EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr A Oboloje	**v**	G4S Secure Solutions Limited

Heard at: Cambridge

On: 31 August 2021 and 01 September 2021
02 September 2021 (Discussion in chambers, no parties present).

Before: Employment Judge Tynan

Members: Ms J Costley and Mr B Smith

Appearances
For the Claimant: In person.
For the Respondent: Mr J Taylor (Counsel).

JUDGMENT

1. The Tribunal declares that the claimant's complaint under s.23 of the Employment Rights Act 1996 that the respondent made unlawful deductions from his wages in the period 16 December 2017 to 28 May 2018 is well founded and the Tribunal orders the respondent to pay to the claimant the sum of £8,143 in respect of unlawful deductions from his wages.

2. The Tribunal has no jurisdiction to determine the claimant's complaint under s.23 of the Employment Rights Act 1996 that the respondent made unlawful deductions from his wages in the period 18 July 2017 to 11 August 2017 as the complaint was presented out of time and accordingly his complaint in that regard is dismissed.

3. The claimant's complaint under s.23 of the Employment Rights Act 1996 that the respondent made unlawful deductions from his wages in the period 29 May 2018 to 28 June 2018 is not well founded and is dismissed.

4. The claimant's complaint that the respondent unlawfully discriminated against him on grounds of race is not well founded and is dismissed.

5. The Tribunal has no jurisdiction to determine the claimant's complaint that he was entitled to holiday pay and accordingly his claim in that regard is dismissed.

REASONS

1. The Claimant was employed by the Respondent as a security officer. By a claim form presented to the Employment Tribunals on 29 March 2018 following ACAS early conciliation between 3 February and 3 March 2018 the claimant pursues claimants against the respondent that he was discriminated against on grounds of race, that unlawful deductions were made from his wages and that he is owed holiday pay.

2. There was a case management hearing before Employment Judge Foxwell (as he then was) on 14 November 2018 when the claimant clarified that his discrimination complaint is that he was directly discriminated against, including by not being offered a 'static' security role or the option of redundancy or a 4-week trial period in a new role when his previous 'static' security role at the respondent's client, PWC, in Cambridge ended in May 2017. He claims that the respondent changed his role to being a support/relief officer without his agreement, and that he was required to cover other employees' holiday, sickness and other absences. The claimant claims that he was effectively placed on a zero-hours contract. The claimant further complains that he was required to work outside the Cambridge area unlike two named comparators, Greg Webster and James Campbell, and that this difference in treatment was designed to force him out.

3. It was identified at the hearing on 14 November 2018 that the claim for unpaid wages covered two periods, namely from 18 July to 11 August 2017 and from 16 December 2017 to March 2018. Employment Judge Foxwell identified that the claimant's claim in relation to the first period may have been presented outside the time limit in s.23 of the Employment Rights Act 1996 in which case the Tribunal would have no jurisdiction to decide that part of the claim. By the time of the hearing on 14 November 2018 the claimant's employment with the respondent had terminated. Notwithstanding the claimant had presented his claim form to the Employment Tribunal on 29 March 2018, it was accepted by Mr Sheppard on behalf of the respondent that the Tribunal should consider the position in respect of the claimant's wages up to his dismissal. The claimant has not brought any claim against the respondent for unfair dismissal or for his notice pay following the summary termination of his employment. Accordingly, the Tribunal has no jurisdiction to consider such matters notwithstanding that the claimant has sought to include a claim to compensation in respect of such matters in his updated Schedule of Loss at pages 39F to 39J of the hearing bundle.

4. It was common ground between the parties at the hearing on 14 November 2018 that the claimant was contracted to work 182 hours per month (paragraph 6 of the case management summary) and further that the claimant could not bring a free standing claim for unpaid holiday pay whilst his employment was continuing (paragraph 7 of the case management summary). Employment Judge Foxwell did not issue a Judgment dismissing the holiday pay part of his claim in case this might affect any further claim he decided to bring in respect of holiday pay following the termination of his employment. No such further claim has been brought by the claimant notwithstanding Employment Judge Foxwell's documented encouragement to the claimant to take advice in the matter.

5. The Tribunal heard evidence from the claimant and on behalf of the respondent from: Mr Stephen Allen, Operations Support Manager: Mr Fraser Gordon, Contract Manager; Mr Graham Rennie, Contract Manager; and Mr Paul Rhodes, Regional Manager. The claimant's evidence was peppered with comments and allegations that the respondent and all four witnesses were variously "fraudsters", "scammers" and "liars". There was no proper basis for these comments and allegations which were casually made. Notwithstanding the Tribunal's intervention and firm encouragement to the claimant to moderate his language he persisted through to the conclusion of the proceedings in alleging dishonesty and collusion. The hearing bundle evidences that he deployed similar language in his correspondence with the respondent, including alleging fraudulent and dishonest conduct on the part of the respondent's in-house solicitor Mr Sheppard simply because the respondent was not ready to exchange witness statements in accordance with the timetable that had been laid down by Employment Judge Foxwell on 14 November 2018. In a similar vein, rather than simply make the point that Mr Allen and Mr Gordon had failed to keep formal minutes of a meeting they had with him on 9 May 2017, he persisted in asserting that the absence of minutes was evidence of collusion and dishonesty. As the Tribunal warned the claimant may be the case, his unwarranted attacks on the respondent's witnesses and his extravagant use of language has merely served to undermine his own credibility as a witness and proved an unhelpful and unnecessary distraction throughout the hearing.

6. There was a single agreed hearing bundle of documents running to 249 pages, with a supplemental section which was unnumbered. The page references below are to the hearing bundle.

Findings of Fact

7. The claimant commenced employment with the respondent on 5 May 2010. In his claim form he gives his job title as full time regular static security officer (page 5). However, that job title is not supported by his contract of employment which is at page 40 onwards of the hearing bundle. The contract confirms only that he was employed as a security officer. The contract did not specify that it was a static role, that is to say assigned to a specific site. We do not accept the claimant's evidence this was the basis

upon which he was interviewed and accepted employment with the respondent. On the contrary the provisions in relation to location and hours of work at pages 40 and 41 of the hearing bundle evidence that he was employed on the understanding and basis that flexibility was expected of him. The relevant provisions of his terms and conditions are as follows:

> "**Location**
>
> 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 and/or assignments within the operating area as directed by your manager, in accordance with the needs of the business and its customers."
>
> "**Hours of work**
>
> Your work may include day, night and weekend shifts as part of a rostered pattern, which can include working on public and bank holidays and which may be varied to meet the requirements at customers' sites."

8. The reference above to working at different locations and/or assignments within "the operating area" reflected the respondent's intention (as is evident from the rest of the clause) to ensure a degree of flexibility in terms of where its security staff worked. Whilst "the operating area" was not further defined we accept the Respondent's evidence that through custom and practice that clause has operated and is understood by employees to operate so that they can be asked to travel to sites up to a distance of 20 miles from their home. This contrasts with contractual arrangements that still apply to a limited number of the respondent's longer serving staff which specify a designated site. The claimant was never employed under such a contract.

9. Notwithstanding the explicit flexibility within the claimant's terms and conditions of employment he was in fact based at the same site over a period of approximately 7 years, namely at PWC's offices in central Cambridge.

10. Until the events with which the Tribunal is concerned in 2017 there is no suggestion that there were any issues with the claimant's conduct or performance. The claimant said in his closing submissions that he had been given a 5 year conduct and performance award during his employment.

11. On 4 May 2017 the respondent commenced formal consultation with the claimant as to where he would be based from 1 June 2017 as PWC had advised the respondent that it no longer required a static security presence from that date at its Cambridge offices. As part of that formal consultation process Mr Allen and Mr Gordon met with the claimant on 9 May 2017. We accept their evidence that during the meeting the claimant was informed that there were no permanent static security officer vacancies at any of the respondent's other client sites within his operating area and that, as we

accept is commonly the case where a contract is ending or changing, they would be able to redeploy him in the immediate term in a support/relief capacity, in particular on their contract with HPE (now Microfocus) in Cambridge, until such time as an opportunity arose for him to effectively become a static security officer at that or another site within his operating area. Not unreasonably, the claimant's preference was to secure a permanent static role at another central Cambridge site. However, his preference in that regard did not reflect any right under his terms and conditions of employment to such a role. In his evidence to the Tribunal the claimant mischaracterised this state of affairs as the respondent trying to introduce an exploitative contract. We simply do not accept that this is what the respondent was seeking to do, instead it quite properly relied upon explicit provisions in his terms and conditions of employment which stated that he could be required from time to time to work at different locations and/or assignments within his operating area in accordance with the needs of the business and its customers. Unfortunately, Mr Allen and Mr Gordon did not prepare minutes or any other formal of record as to the outcome of their meeting with the claimant and any notes that may have been kept are said to have been lost.

12. In the course of the meeting on 9 May 2017 the claimant mentioned that he was intending to take an extended period of leave the following month which would incorporate some unpaid leave. This was readily agreed to by Mr Allen and Mr Gordon and evidences to the Tribunal that they were acting in good faith in their dealings with him. We find they explored with the claimant what shifts he would prefer to work; in so doing they were not saying that his preferences would be met, rather that they would seek to accommodate these if possible. However, consistent with we directly observed during the hearing to be a tendency on the part of the claimant to misinterpret what others say, the claimant came away from his meeting with Mr Allen and Mr Gordon on 9 May 2017 believing (we find, wanting to believe) that it had been agreed that he would work night shifts during the week at HPE. We are satisfied this was not agreed, but the claimant's firm desire to maintain his previous work pattern meant that the seeds for this dispute had been sown.

13. Following the meeting on 9 May 2017 the claimant submitted a formal request for leave (including unpaid leave) which was approved by Mr Allen on 31 May 2017. The claimant also identified that there seemed to be no work for him on ESS, the respondent's work scheduling system. This system is linked to the respondent's payroll system and accordingly it is important that the records on ESS are accurate in terms of ensuring that the respondent's employees are paid correctly. On 6 June 2017 Mr Allen emailed the claimant to confirm that training shifts at HPE had been added to ESS. Mr Allen asked the claimant whether he could cover various day and night shifts on dates in July and August, and also said that further shifts for August and September were being added. On 9 June 2017 the claimant responded:

> "Hi Steve thanks for the information but as I told your earlier I could do the night shifts Monday through Friday. Cheers, Anthony"

14. We find that by his response the claimant was effectively declining to work the day shifts that were being offered to him. The records at page 126 of the hearing bundle evidence that the claimant worked three training night shifts on 5th, 6th and 7th June at HPE. The records are blank for 1st, 8th and 9th June, in other words there is no documented record as to reasons why the claimant did not work on those dates or over the weekends of 3rd & 4th and 10th & 11th June 2017. The total number of hours worked by the claimant in June 2017 was 174 as against the claimant's contractual entitlement to work 182 hours, albeit the claimant has not pursued any complaint in this regard.

15. The claimant alleges that he was told by James Campbell and Derek Webster in June 2017 that when the respondent's contract with IBM, to which they had been deployed, had previously come to an end they had been offered permanent static roles in Cambridge on a 4-week trial period, with the option of redundancy if they were unhappy with the role during the trial period. Neither Mr Campbell nor Mr Webster gave evidence to the Tribunal nor did the claimant submit written statements by either of them or indeed even email, text or other similar messages passing between them that might corroborate what he alleged he had been told by them. There is no information available to the Tribunal as to when the IBM contract came to an end or as to the contractual terms under which either Mr Campbell or Mr Webster were employed to enable the Tribunal to make findings as to whether their circumstances were the same (or not materially different to) the claimant's. For example, we do not know whether either individual was employed on a contract with a designated place of employment, nor is there evidence available to the Tribunal that static vacancies were created for them when the IBM contract came to an end or instead whether static vacancies already existed into which they had simply been redeployed. Alternatively, we do not know whether they had initially been redeployed as support/relief officers until a static vacancy became available for them. When Mr Rhodes heard the claimant's grievance appeal he looked into the matter. We think it noteworthy that although he claimed to have learned in June 2017 that Mr Campbell and Mr Webster had been treated differently the claimant did not mention this at all during the first stage of the grievance process. Mr Rhodes spoke with the respondent's scheduling team and with a member of the HR team, as well as with Mr West, the Contracts Manager at the time, but he found no evidence to support what the claimant said he had been told

16. The claimant has known for 4 years that the respondent disputes that Mr Campbell and Mr Webster were put at risk of redundancy or offered redundancy or otherwise treated differently to him, yet he has done nothing in that time to secure statements or any other evidence from Mr Webster or Mr Campbell in support of what remains a generalised assertion that he was treated differently to them.

17. The claimant was due to return from annual leave on Tuesday 24 July 2017, his absence beyond 3 July 2017 being unpaid leave as he had utilised his full contractual leave entitlement. We do not attach significance, as the claimant does, to the fact that his unpaid leave was recorded on the respondent's systems as unauthorised unpaid leave. This simply reflects that the schedulers who managed the scheduling on ESS complete the reports from a drop-down menu. It has never been suggested by the respondent that the claimant's absence from 3 to 24 July 2017 was other than authorised leave and its description on ESS as unauthorised certainly does not warrant the claimant's statements that the use of this term was evidence of collusion, dishonesty or a lack of integrity on the part of the respondent.

18. The Tribunal was not provided with ESS records from before June 2017 however with effect from 17 June 2017 the ESS records recorded the claimant as being not available at weekends. Again, the claimant relied upon this as evidence of collusion, dishonesty and a lack of integrity on the part of the respondent. We find that it reflected the claimant's clearly communicated preference not to work weekends, confirmed in his emails of 9 June 2017 (page 48) and 26 July 2017 (page 94). Not only did the ESS records accurately reflect the claimant's stated position it meant that he would not be troubled by the respondent's scheduling team at weekends if they needed support/relief cover and instead they could focus their efforts in relation to those staff who were willing and available to work weekends.

19. On return from leave in July 2017 the claimant's position remained as stated on 9 June 2017, namely that he would only work nights during the week. This lead to an exchange on 24th and 26th July between himself, Mr Allen and Mr Gordon during which he questioned their honesty. The tone of his email of 26 July was hostile, even abusive, suggesting to Mr Allen and Mr Gordon that they had lied to him. The claimant was adamant that on 9th May they had promised him a static role at HPE. We have found otherwise and in the circumstances the claimant was stating an intention not to work in accordance with his contractual obligations. This was a position he maintained until 2 August 2017 when he took advice from the Citizen's Advice Bureau. He also maintained on 26 July 2017 that he was entitled to be paid for 240 hours per month, a position he no longer maintains in these proceedings (paragraph 6 of the case management summary at page 35 of the hearing bundle). His Schedule of Loss has been prepared on the basis that he worked 182 hours per month.

20. In an email sent to the claimant on 29 July 2017, Mr Allen confirmed that they had discussed a possible opportunity for the claimant to predominantly support the HPE contract in Cambridge. He went on to say:

> "I advised that we would accommodate you best we can on the HPE contract, but did offer you other assignments within the Cambridge area to cover your outstanding hours per your existing contract. All these assignments would be within a reasonable distance around Cambridge or just outside."

His email concluded:

> "Please make yourself available for work offered on HPE Cambridge account and further offerings within the Cambridge area".

He was doing no more than asking the claimant to work in accordance with his documented terms and conditions of employment.

21. The claimant responded on 1 August 2017 (page 98) and continued to communicate with Mr Allen in hostile terms. He stated that he would only work at HPE in Cambridge.

22. On 2 August 2017 the claimant sought advice from the Citizen's Advice Bureau who spoke with Mr Gordon on his behalf. Mr Gordon explained the contractual position to the advisor and that the claimant was limiting his opportunities for paid work. That led to a further email on 2 August from the claimant (it was not dictated to the advisor by Mr Gordon as the claimant alleges) in which he stated:

> "Hi Steve, I confirm that I can work WEEKDAYS and WEEKENDS and the occasional day shifts. I look forward to having my FULL TIME work reinstated at HPE Cambridge as soon as possible. Kind regards Anthony".

23. Whilst there is some potential ambiguity in the second line of this further email, we consider that if the respondent had any residual concerns as to whether or not the claimant was committing to work in accordance with his terms and conditions of employment, it was incumbent upon the respondent to take the matter up with the claimant. We consider that the email has to be read in the context that the claimant had sought advice from the Citizen's Advice Bureau and that the advisor had spoken directly with Mr Gordon who had asked for written confirmation as to whether or not the claimant was placing limitations on the dates and times he might work. We find that by his email the claimant was indicating that he was ready, willing and able to work in accordance with his terms and conditions of employment. However, the respondent had already completed its schedules for that week with the result that there were then no immediate shifts available for him to work.

24. Whilst the claimant was stating his willingness to work weekdays, weekends and the occasional day shift, he evidently remained dissatisfied and notified the respondent of a formal grievance on 8 August 2017 (page 114). As noted already, he did not say that he had been discriminated against or make any reference to having been treated differently to Mr Campbell or Mr Webster, and although he did request either a redundancy payment or permanent night shifts at HPE on a static basis he did not do so by reference to how anyone else had been treated in comparable circumstances.

25. The claimant met with Mr Rennie on 18 August 2017 to discuss his grievance. Mr Rennie wrote to the claimant on 15 September 2017 advising him of the outcome in his grievance. The grievances were not upheld. Mr Rennie noted that the claimant had made potentially

inflammatory comments and went on to address the claimant's various grievances in some considerable detail. In conclusion he wrote:

> "You are still on a full time contract and although you are being offered work on sites all over the place (within reasonable distance) you need to be as flexible as possible as remember you need to be offered a minimum of 182 hours work each month."

26. The claimant appealed against the grievance outcome on 21 September 2017 and for the first time in that appeal referred to the fact that he believed he was being discriminated against.

27. On 2 October 2017 the claimant started a short-term assignment at the respondent's client JLL's site in central Cambridge. On his eighth shift at JLL the claimant was observed to be asleep. There are two images in the bundle (pages 148 and 149) which appear to confirm this. The claimant denied at Tribunal that he was asleep claiming instead that he had simply been resting his eyes. The two images, which were taken approximately two hours apart in the early hours of 12 October 2017, certainly do not indicate that the claimant was simply resting his eyes. We take on board the claimant's point that the principal security officer on duty that night did not document in their security records that the claimant was observed to have been asleep. In an email several months later on 19 June 2018, David Kelly, the Contract Manager for the relationship, commented that the claimant had been informed at the time as to the reasons why he would not be assigned again to this site.

28. On around July 2017 the claimant was offered work at another JLL site in Chesterford, south of Cambridge. Chesterford is within 20 miles of the claimant's home and therefore within his operating area. He declined this work,citing mobility issues amongst other things.

29. With effect from 15 October 2017 the claimant returned to work at HPE (it had by then changed its name to Microfocus), working day shifts and weekends. He was absent on paternity leave from 18th to 31st October 2017. His ESS records indicate availability for work and potentially a refusal to work in November and December 2017. He had his Grievance Appeal meeting with Mr Rhodes on 20 October 2017. The outcome of the Grievance Appeal had been notified to him on 10 November 2017. Meanwhile, on 9 November 2017 the claimant had put down the phone on Naseer Ahmed from the respondent's scheduling team. The claimant claimed at Tribunal that he did not know who Mr Ahmed was even though page 138 of the hearing bundle confirms that the claimant was aware of Mr Ahmed from at least 11 September 2017. We find that he sought to deny any knowledge of Mr Ahmed in an attempt to justify his otherwise unreasonable conduct in refusing to speak with Mr Ahmed and terminating his call with him.

30. On 13 December 2017 Microfocus made a formal request that the claimant be removed from its site. It is not necessary and indeed not possible on thr

limited available evidence for the Tribunal to make any specific findings as to the reasons for this, specifically whether the given reasons were well founded. They are documented in an email from Lizzy Billington, Facilities Manager at Microfocus, dated 13 December 2017 (pages 178A and 178B). The claimant was not afforded any process to challenge what was said.

31. Thereafter the claimant's records on ESS evidence that he took training shifts at IBM and thereafter Honeywell on 12th & 13th and 14th & 15th December 2017. His scheduling records between 16th and 31st December 2017 are blank. Mr Rennie and Mr Rhodes' statements and evidence to the Tribunal address their involvement in the Grievance and Grievance Appeal process through to conclusion in November 2017. Neither Mr Allen nor Mr Gordon addressed the position in December 2017 in their witness statements. Accordingly, there is no explanation from the respondent as to why the claimant's schedule was left blank in December 2017. There is no evidence before the Tribunal that the claimant was refusing to work or otherwise unavailable.

32. Although the evidence in this regard is limited, we find that in or around January 2018 the claimant was offered work in Bedford by Mr Ahmed. Bedford was outside the claimant's operating area as it was more than 20 miles from his home. We find therefore that he not unreasonably declined that offer. The offer was reiterated by Mr Ahmed on 12 February 2018 (page 192) along with an offer of a role in Wisbech that likewise was outside his operating area. The claimant responded to Mr Ahmed on 14 February 2018, albeit a copy of that response was not in the hearing bundle. There was no evidence available to the Tribunal that other than rejecting work outside his operating area the claimant was saying he was unwilling to work. He issued his Employment Tribunal claim on 29 March 2018. On 28 April 2018 Mr Ahmed emailed the claimant again to reiterate the offer of work in Bedford or Wisbech (page 173). The offers were repeated on 2nd and 19th May (page 175).

33. On 15 May 2018 Mr Gordon emailed the claimant as follows:

> "Good Morning. G4S have just won the contract for DHL nationally including a site in Cambridge. The contract starts on the 1st June but will require a number of training shifts beforehand.
>
> - The hours are Monday to Friday 22:00 – 06:00 and 24 hours at the weekend making a total of 88 hours per week.
> - We will be looking at recruiting a minimum of two officers for this site working the hours between them. This will be a permanent position, with a start date in two weeks time.
> - The pay rate at present is £9.15 per hour.
>
> I would like to offer you a permanent position at this site if you are interested. Please do consider this as it is a good opportunity at a competitively high pay rate."

34. This offer from Mr Gordon would have met the claimant's contractual entitlement to work at least 42 hours per week, and at a higher rate of pay than his ESS records indicate he had been accustomed to.

35. Given the requirement to work training shifts before the contract went live on 1st June 2018, we find that the effective start date would have been Tuesday 29th May 2018, namely immediately following the second May bank holiday weekend. The claimant's response to that offer is at page 180 of the hearing bundle. He wrote:

> "G4S is fully aware of a pending court case between me and them.
>
> So, send your email through the Employment Tribunal and my lawyer and I will respond through the same medium to G4S."

36. We conclude from that response that the claimant was no longer willing to work for the respondent in accordance with his terms and conditions of employment or indeed at all. Thereafter he steadfastly refused to engage with the respondent in a disciplinary investigation and subsequently a disciplinary hearing at which the respondent considered allegations that he had refused to work and to meet his contractual obligations. He was dismissed from the respondent's employment on 28th June 2018. He did not appeal that decision or pursue any Tribunal claim in respect of it, from which we infer that he accepted that the respondent then had grounds to terminate him, certainly in respect of his refusal to work.

The Law and Conclusions

Direct Discrimination

37. Section 13 EqA provides,

> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

38. Except in obvious cases, the consideration of any complaint of direct discrimination calls for some consideration of the mental processes of the alleged discriminator: Nagarajan v London Regional Transport [1999] ICR 877. In this case, the two principal alleged discriminators were Mr Allen and Mr Gordon.

39. The grounds of any decision often have to be deduced, or inferred, from the surrounding circumstances. In order to justify an inference one must first make findings of primary fact from which the inference may properly be drawn. This was something the Tribunal explained carefully to the claimant at the outset of the hearing.

40. A person who complains of discrimination must satisfy the Tribunal that, on a balance of probabilities, he has suffered discrimination falling within the

statutory definition. This might be done by placing before the Tribunal evidence from which an inference can be drawn that the person was treated less favourably than he would have been treated if he did not have the protected characteristics in question (in this case, if he had not been black British): Shamoon v RUC [2003] ICR337. Comparators can provide evidence of less favourable treatment, though they are simply tools which may or may not justify an inference of discrimination. It will depend upon the extent to which the circumstances relating to the comparator are the same as the circumstances relating to the claimant. The more significant the difference or differences the less cogent will be the case for drawing the requisite inference.

41. Under the Equality Act 2010, in order for one or more individuals to be comparators for the purpose of the Act they have to be in the same position in all material respects as the claimant save for their race. Comparators who do not meet this statutory requirement, but who may nevertheless provide evidential value, are not so circumscribed. Their evidential value will, however, be variable and will inevitably be weakened by material differences between the circumstances relating to them and the circumstances of the claimant.

42. In this case the claimant identifies two potential comparators, Mr Campbell and Mr Webster. However, we agree with Mr Taylor's submission that the claimant has failed to identify appropriate actual comparators for *Shamoon* purposes. He has failed to establish primary facts that would enable the Tribunal to draw any proper conclusion as to how he was treated in comparison to Mr Campbell or Mr Webster. He has failed to establish, on the balance of probabilities that the circumstances in which they were redeployed at the end of the IBM contract were the same or not materially different to his circumstances in May/June 2017. Indeed, as we set out in our findings above, he has failed to put forward any material evidence as to their circumstances to support inferences being made. Be that as it may, we have found that they were not placed at risk of redundancy or made redundant or paid redundancy. In our judgment, the claimant has failed to put forward evidence and to establish primary facts from which discrimination could properly be inferred by reference to the claimant's alleged treatment relative to others. He has fallen a long way short in this regard.

43. Having regard to the claimant's relevant circumstances, we are further satisfied that a hypothetical comparator in the claimant's situation, of a different colour or racial origin, would have been treated in exactly the same way that he was. All other things being equal, we are satisfied that they would have been offered support/relief work until such time as they could be found a static position, and that they too would have been offered work outside their operating area if there was insufficient work for them in their operating area. In short, they would have been treated the same way regardless of the claimant's personal protected characteristics.

44. It is possible for a case of unlawful discrimination to be made good without the assistance of any actual comparator or by reference to a hypothetical comparator. In the absence of comparators of sufficient evidential value some other material must be identified that is capable of supporting the requisite inference of discrimination. Discriminatory comments made by the alleged discriminator about the victim might, in some cases, suffice. There were no such comments in this case. Unconvincing denials of a discriminatory intent given by the alleged discriminator, coupled with unconvincing assertions of other reasons for the allegedly discriminatory decision, might in some case suffice. We found the respondents' witnesses to be consistent in their accounts and in their explanations for why they acted as they did when the contract at PWC came to an end, even if their evidence (and Mr Gordon's in particular) was less robust or coherent in relation to events at the end of 2017 and into 2018. Their evidence regarding the events from May 2017 through to the conclusion of the grievance appeal had substance and we contrast it in particular with what we observed was the claimant's tendency to misinterpret what others said.

45. Discrimination may be inferred if there is no explanation for unreasonable treatment. This is not an inference from unreasonable treatment itself but from the absence of any explanation for it. Save that the respondent wrongly believed in August 2017 and then again in late 2017 and into 2018 that the claimant was unwilling to work in accordance with his terms and conditions of employment, we have not identified any material respects in which the claimant was treated unreasonably by the respondents, particularly through to the conclusion of his grievance appeal or that they have failed to provide explanations for their treatment of and actions in relation to him.

46. The claimant has to prove facts from which an Employment Tribunal *"could"* properly conclude that the respondent committed an unlawful act of discrimination. This does not prevent the Tribunal at that stage from hearing, accepting or drawing inferences from evidence produced from the respondent disputing and rebutting the complaint. Once a prima facie case is established, the burden of proof moves to the respondent to prove that it has not committed any act of unlawful discrimination, but it does not shift simply on the complainant establishing the facts of a difference in status and a difference in treatment; it is only once the burden has shifted that the absence of an adequate explanation of the differential treatment becomes relevant: Madarassy v Nomura [2007] EWCA Civ 33.

47. In our discussions we have held in mind that we are ultimately concerned with the reasons why the respondent (and each of the alleged perpetrators) acted as they did in relation to the claimant. The claimant has not proved facts from which we could properly conclude that the respondent committed any unlawful acts of discrimination. But in any event, we are satisfied that their reasons for acting why they did had nothing whatever to do with his colour or race. Even when he was offered work outside his operating area this was with a view to ensuring he had work to do. Accordingly, his complaints that he was discriminated against will be dismissed.

Deduction from Wages

48. Any claim in respect of unlawful deductions from the claimant's wages in the period 7th to 11th August 2017, which otherwise should have been paid on either 15th August or 15th September 2017, should have been notified to Acas under the Early Conciliation scheme by no later than 14th November or 14th December 2017. He did not contact Acas until 3rd February 2018. He has not put forward any evidence that it was not reasonably practicable for him to notify his potential claim within the normal 3 month window. In the circumstances the Tribunal has no jurisdiction to determine this particular complaint.

49. We turn then to the second period in respect of which complaint is made. Mr Taylor drew the Tribunal's attention to the case of North West Anglia NHS Foundation Trust v Gregg [2019] EWCA Civ 387 in which the Court of Appeal looked at whether an employer could withhold an employee's pay at a time when the employee was prevented from working by the actions of a third party. The Court of Appeal looked firstly at the wording of Dr Gregg's contract and then considered the common law principle of whether Dr Gregg was "ready, willing and able" to work. With regard to the contractual position the question is whether the contract permits the employer to deduct pay. If the answer is no, the next question is whether the deduction of pay is in accordance with custom and practice. If the answer to both is no, then the common law position of whether the employee is "ready, willing and able to work" must be considered. We cannot identify any provision in the claimant's terms and conditions of employment entitling the respondent to make deductions from his wages, certainly not where he was excluded from one or more client sites in his operating area and pending his reassignment to another site. The respondent did not seek to adduce evidence that it was established custom and practice that employees would have deductions made from their wages in such situations. In which case there was neither an express nor implied term of the contract which permitted the deduction of pay.

50. With regard to being ready, willing and able to work, the Court of Appeal held that the decisions of third parties, in Dr Gregg's case being the police in imposing bail conditions and the Interim Orders Tribunal in issuing an interim order suspending Dr Gregg's registration, did not mean that he was unable to work. The imposition of police bail conditions and the interim order should not, in the Courts' judgment, automatically have resulted in a conclusion that he was not ready, willing or able to work. The Court commented that such a conclusion was "uncomfortably close to an assumption of guilt" at a time when no decisions had been taken about guilt.

51. The Court of Appeal held that where the contract does not permit the deduction of pay the default position during a suspension or period in which an employee cannot work should not be the deduction of pay. Exceptional circumstances may however justify such a deduction.

52. The claimant could not work at HPE or JLL's central Cambridge site, though in circumstances in which he had seemingly been afforded no opportunity to challenge either decision. He declined to work in Chesterford. However, there was no evidence before the Tribunal that the claimant was unable to work at any of the respondent's other client sites in his operating area, on the contrary his last four shifts worked in December 2017 were at two other client sites. It was not suggested in Mr Taylor's closing submissions that there were exceptional circumstances justifying any deductions. In our judgment the Claimant was entitled not to have deductions made from his pay. He was contracted to work 182 hours per month, and we have identified that his normal rate of pay for non-training shifts in the period immediately leading up to his final day of work for the respondent was £8.50 per hour (even if he would have received a higher rate of pay had he taken up the DHL offer).

53. The claimant was paid for 98 hours worked in December 2017 as against his contracted 182 hours, meaning that he suffered an unlawful deduction from his wages of £714 (84 hours @ £8.50 per hour). Thereafter he suffered unlawful deductions from his wages of £1,547 per month in January, February, March and April 2018, or £6,188 in total. He was unwilling to work three training shifts of 12 hours each on 29th, 30th and 31st May 2018, meaning however that he suffered an unlawful deduction from his wages in the sum of £1,241 in respect of the remaining 146 hours he was contracted to work (146 hours @ £8.50 per hour). The total unlawful deductions from the claimant's wages was therefore £8,143 and that is the sum we shall order the respondent to pay to the claimant. This sum will be subject to deductions for income tax and employee NICs by the respondent.

Holiday Pay

54. Finally, and as Employment Judge Foxwell warned the claimant in 2018, he was not entitled to bring a free-standing claim for unpaid holiday pay whilst his employment was continuing. There has been no further claim by him to holiday pay since his employment with the respondent terminated and, in these circumstances, since this will not prejudice any other outstanding claim by him, the Tribunal dismisses his complaint that he is owed holiday pay on the basis that it has no jurisdiction to determine the complaint.

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Employment Judge Tynan

Date: 13/9/2021

Sent to the parties on: 27/9/2021

N Gotecha
For the Tribunal Office