Case Number: 1802390/2021

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr S P Makinde-Barth	v	G4S Secure Solutions Limited

Heard at: Leeds (by CVP) **On**: 20, 21, 22 and 23 June 2022

Before: Employment Judge A James
Mr P Kent
Mr G Corbett

Representation

For the Claimant: In person

For the Respondent: Mr S Irani-Nayar, counsel

JUDGMENT

(1) The claim for unpaid holiday pay in 2019 (Regulation 16 Working Time Regulations 1998 and S.23 Employment Rights Act 1996) is not upheld and is dismissed.
(2) The claim for unpaid holiday pay in 2020 (Regulation 16 Working Time Regulations 1998 and S.23 Employment Rights Act 1996) is upheld, but any further sums due were paid on 16 June 2021. The claimant has not proved any further loss arising from the unauthorised deduction and therefore no compensation is payable.
(3) The claim for failure to pay the claimant double time for working on 31 December 2020 and 1 January 2021 at Greencore Leeds (section 23 Employment Rights Act 1996) is upheld, but the sum due was paid in September 2021. The claimant has not proved any further loss arising from the unauthorised deduction and therefore no compensation is payable.
(4) The claim in relation to the cancellation of five shifts between January and August 2020 (s.23 Employment Rights Act 1996) is not upheld and is dismissed.
(5) The claim in respect of an alleged failure to allow rest breaks whilst working at Bradford Royal Infirmary between January and June 2021 (Regulation 12 Working Time Regulations 1998) is not upheld and is dismissed.

(6) The claims of direct race discrimination (s.13 Equality Act 2010) are not upheld and are dismissed.

REASONS

The issues

1 The agreed issues which the tribunal had to determine are set out in Annex A.

The proceedings

2 Acas Early Conciliation took place between 18 February 2021 and 29 March 2021. The Claim form (the ET1) was submitted on 3 April 2021.

3 A preliminary hearing for case management took place on 18 June 2021 before Employment Judge Davies. The issues were partially identified. The claimant was ordered to provide further information. A further case management hearing was listed for 10 September 2021. The claimant failed to provide all of the necessary information, in order for his claim to be understood. As a result, at the September preliminary hearing, EJ Shepherd made an unless order, in relation to the provision of the names of the person or people with whom the claimant compares his treatment and the reasons why he alleges that he was treated less favourably because of his race or nationality. That information was provided in time.

4 A further preliminary hearing date was set for 10 December 2021. That preliminary hearing took place as planned, before Employment Judge Lancaster. This final hearing was listed, and relevant case management orders were made, to ensure that the claim was ready to proceed this week.

The hearing

5 The tribunal heard evidence from the claimant. For the respondent, the Tribunal hear from Mr Neil Jones, Contract Manager for Yorkshire and Humberside. There was an agreed trial bundle of 291 pages, to which 8 pages were added at the commencement of the hearing. The claimant's schedule of loss had been missed from the bundle. The claimant also produced six further pages of documents to include in the bundle, which Mr Irani-Nayar did not object to. Those pages were also added by consent.

6 On the third day, when witness evidence had been concluded but when submissions were due to be given, the claimant submitted a copy of a Tesco Club Card statement dated 23 April 2021. The claimant applied to admit that document in evidence. The tribunal declined to allow that document to be admitted in evidence. The tribunal's order of 10 December 2021 stated:

> *By 21st January 2022 the Claimant must send the Respondent copies of any other documents relevant to those issues. This includes documents relevant to financial losses and injury to feelings.*

Issue 2.2 (see Annex A), which is taken from the record of the 10 December 2021 hearing, also refers to the possibility of an identifiable interest charge arising.

7 To allow the document to be admitted, after evidence had been concluded, would be unfair to the respondent. In any event, the statement only tells part of the story. Bank statements for the whole of the period between January and September 2021 would have been required, in order to show whether any loss had arisen, as a result of the failure to make the payment in January 2021 instead of September 2021; and if so, how much.

8 The issues had been identified with some precision on 10 December 2021. Those were discussed at the outset of this hearing, and slightly fine-tuned. The list of issues at Annex A was sent to the parties by the tribunal, and agreed by them, prior to any witness evidence being heard.

9 The bullet points at paragraph 3 of the claimant's witness statement for this hearing, suggested that the claimant was attempting to add to his claims of discrimination. Following a discussion with the claimant, he agreed that the discrimination claims should be limited to the three matters set out in paragraph 5 of the List of Issues. In particular, the claimant did not apply to amend his claim in order to argue that the refusal of rest breaks also amounted to an act of direct discrimination; nor the alleged cancelling of shifts. In relation to the latter, the claimant clarified that he was not saying that was an act of direct discrimination in any event; he alleges that it is negligence. It was explained to the claimant that his position was noted, but the tribunal does not have the power to deal with claims of negligence.

10 The claimant's witness statement only runs to two pages. Following submissions by the claimant, and from Mr Irani-Nayar, the tribunal agreed to allow that statement, the list of issues, and the claimant's schedule of loss to stand as his written witness evidence.

11 In addition, at the outset of his oral evidence, the claimant was asked a number of supplementary questions by the Judge, in relation to a discrete number of issues, including the question of time limits, which had not been dealt with in the claimant's witness statement or the above documents. Mr Irani-Nayar was then given the opportunity to discuss the answers given with Mr Jones/his instructing solicitors, prior to cross examination commencing. Only a short adjournment was required for that purpose.

12 The hearing took place over four days. Evidence in relation to liability was dealt with on the first two days. Submissions on liability were dealt with on the third day. Both parties provided helpful written submissions and expanded on those orally. It was arranged that on the remainder of the third and on the fourth day, the tribunal would deliberate, reach a decision, then reconvene to give the decision and reasons.

13 The hearing was conducted in a courteous and professional manner at all times by all those taking part. The tribunal records its gratitude to those involved for helping to ensure that the hearing proceeded as smoothly and painlessly as possible.

Findings of fact

The claimant

14 The claimant is a German national and of black African racial origins. Neil Jones was not aware that the claimant was a German national until these proceedings were commenced. He was aware of the claimant's race.

Commencement of employment

15 The claimant started work for Securitas on 10 March 2010 as a Security Officer. He remains employed in that role, as an Area Relief Security Officer. This means that the claimant is not contracted to work at any one customer site. Instead, his role is to provide cover at any site within the Yorkshire & Humberside region. This is typically required because of sickness absence, annual leave, or gaps between other security officers' licences expiring and being renewed.

16 The claimant's employment transferred to the respondent under the TUPE Regulations 2006 on 1 November 2016. The respondent provides security staff and expertise to businesses or public sector organisations with large premises that require security provision.

17 The respondent's workforce in Yorkshire and Humberside is racially diverse. About half of the 250 security officers in the region are from non-British backgrounds.

Contract of employment

18 A copy of the claimant's original contract is not before the tribunal. The tribunal was referred to statements of terms and conditions of other employees of the respondent, including two alleged comparators, Mr Finn and Mr Singleton. These confirm, in relation to holiday pay, an entitlement to 5.6 weeks holiday per year. The holiday year runs from 1 January to 31 December. Payment for the first four weeks of holiday is based on average earnings over the previous 12 weeks that the employee worked. For the remaining 1.6 weeks, holiday pay is based on the contracted working hours. Holidays cannot be carried over to the following year. [The tribunal notes that where holiday cannot be taken because of sickness absence, and/or Covid, the position is different under European law and the respondent may wish to update its provisions in that respect]. If holidays are not taken, a payment in lieu will not be made.

19 The claimant was contracted to work 48 hours per week. That is equivalent to 4 x 12 hour shifts in a standard working week. 5.6 weeks holiday for a person working a 4 x 12 hour per week shift pattern, equates to 22.4 days per year, or 268.8 hours. As noted above, pay for the first four weeks of leave (192 hours) is said to be calculated differently by the respondent, to pay for the remaining 1.6 weeks (76.8 hours). [The tribunal notes that from 6 April 2020, average pay is meant to be calculated on the basis of the previous 52 weeks that the employee worked (or actual number of weeks worked if less), subject to a long-stop of 104 weeks, where the worker works intermittent weeks only. Again, the respondent may wish to update its standard contract to reflect that]

20 The claimant usually works on Thursdays, Fridays, Saturdays and Sundays, during the week.

21 If the respondent is not able to offer the claimant 48 hours work per week, he will still be paid for the full 48 hours. However, if the claimant is offered work, but declines the hours offered, the declined hours still count towards the 48 hours the respondent agrees to offer but no payment is made in respect of them. In practice this operates by looking at the total shifts offered over a three-month period.

22 Area Operations Controllers ('AOCs') have primary responsibility for scheduling security officer's hours and holidays, and deciding where they work. This role is currently carried out by Paul Lawrie, in respect of the claimant; for some of the material time this role was carried out by Usman Muzaffar and Craig Rudderham. They are no longer employed by the Respondent.

23 The AOC obtains the Security Officers' availability, confirms their shifts, and records their hours on the Respondent's system ('Javelin'). When a shift has been allocated to a security officer but needs to be cancelled, it is the responsibility of the AOC to update Javelin and to contact the Security Officer by phone/text to let them know. This is not a regular occurrence. It can happen, for example, if a customer contract is cancelled at short notice, or if the security officer contractually assigned to the site has their licence renewed sooner than expected.

24 Neil Jones is the Contract Manager for Yorkshire and Humberside. In that role he has responsibility for 250 Security Officers. As noted above however, it is the AOCs who have the primary responsibility for Security Officers' hours, holidays and allocation to shifts, not Mr Jones. Javelin records Mr Jones as approving holiday requests but that is because the system defaults to him. In reality, it is not him who approves holidays, but the AOCs. It is understandable, on the basis of the written records, that the claimant thought Mr Jones did.

Xuber DXE issue

25 The claimant complains that in or about May and June 2019 his hours were changed when he was working at Xuber DXE. This left the claimant believing that he needed to remain on site, because that was what the client required; but he was not then paid for those extra hours. He argues that the respondent then refused to change back to the hours agreed with the client until his manager at Xuber DXE confirmed the agreed hours.

26 The tribunal accepts Mr Jones's evidence (which was not specifically challenged by the claimant) that the issue in relation to this site arose because of a concern by the respondent that the length of the shift meant that the Working Time Regulations were being breached. They were therefore told to 'lock the site and leave it' by the client. That information was passed to the claimant by Mr Jones. The matter then appears to have been resolved after further clarification from the client about their requirements.

Holiday pay - 2019 and 2020

27 In 2019, the claimant was paid 247 hours holiday pay (see page 221). In 2020, the claimant was paid 333 hours holiday pay (after an additional payment of £451.42 on 16 June 2021, for 50.33 hours – see page 256).

28 On 25 September 2020 the claimant emailed Neil Jones as follows:

Thank you for your email regarding my holiday entitlement for the year 2019/2020.

Please, I am not quite happy that my holiday entitlement was cut from 28 days to 18 days. I believe that this was a mistake and contrary to my contract of employment.

I am a permanent staff, although, I was covering two sites for a period of time now because the site contract where I was covering came to an end. For this reason, Mr Phil Bowman put me down to work two days in a permanent role at a site in Leeds (Xuber DXC) [sic]. To ensure that I covered my weekly hours, he also offered me another two days to work elsewhere as a Relief Officer.

I remember vividly that my holiday entitlement issue first came up sometime last year when I was transferred to you. I believe this issue has been resolved last year and my records of employment were updated not until when it crop up this year again.

I am so surprised that my holiday is reduced to 18 days instead on statutory 28 days that I am entitled to according to my contract of employment. I believe this was a mistake and this needs to be corrected that is why I am writing this letter to you for your attention.

Please, kindly help me to resolve this issue so that it doesn't reoccur yearly.

I will be looking forward for your response.

29 On 1 October 2020, Mr Jones emailed the claimant stating that his holiday entitlement is 5.6 weeks, "*which is an average of what you worked*".

30 On 4 October 2020 the claimant emailed Mr Nick Cooper as follows:

I am very sorry that I need to escalate my problem to you because my line manager was unable to resolve the matter satisfactorily. Also, in accordance with the G4S complaint procedures I believe you are the next person that I can contact to resolve the ongoing problem about my holiday which was cut down by my line manager (Mr Neil Jones) from contracted 28 days to 18 days.

I was contracted as a permanent staff by G4S when Mr Phil Bowman was my line manager. When the contract of the site where I worked initially came to an end, Mr Phil Bowman discussed with me that I will be covering two days in a week at Xuber DXC in Leeds and two days elsewhere as a Relief Officer to fulfil my full-time contract. This arrangement was still in accordance with my contract and I did not object it because the terms and conditions of my contract remains the same.

In 2019 when Mr Phil Bowman left G4S and Mr Neil Jones took over from him, he became my line manager. In 2019 he reduced my holiday entitlement from 28 days to 22 days and he paid me only for 18 days. I contested it but to no avail.

Since last year, I have been having a discussion with him over my entitlement which he stripped off from me. He has refused to reconcile and reinstate my 28 days holiday in accordance with the contract that I signed

with G4S. I explained to him that I have been taking and paid for 28 days holiday since I started working for G4S.

I brought up the matter again this year 2020 with Mr Neil Jones, with the hope that he will reason with me and reinstate my entitlement but instead he insisted that I am only entitle for 18 days which is contrary to my contract.

I made him aware of the contents of my employment contract and I also advised him to check my contract by himself. However, he made it clear to me in his response to my email that he will not change his mind.

I will be very grateful if this matter can be resolved once and for all at this level. Whilst awaiting your response, I will like to thank you for your intervention. [sic]

31 Mr Cooper treated this email as a grievance. He emailed the claimant on 4 October 2020, to ask whether this was the first time that the claimant had raised the matter as a formal grievance. In a reply sent on the same day, the claimant stated that he had raised the issue repeatedly with Mr Neil Jones and that his email was an appeal against Mr Jones' 'final decision'.

32 Mr Chris Mould was appointed by Mr Cooper to hear the claimant's grievance. He emailed the claimant on 12 October 2020 as follows:

Good morning Philip.

Prior to a Grievance hearing we asked HR to review your hours and entitlement.

They have confirmed that you should have 28 days in 2020.

Today I will request HR to raise your entitlement to 28 days. This will take a few days to update.

I trust that this will bring your query to an end.

33 In reply, the claimant said he still had some unanswered questions. He alleged that he was told by Mr Jones that he was entitled to 22 days in 2019 but was paid for 18 days. He asked about the balance and what his entitlement would be in future. Mr Mould replied on 14 October 2020:

I have asked the questions on your behalf.

Please see the following info:

Annual leave cannot be carried over so the 3 days would be lost.

Whilst you continue to work 5 days a week your entitlement will be 28 days as per the government guidelines. Clearly if your working days go down then entitlement goes down too.

34 The claimant replied to Chris Moulds on 18 October 2020 when he stated:

I thanked you for your decision regarding my this year and future annual leave entitlement. I appreciate your time and efforts using to resolve this issue. I am grateful for that.

You stated on your previous email regarding the 2019 annual entitlement: "Annual leave cannot be carried over so the 3 days would be lost"

> *In 2019 I applied for 28 days holidays and those days was approved by Neil (see attached documents for prove of evidence). When I only got 18 days paid I contacted him to find out why. He replied that I am only entitled to 22 days. He totally refused to paid me the 4 days he said I am entitled to as he refused to change his decision regarding my this year annual leave entitlement upon my repeatedly appeals towards him.*
>
> *I am not carried any holidays over but he's still owning me in 2019 an holiday money which I believe I am entitled to be paid.*
>
> *I can't understand why he cut off my annual leave last year and this year.*
>
> *I have all email conversations between me and him and I can forward them to you if you need those emails to help you resolve this issue.*
>
> *I will be looking forward for your response. [sic]*

We were not referred to any response to this email.

35 A further query was raised by the claimant with Mr Jones by email on 4 January 2021 about his 2020 holidays. The claimant pointed out that he had claimed for eight days holiday in December but he had only been paid for four days.

36 In a reply sent on 5 January 2021, Mr Jones explained to the claimant that the first 20 days holiday pay was based on average earnings during the previous 12 weeks worked, whereas the additional 1.6 weeks was paid on the basis of weekly contracted hours. As noted above, that reflects the position set out in the standard statement of terms and conditions of employment, for two of the named white, British comparators, Mr Finn and Mr Singleton. [The Tribunal notes that this may need updating in light of the changes introduced on 6 April 2020 following the acceptance by the government of the relevant recommendation from the Taylor review of modern working practices].

37 On 6 February 2021, the claimant emailed Chris Moulds as follows:

> *You handled my grievance case in 2020 and your final decision was that I am entitled to 28 days annual leave payment. Now I got only 24 days annual leave payment paid. I complained to Neil but he insisted that he is going to pay me only 24 days annual leave payment. [sic]*
>
> *Can you please get in touch with Neil and sort it out for me.*

38 Mr Mould agreed to look into the situation. He took advice from Emma Randle, HR Business Partner. She asked Mr Mould for the grievance outcome the claimant was referring to. Mr Mould responded that there was no grievance: '*It is just his terminology*', he said. He said he had looked in his emails and there was nothing else referring to holidays, between himself and the claimant.

39 Ms Randle also asked Mr Mould if he recalled advising the claimant he was entitled to 28 days holiday in 2020. Mr Mould replied:

> *Not at all. I would have done it in conjunction with Neil and cannot see anything that says 28 days at all.*

40 It is clear that those responses were inaccurate, given the email exchanges between the claimant and Mr Mould in October 2020, quoted above. However, the claimant has not raised any specific complaint against Mr Mould and there is no evidence before the tribunal to suggest that Mr Mould's response was

due to anything other than human error. Indeed, during cross examination, the claimant specifically confirmed that he: '*had nothing against Mr Mould*'.

Greencore Leeds - Bank Holiday pay - 31 December 2020 & 1 January 2021

41 It is not in dispute that the claimant worked on 31 December 2020 and 1 January 2021 at the Greencore site in Leeds. As those days were classed as bank holidays, he was entitled to double time. The respondent accepts that the claimant was not paid double time for those shifts when payment was due. The tribunal accepts the respondent's explanation that the error occurred in relation to the payment rates because one of the Respondent's admin team set up the contract on the system with the incorrect holiday indicators. This meant that the Respondent did not initially charge the client, or pay its Security Officers, the correct rate for these bank holidays. This matter was eventually rectified in September 2021, after the ET1 was submitted.

42 It was up to the claimant to provide evidence of loss arising from that underpayment. As noted above, in the section headed 'The hearing', the claimant failed to provide any evidence prior to the witness evidence being concluded. The one document provided after submissions had been exchanged, does not in any event tell the whole picture over the relevant period, January to September 2021. In those circumstances, the claimant has failed to prove the extent of any loss suffered as a result of the admitted underpayment of wages.

Cancellation of shifts in 2020

43 The claimant complains that five of his shifts were cancelled at the last minute in 2020. The dates are 26 March, 25 April, 3 June, 4 June (De La Rue) and 3 August 2020. He further complains that he was not informed of that in good time and travelled to the site, only to be told by the respondent's client that he was no longer required and the client had informed the respondent of that.

44 The De La Rue site is in the Manchester area, which is not within the Yorkshire and Humberside area. This results in messages not being passed on as effectively as they are for sites in the Yorkshire and Humberside region. As noted above, it is the primary responsibility of the AOC to update Javelin. That appears to have been done in relation to the incidents above, apart from 3 August 2020, which is still showing as a shift that the claimant worked. It is not the claimant's case however that he worked that shift and was not paid for it however; it is still his case that he did not work it, because it was cancelled.

45 The Tribunal accepts that the claimant checks Javelin when he returns from a shift, to see where he is working the following day; it is not his routine practice to check Javelin before setting off in the morning. The tribunal accepts that the claimant usually checks his phone for text messages, or missed calls, as he uses his phone for satnav. It appears to the Tribunal that, in relation to both the respondent's practices, and the claimant's practices, human error will inevitably arise on some occasions. The implications of these findings for the issues before us are explored below.

Alleged shortfall in allocation of shifts – January 2021 onwards

46 The claimant alleged for the first time during his submissions, that in September 2019, he had arranged an appointment with Neil Jones to discuss a shortfall in shifts. Unfortunately, that was not raised in the claimant's witness

evidence before the tribunal, which the respondent, through Mr Irani-Nayar, would have then had the chance to challenge. The claimant told the tribunal that he had other emails, which show that he continued to complain about this during 2019.

47 The Tribunal explained to the claimant that we appreciated that he was representing himself and that would be difficult for him, as someone not trained in employment law or legal procedure. Nevertheless, it was still his responsibility to ensure that all relevant documents were provided to the respondent, in line with the orders made, and included in the bundle of documents for this hearing. It was also incumbent on the claimant to prepare a witness statement setting out all of the evidence which he wanted to give at this hearing. To allow the claimant to adduce additional evidence at this stage, would mean further documents being added to the bundle, further witness evidence being prepared and heard, the adjournment of this hearing, and further dates having to be arranged. The Tribunal did not consider that was just, in light of the three preliminary hearings that had taken place, and the clear orders made by the Tribunal, following those hearings. It would involve further delay and cost and would be contrary to the over-riding objective.

48 The documents that were before the tribunal show that the claimant complained that he was not being allocated the 48 hours under his contract, in emails sent to Mr Jones on 8 April, 21 May and 3 June 2021. There are no emails complaining about the lack of shifts in 2019. Shift breakdowns relating to the claimant's payslips for January, March, April and May 2021 also show a shortfall as follows - 9 shifts in January, 14 in March, 15 in April and 16 in May. The claimant does not pursue a wages claim in relation to the alleged shortfall. He alleges that this is an act of direct race discrimination against him by Mr Jones.

49 There is an email exchange between the claimant and Mr Jones on 17 September 2021. The claimant pointed out that he had only been allocated one shift for the following week. Mr Jones replied immediately. He asked what days the claimant was available to work. The claimant replied several hours later. Within minutes, Mr Jones had asked Mr Rudderham the ACO to allocate the claimant shifts in Bradford on the days when he was available.

<u>Rest breaks at Bradford Royal Infirmary – January to June 2021</u>

50 The claimant complains that on 19 occasions, between 15 January and 13 June 2021, he was not able to take a rest break away from his work station at BRI. If he needed a toilet break, he would radio the security officer in control, who would watch the door via CCTV whilst the claimant was absent. The claimant takes drinks with him, but does not eat during this shift.

51 When the claimant works shifts at the Bradford Royal infirmary, he works from 7pm to 7am. There are a number of other Security Officers working during the night shift. One of those is located at the entrance to A&E, and another at the entrance to the Maternity Ward. Those are the only doors open to the public during those hours.

52 The claimant raised this with Mr Jones and Chris Mould by email on 16 January 2021. His email stated:

> *I am sorry to disturb you this morning. I am at NHS Bradford. I was refused to have a break. I called the control to help me out but I was advised by*

control officer to send you an email. I will be grateful if you could sort it out for me. I am scheduled to work here tonight and tomorrow night. It is impossible for me to do 12 hours shift without a break.

We were not referred to any email response to this message. It is assumed that a conversation would have taken place explaining the position. There were no further emails from the claimant about this issue in the hearing bundle.

53 The respondent's Assignment Instructions for this site state at paragraph 3.3:

3.3 Officer Rest Breaks:

● Officers may not leave site during a rest break and must remain on call to respond to an emergency.

● The duties on this assignment are such that adequate rest can be taken during the course of the operational shift and therefore a specific rest break is not provided.

● Officers may not leave site during contract shift hours without the permission of G4S Management.

54 Prior to the contract commencing, Tanya Driver, the relevant manager at the time, attended the site and checked that compensatory rest could be taken during the night shift. She was satisfied that it could be. The tribunal accepts Mr Jones' evidence, which was not challenged, that none of the other Security Officers allocated to work at this site have complained about their ability to take rest breaks/compensatory rest.

55 The tribunal accepts that there is less activity at night on this site. There are fewer managers at work, no retail, less visitors (visiting hours are 7am to 8pm), no planned operations or clinics. There are therefore less security officers on site. The Tribunal accepts that since there are only two doors open, there is still a steady, although not continuous, flow of people through those doors.

56 On 30 April 2021, after the claim form had been submitted, the claimant was racially abused and insulted by a customer who visited Bradford Royal Infirmary. The hospital has a policy that where a child is brought to hospital, they are to be accompanied by only one parent. This is, presumably, in order to limit the numbers of people inside the buildings, to minimise the risk of infection. The contract commenced during the pandemic.

57 This policy means that if two parents accompany the child, they have to make a choice as to who goes inside the hospital with the child. The mother went in with her child on 3 April. The father was upset at not being allowed to attend with them too, and took it out on the claimant by, amongst other things, being racially abusive towards him. The claimant reported that to Mr Jones on 4 May 2021 by email. Mr Jones responded on 4 May, thanking the claimant for letting him know, and confirming he would take the matter up with the hospital the following day. This is the only incident of racist abuse which the claimant has brought to the respondent's attention in relation to this site in writing during this period. In saying that however, the Tribunal is in no way minimising the seriousness of it, nor how offensive and upsetting the claimant would have found it.

58 From 18 June 2021, the claimant has been told by a member of staff at the hospital that he can take a 20 minute break every three hours or a single one hour break. He can choose which one of those options suits him best. He is able to take a break without anyone staying on the door. That instruction did not come from the respondent and this evidence, which was first raised by the claimant in answer to a question from the Judge, came as a complete surprise to them.

Time limits

59 The claimant is not a member of a trade union. There have been no medical issues preventing or hampering the claimant from starting Acas Early Conciliation or submitting the claim form.

60 The claimant had limited understanding of time limits in ET claims prior to this claim being submitted. The claimant told the Tribunal and the Panel accepts that he did not start tribunal proceedings when he was going through the internal process because his understanding of the Security Industry Authority's (SIA) Code of Practice, is that when internal processes are being used, third parties should not be told the details of those procedures. The claimant's understanding of this is that he could not complain to an Employment Tribunal, which he understands to be a third party, whilst he was going through an internal process. The tribunal was not referred to the relevant provisions of the Code which gave rise to this understanding, although the Tribunal accepts this is the claimant's genuine belief.

61 The claimant also told the Tribunal that it was his belief that he should not start an Employment Tribunal claim until the internal processes had been completed. He explained that this understanding arose from his parents teaching him that to resolve disputes, people need to talk to each other. His belief in that respect has not come from any independent advice given to the claimant about Employment Tribunal claims.

62 Counsel for the respondent argued that these two reasons were inconsistent. The Tribunal does not find them to be so, nor that they are mutually exclusive.

63 The claimant did not carry out an internet search, in relation to Employment Tribunal claims or time limits, or look at, for example the Acas or Employment Tribunal websites, before he started Acas Early Conciliation. He commenced Acas Early Conciliation on 18 February 2021 because he understood from Neil Jones in about February 2021 that he was not going to be paid what he understood to be his agreed holiday entitlement for 2020 of 28 days.

Relevant law

(1) Direct discrimination (s13 EqA)

64 Direct discrimination is defined in s.13 of EqA 2010. 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.

65 If there is less favourable treatment, the fundamental question in any discrimination case is the reason 'why' the Claimant has been treated less favourably than his comparator(s). The answer can be ascertained in two ways - see s.136(2) EqA 2010. Either by way of the two-stage burden of proof

as per *Igen Ltd v Wong [2005] IRLR 258*, or if the circumstances warrant it, by making positive findings as to the motivation in respect of an act of discrimination.

66 The issue of the burden of proof under s.136 EqA 2010 was recently addressed by the Supreme Court in *Efobi v Royal Mail Group Ltd [2021] IRLR 811*. In particular:

(a) The introduction of s.136 EqA 2010 and its change in wording from the predecessor legislation did not eliminate the need for the Claimant to prove facts on the ordinary civil balance of probabilities, from which the inference of discrimination could properly be drawn. Along with the facts that the Claimant adduces in support of its case, the Employment Tribunal must also take into account any facts proven by the Respondent which would prevent any inference from being drawn. (See paragraphs 29-30);

(b) It was observed at paragraph 28 (in relation to the employer's explanation at the second stage of the burden of proof) that the employer's explanation did not have to satisfy some objective standard of reasonableness or acceptability. It did not matter that the employer had acted for an unfair or discreditable reason as long as the reason had nothing to do with the protected characteristic; and

(c) It was observed at paragraph 38 (as per *Hewage v Grampian Health Board [2012] IRLR 870*) that it was important to not make too much of the burden of proof provisions where the Employment Tribunal is in a position to make positive findings on the evidence, one way or the other.

67 It is not sufficient to merely assert a difference in status and a difference in treatment. In order for the respondent to be required to show that it has not committed an act of discrimination it is necessary for there to be some material before the Employment Tribunal from which it 'could properly conclude' that on the balance of probabilities the respondent had committed an act of unlawful discrimination.

EqA – Jurisdiction - Time

68 The Employment Tribunal has jurisdiction to extend time on a just and equitable basis. The discretion to extend time is wide, see, *Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194* at paragraphs 18-19, although factors that will almost always be relevant to consider in this context are (a) the length of, and reasons for the delay and (b) whether the delay has prejudiced the Respondent.

69 Section 123(3)(a) EqA 2010 provides for conduct that extends over a period to be treated as being done at the end of that period. The burden of establishing this rests on the Claimant (*Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 CA*). It can be established in several ways, such as by separate acts of discriminatory treatment as a result of a policy, rule or practice that was in place at the relevant time. Alternatively, there can be separate acts that are linked in some way as evidence of a discriminatory state of affairs. However, it is not sufficient to rely on an alleged overarching or floating discriminatory state of affairs without that state of affairs being anchored by discrete acts of discrimination. See further: *South Western Ambulance Service NHS Trust v King [2020] IRLR 168* at paragraphs 21-23 and 35-36 per Choudhury P.

(2) Working Time Regulations 1998 (WTR) - Rest Breaks

70 Regulation 12 WTR ('Rest breaks') provides that:

> *(1) Where a worker's daily working time is more than six hours, he is entitled to a rest break.*
>
> *(3) Subject to the provisions of any applicable collective agreement or workforce agreement, the rest break provided for in paragraph (1) is an uninterrupted period of not less than 20 minutes, and the worker is entitled to spend it away from his workstation if he has one.*

71 Regulation 21 WTR ('Other special cases') provides that:

> *Subject to regulation 24, regulations 6(1), (2) and (7), 10(1), 11(1) and (2) and 12(1) do not apply in relation to a worker—*
>
> > *(b) where the worker is engaged in security and surveillance activities requiring a permanent presence in order to protect property and persons, as may be the case for security guards and caretakers or security firms".*

72 Regulation 24 WTR ('Compensatory rest') provides that:

> *Where the application of any provision of these Regulations is excluded by regulation 21 or 22…and a worker is accordingly required by his employer to work during a period which would otherwise be a rest period or rest break—*
>
> > *(a) his employer shall wherever possible allow him to take an equivalent period of compensatory rest, and (b) in exceptional cases in which it is not possible, for objective reasons, to grant such a period of rest, his employer shall afford him such protection as may be appropriate in order to safeguard the worker's health and safety.*

73 In *Hughes v Corps of Commissionaires Management Ltd [2011] IRLR 100*, the claimant (C) had been employed by the respondent as a security guard. During his continuous 12-hour shift he was able to take a break when he chose, but breaks were often interrupted as he remained on call. If his break was interrupted, he was allowed to start his break again. He complained that he was not receiving rest breaks under reg.12 or compensatory rest under reg.24(a). The decision of the EAT (which was not disturbed on appeal on another point to the Court of Appeal) held, in particular:

> (a) That in special cases under reg.21, such as the claimant's case, the worker was not entitled to a rest break during his shift. However, the employer was obliged wherever possible to allow the worker to take an equivalent period of compensatory rest under reg.24(a).
>
> (b) The rest actually afforded to him amounted to an equivalent period of compensatory rest. He was freed from all aspects of his work apart from the need to remain on the premises, and to be on call. He was, in principle, allowed a 20 minute break. He was compensated for the fact that he might be interrupted, and for actual interruption, by being allowed to choose when to have his break and starting his break again if interruption occurred (para.27).

74 The issue of an employer's obligations to provide a worker with an "equivalent" period of compensatory rest under WTR reg.24(a) was addressed by the Court of Appeal in *Network Rail Infrastructure Ltd v Crawford [2019] ICR 1206*. In particular:

(a) In Crawford, the employee was a railway signalman working on single-manned boxes on eight-hour shifts, to which the Reg. 21(f) special case exclusion to Reg.12 applied. He had no rostered breaks but was expected to take breaks when there were naturally occurring breaks in work.

(b) The Court held at paragraph 43 that Regulation 24 was not to be interpreted as a requirement to provide at least a 20-minute uninterrupted period of rest. A period of compensatory rest was not intended to be identical to a rest break under Regulation 12, but merely had to be of the same value so as to contribute to the worker's well-being.

Time-limits for WTR and unauthorised deduction of wages claims

75 Reg 30(2) WTR provides that:

(a) An employment tribunal shall not consider a complaint under this regulation unless it is presented— (a)before the end of the period of three months (or, in a case to which regulation 38(2) applies, six months) beginning with the date on which it is alleged that the exercise of the right should have been permitted (or in the case of a rest period or leave extending over more than one day, the date on which it should have been permitted to begin) or, as the case may be, the payment should have been made; or

(b) within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three or, as the case may be, six months.

76 The case law on the correct approach to the test of reasonable practicability was summarised by the Court of Appeal (Underhill LJ) in *Lowri Beck Services v Brophy [2019] EWCA Civ 2490* at [12]. In particular at paragraph 12(3) which provides that:

If an employee misses the time limit because he or she is ignorant about the existence of a time limit, or mistaken about when it expires in their case, the question is whether that ignorance or mistake is reasonable. If it is, then it will have been reasonably practicable for them to bring the claim in time (see Wall's Meat Co Ltd v Khan [1979] ICR 52); but it is important to note that in assessing whether ignorance or mistake are reasonable it is necessary to take into account any enquiries which the claimant or their adviser should have made.

Conclusions

77 In order to reach our conclusions on the issues, we have applied the law to the facts found. In reaching our conclusions, we have considered the burden of proof under the Equality Act 2010. The tribunal has not found facts from which an inference of discrimination could be drawn. The burden of proof provisions have not therefore assisted the claimant in this case.

78 The sub-headings below refer to the allegations raised in the list of issues.

Issue 1 - holiday pay claims – 2019 and 2020

79 The claimant alleges that the respondent has failed to pay the claimant ten days holiday in 2019 and 62.4 hours holiday pay in 2020 (reducing to 12.07 hours, after a further payment of 50.33 hours in June 2021 - see further below).

80 The 10 days in question in 2019 are identified in the Claimant's table at page 222. They cover the period from 3rd September 2019 to 13th December 2019. The Claimant says that these holidays were authorised, but were not recorded on the system so that he was never in fact paid for them. He raised a complaint about this, which was not resolved until November/December 2020 when the Respondent's decision was confirmed. The Respondent's position is that no further payment is outstanding for holidays taken on these dates.

81 Issue 1.5 notes that this claim is on the face of it significantly out of time in any event. Any claim in respect of this alleged series of deductions from wages should have been presented by 12th March 2020 at the latest.

82 Issue 1.6 records that the Claimant calculates his annual holiday entitlement in 2020 at 28 days. At 12 hours per day, that is a total of 336 hours. In his Amended Particulars of Claim dated 16th June 2021, he sets out the leave actually taken and paid as 18 days at 12 hours and 6 days at 9.6 hours. That is 273.6 hours, leaving on his calculation a shortfall of 62.4 hours. On 16th June 2021 he was paid, in recognition of the fact that there had been an underpayment, a further £451.24. That represents, on the hourly rate applicable at the time a payment for 50.33 hours. That still, therefore, leaves an alleged shortfall of 12.07 hours. As at 16th June 2021 therefore, the claimant has received payment for, in total, 323.93 hours holiday taken in 2020.

83 The claim appears to arise from the claimant's mistaken view that he is entitled to 28 days paid holiday per year, regardless of the number of days he works per week. That is in the Tribunal's judgement, a misunderstanding. The claimant's entitlement is to 5.6 weeks leave per year. When the claimant's contractual hours are four x 12 hour shifts per week, his entitlement is to 5.6 x 4, which equals 22.4 days.

84 As for pay for those days, that depends, under the contract, on whether the pay is for the first 4 weeks of leave, or the remaining 1.6 weeks. Pay for the first 4 weeks is, under the contract based on average earnings over the previous 12 weeks when working; for the remaining 1.6 weeks, it is 12 hours per day.

85 In relation to the holiday year 2019, the issue is complicated by the fact that the claimant's hours up to September 2019, were less than 48 hours per week. The claimant has failed to provide the necessary documentation, to throw light on this issue, and in particular, the extent to which he objected at the time to the reduction on hours. The tribunal concludes that by his conduct, and in particular by failing to object to the reduction in hours, the claimant accepted a variation to his contract, which led to an average of 35 hours per week in 2019. (If the claimant did complain, and there is documentary evidence of that, that should have been before the tribunal. It is now too late

for the claimant to put that evidence before the Tribunal. The conclusions reached by the tribunal are based on the evidence before us at this time.)

86 The Tribunal notes that from in or about September 2019, the claimant was again working an average of 48 hours per week. Based on his average hours, the claimant is entitled to 5.6 x 35, which equals 196 hours. Even if, from September 2019, it is assumed that the claimant is entitled to holiday pay on the basis of 48 hours, that would entitle him to 24.24 further hours (an extra 13 hours per week x 1/3 (i.e. 4 months of the year) x 5.6 weeks), giving a total of 220.24 hours. The claimant says he has been paid 18 days at 12 hours per day, 216 hours. However, page 221 of the bundle shows that the claimant has been paid a total of 247 hours, which the tribunal accepts. Therefore the claimant has been paid all the holiday pay he is entitled to in 2019. The fact that holiday may have been authorised, apparently in error, does not change the position as to what is contractually/statutorily payable.

87 Even if the Tribunal had found for the claimant in relation to the 2019 holiday year, there would have been time limit issues, which we will explore briefly below.

88 In relation to the 2020 holiday year, the Tribunal again notes the claimant's argument that, on the basis of his interpretation of the section of the government website dealing with holiday pay, he is entitled to 28 days x 12 hours = 336 hours. As noted above, the claimant is confusing days and weeks. His entitlement under the Working Time Regulations is to 5.6 weeks holiday per year. In relation to that holiday entitlement, his holiday pay should be based on average working hours. It is clear from page 256, that the average weekly hours of the claimant in 2020 was 59.5 hours. That has been multiplied by 5.6 weeks, to give the figure for annual holiday hours of just under 333 hours. That is what the claimant has been paid. No further holiday pay is due.

89 The 2020 claim does succeed, to the extent that there was an underpayment of £451.42 when the claim form was submitted, until payment was made on 16 June 2021. The claimant is entitled to a declaration to that effect. He is not however entitled to any further compensation, for any losses arising from that underpayment since he has not proved any loss in relation to interest - see the facts above in relation to the Greencore Leeds Bank Holiday issue, and the conclusions which follow on Issue 2.

Issue 2 - failing to pay the claimant double time when he worked bank holidays on 31 December 2020 and 1 January 2021 at Greencore Leeds

90 This arose due to an error by the respondent. The error has since been rectified. The claimant was paid the sum owed of £104.64, in September 2021. The claim therefore succeeds but no further pay is due.

91 The only outstanding issue is therefore whether the failure to pay the sum on time has resulted in any quantifiable financial loss to the Claimant for the period up to September 2021, for which he might then be awarded compensation under section 24(2) of the Employment Rights Act 1996. The claimant had alleged that his account was permanently in "minus" so that there may be identifiable interest charges arising. It is however for the claimant to prove his loss. The claimant has failed to provide documentary evidence showing that his account was in arrears, and showing what interest

rate was payable on the arrears. He has therefore failed to prove any financial loss, and no compensation is payable to him.

Issue 3 – cancellation of five shifts in 2020

92 The details of the shifts are at page 71 and set out in the facts above. The claim is quantified at £547.32 gross.

93 The difficulty for the claimant in relation to this claim is that it is pursued as a claim for unauthorised deduction of wages. The claimant did not work the shifts however, because they had been cancelled. The Tribunal has accepted, in the findings of fact, that human error is likely to arise, on the part of both parties. On balance, the tribunal concludes that had the claimant checked Javelin on the morning of the shift, he would have seen that, other than 3 August 2020 shift, the shifts had been cancelled. In relation to the latter shift, that does not appear to have been cancelled and the tribunal has not been shown text messages or other evidence relating to the cancellation of that shift. The facts support the claimant in relation to that shift.

94 However, the claim should be for breach of contract and/or negligence. Since the claimant remains an employee, he cannot bring a breach of contract claim in the Employment Tribunal in relation to the sums he says are due. The tribunal does not have jurisdiction to hear a claim of negligence. These claims therefore must fail and are dismissed.

95 The Tribunal would simply add that, in circumstances where errors are made by the respondent, and that is clearly evidenced at the time (because there are no emails/texts/voicemail messages and the shift is still live on Javelin), it would appear to be just to award an employee in those circumstances pay for the full shift, as well as travel expenses. That is because the opportunity to work on that day, has been lost. Ultimately however that will be a matter for another court, on another day, if necessary.

96 A time limit issue has also been raised in relation to this issue, but given our conclusions above on the lack of jurisdiction of the tribunal to determine this claim, nothing further needs to be said about time limits about this claim.

Issue 4 - failing to allow the claimant a rest break contrary to regulation 12(1) Working Time Regulations 1998 when he worked at Bradford hospital, including in January, February, May and June 2021

97 The 19 occasions are set out on pages 285 and 286. It is accepted that the claimant worked at Bradford Royal infirmary on those dates. The claimant was refused permission to take a 20 minute rest break as prescribed by regulation 12 and 30 (1) (a) of the Working Time Regulations 1998 on each occasion.

98 The respondent relies on the Regulation 21(b) WTR exception. The tribunal concludes that this exception applies. The claimant is engaged in security activities, and a permanent presence is required, in order to protect persons and property. In relation to the latter, the purpose of the provision of additional security services was, in part, to reduce the footfall in the hospital, during the pandemic.

99 Whilst the tribunal accepts that there will still be a flow of people during the night, that flow of people is not continuous, and during the 12 hour shift, the claimant is able to take compensatory rest. This claim therefore fails.

100 The Tribunal would simply add that in light of the evidence which has emerged for the first time at this Employment Tribunal hearing, that the claimant has been told by a member of staff at the Hospital that from 18 June 2021 he can take a break, the respondent may well want to look at the issue again. It may be that regulation 21(b) no longer applies, a rest break should be provided, the Assignment Instructions should be updated, and employees informed. We are however simply raising it as a possibility; we are not determining the issue for the future.

Direct race discrimination claims – Issue 5

101 It is alleged by the claimant that Mr Jones treated him less favourably because he is black and/or because he is a German national and in particular:

a. Issue 5.1 - from about December 2020 to February 2021 refusing to authorise payment of holiday pay after the claimant's grievance was upheld confirming that he should be paid for the holiday;

b. Issue 5.2 - in or about May and June 2019 changing the claimant's hours when he was working at Xuber DXE and then refusing to change back to the hours agreed with the client until his manager at Xuber DXE confirmed the agreed hours.

c. Issue 5.3 - not giving him 17 shifts per month which his contract requires.

102 Before reaching our conclusions on these three discrimination complaints, the tribunal notes that the claimant has not previously raised a complaint of race discrimination in any internal grievance or with Acas. The tribunal has also found that Mr Jones was not aware that the claimant was of German nationality prior to these proceedings being commenced, although he was aware of the claimant's race. The tribunal has also accepted the respondent's evidence that day to day management of Security Officers is by AOCs, not Mr Jones.

Authorisation of holiday pay

103 It is the case that 28 days holiday was not approved. That is because the claimant is not entitled to 28 days holiday, but 5.6 weeks. The tribunal has found that there was still a shortfall in 2020, resulting in a further payment on 16 June 2021. The Tribunal is satisfied however that Mr Jones and others were following the rules in relation to holiday pay applicable to all employees. In the 5 January 2021 email from Neil Jones to the claimant, Mr Jones simply sets out the HR view regarding the calculation of a payment for annual leave. The tribunal is satisfied that the application of those rules did not amount to less favourable treatment. The tribunal is further satisfied that the underpayment, which was rectified in June 2021, was due to a genuine mistake; it had nothing whatsoever to do with the claimant's race.

104 The tribunal has noted that during the grievance process, Chris Mould agreed 28 days. That however was an error. The tribunal again notes that the claimant specifically confirmed that he 'had nothing against Mr Mould'.

Xuber DXE hours

105 The tribunal refers to the findings of fact above. The tribunal concludes that Mr Jones had a genuine belief that there was a Working Time Regulations issue, and that the matter having being further explored, the claimant's hours were

restored. There being no evidence on which the tribunal could draw an inference of discrimination, the burden of proof does not shift. The tribunal is satisfied that this issue arose because of a genuine misunderstanding, which was cleared up after further discussions and investigation. Again, it had nothing whatsoever to do with the claimant's race.

106 A further issue in relation to this specific discrimination allegation is that it is on the face of it substantially out of time. In the light of our findings in relation to the discrimination issues however, it is not necessary or proportionate to go on to consider the question of time limits at any length.

Not giving the claimant 17 shifts per month

107 It appears to be the case that there was a shortfall in shifts, during the early part of 2021, according to the records we have been shown. We were not referred to any records, in relation to those months, of the claimant being offered shifts, and refusing them. There is just a general allegation by the respondent of that.

108 However, the tribunal accepts the evidence of Mr Jones that AOCs have the prime responsibility for the day-to-day allocation of shifts. There has been no credible evidence presented to the tribunal, that Mr Jones has instructed the relevant AOC to offer the claimant less shifts than he is entitled to. What evidence there is that is before us shows that when the claimant raised the shortfall in shifts, Mr Jones responded – see the email of 17 September 2021. It is not the claimant's case that the AOCs are or have been motivated by his race/national origins. In the circumstances, the claimant's claim against Mr Jones does not succeed.

Time limits

Issue 12 - Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 19th November 2020 may not have been brought in time.

Issue 13 - Were the discrimination complaints made within the time limit in section 123 of the Equality Act 2010? The Tribunal will decide:

Issue 13.1 - Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

Issue 13.2 - If not, was there conduct extending over a period?

Issue 13.3 - If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?

Issue 13.4 - If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:

Issue 13.4.1 - Why were the complaints not made to the Tribunal in time?

Issue 13.4.2 - In any event, is it just and equitable in all the circumstances to extend time?

109 Our conclusion on the time limits issues in the discrimination claims is as follows. Although time limits are not as strictly applied in discrimination claims, as they are in other types of claims such as holiday pay and wages claims, an extension of time should still be the exception rather than the rule. Given that

we have arrived at clear conclusions that no discrimination has occurred, there is no conduct extending over a period relating to any discrimination.

110 No time limit issue arises in relation to the 2020 holiday pay, or the 2021 shifts. In light of our conclusion that these claims fail, the Tribunal considers it only necessary to conclude, in relation to the 2019 Xuber DXE claims, which are substantially out of time, that we would not have been satisfied, on the basis of the explanation given by the claimant as to why he did not submit the claim before he did, that it would it be just and equitable to extend the usual three month time limit. See further the reasoning below regarding that explanation.

Issue 14 - Were any other claims (that is all those apart from discrimination) made within the time limit in section 23 of the Employment Rights Act 1996 or regulation 30 of the Working me Regulations 1998? The Tribunal will decide:

Issue 14.1 - Was the claim made to the Tribunal within three months (plus early conciliation extension) of the [effective date of termination / act complained of / date of payment of the wages from which the deduction was made etc]?

Issue 14.2 - [unauthorised deductions only] 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?

Issue 14.3 - If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

Issue 14.4 - 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?

111 The Tribunal has not upheld the wages/holiday pay claims, save for two matters, which the claimant is not entitled to any further compensation for. No time limit arises in relation to those upheld claims.

112 Since the other claims have been dismissed, the Tribunal simply records at this stage that in our judgment, the claimant did not make sufficient enquiries about time limits, at the appropriate time. Further, he appears to have a misunderstanding about the application of the SIA Code. As a matter of law, the provisions of the SIA Code cannot require an internal process to be completed before an Employment Tribunal claim is issued. Whilst the Tribunal accepts that that is the claimant's genuine view, we do not consider that view to be a reasonable one. Further, whilst the Tribunal also accepts that the claimant felt under a moral duty to resolve matters through negotiation, prior to submitting an Employment Tribunal claim, it was not reasonable to delay issuing the claim on the basis of what he considers to be his moral duty. It would have been reasonably practicable for the claimant to submit the claims in time had he made reasonable enquiries about Employment Tribunal time limits when they first arose.

113 As to whether there was a series of deductions, it is not possible to deal with that in the abstract and nothing further needs to be said.

Concluding remarks

114 Employees are entitled to bring Employment Tribunal claims and respondents are entitled to robustly defend them. The tribunal makes no criticism of either party in this case in relation to the respective positions that they have taken.

The tribunal simply wishes to record its regret that it wasn't possible for the parties to resolve the matters earlier, given that there is an ongoing employment relationship. That has resulted, as virtually all litigation does, in financial and emotional cost and stress. The members of the Tribunal sincerely hope that both parties are now able to put these matters behind them, especially since at no stage has any question mark been raised in these proceedings about the claimant's competency. To the extent to which the rest break issue can be revisited; and to the extent that it is possible to offer the claimant work on a permanent site; that may help to reduce the potential for conflict in future. Whether those suggestions are practicable another matter. They are merely put forward as suggestions. Further, to the extent that issues continue to arise regarding shifts and pay, it is to be hoped that those can be properly investigated, documents obtained and retained in relation to them at the time, and the issues resolved as quickly as possible.

Employment Judge A James
North East Region
Dated 28 June 2022

Sent to the parties on:
Dated 1 July 2022

ANNEX A – AGREED LIST OF ISSUES

Wages/holiday pay claims

1. Failure to pay the claimant for 10 days holiday in 2019 and two days holiday in 2020.

   1.1. The 10 days in question are identified in the Claimant's table [222]. They cover the period from 3rd September 2019 to 13th December 2019.

   1.2. The Claimant says that these holidays were authorised, but were not recorded on the system so that he was never in fact paid for them. He raised a complaint about this, which was not resolved until November/December 2020 when the Respondent's decision was confirmed.

   1.3. The Respondent's position is that no further payment is outstanding for holidays taken on these dates, though the specific details of the defence are not set out.

   1.4. The issues are therefore whether these holidays were in fact authorised, whether they were in fact taken, whether they were paid and whether the Claimant has a result been paid less than his annual holiday entitlement for that year (nb the Claimant says that he took and was paid for only 18 days holiday in 2019, but his list does not include any of the 8 bank holidays in that year – which may also have been paid leave).

   1.5. This claim is, however, on the face of it significantly out of time in any event. Any claim in respect of this alleged series of deductions from wages should have been presented by 12th March 2020 at the latest. See the section on Time Limits below.

   1.6. In 2020 the Claimant calculates his annual holiday entitlement at 28 days, 12 hours per day. That is a total of 336 hours. In his Amended Particulars of Claim dated 16th June 2021, he sets out the leave actually taken and paid as 18 days at 12 hours and 6 days at 9.6 hours. That is 273.6 hours, leaving on his calculation a shortfall of 62.4 hours (not the 52.4 hours which formed the basis of Judge Davis' earlier calculations, and which may therefore be a mistake or a mishearing of the figure on her part). On 16th June 2021 he was paid, in recognition of the fact that here had been an underpayment, a further £451.24 [256]. That represents, on the hourly rate applicable at the time a payment for 50.33 hours. That still, therefore, leaves an alleged shortfall of 12.07 hours.

   1.7. The Claimant has now - as at 16th June 2021 - received payment for, in total. 323.93 hours holiday taken in 2020.The issue is therefore whether he in fact took any additional holiday in excess of 323.93 hours and which remains unpaid. If the Claimant did not in fact take his full 28 days holiday entitlement he cannot be paid in lieu for the outstanding balance: the particular issue is whether the 6 days which the Claimant says he did take but which were only paid 9 .6 hours per day ought in fact to have been paid at 12 hours.

2. Failing to pay the claimant double time when he worked bank holidays on 31 December 2020 and 1 January 2021 at Greencore Leeds. Total £104.64.

   2.1. This sum was in fact paid in September 2021.

2.2. The only outstanding issue is therefore whether the failure to pay the sum properly due on time has in fact resulted in any quantifiable financial loss to the Claimant for the period up to September 2021, and for which might then be awarded compensation under section 24 (2) of the Employment Rights Act 1996. The claimant says that his account is permanently in "minus" so that there may be identifiable interest charges arising, but they will not be a large sum by any means.

3. Approximately five times in 2020, sent to shifts that were then cancelled. He received travel expenses but was not paid for his time. He is going to provide further details [page 71]. This happened in 2017 too. He is not bringing a claim about that but will refer to it as part of the background. These days are now identified, and confirmed to be in fact 5 in total, in the Claimant's table. They cover the period from 26th March 2020 to 3rd August 2020. The claim is quantified at £547.32 gross.

   3.1. The Respondent denies liability for any further payment in the circumstances, because it says that the shifts were duly cancelled and recorded as such on the system, but that the Claimant failed to check before attending. A payment of expenses, but not salary, was made on one of these occasions but the Respondent says that was merely an "ex-gratia" payment, and it was not required to make it.

   3.2. This claim is, however, on the face of it out of time in any event. Any claim in respect of this alleged series of deductions from wages should have been presented by 2nd November 2020 at the latest. See the section on Time Limits below.

4. Failing to allow him a rest break contrary to regulation 12(1) Working Time Regulations 1998 when he worked at Bradford hospital, including in January, February, May and June 2021 [page 285].

   4.1. The Claimant says that on each and every occasion when he was assigned to work at Bradford Hospital he was refused permission to take a 20 minute rest break as prescribed by regulation 12 and 30 (1) (a) of the Working Time Regulations 1998.

   4.2. In his tables he identifies 19 such occasions in the periods before and after presentation of the ET1 and prior to the first case management hearing, when this claim was first articulated.

   4.3. The Claimant was paid for the full 12 hours of his shifts, so that he has suffered no actual financial loss. Compensation under regulation 30(4) Working Time Regulations 1998 is only therefore such as is just and equitable to award, having regard to the employer's default.

   4.4. The issue is factually whether or not the Claimant was indeed refused permission to take a rest break. The respondent says that he was not, and that there was nothing to prevent him taking a break at an appropriate time within his shift.

Direct race discrimination claims

5. His manager Mr Jones treating him less favourably because he is black and/or because he is a German national and in particular:

5.1. from about December 2020 to February 2021 refusing to authorise payment of holiday pay after the claimant's grievance was upheld confirming that he should be paid for the holiday;

5.2. in or about May and June 2019 changing the claimant's hours when he was working at Xuber DXE and then refusing to change back to the hours agreed with the client until his manager at Xuber DXE confirmed the agreed hours.

5.3. not giving him 17 shifts per month which his contract requires.

6. The Claimant has now identified 5 alleged comparators.

7. In reality these do not appear to be material comparators in respect of the specifically itemised acts of alleged discrimination, who are in fact in not materially different circumstances to the Claimant (section 23 (1) Equality Act 2010).

8. Rather the Claimant's case is that these people were able to work without hindrance under Mr Jones, without any apparent difficulty over their taking of holidays, or the allocation of shifts or hours under their contracts. Therefore he says an inference should be drawn that the problems which he alone encountered in the course of his employment are because of his race (colour or nationality).

9. Whilst any particular facts (including any background allegation) that the Claimant will seek to prove in order to allow this inference to be drawn (section 136 of the Equality Act 2010), have still not been fully ascertained this will be a matter that will depend on the evidence as to any disparity of treatment that may actually emerge in the course of the hearing. The Respondent will, no doubt, assemble evidence as to the working circumstances and the terms and conditions of employment of the alleged comparators. If the burden of proof is reversed so that the Tribunal could, absent any other explanation, find a contravention of the Equality Act, it will, of course, have to show that on no grounds whatsoever was the detrimental treatment in fact because of an protected characteristic of the Claimant.

10. The alleged failure to allocate sufficient shifts in accordance with the Claimant's contract is confirmed to be from January 2021. This particular term of the contract of employment is denied, which is why the Claimant is ordered to produce very shortly a copy of the document which he is relying upon.

11. Allegations from 2019 are on the face of it substantially out of time. See the section on Time Limits below.

Time limits

12. Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before 19th November 2020 may not have been brought in time.

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

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

13.2. If not, was there conduct extending over a period?

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

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

13.4.1. Why were the complaints not made to the Tribunal in time?

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

14. Were any other claims (that is all those apart from discrimination) made within the time limit in section 23 of the Employment Rights Act 1996 or regulation 30 of the Working me Regulations 1998? The Tribunal will decide:

14.1. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the [effective date of termination / act complained of / date of payment of the wages from which the deduction was made etc]?

14.2. [unauthorised deductions only] 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?

14.3. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

14.4. 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?