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# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Akhtar  
**Respondent:** NSL Ltd  
**Heard at:** East London Hearing Centre  
**On:** 2-4 May & 22 May 2018 (in chambers)  
**Before:** Employment Judge Lewis  
**Members:** Mr M Rowe  
Mr P Quinn

## Representation

**Claimant:** Mr J Nkafu (Counsel)  
**Respondent:** Mr R Lassey (Counsel)

# RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that:-

- (1) The Claimant's claims for race discrimination fail and are dismissed.
- (2) The Claimant's claims for harassment contrary to the Equality Act section 26 fail and are dismissed.
- (3) The Claimant's claim for constructive unfair dismissal under the Employment Rights Act 1996 fails and is dismissed.

# REASONS

## *The issues before the Tribunal*

1 The Claimant brought claims of constructive unfair dismissal, race discrimination

contrary to section 13 of the Equality Act 2010 and harassment contrary to section 26 of the Equality Act 2010. He had made an application to amend to include a claim for victimisation by letter dated 18 January 2018 and this was refused by Regional Employment Judge Taylor on 20 February 2018. The Claimant withdrew his claim for holiday pay, this claim was dismissed upon withdrawal.

2 A case management hearing was held before Regional Employment Judge Taylor on 11 January 2018 at which the Claimant was represented by Mr Nkafu and the Respondent was represented by Ms Kane of Counsel. At that hearing the issues to be determined were agreed after discussion and set out in paragraphs 4 to 7 of the preliminary hearing summary; the claim for holiday pay has been withdrawn and the claim for notice pay is subsumed in the remedy for his complaint of unfair dismissal and/or race discrimination and his claim for loss of earnings arising from those.

3 The issues this tribunal has to decide are as set out in the Case Management Hearing Summary as follows:

**4 Jurisdiction**

- 4.1 Does the tribunal have jurisdiction to consider the claims for race discrimination and/or harassment?
- 4.2 Was the claim brought within a period of three months starting with the date to which the complaint relates? If not, is it just and equitable to extend time?
- 4.3 Are the allegations set out in the claim form a 'continuing act' for the purposes of s123 (3) (a) of the Equality Act 2010.

**5. Direct race discrimination**

- 5.1 The claimant describes himself as black Asian and complains of direct discrimination relying on the protected characteristic of race.
- 5.2 Has the respondent subjected the claimant to the following treatment:
- 5.3 In April 2017 the claimant was required to start monitoring staff, working on the streets, without first receiving training. Comparator Mr Simon Harper, Acting Senior CCTV Operator.

*The respondent resists this allegation and will say, in summary, that new legislative changes came into force in or after April 2015. It was then found that new ANPR (automated number plate recognition) officers were underperforming and needed additional assistance to undertake their duties. Lack of supervision and on the job training were identified as issues that required addressing by the respondent. The decision was taken by the respondent for senior staff, including the claimant, to train their own staff (as set out in full at paragraphs 10 to 14 ET3).*

- 5.4 From April 2012 to 2016 the respondent allocated claimant to work only on night shifts, and did the same from April 2016 onwards, after the claimant made a formal complaint.

*The claimant relies on the following comparators - Ms Sue Bass (white), Mr Simon Harper (mixed race).*

- 5.5 When in 2016 the respondent refused to grant the claimant's request for "emergency holiday leave" at a time when the claimant informed his manager that he needed time off to care for his wife.

*The claimant relies on the following comparators - Mr Simon Harper (mixed race). The claimant will say that Mr Harper was given emergency time off when he needed to care for his children child in 2015 and in 2016.*

- 5.6 Was that treatment "*less favourable treatment*", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances?

- 5.7 If so, was this because of the claimant's race and/or because of the protected characteristic of race more generally?

## **6 Harassment related to race (EQA, section 26):**

The background to this part of the claim is that the claimant was physically attacked by a member of the public while working on the streets, on 20 July 2017. On 21 July 2017 the claimant notified the respondent that he could not come to work.

Did the respondent engage in conduct as follows:

- 6.1 Sending the claimant letters the contents of which were inappropriate and threatening from 21 July 2017 until the date of termination of his employment on 1 September 2017?
- 6.2 If so, was that conduct unwanted?
- 6.3 If so, did it relate to the protected characteristic of race?
- 6.4 Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case, and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

## **7 *Constructive unfair dismissal***

The background to this part of the claim is that the claimant was physically attacked on 20 July 2017. On 21 July 2017, he notified the respondent that he could not come to

work. He will say that he wrote a letter (a grievance) informing the respondent that he could not work on the streets, without first having had appropriate training.

Did the respondent breach the implied term of 'trust and confidence term', i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the claimant by:

- 7.1 Failing to deal adequately or at all with a written grievance from the claimant made on or about 18 May 2017;
- 7.2 Sending the claimant letters, the contents of which were inappropriate and threatening, from 21 July 2017 until the date of termination of his employment on 1 September 2017?

*The respondent will say that the claimant did not send a letter of grievance on or about 18 May 2017, as alleged or at all. It accepts that the claimant sent a letter of grievance in April 2016 and that the claimant's 'resignation' letter sent in September 2017 was treated as a grievance by the respondent.*

- 7.3 If so, did the claimant affirm the contract of employment before resigning?
- 7.4 If not, did the claimant resign in response to the respondent's conduct.
- 7.5 If the claimant was dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA"); and, if so,
- 7.6 Was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the 'band of reasonable responses'?

8. There was some discussion at the start of the hearing as to whether the Claimant was entitled to rely on the allegation that he had been refused emergency holiday leave and the allegation that he had submitted a grievance in May 2017. He had been required to provide further information about those claims on or before 19 January 2018. Having heard from both representatives and considered the file the Tribunal found that further information had been provided by solicitors acting on the Claimant's behalf on 18 January 2018. His solicitors had also sent an application to amend the claim to add a claim for victimisation, that application was refused by Employment Judge Hyde. Contrary to the Respondent's submission, the Tribunal is satisfied that the existing claims were not affected by the decision made by Employment Judge Hyde refusing permission to amend the Claimant's claims: they were not matters which required an amendment, appearing as they did on the face of the claim form and having been identified at the Case Management Hearing as issues to be determined, Employment Judge Hyde's decision related to additional matters which the Claimant had sought to introduce.

***The evidence before the Tribunal***

9 The Tribunal was provided with an agreed bundle of documents for the hearing and a number of witness statements from both sides. On behalf of the Claimant, in addition to his own statement, there were witness statements from Mr Asim Ramzan, Mr Javed Mirza both of whom were present at the Tribunal to give evidence and Mr Steven Hodges and Mrs Suzanne Bass, neither of whom were present at the Tribunal and who were not available to attend to give evidence. On behalf of the Respondent, statements were produced for Mr Philip Maynard and Ms Kyki Kim Bajko both of whom attended the Tribunal and gave evidence.

10 The Tribunal having heard representations made on behalf of both parties read the witness statements of Mr Hodges and Mr Bass and took into account the submissions as to their respective weight made by each representative on their client's behalf.

***Findings of fact***

11 The Claimant was employed by the Respondent from 2 November 1999 when he started working as a Parking Attendant. He progressed through various positions to the position of Senior Civil Enforcement Officer (CCTV) and was employed until 1 September 2017 when he resigned and claimed constructive dismissal.

12 The Respondent describes itself as a multifunctional business which provides parking services, transport services, bus and coach operations, City Centre CCTV monitoring, back office processing, street scape consultancy and debt recovery. It employs in excess of 4,000 members of staff in 250 locations across the UK.

13 At the time of the Claimant's resignation his duties included but were not limited to the following:

- 13.1 Support for CCTV manager, formulate recommendations and implement them;
- 13.2 Supervise, motivate and train CCTV operatives;
- 13.3 To monitor attendance, performance and quality of work of team members;
- 13.4 To report faults/problems – signs and line issues, equipment faults, unenforceable sites (e.g. roadworks/accidents);
- 13.5 Review CCTV footage and assess potential recorded parking and traffic contraventions (i.e. is the PCN valid?);
- 13.6 Error check and error correction of other operator's work;
- 13.7 To contribute to the success of the operation through effective management, promoting best practice and forming a close working

relationship with the client.

14 The company employing the Claimant had initially been Sureway. He was transferred under TUPE Regulations to Vinci Park in 2003, then in 2004 NCP took over and then finally in 2007 the Respondent took over NCP and his contract was transferred to them.

15 In 2007 there were internal vacancies for CCTV operators. The Claimant applied and was successful and was offered a job as a CCTV operator. He was sent for training and in 2008 passed the training and stayed in that position until 2014 when he was promoted to the position of Senior Civil Enforcement Officer (CCTV).

16 In 2007 when the Claimant applied for the vacancy for CCTV operators he was undergoing severe difficulties in his family relationships; he had gone through a divorce which meant that his former wife's family were very hostile to him. He did not go into specifics of what had happened but it was agreed by the Respondent that there were serious problems that had occurred around that time and that the Respondent was aware that the Claimant needed to be employed in an office or desk position, as opposed to being out on the streets where he was vulnerable to attack from his ex-wife's family members.

*The Claimant's grievance in 2016 – including complaint of refusal to grant “emergency holiday leave”*

17 In April 2016 the Claimant submitted a grievance to the Respondent in which he raised a number of complaints, including a number of matters that are not relevant to these proceedings. The relevant parts of his grievance for the purposes of these proceedings, include the complaint that he was being bullied by Phil Maynard, this related to an incident from six months previously in respect of a change of a rota for a colleague, Symon Harper; and that following the arrival on the contract of a new manager, John Peters, Mr Maynard had started to pick on the Claimant.

18 The Claimant also complained that the handling of requests for emergency leave was inconsistent, and, he alleged, discriminatory. This related back to an occasion, some months prior to the bringing of his grievance, when the Claimant had sought time off to accompany his wife to a hospital appointment: the Claimant had asked for emergency annual leave but Mr Maynard treated him on that occasion as absent with cause. The Claimant complained that others had been given emergency annual leave, including somebody called Sarah, and that Symon Harper was allowed to work hours on his rest day in order to take time out of the day on 25 April to leave early and that when he had asked why Symon had been allowed to do this he had not been given an answer. He complained that he felt that he had to escalate his request for emergency leave before they would be accepted and that this was because he was Asian/Muslim.

19 During the course of his grievance hearing his trade union representative, Mr Ramzan, who is also Asian and who was a witness at this tribunal, told the grievance officer that to his knowledge there had been seven grievances about Mr John Peters since Mr Peters had started and it was not just from staff of Asian origin. He said at the time, and confirmed in his evidence to the tribunal that he did not think

Mr Peters actions were influenced by race or were discrimination.

20 In his grievance the Claimant also complained that John Peters and Phil Maynard were obstructive over a shift change request when the Claimant had asked to leave work earlier so that he could go on a family dinner for his birthday.

21 The grievance was investigated by Stephen Palmer, the Contract Support Manager, and we have seen the notes of his investigations. After speaking to the Claimant he made notes of follow up actions, setting out clearly the points that needed to be investigated. He spoke to Javed Mirza, Mr Peters, Suzanne Bass, and Phil Maynard as well as to someone called Velma who was the Notice Processing Officer. At the end of those interviews he formulated some action points that required addressing, these are set out in his email of 19 May 2016. He recommended that there be a re-brief on emergency leave and that the manner of its granting or denial be applied consistently and with more transparency to avoid issues in the future. He wrote a detailed outcome letter on 19 May 2016, addressing each of the points raised by the Claimant, setting out what he had done and to whom he had spoken. He noted that the Claimant's representative stated that he did not feel John Peters was racist against Asians, and that numerous staff he had spoken to had commented they did not believe John Peters to be racist or prejudiced in any way. He also noted that John Peters had had to challenge some practices to do with leave allowances and ad hoc leave requests which had required some changes in policy, and that he had not found any evidence to support allegations of discrimination.

22 Mr Palmer put in place some other steps to address the concerns the Claimant had raised (which are not the subject of any complaint in these proceedings) and recommended mediation between the Claimant and Phil Maynard. He arranged for the mediation meeting to be chaired by Kyki Kim Bajko.

23 The Claimant attended the mediation on 19 July 2016. We have seen Ms Bajko's note notes from that mediation [page 106]. Ms Bajko confirmed in her evidence that Mr Maynard and the Claimant appeared to have a good working relationship. She recalled that they arrived at the meeting together, they were chatting about their journey, they talked to her about having had a good working relationship over the years and showed a great deal of willingness to work through any issues they had. Mr Akhtar commented in the meeting that he had wanted to retract the grievance complaint against Phil but wanted to make management aware of John Peters' attitude towards him. It was agreed that no further action needed to be drawn up. Both the Claimant and Mr Maynard agreed there was a good working relationship between them. That was taken by the Respondent to be the end of the grievance. The Claimant did not appeal or seek to take the grievance to any further stage.

*Frequency of late shifts – complaint of being allocated to work only night shifts*

24 On 1 March 2017 the Claimant emailed Micah Harris to raise his concerns about his shift pattern and changes to his shift pattern. He complained that when the shift patterns had been changed from 13 February he and his 2 fellow supervisors had been told they would have three patterns: early, middle and late and that allocation would be fair between the three supervisors, that is, the Claimant, Sue (Suzanne) Bass and Symon Harper.

25 The Claimant complained that from March he had been doing mostly late shifts, even in his “Early” weeks. He had asked Phil Maynard about this and he was told it was because Symon had child care issues, the Claimant complained that Mr Maynard seemed to care about Mr Harper’s childcare issues but not the Claimant’s and he claimed that the shift allocation was discriminatory.

26 At the time of his complaint in March 2017 the Claimant was told that as a result of his child care commitments Mr Harper had put in a flexible working request not to have to work lates, this had been agreed and therefore a permanent change to his contract had been agreed. In the course of his evidence the Claimant accepted that Mr Harper was a sole parent caring for his son. It had also been agreed that Mr Harper was able to take a break in his shift in order to accommodate his childcare arrangements around dropping off his son at school.

27 The Claimant also accepted that a special arrangement had been reached in his case in respect of his family commitments. The Claimant had contact with his children from his first marriage at the weekends and as a result it was agreed that he was not required to work any weekends, although the role normally involved a rolling shift including weekend work. Mr Harper was subject to the rolling shift and therefore did not always have the weekends free whereas the Claimant did.

28 As a result of the arrangements that had been reached with the Claimant and Mr Harper respectively the burden of the late shifts necessarily fell on the Claimant and Ms Bass and the burden of the weekend shifts necessarily fell on Mr Harper and Ms Bass. As a consequence the Claimant would be required to work late shifts during the week but it was accepted that he could arrange swaps with Ms Bass as and when they both agreed to it.

29 On 17 March 2017 Mr Maynard emailed all three of the Seniors, the Claimant, Sue Bass and Symon Harper confirming the reasons for the shift arrangements. He also explained that the middle shift had been introduced in order to deal with administrative duties but was now deemed unnecessary and the shift pattern would revert to early and late shifts, he confirmed that:

“Existing child care/access concessions will continue to be honoured, however, there will be a need to review all staff concessions to confirm continued requirement.

If there are any instances where you have matters to attend to within the stated shift times, you are at liberty to swap with Senior colleagues, however, you must ensure Senior cover is maintained on the Late shift till 21:30.”

30 The Tribunal were taken to some rotas in the bundle [pages 55 and 56] which show that Ms Bass and the Claimant were rostered to do Earlies and Lates. The Claimant was down to do some Earlies and Ms Bass was down to do some Lates. Ms Bass is white British.

*Monitoring staff working on the streets – without first receiving training*

31 The Claimant also complains that in April 2017 he was required to start

monitoring staff working on the streets without first receiving training and compares himself to Mr Symon Harper, Acting Senior CCTV Operator.

32 It was not disputed that as a result of legislative changes, from April 2015 new ANPR (Automated Number Plate Recognition) requirements meant that changes were made to how the Civil Enforcement Officers were required to carry out their role. The Seniors, including the Claimant, had commented to their managers that some of the officers were underperforming, that noticed that there were considerable discrepancies between their performance and there was no clear explanation for this. As a result the Respondent decided that a period of mentoring should be undertaken in which the Seniors went out with the officers and observed them doing their work. It was intended that this would help them to understand why some CEOs were failing to issue any parking tickets or penalty notices when others were able to issue a considerable number.

33 On 10 May 2017 Mr Maynard again emailed all three of the Seniors confirming that he wished to see the CEO operatives mentored and that he wanted the mentoring shared fairly between the three of them that week and the following week. [p.112]. In that email Mr Maynard referred to the Claimant having had “training from Steven in all aspects of the expected operation of the ANPR vehicles” and having already started to monitor ANPR operatives. He noted that Symon Harper required training and Sue had had some training but required additional support and that arrangements had been made for both of them to have this on Thursday 11<sup>th</sup>, again, with Steven.

34 The training with Steven consisted of accompanying him in the vehicle where he demonstrated how the ANPR vehicle operated. The Claimant complained that this training was inadequate and was not sufficient to equip him to carry out the task he was required to do. We are satisfied however that his real objection was to being required to go out on the streets at all.

35 During the course of the evidence it became apparent that each of the Seniors had their own reasons for not wishing to go out on the street and objected to being required to do so. The Claimant’s complaint before us is in respect of the failure to provide training.

36 We accept the Respondent’s undisputed evidence that the Claimant had been sent on a 4-day training course in November 2016 along with his colleagues, the other Seniors. The course dealt with conflict management, patterns of behaviour, how to deal with issues that arise on the street when issuing penalty notices and conflicts with the public. Following that training the Claimant received a certificate dated 1 November 2016 in Conflict Management for Work Settings [p.289] and a certificate dated 11 January 2017 confirming he had achieved Level 2 Award as a Parking Enforcement Officer: managing conflict, and roles and responsibilities [pages 290 to 291]. The training course was described as “refresher training” and was intended to equip all CEOs to deal with members of the public and to deal with their role in patrolling the streets.

37 The Claimant did not dispute that he received this training before he went out with the CEOs to mentor them. When pressed the Claimant stated that his complaint to the tribunal was that he had not been trained in the CDM map whereas Mr Harper

had.

38 We accept Mr Maynard's evidence that the Claimant did not need to understand how the ANPR equipment operated, nor did he need to understand how the CDM map operated. The CDM map was a tool that helped the CEO understand where the different zones were. The Claimant was not being asked to issue any penalty notices himself, nor was he expected to deal with or address any issues with the software that arose whilst he was out with the CEO. He was simply there to note their performance and to give guidance to the operative in respect of how they dealt with contraventions. The purpose of the mentoring was to address the discrepancy between the CEOs performance and the number of penalties they issued.

39 On 18 May 2017 the Claimant informed Phil Maynard that he had received a call from an ex-family friend who had asked him about his job and whether he was working on the street, as someone had seen him in the green vehicle the previous week in E17, he was told that he needed to be careful. This caused the Claimant considerable concern and he was unable to sleep as a result.

40 The Claimant informed Mr Maynard about some of the history of his previous difficulties with his ex-wife's family and how severe they had been, the impact it had had on his work, how it had only been resolved once he had moved and started a new life out of the borough and the danger that he perceived he was being placed in by being sent out on the street.

41 On 23 May 2017 Mr Maynard wrote the Claimant a detailed letter setting out his response to the Claimant's concerns about his safety and the reasons why he was being deployed on the street in CCTV/ANPR vehicles [pp.122-124]. Mr Maynard made a number of suggestions to try to address the Claimant's concerns, which included, the Claimant being deployed in areas of the borough where he would feel safe. He asked the Claimant for ideas on how this could be achieved. Mr Maynard set out his reasons for not being able to agree to the Claimant's request not to be deployed on the street and invited the Claimant to reconsider his objections. Mr Maynard also pointed out if the Claimant was unable to fulfil the requirements of his role he might have to follow the capability policy, which could include looking at suitable alternative roles within the company.

42 The Claimant responded by email on 6 June, informing Mr Maynard that he still had his concerns, that he was being forced to patrol the streets without any assurance of his safety which he found distressing and he wanted an occupational health referral for stress. He also asked for reassurance on a number of other matters, including asking what measures would be put forward to protect his safety, what he had to do if an incident happened, the timescales for the requirement to patrol, confirmation that all Seniors would be treated in the same way and that he was not being singled out.

43 On 13 June 2017 an email was sent to all three Seniors, Mr Akhtar, Sue Bass and Symon Harper [p.125a] informing them that Sue and Mohammad would be required to do mentoring. Prior to that an email was sent on 2 June 2017 [p.125b to c] to all three seniors, Sue, Mohammad and Symon, setting out why they were being asked to patrol, noting that they had all had training from Steven in all aspects of the expected operation of the vehicles, and that some of them had experience of

mentoring the underperforming operators. They were informed that from 5 June all each of their rotas would be amended to include two days minimum a week deployed monitoring the CEOs performance.

44 In respect of the ANPR CDM training Mr Maynard informed them that: "Next week Steven Hodges will be training you in the use of the ANPR Compliance Display Map website that is used to manage and monitor the ANPR vehicles". Symon Harper had already been trained in its use to clear erroneous detections from the vehicles and that the Claimant and Sue would receive that training the next week. Mr Maynard confirmed: "There will be a requirement for you [that is, all three of them] to undertake this activity on a regular basis to assist the ANPR operation."

45 We are satisfied that the Claimant had received training in management of conflict situations which was relevant to his concerns about being deployed on patrol. The training in the operation of the CDM was not training which would alleviate any of the concerns that he was raising in respect of his safety, which was the focus of his questioning and his complaint before us in the Tribunal. We find that Ms Bass, who is white, had not received that training either.

*Harassment related to race*

46 The background to this part of the claim is that the Claimant was physically attacked by a member of the public while out on patrol on 20 July 2017. The Claimant was taken to A & E and on discharge went straight home. He was unable to return to work the next day, and subsequently remained off work until his resignation on 1 September 2017. The Claimant's complaint of harassment related to race is in respect of the Respondent's actions in sending him letters between 21 July and 1 September 2017 the content of which he alleges were inappropriate and threatening. We have carefully considered the content of those letters and set out our findings below.

47 Before the incident on 20 July 2017 took place the Respondent had commenced a disciplinary investigation against the Claimant in respect of an alleged failure to follow a reasonable management instruction in failing to go out and mentor with a CCTV operative on 16 June 2017.

48 The Claimant was interviewed on 22 June 2017 as part of the investigation. The Claimant denied failing to follow a reasonable management instruction and maintained that it had been agreed with Mr Mirza, the duty supervisor, that he did not have to go out and mentor on 16<sup>th</sup> June. Mr Mirza was interviewed on 4 July 2017, he did not recall having a conversation with the Claimant about altering his duties and it became apparent Mr Mirza had not been on duty that day. In fact Mr Ali Karami had been the duty supervisor on the late shift, but when he was interviewed he was unable to confirm that he had been approached by the Claimant to alter his duties.

49 The Claimant was invited to a disciplinary meeting; the invitation letter dated 18 July 2017 was from Leanne Ranger, signed on her behalf by Mr Maynard.

50 On 20 July the Claimant was in the vehicle patrolling with a CEO. The CEO had left the vehicle to go and issue a penalty charge when two men approached the van

and started to say something to the Claimant. The Claimant wound down the window and one of the two men punched him and appeared to attempt to take the keys from the van. The Claimant called in a "Code Red" over the radio. Mr Mirza heard the radio transmission and took over from the control room and called the police to attend. Mr Mirza attended the scene and took the Claimant to hospital. The Claimant was treated at Whipps Cross Hospital and then discharged.

51 The CEO on patrol with the Claimant had not witnessed the incident and the Claimant had chosen not to wear a body cam which had been available to him. There was no independent record of what took place, only the account from the Claimant.

52 The hospital record indicates that the Claimant was treated with an analgesic, sent home and referred to his GP. According to his GP records [p.139] the Claimant was seen by an admin clinical support at the surgery on 21 July and by his doctor on 31 July.

53 The Claimant maintained that he had asked Mr Mirza to inform Mr Maynard that he would not be in work on 22 July. Mr Maynard had no recollection of Mr Mirza informing him of this although Mr Mirza believes that he did. Consistent with his account of not having heard anything from the Claimant on 24 July 2017 Mr Maynard made enquiries from Norma Weldon at the Customer Service Centre as to whether the Claimant had dialled in or spoken to anyone on the switchboard. On 26 July 2017 Ms Weldon confirmed by email that she had checked with the night shift and there had been no contact since the code red on 20 July. [p.175]. We accept Mr Maynard's evidence that he had not been informed of the Claimant's absence by anyone; otherwise there would be no reason for him to contact Norma Weldon and to ask about whether the Claimant had contacted them.

54 Mr Maynard then tried to contact the Claimant by phone and left a couple of messages for him. This prompted an email from the Claimant on 26 July [p.178] explaining that he was not in the right frame of mind to talk over the phone and asking to communicate by email. He also explained that he was on strong medication and his doctor had advised complete bed rest.

55 Mr Maynard replied within half an hour; thanking the Claimant for his response and explaining that he needed to speak to him that day. Mr Maynard told the Claimant that he had exercised a degree of leniency [thus far] but he had to follow the company procedure laid down in the handbook in respect of reporting absence. He stated that he was unaware of any form of contact having been made. The Claimant did not respond by saying, "I have informed you via Mr Mirza". Mr Maynard followed up on 27 July 2017 again stating that he was sorry that the Claimant did not feel in the right frame of mind and understood that he may not feel inclined to speak on the phone; he explained that there were reporting procedures that the Respondent needed to follow after an incident occurred, with associated legal timeframes and that he needed the Claimant to engage with him to allow the completion of the reports. He referred to the Reporting of Injuries, Disease and Dangerous Occurrences Regulations (RIDDOR) 2013 and set out the information required. He concluded his email in the following way:

"I understand and appreciate that I am asking you to assist at a time of misfortune, and I empathise with your current circumstances, however it is

extremely important that I have these questions answered, and a statement of events today.”

He also thanked the Claimant in advance for his co-operation and wished him a speedy recovery.

56 The Claimant responded on 27 July late in the evening explaining that he still had pain and swelling in his neck. He provided some of the answers to the questions Mr Maynard had asked. He asked Mr Maynard to give the form to Mr Mirza to pass on to him.

57 Mr Maynard contacted the Claimant again on 28 July informing him that he needed a description of the incident by 3 o'clock that day and also pointing out that the Claimant was required to send in a sick certificate.

58 Mr Maynard was being chased for the information required for the RIDDOR report by Richard Parker who was the Health and Safety Support Manager. He asked Mr Maynard to make some more attempts to contact the Claimant directly to obtain the information on his injuries, pointing out the imminent deadline for filing the report. Mr Parker also pointed out the deficiencies in the information provided and requested further information.

59 The Claimant submitted a sick certificate on 31 July, backdated to 21 July, which described his reasons for absence as being “Alleged assault and stress”.

60 In the meantime, the disciplinary proceedings were still ongoing and Ms Ranger had written to the Claimant on 26 July to rearrange the disciplinary hearing. The Claimant had requested more notice in response to Ms Ranger's initial letter, and a new hearing date had been arranged which meant that on 26 July Ms Leanne Ranger was rearranging the hearing for a second time.

61 Leanne Ranger wrote to the Claimant on 2 August 2017 inviting him to a disciplinary hearing on 7 August on the basis that according to his sick certificate he was due back at work on the 4<sup>th</sup>. Ms Ranger explained that she had previously informed the Claimant that if he was unable to attend the next meeting he could appoint a representative who could attend the meeting on his behalf, or he could provide her with a written submission that could be considered in the meeting in his absence. She also informed him that as this was the third time the meeting had been rearranged, should he fail to attend or consider the options she had given him, then the meeting would go ahead in his absence and a decision would be made on the evidence the Respondent currently had.

62 On 3 August the Claimant contacted Mr Maynard to inform him that his doctor was going to sign him off for a further two weeks. He also emailed Ms Ranger requesting that the disciplinary hearing be cancelled. Ms Ranger responded the same day to confirm that the hearing would take place on the 7<sup>th</sup> as per her letter. The Claimant submitted a GP's certificate dated 4 August which stated that he would be unfit for work for a further for two weeks.

63 On 4 August Ms Ranger emailed Rosie Hassan of HR support asking for advice. She told Ms Hassan that in her view the outcome of the disciplinary was unlikely to be dismissal and therefore postponing it only made matters worse as the sanction would be effective from the date of any outcome letter. However, she did agree to postpone the meeting and emailed the Claimant on 7 August to inform him that the meeting was postponed and it would be rearranged. She also informed him that there was a possibility that he may be contacted by OH in the meantime.

64 On 7 August Mr Maynard sent an email to the Claimant which began as follows:

“In relation to your alleged assault and subsequent absence from work, I am disappointed and concerned that you are extremely reticent in keeping contact with management regarding this matter.

I am still waiting for a detailed description of the events that befell you.”

Mr Maynard repeated that he needed the full description for RIDDOR reporting. He continued:

“I understand and appreciate that I am asking you to assist at a time of misfortune, and I empathise with your current circumstances, however it is extremely important that I have these questions answered, and a statement of events today.

This is a reasonable request that I’m confident you will be able to achieve.

Further to this, a colleague and I would like to conduct a welfare visit with you on Wednesday morning 9<sup>th</sup> August 2017 at a time at your convenience. Please advise when and where this can take place?”

65 The Claimant responded on 8 August stating that he was really upset that Mr Maynard had mentioned he was extremely reticent, that he had filled in a form and handed it to Javed (Mr Mirza) and that he was disappointed that management kept harassing and victimising him, alleging that he did not get in touch with management which was not true [p.245]. The Claimant suggested the café at Morrisons as a venue for the welfare meeting.

66 Mr Maynard provided with a detailed email setting out the timeline of his contact with the Claimant [pp.243-244] and this was attached to an email from Mr Micah Harris sent to the Claimant on 10 August 2017. Micah Harris told the Claimant that he would take over the welfare evaluation due to the Claimant’s complaints about being stressed, upset, harassed and victimised. He told the Claimant that he did not consider that Morrison’s was a suitable venue for the welfare meeting and invited him to attend the office instead. He concluded by informing the Claimant:

“Failure to attend this appointment will result in disciplinary action being taken against you for failing to follow a reasonable instruction.”

67 This prompted the Claimant to seek advice from solicitors. On 11 August his solicitor wrote to the Respondent objecting to the tone of the email of 10 August, alleging that the lack of empathy displayed in the tone of the emails confirmed the

victimisation and harassment the Claimant had been subjected to all this while and informing the Respondent that the Claimant would not be attending the meeting. The Claimant's GP records confirm that on 11 August he reported that he was "feeling harassed by work to come back early having been asked to come to work for assessment but he did not feel he could drive there".

68 Mr Harris responded to the Claimant on 14 August informing him that as he was an NSL employee they would not discuss internal matters with third parties they do not recognise, meaning the Claimant's solicitors, and informing him they were expecting him to be at his appointment as he had not informed him that he would not be coming [p.250].

69 On 30 August Mr Harris emailed the Claimant again inviting him to attend a welfare meeting. He told the Claimant that there was a genuine concern for his well-being but there was also a lack of information in regards to the incident which needed to be captured and recorded to comply with legal obligations. Mr Harris informed the Claimant that if he did not attend the meeting without giving notice, Mr Harris would be left with the option to consider withholding sick pay. There was no further reference to any disciplinary action or threat of disciplinary action for failing to attend those meetings.

70 The Claimant responded on 1 September 2017 with his resignation letter addressed to Micah Harris. [p.252]. Having set out his objections to the Respondent's conduct towards him he concluded: "The nature and timing of your contact to me while on sick leave has left me with no other option than to resign with immediate effect".

71 The Respondent acknowledge the Claimant's resignation letter and also treated it as a grievance which was looked into by Ms Bajko. She found that the actions of the Respondent informing him of the correct reporting policy, were not harassment but she upheld the Claimant's complaint in respect of threatening him with disciplinary action if he failed to attend a welfare meeting.

### ***The law***

#### **72 The Equality Act 2010 s13 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.

#### **23 Comparison by reference to circumstances**

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

#### **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.

....

### **39 Employees and applicants**

- (1) An employer (A) must not discriminate against a person (B)--
  - (a) in the arrangements A makes for deciding to whom to offer employment;
  - (b) as to the terms on which A offers B employment;
  - (c) by not offering B employment.
  
- (2) An employer (A) must not discriminate against an employee of A's (B)--
  - (a) as to B's terms of employment;
  - (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
  - (c) by dismissing B;
  - (d) by subjecting B to any other detriment.

### **Employment Rights Act 1996**

95 Circumstances in which an employee is dismissed.

(1) For the purposes of this Part an employee is dismissed by his employer if ...

(c) 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.

### **Conclusions**

#### ***Direct discrimination***

73 From our findings of fact we find that there is no basis on which we could find there was no less favourable treatment of the Claimant on the grounds of race.

#### ***Allocation of late shifts***

74 The complaints in respect of allocation of late shifts did not disclose any less favourable treatment of the Claimant than his colleague Sue Bass, and in respect of Mr Harper there was an explanation for the difference in treatment which had nothing to do with race, it was because of a flexible working arrangement which had been agreed, it was noted that the Claimant had his own flexible working relationship arrangement which meant he did not have to work weekends. We find that there was a material difference between the Claimant and his comparator Mr Harper which explains the difference in treatment and that had nothing to do with race.

#### ***Request for emergency holiday leave***

75 The Claimant's complaint of less favourable treatment in respect of his request for emergency holiday leave was investigated by the Respondent in 2016 as a result of the Claimant's grievance. The Respondent did not find that there had been any race

discrimination, the Claimant's union representative stated at the time that he did not believe there had been any race discrimination. We are satisfied that his grievance was thoroughly investigated and there was no basis for finding that the refusal of his request for emergency holiday leave was in any way related to his race. We are also satisfied that the complaint is considerably out of time; the events giving rise to the complaint predated the grievance brought in April 2016 by some months. The Claimant has not put forward any explanation as to why, if he felt genuinely aggrieved, he did not pursue it at the time. Even if the complaint had had any merit it would not be just and equitable to allow him to pursue the complaint now.

*Failure to provide training*

76 The Claimant was provided with training as set out above in our findings of fact. The only training that Mr Harper received that the Claimant had not was the CDM system; we have found that this would not have addressed the concern the Claimant had in respect of his safety on the street and which we are satisfied is what underlies his making a complaint in respect of lack of training. Ms Bass (who is white) had not received the CDM training either. In the circumstances we accept the Respondent's explanation for the difference in treatment of the Claimant and Mr Harper. We find that the reason for the difference in treatment had nothing to do with the Claimant's race but was simply to do with the timing and availability of each of the individuals concerned, depending on their rota and the availability of the trainer. We find that the Respondent's intention was that the Claimant would receive the same training the following week, as would Ms Bass. We are satisfied there was no less favourable treatment of the Claimant because of his race.

***Harassment related to race***

*Sending the Claimant letters the contents of which were inappropriate and threatening from 21 July 2017 until the date of the termination of his employment on 1 September 2017*

77 We accept that the Claimant did not wish to receive the letters in question. Having carefully considered their content and timing we do not find that they were intended to create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. We considered whether they had that effect on him. We accept that the threat of disciplinary proceedings or withholding payment of sick pay may have been perceived by the Claimant to be hostile, however we are satisfied that this was in compliance with Respondent's policies and was in response to the Respondent's belief that that Claimant was failing to follow reasonable management instructions in relation to providing necessary information and attendance at meetings. It is evident that there was some frustration as to the apparent lack of information coming back from the Claimant, we find that had nothing to do with the Claimant's race. We do not find that the letters violated the Claimant's dignity, nor would it be reasonable for them to be perceived as doing so, nor do we consider that it would be reasonable in the circumstances for them to have the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

***Constructive dismissal***

*Failing to deal with the written grievance from May 2017*

78 This relates to the Claimant's complaint about having to mentor CEO operatives on street patrol, he did not describe it as a grievance, although we are satisfied he was familiar with the Respondent's grievance procedure, having invoked it in 2016. The complaint was addressed by Mr Maynard who responded by setting out the steps that had been taken before requiring the Client to patrol with CEOs. Mr Maynard accepted that reference to risk assessments was to generic risk assessments, but that the assessment was made in respect of the Claimant on the basis of what he was being asked to do. Although the Claimant was being required to go out in a vehicle to patrol with a CEO he could remain the vehicle at all times, he, unlike the CEO, did not have to leave the vehicle. He had been provided with a body cam that he could wear but for some unexplained reason chose not to. The Claimant was not required to issue an penalty notices or to speak to any members of the public, he was simply there to observe how the CEO went about his or her job.

*Sending the Claimant letters which were inappropriate and threatening*

79 The Claimant had suffered an injury while he was at work and the Respondent needed to understand what had happened and to fill in a report under the RIDDOR Regulations the only person able to provide the full information was the Claimant. We are satisfied that Mr Maynard was trying to make sure he had all the relevant information and that he explained to the Claimant why he needed the information. He agreed to the Claimant's request for communication to be via email. He also set out the procedure for reporting absence and why he thought the Claimant had not complied with it. It was submitted on the Claimant's behalf that there was not one expression of sympathy or understanding in any of the emails; we reject that submission which is entirely contrary to the evidence. Mr Maynard was at pains to express his sympathy and to empathise with the Claimant's situation whilst also trying to explain clearly what was needed from him and why.

80 Nor do we find that Ms Ranger's correspondence was inappropriate or threatening, she was attempting to arrange a date for the disciplinary hearing in respect of a matter that pre-dated the Claimant's injury. She gave the Claimant the option of sending a representative or sending in written representations and she rearranged the hearing on three occasions in order to accommodate the Claimant.

81 Mr Harris' threat of disciplinary proceedings for failure to follow a reasonable management instruction might seem harsh if taken out of context, however he was aware that Mr Maynard had made numerous attempts to obtain the required information from the Claimant and that the Claimant appeared to have been rather evasive. The Respondent's grievance and disciplinary procedure provided that a failure to follow a reasonable management instruction could lead to disciplinary action. Mr Harris was of the view that the request to attend a welfare meeting was a reasonable management instruction. In his subsequent email Mr Harris rowed back from any threat of disciplinary action, he did however refer to the possibility of sick pay being withheld if the Claimant was refusing to cooperate to attend the welfare meeting, this was also consistent with the Respondent's procedure. We do not find that the

Respondent intended the content of the letters to be threatening. We do not find that informing the Claimant that his conduct could be seen as failing to follow a reasonable management instruction, or failing to cooperate in attending a welfare meeting, and referring to the possible consequences under the Respondent's procedure was, objectively, conduct that was intended to or was likely to undermine the relationship of trust and confidence. We do not find that the Respondent was in breach of contract.

82 We therefore dismiss the Claimant's claims.

Employment Judge Lewis

25 June 2018