EMPLOYMENT TRIBUNALS

Claimant: **Mr M Sillah**

Respondent: **The Secretary of State for Justice**

Heard at: **Cardiff by CVP** **On: 14 – 16 February 2022**

Before: **Employment Judge C Sharp**
Ms D Hebb
Mr P Collier

Representation:
Claimant: In person
Respondent: Ms S Hornblower (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The notice pay claim is dismissed following a withdrawal by the Claimant;

2. The Claimant's claim of direct race discrimination relating to his decision-making on 17 August 2020 is within the Tribunal's jurisdiction on the basis that it is just and equitable to extend time;

3. The Claimant's claims of direct race discrimination are not well-founded and are dismissed;

4. The Claimant's claim for victimisation is not well-founded and is dismissed;

5. The Claimant's claim for constructive unfair dismissal is not well-founded and is dismissed.

REASONS

The Issues

1. At the outset of the hearing, the Tribunal took the parties through the issues as identified by Employment Judge S Jenkins in the preliminary hearing of 19 October 2021 to ascertain what remained to be determined, following the refusal of permission for the Claimant to amend his claim, and if any matters had already dealt with. The parties confirmed that the notice pay claim had been paid; the Claimant was content for it to be treated as withdrawn and dismissed (it having been explained to him that if he agreed to this step, it was unlikely he would be able to bring the notice pay claim in the future). The Claimant also explained that the only element of the victimisation claim that he wished to argue following the refusal of the application to amend was in relation to the allegedly inappropriate investigation of his grievance.

2. This left four outstanding matters to be determined by the Tribunal:

    a. Time - in relation to the Claimant's allegation of direct race discrimination due to the allegedly unreasonable questioning of his decision-making on 17 August 2020, the primary limitation period expired on 16 November 2020 (or 19 November 2020 if time runs from the last conversation on 20 August). The Claimant did not extend time by approaching ACAS for early conciliation before the primary limitation period expired. It does not form part of a continuing series of acts. The Claimant will need to persuade the tribunal to extend time on the basis that it is just and equitable.

    b. Direct race discrimination - the Claimant complains that two events/acts happened and constituted less favourable treatment because of his race (black African). The two acts of allegedly less favourable treatment complained of are i) unreasonable questioning of the Claimant's decision-making regarding the sacking of a prisoner on 17 August 2020, and ii) inappropriate investigation of the Claimant's grievance.

    c. Victimisation - it is agreed that the Claimant's grievance raised on 22 September 2020 is a protected act. The Claimant says that he was subjected to the detriment of the inappropriate investigation of his grievance because he made that protected act. The Claimant no longer relies on unreasonable questioning of his decision-making regarding the dismissal of the prisoner on 17 August 2020 for this claim – he explained that he meant this point to refer to matters within the refused amendment application.

    d. Constructive unfair dismissal - the Claimant asserts that two acts by the Respondent constituted, either together or separately, a fundamental

breach of contract, breaching the implied term of trust and confidence, entitling him to resign in response to the breach(s) of contract and treat the Respondent's repudiatory behaviour as a dismissal. The two alleged breaches of contract are i) unreasonable questioning of the Claimant's decision-making regarding the sacking of a prisoner on 17 August 2020, and ii) inappropriate investigation of the Claimant's grievance.

3. The Claimant mentioned in passing at the outset of the hearing that he was in New York. The hearing was adjourned to enable the Claimant to obtain confirmation from the Taking of Evidence Support Office of the Foreign, Commonwealth & Development Office that the United States of America had no objection to him giving evidence orally from that location; such confirmation was obtained and the Tribunal gave the Claimant permission to proceed.

Background

4. The Claimant was a prison officer based at HMP Swansea in the employ of the Respondent. He commenced his employment on 14 May 2018. By 17 August 2020, he was based in the A wing of the prison and worked on the A4 landing. It is accepted that on 17 August 2020, a prisoner who was a wing cleaner misused his cell bell and was abusive to the Claimant on two separate occasions. The Claimant decided that the wing cleaner should be removed from his role after the first incident of abuse, something within the power of a prison officer.

5. There is a dispute regarding what happened that day between the Claimant and other prison officers. The Claimant says that his decision to dismiss the prisoner from his role as cleaner was unreasonably questioned and only happened because he was a black African prison officer. The Respondent says that in line with common practice within the prison service, the Claimant's colleague Prison Officer Matthew Bayliss asked the Claimant whether there was an alternative that he wished to consider before the Claimant actioned the dismissal of the cleaner, given an imminent inspection by Her Majesty's Prison Inspectorate, the out of character nature of the cleaner's conduct and his general positive work record. The Respondent says nothing more than a discussion took place and the supervising officer agreed with the Claimant's decision; the Claimant accepts Supervising Officer James Dimond supported him, but says only after an argument in the office in front of other officers at about 12.30pm 17 August 2020. The Claimant also says he had earlier spoken to Officer Dimond who had agreed with his decision; this is disputed.

6. On 18 August 2020, the Claimant emailed the activities team and instructed that the prisoner was removed from his role as cleaner. This was acknowledged as actioned approximately an hour later by the team. On 20 August 2020 in the morning meeting with prison officers of the A wing, Supervising Officer Rowe asked why the prisoner had been dismissed; the Claimant explained. A

colleague, Prison Officer Boulter, questioned whether this was necessary in light of the prisoner's other activities (the Tribunal does not consider it necessary to record here the detail as this is a public judgment). The Claimant does not complain about Officers Rowe or Boulter, but said this conversation caused him to approach the deputy governor of the prison, Mr Rob Denman. It is agreed that Mr Denman confirmed to the claimant that he was able to dismiss the prisoner and later discussed the issue with Officer Rowe; he was told that the prisoner had been dismissed.

7. The Claimant's position is that if he was a white officer, he would not have been asked about his decision to dismiss the cleaner on 17 August 2020; he believed the implication of the questioning was that he was not allowed to dismiss a prisoner because he was a black officer. The parties agree that at no point in discussions with the Claimant with his colleagues was racist language used. The Respondent's position is that it was and remains common practice to discuss the dismissal of a prisoner, and there were good reasons in this case for the Claimant's colleagues to ask if he wanted to reflect on his decision.

8. The Claimant raised a grievance on 22 September 2020, asserting that his decision-making had been questioned for discriminatory reasons by Officers Bayliss and Dimond. The initial investigation by Sarah Edwards is accepted by the parties as being deficient. For example, Ms Edwards only interviewed the Claimant. No explanation has been given why her investigation was so limited. When her report was received on or around 9 October 2020, the Claimant appealed on 13 October 2020 and had a meeting with Mr Denman on 15 October 2020. There is a dispute about who was present at the meeting. It is not disputed that Mr Denman and the Claimant agreed that further investigation was required and that Mr Denman changed the process so that it was dealing with conduct allegations against Officers Dimond and Bayliss.

9. Rhian Slattery was appointed to conduct the ongoing investigation. She reinterviewed the Claimant, and interviewed Officer Bayliss, Officer Dimond and others who were not present in the office but could assist her with understanding the official policy and procedures surrounding the dismissal of prisoners, amongst other matters. At this stage, she did not interview the other officers present in the office on 17 August 2020. Ms Slattery submitted a report to Mr Denman on 30 November 2020. Unfortunately, the Claimant was signed off sick due to stress between 21 December 2020 and 22 February 2021. This meant there was a delay in Mr Denman being able to discuss the report with the Claimant.

10. There is a dispute about what happened on 1 March 2021 when Mr Denman and the Claimant met. There is also a dispute about whether the Claimant was sent the report on that day, the number of meetings that took place on that day, and about what was said. The Claimant resigned on 4 March 2021 and his last day in work was 16 March 2021. The investigation continued but the Claimant

declined to take any further part when contacted on 19 March 2021 by Ms Slattery. The effective date of termination was 3 April 2021 and on 15 May 2021 the investigation concluded, finding that there had been no racial discrimination in August 2020 and no further action was required. This report was delivered to Mr Denman on 17 May 2021, and the Claimant informed of the outcome by way of a telephone conversation with Mr Denman on 18 May 2021.

11. The parties entered into ACAS early conciliation between 12 March and 23 April 2021. The Claimant issued the employment tribunal proceedings on 23 April 2020.

The legal questions

12. There was a jurisdiction issue for the Tribunal to consider – should it extend time to allow the direct discrimination claim regarding the 17 August 2020 incident to be pursued? S123 Equality Act 2010 ("EqA") notes that a claim must be brought within three months of the act complained of, and the act to be complained of in this case was the allegedly unreasonable questioning of the decision-making of the Claimant on 17 August 2020. Bearing in mind that the ET1 was not presented until 23 April 2021, this claim was plainly lodged outside the required time frame whether time ran from 17 or 20 August 2020; the Tribunal must consider whether it would appropriate to extend time on the "*just and equitable*" basis. The remaining claims have been brought in time.

13. Ms Hornblower on behalf of the Respondent reminded the Tribunal of the case law in this area, notably that of **Bexley Community Centre v Robertson** [2003] IRLR 434, which stated that time limits are to be complied with, that there is no presumption in favour of the exercise of the discretion to extend time, and that is the exception to extend time rather than the rule. The absence of a reason would not necessarily have been determinative (**ABMU v Morgan** [2018] IRLR 1050, CA). The onus is on the Claimant to persuade the Tribunal.

14. While Ms Hornblower referred to the factors listed within s.33 of the Limitation Act 1980 (**British Coal Corporation v Keeble** [1997] IRLR 336 EAT), it is not mandatory for a Tribunal to do so. These factors can assist (though not as a checklist). They are the length and reasons for the delay, the extent to which the Claimant had sought professional help and the extent to which information was not known to him until later and the degree to which the Respondent ought to have been blamed for any late disclosure. Consideration should be given to whether the Claimant delayed once he knew of all of the relevant information and, if so, to what extent. **Miller v MoJ** UKEAT/0003/15/LA makes it clear that prejudice is not a determinative factor, but it is important. As HHJ Auerbach stated in paragraph 31 of Wells Cathedral School Ltd and another v (1) Souter and another EA- 2020-000801-JOJ:

"*As a matter of law, there is no particular feature that must necessarily be present in order for a just and equitable extension to be granted, nor that, if present, is automatically sufficient to warrant such a grant. However, some factors are, as it is put, customarily relevant."*

15. In **Adedeji v University Hospitals Birmingham NHS Trust** [2021] EWCA Civ 23, Underhill LJ accepted that a tribunal was entitled to take into account the fact that allowing an extension of time would result in consideration of matters that had happened a considerable time before the submission of the claim, because the claim included complaints that went back over a considerable period of time.

16. For discrimination claims, there is what is called a shifting burden of proof. S136 EqA states:

"(1) This section applies to any proceedings relating to a contravention of this Act.
(2) If there are facts from which the court could decide, in the absence of any other explanation that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

17. As Ms Hornblower submitted, at the initial stage of the claim, the burden of proof is on the Claimant on the balance of probabilities (more likely than not), to establish a prima facie case, i.e. facts from which discrimination can be established in the absence of a reasonable explanation from the Respondent (**Igen v Wong** [2005] EWCA Civ 142, **Barton v Investec Henderson Crosthwaite Securities Ltd** [2003] IRLR 332 and **Hewage v Grampian Health Board** [2012] UKSC 37). A simple complaint of unfair treatment does not, on its own, provide sufficient facts for the burden to move to the Respondent or for the Tribunal to find that this treatment was unlawful discrimination. It is trite law that an allegation of mere difference in treatment between the Claimant and any comparator or between the protected characteristic of the Claimant (in this case race) and others is not sufficient to shift the burden of proof to the Respondent.

18. Turning to the direct discrimination claims, S13 EqA says:

"(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."

19. The comparison that the Tribunal must make under s13 is set out within s23(1):

"On a comparison of cases for the purposes of sections 13, 14 or 19, there must be no material difference between the circumstances relating to each case."

20. The Claimant compares himself to Matthew Bayliss and Richard Bowen (both white prison officers) or in the alternative to a hypothetical white officer in the same material circumstances as him. The Tribunal observed that at no point throughout the hearing did the Claimant adduce evidence about the comparators or make submissions on this point. His claim remained focused on the fact that he is a black African.

21. As Ms Hornblower reminded the Tribunal, what amounts to less favourable treatment is an objective test (**Burrett v West Birmingham Health Authority** [1994] IRLR 7). It is the treatment itself, not the consequences which must be different and less favourable (**Balgobin v Tower Hamlets LBC** [1987] IRLR 401).

22. The case of **Nagarajan v London Regional Transport** [1999] IRLR 572 confirms that a finding of direct discrimination did not require that the discriminator was consciously motivated in treating the complainant less favourably. It was sufficient to support a finding of discrimination if it could properly be inferred from the available evidence that, regardless of the discriminator's motive or intention, a significant cause of his decision to treat the complainant less favourably was that person's protected characteristic. Conscious or subconscious influence due to the existence of a protected characteristic is enough to render the act discriminatory if it was a significant influence. A significant influence is an influence which is more than trivial.

23. The Claimant has also brought a victimisation claim under s27 EqA, which says:

"(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..."

24. There is no dispute that the grievance raised by the Claimant is a protected act. The Claimant explained at the outset of the hearing that following the refusal of his application to amend, this claim now only relates to the allegedly inappropriate investigation of the grievance. There was no argument from Ms Hornblower on behalf of the Respondent that such an investigation if found was not a detriment. The issue for the Tribunal to determine is whether the investigation was inappropriate, and if so, whether a significant influence for such a detriment was because the Claimant raised the grievance. Ms Hornblower referred the Tribunal to the case of **Chief Constable of West Yorkshire Police v Khan** 2001 ICR 1065, HL (a case dealing with the

predecessor act to the EqA), where Lord Scott said the Tribunal had to identify "*the real reason, the core reason, the causa causans, the motive*" for the treatment complained of. The Tribunal when considering whether a detriment was imposed because of a protected act, must identify clearly the protected act and determine the link between the detriment and that act. The observations from *Nagarajan* above regarding significant influence apply to this claim as well. As it is rarer for there to be direct evidence of victimisation, the establishment of a prima facie case of victimisation by a claimant can rely on inferences drawn from the primary facts and circumstances found by the tribunal to have been proved on the balance of probabilities.

25. The final claim to be considered by the Tribunal is one of constructive unfair dismissal. S95(1) of the Employment Rights Act 1996 states an employee is dismissed by his employer if (and, subject to sub section 2(c) the employee then terminates the contract under which he is employed, with or without notice, in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

26. The well-known case of **Western Excavating (ECC) Limited v Sharp** [1978] ICR 221 makes it clear that for such a claim to succeed there must be a fundamental breach of contract that entitles the Claimant to resign due to a repudiatory breach by the Respondent. This is something that must go to the heart or the root of the contract and entitle the Claimant to resign without notice. This involves a consideration as to whether there has been an act or omission, or a series of acts or omissions, by the Respondent which was the cause of the Claimant's resignation and amounted to a fundamental breach of contract. There needs to be a consideration of if and when the breach occurred, if there has been any affirmation by the Claimant, and whether the Claimant resigned in response to the alleged acts or omissions. The Claimant relies on two alleged breaches of contract - i) unreasonable questioning of the Claimant's decision-making regarding the sacking of a prisoner on 17 August 2020, and ii) inappropriate investigation of the Claimant's grievance. The Tribunal must look to see if either of these events occurred, and if so, whether individually or cumulatively, there is a fundamental breach of contract.

27. Lawful conduct is not something that is capable of amounting to repudiation and therefore conduct cannot be repudiatory unless it involves a breach of contract (**Sparfax Limited v Harrison** [1980] IRLR 442 CA).

28. The implied obligation of mutual trust and confidence in employment contracts requires that the employer shall not *"without reasonable and proper cause conduct itself in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employee/employer".* This is a definition which has been cited in well-known cases such as **Malik v BCCI, Woods v WM Car Maintenance Services, Imperial Group Pension Trust v Imperial Tobacco** and **Lewis v Motorworld Garages Limited**.

29. The implied obligation is formulated to cover a great diversity of situations and a balance has to be struck between the employer's interests in managing the business that they run as they see fit, and the employee's interests in not being unfairly and improperly exploited. It is a mutual obligation.

30. The burden lies on the employee to prove the breach on the balance of probabilities, this means that the employee must prove the alleged act or omission, and the employee must prove that the employer's conduct was without reasonable and proper cause. Ms Hornblower drew the attention of the Tribunal to the case of **Leeds Dental Team v Rose** [2014] ICR 94, EAT, which confirms that whether behaviour is said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties is to be objectively assessed, and does not turn on the subjective view of the employee. **Hilton v Shiner Ltd - Builders Merchants** [2001] IRLR 727 saw the EAT observe that even where there is conduct which objectively could be said to be calculated or likely to destroy or seriously damage the trust and confidence between the parties, if there is reasonable and proper cause for the same then there is no fundamental breach of contract.

31. The test whether such proven conduct, in the absence of reasonable and proper cause, amounts to a breach is said to be severe (**Gogay v Hertfordshire CC)**. It is not enough for the employee to prove the employer has done something which is simply in breach of contract or perhaps unreasonable. He must prove that the degree of breach was sufficiently serious, or calculated, to cause such damage that the contract can be fairly regarded as repudiatory, and that repudiation accepted. The cases of **Croft v Consignia PLC** and **The Post Office v Roberts** both indicate that the quality of the breach must be substantial. It must go to the heart of the contract – its root. Those cases along with Lewis also indicate that a repudiatory breach may be formed of the cumulative effect of a number of incidents which of themselves, in isolation, may or may not be repudiatory.

32. The Claimant must not have affirmed the fundamental breach of contract if found. The Tribunal reminded itself of the cases of **W E Cox Toner International Limited v Crook** [1981] IRLR 443 and **Buckland v Bournemouth University Higher Education Corporation** [2010] EWCA Civ 121. Deciding to resign is for many, if not most, employees is a serious matter. It will require them to give up a job which may provide them with their income, their families with support, and be a source of status to them in their community. Their mortgage, regular expenses, may depend upon it and economic opportunities for work elsewhere may be slim. There may, on the other hand, be employees who can quite easily obtain employment elsewhere, to whom those considerations do not apply with the same force. It would be entirely unsurprising if the first took much longer to decide on such a dramatic life change as leaving employment undertaken for several years than it would be

in the latter case, particularly if the employment were of much shorter duration. In other words, it all depends upon the context and not upon any strict time test. Unreasonable conduct alone is not enough to amount to a constructive dismissal (**Claridge v Daler Rowney** [2008] IRLR 672).

33. Finally, the reason for the resignation must be due to the fundamental breach of contract. However, the effective cause does not need to be the sole or dominant cause (**Jones v F Sirl & Son (Furnishers) Ltd** [1997] IRLR 493).

34. If the Claimant's resignation is found to be a dismissal, the Tribunal then must consider whether it was unfair and whether a fair procedure was adopted. No potentially fair reason has been pleaded so if the Claimant succeeds in showing that he was dismissed, this claim is likely to succeed.

The hearing

35. The Tribunal heard oral evidence from the Claimant, Officer Bayliss, Officer Dimond, deputy governor (now governor) Mr Denman, and Ms Slattery (senior probation manager seconded to HMP Swansea). It was also provided with a hearing bundle comprising of 521 pages and witness statements from all of the witnesses heard. The Claimant had to be asked to stop calling the Respondent's witnesses liars during cross-examination, but he willingly complied.

36. Where there was a dispute between the parties regarding factual matters, the Tribunal considered that consideration of contemporaneous documents were the best way of establishing what happened (**Gestmin SGPC SA v Credit Suisse (UK) Ltd and another** [2013] EWHC 3560 (Comm)), but there were points where there were no contemporaneous documents. In such circumstances, the Tribunal had to decide whose evidence to prefer. In general, when there was a dispute between witnesses unsupported by contemporaneous documents, the Tribunal preferred the evidence of the Respondent's witnesses to that of the Claimant. The Claimant's evidence was at times wholly inconsistent with contemporaneous documents and his credibility was undermined as a result. For example, he denied that his then representative Ben Murijo was present at a meeting with Mr Denman and the Claimant on 15 October 2020 when the unchallenged contemporaneous notes confirmed that he was present; the Claimant changed the account within his witness statement of meetings with Mr Denman and when they happened, despite previously confirming that the statement was correct; the Claimant appeared at times evasive when giving evidence.

37. In contrast, Officers Bayliss and Dimond and Mr Denman gave evidence straightforwardly and consistent with previous accounts; Ms Slattery was unable to explain some of her omissions but the contemporaneous documents showed what she did and did not do. It is open to a tribunal to accept part of

what a witness says and reject other parts; the Tribunal reminded itself of this when making findings of fact. The Tribunal also reminded itself that there was a burden of proof on the Claimant to show facts which in the absence of an explanation from the respondent could lead to a determination that there had been a breach of the EqA; where there was a fact that the Claimant wanted to prove, he needed to prove it on the balance of probabilities i.e. that it was more likely than not.

Findings of fact

38. The Tribunal decided it needed to determine the following factual disputes.

August 2020

39. Many of the factual disputes centre on the events of 17 August 2020. It is already agreed that the Claimant was abused by a prisoner cleaner and an inspection of the wing was imminent. The first factual dispute is whether, following the first incident of abuse by the cleaner on 17 August, the Claimant spoke to Officer Dimond and let him know what had happened and of his intention to dismiss the prisoner. Officer Dimond says this did not happen and the first that he knew of the event was when Officer Bayliss brought it to his attention later in the morning; the Claimant says it did happen because he is required to get his line manager's approval. Officers Bayliss and Dimond say that such approval is not required, though dismissals are often discussed, and all parties agree that the formal policy was not followed at the time. This was why the prison staff were reminded to follow the official policy after the events of August 2020. The Tribunal thought that nothing substantial turned on whether this discussion happened or not as it is not the core of the Claimant's case, but background. However, it attempted to make a finding.

40. There is no contemporaneous evidence surrounding this alleged discussion. There is no objective witness. Even if a witness had seen the Claimant speaking to Mr Dimond on the floor, it does not mean that any conversation was the conversation that the Claimant says took place. In essence, the position boils down to one man's word against the other. It is entirely plausible that both witnesses believe they are telling the truth. The Claimant may well believe that he told Mr Dimond what had happened, which by Mr Dimond's account would not be unusual as he was the senior officer on the wing; equally, as Mr Dimond viewed what happened as a "*nothing incident*", the conversation which by the Claimant's own account was not lengthy could have happened and honestly not be remembered by Mr Dimond. There is no obvious reason for either to lie about this alleged conversation.

41. In general, the Tribunal observed that Mr Dimond's evidence in other respects was supported by other witnesses while the Claimant has been found by the Tribunal not to be a reliable or credible witness on some points e.g. who was

present on 15 October 2020 and the events of 1 March 2021. That said, just because a witness' evidence is rejected in relation to one matter does not mean it should be rejected in relation to others. The Tribunal concluded that the Claimant had not proven that he had spoken to Mr Dimond on the balance of probabilities – it remained a 50/50 possibility. However, the Tribunal reiterates that it does not consider this particular alleged incident as important; it is not part of the core complaint and neither party is assisted by a finding whether the conversation did happen.

42. The next factual dispute is whether the Claimant and Officer Bayliss spoke privately in the office alone in the morning of 17 August. Again, there is no surrounding contemporaneous written evidence to assist. The Tribunal was not wholly persuaded that it was an important point whether this conversation happened privately in the morning as Officer Bayliss says and repeated in the office in front of the other officers at 12:30pm, or whether there was simply the one meeting as the Claimant asserts. This is because the essence of what the parties say was said is repeated for both meetings. There is no obvious reason for anyone to lie about whether the alleged first meeting took place as the accounts match what is alleged to have been said for both meetings.

43. That said, there is slightly more evidence than one man's word against the other in respect of whether this meeting took place. Mr Dimond in his statement and confirmed orally said that the first time he became aware that the Claimant had had an issue with the prisoner and had dismissed him was when Officer Bayliss came and told him about it. On the Claimant's account, if he had not met Officer Bayliss in the A2 office in the morning and the matter had only been discussed in the office at lunchtime in the presence of other officers, how could Officer Bayliss have the details of what had happened in order to discuss the matter with Mr Dimond? He could not. Both Officers Bayliss and Dimond have consistently said that Mr Dimond was told by Officer Bayliss what had happened, and this was not challenged by the Claimant. It is a reasonable inference that the Tribunal draws that Officer Bayliss must have spoken to the Claimant in order to understand what had happened; the Claimant gives no account of him telling anyone before the lunchtime meeting. The Tribunal prefers the evidence of Officer Bayliss who it found was a credible witness and explained why he was concerned. On this basis, the Tribunal finds that it is more likely than not that the Claimant and Officer Bayliss did speak in the office privately during the morning of 17 August 2020.

44. The Tribunal then considered what was said in the private meeting between the Claimant and Officer Bayliss. When it considered the Claimant's grievance, the grounds of complaint attached to the ET1, and the witness statements of both Officer Bayliss and the Claimant, all accounts agree that there was a conversation where the Claimant told Officer Bayliss that he wanted the cleaner sacked, that Officer Bayliss said if that was the case it was for the Claimant to sack him (not Officer Bayliss), and that no one used the words "*you cannot*

sack the cleaner" to the Claimant. Officer Bayliss explained that there was a misunderstanding in his conversation with the Claimant. Officer Bayliss believed that the Claimant was asking him to dismiss the cleaner and Officer Bayliss was explaining that if the Claimant who wanted the prisoner dismissed, it was for the Claimant to do it. The Claimant's own account confirms this.

45. English is not the first language of the Claimant and during points in the hearing, it was evident that he did misunderstand what was being said to him and all the meaning of documents in the bundle; it was necessary to correct the misunderstandings. The Tribunal found it was more likely than not that a similar miscommunication had arisen between the Claimant and Officer Bayliss on 17 August 2020. This is consistent with the accounts of both men of the conversation and explains why Officer Bayliss told the Claimant that it was for the Claimant to dismiss the prisoner. This finding substantially undermines the Claimant's allegation that the implication of what Officer Bayliss said to him was that the Claimant could not so dismiss a prisoner; it is the opposite of what Officer Bayliss said to the Claimant.

46. The Tribunal also found that during both the private conversation and the discussion in front of other officers, Officer Bayliss was trying to get the Claimant to reconsider his decision to dismiss the prisoner from his role as cleaner. Officer Bayliss's evidence was that he was concerned the Claimant was making a rash decision. His account was that the Claimant had entered the office, when just Officer Bayliss was present, swearing and demanding that the prisoner was sacked, while Officer Bayliss was concerned such conduct was out of character for the prisoner who was good at his job and with an inspection was imminent. Officer Bayliss (supported by the evidence of Officer Dimond) said that was that it was standard practice to discuss the dismissal of prisoners with colleagues due to the impact on the wing. Orally, he expanded on his description of one occasion where he had personally discussed and reflected on a decision to dismiss and taken an alternative step. This evidence was not challenged.

47. It is agreed that there was a discussion at around 12:30 PM in the office in the presence of other officers. The Tribunal finds that it is more likely than not a similar conversation had happened in the office earlier between the Claimant and Officer Bayliss alone, and it was repeated at the later meeting. The only difference was that Officer Diamond indicated that the Claimant could consider giving the prisoner a warning instead. When the Claimant told him about the second incident of swearing at him by the prisoner, Officer Diamond agreed with the Claimant. There is no challenge to this account by the Claimant, other than he says Officer Dimond had earlier agreed with him in a conversation that morning.

48. The Tribunal had the benefit of considering evidence from other officers present, notably Officers Hayward and Wilkins. They were interviewed in April

2021 by Ms Slattery, several months after the incident in August. They appeared to have a recall of the key points of this meeting. It was not until submissions of the Claimant that he alleged that they had been told what to say; this was never put to any of the Respondent's witnesses. The Tribunal, while accepting the accounts of Officers Hayward and Wilkins were not contemporaneous, was willing to place weight on their accounts. It noted that Officer Wilkins was mentioned as a witness by the Claimant as early as his meeting with Sarah Edwards on 30 September 2020. Officers Hayward and Wilkins' accounts largely matches what has been asserted by the Claimant and Officer Bayliss and Dimond in terms of the contents of the conversation. The only difference is that Officers Hayward and Wilkins are clear that it was a conversation or discussion, and not an argument while the Claimant asserts that it was an argument. Both Officers Wilkins and Hayward observed the Claimant's interaction with the cleaner and described the Claimant as screaming and shouting at the prisoner. The Claimant himself describes his feelings at the 12.30pm discussion as "*very agitated*" (a word also used by Officer Wilkins at page 479), and Officer Hayward describes the Claimant as being very set in his view and "*stern*" during this discussion. Both officers say that Officers Bayliss and Dimond were simply asking the Claimant if he would like to consider other options, but Officer Hayward observed that the Claimant *"probably felt like they were trying to argue with him… They were literally just trying to see if there's other routes, like routes they can go down*" [page 473]. Both officers were clear that nothing inappropriate took place and the Claimant was told he had the final decision on it as it was his landing (see page 479 as an example).

49. The Claimant never says that he was told directly that he could not dismiss the prisoner; in his own account, he says that he was told by Officer Bayliss that it is for him to dismiss the prisoner. The Tribunal does not accept that the Claimant was by implication told that he could not dismiss the prisoner when the opposite was stated by his own account. The Tribunal finds that following the incident with the prisoner, the Claimant was agitated and upset and considers it much more likely that while there was a discussion, the Claimant was unwilling to listen to his colleagues due to his distress and a growing belief that they were more interested in the inspection/the prisoner than him. Officer Bayliss' suggestion that the Claimant reflected on his decision is explained partly by the Claimant's own demeanour as confirmed by all the witnesses present, including the Claimant himself; he was upset.

50. The next matter that requires factual determination is 20 August 2020. On the account of the Claimant, Supervising Officer Rowe simply asked why the cleaner had been dismissed. The comments of Officer Boulter were not the subject of a complaint by the Claimant. The Claimant's point was that if there had been a conversation, rather than an argument, on 17 August 2020, nothing at all should have been said by other colleagues not involved in that discussion on 20 August 2020. The Claimant suggests that the conversation on 20 August

shows that he did not have the power to dismiss a prisoner or to do so without discussion.

51. The Tribunal does not accept this. The fact that other colleagues asked about the dismissal of the cleaner does not change what happened on 17 August. There was a discussion, but it does not mean other officers agreed with the Claimant's professional decision that he was entitled to take, and did take as shown by his email to the activities team on 18 August. However, the Tribunal finds that it was this conversation that led the Claimant to see the deputy governor, Mr Denman. There is no dispute that Mr Denman told the Claimant that the dismissal of the prisoner was a matter for him and reiterated the point to Officer Rowe. Indeed, the Claimant's own account shows that Officer Dimond and Mr Denman both supported him.

52. It is also worth recording that the parties agree that the cleaner was never reinstated to his role and there was no proposal that this should happen. The evidence before the Tribunal is that the prison officers acted as a team and discussed matters that could impact the wing with colleagues was unchallenged. The Claimant also produced no evidence that named an occasion where a prisoner was dismissed by any white officer, let alone by the comparators. His case rested on mere difference – that he was a black African and the comparators were white.

53. Taking all the evidence into account, the Tribunal did not find that the discussion of the Claimant's decision to dismiss the cleaner on 17 and 20 August 2020 was unreasonable. It is not inherently unreasonable for colleagues to ask why a particular step has been taken and to suggest that another option could be considered. Given the imminent inspection, the good work record of the cleaner, and the fact that it has been demonstrated that prison officers do discuss the dismissal of prisoners and take an opportunity to reflect before action in any proposed dismissal, there was good reason for the points made by Officer Bayliss. There is nothing in the surrounding circumstances, particularly given the Claimant accepted that he had no other issues with these officers, that could found an alternative inference.

54. It is also relevant that unfortunately due to the nature of the prison service, abuse by inmates is a run-of-the-mill incident; a "*nothing incident*" as Officer Dimond put it. In the judgment of the Tribunal, having considered the evidence and heard the witnesses, that it is the Claimant's reaction to the thoughts of his colleagues that has raised the matter out of its run-of-the-mill nature. The Claimant made a decision to dismiss a prisoner, his colleagues asked him to think about it before he sent the email to the activities team, the Claimant was unwilling to do so and proceeded to dismiss the prisoner, and he was supported his decision by both Officer Dimond and the deputy governor. Nothing unreasonable occurred.

The investigation

55. The Tribunal must make findings of fact in relation to the investigation in order to determine the claims in relation to it. The Claimant asserts that it was inappropriate, but has not defined the meaning of this word. He specifically said the time taken was not inappropriate, and complained of the failure to interview other officers present in the office at 12.30pm 17 August 2020 or to view CCTV/body camera footage to identity those officers. As Ms Hornblower reminded the Tribunal, an unreasonable or flawed investigation does not necessarily mean that it is a discriminatory act. It is also trite law that when investigating matters, an employer is not required to take every single possible step that can be taken; it should act reasonably and proportionately, particularly if much is agreed between those in dispute.

56. The Claimant raised his grievance on 22 September 2020. Ms Sarah Edwards was appointed to investigate. It is accepted by both parties that her investigation was inadequate. Given that Miss Edwards only interviewed the claimant, in the tribunal's view the parties are correct and this was a flawed investigation. No explanation has been given why Ms Edwards failed to fully investigate.

57. However, when the Claimant met Mr Denman to discuss the matter on 15 October 2020, the deputy governor agreed with the Claimant that the initial investigation was poor and took steps to rectify the matter. The Tribunal notes that the Claimant disputes that Ben Murijo was present at this meeting. It does not accept his evidence in this regard. The contemporaneous note of the meeting, not previously challenged by the Claimant, confirms that Mr Murijo was present; this is more likely than not to be correct, given that he was the local RISE representative (Racial Inclusion and Striving for Equality), an organisation supporting those in the prison service facing discrimination issues. The Claimant was after all complaining of discriminatory treatment; it is entirely plausible that Mr Murijo attended to support him, and the Tribunal finds that this is what happened.

58. Ms Slattery undertook a more extensive investigation. She interviewed Officers Bayliss and Diamond, and the Claimant's then line manager. She also interviewed others who were able to give evidence about the formal policy that was in place (which the parties accept no one followed) and whether the cleaner was undertaking the activities referred to by Officer Boulter. Strikingly though, she did not interview the other prison officers present in the office at lunchtime on 17 August 2020.

59. Ms Slattery was asked about this during the hearing by the panel. Her answers were not impressive. She said that the Claimant had not given her their names and she had not asked him for them as he had talked a lot during their meeting. Ms Edwards had been given names, one of which was Officer Wilkins. Ms

Slattery said that she had undertaken a proportionate investigation. Ms Slattery was able to explain that body camera footage was not available as it is generally only activated when there is a violent incident or major incident involving a prisoner, and she did not look at CCTV for an internal matter. Ms Slattery accepted that there would have been records as to who was on duty, but she did not check them.

60. The Claimant in his cross examination described Ms Slattery as incompetent. The Tribunal did point out to the Claimant that if Ms Slattery had been incompetent, than any failings in her investigation may be caused by this rather than the Claimant's race or the fact that he had made a protected act; the Claimant continued with this line of questioning.

61. The Claimant has two core criticisms of the investigation. He complains that the other prison officers (though during his submissions he started to name other people who were not present in the office) present were not interviewed before his resignation and he complains that CCTV footage was not checked. The reason why the Claimant thinks the CCTV footage should have been checked is that it would have shown who was present in the office; at no point, during the proceedings did the Claimant explain why he did not give all the names of the officers on his shift present in the office.

62. Mr Denman during his evidence was able to give more information about the CCTV. He confirmed that it did not record sound, and therefore could not assist with what was said in the office. Further, there was no CCTV in the office. In the Tribunal's view, it would not have been proportionate or helpful for the Respondent to have gone through CCTV footage and attempt to identify who was in the office in order to interview them when the Claimant simply could be asked. In addition, the CCTV could never have helped determine what was said in the office as there was no sound. It was not a step that the Tribunal considered needed to be taken. It is also relevant that CCTV was only available for a 90-day period according to Mr Denman's unchallenged evidence, and therefore was only available for the early stages of the investigation.

63. However, returning to the issue of the failure to promptly interview witnesses, the Tribunal did consider that Ms Slattery's initial investigation was flawed in this regard. It would not have been disproportionate to have at least interviewed Officer Wilkins as their name had been given at an early stage to Ms Edwards. The Tribunal acknowledges that the Claimant did talk a good deal in his interview with Ms Slattery, but it would not have been difficult to simply ask for the names of the witnesses. Ms Slattery said that she had undertaken many investigations as she had been in her role for 10 to 12 years. She also added that this was the first allegation of race discrimination she had investigated (though she had attended training). In the Tribunal's view, the failure to initially interview at least Officer Wilkins (if not the other officers present) was a flaw in her investigation.

64. The Tribunal also noted that Ms Slattery in her investigation opened with a long statement setting out the Claimant's account of what had happened on 17 August 2020 to each witness. This was in its view an unwise step. Rather than asking an open question of the witness asking what they could remember, the witnesses were being primed with the account of the Claimant. This could have affected the evidence that they gave to the detriment of Officers Bayliss and Dimond. However, this was not to the disadvantage of the Claimant. It did though demonstrate that Ms Slattery in her role as an investigative officer was not acting in accordance with good practice.

65. The Tribunal asked itself why had Ms Slattery omitted to take the step of interviewing the other officers. There was no evidence from which a discriminatory reason could be inferred; the Claimant himself suggested Ms Slattery appeared to be incompetent. The alternative reason based on the evidence was that Ms Slattery was conducting what she termed a proportionate investigation, and given the similarity between the accounts of the Claimant and Officers Bayliss and Dimond, she did not consider the evidence of more objective witnesses necessary. Ms Slattery was unable to explain further to the Tribunal when asked and needed the meaning of the word "*objective*" explained to her. The Tribunal concludes that it is more likely than not Ms Slattery had incompetently failed to interview the other officers as she failed to appreciate the evidential value of objective witnesses; her deficient approach was demonstrated by fer failure to understand that interviews should not start with the witness being told one account, as opposed to being asked open questions.

66. However, when the Claimant discussed the flaw in Ms Slattery's investigation to Mr Denman in their meeting on 1 March 2021, Mr Denman agreed. He obtained names from the Claimant and directed that those officers were to be interviewed by Ms Slattery. Ms Slattery interviewed the officers that she could contact, namely Officers Hayward and Watkins, in April 2021. This means that this defect in the investigation was rectified at the behest of Mr Denman, with whom the final decision rested.

67. The Claimant did not complain about the failure to include the local RISE representative in the investigation, despite Mr Denman's decision that this should happen as shown in the notes of the meeting 15 October 2020. Mr Denman accepted that he had not told Ms Slattery to do this, and there appears to be no evidence of the representative himself complaining. The Tribunal asked itself whether, notwithstanding the claimant's lack of criticism, this failure made any difference; there was no basis on which it could find that it did. This may explain the lack of complaint by the Claimant.

68. The Tribunal turned to 1 March 2021. There are several disputes surrounding what happened on this date. The Claimant says that there were two meetings with Mr Denman, one in the morning and one in the afternoon. The Claimant

says that in the morning Mr Denman expected the claimant to meet without the Claimant having been sent the report of Ms Slattery; the Claimant said that he insisted that he was given an opportunity to read the report before returning in the afternoon. Mr Denman denies this utterly. He points to his email [page 403] of 23 February 2021 sending the report to the Claimant and the acknowledgement of receipt the next day. There are further emails that show that the meeting was arranged to take place at 2pm on 1 March [page 401]; there is no email arranging a meeting in the morning. The Tribunal considers it unlikely that a prison officer can stroll into the office of the deputy governor and have a substantial meeting in the morning when one has been arranged to take place in afternoon with the RISE representative in attendance. The Tribunal finds that there was only one meeting on 1 March 2021 between the claimant and Mr Denman and the report had been sent to the Claimant the previous week. It does not accept the Claimant's evidence on this issue.

69. The other dispute is that the Claimant asserts that Mr Denman told him during the meeting of 1 March 2021 that the investigation was concluded, that the grievance was at an end, and no further action would be taken. Again, Mr Denman denies this utterly and points to the surrounding contemporaneous evidence that shows not only that the investigation was continuing, but also that the Claimant was told this at the meeting. Mr Denman points to the meeting notes which confirm that the investigation is continuing and that the points raised by both Mr Denman and the Claimant will be investigated [page 404-405]; the follow-up email from Mr Denman on 4 March 2021 recording again in writing what is going to be further investigated and asking the Claimant to add any other points so that the investigation can be continued [page 414-415]; the discussion with the Prison Officer Association to the same effect on 3 March 2021 as confirmed by the email from Sarah Rigby of that date [page 409]. The Tribunal prefers Mr Denman's account on the basis of the contemporaneous evidence and the fact that the investigation did continue even after the Claimant resigned. The Claimant was not told on 1 March 2021 that the investigation and grievance process was at an end.

70. Stepping back and taking everything into account, the Tribunal finds that the investigation was flawed. The initial investigation by Ms Edwards was inadequate, but Mr Denman identified this and took steps for the appointment of a new investigator under the Conduct policy. A more substantial investigation was then conducted in November 2020, but this investigation was flawed because of Ms Slattery's failure to not question the more objective witnesses who were present in the office. While the Tribunal can understand that the Claimant's failure to give her names made matters more difficult, Ms Slattery should have had the name Officer Wilkins from the Claimant's interview with Ms Edwards, or could have made some effort to identify who was in the office, such as asking the Claimant or using the records of the Respondent as to who was on shift. The Tribunal understands why the Claimant was unhappy about

such an obvious failure in the investigation, but does not accept his criticism in relation to the failure to view CCTV as fair or reasonable.

71. The difficulty for the Claimant is that the investigation was ongoing when he resigned. By the time it was concluded, this missing evidence had been obtained on the instruction of Mr Denman. The additional evidence was not supportive of the Claimant's position. Taking the whole investigation into account, the Tribunal did not consider that it was inappropriate when the Claimant resigned as he knew Mr Denman had instructed that the additional evidence be obtained, or by the time the investigation ended as the evidence was by then obtained. The investigation was flawed, but the flaws were corrected by its conclusion. Ms Slattery had acted incompetently, but this does not mean the investigation was inappropriate.

72. In the event that the Tribunal's finding that the investigation was not inappropriate is incorrect, there was no evidence that the flaws and inefficient nature of the investigation had any connection to the Claimant's race or the fact that he had raised a grievance. The Claimant had advanced no evidence in support of the race claim, other than he was a black African, and made no comparison to others, actual or hypothetical. Mere difference is not enough to establish discrimination, nor is unreasonableness, inefficiency or incompetence. There was no evidence on which a finding that Mr Denman, the final decision-maker, allowed an inappropriate investigation to take place; the evidence is wholly to the contrary.

Other Conclusions

73. In relation to the direct discrimination claim regarding the questioning of his decision-making on 17 April 2020, the Claimant is out of time. The Tribunal only has jurisdiction if it extends time on the basis that is just and equitable to do so. It is correct that the Claimant failed to adduce any evidence in relation to jurisdiction in his witness statement. In his oral evidence, the Claimant explained that because he was proceeding with the grievance process, he decided to let the process run its course and he had no thought of taking the matter to an employment tribunal. He said he was unaware of time limits. He also accepted that he was well and able to work during the primary limitation period and had accessed numerous sources of advice such as the prison officers association, a solicitor to whom he was referred by the association, and the RISE representatives, including someone from HMP Berwyn.

74. As Ms Hornblower pointed out, the onus is on the Claimant to extend time and time limits exist for a reason. No submission was made by her that the cogency or strength of the evidence had been affected by the delay, or that the balance of prejudice was in the favour of the Respondent. This is not a case where the Claimant was doing nothing in relation to his concerns about what happened in August 2020. He raised a grievance, and the investigation was continuing until

after his resignation. While the incident on 17 August 2020 was not a continuing act, the Claimant was continuing his complaint about it by proceeding with the grievance. If denied the extension, the Claimant would not be able to bring the claim, which is a prejudice. There was no adverse effect on the evidence due to the delay, and the event would have had to be considered anyway due to the constructive unfair dismissal claim. In the judgment of the Tribunal, it is just and equitable to extend time to allow the Claimant's claim of direct race discrimination in relation to the August 2020 matter to proceed.

75. The Claimant has failed to prove that he was unreasonably questioned about his decision making on 17 August 2020 or that the investigation into his grievance was inappropriate. This means that discrimination claim and victimisation claim fails. The Tribunal has also found that in the event that is incorrect, there was no connection to the Claimant's race or the protected act.

76. This leaves the constructive unfair dismissal claim. The Claimant has been unable to demonstrate that either of the two alleged breaches of contract took place. Notwithstanding this, the Tribunal carefully considered the position at the time the Claimant tendered his resignation as at that point the additional evidence had not been obtained. However, the Tribunal has found that when he resigned, the Claimant knew Mr Denman had agreed to instruct the investigating officer to interview the other officers on 1 March 2021 and that the investigation was still continuing. The Respondent did not act in a way calculated or likely to destroy or seriously damage the trust and confidence between it and the Claimant. The Claimant has not been able to establish that there has been any breach of contract, let alone a fundamental breach of contract. Accordingly, the claim of constructive unfair dismissal is not well-founded.

Employment Judge C Sharp
Dated: 17 February 2022

JUDGMENT SENT TO THE PARTIES ON 21 February 2022

FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS Mr N Roche