EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Carl Stanley	**-v-**	Scot Group Ltd t/a Thrifty Car & Van Rental

Heard at: Nottingham **On:** 7 and 8 January 2019

Before: Employment Judge Evans, Ms D Newton, Mr C Goldston

Representation
For the Claimant: Mr Barnes (Consultant)
For the Respondent: Mr Harries (Counsel)

JUDGMENT

1. The Respondent did not discriminate against the Claimant because of race.
2. The Respondent did not victimise the Claimant.
3. The Respondent did not breach the contract of employment of the Claimant.

REASONS

Preamble

1. The Claimant was dismissed by the Respondent with effect from 25 August 2017. On 14 December 2017 he presented a Claim Form to the Employment Tribunal in which he brought complaints of race discrimination, victimisation and for breach of contract (notice pay). He also presented a claim of unfair dismissal but that was not a claim which the Tribunal had jurisdiction to hear because the Claimant had not completed two years' employment when he was dismissed.

2. Those complaints came before the Employment Tribunal in Nottingham on 7 and 8 January 2019. The parties were represented at that hearing as set out above. Before the hearing the parties had agreed a bundle of documents running to 203 pages. All references to page numbers in these reasons are to the bundle page numbers unless otherwise stated.

3. The Claimant provided a witness statement for himself and gave oral evidence. The Respondent provided witness statements for the following individuals who also all gave oral evidence: Nathan Kerr (branch manager for the Respondent's Derby branch), Jason Lindsay (branch manager for the Respondent's Dudley branch), Marcus Loveridge (the Respondent's area manager). In addition, Mr Humphreys,

who had been the branch manager of the Respondent's Leicester branch, attended to give evidence following a witness order having been made. He had prepared a short witness statement for himself.

4. The Tribunal did not have sufficient time to both deliberate and to give an extempore judgment following submissions on 8 January 2019 and therefore reserved its judgment.

<u>The discussion at the beginning of the Hearing and the issues</u>

<u>General discussion</u>

5. At the beginning of the discussion Mr Barnes for the Claimant said that he had asked for the "drivers' logs" to be included in the bundle. He said that he accepted that it would probably have been "over-the-top" to put them all in, but in the end none had been included. He went on to say that they were probably not "massively probative". Mr Harries for the Claimant said that an analysis of car movements had been included between pages 199 and 203.

6. Mr Barnes did not make any application for the "drivers' logs" to be obtained and included in the bundle (or any application for an adjournment so that this might be possible). The issue was as such not pursued.

<u>The issues</u>

7. There was then a discussion of the issues which the Tribunal would need to decide in order to determine the complaints brought. The issues were agreed to be as follows:

   <u>Direct race discrimination</u>

   1) Was the Claimant who describes himself as black British treated less favourably because of his race by:

      a. Being prevented from driving elite class vehicles?
      b. Being provided with less work than his white colleagues?
      c. Being singled out to go home early?

   The comparators relied on were: Mr Carrington in relation to 1) a and Messrs Suchodolski, Birch, Powell and May in relation to 1) b and c.

   <u>Victimisation</u>

   2) The Respondent accepts that Claimant did a protected act by raising a grievance on 24 July 2017 (section 27(2) of the Equality Act 2010 ("the 2010 Act")) ("the Protected Act"). Did the Respondent victimise Claimant (section 39(4) of the 2010 Act)because he had committed the Protected Act by:

      a. Subjecting him to disciplinary action?
      b. Dismissing him?
      c. Rejecting his grievance?
      d. Rejecting his grievance appeal?

   <u>Breach of contract</u>

   3) Did Claimant commit an act of gross misconduct which entitled the Respondent to dismiss him without notice?

It was agreed that the Claimant's notice period was one week.

Other matters dealt with at the beginning of the Hearing

8. Mr Barnes complained that he had only received the witness statement of Mr Humphreys on the morning of the hearing. Witness statements had been exchanged in mid-December at which point there had been no indication that Mr Humphreys would attend. Mr Barnes commented that Mr Humphreys was an important witness (having taken the decision to dismiss) and that he would have liked to get into his evidence "with some depth". Having complained in this manner, Mr Barnes did not in fact make any application.

9. Mr Harries for the Respondent said that the Respondent had also only received Mr Humphreys' witness statement on the morning of the hearing. That was a consequence of Mr Humphreys having attended as a result of a witness order having been made. The Respondent had previously tried to make contact with Mr Humphreys in order to prepare a witness statement but without success. Mr Harries noted that the witness statement was brief.

10. The Tribunal noted that the witness statement of Mr Humphreys was less than 1.5 pages long. The Tribunal took the view that Mr Barnes would have more than sufficient time to prepare his cross-examination of Mr Humphreys overnight. Mr Harries then suggested that the tribunal should not begin to hear the evidence of any of the Respondent's witnesses until the second day of the hearing. That would be "tidier". The Tribunal indicated that assuming that the Claimant's evidence was completed in good time, it would wish to begin to hear the Respondent's evidence. To do otherwise would not be a good use of the resource of the Tribunal's time. As such it would hear the evidence of Mr Kerr. If, however, having reviewed Mr Humphreys' witness statement, there were further matters in relation to which Mr Barnes wish to cross-examine Mr Kerr, then he could be recalled. (In fact Mr Kerr's evidence was not completed until 11am on the second day of the hearing.)

The Law

Race discrimination

11. Section 13 of the 2010 Act provides that an employer discriminates against an employee if it treats him less favourably than it treats or would treat others because of a protected characteristic. Section 4 of the 2010 Act provides that race is a protected characteristic.

12. Section 27 of the 2010 Act provides that an employer victimises an employee when it subjects him to a detriment because he does a protected act or because the employer believes that he has done a protected act.

13. Section 39(2) of the 2010 Act provides that an employer must not discriminate against an employee by dismissing him or by subjecting him to a detriment.

14. Section 39(3) of the 2010 Act provides that an employer must not victimise an employee by dismissing him or by subjecting him to a detriment.

15. Pursuant to section 136 of the 2010 Act, it is for the Claimant who complains of discrimination to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination against the Claimant which is unlawful. These are referred to below as "such facts".

16. If the Claimant does not prove such facts he or she will fail.

17. It is important to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves.

18. In deciding whether the Claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal.

19. It is important to note the word "could" in section 136 of the 2010 Act. At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

20. In considering what inferences or conclusions can be drawn from the primary facts, the Tribunal must assume that there is no adequate explanation for those facts.

21. The Tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining such facts. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

22. Where the Claimant has proved facts from which conclusions could be drawn that the Respondent has treated the Claimant less favourably because of a protected characteristic, then the burden of proof moves to the Respondent. It is then for the Respondent to prove that it did not commit, or as the case may be, is not to be treated as having committed, that act.

23. To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of a protected characteristic, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

24. That requires a Tribunal to assess not merely whether the Respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that the treatment in question was not because of a protected characteristic.

25. Since the facts necessary to prove an explanation would normally be in the possession of the Respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof.

<u>Breach of contract</u>

26. At common law the right of summary dismissal arises when the employee commits a repudiatory breach of contract. The employer has the option of waiving the breach or of treating the contract as discharged by the breach.

27. The key issue, therefore, in any claim of wrongful dismissal will often be whether the employee's breach of contract was repudiatory: whether it was sufficiently serious to justify dismissal. That depends on the circumstances. If not justified, the dismissal is wrongful, and the employer is liable in damages.

28. There are no hard and fast rules as to the degree of misconduct necessary for behaviour to amount to a repudiatory breach of contract, although dishonesty, serious negligence or wilfully disobeying lawful instructions will often justify summary dismissal at common law. The Tribunal will consider whether the misconduct has so

undermined the trust and confidence inherent in the particular contract of employment that the employer should no longer be required to retain the employee in employment.

Findings of Fact

29. We are bound to be selective in our references to the evidence when explaining the reasons for our findings. However, we wish to emphasise that we considered all the evidence in the round when reaching our conclusions.

General background

30. The Claimant was employed by the Respondent from 5 September 2016 until 25 August 2017. He was employed as a driver on a zero hours contract.

31. There was an incident on 24 July 2017 (to which we return below). Following that incident the Claimant brought a grievance against Mr Kerr. In addition as a result of that incident, the Claimant was suspended and subjected to disciplinary action.

32. There was a grievance meeting with Mr Lindsay on 31 July 2017. The Claimant's grievance was subsequently rejected by a letter dated 25 August 2017. The Claimant appealed against the rejection of his grievance. There was an appeal hearing on 20 September 2017 chaired by Mr Loveridge. The appeal was rejected by a letter dated 3 November 2017.

33. There was a disciplinary hearing in relation to the incident on 2 August 2017. The hearing was chaired by Mr Humphreys. Following the hearing the Claimant was dismissed by a letter dated 25 August 2017. The Claimant subsequently appealed his dismissal on 8 September 2017, but because he had appealed outside the period permitted by the Respondent's procedure, the Respondent declined to hear his appeal.

General credibility findings

34. The Tribunal makes the following findings in relation to the general credibility of the various witnesses:

35. **The Claimant:** the Tribunal finds that the credibility of the Claimant was damaged by the following matters:

    35.1. When giving oral evidence he was evasive and apparently unwilling to make even the most minor concessions if it appeared to him that they might damage his case. For example, he was evasive in relation to whether his duties might require him to clean cars (although he was employed as a driver he was required to clean cars when there was no driving work to be done). He was also evasive when asked whether he had been paid on the occasion that he said he had been unnecessarily kept in the depot (he had been paid).

    35.2. When asked about the evidence of witnesses which conflicted with his own, he regularly retreated behind a blanket assertion that anybody who had given evidence which was inconsistent with his evidence did so because they remained employed by the Respondent and/or because they had been instructed to behave in a discriminatory way by the Respondent. Indeed he said that everyone who had been employed by the Respondent and who had been involved in this matter had acted in bad faith. More specifically, he said in his oral evidence that Taj Majid had made up his account of what had happened on 24 July 2017 because he still worked for the Respondent. Equally, Mr Humphreys was not acting in good faith when he decided that the Claimant had been guilty of gross misconduct. The same was said of Mr Lindsay who had rejected his grievance. These blanket assertions damaged the Claimant's credibility because it appeared to the Tribunal that they were made in place of any serious attempt to engage with any evidence before the Tribunal which did not support the Claimant's case.

35.3. His case has not been entirely consistent over time. For example, in his original grievance (page 95) he suggested that the category of cars which she thought that he was being "manoeuvred around" (i.e. not allocated to drive) was those in the "prestige" category. By the time of the hearing his emphasis was very much on those in the "elite" category.

36. **Mr Kerr:** the Tribunal finds that the credibility of Mr Kerr was damaged to a limited extent by his inability to give a sensible explanation for why he had used the term "rude boy" in light of the fact that he accepted that it could be used as a derogatory way of referring to a black man. However, taking the evidence of Mr Kerr in the round, the Tribunal found him to be a generally credible witness for the following reasons:

36.1. He did not seek to deny factual matters which might have been regarded as being unhelpful to the general thrust of his evidence. For example, he did not deny that he had used the words "rude boy". Further, he accepted that he had been sworn at by another employee, Ms Saunders, and had not taken disciplinary action against her. Equally, he had not denied telling the Claimant that there was a policy which meant that employees were not permitted to drive elite cars during their probationary period;

36.2. He engaged with the evidence when questions were put to him and provided careful explanations. An example of this was when he gave a careful and nuanced explanation of why he had not taken disciplinary action against Ms Saunders when she had sworn at him.

37. **Mr Humphreys:** the Tribunal finds Mr Humphreys to have been a credible witness for the following reasons:

37.1. By the time of the hearing he was no longer an employee of the Respondent but he went out of his way to be fair to both the Claimant and the Respondent in his evidence. An example of this was the letter of dismissal: Mr Humphreys accepted that he had not seen the letter before it was sent but pointed out that it reflected emails which he had previously sent to the HR Department and did not seek to distance himself from its contents;

37.2. His oral evidence was consistent with his written witness statement and the contemporaneous documents.

38. **Mr Lindsay:** the Tribunal finds Mr Lindsay to have been a credible witness for the following reasons:

38.1. His oral evidence was consistent with his written witness statement and the contemporaneous documents.

38.2. His oral evidence suggested that he had engaged seriously with the factual issues underlying the Claimant's grievance and not jumped to conclusions.

39. **Mr Loveridge**: the Tribunal finds Mr Lindsay to have been a credible witness for the following reasons:

39.1. His oral evidence was consistent with his written witness statement and the contemporaneous documents.

39.2. His oral evidence suggested that he had engaged seriously with the factual issues underlying the Claimant's grievance and not jumped to conclusions. For example, it was clear that he had conducted further investigations of his own before rejecting the Claimant's appeal against the original grievance outcome.

Pre-employment events

40. The Claimant raised as an issue the fact that Mr Kerr had not been as helpful as the branch manager with whom he had normally dealt in relation to the specification of the cars which he rented on a relatively long-term basis as a client. The Tribunal finds that at the point that Mr Kerr spoke to the Claimant in this respect he was recently appointed and that it was company policy not to guarantee particular specification to the hirer of a vehicle.

41. The Tribunal also finds that it was Mr Kerr who interviewed the Claimant and who made him an offer of employment.

Miscellaneous findings

42. The Claimant contended that on more than one occasion Mr Kerr had referred to young black men who wished to hire cars as "rude boys". He said that this was done in a derogatory manner.

43. Mr Kerr accepted that he had used the term "rude boy" once or twice in the hearing of the Claimant. He accepted that "rude boy" could be used as a derogatory term for a black man. He denied that he had used it in this fashion: he said that in his work he had to deal with many rude and angry customers and that he would have used the term to refer to a rude young man.

44. The Tribunal found on the balance of probabilities that Mr Kerr had used the expression "rude boy" to refer to a black man within the hearing of the Claimant on at least one occasion. The Tribunal finds that it is probable that he used it in circumstances where he believed the customer was behaving inappropriately.

45. The Claimant contended that a female employee had "showed some discriminatory characteristics, particularly to Asian customers, she would even refuse to serve some Asian people". He explained (in background provided in relation to his grievance) that this had been after she had been called a "bitch" by an Asian customer in a language other than English, and the comment had been translated into English for her by a colleague. The Tribunal finds on the balance of probabilities that the female employee had been offended by what an Asian customer had said to her one occasion and that subsequently she had on occasion sought to avoid serving Asian customers.

46. The Claimant alleged that he was singled out by Mr Kerr when he failed to wear his hi-vis jacket around the depot. In summary, he was rebuked when other employees were not.

47. The Tribunal finds that there was a policy in place requiring hi-vis jackets to be worn. The Tribunal finds that the memo at page 150 reflects this. The Tribunal finds that Mr Kerr did not single out the Claimant for the following reasons:

47.1. Mr Kerr's evidence was that he raised the issue with employees as and when necessary. For the reasons set out above, the Tribunal found Mr Kerr to be a generally credible witness and has given significant weight to his evidence;

47.2. The Claimant's role meant that he was not around the depot for most of his working time. Consequently he lacked any kind of overview in relation to how often and with whom Mr Kerr raised the issue;

47.3. Mr Lindsay did not find evidence to support this allegation when he considered the claimant's grievance;

47.4. Mr Loveridge investigated this issue before deciding the grievance appeal. The interviews which he conducted with Mr Taj, Mr Carrington, Mr Powell, Mr Suchodolski, Mr Payne, Ms Saunders and Mr Butcher (pages 183 to 186) do not suggest that Mr Kerr singled out the Claimant. They suggest that he reminded individuals of the need to wear his-vis jacket as and when this was necessary, and that perhaps it was necessary to remind the Claimant more often than some other employees.

Being prevented from driving elite class vehicles and vehicle movements generally

48. There was considerable discussion during the Hearing about how "prestige" and "elite" vehicles were defined by the Respondent. The Tribunal finds that "elite" vehicles were those with a "Z" prefix. "Prestige vehicles" with those in the category below "elite" and generally had a value of £35,000 or more. Examples of elite and prestige vehicles were at page 203.

49. The only period for which the Tribunal has clear figures for the number of vehicles driven by the Claimant and his comparators is the period February 2017 to July 2017 (page 203). They demonstrate that during that period:

49.1. The Claimant drove an elite vehicle on one occasion, prestige vehicles on 57 occasions and moved vehicles on a total of 514 occasions;

49.2. The Claimant's comparator for elite vehicles (Mr Carrington) drove elite vehicles on two occasions, prestige vehicles on 48 occasions and moved vehicles on a total of 439 occasions;

49.3. The Claimant's comparators for being "provided with less work" drove vehicles as follows:
49.3.1. Mr Suchodolski: elite 3, prestige 54, all 369;
49.3.2. Mr Birch: elite 0, prestige 18, all 242;
49.3.3. Mr Powell: elite 0, prestige 30, all 350;
49.3.4. Mr May: elite 0, prestige 6, all 48.

50. The Tribunal finds (as the figures above illustrate) that elite vehicles comprise only a tiny proportion of the total vehicles rented out by the Respondent. This is unsurprising: the target market of the Respondent is not those who wish to rent very expensive vehicles. This is clear even from the name by which it is generally known ("Thrifty").

51. The Tribunal finds, however, that the Claimant was treated less favourably than Mr Carrington in relation to elite vehicles because:

51.1. During his probationary period he was (with an exception being made on one occasion) subjected to a policy that employees could not drive elite cars in their probationary period whereas Mr Carrington was not. (There is not in fact any clear evidence that in his probationary period Mr Carrington drove elite vehicles more regularly than the Claimant did during his, although it is possible he drove them twice to the Claimant's once);

51.2. During the period for which the Tribunal had statistics Mr Carrington drove an elite vehicle twice but the Claimant only drove one once.

52. The Tribunal sets out below its conclusions in relation to the reasons for the difference in treatment. However it notes that the evidence of Mr Kerr which it found to be coherent and consistent was that he had believed when the employment of the Claimant had begun (as a recently appointed manager) that a policy existed which meant that probationary employees did not drive elite vehicle but had been told at a meeting of managers before or around the time that Mr Carrington's employment began that in fact no such policy existed. The Tribunal notes that the existence of such a policy would have been plausible: it would be entirely unsurprising if a car hire firm did not permit new and untested employees to drive its most expensive vehicles.

53. The Tribunal also notes that the incidence of elite cars was statistically insignificant. In the period covered by the statistics available the Claimant had moved vehicles on 514 occasions with one elite vehicle movement. Mr Carrington had moved vehicles on 439 occasions with two elite vehicle movements. As Mr Loveridge put it in his evidence, of the 3000 vehicle movements he had reviewed just 7 were of elite vehicles.

*Being provided with less work than white colleagues*

54. Mr Barnes stated in his submissions that there was no evidence supporting this allegation beyond that contained in the Claimant's witness statement. It should be noted, of course, that there was other relevant evidence – in particular the data set out in the previous section of these findings of fact relating to vehicle movements.

55. In his witness statement the principal issues the Claimant raised relevant to this issue were as follows:

    55.1. Being left in the depot in October 2016;
    55.2. Being told that there were no jobs to do on one occasion in January or February 2017 only for Ms Saunders to then allocate a job to Melvyn Clamp;
    55.3. Hearing Mr Powell tell Ms Saunders that he and Mr Birch would do the last job of the day before the job had been designated by Ms Saunders;
    55.4. Being designated fewer jobs because Mr Powell and Mr Carrington were always shown favouritism by Mr Kerr;
    55.5. Not being given long haul work.

56. Turning first to the incident in October 2016, the evidence of the Claimant was that he was "singled out" for a non-existent monthly review. This resulted in him spending some four hours at the depot rather than driving. Indeed his witness statement suggests that he believed he had been treated less favourably by not being given work and that the monthly review was an invented explanation for why he had not been given work. The evidence of Mr Kerr was that he had had a meeting with the Claimant to make sure that he knew the procedure for checking and cleaning returned vehicles. When there was no driving work to do the Claimant could be required to help check and clean vehicles. Shortly before the incident, which had happened at the end of his first month of his employment, the Claimant had failed to spot damage on a returned Ford transit van. This was why he had had a meeting with him. The Claimant had not been kept in the depot unnecessarily. The Claimant denied that there had been any discussion about his failure to spot damage on a returned Ford transit van.

57. The Tribunal preferred the evidence of Mr Kerr to that of the Claimant in relation to this incident because the Tribunal found Mr Kerr to be a more credible witness for the reasons set out above. The Tribunal finds, therefore, that the reason the Claimant was kept in the depot on this occasion, very early in his employment, was that Mr Kerr wanted to make sure he knew the procedure for checking returned vehicles. The Tribunal has no doubt that the incident rankled with the Claimant because it was clear to the Tribunal that the Claimant did not like the car

checking/cleaning part of his job. He is somebody with a very great interest in cars and what he wanted to do was drive them. This was not therefore an example of the Claimant being given less work. It was an example of the Claimant being given less work of the kind he liked to do but for a good reason.

58. Turning to the incident in January or February 2017, the evidence shows (pages 128, 132 and 133) that on the day in question (13 February 2017) Mr Clamp was allocated a BMW M2 at 9:49 a.m. and that 11 minutes later the Claimant was allocated a Land Rover Discovery Sport. These are both prestige vehicles according to the Respondent's categories. The Tribunal therefore finds that the allocation of the BMW M2 to Mr Clamp was not an example of the Claimant being given less work to do than white colleagues (and in any event Mr Clamp was not one of the Claimant's comparators).

59. Turning to the contention that the Claimant overheard Mr Powell tell Ms Saunders that he and Mr Birch would do the last job of the day, the Tribunal finds that this is evidence of no significant weight for the following reasons:

    59.1. It was not Mr Powell's responsibility to decide who would do the last job of the day;

    59.2. There is no significant evidence (even from the Claimant) in relation to whether Mr Powell and Mr Birch actually did do the last job of the day on that occasion.

60. Turning to the contention that the Claimant was designated fewer jobs than Mr Powell or Mr Carrington by Mr Kerr, the Claimant refers to this in paragraph 20 of his witness statement. He links it there to the fact that he would sit outside in his car until 8 a.m. whereas other drivers would clock in early. The Tribunal finds that there is in fact no evidence to show that Mr Powell and/or Mr Carrington were allocated more jobs than the Claimant (indeed the data available as set out above suggest that it was the Claimant who, overall, was allocated more jobs). However, the Tribunal finds that there will have been occasions when Mr Powell and/or Mr Carrington will have been sent out on a job in the morning more quickly than the Claimant. The Tribunal finds that the reason for this was quite simply that the Claimant was often ready to work later than Mr Powell and/or Mr Carrington because as a matter of principle he did not clock in before 8 a.m. (and, as set out in the witness statement of Mr Kerr, would on occasion clock in after 8 a.m.). Thus the Tribunal finds that, if the Claimant was allocated fewer jobs right at the beginning of the day, this was because of when he arrived. To put it simply the jobs were given to those who clocked in first and so would as a matter of common sense have been ready to leave the office first.

61. Turning to the contention that the Claimant was given less long haul work, this is really no more than an assertion. The Claimant offered no significant examples of this but instead relied upon a joke by a fellow employee. Further, the very nature of the Claimant's job (driving, not sitting in an office with colleagues) meant that he was not well placed to identify what work other employees were or were not doing. The Tribunal therefore does not accept that the Claimant was given less long haul work than Messrs Suchodolski, Birch, Powell or May.

62. Overall, the Tribunal finds that there is no significant evidence whatsoever which points to the Claimant being provided with less work than his comparators, Messrs Suchodolski, Birch, Powell or May. Indeed, the only significant evidence that there is, is the data relating to vehicle movements (the accuracy of which was not challenged by the Claimant or his representative during the hearing) which suggests that in fact the Claimant was provided with more work than all of his comparators. The Claimant has therefore failed to prove less favourable treatment than his comparators in relation to this issue.

Being singled out to go home early

63. Mr Barnes stated in his submissions that there was no evidence supporting this allegation beyond that contained in the Claimant's witness statement. That evidence concerns the incident on 24 July 2017 (which led directly to the Claimant's dismissal), and comments allegedly made by Gordon Powell (paragraph 29) and Dave Birch (paragraph 31).

64. We deal first with the comments allegedly made by Dave Birch and Gordon Powell and find that these do not comprise even a slim evidential basis for contending that the Claimant was "singled out to go home early". Gordon Powell is said to have told another colleague (not the Claimant) that he wanted to work 200 hours a month and the Claimant alleges that on one occasion he worked 196. However the Claimant has not provided figures for himself. The Tribunal is not in a position to find whether the Claimant worked more or fewer hours than this in the month in question or, more significantly, how his figures and those of Mr Powell would compare more generally, and so if any inference could be drawn that the Claimant was being sent home early more regularly than Mr Powell.

65. The Claimant states that Mr Birch on one occasion told him that he had refused to go home when Mr Kerr had tried to send him home and that Mr Kerr "did not challenge this". If this were the case then it would of course show that Mr Kerr had at least tried to send home early employees other than the Claimant. However the Tribunal notes that the Claimant was not an eye witness to this incident and did not call Mr Birch to give evidence in relation to it. Mr Kerr did not accept that this incident had taken place. Generally, Mr Kerr did not accept that the Claimant was sent home more regularly than other drivers. The Tribunal finds on the balance of probabilities that Mr Kerr had not accepted Mr Birch refusing to go home early when asked to do so.

66. Turning to events on 24 July 2017, in summary the evidence of the Claimant was that on 24 July 2017 he had been given the choice at about 15.30 when there were no driving jobs left of going home or remaining at work and cleaning cars. The Claimant stated that Mr Kerr had then asked him if he wanted to leave early at 16.00 but that he had replied that he did not "mind" staying, and that perhaps one of the other drivers could be asked to leave early when they returned. The Claimant said that at 16.15 Mr Kerr had told him that he had to leave at 16.30. The Claimant said that at this point he became frustrated because he believed he was being treated differently to other drivers. The Claimant said that he asked how he could raise a grievance. The Claimant went to the office of Mr Kerr with him and was given the HR email address. The Claimant says he was asked to leave but that he "wanted the situation to be sorted out. I ended up on the phone with HR and was then told that I was suspended."

67. The evidence of Mr Kerr can reasonably be summarised as follows. At 15.30 he had asked the Claimant if he wanted to "call it a day" as there was no work left to be done. The Claimant had said "yeah alright then" and this was not unusual as the Claimant would often ask if he could leave early. At 16.00 Mr Kerr had noticed that the Claimant was still on site cleaning cars. He had approached him and asked him if he would like to go home as the work for the day was finished. The Claimant had replied in a way that was "quite abrupt" and Mr Kerr had allowed him to continue to work. However, at 16.15, having concluded that there were enough clean cars for the following day, he had asked the Claimant go home early. The Claimant had refused and suggested to Mr Kerr that he should ask one of the other drivers to go home early when they got back. There was then a discussion in which Mr Kerr tried to explain why the Claimant needed to go home. The Claimant had raised his voice and become agitated and accused him of discriminating against him. The Claimant had become angry and had stood about 1.5 feet away from Mr Kerr raising a hand in which he was holding keys to within a few inches of Mr Kerr's face. Mr Kerr had asked the Claimant to leave and the Claimant had then walked away from him. However the Claimant had then followed Mr Kerr to his office. He had asked for

information about how to raise a grievance. Mr Kerr had provided him with the necessary information and asked him to leave. The Claimant had refused stating that he wanted things sorting out there and then. The Claimant had behaved aggressively, swinging Mr Kerr's office door open after he had closed it. He had refused to leave until Mr Kerr had spoken to HR on the phone with the Claimant present.

68. There was also other evidence available in relation to the events of 24 July 2017. This including the following:

68.1. There was a statement prepared during the subsequent investigation by Mr Taj (page 85). He said the Claimant was "raising his voice" and his demeanour towards Mr Kerr was "very, very disrespectful" and "he continued to tell Nathan [i.e. Mr Kerr] how bad his management skills were";

68.2. There was a statement prepared during the subsequent investigation by Ms Kerrie Randall, the HR department employee with whom the Claimant and Mr Kerr had spoken (page 86). She said that "Carl was clearly angry and was talking with a raised voice". She went on to say that "I was on loud speaker and Carl would talk over Nathan often, I found it hard to hear what was said thereafter but believe Carl continued to speak in a loud and raised voice. I believe Nathan asked Carl to leave the location and informed him that if he was refusing to leave the branch then he was going to suspend him";

68.3. There was a statement prepared during the subsequent investigation by Mr Suchodolski (page 87). He stated "Manager very calm ask Carl to go to home early because it was nothing to do, was very quiet afternoon. Carl ignore Nate first but second time when he was asked Carl were acting furious. He start shouting and waved his hand in front of his face (Nate face) holding set of car keys. Nate ask him to calm down but he still argue to him."

68.4. There was evidence gathered by Mr Loveridge for the purpose of the grievance appeal and Mr Humphreys. Alan Payne did not recall shouting. He recalled the Claimant raising his voice. He also did not recall the Claimant's behaviour as "aggressive".

69. It should also be noted that the Claimant did not contend that any of his comparators (Messrs Suchodolski, Birch, Powell or May) had returned before the end of the working day from their driving jobs on 24 July 2017 and been treated differently by being permitted to remain when the Claimant was sent home. That is to say the Claimant did not contend that on the day in question he had been told to go home when one or more of his comparators had been permitted to remain at work and be paid.

70. It should also be noted that the Claimant did not give a single concrete example of an occasion when he had been asked to go home early and one or more of his comparators had been permitted to remain.

71. The Tribunal makes the following findings in relation to the Claimant being singled out to go home early:

71.1. The Claimant was employed as a driver on a zero hours contract. It was in the very nature of his job that he would sometimes be sent home early when there was no driving work left to do. In this respect it is worth nothing that "QIs" (i.e. those employed to check and clean cars and not to drive) did not have zero hours contracts. They had fixed hours of work and so could not be sent home early.

71.2. There is no evidence of any weight which suggests that the Claimant was sent home more regularly than other drivers. The Claimant could provide no concrete examples of him being sent home when other drivers were not. The 24 July 2017 is not such an example because no other driver was present on that day.

71.3. On the balance of probabilities, the Tribunal finds that the Claimant was not "singled out" to be sent home. That is to say the Claimant was not sent home more regularly than his chosen comparators. The Tribunal has no doubt that if there had been occasions when the Claimant had been sent home and his chosen comparators had remained at work then he would have cited those occasions rather than relying on the vague contentions relating to Mr Powell and Mr Birch.

72. So far as the events of 24 July 2017 are concerned, the Tribunal finds that the Claimant:

72.1. Refused to stop work when asked to do so;

72.2. Refused to leave the site when asked to do so;

72.3. Spoke to Mr Kerr in a disrespectful manner, shouting and holding keys close to his face in a way which was intimidating;

72.4. Insisted on pursuing the grievance which he wished to raise there and then, which resulted in the phone call to HR.

73. In making these findings the Tribunal has preferred the evidence of Mr Kerr to that of the Claimant. This is because:

73.1. The weight of the evidence generally as set out above supported Mr Kerr's evidence rather than that of the Claimant; and

73.2. In light of the credibility findings above, the Tribunal gives more weight to the evidence of Mr Kerr than to that of the Claimant.

<u>The disciplinary action and dismissal</u>

74. Following the incident on 24 July 2017 Mr Kerr wrote to the Claimant on 28 July 2017 stating that the Claimant was charged with:

- *Serious insubordination*
- *Refusal to follow reasonable management instructions*
- *Intimidating behaviour*

75. The Tribunal finds that having received advice from HR Mr Kerr believed that the way in which the Claimant had behaved was such as to merit disciplinary action.

76. The letter referred to "my investigation" and included statements from: Mr Kerr, Mr Suchodolski, Mr Taj and Ms Randall. The taking of the statements was organized by the HR department of the Respondent. Mr Kerr was not involved in their preparation, apart from his own. He also did not carry out any investigation: although the letter of 28 July 2017 refers to "my investigation" the gathering of evidence and the drafting of the letter were carried out by HR.

77. Mr Humphreys conducted the disciplinary hearing on 2 August 2017. After the hearing Mr Humphreys visited the Derby branch and spoke to Mr Kerr, Ms Saunders, Mr Taj and Mr Payne. He asked them questions arising from the evidence that the Claimant had given to him and he recorded this in an email to Ms Randall on 14

August 2017 (pages 103-104). He had also emailed Ms Randall on 8 August 2017 (page 105). In the email he sets out his view in relation to each of the three charges. Finally, on 15 August 2017 (page 107) he emailed Ms Randall with his conclusions. In that email he recommends “dismissal”.

78. A letter of dismissal was then sent to the Claimant on 25 August 2017 (page 108). The Tribunal finds in accordance with Mr Humphreys evidence that the letter was sent when Mr Humphreys was on holiday and that he did not see it before it was sent. However the Tribunal also finds that the contents of the letter are essentially consistent with the three emails which Mr Humphreys sent to HR.

79. The Tribunal finds that Mr Humphreys would have approved the letter of dismissal if he had been shown it because that was his evidence and because as stated above the letter of dismissal was consistent with his emails. The Tribunal finds, however, that strictly speaking it cannot be said that the decision to dismiss was that of Mr Humphreys. This is because although his email of 15 August 2017 recommends dismissal, it does not contain an actual decision and none was subsequently communicated to Ms Randall.

80. The Tribunal finds that what in fact happened was this. In his email of 8 August 2017 Mr Humphreys said (page 105): “I believe we should look at this recent grievance before coming to a decision”. This was because “Carl explained that his grievance was linked to the disciplinary”. Although the evidence in relation to this point is not entirely clear, the Tribunal finds that the Respondent awaited the conclusion of Mr Lindsay’s grievance investigation before enacting Mr Humphreys’ recommendation to dismiss. The Tribunal notes that the Respondent cannot reasonably be criticized for this: it was sensible to see if Mr Lindsay found anything in the Claimant’s complaints against Mr Kerr before deciding whether to dismiss him. If Mr Lindsay had found evidence of discrimination in relation to matters which Mr Humphreys had not investigated then it would self-evidently have been sensible for the findings of Mr Humphreys to have been re-visited as such evidence might well have caused him to weight differently the evidence which he himself had heard.

81. Overall, however, the Tribunal finds that Mr Humphreys undertook his role seriously. After the hearing on 2 August 2017 he took the time to carry out further investigations and his emails to HR showed that he took care to obtain relevant evidence and then conscientiously examined it. The Tribunal finds that the email of 15 August 2017 recommending dismissal reflected his view of the evidence. The Tribunal also finds that although the letter refers to “dismissal” and not “summary dismissal” there is no doubt that he would have recommended “summary dismissal” if he had been asked: his email states (in effect) that on the balance of probabilities he finds that on 24 August 2017 the behaviour of the Claimant was “aggressive”, “unprofessional and disrespectful”, “manipulative, calculated, undermining and very unwelcome”. Further, the Tribunal finds that in light of the evidence before him it is entirely unsurprising that Mr Humphreys concluded that the Claimant was guilty as charged: that is what on the balance of probabilities the evidence before him suggested.

<u>The grievance and grievance appeal</u>

82. Mr Lindsay was asked to investigate the grievance raised by the Claimant on 24 July 2017 (page 81) and in relation to which details were provided on 31 July 2017 (page 92).

83. The grievance raised a variety of issues. Mr Lindsay broke it down and analysed it by reference to four main points. This was sensible and is not an approach which has been criticized by the Claimant or his representative. The four main points were (in effect):

83.1. The Claimant not being allocated "prestige" vehicles to drive;

83.2. The Claimant being allocated less work than some other drivers/Mr Kerr showing favouritism in the allocation of jobs to Mr Powell and Mr Carrington;

83.3. The Claimant being pulled up for not wearing his hi-vis jacket when other drivers were not;

83.4. The Claimant being sent home early on 24 July 2017.

84. Mr Lindsay interviewed the Claimant on 31 July 2017 and spoke to Mr Kerr as part of his investigation. Mr Lindsay then sent the Claimant a letter rejecting his grievance on 25 August 2017 (page 122). Mr Lindsay accepted in his evidence that the letter had been drafted by HR on the basis of information that he had provided but that he had approved it and fully agreed with its contents.

85. In summary, in relation to the four main points Mr Lindsay concluded:

85.1. There was no evidence supporting the allegation that the Claimant had been discriminated against by "not driving any of the prestige/elite vehicles". Mr Lindsay accepted Mr Kerr's explanation that he had wrongly believed there was a policy preventing probationary employees from driving certain vehicles and found the Claimant had driven prestige vehicles;

85.2. There was no favouritism. Any issue arose as a result of the Claimant not having always clocked in by 8am;

85.3. There was no discrimination. A memo had been circulated regarding the requirement to wear hi-vis jackets. The Claimant had been pulled up because of this;

85.4. He had been sent home because he was on a zero hours contract.

86. The Tribunal finds that Mr Lindsay carried out a significant amount of investigation when considering the grievance. The letter rejecting the grievance had appendices 1 to 15 attached to it.

87. Having had the opportunity to hear his oral evidence, the Tribunal finds that Mr Lindsay undertook his task conscientiously and with an open mind. The Tribunal finds that his conclusions reflected his view of the evidence before him. The Tribunal also finds that the evidence supported his conclusions.

88. The Tribunal accepted as true Mr Lindsay's evidence that if he had been asked to dismiss the grievance because the Claimant had made allegations of race discrimination he would have objected and "spoken up" about that. Mr Lindsay is black British and the Tribunal finds that, unsurprisingly, he was genuinely offended by the suggestion that he might have done this.

89. The Claimant appealed against the rejection of his grievance. His "Statement of Case" for the appeal hearing (page 163 to 170) was primarily a word for word repletion of the email of 31 July 2017 setting out the details of the grievance but its last two pages contained additional comments from Mr Saqib Hussain, an officer of the Employees United Union. Those two pages refined the four main points to a very limited extent.

90. Mr Loveridge was appointed to deal with the grievance appeal. He has considerable experience of dealing with grievances and grievance appeals. The grievance appeal took place on 20 September 2017.

91. Mr Loveridge did not simply review the evidence before Mr Lindsay. He conducted further investigations of his own, interviewing Mr Taj, Mr Carrington, Mr Powell, Mr Suchodolski, Mr Payne, Ms Summers, Mr Butcher and Mr Kerr (pages 183 to 189).

92. Mr Loveridge reviewed the findings of Mr Lindsay and also spent some time considering driver logs from the previous 6 months.

93. Mr Loveridge wrote to the Claimant rejecting his grievance appeal on 3 November 2017 (page 190). He addressed each of the four main points raised. He reached essentially the same conclusions as Mr Lindsay but gave more detail in relation to in particular points 1 and 3 in light of the further evidence he had received.

94. Having had the opportunity to hear his oral evidence, the Tribunal finds that Mr Loveridege undertook his task conscientiously and with an open mind. The Tribunal finds that his conclusions reflected his view of the evidence before him. The Tribunal also finds that the evidence supported his conclusions.

<u>Submissions</u>

95. The submissions of Mr Harries for the Respondent were largely set out in his skeleton argument, a copy of which is on the Tribunal's file. We do not repeat them here.

96. The oral submissions of Mr Harries may reasonably be summarised as follows:

    96.1. The allegation that the Claimant had been "sidelined" in relation to elite cars had remained unspecific throughout the hearing and did not hold water;
    96.2. The Claimant made allegations of racism against Mr Kerr and yet had failed to mention that it was Mr Kerr who had interviewed him and offered him the job with the Respondent;
    96.3. Overall the Claimant's definition of an "elite" car reflected what he wanted to drive, not anything else. In the end his complaint was all about which cars he wanted to drive;
    96.4. Such evidence as there was showed that in fact the Claimant had driven high-value and elite cars more than anybody else;
    96.5. The Claimant's perception that he had been given less work to do than others was due to the fact that he was not as punctual in the morning as others – "the early bird catches the worm";
    96.6. Being asked to go home early was a fundamental part of a zero hours contract;
    96.7. His credibility was undermined by his allegation that practically everybody involved apart from himself had acted in bad faith;
    96.8. Mr Lindsay (who is black British) has made it clear he would have spoken up if somebody had asked him to victimise the Claimant for making an allegation of race discrimination. Further he had gone about his task with diligence: his report ran to 35 pages.

97. Mr Barnes for the Claimant's did not provide a skeleton argument or written closing submissions. The Tribunal therefore asked him to set out the evidence which he said supported each element of the Claimant's complaints as set out in the issues listed above.

98. In fact Mr Barnes had to be reminded towards the end of his submissions that he had not addressed the question of what evidence there was to support each strand of the Claimant's complaints. Up to then his submissions had been a lengthy summary of some of the evidence which the Tribunal had heard. The tribunal does not seek to reproduce that summary here but the points made by Mr Barnes included the following:

98.1. Mr Kerr's evidence in relation to why he believed there was a prohibition on employees driving elite cars during their probationary period was unsatisfactory, as was his explanation for how he had come to be disabused of this notion;

98.2. Mr Kerr had treated the Claimant poorly even before his employment had begun when he was a client. He had been difficult about providing higher cars reflecting the Claimant's requirements of the customer when there had been no need for this. Mr Kerr had accepted that he had used the term "rude boy" and that this was a derogatory term for black men. This reflected the fact that whether consciously or subconsciously Mr Kerr treated black men less favourably than others;

98.3. The Claimant had been singled out on more than one occasion to go home early;

98.4. Mr Kerr had accepted other employees directing vile language at him (for example Ms Saunders had called him a "knob head") and yet it was unacceptable for the Claimant to swear at Mr Kerr;

98.5. Only the Claimant had been required to stay in the depot so he could be taught how to clean a car;

98.6. The Claimant had been subjected to a flawed disciplinary process because he had raised a grievance. In particular there had been little or no investigation prior to the disciplinary hearing. That had been a knee-jerk reaction;

98.7. The flaws in the disciplinary process were reflected in the fact that Mr Humphreys had not seen or approved the letter of dismissal before it was sent. Further, his recommendation of dismissal had been upped to summary dismissal in the actual letter;

98.8. The evidence relating to timekeeping was a red herring: the Claimant was never more than a few minutes late and employees were rarely ready to work before 8:15 AM.

99. The Tribunal then reminded Mr Barnes that it needed to be satisfied that there had been less favourable treatment before considering the reason for it. Mr Barnes was therefore again asked to identify the evidence supporting each allegation of less favourable treatment. He commented as follows:

99.1. **Being prevented from driving elite class vehicles:** the evidence was that the Claimant had been told that there was a policy preventing employees from driving elite class vehicles during their probationary period when in fact there was no such policy. Mr Barnes said that there was no evidence beyond that and agreed, therefore, that the question for the Tribunal in this respect was, in reality, whether Mr Kerr told the Claimant that such a policy existed because of a mistaken belief that it did or because he wanted to prevent the Claimant as a black man from driving such vehicles.

99.2. **Being provided with less work than white colleagues:** Mr Barnes said that there was no evidence to support this allegation of less favourable treatment beyond that contained in the Claimant's witness statement.

99.3. **Being singled out to go home early:** Mr Barnes said that the evidence was that this had happened on 24 July 2017. The Tribunal clarified with Mr Barnes that it was not alleged that there had been a white employee who had not been sent home on 24 July 2017. Mr Barnes agreed that this was not alleged. He said that the relevant evidence was in paragraphs 27 and 31 of the Claimant's witness statement. There was no relevant evidence beyond that.

Conclusions

Direct race discrimination

1) Was Claimant treated less favourably by:

a. Being prevented from driving elite class vehicles?

100. The named comparator of the Claimant in relation to this issue was Mr Carrington. The Tribunal has found above that the Claimant was treated less favourably in that: (1) he was told that there was a policy preventing him from driving elite vehicles during his probationary period and Mr Carrington was not and; (2) in the period for which figures were collected he drove an elite vehicle only once whereas Mr Carrington did so twice.

b. Being provided with less work than his white colleagues?

101. The Tribunal has found above that there was no less favourable treatment in this respect when the treatment of the Claimant is compared to that of his comparators (Messrs Suchodolski, Birch, Powell and May). The Claimant's claim in relation to this issue therefore fails.

c. Being singled out to go home early?

102. The Tribunal has found above that there was no less favourable treatment in this respect when the treatment of the Claimant is compared to that of his comparators (Messrs Suchodolski, Birch, Powell and May). The Claimant's claim in relation to this issue therefore fails.

103. The remaining question, therefore, in relation to the claim of direct race discrimination is whether the less favourable treatment relating to elite class vehicles was because of race, or not.

104. The Tribunal has considered whether the Claimant has proved facts from which conclusions could be drawn that the Respondent treated the Claimant less favourably because of race. In particular, the Tribunal has considered whether the fact that the manager, Mr Kerr, used the words "rude boy", although he knew that they could be regarded as being a derogatory way or referring to black men, and the fact that a female employee in the office managed by Mr Kerr had on occasion sought to avoid serving Asian customers because of the way one such customer had spoken to her in the past, are such facts. The Tribunal has concluded that they are, just.

105. The Tribunal therefore went on to consider whether the Respondent had proved that the less favourable treatment was in no sense whatsoever because of race. The Tribunal has concluded that it has proved this for the following reasons:

105.1. So far as the policy was concerned, the Tribunal has concluded that this simply reflected a mistaken belief on the part of Mr Kerr, this is because:

105.1.1. This was Mr Kerr's evidence. Some considerable weight was given to it because Mr Kerr was found to be a generally credible witness. Further it was plausible for the reasons set out above that such a policy would exist. Many employers would not wish a new (and so untested) employee to have control of a car worth perhaps £50,000 or more;

105.1.2. The overall statistics in relation to elite and prestige cars did not suggest that it was likely that the Claimant had been treated less favourably than Mr Carrington because of race by Mr Kerr inventing the policy. If Mr

Kerr had invented the policy with the purpose of preventing the Claimant from driving elite cars because he was black, one would have expected the figures to show that he had also driven fewer prestige cars. That is not what the figures showed. The number of elite cars was statistically insignificant and the Claimant quite clearly had driven more than his fair share of prestige cars.

105.2. So far as the fact that Mr Carrington had driven two elite cars in the relevant period whereas the Claimant had only driven one is concerned, this is because:

105.2.1. This was Mr Kerr's evidence. Some considerable weight was given to it because Mr Kerr was found to be a generally credible witness.

105.2.2. The statistics showed that in the relevant period there were other employees who were white who had not driven any elite vehicles at all (Mr Birch, Mr Powell and Mr May).

105.2.3. The figures relating to prestige cars showed the Claimant had driven them more times in the relevant period than Mr Carrington (57 to 48). If Mr Kerr had really been trying to stop the Claimant drive elite cars one would have expected him to have adopted the same approach in relation to prestige cars.

<u>Victimisation</u>

1) **The Respondent accepts that Claimant did a protected act by raising a grievance on 24 July 2017 (section 27(2) of the Equality Act 2010 ("the 2010 Act")) ("the Protected Act"). Did the Respondent victimise Claimant (section 39(4) of the 2010 Act) because he had committed the Protected Act by:**

   a. **Subjecting him to disciplinary action**
   b. **Dismissing him**
   c. **Rejecting his grievance**
   d. **Rejecting his grievance appeal**

106. In light of its conclusions in relation to the shifting burden of proof above, the Tribunal has approached these questions on the basis that the Claimant has proved facts from which conclusions could be drawn that the Respondent victimised the Claimant. However the Tribunal has concluded that the Respondent has shown that the treatment of which the Claimant complains was in no sense whatsoever because of the Protected Act.

107. Turning first to the disciplinary action, in light of its findings above about how the Claimant behaved on 24 July 2017, and also the underlying merits of the complaints about the Claimant being prevented from driving elite vehicles, being given less work and being singled out to be sent home early, the Tribunal concludes that Mr Kerr's decision to subject the Claimant to disciplinary action was in no sense whatsoever because of the Protected Act. This is because the Tribunal concludes that if the Claimant had politely asked for the grievance procedure details and then gone home there would have not been any disciplinary action. The Tribunal concludes that the reason disciplinary action was instigated was quite simply the way in which the Claimant had conducted himself on 24 July 2017: he had refused to stop work when asked to do so, he had refused to leave the site when asked to do so, and he had spoken to Mr Kerr in a disrespectful manner which was also intimidating.

108. Turning to the decision to dismiss, the Tribunal concludes that the Respondent's decision to dismiss the Claimant was in no sense whatsoever because of the

Protected Act. It was because the honest belief of Mr Humphreys on reasonable grounds after a reasonable investigation was that the Claimant was guilty of gross misconduct. This belief was relied on by the Respondent to dismiss the Claimant. (The Tribunal has carefully considered the fact that it was not, technically speaking, Mr Humphreys who took the decision to dismiss, but this does not affect our conclusion in this respect in light of our findings of fact above.)

109. Turning to the decision to dismiss the grievance, the Tribunal concludes that Mr Lindsay's decision to reject the grievance was in no sense whatsoever because of the Protected Act. It was because after conscientiously considering the evidence before him he genuinely concluded that the grievance was without merit.

110. Turning to the decision to dismiss the grievance appeal, the Tribunal concludes that Mr Loveridge's decision to reject the grievance appeal was in no sense whatsoever because of the Protected Act. It was because after conscientiously considering the evidence before him and conducting further investigations he genuinely concluded that the grievance was without merit.

111. Further, the Tribunal has had to make findings in relation to areas covered by the grievances to deal with the complaint of direct discrimination. In light of those findings, the Tribunal concludes not only that Mr Humphreys, Mr Lindsay and Mr Loveridge reached the conclusions that they did because they honestly believed on reasonable grounds after reasonable investigations that the evidence supported those conclusions but also that those conclusions were on the balance of probabilities correct when viewed in light of all the evidence available to the Tribunal at the Hearing.

112. In light of the conclusions set out above the Claimant's claims of direct race discrimination and victimisation fail and are dismissed.

<u>Breach of contract</u>

1) **Did Claimant commit an act of gross misconduct which entitled the Respondent to dismiss him without notice?**

113. The Respondent's disciplinary policy (page 9) states that gross misconduct included:

> *Serious insubordination including rudeness to a manager or refusal to follow reasonable management instructions*

114. In light of the findings of fact above, the Claimant quite clearly did display insubordination and rudeness on 24 July 2017. Further, he failed to follow reasonable management instructions by refusing to stop work and by refusing to leave site when requested.

115. The Claimant was as such guilty of gross misconduct as defined by the Respondent's disciplinary policy. More generally, the Tribunal concludes that his behaviour on 24 July 2017 was quite clearly sufficiently serious misconduct to amount to a repudiatory breach of contract. That is to say it was gross misconduct.

116. Accordingly the Respondent was entitled to summarily dismiss the Claimant and his claim for breach of contract fails and is dismissed.

Employment Judge Evans

Date: 24 February 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

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FOR EMPLOYMENT TRIBUNALS