



EMPLOYMENT TRIBUNALS

BETWEEN
AND

Claimant
Mr A Achi

Respondent
(1) GMB
(2) Mr J Morgan
(3) Mr S Richards
(4) Ms A Gearing
(5) Ms R Mitchell

JUDGMENT OF THE EMPLOYMENT TRIBUNAL (RESERVED JUDGMENT)

HELD AT Birmingham ON 28 – 31 October 2019
1 November 2019 (Panel Only)
4 – 7 November 2019

EMPLOYMENT JUDGE GASKELL MEMBERS: Mr MZ Khan
Mr RS Virdie

Representation

For the Claimant: In Person
For Respondent: Mr O Segal QC (Counsel)

JUDGMENT

The unanimous judgment of the tribunal is that:

- 1 All claims against the third, fourth and fifth respondents are dismissed upon being withdrawn by the claimant.
- 2 The claimant was not dismissed by the first respondent; his claim for unfair dismissal is not well-founded and is dismissed.
- 3 The claimant's claim for unlawful deductions from wages (contractual sick pay) is well-founded. There is an award to the claimant, payable by the first respondent in the sum of £1020.50 net.
- 4 The first and second respondents did not, at any time material to this claim, act towards the claimant in contravention of Section 39 of the Equality Act 2010. The claimant's claims against the first and second respondents for direct race discrimination and victimisation, pursuant to Section 120 of that Act are dismissed.

REASONS

Introduction

1 The claimant in this case is Mr Ake Achi who was employed by the first respondent, GMB, as a Regional Organiser, from 1 September 2014 until 6 April 2018 when his employment terminated following his resignation given in writing on 8 March 2018. The second respondent, Mr Joe Morgan, is the Regional Secretary of the first respondent for the Birmingham and West Midlands Region (GMB Birmingham).

2 The claimant's first claim form, Case Number 1304086/2017, was presented to the tribunal on 21 November 2017 whilst the claimant remained in the first respondents employment. This claim names all five of the respondents and is a claim for race discrimination.

3 The claimant presented a second claim form, Case Number 1303029/2018, naming only the first respondent. This was presented to the tribunal on 10 June 2018 (although seemingly not formally accepted by the tribunal and sent to the respondent until 2 October 2018). This is a claim for unfair (constructive) dismissal; unpaid wages; race discrimination; and victimisation.

4 Responses to the claims were filed with the tribunal on 16 January 2018 and 30 October 2018 respectively. All of the claims are denied. The claimant has since withdrawn the claims against the third, fourth and fifth respondents. The claims against those respondents will be dismissed.

5 The claims against the first and second respondents were consolidated by order of Employment Judge Broughton; and they were considered as a Closed Preliminary Hearing conducted by Employment Judge Verena Jones on 7 December 2018.

6 Judge Jones compiled a detailed List of Issues to be determined by this panel. This was annexed as Appendix 1 to her Case Management Order which was sent to the parties on 31 January 2019.

The Evidence

7 The claimant gave evidence on his own account and he called oral evidence from three witnesses: Mr Mark Wilkinson – Senior Organiser, GMB Southern Region (GMB Southern); Jacqueline Cash – National Negotiating Committee Representative, GMB Birmingham; and Stuart Harrison – Regional Organiser, GMB Birmingham.

8 The claimant also adduced evidence by way of written statements from Mr Patrick Thompson – Regional Organiser, GMB Southern; Mr Ross Murdock – Regional Organiser, GMB Southern and Mr Oliver Madurapperuma Don, Mr Furqan Safdar, and Mr Beletkachew Mekonnen who were GMB Members. These witnesses were not required to attend the hearing because, whilst it was accepted that their evidence was potentially relevant to the issues in the case, Mr Segal was content for the tribunal to read the statements - he did not wish to cross-examine the witnesses.

9 The claimant produced witness statements from eight further witnesses who did not attend the hearing, and whose evidence, in our judgement, was not relevant to the issues in the case.

10 For the respondent we heard evidence from five witnesses: Ms Amanda Gearing - Senior Organiser, GMB Birmingham; Mr John Phillips - Regional Secretary - GMB Wales and South-West Region; Stuart Richards - Senior Organiser - GMB Birmingham Region; Neil Derrick - Regional Secretary, GMB Yorkshire and North Derbyshire Region and Joe Morgan - Regional Secretary, GMB Birmingham.

11 We found the evidence of all five of the respondent's witnesses to be consistent; compelling; and truthful. Their evidence was consistent with each other and with contemporaneous documents. Their evidence remained internally consistent; it did not vary under cross examination.

12 The evidence given by the claimant's witnesses - the three who gave oral evidence (Paragraph 7 above); and the five whose evidence was in written form (Paragraph 8 above) was also truthful and subject to very little challenge. However, it was largely irrelevant: it is simply no answer to possible criticisms and concerns of the claimant's actions on specific occasions whilst working in the Birmingham Region to call evidence of other unrelated occasions where his actions were to be commended.

13 So far as the claimant himself is concerned, much of his evidence was accepted by the respondent indeed this is a case with surprisingly little difference on the primary facts. But, we found the claimant to be inconsistent both as between his evidence and the contemporaneous documents; and internally inconsistent in that is evidence of varied between his witness statement and some of the answers given in cross-examination. There are two matters upon which we expressly disbelieve the claimant: -

(a) We do not accept the claimant's current assertion that it was not until the non-payment of his salary (contractual sick pay) on 6 March 2018 that he

decided to terminate his employment. The evidence is clear that the appellant had no intention of returning to work once his entitlement to statutory sick pay expired.

- (b) We reject the claimant's assertion that, in relation to his request for a day's annual leave on 28 February 2017, he had informed Ms Gearing that he had arranged cover. We accept Ms Gearing's account that she had indicated that the claimant would be allowed leave if he arranged cover but he failed to do so.

14 In addition to the witness evidence to which we have referred, we had an agreed bundle of documents running to in excess of 2600 pages. We have considered those documents from within the bundle to which we were referred by the parties during the hearing.

15 As we have already stated, there is very little dispute as to the primary facts in this case; but, where there is a dispute of fact between the claimant and the respondent's witnesses, we prefer the evidence of the respondent's witnesses. We have made our findings of fact accordingly.

The Facts

16 The claimant who identifies himself as Black African, commenced employment with the first respondent on a temporary contract in GMB Southern on 1 September 2014. On 1 April 2015, he was employed on a permanent contract as an Organiser. This employment was subject to a 12-month probationary period. There is no doubt that the claimant worked to a high standard whilst in GMB Southern and was highly thought of by GMB members and management in that Region.

17 The claimant wished to relocate to Birmingham to be nearer to his family. Around October 2015, GMB Birmingham advertised a vacancy for an Organiser in the Region. The claimant made it known to the Regional Secretary in GMB Southern that he was interested in a transfer. Following a meeting involving the claimant; Mr Morgan; Mr Richards; and Ms Gearing, the claimant was accepted by GMB Birmingham on transfer. This was arranged without the claimant undergoing any form of competitive process. All regions of GMB are autonomous; GMB Birmingham were under no obligation to accept the claimant; they could have declined the transfer. The claimant commenced employment as an Organiser with GMB Birmingham on 16 November 2015. It was agreed that he would serve the unexpired portion of his probationary period in Birmingham - he therefore remained on probation until 31 March 2016.

18 No two Regions of GMB are identically organised. From what Mr Morgan knew the work which the claimant had been doing in GMB Southern would be

closest in nature to that done by the Organising team in Birmingham under the management of Ms Gearing. However, the vacancy which existed in Birmingham was with one of the Industrial teams under the management of Mr Richards. The Industrial teams worked with local branches and sites in a particular sector or geographical area. The role of the industrial teams was to support the day-to-day work of the Union - working with branches to promote recruitment and assist members. The Organising team's focus is to drive an organising agenda and support national and regional targets.

19 Mr Richards' team consisted of seven Organisers some based in the Regional Office in Halesowen and some at another office in Worcester. Each Organiser is responsible for various workplaces and for the union representatives operating in each workplace. Each Organiser has a "sheet" which contains a list of all the individual union members for whom they are responsible. The majority of sheets contained a mix of different employers different industries/sectors. Within their industry/sector the Organiser would be expected to promote Union membership and also to ensure that members were properly serviced (casework). Representation at hearings would ordinarily be undertaken by union representatives who were volunteers within the membership in a particular workplace.

20 The claimant had previously worked in the Security Sector; and so, Mr Richards decided to allocate a sheet to him comprising the S20 Security Branch. This Branch had previously been supported by Mr Harrison, an experienced Organiser - he had been responsible for both prison service staff and security staff. Mr Richards thought this might be too much for a new starter, so he allocated the prisons element to another Organiser - Justine Jones. He allocated other duties to Mr Harrison; and the claimant was left just with the Security Branch. This created a sheet of approximately 1050 members of whom 15 were union representatives. This was a comparatively small sheet; most of Mr Richards' team had responsibility for over 2000 members; the largest sheet had over 9000.

21 By his own admission, the claimant experienced difficulty in establishing a satisfactory working relationship with S20. In the period from November 2015 to July 2016, there were an abnormally high number of complaints from GMB representatives and union members. Mr Richards never regarded this either as a performance issue or as a disciplinary issue; to the contrary, he appears to have understood the difficulties which the claimant was experiencing. Essentially, the claimant complains, that during this period, Mr Richards did little to support him. But, to a large extent the claimant has missed the point: the members and representatives in the branch are not subject to any form of control or discipline from the Regional Organisers; the Senior Organisers; or even the Regional Secretary. Effectively, they are the consumers of the Union's services - the

customers. The claimant's expectation appears to have been that, whenever there was a complaint against him, there should have been an investigation in which he would have been exonerated. What he failed to appreciate however, is that such an approach would be unlikely to rectify the complaint - the customer would still feel aggrieved. The support which was given by Mr Richards was firstly to provide the claimant with a mentor - Ms Rebecca Mitchell; and then a second mentor - Mr Harrison, who had previously serviced S20. And, on the occasion of there being complaints, to provide the claimant with advice as to how he might have approached the situation differently.

22 In February 2016, Mr Richards conducted a development review for the claimant and produced a report dated 1 March 2016. This was generally positive. The claimant was eventually to complain that he had been "*failed*" at this review: this is simply not the case; at the time of the review there were five objectives to be considered; the claimant had met four of them; but, by his own admission, he had not met the fifth. The review did nothing more than to record which of the objectives have been met and which had not. The claimant was judged to have performed satisfactorily against the objectives as a whole.

23 There was a further review of the claimant's performance in June 2016. This involved two elements: one was an evaluation of performance against individual objectives; and the other involved evaluation of the individual skills against the job description. In order to be recommended for pay progression, an individual needed to pass both elements. Pay progression is only considered when an employee has worked for GMB for two years - before that only the objective element of the assessment is considered and pay progression will not apply. Accordingly, in June 2016, the claimant's review did not consider pay progression. Against his objectives, the appellant was marked as meeting 4 out of 5 targets which was a pass. In September 2016, when the claimant completed two years' service, he was entitled to be considered pay progression. Mr Richards inevitably linked back to the June 2016 review; but concluded that, as yet, the claimant did not have the necessary skills to meet all aspects of his job description. Accordingly, the claimant was not recommended for pay progression. We are satisfied that, in reaching this conclusion, Mr Richards considered information available of progress throughout the claimant's career with GMB to date.

24 The claimant's difficulties in dealing with S20 came to a head in June 2016 when there was a branch meeting which passed a vote of no-confidence in the claimant as its Organiser. Mr Richards explained to us in evidence that such a vote is of no legal consequence; it is entirely a matter for the Union to allocate areas of responsibility to its Organisers. But, Mr Richards concluded that the relationship between the claimant and S20 had now irretrievably broken down; and no amount of support from him was likely to restore it. Mr Richards met with

three members of S20 branch to discuss their dissatisfaction; and effectively diffused things such that it did not escalate to a full-scale complaint against the claimant. Then, on 10 August 2016, Mr Richards met the claimant: he did his best to put the current situation in the most positive light and suggested to the claimant that perhaps he should move to another team so as to gain exposure to different sectors across the Region. Mr Richards then discussed the situation with Mr Morgan and Ms Gearing before informing the claimant of the decision to transfer him to the Organising Team under Ms Gearing's management. It was Mr Richards' understanding that the claimant agreed to this move: certainly, we are satisfied that the claimant was informed before it was announced more generally.

25 This transfer was not a demotion at all. It was a reallocation of duties to suit the claimant's skills better. It was done as a way to support and develop the claimant. It was moving him back to what he had done well whilst working at GMB Southern.

26 On 1 September 2016, the claimant commenced work with the Organising Team. It was Ms Gearing's evidence that, much to her frustration, effectively, the Team was under-resourced. Applying previous practice, the newest members of the Team had to share a laptop - this had been the position for the claimant's white predecessor; and for more senior white employees including Rebecca Mitchell. Ms Gearing was satisfied that the claimant had sufficient access to a computer to properly undertake his duties; she pointed out that he did have a secretary who could carry out administrative tasks on his instructions. There was no evidence of the claimant, during this period, ever failing to produce work or being questioned or disciplined for such failure.

27 Between September 2016 and the end of the year, Ms Gearing was concerned that the claimant appeared unhappy at work and that he did not fully engage with the rest of the Team. This also coincided with a number of complaints surfacing which essentially related to the claimant's time on the Industrial Team. To address these concerns informally, the claimant was invited to a meeting with Mr Morgan which took place on 31 January 2017. The following day, Mr Morgan summarised the meeting in an email. It is clear that the main focus of the meeting was the claimant's apparent unhappiness at work. The reference to the historical complaints appeared to be nothing more than Mr Morgan reassuring the claimant that he could now ignore them. Otherwise, the meeting was positive; Mr Morgan telling the claimant that he wished him to be happy at work.

28 There were two occasions where the claimant was due to attend meetings with Ms Mitchell, but he was very late. On these occasions she was extremely concerned and on the second occasion she felt that her safety had been compromised. There was also a third occasion of lateness which was

observed by Ms Gearing. For the avoidance of doubt, it was not suggested that the claimant had specific “*contractual hours*” and that he was late for work in that sense. The position here was that the claimant had specific appointments for which he was late - this was discourteous and caused inconvenience to others.

29 On 24 February 2017, Ms Gearing conducted a disciplinary hearing. The outcome of the meeting was the issue of a written warning. The claimant had been 30 - 40 minutes late on each of the first two occasions; and over half an hour late on the third. In his later complaint of race discrimination, the claimant relies on the treatment of two comparators - Ms Mitchell and Ms Elaine King. It is a fact that those two had each been late on a single occasion by no more than 10 minutes and on both occasions having telephoned ahead.

30 The claimant complains that Ms Gearing should not have conducted the disciplinary hearing as she herself was a witness to the third instance of lateness. But, this was a situation where there was in fact no disagreement as to the basic facts. It was unnecessary for an independent disciplining officer to make specific findings of fact. At the meeting, the claimant was accompanied by Ms Cash, she confirmed in evidence that she considered the hearing was fairly conducted and the sanction was reasonable.

31 The claimant requested leave to attend two external events on the 20 and 28 February 2017. His request for leave on 20 February 2017 was refused by Ms Gearing because two other members of the Team had already booked leave on that day (it was a colleagues wedding). The request for 28 February 2017 was refused because the claimant had a full diary on that day. Ms Gearing confirmed that she would consider the request further if the claimant obtained cover for his commitments. The claimant made no contact with Ms Gearing to indicate that such cover was available.

32 On 9 March 2017, Mr Morgan conducted an appeal hearing against Ms Gearing’s decision to issue a written warning. He dismissed the claimant’s appeal; and upheld Ms Gearing’s original decision.

33 On 14 March 2017 the claimant commenced a period of sick leave. He did not return to work.

34 Ms Gearing acted quickly in response to the claimant’s sickness absence; and sought Occupational Health advice. The OH Physician conducted a telephone assessment of the claimant on 6 April 2017 and reported to Ms Gearing the same day. The recommendation was a process of conflict resolution to aid the claimant’s return to work as soon as possible.

35 In the OH report, it was clear that the claimant had complained to OH that he was being treated unfairly; working within an environment where there is a bullying culture; and that the Region did not take diversity issues seriously. When Mr Morgan saw the report, he was understandably concerned by such allegations, which had not been raised with him; or with any of the Senior Organisers and the claimant had not initiated the grievance procedure. On 10 April 2017, Mr Morgan wrote to the claimant explaining that he intended to fully investigate these concerns - and that he had appointed Senior Organiser Mr Mohammed Khalik to conduct an investigation. In cross examination, the claimant agreed that promptly setting up an investigation was entirely the correct response. Furthermore, pending such investigation, it is difficult to see how Mr Morgan could implement the recommendation of conflict resolution. The claimant had provided no details and given no indication to OH as to who he was in conflict with.

36 On 11 April 2017, the claimant raised a grievance. He named the individuals against whom he was raising the grievance as Mr Richards; Ms Gearing; Ms Mitchell; and Mr Morgan. Although, in the grievance, the claimant suggests that the Region finds it difficult to embrace diversity, it is far from clear that he is alleging race discrimination against these individuals.

37 As there was now a grievance against the Regional Secretary, Mr Morgan, Mr Khalik's investigation was stood down. It was appropriate to appoint a Regional Secretary from another Region to deal with grievance; Mr Phillips was appointed. The grievance meeting was originally fixed for 22 May 2017. Because of the claimant's continuing ill-health, the date was deferred - eventually the grievance hearing took place on 3 August 2017.

38 In May and June 2017, Ms Gearing was copied into publicity material from the TUC which included information about some training events being staged by the "*Hope Not Hate*" Campaign. The publicity material suggested that the claimant was one of the tutors at the event. Ms Gearing was concerned that the claimant appeared to be making himself available for such events whilst off sick and ostensibly unfit for work. She forwarded the material to Mr Morgan. Ordinarily Ms Gearing would have dealt with such a matter herself; she did not do so on this occasion because she was aware of the outstanding grievance against her.

39 On 20 June 2017, Mr Morgan wrote to the claimant querying the content of the leaflets and asking why he was able to carry out such work but not attend his normal place of employment. (The claimant was receiving full salary as contractual sick pay.) The claimant did not respond to Mr Morgan; and so, on 23 June 2017, Mr Morgan wrote again - he requested a response by no later than 26 June 2017. When the claimant still did not respond, Mr Morgan took steps to

suspend his sick pay with immediate effect and institute a disciplinary investigation.

40 The claimant then instructed solicitors: they wrote to Mr Morgan asking that the sick pay be immediately reinstated. And on 6 July 2017, the claimant contacted HR about the suspension of his sick pay. Once Mr Morgan was satisfied that the claimant was properly engaging with the respondent, he lifted the suspension. The claimant suffered no financial loss. The evidence about this was a little confused, but, at worst, the claimant received his contractual sick pay, which was due on 6 July 2017, a matter of one day late.

41 Although the sick pay had been reinstated, Mr Morgan believed that there was a potential disciplinary issue which required investigation. He instructed Mr Khalik to conduct such an investigation; the outcome of the investigation was that it appeared that the claimant had not actually participated in the training events; he was on the publicity material to do so; but had not done so. Accordingly, no disciplinary action was appropriate; and none was taken.

42 Following a thorough investigation, in which all protagonists were interviewed separately, Mr Phillips conducted the grievance hearing on 3 August 2017. The claimant attended the hearing unaccompanied: he had been told of his right to be accompanied; but his preferred companion was not available; the claimant was given the opportunity to further postpone the hearing but chose not to do so.

43 On 8 August 2017, Mr Phillips wrote to the claimant advising him of the outcome of the grievance. All aspects of the grievance were dismissed. Further, Mr Phillips found not only that the grievance was baseless but that it may well have been made in bad faith. He considered that the raising of a malicious grievance was potentially a disciplinary issue. He informed the claimant that he had decided to refer the matter for disciplinary investigation. The claimant was advised of his right of appeal.

44 On 16 August 2017, the claimant submitted a letter of appeal against Mr Phillips' findings. This was referred to another senior officer from outside the Region, Mr Derrick. He was appointed to deal with the appeal on 21 August 2017; the hearing took place on 8 September 2017; and, again, Mr Derrick heard from each of the protagonists separately. The claimant produced new documents at the hearing without explanation as to why these had not been submitted in advance as requested. Mr Derrick wrote to the claimant on 19 September 2017 with the outcome. The appeal was dismissed; Mr Derrick was concerned at the profound and distressing impact which these allegations it had on the individuals concerned; in particular, Ms Mitchell; Mr Richards; and Ms Gearing. He felt that there was nothing worse for a trade union official and to be unfairly labelled as a

racist and a bully. Mr Derrick concurred with Mr Phillips' conclusion that the grievances were malicious; and agreed that the matter should be referred for disciplinary investigation.

45 Mr Andy Worth - Regional Secretary, GMB Midlands & East Coast Region was appointed to deal with the disciplinary proceedings. A hearing was initially fixed for 24 October 2017; but the claimant's solicitor wrote indicating that the claimant was too unwell to attend. A later date was agreed but the claimant was still unwell. Ultimately it was decided that the disciplinary proceedings would be postponed until the claimant's health improved.

46 The claimant remained off sick with no indication from him as to a likely date for his return. On 5 January 2018, the respondent received an email from a reference agency requesting information about the claimant who was proposing to rent a new home. This request was dealt with by Ms Adelle Atkiss, Mr Morgan's PA. She provided all of the information requested by the agency. One of the questions asked was whether it was expected that the applicant's income would remain at or above its current level for the next five months. By the time of this request, the claimant had been absent on sick leave for 10 months (since 14 March 2017); the claimant's entitlement to contractual salary whilst off sick was for 12 months; if his sickness absence continued after that he would not be entitled to any remuneration from the respondent. Ms Atkiss therefore responded that she did not expect the applicant's income to remain at its current level and explained why.

47 As stated, the claimant's entitlement to contractual sick pay was for a period of 12 months. He commenced his period of sickness on 14 March 2017; and it appears to us that, on any reading of the contractual documentation, he was therefore entitled to be paid whilst off sick until 13 March 2017. Unfortunately, both Mr Morgan, and the claimant's solicitor Ms Conlan, misread or misunderstood the paperwork. There were exchanges of emails and correspondence; Mr Morgan had concluded that the claimant's entitlement to sick pay expired at the end of February 2018; Ms Conlan calculated that he was entitled to receive his sick pay until 10 April 2018. We are quite satisfied that both of them were wrong. In the event, the claimant was paid until 28 February 2018. At the conclusion of the hearing before us, the respondent conceded that he was entitled to be paid until 13 March 2018.

48 The claimant was paid on the 6th day of each month for the entirety of that month. Effectively, he was paid six days in arrears and for the rest of the month in advance. Because of the misunderstanding referred to in the previous Paragraph, he received no pay on 6 March 2018. On 8 March 2018, the claimant submitted a letter of resignation; he claimed that he was constructively dismissed and that the final straw had been the non-payment of his sick pay on 6 March

2018. As we indicated earlier, we do not believe the claimant on this point; it is quite apparent to us that, well before 6 March 2018, the claimant had decided that he would not be returning to work for the respondent. The claimant remained off sick until his entitlement to sick pay expired; and it was always his intention to resign then. The claimant would not have been entitled to any pay after the 13 March 2018; but, when he resigned on 8 March 2018, he gave one month's notice; he was therefore entitled to retain his car until the expiry of the notice period.

49 The claimant had first consulted ACAS about his discrimination claims on 3 October 2017. He presented his first claim form on 21 November 2017. Following his resignation on 8 March 2018, and the termination of his employment on 6 April 2018, the claimant presented his second claim form on 10 June 2018.

The Law

50 The Equality Act 2010 (EqA)

Section 4: The Protected Characteristics

The following characteristics are protected characteristics—
age;
disability;
gender reassignment;
marriage and civil partnership;
pregnancy and maternity;
race;
religion or belief;
sex;
sexual orientation.

Section 9: Race

- (1) Race includes—
- (a) colour;
 - (b) nationality;
 - (c) ethnic or national origins.

Section 13: Direct discrimination

- (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.

Section 27: Victimisation

- (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.

Section 39: Employees and applicants

- (1) An employer (A) must not discriminate against a person (B)—
- (a) in the arrangements A makes for deciding to whom to offer employment;
 - (b) as to the terms on which A offers B employment;
 - (c) by not offering B employment.
- (2) An employer (A) must not discriminate against an employee of A's (B)—
- (a) as to B's terms of employment;
 - (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
 - (c) by dismissing B;
 - (d) by subjecting B to any other detriment.
- (3) An employer (A) must not victimise a person (B)—
- (a) in the arrangements A makes for deciding to whom to offer employment;
 - (b) as to the terms on which A offers B employment;
 - (c) by not offering B employment.

- (4) An employer (A) must not victimise an employee of A's (B)—
 - (a) as to B's terms of employment;
 - (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for any other benefit, facility or service;
 - (c) by dismissing B;
 - (d) by subjecting B to any other detriment.

Section 123: Time limits

- (1) Subject to section 140A proceedings on a complaint within section 120 may not be brought after the end of—
 - (a) the period of 3 months starting with the date of the act to which the complaint relates, or
 - (b) such other period as the employment tribunal thinks just and equitable.
- (3) For the purposes of this section—
 - (a) conduct extending over a period is to be treated as done at the end of the period;
 - (b) failure to do something is to be treated as occurring when the person in question decided on it.
- (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
 - (a) when P does an act inconsistent with doing it, or
 - (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

Section 136: Burden of proof

- (1) This section applies to any proceedings relating to a contravention of this Act.
- (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
- (3) But subsection (2) does not apply if A shows that A did not contravene the provision.

(6) A reference to the court includes a reference to—

(a) an employment tribunal;

51 **The Employment Rights Act 1996 (ERA)**

Section 94 - The right [not to be unfairly dismissed]

(1) An employee has the right not to be unfairly dismissed by his employer.

Section 95 - Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) . . ., only if)—

- (a) the contract under which he is employed is terminated by the employer (whether with or without notice) - *Direct dismissal*,
- (c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct - *Constructive dismissal*.

Section 98 - General Fairness

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

- (a) the reason (or, if more than one, the principal reason) for the dismissal, and
- (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

- (a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,
- (b) relates to the conduct of the employee,
- (c) is that the employee was redundant, or
- (d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

- (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
- (b) shall be determined in accordance with equity and the substantial merits of the case.

52 **Decided Cases – Race Discrimination**

Ladele –v- London Borough of Islington [2010] IRLR 211 (CA)

There can be no question of direct discrimination where everyone is treated the same.

Bahl –v- The Law Society & Others [2004] IRLR 799 (CA) Eagle Place Services Limited –v- Rudd [2010] IRLR 486 (CA)

Mere proof that an employer has behaved unreasonably or unfairly would not, by itself, trigger the transfer of the burden of proof, let alone prove discrimination.

Nagarajan v London Regional Transport [1999] IRLR 572 (HL) Villalba v Merrill Lynch & Co [2006] IRLR 437 (EAT)

If racial grounds or protected acts had a significant influence on the outcome, discrimination is made out. These grounds do not have to be the primary grounds for a decision but must be a material influence.

Rihal –v- London Borough of Ealing [2004] IRLR 642 (CA) Anya –v- University of Oxford [2001] IRLR 377 (CA) Shamoon –v- Chief Constable of the RUC [2003] IRLR 285 (HL) R –v-Governing Body of JFS [2010] IRLR 186 (SC)

In a case involving a number of potentially related incidents the tribunal should not take a fragmented approach to individual complaints, but any inferences should be drawn on all

relevant primary findings to assess the full picture. Any inference of discrimination must be founded on those primary findings. Where there is no actual comparator a better approach to determining whether there has been less favourable treatment on prescribed grounds is often not to dwell in isolation on

the hypothetical comparator but to ask the crucial question “why did the treatment occur?” In deciding whether action complained of was taken on grounds of race a distinction is to be drawn between action which is inherently racially discriminatory and that which is not; to establish that the action was taken on racial grounds in the former case motive or intention of the perpetrator is not relevant - in the latter it is relevant.

Greater Manchester Police v Bailey [2017] EWCA Civ 425 (CA)

Held that “*it remains common to refer to the underlying issue as the ‘reason why’ issue*”. Any suggestion that this could be answered by applying a 'but for' test was firmly rejected by the Court of Appeal.

Martin v Devonshires Solicitors [2011] ICR 352 (EAT)

The claimant had a mental impairment, and while she believed in her allegations of sex discrimination, they were false. Her dismissal for pursuing grievances where the complaints involved serious false allegations which she refused to accept were false, and where she was likely to behave in a disruptive manner in the future, was not found to be an act of victimisation. Underhill P, noting that false allegations are protected unless brought in bad faith, went on, however, to say that “*it would be extraordinary if these provisions gave employees absolute immunity in respect of anything said or done in the context of a protected complaint*”.

HM Prison Service v Ibibidun [2008] IRLR 940 (EAT)

The dismissal of the employee was found to have related not to his bringing of tribunal proceedings complaining of race discrimination but *to the way in which he pursued those proceedings, including unreasonable allegations, with a view to harassing his employer to settlement*. As the reason for the dismissal was the manner of performing the protected act rather than the protected act itself, this did not amount to victimisation.

Igen Limited –v- Wong [2005] IRLR 258 (CA)

Hewage -v- Grampion Health Board [2012] IRLR 870 (SC)

Ayodele -v- Citylink Limited [2018] IRLR 114

The burden of proof requires the employment tribunal to go through a two-stage process. The first stage requires the claimant to prove facts from which the tribunal could find that the respondent has committed an unlawful act of discrimination. The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did commit the

unlawful act. If the respondent fails then the complaint of discrimination must be upheld.

Madarassy v Nomura International Plc [2007] IRLR 245 (CA)

The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg race) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal “could conclude” that the respondent had committed an unlawful act of discrimination. Although the burden of proof provisions involve a two-stage process of analysis it does not prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant’s evidence of discrimination.

Laing –v- Manchester City Council [2006] IRLR 748 (EAT)

In reaching its conclusion as to whether or not the claimant has established facts from which the tribunal *could* conclude that there had been unlawful discrimination the tribunal is entitled to take into account evidence adduced by the respondent. A tribunal should have regard to all facts at the first stage to see what proper inferences can be drawn.

53 Decided Cases – Constructive Dismissal

Western Excavating (ECC) Ltd, -v - Sharpe [1978] IRLR 27 (CA)

An employee is entitled to treat himself as constructively dismissed if the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract. The employee in those circumstances is entitled to leave without notice or to give notice, but the conduct in either case must be sufficiently serious to entitle him to leave at once.

The employee must make up his mind to leave soon after the conduct of which he complains if he continues the any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged.

Garner -v- Grange Furnishing Ltd. [1977] IRLR 206 (EAT)

Conduct amounting to a repudiation can be a series of small incidents over a period of time. If the conduct of the employer is making it impossible for the

employee to go on working that is plainly a repudiation of the contract of employment.

Woods -v- WM Car Services (Peterborough) Ltd. [1981] IRLR 347 (EAT)

It is clearly established that there is implied in a contract of employment a term that employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Any breach of this implied term is a fundamental breach amounting to repudiation since it necessarily goes to the root of the contract. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The employment tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that an employee cannot be expected to put up with it.

WE Cox Toner (International) Ltd. -v- Crook [1981] IRLR 443 (EAT)

The general principles of contract law applicable to a repudiation of contract are that if one party commits a repudiatory breach of the contract the other party can choose either to affirm the contract and insist on its further performance or he can accept the repudiation in which case the contract is at an end. The innocent party must at some stage elect between those two possible courses. If he once affirms the contract his right to accept the repudiation is at an end, but he is not bound to elect within a reasonable or any other time. Mere delay by itself (unaccompanied by any express or implied affirmation of the contract) does not constitute affirmation of the contract, but if it is prolonged, it may be evidence of an implied affirmation. Affirmation of the contract can be implied if the innocent party calls on the guilty party for further performance of the contract since his conduct is only consistent with the continued existence of the contractual obligations.

Malik -v- BCCI [1997] IRLR 462 (HL)

The obligation (to observe the implied contractual term of mutual trust and confidence), extends to any conduct by the employer likely to destroy or seriously damage the relationship of trust and confidence between employer and employee. If conduct, objectively considered, is likely to cause damage to the relationship between employer and employee a breach of the implied obligation may arise. The motives of the employer cannot be determinative or even relevant.

Nottinghamshire County Council –v- Meikle [2004] IRLR 703 (CA)

Once the repudiation of the contract by the employer has been established, the proper approach is to ask whether the employee has accepted the repudiation by treating the contract of employment as at an end. It is enough that the employee resigned in response, at least in part, to fundamental breaches by the employer.

GAB Robins (UK) Ltd. –v- Gillian Triggs [2007] UKEAT/0111/07RN

The question to be addressed is whether, taken alone or cumulatively, the respondent's actions amount to a breach of any express and/or implied terms of the claimant's contract of employment amounting to a repudiation of that contract.

Tullet Prebon PLC & Others -v- BCG Brokers LP & Others [2011] IRLR 420 (CA)

A repudiatory breach of contract; conduct likely to damage the relationship of trust and confidence must be so serious that looking at all the circumstances objectively, that is from the perspective of a reasonable person in the position of the putative innocent party, the contract breaker has clearly shown an intention to abandon and altogether refuse to perform the contract.

Waltham Forest LBC -v- Omilaju [2005] IRLR 35 (CA)

This case clarified the position where a complainant was lying on the "final straw" principle: if the final straw is not capable of contributing to a series of earlier acts which may cumulatively amount to a breach of the implied term of trust and confidence, then there is no need to examine the earlier history. If an employer has committed a series of acts which amount to a breach of the implied term; but the employee does not resign his employment in response thereto; he cannot subsequently rely on those acts to justify a constructive dismissal in the absence of a later act which enables him to do so. If the later act is entirely innocuous it is entirely unnecessary to examine the earlier conduct as the later act will not permit the employee to invoke the final straw principle. An entirely innocuous act on the part of the employer cannot be a final straw.

The Claimant's Case

54 Taken from the Appendix to the Case Management Order made by Employment Judge Jones on 7 December 2018, the claimant alleges that the following are the acts and/or omissions on the part of the respondent which amount to acts of direct discrimination and/or victimisation and which either

individually or collectively amount to a fundamental breach of the employment contract: -

54.1 Race discrimination

(A) – After a review of the claimant’s work on 29 June 2016, the claimant was ‘failed’ but not provided with support to address his perceived problems, including issues between the claimant and S20.

(B) – In September 2016, Mr Richards wrongly used the claimant’s 29 June 2016 ‘review’ as the basis of a negative pay progression report. Mr Richards failed to base the pay progression report in September 2016 on all the information available at the time and relied upon a review intended for a different purpose.

(C) – On 12 August 2016, Mr Richards emailed the claimant (and other colleagues) to inform the claimant that he was being transferred to the Organising Team and that a white colleague, Neil Williams, would take his place in Mr Richards’ Team. The claimant compares his treatment with that of Jane Brown, whose case followed the proper procedure and she was not transferred.

(D) – In October 2016, Ms Gearing failed to provide the claimant with a computer, which he needed to do his job, when all other organisers in the same Team had their own designated computers, including Ms Mitchell who was engaged in the same tasks as the claimant. Ms Mitchell is of white British ethnic origin.

(E) – In January 2017, and in an email of 1 February 2017, Mr Morgan used unsubstantiated complaints made by members or activists against the claimant without the claimant being provided with the details or allowed to respond. The claimant alleges one particular ‘complaint’ by Jason Lammas referred to at Paragraph 20(3) of the ET3 was never in fact made.

(F) – In February 2017, Ms Mitchell reported the claimant to Ms Gearing for being late and kept a record of his timekeeping.

(G) – In February 2017, Ms Gearing initiated disciplinary proceedings against the claimant in relation to his lateness when she did not discipline other Team Members, Ms Mitchell and Ms Elaine King (both white British) who were also late, and in the context of his contract only referring to ‘unspecified hours’. On 24 April 2017, Ms Gearing conducted the disciplinary hearing herself and took into account the claimant’s conduct at the Hearing in making her decision to issue a written warning.

(H) – In February 2017, Ms Gearing did not allow C to take annual leave to attend two events: ‘One Day Without Us’ on 20 February 2017 and the National Equality Forum in London on 28 April 2017. GMB did not provide support for the first of these events and encouraged staff to support an LGBT event. The claimant alleges that this was direct discrimination because of his support for migrant workers.

(I) – In March 2017, Mr Morgan heard the claimant’s appeal against Ms Gearing’s decision to give him a written warning, upheld her decision and decided that it was not inappropriate for her to conduct the Hearing herself or to take the conduct of C during the Hearing into account in reaching her decision. The claimant says this was a pre-determined decision to penalise him based on his race/ethnicity.

(J) – In April 2017, the respondent did not follow the recommendation of an independent OH Consultant who carried out an assessment of the claimant and recommended that a conflict resolution process be instigated.

(K) – In late June 2017, Mr Morgan suspended the claimant’s sick pay due to allegations in relation to the claimant participating in training sessions for another organisation and instructed Mohammed Khalik to investigate the matter. On 6 July 2017, Mr Morgan wrote to the claimant informing him that the suspension of his sick pay would be lifted until the investigation was completed. The investigation into these issues included Mr Khalik contacting third parties without the claimant’s consent. On 19 September 2017, Mr Morgan informed the claimant that his sick pay would not be suspended.

(L) – In August 2017, the claimant’s grievance, issued on 11 April 2017 went straight to the second stage of the grievance procedure and was not dealt with using the usual three-stage grievance process. In respect of this allegation the claimant compares his treatment to the treatment of Jane Brown, who brought a grievance against a Regional Secretary in another Region.

54.2 **Victimisation**

(a) The alleged protected act was the grievance raised by the claimant on 11 April 2017.

(b) The alleged detriments are: -

(A) Mr Morgan writing to the claimant about the claimant featuring on a Right2Work flier as delivering training.

(B) Mr Morgan initiating an investigation into whether or not the claimant had delivered the training.

- (C) The bringing of disciplinary proceedings against the claimant which were to be heard in October and then November 2017 which was suspended due to the claimant's ill-health.
- (D) The respondent dismissing the medical assessment of the claimant's GP and accusing him of working whilst off sick.
- (E) Bringing new allegations against the claimant of aggressive behaviour at a meeting in June 2016.
- (F) Accusing the claimant of fraudulently claiming sick pay.
- (G) The content of the reference provided to the letting agent.

54.3 Unfair constructive dismissal

C relies on the various complaints set out above as being calculated or likely to destroy his trust and confidence, with the 'final straw' being the failure to pay his final 2 weeks' sick pay in March 2018.

The Respondent's Case

55 It is the respondent's case that the claimant was not subject to any unfavourable or less favourable treatment at all. Those matters about which he complains all normal interactions in a busy office between employees and managers. The disciplinary action taken against the complainant in February 2017 was entirely justified as was the commencement of the disciplinary investigation in November 2017. Even if the tribunal were to find that some of the respondent's treatment of the claimant was unfair, the respondent's case is that there is nothing which remotely links it either to his race or to his grievance. Applying the burden of proof provisions, the respondent's case is that the claimant simply has not established facts from which the tribunal could conclude that discrimination or victimisation has taken place here.

56 It is the respondent's case that Allegations (A) to (L) are out of time and that the tribunal does not have jurisdiction to consider them.

57 It is conceded that, if it was made in good faith, the April 2017 grievance is a protected act for the purpose of the victimisation claim. Mr Phillips and Mr Derrick each came to the conclusion that the grievance may not have been raised in good faith. But, absent a full investigation (which ultimately did not take place), the respondent reached no final conclusion on this. Mr Segal has not invited the tribunal to find that the grievance was not raised in good faith.

58 The respondent denies a course of conduct which amounted to a breach of the claimant's contract of employment. As stated above, the respondent's cases that these were normal interactions in a busy office nothing unfavourable or detrimental. At the conclusion of the hearing, the respondent conceded that the claimant had been underpaid his contractual sick pay by 13 days. The respondent does not accept that even this would amount to a fundamental breach of the employment contract. The evidence shows that the respondent was clearly willing to engage with the claimant and his solicitor with regard to the proper interpretation of the contract, but matters became confused because the solicitor was contending for payments extending beyond 13 March 2018 which were clearly not due. Essentially the respondent's case is that this was a payroll error and does not of itself amount to a fundamental breach. But, in any event, the respondent does not accept that the claimant resigned in response to this.

Discussion & Conclusions

Race Discrimination

59 Allegation (A)

- (a) The claimant was not 'failed' as he alleges. He was adjudged (self-evidently) not to have met his objective to conduct workplace audits (he had not done them), but to have met his other four objectives. Not only did that not constitute 'failure' at the time, but when the position as to whether he had performed satisfactorily overall against his objectives had to be formalised for pay progression purposes, the decision was 'Yes'.
- (b) The claimant accepted in evidence that many of the documents in the bundle showed Mr Richards being supportive. The claimant also accepted that there was no training he requested which was not provided for him.
- (c) In our judgment, the evidence shows that Mr Richards was extremely supportive of the claimant. Even if, as the claimant claims, Mr Richards could have managed the S20 situation differently and more effectively, that does not begin to ground a claim of discrimination. The evidence (including that given by the claimant and his witness) is that Mr Richards had adopted the same approach when Mr Harrison was their officer and had not been persuaded to take a different approach when Mr Harrison had recommended that in a report on the branch.
- (d) The claimant accepted in evidence that, at the material time, he did not consider he was the victim of discrimination – indeed that he was “*really happy*” with Mr Richards' management of him until June 2016. It was only 6 months after leaving Mr Richards' Team that he claims to have “*noticed a pattern*”. We agree with Mr Derrick's conclusion that such “*back-labelling*” is unpersuasive.

- (e) It was the clear evidence of Mr Harrison, one of the claimant's witnesses, that the claimant was indeed not succeeding in his servicing duties and that he was not treated any differently by Mr Richards because of his race.

60 **Allegation (B)**

- (a) It is right that Mr Richards did use the 29/6/16 review in compiling the report on about 26 September 2016, but this was not to the claimant's disadvantage. In evidence the claimant clarified that his complaint was that Mr Richards had not taken account of "*all the information available at the time*" which should have included information about the claimant's performance in GMB Southern prior to 16 November 2015. It is not right that Mr Richards did not pay attention to the claimant's prior satisfactory performance in GMB Southern, Mr Richards expressly took into account the claimant having exceeded his targets during that period in determining that, overall during the previous 12 months, the claimant had "*performed satisfactorily against the objectives*".
- (b) It emerged during evidence that the claimant's real complaint was that Mr Richards should not have assessed him as not meeting the overall requirements of the job during the previous 12 months. Mr Richards did set out the detailed basis for his judgment in that regard. In light of the claimant's inability over 8 months to motivate activists and representatives and maintain workplace and branch organisation at the main branch he had responsibility for, S20, that judgment was inevitable.
- (c) It was the claimant's own assessment of the situation that he was "*struggling*" and that work issues had become "*too much for him*". It is hard to understand why he is so critical of Mr Richards' judgment that he was not yet meeting overall the elements of his role
- (d) The claimant also complains that Mr Richards did not meet with him again in September (they had discussed the claimant's performance on 29 June 2016) before completing the form. However, we accept Mr Richards' evidence that he offered the claimant the opportunity to discuss the assessment which was not taken up (this was accepted by the claimant in his cross-examination of Mr Richards). Further, the claimant did not appeal the assessment (as he was informed he might, nor even pursue the issue when he was asked whether he wished to do so by Mr Morgan on 31 January 2017).

61 **Allegation (C)**

- (a) It was agreed in evidence that the claimant was not informed of the transfer by email along with the rest of the team as alleged. Rather, following a discussion about needing to change his duties so that he gained exposure to different sectors across the region on 10 August 2016,

- Mr Richards personally informed the claimant of the transfer before informing the rest of the team.
- (b) Jane Brown's case was completely different. She had employed as a Political and External Relations Officer. The Regional Secretary wanted to eliminate that role and offered Ms Brown the role of Recruitment Officer; which she rejected and thus was offered redundancy. The suggestion that Ms Brown was, after a procedure, 'not transferred', is doubly misconceived: first, she declined to take part in the consultation or grievance procedure as offered; secondly, her employer was adamant in maintaining its decision to make her role redundant.
 - (c) The claimant maintains that he was unfairly 'demoted'. Once it had, reasonably been determined that responsibility for S20 should be given to a more experienced offer, which was expressly stated not to be a reflection on the claimant, the only question remained how to redeploy the claimant within his contractual role and job description as Regional Organiser.
 - (d) There was a constructive discussion between the claimant, Mr Richards and Mr Harrison on 10 August 2016, following which Mr Richards decided the best move for the claimant would be to the Organising Team and he sought Mr Morgan's approval. When that was given, he informed the claimant. The transfer was not a demotion at all, but the sort of reallocation of duties the first respondent implements regularly to suit it and its employees.
 - (e) The respondents' evidence relating to relevant white comparators is compelling. Historically, Roger Jenkins and Sharon Wilde had been transferred into the Organising Team before becoming national officers. More recently, both Ms Mitchell and Neil Williams had been transferred from industrial sheets into that Team. (Ms Mitchell had been transferred out and then back in, precisely because it was felt her skills were best suited to that Team – much as Mr Richards considered the position to be as regards the claimant in August 2016. Mr Williams had been transferred into the Organising Team and then back out when Ms Gearing considered his strengths might be better suited to an Industrial Team).
 - (f) Remarkably, the claimant suggested to Mr Richards in cross-examination that he had been disadvantaged because Mr Richards had not put him into a formal capability process. Mr Richards rejected that, saying he had tried to support the claimant by avoiding such a process.

62 Allegation (D)

- (a) In our judgment, this complaint is wholly spurious. The claimant was well aware, as he confirmed in evidence, that, as the newest member of the team having to share a computer, he was in exactly the same position as

his white predecessor. Other white employees, including Ms Mitchell, had been in the same position also.

- (b) In cross-examination, the claimant sought to re-frame his complaint as being that he alone had to do certain work requiring a computer which other team members did not have to do. This is inconsistent with the wording of the complaint, that his comparator was “*engaged in the same tasks as*” him. In our judgment, it is inherently unlikely that the need of others for a computer when they were the most junior member of the team, differed significantly from the claimant’s own need.
- (c) Finally, it is the unchallenged evidence of Ms Gearing that she regularly lobbied Mr Morgan for sufficient computers for all of her Team members. But, at the time, Mr Morgan had resisted this on costs grounds.

63 Allegation (E)

- (a) Dealing briefly with the last allegation first regarding the complaint by Mr Lammas. It is clear from documents in the bundle that Mr Lammas did indeed complain that the claimant had failed to keep in contact with him regarding upcoming grievance and investigation meetings with his employer. As Mr Richards explained in cross-examination, his only concern as to the claimant’s conduct regarding this member was his failure to communicate effectively and reassure the member.
- (b) As to Mr Morgan’s meeting with the claimant on 31 January 2017 and the follow up email. The claimant accepted that the email correctly summarised the meeting. The meeting was called by Mr Morgan because of reports of the claimant’s lack of engagement with his work and colleagues and because he did seem to be happy at work. The only reference to “complaints” is by way of background in reference to the claimant’s time in Mr Richards’ Team and Mr Morgan’s reassurance that the claimant could be safely ignore these complaints.
- (c) In no sense did Mr Morgan “use” those historic complaints “against the claimant”. It is difficult understand the claimant’s sense of being unfairly treated at this meeting.

64 Allegation F

- (a) On two occasions the claimant was very late, turning up after the time his presence was needed, without contacting Ms Mitchell in advance. On the second occasion, she considered it to be a health and safety issue. There is no basis for the suggestion that Ms Mitchell reported the claimant because of his race.
- (b) In framing his grievance, the claimant ignored Ms Mitchell’s role as “Equalities Officer” and her well documented commitment to equality and diversity. The claimant stated in his grievance that Ms Mitchell did not

understand race discrimination. In our judgment, this allegation certainly is spurious.

65 **Allegation G**

- (a) The claimant's reference to his contract misses the point . Ms Gearing's concern was not that the claimant was not completing his contractual hours but that he had committed to attending to work at certain times on the three relevant occasions in February 2017 and had arrived significantly late.
- (b) In our judgment, the references to supposed comparators are spurious. The claimant had a recent history of poor timekeeping which had been dealt with informally by Ms Gearing; the same was not true of Ms Mitchell and Ms King. In February 2017, the claimant was late on three separate occasions. It appears that Ms Mitchell and Ms King were late on one occasion each. The degree of lateness these occasions was also a point of distinction between the claimant and the comparators. 30-40 minutes late on each occasion for the claimant contrasts with the supposed comparators arriving 10 minute late on one occasion each and after phoning ahead.
- (c) In cross-examination, these were accepted by the claimant as valid points of distinction. The short point is, the claimant was persistently late and was disciplined for misconduct.
- (d) In cross-examination, the claimant accepted that it was appropriate for him to be invited to a formal disciplinary hearing. As to the suggestion that a manager should not conduct such a hearing if they have themselves discovered the relevant facts, it is right that the disciplinary policy envisages that sometimes a formal investigation will have to be undertaken and that, if so, a different manager should hear the disciplinary. However, this was not such a case. The facts were in essence agreed; all that remained was for Ms Gearing to consider the claimant's mitigation; and decide on the sanction.
- (e) There can be no valid objection to Ms Gearing taking account of the claimant's conduct at the hearing. She found the claimant to be obstructive almost throughout and is not once recorded accepting any degree of fault or offering an apology. As a matter of common sense and established law, an employer is permitted to take into account in determining a disciplinary sanction the employee's attitude at the disciplinary hearing, and in particular whether the employee has given the employer confidence that they understand and accept the misconduct and that it will not be repeated.
- (f) Ms Cash confirmed in evidence that she considered the hearing was fairly conducted, the sanction was reasonable, and Ms Gearing had not treated the claimant in a discriminatory way.

66 Allegation (H)

- (a) As to 20 February 2017, the complaint is spurious. The claimant knew that the only reason he had not been permitted to take leave was because two other members of the Team had already booked leave that day. By the time of his grievance, the claimant knew that there were white members of the team who had wanted, but were not permitted, that day off following their colleague's wedding.
- (b) As to 28 February 2017, the claimant says that he had told Ms Gearing he had arranged cover; she had still not allowed him that day off. We find Ms Gearing's account to be more consistent with common sense - why should she refuse him annual leave that day if he had already arranged cover? This account is consistent with the contemporaneous documents; it is consistent with Ms Gearing's previous supportive attitude; and it is barely conceivable that the claimant would not have raised a complaint, at least informally in an email, about what would have been an arbitrary and unfair management action.

67 Allegation I

- (a) At Paragraph 65 above we have explained our finding that the original decision was legitimate. There is no basis in our view to impugn to decision to uphold it on appeal. The allegation that the decision was pre-determined and discriminatory is premised not only on the original decision being unfounded, but on there being no reasonable basis on which anyone else might not share the claimant's view.
- (b) We find that this complaint is wholly spurious.

68 Allegation (J)

This too is a wholly spurious complaint. The claimant agreed in cross-examination Mr Morgan's action in immediately setting up an investigation into his concerns as the appropriate way to address the situation described in the OH Report. It is difficult to see how ant conflict resolution process could even begin unless the relevant facts were established.

69 Allegation (K)

- (a) The claimant accepted that a reasonable employer would want to look into what appeared to be an employee working in some other capacity whilst being paid sick pay on the basis that he was unable to work at all. The claimant further accepted that an employer would be concerned if

questions put to the employee were not responded to. The claimant had failed on two occasions to respond to Mr Morgan.

- (b) It was not discriminatory for Mr Morgan to have asked Mr Khalik to investigate the issue, or for Mr Khalik, as part of that investigation, to make an inquiry of the relevant third party.
- (c) Clearly the decision not to suspend sick pay during the investigation or following it cannot constitute less favourable treatment.

70 **Allegation (L)**

- (a) We accept the evidence of Mr Morgan; Mr Phillips; and Mr Derrick: they applied the long-standing (and common sense) practice to “jump to” Stage 2 when an employee’s grievance was brought against his Regional Secretary. The claimant accepted he had no reason to question that this was the respondent’s practice in such circumstances.
- (b) The comparison with Jane Brown is misconceived. In that case, the employee had been required to undertake Stage I with her Regional Secretary. She did not wish to do so; she had wanted to proceed immediately to Stage 2. Ultimately, the respondent had been criticised by the Employment Tribunal for imposing this requirement in the particular circumstances of her case.
- (c) We accept Mr Derrick’s evidence that the respondent’s practice in the circumstances of the claimant’s grievance is applied regardless of race.

71 **Allegation M**

- (a) The claimant accepted that if there was a genuine belief by Mr Phillips or Mr Derrick that his allegations were spurious or malicious, they were obliged to refer them, in compliance with the relevant policy.
- (b) According to the unchallenged evidence of Mr Phillips and Mr Derrick, that was the situation here. Mr Phillips told us that he had reached the view that the claimant had brought the allegations in bad faith. If the claimant had not resigned, that proposition would have had to be tested at a disciplinary hearing and might have been refuted. The issue was not explored directly during the grievance or appeal hearings.
- (c) In cross-examination, the claimant accepted that Mr Phillips and Mr Derrick may well have genuinely reached the views they did, but complained that they reached those views “*based on incomplete evidence*”. Even if that were so, that would not support this complaint – which was further undermined when C said that he did “*not know*” if the decision to refer him to a disciplinary process was because of his race.
- (d) Ms Gearing and Mr Richards prepared documents (as is obvious from their content) for the August grievance hearing and not “in support of disciplinary action”. There clearly cannot be anything discriminatory in

preparing notes to enable a person to defend themselves against a complaint of race discrimination. Those documents were provided to Mr Derrick, who in turn included them in the papers he provided to HR when he referred the matter for a disciplinary process HR in turn provided them to the claimant.

72 Having set out our analysis and findings in respect of each of the allegations of race discrimination, we have concluded that the claimant has not established before us any facts from which we could properly conclude that he has been subject to acts of direct discrimination. The matters about which he complains appear to us to be ordinary interactions between an employee and managers. Even if it were the case that some of these actions were unfair, there is no basis to conclude that they were motivated by the claimant's race. However, our judgement is that the claimant has not even established any unfair or unreasonable conduct. To the contrary, Mr Morgan; Mr Richards; and Ms Gearing appear to us to have with conspicuous fairness and to have provided the claimant with their full support throughout.

73 Accordingly, we find that the claims of direct discrimination are totally without merit and they are dismissed.

Jurisdiction

74 Potentially, Allegations (A) - (I) are out of time. Allegations (A) - (C) against Mr Richards are at least a year out of time. The last allegation against him was in September 2016 and this was only raised internally in the most general terms in April 2017 and not in more specific terms until June. Allegations (D) - (I) against Ms Gearing and Mr Morgan are approximately five months out of time - the most recent occurring in March 2017 when Mr Morgan dismissed the claimant's appeal against the written warning previously given by Ms Gearing.

75 The subsequent allegations relate principally to the actions of Mr Phillips and Mr Derrick - both of them independent of GMB Birmingham Region. There is a discreet incident involving Mr Morgan where the claimant was suspected of working in another capacity whilst off sick. Our judgement is that allegations (A) to (I) cannot be said to be part of a continuing series of events; they are a set of events which came to a conclusion in March 2017; the subsequent events do not relate back to them at all. We have considered allegations (A) - (I) and have dismissed them on their merits; but, in any event, it is our conclusion that the tribunal lacks jurisdiction to consider them absent a finding of it being just and equitable to do so.

76 We have considered whether or not it would be just and equitable. The claimant has advanced before us no case upon which such a finding could be

made. And, bearing in mind the claimant's knowledge of employment law; and his employment as a trade union Organiser; there appears to us to be no proper explanation which could justify extending time.

Victimisation

77 Absent any evidence before us to conclude that the grievance raised in April 2017 was raised in bad faith, we find that that grievance was a protected act for the purposes of a victimisation claim.

78 **Detriments (A), (B), (D) and (F)**

Issues (A), (B), (D) and (F) all relate to Mr Morgan's decisions to suspend the claimant's sick pay and then to instigate an investigation into whether the claimant had been working whilst off sick. Those matters are addressed at Paragraph 69 above. Those decisions were not because of the claimant's protected act, but, as the claimant readily accepted in cross-examination, because a reasonable employer would need to satisfy itself that the apparent evidence of the claimant working whilst off sick did not, on investigation, demonstrate that to have happened.

79 **Detriment (C)**

- (a) This relates to the respondent's decision to institute disciplinary proceedings against the claimant on the basis that his allegations of discrimination in his grievance appeared spurious, vexatious and/or malicious. That matter is addressed at Paragraph 71 above. The decision was not because of the claimant's protected act, but because Mr Phillips and Mr Derrick believed, having heard the grievance, that his allegations did appear spurious, vexatious and/or malicious. Based on that view, they were entitled and indeed obliged, as the claimant accepted in evidence, to refer the issue to a disciplinary process per the respondent's written procedure.
- (b) The facts are materially similar to those in ***Martin*** where the complaints involved serious false allegations which the employee refused to accept were false, and ***Ibimidun*** where the reason for the dismissal related but to the way in which the claimant had pursued discrimination proceedings, including by making unreasonable allegations.

80 **Detriment (E)**

- (a) This allegation derives from what Mr Richards when when commenting that four activists from S20 "*stated that the claimant was aggressive at the Branch meeting [on 13 June 2016]*". In fact, Mr Richards continued: "*I*

- informed the activists that I would not accept a 'vote of no confidence' ... Ake's priority was only to get the branch working more effectively. ... I believe that Ake was trying to raise genuine concerns with activists from the Branch ...".* Far from constituting "bringing new allegations against the claimant", Mr Richards was simply recording some background facts and stating that those views of the Branch were not shared by him. If anything, Mr Richards was engaged in refuting allegations made against the claimant by others.
- (b) The 'allegation' that there had been complaints made by the branch about the claimant in June 2016 was well known to the claimant at the time and discussed with him by Mr Harrison and Mr Richards.
 - (c) As to the issue of detriment, the claimant's suggestion in questions to Mr Phillips and Mr Derrick that the "new allegations" "*must have been taken into account*" in their decisions to refer his case for a disciplinary hearing, is, in our judgment untenable (and denied by them).

81 Detriment (G)

- (a) This is a spurious allegation. The questions the respondent was required to answer were answered by it accurately and honestly.
- (b) The claimant's solicitor, commenting on the claimant's health and possible return to work, had recently stated "*the situation persists and is unlikely to change in the foreseeable future*".
- (c) The claimant's current sick note was for 2 months, with no need to assess his fitness for work at the end of that period.
- (d) It is not possible to criticise the respondent for considering it "*likely*" that the claimant would not be in receipt of salary when his sick pay ran out.

82 Having thus analysed the facts surrounding each of the alleged detriments, our conclusion is that the claimant has not established before us any facts upon which we could conclude that he had been victimised. On the evidence we have considered, the respondent acted with conspicuous fairness throughout.

83 The claim for victimisation is totally without merit and is dismissed.

Constructive Dismissal

84 We have already explained that, in our judgement, the claimant's complaints of discriminatory treatment between June 2016 and September 2017 (Allegations A – M) are wholly misconceived. Not only did the respondent not discriminate unlawfully against the claimant, we find that the respondent's managers acted with conspicuous fairness and were fully supportive of the

claimant throughout. Accordingly, in our judgement, there is no question of any breach of the employment contract during that period.

85 The question which therefore arises is whether the failure to pay the claimant's contractual sick pay on 6 March 2018 amounted to a fundamental breach of the employment contract. We accept Mr Morgan's evidence that the failure to pay was entirely due to an honest misunderstanding of the claimant's contract. Further, it is clear from the correspondence we have read that the respondent was willing to engage with the claimant on the point. But, matters were confused by the claimant's solicitor repeatedly insisting that sick pay was due until a date in April 2018.

86 We accept that essentially what occurred here was a payroll error. In no way could this have been reasonably interpreted as an action by the respondent indicating an intention no longer to be bound by the contract. Accordingly, in our judgement, there was no fundamental breach of the contract. And, absent a fundamental breach of the contract, there can be no finding of constructive dismissal.

87 In any event, in our judgement, the claimant did not resign in response to the non-payment of his contractual sick pay on 6 March 2018. We acknowledge that his resignation letter states as much; but we have also considered documentation going back to September 2017 in support of the claimant's grievance appeal. In that documentation, the claimant clearly states - "*I cannot work for the GMB anymore, ... I do not have any confidence in working for any movement where things can be put on me and I am unable to defend myself*". In our judgement, having considered the claimant's evidence before us when cross-examined about this, we are quite satisfied that he had already decided to terminate his employment as soon as his entitlement to sick pay ended.

88 In our judgement, the claim for constructive dismissal is totally without merit and is dismissed.

Unlawful Deduction from Wages

89 The respondent now concedes that the claimant is entitled to be paid his contractual sick pay for the period 1 – 13 March 2018. We therefore make an award of pay for that period which we calculate to be £1020.50 net.

Employment Judge Gaskell
8 April 2020