Case No: 2204613/2018

EMPLOYMENT TRIBUNALS

Claimant: Mr N Onyuta

Respondent: London Underground Ltd

Heard at: London Central

On: 11, 12, 13, 14, 17 & 18 June 2019
19 & 20 June (in chambers)

Before: Employment Judge H Grewal
Mr D Carter and Mr S Williams

Representation

Claimant: In person

Respondent: Ms J Shepherd, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1 The Tribunal does not have jurisdiction to consider complaints of race discrimination and race-related harassment in respect of acts that occurred before 9 December 2017.

2 The complaints of race discrimination and race-related harassment in respect of acts that occurred after 9 December 2017 are not well-founded.

REASONS

1 In a claim form presented on 21 May 2018 the Claimant complained of race discrimination. The Claimant commenced Early Conciliation ("EC") on 8 March 2018 and the EC certificate was granted on 22 April 2018.

The Issues

2 The Claimant describes himself as black African. It was agreed that the issues that we had to determine were as follows:

2.1 Whether the Respondent directly discriminated against/racially harassed the Claimant by doing any of the following:

(a) While he was at Hammersmith from 2008 to January 2015 changing his shift pattern and annual leave so that he lost five days per year;

(b) Moving him from Hammersmith to Ealing Common Depot in January/February 2015 contrary to the workforce agreement;

(c) Mishandling his first grievance dated 18 November 2015 by ignoring his evidence;

(d) Not giving him a pay rise when he moved form Hammersmith in contrast to Mark Morrish who got a pay rise;

(e) Suspending him from work in December 2015 and subjecting him to a disciplinary process culminating in an appeal in June 2016;

(f) Using CCTV cameras against him in the course of the disciplinary process;

(g) Mark Morrish suggesting in the course of the investigation that the golf club which the Claimant had at work was an offensive weapon whereas no such suggestion was made when the golf club had been next to a desk occupied by Nick Wallace, a white man;

(h) Mark Morrish and Matthew Sullivan colluding and devising a special roster (at Ealing) to deny the Claimant his true grade (GH45) as a result of which he was mis-graded at GH35;

(i) Mark Morrish asking Matthew Sullivan to get rid of the Claimant in 2016;

(j) Sarah Barnes/Burns' determination of the Claimant's second grievance (of 15 March 2016 re Mark Morrish) – which, in the Claimant's view, was a "cover up" instructed by Denise O'Connor;

(k) Making a decision not to return the Claimant to Ealing (the Claimant claims that the reason given to him was to avoid him suffering "work-related stress");

(l) Mr Guy discussing the Claimant's medical history with other members of staff such as Dominic Nitu and Darren Ratcliffe in October/November 2017;

(m) Mr Guy aggressively confronting the Claimant in November 2017 (witnessed by David Kemp);

(n) Not investigating properly or at all the Claimant's third grievance of 14 November 2017 in which he alleged bullying by Mr Guy;

(o) Between February and May 2018 forcing the Claimant to accept assignment to Stonebridge Park depot.

2.2 Whether the Tribunal has jurisdiction to consider complaints about any acts or failures to act that occurred before 9 December 2017.

The Law

3 Section 13 of the Equality Act 2010 ("EA 2010") provides that a person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. Race is a protected characteristic (section 4). On a comparison of cases for the purposes of this section, there must be no material difference between the circumstances relating to each case (section 23 EA 2010).

4 Section 26 EA 2010 provides that a person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic and that conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

5 If there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Tribunal must hold that the contravention occurred unless A shows that A did not contravene the provision (section 136 EA 2010). Proceedings on a complaint under the Equality Act 2010 may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the Tribunal thinks just and equitable (section 123(1)). Conduct extending over a period is to be treated as done at the end of the period (section 123(3)(a)). Failing to do something is to be treated as occurring when the person in question decided on it (section 123(3)(b)). Section 140B extends the time limit for bringing claims to facilitate Early Conciliation.

6 In recent years the higher courts have emphasised that in cases where there is no actual comparator, or where there is a dispute about whether a comparator is an appropriate comparator, tribunals should focus on why the claimant was treated in the way that he or she was treated. Was it because of a protected characteristic? The point has been made, among others, by Lord Nicholls in **Shamoon v Chief Constable of the RUC [2003] IRLR 285** (at paragraph 11), Mummery LJ in **Aylott v Stockton on Tees BC [2010] IRLR 94** (at paragraph 41 – "*There is essentially a single question: did the claimant, on the proscribed ground, receive less favourable treatment than others?"*) and Underhill J in **Cordell v FCO [2012] ICR 280** (at paragraph 18).

7 It has long been recognised that it is extremely rare for there to be overt evidence of direct discrimination and the issue in each case will be whether such discrimination

can be inferred from the primary facts found by the tribunal. In determining whether there are facts from which the tribunal can infer race or sex discrimination, the tribunal must have regard to all the material facts and is not limited to considering only the evidence adduced by the claimant – **Laing v Manchester City Council [2006] IRLR 745**. Where there is a finding of less favourable treatment, a tribunal may infer that discrimination was on the proscribed grounds if there is no explanation for the treatment or if the explanation proffered is rejected - **King v Great Britain-China Centre [1991] IRLR 513.**

8 The burden of proof does not shift to the employer simply on the claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate the possibility of discrimination. They are not, without more, sufficient material from which a tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination – **Madarassy v Nomura International PLC [2007] IRLR 247**.

9 If the tribunal is satisfied that the prohibited characteristic was one of the reasons for the treatment in question, that is sufficient to establish direct discrimination. It need not be the sole or even principal reason for the conduct; it is enough that it is a contributing cause in the sense of a "significant influence" – Lord Nicholls in **Nagarajan v London Regional Transport [1999[IRLR 572, at 576.**

The Evidence

10 The Claimant gave evidence and Wubneh Mekennon (Store Operative) and Derek McGuinness (RMT representative) gave evidence in support of his claim. The following witnesses gave evidence on behalf of the Respondent – Mark Morrish (Stores Manager), Matthew Sullivan (Group Warehouse Manager), David Scotchbrook (Stores Manager), Wayne Windelier (Depot Manager), Mark Guy (acting Stores Manager), Duncan Weir (Head of Operational Track -Asset Operations), Fernando Soler (Service Control Manager), Sarah Barnes (Commercial Manager – Fleet Operations), Denise O'Connor (Head of Plants and Materials Management) and Anne-Marie Costigan (HR Manager). The Tribunal had a bundle of documents that comprised 570 pages. Having considered all the oral and documentary evidence, the Tribunal made the following findings of fact.

Findings of Fact

11 The Claimant describes himself as black African.

12 On 8 December 2008 the Claimant commenced employment with the Respondent as Store Operative (pay scale GH35) based at the depot at Hammersmith. Prior to being appointed permanently to the role he had worked in it for a few months in a temporary capacity, having been recruited to it by Mark Morrish, the Stores Manager at Hammersmith.

13 The Claimant's contract contained the following terms:

> "*Your normal work location will be Hammersmith Depot, Lena Gardens, Hammersmith, London, W6 7PY. LUL will endeavour to allocate you to an operating location convenient to you, but reserves the right to require you to work*

at any place it may from time to time determine within the area served by LUL and the London Bus Services."

"*Your contractual hours of work are 35 and average number of shifts per week are 5. These hours and shifts may be averaged out over a year in accordance with the duty rosters and current trade union agreements. Duty rosters operate on a 24 hour, 7 days a week basis and include statutory holidays…*

Your working pattern may be changed from time to time to meet the needs of the business. Your manager will advise you of your times of attendance."

"*You are entitled to 7.4 weeks' annual leave per annum … inclusive of statutory holidays…*

Dates on which leave is taken will be by agreement between you and your manager/supervisor in line with trade union agreements."

14 The stores in the depot were part of Fleet Maintenance. According to the Framework Agreement for Fleet Maintenance there were two types of stores employees – stores charge hand and stores operative. Their duties were described as follows. The stores charge hand covered for the stores manager in his absence, was responsible for co-ordinating daily activities within the stores and arranging ad hoc changes to workload planning depending on deliveries and issues required at any time, providing guidance to the team members and undertaking stores work within his/her competence including the work of a stores operative. The stores operative carried out materials supply activities including goods receipt and issue, materials storage and handling (including use of lifting equipment), perpetual stock accuracy checks, daily specific stock accounts, meeting attendance as required to report back on nil and low stocks. The Agreement stated that they would also be required to undertake all tasks for which they were deemed competent or licensed, as appropriate, to the duties to which they were assigned.

15 Paragraph 2.1 of the Framework Agreement dealt with where employees worked and provided at paragraph 2.1.1,

> "*Employees will normally be allocated to work at a specific depot. LUL will endeavour to deploy employees to an operating location convenient to them, but reserves the right to require an employee to work at any location it may from time to time determine, provided that such a place is within the area served by London Transport services."*

Paragraph 3.1 dealt with shift patterns and paragraph 3.1.1 provided,

"*All employees are contracted to be prepared to work shifts. They are:*

Day - Days
Two Shift - Days/Lates (D/L)
Two Shift - Days/Nights (D/N)
3 Shift - Variable shift pattern over a 24 hour period
Nights - Nights (N)"

16 The pay scales of the stores employees depended on their role (whether they were employed as a stores chargehand or a stores operative) and the frequency with which they were rostered to work shifts with unsociable hours. Any shift that involved working beyond 6 pm. was classified as a shift with unsociable hours. Charge hands who worked only days were on pay scale GH13, those who worked one shift in three with unsociable hours were on GH 33 and those who worked one shift in two with unsociable hours were on GH43. As far as stores operatives were concerned those who worked days only were GH15, those who worked one shift in three with unsociable hours were on GH35 and those who worked one shift in two with unsociable hours were on GH45. The pay increased as the frequency of working shifts with unsociable hours increased.

17 When the Claimant first started at Hammersmith there were three shifts – 7.30 am to 3.15 pm, 10.20 am to 6 pm and 10 pm to 6 am. The shift pattern was working each of those shifts in turn. The result was that he worked one shift with unsociable hours in every three shifts he worked. From about 2012 the night shift was stopped. Thereafter, the Claimant and the other store operatives worked only day shifts, but they continued to be paid at the GH35 pay scale.

18 At Hammersmith the Claimant reported to Mark Morrish, the Stores Manager. Mr Morrish reported to Matthew Sullivan, Group Warehouse Manager. Mr Morrish was not a particularly proactive or assertive manager. The Claimant and Mr Morrish had a good working relationship and they socialised outside work. Mr Morrish had attended social events at the Claimant's home.

19 Around 2008 the Respondent reduced the standard working week from 37.5 to 35 hours per week and introduced Banked Rest Days (known as "non-SAP" days). The way that this worked was that staff worked an extra 9 minutes on each shift and thus accrued 5 rest days in addition to their contractual 37 days of annual leave. In the Hammersmith depot the extra five days were awarded by not rostering staff to work on bank holidays (other than those over Christmas and the New Year) leaving staff to use their contractual holiday entitlement (of 37 days) over the rest of the year.

20 In 2012 the Respondent decided to pool responsibilities for materials together under the Head of Materials Management, Denise O'Connor. At that point all the stores staff were transferred into her team.

21 In about 2013, following the introduction of new trains, the Respondent decided that it no longer required the Hammersmith depot and it began consultations with the trade unions about closing it down. A large number of staff worked at the depot and the stores staff were a very small part of it. At a meeting on 9 December 2013 it was agreed that stores staff were within Asset Performance (Denise O'Connor's team) and would not form part of the consultations (called the MCP9 discussions). Any changes proposed by their line management in relation to them would be the subject of separate consultation. John Hunt from RMT was present at that meeting.

22 In the latter half of 2014 Matthew Sullivan had discussions with Mark Morrish and the two stores staff in Hammersmith – the Claimant and Wubneh Mekennon – about the closing down of Hammersmith. Initially, there was no other role available for Mr Morrish and he was willing to take redundancy. However, Nick Wallace, the District Line stores manager, resigned and Mr Morrish was instructed to take over that role. He did so in November 2014. He did not get any pay rise.

23 The discussions with the Claimant and Wubneh Mekennon continued from October to December 2014. They were asked to choose a depot to which they wished to transfer. Derek McGuiness was involved in these discussions. Mr Mekennon chose Ealing Common. The Claimant initially chose Hainault, but then changed his mind and said that he wanted to go to Northumberland Park. He was told that that would not be possible because an employee, who had previously worked at Hammersmith, had been moved there after a dispute between him and the Claimant and Mr Mekennon in order to separate them. There was then some discussion around Neasden and the Claimant finally settled on Ealing Common.

24 On 9 December 2014 Mr Sullivan met with John Hunt and Derek McGuinness, the RMT representatives, to discuss the move of the Hammersmith stores staff. Mr Sullivan confirmed that the Claimant and Mr Mekennon would be moving to Ealing Common stores and that the Ealing Common depot wd be their home depot. He said that they wd continue to work as GH35 operatives and that the shift pattern at Ealing was one shift with unsociable hours in every three shifts ("one in three"). John Merritt, who had been working at Ealing Common, was transferring to Neasden at his request. Mr Merritt had historically been on pay scale GH 45. He had continued to be paid at that scale at Ealing Common although he had worked a one in three shift pattern. Mr Sullivan also advised them that Hammersmith would be supported as a satellite out of Ealing Common stores.

25 There were two shifts at Ealing Common – 7.30 am to 3.10 pm and 2 pm to 9.40 pm. The latter counted as a shift with unsociable hours because it involved working after 6 pm. The stores operatives at Ealing Common worked one in three, i.e. two weeks working the early shift and one week working the late shift. The charge hand, Balvinder Malan, worked one in two, i.e. one early shift and one late shift every two weeks. He had worked that pattern for many years.

26 On 13 January 2015 Mr Sullivan wrote to the Claimant to confirm that on 23 February 2015 he would transfer to the Ealing Common depot as Stores Operative reporting to the District Line Stores Manager. He said that there would be no change to his role or responsibilities and that he would remain on the same grade and salary and terms and conditions. A similar letter was sent to Mr Mekennon.

27 On 19 February Denise O'Connor and Mr Sullivan met with the Claimant and Mr Mekennon and their RMT representatives, John Hunt and Derek McGuiness. The meeting was held because the Claimant and Mr Mekennon had raised questions about shift patterns at Ealing and the correct level of pay. They felt that because there were two shifts worked at Ealing they would be working a one in two pattern and should, therefore, be paid at GH45 level. Ms O'Connor explained that although there were two shifts at Ealing, the pattern worked there and that which they would be work was a one in three (one late shift followed by two early shifts). There was then an adjournment during which the Claimant and Mr Mekennon had a discussion with their trade union representatives. After the adjournment, they accepted that what they were being asked to work was a one in three shift pattern. They confirmed that they would be happy to move to Ealing Common on 23 February.

28 On 23 February 2015 they moved to Ealing Common. There was one other stores operative (Arif Mehmet) who worked there. There was a stores operative called Mark

Eastwood who worked at the Upminster depot. They were both at GH35 level and worked a one in three shift pattern.

29 There were issues with the Claimant and, to a lesser extent, Mr Mekennon from the start. They would leave early and argue that what they were being asked to do was not part of their job. However, their behaviour became more disruptive and challenging in September 2015 when Derek McGuiness started advising them. The Claimant did not always work his full shifts; he often arrived late or left early and took long breaks. There was a signing in book the use of which, unfortunately, was not strictly enforced. The Claimant did not accurately record the times that he arrived and left. When Mr Morrish challenged him about leaving early, the Claimant would deny it and would say to Mr Morrish that he could not prove it. The Claimant and Mr Mekennon refused to load or unload vehicles transferring materials to other depots, especially to Upminster. Mr McGuiness had advised the Claimant that it was not part of his duties and he did not have to do it. That was incorrect. It was part of the store operative's duties. When Mr Morrish challenged the Claimant, his response was that he was not going to do it and there was nothing Mr Morrish could do about it. The Claimant and Mr Mekennon refused to go to meetings which Store Operatives had to attend. The other store operative, Arif Mehmet, and the charge hand, Balvinder Malhan, did that work and could not understand why the Claimant and Mr Mekennon felt they did not have to do it. They felt that Mr Morrish was not dealing with it and was letting them do what they wanted. A more effective and robust manager would and should have taken disciplinary action against them at that stage.

30 On 15 October Mr Morrish sent Matthew Sullivan an email in which he said that the issues were still unresolved and that the Claimant was refusing to speak to Peter Kent (who worked in the stores at Upminster) because he said that Peter had nothing to do with Ealing and he (the Claimant) had nothing to do with Upminster. He continued,

> "*This is causing additional work as the figures put out by Nicholas were incorrect. Nicholas is unreliable, un-cooperative and causing anguish within the team.*
> *I have asked Balvinder to submit the figures to Peter at the end of his shift.*
>
> *Balvinder has done the transfer for the MA, which will be sent on the van, to Upminster on Friday."*

He concluded the email by asking Mr Sullivan whether he could transfer the Claimant to another area.

31 On 20 October Mr Morrish was working at Upminster and the Claimant was working the late shift at Ealing (2pm to 9.39). Mr Morrish returned to the Ealing depot at around 7-30-8 p.m. The stores and the store office were closed and the Claimant was not there. He went to see if his car was there and it was not. He spoke to the security team who told him that that the Claimant had left and that he regularly left at about 8 p.m. The signing out sheet showed the Claimant as having left at the correct time. Mr Morrish spoke to the Claimant about it the following morning. The Claimant laughed and said that Mr Morrish could not prove it. Mr Morrish told Mr Sullivan about it.

32 On 21 October Matthew Sullivan was at Ealing and he spoke to the Claimant and Mr Mekonnen about their refusal to carry out reasonable instructions with regards to

Upminster. He advised them that it was part of their normal store duties to liaise with other depots, load vehicles, transfer materials and provide stock levels as required. John Hunt also spoke to them and advised them that it was part of their normal duties.

33 On 26 October the Claimant was working the early shift and left 30 minutes before the end of the shift. Mr Morrish sent him an email in which he reminded him of the start and end times of the two shifts and said that it was not acceptable for him to leave 30 minutes early as he had done the previous day. He also said that reminding him of his working hours was not harrassment because when he had done so in the past the Claimant had accused him of harassment. His email was copied to Matthew Sullivan and John Hunt. The Claimant's response was that he was well aware of his hours and that he hoped that it applied to Mr Morrish as a manager as well because his contracted hours were 7.30 to 15.09m and "*not 9.10am-10pm or till when you feel like going home."* He said that the matter had arisen before when Mr Morrish had turned up at work whenever he wanted and that his hours had been made clear to him. He continued "*so please don's start it up again as I'm well aware of my hours that's why I call it harassment."* It was an unacceptable response to a reasonable management instruction.

34 On 29 October Mr Sullivan sent an email to Ian McCrow, Security Manager at the Respondent. He said that he had a serious concern at the Ealing Common depot because he had reason to believe that a member of the stores team had left the depot for a considerable amount of time but had remained signed in. That meant that in the event of an evacuation the individual would be unaccounted for and members of the emergency services or the individual's colleagues could put themselves at risk unnecessarily looking for the individual. He described the Claimant's car and asked Mr McCrow to either supply the relevant CCTV or to confirm the entry and exit times of the vehicle on 20 October 2015. He was provided with the CCTV footage in early November.

35 On 10 November Mr Morrish returned to Ealing at 9.30 p.m. and the Claimant had already left. He was supposed to be working until 9.39. Mr Morrsih sent him an email on 10 November in which he pointed that out that there was no flexi-time in stores or working though lunch and going home early.

36 Prior to that Mr Morrish had agreed with the Claimant and Mr Mekonnen that they would work overtime on a Saturday and Sunday. They left after working five hours on the Saturday and did not come to work at all on Sunday. On 10 November the Claimant sent Mr Morrish an email in which he said that he had seen that his and Mr Mekonnen's names had been crossed out on the overtime sheet for the Sunday. The Claimant said that the overtime that they did was "job and knock". That referred to a previous practice where people had claimed overtime for more hours than they had worked on the basis that they were entitled to leave when the job was done but to claim overtime for the full period. He continued,

> **"***so please do the right thing. And stop upsetting us because this issue could turn into something else on top of what is already going on. And I'm sure we all don't want to go down that road. That's why I don't want to talk to you any more because of the things you have done to us. And you still keep on do it."*

37 Mr Morrish responded that there was no "job and knock" and that he had made that clear on Saturday and that the Claimant would not be paid for Sunday as he had not worked on Sunday.

38 On 13 November 2015 Mr Sullivan called David Scotchbrook, Stores Manager for Northumberland Park, and said that he had concerns about staff at Ealing Common, in particular the Claimant, leaving before the end of their shift and he asked him to investigate the matter.

39 On 18 November Mr Sullivan wrote again to Mr McCrow. He said that he had viewed the CCTV and had discussed it with the legal team as the matter was under investigation. He said that they had advised him to get a second CCTV footage to ensure that it was not a one off. He asked for CCTV footage for 10 November between 7 pm. and 9.40.

40 On 18 November Mr Morrish sent the Claimant an email that a member of staff had told him that he had asked the Claimant to pass a message to Mr Morrish and the Claimant had responded that he had not passed on the message as he was not talking to Mr Morrish.

41 On the same day Mr Morrish sent a message to the everyone in the stores team at Ealing about time-keeping. He reminded them of the start and finish times of their shifts and that there was no flexi-time which meant that if people chose to come in early that did not mean they could leave early. He also pointed out there was no working though lunch and leaving early.

42 The Claimant's response is set out below,

> *"Lead by example mark! You're a manager I know this is part of your bulling tactics let me make it clear to you what are your contracted hours? Your quick to talk about my hours I do my hours. do you do your contracted hours No you Don't THEM your hours are 7.30am to 15.15. I think you will find these are NOT from 9am to 20.30 pm or at any time that you wish to turn up at work…now if you don't stop what your doing I'm going to escalate this issue to HR… so please stop picking on us now before this turns into some else. I think you know what I mean don't say I did not tell you."*

The content of the email is nonsensical. Mr Morrish was reminding staff that they must be at work during the contracted hours. The Claimant's response to that is to suggest that his manager was doing something wrong by being at work for longer than his contracted hours. The tone is insubordinate, offensive and threatening.

43 On 18 November the Claimant raised a formal grievance in which he complained about the lack of consultation prior to the move from Hammersmith, the level of pay at Ealing and being given additional duties since the move. His desired outcome was for his grade to change to GH45. Sarah Barnes was appointed to investigate his grievance.

44 On 3 December Mr Scotchbrook interviewed Mr Morrish as part of his investigation into timekeeping. Mr Morrish said that he was annoyed that they were only talking about time-keeping because there were other more serious issues that needed to addressed as well, such as the Claimant's refusal to work and to speak to

his colleagues and to him. Mr Scotchbrook passed Mr Morrish's concerns on to Mr Sullivan.

45 Sarah Barnes interviewed the Claimant, who was accompanied by Mr McGuiness, on 3 December 2015 and Messrs Morrish and Sullivan on 8 December.

46 On 11 December Mr Sullivan met Mr Morrish, in the presence of Mr Scotchbrook, to discuss Mr Morrish's concerns about the Claimant. A number of issues came up. Mr Morrish said that the Claimant had been wearing headphones while working. He had asked him to take them off and the Claimant had refused. In February 2015 the Claimant had had a golf club by his desk. Mr Morrish had told him to take it home. The Claimant had not done so and Mr Morrish had put it in the skip. A new golf club had appeared next to his desk that week and he felt threatened by it. The Claimant had been told to put on safety boots but had refused to do so. The Claimant was not talking to the rest of the team and was blanking Arif completely. Mr Sullivan said that he had received emails from Arif asking for an immediate transfer out of Ealing. Mr Morrsih was asked whether he could manage the Claimant and he replied that he could not.

47 Following this meeting Mr Sullivan decided to widen the scope of Mr Scotchbrook's investigation to look into all the other matters raised by Mr Morrish and to suspend the Claimant while that investigation took place. On 21 December Mr Morrish wrote to the Claimant advising him of his suspension on full pay as from that date. **200-202** He said that the reason for the suspension was his alleged continued failure to follow reasonable management requests and instructions. He was informed that an investigation was being undertaken by Mr Scotchbrook and that Mr Scorchbrook would get in touch with him to interview him

48 Mr Scotchbrook interviewed the Claimant on 15 January 2016. The Claimant was accompanied by Mr McGuiness. The Claimant said that there were serious relationship issues between him and Mr Morrish and that he had told a colleague that he would not a pass message to Mr Morrish because he was not talking to him. He said that he had found the golf club in a pit and was going to take it home but had forgotten to do so. He accepted that his emails to Mr Morrish had been unacceptable had sounded threatening but said that he had felt harassed and very upset at the time. He was asked about 20 October and 10 November when the CCTV footage had shown him as leaving considerably before the end of his shift but the signing out sheets had shown him as leaving at the end of the shift. The Claimant said that if that was what the CCTV footage had shown he must have left early. He said that on one occasion he had gone home early because there had been a problem at home. He accepted that he should have notified a manager of that and said that he must have put the end time of the shift on the sheet because everyone did that.

49 Sarah Barnes interviewed John Hunt from RMT on 18 January 2016. He confirmed that the note of the meeting of 9 December 2014 was accurate. He confirmed that the roster at Ealing was a one in three shift and that they had all agreed that it was properly graded at GH35.

50 Ms Barnes produced her grievance investigation report on 3 February 2016. She did not uphold any of the Claimant's complaints. She concluded that (i) an acceptable level of consultation had taken place prior to the Claimant's transfer from Hammersmith to Ealing and that agreements were reached and accepted by all at

the meetings; (ii) although there were two shifts at Ealing Common, the Claimant was working one shift with unsociable hours in every three shift and was therefore, appropriately, classified as "one in three" for pay levels; (iii) the Claimant had been given adequate notice of the change in shift patterns prior to the move; (iv) as the Claimant was working one in three, the grade level at which he was employed was correct; and (v) Ealing Common and Upminster depots were both part of the District Line and material needed to be moved between the depots and it was not unreasonable to ask employees working at those two depots to assist in the movement of the materials.

51 Ms Barnes presented her findings to the Claimant and Mr McGuiness at a meeting on 10 February 2016. A letter confirming the outcome and enclosing the investigation report and the minutes of the meeting on 10 February was sent to the Claimant on 15 February. Ms Barnes advised him of his right of appeal and that any appeal should be submitted in writing within seven calendar days.

52 On 12 February 2016 Mr Scotchbrook recommended that the Claimant's case proceed to a Company Disciplinary Interview. The Respondent's Discipline at Work Procedure provides that where there is evidence of gross misconduct the case must be referred to a Company Discipline Interview ("CDI"). The alternative is a Local Disciplinary Interview at which the only sanctions that can be imposed are an oral warning or a written warning. At a CDI there is a wider choice of sanctions available. These include final written warning, a transfer and dismissal. Mr Scotchbrook identified the following matters as potentially being gross misconduct – on 20 October and 10 November 2015 the Claimant had failed to complete his full shift, on the first occasion leaving the depot at 20.28 and on the second at 20.11 (when his shift was due to end at 21.40); between 27 October and 20 November 2015 the Claimant had sent his line manager emails that were not polite, courteous or respectful but threatening and intimidating; and on 9 December 2015 he had not been wearing his safety footwear.

53 On 18 February 2016 Mr Scotchbrook informed the Claimant of his decision to refer him to a CDI. He warned him that a possible outcome might be the immediate termination of his employment.

54 On 24 February 2016 the Claimant appealed the grievance outcome. His appeal was rejected as it was submitted out of time. HR's advice was that there were not any exceptional circumstances to justify granting the Claimant an extension of time.

55 On 25 February 2016 Mr Scotchbrook invited the Claimant to attend a CDI on 16 or 17 March 2016. He told him that he was being charged with gross misconduct and set out the allegations which had been identified in his report and the sections of the Respondent's Code of Conduct which applied. He sent him a copy of the documents which had formed part of his investigation. He advised him of his right to be accompanied and to adduce evidence at the CDI. He was warned that a potential outcome might be a final written warning or a summary dismissal.

56 On 15 March the Claimant wrote to the Respondent that he wanted to take out a grievance for institutional racism, harassment and bullying which had caused me a lot of stress for over two years. He said that it had now got to the point where he had been suspended from work "*for a false and cooked up allegation".* Messrs Sullivan

and Morrish and others had been "*colluding and inciting and influencing the outcome"* of the investigation that had taken place.

57 The CDI took place on 17 March and 8 April 2016. It was conducted by Wayne Windeler and Keith Clarke. The Claimant was represented by Mr McGuiness.

58 On 28 April Mr Winderler sent the Claimant the outcome of the CDI. The panel had found two of the three allegations to be proven. They had found that the Claimant had on 20 October and 10 November 2015 left the depot before the end of his shift. He had accepted that and had given reasons at the CDI for leaving early. He had said that he had left early on 20 October 2018 because there were problems with drainage at home and Thames Water was coming to visit. Thames Water had confirmed that they had attended. However, the incident had been reported on 28 October and had been resolved on that day. There was no evidence of the incident being reported on 20 October. Before 10 November Mr Morrish had reminded the Claimant of the times that his shifts started and ended. On 8 April the Claimant had said that he had left early on 10 November because of a headache and he had told Mr Morrish that. However, when Mr Scotchbrook had first asked him about it he had said that he could not recall going home early on that day but if the CCTV showed that, he must have done so. The reasons that he had given for leaving early were not credible. The panel also found that the Claimant's emails to his manager had not been polite, courteous or respectful but threatening and intimidating. The Claimant had accepted that but had said in his defence that they had been written in response to bullying and harassment from Mr Morrish. The panel had not seen any evidence of Mr Morrish bullying and harassing the Claimant. The panel found that there was insufficient evidence that the Claimant was not wearing safety footwear or that he had failed to follow safety procedures.

59 The sanction imposed for leaving work before the end of his shift was a final written warning which would be effective for 52 weeks from 20 October 2016. The sanction for the emails to his line manager was to transfer the Claimant to Hainault depot as a result of the serious breakdown in his relationship with his line manager. The transfer would be for a period of 52 weeks after which time the Claimant would move back to his substantive role at Ealing Common depot. The Clamant was to start work at Hainault on 3 May 2016. The panel also identified certain training which the Claimant had to undertake in order to improve his conduct. The training was to be taken within two months of the date of the letter but definitely before the Claimant returned to the Ealing Common.

60 On 3 May 2016 the Claimant appealed the outcome of the CDI. The appeal was heard by Duncan Weir on 6 June 2016. Mr Weir sent the Claimant his decision on 24 June 2016. He concluded that the panel had been correct to conclude that the charges against the Claimant had been proven. He upheld the sanction for the second charge but reduced it for the first charge from a final written warning to a written warning. His reason for doing that was that although Mr Morrish had informally warned the Claimant about his time-keeping, the Claimant had not been given a written warning which would have given him the opportunity to reflect and moderate his behaviour accordingly. He, therefore, believed that the charge of gross misconduct for that had not been proportionate.

61 The Claimant transferred to the Hainault depot at the beginning of May 2016.

62 The Respondent commissioned a company called CMP Resolutions on 29 March 2016 to undertake an independent investigation of the Claimant's grievance of 15 March. The investigation was undertaken by Morag Slater. She interviewed the Claimant on 26 April and 6 May 2016 and Messrs Sullivan and Morrish on 25 May and 7 June 2016 respectively. She interviewed a further ten witnesses between June and August 2016.

63 Ms Slater produced her investigation report on 22 November 2016. Having clarified his complaint with him, she had understood him to be making the following five allegations:

(a) Unfair and inconsistent treatment due to race with respect to the terms and conditions of transfer to a new depot and the withholding of overtime;

(b) Collusion to affect his career and preferred transfer location, including inappropriate and dishonest comments and influencing others;

(c) Abuse of power including how terms and conditions were confirmed and the breach of Health and Safety (H&S) and CCTV procedures and policies;

(d) Inappropriate conduct of manager including providing incorrect evidence during the misconduct investigation; and

(e) Lack of due process and biased and flawed investigation into alleged misconduct.

64 Her conclusions on each of those allegations were as follows;

(a) The shift pattern had been raised, discussed and reviewed multiple times and the Claimant had raised repeat allegations about it and on this occasion had added that it was race discrimination. There was no evidence that the Claimant had been treated differently from his comparators and a historical grade was no longer a valid comparator. The evidence showed that the Claimant had been graded and paid in line with his shift pattern as the grade is directly related to the regularity of unsocial hours and the Claimant's "unsocial" late shifts occurred every three weeks. The Claimant's claim for overtime was for overtime that he had not worked and in relation to a practice that had resulted in the dismissal of other employees in the wider organisation. His claim that he had been treated unfairly due to Mr Morrish withholding a payment for overtime not worked was not upheld.

(b) This allegation related primarily to the failure to move the Claimant to Northumberland Park. Ms Slater did not uphold the allegation that Messrs Sullivan and Morrish had made dishonest comments about the Claimant and another employee working together. There was insufficient evidence of Mr Morrish having made any other comments about the Claimant. It was clear, however, that the relationship between them was strained and that that was known by other employees.

(c) The allegation that Mr Sullivan had abused his power by issuing the Claimant's terms and conditions to him in writing was not upheld. Mr

Sullivan had health and Safety concerns from October 2015 to January 2016 when the requests for CCTV footage were made. He also had timekeeping concerns but the Heath and Safety concerns had taken priority. However, there had been insufficient communication of the Health and Safety requirements to the Claimant and the team.

(d) There had not been inappropriate conduct by Mr Morrish. The emails sent by the Claimant had demonstrated inappropriate and unprofessional behaviour. The conclusion was that Mr Morrish had found it difficult to manage the Claimant and had some management development needs.

(e) While there were aspects of the investigation which could have been improved, it had not been biased or flawed. The potential disciplinary charge had been determined by Mr Scotchbrook and not anyone else. He had weighed up the quality of the evidence and discounted aspects that lacked sufficient or robust evidence. The emails sent by the Claimant were sufficient grounds to pursue a disciplinary process, irrespective of the frustrations the Claimant was experiencing.

66 On 2 December 2016 the HR department informed the Claimant that Ms Slater had completed her investigation and that the next stage would be for an internal accredited manager to review the report and to determine the outcome and any recommendations and that these would then be shared with the Claimant. The manager who was asked to review the report was Fernando Soler, Service Control Manager for the Jubilee Line. Having considered the report carefully, Mr Soler decided not to uphold the Claimant's complaint of bullying and harassment but recognised that there were areas where the business and the management involved could improve.

67 Mr Soler met with the Claimant on 22 December 2106 and 11 January 2017 to discuss the report and his decision. The Claimant was accompanied by Mr McGuiness. Ms Slater and someone from HR also attended. The Claimant was given a copy of the report on 22 December. The recommendations that Mr Soler made were that:

(a) A formal offer of mediation be made to the Claimant, Mr Morrish and Mr Sullivan. He felt that there had been a serious breakdown of relationship between the Claimant and his management and that an open discussion might help them to build a constructive working relationship.

(b) There be a review of management capability and the skillset of the team;

(c) A review be undertaken of the working practices of the team;

(d) A review be undertaken to ensure that that processes were consistent across the various depots; and

(e) There be a review of the communication processes within the teams.

68 The conclusions were set out in a letter dated 12 January 2017. The Claimant was advised of his right to appeal within seven days of receipt of the letter. The Claimant appealed on 17 January 2017.

69 The grievance appeal was heard by Celia Harrison on 2 March 2017 **386-391.** The Claimant was represented by Mr McGuiness. Ms Harrison dismissed the appeal on 6 March 2017.

70 On 5 May 2017 Ms O'Connor met with the Claimant and Mr McGuiness to discuss the Claimant's return to the Ealing Common depot. The Claimant said that he wanted to go back to the Ealing Common depot and Ms O'Connor said that there needed to be a good working relationship and a support network in place for him. The Claimant had still not attended the two training courses which the CDI outcome letter had said that he needed to undertake before returning to Ealing Common. The Claimant agreed that he would book them. He was told that Matt Sullivan no longer worked in the team and that Sarah Barnes was Mr Morrish's line manager. The Claimant said that he was willing to participate in mediation with Mr Morrish. Ms O'Connor proposed 4 July as a date for mediation. That was later changed to 1 August 2017. Ms O'Connor also suggested that it would be helpful to the Claimant to have a mentor in the team and suggested David Kemp for that role. David Kemp was the Central Line Stores Manager at Hainault. The Claimant said that he was very intelligent, calm and relaxed and that he got on with him. She offered the Claimant counselling sessions through OH if he wanted them. It was agreed that they would aim for the Claimant to return to Ealing Common on 31 July 2017. Ms O'Connor said that they would pay the Claimant travel time from that date until 31 July 2017. The Claimant asked for that to be backdated to October 2016. Ms O'Connor pointed out that the Claimant had been sent to Hainault because his behaviour had fallen short. She agreed as a compromise to backdate the travel payments to 1 April 2017.

71 Mr Morrish made it clear that he would not attend the mediation voluntarily because he had no confidence in the process. He said that he had no faith in the Claimant because he had fabricated evidence and had lied and maligned his character by accusing him of bullying, harassment and racism toward him (the claimant) and Mr Mekonnen. There was no possibility of restoring any kind of relationship of trust between him and the Claimant because he did not have any trust in him. He would attend the mediation if he was compelled to do but would not sign the mediation confidentiality agreement.

72 Ms O'Connor decided that there was no point in pursuing mediation if Mr Morrish did not want to participate in it voluntarily. It was unlikely to achieve anything in those circumstances. She, therefore, advised the Claimant that the mediation scheduled for 1 August was cancelled and said that she would be in contact with him to confirm the date when he could return to Ealing Common.

73 Ms O'Connor wanted to arrange a meeting with the Claimant and Mr Morrish before the Claimant returned to Ealing Common. The Claimant was on restricted duties at Hainault and was due to have an Occupational health assessment later in August. Ms O'Connor felt that it was wise to delay the meeting to discuss his return to Ealing Common until it was known whether he could undertake the full range of his duties at Ealing Common. Hence, she postponed the meeting until after he had had his Occupational Health assessment. The OH assessment took place on 21 August 2017.

74 On 19 September2017 the Claimant informed Ms O'Connor that he no longer wanted Mr Kemp to be his mentor. He said that he had had problems at Hainault, similar to those that he had had at Ealing Common. Mr Kemp was aware of them but

had done nothing about them and he felt that it was being covered up by him. Mr Kemp was absent sick from 20 September onwards.

75 On 26 September Ms O'Connor advised the Claimant that she would arrange a ground rules or "clear the air" meeting on 19 October 2017 to be attended by him, Mr Morrish, Sarah Barnes, John Hunt (RMT representative) and Derek McGuiness. She sent him an agenda for the meeting. Mr McGuiness informed her that the Claimant was not happy with the agenda and wanted to raise other issues. Ms O'Connor took the view that it was likely that the meeting would be confrontational and would not achieve anything. Hence, she cancelled the meeting. In light of the continuing mistrust and ill-feeling between the Claimant and Mr Morrish she had serious reservations as to whether they could re-establish a working relationship. Furthermore, Ms Barnes was not permanently based at the depot and so there would not be anyone readily available to support Mr Morrish should issues arise between him and the Claimant. She had serious concerns that forcing Mr Morrish to manage the Claimant might well have a detrimental impact upon his health. She took the view that it would not be appropriate for the Claimant to return to Ealing at that time. She decided to discuss the matter with HR.

76 Mark Guy was the Chargehand at Hainault and acted as Stores manager while Mr Kemp was absent sick. He was on annual leave form 20 to 30 October 2017. On 25 October Mr Sullivan called him and asked for his assistance in locating a harness cable for a stopped train at Hainault. Mr Guy called the depot and spoke to the Sores Operative there. He asked him to get the Claimant to assist in the matter. The operative said that the Claimant was not at work. Mr Guy confirmed that the Claimant had not booked any leave for that day. He sent the Claimant two text messages asking him why he had not attended and whether he was alright. The Claimant did not respond.

77 This was not the first time that the Claimant had been missing from work. He regularly arrived late but entered an earlier time on the attendance sheet or just disappeared for a few hours from work in the middle of the day or would be present but not working. Mr Kemp and Mr Guy had both spoken to him on occasions about it and his colleagues had complained that he did whatever he wanted and that he got away with it.

78 When Mr Guy returned to work on 31 October he spoke to the Claimant about his non-attendance on 25 October and gave him a letter of advice. The letter of advice simply reminded the Claimant of the procedures to be followed. He had to ensure that any annual leave required was requested and approved in advance. If he was unable to attend for any other reason he should contact the manager, Chargehand or deputy prior to the start of his shift and advise him or her of the reason for his non-attendance. The Claimant said that he "didn't see the big deal" as he would just take the day as a non-SAP day. This was a reference to the extra five days' annual leave that Stores Operatives get by working an extra 10 minutes. There are not recorded on the Respondent's shift/absence recording system (known as "SAP"). However, employees are still expected to get authorisation from their managers to take non-SAP days off. Mr Guy told the Claimant that he had not earned any SAP days because he did not work the extra 10 minutes and he had not sought approval in advance to take the day off. The Claimant got angry with Mr Guy and shouted at him. He said that he was liar and a hypocrite and that his absence was none of Mr Guy's

business as he was not his line manager. He threw the letter of advice across the room.

79 That afternoon the Claimant sent Ms O'Connor an email in which he asked her to advise Mr Guy to stop harassing him. He said that he had taken the day off as a non-SAP day due to his son being unwell. He accused Mr Guy of defrauding the Respondent.

80 On 8 November 2017 Ms Barnes invited the Claimant to attend a fact-finding meeting on 13 November to discuss his unauthorised leave on 25 October and his conduct on receiving the advice letter.

81 On 9 November Mr Guy asked the Claimant to attend fork lift refresher training on 16 November. The Claimant responded that he had booked that day off. Mr Guy was informed that it was not in SAP as approved. Mr Guy asked the Claimant who had approved it. The Claimant responded that it was not his problem whether it had been approved or not. He had followed the correct process for booking leave. He concluded by saying, "Please don't email me again regarding my leave talk to my manager.".

82 Ms Barnes conduct the fact-find by interviewing Mr Guy and the Claimant on 13 November 2017. She interviewed other Stores Operatives at Hainault on 22 and 28 November 2017 and David Kemp on 28 November In his second interview on 7 December Mr Nitu (one of the stores operatives) changed his story. On 9 January 2018 she informed the Claimant that she had decided to take no further action on the matter.

83 On 14 November the Claimant raised a grievance against Mark Guy. He complained about constant harassment and bullying by Mr Guy. He said that he always treated him very unfairly and had used very aggressive words towards him on more than one occasion. He talked behind his back to his colleagues and had discussed his medical history with them. He believed that he was involved in fraud. In his interview with Ms Barnes the previous day the Claimant had said that Mr Guy had taken annual leave but not recorded the same dates on SAP and that he had claimed overtime when he was on annual leave. He had reported these matters to Mr Kemp and Ms O'Connor but they had not taken any action. The Claimant was absent sick with work-related stress after that day.

84 HR acknowledged receipt of his complaint the same day and advised him how it would be progressed. He was advised that due to the availability of Accredited Managers trained in how to identify and deal with harassment and bullying it could take some time before the investigation began.

85 The Claimant was referred to Occupational Health. Their advice given on 7 December 2017 was that his stress levels would not improve unless the departmental issues were resolved. He was unfit to work at that stage.

86 Ms O'Connor advised HR that she would investigate the allegations of fraud against Mr Guy. Between 14 November 2017 and 9 February 2018 she conducted a full investigation into the allegations of fraud. At the conclusion of her investigations she was satisfied that there was no evidence to support the allegations made by the

Claimant. On 21 February 2018 she informed the Claimant that she had decided to take no further action as there was no evidence to support the allegations.

87 On 9 February Anne-Marie Costigan, who was an Accredited Manager for bullying and harassment, advised HR that the Claimant's grievance of 14 November 2017 did not meet the Respondent's definitions of bullying and harassment and should, therefore, not be dealt with under the Respondent's Bullying and Harassment procedure but under the Respondent's Grievance Procedure. She advised the Claimant of her decision.

88 On 27 February 2018 Ms Barnes held a case conference with him to discuss his return to work. The Claimant had been absent with work-related stress since 14 November 2017. The Claimant was accompanied by Mr McGuiness. The Claimant said that he wanted to return to Ealing once the recommendations had been put in place. Ms Barnes said that returning to Hainault or Ealing Common was not an option given the background and issues at those two locations and the effort to trying to get relationships with staff back on track there would be too stressful for all concerned. The Claimant was offered Northumberland Park as an option. It was felt that that would be a good option because Mr Scotchbrook was a strong manager and he would support the Claimant. In spite of the fact that the allegations of misconduct against the Claimant had been upheld, he maintained that he had not done anything wrong. A further case conference was scheduled for 14 March 2018.

89 Ms Barnes informed Ms O'Connor that she found it very stressful to manage the Claimant. As a result, Ms O'Connor decided that she would conduct the next case conference. At the case conference on 14 March 2016 the Claimant said that Northumberland park was not an option and that he wanted to return to Ealing Common. Ms O'Connor repeated that for the reasons already given returning to Ealing Common was not an option. She offered the Claimant the option of going to Stonebridge Park. She said that they could not put the Claimant in a situation which would aggravate his stress levels. She said that if the Claimant did not accept one of the two locations offered to him, she would be left with no option but to consider redeployment. She said that they had offered two reasonable locations to support the Claimant's return to work and to provide the right environment to minimise stress. That accorded with the advice given by Occupational health. They had a duty of care to him and the other members of the team. She gave the Claimant a week to think about it and a further meeting was arranged for 23 March 2018.

90 On 20 March 2018 the Claimant informed Ms O'Connor that he and Mr McGuiness would not be attending the meeting on 23 March and that they had contacted ACAS about the matter.

91 Ms O'Connor canvassed with Mr Morrish whether he would attend a "clear the air" meeting with the Claimant. He made it clear that he would not. He said that as there had been a complete breakdown of the working relationship between him and the Claimant there was nothing to gain by attending a meting with him. He said that whenever he had had any contact with the Claimant he had received negative and aggressive comments from him. He said that the whole process had caused him months of stress, anxiety and sleepless nights to the point of feeling that he had no option but to consider his resignation.

92 The Claimant remained absent sick.

93 On 20 April 2018 the Claimant was informed that his grievance had been referred to Stephen Everitt who would investigate it and the Claimant would hear from him shortly. On 1 May Mr Everitt invited the Claimant to attend a meeting on 8 or 9 May. On 3 May he sent the Claimant an email asking him which date suited him better. The Claimant did not respond. On 10 May he sent the Claimant a letter offering him two further dates for a meeting – 16 or 17 May. There was no response to that and on 21 May he sent him a further letter offering another two dates – 30 or 31 May. He said that that was his third attempt at trying to arrange the grievance hearing and, if he did not hear from the Claimant by 29 May, he would assume that he was no longer wished to pursue his grievance and would consider the matter closed. The Claimant responded that that issue and others were with the Employment Tribunal and he would not attend the meeting. Mr Everett informed that in those circumstances he would close his grievance.

94 The Claimant's latest sickness certificate was due to expire on 15 May. On 14 May Ms O'Connor wrote to him that she would be making a further referral to Occupational Health but if he was well enough to return to work on 16 May he should report to Stonebridge park. The Claimant sent a further medical certificate that he was unfit to work until 11 June 2018.

95 The Occupational Health Physician advised on 29 May 2018 that the Claimant was fit and well enough to return to work and there was no medical reason why he could not work at Northumberland Park or Stonebridge Park depot, although his preference was to return to the Ealing Common depot.

96 At a case conference on 25 June the Claimant agreed that he would return to work at the Stonebridge Park depot but said that he was doing so under duress. On 9 July 2018 the Claimant returned to work at the Stonebridge park depot.

Conclusions

Jurisdiction

97 The complaints in respect of all the acts or failures that occurred before 9 December 2017 will not have been presented in time unless the Tribunal finds that they were part of a continuing act of discrimination that continued beyond that date. All the acts of which the Claimant complains bar three of them (at paragraph 2.1(k), (n) and (o) above) occurred before 9 December 2017. If they are not found to be part of a continuing act that continued beyond that date, the Tribunal would only have jurisdiction to consider those complaints if it considered that it was just and equitable to do so. The majority of the acts of which the Claimant complains occurred in 2015 and 2016. Any claim presented on 21 May 2018 is considerably out of time. The Claimant has not provided any explanation of why those complaints could not have been presented earlier. He had at all material times the benefit of the advice and assistance on his RMT representatives. In all the circumstances of the case, the Tribunal concluded that it would not be just and equitable to consider any complaints that were not presented in time.

Complaints about acts that occurred before 9 December 2017

98 We have not found that between 2008 and 2015 the Respondent changed the Claimant's shift pattern and annual leave so that he lost five days per year. The Claimant's evidence was that he was unaware of the Banked Rest Days (or non-SAP days) earned by working an extra nine minutes per day. It might well be that it was introduced before he joined and that he was unaware of it. There was no evidence that the information had been deliberately withheld from him. In any event, the way in which it was implemented in Hammersmith meant that he would have benefitted in the same way as everyone else. Staff at Hammersmith were given the extra five days' holiday by not being rostered to work on five Bank Holidays. The Claimant was not subjected to a detriment. There was no evidence from which the Tribunal could infer that the Claimant was treated less favourably than an actual or hypothetical comparator or that it was in any way related to race.

99 The Respondent did not move the Claimant from Hammersmith to Ealing Common contrary to the Framework Agreement. The Respondent decided for business reasons to close down the Hammersmith depot. It had discussions with the three Stores staff at Hammersmith about the depots to which they could be transferred. The Claimant, Mr Mekennon and Mr Morrish were treated in the same way. The Claimant agreed to move to Ealing Common. Mr Mekennon and Mr Morrish also moved to Ealing Common. There was no evidence from which the Tribunal could infer that the Claimant was treated less favourably than an actual or hypothetical comparator or that it was in any way related to race.

100 We have not found that Mr Morrish received a pay rise when he moved from Hammersmith to Ealing Common.

101 We have not found that Ms Barnes did anything wrong in investigating the Claimant's grievance. She interviewed all the relevant witnesses, including the Claimant. She took into account what everyone said and produced a clear and reasoned report. The Claimant was not subjected to the detriment of which he complains. She did not mishandle his grievance or ignore his evidence.

102 The Respondent suspended the Claimant in December 2015 and subjected him to a disciplinary process which culminated in his appeal in June 2016. It did so because of the Claimant's conduct in October and November 2015; On 20 October 2015 he had left work 1.5 -2 hours before the end of his shift although the signing in sheet showed him being signed out at the end of the shift; on 10 November he had left 1.5 hours before the end of his shift; during that period he had sent Mr Morrish a number of emails that were offensive and threatening. The Claimant did not rely on any actual comparator. There was no evidence from which we could infer that had the Claimant not been black African, the Respondent would not have suspended him and started the disciplinary process. There was no evidence that race had anything to do it. The Respondent took the actions that it did because of the Claimant's unacceptable conduct.

103 The CCTV footage was requested to establish what Mr Sullivan believed to be the position, namely that the Claimant had been absent from the depot for a long period when according to the signing in sheets he was still present at the depot. Only the CCTV footage could establish whether that had in fact happened. If it had, it raised two important concerns; firstly, it raised health and safety issues because in

the event of an evacuation the emergency services and the Respondent's employee would unnecessarily put themselves at risk searching for someone who was not there. Secondly, it raised conduct issues. There was no evidence from which we could infer that requesting the CCTV footage had anything to do with race. It was obtained because the Claimant's absence from the site when he was shown as still being signed in raised serious concerns.

104 We have not found that Nick Wallace had kept a golf club next to his desk or that Mr Morrish had been aware of it and not raised any issues. Mr Wallace was Mr Morrish's predecessor. The Claimant's evidence was that he had found it in the stores with golf balls and had kept it as a decoration because it looked beautiful. He accepted that the first one he had found had disappeared and that he had then got a replacement. Mr Morrish had told his managers in December 2013 that he felt threatened by it. In view of the tone and content of the emails that the Claimant was sending Mr Morrish in October and November, it is not surprising that Mr Morrish felt threatened. It had nothing to do with race.

105 Mr Morrish and Mr Sullivan did not collude and devise a special roster at Ealing Common to deny the Claimant "his true grade" (GH45). The Claimant was not mis-graded GH35. The pattern worked at Ealing common was one in three (one late shift and two early shifts) and the Claimant was correctly graded at GH35. The Claimant was not subjected to the detriment of which he complains.

106 On 15 October 2015 Mr Morrish asked Mr Sullivan whether he could transfer the Claimant to another area. The request was made in the context where the Claimant was refusing to co-operate and talk with his colleague who worked in the stores in Upminster and causing additional work for his colleagues. Mr Morrish felt that he was "*causing anguish in the team."* This was to do with the Claimant's conduct. There is no evidence from which we could infer that it had anything to do with race.

107 Ms Barnes did not determine the Claimant's grievance of 15 March 2016. She had nothing to do with it.

108 We have not found that Mr Guy discussed the Claimant's medical history with other members of staff in October/November 2017.

109 We have not found that Mr Guy aggressively confronted the Claimant in November 2017 in the presence of Mr Kemp. We have found that the Claimant got angry with Mr Guy and shouted at him on 31 October 2017 when Mr Guy gave him the letter of advice. Mr Guy accepted in evidence that he had on occasion raised his voice at the Claimant in response to the Claimant raising his voice. It is very likely that he did so on 31 October 2017. He did so because of the Claimant's challenging and difficult behaviour. Race had nothing to do with it.

<u>Complaints about acts that occurred after 9 December 2017</u>

110 There was a delay in progressing the Claimant's grievance of 14 November 2017. He was warned at the outset that there might be a delay in starting the investigation because of the availability of managers accredited to identify and deal with bullying and harassment. It was not until 9 February that such an accredited

manager advised that the Claimant's grievance did not meet the definition of bullying and harassment and should be dealt with under the Respondent's Grievance Procedure. There was then a further delay until 20 April 2018 when the Claimant was informed that Stephen Everitt would investigate his grievance. The Claimant was absent sick from 14 November 2017. Thereafter, Mr Everitt invited the Claimant to a grievance meeting on three different occasions. The Claimant did not respond on the first two occasions and on the third attempt he said that he would not attend the meeting. As a result Mr Everitt closed the grievance. The Respondent did not investigate the grievance because the Claimant refused to attend a meeting to discuss it. It had nothing to do with race.

111 We accept that ultimately a decision was made that the Claimant could not return to the Ealing Common depot. The Respondent's intention initially had been that he should return to Ealing Common and it had taken steps to facilitate that. However, he could only return there if the breakdown of the working relationship between him and Mr Morrish could be repaired. Mediation was proposed as a way of repairing the relationship, but mediation only works if the parties to it participate in it willingly and are not compelled to participate in it. Mr Morrish, for understandable reasons, was not prepared to do so . Ms O'Connor then tried to arrange a meeting to clear the air but soon realised from Mr McGuiness's response that the meeting would end up being confrontational and not achieve what it was intended to achieve. It became apparent to the Respondent that the breakdown in their relationship could not be repaired and that it would not be fair to either of them to make them work together. The Claimant was at the time absent sick with stress. The Respondent concluded, therefore, that the Claimant could not return to Ealing Common. The Claimant's case is that in those circumstances the Respondent should have moved Mr Morrish because he had not agreed to participate in the mediation. We do not accept that. The relationship had broken down because of the Claimant's conduct. His removal from Ealing Common had been part of a disciplinary sanction imposed on him because of his behaviour. His complaints against Mr Morrish had not been upheld. In those circumstances, if they could not work together, it was only right that the Claimant should be moved and not Mr Morrish. The Respondent was entitled to conclude in those circumstances that the Claimant should not return to Ealing Common. That decision had nothing to do with race.

112 The Claimant was not forced to accept the assignment to Stonebridge Park. The Claimant was offered the options of going to Northumberland Park and Stonebridge Park because there were vacancies there. The Respondent was entitled under the Claimant's contract and the Framework Agreement to require him to work at either of those two locations. The Claimant was also told that if he did not accept one of those options, the Respondent would have to consider redeployment. The Claimant agreed to work at Stonebridge Park although he said that he was doing so under duress. Requiring the Claimant to work at another location flowed from the decision that he could not return to Ealing Common. It had nothing to do with race.

113 Having looked at each of the complaints individually we stood back and looked at the picture as a whole to see whether it showed the Claimant's race as being a factor or part of the reason for the conduct about which he complained. The picture that emerged was that both at Ealing Common and at Hainault the Claimant had not been at work when he should have been, and had been unco-operative, insubordinate and generally difficult to manage.

114 As we have not found any acts of race discrimination or race-related harassment after 9 December 2017, it follows that the Tribunal does not have jurisdiction to consider the complaints about acts that occurred before that date. As is clear from our conclusion, had we had jurisdiction to consider them we would have concluded that the complaints were not well-founded.

Employment Judge Grewal

Date 8 November 2019

JUDGMENT & REASONS SENT TO THE PARTIES ON

8 November 2019

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FOR THE TRIBUNAL OFFICE