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THE EMPLOYMENT TRIBUNALS

Claimant

Respondents

Mr J Tabinas

v

(1) Wilson James Limited
(2) Francis Crick Institute Limited

Heard at: London Central

On: 4 & 5 October 2017

Before: Employment Judge Isaacson

Members: Mr T Burrows
Mr J Carroll

Representation:

Claimant: In Person
First Respondent: Ms H Compton, Counsel
Second Respondent: Mr N Roberts, Counsel

JUDGMENT

The unanimous Judgment of the Tribunal is as follows:

The Claimant's claims for direct race discrimination and victimisation fail and are dismissed.

REASONS

Evidence before the Tribunal

- 1 The Tribunal was presented with a joint bundle of documents. The Claimant produced a brief witness statement with attachments, a chronology and gave evidence before the Tribunal.
- 2 On behalf of the First Respondent the Tribunal had a witness statement from Mr James Fawsitt, who is the Logistics Solutions Development Manager for the First Respondent and is now employed for the Second Respondent; a

witness statement from Ms Katie Pryce, the Pre-Construction and Sustainability Coordinator for the First Respondent and was presented with a witness statement from Mr Colin Dann, the Strategic Account Manager. Mr Dann did not attend at the Tribunal and although the Tribunal took in to account evidence that was supported by documentation within the bundle, gave little weight to the rest of his witness statement. Mr Fawsitt and Ms Price were available to be questioned by the Tribunal.

- 3 The Tribunal also heard evidence on behalf of the Second Respondent from David Clark, the Head of Security Logistics and Waste Management at the Second Respondent and Mr Andrew Steele who was previously an employee of the Second Respondent as a Logistics Manager.
- 4 The Tribunal also had the benefit of a cast list and chronology prepared by the Respondents and written skeleton arguments from both Counsels. Both counsel and the Claimant gave oral submissions.

Claims and Issues

- 5 The claims before the Tribunal are direct discrimination and victimisation on the grounds of race. The issues before the Tribunal were set out in a Preliminary Hearing Case Management Order by Judge Goodman dated 8 June 2017 as follows:

Section 13 Direct discrimination on Grounds of Race

- 6 Has the Second Respondent subjected the Claimant to the following treatment falling within section 39 Equality Act 2010 (EqA), namely:
 - (i) Failing to give assistance with moving pallets of boxes on the 14th September 2016.
 - (ii) Reprimanding him for not doing dry ice on 15th September 2016.
 - (iii) Informing Andy that the Claimant had left the mail trolley with one wheel missing without reporting it.
 - (iv) Refusing cover for 30 minutes on 15 September 2016, so the Claimant had to delay a break.
 - (v) Requesting the First Respondent to remove the Claimant from the contract.
- 7 Has the Respondent treated the Claimant as alleged less favourably than it treated or would have treated the comparators? The Claimant should identify comparators, or describe a hypothetical comparator.

- 8 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?
- 9 If so, what is the Respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Section 27 Victimisation

- 10 Has the Claimant carried out a protected act, namely the report dated 15 September 2016 complaining of the incidents on the 14th of 15th of September, and another incident on the 19th August 2016?
- 11 If there was a protected act has the First Respondent carried out any of the treatment identified below because the Claimant has done a protected act?
- i. Procuring or complying with the Second Respondent's request to remove the Claimant from the contract?
 - ii. Dismissing the Claimant?

The Law

- 12 Section 13 of the EqA provides:-

"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.

- 13 Race is one of the protected characteristics set out in section 4 of the EqA. A Tribunal needs to ask what is the operative reason for the treatment after looking at all the facts - what is the effective or predominate cause for the treatment? Race does not need to be the sole cause for the less favourable treatment. Unreasonable behaviour alone does not amount to discrimination; there needs to be some more evidence in support.
- 14 Section 23 EqA provides the need for a comparator, which can be actual or hypothetical. Section 136 EqA sets out the burden of proof:-
- 15 ***"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) *That subsection (2) does not apply if A shows that A did not contravene the provision.*
- (4) *The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.”*

16 In **Efobi v Royal Mail Group Ltd** the EAT held there is no burden on Claimants to prove facts from which a Tribunal could decide that the Respondent has discriminated. “Section 136(2) ...requires the ET, instead, to consider all the evidence, from all sources, at the end of the hearing, so as to decide whether or not there are facts etc ... It may therefore be misleading to refer to a shifting of the burden of proof, as this implies, contrary to the language of section 136(2), that Parliament has required the claimant to prove something...”

17 Section 27 of the Equality Act 2010 provides protection from victimisation:-

“27 Victimisation

- (1) *A person (A) victimises another person (B) if A subjects B to a detriment because-*
 - (a) *B does a protected act, or*
 - (b) *A believes that B has done, or may do, a protected act.*
- (2) *Each of the following is a protected act-*
 - (a) *bringing proceedings under this Act;*
 - (b) *giving evidence or information in connection with proceedings under this Act;*
 - (c) *doing any other thing for the purposes of or in connection with this Act;*
 - (d) *making an allegation (whether or not express) that A or another person has contravened this Act.”*

- 18 The burden is on the Claimant to show that he has done a protected act and there needs to be more than just saying “I have a complaint of discrimination”. The employer is entitled to more notice than just the contention that there is victimisation / discrimination.

Findings of Fact

- 19 The Claimant is of Filipino/ Malay origin and suffers from Type 2 Diabetes.
- 20 The Claimant’s employment commenced on 6 March 2015 with Shields Security Agency. His employment was transferred under TUPE to the First Respondent, Wilson James (“WJ”) on the 1st November 2015. Prior to his employment with Shields Security Agency the Claimant’s main work experience was as a Security Officer.
- 21 The Claimant was employed by the First Respondent to work at the Francis Crick Institute Limited (“Crick”), the Second Respondent’s site. Crick’s main building is a large biomedical research institute located close to Kings Cross Station in London. The building houses a joint project supported by Cancer Research UK, The Medical Research Council, the Wellcome Trust, University College London, Imperial College London and Kings College London. The site is used by those organisations to conduct research into the diagnostics and prevention of human disease.
- 22 The First Respondent is a provider of Security and Logistic Services to the Crick. The Second Respondent signed a commercial agreement with the First Respondent in August 2015. Under the terms of the commercial agreement WJ sends its own employees to work within the Crick Building to deliver a wide range of security and logistic services. One important part of the agreement, under specification of works, was that Crick ensured that they could easily send employees from the First Respondent away from the site if they did not meet the performance standards required and that they reserved the right to do so without having to give notice (page 171).
- 23 The Claimant was one of 12 Logistic Security Officers at the Crick. The Logistic Security Officers were responsible for the movement of goods internally within the Crick. They also undertook Banksman vehicle duties. As a Banksman their job was to marshall the movement of vehicles in the loading bay. The building commonly had between 3 and 4 vehicles arriving at the building at the same time; those vehicles carry chemicals, bio chemical samples, animals’ DNA and blood samples and expensive equipment. For example, one piece of kit that was delivered into the bay included a piece of equipment worth 40 million pounds. The vehicles also carried highly sensitive material. A banksman’s duties involve controlling vehicles in a complex environment. It is a specialised area and as a consequence there is training around the handling of goods.

- 24 The Tribunal accepts the evidence of Mr Clark that at the beginning when the Claimant first worked on the Crick site it was relatively quiet but as the summer went on the amount of vehicles and visitors to the site increased. During that period the construction phase was coming to an end and the migration phase into the building was ramping up. During the summer of 2016, the loading bay was packed full of construction materials.
- 25 The Tribunal accepts the evidence of the Second Respondent's witnesses that it was a very important part of the Claimant's role to be Banksman and how crucial it was that the vehicles were carefully parked and the safety of that whole area.
- 26 In light of the nature of his work at the Crick the Claimant was required to undertake training. A summary of the training courses that the Claimant undertook and passed is at page 364 which sets out the logistics team training matrix. This meant he was trained to undertake his role as Logistics Officer. Included in that training were manual handling, scientific hazard awareness, autoclave safety, hazardous waste and liquid nitrogen safety, operating a fork lift truck and vehicle marshalling and banksmen. The Tribunal accepts the evidence of the Claimant that a lot of that training was classroom based; using pictures and the Claimant was concerned regarding the movement of dry ice on the basis that he said that he had not had the opportunity to shadow someone to know how to handle and where to take the ice.
- 27 The Claimant's first supervisor was Mr Tenant and he had no problems with him during the 6 to 8 weeks that he was working under him. The Claimant was one of 12 Logistics Security Officers at the Crick during summer 2016. The team included people from Eastern Europe, Portugal, the Caribbean and the Philippines. The Claimant explained to the Tribunal that although there was another Logistics security officer from the Philippines he had been born in the UK and therefore could be distinguished from the Claimant who had been born in the Philippines.
- 28 Around June 2016, Mr Chad Smith joined the Logistics Team from the old Francis Crick Building at Mill Hill. The tribunal did not hear any evidence from Mr Smith. He was described to the Tribunal as a "rough diamond".
- 29 There was an incident on the 15th July 2016, which is set out in an incident report that the Claimant completed, at page 293 of the bundle. In summary in that report the Claimant refers to an incident where there was only one lift key and he was criticised for removing the lift key and going to another lift to deal with the removal of nitrogen. The Claimant felt that Mr Smith had unfairly shouted at him without investigating or accepting his explanation and that he did not speak to him in a nice way or in a diplomatic way. The Claimant felt that he was treated unfairly and that it was embarrassing to him.

- 30 At the end of the report the Claimant stated: *"We need to think that everyone have individual differences (Diversity and Equality Act) Do not make any step without confirming or listening of someone explanation. Listening is the best way of communication. Always use rational and not the emotional attitude"*. The Claimant explained to the Tribunal that he felt that Mr Smith should have first considered and investigated the situation and then maybe spoken to him away from other colleagues and not shouted at him in front of colleagues which he found very humiliating and upsetting.
- 31 The Claimant sent his incident report to Mr Fawsitt and the Tribunal finds that Mr Fawsitt did take reasonable steps to investigate the matter. He spoke to both Mr Smith and to the Claimant individually and the Tribunal finds, although the Claimant does not recall it, that he did speak to them together. Mr Fawsitt concluded that neither were effective communicators; Mr Smith due to his lack of management /supervisory experience and the Claimant due to his imperfect English and his inability to take criticism well. He informed Mr Smith that coming from a different culture Mr Tabinas was sensitive to "losing face" and Mr Smith should avoid criticising him when there were other colleagues present. He reminded the Claimant that Mr Smith was the supervisor and that the Claimant had to do as reasonably requested and that where there was a safety issue, Mr Smith would be compelled to intervene immediately and that in a busy loading bay environment with truck engines running etc this may include raising his voice and shouting. He concluded that there was no evidence of discrimination and told the Claimant that unlike in a corporate security environment where he had come from, raising one's voice/ shouting was normal in a construction loading bay environment and that he should not take personal offense as he had.
- 32 The Tribunal accepts the evidence of Mr Fawsitt that at this time he started to consider whether the Claimant was suitable for the logistic role due to his inability to communicate effectively or to take criticism from a supervisor but hoped that he would be able to develop and manage him to become more effective.
- 33 On 14th September 2016, there was an incident when the Claimant was moving pallets. There were 20 pallets piled high. The Claimant had just finished the health and safety training in relation to operating a forklift truck and he was of the belief that if he could not see over the pallets then it was necessary for him to be accompanied in case he ran into anything, which was a danger. He therefore asked if Gints could help him but Mr Smith refused and instead asked Gints to help Paul who was only moving one pallet. The Claimant found the incident upsetting and felt that he was being treated differently to his colleagues.
- 34 On 15 September 2016 there was an altercation between the Claimant and Mr Smith. Mr Smith had received emails regarding the failure of the delivery of dry ice from users of the building and as a result he was agitated because according to the email there had been two occasions on which the dry ice

had not been delivered. Mr Smith believed that he had instructed the Claimant to move the dry ice. The Claimant told the Tribunal that he never in fact had been so instructed but if he had been instructed to do so, he would not have immediately done it but would have first shadowed someone else. Although he had training he did not feel it was appropriate for him to deliver the ice without shadowing, particularly as it was such a large, busy building he would not know where to take the ice.

- 35 The altercation between the Claimant and Mr Smith was witnessed by Mr Steele. The Tribunal finds that Mr Smith was agitated because he had been criticised for the failure of the delivery of the ice on two occasions and would have raised his voice when communicating with the Claimant. The Tribunal also accepts the evidence of Mr Steele that Mr Smith shouting at the Claimant led to a strong reaction from the Claimant. The Tribunal concludes that both Mr Smith and the Claimant raised their voices and the Claimant got quite upset because he felt he had not been asked to deliver the dry ice that day. Mr Steele tried to calm down the situation and although he suggested that Mr Smith did not raise his voice, the Tribunal does find that the tone and way Mr Smith spoke to the Claimant was condescending and made him feel like he was being treated less favourably than his colleagues.
- 36 However, there is no evidence before the Tribunal that Mr Smith spoke to the Claimant in this manner because of his race. The Tribunal finds that Mr Smith spoke to the Claimant in a condescending way because he was upset that he was being criticised for the failure of the delivery of the ice and believed the blame fell on the Claimant. Because of this incident Mr Steele put Mr Smith on a training course to help him with his management skills.
- 37 Another incident which took place on the 15 September 2016 was when Mr Smith criticised the Claimant for not reporting that the mail trolley had a wheel off and therefore could not be moved. The Tribunal accepts that the Claimant had in fact reported the matter to Colin, the Logistics Senior Member, but does find that Mr Smith raised his voice with the Claimant because he believed that the Claimant had failed to report the wheel missing from the mail trolley.
- 38 There was also an incident that same day when the Claimant asked Mr Smith to be relieved to take his break at 3 o'clock. Mr Smith was doing something on the computer and told him to wait a couple of minutes. The Claimant himself said in evidence that Mr Smith appeared to have forgotten about him and the Claimant in the end had to wait 30 minutes before he was relieved by someone else. Although the Claimant did need to stick to set lunchtimes because of his use of insulin the Tribunal does not find that he told Mr Smith that was the reason why he had to leave at 3 o'clock. The Tribunal finds that although Mr Smith may have been dismissive of the Claimant the real reason the Claimant was left waiting was because he just forgot about him and it was no more than that.

- 39 On 16th September there was a meeting between Mr Clark and Mr Steele about the Claimant's performance at which Mr Steele flagged serious concerns about the Claimant.
- 40 On 18th September the Claimant sent to Mr Fawsitt and to Mr Steele his second incident report, at pages 294-295, and the accompanying email is at page 293. In the report the Claimant goes through the three incidents referred to above (dry ice, mail trolley and break) and states that the way he was treated by Mr Smith was unacceptable. He states: "*It is crystal clear that Chad act is Direct and indirect discrimination*" and what is happening in the workplace is against the law and goes on to ask that the matter is investigated to stop discrimination in the workplace. The Claimant does not specify what form of discrimination he means, only referring to direct and indirect discrimination.
- 41 Mr Fawsitt investigated the matter by speaking with the Claimant and to Mr Smith. In relation to the failure to replenish the dry ice Mr Fawsitt also spoke to many of the team members. The consensus was that Mr Smith had told the Claimant to do the dry ice task and that the Claimant had not done so which resulted in a complaint from the laboratory. He concluded that the Claimant had been correctly tasked and that he had failed to carry it out. He believed it was the Claimant who did not understand the task but was too proud to say that he did not understand and therefore the task went undone. He concluded that there was no indication of any discrimination against the Claimant by Mr Smith; the Claimant had been trained to handle dry ice in the SHS Hazards Awareness Training conducted on 25 May and it had been a reasonable request of Mr Smith.
- 42 Mr Fawsitt also spoke to Mr Steele regarding the incident and Mr Steele told him that the Claimant blew up to the point that he felt that it was unprofessional and that as a manager of the employing client he felt he should not have to take that kind of behaviour from the Claimant. Mr Fawsitt told Mr Smith and Mr Steele that if the Claimant had acted unprofessionally and had become angry then this was not the sort of behaviour that he expected of an employee and that he could instigate an investigation and possible disciplinary process against him. However, the matter was not taken further as the Second Respondent, on 20th September, asked for the Claimant to be removed from the site.
- 43 On 20th September Mr Fawsitt witnessed the Claimant returning from a café, which was not on site, with a hot drink with another colleague when he should have been working. The Claimant also returned through an exit which he should not have done so and which Mr Fawsitt thought was a breach of health and safety. Mr Fawsitt was unimpressed especially as he had been trying to call the Claimant without success and then was required to leave his office to then find the Claimant carrying the coffee and being absent from work.

- 44 As a result, Mr Fawsitt completed a record of performance meeting form in which he noted the incident and described the nature of the Claimant's behaviour as unsatisfactory performance for taking unauthorised breaks and leaving the building via the loading bay entrance and not using the correct exit point and not being contactable as required during working hours. He also completed a similar form for the other logistics officer who also took coffee with the Claimant at the time and later presented the performance form to the other colleague. The Claimant was never made aware of this performance form because it was never put to him as he was removed from the site.
- 45 On 20 September, Mr Clark and Mr Steele had a further discussion regarding the Claimant's performance. Mr Clark came to the conclusion that it was necessary to ask that the Claimant be removed from the site. Mr Steele summarised their discussion in his witness statement at paragraph 19. He was unhappy with the Claimant's inability to cope with anything more than basic instructions and in particular mentioned the two near misses during Banksmen's duties carried out by the Claimant which required another operative to step in to avoid an accident. He witnessed the first near miss himself.
- 46 The decision to remove the Claimant from the Second Respondent's site was confirmed in an email to Mr Fawsitt, at page 251. In the email Mr Steele talked about raising his concerns the week before. He felt that although the Claimant was able to follow basic instructions, since the Logistics Services had fully mobilised, he had concerns regarding his ability to cope with more complex sets of instructions and referred to the two near misses. He also referred to the fact that the Claimant had subsequently filed a report which he felt demonstrated that the Claimant was not happy at the Crick. He asked for the Claimant to be replaced by another operative.
- 47 On 21st September, there was an email exchange between the Employee Relations Manager and Mr Fawsitt about the two near misses. Mr Fawsitt expressed his annoyance that unfortunately the proper process had not been followed and the correct forms had not been completed reporting the incidents.
- 48 On 23rd September there was an incident which is set out in the Claimant's chronology of events in which Mr Smith accused the Claimant and Gints, another Logistics Security Officer, in a rude way raising his voice, about using two staff for one cage delivery trolley and about not answering phones, although it was later established that the phones were not in fact working. Although the Tribunal accepts that this incident did happen, it does not form one of the alleged acts of discrimination as it was not set out in the Claimant's claim form and is therefore not listed in the Preliminary Hearing Case Management Order dated 8 June 2017. In any event the Tribunal does not find that Mr Smith's behaviour on this occasion was in any way because of the Claimant's race.

- 49 On 24th September, the Claimant was informed by telephone by Mr Fawsitt that he was requested to remove him from the site following several incidents including friction with his supervisor, poorly executed Banksman skills resulting in the two near misses and his misunderstanding of routine tasks such as the delivery of ice that culminated in a discussion with Mr Steele and Mr Smith when the Claimant lost his temper and got irate.
- 50 Mr Fawsitt explained to the Claimant that he would be placed on a redeployment pool for 14 days and that he would be paid at the FCI rate for the shifts that he would have worked during that time, but he would be expected to attend meetings with Mr Fawsitt and HR recruitment to find him another post at another client's site.
- 51 The Claimant had previously been under the first Respondent's redeployment process and therefore should have been familiar with it. In their conversation the Claimant stated that he only wanted to work in Central London and that he did not want to, for example, commute to Heathrow where there was a possibility of a job. Mr Fawsitt explained as his Line Manager that he would try to assist him in finding a new role and sent an email confirming their telephone conversation, at page 258.
- 52 On 27th September the First Respondent sent to the Claimant a letter regarding the redeployment process and chased the Claimant by a further email, at page 309.
- 53 The Claimant submitted an application form in the format of a previous old application form without any amendments. Mr Fawsitt explained to the Claimant that he needed to update it before it could be used.
- 54 The Claimant explained to the Tribunal that he had not been able to update the application form because of the way he had been treated he was under a lot of stress and anxiety and suffering from headaches and did not feel that he had time to recover within the short timescale that was imposed on him. He felt the obligation was on the First Respondent to have amended the form so that it was in the appropriate form to send out for job applications. The Tribunal finds that, although it was a short timescale, the Claimant should have been able to at least update his application form, even if it was just by cutting and pasting his application form from the old one with updates added to it. The Tribunal finds that the First Respondent had acted reasonably in presenting the Claimant with a number of job options available.
- 55 On 5th October the First Respondent sought further information from the Claimant about his grievance and also provided further information about obtaining another role (page 298). The email asked the Claimant to provide specific details of the alleged incidents and any supporting evidence to support his grievance.

- 56 On 10th October the First Respondent wrote to the Claimant seeking the material to support his grievance (page 310). The email also deals with the process of his redeployment and again chases the Claimant to provide evidence regarding the grievances that he had raised.
- 57 On 11th October, the Claimant is invited to a redeployment meeting and is notified that the outcome of the hearing may be his dismissal from the company's employment.
- 58 The Claimant attended a redeployment meeting on 13 October with Mr Fawsitt. At that meeting the Claimant is dismissed with one week's notice on the basis that the Claimant has failed to apply for any roles, including the first three roles that have been identified. The Claimant was given one week's notice during which the Claimant would continue to be paid and was still able to apply for other roles within the organisation.
- 59 At the meeting the Claimant explained to Mr Fawsitt that he had not been able to apply for any roles because of headaches he could not use a computer. They talked about other alternatives and discussed the possibility of a zero hour's contract on the bench team which the Claimant said that he would be interested in. After the meeting Mr Fawsitt introduced the Claimant to the bench team manager Mr Khan and told Mr Khan that the Claimant was reliable and a conscientious employee but was not suited to his existing role and was seeking a security role within the firm. Mr Khan told the Claimant to apply for that role within the bench team. Mr Khan told Mr Fawsitt that he would be able to give the Claimant plenty of hours of bench work.
- 60 Towards the end of the meeting the Claimant told Mr Fawsitt he was going on holiday on 18 October. Mr Fawsitt told the Claimant that if he correctly completed the application form for Mr Khan that day he would be accepted on the bench team and then Human Resources would not have to send the Claimant his notice letter and he would have a job to come back to at the end of his holiday. However, the Claimant did not fill in the application form.
- 61 Also on 13th October the Claimant had a meeting with Mr Dann regarding his grievance. The meeting was approximately 45 minutes and the Claimant did not give much evidence to the Tribunal regarding the meeting nor was the Tribunal able to question Mr Dann. The Tribunal accepts the summary of the meeting set out in Mr Dann's witness statement which does not appear to be disputed. They discussed the incident when Mr Smith shouted at the Claimant in front of other people. The Claimant was told that matter had been investigated and that the manager, Mr Smith, had been told that he should not have shouted at him.
- 62 The Claimant explained that since that incident he felt that the supervisor had not treated him fairly. He said that he had not been provided with adequate training and he was never given a computer login and that he was the only one not to have a mobile phone on site. Mr Dann explained to the

Claimant that he would need to provide more details of what he alleged was the discrimination against him by his supervisor. Following the meeting the Claimant failed to provide any further details of the alleged discrimination.

- 63 On 13th October the Claimant was signed off sick for 2 weeks by his doctor for anxiety disorder.
- 64 On 18th October the First Respondent sent a letter of dismissal to the Claimant, pages 335-336, which stated that they had during his redeployment period actively encouraged him to apply for vacant positions but he had not engaged in the redeployment process and referred to the fact that he could have applied for the bench team on a zero hours contract but no application form had been received. Since he had not been successful and could not be redeployed to an alternative position, his employment was being terminated for some other substantial reason with one week's notice. The Claimant was notified of his right to appeal against the decision.
- 65 On 18th October the Respondent also sent a letter seeking further information from the Claimant regarding his grievance. The Claimant entered into an email exchange with Mr Fawsitt asking him whether he had been investigating his grievance and Mr Fawsitt explained, by copying in previous correspondence, that he required more details of the alleged discrimination and evidence before he could investigate the grievance any further.
- 66 The Claimant's effective date of termination was on 20 October 2016. The Claimant was invited to a grievance hearing by a letter dated 4 November for the hearing to take place on 14 November but the Claimant did not attend. He was sent a further invitation to attend a grievance hearing on 23 November, the Claimant did not attend.
- 67 On 30th November the Claimant contacted ACAS in relation to early conciliation and an early conciliation notification with the First Respondent was issued.
- 68 On 9th December the Claimant entered early conciliation with the Second Respondent.
- 69 On 19th December over half of the WJ employees working on the Second Respondent's site were removed from the site as the need for the Logistic staff was reduced.
- 70 On 30 December and 6th January 2017 ACAS early conciliation certificates were issued and the Claimant presented his claim form on 23 January 2017.

Applying the Law to the Facts

- 71 It was clear to the Tribunal, on hearing the evidence from the Claimant, that the Claimant felt very hurt by the incidents with Mr Smith. However, there is no evidence before the Tribunal that any of the treatment by Mr Smith was on the grounds of his race. All the Claimant could say to the Tribunal was that he had been treated unfavourably compared to his other colleagues and that he felt it. He did not know why he had been treated differently and therefore he concluded that the reason was because of his race.
- 72 It is not sufficient for the Claimant just to say there must be no other reason for his treatment; there needs to be some grain of evidence to persuade the Tribunal that the reason for any less favourable treatment was on the grounds of the Claimant's race and there is no evidence before the Tribunal of that. There is, however, evidence before the Tribunal of non-discriminatory reasons why Mr Smith treated the Claimant the way he did.
- 73 Turning to the specific issues before the Tribunal: whether the incidents listed in paragraph 4 of the order are treatments falling within section 39 of the EqA, whether it was less favourable treatment and if so whether it was because of the Claimant's protected characteristic of race. The Tribunal finds that the Claimant felt that all the incidents were less favourable treatment and the Tribunal accepts that the Claimant felt hurt and wronged by all the incidents. There was no evidence before the Tribunal from the Respondents to demonstrate that Mr Smith would have treated the other Logistics officers the same way in the same circumstances other than referring to Mr Smith as a rough diamond.
- 74 In relation to the pallet incident on the 14th September 2016, the Tribunal finds the Claimant was right that it would have been a health and safety issue because of the height of the pallets, for him to be moving the pallets on his own without being assisted and that it was wrong of Mr Smith to have denied him the help from Gint and instead let Gint assist his colleague Paul. However there is no evidence before the Tribunal to persuade it that one of the effective reasons for Mr Smith requiring the Claimant to move the pallets without assistance was because of his race.
- 75 In relation to reprimanding the Claimant for not delivering the dry ice, it is clearly set out in the findings of fact that Mr Smith was irritated by the fact that he had had a complaint from the laboratories for the failure of delivery of dry ice on two occasions and that he felt that he had ordered the Claimant to deliver the dry ice. The Tribunal finds that Mr Smith did shout at the Claimant in front of colleagues in a demeaning manner which was inappropriate and was hurtful to the Claimant and that Mr Smith should not have acted in that manner in front of other Logistic staff. He should have, as the Claimant suggested, investigated the matter, considered it and then spoken to the Claimant in private somewhere else. However, there is no evidence that the reason why Mr Smith spoke to the Claimant in this way was on the grounds of his race. The evidence before the Tribunal, supported by the Second

Respondent's witnesses, is that Mr Smith genuinely was annoyed with the Claimant for failing to deliver the dry ice, having been criticised by the laboratories. The Tribunal takes in to account the fact that Mr Fawsitt, when investigating the matter spoke to both the Claimant, to Mr Smith, and other members of the team and then concluded that Mr Smith was of the belief that he had instructed the Claimant to move the dry ice. The Tribunal finds that the reason he shouted at the Claimant was because he was annoyed that the dry ice had not been moved and was not on the grounds of the Claimant's race.

- 76 In relation to the mail trolley again Mr Smith was mistaken. The Claimant had notified a colleague regarding the missing wheel, but Mr Smith believed that the Claimant had failed to report it and then spoke to him in a manner that was inappropriate in the circumstances. But there is nothing before the Tribunal for us to be able to conclude that the criticism of the Claimant for failing to report the trolley incorrectly was on the grounds of the Claimant's race but rather on the basis that he felt that the Claimant had failed to report the missing wheel.
- 77 In relation to the 30 minute delay to his lunch break, the Tribunal is critical of Mr Smith for being dismissive of the Claimant and can imagine the way he spoke to him was in a very dismissive way. However, the Tribunal finds, as accepted by the Claimant in his own evidence, that Mr Smith probably just forget about the Claimant and the reason why he was not relieved from his duties to take lunch was nothing to do with the Claimant's race but was purely because Mr Smith forgot about him while on the computer.
- 78 The Tribunal understands that the Claimant found all of these incidents to be very upsetting and humiliating, but there just is not sufficient evidence before the Tribunal to conclude that the reason Mr Smith treated the Claimant in this way was because of his race. Whereas there is evidence that there were managerial reasons for why he treated the Claimant in the way he did.
- 79 The Tribunal finds that the reasons for the First Respondent being requested to remove the Claimant from the contract were the reasons set out in pages 251 and 288 of the bundle, namely that they were concerned regarding the Claimant's ability to cope with more complex sets of instructions, having had two near misses as the site got more busy, the fact that the Claimant had filed a report demonstrated that he was not happy and that he had not grasped the full range of the processes required to conduct the logistics role to their satisfaction and they were unhappy with the way he had reacted during a meeting with Mr Smith and Mr Steele.
- 80 The Tribunal finds that the Claimant was not less favourably treated when he was removed from the Crick site as the First Respondent was required, under the terms of their agreement with the Second Respondent, to remove someone from the site when requested to do so. The Second Respondent would have done the same thing with any of the logistic officers who they felt were failing in their duties and not up to the complexity of the instructions on

the busy site. There is no evidence before the Tribunal that the Claimant was moved because of his race.

- 81 In conclusion, in relation to the Claimant's claim for direct race discrimination, the Tribunal finds that the claim fails and is dismissed.
- 82 Turning to the claim of victimisation, the Tribunal finds that because the Claimant did not specifically explain the nature of his complaint but merely referred to direct and indirect discrimination that as a matter of law the Claimant's incident report was not a protected act. However, if the Tribunal is wrong on that and if the incident report could amount to a protected act, the Tribunal does not find that the Claimant was removed from the Second Respondent's site or dismissed because he did a protected act.
- 83 The Claimant was removed from the Crick site for the reasons set out in paragraph 46 above, namely that the Second Respondent believed that the Claimant was not able to follow basic instructions; since the Logistics Services had fully mobilised, Mr Steele had concerns regarding the Claimant's ability to cope with more complex sets of instructions and referred to the two near misses. He also referred to the fact that the Claimant had subsequently filed a report which he felt demonstrated that the Claimant was not happy at the Crick. The Tribunal accepts that the Claimant's incident report was a factor in the decision to remove him from the site but only on the basis that the Second Respondent believed that the report demonstrated that he was not happy on site.
- 84 The reason the Claimant was dismissed was because he failed to apply for any roles within the 3 week redeployment period which included his one week's notice.
- 85 The Tribunal finds that Mr Fawsitt genuinely hoped that the Claimant would remain in the First Respondent's employment and had encouraged the Claimant to complete the application forms and in particular applying for the bench zero hours work. Although the Claimant felt unable to do so at the time, the Tribunal finds that it was because he did not engage himself with the redeployment process and did not make the necessary applications, including updating his application form, that he was dismissed for some other substantial reason, namely that he had not been able to obtain alternative employment under the redeployment process. The Claimant was not dismissed for his report dated 15 September 2016.

- 86 In conclusion, the Tribunal finds that the Claimant's claim for victimisation fails and is dismissed.

Employment Judge Isaacson
30 October 2017