Case Number: 2207416/2017

THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON CENTRAL**
BEFORE: **EMPLOYMENT JUDGE ELLIOTT**
MEMBERS: **MR M REUBY**
MS J GRIFFITHS

BETWEEN:

Mr M Khalifa

Claimant

AND

Ultimate Security Services Ltd

Respondent

ON: **24, 25, 26 and 27 June 2019 (In Chambers on 27 June 2019)**
Appearances:
For the Claimant: **Mr K Perera, legal assistant For the Respondent: Ms R White, counsel**

RESERVED JUDGMENT

The unanimous Judgment of the Tribunal is that the claims fail and are dismissed.

REASONS

1. By a claim form presented on 13 October 2017, the claimant Mr Mohamed Khalifa brought claims of automatically unfair dismissal and detriment for

whistleblowing, race discrimination and breach of contract. The respondent defended the claims.

2. The claimant worked for the respondent as a security controller from 6 March 2017 to the date of his dismissal on 22 June 2017.

The procedural background

3. A preliminary hearing for case management took place on 27 February 2018 before Employment Judge Glennie. It had been postponed from 21 December 2017 on the claimant's application due to his representative's unavailability and postponed again from 29 January 2018 for compassionate reasons for the claimant.

4. At the preliminary hearing on 27 February 2018 the claimant was given leave to amend to include reference to his complaint that a Mr Rasheid failed to complete his patrols and made fraudulent entries in the time records.

5. A list of issues was produced for the hearing on 27 February 2018 and the respondent was ordered to produce an updated clean copy of that list.

6. The full merits hearing has been postponed three times. It was originally listed for four days in April 2018 and was postponed to June 2018 on the claimant's application and with no objection from the respondent. It was listed for June and postponed on that occasion due to lack of tribunal resources. It was relisted for four days in November 2018. It was postponed, this time on the respondent's application, due to the unavailability of a key witness.

The issues

7. The issues were set out as an Agreed List of Issues at pages 66-70 of the bundle as follows.

<u>Direct race discrimination</u>

8. The claimant identifies himself as black and of Sudanese ethnic origin. His comparator is Mr Ahmed Rasheid who is said to be of Iraqi origin. The claimant also relies on a hypothetical comparator.

9. Did the alleged acts of discrimination occur at all?

10. Was there less favourable treatment because of race?

11. Is Mr Rasheid a valid comparator? Has the claimant suffered less favourable treatment compared to Mr Rasheid so as to establish facts

from which the tribunal could conclude that the treatment was because of his race? What was the reason for the less favourable treatment?

12. The acts of discrimination relied upon were as follows:

    a. Mr Rasheid failed to perform his duties on several occasions and allegedly made fraudulent entries in the time records contrary to his/ the respondent company's legal obligations while on the claimant's shift and allegedly abused the claimant verbally but was not disciplined. The claimant says he was dismissed for raising these issues.
    b. By contrast, the claimant was told off by his security manager and was warned not to approach Mr Rasheid and to leave him alone; and c. Was the claimant dismissed because management and white staff working under him could not accept that a black person was in control of security and was in charge of process implementation and supervision and decision-making (the claimant also in his claim alleges that his dismissal was due to making a protected disclosure)
    d. The dismissal.

13. The respondent denied the allegations set out above.

14. Was the claimant dismissed during his probationary period for reasons related to his performance and/or conduct as a supervisor and because he had previously been spoken to about his conduct and performance?

15. Did the respondent's security manager address with Mr Rasheid the issue raised by the claimant in a reasonable and proportionate manner.

16. The respondent disputes that there was less favourable treatment of the claimant when compared to Mr Rasheid and relies upon materially different circumstances (described as a situation unlike that of the claimant).

<u>The protected disclosure claim</u>

17. What was the reason or principal reason for the dismissal? Was it because the claimant made a protected disclosure? The burden of proof is on the claimant.

18. It is an issue for the tribunal as to whether the claimant made a qualifying disclosure under section 43B(1) of the Employment Rights Act 1996 (ERA). Did the claimant reasonably believe that it was made in the public interest? Was it made to his employer?

19. What was the principal reason for dismissal, was it because the claimant made a protected disclosure?

20. The protected disclosure relied upon is a complaint made by the claimant about Mr Rasheid whom the claimant says failed to perform his duties whilst on the claimant's shift when it was said to be illegal not to complete those patrols and that he made fraudulent entries. The reference to illegality that the claimant relies upon section 43B(1)(a) and (b), criminal offence and legal obligation. The criminal offence relied upon was put as theft and the legal obligation relied upon is the terms of the contract between the respondent and its client.

21. When the claimant commenced his evidence, health and safety issues were brought up under section 43B(1)(d) which had not previously been raised. The respondent in submissions reminded the tribunal that there had been no application to amend to include this and the claimant did not rely on this subsection in his submissions. We find that it was not part of the issues for our determination.

22. The relied upon disclosure was in writing on 18 May 2017 to Mr Sillitoe, Mr Sawyer and Mr Gurung.

23. At the outset we raised with the parties the case of ***Blackbay Ventures Ltd v Gahir*** (below) as a reminder of the exercise the tribunal had to follow in deciding whether the disclosure was qualifying and protected.

24. Alternatively was the reason for termination of employment the claimant's conduct and/or performance/capability?

Whistleblowing detriment

25. As above, did the claimant do a protected disclosure?

26. The detrimental treatment relied upon is as follows

    a. that after his work was initially appreciated and he had not been told of any shortcomings, there were complaints about his performance and behaviour
    b. he was told that his "*heavy-handed approach*" could be perceived as bullying when dealing with security officers on site. The claimant's case is that all he did was to check that the patrol records were a true record of patrols carried out.
    c. being subjected to segregation and pressure not to report Mr Rasheid and being told to leave him alone.
    d. the detrimental treatment is denied by the respondent and in the event that the Tribunal finds that the treatment happened, was it on grounds of making a protected disclosure?

27. Issues of remedy were not for this hearing.

Witnesses and documents

28. The tribunal heard from the claimant.

29. For the respondent the tribunal heard from (i) Mr Steven Sillitoe, Estate Security Manager and (ii) Ms Jana Havlikova, a security supervisor.

30. We had a witness statement from Mr Malcolm Sawyer who had worked for the respondent as an assistant security manager. We were told by counsel for the respondent that Mr Sawyer retired to Devon about four to five months prior to this hearing. He was originally due to be called by the respondent and as set out above, this hearing has been postponed more than once. It was a decision for the respondent as to whether to call Mr Sawyer and no application was made for a witness order.

31. There was a bundle of documents of around 400 pages. We had a cast list and chronology from the respondent. The chronology was agreed by the claimant on day 2.

32. We had a written submission from the respondent to which counsel spoke and an oral submission only from the claimant. All submissions and any case law referred to were fully considered even if not expressly referred to below.

Findings of fact

33. The claimant worked for the respondent for just over three months as a Security Controller, from 6 March 2017 to 22 June 2017 at the New Street Square site in London EC4. For the purposes of the race discrimination claim he describes his racial group as Black Sudanese.

34. The respondent is a security company. Based on the ET3 we find it employs over 2,000 employees in Great Britain and about 28 employees at the New Street Square site.

35. He was interviewed and offered the job of Security Controller by Mr Steven Sillitoe, Estates Manager. Mr Sillitoe was keen to have the claimant on board. On 13 January 2017 (page 125) Mr Sillitoe told HR in an email that he had interviewed the claimant and thought he would "*make a fine addition for us at New Street Square in the capacity of Shift Controller*" and on 7 February 2017, when the vetting process was taking time, he said "*I still wish for Mohammed to join us, and I absolutely don't want to see him without a job, so I'm willing to wait a little longer.*" (page 119).

36. Part of the role of a Controller is to step up and fill in for the Supervisor when the Supervisor is not present. The Supervisor takes overall responsibility for the team, working together with the Controller.

<u>Ethnicity breakdown</u>

37. The respondent's workforce at New Street Square was ethnically diverse. We saw a breakdown at page 397. This breakdown was prepared for the purposes of these proceedings. We were told by Mr Sillitoe and find that it was representative of the position in mid 2017 when the claimant was employed by the respondent.

38. Of 27 members of staff, 6 were described as British and only one as White British. The largest ethnic group was Nepalese of which there were 8. Other racial groups ranged from Ghanaian, Bangladeshi, Indian, Dutch, Spanish, Lithuanian, Grenadian, Portuguese, Mixed South African and Greek. Of the five members of the respondent's Leadership Team, Ms Curtis, the commercial manager is black.

39. It was accepted in evidence by Mr Stillitoe, Estate Security Manager, that the claimant was the only black person at Controller/Supervisor level. Of those we heard about, we find that Senior Supervisor Mr Yam Gurung is Nepalese; Controller Mr Hakim Haurari is North African and Supervisor Mr Uddin is Bangladeshi.

40. It is an agreed fact that the claimant was the only person to fail his probationary period in the last three years.

Contract and policy documents

41. We saw the claimant's contract of employment at page 129 of the bundle. The clause relating to the probationary period was at clause 2.3 (page 130). The relevant part of that clause said:

> *Your employment with the Company is also subject to a probationary period of 6 months. During this period your performance will be regularly reviewed and if you complete the period satisfactorily you will be notified in writing of your appointment to the Company's permanent staff. If during or at the end of your probationary period the Company is dissatisfied with your performance your employment may be terminated immediately in writing without notice in the first month and then one week's notice.*

42. We had the disciplinary policy at page 298 and the Probation Policy Line Manager's Guide at page 112, both of which were expressed to be noncontractual.

43. The Probation Policy Line Manager Guide said (pages 114 and 116):

> *4.1.1 review meetings provide the line manager and the employee an opportunity to review progress since the employee started, or alternatively since the last performance review meeting.*

4.1.9 Once a probation meeting has been completed a copy of the review meeting form detailing any action plans/time scales must be given to the employee and a reminder of the next probation review meeting date which will need to be confirmed on the review form.

5.0 1 & 3 Month Probation Review

5.1.2 the line manager will be required to discuss and document the following;

a) attendance and timekeeping
b) training delivered to date and grade the employee's performance
c) initiatives and accomplishments on site
d) any positive or negative client feedback
e) training and/or development requirements
f) overview of the employee's performance
g) actions and timescales agreed
h) discuss comments from employee
i) set a date with the employee for the next review meeting
j) employee to be given with a copy of the review document
k) document to be held on site in a secured environment, as the document is private and confidential

44. We have not set out each and every clause within the Probation Policy Line Manager Guide to which the claimant took the tribunal. We nevertheless read and considered all the clauses to which we were taken.

45. We also took account of this document being a "Manager Guide" and not a document with contractual effect.

The claimant's role

46. The claimant was a Security Controller, who had security officers reporting to him. Security Controllers report to a Supervisor and Supervisors report to Mr Sillitoe. In the absence of the Supervisor, the Security Controller acts in that role. When the claimant joined, his main supervisor and line manager was Mr John Gibson. Not long after the claimant joined, Mr Gibson had a significant bereavement and the claimant stepped up to cover his role. Mr Sillitoe's evidence was that the claimant did so admirably.

47. It was accepted by the respondent that because of his own difficulties, Mr Gibson had not done the best job at training the claimant.

Reports about the claimant

48. Mr Sillitoe's evidence was that problems began to surface with the claimant's work about three or four weeks into his employment, from about

the end of March 2017. Verbal reports began to reach him about the claimant missing emails and issues with access cards.

49. On 21 April 2017 the claimant sent Mr Sillitoe an email about security officer Rahour not wearing his security badge (page 239). On 24 April security officer Rahour sent an email to Mr Sillitoe (page 243) complaining that the claimant had been rude to him on the issue of the security badge and had raised his voice. Given the importance of wearing the security badge, Mr Sillitoe backed the claimant on the matter.

50. Mr Sillitoe continued to receive reports about the claimant being heavyhanded with the security officers. Mr Sillitoe was told that the claimant had been suspending officers and he had no authority to do so.

51. Security Officer Tichomirov complained to Mr Sillitoe that the claimant had bullied him. We saw a note of his complaint dated 10 April 2018 at page 316. In that email the security officer alleged that the claimant said: "*I am a boss and you do what I order to tell you*" and "*you have been suspended for not following my orders, you are wasting my and ultimately security time!".* It was reported to Mr Sillitoe that the claimant had summoned S/O Tichomirov back to the office after had he been to get changed to go home and berated him in front of others in the office. S/O Tichomirov went off sick for two days after this incident and Mr Sillitoe met with him on his return. Mr Sillitoe accepted that he did not speak to the claimant about the incident.

52. Mr Sillitoe also learned that the claimant had suspended the dock master Mr Fairweather who worked in the loading bay. The claimant admitted suspending Mr Fairweather (his statement paragraph 27). The claimant did not have the authority to suspend an employee.

53. On 13 May 2017 Senior Supervisor Mr Yam Gurung sent an email to Assistant Security Manager Mr Malcolm Sawyer complaining about the number of emails the claimant had left unattended over his last two night shifts. Mr Gurung thought it was something that the night shift could have done easily, he had let this go before, but was now becoming irritated (page 254). Mr Sawyer forwarded this email to Mr Sillitoe on 16 May 2017 (page 254). Mr Sillitoe saw this as a complaint that the claimant was not keeping on top of his administration.

54. There was a further complaint along these lines on 8 May 2017 from security supervisor Ms Jana Havlikova stating that cards had not been processed and tenants in the building had been complaining (page 256).

<u>The claimant's disclosure email</u>

55. On 18 May 2017 the claimant sent an email to Mr Sillitoe as the Estate Security Manager (page 261), copied to Mr Sawyer and Mr Gurung complaining about Security Officer Ahmed Rasheid. The email is the

disclosure relied upon by the claimant for his whistleblowing claim. It was titled "*S/O Ahmed Rasheid Patrol Report (4667)".*

56. The claimant's email said as follows (page 260):

> *Dear Sir security manager*
> *Steve Sillitoe*
> *Good morning*
> *As per my conversation with SSS Yam Gurung on Saturday, 13th of May 2017,*
> *About my continuous serious concern on the poor performance of the security officer A Rasheid on the patrols As I have*
> *always scrutinised the officers patrols?*
> *I have found out that S/O A. Rashid is missing major points,*
> *….most times he is scanning an over 20 per cent of the total patrol points, which have nothing to do with the actual targeted patrol.*
> *After drawing the S/S Y Gurung kind attention to this issue on Saturday, 13 May who was the duty supervisor at that day shift and SSS Y Gurung had a word with the concerned S/O*
> *and discussing my concerns with the duty supervisor Gibson we decided to escalate the issue to the security manager*
> *We do think S/O Ahmed does lack the basic knowledge of the patrols:*
> *Today example of the S/O performance:*
> *1- missed nine points from the actual patrol points, 145, 136, 135, 155, 157, 15 649, 50 and 51.*
> *2- 4 none patrol points are scanned by the S/O, which are, 52, 55, 57 and 47.*
> *After checking S/O A. Rasheid, I initially discovered that he was four points less of the total dedicated patrol points. But I started to scrutinise his patrols, while sending him back immediately to redo the missed initial points. But after a thorough scrutiny I have found out that about the above missed and none related patrol points hits To be fair to the S/O, there are two patrol points that are supposed to be on the patrol hit points,*
> *They were scanned by the S/O but they were not on the original patrol points 52, 55, 57.*
> *166 non-existent patrol points.*
> *Total score for hits on the 3rd patrol with 49 points, which are 11 points short of the original patrol points*
> *Regards*
> *Mohamed Khalifa*

57. The email read as a report on S/O Rasheid's performance and this was consistent with the subject title, "*S/O Ahmed Rasheid Patrol Report (4667)".* At the start of the email, after referring to a previous conversation on 13 May, the claimant introduced the matter as his serious concern on the poor performance of the security officer. He said that the officer lacked basic knowledge of the patrols.

58. The email made no mention of potential criminal offences or the terms of the contract between the respondent. The respondent has Key Performance Indicators (KPI's) agreed with their client to carry out a certain number of patrols with specified regularity. We did not have the KPI's in the bundle. We had only a few pages of the respondent's contract with its client. We had part of Section 3 starting at page 378 of the bundle with copies of clauses 1.1.1, 5.1.2, 6.1.1 and 6.3. Mr Sillitoe told the tribunal that they have a Service Level Agreement with KPI's, as they do with all their clients.

59. The claimant did not say in evidence that he was aware of the terms of the contract with the client. The tribunal asked Mr Sillitoe if Controllers or Supervisors had access to the terms of the contract with the client. Mr Sillitoe said that they do not. We find that the claimant was unaware of the terms of the contract with the client.

60. Mr Sillitoe and Ms Havlikova explained that there are a number of reasons that patrol points could be missed, for example a barcode reader could be damaged. If patrol points are missed it is the Controller's role to get an explanation or send them back to clock the missing point or to guide them or show them how to do it.

61. Mr Sillitoe replied about 3.5 hours later on 18 May (page 259). He asked what the claimant had done to address the issue of S/O Rasheid missing a number of patrol points. It is the Controller and/or Supervisor's role to send the officer back to complete the patrol or to show him the points he had missed if he was unsure. Mr Sillitoe was concerned that the claimant had given no information to show how he had attempted to deal with the issue. Mr Sillitoe saw this as a performance issue on the part of the claimant and wanted to meet with him to discuss it.

62. Mr Sillitoe was also concerned that the claimant had made some serious allegations against other Shift Supervisors and Controllers and he demanded to see proof of these allegations. We were not told the nature of these allegations. Mr Sillitoe candidly admitted in evidence that these allegations had made him angry. The claimant was relatively new to the team (he had been there for about two months) and Mr Sillitoe had worked with the team for some time and knew them well.

63. In addition, upon receipt of the claimant's email of 18 May, Mr Sillitoe downloaded the patrol statistics and found that they were within acceptable parameters save for the one raised by the claimant. Mr Sillitoe's evidence was that it was part of the claimant's job as a Controller to make sure that security officers were made aware of missed points and to ensure that they visited them before the patrol could be completed.

64. This responsibility forms part of the Security Controller's Assignment

Instructions at page 106 of the bundle which is the Controller's Job Description. Point 11 of those instructions state that the Security Controller must ensure that the shift carry out the correct patrols.

The meeting on 22 May 2017

65. Having also received complaints about the claimant, from S/O's Rathour and Tichomirov, Mr Sillitoe held a meeting with the claimant. The meeting took place on 22 May 2017. Mr Sillitoe made a note of the meeting on 23 May 2017 pages 261 – 262. Ms Havlikova was present at the meeting as a witness. She was not present as a note taker. Mr Sillitoe accepted in evidence that not all of the matters set out in his meeting note were covered in the meeting.

66. Mr Sillitoe reminded the claimant that he was in the seventh week of a sixmonth probationary period and the purpose of the meeting was to address concerns and give feedback. He said there would be a further meeting at the three-month stage and six-month stage. He raised the complaints from the two security officers and the fact that he was aware of an altercation between the claimant and Mr Fairweather when that officer was late back from a break.

67. Mr Sillitoe asked what the claimant had done to address S/O Rasheid's performance. The claimant blamed his supervisor Mr Gibson saying he felt it was his fault.

68. Mr Sillitoe agreed with the claimant that S/O Rathour should have been wearing his badge. As there was no evidence to substantiate the complaints of aggressiveness, Mr Sillitoe agreed with the claimant. Mr Sillitoe told the claimant he could not condone bullying in any shape or form and told him to "*take your foot off the gas*" to let the officers do their job and if there was reason to admonish an officer, to bring it to the attention of his supervisor.

69. Mr Sillitoe concluded the meeting by saying that they would meet again at the three month point to discuss progress. It is not in dispute that Mr Sillitoe told the claimant to "*take his foot of the gas*", meaning to let the officers get on with their job and not be so hard on them.

70. The claimant agreed in evidence that at the 22 May meeting, Mr Sillitoe gave instructions that he should focus on mastering the control room duties which was his primary responsibility. Mr Sillitoe accepted that he did not give the claimant a copy of his notes of that meeting.

71. On 22 May 2017 the claimant replied to Mr Sillitoe's email of 18 May 2017. Neither party could pin down the time of the meeting on 22 May 2017 so we are unable to make a finding as to whether the claimant's email was sent before or after the meeting. We take the view that nothing turns on this.

72. The claimant set out to what he had done to try to address matters with S/O Rasheid. He also complained that upon leaving the control room S/O Rasheid has told him to "*F* off*". He said this was witnessed by Ms Havlikova. Both of the respondent's witnesses said that swearing was not uncommon in the workplace but they did not tolerate that sort of swearing directed at a colleague.

73. Mr Sillitoe addressed the swearing issue with S/O Rasheid (his statement paragraph 19). He made it clear to S/O Rasheid that there would be consequences if he spoke to the claimant like that again.

74. Following this meeting Mr Sillitoe took soundings from colleagues about the claimant's performance. He asked two of the supervisors for their comments. On 8 June 2017 Supervisor Ms Havlikova sent an email (page 265) saying that she was not very happy to work with him particularly during lockdown procedures on site when the site was busy and needed a proper attitude and a quick response. She said she had to ask him a few times to be more careful. She also said she noticed that he was bossy to other offices which she thought was not needed. She thought he was not a team player.

75. On the same day, Controller/Supervisor Mr Haurari sent an email, page 266, with an 11-point list setting out concerns about the claimant's working practices. At point 6 he said that both he, Ms Havlikova and Mr Yam Gurung had trained the claimant "*on multiple occasions*". He also stated that he thought the claimant was not a team player and that he blamed others "*for his simple mistakes*".

76. Mr Sillitoe sent this information to Mr Calvin Pillay, an account director at the respondent stating: (page 267) "*Read through this Mail, I think I need to remove him as a controller. Your thoughts?"* Mr Pillay told Mr Sillitoe to contact HR.

77. On 9 June 2017 Mr Sillitoe sent an email asking for advice from HR page 271. He said he had received a number of complaints about a controller, ranging from him not carrying out his role as requested, failing to address work related concerns and bullying. He said that the controller was still within in his probation. He said that staff were refusing to work with him because of his bullying ways. Mr Sillitoe asked if he could meet with HR to give him some guidance. He said he felt he needed to act quickly.

78. Mr Sillitoe was asked in evidence why he needed to act quickly. His main concern was the bullying to make sure that it did not happen to anyone else.

79. Mr Sillitoe asked Mr Yam Gurung for a report on the claimant. On 10 June 2017 Mr Gurung sent an email (page 272) saying he found him very unorganised with emails, that he had trained him over the weekend on

handover but had not seen him complying and was surprised at his lack of knowledge.

80. It was put to Mr Sillitoe that he told Ms Havilkova, Mr Gurung and Mr Haurari what to write. He denied this and so did Ms Havlikova. It was put to him that what they said was similar. Mr Sillitoe said he thought this was because they were all observing the same things, such as the claimant not being a team player and not being good with his administration. We find that he had asked for feedback and as the supervisors were all observing the claimant's performance, we find that they were observing the same things and this is why their reports are similar. We find that Mr Sillitoe did not tell them what to say.

81. On 22 June 2017 Mr Sillitoe had a meeting with Mr Andrew Safo Poku, the Head of HR. The HR advice was for the claimant to fail his probation. Mr Sillitoe's main concern was for the site that he managed (New Street Square) and his team of officers.

<u>The three-month probationary review meeting of 22 June 2017</u>

82. On 22 June 2017 Mr Sillitoe held a probationary review meeting with the claimant. The meeting was also attended by Mr Sawyer the assistant security manager. Mr Sillitoe's note of that meeting was set out in an email of 22 June 2017 at 08:55 hours to Mr Safo Poku and Ms Taylor in HR, copied to Mr Pillay (page 273).

83. Mr Sillitoe told the claimant that he had not improved and as a result he had been obliged to apologise to a tenant on the estate after a number of access cards were incorrect. Mr Sillitoe told the claimant that his administration was lacklustre and his time management in prioritising jobs was very poor. He said that Mr Gurung, Ms Havlikova and Mr Haurari had all attempted to train him again and again. He accepted that the training given by Mr Gibson had been poor but the other three officers were experienced and had tried to train him.

84. The claimant told Mr Sillitoe that he believed it was a form of conspiracy because he had argued with Ms Havlikova for not filing or answering emails. He did not say that he thought it was because of his race or his email of 18 May.

85. Mr Sillitoe concluded the meeting by telling the claimant that he had failed his probation on grounds that he was not grasping the importance of administration and that he had isolated himself from the team by his heavy-handed approach. Mr Sillitoe's view was that the team would not respond to his supervision when the occasion called for it. He told the claimant to contact HR in relation to what happened next and any options that remained for him. It was the first time Mr Sillitoe had failed an employee's probation and we find he was unsure of what had to happen next. In his email of 22 June 2017 to HR after the meeting (page 273) he

said: "*I advised him that we would pay him for the entirety of the 7 days shift, and also that he should contact HR, in relation to what happens next and any options that remain for him."*

86. The email of 22 June set out for HR, Mr Sillitoe's reasons for failing the claimant's probation. These were for not grasping the importance of administration and his heavy-handed approach which meant that that the team would not respond to his supervision when needed. He said there had also been a complaint from a tenant.

87. It was accepted by the respondent that prior to the meeting on 22 June 2017, they did not give the claimant the evidence that had been collected for the purpose of that meeting. Instead, Mr Sillitoe went through those matters with the claimant in the meeting itself. This was a breach of the Probation Policy Line Manager Guide.

88. This is one of the most ethnically diverse workforces that this tribunal has seen in its combined experience. We saw no evidence of any barrier to those from ethnic minorities reaching senior positions. We find against the claimant on his assertion that he was "*dismissed because management and white staff working under him could not accept that a Black person was in control of Security and was in charge of process implementation and supervision and decision making*" (list of issues above).

89. It is hard to reconcile Mr Sillitoe's hand in the recruitment of the claimant with the claimant's argument that management could not accept a black person in control of security. Mr Sillitoe recruited him as a Controller and was prepared to wait for him while his recruitment checks were completed.

90. We find that the reason for termination of the claimant's employment was because of his poor performance in his probationary period.

<u>The comparator S/O Rasheid</u>

91. The claimant's case is that he was treated less favourably than S/O Rasheid. The claimant's complaints were that S/O Rasheid swore at him, that he was poor at his patrols. Mr Sillitoe acknowledged that S/O Rasheid, who was a bench worker, meaning that he filled in for other's absences, was inclined to cut corners from time to time. He would sometimes be a few minutes late back from breaks and took an extra five minutes when he could. Mr Sillitoe said he was "*on my radar to look out for".* He was very clear that the corner cutting was not about the security patrols themselves.

92. We find that it was the claimant's responsibility as a Controller and/or Supervisor to make sure that S/O Rasheid did his patrols and if he did not, to find out an explanation or to send him back to clock the points.

93. One of the material differences between the claimant and S/O Rasheid was that the claimant was a Controller and S/O Rasheid was a bench security officer. The claimant held supervisory responsibilities and one of Mr Sillitoe's concerns was his ability to effectively manage the shift.

94. The claimant complained that S/O Rasheid told him to "*F* off".* We were told that swearing was not uncommon in the workforce, but clearly it should not be used offensively between colleagues. Mr Sillitoe dealt with this, perhaps not in the way that the claimant would have wished but he did not leave it unaddressed. He gave S/O Rasheid a verbal reprimand and told him it would be dealt with more seriously if it happened again. S/O Rasheid accepted that he had done wrong and told Mr Sillitoe he would not do it again. By contrast, when the claimant's shortcomings were put to him, he did not take them on board and had a tendency to blame others, such as Mr Gibson.

95. We find that there was a material difference in the status of the claimant and his comparator, as the claimant held a supervisory role and a material difference in the claimant's response when shortcomings were put to him.

96. The issue this tribunal was required to determine was that S/O Rasheid failed to perform his duties on several occasions and made fraudulent entries in the time records contrary to his/ the company's legal obligations and that he verbally abused the claimant (list of issues).

97. We had no evidence that S/O Rasheid failed to perform his duties "*on several occasions*". We had evidence of one occasion and Mr Sillitoe's evidence that he had checked the records which were all within acceptable parameters, save for on the one occasion the claimant had raised with him. We had no evidence of S/O Rasheid making "*fraudulent entries*". We find he did not. This was a very serious allegation which was unsubstantiated. It was also the claimant's responsibility to deal with S/O Rashied to make sure that he completed his patrol properly. Mr Sillitoe also addressed the swearing issue.

98. The claimant also relies upon being "*told off by his security manager and was warned not to approach Mr Rasheid and leave him alone*" (list of issues). We find that the claimant was told by Mr Sillitoe to "*take his foot of the gas*". He was not told not to approach S/O Rasheid. This would have been impracticable given that he was in a supervisory position. Mr Sillitoe told the claimant generally to "*take is foot of the gas*" in relation to those he supervised because his heavy-handed approach was not appropriate. We find that the claimant was not "*told off*" by Mr Sillitoe. We find that certain performance issues were properly drawn to his attention in the 22 May 2017 meeting.

99. We find that there were materially different circumstances between the claimant and S/O Rasheid and that there was no less favourable treatment of the claimant because of his race.

Events after the 22 June meeting

100. The claimant telephoned Ms Taryn Garwood, an HR Manager. There was a transcript of the call from pages 275 – 278. Essentially, Ms Garwood did not know the background and could not help immediately.

101. On 4 July 2017 Mr Safo Poku, Head of HR, wrote to the claimant (page 279) to confirm that probation had failed and that as from the date of that letter, his contract of employment was terminated. The letter spelt out Mr Sillitoe's reasons for termination consistent with the email of 22 June 2017. Mr Safo Poku said there was no appeal process for that decision.

102. The claimant said that the decision was very unfair and he sent a lengthy email to Ms Garwood at 15:28 hours on 4 July 2017 (pages 280 – 284). He said he was truly shocked because over two weeks previously Mr Sillitoe had praised him and congratulated him. He said he had been treated in a "*horrid and ugly unprofessional way*" and he complained that no steps were taken to rectify his situation such as offering guidance or support on how to overcome the difficulties. He complained that he was not given extra training or coaching or closer supervision. He did not say in this lengthy complaint to HR that he thought that his dismissal was because of his race or because he sent the email of 18 May 2017 to Mr Sillitoe.

103. On 11 July 2017 the claimant complained by email to Mr Safo Poku (page 289). He said he wanted to discuss the matter further. In this lengthy email he once again made no reference to his email of 18 May 2017 or his race as being the reason for his dismissal.

104. Mr Safo Poku offered the claimant a meeting on 18 July 2017 at 10am. The claimant emailed at 10:06 hours on 18 July to say he could not attend due to an emergency. Mr Safo Poku followed this up on 28 July 2017 (page 286) asking the claimant how he would like to proceed and followed this up again on 17 August 2017 noting that the claimant had not replied. By this time Mr Safo Poku had heard from the claimant's solicitors.

105. In evidence, the claimant said he could think of no other reason other than his race as the reason for his dismissal. The tribunal reminded the claimant that he relied upon another reason, namely his whistleblowing claim.

106. In terms of his case that he was "*subjected to segregation*" as an act of race discrimination, the claimant's oral evidence was that the respondent put him in a place where he was not allowed to express his views. He accepted that he was not put in a place by himself or that people did not speak to him. He said: "*mentally I was isolated"* and he "*was not dealt with in an appropriate manner as a human being*".

107. In submissions it was accepted on behalf of the claimant that

"*segregation*" was not the appropriate word and the claimant sought to change the case after the conclusion of all the evidence, to that of him being "*cornered*" by Ms Havlikova, Mr Gurung and Mr Haurari in the reports that they made about him. This was not the case that the respondent had been required to answer.

108. We find that on his own admission the claimant was not segregated so his claim for race discrimination by being segregated, fails on its facts.

The relevant law

109. Direct discrimination is defined in section 13 of the Equality Act 2010 which 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.

110. 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.

111. 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

112. 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.

113. Bad treatment per se is not discriminatory; what needs to be shown is worse treatment than that given to a comparator - ***Bahl v Law Society 2004 IRLR 799 (CA)***.

114. 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.

115. In ***Madarassy v Nomura International plc 2007 IRLR 246*** it was held that the burden does 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".

116. 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.

117. 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.

118. The Court of Appeal in ***Ayodele v Citylink Ltd 2017 EWCA Civ 1913*** confirmed that the line of authorities including ***Igen*** and ***Hewage*** remain good law and that the interpretation of the burden of proof by the EAT in ***Efobi v Royal Mail Group Ltd EAT/0203/16*** was wrong and should not be followed

Protected disclosures

119. Under section 48A of the Employment Rights Act 1996, a "protected disclosure" is defined as a "qualifying disclosure" which is disclosed in accordance with sections 43C to 43H of that Act.

120. Section 43B(1) of the Employment Rights Act 1996 defines a qualifying disclosure:

> *(1) In this Part a "qualifying disclosure" means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—*
>
> *(a) that a criminal offence has been committed, is being committed or is likely to be committed,*
>
> *(b) the information disclosed tends to show that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject."*
>
> *(d) that the health or safety of any individual has been, is being or is likely to be endangered,*

121. Section 43C ERA provides that a qualifying disclosure is made in accordance with this section if the worker makes the disclosure to his employer.

122. Section 47B provides that a worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.

123. For the purposes of automatically unfair dismissal Section 103A ERA 1996 provides that an employee who is dismissed shall be regarded…… as unfairly dismissed if the reason (or, if more than one, the principal reason) for the dismissal is that the employee made a protected disclosure.

124. The time limit for bringing a detriment claim under section 47B is set out in section 48(3) of the Employment Rights Act 1996. It is the "reasonably practicable" test. An employment tribunal shall not consider a complaint unless it is presented—

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

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

125. In ***Cavendish Munro Professional Risks Management Ltd v Geduld 2010 ICR 325*** the EAT said that in order for a communication to constitute a qualifying disclosure under section 43Bm, it must involve the disclosure of information as opposed to the mere making of an allegation or statement of position. Slade J at paragraph 24 said "*Further, the ordinary meaning of "information" is conveying facts…..Communicating "information" would be: 'The wards have not been cleaned for the past two weeks. Yesterday, sharps were left lying around'. Contrasted with that would be a statement that: 'You are not complying with health and safety requirements.' In our view this would be an allegation not information".*

126. In ***Western Union Payment Services Ltd v Anastasiou EAT/0135/13*** the EAT reviewed the earlier authorities including ***Cavendish Munro.*** Eady J said that section 43B of the ERA required the disclosure to be one of "information", not merely the making of an allegation or a statement of position. The distinction can be a fine one to draw and will always be fact sensitive. The disclosure of information must further identify, albeit not in strict legal language, the breach of legal obligation relied on.

127. Doubt was cast on the decision in ***Cavendish Munro*** by the EAT in ***Kilraine v London Borough of Wandsworth EAT/0260/15*** which considered the distinction between an allegation and information. Langstaff P said: "*I would caution some care in the application of the*

principle arising out of ***Cavendish Munro****…… The dichotomy between "information" and "allegation" is not one that is made by the statute itself. It would be a pity if Tribunals were too easily seduced into asking whether it was one or the other when reality and experience suggest that very often information and allegation are intertwined. The decision is not decided by whether a given phrase or paragraph is one or rather the other, but is to be determined in the light of the statute itself. The question is simply whether it is a disclosure of information. If it is also an allegation, that is nothing to the point*".

128. The decision of the EAT was upheld by the Court of Appeal in ***Kilraine 2018 EWCA Civ 1436*** so that the position is that there is a spectrum to be applied. Although a pure allegation is insufficient a disclosure may contain sufficient information even if it also includes allegations. It is a question of fact for the tribunal. The information must also "*tend to show*" one or more of the matters set out in section 43B(1) ERA.

129. In July 2017 the Court of Appeal decided ***Chesterton Global Ltd v Nurmohamed 2017 EWCA Civ 979*** dealing with the question of the public interest test. The worker's belief that the disclosure was made in the public interest must be objectively reasonable. The words "*in the public interest*" were introduced prevent a worker from relying on a breach of his or her own contract of employment where the breach is of a personal nature and there are no wider public interest implications.

130. In ***Chesterton*** whilst the employee was most concerned about himself (in relation to bonus payments) the tribunal was satisfied that he did have other office managers in mind and concluded that a section of the public was affected. Potentially about 100 senior managers were affected by the matters disclosed. Mr Nurmohamed believed that his employer was exaggerating expenses to depress profits and thus reducing commission payments in total by about £2-3million.

131. The Court of Appeal held that the mere fact something is in the worker's private interests does not prevent it also being in the public interest. It will be heavily fact-dependent. Underhill LJ noted four relevant factors:

a. The numbers in the group whose interests the disclosure served
b. the nature of the interests affected and the extent to which they are affected by the wrongdoing disclosed
c. the nature of the wrongdoing disclosed – disclosure of deliberate wrongdoing is more likely to be in the public interest than the disclosure of inadvertent wrongdoing affecting the same number of people
d. the identity of the alleged wrongdoer – the larger or more prominent the wrongdoer (in terms of the size of its relevant community, i.e. staff, suppliers and clients), the more obviously should a disclosure about its activities engage the public interest although this should not be taken too far.

132. The Court of Appeal also sounded a note of caution (judgment paragraph 36) stating that the public interest test did not lend itself to absolute rules. The broad intent behind the amendment to the law in July 2013 introducing the public interest test, is that workers making disclosures in the context of private workplace disputes should not attract the enhanced statutory protection accorded to whistleblowers, even where more than one worker is involved.

133. In ***Blackbay Ventures Ltd v Gahir 2014 ICR 747*** the EAT summarised the case law in relation to public interest disclosures as set out below. We drew this case and the guidance set out below to the attention of the parties on day 1 of the hearing.

> *(1) Each disclosure should be identified by reference to date and content.*
>
> *(2) The alleged failure or likely failure to comply with a legal obligation, or matter giving rise to the health and safety of an individual having been or likely to be endangered or as the case may be should be identified.*
>
> *(3) The basis upon which the disclosure is said to be protected and qualifying should be addressed.*
>
> *(4) Each failure or likely failure should be separately identified.*
>
> *(5) Save in obvious cases if a breach of a legal obligation is asserted, the source of the obligation should be identified and capable of verification by reference for example to statute or regulation. It is not sufficient as here for the employment tribunal to simply lump together a number of complaints, some of which may be culpable, but others of which may simply have been references to a check list of legal requirements or do not amount to disclosure of information tending to show breaches of legal obligations. Unless the employment tribunal undertakes this exercise it is impossible to know which failures or likely failures were regarded as culpable and which attracted the act or omission said to be the detriment suffered. If the employment tribunal adopts a rolled up approach it may not be possible to identify the date when the act or deliberate failure to act occurred as logically that date could not be earlier than the latest of act or deliberate failure to act relied upon and it will not be possible for the Appeal Tribunal to understand whether, how or why the detriment suffered was as a result of any particular disclosure; it is of course proper for an employment tribunal to have regard to the cumulative effect of a no of complaints providing always have been identified as protected disclosures.*
>
> *(6) The employment tribunal should then determine whether or not the claimant had the reasonable belief referred to in s.43B(1) and under the 'old law' whether each disclosure was made in good faith; and under the 'new' law whether it was made in the public interest.*

134. A disclosure can still amount to a qualifying disclosure even if the information disclosed is not factually correct - ***Darnton v University of Surrey 2003 IRLR 133 (EAT).*** The test to be applied is whether the employee had a reasonable belief in the information at the time the disclosure was made.

Conclusions

Was the claimant's 18 May 2017 email a protected disclosure?

135. We have considered whether under the provisions of sections 43A and 43B(1) ERA, the 18 May 2017 email amounted to a qualifying and protected disclosure under these statutory provisions.

136. It was not in dispute that the 18 May email was sent to Mr Sillitoe who was the Estate Security Manager. We find that the disclosure was made to the claimant's employer for the purposes of section 43C. It was not suggested by the respondent that this email was not sent to the employer.

137. Before looking at the question of the reasonable belief of the claimant, we considered firstly whether the email tended to show one or both of the categories of information in sections 43B(1)(a) or (b). Those subsections are set out above in full, and in summary form we considered whether the email tended to show that a criminal offence had been committed; or that the respondent had failed to comply with any of its legal obligations under the terms of its contract with its client.

138. The email, the content of which is set out in full above, did not tend to show that a criminal offence had been, was being or was likely to be committed. It made absolutely no reference to criminal offences. There is no suggestion in that email that theft or fraud was being committed or perpetrated. We were told by the claimant that the criminal offence relied upon was that of theft.

139. To the extent that the claimant asks this tribunal to infer this from the content of the 18 May 2017 email, we are unable to do so. If the claimant wished to rely on a disclosure which tended to show that a criminal offence was being committed, he needed to say more. For example, he could have said something along the lines of: "*If the patrols are not being carried out properly by this officer, I believe the company is being paid by when it is not entitled to be paid and this is fraudulent".*

140. The claimant makes no reference to the contract with the client. Our finding of fact above is that the claimant did not have knowledge of the terms of the contract with the client. He was therefore not in a position to say that the respondent was failing to comply with any legal obligations in that contract because when he made the disclosure, he did not know what they were. It was open to the claimant to say, had he believed as much: "*I believe you are acting in breach of the terms of the contract with the client".* He said nothing resembling this.

141. In our view the claimant asks this tribunal to put an interpretation on his email of 18 May 2017 which is not there at face value. The email is a performance report on Security Officer Rasheid and it is a step too far to say that it discloses criminal offences or a breach of legal obligations. If

the claimant wished to disclose such matters, he needed to say more. We find that the email does not tend to show that a criminal offence has been committed, is being committed or is likely to be committed. We find that the email does not show that the respondent has failed, is failing or is likely to fail to comply with any legal obligation to which they were subject.

142. For these reasons we find that 18 May 2017 email is not a protected disclosure. As we have found that the email does not tend to show one of the categories of information in section 43B(1), it is not relevant or even possible to consider the question of reasonable belief. It has also not been necessary for us to consider the issue of public interest.

143. For these reasons the claims for automatically unfair dismissal for whistleblowing and whistleblowing detriment fail for the lack of a protected disclosure.

<u>The race discrimination claim</u>

144. The respondent has a workforce which is ethnically very diverse. We saw this from the breakdown on page 397 which just dealt with the staff at the New Street Square site. This is set out in our findings above.

145. It was the claimant's case that he was dismissed because management and white staff working under him could not accept that a black person was in control of security and was in charge of the process of implementation, supervision and decision making. We have found against the claimant on this on the facts.

146. We have also found in terms of his comparator, that there were materially different circumstances and/or that his complaints failed on their facts, for example there was no evidence of his comparator making fraudulent entries.

147. We have found that Mr Sillitoe's reason for dismissal was not the claimant's race but his poor performance during his probationary period.

148. The claimant did not have two years service and he did not have the right to the procedural protections that would have applied had he acquired the right not to be unfairly dismissed.

149. The respondent's processes were not ideal. Mr Sillitoe did not fully comply with the Probation Policy Line Manager Guide. Based on our findings above, we were nevertheless satisfied that the claimant's shortcomings were brought to his attention in the 22 May meeting and he was given an opportunity to improve before he was told he had failed his probation on 22 June 2017. In any event, the matters relied upon by the claimant fail as acts of direct race discrimination and there was no protected disclosure.

150. For these reasons, the claims fail and are dismissed.

_____

Employment Judge Elliott
Date: 27 June 2019

Judgment sent to the parties and entered in the Register on .
01/07/2019
for the Tribunals