Case No: 3304182/2023

EMPLOYMENT TRIBUNALS

Claimant: Ahmed Tayel

Respondent: The Secretary of State for Justice (1)
David Daddow (2)
Simon Cartwright (3)

Heard at: Bury St Edmunds Employment Tribunal

On: 6, 7, 8, 9, 10, 13, 14, 15, 16, 17, 20, 21, 22 January 2025 (14 hearing days)
23, 24, 27 January 2025 (3 deliberation days)

Before: Employment Judge Hutchings (sitting alone)

Representation
Claimant: in person
Respondent: Mr S. Crawford, counsel

RESERVED JUDGMENT

It is the judgment of this Employment Tribunal that:

1. The complaint of being subjected to detriment for making a protected disclosure is not well-founded and is dismissed.

2. The complaint of being subjected to detriment for taking leave for family and domestic reasons is not well-founded and is dismissed.

3. The complaint of direct perceived disability discrimination is not well-founded and is dismissed.

4. The complaint of indirect religion / belief discrimination is not well-founded and is dismissed.

5. The complaint of harassment related to perceived disability is not well-founded and is dismissed.

6. The complaint of harassment related to religion / belief is not well-founded and is dismissed.

7. The complaint of victimisation is not well-founded and is dismissed.

8. The complaint of unauthorised deductions from wages is well-founded and failure to pay the National Minimum Wage is not well founded and is dismissed.

REASONS

Introduction

1. The claimant commenced employment with the first respondent, HM Prison and Youth Offender's Institute Hollesley Bay ("HMP & YOI Hollesley Bay", the "prison") in Support Service Operations on 14 August 2017. Since the issue of these proceedings I understand that the claimant's employment with the first respondent has ended (the claimant telling me several times during the hearing that he is unemployed and writing in an email to the Tribunal dated 23 January 2025 he had been dismissed by the third respondent while working at Warren Hill Prison). The issues before me relate to a period of continuing employment at HMP & YOI Hollesley Bay, at the end of which the claimant transferred to Warren Hill Prison. There are no complaints before me which relate to the end of the claimant's employment with the first respondent.

2. The second respondent, David Daddow, is the Governing Governor in charge of HMP & YOI Hollesley Bay. The third respondent, Simon Cartwright, is the Prison Group Director for Hertfordshire, Essex and Suffolk Prison Group.

3. ACAS consultation with the first and second respondents started on 20 February 2023 and a certificate was issued on 3 April 2023. ACAS consultation with the third respondent started on 3 March 2023 and a certificate was issued on 3 April 2023.

4. By an ET1 claim form and Particulars of Claim dated 19 April 2023 and amended Particulars of Claim dated 30 June 2023 and 19 April 2024, the claimant makes the following claims:

    4.1. Section 47B of the Employment Rights Act 1996: detriment for making a Protected Disclosure;

    4.2. Section 47C of the Employment Rights Act 1996: detriment for leave for family and domestic reasons (time off under section 57A);

    4.3. Section 13 of the Equality Act 2010: direct discrimination due to perceived disability;

    4.4. Section 19 of the Equality Act 2010: Indirect Discrimination due to religion;

    4.5. Section 26 of the Equality Act 2010; harassment due to religion and perceived disability;

4.6. Section 27 of the Equality Act 2010: victimisation; and

4.7. Section 1 of the National Minimum Wage Act 1998 / Section 13 of the Employment Rights Act 1996: Failure to pay National Minimum Wage/ unlawful deduction from wages.

5. The claimant's religion as Muslim.

6. By an ET3 response form and Grounds of Resistance dated 28 June 2023 and amended Grounds of Resistance dated 2 October 2023 and 26 June 2024 the respondents defend all claims, asserting all actions taken were reasonable management decisions as a direct result of their concerns about the claimant's behaviour. The respondents submit that the claimant is not owed any wages.

Evidence and procedure

7. The case was listed for 17 days in January 2025.

8. I considered the following documents which the parties submitted in evidence:

8.1. A hearing file of 1772 pages, which Mr Crawford told me the respondents solicitors had sent to the claimant's then solicitor in September 2024, the claimant told me he received this file in early November 2024;

8.2. The respondents supplementary hearing file of 235 pages, which was sent to the claimant's then solicitor on 19 December 2024, and admitted by the Tribunal as relevant evidence on day 1 of the hearing.

8.3. On day 1 of the hearing Mr Crawford sought my permission to admit a further file of 23 pages of documents. The file was sent to the claimant's then solicitor on 3 January 2024. The claimant did not object to the admission of these documents, telling me that they were correspondence and documents he had created. I agree the documents are relevant to the issues in dispute; as such I admitted the file as evidence.

8.4. Daily the claimant sought to disclose additional documents, sending them to the Tribunal's email address and the respondents' solicitor. Mr Crawford did not object to their admission and the following documents were admitted:

8.4.1. Day 1: the claimant's letter to his MP dated 5.12.2022.

8.4.2. Day 5: 39 page document starting with email dated 9.2.23 from the claimant to Mr Cartwright; and 4 page email dated 7.11.21 sent from Mr Palmer to respondents' employees.

8.4.3. Day 8: 8.1.2021 performance management correspondence; 26.3.2021 managing poor performance correspondence; 17.9.2021 email from Mr Cartwright to the claimant; 1.5.2022 respondents' notice to colleagues regarding diversity; 14.9.2019 claimant's payslip; 21.4.2021 claimant's request for information; 21.7.2022 Terms of reference documentation sent by Mr Atkinson to the claimant; 8.8.2022 letter to member of staff under investigation; 27 July 2022 letter from

Mr Atkinson to Mr Daddow; and 31 July 2022 email from Mr Johnson to Mr Tayel.

8.4.4. Day 9: email dated 5 September 2022 from Mr Atkinson to the claimant; and email dated 12 September 2022 from Mr Atkinson to the claimant.

8.4.5. Day 10: 06/09/2022 complaint from Mr Tayel to Mr Atkinson and Deputy Director of Custody/ Simon Cartwright; and email/ letter from Peter Johnson dated 13/09/2022.

8.4.6. Day 12: 21/7/2022@ 06:35 Communication- request for electronic communication and response 22/07/2022 @ 09:28; and 29/11/2022 @ 06:32 Communication- request for electronic communication.

8.4.7. Day 13: a letter dated 27.1023 was admitted at the claimant's request; the respondents did not object.

9. On day 1 Mr Crawford provided the claimant and the Tribunal with the following neutral documents:

   9.1. Chronology of incidents and opening note;
   9.2. Chronology of the issues by reference to each claim type; and
   9.3. Chronology of grievances, performance managements and disciplinary processes.

10. I considered the documents; they were neutral chronologies, one of which sought to identify the page reference for the protected disclosures as the specific documents had not been identified by the claimant in the hearing file. Mr Crawford invited the claimant to consider the page references he had identified for each protected disclosure and confirm whether it was the correct document / identify the correct document by page reference if not. The claimant refused to accept copies of these documents. They were placed in his desk in the hearing room for him to consult should he wish to do so, and sent to him by email by the respondents' solicitor. Despite several suggestions from me that he may wish to do so as they contained helpful chronologies of his complaints, it is my observation that he did not.

11. The claimant did not provide a schedule of loss prior to the hearing. He was ordered to do so and a schedule of loss was received by the Tribunal and the respondents on day 6.

12. The claimant represented himself and gave sworn evidence on days 5, 7, 8 and 9. It is noted that the claimant was represented by a solicitor in the preparation of his claim and at the case management hearing on 3 October 2023. The solicitor did not attend day 1 of this hearing; the Tribunal hearing file did not contain a notice that the solicitor has ceased to act. The claimant refused to tell me whether he was still represented by a solicitor. Therefore, on day 1 I proceeded with the hearing on the basis the claimant was not represented. After the hearing on day 1 the Tribunal sent an email to the solicitor asking for confirmation as to whether the firm still represented the claimant. On 6 January the firm replied:

"We are not representing Mr Tayel. We had a retainer with Mr Tayel; however, this has not been extended to attendance and/or representation at the final hearing. We will therefore not be present at any part of the hearing".

13. Therefore the remainder of the hearing proceeded with the claimant as a non-represented party. I gave the claimant the explanations in plain language at each stage of the hearing, as recorded in the record of hearing, and in doing so referenced the relevant rule in the Employment Tribunal Procedure Rules 2024, noting that the claimant could access the Rules on the internet.

14. The respondent was represented by Mr Crawford of counsel who called sworn evidence from:

    14.1. Sarah Coccia, Area Executive Director for London, at time of the complaints Executive Director for Public Sector Prisons South (day 4);

    14.2. Dave Atkinson, Senior Operational manager HMP & YOI Hollesley Bay during relevant period (day 10);

    14.3. Sophie Hart, People Hib Manager since June 2021 (day 10);

    14.4. Melanie Allen, Deputy Governor, HMP & YOI Hollesley Bay from June 2021(days 10 and 11);

    14.5. David Daddow, Band 10 Governing Governor in charge of HMP & YOI Hollesley Bay from July 2021 (day 11);

    14.6. Jason Claydon, Head of Security and Operations HMP & YOI Hollesley Bay since February 2022 (day 12);

    14.7. Marc Barrett, Senior Officer, Custodial Manager, Night Orderly Officer at relevant time (day 12);

    14.8. Luke Girling, Operational Head of Function, Head of Offender Management services (day 12); and

    14.9. Simon Cartwright, Prison Group Director for Hertfordshire, Essex and Suffolk Prison Group (day 13).

15. By email dated 19 January 2025 the claimant made a request to submit a written closing statement. This was discussed with parties at the start of the hearing on 20 January 2025. Mr Crawford did not object. As the claimant was not represented I spent some time explaining the purpose of a closing statement at the time of this request, and again at the end of the hearing on 22 January, when I directed parties to send their statement to the Tribunal administration and each other by no later than 4pm on 23 January 2025. The claimant asked for more time. I did not consider more time proportionate, given the delays during the hearing, that parties had been aware of the Tribunal timetable at the start of the hearing, and updates during, and the parties had from the end of the hearing and the following day to finalise their statements. I explained to the claimant that the statement did not need to be lengthy; it was a summary as to why his claims should succeed. Both parties submitted their statements in time, the claimant sending a short amendment on the morning of 24 January, which I included when reading his statement.

Hearing Timetable

16. Having dealt with preliminary matters on 6 January 2025 and having taken 7 January 2025 as a reading day for the Tribunal, allowing the claimant time to address the details missing from his applications for disclosure and witness orders (reference the applications recorded below), on 8 January 2025 I revised the timetable for the remainder of the hearing, setting the timetable out at paragraph 15 of the case management order sent to the parties on 8 January 2025. However, due to unforeseen circumstances including evacuation of the court building (on day 6) and delays in the hearing process (on more than one occasion the claimant was delayed when travelling to the hearing and the hearing started late) it was necessary to reset this timetable during the hearing. At the end of each hearing day I updated the timetable and, mindful the claimant was not represented, explained the process for the following day. The timetable followed is below; all updates to the timetable were discussed with both parties on an ongoing basis during the hearing:

    16.1. 6 January: preliminary matters and applications:
    16.2. 7 January: Tribunal reading day;
    16.3. 8 January: delay due to claimant attending a job interview; claimant's renewed preliminary applications;
    16.4. 9 January: evidence of Sarah Coccia (due to her unavailability from 13 January);
    16.5. 10 January: further applications from the claimant; claimant evidence (afternoon only);
    16.6. 13 January: hearing adjourned due to evacuation of the court building;
    16.7. 14 January: claimant evidence;
    16.8. 15 January: claimant evidence;
    16.9. 16 January: claimant evidence
    16.10. 17 January: Dave Atkinson, Sophie Hart, Melanie Allen
    16.11. 20 January 2025 – Melanies Allen (continue), David Daddow
    16.12. 21 January 2025 – Jason Claydon; Luke Girling, Marc Barrett
    16.13. 22 January 2025 – Simon Cartwright
    16.14. 23 January 2025 – time for parties to prepare written closing statements and send them to the Tribunal by email by no later than 4pm; and
    16.15. 24, 27 January 2025:deliberation.

17. The Tribunal took regular breaks, starting at 10am (except when the claimant was delayed) and finishing around 4pm each day. At the start of the hearing the claimant confirmed he did not require any reasonable adjustments. The majority of the hearing took place in person. This was revised by the claimant's requests to attend Friday congregational prayers (recorded below). Mr Crawford confirmed that the respondents' witnesses did not require reasonable adjustments. Mrs Coccia gave her evidence first by CVP due to the timetable being revised (to accommodate delays) which meant she would be travelling outside the jurisdiction and unable to give oral evidence had the hearing followed the original timetable.

18. Mindful the claimant was not represented at the early, at the hearing (repeated many times during) I explained the process of a hearing in the Employment Tribunal, using plain English and by reference to the Employment Tribunal

Procedures Rules 2024, in particular rule 3. I am satisfied that the adjustments and support the claimant received from the Tribunal complies with the overriding objective of the Employment Tribunals (rule 3) to ensure parties are on an equal footing, where one party is a litigant in person. Specifically, rule 3 was explained to the claimant in detail on day 1 and again on day 4 of the hearing, and at other times as recorded in the hearing notes, when the claimant raised his concerns that he was not being afforded a fair process.

19. In summary, there was flexibility in the hearing process (recorded in this decision) to accommodate the delays to the start of the hearing; the claimant was given oral and written guidance about the process of asking questions of the respondents' witnesses; I explained the meaning of words to the claimant when he queried words used by Mr Crawford when asking questions, after the claimant had completed his questioning of the respondents' witnesses I reviewed the witness' statement to ensure that the claimant had asked questions about all relevant evidence, directing him to paragraphs in the statement where he had not; and on 2 occasions I gave the claimant about the preparation of his closing statement.

20. Throughout the hearing I shared guidance from rule 3 of the Employment Tribunal Procedure Rules 2024 and the guidance in the Equal Treatment Bench Book 2024. Often the claimant chose not to follow the guidance afforded him by the Tribunal: of course, this is his choice. When he did not agree with the approach taken by the Tribunal (suggesting that he was not being afforded the opportunity to ask his questions) he did not return to the hearing without notice, instead sending an email expressing concerns pursuant to Article 6.

21. Frequently, I asked the claimant if he had any questions about any of the explanations I had given. When he did ask a question about my explanations (which he rarely did, suggesting he understood them) I rephrased the explanation. Mindful of the delays and the fact the Tribunal was an unfamiliar forum for the claimant, sometimes I had to move the hearing on when the claimant sought to "clarify" something for my benefit (not at my request) to ensure the proceedings could be completed in the available hearing time, explaining that clarification was not necessary as I was taking a detailed contemporaneous note of the evidence and would have this and all the documents available to me during my deliberations. I am satisfied that a just and fair hearing took place for both parties, complying with rule 3 of the Employment Tribunal Procedure Rules 2024.

Reasonable adjustments

22. In an email dated 10 January 2025 the claimant indicated for the first time that he wanted to attend Friday Congregational Prayers. I note that at no time since the hearing was scheduled at the case management hearing in October 2023 had a request been made. I asked the claimant if he required adjustments to the usual hearing timings to enable him to attend Prayers. The claimant told me that he was required to attend Congretioanl Prayers in person. The claimant had attended the Tribunal in person on 10 January as the direction of the Tribunal; in making this direction on 9 October the claimant had not told me or Tribunal administration that he wanted to attend Congregational Prayers in person on 10 January and when, on 9 January, the claimant made an application to convert the entire hearing to CVP he had made no reference to Congregational Prayers at all, or attending them in person, as a reason he was

seeking to convert the hearing to CVP. In this context, I find his implication in his email that the Tribunal had ordered him to attend in person on 10 January and as a result he could not attend Congregational Prayers in person disingenuous. His approach invariably informs my assessment of the claimant's credibility.

23. On 10 January we took a break to give the claimant some time to try and find somewhere local to the court building to attend prayers, and to find out the times of prayers that day. I told the claimant the Tribunal would make similar enquiries as this was a request with which the Tribunal was familiar and accommodated when made, including finding a private room in the Tribunal for anyone who wanted to pray. After the break the claimant told me there was no-where local to attend prayers and he had not been able to confirm the times of prayers that day. The Tribunal had identified the pray times, by reference to official information published by a local mosque. When I offered to share the times of Congregational Prayers identified by the Tribunal with the claimant he told me I would not know the times as he would as I am not Muslim. The claimant then told me that he wanted to proceed with the hearing in person and that he would not attend Congregational Prayers on this occasion. The hearing proceeded on this basis.

24. On 10 January, mindful the hearing was scheduled for the following 2 Fridays (17 and 24 January), I told the claimant that on the subsequent Fridays the hearing would be hydrid so he could attend by CVP and I would adjust the hearing times to accommodate his attendance in person at Congregational Prayers. I asked the claimant to inform the Tribunal the time he would need to leave the hearing to attend Congregational Prayers in person and the time he would be able to return. By the following Thursday, 16 January, he had not provided the Tribunal with the requested information, but told me he would attend the following day by CVP and when asked, that it would take him 20 minutes to travel from his home to mosque, and that he had a arranged a lift. I gave Mr Crawford and the respondents' witnesses the option to attend by CVP too, which they did on 17 January; the Tribunal did not sit on 25 January.

25. As the claimant had not provided the requested information the about prayer timings on 17 January, during the morning hearing on 16 January I asked the claimant to obtain this information in the lunch break. After lunch he told me he had been unable to do so. I asked him to confirm the times before the start of the hearing on 17 January 2025, preferably by email to the Tribunal. On 17 January the claimant emailed Tribunal before the hearing informing me that he would need to leave at 12.55pm; he did not include the time at which he would be able to return to the hearing. At the hearing, the claimant told me he would be able to return at 1.30pm. This did not make sense to me, as the previous day the claimant had told me the travel time to the mosque was 20 minutes. The claimant was requesting a break of 35 minutes to attend Congregational Prayers when, by his own information to the Tribunal, the travel time to the mosque and back was 40 minutes. I decided a proportionate response was to take a break from 12.40pm to 2pm to enable the claimant to attend Congregational Prayers in person, on the basis of pray times identified by the Tribunal from official documents and the claimant's information about his travel time.

26. At the claimant's request, a reasonable adjustment was made to allow the claimant to make notes while giving his evidence as he was a litigant in person

attending the hearing on his own. The Tribunal provided the claimant with a notepad and pen.

Claimant's applications

Day 1

27. At the start of the hearing on 6 January 2025 the claimant made 5 applications (some of which had been sent to the Tribunal in writing prior to the hearing, which Regional Employment Judge ("REJ") Foxwell had directed would be considered by the presiding judge at the hearing. I address the applications below:

Application 24 December 2024 and updated with additional reasons on 6 January 2025 to postpone the hearing

28. On 24 December 2024 the claimant made an application to postpone the hearing on the basis he had had insufficient time to prepare and he had not received all relevant documents.

29. On 3 January 2025 REJ Foxwell directed the hearing would proceed as judge sitting alone due to unavailability of non-legal members. On 6 January 2025 the claimant updated his application to postpone to include the reason that the Tribunal was not comprised of a full panel.

30. Mindful the claimant was not represented at the hearing I explained the basis of REJ Foxwell's decision to direct the hearing proceed as judge sitting alone by reference to the following documents, quoting from them as recorded below:

30.1. The Senior Presidents Guidance on Panel composition dated 29 October 2024, paragraph 3:

"3. Subject to paragraph 5, in respect of matters that fall to be decided at or following a final hearing, a judge will decide, having regard to the interests of justice and the overriding objective, whether an Employment Tribunal is to consist of:

a. a judge sitting alone; or

b. a judge, an employee member, and an employer member;

unless a leadership judge decides that it should consist of two judges for the purposes of training and development.

30.2. Presidential Guidance on Panel Composition issued 29 October 2024, paragraphs 7 to 11:

"7. A judge's decision on panel composition is a case management order for the purposes of rule 29. The factors that are relevant to panel composition will vary from case to case. They need not lead inevitably to a conclusion one way or the other, but are for the judge to weigh in the balance when deciding the composition
which furthers the interests of justice and accords with the overriding objective.

8. They include:
8.1 The views of the parties (which are not determinative).

8.2 Whether the issues to be determined at the hearing require an understanding of contemporary workplace norms, practices and challenges, to which the
members can contribute their experience. This may be so where the issues require an assessment of the reasonableness of the actions or beliefs of the employer or the employee and the members' experience may add significant value to that assessment.
8.3 On a practical level, the availability of members to sit on the case (which may correlate with the length of the hearing) and the risk of delay to the case if a full tribunal were to be empanelled.

9. Examples of cases which involve an assessment of reasonableness are: whether an employer acted reasonably or unreasonably in treating its reason for dismissal as a sufficient reason for dismissing the employee6; whether, in constructive dismissal cases, an employer had reasonable and proper cause for conduct that would otherwise be likely to destroy or seriously damage the relationship of trust and confidence; whether it was reasonable for an employee to believe that a qualifying disclosure was made in the public interest; whether it was reasonable for an employee to believe that circumstances connected with work were harmful
or potentially harmful to health and safety, or posed a danger that was serious and imminent; whether an employer failed to comply with a duty to make a reasonable adjustment for a disabled person; and whether it was reasonable for unwanted conduct to have the effect of violating a person's dignity (or creating for them an intimidating, hostile, degrading, humiliating or offensive environment).

10. The involvement of members is not to be limited to cases that involve an assessment of reasonableness. For example, we anticipate that judges may often consider it appropriate to have members on a panel that is required to consider an appeal against a health and safety prohibition or improvement notice; the lawfulness of inducements relating to trade union membership/activities or collective bargaining; the consultation steps that an employer has undertaken in respect of collective redundancy situations; whether an asserted belief qualifies for protection from discrimination; and, when examining objective justification in those discrimination claims where the defence arises, whether the legitimate aim identified by an employer corresponds to a genuine business need.

11. The fact that the case involves an assessment of the sort identified in paragraphs 7 to 10 above does not, in and of itself, mean that a full tribunal should be empanelled. The question for the judge in each case is whether the members' experience is likely to add significant value to the process of adjudication.

31. I noted that the claimant was not claiming unfair dismissal and there were only a few discrete, factual claims of harassment, which would require an assessment of the impact of any unwanted conduct found by the Tribunal to have taken place as alleged by the claimant. I referred to rule 3 of the Employment Tribunal Procedure Rules 2024 and the requirement of the Tribunal to take account of the rule to avoid delay, so far as compatible with proper consideration of the issues and save expense when making a case management decision (noting that the decision on Tribunal composition is a case management decision). I explained that the next available date for this

length of hearing would result in a further delay of approximately 18 months. I explained that as some of the alleged events about which the claimant complains date to 2021, it was not in the interests of justice to delay for this amount of time as it is already over 3 years since some of the events about which the claimant complains, noting memory fades with time. Therefore, I noted a further delay of 18 months was not in either party's interests.

32. Having summarised and explained the Presidential Guidance and Practice direction on panel composition to the claimant, and having asked the claimant if he had any questions, we took a 30 minute break for the claimant to consider the information I provided. I am satisfied that I had assisted the claimant, mindful he is not represented, with an explanation as to the reason REJ Foxwell had made the decision the hearing should proceed judge sitting alone, and that I had referred, and explained to the claimant, the rules which informed this decision. After the break, the claimant thanked me for my assistance and said he accepted REJ Foxwell's decision.

33. Returning to the other reasons cited by the claimant for applying for a postponement; at the hearing the claimant told me that he had appealed the Tribunal's decision to refuse interim relief and a judge's refusal to consolidate 2 subsequent claims with this one to the Employment Appeal Tribunal ("EAT"). The claimant told me this hearing should be postponed pending the outcome of these appeals. Mr Crawford informed me that the appeals had been refused by His Honour Judge Tayler; the claimant indicated he would be appealing this decision.

34. Mr Crawford opposed the postponement application setting out the respondents' reasons why it was in the interests of justice to proceed. In summary, he told me: the hearing had been scheduled for more than 15 months; while there was some delay to the production of the hearing files, neither the claimant nor his solicitor raised a concern at the time nor at any time before the start of this hearing; a further appeal of EAT decisions is not a reason to not proceed; the respondents have provided additional information in response to the claimant's concerns about missing correspondence; and the claimant has had sufficient time to prepare, the case management hearing having taken place in October 2023 and the file having been sent to the claimant's solicitors in September 2024 (I note the claimant says he received it at the beginning of November 2024). Mr Crawford told me there was plenty of time to deal with the claimant's applications during a 17 day hearing and further delay was not in the interests of any party, particularly given my observation about the next available hearing date.

35. I refused the postponement application, giving reasons orally, which are summarised as follows. The claimant was represented until the start of this hearing; taking his case at its highest (that he did not receive the documents until early November 2024) he has had sufficient time to review the documents (with or without his solicitor) and prepare for the hearing and has provided a witness statement. I noted that REJ Foxwell had explained to the claimant in written correspondence that an appeal is not a reason to postpone a hearing and a case proceeds in the normal course pending any order to stay or appeal decision of a higher court. The claimant's applications for specific disclosure and witness orders were not a reason to postpone and could be considered following the application about hearing length and type (in person or CVP). I repeated REJ Foxwell's written correspondence to the claimant that even if the

witness orders are granted, the claimant does not require additional preparation time as a party who secures a witness order does not, following due process in the tribunals, have the right to ask questions of those witnesses except in exceptional circumstances. Therefore applications for specific disclosure and witness orders are not a reasons to postpone. I balanced the prejudice to the respondents of a postponement (of about 18 months), noting the respondents' witnesses have submitted statements and are scheduled to attend, concluding the balance of prejudice favoured the respondents. The claimant received the witness statements several weeks ago and, in my judgment, has had sufficient time to prepare. Indeed, given a rescheduled hearing would be about 18 months in the future, I concluded this was not fair to either party; it is in the interests of justice for all parties to have a resolution, particularly given the seriousness of the allegations.

36. Even though the claimant had withdrawn panel composition as a reason to postpone, mindful he was not represented, I reiterated why the decision to proceed judge sitting alone was not a reason to postpone given the factual and legal claims before me.

Application dated 24 December 2024 to reduce the number of hearing dates due to the claimant not calling as many witnesses as indicated at CMPH

37. I referred to the draft timetable sent by the respondents' solicitor to the claimant and Tribunal prior to the hearing, explaining it was my assessment that the timetable fairly reflected the time required, given the number of applications made by the claimant and the fact the Tribunal had 10 witnesses to hear from. The claimant told me he had seen the timetable and as a result withdrew this application to reduce the number of hearing days. In the event the Tribunal required the listed 17 days to conclude these proceedings.

Application dated 24 December 2024 to convert the hearing to CVP

38. I explained that lengthy hearings should take place in person unless there is a good reason for a hearing to take place by video link. The claimant told me a video hearing would save travel costs and time for all parties. Mr Crawford told me the respondents object to the hearing being converted to CVP, given the number of witnesses and length of the hearing. Subsequently, the claimant withdrew this application.

39. I note that the claimant did not make any reference to Congregational Prayers in this application. The first request the claimant made to attend Congregational Prayers was on 10 January 2025. I have recorded this request above (reference: reasonable adjustments)

Application dated 24 December 2024 for 7 witness orders

40. On 24 December 2024 the claimant submitted a written application for 7 witness orders. It was not possible to hear these applications on 6 January 2025 as the claimant did not bring a copy of his application document with him, the respondents did not have a spare copy and the Tribunal did not have the facility to print a copy. In any event, having considered the written document I concluded that it did not contain sufficient information for the application to be properly responded to by Mr Crawford or for the Tribunal to make a decision. Mindful the claimant was not represented at the hearing, I gave the claimant

oral guidance so that he could review his application and resubmit it with reference to his claim, and specifically the issues, explaining why he considered each witness relevant. This guidance was repeated in the Tribunal's written orders dated 7 January 2025 and sent to the claimant that day.

41. Given the claimant did not have a copy of his application and that, in my judgment, the application was not sufficiently detailed, I suggested the application could be heard at 10am on day 2 when the claimant would have a copy of his application and could consider the Tribunal's guidance and update his application in light of this. The claimant refused to respond to this suggestion. He would not reply to my request to say whether he would attend the hearing on day 2. Therefore I directed that day 2 would be a Tribunal hearing day and parties did not need to attend.

42. The claimant did not attend day 3 of the hearing, citing in an email overnight to the Tribunal concerns that the hearing on day 1 did not comply with Article 6 of the EHCR. I have addressed the due process the Tribunal followed, and the steps taken to support him, mindful that the claimant was not represented elsewhere in this judgment.

43. On day 4 the claimant renewed his written application for witness orders, applying for 2 witness orders (considered below).

Application dated 24 December 2024 for specific disclosure (5 documents)

44. The claimant did not bring a copy of his 24 December 2024 for specific disclosure to the hearing. Mr Crawford gave the claimant a spare copy he had. I noted that the application did not specifically by reference to date, type and parties to the document nor explain by reference to the claims, or list of issues, why the claimant considered the document relevant. I asked the claimant to explain the relevance by reference to the respondent's list of issues, which was agreed by his solicitor at the October 2023 case management hearing. The claimant's response to me did not do so; what the claimant said to me did not address any points in my guidance. Therefore I refused the application due to lack of specificity as to the documents sought.

45. I told the claimant, and directed the same in writing, that he could make a further application for specific disclosure on 8 January 2025 if the amended application detailed the document sought and why it was relevant by reference to the list of issues. The claimant did not attend the hearing on 8 January 2025. On 9 January 2025 the claimant renewed his specific disclosure application in writing. I asked if he wanted to add anything to the written application and he declined. Mr Crawford objected to the application on the basis, in summary, that the documents sought we not directly relevant to the decisions about which the claimant complains. I agreed and the application was refused.

<u>Day 4</u>

46. The claimant did not attend day 4 of the hearing in person, contrary to the Tribunal's direction that the hearing would proceed in person. Pursuant to rule 47 of the Employment Tribunal Procedure Rules 2024 the Tribunal made reasonable enquiries as to the reasons for the claimant failing to attend the hearing centre, contacting him by email and informing him of the possible consequences of his non-attendance. The claimant replied by email that he had

a job interview and that he needed to look after son; the claimant's response did not provide evidence to support either reason, therefore in order to ensure a fair hearing for all parties, Mr Crawford and the respondents' witnesses having attended the hearing centre on time, I requested evidence in support of his reasons.

47. The claimant provided me with a teams invitation titled interview for a custody officer 9-10am and a letter from his son's school setting out some information from the school about the son's adjustments there. As to the interview, I reminded the claimant that he had had the dates of this hearing since the case management hearing on 3 October 2023; therefore, it was incumbent on him to arrange any personal matters to ensure he could attend the hearing. Given the time of the interview, I delayed the start of the hearing until 10.30am and arranged for the claimant to receive a CVP hearing link by email so he could join remotely. The information in the letter did not support the suggestion that claimant needed to look after his son that day; he offered no further explanation or evidence for this reason and attended the hearing by CVP for the entirety of the hearing day.

Second application for the hearing to be converted to CVP

48. On day 1 the claimant withdrew his application to convert whole hearing to CVP. On day 4 he asked for this to be renewed. As I have not made a decision (the claimant having withdrew) and mindful he was not represented, I allowed the claimant to make this application. Before doing so we took a break from 11.10am to 11.25am for claimant together his thoughts on the reasons for this request.

49. The claimant told me that his son may not be well in the morning (I note there was no evidence, the letter from the school did not address the son's current health, and the claimant's suggestion of "may" was speculative) and it was for everyone's convenience to save the time and cost of having to travel to Bury St Edmunds. The claimant made the unsubstantiated submission that the respondents and their witnesses do not want to travel in either. Mr Crawford confirmed this was not the case, noting that everyone present at the hearing has personal commitments and have travelled some distance. Mr Crawford told me that the reasons being advanced by the claimant are not exceptional or significant such that it could not have been considered prior to today and do not displace the Tribunal's preference for a hearing of this length and with this number of witnesses to take place in person, commenting that the reasons given have been advanced by the claimant late in the day when matters such as convenience and travel time and cost would have been know since October 2023 when the hearing date and location was set by Employment Judge Warren.

50. In refusing the claimant application, I echoed the reasons given by Mr Crawford to continue in person, noting that long hearings (this is 17 days) and with many witnesses (10 in total) are generally held in person given the sometimes technical challenges of many people being online, the fatigue associated with lengthy video hearings and when very serious allegations of discrimination have been made by a claimant, as here, the merit of assessing evidence given under oath in person. I decided the hearing must continue in person.

Application for 2 witness orders

51. Prior to the hearing the claimant sent a revised written application for witness orders, asking that the Tribunal make 2 order for Ben Turner and Sally Hill> note the claimant had taken account of the written guidance I had provided to claimant in the case management order dated 8 January 2025, to refer to the respondent's list of issues (which Employment Judge Warren had ordered as the final list), to assist the claimant in revisiting his application. I note he referred to the claimant's list of issues. I note he did not apply for a witness order for Peter Johnson in this application. I read the applications and asked if the claimant wanted to add anything; he told me he did not.

52. The respondents objected to the requests. In summary, Mr Crawford told me that the Tribunal had direct witness evidence from the people who made the decisions (the alleged detriments) about which the claimant complains (witness statements and those witnesses were available to be questioned by the claimant and the Tribunal), submitting that neither Sally Hill nor Ben Turner made the decisions about which the claimant complains and their involvement was indirect and they were acting on the instructions of others. They could offer no insight into mindset of decision makers. In these circumstances Mr Crawford told me it is neither necessary or proportionate for the Tribunal to hear evidence from these individuals. I agree. For certainty, and indeed of some assistance to the claimant given he is not represented, Mr Crawford took the Tribunal through each issue identified by claimant indicating the witness who had provided a witness statement who the claimant alleges was responsible for the decision, noting from the neutral chronology that Sally Hill and Ben Turner's involvement did not correspond to same period as the core factual allegations.

53. Mindful of rule 3 of the Employment Tribunal Rules of Procedure and the requirement of proportionality, the fact the respondents are calling evidence from 9 witnesses who are the individuals responsible for the decisions about which the claimant complains, I refused the application. Taking account of the fact the claimant is not represented at the hearing, I explained to him that tribunals hear evidence of fact from the people with direct experience of the events complained about and that I was satisfied that each person against whom he had made each allegation in these proceedings had provided a witness statement which the claimant could question them about. I told the claimant I was satisfied a fair hearing could take place and evidence could be properly tested without the need to order people who were not responsible for the decisions to give evidence.

Application for specific disclosure (4 documents)

54. Mr Crawford having confirmed one of the documents in the original application was in the hearing files, the claimant revised his written application for 4 documents, telling me at the hearing he had nothing to add. Mr Crawford resisted the application reiterating the submissions for the witness order application, that the documents sought are not directly relevant to factual allegations brought by the claimant and given all decision makers had provided a witness statement and were available for cross examination, it was not proportionate to order the respondents to search for these documents at this stage in the proceedings. In refusing the application I agreed with these submissions and explained to the claimant that proper process was for the claimant to ask questions of the respondents' witnesses. I noted that I had

provided the claimant guidance on this in the case management order sent to him on 8 January.

Day 13

55. Part way through asking Mr Cartwright questions, the claimant told me that he wanted unredacted copies at pages 1673 and 1674, and documents dated 30.6.20 and 21.1.23 in the hearing file, I told the claimant that I would consider this after the conclusion of Mr Cartwright's evidence. At this time the claimant told me, on reflection, he did not want to pursue these applications.

56. During lunchbreak the claimant sent a written application for a witness order for Peter Johnson; he confirmed he had nothing to add orally to the application. In summary the claimant seeks the witness order on the basis of Mr Johnson's knowledge of "email of 02/07/2018" and the relationship the claimant allege Mr Johnson had with Mr Daddow in passing on information and the fact that on "*13/09/2022 Mr Johnson invited [the claimant] to a performance management meeting."* The claimant submitted that Mr Johnson's evidence is relevant to issues of *"pay- poor performance- disciplinary- suspension",* the claimant's complaint about the activation of body worn cameras and hand delivery of the suspension letter.

57. Mr Crawford objected to the application, referring me to the sworn evidence in Mr Daddow's witness statement that Mr Johnson had intended to give evidence but he had not been at work due to a significant, ongoing health condition and therefore this is the reason he had not submitted evidence. Mr Crawford notes that the claimant had known this was the reason Mr Johnson has not provided a witness statement since he received Mr Daddow's witness statement in October 2024.

58. I refused the application, not least for the reason that a Tribunal was not going to order someone who was off work with significant health issues to attend a hearing to give evidence. In any event, the respondents direct evidence from the individuals who made the decisions about the claimant's pay, to transfer him to day shifts, to investigate his complaints, suspend him and to activate the body worn order. In this regard there is no gap in the evidence. As regards delivery of the suspension letter, the claimant's request seems to have misunderstood this complaint. The complaint is that a decision was taken to deliver the letter by hand; this was not Mr Johnson's decision, he was the messenger and therefore his evidence is not necessary.

59. In his closing submission the claimant asked me to make an adverse inference from that fact that Mr Johnson had not provided a witness statement or given evidence at the hearing. I find this a curious request given the claimant was aware from October 2024, and this was emphasised at the hearing, that the reason for Mr Johnson not giving evidence was his ongoing and significant ill health. I accept this reason; no adverse inference has been made.

List of issues

60. At the start of the hearing, mindful that the claimant was not represented, I explained the purpose of the List of Issues; a summary of the claims by reference to the factual complaints and legal tests for complaint. The parties had been unable to agree a list of issues by the start of the hearing. At the

October 2023 case management hearing Employment Judge Warren had ordered that the respondent's list of issues stand as the final list of issues to be referenced at this hearing. This was in the context of the claimant's then solicitor having also prepared a list of issues for the October 2023 but that list not having made it to Employment Judge Warren for the hearing (despite having been sent to Tribunal administration in time).

61. At this hearing the claimant sent the Tribunal a copy of the preliminary hearing file which had been prepared for the case management hearing, at page 117 to 124 of which was the claimant's draft list of issues. He expressed his concern that it was not fair this had not been considered at the case management hearing and objected to the Tribunal using the respondent's list at this hearing, as directed by Employment Judge Warren.

62. In these circumstances, and as the claimant was somewhat vexed and frustrated at my suggestion I follow Employment Judge Warren's direction and use the respondent's list, I considered the claimant's change in circumstances to a litigant in person sufficient reason to revisit the list of issues. I agreed with Mr Crawford's submission that the lists are, in fact, very similar; in places it is a matter of semantics where words used to summarise the legal tests are slightly different. Therefore, I took it upon myself to review both lists and produce a final list using standard wording for the legal tests used by the Tribunal. I also updated the list to reflect the amendments agreed to the claim in April 2024. The updated and final list was sent to both parties on 10 January. It is set out below.

63. The issues the Tribunal will decide are:

1. **Time limits**

    1.1 Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 19.11.2022 may not have been brought in time.

    1.2 Were the discrimination and victimisation complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

        1.2.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
        1.2.2 If not, was there conduct extending over a period?
        1.2.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
        1.2.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
            1.2.4.1 Why were the complaints not made to the Tribunal in time?
            1.2.4.2 In any event, is it just and equitable in all the circumstances to extend time?

1.3 Was the unauthorised deductions (national minimum wage) complaint made within the time limit in section 48 of the Employment Rights Act 1996? The Tribunal will decide:

1.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the date of payment of the wages from which the deduction was made?
1.3.2 If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?
1.3.3 If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?
1.3.4 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
1.3.5 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

2. **Protected disclosure**

2.1 Did the claimant make one or more qualifying disclosures as defined in section 43B of the Employment Rights Act 1996? The Tribunal will decide:

What did the claimant say or write? When? To whom? The claimant says he made disclosures on these occasions:

2.1.1 On 17 September 2021, the claimant disclosed that he was being paid below the National Minimum Wage (NMW).

2.1.2 On 30 June 2022, the claimant reported an act of sexual harassment to the second respondent and accused him of a lack of action, encouragement, and breach of a legal duty.

2.1.3 On 4 July 2022, 26 September 2022, 16 November 2022 and 29 November 2022, the claimant reiterated the issues regarding the unfair treatment of BAME prisoners. Prisoners' safety to the first and second respondent

2.1.4 On 6 July 2022 the claimant reported brief allegations of sexual harassment against females' staff- allegation of an abscond of a prisoner which could have been prevented- suppression of documents and denying the IMB access to prison records including complaints of discrimination by prisoners. This was communicated to Mrs Coccia and the third respondent. The claimant promised to supply full particulars.

2.1.5 On 6 September 2022, 5 December 2022, 9 December 2022 and 20 January 2023 the claimant raised issues of

discrimination, harassment and victimisation and breach of Public Sector Equality Duty and Prison Safety to the third respondent.

2.1.6 On 26 September 2022 the claimant raised issues of Health and Safety in the prison.

2.1.7 On 26 November 2022 and 29 November 2022, the claimant raised concerns with the second respondent about discrimination towards BAME employees.

2.1.8 On 5 December 2023, the claimant made a protected disclosure to his Member of Parliament, Tom Hunt regarding concerns he had about the management of Hollesley Bay (Sexual Harassment against two female staff by the same prisoner, Failure to prevent abscond and Independent Monitoring Board - treatment of BAME Prisoners. It is submitted that an MP is a “prescribed person” for the purposes of section 43F of the ERA.

2.1.9 On 16 May 2023, the claimant complained to Mrs Coccia and the third respondent that he was dissuaded from making protected disclosures to his MP by the Second respondent by threatening disciplinary action for the same.

2.1.10 Did he disclose information?

2.1.11 Did he believe the disclosure of information was made in the public interest?

2.1.12 Was that belief reasonable?

2.1.13 Did he believe it tended to show that:

2.1.13.1 a criminal offence had been, was being or was likely to be committed;

2.1.13.2 a person had failed, was failing or was likely to fail to comply with any legal obligation; specifically the claimant relies on: a legal obligation to pay the national minimum wage;

2.1.13.3 a miscarriage of justice had occurred, was occurring or was likely to occur; specifically the claimant relies on the Misconduct in Public Office Criminal Justice and Court Act 2015

2.1.13.4 the health or safety of any individual had been, was being or was likely to be endangered; specifically the claimant relies on The Health and Safety Act 1974 and “general breaches of health and safety in the prison”

2.1.14 Was that belief reasonable?

2.2 If the claimant made a qualifying disclosure, it was a protected disclosure because it was made to the claimant's employer.

3. **Detriment (Employment Rights Act 1996 section 48)**

3.1 Did the respondent do the following things:

3.1.1 On 30 June 2022, the second respondent placed the claimant under the first respondent's poor performance policy.

3.1.2 On 30 June 2022, the second respondent raised false allegations against the claimant.

3.1.3 On 30 June 2022, the second respondent demanded that the claimant transfer from night shifts to day shifts.

3.1.4 On 30 June 2022, the second respondent said you will only work in the gate and not on any residential unit." This had the effect to segregate the claimant from other employees.

3.1.5 On 15 July 2022 the claimant was placed under disciplinary investigation.

3.1.6 On 25 July 2022, the second respondent altered a job specification of a role the claimant was interested in to say employees must not be subject to performance management and must be band 5 or above.

3.1.7 On 31 July 2022, the claimant received a written warning.

3.1.8 On 6 October 2022 the claimant was placed under second disciplinary investigation.

3.1.9 On 14 October 2022, the third respondent proceeded with the investigation to disciplinary.

3.1.10 On 28 November 2022, the third respondent refused the claimant request for transfer to Warren Hill Prison and subjected the claimant to unreasonable and without proper cause suspension.

3.1.11 On 29 November 2022, the second respondent suspended the claimant and placed him under a third disciplinary investigation, this was one day after the claimant's further complaint of discrimination.

3.1.12 On 29 November 2022, the second respondent accused the claimant of being erratic and irrational.

3.1.13 On 23 January 2023, the first and second respondent instructed Mr Johnson to visit the claimant's house and hand deliver a letter placing him on final written warning under performance management.

3.1.14 On 27 January 2023 the third respondent upheld the decision to suspend the claimant.

3.1.15 On 6 February 2023 the second respondent refused the claimant request for information and refused the claimant the opportunity to appeal against the decision to place the claimant on final written warning.

3.1.16 On 18 April 2023, the second respondent wrote to the claimant forcing him to work on day shifts, which would in turn mean he loses around £10,000 per annum in salary.

3.1.17 On 21 April 2023, the second respondent threatened the claimant with disciplinary action for his protected disclosure of 05/12/2023 in a letter to all staff he wrote: *"I have provided below some of the key policies and controlling principles. This should demonstrate the seriousness of sharing prisoner, staff, or prison performance information outside of HMP & YOI Hollesley Bay without the permission of the Governor (Asset Owner). Prison sensitive information is provided to staff ONLY for the purpose of work within the prison. Permission to use sensitive information or share prison information outside of the prison can only be permitted with the authority of the Governor. Should any person be found to have shared prisoner, staff, or prison data to any person outside of HMPPS without the asset owner's permission (Governor), they may be subject to disciplinary action. This includes, sharing information with Members of Parliament, local government, members of the public or media."*

3.1.18 From 16 May 2023, Mrs Coccia and the third respondent failed to investigate the claimant's complaint that he was dissuaded from making protected disclosures by the second respondent, further both Mrs Coccia and the third respondent failed to take any restorative action regarding the second respondent's threats regarding disciplinary action for making protected disclosures.

3.1.19 On 19 May 2023, Mrs Coccia kept the claimant on poor performance which caused a loss of chance to apply for positions with the first respondent, for instance, he could not apply for position 74405 – Prison Group Equalities Lead HES with a salary of £44,332 to £53,201 per annum.

3.2 By doing so, did it subject the claimant to detriment?

3.3 If so, was it done on the ground that he made a protected disclosure / other prohibited reason?

4. **Detriment for time off for dependants (Employment Rights Act 1996 section 57A(1))**

4.1 Did the claimant take time off for his dependents, namely his children, because of unexpected disruption or termination of the arrangements for care of his children?

4.2 On 5 September 2022 did the claimant ask for "a reasonable amount of time off" during the claimant's working hours in order to take action which was necessary because of the unexpected disruption or termination of the arrangements for care of his children?

4.3 Did the respondent do the following things:

4.3.1 On 6 October 2022, Mrs Allen placed the claimant under investigation for "absenting" himself.

4.3.2 On 2 February 2023, the first and second respondent proceeded to move the above allegations to disciplinary.

4.4 By doing so, did it subject the claimant to detriment?

4.5 If so, was it done on the ground that he took time off for dependents?

5. **Remedy for Protected Disclosure Detriment**

5.1 What financial losses has the detrimental treatment caused the claimant?

5.2 Has the claimant taken reasonable steps to replace their lost earnings, for example by looking for another job?

5.3 If not, for what period of loss should the claimant be compensated?

5.4 What injury to feelings has the detrimental treatment caused the claimant and how much compensation should be awarded for that?

5.5 Has the detrimental treatment caused the claimant personal injury and how much compensation should be awarded for that?

5.6 Is it just and equitable to award the claimant other compensation?

5.7 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

5.8 Did the respondent or the claimant unreasonably fail to comply with it?

5.9 If so, is it just and equitable to increase or decrease any award payable to the claimant? By what proportion, up to 25%?

5.10 Did the claimant cause or contribute to the detrimental treatment by their own actions and if so, would it be just and equitable to reduce the claimant's compensation? By what proportion?

5.11 Was the protected disclosure made in good faith?

5.12 If not, is it just and equitable to reduce the claimant's compensation? By what proportion, up to 25%?

6. **Direct discrimination (Equality Act 2010 section 13) - perceived disability**

6.1 Did the respondents perceive the claimant to have a disability as defined in section 6 of the Equality Act 2010 at the time of the events the claim is about? The claimant says the second respondent perceived the claimant to have a mental impairment of being deluded.

6.2 Did the second respondent perceive the claimant to have a mental impairment?

6.3 Did the respondent do the following things:

6.3.1 On 7 October 2021 the second respondent refused to engage the claimant on nights unless he undertook an Occupational Health assessment, he said: *"I do however remain concerned about your well-being and how nights may be affecting your mental health. I am not willing to retain you on Nights unless you engage in an OH Night worker referral."*

6.3.2 On 29 November 2022 the second respondent said *"Your behaviour appears erratic and irrational. Genuinely, if you are struggling with your mental, physical health or have an undisclosed disability, please let your manager or Head of function know. They are skilled and competent to direct you to support services available. Whilst your current conduct is unacceptable, I am keen to ensure we continue to offer you support."*

6.4 Did Mr Claydon aid Mr Daddow in any of these acts.

6.5 For any proven act, 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 he was treated worse than someone else would have been treated.

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

6.6 If so, was it because of the respondents' perception that the claimant was disabled?

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

7. **Indirect discrimination (Equality Act 2010 section 19): religion / belief**

7.1 A "PCP" is a provision, criterion or practice. Did the respondent have the following PCP:

7.1.1 not allow employees on suspension but attending meetings at the Prison to use the multifaith chaplaincy

7.2 Did the respondent apply the PCP to the claimant?

7.3 Did the respondent apply the PCP to persons with whom the claimant does not share the characteristic, (persons of a belief other than Muslim), or would it have done so?

7.4 Did the PCP put persons with whom the claimant shares the characteristic (religion Muslim) at a particular disadvantage when compared with persons with whom the claimant does not share the characteristic (other religions)?

7.5 Did the PCP put the claimant at that disadvantage?

7.6 Was the PCP a proportionate means of achieving a legitimate aim? The respondent says that its aims were:

7.6.1 preventing any repetition of a confrontational incident which had arisen in the past when the claimant had previously attended the prison whilst on suspension;
7.6.2 to enable requisite notice for the use of the chaplaincy;
7.6.3 to enable arrangements for a member of staff to escort the suspended member of staff to the multifaith chaplaincy;
7.6.4 to enable the unlocking and locking of the multifaith chaplaincy;
7.6.5 to avoid contact with potential witnesses whilst on suspension.

7.7 The Tribunal will decide in particular:

7.7.1 was the PCP an appropriate and reasonably necessary way to achieve those aims;

7.7.2 could something less discriminatory have been done instead;

7.7.3 how should the needs of the claimant and the respondent be balanced?

8. **Harassment related to perceived disability (Equality Act 2010 section 26)**

8.1 Did the second respondent have a perception that the claimant had a mental impairment?

8.2 If so, did the second respondent have a perception that the claimant was disabled?

8.3 Did the respondent do the following things:

8.3.1 On 7 October 2021 the second respondent refused to engage the claimant on nights unless he undertook an Occupational Health assessment, he said: *"I do however remain concerned about your well-being and how nights may be affecting your mental health. I am not willing to retain you on Nights unless you engage in an OH Night worker referral."*

8.3.2 On 29 November 2022 the second respondent said *"Your behaviour appears erratic and irrational. Genuinely, if you are struggling with your mental, physical health or have an undisclosed disability, please let your manager or Head of function know. They are skilled and competent to direct you to support services available. Whilst your current conduct is unacceptable, I am keen to ensure we continue to offer you support."*

8.4 If the alleged facts on 7 October 2021 and 29 November 2022 are proven, did either / both amount to unwanted conduct?

8.5 Did it relate to the perceived disability (if found)?

8.6 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?

8.7 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.

9. **Harassment related to religion / belief (Equality Act 2010 section 26)**

9.1 Did the respondent do the following things:

9.1.1 Did Mr Girling's refusal to allow the claimant to use the multifaith chapel on 6 January 2023 amount to unwanted conduct.

9.1.2 On 6 January 2023 the first and the second Respondent Instructed Mr Johnson and Mr Claydon to unnecessarily activate the Body Worn Video Camera and escort the claimant inside the administrative building in an unwanted/ hostile/ humiliating and degrading manner, Mr Daddow who
the claimant never met wanted to examine the contents of the video footage in order to identify any disability (Mental or physical).

9.1.3 On 8 December 2023 the first respondent sent a Christmas card to the claimant which stated:

"MERRY FUCKIN XMAS YOU CUNT. NARCISSISTIC PRICK. GOOD LUCK WITH THE COURT FEES HA-HA.

9.2 If so, was that unwanted conduct?

9.3 Did it relate to the claimant's religion?

9.4 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?

9.5 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.

10. **Victimisation (Equality Act 2010 section 27)**

10.1 Did the claimant do a protected act as follows:

10.1.1 On 30 June 2022, the claimant reported sexual harassment and accused the second respondent of a lack of action, encouraging the sexual harassment and a breach of legal duty.

10.1.2 On 6 September 2022, the third respondent failed to investigate the claimant's Complaint and provide the claimant with justice.

10.1.3 On 14 October 2022, the third respondent proceeded with the investigation to disciplinary.

10.1.4 On 28 November 2022, the third respondent refused the claimant request for transfer to Warren Hill Prison and subjected the claimant to unreasonable and without proper cause suspension.

10.1.5 On 29 November 2022, the claimant raised concerns with the second respondent about discrimination of Black & Minority Ethnic ("BAME") employees.

10.1.6 On 9 December 2022, the claimant raised issues of discrimination, harassment and victimisation to the third respondent.

10.2 Did the respondent do the following things:

10.2.1 On 30 June 2022, the second respondent placed the claimant under the first respondent's poor performance policy.

10.2.2 On 30 June 2022, the second respondent raised false allegations against the claimant.

10.2.3 On 30 June 2022, the second respondent demanded that the Claimant transfer from night shifts to day shifts.

10.2.4 On 30 June 2022, the second respondent said you will only work in the gate and not on any residential unit." This had the effect to segregate the claimant from other employees.

10.2.5 On 25 July 2022, the second respondent altered a job specification of a role the claimant was interested in to say employees must not be subject to performance management and must be band 5 or above.

10.2.6 On 31 July 2022, the claimant received a written warning.

10.2.7 On 29 November 2022, the second respondent suspended the claimant and placed him under a disciplinary investigation, this was one day after the claimant's further complaint of discrimination.

10.2.8 On 29 November /2022, the second respondent accused the Claimant of being erratic and irrational.

10.2.9 On 9 December 2022 the third respondent failed to investigate the claimant's complaint and failed to provide sense of justice to the claimant.

10.2.10 On 23 January 2023, the first and second respondent instructed Mr Johnson to visit the claimant's house and hand deliver a letter placing him on final written warning under performance management.

10.2.11 On 27 January 2023 the third respondent upheld the decision to suspend the Claimant.

10.2.12 On 06 February 2023 the second respondent refused the claimant request for information and refused the claimant the opportunity to appeal against the decision to place the claimant on final written warning.

10.2.13 On 27 January 2023 the third responded upheld the second respondent decision to suspend the claimant.

10.2.14 On 18 April 2023, the second respondent wrote to the claimant forcing him to work day shifts, which would in turn mean he loses around £10,000 per annum in salary.

10.2.15 On 8 December 2023 the first respondent sent a Christmas card to the claimant which stated:

"MERRY FUCKIN XMAS YOU CUNT. NARCISSISTIC PRICK. GOOD LUCK WITH THE COURT FEES HA-HA.

10.3 By doing so, did it subject the claimant to detriment?

10.4 If so, was it because the claimant did a protected act?

10.5 Was it because the respondent believed the claimant had done, or might do, a protected act?

11. **Remedy for discrimination or victimisation**

11.1 Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

11.2 What financial losses has the discrimination caused the claimant?

11.3 Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

11.4 If not, for what period of loss should the claimant be compensated?

11.5 What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

11.6 Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

11.7 Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

11.8 Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

11.9 Did the respondent or the claimant unreasonably fail to comply with it by ?

11.10 If so is it just and equitable to increase or decrease any award payable to the claimant?

11.11 By what proportion, up to 25%?

11.12 Should interest be awarded? How much?

12. **Unauthorised deductions: National Minimum Wage Claim – Section 1 NMW Act 1998**

12.1 The claimant alleges that the first respondent failed to pay him the NMW and therefore this amounts to an unlawful deduction from his wages.

12.2 Were the wages paid to the claimant from March 2020 less than the wages he should have been paid?

12.3 Into which category of work does the claimant's work fall, is it either:

12.3.1 time work;
12.3.2 salaried hours work;
12.3.3 output work, or
12.3.4 unmeasured work

12.4 What are the number of hours that have been worked, or have been deemed to be worked, in each pay reference period?

12.5 The claimant says:

12.5.1 In the tax year 2020 to 2021 did he work 2002 hours, which divided by his salary £17,175 = £8.57 per hour?

12.5.2 In the tax year 2021 to 2022 did he work 2002 hours, which divided by his salary £17,605 = £8.79 per hour?

12.6 Was there a difference between this sum and national minimum wage?

12.7 If so, can the claimant claim these sums as unlawful deduction of wages?

13. **Remedy**

13.1 How much should the claimant be awarded?

Findings of fact

Credibility

64. I make a general observation that the claimant's interactions with the Tribunal process was unpredictable and, on occasion, disruptive. He was late several times. Once he refused to say whether he would attend the following day (day 1 / day 2), once he did not attend at all without providing notice on his non-attendance and evidence in support until requested by the Tribunal (day 3). On one occasion when attending by CVP agreed to accommodate his personal circumstances (day 10), the claimant did not return to the hearing following a break. Several times he refused to answer my questions to check his understanding of the hearing process or ignoring the question completely and addressing me on something unconnected. When the claimant ceased engagement this was followed by an email to the Tribunal suggesting that, as a litigant in person, he was not being afforded a fair hearing in contravention of Article 6 of the EHCR.

65. For the reasons stated in this judgment, I am satisfied that the hearing was fair. My assessment of the timeline of the claimant's actions is that when he did not agree with the direction of the Tribunal or the decision in respect of an application the claimant temporarily ceased to engage with the proceedings and suggested the hearing was not being conducted fairly. I make the observation that it may not have been conducted in the manner the claimant wanted but the Tribunal must ensure the hearing is fair to both parties. The claimant would not take guidance from me about the evidence he should be asking questions about, complaining that he was not being allowed to ask the questions he wanted. Therefore, I allotted the claimant time to ask any question without interruption. However, it was often the case that the witness did not understand the question and I had to interject to rephrase the question as required by due process.

66. As to the credibility of the claimant's evidence, it was evident that the claimant found the process of giving evidence stressful and, at times, frustrating. Often his answers were evasive, or he stated *"I do not agree"* offering no further explanation. When Mr Crawford referred him to documents seeking to confirm the contents, it was my assessment, observing the claimant, that he did not take time to consider the contents of the document, replying *"if that is what it says then that is what it says".* On occasion the claimant took issue with Mr Crawford's questions, including in emails to the Tribunal. I explained that it was my assessment that the questions were relevant, reminding him of the guidance that I gave to him at the outset of his oral evidence: that he may not like the question or agree with what is being put to him but given the seriousness of the allegations it was imperative that the respondents have the opportunity to challenge the claimant's version of events.

67. I bear in mind when assessing the claimant's evidence the degree of stress he was naturally feeling and the length of time he was in the witness box. In assessing the claimant's credibility, I have also borne in mind that he was not represented and at times found the process distressing. When the claimant became upset giving evidence we took a break to give the claimant some private time to compose himself.

68. Regarding the Christmas card complaint, in his witness statement the claimant accuses a named individual of sending the card and another named individual of knowing this individual had sent the card. Both individuals gave evidence in these proceedings vehemently denying the allegations. At the hearing the claimant withdrew these allegations (hence my not naming the individuals) and told me that he considered it was an (unidentified) employee of the first respondent who had sent the card. Given the extremely offensive content of the card, these are very serious allegations. To change his evidence during a hearing on a very serious allegation means that, unfortunately, it is necessary to treat the claimant's evidence with very considerable caution. There were many occasions when his evidence was manifestly inconsistent with the contemporaneous documentary evidence. I have addressed these and other instances in my review of the evidence below. The claimant was generally unwilling to make factual concessions, however implausible his evidence. This inevitably affects my overall view of his credibility, although I have borne in mind that untruthful evidence may be given to mask guilt or to fortify innocence.

69. Although significant parts of the claimant's evidence were not credible, my assessment is that he genuinely believed that his employment contract was 38.5 hours and was a permanent night shift contract (neither is correct, I address this in my findings of fact below) and was generally offended by his managers attempts to explain otherwise. Consequently, there has been a degree of self-deception on his part regarding the terms of his employment with the first respondent. This self-deception seems, in my assessment, to have fuelled a campaign by the claimant against his managers in which he makes many accusations against many people. It is my assessment that at the core of these proceedings is the claimant's misunderstanding as to the terms of his employment and a resulting resentment when, to quote Mr Cartwright's evidence, his managers sought to make the claimant do the job he was being paid to do, which included working day shifts at their direction.

70. I found the respondents' witnesses keen to assist the Tribunal. Despite a complex chronology of multiple written complaints and grievances brought by the claimant against several colleagues, their written and oral evidence was consistent with each other and the contemporaneous documents.

Factual findings

71. Mindful the claimant is not legally represented, I explained during the hearing that a Tribunal makes findings of fact as to what it considers, on balance, happened, when the claimant's and respondent's witnesses recollection of events differ and the facts are relevant to the complaints. Once the Tribunal has made the findings of fact it then applies to these facts the legal test for each complaint made by the claimant, in order to conclude whether the complaints have merit. There are my findings.

Claimant's terms of employment

72. The claimant started employment with the first respondent on 17 August 2017 as a Band 2 Operational Support Grade ("OSG") at HMP & YOI Hollesley Bay. Clause 7 of the claimant's Terms and Conditions of Appointment states:

"You will normally work a week of 37 hours excluding meal breaks. You will be eligible to apply to work flexible hours. You will be paid monthly in arrears by credit transfer directly into your bank account. Your annual basic pay will be based on a 37 (net) hour working week, excluding meal breaks, which are unpaid.…

As a Support Services Operations you are required to work regular unsocial hours and will receive an addition to basic pay of 17% to recognise this."

73. There is no term in the contract stating the claimant will work night shifts only. The wording *"you are required to work regular unsocial hours"* affords his employer flexibility to deploy the claimant during the night, as staffing in a prison requires, and should he be deployed during antisocial hours, the claimant received an uplift to his pay. Therefore, I find that claimant was not expressly contracted to night shifts under the terms of this contract. His contract was not that of permanent night worker.

74. The claimant alleges that on 1 September 2018 *"following a request to transfer to permanent nights, from this date [he] was consistently and permanently working night shifts"* and that he *"worked at HMP Hollesley Bay for 5 years. From 01/09/2018 to 29/11/2022 (suspension date) [he] worked consistently nights."* It may have been the case that the claimant worked regularly and predominantly on night shift (he has not provided evidence to the Tribunal, such as his rotas or payslips at this time, to prove that he did). Neither the claimant's claim forms nor his witness statement explain whether this request was oral or written and to whom he made the request. The claimant has not proved in his evidence that he made this request. In any event, taking his case at its highest, even if the claimant did make this request he is misconceived in his assertion that this changed his contact of employment to night shifts only. It is not the case that the terms of an employment contract are amended as a result of a request by an employee. As a matter of contract law, being deployed on and agreeing to do night shifts regularly / permanently does <u>not</u> automatically amend the terms of his employment contract. Any request must be accepted by the employer and consideration given for any change. Given the size and administrative resources of this employer, it would have been highly unusual for any change to not have been documented by an amended employment contract. There is no evidence before me of an amended contract. The first respondent disputes that the contract was amended to permanent nights in 2018 or at all. The basis of the claimant's complaint that he was contracted to night shifts only is his assertion that he made a request to work nights and was given night shifts as a result; the fact is he expressed a preference which was accommodated by his employer. This is the employer exercising its discretion under the contract to deploy the claimant to work unsocial hours, and responding to the claimant's preference to do the same.

75. For these reasons, I find that the contract was not amended in September 2018, or at all, to a night shift only contract. The first respondent could deploy the claimant on day or night shifts as required by staffing needs in the prison, provided the claimant received the required notice of a management decision to change his shift pattern.

76. The claimant has conflated a regular shift pattern of nights to a contractual change to the terms of his employment. In this regard the claimant is misguided in his understanding of how changes to his contractual terms are effected. It is

my assessment that this misunderstanding of his employment contract caused the claimant frustration and distress when he deployed to day shifts, something he did not want to do, and this frustration has fuelled both the content and tone of many of the communications to his managers. I consider his communication below.

77. Clause 7 of the claimants terms of employment contract him to a 37 hour working week. The claimant told me he was worked a 38.5 hour contractual week, and therefore his contractual hours were 38.5 hours. This is the basis of his unlawful deduction from wages claim; that he was owed the difference in hours between the first respondent's interpretation of his contract and his. The claimant alleges:

"From 2/03/2020 The prison continued to deduct from my wage until 30/05/2023. The prison was paying me 37hours p/w. The prison should have paid me 38.5 hours/p/w. Following the transfer to Warren Hill, The Prison service started to pay me 38.5 hours/p/w."

78. I have seen documentary evidence that on 21 March 2021 HMPPS regional management undertook an audit of shift patterns, identifying an action point to change the 37 hour shift pattern to 22 weeks long to embed 3 rest days. On these days the email recipients were told they could still choose to work and claim overtime or TOIL. This was a regional decision; it was communicated to employees, including the claimant, working the 37 hour shift pattern. I find the March 2021 adjustment to the shift pattern did not change clause 7 of the claimant's employment contract. He remained employed on a 37 hour working week involving unsocial hours, deployed as day or night shifts. The contemporaneous emails from management explain the change; it was the length of the shift pattern changed (in terms of the number of weeks across which the shift pattern was spread), not the hours. These remained 37 hours, as per the claimant's employment contract.

79. As 3 rest days were now embedded in the shift cycle (facilitated by lengthening the number of weeks across which the shift pattern was spread), any employee working this pattern had the option to work on a rest day and be renumerated with overtime pay or TOIL. Electing to do so on a regular basis, as the claimant did, did not change his contractual terms from 37 hours to 38.5 hours. I find the claimant's employment contract remained 37 hours.

80. Between 4 April 2021 (when the new shift cycle started) and 26 May 2021 (when renumeration available for working beyond contractual hours changed) any hours worked in addition to the 37 hours was overtime, for which an employee would receive TOIL or overtime payments. The claimant regularly elected to work hours additional to his contracted 37 hours; he elected to be paid overtime for these hours.

81. I have seen the 27 May 2021 email the claimant sent in response to a email circulated to staff titled "Overtime Shortfalls (June)" (25 May 2021); he offered 4 dates when he was able to do overtime night shifts. On 2 June 2021 in reply, the claimant was told that there was no OSG overtime available, something not known at the time the request was made. The claimant replies the same day accepting this explanation.

82. The claimant's fundamental misunderstanding of his employment contract is illustrated by a statement made by the claimant in his 17 September 2021 complaint document. In relation to overtime payments he complains: *"I have been claiming those hours for 2 years. Mrs Allen stopped it last year without given a reason why. Mrs Allen is the one who manages the budget."* Overtime is discretionary not contractual. It is a management decision whether to offer overtime, usually based on staffing levels, and how this is renumerated (overtime pay or TOIL). Hence the word "over"; it is over contractual entitlement.

83. The claimant could elect to work hours in addition to the 37 for which he was contracted; it was for management to decide how the overtime was renumerated. There is no entitlement in the claimant's contract which requires the first respondent to pay the claimant overtime if he elected to work additional hours. I find he was not contractually entitled to overtime, nor was he contractually entitled to receive pay for the overtime he worked. Renumeration for overtime could with be TOIL or pay, provided this was communicated to the claimant before he undertook the overtime.

84. In Mr Atkinson's investigation of some of the claimant's grievances (October 2022) Mr Atkinson concluded that the claimant's employment contract was a generic Band 2 contract and not a permanent nights contract and this (correct) interpretation was explained to the claimant several times. This was also explained to him by Mr Daddow and Mrs Coccia.

Claimant's concerns with pay

85. In August and September 2021 the claimant raised concerns with Ms Allen that he was owed pay (specifically that he was entitled to a payment of 3 hours overtime each week from March 2020). He was not happy with the explanations he received (which accord with my findings about the claimant's contractual terms). On 13 September 2021 he submitted a formal grievance to Mr Daddow about Ms Allen, alleging unlawful deduction from wages, failure to pay the minimum wage, discrimination and that Ms Allen's responses to the issues the claimant had raised about his pay amounted to victimisation.

86. Mr Daddow reviewed the complaint and correspondence between the claimant and Ms Allen, expressing his concern in an email later that day that the tone of the claimant's emails to Ms Allen was *"abrupt and disrespectful".* On 17 November 2021 the Ms Allen raised a grievance about the tone of the claimant's 13 September email to her.

87. On 17 September 2021 the claimant submitted a formal grievance about Mr Daddow's handling of his complaint to Mr Cartwright. In doing so the claimant says he made a protected disclosure that he was being paid below the National Minimum Wage (NMW).

88. At this point I must note that the claimant did not identify to the Tribunal the documents in the hearing file on which he was relying for his alleged protected disclosures. I will need to review the wording of each alleged disclosure to determine whether it satisfies the legal definition of a protected disclosure. To assist the Tribunal Mr Crawford prepared a table of the alleged protected disclosures and detriments (one of the 3 neutral documents) on which he noted a page reference in the hearing file of what the respondents had concluded to

be the documents on which the claimant relies as protected disclosures. The claimant refused to engage with this document. Therefore, I have considered the documents in the hearing file I consider to be the communication the claimant is suggesting is a protected disclosure, guided by Mr Crawford's suggestions.

89. The first alleged protected disclosure is the 17 September 2021. I have considered the communication at page 546. In summary, the claimant complains there was a *"(i) Deliberate failure/ refusal to accept a valid complaint /refusal to log a complaint of discrimination and victimisation against the Deputy Governor. (ii) Deliberate failure/ refusal to apply the Grievance Policy to me. iii) Deliberate unwanted/ hostile, degrading, and humiliating comments."* . The complaint contains information about his pay. He does not express concerns that colleagues are not being paid the correct amount. The emails is personal to the claimant. The claimant complains that Ms Allen is failing to pay him what he is entitled. The claimant does not mention the National Minimum Wage (NMW) in this email.

90. I find the grievance is not that the claimant is not being paid the national minimum wage. The complaint is specific to the claimants concerns that the Mr Daddow is not handling his complaint about Ms Allen appropriately and focuses in strong terms on Mr Daddow's handling of this complaint and why the claimant considers the approach unlawful.

91. Ms Hart investigated the claimant's concerns with his pay. On 1 October 2021 she provided the claimant with an explanation of the overtime policy and how a Workforce Planning Committee made the decision to cease overtime from 26 May 2021. She acknowledged that the claimant had received a shortfall in pay, due to an Officer being given overtime for OSG duties in June 2021. Ms Hart assessed shift patterns and concluded that the claimant had taken 42.84% of overtime for the period 1 March – 26 May 2021, therefore he had not been treated less favourably (indeed he had been treated more favourably as he had had the greatest share of overtime of any OSG).

92. On 6 October 2021 the Mr Daddow responded to the claimant's concerns about being on a 37 hour contract and not being paid correctly, explaining:

"Your entitlement is based on 37 hours per week. You have a rotational Night shift pattern that balances out your working week to deliver your contracted hours of 37. Your scheduled Rest days mean that you do not need to accrue TOIL as you have scheduled Rest Nights to balance out your attendance to your 37 hour contract. You have elected to work these scheduled Rest Day shifts which has incurred TOIL. There is no overtime available to cover this and it is not necessary. You are not automatically entitled to overtime. You should take your rest days."

93. I find this explanation accurately reflects the terms and effect of the employment contract the claimant entered into on 17 August 2018 as I have found them. I have also found there was no change to the claimant's contractual terms in 2018, 2021 or at any time during his employment at the prison. Mr Daddow acknowledges that contractual terms for new OSGs had changed and they had started on 39 hour contracts. Mr Daddow told the claimant that the individuals the claimant alleged were treated more favourably had different contractual terms in their written employment contracts.

94. On 12 May 2022, the claimant requested that the prison pay him for 6 hours which he accrued between 2 March 2020 and 12 May 2022. Ms Hart looked into this; in summary a disparity in shifts attended against shifts paid was found and these were paid in the claimant's October pay.

Occupational Health ("OH") referral

95. On 7 October 2021 the claimant alleges that the second respondent refused to engage him on nights unless he undertook an Occupational Health assessment, telling the claimant:

"I do however remain concerned about your well-being and how nights may be affecting your mental health. I am not willing to retain you on Nights unless you engage in an OH Night worker referral."

96. The second respondent told me that on 6 October 2021 he shared his concerns relating to the claimant's wellbeing and the impact that long-term night shifts might be having on the claimant as follows:

"I am concerned about your wellbeing and the impact long term night shifts may be having on you. I would encourage you to consider the recently offered OH Night worker assessment. If you would like this contact your line manager. It may be beneficial to you and other night workers to return for a period of day shifts."

97. The second respondent accepts that he was not willing to retain the claimant on nights unless he engaged in the proposed night worker referral. The second respondent told me that all other OSG night workers agreed to and completed OH referrals; the claimant has not disputed this. In emails from the second respondent the reasons the second respondent was mandating an OH referral were explained to the claimant:

"I have no desire to remove you or anyone else from nights unnecessarily but I am concerned that we are retaining a permanent night group that may not be in the best interests of individual health or in the best interests of the establishment."

98. The wording of the second respondent's email speaks for itself. I find that the second respondent had concerns about the impact night shifts were having on claimant's wellbeing; consequentially it was a reasonable management request that the claimant engage in an OH referral.

99. Further reasoning was provided to the claimant in an email dated 8 October 2021, the second respondent telling the claimant that he had found the tone of his communication *"unprofessional and disrespectful".* I have read several emails the claimant sent to the Ms Allen and Mr Daddow raising concerns about his pay; notwithstanding he was raising issues, and was understandably upset and frustrated as he considered he was not being paid correctly, I find his emails direct and abrupt, and the use of bold and underlined text unnecessary and disrespectful of management. I find management's concerns about the tone and presentation of the claimant's written communications justified.

100. Given the amount of night work the claimant was undertaking and the nature of his communications, I find his refusal to engage in an OH referral baffling. I have found that the request was a supportive measure and it was in his interests to do so. I make the observation that the respondents have a duty both to their employees and the prisoners to ensure a safe environment. In these circumstances, given the environment (open prison) and nature of the work (often unsocial hours) this duty is more acute. It is incumbent on an employer in these circumstances to take all reasonable measures to support employees. In all the circumstances at that time, I am satisfied that the decision to mandate an OH referral for the claimant to remain on night shifts was a supportive and genuine measure. For reasons the claimant has not explained to me nor are apparent to this Tribunal, the claimant consistently refused to engage in the offers of support, or meet with management to discuss his concerns in person.

6 June 2022 incident

101. On 6 June 2022 the claimant was involved in an incident with 2 prisoners during a night shift. The claimant considers he dealt with the incident appropriately. The respondents disagree. Mr Barrett (the claimant's line manager at that time) was the night orderly on duty. His evidence is that he found the claimant standing outside the office with 2 prisoners, holding their mobile phones in his hand. The claimant admitted he had the prisoners' phones in his hand, telling me the prisoners had given them to him. Mr Barret told me the claimant's conduct was contrary to the procedure followed in an open prison on night shift, known as "night state". Mr Barrett explained the procedure during night state as: in an open prison prisoners rooms are not locked during the night; therefore for their own, colleagues' and prisoners' safety, OSG staff are instructed not to approach prisoners; if they are concerned about a prisoner's behaviour, the first step is to report the concern to the night manager (who is trained in restraint, OSGs are not) and who decide what action is appropriate; this is usually to do nothing if there is no imminent danger and report the incident at the daily briefing handover where managers will decide if action (which as adjudication) is necessary for any prisoners involved. Mr Barrett told me the reasoning was that it was more appropriate to deal with issues during the day as at night tensions can often escalate more quickly and there are less staff on shift. Indeed, I have seen the 16 April 2021 policy notice which stated that *"Night Night patrols / night staff are to only report suspicions on nights – direct, overt challenging of mobile phone use on nights must cease – no more entering rooms on nights with activated BWVCs and asking men to hand over illicit items".*

102. Mr Barrett reported the incident at the daily meeting the following morning; as a result Mr Johnson and Mr Claydon were aware of the incident. It was the assessment of the claimant's managers that approaching prisoners and taking the phones (which Mr Barratt told me the claimant had in his hand) had put the claimant, his colleagues and other prisoners at risk.

103. At the hearing the claimant was at pains to explain that he did not do anything wrong. I have no doubt that the claimant's actions were well intended. However, based on my assessment of the claimant's credibility and his robust and direct approach in addressing issues with his managers, I prefer Mr Barretts evidence that it was his assessment that the claimant had taken the phones from the prisoners. In any event, I find that he did not follow the night

state as night state that required prisoners to remain in their rooms; the claimant should not have brought them to the night orderly's office.

104. I find the 6 June incident, and the claimant's failure to follow night state, informed, in part, the decision to transfer the claimant to day shifts and Mr Claydon decision to place the claimant on performance management.

Claimant's involvement in colleague's suspension

105. On 13 June 2022 a staff member was suspended by the Ms Allen while the allegations of unwanted conduct were investigated. By email dated 16 June 2022 the claimant queried his colleague's suspension, considering it unlawful on the basis the Ms Allen, as Deputy Governor, did not have the power to suspend. Mr Daddow responded, telling the claimant that he authorised suspension decision. At the time of this email the claimant would not, given his grade, have been privy to management processes such that a decision can be made and authorised by one manager and communicated by another. There is no evidence from the claimant suggesting that Mr Daddow was not the decision maker. I find that the second respondent authorised the suspension it was his decision, communicated via the Deputy Governor.

Communication by the claimant: 30 June 2022

106. In this claim, the claimant alleges that on 30 June 2022, he reported an act of sexual harassment to the second respondent (regarding incidents on 4 May 2022 and 21 June 2022) alleging inaction and breach of legal duty by the second respondent. The claimant relies on this as a protected disclosure. The clamant did not identify the document to the Tribunal. I have considered the claimant's communication at page 922. In his 30 June email the claimant referenced that he referred to this allegation in his unsuccessful application for the role of Head of Business Assurance dated 10 June 2022.

107. I have considered the 30 June email; it was sent as part of an exchange of emails from the claimant to Mr Daddow seeking feedback as to why he was not successful in securing the role. I have also read this exchange. I find the sequence of correspondence as follows: the claimant applied for a role; he was unsuccessful; he sought feedback; he was told Ms Allen was willing to meet with him to provide feedback on his application; the claimant did not take up the offer not meet; the claimant refers to the example he used in his application and writes:

"My job application gave a good / a perfect example of unlawful conduct of sexual harassment by prisoner (B) against a female member of staff and the complete lack of action taken by you and others.
Legally speaking, your lack of action amounted to an encouragement of sexual harassment by prisoners against female members of staff in the workplace./Putting female staff at risk of sexual harassment.
The incident took place on 04/05/2022.
You did not take any action against the prisoner notwithstanding the fact that you are under legal duties to take action/ and you have tools under your disposal to protect the staff. Tool including: transferring the prisoner to closed condition and reporting the matter to the police if necessary.
As a result of your lack of action/ encouragement of sexual harassment/ breach of your legal duty, the same prisoner(B) struck again against a

different female member of staff and subjected her to unwanted sexual harassment. The incident took place on 21/06/2022 @12:30
I am under duty to report unlawful conducts and wrong doing. My female work colleagues should not be subjected to unwanted and unlawful sexual harassment in the prison. HMPPS do not tolerate inappropriate behaviours. Had you taken all the necessary steps to protect and safeguard the female member of staff (Incident of 04/05/2022), no sexual harassment would have taken place on 21/06/2022."

108. This is the information contained in the email. The claimant suggests in these proceedings he was raising concerns about alleged sexual harassment in the prison in the public interest. His assertion is simply not credible. I find the focus of the 30 June email is to obtain feedback about his application. The email exchange evidences that the claimant wanted written feedback; he was offered a meeting with Ms Allen. The email exchange evidences that the claimant was frustrated that he was not being afforded feedback in the form he wanted. While there is reference to concerns about sexual harassment, on balance, read in the context of this exchange, the only rational interpretation of the claimant's email is that he was upset he was not successful in the role, frustrated that his request for written feedback was met with an offer of a meeting to discuss feedback, the claimant lashed out in a petulant communication making serious and unfounded allegations. The email is personal; it was not sent in the public interest.

Performance management

109. On 30 June 2022 Mr Claydon emailed a letter (dated 21 June) to the claimant about night working and performance management. The claimant alleges that this letter demanded that he transfer from days to nights, a request he told me was not lawful due to a contractual change in 2021 which meant he could only be deployed to a night shift.

110. The letter reiterates concerns the claimant's employer had about the claimant working nights. It was not news to the claimant that his employer had these concerns; I have found concerns surrounding the claimant's conduct had been raised by Mr Daddow as a reason for suggesting an OH referral. Indeed, the letter makes it clear the absence of an OH assessment and the incident on 6 June 2022 informed Mr Claydon's decision to place the claimant on performance management.

111. Given my findings about the 6 June 2022 incident, I find that Mr Claydon made a reasonable and necessary decision to move the claimant from night to day shifts; the claimant was given 28 days' notice of the change. Mr Claydon informed the claimant during the notice period he would work in the gate, where there was no interaction with prisoners.

112. The claimant alleges this decision was intended to segregate him from other employees. It was not. Mr Claydon told me that his primary concern was preventing risk and, as the claimant accepted at the hearing, he was not trained in restraint. As the claimant had approached prisoners contrary to the night state practice, and his managers considered his actions, albeit well intended, had potentially put colleagues and prisoners at risk, this was a reasonable redeployment. As I have found the claimant was not on a night shift only

contract, and there had been no change to his contract such that he could only be deployed on the night shift, I find the decision to move him to a day shift valid and reasonable. Notwithstanding this, the claimant repeatedly resisted this management instruction: on 2 July 2022, the claimant wrote to Mr Daddow that he was "not going anywhere". In the context of this correspondence, I find he meant he would not transfer to day shifts; on 7 July 2022, the claimant stated he will not be attending and will attend nights; in reply he is told my Mr Claydon failure to do so may have disciplinary consequences.

113. The claimant alleges it was the second respondent and not Mr Claydon who wrote this letter. Mr Claydon has dyslexia. He explained to me that the Ms Allen usually proof reads his correspondence before it is sent. He and she told me she was on annual leave at this time. Mr Claydon and the second respondent both told me that the second respondent proof-read this letter due to the Ms Allen's leave. There is no evidence before me that the second respondent wrote this letter; I find he did not. I prefer the respondents' evidence that Mr proof read it.

114. On 7 July 2022 the claimant was informed of his new shift pattern, aligning with the terms of his performance management. I have seen his responses that he did not agree to the change and would continue to work his night shift. I find these were based on his misunderstanding of the his employment contract, and were I defiance of a valid management instruction. However, rather than engage in reasonable discussion with his employer to resolve the different interpretation of the contract (I have seen Mr Daddow's suggestion that the claimant arrange an appointment to meet him) the claimant continues to object to the move from days to nights.

115. For the reasons stated as to the terms of the claimant's employment contract, I find Mr Claydon decision to move the claimant to day shift valid and reasonable, given the concerns which had been communicated to the claimant about the tone of his correspondence to managers, his refusal to engage with an OH referral and the incident on 6 June. I find the claimant's communications telling his employer he would not attend day shifts (for example 2 July 2022, 7 July 2022, 23 November 2022) contrary to his contractual terms and a refusal to comply with a reasonable management instruction. Therefore, Mr Claydon telling the claimant that if he did not attend the new shift pattern he would be reported as being absent without leave was justified. I find the claimant's managers were seeking to get him to do the job he was paid to do (as Mr Cartwright tried to explain to the claimant when giving evidence) which included, contractually, working a day shift at management direction. The claimant consistently communicated that he would not attend day shifts; in these circumstances I find the second respondent's emails telling the claimant failure to do so could constitute disciplinary action appropriate. Mr Claydon was not the claimant's line manager. However, following the incident on 6 June the claimant had raised a grievance against Mr Barrett and his line management had changed to Mr Johnson. In these circumstances, I consider it appropriate for Mr Claydon to have oversight of the claimant's performance management process.

<u>4 July 2022: the claimant's grievance against Marc Barrett</u>

116. On 4 July 2022 the claimant raised a grievance against Marc Barrett. The claimant relies on this document as a protected disclosure. The clamant did not

identify the document to the Tribunal. I have considered the claimant's communication starting at page 936, and specifically page 939. The claimant alleges it reiterates his concerns about the unfair treatment of BAME prisoner by the first and second respondents and as raising concerns about prisoner safety. It contains information. I have considered the grievance. While it does reference concerns about prisoner safety, I find these are examples given to support the complaint specific to concerns the claimant had about Mr Barrett's conduct. Indeed, in the grievance the claimant states: *"This complaint is against Mr Barrett only."* By the claimant's wording alone, it is evidence that this was not a document intended to raised concerns publicly. The claimant was unhappy about the way the incident in 6 June was handled and he was raising his concerns about that through this document, setting out health and safety concerns he considered were a result of Mr Barrett's conduct.

117. Mr Girling investigated this grievance and dismissed the allegations.

6 July 2022: grievance against David Daddow

118. On 6 July 2022 the claimant raised a grievance (to Mrs Cocchia and the third respondent) against the second respondent which he says "reported brief allegations of sexual harassment against females' staff- allegation of an abscond of a prisoner which could have been prevented- suppression of documents and denying the IMB access to prison records including complaints of discrimination by prisoners". He relies on this email as a protected disclosure. The clamant did not identify the document to the Tribunal. I have considered the claimant's communication at page 960.

119. I have considered the email. It contains information in that it states the allegations made by the claimant. It is titled "Very serious allegations against David Daddow", which the claimant sets out in 4 subsequent paragraphs. The claimant asks Mrs Coccia her availability and states: "I will draft a comprehensive/ fully detailed letter and identify the serious issues before I come and see you." Considered in the context of the many emails the claimant had set to Mr Daddow expressing his frustration about his pay, the OH request, the decision to move the claimant to nights, I find that the purpose of this email was to express the claimant's concerns about Mr Daddow more widely; it was not sent in the context of a wider public interest.

15 July 2022: investigation by Dave Atkinson

120. In July 2022 Mr Cartwright commissioned Mr Atkinson to investigate complaints raised by the claimant (in summary about his managers handling of a sexual harassment complaint involving a prisoner and female staff member, the decision to move the claimant from nights and place him on performance management, the Head of business assurance vacancy, misleading if the IMB and failure to identify that a prisoner was an abscond risk) and a complaint against the claimant by Ms Allen concerning the tone of his communications.

121. Mr Atkinson completed his report in 7 October 2022, finding: the way in which the Governor dealt with the sexual harassment allegation correct and proportionate; the concerns about the claimant's performance were valid, however further consideration could have been given before moving the claimant from night shift; there was no racial discrimination regarding the decision making for the Head of Business Assurance role (it was a blind sift

applying a scoring mechanism and that it was within the Governor's discretion to change the requirements of the role (I address my findings on the reasons for this below); that the claimant made his complaint about IMB with limited knowledge (as an OSG Band 2 he was referencing management decisions without full access to the information and requisite knowledge); and the prisoner was not an abscond risk and the matter was properly dealt with. In summary, Mr Atkinson dismissed the claimant's complaints, setting out the reasons he did so. Mr Atkinson found the claimant's communications to Ms Allen warranted a disciplinary investigation.

122. I find the investigation process thorough and fair. Mr Atkinson interviewed those about whom the claimant raised grievances. The claimant was given the opportunity to attend an interview so that he could explain his position to have Ms Allen's concerns explained to him in person and for him to put forward his response; he did not engage with this. Two days were allocated for the interview with the claimant. The claimant was interviewed on 5 September 2022, during which he asked to leave early because of childcare, which was allowed by Mr Johnson on the understanding the interview would continue the following day. The claimant did not attend an interview on 6 September. I address the events of the 5 and 6 September in more detail below.

25 July 2022: Head of Business Assurance (temporary) advert

123. The first respondent having not found a suitable candidate for the Head of Business Assurance role in June 2022, on 25 July 2022 the second respondent advertised the role on a temporary basis, requiring applicants to be band Grade 5 or above and not subject to performance management. The claimant alleges that the June job specification had been altered to prevent him from applying (at this time the claimant was Band 2 and subject to performance management). The second respondent told me that as the substantive campaign (in which the claimant applied) had not been successful, the decision was taken to appoint an interim post and the criteria revised to target more junior managers as a development opportunity. The second respondent explained that:*" [T]his method of covering a short term vacancy enables the prison to set a criteria for staff who already hold the necessary qualifications, accreditation and experience to do the role."* In oral evidence Mr Daddow told me it was imperative that whoever took on the interim role had to have sufficient management expertise to get *"up and running in the role quickly"* as it was an interim appointment.

124. I find the reasons for the amendments to the advert were as stated by Mr Daddow. The claimant's role meant he had neither the insight or knowledge as to how management roles operated and how process of filling a senior role aligned to these requirements.

Written warning

125. On 31 July 2022 Mr Johnson wrote to the claimant issuing him with a first written warning. I have considered the letter; the reasons for the warning are stated in the letter. While the claimant did not agree with the reasons, I find they reflected the concerns the claimant's managers had already raised with him several time and supported by the managers records of the claimant's behaviour. On 2 September 2022, the claimant email Mr Johnson telling him he is "not coming off nights".

5 and 6 September 2022

126. Parties are agreed that as part of Mr Atkinson's investigation interviews with the claimant were arranged for 5 and 6 September 2022. The claimant attended on 5 September 2022; during the meeting the claimant asked to leave early due to child care responsibilities, which Mr Johnson agreed to on the understanding the meeting would continue the following day. There is no record that the claimant made any request prior to the meeting or to anyone other than Mr Atkinson. He did not make this request to his line manager, or inform Mr Johnson of the reason he had left early.

127. The following day (6 September 2022) the claimant attended training at the prison, but did not meet with Mr Atkinson as arranged. He left his shift early. The claimant gives he did not meet with Mr Atkinson his as *"he had not provided details of the complaint against me".* I find that, had the claimant genuinely held this view he would not have attended the meeting on 5 September. Based on my assessment of the claimant's credibility, I find the claimant was frustrating the due process to which he was subject. It is my assessment that something was said by Mr Atkinson at the meeting on 5 September as a result of which the claimant refused to engage further in the process. The meeting was scheduled in working hours; again the claimant failed to comply with a reasonable management instruction. Indeed, in these proceedings, on occasion, when the claimant was not satisfied that the hearing was proceeding in a way he considered fair, he would send a lengthy email and refuse to engage further or not attend. This is reflects his behaviour at times during his employment and informs my assessment of the events about which he complains. I find that on 5 and 6 September the claimant was absent without the consent of his line manager.

128. On 6 September 2022 the claimant says he raised issues of discrimination, harassment and victimisation and breach of Public Sector Equality Duty and Prison Safety to the third respondent. He relies on this communication as a protected disclosure. The clamant did not identify the document to the Tribunal. I have considered the claimant's communication at page 2025. The document contains information, alleging the claimant's concerns about discrimination as he states in this claim. Given my findings on the claimant's behaviour on the 5 September and failure to reconvene his meeting with Mr Atkinson on 6 September, I find that the communication was not sent in the public interest; it was sent due to the claimant's dissatisfaction with Mr Atkinson's investigation.

129. On 6 September 2022 the claimant alleges that the third respondent failed to investigate the claimant's complaint and provide the claimant with justice. The chronology of events in this claim alone evidence that the claimant's many grievances and the issues he raised were investigated. This was not an easy process given the volume of complaints made by the claimant, many overlapping. I find all the complaints raised by the claimant were investigated (I have had the benefit of reading the outcome reports). I accept that the claimant's mindset that they were not investigated to his satisfaction.

130. On 15 September 2022 parties agree that the first respondent acknowledged a disparity between the claimant's hours worked and the hours for which he had been paid in the preceding months. The disparity was settled with the first respondent paying the claimant for R1 72 hours in the claimant's

October 2022 pay. This matter is settled and does not relate to the claims before the Tribunal.

26 September 2022 communication

131. On 26 September 2022 the claimant says he wrote to Ms Allen raising concerns about unfairness and safety of BAME and raising health and safety issues. The clamant did not identify the document to the Tribunal. I have considered the claimant's communication at page 989. It contains information. I have considered this correspondence. The claimant refers to the Prison Rules 1999 and alleges that the Ms Allen failed to carry out his duties during incidents in September 2022 by not attending the prison. At the hearing Ms Allen and Mr Daddow explained to me the reasons they considered the incidences had been properly managed and why, in the circumstances, it was not a requirement for the Duty Governor to be on site. Based on my assessment of credibility and the expertise and management experience of the respondents' witnesses, I prefer their assessment that the incidences were properly dealt with rather than the claimants who, as an OSG, could state the rules but had limited insight as to their proper application. I find he was raising concerns, but the basis in which he did so was his personal frustrations due to the on-going investigations into his conduct, being subject to a performance management process with which he disagreed and his increasing and persistent frustration at being deployed to the day shift.

132. The claimant repeats these frustrations in subsequent communications with his managers: on 28 September 2022 the claimant tells Mr Girling that day shifts are not his shift pattern and that he works nights; on 26 November 2022 the claimant emails Mr Daddow and Mr Claydon stating that day shifts are not his shift pattern and that he will be attending his night shift pattern as usual on 28 November; and on 28 November 2022, the claimant emails Mr Claydon stating he has no power to transfer him from permanent nights to permanent days.

6 October 2022 investigation

133. On 6 October 2022 the claimant is placed under investigation due to leaving the meeting on 5 September 2022 and not attending the meeting on 6 September 2022, leaving his shift early. Ms Allen told me that Mr Atkinson was not the claimant's line manager and did not have authority to allow the claimant to leave early. I find the claimant had not complied with the first respondent's absent processes in that he did not ask permission of his line manager, Mr Johnson, to leave his shift early on 5 and 6 September.

134. On 14 October 2022 Mr Claydon emailed the claimant and as a gesture of good will offers a further 28 days' notice of removal from night shifts to such that his day shifts would start the week commencing 13 November. I find that the claimant had 28 days' notice of a shift pattern change and this was reasonable notice for the first respondent to redeploy the claimant to day shifts, as it was legally entitled to do under the terms of his employment contract.

135. On 21 October 2022, Mrs Coccia emailed a letter to the claimant explaining (again) that the claimant's contract of employment is not permanent nights and that he can be redeployed with 28 days' notice and that the notice period provided plenty of opportunity for the claimant to make any plans for the

change. I find this gave the claimant sufficient opportunity to address any childcare arrangements arising from the lawful change to his shift pattern. Despite this on 3 and 18 November the claimant communicates to Mr Johnson that he will not come off the night shift and that he does not (erroneously based on my findings) agree or accept the change to his shift pattern. In reply, on 22 November 2022 Mr Johnson writes to the claimant, explaining in detail the basis on which the claimant's managers redeployed him from the night to day shift.

136. On 24 November 2022, the claimant emailed Mr Daddow and states that Bulletin 08 does not empower him to change the claimant's "permanent night shift" pattern to a permanent day shift pattern. The claimant's email is misconceived; he was not, as I have found, on a permanent night shift contract. Therefore, under the terms of his 2017 employment contract he could be redeployed to the day shift, with sufficient notice and this was Bulletin 8 compliant. In this email I note that the claimant states: *"I will follow you imposed shift pattern notwithstanding the fat it is unlawful".*

137. On 14 October 2022, having received Mr Atkinson's report, Mr Cartwright decided there was sufficient concern about the nature of the claimant's communications to Ms Allen to proceed to a disciplinary investigation. Mrs Hill is appointed as disciplinary officer; on receipt of the papers, she decides not to proceed to a disciplinary and Ms Allen's complaint against the claimant is not taken any further. It does not proceed as a disciplinary process.

16 November 2022 communication

138. On 16 November 2022 the claimant says he repeats similar concerns about BAME prisoners. The clamant did not identify the document to the Tribunal. I have considered the claimant's communication at page 2009. He writes to Sally Hill and Sarah Coccia. The communication contains information and raises concerns about BAME prisoners. It is focused to the claimant's personal concerns.

26 November 2022 communication

139. On 26 November 2022 the claimant says he repeats similar concerns about BAME prisoners. The clamant did not identify the document to the Tribunal. I have considered the claimant's communication at page 1057. I have considered this email to Mr Daddow. It contains information. I find that the claimant states that day shifts are not his shift pattern and he will attend a night shift and that he considers any attempt to transfer him unlawful. The email refers to a racial equality organisation, in the context of the claimant's complaint about the transfer to day shifts. The focus is personal not public.

Transfer request

140. On 28 November 2022 the claimant alleges his request to transfer to Warren Hill is rejected. There is no evidence that Mrs Coccia or Mr Cartwright rejected this request. Indeed, Mrs Coccia told the claimant, and the Tribunal, that she considered fresh start a good idea for the claimant. The transfer request was paused as the following day the claimant was suspended. Therefore, the transfer could not proceed at this time but did subsequently, the claimant transferring to Warren Hill on 24 April 2023.

28 and 29 November 2022 shifts

141. The claimant did not attend his shifts on 28 and 29 November 2022. These were day shifts. The only reason the claimant gives for his absence was that his employment contract was permanent nights. For the reasons stated above, I have found that it was not and the claimant's managers could redeploy him to day shifts with reasonable notice.

29 November communications

142. The claimant alleges that, on 29 November 2022, Mr Daddow suggested the claimant is struggling with his mental or physical health and had an undisclosed disability. I find he does; Mr Daddow writes:

"Your behaviour appears erratic and irrational. Genuinely, if you are struggling with your mental, physical health or have an undisclosed disability, please let your manager or Head of function know. They are skilled and competent to direct you to support services available. Whilst your current conduct is unacceptable, I am keen to ensure we continue to offer you support."

143. This is in the context of an email informing the claimant about the work life balance process and referencing the claimant's behaviour in the preceding weeks as follows:

"Your requests for transfer or leave have not currently been supported and you have been advised to attend the meeting with your manager or head of function on the 28/11/22. You failed to attend for work or that meeting where you could have discussed your concerns. Your unauthorised absence, despite advice from very senior managers is very problematic for you as it demonstrates a continued pattern of behaviour contrary to the code of conduct and discipline and closely aligned to the reasons you have been placed on poor performance. You may perceive this as a threat, but it is a manager's responsibility to advise an employee when their behaviour may lead to a negative consequence. The management team have maintained a very supportive attitude towards you, but you have failed to engage. I would encourage you to seek advice and support from your managers, PAM assist or the care team."

144. Taking account of wider context of Mr Daddow's statement and my findings on the claimant's behaviour in the preceding weeks, I found this statement was made out of concern, informed by the claimant's behaviour, which was erratic. The tone of the emails I have seen which the claimant sent to his managers is adversarial and, in places, threatening, unnecessarily so, with the use of direct language, bold script and underlined text. The claimant's language and presentation in his communications, in my assessment, evidences his frustration at his managers' decision to place him on performance management and transfer him to day shifts on the basis of their valid concerns.

145. On 29 November 2022 the claimant says he again reports his concerns about the unfairness and safety of BAME prisoners. The clamant did not identify the document to the Tribunal. I have considered the claimant's communication at page 1097. The email contains information. The focus of the email is the claimant's suggestion that he had a work life balance agreement in place. The letter goes on to raise concerns about equality and race. I find the words used personal to Mr Daddow; repeatedly the claimant accuses Mr Daddow *"you*

allow….you do not… you have….”. I find this email is a personal attack on Mr Daddow. It was not sent in the public interest.

Work life balance agreement

146. The claimant suggests the he had a Work Life Balance agreement (“WLB”) in place. Ms Hart told me it is an agreement giving an employee permission to deviate from their standard working pattern and an employee would need to make an internal application online which would then be discussed and approved at monthly workforce planning committee meetings; it was not enough for an application to be submitted, it would also need to go through an approval process. There is no evidence in the hearing files that the claimant completed this process. He has not produced a copy of this agreement to the Tribunal. Ms Hart told me that *“no such application or agreement could be located. On that basis, I confirmed to Mr Johnson that there was no record on file”.* Based on my assessment of the claimant’s credibility and the fact he has not been able to produce a copy of the agreement, or evidence supporting that he made an application to the Tribunal, nor tell me the terms of the agreement I am satisfied that the claimant did not make this application and did not have a WLB.

Claimant’s suspension

147. On 29 November 2022 the second respondent sends the claimant a letter of suspension by email; the letter states the reasons for the claimant’s suspension:

> *“Failure to obey a lawful and reasonable order or written instruction.*
> *Repeated poor timekeeping (including abuse of flexible working hours)*
> *Despite being repeatedly advised of your start time and scheduled shifts from the 28/11/22 you failed to attend for duty on the 28/11/22 and the 29/11/22. This is further demonstration that you are refusing to comply with lawful management instructions by failing to attend for duty when you were required to attend.”*

148. The wording of the suspension letter is clear and accords with events predating the decision to suspend the claimant. I find the claimant was suspended for the reasons stated in the letter. I have seen contemporaneous correspondence from Mr Girling to the claimant in which Mr Girling attempts to meet with the claimant. The claimant does not engage with these requests, I find without offering good reasons. I find it is disingenuous of the claimant to claim in these proceedings that the first respondent did not allow him to tell his side of the story when he was offered the opportunity to meet several times and he did not engage with arranging a meeting with his managers (he did not follow up on the offers of Ms Allen and Mr Daddow) or did not turn up (Mr Atkinson investigation meeting).

149. These incidences were considered by Mr Girling as part of his on-going investigation into the September allegations and informed the decision to suspend the claimant. The letter informs the clamant that during the period of his suspension he *“must not enter HMPPS premises without the permission of Head of Security, Jason Claydon.”* This is a standard and reasonable term of suspension, and particularly necessary given the claimant worked at a prison. I find this decision had been foreshadowed in the 28 November email from Mr

Daddow to the claimant in which Mr Daddow tells the claimant the risk of non-compliance with a management instruction (to attend his day shift) and advises the claimant he is making an informed decision if he does not do so and should be aware of the consequences; and Mrs Coccia's email dated 28 November 2022 advising him to follow the instructions to attend his night shift.

5 December 2022 communication

150. On 5 December 2022 the claimant alleges he raised issues of discrimination, harassment and victimisation and breach of Public Sector Equality Duty and Prison Safety to the third respondent. The clamant did not identify the document to the Tribunal. I have considered the claimant's communication at page 1146. The claimant refers to the *"contents of my emails/ correspondence in which you were copied in….(29/11/2022 & 01/12/2022) stating they are to "be treated as complaints of victimisation -discrimination - bullying and harassment."* This email does not contain information.

Correspondence with Tom Hunt MP

151. On 5 December 2023, the claimant says he made a protected disclosure to his Member of Parliament, Tom Hunt MP, regarding concerns he had about the management of Hollesley Bay (Sexual Harassment against two female staff by the same prisoner, failure to prevent abscond and Independent Monitoring Board - treatment of BAME Prisoners. The letter contains information and expresses the concerns stated.

152. On 1 February 2023, Damian Hinds (Minister for Prisons and Probation) responded to Mr Hunt's email stating that the claimant's concerns had been raised through internal grievance procedures and that these were being investigated [page 1297 – 1298]. Mr Hinds stated that it appeared some of the information that had been provided to Mr Hunt contained personal information, and therefore, should not have been shared in this matter prompting data protection concerns.

153. The respondents were concerned that some of the information the claimant shared with Mr Hunt was confidential. It was for this reason I find that the second respondent circulated a notice to all staff on 23 April 2023. The claimant alleges this notice targeted him. I have considered this notice; it is a general reminder to all prison staff of their obligations to confidential information and the consequences of failing to do so. There is nothing threatening about this notice.

7 December 2022 (claimant attending Hollesey Bay)

154. On 7 December 2022 at 08.10 the claimant emails Mr Claydon and others stating:

Good morning,
I am writing to you to let you know that I am attending work today in order to:
1. Examine and copy my online payslips. As the prison knows, I only receive online payslip (not hard copies).
2. Examine and copy the link in which Mr Claydon supplied via email (Intranet link) on 23/11/2022.
3. Contact SSCL regarding information connected to payment. And;

4. Contact RISE (Racial Inclusion and Striving for Equality), I am a member of RISE. I will initiate contact from my work email and attach my personal email.

155. Mr Clayson replied to this email at 08:34, reminding the claimant of the terms of his suspension and telling the claimant:

"You have not contacted me to seek permission to enter HMP Hollesley Bay or any other HMPPS premises. It is therefore not possible to facilitate a visit at this time."

156. I find that the claimant's email does not comply with the terms of the claimant's suspension. He was required to seek permission to attend the prison, not inform them when he was coming, which is the approach he takes in the email. It was not for the claimant, having been suspended, to direct when he would attend the prison. Mr Claydon was right to reply as he did, telling the claimant he had not obtained the required permission. Nevertheless the claimant did come to the prison that day and was refused entry. This refusal was fair; the claimant had been told in writing at least twice the terms of his suspension and the requirement for him to obtain Mr Claydon's permission to come to the prison. He ignored this direction.

157. Mr Girling told me that at approximately 08:55am on the morning of 7 December he received a telephone call in his office from an OSG informing Mr Girling that the claimant had arrived at the gate. Mr Girling and Mr Claydon's evidence accords that they both went to the gate, meeting each other on the way. Their evidence also accords that Mr Claydon informed the claimant (correctly I find based on the wording of the suspension letter) that the claimant did not have permission to enter the prison and asked the claimant to leave. The claimant alleges that Mr Claydon told him to "fuck off" when he arrived. Mr Claydon and Mr Girling deny this. Based on my assessment of the claimant's credibility and the misrepresentations I have found he made in his evidence about events on 6 June (and his misrepresentations to me at this hearing about his request to attend Congregational Prayers) I prefer the respondents' witnesses recollection. I find that Mr Claydon did not use abusive language towards the claimant.

158. At the hearing the claimant stated he is entitled to a payslip; he is correct. However, that employment right does not entitled him to circumvent or ignore the terms of his suspension. The approach the claimant should have taken was to write and inform Mr Claydon the reasons he needed to attend the prison premises (including the right for a payslip) and once he has received the permission and agreed a time as he was required to do so under the terms of his suspension he could attend the prison to obtain a copy of his payslip. The claimant seems to taken the view that his right to a payslip was an absolute right, that entitled him to disregard the terms of his suspension. In this regard he is incorrect.

159. Indeed, based on my assessment of the claimant's credibility, I find the claimant was purposefully obstinate in taking this approach, to further frustrate his relationship with his employer. I find that the decision to refuse the claimant entry was reasonable and appropriate in all the circumstances. Mr Claydon's evidence is that neither he nor Mr Girling acted aggressively or inappropriately towards the claimant. Mr Girling's evidence accords. Based on my assessment of the claimant's credibility, I prefer the respondents' evidence of events on 7

December. On 8 December 2022 Mrs Coccia asked Mr Daddow to look into the incident on 7 December. He found that Mr Claydon and Mr Girling acted appropriately. For the reasons stated, I agree.

160. The claimant's grievance in respect of this incident was investigated and an outcome issued on 3 February 2023; the grievance was not upheld. The evidence before me is that the claimant did not attend a meeting on 23 January 2023 meeting arranged to allow him to put forward his recollection of the incident. I find that the claimant has a pattern of behaviour in refusing to engage with or attend meetings arranged for him if they do not comply with his interpretation of how things should be handled. In this regard his does not respect the expertise or experience of his managers.

9 December 2022 communication

161. On 9 December 2022 the claimant alleges he made a public disclosure regarding discrimination, harassment, victimisation and breach of public sector equality duty. The clamant did not identify the document to the Tribunal. I have considered the claimant's communication at page1146. I find this email does not contain information; it refers back to "the contents of my emails/ correspondence in which you were copied in, were clear 29/11/2022 & 01/12/2022)" and goes on to day *"the contents of my emails are to be treated as complaints of victimisation - discrimination -bullying and harassment."*

6 January 2023

162. On 6 January 2023 the claimant complains that his request to use multi-faith chaplaincy on the prison site is refused. It is agreed that Mr Girling had invited the claimant to interview as part of his investigation.

163. The written request made by the claimant asked to have *"access to facilities, services, resources"* the claimant telling Mr Girling that he would come to the prison at 9.30am *"to prepared for interview".* Mr Girling told me he interpreted this as a request *"to access facilities and services and I took that as services, water, toilet, those sort of services which were in my consideration in the St George building where prisoners have no access".* I find this interpretation reasonable. As the claimant was suspended, a reasonable assessment would be that he should not have access to areas where prisons have access (mindful this is an open prison). Mr Girling explained the chaplaincy was in such an area. Furthermore, it is not a reasonable request for someone who has been suspended from duties in a prison be given a set of keys.

164. In stating his reasons to attend, the claimant did not communicate that he wanted to attend Congregational Praters at the chaplaincy, and his suggestion that the wording in his request should be interpreted as such is simply not feasible. Indeed, I find this suggestion disingenuous, the claimant having displayed the same approach to the Tribunal. As the claimant told me at the hearing, and I respect, someone is not Muslim does not have the requisite knowledge about Congregational Prayers.

165. I have also considered the following exchange between the claimant and Mr Girling (taken from the contemporaneous notes made by Mr Girling, and corroborated by a colleague who witnesses the exchange) which include a record of the interview):

"AT – For Friday p[r]ayer I am not allowed to access the establishments facilities though am I?
LG – Do you mean whilst you are subject to suspension?
AT – In general, I'm not allowed to use the facilities for Friday prayer am I?
LG – The answer to this would depend on whether you where suspended, as you currently are.
AT – Okay."

166. I find that this is not a request to attend Friday prayers on 6 January 2023; it is a general enquiry. I find that, in this claim, the claimant has twisted the words of this exchange to suggest to this Tribunal that he had made a specific request to Mr Girling to attend Congregational Prayer that day at the multifaith chaplaincy and this was refused. He did not, either in writing before attending the prison, or during his visit. Therefore I find that as no request was made, it could not have been refused. Indeed, it is fair to say that a non-Muslim may not have any knowledge of Congregational Prayers, or the importance of attending these prayers in person to worship with others. Therefore, it is simply not credible that a non-Muslim would or should have interpreted the words used by the claimant as a request for use the chaplaincy. Therefore, I find the interpretation has been added by the claimant on reflection at a later date and it was not his intention to use the chaplaincy that day.

167. Indeed, this conduct on the part of the claimant is reflect of suggestion that on 10 January 2025 he had been ordered to attend the hearing in person and as a result he was being prevented by the Tribunal from attending Congregational Prayers (see above). In fact, prior to attending the Tribunal in person on 10 January, at my direction given the claimant's non-attendance earlier that week, the claimant had not made a request for the Tribunal to make an adjustment for the claimant to attend Congregational Prayers. Indeed, his suggestion to me at the start of the hearing on 10 January 2024 his request made to me the previous day to attend by CVP on 10 January to enable him to attend Congregational Prayers in person was not truthful. As recorded in the Tribunal's hearing notes and in this judgment, the claimant's request on 9 January for a CVP hearing the following day gave several reasons why he considered this necessary, but did not mention Congregational Prayers.

168. The claimant's conduct misrepresenting the request he made to me invariably informs my assessment of his conduct on 6 January 2023. Mr Girling told me that initially the interview was arranged for 20pm but was changed to 11am at the claimant's request (due to a family commitment / child care issue).

169. For these reasons I find the claimant's 9 January 2023 email suggesting that he had informed Mr Girling during the meeting that he wanted to attend the multi-faith facilities to attend Friday prayer and that Mr Girling had advised that this could not be accommodated misrepresents the conversation which took place.

170. On both 6 January 2023 and 10 January 2025 the claimant misrepresented conversations to suggest that he was being prevented from attending Congregational Prayers in person. The claimant repeats this misrepresentation in his closing statement, telling me: *"I was denied access to Muslim Friday prayer (congregational prayer) because I was suspended."* This is simply not true.

171. In his claim the claimant suggests that the first respondent had a policy of to *"not allow employees on suspension but attending meetings at the Prison to use the multifaith chaplaincy"* . The respondents' witnesses deny there was such a policy. Consistently their evidence is that the chapel was a multifaith space available to staff and prisoners of all religions to worship. I have found the claimant's evidence about his alleged request to use the chapel on 6 January not credible. There is no evidence before me that the claimant, or anyone else, was refused access to the chaplaincy when a request was made. I find that the respondents did not have this practice.

172. The claimant complains that on 6 January 2023 Mr Johnson and Mr Claydon activated body-worn video cameras. Mr Johnson and Mr Claydon told me they did and that they considered this reasonable conduct in the circumstances. When the claimant asked him why, Mr Claydon told me *"A body worn camera is a de-escalation tool, after the 7 December I was clear how your behaviour made me feel, from what I recall you stood up when I came in and you turned round and as soon as the camera was activated you became polite in manner. Considering I had felt you had made false allegations I felt reassured there would be a record."* Given my findings about 7 December, I consider this the reason Mr Claydon activated the camera and the action was reasonable in all the circumstances.

<u>20 January 2023 communication</u>

173. On 20 January 2023 the claimant raised issues of discrimination, harassment and victimisation and breach of Public Sector Equality Duty and Prison Safety to the third respondent. The clamant did not identify the document to the Tribunal. I have considered the claimant's communication at page 1239. This is part way through a lengthy email (containing information) the focus of which is the claimant's concerns about the way his complaints are being investigated and alleging detriments he considers he has suffered as a result. The email is overwhelming about the claimant, the way he says he has been treated and his allegations that this amounts to discrimination. It is not a document sent in the public interest; it is overwhelmingly a document expressing concerns about how the claimant considers he has been treated.

<u>Hand delivered letter: 23 January 2023</u>

174. The respondents accept the claimant emailed several times to tell his employer to communicate with him by email. The claimant is misguided in that he seems to think the terms of his employment allowed him to mandate a method of communication, and in doing so all other methods are excluded. The claimant does not have this right.

175. In any event, until 23 January 2023 the respondents followed this request. That day Mr Johnson delivered a second warning letter to the claimant's house by hand. I have found that often the claimant does not engage in the requests being made of him, including not reporting in every Monday from 5 December 2022 (a condition of his employment, which he was reminded of by Mr Claydon on 19 December, 1 January 2023, 10 January 16 January and 23 January as the claimant did not comply with this management instruction), nor responding to letters reminding him to do so and not attending day shifts. The respondents evidence is that when letters were sent by recorded delivery to the claimant,

the Royal Mail were unable to prove evidence of delivery. Mr Claydon told me, and I have seen the written evidence, that the claimant was invited to suggest alternative times to maintain contact; he did not reply. I find that, given the claimant's non engagement, the respondent was justified in hand delivering a letter. I find the letter was delivered by hand because of the claimant's conduct in not engaging. Had he engaged, complied with terms of his suspension and maintained contract, the delivery of the letter by hand would not have been necessary.

176. The claimant alleges that the hand delivery of this letter was intended *"to intimidate and distress my family by sending staff to my home instead of sending an email".* I have found that the reason the letter was sent in person was the claimant's failure to comply with the terms of his suspension and report in each Monday as instructed, the fact special delivery post correspondence could not be tracked by Royal Mail, suggesting that it had not been signed for. The reason the letter was hand delivered was the claimant's failure to engage with other forms of communication. There is no evidence there was an intention on the part of the respondents to intimidate the claimant. He was on the receiving end of a by hand delivery as a result of his own actions.

Appeal against suspension

177. On 13 December 2022 Mrs Coccia invited the claimant to discuss his appeal against suspension and application to set aside disciplinary proceedings. The proposed date of the meeting was changed at the claimant's request, but the claimant did not attend the 25 January 2023 meeting on the basis that the fact he disagreed with the process being followed by the first respondent and that entitled him to absent himself. It did not. I find this approach wholly disrespectful, especially to someone of Mrs Coccia's seniority. The claimant should have attended and raised his concerns about the process at this meeting, in a forum where an exchange of views on the different interpretations. Instead the claimant took a dogmatic and strident approach, hiding, in my assessment, behind lengthy emails but refusing to engage with his employer in open discourse face to face. In find the claimant had the opportunity to put forward his concerns at this meeting. By failing to attend he lost that opportunity. Mr Cartwright upheld the decision to suspend the claimant and he is told the reasons for this in a letter dated 27 January. I consider it was reasonable for the second respondent to ensure delivery of the letter by hand

Mr Girling's investigation (concluded February 2023)

178. I find the claimant did not engage with Mr Girling's investigation despite Mr Girling's request to meet again. In this context Mr Girling considered written evidence, issuing his report on 2 February 2023, concluding the claimant did not have the relevant permissions to leave the prison on 5 and 6 September 2022 and that the claimant failed to follow management instructions to transfer to the day shift and maintain contact as instructed while suspended. Mr Girling concluded his findings were sufficiently serious to proceed with a disciplinary process. The claimant has not explained in his evidence why he did not comply with the terms of his suspension. In these circumstances,.

179. On 6 February 2023 the claimant alleges Mr Daddow refused to provide him with information and appeal of final written warning. I find the reason for this is that the claimant had raised several complaints against Mr Daddow and as

such he was a witness to the on-going investigations. It was therefore appropriate, and due process, that the claimant did not contact witnesses (he had been told this as part of his suspension). Mr Daddow's refusal to respond was appropriate in the circumstances. It was inappropriate for the claimant to contact Mr Daddow given the nature of the complaints he had made against Mr Daddow. He had been told he could direct his concerns to other managers.

April 2023 day shifts

180. The claimant alleges a letter sent on 18 April 2023 letter forced him to do a day shift resulting C says in a loss of £10,000 to his salary. It did not. Several times the claimant had been told that his contract was not permanent nights, and the reasons why. The letter was directing the claimant to the job for which he was contracted and paid to do.

181. On 19 April 2023 the claimant commenced these proceedings. The document is about complaints personal to him.

May 2023

182. On 6 May 2023 the claimant alleges Mrs Coccia and Mr Cartwright failed to investigate his complaint that he was dissuaded of making protected disclosure to his MP by Mr Daddow. I have seen the correspondence the claimant sent to Mrs Coccia raising concerns about Mr Daddow's conduct. The email is copied to Mr Cartwright. In evidence Mrs Coccia told me that "[A]s Mr Cartwright had been copied to this email, it would have been my expectation that he respond, as any queries or complaints be responded to a the lowest possible level in the first instance". Mrs Coccia told me that she would not have expected a response necessary in any event, given Mr Daddow's correspondence was sharing an extract from the civil service code to remind all staff at HMP Hollesley Bay as their duties as a civil servant. I find re reason not to investigate. I accept Mrs Coccia's evidence that circulation not threatening and did not require a response and in any event the claimant had transferred to Warren Hill by this point.

183. On 16 May 2023 alleges that he was dissuaded by the second respondent from making a complaint to his MP. The clamant did not identify the document to the Tribunal. I have considered the claimant's communication at page 1239. 1344. In this document the claimant is addressing the outcome of the investigation into his complaints against Mr Daddow and Ms Allen. There is no public aspect to the contents of this communication.

184. On 19 May 2023 the claimant alleges that his poor performance status was maintained by Mrs Coccia. Mrs Coccia told me that the "recommendation had been to pause the performance management process for 3 months whilst the claimant settled in at Warren Hill prison." I find this was the reason for the performance record being paused. There is no evidence before me that it related to the claimant's 16 May 2023 email or suggest that the poor performance criteria remained in place when the claimant started work at Warren Hill.

Christmas card

185. On 8 December 2023 the claimant received a Christmas card at his home address, which had been posted the previous day and processed through the Royal Mail's South East Anglia Mail Centre. The words written in the card are extremely offensive. The card also refers to court proceedings.

186. At the hearing on day 13 (and in an email sent to the Tribunal the following day, 23 January 2023) the claimant told me that his allegation regarding the Christmas card was that an [unidentified] employee of the first respondent had sent the card. The claimant's 23 January email records his case as: the "Christmas Card allegation is against the First Respondent (R1-SOSJ- The employer)". Neither at the hearing on day 13 or in this email does the claimant name any employees of the first respondent as the suspected sender of the card. On day 13 he told me he was not alleging that the second or third respondent had sent the card. Therefore, I disregarded the following evidence in the claimant's witness statement: the paragraph inviting me to connect the sender of the card to a comment recorded in the transcript of an August 2022 investigation meeting; and the paragraph in which he refers to named individuals as posting / knowing about the Christmas card. I note the claimant did not explain to me why he had decided to change his allegations from named individuals to an unknown employee.

187. Understandably the claimant is very upset about having received such an offensive communication. On 9 January 2025 the claimant emailed the third respondent informing him of the card and asking that the second respondent "to investigate this indictable offence / hate crime please". The same day the third respondent directed Dave Nicholson to action a formal investigation. Mr Peck was assigned to investigate, with the following terms of reference:

"…investigate the circumstance around OSG Mr Ahmed Tayel who was sent an abusive/inappropriate Christmas card via Royal Mail on the 8th of December 2024. Your investigation should try to establish the author of the card and if there is a clear link to any HMPPS establishment or staff."

188. The claimant does not consider that the first respondent investigated the Christmas card as it should have done, suggesting to the second respondent at the time and at the hearing that respondents' tackling unacceptable behaviour unit should be involved. However, his complaint to the Tribunal about the Christmas card is that the sending of the card amounted to harassment and victimisation. It is not part of the claimant's claim that there was a failure to investigate or the investigation was deficient in some way. Therefore, the way in which the first respondent investigated the 8 January complaint about the card is not an issue before this Tribunal.

189. Mr Peck investigated by conducting interviews and contacting Royal Mail repeatedly over several weeks to establish the sender of the card, concluding in a report dated 29 February 2024 that Royal Mail would not identify from the franking code where the card was posted, but it was possible to conclude from the franking code that the card was not posted at with Hollesey Bay or Warren Hill prison. On 2 April 2024 the claimant was sent a letter dated 28 March 2024 informing him that it had not been possible to identify the sender of the card.

Relevant law

<u>Jurisdiction – time limits</u>

190. Section 123 of the Equality Act 2010 sets the time limits for discrimination claims and provide:

Subject to section 140B 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.
(2)Proceedings may not be brought in reliance on section 121(1) after the end of—
(a)the period of 6 months starting with the date of the act to which the proceedings relate, 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.

191. The ACAS early conciliation procedure covers discrimination claims. The primary time-limit is within 3 months of the discriminatory action. If the claim is late, the tribunal has a 'just and equitable' discretion under s123(1)(b) to extend time. *In Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96*, the Court of Appeal held that 'an act extending over a period' can comprise a 'continuing state of affairs' as opposed to a succession of isolated or unconnected acts. There needs to be some kind of link or connection between the actions.

Section 47B of the Employment Rights Act 1996: Detriment for Making a Protected Disclosure.

192. Section 47C of the Employment Rights Act 1996 provides:

(1)A worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that the worker has made a protected disclosure.
(1A)A worker ("W") has the right not to be subjected to any detriment by any act, or any deliberate failure to act, done—
(a)by another worker of W's employer in the course of that other worker's employment, or
(b)by an agent of W's employer with the employer's authority,
on the ground that W has made a protected disclosure.
(1B)Where a worker is subjected to detriment by anything done as mentioned in subsection (1A), that thing is treated as also done by the worker's employer.
(1C)For the purposes of subsection (1B), it is immaterial whether the thing is done with the knowledge or approval of the worker's employer.

(1D)In proceedings against W's employer in respect of anything alleged to have been done as mentioned in subsection (1A)(a), it is a defence for the employer to show that the employer took all reasonable steps to prevent the other worker—
(a)from doing that thing, or
(b)from doing anything of that description.
(1E)A worker or agent of W's employer is not liable by reason of subsection (1A) for doing something that subjects W to detriment if—
(a)the worker or agent does that thing in reliance on a statement by the employer that doing it does not contravene this Act, and
(b)it is reasonable for the worker or agent to rely on the statement.
But this does not prevent the employer from being liable by reason of subsection (1B).
(2) This section does not apply where—
(a)the worker is an employee, and
(b)the detriment in question amounts to dismissal (within the meaning of Part X).
(3)For the purposes of this section, and of sections 48 and 49 so far as relating to this section, " worker ", " worker's contract ", " employment " and " employer " have the extended meaning given by section 43K.

193. Mr Crawford referred me to Korashi v Abertawe Bro Morgannwg University Local Health Board 2012 IRLR 4, EAT noting the guidance in that case which requires that the tribunal consider the extent of the knowledge of the employee about the work practices in assessing the extent to which she or he could reasonably believe the information tended to show that which they allege. I have also considered the guidance from the practitioner's text IDS Employment Law Handbooks about this case.

194. Mr Crawford also referred me to the case of Panayiotou v Chief Constable of Hampshire Police 2014 ICR D23 in which the EAT upheld a decision that the reason for dismissal and detriments was not the fact that Mr Panayiotou made protected disclosures; but the manner in which he pursued his complaints. It was found that he would 'campaign relentlessly' if he was dissatisfied with the action taken by his employer following his disclosures and would strive to ensure that all complaints were dealt with in the way he considered appropriate. As a result, the employer had to devote a great deal of management time to responding to correspondence and complaints. In essence, he had become 'completely unmanageable' and this led to his dismissal. It was held that it was the combination of his long-term absence from work and the way in which he pursued his various complaints which led to his dismissal and his claims under s.47B and s.103A failed.

195. Furthermore, a whistleblower's conduct and his or her protected disclosure may be properly separable in the context of a detriment claim as it is in the context of an unfair dismissal claim. Further authority for that proposition comes from the Court of Appeal in Kong v Gulf International Bank (UK) Ltd 2022 EWCA Civ 941, CA.

Section 47C of the Employment Rights Act 1996: Detriment for Leave for Family and Domestic Reasons (Time off under section 57A)

196. Section 47C of the Employment Rights Act 1996 provides:

(1)An employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done for a prescribed reason.

(2)A prescribed reason is one which is prescribed by regulations made by the Secretary of State and which relates to—
(a)pregnancy, childbirth or maternity,
(aa)time off under section 57ZE,
(ab)time off under section 57ZJ or 57ZL,
(b)ordinary, compulsory or additional maternity leave,
(ba)ordinary or additional adoption leave,
(bb)shared parental leave,
(bc)carer's leave,
(c)parental leave,
(ca)... paternity leave,
(cb)parental bereavement leave,
(cc)neonatal care leave, or
(d)time off under section 57A.
(3)A reason prescribed under this section in relation to parental leave may relate to action which an employee takes, agrees to take or refuses to take under or in respect of a collective or workforce agreement.
(4)Regulations under this section may make different provision for different cases or circumstances.
(5)An agency worker has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by the temporary work agency or the hirer done on the ground that—
(a)being a person entitled to—
(i)time off under section 57ZA, and
(ii)remuneration under section 57ZB in respect of that time off,
the agency worker exercised (or proposed to exercise) that right or received (or sought to receive) that remuneration,
(b)being a person entitled to time off under section 57ZG, the agency worker exercised (or proposed to exercise) that right,
(c)being a person entitled to—
(i)time off under section 57ZN, and
(ii)remuneration under section 57ZO in respect of that time off,
the agency worker exercised (or proposed to exercise) that right or received (or sought to receive) that remuneration, or
(d)being a person entitled to time off under section 57ZP, the agency worker exercised (or proposed to exercise) that right.
(6)Subsection (5) does not apply where the agency worker is an employee.
(7)In this section the following have the same meaning as in the Agency Workers Regulations 2010 (S.I. 2010/93)—

- *"agency worker";*
- *"hirer";*
- *"temporary work agency".*

197. Section 57A of the Employment Rights Act 1996 provides:

(1)An employee is entitled to be permitted by his employer to take a reasonable amount of time off during the employee's working hours in order to take action which is necessary—
(a)to provide assistance on an occasion when a dependant falls ill, gives birth or is injured or assaulted,
(b)to make arrangements for the provision of care for a dependant who is ill or injured,
(c)in consequence of the death of a dependant,

(d)because of the unexpected disruption or termination of arrangements for the care of a dependant, or
(e)to deal with an incident which involves a child of the employee and which occurs unexpectedly in a period during which an educational establishment which the child attends is responsible for him.
(2)Subsection (1) does not apply unless the employee—
(a)tells his employer the reason for his absence as soon as reasonably practicable, and
(b)except where paragraph (a) cannot be complied with until after the employee has returned to work, tells his employer for how long he expects to be absent.
(3)Subject to subsections (4) and (5), for the purposes of this section " dependant " means, in relation to an employee—
(a)a spouse or civil partner,
(b)a child,
(c)a parent,
(d)a person who lives in the same household as the employee, otherwise than by reason of being his employee, tenant, lodger or boarder.
(4)For the purposes of subsection (1)(a) or (b) " dependant " includes, in addition to the persons mentioned in subsection (3), any person who reasonably relies on the employee—
(a)for assistance on an occasion when the person falls ill or is injured or assaulted, or
(b)to make arrangements for the provision of care in the event of illness or injury.
(5)For the purposes of subsection (1)(d) " dependant " includes, in addition to the persons mentioned in subsection (3), any person who reasonably relies on the employee to make arrangements for the provision of care.
(6)A reference in this section to illness or injury includes a reference to mental illness or injury.

198. Mr Crawford referred me to the online guidance, 'Time off for family and dependants' ('the online guidance'), available on the Government information website (www.gov.ukOpens in a new window), makes it clear that the right is intended to cover *unforeseen* matters and would not cover, for example, a parent taking a child to a hospital appointment. It suggests that if employees know in advance that they are going to need time off, they may be able to arrange with their employer to take annual leave. Alternatively, if the circumstances behind the need to take time off relate to the employee's child, the employee may qualify to take unpaid parental leave.

199. In Qua v John Ford Morrison 2003 ICR 482, EAT, the Appeal Tribunal considered how employment tribunals should approach the question of whether it was necessary for an employee to take time off in any given situation. The EAT held that factors to be taken into account include: the nature of the incident which has occurred; the relationship between the employee and the dependant in question; and the extent to which anybody else can provide assistance.

200. The EAT took a broader view in Royal Bank of Scotland plc v Harrison 2009 ICR 116, EAT a case concerned primarily with the meaning of the word 'unexpected' in S.57A(1)(d). The EAT emphasised that it is for the employment tribunal in each case to find on the facts whether necessity has been established and that many factors will come into play, including considerations of urgency and time. While there were 'no hard and fast rules', the Appeal Tribunal noted 'the obvious principle that the greater the time to make alternative arrangements, the less likely it will be that necessity will be

established'. In its view, if an employee failed to take appropriate steps to make alternative arrangements but had sufficient time in which to do so, a tribunal is unlikely to find as a fact that it was necessary for him or her to take the time off.

Section 13 of the Equality Act 2010: Direct Discrimination – religion / belief

201. Section 13 of the Equality Act 2010 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.
(2)If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim.
(3)If the protected characteristic is disability, and B is not a disabled person, A does not discriminate against B only because A treats or would treat disabled persons more favourably than A treats B.
(4)If the protected characteristic is marriage and civil partnership, this section applies to a contravention of Part 5 (work) only if the treatment is because it is B who is married or a civil partner.
(5)If the protected characteristic is race, less favourable treatment includes segregating B from others.
(6)If the protected characteristic is sex—
(a)less favourable treatment of a woman includes less favourable treatment of her because she is breast-feeding;
(b)in a case where B is a man, no account is to be taken of special treatment afforded to a woman in connection with pregnancy, childbirth or maternity.
(7). . . . . .
(8)This section is subject to sections 17(6) and 18(7).

202. Lord Nicholls in Nagarajan v London Regional Transport [1999] ICR 877 (at 886), notes that it is not necessary for the claimant's religion or any protected act to be the sole reason for any established less favourable treatment, unwanted conduct or detriment and noting that liability may be established if a protected characteristic (or a protected act) is a significant influence/more than trivial reason for the treatment complained of.

Section 19 of the Equality Act 2010: Indirect Discrimination – religion / belief

203. Section 19 of the Equality Act 2010 provides:

(1)A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.
(2)For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—
(a)A applies, or would apply, it to persons with whom B does not share the characteristic,
(b)it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,
(c)it puts, or would put, B at that disadvantage, and
(d)A cannot show it to be a proportionate means of achieving a legitimate aim.
(3)The relevant protected characteristics are—

- *age;*
- *disability;*
- *gender reassignment;*
- *marriage and civil partnership;*
- *race;*
- *religion or belief;*
- *sex;*
- *sexual orientation.*

Section 26 of the Equality Act 2010: Harassment – perceived disability

204. Section 26 of the Equality Act 2010 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.
(5)The relevant protected characteristics are—

- *age;*
- *disability;*
- *gender reassignment;*
- *race;*
- *religion or belief;*
- *sex;*
- *sexual orientation*

205. In considering the words “intimidating, hostile, degrading, humiliating or offensive” a Tribunal must be sensitive to the hurt comments may cause but balance so as not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase: *Richmond Pharmacology Ltd v. Dhaliwal* [2009] IRLR 336. Where a claim for harassment is brought on the basis that the unwanted conduct had the *effect* of creating the relevant adverse environment, section 26 has been interpreted as creating a two-step test for determining whether conduct had such an effect; *Pemberton v Inwood* [2018] EWCA Civ 564. The steps are:

205.1. Did the claimant genuinely perceive the conduct as having that effect?

205.2. In all the circumstances, was that perception reasonable?

Section 27 of the Equality Act 2010: Victimisation

206. Section 27 of the Equality Act 2010 provides:

(1)A person (A) victimises another person (B) if A subjects B to a detriment because—
(a)B does a protected act, or
(b)A believes that B has done, or may do, a protected act.
(2)Each of the following is a protected act—
(a)bringing proceedings under this Act;
(b)giving evidence or information in connection with proceedings under this Act;
(c)doing any other thing for the purposes of or in connection with this Act;
(d)making an allegation (whether or not express) that A or another person has contravened this Act.
(3)Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.
(4)This section applies only where the person subjected to a detriment is an individual.
(5)The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule.

207. The acts that are protected by the victimisation provisions are set out in section 27(2) of the Equality Act 2010. They are: bringing proceedings; giving evidence or information in connection with proceedings under the; doing any other thing for the purposes of or in connection with the Equality Act; and making an allegation (whether or not express) that A or another person has contravened the Equality Act.

208. A detrimental act will not constitute victimisation, if the reason for it was not the protected act itself, but some properly separable feature of it. There is no requirement that the circumstances be exceptional for such a case to arise: *Page v Lord Chancellor and anor* [2021] IRLR 377 (CA), per Underhill LJ at paras.55-56.

209. A claimant seeking to establish victimisation must show two things:

209.1. That they have been subjected to a detriment; and

209.2. That he or she was subjected to that detriment <u>because of</u> a protected act.

209.3. There is no need for the claimant to show that the treatment was less favourable than that which would have been afforded to a comparator who had not done a protected act.

210. To succeed in a claim of victimisation the claimant must show that he or she was subjected to the detriment *because* of doing a protected act or because the employer believed the claimant had done or might do a protected act. Where there has been a detriment and a protected act, but the

detrimental treatment was due to another reason, a claim of victimisation will not succeed.

211. The essential question in determining the reason for the claimant's treatment is: what, consciously or subconsciously, motivated the employer to subject the claimant to the detriment? This will require an inquiry into the mental processes of the employer. If the necessary link between the detriment suffered and the protected act can be established, the claim of victimisation will succeed.

212. The case of Chief Constable of West Yorkshire Police v Khan 2001 ICR 1065, HL is relevant to my assessment. The House of Lords guides that a tribunal must identify *"the real reason, the core reason, the causa causans, the motive"* for the treatment complained of. What is the real reason for the detriment?

213. The case of Chief Constable of Greater Manchester Police v Bailey 2017 EWCA Civ 425, CA provides guidance on how a Tribunal show apply the reason why test and reiterates the well-established legal test for victimisation that an act will be done "because of" a protected characteristic, or "because" the claimant has done a protected act, as long as that had a significant influence on the outcome. The case cautions an Employment Tribunal from making an error of law, reminding (and perhaps cautioning us) that:

"It is trite law that the burden of proof is not shifted simply by showing that the claimant has suffered a detriment and that he has a protected characteristic or has done a protected act…."

214. The case is helpful to this Tribunal not least as Underhill LJ recites the key statutory provisions, noting that in section 27 of the Equality Act 2010 the question is whether a detriment was done 'because of a protected act. The decision directs us that 'because' is the key word. Crucially, this is not identical to a 'but for' test; Ahmed v Amnesty International [2009] ICR 1450. One is looking for the 'reason why' the treatment occurred. Where treatment is not inherently discriminatory, one must look into the 'mental processes' of the decision maker. We must be satisfied, and have sufficient evidence before us, that the decision-maker's 'mental processes' were discriminatory if we make a finding of victimisation. It was held that the correct test we must apply is that the detriment occurred "because of" the protected act. A tribunal must first decide whether a claimant has established a *prima facie* case of unlawful victimisation; if he has, the burden shifts to the respondent to prove a non-discriminatory explanation.

215. It is important that a Tribunal has the burden of proof foremost in its mind when making a decision about a victimisation complaint. The victimisation claim is subject to the provisions of section 136 of the Equality Act 2010 relating to the burden of proof: this is set out below.

Section 1 of the National Minimum Wage Act 1998 / Section 13 of the Employment Rights Act 1996: Failure to pay National Minimum Wage

216. Section 1 of the National Minimum Wage Act 1998 provides:

(1)A person who qualifies for the national minimum wage shall be remunerated by his employer in respect of his work in any pay reference period at a rate which is not less than the national minimum wage.
(2)A person qualifies for the national minimum wage if he is an individual who—
(a)is a worker;
(b)is working, or ordinarily works, in the United Kingdom under his contract; and
(c)has ceased to be of compulsory school age.
(3)The national minimum wage shall be such single hourly rate as the Secretary of State may from time to time prescribe.
(4)For the purposes of this Act a "pay reference period" is such period as the Secretary of State may prescribe for the purpose.
(5)Subsections (1) to (4) above are subject to the following provisions of this Act.

217. Section 13 of the Employment Rights Act 1996 provides:

(1)An employer shall not make a deduction from wages of a worker employed by him unless—
(a)the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
(b)the worker has previously signified in writing his agreement or consent to the making of the deduction.
(2)In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—
(a)in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
(b)in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
(3)Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.
(4)Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.
(5)For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.
(6)For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.
(7)This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.
(8)In relation to deductions from amounts of qualifying tips, gratuities and service charges allocated to workers under Part 2B, subsection (1) applies as if—

(a)in paragraph (a), the words "or a relevant provision of the worker's contract" were omitted, and
(b)paragraph (b) were omitted.

Burden of proof: section 136 Equality Act 2010

218. Section 136 of the Equality Act 2010 provides:

(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)the Asylum and Immigration Tribunal;
(c)the Special Immigration Appeals Commission;
(d)the First-tier Tribunal;
(e)the Education Tribunal for Wales;
(f)the First-tier Tribunal for Scotland Health and Education Chamber .

219. I have considered the guidance of the Court of Appeal in Madarassy v Nomura International Plc [2007] ICR 867 at paragraphs 56 to 57, noting that it is not sufficient for the complainant to prove facts from which the tribunal could conclude that the respondent 'could have' committed unlawful discrimination. The words 'could conclude' (or 'could decide' (s.136(2) Equality Act 2010)) mean that a 'reasonable tribunal could properly conclude'. He also reminded us that unreasonable treatment of itself is not sufficient to give rise to an inference of discrimination or victimisation; employers 'will often have unjustified albeit genuine reasons for acting as they have. If these are accepted and show no discrimination, there is generally no basis for the inference of unlawful discrimination. Even if they are not accepted, the tribunal's own findings of fact may identify an obvious reason for the treatment in issue, other than a discriminatory reason' (Bahl v The Law Society [2004] IRLR 799 (CA) at paragraph 101).

Analysis and conclusion

Time limits

220. The respondents submits that any events about which the claimant complains which are found to have taken place before 19 November 2022 may not have been brought in time. I have considered the date the claim form was presented and the dates of early conciliation applying the legal test set out in section 123 of the Equality Act 2010 and agree with the respondents that 19 November 2022 is the correct cut-off date . Therefore I must conclude that any events about which the claimant complains which took place before 19 November 2022 are out of time and the Tribunal does not have jurisdiction to consider them, unless I exercise my discretion to extend time. In doing so, I am guided by section 123 of the Equality Act 2010.

221. For those events predating 19 November 2022 I must decide if there was conduct extending over a period. I consider there was as the thread which runs through all the claimant's claims is his misunderstanding of his contract of employment and conviction that the contract was amended to 38.5 hours and a permanent night contract. I have found that the claimant's various grievances and complaints flow from his increasing frustration that the respondents did not agree with his interpretation of his contract. This period of contract ends with the claim before me that the clamant was not paid NMW on an ongoing basis, due to his interpretation of his contractual hours. Taking the claimant's claim at its highest, and mindful he was not represented at the hearing, I conclude that there was continuing conduct and I have considered the discrimination and victimisation claims as in time.

222. I have applied the same analysis to the unauthorised deductions (national minimum wage) complaint and have considered the claim as a series of deductions and therefore in time.

Protected disclosures

223. It is noted that the claimant's own evidence does not identify the documents on which he relies. I have referenced in my findings of fact the documents I have considered for each alleged disclosure, based on the documents identified by Mr Crawford to assist the Tribunal. For his communications to satisfy the legal test a protected disclosure first, I must decide whether, in the communication the claimant disclosed the information alleged and, if so, did the claimant believe the disclosure of information was made in the public interest? I consider each alleged disclosure in turn.

224. On 17 September 2021, the claimant alleges he disclosed that he was being paid below the NMW. I have found he did not. This email does not disclose information about the NMW. The claimant was represented during the preparation of his claim; mindful he was not at the hearing, and taking his case at its highest I have considered whether, despite the absence of a reference to NMW, on balance, it is possible to conclude from substance of the wording the claimant is claiming he is not being paid the NMW. It is not. I have found the this email is a complaint personal to the claimant about having received TOIL and not overtime pay. It is not on any interpretation a complaint about the NMW. It has been relabelled this in these proceedings. I have found the claimant does not raise concerns about the pay of others; the email is personal to his complaints only. It is simply not feasible that the claimant sent this email in the public interest. Applying the legal tests, I conclude the 17 September 2021 is not a protected disclosure.

225. On 30 June 2022, the claimant alleges he reported an act of sexual harassment to the second respondent and accused him of a lack of action, encouragement, and breach of a legal duty. I have found that the claimant sent this email due to his dissatisfaction in not succeeding in his application for the Head of Assurance role, in which he referred to concerns about sexual harassment in the prison as an example to evidence, in his view, his suitability for the role. The application was personal to him and part of a confidential job application. I have found the subsequent reference in the email was in the context of the claimant's discontent at not progressing to interview. It is not feasible to suggest that the 30 June email was sent in the public interest. It

was a private communication about his application, in which he referred to the alleged act of sexual harassment used as an example to support his application. On balance, I conclude that this email was sent in the context of the claimant's discontent at the response to his application. In the circumstances I conclude that, on balance, it cannot reasonably be considered that the reference to the act of sexual harassment was made in the public interest. I conclude the email is not a protected disclosure.

226. On 4 July 2022 the claimant alleges that he reiterated the issues regarding the unfair treatment of BAME prisoners' safety to the first and second respondent. I have found that the grievance against Marc Barrett does contain information and references concerns about prisoner safety. However, I have found that these are examples given to support the complaint specific to concerns the claimant had about Mr Barrett's conduct and that the grievance states: *"This complaint is against Mr Barrett only."* By the claimant's wording alone, it is evidence that this was not a document intended to raised concerns publicly. I have found the claimant was unhappy about the way the incident in 6 June was handled and he was raising his concerns about that through this document, setting out health and safety concerns he considered were a result of Mr Barrett's conduct. Further, the claimant's knowledge of the matters he was allegedly disclosing to his employer was informed by his role in the prison and as an OSG working the night shift often he knew from his experience that such matters were not examples of failings in the workplace. He knew that these matters had been properly dealt with and would not reasonably be considered information tending to show a breach of legal obligation. The information was submitted for the sole purpose of complaining about Mr Barrett and the content disingenuous, which the claimant knew from his role as an OSG. The purpose of the disclosure was to retaliate against Mr Barrett due to the events of 6 June. For these reasons I conclude the 4 July complaint is not a protected disclosure.

227. On 6 July 2022 the claimant alleges that he reported to Mrs Cocchia and the third respondent brief allegations of sexual harassment against female staff member's allegation of an abscond of a prisoner which could have been prevented- suppression of documents and denying the IMB access to prison records including complaints of discrimination by prisoners. The email does disclosure information about these things. The content is a matter of public interest. However, I conclude did not reasonably believe at the time he was sending the email in the public interest. This is evidence from the title: "Very serious allegations against David Daddow", which the claimant sets out in 4 subsequent paragraphs. Considered in the context of the many emails the claimant had set to Mr Daddow expressing his frustration about his pay, the OH request, the decision to move the claimant to nights, I have found that the purpose of this email was to express the claimant's concerns about Mr Daddow more widely; it was not sent in the context of a wider public interest.

228. I have found the issue was addressed by the prison's management at the time, having preferred the Governor and Deputy Governor's evidence that the first respondent had appropriately addressed the issue of sexual harassment against the female staff member and she was satisfied it had been addressed; the claimant was aware of this, in his not wishing to take the matter further. I conclude this email is not a protected disclosure as the claimant, for these reasons, the claimant did not reasonably believe he was sending it in the public interests. It was sent due to his personal frustrations at

and as a consequence of management decisions with which the claimant did not agree. Further the claimant could not have raised this concern reasonably believing it was in the public interest and there had been a breach of a legal obligation as he knew by the time he sent the email that the incident of sexual harassment had been resolved internally.

229. On 6 September 2022, 5 December 2022, 9 December 2022 and 20 January 2023 the claimant raised issues of discrimination, harassment and victimisation and breach of Public Sector Equality Duty and Prison Safety to the third respondent. My findings and the chronology of events evidence that when the claimant disagreed with a management decision more often than not he raised a grievance or refused to reasonably engage with the process (as evidence by his failure to attend meetings arranged to discuss his concerns). The chronology in my findings of fact evidences that these communications follow issue being raised with the claimant about his conduct. He raised matters where, given his role as an OSG Band 2, his knowledge of the events they concern was limited. In this regard, it is not feasible that he was raising genuine concerns. Given the chronology, and the language used and manner of his communications (legalistic language, use of bond an underlining) I conclude his motivation for raising these concerns was his personal frustration that management decisions, in particular the decision to transfer him from day to night shifts. I have found, based on my interpretation of the claimant's contract that this decision complied with its terms. The claimant, incorrectly, was of the view it did not. There is a common thread through the timeline that whenever management sought to enforce the shift move, they received a communication making allegations. For this reason I conclude that the claimant was not motivated by a concern of wrong-doing in the prison. He was motivated by the fact he did not want to move from the night shift, and management were directing this transfer. This general finding is applicable to all 4 of these communications; I address them specifically below:

230. I have found the 6 September 2022 contains information, alleging the claimant's concerns about discrimination as he states in this claim. Given my findings on the claimant's behaviour on the 5 September and failure to reconvene his meeting with Mr Atkinson on 6 September, the claimant did not reasonably believe he was raising a concern in the public interest. I conclude it was sent due to the claimant's dissatisfaction with Mr Atkinson's investigation. This is not a protected disclosure.

231. On 26 September 2022 the claimant alleges he raised issues of Health and Safety in the prison. This related to an incident with a prisoner, when the claimant alleges the Duty Governor (who was not on site) should have attended an attempted suicide situation. I have found the communication contains information and refers to the Prison Rules 1999 and alleges that the Duty Governor failed to carry out his duties during incidents in September 2022 by not attending the prison. Following explanations from prison management, I have found that it was not a requirement for the Duty Governor to attend if he was not on site as procedure were in place for staff to handle the situation in the moment. I have found that management considered the incidences had been properly managed and why, in the circumstances,

232. The respondents suggest this disclosure was made to retaliate and push back against a reasonable management direction that he attend a shift pattern that was not exclusively night shifts. I consider that there was an element of concern on the part of the claimant about the safety of prisoners, given the very serious nature of this incident. I agree. Based on my finding that the basis on which the claimant was raising his concerns was his personal frustrations due to the on-going investigations into his conduct, being subject to a performance management process with which he disagreed and his increasing and persistent frustration at being deployed to the day shift, he did not make the disclosure reasonably believing it was in the public interest. It was retaliation. This is not a protected disclosure. Indeed, the legal obligations relied on by the claimant in his email do not accord with the concerns raised by the claimant. In the claimant's description of the incident there is no evidence of disorder and staff managed the situation. The claimant knew that these matters had been properly dealt with and would not reasonably be considered information tending to show a breach of legal obligation.

233. On 16 November 2022 the claimant alleges that he reiterated the issues regarding the unfair treatment of BAME prisoners. Prisoners' safety to the first and second respondent. I have found that the communication contains information and raises concerns about BAME prisoners. It is focused to the claimant's personal concerns. Again, I conclude given the information disclosed, the claimant's knowledge of the matters referred to in this communication were informed by his role in the prison and he knew that such matters were not examples of failings in the workplace. He knew that these matters had been properly dealt with and would not reasonably be considered information tending to show a breach of legal obligation. Therefore, I must conclude that at the time he made the disclosure, the claimant could not reasonably have believed he was doing so in the public interest. This is not a protected disclosure.

234. On 26 November 2022, the claimant says he raised concerns with the second respondent about discrimination towards BAME employees. I have found the document refers to a staff forum involving Ipswich and Suffolk Council for Race Equality ("ISCRE") and a request that the second respondent share with the claimant / all staff "the minutes/ report of ISCRE in reference to a document the second respondent had prepared and the claimant had accessed. In requesting the minutes the claimant is seeking further information about the quote he cites from the document. The claimant is requesting information. I have found the claimant is doing so alongside stating that day shifts are not his shift pattern and he will attend a night shift and that he considers any attempt to transfer him unlawful. The email refers to a racial equality organisation, in the context of the claimant's complaint about the transfer to day shifts. There is no disclosure of information; the email is personal to his dispute with Mr Daddow over his shift pattern; given the request for information the claimant cannot reasonably have believed he was making a disclosure in the public interest. Therefore, I must conclude the 26 November 2022 email is not a public disclosure.

235. The 29 November 2022 is not a public disclosure. I have found that the focus of the email is the claimant's suggestion that he had a WLB in place. It is the claimant discussing a work life balance agreement which he says the prison holds for him. The claimant then goes on to discuss his understanding

of the processes of obtaining such an agreement. The email is sent in the context of conversations about the claimant's move to day shifts. I have found that the reason a conversation took pale about a work life balance agreement was the claimant was suggesting he had one that required him to be deployed on night shifts only. I have found he did not. In any event, the email does not disclose information (in terms of facts about treatment of BAME employees). There is no public interest element; the claimant responding to the second respondent's suggestion that the prison does not hold a work life balance agreement for him. The letter goes on to raise concerns about equality and race. I find the words used personal to Mr Daddow; repeatedly the claimant accuses Mr Daddow *"you allow….you do not… you have…."*. I find this email is a personal attack on Mr Daddow and given the words he uses the claimant could not reasonably have believed he was sending the email in the public interest. This email is not a public disclosure. The same conclusions apply to the email expressing concerns about BAME prisoners.

236. On 5 December 2022, the claimant says he raised issues of discrimination, harassment and victimisation and breach of Public Sector Equality Duty and Prison Safety to the third respondent. I have found this communication refers to the *"contents of my emails/ correspondence in which you were copied in….(29/11/2022 & 01/12/2022) stating they are to "be treated as complaints of victimisation -discrimination -bullying and harassment."* This email does not contain information; therefore it is not a protected disclosure.

237. On 5 December 2023, the claimant says he also made a protected disclosure to his Member of Parliament, Tom Hunt MP regarding concerns he had about the management of Hollesley Bay (sexual Harassment against two female staff by the same prisoner, Failure to prevent abscond and Independent Monitoring Board - treatment of BAME Prisoners. The claimant submits that an MP is a "prescribed person" for the purposes of section 43F of the ERA. I have found that the claimant did write to his MP. I agree an MP is a prescribed person. The email does disclose information, repeating concerns that the claimant had previously raised with the first respondent direct. At the time of this disclosure, I have found that the respondents had sought to address the concerns already raised and provided the claimant with explanations. When considering a disclosure to a prescribed person (and I agree with the claimant that the MP satisfies the definition) I must determine whether the claimant reasonably believe that the information contained within this document was "substantially true", as required by s43F (1)(b)(ii) ERA 1996. On balance, I conclude he could not, as had he engaged with the explanations he had received from the first respondents managers, and mindful of his knowledge from his role as an OSG, it is not feasible that he believed what he was alleging. Based on my assessment of the claimant's credibility and the timeline of events, I conclude that the claimant wrote to his MP due to his frustration, which his emails evidence had been building over many months, that his managers would not accept his interpretation of his employment contract and deploy him to night shifts only. This is not a protected disclosure.

238. On 9 December 2022 claimant raised issues of discrimination, harassment and victimisation and breach of Public Sector Equality Duty and Prison Safety to the third respondent. I have found that this email does not contain information; it refers back to "the contents of my emails/

correspondence in which you were copied in, were clear 29/11/2022 & 01/12/2022)" and goes on to day *"the contents of my emails are to be treated as complaints of victimisation - discrimination -bullying and harassment."* This is not a protected disclosure.

239. On 20 January 2023 the claimant raised issues of discrimination, harassment and victimisation and breach of Public Sector Equality Duty and Prison Safety to the third respondent. I have found that the focus of this document is the claimant's concerns about the way his complaints are being investigated and alleging detriment he considers he has suffered as a result. It is not a document sent in the public interest; it is overwhelmingly a document expressing concerns about how the claimant considers he has been treated. This is not a protected disclosure.

240. On 16 May 2023, the claimant says he complained to Mrs Coccia and the third respondent that he was dissuaded from making protected disclosures to his MP by the second respondent by threatening disciplinary action for the same. The claimant does indeed write this to Mrs Coccia. The threatened disciplinary action if the notice the second respondent sent to all employees to remind them of their regulatory obligations and confidentiality obligations with respect to sharing of prisoner, staff or prison information outside of HMP Hollesley without the data owner's permission. The notice states that anyone (all recipients) doing so may be subject to disciplinary action. The email discloses information. I have found the notice was a general circular to all staff, and while the reminder was trigger by the concerns raised by Mr Hinds (that personal information had been shared), understandably so, it served to remind all staff in these circumstances. I have found it was not targeted at or threatening to the claimant. In these circumstances, I conclude it is simply not feasible for the claimant to have reasonably believed the notice was circulated to dissuade him from making protected disclosures, nor is it reasonably feasible that the claimant's email to Mrs Coccia was informing her of an attempt to gap him. The claimant has overreacted to a standard circular, perhaps because, on reflection, he recognised that some of his communications to Mr Hunt accorded with the concerns raised by Mr Hinds, or because of his on-going and very vocal (considering the tone and script of his emails communications) frustrations about the management direction that he work day shifts. This is not a protected disclosure.

241. In considering the protected disclosures I have concluded that either the document referred to did not disclosure information alleged or was not a document sent in the public interest or that claimant did not have a reasonable belief that he was disclosing information in the public interest.

242. I consider the case of Panayiotou v Chief Constable of Hampshire Police 2014 ICR D23 relevant to my decisions and analogous to the case before me. In that case the reason for detriments was not the fact that the claimant made protected disclosures (I note I have found that the claimant has not) but the manner in which he pursued his complaints. The EAT noted that the claimant would 'campaign relentlessly' if he was dissatisfied with the action taken by his employer following his disclosures and would strive to ensure that all complaints were dealt with in the way he considered appropriate. As a result, the employer had to devote a great deal of management time to responding to correspondence and complaints. In essence, he had become 'completely unmanageable'. I have read the many complaints the claimant raised and his

many emails following up on them. The conduct is relentless and I have found his tone on occasion to be inappropriate. Taking the evidence of the 9 witnesses for the respondent as a whole, there can be no doubt that these complaints took you considerable amounts of management time. I have found that the claimant either did not turn up for meetings or sent lengthy strongly worded emails if he was dissatisfied at the approach taken by management. He was strident in his refusal to move to day shifts. As in the case of Panayiotou v Chief Constable of Hampshire Police 2014 ICR D23, I find the claimant's conduct, self-driven, made him completely unmanageable.

243. I have concluded that, in the context of the many emails I have read which the claimant sent to his employers, and the tone and presentation of those emails, the communications arose out of the claimant's frustrations that his managers did not agree with his interpretation of his employment contract as amended to a permanent night worker and his disagreement with the reasons given my his managers for placing him on performance management and suspending him. It is my assessment

244. For these reasons, I conclude the claimant did not make any protected disclosures.

Detriment

245. As I have concluded that the documents relied on by the claimant are not public disclosures it cannot, as a matter of law, be the case that the claimant suffered the alleged detriments as a result. However, for completeness, I have considered in my findings of fact whether the events identified by the claimant took place a alleged, and whether they amount to detriment (noting even if they do, they cannot be found to have been done on the ground that the claimant made a protected disclosure as I have found he did not. I am mindful that for actions to constitute a detriment they must not be fairly justified and whether actions amount to detriments is assessed in the context of a low threshold.

246. On 30 June 2022, the second respondent did not place the claimant under the first respondent's poor performance policy. I have found that the decision to place the claimant under poor performance was a decision taken by Mr Claydon. He made this decision on 21 June 2022, when he drafted the letter the claimant received by email on 30 June. I have found that, given he has dyslexia, it was Mr Claydon's practice to ask Mrs Allen to proof read correspondence he had drafted. Mrs Allen was on holiday, so Mr Claydon asked the second respondent to do so instead. I have found the second respondent did so, correcting grammar and spelling as necessary. I conclude the claimant's allegation is not well founded. It was Mr Claydon and not the second respondent who took the decision to place the claimant on poor performance. As this did not happen as alleged by the claimant. There is no detriment.

247. On 30 June 2022, the claimant alleges the second respondent made false allegations against the claimant regarding the claimant's the conduct during his 6 June 2022 night shift. I have found that the conduct the second respondent raised with the claimant (which I have found to be taking the mobile phones from the prisoners and bringing prisoners to the office) was

corroborated by Mr Barretts report from that evening (that the claimant did not follow "night state" practice) and concerns discussed at the daily briefing on 7 June that failure to do so left Mr Barrett and Mr Johnson concerned that the claimant's conduct put staff and prisoners at risk. I have found the concerns raised were not false; they were triggered by the claimant's conduct as I have found it on 6 June 2022. There is no detriment in raising genuinely held concerns.

248. On 30 June 2022, claimant alleges the second respondent demanded that the claimant transfer from night shifts to day shifts. I have found that the second respondent issued a notice requiring the claimant to transfer from night shifts to day shifts, and this was a valid management instruction complaint with the terms of the claimant's employment contract. I have found that the claimant received 28 days' notice of the transfer. I have found the second respondent explained the reasons for this decision to the claimant, in summary concerns the claimant's managers had about his conduct on his 6 June nightshift, his refusal to engage in an OH assessment and concerns management had about the tone of some of the claimant's emails to his managers. For these reasons, I conclude there was a valid management direction informing the claimant he would transfer from day to night shifts. Accordingly, there is no detriment.

249. On 30 June 2022, the claimant alleges the second respondent said you will "only work in the gate and not on any residential unit" to segregate the claimant from other employees. I have found that the decision was taken to redeploy the claimant to gate staff during his night shift pending his transfer to days, due to valid concerns the claimant's managers had about his conduct on failing to follow night state on 6 June. There is no evidence before me the decision was taken to segregate the claimant. The night orderly was stationed at the gate; the claimant had the same, if not more, interaction with colleague in this position. There is no detriment.

250. On 15 July 2022 the claimant alleges he was placed under disciplinary investigation. I have found that on 15 July Mr Claydon undertook an investigation of complaints raised by the claimant and also the complaint raised by Ms Allen about the tone of the claimant's emails to her. The complaint's made by the claimant which were investigated in this process were: his complaint of 1 July 2022 against the second respondent; his 4 July 2022 grievance against Mr Barrett; his 6 July 2022 complaint against the second respondent; his 11 July 2022 request to set aside decision made by Public Authority (also reference in his 13 July complaint); his 12 July 2022 complaint adding the second respondent and Mr Claydon to his 4 July grievance against Mr Barrett; and his 14 July 2022 query. Mr Atkinson was assigned to undertake this investigation. The word disciplinary was not used and nor were the actions taken by Mr Claydon or Mr Atkinson at this time disciplinary in substance.

251. I have found that Mr Atkinson sought to interview the claimant as part of the investigation process and this was difficult; the claimant left early from the interview on 5 September (for family reasons, with Mr Atkinson's permission, but did not seek or secure permission of his line manager) and did not attend the reconvened meeting after his training on 6 September. On 1 August 2022 and 6 September 2022 the claimant provided additional information about his complaints. I have found that, as a result Mr Atkinson considered the

complaints on the evidence before him, concluding that the claimant's complaints were not well founded (for the reasons stated in his report dated 7 October 2022), but upholding Ms Allen's grievance against the claimant. I have found that on 14 October 2022 in receipt of the report it is Mr Cartwright who takes the decision that Ms Allen's complaint should be elevated to a disciplinary procedure and appoints the Sally Hill to conduct a disciplinary hearing. She reviews the evidence in support of Ms Allen's complaint and, on 8 November 2022 decides not to progress the investigation to a disciplinary hearing.

252. The claimant's allegation misrepresents the facts. He was not subjected to a disciplinary procedure on 15 July 2022. Mr Atkinson's role was to investigate the concerns raised by the claimant and Ms Allen at that time. I conclude that the claimant has conflated the investigatory steps to that of disciplinary; the facts are that an investigation process was instigated on 15 July 2022 but it was not until 14 October 2022 that a disciplinary process was consider which in the event the first respondent did not pursue. There is no detriment.

253. On 25 July 2022, the claimant alleges that the second respondent altered a job specification of a role the claimant was interested in to say employees must not be subject to performance management and must be band 5 or above. I have found that the June 2022 advert for the permanent role of Head of Business Assurance was amended when it was readvertised in the July (the role not having been filled In the June). I have accepted the explanation provided to the Tribunal by the second respondent (mindful that given his seniority he would have greater insight into the appointment process that the claimant); that the role was readvertised as a temporary position and as the appointee would hold the position interim it was necessary for that person to be able to get up and running in the role quickly. I have accepted Mr Daddow's explanation that to achieve this aim it was necessary for any appointee to have requisite managerial experience, hence the condition of band 5. It is reasonable for an employer to have a requirement that an appointee to a senior management role is not subject to performance management. I have found that it was for this reason the application criteria was changed. There is no detriment.

254. On 31 July 2022, the claimant says he received a written warning. He did. I have found this warning was justified, the reason being that the claimant had repeatedly challenged the valid management direction to transfer him to the day shift, would not engage in an OH referral and due to valid management concerns about his actions during his 6 June night shift. There is no detriment.

255. On 6 October 2022 the claimant says he was placed under a second disciplinary investigation. I have found that the claimant was contacted on this day by Mr Girling to investigate why the claimant left early on 5 September and why he did not reconvene his interview with Mr Atkinson on 6 September. I have addressed this allegation above. Mr Atkinson did elevate the investigation to a disciplinary level and on 14 October 2022, the third respondent did appoint Sally Hill to convene a disciplinary hearing to consider the Ms Allen's concerns about the tone of the claimants emails. I have found the reason he did so was the recommendation made by Mr Atkinson in his report.

256. Therefore to this extent, the third respondent proceeded with the investigation to disciplinary. However Ms Hill did not proceed with the disciplinary; accordingly I conclude there is no detriment to the claimant. His employer was following a due process in the requisite stages and ultimately decided not to elevate the matter to a disciplinary hearing.

257. On 28 November 2022, the claimant alleges that the third respondent refused the claimant request for transfer to Warren Hill Prison and subjected the claimant to unreasonable and without proper cause suspension. I have found that the claimant made this request to Mrs Coccia. I have considered the timeline of events prepared for.by Mr Cartwright. In evidence the claimant accepted that the timeline reflected the order in which things happening (even if he did not agree the validity of what was happening). I have found the reason that the claimant was not transferred at this time was the fact he was subject to suspension. I have found that his November 2022 suspension was based on valid concerns; the reasons are stated in the letter.

"Failure to obey a lawful and reasonable order or written instruction. Repeated poor timekeeping (including abuse of flexible working hours). Despite being repeatedly advised of your start time and scheduled shifts from the 28/11/22 you failed to attend for duty on the 28/11/22 and the 29/11/22. This is further demonstration that you are refusing to comply with lawful management instructions by failing to attend for duty when you were required to attend."

258. I have found the claimant was suspended for the reasons stated in the letter. I have found the claimant does not engage with requests to meet managers ,and did not turn up to the 6 September investigation meeting with Mr Atkinson investigation meeting. There is no detriment.

259. On 29 November 2022, the claimant says second respondent suspended the claimant and placed him under a third disciplinary investigation, this was one day after the claimant's further complaint of discrimination. I have found the reason for this decision was the claimant's refusal throughout July 2022 to follow the legal and valid management direction to work on day shifts and failure to attend his shifts on 28 and 29 November 2022, in defiance of the terms of his contract and the requests of his managers. The claimant indicated in various communications to his managers several times that he did not accept their interpretation of his employment contract, that he considered he was contracted to night shifts only and that he was not accepting of the direction to transfer to day shifts (2 July, 7 July, 2 September, 28 September, 3 November, 18 November, 24 November (this being an exception in which the claimant says he will "follow" the unlawful day shift pattern but then fails to do so), 26 November, 28 November.

260. I have found the claimant was told repeatedly times, including by Mrs Coccia on 21 October 2022, that the second respondent's interpretation of the claimant's employment contract was correct and entitled his managers to change his shift provided he received 28 days' notice of any change (which I have found the claimant received). I have found the claimant was told by the second respondent and Mr Claydon the reasons for this transfer and the consequences of not following this direction several times. Yet the claimant remained strident in his refusal to follow the lawful direction to transfer to days, including on 28 November when both the second respondent and Mrs

Coccia email the claimant to advise him of the consequences of not complying with the instruction. Mrs Coccia suggested to the claimant that he meet with his managers to resolve their differences with the interpretation of the contract. The claimant did not arrange such meeting, remaining strident through his emails that his interpretation was correct. For the reasons stated in my findings of fact the claimant was not correct.

261. When questioned by the claimant, Mr Cartwright comments that all his managers were trying to do was get the claimant to do the job he was paid to do. I agree. I have found the claimant did not have a work life balance agreement in place, something the respondents had told the claimant several times, including on 29 November 2022 when the second respondent advised the claimant that the process required him to apply for one and there was no record he had done so. I have found that was because he had not made the application, as his own emails of 29 November concede when he (incorrectly) interprets the process as the employee not having to take action.

262. Based my findings about the weeks leading up to the claimant's suspension on 29 November I conclude the second respondent was justified in his decision to suspend the claimant; he did so because the claimant stridently refused to accept that he could be transferred to the day shift and his repeated communications indicating he would not attend day shifts. There is no detriment.

263. On 29 November 2022, the claimant says the second respondent accused the claimant of being erratic and irrational. He did, in an email to the claimant that day. I have found that the second respondent made this statement following the claimant's repeated refusal to comply with the terms of his employment contract and attend day shifts and would not meet with his managers to discuss the different interpretation of his employment contract. This behaviour is irrational. On 24 November the claimant writes that he will attend the day shift even though he considers the direction unlawful. He does not do so and in subsequent correspondence returns to his previous stance that he will continue to attend his night shifts and will not work a day shift. This behaviour is erratic. I conclude the claimant's own behaviour at that time justify the comments. There is no detriment.

264. On 23 January 2023, the claimant alleges that the first and second respondent instructed Mr Johnson to visit the claimant's house and hand deliver a letter placing him on final written warning under performance management. I have found they did. I have found the reason Mr Johnson was so instructed was the claimant's repeated failure to follow the reasonable (and standard) term of his suspension to telephone in weekly from 5 December.

265. The claimant's request for communication by email does not negate this action. An employee can indicate a preference for the method of communication; the claimant was under the misapprehension that he could not mandate his employer's method of communication with him. He could not. The claimant's managers respected his preference. However, in my judgement it was reasonable and necessary for the claimant's managers to use any alternative method of communication when the claimant was not checking in with his employer as required. Given the fact that the fact that Royal Mail were unable to track postal communications sent by special delivery in this context (and therefore the claimant's managers could not be

assured he had received the letters) and given the seriousness of the communication (a second and final written warning) I conclude that the first and second respondents had no option but to deliver the letter by hand. There is no evidence that Mr Johnson's conduct was anything other than entirely appropriate (indeed the complaint is not about the conduct of the delivery, it is about the fact of delivery in person). I conclude the first and second respondent's direction to Mr Johnson to deliver the letter by hand entirely appropriate. There is no detriment.

266. On 27 January 2023 the claimant alleges the third respondent upheld the decision to suspend the claimant. I have found the claimant did not attend the meeting arranged with Mr Carwright (which Mr Cartwright subsequently sought to rearrange) without explanation. I conclude the suspension was upheld for this reason. There is no detriment. It was the claimant's own behaviour which informed Mr Cartwright's reasonable, in my judgment given the claimant's refusal again to engage in person, to uphold his suspension. There is no detriment.

267. On 6 February 2023 the claimant says the second respondent refused the claimant request for information and refused the claimant the opportunity to appeal against the decision to place the claimant on final written warning. This allegation is misguided. I have found that the second respondent did not "refuse" the request; Mr Daddow reasonably (as he was not the claimant's direct line manager) refer the claimant to his managers noting that the claimant had been told he was not appropriate for the claimant to contact anyone who was part of the complaints raised by the claimant (Mr Daddow was a witness). The claimant has not accurately described the communication from the second respondent. There is no detriment.

268. On 18 April 2023, the claimant says the second respondent wrote to the claimant forcing him to work on day shifts, which would in turn mean he loses around £10,000 per annum in salary. The allegation centres on the claimant's misunderstanding of his contractual terms. I have found it was lawful under the terms of his employment contract for the respondents to redeploy the claimant to day shifts with 28 days' notice. That is what they did. He was not forced to do so in that the request complied with his contractual terms. There is no detriment.

269. On 21 April 2023, the second respondent threatened the claimant with disciplinary action for his protected disclosure of 05/12/2023 in a letter to all staff he wrote: *"I have provided below some of the key policies and controlling principles. This should demonstrate the seriousness of sharing prisoner, staff, or prison performance information outside of HMP & YOI Hollesley Bay without the permission of the Governor (Asset Owner). Prison sensitive information is provided to staff ONLY for the purpose of work within the prison. Permission to use sensitive information or share prison information outside of the prison can only be permitted with the authority of the Governor. Should any person be found to have shared prisoner, staff, or prison data to any person outside of HMPPS without the asset owner's permission (Governor), they may be subject to disciplinary action. This includes, sharing information with Members of Parliament, local government, members of the public or media."*

270. I have found that the notice was sent to all staff following concerns raised by Mr Hines on 1 February 2023 with Tom Hunt MP (and subsequently communicated to the second respondent on 28 February 2023). In his evidence to the Tribunal, the claimant accepts that he did not send his letter to Tom Hunt MP to anyone other than Tom Hunt. Therefore, I conclude that the second respondent did not know that it was the claimant who had raised concerns with his MP. Furthermore, I have found the notice was a general circular to staff triggered by Mr Hind's concerns there may have been a breach of confidentiality within the prison. In these circumstances it was a reasonably reminder, with the second respondent following best practice in a workplace. The circular is generic; I have found it did not threaten or target the claimant. There is no detriment.

271. The claimant alleges that from 16 May 2023, Mrs Coccia and the third respondent failed to investigate the claimant's complaint that he was dissuaded from making protected disclosures by the second respondent, further both Mrs Coccia and the third respondent failed to take any restorative action regarding the second respondent's threats regarding disciplinary action for making protected disclosures. The threatened disciplinary action is the notice the second respondent sent to all employees to remind them of their regulatory obligations and confidentiality obligations with respect to sharing of prisoner, staff or prison information outside of HMP Hollesley without the data owner's permission. Given Mrs Coccia's seniority, and my fidings that the notice was sent to all staff, her expectation in her witness evidence that the email was a matter for Mr Cartwright (he was copied) was reasonable. There is no detriment to Mrs Coccia not responding.

272. Mr Cartwright's evidence is that he does not recall responding, possibly because the claimant had transferred to Warren Hill by this point. The legislation does not contain a definition of detriment. Case law guides me that it is a low threshold, but that any failure must be deliberate. In Ministry of Defence v Jeremiah 1980 ICR 13, CA, Lord Justice Brandon said that 'detriment' meant simply 'putting under a disadvantage', while Lord Justice Brightman stated that a detriment 'exists if a reasonable worker would or might take the view that [the action of the employer] was in all the circumstances to his detriment'. Brightman LJ's words, and the caveat that detriment should be assessed from the viewpoint of the worker, were adopted by the House of Lords in Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL. The question of whether an employer's acts or omissions amount to a detriment is distinct from the question regarding the reason for those acts or omissions. Therefore Mr Cartwright's explanation for not responding is not relevant to my analysis. My focus is whether Mr Cartwright not responding. There is no evidence before me that the failure to respond was deliberate. Indeed, the claimant did not address the email to him, he was copied. It is disingenuous to claim that someone did not reply to correspondence that was not directly addressed to them.

273. I have found there is no detriment in law. However, even if I am wrong on this, as I have found that the claimant has not made a protected disclosure, the claimant's claim for whistleblowing cannot succeed. There was no protected disclosure so Mr Cartwright's failure to reply had nothing to do with anything done by the claimant. Mr Cartwright was a patient, thorough and credible witness. I accept his evidence that he cannot recall replying and if that is the case it was because the claimant had transferred to Warren Hill.

274. On 19 May 2023, the claimant says Mrs Coccia kept the claimant on poor performance which caused a loss of chance to apply for positions with the first respondent, for instance, he could not apply for position 74405 – Prison Group Equalities Lead HES with a salary of £44,332 to £53,201 per annum. I note that the claimant has not produced any evidence to this Tribunal to support his assertion he intended to apply for these roles, or that his banding, skills and experience qualified him to do so.

275. The claimant's recollection is inaccurate. I have found that the claimant's performance management was paused pending his settling into Warren Hill. Mindful the claimant is not represented, taking his case at its highest the Tribunal can infer that as he had applied for the permanent role, on balance, he would have applied for the temporary role but for the band requirement. However, to make such an inference the Tribunal would need to see some evidence that the claimant was keen to pursue his career progression in this way. The evidence before the Tribunal is that following his disappointment in failing to secure an interview for the permanent role, the claimant requested feedback and the Deputy Governor offered to meet with him. I have found that the claimant did not engage with this offer. Therefore, on balance, I conclude that the claimant was not serious about advancing his career in this direction. Had he been so he would have sought feedback in any form, and particularly face to face. I conclude there was no loss of chance and therefore no detriment.

276. In a claim for whistleblowing, a judge must determine whether any protected disclosure the Tribunal has found was made by a claimant materially influenced the person the claimant alleges made the decision he considers a detriment. A Tribunal only need consider this element of the legal test if the Tribunal concludes that a claimant has made a protected disclosure. For the reasons stated above, I have concluded that none of the communications the claimant asserts are protected disclosure satisfy the legal test of so being. Either the claimant's communications do not contain information, or, they are not made in the public interest, but are personal to the claimant, or, on balance, I cannot conclude that the claimant reasonably believed he was disclosing the concerns he alleges in this claim. Therefore, as I have concluded the claimant has not made a protected disclosure, it cannot be that any of the events that happened subsequent to these disclosures.

277. Indeed, taking the context of the claimants complaints as a whole and the chronology of events, it is my assessment that many of these communications were sent to frustrate his employer because the claimant was not getting his own way. He was determined to remain on night shifts. He was told repeatedly that the terms of his contract was that his managers could deploy him to day shifts. He would not engage in constructive communications or meet with his managers to engage in a discussion of the opposing views. His email correspondence shows that, instead, he became increasingly strident in his view and frustrated with his managers responses. In this context it is my judgment that many of the communications were sent because the claimant was not getting his own way; to remain on night shifts. In reaching this conclusion I have considered the parallels to the case of Panayiotou v Chief Constable of Hampshire Police 2014 ICR D23 to which Mr Crawford referred me in his

written submissions. I agree there are parallels between the claims made by this claimant and Mr Panayiotou. I have found the claimant has sent lengthy, strident emails when he did not agree with management instructions (transfer to night shifts) or his manager's assessment of his conduct (6 June 2022, 5 December 2022, 6 January 2023).

278. Not only have I concluded the claimant did not make protected disclosures, I have concluded that none of the events about which the claimant complains in his whistleblowing complaint are detriments. For the reasons stated, the whistleblowing claim fails.

279. I have had oversight of the numerous emails the claimant sent to his managers at the prison, and higher management, all of whom have given evidence to this Tribunal. It is my assessment that the directional and accusatory language (I have quoted examples above), tone, presentation (repeated use of bold and underlined text) and the regularity of the correspondence (not allowing his managers reasonable time to respond before elevating the complaints) pervades the entirety of the communications. In this regard the claimant has shown a lack of respect to his managers, making very serious allegations. The claimant was evidently upset and frustrated that his managers did not agree with his assessment that his employment contact had changed to permanent night shifts. However, the manner he has gone about raising his concerns lacks reasonableness and is troubling. He would not engage in face to face discourse, and used email as a tool to make unfounded and very serious allegations. It is a matter if substance not form; previewing correspondence with a reference to "respectfully" does not, in my assessment, negate content in the correspondence which is threatening and aggressive in tone.

Time off for dependants detriment

280. I must consider whether the claimant took time off for his dependents, namely his children, because of unexpected disruption or termination of the arrangements for the care of his children. I have considered the government guidance 'Time off for family and dependants' and note that this provision is intended to cover unforeseen circumstances.

281. The decision of the EAT in the case of Qua v John Ford Morrison 2003 ICR 482, EAT, to which I direct myself I must follow, guides me that I must take into account, amongst other things, the following factors: the nature of the incident which has occurred (requiring the employee to take time off unexpectedly for his dependent; the relationship between the employee and the dependant in question (I note it is the claimant's children for whom he required time off); and the extent to which anybody else can provide assistance (I note that in his evidence the claimant refers to in-laws living approximately 50 miles away but makes no mention of the commitments of a partner/wife).

282. On 5 September 2022 the claimant says he asked for "a reasonable amount of time off" during the claimant's working hours in order to take action which was necessary because of the unexpected disruption or termination of the arrangements for care of his children. I have found that he made this request at the start of / during the interview with Mr Atkinson.

283. Therefore the question arises as to whether the requirement to leave early for his children on 5 September was “unexpected”. To establish the legal definition of “unexpected” in the context of section 57A of the Employment Rights Act 1996. I have considered the guidance of the EAT in the case of Royal Bank of Scotland plc v Harrison 2009 ICR 116, EAT and note it is a matter for me to find on the facts whether necessity has been established by the claimant mindful of any evidence the claimant presents to support the urgency of the request. Of particular relevance is whether the claimant had sufficient time to make childcare arrangements. If this is the case, the case law guides me that I must conclude that the request was not out of necessity.

284. I have found the claimant’s attendance at an interview with Mr Atkinson on 5 September 2022 was not unforeseen; the claimant had received prior notice of the meeting and did not inform his employer in advance that he had issues with childcare, only doing so at the meeting, nor did he produce evidence at the time or to this Tribunal that an unforeseen occurrence had arisen on that date which meant it could not stay for the entirety of the meeting. I conclude that the claimant had known of the requirement for childcare on 5 September 2022 in advance this is not an unexpected disruption. The claimant could have explained to his employer in advance that he had been unable to arrange childcare, telling his employer of the attempts made, and request an alternative date for the interview when he had childcare in place; he did not do so, telling Mr Atkinson (who was not his line manager) during the meeting and not informing his direct managers at the prison at all of his predicament.

285. Based on these findings and the guidance in the case of Royal Bank of Scotland plc v Harrison 2009 ICR 116, EAT I must conclude that the claimant’s request did not satisfy the requirements of section 57A of the Employment Rights Act 1996 (specifically subsection 57A(1)(d) which is the subsection relevant to the complaint brought to the Tribunal); the claimant has not presented evidence to me, nor did he do so to Mr Atkinson when making the request, that the request to leave early was made due to unexpected disruption or termination of arrangements for the care of one of his children. The claimant has not discharged the burden of proving that on balance

286. I have found that on 6 October 2022, the Deputy Governor placed the claimant under investigation for “absenting” himself on 5 September 2022 (which resulted in a disciplinary investigation in February 2023). As the time-off for dependants exception does not apply given my findings that: the claimant had advance knowledge of the meeting and therefore time to arrange childcare; had he been unable to do so he could (and should) have notified his employer in advance, explaining the challenges he was facing and requested an alternative date to the meeting on this basis, things he could (and should) have raised with his line manager in advance of the meeting, instead of springing it on someone who was not his manager during a meeting of which he had had several weeks’ notice. Given the circumstances, I conclude there was no detriment to the claimant in the Deputy Governor investigating the claimant leaving the meeting early on 5 September 2022. He did not have his line manager’s consent to do so and did not provide evidence to Mr Atkinson or this Tribunal that there was an emergency situation on that day.

287. I note the claimant's conduct at the hearing was similar. Having had notice of this hearing since October 2023 one of the grounds for his request to postpone was childcare arrangements. The only evidence to support this was an email from his son's school briefly setting out adjustments in place for the claimant's son in school. This did not provide a reason to postpone the hearing. The claimant's conduct at the hearing echoes that to his employer. The claimant appears to be under the misconception that challenges with childcare are a reason not to attend a prearranged meeting. They are if those challenges are unforeseen and a detailed explanation of attempts made to find childcare have not succeeded. Section 57A(1)(d) of the Employment Rights Act 1996 protects an employee where they have faced an unexpected failure of childcare. That was not the case for the claimant and for these reasons his claim that he suffered a detriment for time-off for dependants fails.

Direct discrimination - perceived disability

288. The claimant alleges that the second respondent perceived him to have a mental impairment and as a result discriminated against him by requiring the claimant to engage in an OH assessment. I note that I asked the claimant to explain to me the disability / mental impairment he considered the second respondent had perceived him to have. He did not do so. I explained that it was for the claimant to present his case with as much information about the allegations as possible and it was for this reason the Tribunal needed to understand the particular disability the claimant was alleging to have been perceived. The claimant's provide no more information than that the second respondent perceived him to have a mental impairment due to the second respondent's used of the words *"deluded and irrational".*

289. Despite the claimant being unable to specify the disability/ mental impairment he says the second respondent perceived him to have, mindful he was not represented at the hearing, I have considered his complaint based on a general mental impairment. I have found that in an email on 7 October 2021 the second respondent did write the following to the claimant: *"I do however remain concerned about your well-being and how nights may be affecting your mental health. I am not willing to retain you on Nights unless you engage in an OH Night worker referral."* I have found that, while it was not mandatory, it was common practice for night shift workers in the prison to undertake an OH assessment given the added pressures of night shift work. I have found that this statement was an expression in the context of the claimant's previous very strongly worded emails to the second respondent which, in my judgment, were unnecessarily confrontational in tone to his managers (I note the repeated use of bold text and underlying and the claimant's use of strong language (for example "*You clearly breached your duty of care to me. Your email is tainted by victimisation/ bullying and ulterior motive. The evidence is there. I will place full reliance on your words…"*). I conclude these word are not a perception of a mental impairment / disability; they are justified concern given the claimant's employer best practice of offering OH referrals to night workers and the tone of his correspondence with his managers.

290. I have found that on 29 November 2022 the second respondent said *"Your behaviour appears erratic and irrational. Genuinely, if you are struggling with your mental, physical health or have an undisclosed disability, please let your manager or Head of function know. They are skilled and competent to direct you to support services available. Whilst your current conduct is unacceptable, I am keen to ensure we continue to offer you support."* For the reasons already stated, I conclude that this was also an expression of concern resulting from the claimant's refusal to engage with OH and the tone of his emails.

291. I conclude that the second respondent did not perceive the claimant to have a mental impairment. He expressed concern, which was reasonable in the context of the claimant's refusal to engage with OH and the tone of the claimant's emails to his managers between September and November 2022. These were concerns expressed by the second respondent to the claimant. The claimant has not presented any evidence to the Tribunal to support his allegation that Mr Claydon aided Mr Daddow in the content of these communications. I conclude he did not.

292. As the claimant has made a complaint of direct discrimination, notwithstanding that I have concluded the second respondent did not perceive the claimant to have a disability, and therefore the act alleged by the claimant is not proven, for completeness, mindful the claimant is not represented, I note that there is no evidence that the second respondent did or would have treated a n OSG more favourably than the claimant. I have found based on the evidence of several prison managers that it was standard practice for management to offer OSG's working in night shifts an OH referral to support their wellbeing given the additional challenges of night work; the evidence from these managers is that the majority of OSGs on night shifts engaged in this supportive measure. Therefore, I conclude that had the second respondent had concerns about the conduct and communications of an OSG night worker colleague of the claimant's he would have expressed similar concerns and required that OSG to undertake an OH assessment.

293. There is no detriment. Indeed, the offer of an OH referral was a supportive measure.

<u>Harassment related to perceived disability</u>

294. For the reasons already stated, I conclude that the second respondent did not have a perception that the claimant had a mental impairment. The communications on 7 October 2021 and 29 November 2022 expressed concerns given the claimant's refusal to engage in an OH referral and the tone and presentation of his emails to his managers.

295. The claimant says the concerns expressed in the second respondent's communications of 7 October 2021 and 29 November 2022, and the request to undertake an OH referral are unwanted conduct. I have concluded the second respondent did not perceive the claimant to have a disability for the reasons stated above. Therefore the communications as a matter of fact could not relate to a perceived disability as that perception was in the mind of the claimant only. In any event, expresses concerns about an employees behaviour and offering an OH assessment as a

supportive measure do not, objectively and reasonably, have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. The OH referral was a standard and supportive practice with which OSG colleagues on night shifts had engaged.

Harassment related to religion/belief

296. The claimant's religion is Muslim.

297. I have found that Mr Girling did not refuse to allow the claimant to use the multifaith chapel on 6 January 2023. The claimant asked to attend the prison to use the facilities and services. I have found that it was reasonable for Mr Girling to interpret this request to use office space and facilities in that part of the prison that was not accessible to prisons. The claimant was suspended at this time. I have found he did not make an express request before coming to the prison on 6 January, or during his conversation with Mr Girling. I have found that, during this conversation, the claimant made general references to prayer and the chapel but did not request to pray there that day. The claimant misrepresented his conversation with Mr Girling to this Tribunal. Therefore, as the events did not happen as alleged by the claimant and he has not switched the burden of proof and there is no unwanted conduct.

298. The claimant has not presented any evidence, and nor is there any before me that it was the intention of the first respondent and / or second respondent to examine the contents of the video footage in order to identify any disability. Nor has he provided any explanation in his claim documents or evidence to the Tribunal why he considers the activation of the cameras in some way connected to his religion. Therefore, the claimant has not switched the burden of proof to the respondents. While the claimant considered the use of the body worn cameras unwanted conduct, I am satisfied that the reasons Mr Johnson and Mr Claydon activated their body worn cameras for the reasons they explained to me. There is no evidence before me that this was on the instruction of the first and/or the second Respondent. I have found the reasons for Mr Johnson and Mr Claydon activating their cameras were that the claimant had misrepresented previous interactions with them and they were concerned that he was becoming agitated so they so to ensure their interactions with the claimant did not escalate. It was appropriate for the claimant to be escorted to the prison building by Mr Johnson and Mr Claydon as he was suspended.

299. I have found that on 8 December 2023 the claimant did receive a Christmas card to the claimant which stated:

"MERRY FUCKING XMAS YOU CUNT. NARCISSISTIC PRICK. GOOD LUCK WITH THE COURT FEES HA-HA.

300. The offensive language in this card speaks for itself. It is unwanted conducted relation to the claimant's religion which, objectively, have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Receiving the card did cause the claimant and his family considerable upset.

301. The claimant alleges that some (unidentified) employee of the first respondent must have sent the card as it refers to *"court fees"* and by inference these proceedings. I must consider whether this is sufficient to establish that it was an employee of the first respondent that sent the card. I am not satisfied that, on balance, it was. The claimant had challenging interactions with prisoners (examples include a petition by prisoners in 2021 to remove the claimant from the night shift and the incident with the mobile phones); it is equally possible that the card had been sent externally at the direction of a prison. In reaching this conclusion I have taken account of Mr Peck's investigations with Royal Mail; while it was not possible to establish the postal location of the court, it was possible to establish from the envelope that the postmark was not within the vicinity of the prison.

302. While distressing, the allegation made by the claimant is, in my judgment, too speculative, to establish that it was an employee of the first respondent. Therefore, I must conclude that the claimant has not switched the burden to the first respondent as he has not established as a matter of fact that it was an employee who sent the card. In reaching this conclusion I have taken into account my winding

Indirect discrimination: religion / belief

303. The claimant alleges that the respondents had a provision, criterion or practice to "not allow employees on suspension but attending meetings at the Prison to use the multifaith chaplaincy".

304. The facts as I have found them are that the claimant did not make a request to use the chaplaincy to pray on 6 January 2023 and that he had misrepresented the exchange he had with Mr Girling. The claimant spoke in general terms about being Muslim and Friday prayers in the chaplaincy. In his evidence to the Tribunal he has inaccurately extrapolated this conversation to an express request to use the chaplaincy that day. Mr Girling's response was that use of the chaplaincy would depend on whether the claimant was suspended at the time. That decision was a matter for prison management, particularly as the chaplaincy was in an area to which prisoners had access. Mr Girling was not responding to a request to use the chaplaincy nor did he say if an employee was suspended they would be prevented from using it. In this regard the claimant has twisted the words used by Mr Girling and has misled this Tribunal. Had the claimant made an express request, this would have been considered under the terms of his suspension by Mr Claydon.

305. The Deputy Governor told me that there was no practise at the prison of preventing a person on suspension who is attending the prison for a meeting from attending the chaplaincy. The claimant has not produced any evidence to refute this statement.. Therefore, I must conclude that there was no such practice.

Victimisation

306. The respondents concede that the claimant has done a protected act. I agree. The following acts, which I have found the claimant did (but am making no findings as to whether there was merit or substance to these

acts as that is not required by the legal test for a protected act), within section 27(2)(d) (making an allegation (whether or not express) that A or another person has contravened).

306.1. The 30 June 2022 communication reporting sexual harassment;
306.2. The 6 September 2022 communication alleging a failure to investigate complaints made under the Equality Act 2010;
306.3. The 29 November 2022 communication in which the claimant raised concerns with the second respondent about discrimination of Black & Minority Ethnic employees; and
306.4. The 9 December 2022 communication raising issues of discrimination, harassment and victimisation to the third respondent.

307. I conclude that the following communications are not protected acts as they do not fall within the acts that are protected by the victimisation provisions set out in section 27(2) of the Equality Act 2010:

307.1. The third respondent proceeded with the investigation to disciplinary (14 October 2022): this related to the complaint brought by the Deputy Governor about the tone of the claimant's emails; the investigation proceeded as Mr Cartwright concluded that there was a case to answer. The was not an act done by the claimant.

307.2. The third respondent's 28 November 2022 refusal to allow the claimant request for transfer to Warren Hill Prison. I have found that this was not an absolute refusal: the decision was put on hold pending the outcome of the claimant's suspension. Accordingly, it was not an act done by the claimant.

308. The claimant alleges that, because of the communications I have concluded are protected acts, the respondent did the following things to him. To succeed in a claim for victimisation a claimant must identify something in addition to the existence of the protected act and the alleged treatment from which a Tribunal can conclude that the two are linked.

309. The claimant does not address the reasons why he considers his treatment linked to the communications he made. Mindful that the claimant was not represented at the hearing, to ensure that he had had every opportunity to present his full case, I asked him several times during the hearing to explain to me why he considered the alleged treatment was linked to his communications. Each time his response was the same: that the treatment happened after the communications. He did not identify anything more than chronology. Following the requirement of section 127 of the Equality Act 2010, and the burden on the claimant to show something more than chronology, I conclude that the claimant has not shifted the burden of proof to the respondents such that the respondents must explain to the Tribunal the reasons for any alleged acts I have found took place as the claimant alleges.

310. My conclusion guided by the case of Chief Constable of Greater Manchester Police v Bailey 2017 EWCA Civ 425, CA and the established legal principle that

"It is trite law that the burden of proof is not shifted simply by showing that the claimant has suffered a detriment and that he has a protected characteristic or has done a protected act…."

311. In any event, notwithstanding this conclusion, as part of my analysis of the acts I have considered the reasons why the respondents behaved in the ways alleged (if I found they did). I have asked myself the reason why the respondents did what they did, addressing each in turn and asking what, consciously or subconsciously, motivated the employer to subject the claimant to the detriment, taking account of the mental processes of the decision maker.

312. In doing so, I have been mindful of the case law that directs me, noting from:

312.1. the case of Chief Constable of West Yorkshire Police v Khan 2001 ICR 1065, HL that I must identify *"the real reason, the core reason, the causa causans, the motive"* for the treatment complained of, if that treatment is a detriment; and

312.2. the case of Chief Constable of Greater Manchester Police v Bailey 2017 EWCA Civ 425, CA. that the well-established legal test for victimisation that an act will be done "because of" a protected characteristic, or "because" the claimant has done a protected act, as long as that had a significant influence on the outcome.

313. The case is helpful to this Tribunal not least as Underhill LJ recites the key statutory provisions, noting that in section 27 of the Equality Act 2010 the question is whether a detriment was done 'because of a protected act. The decision directs us that 'because' is the key word. Crucially, this is not identical to a 'but for' test; Ahmed v Amnesty International [2009] ICR 1450. One is looking for the 'reason why' the treatment occurred. Where treatment is not inherently discriminatory, one must look into the 'mental processes' of the decision maker. We must be satisfied, and have sufficient evidence before us, that the decision-maker's 'mental processes' were discriminatory if we make a finding of victimisation. It was held that the correct test we must apply is that the detriment occurred "because of" the protected act. A tribunal must first decide whether a claimant has established a *prima facie* case of unlawful victimisation; if he has, the burden shifts to the respondent to prove a non-discriminatory explanation.

314. Below are my conclusions.

On 30 June 2022, the second respondent placed the claimant under the first respondent's poor performance policy

315. I have found that on 30 June 2022, the second respondent did not place the claimant under the first respondent's poor performance policy. I have found that the decision to place the claimant under poor performance was a decision taken by Mr Claydon. He made this decision on 21 June 2022, when he drafted the letter the claimant received by email on 30 June. I have found that, given he has dyslexia, it was Mr Claydon's practice to ask Mrs Allen to proof read correspondence he had drafted. Mrs Allen was on holiday, so Mr Claydon asked the second respondent to do so instead. I have found the

second respondent did so, correcting grammar and spelling as necessary. I conclude the claimant's allegation is not well founded. It was Mr Claydon and not the second respondent who took the decision to place the claimant on poor performance. As this did not happen as alleged by the claimant, it cannot be as a result of any of the protected disclosures. In any event I have found Mr Claydon placed the claimant on performance management for valid reasons, namely. There is no detriment. I have found events did not happen as alleged by the claimant.

On 30 June 2022, the second respondent raised false allegations against the claimant

316. I have found that the conduct the second respondent raised with the claimant was corroborated by Mr Barretts report from that evening (that the claimant did not follow "night state" practice) and concerns discussed at the daily briefing on 7 June that failure to do so left Mr Barrett and Mr Johnson concerned that the claimant's conduct in taking the mobile phones from the prisoners and bringing them to the office put staff and prisoners at risk. The concerns raised were not false; they were triggered by the claimant's conduct on 6 June 2022. These were genuinely held concerns unconnected with the claimant's protected act on 30 June. I have found the allegations were not false. There is no detriment.

On 30 June 2022, the second respondent demanded that the Claimant transfer from night shifts to day shifts

317. I have found that the second respondent issued a notice requiring the claimant to transfer from night shifts to day shifts, and this was a valid management instruction complaint with the terms of the claimant's employment contract. I have found that the claimant received 28 days' notice of the transfer. I have explained the second respondent explained the reasons for this decision to the claimant, in summary concerns the claimant's managers had about his conduct on his 6 June nightshift, his refusal to engage in an OH assessment and concerns management had about the tone of some of the claimant's emails to his managers. For these reasons, I conclude there was a valid management direction informing the claimant he would transfer from day to night shifts which had nothing to do with the protected acts. There is no detriment.

On 30 June 2022, the second respondent said you will only work in the gate and not on any residential unit." This had the effect to segregate the claimant from other employees

318. I have found that the decision was taken to redeploy the claimant to gate staff during his night shift pending his transfer to days. There is no evidence before me the decision was taken to segregate the claimant. I have found this was due to the concerns the claimant's managers had about his conduct on failing to follow night state on 6 June. The night orderly was stationed at the gate; the claimant had the same, if not more, interaction with colleague in this position. There is no evidence before me that the decision to move the claimant to the gate was because of one of the protected acts; it was a direct result of the respondents' findings about the 6 June incident with the mobile phone and consequential decision to transfer the claimant to the day shift. There is no detriment.

On 25 July 2022, the second respondent altered a job specification of a role the claimant was interested in to say employees must not be subject to performance management and must be band 5 or above.

319. I have found that the June 2022 advert for the permanent role of Head of Business Assurance was amended when it was readvertised in the July (the role not having been filled In the June). I have accepted the explanation provided to the Tribunal by the second respondent; that the role was readvertised as a temporary position and as the appointee would hold the position interim it was necessary for that person to be able to get up and running in the role quickly. I have accepted Mr Daddow's explanation that to achieve this aim it was necessary for any appointee to have requisite managerial experience. I have found that it was for this reason the application criteria was changed. There is no detriment.

On 31 July 2022, the claimant received a written warning

320. I have found that the contents of the 31 July written warning reflected genuine concerns the claimant's managers had already raised with him several time and supported by the managers records of the claimant's behaviour. The warning was justified, There is no detriment. The thought processes which led to this warning are set out in my findings of fact; the decision to issue the claimant with a written warning had nothing to do with the protected acts.

On 29 November 2022, the second respondent suspended the claimant and placed him under a disciplinary investigation, this was one day after the claimant's further complaint of discrimination.

321. I have found the reason for this decision was the claimant's refusal throughout July 2022 to follow the legal and valid management direction to work on day shifts.

322. Not only have I found that the claimant did not attend work on days shifts, I have found that, in defiance of the terms of his contract and the requests of his managers, the claimant indicated in various communications to his managers several times that he did not accept their interpretation of his employment contract, that he considered he was contracted to night shifts only and that he was not accepting of the direction to transfer to day shifts (2 July, 7 July, 2 September, 28 September, 3 November, 18 November, 24 November (this being an exception in which the claimant says he will "follow" the unlawful day shift pattern but then fails to do so), 26 November, 28 November.

323. I have found the claimant was told repeatedly times, including by Mrs Coccia on 21 October 2022, that the second respondent's interpretation of the claimant's employment contract was correct and entitled his managers to change his shift provided he received 28 days' notice of any change (which I have found the claimant received). I have found the claimant was told by the second respondent and Mr Claydon the reasons for this transfer and the consequences of not following this direction several times. Yet the claimant remained strident in his refusal to follow the lawful direction to transfer to days, including on 28 November when both the second respondent and Mrs

Coccia email the claimant to advise him of the consequences of not complying with the instruction. Mrs Coccia suggested to the claimant that he meet with his managers to resolve their differences with the interpretation of the contract. The claimant did not arrange such meeting, remaining strident through his emails that his interpretation was correct. For the reasons stated in my findings of fact the claimant was not correct.

324. When questioned by the claimant, Mr Cartwright comments that all his managers were trying to do was get the claimant to do the job he was paid to do. I agree. I have found the claimant did not have a work life balance agreement in place, something the respondents had told the claimant several times, including on 29 November 2022 when the second respondent advised the claimant that the process required him to apply for one and there was no record he had done so. I have found that was because he had not made the application, as his own emails of 29 November concedes when he (incorrectly) interprets the process as the employee not having to take action.

325. Based my findings about the weeks leading up to the claimant's suspension on 29 November I conclude the second respondent was justified in his decision to suspend the claimant; he did so because the claimant stridently refused to accept that he could be transferred to the day shift and his repeated communications indicating he would not attend day shifts. There is no detriment. The thought processes of the his managers are clearly documented and explained above. The steps they took had nothing to do with the protected acts.

On 29 November 2022, the second respondent accused the Claimant of being erratic and irrational

326. I have found he did, in an email to the claimant that day and did so following the claimant's repeated refusal to comply with the terms of his employment contract and attend day shifts and would not meet with his managers to discuss the different interpretation of his employment contract. This behaviour is irrational. On 24 November the claimant writes that he will attend the day shift even though he considers the direction unlawful. He does not do so and in subsequent correspondence returns to his previous stance that he will continue to attend his night shifts and will not work a day shift. This behaviour is erratic. I conclude the claimant's own behaviour at that time justify the comments. I have found the comments came from a place of concerns, reflecting Mr Daddow's mindset at that time, which can be seen when the letter is read in its entirety; There is no detriment.

On 9 December 2022 the third respondent failed to investigate the claimant's complaint and failed to provide sense of justice to the claimant

327. I have found that this email does not contain information; it refers back to "the contents of my emails/ correspondence in which you were copied in, were clear 29/11/2022 & 01/12/2022)" and goes on to day *"the contents of my emails are to be treated as complaints of victimisation - discrimination - bullying and harassment."* This communication did not lead to an investigation as it was referring back to other communications and not a stand-alone request to investigate. There is no detriment.

On 23 January 2023, the first and second respondent instructed Mr Johnson to visit the claimant's house and hand deliver a letter placing him on final written warning under performance management

328. I have found they did. I have found the reason Mr Johnson was so instructed was the claimant's repeated failure to follow the reasonable (and standard) term of his suspension to telephone in weekly from 5 December.

329. The claimant's request for communication by email does not negate this action. An employee can indicate a preference for the method of communication; the claimant was under the misapprehension that he could not mandate his employer's method of communication with him. He could not. The claimant's managers respected his preference. However, in my judgement it was reasonable and necessary for the claimant's managers to use any alternative method of communication when the claimant was not checking in with his employer as required. Given the fact that the fact that Royal Mail were unable to track postal communications sent by special delivery in this context (and therefore the claimant's managers could not be assured he had received the letters) and given the seriousness of the communication (a second and final written warning) I conclude that the first and second respondents had no option but to deliver the letter by hand. There is no evidence that Mr Johnson's conduct was anything other than entirely appropriate (indeed the complaint is not about the conduct of the delivery, it is about the fact of delivery in person). I conclude the first and second respondent's direction to Mr Johnson to deliver the letter by hand entirely appropriate. There is no detriment. The letter was not hand delivered as a result of any protected act. It was because the claimant was not responding to correspondence and the respondents wanted to ensure that a letter with potentially serious consequences for the claimant was received by him.

On 27 January 2023 the third respondent upheld the decision to suspend the Claimant

330. I have found the claimant did not attend the meeting arranged with Mr Carwright (which Mr Cartwright subsequently sought to rearrange) without explanation. I conclude the suspension was upheld for this reason. There is no detriment. It was the claimant's own behaviour which informed Mr Cartwright's reasonable, in my judgment given the claimant's refusal again to engage in person, to uphold his suspension. There is no detriment. Mr Cartwright's reasoning is clear; the claimant had had the opportunity to meet, he did not engage, the evidence supported the reasons for the suspension and therefore it was upheld. Mr Cartwright's decision had nothing to do with the protected acts.

On 06 February 2023 the second respondent refused the claimant request for information and refused the claimant the opportunity to appeal against the decision to place the claimant on final written warning

331. I have found that the second respondent did not "refuse" the request; Mr Daddow reasonably (as he was not the claimant's direct line manager) refer the claimant to his managers noting that the claimant had been told he was not appropriate for the claimant to contact anyone who was part of the complaints raised by the claimant. The claimant has not accurately

described the communication from the second respondent. There is no detriment.

On 18 April 2023, the second respondent wrote to the claimant forcing him to work day shifts, which would in turn mean he loses around £10,000 per annum in salary

332. I have found this allegation centres on the claimant's misunderstanding of his contractual terms. I have found it was lawful under the terms of his employment contract for the respondents to redeploy the claimant to day shifts with 28 days' notice. That is what they did. He was not forced to do so in that the request complied with his contractual terms. There is no detriment. Since July 2022 the respondents had been trying to move the claimant to day shifts, as they were entitled to do under his employment terms, the reasons clearly stated to the claimant at each stage, which evidence the concerns that were in the minds of his managers.The claimant was defiant in response. There is no detriment.

On 8 December 2023 the first respondent sent a Christmas card to the claimant which stated:

"MERRY FUCKING XMAS YOU CUNT. NARCISSISTIC PRICK. GOOD LUCK WITH THE COURT FEES HA-HA.

333. I have found that, while distressing, the allegation made by the claimant is, in my judgment, too speculative, to establish that it was an employee of the first respondent. Therefore, I must conclude that the claimant has not switched the burden to the first respondent as he has not established as a matter of fact that it was an employee who sent the card.

<u>Unauthorised deductions / NMW</u>

334. This claim is founded on the claimant's misconception that he was employed on a contract of 38.5 hours per week. The claimant's calculations which he says show he was paid below the minimum wage apply (and therefore the first respondent had made an unlawful deduction from his wages).

335. I have found that the terms of the claimant's 2017 employment contract were not amended at any time during his employment at HMP Hollesley Bay. He was employed on a 37 hour contract. His hourly pay under this contract exceeded the NMW at that time. I have found that under the terms of his employment any hours worked in excess of 37 hours were renumerated as paid overtime (for which the claimant has received full payment) or TOIL. Accordingly, I conclude that the first respondent has not made any unlawful deductions from the claimant's wages.

336. For these reasons, it is the judgment of this Employment Tribunal that:

336.1. The complaint of being subjected to detriment for making a protected disclosure is not well-founded and is dismissed.

336.2. The complaint of being subjected to detriment for taking leave for family and domestic reasons is not well-founded and is dismissed.

336.3. The complaint of direct perceived disability discrimination is not well-founded and is dismissed.

336.4. The complaint of indirect religion / belief discrimination is not well-founded and is dismissed.

336.5. The complaint of harassment related to perceived disability is not well-founded and is dismissed.

336.6. The complaint of harassment related to religion / belief is not well-founded and is dismissed.

336.7. The complaint of victimisation is not well-founded and is dismissed.

336.8. The complaint of unauthorised deductions from wages is well-founded and failure to pay the National Minimum Wage is not well founded and is dismissed.

APPROVED BY:

Employment Judge Hutchings

DATE 30 January 2025

JUDGMENT & REASONS SENT TO THE PARTIES ON

11/2/2025

FOR THE TRIBUNAL OFFICE

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