EMPLOYMENT TRIBUNALS

Claimant: Mr A Borkowiak

Respondent: RPL Transport Ltd

HEARD AT: BURY ST EDMUNDS **ON**: 26th, 27th & 28th June 2017.

BEFORE: **Employment Judge Laidler**

MEMBERS: Ms L Daniels
Mrs S Allen

REPRESENTATION

For the Claimant: Miss M Wisniewska, Lay Representative.

For the Respondent: Mr C Bailey-Gibbs, Solicitor.

JUDGMENT having been sent to the parties on 30th June 2017, and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013, the following reasons are provided.

REASONS

1. The claim in this matter was received on the 15th July 2016 in which the Claimant brought claims of unfair constructive dismissal, race discrimination and breach of contract in respect of wages. The claims were denied in their entirety in the response.

2. There was a Preliminary Hearing on the 30th September 2016 which identified the issues in this case as follows:

The Issues

Unfair dismissal claim

3 Was there an act or omission by the respondent? Specifically, the claimant relies on the following:

3.1 That the claimant was paid a different rate of pay to his British colleagues on grounds of his race up until he went on sick leave on 8th February 2016;

3.2 Being made to breach the laws on driver's working time; (The claimant will provide a date for these breaches following disclosure)

3.3 Being told by Danny Wright to "do the job or there is the door" when he raised issues around driving hours in or around February 2016;

3.4 Being told by Danny Wright when he was off sick (in or around February 2016) that "You are not sick. There is something wrong in your head. I will send a doctor to your house".

4. If so did one or more of the above (taken individually or collectively) amount to a fundamental breach of contract? The claimant alleges in this regard that they amounted to a breach of the implied term of trust and confidence entitling him to resign.

5. Has the Claimant resigned promptly in response to the breach i.e has he affirmed the contract?

6. If so, the respondent does not advance any reason for the dismissal so the Tribunal should consider whether the respondent otherwise acted reasonably?

***Section 26: Harassment on grounds of* race**

7. The claimant is of polish origin. Did the respondent engage in unwanted conduct as follows?

7.1 Paying the claimant, a different rate of pay on grounds of race as set out in the second paragraph of 8.2 on the ET1;

7.2 Being told by Danny Wright to "do the job or there is the door" when he raised issues around driving hours in or around February 2016;

7.3 Being told by Danny Wright when he was off sick (in or around February 2016) that "You are not sick. There is something wrong in your head. I will send a doctor to your house"

8. Was the conduct related to the claimant's protected characteristic namely his race?

9. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

10. If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

11. In considering whether the conduct had that effect, the Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

***Section 13: Direct discrimination on grounds of* race**

12. Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act, namely*:*

    12.1 Paying the claimant a different rate of pay on grounds of race as set out in the second paragraph of 8.2 on the ET1;

    12.2 Being told by Danny Wright to "do the job or there is the door" when he raised issues around driving hours in or around February 2016;

    12.3 Being told by Danny Wright when he was off sick (in or around February 2016) that "You are not sick. There is something wrong in your head. I will send a doctor to your house"

13. Has the respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies on hypothetical comparators and actual comparators within the workplace namely British drivers.

14. If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

15. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Time/limitation issues

16. The claim form was presented on 15th July 2016. Accordingly, any act or omission which took place before 16th May 2016 (as adjusted for the ACAS early conciliation period) is potentially out of time, so that the tribunal may not have jurisdiction. For each of the matters relied upon by the claimant in respect of his discrimination and harassment claims the tribunal will need to consider time and namely:

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

    16.2 Was any complaint presented within such other period as the employment Tribunal considers just and equitable?

Breach of contract

17. Did the respondent fail to pay the claimant the correct rate of pay?

18. The Tribunal has had to ensure that the Claimant's representative kept to those issues throughout this hearing. It is to be noted there was an application at the Preliminary Hearing to amend to add other claims which was not granted. The hearing had then been listed for the 30th January but that was postponed due to lack of Judicial resource hence the hearing before this Tribunal. One of the orders made at the Preliminary Hearing was for further and better particulars of the alleged breaches of drivers working time to be filed by the 11th November and these the Tribunal saw at page 284 of the bundle. These gave dates of alleged infringements from the 10th August to the 9th November 2015.

19. The Claimant had earlier periods of employment with the Respondent but these are not relevant for the purposes of these proceedings. This period of employment commenced with the Respondent on the 23rd September 2012. The Claimant had lost his licence on 19th January 2012 following accumulation of too many points. This he confirmed in cross examination explaining that he had lost his licence for 6 months but TP99 stayed on the licence for 4 years which would have shown any potential employer that he had been disqualified for that 6-month period.

20. The Tribunal saw in the bundle the statement of terms issued to the Claimant and this provided that his basic rate of pay was £408 per week. It also provided that: -

> *"Your normal hours of work will be 48 hours per week Monday to Friday to fall in line with the Working Time Directive Regulations, although the actual hours will be in accordance with driver's hours. Staff may be temporarily required to work additional hours when the needs of the business require them to do so. Changes either temporary or permanent will take place only after consultation with you."*

21. To start with when employed the Claimant was doing what is known as "tramping". This involves driving long distances and staying away overnight. The Claimant was understandably reluctant to continue doing that role due to the effect on his family life. The Tribunal saw a letter dated 2nd September 2014 from Mr Wright offering the Claimant a shunting job at the Client Sansetsu. The letter confirmed: -

> *"The start time will vary between 2300 - 0500 hours each day which will give you the opportunity to be home each evening."*
>
> *As discussed this will be paid at the normal day rate of £418 per week.*
>
> *These rates will not vary regardless of where these are during a 24-hour period.*

22. A letter dated 12th November 2014 was sent to staff to confirm the takeover of RPL Transport by the Bedfords Group. This confirmed that the hourly rates remained £8.00 per hour for the first 50 hours and that all hours over 50 were to be paid at £10.50 per hour. Nowhere are the rates the Claimant mentioned in his claim form of £10.50 for standard hours and £14.00 for hours over 50 seen in the documentation although it is correct to say that the Claimant accepted that the lower rate probably should have been referred to as £9.60 once an anonimised pay slip was revealed with that rate on it.

23. There was another letter to the Claimant dated 24 November 2014 from Mr Wright confirming the rates as have been referred to above of £8.00 per hour and £10.50 for additional hours over 50.

24. There was also a document at page 222 being a schedule to the contract of employment. This showed that from December 2014 £8.00 per hour and after 50 hours £10.50. On the same page was a second schedule with effect from May 2016 of £9.60 and £14.00. It did seem from the Claimant's evidence and submissions that he believed he should have been paid those rates even though they were not in place whilst he was in employment.

25. The Tribunal saw records of the pay paid to the Respondent's employees. At page 240 was an entry 544 which the tribunal accepts was a Mr Perrera who replaced the Claimant. The tribunal finds and the Claimant accepted that he was paid at the same rate as he the Claimant had been. Also on that sheet was identified a British driver who was paid a flat rate of £90 per week but it was accepted that driver was on a day shift.

26. The issue of pay goes to constructive dismissal, race and breach of contract. The Claimant's argument is that these rates set out above were correct as day rates, but that he was entitled to a night rate. The Tribunal accepts the evidence of the Respondent that there was not at that time a night rate. The employer was RPL and not Bedfords. The Claimant tries to compare himself to Bedford drivers who are not appropriate comparators. The issue of the correct Respondent came up at the Preliminary Hearing and paragraph 17 of the summary sent to the parties confirmed that these proceedings were against RPL as the employer only, and not Bedfords.

27. The Claimant alleges that he was made to breach the laws on driver's hours. As stated he provided further and better particulars of those irregularities. In cross examination, he accepted that those mistakes were his and that sometimes he inserted the Tacograph too early or too late. He went on to suggest that this may have been caused by him having to work 15 hours a day rather than 10 hours. It was put to the Claimant that the finish times were not dictated to by the Respondent but the Client. The Claimant then stated *"This was not race discrimination. They made me break the law, my hours and shift were nothing to do with race discrimination."* The Claimant then appeared to try and pursue a claim he was being made to work long hours, but again that was not one of the issues before this Tribunal.

28. There were then two remaining issues with regard to two alleged words

used by Mr Wright to the Claimant. The Tribunal although accepting that the Claimant speaks good English has come to the conclusion that there has been a genuine misunderstanding as to what was said to him.

29. The Claimant firstly alleges Mr Wright said "There's the door". The Tribunal does not find Mr Wright said that. It accepts that they had to discuss with the Claimant as they did with others the need to comply with all aspects of not only the Working Time Regulations but the Driver's Hours Regulations, and it may well have been that the employer stated that to keep his job he had to comply with the legal requirements. That would have been a reasonable thing for an employer to make clear and would have been said to any employee regardless of race or any other protected characteristic. The Tribunal does not accept that the Claimant was told 'There's the door'.

30. The final complaint the Claimant makes is with regard to his sickness absence and suggests that Mr Wright did not believe he had been sick, that he said it was a problem 'with his head' and he was going to send a Doctor to the Claimant's home. Firstly, the Tribunal notes that on the sick notes that were produced by the GP he never ticked the box which said "I will need to assess your fitness to work" or that he would not. The certificates were therefore not completely filled in by the GP. The Tribunal accepts that the Respondent made a perfectly reasonable request, that following a period of 5 weeks off work with stress that the Claimant get a fitness to work report from his GP, their GP or their Occupational Health Doctor. There was another misunderstanding in that the Tribunal is satisfied Mr Wright did not say the Claimant had not been sick, but had tried to distinguish between a physical condition where it might have been possible to see that he had fully recovered and one that was a psychological condition. The Tribunal is satisfied that he did not say he would send a Doctor to the Claimant's house, but that he could arrange for the Claimant to visit their Doctor or Occupational Health and would pay for it. Taking into account the nature of the Respondent's business this was a perfectly reasonable request.

31. On the 29th January 2016, a letter was sent to the Claimant confirming that he was being taken off the shunting role at the Sansetsu site, as the Respondent had received some customer complaints about the Claimant's behaviour whilst working for that Client. They asked him not to contact any employee or owner of the Client, or to discuss the complaint with them.

32. There was evidence that the Claimant did do some tramping work before going off sick on or about the 8th February not to return then to the Respondents employment.

33. There seemed to be another attempt to expand the Claimant's case to include an argument that no disciplinary procedure was followed before issuing this letter. Again that was never part of the Claimant's pleaded case.

34. The Claimant resigned on the 4th March giving two weeks notice and the effective date of termination was the 11th March. He started new employment on the 14th March. The TP99 had been cleared from the Claimant's licence on the 19th January 2016.

35. There has been much evidence of varying sorts produced to this Tribunal during the course of this hearing by the Claimant and his representative including a wage slip said to be of a British driver with all the details blanked out save the rate of pay. Documents which the Claimant's representative herself refers to as "random Internet searches" none of which is evidence upon which this Tribunal can rely or base it's findings upon. Even the evidence of the Claimant's own witnesses did not address the very particular issues before this Tribunal. Mr Imeson had not worked for the Respondent since 2014.

THE RELEVANT LAW

36. The Claimant states that he was constructively dismissed and must therefore show that he was dismissed within the meaning of section 95(1)(c) Employment Rights Act 1996 namely that 'the employee 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'.

37. The Tribunal accepts that the law was accurately set out in the Respondent's submissions and that the appropriate test for constructive dismissal is still that set out in *Western Excavating ECC Ltd v Sharp [1978] IRLR 27* when it was stated:

> *If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains: for, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract.*

38. As was made clear in *Malik v BCCI* [1997] IRLR 462 the breach may be of the implied as well as express term of the contract. The court made it clear that the implied obligation extends to any conduct by the employer 'likely to destroy or seriously damage the relationship of trust and confidence between employer and employee.'

39. The Claimant brings claims under the following provisions of the Equality Act 2010:
    13 Direct discrimination

(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.

26 Harassment

(1) *A person (A) harasses another (B) if—*

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

136 Burden of proof

(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.

40. *Igen Ltd v Wong* [2005] IRLR 258 still sets out the basis upon which the Tribunal should approach the burden of proof in discrimination cases. The Court of Appeal stated:

The first stage requires the applicant to prove facts from which the tribunal could, apart from the section, conclude in the absence of an adequate explanation that the respondent has committed, or is to be treated as having committed, the unlawful act of discrimination against the complainant. The words "in the absence of an adequate explanation", followed by "could", indicate that the tribunal is required to make an assumption at the first stage which may be contrary to reality, the plain purpose being to shift the burden of proof at the second stage so that unless the respondent provides an adequate explanation, the complainant will succeed. It would be inconsistent with that assumption to take account of an adequate explanation by the respondent at the first stage.

The second stage, which only comes into effect if the complainant has proved those facts, requires the respondent to prove that he did not commit or is not to be treated as having committed the unlawful act, if the complaint is not to be upheld. If the second stage is reached, and the respondent's explanation is inadequate, it will be not merely legitimate but also necessary for the tribunal to conclude that the complaint should be upheld…

> *Although there are two stages in the tribunal's decision-making process, tribunals should not divide hearings into two parts to correspond to those stages. Tribunals will generally wish to hear all the evidence, including the respondent's explanation, before deciding whether the requirements at the first stage are satisfied and, if so, whether the respondent has discharged the onus which has shifted.*
>
> *…employment tribunals should not too readily infer unlawful discrimination on a prohibited ground merely from unreasonable conduct...*

41. *Madarassy v Nomura International PLC* [2007] IRLR made it clear that a difference in protected characteristic and a difference in treatment is not sufficient to pass the burden of proof to the employer.

Conclusions

Constructive Dismissal

42. There has been no breach of any implied or express terms of the contract such as to entitle the Claimant to resign and claim constructive dismissal.

43. The Claimant relies upon the same matters as he alleges to be discriminatory as breaches of the contract by the employer. The Claimant has however not established any such breach He was paid according to the contract. He accepted that in relation to breaches of drivers' hours they were his responsibility. The tribunal has not found that Danny Wright used the words alleged by the Claimant.

44. The claim for constructive dismissal must therefore fail and is dismissed.

Race Discrimination

45. In relation to both the claims of harassment and direct discrimination the Claimant has not established any facts from which the Tribunal could conclude less favourable treatment and the burden of proof does not therefore pass to the Respondent. The Claimant was paid the contractual rate for the job. He cannot rely on rates that came into force once he had left employment or that were paid by another employer.

46. If the Claimant had established such facts and the burden passed the Respondent has provided an explanation which is in no way whatsoever to do with race, namely that they were paying the contractual rate.

Breach of Contract

47. It follows that with regard to the breach of contract claim the Claimant was

paid in accordance with his contract, there was no breach and that claim must also fail and is dismissed.

Employment Judge Laidler, Bury St Edmunds
04.08.17.

JUDGMENT SENT TO THE PARTIES ON

……..

.....
FOR THE SECRETARY TO THE TRIBUNALS