



EMPLOYMENT TRIBUNALS

Claimant: Mr G Oluokun
Respondent: Integral UK Ltd
Heard at: Central London Employment Tribunal (in person)
On: 26, 27, 28, 29 September 2023
Before: Employment Judge Adkin
Ms H Ewing
Mr T Harrington-Roberts

Appearances

For the Claimant: In person
For the respondent: Miss C. Urquhart, Counsel

JUDGMENT

1. The following claims are not-well founded and are dismissed:
 - a Direct discrimination because of race or age or disability (section 13 of the Equality Act 2010);
 - b Harassment relating to race or age or disability (section 26 of the Equality Act 2010);
 - c Failure to make reasonable adjustments (sections 20-21 of the Equality Act 2010);
 - d Indirect disability discrimination (section 19 of the Equality Act 2010);
 - e Discrimination arising from disability (section 15 of the Equality Act 2010);

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- f Claim for unlawful deduction from wages, specifically annual leave and overtime (section 13 of the Employment Rights Act 2010).

Employment Judge Adkin

30 November 2023

Sent to the parties on:
01/12/2023

For the Tribunal Office:

REASONS

The Claim

1. The Claimant presented his claim of direct age, race and disability discrimination, unlawful deduction from wages (holiday pay) on 4 July 2022.

Evidence

2. We received a 416 page bundle in both electronic and hard copy formats.
3. We received witness statements from:
 - 3.1. The Claimant;
 - 3.2. Mr Abidoye Amao, Union Representative;
 - 3.3. Mr Michael Allen, Contract Delivery Manager;
 - 3.4. Ms Kirstie Stewart, People Experience Adviser (former HR Adviser);
 - 3.5. Ms Kate Bodman, Senior HR Adviser (ex-employee);
 - 3.6. Ms Yvonne Habib, Senior Employee Relations Manager.
4. On the second day of the hearing the Claimant raised that there were documents that were not included by the Respondent in the hearing bundle. We heard submissions from both parties.

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5. The Respondent's solicitor had invited the Claimant in correspondence to explain what the relevance of a number of documents was. The Claimant did not do this. Ultimately the Respondent's solicitor told him that he needed to provide his own bundle since they could not see what the relevance of these documents was. The Claimant did not do this.
6. We heard substantial submissions from both sides on the principle of whether these documents were relevant and whether they should be accepted. Ultimately however we took a pragmatic approach and invited the Claimant to produce such additional documents on the third day of the hearing as he believed were relevant to the issues in the case. He did this and we accepted all of those documents into evidence, working on the basis that we would consider the relevance of each document as we needed to.
7. We also identified from an earlier Preliminary Hearing a 219 page bundle which contained at page 85 a Disability Impact Statement plus the Claimant's "additional" 83 pages (substantially medical records). The Claimant was concerned before us that not all of these documents had been replicated in the bundle for the final hearing. To address this concern and rather than spending a substantial amount of further time considering the history of the correspondence on the topic of relevant documentation, dealing with the matter pragmatically, we arranged for the Respondent to print the 219 page bundle for the witness stand and made these documents from both bundles available to the panel.

Hearing & procedure

8. An adjustment was made to address the Claimant's reported difficulty in reading computer screens for long periods. On the first day of the hearing the Claimant was provided with a printed version of the bundle and printed witness statements, so that he would not have to spend a long time in the hearing looking at documents which he had brought to the hearing on his laptop.
9. Given the Claimant's ongoing concern about documents omitted from the bundle, , on the third day of the hearing we asked the parties to attend at 9:00am so that the Claimant could provide Respondent's counsel with any updated documents. The timing was to allow the Respondent to make an assessment before the hearing commenced as to whether these documents should be objected to or not. The Claimant did not provide copies to the Respondent but instead provided a copy to the Respondent in the hearing at 10:10am. Miss Urquhart was able to rapidly review these in the hearing itself and took a pragmatic view such that they were added to the back of the hearing bundle, as described above.
10. Also on the third day of the hearing the Claimant was given a further printed copy of the bundle, given that he had dismantled the hard copy file provided on the first day and taken the documents out of page number sequence.
11. As to submissions, at our request Miss Urquhart provided written submissions to the Claimant shortly after 18:00 by email on the third day of the hearing so that he had advance notice of the content.

12. We asked the parties to attend to commence at 9:30am on the fourth day of the hearing for submissions to give us the maximum possible chance of completing deliberations within day. Parties did attend but the Claimant reported difficulties in sending his written submissions and so at 10:15am we commenced the hearing. He read out from his screen and then provided a copy of those submissions by email later on.

Disability

13. The decision of the Tribunal in the preliminary hearing on 19 December 2022 (EJ Adkin sitting alone) was that the Claimant did at the times material to this claim have a physical impairment in relation to his right eye and which did have a substantial effect on his day-to-day activities, specifically “tear film insufficiency”, eye strain, blurred vision and pain with a watering eye. He experienced difficulties using computer screens and preparing written documents, which were found to be day-to-day activities. He struggled in lower light conditions.
14. The Tribunal found that the Claimant’s back condition and depression did not amount to a disability during this period.

Findings of fact

Agency work pre-dating employment

15. On 19 July 2021 the Claimant commenced working as an electrical engineer contractor via an agency Morson for the Respondent providing services at the Australian High Commission.
16. The Claimant’s supervisor in that role was Mr Said Nhari, who in turn reported to Mr Michael Allen, a Contract Delivery Manager employed by the Respondent. Mr Nhari was on annual leave during the summer and returned in mid August 2021.
17. The contract at the Australian High Commission was operated by JLL, a business within the same group as the Respondent, which provided a facilities management service. The Senior Facilities Manager on the contract was Lynda Hills. Ms Hills was employed by the parent company JLL. JLL was the Respondent’s client and the High Commission (the Australian Department for Foreign Affairs and Trade or DFAT), in turn was JLL’s client.
18. As part of the Respondent’s agreement with JLL, they were requested to engage any potential employee as a temporary worker before they would be considered for permanent employment.

Concerns

19. Mr Allen says that that Mr Nhari had made occasional comments about the Claimant, but Mr Allen had the impression that Mr Nhari was not unduly concerned and as a result had interpreted the comments as occasional “niggles” rather than anything more serious. He felt that Mr Nhari as supervisor could manage this.

Employment by the Respondent

20. On 30 December 2021 the Claimant was offered employment as an electrical engineer with the Respondent, as a result of a decision by Mr Allen that he should be offered a permanent position rather than remaining as an agency worker. He was provided with a contract of employment dated 30 December 2021 with a proposed start date for employment of 17 January 2022.
21. On 31 December 2021 Mr Allen had a meeting with Mr Nhari by video (MS Teams). Mr Nhari had just returned from annual leave. In that discussion Mr Nhari made it clear that the mistakes made by the Claimant were rather more serious than Mr Allen had previously appreciated. He explained that the concerns related to incorrect wiring and wires falling out of position, which by clear implication was unsafe. Following that conversation Mr Allen immediately put the Claimant's job offer on hold. As contractual documents had already been issued, the administration supervisor in HR Ms Aynsley indicated that she would not chase up the return of these contractual documents or attach the Claimant to the Respondent's payroll until Mr Allen had confirmed.
22. Mr Allen told the Claimant not to send his contract back until after a technical assessment had been carried out.

Technical assessment

23. On 7 January 2022 Mr Allen followed up on the concerns raised by Mr Nhari by asking a colleague Daniel Elliot for advice. Mr Elliot's role was Senior Authorised Person JLL Portfolio City and Greater London.
24. Mr Allen emailed Mr Elliot that the site supervisor had raised concerns regarding technical abilities and asked if a technical assessment could be carried out. Mr Elliot, suggested an EST 1 assessment paper, which would take approximately an hour to complete. He explained that mark of 70% would be required to be considered for AP (authorised person) and that the test covers a fairly broad spectrum of electrical theory.
25. Initially the EST 1 competency assessment was arranged to take place on Monday, 24 January 2022. Unfortunately the Claimant called in sick on Friday 21 January 2022 and in fact the assessment did not take place until 10 February.
26. On 14 January 2022 Ms Lisa Aynsley in HR administration processed the Claimant as a non-starter.

Second contract of employment

27. The Claimant had direct email contact with Ms Hills at JLL the client and the Respondent's parent company. Mr Allen suggests that the Claimant did not really understand that she was the client, rather than his employer.
28. Notwithstanding Mr Allen's view that Ms Hills was or represented the client, it seems that she had the power to overrule Mr Allen in relation to the decision to make the Claimant's employment status permanent. Despite the concerns raised

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and the pending test, Lynda Hills decided that the Claimant should be employed regardless of how he might score in the test. Her decision was that the Claimant could be trained up to the required standard.

29. Accordingly a further offer of employment and a new contract was sent to the Claimant on 3 February 2022 before he sat the EST 1 paper.
30. Mr Allen emailed the Claimant on 3 February 2022 to say,
- “Your Integral contract is now complete and will be sent to you shortly with a start date of 7/2/22. I have arranged for your EST 1 test to take place next Thursday, Integral SAP Dan Elliott and I will be on site approximately 8am. Said is aware.
- Also, I will be on site tomorrow for a catch up with Said, Raymond and yourself”
31. The reference to Raymond was to Raymond Nedelcu who was an engineer being engaged on a temporary basis at the same site.
32. In the hearing before us the Claimant presented the circumstances of the two employment contracts as in some way suspicious. The reality we find is that Mr Allen had prudently suspended the recruitment process given the concerns raised. Mr Allen was in effect overruled by someone more senior in the parent organisation to provide the Claimant with permanent employment without awaiting the test result. We do not see how this was to the Claimant’s detriment.

Overtime under the contract

33. The contract contained the following clause in relation to overtime:

7. Overtime

You shall be required to work overtime in addition to your normal hours of work if instructed to do so by your Line Manager on reasonable notice, or if necessary for the proper performance of your duties.

The Company does not guarantee that over time will be available to you.

...

All overtime/additional hours must be authorised in writing by your Line Manager before being worked and will not be payable if the appropriate written authorisation is not granted.

Alleged sub-standard maintenance task – 2.2.22

34. On 2 February 2022 the Claimant carried out an electrical maintenance task, which the Respondent says was subsequently discovered to be sub-standard as a result of a minor accident on 28 February.

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35. The Claimant denies that the work was sub-standard and that there was an accident and alleges that this was a "fit up" by his colleagues, i.e. that evidence was falsified as a pretext to dismiss him.

Start date of employment

36. Under the terms of the second contract, the Claimant's employment commenced on 7 February 2022.

Information provided to the Respondent about Claimant's disability

37. On 10 February 2022 the Claimant filled in an employment health questionnaire which appears at page 170 of the main bundle. In that questionnaire the Claimant answered various questions which were in a yes or no format where he could tick yes or no, including the following:
38. Number 9, eye conditions where the Claimant has ticked yes and added a handwritten comment, "shortsightedness".
39. There is no evidence of any more significant eye problem than shortsightedness having been provided to the Respondent.

Re-scheduled technical assessment EST1

40. Also on 10 February 2022 the Claimant took the EST1 assessment. A blank version of this assessment appeared in the bundle. It is a 15 page test entitled "Integral Safe Systems of Work – Low Voltage Knowledge" dated December 2017 containing 65 numbered questions relating to electrical theory which are mostly text based but containing various coloured diagrams.
41. Following up on this, on 17 February Mr Elliot provided this feedback on the Claimant's performance:
- "I have been through it and unfortunately he's not done very well, only achieving around 30%, certainly well below the 70% required for AP. Some of that may be down to language, but there were some fairly fundamental mistakes in there, like 3 phase colours."
42. Mr Allen asked on 21 February if there were appropriate training courses to improve technical knowledge and capabilities. Unfortunately that request was overtaken by events.
43. In his further particulars of claim, repeated in identical language in his witness statement the Claimant alleges that Mr Allen "false fully" communicated the outcome of the test to him on 28 February 2022. The Claimant appears to see this as part of a wider conspiracy to remove him from his role.
44. Insofar as this appears to be an allegation that Mr Allen falsely represented to him the outcome of this test, we do not find that the Claimant has established this. The Tribunal accepts Mr Allen's evidence he had been told by Mr Elliott that the Claimant had scored 30% and that Mr Allen was very concerned about this. This is supported by the contemporaneous email correspondence.

16 February 2022

45. On 16 February 2022 Mr Nhari and the Claimant argued about whether or not access hatches were required to replace spotlights.

19 February 2022 "jokes"

46. On 19 February Mr Nhari, the Claimant and Mr Nedelcu were sat in the Engineers' Room at the start of the day. Mr Nedelcu was looking at a photo of his friend's house in Romania which had caught fire.
47. There is conflicting evidence about whether this house was said to be in Romania or Hungary, but that detail is not material.
48. According to Mr Nhari, Mr Nedelcu said to the Claimant "Did your friend wire up the house?" in reference to image of the burnt house. This was supposed to be a joke, although not taken as such by the Claimant. The Claimant apparently reacted angrily and started shouting at Mr Nedelcu. Mr Nedelcu did not reply and sat quietly.
49. The Claimant's version of that the 19 February incident in his witness statement prepared for the Tribunal hearing was that Mr Nedelcu accused a friend of the Claimant having gone to burn his friend's house in Romania, after which Mr Nedelcu then started laughing with Mr Nhari.
50. It seems likely given the two different versions that the Claimant had not fully understood what Mr Nedelcu had said.
51. Later on according to Mr Nhari the Claimant refused to share the goods lift with his colleagues leading to Mr Nedelcu to quip "Godwin won't share the lift with us because we are dirty" which again caused the Claimant to react angrily and shout at Mr Nedelcu.

26 February 2022 disagreement

52. On 26 February 2022 there was something of a falling out between Mr Nhari the supervisor, the Claimant and Raymond Nedelcu when the three men were working together on an air conditioning unit.
53. The Claimant alleges that he was subject to "all sorts of racist abuse, victimising and harassing" and "continuous bullying and harassment" (sic). He did not substantiate these allegations with evidence of any racist language said to have been used on this occasion.
54. As to what occurred on 26 February, the Claimant says that the two men started shouting at him that he had removed screws or cushion on the air conditioning unit they were working on. The Claimant responded that he did not remove any screws and in fact the cushion had simply was shifted a bit.
55. Mr Nhari's version of events was that the Claimant had begun to remove the supporting bolts from a ceiling mounted air conditioning unit, but when challenged

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lied about it and it degenerated into an argument. The Claimant initially accused Mr Nhari of assaulting him, but then appeared to retract this when Mr Nhari challenged this and pointed out that Mr Nedelcu was present as a witness. The Claimant apparently said "I didn't mean in this way".

28 February discussion

56. Two days later, on the afternoon of 28 February 2022, Mr Allen spoke to the three men about the falling out on 26 February. According to the Claimant this discussion took place in the period 15:00 – 17:30.
57. Mr Nhari suggested that there had been a recent run of conflicts involving the Claimant. He said that on 16 February Mr Nhari and the Claimant had argued about whether or not access hatches were required to replace spotlights. The following day on 17 February when Mr Nhari asked of the Claimant and Mr Nedelcu which one of them had done a particular job the Claimant shouted at him "this is a handyman job why are you asking me?" He said that he had to tell the Claimant to stop shouting otherwise client employees would hear.
58. He mentioned Mr Nedelcu's jokes and the Claimant's hostile reactions on 19 February and then the falling out on 26 February.
59. The Claimant did not accept the version of events and when asked why they should lie suggested that the two men were playing games.

Mr Allen seeks advice

60. Mr Allen's wrote to colleagues Kirsty Stewart (HR) and Gary Woods his line manager to ask for advice. He gave an account of the versions of events (Mr Nedelcu supporting Mr Nhari) before concluding:

Said [Nhari] has stated that the times in which Godwin has shouted at him caused him stress, a feeling he did not want to attend work and feels he can no longer manage Godwin.

Said has also raised concerns regarding Godwin's Electrical competency; he informed me of incidents in which cables have not been terminated correctly, tripping a Circuit Breaker and almost electrocuting himself whilst carrying out PAT testing

Godwin carried out the EST-1 (Electrical Competency test) with Integral SAP Dan Elliott and Dan informed me Godwin got approximately 30% correct, I have asked Dan to provide the test results.

Taking in to account all the above issues as well as the incident report from Said on 2/3/22 I have serious concerns with Godwin's ability to carry out his role, his technical competency and ability to work with the current engineering team. I do not know how Godwin can pass his probation period, could you please provide some advice and what we can do next?

Alleged electric shock

61. An incident reporting form in the bundle at pages 187-199 suggests that at 09:30 on 28 February 2022 Raymond Nedelcu received a mild electric shock to his right hand and a scratch to his arm. According to that document no time was lost as a result of these injuries. The narrative explaining the accident reads as follows:

“On Monday, 28 February 2022, whilst Raymond was removing a few metal ceilings tiles to access the ceiling void in the lift lobby area of level 5, he touched an energized electrical Low voltage wiring that was left exposed and unsafe (please see photos emailed to Michael Allen).

I can confirm that this light fitting and the wiring was recently replaced by Godwin [**i.e. the Claimant**] and both Raymond and I were unaware that he did not terminated the cable properly and he did not use the electrical black box supplied with the light fitting to prevent any electrical shock to anyone.

Although it was a low voltage fitting this minor electrical shock caused Raymond to act fast and scratch his arm otherwise, he is not showing any other noticeable symptoms.”

[**bold words** in square parentheses added]

62. In the section of the document dealing with the suspected cause of the accident the following is written:

Direct Cause: Raymond’s direct contact with live electrical wiring whilst removing the metal ceiling tile.

Indirect Cause: Godwin failing to terminate the cables properly and not using the electrical box provided by supplier to prevent contact with the live cables.

63. The form is dated 28/02/2022 and signed by Ramond Nedelcu who is described “Plumber (Agency)”.

64. Mr Allen recorded in a handwritten note what he was told about the accident alleged to have occurred on 28 February. This may not have been written on 28 February:

"28/2/22: RAYMOND/SAID

RAYMOND RECEIVED ELECTRIC SHOCK 5TH FLOOR AUS CENTRE, LIGHT TERMINAL COPPER EXPOSED + INSULTTING COVER LEFT OPEN. SAID ASSIGNED JOB TO GODWIN/PHOTO TAKEN!"

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65. The bundle contains a photograph described in the index as “photo – exposed wire” which shows a black electrical junction box with the lid off, a screw loose in the foreground and a small piece of copper wire poking out of the junction box as if the entire wire has not been safely captured in the box.
66. This was said to be a low-voltage electric shock. It was not being suggested that this had been a life-threatening situation, but was being put forward as evidence that there had been a sloppy job carried out by the Claimant which might in other circumstances have been genuinely dangerous.

Timing of Mr Allen’s notification of accident

67. Mr Allen’s witness statement at paragraphs 22 - 26 gives the impression that he spoke to the three men about the electric shock allegation on 28 February. He acknowledged in his oral evidence that this was not correct and accepted what the Claimant put to him which is that the conversation on 28 February was substantially about earlier events involving an air-conditioning unit on 26 February 2022 and his receiving information about the alleged electric shock came later.
68. Further support for the later timing is Mr Nhari’s email 02 March 2022 14:30 to which the photograph referred to above was attached. This email does not suggest that the two men had had any earlier communications about the matter.
69. Although Mr Allen’s oral account was at odds with his witness statement, we felt that the explanation for this was that he had not checked his witness statement carefully enough.

Claimant’s criticisms of the evidence

70. The Claimant has made a number of criticisms of the evidence that has been produced in support of the Respondent’s case on his alleged unsafe work on 2 February leading to the alleged accident on 28 February.
71. The Tribunal accepts that there were a number of aspects of the documentation about this incident that are less than satisfactory.
72. First we note that the incident date is inconsistently reported as 28th of March 2022 in one part of the form and 28/02/2022 in another. At least one of these dates must be wrong. The Claimant placed significant emphasis on this. We find it quite likely that in fact this form was filled out in March 2022 rather than on the day of the alleged incident itself. That would tie in with Mr Nhari’s email sent on 2 March. It has to be in doubt whether the accident occurred on the morning of 28 February 2022 as stated, since if it had occurred then it would have been likely to be a topic of conversation in the discussion on the afternoon of the same day described above. Of course that does not follow that the content relating to the details of the incident was actually fabricated, as this might simply be an error. (For example the Claimant’s later letter of appeal against dismissal had the wrong year on it as part of the date and we did not consider this was anything other than simply a typographic error.)

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73. Second we note that the line manager did not sign this form in the box 13 on page 192, rather it was signed by Raymond Nedelcu on page 195, yet the narrative on page 191 has most likely been written by Mr Nhari, since it refers to Raymond in the third person.
74. Third, the narrative at box 10 on page 191 does not contain simply a factual account of the circumstances leading to a health and safety incident. It goes further and is plainly written in a way to suggest carelessness on the part of the Claimant.
75. We understand why the Claimant has the impression that his two colleagues did not want him to be part of the team and we accept that he believes that he was "fitted up" i.e. that evidence was dishonestly created to get rid of him.
76. We have reminded ourselves that cogent evidence is required for a fraud or forgery which the creation of false evidence would be akin to. The Tribunal has not heard evidence from Said Nhari or Raymond Nedelcu, presumably because the allegations of discrimination in the list of issues relate to management actions, e.g. calling the Claimant to a meeting and dismissing him, not specifically making of false statements. There is no evidence or suggestion that either man would have benefited in any way financially from the Claimant no longer working with them.
77. We find that the incident report was substandard and incomplete. It would have been better had a line manager or someone independent signed it off given that by this stage the three colleagues were not getting on.
78. It is clear that Said Nhari and Raymond Nedelcu were attempting to show that the Claimant was incompetent. That is not necessarily the same as saying that the evidence was fabricated. The Tribunal does not need to make an assessment of that for the matters that we are dealing with.

Incident report escalated

79. On 2 March 2022, following on from Mr Nhari's email, Michael Allen emailed Kirstie Stewart, HR Advisor, on 2 March 2022 forwarding on Mr Nhari's email and the photos that had been attached with it.
80. Referring to the Claimant, Mr Allen remarked that he had 'concerns regarding his technical ability to carry out the role, safety of the work he is carrying out and his behaviour'.

Invite to Probationary review

81. On 22 March 2022, Mr Allen invited the Claimant to a probationary review meeting to take place on 24 March.
82. Later that evening Claimant complained about the invitation to Lynda Hills, referring to the circumstances of the re-issued contract and stating:

"Said Nahri has never been happy about the employment contract and they make embassy environment very unhealthy and unhappy for me.

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Said Nahri has been engineer lies around the whole Australia embassy about me and looking for every way to get me sacked.”

83. On 23 March 2022 the Claimant told Mr Allen he could not attend on 24 March and went off on sick absence with a headache.

Tools

84. On 27 March 2022 the Claimant attended the client site to collect his tools.
85. The Tribunal was invited by the Respondent to make a finding that the Claimant had collected his tools on this day and that his motivation was to work elsewhere when he was suggesting to the Respondent that he was unfit to work. By implication therefore he had been dishonest.
86. We are not satisfied, based on the evidence we have received that this allegation is made out. The Tribunal considered that the Claimant’s motivation may simply have been to protect valuable tools. In any event this allegation falls outside of the issues we need to determine for the claims before us.

Sick absence

87. On 28 March 2022 Mr Allen told Ms Stewart that the Claimant remained off work on sick absence and further that he had not following the absence reporting procedure of contacting his line manager.

GP attendance

88. On 28 March 2022 the Claimant reported to his General Practitioner. The note reads:
- “Low mood - depression, has a lot going on at work. Harassment victimisation. Pull out of work contract but it is giving him low mood”

Probationary review process

89. On 30 March 2022 the Claimant was invited to probationary review meeting on 1 April 2022.
90. At this stage failing to follow the correct reporting absence procedure was added as an additional basis for the employer to concerns that they wish to discuss the review meeting.

Further sickness absence

91. The Claimant says he was not well enough to attend, specifically:

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"I developed serious headache and pain all over my body and migraines radiating all over my body and my legs and affecting my body veins"

92. On 6 April 2022 the Claimant submitted a fit note (covering 23 March to 29 April) which cited "anxiety/stress".

Further probationary review process invite

93. On 20 April 2022 the Claimant invited to a further probationary review meeting on 22 April 2022, in a letter together with the probationary policy, pictures of the journal alleged to be completed by the Claimant and the incident report were attached.
94. This was the third date suggested and the Respondent indicated that no further postponement would be allowed. The letter contained the following passage:

"Following your previous comments regarding your fitness to attend a meeting, we are happy to make any reasonable adjustments to support you. These include:

- Holding the meeting via phone call, rather than Microsoft Teams.
- A written submission from you regarding the allegations listed and any mitigating factors.
- Allowing a representative to attend the meeting on your behalf.

I must advise that due to the length of time this process has been ongoing and because the probation review meeting has already been rescheduled, that no further postponements will be permitted. Failure to attend this meeting or advising upon one of the adjustments listed prior to the meeting, may result in the meeting being held and a decision made in your absence based on the evidence already available to the Company.

You are entitled, if you wish, to be accompanied to this meeting by a work colleague or a trade union official.

Please let me know the name of the person who will accompany you. If your chosen representative is unable to attend this meeting on the given date, please let me know immediately so that I can consider whether to rearrange the meeting.

Investigation -

95. On the following day, 21 April 2022 the Claimant told Ms Stewart that he was unable to attend due to an absence due to stress/anxiety from work, medical attention which he says he attended an emergency surgery as well as his GP and was on "strong medication". He complained of victimisation and continuous

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harassment from work and that his representative would need days off work to attend a meeting.

96. In response on 22 April 2022 Ms Stewart agreed to postpone the meeting.
97. On 28 April 2022 the Claimant was invited to a rescheduled probationary review meeting on 3 May 2022. This letter contained the following:

Whilst we appreciate that you are currently unfit to work, we wish to conclude the process as soon as possible to avoid any further stress on yourself. Therefore, a probationary review meeting has been rescheduled for Tuesday 03 May 2022 at 11:00am via a Microsoft Teams Call, and will be conducted by myself, in the presence of Kirstie Stewart, HR Advisor, as a note taker. If there are any adjustments that you believe I need to make so you are able to attend this meeting, please let me know so that I may consider these in advance.

98. On 2 May 2022 the Claimant asked for meeting to be further postponed, stating:

"I had my medical appointment surgery as regards my sickness on 25/4/22 to check about the state of my health stress/anxiety at work and persistent margarine and ear drum pain ...I was given an extension to my sick note yet to arrive in 10 days but will be send to HR of integral services limited due to stress/anxiety at work.

I am on a strong medications and been advised to stay off work.

I am not fit for now and I have informed my union representative from RMT and extension sick note will be sent to Integral services limited HR and contract delivery manager.

It will be an unlawful and illegal to hold any meeting whilst I am unwell. I will advise that it is advisable to hold on any meeting until I am fit to attend physically ."

Probationary review meeting in Claimant's absence

99. On 3 May 2022 the probationary review meeting took place. Michael Allen, Contract Delivery Manager and Ms Stewart, HR convened in the absence of the Claimant.
100. On 04 May 2022 the Claimant explained in an email to Ms Stewart why he could not attend:

"I already advised in my email dated 02/05/22 @ 18:20pm invite probationary review meeting received on 29 April, 2022 at 17:03pm copy to Kirstie Stewart (HR advisor) and Michael Allen (Contract delivery manager) my representative that I was advised by my

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medical general practitioners to stay off work or any meeting for now due to state of my health severe migraine and ear drum pain due to false allegations at work against me that results to stress/anxiety.

It will be unlawful/ against the employment tribunal law act 98("ERA") to carry out any meeting when I am advised to stay off work and not fit for work or to attend any meeting and that my unfit note will be send to HR and copy contract delivery manager in my email when it arrives. I am on a strong medication for now. So I can't defend myself due to my state of health stress/anxiety I am passing through now so I can't cope with any adjustments for now. So I feel it will be reasonable to allow me to be fit to attend the meeting.

I have informed and update the company Integral services limited in my email of my state of health at this moment and copy my union representative.

I reinstate it will be unlawful/ illegal to carry out any meeting in my absence and unreasonable not to amend the date of the investigation invite meeting. I was only invited once on 22/3/22 for a probationary review meeting on 24/3/22. And since 23/3/22 I have been off sick my sick note was copy to Integral services HR and contract delivery manager on 6/4/22.

My sickness was caused due to false allegations against me at work and the adverse effects is what I am undergoing/ nursing.

I am willing to defend myself when I am fit."

Letter of dismissal

101. On 5 May 2022 Mr Allen wrote to the Claimant to confirm that the outcome of his probationary period was that he would be dismissed. He wrote:
- “At the meeting, it was decided that during your probationary period, your conduct and performance in the role of Service Engineer has been unsatisfactory.
- Specifically, the reason for this decision was;
- Serious breach of Health and Safety rules on 02 February 2022, which resulted in an accident on site on 28 February 2022
 - Failure to follow the correct reporting absence procedure”
102. Mr Allen's conclusion was that the Claimant had been guilty of gross negligence. He informed the Claimant that his last day of employment would be recorded as 03 May 2022.
103. Since that was not received until 5 May 2022, notwithstanding the content of the letter the effective date of termination was 5 May.

ACAS

104. On 6 May 2022 ACAS was notified by the Claimant of a dispute.

Medical fit note

105. On 7 May 2022 the Claimant's GP produced a Fit note (covering 29 April to 10 June) citing "stress / [REDACTED] – under review". The advice was that the Claimant was not fit for work.

Appeal

106. By a letter dated 8 May 2022 the Claimant appealed the outcome of the probationary review meeting.

107. In the appeal letter he rehearsed the recent history of being signed off and having attended Middlesex Hospital. He described the history of the signing of the contract. He stated that since the signing of the contract on 7 February there had been a negative inkling about his performance. He alleged that a false allegation had been made and said that he was worried about Mr Nhari's victimisation, intimidation, bullying, harassment and false allegations which he claimed had been made to Mr Allen by telephone on 25 October 2021, 31 January 2022, 28 February 2022, 10 March 2022.

Progression of the appeal

108. On 16 May 2022 Ms Stewart acknowledged the appeal in an email to Claimant, and passed the appeal on to Kate Bodman, a Senior HR Advisor for the Respondent and the parent company JLL.

109. Ms Bodman was based in Bristol and had four direct reports. She had been responsible for just under five years for managing the central inbox for the human resources advisory function. She would receive in the region of 50 – 80 emails each day and was required to sift and then either action or delegate email enquiries.

110. On 17 May 2022 Kate Bodman asked Gary Woods, Operations Director to hear the appeal and asked for dates of availability. Thereafter email trail relating to the appeal ends.

111. In her witness statement at paragraph 9 Ms Bodman says that:

“9. ... I could find no record that Gary had ever responded to my email and I can only assume that I forgot to chase it up. This is perhaps due to the fact that when reviewing the emails, **I discovered that the email had been incorrectly filed in the folder relating to an appeal for another employee.**

10. I pride myself on being very efficient and was upset to discover this mistake. I can only imagine that I inadvertently misfiled the email

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and the lack of response from Gary Woods and no chase from Mr Oluokun meant that it went forgotten.

11. I cannot provide any other excuse for this mistake. I have no doubt that had Mr Oluokun chased the company for an appeal hearing, my mistake would have been discovered much sooner.

12. As regards Mr Oluokun's allegation that his appeal was not heard because of his race, age and/or disability, I can categorically state that this is not true. I dealt with hundreds of appeals as a Senior HR Adviser and each was given equal time and consideration regardless of any protected characteristics of the appellant. I personally, and the HR team at Integral, take pride in treating everyone equally and the company ensures that training and awareness on diversity is a key part of each employee's development alongside having a dedicated ethics contact page for employees to anonymously raise any concerns they may have. The company has a very diverse workforce and the value that each brings to the company is respected. In any event, I would not have been aware of Mr Oluokun's personal characteristics unless I had read through the background to his appeal which I would not have done until much later, once an appeal chair had been identified and a hearing arranged.

[emphasis added]

112. As a matter of fact, the Claimant did not chase the progression of the appeal, although that is not a criticism of him. Our view is that the onus was on the Respondent as employer to follow through the process rather than for the Claimant to chase.
113. Mr Wood, was Michael Allen's line manager. Mr Allen had raised with Mr Woods at earlier stage concerns about the Claimant's performance. It was also likely we find that he would have been aware of the fact that there was dismissal or at likely to be a dismissal prior to receiving this request.
114. There was a failing on the part of both Ms Bodman and Mr Woods. We consider it was the responsibility of Ms Bodman to chase this up.

ACAS communication

115. On 25 May 2022 a conciliator at ACAS, Kelly Thatcher, contacted the Respondent using Yvonne.habibname@eu.jill.com. This was the wrong email address.
116. Several weeks later, presumably having received no response, Ms Thatcher forwarded her email on 15 June 2022 to the email of Chris Doughty, the Head of People Experience, UK & Ireland. Mr Doughty forwarded this email a few minutes later to Ms Habib with the comment "Looks like the below was meant for you – do you know the case or do I need to find out". 15 June was the day before the ACAS conciliation period expired.
117. ACAS issued a certificate on 16 June 2022.

Claim

118. On 4 July 2022 the Claimant submitted a claim to the Tribunal.

Further email ACAS communication

119. On 4 August 2022 there were further emails from ACAS to Chris Doughty - who then emailed two colleagues just over a couple of hours later suggesting a call to “discuss risk and strategy”.

Law

120. We are grateful to both parties for written submissions and brief oral submissions.

DISCRIMINATION –

Equality Act 2010

121. The Equality Act 2010 contains the following provisions:

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.

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.

15 Discrimination arising from disability

(1) A person (A) discriminates against a disabled person (B) if—

(a) A treats B unfavourably because of something arising in consequence of B's disability, and

(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.

19 Indirect discrimination

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

- (2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
- (a) A applies, or would apply, it to persons with whom B does not share the characteristic,
 - (b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
 - (c) it puts, or would put, B at that disadvantage, and
 - (d) A cannot show it to be a proportionate means of achieving a legitimate aim.

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.

Perception of protected characteristic

122. Direct discrimination may arise because of a *perception* that a Claimant has a protected characteristic (Chief Constable of Norfolk v Coffey [2019] IRLR 805). Underhill LJ said as follows at paragraph 11 that decision:

It is common ground before us, as it was before both tribunals below, that an act will be caught by s 13(1) where A acts because he or she thinks that B has a [2019] IRLR 805 at 808 particular protected characteristic even if they in fact do not: this is generally labelled '**perception discrimination**'. Judge Richardson gave an example at para 47 of his judgment, taken from the Explanatory Notes to the 2010 Act:

'If an employer rejects a job application form from a white man whom he wrongly thinks is black, because the applicant has an African-sounding name, this would constitute direct race discrimination based on the employer's mistaken perception.'

I should say, because it appears that a case of perception discrimination under the 2010 Act has not previously been before this Court, that I am satisfied that the consensus on this issue below was

correct. As a matter of ordinary language the phrase 'because of [a protected characteristic]' is wide enough to cover the case where A acts on the basis that B has that characteristic, whether they do or not¹; and the Explanatory Notes confirm that that was Parliament's intention.

123. We have considered the guidance set out in *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] ICR 1205, EAT, as approved and revised by the Court of Appeal in *Igen Ltd (formerly Leeds Careers Guidance) and ors v Wong and other cases* [2005] ICR 931, CA as follows:

Commented [AE1]: Is that right? Forgive me - it may be a trade name?

(1) Pursuant to s.63A of the SDA, it is for the Claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the Claimant which is unlawful by virtue of Part II or which by virtue of s. 41 or s. 42 of the SDA is to be treated as having been committed against the Claimant. These are referred to below as "such facts".

(2) If the Claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that "he or she would not have fitted in".

(4) In deciding whether the Claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word "could" in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) 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.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the Claimant has proved facts from which conclusions could be drawn that the respondent has treated the Claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

124. We have also considered *Nagarajan v London Regional Transport* [1999] IRLR 572, *Madarassy v Nomura International plc* [2007] IRLR 246 CA, *Ayodele v Citylink Ltd* [2017] EWCA Civ 1913. In *Hewage v Grampian Health Board* [2012] ICR 1054, SC in which Lord Hope endorsed the following guidance given by Underhill P in *Martin v Devonshires Solicitors* [2011] ICR 352, EAT:

“the burden of proof provisions in discrimination cases... are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination — generally, that is, facts about the respondent’s motivation... they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent’s motivation and what is in issue is its correct characterisation in law’.

125. In *Madarassy v Nomura International plc* [2007] ICR 867 CA Lord Justice Mummery held as follows:

“The court in *Igen v. Wong* expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent “could have” committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal “could conclude” that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.” (para 56)

126. In *Glasgow City Council v Zafar* [1998] ICR 120, HL, Lord Browne-Wilkinson said that in the context of a discrimination claim ‘the conduct of a hypothetical reasonable employer is irrelevant. The alleged discriminator may or may not be a reasonable employer. If he is not a reasonable employer he might well have treated another employee in just the same unsatisfactory way as he treated the complainant, in which case he would not have treated the complainant “less favourably”.’ He approved the words of Lord Morison, who delivered the judgment of the Court of Session, that ‘it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances’. It follows that mere unreasonableness may not be enough to find an inference of discrimination.

PCPs

127. In *Ishola v Transport for London* [2020] EWCA Civ 112, the Court of Appeal confirmed that one off events are not necessarily provisions criteria or practices (i.e. PCPs) and must be examined carefully to see whether it could be said that they are likely to be continuing.

CONCLUSIONS

DIRECT RACE DISCRIMINATION/HARASSMENT

128. The Claimant describes himself as black African of Nigerian origin.

Direct race harassment

129. We were not satisfied that the Claimant established that any of the conduct below “related to” his race or nationality so as to amount to harassment within the meaning of section 26. There is no direct reference to his race nor circumstances which lead us to the conclusion that the conduct complained of somehow was indirectly related to his race.
130. This claim does not succeed. We therefore considered the claim of direct race discrimination.

Direct race discrimination

131. We have approached these claims on the basis that the Claimant must be relying on a hypothetical comparator, since there is no actual comparator in the same circumstances.
132. It has been convenient to deal with claim of direct race discrimination in relation to each allegation below.

11.1 On 22 March 2022 inviting him to a meeting on 24 March 2022 to discuss false allegations made against him in order to get rid of him:

Facts

133. The focus of this allegation is the invitation made on 22 March 2022. It is not in dispute that Michael Allen invited the Claimant to a meeting on 24 March to discuss the allegation of "serious breach of Health and Safety rules on 2 February 2022, which resulted in an accident on site on 28 February 2022".
134. It is not the function of this Tribunal to decide whether the work carried out by the Claimant on 2 February was in some way defective, that falls outside of our expertise. Similarly it is not our function for us to determine whether or not an accident or injury occurred on 28 February 2022. There are other legal forums which would be more appropriate to decide what occurred that on that day.
135. Our focus is on Mr Allen, the alleged discriminator and the allegation that he invited the Claimant to discuss false allegations in order to get rid of him. This is characterised by the Claimant as a premeditated plan.
136. Mr Allen was not present either on 2 February 2022 when the alleged defective work was carried out by the Claimant, nor when the alleged accident occurred on 28 February 2022. He did not have first hand knowledge of either matter. He did not complete the incident report himself. The evidence that Mr Allen had was the photographic evidence and the accounts of Mr Nhari and Mr Nedelcu. In other words he was reliant on the evidence of his junior colleagues.
137. While are criticisms that can be made of the incident report completed in relation to the alleged accident, we have not come to the conclusion that Mr Allen knew the allegations to be false. We bear in mind that was aware of Mr Nhari's concerns raised over a period of time. There was also the objective evidence of the competence test in which the Claimant only scored 30% and that Mr Nhari's account of various events was supported by Mr Nedelcu.
138. In his oral evidence Mr Allen denied that the accident was "planned". His evidence was that he did not believe the allegations to be fraudulent and took them at face value. We have no evidence that Mr Allen has acted other than properly in this matter. His correspondence about his various concerns appears to us to be professional, careful and genuine.

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139. In view of the background and our assessment of his evidence the Tribunal accepted that Mr Allen's about his beliefs and reasons for inviting the Claimant to an interview, having taken HR advice. It follows that we do not find that the Claimant established the necessary factual basis for this allegation, i.e. that Mr Allen knowingly invited him to discuss false allegations.

Race

140. This allegation therefore does not succeed. However we have gone on to consider in the alternative whether there is evidence suggesting that the Claimant's race was a factor in the way he was treated by Mr Allen.
141. The Claimant was a contractor from July 2021 the previous year. Mr Allen himself took the decision to move the Claimant from an agency worker to a permanent employee. He must have been aware of the Claimant's race and nationality at the time that he took that decision. That does not mean of course that he could not have discriminated against the Claimant at a later stage, but it does at least suggest that he did not start off with a negative view of the Claimant because of his race.
142. Mr Allen's assessment was the initial negative comments made about the Claimant's work by Said Nhari were no more than minor niggles. At that stage he was prepared to overlook these and put the Claimant onto a permanent contract. That Mr Allen was prepared to give the Claimant the benefit of doubt in spite of those niggles seems to the Tribunal to undermine the suggestion that he had a preconceived negative view of the Claimant based on his race.
143. We accept Michael Allen's evidence that he believed there were genuine concerns raised to him by members of the team about the Claimant and for that reason it was not appropriate to confirm the Claimant's appointment at the end of probation. The EST1 test was objective evidence which supported that there was a competence gap.
144. We have not found that there is direct evidence of Mr Allen consciously or unconsciously discriminating against the Claimant because of his race, nor are the facts from which we could reasonably draw that inference.

11.2 Holding the meeting in his absence when he was certified as unfit to work:

145. The Respondent realistically accepts that it was not an ideal situation to hold a meeting in an employee's absence, but says it had to resolve this issue and points to the context.
146. The Claimant had been absent on full pay in the region of six weeks. It was near the end of the Claimant's probationary period, when it would in any event have been standard to hold a review meeting.
147. The Respondent was under pressure from its client Lynda Hill at JLL given that the team was one person short and so was not meeting the terms of its own obligation to the ultimate client the Australian High Commission. We note that this was from Linda Hills, the client lead whose pressure to issue the Claimant with a contract that had led to the second contract described above.

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148. There were a series of invitations to a meeting to hold the Claimant's probationary review (22 March [204-5]; 30 March [216-217]; 20 April [229-230] and 28 April [231-232]).
149. In the last three of these letters Mr Allen offered the Claimant different ways to participate, specifically holding the meeting as a telephone call rather than on Microsoft Teams, inviting a written submission from the Claimant or alternatively allowing a representative to attend the meeting on his behalf.
150. We acknowledge the Respondent's argument that the medical advice did not preclude the Claimant from attending a meeting or at least writing a document to answer the allegations.
151. We formed the conclusion that the Respondent was trying to engage the Claimant in a variety of different ways and offering to reschedule. It is difficult to interpret this as the Respondent trying to make a decision without the Claimant's input when they were actively soliciting it.
152. We find that a hypothetical employee in the same situation as the Claimant, i.e. where there was a question over professional competence during a probationary period and who had gone on sick absence leaving a contract unfulfilled, would have been likely to experience similar treatment. We can see that this situation needed resolving. There was nothing said or done in our assessment that suggested that the Claimant's race was a factor in the way that the managers decided to manage this situation. We do not find that the approach of holding a meeting in the Claimant's absence after a series of invitations and delay in the circumstances leads us to an inference that discrimination had occurred.

11.3 Dismissing him;

153. Concerns had been raised about the Claimant's competence. There was a specific allegation that a minor accident had been caused. Given that the Claimant did not participate in the probation review process there was no new information to provide the Respondent with a contrary view or an explanation as to what had occurred. The Claimant's suggestion that false allegations had been made against him did not materialise until his letter of appeal in May 2022 (wrongly dated 8 May 2021).
154. The Claimant was on probation. His status was not therefore the same as an employee whose permanent employment had been confirmed that the end of probation, who might expect greater security.
155. For similar reasons to those set out in relation to allegations 11.1 and 11.2 above, we do not mind that there is direct evidence that the Claimant's race was a factor in the management decision to dismiss, nor is there evidence from which we might draw an inference of race discrimination.

11.4 Not dealing with his appeal

156. The Respondent failed to deal with the Claimant's appeal against the decision to dismiss him. There was a clear right to an appeal under the probation policy.

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157. It seems to the Tribunal that this undoubted failure calls for an explanation.
158. The Tribunal did not hear live evidence from Ms Bodman, who has apparently recently commenced employment with another employer.
159. Ms Bodman's account is plausible. We do not have compelling reasons not to accept the truth of the statement as to the misfiling of the Claimant's appeal, her workload of emails generally and specifically in relation to appeals, and that the Respondent has a diverse workforce. It would have been more satisfactory had Ms Bodman been subject to a witness order so that the Tribunal would have had benefit of live evidence and the Claimant given the opportunity to cross examine her.
160. As to the awareness of these two individuals of the Claimant's protected characteristics, there is no evidence at all that Ms Bodman and Mr Woods were aware either of his age or his disability (eye condition).
161. Both Kate Bodman and Gary Woods had some responsibility to ensure that the Claimant's right to an appeal was granted. Ms Bodman acknowledged in her witness statement that this was her error. She said that the email had been incorrectly filed in the folder relating to an appeal for another employee. She said that she was upset when she discovered his mistake.
162. While Ms Bodman says in her statement she was not aware of the Claimant's personal characteristics, we consider that he has a surname that would suggest that he has African heritage. That is only at the level of likelihood and is far from certainty. As to nationality, someone with that surname might be British, or from an African nation or from of some other nation. Nevertheless direct discrimination can be established on the basis of a perceived protected characteristic. We find that the Claimant would in this situation be likely perceived to be African.
163. What evidence is there? There is no evidence that Ms Bodman met the Claimant. There is no evidence that his race was something that she considered. In fact there is little evidence at all beyond the fact that she said she had a busy workload and she misfiled the appeal and overlooked this as a mistake. We accept that if the Claimant had chased the appeal, it is likely the mistake would have been discovered. Again to reiterate that is not a criticism of the Claimant.
164. There is no evidence that Ms Bodman had a particular *animus* toward the Claimant or people who shared his race. There is no evidence of this being part of a pattern of behaviour which might found an inference of a discriminatory mindset. Ultimately we have not concluded that there is evidence that could reasonably lead us to the conclusion that race was part of the reason why this appeal was not progressed.
165. We do not find that that an allegation of race discrimination is made out.

11.5 Not engaging with ACAS during Early Conciliation.

166. Allegations of this sort, i.e. that an employer should have engaged in a without prejudice process to settle a claim are often particularly difficult for the Tribunal.

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Communications about settlement are ordinarily without prejudice (i.e. they should not be considered by the Tribunal) or often privileged (i.e. confidential advice from legal advisers) and in any event an employer's reasons for choosing whether or not to engage in potential settlement are various. We do not find that failure to engage in settlement negotiations in itself, without context suggesting that a protected characteristic was a factor, should found an inference of discrimination.

167. At the root of this allegation is an error by ACAS in using the wrong email address, which left very little time for the Respondent to deal with this dispute within the conciliation window.
168. We note that at a later stage August 2022 when a further email is sent from ACAS in fact Chris Doughty suggests discussing the matter internally.
169. We find that the wrong email address provides an explanation for the lack of engagement which was the fault of a third-party rather than the Respondent rather than discriminatory treatment.

DIRECT AGE DISCRIMINATION/HARASSMENT

170. The Claimant mentions his age a few times in his witness statement. For example on page 33 (paragraph 22) he mentions that he was 53 years of age and comments that his supervisor Mr Nhari was 52 years. Their other colleague Raymond was in his late 20s.
171. For all practical purposes the Claimant was very close to being the same age as his supervisor Mr Nhari, whereas there was what might be described as a generation gap between these two men and their younger colleague Mr Nedelcu.
172. What the Claimant did not do is advance any cogent reasons why he felt that he was being harassed in relation to his age or why he believes that because of his age he was treated less favourably than someone of a different age group. His closing submission on direct age discrimination/harassment was:

“The Respondent knew has of the time of the claimant employed under integral UK Limited he was 53 years plus and a year older compared to the supervisor Said Nahri (SN). At all cost claimant was frustrated, victimised and harassed even by the way evidence was gathered by the Respondent to dismiss the second employment contract Integral UK Limited considering all these atrocities committed by the Respondent the claimant credibility, emotional feelings and physically and confident damaged by the Respondent by the way evidence was gathered to frustrate and fairy tale lies against the claimant dismissal of Integral UK Limited employment contract.”

173. In relation to age, considering the Respondent's evidence, at paragraph 59 of Michael Allen's witness statement he said:

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“Godwin had an issue with Raymond’s age having made comments more than once that he was “too young to understand” something or referring to him as “boy” or “the boy”. My impression was that Godwin disrespected Raymond because of his age, as opposed to the other way around.”

174. That the Claimant referred to Raymond as “the boy” is evidenced by a handwritten note taken on 28 February (396).
175. When the Claimant spoke to Mr Allen on 28 February 2023 about the difficulties in the team of three he told Mr Allen that he had said to Said Nahri “I am older than you.”
176. We find that ages or relative ages was something that was on the Claimant’s mind in his interaction with colleagues. We do not find that there is evidence suggesting that the Claimant’s age was something that was in the mind of his colleagues or that influenced the way that he was treated by them. In relation to the appeal and ACAS process, there is no evidence that the Respondent employees involved would have known the Claimant’s age at all.
177. There is no evidence that conduct “related to” the Claimant’s age such as to be the basis for a claim of harassment.
178. There is no direct evidence from which we could conclude that there was less favourable treatment because of the Claimant’s age such as to be the basis for a claim of direct age discrimination, not any reasonable basis to infer this.

DIRECT DISABILITY DISCRIMINATION

179. The Claimant was disabled at the material time by reason of his eye conditions, specifically “tear film insufficiency” eye strain, blurred vision and pain with a watering eye.

Whether the Respondent directly discriminated against/harassed him because he was disabled by doing any of the acts listed at paragraph 11 above.

180. There is an absence of evidence that the Claimant’s eye condition (tear film insufficiency) was something that was known to the Respondent or had been mentioned by the Claimant, beyond saying that he was shortsighted in his disability questionnaire at the outset of his employment.
181. Since the Claimant has failed to establish that his colleagues at the Respondent were aware of his disability, he cannot succeed in showing a claim of direct disability discrimination.
182. There is no evidence that conduct “related to” the Claimant’s disability such as to be the basis for a claim of harassment.

FAILURE TO MAKE REASONABLE ADJUSTMENTS

PCP

183. 14. Whether the Respondent applied a **provision, criterion or practice** of holding probation/disciplinary meetings when employees were certified as unfit to work and in their absence;
184. Following the guidance of the EAT in **Ishola v TFL** we have considered whether the holding of a probation meeting with the Claimant was a provision, criterion or practice ("PCP"), or whether it is better characterised as simply an event in his particular case.
185. While we did not receive evidence of the way other similar cases were dealt with, we have drawn the inference that pushing ahead to hold a meeting with someone certified unfit to work during their probationary period could be described as a practice. We draw the inference that there was HR involvement and that this is something that they would have done in other similar cases.
186. We find therefore that it was apt to be described as a PCP.

Substantive disadvantage

187. 14.1 Whether that put the Claimant at a **substantial disadvantage** in comparison with persons who are not disabled;
188. The disadvantage that the Claimant emphasised in the hearing before us was his difficulty in attending the performance review meetings because he was unwell. That unwellness was described in the sick certificates as stress/anxiety and related to his mental health rather than his eye condition.
189. The Claimant has not established substantial disadvantage in relation to his disability i.e. eye condition in respect of the probation meetings. That he did not attend because of stress of anxiety does not assist him in relation to his actual disability.
190. It follows that this claim cannot succeed, but we have gone on to consider the remaining elements in case we are wrong about that.

Knowledge

191. 14.2 Whether the Respondent knew or could reasonably have been expected to know that the Claimant was disabled and was likely to be placed at a disadvantage;
192. To reiterate our finding above, there is an absence of evidence that the Claimant's eye condition (tear film insufficiency) was something that was known to the Respondent or had been mentioned by the Claimant, beyond saying that he was shortsighted in his disability questionnaire at the outset of his employment.

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193. The Claimant did not report the problem with his eye which might have put the respondent on notice that there was a difficulty. We do not find that the Respondent could reasonably have been expected to know about either the eye condition or that the practice of holding a probationary view while the claimant was signed off sick was likely to cause a disadvantage because of the eye condition..

Adjustment

194. 14.4 If so, whether the Respondent could have made a reasonable adjustment that would have alleviated that disadvantage.
195. Given our findings above it is not necessary to consider whether a reasonable adjustment could have been made.

INDIRECT DISABILITY DISCRIMINATION

196. 15. Whether the Respondent applied the PCP at paragraph 14 above;
197. 15.1 Whether it put disabled persons and the Claimant in particular disadvantage when compared with persons who are not disabled;
198. We did not find that the Claimant was placed at a particular disadvantage in relation to being called to a probationary review because of his eye condition.
199. 15.2 Whether the Respondent can show it to be a proportionate means of achieving a legitimate aim.
200. Given our findings above it is not necessary to consider justification.

DISCRIMINATION ARISING IN CONSEQUENCE OF DISABILITY (SECTION 15)

Unfavourable treatment

201. 16. Whether the Respondent treated the Claimant unfavourably by holding the meeting in his absence;
202. We find that holding a probationary review, especially when a possible outcome was dismissal was unfavourable treatment.

Because of something arising

203. 16.1 Whether it did so because he was unable to attend because he was unfit to work;
204. The cause of the meeting being held in the Claimant's absence ultimately was his stated inability to attend.
205. 16.2 Whether his sickness absence arose in consequence of his disability;

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206. The sickness absence arose in consequence of the Claimant's anxiety and stress, not his eye condition.

207. This claim does not succeed.

Knowledge

208. 16.3 Whether the Respondent knew or could reasonably have been expected to know that the Claimant was disabled;

209. As stated above, the Respondent had no knowledge of the Claimant's eye condition.

Justification

210. 16.4 Whether the Respondent can show that the treatment was a proportionate means of achieving a legitimate aim.

211. Given our findings above it is not necessary to consider justification.

OTHER CLAIMS

Unpaid annual leave

212. At the bottom of section 9.2 on the claim form ET1 (page 15 of the agreed bundle), the Claimant states "arrears of holiday I am entitled to 23 days holiday untouched". He calculates that 23 days at £150 gives a total figure of £3,450.

213. Under regulations 13 and 13A of the Working Time Regulations 1998, the Claimant was entitled to 5.6 weeks' annual leave. Under regulation 14 he would be entitled to compensation for unpaid annual leave on termination on a pro rata basis.

214. Ms Stewart's unchallenged evidence on the topic of holiday pay was:

"43. ... As Mr Oluokun had not started employment until 7 February 2022, his pro-rata entitlement was for 3 months and so, **7 days including bank holidays**. There had been two bank holidays at Easter; Mr Oluokun would have been paid for these even though off sick. I was satisfied that he had been paid correctly his for his accrued but untaken holiday correctly. This is confirmed in his payslip for May 2022 (page 199) which shows a payment of £876.92 for holiday pay."

215. Given that the claimant had worked three months, i.e. $\frac{1}{4}$ of the year he was entitled to $(28 / 4 =)$ 7 days' annual leave, which includes public holidays.

216. The Claimant's final pay slip showed a payment of £876.92 [266] which represents 6 days holiday pay.

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217. Taking this payment together with the two days public holiday at Easter 2022 means that the Claimant had been paid a day more than his entitlement on termination. In other words there is no accrued but unpaid annual leave and this claim fails.

Overtime

218. The Claimant's contract provides that overtime must be authorised in writing [159].

219. There is no evidence of this, nor is there any evidence from the Claimant about the sums he is claiming or the dates they relate to.

220. The burden of proof was on the Claimant to establish this claim. He has not proved the entitlement to overtime.

Written reasons

221. Where reasons for matters were given orally at the hearing, the parties may apply for written reasons within 14 days of the date of this order being sent to them pursuant to rule 62 of the Employment Tribunal (Constitution & Rules of Procedure) Regulations 2013, Schedule 1.

Discussion during break in the Claimant's evidence

222. The Respondent invited us to conclude that the Claimant and his witness Mr Amao spoke about the Incident Reporting Form dated variously 28/02/2022 and 28 March 2022 (page 187) during an overnight adjournment of the hearing when the Claimant was under oath and should not have been talking about the case. It was a somewhat curious feature of Mr Amao's evidence that he spontaneously started speaking about page 187 during the course of his evidence and it transpired had a folded up copy of this page from the bundle given to the Claimant in his pocket which appeared during the course of his evidence.

223. The Claimant denied that the conversation between himself and his witness occurred.

224. Although it seems to the Tribunal that it is a possibility that the Claimant and his witness did discuss the content of page 187, suggested by the fact that this document ended up in the witness' pocket, we are alive to the possibility that the Claimant may not have fully understood the guidance was given to him about not talking about his evidence.

225. In any event we did not conclude that this had a material impact on the evidence or our deliberations and conclusion in this case. In the circumstances therefore we have taken the view that it is not necessary for us to make a finding as to whether or not this conversation had occurred.

226. The Tribunal is anxious not to encourage any dispute falling outside of the narrow issues we have been tasked to consider.

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**Employment Judge Adkin
30/11/23**

**Date of Judgment
01/12/2023**

Date sent to parties

APPENDIX
The Issues

(agreed at hearing with Employment Judge Grewal on 27 January 2023)

Direct race discrimination/harassment

11 The Claimant describes himself as black African. Whether the Respondent directly discriminated against/harassed him by:

11.1 On 22 March 2022 inviting him to a meeting on 24 March 2022 to discuss false allegations made against him in order to get rid of him;

11.2 Holding the meeting in his absence when he was certified as unfit to work;

11.3 Dismissing him;

11.4 Not dealing with his appeal; and

11.5 Not engaging with ACAS during Early Conciliation.

Direct age discrimination/harassment

12 The Claimant was aged 53 at the material time. Whether the Respondent directly discriminated against/harassed him because he was over 50 by doing any of the acts listed at paragraph 11 above.

Direct disability discrimination

13 The Claimant was disabled at the material time by reason of his eye condition. Whether the Respondent directly discriminated against/harassed him because he was disabled by doing any of the acts listed at paragraph 11 above.

Failure to make reasonable adjustments

14 Whether the Respondent applied a provision, criterion or practice of holding probation/disciplinary meetings when employees were certified as unfit to work and in their absence;

14.1 Whether that put the Claimant at a substantial disadvantage in comparison with

persons who are not disabled;

14.2 Whether the Respondent knew or could reasonably have been expected to know that the Claimant was disabled and was likely to be placed at a disadvantage;

14.3 If so, whether the Respondent could have made a reasonable adjustment that would have alleviated that disadvantage.

Indirect disability discrimination

15 Whether the Respondent applied the PCP at paragraph 14 above;

15.1 Whether it put disabled persons and the Claimant in particular disadvantage when compared with persons who are not disabled;

15.2 Whether the Respondent can show it to be a proportionate means of achieving a legitimate aim.

Discrimination arising in consequence of disability

16 Whether the Respondent treated the Claimant unfavourably by holding the meeting in his absence;

16.1 Whether it did so because he was unable to attend because he was unfit to work;

16.2 Whether his sickness absence arose in consequence of his disability;

16.3 Whether the Respondent knew or could reasonably have been expected to know that the Claimant was disabled;

16.4 Whether the Respondent can show that the treatment was a proportionate means of achieving a legitimate aim