



EMPLOYMENT TRIBUNALS

Claimant: Mr D Beyea

Respondent: Secretary of State for Justice

Heard at: Birmingham

On: 12, 13, 14 & 15 June 2023

Before: Employment Judge Maxwell
Mr T Liburd
Mr K Hutchinson

Appearances

For the claimant: in person

For the respondent: Mr Dilaimi, Counsel

JUDGMENT

1. The Claimant's claim of unfair dismissal is not well founded and is dismissed.
2. The Claimant's claim of direct race discrimination is not well founded and is dismissed.
3. The Claimant's claim of harassment related to race is not well founded and is dismissed.
4. The Claimant's claim for accrued annual leave is not well founded and is dismissed.

REASONS

Preliminary

Claims

5. By a claim form presented on 16 August 2021, the Claimant presented claims of:
 - 5.1 constructive unfair dismissal;
 - 5.2 direct race discrimination;

- 5.3 harassment related to race;
- 5.4 holiday pay.
- 6. The Claimant's claims on the issues arising were discussed at a Case Management hearing before EJ Wilkinson on 6 July 2022.

Issues

- 7. The particulars included by the Claimant in his form ET1 were exceedingly brief and in some respects, vague. It is apparent that EJ Wilkinson devoted a considerable amount of time to exploring with the Claimant the matters he wished to complain about. As a result of that exercise, the issues on liability were identified in the following way:

1. Time limits

1.1 were the discrimination and harassment complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

1.1.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.1.2 If not, was there conduct extending over a period?

1.1.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

1.1.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

1.1.4.1 Why were the complaints not made to the Tribunal in time?

1.1.4.2 In any event, is it just and equitable in all the circumstances to extend time?

2. Constructive unfair dismissal

2.1 was the claimant dismissed?

2.1.1 Did the respondent do the following things:

2.1.1.1 Racially profile the claimant by alleging that he had brought illegal drugs into the prison.

2.1.1.2 On 7 March 2021 did Rebecca Booker (the claimant's manager) and three other senior officers interview the claimant and make false allegations that the claimant was bringing illegal drugs into the prison.

2.1.1.3 Fail to provide the claimant with log-in details for the HMP Birmingham following the commencement of his employment to

enable him to properly access the place of work and carry out his role.

2.1.1.4 Fail to respond to his requests, made almost everyday (or very frequently) to both Rebecca Booker and to her manager, the Governor of the prison. Those requests having been made verbally and on one occasion, by email.

2.1.1.5 On 7 March 2021 did Rebecca Booker send an email to the claimant in which she:

2.1.1.5.1 Repeated things that she had said in the meeting earlier that day; and

2.1.1.5.2 Make additional false allegations or otherwise raise matters relating to the claimant's work which were not true.

2.1.1.6 Act in all of the circumstances set out above in a discriminatory way due to the claimant's racial background.

2.1.1.7 Did the respondent fail to properly communicate with the claimant following him being on sick leave between 7 March 2021 and his employment ending. The claimant asserts that this lack of engagement was the final act which caused him to resign and which supports his constructive dismissal claim.

2.1.2 Did that breach the implied term of trust and confidence? The Tribunal will need to decide:

2.1.2.1 whether the respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the respondent; and

2.1.2.2 whether it had reasonable and proper cause for doing so.

2.1.3 Was the breach a fundamental one? The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

2.1.4 Did the claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the claimant's resignation.

[...]

4. Direct race discrimination (Equality Act 2010 section 13)

4.1 the claimant's racial background is: black, African.

4.2 did the respondent do the following things:

4.2.1 On 7 March 2021 did Rebecca Booker (the claimant's manager) and three other senior officers interview the claimant and make false allegations that the claimant was bringing illegal drugs into the prison.

4.2.2 Fail to provide the claimant with log-in details for the HMP Birmingham following the commencement of his employment to enable him to properly access the place of work and carry out his role.

4.2.3 Fail to respond to his requests, made almost everyday (or very frequently) to both Rebecca Booker and to her manager, the Governor of the prison. Those requests having been made verbally and on one occasion, by email.

4.2.4 Fail to respond to an email sent to Florence Barwe (the head of BAME at the Ministry of Justice) some time between 7 March 2021 and the end of the claimant's employment from the claimant's private email inbox in which the claimant raised grievances about his treatment by staff at the prison.

4.3 was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether s/he was treated worse than someone else would have been treated.

The claimant has not named anyone in particular who s/he says was treated better than s/he was.

4.4 if so, was it because of race?

4.5 Did the respondent's treatment amount to a detriment?

5. Harassment related to race (Equality Act 2010 section 26)

5.1 did the respondent do the following things:

5.1.1 On 7 March 2021 did Rebecca Booker (the claimant's manager) and three other senior officers interview the claimant and make false allegations that the claimant was bringing illegal drugs into the prison.

5.1.2 On 7 March 2021 did Rebecca Booker send an email to the claimant in which she:

5.1.2.1 Repeated things that she had said in the meeting earlier that day; and

5.1.2.2 Make additional false allegations or otherwise raise matters relating to the claimant's work which were not true.

5.2 if so, was that unwanted conduct?

5.3 did it relate to race?

5.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

5.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

[...]

7. Holiday Pay (Working Time Regulations 1998)

7.1 did the respondent fail to pay the claimant for annual leave the claimant had accrued but not taken when their employment ended?

8. Important clarity was added by the exercise in which EJ Wilkinson engaged. Some important details were still lacking. In particular, aside from Ms Booker, no other alleged perpetrators of discriminatory acts were named.
9. Notwithstanding the documents disclosed by the Respondent to the Claimant included the names of very many managers and other staff who were involved to some extent in the matters about which he complained, the Claimant did not identify other perpetrators in his witness statement either.

Evidence

10. We were provided with the agreed bundle of documents, running to page 421.
11. We were provided with witness statements and heard oral evidence from:
 - 11.1 Divine Beyea, the Claimant;
 - 11.2 Tanya Duffield, Operational Support Grade;
 - 11.3 Rebecca Booker, Custodial Manager;
 - 11.4 Lee Bywater, formerly Head of Offender Management Services;
 - 11.5 Ritchie Massey, People Hub Custodial Manager.
12. Prior to the hearing, the Claimant had applied to put in evidence a video, which was said to show a group of white girls attacking a black girl, unconnected with his employment or the prison service. We said this would not be admitted into evidence, as it was not relevant to the questions this Tribunal had to decide, namely whether the Claimant had been unfairly dismissed, discriminated against because of his race, suffered harassment related to his race or was due accrued holiday pay.
13. At the beginning of the hearing, the judge spent some time with the parties discussing the documents we had received, so as to ensure we had all the parties intended we should. It transpired, the Claimant was working from an unpaginated bundle. Most likely, he had brought along the disclosure bundle rather than that prepared for the final hearing. Fortunately, more paper copies of the final hearing bundle had been provided to the Tribunal than were necessary

and so one of these was given to the Claimant. He raised no other or issue with objection to the documents.

14. In the middle of his closing submissions, however, the Claimant sought to refer to a new document, which was not in the hearing bundle. He began to read from an email on his phone. The Tribunal reminded the Claimant this was his opportunity to comment upon the evidence we had received. He could not use closing submissions as a mechanism to read in new evidence.

Submissions

15. The Respondent produced a cast list, chronology and skeleton argument.
16. Both parties made oral closing submissions.

Decision

17. Whilst the judge was giving oral reasons to the parties for our judgement, the voice assistant function on the Claimant's phone said something about "unlocking". Asked what he was doing, the Claimant said it was necessary for him to unlock his phone to cancel an incoming call. We were surprised that it was necessary for the Claimant to unlock his phone in order to reject a call or even if that were so, that he would not simply let it ring out silently. The judge asked the Claimant whether he was making a recording of the proceedings. The Claimant said he was not. The parties were reminded that it is a criminal offence to make a recording of Court or Tribunal proceedings.

Facts

Witness Evidence

18. Whilst all witnesses were endeavouring to tell the truth, from their own perspective, we found those who gave evidence on behalf of the Respondent to be more credible and reliable.
19. Ms Booker and Ms Duffield were cross-examined by the Claimant and subject to challenge. Both gave direct answers to the questions he asked. Their responses were credible and consistent with the documentary evidence. We found them to be satisfactory witnesses. There was little or no challenge put by the Claimant to Mr Bywater or Mr Massey. We were satisfied with the evidence given by both.
20. As far as the Claimant is concerned, whilst we do not doubt his honesty, his answers sometimes failed to address the question asked or were otherwise not easy to understand. He had a tendency on occasion, to answer a question with a question. He spoke at length about matters unrelated to his own claims. The Claimant's perspective on events was frequently excessive and unrealistic.

Background

21. The Claimant commenced employment with the Respondent as a prison officer on 7 May 2018 at HMP Long Lartin. He transferred to HMP Birmingham on 4 January 2021. Ms Booker became his line manager after his arrival at Birmingham, although the exact date of this could not now be determined.

Cnomis

22. The Respondent operates a number of IT systems. By email of 14 January 2021, Mr Massey requested a new Quantum User Account be set up for the Claimant. This was necessary so that the Claimant could access Cnomis, which is used by the Respondent to record information about prisoners. This system is organised regionally, so that the Claimant's existing login details from Long Lartin could not be used at Birmingham. Notwithstanding Mr Massey's email was sent soon after the Claimant's transfer, his request does not appear to have been actioned by the Respondent's IT support department.
23. We rejected the Claimant's suggestion that the email in the hearing bundle from Mr Massey to the IT department on 14 January 2021 was a fabrication, created after the event by the Respondent to hide its racially motivated failure with respect to Cnomis. There was nothing on the face of the document to suggest irregularity, it was a fairly routine business communication and we noted the Claimant did not put this allegation to Mr Massey when he gave evidence.
24. The obvious and likely reason for the Claimant's account not being set up in a timely fashion, was an omission or failure by the IT support department. Common experience suggests that large bureaucratic organisations, in both the public and private sector, sometimes struggle to resolve matters of this sort promptly. Furthermore, at the time of this request, the Respondent was affected, as were most employers, by the ongoing consequences of covid and lockdown. There was nothing to suggest the Claimant's race was known by those who worked in the Respondent's IT department.
25. Whilst the Claimant now complains about the Respondent's failure to provide him with login details, there is no evidence of any active chasing by him at the time. On reading his witness statement, we had been left with the impression the Claimant was saying he actively chased Ms Logan, the Respondent's Head of Residence. In cross-examination, however, the Claimant said the he had only raised the lack of a Cnomis login when asked by managers about why he had not recorded events on that system. We pause to note that offering this information as an explanation for what might otherwise have appeared to be his omission, is not the same as the Claimant taking the initiative to chase his employer over IT access. Furthermore, we do not accept this situation prevented him from doing his job and less still that it was "life-threatening". The Claimant's suggestion he was prevented from doing his job is contradicted by the fact of him doing it over a number of weeks, prior to his suspension. The Claimant not only discharged his rostered shifts, he volunteered for and undertook additional shifts, by way of overtime. We do not believe the Claimant would, voluntarily, have put himself in a life-threatening situation. He did not make any such suggestion at the time, it is a characterisation he has applied only after the event.

Other Requests

26. The Claimant agreed he was provided with "the basics, camera and body armour". The Claimant was not, however, given a prison issue see-through bag, to use when bringing his lunch into the prison. He had taken this up with Mr Jones of Security and been told there were none available at the time.

27. No other request made by the Claimant of Ms Booker or Ms Logan or failure to respond has been shown on the balance of probabilities. Whilst the Claimant spoke in the most general terms of making requests, he gave no evidence of any specific request (i.e. what he had asked for, when, of whom or how it was responded to).

Alleged Assault

28. On 3 March 2021, a prisoner alleged that he had been assaulted by the Claimant the previous day, in the form of being punched repeatedly. The prisoner reported this matter to a Custodial Manager, Mr Scott.
29. The Claimant was questioned about this allegation on 4 March 2021, by Ms Logan. He denied any use of force.
30. An investigation into the alleged assault was commissioned by Deputy Governor Mr Sillifant.
31. On 7 March 2021, Ms Booker spoke to another prison officer, for contact purposes whilst he was on sick leave. During this conversation, the officer started to speak about the allegations made by the prisoner. The officer told Ms Booker that he felt he was “between a rock and a hard place”. From that and other comments, Ms Booker formed the view the officer could say more but was reluctant to do so.

Prison Entry

32. The Respondent has a rule at HMP Birmingham, whereby staff including prison officers are issued with and required to use a special bag when bringing their possessions into the prison. The bag has clear transparent plastic on one side, which enables the content to be seen. They could not use a non-transparent bag. This is one of various measures in place to prevent illicit items (drugs, phones etc) from being brought into the prison.
33. The Claimant arrived at work late on 7 March 2021. This was not one of his rostered days, rather he had agreed to do overtime. The Claimant was somewhat agitated and carrying a non-see-through carrier bag. The bag was made of a thin “cloudy” plastic. Whilst something could be seen through this, it was not clear and transparent. The Claimant was challenged about this by Ms Mattu, Operational Support Grade, who was on duty in the gate. She told him he could not take this bag into the prison. The Claimant responded by saying “well how am I supposed to carry my lunch?” Ms Mattu said the Claimant could take his lunch out of the bag and carry it but the bag itself was not permitted. The Claimant became somewhat irate as a result of this. Ms Mattu asked for assistance from one of her colleagues. As Ms Duffield walked over, the Claimant removed two Tupperware containers and then pushed the carrier bag through the hatch into the gate. The Claimant then went toward the staff entrance holding his Tupperware.
34. Despite being permitted to proceed, the Claimant decided not to go into the prison. Instead, he turned back and went home.

35. Asked during this hearing to explain why he did not go into the prison, the Claimant said he could not do so because his lunch was “exposed”. We found this explanation difficult to understand. The Claimant’s lunch was in two Tupperware containers he was able to hold in his hands. The Claimant took his lunch away with him and went home. He could, just as easily, have taken it into the prison.
36. This turn of events, was reported to Ms Booker, the Claimant’s line manager.
37. During the hearing, the Claimant challenged Ms Booker about the date on which she became his manager. She could not give a precise date. It was difficult for us to understand the relevance of this issue. Certainly, when the Claimant had appeared before EJ Wilkinson, he had identified Ms Booker as his line manager. Eventually, it transpired the Claimant was seeking to highlight the fact of Ms Booker becoming his line manager at some point after he started working at Birmingham, in order then to suggest that she had gone out of her way to seek this allocation of line management responsibility, so as to facilitate her targeting of him. This was a very far-fetched suggestion for which there was no evidential support. Indeed, it appeared to be contradicted by the fact of her offering him additional shifts and dealing with his behaviour on 7 March 2021 by way of management advice, rather than a more formal approach. If Ms Booker was seeking to treat the Claimant detrimentally, she declined more than one opportunity to do so.
38. Ms Booker telephoned the Claimant to find out what had happened. By reason of his absence, the Respondent was understaffed. The Claimant believed he was, in effect, doing the Respondent a favour by working that day at all, as it was not one of his rostered shifts. Ms Booker on the other hand was of a different view, namely once the Claimant had agreed to work the shift then he was obliged to. The Claimant demanded the prison pay for his taxi fare home and his taxi fare back to the prison, if he was to undertake the shift. Ms Booker said this could not be done. After some to-ing and fro-ing, the Claimant agreed to return without his taxi fare being paid.
39. The Claimant disputed the description of him as being irate. He also denied staring at Ms Duffield and Ms Mattu. On the balance of probabilities, it is likely the Claimant did become irate when he was challenged over his plastic carrier bag and not allowed to take this into the prison. If he had remained entirely calm, there would be no reason for Ms Mattu to seek the assistance of a colleague. Such irritation might also explain the Claimant’s otherwise rather odd behaviour in going home rather than into work. Furthermore, given a sequence of events that included the Claimant coming back to work following a conversation with his line manager, we think it likely he was annoyed about all of this on coming to the gate for a second time that morning and did stare at Ms Duffield and Ms Mattu as he went through.
40. When the Claimant arrived back at the prison, he did not have a bag, Tupperware containers or any other form of lunch. By this point, the Claimant’s behaviour had aroused some suspicion. Separately from notifying Ms Booker of the Claimant’s behaviour, a report was made to the Respondent’s security department. A search was deemed appropriate and this was conducted, with the Claimant’s consent.

Discussion with Booker

41. Soon after his entry to the prison, Ms Booker spoke to the Claimant in the muster corridor. She was accompanied by Ms Beddows, Custodial manager. Following this, Ms Booker sent an email recording the same. Apart from the characterisation of his behaviour as being rude or aggressive, the Claimant accepted her email was otherwise an accurate account of their meeting. We agree this does fairly reflect the discussion:

Further to our conversation this morning I would like to record the salient points we discussed and agreed upon. Below is a summary of the events of the morning:

- **On Sunday 7th March 2021 you had agreed to complete an A shift PP on P wing.**
- **You attended the establishment for duty and were challenged about the bag your food was contained in.**
- **You handed over the bag to gate staff and carried food in two clear containers to the pedestrian lock. You then decided to leave the establishment**
- **You did not contact any manager to explain your actions**
- **When contacted by me your were rude, disrespectful and initially reluctant to return to the prison.**
- **On returning to the establishment you were described as aggressive by gate staff.**
- **CM Beddows and I met with you to discuss these events.**

When we met we discussed your frustration centred around not being given a clear bag on your arrival at HMP Birmingham. I clarified that you had not asked me to assist as your line manager. I explained to you that whatever the reasoning it was not acceptable that you left the prison this morning and it was also not acceptable that you failed to contact either Oscar 1 or the P wing management to inform them of, or discuss your intentions.

I hope from our conversation this morning we are clear that you must not conduct yourself in an unprofessional manner when dealing with any person working at his prison. Gate staff act with the authority of the Governor when giving staff instructions and you must comply with their requests. I hope it also clear that you cannot go off duty without he relevant permission regardless of what shift you are completing.

Any issues you may have should be raised with your CM in order for them to assist.

Any further instances of unprofessional conduct or unacceptable attendance/timekeeping may be lead to a more formal response being considered.

42. Ms Booker wrote in this way in order to record their discussion. While she had dealt with the matter in informally, some record of this was important. Such record keeping is good management practice. Indeed, employers are frequently criticised in the Tribunal for their failure to keep a note of such conversations. When management advice is given, in the event of any repetition, it is important to be able to refer back to what was said on the subject previously. The description of the Claimant as being aggressive is not Ms Booker's, rather it is her reflecting accurately the report she had received from the gatehouse. As far as her own reference to him as being rude is concerned, we are satisfied this was Ms Booker's genuine and reasonable view, following their difficult exchange on the phone.

Discussion with Harper & Coulson

43. When Ms Booker finished speaking with the Claimant, he was then interviewed by Mr Harper and Mr Coulson of the security department. Their involvement was prompted by a report from the gate. This was not something, as the Claimant suggested, Ms Booker had arranged or authorised.
44. The only evidence we had about this conversation with Harper and Coulson, came from the Claimant. Unsurprisingly, the Respondent not knowing that Mr Harper and Mr Coulson would be accused of discrimination, had not called them as witnesses.
45. The Claimant's claim form and the clarification he provided to EJ Wilkinson, suggested he was complaining about a single meeting on 7 March 2021 with Ms Booker and three other managers in attendance, during which he was accused of bringing drugs into the prison. Ms Booker attended to give evidence, refuting that claim.
46. It is now abundantly clear, there was no meeting on 7 March 2021 between the Claimant and four managers including Ms Booker, let alone one during which he was accused of bringing drugs into the prison. In answering questions from Mr Dilaimi in cross examination, the Claimant recounted meeting with Ms Booker and Ms Beddows and then, separately, meeting with Mr Harper and Mr Coulson of the Respondent's security department, thereafter. Furthermore, the Claimant clarified his complaint of being accused of bringing drugs into the prison was based upon his conversation with Harper and Coulson, not that with Booker and Beddows.
47. The Claimant repeatedly complained that the Respondent had called the wrong witnesses, saying it had failed to call those who were involved in the discrimination against him and instead called some witnesses he had never met. This complaint is unjustified. The manner in which the Claimant set out his complaints was both vague and confusing. If he had named Mr Harper and Mr Coulson as discriminating against him, at some point before giving evidence in the Tribunal, then perhaps the Respondent would have called one or both of them as witnesses.
48. The Claimant's explanation for providing the names Harper and Coulson at such a late stage was his receipt of the Respondent's cast list, at or shortly before the hearing. We do not see how this can have operated as a prompt. Whilst those

two are named in the Respondent's list, the same is true of very many others. Counsel has simply prepared a cast list from the names that appear in the bundle of documents for this hearing. The same information was available to the Claimant when the Respondent sent its disclosure to him. The manner in which the Claimant conducted the proceedings did not suggest much familiarity on his part with the documents. When he had the opportunity to cross examine the Respondent's witnesses, he made little if any use of the emails or records.

49. Nonetheless, we accepted the Claimant's evidence about this conversation. His account of what was said to appeared to be consistent with the other evidence and was inherently plausible.
50. Mr Coulson and Mr Harper asked the Claimant what he had been bringing into the prison when stopped, earlier that morning. The Claimant responded (as he did many times at the Tribunal) with a question, asking where their information had come from. In response to this, the Claimant was told that suspicious activity had been reported from the gate, a bag having been taken from the Claimant and him then going home. The Claimant again asked a question, namely "what are you trying to imply?". They said they were just asking. The Claimant said it was absurd they should be asking. The exchange ended with Mr Coulson and Mr Harper saying they still found it strange that he would come to work, have a bag taken from him and then decide to go home. At no point did Mr Harper or Mr Coulson accuse the Claimant of bringing drugs into the prison.

Claimant's Account

51. Later on 7 March 2021, the Claimant wrote to Ms Booker, complaining about various matters.

I came into work today with a see through bag which I was challenged for taking in the bag and I decided to go home. Remember this was not my underlying shift and I opted to help the establishment due to staffing levels. I was treated inhumanely for being asked to carry my food on my hand into the establishment. Point to note on Wednesday there was targeted search on P wing by security and DST. I came in with that same see through carrier bag and I was stripped searched and NO ONE ever complaint{ CONSISTENCE}. Check CCTV to corroborate this information. You contacted me on the phone and said I was rude disrespectful and reluctant to return to work. I find this very intriguing because I have the call log on my phone and you called at 08.50 and I was back at the establishment before 45 minutes taking into considerations I had to prepare and return to work. I told you the situation that occurred and you are just now trying to intimidate me by saying I was rude and disrespectful. What did I say that was rude and disrespectful?? I should have stayed quiet and not explained the situation as it happened. I have never been rude or disrespectful to any of my seniors at work and you can check with my formal establishment which I have been for years. You said I was aggressive to the gate staff on my return because I asked for the name of the gate CM so that he provide me with a required bag as I am not willing to be coming to work and not having my food. I want to insist I know of colleagues who have not turn up for work although they volunteered and switch off their phones on the day. This I will be using for posterity. When I return instead of you letting me to go ahead and do my job you called the attention of 4 other senior officers to come and

scrutinise me and the CM LIAM Jones for security whom I had previously been asking for the required see through bag and he said there are none available and he even testified this morning I have been asking for this bag when I was pulled into another office for questioning. This are part of the types of Racist things done to black officers as I do not understand why they thought my going back home with my food was suspicious that I might have been conveying an illicit item. I do not have a mental capacity to make a decision ? Do you all know the effects of all this to my mental health?? I have a difficult job to do everyday dealing with people who have challenging behaviours and the least I need from people I call my team is assistance which am basically not having and now you turn around and want to paint me rude and disrespectful? I am not in a good state of mine now I just thought I let you know as you can check my working records /attendance/timekeeping I have no problems with that ever.

52. We do not accept the Claimant's bag was see-through. We prefer the evidence of Ms Duffield, to the effect that it was made from thin and cloudy plastic, whereby something could be seen of the contents but it was not clear and fully transparent. Had this bag truly been see-through, the Claimant would have made that point to Ms Mattu and Ms Duffield when first challenged. The Claimant did not do so and we note he is not someone who is reluctant to express himself in strong terms. We are of the same view with the suggestion he had been allowed to bring in this bag before. This latter point is not one he pursued at the Tribunal, when he was asking questions of Ms Duffield or at all.
53. We note the Claimant has a tendency to use exaggerated language. His complaint of being treated "inhumanely" because Ms Mattu would not let him bring his carrier bag into the prison, is an example of this.
54. In his email, the Claimant does not merely address events of that day, rather he complained about various matters, including the recent allegation of assault made by a prisoner. He also made allegations unrelated to his own unrelated to his own treatment. We note, the Claimant has provided no evidence whatsoever of the Respondent, generally, subjecting black prison officers to racist treatment.
55. When challenged in the course of cross-examination, the Claimant described his behaviour at the gate on 7 March 2021 as "nothing out of the ordinary". The Claimant said no white officer had been stopped that day and challenged as he was and this demonstrated he was the victim of "racial profiling". The Claimant's view of this matter is unrealistic and contrary to the evidence. Several of the Respondent's witnesses were asked and told us they knew of no other prison officer behaving as the Claimant did. Whilst there had been previous occasions on which an officer had turned up with the wrong kind of bag and been challenged over this, none of the Respondent's witnesses had ever encountered a scenario in which the officer responded to this challenge by deciding not to proceed with entry into the prison and instead went home. The Claimant did not disagree with this. The Claimant did not say there was any occasion on which a white prison officer, or indeed any other member of staff, had behaved in this way.
56. There is, at the heart of the Claimant's complaint, a wholly unrealistic view about how his behaviour that morning would, objectively, have appeared. It is not the

case that the Respondent treats prison officers as beyond reproach and simply assumes in all cases they are acting lawfully and with propriety. On the contrary, and very sadly, there is an issue with corruption. Some prison officers are the means by which illicit items find their way into prisons. The Respondent has an anticorruption unit dedicated to uncovering behaviour of this sort. Objectively, the Claimant turning up for work in an agitated state with the wrong kind of bag, being challenged over this and instead of continuing with entry to the prison (in the course of which he might be subject to further search or challenge) turning about and going home, was likely to arouse suspicion. Subsequently, the Claimant returned with neither bag nor Tupperware. During his evidence at the Tribunal, the Claimant emphasised his need to have lunch. Yet, when he returned to the prison on the morning of 7 March 2021, he did so without this. Approaching any security check and then turning back at the last moment is likely to appear suspicious. Adding in all the other circumstances to which we have referred, the Claimant's behaviour would, objectively, appear very suspicious. It is, therefore, wholly unsurprising that he would be subject to search and questioning. We hasten to add, however, we have not found the Claimant was attempting to bring in anything illicit.

57. We also struggle with the notion that the Claimant could not see how his actions might appear suspicious. Working in a prison environment, the Claimant should have been well aware of the need to be alert to potential indicators of wrongdoing. The Claimant had several years experience at a high security prison before coming to Birmingham. It does not, of course follow that because someone behaves in a way such as to arouse suspicion, that the person has in fact engaged in some improper act. The fact of the person being turning out to be innocent does not, however, mean that it was improper to have challenged and questioned them.
58. It is also appropriate to note that from the Respondent's perspective, at close of play on 7 March 2021, no further action was required. The Claimant had been reminded of the Respondent's policies and expected standards of behaviour. As far as Ms Booker's and the Respondent's security department were concerned, the matter was at an end, informal advice having been given.

Suspension

59. On 8 March 2021, the Claimant was suspended from work. This had nothing to do with events at the gate of the previous day. The letter explained the Respondent was going to investigate allegations of "the use of inappropriate force and unprofessional conduct" on 2 March 2021. This also provided that during the period of suspension, Lee Bywater was to be the Claimant's point of contact. This step was taken in accordance with the Respondent's policy.

Ms Barwe

60. On 10 March 2021, the Claimant sent an email complaining about recent events, which he intended to be received by Ms Barwe. He decided to write to her, as he understood Ms Barwe was the "Head of BAME". Her position at the time was in fact Staff Networks Administrator in the Diversity and Inclusion Department. Unfortunately, the Claimant misspelled her email address. In particular he failed to note the spelling of Ms Barwe's first name, Florance, included an 'a' rather

than an 'e' at the fifth letter. The Claimant received an automated response that referred to his message being blocked. He misconstrued this as involving a Ms Barwe having made a decision to block his email and ignore his complaint. When this mistake was pointed out to the Claimant during the course of the hearing, he still would not concede the point. He maintained Respondent was at fault for failing to reply, yet did not explain how his incorrectly addressed email could have come to anyone's attention. An email cannot be ignored unless it is first received.

Mr Bywater

61. On 15 March 2021, the Claimant emailed Mr Bywater saying he had tried to call, as required by the terms of his suspension. Unfortunately, Mr Bywater had been in a meeting when the Claimant telephoned. Following this, however, Mr Bywater called the Claimant back. They had a short discussion and the Claimant made it clear that he would prefer email rather than telephone communication, which preference Mr Bywater accepted.
62. On 18 March 2021, Mr Bywater sent the Claimant details of the Respondent's PAM Assist programme, whereby he could receive counselling through a self-referral system. Mr Bywater also explained that the Claimant's timecards were on the system and awaiting approval for the next pay cut-off date. Mr Bywater liaised with Mr Massey in the People Hub and was told no difficulties were anticipated with timecard.
63. The Claimant and Mr Bywater had further contact by email 22 March 2021. Mr Bywater said the Claimant should not hesitate to get in touch he needed anything.
64. On 24 March 2021, the Claimant wrote to Mr Bywater saying he had missed a phone call from Ms Booker and she had left a message saying she wished to speak with him briefly. The Claimant said he been warned not to speak to anyone from the establishment except for Mr Bywater. The Claimant also referred to his deteriorating mental state. Mr Bywater replied quickly, in the following terms:

You have done the right thing in contacting me. I have just spoken to CM Booker and she was unaware of the instruction you have been given. CM Booker was asked by the detail team to ask you if you wanted your payslip copies that the detail team have in their possession. Please let me know what you would like to do with these.

Can I ask have you utilised the employee support that I sent you last week. Also could you please confirm who your SOP line manager is so that I can arrange for an occupational health referral for mental health in order to support you.

Please continue to use me as your point of contact. I will speak with detail and have already spoken with CM Booker to confirm any contact should be via myself.

65. Notwithstanding the Claimant referring to a deterioration in his mental health, there is no evidence he took up the counselling offered by the Respondent. It is

well-recognised that periods of suspension during which serious allegations are being investigated, can be very difficult for the employee concerned. This is one of the reasons why employers offer counselling of the sort the Respondent did.

66. By email of 29 March 2021, Mr Bywater chased the Claimant in connection with the occupational health referral he was trying to arrange. Mr Bywater also asked the Claimant who his line manager was on SOP (the relevant IT system).
67. The Claimant replied on 5 April 2021:

I am writing to you as per your request. I am sorry as I have just been recently transferred into HMP Birmingham and most information that I have been provided are either incorrect or not worth using.

When I started on the 11th of Jan I was meant to be on N wing. I worked there for 3 days and has since been on P wing which I understand was now my permanent place of work. I don't know who my line manager is but am very sure you can have this information from the establishment. You have to remember am not allowed to be calling to speak to anyone there now.

I hope this helps. This is my courtesy contact for the week.

68. On 12 April 2021, the Claimant wrote to Mr Bywater saying that he had yet to receive his payslips and P60 and these were urgently required. Mr Bywater replied asking the Claimant to confirm the address he wished these to be sent to. The Claimant then responded:

I have ONLY the address written on my wage slip.

Please I will appreciate if this are sent to me on this address.

[...]

69. Mr Bywater replied:

I do not have access to your sop or wage slip to get the address.

So when I ask you questions such as the below it would be really helpful if you answer me with the details.

If you can tell me the address to send the slips I will arrange for them to be posted straight away.

If you don't tell me the address I have to wait for your line manager to get me the details which ultimately slows the process down.

Please remember that I am here to help you and not hinder you. I am here to try to look after your welfare.

70. On 19 April 2021, the Claimant did provide his address to Mr Bywater. The significance of this email only became apparent during the course of the hearing at the Tribunal. Mr Bywater needed the Claimant's address in order to send the documents the Claimant wished to receive. The easiest way for Mr Bywater to get that information was to seek it from the Claimant. The Claimant, however,

misconstrued this approach by Mr Bywater as a sinister one. The Claimant, incorrectly, assumed that Mr Bywater already had his address and was only asking for that in order to be deliberately difficult. This is unrealistic. Mr Bywater would have no interest in making additional work for himself. Asking the Claimant for information Mr Bywater already had would simply generate more correspondence requiring a reply. Mr Bywater asked because he did not have that information. The Claimant says the Respondent had that information and Mr Bywater could have obtained it in another way. As is the case with most large employers, confidential employee information is protected and not disseminated more widely than necessary. While certain managers would have access to the Claimant's details, such as his line manager, others would not. Mr Bywater did not have this access and told the Claimant so. The Claimant had a tendency to jump to adverse conclusions, with little or no justification.

Investigation Extension

71. On 6 April 2021, Mr Sillifant extended the investigation completion date to 14 May 2021, as a result of various factors, in particular key witnesses being moved to another establishment.
72. The Claimant wrote to Mr Bywater about the investigation on 26 April 2021:

I was left a voicemail last week by Chris W in safer custody to come in on Friday the 30th for a discussion on the investigation. I called back and left a message that I will be in contact through you. I am not actually well now and I will be sending in a sick note from my GP in the days ahead.

Sick Leave

73. On 28 April 2021, the Claimant commenced a period of sick leave. He was signed off work by his GP until 14 May 2021 as result of work-related stress, low mood and depression.
74. Under the Respondent's policy, the Claimant's point of contact reverted to his line manager, Ms Booker, when he was unfit for work by reason of ill-health. Mr Bywater wrote to the Claimant about this change on 29 April 2021:

I have clarified that if you declare yourself as being sick, the investigation process will temporarily pause. Your sick management will then revert back to your line manager and they will be authorised to contact you to discuss your illness. My Welfare contact will stop during that process. Once you declare yourself fit the Investigation would resume and I would re-engage as your point of contact.

If you are declaring yourself sick you would need to do so in the normal way through the sick line.

If you are not sick then the investigation will proceed and the Investigating Officer will make contact with you to arrange interview.

I also need to confirm that a wage slip was sent to you this week which was held by detail. I forwarded it recorded delivery. Detail do not have any more post addressed to you.

I have contact your line manager Bec Booker who has confirmed that the Occupational Health referral I requested has been made.

I think it would benefit if I spoke to you today to get an up to date position as I am on leave next week.

75. Ms Booker attempted to contact the Claimant on a number of occasions. She telephoned him, sent emails and wrote to his home address. The Claimant did not respond to any of these communications.
76. On 12 May 2021, both Mr Bywater and Ms Booker wrote to the Claimant separately. Ms Booker's email included:

Governor Bywater has sent me a copy of your doctors sick note dated from 28/04/2021 till 14/05/2021 for work related stress, low mood & depression. Whilst you are sick, I will be managing your absence. Governor Bywater will then take back over and the investigation and will continue with contact.

I have attempted to make contact with you by telephone but there has been no answer. I have left voicemails asking you to make contact with me. Governor Bywater has sent an email to your personal email also asking you to make contact. Despite this we have been unable to make contact with you.

It is important that you maintain contact whilst you are absent from work. This enables us to properly help and support you towards an appropriate return to the workplace. An occupational health referral has been made for you which is automatically sent when any member of staff is off work due to stress. They will contact you directly to arrange the appointment.

Please make contact with the prison as a matter of urgency. Failure to do this may affect your access to sick pay.

77. The Claimant did not cooperate in the referral to occupational health.
78. On 14 May 2021, the Claimant sent two emails, the first complaining about various matters in his employment and the second, tendering his resignation:

This is a formal note of my resignation 14/05/2021. I have worked in HMP Birmingham for less than 4 months and I have had a very bad experience with the management and I am unable to continue as the job I am supposed to perform demands I should be fully equipped, excellent state of mind, good team and support of which I was not given and this has affected my mental health drastically.

Please I have accrued annual leave from Long Lartin worth more than 100 plus hours carried over . I will be extremely grateful if you can resolve this matter ASAP.

79. Notably, despite complaining about various ways in which it been treated going back to the start of his employment at HMP Birmingham, the Claimant made no complaint about any of these matters until after events on 7 and 8 March 2021.

Law

Limitation

80. Where a claim is presented under the **Equality Act 2010** (“EqA”) outwith the primary limitation period, the Tribunal has a discretion to extend time, where it is just and equitable to do so.
81. Separately, where a series of discriminatory acts are found by the Tribunal to constitute a single continuing act of discrimination, the claim will be in time where the last part of the act was within the 3-month period.
82. So far as material, EqA section 123 of the provides:

(1) Subject to sections 140A and 104B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

83. An Employment Tribunal applying section 123 has a broad discretion. A useful summary of the case law and multifactorial approach was given by the EAT in **Rathakrishnan v Pizza Express (Restaurants) Ltd [2016] ICR 283** per HHJ Peter Clark:

11. A useful starting point is the judgment of Smith J in British Coal Corp v Keeble [1997] IRLR 336. That was a case concerned with the just and equitable extension of time question in the context of a sex discrimination claim. Smith J, sitting with members, in allowing the employers' appeal and remitting the just and equitable extension question to the employment tribunal, suggested that in exercising its discretion the tribunal might be assisted by the factors mentioned in section 33 of the Limitation Act 1980, the provision for extension of time in personal injury cases. The first of those factors, as Mr Peacock emphasised in the present appeal, is the length of and reasons for the delay in bringing that claim.

12. However, as the Court of Appeal made clear in Southwark London Borough Council v Afolabi [2003] ICR 800, in deciding the just and equitable extension question, a tribunal is not required to go through the matters listed in section 33(3) of the Limitation Act 1980, provided that no significant factor is omitted. That principle was more recently reinforced in a different context by the Court of Appeal in Neary v Governing Body of St Albans Girls' School [2010] ICR 473, where the leading judgment was given by Smith LJ. There, it was held that a line of appeal tribunal authority requiring a tribunal to consider the factors in the CPR, rule 3.9(1), as it then was, when deciding whether or not to grant relief from sanction following non-compliance with an unless order, was incorrect. Following Afolabi it is sufficient that all relevant factors are considered.

13. Section 33(3) of the 1980 Act does not in terms refer to the balance of prejudice between the parties in granting or refusing an extension of time.

However, Smith J referred to the balance of prejudice in Keeble, para 8, to which Mr Peacock has referred me. That, it seems to me, is consistent with the approach of the Court of Appeal in the section 33 personal injury case of Dale v British Coal Corpn, where Stuart-Smith LJ opined that, although not mentioned in section 33(3), it is relevant to consider the plaintiff's (claimant's) prospect of success in the action and evidence necessary to establish or defend the claim in considering the balance of hardship. That passage neatly brings together the two factors which, Mr Dutton submits, were not, but ought to have been, considered by this tribunal in the proper exercise of its discretion: prejudice and merits. I shall return to those factors in due course.

14. What has emerged from the cases thus far reviewed, it seems to me, is that the exercise of this wide discretion (see Hutchison v Westward Television Ltd [1977] ICR 279) involves a multi-factoral approach. No single factor is determinative.

15. Returning to the balance of prejudice, this concept arises elsewhere in our jurisdiction. For example, in deciding applications to amend the form ET1, the Selkent principle: Selkent Bus Co Ltd v Moore [1996] ICR 836.

84. Importantly, there is no presumption that time will be extended; see **Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 343 CA**, per Auld LJ:

25. It is also of importance to note that the time limits are exercised strictly in employment and industrial cases. When tribunals consider their discretion to consider a claim out of time on just and equitable grounds there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse. A tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule. [...]

85. The Court of Appeal considered the exercise of this discretion again in **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640**, per Leggatt LJ:

18. First, it is plain from the language used ("such other period as the employment tribunal thinks just and equitable") that Parliament has chosen to give the employment tribunal the widest possible discretion. Unlike section 33 of the Limitation Act 1980, section 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard, and it would be wrong in these circumstances to put a gloss on the words of the provision or to interpret it as if it contains such a list. Thus, although it has been suggested that it may be useful for a tribunal in exercising its discretion to consider the list of factors specified in section 33(3) of the Limitation Act 1980 (see *British Coal Corporation v Keeble* [1997] IRLR 336), the Court of Appeal has made it clear that the tribunal is not required to go through such a list, the only requirement being that it does not leave a significant factor out of account: see *Southwark London Borough Council v Afolabi* [2003] EWCA Civ 15; [2003] ICR 800, para 33. [...]

19. That said, factors which are almost always relevant to consider when exercising any discretion whether to extend time are: (a) the length of,

and reasons for, the delay and (b) whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

86. The question of what amounts to a “continuing act” was considered by the Court of Appeal in **Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96**, per Mummery LJ:

52. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as a complete and constricting statement of the indicia of 'an act extending over a period'. [...]Instead, the focus should be on the substance of the complaints that the Commissioner was responsible for an ongoing situation or a continuing state of affairs in which female ethnic minority officers in the Service were treated less favourably. The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed.

Unfair Dismissal

87. So far as material, section 95 of the **Employment Rights Act 1996** (“ERA”) provides:

95 Circumstances in which an employee is dismissed

(1) For the purposes of this Part an employee is dismissed by his employer if (and, subject to subsection (2) only if...

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

88. Where, as here, the respondent denies dismissal, the claimant has the burden of proving dismissal within section 95(1)(c).
89. In accordance with **Western Excavating v Sharpe [1978] IRLR 27 CA**, it is not enough for the claimant to leave merely because the employer has acted unreasonably, rather a breach of contract must be established.
90. In order to prove constructive dismissal four elements must be established:
- 90.1 there must be an actual or anticipatory breach by the respondent;
- 90.2 the breach must be fundamental, which is to say serious and going to the root of the contract;
- 90.3 the claimant must resign in response to the breach and not for another reasons;
- 90.4 the claimant must not affirm the contract of employment by delay or otherwise.

91. Implied into all contracts of employment is the term identified in **Malik v BCCI [1997] IRLR 462 HL**:

The employer shall not without reasonable and proper cause conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.

92. In **Baldwin v Brighton and Hove City Council [2007] IRLR 232** the EAT held that a breach of trust and confidence may be caused by conduct calculated or likely to have the proscribed effect.

93. Either as an incident of trust and confidence, or as a separate implied term, employers are under a duty to afford their employees a means of prompt redress with respect to their grievances; see **W A Goold (Pearmark) Limited v McConnell [1995] IRLR 516 EAT**, per Morrison J:

11. [...] It is clear therefore, that Parliament considered that good industrial relations requires employers to provide their employees with a method of dealing with grievances in a proper and timeous fashion. This is also consistent, of course, with the codes of practice. That being so, the industrial tribunal was entitled, in our judgment, to conclude that there was an implied term in the contract of employment that the employers would reasonably and promptly afford a reasonable opportunity to their employees to obtain redress of any grievance they may have. It was in our judgment rightly conceded at the industrial tribunal that such could be a breach of contract.

94. At least insofar as the question of breach of the implied term of trust and confidence is concerned, the band of reasonable responses test does not apply; see **Buckland v Bournemouth University [2010] IRLR 445 CA**.

95. Furthermore, the decision in **Buckland** confirms that a repudiatory breach cannot be remedied; per Sedley LJ:

40. This account of the alternative courses which may be taken in response to a repudiatory breach leave no space for repentance by a party which has not simply threatened a fundamental breach or forewarned the other party of it but has crossed the Rubicon by committing it. From that point all the cards are in the hand of the wronged party: the defaulting party cannot choose to retreat. What it can do is invite affirmation by making amends.

96. In a last straw case, the final act relied upon need not in isolation constitute a breach of contract, nor even amount to unreasonable or blameworthy conduct, although an entirely innocuous act will not suffice; see **Omilaju v Waltham Forest London Borough Council [2005] IRLR 35 CA**.

97. Whilst mere delay will not amount to affirmation, where the employee continues to perform their contract a point may be reached when that becomes persuasive evidence they have indeed affirmed the contract; see **W E Cox Toner (International) Limited v Crook [1981] ICR 823 EAT**.

98. Where the breach of contract relied upon is comprised of conduct over a period of time, if there was affirmation in the middle this the question may arise whether

the claimant has lost the right to rely upon the earlier behaviour. This point was addressed recently by the Court of Appeal **Kaur v Leeds Teaching Hospitals NHS Trust [2018] EWCA Civ 978**, per Underhill LJ:

51. [...] As I have shown above, both Glidewell LJ in Lewis and Dyson LJ in Omilaju state explicitly that an employee who is the victim of a continuing cumulative breach is entitled to rely on the totality of the employer's acts notwithstanding a prior affirmation; provided the later act forms part of the series (as explained in Omilaju) it does not "land in an empty scale". I do not believe that this involves any tension with the principle that the affirmation of a contract following a breach is irrevocable. Cases of cumulative breach of the Malik term (which was not the kind of term in issue in either Safehaven or Stocznia Gdanska) fall within the well- recognised qualification to that principle that the victim of a repudiatory breach who has affirmed the contract can nevertheless terminate if the breach continues thereafter. It is true that, as Safehaven says, the correct analysis in such a case is not that the victim can go back on the affirmation and rely on the earlier repudiation as such: rather, the right to terminate depends on the employer's post-affirmation conduct. Judge Hand may therefore have been right to jib at Lewis J's reference to "reactivating" the earlier breach (though, to be fair to him, he did say "effectively re-activates"); but there is nothing wrong in speaking of the right to terminate being revived, by the further act, in the straightforward sense that the employee had the right, then lost it but now has it again.

99. Where the claimant resigns in part because of a repudiatory breach of contract, that will suffice, the breach need not be the only or the main cause for that decision; see **Nottinghamshire County Council v Meikle [2004] IRLR 703**.
100. If a constructive dismissal is established the employment tribunal must still consider whether the respondent has shown a potentially fair reason for dismissal within ERA section 98(1) and whether or not dismissal was reasonable in all the circumstances under section 98(4).

Direct Discrimination

101. In the employment field and so far as material, section 39 of **the Equality Act 2010** ("EqA") provides:
- (2) An employer (A) must not discriminate against an employee of A's (B) -**
 - (a) as to B's terms of employment;**
 - (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;**
 - (c) by dismissing B;**
 - (d) by subjecting B to any other detriment.**
102. As to the meaning of any other detriment, the employee must establish that by reason of the act or acts complained of a reasonable worker might take the view that they had thereby been disadvantaged in the circumstances in which they had thereafter to work. An unjustified sense of grievance cannot amount to a

detriment for these purposes; see **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL**.

103. EqA section 13(1) provides:

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

104. The Tribunal must consider whether:

104.1 the claimant received less favourable treatment;

104.2 if so, whether that was because of a protected characteristic.

105. The question of whether there was less favourable treatment is answered by comparing the way in which the claimant was treated with the way in which others have been treated, or would have been treated. This exercise may involve looking at the treatment of a real comparator, or how a hypothetical comparator is likely to have been treated. In making this comparison we must be sure to compare like with like and particular to apply EqA section 23(1), which provides:

(1) On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.

106. Evidence of the treatment of an actual comparator who is not close enough to satisfy the statutory definition may nonetheless be of assistance since it may help to inform a finding of how a hypothetical comparator would have been treated.

107. As to whether any less favourable treatment was because of the claimant's protected characteristic:

107.1 direct evidence of discrimination is rare and it will frequently be necessary for employment tribunals to draw inferences from the primary facts;

107.2 if we are satisfied that the claimant's protected characteristic was one of the reasons for the treatment complained of, it will be sufficient if that reason had a significant influence on the outcome, it need not be the sole or principal reason;

108. In the absence of a real comparator and as an alternative to constructing a hypothetical comparator, in an appropriate case it may be sufficient to answer the "reason why" question - why did the claimant receive the treatment complained of.

109. The definition in EqA section 13 makes no reference to the protected characteristic of any particular person, and discrimination may occur when A is discriminated against because of a protected characteristic that A does not possess; this is sometimes known as 'discrimination by association'.

110. The burden of proof is addressed in EqA section 136, which so far as material provides:

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision occurred.

111. When considering whether the claimant has satisfied the initial burden of proving facts from which a Tribunal might find discrimination, the Tribunal must consider the entirety of the evidence, whether adduced by the claimant or respondent; **see Laing v Manchester City Council [2006] IRLR 748 EAT.**

112. Furthermore, a simple difference in treatment as between the claimant and his comparators and a difference in protected characteristic will not suffice to shift the burden; see **Madarassy v Nomura [2007] IRLR 246 CA.**

113. The burden of proof provisions will add little in a case where the ET can make clear findings of a fact as to why an act or omission was done or not; see **Martin v Devonshires Solicitors [2011] IRLR 352 EAT**, per Underhill P:

39. This submission betrays a misconception which has become all too common about the role of the burden of proof provisions in discrimination cases. Those provisions are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination generally, that is, facts about the respondent's motivation (in the sense defined above) because of the notorious difficulty of knowing what goes on inside someone else's head "the devil himself knoweth not the mind of man" (per Brian CJ, YB 17 Ed IV f.1, pl. 2). But they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law [...]

Harassment

114. Insofar as material, EqA section 26 provides:

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

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

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

(i) violating B's dignity, or

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

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

- (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
- (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

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

115. Whilst the unwanted conduct need not be done 'on the grounds of' or 'because of', in the sense of being causally linked to, a protected characteristic in order to amount to harassment, the need for that conduct be 'related to' the protected characteristic does require a "connection or association" with that; see **Regina (Equal Opportunities Commission) v Secretary of State for Trade and Industry [2007] ICR 1234 QBD**. Notwithstanding it was decided under the prior legislation including the formulation "on the grounds of", the observations made by the EAT in **Nazir v Asim [2010] ICR 1225** may still be of some relevance:

69 We wish to emphasise this last question. The provisions to which we have referred find their place in legislation concerned with equality. It is not the purpose of such legislation to address all forms of bullying or anti-social behaviour in the workplace. The legislation therefore does not prohibit all harassment, still less every argument or dispute in the workplace; it is concerned only with harassment which is related to a characteristic protected by equality law—such as a person's race and gender.

116. In relation to the proscribed effect, although C's perception must be taken into account, the test is not a subjective one satisfied merely because C thinks it is. The ET must reach a conclusion that the found conduct reasonably brought about the effect; see **Richmond Pharmacology v Dhaliwal [2009] IRLR 336 EAT**.
117. Guidance on the threshold for conduct satisfying the statutory definition was given by the EAT in **Betsi Cadwaladr University Health Board v Hughes [2014] 2 WLUK 991**; per Langstaff P:

10. Next, it was pointed out by Elias LJ in the case of Grant v HM Land Registry [2011] EWCA Civ 769 that the words "violating dignity", "intimidating, hostile, degrading, humiliating, offensive" are significant words. As he said:

"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

11. Exactly the same point was made by Underhill P in Richmond Pharmacology at paragraph 22:

"..not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can

be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.”

12. We wholeheartedly agree. The word “violating” is a strong word. Offending against dignity, hurting it, is insufficient. “Violating” may be a word the strength of which is sometimes overlooked. The same might be said of the words “intimidating” etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.

Conclusion

Time Limits

118. The Claimant contacted ACAS on 2 July 2021 and a certificate was issued on 13 August 2021. His claim was presented on 16 August 2021. Any complaint by the Claimant about events which occurred on or after 3 April 2021 was in time.
119. The principal focus of the Claimant’s complaints is, however, events on 7 March 2021. His complaints in this regard were presented outwith the primary 3 month limitation period and were circa 4 weeks late.
120. The only reason which emerge from the Claimant’s evidence for the lateness of his claims was his poor mental health. We note he was not diagnosed by his GP as being ill until 28 April 2021 and the certificate then issued only ran up to 14 May 2021. The medical evidence does not substantiate the Claimant being unable to prepare a submit a claim during that time. There is no medical evidence addressing the period before after, in which the Claimant might also have presented a claim. We note that when he did put his claim in, this was exceedingly brief. We are not satisfied there was any health obstacle to him presenting a timely claim. The Claimant says he was not aware of time limits. He had access to the Internet and could have made himself aware of these if he had conducted a minimal amount of online research. We note the Claimant’s evidence is that he went straight to the www.gov.uk website and thereby avoided any other sources of information. Nevertheless, the government website includes information about time limits for Tribunal claims and the Claimant’s professed lack of knowledge is unreasonable.
121. Mr Dilaimi said there was no evidence of the Claimant being unable to present a claim in time. We agree. Had the relevant test been one of reasonable practicability, then that would probably have provided a complete answer. The Claimant’s unfair dismissal claim was, however, presented in time. The relevant test for his discrimination claims is just and equitable.
122. Whilst the Claimant has not provided a good reason for the lateness of his claim, it is necessary for us to consider all of the relevant factors, in particular the balance of prejudice.
123. If no extension is granted the Claimant will be severely prejudiced. His complaints about what happened on 7 March 2021 are central to his discrimination claims. Although other matters are complained about before and

after that day, it is the events of the 7th which the Claimant says amounted to racial profiling and involved him being targeted for discriminatory treatment.

124. If an extension is granted there will be little or no prejudice to the Respondent. The Respondent has been required to address events of 7 March 2021 in any event, as they are also relied upon by the Claimant for his unfair dismissal claim. Furthermore, the delay in this case is relatively modest, being a matter of a small number of weeks. There is nothing to suggest the Respondent has been less able to respond to and defend the Claimant's claim by reason of that small delay, as compared with the position it would have been in had the claim been presented in July rather than August. To the extent the complaint was difficult to address, this was due to its vagueness not its lateness.
125. The balance of prejudice plainly favours extending time and it is in the interests of justice to do so.

Unfair dismissal

126. We will address in turn each matter the Claimant relies upon as causing or contributing to a repudiatory breach of contract.

2.1.1.1 Racially profile the claimant by alleging that he had brought illegal drugs into the prison.

126.1 There was no racial profiling. Furthermore, it was not alleged that the Claimant had brought illegal drugs into the prison.

2.1.1.2 On 7 March 2021 did Rebecca Booker (the Claimant's manager) and three other senior officers interview the claimant and make false allegations that the claimant was bringing illegal drugs into the prison.

126.2 The Claimant was interviewed, firstly by Ms Booker and Ms Beddows, secondly by Mr Harper and Mr Coulson. It was not alleged, falsely or otherwise, during either interview that the Claimant had brought illegal drugs into prison.

2.1.1.3 Fail to provide the claimant with log-in details for the HMP Birmingham following the commencement of his employment to enable him to properly access the place of work and carry out his role.

126.3 The Respondent did fail to provide the Claimant with login details for its Cnomis system. This meant he was unable to record details on that system himself about prisoners. He was prevented from carrying out that aspect of his role. He was, however, able to did carry out the remainder and vast majority of his role as prison officer. Furthermore and as noted above, he volunteered for and did overtime.

2.1.1.4 Fail to respond to his requests, made almost everyday (or very frequently) to both Rebecca Booker and to her manager, the Governor of the prison. Those requests having been made verbally and on one occasion, by email.

126.4 We have not found any failure to respond to requests on the part of Ms Booker or Ms Logan.

2.1.1.5 On 7 March 2021 did Rebecca Booker send an email to the claimant in which she:

2.1.1.5.1 Repeated things that she had said in the meeting earlier that day; and

2.1.1.5.2 Make additional false allegations or otherwise raise matters relating to the Claimant's work that were not true;

126.5 Ms Booker did send an email to the Claimant repeating what she had said to him earlier that day.

126.6 Ms Booker did not make any false allegations, additionally or otherwise, nor raise any matters relating to the Claimant's work that were untrue.

2.1.1.6 Act in all of the circumstances set out above in a discriminatory way due to the claimant's racial background.

126.7 For the reasons set out below we did not find that any of the matters the Claimant complained of, to the extent these occurred, were discriminatory due to race.

2.1.1.7 Did the respondent fail to properly communicate with the claimant following him being on sick leave between 7 March 2021 and his employment ending. The claimant asserts that this lack of engagement was the final act which caused him to resign and which supports his constructive dismissal claim.

126.8 There was no failure to communicate properly or lack of engagement on the part of the Respondent. It is abundantly clear from the correspondence the Respondent, through Mr Bywater and Ms Booker, was endeavouring to maintain contact and support the Claimant during his suspension and sick leave. The only failures in communication and engagement were those of the Claimant.

127. We go on to address whether, to the extent that conduct complained of was found to have occurred, this amounted to a breach of the implied term of trust and confidence. We first consider whether the Respondent had reasonable and proper cause to act as it did.

127.1 The Respondent had reasonable proper cause to interview the Claimant on 7 March 2021 in connection with his entry to the prison that day. For the reasons set out above, the Claimant's behaviour tended to arouse suspicion and it was proper for the Respondent to make further enquiries in this regard.

127.2 There is no evidence to show the specific cause of the failure by the IT department to action Mr Massey's request. In that respect, we cannot be satisfied the Respondent was acting with reasonable proper cause.

127.3 Ms Booker did send an email on 7 March 2021, repeating the matters she had discussed with the Claimant. This was good management practice. The Respondent had reasonable proper cause to proceed in that way.

128. Next we must consider to the extent the Respondent acted in the manner alleged without reasonable proper cause, this amounted to the Respondent behaving in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the claimant and the Respondent. The only matter where there was no reasonable proper cause is the Respondent's failure to provide the Claimant with a Cnomis login. Whilst this was unfortunate, it is the sort of IT problem that frequently arises in the workplace, especially large bureaucratic public or private sector organisations. Plainly this did not substantially impede the Claimant because he continued to work throughout the material period and this only stopped when he was suspended. The suggestion that this omission was life-threatening is plainly exaggerated. The Claimant volunteered to work additional shifts, he would not have done so if he believed that his life was put at risk in the way he now says. Objectively, this conduct comes nowhere near that which would seriously damage or destroy trust and confidence.
129. Accordingly, the Claimant was not dismissed and his unfair dismissal claim fails.

Direct Race Discrimination

130. We will address in turn each matter the Claimant alleges amounted to a detriment for his complaint of less favourable treatment because of race.

4.2.1 On 7 March 2021 did Rebecca Booker (the claimant's manager) and three other senior officers interview the claimant and make false allegations that the claimant was bringing illegal drugs into the prison.

130.1 As set out above, whilst the Claimant was interviewed, no allegation was made that he had brought illegal drugs into prison.

4.2.2 Fail to provide the claimant with log-in details for the HMP Birmingham following the commencement of his employment to enable him to properly access the place of work and carry out his role.

130.2 As set out above, the Respondent did fail to provide the Claimant with login details for its Cnomis system but the consequences of this on his ability to do his duties was very limited.

4.2.3 Fail to respond to his requests, made almost everyday (or very frequently) to both Rebecca Booker and to her manager, the Governor of the prison. Those requests having been made verbally and on one occasion, by email.

130.3 We have not found any failure to respond to requests on the part of Ms Booker or Ms Logan.

4.2.4 Fail to respond to an email sent to Florence Barwe (the head of BAME at the Ministry of Justice) some time between 7 March 2021 and the end of the

claimant's employment from the claimant's private email inbox in which the Claimant raised grievances about his treatment by staff at the prison.

130.4 There was no failure by the Respondent to respond to this email. It was not received because the Claimant did not send it to the correct address.

131. We next go on to consider whether, to the extent that treatment was found, this was less favourable because of race.

131.1 As far as interviews were concerned, there are no facts from which in absence of explanation could find these have been carried out because of race. There is an overwhelmingly obvious reason for these interviews, namely the Claimant's suspicious behaviour at the gate. There is nothing pointing toward a hypothetical comparator – namely, a white prison officer who arrived at the gate late for work, in an agitated state, with a non-see through plastic bag containing Tupperware, who was challenged about this, told he would have to carry his lunch, gone toward the staff entrance and then turned about and gone home, before coming back later without any lunch - being treated in any different way. We are quite satisfied such a person would have received precisely the same scrutiny. Accordingly, the burden does not shift to the Respondent. We should say in any event, we were entirely satisfied by the Respondent's explanation for the treatment, namely it was because of the Claimant's suspicious behaviour and had nothing whatsoever to do with race.

131.2 As far as the Cnomis login is concerned, there are no facts from which in the absence of an explanation we could find this was because of race. There is simply nothing to suggest a link between the Claimant's race and the lack of login details being provided in a timely fashion. This sort of administrative inefficiency is all too common in large employers. Whilst the Claimant suggested the email in the bundle from Mr Massey was a fabrication, there is nothing to support that proposition and he did not even put the challenge to the witness. There was no evidence of the Respondent's race being known by those employed in the IT department. Furthermore, this delay occurred during a time when the Respondent was affected by Covid and lockdown. Accordingly, the burden does not shift to the Respondent. Even if it had, we would have accepted the proffered explanation, namely that Mr Massey did make this request at the beginning of the Claimant's employment and it was not actioned due to an administrative failing unrelated to race.

132. Accordingly, the direct race discrimination claim fails.

Harassment related to race

133. We will address in turn each matter the Claimant alleges amounted to a unwanted conduct relating to race.

5.1.1 On 7 March 2021 did Rebecca Booker (the claimant's manager) and three other senior officers interview the claimant and make false allegations that the claimant was bringing illegal drugs into the prison.

133.1 As set out above, whilst the Claimant was interviewed, no allegation was made that he had brought illegal drugs into prison.

5.1.2 On 7 March 2021 did Rebecca Booker send an email to the claimant in which she:

5.1.2.1 Repeated things that she had said in the meeting earlier that day; and

5.1.2.2 Make additional false allegations or otherwise raise matters relating to the claimant's work which were not true.

133.2 Ms Booker did send an email to the Claimant repeating what she had said to him earlier that day

133.3 Ms Booker did not make any false allegations, additionally or otherwise, nor raise any matters relating to the Claimant's work that were untrue.

134. The interviews carried out with the Claimant on 7 March 2021 and the email sent by Ms Booker were both unwanted by him.

135. We go on, therefore, to whether the unwanted conduct related to race.

135.1 As far as interviews are concerned, for the same reasons as set out above in connection with direct race claim, there is nothing to show these were related to the Claimant's race. There are no facts from which we could find that was so, in the absence of an explanation. Accordingly, the burden does not shift. In any event, we accepted the explanation which had nothing whatsoever to do with race.

135.2 As set out above, Ms Booker's email was good management practice. There are no facts from which in the absence of an explanation we could find this related to race. Further and in any event, we accepted her evidence of why she wrote this, which had nothing whatsoever to do with race.

136. Accordingly, the complaint of harassment related to race fails.

Annual Leave

137. in the course of cross-examination, when the evidence relied upon by the Respondent in connection with annual leave was put to the Claimant, he accepted this was correct. Our conclusion is that he was right to do so. Mr Massey sets out in his witness statement the information he relied upon, where this came from and how he went about establishing the Claimant's accrued entitlement to annual leave. No fault has been shown with respect to the data or method. Our conclusion is the Claimant was paid all that he was entitled to.

138. The annual leave claim is not well founded and is dismissed.

Postscript

139. In the course of pursuing his claim, the Claimant has made allegations of a most severe character. The Claimant said he had been treated as a subhuman. In his closing submissions he made reference the racist murder of Stephen Lawrence and sought to draw parallels. In his witness statement, the Claimant alleged the officers concerned in the matters about which he was complaining were white supremacists. When cross-examining the Respondent's witnesses, he made accusations of them having hatred for black people and doing evil. The Claimant has produced no evidence whatsoever to substantiate these grave propositions and we reject them entirely.

Employment Judge Maxwell

Date: 15 July 2023