EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Kunle Abayomi	**v**	**Openreach Ltd**

Heard at: London Central
On: 6 - 9 June 2023

Before: Employment Judge Hodgson
Mr P Madelin
Ms S Aslett

Representation

For the Claimant: in person
For the Respondent: Ms S Martin, counsel

JUDGMENT

(1) The respondent shall pay the claimant unpaid wages of £225.23.

(2) The claim of wrongful dismissal fails and is dismissed.

(3) The claim of failure to pay accrued holiday pay due on termination of employment pursuant to the Working Time Regulations is dismissed.

(4) All claims of direct discrimination fail and are dismissed.

(5) All claims of harassment fail and are dismissed.

(6) The claim of indirect discrimination fails and is dismissed.

REASONS

Introduction

1.1 On 7 June 2022, the claimant presented a claim.

The Issues

2.1 The issues were discussed at the hearing, and further details of the discussion is given below.

2.2 There are claims of direct discrimination, indirect discrimination, and harassment. For the claim of direct discrimination, the claimant relies on race and age. For harassment, the claimant relies on race. For indirect discrimination, the claimant relies on age. He alleges unlawful deduction from wages, failure to pay accrued holiday pay on dismissal, and wrongful dismissal.

2.3 Both parties accept that the claimant resigned. The claimant alleges that he was constructively dismissed, as he resigned in response to respondent's fundamental breach of contract.

2.4 The allegations of direct discrimination (race) were identified by EJ Smith; they are set out below as modified where applicable at the hearing:

- 2.4.1 allegation one: an event having occurred on 3 March 2022 at the Exeter training centre, the respondent chose to wrongly implicate the claimant as being guilty of gross misconduct;
- 2.4.2 allegation two: by inviting the claimant to a meeting at Croydon on 10 March 2022 without giving him notice about what the meeting was to be about;
- 2.4.3 allegation three: by suspending the claimant at the 10 March 2022 meeting and the decision being made to carry forward disciplinary proceedings against him;
- 2.4.4 allegation four: by Jordan Martin following him into the toilet at Croydon on 11 March 2022;
- 2.4.5 allegation five: in the respondent ignoring and not addressing the claimant’s complaints of intimidation and having been subject to threatening behaviour; and,
- 2.4.6 allegation six: by dismissing the claimant on 26 May 2022?

2.5 The claimant alleged allegation four was also an act of age discrimination.

2.6 The claimant alleged allegations two and three were harassment related to race.

2.7 There was difficulty identifying the alleged provision criterion or practice for the claim of indirect discrimination. The provision criterion or practice, as allowed by amendment,[1] was recorded as follows:

> **A claim of indirect age discrimination based upon a provision, criterion or practice (PCP) applied by the respondent, namely that complaints made by "new starter" employees are treated differently – and specifically, dealt with at a slower pace – than those made by employees who are not "new starters."**

2.8 No disadvantage was identified in the application to amend. At the hearing, the claimant stated the disadvantage was the failure to deal with his grievance until after the termination of his employment.

2.9 The respondent did not accept that it applied that provision criterion or practice.

2.10 As the application to amend was made outside the limitation period for bringing the claim, the tribunal may need to consider whether it is just and equitable to extend time.

2.11 To the extent the claimant particularised his claims for failure to pay accrued holiday pay and wages, the detail is set out in section 4 below.

Evidence

3.1 We received a bundle of documents. Several further documents were disclosed by the claimant and admitted by consent, albeit the relevance was not accepted.

3.2 The claimant filed various additional documents during the hearing and we considered them as necessary.

3.3 The claimant gave evidence.

3.4 For the respondent we heard from three witnesses, Mr Kevin Westall; Mr Jim Prichard; and Mrs Jennifer O'Brien.

3.5 The respondent relied on written submissions.

3.6 Following the hearing, the claimant filed written submissions, which he
3.7 revised further on a number of occasions and we considered all versions.[2]

Concessions/Applications

4.1 On day one of the hearing, we reviewed the issues in this case. There had been two previous case management discussions. On 12 August 2022, EJ Klimov identified what appeared to be the issues; he noted the

[1] Allowed by EJ Smith on 14 December 2022.
[2] The final version was number 8.

claimant may seek to amend, and the issues would be fundamentally affected. He recorded, "The claim is about the claimant's dismissal and his treatment during the disciplinary process, which the claimant claims was discriminatory because of his race." He also noted that there were claims for wrongful dismissal, failure to pay accrued holiday pay, and overtime. The claim for wages and holiday pay was not particularised either in the claim or in the issues. The claimant specifically conceded there was no claim for indirect discrimination. EJ Klimov recorded the complaints.

> **The Complaints**
> **12. The claimant is making the following complaints:**
> **a. Wrongful dismissal (notice pay);**
> **b. Holiday pay;**
> **c. Unauthorised deduction from wages with respect to overtime**
> **d. Direct race discrimination about the following:**
> **i. Dismissal,**
> **ii. Conduct of the disciplinary process.**
> **e. Harassment related to race about the following:**
> **i. On 10 March 2022 being "entrapped" at a meeting at the respondent's Croydon training centre,**
> **ii. On 10 March 2022 being followed to the toilet by Jordan Martin.**

4.2 The claimant alleged that he been constructively dismissed. He failed to set out details of the breach of contract in his claim form.

4.3 In a further case management discussion before EJ Smith, the claimant made an application to amend. The application to amend was identified by EJ Smith as follows:

> **Claimant's application to amend**
> **4. The Claimant applied for permission to amend his claim form to include two additional claims:**
> **4.1. A claim of indirect age discrimination based upon a provision, criterion or practice (PCP) applied by the Respondent, namely that complaints made by "new starter" employees are treated differently – and specifically, dealt with at a slower pace – than those made by employees who are not "new starters"; and,**
> **4.2. A claim of direct age discrimination in relation to the allegation that he was followed to the toilet on 11 March 2022.**

4.4 The order was as follows:

> **Amendment**
> **9. The Claimant's application to amend the claim form to include complaints of indirect age discrimination and direct age discrimination is allowed.**
> **10. The Respondent has permission to rely upon an amended response to the claims as now clarified. If it wishes to do so, it must send a copy of the amended response to the Tribunal (copying in the Claimant) by 11 January 2023. Any amended response must set out any legitimate aim(s) relied upon by the Respondent in respect of its justification defence to the Claimant's direct and indirect age discrimination claims.**

4.5 Further allegations of direct discrimination were included. There was no application to amend, albeit a number of the allegations appeared to be fresh. The respondent has not taken issue with their inclusion in the issues and we have adopted the allegations of direct discrimination, and the further allegations of harassment as set out in EJ Smith's order.

4.6 The claimant gave no proper detail as to the claim for accrued holiday pay. EJ Smith recorded the claim for unauthorised deduction of wages "concerns return travel to Bradford on 17 February 2022 and to Exeter on 2 March 2022." The contractual term relied on was not identified.

4.7 At the hearing, we sought to clarify the indirect discrimination claim. The claimant initially stated that it concerned the operation of a written policy, the new joiners' procedure, and thereafter stated it concerned the written grievance policy. However, the claimant was unable to identify, in either document, any wording relied on. The claimant was unable to adequately identify what he said was the provision criterion or practice, or confirm whether it had been recorded accurately by EJ Smith. As for the disadvantage, he stated that "his grievance was not investigated."

4.8 The claimant had filed a written application to amend in August 2022, it was not in the bundle. We asked for a copy. We also ordered that the claimant set out, by the following day, the provision criterion or practice relied on. In addition, he should state whether it was communicated in writing, and if so, the document should be identified. If it were communicated orally, he should set out the wording and give details of when he was told and by whom.

4.9 In response, the claimant sent an email which stated the following:

> **Order Responses & Amendment to claim application 26/08/2022**
>
> **Fiona Wilson's (HR) communication (email attached) which I will note down as you instructed informed me that my grievances all my complaints and grievances up to the 11 of March 2022 could not be investigated at that point as I was under a different and (in my view) limiting new Joiners procedure as opposed to the general grievances procedure. I found this to be disadvantageous. My complaints at that point and intimidation in Exeter, and, improperly conduct during meeting in Croydon were basically ignored until I was terminated. However, this could have been investigated as part of the dicinplinary prcess with Kevin Westall and Pritchard. I am mystified why this wasn't.**
>
> **This is in comparison with other staff who have grievances and complaints investigated promptly.(Hypothetical comparators).**
>
> **My actually comparator is Bradley Willis and lesser extent Benjamin Jones of Exeter Training Centre. Their vindictive complaints prompted my training manager Kevin Westall or get on plane or train, literally overnight, to Croydon. The issue with my alleged missue of the van was only later introduced and additional reason or legitimate reason to suspend me.**
>
> **The disparity overwhelming affects apprentices most of which as of young age a group 17- 25**

The difference between my comparators and I, at least 7- 10 years age gap, length of service and race. In addition, at the eventual investigation, meeting and outcome conducted by Jennifer O'brien in bundle (which I boycotted) it seems from thier statements they had time to prepare and have representation. This can be confimed by Jennifer O'brien. This as opposed to me having investigations and disclinary meetings sprung up on me at Croydon Training Centre under flase pretences without Union (CWU) representation when this was requested as soon as I figured out the situation into which I was lured. At that point, any outcome was null and void.

This why I claim indirect age discrimination as the process overwhelming disadvantages younger people who are mostly and statistically make most of apprentice new Joiners.

I also added claim direct age discrimination race in regards to incident and Croydon.

This was in addition to already established claim of racial discrimination in relation to all how I was treated and how my grievances were investigated or not.

<u>Please also find the Respondent's Amended and inital response.</u>

Holiday Pay Calculation.

I actually believe my holiday pay amounts to between 80 and 100 hours- not 64 hours and 2 mins at rate of between £10 to 12 per hour.
= higher end £1200.

The Respondent paid me a figure of £ 848 and deducted they claim I owed them (£239) (unrecoverbale loan) national and and tax were also deducted. These are approximate figures.

Please note that, whilst I was on holiday I had to maintain communication with HR and the dicinplinary managers during suspension. I classify this as extra work or overtime or arrears of pay or other payment.
I would like to claim 8% interest on the debt which was admitted as owed.

I also claim overtime in respect to travelling either my van outside work hours amounting to up to 16 hours. I think your client (Openreach) still disputes this. I classify this as extra work or overtime or arrears of pay or other payment.

4.10 The claimant referred to an email from Fiona Wilson relevant email reads as follows:

Hi Kunle,
I am a HR specialist and have reviewed your formal complaint.
Unfortunately your complaint does not meet the criteria for it to be investigated under the grievance process as you are in a formal NJ process and the issues you are raising are in relation to the process and the people who were involved in your new joiner discussion.
Any issues you have regarding the new joiner process or people involved should be raised with at your new joiner meeting. This manager will respond to the points that you have raised.
I attach a copy of the grievance procedure which outlines reasons when it is not appropriate to raise a grievance.
Regards,

Fiona

4.11 The claimant failed to give any clear statement of what was said to be the provision criterion or practice. It would appear, considering the totality of the documentation and the claimant's oral submissions that the provision, criterion or practice is said to be the criteria that his complaint could not be investigated in the grievance process, as he was in a formal new joiner's process and the issues raised and people involved were related to the process. It is not easy to reconcile that with the identification of the provision criterion or practice as set out by EJ Smith.

4.12 As regards the alleged disadvantage, the claimant stated it was the failure to deal with his grievance.

4.13 The respondent clarified, in response to our order, its position. The response, filed on day two, was as follows:

Indirect Age Discrimination

1. **In respect of the claim for indirect age discrimination, the Respondent's position is as follows:**

    a. **As far as the Respondent understands, the PCP is: 'a practice of not investigating grievances raised by 'New Joiners''. The Claimant alleges that this practice disproportionately affects individuals in the age group 17-30.**

    b. **The Respondent denies that it applied such a PCP.**

    c. **The Respondent denies that any such PCP puts individuals in the age group 17-30 at a particular disadvantage. It is denied that any such PCP disproportionately affects individuals in the age group 17-30.**

    d. **The Respondent understands the particular disadvantage to the Claimant to be that his grievance dated 10.3.22 was not investigated by the Respondent.**

    e. **The Respondent accepts that the Claimant's grievance dated 10.3.22 was not investigated by the Respondent. This was not as a result of the PCP. The grievance related to issues which were being addressed as part of the Claimant's disciplinary process so should have been dealt with as part of that process.**

    f. **The Respondent does not seek to justify the PCP. The PCP is not one applied by the Respondent.**

Holiday pay

2. **In respect of the Claimant's claim for holiday pay, the Respondent has confirmed that the Claimant was owed 64.03 hours holiday pay. This has been calculated using the following information:**
    - **Dates of employment – 14 February 2022 – 26 May 2022 = 102 days**
    - **Holiday year - 1 April 2021 – 31 March 2022 & 1 April 2022 – 31 March 2023**
    - **Holiday allowance per leave year – 22 days**
    - **22 days/365 * 102 gives 8.56 days of holiday accrued (for the avoidance of doubt, the Respondent accepts that the Claimant's**

holiday entitlement carried over from one annual leave year into another. This has been considered in the calculation).

- **Total holiday accrued– 64.03 hours / 8.56 days / 1.712 weeks**
- **Total holiday taken – 0 hours**
- **Annual salary - £23,345.00 (plus £3,380.04 London Weighting) = £26,725.04**
- **Weekly wage = £512.17**
- **Total sum accrued = £874.51 (gross)**

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3. **Calculation = £26,725.04 52.18 ÷ 37.5 = £13.65 x 64.03 = £874.51**

Notice pay

4. **The Claimant's notice period was 1 month. This equates to £1,820.42 (gross).**

Overtime

1. **The Respondent would have been entitled to 4 hours overtime for travel to Exeter on 2 March 2022 and 4 hours for travel from Exeter to London on 4 March 2022.**

2. **The Claimant's hourly rate was £13.65. The Respondent pays overtime at a rate of 1.5 x hourly rate for each hour worked i.e., £20.475 for the Claimant. Total entitlement of overtime therefore amounts to £163.80.**

The Facts

5.1 The respondent employed the claimant as an apprentice network engineer from 4 February 2022 to 26 May 2022. At all material times, the claimant was age 24. EJ Smith recorded the claimant "defines his race in terms of his black skin colour."

5.2 The claimant's role as an apprentice network engineer required him to travel to sites using a company vehicle. All driving hours were monitored via tachograph. Personal use was not permitted.

5.3 On 14 February 2022, the claimant signed the respondent's "driving and use of vehicles" policy to confirm he had read it. The operation of the policy was explained in detail at the initial induction week in Bradford. The claimant was permitted to, and did, ask questions. The policy was fully explained. At all material times the claimant was aware of the policy.

5.4 The claimant was aware that he would not be insured if driving the company vehicle for personal use.

5.5 The claimant was due to attend a further course starting on 2 March 2022 In Exeter. The respondent had booked the claimant a hotel on 1 March 2022 to enable him to start the following morning at 8:30. The claimant chose not to travel the night before, but instead travelled in the morning. He left at 05:30 and was late to the training. He arrived at the centre just after nine and did not attend training before 09:10.

5.6 On the same day, 2 March 2022, the claimant was due to return from lunch at 13:10 but he was late and arrived at 13:45. He did not return to the car park until 13:26.

5.7 On the second day of the Exeter training, 3 March 2022, the claimant was once again late returning after lunch. Mr Bradley Wills was conducting the training. He asked all candidates to return after lunch. The afternoon training session was to be a practical, for which there would be a briefing. All trainees were asked to return a couple of minutes prior to 12:30 to enable the briefing to take place. The claimant was late, turning up at 12:32, by which time the briefing had taken place and many trainees were leaving for the afternoon practical session.

5.8 When the claimant returned, Mr Wills was leaving having finished the briefing. There then followed a discussion. The claimant denied that he was late. The claimant alleges Mr Wills screamed at him. The contemporaneous documentation shows that Mr Wills denied this, but he did accept that the discussion became "more formal and firm." The written documentation from other witnesses would indicate Mr Wills expressed, at least, annoyance. However, at no time did the claimant accept he was late. We have not found the claimant's evidence on this point to be credible and we find that he was late.

5.9 As the claimant was late for a third time in two days, Mr Wills removed the claimant from the course and generated a "delegate exception" report. The effect of the report was to refer the claimant to another manager, Mr Ben Jones.

5.10 On 4 March, the claimant was told that the following week, starting 7 March 2022, he would be required to contact Mr Jon Greig to arrange a "ride along" which is, essentially, accompanying an experienced member of staff. The claimant failed to make contact on 4 March 2022. The claimant's text messages demonstrate that he first attempted to make contact on 7 March 2022, but he had still not secured a ride along by the following day. It appears Mr Greig however did not get, or did not respond to, the initial message. Does not appear the claimant sought to contact Mr Greig again until the Tuesday.

5.11 Having received Mr Wills report, the claimant's manager, Mr Westall called for the records recording the movement of the claimant's vehicle. We will refer to it as the car report. He obtained this car report in order to ascertain whether the claimant was late to training on 2 March 2022. The car report contains an extract from a period. When he received the report, Mr Westall noted the claimant appeared to have used the car for private purposes on 28 February 2022 and 1 March 2022. He also noted that it supported the allegation the claimant was late for training on 2 March 2022.

5.12 Trainees attend meetings known as new joiners meetings. Following the difficulty with the claimant's course in Exeter, the claimant was due to

attend a new joiner meeting on 10 March 2022. When Mr Westall obtained the information which showed the claimant had appeared to use his vehicle privately, he considered that there was an issue that needed investigating and decided to instigate the process of investigation. Having ascertained the claimant's movements, he considered the most appropriate time to meet the claimant was at the new joiners meeting.

5.13 It is the respondent's practice, with fact-finding meeting, not to warn the employee that there is a potential investigation, or give notification or details of the fact-finding meeting, prior to it taking place. The claimant was not aware that Mr Westall would attend on 10 March 2022.

5.14 Prior to the meeting, Mr Westall reviewed an email from Mr Benjamin Jones, dated 3 March 2022, which recorded his conversation with the claimant. He subsequently spoke with another trainee who had been present on the course.

5.15 The new joiners meeting was being conducted by Mr Jordan Martin. The hearing was recorded, and a transcript produced. The claimant denied using the vehicle for personal use. He accepted he had been late on 2 March, but denied being late on 3 March. He claimant alleged Mr Wills had shouted at him and had been aggressive.

5.16 Following the course, the claimant had sent an email. The email contained the following words

> **Message to Bradley, a couple year ago.. I would not have stayed clamed when faced with such verbal assaults. For the future, be cautious, You do not know the calibre or background of someone you just met.**

5.17 The claimant denied that his comments were inappropriate or rude towards Mr Wills.

5.18 Mr Westall concluded the claimant had not made much effort to attend the ride along.

5.19 Following the meeting, Mr Westall decided to suspend the claimant.

5.20 The letter of suspension stated:

> **Dear Kunle**
> **Reason/s for suspension**
>
> **I'm writing to let you know that from 10 March 2022 you're suspended from work until further notice whilst investigations are carried out into the allegations of misconduct. In particular, it is alleged that you have used your Openreach vehicle for unauthorised journeys without permission from your manager.**
>
> **We may change or add to these allegations as appropriate due to our investigations.**
>
> **Why suspension?**

> **The decision's been made to suspend you to make sure that the integrity of the investigation is protected and/or to protect the business.**
>
> **I must advise you that this is a precautionary suspension pending the outcome of any disciplinary action which may follow. Your suspension isn't disciplinary action and it doesn't mean that you're guilty of any misconduct.**
>
> **We'll keep the suspension under review and will try to make your suspension no longer than it's needed. You'll remain on suspension until we notify you otherwise, but should things change, then your suspension could be lifted and you'll be told straight away.**
>
> **Terms and conditions during suspension**
>
> **We'll continue to pay your basic salary in the normal way …**

5.21 Following the suspension, Mr Westall became concerned about the claimant. Mr Westall perceived that the claimant's head dropped and his demeanour changed. The claimant asked if he could go the toilet and Mr Westall agreed. He and Jordan Martin then spoke, Mr Westall suggested that Mr Martin should go and check on the claimant. Mr Martin went to the toilet. There is no suggestion that he spoke with claimant. He returned before the claimant returned.

5.22 Mr Westall and Mr Jordan then accompanied the claimant to his van to collect his things.

5.23 There then followed grievances from the claimant. On 10 March 2022 at 20:10 the claimant sent a text to Mr Mark Rainbow and Mr Westall stating "For the avoidance of doubt I want to formally complain about my allegations against Bradley Wills (Exeter) and his manager Benjamin Jones." He stated the details were in a previous email, and it appears this was the feedback email following the course. Mr Westall responded by text asking the claimant to set out his list of specific allegations.

5.24 At this time the claimant did not complain about the action on 10 March. The claimant sent a further email on 10 March 2022 21:02. This recorded the primary complaint was "focused on Bradley Wills." This was based around the "interaction" with him around 12:34 on 3 March 2022. He alleged he had been accused, falsely, of being back late from lunch. He alleged Mr Wills raised his voice and became "very intimidating." The second allegation was that Mr Wills "wrongfully ejected" the claimant from the course. He complained that Mr Benjamin Jones supported Mr Wills' decision.

5.25 At some point, it is not entirely clear when, the claimant's grievance was expanded to include his "discussion or deceitful meeting with Jordan Martin and Kevin Westall" as referred to in the claimant's email of 12 April 2022.

5.26 Mr Jim Prichard dealt with the disciplinary hearing. At the time he was national transport compliance and build manager. As the claimant was a new joiner, this meeting was a "new joiner meeting." Mr Prichard wrote to the claimant on 23 March 2022 page 276. Mr Prichard's letter identified the following issues:

> **You joined the company on 14 February 2022 and since joining your Line Manager has had a number of discussions with you relating to the following issues:**
> - **During the period 17/02/2022 – 02/03/2022 you have used your Openreach vehicle for unauthorised use / journeys**
> - **On the 02/03/2022 you were late attending the ORCST001 - Behaviours: Your Visit Counts Module and on 03/03/2022 to your ORLDR0471 Module**
> - **On the 03/03/2022 you made an inappropriate and threatening comment about the trainers in your post training feedback**
> - **On 7-8/03/2022 you failed to follow a reasonable instruction when you did not attend a ride along**

5.27 The claimant responded by saying he did not feel comfortable to attend the meeting. There then followed some lengthy correspondence before, ultimately, the claimant consented to a Teams meeting. Prior to the meeting, Mr Prichard reviewed all of the relevant evidence. At the meeting, he addressed the following: the alleged misuse of the Open Reach vehicle; the alleged inappropriate threatening comments about trainers in post training feedback; and the claimant's failure to follow reasonable instruction to attend a ride along.

5.28 The claimant was given the chance to give his version of events and to answer all questions. Mr Prichard decided to dismiss the claimant and he set out his rationale in a detailed and thorough letter of 25 March 2022. In summary, the letter concluded the claimant had wrongfully used the vehicle for personal use on 28 February 2022 to view an apartment he was considering renting and he had sought to obscure this by attending a garage near that apartment when he had ignored, and failed to attend, two other Esso garages within a two-mile radius of his own home. He concluded the primary reason for the journey was to view the apartment, and not to refuel the car. This was personal use.

5.29 He also found the claimant had misused the vehicle on 1 March 2022 for a period of hours after work. He rejected the claimant's assertion that he was "going for a drive to get comfortable driving long distance." He also rejected the subsequent allegation that the claimant had taken the vehicle to a "mate's" garage, as there was no evidence of an urgent safety issue. The claimant's journey had, in any event, started after the relevant garage closed, and the claimant continued to use the vehicle for nearly 2 hours. Further, he then drove the following day for approximately 186 miles without contacting either the AA, or RIVUS in relation to any safety concern. Mr Prichard was satisfied the claimant fully understood the vehicle policy.

5.30 Mr Pritchard concluded the claimant had been late on 2 March 2022 even though he had a hotel booked the evening prior to the course. He did not accept the claimant's allegation that he had not attended the hotel because he felt unsafe to drive, as he had driven for two hours that night in any event. He rejected the claimant's allegation that he was late because he had to stop to take breaks on the morning of 2 March, as the car report demonstrated that no stops were taken.

5.31 Mr Pritchard concluded the claimant was late returning to his course on 3 March, and that resulted in him being removed from the course. Attending work at required times was a required behaviour.

5.32 Mr Pritchard concluded that the claimant made an inappropriate and threatening comment about trainers in his post-training feedback by stating in an email

> **Message to Bradley, a couple year ago ... I would not have stayed calmed when faced with such verbal assaults. For the future, be cautious. You do not know the calibre or background of someone you just met.**

5.33 He considered the language to be unacceptable, threatening, and aggressive. He stated, in conclusion, “Whilst I have considered a lesser sanction, there has been a number of failings, since your recruitment, in relation to our standards and behaviours policy as well as flagrant misuse of your company vehicle in personal time which is an act of gross misconduct, which cannot be overlooked." He found that there was a "complete breakdown of trust." He confirmed the last day of employment would be 27 March 2022.

5.34 Mr Prichard did not deal with the claimant's grievance. He knew about the grievance because he had been copied in to the claimant's email. However, he had sought advice from HR, had been told by an HR partner, Ms Patel, that he should not deal with it and he had therefore deleted the email.

5.35 The claimant was given a right of appeal.

5.36 Before the dismissal could take effect, the claimant chose to resign. The letter of resignation stated, in part:

> **Letter of Resignation**
> **I have been notified that last day of employment will be 27th May 2022.**
>
> **I want to give notice effective immediately today 26th of May 2022 I, Kunle Abayomi resign from my as Trainee Openreach Engineer for the reasons above, as well Openreach Limited breaching my contract, and its own code of ethics, procedures and poilcy in relation to me.**
>
> **Should Openreach Limited want to settle this matter with me, the remedies are as follows:**
> **£16500 NET compensation paid to me. This is approximately the reminder of my salary I would expected to receive for my employment in the period February 2022 to April 2023 minus my inner London allowance**

I drop all claims I have articulated now and future possible claims I might bring related to my employment from February 14th 2022 to 26 th May 2022.
Or
£6400 NET compensation paid to me for serve distress and inconvenience and damages to feelings suffered in last months. This is approximately 3 months salary without any deductions for me.
+
Re hiring of myself, Kunle Abayomi. Continuation of my training in location less than 100 miles or 161 KM from my home address.
+
Continuation of my base of operation in NWS or change to NW2, London as long that is within the inner London band Investigation into my complaints and grievances and reasonable action taken.
+
New line (training) management and no contact with those I made complaints
+
I will receive no less favourable treatment or victimisation based on passed experience in the event of any future settlement, if any.

+All claims of misconduct against are squashed. I am willing to take part in reflection and re traing of
components of Openreach code of ethics, procedures and behaviours that I may not understand or lack. Likewise, those I have complained about must do the same.

In return, I drop all claims that I intend the bring in relation to my employment from February 14th 2022
to 26th May 2022.

Should Openreach Limited want settle this matter with me, this should be indicated and any agreement must be completed by 4pm June Sth 2022. No extension is possible

5.37 On 30 May Mr Jon Saint wrote to the claimant and stated

Dear Kunle
I accept your resignation with immediate effect however please note that you are required to give notice of your resignation therefore you are in breach of contract.

I note you have raised a number of issues these will be managed via our post employment grievance process – you will be advised in writing regarding next steps.

Additionally we note your intention to appeal which you need to do so formally as per the decision letter by the deadline date.

5.38 The claimant's grievance was dealt with by Ms Jennifer O'Brien who at the time was senior manager in apprentice delivery. The claimant appealed, out of time, on 2 June 2022. Ms O'Brien agreed to hear the appeal. The claimant refused to attend. Ms O'Brien investigated. She considered Mr Prichard's letter and the rationale for his decision. She noted there were four key issues. She reviewed the data and interviewed witnesses.

5.39 As to misuse of the vehicles, she supported Mr Prichard's findings. She noted the claimant admitted to being late for the training course on 2

March. She was satisfied there was evidence that he had been late back from lunch on 3 March 2022. She agreed that the claimant's feedback on 3 March 2022 contained threatening language. She agreed that the claimant had not made sufficient efforts to secure the ride along on 7 and 8 March. As for the appeal decision, she upheld the "decision to dismiss the claimant."

5.40 As for the grievance, she identified two main point

> **28. The two mam points of the Claimant's grievance were**
>
> > **1. That Bradley Wills had spoken to the Claimant in an aggressive manner at the training centre on 3 March 2022, making him feel discriminated against and bullied**
> > **2. That he had been followed to the toilet and entrapped at the training centre on 10 March 2022 for approximately 3 hours.**

5.41 She spoke to the individuals named in the grievance and documented the conversations in her report page 353. Bradley Wills admitted to speaking to the claimant in a firm tone. He confirmed he had asked the claimant to leave the course on 3 March 2022, because he felt the claimant was no longer listening to him and the claimant had been aggressive in his response. The claimant named two individuals who were said to be witnesses who she described as NS and JM. JM said Bradley "lost it" when the claimant was late again. He said it made him nervous and comfortable. Ultimately, Mrs O'Brien partly upheld the claimant's complaint. She did not consider the policy on lateness was sufficiently clear, such that the delegate would understand he would be removed from the course. She recommended a policy be put in place. She concluded that Mr Wills had behaved in a way which had made some feel uncomfortable. She concluded he had become frustrated and was perhaps inexperienced dealing with conflict. She recommended training.

5.42 She also considered whether it was inappropriate for Jordan Martin to follow the claimant to the toilet on 10 March 2022 she concluded that Mr Martin genuinely had concern for the claimant's welfare; she thought there were learning points. She thought that there were coaching opportunities for both Mr Sims, and Mr Martin.

The law

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

6.2 Section 13 - Direct discrimination

> **(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.**

6.3 **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 is authority for the proposition that the question of whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was. Accordingly:

> "employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was." (para 10)

6.4 **Anya v University of Oxford** CA 2001 IRLR 377 is authority for the proposition that we must consider whether the act complained of actually occurred (see Sedley LJ at paragraph 9). If the tribunal does not accept the there is proof on the balance of probabilities that the act complained of in fact occurred, the case will fail at that point.

6.5 Harassment is defined in section 26 of the Equality Act 2010.

> **26(1) A person (A) harasses another (B) if—**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
> **(b) the conduct has the purpose or effect of—**
>
> **(i) violating B's dignity, or**
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **…**
> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account--**
>
> **(a) the perception of B;**
> **(b) the other circumstances of the case;**
> **(c) whether it is reasonable for the conduct to have that effect.**
>
> **(5) The relevant protected characteristics are—**
> **age; disability; gender reassignment; race; religion or belief; sex; sexual orientation.**

6.6 In **Richmond Pharmacology v Dhaliwal [2009] IRLR 336** the EAT (Underhill P presiding) in the context of a race discrimination case, made it clear that the approach to be taken to harassment claims should be broadly the same. The EAT observed that 'harassment' is now defined in a way that focuses on three elements. First, there is the question of unwanted conduct. Second, the tribunal should consider whether the conduct has the purpose or effect of either violating the claimant's dignity or creating an adverse environment for him or her. Third, was the conduct on the prohibited grounds?

6.7 In **Nazir and Aslam v Asim and Nottinghamshire Black Partnership UKEAT/0332/09/RN, [2010] EqLR 142**, the EAT emphasised the importance of the question of whether the conduct related to one of the

prohibited grounds. The EAT in **Nazir** found that when a tribunal is considering whether facts have been proved from which a tribunal could conclude that harassment was on a prohibited ground, it was always relevant, at the first stage, 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 and should not be left for consideration only as part of the explanation at the second stage.

6.8 In **Dhaliwal** the EAT noted harassment does have its boundaries:

> **We accept that 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. We accept that the facts here may have been close to the borderline, as the Tribunal indeed indicated by the size of its award.**

6.9 Harassment may be unlawful if the conduct had either the purpose or the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

6.10 A claim based on 'purpose' requires an analysis of the alleged harasser's motive or intention. This may, in turn, require the Employment Tribunal to draw inferences as to what that true motive or intent actually was: the person against whom the accusation is made is unlikely to simply admit to an unlawful purpose. In such cases, the burden of proof may shift, as it does in other areas of discrimination law,

6.11 Where the claimant simply relies on the 'effect' of the conduct in question, the perpetrator's motive or intention even if entirely innocent does not in itself afford a defence. 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 complainant's point of view: the subjective element. It must also ask, however, whether it was reasonable of the complainant to consider that conduct had that effect: the objective element. The fact that the claimant is peculiarly sensitive to the treatment does not necessarily mean that harassment will be shown to exist.

6.12 The requirement to take into account the complainant's perception in deciding whether what has taken place could reasonably be considered to have caused offence reflects guidance given by the EAT in **Driskel v Peninsula Business Services Ltd [2000] IRLR 151**, which concerned the approach to be taken by employment tribunals in determining whether alleged harassment constituted discrimination on grounds of sex. In **Driskel** the EAT held that although the ultimate judgment as to whether conduct amounts to unlawful harassment involves an objective

assessment by the tribunal of all the facts, the claimant's subjective perception of the conduct in question must also be considered.

6.13 Section 23 refers to comparators in the case of direct discrimination.

6.14 Section 23 Equality Act 2010 - Comparison by reference to circumstances

> **(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.**

6.15 Section 136 Equality Act 2010 provides for a reverse burden of proof.

> **136(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(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.**
>
> **(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.**
>
> **(5) This section does not apply to proceedings for an offence under this Act.**
>
> **(6) A reference to the court includes a reference to—**
>
> **(a) an employment tribunal;**
> **(b) …**

6.16 In considering the burden of proof the suggested approach to this shifting burden is set out initially in **Barton v Investec Securities Ltd [2003] IRLR 323** which was approved and slightly modified by the Court of Appeal in **Igen Ltd & Others v Wong [2005] IRLR 258.** We have particular regard to the amended guidance which is set out at the Appendix of **Igen**. We also have regard to the Court of Appeal decision in **Madarassy v Nomura International plc [2007] IRLR 246.** The approach in **Igen** has been affirmed in **Hewage v Grampian Health Board 2012 UKSC 37**

6.17 Indirect discrimination is defined by Section 19 Equality Act 2010 **–**

> **19(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.**
>
> **.**

6.18 It is important for the claimant to get the alleged PCP right because any attempt to change it may require an amendment: **Brangwyn v South Warwickshire NHS Foundation Trust** [2018] EWCA Civ 2235.

6.19 The provision, criterion or practice ('PCP') must be shown to exist before any question arises of applying the statutory burden of proof under Equality Act 2010 s 136; that reversal cannot be used to establish the PCP in the first place: **Bethnal Green & Shoreditch Educational Trust v Dippenaar** UKEAT/0064/15 (21 October 2015, unreported) .

6.20 It is for the respondent justify the PCP relied on.

6.21 Normally a PCP will be a state of affairs or have an element of repetition; it is possible for an apparently one-off event to constitute a PCP, but this is only likely if it is at least capable of applying again or applying to other employees **Ishola v Transport for London** [2020] EWCA Civ 112.

6.22 It is important for the ET to identify the correct pool for comparison on the question of 'particular advantage' in order for there to be an appropriate comparison: **Allen v Primark Stores** Ltd [2022] EAT 57, [2022] IRLR 644.

6.23 In **Homer v Chief Constable of West Yorkshire Police** [2012] IRLR 601, [2012] ICR 704, SC, Lady Hale pointed out that the current wording in para (b) ('particular disadvantage') was intended to change the law 'to do away with the need for statistical comparisons where no statistics might exist.'

6.24 Section 123 Equality Act 2010 sets out the time limits for bringing a claim.

> **(1) Subject to section 140A 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.**
>
> **…**
> **(3) For the purposes of this section--**
>
> **(a) conduct extending over a period is to be treated as done at the end of the period;**
> **(b) failure to do something is to be treated as occurring when the person in question decided on it.**

> **(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something--**
>
> **(a) when P does an act inconsistent with doing it, or**
> **(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.**

6.25 It is possible to extend time for presentation of a claim of unlawful discrimination. The test is whether the tribunal considers in all the circumstances of the case that it is just and equitable to extend time.

6.26 It is for the claimant to convince the tribunal that it is just and equitable to extend the time limit. The tribunal has wide discretion but there is no presumption that the tribunal should exercise its discretion to extend time (see **Robertson v Bexley Community Centre TA Leisure Link** 2003 IRLR 434 CA.

6.27 It is necessary to identify when the act complained of was done. Continuing acts are deemed done at the end of the act. Single acts are done on the date of the act. Specific consideration may need to be given to the timing of omissions. In any event, the relevant date must be identified.

6.28 The tribunal can consider a wide rage of factors when considering whether it is just and equitable to extend time.

6.29 The tribunal notes the case of **Chohan v Derby Law Centre** 2004 IRLR 685 in which it was held that the tribunal in exercising its discretion should have regard to the checklist under the Limitation Act 1980 Although the list of factors set out in the Limitation Act 1980 s 33 may be of some use, it should not be used formulaically as a check list, see **Adedeji v University Hospitals Birmingham NHS Foundation Trust** [2021] EWCA Civ 27.

6.30 A tribunal should consider the prejudice which each party would suffer as a result of the decision reached and should have regard to all the circumstances in the case which can include: the reason for the delay; the length of the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued had cooperated with any request for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to a cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

6.31 This list is not exhaustive and is for guidance. The list need not be adhered to slavishly. In exercising discretion the tribunal may consider whether the claimant was professionally advised and whether there was a genuine mistake based on erroneous advice or information. We should have regard to what prejudice if any would be caused by allowing a claim to proceed.

6.32 Tribunals may consider the merits of the application, but if the tribunal does so, the party should be invited to make submissions.

6.33 The position has been complicated by **Galilee v The Commissioner of Police of the Metropolis** EAT/0207/16. HHJ Hand decided that the relation back principle does not apply, and section 35(1) of the Limitation Act 1980, which provides for a statutory deeming of a relation back, does not apply to employment tribunals.

6.34 If the relation back principle does not apply, time remains a jurisdictional issue. If a claim is out of time, a tribunal must formally extend time or dismiss the claim. Granting an amendment does not extend time, as time is merely a factor to be considered as part of the exercise of discretion. It follows that granting an amendment may lead to a claim that is out of time being included in the final hearing. Time could be considered at a further preliminary hearing or it could be left to the final tribunal. If left to the final tribunal, there is a real risk that significant costs will be incurred in pursuing and defending a claim that may well be dismissed as being out of time. However it is approached time must be decided. HHJ Hand in Galilee found that the amended claim will be deemed brought at the date the amendment is granted.

6.35 Tribunal's may, if they consider it necessary in exercising discretion, also consider the merits of the application, but if the tribunal does so the party should be invited to make submissions.

6.36 Working Time Regulations 1998 regulation 14 deal with payment of accrued holiday pay:

> **14(1) This regulation applies where—**
>
> **(a) a worker's employment is terminated during the course of his leave year, and**
> **(b) on the date on which the termination takes effect ('the termination date'), the proportion he has taken of the leave to which he is entitled in the leave year under regulation 13 and regulation 13A differs from the proportion of the leave year which has expired.**
>
> **(2) Where the proportion of leave taken by the worker is less than the proportion of the leave year which has expired, his employer shall make him a payment in lieu of leave in accordance with paragraph (3).**
> **(3) The payment due under paragraph (2) shall be—**
>
> **(a) such sum as may be provided for the purposes of this regulation in a relevant agreement, or**
> **(b) where there are no provisions of a relevant agreement which apply, a sum equal to the amount that would be due to the worker under regulation 16 in respect of a period of leave determined according to the formula--**
>
> **(A X B) - C**
> **where—**
>
> **A is the period of leave to which the worker is entitled under regulation 13 and regulation 13A;**

B is the proportion of the worker's leave year which expired before the termination date, and
C is the period of leave taken by the worker between the start of the leave year and the termination date.

...

Conclusions

7.1 We first consider whether the claimant was dismissed. Mr Prichard gave the claimant notice of dismissal to take effect on 27 May 2022. The claimant responded by resigning immediately. That resignation was accepted, but not before 30 May 2022. Mr Saint observed the claimant was in breach of contract by not giving notice, but elected to accept the breach and treat the employment as terminated. We therefore find the employment came to an end at the point of the claimant's resignation during the period of notice given by the respondent.

7.2 It is the claimant's case that he was entitled to resign because the respondent was in fundamental breach of contract, and hence, he was not in breach of contract. Further, he alleges that the respondent's breach of contract was a material reason for the resignation, meaning he was constructively dismissed.

7.3 We first consider whether the respondent was in breach of contract. The alleged breach of contract is not set out adequately in the claim form. It was discussed before EJ Smith who recorded several mattes said to be a breach of the term mutual of trust and confidence. We will consider those matters identified.

7.4 The claimant alleges the respondent was not paying overtime. We will set out our full findings on the obligation to pay overtime when considering the claim of unlawful deduction from wages. In brief, the claim the respondent had not failed to pay overtime at the point of resignation is wrong, as the claimant had not made any claim for overtime.

7.5 We do not accept that the respondent had failed to respond to any holiday request. Before joining, the claimant had requested three weeks' holiday in May. He was granted leave from 6 to 22 May. When he was suspended, the claimant sought to cancel his holiday. Mr Prichard agreed to cancel all holiday on 18 May 2022. The respondent was under no obligation to cancel holiday. In any event, it did so prior to the claimant's resignation. Any alleged delay in doing so was not itself a breach of contract.

7.6 The claimant alleges the respondent breached its own grievance procedure. He has failed to give any proper particulars. The grievance procedure applied to all members of staff, regardless of when they join. Section 4 of the grievance procedure provides the grievance is not appropriate where an individual is "in a formal process (for example redundancy, improving performance or disciplinary) and you are raising issues about that process." We do not need to decide if that grievance

procedure itself was contractual. The respondent's approach was within the terms of the grievance procedure and was therefore not a breach. The claimant was raising matters which concerned the allegations to be addressed in the new joiners meeting, which was essentially disciplinary.

7.7 The claimant says finding he was guilty of gross misconducts was a breach of contract. We are satisfied that there are ample grounds for finding the claimant was guilty of gross misconduct. The most significant breach of contract was private use of the company vehicle. The claimant was aware of the policy. By using the vehicle for private use, he was driving without insurance, which was a criminal offence. Using the company car illegally had potential for bringing the company into disrepute and cause serious loss. For the reasons we will consider further below, we find that the claimant's explanations for his use of the vehicle on 28 February 2022 and 1 March 2022 were untruthful. The primary reason for using the vehicle on 28 February was to view a property. The claimant never gave a proper explanation to use the vehicle on one March, and we reject the assertion that in some manner he was getting used to driving the car. The respondent was entitled to find the claimant was guilty of gross misconduct.

7.8 The claimant alleges the respondent breached contract by not paying holiday pay. At the time he resigned, he had taken no holiday, and he was entitled to no holiday pay. Entitlement to accrued holiday only became due after he resigned and so cannot be a reason for the resignation. The claimant could not have anticipated that the respondent would fail to pay accrued holiday pay.

7.9 The claimant alleges he was subject to unlawful discrimination. We found there was no discrimination, we set out our reasons for this below. The respondent did not breach contract by discriminating.

7.10 It follows we find the respondent was not in breach of contract. It was not, therefore, open to the claimant to accept a breach of contract and treat himself as dismissed.

7.11 Lest we be wrong about breach of contract, we consider the claimant's reason for resignation. He makes clear in his letter of resignation that he is resigning having been given notification that his employment will terminate on 27 May 2022. It follows that the respondent’s notice of termination was the trigger for his resignation. We find that, but for that notice of termination, the claimant would not have resigned at that point. We reject his evidence that he was on the verge of resigning in any event. That evidence is inconsistent with the remainder of the letter of resignation which refers to his being re-hired. We treat the termination letter as a last straw. In resignations in response to a last straw, the last straw must itself contribute in some small way to the breach of contract, albeit the nature of the last straw may not be the same as the preceding conduct. In addition, the last straw must, in some sense be blameworthy. The letter of termination was rational and fully justified. In no sense whatsoever was it

blameworthy. It was not capable of being the last straw, and the claimant was not free to treat it as a last straw event.

7.12 For all the reasons we have given the respondent did not breach the claimant's contract; we find that the claimant was not constructively dismissed.

7.13 We next consider whether the claimant is entitled to notice pay. To receive damages for notice, we must find the dismissal was wrongful. It would be wrongful if the claimant resigned, in circumstances he was entitled to do so, because of a breach of contract by the employer. We found that the respondent was not in breach of contract. The claimant was not entitled to resign and treat his contract as at an end. He was not entitled to notice pay. The claimant was in breach of contract by failing to give notice. He is not entitled to any damages for failure to pay his notice.

7.14 We next consider the allegations of direct race discrimination. We should note the respondent has referred to various individuals as actual comparators. None was in the same material circumstances as the claimant and we need consider them no further. We have had regard to all the evidence when considering the relevant comparison. This is not a case where is has been necessary to specifically construct a hypothetical comparator, as we have been able to focus on the reasons for treatment.

Allegation one: an event having occurred on 3 March 2022 at the Exeter training centre, the Respondent chose to wrongly implicate the claimant as being guilty of gross misconduct.

7.15 This allegation is poorly particularised. It appears the claimant alleges that the altercation with Mr Wills shortly after 13:30 on 3 March 2022 constituted direct race discrimination. We accept there was an incident. We find the claimant returned late from lunch. Mr Willis told the claimant he was late, and the claimant denied it. There followed a discussion. The claimant maintained his denial. We find, on the balance of probability, Mr Willis became annoyed and he showed this by raising his voice. We have no doubt the claimant did not welcome the behaviour. We do not need to consider separately whether there is any fact from which we could conclude the action amounted to discrimination. We are satisfied that the respondent has established, on the balance of probability, an explanation which in no sense whatsoever is because of race. The claimant was late. This was the third occasion he had been late. Mr Willis viewed the claimant's behaviour as inappropriate and disruptive. When challenged, the claimant was difficult and confrontational. Mr Willis responded to the claimant's conduct and not to his race. We are satisfied he would have responded in the same way to anyone who had been late on three occasions, as the claimant had been, and who reacted negatively, as the claimant did.

Allegation two: by inviting the Claimant to a meeting at Croydon on 10 March 2022 without giving him notice about what the meeting was to be about.

7.16 The claimant was invited to a meeting on 10 March 2022. The claimant did have notification it was a new joiners meeting. He was not aware that Mr Westall would attend to undertake a fact find. In that sense, he was not given notice about the purpose of the meeting. We are satisfied that the respondent has established an explanation which, in no sense whatsoever, is because of race. The fact find was necessary because Mr Westall had, legitimately, investigated the allegation the claimant had been late on three occasions at the Exerer training, which had led to the claimant being removed from the course. As part of that investigation, he had, legitimately, obtained the car report. The car report demonstrated the claimant appeared to have used the vehicle privately on at least two occasions being 28 February 22 and 1 March 2022. Mr Westall was entitled to investigate that. Mr Westall acted in accordance with the normal procedure, and the practice he always applied which was not to inform the individual of the fact find. He would have treated the claimant in exactly the same manner whatever his race. This allegation fails.

Allegation three: by suspending the claimant at the 10 March 2022 meeting and the decision being made to carry forward disciplinary proceedings against him.

7.17 We accept the claimant was suspended on 10 March 2022. The reason for the suspension was set out in his detailed letter. We found the respondent has established an explanation, on the balance of probability, which no sense whatsoever is because of race. The claimant was suspended because there was clear evidence that he had breached his contract in a number of respects, including using a vehicle for private use. The reason for the suspension was the claimant's conduct. In no sense whatsoever was it because of his race. There is no evidence that any hypothetical, or real comparator would have been treated differently in the same circumstances.

Allegation four: by Jordan Martin following him into the toilet at Croydon on 11 March 2022.

7.18 We are satisfied that Mr Jordan Martin followed the claimant after the claimant had gone to the toilet. We accept that the toilet area was large. Mr Martin did not in fact see the claimant or speak to him. We are satisfied the respondent has established an explanation which in no sense whatsoever is because of race. The claimant requested to go to the toilet after the fact find interview had concluded. At that point his demeanour had changed significantly. Both Mr Westall and Mr Martin were concerned for the claimant's welfare and feared that he may harm himself. They were faced with a difficult situation and had genuine concerns. We accept that there was some discussion and that Mr Westall suggested Mr Martin should check on the claimant. This was a reasonable and humane response; we do not accept the Mr Martin's response was inappropriate in any manner. We accept Mr Westall's evidence that he would have behaved in the same way towards anyone, regardless of race, if he were worried for their welfare. This claim of discrimination fails

Allegation five: by the respondent ignoring and not addressing the claimant's complaints of intimidation and having been subject to threatening behaviour.

7.19 This allegation is poorly particularised. It was not adequately identified in the order EJ Smith. At the commencement of the hearing, we clarified that the alleged of intimidation and threatening behaviour concerned those matters raised in the claimant's grievance of 10 March 2022. The grievance concerns the alleged intimidation nd threatening behaviour of Mr Willis on 3 March 2022. What is said to be the act of discrimination is unclear. Ultimately, the complaints of intimidation and threatening behaviour were considered by Mrs O'Brien during the formal grievance process, which concluded after the claimant's resignation. Therefore, it is possible to say that the allegation should fail because the respondent did not ignore or fail to address the grievance. If it is the claimant's intention to say that the grievance should have been investigated prior to his resignation, he fails to make that clear. He fails to make clear against whom the allegation is brought.

7.20 We find the allegation cannot succeed against Mr Prichard. Mr Prichard was aware of the grievance. He sought advice from HR. He was told that he should not deal with the grievance and should delete the email. Therefore, to the extent it can be said that Mr Prichard failed to deal with the grievance, there is a clear explanation. Mr Pritchard did not deal with it because he was not mandated to do so. He would have behaved in same way to any individual, and in no sense whatsoever with this action because of the claimant race.

7.21 Before us, the claimant objected to the letter from Fiona Wilson of 12 April 2022 where she stated that the complaint did not meet the criteria to be investigated under the grievance process as the claimant was "in a formal NJ process and the issue you are raising are in relation to the process and the people who were involved in your new joiners' discussion." That refusal was in accordance with the grievance procedure, which was applicable to all employees. There is no fact from, which we could conclude it was because of the claimant's race. The respondent has made out its explanation, which is that he was treated in accordance with the policy. This allegation fails.

Allegation six: by dismissing the Claimant on 26 May 2022?

7.22 This fails. The claimant was not dismissed. To the extent the allegation is directed at Mr Pritchard's notice of termination. It must fail. Mr Pritchard gave notice of termination because of the claimants breach of contract; he would have treated anyone of a different race in the same way.

7.23 The claimant brings further allegations of direct discrimination. He alleges allegation four was an act of age discrimination. We have found that the respondent has established an explanation. That explanation is also an answer to the age discrimination claim.

7.24 The claimant alleges that allegations two and three amount to acts of harassment related to race.

7.25 We find allegation two was not an act of harassment. This conduct was unwelcome to the claimant. There is no fact on which we could find that the purpose was to harass the claimant. We find that it could not reasonably be said to harass the claimant. The reason for the interview was the claimant's misconduct. Whilst an individual may find investigation of his or her misconduct unwelcome, such investigations are reasonable. Finally, in no sense whatsoever was it related to is race. The investigation was caused entirely by the claimant's conduct.

7.26 We find allegation three was not an act of harassment. Suspending the claimant was no doubt unwelcome to him. However, as noted above, there was a clear explanation which is grounded in the claimant's own misconduct; the respondent's investigation had demonstrated there was prima facie evidence to justify what was, essentially, disciplinary action, albeit through the new joiners process. For the reasons already given, in no sense whatsoever did it relate to the claimant's race.

7.27 It follows the allegations of harassment fail.

7.28 We next come to the indirect discrimination claim.

7.29 The nature of the indirect discrimination claim remains unclear.

7.30 The initial application to amend, as heard by EJ Smith, stated:

> **I would like to add indirect age discrimination. This is relation the relationship and interaction the respondent has with new trainee recruits whom are overwhelming between 17 and 30 years on number of matters, but in my claim, particularly related to work routine, disciplinary, grievance and complaint processes the user the "new joiners procedure."**

7.31 This application failed to set out either a provision criterion or practice or the disadvantage alleged.

7.32 At the hearing on 14 December 2022, EJ Smith did not require the claimant to set out the application in any further detail. The judge recorded the amendment in the following term:

> **4.1 A claim of indirect age discrimination based upon a provision, criterion or practice (PCP) applied by the Respondent, namely that complaints made by "new starter" employees are treated differently – and specifically, dealt with at a slower pace – than those made by employees who are not "new starters."**

7.33 It is unclear where that construction came from. It fails to set out whether the claimant is relying on a specific policy or procedure, or whether some other form of provision is envisaged, and if so whether it was applied by an individual, or was a more general provision of the respondent. It is

simply unclear. Further, there is a failure to set out the provision criterion or practice (PCP). EJ Smith acknowledges this, to a degree, stating the amendment was in need of "some refinement." However, the judge appeared to think it was nevertheless "clear." Nowhere in the narrative is the disadvantage recorded.

7.34 At the hearing, the tribunal requested the claimant confirm the position in writing. We have noted the claimant's full response above. In particular, he refers to Fiona Wilson's email where he says that he was "under a different … limiting new joiners' procedure as opposed to the general grievance procedure." He states he found it to be disadvantageous. The disadvantage that he relied on, at least orally at the hearing, was that his grievance was not investigated.

7.35 At the hearing, we asked the claimant to point to the wording of the new joiners agreements on which he relied. He was not able to do so. We asked the claimant to point to the wording of the grievance procedure he relied on. The claimant was not able to do so. It remains unclear whether the claimant is suggesting this Ms Wilson was applying a policy which already existed, or whether she was behaving in a way which was outside the respondent's policy or was some of invention of her own. It is unfortunate that the amendment was allowed when no PCP was identified by the claimant in his written application, nor clarified adequately or at all at the hearing itself, as acknowledged by EJ Smith in saying it needed "some refinement."

7.36 There are numerous potential ways in which a provision criterion or practice could be framed. When the provision criterion or practice relied on is not adequately set out, it causes significant uncertainty. The claimant, as in this case, does not know the claim he is advancing. The respondent does not know the case it has to answer. The tribunal does not know the case it is to judge. Moreover, it leads to a situation where the tribunal will, inevitably, seek to clarify the allegation. It can be unclear whether any 'clarification' is in itself clarification of an existing claim, or is a new provision criterion or practice, which would require amendment. The position is made yet more uncertain when the disadvantage is never identified.

7.37 The first question is whether the PCP is made out. At heart, there is some form of allegation that new starters are treated differently in relation to "complaints," which we interpret as grievances, given that this was what Fiona Wilson was dealing with. As noted, at the hearing, the claimant initially stated that the differences were enshrined in the policies themselves. He was unable to point to the relevant wording. We find that there is no evidence that the new starters are treated differently from other employees in relation to grievances. There is a single grievance policy. That grievance policy has exceptions when the policy stated it will not be used (see section 4 of he policy, as we have noted above). One of those exceptions concerns the treatment of grievances or complaints when there is an ongoing process such as a disciplinary process which is concerned

with the same subject matter.

7.38 It is implicit that the claimant's case is based on the PCP related only to new starters. That allegation must fail. The grievance policy, and its exceptions, applied to all employees.

7.39 It follows that to the extent the claimant's identified the PCP at all, he has failed to establish its existence. The new joiners are not treated differently.

7.40 The disadvantage alleged is the failure to consider his grievance. He did not rely, expressly, on any delay in considering his grievance. That was not his case. As noted, the amendment fails to set out what disadvantage was relied on. That is a serious omission, and it creates difficulty and uncertainty, which is unfortunate.

7.41 The second part of the test concerns whether it puts persons with the claimant's characteristic at a particular disadvantage when compared with those who do not share it. The characteristic relied on is age, and in particular, the claimant refers to individuals who are between 17 and 30. It is less clear whether the claimant seeks to compare those within the group to whom the alleged PCP was applied or relies on a comparison with all employees. To the extent that he identifies a PCP he alleges it is applied only to new joiners. His subjective opinion is that the majority of new joiners are aged between 17 and 30. We have no reliable statistical evidence.

7.42 The disadvantage, as identified at the hearing, was that his grievance was not investigated. That allegation fails factually. His grievance was investigated.

7.43 He gave no evidence as to the treatment of the group. It follows the claimant fails to establish the disadvantage which he relied on at the hearing.

7.44 The tribunal should not be unnecessarily pedantic in identifying claims. However, neither should the tribunal allow unbridled licence to a claimant to put his case, from moment to moment, in whatever manner the claimant feels is advantageous at the time. Standing back from all this, it may be possible to argue that there is a PCP of excluding from the grievance process grievances the subject matter of which is being considered in other processes, such as disciplinary processes. It may be possible to argue that there is a disadvantage in that grievances may not be investigated at all, or may be delayed. However, that would involve accepting that the PCP related to the entirety of the workforce and the disadvantage, as it may apply in this case, was failure to investigate or delay. That is not the claimant's case. Any such claim would require an amendment. Moreover, the respondent has not advanced any justification defence, because it has relied on the fact that the PCP as identified by the claimant was not applied, a matter on which is it has succeeded. Had the

claimant put his case in a fundamentally different manner and based it on the effect of section 4 of the grievance procedure, the respondent may have put forward a justification defence.

7.45 It follows for the reasons we have given the indirect discrimination claim would fail on its merits. We should, in any event, consider if it was brought in time.

7.46 The application to amend was not granted until 14 December 2022. The indirect discrimination claim concerns events going back to May 2022. The claimant fails to identify sufficiency when he says the discrimination occurred. The amendment is unclear, and so it is difficult to establish a definitive date for the alleged discrimination. It is clear that the claim was brought out of time by several months.

7.47 The fact that time remained in issue was identified by EJ Smith (see paragraphs 5.3 and 7 of the judge's case management order. We have set out the relevant law above. If the relation back principle does not apply, the indirect discrimination claims is clearly out of time. The claimant has presented no evidence or arguments to identify why he delayed in bringing the claim. In his order of 12 August 2022, EJ Klimov recorded the claimant specifically accepted he was bringing no claim of indirect discrimination. There is no suggestion that the claimant indicated he would seek to amend bring a claim of indirect discrimination. It appears the claimant chose not to bring a claim of indirect discrimination initially. It is for him to establish the reason why he delayed. We should consider whether it is just and equitable to allow the claim.

7.48 A tribunal may consider the prejudice which each party would suffer as a result of the decision reached and should have regard to all the circumstances in the case which can include: the reason for the delay; the length of the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued had cooperated with any request for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to a cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

7.49 The respondent should not be required to face uncertain claims. Uncertain claims can be oppressive and difficult to deal with. This respondent could not be reasonably expect to know, either from the claimant's application, or the order if EJ Smith permitting amendment, what the PCP was or what was the alleged disadvantage. The claimant failed to set out the claim of indirect discrimination adequately or at all. It was not adequately identified at the hearing, for the reasons we have given. It remained uncertain coming into this hearing, and throughout the hearing, as the claimant's ground persistently shifted. As noted above, the claimant was unable to identify whether he was relying on any documentation or document. He initially said he was but failed to identify the relevant wording.

7.50 In a situation where the amendment is not adequately identified, the basis on which it is put is likely to shift, as in this case, which is a puts the respondent at a serious disadvantage, and undermines any prospect of a fair hearing. As noted, if the claimant had identified the actual policy, on which Ms Fiona Wilson relied, the respondent may have approached any justification defence differently. The reality is that the respondent is put to fundamental hardship by having to deal with such an unclear claim, whereas the claimant is put to little hardship, as he is able to rely upon the remainder of his claims. Given the circumstances of this case, we do not consider ir appropriate to work through any check list. In the circumstances we find that it is not just equitable to extend time.

7.51 We deal next with the claimant's allegation of unlawful deduction from wages. The claimant has failed to plead this adequately or at all and the evidence he has given is inadequate. The respondent has, through counsel, made a number of admissions which we are entitled to take into account.

7.52 It appears that this claim relates to periods of overtime he seeks to claim whilst travelling to and from training courses.

7.53 His terms and conditions of employment confirm there is no contractual right to overtime, but he is entitled to payment for work directed when operationally necessary. From Monday to Sunday it is at 1.5 times the hourly rate. It is less clear when and how it will be directed or authorised, or what claim should be made. It is common ground that there is some form of system which requires the claimant to request payment. It is also common ground that no such request was made prior to the termination of employment. The claimant says he did not have access to the system. Whether or not he had access to the relevant system, he did not raise it in any other manner, when he could have done so.

7.54 The evidence given by the claimant is limited. In his statement he states "I believe I have a plausible claim for overtime." At the start of his claim form, he states he first travelled to Bradford on February 17 as "three hours of overtime). In addition, he appears to refer to four hours travel to Exeter and four hours return. Therefore it appears his claim is for 11 hours overtime.

7.55 The respondent conceded the claimant was owed 11 hours pay, as recorded in the submissions as follows:

> **The claimant is entitled to overtime payments for 11 hours of overtime (as claimed in his witness statement). The claimant's hourly rate was £13.65. Overtime is paid at 1.5x the hourly rate. 11 hours x £13.65 x 1.5 = £225.23. This payment has not yet been made to the claimant.**

7.56 We award wages in the sum of £225.23.

7.57 The claimant seeks payment of interest on his wages. There is no

automatic right to interest. We may order an additional amount pursuant to sec. 24(2) Employment Rights Act 1996 where we consider it appropriate. Had the claimant sought payment of overtime whilst employed, we may have considered payment of an additional sum. He did not apply for overtime during his employment. Further, his claim would have failed for lack of evidence, but for the respondent's admission. This is not an appropriate case for our discretion, there is no financial loss attributable to the matter complained of.

7.58 Finally, we must consider the claim for failure to pay holiday accrued but untaken as at the date of termination of employment.

7.59 We have previously noted that the claimant did initially request, and book, holiday. The claimant did not take any of his holiday entitlement prior to his resignation.

7.60 The claimant started work on 14 February 2022. His employment came to an end on 26 May 2022. The total number of days he was employed was 101. The terms and conditions of employment provide the holiday year starts on 1 April and ends on 31 March. Those who start partway through the year have pro-rata holiday entitlement. The initial contractual entitlement is 22 days. There is provision for carrying over some holiday, that is limited and is normally agreed. On leaving, the employee is required to use holiday during the notice period. The contract states, "If you can't do that we'll will pay you for any statutory holiday you have taken." It follows that the only contractual provision for payment of holiday accrued but untaken at the time of termination is the statutory position under the working Time regulations. This is governed by regulation 14 Working Time Regulations 1998. Regulation 14 does not, in itself, allow carryover of holiday from a previous holiday year. However, in this case it may be arguable that the claimant would be entitled to carryover all accrued holiday given that he was in part absent and part was training, and it does not appear the respondent has taken the point.

7.61 For the purpose of regulation 14, bank holidays taken would apply to reduce the total leave accrued, as they are paid holiday.

7.62 The total leave in a year, having regard to regulation 13 and regulation 13A, is 28 days. The maximum amount accrued is calculated by reference to the time employed, and in this case was a maximum of 28 x (101÷365) = 7.75 days. Rounded up this is eight days. For the purpose of a regulation 14 calculation, bank holidays should be deducted. It appears there were three bank holidays which means the total holiday accrued but untaken, the purpose of regulation 14, was five.

7.63 The claimant has given inadequate evidence on the holiday claim. It is clear that the holiday pay was disputed after he left, and payment was made. The respondent's undisputed position is that it has made a payment for holiday accrued of 64.03 hours which equates with 8.56 days.

7.64 We find that this is in excess of the sum which was owed to the claimant under statute, even on the most favourable calculation, even excluding bank holidays. We therefore dismiss the claim for holiday pay.

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Employment Judge Hodgson

Dated: 24 July 2023

Sent to the parties on:

24/07/2023

For the Tribunal Office