.

5. The respondent then amended the grounds of response. On holiday requests, the respondent said all requests must be made by the Agresso system and the claimant did not do this. The line manager refusing them was not Colins or Kadir; the claimant's line manager at all times was Adam Milton. On holiday pay, they said he had been paid all outstanding holiday, in payments on 7 February and 7 April 2023, and if this resulted in a loss of state benefit he should recover that from the government. It was denied that the claimant was discriminated against because of race in respect of requests for leave and payment for holiday. It was denied he attended head office on 6 occasions, that the unknown woman was their employee, or that he was harassed.

Evidence

6. The tribunal heard evidence from:

Mohammedou Sow, claimant. The witness statement was brief and he was asked a number of questions by the tribunal about the facts of the matters pleaded.
Colin Ray, the respondent's Manning Operations Manager. He gave evidence about the holiday request system but had never met the claimant, and was only brought in when early conciliation after early conciliation began.
Tracy Taylor, HR Business Partner for the London security sector of the respondent's business. She had not been involved in the holiday pay requests either. Her evidence was about the HR department staff and layout as it was

on 30 November 2022.

There was a hearing bundle of 91 pages.

Witness Orders

7. The claimant asked the tribunal on the first hearing day to make orders for the attendance of Abby Bantock, Ashleigh Copley and Blawal Ilyas. We declined to make orders for Ms Bantock and Ms Copley because neither now worked for the respondent; Ms Bantock left in December 2022 and Ms Copley some months after that. it was not alleged that either of them engaged in the alleged harassment, and because of that we considered their evidence could add little to the fact that the written complaints the claimant handed them were never answered or processed. We declined to make an order for Mr Ilyas because we doubted he would be able to add to the brief email exchange between him and the claimant on 16 November, or that his evidence about line management would be useful, when we already had the evidence of Colin Ray. We could draw inferences about the respondent's failure to call evidence from any of their staff who had been involved in his requests to take holiday.

8. The claimant was aggrieved that the respondent did not send their witness statements until a week after he had sent this. This should not have happened. However, we did not consider this gave the respondent any advantage, as the claimant's own statement addressed so few facts.

Conduct of the Hearing

9. The claim was listed for four days. The evidence was completed on the first day.

10. On the second day the claimant attended at 10am, but said he was unwell and proposed to attend accident and emergency at Hammersmith Hospital. He had chest and leg pain, and bleeding in the mouth. He would not sit down but leaned against the wall. He explained that leg pain was a longstanding problem. The tribunal adjourned the hearing to 10am the following day. An email was sent to the parties later that morning asking them to send a set of DWP letters about Universal Credit (claimant) and payslips (respondents), both for the period. The claimant was asked to update the tribunal on whether he would be able to attend the following day and to supply some medical evidence.

11. The respondent supplied the payslips as asked, but the claimant did not reply at all, nor did he attend the hearing on the third day. The clerk telephoned him but the call went to voicemail. Faced with this lack of information the tribunal decided that it would not be just to adjourn another day without knowing if the claimant could attend then, or to adjourn to a further day to be fixed. If the claimant had been gravely ill, he could supply medical evidence and ask for reconsideration. In the absence of evidence it was possible he was downcast

and discouraged by hearing his case being contested the previous day or by the refusal of witness orders, and disinclined to attend further. Instead of adjourning again, we would hear the respondent's submissions, and ask for their comment on what the tribunal understood were the claimant's submissions, working from documents in the bundle written by the claimant, and from his witness statement, both of which contained material in the nature of a submission. We would consider the claimant's written views when deliberating.

12. We then heard the respondent's submission on the law and reserved judgment.

Findings of Fact

13. The respondent provides cleaning and security services for business clients. They employ 29,000 people across the UK and Ireland. About 15,000 are in security.

14. The claimant identifies as black African. He has been employed as a security officer from 2008. His contract of employment transferred to the respondent under TUPE in December 2021.

15. He was a relief security officer, one of a team of 150 deployed to contract sites when one of the regular security team was off sick or on holiday. He received instructions on where he was to work from the controller, Blawal Ilyas.

16. We did not have a contract of employment in the bundle. Before the transfer the claimant's leave year ran from January to December. After transfer it ran from April to March. The respondent said they had informed all affected staff by letter in March 2022 but the document was not produced and it was not clear to us that the claimant had received it.

17. The respondent's annual leave policy states that employees must use an app called Timegate/Agresso, a computer system, to request leave. The line manager will then approve or reject the request. Employees must have approval before they take leave. They must either give 28 days notice or ask the line manager to exercise discretion to grant leave at shorter notice. They must use all their leave before the end of the year, although up to five days can be carried over to the next year, and there are some exceptions, for example when an employee has been sick and unable to take leave. There is also provision for an employee to be compelled to take his leave, and one of the examples given where this will happen is where he has not exhausted his annual leave entitlement.

18. In the bundle was a printout of the computer record showing the claimants requests for leave in 2022. This record does not show the date that the employee made the request, but it does show the dates of the leave period being requested, the date that the request was approved or rejected, the

name of the manager giving the decision, and the reason. The claimant would be notified of the decision through the app on his phone.

19. Nothing contradicts the claimant's assertion that he made his requests for leave on 1 and 17 September. His witness statement does not add to what he told Judge Glennie.

20. The computer printout shows that two requests by the claimant to take leave from 1st to 15th November 2022, and two requests to take leave from the 5th (or 6th) December 2022 to the 2nd January 2023, were all rejected by Adam Milton on the 27th October 2022 with the message "email line manager". Other requests, for leave to be taken from the 14th to 29th November 2022, and from 12th to 31st December 2022, were rejected by Ali Kawsar on 10th November 2022 with the message: "sent to incorrect portfolio manager, please contact your line manager".

21. As to the claimant making a request for leave on the 8th December, there is no evidence on the computer system printout, nor any from the claimant.

22. The evidence of Colin Ray was that the computer programme was set up so that leave requests made by relief security officers would be directed to the line manager of the site where that employee worked most often. As he put it: "Unfortunately, our internal systems were not equipped to deal with the complexity of a relief officer's role when they were set up".

23. Ms Taylor added that in the autumn of 2022 there had been a lot of difficulty with leave requests being refused. She attributed this to there having been two new batches of employees being transferred in from companies they had acquired. She said that in "nine times out of 10" these difficulties had been resolved though HR.

24. On 16th November 2022, the claimant emailed his controller, Blawal Ilyas, saying:

> "can you approve my holidays request on the system, from 14/11/22 to 29/11/22 and also from 17/12/22 to 31/12/22. I have only two weeks and one month left to book my holiday is already on system I have below all as was advised today. Please can you forward this to Quader or Collins (supervisor) for help if not to HR?"

25. Mr Ilyas replied to the first sentence 2 minutes later: "wrong e-mail I don't deal with holidays please send to scheduling.london@bidvestnoonan.com". He does not seem to have replied at all to the request to forward it to others. The claimant has suggested that Mr Ilyas was instructed to to reply in this way by his team leader Qadir Misra, or by his manager, Colin Ray. The tribunal doubts however that he would have had the time to consult them before replying.

26. Mr Ray said in his witness statement that on reflection he thought Mr Milton and Mr Kawsar could have spoken to each other or to other relevant line managers to discuss the claimant's leave requests and get approval to accept them. Mr Ray also agreed in evidence that scheduling.london was a help desk, which should have been able to deal with his query.

27. However, when the claimant emailed scheduling on 21st November 2022 saying "I need your help regarding my holiday request", there was no reply.

28. On 21st November the claimant went to the respondent's head office on 11th floor of a building at Aldgate. He asked at reception to speak to someone from HR, and then handed to the woman from HR who came to see him a sheet of paper which says:

> "Dear Sir and Madam, I would like to make a formal complaint about my holiday request not being approved on the portal since September 2022. I applied for more than nine different dates of holidays that weren't approved. I have spoken to many people about my holiday requests from meaning (manning) control for example Ilias, Christ and Ahmed but they all decline because they don't want to be involved with holiday requests. I phoned many times to speak to Collins or Quader (supervisors). I have been told they are very busy at the moment by Ilias from meaning controller and also Ilias advised me to apply from the Bidvest schedules teams for my holidays request. I would like HR to help me to resolve this matter as soon as possible. I have applied from the 14/11/29 and also 17/12/22 to 31/12/22 already on system. From 21/11/22 to 5/1/23 new holidays request".

In a different colour ink and handwriting which differs from the claimamnt's signature someone has written on the bottom "Abby Bantock HR business partner".

29. The respondent says Ms Bantock only works at the UCL site and would not have been at Aldgate. The claimant insists she showed him ID. But in the tribunal's finding he saw someone, possibly not Ms Bantock, who said Ms Bantock would be dealing with it. That person walked through from reception into the back office and then returned with the paper and the name written on it and handed it back to the claimant.

30. Ms Taylor's evidence was that HR personnel would have scanned the document into their system for complaints and grievances.

31. By 30th November the claimant had heard no more, and he went to the Aldgate building again. There he handed in another sheet of paper:

> "Dear Sir and Madam I would like to raise grievances about my holiday request not being approved on my portal since September 2022. I made a complaint on 21st November 2022 I handed a letter to Abbey Bartock

(HR) business partner she advised me that she will try to resolve this matter. I have spoken to payrolls and they advised me also that there are no holidays payments so far. I have included an e-mail from Ilias (meaning control room) that they are not responsible for my holidays requests, also Ilias advised me to the e-mail scheduling team that dealt with the holidays request. I have emailed the scheduling team twice but no reply has been received please see enclosed evidence. I have been advised to ask the HR manager to resolve this matter if they cannot resolve this matter therefore, I can apply for third parties to resolve this matter. I would like to ask HR to help to resolve this matter as soon as possible".

32. A woman took this from him, walked into the office from reception with it, then came back with a date stamp on the bottom and, in different handwriting to his and in blue (not black) ink the words "handed to Ashleigh Copley for Abbie".

33. This visit to the office is the occasion when the claimant was engaged in conversation with an unknown employee at the ground floor reception area. The claimant says this person wore Bidvest Noonan uniform. Ms Taylor's evidence is that staff at Aldgate do not wear uniform, although they would wear a company lanyard for their passes. We conclude that the conversation did take place, but as it was on the ground floor of a tenanted building he may been mistaken or misremembered that person wearing the respondent's lanyard.

34. The claimant heard no more about his leave or whether and when he could take it. On 8th December 2022 he approached ACAS for early conciliation. According to Ms Taylor the company then engaged in discussion with an ACAS conciliation officer and understood that the claimant wanted holiday pay. Ms Taylor instructed Mr Ray to pay the claimant £2,330.72 holiday pay. She said she had not made a calculation but understood from ACAS that this was the figure requested.

35. The early conciliation period ended on the 19th January 2023 when a certificate was issued. At that date the claimant had not heard from the company about his holiday request.

36. On 7th February 2023 the respondent issued the monthly pay slip showing that in addition to his normal wages he was to receive £2,330.72 holiday pay. The money will have reached his account a day or so later.

37. On 9th February 2023 the claimant presented his claim to the employment tribunal. The claim form says:

> "I made a complaint about my holiday requests never being approved and I have written them two letters and handed them to the HR support manager. I believe this is unfair treatment. My holiday was a mix of my wages, therefore, all the money they paid to the tax for example I was

working on my added with my wages. I have raised the complaint letter to HR manager regarding my holiday was not approve".

He ticked the box saying he was owed holiday pay. He did not tick the box for race discrimination but in answer to the question what he wanted if his claim was successful, he ticked the box "if claiming discrimination a recommendation".

38. On 24th February 2023 Mr Ray emailed the claimant saying he was just checking that he received all his monies owed, if so would he close the employment tribunal case, or otherwise tell him what he was owed.

39. On 14th March 2023 the respondent filed their response, denying liability and asking for further information on when he had made his requests.

40. In the meantime, the claimant found in mid-February that as a result of being paid holiday pay in addition to the January wages for which he had worked, the housing benefit payment by DWP to his landlord as a contribution to his rent was reduced from £676.46 to £25.66 and he had to make up the difference.

41. On 7 April 2024 the respondent added a further £876.49 for holiday pay to the claimant's wages. It was not explained why this was. It seemed to us likely that this was an end of year reconciliation by the payroll department. It was clear in evidence that neither Mr Ray nor Ms Taylor was able to assist with the figures. This additional payment will probably have led to another reduction in housing benefit payment to the landlord in the order of £150 - £200, but we do not have the documents.

Relevant Law

Holiday

42. The Working Time Regulations 1998 as amended provide a right to paid annual leave of 28 days in any year. An employee can only be paid for untaken leave if it is on termination of employment and for leave untaken in the current year (regulation 13(9)). Regulation 15 provides that an employee can elect when to take his leave by giving notice to his employer. The employer can, on notice, require the worker to take leave or not take leave on particular days.

43. Regulation 30(1), on remedies, provides that a worker may present a complaint to an employment tribunal that his employer has (a) refused to permit him to exercise any right he has (this includes the right to annual leave), or (b) has failed to pay him the whole part of any amount to him for his leave. By regulation 30(3):

where an employment tribunal finds a complaint under paragraph (1)(a)

well founded the tribunal –

(a) shall make a declaration to that effect, and

(b) may make an award of compensation to be paid by the employer to the worker.

By regulation 30(4):

the amount of the compensation shall be such as the tribunal considers just and equitable in all the circumstances having regard to –

(a) the employer's default in refusing to permit the worker to exercise his right, and

(b) any loss sustained by the worker which is attributable to the matters complained of.

36. The Regulations implement the EU Working Time Directive. It is clear from the case law that the European Court of Justice, and following their decsions, the UK courts, hold that the provisions on rest breaks and annual leave in the Directive are intended not to remunerate employees, but to ensure as a matter of health and social policy that employees are allowed periods of rest within the working day and within the working year.

37 There has been much litigation about the *amount* of holiday pay, from which it is also clear that the purpose of holiday pay is to ensure that employees are not discouraged from taking holiday because they cannot afford to stop work. This is also the purpose, for example, of the provision that payment in lieu of holiday can only be made on termination, when an employee would be no longer be able to take outstanding leave. Employers can refuse permission for leave for sound reasons. The claimant should have renewed his request. Other cases show that an employer must encourage his workers to actually take their leave.

Discussion and Conclusion – Holiday

38. The respondent submits that they did not refuse to permit the claimant to exercise his right to take annual leave. The claimant could have renewed his requests for annual leave, as he could have taken it at any time between January and March 2023. The respondent's obligation was to ensure that employees had the facility to exercise their right to annual leave, and they provided this by means of the computer system. They add that they are not required to grant leave, only to permit an employee to request it.

39. The tribunal considers that the respondent did refuse to permit the claimant to exercise his right to take annual leave. His requests to take leave in November

and December 2022 were all rejected on grounds that the request had gone to the wrong line manager. The claimant did not direct his requests to any particular line manager, he only used the respondent's system as they required. It was the respondent's computer system that directed requests to particular line mangers. When told the reason, he tried to get it sorted out by phoning his controller Ilyas (and possibly others – Chris and Ahmed), and emailing, but got no answer. It occurred to us that this was not just because the *claimant* did not know who his line manager was - other than Ilyas who directed him where to work. On the evidence, the *respondent* did not know who the appropriate line manager was either. The respondent's amended response to the claim says (paragraph 6) that his line manager was Adam Milner, even though Adam Milner had turned down requests on the basis that he was *not* the line manager. Mr Ray did not say who the line manager was either. He suggested it would be Qader Misra, but then added (paragraph 28) that Mr Misra would not be authorised to approve holiday. We could not conclude, as the respondent suggested, that the claimant's request had been turned down for a sound reason. Turning him down because the request had been addressed (by the computer programme) to the wrong line manager is not a sound reason because not only did the claimant not know who the line manager was, it seems the respondent did not know either. It cannot be said that they permitted him to request annual leave when the only way he was allowed to request leave was by using a system that bounced back requests because they had not been directed to the right line manager when no one could say who that was, not even the respondent.

40. As for the claimant having the opportunity to make further requests for leave in the first three months of 2023, before the leave year expired, the tribunal does not accept that they were not in breach because the claimant did not make a request. It is possible, going by his email to Ilyas, that the claimant had not appreciated that the leave year no longer ended in December, as it had in previous years, but now ended in March. It also seemed likely to us that even if he did appreciate that the year end had moved, he considered that a further request on the computer system would be futile. He had made six (going by the lines on the printout) requests. All had been rejected for the same reason. No one had told him which line manager he had to contact to get it authorised. He had tried to take it up with HR but met a stone wall. Even when he submitted a claim form to the employment tribunal - which makes it clear that he wanted to take leave, and it was not a claim for holiday pay - the respondent did not investigate what he said but assumed he had taken leave and not been paid for it. A brief check on their own records would have shown he had not taken holiday, and that all his requests for holiday had been turned down. If asked, Ilyas could have confirmed that the clamant had then wanted to know who could approve it. After looking at the computer record Mr Ray could have emailed the claimant on 28 February 2023 to say that he could still take holiday in the current leave year, and that he could make sure the request was allocated to the right line manager for decision. Instead, the respondent, by Ms Taylor, made a payment without investigation or even reading the claim form (posted to the respondent 10 days before Mr Ray sent his email) Mr Ray onlhy asked the claimant if he was owed anything else.

41.An employment tribunal can comment on what is good employment practice: in **Meek v City of Birmingham District Council** (1987) IRLR 250, the Court of Appeal, stating what was required of an employment tribunal decision, added: "it is also highly desirable that the decision of an industrial tribunal should give guidance both to employers and trade unions as to the practises which should or should not be adopted". In our experience disputes and misunderstandings about holiday entitlement, as with overtime, back pay, and so on, are common. They are often sorted out by a manager or team leader sitting down with the employee to understand and explain. With something so basic here as "computer says no", and when the respondent itself understood that that the system had trouble with leave requests being routed to the wrong line manager, the line managers to whom the requests were being routed should have made more effort to re direct them or tell the claimant who to contact. The claimant's controller could have passed him on Qader Misra to say who should approve his leave, and Ms Taylor or Mr Ray, when contacted by ACAS, could have gone to the claimant to understand the problem. This should not require a formal grievance. Nor should the claimant have been required to e-mail HR to make an appointment or to e-mail his request (as was suggested) rather take it to HR in person. In the words of the lay members, the respondent's system was a "shambles". The claimant's treatment was inexplicably shoddy for such a large employer.

Remedy for Holiday Breach

42.The tribunal therefore declares that that the respondent was in breach of regulation 30 in failing to permit the claimant to take annual leave.

43. We have a discretion to award compensation in addition. There is guidance in **Miles v Linkage Community Trust Ltd (2008) IRLR 602** on the factors relevant to the employer's default element in regulation 30(4): how long the default went on for, how outrageous or offensive it was in failing to meet an employee's grievances, and how much time (it was a rest break case) was involved. In **Miles** the employment tribunal had made no award. The Employment Appeal Tribunal expressed the view that they might have come to a different conclusion; it was surprising for a tribunal to make no award once it had upheld a claim a claimant's right, but the employment tribunal had exercised its discretion and had not been wrong in principle.

44. In this case we considered that the failure to permit the claimant to exercise his right to annual leave had started on 27th October 2022, when Adam Milner turned down the requests he had made, starting 1st September 2022. The failure continued at least until the end of February 2023, which will have been the last date when his request for 28 days in the current leave year could have been approved. On outrage and offence, while there was no offensive language to the claimants face, it was offensive to give him a persistent brush-off: not to find out who the correct line manager was, not to tell the claimant what to do when he was turned down, to direct him to a help desk which did not even reply, then fail to address written grievances, and fail to explore the issues with him direct when

he approached ACAS as the next stage.

45.It was suggested, in the context of the race claim, that this was a system error, not a human error, so that the claimant's race did not enter into it. In our view, computers are programmed by humans, and managed by the humans who use them as a tool, and when they do not achieve their purpose those humans should pick up errors and find alternative ways of discharging their statutory duty.

46.As for the scale of the default, the rest breaks cases are concerned with 30 minute breaks in a working day. Here we are looking at the claimant's entire year's holiday entitlement. Having regard to all three factors we consider the default significant. It would not be just to make no award.

47.There is little authority on how much should be awarded for employer default. We noted the discussion in **Skiggs v South West Trains UKEAT0763/03,** where enforcement was of a different right, but the formulation for a discretionary award was the same as that in regulation 30(4). There may be compensation for the employer's default even where there was "no financial loss or other special injury" (paragraphs 15-17).

48. We may also take into account the loss to the claimant when considering an award. There is guidance in **Grange v Abellio London Ltd (2017) IRLR 108** and **Santos Gomes v Higher Level Care Ltd (2018) EWCA Civ 418.** First, it is clear that a tribunal should not award injury to feelings in such cases (**Santos Gomes)** but can make an award for personal injury (**Grange**) even without formal medical evidence. Both are also rest break cases. In **Grange** the employee needed to eat regularly because of a bowel complaint. As for loss, that is financial loss or personal injury.

49. The claimant's schedule of loss is hard to understand and the tribunal did not have the opportunity to ask him to explain in more detail. There is a claim for the holiday pay he received. We cannot award that: it was paid. There is a claim that he has paid more tax than he should have. We can understand that this might be the case if the holiday pay took him into the 40% tax bracket, but without his P60 for any year we cannot make a finding that over the year he did pay more tax than was due.

50.There is a further claim that he has not gained by getting pay in lieu of leave; if he had been allowed to take holiday in the year, he would have continued to receive his usual pay during the annual leave period, without going to work, and DWP would have continued to pay part of his rent. He is aggrieved that he has lost some of the benefit of his holiday pay (if that pay is said to represent, compensation for not taking the leave) by the increase in the rent he had to pay – an extra £650.80, going by the January and February DWP letters we have, and probably another £150-200 in May after the April addition of holiday pay. The respondent argues that there is no loss because he has had the holiday pay; the claimant's case is that he had to work to get the extra pay, if allowed leave, he would have had the usual wages, and his rent paid, and now has had to pay

more rent.

51.In the rest break cases, compensation is often assessed by reference to a claimant having had to work hours unpaid, so awards have been made by reference to the hourly rate for the rest breaks foregone. Rest breaks are (unlike holiday) normally unpaid. Here the claimant has had the money, but not the leave. It is better to take the amount of extra rent as a measure of the disadvantage of not being allowed to take annual leave, having instead to work throughout the year.

52.As for injury, we have some material from which to assess damage. The claimant said in his witness statement that he was being harassed at work by people commenting how they could take their leave and he was only sleeping 3 hours a night, and had to take paracetomol to get to sleep. Paracetomol suggests a physical pain. On the second morning, when explaining his ill health the claimant said he had longstanding pains in his legs like electric shocks. There is no suggestion he has had to take time off because of this. In a letter to the tribunal protesting about the respondent's conduct over the delayed exchange of witness statements, he said he was physically (and) mentally affected by the case, he could not eat or sleep properly, and had a headache every day. This sounds like a stress reaction. The complication is that some of this may be related to his belief that he has been treated like this because of race.

52. The statutory provision for paid holiday is for the good of employees' health, not so they can earn more money. It is assumed that working without annual rest is bad for health. We know the claimant has longstanding trouble with pains in the leg. We know he is a security officer, so will be spending a lot of the working day patrolling, rather than sitting at a desk. Had he been permitted to take leave, he could have put his feet up, literally and figuratively. Loss of 28 working days leave means 5.6 weeks when he was having to walk about with pain in his legs, not enough to require time off work, but still painful. We reviewed minor injury awards in the JSB Guidelines on personal injury awards. The range for minor injury lasting 28 days goes up to £1,370, and for 3 months up £2,450. We would assess an award for 5.6 weeks of having to walk on painful legs rather than rest at home at £1,500. We do not include mental distress, as we without evidence of the extent to which that exceeded "normal" injury to feelings.

53. Adding in an award to reflect the default on the part of the employer, which provided a wholly inadequate system, whether by computer or the staff from whom the claimant sought advice, and which, Mr Ray's hindsight apart, seems wholly unrepentant, we decided to make an award of £2,500.

Relevant Law – Race Discrimination and Harassment

54. Direct discrimination because of a protected characteristic is prohibited by section 13 of the Equality Act 2010. Race is a protected characteristic. Discrimination occurs where the employer treats or would treat the employee less favourably because of a protected characteristic. The circumstances of the claimant and the comparator must be materially the same dash section 23. There

can be an actual comparator, or a hypothetical comparator dash the person the employer "would treat" more favourably.

55.Harassment is prohibited by section 26 of the Equality Act 2010:

(1) A person (A) harasses another (B) if-

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) The conduct has the purpose or effect of-

(i)Violating B's dignity, or

(ii)Creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(3) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a)the perception of B;

(b)the other circumstances of the case;

(c)whether it is reasonable for the conduct to have that effect.

56. Because people rarely admit to discriminating, may not intend to discriminate, and may not even be conscious that they are discriminating, the Equality Act provides a special burden of proof. Section 136 provides:

"(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."

57. How this is to operate is discussed in **Igen v Wong (2005) ICR 931**. The burden of proof is on the claimant. Evidence of discrimination is unusual, and the tribunal can draw inferences from facts. If inferences tending to show discrimination can be drawn, it is for the respondent to prove that he did not discriminate, including that the treatment is "in no sense whatsoever" because of the protected characteristic. Tribunals are to bear in mind that many of the facts require to prove any explanation are in the hands of the respondent.

58. **Anya v University of Oxford (2001) ICR 847** directs tribunals to find primary facts from which they can draw inferences and then look at: "the totality of those facts (including the respondent's explanations) in order to see whether it is legitimate to infer that the actual decision complained of in the originating applications were" because of a protected characteristic. There must be facts to support the conclusion that there was discrimination, not "a mere intuitive hunch". **Laing v Manchester City Council (2006) ICR 1519,** explains how once the employee has shown less favourable treatment and all material facts, the tribunal can then move to consider the respondent's explanation. There is no need to prove positively the protected characteristic was the reason for treatment, as tribunals can draw inferences in the absence of explanation – **Network Rail Infrastructure Ltd v Griffiths-Henry (2006) IRLR 88** - but Tribunals are reminded in **Madarrassy v Nomura International Ltd 2007 ICR 867**, that the bare facts of the difference in protected characteristic and less favourable

treatment is not "without more, sufficient material from which a tribunal could conclude, on balance of probabilities that the respondent" committed an act of unlawful discrimination". There must be "something more".

59. There are factors from which we can draw inferences, such as, statistical material, which may "put the tribunal on enquiry" – **Rihal v London Borough of Ealing (2004) ILRLR642**, where a "sharp ethnic imbalance" should have prompted the tribunal to consider whether there was a non-racial reason for this. **McCorry v McKeith (2017) IRLR 253** noted that "reluctant, piecemeal and incomplete nature of discovery" could be a factor indicating discrimination, as can omissions and inaccuracies -**Country Style Foods Ltd v Bouzir (2011) EWCA Civ 1519.**

60. **Shamoon v Royal Ulster Constabulary (2003) ICR 337** discusses how, particularly in cases of hypothetical comparators, tribunal may usefully proceed first to examine the respondent's explanation to find out the "reason why" it acted as it did. **Glasgow City Council v Zafar 1998 ICR 120**, and **Efobji v Royal Mail Ltd 2017 IRLR 956**, reminded tribunals that the respondent's explanation must be "adequate", but that may not be the same thing as "reasonable and sensible".

Race Discrimination – Discussion and Conclusion

61. It is the claimant's case that he was refused leave most because he is black. When sitting with other security officers on site he heard about them being granted the requests for annual leave, and they were white. There were no details of this assertion. He was asked whether he knew of other black security officers being refused leave, but he did not know. He was asked whether he knew of other black security officers being granted leave, but he did not know.

62. We did not know much about the ethnic composition of the respondents workforce in general, or the security section in particular. The claimant asserted that other security officers were white, or that Asians predominated. The respondent asserted that as many as four out of six of their security staff are black. Miss Taylor confirmed that the respondent does undertake ethnic monitoring but she had not checked the figures. So we are without the evidence to confirm the claimant's impression. We did however conclude from other imprecisions in the claimant's evidence that He could sometimes misunderstand the question or exaggerate his impression, under his evidence on this could not be relied on. The general experience of panel members is that as a rule the security sector is racially very mixed, and this includes black African security officers as much as other groups. More than that we cannot say.

63. Respondent's case is that the claimant was rejected by a computer system, which have no regard to race. We accept it is improbable that the computer was programmed to reject holiday requests made by black staff, as against white or Asian staff.

64. We examine separately whether the unhelpful approach of the line managers, Mr Ilyas, or the HR staff who took away the written grievances, was because he was black. We do not know if Adam Milner was black or white. Someone called Ali Kawsar might be of Asian descent. We comment that neither had met the claimant: they might assume from his name that he was a Muslim, but could not

tell from that that he was black. The two women who met him in HR would have seen that he was black.

65. Our difficulty is not having any information about comparators. According to Ms Taylor there were persistent problems with the programme that autumn which were usually but not always resolved. Neither she nor the claimant has any information about how other requests were treated by reference to ethnicity.

66. Our concern was that the most likely explanation why the claimant's request was turned down because it had been routed to a line manager who did not know who he was is because he was a relief security officer. Relief officers do not seem to have had a dedicated line manager, hence the unsatisfactory work around of routing their requests to a line manager for sites where they had worked. When the claimant was on site and heard from white colleagues that their requests have been accepted, those colleagues will have been permanent staff, with a line manager allocated on the computer system. All relief officers, of any race, are likely to have met the claimant's difficulty. That is the non racial explanation for the rejection of the computer request.

67. As for staff, we have no reason to think that Adam Milner or Ali Kawsar were unhelpful because of race, rather than, say, laziness. The claimant does not suggest Mr Ilyas was unhelpful because of race – he dealt with him regularly, so could have given details to support this view. As for the HR personnel, they could have put his written requests to one side and forgotten them, they could have forgotten to scan them in to the computer system (which Ms Taylor says is what happened), all of which could have been done if someone who was not black had turned up with a grievance without an appointment and without emailing. We do not say they were not at fault, only that they could have treated non-black employees like this too. Without more we could not conclude that their omission was because he was black. As for the ACAS approach, at that stage race was not an issue and Mr Ray and Ms Taylor may not have known he was black.

68.We understand how many slights black people can encounter in their daily lives from casual racism, such that the claimant believed that his setbacks were because he was black. But we concluded he has not established any facts - other than that he is black - from which we could conclude that race was the reason for the unhelpful way his leave requests were handled. We considered the respondent had an inadequate system for leave requests made by relief officers, but there was no evidence to show that black officers' requests were unsuccessful any more than relief officers of some other ethnic group.

Harassment

69. We accept there was a conversation with a woman of the description the claimant gave to Judge Glennie at the case management hearing. We are not confident that she was an employee of the respondent, as this occurred at ground floor reception. Even if she was, after reviewing the conversation, we accepted she had been rude, but could not conclude this was because the claimant is black. The remark not to come too close to him suggested she found him intimidating. The claimant is tall and well built. He does not always express his meaning clearly. The way she spoke to him will have made him tense. The panel considered any approach to a woman by a large and tense man who

seemed to come too close will have prompted a request to step back. Mr Ray, who is white, is also tall and well built. If he had come up close to a woman when tensed up he too would have been experienced as intimidating and asked to step back. Having considered what we know of the circumstances, which is only what the claimant has told us, as the respondent have not been able to trace this person and deny she was employed by them, we could not conclude that her rude and unfriendly approach was related to his race.

Breach of ACAS Code

70. Section 207A of the Trade Union and Labour Relations (Consolidation) Act provides that where it appears to the employment tribunal that there is a relevant code of practise, that the employer failed to comply with the code in relation to that matter, and that failure was unreasonable, the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any awarded mix to the employee by no more than 25%. Times under regulation 30 of the working times regulations 1998 all covered by this provision.

71. The Code provides that an employee should allow employees to present grievances, that they should have a meeting about the grievance, and they should deliver an outcome. On the face of it, the claimant handed in a grievance in writing on the 30th November at their head office. The grievance was never dealt with.

72. This matter was not canvassed in the hearing. The parties are invited to write to the employment tribunal making representations on whether it is just and equitable that the tribunal should or should not increase the award by up to 25%. It is envisaged that these written representations will be discussed by the employment tribunal so as to make a decsion, unless the parties request a hearing.

Employment Judge Goodman
12 January 2024

JUDGMENT AND REASONS SENT to the PARTIES ON

.

. .12/01/2024

FOR THE TRIBUNAL OFFICE