EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
	v	
Mr T Rule		CIS Security Ltd

Heard at: **London Central Employment Tribunal**

On: **26 February – 1 March 2024**

Before: **EJ Webster**
Mr I Allwright
Mr B Furlong

Appearances
For the Claimants: **In person**
For the Respondent: **Ms McIntosh (professional rep)**

RESERVED JUDGMENT

1. The Claimant's claim for automatic unfair dismissal pursuant to s103A Employment Rights Act 1996 is not upheld.

2. The Claimant's claims for whistleblowing detriments pursuant to s48 Employment Rights Act 1996 are not upheld.

3. The Claimant's claims for direct race discrimination pursuant to s13 Equality Act 2010 are not upheld.

4. The Claimant's claims for race-related harassment pursuant to s26 Equality Act 2010 are not upheld.

5. The Claimant's claims for victimisation pursuant to s27 Equality Act 2010 are not upheld.

6. The Claimant's claim for unpaid notice pay is dismissed upon withdrawal.

7. The Claimant's claim for unpaid holiday pay is partially upheld. The Respondent must pay the Claimant 1.5 days' holiday pay totalling **£200.79** (gross).

REASONS

The hearing

1. This case was badly prepared by both parties. There had been 3 preliminary case management hearings, the most recent in January 2024. At each hearing work had been done to finalise the list of issues and case preparation directions had been given. Despite this the parties arrived at the hearing without an agreed bundle for which fault lay with both sides. Most notable of the issues before us in attempting to hear the case was that the Claimant had only disclosed several hundred pages of documents the week before the hearing and the Respondent had failed to properly respond to the Claimant's application for specific disclosure.

2. In the week before the hearing, a different Employment Judge had ordered that in addition to the Respondent's bundle, a separate, supplementary bundle be prepared by the Claimant of the documents that the Claimant sought to adduce. The Claimant had not done the first day of this hearing. He said that all the additional documents were interspersed with ones that were already in the existing bundle and he could not go through them in time to separate them out. The parties were ordered to use the first day to go through the Claimant's bundle and identify the additional documents and prepare a supplementary bundle. The Respondent was also ordered to find out if the documents that the Claimant sought in his application for specific disclosure existed and if so why they had not been disclosed.

3. Despite these orders on the first day, the parties attended on the second day having not prepared or agreed the contents of a supplementary bundle. Only at this point did the Respondent's representative object to the addition of the new documents from the Claimant. The basis for her application was that they had been disclosed so late, she could not tell if they were relevant and she considered that it significantly disadvantaged the Respondent as it had not had an opportunity to consider the evidence properly with its witnesses. Ms McIntosh also referred to the Tribunal's order the previous week which had required the Claimant to prepare a separate supplementary bundle with the additional documents. She said that the order was clear and the Claimant had failed to comply with it. She did not explain why she was unable to work with the Claimant the day before in attempting to get the documents into a useable format for the Tribunal to consider. Although not legally qualified, Ms McIntosh is a professional representative and she did not assist the Tribunal as would normally be expected in these circumstances.

4. The Claimant stated that he considered that they were relevant documents. He was a litigant in person. He had struggled to be able to afford to get transcripts of

the recordings of meetings he had made and this is why they were disclosed so late. He had sent them via Dropbox to the Respondent's representative the week before. The Respondent's representative says that they were sent to her colleague when the Claimant knew that the colleague was on leave.

5. The Claimant proposed no solution to the fact that his additional documents were still integrated within a much larger bundle. He gave little or no explanation for why he was not able to remove the additional documents that he wanted included and put them into a separate bundle. He also did not provide explanations as to how each additional document was relevant. Instead the Tribunal was faced with having to consider the Claimant's request for additional documents by perusing the index and attempting to understand its relevance and make an appropriate order.

6. Neither party applied for a postponement before us though we note that the Claimant had applied for a postponement in the week before the hearing which was refused by a different judge.

7. Therefore, on the second day of the hearing, in light of the Respondent's objection and the Claimant's failure to properly particularise the basis on which the additional documents were relevant, the Tribunal considered the application for late addition of approximately 200 pages of additional documents in as proportionate a way possible and in accordance with the Overriding Objective.

8. We allowed approximately 100 pages of additional evidence namely the transcripts of the conversations which were specifically referenced in the List of Issues and which we concluded may be relevant to our determination. On the following day we also allowed a further transcript of a recording of a conversation with Mr H Muhammad on the basis that it was relevant and because the evidence demonstrated that the Claimant had sent it to the Respondent as part of the grievance investigation and therefore the Respondent had also had a copy which it had clearly failed to disclose.

9. Both parties had failed to carry out a proper disclosure exercise. The Claimant said that the transcripts had not been disclosed because he had to save up to be able to afford then. He did not explain why, despite there having been three previous case management hearings, he failed to disclose the policies, emails and other documents which formed part of the additional bundle he applied to have accepted at this late stage. Further he could not properly explain why he had not disclosed the recordings of the conversations at an earlier date as opposed to waiting until he had the transcripts.

10. The Respondent witnesses, during evidence referenced various documents and that were also missing from the bundle. There were clearly notes of meetings, emails and policies that were missing from the bundle. This failure to carry out a proper disclosure exercise along with their failure to address many of the issues in their witness evidence meant that all of their witnesses' credibility was significantly damaged. We had no explanation for these failures. Where we have drawn negative inferences we set that out below.

11. The Respondent also chose not to provide evidence from the person who made the decision to dismiss the Claimant. Two other crucial witnesses no longer worked for the Respondent though we were given no information as to whether they had been asked to give evidence nor was any explanation provided for their absence other than when the Tribunal asked directly. This meant that determining the motive for several of the Respondent's actions was difficult for the Tribunal which is discussed in our conclusions below.

12. During the Claimant's submissions he stated that he had not been allowed to play the recordings and that this had not been fair. The Tribunal listened to two recordings of the same incident (the altercation with Ashish Mathur on 3 December 2022). This was because the Respondent had a longer recording of this conversation that one of their employees had taken. (This was something else that they had not disclosed until during the hearing despite their obligations of disclosure.)

13. At a previous hearing the Claimant had been told that if he wanted to rely upon the recordings he would need to provide the written transcripts and could use those as evidence. Given that we had allowed in the transcripts of the relevant conversations, it is not clear what the recordings would have added as the Respondent did not challenge the validity of the transcripts. Therefore during the hearing, EJ Webster had told the Claimant that there was no need to play the recordings of 2 conversations on the basis that we had the transcripts. It was for this reason that they were not listened to. We do not consider that there was any unfairness to the Claimant in proceeding in this way.

14. The Tribunal was provided with 5 witness statements for the following individuals:

    (i) The Claimant
    (ii) Mr A Morvan (HR representative at the Respondent)
    (iii) Mr D De Sousa
    (iv) Mr H Muhammad
    (v) Mr P Hollands

    All gave oral evidence to the Tribunal.

15. During reading the witness statements it appeared to the Tribunal that the Claimant appeared to consider that his various claims for discrimination and the acts relied upon under various headings were not the same as those outlined in the list of issues. The parties had already gone through the List of Issues at some length during the first morning but it was not apparent until reading the witness statements of the divergence between the topics focused on there and the witness evidence provided by the Claimant. When the Tribunal raised this with the Claimant at the outset of the hearing he confirmed that he understood that the Tribunal would only be considering the claims set out in the List of Issues and was not seeking to introduce any new matters.

The Issues

16. The claimant is making the following complaints:

16.1 Automatic unfair dismissal under s.103A ERA 1996;
16.2 Direct race discrimination;
16.3 Harassment due to race;
16.4 Victimisation;
16.5 Detriment due to whistleblowing
16.6 (Unlawful deduction of) notice pay
16.7 (Unlawful deduction of) holiday pay

17. Time limits

17.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 24 December 2022 may not have been brought in time.

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

1) Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
2) If not, was there conduct extending over a period?
3) If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
4) If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

17.2.4.1 Why were the complaints not made to the Tribunal in time?
17.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

17.3 Was the detriment complaint made within the time limit in s.23 of the Employment Rights Act 1996? The Tribunal will decide:

1) Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act complained of?
2) If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?
3) If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
4) If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

18. Protected disclosure

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

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

18.1.1.1 On 28 November 2022 reported an incident involving a robbery to Paul Holland
18.1.1.2 On 28 December 2022 Reported the incident to the Police

18.1.1.3 On 21 November 2022 the respondent failed to give CCTV evidence of the incident to the Police.

2) Did he disclose information?
3) Did he believe the disclosure of information was made in the public interest?
4) Was that belief reasonable?
5) Did he believe it tended to show that:

18.1.5.1 a criminal offence had been, was being or was likely to be committed;
18.1.5.2 a person had failed, was failing or was likely to fail to comply with any legal obligation;
18.1.5.3 a miscarriage of justice had occurred, was occurring or was likely to occur;
18.1.5.4 the health or safety of any individual had been, was being or was likely to be endangered;
18.1.5.5 the environment had been, was being or was likely to be damaged
18.1.5.6 information tending to show any of these things had been, was being or was likely to be deliberately concealed.

6) Was that belief reasonable?

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

19. Whistleblowing Detriment (Employment Rights Act 1996 section 48)

19.1 Did the respondent do the following things:

1) On 28 November 2022 say information regarding the robbery was irrelevant [82, 97-98]
2) On 28 November 2022 criticised the Claimant for calling the police
3) On 19 December 2022 failed to take the Claimant's grievance seriously

19.2 By doing so, did it subject the claimant to detriment?
19.3 If so, was it done on the ground that he made a protected disclosure?

20. Automatic Unfair dismissal s.103A

20.1 What was the reason or principal reason for dismissal? The Claimant avers that the principal reason for dismissal was that he made a protected disclosure. If so, the claimant will be regarded as unfairly dismissed.

20.2 The respondent says the reason was a substantial reason capable of justifying dismissal, namely failure to pass probation; alternatively capability (performance) in that the Claimant did not pass his probationary period.

20.3 Did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? If the reason was capability, the Tribunal will usually decide, in particular, whether:

1) The respondent adequately warned the claimant and gave the claimant a chance to improve;

2) Dismissal was within the range of reasonable responses.

21. Direct Race discrimination (Equality Act 2010 s13)

21.1 The claimant identifies as black, Caribbean.

21.2 Did the respondent do the following things:

1) On 3 December 2022 'Ashif' treated the Claimant in a hostile manner regarding lateness compared to Hanif [121]
2) On 3 December 2022 'Ashif' watched the Claimant on CCTV and noted down the time he arrived [124]
3) On 3 December 2022 'Ashif' called "John" to cover the Claimant's shift [126-7]
4) On 3 December 2022 'Ashif' wrote a statement which C disagrees with [126], including:

21.2.4.1 Stating that C said "You're all the same"
21.2.4.2 Did not state the true reason for the Claimant's lateness
21.2.4.3 Claimant that the Claimant called H a "Paki",

21.3 Was that less favourable treatment?

1) 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.
2) If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.
3) The claimant says he was treated worse than Hanif
4) If so, was it because of race?
5) Did the respondent's treatment amount to a detriment?

22. Harassment related to race and/or religion (Equality Act 2010 section 26)

22.1 Did the respondent do the following things:
1) On 28 Nov 2022 Refused the Claimant's request to move sites [102-3]
2) On 28 Nov 2022 Told the Claimant to either work 9 months on site or resign. [102-3]

22.2 If so, was that unwanted conduct?
22.3 Did it relate to race?
22.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
22.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

23. Victimisation (Equality Act 2010 section 27)

23.1 Did the claimant do a protected act as follows:

1) On 20 November 2022 issued a grievance regarding the Respondents' actions following an incident on 3 October 2022

23.2 Did the respondent do the following things:

1) On 28 November 2022 Failed to conduct a proper investigation into the Claimant's grievance, in that:

23.2.1.1 The investigation meeting was held without written notice, contrary to procedure [78, 81]

23.2.1.2 The meeting was held in the "tec room" to prevent recording [78]

23.2.1.3 The meeting was held according the Disciplinary policy [78-80], as there is no investigation in the grievance policy [84]

23.2.1.4 During the meeting P. Holland claimed the information provided by the Claimant was irrelevant [82]

23.2.1.5 Withheld CCTV evidence from the Claimant that had been requested [91]

23.2.1.6 Withheld that statements had been procured from Hanif [85]

23.2.1.7 During the meeting Paul Holland alleged that the Claimant nudged Hanif's chair, causing him to jump up [88]

23.2.1.8 Failed to record the minutes of the Grievance investigation correctly [93]

2) On 28 Nov 2022 Adam Fallon failed to conduct a fair probation review, in that:

23.2.2.1 AF said incorrectly that the Claimant did not listen to his supervisor [97-8]

23.2.2.2 AF said that C should not have called the police 97-8]

23.2.2.3 AF said the Claimant could not move sites, but had to stay for 9 months or resign [97-8]

23.2.2.4 AF Failed to properly record the probation review notes [102-3]

23.2.2.5 AF refused to let C have a copy of the minutes because C refused to sign them [106]

23.2.2.6 Failed to provide a hard copy of the probation review notes to the Claimant [104]

3) At the meeting on 28 Nov 2022 AF Failed to correctly complete a performance improvement plan for the Claimant [105]

4) On 28 November 2022 AF responded to a Police email to say that no offence had taken place [111]

5) On 1 December 2022 "Domingo" failed to reply to an email asking to transfer to a different site [112]

6) On 1 December 2022 AF failed to reply to the Claimant's email [116]

7) On 3 December 2022 AF sent an email saying negative things like lateness [-]

8) On 3 December 2022 AF sent emails regarding the claimant [128]

9) The Respondent predetermined the outcome of the Probation Review as follows;

23.2.9.1 On 3 December 2022 "Oller" asked the claimant to leave site [135]

23.2.9.2 On 3 December AF logged onto the Timegate App to delete the Claimant's shifts [130];

23.2.9.3 On 7 December 2022 Paul Holland incorrectly said the Timegate App had deleted shifts in error [144]

10) On 5 December 2022 “Domingo” sent an email to Renata to say C would not be returning to site [137-140] pg 276
11) On 7 December 2022 the Respondent did not give the Claimant the allegations made against him in spite of a request to do so, so he could not defend himself. [144-5]
12) On 7 December 2022 Olivia incorrectly Claimed AF was on annual leave [143]
13) On 18 December 2022 Paul Holland did not grant the Claimant the holiday dates he requested [159-60]
14) On or about 18 December 2022 Adam Fallon ignored the Claimant’s email about his holiday.
15) On 19 December 2022 PH informed the Claimant by email that his grievance had not been upheld [170]
16) On 30 December 2022 Alexsandra told C he was not entitled to Statutory Sick Pay [175
17) On 30 December 2022 PH said the Claimant did not understand the holiday request [176]
18) On 3 January 2023 Alice Stockler sent an email to reschedule probation meeting [177]
19) On 6 January 2023 Alice Stockler sent an email to confirm that the Claimant had not passed his probation [178]
20) On 9 January 2023 Alexsandra told C he was not entitled to SSP [179]
21) On 9 January 2022 Domingo failed to respond to C’s email to collect belongings [190]
22) On 20 January 2022 Alice Stockler did not reply fully to the Claimant’s data access request as it failed to include specific documents and CCTV data [192, 195]
23) On 03 Feb 2023 Alexsandra/HMRC wrote to the claimant that CIS owe £255.48 [193]
24) On 3 Feb 2023 Alexsandra failed to pay one week notice period [193]
25) During January 2023 The Respondent employed a woman called Liah on instruction from the Client [194]

23.3 In each case, by doing so, did it subject the claimant to detriment?
23.4 If so, was it because the claimant did a protected act?
23.5 Was it because the respondent believed the claimant had done, or might do, a protected act?

24. <u>Holiday Pay (Working Time Regulations 1998)</u>

24.1 What was the claimant’s leave year?
24.2 How much of the leave year had passed when the claimant’s employment ended?
24.3 How much leave had accrued for the year by that date?
24.4 How much paid leave had the claimant taken in the year?
24.5 Were any days carried over from previous holiday years?
24.6 How many days remain unpaid?
24.7 What is the relevant daily rate of pay?

The Law

Time Limits

Discrimination Claims

25. The time limit that applies to discrimination claims is that set out in Section 123 of the Equality Act 2010. A claim must be presented within 3 months of the act complained of or within such further period as is just and equitable. The test for extension under Section123(2)(b) allows for the Tribunal to extend time where it is just and equitable to do so. That discretion is the exception rather than the rule: *Robertson v. Bexley Community Centre* [2003] IRLR 434, at para 25. Although the discretion is wide, the burden is on a claimant to displace the statutory time limits, *Chief Constable of Lincolnshire Police v. Caston* [2010] IRLR 327.

26. In *Abertawe Bro Morgannwg University Local Health Board v. Morgan (Unreported)* (UKEAT/0305/13/LA), Langstaff P held at para 52 that a litigant could hardly hope to satisfy the burden unless she provides an answer to two questions: The first question in deciding whether to extend time is why it is that the primary time limit has not been met; and insofar as it is distinct the second is reason why after the expiry of the primary time limit the claim was not brought sooner than it was. The case of Owen v Network Rail Infrastructure Ltd [2023] EAT 106 held that a Tribunal had erred in finding that if no explanation or reason for the late submission of the tribunal claim could be found in the evidence, this necessarily meant that an extension of time should be refused, as opposed to that being a relevant, but not necessarily decisive, consideration to weigh in the balance.

27. In *British Coal Corporation v. Keeble* [1997] IRLR 336, the EAT considered Limitation Act 1980, s.33 to provide a useful checklist for a Tribunal's consideration of whether to exercise its discretion to extend time. That checklist sets out the following factors:

(a) the length of and reasons for the delay;

(b) the extent to which the cogency of the evidence is likely to be affected by the delay;

(c) the extent to which the party sued had cooperated with any requests for information;

(d) the promptness with which the plaintiff acted once he or she knew of the facts giving rise to cause of action;

(e) the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.

28. The courts have subsequently clarified that this is merely a useful checklist rather than a statutory requirement: *Southwark London Borough Council v. Alfolabi* [2003] IRLR 220.

29. The tribunal should consider whether to exercise its discretion to extend time separately in respect of each claim rather than doing so on a global basis.

Whistleblowing Detriment Claims

30. s48 ERA Complaints to employment tribunals

(1A) A worker may present a complaint to an employment tribunal that he has been subjected to a detriment in contravention of section 47B.

(2) On a complaint under subsection (1), (1ZA), (1A) or (1B) it is for the employer to show the ground on which any act, or deliberate failure to act, was done.

. . .

(3) An employment tribunal shall not consider a complaint under this section unless it is presented—

(a) before the end of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or

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

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

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

(b) a deliberate failure to act shall be treated as done when it was decided on; and, in the absence of evidence establishing the contrary, an employer, a temporary work agency or a hirer shall be taken to decide on a failure to act when he does an act inconsistent with doing the failed act or, if he has done no such inconsistent act, when the period expires within which he might reasonably have been expected do the failed act if it was to be done.

(5) In this section and section 49 any reference to the employer includes

. . (b) in the case of proceedings against a worker or agent under section 47B(1A), the worker or agent.

31. S136 Equality Act 2010 - The Burden of Proof

S.136(2) provides that if there are facts from which the court or tribunal could decide, in the absence of any other explanation, that a person (A) contravened a provision of the EqA, the court must hold that the contravention occurred; and S.136(3) provides that S.136(2) does not apply if A shows that he or she did not contravene the relevant provision.

32. The EHRC Employment Code states that 'a claimant alleging that they have experienced an unlawful act must prove facts from which an employment tribunal could decide or draw an inference that such an act has occurred' – para 15.32. If such facts are proved, 'to successfully defend a claim, the respondent will have to prove, on the balance of probabilities, that they did not act unlawfully' – para 15.34.

33. The leading case on this point remains Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases 2005 ICR 931. This was further explored in *Madarassy v Nomura International plc 2007 ICR 867, CA*; and confirmed in *Hewage v Grampian Health Board 2012 ICR 1054, SC*.

34. In the case of Igen, the Court of Appeal established that the correct approach for an employment tribunal to take to the burden of proof entails a two-stage analysis. At the first stage the claimant has to prove facts from which the tribunal could infer that discrimination has taken place (on the balance of probabilities). If so proven, the second stage is engaged, whereby the burden then 'shifts' to the respondent to prove on the balance of probabilities, that the treatment in question was 'in no sense whatsoever' on the protected ground.

35. The Court of Appeal in *Barton v Investec Henderson Crosthwaite Securities Ltd 2003 ICR 1205, EAT*, gave guidelines as follows:

(i) it is for the claimant to prove, on the balance of probabilities, facts from which the employment tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not prove such facts, the claim will fail

(ii) in deciding whether there are such facts it is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In many cases the discrimination will not be intentional but merely based on the assumption that 'he or she would not have fitted in'

(iii) The outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal

(iv) The tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination — it merely has to decide what inferences could be draw

(v) in considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts

(vi) these inferences could include any that it is just and equitable to draw from an evasive or equivocal reply to a request for information

(vii) inferences may also be drawn from any failure to comply with a relevant Code of Practice

(viii) when there are facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent

(ix) it is then for the respondent to prove that it did not commit or, as the case may be, is not to be treated as having committed that act

(x) to discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever on the protected ground

(xi) not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment

(xii) since the respondent would generally be in possession of the facts necessary to provide an explanation, the tribunal would normally expect cogent evidence to discharge that burden — in particular, the tribunal

will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or any Code of Practice

36. Harassment – s26 Equality Act 2010

S26 (1)A person (A) harasses another (B) if—

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

(b)the conduct has the purpose or effect of—

(i)violating B's dignity, or

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

…..

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

(a)the perception of B;

(b)the other circumstances of the case;

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

(5)The relevant protected characteristics are—

….

disability

37. The EHRC code, which we look to for guidance, sets out what is meant by 'related to' in paragraphs 7.9-7.11. It states that related to has a broad meaning and that the conduct under consideration need not be because of the protected characteristic.

38. The Claimant must establish first that the conduct is unwanted and then whether, taking into account all of the circumstances of the case it is reasonable for the conduct to have the stated effect. This is an objective test with a subjective factor of hearing in mind the perception of the claimant.

39. The gravity of the conduct is a key part of the objective assessment. Some complaints will fall short of the standard required. Elias LJ in Land Registry v Grant [2011] ICR 1390 CA (para 47):

… even if in fact the [act complained of] was unwanted, and the Claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.

40. Victimisation: Equality Act 2010 s27

S27 (1) A person (A) victimises another person (B) if A subjects B to a detriment because—

(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.
(2) Each of the following is a protected act—
(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.
(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
(4) This section applies only where the person subjected to a detriment is an individual.
(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

Direct discrimination – s 13 Equality Act 2010

41. 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."

42. We have reminded ourselves that discrimination such as this is rarely obvious and it is unusual that any such treatment is openly admitted to or confirmed by clear written evidence as confirmation. The tribunal must consider the conscious or subconscious mental processes which led A to take a particular course of action in respect of B, and to consider whether a protected characteristic played a significant part in the treatment.

43. For A to discriminate directly against B, it must treat B less favourably than it treats, or would treat, another person. The Tribunal must compare like with like (except for the existence of the protected characteristic) and so "there must be no material difference between the circumstances" of the claimant and any comparator. (*section 23(1), EqA 2010*).

44. Section 23 EqA provides:

(1) On a comparison of cases for the purposes of section 13…there must be no material difference between the circumstances relating to each case.
(2) The circumstances relating to a case include each person's abilities if – on a comparison for the purposes of section 13, the protected characteristic is disability…

45. In *Nagarajan v London Regional Transport* [1999] IRLR 572, the House of Lords held that if the protected characteristic had a 'significant influence' on the outcome, discrimination would be made out. The crucial question in every case is, '*why the complainant received less favourable treatment…Was it on the grounds of [the protected characteristic]? Or was it for some other reason..?*'.

46. In *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 at [11-12], Lord Nicholls:

> *'[…] employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the Claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the Claimant on the proscribed ground, was less favourable than was or would have been afforded to others.*
>
> *The most convenient and appropriate way to tackle the issues arising on any discrimination application must always depend upon the nature of the issues and all the circumstances of the case. There will be cases where it is convenient to decide the less favourable treatment issue first. But, for the reason set out above, when formulating their decisions employment Tribunals may find it helpful to consider whether they should postpone determining the less favourable treatment issue until after they have decided why the treatment was afforded to the Claimant […]'*

47. Since *Shamoon*, the appellate courts have broadly encouraged Tribunals to address both stages of the statutory test by considering the single 'reason why' question: was it on the proscribed ground, or was it for some other reason? Underhill J summarised this line of authority in *Martin v Devonshire's Solicitors* [2011] ICR 352 at [30]:

> *'Elias J (President) in Islington London Borough Council v Ladele (Liberty intervening) [2009] ICR 387 developed this point, describing the purpose of considering the hypothetical or actual treatment of comparators as essentially evidential, and indeed doubting the value of the exercise for that purpose in most cases-see at paras 35–37. Other cases in this Tribunal have repeated these messages- see, e.g., D'Silva v NATFHE [2008] IRLR 412, para 30 and City of Edinburgh v Dickson (unreported), 2 December 2009 , para 37; though there seems so far to have been little impact on the hold that "the hypothetical comparator" appears to have on the imaginations of practitioners and Tribunals.'*

Protected Disclosures

48. s43A ERA 1996 Meaning of "protected disclosure"

> In this Act a "protected disclosure" means a qualifying disclosure (as defined by section 43B) which is made by a worker in accordance with any of sections 43C to 43H.

49. s43B Disclosures qualifying for protection

> (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, or is likely to be deliberately concealed.

. . .

(5) In this Part "the relevant failure", in relation to a qualifying disclosure, means the matter falling within paragraphs (a) to (f) of subsection (1)

50. s 43C ERA Disclosure to employer or other responsible person

(1) A qualifying disclosure is made in accordance with this section if the worker makes the disclosure …—

(a) to his employer, or

(b) where the worker reasonably believes that the relevant failure relates solely or mainly to—

(i) the conduct of a person other than his employer, or

(ii) any other matter for which a person other than his employer has legal responsibility, to that other person.

(2) A worker who, in accordance with a procedure whose use by him is authorised by his employer, makes a qualifying disclosure to a person other than his employer, is to be treated for the purposes of this Part as making the qualifying disclosure to his employer.

51. s43G Disclosure in other cases

(1) A qualifying disclosure is made in accordance with this section if—

(a) …

(b) [the worker] reasonably believes that the information disclosed, and any allegation contained in it, are substantially true,

(c) he does not make the disclosure for purposes of personal gain,

(d) any of the conditions in subsection (2) is met, and

(e) in all the circumstances of the case, it is reasonable for him to make the disclosure.

(2) The conditions referred to in subsection (1)(d) are—

(a) that, at the time he makes the disclosure, the worker reasonably believes that he will be subjected to a detriment by his employer if he makes a disclosure to his employer or in accordance with section 43F,

(b) that, in a case where no person is prescribed for the purposes of section 43F in relation to the relevant failure, the worker reasonably

believes that it is likely that evidence relating to the relevant failure will be concealed or destroyed if he makes a disclosure to his employer, or

(c) that the worker has previously made a disclosure of substantially the same information—

(i) to his employer, or

(ii) in accordance with section 43F.

(3) In determining for the purposes of subsection (1)(e) whether it is reasonable for the worker to make the disclosure, regard shall be had, in particular, to—

(a) the identity of the person to whom the disclosure is made,

(b) the seriousness of the relevant failure,

(c) whether the relevant failure is continuing or is likely to occur in the future,

(d) whether the disclosure is made in breach of a duty of confidentiality owed by the employer to any other person,

(e) in a case falling within subsection (2)(c)(i) or (ii), any action which the employer or the person to whom the previous disclosure in accordance with section 43F was made has taken or might reasonably be expected to have taken as a result of the previous disclosure, and

(f) in a case falling within subsection (2)(c)(i), whether in making the disclosure to the employer the worker complied with any procedure whose use by him was authorised by the employer.

(4) For the purposes of this section a subsequent disclosure may be regarded as a disclosure of substantially the same information as that disclosed by a previous disclosure as mentioned in subsection (2)(c) even though the subsequent disclosure extends to information about action taken or not taken by any person as a result of the previous disclosure.

52. 47B Protected disclosures

(1) A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

(1A) A worker (“W”) has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—

(a) by another worker of W's employer in the course of that other worker's employment, or

(b) by an agent of W's employer with the employer's authority, on the ground that W has made a protected disclosure.

(1B) Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.

(1C) For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

(1D) In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—

(a) from doing that thing, or

(b) from doing anything of that description.

> (1E) A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—
> (a) the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and
> (b) it is reasonable for the worker or agent to rely on the statement.
> But this does not prevent the employer from being liable by reason of subsection (1B).
> (2) … this section does not apply where—
> (a) the worker is an employee, and
> (b) the detriment in question amounts to dismissal (within the meaning of Part X).
> (3) For the purposes of this section, and of sections 48 and 49 so far as relating to this section, "worker", "worker's contract", "employment" and "employer" have the extended meaning given by section 43K.

53. In *Williams v Brown* UKEAT/0044/19/OO, HHJ Auerbach stated in relation to the s43B(1) definition at paras 9 and 10:

> *"9. It is worth restating, as the authorities have done many times, that this definition breaks down into a number of elements. First, there must be a disclosure of information. Secondly, the worker must believe that the disclosure is made in the public interest. Thirdly, if the worker does hold such a belief, it must be reasonably held. Fourthly, the worker must believe that the disclosure tends to show one or more of the matters listed in sub-paragraphs (a) to (f). Fifthly, if the worker does hold such a belief, it must be reasonably held.*
>
> *10. Unless all five conditions are satisfied there will be not be a qualifying disclosure. In a given case any one or more of them may be in dispute, but in every case, it is a good idea for the Tribunal to work through all five. That is for two reasons. First, it will identify to the reader unambiguously which, if any, of the five conditions are accepted as having been fulfilled in the given case, and which of them are in dispute. Secondly, it may assist the Tribunal to ensure, and to demonstrate, that it has not confused or elided any of the elements, by addressing each in turn, setting out in turn out its reasoning and conclusions in relation to those which are in dispute."*

54. To satisfy s43B(1)(f) ERA, note that the disclosure must be about something more than 'concealment' itself. It must be disclosure of information tending to show concealment *of information tending to show a breach of a legal obligation / criminal offence etc.*

55. A belief may be mistaken provided it is reasonably held – *Babula v Waltham Forest* [2007] ICR 1026, CA, (Wall LJ), para 75.

56. An expression of opinion can also convey information - *Norbrook Laboratories (GB) Ltd v Shaw* [2014] ICR 540, EAT, para 25. Information and allegation are not mutually exclusive - *Kilraine v London Borough of Wandsworth* [2018] ICR 1850, CA, para 38.

57. A disclosure of information is to be assessed in the light of the context that it is made - *Kilraine v London Borough of Wandsworth* [2018] ICR 1850, CA, para 41.

58. Where a disclosure is claimed to relate to a criminal offence or show a breach of a legal obligation, a worker is not required to specify chapter and verse of what criminal offence or legal obligation she has in mind so long as the nature of the criminal offence or legal obligation is clear. However in *Blackbay Ventures Ltd (t/a Chemistree) v Gahir* [2014] ICR 747, the EAT stated at para 5: 'Save in obvious cases, if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation'. A moral or ethical objection or a breach of industry guidance or rules is not enough.

Whistleblowing Detriment

59. Once all the other necessary elements of a claim have been proved on the balance of probabilities by the claimant — i.e. that there was a protected disclosure, there was a detriment, and the respondent subjected the claimant to that detriment — pursuant to Section 48(2) ERA, the burden will shift to the Respondent to prove that the worker was not subjected to the detriment on the ground that he or she had made the protected disclosure. If an employment tribunal can find no evidence to indicate the ground on which a respondent subjected a claimant to a detriment, it does not follow that the claim succeeds by default — *Ibekwe v Sussex Partnership NHS Foundation Trust* EAT 0072/14 at para 21.

60. In looking at causation on a detriment claim, the EAT in *London Borough of Harrow v Knight* [2003] IRLR 140, para 16, emphasised that the test is whether the worker was subjected to the detriment on the ground that the worker had made a protected disclosure - not whether it was 'related to' the protected disclosure. Elias LJ's formulation of the causation test in *Fecitt and ors v NHS Manchester (Public Concern at Work intervening)* [2012] ICR 372, para 38 is whether the protected disclosure materially (in the sense of more than trivially) influences the employer's treatment of the whistleblower.

61. **s103A Automatic Unfair Dismissal 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.

62. Where an employee claims that he or she was dismissed contrary to S.103A, the question for consideration is whether the protected disclosure was the reason or principal reason for the dismissal. If it was, then the dismissal will be automatically unfair. This is a different test to the 'on grounds of' test applicable to whistleblowing detriment.

63. Section 47B protects a worker from being subjected to a detriment on the ground that he or she *made* a protected disclosure. It does not extend to the

situation where the worker attempted or proposed to make a protected disclosure.

Facts

64. We have only made findings of fact in relation to matters which are relevant to the issues we had to decide. We have considered all the evidence we were taken to. Where matters or evidence discussed before us are not referred to in the Judgment that does not mean we have not considered them. All of our findings are reached on the balance of probabilities.

65. The Claimant was employed as a Security Officer from 6 September 2022 until 16 January 2023. The Respondent provided security services to various clients. The Claimant was employed by the Respondent to work at its Rathbone Place site. He worked a 4 on 4 off shift pattern.

66. The Claimant provided an enormous amount of erroneous information regarding the working responsibilities within the Respondent. However, of relevance was the fact that there three areas that security officers worked on rotation; the loading bay, outside on the site and the control room. The Claimant was predominantly deployed in the loading bay and outside on site. Any time spent in the control room was generally done in order to provide relief for breaks to those working in the control room.

67. The Claimant also included a lot of information about incidents that occurred that he says were discriminatory that are not relevant to the agreed issues in this case. We have therefore not made findings in respect of those allegations.

<u>Altercations with Mr Muhammad</u>

68. On two occasions, the Claimant assisted members of the public. The first occasion was when he assisted a woman whose mobile phone had been stolen. The evidence regarding exactly which date this took place on is difficult to pin down. However on balance we think that the robbery took place on or around 2/3 October and the difficulties regarding reporting it arose on 3 October.

69. The Claimant assisted the woman whilst she was in Rathbone Place including speaking to the police when the woman called them. It was not in dispute that the robbery itself took place outside Rathbone Place and that the woman had come to the site because her partner worked in the vicinity.

70. When the Claimant returned to the control room he asked Mr Muhammad to report it in accordance with the Claimant's interpretation of the Assignment Instructions. Mr Muhammad did not report the incident because he said it had happened off site and therefore ought not to be reported.

71. There was significant disagreement during the hearing as to the correct interpretation of the Assignment Instructions. The Respondent asserted that the AI was a generic document that was often amended and updated in practice by those on the ground doing the job in conjunction with the client at

each site. In this regard, they had agreed with their client not to report robberies that did not occur on site. They said that they had a degree of operational discretion that could deviate from the AI and that the staff on site, particularly those who had been there for some time, would know how to exercise that discretion in accordance with the client's requirements. The Claimant disagreed and considered that Mr Muhammad's refusal to report the robbery was in breach of the AI and in breach of the Respondent's obligations to its client. This appeared to us to be one of many disagreements between the Claimant and Mr Muhammad regarding the running of the site.

72. We consider that the Claimant wanted this incident reported because he considered it to be important. It is not clear to us why he then considered that Mr Muhammad telling him that it was not sufficiently important to report, was in some way a personal attack on the Claimant. Mr Muhammad was the acting supervisor and at the relevant time the Claimant had only been on site for 2 weeks. Mr Muhammad's intent was to tell the Claimant that this was not how the job was done. There was an audio recording of this incident for which we had the transcript in the supplementary bundle (p 248-253). It is clear that Mr Muhammad did swear during this conversation using the word 'shit'. It is also clear that the Claimant had decided, from an early stage that it was appropriate to record his colleagues.

73. On 19 November there was a drunk woman on the site. She was sat outside a fire escape. The Claimant sought help for her which was readily available as she had friends there and knew someone working at Big Momma's restaurant which was part of the site. When the Claimant returned to control room the Claimant asked Mr Muhammad to report it. Mr Muhammad said that it did not need reporting. However the Claimant insisted so Mr Muhammad told him to write up the report and left the room for around 30 minutes. When he returned there was an altercation. The Claimant's phone had run out of battery so he had not completed the report as directed and Mr Muhammad did say that the Claimant was useless. During evidence before us Mr Muhammad agreed that he had said this and regretted it. Subsequently Mr Muhammad alleges that the Claimant swore at him calling him a 'Paki' and a 'Cunt' and saying he should go back to his own country. This is one of very few conversations the Claimant did not have an audio recording of. He has not provided an explanation for that. We assume that this may have been because his phone had run out of battery at this stage. The Respondent says that the CCTV is no longer available because the footage belongs to their client who deletes all footage after 28 days.

74. The Claimant accepts that he made references to what he perceived people's countries of origins to be and so may have said that Mr Muhammad was from Pakistan. We had audio and transcripts of him frequently making reference to people's national origins. However he denies using the racial slur or swearing at Mr Muhammad and considers that the people working in the control room had an agenda to get rid of him and this is why it was alleged that he had sworn at Mr Muhammad.

75. The Claimant alleges that during this incident Mr Muhammad came up to him and threatened to punch him raising his hand as if to do so and the Claimant said that he felt threatened. Mr Muhammad denies that and Mr Holland states that on viewing the CCTV footage of the incident Mr Muhammad did not raise his hands above waist level.

76. There was also a dispute as to whether the Claimant nudged Mr Muhammad's chair on the way out.

77. As a result of this altercation with Mr Muhammad, the Claimant emailed Mr Fallon the site supervisor on 20 November 2023 at 10.24 in the morning. The email complained about the incident on 3 October 2022.

78. On the same day (20 November), the Claimant also sent his formal grievance. This was sent at 11.18. This email was sent to Mr Fallon, Mr Desousa, Ms Rand and HR and the Control room. The grievance raises the incident with between the Claimant and Mr Muhammad on 19 November as well as referring to the incident with the drunk woman and attaches the report about the 3 October incident.

79. The formal grievance, in summary, details the incidents with the women and what the Claimant did and then complains about Mr Muhammad's behaviour in failing to report the incidents and states that Mr Muhammad had threatened to punch him. The Claimant accepts that nowhere in this grievance does he mention discrimination or any issue regarding race or national origins.

80. Mr Thapa sent a report the following day about the altercation between Mr Muhammad and the Claimant on 20 November 2022. Mr Thapa's statement only refers to what he had been told by the Claimant. He was not an eye witness to the incident.

81. The Claimant also reported the altercation between him and Mr Muhammad to the police on the same day. There was also an earlier report to the police regarding the phone robbery issue.

82. The police visited the premises. It was not in dispute that the Respondent did not send the CCTV footage to the police. They stated that it belonged to their client at Rathbone place which we accept. The email correspondence suggests that the police had not viewed it. However one of the Respondent witnesses told us that the police did come in and did view the footage on site.

<u>The Grievance Investigation</u>

83. On 28 November the Claimant had a grievance meeting with Mr Holland in the morning and his 8 week probation meeting with Mr Fallon in the afternoon.

84. We heard evidence from Mr Holland. Mr Fallon no longer worked for the Respondent and we did not hear evidence from him but we did have a transcript of the meeting.

85. Mr Holland met with the Claimant. He did not notify him in advance that there was going to be a meeting that day and he did not inform him of his right to be accompanied as set out at page 190 of the Bundle. Mr Holland said he was under no obligation to do that because this was a grievance investigation meeting. This does not explicitly refer to a grievance investigation meeting. It says that a grievance hearing will be scheduled without delay and that an employee is entitled to accompaniment at the hearing. We accept that an investigation meeting might be held as part of the process and that those who take part in investigation meetings would not necessarily have the right to accompaniment. However what then normally would be expected to follow would be a further, more formal grievance meeting which would have involved notice and accompaniment. That is what the policy suggests is the process (pg 191). Mr Holland did not go on to have a formal meeting with the Claimant having established the facts and in fact it is on the basis of this interview alone that Mr Holland determined the Claimant's grievance and sent the outcome letter (pg 302, dated 19 December). He therefore breached the Respondent's grievance process.

86. When asked by the Tribunal what else he had done in terms of a grievance investigation, Mr Holland said that he had also spoken to Mr Muhammed and Mr Fallon about the situation. We had no notes of either conversation. Mr Holland had not put that information in his witness statement. There was a written statement in the bundle by Mr Thapa (as referenced above) but Mr Holland said he had never seen that document before the Tribunal hearing. We therefore conclude that Mr Holland's grievance investigation failed to adhere to the Handbook and was inadequate in that, on balance, we find that he failed to properly interview Mr Muhammad or Mr Fallon or Mr Thapa all of whom were relevant people to speak to about the issues the Claimant was raising in his grievance. We consider that he viewed the CCTV footage and decided that the Claimant was making trouble and he did not want to uphold his grievance. We find that he did not take the Claimant's grievance seriously because of what he viewed in the CCTV footage and because of his meeting with the Claimant.

87. We had a transcript of the meeting between the Claimant and Mr Holland which was taken without the permission of Mr Holland. This was in breach of the grievance policy which expressly states that meetings should not be recorded. The Claimant had asked to record it and been refused and yet the Claimant continued recording. The Claimant maintains that he did not say he would stop recording and therefore it was clear that he was recording. We disagree. He says 'OK' in response to Mr Holland's statement that the recording ought not to be made and we consider it was reasonable for Mr Holland to understand that the Claimant had therefore stopped recording. 'OK' is generally interpreted as an affirmative statement indicating that someone is agreeing to do what they have been asked to do. We find that the Claimant knew that Mr Holland believed that he had stopped his recording and continued to deliberately deceive Mr Holland for the remainder of that meeting.

88. The Claimant asserts that the meeting was held in the tech room to prevent him recording or to make it more difficult. We do not agree. The fact that the

Claimant could and did continue to record in that room suggests that it was not impossible. We also consider that Mr Hollands was not expecting to be recorded so he would not have planned accordingly.

Probation meeting

89. There was then an 8 week probation review meeting with Mr Fallon, also on 28 November 2022. Mr Fallon's approach was more conciliatory and having read the transcript in full, it was the Tribunal's opinion that Mr Fallon was hoping to restore the relationship between the Claimant and his colleagues by suggesting that the Claimant take a different approach to how he interacted with his colleagues in order to regain trust and confidence.

90. The conclusion of the probation meeting was that there were a great deal of positives but that the Claimant needed to work on his relationships with his colleagues. The positives that were highlighted were his communication skills with the public and his efforts regarding the two incidents with the women on the site were examples of that positive behaviour. Therefore Mr Fallon made it clear to the Claimant that his work was appreciated and his actions condoned in respect of how he dealt with the public.

91. What Mr Fallon discussed with the Claimant was that how those incidents were then reported and that the way in which the Claimant disagreed with his supervisor in respect of that, was not helpful. He suggested that covertly recording colleagues would not foster good relationships and clearly explained why. The Claimant justified his recordings to the Tribunal by saying that his colleagues were either lazy and not doing their job properly because they took long breaks or watched movies and did not welcome his intrusion into that way of working and/or that he considered they were collaborating against him and he needed to protect himself.

92. At the probation meeting the Claimant asked to transfer to another site. He was told that he could not request a transfer within the first 9 months. It is clear in the contract that this is the Respondent's normal policy (p123). We established that it was possible for managers to move people if they wanted to but this was not normal practice as they wanted to sufficiently train people before moving them. He was told that in order to move sites he would have to resign.

Altercation on 3 December 2022

93. There was an altercation between a member of staff called Ashish Mathur (though he is also referred to as Ashif at various points in the pleadings) and the Claimant. We listened to both versions of the audio recording of this incident.

94. On 3 December the Claimant arrived at work late due to transport difficulties. At the point at which he had mobile reception he called Control and told them that he was running late by around 30 minutes. We did not have a recording of this part of the incident – though this conversation was not in dispute.

95. When the Claimant arrived on site a row broke out with Mr Mathur. Mr Mathur asked the Claimant to explain why he was late and why he had not called in.

The Claimant was unhappy with him asking that because he had already called into control and notified them.

96. The Claimant considers that he was treated differently from Mr Muhammad who was also late that day. Mr Muhammad told us in evidence that he was not late, he had been in the office but had left when the Claimant was about to come in as he did not want to be around him. The Tribunal found that explanation plausible. Mr Muhammd and the Claimant had been arguing over several weeks by this time and the Claimant had reported the situation to his managers and the police. We accept that Mr Muhammad would not want to be in the same room as him if possible.

97. During the row between the Claimant and Mr Mathur, the Claimant referred to Mr Mathur's national origins. The Claiamnt says that Mr Mathur is Pakistani or Bengali. Mr Mathur replies that he is neither. In response the Claimant says 'Wherever you are from. You're Asian." There continue to be repeated references to Mr Mathur and other colleagues' ethnicity in various ways by the Claimant. Having listened to two different recordings, the Claimant does not use the word 'Paki' but he does say other things that could reasonably be interpreted as derogatory such as, "It's how you lot stay' with 'you lot' being a reference to those with an Asian background and making reference to the fact that Mr Mathur had only just got citizenship. The Claimant said in submissions that this reference to the fact that Mr Mathur had only just received citizenship was intended to belittle him as a supervisor (or words to that effect). He did not consider that this was a discriminatory remark despite that context.

98. During the conversation Mr Mathur stated that the Claimant should go home and not complete the shift saying that he did not want to work with him. He also said that the Claimant would not be paid for 4 hours. It is not clear why he said that. The Claimant was understandably angered by this suggestion given that he was only 30 minutes late.

99. Both the Claimant and Mr Mathur were recording this incident without the other one knowing. We heard both versions of that conversation. The only difference was that the Respondent's recording started at an earlier time.

100. As a result of the altercation, Mr Mathur emailed Mr Fallon who then sought the advice of Mr De Sousa as to how to proceed. Mr De Sousa, who was at home, decided on the basis of an emergency call from Mr Fallon, that the two individuals needed separating and so the Claimant was removed from site with full pay to diffuse the situation whilst someone was appointed to investigate. He said that he decided that the Claimant should go home as opposed to Mr Mathur because Mr Mathur was the acting supervisor on that shift. We accept that explanation.

101. The Claimant left the site and a different individual (John) was brought in to replace him.

102. Mr De Sousa's witness statement said that Mr Fallon was asked to investigate the incident and took a witness statement from Mr Mathur as a

result. We saw no evidence of any other investigation taking place. Mr Fallon did not, for example, arrange an investigation meeting with the Claimant or Stefan who was in Control that night and who we hear in the recordings.

103. On the 5 December the client representative at the site (Renata) emailed Mr De Sousa saying that the incident had come to her attention and she was unhappy at the idea of there being any racist behaviour on the site. Mr De Sousa responded on 6 December (p 276) stating that the Claimant would not return to the site and that a meeting had been scheduled with him for the 8th December.

Holiday and sick leave

104. The Claimant's son was born at around this time and the Claimant took annual leave. The Claimant originally sought paternity leave. He mistakenly referred to it as maternity leave. However the Respondent informed him that he did not have sufficient service to take paternity leave and suggested he use annual leave instead. Some of that annual leave was granted and the Claimant took 8 days annual leave in total. That was evidenced by the December 2022 payslip (p 312) and was not disputed by the Claimant. The dates taken were 8, 9, 11, 16, 17, 18, 19 and 24 December 2022.

105. The Claimant was also off sick for some of this period. We had one sick certificate in the bundle but the Claimant was not challenged on his evidence that he remained unwell and we therefore accept that he was not well.

Grievance outcome

106. The Claimant received the grievance outcome letter on 19 December 2022. Mr Holland stated that he did not uphold the grievance. He did not set out in that letter what investigation he had done in terms of who he had spoken to or why. He says that he spoke to all parties that have been highlighted but he did not given any information as to what they had said nor why he reached his conclusions.

"After the hearing and subsequent adjournment, I have concluded my investigation and I cannot find sufficient grounds to substantiate your grievance. I have spoken to all parties that have been highlighted as involved in this case, but I have not found any further evidence to validate the concerns you have raised through my investigation. All parties have been given sufficient time and support to progress but this support has not been taken. That being said, I feel that our employees have been treated fairly, and as such those officers that work in that environment contact me directly. Whilst I understand you feel you havebeen treated unfairly, no formal action has been taken against you and through my investigation I could not find any evidence to substantiate your concerns.

I trust the above resolves your concerns and look forward to your response confirming the same. Should this not be the case, you are advised that you have the right of appeal against my decision. If you wish to appeal, you should do so in writing within 5 working days of the date of this letter to your HR representative, stating your reasons for the appeal." (P 302)

Probation review and termination

107. The Claimant was asked to attend a 12 week probation review meeting. We had an email in the bundle dated 9 December trying to schedule if for 14 December. It refers to the fact that it was due to take place on 8 December but was rescheduled because the Claimant was unwell. In total, the meeting was postponed on 3 occasions. The last date upon which the review meeting was scheduled was 5 January 2023. Two hours before the meeting was due to start the Claimant submitted a sick certificate. Mr Hobbs decided to proceed with the meeting in the Claimant's absence due to the number of previous postponements. We did not hear from Mr Hobbs as to why he decided to do that.

108. Mr Hobbs decided that the Claimant had failed his probationary period and terminated the Claimant's employment with immediate effect. The reasons given on the dismissal letter were as follows:

(i) Behaviour that is disruptive to the site and colleagues
(ii) Unacceptable level of conduct
(iii) Unsatisfactory level of teamwork and cooperation
(iv) Reports of racist remarks being made

109. As Mr Hobbs was not called to give evidence, the reasons behind these conclusions could not be tested. The Claimant was given the right to appeal against the dismissal n but did not do so.

Discussion and conclusions

Time Limits Limitation

110. The Claimant was dismissed on 5 January 2023. The ACAS Early Conciliation period commenced and finished on 21 February 2023. The Claimant's ET1 was accepted on 23 March 2023.

111. One day ought to be added to the normal 3 month limitation period given that Early Conciliation occurred for 1 day. Therefore, any incident relied upon before 23 December 2022 is potentially out of time.

112. We address the limitation periods for each head of claim below.

Whistleblowing detriment claim

113. Where the detriment relied upon by the Claimant occurred before 23 December 2022, that claim will be out of time unless the Claimant can show that it was not reasonably practicable for him to bring the claim in time. Where the complaint relates to a series of acts or failures to act, then the limitation period starts from the date of the last act relied upon (s48(3)(a) ERA 1996.

114. The detriments which the Claimant relies upon occurred on are:

- On 28 November 2022 say information regarding the robbery was irrelevant [82, 97-98]

- On 28 November 2022 criticised the Claimant for calling the police
- On 19 December 2022 failed to take the Claimant's grievance seriously

115. They are all separate incidents. The first is a comment made by Mr Hollands, the second is a comment made by Mr Fallon in a different meeting and the last is an act by Mr Hollands again in writing his grievance outcome letter. It is possible that both acts by Mr Hollands, as they relate to the Claimant's grievance, constitute a series of acts. Even then though, the Claimant did not submit a claim within time. The Claimant has not explained why it was not reasonably practicable for him to submit a claim regarding any of these incidents within 3 months of them occurring. Given that 'not reasonably practicable' is a high bar, the absence of any explanation for not putting in the claim sooner puts the Tribunal in a position of difficulty. The Claimant is a litigant in person so we have considered whether we have any evidence upon which we could conclude that it was not reasonably practicable for the Claimant to submit a claim in time and we have decided that we do not. He was able to carry out many other acts during this time. We do not have evidence that he was in some way incapacitated during this time nor that he was unaware of the incidents until later.

116. We therefore consider that the Claimant's claims for whistleblowing detriment are all out of time and we do not have jurisdiction to decide them.

117. Despite the above we make the following observations about the disclosures relied upon by the Claimant.

<u>On 28 November 2022 reported an incident involving a robbery to Paul Holland</u>

118. The Claimant first reported his concerns regarding the mobile phone theft incident to Mr Fallon on 20 November 2022 via email. The Claimant's report to Mr Holland on 28 November 2022 was within the context of his grievance regarding Mr Muhammad's behaviour towards him and his failures to report incidents in accordance with the AI.

119. Given that the Claimant had already reported this matter via email it is not clear why he is relying upon his report to Mr Hollands as opposed to his email to Mr Fallon. We accept that the claimant provided Mr Hollands with information that a crime against a member of the public had been committed on 3 October 2022. We also accept that reporting a crime is capable of being in the public interest. There is no need for a disclosure to be made in good faith. We consider that this disclosure was capable of being a qualifying disclosure.

<u>On 28 December 2022 Reported the incident to the Police – the Claimant elaborated that he relied both upon reporting the mobile phone robbery to the police and reporting his altercation with Mr Muhammad to the police.</u>

120. S43G ERA sets out the criteria for a qualifying disclosure where it is made to an external body such as the police. This is set out in full above.

121. The Claimant spoke to the police about the robbery incident but he did not report it to the police himself. It was reported to the police by a member of the public. We therefore consider that he cannot rely upon this as a qualifying disclosure as he did not make the initial report nor did he believe that he was doing so. He was just talking to the police when a member of the public was calling the police and making her own report. We do not know what information he gave the police and given that he was not a witness to the robbery itself but was simply recording that he was assisting the member of the public, we do not consider that this incident involving the police can amount to a qualifying disclosure by the Claimant in accordance with s43G ERA.

122. Separately, the Claimant reported Mr Muhammad's behaviour towards him to the police. We accept that the Claimant reasonably believed that the information he gave the police about Mr Muhammad threatening him in the altercation was substantially true even though Mr Hollands says that the CCTV did not show Mr Muhammad raising his fists. It does not seem in dispute that Mr Muhammad got close to the Claimant during an argument and we can accept that the Claimant may have felt physically threatened. We do not consider that there is any evidence that he did it for personal gain. We must therefore consider whether any one of the requirements of s43G(2) are satisfied.

123. We do not accept that the Claimant reasonably believed that he would be subjected to a detriment by his employer if he made the disclosure to them. He made the disclosure to his employer on the same day so he clearly did not consider that this was a significant concern. He had no reason at this point to consider that his employer was going to subject him to a detriment as a result of reporting it to them.

124. We do not accept that the Claimant reasonably believed that evidence relating to the alleged failure would be concealed or destroyed. He had no grounds to reasonably believe that Mr Muhammad would destroy the CCTV which belonged to the client not to the Respondent. The CCTV footage is deleted after 28 days in accordance with the client requirements but that does not mean that at the time that he reported this incident to the police he believed that anyone at the Respondent would otherwise delete the footage.

125. The Claimant had made the disclosure to his employer on the same day in his grievance email. He therefore had made a disclosure of substantially the same information to his employer and we believe it was before he reported the matter to the police although this was not entirely clear from the evidence we heard. Taking it at its highest then the Claimant potentially therefore satisfies s43G(2)(c) but not s43G(2)(a) or (b).

126. However we must also consider whether it was reasonable in all the circumstances for the Claimant to make the disclosure to the police and part of that consideration is why he reported it to the police on the same day that he reported it to his employer. He did not wait for a negative response or any

failure to respond by his employer. He could not have known, at the point that he reported it to the police, that Mr Hollands would not take his grievance about this matter seriously. Instead, he reports it to an outside body supposedly on the basis that he considered it was in line with the AI policy that governed his work. We do not accept that explanation. We consider that he reported the incident to the police to place Mr Muhammad under pressure because he did not like him and he did not like the way Mr Muhammad spoke to him. We do not accept the Claimant's arguments that he was exposing Mr Muhammad's laziness or failure to do the job and that Mr Muhammad felt threatened by his presence. We conclude that the Claimant reported the matter to the police because he was attempting to get Mr Muhammad reprimanded or dismissed. He considered that reporting it to the police would increase the pressure on the respondent to take action against a colleague he had a bad relationship with and it was not reasonable in all the circumstances to take this step.

127. We also do not consider it reasonable that the Claimant thought that the AI policy applied to an incident with a colleague where there had been no actual violence albeit there had been a threatening altercation. Whilst we accept that it indicated that assaults ought to be reported to the police, this was primarily in the context of matters that occurred to members of the public in the area that they provided security for and possibly where the members of staff themselves were assaulted by members of the public. We do not consider that it was reasonable for the Claimant to interpret this as applying to an argument between colleagues, particularly when it was not violent and no physical altercation took place.

128. This was not a particularly serious incident or failure and he had not given his employer a chance to deal with the disagreement between colleagues before reporting it to the police.

129. In all the circumstances then we do not consider that the Claimant's disclosure to the police about the incident with Mr Muhammad amounts to a qualifying disclosure under s43G ERA 1996.

<u>On 21 November 2022 the respondent failed to give CCTV evidence of the incident to the Police</u>

130. This cannot be a disclosure by the Claimant to the Respondent as this is an allegation that the Respondent failed to take action. It is about something the Respondent allegedly did not do; it is not a disclosure of information by the Claimant.

131. The only disclosure that we have found could amount to a qualifying disclosure is the Claimant reporting the robbery incident to Mr Fallon on 28 November 2022.

<u>Detriments</u>

132. The Claimant relies upon three detriments. We assess whether there is a causative link between the disclosure on 28 November 2022 to Mr Hollands about the robbery and the detriments relied upon.

On 28 November 2022 say information regarding the robbery was irrelevant [82, 97-98] (Mr Hollands)

133. We do not consider that Mr Hollands telling the claimant that the information regarding the robbery was irrelevant was a detriment. Mr Hollands was seeking to establish the basis for the Claimant's complaints about Mr Mohammad and so details of what the Claimant had or had not done or what had happened to the robbery victim whilst he was assisting her, were largely irrelevant to his consideration of whether Mr Muhammad had acted correctly or not. He wanted to understand what had happened between the Claimant and Mr Muhammad.

134. If we are wrong on that, in any event, we do not consider that this comment was caused by the fact that the Claimant had made this disclosure to Mr Hollands. It was caused because in investigating the incident, Mr Hollands was frustrated by the Claimant's approach and in particular his antagonistic approach to Mr Mohammad's decision that the matter did not need to be reported. It was not caused because of the content of what the Claimant reported but because he disagreed with the Claimant's actions towards his colleague.

(i) On 28 November 2022 criticised the Claimant for calling the police (Mr Fallon)

We do not consider that Mr Fallon was criticising the Claimant for calling the police because the matter had been reported to Mr Holland. As set out above, the report to the police was not a qualifying disclosure.

In any event having read the entire transcript of the conversation between the Claimant and Mr Fallon on 28 November, we do not consider that Mr Fallon was subjecting the Claimant to a detriment by asking him to reflect on whether calling the police was the right thing in all the circumstances. He was asking the Claimant to reflect on whether calling the police on his colleagues was good for his relationship with the team. He was asking this in circumstances where the Claimant had called the police on a colleague where there had been no violent altercation and before there had been any attempt at calming the matter down with the assistance of managers or colleagues. We do not accept that the Claimant really believed that he was acting in accordance with the AI policy or that it was reasonable for him to think that this was how he should behave. We consider that he was attempting to have his colleague disciplined and Mr Fallon was carefully advising him that to remain employed and part of the team, he might want to reflect on this as a course of action in the future.

(ii) On 19 December 2022 failed to take the Claimant's grievance seriously (Mr Hollands)

We accept that Mr Hollands failed to take the Claimant's grievance seriously but we do not accept that this was because the Claimant had told Mr Hollands about the robbery. We consider that Mr Hollands failed to take this seriously because he viewed the CCTV footage of the incident between the two colleagues and considered that the Claimant was making a fuss about an incident that he did not consider serious. In addition, given Mr Mohammad's length of employment, he preferred Mr Muhammad's version of events even without an investigation. That is an example of poor management and investigations, but we do not consider it occurred because the Claimant reported the matter. We consider that it occurred because the Claimant had fallen out with several members of the team by this stage and Mr Hollands found him annoying.

135. The Claimant's claims for whistleblowing detriments are not upheld. The detriments relied upon are out of time in circumstances where it was reasonably practicable for the claims to have been brought in time. Further, two of the qualifying disclosures relied upon do not amount to qualifying disclosures. Finally the one qualifying disclosure we have found occurred, did not materially influence the respondent to carry out the detriments relied upon in any event.

Automatic unfair dismissal

136. The Claimant's unfair dismissal claim is in time. Given our conclusions above about the disclosures relied upon, to succeed, the Claimant must demonstrate that his disclosure to Mr Hollands on 28 November about the incident with Mr Muhammad was the reason or principal reason for his dismissal. (Fecitt and ors v NHS Manchester (Public Concern at work intervening) 2012 ICR 372, CA.).

137. We do not consider that the reason or principal reason for the Claimant's dismissal was his disclosure to Mr Hollands. We consider that the Claimant failed his probation because he had failed to establish a functioning, working relationship with several of his colleagues and in particular with Mr Muhammad and then Mr Murthy both of whom were shift leaders on the relevant occasions. During conversations or arguments with both, the Claimant had refused to comply with management requests, he had, even on his own evidence, sought to belittle Mr Murthy because he had only gained his citizenship recently, he frequently referenced his colleagues' perceived nationalities and he made it clear that he had no trust or confidence in his colleagues by frequently recording them.

138. The reasons given for the Claimant's failure to pass his probation were:

(i) Behaviour that is disruptive to the site and colleagues
(ii) Unacceptable level of conduct
(iii) Unsatisfactory level of teamwork and cooperation
(iv) Reports of racist remarks being made

139. We consider that on balance, the Respondent has demonstrated that these were the reasons that the Claimant was dismissed. This is despite the fact that we did not hear evidence from Mr Hobbs who made the decision to dismiss. Even if the absence of that evidence we have concluded that the dismissal letter and the evidence we had from the Claimant and the other Respondent representatives was sufficient to establish, on balance of probabilities that the above listed reasons were the real reasons the Claimant did not pass his probation period.

140. We do not accept that the fact that the Claimant had reported Mr Muhammad's behaviour to Mr Hollands on 28 November caused the Respondent to reach all of the conclusions above. We accept that part of their conclusions regarding teamwork and disruptive behaviour, may have been because the Claimant reported Mr Muhammad's behaviour however we do not consider it was the reason or principal reason. The reason or principal reason was that over the course of his short employment, the Claimant had made his colleagues uncomfortable and anxious on repeated occasions, he had made remarks about people's nationalities that they found concerning, he had refused to accept his shift leader's guidance on whether a matter ought to be reported in accordance with the AI and he had refused to listen to Mr Fallon when he told him what he needed to do to improve his relationship with his colleagues at the 8 week probation review meeting. It was therefore the Claimant's approach and behaviour which led to him failing his probation and being dismissed, not his disclosures.

141. The Claimant's claim for automatic unfair dismissal is not well founded and is not upheld.

Race discrimination claim

142. The Claimant relies upon several acts, all by Mr Murthy on 3 December, as being acts of direct race discrimination. He says that he was treated less favourably that Mr Mohammad who he says was also late on that day but was not treated negatively in any way.

143. These claims are out of time. Any incident prior to 24 December 2022 is out of time. This was a one off incident with a colleague and not part of a continuing act.

We must consider whether it is just and equitable to extend time.

144. In *Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434, CA*, the Court of Appeal stated that when employment tribunals consider exercising the discretion, '*there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a claim unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule.*'

145. In exercising our discretion we may have regard to the checklist contained in S.33 of the Limitation Act 1980 (as modified by the EAT in *British*

Coal Corporation v Keeble and ors 1997 IRLR 336, EAT). We may consider, in particular, the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the respondent has cooperated with any requests for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

146. We understand that around December 2022 the Claimant had a new baby. We also understand that subsequently the Claimant had some episodes of ill health. The delay was only 3 weeks and is unlikely to have affected the cogency of the evidence. We understand that Mr Murthy no longer works for the Respondent but we do not know when he left and therefore whether the 3 week delay has in any way affected their ability to obtain witness evidence from him.

147. However the Claimant was able to contact ACAS on 21 February 2023 and submit his ET1 on 23 March 2023. He has not explained why he was not able to do those things 3 weeks earlier nor why he did not think to do so. He has not suggested that he did not know about the relevant 3 month deadline for such claims and he knew about this incident at the time that it occurred. We have not been told that the Claimant has sought legal advice. When considering whether it is just and equitable to extend time, we must weigh up all of these factors and the relative prejudice to both parties. There is an inevitable prejudice to the Claimant if we do not extend time. However the Respondent is also disadvantaged if we do consider it.

148. On balance, we do consider that it is just and equitable to extend time in all the circumstances. The delay in bringing a claim was short. The Claimant was not legally represented at the time. He linked the deadline for bringing his claim to his dismissal which, he believed, at least in part, stems from the situation with Mr Murthy that occurred a few weeks earlier. The delay has not affected the Respondent's ability to respond to the claim and therefore, in those circumstances we consider that it is just and equitable to extend time to consider the race discrimination claims.

149. The Claimant did not put to any of the Respondent witnesses that Mr Murthy's actions were motivated by the Claimant's race either because he was black Caribbean or because he was not Asian. The Claimant's concerns that were articulated during the course of the hearing were that there was a clique of individuals within the Respondent, of a shared or similar national background, who all worked with each other to ensure that nobody reported them being 'lazy' or sleeping on the job, or failing to comply with their obligations to their clients.

150. He did not establish, with any corroborating evidence, that any of the individuals were in fact of the same nationality or background nor that there was any such clique in operation. We had no evidence whatsoever to support that conclusion. We accepted Mr Mohammad's evidence that on 3 December he was at work but had left the room to avoid seeing the Claimant. He is

therefore not an appropriate comparator because he was not late to work that day.

151. An appropriate hypothetical comparator is someone who was in the same circumstances as the Claimant save for his race. We were not addressed on this point by either party. We consider that it would be an individual who was not of the same race as the Claimant or who was not 'Asian', who arrived on shift late, who had also not called the site but had called control and then reacted in the same way that the Claimant did when he was asked why he had not called the site by Mr Murthy.

152. Having listened to both recordings of the incident we consider that the Claimant's reaction is combative. We understand his concern and possible anger that he was being reprimanded when he had correctly reported his absence, and subsequently told to go home and that he would not be paid. Nevertheless we do not consider that this excuses his remarks about the ethnicity of Mr Murthy and his colleagues even when he does not use obviously derogatory language. It is the Claimant who makes people's race or nationality an issue on this occasion; not Mr Murthy. Further we consider that the Claimant's self-confessed attempt to put Mr Murthy in his place by referring to his recent citizenship award further supports that it was the Claimant who was making race a negative issue on this occasion.

153. In that context, we do not consider that the Claimant has shown that he was treated less favourably than someone else in the same circumstances but of a different racial background would have been treated. We consider that Mr Murthy's actions during and after this incident are explained by the Claimant's behaviour towards Mr Murthy not his race or nationality.

154. Taking each incident in turn:

i. On 3 December 2022 'Ashif' treated the Claimant in a hostile manner regarding lateness compared to Hanif

We do not consider, having listened to the recordings, that Mr Murthy was hostile towards the Claimant because of the Claimant's race. He considered the Claimant to be late and when he questioned him about it, the Claimant's response was hostile and he responded accordingly. The reason behind the treatment was not the Claimant's race.

ii. On 3 December 2022 'Ashif' watched the Claimant on CCTV and noted down the time he arrived

We believe that the reason this occurred was because Mr Murthy did not know, at the time, that the Claimant had called into the Control room. There is nothing to suggest that this occurred due to the Claimant's race. The Claimant was late and his time of arrival was noted. The Claimant has provided no evidence to suggest that the Claimant's race was the reason for the treatment.

iii. On 3 December 2022 'Ashif' called "John" to cover the Claimant's shift.

This occurred because the Claimant was late and subsequently because the Claimant was told to go home, on full pay, once his disagreement with Mr

Murthy was highlighted to the managers. The Claimant has provided no evidence to suggest that the Claimant's race was the reason for the treatment.

iv. On 3 December 2022 'Ashif' wrote a statement which C disagrees with including:

a. Stating that C said "You're all the same"
b. Did not state the true reason for the Claimant's lateness
c. Claimant that the Claimant called H a "Paki"

On balance, we conclude that Mr Murthy wrote a statement reflecting his understanding and recollection of the conversation and he would have written the same statement had the same conversation taken place with someone else who was not of the same racial background as the Claimant. Although we did not hear from Mr Murthy in evidence because he no longer worked for the Respondent, we consider it more likely than not that his statement was written to the best of his recollection regarding what had been discussed. The Claimant said something very similar to 'You're all the same' and whilst he did not call Mr Murthy a 'Paki' he did call him Pakistani. Clearly the two are not the same, however, it is clear that the Claimant references what he believes are Mr Murthy's racial origins in a way that seems wholly irrelevant to the question of whether the Claimant was late and reported his lateness appropriately or not and in a way that is intended to be pejorative. We conclude, on balance, that the reason why Mr Murthy makes the report about the Claimant's behaviour is not the Claimant's race but the comments that the Claimant makes about Mr Murthy's race.

155. The Claimant's claims for race discrimination are not upheld.

<u>Holiday pay</u>

156. The Claimant accrued statutory entitlement to 5.6 weeks' holiday pay per annum. This entitlement accrued on a monthly basis. The Claimant was employed for 4 months. He therefore accrued 1.9 weeks (rounding up to the nearest decimal point). 1.9 weeks is the equivalent of 9.5 days. It was accepted that the claimant took 8 days' leave. He is therefore owed 1.5 day's leave.

157. One day's pay was £133.86 gross (taken from holiday pay on payslip pages 312). The Claimant is therefore owed £133.86 x 1.5 = £200.79 (expressed as a gross figure).

Employment Judge Webster

Date: 25 March 2024

JUDGMENT and SUMMARY SENT to the PARTIES ON

5 April 2024

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M PARRIS

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FOR THE TRIBUNAL OFFICE