EMPLOYMENT TRIBUNALS

Claimant: Mr J Mayanja

Respondent: Stockport Metropolitan Borough Council

Heard at: Manchester **On:** 5-8 October 2021
11 October 2022

Before: Employment Judge Phil Allen
Mr T Walker
Ms A Ross-Sercombe

REPRESENTATION:

Claimant: In person
Respondent: Ms L Quigley, counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant was not subjected to a detriment because he did a protected act or because the respondent believed that he may do so. The claim for victimisation does not succeed and is dismissed.

2. The claimant was not harassed related to race. The claim for harassment related to race does not succeed and is dismissed.

3. The respondent did not breach the claimant's contract of employment. The claimant's claim for breach of contract does not succeed and is dismissed.

4. The respondent did not indirectly discriminate against the claimant in relation to race. The claim for indirect discrimination does not succeed and is dismissed.

5. The respondent's counter-claim for breach of contract succeeds. The claimant must pay the respondent damages for breach of contract of **£187.44**, for overpaid salary which he is contractually obliged to repay, and **£415.76**, for overtaken annual leave which he is contractually obliged to pay to the respondent.

REASONS

Introduction

1. The claimant was employed by the respondent as a civil enforcement officer from 8 January 2018 until 22 May 2019, when the claimant was dismissed. The claimant alleged harassment on grounds of race, indirect race discrimination, victimisation, and breach of contract. The respondent also brought a counter-claim for breach of contract.

Claims and Issues

2. A preliminary hearing (case management) was conducted in this case on 7 September 2020. Following that hearing, and as ordered, the respondent asked the claimant a series of questions in writing. The claimant provided his responses on 12 October 2020 (69), which was treated as further and better particulars of his claim.

3. A list of issues had not been agreed in advance of the hearing, but the respondent had included in the bundle a draft list of issues which it had prepared based upon the claimant's further particulars (81i). At the start of this hearing the claimant confirmed that the list of issues contained the issues which needed to be determined in the claims he wished to bring, save only for the additional claims for which he was making an application to amend (see below). As a result, and as the application to amend was refused, the draft list of issues was accepted by the Tribunal as the list of issues which it needed to determine.

4. The issues identified in that list of issues were as follows:

Victimisation

The claimant alleges that he did the following protected acts:

a. The claimant's representation of Mr Gilmour in his probationary hearing;

b. The claimant's representation of Mr Gilmour on behalf of J Bon Laws in proceedings in the Manchester Employment Tribunal under case number 2418062/2018.

These acts are agreed by the respondent.

Further the claimant relies on the following detriments as detriments amounting to unlawful victimisation:

a. The decision to conduct a disciplinary investigation;

b. The decision to proceed to a disciplinary hearing;

c. Making findings of gross misconduct against the claimant including the decision to dismiss the claimant.

1. Are there facts such that the Tribunal could conclude, because of those protected acts, the respondent subjected the claimant to the above detriments, thereby amounting to unlawful victimisation?

2. If so, what is the appropriate remedy?

Racial harassment

3. In relation to the respondent's attempt to recover overpayments made to the claimant because of his unauthorised absence and the resulting confusion, did the respondent subject the claimant to unwanted conduct relating to his nationality or ethnic background which had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

   The list of issues noted that the respondent did not plead the statutory defence.

4. If so, what is the appropriate remedy?

Breach of contract

5. By dismissing the claimant summarily for gross misconduct, did the respondent act in such a way as to breach its contract with the claimant?

6. If so, then is the correct remedy the payment of the claimant's notice pay or something more?

Indirect race discrimination

7. By applying the sickness absence reporting procedure to the claimant and the requirement for him to comply with its terms, did the respondent apply a provision criterion or practice (PCP) which, by virtue of his ethnic background he was less able to comply by virtue of his ethnic background by reference to those who do not share his characteristic?

8. Did the application of the PCP put the claimant, or would it put those persons with whom the claimant shares the characteristic, to a disadvantage?

9. Can the respondent objectively justify the application of the PCP as a proportionate means of achieving a legitimate aim?

10. What was the disadvantage the claimant suffered and if so what is the appropriate remedy?

Respondent's counterclaim

11. Does the Employment Tribunals Act 1996 and the Extension of Jurisdiction Order 1994 apply to these proceedings?

12. Are the sums applied for by the respondent due under a contract of employment with the claimant?

13. If so, what is the appropriate amount of remedy?

5. In respect of the indirect discrimination claim, the list of issues did not necessarily record the claim as the claimant wished to pursue it and as it needed to be determined.

6. In box 15 of the claim form recorded (13) "*the claimant further challenges respondents imposition of new requirements (i) air ticket bookings (ii) medical insurance as proof of sickness (practice), as capable of resulting into indirect discrimination for black and Asian employees most are from countries that have no healthy insurance policies a test both (individuals) and (group) in collectively*".

7. The indirect discrimination claim was recorded in a slightly different way in the claimant's skeleton arguments. That recorded the questions to be asked as:

a. *Is imposition of medical insurance as test of sickness absence a policy, criteria or procedure?*

b. *What is reasonable refusing treating Ugandan medical prescription as a UK based one?*

c. *If so, would it unreasonably affect more Black people than their white counter parts?*

d. *Is the policy/PCP a proportionate means of achieving a legitimate aim?*

8. On the first morning of the hearing, the respondent was asked to identify the legitimate aim or aims upon which it relied in defending the claim for indirect race discrimination. The respondent's representative identified paragraphs 61 and, 62 of the grounds of resistance (39), which referred to relying upon the legitimate aims of: ensuring that the management of the civil enforcement team was able to properly resource enforcement services to the community; full staffing; legitimate service; removing disproportionate burdens on other staff members; as well as the costs of alternative and duplicative resourcing.

9. The way in which the claimant's breach of contract claim was contended in his skeleton argument differed from the way in which it was defined in the list of issues. The claim, as phrased in the skeleton argument (and at points during the hearing), focussed on whether the respondent had correctly applied its policies and procedures. This included whether the respondent was able to treat the misconduct identified as gross misconduct rather than misconduct. It also included whether the respondent was entitled to request that the claimant provide the documents sought from him, when the absence policy (for absences of less than seven days) recorded only the need for reasons to be provided and not a statement that evidence should be provided.

Procedure

10. The claimant represented himself at the hearing. Ms Quigley, counsel, represented the respondent. The hearing was conducted in-person.

11. A bundle of documents was prepared in advance of the hearing which ran to over 500 pages. The Tribunal read only the pages in the bundle to which it was referred by: the references in the respondent's witness statements; the claimant when he was asked to provide a list of pages which needed to be read alongside his witness statement on the morning of the first day; the respondent's representative on the morning of the first day (with reference to the claimant's application); or during the questioning of witnesses. Where numbers are referred to in brackets in this Judgment that is a reference to the page number in the bundle. A policy, and related document, was added to the bundle on the third day of hearing, after it was provided by the respondent.

12. Due to an omission by the Tribunal, the counter-claim had never formally been served on the claimant, nor had he been required to submit a response to it. It was confirmed with the claimant on the first morning that: he was prepared to defend the respondent's counter-claim; and that he had been given the opportunity to provide details of his response when he provided his further particulars (which provided a response to the counter-claim) (70). The claimant confirmed that he was prepared and able to defend the counter-claim. In the light of the claimant's confirmation at the hearing, the Tribunal waived the requirements of formal service and response; and proceeded to hear and determine the counter-claim as part of the hearing.

13. A connection between one of the members of the panel and one of the respondent's witnesses was identified and explained to the parties on the morning of the first day. The parties were given the remainder of the morning, whilst reading was being undertaken, to consider their position. At the start of the afternoon on the first day, both parties confirmed that they had no objection to the panel hearing the case and no application was made by either party for the member of the panel to recuse himself (that is to not be part of the panel conducting the hearing).

14. It was apparent that the parties had not prepared the case in accordance with the case management orders made by the Tribunal at the preliminary hearing. It was apparent that witness statements had only been prepared and finalised very shortly prior to the hearing. The claimant's position on the first morning was that he had not been provided with the respondent's witness statements. Arrangements were made for him to be provided with copies of those statements on the morning of the first day.

15. The claimant had prepared and provided to the Tribunal by email a skeleton argument document. A copy was located during the first morning of the hearing and that was provided to the Tribunal panel and the respondent's representative.

The application to amend

16. On the morning of the first day, the claimant made an application to amend his claim to include claims for direct sex and race discrimination. The claimant and

the respondent agreed, after it was suggested to them, that the Tribunal would first read the witness statements and the relevant documents first, before hearing the application to amend. Accordingly, during the morning of the first day and the start of the afternoon, the Tribunal read the witness statements and relevant documents.

17. The claimant's application to amend his claim was initially made verbally without the amendment sought being identified in writing. The claimant was provided with the opportunity, during the time for reading, to write down the amendment he sought to make to his claim (that was the claim(s) for direct discrimination which he wished to pursue). The claimant did so, and a copy was provided to the panel and the respondent's representative. When making the application orally, the claimant sought leave to amend his claim to pursue a claim for direct race discrimination. When the written applied for amendment was provided, the claimant sought to amend his claim to purse claims for both race and sex discrimination. The claimant's application to amend was considered for both direct race and sex discrimination based upon the document prepared.

18. In the afternoon of the first day the Tribunal heard the claimant's application to amend his claim. It also heard submissions from the respondent's representative. The respondent contended that the application to amend should not be granted. The Tribunal retired to consider its decision and, after detailed consideration, returned to the hearing and provided the parties with its decision and reasons, as detailed below at paragraphs 19 to 28. The application to amend was refused.

19. On the claim form the claimant did not tick the boxes for claims of race or sex discrimination, but he did tick the disability discrimination box (7). The content of box 8.2 of the claim form detailed a breach of contract claim and a victimisation claim (8). In box 15 (additional information) (13) there was detail of the claimant's harassment claim and then a section which claimed discrimination direct and indirect. The claim form made reference to direct discrimination, explicitly recording the claimant's protected characteristics as him being black and male, but went on to say that the basis for the claimant's feelings of detriment were based upon the protected acts relied upon for the victimisation claim.

20. The case management order issued following the preliminary hearing on 7 September 2020, ordered that the respondent was to send the claimant a list of questions to answer, and the claimant was to reply to those questions with "*his further and better particulars*". The claimant provided those further particulars on 12 October 2020 (69) What the claimant said in that document was very clear, under the heading "*Direct race discrimination*": "*The claimant did declare his race as black African male nonetheless, I have never actively sought direct race discrimination*"; and "*As it stands now, there is no direct race claim sought*".

21. The application to amend was made verbally on the first day of the hearing. The amendment sought was then recorded in writing. The claimant's written document which recorded the amendment sought, stated that he wished to be able to pursue claims to include direct race and sex of the disparity in treatment accorded to himself in comparison to what was accorded to his colleagues who also happened to be a different race (white) and sex (women). He wished to pursue this claim in relation to four incidents:

a. Evidence requested of the claimant under his return/back to work interview that was not requested of them;

b. Guidance from occupational health applied in their cases but not the claimant's;

c. The two comparators (named as Catherine and Wendy) both had more absences but their absence was never treated as gross misconduct; and

d. Discretion to treat the one day off awol as annual leave or unpaid compassionate time off, as was done in the comparators' cases.

22. The Tribunal took into account the case of **Selkent Bus Company v Moore**, the Overriding objective, and Guidance note 1 of the Employment Tribunals (England & Wales) Presidential Guidance General Case Management (as it relates to amendment). The Tribunal particularly noted paragraph 4 which says: "*In deciding whether to grant an application to amend, the Tribunal must carry out a careful balancing exercise of all of the relevant factors, having regard to the interest of justice and the relevant hardship that will be caused to the parties by granting or refusing the amendment*".

23. In the light of the particular points highlighted in the Presidential Guidance, the Tribunal considered:

a. The amendment to be made was a substantial alteration, introducing direct discrimination claims which relied upon comparators, and the claimant's alleged disparate treatment when compared to those comparators;

b. In terms of time limits, when taking ACAS Early Conciliation into account, the date upon which the claims should have been entered in order to fall within the primary time limits in the Equality Act 2010 was 15 September 2019. Therefore, the application to amend was made over two years after the primary time limit had expired. It was noted that the relevant test for an extension of time was whether it was just and equitable (rather than the more stringent reasonably practicable test);

c. When considering the timing and manner of the application, the Tribunal was at a loss to understand why the application had not been made earlier than the first day of hearing. The Tribunal understood that the claimant linked the application to disclosure made about the comparators, but it was not immediately apparent to the Tribunal why the documents disclosed triggered the application to amend. In any event, the claimant would have been able to make the application to amend prior to the first morning of the hearing and did not do so. The Tribunal also particularly took account of the fact that the claimant had clearly stated that he was not pursuing a direct race discrimination claim in the further particulars provided on 12 October 2020 (and had made no reference to direct sex discrimination at all) (69).

24. The most important part of the test was to balance the hardship and injustice of allowing or refusing the amendment. The Tribunal took into account that:

    a. If the application was refused, the claimant would be unable to pursue the new claims which may have merit and therefore that was a particularly significant hardship. However, the claimant would still be able to pursue the claims he had chosen to bring in his claim form (and further particulars); and

    b. The respondent highlighted that they had not prepared for the hearing on the basis of the claims which the claimant now wished to bring. They would need to call an additional witness or witnesses. They would need to reconsider disclosure. The impact would be that the four-day hearing would need to be postponed. That would have inevitable cost implications and, particularly in the light of the likely lengthy delay before a four-day hearing could be re-listed, there would be the impact on the evidence and recollection of witnesses which a further extensive delay would have.

25. The Tribunal considered the overriding objective and, of course, the need to deal with cases fairly and justly, and noted the need to avoid delay (so far as is compatible with the proper consideration of the issues) and save expense.

26. The Tribunal observed that it was highly unsatisfactory that there had not been an agreed list of issues prior to the first day of hearing.

27. On balance, and having carefully considered the factors outlined, the Tribunal's decision was that the application to amend was refused.

Other procedural matters

28. On the second day of hearing, the Tribunal heard evidence from the claimant, who was cross examined by the respondent's representative, before being asked questions by the Tribunal.

29. During the claimant's evidence he referred to various documents which were not in the bundle. The claimant was invited to provide copies to the Tribunal during the hearing (being documents which should have been disclosed in any event). The claimant did not provide any additional documents. After the issue was raised, the claimant explained that he did not have some of the documents referred to.

30. On the third and fourth days of the hearing, the Tribunal heard evidence from the following witnesses called by the respondent, each of whom was cross examined by the claimant and was asked questions by the Tribunal: Mr David Whitfield, Head of Parking; Mr Ian O'Donnell, Head of Service for Public Protection; Mrs Rowena Hall, senior officer within the HR team; Ms Lindsay Bryan, Operational manager for Public Protection; and Mr Andrew Kippax, Strategic Housing Lead.

31. After the evidence was heard, each of the parties was given the opportunity to make submissions. It was not possible to hear those submissions in the time initially allocated for the hearing, so the hearing was re-listed for a further day when submissions were heard. That fifth day was delayed longer than would have been

ideal, as a result of a postponement of the re-convened date initially listed, and issues in identifying an appropriate date available to the panel and the parties. Prior to the fifth day, each of the parties provided detailed written submissions and the claimant provided a further document detailing a list of authorities and essential passages. The Tribunal read the submission documents provided. On the morning of the fifth day each party also made submissions orally.

32. Judgment was reserved and accordingly the Tribunal provides the Judgment and reasons outlined below.

Facts

33. The claimant worked for the respondent as a civil enforcement officer from 8 January 2018.

34. The Tribunal was provided with a statement of particulars of employment which had been issued to the claimant on 3 January 2018. That provided that the claimant was entitled to salary to be paid on or about 15th of the month. In relation to overpayments, it provided the following (204):

> *"The Council shall be entitled to deduct from your salary (or other payments due to you) any money which you may owe to the Employer at any time. If you owe the Employer money due to any overpayment, this will usually be repaid by deductions from salary over the same number of months as the overpayment occurred. If you leave your employment the Council will recover any monies owed from the final payment."*

35. The provision regarding holiday entitlement (205) provided that the claimant was entitled to 21 days holiday, plus eight statutory national holidays, and two extra-statutory days, per annum. In relation to outstanding leave on termination it said the following (206):

> *"If at the termination of your employment you have a holiday entitlement you have not yet taken, you will be required to take that annual leave during any period of notice given to or by you. If you have taken more days than you have accrued you will be required to pay back the deficit."*

36. The statement of terms and conditions made reference to a disciplinary procedure and a grievance procedure. The provisions detailed sickness allowance. The document provided that, if an individual was prevented from working due to illness, they should notify their immediate supervisor by the start of the working day. The document expressly provided that messages should only be left if the manager could not be contacted. Absences of up to seven days required a completed self-certification form and (207): *"For absence beyond 7 days you are required to obtain a medical statement signed by a doctor".* The statement provided for four weeks' notice of termination to be given for an employee of the claimant's salary and grade.

37. The respondent had an employment relations policy and procedure which included within it the disciplinary procedure. As relevant to this case, that provided that (at 7.3) (454):

> *"Certain misconduct, normally referred to as gross misconduct, is so serious that the first occurrence would probably call for summary dismissal. Acts which constitute such misconduct are those resulting in a serious breach of the terms of employment."*

38. The claimant placed significant reliance upon Appendix 1 of that document (472). That appendix included examples of misconduct and, separately, examples of gross misconduct. At the start of the section for examples of misconduct it said:

> *"The following list contains examples of misconduct. It is not intended to cover all possible circumstances which may arise. Some of the examples listed below may be regarded as gross misconduct in certain circumstances."*

39. That list included poor attendance and unauthorised absence. Unauthorised absence was not present in the listed examples of gross misconduct. The list of examples of gross misconduct was clearly stated not to be exhaustive. That list included (amongst other things) fraud and serious breach of confidence.

40. The respondent also had a sickness absence procedure which was contained within the sickness absence management policy and procedure (487). That provided for absences to be reported as soon as possible on the first day of absence, no later than 10.00 am or within one hour of the normal starting time. That required the reason for absence to be provided. All absences of seven calendar days or less were to be self-certified. For all absences over seven calendar days, it said: *"must be covered by a medical certificate (also known as a Fit Note)".* There were provisions relating to maintaining contact during sickness absence. There were also provisions regarding the return-to-work interview. The claimant emphasised that those provisions stated that the purpose of the return-to-work interview was to discuss the reason for the absence; the relevant provisions did not expressly require the production of evidence about the absence.

41. On 11 October 2018 the claimant was spoken to by his manager about being absent on the day prior to, and the day following, annual leave. The Tribunal was provided with a note recording the conversation (234). The claimant accepted that he had been mistaken and apologised. No formal action was taken. The claimant booked the two days as annual leave and was paid for them.

42. The claimant booked a period of annual leave during which he attended his sister's wedding in Uganda. The leave commenced on 24 January 2019. The claimant was due back in work on 18 February 2019. The respondent's evidence was that the rotas were written a year in advance and it was important to the respondent to ensure that the required number of civil enforcement officers were working at any time.

43. On 12 February 2019 the claimant obtained medication related to malaria from the Gavana Medical Clinic (441) (a clinic in Uganda). The claimant placed significant reliance upon that document as proving his ill health and providing the certification that the respondent sought for absence. The Tribunal found the document hard to read. The document contained handwritten details about medication which appeared to have been prescribed or provided. The document contained a stamp with the date and number for the relevant clinic. The document

did not provide any detailed information about: the claimant's medical condition; who the claimant had been seen by at the time; or about any diagnosis for the claimant (save for the words "*malaria*" appearing at the top of the document). The document did not appear to have been signed by a Doctor and it did not contain much (if any) of the detail which would normally appear on a Fit Note from a UK based GP.

44. The claimant's evidence was that he had been booked to return from Uganda on a flight with Ethiopia Airlines on 15 February 2019. This was not a direct flight. The claimant's evidence was that the flight was booked through someone else. He did at some time have a flight number and a ticket for the flight. As a result of ill health, the claimant said he was not able to board the flight. No evidence was provided to the respondent or the Tribunal which evidenced that the claimant had ever been booked on such a flight.

45. On Monday 18 February 2019 the claimant was due to work for the respondent. He did not attend and did not contact the respondent. The claimant accepted (for this day only) that he was absence without leave. The claimant's evidence was that he had endeavoured to email the respondent on Saturday 16 February to inform them of his absence, but the email had not sent. No evidence was provided of this email or draft email, or of the fact that it had not sent. The claimant explained that he did not telephone from Uganda due to cost.

46. At 16.11 on Tuesday 19 February 2019, a day when the claimant had been due to work, Mr Whitfield sent the claimant a Facebook Messenger message (261). He enquired after the claimant and expressed concern about his safety. He explained that the respondent had been trying to contact the claimant by phone and had left messages, and asked him to respond. The claimant's evidence was that he did not receive voice messages in Uganda.

47. The claimant responded on Messenger at 17.28 (262) on Tuesday 19 February 2020 at 17.28. He apologised and said he was improving but was not yet well. He said:

> "*Contracted malaria mid last week and was in hospital until yesterday.*
>
> *Talked to Ethiopian airlines a day before my flight and was advised following the Ebola epidemic in eastern Uganda no one with fever-malaria like symptoms is allowed onboard as a precaution.*
>
> *Sent ya an email on Saturday which I resent today when I realised initial attempt failed.*
>
> *My next appointment with the doctor is due on Saturday, given an all clear I will then make travel re-arrangements with Ethiopian airlines*".

48. On 11 March 2019 the claimant sent Mr Whitfield an email (258) which appeared to record the claimant sending an email to Mr Whitfield at 09.52 on 19 February 2019 and it not being delivered. The 19 February was the Tuesday (and not the Saturday, which had been the 16 February). That (proposed) email from the claimant said:

> "*just realised my email of Saturday failed to deliver. I contracted malaria last week been in hospital until yesterday. Contacted Ethiopian airlines in advance on Friday and was advised due to the ongoing Ebola scare in eastern Uganda anyone passengers with malaria-fever symptoms are barred from boarding the aircraft. Was advised when my treatment is finished to contact them with a confirmation letter from doctors. On medication but not in hospital any more…*"

49. In answers to cross-examination, the claimant confirmed that he had never been hospitalised nor had he stayed in hospital. He had visited the clinic for his malaria. He confirmed that there were only a few hospitals in Uganda and the clinic where had had received treatment had the ability to treat patients who needed to stay. He did not agree with the suggestion that the statements made regarding being in hospital were misleading. He emphasising that he visited the clinic more than once.

50. On 5 March 2019 the claimant returned from Uganda to the UK on a flight (or flights) with Ethiopia Airlines, as was evidenced by the boarding card which the claimant retained (441). The claimant's evidence was that the flight left Ethiopia on 4 March. What was recorded on the boarding card was that the flight boarded at 00.20 on 5 March. The claimant returned to the UK later that morning. The claimant's evidence to the Tribunal was that he had been given a letter which proved that he was fit to travel as such a document was required to board the aircraft. It was his evidence that he had not retained a copy of that document, and he had been required to give the original to the airline at the time that he boarded the flight.

51. During the period of 6-8 March 2019 the claimant was granted emergency leave related to the confiscation of his passport on his return to the UK and his right to work. Those days did not form part of the respondent's decision-making and were not relevant to the Tribunal's decision.

52. The claimant had rest days on 9 and 10 March 2019. On 11 March 2019 the claimant returned to work. Mr Gilbank (the claimant's manager) and Mr Whitfield (Mr Gilbank's manager) met with the claimant on 11 March 2019. The claimant provided the boarding card for the flight upon which he had returned (441) and the document from Gavana Medical Clinic (also 441).

53. Mr Whitfield's evidence was that he made it clear to the claimant that he needed to provide proof of his original flight, and that the document from Gavana Medical Clinic was not proof of the claimant's hospitalisation. Mr Whitfield's evidence was that the claimant acknowledged this.

54. Mr Whitfield asked the claimant if he had travel insurance. Mr Whitfield's evidence was that he had asked for this not because there was a requirement that it should be provided, but because it might have demonstrated what the claimant said about the existence of his original booked flight and the reason for him being unable to return on it. There was no dispute that the claimant did not have travel insurance.

55. The claimant, in his witness statement, did not provide any evidence about what occurred at either of the meetings of 11 or 12 March 2019. There was no suggestion that, at the time, the claimant raised any contention that he would not

provide the documents sought because the respondent was not entitled to request them. Mr Whitfield was cross-examined by the claimant about this meeting on the basis that it was a return-to-work meeting and therefore the procedures did not provide for the evidence sought to be required/requested. In the answers he gave, Mr Whitfield was very clear that he did not consider this to have been a return-to-work meeting, rather it was a meeting intended to obtain the evidence required about the claimant's absence from work without authorisation.

56. On 12 March, Mr Whitfield again met with the claimant. Mr Whitfield's evidence was that he spoke to the claimant in a room, as he wanted to make it clear to the claimant that in the absence of anything further from him, the matter was starting to escalate. Mr Whitfield's evidence was that by this time he was beginning to question whether the claimant's *"excuses were genuine and his intentions were as legitimate as he had made out when requesting the leave".* Mr Whitfield again asked for documents and the claimant still had nothing else to provide. Mr Whitfield's evidence was that he provided the claimant with his own phone for the claimant to phone the friend who had bought the tickets; the claimant dialled the number but his friend did not answer. The claimant was given permission to use his work mobile phone to phone his friend to obtain some proof about the flight. Mr Whitfield's evidence was that he did this *"so that he could put the matter to bed".*

57. Mr Whitfield knew about the assistance the claimant had provided to Mr Gilmour. His unchallenged evidence was that he did not inform Mr O'Donnell or Mr Kippax about it.

58. Mr O'Donnell was a more senior manager who had not previously had any dealings with the claimant. On 13 March 2019 he was approached by Mr Whitfield, who told him what had occurred. Mr O'Donnell took advice from Human Resources. He decided to meet with the claimant. He did so, accompanied by Mrs Hall. Mr O'Donnell's view was that the claimant's explanation for his extended absence was considered unsatisfactory. He met with the claimant to give him the opportunity to provide evidence and, in answer to questions, he explained that he expected the claimant to provide the documents requested (such as evidence of the flight upon which he had been booked). As a result of the explanation provided by the claimant, the lack of documentation, and the claimant's demeanour and responses in the meeting (he was felt to be high-handed, confrontational, and evasive), Mr O'Donnell decided that he felt that the claimant's explanation lacked credibility. He took the view that it was apparent that the claimant had not been in hospital (as indeed he had not been), which contradicted what Mr O'Donnell believed the claimant had told his manager.

59. Mr O'Donnell adjourned the meeting and spoke to Mrs Hall. He decided that the matter needed to proceed to a full investigation. He felt that the claimant's account was not stacking up and there was no evidence that supported his version of events (when there easily could have been). He also decided that one potential outcome could be gross misconduct (which he confirmed in his letter). Mr O'Donnell was very clear, when answering questions, that when meeting with the claimant he was not doing so under the absence policy, rather the meeting was one which resulted in the instigation of an investigation under the disciplinary policy.

60. Mr O'Donnell also made the decision to suspend the claimant on 13 March 2019. At the time that he made the decision to suspend and instigate an investigation under the disciplinary procedure, he did not know that the claimant had supported Mr Gilmour. He was unaware of the protected acts. It was clear that Mr O'Donnell reached his own decision based upon what he had been told and heard.

61. The meeting between Mr O'Donnell and the claimant reconvened and the claimant was informed that he was suspended. A letter was sent to the claimant on 13 March detailing the decisions and the reasons for them (270).

62. Ms Bryan undertook the investigation into the issues raised. She emailed the claimant on 27 March 2019 introducing herself (289). She was not directly involved with the claimant's service area. The claimant was invited to an investigation meeting on 2 April in a letter of 27 March (290). The claimant did not attend for the scheduled meeting and was telephoned by Ms Bryan on 2 April. The claimant informed Ms Bryan that he had not received the invitation letter. The claimant asked for the revised meeting date to take place after 5 April as he had a GP appointment to discuss what he said were the ongoing symptoms following his malaria. Ms Bryan suggested to the claimant that he should obtain the appropriate certification from his GP. No documentation was ever provided by the claimant (to the respondent or the Tribunal) from a UK based medical practitioner which recorded that the claimant had ever had malaria, or that the claimant had reported to the Medical Practitioner or GP that he had done so.

63. The claimant was invited to a disciplinary investigation meeting on 11 April. That was confirmed in an email from Ms Bryan on 3 April (293) and a letter from Ms Bryan on 4 April (295). The claimant acknowledged the email and stated that he would be attending accompanied by his union representative (301). The claimant failed to attend that meeting. He rang Ms Bryan to say he was too ill to attend.

64. The investigation meeting was rescheduled for 17 April, which was confirmed in a letter of 16 April (311). The claimant did not attend the rearranged meeting. Accordingly, Ms Hall emailed the claimant on 18 April to say that as he had not attended the three scheduled meetings the intention was to move straight to a disciplinary hearing (314). Ms Bryan confirmed to the claimant that the matter was being escalated to a formal disciplinary hearing to be held on 9 May (316).

65. The claimant was sent an invite to a disciplinary hearing signed by Ms Bryan on 24 April (317). That stated that the three allegations which were to be determined at the disciplinary hearing were: that the claimant was absent from work without permission from 18 February 2019 to 6 March 2019; that the claimant had failed to follow the correct reporting procedure as outlined in the sickness absence procedure; and that the claimant had been in contact with colleagues without permission whilst suspended on two occasions.

66. The latter allegation related to something which had occurred during the claimant's suspension and the investigation. On 17 April 2019 Ms Bryan saw an email from Mr Whitfield (316C). It was her evidence that she had seen this after she had returned from the third investigation meeting which the claimant had failed to attend, and after she had resolved to move issues forward to a disciplinary hearing. That email detailed that another Civil Enforcement Officer had been contacted by the

claimant the previous week and Mr Whitfield had followed it up to find out if that was true. What Mr Whitfield recorded was:

> *"He said that* [the claimant] *had enquired how he was and mentioned that he was defending a dismissed CEO and would be hopefully back in work this week after suffering from Malaria."*

67. Ms Bryan subsequently spoke to Mr Whitfield, who provided her with some background, which was recorded in a handwritten note on the same document. That handwritten note made reference to the fact that the claimant was representing a Civil Enforcement Officer in an "*Industrial Tribunal*". That was the reason why the claimant said he had contacted the individuals during his suspension.

68. Ms Bryan addressed this email at some length in her witness statement. Her evidence was that the fact that the claimant was representing another Civil Enforcement Officer was not something which crossed her mind as being relevant to the other issues. Her evidence was that she made the decision that the matter should proceeded to a disciplinary hearing because the claimant had refused to engage with her and provide his side of the story in relation to what she believed was unauthorised absence and an explanation that did not add up. The third allegation related to the claimant contacting other employees whilst suspended; but that allegation was not because the claimant was representing another Civil Enforcement Officer.

69. An occupational health assessment was provided to the respondent following an initial consultation with the claimant on 29 April 2019 (442a). That report confirmed that the claimant was fit to attend a management meeting. It referred to the claimant having reported ongoing anxiety and chest pain, but recorded that the claimant had reported that his chest pain had resolved.

70. Other than the document provided from the Gavana Medical clinic, a prescription of 2 April 2019 (442) (see below), and the occupational health report, no other medical evidence whatsoever was provided to the Tribunal. No Fit Notes were provided, nor was there any reports or records provided by the claimant from his GP or a treating Doctor. When asked by the Tribunal about the medical records to which he had referred during his cross-examination, the claimant emphasised the two prescriptions and explained that they were the medical evidence upon which he wished to rely. He went on to say that he had endeavoured to obtain records from his GP but they had not yet been provided.

71. Mr Kippax, the respondent's Strategic Housing Lead, was asked to hear the claimant's disciplinary. Prior to hearing the case and being presented with the case details, Mr Kippax's evidence was that he had no knowledge of the claimant and no involvement in his area of work. It was also Mr Kippax's evidence that he was not aware that the claimant had provided support to Mr Gilmour. He did not have any knowledge about Mr Gilmour until he saw the claimant's appeal letter of 12 June 2019 (sent after he had made his disciplinary decision).

72. The first disciplinary hearing was scheduled for 9 May 2019. The claimant contacted Ms Bryan on 7 May to say that he was too ill to attend. Mr Kippax agreed to postpone the disciplinary hearing.

73. The disciplinary hearing was rescheduled for 16 May. The claimant did not attend. Mr Kippax decided that it was not fair to proceed in the claimant's absence and the disciplinary hearing was rescheduled. A letter was sent to the claimant by Ms Bryan dated 16 May 2019 (361) providing details for the reconvened hearing. That letter made it clear that the hearing may go ahead in the claimant's absence.

74. At 11.40am on 22 May (the date of the re-arranged hearing) the claimant emailed Ms Bryan to say that was unable to attend the meeting and that he was visiting the nearest A&E department. Mr Kippax made the decision to proceed with the disciplinary hearing as, at that time, the respondent had not received any Fit Notes or sick notes to cover the relevant periods. He made the decision to proceed in the claimant's absence. Attached to the claimant's email was a prescription dated 2 April 2019 (442) which showed that the claimant had been prescribed propranolol by a Doctor based in Essex. No evidence was provided to the Tribunal which showed that the claimant had attended A&E (or any medical professional) on 22 May 2019.

75. In the claimant's absence, the hearing proceeded. Mr Kippax made the decision that the claimant should be dismissed. He found that the misconduct amounted to gross misconduct. In his letter he repeated the three allegations which had been made in the disciplinary hearing invite. Within his decision letter Mr Kippax said the following (372):

> *"Reasonable time has been given for you to provide supporting documents to show the absence was due to illness and to confirm you had booked flights back before 18th February and tried to make contact prior to the date you were due to return to work. Three opportunities were provided to meet to discuss the matter, and no documentary evidence has been provided to explain your failure to attend. Clear management instructions requesting the documents and your required attendance at the meetings have failed to be followed. I consider that not only were you absent from work without permission, but you have provided insufficient proof that you were unable to return to work as originally planned or that you had ever intended to return to work on 18th February."*

76. In his evidence to the Tribunal, Mr Kippax emphasised that, in some cases, the allegations in the case may not have justified a finding of gross misconduct and summary dismissal. It was the claimant's failure, or refusal, to engage with the respondent at any stage of the processes made matters worse. In his evidence, Mr Kippax emphasised that his mind had remained open about the claimant until the final hearing on 22 May. If he had provided some supportive evidence of the reasons he gave for his unauthorised absence, then this would have *"allowed me to justify stepping back from dismissal".*

77. The dismissal of the claimant was confirmed in an email of 22 May 2019 (367). The outcome and the reasons for it were recorded in the letter of 23 May (369). The claimant appealed against the outcome on 12 June 2019 (379). Within that appeal letter the claimant referred to himself as being the "*lead lawyer*" in the case brought by Mr Gilmour against the respondent. The appeal letter brought to the attention of the recipients that the claimant was supporting Mr Gilmour in his Tribunal proceedings. The first occasion when Mr Kippax was made aware of the claimant's

support for, and representation of, Mr Gilmour, was when he received the appeal letter.

78. The claimant's appeal against his dismissal was heard on 24 July and 14 August 2019 by the respondent's Employment Appeals Committee. The claimant did not attend the appeal hearing nor did he submit any further evidence for the committee to consider. The committee nonetheless considered the matter and upheld the decision to dismissal. The appeal decision was explained in a letter of 15 August 2019 (400).

79. The respondent pays employees on the 15th of each month, for the full calendar month. The claimant was dismissed on 22 May 2019. As a result, the claimant had already been paid for the full month of May on 15 May, prior to his dismissal. That meant he was paid salary for the period from 22 May to 31 May. He was not employed during that period. He was not entitled to be paid for that period.

80. The claimant's annual leave year with the respondent ran from 8 January to 7 January. The respondent's case was that, as at the date of his dismissal, the claimant had taken more holiday that he was entitled to for that leave year. That is, the claimant had taken annual leave to which he would have been entitled had he been employed for the full leave year, but when a pro rata annual leave calculation was undertaken for the period of the leave year for which he had actually been employed (from 8 January to 22 May), he had taken more than the annual leave to which he was entitled for that period.

81. The Tribunal heard evidence from Ms Hall, a senior officer within the respondent's Human Resources team. Her evidence was that it was usual practice for any overpayment to be recovered. There was a standard process undertaken by which the respondent's HR/Payroll team automatically informed the employee of the overpayment as part of the respondent's leaver process. If the overpayment was not made, or agreement was not reached, it was then passed to the Income Recovery team to process. It was Ms Hall's evidence that neither the members of the HR/Payroll team nor the members of the Income Recovery team would be aware of the specific case or anything about the relevant individual, including their race or ethnicity.

82. A letter was sent to the claimant on 13 June 2019 about an overpayment of salary (384). That stated that the claimant had been overpaid a net figure of £763.78. An invoice dated 12 June 2019 was sent to the claimant claiming the same amount (377). That stated that the overpayment of salary was £187.44 and the overtaken annual leave was £576.34. A payslip of 15 June 2019 also recorded the same overpayment figures (385) but stated that £603.20 was due when deductions for tax were taken into account.

83. In his evidence, the claimant emphasised that he felt the alleged overpayment should not have been sought as the money had been received in good faith. It was his evidence that there had been no material misrepresentation. It was entirely correct that there was no evidence that the claimant had materially misrepresented anything, in order to receive the over-payments. The over-payments had occurred because of the timing of the respondent's payment of the claimant's salary (which included payment for a period after his employment ended), and because of the

impact of the termination of the claimant's employment on his annual leave entitlement for his final leave year (which needed to be calculated pro-rata for the part-year worked, when his employment terminated).

The Law

Victimisation

84. Section 27 of the Equality Act 2010 says:

> **"(1) A person (A) victimises another person (B) if A subjects B to a detriment because – (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.**
>
> **(2) Each of the following is a protected act – (a) bringing proceedings under this Act; (b) giving evidence or information in connection with proceedings under this Act; (c) doing any other thing for the purposes of or in connection with this Act…"**

85. The first question which has to be asked is whether the claimant did a protected act. That was not in dispute in this case. If the claimant has done the protected act, for victimisation, the next question for the Tribunal is whether the respondent subjected the claimant to a detriment because of that protected act, in the sense that the protected act had a material or significant influence on subsequent detrimental treatment. That exercise has to be approached in accordance with the burden of proof. If the claimant proves facts from which the Tribunal could reasonably conclude that his protected act had a material influence on subsequent detrimental treatment, his case would succeed unless the respondent could establish a non-discriminatory reason for that treatment. If the Tribunal concludes that the protected act played no part in the treatment of the claimant, the victimisation complaint fails even if that treatment was otherwise unreasonable, harsh or inappropriate. Unreasonable behaviour itself does not necessarily give rise to any inference that there has been discriminatory treatment.

86. As is addressed below when considering the claimant's submissions, section 27(1) also provides that victimisation occurs where the alleged discriminator believes that the claimant may do a protected act. If the discriminator's belief had a material or significant influence on subsequent detrimental treatment, such treatment will be unlawful victimisation.

87. The word detriment in section 27 is to be interpreted widely. The key test is for the Tribunal to ask itself: is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?

Harassment

88. Section 26 of the Equality Act 2010 says:

> **"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."

"In deciding whether conduct has the purpose or effect referred to in subsection (1)(b), each of the following must be taken into account – (a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect."

89. The Employment Appeal Tribunal in **Richmond Pharmacology v Dhaliwal [2009] IRLR 336**, stated that harassment is defined in a way that focuses on three elements: (a) unwanted conduct; (b) having the purpose or effect of either: (i) violating the claimant's dignity; or (ii) creating an adverse environment for him; (c) on the prohibited grounds. Although many cases will involve considerable overlap between the three elements, the EAT held that it would normally be a 'healthy discipline' for Tribunals to address each factor separately and ensure that factual findings are made on each of them.

90. The alternative bases in element (b) of purpose or effect must be respected so that, for example, a respondent can be liable for effects, even if they were not its purpose (and vice versa). It is important that the Tribunal states whether it is considering purpose or effect.

91. If the conduct has had the proscribed effect, it must also be reasonable that it did so. The test in this regard has both subjective and objective elements to it. The assessment requires the Tribunal to consider the effect of the conduct from the claimant's point of view; the subjective element. It must also ask, however, whether it was reasonable of the claimant to consider that conduct had that requisite effect; the objective element.

92. The last element of the question is whether the conduct related to one of the prohibited grounds. When considering whether facts have been proved from which a Tribunal could conclude that harassment was on a prohibited ground, it is always relevant to take into account the context of the conduct which is alleged to have been perpetrated on that ground. That context may, in fact, point strongly towards or against a conclusion that it was related to any protected characteristic

Indirect discrimination

93. S19 Equality Act 2010 provides:

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

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if:

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

> **(b) It puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,**
>
> **(c) it puts, or would put, B at that disadvantage, and**
>
> **(d) A cannot show it to be a proportionate means of achieving a legitimate aim."**

94. When considering a claim of indirect discrimination, it is necessary to consider the statutory test in stages:

a. The first stage is to establish whether there is a PCP;

b. If the Tribunal is satisfied that the PCP contended for has been or would be applied, the next step is the analysis of whether there is a particular disadvantage for those with the relevant protected characteristic when compared to those that do not share the protected characteristic; and

c. If the group disadvantage is established, then it must be shown that it did or would put the individual at that disadvantage.

95. The burden of proving those elements is on the claimant.

96. With regard to justification, the burden of proof is on the respondent to establish justification.

Burden of proof

97. Section 136 of the Equality Act 2010 sets out the manner in which the burden of proof operates in a discrimination case and provides as follows:

> **"(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.**
>
> **(3) But sub-section (2) does not apply if A shows that A did not contravene the provision".**

98. At the first stage, the Tribunal must consider whether the claimant has proved facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This is sometimes known as the prima facie case. It is not enough for the claimant to show merely that he has been treated less favourably than his comparator and there was a difference of a protected characteristic between them. In general terms "*something more*" than that would be required before the respondent is required to provide a non-discriminatory explanation. At this stage the Tribunal does not have to reach a definitive

determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination, the question is whether it could do so.

99. If the first stage has resulted in the prima facie case being made, there is also a second stage. There is a reversal of the burden of proof as it shifts to the respondent. The Tribunal must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. To discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever on the grounds of the protected characteristic.

100. In practice Tribunals normally consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, second, whether the less favourable treatment was on the ground that the claimant had the protected characteristic. However, a Tribunal is not always required to do so, as sometimes these two issues are intertwined, particularly where the identity of the relevant comparator is a matter of dispute. Sometimes the Tribunal may appropriately concentrate on deciding why the treatment was afforded, that is was it on the ground of the protected characteristic or for some other reason?

101. In most cases there is a need to consider the mental processes, whether conscious or unconscious, which led the alleged discriminator to do the act. Determining this can sometimes not be an easy enquiry, but the Tribunal must draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances (with the assistance where necessary of the burden of proof provisions). The subject of the enquiry is the ground of, or the reason for, the alleged discriminator's action, not his motive. In many cases, the crucial question can be summarised as being, why was the claimant treated in the manner complained of?

102. The Tribunal needs to be mindful of the fact that direct evidence of discrimination is rare and that Tribunals frequently have to infer discrimination from all the material facts. Few employers would be prepared to admit such discrimination even to themselves.

103. The protected characteristic does not have to be the only reason for the conduct, provided that it is an effective cause or a significant influence for the treatment.

104. The explanation for the less favourable treatment does not have to be a reasonable one. Unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment. It cannot be inferred from the fact that one employee has been treated unreasonably that an employee of a different race (or with any other difference of a protected characteristic) would have been treated reasonably

105. The way in which the burden of proof should be considered has been explained in many authorities, including: **Nagarajan v London Regional Transport [1999] IRLR 572; Barton v Investec Henderson Crosthwaite Securities Limited [2003] IRLR 332**; **Shamoon v Chief Constable of the RUC [2003] IRLR 285; Hewage v Grampian Health Board [2012] ICR 1054; Igen Limited v Wong [2005]**

ICR 931; Madarassy v Nomura International PLC [2007] ICR 867; Royal Mail v Efobi [2021] UKSC 33.

Breach of contract

106. A breach of contract claim can only be brought in the Employment Tribunal if the Employment Tribunals Extension of Jurisdiction (England and Wales) Order 1994 applies. That Order only applies to claims by an employee and where the claim arises or is outstanding on the termination of the employee's employment. Where a breach of contract claim has been brought by an employee, the Order also applies to an employer's counterclaim, where the claim arises or is outstanding on the termination of the employee's employment.

107. Unlike in an unfair dismissal claim, where the focus is on the employer's reasons for the dismissal and it does not matter what the Employment Tribunal thought objectively occurred or whether the misconduct actually happened, it is different when determining wrongful dismissal. For a wrongful dismissal or breach of contract claim, the question is, whether the employee fundamentally breached the contract of employment; whether what the respondent alleged actually occurred. In a claim for wrongful dismissal the legal question is whether the employer dismissed the claimant in breach of contract. Dismissal without notice will be such a breach unless the employer is entitled to dismiss summarily. An employer will only be in that position if the employee was himself in breach of contract and that breach was repudiatory.

The Claimant's Submissions

108. In his legal arguments and other documents, the claimant relied upon a significant number of cases, some of which were clearly pertinent to the issues to be decided and others which were less clearly applicable. The main authorities which the claimant relied upon were (in summary) as follows:

(1) **Lock v Cardiff Railways Co Ltd [1998] IRLR 358** – an authority about the importance of employees being aware of what could be construed as gross misconduct – a decision about fairness in an unfair dismissal case where there is an agreed/existing code;

(2) **Department of Transport v Sparks [2016] EWCA Civ 360** – a decision about whether parts of a handbook are incorporated into a contract of employment;

(3) **Shamoon** (as referred to above) a key authority on the burden of proof;

(4) **Nagarajan** (as referred to above) which also relates to the application of the burden of proof;

(5) **Norman & Douglas v National Audit Office UKEAT/0276/14** – a decision about clauses in an employment contract and the fact that there must be a clear provision which must provide unambiguously for it to operate so as to enable an employer to change contractual terms;

(6) **Warburton v Chief Constable of Northamptonshire Police [2022] ICR 925** – a decision that highlights that detriment is to be interpreted widely and the correct test to be applied for discrimination;

(7) **St Mungo's Community Housing Association v Andrews UKEAT/0180/20** which addressed the key tests in a victimisation claim (see below);

(8) **Bakkali v Greater Manchester Buses (South) Limited [2018] ICR 1481** is guidance on the test to be applied in a harassment claim and determines that the **Dhaliwal** case (quoted above) remains good law even after the Equality Act 2010 was brought into force;

(9) **York City Council v Grosset [2018] ICR 1492** on the correct questions to ask in a victimisation claim;

(10) **Essop v The Home Office [2017] IRLR 55** on the correct approach to an indirect discrimination claim;

(11) **Ishola v Transport for London [2020] IRLR 368** in relation to PCPs and one-off acts; and

(12) **Chief Constable of Yorkshire v Homer [2012] ICR 704** on indirect discrimination.

109. The Tribunal does not need to reproduce all the arguments made by the claimant in his submissions document, list of authorities, or verbal submissions. The submissions were considered and taken into account. There were, however, two specific things which it is appropriate to record in this Judgment which arose from consideration of the law which the claimant contended applied to this case.

110. The claimant submitted that, in a victimisation claim, the respondent (or the relevant discriminator) did not need to be aware of the protected act. For that he relied upon the **St Mungo's** decision referred to above. What that decision emphasised, in the passage he referred to, was the full statutory test for victimisation. As already explained above, because of the breadth of the definition of protected act in section 27, victimisation can occur where the alleged discriminator believes that the claimant has done or may do a protected act (even where he is not aware of an actual protected act). The provision does not require knowledge of the actual protected act, where the alleged discriminator believes that the claimant has or may do a protected act, and then treats them detrimentally as a result. Whilst in most cases the alleged discriminator will know about the protected act for victimisation to occur, that does not need to be the case. However, there still needs to be some evidence that the alleged discriminator treated the claimant detrimentally because he believed the claimant had done or may do a protected act; there must be some evidence of that belief. The issues as they applied to the facts are addressed below. However it is worth recording when addressing the law that, for Mr O'Donnell and Mr Kippax, there was no evidence whatsoever that they believed the claimant may do or had done a protected act (as well as there being no evidence that they did know that he had done the protected act(s) relied upon - supporting Mr Gilmour).

111. In relation to indirect discrimination, the **Ishola** decision was important in the context of this case. That Judgment made clear that the words "provision, criterion or practice" should be construed widely as is said in the statutory Code of Practice. Nonetheless, Lady Justice Simler, in the Court of Appeal decision, noted that it was significant that Parliament had chosen to define claims based on indirect discrimination by reference to those particular words and had not used the words "act" or "decision" in addition or instead. She emphasised that the PCP in an indirect discrimination claim, and the thing which must be justified, was not the disadvantage which a specific claimant suffered, but the practice, process or rule itself under which the decision was made. The PCP is something which must be capable of being applied to others (including a hypothetical comparator); it does not apply to every act of unfair treatment of a particular employee. What Lady Justice Simler said was:

> *"That is not the mischief which the concept of indirect discrimination…[is] intended to address."*

The Respondent's Submissions

112. The respondent's counsel provided a lengthy submission which the Tribunal will not reproduce in this Judgment. That lengthy written submission referred to a significant amount of case law. In particular, the submission addressed indirect discrimination at some length. It is unnecessary to list in this Judgment all of the authorities referred to. The respondent's representative did make reference to **Dhaliwal** (addressed above), and also referred in detail to the **Bakkali** case, to which the claimant also referred. The respondent's representative also highlighted the six salient features of indirect discrimination from the decision of **Essop v The Home Office**, a case to which the claimant also brought the Tribunal's attention. The respondent also relied upon **Ishola** and cited an extract from it.

113. In relation to the issue of victimisation, what the respondent's representative submitted was the following: *"In order to subject an employee to victimisation it is necessary for the alleged discriminator to have actual knowledge of the protected act, otherwise the conduct could not be 'because of' the protected act".* (**Scott v London Borough of Hillingdon [2001] EWCA Civ 2005, CA**). As per 394 **Peninsula Business Service Limited v Baker [2017] IRLR, EAT**, *"the Tribunal cannot automatically attribute the principal's knowledge to the agent"*. The respondent's representative accordingly addressed the requirement for knowledge of the protected act by the alleged discriminator personally, as opposed to the knowledge of the respondent organisation as a whole. That was a different point to the one made by the claimant about the breadth of the protection under section 27 which can cover the belief of the discriminator (without requiring actual proof that he knew about the protected act).

114. With regard to the breach of contract claim, within her submissions the respondent's counsel said the following:

> *"In effect the Respondent concluded that the Claimant's account of why he failed to return to work on-time was untrue. Honesty and the ability to trust an employee goes to the heart of the employment contract and if broken is evidence of a repudiatory breach."*

Conclusions – applying the Law to the Facts

Victimisation

115. The respondent accepted that the claimant did the protected acts upon which he relied. Those protected acts were: the claimant's representation of Mr Gilmour in his probationary hearing; and the claimant's representation of Mr Gilmour in proceedings in the Manchester Employment Tribunal.

116. The Tribunal considered each of the alleged detriments relied upon in the claimant's victimisation claim, as recorded at (a)-(c) in the list of issues reproduced above.

117. The first alleged detriment relied upon, was the decision to conduct a disciplinary investigation in relation to the claimant. That decision was made by Mr O'Donnell. The Tribunal found that Mr O'Donnell did not know that the claimant had done the protected acts relied upon. There was no evidence that he did. The Tribunal also did not find that Mr O'Donnell believed that the claimant had done or would do a protected act. There was no evidence of that either. Mr O'Donnell was simply unaware of the claimant's representation of Mr Gilmour and it was not a factor at all in his decision-making. As a result of those findings, the claimant's claim for victimisation (a) did not succeed. The decision to conduct a disciplinary investigation was Mr O'Donnell's, and he did not make that decision because the claimant had done (or because he believed that the claimant had done or may do) a protected act.

118. The third of the detriments relied upon was the finding of gross misconduct and the decision to dismiss the claimant, reached at the end of the disciplinary procedure. That was a decision made by Mr Kippax. The Tribunal found that Mr Kippax did not know that the claimant had done the protected acts (at the time that he made the decision to dismiss, albeit he became aware later during the appeal process). There was also no evidence that Mr Kippax believed the claimant had done or may do a protected act. Mr Kippax made the decision to dismiss based upon the evidence before him which had been collated as part of the disciplinary process. That decision was not made because the claimant had done a protected act, or because Mr Kippax believed that the claimant may do a protected act. As a result the claimant's claim for victimisation (c) did not succeed.

119. The position for the second of the claimant's alleged detriments as part of his victimisation claim, was slightly more complicated. That alleged detriment was the decision to proceed to a disciplinary hearing. The decision to proceed to a disciplinary hearing was made by Ms Bryan. Ms Bryan was made aware that the claimant had done the protected acts at around the time that she made the decision to proceed to a disciplinary hearing, and therefore the position for this detriment was different to those for the other two.

120. Ms Bryan undertook the investigation into the allegations against the claimant. She endeavoured to meet with the claimant on three occasions, but none of those meetings were attended by the claimant. She ultimately made the decision that the matters would need to be addressed at a disciplinary hearing; the issues not having been resolved as part of her investigation. The Tribunal found that Ms Bryan made the decision that she did because of the evidence that she had before her, and not

because of anything that she knew about the claimant's support for, or representation of, Mr Gilmour (about which she had been informed). That was Ms Bryan's evidence (see paragraph 68), and the Tribunal accepted that evidence and found it to be true.

121. Accordingly, the Tribunal did not find that Ms Bryan's decision to proceed to a disciplinary hearing was material influenced by the fact that the claimant had done a protected act, or indeed because she believed that the claimant may do another protected act. Ms Bryan made the decision to proceed to a disciplinary hearing after an investigation in which she had been unable to meet with the claimant, and where she believed the issues needed to be addressed as part of a disciplinary hearing. As a result the claimant's claim for victimisation (b) did not succeed.

Harassment

122. The claimant's claim for racial harassment was in relation to the respondent's attempts to recover overpayments made to the claimant.

123. Applying the harassment test and following the steps confirmed in **Dhaliwal** and **Bakkali**, the Tribunal found that:

a. the endeavoured recovery of overpayments was unwanted conduct; and

b. in this case that the respondent pursuing recovery of the debt created an intimidating and/or hostile environment for the claimant. It was not the purpose (that was to recover the overpayments made), but in general terms for any ex-employee having an ex-employer seeking to recover such a debt in the way evidenced, did have such an effect.

124. The final element of the test was to determine whether the harassment was related to the protected characteristic, here being race. As explained below, the Tribunal found that the respondent's attempt to recover overpayments made to the claimant was not related to his nationality or ethnic background.

125. At the termination of the claimant's employment, it was the case that there were sums outstanding which the claimant owed to the respondent. Those sums arose from: the claimant having been paid in the middle of the month for the whole of the month, when his employment terminated prior to the month concluding; and for annual leave taken which exceeded the amount the claimant was due for the year as a result of the termination of his employment (albeit it was leave which he would have been entitled to had he remained employed for the whole leave year).

126. The right to recover those elements was recorded in the claimant's terms and conditions of employment. The Employment Tribunal accepted the evidence of Ms Hall. The evidence of Ms Hall was that recovering such debts was the usual procedure. It was a process followed mechanically once someone was identified as a leaver. The Tribunal accepted her evidence that those were not qualitative decisions made about whether the claimant should be pursued for the amounts or in relation to the claimant personally; it was the process followed by the respondent without any specific consideration of the individual or their circumstances. The

Tribunal found that the process was an automatic one for all employees in the same circumstances as the claimant.

127. Applying the burden of proof to this allegation, the claimant needed to show the "*something more*" required to demonstrate that the decision to recover the overpayments was related to race. The claimant did not do so. There was no evidence available of the "*something more*" to demonstrate that this mechanical process was undertaken because of race or the claimant's race. The Tribunal found that any other employee, or any hypothetical employee in the same circumstances as the claimant, would have faced attempts to recover the overpayments irrespective of their race. The conduct did not relate to the claimant's race, nationality, or ethnic origin/background.

Breach of Contract

128. There was no dispute that the claimant was entitled to four weeks' notice on the termination of his employment under the terms of the employment contract, if he had not fundamentally breached his contract. The question which the Tribunal therefore needed to determine was whether the claimant fundamentally breached his contract of employment with the respondent, thereby entitling the respondent to accept that fundamental breach and terminate without notice.

129. The Tribunal accepted the respondent's representative's submission that honesty and the ability to trust an employee went to the heart of the employment contract and, if broken, that was evidence of a repudiatory breach of that contract. Technically such a breach would be one which fundamentally breached the duty of trust and confidence owed by an employee to the employer. Mr Kippax's decision letter (see paragraph 75 above) did address and explain that this was part of his decision. The respondent's representative relied upon this (see paragraph 114 which quotes her submissions). The Tribunal accepted that if the claimant acted dishonestly in relation to his leave, absence without leave, and time away from work, that was a fundamental breach of the employment contract by him. Honesty is important to all employees and such actions would have been likely to have been a breach of any employment contract, but that would certainly have been a fundamental breach for an employee working as a Civil Enforcement Officer.

130. The Employment Tribunal found the claimant to have acted dishonestly in the reasons he gave for his non-attendance at work with the respondent, and the explanations which he provided when further information was sought.

131. There was no evidence before the Tribunal of the claimant having ever been booked on a flight to return to the UK, prior to the one he ultimately took. The Tribunal found that had the claimant been booked on such a flight that would have been something that he would have been able to have evidenced. It was an international flight (or flights) returning to the UK, which would have been required to have been booked in the claimant's name. Even if the claimant did not wish to evidence the flight to the respondent during their internal procedures because he felt that their procedures did not require him to do so, it was something the claimant should have been able to evidence to the Tribunal. There was no genuine and good reason why he did not produce such evidence for the Tribunal during the hearing. The Tribunal found that, had he been booked on such a flight, he would have been

able to produce evidence that confirmed that he was. During his submissions, the claimant was provided with three opportunities to explain why he had been unable to evidence that he had been booked on the original flight which he said would have returned him to the UK for the date he was due to return to work. He did not do so; he gave only evasive answers.

132. Accordingly, the Tribunal found that the claimant was never booked on a flight to return to the UK on the original date as he had stated. As a result, the claimant was dishonest in his reasons given for his absence from work and in the answers he gave when being asked about his absence from work. As he was dishonest and responded to questions asked of him in a dishonest way, that broke the duty of trust and confidence in a fundamental way. The respondent was entitled to accept that fundamental breach and not to pay him for notice or in lieu of notice.

133. The Tribunal found the claimant's evidence at the hearing generally to be evasive. Throughout the hearing the claimant did not answer questions, but rather talked around the questions asked.

134. The claimant placed great reliance upon the document produced in relation to malaria (441). The limitations to what was shown by that document are noted above. The Tribunal found that document to be somewhat unconvincing evidence. The Tribunal noted that there was no record, other than that note, of the claimant receiving treatment for malaria, whether in Uganda or upon his return to the UK. Whilst the Tribunal was willing to accept that the claimant had difficulties in providing evidence which correlated to a UK Fit Note from his treatment in Uganda, the Tribunal would still have expected the claimant to have been able to produce some more convincing evidence that demonstrated that he had suffered from malaria, had he done so. The absence of such evidence did not (on its own), in the view of the Tribunal, show that the claimant was dishonest, but the lack of any such evidence meant that there was no corroboration of the claimant’s assertion that he had been unable to return to the UK due to his malaria. Similarly, the Tribunal would also have expected the claimant to have either retained, or to have been able to have obtained a copy of, the letter he said he had presented to the airline for the flight upon which he returned, which showed that he was fit to fly. The absence of such a letter did not prove dishonesty, but it did illustrate the claimant’s failure to corroborate the story which he had given which the Tribunal has found to have been dishonest.

135. In terms of the claimant's absence without leave, the claimant admitted that he was absent without leave for at least one day. The claimant's actual period of absence was longer. Had the claimant been able to evidence his ill health and/or the cancellation of his flight, then the Tribunal would not have found the conduct of the claimant in being absent amounted to a fundamental breach of contract. Indeed, from the evidence of the respondent’s witnesses, it appeared that had the claimant been able to evidence his ill health and/or the cancellation of his flight during the internal procedures, he would not have been subject to a disciplinary procedure or, at least, he would not have been dismissed. The reason for the claimant’s dismissal was (at least in part) his lack of trustworthiness or honesty in relation to the reasons he gave for being absent from work for an extended period of time. The Tribunal found that the claimant did not tell the truth about the reason for his absence, as if the reasons given by the claimant had been true, he would have been able to evidence them to the Tribunal.

136. In those circumstances the claimant did fundamentally breach his contract with the respondent. The claimant's claim for breach of contract in respect of notice did not succeed.

137. The other issues raised by the claimant as part of his breach of contract claim, including those recorded in his skeleton argument, did not affect the Tribunal's decision. The Tribunal did not find that the respondent acted in breach of contract in the approach taken to the claimant's absence and the evidence requested from him, in circumstances where he had been unable to provide a Fit Note or broadly-equivalent medical certification evidencing the reason for his absence. In any event, the arguments raised did not alter the fact that the Tribunal found the claimant to have acted in fundamental breach of his contract and that, accordingly, the respondent was contractually entitled to terminate the contract without notice as a result.

Indirect race discrimination

138. The indirect race discrimination claim in this case was potentially very complicated, with that complexity highlighted by the number of different ways in which the claimant put his own case and by the length of the respondent's submissions addressing the indirect race discrimination claim. However, in practice, the Tribunal found reaching a decision on the claimant's indirect race discrimination to be relatively straightforward for the reasons outlined below.

139. An indirect race discrimination claim requires as its starting point the application of a provision, criterion or practice ("PCP"). That PCP must be something of general application, as opposed to being a bespoke decision made specifically in relation to the claimant. That was something made clear by the Court of Appeal in the **Ishola** case addressed above (a case relied upon by both parties).

140. In his submissions, the claimant made it very clear that the PCP upon which he was relying for his indirect race discrimination claim was, or were, the bespoke decisions made about him personally (contrary to what had been recorded in the list of issues). His response to the respondent's representative's submissions about the application of the relevant policies, was that he was <u>not</u> relying upon the application of the policy, but rather he was relying upon the specific decisions made in relation to him about his absence. On that basis, the claimant's indirect discrimination claim could not succeed. The case brought by the claimant was not one that was genuinely an indirect race discrimination claim. Bespoke and unique decisions made in relation to the claimant's own personal circumstances were not a PCP (as a PCP is required for an indirect discrimination claim).

141. Looking at the matters which the claimant raised, those were bespoke decisions about the claimant's own personal circumstances. What the respondent's procedure provided was that where an employee was unable to return to work for an extended period due to sickness, the employee must provide a Fit Note certifying their absence. The claimant was unable to provide such a Fit Note. Had the respondent applied this requirement in an inflexible way, there is no doubt that it could have amounted to a provision, criterion or practice which would have placed the claimant at a disadvantage relating to or arising from his trip to Uganda. However, the respondent did not apply the policy inflexibly.

142. The other matters about which the claimant complained, such as the issue of medical insurance evidence being raised and/or the lack of acceptance of the medical prescription document which he produced, arose from the respondent's willingness to accept other evidence which showed the reason for the claimant's absence. What was not accepted was the evidence that he personally produced about his condition and his inability to return. In practice the issues raised by the respondent such as the absence of proof of the claimant's original flight booking and the lack of medical evidence of his hospitalisation (or similar) in Uganda, were part the respondent's attempts to address the claimant's inability to provide the basic evidence which the policies provided for (a Fit Note or medical certification). The medical insurance documentation was not something the respondent insisted on; it was simply a suggestion of something that the claimant could have been able to produce which might have evidenced the reason he gave for being absent from work. It was a bespoke suggestion made to him in the light of his personal circumstances and not ultimately pursued.

143. In the light of the decision reached about the PCP, the Tribunal has not needed to (nor been genuinely able to) determine whether such a PCP placed those sharing the claimant's protected characteristic at a disadvantage. It has also not needed to determine whether it placed the claimant at such a disadvantage (in the light of the Tribunal's findings as recorded for the breach of contract claim). The Tribunal was not able to determine issues 8 and 9 from the List of Issues, as the determination of those issues was entirely dependent upon the claimant's case relying on a PCP of wider application than something which was applied to the claimant alone.

144. Had it been necessary, the Employment Tribunal would have determined that the respondent's requirement for the claimant to produce documents which evidenced the reason for his absence, beyond those actually produced by the claimant, would have been a proportionate means of achieving the legitimate aims relied upon. The Tribunal would also have found the requirement in the respondent's sickness absence reporting procedure and the terms and conditions that the claimant needed to produce a Fit Note or medical statement signed by a Doctor for periods of extended ill-health absence, was a proportionate means of achieving the legitimate aims relied upon (where the requirement was not applied inflexibly when the ill health absence had occurred abroad at a location, from which a UK Fit Note was not available).

The respondent's counterclaim

145. As at the termination of the claimant's employment on 22 May 2019, the claimant did owe sums to the respondent.

146. The claimant was paid for the full month of May, albeit that his employment terminated on 22 May. Accordingly, the outstanding salary was due for the period from 22 to 30 May, for which the claimant had already been paid but did not in fact work. The terms and conditions under which the claimant worked, made clear that such overpayments would be recovered (albeit they would have been recoverable in any event).

147. In the counterclaim (37) the respondent sought repayment of the sum of £187.44. In the respondent's representative's submissions, she asserted that the claimant had been overpaid £187.44 after relevant deductions. Accordingly, the Tribunal finds that the claimant was due to reimburse the respondent **£187.44** in respect of overpayment of salary, as that is the sum sought by the respondent's representative. The claimant was contractually obligated to repay that amount. He has not done so. The sum due was arising from, or outstanding on, the termination of the claimant's employment.

148. In relation to accrued but untaken annual leave, had the claimant remained employed for his full leave year there would be no issue whatsoever with the annual leave which he had taken. However, because the claimant's employment ended earlier in the year, once a pro rata calculation was undertaken the claimant had taken more than the annual leave which he was entitled to take (as a result of the termination date). Applying the provision of the claimant's contract referred to at paragraph 35 above, the claimant was contractually obliged to repay the respondent for the excess leave taken and paid.

149. In the respondent's representative's submissions, the respondent did not assert a precise sum of money that was due. Those submissions also asserted an annual leave entitlement calculation based upon hours. The contractual provisions referred to annual leave in relation to days and therefore the submitted approach was not the one that accorded with the terms of the contract.

150. The Tribunal undertook its own calculation and found that the claimant owed the respondent for nine days' annual leave taken in the relevant leave year in excess of his entitlement. On the basis that the claimant was paid £54.64 per calendar day, that would have equated to a total sum due of £491.76.

151. The Tribunal noted the payslip of 15 June 2019 which recorded the overpayment figures (385) stated that only a total of £603.20 was due when deductions for tax were taken into account (including the salary overpayment). As £187.44 has already been awarded in respect of that overpayment, only £415.76 remains due in accordance with the relevant payslip. Accordingly, even if the claimant had been due to repay a higher amount, the payslip makes clear that a greater sum is not outstanding in breach of contract. The respondent is awarded **£415.76** as the sum due from the claimant for overpayment of salary and to which it is entitled. It was for the respondent to evidence the damages sought and, save for the sums awarded, the respondent has not done so.

Summary

152. For the reasons explained above, the Tribunal did not find for the claimant in relation to any of his claims. The Tribunal found for the respondent in its counter-claim.

153. The Tribunal would add that it was not considering or determining an unfair dismissal claim, as the claimant did not have sufficient service with the respondent to be able to pursue such a claim. At least one of the authorities relied upon by the claimant was only applicable to such a claim. Some of the arguments pursued by the claimant were also those which would have been relevant, or more significant, for an

unfair dismissal claim (rather than a wrongful dismissal/breach of contract claim). For example, the contention that there was an inconsistency or unfairness in dismissing following the absence in 2019, in the light of the lack of action taken for the absence in 2018, would have been relevant to an unfair dismissal claim. The claimant's emphasis of what was categorised as gross misconduct in the respondent's procedure and what was not, would have been something that would have had greater application to an unfair dismissal claim.

Employment Judge Phil Allen
Date: 9 November 2022

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON
17 November 2022

FOR THE TRIBUNAL OFFICE

NOTICE

THE EMPLOYMENT TRIBUNALS (INTEREST) ORDER 1990 ARTICLE 12

Case number: **2411438/2019**

Name of case: **Mr J Mayanja** v **Stockport Metropolitan Borough**

Interest is payable when an Employment Tribunal makes an award or determination requiring one party to proceedings to pay a sum of money to another party, apart from sums representing costs or expenses.

No interest is payable if the sum is paid in full within 14 days after the date the Tribunal sent the written record of the decision to the parties. The date the Tribunal sent the written record of the decision to the parties is called **the relevant decision day**.

Interest starts to accrue from the day immediately after the relevant decision day. That is called **the calculation day**.

The rate of interest payable is the rate specified in section 17 of the Judgments Act 1838 on the relevant decision day. This is known as **the stipulated rate of interest**.

The Secretary of the Tribunal is required to give you notice of **the relevant decision day**, **the calculation day**, and **the stipulated rate of interest** in your case. They are as follows:

the relevant decision day in this case is: 17 November 2022

the calculation day in this case is: 18 November 2022

the stipulated rate of interest is: **8% per annum**.

Mr S Artingstall
For the Employment Tribunal Office

GUIDANCE NOTE

1. There is more information about Tribunal judgments here, which you should read with this guidance note: www.gov.uk/government/publications/employment-tribunal-hearings-judgment-guide-t426

   If you do not have access to the internet, you can ask for a paper copy by telephoning the Tribunal office dealing with the claim.

2. The payment of interest on Employment Tribunal awards is governed by The Employment Tribunals (Interest) Order 1990. Interest is payable on Employment Tribunal awards if they remain wholly or partly unpaid more than 14 days after the **relevant decision day**. Sums in the award that represent costs or expenses are excluded. Interest starts to accrue from the day immediately after the **relevant decision day**, which is called **the calculation day**.

3. The date of the **relevant decision day** in your case is set out in the Notice. If the judgment is paid in full by that date, no interest will be payable. If the judgment is not paid in full by that date, interest will start to accrue from the next day.

4. Requesting written reasons after you have received a written judgment does **not** change the date of the **relevant decision day**.

5. Interest will be calculated as simple interest accruing from day to day on any part of the sum of money awarded by the Tribunal that remains unpaid.

6. If the person paying the Tribunal award is required to pay part of it to a public authority by way of tax or National Insurance, no interest is payable on that part.

7. If the Secretary of State has claimed any part of the sum awarded by the Tribunal in a recoupment notice, no interest is payable on that part.

8. If the sum awarded is varied, either because the Tribunal reconsiders its own judgment, or following an appeal to the Employment Appeal Tribunal or a higher court, interest will still be payable from **the calculation day** but it will be payable on the new sum not the sum originally awarded.

9. The online information explains how Employment Tribunal awards are enforced. The interest element of an award is enforced in the same way.