JJE

EMPLOYMENT TRIBUNALS

Claimant: **Mr L Sabovik**

Respondent: **Co-Operative Group Limited**

Heard at: **East London Hearing Centre**

On: **3,4,5,6 July 2018 & 10 July 2018 (In Tribunal)**
11 July 2018 (In Chambers)

Before: **Employment Judge Ross**

Member: **Ms J Hartland**

Member: **Mr D Ross**

Representation

Claimant: In Person

Respondent: Ms Bowen, Counsel

JUDGMENT

The judgment of the Tribunal is that:-

1. **The complaints of direct race discrimination, race discrimination by victimisation and disability discrimination are not upheld.**
2. **The Claim is dismissed.**

REASONS

Complaints and Issues

1. Having complied with the Early Conciliation provisions, the Claimant presented a Claim on 5 June 2017, complaining of direct race discrimination, race discrimination by victimisation and disability discrimination. The Early Conciliation notification was received by ACAS on 23 March 2017

2. Subsequently, having again complied with the Early Conciliation provisions, the Claimant presented a second claim alleging race discrimination victimisation and other complaints.

3. The Claims were opposed, with the Respondent complaining that it could not understand the complaints, in the absence of particulars.

4. There were three Preliminary Hearings for case management and definition of the issues.

5. Using the Order of Employment Judge Allen, the Tribunal drafted a list of issues for use in this case. This was agreed by the parties on the morning of 4 July 2018, the whole of 3 July 2018 having been absorbed by pre-reading and applications by the parties. A copy of the agreed list of issues is annexed to this set of Reasons.

6. The Claimant complains of direct race discrimination, because of his nationality. He is Slovakian.

7. The Claimant also brings two complaints of discrimination by victimisation. The Respondent admitted that the Claimant made complaints of discrimination on 8 January 2014, 4 January 2015, 11 April 2015, 12 January 2016 and 1 January 2017, which amounted to protected acts. The first Claim was also a protected act.

8. At the outset of the hearing, the Respondent objected that the Claimant had attempted to introduce new complaints in his witness statement, or the statements of his witnesses, and that certain evidence was irrelevant. There were applications made to exclude evidence, which we determined for reasons given at the time. The evidence which we considered is listed below.

9. We were mindful that it would not be fair for new complaints to be advanced, which were not part of either claim nor identified at the Preliminary Hearings. We were also mindful of the need to ensure that the Claimant could have a fair hearing of his complaints. For instance, in his witness statements, the Claimant advanced the argument that mediation had been used by the Respondent as a tool to cover up discrimination. This was not a complaint raised at any of the three Preliminary Hearings. Accordingly, this was not treated as a further complaint of race discrimination or victimisation, but it was not excluded from the Claimant's witness statement evidence, with the Tribunal attaching such weight to the evidence as it thought fit, which was very limited given the late stage at which the allegation was made and the unparticularised nature of the allegation. We did not find this allegation proved.

10. At the outset of the hearing, on 4 July 2018, Ms. Bowen applied to exclude certain parts of the evidence of two live witnesses for the Claimant, namely Piotr Zubowicz and Andrej Kubicek, which she argued raised new complaints which the Respondent could not be expected to respond to because they were not part of the Claimant's pleaded case nor the issues identified by Employment Judge Allen. We allowed part of that application, for reasons given at the time and list below the parts of their evidence taken into account.

11. On the morning of 6 July 2018, the Claimant sought to adduce further oral evidence, about four further drivers, and to rely on a screen shot recently taken. He argued that this evidence would show that the Respondent paid and provided a 35 hour course to all new drivers to enable them to get a CPC card (and thus a DQC). The application was refused for the reasons given at that time, which included that we considered that this evidence was not relevant to the issues (the potentially relevant allegation, at issue 4.1, being that of victimisation by not considering the Claimant for HGV driver roles), that it could have been raised in his oral evidence already, his admission that he would need to do the 35 hour CPC course before he could become a HGV driver, and because we could not see how this evidence would assist him in this case, given the agreed list of issues.

12. On the morning of 10 July 2018, the Respondent made, then withdrew, an application to adduce witness statements from three of these drivers. This withdrawal was after the Tribunal had pointed out that we had already determined on 6 July 2017 that the Claimant's proposed further evidence had been found not to be relevant to the issues.

<u>The Evidence</u>

13. The parties had agreed two bundles of documents. The second bundle mainly contained documents relevant to issue 4.2, which emerged from the second Claim. Pages were added to the bundles in the course of the hearing, which was unavoidable given the number of documents sent by email to the Tribunal by the parties. As a result, the first bundle ran from pages 1-638; the second bundle ran from page 1 to page 56 (ending with the draft minutes of the local Joint Consultative Committee meeting for 21 June 2018).

14. Page references in this set of Reasons refer to pages in the first bundle of documents, save where stated.

15. We read and took into account the following statements:

For the Claimant:

15.1. First statement of the Claimant dated 7 June 2018 (save for paragraphs 8 and 8A, 16-17, 21, 22, 23);

15.2. Second statement of the Claimant dated 5 June 2018;

15.3. Statement of Andrej Kubicek, Warehouse Operative, dated 26 April 2018 (except paragraphs 3 to 8, and 11 to 14);

15.4. Second statement of Andrej Kubicek;

15.5. Piotr Zubowicz (except paragraph 1, the second sentence of paragraph 4, and paragraph 5), Warehouse Operative;

15.6. Martin Potancok, Warehouse Operative;

15.7. Hubert Kowalski, Day Shift Driver.

For the Respondent

15.8. Janet John, Operations Manager;

15.9. John Ramsden, Team Manager;

15.10. Kevin Harris, Transport Team Manager;

15.11. Piotr Ciszek, Back Shift Transport Manager;

15.12. Pawal Gorny Warehouse Shift Manager;

15.13. Hilary Barnes, Employee Relations Business Partner;

15.14. Sean Byrne, Back Shift Team Manager;

15.15. Shane Quinlan, former Warehouse Operations Manager (until 9 February 2018);

15.16. Steve Harris, Back Shift Transport Manager;

15.17. Russell McAleese, Warehouse Back Shift Manager;

15.18. Steve Fry, Warehouse Shift Manager;

15.19. Anton Prior, Warehouse Shift Manager.

16. In addition to the Claimant, we heard oral evidence from Mr. Zubowicz and Mr. Kubicek.

17. In respect of the Respondent's witnesses, we heard oral evidence for the witnesses listed from 15.8 to 15.13 inclusive.

18. Where we did not hear oral evidence from a witness, we attached such weight to their evidence as we saw fit, given that the evidence was not tested in cross-examination.

19. In respect of the Claimant's evidence, we found that the quality of his oral evidence was not affected by the presence and assistance of an interpreter. We found, however, that his limited English language skills may have led to misunderstanding by him in the past at work. Moreover, we found that he lacked understanding of certain factual matters, because he held entrenched, emotional, views as to his treatment and what the Respondent should or should not have done, which lacked any basis in fact.

20. The Claimant had become over-sensitive and suspicious where either procedures were not followed to the letter or an outcome was not that which he believed to be correct or fair, jumping to the conclusion that these matters were due to his nationality. This was demonstrated by the admitted fact that he had brought about 35 grievances against a variety of managers since 2014 and his approach to the draft Joint Consultative Committee minutes referred to below, questioning whether lawyers had been present when the interpretation of the collective agreement at issue was agreed.

21. We found that the Claimant's witnesses also made allegations which were based on perception or belief but not facts. For example, Mr. Kubicek purported to recall specific words used by Ms. John and another manager present at a meeting on 7 March 2017 which seemed most unlikely to be accurate, given the time that had passed, the contemporaneous documents and the lack of any previous complaint relating to those words. Mr. Zubowicz contended that Mr. Ramsden had failed to keep proper notes of a meeting on 13 December 2016; when asked what was not recorded, it was pointed out that the gist of that point had been recorded on the face of the notes.

22. Where there was a conflict of evidence, we preferred the evidence of the Respondent's live witnesses and the content of the Respondent's documents.

<u>Findings of Fact</u>

23. We read and heard a lot of evidence over the course of this hearing, some of it of marginal or no relevance. The following are the relevant findings of fact. The fact that we do not refer to a particular piece of evidence or dispute of fact is not evidence that we have not taken the evidence into account. Further, it is important to recognise that the list of issues is a tool to assist the parties and the Tribunal to focus on that which is relevant. We were not invited to amend the list of issues.

24. The Claimant has been employed at the Respondent's depot in West Thurrock from May 2009. He is a warehouse operative.

25. The Claimant employs about 500 workers in its warehouse at this site. The workforce is diverse. There are more than 20 nationalities, with the majority being nationals of countries in Eastern Europe. There is no one nationality which is dominant in management roles, nor in a specific job, nor do nationals from any one country dominate any specific training.

26. Also, there are various European nationalities amongst the drivers including three Slovakian drivers.

Background matters

8 January 2014

27. Following an incident in the warehouse on 8 January 2014, the Claimant brought a grievance against Edward Spender. It was alleged that Mr. Spender said the following:

"*Edward said that I have done it on purpose (called him MR Ed) and I said that I have done it to other TL then he said go back to work you smell. He added that I'm a small person, that I should come back to my country (Slovakia). I have asked why you tell me that? He said that he is the boss and I'm the worker and if I will put a grievance or say it to manager he will deny everything. He said that he had similar situations in the past and he is still here, he is the boss. He said we can*

have a meeting upstairs to discuss the problem but he will deny everything. He said that I have a wife and a child and I need this job. He said he works and he has got friends on dayshift. He said that I will have no rotation and he will say to other TL to not to rotate me. He said I need to be careful for my job. All the conversation should be visible on camera I think. He made me feel very small and not needed".

28. Mr. Spender made allegations of bullying and harassment against the Claimant: see p.180.

29. The Respondent investigated by interviewing Mr. Spender and viewing CCTV. Mr. Mardell, then backshift manager, decided the statements conflicted and the CCTV was inconclusive, so the grievance was not upheld: see p.201. A letter was sent to Mr. Spender stating the outcome to prevent any risk of this happening in the future was mediation and for Mr. Spender to role model correct behaviours.

30. The Claimant alleged that because of Mr. Spender's discrimination, Mr. Mardell tried to hush it up by offering the Claimant a driver's position. We find this did not happen because:

    30.1. The Claimant did not refer to this in any previous grievance nor within the three Preliminary Hearings.
    30.2. It was very unlikely that the Claimant would not have complained if such an offer was not honoured, given that he has made 35 grievances since 2014;
    30.3. The Claimant believed Mr. Spender was sacked, which is why he returned to work.

31. It is more likely, by inference, that Mr. Mardell encouraged the Claimant to apply for driver roles, on being told by the Claimant that he had a full HGV licence and experience. This explains why Mardell sent the email at p.202a, stating "*Please follow the link below for the application process*". This email is inconsistent with an offer of a driver's role.

32. As we find below, at no time has the Claimant had a CPC and he has never held a DQC entitling him to drive for the Respondent.

33. We accepted the Claimant's evidence about the gist of what was said to him by Mr. Spender.

34. We drew no inference from this incident and there was nothing to indicate that any acts or omissions of the Respondent after the statements by Mr. Spender were because the Claimant is Slovakian. Moreover, the Claimant did not work with Mr. Spender again after January 2014. He did not feature in any further complaints by the Claimant, and the Claimant did not allege any other manager acted as they did because of this incident with Mr. Spender.

January 2015

35. We preferred the Respondent's evidence and the contemporaneous documents to the evidence of the Claimant in respect of this matter to the evidence of the Claimant in his witness statement at paragraph 24, which was not consistent with them.

36. On 10 January 2015, there was an accident in the warehouse. A forklift driven by the Claimant hit Peter Boland, another employee. The incident report is at 217. Pawel Gorny, shift manager, investigated by viewing the CCTV and taking statements. He concluded:

"*Explain Your Findings*

Having watched the video evidence several times it is possible to establish above the reasonable doubt that the cause of the accident was the fact that Lukas was not following the procedures correctly. This is evident in the fact that at the time of the accident Lukas was not looking in direction of travel/(in reverse). Should Lukas look in the direction of travel he would have been able to spot Peter which will prevent the accident from happening. Lucas was also lifting the Empleezy waste bin at the same time as reversing which is again a breach in the procedure (drivers should not be using hydraulics whilst moving). In addition Piotr Zubowicz's statement is inconsistent with the video evidence in a fact that he claimed he saw Lukas looking back when reversing where in the video evidence he is facing the other way which would prevent him from seeing the incident

Recommendations

Due to the serious nature of the incident my recommendation is the Lukas should be investigated for gross negligence which has led to potentially dangerous incident. In addition MHE should not be driven into the tray/waste area, my recommendation is that further investigation needs to be conducted into allegedly giving a false account of facts regarding the accident by Piotr Zubowicz."

37. We accepted the evidence of Mr. Gorny as to what the CCTV evidence showed and that he had viewed it several times. He saw that the Claimant had reversed without looking.

38. Mr. Gorny asked Stephen Harris to review the CCTV evidence and investigation report, and to suspend the Claimant. He agreed to do so and that further investigation was required. Mr. Harris suspended the Claimant based on the allegation of gross negligence, shown by the letter at p.218.

39. The disciplinary hearing was heard by a different manager, Mr. Shanks. A final written warning dated 24 Feb 2015 was given.

40. We found that the reason for suspension was the manifest evidence of the conduct of the Claimant, including the CCTV evidence. The cause of the suspension was nothing to do with the Claimant's nationality

41. We accepted the evidence of Mr. Gorny that there was nothing in the CCTV evidence to suggest that Peter Boland had done anything wrong. Moreover, Shana Webb was merely a witness to the incident and had not done anything to contribute to the collision. There was no reason why either Mr. Boland or Ms. Webb should have been suspended or subject to any disciplinary action.

42. There was no evidence to suggest the reason for the treatment of the Claimant by his suspension and disciplinary sanction was because of nationality as opposed to the evidence collected. We accepted the Respondent's evidence as to the evidence collected by the Respondent in respect of this incident. The witness statement evidence of Mr. Harrison was corroborated by the oral and written evidence of Mr. Gorny, who we found to be a reliable witness.

January 2016: report to Mr. Moskal; no investigation alleged.

43. Although this was the third background incident relied upon by the Claimant in support of his claims of direct discrimination (see page 27), the date that he provided during the Preliminary Hearings (March 2016) was incorrect.

44. The Claimant's witness statement evidence was as follows:

"27.12.2015 ***p.392***
Peter Boland
On this day Peter Boland had incident at work with LLOP. Shortly after parked this LLOP across walkway leading to fire exit ***SSOW 72-3(p347)****. SSOW 72-8(p347). I reported it to Mr. W. Moskal (team leader).*
Went to see Mr. W. Moskal one hour later to ensure myself he reported it. He did not.
I raised grievance against Mr. W. Moskal on 07.01.2016 ***p288*** *to P. Garry* ***p.296-p.298***
Asked P. Garry to have look on the CCTV.
I was told that CCTV did not worked on the day of this incident.
No action took place. ***P.307-308*** *Mr. W. Moskal statement".*

45. The documents show that on 7 January 2016, the Claimant submitted an informal grievance to Mr. Gorny, his shift manager, against Mr. Moskal, a team leader. He alleged (see page 288) that Mr. Moskal did not report a Health and Safety issue which took place on 27 December 2015. The Claimant does not make the grievance about the lack of action against Mr. Boland, or ask for Mr. Boland to be investigated.

46. Mr. Gorny interviewed the Claimant who stated Peter Boland had parked his LLOP in a way that blocked the walkway leading to the fire exit, and "*I also heard that he had hit another truck the forks or wheels*" (p.296).

47. Mr. Gorny interviewed Mr. Moskal, evidenced by pages 307-308. Mr. Moskal stated that the Claimant had told him that there was a LLOP truck parked on the walkway, and that Mr. Moskal then moved it to safety. Mr. Moskal stated that he reported it to Mr. Gorny on the day, and that he had done everything right. He did not mention an accident. He could not recall checking the MHE book.

48. Mr. Gorny then spoke to Mr. Boland, informally, who denied having any accident on 27 December 2015. In the light of the responses from Mr. Moskal and Mr. Bolan, Mr. Gorny decided that there was no reason to take matters any further or carry out further investigations. We found Mr. Gorny's evidence to be reliable in respect of this incident.

49. In answer to my question, querying whether the complaint was about Peter Boland parking across the walkway rather than an accident, the Claimant responded: "*Not sure how recorded; I told PG I heard bang of collision then saw PB parking on walkway; I report that nothing else*."

50. This answer, coupled with his evidence to Mr. Gorny in interview, tends to show that the Claimant's evidence not as reliable as that of Mr. Gorny, because it shows that the Claimant did not actually see any collision. Further, the account given in the interview to Mr. Gorny is slightly different to the evidence before us; in the interview with Mr. Gorny, he does not mention hearing "a bang", and he appears to be referring to hearsay evidence. Moreover, as we have noted, the Claimant was even wrong about the date of this incident when it was provided at the Preliminary Hearing; he admitted in cross-examination that he had been referring to this incident on 7 January 2016 (despite stating March 2016 at the Preliminary Hearing).

51. The Claimant did not contend that he saw any form of collision or accident. Moreover, from the evidence, no collision was captured on CCTV, and no one complained about the consequences of an accident. Furthermore, the Claimant did not report this alleged incident for 11 days, and even then, did not mention an accident in his written grievance.

52. The reason that Mr. Gorny decided not to take any further action was not related to the fact that the Claimant was Slovakian. We accepted Mr. Gorny's evidence on this point, because there was no evidence to support the Claimant's grievance, no CCTV, and the grievance itself lacks any particulars (it gives no mention of the alleged accident: see page 288). We also relied on our findings in the above paragraphs, which assisted us in concluding that we should draw no inference from those findings which might support the complaints of discrimination.

October 2014: drug and alcohol tests

53. Contrary to 11.4 of the Preliminary Hearing summary at p.27, the Claimant's oral evidence was that he had a drug test following an incident at work on 21 September 2016.

54. The Claimant's evidence was that Martin Coda, a British worker, had an accident on 24 October 2014 whilst driving the counter-balance and was not drug and alcohol tested.

55. At p.161, the Respondent's Human Resources' record showed that Mr. Coda was tested.

56. The list of drug and alcohol tests at p.215 was prepared for a grievance of another worker, Mr. Marchel. This shows that Mr. Coda did have a drug and alcohol test on 10 November 2014.

57. In a later grievance, p.212, management appear to admit that Mr. Coda was not tested, but that this was an error by management.

58. We found that no inference that the Claimant was subject to any less favourable treatment because of nationality can be because drawn:
    58.1. The Claimant and Simon Lane were both drug-tested after the collision in 2016.
    58.2. Part of Mr. Marchel's grievance (page 231) was that Polish workers were targeted and a Slovakian not tested, which tends to undermine the Claimant's case.
    58.3. The list at page 215 (which was not challenged) shows workers of different nationalities tested at the direction of different managers.

Issue 1.1: Claimant disciplined on 28 December 2016 compared to Mr. Lane

59. We found Mr. Ramsden to be an honest and straightforward witness, whose evidence we accepted. It was consistent with the contemporaneous documents.

60. There was an accident in the warehouse involving the Claimant and Simon Lane, an operative of British nationality.

61. David Gardner, a Team Leader, prepared the incident report and recommended that both the Claimant and Mr. Lane be investigated:
    "Recommendations
    I recommend Simon be investigated as he should have used his horn when approaching Lukas, and this is the second accident he has had in a short period of time. I also recommend Lukas be further investigated for not being aware of MHE at all times (SSOW72) and his questions to be formally noted down with a note taker present to prevent dispute. Also he should have reported the incident as soon as it happened and not waited".

62. The investigations into each worker were carried out by different managers.

63. This was caused by the time delay between investigatory interviews. Although the use of separate investigators was poor practice, there was nothing to suggest that this was less favourable treatment of the Claimant, nor that it was because of his nationality. The reason for the delay was that the Claimant was off sick for 15 days after the accident and then on annual leave.

64. The manager who investigated Mr Lane did not recommend him for disciplinary action.

65. In his investigatory interview, carried out by Maciej Suszcezewicz, of Polish nationality, the Claimant was told that he had not followed two procedures, SSOW72 (be aware of MHE and pedestrian movements at all times) and not reporting the accident straight away. The notes of that interview (page 368-375) suggest it was not without dispute. The interviewer asked the Claimant several times "*did you try to stop him driving away?*". At one point, the Claimant says "*No comment*" in answer. The significance of whether Mr. Lane was stopped by the Claimant straight away was that photos could have been taken of the position of the vehicle, the location and a thorough investigation concluded. Mr. Suszcezewicz decided to recommend the disciplinary procedure be used, for the two matters identified.

66. We found that this complaint was an example of where the Claimant assumed a fact and assumed the reason for the treatment. Here, the Claimant initially assumed Simon Lane was not investigated and assumed in evidence that Mr. Ramsden had details of Simon Lane's evidence. When Mr. Ramsden conducted the disciplinary hearing, he did not have details of the evidence against Mr. Lane, because he was not dealing with a disciplinary case against him.

67. We accepted that Mr. Lane was not disciplined, but we found that he was not a comparator. There were material differences between the two workers.

68. We concluded that a hypothetical British or non-Slovakian comparator would have received the same penalty (a 12 month warning) from Mr. Ramsden, where the evidence against the comparator was the same.

69. We accepted the evidence of Mr. Ramsden that he found that there was a breach of SSOW 72 rule and this was the primary reason for the disciplinary penalty, because:
    69.1. People needed to be aware of their surroundings at all times in a building with 60-70 vehicles;

    69.2. We did not accept Mr. Zubowicz's evidence that Mr. Ramsden did not write down the evidence of the Claimant. Mr. Zubowicz stated that Mr. Ramsden had not written down the question and answers about the speed Mr. Lane was driving. Page 350, part of the notes of interview, shows that the relevant gist of the evidence of the Claimant was recorded. We find it unlikely that, having heard his evidence to the Tribunal, Mr. Ramsden repeatedly refused to write down specific matters, as alleged by Mr. Zubowicz.

Issues 1.2 and 1.3: 6 March 2017, Janet John not upholding the grievance of race discrimination against Mr. Ramsden

70. We found Ms. John to be an honest witness, whose evidence was consistent, and whose evidence was corroborated by the contemporaneous documents. We found that she had tried to help the Claimant.

71. Ms. John was impartial having had no previous dealings with the Claimant. There was no complaint when she informed him that she would hear the grievance at page 387 and the appeal against the disciplinary sanction imposed by Mr. Ramsden together.

72. The hearing took place on 18 January 2017. The minutes of the meeting are at pages 389-399, and we find these are accurate if not verbatim.

73. Ms. John investigated after this first hearing. She gave her decision at a second meeting on 7 March 2017 (not 6 March 2017 as alleged).

74. Ms. John decided to uphold the Claimant's appeal against his disciplinary sanction, for the reasons that she gave in evidence. In short, she considered that disciplinary action should have been taken against both the Claimant and Mr. Lane or against neither.

75. Ms. John did not uphold the Claimant's grievance of race discrimination against Mr. Ramsden. We did not find that this was due to the Claimant's nationality for the reasons she gave in evidence. We accept that she made her decision on the evidence before her.

76. In particular, the grievance was based on the misconception that the Claimant had not been investigated: see page 387 ("*my fellow colleague hasn't even been investigated…*"). We found that this was incorrect as a fact. Mr Lane was investigated by Ms. Craddock; and she decided not to pass the case forward for disciplinary action. Ms. John discovered this to be the case as she investigated and this was a reason for her decision to uphold the appeal.

77. Furthermore, Ms. John did properly investigate the grievance. Indeed, she heard the Claimant's complaints about historical matters, which he said showed discrimination because of his nationality. This was not necessary for her to conclude the appeal and grievance, but her approach provides evidence that she did not act as she did because of his nationality.

78. Moreover, Ms. John could see no evidence to support the allegation that the Claimant had been treated differently to Simon Lane because of his nationality. As she explained, different investigating managers can make different decisions.

79. We could see no evidence to support this allegation, either, from the facts we heard. There was a difference in treatment in the outcomes for Mr. Lane and the Claimant, but this was because one investigating manager had decided to recommend the Claimant's case for the disciplinary procedure, and a different investigating manager had decided not to recommend Mr Lane's case for the disciplinary procedure. On the evidence we heard, a hypothetical comparator would have been treated the same as the Claimant.

Alleged offer by Ms. John of a driving role

80. At the meeting on 7 March 2017, where Ms John provided her decision to the Claimant, we found that she was trying to draw a line under what had gone before, given the number of grievances raised by the Claimant. She was trying to look forwards, for the benefit of the Claimant and the Respondent.

81. We found that the Claimant misunderstood or not remembered what was said to him at that meeting. He alleged that at this meeting he was promised a driving job if no further grievance was made. We find that this offer was not made. We preferred the evidence of Ms. John, which was consistent with the documents as a whole and corroborated as it was by her decision letter at page 409-411. The decision letter states:

"…I do not believe that you have provided sufficient evidence to corroborate your allegations of race discrimination and bullying and harassment relating to your disability in this case. I can find no evidence of actions being taken by Maciej Suszczewicz or John Ramsden, to deliberately aggravate your medical condition. I find that the decisions made, were based on the available evidence and on a judgement about what had happened in this case as there were no witnesses.

In our informal meeting that followed our meeting on 18th January, you indicated that you would like to be considered for driving duties. We discussed your current physical limitations and how they would impact your ability to handle cages in the course of driving duties, however, I am confirming that I am prepared to consider a transfer to driving duties, in light of up to date medical advice provided by Occupational Health and subject to the availability of a vacancy.

In addition, I feel that due to the volume of concerns you have raised against your management team, it may beneficial to both parties to consider a mediation meeting with an independent HR colleagues Adrian Rowley, our Regional HRBP and myself to work towards reaching an understanding of how to move forward in a way that enables you to feel more supported at work.

Finally, from my experience of this case, I find that you have raised grievances in relation to ongoing cases, even before a process has been completed. I'd like to state that it is not common practice for the Coop to adopt two different processes (simultaneously) in addressing the same issue; therefore please understand that, the business reserves the right to decline to hear future grievances where they relate to an ongoing matter or matters where a process has been exhausted. Where such decision are made, you will be duly notified.

There is no further level of appeal and therefore this decision is final".

82. It is clear from the notes of the meetings and from this passage that the physical limitations of the Claimant were discussed at the meetings on 18 January and 7 March. It is clear that Ms. John could not have offered him a driving job, given that medical advice from Occupational Health was required, given his physical

impairments and the effect that they had on his ability to handle cages in the course of driving duties.

83. We did not accept the evidence of Mr. Kubicek. We rejected his evidence that he could recall specific words allegedly used at a meeting in March 2017 when he made his statement in April 2018. The alleged conditional offer of a driving job if the Claimant did not make further grievances was never made.

84. After this meeting on 7 March, Ms. John investigated with Mr. Ciszek about why the Claimant had not been successful in his application to be a driver. Mr. Ciszek explained that the Claimant did not have the CPC qualifications required to be a driver.

85. Moreover, when the Occupational Health report arrived, in May 2017, it recommended that there should be a permanent restriction on manual duties for the Claimant, specifically citing handling 300kg cages (the average lorry carries up to 28 cages which carry stock up to 300kg) (see page 429). In addition, the Claimant was on medication which affected his ability to drive (see page 429).

86. This medical evidence supports our finding that it was not possible for Ms. John, either in March 2017 nor subsequently, to offer the Claimant a driving role. This alleged failure had nothing to do with his nationality.

Mediation being used as tool to cover up race discrimination and victimisation

87. The Claimant, in the summary at the end of his witness statement, alleges that mediation (or the proposal of it) is being used by the Respondent as a tool to cover up race discrimination. This is an unparticularised allegation, not mentioned in any of the Preliminary Hearings as far as we can read or infer. This allegation was an example of the Claimant holding a strong belief based on assumption, not fact.

88. From the evidence we heard and read, the Respondent, through various managers including Ms. John, both at her meeting on 7 March 2017 and afterwards, had afforded the Claimant several opportunities to raise and discuss complaints. So much time had been afforded to him, it was very unlikely that mediation, or the proposal of it, was being used as a tool to hide race discrimination.

89. We found that although Ms. John recommended mediation in her decision letter (page 410), this did not take place, for the following reasons, none of which led to an inference that the Claimant's nationality had anything to do with this outcome:

89.1. Shortly after the meeting on 7 March, the Claimant was involved in a further disciplinary case.

89.2. At about the same time, there was a management re-structure through the whole of logistics, and Ms. John was heavily involved in that because some shift managers were made redundant, as was the relevant HR Business partner.

89.3. The Claimant went on sick leave ending in July 2017.

89.4. On his return in July 2017, Ms. John asked the Claimant if he wanted mediation with his shift managers, which he did. Ms. John tried to arrange this, but then became aware that he had submitted his first Claim form. She was then advised to hold off from mediation until the outcome of the Claim was known.

90. We concluded from all the evidence, particularly that of Ms. John, that mediation was proposed in a genuine attempt to move matters forward and improve relationships within the business.

6 March 2017; Ms John not taking action against Mr. Ramsden.

91. Ms. John found that Mr. Ramsden had done nothing wrong. She reached that conclusion purely on the evidence before her. The incident involving Mr. Lane had first been investigated by Mr. Gardiner, who recommended investigation of both workers; Mr. Suszczewicz had then investigated the Claimant's conduct and made a recommendation for the disciplinary procedure to be used; and Mr. Ramsden then reached a decision on the evidence before him.

92. By Ms. John's failure to take disciplinary action against Mr. Ramsden, the Claimant was not being treated less favourably than a hypothetical comparator. A non-Slovakian operative, in the same material circumstances, would have been treated the same way. Ms. John made the point that the warning was a relatively low level one.

93. We have considered the reason why there was no action against Mr. Ramsden and concluded as follows:

93.1. The appeal is not directed to the disciplinary of Mr. Ramsden. This was not a ground of appeal.

93.2. Ms. John believed the treatment of the Claimant was not connected to his nationality, and she had a reasonable evidential basis for that belief, because she had considered the evidence that Mr. Ramsden had before him.

93.3. Ms. John had overturned the decision of Mr. Ramsden to give the Claimant a warning, because she had had the opportunity to see all the evidence from the investigations into Mr. Lane's conduct and into the Claimant's conduct. She was able to understand that Mr. Ramsden was never asked to consider any disciplinary charge against Mr. Lane.

Issue 1.4 6 March 2017: Claimant not permitted to appeal grievance outcome on basis that his grievances were being dealt with as part of the disciplinary process

94. The outcome letter dated 6 March 2017 states:
"There is no further level of appeal and therefore this decision is final."

95. It does not distinguish between the disciplinary case and the grievance case. Ms. John admitted that the Claimant was entitled to appeal the grievance outcome.

96. Whilst we find that this was poor practice not to allow an appeal on the grievance of race discrimination, we accepted Ms. John's evidence that this was due to her mistake, and this decision had nothing to do with the nationality of the Claimant. She explained how the mistake had occurred; over the course of editing a template letter, the last sentence about an appeal on the grievance was removed. She proceeded on the basis that this was due to the grievance becoming part of the disciplinary appeal.

97. Furthermore, we inferred from the degree of investigation carried out by Ms. John, and the length and detail of the decision letter, that the decisions within it were not made because of the nationality of the Claimant.

98. At the meeting on 7 March 2017, the Claimant raised no complaint about this part of the decision, nor did he point out that he was entitled to appeal the grievance outcome.

99. The Claimant was questioned in cross-examination as to why the refusal of an appeal was alleged to be because of his nationality. The Claimant did not answer the point. In response to a question from the Tribunal, as to why he believed this was race discrimination, he answered as follows:

"*Reason it came to ET I firm believe she not allow me appeal because Slovak background and protect Brit colleague.*

EJ: But Why?

Because I raised grievance for RD but she refused to accept it and because she admitted I was treated differently to my British colleague and hence confirmed there was work discrimination."

100. On the face of this response, there was a very limited and narrow evidential basis for the Claimant's belief. From the evidence of the Claimant, we did not find that there were grounds to infer that a reason for not providing a grievance appeal was the nationality of the Claimant.

Issue 4.1: Allegation that the Claimant was not considered by the Respondent for work as a HGV driver

101. The Claimant's evidence on this complaint demonstrates both a lack of understanding and a degree of not wanting to understand the requirements to be a HGV driver. These matters arose from his entrenched views as to who paid for the initial CPC qualification. We find that it is likely that he wanted the Respondent to pay for the necessary initial CPC qualification, even though that is not the Respondent's procedure.

102. We preferred the evidence of Mr. Ciszek where there was any conflict of evidence with the Claimant or the Claimant's witnesses. We should add that Mr. Ciszek attended the Tribunal despite having sciatica and being unfit to work. Despite his evident discomfort, he gave detailed and precise evidence in response to cross-examination.

103. The Respondent's requirement is that each driver must hold a current driving licence and a CPC card: see page 459. Proof of having the CPC is given by the Driver's Qualification Card, "DQC", which all HGV drivers must hold.

104. The CPC is proof that a set of standards established by the European Union has been reached. It applies to initial driver training and career-long continuing training. To get the full CPC, a driver must pass all the tests that make up the CPC to qualify for the initial CPC.

105. Page 469 is part of a Driver and Vehicle Standards Agency publication; it demonstrates what is required to get and retain CPC, which corroborates the evidence of the Respondent on this issue.

106. Once CPC qualified, a DQC can be obtained by a driver. Thereafter, each driver must have periodical training of 35 hours experience over five years to maintain their CPC qualification.

107. The Respondent pays for the periodical training by providing and paying for 7 hours training each year for each CPC qualified driver. The Respondent does not pay for the initial CPC qualification. This fact was not accepted, or not understood, by the Claimant throughout the hearing.

108. As the Claimant admitted, at no time has he held a Driver Qualification Card. Also, in evidence, he admitted that he was aware that he needed a CPC card before becoming a driver.

109. The Claimant also admitted that his witnesses, and suggested comparators, Mr. Kowalski and Mr. Potancok, had CPC cards. Mr. Trojanowski also had CPC qualification at all material times as admitted by the Claimant and demonstrated by the table at page 423.

110. As Mr. Ciszek explained, the Respondent sometimes ran a "Warehouse to Wheels" programme. This applied to those warehouse operatives with no HGV

qualifications and a good record who wished to become drivers. This was an exception to the Respondent's procedure of not paying for the initial CPC. The Claimant had a HGV qualification and was not eligible for this programme; he admitted this in evidence.

111. The Respondent also runs, about once per year, a "Class 2 Wheels" programme, where colleagues from the warehouse have gained qualifications and their DQC, in their own time and at their own cost, are encouraged to apply to transfer. This is seen as a promotion. The Claimant did not enter this programme and we heard no evidence he applied to do so. We find he was not eligible for it.

112. Mr. Scwarc and Mr. Kulaga were named as comparators. They each had a CPC card, as shown by the table at page 423. They came through as drivers from one or other of the above programmes. Therefore, their circumstances were materially different from that of the Claimant in a vital way.

2014 driver application

113. It is important to recognise that the complaint is that the Claimant was not "*considered*" for work as a HGV driver.

114. The Claimant was invited to apply by Mr. Mardell for a driver role in January 2014, evidenced by page 202b.

115. The Claimant wrote to Mr. Mhandire (former transport manager) requesting transfer. The Claimant had been informed by Mr. Fry, another manager to contact him. Unfortunately, Mr. Mhandire had left the Respondent by that stage. But the fact that he was advised to write to him points towards the Respondent being open to employ the Clamant as a HGV driver, provided he was qualified to drive.

116. By letter 16 October 2014, the Claimant was invited to interview, and told to bring his CPC card: see page 205C. This is inconsistent with the Claimant's evidence: we do not accept that he was told by Mr. Holmes that there was no need to bring this card and that all drivers were given the opportunity to obtain their CPC. We preferred the clear evidence of Mr. Ciszek and Mr. Harris that the Respondent only pays for ongoing training (7 hours per year over 5 years) for drivers who already have a CPC card.

117. In any event on 16 October 2014, the Clamant failed the driving assessment, which led to the outcome he was not successful for the role in any event.

118. The Claimant failed the written test and driving test for those wishing to become drivers, in November 2014: see page 208C.

119. Page 208C, shows that on 3 December 2014, the Claimant failed the written test and driving assessment (twice).

120. There is nothing to indicate that these tests were not part of a proper process of recruiting drivers, and no evidence to lead to an inference that the Claimant's nationality played any part in his failures in those tests and assessments.

121. There was no complaint or grievance of victimisation against assessors for this or the assessment at page 208B.

122. The Claimant claimed he was not informed he had not passed the tests, but we find this must be incorrect It was impossible that he would not know because he needed to re-take the test: see eg. page 208AA, which is clearly referring to him taking the test again.

Post-2014 applications

123. In 2015, no application at all was made by the Claimant. When he was asked whether he had applied in 2015, the Claimant did not answer at first, and no particulars of any substantive step to obtain a driving post in 2015 were provided.

124. In 2016, a Class 1 driving role was advertised online and on the warehouse notice board.

125. The Claimant applied and was interviewed on 9 March 2016. Mr. Ciszek decided that he had passed interview but that he could not be offered the role because he did not have the CPC qualification.

126. The notes of the interview record the following as being said at the end of the interview (page 315):

"*Haven't got CPC. If will be given job will do one then*"

This shows that the Claimant knew and accepted at that time that he needed a CPC before he could drive. We found that the Claimant was stating that, if he was given a driving job, he would then do his CPC.

127. In respect of the application of March 2016, the Claimant's continued misunderstanding of the real position with respect to the CPC qualification was demonstrated in his evidence, which arose because of his entrenched views. His view was that the Respondent paid for the initial CPC as well as the periodic training to maintain the CPC, and that he was being treated less favourably than others. He could point to no evidence to support this view. We rejected his evidence and his case on this point, preferring the detailed evidence of the Respondent's witnesses.

128. Moreover, the Claimant accepted in evidence that he had said he would do the initial CPC if given the job; and admitted he had been advised that he needed CPC qualification first. He considered this demonstrated he was treated differently from other drivers.

129. The Claimant applied for a driver's role again in April 2016 but was unsuccessful.

130. The contemporaneous documentary evidence corroborates the evidence of Mr. Ciszek that the reason why no offer was made is as stated in table at page 423, which is that "*he has not got his CPC*". There was no manipulation of any documents, at any time, by the Respondent's witnesses.

131. The inference from this table is that Mr. Borzecki, a Polish applicant whom the Claimant referred to as a comparator, already had his CPC at the time of interview. The note at page 569B indicates that Borzecki had a CPC, but had not completed all the necessary modules. Mr. Borzecki was not in the same material circumstances as the Claimant. Moreover, Mr. Borzecki did get the DQC qualification, demonstrated by page 577.

132. Mr. Ciszek's evidence was corroborated by the correspondence between the Claimant and himself, at p.332 – 333. A series of emails states:

"29 June 2016 08:47
……I do not know why in The Co-Operative I was told I need to pass another exam to be a lorry driver."

26.06.2016 14:29
Have you done your CPC now?

27 June 2016 13:17
….You said that I need to do CPC and after that I required to pass test organized by company…

29.04.2016 17:52
We have had various conversations since your interview (ie lack of CPC which is essential to become a professional driver)."

133. At this point in the evidence, the Claimant made a new allegation, which was that the higher officers directed, whenever there was a grievance made by him, that he should be offered a driving job to quieten him and to conceal his complaint for three months. This allegation was baseless; there was no evidence at all to support it.

134. The Claimant did not apply for driver posts advertised in July and August 2016, nor for those advertised in January, February and March 2017.

135. In about May 2017, Mr. Ciszek explained to Ms. John that the Claimant lacked the CPC qualification and so could not be appointed a driver.

2018

136. In about January 2018, the Respondent had a "Class 2 Wheels" programme. There were 10 roles for warehouse and store workers with Class 2 licences. Towards the end of May 2018, the Claimant approached Mr. Ciszek and stated for the first time that because he had obtained his Class 2 licence prior to 2009, he did not require the initial CPC training to obtain a CPC qualification.

137. The Claimant's application arrived after the closing date for this programme. Mr. Ciszek put his name on the reserve list along with other workers. Again, Mr. Ciszek advised the Claimant to arrange the necessary training to obtain the CPC qualification, and that he came to see him once he had a DQC.

138. We find that, even if this application had been made in time, and even if the Claimant had Acquired Rights under an EC Directive and did not need the initial CPC qualification, he lacked the CPC periodical training required to retain his CPC qualification, and therefore he would not qualify for the mandatory DQC. At no point did the Claimant suggest that he had had the necessary training of 35 hours over 5 years to maintain his CPC.

139. From all the above evidence, we found as a fact that the Respondent did not fail to consider the Claimant's applications to do driving roles. It is clear that the Respondent did consider him for HGV driving roles.

140. Although not strictly necessary to determine this complaint, we went on to consider whether the Respondent had failed to appoint (rather than failed to consider) the Claimant to a driver role because he had done the protected acts listed in the List of Issues. We found that the reasons why he could not be appointed to a driver role had nothing to do with the protected acts. In particular:

    140.1. The Claimant had, on some applications, failed necessary assessments.

    140.2. The Claimant lacked a valid CPC qualification and did not have the required DQC.

    140.3. The Claimant did not apply on certain recruitment exercises.

    140.4. The Claimant had never, prior to May 2018, contended that he did not need the initial CPC qualification because of Acquired Rights. Mr. Ciszek had no idea that this might be the case prior to May 2018.

141. We add only the following. The Claimant made inquiries on 26 January 2018 about what qualifications he needed to get a DQC card. He was informed that he needed 5 days CPC training – that is 35 hours training: see page 452. This demonstrates that the Claimant cannot be in a better position even if he has Acquired Rights than existing CPC holders.

Issue 4.2

142. On 28 July 2017, the Claimant submitted a holiday request form (page 34, second bundle) asking to take the 30 August 2017 as a lieu day, which he said he had accrued on 29 May 2017, when he was scheduled to work, but was off sick.

143. Mr. Gorny understood the "Lidia Warehouse and Clerical Agreement" (starting at page 26, second bundle) to mean that Bank Holiday payments are included in the basic salary of warehouse operatives and that bank holidays are included in the

annual leave allowance, unless a worker worked more than 6 bank holidays voluntarily, in which case they were granted a day off in lieu as well as a double time payment. He understood this to mean that a worker who was off sick on a bank holiday would only get a day off in lieu if they had already worked 6 bank holidays. As a result of his understanding of how the collective agreement operated, he rejected the request for the day off in lieu.

144. We accepted that Mr. Gorny acted as he did because he believed that this accorded with the meaning and effect of the relevant collective agreement. This is because we found his evidence to be honest and because, in any event, his interpretation of the collective agreement appeared to the Tribunal to be the correct one. We found that the correct interpretation of the collective agreement means that Appendix 3, "Sick Pay and Public Holidays" section, must be read with the whole of the collective agreement that proceeds it.

145. We find, also, that the interpretation of the collective agreement reached by Mr. Gorny is agreed by the relevant trade union: see the draft Joint Consultative Committee minutes at page 54. This is a further reason why we accepted his evidence.

146. Following the refusal by Mr. Gorny, the Claimant raised a grievance against Mr. Gorny for breach of contract. During the grievance hearing, the Claimant produced a holiday form from Mr. Iskra signed by him when he had requested a day in lieu for 26 December 2016 when he was scheduled to work but off sick. Mr. Gorny signed this off, believing Mr. Iskra had applied for holiday, not noticing the comment about this being a lieu day request.

147. The grievance was heard by Shane Quinlan, who interpreted the collective agreement differently. In the Tribunal's experience, collective agreements are not usually drafted by lawyers, and may be open to different interpretations. The relevant provisions here were open to different interpretations, which explains why the grievance was upheld. This did not lead us to draw an inference that Mr. Gorny acted as he did because of protected acts.

148. It is notable that the Claimant brought issue 4.2 as a complaint of victimisation, despite the Respondent upholding his grievance and giving him the day in lieu. We find that this is further evidence that the Claimant was over-suspicious and had entrenched views about management and its motives. He was unable to entertain the thought that Mr. Gorny could have acted in error and did not accept that the trade union agreed with Mr. Gorny's understanding of the agreement. In any event, as explained, we found the collective agreement tended to support Mr. Gorny's interpretation.

The Law

149. For convenience, all section references in this set of Reasons are to the Equality Act 2010.

Direct Discrimination

150. Section 13 provides:
"A person (A) treats another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others."

151. The required comparison must be by reference to circumstances. Section 23(1) provides:
"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."

152. In terms of how a comparator should be constructed, the Tribunal directed itself in accordance with *Shamoon v Chief Constable of the RUC* [2003] UKHL 11, ICR 337 and *Balamoody v UK Central Council for Nursing* [2002] IRLR 288 CA, at 53-54, from which the following principles can be distilled:

(1) Where there is no evidence as to the treatment of an actual comparator whose position is wholly akin to the Claimant's, a Tribunal has to construct a picture of how a hypothetical comparator would have been treated in comparable surrounding circumstances. Inferences will frequently need to be drawn.

(2) One permissible way of judging a question such as that is to see how un-identical but not wholly dissimilar cases were treated in relation to other individual cases. It is not required that a minutely exact actual comparator has to be found for this use as an "evidential comparator".

153. Whether the comparison is sufficiently similar will be a question of fact and degree for the Tribunal, see *Hewage v Grampian Heath Board [2012] ICR 1054*.

154. In *Shamoon*, at 9-11, Lord Nicholls gave guidance as to how an employment tribunal may approach a complaint of direct discrimination and explained that it was sometimes unnecessary to identify a comparator:
"…*employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it on the proscribed ground which is the foundation of the application? That will call for an examination of all the facts of the case. Or was it for some other reason? If the latter, the application fails. If the former, there will be usually be no difficulty in deciding whether the treatment, afforded to the claimant on the proscribed ground, was less favourable than was or would have been afforded to others*."

Less favourable treatment and "detriment"

155. The proper test as to whether a detriment has been suffered is set out in *Shamoon* at paragraphs 34-35. In short:

"*Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to "detriment".*"

156. A worker who over-reacts or who is hyper-sensitive cannot succeed in proving less favourable treatment.

157. In directing itself to the conclusions above, the Tribunal reminded itself that section 13(1) requires the Tribunal to ask whether the "treatment", not its consequences, was less favourable.

Causation

158. If the Tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason: see the observations of Lord Nicholls in *Nagarajan* (p 576) as explained by Peter Gibson LJ in *Igen v Wong,* paragraph 37.

159. In *Igen v Wong*, at paragraph (11) of the Appendix, it is pointed out that, if the burden of proof shifts, it is necessary for an employer to prove that the treatment was in no sense whatsoever on the grounds of the protected characteristic, because "no discrimination whatsoever" is compatible with the Burden of Proof Directive. The guidance in *Igen v Wong* was approved by the Supreme Court in *Hewage v Grampian Health Board*.

Discrimination by Victimisation

160. Section 27 provides, where relevant:

"*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."

Burden of proof in discrimination cases

161. We reminded ourselves of the reversal of the burden of proof provisions within section 136(2) EA 2010, as explained in *Igen v Wong* [2005] EWCA Civ 142 and *Madarassy v Nomura* [2007] ICR 867.

162. Section 136 provides:

“(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.”

163. It is important, however, not to make too much of the role of the burden of proof provisions at section 136. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they do not apply where the tribunal is in a position to make positive findings on the evidence one way or the other: *Hewage v Grampian Health Board* [2013] UKSC 37.

The function of an agreed list of issues

164. The authorities on this subject are fairly consistent. We reminded ourselves of the following relevant principles:

164.1. The function of an Employment Tribunal is to determine the claims which the claimant has actually brought, not those which he might have brought. A claimant is limited to the complaints set out in the agreed list of issues: *Land Rover v Short* [2011] UKEAT 0496/10.

164.2. A list of issues is a case management tool. If it is agreed, that will, as a general rule, limit the issues at the substantive hearing to those in the list. As the Tribunal that conducts the hearing is bound to ensure that the case is clearly and efficiently presented, it is not required to stick slavishly to the list of issues agreed where to do so would impair the discharge of its core duty to hear and determine the case in accordance with the law and the evidence: *Parekh v LB Brent* [2012] EWCA Civ 1630 at paragraph 31 (applied in *Scicluna v Zippy Stitch Ltd* [2018] EWCA Civ 1320).

Submissions

165. Counsel for the Respondent filed and served a full and helpful set of written submissions at the start of the hearing. On the final day of the hearing, Ms. Bowen provided the authorities referred to and helpfully offered to take the Claimant to relevant paragraphs, before submissions began (although we were informed that

he did not take up this offer). Ms. Bowen expanded on her written submissions orally.

166. The Claimant read from a set of written submissions, which were interpreted.

167. We took account of all the submissions, even if not all are referred to in our conclusions.

Conclusions

168. Applying our findings of fact and the law set out above to the agreed issues, we reached the following conclusions. The protected acts listed in issue 6 were conceded.

Issue 1

169. The Respondent did not treat the Claimant less favourably than the Respondent treats or would treat an appropriate comparator in any of the matters set out at issues 1.1 to 1.4.

Issues 2 and 3

170. The Claimant has not proved facts from which the Tribunal could conclude that any of the treatment found proved was because of the Claimant's nationality.

171. We have made positive findings of fact which lead to the conclusion that the treatment of the Claimant by the Respondent was caused by facts and matters which were nothing to do with the Claimant's nationality.

172. The Tribunal accepted the evidence of the Respondent's witnesses which explained both that the treatment was not less favourable in the sense meant by section 13 EA 2010, but also that it was not caused, to any extent, by the Claimant's nationality.

Issue 4.1

173. We concluded that the Tribunal had no jurisdiction to hear this complaint for the reasons given below.

174. If we are wrong on the issue of jurisdiction, our conclusions on the merits are as follows. Given our findings of fact on this issue, at paragraphs 101-139 above, we concluded that the Respondent did not fail to consider the Claimant for HGV driving roles from 2014 onwards.

175. Moreover, the Tribunal concluded that, although he had applied for driving roles over the period from 2014, the Claimant was not appointed for the reasons set out at paragraph 140 above. The failure to appoint him had nothing to do with any protected act.

Issue 4.2 and 5

176. The Tribunal concluded that the decision of Mr. Gorny on or about 28 July 2017 was a detriment.

Issues 6 and 7

177. The Claimant has not proved facts from which the Tribunal could conclude that the Respondent did those acts because the Claimant had done a protected act. The Claimant has only proved a detriment and the protected acts. The Claimant himself admits that the decision was reversed by Mr. Quinlan, despite the fact that this decision appears to the Tribunal to be based on an interpretation of the collective agreement which is unlikely to be correct – because it puts workers who are off sick when rostered to work the first 6 bank holidays in a better position than those who actually work the bank holidays.

178. In any event, the Tribunal has made positive findings of fact that the decision of Mr. Gorny to refuse the lieu day was not caused, to any extent, by the protected acts set out in issue 6. We have explained why in the relevant findings of fact.

Issue 8

179. We concluded from the findings of fact set out at paragraphs 102 to 140 that there was no policy or practice extending over the period from 2014 whereby the Respondent failed to consider the Claimant for HGV driver roles. He was considered for HGV driver roles.

180. We have found that the Claimant was not qualified to be appointed as a HGV driver at any point up to the issue of his second claim, and this was discovered by the Respondent precisely because it was considering his application for a HGV driver role in 2014.

181. Therefore, the complaints in respect each of the decisions on the Claimant's applications for a HGV driver role are outside the three month limitation period provided by section 123(1) EA 2010.

182. The alleged decisions not to consider the Claimant for HGV driving work were made on or about the following dates:

182.1. October 2014;
182.2. November 2014;
182.3. December 2014;
182.4. March 2016;
182.5. April 2016.

183. The first Claim was not presented until 5 June 2017. This means that the Tribunal was required to consider whether it was just and equitable to hear these complaints

despite the fact that they were presented so many months out of time.

184. We took account of the recent guidance in *Abertawe Bro Morgannwg University Local Health Board v Morgan* [2018] EWCA Civ 640 at paragraphs 17-25. We noted how wide our discretion is under section 123(1)(b) EA 2010; and we took into account that an extension may be granted even where there is no good reason for the delay.

185. We concluded that it would not be just and equitable to extend time for the period required in respect of any of these complaints. This was because:

185.1. There was a very long period of delay following each unsuccessful application before the first Claim was presented.

185.2. There was no evidence of any good reason (or any reason at all) to explain why these complaints could not have been presented before 5 June 2017.

185.3. No evidence was provided by the Claimant to explain why it was just and equitable for time to be extended.

185.4. The relevant factors weighed against the extension of time, including the extent of the delay (which was likely to affect the quality and availability of the oral evidence and the availability of documents), the associated prejudice to the Respondent caused by the delay, and the fact that the Claimant had complaints which were in time and could still be pursued.

186. In any event, the Respondent did not fail to consider the Claimant for HGV driver jobs. We have explained why in our detailed reasons at paragraphs 102 to 139 above.

<u>Summary</u>

187. Each complaint fails. The Claim must be dismissed.

Employment Judge A Ross

30 July 2018