EMPLOYMENT TRIBUNALS

Claimants: Mr Roger Kinsman Junior
Mr Roger Kinsman Senior

Respondents: Drumconner Limited
Drumconner Homes Limited
Drumconner (Bournemouth) Limited

Heard at: Southampton **On:** 25 – 29 September and 8-9 December 2017

Before: Employment Judge Jones QC
Ms Sinclair
Mr Holcombe

Representation:

Claimant: Ms R Barrett of Counsel

Respondent: Mr I Wheaton of Counsel

JUDGMENT

1. The Tribunal does not have jurisdiction to hear the unfair or wrongful dismissal claims of either Claimant.

2. The First Claimant's harassment claim fails and is dismissed.

3. The First Claimant's victimisation claim fails and is dismissed.

4. The First Claimant's holiday pay claim succeeds in the sum of £2,423.10

5. The First Claimant's unlawful detriment claim fails and is dismissed.

6. The Second Claimant's victimisation claim fails and is dismissed.

REASONS

Introduction

1. The present proceedings have two claimants and three respondents.

2. The two claimants are Roger Kinsman Junior ("The First Claimant") and his father, Roger Kinsman Senior ("the Second Claimant"). The three respondents are Drumconner Ltd ("DCL"); Drumconner Homes Ltd ("DHL") and Drumconner Homes (Bournemouth) Ltd ("DHBL"). The position of the parties is that by the date of their respective terminations of employment, the Claimants were each employed by all three Respondents.

Findings of Fact

3. The case is concerned with the breakdown in the relationship between two families: the Kinsmans and the Creaseys.

4. Mr Peter Creasey is a charismatic business man with a range of interests which stretch from mining to the care home business that is the focus of the present proceedings. Mr Creasey lives in Lancing in West Sussex.

5. Hounslow Borough Council formerly owned a property in Lancing which it ran as respite holiday care home. The home was run by the Second Claimant, who was a Registered Nurse, and his wife. In or about 1980, the Council decided to close the home and make the Second Claimant redundant. The Second Claimant and Mr Creasey came to an arrangement. The idea was that Mr Creasey would buy the property and that a nursing home would be set up. The Second Claimant and his family lived in one of two buildings on the site. The First Defendant was the vehicle used to acquire the home.

6. The early history of the venture is a little unclear but it seems that there was a period of around two years in which preparations were being made to re-open the site as a residential nursing home. During that period the Second Claimant and his wife assisted in the preparations but without being entitled to any pay. At that point the First Claimant was still a child. Instead, of receiving pay the Second Claimant and his wife were allowed to live rent free in the bungalow. Mr Creasey says that he gave them money from time to time for food. The Second Claimant says that all of his bills and food were provided for. During that period, the Second Claimant says, he was permitted to buy items from the local hardware store on Mr Creasey's account. There was a limit on how much could be spent. That arrangement, says the Second

Claimant evolved, with Mr Creasey's agreement, so that they could, instead, charge items bought in a cash and carry to the business. He also suggested that they could order milk, bread, meat, fish, fruit, vegetables, flowers and newspapers from local suppliers, again at the business's expense. He alleges that Mr Creasey described the arrangement as an "emolument". We took that to mean a benefit conferred in return for his service as an employee. The Second Claimant saw himself as having an "allowance". He claimed that if the allowance was underspent he would roll it over to the following week. If he overspent, he would put money in a tin kept in the Lancing home and Mr Creasey would take the money out once a year and spend it on holiday. There was no real corroboration for the process described. The allowance was not declared to the Revenue. The fact that care was taken to ensure that the "allowance" was spent on things that might plausibly pass as items purchased for the business makes it clear that the intention was that the Revenue should not appreciate that an emolument was being conferred.

7. The Second Claimant submitted his own returns to the Revenue. He had assistance from an accountancy firm, CCI, who were also the company accountants. The work they performed for the Second Claimant was paid for by the business.

8. The Second Claimant was also provided with a "company car". It was replaced every few years.

9. Although it is not clear from the evidence when, the Second Claimant was provided with a mobile phone which, he told us, was principally used for personal calls. His wife was given one too.

10. Mr Creasey promised the Second Claimant a home and salary "for life". The Kinsmans were quick to assert that Mr Creasey was (or had least had been) a very generous man. Mr Creasey accepted the compliment whilst ultimately insisting that he had not been as generous as the Claimants had been greedy.

11. The residential nursing home opened in 1982. The Respondent's case is that the Second Claimant became an employee in the same year. The Second Claimant's case is that he had been an employee since 1980. The Tribunal considers that the employment began in 1980 when the Second Claimant began to perform services and to receive benefits in kind and occasional cash payments.

12. In 1985, the Second Claimant began to receive private health insurance. His wife was also covered. A pension was also arranged for him.

13. A second nursing home was opened in Bournemouth in 1987.

14. In or about 1990, the First Claimant began to work for the business as a care assistant. He left in 1992 but, having qualified, re-joined as a Registered General Nurse on 27 November 1995. In 1998, he became Registered Manager of the Lancing Home. Each home had its own registered manager. The Bournemouth home had

three over the relevant period: Helen Colley, succeeded in 2012 by Jo Wright and in 2013 by Hannah Guyan.

15. The Second Claimant was "General Manager" which was a rather loosely defined but more senior role which involved overall responsibility for operations. He was also a company secretary and owned a single share in each of the Respondent companies.

16. Eventually, the Second Claimant stood down as General Manager and the First Claimant was appointed in his place. As General Manager, the First Claimant was responsible, as his father had been, for both homes. He remained Registered Manager at Lancing.

17. The Second Claimant became "Site Manager". The role seems to have been a form of semi-retirement. The witness statements disagree about when the change occurred. Mr Creasey says it happened in August 2005 (but accepts he is not quite clear when). The First Claimant says it happened in around 2008. The Second Claimant says it happened in 1998. We concluded that the First Claimant's recollection was likely the most accurate.

18. The Second Claimant continued to live, rent-free, next door to the Lancing home and would perform such tasks as might arise from time to time. He continued to receive a salary of £27k. He continued to purchase items up to his "allowance" which, he claims, ultimately rose to £300 a week between himself and his wife. He retained his mobile phone. He retained his company car. The car was used, from time to time, for errands related to the Lancing home.

19. The First Claimant received a salary. The salary was periodically increased. In 2013, the First Claimant had a conversation with Mr Creasey which resulted in the First Claimant's wife being paid £10,000 a year by way of salary of her own. The First Claimant well understood that his wife was not going to perform any actual duties. The explanation he gives in his witness statement was "... this would benefit me because I wouldn't pay as much tax." Whilst the First Claimant's case was that the suggestion came from Mr Creasey he understood that what was being proposed was a form of tax evasion. He could have refused to take that course. He did not object.

20. From 2005, the First Claimant says, he too received an "allowance". It began at £40 and increased over time until, at the date of his dismissal in 2016, it was £80 per week. He would use his allowance by making purchases on the company credit card, taking care that they were items that might credibly be for use in the business. Again, the "allowance" was not declared to the Revenue.

21. The First Claimant also had a company car, ultimately an Audi A6, which was kept at his home. He made extensive personal use of the vehicle. He also had a mobile phone provided by the business as did his son, Joe. The First Claimant says that that was done with Mr Creasey's express permission. Mr Creasey says it was not. The First Claimant says that it was arranged by Oliver Harper, who worked in the

business and was Mr Creasey's step son. We find, on balance, that Mr Creasey did give permission for Joe to have a phone.

22. In or about July 2014, Ms Larby began to spend one day a week in the Lancing home working on the paperwork. Ms Larby works for CCI, the business's accountants.

23. In 2015, the business's mobile phone contracts came up for renewal. The First Claimant was told that if the business took out more lines (11 in total) it would qualify as an "exclusive customer" and the effect, perverse as it might seem, was that there would be a lower overall cost to the business than there would be if they had fewer lines. Lines were given to Oliver Harper, who worked as Payroll Manager and Tracey Burtenshaw, who was a bookkeeper. Since neither employee worked away from the home, neither strictly needed a mobile phone for the performance of their duties. A line was also given to the First Claimant's younger son, George. At that point, therefore, both of his sons had mobile phones at the company's expense. Each received a new iPhone as part of the deal. Oliver Harper bought covers for their phones as a gift. The First Claimant alleges that this demonstrates that the matter was dealt with in the open and that Mr Harper was well aware of arrangements. Mr Harper denied that he was aware of what was going on. The First Claimant said he had express permission for the arrangement. Mr Creasey says he was not aware. We prefer the evidence of the First Claimant in this regard. His suggestion that he offered to pay for his son's line rental and was told "If we have to worry about spending £30 a month on a line rental for your sons something must be going wrong" rings true and is consistent with the generous approach that Mr Creasey seems to have taken at this time.

24. In July 2015, the First Claimant returned from holiday to be told that he was no longer to be registered manager of the Lancing home and that he was to concentrate on his General Manager role. A colleague called Kim Lelliot was promoted into the registered manager role. The appointment did not work well and the First Claimant ultimately resumed his role and in January 2016, the First Claimant's salary was increased to £60,000 a year. The rise reflected the hard work the First Claimant had to do to recruit and bed in a new team. These events had a significant effect on the First Claimant. The impression the Tribunal had from the First Claimant's oral evidence was that he did not, thereafter, feel able to trust Mr Creasey as he once had. Over the following months he came to feel that Mr Creasey was undermining him. In July 2016 he lodged a grievance which describes his experience in some detail. He complains that Mr Creasey was "openly questioning members of [his] staff about [his] work and [his] contribution to the business. Staff members had been given licence to question him. This growing feeling of insecurity was accentuated by the increasingly difficult financial circumstances that the business faced and the constraints imposed upon the First Claimant in consequence. In his grievance letter he complains:

> ".. I am being set the same wage percent targets of 55%, even though there is now the consideration of increases in pension contributions, increases in the minimum living wage and with 5 less rooms. This has now become an

> extremely difficult target to hit without seriously compromising on client care, (which we both agree cannot happen) but I do not feel that you have taken these additional factors into consideration.
>
> I feel that I am being set up to fail and it is only a matter of time until I do so. This, as I am sure you can imagine, is causing me immense anxiety and stress and I currently feel extremely targeted in my role."

25. In or about April 2016, the First Claimant was approached by Ms Larby and Ms Burtenshaw. He was given a list of the numbers that had been provided pursuant to the mobile phone contract entered into the previous year. Ms Larby wanted to identify who had each number. Some names had already been written in. Some required names to be added. The First Claimant added his sons' names. Next to Joe's name is an annotation added by the First Claimant which suggests, untruthfully, that he was the handyman at the Bournemouth home. George, is recorded as "on call" at Bournemouth. The express purpose of the exercise, on the First Claimant's evidence, was to mislead the Revenue and allow the business to suggest that the lines were for a business purpose. He suggests that he was encouraged to do this by Ms Larby and that he trusted that, as she was an accountant, the conduct must be appropriate. We do not accept that the First Claimant was so naïf. We conclude that he understood that it would be wrong to mislead the Revenue but intended to do so. He was General Manager and was involved in the recruitment and remuneration of staff members. There is no reason to believe that he would have failed to appreciate that what he was proposing was dishonest. The live issue is whether he was also seeking to deceive Ms Larby. We are reluctant to conclude that Ms Larby would, as a professional, effectively propose a fraud. It seems doubly unlikely given that at this point, CCI was actively advising Mr Creasey that the Revenue was taking an ever closer look at expenses of this kind and that it was time to ensure that matters were put in order. It is significant, however, that by this point Ms Larby had been working at the Lancing home for over a year. The boys frequently visited the home. She told us that she did not know the names of the First Claimant's sons. We found that difficult to accept, but assuming it was true, Ms Burthensaw certainly knew who Joe and George were. So did Mr Harper, who was a party to the conversation. Nor would the First Claimant have had any reason to believe that Ms Larby would either not know or would fail to check whether the Bournemouth home employed anyone in the handyman/on-call roles and, if they did, who they were and whether they had a phone. If the First Claimant had intended to mislead Ms Larby and Ms Burthenshaw, writing his sons' real names on the list seems a particularly odd way of trying to achieve it. We think that Ms Larby did appreciate that his sons had phones, but that she did not try to find a way of covering the matter up or deceiving the Revenue. We think it likely that she reported the matter to her firm which is why the discussion, described below, that took place on 18 July 2016 seems to have started from the premise that the Claimant's family had phones from the business.

26. In June 2016, Mr Creasey met Mr Gerald Ilsley. Mr Ilsley lived in the house next door to the Lancing home. Mr Creasey bought Mr Ilsley's home from him. His wife was very ill. Mr Creasey agreed to very substantially delay completion to accommodate

Mr Ilsley's search for another home. Mr Ilsley is an experienced HR professional. He is self-employed and provides services on a consulting basis.

27. On 30 June 2016, the First Claimant had a conversation with Mr Creasey about Mr Singh, a colleague. Mr Singh is of mixed race and undergoing a gender reassignment[1]. He had recently been recruited. The First Claimant recorded the conversation. The Tribunal was provided with a transcript. The substance of the transcript was not disputed. Mr Creasey is recorded as saying of Mr Singh: "He could work here if he worked nights". The First Claimant responds by saying that Mr Singh was going to work days, to which Mr Creasey replies: "It's not a good image. We've got to think of image. A few people are saying, I mean you must have heard, surely ...". Mr Creasey accepted in the course of his oral evidence that he was concerned about the image that Mr Singh presented to residents during the course of his reassignment. The First Claimant alleges that there was a further conversation in the garden of the Lancing home in which Mr Creasey asked of Mr Singh: "What is it? … Is it a boy or is it a girl". Mr Creasey said in the course of cross-examination that he could not remember using those words but it is the kind of thing he could imagine he might have said We find, on balance, that he did refer to Mr Singh as "it".

28. On 15 July 2016, the Second Claimant had a meeting with Mr Creasey in a car park. Mr Creasey raised the prospect of cutting staff wages and taking away the Second Claimant's private healthcare. The Second Claimant says Mr Creasey also talked of taking away his "allowance". The conversation unsettled the Second Claimant and he arranged a meeting with Mr Comer, a partner at CCI who is responsible for the business's accounts.

29. On 18 July 2016, the Claimants, met Kerry Larber and Mr Comer. Mr Comer identified two pressures on the business. The first was the need to keep the bank happy and to demonstrate that costs were being controlled. The second was an alleged change in attitude on the part of the Revenue which meant that they were less tolerant of undeclared benefits. They discussed a number of matters. The first was the "company" cars provided. The Second Claimant's car bore the home's logo and was kept on the premises. By contrast, the First Claimant's car had no logo and was kept at home. The business met fuel costs regardless of the use made of the vehicles. The implication was that his car was really for his personal use and was an undeclared benefit. The First Claimant confirmed that that was his understanding saying that he saw the car as "part of his remuneration package" and seems to have wanted to know whether he might be otherwise compensated if he no longer had a car.

30. The next subject was use of mobile phones. Mr Comer seems to have raised the question of the phones used by the First Claimant's family (the CCI note of the meeting makes reference specifically to the First Claimant's sons), indicating that it was known to CCI that they had them. The First Claimant said that it had been done

[1] The Respondents admitted that Mr Singh ahs the protected characteristic of gender reassignment in their amended ET3.

with Mr Creasey's approval but that if they had to be cancelled they could be. Mr Comer said he would check with Mr Creasey. The use of credit cards for personal purchases was also discussed. The Claimants told Mr Comer that this was permitted by Mr Creasey (and Mr Comer undertook to check). Mr Comer made it clear that it was a taxable benefit.

31. Following the meeting Ms Larby was instructed to conduct an internal audit.

32. On 22 July 2016, the First Claimant lodged a grievance. The grievance is relied upon as a "protected act" for the purposes of the **Equality Act 2010, s. 27.** The grievance is principally concerned with a suggestion that Mr Creasey is undermining the Claimant and setting him up to fail. He complains that Mr Creasey is interfering with his management of the homes and in that context makes reference to Mr Creasey questioning the staff that the First Claimant was employing. He refers to Mr Creasey having "an issue with some of our staff based on their size, race and gender".

33. On the same day, the Second Claimant commenced a period of stress-related sickness absence.

34. On 17 August 2016, the First Claimant wrote to Mr Creasey chasing a response to his grievance letter.

35. On 22 August 2016, Mr Oliver Harper, Mr Creasey's stepson, was appointed Senior Manager. On the same day, Ms Larby completed her internal audit. Attention focused on alleged excessive mobile phone usage and the purchases that the Kinsmans had made pursuant to their "allowance" and on certain purchases made on business credit cards. Mr Creasey met with CCI and invited Mr Ilsley to attend. Mr Ilsely was given the job of resolving the issue. Mr Creasey made his first statement. He denied having authorised the expenditure.

36. Mr Ilsley wrote to both Claimants on 24 August 2016 inviting them to a meeting to be held on 31 August 2016. He also suspended them on full pay. Puzzlingly, the suspension was stated to be with effect from 22 August 2016, that is two days before the letters were sent. The letter to the First Claimant thanked him for his letter of 17 August 2016.

37. Mr Ilsley met with both Claimants on 31 August 2016. At his meeting with the First Claimant, he went through the documents dealing with the "allowance" purchases and a number of other credit card expenses. Mr Ilsley suggested that the First Claimant's use of the credit card might amount to fraud. Mr Ilsley told the First Claimant that he would report to the business that the matter should be taken forward as a disciplinary matter and that it could lead to dismissal or a report to the Police.

38. At his meeting with the Second Claimant, he discussed the latter's use of his mobile phone and his purchase of items for personal us. The explanation that he received was that the Second Claimant believed his actions had been authorised by Mr

Creasey. On his own evidence, Mr Ilsely told the Second Claimant that the purchases had been made without approval (again, this was before a formal disciplinary investigation had even begun) and that it would be treated as a disciplinary matter. He told him that he could be found to have grossly misconducted himself and that he could lose his home. Mr Creasey's witness statement observes that the Second Claimant "appeared to be shocked".

39. Later the same day he had a conversation with the Claimants in which the possibility of a termination with a settlement payment was canvassed. Mr Creasey told us that by this date he had already decided that the Kinsmans should leave and had likely told Mr Ilsley that.

40. There was a further meeting on 13 September 2016 at which Mr Ilsely sought to discuss an agreed termination. He told the Tribunal that by that date Mr Creasey's preferred option was for the Claimants to leave. Although there were subsequent negotiations, they did not result in a settlement. We note that at least one of the offers made to the Second Claimant would have allowed him to remain in his home.

41. On 30 September 2016, the First Claimant raised a second grievance. Although the letter makes an allegation of "victimisation", it is not relied upon as a protected act. It complains that someone called Tracey Parker had been recruited to replace the First Claimant. It alleges the disciplinary charges are spurious. It suggests that Mr Creasey is trying to get rid of the Claimants because of the discussions on 18 July 2016 about the benefits the First Claimant contends were afforded to them but which the accountants had identified had not been properly taxed. He complains that the process is taking too long and that Mr Ilsley is not properly independent.

42. Mr Ilsley completed his investigation reports on 4 October 2016.

43. On 6 October 2016, Mr Ilsley wrote to the Second Claimant inviting him to a disciplinary hearing to take place on 12 October 2016. The meeting was later rescheduled to 20 October 2016. The letter alleged that the Second Claimant had been guilty of theft. It enclosed a copy of Mr Ilsley's investigation report.

44. On 11 October 2016, Mr Ilsley wrote to the First Claimant inviting him to a disciplinary hearing. The letter alleged that the First Claimant had made personal use of his business mobile phone; that he had used a company credit card to purchase "consumables" for his personal use; and that he had used the card to purchase "a variety of items" for his personal use. Reference was made to Mr Ilsley's investigation report. The meeting did not take place on the original date and was rearranged for 7 March 2017.

45. Solicitors acting for the First Claimant wrote to the Respondents on 17 October 2016. In the letter, a request was made for a number of categories of document which it was thought might be exculpatory:

    (1) The Second Claimant's mobile phone records;

(2) The credit card statements relating to the cards given to two of the former registered managers of the Bournemouth home which, it was suggested, would establish that they too had had an "allowance"; and

(3) An audit conducted in 2014 by CCI.

46. Mr Ilsley replied on behalf of the Respondents on the same day. He did not disclose the documents and declined to enter into any further correspondence in relation to the disciplinary hearing.

47. The Second Claimant's disciplinary hearing was conducted on 20 October 2016 by Mr Humphries, a partner with CCI. His decision is set out in a report of the same date. He deals, broadly, with two matters. The first is misuse of the company mobile phone. He records that Mr Creasey, who had appeared as a witness, had accepted that some personal use was appropriate. The question resolved, therefore, to whether use was excessive. Mr Humphries concluded that the allegation, if made out, would justify nothing more than a warning. The second area he considered was purchasing items for personal use using the business's credit cards. In relation to two items: fish and a garden ornament, Mr Humphries appears to have felt that there was insufficient evidence and recommended that, absent more evidence being forthcoming, no further action should be taken. In relation to the wider allegation of purchasing consumables, the Second Claimant alleged that this was consistent with the "allowance" he was afforded of £300 per week. Mr Humphries felt unable to decide whether to accept the Second Claimant's evidence on the issue or that of Mr Creasey, who denied the existence of any allowance. He concluded as follows:

> "I am not an officer of the company and it is the company that needs to make the decision as to whether there has been any wrongdoing. To this end it would appear reasonable for the company to give the director's statements precedence over those of [the Second Claimant] and therefore to conclude that these accusations represent misappropriation of the company's property. If the company takes this stance then I do not feel that the company would be acting unreasonably were it to dismiss [the Second Claimant] for gross misconduct."

Whilst one may have sympathy for Mr Humphries's position (it can be very difficult to decide whose evidence to accept in a straight conflict) his proposed way forward had two consequences. First, it meant the burden was effectively on the Second Claimant to prove he was not dishonest. Secondly, it meant that he would have to persuade Mr Creasey to disregard his own evidence. It would be difficult to characterise that as a fair process.

48. The First Claimant attended the hearing as his father's companion. During the hearing there was a heated exchange between Mr Creasey, who was attending as a witness and the First Claimant. Mr Creasey told the First Claimant:

(1) That he and the Bournemouth manager felt that the First Claimant was "failing on every single aspect of the home's management";

(2) That the First Claimant had been pulling the wool over his eyes; and

(3) That he had learned a lot and that the First Claimant was incompetent.

These sentiments were consistent with those expressed by Mr Creasey in the course of giving his oral evidence and we conclude represented his genuine opinion of the First Claimant at the time.

49. The decision as to whether or not impose a sanction on the Second Claimant was given, formally, to Hannah Guyan to make. She was the registered manager of the Bournemouth home. She was, of course, effectively employed at Mr Creasey's pleasure and the notion that she would have any real scope for rejecting his evidence struck the Tribunal as being entirely unrealistic. It was put to Mr Creasey that he had taken the decision. He told us that, in truth, Mr Ilsely had taken it. He then backed away from that position to say that he did not know who had taken it. He then changed his mind a second time and accepted that he had made the decision himself. A letter in Ms Guyan's name was sent to the Second Claimant on 7 November 2016 dismissing him. The Second Claimant did not appeal the decision to dismiss, preferring to issue Tribunal proceedings instead.

50. The First Claimant lodged a third grievance on 31 October 2016. The grievance focused on the way in which it was alleged that Mr Ilsley had treated the First Claimant during the Second Claimant's disciplinary hearing.

51. On 15 November 2016, the First Claimant attended a grievance hearing. It was conducted by Lyn Maharaj of RBS Mentor Services.

52. Ms Maharaj ultimately rejected the First Claimant's grievance setting out her reasons in a letter dated 19 December 2016. The First Claimant appealed the decision unsuccessfully. Neither the way in which the grievance was dealt with nor its result is identified by the First Claimant as being unlawful.

53. The First Claimant's disciplinary hearing was, again, conducted by Mr Humphries. The hearing took place on 7 March 2017. Mr Humphries's decision is dated 10 April 2017. It is a very carefully reasoned document. On the personal expenditure he divides the purchases into two categories: those that he is satisfied were in truth business expenses and those that were truly for personal use. He notes that the First Claimant had alleged that he had an allowance that covered these purchases. He was not satisfied that the existence of the allowance had been disproved. He concluded that the allegations did not allow a conclusion of gross misconduct. He went on to consider the question of the Kinsman family having mobile phones at the Business's expense. He observed that the question turned on whether the business had authorised the practice. Rather than reaching his own conclusion he says:

> "If the company is confident that these telephone lines were contracted for without authorisation then this would clearly be a breach of [the First Claimant's employment conditions and would, in my opinion, be tantamount to gross misconduct and give reasonable grounds for summary dismissal."

Again, Mr Humphries's unwillingness to reach a conclusion is perhaps understandable but created the unfortunate situation in which, it being, as he saw it, the company's word against the First Claimant's it was being left to the company to decide whether it was telling the truth. More realistically, it was being left to Mr Creasey to decide whether he believed himself. The problems that this causes for the fairness of the process are obvious.

54. The decision was, allegedly, left in the hands of Mr Harper. This was despite his having been a witness in the proceedings. He had the impossible task of having impartially to decide whether his Step-father was telling the truth about the mobile phones being unauthorised. Mr Harper told us frankly that the truth was that Mr Creasey took the decision. On 26 April 2017, Mr Harper wrote to the First Claimant, saying:

> "The Company accepts [Mr Humphries's] comments that you assigned Company mobile phones and devices to your family, none of whom are Company employees, for their use between November 2015 and August 2016 to the value of £1,189.96 in contradiction of the Company's Staff Handbook [2010] guidance – Page 7 Home property and your actions are tantamount to gross misconduct and gives reasonable grounds for summary dismissal.
>
> Therefore it is the Company's decision to dismiss you summarily for gross misconduct without notice or payment in lieu of notice because of your fraudulent representation of the use of the phones you allocated to your family at the Company's cost and without prior authorisation."

Mr Harper told us that Mr Ilsley had told him to write the letter – something that Mr Ilsley had not shared with us in the course of his own evidence.

55. The First Claimant appealed the decision to dismiss him in an email dated 2 May 2016. A hearing was ultimately arranged for 7 July 2017. The hearing was conducted by Ms Helen Sykes. She dismissed the appeal in a letter dated 4 August 2017. Ms Sykes's approach was idiosyncratic. The First Claimant had been dismissed on only one ground. Ms Sykes decided to hold a rehearing. She did not, despite the First Claimant's understandably vehement objections, limit the rehearing to the single matter for which he had been dismissed. She took the view that Mr Humphries had been over-cautious. She reinstated the full range of charges and went so far as to add a new one about the provision, at the business's expense, of electrical works at the First Claimant's house. She also decided, without actually interviewing him, that Mr Creasey's account was the more credible. Indeed, her response to the First Claimant's complaint that Mr Creasey's evidence had not been tested was simply

that he had prepared a number of witness statements. Her approach was that she would accept whatever Mr Creasey said unless the First Claimant could prove it was not true. The strong view of my lay members, which I share, was that this was not an appropriate or fair manner in which to conduct an appeal.

56. The First Claimant received a payment of £2,301.95 in respect of untaken holiday. The First Claimant alleges that the figure is too low. First, he says that the payment (which relates solely to the holiday year 2017) has been calculated on the basis that his holiday entitlement was just 28 days a year, whereas, in fact, it was 7 weeks. The Staff Handbook says that the First Claimant was entitled to 20 days plus public holidays. That represents his express contractual entitlement. The First Claimant says that a longer period was agreed with his father but is recorded nowhere in writing. He said the pattern of his taking the holiday would have been reflected in records but those records were not available to us. Although the First Claimant appears to have suggested to the Respondents that his proper entitlement was 7 weeks in a note at the time of termination, that does not reflect his pleaded case. The holiday pay claim was added by way of amendment on 9 June 2017. The pleading suggests (at Paragraph 38.2) that in the full leave year of 2016, the First Claimant accrued 5.6 weeks (or 28 days) of holiday. His pleaded case, therefore, reflects his express contractual entitlement. In the circumstances, and absent any further amendment, we find that he was entitled to 28 days holiday a year. Had the pleading been amended, we would not have been prepared to conclude without some corroborating documentary evidence, that the First Claimant had a contractual entitlement to 7 weeks holiday a year.

57. The second respect in which the First Claimant alleges that he was underpaid is, on the face of his pleading, that he had only taken 2 of his 5.6 weeks of holiday in 2016. He was prevented, he says, from taking any further holiday because he was suspended. This does not appear to be formally contested by the Respondents. The staff handbook precludes the rolling over of untaken holiday. Again, the First Claimant says there was a special rule for senior staff. Again, there is no corroborating evidence for that and we have not been prepared to find that there was a special rule. That some roll over may be required as a matter of Law rather than contract is a question addressed when we turn to consider the specific claims below.

58. The Claimants each allege that they were concerned about Mr Creasey's attitude to members of ethnic minorities. There are a number of threads to the evidence.

(a) *Attempts to influence recruitment*

58. The Claimants allege that Mr Creasey had from time to time expressed a preference that black staff should not be hired to work in the homes.

59. There is diversity in the workforce. Mr Creasey points out that the workforce is 6.6% non-white, whereas the 2011 census suggests that the only around 2.3% of those living in the area are non-white. The Claimants say that that diversity is despite Mr

Creasey and not because of him. It is certainly true that recruitment was ultimately a matter for the home management and not Mr Creasey.

60. Mr Creasey vehemently denied the allegation. He insisted that he was not a racist and we accepted that. His vocabulary, however, reflected standards of an earlier time. For instance, when answering questions from the Tribunal about the profile of his staff he drew a distinction between "British" staff and "Black" staff. On further clarification, it emerged that he included Black British staff in the latter category.

61. In the transcript of his conversation with the First Claimant on 30 June 2016, he is recorded as saying "you've got great Europeans … you got lots of blacks here now". It should be noted that the same transcript does record Mr Creasey praising Shingirai Jambaya who is Black Zimbabwean, so he does not seem to have been invariably opposed to the employment of members of ethnic minorities. We formed the view that Mr Creasey's position was that some of the residents were uncomfortable in a racially diverse environment and that that should be reflected in recruitment decisions hence his reference to "lots" of blacks. Whilst we were not persuaded that Mr Creasey had any personal antipathy to black employees whether conscious or subconscious, it was clear that he wanted the home to reflect a specific and very traditional image. The lack of personal antipathy does not make his behaviour any less discriminatory. Colour should not be a factor taken into account when recruiting care staff. We concluded that Mr Creasey had, from time to time, sought to persuade the Second and then the First Claimant to reflect his desired image for the home in their recruitment decisions.

62. It is alleged that Mr Creasey instructed receptionists to tell potential job candidates with heavy accents or foreign-sounding names. There was no corroboration for this account and we did not feel we had sufficient evidence to make a positive finding on the issue.

(b) *Interaction with black staff members*

63. The First Claimant alleges that Mr Creasey, a frequent traveller to South Africa, would have embarrassing and intrusive conversations with two employees: Pila Nesi and Shingirai Jambaya asking them, amongst other things, what tribe they were members of. He said that Pila complained that the questions embarrassed her. Mr Creasey's explanation was that he was genuinely interested in their background and culture and that his enquiries were well-received. We heard from neither employee. However, each produced a statement in the course of the investigation into the First Claimant's grievance. Ms Nesi's statement says:

> "Mr Creasey would always make time for pleasant conversation about my home country. I remember our discussions about Cape Town in South Africa and him telling me how much he enjoyed his visits there.

> I have always found common ground in our conversation as we could relate to the pleasant weather and the friendly nature of the people which he also encountered.
>
> I've always experience [sic] Mr Creasey to be very polite, pleasant and respecting of me as a person."

Ms Jambaya's statement denies having heard Mr Creasey "throwing some racial remarks (especially at [her] or about[her])". In the circumstances, we do not accept the First Claimant's evidence that Mr Creasey's interactions with black members of staff were unwelcome or embarrassing.

64. In the course of his oral evidence he told us he would greet black nursing staff by saying "here come the Blacks". It was meant in a good-humoured way, he suggested and accepted as such. In many other contexts, saying that would be the basis of a well-justified complaint. However, again, the evidence produced for the grievance investigation appears to back Mr Creasey's account that, in the particular context of his relationship with Ms Nesi and Jambaya, it was taken in the spirit in which it was intended.

Claims

(1) The First Claimant

65. The First Claimant makes the following claims:

1. Harassment
2. Victimisation
3. Unfair Dismissal
4. Wrongful Dismissal
5. Holiday Pay
6. Unlawful Detriment

(2) The Second Claimant

66. The Second Claimant brings the following claims:

1. Unfair Dismissal
2. Wrongful Dismissal
3. Victimisation.

Illegality

67. Having read the statements and associated documents before oral evidence began, the Tribunal raised the question whether it lacked jurisdiction in relation to any of the Claimants' claims on grounds of illegality. The Tribunal acceded to the joint

invitation from the parties to hear all the evidence first and to allow submissions to be made at the close of proceedings.

68. Both parties invited the Tribunal's attention to the judgment of the Supreme Court in **Patel v Mirza** [2016] UKSC 42, [2017] AC 467, in which the Court reformulated the requirements of the defence of illegality.

69. The approach to be taken was summarised in the judgment of Lord Toulson JSC as follows:

> "The essential rationale of the illegality doctrine is that it would be contrary to the public interest to enforce a claim if to do so would be harmful to the integrity of the legal system (or, possibly, certain aspects of public morality, the boundaries of which have never been made entirely clear and which do not arise for consideration in this case). In assessing whether the public interest would be harmed in that way, it is necessary (a) to consider the underlying purpose of the prohibition which has been transgressed and whether that purpose will be enhanced by denial of the claim, (b) to consider any other relevant public policy on which the denial of the claim may have an impact and (c) to consider whether the denial of the claim would be a proportionate response to the illegality, bearing in mind that punishment is a matter for the criminal courts. Within that framework, various factors may be relevant but it would be a mistake to suggest that the court is free to decide a case in an undisciplined way. The public interest is best served by a principled and transparent assessment of the considerations identified, rather than by the application of a formal approach capable of producing results which may appear arbitrary, unjust or disproportionate."

70. As to the "various factors" that might properly be considered, Lord Toulson did not attempt to list them exhaustively, pointing, at Paragraph 107 of the judgment, to the "infinite possible variety of cases". He made approving reference to a list of factors proposed by Professor Andrew Burrows in his Restatement of the English Law of Contract (2016):

> "(a) how seriously illegal or contrary to public policy the conduct was; (b) whether the party seeking enforcement knew of, or intended, the conduct; (c) how central to the contract or its performance the conduct was; (d) how serious the sanction the denial of enforcement is for the party seeking enforcement; (e) whether denying enforcement will further the purpose of the rule which the conduct has infringed; (f) whether denying enforcement will act as a deterrent to conduct that is illegal or contrary to public policy; (g) whether denying enforcement will ensure that the party seeking enforcement does not profit from the conduct; (h) whether denying enforcement will avoid inconsistency in the law thereby maintaining the integrity of the legal system."

71. Lord Toulson listed some factors himself. One not reflected in Prof Burrows's list was whether there was a marked disparity in the parties' respective culpability.

72. The conduct in this case is, we consider, "seriously illegal". It is serious in two senses. The first sense is that the wrongdoing has been consistent and long-standing. From the outset of the employment of both Claimants a significant element of the benefits they have received in return for the provision of their labour has been undeclared benefits in kind. It is serious in a second sense: the public policy that they have frustrated is a very important one. There is a clear public policy in ensuring that employers and their employees do not structure their relationships so as to evade liability for tax. It is taxation revenue that pays for the essential services upon which so many of their fellow citizens depend. It also pays, of course, for the Courts Service and, more specifically, the Employment Tribunal. The effect of evading their tax liabilities is to pass their share of the burden to others.

73. The Claimants knew of and intended the evasion. The guiding principle for determining what they bought with their allowance was whether or not it could be passed off as having been purchased for the benefit of the residential home. It was not a case of a failure to recognise that the benefits in kind were properly taxable, there was a conscious effort to make sure that the true nature of the purchases was concealed from the Revenue. There were other individual instances of dishonesty. By way of example, the First Claimant agreed that a pay increase should be paid instead to his wife on the basis that it was remuneration for work he knew she was not doing in the home that he ran. His suggestion that he only latterly recognised that what he was doing was wrong was one that the Tribunal was unable to accept.

74. The wrongdoing was "central to the contract" – it was a portion of the consideration provided in return for the Claimants' labour.

75. The seriousness of the denial of enforcement for the Claimants is a question which turns, first, on the extent of that denial. The denial of enforcement that the Tribunal decided to consider was of their contractual and unfair dismissal rights. We do not underestimate the significance of those rights. We are also conscious that it is not for us to seek simply to punish the Claimants. We take the view that that they differ from the other rights sought to be enforced here. Taking, for example, the protection against harassment, discrimination rights are considered particularly significant. This is reflected in the fact that the prohibition of harassment applied before the employment relationship has even commenced (in contrast to unfair dismissal which, save in cases of automatic unfair dismissal, requires a period of qualifying employment) and in the fact that compensation is uncapped. Similarly, with victimisation, the protection is afforded to former as well as existing employees, compensation is uncapped, and the protection helps ensure the integrity of the other protections (and of their enforcement in tribunal) by protecting those who assert their rights. It follows that whilst the denial of enforcement of any right is a serious matter, we think it properly arguable that denying enforcement of unfair dismissal and wrongful dismissal rights is capable of being of a proportionate step where illegality of the sort found in the present case has occurred. As to whether it is

in fact proportionate, we return to that question once we have considered the other factors.

76. Turning to whether denial of enforcement will further the purpose of the rule infringed, we consider that it will. Employment Tribunal decisions are now made available to the public. One hoped for effect of that exercise is to allow decisions to guide other employers and employees in identifying good industrial and employment practice. It follows that not only will it be clear to the parties to this case that illegal conduct of this kind creates a risk of loss of the ability to enforce at least some employment law rights but there is a real, if modest, possibility that others will be assisted by the example.

77. We consider that denying enforcement of unfair and wrongful dismissal rights in circumstances where there has been persistent and consistent misleading of the Revenue is capable of being an individual deterrent and of having, for the reasons explained immediately above, a general deterrent effect.

78. Denying enforcement of unfair and wrongful dismissal rights will, by denying the Claimants access to benefits that the State might otherwise have conferred upon them, have the effect of removing from them, at least to some extent, the advantage that they have gained by withholding from the State the sums properly due to it as taxation.

79. We do consider that allowing enforcement risks an inconsistency in the law which would have the effect of making it harder to maintain the integrity of legal system. At a concrete level, the Tribunal has very limited resources. The cost of having an Employment Judge and panel of members consider the claim is not inconsiderable. It is funded from taxation. Our sitting on this case meant that we were not able to consider other cases. It is likely that in those cases the claimant would not have engaged in illegal conduct of the sort with which we are concerned here. Their justice, in consequence, is delayed. For the law to be prohibit unlawful arrangements of the present kind but then to ensure it has no consequence when parties to it wish to litigate over its termination risks, in our view, a meaningful inconsistency.

80. We do not think that there is a marked difference in culpability. This is not a case about an arrangement forced upon the Claimants. They embraced it willingly and implemented it themselves on a day to day basis. It might be suggested that this hands to the Respondents a windfall. However, we do not think that is so. If we had been persuaded it was principally the Respondents who were responsible for what occurred, we would have weighed that carefully and it might have pointed towards allowing the Claimants to enforce their rights. Similarly, if the Respondent had sought to counterclaim for breach of contract to recover the value of the benefits in kind transferred, we would have had to consider whether we would have allowed the Respondents to enforce their rights – we would have taken some persuasion. However, only the Claimants are seeking to use the Tribunal to enforce rights at this juncture.

81. Having considered the factors set out above, we conclude that the Claimants should not be permitted to enforce rights in relation to unfair or wrongful dismissal and those claims are dismissed. We conclude that it would be contrary to the public interest to enforce those claims. For the reasons given above, we conclude that the purpose of the tax legislation has been transgressed and that that purpose will be enhanced by denial of the claim. We have considered the public policy that the limited resources of the tribunal system should be allocated in a manner which is proportionate and fair to all users and the impact on the more general policy that those who have suffered legal wrongs should have access to redress and the outcome of that consideration is that we consider that the denial of the specific claims would be a proportionate response to the illegality. We turn therefore to consider the other claims.

The First Claimant

(1) The Harassment Claim

82. **Equality Act 2010, s. 26** defines harassment in the following terms:

> "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"

83. Counsel reminded of us of the helpful guidance given by Underhill J, as he then was, in **Richmond Pharmacology Ltd v Dhaliwal** [2009] ICR 724, EAT. We should ask ourselves: (1) Did the respondent engage in unwanted conduct; (b) Did the conduct in question either: (a) have the purpose or (b) the effect of either violating the claimant's dignity or (ii) creating an adverse environment for them, and (3) Was that conduct related to a relevant protected characteristic.

84. The present case is unusual because the First Claimant is not relying on his own protected characteristic. He is instead advancing a case of "associative" harassment. In her closing submissions, Ms Barrett sets out argument in support of her contention that an associative harassment claim is available. She relies upon **Coleman v Attridge Law** (C-303/06) [2008] ICR 1128 which established that for the purposes of the EU Framework Directive 2000/78 a claimant could complain of harassment where she was harassed because of her son's disability. She provided two examples of EAT cases in which claimants were able to rely on unwanted conduct relating to another's protected characteristic to found a claim of harassment under predecessor provisions: **Saini v All Saints Haque Centre** [2009]

IRLR 74 (a case on religious harassment) and **Moxam v Visible Changes Ltd** [2012] Eq LR 2020 (a case on racial harassment). Mr Wheaton's submissions on behalf of the Respondent do not contest the availability of an associative harassment claim in principle.

(a) Did the Respondent engage in unwanted conduct?

85. There was no dispute between the parties as to the liability of the three Respondents for the actions of Mr Creasey. The specific instances of alleged unwanted conduct are taken from the list of issues prepared for the hearing by the Claimant's representatives.

(i) *30 June 2016: References to Mr Singh*

86. Did Mr Creasey refer to Mr Singh as "it"? Mr Creasey is not recorded in the transcript of the 30 June 2016 call as referring to Mr Singh as "it". We do not find that he used that language on 30 June 2016.

87. Did Mr Creasey say of Mr Singh "he can work here if he works nights"? In the light of the transcript of the call between the First Claimant and Mr Creasey, we find that he did.

88. Did Mr Creasey say of Mr Singh "It's not a good image. We've got to think of image"? Again, in light of the transcript, we find that he did.

89. Were these instances of unwanted conduct? We find that they were. We find that the First Claimant found the statements upsetting.

(ii) *Other alleged conduct in the period January 2016 to July 2016*[2]

90. Did Mr Creasey refer to Mr Singh as it in the conversation in the garden and did he ask "is it a boy or is it a girl"? We find that he did use that language.

91 Did Mr Creasey say in the course of the 30 June 2016 conversation "you got lots of blacks here now"? In the light of the transcript we find that he did.

92. Did Mr Creasey try to discourage the First Claimant from hiring black candidates by shaking his head or saying "It's not the image we want"? We find that he did.

93. Did Mr Creasey display two wooden painted statues depicting black and Asian servants? We find that the statues were purchased by Mr Creasey and that he arranged for them to be displayed in the Lancing home.

[2] We have omitted Item 3 a. from the List of issues since it overlaps with items 1 a. to c. we have omitted items 3 d and e since they were not advanced in the course of the hearing. We have omitted item 3 f since it repeats item 3 b

94. Did he instruct the receptionists employed at the Lancing home to tell prospective job applicants whose name and/or accent sounded foreign that there were no vacancies? We do not consider that sufficient evidence was advanced before us to allow us safely to conclude that this occurred.

95. We accept that each instance we find made out above was an instance unwanted conduct. The First Claimant's evidence, which we accept, was that he found the behaviour objectionable.

(b) Did the conduct relate to a protected characteristic?

96. The references to Mr Singh in the course of the 30 June 2016 conversation related to Mr Singh's protected characteristic of gender reassignment. We do not think that they related to his protected characteristic of race.

97. Similarly, the reference to Mr Singh as "it" during the conversation in the garden related to his gender reassignment but not to his race.

98. The instances of unwanted conduct set out at Paragraphs 91 to 93 inclusive immediately above related to the protected characteristic of race.

(c) Did the conduct have the purpose or effect of violating the First Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the First Claimant?

99. The conduct did not have the purpose of violating the First Claimant's dignity or of creating what we shall refer to as an harassing environment. Mr Creasey genuinely does not appear to have thought that anyone would find what he had to say offensive.

100. Turning to the question of the effect on the First Claimant, we note that he does not appear to have raised any specific concerns about Mr Creasey's behaviour until his letter of 22 July 2016. That letter makes a rather glancing reference to the issue:

> "You have promised on numerous occasions that you would not interfere with my management of the homes but you seem unable to keep this promise. An example of this that is of particular concern to me is your questioning of the staff that I'm employing. You have an issue with some of our staff based on your judgment of their size, race and gender. This is completely unacceptable to me. I will employ the most qualified people for the role and that qualification does not include how they look …"

The First Claimant is not complaining expressly of associative harassment. Mr Creasey's alleged issues with size, race and gender are raised in the context of a complaint that he is interfering with the Claimant's management of the homes rather than that it is violating his dignity or creating an harassing environment.

101. The First Claimant is more specific in his witness statement. He talks about having to "endure" Mr Creasey's "racist comments" for a number of years. He says that he felt "embarrassed by [Mr Creasey's] comments and … insulted that he was so dismissive about people because of the colour of their skin." He complains that "Some of [his] friends at the times [sic] were black and having to work in such an environment made [him] feel hypocritical". A witness in the grievance process, Carol Wilson (a former deputy manager) records the First Claimant having been frustrated by Mr Creasey's approach and the alleged unfairness of the recruitment processes.

102. We have no doubt that the First Claimant deprecated Mr Creasey's behaviour. We accept he may have made him uncomfortable, frustrated and embarrassed, but we think that falls some way short of his dignity being violated or the environment being intimidating, hostile, degrading, humiliating or offensive. We have in mind Lord Justice Elias's warning in **Land Registry v Grant** [2011] EWCA Civ 769 that we should not "cheapen the significance of the words 'intimidating, hostile, degrading, humiliating or offensive environment'[3]". We were struck by the long period in which the First Claimant raised no objection with Mr Creasey, confining himself to complaining to colleagues. To look at a specific example, if he genuinely considered that the so-called "colonial men" statues created an harassing environment, he could, as manager of the home, simply have removed them from display. His own evidence was that he resisted Mr Creasey's attempt to steer him away from recruiting members of ethnic minorities without apparent consequence, so there is no reason to believe that putting the statues in a cupboard would have had any adverse consequences for him.

103. There is a logically prior issue, which is whether the harassment claim was in time. The incidents relied upon all pre-date the raising of the grievance on 22 July 2016. The latest incident appears to have been 30 June 2016. Day A was 19 September 2016. Day B was 19 October 2016. It follows that any claim had to be lodged by 19 November 2016 and the earliest date within time would be 21 June 2016. Had we taken the view that the First Claimant had been unlawfully harassed we would have concluded that there was, to use the shorthand, a continuing act which came to an end no earlier than 30 June 2016 and, therefore, that the claim was within time.

(2) <u>The Victimisation Claim</u>

104. Victimisation is prohibited by **Equality Act 2010**, **s. 27** which provides:

> "(1) A person (A) victimises another person (B) if A subjects B to a detriment because –
>
> (a) B does a protected act, or
> (b) A believes that B has done, or may do, a protected act.

[3] See Paragraph 47 of the judgment

(2) Each of the following is a protected act –

(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

105. The causal test – "because" – requires only that the protected act be a substantive cause, i.e. that it should have a significant influence, on the subjection to detriment.

(a) Did the First Claimant perform a protected act?

106. The First Claimant relies upon his letter of 22 July 2016. We have set out the relevant passage at Paragraph 100 above.

107. Submissions made on the First Claimant's behalf suggest that the passage contains an implicit allegation that recruitment decisions are affected by race or sex. We think that the passage does bear that interpretation. It was certainly interpreted that way by Ms Maharaj, who conducted the grievance investigation. It is dealt with at section 7 of the outcome letter and is headed "Discrimination towards staff based on race, size and gender". Ms Maharaj says that she consider the allegation to be "the most serious".

108. We find that the First Claimant's letter of 22 July 2016 was a protected act.

(b) Was the First Claimant subjected to detriments?

109. We find that the First Claimant was suspended and that suspension is capable of amounting to a detriment.

110. We find that the First Claimant was subject to allegations of misconduct and that such allegations are capable of amounting to a detriment.

111. We find that Mr Ilsley did suggest at his meeting on 31 August 2016 that disciplinary procedures would be engaged and that a dismissal and/or a report to the police were possible outcomes. That was behaviour which was capable of amounting to a detriment.

112. We find that on the same day and at a later meeting on 13 September 2016, Mr Ilsley did seek to negotiate a termination and that that was capable of amounting to a detriment.

113. We find that there was a failure fully to investigate whether or not Mr Creasey had authorised the expenditure for which the First Claimant was subsequently dismissed and that there was a failure to provide his solicitors with the potentially exculpatory material they had asked for. These matters are, again, capable of amounting to a detriment.

114. We find that the Claimant was dismissed and, once again, that is capable of amounting to a detriment.

(c) Was the First Claimant subjected to any of the detriments found above because he had performed the protected act?

115. The First Claimant was not subjected to a detriment because he had performed a protected act.

116. Having weighed the evidence before us we consider what happened was as follows. When the business was going well, Mr Creasey was a very generous man. His generosity was, to some extent, being underwritten by other taxpayers since the benefits he dispensed were not always scrupulously declared to the Revenue. As things grew more difficult, he seems to have begun to lose faith in the First Claimant. This is exemplified by his having appointed Ms Lelliot as Registered Manager of the Lancing home without consulting the Claimant in July 2015. The First Claimant complains in his witness statement that over 2015-16 "Mr Creasey made [his] life increasingly difficult". Mr Creasey was questioning the First Claimant's judgment when talking to staff and had told the Second Claimant that he did not respect the First Claimant. This was, of course, before the protected act. Even when the First Claimant was reinstated as registered manager, he complained that he was being set up to fail. When CCI began to take a closer interest in the non-declared benefits, Mr Creasey's view of the Kinsmans seemed to change from their being the appropriate recipients of his largesse to their being people who had exploited their position. We have little doubt that he had authorised the use of company credit cards for a certain amount of personal expenditure. It may be, though we do not need to go so far, that he authorised a specific sum. We consider, however, that he had either never quite put together (or had lost track of) what the accumulated value of his various acts of generosity had been until his accountants were advising that they threatened his bank covenant and risked triggering liability to the Revenue. We think that once he was focused on the actual extent of the various perks he resented them and, somewhat unfairly, blamed the Kinsmans. Having decided that he had been exploited, he lost trust and confidence in the Claimants and decided that they had to go.

117. It was to some extent the feeling on the First Claimant's part that the tide was begin to run against him and, in that regard, especially the meeting of 18 July 2016, that

prompted the grievance letter. So rather than the grievance letter prompting increasing hostility in Mr Creasey we think it was Mr Creasey's gathering hostility that prompted the letter.

118. Of course, the protected act does not need not be the main cause of the detriments. It need only be a substantive cause. Mr Creasey accepted that he "wasn't pleased" about the implication in the grievance letter that he discriminated on grounds of race and gender. However, he also said he did not take much notice. He said he "basically ignored it". This was because he was entirely satisfied in his own mind that the allegation was unfounded. From many witnesses we might have found that testimony very difficult to accept. However, it was consistent with his attitude to matters of race and gender generally demonstrated in his oral evidence. He simply took such matters less seriously than many others would. We do not think the protected act had any material influence on his decision that the Claimants had to leave.

119. In the circumstances the First Claimant's victimisation claim fails.

(3) <u>The Holiday Pay Claim</u>

120. We concluded above that the First Claimant was entitled as a matter of contract to 28 days or 5.6 weeks of paid holiday each year. That matches the entitlement generated by **Working Time Regulations SI 1998/1833 regs 13** and **13A.**

121. In the light of that finding the Respondents paid the First Claimant all he was due in respect of untaken holiday in calendar year 2017.

122. That leaves his claim that he should be paid in respect of untaken holiday in the year 2016. His contract precluded rolling over, so that he will have to rely upon the **WTR** to found his claim. We need, then to distinguish between the "ordinary" paid leave entitlement conferred by **Reg 13** and the "additional" entitlement conferred by **Reg 13A**. The latter is a purely domestic right and does not have to be interpreted in a manner consistent with the **Working Time Directive** (see **Fulton v Bear Scotland Ltd** [2015] ICR 221, EAT). **Reg 13A** allows for leave to be "rolled over" but only where there is a "relevant agreement" that it should be (see **Reg 13A(7)**). We have not been prepared to find that any such agreement exists. That means we are focussed on the 4 weeks of annual leave conferred by **Regulation 13**. We know from **Fulton** above, that we may assume that any leave taken may be assumed to be intended to use this entitlement first. Given that the First Claimant took two weeks holiday in 2016, what is at stake is 2 weeks of pay.

123. The First Claimant cites **NHS Leeds v Larner** [2012] EWCA Civ 1034 for the proposition that the Directive requires that an employee should be allowed to roll over leave that they are precluded from taking in the relevant leave year. Larner is not a case about suspension and we would have been interested to hear from Mr Wheaton whether he considered that a distinction fell to be drawn between cases

where an employee is precluded from taking leave through suspension and those where they are precluded through medical incapacity. Unfortunately, it was not a matter that he addresses in his submissions. Ultimately, we were persuaded that given the significance that the European jurisprudence has consistently given to the right to paid annual leave; the fact that suspension, like sickness absence, is a form of enforced absence from work; and given that suspension is intended to be neutral so that it does not follow that being absent on suspension requires any fault on the employee's part, we should find that where an employee is prevented from taking annual leave pursuant to **Reg 13** by reason for suspension, the entitlement should be rolled over.

124. We conclude, therefore, that the First Claimant was entitled to 10 further days of holiday pay on termination. That represents a further £2,423.10.

(4) The Unlawful Detriment Claim

125. The First Claimant alleges that he was subjected to a detriment on the ground that accompanied his father to the latter's disciplinary hearing. He alleges, that in consequence, there was a breach of **Employment Relations Act 1999, s. 12**.

(a) Was the Claimant subjected to a detriment?

126. The First Claimant alleges that he Mr Creasey told the First Claimant:

(1) That he and the Bournemouth manager felt that the First Claimant was "failing on every single aspect of the home's management";

(2) That the First Claimant had been pulling the wool over his eyes; and

(3) That he had learned a lot and that the First Claimant was incompetent.

As we found above, Mr Creasey did say those things. We also find that being told those things amounted to a detriment.

(b) Was the First Claimant subjected to those detriments on the ground that he had accompanied his father to the latter's disciplinary hearing?

127. We find that he was not. We think that the statements were a reflection of Mr Creasey's genuine beliefs about the First Claimant and that he would have said what he said in the manner in which he said it whether or not the First Claimant had accompanied his father. The disciplinary hearing was simply the occasion of the exchange, it was not part of the reason that Mr Creasey held or expressed those particular views.

128. In the circumstances, the claim fails.

The Second Claimant

129. As a result of our conclusion on the question of illegality, the only claim remaining to the Second Claimant is an associative victimisation claim. However, in the light of our findings at Paragraphs 115 to 118 above, that claim also fails as any detriment to which the Second Claimant might have been subject was not because the First Claimant had made a protected disclosure.

_____
Employment Judge Jones QC

Date:- 7 March 2018

Sent to the parties on:
23rd March 2018

_____

_____
For the Tribunal