EMPLOYMENT TRIBUNALS

Claimant: **Mr S Z Hussain**

Respondent: **G4S Secure Solutions (UK) Ltd**

Heard at: **East London Hearing Centre**

On: **21, 22 and 23 February 2023**

Before: **Acting Regional Employment Judge Burgher**
Members: **Ms J Houzer**
Ms P Alford

Appearances

For the Claimant: **Mr S Rahman (Counsel) then Mrs S Hussain (Wife)**
For the Respondent: **Mr G Mahmood (Counsel)**

Urdu Interpreter: **Ms N Forzi**

JUDGMENT

1. The Claimant's claim for unlawful victimisation fails and is dismissed.

2. The Claimant's claim for unauthorised deduction of wages fails and is dismissed.

REASONS

Issues

1. The Claimant was employed as a security guard by the Respondent and brings claims outlined in the issues below arising from his employment. The hearing started by identifying, clarifying and confirming the issues were as follows:

Jurisdiction – Time limits

1 The Claim form was presented on 13 May 2021. The Claimant contacted ACAS to commence Early Conciliation on 4 March 2021 and was issued a certificate on 15 April 2021.

1.1 Any individual acts or omission which took place before 5 December 2020 are potentially out of time.

1.2. With respect to the Claimant's discrimination complaints under the Equality Act 2010:

1.2.1. Does the Claimant prove that there was conduct extending over a period of time which is to be treated as done at the end of the period? Is such conduct accordingly in time?

1.2.2. Where any of the acts complained of are found to be out of time, would it be just and equitable for the Tribunal to extend the time limit?

1.3. With respect to the Claimant's unlawful deduction of wages complaint under the Employment Rights Act 1996

1.3.1. Does the Claimant prove that there were a series of deductions and the last deduction as being within the relevant period of 3 months?

1.3.2. Where any of the acts complained of are found to be out of time, are the Tribunal satisfied that it was not reasonably practicable to present it before 13 May 2021 and it is reasonable to extend time.

Victimisation–s27(1) Equality Act 2010

2. Did the Claimant do the following acts and were they protected acts:

i. On or around 16 April 2019 email to Andy Young complaining about favouritism and then had a discussion with his managers about being treated differently

ii. On or around 7 May 2019 email complaining about discrimination with the way that he and another colleague were being treated

iii. On or around 11 July 2019 sent a written grievance complaining about racism

iv. On or around 7 October 2019 email complaining about harassment, favouritism and racism

v. On or around 25 February 2020 email complaining that he wished to be treated fairly and managers should avoid discrimination

vi. On 6 July 2020, email complaining about being treated differently to other employees

vii. On 17 August 2020 email complaining that his grievances have not been responded to or resolved.

viii. On 25 August 2020 email complaining that he would be discussing his grievances with a solicitor or will send them to an employment tribunal

ix. On 17 November 2020 in grievance meeting with Ian Robinson making complaints of discrimination

x. On 22 December 2020 response to grievance outcome and complaining about discrimination.

3. Did the Respondent subject the Claimant to any of the following:

i. Ignoring and or not following up within a reasonable time on his written grievances

ii. From 15 June 2020 removing the Claimant from Ford site and not giving him pay or allocating him to another site

iii. On 17 November 2020 at the Claimant's grievance, the Respondent presented the Claimant with historical alleged complaints about him that had not been discussed with him when the allegations were supposed to have happened

iv. Not handing his grievance correctly and the grievance and appeal disregarding his evidence and outcome rejecting his grievances.

v. On 14 January 2021 presenting the Claimant with a new casual worker contract

vi. Respondent updating the intranet and recording the c as a zero hour worker contrary to his employment contract.

4. If so, did 3(i) to (vi) amount to detriments?

5. If so:

i. did the Respondent subject the Claimant to any or all of those detriments because the Claimant did the protected acts at 2(i) to (x);

ii or did the Respondent subject the Claimant to any or all of those detriments because the Respondent believed that the Claimant had done, or may do, a protected act?

6. Was there conduct extending over a period of time which is to be treated as done at the end of the period? Is such conduct accordingly in time?

7. If any of the acts complained of are found to be out of time, would it be just and equitable for the Tribunal to extend the time limit?

Unlawful Deduction of Wages including failure to pay national minimum wage – s13 Employment Rights Act 1996

8. What was the contractual relationship between the Respondent and the Claimant? The Claimant asserts that this is governed by a contract dated 13 November 2013, signed on 26 November 2013 entitles him to be paid for minimum of 42 hours per week at minimum wage rate. The Respondent contends that there are different contractual arrangements for the period after the contract of 13 November 2013 and up to June 2020; and the period after June 2020 when the Respondent says the Claimant (at his request) was engaged as a casual worker (with no guaranteed hours).

9. Did the Respondent fail to pay the Claimant his full contractual salary between January 2019 and 15 June 2020 without contractual justification?

10. Did the Respondent fail to pay the Claimant his contractual salary between 16 June 2020 to 12 May 2021 at the national minimum wage for a guaranteed period of 42 hours per week? Has the Respondent continued to fail to pay the Claimant his entitlement of 42 hours pay from 13 May 2021 (date of claim) to date by not providing him with work.

11. If such failures to pay are established did this amount to an unlawful deduction from wages?

12. Was the unauthorised deduction complaint made within the time limit in section 23 of the Employment Rights Act 1996?

The Tribunal will decide:

i. Was the claim made to the Tribunal within three months of the date of the payment of the wages from which the deduction was made?
ii. If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?

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 thereafter?

13. Does this amount to a continuing unlawful deduction of wages so as to give the Tribunal jurisdiction to hear the claim or did any breaks in the period of deductions deprive the Tribunal of jurisdiction?

Remedies

ACAS

14. In the event the Claimant succeeds, should any award be adjusted under s207A of Trade Union and Labour Relations (Consolidation) Act 1992 on account of a failure to follow an applicable Acas Code. If so, by how much? The Claimant says that the Respondent failed to respond to grievances in a timely manner. The Respondent says that the Claimant failed to exercise his right to appeal in relation to some grievances.

Discrimination

15. What (if any) financial losses has discrimination caused the Claimant?

16. Has the Claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

17. If not, for what period should the Claimant be compensated?

18. What injury to feelings has the discrimination caused the Claimant and how much compensation should be awarded for that?

Unlawful deduction from wages

19. What (if any) sum is owed by the Respondent to the Claimant?

Procedural matters

2. The Tribunal was assisted by Ms N Forzi, Urdu interpreter who provided simultaneous translation to the Claimant by telephone during the CVP hearing. When the Claimant was giving evidence or asking questions the translation was sequential.

3. On the second day of the hearing, Mr S Rahman, on behalf of the Claimant, withdrew from representing the Claimant. He indicated that just prior to the Claimant's re-examination that he needed time to seek professional advice, and was given limited scope to take instructions from the Claimant about his position. It transpired the Mr Rahman felt compelled to withdraw from proceedings. The Claimant was given an opportunity to make representations on how he would like to proceed. He stated that he did not need a solicitor or barrister and wanted to continue with his wife, Mrs Hussain, speaking on his behalf and questioning the Respondent's witnesses. Mrs Hussain also needed Ms Forzi's translation assistance.

4. When considering the appropriate way to proceed, the Tribunal concluded that it was in accordance with the overriding objective to continue. The Tribunal is accustomed to dealing with cases with litigants in person and notwithstanding the language difficulties it was appropriate to continue given that the Claimant had given his evidence and had been cross examined; the issues were well defined and disputes clear to the Tribunal; the claims were now dated; and Ms Forzi would interpret and explain the process once outlined. We allowed Mrs Hussain breaks to consider questions of witnesses and adjourned the case overnight to enable to the Claimant to draft closing arguments.

Evidence

5. The Claimant gave evidence on his own behalf. His understanding of English is limited, and it was necessary for him to give evidence by way of an interpreter and we were able to assisted by Miss Forzi, Urdu interpreter.

6. The Respondent called Mr Tony Russo, account manager, Mr Ian Robinson, operations manager at Ford operations and Mr Fraser Gordon, contracts manager to give evidence on its behalf.

7. All witnesses gave evidence under oath of affirmation and were subject to cross examination and questions from the Tribunal.

8. The Tribunal was also referred to relevant pages in an agreed bundle consisting of 434, pages and admitted a further document dated 8 July 2021 from Kenneth Costello to the Claimant.

Facts

9. The Tribunal has found the following facts from the evidence.

10. The Claimant is of Pakistani origin and commenced employment with the Respondent working on a casual working contract on the 30 March 2012. The casual working contract contained the following relevant terms.

Appointment & Location

On each occasion when you agreed to work for the Company, you will be employed will be employed as per the position/roll offered to you, undertaken security duties as, when and where to be mutually agreed between you and the Company.

Hours of work

You agree that the work will be offered on an as and when required basis. There is no guaranteed minimum number of hours

….

In accordance with the provisions of the Working Time Regulations 1998, you may elect to work more than an average of 48 hours per week, taken over a referencing period of 26 weeks …. If you do so, your contracted hours will not be affected but the Company may be able to offer you more than 48 hours per week if work is available.

The work offered to you may include day, night and weekend shifts and may include working on public and bank holidays. If you begin to work 48 hours or more per week and on a regular basis, the Company may offer you a full-time contract.

11. The Respondent sent the Claimant a casual work contract dated 20 March 2012. He signed this casual work contract on the 16 April 2012 and we find that he accepted and understood the terms of this agreement. Whilst he had only recently relocated to England from Pakistan, we infer from his signature on the contact that the terms were translated and explained to him before he signed it.

12. When working under the casual work contract the Claimant was working extensive hours on a regular basis. However, there were also periods when the Claimant was not assigned work. In November and December 2012, the Claimant wrote emails seeking help and guidance in not having a permanent site to work at and how to be assigned holiday pay when he had *'no work'*.

13. We find that the Claimant was fully aware of what a casual work contract was, specifically he was not obliged to be given work at any particular location or at all, and he was not obliged to accept work offered.

14. By letter dated 25 September 2023, Mr Trevor Mulvaney of the Respondent informed the Claimant that a review of the zero-hour contract, working hours and availability had been undertaken and the Respondent was of the opinion that the Claimant should be offered a full time contract based on an average of 42 hours per week.

15. The Claimant was subsequently offered a contract of employment on 13 November 2013. On 26 November 2013 the Claimant signed confirming acceptance of the terms and conditions of his contract of employment. The contract of employment had the following relevant terms.

2. Location and Mobility of Employment

2.1. The Company provides services to numerous different customers at a variety of locations. You will be allocated your assignments by your Manager's and you may be

required from time to time to work at different locations or on assignments within the operating area as directed by your manager and in accordance with the needs of the business and its customers, as such you will not be allocated one particular location as your place of work.

2.2. The nature of our business is the provision of security services. These services are provided to numerous different customers at a variety of locations. The particular services provided will therefore vary according to customer requirements and you will be expected to provide the services as indicated by the relevant manager and according to the requirements of each assignment.

5. Hours of Work

5.1. New employees who join without an SIA Licence must successfully complete the ITC and the SIA application process during week 1 of your employment. During this first week, your contracted hours will be specified by the timings of the courses. From week 2 and thereafter, your contracted hours will be an average of 42 hours taken over a period of several weeks which equates to 182 per calendar month.

…

5.4. Due to the nature of the Company's business, operational staff may be rostered to work varying shift patterns, embracing days, nights, weekends and public holidays. The Company is not obliged to give advance notice of any necessary shift / roster changes, although reasonable efforts will be made to give reasonable notice.

6. Pay

…

6.2 Aside from the rate of pay you will receive whilst undertaking and being subject to the company's mandatory training, screening/vetting process, wherein you will receive a rate equivalent to a sum of 90% of the applicable assignment rate, your normal contracted rate of pay will be in all other circumstances, the applicable National Minimum Wage rate applicable to your individual circumstances. The actual rate of pay you might receive could vary according to whichever rate is applicable to the assignment where you work (the Assignment Rate). The Assignment Rate varies from assignment to assignment. Your rate of pay will not fall below your contracted National Minimum Wage rate of pay.

…

6.4 The gross basic pay for operational employees is automatically calculated via a rostering system(Signet), at the local offices. Accordingly, any pay enquiries should be directed to the local office in the first instance. If pay enquiries are not satisfactorily resolved on being referred to the local office, then the employee should take the matter up via the Grievance Procedure.

16. We infer from his signature that the terms were translated and explained to him before he signed it and we find that the Claimant agreed and understood that in return for guaranteed 42 hours work, he could be assigned to work at any location by his manager; and he was contractually obliged to work where he was required by the Respondent.

17. The Claimant worked on this contract of employment assigned at Shell initially for a number of years before being located to the Ford Motor Company in Dagenham from September 2018.

18. From January 2019, we find that there were difficulties reported by others about working with the Claimant. This resulted in the Claimant receiving a decreased number of shifts from February to March 2019. The Claimant complained about not being given shifts and not being paid the correct amounts by email during this time.

19. On 16 April 2019 the Claimant emailed Andy Young and HR outlining that his grievances about shifts and pay had not been replied to and that he had not been paid his contracted hours for February and March 2019.

20. On 7 May 2019 the Claimant emailed Asim Butt and stated that there was inappropriate assigning of shifts. He stated that this was a serious injustice done to other members and was a form of discrimination.

21. We find that, to the extent that the Claimant received less than the 182 hours pay for the relevant months from February to May 2019, which the Claimant's pay slips would evidence, the Respondent was not complying with the contract which and any shortfall in payment would have amounted to an unlawful deduction of deduction of wages.

22. On 11 July 2019, the Claimant wrote grievance against night supervisor, Mr Conteh, arising from being threatened for refusing to cover a gate. The Claimant stated that Mr Conteh had refused to give the Claimant shifts and was showing racism, favoritism, and discrimination.

23. The Claimant's issues were informally addressed, and there were no further complaints until 7 October 2019 when the Claimant raised concerns about the roster. The Claimant referred to his 7 May 2019 and 11 July 2019 grievances for context and specifically referred to a recent verbal complaint he had made about favouritism and racism.

24. There was an attempt to address the Claimant's concerns and wishes to accommodate his personal circumstance. The Claimant was able to be released from working Saturday nights having stated that he did not wished to work them and he was removed from the roster to work Saturday nights at 'Gate 17' where he was working and this was confirmed in an email dated 6 January 2020 from Mr Conteh. Additionally, the Claimant did not wish to work at certain sites and was reluctant to work certain days and evenings so that he could be at home and support his wife who had medical conditions and needed his help to look after their children.

25. The Claimant's claim alleges that around 25 February 2020 he sent an email complaining that he wished to be treated fairly and managers should avoid discrimination. However, there was no email referred to the Tribunal on this date and the Claimant did not advance evidence of it.

26. The Claimant's timesheets for February and March 2020 show that he worked in excess of the 182 guaranteed monthly hours. In April 2020 the Claimant was

recorded as taking unpaid leave and then was absent due to sick leave did not work at all. The Claimant took annual leave in May 2020 and returned to work on 1 June 2020 until he was sent home from his shift on 15 June 2020.

27. Sometime in March 2020 Gate 17 where the Claimant was working had closed and following this the Claimant was assigned to different gates in Ford Dagenham. Also, between March and June 2020 there were negative reports from people the Claimant worked with alleging that he was not present at the gate when he should have been, that he left the gate unattended and that he was discovered asleep being asleep on duty.

28. The Claimant disputes the accuracy of what was reported in emails of Leah McSweeney (20 March 2020 and 17 June 2020), Zhuheb Miah (13 June 2020) and we do not engage with whether these reports were in fact accurate. However, we find that these reports were made by individuals who did not know of the Claimant's earlier complaints, whether protected acts or otherwise. There was no suggestion, nor could there have been on the evidence, that the negative events reported were because of earlier complaints and we find that the individuals were outlining their contemporaneous, even if subjective, frustrated perceptions of what they believe had occurred.

29. Specifically, in the context of what we have to decide, Leah McSweeney sent the Claimant home from work on the night shift on 14/15 June 2020 for allegedly being found asleep. On 17 June 2020 Ms McSweeney emailed Mr Russo as follows:

> At round 01:10am on the 15th June 2020 I had to send Syed Hussain home from his shift at J building due to him being found asleep in the company car this was flagged up to our AP officer whilst he was on patrol by workers in J building who had been on there break.
>
> They had been pressing there horn to wake him up with that failing the AP officer informed me and I went and banged on the car not once but twice to wake him up.
>
> With that I said to him I think the best thing was for him to go home and rest he didn't have much to say apart from ok so I asked him to meet me at Gate 20.
>
> From there I explained it would be best for him to go home to save any more problems his reply was that its was up to me that I could cover him and say that he was not sleeping when I arrived at J Building this was heard by Gate 20 guard Aziz when said I couldn't do that and that it was best for him to go home he accepted and left at just gone 01:15am.
>
> Control was informed at 01. 20am.

30. Mr Russo met with the Claimant on 19 June 2020. He states that sleeping on duty would have been an act of misconduct and had it been taken to disciplinary it was likely to result in the Claimant's dismissal. He states that he showed the Claimant a photograph of him sleeping on duty and the Claimant did not deny that he was asleep.

31. The Claimant categorically disputes the fact that he was found to be asleep. He disputes that he was shown a photograph of him asleep by Mr Russo. In his ET1 and witness statement make no reference at all to the context of him not being

allocated with work from 15 June 2020. He states at paragraph 35 of the ET1.

> On 15 June 2020, my managers stopped allocating any work to me and around the 19lh June 2020 I was told that they would transfer me to Denton or Tilbury because they did not have a fixed position for me to work at on the Ford Motor site in Dagenham. I explained if that is the case, then I do not mind continuing work with G4S as 'casual*. By this I meant, with no fixed site to work at, I was not requesting to change my employment contract.

32. The Claimant did not make himself available for work from the 19 June 2020. When he was accused of not accepting work he wrote an email dated 3 July 2020 stating:

> Dear Naseer,
>
> As per your highlighted line to work in FMC, my answer to that is "NO". I have got no issue on working at FMC. My Line Manager stopped me on 15th June from working at FMC and he called me after four days to attend a meeting at his office and gave me an offer of transfer to Denton or Tilbury, because my Gate 17 is now closed permanently. I therefore, requested him to kindly transfer me back at casual in G4S instead!
>
> Mr. Tony then forgot to send an email to you all to request my transfer back to G4S as a casual. I called him again after 4 days, he picked my phone and apologized to me. He then sent an email that day in evening to me and all of you. I later on called Tabz and you to sort out my issues.
>
> I have got no issue in working "day or night" at FMC but my only concern is that why am I the only person being targeted for "unequal distribution of shifts" at the FMC? If working day and night applies for me it shall apply for others too, including supervisors.
>
> As mentioned before, I have previously sent "grievances notes" to my compliance officer but unfortunately, he has failed to adequately investigate my complaints. I now suffer a detriment by being offered a transfer to Denton, Tilbury or back to G4S as a casual contractor rather than sorting out the issues that I have previously raised. …

33. Curiously, the Claimant stated before us that he did not understand the contents of this email that he says was written by his daughter. We reject his evidence in this regard. We find that the text we have underlined records the Claimant's position at the time, namely he did not wish to transfer to Denton or Tilbury and he requested to be transferred back to casual.

34. When matters progressed, and the Claimant was not receiving the hours he had hoped for, he complained in an email dated 6 July 2020

> … Moreover, 'I'll make you clear once again that I never myself requested him to transfer me on any other site until he gave me an offer of Denton and Tilbury; on the basis of which I than told him to transfer me back as a floating officer in G4S but never asked him to change my contracted hours from "42" to "0".
>
> Lastly, I don't want to leave FMC (Ford Motor Company) until I find any suitable site to transfer. I am writing this to address the issues and difficulties that I have been facing

> at this site. As you stated that your job is to provide services to the client, it is also mandatory for the management to look after your employee's concerns too.

35. We had to consider what was said and agreed at the 19 June 2020 meeting. This was a matter of significant dispute and importance to the issues to be decided. We find that Mr Russo stated that the Claimant's Gate 17 had closed. The Claimant was shown the photograph of him allegedly sleeping on duty and was told that he would not be permitted to work at Ford Dagenham. He was informed that there was a possibility of work at Tilbury or Denton. The Claimant did not want to work at either of these locations and stated that that he did not mind reverting to work as a casual employee. The significance of this is that Claimant would have been entitled to choose where he worked. However, in doing so he gave up the entitlement to a minimum 42 hours work each week. Going 'casual' could not have reasonably meant anything else, otherwise the Claimant would have benefitted from being able to decline where to work regardless of the Respondent's business requirements whilst still being entitled to be paid a minimum of 42 hours each week.

36. We find there was an agreement for the Claimant to return to a casual contract, and this agreement on 19 June 2020 ended the permanent contract of employment. Mr Russo was expected to complete the paperwork reflecting this agreement, but the Claimant later sought to change his mind when asked to confirm it by email.

37. By 6 July 2020 the Claimant was asserting that he wished to be a 'floating officer' with a minimum of 42 hours a week. He stated that he wanted to stay at Ford Dagenham. However, he had no contractual entitlement to work where he wished and he knew full well why he was removed from working at Ford Dagenham. The Claimant sought to change his mind as the reality of more limited hours under the newly agreed casual working contract became apparent. In this email the Claimant complained about unfair treatment. He stated:

> My dear friend my gate was closed on 18th March not today, but they are not giving me work as per my weekly contracted hours for last two months. This too had happened with me in year 2019. Kindly check your records for that. During these days there have been many changes in FMC site and some people are enjoying here. Especially, supervisors who are working day and night for about 12 hours but giving us officers only 8 hours shifts. Can you not see any unfair treatment here?
>
> I am suffering on this site since 2018 and have been very patient and tolerant that may be coming days will be better. But unfortunately, every time I have been targeted and treated unfairly. They are supporting their old officers who are taking an advantage of this since senior management too supports them. Can you not see any unfair treatment here?
>
> Many times I raised issue's regarding unfairness at distributing work shifts. Last month two officers left from Gate - 20 to somewhere else but they didn't bother asking me about this position and hence transferred a day officer in the Night shift, and confirmed that he has got five days guaranteed shifts (Mon-Fri). Can you not see any unfair treatment here?

38. However, the Claimant's change of mind did not mean that his permanent contract of employment continued. It had ended on 19 June 2020 when the agreement to transfer to casual was reached. From 19 June 2020 we find that the Claimant was

contracted as a casual worker, albeit that the formal written contract in this regard was not issued until after the Claimant's grievance was determined in December 2020.

39. The Claimant did not work any shifts for the Respondent in July 2020 but then started accepting ad hoc shifts, for the Respondent and was placed at GlaxoSmithKline, Lloyds Pharmacy Clinical HealthCare and Johnson Matthey PLC between September 2020 and January 2021.

40. On 17 August 2020 the Claimant sent an email to Mr Murray complaining that he was stopped from working at Ford and was not being allocated hours there. He complained that he had not received payment for his outstanding contractual hours since January 2019 which formed part of his earlier grievances.

41. On 25 August 2020 the Claimant sent an email to Mr Russo complaining that his grievances had not been responded to or resolved he would have no option but to discuss with his solicitor or raise matters with to the Employment Tribunal.

42. By letter dated 2 September 2020 the Claimant was invited to a meeting to take place on 7 September 2020 to discuss grievance issues, contract hours and work matters.

43. On 14 September 2020 the Claimant emailed a formal grievance to Paul Meddes of the Respondent and wrote

> …
>
> 2. I faced discrimination at the hands of my senior supervisor, supervisors and deputy supervisors for which I wrote a grievance letter but didn't get anything back in reply till yet. They didn't allocate equal shifts to me and did favouritism. They too used to change my rota without informing me.
>
> 3. For past three months (June 2020 - Aug 2020) I have been at home without pay. My manager stopped me from working at the FMC site without giving any valid reason.
>
> 4. My Manager transferred me back to Casual Zero Hour contract that I never accepted at first stance. Since then they are making me work as a floater from September 2020 which I am not meant to be doing as I never accepted the transfer.
>
> 5. Lastly, for last three months they didn't gave me any job though I was contracted for 42 hours.

44. The Claimant did not allege that this formal grievance amounted to a protected act.

45. By letter dated 29 September 2020, Ian Robinson informed the Claimant that a grievance meeting was arranged to take place on 7 October 2020. However, the Claimant sought to rearrange this date, he requested an interpreter and for Mr Costello not to attend as he was subject to the grievance concerns. The meeting was rearranged to take place on 13 October 2020, without Mr Costello being in attendance. The Claimant was invited to arrange an interpreter himself to attend. However, on 12 October 2020 the Claimant requested further postponement of the meeting as his GMB Representative could not accompany him. The Claimant later emailed on 28

October 2020 stating his GMB representative would be available after 10 November 2020. The meeting was rearranged and took place on 17 November 2020.

46. The Claimant makes no complaint about how the meeting was conducted; an interpreter and union representative was there. The discussion focused on the changes that occurred in June 2020 and the extent to which that amounted to discrimination.

47. On 15 December 2020, Mr Robinson sent the Claimant an email rejecting his grievance. The Claimant appealed against this by letter dated 22 December 2020. The Claimant's grievance appeal was heard on 16 February 2021 and subsequently dismissed by Mr Frazer Gordon on 25 February 2021.

48. Following the Respondent completing some internal discussions in January 2021 as to why the Claimant was not formally disciplined regarding the allegations against him at FMC in 2020 the Claimant was formally sent a casual staff working agreement on 14 January 2021. The Claimant objected to his by email on 20 January 2021 and reiterated his

49. In March 2021 the Claimant commenced employment with KK Security & FM Ltd where he earned significantly more than the amount he was earning with the Respondent under his previous permanent contract of employment.

50. Notwithstanding the Claimant's work for KK Security, his casual work contract with the Respondent subsisted. However, on 8 July 2021 Mr Costello wrote to the Claimant as follows:

> I write further to your recent conversations with member of our Scheduling Team. You have advised the team that you will not return to work until the matters currently under the jurisdiction of the Employment Tribunal service have completed.
>
> I note that you have not submitted a complaint recently, and we are not aware of any further outstanding issues which are not in front of the Tribunal which need to be resolved.
>
> The Employment Tribunal process and your ongoing attendance at work are two separate issues and we are keen to ensure that your attendance at work is not unnecessarily impacted by the ongoing Tribunal process. We would like to ensure you continue to be provided with access to work in the normal way, and that the current tribunal process does not unnecessarily prevent you from attending work.
>
> However, under the terms of your Casual Worker Agreement, you are not obligated to perform any work that is offered. <u>In light of this, and your statement that you will not return to work until the completion of the tribunal process we will refrain from offering you work until such time as you advise us you are intending to accept work</u> that is offered, or the outcome of your tribunal process is determined; whichever event occurs first. For the avoidance of doubt, <u>we are happy to continue to offer you available work should you advise us you wish to return</u>.

51. It is clear from this letter that the Respondent was no longer going to offer the Claimant further work until the Claimant advised of his wish to return to work. No such notification was evidenced before us.

Law

52. Section 27 Equality Act 2010 states

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

53. Mr Mahmood referred the Tribunal to a number of cases including the case of Waters v. Commissioner of Police for the Metropolis [1997] ICR 1073 when considering what is a protected act, specifically simply using the word 'discrimination. Without providing sufficient information or facts would not amount to a protected act.

54. Mr Mahmood also referred us to the relevant factors of knowledge and causation when considering victimisation complaints. For knowledge, in the Court of Appeal case of Scott v London Borough of Hillingdon (2001) EWCA LJ Keene stated:

> 9. It is not in dispute that to establish victimisation under that provision the complainant must establish that the discriminator knew or suspected that the complainant had done the protected act. Without such knowledge or suspicion, there could be no causal link between the protected act and the less favourable treatment.
>
> 19 …knowledge on the part of the alleged discriminator of the protected act is a pre-condition to a finding of victimisation.

55. In respect of causation the House of Lords case of Chief Constable of West Yorkshire Police v Khan 2001 ICR 1065, HL held that the tribunal must identify 'the real reason, the core reason, the motive for the treatment complained of.

56. For victimisation complaint time limits section 123 of the Equality Act 2010 states:

> 123 Time limits
>
> (1) …..a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (2) Proceedings may not be brought in reliance on section 121(1) after
>
> the end of—
>
> (a) the period of 6 months starting with the date of the act to which the proceedings relate, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> (a) when P does an act inconsistent with doing it, or
>
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

57. The Tribunal would need to consider whether alleged conduct extended over a period. If the matters were out of time the Tribunal has a discretion to extend time if it is considered just and equitable to do so. In the case of Adedeji v University Hospitals Birmingham NHS Trust [2021] EWCA Civ 23. Underhill LJ held

> "The best approach for a tribunal in considering the exercise of the discretion under section 123 (1) (b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular (as Holland J notes) "the length of, and the reasons for, the delay". If it checks those factors against the list in Keeble, well and good; but I would not recommend taking it as the framework for its thinking".

58. In respect of the unlawful deduction of wages complaint section 13 of the Employment Rights Act 1996 states:

> 13 Right not to suffer unauthorised deductions.
>
> (1) An employer shall not make a deduction from wages of a worker employed by him unless—
>
> (a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or
>
> (b) the worker has previously signified in writing his agreement or consent to the making of the deduction.
>
> (2) In this section "relevant provision", in relation to a worker's contract, means a provision of the contract comprised—
>
> (a) in one or more written terms of the contract of which the employer has given the worker a copy on an occasion prior to the employer making the deduction in question, or
>
> (b) in one or more terms of the contract (whether express or implied and, if express, whether oral or in writing) the existence and effect, or combined effect, of which in relation to the worker the employer has notified to the worker in writing on such an occasion.
>
> (3) Where the total amount of wages paid on any occasion by an employer to a worker employed by him is less than the total amount of the wages properly payable by him to the worker on that occasion (after deductions), the amount of the deficiency shall be treated for the purposes of this Part as a deduction made by the employer from the worker's wages on that occasion.
>
> (4) Subsection (3) does not apply in so far as the deficiency is attributable to an error of any description on the part of the employer affecting the computation by him of the gross amount of the wages properly payable by him to the worker on that occasion.
>
> (5) For the purposes of this section a relevant provision of a worker's contract having effect by virtue of a variation of the contract does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the variation took effect.
>
> (6) For the purposes of this section an agreement or consent signified by a worker does not operate to authorise the making of a deduction on account of any conduct of the worker, or any other event occurring, before the agreement or consent was signified.
>
> (7) This section does not affect any other statutory provision by virtue of which a sum payable to a worker by his employer but not constituting "wages" within the meaning of this Part is not to be subject to a deduction at the instance of the employer.

59. In the Court of Appeal case of New Century Cleaning Co Ltd v Church 2000 IRLR 27, Morritt LJ held that a legal entitlement to wages meant an entitlement arising from the contract of employment. The words "or otherwise" did not to extend the scope

of ‘sums payable to the worker in connection with employment beyond the workers entitlement. has some entitlement).

60. We were referred to the case of Greg May (Carpet Fitters and Contractors) Ltd v Dring 1990 ICR 188, EAT when assessing what a worker is contractually entitled to. Specifically, we have to decide, on ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasion. This involves consideration of whether there was an agreed variation of contract.

61. Section 23 of the Employment Rights Act 1996 sets out the time limits for unauthorised deductions of wages as follows:

> 23 Complaints to employment tribunals.
>
> (1)A worker may present a complaint to an employment tribunal—
>
> (a) that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),
> …
>
> (2)Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—
>
> (a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made, or
>
> (b) in the case of a complaint relating to a payment received by the employer, the date when the payment was received.
>
> (3) Where a complaint is brought under this section in respect of—
>
> (a) a series of deductions or payments, or
>
> (b) a number of payments falling within subsection (1)(d) and made in pursuance of demands for payment subject to the same limit under section 21(1) but received by the employer on different dates,
> the references in subsection (2) to the deduction or payment are to the last deduction or payment in the series or to the last of the payments so received.
>
> (3A) Section 207B (extension of time limits to facilitate conciliation before institution of proceedings) applies for the purposes of subsection (2).
>
> (4) Where the employment tribunal is satisfied that it was not reasonably practicable for a complaint under this section to be presented before the end of the relevant period of three months, the tribunal may consider the complaint if it is presented within such further period as the tribunal considers reasonable.

> (4A) An employment tribunal is not (despite subsections (3) and (4)) to consider so much of a complaint brought under this section as relates to a deduction where the date of payment of the wages from which the deduction was made was before the period of two years ending with the date of presentation of the complaint.
> (4B)(4A) does not apply so far as a complaint relates to a deduction from wages that are of a kind mentioned in section 27(1)(b) to (j).

62. In relation to the section 23 Employment Rights Act 1996 time limit provisions, the issue is whether it was reasonably practicable to have presented the claim in time. The Tribunal considered the guidance in the case of Palmer and Saunders v Southend-on- Sea Borough Council [1984] IRLR 119, CA where at paragraph 35 May LJ outlined the test of reasonable practicability. This is construed as assessing what is reasonably feasible or what is reasonably capable of being done. The Tribunal has regard to the fact that there are numerous factors that a Tribunal can properly consider when determining whether it is reasonably feasible. However, when considering whether it is reasonably feasible to have been done, modern methods of obtaining information and communication mean ignorance of the law is no excuse.

Conclusions

63. In view of the facts and law outlined above, our conclusions on the issues are as follows.

Victimisation – s27(1) Equality Act 2010

64. In respect of alleged protected acts our conclusion are as follows:

64.1 The Claimant's email of 16 April 2019 to Andy Young complaining about favouritism did not amount to a protected act. No specific or implied reference to protected characteristics referred to in the Equality Act 2010 was raised for this email to fall within the scope of section 27. As an aside, it was clear from the evidence that at that time the Claimant was in fact complaining that employees with longer service were being given more favourable shift selections than him and this had nothing to do with a protected characteristic.

64.2 The Claimant's email of 7 May 2019 mentioned favoritism and discrimination. This does not mention a protected characteristic and the nature of the email, combined with the Claimant's concerns about being treated less favourably than longer serving employees does not lead the Tribunal to conclude that it amounted to a protected act and the Respondent could not reasonably be held to believe that the Claimant did, or may do, a protected act.

64.3 The Claimant's written grievance dated 11 July 2019 complained about racism (a protected characteristic) and being badly treated. The Tribunal concludes that this amounted to a protected act.

64.4 The Claimant's email of 7 October 2019 referred to his 11 July 2019 email and specifically referred to a recent verbal complaint he had made about favouritism and racism. We therefore conclude that this amounted to a protected act.

64.5 The Claimant has not established that he made a protected act by email on 25 February 2020 as alleged.

64.6 The Claimant's email dated 6 July 2020 does not amount to a protected act. It referred to unfair treatment regarding shift allocations and no protected characteristic was engaged in his complaint. We therefore conclude that this was not a protected act.

64.7 The Claimant's email dated 17 August 2020 email complaining that his grievances had not been responded to or resolved and no protected characteristic was referred to. When construed in the context of the Claimant's concerns being raised at the time it did not amount to a protected act in the sense that the Respondent believed that the Claimant had done or may do a protected act. We therefore do not conclude that this was a protected act.

64.8 The Claimant's email dated 25 August 2020 complained that he would be discussing his grievances with a solicitor or would send them to an employment tribunal did not amount to a protected act. When construed in the context of the Claimant's concerns being raised at the time it did not amount to a protected act in the sense that the Respondent believed that the Claimant had done or may do a protected act. We therefore conclude that this was not a protected act.

64.9 On 17 November 2020 in the grievance meeting with Ian Robinson making complaints of discrimination. No specific protected characteristic was mentioned and when considered in the context of the Claimant's concerns about being removed from shifts it did not amount to a protected act in the sense that the Respondent believed that the Claimant had done or may do a protected act. We therefore conclude that this was not a protected act.

64.10 On 22 December 2020 appeal and response to grievance outcome and complained about discrimination. However, no specific protected characteristic was mentioned and when considered in the context of the Claimant's concerns about being removed from shifts it did not amount to a protected act in the sense that the Respondent believed that the Claimant had done or may do a protected act. We therefore conclude that this was not a protected act.

65. The Claimant has therefore established that there were two protected acts on 11 July 2019 and 7 October 2019.

66. Our conclusions on whether the Respondent did any other following matters and if so whether it was because of the protected act are as follows.

66.1 The Respondent sought to engage with the Claimant's grievances informally. From 11 July 2019 shift concerns were addressed and from 7 October 2019 the Claimant was able to secure shift allocations more compatible with his personal circumstances. Whilst we conclude that these grievances were not formally concluded we do not conclude that they were ignored or unreasonably delayed. This allegation of detriment because of a protected act therefore fails.

66.2 The Claimant was removed from the Ford Dagenham site on 15 June 2020 due to an allegation that he was asleep on duty. There was no suggestion that this allegation was made because of the Claimant's protected acts the previous year or that the individual who made the allegation was aware of his protected acts. In respect of not being given work, this was due to the agreement to transfer to a casual work contract and the Claimant's change of mind and continued wish to work at Ford. This allegation of detriment because of a protected act therefore fails.

66.3 On 17 November 2020 in the context of addressing the Claimant's grievance, he was presented with historical complaints about him. The historical complaints were not raised because the Claimant had made protected disclosure and were discussed in the grievance as they were contemporaneous issues of his work at Ford in order to address the Claimant's allegations of discrimination. Separately, we have found that the allegation of sleeping on duty had been discussed with the Claimant on 19 June 2020. This allegation of detriment because of a protected act therefore fails.

66.4 The Claimant did not maintain that his grievance or grievance was handled incorrectly. We do not conclude that the outcome of the grievance or grievance appeal was because of the Claimant's protected disclosures made in 2019. The outcome of the grievance and grievance appeal was based on the factual information presented to the respective officers. This allegation of detriment because of a protected act therefore fails.

66.5 The Claimant was presented with a casual work contract on 14 January 2021. This was sent to the Claimant to reflect the basis of the contractual relationship that existed between the parties following agreement on 19 June 2020 and implementation of it. The delay in sending the contract was due to the Claimant initially expressing a change of mind on 3 July 2020 and subsequently presenting and pursuing his grievance in this regard. This allegation of detriment because of a protected act therefore fails.

66.6 The Respondent updated its intranet and recorded that the Claimant as a zero-hour worker because it reflected the understanding of what had been agreed on 19 June 2020. This was not because of a protected act and therefore this allegation of detriment because of a protected act therefore fails.

67. In view of the above conclusions the Claimant's complaints of victimisation fail and are dismissed. It has not been necessary for the Tribunal to consider time limit issues in this regard.

Unauthorised deduction of wages - s13 Employment Rights Act 1996

68. The Tribunal has found that the Claimant was employed under a contract of employment with a guaranteed minimum of 182 hours a month, 42 hour a week, during the period January 2019 to 19 June 2020. From 19 June 2020 the Claimant's contract was varied to a casual work contract.

69. The Tribunal does not have jurisdiction to consider any aspect of the for unauthorised deductions claim prior to the date of claim on 12 May 2021, due to the

2-year limitation specified in section 23(4A) of the Employment Rights Act 1996. The consequence of this is that the Claimant's complaints that he was not paid his contractual sums for February 2019 to April 2019 cannot be considered by the Tribunal.

70. The Claimant was also complaining that from May 2019 to 19 June 2020 he suffered a series of unlawful deductions from his minimum 182 hour a month contract. The Claimant's payslips show that he was paid the minimum from January 2020 to March 2020. He was still employed at Gate 17 for this period. Therefore, any complaints for unpaid sums for the preceding period from May 2019 to January 2020, which was not clarified before us, do not form part of a series of deductions combined wit alleged authorised deductions from April 2020.

71. From April 2020 to 19 June 2020, to the extent that the Claimant was available to work a minimum 182 hours each month, having regard to sickness and other absences, and to the extent that he was not paid such hours at the minimum wage, he would have been entitled to the shortfall in payment.

72. On 19 June 2020 the Claimant agreed to revert to a casual work contract following being informed of allegations of him sleeping on duty, being aware of the fact that the gate he was working on was closed and him not wishing to be assigned to Denton or Tilbury.

73. The Claimant's later change of mind on 3 July 2020 did not mean that his permanent contract of employment continued. It had ended on 19 June 2020 when the agreement to transfer to casual was reached. We conclude that the Claimant was then contracted as a casual worker, albeit that the formal written contract in this regard was not issued until after the Claimant's grievance was determined in December 2020.

74. The Respondent operated under the casual work contract from 19 June 2020 and clearly communicated with the Claimant that this was the case. We have found that there was an agreement to this effect and if this was not the case we would have concluded that there would have been a breach of contract by the Respondent ending the contract of employment and was replacing it with the casual work contract. Either way the permanent contract of employment had terminated. In respect of post claim allegations, on 8 July 2021, whilst unbeknown to the Respondent the Claimant was working elsewhere, the Respondent informed the Claimant that he would not even be offered work pursuant to the casual work contract until he specifically informed the Respondent that he wished to work. He did not do so.

75. Given our conclusions, any claim the Claimant had for unauthorised deduction of wages crystalized on 30 April 2020 in respect of payments which were due for any alleged series of deductions between 13 May 2019 to 31 December 2019 and 31 July 2020 in respect of payments which were due following any series of deductions for April 2020 to 19 June 2020. The Claimant should have brought his claims in this regard by 29 July 2020 and 30 October 2020 respectively. However did not present his claim until 13 May 2021. His claim has therefore been presented out of time.

76. We conclude that it was reasonably practicable for the Claimant to have presented his claims in time. Whilst English is a second language for the Claimant, he mentioned in his email of 25 August 2020 that he was aware of the Employment

Tribunal as an option to enforce his rights. He also had access to a trade union representative but did not progress his complaint for unauthorised deductions of wages in time. Therefore, we conclude that we do not have jurisdiction pursuant to section 23 of the Employment Rights Act 1996 to consider the Claimant's claim for unauthorised deduction of wages which is dismissed.

77. In these circumstances it is not necessary for the Tribunal to draw conclusions as to whether the ACAS procedure on grievances has been complied with.

78. The provisional remedy hearing on 10 May 2023 is therefore vacated.

Acting Regional Employment Judge Burgher
Dated: 10 March 2023