RM

EMPLOYMENT TRIBUNALS

Claimant: **Mr C Spinelli**

Respondent: **Cordant Cleaning Limited**

Heard at: **East London Hearing Centre**

On: **8 – 11 October 2019**

Before: **Employment Judge Goodrich**

Members: **Ms L Conwell-Tillotson**
Dr J Ukemenam

Representation

Claimant: Mr D Deeljur (Counsel)

Respondent: Ms L Lovell (Solicitor)

JUDGMENT

The judgment of the Tribunal is that:-

1 The Claimant was not unfairly dismissed.

2 The complaint of race discrimination fails and is dismissed.

REASONS

The Background and the Issues

1 The background to this hearing is as follows.

2 The Claimant issued his first claim (3202491/2018) on 9 December 2018. Prior to

issuing proceedings, he had obtained, as required, an ACAS certificate giving the date of receipt of the early conciliation as 26 October 2018; and the issue of the certificate as 26 November 2018.

3 In box 8.1 of the Claimant's claim form boxes were ticked that he was bringing a claim of race discrimination; and another type of claim which was described as harassment and work-related stress.

4 At box 8.2 of the claim form details were given of the acts of race discrimination alleged to have been carried out towards him by the Respondent. The details of the claim were drafted in the first person; and, the Tribunal was informed, were drafted by Mrs Spinelli, the Claimant's wife.

5 The Respondent submitted an ET3 Response to the claim denying the complaint and giving their account of events.

6 The Claimant instructed Gordon & Thompson Solicitors to represent him. On 11 March 2019 they sent an email to the Employment Tribunal and the Respondent with various documents including a document headed "summary" giving details of complaints of unfair dismissal and harassment; and discrimination. At the time of issuing his ET1 claim form the Claimant remained in the Respondent's employment.

7 On 18 March 2019 a Preliminary Hearing was conducted by Employment Judge Prichard, at which both parties were represented by solicitors.

8 Amongst the points made in Employment Judge Prichard's summary of the issues were the following:

8.1 The case was confused and he worked extremely hard over the course of the hearing to wring information from the Claimant's team about the case.

8.2 He was unprepared for the fact that the Claimant has resigned one week before the Preliminary Hearing. A statement of the unfair dismissal case was sent to the Tribunal on the same day, 11 March.

8.3 He advised that the safest course was to present a new claim attaching the current grounds of claim that was sent on 11 March as the grounds for the constructive dismissal claim.

8.4 Various paragraphs in which the Judge sought to clarify what were the issues in the first Employment Tribunal claim that had been presented.

8.5 Work remained to be done by the Claimant's representative and he had asked Mr Newton (the Claimant's representative) to take the opportunity to put a lot more facts into it. He might need the help of both the Spinelli's to do this because Mr Spinelli's English is not good.

9 The Claimant's solicitors heeded the Judge's advice and submitted a new claim

on 8 April 2019 (case number 3200923/2019). Prior to doing so they obtained an ACAS early conciliation certificate which was received and issued by ACAS on 27 March 2019.

10 The second ET1 Claim was submitted by the Claimant's solicitors. In box 8.2 the boxes were ticked for unfair dismissal, race discrimination and another type of claim which was described as harassment and bullying.

11 In box 8.2, where a Claimant is required to give details of their complaint, only three sentences were provided.

12 The first sentence was as follows: "I commenced my employment with the employer on 22/01/2010 and worked part-time until 11/03/2019 when I decided to quit my job because of unfair treatment and race discrimination because of my race or ethnic origin."

13 The second sentence was "see attached details of my unfair dismissal claim and race discrimination claim".

14 In fact, however, the Claimant's solicitors did not attach details of the Claimant's unfair dismissal claim and race discrimination claim. Subsequent correspondence from the solicitors shows that they intended to enclose the 11th March 2019 document that had been sent to the Employment Tribunal.

15 The Respondent's solicitors entered an ET3 Response denying the Claimant's claims. They made the preliminary point that, although the Claimant's claim form referred to an attachment entitled "unfair dismissal claim and race discrimination claim" no such details were attached.

16 Nonetheless, the Respondent's solicitors entered a Response on the assumption that the details concerned were those set out in the document that had been sent by email on 11th March 2019 to which we have referred above; and the issues identified at the March Preliminary Hearing and recorded in the summary of that discussion. They provided a detailed defence on this basis.

17 On 22 May 2019 the Respondent's solicitors made an application for another Preliminary Hearing to be listed to consider striking out the Claimant's claim and/or making a deposit order. They complained that the Claimant had failed to comply with Employment Judge Prichard's Case Management Order, stating "Mr Newton will please as soon as he practicably can provide a new ET1 claim form with an expanded summary attached which also serves to clarify the original claim"; and asserted that the Claimant and/or his representative had failed to comply with the order.

18 In response the Claimant's solicitors sent an email on 28 May 2019 responding to the application by the Respondent's solicitors. Attached to this letter was a document headed "amended statement of the case". This was a much longer document than the details given in the first Employment Tribunal claim; or the statement of case submitted on 11 March 2019. It included numerous new factual allegations against the Respondent.

19 The Respondent made a further application for the Claimant's claim to be struck

out or a deposit order made, complaining that his claim was far from clear, that he appeared to be attempting to introduce new issues for the Employment Tribunal to consider without making an application to amend his claim and that the Respondent still did not have the details to allow it to defend the claim.

20 In response to the correspondence Employment Judge Crosfill directed that there should be a Preliminary Hearing to determine the following issues:

20.1 The issues in the case and any Case Management Orders.

20.2 Whether the Claimant requires permission to rely on his amended ET1 and whether it should be given.

20.3 Whether any part of the claim has no reasonable prospect of success and should be struck out; and

20.4 Whether any part of the claim has little reasonable prospect of success and whether a deposit order should be made. The parties were ordered to provide a final list of issues including any area of disagreement to be discussed at the Preliminary Hearing.

21 A Preliminary Hearing took place on 20 September 2019, conducted by Employment Judge Barrowclough. None of the four objectives required by Employment Judge Crosfill to be determined was achieved. He recorded that a draft list of issues to be determined was handed up by counsel for the Claimant; and that a final list of issues was to be agreed by the parties and sent to the Tribunal by no later than 4.00pm on 27 September 2019.

22 I understand from speaking with the representatives that they had some discussions between themselves which led to the Claimant's representative agreeing not to proceed with various of the Claimant's complaints and causes of action; and for the Respondent not to pursue its strike out and deposit order application.

23 The parties' representatives failed to agree a final list of issues for the Tribunal to determine, contrary to the direction given by Employment Judge Barrowclough.

24 On 27 September 2019 Ms Lovell (the Respondent's in-house solicitor with conduct of the case throughout) made an application to vacate the hearing date and use the first day as a Preliminary Hearing to consider the issues. She referred to the issues not having been agreed and that the Claimant's proposed list contained allegations that were not part of his pleaded case. She complained that the further issues had not been particularised and the allegations were vague.

25 The Claimant solicitor, Mr Newton, objected to the Respondent's application, referred to two Preliminary Hearings already having taken place and stated that the last proposed list of issues had been taken from the last and final amended statement of case.

26 In response to the Respondent's application, Employment Judge Gardiner refused the postponement request to vacate the hearing; and directed that the issues for

determination would be discussed at the Employment Tribunal at the outset of the hearing.

27 It can be seen from the above, therefore, that the case was not in the state that it should have been at the outset of the four-day trial for the case, a precious allocation of time on Employment Tribunal resources. Most of the first day of the hearing was spent clarifying the issues and reaching a final agreed list.

28 In order to assist the parties, the Employment Judge notified them of the Tribunal's preliminary thinking on the procedural disputes between the parties, whilst making clear that it was an indication only, not a final determination. Happily, the representatives accepted the preliminary indications given by the Employment Judge, which were as follows:

28.1 In so far as the current (disputed) list of issues was a distillation of the complaint set out in box 8.2 of the first Employment Tribunal claim by the Claimant, we would expect them to form part of the agreed list of issues.

28.2 In so far as the issues were ones that were a distillation of those provided to the Tribunal on 11 March 2019, the Tribunal would also expect them to form part of the agreed list of issues. The Respondent had been in receipt of the document from 11 March, the second complaint was a constructive unfair dismissal and race discrimination complaint, to which they had given a full response in their second ET3 response and the failure to include it appeared to have been an oversight on the Claimant's solicitors part. There was no prejudice to the Respondent who had prepared to meet this case.

28.3 In so far as the amended statement of case sent by the Claimant's solicitors on 28 May 2019 included entirely new factual allegations, this was problematic for a number of reasons. Firstly, leave to amend would be needed. Secondly, the latest list of issues supplied on behalf of the Claimant included details taken from the 28 May amended statement of case that were not included in the list of issues submitted on behalf of the Claimant for the Preliminary Hearing before Employment Judge Barrowclough on 20 September 2019. Mr Deeljur accepted that they should have been part of the list of issues submitted to Employment Judge Barrowclough. Thirdly, if leave to amend the Claimant's claim in order to allow the new allegations contained in the amended statement of the case were to be allowed, this hearing would need to be postponed. The Respondent would need to file an amended response and provide a witness statement from Mr Sesay, who was the subject of many of the new allegations contained in the 28 May document. Additionally, Ms Lovell informed the Tribunal that Mr Sesay was off work on long term sickness so she was unable to take instructions from him. Her position was that, in so far as the allegations against Mr Sesay contained in the first claim form and the statement of case submitted on 11 March 2019 referred to Mr Sesay she was not proposing to call him as a witness and was content to take the risks for this course of action. Her clients wanted to go ahead with the case.

29 After taking instructions, the Claimant's representative notified the Tribunal that the Claimant wished to proceed with his case. Both representatives worked together, with some assistance from the Employment Judge, to reach a final agreed list of issues.

30 The list of issues is attached as an appendix to this judgment.

31 After the Claimant started to give his evidence, the Tribunal had some concerns as to the quality of his English and comprehension of the questions being put to him. We asked the parties' representatives for their views and took some time to reflect on the issue ourselves. We were mindful that, at the first Preliminary Hearing before Employment Judge Prichard he had recorded "Mr Spinelli's English is not good". The Claimant's representatives had not applied, however, for a Court interpreter.

32 Mr Deeljur explained that, with patience and taking a little longer than usual to cross-examine, the Claimant did understand the questions asked and he wished to proceed. Ms Lovell also, on behalf of the Respondent, wished the case to proceed. The Tribunal's observation was that, with questions needing to be rephrased from time-to-time and avoiding difficult words and jargon, the Claimant was able to understand and respond to the questions asked. After the Tribunal's adjournment the Claimant's comprehension appeared to improve; and it may have been that the Claimant was showing more confusion at the start of his evidence because of initial nervousness.

The Relevant Law

33 Section 95 Employment Rights Act 1996 ("ERA") sets out the ways in which an employee is treated as being dismissed. The relevant statutory definition of a constructive dismissal is as follows:

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

34 The burden of proof for establishing a constructive dismissal is on the employee. It has been held that the employee needs to prove:

34.1 That the employer has committed a breach of the employee's contract of employment, whether of an express or implied term.

34.2 The breach is sufficiently serious to amount to a fundamental breach of contract.

34.3 The employee must leave in response to the breach of contract, not for some unrelated reason. It was held in the case of *Nottinghamshire County Council v Meikle [2004] IRLR 703 CA* that is it enough that the employee resigned in response, at least in part, to the fundamental breach by the employer.

34.4 The employee must not delay too long following the breach of contract in order to resign or will be regarded as having elected to affirm the contract.

35 There has been extensive caselaw on what may amount to fundamental breaches of contract.

36 In this case, the Claimant contends that the Respondent committed a breach of the implied term of mutual trust and confidence. In the case of *Woods v WM Car Services (Peterborough) Ltd [1981] IRLR 347 EAT* it was held that it is clearly established that there is implied in a contract of employment a term that the employers will not, without reasonable and proper cause, conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee. Any breach of this implied term is a fundamental breach amounting to a repudiation since it necessarily goes to the root of the contract. To constitute a breach of this implied term, it is not necessary to show that the employer intended any repudiation of the contract. The Employment Tribunals function is to look at the employer's conduct as a whole and determine whether it is such that its cumulative effect, judged reasonably and sensibly, is such that the employee cannot be expected to put up with it.

37 In the case of *London Borough of Waltham Forest v Omilaju [2005] IRLR 35 CA* it was held that in order to result in a breach of the implied term of trust and confidence, a "final straw", not itself a breach of contract, must be an act in a series of earlier acts which cumulatively amounts to a breach of the implied term. The act does not have to be of the same character as the earlier acts. Its essential quality is that, when taken in conjunction with the earlier acts on which the employee relies, it amounts to a breach of the implied term of trust and confidence. It must contribute something to that breach, although what it adds may be relatively insignificant so long as it is not utterly trivial.

38 Affirmation of a contract is essentially the legal embodiment of the everyday concept of "letting bygones be bygones". If one party commits a repudiatory breach of contract, the other party can choose either to affirm the contract and insist on its further performance or accept the repudiation, in which case the contract is at an end. The innocent party must at some stage elect between these two possible causes; if he or she once affirms the contract, his/her right to accept the repudiation is at an end. But he/she is not bound to elect within a reasonable or any other time. Mere delay by itself (unaccompanied by any express or implied affirmation of the contract, does not constitute affirmation of the contract; but if it prolonged it may be evidence of an implied affirmation.

Direct Race Discrimination and Race Discrimination Harassment

39 In respect of direct race discrimination, a Tribunal is concerned with section 13 Equality Act 2010 ("EqA") when read with section 39. It is recognised that it is unusual for there to be clear, overt evidence of discrimination and that the Tribunal should expect to have to consider matters in accordance with section 136 EqA and the guidance in respect thereof set out in the case of *Igen Ltd v Wong and other cases [2005] IRLR 258 (CA),* concerning when and how the burden of proof may shift to the Respondent and what the Respondent must prove if it does. The burden of proof provisions have also been considered in numerous subsequent cases. The burden of proof is usefully considered through a staged process.

40 At the first stage the Tribunal has to make findings of primary fact and determine whether these show, in respect of the Claimant and the real or hypothetical comparator, less favourable treatment and a difference in race. In respect of a real, named comparator, the Tribunal looks for a difference in treatment which a reasonable person would consider to less favourable and which this Claimant also felt was less favourable treatment. The test is: is the Tribunal satisfied, on the balance of probabilities and with the burden of proof resting on the Claimant, that this Respondent treated this Claimant less favourably than they treated a comparable employee of a different race or of a different religion or belief?

41 When considering whether there has been less favourable treatment, comparisons between two people must be such that the relevant circumstances are the same or not materially different. The Tribunal must be astute in determining what factors are so relevant to the treatment of the Claimant that they must also be present in the real or hypothetical comparator in order that the comparison which is made will be a fair and proper comparison. Often, but not always, these will be matters which will have been in the mind of the person doing the treatment when relevant decisions are made.

42 If the Tribunal is satisfied that there was less favourable treatment and the difference in race in comparable circumstances, we proceed to the next stage. We direct ourselves in accordance with Section 136 EqA and ask, in respect of each item of less favourable treatment which has been proved, whether the Claimant has proved facts from which the Tribunal could reasonably conclude, in the absence of an adequate explanation, that the less favourable treatment was on racial grounds or on grounds of religion or belief. Findings of fact which affect whether we could so conclude will vary from case to case. Unreasonable treatment on the part of an employer is not necessarily a matter from which we will ultimately conclude that there was unlawful discrimination, merely because the person adversely affected by it is a particular race, but if it constitutes less favourable treatment than the comparator has received, it will be a matter from which an inference could be drawn at this stage leaving the employer to prove that it had or would have treated a person of another race or another religion or belief unreasonably too. The Tribunal should take into account, where it considers it relevant, the provisions of the ECHR Code of Practice on Employment.

43 If the Tribunal could reasonably conclude, absent a non-discriminatory explanation, that there was unlawful discrimination, we move to the next stage. In the absence of an adequate explanation, the Tribunal will uphold the complaint that there has been discrimination on grounds of race in respect of the proven act/s of less favourable treatment. So, we now look at the employer to see whether it provides and proves a credible, non-discriminatory explanation or reason for the difference in treatment. In the absence of such an explanation, or in the absence of such an explanation which we accept as proven on the balance of probabilities, we will infer or presume that the less favourable treatment occurred because of the Claimant's race.

44 When the Tribunal is considering a hypothetical comparator, the stages tend to merge or become indistinguishable. If the Tribunal concludes that an employee of one race has been treated less favourably than a hypothetical employee of a different race in comparable circumstances would have been treated, this will almost certainly contain an inference, express or implicit, to the effect that but for the race the first employee would not have been so treated. Tribunals have sometimes been encouraged, rather than

entering into an arid exploration of the burden of proof provisions, to focus on why the Claimant was treated as he or her was found to have been treated; namely, whether or not it was on the prohibited ground.

45 Harassment is defined in Section 26(1) EqA when read with Section 40.

46 In the case of *Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336 EAT* guidance was given that the necessary elements of liability for harassment are threefold:

46.1 Did the Respondent engage in unwanted conduct?

46.2 Did the conduct in question have (a) either the purpose or (b) the effect of either (i) violating the Claimant's dignity or (ii) creating an adverse environment for her – the prescribed consequences.

46.3 Was the conduct on a prohibited ground?

47 The Tribunal must also have regard to the time limits provisions of section 123 EqA. The primary time limit, within which the claim must be presented in order for the Tribunal to have jurisdiction to consider it, is three months from the date of the act(s) about which a complaint is made, but this is subject to various qualifications. Section 123(3)(a) provides that any act extending over a period shall be treated as done at the end of that period. Caselaw has expanded this further. Such an act may be something done in pursuance of a policy or practice, however informal, or a series of linked or connected acts. It cannot be a few isolated instances spread over time, or a single act with continuing consequences. Additionally, section 123(3)(b) provides that failure to do something is to be treated as occurring when the person in question decided on it. Beyond this, section 123(1)(b) provides that a Tribunal may consider a complaint which is out of time if it is, in all the circumstances, just and equitable to do so. This is a wide discretion. We must bear in mind that limitation periods ought not without good reason to be disobeyed. The issue of prejudice is very important: how "old" is the claim, have memories faded or become less reliable, are witnesses unavailable, have documents disappeared? Is it unfair for either party to proceed? What explanation is given for delay? Have internal proceedings kept matters alive in the interim? Has the Respondent in any way misled the Claimant or being responsible for the delay? No list can be exhaustive, for we must bear in mind all relevant factors.

48 Additionally, time limits considerations may be affected by the extension of time provisions contained in early conciliation legalisation.

The Evidence

49 On behalf of the Claimant the Tribunal heard evidence from:

49.1 The Claimant himself, Mr Cristian Spinelli.

49.2 Mrs Getty Spinelli, the Claimant's wife.

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

50.1 Ms Tracie Lineham, Head of Huma Resource Services for the Respondent.

50.2 Mr James Storey, Key Account Manager for the Go Ahead Bus Account of the Respondent.

50.3 Mr Steven Chisnall, Key Account Manager for the Respondent.

51 In addition, the Tribunal considered the documents to which it was referred in an agreed bundle of documents.

Findings of Fact

52 We do not seek to set out each detail of evidence provided to us. Nor do we seek of make findings on each detail which was in dispute between the parties. We seek to make the findings we consider relevant and necessary to determine the issues we are required to decide. We have, however, considered all the evidence provided to us and borne it all in mind.

53 The Claimant, Mr Cristian Spinelli, commenced employment with the Respondent on or around 22 January 2010. When we say the Respondent, the name of the Claimant's initial employer was Dynamiq Cleaning Limited, which is part of the Respondent's group of companies. There is no dispute between the parties that he was continuously employed by the Respondent (or its predecessor) from 22 January 2010 until his resignation by email on 11 March 2019. At some point the Claimant's employment transferred to Cordant Cleaning Limited, the Respondent in these proceedings.

54 The Claimant describes his colour and ethnic origins as white Italian.

55 The Claimant was a cleaner at a bus garage in Dockland, East London. The Respondent had a contract with the Go Ahead Bus Company to, amongst other tasks, clean the garage.

56 The job the Claimant performed is a hard one. It involves cleaning the buses outdoors. In winter, and with the bus depot being near the Thames, at night the working conditions can be very cold, at times sub zero temperatures.

57 The main witness for the Respondent, Mr Storey, described the Claimant as one of the best deep clean bus cleaners he had; and that he had a reputation for being hot headed. From having read and listened to the evidence provided to us, the Tribunal does not doubt that both are correct.

58 The Claimant formed part of a team of about 18 – 19 people employed by the Respondent to work in the Docklands Depot.

59 The Respondent's employees worked different shifts, the Claimant forming part of

the night shift team.

60 The night shift crew consisted of:

60.1 Three shunters.

60.2 One supervisor.

60.3 Five cleaners (of whom the Claimant as one).

60.4 One manager.

60.5 One “allocator”.

60.6 The Respondent also had fuellers working at the depot.

61 As their titles suggest, the task of the cleaners was to clean the buses, the shunters to move the buses around the depot and the fuellers to make sure that the buses were fuelled.

62 The buses arrive at the Docklands depot at different times depending on their routes. From time-to-time the routes and times of entry into the depot are changed by Transport for London (“TFL”). The shifts of the Respondent’s cleaners are geared to making sure that they have buses to clean throughout their shifts, rather than having them needing to wait around, sometimes in cold conditions.

63 Every day, the buses have a daily clean. They have a weekly clean which involves a few more cleaning tasks than the daily clean. They have an 8 week clean. In addition, they have something described as an “MOT clean” which, Mr Storey explained, involves pretty much everything in the bus being cleaned.

64 Health and safety is an important part of the successful operation of the performance of the Respondent’s contract with Go Ahead Bus Company. Buses are being moved around the depot and poor standards of health and safety risks accidents and even fatalities.

65 The hierarchy of the Respondent, in terms of managing the Claimant, was as follows:

65.1 As stated above, the Claimant was one of the cleaners working at the Docklands depot.

65.2 The next level of management was the supervisors.

65.3 The most senior employee of the Respondent at the depot was the site manager. From some date in 2015 until 24 October 2018 the site manager was Mr Mohammed Sesay. On 29 October 2018 Mr Sesay was replaced by Mr Afolabi a Site Manager at the Docklands garage.

65.4 Above them, although not working at the Docklands site, was an Area Manager, responsible for a number of sites within the area of which the Docklands depot formed part; and an Operations Manager.

65.5 The manager for the Go Ahead Bus Account with the Go Ahead Bus Company was Mr James Storey. Mr Storey explained that the Go Ahead Bus Company is mainly based in London and that he was responsible for everything within that account. He had about 600 cleaners working on the account, four area managers and one key account manager.

65.6 Mr Storey had himself worked for the Go Ahead Bus Company.

66 In the course of the hearing Mr Deeljur, counsel representing the Claimant, clarified that the Claimant's case is that the racial discrimination he says was committed towards him was by Mr Sesay, the Site Manager to whom we have referred above. The Claimant makes no allegations of race discrimination against the Respondent's witnesses at this Tribunal, or other individuals involved in his case before this Tribunal.

67 Mr Sesay was not a witness at this hearing. Ms Lovell, the Respondent's representative (and in-house solicitor) explained that Mr Sesay is off work on long term sickness absence (as explained earlier above she wanted the hearing to go ahead despite his absence).

68 In October 2015 the Claimant issued a written grievance against an individual he described as his supervisor Mr Ahmed, complaining of being bullied since he had reported to Mr Storey that he saw him sleeping on a bus without wearing his identity uniform. Although it was not made clear to the Tribunal who this individual was, and there was no cross-examination on the point, the Tribunal believes that this was a complaint against Mr Mohammed Sesay, and Ahmed was the Claimant's abbreviation of this name.

69 Whoever the individual was, the Respondent arranged a grievance meeting on 13 October 2015 for the Claimant to discuss his grievance; and the Claimant did not attend the meeting.

70 In July 2016 the Claimant raised another grievance, this time naming his manager "Mr Mohammed" by whom he definitely meant Mr Mohammed Sesay. It is again unclear whether any detail needs to be given as to this grievance. In the Claimant's statement he referred to his grievance as having been in 2018. Mr Deeljur accepted that the Claimant's witness statement was referring to the wrong grievance and the wrong date and invited us to cross out paragraphs 32 to 39 of the Claimant's witness statement. Mr Storey also dealt with this grievance in his witness statement. As Mr Deeljur did cross-examine Mr Storey on the 2016 grievance we make brief findings of fact only, in view of Mr Deeljur having asked us to cross out the paragraphs in question in the Claimant's witness statement.

71 The Claimant's complaints against Mr Sesay were of bullying and racism, being threatened by Mr Sesay with dismissal and of being given too many buses to clean by him.

72 On 21 August 2016 Mr Kanu, Area Manager, met with the Claimant, who was accompanied by his wife, to discuss the grievance. Notes were taken of the grievance meeting.

73 The next day Mr Kanu met with Mr Sesay, who denied the allegations of race discrimination or unfair treatment of the Claimant, or of being given an excessive number of buses to clean.

74 Mr Kanu gave his grievance outcome which included the following points:

74.1 As regards bullying and racism (and other issues) Christian (the Claimant) had not provided any evidence or witnesses as to dates or times of the allegation. He accepted that this did not mean that the claims had not happened and that they or may not have happened but that it was difficult to point out whether the claims were factual.

74.2 The manager had been interviewed but denied all the allegations and in the absence of witnesses, dates or times it was practically impossible to determine whether or not the site manager had committed any of the alleged issues.

74.3 As regards to the number of buses cleaned he compared the sheets to other operatives and the allegations of cleaning records on Saturdays. These did not appear to support the Claimant's allegations of having an unfair allocation.

74.4 The Claimant and his wife were happy for Mr Kanu to resolve the issue at a site level and that a disciplinary hearing was not necessary at this time.

75 The Claimant appears to have been content with the outcome as he did not write to object to the outcome or pursue any further grievances until 2018.

76 There was a dispute between the parties as to the extent of the training provided to the Claimant. Mr Storey provided comprehensive details of the training for cleaners at the garages the Respondent is required to clean for the Go Ahead Bus Company. The Claimant, on the other hand, disputed that he was provided with any training.

77 The Tribunal finds that the Claimant is mistaken in asserting that he was provided with no training by the Respondent. Firstly, Mr Storey appeared to the Tribunal to be a reliable witness who has worked both for the Respondent and the Go Ahead Bus Company. As someone who had worked for the Go Ahead Bus Company he knew what Go Ahead required from the cleaning staff. He also visited all the sites for which he was responsible. He visited Docklands Depot every two months and had quarterly meetings with the managers. We believe that the training took place both because of finding Mr Storey evidence plausible and convincing; and because, as Mr Storey stated in his witness statement, bus depots are dangerous places with buses moving around it, unless there are strict safety standards.

78 As stated earlier, Mr Sesay was transferred to another depot in October 2018 and

was replaced as site manager by Mr Afolabi. When cross-examined, Mr Storey explained the reason for this. On three occasions Mr Sesay had his car vandalised. On the first occasion he had his tyres cut and paid to replace them. On the second occasion he had all four tyres slashed and asked for a loan to pay for their replacement. Although Mr Storey reported the incident to the police, with no CCTV in operation (Mr Sesay was not allowed to park his car at the depot) the identity of the individual concerned is not found. On the third occasion all four tyres were slashed and graffiti "pic" was painted in blue (presumably meant to be "prick"). Mr Storey paid for Mr Sesay's vehicle to be repaired out of his own money and swapped into another site. The identity of the individual concerned was never discovered.

79 All the above are set out as background to the incidents the Tribunal is asked to determine in the agreed list of issues.

Issues 2.1(d) and 12.1(d) (allegations of constructive dismissal and direct race discrimination alternatively race discrimination harassment) – was the Claimant the only one who had his contract changed on 27 December 2016? Were there other workers of different ethnic origins who did not have their contracts changed?

80 At Clause 7.3 of the Claimant's contract of employment is the following statement:

> "The company may change the hours and location that you are required to work. You will be given reasonable notice of any such change."

81 The Claimant appears to have had a change of contract at his own request on 21 January 2013. This was a change from 42 hours a week, six days a week to 35 hours per week five days a week. The reason for the change was stated to be "due to personal issues".

82 On 27 December 2016 the Claimant had another change of contract, which was to change his hours of work from 21.00pm to 0.500am; to 20.00pm to 0.400am.

83 The reason for the change was stated as "due to operations reasons". This was, Mr Storey explained, a need to change hours when the times of buses coming into the garage changed because of route and time changes imposed by TFL.

84 The Claimant was unhappy at the change of time and the short notice of the change. The contractual change gives the signing of the change as 27 December 2016 and the date it was effective from as 27 December 2016. The Claimant was unhappy both about the change itself, because of difficulties with getting public transport at 4.00am; and the short notice concerned. Mr Storey accepted when cross-examined that the change was given with short notice; and explained that this was because they sometimes received very short notice from TFL.

85 The Claimant was not alone in having his contract changed at short notice. Mr Abu Bangura, at the Docklands Bus Garage, also had his contract changed. The Tribunal was provided with his change of contract being signed on 13 June 2018 and effective from 14 June 2018. The reason for the change, like that given to the Claimant, was stated as

"due to operational needs". He, like the Claimant, was required to work from 20.00 to 0.400. The change in Mr Bangura's case was for the rest days he had being changed from Thursday and Friday, to Saturday and was also stated as "due to operational needs". Mr Bangura subsequently had a change to his contract in having his start time on Sunday changed to being from 21.00 to 0.500. Again, this was stated to be due to operational needs.

86 The Tribunal finds, therefore, that the changes to the Claimant's hours of work were not because of his colour or racial origins, but due to the operational needs of the service; as is shown by Mr Bangura also having his days or hours of work changed at short notice because of operational needs. Also of note is that the Claimant signed his change to the contract of employment and it did not form part of the grievances to which we have referred above.

Issue 2.1(f) and 12.1(f) Constructive Unfair Dismissal and Direct Race Discrimination alternatively Race Discrimination Harassment allegation – was the Claimant subjected to a drug/alcohol test on 28 June 2017 where other staff members of different ethnic origins were not?

87 The Respondent requires its employees to take, and pass, drugs and alcohol tests. The reason for them, as is probably obvious, is that the nature of the depot is such that individuals under the influence of alcohol or drugs risk being a danger to themselves and others working on the site.

88 The Respondent outsources its drugs and alcohol test to a company called Randox. They, the Tribunal was informed, undertake drugs and alcohol testing for many organisations including, the Tribunal was informed, the Metropolitan Police. The Respondent has a drugs and alcohol policy which forms a key part of its strategy for ensuring the safety and welfare of all employees, contractors and customers.

89 The relevant parts of the Respondent's drugs and alcohol testing policy are their testing at random; and their "for cause" testing.

90 The way that the random testing operates is as follows. Randox notify Mr Storey of the dates during the year that the random testing will take place. Although Mr Storey is aware of the dates, they are kept secret from the workplace employees concerned. When Randox arrive on the site they are given details of the Respondent's employees working on that shift and Randox select randomly up to six employees to test. The individuals who have been selected by Randox are then brought to the Randox individual who will conduct the testing.

91 The "for cause" method of testing occurs when a supervisor or manager at the site has reason to suspect an individual or individuals as being under the influence of drink or drugs. They have to get authorisation from more senior management in order for the show cause testing to take place. The "for cause" testing consists of testing taken place of the individual or individuals that are suspected of being under the influence; together with individuals who are randomly selected.

92 In dispute between the parties is whether, on 28 July 2017, the drug testing that

took place was a random testing or a for cause testing – Mr Storey's evidence being that it was random and the Claimant that it was for cause.

93 On the balance of probabilities, the Tribunal finds that the testing that took place was a "for cause" test. We so find firstly because Randox's form, giving the reason for the test, ticked "for cause" for all three individuals. It appears to the Tribunal to be unlikely that they would have filled the form incorrectly. Secondly, two of the three individuals that were tested failed the test. In answer to a question from the Judge, Mr Storey accepted that it would be unusual for two out of three individuals to fail the test, as was the case here. Both the individuals that failed the test were dismissed. The Claimant was the third individual tested and he passed the test.

94 In dispute between the parties is whether the Claimant was selected for the test on that day by Randox; or whether it was Mr Sesay who targeted the Claimant for drugs testing, as asserted by the Claimant and denied by Mr Storey.

95 On this dispute, the majority of the Tribunal (the Judge and Mrs Conwell-Tillotson) find that the Claimant was not targeted by Mr Sesay and was randomly selected by Randox including because:

95.1 It appears likely that one or two of the individuals who were tested had given cause to arouse suspicions of a supervisor or site manager. Both failed the test. It is likely, therefore, that one or both of them were selected under the for cause procedures.

95.2 The Claimant passed the test, so that it is unlikely that he gave cause to arouse suspicion.

95.3 When a for cause test takes place, other individuals are selected at random. The Claimant was on duty at the time concerned. As he was on duty at the time he would have been one of those eligible for random selection.

95.4 The Claimant and other individuals on site when the testing was being carried out were selected at random as part of the normal procedures.

95.5 Although the Claimant stated in his evidence that he was pointed out on that occasion by Mr Sesay that appears unsurprising. The individuals being tested would not be known to the external organisation carrying out the testing so would need to be identified by a manager on site.

96 The minority of the Tribunal (Dr Ukemenam) finds that the Claimant was identified by Mr Sesay as one of the show cause individuals to be tested, although Mr Sesay had no grounds for believing him to be under the influence of alcohol or drugs. He so finds because the Claimant and Mr Sesay had long standing difficulties in their relationship and, if the Claimant were to fail a test he would be dismissed. The two individuals that failed the test were both dismissed.

97 All the members of the Tribunal agree, however, that the selection of the Claimant

had nothing whatsoever to do with his colour or racial origins. The majority finds that he was one of those randomly selected during a show cause test. The minority finds that the selection had nothing to do with the Claimant's colour or racial origins but the relationship difficulties which started with the Claimant reporting Mr Sesay for sleeping in a bus.

Issue 2.1(c) and 12.1(c) Constructive Unfair Dismissal and Direct Race Discrimination alternatively race discrimination harassment – on 5 August 2018 was the Claimant unfairly asked by Mr Sesay to complete a return to work form? Were other workers of different ethnic origins not asked to fill in a return to work form after being off sick? The Claimant relies on the comparator Nurul Mowla or a hypothetical comparator

98 On 5 August 2018 the Claimant returned to work after having had one day off work sick. On his return to work he was required to sign a return to work interview form. He was incensed by this because he had previously not been asked to sign a return to work form after short term sickness absences.

99 The Respondent's explanation for the Claimant for being required to sign a return to work interview record form is straightforward. In August 2018, during a meeting with the Respondent's client, Go Ahead Bus Company, there was a discussion as to ways to reduce sickness absence, because it affected the Respondent's ability to meet their service level agreement with Go Ahead. Mr Storey spoke to his Area Managers who then spoke to their site managers to make sure that they carried out return to work interviews in respect of all sickness absences, short-term or long-term.

100 It is correct, therefore, that Mr Mowla was not asked to sign a return to work form after his sickness absence. This was however, in 2016, when the Respondent practices at the site were less stringent on return to work interview records.

101 It is abundantly clear to the Tribunal that Mr Sesay's requirement for the Claimant to sign a return to work sickness interview record on 5 August 2018 was nothing to do with his colour or racial origins because:

101.1 The requirement to do so came from an instruction from Mr Storey. It was not instigated by Mr Sesay.

101.2 During August, other individuals at the Docklands site were required by Mr Sesay, as per Mr Storey's instructions, to sign return to work interview records. The Tribunal was provided with copies of three other individuals who, in August 2018, signed return to interview forms for interviews conducted by Mr Sesay, after they had short-term sickness absences.

Issue 2.1(e) and 12.1(e) Constructive Unfair Dismissal and Direct Race alternatively (Race Discrimination Harassment claim) – was the Claimant shouted at loudly in a harassing manner by Mohammed Sesay on 5 August 2018? If so was this related to race?

102 After the incident in question both Mr Sesay and the Claimant gave a written account of events.

103 Mr Sesay sent an email to his Area Manager to say that he had politely asked the Claimant to come to the office to fill a return to work interview record form; but he had refused to do so and started screaming at him, telling him very loudly that he was bullying him. Mr Sesay then recounted that the Claimant got out of the office screaming, fell down and was taken away from the site by ambulance.

104 The Claimant's account in a grievance he sent in a few days later, includes the statement "at this point my anger was triggered … I lost control of the said anger".

105 The Tribunal finds that the angry exchange was instigated by the Claimant; although Mr Sesay, when confronted by the Claimant screaming at him may also have shouted at the Claimant in response. In Mr Sesay's absence we have not heard his evidence, so give the Claimant the benefit of the doubt to this extent. We so find because all Mr Sesay was seeking to do was, as he was doing with the other individuals who were required to sign the forms in the question, was to implement procedures required by Mr Storey following meetings with their client. There is no reason for Mr Sesay to have instigated an angry confrontation. The Claimant's overreaction to the request is also symptomatic of a later angry exchange that took place between the Claimant, Mr Storey and Mr Maskell on 9 March 2019 (to which we refer later below).

106 The incident in question, therefore, clearly has nothing to do with the Claimant's colour or racial origins. It was the Claimant, not Mr Sesay, who lost his temper – at most Mr Sesay was responding to being shouted at by the Claimant.

Issue 2.1(a) and 12.1(a) (allegations of constructive unfair dismissal and direct race discrimination or alternatively race discrimination harassment) – on 2 October 2018 the Claimant was sent home by Mr Steven Chisnall for allegedly not wearing the correct uniform (PPE). Were other workers of different ethnic origins to the Claimant allowed to work without wearing any of the correct PPE?

Issue 2.1(b) and 12.2(b) (allegations of constructive unfair dismissal and direct race discrimination alternatively race discrimination harassment – as of 2 October 2018 had the Claimant been given a Cordant fleece and hi-vis jacket?

107 The Respondent, until 2015, did not have a record of the clothing supplied to its workforce at the Docklands garage.

108 The Tribunal was supplied with documentation to show what clothing and PPE equipment was supplied to the Claimant after 2015. This shows that he was supplied with a yellow hi-vis jacket on 31 May 2017, yellow motorway coat on 21 August 2017, safety boots on 22 August 2016, trousers on 6 October 2018, a polo shirt on 6 October 2018 and a fleece on 17 October 2018.

109 As Mr Sesay was the Site Manager in 2017, when the Claimant was supplied with yellow hi-vis jacket and motorway coat; and in 2016 when he was supplied with safety boots it appears unlikely that Mr Sesay was preventing the Claimant from getting the clothing and equipment he wanted. Additionally, the Claimant was a member of a trade union; and, after the incident on 2 October to which we are about to refer, he sent a text message to his trade union representative to request supply of uniform. The records

show that he was supplied with trousers and a polo shirt on 6 October 2018 and a fleece on 17 October 2018. If he was truly unhappy about the uniform supplied to him it is likely that he would have contacted Mr Silvester Morisone, the trade union representative.

110 Mr Chisnall was visiting the Docklands garage on 2 October 2018 in order to show Mr Maskell round the garage, as Mr Maskell had recently joined the Respondent as an Operations Manager. Mr Chisnall was a key Account Manager.

111 Prior to working for the Respondent Mr Chisnall had worked for one of their competitors, ISS.

112 Mr Chisnall explained the Respondent's policy on uniforms. He explained that new employees were given a uniform of a tee shirt, fleece, jacket, trousers, hi-vis jacket and PPE boots; two pairs of trousers, two tee shirts and a fleece. So long as the employees were wearing their own clothes, the Respondent's managers were content for them to do so, provided that the boots they wore met the PPE requirements.

113 In dispute between the parties is whether or not the Claimant was wearing a jumper with the logo of the Respondent's competitor, ISS, on him when Mr Chisnall and Mr Maskell visited the site (as asserted by Mr Chisnall); or whether he was not; and whether it was Mr Chisnall or Mr Maskell who told him to take his jumper off.

114 The Tribunal finds that was Mr Chisnall who saw the logo and told the Claimant to take it off. As Mr Chisnall explained in his evidence, he knew the ISS logo very well, having worked for them. It is likely, therefore, and we find that it was Mr Chisnall who spoke to the Claimant about it, not Mr Maskell.

115 The Tribunal is satisfied that Mr Chisnall's motive for sending the Claimant home was nothing to do with race, nor was it anything to do with Mr Sesay. The incident was with Mr Chisnall, not Mr Sesay and there is an obvious explanation for what took place that has nothing to do with the Claimant's colour or racial origins. It is readily understandable that Mr Chisnall would not want the Claimant to be working in a Go Ahead bus garage under a contract being performed by the Respondent in a uniform of a competitor. Nor has the Claimant suggested that Mr Chisnall was treating him less favourably on racial grounds, or related to racial grounds.

116 Mr Chisnall gave the Claimant a number of options. He offered for him to take off the jumper with the logo, or cover it with another item of clothing; or go home and get another item of clothing, reassuring him that he would nonetheless be paid. The Claimant did none of these tasks but returned home and did not return. He was, nonetheless paid for the shift. This, additionally, does not suggest any unfavourable treatment towards the Claimant – the Respondent would have been entitled not to have paid him for the shift in view of the Claimant leaving the site and not returning.

Issue 2.1(g) and 12.1(g) (Constructive Unfair Dismissal and Direct Race Discrimination alternatively Race Discrimination Harassment) - did the Respondent failed to deal with the grievance made by the Claimant on 9 August 2018?

Issue 2.1(h) – did the Respondent failed to deal with the complaint the Claimant says that

he raised by text message and telephone calls to his union representative Mr Silvester Morrison, and which he says Mr Morrison told him he passed on to Mr Storey? Mr Storey denies that Mr Morrison notified him of any such complaints.

117 On 9 August 2018 the Claimant sent a grievance to the Respondent, drafted by his wife. The main points in his written grievance were:

117.1 Complaints about being "tortured" at his workplace by his manager (Mr Sesay) telling him that he must be sacked.

117.2 A complaint about the return to work interview form Mr Sesay had asked him to sign, referred to in our findings of fact above.

117.3 Complaining about being required to take a drugs and alcohol test (also referred to above) and complaining about the change in his contractual hours, again referred to above.

117.4 Complaining about the effects he said Mr Sesay's behaviour had on him.

118 The grievance should have been dealt with by the Respondent's HR Department; in particular by an HR employee called Rachel Macauley.

119 Ms Macauley did not respond to the Claimant's grievance and did not notify any of the Claimant's managers that she had received such a grievance. Ms Lineham, who is now Head of HR Services for the Respondent, readily accepted that the failure of the Respondent to reply to the Claimant's grievance was entirely unacceptable.

120 Ms Lineham's explanation for the failure to conduct a grievance with the Claimant was that unacceptable although it was, the Claimant was not alone in failing to have a grievance process by Ms Macauley. An individual called Mr Adadapo Cole, who is of black African colour and origins, submitted a grievance on 9 March 2018 that she also failed to process or deal with. On 2 January 2019 she received a flexible working request from Mr Muzzamel Choudhury on 2 January 2019 which she did nothing in response to the request. She explained that she understood that she had a large workload at that time and some health issues.

121 As regards the issue concerning Mr Sylvester Morrison, the Tribunal finds that the Claimant is confused about this. After the incident concerning the Claimant's clothing on 2 October 2018, the Claimant contacted Mr Morrison notifying him that he had been sent home the previous day because of uniform and requesting uniform and PPE equipment. The Tribunal bundle contains copies of the relevant text messages.

122 The Tribunal was also provided with an email exchange between ACAS and Mrs Spinelli on 15 October 2018 which refers to the Claimant being sent home. Additionally, there is an email from Mr Morrison to Mrs Spinelli in which he stated that he had spoken to Mr Storey to get the "uniform issue sorted".

123 When cross-examined Mr Storey gave evidence about contact he had with Mr

Morrison about obtaining further uniform for the workforce at the Docklands garage.

124 The Claimant's communications with Mr Morrison were not, therefore, those set out in the grievance of 9 August 2018 to which we have referred; but specifically as to the obtaining of further uniform following the incident on 2 October 2018.

125 On 26 October 2018 the Claimant contacted ACAS. ACAS contacted the Respondent.

126 Mr Storey was unaware of the Claimant's grievance on 9 August 2018 for the reasons set out above. He wanted to find out what the Claimant's complaints were and to seek to resolve them. He wrote to Mr Spinelli, by a letter dated 7 November 2018, inviting him to a grievance hearing on 12 November 2018.

127 A meeting took place on 12 October 2018 attended by the Claimant, Mr Storey and Mr Maskell. The meeting started with Mr Storey telling the Claimant that no one could find out about his grievance and asking him what the grievance was. The Claimant refused to inform Mr Storey what he was complaining about and said instead that he will be taking the matter to Court. The meeting ended with Mr Storey and Mr Maskell none the clearer about the Claimant's complaints were.

128 By a letter dated 20 November 2018 Mr Storey wrote once again to the Claimant. He referred to the meeting on 12 November 2018, and informed him that the company were unable to locate the copy of his specific complaint; and that in order to investigate his complaints the company needed to understand the specific nature of the complaints. Mr Storey invited the Claimant to a grievance hearing on 23 November 2018. He attempted to reassure him that he would be given a thorough opportunity to discuss all his grievances and that he could bring a fellow colleague or trade union representative with him. He was asked to confirm that he would attend the meeting.

129 The Claimant declined to attend the meeting, stating that insufficient time was given for him to invite his representative and get his evidence.

130 Mr Storey wrote to the Claimant again, by letter dated 29 November 2018. He reiterated what he had said in his previous letter and again invited him to a grievance hearing, this time on 3 December 2018. The Claimant again declined to attend stating that he had not received the letter or email sent and not had an opportunity to arrange a union representative.

131 By a letter dated 21 December 2018 Mr Hawser invited the Claimant to a grievance hearing on 9 January 2019.

132 On 14 January 2019 Ms Macauley wrote to the Claimant. By then the Claimant was off work sick. Ms Macauley invited the Claimant to send a written grievance; or, if he preferred, to have a face-to-face meeting. She invited him, if he wished to submit his grievance in Italian. She asked him to indicate how he would like to proceed or submit his grievance in writing so that it could be investigated. She also asked him if he wished a welfare meeting to be arranged. So far as the Tribunal is aware the Claimant did not take up any of these invitations.

133 From the above communications it is clear that, once Mr Storey became aware of the Claimant having complaints against the Respondent, because of the communication from ACAS, he and others did all they reasonably could to seek to discover what the Claimant's complaints were. The Claimant failed to engage with the process.

The termination of the Claimant's employment

134 Amongst the health and safety procedures of the Respondents are Safe Systems of Work (SSOW) for the Docklands garage. These contain signing off sheets signed by the employees and documentation to show that their health and safety procedures had been complied with. The signing off sheets had gone missing. The Claimant and others in the Respondents workforce were required to reread the procedures and to sign to confirm that they had seen and understood the process. Until March 2019 the Claimant had signed as required.

135 Mr Storey asked the Site Manager, Mr Remi Afolabi (the Manager that had taken over from Mr Sesay) to obtain the SSOW form. On 5 March 2019 he was asked to do this and refused to do so.

136 On 9 March 2019 the Claimant was invited to a meeting with Mr Storey and Mr Maskell, with Mr Afolabi to take notes. The purpose of the meeting as to find out why the Claimant was refusing to sign the SSOW.

137 The Claimant accepted in cross-examination that he lost his temper at that meeting. He was shouting loudly and he smashed his fists so hard on the table that the mobile telephones on them fell off the table. The room was small and the individuals present were afraid for their own safety. A member of staff from Go Ahead, hearing the shouting, came into the room to ask the Claimant to calm down. The Claimant told those present that he did not want the job and left the site.

138 On 11 March 2019 the Claimant sent an email to the Respondent stating that he could no longer work for them because he had been unfairly treated, discriminated against, harassed and victimised.

139 In response, Ms Jennifer George, Head of the Respondent's HR Services at that time, wrote to the Claimant, by letter dated 14 March 2019. Amongst the points raised by her were that:

139.1 He had become incredibly agitated at the meeting on 9 March, slamming his hands on the table, shouting and acting aggressively.

139.2 He had not returned to work for his scheduled shifts and the necessary documents remained unsigned, but had emailed his resignation on 21 March explaining that he wished to do this on the basis of being discriminated against, harassed and victimised but without providing any other information.

139.3 It was important that he took some time to reconsider his resignation and give more information to support his allegations so they could best

resolve matters.

139.4 She was also aware that the grievance he had raised in October 2018 had had meetings organised on at least four occasions and saw a lot of different reasons had not materialised so they were still unaware of the matters that needed to be reviewed.

139.5 Requesting him to reconsider his resignation; and that if he wished to do so to get back in touch with her or Jimmy (Storey) by no later than 20 March.

140 The Claimant did not reply, so far as the Tribunal was made aware, to Ms George's letter. As set our earlier in this judgment he had issued his first proceedings on 9 December 2018; and issued his second set of proceedings on 8 April 2019.

Reasons given for delay in issuing proceedings (as regards any out of time complaints)

141 Mr Deeljur was invited by the Judge to examine in chief the Claimant for his reasons for putting his claim in when he did.

142 In response the Claimant stated that he had sent his complaints to management but they never did anything, so that he came to court. He stated that he had a trade union representative but that he did not know at the time that he could take a claim to court.

Whether the implied term of mutual Trust and Confidence was broken by the Respondent

143 Looking at the employer's conduct as a whole was its cumulative effect, judged reasonably and sensibly such that the employee cannot be expected to put up with it?

144 The Tribunal finds that the employer's conduct to the Claimant fell short of this threshold including because:

144.1 The Claimant was good at his job. The job was a hard one, working antisocial hours in working conditions that could be cold and unpleasant.

144.2 The Respondent could, if they wished, have taken disciplinary action against him. They did not do so. Even Mr Sesay, who the Claimant complains about as the racial discriminator against him and as having bullied him, never in the space of about three years instigated disciplinary action against him. When the Claimant went back home and did not return on 2 October 2018, not only was no disciplinary action taken against him, but he was paid for the shift. No disciplinary action was taken against the Claimant by Mr Sesay when on 5 August 2018, they had a confrontation about the reasonable request by Mr Sesay for the Claimant to leave to return form. When the Claimant had an angry and threatening outburst on 9 March 2019, which the Respondent could have dealt with as an act of misconduct or gross minconduct, and subsequently resigned, the Respondent offered to let

him reconsider his resignation.

144.3 As explored above in our findings of fact, the Claimant was not being singled out for unfavourable treatment on racial grounds and his race discrimination complaints fail (see also our conclusions below).

144.4 It was a serious oversight on the Respondent's part not to have responded to his grievance dated 9 August 2018, as the Respondent readily accepts. Had the matter rested at that failing, the Claimant's constructive unfair dismissal complaint might have succeeded. However, once Mr Storey was aware of the Claimant's grievance, the Respondent did everything it reasonably could have to try to find out about it. From November until the Claimant's resignation the unreasonable conduct in respect of the Claimant's grievance was on the part of the Claimant alone. He refused to engage with numerous attempts by the Respondent to understand what he was complaining about and seek to resolve the issues.

Closing Submissions

145 Both representatives gave oral closing submissions, in addition Mr Deeljur gave closing submissions in writing, primarily as to the relevant law. Ms Lovell agreed with the submissions as to the relevant legal principles.

146 Ms Lovell's oral closing submissions on behalf of the Respondent including the following points:

146.1 The Claimant's complaints as to matters that took place before July 2018 were out of time, namely the complaints as to the change of contract on 27 December 2016 and drugs/alcohol test on 28 June 2017.

146.2 The Claimant was a less reliable witness than those of the Respondents and, where there was conflict in the evidence, the Respondent's witnesses were to be preferred.

146.3 As regards the change of contract issue, the Claimant had accepted in cross-examination that Mr Bangura worked the same hours as the Claimant. It was for operational reasons.

146.4 None of the allegations of race discrimination caused the burden of proof shift.

146.5 As regards with the Claimant's uniform, he was wearing the competitors uniform and there was no detriment as the Claimant could have covered the logo by wearing a coat, or could have gone home and changed his uniform and in any event he got paid although he went home.

146.6 Submissions as to the hi-vis jacket and fleece supplied to him.

146.7 Referring to all the individuals who were required to complete return to work sickness absence forms in August 2018, following a tightening in procedure. Mr Mowla, whose return to work after sickness absence was two years earlier, was not an appropriate comparator.

146.8 As regards to the allegation of being shouted at, if he was shouted at, which is denied, the Claimant had entirely unreasonably refused to sign a return to work form and the Claimant agreed in cross-examination that Mr Sesay may have shouted because the Claimant refused to sign the form. The Claimant himself accepted that he was angry.

146.9 As regards to the drug test the Claimant was not being singled out – two other individuals were drug tested on that date and the Claimant passed his drug test unlike the two other individuals.

146.10 The Claimant's grievance of 9 August 2018 was not properly dealt with. However, the Respondent did make numerous attempt subsequently to find out about the Claimant's grievance and the Claimant refused to cooperate.

146.11 Giving details as to the request for uniform passed to Mr Morrison and referring to Mr Storey's evidence on it.

146.12 The Claimant was neither racially discriminated against nor constructively unfairly dismissed. She made similar submissions for the constructive dismissal complaint as the race discrimination one. There was no fundamental breach of contract. Even if, which the Respondent denies, there had been a fundamental breach of contract, the contract was affirmed by the Claimant continuing to work for the Respondent.

146.13 If the Claimant's claims were to succeed, he could and would have been dismissed fairly shortly afterwards for his unreasonable refusal to sign the SSAW form and his aggressive and threatening behaviour at the meeting on 9 March 2019.

147 On behalf of the Claimant Mr Deeljur's oral submissions included the following:

147.1 The Claimant was an honest witness.

147.2 In eight years of employment no complaint had been made about performance.

147.3 The Tribunal had heard no evidence or witness statement from Mr Sesay, Mr Maskell, Mr Kanu, from Cleaners or from Mr Afolabi. Mr Sesay was the main protagonist.

147.4 As to PPE equipment there was a conflict of evidence between the Claimant and Mr Chisnell.

147.5 The Claimant says that Mr Mowla was a correct comparator for return to work.

147.6 If patience was shown with the Claimant and his English being "not the best" he got what was required; and Mr Sesay, was the Claimant's manager and should have made sure that this occurred.

147.7 It was not reasonable to change the Claimant's contractual hours at such short notice.

147.8 As regards to shouting between the Claimant and Mr Sesay was not at this Tribunal.

147.9 As regards to the drug testing Mr Sesay targeted the Claimant to do a drug test on 28 June 2017.

147.10 The Respondent failed to deal with the Claimant's grievance on 9 August 2018.

147.11 As regards the Claimant's complaint to Mr Morrison, the union representative to pass to the Respondent, Mr Storey could be mistaken.

148 In response to the judge's invitation for submissions on time limits and whether there should be any reduction or award on "*Polkey*" grounds or contributory fault he made the following submissions.

148.1 Mr Sesay's actions amounting to acts extending over a period and thus were in time.

148.2 Although he could not submit that dismissal would not have been a reasonable response to the Claimant's actions on 9 March 2019, the Respondent would not necessary had dismissed the Claimant.

Conclusions

Constructive Unfair Dismissal Complaint

149 For the reasons set out in the findings of fact the Respondent did not commit a breach of the implied term of mutual trust and confidence.

150 The Claimant's complaint of constructive unfair dismissal, therefore, fails.

Direct Race Discrimination alternatively Race Discrimination Harassment complaints

151 The Tribunal considers it unlikely that the Claimant has proved, on the balance of probabilities, facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination against the Claimant which is unlawful. We agree with Ms Lovell's submissions to that effect.

152 Although Mr Sesay was not present at this hearing, this was a case which was reasonably well documented. There were plausible, convincing reasons given for the Respondent's actions in respect of the matters listed in the list of issues. For example, although the Claimant had his hours changed to work from 8.00pm to 4.00am, instead of 9.00pm to 5.00am, another employee also had their contract changed in order to work these hours. As regard the drugs test on 28 June 2017, two other employees of different ethnic origins to the Claimant were also required to take the test (and failed and were dismissed). To give another example, in August 2018 other employees, like the Claimant, were required to sign a return to work form.

153 If the burden of proof did shift to the Respondent to disprove discrimination (contrary to our conclusion above), we have considered the Respondent's explanations for its actions. In the case of the Respondent's failure to respond to the Claimant's written grievance dated 9 August 2018, the individual concerned in the Respondent's Human Resources Department failed to deal with the grievance, or communicate with the Claimant's manager. It was undoubtedly a failing, it was clear, however, that the failing was not to do with the Claimant's race, but the shortcomings of the Human Resources Department at that time- other individuals of different colour and ethnic origins than the Claimant similarly were treated in a similar matter to the Claimant around that time. All the explanations given for the Respondent's actions that form part of the list of issues are explanations that the Tribunal has accepted as being in no sense whatsoever acts of race discrimination.

154 The Claimant's complaints of direct race discrimination and race discrimination harassment, therefore, fail and are dismissed.

Time Limit Issues

155 In view of the above it is unnecessary to determine whether or not the two complaints of the Claimant which are out of time (subject to whether they amounted to continuous acts) should have time limits extended.

Employment Judge Goodrich

15th November 2019