Case Number: 3334459/2018

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Q Thomas	v	Serco Limited

Heard at: Watford **On**: 10-13 and (in private) 14 August 2020

Before: Employment Judge Hyams **Members:** Ms S Goldthorpe
Ms I Sood

Appearances:

For the claimant: In person
For the respondent: Ms M Stanley, of counsel

RESERVED UNANIMOUS JUDGMENT

1. The claimant's claims of discrimination contrary to sections 13 and 39 of the EqA 2010 do not succeed, and are accordingly dismissed.

2. The claimant is entitled to unpaid notice pay in the sum of £332.83 gross, i.e. before the deduction of income tax and national insurance contributions, which should be deducted by the respondent from that sum and paid to Her Majesty's Revenue and Customs pursuant to regulations 37 and 37A of the Income Tax (Pay As You Earn) Regulations 2003, SI 2003/2682.

3. The claim for unpaid holiday pay is not well-founded and is dismissed.

REASONS

The claim and the issues

1 In these proceedings, by the time of the hearing before us, the claimant claimed

1.1 that he had been discriminated against because of his race and/or age, contrary to sections 13 and 39 of the Equality Act 2010 ("EqA 2010"),

1.2 that he was owed holiday pay, and

1.3 that he was owed notice pay.

2 At the start of the hearing, it was made clear by Ms Stanley (to whom we were grateful for her assistance, including her flexibility in responding to the claim on behalf of the respondent when the claimant sought to introduce new material during the course of the hearing) that the respondent accepted that the claimant was owed notice pay, which was in the circumstances a week's pay. Therefore, the only "live" issues that we had to determine were whether or not the claimant was discriminated against because of his age or race (or both), and whether he was owed any money in respect of his holiday entitlement.

3 The issues were stated by Employment Judge Alliott in a record of a case management hearing of 7 August 2019. The record was at pages 53-59, i.e. pages 53-59 of the hearing bundle. The record was sent to the parties on 25 August 2019. The issues were stated in paragraph 4 on pages 54-56. The issue concerning holiday pay needs no elaboration here. The issues in relation to notice pay were stated on the basis that by the time of that hearing, the respondent accepted that it had not paid the claimant his week's notice pay. The issues relating to the claim of direct discrimination within the meaning of section 13 of the EqA 2010 are stated in paragraphs 4.3 to 4.8 on pages 54-55, as follows (and while we quote it precisely, we note that the subparagraphs of paragraph 4.3 became subparagraphs of a paragraph 4.4, which in fact does not exist):

"4.3 Has the respondent subjected the claimant to the following treatment?

4.4.1 On numerous occasions Neville Joseph required the claimant to work overtime and did not allow the claimant to refuse to work overtime.

4.4.2 On numerous occasions Neville Joseph put the claimant on the physically harder rounds.

4.4.3 In or around June 2018, after the claimant had not been picked up by his dustcart and the claimant subsequently went to the depot, Neville Joseph accused the claimant as having no common sense and belittled him in front of other staff.

4.4.4 After the claimant called in sick on 23 July 2018, dismissing the claimant on 24 July 2018.

4.5 Was that treatment less favourable treatment? Ie did the respondent treat the claimant as alleged, less favourably than it treated or would have treated others (comparators) in not materially different circumstances?

4.6 The claimant relies on the following comparators: white refuse loaders in their late 30's / 40's and/or hypothetical comparators.

4.7 If so, was this because of the claimant's protected characteristics of race and/or age?

4.8 As regards the age discrimination claim, if so, has the respondent shown that the treatment was a proportionate means of achieving a legitimate aim?"

4 In considering those issues, we were obliged to apply section 136 of the EqA 2010, which is in these terms:

"(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."

5 However, in some circumstances, it is possible, or even necessary, either instead or in addition to apply the decision of the House of Lords in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 and therefore to ask why that which is the subject of the claim occurred.

6 When applying section 136, it is possible, when considering whether or not there are facts from which it would be possible to draw the inference that the respondent did what is alleged to have been less favourable treatment because of a protected characteristic, to take into account the respondent's explanation for the treatment. That is clear from the line of cases discussed in paragraph L[807] of *Harvey on Industrial Relations and Employment Law*, as follows:

"Whether considering, then, the legacy legislation or the Equality Act burden of proof provision, the two-stage process remains the starting point. In the first place, the complainant must prove facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed an unlawful act of discrimination against the complainant. According, to the Court of Appeal in *Madarassy v Nomura International plc* [2007] IRLR 246, [2007] ICR 867, CA, 'could conclude' must mean 'a

reasonable tribunal could properly conclude' from all the evidence before it (also restated in *St Christopher's Fellowship v Walter-Ennis* [2010] EWCA Civ 921, [2010] EqLR 82). That means that the claimant has to 'set up a prima facie case'. In *Madarassy* it was held that a difference of status and a difference of treatment was not sufficient to reverse the burden of proof automatically; Underhill P in *Hussain v Vision Security Ltd and Mitie Security Group Ltd* UKEAT/0439/10, [2011] All ER (D) 238 (Apr), [2011] EqLR 699 warned that this must not be given the status of being a rule of law. Whether the burden has shifted will be a matter of factual assessment and situation specific. The second stage, which only applies when the first is satisfied, requires the respondent to prove that he did not commit the unlawful act. A note of caution, however, is necessary against taking from *Igen* [i.e. *Igen Ltd v Wong* [2005] ICR 931] a mechanistic approach to the proof of discrimination by reference to RRA 1976 s 54A. In *Laing v Manchester City Council* [2006] IRLR 748, [2006] ICR 1519 Elias P observed as follows:

> ''71. We would add this. There still seems to be much confusion created by the decision in *Igen v Wong*. What must be borne in mind by a tribunal faced with a race claim is that ultimately the issue is whether or not the employer has committed an act of race discrimination. The shifting in the burden of proof simply recognises the fact that there are problems of proof facing an employee which it would be very difficult to overcome if the employee had at all stages to satisfy the tribunal on the balance of probabilities that certain treatment had been by reason of race.
>
> 72. The courts have long recognised, at least since the decision of Lord Justice Neill in the *King* case to which we have referred, that this would be unjust and that there will be circumstances where it is reasonable to infer discrimination unless there is some appropriate explanation. *Igen v Wong* confirms that, and also in accordance with the Burden of Proof directive, emphasises that where there is no adequate explanation in those circumstances, then a Tribunal must infer discrimination, whereas under the approach adumbrated by Lord Justice Neill, it was in its discretion whether it would do so or not. That is the significant difference which has been achieved as a result of the burden of proof directive, as Peter Gibson LJ recognised in *Igen*.
>
> 73. No doubt in most cases it will be sensible for a tribunal formally to analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case. As I said in *Network Rail Infrastructure v Griffiths-Henry* [2006] IRLR 865 (at para 17), it may be legitimate to infer that a black person may have been discriminated on grounds of race if he is equally qualified for a post which is given to a white person and there are only two candidates, but not necessarily legitimate to do so if there are many candidates and a substantial number of other white persons are also rejected. But at what

> stage does the inference of possible discrimination become justifiable? There is no single right answer and tribunals can waste much time and become embroiled in highly artificial distinctions if they always feel obliged to go through these two stages.''
>
> In *Commissioner of Police of the Metropolis v Maxwell* UKEAT/0232/12, [2013] EqLR 680 it was emphasised that particularly in cases where there are a large number of complaints the tribunal is not obliged to go through the two stage approach in relation to each and every one."

The presentation of the claim form and the date before which the claim was out of time unless time was extended by us under section 123(1)(b) of the EqA 2010

7 The precise date when the ET1 claim form was presented to the tribunal was not in the circumstances as we found them to be material, but it appeared to us that the claim form had originally been rejected because it did not contain the early conciliation certificate number, and that it was therefore received for the first time in a jurisdictional sense when it was re-presented, with that number included. The first date of presentation, after which the form was rejected, was 31 October 2018. The second was 5 November 2018. The early conciliation period was commenced when the claimant contacted ACAS on (the early conciliation certificate showed) 28 August 2018 and ended on 17 September 2018. Thus the claim was in time in respect of acts or omissions which occurred on or after (at best, from the claimant's point of view, assuming in his favour that the form was properly presented to the tribunal on 31 October 2018) 12 July 2018.

The evidence before us

8 We heard oral evidence from the claimant on his own behalf and from Mr Dwayne Blake on the claimant's behalf. We heard oral evidence on behalf of the respondent from (1) Mr Neville Joseph, who is employed by the respondent as a Supervisor in the respondent's Environmental Services team providing waste collection and recycling services to Chiltern and Wycombe Council, and (2) Mr Guy Baber, who is employed by the respondent as a Contract Manager, managing the contract for the provision of those Environmental Services to Wycombe Council. We also read documents in the 344-page bundle and other relevant loose documents which were put before us during the hearing by the parties.

9 There were stark conflicts of evidence between the parties on a number of material matters, and in the absence of evidence from the maker of the decision to terminate the claimant's employment with the respondent, Mr Hosier, we paid particular attention to the documentary and oral evidence before making our findings of fact. In what follows, therefore, we refer to the evidence in detail before stating our findings of fact by reference to that evidence.

The documentary evidence concerning the starting and ending of the claimant's employment with the respondent

10 The claimant was employed by the respondent as a refuse loader. The start of the claimant's employment was the subject of different assertions by the parties but on our findings of fact, the precise start date was not material. However, the documents from which the precise start date could be ascertained were relevant, and it is convenient to mention them here. The claim form stated that the claimant's employment started on 8 February 2018. The ET3 response form said nothing in response to that assertion, but the Grounds of Resistance accompanying the claim form stated (at page 49) that the claimant "commenced work on 15 February 2018 as a Loader". The document at pages 110-119 was stated to be the claimant's contract of employment, and it was dated 15 February 2018. There was in the bundle also a Schedule of Employment in the claimant's name. It was at pages 120-122, and it stated that the start date of the claimant's employment was 31 January 2018.

11 The claimant was employed for the first 6 months of his employment with the respondent on a probationary basis, the effect of which was stated in paragraph 3 on page 111, as follows:

> "Where applicable, your Appointment is subject to confirmation following the completion of a satisfactory probationary period the duration of which is specified in the Schedule of Employment.
>
> At the end of a successful probationary period, your Appointment will be confirmed. If either party is not satisfied, the probationary period may be extended or steps may be taken to terminate the Contract."

12 In the Schedule of Employment, the duration of the probationary period was stated on page 121 as "6 months can be extended 12 months", and the employer's notice period during that period was stated to be applicable to "External Hires only" and was stated on the same page to be "1 week's notice In writing".

13 The claimant's employment was terminated by the respondent when the letter at page 144, dated 24 July 2018, was sent to the claimant. The letter was sent, and signed, by Mr L Hosier, who was Mr Joseph's line manager. It was in these terms:

> Dear Mr Thomas,
>
> **Probationary Review**
>
> In accordance with your contract of employment and whilst within your probationary period, I write to inform to you that following a review of your

position and after due consideration we will be terminating your employment with immediate effect.

Following your actions of taking time off without prior official authorisation coupled with the reasoning for extending your probation due to attendance issues, it has been decided that you have not met the terms and conditions of your contract of employment with regard to your both your [sic] attendance levels and conduct.

Yours sincerely,

L Hosier
Operations Manager".

The claimant received that letter on 25 July 2018, when he received it in the post.

<u>The extent of the oral evidence which we heard about the reasons why the claimant was dismissed</u>

14 As is clear from what we say above, we did not hear evidence from Mr Hosier. In fact, the respondent had, via the firm of solicitors which was originally instructed to defend the claims, in April 2020 applied for a witness order to compel Mr Hosier's attendance, on the basis that Mr Hosier had ceased to work for the respondent and would not attend unless he was compelled to do so. However, the respondent did not know Mr Hosier's new contact details, and while the application for an order was granted, it was signed only during the week before the hearing before us, and (1) the order was addressed to Mr Hosier via the respondent's correspondence address, and (2) the order was received by the respondent only on the second day of the hearing, when the claimant brought a copy of it to the hearing, having received it in the post the day before, while he was at the hearing.

15 Mr Joseph did not participate in the decision to dismiss the claimant: he said that it was Mr Hosier's decision alone. We did, however, hear evidence from Mr Baber who, in the circumstances which we describe below, spoke to Mr Hosier and was told by Mr Hosier the reason for the claimant's dismissal.

<u>The documentary and oral evidence before us about, and relating to, the reasons for the claimant's dismissal</u>

16 There was at page 106 a print-out of a screenshot of the respondent's absence management software program, showing that the claimant had been absent from work on account of sickness on 10 April 2018, 17 April 2018, 21 May 2018, 2 June 2018, 8 June 2018, 18 July 2018 and 23 July 2018. During the course of the hearing, Ms Stanley sent us and the claimant copies of the recordings of the claimant's voicemail messages, left on the respondent's network using that

software program, for each of those absences. The manner in which the software program worked was stated in a letter dated 16 February 2018 addressed to the claimant of which there was a copy at pages 123-132. We listened to all of the voicemails that the claimant had left, stating the reasons for his absence on each of the days to which we refer in the first sentence of this paragraph.

17 There were in the bundle copies of return to work interview forms for all but the final one of those absences. At pages 321-4 there was one for the absence of 10 April 2018. It stated that the actual date of return to work was 11 April 2018 and that the date of the return to work interview was 11 April 2018. There was a box on the form for "Further detail on the absence reason", which had this text in that box:

> "left shoulder pain went to doctors given pain killers for pain, told if pain continued to call and not return to work if feeling ok return to normal duties job description was given to doctor".

18 The form at pages 325-328 was for the absence of 17 April 2018 and the "Further detail" box on page 326 contained this text:

> "Previous injury while playing football, have spoken to Qwam and said that if continued sickness occurs in a result of you playing football he may have to reconsider where [sic] this is the suitable job for him".

19 Mr Joseph's witness statement contained in paragraph 10 this passage about that absence:

> "At the return to work interview after the absence on 17 April I told Qwamani that if football was causing injuries and preventing him attending work he would need to consider if this was a suitable job for him. He assured me that he needed the job to pay his bills so he would stop playing football."

20 The form for the absence of 21 May 2018 had in the "Further detail" box on page 330:

> "Qwamani injured himself playing football."

21 The voicemail message that the claimant left for that absence was in these terms:

> "Yesterday I was playing football and someone tackled me, two feet, on my ankle and put their studs into my foot. So, obviously, my foot's got swollen and I can't walk with it, so that's the reason I'm not coming in to work. Okay, bye."

22 The form for the absence of 2 June 2018 was at pages 333-336. It was stated to have been completed by Mr Joseph and had these words in the "Further detail" box on page 334:

> "Swollen Ankle due to injury that happened while playing football".

23 The claimant denied in oral evidence saying to Mr Joseph at his return to work interview concerning the absence of 2 June 2018 that the ankle injury was the result of playing football. The claimant's voicemail message in regard to that injury was in these terms:

> "Ankle swollen yesterday morning, woke up this morning and ankle swollen again, so I have decided not to come into work today, alright, bye."

24 On 6 June 2018, the respondent sent the claimant the letter of that date at page 199. It was sent by Mr Simon Reynolds, Operations Manager at the respondent's Clay Lane address (where the claimant was based). No further details of the address from which the letter was sent were given. The letter was stated to have been given to the claimant by hand, and was in these terms:

> "Having reviewed your absence, you have had 4 days, and 4 periods of sickness absence in the last rolling 12 months and therefore you are invited to attend a formal absence meeting on 9th [crossed out by hand and replaced by hand with 8th] June 2018 in Clay Lane Depot at 07:00.
>
> The meeting will be chaired by Les Hosier, Operations Manager and a note taker will also be present.
>
> The meeting will be held in accordance with the UK CSOP Sickness Absence Management and One of our procedure. [sic]
>
> The purpose of this meeting is to discuss your sickness attendance level which is a cause for concern. The outcome of which could result in a stage one written warning or no further action.
>
> If you wish, you may be accompanied to the meeting by a colleague from work or a representative of any trade union of which you are a member, but not a close relative, solicitor or anyone who does not work for the Company or trade union. This companion may help you prepare for the meeting, take notes or can speak on your behalf (but may not answer questions) comment on written evidence or the application of our procedures. Should you wish to be accompanied, please let me have their name(s) in advance of the meeting."

25 We record at this point that the respondent's Sickness Absence Management standard operating procedure was at pages 64-89 of the bundle, and that at page 76, this was stated:

> ‘Serco uses ‘triggers’ relating to the amount and frequency of days off sick, to manage sickness absence fairly and consistently across the UK.
>
> There is no “acceptable level” of non-attendance and trigger levels are not to be regarded as an entitlement. However, we recognise that occasionally full attendance may not be possible. The absence triggers are used to identify employees whose attendance records give cause for concern. The trigger levels are:
>
> • 4 occasions of absence during a rolling consecutive twelve month period from the first day of the last occurrence of absence;”.

26 The claimant was, as we say above, absent from work on 8 June 2018. He therefore did not attend the absence meeting planned for that day. Mr Hosier then sent the letter at page 202. It was also stated to have been given to the claimant by hand. It was dated 11 June 2018. This time, the letter had on it the details of the address of the Clay Lane base, namely “Wycombe Air Park, Clay Lane, Marlow, Bucks, SL7 3DJ”. The letter started in these terms:

> Having reviewed your absence, you have had 5 days, and 5 periods of sickness absence in the last rolling 12 months and therefore you are invited to attend a formal absence meeting on 20 June 2018 in Clay Lane at 07: 15.
>
> This is a rescheduled formal absence meeting. You were invited to a formal absence meeting previously on 8th June 2018, however the meeting needed to be rearranged.
>
> This rescheduled meeting will be chaired by Les Hosier, Operations Manager and a Note Taker may/ will also be present.”

27 The final three paragraphs of the letter were in the same terms as those of the letter of 6 June which we have set out in paragraph 24 above

28

29 There was in the bundle at pages 137-140 a copy of a letter from the claimant to the respondent, with several attachments. The letter at page 137 was handwritten, was signed by the claimant and was dated 8/6/18. It did not state the address to which it was sent. It stated on the top right hand side of the page the claimant’s address, and it stated the claimant’s name clearly. It was in these terms:

> “Employee Number: 20083954
>
> Dear Sir/Madam

> Please find attached a medical certificate and Hospital letter for physio appointment due; in relation to recent sickness.
> Please not [sic] that I would appreciate where necessary holiday/annual leave to be used for hospital appointments due (i.e. 25/6/18).
>
> Thanking you in advance
> Kind Regards
>
> Mr Q Thomas"

30 The following page (page 138) was a document which we accepted was from the claimant's local doctors' surgery. It was signed by Dr E Patel, was dated 8/6/2018, and was in these terms:

> "This is to certify that [the claimant's name and address were then stated] in my opinion is suffering from Ankle Pain and is not fit to follow his occupation until 15/6/18".

31 At page 139 there was a copy of a letter from Wycombe Hospital confirming that an outpatient appointment had been made for the claimant with the Physiotherapy team there on Monday 25 June 2018. At page 140 there was a poor quality copy of an invoice from the doctors' surgery. There was a rather better copy at page 200. It was evidently for giving the claimant the document whose terms we set out in the paragraph immediately preceding this one.

32 At page 284, there was a copy of an approved holiday request form for the period 11-13 June 2018 inclusive. At page 282 there was the same kind of form, also approved, for holiday from 14-16 June 2018 inclusive.

33 At pages 337-338, there was a copy of the "Return to Work Interview Form" for the absence of 8 June 2018. It stated that

33.1 the first day of absence to which the form related was 8 June 2018,

33.2 the "Actual date returned to work" was 11 June 2018,

33.3 the "Number of working days absent" was 1,

33.4 the claimant had reported the absence via the respondent's "My HR Absence Manager",

33.5 the "Date of Return to Work Interview" was 8 June 2018, and

33.6 that the "Line Manager/meeting conducted by" was Mr Hosier.

34 The form stated on it this in the box next to the one entitled "Further detail on the absence reason":

> "Qwamani had a re-occurrence of an ankle swelling coupled with his report of a cousin passing-away. He has been off for 1 day, Friday 8th and following this he is on annual leave."

35 Mr Joseph's oral evidence was that he had not conducted a return to work interview for the claimant on 8 June 2018.

36 The words used by the claimant in the voicemail message of 8 June 2018 to describe the reason for his absence were these:

> "My ankle has swollen up at 12 o'clock this morning so I rang up 111 line to get an appointment with my doctor, with them so I am getting an appointment later on today, and also I have had a family bereavement, so, umm, I don't know when I will be back in because I have to deal with that family bereavement, so I will get back to you. Er, bye."

37 There was a certificate of posting issued by the "Post Office Ltd" of which there was a copy at pages 201 and 259. It was stated to have been issued by the post office at 3 Castle Street in High Wycombe. The posting date was 9 June 2018 and the time of posting was stated to be 14:37. 9 June 2018 was a Saturday, so in all probability whatever was posted was not picked up by the Royal Mail until Monday 11 June 2018.

38 The certificate had on it two addressee building names or numbers and postcodes, neither of which was that of the Clay Lane location. One letter was sent to building number 16422 at postcode B309EP and the other was sent to building name Booker at postcode HP144YE. The certificate was also a receipt and showed that the letters were sent "Signed for 1st". At the bottom of the certificate, it had these words:

> "Delivery aim: next working day. Proof of delivery and signature available online."

39 On 20 June 2018, the meeting that was arranged via the letter dated 11 June 2018 at page 202 to which we refer in paragraph 26 above, took place. We did not hear any oral evidence about how the claimant was given that letter, but it was, as we say in paragraph 26 above, described in the letter itself to have been delivered by hand.

40 Mr Joseph's evidence about what happened at the meeting of 20 June 2018 was in paragraph 12 of his witness statement, which was in these terms:

> "The meeting on 20 June had been rearranged from 8 June because Qwamani had been absent on day. [sic] I attended this meeting with Les Hosier who conducted it. I recall that we discussed the amount of sickness absence Qwamani had taken in the short amount of time he had been employed and that the situation needed to improve as it was unsatisfactory.

> Our concern that the absence also seemed to be related to football injuries was also discussed and we stated our view that Qwamani needed to make a choice of playing football or committing to work. At that meeting Qwamani told us that he had been invited to attend trials for the Dominican national football team during the summer and that he would need time off to train. Both Les and I expressed that we were happy that he had that opportunity but if it did not fit with work commitments he would need to make a choice as to whether he continued with work as we could not sustain continuing absence."

41 The claimant said nothing in his witness statement about a meeting of that day, but he accepted in cross-examination that he had been at a meeting of the sort described by Mr Joseph as having occurred on 20 June 2018, and that there had been a discussion at the meeting about the impact of his football playing on his ability to do his job. When asked whether he remembered Mr Joseph and Mr Hosier saying that he needed to concentrate on either work or football, he said that he recalled them saying "something of the sort".

42 It was the claimant's oral evidence, however, that the only time he said that he was absent from work because of football injuries was when he left the one voicemail message in which he referred to football as the cause of the injury: the one which we have set out in paragraph 21 above. Otherwise, he claimed, the injuries were the result of stressful working conditions.

43 On 21 June 2018, Mr Hosier sent the letter at page 204 to the claimant. It had as the address from which it was sent: "Serco, Wycombe Airpark, Clay Lane Depot, Wycombe, Buckinghamshire SL7 3DJ". It was headed "Probation Review Outcome" and it was in these terms:

> "**Probationary Review**
>
> In accordance with your contract of employment whilst within your probationary period, I write to inform you that following a review of your position and after due consideration we will be extending your probation period for a further period of six months from the date of this letter.
>
> The reason for the above decision is due to your attendance performance and a Stage One Trigger within your first six months of employment."

44 The next relevant development was that the claimant was absent from work on account of sickness on 18 July 2018. The Return to Work Interview Form was at pages 341-344. It stated as the "Absence Reason": "Stomach Related (food poisoning, D&V)". The claimant's oral reason for the absence, as left on the respondents' absence management system, was entirely consistent with that.

45 The parties agreed that the claimant had a conversation with Mr Joseph at least on 20 July 2018 about the possibility of the claimant taking time off from 23 July

2018 onwards for a period of at least four weeks. Mr Joseph's witness statement contained (in paragraph 15) this passage about what happened on 20 July 2018:

> "On Friday 20 July 2018 I then had a further conversation with Qwamani who was requesting a period of three months leave. My recollection of this conversation is that it happened on the afternoon of 20 July after Qwamani had returned from his round and not at 06:50 in the morning as Qwamani states. The period between 06:30 and 07:00 is extremely busy for me in organising the departure of crews on the daily rounds and I would not have been available to talk to Qwamani at that time. My recollection is also that Les Hosier was not at the site on that day and in any event did not get to work until after 07:00. I recall that Qwamani approached me in the afternoon and told me he needed three months leave for caring responsibilities as his mother was not well. I said to him that would be difficult but that perhaps he should talk to Les about it on Monday when he was back in the office and we could also talk to HR to see what could be arranged. No dates were mentioned in respect of the leave that Qwamani required. We left the conversation at that and at no time in that conversation did I authorise any leave. I did not tell Qwamani that a new HR person would be starting on Monday who it could be discussed with and I believe he is misremembering the statement I made to him. Given the previous conversations about attending a trial for the Dominican football team during the summer and needing to train I was suspicious as to why Qwamani suddenly needed four weeks off apparently for unspecified care reasons related to his mother. There had not been any previous mention of Qwamani providing care for his mother."

46 The reference by Mr Joseph to the claimant saying that he had a conversation at 06:50 on 20 July 2018 was made because the claimant the next day sent the letter at pages 142-143 to the respondent's HR Department, and because by the time that Mr Joseph wrote his witness statement, he had seen that letter. The letter did not state the address to which to which it was sent and instead was merely headed "FAO HR DEPARTMENT, SERCO LIMITED". There was at pages 213 and 259 a copy of a certificate of posting dated 21 July 2018, for a letter sent by special delivery to a building with the number 16422 at postcode B309ED, and a letter sent by signed for second class post to building name Serco L at postcode HP144YE. The letter was in these terms.

> "Dear Sir/Madam
>
> I write this letter to advise and request a period of unpaid leave; commencing week of 23/07/18, for a period of 4 weeks.
>
> I have today; @ approx 6:50am, spoke[n] with my Site Manager and Supervisor, Les Hosier & Neville Joseph to see if this would be something they would be able to accommodate and authorise for me.

> They have both said that they did not have a problem with my request, and that I needed to discuss/sort out with the new HR individual due to start w/c 23/07/18.
>
> Please be advised that it has been necessary to request this time off due to my family commitments; i.e. I am the primary carer for my mother, and other personal matters which I must attend to during this period requested, also.
>
> I would also like to request that any annual leave I have remaining, which has not already been booked, be used for part of this unpaid leave request, so as not to leave me 'out of pocket', whilst I attend to important Family & Personal responsibilities.
>
> I believe I still have 7 days annual leave left to take/book this year.
> Please can you adjust my Holiday Entitlement Days remaining, as I notice that this has yet to be done from my period of 1 week sickness dated 8/6/18-15/6/18. This week I was paid sick pay and not holiday pay in my June 2018 months salary, therefore I am owed those days back on my Holiday Entitlement remaining.
>
> I would like to take the time to thank you for your time consideration and understanding."

47 At page 210 there was an undated handwritten note (which was not proved by the claimant or the subject of cross-examination), in these terms:

> "Spoke to Neville + Les @ 6:50am on 20/07/18
> Regarding unpaid leave request.
> Advise that they are ok with this request
> HR new person to sort this out on 23/7/18."

48 The claimant then did not attend work on Monday 23 July 2018. Mr Joseph's witness statement contained a succinct account of what happened on that day. It was in paragraph 17 and was as follows:

> "Qwamani did not attend work on Monday 23 July 2018 and phoned in sick to the absence line. Qwamani stated to the absence line that he could not attend work as he had not slept properly over the weekend due to his mother being in pain and he was stressed about the situation. I called Qwamani at 10:24 on 23 July but there was no answer and I left a message for him to call me back. This action is recorded on the absence management system. I made Les Hosier aware of the request that Qwamani had made the previous Friday and his further absence and unavailability for contact that day. I did not speak to Qwamani again and I did not speak to him later that week about return to work as he alleges."

49 The claimant's voicemail message left on the respondent's absence management system was in these terms:

> "I don't feel very good these last couple of days. I haven't really been sleeping much because obviously my mum isn't sleeping much because she's been in pain with her body obviously with her shoulder and stuff, so today I might have to take her to the doctor's or the hospital because I haven't been able to sleep all weekend and I haven't really had much sleep at all, so I am just stressed out and just need some time."

50 We were sent by email on 13 August 2020 a copy of a Word document which consisted of a screenshot taken from the respondent's absence management system, showing that the time of that telephone call from the claimant was 05:55 and that Mr Joseph had called the claimant back on the same day, 23 July 2018, at 10:24 and "Left [a] Message". We were sent under cover of the same email a recording of a voice note left by Mr Joseph on the absence management system, in the following terms:

> "Unable to get hold of Qwami who, from his message, says he's been a bit stressed out with personal life, hasn't been sleeping, and his mum is not feeling too well."

51 The claimant said that he received the letter at page 144 dated 24 July 2018 (the text of which we have set out in paragraph 13 above) on 25 July 2018, in the post. The claimant's oral evidence was that Mr Joseph had called him on that day, 25 July 2018, and asked him about his return to work date. Mr Joseph firmly denied calling the claimant after 23 July 2018.

52 The claimant then sent the handwritten letter at pages 214-221. It was dated 27 July 2018 and it was headed "Re: Formal Letter of Grievance - Discrimination." It was stated to be about "withholding of wages due, notice period, holiday pay, etc". On pages 215-216 there was this passage:

> "I have previously tried to resolve some of these matters/problems at work informally/formally:
>
> - had previous discussions with both the supervisor, Neville and also separately Les, prior to my discussion with them both at 6.50am (approx) on 20/07/18.
>
> - They had been informed of my stress on the Job and physio appointments (please refer to doctors certificate and letter forwarded 8/6/18)
>
> - They had both been spoken with on the morning of 20/7/18 at approx 6:50am, where I requested and got verbal authorisation for

time off requested for the coming 4 weeks; taking into consideration holiday already approved and holiday yet to be taken.

- I had been under so much stress that I was forced to phone the sick line on the 23/7/18, having had headaches and lack of sleep all that weekend of 21/718 & 22/7/18.

- This was followed by a call to me by Supervisor Neville on the afternoon of 25/7/18, asking me how things were and informing me that I should let him know when I was to return to work.

- The next thing I know, I received a letter from Les Hosier, terminating my contract of employment, dated 24/7/18".

53 In paragraph 4(l) of his witness statement, the claimant said this:

> "Prior to 22.07.18 I was given verbal authorisation/agreement from Les & Neville for time off."

54 In paragraph 3 of his witness statement, Mr Baber said that he had been asked to consider the claimant's grievance, but that he had not seen the letter dated 27 July 2018 at pages 214-221 from which we have set out a passage in paragraph 51 above. Instead, Mr Baber had been asked to consider the claimant's grievance as stated in the typed letter dated 10 August 2018 of which there was a "clean" copy at pages 148-150 and a copy with Mr Baber's handwritten comments (proved by him in his witness statement as described in paragraph 57 below) at pages 222-224.

55 Mr Baber responded to the claimant's grievance, as stated in the claimant's letter of 10 August 2018, in the letter dated 30 August 2018 at pages 155-6. Interestingly, in paragraph 5 of the latter letter, Mr Baber wrote this:

> "We do not have on record any GP certificate for you with regards to 8th June. As you were only off for one day, you would not have been required to supply a certificate for that day in any case."

56 However, in cross-examination, Mr Baber accepted that he had not contacted the respondent's central HR team to find out if they had in their possession a copy of the claimant's letter and its enclosures at pages 137-140. The source of that letter was not clear to us: we heard no evidence as to whether the letter and its enclosures were put in the bundle having been given by the claimant to the respondent for inclusion in the bundle, or whether the respondent had a copy in its possession at the time of disclosure.

57 In addition, in paragraphs 1-3 of his letter of 30 August 2018 to the claimant at page 155, Mr Baber wrote this:

"1. We acknowledge that you spoke to Neville Joseph and Les Hosier about asking for four weeks away from work. However, their memory is that your request for a large amount of time away from work was to do with training for the Dominican Football Team.

2. No verbal authorisation was given by Neville or Les for four weeks off work, Les confirms he told you that MyHR would also have to give consent as well as the local management team.

3. Les suggested to you that he would speak to MyHR on Monday 23rd as he was seeing an advisor that day for something else. This is the day you called in sick."

58 In regard to that issue, and in regard to the issue of the reason for the claimant's dismissal, Mr Baber said this in his witness statement:

"7. I spoke to Neville Joseph and Les Hosier to discuss the allegations in the grievance and made notes on the grievance letter to record what they told me (page 222-224). Both Neville and Les confirmed they had spoken to Qwamani on 20 July 2018 in respect of a request for time off from work but they had not authorised any absence. The clear recollection of both Neville and Les was that Qwamani had poor absence during his employment which related mainly to football injuries They both recalled Qwamani mentioning he wanted time off to play in a trial for the Dominican Football Team during the summer. They were aware that Qwamani lived with his mother but not that he had care responsibility for his mother and nothing had been formally mentioned to them. Both Les and Neville were unaware of any stress at work issue being raised. Les confirmed to me that Qwamani had been dismissed due to continued poor attendance in his probationary period after receiving a formal warning on 20 June 2018.

...

OTHER ALLEGATIONS

16. I understand that Qwamani is now making specific allegations, both around alleged discrimination and deductions which were made to his wages upon termination. To the extent I am able, and I have not addressed these above, I have responded to those allegations below.

17. <u>That Qwamani's dismissal was an act of discrimination:</u> I did not dismiss Qwamani directly. However, following my grievance investigation I am firmly of the view that that Qwamani's dismissal was not because of his age or his race. Les Hosier confirmed to me that the dismissal was due to Qwamani's further absences on 18, 23 and 24 July 2018 when he had already been formally warned about his unsatisfactory absence during

his probationary period leading to his probation being extended. In addition Qwamani had not been contactable when he began his absence on 23 July and his managers were unclear when he was returning to work."

59 In paragraph 4(k) of his witness statement, the claimant acknowledged that he had been invited to attend "football trials, by a team from the Caribbean Islands". In oral evidence, the claimant said that it was going to be a one-day trial which was going to take place in Essex towards the end of August.

The documentary evidence concerning the holiday pay claim and the money paid to the claimant in respect of the month of July 2018

60 When Mr Baber investigated the claimant's grievance, he was misinformed by the respondent's payroll team about what had been paid to the claimant. The amount of pay that the claimant was given in respect of the month of July 2018 and in respect of notice pay and accrued holiday pay was shown (to the extent that it was actually shown) by the documents at pages 292-294. It was clear that the claimant was paid £808.40 i.e. after the deduction of income tax and other necessary deductions, as his final pay.

The documentary and oral evidence that we heard about and in relation to the allocation of duties to the claimant and other loaders

61 The evidence relating to the issues recorded in paragraph 3 above about the allocation of rounds to the claimant ("On numerous occasions Neville Joseph put the claimant on the physically harder rounds") and whether or not the claimant was required to work overtime against his will ("On numerous occasions Neville Joseph required the claimant to work overtime and did not allow the claimant to refuse to work overtime") included a set of sheets headed "Daily Booking on" showing the allocation during the months of June and July 2018 (i.e. and only those months) of the claimant to the various collection rounds of the respondent, of which there was a redacted copy in the bundle at pages 157-193 (i.e. one with the names of persons other than the claimant blanked out). We were told that the document had been disclosed to the claimant in redacted form. As explained to the parties, those documents should have been disclosed in unredacted form, and if there had been a justification for blanking out the names of the other employees, then that could have been done in the hearing bundle only, with the other employees referred to by a letter (such as A, B, C etc), and a key used to enable the parties and the tribunal to identify those other employees by reference to their age and race. We said so at the hearing and referred the parties to the decision of the Court of Appeal in *Dunn v Durham County Council* [2013] 1 WLR 2305, showing that the Data Protection Acts and related legislation does not apply to the disclosure of documents in the course of litigation. In fact, we could see no justification for the redaction of the names of the other employees in the version of the document that was in the bundle. Ms Stanley had evidently advised her client to that effect, and at the start of the

hearing we were given a copy of the document at pages 157-193 in unredacted form. Ms Thomas objected to it being relied on by the respondent on the basis that it was far too late for the respondent to rely on new documentary evidence, but as we said to Ms Thomas, in the absence of the evidence in that document, the claimant's claim of less favourable treatment in the allocation of duties to him was highly likely to fail, as it had been advanced by him in only a general form, i.e. in the manner to which we now turn.

62 The claimant's witness statement evidence in support of his claim of differential treatment by Mr Joseph in regard to the allocation of duties was in the following subparagraphs of paragraph 4 of his witness statement (ignoring the part of that paragraph dealing with the alleged inadequacy of personal protection equipment and the vehicles used for the collection rounds, on the basis that those were not part of the agreed issues before the tribunal):

> "(b) During my daily working routine, I witnessed and experienced favouritism, discrimination (on the grounds of Race & Age) victimisation, bullying and harassment, with Management against various staff members (including myself Mr Qwamani Thomas – through no fault of my own)
>
> (c) For the large majority of the time working at Serco; between the period of February 2018 to July 2018, I worked and was partnered up with Mr Dwayne Blake as a Refuse Loader.
>
> (d) The rounds would be distributed unevenly, where longer serving staff members, Older Staff members, Caucasian English/Caucasian European staff members, and staff members who were on a Veolia contract would be treated better.
> More consideration, allowances and preference were made for these staff member individuals on a regular basis.
>
> ...
>
> (g) For the workload on a daily basis, we would often be compelled and forced to take on the work of other crews/loaders, who did not finish their rounds and went home on time.
> This not only put us under strain and pressure, but we also felt that we were being singled out and penalised for being more 'efficient' at our jobs.
>
> (h) It was often just 'expected' for us to work through our lunch breaks, and we often did this the majority of the time in order for us to be able to complete the 'excessive' workload that was put upon us.
>
> (i) Advantage was taken by management; towards staff members like myself, due to our accommodating attitude.

Regularly, we were 'singled out'; upon returning to the yard, to go out again and help other Loaders/Crews or to do other rounds that were left.
It was also a regular occurrence for Neville (supervisor) to ring us whilst we were out working already.
He would regularly let us know that there were other Crews/Loaders who needed help, or other collections to be done and would 'insist' on us doing this work.
We were never provided with the opportunity/option to say 'no'.

(j) I strongly believe that the people of colour (Ethnic/afro-Caribbean) were treated differently from the Caucasian English/Caucasian European members of staff.
My comparators (e.g. Caucasian English/Caucasian European males who worked alongside me at that time) were distinctly/noticeably treated better, with more consideration, care and understanding.
I also experienced some 'prejudice'/discrimination from the Management staff within the same Ethnic/afro-Caribbean group."

63 Mr Blake's witness statement was in almost identical terms. Any differences were the result of an adaptation of the wording to take account of the fact that Mr Blake was the maker of the statement. However, in cross-examination, Mr Blake said that he had asked not to be put on recycling rounds, and Mr Joseph had accommodated that request. Mr Blake is of a similar age to the claimant, and is of a similar ethnic origin: he described himself as being of mixed Caribbean ethnic origin.

64 Mr Joseph's evidence about the allocation of duties was in paragraphs 23.1-23.9 of his witness statement. Mr Baber's witness statement contained this paragraph, immediately following that which we have set out at the end of paragraph 57 above:

"18. <u>That there was discrimination in the duties that Qwamani was allocated</u>: I understand that Qwamani alleges he was allocated 'heavier' rounds due to his age or race. There are broadly three types of collection rounds the contract operates: Domestic, Green and Recycling and in addition some supporting collections for larger 'bulk' waste bins. Across the Domestic, Green and Recycling the work is physically similar although with slightly more lifting of smaller Recycling bins which are not wheeled as opposed to other 'wheelie-bins'. The vehicles all have powered lifting equipment for bins so there is no physical difference in that respect between rounds. All the work conducted on the contract has been assessed for health and safety considerations and all lifting and manual handling is within health and safety regulations (pages 295 - 318 of bundle)."

65 Both Mr Joseph and Mr Baber said in oral evidence that they had themselves gone out on rounds with crews from time to time to see what they were

experiencing on those rounds, i.e. in order to have personal knowledge of what the rounds were like. Both witnesses were of the firm view that there was no material difference between the rounds in terms of the time that they were likely to take and their difficulty. While some of the rounds were of properties in rural areas, with far greater distances between some properties and their neighbours than in the urban areas, the rounds all varied in the time taken to complete them from week to week. That was because residents would leave different amounts of rubbish to be collected from week to week and from season to season. Mr Joseph's evidence was that he could, and did, track electronically the progress of the vehicles collecting refuse, so that if one was likely to finish early and another one was taking more time than might have been expected, he would in effect direct (by asking, of course) the team on the first of those rounds once they had finished it to go and help with the completion of the other team's round.

66 Sometimes, Mr Joseph said, a team might finish their round at, say, 12:30, and be permitted to go home because there was no other round that required assistance. However that was, he said, far from the norm, and no one team was favoured over any other in that regard.

67 As for the allocation of overtime, Mr Joseph said this in paragraph 23.1 of his witness statement:

> "That on numerous occasions I required Qwamani to work overtime and did not allow Qwamani to refuse to work overtime; I do not know what occasions Qwamani is specifically referring to in this instance. It may be that he is talking about the mandatory catch-back following a bank holiday but otherwise overtime is voluntary. All refuse loaders can be asked to carry out overtime, and can volunteer for this, but in the same vein all refuse loaders can refuse to work overtime. I do ask if people want to work overtime when it is required but I became aware that Qwamani did not want to do it so I stopped asking him. I do not have a specific system for allocation of overtime, as I simply ask loaders if this is something they will be willing to do as and when it is required."

68 In oral evidence, the claimant said that when Mr Joseph asked him, the claimant, to work overtime, then he would leave it to Mr Joseph to record on his (the claimant's) time sheet that he (the claimant) had worked overtime, i.e. that there was a valid claim for overtime. Mr Joseph said that he would not normally put anything into the time sheet of any member of staff, and that he would at most put on it that the employee had worked, say, an hour of overtime when the employee had failed to claim it. It was for the employee to complete the time sheets, he said, in all respects. Mr Blake in oral evidence said that he did not ask Mr Joseph to complete his (Mr Blake's) time sheets in any respect, and that he would complete them himself, including by making a claim in them for overtime.

The evidence of the claimant and Mr Joseph about the alleged belittling by Mr Joseph of the claimant

69 The claimant stated nothing in his witness statement about the alleged incident of belittling of him by Mr Joseph. Ms Thomas relied in that regard on paragraph 4(b), which we have set out at the start of paragraph 61 above, but that was plainly an insufficient evidential basis for the claim.

70 Mr Joseph's witness statement contained this paragraph about the alleged belittling:

> "That on or around June 2018, after Qwamani had not been picked up by his dustcart I accused him of not having any common sense and belittled him in front of other staff: This is not correct and I do not recall any incident of this kind. I did not belittle Qwamani as alleged. It is true there were occasions when Qwamani did not arrive to meet the vehicle and get picked up for work as described at paragraph 8 above and I would probably have spoken to him to remind him of his responsibility to meet the vehicle. However, even if this event had taken place as Qwamani alleges, I do not understand how Qwamani is suggesting that this was discrimination linked to his race or age as it would have arisen entirely from Qwamani failing to meet the vehicle."

71 When asked by us in oral evidence about the place where he might have spoken to the claimant if he was going to take the claimant to task about not attending on time to be picked up by the vehicle of whose crew he was rostered to be a member that day, Mr Joseph said that he would not have spoken to the claimant in front of other employees but would instead have had a conversation with the claimant on his own, in a room without anyone else present. It might have been the room in which he distributed the keys to vehicles every day, he said. There were, he said, two other places in the respondent's base at Clay Lane where he might have had an individual conversation with the claimant.

Our resolution of the material conflicts of evidence: our findings of fact in that regard and our reasons for them

The alleged belittling of the claimant

72 We accepted that evidence of Mr Joseph. We concluded, both for the reasons given by Ms Stanley in paragraph 25 of her skeleton argument and on the balance of probabilities given our acceptance of that part of Mr Joseph's evidence, that there was no incident when the claimant was belittled by Mr Joseph as claimed by the claimant as having occurred in or around June 2018 after the claimant was not picked up by the vehicle whose team he was rostered to be a part of that day.

What was said, and by whom, on 20 July 2018

73 We concluded that Mr Joseph's recollection of what had been discussed, and with whom, on 20 July 2018, about the claimant's desire to take time off from 23 July 2018 onwards was in some respects mistaken. By the time that he gave evidence to us, he recalled that the claimant had asked for three months off. We concluded that the claimant had in fact asked for one month off. Mr Joseph also recalled by the time of giving evidence to us that the claimant had spoken only to him, and that it was in the afternoon, and not the morning of 20 July 2018. We concluded that in fact the claimant might well have spoken to Mr Joseph at 6.50am, as the claimant alleged, and that the claimant had indeed spoken to both Mr Joseph and Mr Hosier on that day about taking time off for the following four weeks. However, we accepted all of paragraph 12 of Mr Joseph's witness statement, which we have set out in paragraph 39 above.

74 What we were sure about, given

74.1 the oral evidence of Mr Joseph on the issue,

74.2 our acceptance of the content of paragraph 12 of Mr Joseph's witness statement,

74.3 the content of the nearly-contemporaneous letter from Mr Baber to the claimant of 30 August 2018 which we have set out in paragraph 56 above,

74.4 the fact that even the claimant did not say in his first written communication on the issue, i.e. his letter of 21 July 2018 set out in paragraph 45 above, that the request for time off was approved, as he needed to "discuss/sort out [the request] with the new HR individual due to start w/c 23/07/18", and

74.5 the improbability of the respondent agreeing to the claimant taking a month off to meet "family commitments" and "other personal matters" in the circumstances that (1) the claimant had previously (as Mr Joseph said in paragraph 12 of his witness statement) sought time off to train for the football trial which was to take place towards the end of August 2018, and (2) (as so stated) both Mr Joseph and Mr Hosier were not willing to authorise that time off,

was that Mr Joseph and Mr Hosier did not agree to the claimant's request to take four weeks off from 23 July 2018 onwards, or otherwise in the near future.

The alleged telephone call of Mr Joseph of 25 July 2018 to the claimant

75 On the question whether Mr Joseph called the claimant on 25 July 2018 and asked the claimant when he was returning to work, we preferred the evidence of

Mr Joseph that he did not do that, and that the last time that he called the claimant by telephone was on 23 July 2018 in the manner we describe in paragraph 49 above.

The alleged less favourable treatment in the allocation of duties by Mr Joseph

76 As for the evidence on the question whether the claimant was treated less favourably because of his age or race in the allocation of duties, while we were unimpressed by the fact that the document at pages 157-193 and its unredacted version referred to Wednesday 20 June 2018 and Thursday 20 June 2018, and that it had on it that on Wednesday 20 June (which was in fact 19 June) the claimant was one of the "holiday loaders", when that was inconsistent with all of the documents in the bundle, and the other evidence, about the days when the claimant was on holiday, we accepted Ms Stanley's analysis of it (in her closing submissions) as disproving the claimant's case. By way of example, as Ms Stanley said in paragraph 15 of her closing submissions:

> "The Claimant says (i) that he was placed on more physically difficult rounds and (ii) that recycling and green waste were more physically difficult rounds than general refuse. The figures show that the Claimant worked the same amount of time on recycling (more difficult on the Claimant's case) as he worked on general refuse (easier on the Claimant's case). The figures show the Claimant worked less on green waste (more difficult on the Claimant's case) than he worked on general refuse (easier on the Claimant's case).

77 We were also persuaded by the oral evidence of both Mr Joseph and Mr Baber that no one round was any more demanding, overall, than any other.

78 Ms Stanley's closing submissions continued in paragraph 16:

> "If the Tribunal accepts these two initial findings of fact, that disposes of the Claimant's case on this allegation. In particular the Tribunal would have found that:
>
> (i) no round is more physically difficult than any other; and
>
> (ii) even if some rounds are more difficult the Claimant was not allocated to any particular round or type of round."

79 We accepted that submission. In fact, even if it had been necessary to go further and consider whether or not there was evidence from which we could draw the inference that the claimant had been discriminated against because of his age or race (or both) in the allocation of duties to him by Mr Joseph, we would have concluded that the ethnic origins and ages of the persons on the claimant's round and on the rounds with whose teams he compared the treatment of his team (as established by the respondent during the course of the hearing of 10-13 August 2020) were not such as to justify the drawing of that inference.

The working by the claimant of overtime

80 As for the claim that the claimant was forced to work overtime against his will, we accepted Mr Joseph's evidence on this, in paragraph 23.1 of his witness statement, which we have set out in paragraph 66 above. We accordingly concluded that the claimant was at no time required to work overtime against his will. Rather, we concluded, there were occasions when the claimant was asked, as part of a team, once his team had completed its allotted round for the day in question, well before 4.00pm, to help another team which was unlikely to finish its round before 4.00pm. However, even when that happened, the claimant was not required to work past 4.00pm.

Our findings of fact on the issues of liability before the tribunal and our reasons for them (to the extent that we have not already made such findings in the preceding paragraphs)

The claimant's dismissal

81 On the most important question for us, which was whether or not the claimant's dismissal was to any extent because of his age or race, we came to the conclusion that there was no evidence before us from which we could draw the inference of discrimination against the claimant because of his age or race, but that if there had been such evidence then we would have concluded by reference to the documentary evidence, the oral evidence of Mr Joseph concerning the circumstances which preceded the claimant's dismissal and Mr Baber's oral evidence of his conversation with Mr Hosier about the reasons for that dismissal, that the claimant's dismissal was in no way tainted by his age or his race. That was because in our view all of the evidence pointed towards the conclusion that the reasons for the claimant's dismissal were

81.1 the fact that he had, within the first six months of his employment with the respondent, been absent from work on (by 24 July 2018) seven days when the respondent's absence policy to which we refer in paragraph 25 above was triggered when there were four days of absence in a rolling period of a year; and

81.2 the fact that the claimant had asked for a period of four weeks off starting on 23 July 2018, had been refused it, and had then called in sick on that day, and had then not attended on the following day either, in the circumstance that the claimant had given as the reasons for his absence those which we have set out in paragraph 48 above.

82 Those things were ample justification for the reasons given in the dismissal letter which we have set out in paragraph 13 above, namely the claimant's "attendance levels and conduct".

The allocation of duties

83 If it had been necessary to consider the question of the alleged less favourable treatment of the claimant in regard to the allocation of duties because of the claimant's age and/or race, we would have been of the view as a result of the oral evidence of Mr Blake to which we refer in paragraph 62 above about the granting by Mr Joseph of his (Mr Blake's) request not to be put on recycling collection rounds that it was unlikely that the claimant was treated less favourably in regard to the allocation of his duties because of his age and/or race. However, in the event, given our conclusions stated in paragraphs 75-78 above, we did not need to add that matter into the balance when coming to a conclusion on that part of the case.

The holiday pay claim

84 We came to the conclusion that the claimant had not satisfied us on the balance of probabilities that he had put before the respondent the letter and its enclosures at pages 137-140 to which we refer in paragraphs 28-31 above. That was not least because he had not sent it to his line manager or otherwise to his workplace, namely the Clay Lane depot, as we accepted that it was not in the respondent's workplace file for the claimant when Mr Baber wrote his letter of 30 August 2018 at pages 155-156 (as stated in paragraph 5 of that letter, which we have set out in paragraph 54 above). However, by the time of the hearing before us, the documents at pages 137-140 were plainly in the possession of the respondent.

85 There was (see paragraph 59 above) no factual dispute about the amount of money that the claimant received as his final payment from the respondent. Nor was there a dispute about the amount of pay that the claimant should have received, gross, by way of notice pay: £332.83. What was in issue was whether the claimant should have been paid something in addition in respect of the working week commencing on 11 June 2018. In that regard, if he had taken the time as sickness absence, then, it was agreed, he would have received three days of statutory sick pay, i.e. as agreed (in discussion with the parties towards the end of the hearing) £55.23 gross.

86 We said that we would calculate the amount that it appeared that the claimant should have received after the end of the hearing, and that if it appeared that our calculations were wrong, then either party could apply for a reconsideration of our conclusion on the point. We worked on the basis that the claimant was not entitled to pay for any day after 20 July 2018, as the claimant was not at work or able and willing to work. Thus, the claimant was entitled to pay for July 2018 of 20/31 of his annual salary divided by 12. His annual salary by the time of his dismissal was agreed to be £17,307.36. One twelfth of that is £1,442.28. That was in fact the basic pay shown on the claimant's payslips at pages 289-292. Thus, the claimant was entitled by way of pay for July 2018 to £930.53 gross.

87 By then, the claimant had taken (as calculated by Ms Stanley in paragraphs 37-41 of her closing submissions, which we accepted on this) two days more than his full entitlement if he was treated as having taken the period of 11-15 June 2018 inclusive as holiday. That was worth 2/5 times £17,307.36/52, which is 0.4 x £332.83, i.e. £133.13 gross. However, if the claimant had not taken that period as holiday, then he would have received £55.23 gross by way of statutory sick pay.

88 If the claimant's notice pay of a week's pay (£332.83) is added to the sum of £950.53 stated at the end of paragraph 85 above, and then the sum for sick pay of £55.23 is added, then the total sum payable as a final payment to the claimant is £1,138.89. By then the claimant had received (as shown on the payslip at page 291) during the 2018-19 income tax year gross pay totalling £4,106.47. Thus, the claimant's pay in July 2018 would not have been subject to income tax. It would, however, have been subject to national insurance contributions which were payable on earnings above £116 per week, at the rate of 12%. Thus, national insurance contributions were payable on £216.83 per week at 12%. That is £26.02 per week. If it is assumed for the sake of simplicity that the claimant worked for 3 weeks in July 2018, then national insurance contributions of 3 x £26.02 would have been levied on the sum of £930.53, i.e. £78.06. Also, the week's notice pay would have been subject to the deduction of one week's national insurance contributions, i.e. £26.02. Thus the claimant's net pay should have been £1,138.89 minus £104.08. That is the sum of £1,034.81. The claimant was paid £808.40. The difference between the two sums is £226.41. Given that any sum paid to the claimant in compliance with any order made by us will be subjected to income tax and national insurance contributions, we divided that sum by 0.68 (which we arrived at as a result of the addition of the basic rate of income tax, i.e. 20%, and assuming that national insurance contributions at 12% would be levied in full) to get the figure of £332.95 as the gross sum payable. That was only a little over the sum agreed to be paid by the respondent here, i.e. £332.83.

The sick pay claim: a discussion

89 Given the purpose of the Working Time Regulations 1998, SI 1998/1833, we were willing to conclude that the claimant should in the circumstances described above, and given our inescapable conclusion in the final sentence of paragraph 83 above, have been treated as having been off work because of sickness during the period 11-15 June 2018. Thus, he should have been regarded as being entitled to five more working days of holiday than the respondent calculated. However, it was clear from the payslip at page 291 for June 2018 that the claimant had in fact received full pay for that period. Thus, at most the claimant was entitled to sick pay as agreed in the sum of £55.23 gross. However, it appeared from the calculated figure referred to at the end of paragraph 87 above that the respondent's HR team took that factor into account and simply failed to recognise that the claimant should received a week's notice pay.

Our overall conclusions

90 Accordingly, the claimant's claims of discrimination contrary to the EqA 2010 do not succeed.

91 As for the claimant's claim for unpaid holiday and notice pay, given that (1) our calculations stated in paragraph 87 above may have been slightly inaccurate, (2) we had included in them the maximum which we believed the claimant could have claimed in respect of the period of 11-15 June 2018 inclusive, and (3) the respondent conceded that it owed the claimant a week's gross pay, which is £332.95, we concluded that the claimant should receive as a result of our deliberations the latter sum, and that sum only, by way of a judgment sum. For the avoidance of doubt, we concluded that the most that the respondent owed the claimant by way of unpaid remuneration was that sum.

Employment Judge Hyams

Date: 2 September 2020

JUDGMENT SENT TO THE PARTIES ON

...02/09/2020

..Jon Marlowe

FOR THE TRIBUNAL OFFICE