RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr J Lasila**

Respondent: **Apcoa Parking (UK) Limited**

Heard at: **East London Hearing Centre**

On: **16 – 19 and 23 – 24 October 2018**

Before: **Employment Judge Goodrich**

Members: **Ms L Conwell-Tillotson**
Mr L O'Callaghan

Representation

Claimant: In person assisted by Mrs A Lasila (Claimant's wife)

Respondent: Mr Reehan Chaudhry (solicitor advocate)

JUDGMENT having been sent to the parties on 5 November 2018 and reasons having been requested in accordance with Rule 62(3) of the Rules of Procedure 2013 (judgment, with reasons, having been given to the parties orally on 24 October 2018).

REASONS

The Claim and The Issues

1 The Claimant, Mr Jude Lasila, presented his Employment Tribunal claim on 6 February 2018. Prior to doing so he had obtained an Acas early conciliation certificate, as is required, covering the period from 3 January to 3 February 2018. He gave his dates of employment as being from 14 July 2015 to 3 January 2018.

2 The Respondent entered a response disputing the Claimant's claims.

3 On 3 May 2018 a Preliminary Hearing was conducted. At that hearing, the issues in the case were clarified and Case Management Orders made.

4 The case was listed for a six day hearing before this Tribunal.

5 At the outset of this hearing the Judge clarified with the parties whether the list of issues in the case was as defined at the Preliminary Hearing, or amendments needed. There had been some matters that Mr Chaudhry (the Respondent's representative) had needed to obtain instructions on following the Preliminary Hearing.

6 A few amendments were made to the list of issues and the list of issues attached to this judgment is the agreed list of issues the Tribunal was required to determine.

7 Also discussed on the first morning of the hearing was that there were documents the Claimant wanted added to the trial bundle prepared by the Respondent; and, the Tribunal was informed, there were additional documents supplied by the Respondent to the Claimant that had not been in the initial trial bundle provided to him. After time was given for the documents to be inspected by the Claimant and the Respondent's representative respectively, no objection was made to their inclusion in the trial bundle.

The Relevant Law

Constructive Unfair Dismissal

8 Section 95(1)(c) Employment Rights Act 1996 ("ERA") provides the statutory basis for a constructive unfair dismissal claim. It provides that an employee is dismissed by his employer if:

> "(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

9 The burden of proof is on an employee to show that there has been a dismissal within the meaning of section 95(1)(c). In order to do so the Claimant needs to prove:

9.1 That there was a breach of contract, whether an express term or implied term of the contract of employment.

9.2 That the breach was sufficiently important, or fundamental, to justify the resignation of the employee.

9.3 That the employee resigned at least in part because of the breach of contract.

9.4 The employee concerned did not affirm the contract or waive the breach of contract. Affirmation has sometimes been described as the legal equivalent of "letting bygones be bygones". In the case of *Western Excavating v Sharpe [1978] IRLR 27 CA* it was held that an employee must not delay too long in terminating the contract in response to the employer's breach, otherwise the employee may be regarded as having elected to affirm the contract and will lose the right to treat himself/herself as discharges.

10 In the case of *Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347 EAT* guidance was given that it is clearly established that there is implied in a contract of employment the term that the employers will not, without reasonable and proper cause,

conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Any breach of this implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of the contract. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The Employment Tribunal's function is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.

Paternity Leave Discrimination

11 Section 47C ERA provides that an employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done for a prescribed reason.

12 Section 47C(2)(ca) ERA provides that paternity leave is one of the prescribed reasons. Regulation 28(1)(a) provides that an employee is entitled under section 47C ERA not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer because the employee took or sought to take paternity leave or ordering or additional adoption leave.

13 Section 48(1) Employment Rights Act 1996 provides that an employee who has suffered a detriment in contravention of section 47C ERA may make a complaint to an Employment Tribunal.

14 Section 48(2) ERA provides that, on such a complaint, it is for the employer to show the ground on which any act or deliberate failure to act was done.

15 Section 48(3) ERA provides that:

> "(3) an Employment Tribunal shall not consider a complaint under this section unless it is presented –
>
> (a) Before the end of the period of the period of three months beginning with the date of the act or failure to act to which the complaint relates or, where that act or failure is part of a series of similar acts or failures, the last of them, or
>
> (b) Within such further period as the Tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months."

16 In the case of *Palmer & Saunders v Southend-On-Sea Borough Council [1984] IRLR 119 (CA)* guidance was given that whether it was reasonably practicable for a complaint to be presented in time is pre-eminently an issue of fact of the Employment Tribunal, taking all the circumstances of the given case into account.

17 Guidance was given in the *Palmer & Saunders* case on the kinds of factors an Employment Tribunal might wish to consider. These included factors such as whether the employee had been physically prevented from complying with a limitation period by

such matters as illness or a post strike; when the employee knew of the right to make a complaint; whether there was any misrepresentation about any relevant matter by the employer to the employee; whether the employee was being advised at any material time and if so by whom; the extent of the adviser's knowledge of the facts of the employees case; and the nature of any advice which may have been given; whether there was any substantial failure on the part of the employee or their adviser which led to the failure to comply with the time limit; and whether the employer's conciliatory appeal mechanisms were being used.

Direct race discrimination and race discrimination harassment

18 In respect of direct race discrimination, the Tribunal is concerned with section 13 Equality Act 2010 ("EqA") when read in conjunction with section 39.

19 In respect of race discrimination harassment, a Tribunal is concerned with section 26 EqA.

20 In both forms of prohibited conduct, it is necessary for an Employment Tribunal to consider matters in accordance with section 136 EqA and have in mind guidance given on such matters in the case of *Igen Ltd v Wong & other cases [2005] IRLR 258 (CA)* and numerous subsequent cases concerning when and how the burden of proof may shift to the Respondent and what the Respondent must prove if it does. These aspects are usefully considered through a staged process.

21 At the first stage the Tribunal has to make findings a primary fact and determine whether these show, in respect of the Claimant and a real or hypothetical comparator, less favourable treatment and a difference in race.

22 If the Tribunal is satisfied that there was less favourable treatment and a difference of race in comparable circumstances the Tribunal proceeds to the second stage. It directs itself in accordance with section 136 EqA and asks, in respect of each item of less favourable treatment which has been proved, whether the Claimant has proved facts from which the Tribunal could reasonably conclude, in the absence of an adequate explanation, that the less favourable treatment was on racial grounds. Findings of fact which affect whether the Tribunal could so conclude will vary from case to case. Examples might include prior or subsequent acts of discrimination; breach of a provision or recommendation in the ECHR Code of Practice; some unexplained adverse or hostile conduct towards the Claimant revealed by the facts; inconsistent or evasive oral or documentary evidence from the employer. Unreasonable treatment on the part of an employer is not necessarily a matter for which the Tribunal will ultimately conclude that there was unlawful discrimination, merely because the person adversely affected by it is a particularly race, but if it constitutes less favourable treatment than a comparator has received, that will be a matter from which the inference could be drawn at this stage, leaving the employer to prove that it had or would have treated a person of another race unreasonably too.

23 If a Tribunal could reasonably conclude, absent a non-discriminatory explanation, that there was unlawful race discrimination, it moves to the next stage. In the absence of an adequate explanation, the Tribunal will uphold the complaint that there has been discrimination on grounds of race (or in the case of race discrimination harassment,

related to race) in respect of the proven acts of less favourable treatment. The Tribunal looks to the employer to see whether it provides and proves a credible, non-discriminatory explanation or reason for the difference in treatment. If the employer does not prove on the balance of probabilities an explanation, the Tribunal will infer or presume that the less favourable treatment occurred because of (or for reasons related to) the Claimant's race.

24 Tribunals have often been encouraged to ask the question of why a Claimant was treated in the way he/she was, rather than conducting a lengthy analysis of the stages described in the *Igen v Wong* case- to ask whether the treatment of the Claimant was on the prescribed ground or not.

25 The necessary elements for liability for race discrimination harassment are three-fold namely:

25.1 Did the Respondent engage in unwanted conduct?

25.2 Did the conduct in question either have the purpose or effect of either violating the Claimant's dignity or creating an adverse environment for him/her?

25.3 Was the conduct on a prohibited ground?

The Evidence

26 On behalf of the Claimant the Tribunal heard evidence from the Claimant himself.

27 On behalf of the Respondent the Tribunal heard evidence from:

27.1 Mr Dale Barraclough, Assistant Contract Manager for the Respondent.

27.2 Mr Kaleem Jaffery, Contract Manager for the Respondent.

27.3 Mr Ihsan Iqbal, a Training Manager for the Respondent.

27.4 Ms Chelsey Smith, Human Resources Manager for the Respondent.

28 In addition, the Tribunal considered the documents to which it was referred in an agreed bundle of documents, together with some additional documents provided to the Tribunal during the hearing.

Findings of Fact

29 The Tribunal sets out below the findings of fact we consider relevant and necessary to determine the issues we are required to determine. We do not seek to set out each detail provided to us. Nor do we seek to make findings on every matter on which the parties were not agreed. We have, however, heard all the evidence provided to us and we have borne it all in mind.

30 The Claimant, Mr Jude Lasila, describes himself as being black and of Nigerian ethnic origins as regards his direct race discrimination claim.

31 The Claimant was continuously employed by the Respondent, Apcoa Parking UK Limited, from 14 July 2015 to 3 January 2018. On 3 January 2018 the Claimant sent an email to the Respondent giving his immediate resignation from the Respondent's employment.

32 Previously the Claimant had also been employed by the Respondent from October 2013 to October 2014.

33 The Respondent carries out parking enforcement under a contract with the London Borough of Hackney (amongst other services it carries out for other clients). The Respondent, according to its ET3 response, has 113 employees working on the London Borough of Hackney contract and 2,012 working in Great Britain. It is, therefore, a large employer.

34 The Claimant was employed to work on the Respondent's contract with the London Borough of Hackney.

35 Mr Barraclough gave details of the nature of the service provided to the London Borough of Hackney. He explained that their contract is normally for five years with possibilities of extensions of contracts. The purpose is to carry out parking enforcement within Hackney.

36 The types of work that the contract includes are such tasks as the towing and removing of vehicles; suspension of parking for special events; about 100 estates parking enforced by the estate teams; CCTV team enforcement; contraventions of school restrictions on parking and bus lanes; moped riders' enforcement; providing enforcement on street parking; officers on foot and on particular beats; drivers carrying out enforcements in estates; and daytime and night time enforcement.

37 The individuals carrying out driver functions would have beats or estates to drive to and carry out enforcement activities. They might be asked to attend certain client instructions and they might have rapid response requests, for example if a vehicle was blocking a driveway.

38 The terms "mobile enforcement" and "estate teams" were used interchangeably in the evidence provided to the Tribunal.

39 Mr Barraclough explained to the Tribunal that the predominant number of enforcement officers are those carrying out foot patrols. The Respondent had about 40 officers on foot daily and six on estates. The Respondent had two vehicles or vans, with a driver and passenger to carry out mobile enforcement. They had two mopeds for mobile enforcement, in addition to the two van. They had 40 on foot patrols and they had two mobile patrols. The

40 Parking enforcement is an unpopular job with some members of the public and it is not uncommon for members of the public to become irate or, from time-to-time, for

vehicles to have the tyres of their vans slashed.

41 The Claimant's job title was a Civil Enforcement Officer ("CEO"). He was issued with a statement of terms and conditions of employment. There was a clause on mobility and flexibility requiring him to carry out any additional, reasonable duties, or tasks requested by his manager. There was provision that on occasions the duties might be different to the primary job for which he was recruited.

42 The Claimant only wanted to do mobile enforcement, using a van, not foot patrols. In practice that is what he did other than on a very few occasions.

43 The Claimant was aware, however, that contractually he could be required to do foot patrols. In the course of a subsequent grievance meeting (to which we refer below) he stated that he had signed his contract "due to frustration and desperation"; and he confirmed, when cross-examined by the Respondent's representative, that he could be contractually required to do foot patrols.

44 The hierarchy of the management of the Hackney contract was as follows.

45 When the Claimant started (or restarted) working for the Respondent his day-to-day supervisor was initially Mr Nosiri. Subsequently, after Mr Nosiri left that position, his immediate supervisor day-to-day was Mr Muhammed Jamil.

46 The senior supervisor for the Claimant throughout the contract was Ms Leman Ozkan.

47 Next in line were two deputy contract managers. Initially one of them was Mr Ying Pang and Mr Dale Barraclough.

48 The contract manager for the Hackney contract was Mr Khalim Jaffery.

49 The Human Resources manager for the London Borough of Hackney contract and other contracts was Mrs Chelsey Smith.

50 The Respondent's workforce performing the London Borough of Hackney contract is ethnically diverse. The largest single proportion is of employees of black African employees, namely 43.22 percent, followed by "white other" at 15.25%, followed by Pakistani ethnic origins at 11.86 per cent, black Caribbean 7.63 per cent and a number of other nationalities. White British amounted only to 1.60 percent. At the time of the Claimant's employment, however, none of the more senior managers were of black African or black Caribbean origins.

51 The Respondent has an equal opportunities policy although, as far as the Tribunal was made aware, it did not form part of the bundle of documents provided to the Tribunal. Ms Smith informed the Tribunal that managers are trained on the policies; and that it forms part of the induction training for all new employees of the Respondent.

52 The Claimant's contract of employment required him to perform 40 hours per

week, consisting of 8 hour shifts. Overtime was paid at the ordinary rate of pay. The allowance for driving the van for mobile enforcement was an extra £3.00 per shift, or £5.00 for driving on a moped.

53 So far as the Tribunal was made aware there were no significant problems in the Claimant's employment until the events that have given rise to the Claimant's first grievance in February 2017. The Claimant was regarded by his managers as being an effective, good and hardworking employee.

54 All the above findings of fact are by way of background and, so far as the Tribunal is aware, and not the subject of any significant dispute between the parties.

Allegation at appendix paragraph 5.1- inappropriate sexual conduct around February 2017

Allegation at appendix paragraph 12.1- demotion on return to work

55 The Tribunal turns now to the Claimant's first grievance.

56 This contains allegations of what was described as inappropriate sexual conduct; and of demotion on the Claimant's return to work from maternity leave.

57 The Tribunal has treated the term "demotion" as being a turn of phrase, not a legal definition. What the Claimant meant what he objected to was working on foot patrols, not on mobile enforcement; and not getting the £3.00 allowance for driving the van. As referred to earlier above, the Claimant accepted when cross examined that he could be contractually required to do foot patrols.

58 On about three occasions around November and December 2016 the Claimant observed Mr Caman Hussein giving Ms Leman Ozkan massages in the office where the Claimant worked when he was not performing patrols.

59 The Claimant reported this to his supervisor, Mr Nosiri, but told him that he did not want the matter raised with management.

60 So far as the Claimant and Tribunal are aware these three occasions were the only occasions when the massages took place.

61 The Claimant's wife was due to give birth on 2 February 2017.

62 On 25 January 2017 the Claimant completed a paternity leave form. In his form he stated that the date the baby was due was 2 February 2017; that he would like his paternity leave to start on the date the baby is born; and that he wanted to be away from work for two weeks.

63 In fact, the baby was born one day before the due date and the Claimant commenced his 14 days paternity leave on 1 February 2017. The Claimant was off work on paternity leave form 1 – 14 February 2017.

64 On or about 13 February, two days before the Claimant was due to return from maternity leave, he telephoned Ms Ozkan about his return to work. The Claimant had found out from a colleague that he had been placed on some foot patrols on his return to work.

65 The Claimant had been put on a rota to do three foot patrol shifts during the week that he would be returning from paternity leave and one foot patrol the following week. The rotas were drawn up by Ms Ozkan either one week or two weeks in advanced.

66 The Claimant telephoned Ms Ozkan to complain about having been put on foot patrol. He asked why he was on foot patrols and for her to change the rota.

67 In dispute between the parties was whether Ms Ozkan told the Claimant that he had been put on foot patrol because she did not know whether the Claimant would be coming back (as was the Claimant's evidence); or whether it was because she did not know when he would be coming back) which is what Ms Ozkan told Mr Barraclough in his subsequent interview to investigate the Claimant's grievance (to which we refer below).

68 The Tribunal finds that the Claimant is mistaken in his account and that he was told by Ms Ozkan that she did not know when he would be returning, not whether he would be returning. This is far more plausible than the Claimant's account. Firstly, Ms Ozkan had no reason to believe that the Claimant was leaving or have left his employment with the Respondent; and secondly because she would have been unlikely to have put the Claimant on a rota if she thought he had left.

69 Ms Ozkan told the Claimant that the rota had been made and no amendments could be made without authorisation from Mr Pang.

70 The following day the Claimant telephoned Ms Ozkan again to find out if the shifts in question had been changed from foot patrol to mobile.

71 Ms Ozkan told the Claimant that Ying (Pang) had not authorised a change to the rotas and that he would do three foot patrol shifts that week and one the following week and then return to estates (mobile).

72 On the Claimant's return to work on 15 February 2017 the Claimant complained to Mr Pang about being put onto foot patrol shifts. Mr Pang declined to change the shifts.

73 The Claimant worked two and a half of the three foot patrol shifts for the week of his return before going off work sick. The Claimant was off work sick the following week, so he did not do the foot patrol shift for which he had been put on the rota for the following week.

74 On the Claimant's return to work the rotas had been drawn up already. The rotas were, however, altered (unlike when the Claimant returned from paternity leave) to accommodate his return to work by putting him onto mobile patrol.

75 From the date of the Claimant's return to work from sickness absence (which was about two weeks) the Claimant was put onto mobile (estates); and he never did foot patrol

shifts again during his employment with the Respondent, so far as the Tribunal was made aware.

76 The Claimant made a written complaint about being placed on foot patrol on his return from paternity leave. He provided a letter concerning this complaint and subsequently another letter. As referred to earlier above, he described being placed on foot patrol as a demotion and complained about the loss of the mobile allowance for mobile work; and he also made a complaint about what he described as "personal body massages" being given to Ms Ozkan by Mr Hussein.

77 The Claimant's two letters were treated as a grievance and were investigated by Mr Barraclough.

78 Mr Barraclough interviewed the Claimant, Mr Hussein, Ms Ozkan and Mr Pang. He took notes of all these interviews or had notes taken by someone present for that purpose.

79 In Mr Barraclough's interview with the Claimant about the massage, Mr Barraclough asked whether the Claimant meant a neck massage. The Claimant agreed. The Claimant made no mention of Ms Ozkan making noises of pleasure as stated in the list of issues attached to this judgment.

80 Both Mr Hussein and Ms Ozkan were questioned by Mr Barraclough and agreed that he had been giving her neck massages. Mr Hussein explained that he did massage her as she suffers from arthritis and it was a neck massage even although she was in full uniform and that it was done in the supervisor's office.

81 Mr Pang's explanation to Mr Barraclough about the foot patrols the Claimant was asked to carry out was confused and contradictory. One explanation he gave was that the Claimant needed to be multi skilled. He also stated that he did not know when the Claimant would be coming back and stated that the Claimant might leave. He was not of course present here as a witness and we do not accept this explanation. Mr Pang should have known when the Claimant was due to return to work after his paternity leave and he did not explain why the Claimant's return from paternity leave should be when he decided that the Claimant "needed to be multi skilled".

82 When questioned by the judge as to whether or not, if the Claimant had not been on paternity leave, he would have been placed in the van for mobile enforcement, rather than being placed on foot patrol for the shifts in question, Mr Barraclough accepted that he probably would have been.

83 Mr Barraclough provided the Claimant with a written grievance outcome given to him by hand, on 24 March 2017.

84 Mr Barraclough decided not to uphold the Claimant's grievance. Amongst the points made in his letter were the following:

84.1 He stated that after looking at the Claimant's personnel file there was no evidence to suggest that he applied for a mobile position and that neither

his job application or job offer contract stated Mobile Civil Enforcement Officer.

84.2 He referred to there being no guarantee for Leman (Ozkan) or Ying (Pang) of his return until he called Leman after the rota had been agreed and planned; and that for deployment purposes, it is far easier to source a foot patrol officer than a driver due to availability of walkers in ratio to APCOA approved drivers.

84.3 He referred to there being a complete misunderstanding about discussions between the Claimant and Ying about what had taken place. He went on to state that Ying had failed to explain himself clearly and make sure he was fully informed; but had he done so your complaint may never have been raised.

84.4 There was some reference to the Claimant potentially applying for a role of estate supervisor which would have been a promotion (as this did not form part of the list of issues we do not deal with this in detail).

84.5 He stated that he did not understand what bearing Leman having neck massages had in relation to his complaint letter.

84.6 He notified the Claimant of his right of appeal.

84.7 When cross-examined on why he had not taken more seriously the issue of the massage is being given, Mr Barraclough stated that he did not think that this was a serious issue. Mr Barraclough's treatment of this complaint was unsatisfactory in that he did not treat it as a standalone complaint of inappropriate behaviour, as well as the point he made of the issues not being linked. The Claimant had not stated that the issues were linked.

85 At no point during the Claimant's grievance meeting and subsequent appeal meeting did the Claimant suggest that Ms Ozkan was making noises of pleasure, as subsequently asserted in his ET1 claim form.

86 The Claimant was unhappy about the grievance outcome and appealed against it. He complained about the position being one of a mobile CEO. He also referred to Dale (Barraclough) mentioning that he did not see any reason why he should not go on with his regular duties when he came back to work. Mr Barraclough did, therefore, give the Claimant some reassurance. Most of the Claimant's grievance appeal was directed to his complaint about being put on foot patrol after returning from paternity leave. He did also, however, make a brief reference to what he described as being "exposed to inappropriate pornographic behaviour from members of staff" (an exaggeration, in view of what had actually taken place).

87 Although the Claimant raised other issues, because they do not form part of our list of issues, we do not deal with them.

88 On 4 April 2017 Mr Jaffrey met with the Claimant. The discussion focused mainly

on the mobile enforcement and foot patrols. Mr Jaffrey asked the Claimant what he wanted from the grievance that he had written. The Claimant stated that he wanted an assurance that he would be kept on mobile work. Mr Jaffrey told him that he could not change his contract but referred to him in four years only having spent six days on street patrol; and that so long as he did his job in a professional manner he believed that he would still been a driver, and that he would only be taken out if he was not competent as a driver. He was also informed that he could apply for any job advertised that he wanted. He told the Claimant that he appreciated the Claimant as a worker. He also notified the Claimant that he would be writing to the Claimant as to the outcome of the meeting.

89 Mr Jaffrey did not make any mention about the complaint of "pornographic behaviour". When questioned on this by the Judge he accepted that, in hindsight, he should have done.

90 When cross-examined about this grievance appeal meeting the Claimant agreed that when he came out of the meeting with Mr Jaffrey he was happy with the outcome because of the assurances Mr Jaffrey had given him verbally. Also of note is that, unlike other meetings, the Claimant signed the minutes of the meeting, which suggests that he was happy with the assurances given.

91 Mr Jaffrey wrote a letter to the Claimant recording the grievance appeal outcome.

92 In dispute is whether the Claimant received the grievance appeal outcome letter form Mr Jaffrey (he says that he did not).

93 The letter was sent to the Claimant both by ordinary post and recorded delivery.

94 On the balance of probabilities, the Tribunal finds that the Claimant did receive the grievance appeal outcome and is mistaken in stating that he did not because:

94.1 It is unlikely a letter sent both by recorded delivery and ordinary both go astray.

94.2 Although the Claimant had provided his cousin's address as an address for correspondence being sent to, he informed the Tribunal that he went regularly to his cousin's house to pick up his post.

94.3 If the Claimant had not received the letter it is likely that he would have asked for it. In the last sentence of the minutes that the Claimant had signed Mr Jaffrey stated that he would be writing to the Claimant.

95 Even, however, if the Claimant did not receive the grievance appeal outcome, because he was happy at the time with the outcome of it and the verbal assurances he was given and he never did another foot patrol for the Respondent, the grievance appeal outcome did provide a closure to the foot patrol issue.

96 Why was the Claimant placed on foot patrols on his return from paternity leave? It was a change that could be regarded as detrimental or unfavourable to the Claimant both because he did not like doing foot patrols and because he lost his mobile allowance for

the shifts in question.

97 The principal reason why the Claimant had been placed on foot patrol is that he had been absent on paternity leave. As referred to above this was accepted by Mr Barraclough when questioned on this. Mr Pang was not a witness at this Tribunal, his answers to questions when he was interviewed were confused and we do not accept them. The Claimant, in the paternity leave form he completed, was quite clear as to how long he wanted to take for paternity leave. He telephoned two days before his return so if there had been any doubt he had cleared that doubt up. Unlike when the Claimant returned from sickness absence the rota was not changed. Mr Pang's reference to the Claimant needing to broaden his skills was unconvincing in view of the Claimant having previously apart from a very few occasions been on mobile enforcement.

Allegation at appendix paragraph 5.2- being failed on his key performance indicators on 20 September 2017

98 We turn now to the issue of the failed Key Performance Indicators ("KPIs").

99 By September 2017 the Claimant's immediate supervisor was Mr Mohammed Jameel. He had been appointed by then to a supervisor post that the Claimant had also applied for.

100 Possibly in dispute is whether the Claimant had failed his KPIs in September 2017. In paragraph 14 of the ET3 response it was disputed. The Claimant was not however cross-examined on this point. On the balance of probabilities, the Tribunal finds that Mr Jameel did fail the Claimant on a KPI in September 2017, which caused the Claimant to lose his bonus. We so find because:

100.1 This was the Claimant's evidence and he provided screenshots to seek to provide confirmation of this point.

100.2 Mr Jameel was not present to give his account of events.

100.3 The Claimant did not have put to him that he had not failed any KPIs.

100.4 The point is not entirely free from doubt as, so far as the Tribunal is aware, we were not provided with the Claimant's payslip for that month.

101 The Claimant accepted when cross-examined, however, that he did not complain about Mr Jameel's decision to Mr Jameel's manager. He also accepted that he had not done so in the second grievance to which we refer below. Nor did he do so in his second grievance outcome. Nor did he make any reference to the issue in his resignation letter. The first the Respondent knew of this complaint therefore was on receipt of the Claimant's ET1 claim form.

Allegation at appendix paragraph 15- being investigated in relation to the faulty vehicle in or around September 2017

102 We turn next to the issue of the Claimant being investigated in relation to a faulty vehicle; that his complaint about being made to drive vehicle back when it was smoking; and the comparison he drew (referred to in the list of issues) about the vehicle breaking down three weeks later and being picked up.

103 The Claimant was one of the drivers of a vehicle that developed a faulty clutch. On 6 September 2017 the vehicle was sent for repairs. The Claimant had been asked to drive the vehicle back to the depot.

104 The garage carrying out the maintenance repairs reported as follows:

> "The dealership have removed the gearbox and found that the clutch/flywheel has failed due to the manner in which it has been driven, and as a result the manufacturer will not offer any contribution to the repairs under goodwill/warrantee. They can also find no signs of any component failure or manufacturing defect. The charge for the repairs was £927.75 plus VAT."

105 Mr Barraclough was unhappy about the vehicle damage. He sent an email to an individual called Herbie Dyges. He stated that the damage was totally unacceptable. He stated that although they had an idea of who had mainly been driving the vehicle in August, it was not currently indicative that one officer is at fault. He asked Mr Dyges to look through the defect folder for the past six months and establish which CEO had been mainly driving the vehicle and carry out a full investigation. He did so by email dated 22 September 2017 and asked for his findings by 29 September 2017.

106 Mr Barraclough did not know who the main driver/drivers for the vehicle had been during the previous six months. There were five drivers for the vehicle for the main part. There were two black drivers, two white drivers and one was not made clear to us. As the Claimant stated that three black drivers were interviewed (he was mistaken on is as only two were interviewed) which suggests that the fifth driver is black. The Tribunal understands that he may have been a night driver.

107 The Claimant did not dispute that he and the other driver investigated were the main drivers of the vehicle. His complaint, as expressed at the Tribunal, was that everyone that had driven the vehicle during the previous six months should have been investigated. Other drivers did from time to time occasionally drive the vehicle, mainly on short journeys.

108 On 27 September 2017 the Claimant was interviewed by Mr Dyges, who was a supervisor. He was told that it was an investigation related to the use of the company vehicle. He was asked questions about the vehicle and how he used it, such as what was the duty of care to a company vehicle. The Claimant responded that it was "I keep the company vehicle safe as I would like my own private vehicle to be kept".

109 The other main driver was also interviewed, Mr Sampson Ewrum, who is black.

110 The Claimant made no mention in his interview with Mr Dyges of the vehicle having been smoking or to complain about having to take the vehicle back to the depot in such circumstances.

111 Mr Barraclough's decision was to take no further action over the incident. He did not however, communicate this decision to the Claimant or, so far as we know, to Mr Ewrum.

112 As regards the issue of the Claimant stating that the vehicle was smoking and he was made to drive it back from the depot, the tribunal finds that the Claimant did not report that the vehicle he was driving was smoking. We so find because he did not say this to Mr Dyges; the report he signed on 6 September which led to the vehicle being repaired contains a statement "please do not use until the vehicle fixed" and referred to the vehicle making a terrible sound.

113 The Claimant claimed in his evidence that his signature on the form was a forgery. We do not believe that it was a forgery. Not only is there no obvious motive for forgery but it is also consistent with what the Claimant was saying in his second grievance interview to which we refer later in which he was referring to the sounds made by the clutch, not the vehicle smoking. Additionally, although the Tribunal are not handwriting experts, the signature appears to be that of the Claimant in that it appears to be the same as the signature provided by the Claimant when he signed his witness statement at this Tribunal before giving evidence.

114 It is correct that on an occasion a few weeks later, the Tribunal believes in November, a white driver of the vehicle had the vehicle towed back to the Respondent's depot. The reason for the vehicle being towed was that it had had all four tyres slashed.

115 Did the decision to investigate the Claimant over clutch misuse have anything to do with the Claimant's colour or racial origin; and did the decision to ask the Claimant to drive the vehicle back to the garage, rather than being towed, have anything to do with his colour or racial origins? Why was it done?

116 The Tribunal finds that the actions were in no sense whatsoever because of the Claimant's colour or racial origins. Mr Barraclough, who made the decision, was unsure as to which drivers had been mainly driving the vehicle in the previous six months. It was a reasonable step to be taken in that the clutch damage would not have been the result of what had happened on that day, but over a period of time. It was also reasonable in that the main driver or drivers of the vehicle were the ones most likely to have caused the damage; and the garage had reported that the problem was caused by driver misuse. In any event, the issue never went further than an interview in which a reminder was given to take care of the vehicle.

117 It would, however, have been better practice for Mr Barraclough to have send a short note to the Claimant to notify him that no further action was being taken.

118 As regards the white driver having the vehicle towed back there is an obvious difference between the two situations. A driver of a vehicle with four slashed tyres cannot sensibly be expected to drive it back to the depot. A vehicle which has a noisy clutch can

be driven a short journey to have repaired. We are satisfied that the difference in circumstances was such that there was no connection whatsoever with the Claimant's colour or racial origins.

Allegation at appendix paragraph 12.2- reduction of overtime offered to the Claimant

Allegation at appendix paragraph 19- Mr Iqbal lied by saying that the Claimant had been offered overtime on numerous occasions and had refused them all

119 We turn next to the issue as to the overtime offered to the Claimant, which formed part of his second grievance complaint.

120 Mr Iqbal, a training manager, was asked to investigate the Claimant's grievance.

121 The Claimant sent a written complaint to Mr Jaffrey on 21 October 2017. Amongst the complaints he made were:

121.1 He found the rotas to be allocated in a way it was "very discriminatory" and that he was not being offered the overtime given to his white counterparts.

121.2 He made a complaint about his vehicle condition that day (we do not deal with this as it did not form part of the list of issues).

121.3 He complained about the investigation that had been carried out (described above) which he stated to be "very discriminatory". He complained about only a specific set of CEOs being investigated and a lot of more supervisors could have been investigated include lots of CEOs could have been investigated, including supervisors. He described it as victimisation.

122 The Tribunal was provided with details of the amount of overtime worked by the Claimant during 2016. It was also provided with the amount of overtime worked by the Claimant and four other drivers during 2017.

123 The records show that during 2016 the Claimant worked 40 hours overtime.

124 The records for the Claimant show that he worked 121.5 hours overtime in 2017. Much of this was worked in December 2016 and January 2017 (the Claimant being paid the month after the overtime worked). The records show that he was paid for 16 hours overtime worked in January 2017, 64 hours in February 2017 and the balance of the overtime hours being for the remainder of 2017.

125 One of the other drivers, Mr Jameel, worked 56 hours overtime during 2017, although he became a supervisor in August 2017 so no overtime is recorded from that period onwards.

126 Another driver called Festus worked 176 hours overtime in 2017. Another driver,

called Costas, worked the most overtime in 2017, 232 hours.

127 Another driver, called Miguel, worked 136 hours overtime in 2017.

128 On 31 October 2017 the Claimant met with Mr Iqbal. He discussed two main issues with it. The first concerned the vehicle he drove, although the issue of the Claimant being investigated over clutch damage and the issue of the reference in the Claimant's email about the vehicle condition on 21 October 2017 appeared to have been muddled.

129 Another issue raised by the Claimant was about favouritism about overtime and the rotas.

130 Mr Iqbal asked the Claimant whether he had actually approached his supervisor about his interest in overtime. In reply the Claimant stated that in the past he did and they were all aware of his interest in overtime. He accepted when cross-examined that he had not been asking his supervisors for overtime after December 2016.

131 The Claimant also stated to Mr Iqbal that he believed that he was subjected to victimisation and discrimination because of the first grievance he put in. Later on in the interview the Claimant offered another reason for not being provided with sufficient overtime. He stated that "585" (Festus) had lent money to Leman (Ozkan) which was probably why she had been offering overtime to him and that he saw this as unprofessional.

132 Mr Iqbal interviewed Ms Ozkan and Mr Jameel. Unlike Mr Barraclough, he kept no notes of these interviews with these two individuals, although he did take and keep notes of his interview with the Claimant.

133 The explanation Mr Iqbal received from Ms Ozkan and Ms Jameel was that the Claimant had not been requesting overtime.

134 In evidence at the Tribunal Mr Iqbal also referred to the difference in the amount of overtime being offered was that the Claimant was not willing to do the foot patrols whereas the other drivers were.

135 Although it is surprising that Mr Iqbal did not give this explanation to the Claimant in his decision letter about the grievance it is nevertheless convincing because of the discrepancy in the available shifts for foot patrol being greater than for mobile enforcement.

136 On 7 December 2017 Mr Iqbal gave the Claimant his decision outcome. He rejected the Claimant's grievance, including making the following points:

136.1 He stated that he had checked the vehicle logs which showed that there was a small, negligible, amount of, mileage that had occurred without any logs being completed; and that he would recommend that in future a log was created to record the mileage done and reinforce by regular audits.

136.2 In relation to overtime he stated that overtime was given to those who requested it and that he would be asked if he would like to do an additional shift as and when it was available. He was told to approach his supervisor or Leman (Ozkan) to inform them of the request. He stated that he had spoken to both of them; and that Mohammed (Jameel) had also confirmed that he had not requested any overtime. He stated that Mohammed recalled offering him overtime multiple times which he had refused.

136.3 He stated that he had investigated the claim about Leman being lent money from another CEO then giving him overtime; that he had investigated the claim and found no evidence to suggest that that was the case.

137 The Claimant was unhappy about the grievance outcome.

138 On 8 December 2017 he spoke to Mr Jameel. He secretly recorded the conversation.

139 In the course of the Claimant's record of the conversation Mr Jameel referred to an occasion where he had asked the Claimant whether he would do a shift and the Claimant had said that he would not. He referred to the Claimant never talking with him about the rota. They had a discussion about whether the overtime offer made was "cover" (the Claimant's description of it) or overtime.

140 Mr Jameel stated that there was only one occasion when he asked the Claimant to do overtime.

141 In dispute is whether Mr Iqbal was lying when he said in his grievance outcome that the Claimant had been asked multiple times about overtime by Mr Jameel (as the Claimant says); or whether he was mistaken (as Mr Iqbal says). The Tribunal finds that Mr Iqbal was mistaken but that he was not lying because:

141.1 It is symptomatic of a sloppy investigation. As noted above unlike Mr Barraclough had notes taken at each interview he conducted, Mr Iqbal did not take, or if he did, did not retain, notes of his meeting with Mr Jameel. It is understandable therefore that he might make mistakes such as this.

141.2 Mr Iqbal had no reason to lie about whether the Claimant was asked for overtime once or on numerous occasions. Mr Iqbal was a training officer- he was not part of the team the Claimant worked in. The Claimant never suggested any motive for why Mr Iqbal would be lying.

142 Did the amount of overtime the Claimant was offered in comparison to the other drivers have anything to do with his first grievance or the paternity leave issue? The Tribunal finds that it did not:

142.1 In cross-examination the Claimant accepted that he had asked for overtime in December 2016. This would explain his high amount of overtime

worked in December 2016 and January 2017. It is also consistent with Mr Iqbal explaining that overtime was given on a "first come first served" basis.

142.2 The Claimant accepted in cross-examination that he had not asked for overtime after December 2016.

142.3The Claimant in fact performed more overtime in 2017 than in 2016, as set out in the Respondent's overtime records.

142.2.1 The Claimant did about the same amount of overtime between March and December 2017 as he had for the whole of 2016.

142.2.2 One of the reasons for the discrepancy and overtime given by the Claimant in his meeting with Mr Iqbal was that Ozkan was showing favouritism because she had been lent money by Festus. If this is true (which we doubt) it would have nothing to do with the Claimant's paternity leave or his grievance.

143 The Claimant was off work sick from 9 December, the reason given being stress at work. The Claimant was becoming highly stressed. He went off sick the day after receiving Mr Iqbal's grievance outcome.

144 On 11 December 2017 the Claimant appealed about Mr Iqbal's grievance outcome. Amongst the issues he raised were about overtime only been given to those who requested it; he referred to Mr Iqbal making a blatant lie about Mohammed offering him overtime on multiple occasions and he made complaints about the rotas.

145 On 12 December Ms Smith acknowledged the Claimant's grievance. She asked for clarification and whether he was making a grievance appeal or a fresh grievance.

146 Ms Smith sent the Claimant a letter arranging a grievance appeal with herself on 18 January 2018. Ms Smith was on holiday for part of the time between the Claimant's grievance appeal and the date she was arranging it.

147 By email dated 15 December 2016 the Claimant asked for various documents. Mr Jaffrey declined to provide them for data protection reasons but referred the Claimant to Mrs Smith if he wished to take the issue further.

148 The Claimant followed up his request. Mr Jaffrey sent an email on 2 January 2018 to the Claimant confirming that he would not be providing them himself but stating that Chelsey (Smith) would investigate his claim thoroughly. Ms Smith was on holiday until 8 January 2018.

149 On 3 January 2018 the Claimant resigned with immediate effect, sending an email explaining his reasons for doing so. His reasons that he gave were:

149.2 Referring to being placed on foot patrol rotas after return from paternity leave.

149.3 Referring to appropriate sexual behaviour by his supervisor.

149.4 Referring to a transfer to another branch being denied.

149.5 Referring to his treatment after maternity leave being viewed as a demotion.

149.6 Referring to his overtime complaint.

149.7 Referring to the investigation of himself and two black members of staff over vehicle damage.

149.8 Stating that his grievance decision letter (from Mr Iqbal) contained the "unforgivable lie" about been offered overtime multiple times by a supervisor and refusing them all.

150 The Claimant stated that he would not attend the grievance meeting arranged on 18 January 2018 with Mrs Smith.

151 He did however, subsequently attend a meeting with her, on the proviso he gave, that it would be an informal meeting only.

152 Mrs Smith sought to persuade the Claimant to withdraw his resignation but the Claimant declined to do so.

153 The Claimant undertook Acas early conciliation between 3 January and 3 February 2018 and issued this Employment Tribunal claim on 6 February 2018.

154 The Tribunal has considered the Claimant's constructive unfair dismissal claim. We remind ourselves that our function is to look at the employer's conduct as a whole and determine whether it was such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it. Did the behaviour reach this threshold? The Tribunal finds that it fell short of this threshold because:

154.2 It is true that the Claimant was the recipient of paternity leave discrimination in February 2017. Ordinarily, an act of discrimination would amount to a fundamental breach of contract. In this case, however, the issue was quickly resolved in February 2017. Within three weeks of the Claimant's return from paternity leave he was never placed on a foot patrol shift again.

154.3 There were some flaws in how the Respondent carried out its investigations, to which we have referred above. For example, the issue of the Claimant's complaints about massages were not notified to the Claimant in the grievance outcomes in treating them as stand alone complaints. There were some flaws in how Mr Iqbal handled the grievance. His mistake about how often Mr Jameel had asked the Claimant if he wanted to do overtime was a mistake that clearly angered

the Claimant.

154.4 Looking at the Respondent's behaviour towards the Claimant as a whole, however, it was clear to the Tribunal that they valued the Claimant as an employee and were doing their best to resolve his complaints.

154.5 For example, although the Claimant could contractually have been required to do foot patrol, they kept him on mobile patrols both almost invariably before his paternity leave and after he raised his grievance with Mr Barraclough.

154.6 Mr Jaffrey reassured the Claimant in his meeting about the foot patrol issue and he praised the Claimant as an employee. The Claimant was happy with the grievance appeal outcome.

154.7 The Claimant's other complaints were not made out for the reasons we went through.

154.8 So far as the key performance indicators issue was concerned it was not mentioned as a reason for the Claimant's resignation in his resignation letter. In any event the Claimant never complained about the issue during his employment with the Respondent although he complained about many other things.

155 The Tribunal has also looked at the time limits issue for the paternity leave related question. Was it reasonably practicable for the Claimant to have presented his claim within the time limit in respect of being placed on foot patrol the issue he described as "demotion"?

156 The Tribunal finds it was reasonable practicable to do so:

156.2 The Tribunal reminds itself that the reason or practicability test is a stricter test than the just and equitable test.

156.3 The Claimant was not physically prevented by illness or issue such as postal strikes and the like from presenting his complaint within three months of the decision being made i.e. February 2017. The time limit is three months and it was a long time out of time as his claim to the Employment Tribunal was not issued until February 2018.

156.4 The Claimant knew of his right to bring an Employment Tribunal claim.

156.5 There was no misrepresentation on the part of the employer about a relevant matter. Both Mr Barraclough and Mr Jeffrey met with the Claimant and explained the Respondent's position about overtime.

156.6 The Claimant was not receiving legal advice at that time although he

could have done so and did so from around December 2017 to around February 2018.

156.7 The Claimant did use the Respondent's grievance procedures. By 4 April 2017 however he had attended his grievance appeal meeting with Mr Jaffrey he had already been put back on mobile patrols by then. He was given some reassurances about being kept on mobile patrols particularly by Mr Jaffrey.

156.8 The Claimant's Employment Tribunal claim was not presented until a long time after the outcome of her grievance appeal with Mr Jaffrey.

Closing Submissions

157 The Tribunal was provided with both typed submissions and oral submissions both by Mr Chaudhry on behalf of the Respondent; and by the Claimant himself (although the Claimant was represented by his wife for most of the hearing the Claimant gave his verbal closing submissions himself).

Conclusions

Constructive Unfair Dismissal claim

158 For the reasons set out in the Tribunal's findings of fact, although there were some failings in how the Respondent dealt with the Claimant as indicated above, their treatment fell short of the test given in the *Woods* case as to whether it is cumulative effect judged reasonably and sensibly was such that the Claimant could not be expected to put up with it. The claim therefore fails.

Paternity leave

159 The demotion claim is out of time so the Tribunal has no jurisdiction to consider it.

160 If it had been in time the claim would have succeeded for the reasons given in the Tribunal's findings of fact.

161 The reduction of overtime claim fails for the reasons given in the Tribunal's findings of fact.

Direct race discrimination claim

162 These claims fail for the reasons given in the Tribunal's findings of fact. As we went straight into the question of the why the Claimant was treated as he was, in other words we considered the Respondent's explanation or reasons for his treatment, it is probably unnecessary to go through the process as set out in the *Igen v Wong* case. Tribunals have been encouraged to look at why an individual was treated in the reason they were, whether it was for a prohibited reason or not.

163 The Claimant was able to show that he was treated less favourably than white drivers who drove the van albeit much less than the main drivers. The white drivers are not, however, true comparators, because they hardly drove the vehicle at all; and, when they did, it was for short journeys; whereas the Claimant drove the vehicle a lot. We doubt, however, whether the facts proved by the Claimant was such as to cause the burden of proof to shift to the Respondent, having in mind the guidance given in the *Madarassy* case. Even, however, if the burden of proof does shift the Tribunal is satisfied that the Claimant's treatment was in no sense whatsoever because of his race or colour, for the reasons given in our findings of fact above. This complaint fails.

Victimisation

164 The Respondent accepted that the Claimant had carried out protected acts.

165 The victimisation complaint fails the facts we have found do not show that Mr Iqbal did lie to the Claimant; and any detrimental treatment the Claimant may have suffered was not because the Claimant raised a complaint of race discrimination in his grievance.

166 For the reasons given in the Tribunal's findings of fact we find that the issue of Mr Iqbal informing the Claimant that he had been offered overtime on multiple occasions was not an act of victimisation. Mr Iqbal was mistaken. He was not lying. In any event we do not see that even if he had been lying that it was because of the Claimant's complaint of race discrimination. The Claimant's claims, therefore, fail and are dismissed for the reasons give.

Respondent's application for costs

167 After the Tribunal had given its judgment Mr Chaudhry made an application for costs. The Tribunal heard submissions both from him and from Mrs Lasila on behalf of the Claimant.

168 The Respondent's submissions included the following points:

168.2 The application was for the costs incurred for two elements of the Claimant's claim. One was for his complaint about being failed on KPIs. The other was for his claim about the vehicle he was driving developing smoke coming from the bonnet.

168.3 He submitted that the Claimant had acted unreasonably in bringing these proceedings. Alternatively, he submitted that these claims had no reasonable prospect of success.

168.4 His claims for the work stated were additionally caused by this amounted to £1,380 plus VAT.

168.5 He referred to cases giving guidance as to the Tribunal not being required to link the exact costs to the exact amounts of work; although he accepted, in response to a question from the judge, that Tribunal needed to be mindful of the link.

168.6 The purpose of costs was to be compensatory not punitive and the Tribunal was entitled to have regard to the Claimant's means.

169 Mrs Lasila's closing submissions included the following points:

169.2 The Claimant had noted the failure of his KPIs on an appropriate form.

169.3 Jude had had a mental breakdown so not to have mentioned one situation when there were so many issues was understandable in the circumstances.

169.4 The issue of the vehicle smoking is an issue that he could have mentioned and the other individual in the vehicle could have been asked about it.

169.5 As to the bill of costs, the costs claim for the bundle of documents were relating to such costs that they could not have done themselves as the Respondent had the documents. The Judge asked for details of the Claimant's income. The Tribunal was informed that the Claimant is doing agency work, which is variable and earning considerably lower sums than the Respondent. Mr Chaudhry clarified that the payslips in the bundle of documents showed the Claimant as earning between £289 and £430 per week, whereas he had been earning £1,400 net per month with the Respondent. The Claimant and his wife have two children living with them, aged 1 and 12. She is not yet working after the birth of their young child and claims tax credit. They live in a housing association property with a rent of £900 per month.

170 The Judge asked Mr Chaudhry if, having heard the details given as to the Claimant's means they continued to seek to apply for costs and he modified his claim for £1,380 plus VAT to £500.

171 The Tribunal had in mind the two-stage test set out in Rule 76 namely to consider whether the threshold had been reached of the Claimant behaving unreasonably in the brining of proceedings or having no reasonable prospect of success; and, if so, to consider whether to exercise our discretion to make a costs order.

172 The Tribunal also had in mind the Claimant's ability to pay.

173 On these two issues the Tribunal decided as follows:

173.2 So far as bringing proceedings unreasonably was concerned the Tribunal considered that these claims fell short of that threshold. We have in mind that the Claimant has been, in effect, self represented. He has had some legal advice between December 2017 and February 2018, but has been representing himself during the proceedings. No legal aid is available so that the Claimant has not been in the position of being able to afford a competent legal adviser to have advised near the time of the

hearing of the prospect of success of each element of his claim and whether to withdraw some aspects. The Claimant is not a lawyer.

173.3 As regards whether the claims had no reasonable prospect of success, both these claims were weak. The KPI issue came higher, the Tribunal finds, than having no reasonable prospect of success. Mr Jameel may well have wrongly failed the Claimant on the KPI in question. If so the Claimant lost his bonus.

173.4 On the issue of smoke coming from the bonnet of the vehicle it is arguable that this did have no reasonable prospect of success, although the Tribunal did need to make findings of fact on whether the Claimant had raised this issue or not.

173.5 Giving the Respondent the benefit of the doubt that the smoking vehicle the Respondent response to it had no reasonable prospect of success we have gone on to consider whether to exercise our discretion to make order for costs.

174 The Tribunal's response as to whether we consider, in our discretion, that an order for costs should be made is that it should not because:

174.2 We are not satisfied that the Respondent incurred anything like the costs claimed or the issue in question. They brought no additional witnesses because of it. There was no reference to the issue in their witness statements. The complaint and investigation of it was all part and parcel of the investigation instigated by Mr Barraclough as to the clutch of the van being damaged by misuse. Any additional work incurred was minimal.

174.3 We have had regard to the Claimant's means. They are very limited. The family has a very limited income. The Claimant is earning less than he did with the Respondent and is the sole earner. Any order of costs awarded against the Claimant would punish the family's two children.

174.4 The Tribunal wants to encourage both sides to have closure of the case and move on this is one of the functions of an Employment Tribunal to give its judgment with the Tribunal's expertise in law and experience of the working world and the parties move on from it, whether they like the judgment or not.

174.5 Looking at the Respondent's behaviour as a whole, although the Claimant lost the case, there were failings in how the Respondent dealt with him and lessons to be learnt by their management team.

Employment Judge Goodrich

15 April 2019

Appendix

List of Issues

1. The agreed list of issues is as follows.

Complaints

2. By a claim form presented on 6 February 2018, the Claimant, Mr Jude Lasila, brought complaints of constructive unfair dismissal, detriments contrary to section 47C, Employment Rights Act 1996 (ERA), race discrimination and race discrimination victimisation. The Respondent resists the claims by a response form presented on 16 March 2018.

Constructive Unfair Dismissal

3. Did the Claimant resign as a result of an act or omission or series of acts or omissions by the Respondent?

4. Did that conduct amount to a fundamental breach of the Claimant's contract of employment?

5. The term of the contract relied upon by the Claimant is the implied term of trust and confidence. Specifically, he relies on the following allegations:

5.1 Inappropriate sexual conduct around February 2017. The Claimant says that one of his supervisors, called Miss Leman Ozkan, on about three occasions on dates in November and December 2016, was having her back rubbed by Mr Cannon (surname unknown) and making noises of pleasure while he was doing so.

5.2 Being failed on his key performance indicators on 20 September 2017.

5.3 Reduction in overtime occurring from February to December 2017 as a result of his complaining of the inappropriate sexual conduct described above.

5.4 The allegations under the heads of claim below.

6 Did the Claimant affirm the contract following the breach? The Respondent's case is that the Claimant's resignation, which it says it received on 3 January 2018, occurred a considerable time after some of the events in question.

7 If the Tribunal finds that the Claimant was dismissed, what was the reason for dismissal? The Respondent would contend that it was some other substantial reason for dismissing the Claimant, namely a breakdown in relations between the employer and employee.

8 Did the Respondent act reasonably in treating that reason as sufficient for dismissal; i.e. was the dismissal fair?

9 Did the Claimant fail to reasonably comply with the ACAS code? The Respondent says that the Claimant failed to attend his grievance appeal meeting.

10 Did the Claimant contribute to his dismissal?

Section 47C ERA; Detriment claim following paternity leave

11 The Claimant took paternity leave from 1 February 2017 to 14 February 2017.

12 Was the Claimant subjected to the following detriments alleged as follows:-

12.1 Demotion on return to work
12.2 Reduction of overtime offered to the Claimant.

13 The Claimant's ET1 claim form was submitted on 6 February 2018. Is this claim out of time: and, if so, should time limits be extended?

Section 13 Equality Act 2010; Direct Race Discrimination

14 The Claimant describes himself as black and of Nigerian ethnic origins.

15 Did the Respondent treat the Claimant less favourably because of his race than it treated Caucasian employees who were not investigated in relation to the faulty vehicle in or around September 2017? The Claimant says that in September 2017 the company vehicle he was driving developed smoke coming from the bonnet. He said he asked for the vehicle to be picked up but that Miss Leeman Ozkan, his supervisor, refused. He says that in comparison, about three weeks later, the company vehicle that Mr Costa (surname unknown) was driving broke down and the vehicle was picked up.

16 Can the Respondent establish a non discriminatory explanation? The Respondent says that all those who used the vehicle were investigated regardless of their colour or ethnic origins.

Section 27 Equality Act 2010; Victimisation

17 Do the following amount to protected acts?

17.1 Written complaint to Dale Barrowclough in February 2017

17.2 The Claimant's grievance by email dated 21 October 2017.

The Respondent accepts that the above were protected acts.

18 Was the Claimant subjected to any of the following alleged detriments as a result of any of the above?:

19 Ihsan Iqbal lying to the Claimant in response to an appeal. The Claimant says that Mr Iqbal lied by saying that the Claimant had been offered overtime on numerous occasions and had refused them all. The Claimant disputes he was offered overtime since his complaint in 2017.