Case Number: 3323942/3016

THE EMPLOYMENT TRIBUNAL

SITTING AT: LONDON SOUTH
BEFORE: EMPLOYMENT JUDGE ELLIOTT
MEMBERS: MS H BHARADIA
MR W DIXON

BETWEEN:

Mr M N Sheikh
Claimant

AND

ADT (Tyco) Fire and Security
Respondent

ON: 26, 27, 28 and 29 June 2017
IN CHAMBERS: 30 June 2017
Appearances:
For the Claimant: In person
For the Respondent: Mr E Legard, counsel

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that the claim fails and is dismissed.

REASONS

1. By a claim form presented on 15 June 2016 the claimant Mr Mohammed Naqi Sheikh brought complaints of unlawful discrimination on grounds of race, disability and victimisation. The claimant's employment with the respondent is continuing.

The issues

2. A preliminary hearing took place on 11 October 2016 before Employment Judge Hall-Smith and which the issues were identified in broad terms. The respondent was ordered to prepare a draft list of issues to be agreed with the claimant by 17 January 2017.

3. We had a draft list of issues from the respondent which we used as a basis for clarifying the issues with the parties at the outset of this hearing.

Direct Disability and/or Race discrimination

4. Was the claimant treated less favourably by the respondent because of

his disability and/or race? The claimant describes himself as Asian British. In terms of disability he relies upon a heart condition and a subsequent quadruple bypass operation. Disability is not in dispute.

5. The claimant relies upon the following matters as less favourable treatment because of race and/or disability:

    a) In 2013 being asked to trial a 'tracker'. This is relied upon as disability discrimination;
    b) In about in April 2014 either Ms Bradley or Mr Scott deliberately fabricating a timesheet, this is relied upon as race and disability discrimination;
    c) Being subjected to a disciplinary investigation, this is relied upon as race and disability discrimination;
    d) The disciplinary hearing manager Mr Roger Hitt, using a disciplinary sanction outside the disciplinary process. The sanction was a Letter of Concern. This is relied upon as race and disability discrimination.
    e) Being denied a right of appeal against the disciplinary outcome, this is relied upon as race and disability discrimination;
    f) In January 2014, having his working area changed and being moved to the 'small works' team under Mr Charles Scott, this is relied upon as race and disability discrimination;
    g) Since 2006 being denied an opportunity for promotion by way of a grade rise, this is relied upon as race and disability discrimination.
    h) In June 2014 in relation to his grievance, the respondent failing to follow their own policy and failing to carry out an investigation into the full grievance issues in relation to promotion issues and not making any investigation notes, this is relied upon as race and disability discrimination.

6. Are the above allegations proven (did they happen in the manner as alleged by the claimant)?

7. The claimant compares himself with all other engineers within the respondent company in order to establish that such treatment was less favourable and, in each case, was in circumstances which were not materially different from his comparators?

8. Has the claimant proved facts from which the Tribunal could conclude in the absence of any other explanation that the reason for such treatment (if proven) was because of his disability and/or race?

9. If so, can the respondent show that the said treatment was for a non-discriminatory reason?

10. Are either or both of these complaints in time?

<u>Victimisation</u>

11. Did the claimant do a protected act? The claimant relies upon his

grievance dated 13 June 2014 as the protected act. The respondent admits that this is a protected act.

12. The claimant also relies on a verbal complaint made to Mr Baldwinson on 2 December 2013 and confirmed in writing in the 13 June 2014 grievance. The claimant says he said he did not wish to be part of the trial. The respondent denies that it is a protected act.

13. Was the claimant subjected to detrimental treatment because he had done a protected act?

14. The claimant relies upon the following as detrimental treatment for the purposes of his victimisation complaint:

    a) Being denied an opportunity for promotion;
    b) A failure to carry out a full and fair (grievance) investigation;
    c) The rejection of his grievance and grievance appeal.
    d) Mr Hitt changing the disciplinary allegation from gross misconduct to a lesser charge but leaving a Letter of Concern on his file.
    e) Imposing a disciplinary sanction when the claimant says that no disciplinary sanction should have been imposed.
    f) The disciplinary appeal process and not being permitted to appeal the Letter of Concern.

15. Is the complaint in time?

<u>Harassment related to disability and/or race</u>

16. Was the claimant subjected to unwanted conduct? He relies upon the following allegations in support of his harassment complaint:

    a) Alleged homophobic remarks made by Rob Baldwinson on 20 August 2010; The claimant says Mr Baldwinson said "*have you been holding hands with another engineer*". The claimant said when clarifying the issues that this related to his race and his disability.
    b) A comment made by Mr Baldwinson in 6 December 2013 about his car number plate reading like 'JUDAS'; the comment was "*your car registration number is JUDAS",* the claimant said when clarifying the issues that this related to his race and disability.

17. Does the claimant prove that the above allegations occurred?

18. If so, was the conduct unwanted and was it related to his disability and/or race?

19. If so, did the conduct have the purpose or effect of creating for the claimant an intimidating, hostile, degrading, humiliating or offensive environment for him?

20. Was it reasonable for such conduct to have that effect, given the

claimant's perception and the other circumstances of the case?

21. Is the complaint in time?

Witnesses and documents

22. We heard from the claimant.

23. For the respondent we heard from six witnesses: (i) Mr Robert Baldwinson, the claimant's line manager until the end of 2013; (ii) Mr Charles Scott who became his line manager from 1 January 2014; (iii) Mr Roger Hitt, a Service Manager and the disciplinary officer, (iv) Ms Emily Delaney, HR officer and notetaker at the investigatory meeting (and at the relevant time known as Emily Ray); (v) Mr David Jones, a Regional Sales Manager and the grievance officer and (vi) Mr Keith O'Neil, at the relevant time an Installation Manager in the south-west and the grievance appeal officer. Mr O'Neil and Ms Delaney are no longer in the respondent's employment.

24. There was a bundle of documents of just under 500 pages. The claimant told us that it was not an agreed bundle.

25. We had separate chronologies and cast lists from both sides. We also had separate lists of issues from both sides, requiring us to spend time on day 1 clarifying the issues with the parties. No agreed list of issues had been produced as ordered by Employment Judge Hall-Smith on 11 October 2016.

26. We had written submissions from both parties to which they spoke. They are not replicated here. All submissions and authorities referred to were considered even if not expressly referred to below.

27. The claimant was accompanied by a litigation friend Mr A Mer, who attended in the capacity of a friend.

Findings of fact

28. The claimant commenced work with the respondent on 20 March 2000 as an Installation Field Engineer. The respondent sells, installs and maintains fire and security systems. The respondent employs about 6,000 employees in Great Britain and about 1,000 in the area where the claimant worked.

29. The claimant is an installation engineer which involves attending customer sites to install security systems. His employment is continuing.

30. The claimant's disability is a heart condition and disability is admitted by the respondent. He had his first heart operation by way of angioplasty with stent, in February 2003. He produced a document at page 226 of the bundle which he says shows that HR recognised that he was disabled.

Unfortunately the quality of the copy document was so poor it could not be read. However, disability was not in dispute.

31. The claimant had a further angiogram and stents fitted in May 2010. He returned to work on 21 June 2010 on light duties.

32. As part of his harassment claim, the claimant relies upon a comment which he says was made on 20 August 2010. It was not until day one of this hearing that the respondent became aware of the date upon which the claimant relied in respect of this comment. The claimant's evidence is that on that date he told his manager Mr Rob Baldwinson that he was working on a job with another engineer and this would not be finished and Mr Baldwinson allegedly said "*what have you been doing, holding hands?".* The claimant said in his chronology (page 2) "*these are homophobic remarks that are uncalled for and are in my grievance".* Mr Baldwinson denies making this comment; when cross-examined he said "*I never ever said it".*

33. In his grievance hearing on 17 July 2014 the claimant described the comment as homophobic. He was asked by the hearing officer, Mr Jones why he saw it that way and he replied (notes page 61): *"2 men on the job, how would it sound to you? We all know what he was getting at*". The claimant did not say to Mr Jones that he saw the comment as harassment or discrimination because of his race or disability.

34. The claimant accepted in cross-examination that this comment was unrelated to his race or his disability. He said it was something that Mr Baldwinson should not have said and he regarded it as bullying and intimidation. We find that the comment was not related either to the claimant's race or his disability. He also agreed that it could not be connected to events about which he complained four years later.

35. Neither of these harassment allegations featured in the ET1.

<u>The tracker</u>

36. In the autumn of 2013 General Manager Mr Neil Hunter informed Mr Baldwinson that the respondent's Fleet Department had made a decision to trial trackers in vehicles. This decision was not made by Mr Baldwinson, who was asked to implement the trial.

37. Mr Baldwinson was asked to choose three engineers from his direct reports (a total of 10) who would trial the trackers. The purpose of the tracker was not to ascertain the driver's whereabouts but to record and inform the respondent of driving habits with a view to reducing cost of vehicle upkeep and maintenance. Employees were expected to switch off the tracker when they were not at work.

38. In November 2013 Mr Baldwin's and considered who within his team he wished to select for the trial. At that time the engineers in his team were

Gary Taylor, John Crawley, Lloyd Humphries, Scott Woods, Andrew Stockton, Dave Kennedy, Stewart Smith, Mindy Klusis and the claimant. In terms of racial groups, all are white British save for Mr Klusis whom we were told is Lithuanian and Mr Kennedy whom we were told is Irish.

39. The main criterion used by Mr Baldwinson for selecting engineers for the trial with those who carried out the most trips and therefore covered the most miles during the day. Mr Baldwinson chose Mr Crawley, Mr Smith and the claimant. The claimant was chosen because he carried out work which predominantly related to signalling which was a shorter job carried out at the end of an installation. This meant that the claimant would normally carry out more jobs in a day than those working on larger jobs. Mr Smith and Mr Crawley were also chosen because they dealt with small jobs and they therefore tended to do more jobs in a day and more mileage.

40. When questioned on the matter during the internal processes Mr Baldwinson made a random selection. In his witness statement paragraph 10.4 and 10.5 he said he selected those who did the shorter jobs. We find that this is the method that he used, because those selected were those who did the shorter jobs. Mr Baldwinson admits that he did not check the mileage records at the time as from his knowledge as a manager he knew who made the most trips during the day and who did the shorter jobs.

41. The claimant's case was that Mr Baldwinson chose Mr Smith and himself for the tracker because they are both disabled employees. The claimant understood Mr Crawley to have a back condition. Mr Baldwinson said that he knew Mr Smith had a back condition but he did not consider him disabled. We had no evidence to show whether Mr Smith's back condition met the definition of disability in the Equality Act. The claimant was unaware that Mr Crawley had also been selected. Mr Crawley is not disabled. We find that Mr Baldwinson did not select the claimant for the tracker because of his disability, we find that he made the selection based upon those who carried out the shorter jobs.

42. The claimant's tracker was due to be fitted on 2 December 2013. The claimant complained to the Fleet Department about it and also told Mr Baldwinson that he did not wish to be part of the trial. The claimant alleges that Mr Baldwinson was annoyed and replied "*are you special, are you special*". The claimant walked away from him. This was set out in paragraph 5 of the claimant's witness statement. Mr Baldwinson denies making this comment. The claimant did not have the tracker fitted. Neither the claimant nor Mr Baldwinson gave evidence that the claimant made a complaint of discrimination on 2 December 2013. Mr Baldwinson's evidence (statement paragraph 17) was that the claimant did not make any allegation that he had been selected because he was disabled. We find that the claimant did not allege disability discrimination, or any other form of unlawful discrimination, in that conversation with Mr Baldwinson on 2 December 2013.

43. In his grievance hearing on 17 July 2014 the claimant told the grievance officer Mr Jones that he did not have a problem having a tracker fitted, he said he just wanted to be treated equally and it was just himself and Stewart Smith, who had back problems, who were the members of Mr Baldwinson team who had been chosen to have a tracker (notes page 62). The notes show (again page 62) that the claimant's union representative Mr Cormack commented that he also had a tracker.

44. On 6 December 2013 the claimant was working on an important job at a large site in Kingston upon Thames. Mr Baldwinson dropped in on the claimant to deliver some equipment. The claimant was getting on well with the job so he did not stay long. As he was about to leave he made a comment on the claimant's vehicle's number plate which was FJ63 VES, saying that from a distance the combination of numbers and letters looked like they spelt the word "Judas". The claimant took this as an expression of anger from Mr Baldwinson, whom he said was furious that the claimant had spoken to the fleet department to take himself out of the trial.

45. The claimant agreed that both he and Mr Baldwinson laughed at the comment at the time. The claimant said he laughed because of the stupidity of it, not because he thought it was funny. He said he was offended by it. The claimant agreed in cross examination that the comment was unrelated to his race and his disability and as with the "holding hands" comment he thought it was part of bullying and intimidation.

46. Mr Baldwinson admits making the comment but denies that it had anything to do with the claimant choosing not to have the tracker fitted to his vehicle. Mr Baldwinson says it was a light-hearted joke.

<u>Change of work area in January 2014</u>

47. In December 2013 the respondent was undergoing a national review of its engineers with a view to separating out small works and big works and trying to align engineers areas to the postcode in which they lived. This was with a view to reducing travel time and increasing the number of jobs in engineer could do in a day, and also to reduce fuel costs. As a result of this many engineers were assigned to different areas and line managers. This process was managed by General Manager Mr Neil Hunter. The changes affected all engineers and was not individual to the claimant.

48. The claimant lived in Croydon and reported to Mr Baldwinson as part of the Sunbury area. Mr Baldwinson's engineers covered postcodes TW Twickenham, KT Kingston upon Thames and UB Uxbridge. The proposal was that from 1 January 2014 Mr Baldwinson team would be responsible for big works only and that small works in those areas would be passed to Mr Charles Scott. It was therefore decided that the claimant and Mr Stewart Smith would move to Mr Scott's team.

49. Mr Baldwinson discussed the proposed change with the claimant. The claimant's case is that Mr Baldwinson and his manager Ms Ellen Bradley got together to change his work area to north and north-west London. The claimant told Mr Baldwinson that he was not happy about the change and he would take the matter up with Ms Bradley.

50. The claimant was not the only engineer to complain about the changes. His colleague Mr Smith complained and some of the engineers remaining in Mr Baldwinson's team also complained about the inclusion of the GU postcode into their area.

51. The claimant said he did not find out about this change until he returned from holiday in January 2014. The claimant saw the change as a punishment for raising the issue about the tracker. This complaint is one of disability discrimination only and not race discrimination.

52. We find that this was not a "punishment" for raising the tracker issue. The area change applied across the board and affected all the engineers in Mr Baldwinson's team, whether they transferred to Mr Scott's management or stayed with him. It was not because of the claimant's heart condition.

<u>The allegation of a fabricated time sheet</u>

53. The claimant's case was that his time sheet, which appeared at page 29D of the bundle had been fabricated. He accepts that the entries in the time sheet are largely in his handwriting and that he signed the document on 31 March 2014. The time sheet also bears the signature of his former manager Mr Baldwinson who signed it on 2 April 2014.

54. One of the work planners Mr John Davis noticed a discrepancy in the claimant's time sheet for 26 March 2014 when the claimant had been working at the 99p Store. The claimant had been working that day with another engineer Mr Dave Hunt, whom he was training. The claimant normally worked alone. Mr Hunt's time sheet gave a finish time of 6pm and the claimant put a finish time of 8pm. Mr Davis showed this to Mr Baldwinson who asked Mr Davis to show it to Mr Scott as the claimant's line manager.

55. On seeing the time sheet Mr Scott telephoned Mr Hunt to ask him what time he finished on 26 March 2014. Mr Hunt replied 1800 hours. Mr Scott asked whether Mr Hunt and the claimant left at the same time and Mr Hunt said they did. The claimant claimed three hours overtime on that day from 5pm to 8pm and said that he had claimed for time until he got home on that day and said he had permission to do so. He also said he worked through lunch and added on an hour's overtime at the end of the day.

56. Mr Scott considered the matter was potentially very serious. He did not call the claimant to ask him about it. He took the view that it could result in a serious disciplinary charge so he took the time sheet to his line

manager Ms Bradley, who sat about four feet away from him in the office, for advice on what to do. Ms Bradley agreed with Mr Scott that there was a discrepancy and she said she would take it on from there. Mr Scott had no more to do with the matter.

57. The claimant was not clear as to who he says "fabricated" his time sheet. When clarifying the issues on day 1 he told the tribunal that it was either Ms Bradley or Mr Scott. In further particulars on page 239 of the bundle he put the allegation against Ms Bradley or Mr Baldwinson.

58. What had happened in relation to the time sheet was as follows. The column in the time sheet marked K had three categories of overtime, paid at either time, time and a half or double time. In the column for time and a half the claimant had claimed the three hours and again in the totals column he claimed for three hours. Both entries of three hours were crossed out with an "X" and replaced with the figure 1. Against this it said "*as per R.B.".* Mr Baldwinson's evidence which we accept was that he made this alteration to the time sheet crossing out 3 hours and replacing it with 1 hour because of the concerns that the claimant may have over claimed. One of the reasons Mr Baldwinson did this was to make sure that the timesheet could still be submitted in the meantime to allow the claimant to be paid for his travel expenses. It remained open to the claimant and the respondent to resolve the overtime issue subsequently, but it enabled the timesheet to be submitted and paid in the meantime.

59. We find that the timesheet was not "fabricated" by anyone. It was amended by Mr Baldwinson in the manner described above. This was not done by Mr Baldwinson any way dishonestly. He did not hide the fact that he made the alteration as he placed his initials against it. There was a dispute over the amount of overtime claimed by the claimant which had yet to be resolved.

60. The claimant agreed that in view of the discrepancy between his time sheet and Mr Hunt's, his manager was entitled to investigate the matter. The claimant took issue with the fact that it was Ms Bradley, his manager's manager, and not his own line manager Mr Scott who decided to investigate the matter. The claimant's case is that Ms Bradley orchestrated this investigation because of the claimant's race and because of his disability. We see nothing amiss or untoward about Mr Scott raising this concern with his own line manager and Ms Bradley informing him that she would take it forward from there.

61. During the investigation Ms Bradley also found a discrepancy on the claimant's time sheet for 4 April 2014. The claimant had been working at Asda on that day and stated on his time sheet that he left at 6:30pm and told Ms Bradley he left at 5:30pm. The customer said he left at 4:30pm and that it would not be later than 5pm as that is when they leave. The claimant said that he added an hour due to working through his lunch break.

The disciplinary investigation in April 2014

62. In April 2014 the respondent initiated a disciplinary investigation into the claimant's claims for overtime. The claimant received a telephone call from Ms Rachel Edwards, the Sunbury Intstall Planner, on Friday 11 April 2014 informing him that Ms Bradley wished to meet with him on Monday 14 April at 9am. The claimant called Ms Bradley to find out what it was about and she told him that she was looking into some discrepancies in his timesheet and that a member of HR would also be present to take notes. The claimant asked for union representation at the meeting and was told by Ms Bradley that he did not have the right to be accompanied at this meeting.

63. We saw Ms Edwards' email to Ms Bradley dated 11 April 2014 at page 29E of the bundle. This raised time recording issues including that on 10 March 2014 at an organisation called Little Tiger Press the claimant had claimed that he had worked there all day the customer said he had been present for no more than three hours.

64. A planner named Mr John Davis saw the claimant's time sheet for 26 March 2014 when he had worked at the 99p Store with a trainee engineer Mr Dave Hunt. Mr Davis noticed that although both engineers worked on the same job, Mr Hunt's time sheet showed him finishing work at 1800 hrs and the claimant put 2000 hrs. We were not shown Mr Hunt's time sheet.

65. Discrepancies were also raised in respect of the claimant's time sheets for 2 and 4 April 2014. We did not see these time sheets.

66. The claimant attended the meeting on 14 April 2014. Ms Bradley was accompanied by Ms Emily Ray (now Delaney) from HR, who attended as a notetaker. The claimant asked to record the meeting but was told that this was against company policy. The notes of the meeting taken by Ms Delaney were at pages 30-37.

67. The claimant complains about the length of time it took to produce the notes of the meeting, which was about 6 weeks. Ms Delaney accepted that this was "longer than was ideal". In April 2014 she was new to the respondent's employment having joined that month and the HR department was stretched and she was covering for another HR Business Partner who had recently left. She had a heavier workload than that which applied to her own job and typing the notes of this meeting was not at the top of her priorities. She apologised to the claimant for this.

68. The claimant told Ms Bradley that on 26 March he had not reached home until 8pm or 8:30pm and that if he went beyond his duty he should get overtime. He said his previous manager (Mr Baldwinson) had said he could do this. The claimant's case was that his managers had been signing off his time sheets for many years and he had followed this practice. The respondent's case was that managers could not oversee the detail of the engineer's working day and they relied on their integrity.

69. Ms Bradley told the claimant that they were having an issue with productivity so they were looking at all jobs that were overrunning and they were not just looking in to the claimant (notes of meeting pages 36-37).

70. On 17 April 2014 Mr Baldwinson sent an email to Ms Bradley page 37A, saying "*it has never been agreed that engineers can book over time until they reach their home destination, it was agreed in my KPI meetings that if over time was required the engineer would ring me to agree they could stay behind to complete the installation, this is so I know they will be working late as a H&S issue. Also they have all been given a travel timesheet, so they know how much they can book travel time they can book on their timesheet, this would be the longest journey for that day, I would not pay travel time and extra hours over time just because the engineers stayed one or 2 hours past 1700 hours, THEY WOULD ONLY GET THEIR TRAVEL TIME.*"

71. Ms Bradley as investigating officer made a decision that the matter should proceed to a disciplinary hearing.

Invitation to disciplinary hearing

72. On 23 May 2014 Mr Roger Hitt, a Service Manager, wrote to the claimant (page 38) inviting him to a disciplinary hearing on 30 May 2014. The letter identified four allegations of gross misconduct namely:

    - *It is alleged that on 10 March 2014 when working at Little Tiger Press you claimed that you had worked all day however the Customer confirmed that you were there for three hours only; which you dispute.*
    - *It is alleged that on Wednesday 26 March you claimed three hours overtime when you worked only until 6pm (one hour over time). You also claimed your travel time (90 minutes)*
    - *It is alleged that on 2 April 2014 you claimed 1.5 hours of overtime however the Customer confirmed that you left at 4pm*
    - *It is alleged to that on 4 April 2014 you claimed 1.5 hours of overtime however the Customer confirmed that you were not with him any longer that 4:30pm*

73. The letter said that these charges were considered gross misconduct under the terms of the disciplinary policy and a copy of that policy was enclosed with the letter. The letter did not expressly state that a potential outcome of the hearing could be dismissal. The claimant was notified of his right to be accompanied.

74. The claimant requested a postponement of the hearing because his union representative Mr Les Cormack was not available. This request was granted and the hearing was rescheduled for 13 June 2014.

The postcode question

75. In about June 2014 the respondent was dealing with some structural changes. Mr Scott was tasked with asking a set of 6–8 questions of all

the engineers in his team. The questions were set out on a spreadsheet. One of the questions was the engineer's postcode so that they could best match up the jobs with the location closest to that engineer. The only member of the team to object to the question was the claimant. All the other engineers answered the question when asked. The claimant did not give his postcode to Mr Scott.

76. The claimant said that he had no problem with the reason why the respondent wanted to know his postcode or the fact that they asked him. He thought it strange that they should ask because they already had it. What the claimant objected to, was the way in which they asked him, with Mr Scott saying that he had been asked by Mr Paul Stickler to find out the information. Mr Stickler had responsibility for training.

77. Mr Scott could not remember whether he had mentioned Mr Stickler's name or not. He said he might have done. Mr Scott was recently back at work after a serious illness himself at that time. The spreadsheet questionnaire came from a General Manager named Mr Hunter and Mr Stickler worked closely with Mr Hunter.

78. The claimant's objection was being told that the information was requested by Mr Stickler. We had difficulty in seeing what was problematic about this. The claimant was asked for his postcode, he chose not to give it. Mr Scott did not take it any further. The request for the postcode was not specific to the claimant it was made to all the engineers in Mr Scott's team. The request was unrelated to his race or disability.

<u>The claimant's grievance of 13 June 2014</u>

79. On the day of his disciplinary hearing, the claimant delivered a four-page grievance letter (pages 41-44). In the grievance letter the claimant complained of disability and racial discrimination, bullying, harassment and victimisation suffered over the last few years from Mr Baldwinson and continued by Ms Bradley. The respondent accepts that this letter amounts to a protected act for the purposes of the claimant's victimisation claim. The claimant raised 13 numbered points of complaint in his four-page grievance letter.

80. In summary form the points of grievance covered (1) time off for medical appointments, (2) the lack of performance appraisals, (3) those whom he had trained being promoted when he had not; no names of individuals were given, (4) victimisation because he refused to be part of the tracker trial, (5) Mr Baldwinson and Mr Bradley reviewing his time sheets and changing his work area, (6) the disciplinary process and not being told that he could be dismissed for gross misconduct and his allegation that either Ms Bradley or Mr Scott had changed his time sheet, (7) that he had been charged with gross misconduct when his conduct was exemplary, (8) Ms Bradley or Mr Scott changing his time sheet, (9) Ms Bradley not carrying out a fair disciplinary investigation, (10) a further complaint regarding Mr

Scott and the time sheet, (11) a further complaint regarding Mr Scott or Ms Bradley changing the time sheet, (12) a complaint about collusion saying that Mr Scott, Mr Baldwinson and Ms Edwards were acting under Ms Bradley's instructions to harass and victimise him and (13) his dispute about the disciplinary charges.

<u>The disciplinary hearing of 13 June 2014</u>

81. The claimant attended the disciplinary hearing on 13 June 2014 before Mr Hitt, who was accompanied by Ms Carmen Vasconcelos, a Regional HR Business Partner. The claimant was accompanied by his union representative Mr Les Cormack. The notes of the hearing were at pages 45 to 48.

82. Mr Hitt had never worked with the claimant and had never managed him. He only knew the claimant in passing to say hello to at the Sunbury branch.

83. The claimant's grievance is dated 13 June 2014, the same day as his disciplinary hearing. Mr Hitt's evidence was that he was not aware of the grievance when he conducted the disciplinary hearing (statement paragraph 14) and that he did not become aware of it until he saw it in the bundle for this tribunal hearing. The claimant did not say that he handed the letter to Mr Hitt on 13 June 2014. We accept Mr Hitt's evidence and find that he was not aware of the grievance when he carried out the disciplinary hearing either on 13 June or on the adjourned date of 3 July 2014 or when he gave his outcome on 7 July 2014.

84. Mr Hitt said that he did not know about the claimant's disability (witness statement paragraph 23). We find that the claimant raised it in the meeting of 13 June 2014 as it is referred to in the respondent's note of that meeting on page 48, when the claimant contended that he had been chosen for the tracker trial because of his heart condition. We find that Mr Hitt was aware of the claimant's disability.

85. Mr Hitt said that he needed to go away and look at the paperwork provided by the claimant and carry out further investigation so he adjourned the hearing until 3 July 2014. Ms Vasconcelos wrote to the claimant to confirm this (page 51).

86. Following the meeting on 13 June, Mr Hitt met with the claimant's former and current line managers, Mr Baldwinson and Mr Scott and with their manager Ms Bradley. He discussed with them the process for engineers claiming overtime and in particular the claimant's practice of working through lunch and then claiming the equivalent additional overtime by stating that he had worked later than he had. All three said that they would not condone this practice.

87. The hearing resumed and concluded on 3 July 2014. Mr Hitt gave his decision in writing as set out below.

The disciplinary outcome

88. Mr Hitt's outcome letter dated 7 July 2014 was at page 54 of the bundle. He made the following observations:

> *1) You appear not to appreciate that having completed the timesheets in the way you have led to allegations in the first place.*
> *2) Your claim that it was common knowledge that you book lunch on your timesheet and claim overtime at the end of the day if you have worked through lunch is not corroborated by others in the installation team.*
> *3) There are inconsistencies in your responses from the first meeting with Ellen and the second meeting with me.*
> *4) You consistently have left systems in service with the bureau when not on site and on one occasion on 10 March, you claimed to have been on site at Little Tiger until 14:30 (although the customer says you were not) demonstrating the use of the system when in fact the system was taken off test at 12:55.*
>
> *In my view you have been culpable in making claims not consistent with your working day.*
>
> *However, you make a good point that given managers have signed off the timesheets for the alleged issues they must have agreed with your claim.*
>
> *This leaves me to issue you with a letter of concern for the following reasons:*
>
> *1) you have been negligent in accurately completing your timesheet*
> *2) that you allege you have worked through lunch and have therefore not complied with the ADT Health and Safety policy to take a lunch break, potentially putting yourself at risk and that of others working with you.*
> *3) That you have not adhered to the company procedure for placing systems on and off test which had the potential to put the customer at risk and lead to claims against ADT.*
>
> *However, I would like to take this opportunity to inform you that with immediate effect you must complete your timesheets in an accurate manner, and adhere to the H&S policy at all times, namely take a lunch break and place systems on and off test in the correct manner.*
> *Please note that failure to follow the above steps may result in further action being taken in accordance with Tyco's Disciplinary Policy and Procedure.*

89. The claimant's case is that this letter of concern was outside the disciplinary procedure. We saw the disciplinary procedure commencing at page 296 of the bundle. The action which could be taken as a result of the disciplinary hearing was set out on page 299. These were:

Disciplinary action	**Duration**
No formal action taken	
No formal action, but areas of concern apparent, therefore an Improvement Letter detailing concerns to be issued and a copy to be retained on the Employees File	
First written warning	6 months
Final written warning	12 months
Final written warning in conjunction with: • period of unpaid suspension	12 months

• demotion in rank/grade with loss of benefits • transfer if feasible • loss of seniority • extended duration of warning up to 24 months These matters may, at the discretion of the company be considered as an alternative to dismissal	
Dismissal	

90. Mr Hitt's evidence was that he went with the second category in the above table of disciplinary action. The claimant took issue with this because the outcome letter described itself (just above the second set of numbered points) as a letter of concern and not an "Improvement Letter detailing concerns". Nevertheless, we find that this is what it was - in terms of disciplinary action it was the second category of disciplinary outcome. It was a letter that detailed Mr Hitt's concerns about the claimant's practices in completing his timesheets and working through his breaks. This was to ensure that the claimant in future followed good practice and could avoid the risk of future disciplinary action. We find that the letter of concern issued by Mr Hitt fell within the remit of the disciplinary procedure. It is a matter of semantics. It was a letter "detailing concerns".

91. Mr Hitt has overall responsibility for 130 engineers who are managed by eight field line managers. Nineteen of his current team of 130 are black or from an ethnic minority. Mr Hitt has carried out about 18 disciplinary hearings three of which (apart from the claimant) involved potentially false overtime claims. Of the three others, two were White British and one was Black British. One White British employee was dismissed and the two others had Letters of Concern issued to them.

92. The claimant did not identify anyone who had been charged with the same or similar disciplinary charges and who had been treated more favourably than himself. He did not put to Mr Hitt that had he not been disabled or had he been of a different racial group, the decision would have been to take no formal action.

<u>The claimant's appeal against the letter of concern</u>

93. The claimant complained that he was not given a right of appeal against the letter of concern. On 9 July 2014 (page 55A) the claimant wrote to Mr Hitt, saying that he wished to appeal and asked for details of the process. On 14 July 2014 the claimant sent a six-page appeal letter to Mr Hitt (page 56-57D). Mr Hitt passed the letter to HR (his statement paragraph 21). It is stamped "*Received Workforce Support 15 Jul 2014*" and this leads us to find that it was passed to HR. We find that the claimant's appeal was not acknowledged by anyone and was not actioned and not taken forward.

94. The appeal process within the disciplinary procedure was at page 303. It says "*An employee will have the right of appeal against any disciplinary action taken".* It was submitted by the respondent that there was no right of appeal against a letter of concern because it was not a disciplinary sanction. The policy says that the employee will have the right of appeal against "<u>any</u> disciplinary action" (our underlining) and the table of Disciplinary Action (bundle page 299) refers to the Improvement Letter detailing concerns. It is said not to be formal action, but we find under the terms of the policy that it was action nevertheless and therefore the right of appeal attached to it. Mr Hitt's view (which is incorrect on our finding) was that this was not formal action and therefore no right of appeal attached.

95. Mr Hitt accepted in his outcome letter that the claimant made a good point that his managers had signed off his timesheets for the alleged issues and Mr Hitt therefore accepted the claimant's argument that the managers must have agreed with the timesheet claim. The respondent believed that they had not sanctioned the claimant as no formal disciplinary sanction had been imposed and this was why they did not afford him a right of appeal against the letter of concern. We find on a balance of probabilities that the respondent believed that the right of appeal did not attach to the letter of concern.

96. The appeals procedure states (page 303) that an appeal hearing should be arranged without delay and where practicable, usually within 10 working days of the appeal letter. In his grievance letter of 25 September 2014 (at page 92) the claimant raised the fact that he had not received a reply to his disciplinary appeal letter.

<u>The promotion issue</u>

97. The claimant has worked as a grade 4 since 2006. The respondent does not have a particularly effective appraisal process. We were told that this is a matter that the respondent is now seeking to address.

98. Engineers could request an appraisal if they wished and normally did so if they were seeking a grade increase. The claimant had such an appraisal in November 2012 and we say the appraisal document at page 270 of the bundle. The claimant took great issue with the fact that it was dated 21 November 2012, a day when he says he was on holiday. Neither the claimant nor his appraiser Mr Baldwinson deny that the appraisal took place and we find that it took place around the 21 November 2012, although not on that exact date. The claimant's evidence was that Mr Baldwinson made derogatory comments about his IT skills in the appraisal meeting. In his grievance meeting (notes page 63) the claimant made reference to Mr Baldwinson carrying out his appraisal.

99. In that appraisal the claimant scored 72 out of 124. Mr Baldwinson encouraged him to improve his basic IT skills.

100. From 2007/2008 up to 2010 the process for achieving a grade increase or promotion was for Field Line Manager's Manager, (in this case Mr Baldwinson's manager Mr Andy Mercer) to notify the Field Line Manager of engineers that he believed should take a grade test. It is crucial to achieving promotion or a grade rise to pass a grade test.

101. After 2010 there were three stages to achieving a promotion or grade increase. Firstly the engineer would request an appraisal at which goals would be set. Secondly, again at the instigation of the engineer, a follow-up appraisal would be set to see whether the goals had been achieved. If they had, the third stage was to sit the written grade test.

102. We find that the claimant did not ask for a second appraisal. He did not suggest that he did.

103. Mr Baldwinson gave evidence as to this process for seeking a grade increase and his evidence was corroborated by Mr O'Neil. We find that the process described above was the process for seeking a grade increase.

104. It is not in dispute that the claimant never undertook a grade test which is a pre-requisite for a grade increase.

105. The claimant did not identify anyone whom he said had been promoted above him. The tribunal asked him about the list on page 29C, a mileage list, showing the names of the other engineers managed by Mr Baldwinson in 2013. He said that Dave Kennedy joined the respondent after himself and had been promoted twice. We were told whether Mr Kennedy was or was not disabled. Again in answer to Tribunal questions, we were told that Mr Kennedy is Irish. The claimant thought he was white British so we find that he is white. However, we were not told anything about Mr Kennedy's skill set or the reason why he was promoted.

106. In answer to the tribunal's question as to whether there was anyone whom the claimant had trained and was higher than him, the claimant said "*there is one, Mark Walker in Wales, he was my apprentice from day one*". We were not told whether Mr Walker had a disability and we were not told his racial group or anything about his skill set.

107. The claimant's case was that Mr Jones and Mr O'Neil as the grievance officers should have done an analysis of all those who were promoted since 2006. In his grievance letter (page 41) he said he has been "*waiting 6-7 years for a grade rise*". At the bottom of page 41 he said that Mr Baldwinson had had time to approve "*abled bodied engineers*" for promotion and on page 42 he complained that he had trained new recruits who had been promoted. At no time did he mention any names.

108. The claimant made a very generic complaint about his lack of promotion and he did not mention any names of those whom he considered had

been unfairly promoted above him. This made it difficult for the respondent to investigate. Mr Jones as the grievance officer asked Mr Baldwinson about the claimant's performance and was told that the claimant was not sufficiently proficient in IT and this was the area in which he needed to develop.

109. The claimant specialises in signalling through cable work. The direction for the respondent was towards wireless systems, CCTV, IP addresses and routing so that computer programming was increasingly important. The respondent provides some IT training but not in the basics. In his appraisal on page 273 the claimant scored zero for computer skills for general computer awareness and basic operation/inputs, eg keyboard and mouse skills within menu driven systems or programmes. He also scored zero on ability to operate computer/keypads, to configure, interrogate and retrieve data and carry out designated tasks and applied actions appropriate to the job function.

110. Mr Baldwinson's handwritten comment at the end of the appraisal document, page 277 was: "*Naqie needs to get general awareness of computer skills and needs to be able to interrogate P/C programs".*

111. The claimant did not take things forward after his appraisal with Mr Baldwinson. He did not request a second appraisal or a grade test to demonstrate his skills.

112. The grievance officer Mr Jones was asked by the claimant why he did not investigate the lack of promotion going back to 2006. Mr Jones said he had made enquiries of the manager and been told there was a gap in the claimant's skill set, this had been raised with the claimant who had been asked to work on it. We find in those circumstances it was not necessary for Mr Jones to go back to 2006 in his investigation and it remained open to the claimant to seek to demonstrate to the respondent that he held the skills that they were looking.

<u>The grievance hearing</u>

113. The claimant's grievance was heard by Mr David Jones who at the relevant time was a Regional Services Solutions Manager. The grievance hearing took place on 17 July 2014, the claimant was accompanied by his union representative Mr Cormack and an HR notetaker was present, Ms Lisa Sampson. The notes of the grievance hearing were at pages 58 - 67. The claimant was sent a copy of those notes by letter dated 22 July 2014 (page 68).

114. Mr Jones was aware that the claimant was a disabled person because the claimant disclosed this in his grievance letter of 13 June 2014 and mentioned it at the grievance hearing (page 59).

115. Mr Jones did not carry out any investigation prior to the hearing on 17 July 2014 because he wanted to have a discussion with the claimant, to

better understand his complaints and to find out what outcome he was seeking. The outcome the claimant sought was that all of those who had been involved in his disciplinary namely Mr Baldwinson, Mr Scott, Ms Bradley, Ms Rachel Edwards and someone named Noleen should be dismissed for gross misconduct.

116. Mr Jones was unable to have any discussion with Ms Bradley because she had suffered a very serious health problem and was absent from work. Mr Jones was able to speak to Mr Baldwinson and Mr Scott. Mr Jones spoke to Mr Scott about the claimant's complaint about the request for his postcode.

117. We have made findings above as to why Mr Jones did not carry out the exercise that the claimant now asserts he should have done, in examining the promotion situation going back over eight years to 2006.

118. Mr Jones did not make notes of his discussions with Mr Baldwinson and Mr Scott. He said that when he dealt with grievances, sometimes he made notes and sometimes he did not. He said he was "*picked upon this*" by HR in relation to this process and we find that HR told Mr Jones that good practice would have involved making notes of those discussions and allowing the claimant to have copies. This was not good practice on the part of Mr Jones.

119. Mr Jones' grievance outcome letter was at pages 79-84 and is dated 17 September 2014. Although the outcome took two months, the claimant did not raise a complaint about this. The outcome was thorough. It dealt with all the issues raised by the claimant. Mr Jones encouraged the claimant to "*actively look to develop[ment] your IT skills*" (page 81). He drew the claimant's attention to the respondent's Learning Management System which he said provided some excellent on-line training modules which could be accessed at any time, from any computer both inside and outside the company. He was told that this could increase his promotion prospects. We had no evidence that the claimant took this step and we find that he did not.

120. The grievance was not upheld. The claimant lodged a very detailed grievance appeal, running to 13 pages, on 25 September 2014.

<u>The grievance appeal hearing</u>

121. The claimant's grievance appeal was heard on 29 February 2016 by Mr Keith O'Neil who has since left the respondent's employment. The reason for the delay was because the claimant was off sick from July 2014 to January 2016. We saw a sick note at page 72 dated 23 July 2014 which indicated the start of the claimant's sick leave. The claimant was off sick when he wrote his grievance appeal letter.

122. The claimant was offered a grievance appeal hearing on 19 November 2014 (page 107). He declined this due to his health and asked that it take

place on his return to work (page 108).

123. In February 2016 Mr O'Neil was an Install Manager covering Portsmouth, Plymouth and Hemel with Sunbury and the City added on temporarily for a nine-month period starting in January 2016. The claimant was again represented by Mr Cormack and there was an HR notetaker present Ms Rebecca Boram. The notes were at pages 133-142.

124. It was difficult for Mr O'Neil to conduct investigations because of the circumstances of a number of the individuals who had been involved. Ms Bradley was long term sick due to a very serious health condition. Mr Scott was off sick having had a heart attack. Mr Jones, the grievance officer, had left the respondent's employment. The only relevant person with whom Mr O'Neil could conduct any investigation (other than with the claimant) was Mr Baldwinson.

125. Mr O'Neil did carry out an investigatory interview with Mr Baldwinson and the notes of that meeting were at pages 140-142.

126. On the promotion issue Mr Baldwinson said that the claimant had asked to go up a grade so they did an appraisal. This was the appraisal in November 2012. The claimant and Mr Baldwinson had a discussion about the claimant's IT skills. The claimant had a significant skills gap in IT and the respondent does not provide training in the basics. Mr Baldwinson told Mr O'Neil in the investigation meeting that he told the claimant that he needed to do a course on PCs and cameras in order to move up. Once that had been done, he could go on to one of the respondent's training courses. As we have found above, the claimant did not follow up on this or on Mr Jones' recommendation in the grievance outcome letter in relation to the respondent's Learning Management System.

127. Mr O'Neil asked the claimant what outcome he was seeking and again the claimant said that he wanted those involved in his disciplinary to be "punished" (page 133) and dismissed (page 136).

128. Mr O'Neil produced a nine-page grievance appeal outcome letter dated 14 March 2016 (pages 145-153). He went through the claimant's points of appeal in detail. In conclusion he found no evidence to substantiate the points raised by the claimant and he upheld the grievance outcome of 17 September 2014.

<u>The time point</u>

129. The claimant has been a member of Unite the union throughout the events relied upon in these proceedings. He was accompanied at his disciplinary and grievance hearings by Mr Les Cormack, a trade union representative.

130. The claimant is not shy in coming forward and raising complaints when he considers that he has not been fairly treated. He raised a detailed

grievance on the day of his disciplinary hearing and produced a very detailed letter of appeal when he was not satisfied with the grievance outcome. He brought to the tribunal a pile of diaries in which he said he had made entries relating to the matters upon which he relied. The diaries had not been disclosed to the respondent and were not put in evidence before us.

131. The claimant accepts that he was aware of the respondent's grievance procedure and there was nothing preventing him from 2010 onwards from lodging a grievance in relation to the matters about which he now complains. He told the tribunal that he took advice from his union about bringing this tribunal claim although he had some hesitations because his union representative Mr Cormack is managed by Mr Hitt, the disciplinary officer. He thought there may be a conflict of interest but he did not raise it because he said it is very difficult to get someone to represent him.

132. The claimant confirmed in cross-examination and we find that he was aware of his right to complain to an Employment Tribunal.

133. The claimant's view was that his claim was within time because ACAS had agreed to conciliate. We explained to the claimant that ACAS does not have power to adjudicate upon time limits and that is a matter for the tribunal.

134. The evidence in relation to the "holding hands" comment is now seven years old. Mr Baldwinson did not know about the allegations of discrimination until he was interviewed by Mr Jones in the summer of 2014 in connection with the claimant's grievance.

135. The events relating to the disciplinary matter took place between April and July 2014. The ET1 was not presented until 15 July 2016, two years later. The claimant accepts and we find that Ms Ellen Bradley was one of the key players. She has very unfortunately suffered a serious development in her health which means that she is unable to give evidence. The respondent is prejudiced by not being in a position to call her as a witness to deal with questions of fact.

136. The claimant said that he did not bring his claim any sooner because he had a quadruple heart bypass and he did not want to put himself under any more stress. He was well enough to return to work for about six weeks in February/March 2015. The claimant did not produce any medical evidence to support his contention that he was not well enough to issue proceedings until July 2016.

137. On 25 September 2014, while he was off sick the claimant wrote his very detailed grievance appeal letter. He was asked if he had help with it and said he "near enough" wrote it himself. We find that the claimant was able in 2014 to deal with the issues that he now relies upon in these proceedings.

138. The claimant also said that he thought that he had to give the respondent an opportunity to put things right through the internal grievance procedure before he could bring a claim. He did not identify the source of this understanding and said that he did not take legal advice about it and he did not ask his union about it. He presented this reason more forcefully than the reason of his health.

139. In an email to Mr O'Neil dated 21 March 2016 at page 154, the claimant made reference to seeking legal advice from a solicitor. Specifically this related to the claimant's complaint to the Information Commissioner's Office. The claimant was actively engaging with a subject access request and in a complaint to the ICO.

140. The claimant made a subject access request on 4 June 2014 (as referenced in his letter to the ICO on 26 February 2015 at page 456). There is reference to him having three separate complaints to the ICO (eg pages 452 and 464).

141. We find that the claimant's health and sickness absence did not prevent him from pursuing his subject access requests and complaints to the ICO during 2014 and 2015 and the preparation of a very detailed grievance letter in September 2014.

The law

142. Section 13 of the Equality Act 2010 provides that 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.

143. Section 23 of the Act provides that on a comparison of cases for the purposes of section 13, there must be no material difference between the circumstances relating to each case.

144. Section 26 of the Equality Act 2010 defines harassment under the Act as follows:

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

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

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

(i) violating B's dignity, or

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

…………………..

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

(a) the perception of B;

(b) the other circumstances of the case;

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

145. Section 27 provides that a person victimises another person if they subject that person to a detriment because the person has done a protected act. A protected act is defined in section 27(2) and includes the making of an allegation (whether or not express) that there has been a contravention of the Equality Act.

146. In relation to victimisation Lord Nicholls said in ***Chief Constable of West Yorkshire v Khan 2001 IRLR 830 (HL)***:

> *"Contrary to views sometimes stated, the third ingredient ('by reason that') does not raise a question of causation as that expression is usually understood. Causation is a slippery word, but normally it is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the 'operative' cause, or the 'effective' cause. Sometimes it may apply a 'but for' approach. For the reasons I sought to explain in* Nagarajan *…….a causation exercise of this type is not required either by s.1(1)(a) or s.2. The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact." (paragraph 29)*

147. Section 136 provides that 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.

148. One of the leading authorities on the burden of proof in discrimination cases is ***Igen v Wong 2005 IRLR 258***. That case makes clear that at the first stage the Tribunal is to assume that there is no explanation for the facts proved by the claimant. Where such facts are proved, the burden passes to the respondent to prove that it did not discriminate.

149. Lord Nicholls in ***Shamoon v Chief Constable of the RUC 2003 IRLR 285*** said that sometimes the less favourable treatment issues cannot be resolved without at the same time deciding the reason-why issue. He suggested that Tribunals might avoid arid and confusing disputes about identification of the appropriate comparator by concentrating on why the claimant was treated as he was, and postponing the less favourable treatment question until after they have decided why the treatment was afforded.

150. In ***Madarassy v Nomura International plc 2007 IRLR 246*** it was held that the burden doers not shift to the respondent simply on the claimant establishing a different in status or a difference in treatment. Such acts only indicate the possibility of discrimination. The phrase "could conclude" means that "a reasonable tribunal could properly conclude from all the

evidence before it that there may have been discrimination".

151. In ***Hewage v Grampian Health Board 2012 IRLR 870*** the Supreme Court endorsed the approach of the Court of Appeal in ***Igen Ltd v Wong*** and ***Madarassy v Nomura International plc***. The judgment of Lord Hope in ***Hewage*** shows that it is important not to make too much of the role of the burden of proof provisions. They require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

152. Showing that conduct is unreasonable or unfair is not, of itself, enough to transfer the burden of proof - ***Bahl v Law Society 2003 IRLR 640 (EAT).***

153. The courts have given guidance on the drawing of inferences in discrimination cases. The Court of Appeal in ***Igen v Wong*** approved the principles set out by the EAT in ***Barton v Investec Securities Ltd 2003 IRLR 332*** and that approach was further endorsed by the Supreme Court in ***Hewage***. The guidance includes the principle that it is important to bear in mind in deciding whether the claimant has proved facts necessary to establish a prima facie case of discrimination, that it is unusual to find direct evidence of discrimination.

154. Section 123 of the Equality Act 2010 provides that:

> *(1) …………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.*

155. This is a broader test than the reasonably practicable test found in the Employment Rights Act 1996. It is for the claimant to satisfy the tribunal that it is just and equitable to extend the time limit and the tribunal has a wide discretion. There is no presumption that the Tribunal should exercise that discretion in favour of the claimant.

156. The leading case on whether an act of discrimination it to be treated as extending over a period is the decision of the Court of Appeal in ***Hendricks v Metropolitan Police Commissioner 2003 IRLR 96***. This makes it clear that the focus of inquiry must be not on whether there is something which can be characterised as a policy, rule, scheme, regime or practice, but rather on whether there was an ongoing situation or continuing state of affairs in which the group discriminated against (including the claimant) was treated less favourably.

157. The burden is on the claimant to prove, either by direct evidence or inference, that the alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of an act extending over a period.

158. In ***British Coal Corporation v Keeble 1997 IRLR 336*** the EAT said that in considering the discretion to extend time:

It requires the court to consider the prejudice which each party would suffer as the result of the decision to be made and also to have regard to all the circumstances of the case and in particular, inter alia, to –

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

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

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

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

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

159. There is no presumption that a tribunal will exercise its discretion to extend time. It is the exception rather that the rule - see ***Robertson v Bexley Community Centre 2003 IRLR 434.***

160. The decision of the Court of Appeal in ***Apelogun-Gabriels v London Borough of Lambeth 2001 IRLR 116*** makes clear that there is no general principle that an extension will be granted where the delay is caused by the claimant invoking an internal grievance or appeal hearing.

161. The claimant relied upon one authority, ***Olasehinde v Panther Securities plc EAT/0554/07*** in which the EAT held that a disciplinary charge brought with no reasonable basis constituted a detriment. The employment tribunal in that case found that there was no reasonable basis for the bringing of the disciplinary charge. It was also held in that case that there was no error of law in the tribunal taking the view that the employee was not allowed to rely on a detriment which he had alleged for the first time in his closing submissions.

Conclusions

Time limit

162. The claim was presented on 15 July 2016. The dates of Early Conciliation were from 7 June 2016 to 7 July 2016. The claimant told the tribunal that ACAS would not have accepted his claim if it was out of time. We informed the claimant that ACAS does not have jurisdiction over time limits and that it is a matter for the tribunal.

163. The last act of direct discrimination and victimisation relied upon relates to the grievance and the grievance appeal. The appeal outcome was on 14 March 2016 and therefore in respect of the grievance process, the claim is within time. Taking account of the extension of time effected by the EC Certificate, time expired on 7 August 2016 in relation to the

grievance process.

164. The allegation of being denied promotion is a matter that continued until the date of the presentation of the claim and we find that jurisdictionally this claim is within time.

165. The acts of harassment relied upon were on 20 August 2010 and 6 December 2013. In respect of 20 August 2010 time expired on 19 November 2010 and for 6 December 2013 time expired on 5 March 2014. There was no Early Conciliation commenced prior to the expiry of those dates in order to "stop the clock" for time limit purposes. The claims are substantially out of time by nearly six years in relation to the first and by just under two years in relation to the second act relied upon.

166. The disciplinary outcome was on 7 July 2014. The claimant was not expressly told that he did not have a right of appeal against dismissal. The appeals procedure (page 303) says that an appeal hearing should usually be arranged within 10 working days of receipt of the appeal letter. Based on the policy the appeal should have been heard by 29 July 2014. On 25 September 2014 the claimant complained in his grievance appeal letter about having heard nothing on his disciplinary appeal.

167. We find that by the end of 2014 at the latest it should have been clear to the claimant that he had been denied a right of appeal. No further step had been taken on it by the respondent, it had not even been acknowledged. To be within time, the claim in relation to the disciplinary process proceedings should have been commenced by the end of March 2015. The claim is therefore about a year and three months out of time on the disciplinary process.

168. We did not hear from the claimant as to why we should treat the disciplinary process and the grievance process as part of a continuing act. They are separate processes.

169. We have considered whether it is just and equitable to extend time. Following ***Apelogun-Gabriels*** (above) there is no general principle that an extension will be granted where the delay is caused by the claimant invoking an internal grievance or appeal hearing. It is one factor for us to consider. The claimant was not ignorant of his right to bring a tribunal claim. He had union representation throughout. He did not identify the source of his understanding that he needed to complete the grievance process before he could bring his claim. He did not seek advice about it.

170. We have found above that the claimant does not satisfy us that his health prevented him from bringing proceedings within time.

171. The delay in bringing proceedings is lengthy, at its shortest point on the matters outside the primary time limit, it is about a year and three months, and much longer in relation to the harassment claim. The claimant did not act promptly when aware of the facts giving rise to his causes of

action. The cogency of evidence is affected by the absence of Ms Ellen Bradley whom the claimant accepted was a key player. He failed to take appropriate professional advice despite being aware of his right to bring a claim in the Employment Tribunal.

172. We therefore find that it is not just and equitable to extend time. We find that the harassment claim is out of time and all but the promotion claim and the claim in relation to the grievance process is out of time, both as to direct discrimination and victimisation.

Harassment

173. Two acts of harassment are relied upon were:

a) An alleged homophobic remark made by Rob Baldwinson on 20 August 2010; that Mr Baldwin said "*have you been holding hands with another engineer*". The claimant considered the comment "homophobic" but says this is related to his race and his disability.
b) A comment made by Mr Baldwinson in 6 December 2013 about his car number plate reading like 'JUDAS'; the comment was "*your car registration number is JUDAS",* the claimant says this is related to his race and disability.

174. We have found above that the harassment claim is out of time and the tribunal has no jurisdiction to consider it. It fails on that ground. If we are wrong about this and had we jurisdiction to consider it we would have found as follows.

175. For the "holding hands" comment we found it difficult to make a finding as to whether Mr Baldwinson made this comment or not. It is an allegation of a comment allegedly made six years before the claim was lodged and seven years before this hearing. It highlights the difficulty with a claim such as this being made so far out of time.

176. Mr Baldwinson admits making the comment about the number plate.

177. On the claimant's own evidence and upon our findings above, these comments were in any event unrelated to his race or disability. For this reason, we have not found it necessary to make a finding of fact as to whether Mr Baldwinson did or did not make the "holding hands" comment. as even if he did, it was not related to the claimant's race or disability.

178. These acts of harassment did not appear in the ET1. The claimant does not bring claims for discrimination on grounds of sexual orientation or religion or belief or any of the other protected characteristic. He brings a discrimination claim saying that he suffered harassment related to his race and/or disability, yet he accepts that the comments upon which he relies were unrelated to those protected characteristics.

179. Even if not out of time the claims for harassment would fail in any event

and are dismissed.

Direct discrimination because of race and/or disability

Race discrimination

180. The claim for direct race discrimination barely featured in this case. The claimant did not raise it in evidence at all. He did not put to the respondent's witnesses that they had treated him in the manner that they did because he is British Asian. He made no reference to the race of anyone else by way of comparison. The only reference to race that we were taken to (by the respondent) was in the first line of the claimant's grievance letter of 13 June 2014 where he said "*I am raising this grievance because of disability and racial discrimination, bullying, harassment and victimisation"* (page 41).

181. The claimant has not shown facts from which we could conclude in the absence of any other explanation, that the respondent discriminated against him because of his race. The burden of proof does not pass to the respondent. Regardless of the time point, the claim for direct race discrimination fails on this basis on all the heads of complaint raised.

Disability discrimination

182. The claimant did not have the tracker fitted. We have found above that he was not selected for the tracker because of his disability. He was selected because he was one of three employees selected because they did the shorter jobs. Even if we are wrong on the time point, we find that the claimant was not selected for the tracker because of his disability.

183. In relation to the time sheet, our finding of fact is that neither Ms Bradley, Mr Scott, nor Mr Baldwinson "fabricated" the claimant's time sheet. We have found that Mr Baldwinson amended it and clearly initialled it to show what he had done. The claim of fabricating the time sheet fails on its facts.

184. In terms of initiating a disciplinary investigation, the respondent had a legitimate concern about the entries on the claimant's time sheets. The claimant accepted that his manager was entitled to investigate the matter, but took issue with the fact that it was his manager's manager who initiated the investigation. We have found above that the respondent had an issue with productivity and they were not just looking at the claimant. To succeed in his claim for direct discrimination, the claimant has to show that the reason the respondent initiated the disciplinary investigation was because he was disabled with a heart condition.

185. We find that this was not the reason the respondent commenced the investigation. It was because of their concerns about the discrepancies in the claimant's time sheet and Mr Hunt's time sheet for 26 March 2014 and this was a legitimate concern. The respondent had a legitimate basis for

commencing the investigation and proceeding with a disciplinary process. Even if we are wrong on the time point, the claim for direct discrimination fails in this respect. The claimant did not point to anyone whom he said had been treated more favourably than him, in the same or similar circumstances. The claim for direct discrimination in relation to the investigation would therefore have failed even if within time.

186. We have found above that a Letter of Concern was not outside the disciplinary process. Even if this part of the claim had been in time, it fails on its facts in any event.

187. We have found above that a right of appeal attached to the Improvement Letter or Letter of Concern and the claimant was not given this right. To succeed on his claim for direct disability discrimination the claimant has to show that the reason he was not given an appeal against the Letter of Concern was because he was disabled with a heart condition. We have found that the reason the claimant was not given a right of appeal was because the respondent wrongly interpreted the policy as giving a right of appeal only against formal disciplinary action. We find that it was not done because of the claimant's disability. Therefore even if we are wrong on the time point, this aspect of the claim would have failed in any event.

188. The claim in respect of the change of work area at the beginning of 2014 is substantially out of time. We have found above that the area change applied across the board and affected all the engineers in Mr Baldwinson's team, whether they transferred to Mr Scott's management or stayed with him. It was not because of the claimant's disability. Even if we are wrong on the time point, this claim fails in any event.

189. We have found above that the reason the claimant was not promoted was because of a gap in his IT skills. He did nothing to address this skills gap. We find that the lack of promotion was unrelated to his heart condition and therefore was not because of his disability and this claim therefore fails.

190. The claimant complains in relation to the grievance process that the respondent failed to follow its own policy and that it failed to carry out an investigation into the full grievance issues in relation to promotion. We have found above that the grievance and appeal officers found that the reason for the lack of promotion was the claimant's IT skills gap – clearly identified in his appraisal document - and it was not therefore necessary to carry out a detailed investigation into why he and other engineers had or had not been promoted over a period of eight years. This would have been a disproportionate and unnecessary exercise. We find that the reason for the lack of promotion was not because of the claimant's heart condition. This aspect of the claim fails.

191. We found above that it was poor practice on the part of Mr Jones not to take notes of his investigatory meetings. However, we find that he did not fail to make notes because of the claimant's disability. It was something

he did sometimes and not on other occasions and he was rightly picked up on it by HR. Just because Mr Jones failed to take notes does not mean, on our finding and as per ***Madarassay*** and ***Bahl***, that this is discrimination. The claimant did not put to Mr Jones that this was the reason he failed to make notes. We find that it was not disability discrimination.

192. It was not until his closing submissions that the claimant identified for the first time an individually named comparator – Mr Dave Hunt, the engineer with whom he was working at the 99p Store on 26 March 2014. At no time during the evidence were we told Mr Hunt's racial group. We do not know whether or not he had any disability. We find, following ***Olasehinde*** above that it is not open to the claimant to identify and rely on a named comparator for the first time in his closing submissions. The respondent had not previously been aware of his case in this respect and has not had an opportunity to answer it in evidence.

193. The claims for direct discrimination fail and are dismissed.

<u>Victimisation</u>

194. The respondent accepts that the grievance of 13 June 2014 was a protected act.

195. The claimant also relies upon on a verbal complaint which he says he made to Mr Baldwinson on 2 December 2013 to the effect that he did not wish to be part of the tracker trial. We have found above that the claimant did not complain of discrimination on 2 December 2013 and we therefore find that there was no protected act on that date.

196. The only protected act is the grievance of 13 June 2014.

197. In relation to promotion we repeat of findings in relation to direct discrimination, namely that the reason for the lack of promotion was the skills gap. Any failure to promote from 2006 to 13 June 2014 cannot be an act of victimisation because the protected act had not taken place. The claimant was off sick from July 2014 to January 2016 (save for a short period in February/March 2015). We find that the reason for failure to promote was unrelated to his grievance and the claim for victimisation fails in this respect.

198. The claimant complains that there was a failure to carry out a full and fair grievance investigation and this was because he complained about discrimination within his grievance. Part of his complaint was that the grievance officers did not investigation his lack of promotion going back to 2006. We have made findings above as to the reasons why the grievance officers did not investigate back to 2006 and this had nothing to do with the complaint of discrimination. The claimant fails to establish a causal link between the protected act and any deficiency in the investigation or grievance process.

199. The grievance outcomes were very detailed and they followed hearings with the claimant at which he had union representation. Any lack of thoroughness of the appeal investigation was because of the absence of three key players (Ms Bradley, Mr Scott and Mr Jones) and not because of the protected act. We have found that Mr Jones should have made notes of his investigation and this was poor practice. He nevertheless carried out investigation with Mr Baldwinson and Mr Scott.

200. We find that the respondent did not fail to carry out a full and fair grievance investigation and the claim for victimisation fails in this respect.

201. The grievance officers produced detailed and soundly reasoned outcomes. The failure to uphold the claimant's complaints was not because he had made a complaint of discrimination. The claim for victimisation fails in this respect.

202. The claimant complains that it was an act of victimisation to give him a Letter of Concern. We have made a finding of fact above that the disciplinary officer Mr Hitt was not aware of the protected act when he heard the disciplinary and gave his outcome. The claimant fails to establish a causal link between the protected act and the disciplinary outcome and the claim for victimisation fails in this respect.

203. The claimant was not given the right of appeal against the Letter of Concern. Our finding above is that this was because the respondent wrongly interpreted the policy and not because the claimant had done a protected act. The claimant fails to establish a causal link between the protected act and the lack of an appeal against the Letter of Concern and the claim for victimisation fails in this respect.

204. The only aspect of the victimisation claim which is in time (based on our findings above) is the rejection (ie the failure to uphold) the grievance and the grievance appeal. We have made findings on the other aspects above in the event that we are wrong on the time point. The claim for victimisation therefore fails and is dismissed.

Listing a date for a provisional remedies hearing

205. The parties having been given an opportunity to check their availability we listed a provisional remedies hearing on **20 December 2017**.

206. There was a schedule of loss at page 208 of the bundle. The claimant remains in the respondent's employment. The respondent did not seek an updated schedule of loss and sought no further orders in relation to remedy.

207. In the light of our findings above, the date for the remedies hearing is vacated.

Employment Judge Elliott
Date: 30 June 2017