THE EMPLOYMENT TRIBUNALS

BETWEEN

Mr Dieudonne Ilunga ***Claimant***

and

DHL Services Ltd ***Respondent***

HELD AT: London Central **ON**: 27, 28 and 29 March 2019
EMPLOYMENT JUDGE: Mr Paul Stewart **MEMBERS:** Ms Jill Tombs and Mr Ratnam Maheswaran

Appearances:
For Claimant: in person
For Respondent: Mr Dunn of Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that all the claims are dismissed

REASONS

The Claims

1. By an originating application presented to the Tribunal on 20 June 2018, the Claimant made claims of unfair dismissal, race discrimination and arrears of pay. At Preliminary Hearings conducted by Employment Judge Glennie on 13 December 2018 and by Employment Judge Tayler on 8 January 2019, the Claimant was given permission to amend his claim in a more limited way than that for which he had applied. His claims comprise assertions that he was unfairly dismissed, that he was dismissed because of his race and that Ms Pauline Steele operated to get the Claimant dismissed because she wanted to put her son in the Claimant's place. Additional to those claims are firstly a claim of victimisation – that the Claimant was subjected to a detriment because of emails that the Claimant sent on 18 December 2017 and in January 2018 – and secondly a claim for arrears of pay.

The Tribunal

2. This Hearing took place over three days with the parties being sent away on the third day at 1500 hours on 29 March 2019 with the promise of a written decision. This left the three members of the Tribunal sufficient time to discuss the matter and reach a judgment that day but insufficient time for the reasons for that judgment to be written up. It was left that a draft of the judgment would be

produced by the Employment Judge and circulated to the members for their comments and approval. That task had not been started when we were informed on 7 May 2019 that, over the first weekend of May, Mr Ratnam Maheswaran had died.

3. As the parties will have observed during the hearing, Mr Maheswaran was an active, interested Tribunal member who asked perceptive questions. His input into the Tribunal's discussions were thoughtful and valued by the surviving members of the Tribunal who alone approved these written reasons for the judgment that all three of us arrived at.

Preliminary Ruling

4. At the start of the hearing, the Claimant made an application to postpone the hearing in order that he might secure legal representation. He had received advice and assistance in the preparation of his case from Montas Solicitors. However, they were unable to supply an advocate for this hearing themselves. They had approached a number of barristers to represent the Claimant at this hearing. However, they required payment in advance, something the Claimant was not able to provide.

5. The Claimant further informed us that he anticipated being able to pay for representation after 8 April 2019 because, on that date, he anticipated receiving a student loan of £3,700. The Claimant had enrolled on a full-time course of study – we understood the course to be connected with business studies – and his church as going to provide him with such a loan for each term of such study.

6. We were somewhat perturbed at the proposal the Claimant was advocating – that we should grant him an adjournment so that he could obtain a student loan which would provide him with the funds whereby he could secure the services of a barrister to present his case. It begged the question as to what the Claimant – and his family – might live on during the period of his study should his case be unsuccessful.

7. In all the circumstances, while we sympathised with the Claimant's predicament, we did not consider that it was in the interests of justice that we should accede to his request. Employment Tribunals are well used to litigants in person and collectively we were of the view that, while a professional advocate relieves a litigant of the strain of presenting his or her own case, cases are judged on their merits, not on the quality of the advocacy.

The Hearing

8. We heard evidence first from the witnesses called by the Respondent. They were, in order of appearance:

    i) Mr Darren Murray who performs the role of contract manager for the DHL Patient Transport Services site based in Wembley. He was the person who decided that the Claimant should be dismissed.

    ii) Mr Ian Lucas who is employed by the Respondent as Operations Director. Mr Lucas conducted the appeal brought by the Claimant against the dismissal decision of Mr Murray.

iii) Ms Toni Whiteing who is employed as the Control Tower Manager as part of the Respondent's Patient Transport Services for the Imperial College Healthcare NHS Trust based at Charing Cross Hospital. She was the Claimant's line manager from March 2017 until his dismissal on 16 March 2018.

9. We then heard the Claimant's evidence. He did not call any witness save himself.

The facts

10. The Respondent is a global logistics business providing distribution and logistics services to major businesses and organisations in the UK and internationally. The Respondent had a Patient Services Transport Contract [*the PST Contract]* with Imperial College Healthcare NHS Trust to provide logistic support in relation to the safe and swift transportation of patients for non-emergency services at the Charing Cross Hospital. The patients being transported range from those with reduced mobility to those with high dependency. The Respondent's staff engaged in the PST Contract are organised into a Control Team and a Patient Care Centre. The PTS Contract is regulated by the Care Quality Commission (*CQC*). Under the PTS contract, the Respondent is required to transport patients in accordance with set Key Performance Indicators which address issues such as patient waiting times and response times to transfer to requests for transport.

11. The Claimant is black. He was born in the Democratic Republic of Congo and came to the UK in 1995. He was employed by the Respondent as a transport controller from 11 April 2011 until his dismissal on 16 March 2018. In this role, the Claimant worked on the rota pattern of 4 days on 4 days off in the Charing Cross Control room. This meant he worked at 12 hour shift (7 am to 7 pm) as part of a "2 persons" controller shift system.

12. With staff working on a nightshift, this effectively meant that the control room is operated 24 hours per day. The controllers oversee 15 vehicles across three sites. The Claimant's role of booking patients onto the earliest available transport is controlled through the use of a case management system called "Cleric". Requests for patient transport would come into Cleric from the PCC team and the Claimant would be required to allocate patience to drivers and vehicles.

13. On 16 December 2017, it was reported by the PCC team that the Claimant had left his single crew workplace unattended and had left the site without informing anyone. The report was escalated to Ms Whiteing the following day by Ms Pauline Steele who was the PCC manager. Ms Whiteing was not on shift on the weekend of the 16 – 17 December 2017 and therefore first became aware of this issue on 18 December 2017.

14. Ms Whiteing received a separate email early on 17 December 2017 from Mr Madhav Desai, a Transport Supervisor based in Wembley. In the email, Mr Desai expressed concerns that he had been attempting to contact the Claimant in the Control Room whilst on the same shift as the Claimant on 16 December. The reason Mr Desai had been attempting to contact the Claimant was because he had received notification that patients were still awaiting transportation. As he had been unable to make contact with the Claimant, he was required himself to take over the driver allocation using Cleric. To Mr Desai, it was apparent that the Claimant had not allocated patients to drivers/vehicles: the patients that had

contacted him were renal patients who regularly were provided with transport three times per week.

15. Later that day – 17 December – Ms Whiteing received further email complaints from Mr Desai to say that he was, again, having to move patients and that the Claimant was not answering calls from drivers during his shift. Mr Desai had drivers sitting idle because the Claimant was not allocating patients.

16. Ms Whiteing decided to investigate. She requested a statement from the individual who raised the issue first and from other colleagues who were on shift on 16 and / or 17 December. She also prepared a statement of her own recording her interactions with the Claimant. He had asserted to her that he had been on time to start work on both days but had left early on 17 December because he had worked through his lunch break. She carried out checks on the Cleric system on the Respondent's computer system and discovered that the Claimant had logged into that system after his contractual start time on both days.

17. In the course of her investigation, Ms Whiteing discovered that the Claimant had been late for work on 1 January 2018. The Claimant asserted that this was because of the limited transportation service available that day. He asserted he had tried to contact Ms Whiteing to notify her of her lateness. Ms Whiteing checked her mobile phone: it disclosed no missed call from the Claimant. At this point, she realised she had moved from being an investigator to being a witness. She also knew that the Respondent had offered a taxi service to those staff working on Christmas Day, Boxing Day and New Year's Day. Such staff included the Claimant. Consequently, she asked another Control Room Supervisor, Mr Nick Lennon, to take over as Investigation Manager and he conducted an investigation meeting on 19 January 2018 that the Claimant attended.

18. The result of that meeting was a recommendation by Mr Lennon that disciplinary action should be taken against the Claimant. In consequence, Mr Murray was asked by the Respondent's HR department to conduct a disciplinary hearing as he had no prior involvement in the investigation. Prior to being asked to do this, Mr Murray knew the Claimant "relatively well" as he provided the Claimant with management support in the context of a return to work from long-term sickness absence.

19. Mr Murray was provided with the statements that Ms Whiteing had gathered up and documents which Mr Lennon had used in the investigation. From all the documents, Mr Murray was able to observe that:

    a) The Claimant said he could not remember why he had been late on 16 December 2017. He added that he had trouble logging on to the system but confirmed he had made no contact with IT to report the problem. The Claimant's shift that day was from 0700 to 1900 hours. It was expected that employees should be logged in at the start of the shift and ready to review both patients and resources. The first Cleric logon for the Claimant that day was at 07:25:02 – in other words, 25 minutes after his start time.

    b) The Claimant confirmed he had left at 6 p.m. that day to visit 'a friend' (his contractual finish time was 7 p.m.) notwithstanding the Cleric system showing his last work entry as being 1737 hours. The Claimant did not appear on the

Cleric system as having logged out, which suggested there was a forced shutdown of the system, that is, one which occurs automatically once there has been a period of inactivity at the terminal.

c) The Claimant attributed his lateness on 17 December 2017 either to public transportation or to IT issues. His first login to the Cleric system was at 0754 hours. The Claimant had explained that IT had told him the day before to restart the system. When questioned as to when contact was made with IT, the Claimant said he had only contacted IT on Sunday 17 December. Mr Murray noted that these answers appeared contradictory.

d) The Claimant stated he had left work on time on 17 December 2017. The last Cleric entry for him was at 1658 hours. His finish time that day was 1900 hours.

e) In respect of being late on 1 January 2018, the Claimant stated he had called the office to say he would be late but that no one was there. He also stated he had not called Ms Whiteing about being late "because it was New Year".

20. The Claimant was invited to a disciplinary hearing to be conducted by Mr Murray on 6 March 2018 by letter dated 26 February 2018. The letter made it clear that the conduct alleged against the Claimant could constitute gross misconduct and this might result in summary dismissal. The Claimant was told that he had the right to be accompanied to the hearing by a work colleague or authorised trade union representative.

21. The Claimant was accompanied to the hearing by his Unison representative, Mr Mark Lione. Miss Danielle Merritt who was an HR Resolutions Manager attended to provide HR support and to take notes of the hearing.

22. Mr Murray confirmed in his evidence to us that the main points raised during the disciplinary hearing comprised the following:

a) The Claimant could not remember what time he had started his shift on 16 December 2017. After Mr Murray repeatedly sought clarification on whether he had reported the logging in issues with IT, the Claimant confirmed that he had not reported it.

b) The Claimant stated that the reason he had left his shift early on 16 December 2017 was so that he could visit his brother, who had been admitted to Charing Cross Hospital. The Claimant stated that, as he was in charge, it was therefore his decision to work through his lunch. With regards to the last Cleric time entry listed as 17:37, the claimant explained he was not required to allocate any vehicles during that time and that was the reason for the time entry. The Claimant appeared confused when clarification was sought on who he had worked with on each shift on 16 – 17 December 2017/

c) The Claimant stated that he had experienced the same IT issues on Sunday 17 December 2017 and, although he was on time for work, he had logged in late. The Claimant confirmed that on his date he had reported the issue to IT. When Mr Murray questioned whether he had received the ticket from IT (to confirm the issue had been logged), the Claimant changed his story and said he did not call IT. Mr Murray highlighted his concerns to the Claimant about

his changing version of events, in that during the investigation he had said that he had reported it but had not received the ticket but now was saying that he did not call IT as he had resolved the issue by himself.

d) The Claimant also wanted to change his account of events for 17 December 2017. He stated that he had, in fact, left a shift at 6 pm. When discussing his time entries on Cleric for that date, the claimant responded by stating that he had "family issues" without providing any further explanation. He appeared to suggest that there was limited work for him to do (hence him leaving early). Mr Murray explained that there was evidence from a witness, the transport front desk supervisor, which suggested that they were required to take over the Claimant's work so that patients could be allocated.

e) The Claimant appeared hesitant to confirm who it was that he had contacted about his lateness on 1 January 2018. He stated that "no one answered "and, when he asked if he had called Ms Whiteing, he did not respond. Mr Murray put to him that, in the investigation meeting, the Claimant had said he hadn't wanted to call Ms Whiteing because it was the New Year. At this point, the Claimant then said he had called Ms Whiteing. When Mr Murray expressed his concerns about the consistency of the Claimant's responses, the Claimant became very emotional and said his father was at the end of his life.

f) The Claimant's representative made what sounded to Mr Murray as an apology. This prompted Mr Murray to point out that the Claimant had had the opportunity himself to apologise during the investigation and the disciplinary hearing. Mr Murray considered the Claimant to have demonstrated no real recognition of any wrong doing on his part.

23. Mr Murray adjourned the hearing and considered what he had heard. He reached the conclusion that he could not reconcile the Claimant's account with the other statements he had read. The Claimant's account itself lacked consistency and Mr Murray formed the view that he could have no confidence in the Claimant's version of events. He upheld the allegations.

24. As to the appropriate sanction, Mr Murray took into consideration the Claimant's previous disciplinary record and length of service. Because the Claimant's conduct was a clear breach of absence reporting procedures with the Respondent being liable for financial penalties if they failed to meet contractual obligations under the PST Contract, he decided that the Claimant's behaviour amounted to gross misconduct and therefore justified summary dismissal.

25. Mr Murray reconvened the disciplinary hearing on 31 March 2018 and announced his decision which was confirmed in a letter to the Claimant. The Claimant appealed the decision and the appeal was heard by Mr Lucas on 3 April 2018. Mr Lucas decided, having heard the Claimant and considered the points the Claimant based his appeal on, that the decision to dismiss should be upheld. It is of note that the Claimant did not raise race discrimination as being an issue in his appeal.

26. Mr Lucas' statement sets out the grounds of appeal raised by the Claimant, how the Claimant clarified the grounds of appeal during the hearing and consideration Mr Lucas gave to the points the Claimant made. Mr Lucas was accompanied by

Mr Andrew Smith, an HR Resolution Manager, who took notes and provided HR support and the Claimant was accompanied by Mr Mark Lione, his union representative. We accepted Mr Lucas' account of the appeal hearing.

Unfair Dismissal

27. On the evidence, we were satisfied that the Respondent had established that the reason for the dismissal related to conduct. We have regard to the well-known legal principles set out by Arnold J in **British Home Stores v Burchell [1980] ICR 303** and **Sainsbury Supermarkets Ltd v Hitt [2003] ICR 111**. Arnold J said at 304:

> The case is one of an increasingly familiar sort in this tribunal, in which there has been a suspicion or belief of the employee's misconduct entertained by the employers; it is on that ground that dismissal has taken place; and the tribunal then goes over that to review the situation as it was at the date of dismissal. The central point of appeal is what is the nature and proper extent of that review. We have had cited to us, we believe, really all the cases which deal with this particular aspect in the recent history of this tribunal over the past three or four years; and the conclusions to be drawn from the cases we think are quite plain. What the tribunal have to decide every time is, broadly expressed, whether the employer who discharged the employee on the ground of the misconduct in question (usually, though not necessarily, dishonest conduct) entertained a reasonable suspicion amounting to a belief in the guilt of the employee of that misconduct at that time. That is really stating shortly and compendiously what is in fact more than one element. First of all, there must be established by the employer the fact of that belief; that the employer did believe it. Secondly, that the employer had in his mind reasonable grounds upon which to sustain that belief. And thirdly, we think, that the employer, at the stage at which he formed that belief on those grounds, at any rate at the final stage at which he formed that belief on those grounds, had carried out as much investigation into the matter as was reasonable in all the circumstances of the case.

28. The first question under the **Burchell** test was, did the dismissing officer of the Respondent have a genuine belief that the Claimant was guilty of gross misconduct. We considered Mr Murray to have had such a genuine belief. Second, we considered he had reasonable grounds upon which to form such a belief.

29. Counsel for the Respondent set out a list of the grounds on which Mr Murray had based his belief. We accept the accuracy of those grounds and together they constitute reasonable grounds for Mr Murray's genuine belief. The list is as follows:

a) The Claimant's inconsistent and misleading evidence on his alleged contact with IT;

b) The Claimant's acceptance he had left at 6 pm instead of 7 pm on 16th December 2017 when the record provided by the Cleric computing system suggested he had left even earlier [and when he did not have permission to leave at 6 pm on account of having worked through his lunch hour];

c) The Claimant's inconsistent evidence as to why he had left early on 16th December 2017:

d) The Claimant's suggestion that it was acceptable to leave early as the workload was quiet, a point that was contradicted by his colleagues;

e) The Claimant's suggestion that he had told a colleague named Bobby he was leaving on 16th December 2017 despite Bobby not even being in work that day;

f) The Cleric records demonstrating the Claimant's arrival and departure logins and logoffs which were consistent with the witness evidence obtained;

g) The Claimant's evidence as to why he did not log off from the system;

h) The Claimant's inconsistent evidence as to why he was late to login on the 17th December 2017;

i) The Claimants inconsistent evidence as to his departure time on the 17th December 2017;

j) The Claimant's inconsistent evidence as to his actions when he was late on 1st January 2018.

30. Finally, we considered that, at the stage at which he formed that belief, the Respondent had carried out as much investigation into the matter as was reasonable in all the circumstances of the case. We considered the procedure adopted for investigating the Claimant's conduct and for conducting the disciplinary hearing and the appeal hearing to have been fair. On the finding that the alleged misconduct had occurred, we considered the sanction of dismissal to be within the range of reasonable responses an employer might adopt upon such gross misconduct having occurred.

Direct Discrimination

31. The allegation the Claimant makes is that he was dismissed because of two reasons, first his race and second because Ms Steele wanted him dismissed so that his job could be filled by her son.

32. In his ET1, the Claimant made the assertion that Ms Steele, the PCC manager, was "always saying to other staff that she will take my job to give to her son Scott". She was, he asserted, very racist and she had been sacking black staff special agency staff. "She made her staff to write false statement against me" and the allegations of arriving late and leaving early on three days were wrong. He mentioned as examples of the discriminating treatment two other workers. Both Ms Rebecca Gates and Mr Lennon, he asserted, were "always later" than their start times.

33. The burden of proof of such allegations is on the Claimant, see **Madarassy v Nomura International plc** [2007] EWCA Civ 33; [2007] IRLR 246. A claimant must show more than a difference in sex and a difference in treatment to establish a prima facie case of sex discrimination. We bear in mind the provision in the Equality Act 2010 concerning the burden of proof:

> 136 Burden of proof
>
> (1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

> (3) But subsection (2) does not apply if A shows that A did not contravene the provision.
>
> …
>
> (6) A reference to the court includes a reference to—
>
> (a) an employment tribunal;

34. The Claimant did not, either in the disciplinary hearing which led to his dismissal or in his appeal, advance a case that the dismissal was because of race discrimination and not for the misconduct being alleged against him.

35. In this hearing, the Claimant did not provide any written evidence regarding either comparator: as he said when being cross-examined:

> I did not think about mentioning Nick Lennon but I also forgot about mentioning Rebecca.

36. In his statement , the Claimant made a general complaint about unspecified "white workers": he said:

> As I worked for the Respondent for six years, I had the opportunity to observe the culture of the Respondent's workplace. I saw white workers arriving to work late for their shifts. They also left early when they worked through their lunch breaks without getting permission from a manager. The Respondent was aware of these activities in the workplace and took no action against any of these white workers. None of them was ever suspended on pay for their actions pending an investigation into their conduct or invited to a disciplinary hearing or dismissed for their conduct and behaviour in this respect.

37. The Claimant explained he had not mentioned either comparator in his witness statement because "there was a lot of other things to think about and I am unfamiliar with British court procedure". Curiously, he did mention another comparator in his witness statement, not one he had named in his pleadings. This was his former colleague, Mr Jerome Bunce, who the Claimant asserted had arrived for work late but had not been disciplined or dismissed. However, the specific instance the Claimant cited when Mr Bunce had been late was the morning of 8 April 2012 – over five and a half years before the incidents for which the Claimant had been disciplined. Mr Bunce's lateness, not having been pleaded, understandably did not feature in the statements of the Respondent's witnesses and the Claimant did not question them about Mr Bunce's time keeping. No evidence was thus produced concerning Mr Bunce.

38. Whilst being cross-examined, the Claimant spoke for the first time of a difference in treatment in the workplace when he worked with Mr Murray. He said:

> Scott Barnett would be asked to get coffees by Darren Murray and Darren would then ask all the white people in the room but would not ask me if I wanted a coffee and, if so, what sort of coffee – which is what he asked the others. I did not complain about it because that is the way things were done in the Respondent 's organisation. Previously, Emma, a young white girl of 22, had told me to "shut up" in front of all the DHL staff, supervisors, everybody - and that had caused me to go home suffering from stress for 3 months. I did complain about that to Mr Aeunaan, a manager. He passed the process to the next level – he passed to People Services. One of the managers, Lesley, was given the case to process. She called me to a meeting. She suggested some mediation with Emma. I did not have the mediation meeting. Emma continues to work – no one contacted me at all.

> I did not mention this incident concerning Emma in my witness statement. I did not ask Darren Murray when I was questioning him in the Tribunal about the incident of asking only white employees if they wanted coffee because I thought I would get the postponement on the first day and when I did not get the postponement I forgot so many things to ask.
>
> …
>
> When I made the claim … … I did not mention either of these incidents concerning Emma or Darren Murray because the Emma incident was in 2015 and the Darren Murray incident was in 2017 – I forgot about Darren incident when I filled in [*the ET1*].

39. This evidence was given by the Claimant after Mr Murray and the other witnesses for the Respondent had given their evidence and, as he acknowledged, without being asked questions about these events by the Claimant.

40. Ms Whiteing provided the Tribunal with evidence regarding Ms Gates: she had been late on 2 occasions in October and November 2017 when working in Ms Steele's team. Ms Whiteing was able to inform us that Ms Gates was approximately 5 to 10 minutes late on each occasion and her lateness led to a file note being made on the first occasion and a verbal warning being made on the second occasion of lateness. Ms Whiteing made the valid observation that she:

> … would not deem that starting a shift 5 – 10 minutes late as being comparable to what I understand to be the allegations in relation to which [the Claimant] was dismissed, namely [his] multiple absences for a duration of hours, his failure to notify site of his absence and his failure to log out of the patient booking system.

41. Ms Whiteing was unable to comment on Mr Lennon so that meant that we had no evidence concerning him at all and her evidence about Ms Gates represented all the evidence we had about her. In the circumstances, we did not consider that the Claimant had made out his case that either Mr Lennon or Ms Gates (who may, indeed, be white - the Claimant had left it to us to assume that fact) had been treated more favourably than had the Claimant in respect of lateness. Nor did we consider we had any proper evidence concerning the alleged failure of the Respondent to discipline Mr Bunce five and a half years before the Claimant.

42. In the circumstances, we are not able to reach the conclusion that, on the basis of the evidence we heard from the Claimant, there were facts from which we could decide, in the absence of any other explanation, that the Respondent had discriminated against the Claimant on racial grounds. The Claimant did not provide any evidence concerning the two named comparators. The allegation concerning Mr Bunce about which no notice had been given in the pleadings related to an event that was over five years before the matters we were concerned with. We were not impressed with the Claimant's ability to recall events accurately. We do not find the allegation he makes about Mr Bunce to be a fact. Thus, we cannot say that, on what we heard concerning Mr Bunce and the later treatment of the Claimant, there were facts upon which we could decide, in the absence of any other explanation, that direct discrimination took place.

43. If we are wrong about there being facts established on which we could decide that discrimination had occurred, we say that the evidence we heard from the Respondent concerning the named comparator, Ms Gates, reinforces the doubts we have concerning the accuracy of the Claimant's memory and his ability to

recognise a true comparator, one whose conduct concerning lateness puts her (or him) in the same league as the Claimant.

44. We not only reached the conclusion that the facts presented by the Claimant did not entitle us to reach the conclusion that we could decide that the Claimant had contravened the provision outlawing direct discrimination in respect of all the comparators (named in the pleadings or otherwise) but we also reached the same conclusion in respect of the allegation concerning the racist behaviour of Ms Steele. We were presented with no detail whatsoever about the broad allegation that the Claimant made that she had been sacking black staff, especially black agency staff. In respect of her son, it was accepted by the Claimant that Ms Steele's son applied for and was successful in gaining employment with the Respondent on 1 March 2018, five days before the disciplinary hearing before Mr Murray was held. Furthermore, Mr Lucas informed us, and we accept, that Ms Steele is not involved in recruitment in her capacity as operating the customer care team.

Victimisation

45. The Claimant alleges that he sent emails dated 18 December 2017 and January 2018 which constitute protected acts. The Claimant never produced the January email. It is said to have been addressed to Ms Whiteing and contained an allegation of race discrimination. Ms Whiteing denied ever receiving such an email and we were informed by her that a search had been conducted by the Respondent's People Services Team which had failed to uncover such an email.

46. The other email, that dated 18 December 2017, was addressed to Ms Whiteing and was received by her. However, the email was entitled "Statement for the weekend comp[*ain*]". Ms Whiteing understood this to be a response to the fact that Ms Steele had, in her capacity as the manager in charge of the customer care team, raised issues about the responsiveness of the Claimant as a Transport Controller with his line manager, Ms Whiteing. There was no allegation in the email of race discrimination. In this regard, counsel for the Respondent referred us to the judgment of HH Judge Richardson in the EAT in **Beneviste v Kingston University** UKEAT/0393/05/DA and, in particular, to remarks of the judge at paragraph 29:

> There is no need to for the allegation to refer to the legislation, or to allege a contravention, but the gravamen of the allegation must be such that, if the allegation were proved, the alleged act would be a contravention of the legislation. If a woman says to her employer, "I am aggrieved with you for holding back my research and career development" her statement is not protected. If a woman says to her employer, "I am aggrieved with you for holding back my research and career development because I am a woman" or "because you are favouring the men in the department over the women", her statement would be protected even if there was no reference to the 1975 Act or to a contravention of it. An Originating Application does not identify a protected act in the true legal sense merely by making a reference to a criticism, grievance or complaint without suggesting that the criticism, grievance or complaint was in some sense an allegation of discrimination or otherwise a contravention of the legislation.

47. Bearing such guidance in mind, we are satisfied that the email sent by the Claimant to Ms Whiteing did not constitute a protected act. In any event, it is difficult to see any evidence that the Claimant suffered any detriment as a result of sending this email other than not receiving a direct reply. As a consequence,

we dismiss the victimisation claim.

Wages Claim

48. The remaining claim is for wages: the Claimant deals with the claim in his statement at paragraph 60 thus:

> The respondent was made for two weeks' pay. When I got my last wage slip, I was paid for two weeks instead of four weeks in July 2018. I am owed £234.00.

49. The figure of £234.00 was described by the Claimant in his evidence as being a typing error for £254.33.

50. In his ET1 presented to the Tribunal on 20 June 2018 (some 11 months after receipt of his receipt of his 25 July 2017 wage slip), the Claimant had ticked the box to indicate that he was owed arrears of pay. In his elaboration of the claim, he referred to Ms Steele having booked:

> … and also the same manager Pauline Steele she has book 2 weeks of absent but I was at work the when their paid back their money their taken £254 of my ways because of same day payment and the during this period my dad was very ill in the hospital on the date of meeting it was the day I received the news about my dad for the end of life and he pass away on 08 April 2018 the manager in charge Darren Murray he has no consideration of my Dad he was very Rudy I was trying

51. In his "Schedule of Loss as at 4th January 2019", the Claimant wrote under the heading "Unlawful deduction of wages":

> The Respondent did not pay me for two weeks pay for July 2018. I was paid for two weeks instead of four weeks in July 2018.
>
> The Respondent therefore owes me £254.33

52. Solicitors acting for the Claimant presented to the Tribunal on 22 January 2019 a document entitled "Ilunga Statement of Case – Skeleton Argument on behalf of the Claimant" that the Claimant was given permission to file by Employment Judge Tayler on 8 January 2019. In it, the Claimant merely indicated, in respect of arrears of pay, that he would supply details of arrears of pay in the preliminary hearing.

53. In the bundle, we were shown a photocopy of the Claimant's payslip dated 25 July 2017. It indicates that he received Basic Pay for the month of £1,969.39 gross from which a sum of £795.33 was deducted marked "Unpaid Abs". Added in the Claimant's handwriting are the words:

> Paid on 03/08/2017
>
> Same Day Payment System
>
> £795.33 - £541.00 - £254.33

54. So, contrary to the Claimant's statement, the deduction he says left him being owed £254.33 occurred not in July 2018 (a month after he had submitted the ET1) but some eleven months before he submitted the ET1.

55. It is clearly out of time. The Claimant has not presented any evidence designed to show that it was not reasonably practicable for him to have presented the claim within time and this we must dismiss the claim.

56. If we are wrong about that, it is difficult not to agree with Mr Dunn when he submits that the Claimant's evidence regarding this claim is unclear.

57. What is clear is that the Claimant was not challenging the whole of the deduction of £795.33 on his July 2017 pay slip. It would appear from the evidence of Ms Toni Whiteing that the normal procedure if there is a query on a pay slip of a staff member whom she line manages for the staff member to provide her with a photocopy of the pay slip for her to email it to Finance and ask for an explanation. If Finance come back with an answer indicating the Respondent to be at fault, Ms Whiteing said the first way to resolve it is to add money into the following month's wages. But she also said that:

> The other way is for Respondent to offer an on the day payment service if before 10 o'clock that same day - but the negative is the tax man takes a large amount which gets paid back over the next couple of months.

58. Piecing together that evidence with the fact that the Claimant was not claiming the whole of the deduction of the £795.33 and appears to have endorsed on his pay slip a reference to the Same Day Payment System, we conclude that the Claimant had received a payment for £541 on that System (which must have been a net payment) and considered the deduction of £795.33 (which must have been the gross of £541) as leaving him being owed £254.33. If we are right in this conclusion, then the sum of £254.33 is not owed to the Claimant but has disappeared as being deductions for tax and national insurance.

59. Thus, we dismiss the Wages Claim.

Conclusion

60. For the reasons set out above, we dismiss all the claims.

EMPLOYMENT JUDGE -Paul Stewart
On:
10 October 2019

DECISION SENT TO THE PARTIES ON

24/10/2019

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FOR SECRETARY OF THE TRIBUNALS