EMPLOYMENT TRIBUNALS

Claimant: **Mr Richard Walters**

Respondent: **CT Plus (CIC)**

Heard at: **East London Hearing Centre**

On: **12 & 13 March 2020**

Before: **Employment Judge Russell**

Members: **Mrs W Blake-Ranken**
Mrs P Alford

Representation
Claimant: **Mr W Lewis (Counsel)**
Respondent: **Mr E Nuttman (Solicitor)**

JUDGMENT

The judgment of the Tribunal is that: -

1. **The Respondent made unauthorised deductions from the Claimant's wages between 25 January 2019 and 29 March 2019.**

2. **The Respondent shall pay to the Claimant the sum of £45.90.**

3. **The claims of harassment related to race and/or direct discrimination because of race fail and are dismissed.**

REASONS

1 By a claim form presented on 10 June 2019, the Claimant brought claims of race discrimination and unauthorised deduction from wages. The claim refers to breach of contract but the Claimant remains employed. The Respondent resists all claims.

2 At the outset of the hearing, the issues were discussed. The Claimant describes his race as black African Caribbean and relies upon a white comparator, Mr Gaunt. The reference in his Further Information to "payslips of the Appellant's spouse" was agreed to be potentially relevant to remedy if the claim succeeded.

Race Discrimination

2.1 Was the Claimant subjected to the following conduct?

(a) Unfair suspension from work for 14 days;
(b) Being unfairly subjected to an unwarranted disciplinary;
(c) Loss of paid overtime opportunities during the period of suspension;
(d) Being subjected to unfair harassment causing him stress and distress.

2.2 If so, was such conduct related to race and did it have the prescribed effect within section 26 Equality Act 2010?

2.3 In the alternative, was such conduct less favourable treatment because of race?

Unauthorised deduction from wages

2.4 The Claimant claims for deductions dating back to 3 March 2017. Does the Tribunal have jurisdiction to hear the complaint by reason of:

(a) The Deduction from Wages Limitation Regulations 2014 and amendment to section 23 of the Employment Rights Act; and/or

(b) Any gap of more than three months between two relevant deductions thereby breaking the series.

2.5 For claims within the Tribunal's jurisdiction, to what pay was the Claimant contractually entitled at a relevant date?

2.6 Did the Respondent make unauthorised deduction from his wages by failing to pay any such sums?

3 The Tribunal heard evidence from the Claimant and Mr Ricky Gaunt (former Driver) on his behalf. For the Respondent, we heard evidence from Ms Sian Williams (HR Business Partner), Ms Keriann Steel (Driver Manager), Mr Nigel Thomas (Performance Manager) and Mr Scott Packman (Driving Standards Manager). With the agreement of the Claimant and his representative, Ms Steel gave evidence on the afternoon of the first day of the hearing as she had suffered an injury to her head and, whilst she felt well, was concerned about any overnight effects. We were provided with an agreed bundle of documents and read those pages to which we were taken during the course of evidence.

Findings of fact

4 The Respondent is a social enterprise in the transport industry, delivering a range of transport services. It has a contract with Transport for London (TFL) to deliver the London Red Bus service.

5 The Claimant commenced employment with the Respondent on 9 January 2017 and is currently employed as a driver working from the Walthamstow depot on the red bus service. The Claimant's contract of employment showed his contracted hours as 39 per week and gives the Respondent the right to place employees on paid suspension in

accordance with the company handbook. The Claimant also worked regular overtime above his contracted minimum of 39 hours per week.

6 Mr Sayed Mohammed is responsible for day-to-day payroll at the Walthamstow depot. Any pay query received by Ms Williams, would be referred to Mr Mohammed. The Respondent's payroll system is complicated and the records not easy to understand. Drivers are paid weekly. The Respondent's systems record the actual number of hours driven and use a "docket" adjustment to make the hours up to the minimum contracted 39 hours per week. So, for example, where a driver has actually driven for 38 hours in a week, the payslip would show the hours driven (either Monday to Friday, or Saturday-Sunday) and an additional one hour shown as "dockets". Drivers are paid a week in arrears.

7 Relatively early in his employment, the Claimant noticed discrepancies between the total number of hours worked and the wages received, including occasions where he was paid less than his basic contractual 39 hours. The Claimant produced a schedule of underpayments based upon payslips which he had been able to find. He alleged that there were underpayments on 3 March 2017, 24 March 2017, 30 June 2017, 22 September 2017, 5 January 2018, 23 March 2018, 29 June 2018, 25 January 2019, 22 March 2019, 29 March 2019 and 12 April 2019. The Claimant was concerned about the underpayment of his wages due to his financial commitments to his family. On the Claimant's evidence and that of Mr Gaunt, which we accepted on this point as reliable and credible, this was a widespread problem encountered by drivers at Walthamstow. The Claimant repeatedly raised a query with Mr Mohammed but received no adequate explanation for the apparent shortfalls.

8 The Respondent's payroll data for the relevant period from January 2019 shows the following:

8.1 25 January 2019, the Claimant was paid for 36.63 hours. This left a shortfall of 2.37 hours which the Respondent said was due to a rest day exchange.

8.2 15 March 2019, the Claimant was paid for 35.57 hours, leaving a shortfall of 3.43 hours. The Respondent says that this was adjusted in the following week.

8.3 22 March 2019, the Claimant was paid for 35.57 hours and a docket entry of 3.43 hours. As the total adjusted for the week was 39 hours, the shortfall from the previous week had not been corrected (alternatively it was adjusted but this week had its own 3.43 hour shortfall).

8.4 29 March 2019, the Claimant was paid for 26.03 hours and a docket entry of 3.43 hours. Assuming that the docket entry corrected the 3.43 shortfall carried forward from the previous week, the shortfall was 12.97 hours. The Respondent accepts that there was an underpayment of 9.54 hours. I find that this erroneously gives credit twice for the docket (that is in this week and the previous week).

8.5 12 April 2019, the Claimant was paid for 26.84 hours. The 12.16 hour shortfall was because the Claimant was absent due to sickness. Initially the Claimant said that only his duty on 5 April 2019 (10 hours) was affected but,

in the course of evidence, he accepted that he had been absent for part of his duty on 30 March 2019. I find that there was no underpayment in the pay for this week.

9 The Claimant became increasingly unhappy with the repeated underpayments and instructed solicitors who wrote to the Respondent, for the attention of Mr Thomas, on 9 April 2019. No reply was received to the solicitor's letter or to the Claimant's numerous telephone calls to HR about his pay. Mr Thomas and Ms Steel denied knowledge of the Claimant's complaints. Ms Steel was responsible for a lot of drivers and was not directly concerned with payroll and, on balance, the Tribunal accepts her evidence as reliable and truthful. With regard to Mr Thomas, however, the solicitor's letter was sent to him directly and clearly set out the Claimant's case that the Respondent had acted in breach of contract. On balance, the Tribunal finds that Mr Thomas did know about the Claimant's complaints about underpayment after receipt of the letter dated 9 April 2019.

10 As part of the conditions of the contract, the Respondent's red bus routes are subject to random bus customer experience surveys (BCES) by TFL. There might be up to 40 surveys a year but with no set pattern or frequency. On a date and route chosen by TFL, a "mystery shopper" boards the bus and assesses the driver's performance by reference to set criteria, namely interaction with customer, serving stop, driving standards, driver presentation and external information, with each given a rating of "✓", "✗" or "✓/✗" and an overall score. We find on balance that there was no official threshold score for acceptable performance and it was a matter of overall manager discretion, although a score of under 85 or criterion marked with a cross warranted a conversation with the relevant driver.

11 In a BCES of a route driven by him on 11 January 2019, the Claimant was given an overall score of 69. Three criteria were marked with a cross, namely that he did not engage with customers as they boarded, made little effort to help and his acceleration and braking was harsh throughout the journey. Ms Steel wrote to the Claimant on 5 February 2019 inviting him to attend an investigatory discussion but did not provide him with a copy of the BCES report in advance.

12 The Claimant was the subject of a second mystery shopper assessment on 11 February 2019. Whilst it was unusual for there to be two reports on the same driver in such close succession, the Tribunal finds that this was coincidence and not directed or arranged by the Respondent. The BCES report for 11 February 2019 gave the Claimant an overall driver score of 77 with only one criterion marked with a cross, namely communication with customers. Despite the score being under 85 and one criterion marked with a cross, this BCES report was not included in the proposed investigatory discussion. Instead, a copy was sent to the Claimant and he was asked to address the issues raised. This is consistent with the Tribunal's finding that there was no set threshold and it was a matter for managerial discretion. The Claimant does not criticise the Respondent for sending him a copy of the report but he disputes the criticism and did not understand what was the issue.

13 Ms Steel conducted the investigation meeting with the Claimant on 13 February 2019. The Claimant was not given a copy of the BCES report to take away from the meeting but was aware of its contents which were read and discussed during the meeting. At the bottom of the page, Ms Steel recorded the Claimant's position that he did not accept the comments and her decision that an independent manager would review the

report and decide what, if any, further action to take. The Claimant and Ms Steel did not discuss the report again but we accept her evidence that within a matter of days of the meeting, she passed the documents to Mr Thomas.

14 Almost two months later, the Claimant received a letter dated 4 April 2019, drafted by and in the name of Mr Thomas but signed by Ms Steel. Ms Steel had not read the letter before signing it on behalf of Mr Thomas and had not been aware of his decision to send the Claimant on a driving assessment. The letter stated:

> "**Following on from your meeting with Keriann, the next stage of the process will be to provide additional driver training.**
>
> **This training will consist of a 3.5 hour session with a professional driving instructor on a one to one situation. They will assess your drive and look at ways to improve and prevent further accidents occurring.**
>
> **Accidents costs the company over a £100,000 per year and therefore not just from a financial point of view but most importantly improving safety, CT Plus is committed to providing a safe comfortable ride to our passenger a safe comfortable ride to our passengers.**
>
> **I am therefore requesting you attend on Wednesday 10 March. Please report to the front counter at Ashgrove Depot by 0845.**
>
> **After the assessment, the report will be reviewed and a formal meeting will be held which may be in the form of a disciplinary**."

15 The Claimant was surprised and concerned to receive the letter. Whilst it referred to a meeting with Ms Steel, that had taken place almost two months before and nothing further had happened. Moreover, the letter stated that the purpose of the training was to "**improve and prevent further accidents occurring**" yet the Claimant had not been involved in any accidents and had an excellent driving records for which he had received rewards. The date for the training had already passed. Finally, the letter referred to the possibility of a disciplinary meeting once the training report had been reviewed.

16 The Claimant's case is that the letter contained untrue allegations made with the aim of stopping him raising issues about his pay. Mr Thomas maintained that it was a standard template used for drivers and that the Claimant was one of several drivers sent on the training assessment course which was in no way disciplinary action, simply an opportunity to improve.

17 The Tribunal did not find Mr Thomas to be an impressive witness and regarded his evidence with a degree of caution. For example, his assertion that this was a standard template was not supported by the evidence of Ms Steel and Ms Williams. Ms Williams accepted that the letter could have been better worded, that the reference to an accident could be read in different ways and that the final paragraph should have included the words "if necessary". By contrast, Mr Thomas maintained that the reference to accidents was generic; it did not suggest that the Claimant had had an accident but referred to the need for training in defensive and preventative driving because of the reference to harsh braking and accelerating in the BCES report. Indeed, Mr Thomas was not prepared to accept that the Claimant could reasonably have interpreted the letter as a suggestion that he had been involved in an accident and was therefore being sent on training. Moreover, when asked about the delay in sending the letter, Mr Thomas said that this had been due

to the need to find a date and external provider to carry out the training. There was no evidence to support his assertion and it was not referred to in his witness statement. For these reasons, the Tribunal find that Mr Thomas' evidence about the letter sent on 4 April 2019 was self-serving, designed to avoid criticism rather than being straightforward and reliable. However, as set out above, Mr Thomas found out about the Claimant's pay complaints when he received the solicitor's letter dated 9 April 2019 by which date the letter requiring the Claimant to attend the driving assessment had already been sent.

18 On 5 April 2019, the Claimant spoke to a supervisor (Tesin) and explained that he believed that it had been sent to him error for the reasons set out above. We accept as reliable and plausible the Claimant's denial that he spoke to Ms Steel.

19 At about 5.20pm on 8 April 2019, at the end of his duty as he was leaving, the Claimant was given a further copy of the letter with only the date of the training amended to 10 April 2019. The Claimant was absent from work on 9 April 2019.

20 When the Claimant attended Walthamstow on 10 April 2019 at 7.13am for his driving shift, Tesin told him that he should be at Ash Grove for training. The Claimant went to Mr Mohammed's office to ask why he should attend the course but was told to go and explain to those at Ash Grove. The Claimant believed that he was being forced to attend training for which nobody could give him a reasonable justification and which could result in disciplinary action. He told Mr Mohammed that he would not attend the training as he did not believe the request to be reasonable. The Claimant was told to speak to Ms Steel when she arrived.

21 At around 10.00am, the Claimant was called to Ms Steel's office. He explained his concern at being asked to attend the driver assessment training which could lead to disciplinary action when he had not in fact been involved in any accident. After a short break, the Claimant was called back into Ms Steel's office and told that the training was because of the January 2019 BCES report. The Claimant maintained that he had disputed the contents of the report, there was no reference to it in either of the letters requiring him to attend driver assessment and that he had heard nothing following the discussion of the investigation meeting. He asked how the Respondent had reached the decision to send him for an assessment which may lead to disciplinary action. In evidence, the Claimant accepted that he would not have attended unless the Respondent could prove to him that his driving had been poor on the date of the BCES survey.

22 The Claimant was again asked to wait outside whilst Ms Steel spoke to Mr Thomas who in turn said that he would clarify with Mr John Batchelor, Head of Operations, whether the Claimant was required to attend the training. Mr Batchelor agreed that the instruction to attend training was appropriate given the failed BCES report and decided that if the Claimant continued to refuse to attend, he should be suspended for failure to follow a reasonable management request.

23 The Claimant's evidence is that whilst waiting outside her office, Ms Steel walked passed him with another manager, went to her car alone and drove off without saying anything to him. Ms Steel's evidence is that she had received a telephone call that a colleague was ill and told Mr Thomas that she needed to take him to hospital. The Tribunal did not think that it was necessary to resolve this dispute in order to determine the issues before us.

24 Shortly after seeing Ms Steel leave, the Claimant was called back into the office by Mr Mohammed and told that Mr Thomas had instructed that he be suspended for failure to follow a reasonable instruction and that he would be sent written confirmation. In evidence, Mr Thomas could not remember whether Mr Mohammed had explained why the Claimant was not prepared to attend the assessment but maintained that he had offered to discuss matters in person with the Claimant if he attended Ash Grove. Despite the unsatisfactory nature of his evidence in other regards, the Tribunal accepted as truthful and reliable Mr Thomas' evidence that he did not know the Claimant's ethnicity at the time that he decided to require him to attend the assessment or when he suspended him. Mr Thomas did not have day to day dealings with the Claimant, his name was not indicative of nationality or race and the solicitor's letter he received did not refer to race.

25 Later the same day, the Claimant emailed Ms Williams (HR) complaining about the way in which the suspension had been handled and asked for written confirmation of the reasons and likely duration.

26 The Claimant's case is that he did not receive a letter confirming suspension. There is no letter in the bundle. Mr Thomas' evidence was that a letter was produced and, he believed, sent to the Claimant. It was prepared by Ms Steel and set out the reasons for the suspension; there was no copy available because the Respondent's IT system had been hacked. Ms Steel's witness statement made no reference to drafting a suspension letter and, in oral evidence, she said that she did not send such a letter as she understood that Mr Thomas had explained the reasons for his decision orally. Mr Packman's evidence was that he had not seen a copy of the suspension letter. Ms Williams' evidence was that she was not aware of the existence of a suspension letter, even in draft. None of the contemporaneous documents in the bundle refer to the existence of such a letter. On balance, the Tribunal finds the evidence of Mr Thomas to be unconvincing and inaccurate; there was no suspension letter drafted or sent to the Claimant. The Tribunal regarded this as a further example of Mr Thomas giving evidence to best suit the case he wished to put forward and meet any criticisms of his own conduct rather than evidence which was accurate and reliable.

27 On 18 April 2019 Ms Steel provided a response to the Claimant's complaint to HR, providing as background the receipt of the BCES report, the investigation meeting on 13 February 2019, the Claimant's strong disagreement with the contents of the report, her decision to send it for review by an independent manager and subsequent receipt of Mr Thomas' draft letter informing the Claimant that he must attend refresher training. Save for the dispute about the circumstances of her departure, which the Tribunal have not found necessary to decide, there is little material conflict with the Claimant's account.

28 The Claimant was invited to attend an investigation interview with Mr Packman on 24 April 2019. At the meeting, the Claimant gave a full explanation of the circumstances leading up to his suspension and why he had refused to attend the training. During the meeting, Mr Packman investigated the Claimant's previous driving record which he acknowledged to be excellent. There was a short adjournment whilst Mr Packman spoke with Ms Steel. When the investigation meeting reconvened, Mr Packman informed the Claimant that his suspension would be lifted with immediate effect.

29 The Claimant's evidence is that Mr Packman also said that he realised that it had all been a big mistake which had led to the suspension and the whole matter had not been dealt with properly. Mr Packman, by contrast to Mr Thomas, was an impressive witness,

prepared to accept that things had not been handled well by the Respondent. His evidence was that having heard the Claimant's explanation, he agreed that there was confusion caused by the wording of the letter and, describing the Claimant as very nice and with a good driving record, put the January 2019 BCES report down to the fact that everybody can have a bad day. It is entirely plausible that he told the Claimant that the matter had not been dealt with properly and we find on balance that he did.

30 By letter 30 April 2019, Mr Packman confirmed his decision that there was no case to answer and that suspension would be lifted with immediate effect, stating:

> **"I am satisfied that although the instruction for you (sic) attend a driving assessment was made with the best intention, the way in which it was communicated was far from acceptable and as such could easily have caused the confusion it did.**
>
> **I also fully accept that had we communicated the reason for the course with you would have been more than happy to attend and demonstrate your excellent driving skills.**
>
> **I can only apologise for this and hope we can draw a line under the matter and move on with the provision of an excellent bus service."**

31 After these Tribunal proceedings were instituted, the Respondent undertook a review of the Claimant's pay for the relevant period. On 25 October 2019, the Respondent paid the Claimant the sum of £220.03 to rectify historic underpayments forming part of this claim. Ms Williams said that part of the reason for the delay was that a malicious IT attack upon its system had hampered its ability to utilise the Sage payroll software and rectify any underpayments to staff in the effective period. The Tribunal find that it was the Tribunal proceedings which prompted the review and rectification payment.

32 The bundle contained a document which was described as a "candidate training breakdown" covering the period 4 November 2016 to 7 October 2019. It listed 25 drivers sent for training, of whom only three were sent during 2019 (one white European, two black British). The Respondent's case was that driving assessment training was commonly used and that it was not intended as a disciplinary sanction. Mr Thomas' evidence was that five or six other drivers had been sent on the assessment training at the same time as the Claimant. This was inconsistent with the numbers shown on the breakdown. Mr Packman, however, confirmed Mr Thomas' estimate and explained that it was part of his role to maintain the quality of driving provision. Ms Williams' evidence was that the breakdown may not be accurate in part because the Respondent had recently changed from an internal to an external provider and in part because Ms Steel had produced the list and may only have included drivers whom she had sent on the training. Ms Steel was not asked questions about the breakdown by either Mr Lewis or the Tribunal and was not present on the second day. On balance, we accept that the breakdown is not a safe basis from which we could draw inferences as it is not complete.

33 The Claimant's evidence was that he is aware of other drivers with poor BCES reports and unsatisfactory scores but who were not requested to attend driving assessment. No names or details of those drivers were supplied. The Claimant has chosen to rely upon Mr Gaunt as his comparator, maintaining that Mr Gaunt had been involved in "at fault" accidents but was not required to attend assessment or threatened with disciplinary action. In his evidence, Mr Gaunt confirmed that the problem with underpayment of wages was frequent and widespread at the Walthamstow depot and maintained that the Respondent disregarded the poor driving skills of white drivers who

had been involved in road traffic accidents and had been neither suspended nor required to attend a driver assessment course. Mr Gaunt did not accept, however, that he was such a driver as he maintained that he had not been at fault in his accidents. There was no evidence before the Tribunal that Mr Gaunt had received a critical BCES report nor of other BCES reports of concern received by the Respondent.

Law

Discrimination

34 Section 13 of the Equality Act 2010 provides that a person discriminates against another if, because of a protected characteristic, he treats that other less favourably than he treats or would treat others. Race is a protected characteristic. Conscious motivation is not a requirement for direct discrimination, it being enough that the protected characteristic had a significant influence on the outcome. The crucial question is why the complainant was treated in the way in which they were, particularly in cases where there are no actual comparators identified, **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] IRLR 285.

35 Harassment is defined in section 26 of the Equality Act 2010 as follows:

> **"(1) A person (A) harasses another (B) if -**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
>
> **(b) the conduct has the purpose or effect of -**
> **(i) violating B's dignity, or**
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **…**
>
> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account -**
>
> **(a) the perception of B;**
> **(b) the other circumstances of the case;**
> **(c) whether it is reasonable for the conduct to have that effect."**

36 In **Richmond Pharmacology v Dhaliwal** UKEAT/0458/08/CEA, the EAT provided guidance to the effect that an Employment Tribunal deciding harassment claims should consider in turn: (i) the alleged conduct, (ii) whether it was unwanted, (iii) its purpose or effect and (iv) whether it related to a protected characteristic. As to effect in particular, at paragraph 15, the EAT made clear the importance of the element of reasonableness, having regard to all of the relevant circumstances, including context and in appropriate cases whether the conduct was intended to have that effect.

37 In considering the burden of proof, we referred to s.136 Equality Act 2010 and the guidance set out in the case of **Igen Ltd v Wong** [2005] IRLR 258, CA as approved in **Madarassy v Nomura International Plc** [2007] IRLR 246, CA. This guidance reminds us that it is for the Claimant to prove facts from which the Tribunal could conclude, in the absence of adequate explanation, that the employer has committed an act of unlawful discrimination. The outcome at this stage of the analysis will usually depend upon what

inferences it is proper to draw from the primary facts found by the Tribunal. Where the Claimant has proved such facts, the burden of proof moves and it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the prohibited ground.

38 The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination; they are not, without more, sufficient material from which we could conclude that there had been discrimination, **Madarassy** at paragraphs 54-57. The protected characteristic must be an effective cause of any less favourable treatment. We must take care to distinguish between unfair or unreasonable treatment and discriminatory treatment as the two are not the same.

Unauthorised Deduction from Wages

39 The Employment Rights Act 1996 ("ERA") s.13 provides that an employer shall not make a deduction from wages of a worker employed by him unless the deductions are required or authorised to be made by virtue of a statutory provision, a relevant provision of the worker's contract or the worker has previously signified in writing his agreement or consent to the making of the deduction.

40 A deduction occurs when an employee or worker is paid less than the amount due on any given occasion including a failure to make any payment, s.13(3) ERA.

41 The Tribunal must first consider whether there has in fact been any deduction, in other words what amount was due to the claimant under the terms of his contract as set out above. In the event that a lesser sum was paid, the Tribunal must consider whether the provisions of the contract amounted to a relevant provision authorizing such deduction.

42 The Deduction from Wages Regulations 2014 implemented two new sections to section 23 of Employment Rights Act, with the effect that claims brought on or after 1 July 2015 are limited to two years before the date of the complaint.

43 In **Bear Scotland Ltd v Fulton and Another** UKEATS/0047/13, the EAT held that any period of more than three months between unauthorised deductions breaks the "series" for the purposes of time limits. In considering whether there is a "series", the EAT held at paragraph 79 that consideration must be given to whether there is sufficient similarity of subject matter and/or a sufficient frequency of repetition, before concluding that the passage of time extinguishes jurisdiction where there is a gap of more than three months between two series of deductions.

44 Mr Lewis submitted that **Bear Scotland** did not make clear to what extent instances of correct payment break a series of deductions, relying upon **Ekwelem v Excel Passenger Service Ltd** UKEAT/03438/12 where the EAT found that a series of deductions was not broken when a period of unlawful deductions was interrupted by a period of lawful deductions. Mr Nuttman did not accept that **Ekwelem** applied to the facts of this case. Mr Lewis also relied on decision of the Northern Ireland Court of Appeal in **Chief Constable of Northern Ireland v Agnew** [2019] NICA 32 which disapproved **Bear Scotland** and found that a series of deductions was not automatically broken by a gap of three months or more, rather this was a question of fact to be decided in the circumstances of the case.

Conclusions

Unauthorised Deduction from Wages

45 The limitation imposed by the amended section 23 is such that the Tribunal is deprived of jurisdiction to hear complaints about alleged deductions before 11 June 2017 (two years before the claim was presented).

46 This leaves alleged deductions on 30 June 2017, 22 September 2017, 5 January 2018, 23 March 2018, 29 June 2018, 25 January 2019, 22 March 2019, 29 March 2019 and 12 April 2019. Whilst a decision of the Court of Appeal in Northern Ireland has persuasive effect, it is not binding on the Employment Tribunal in England and Wales whereas the decision of the UK EAT in **Bear Scotland** is binding. For this reason, the Tribunal is bound to apply the three-month gap rule unless satisfied that it is not appropriate in this case. The Tribunal carefully considered Mr Lewis' submission about **Ekwelem** but found that the ratio in that case did not apply in the case before us now. On the facts of **Ekwelem**, there continued to be a series of deductions without any breaks at all, rather the issue was that some of the deductions were found to be authorised rather than unauthorised. On the facts of the Claimant's case, however, there were no deductions at all between 29 June 2018 and 25 January 2019, a period of seven months (or 29 weeks as he was paid weekly). The Tribunal does not have jurisdiction to hear the claim for alleged deductions before 25 January 2019.

47 In the alternative, even if the three-month **Bear Scotland** rule did not apply, the Tribunal would have found as a matter of fact that the seven-month period in which the Claimant was paid correctly on each of 29 different pay dates was a sufficient temporal gap to break the series of deductions. The frequency of alleged deductions throughout the period 3 March 2017 to 25 January 2019 was insufficient to warrant a finding that it was a "series" rather than sporadic errors.

48 As for the four alleged deductions from 25 January 2019 which were in time, the Tribunal accepts that the Claimant was not paid the sums to which he was contractually entitled on the dates when they were due. This much was recognised by the Respondent in the rectification payment made to him in October 2019. For the reasons set out in our findings of fact, although there were some top up payments for missing hours by use of the dockets system in March 2019, there remained one outstanding docket top up of 3.43 which was not made. We find that the relevant date when the docket payment should have been made was 29 March 2019 (as earlier docket payments corrected earlier errors a week in arrears). As for the alleged underpayment on 12 April 2019, we have accepted that the Claimant was also absent for part of his duty on 30 March 2019. The effect of the absence is that he was not paid less than the sum to which he was contractually due.

49 For these reasons, the Claimant is entitled to a declaration that were unauthorised deductions from his wages during the period January to March 2019. Taking into account the sums already paid, there remains the sum of £45.90 due to the Claimant which the Respondent is ordered to pay.

Race – harassment/direct discrimination

50 The Tribunal has accepted as a matter of fact that the Claimant was suspended

from work for 14 days and was required to attend a disciplinary investigation. From his payslips it is evident that he regularly worked overtime (this was not disputed) and he lost the opportunity for paid overtime during the period of his suspension. Each of these was unwanted by the Claimant.

51 The Claimant bears the burden of proving primary facts from which the Tribunal could conclude that this was conduct related to race. No comparator is required in the section 26 harassment claim although evidentially it is material that the Claimant has not adduced evidence of other drivers with critical BCES surveys who were not sent on a driving training assessment. Unfair or unreasonable treatment is not sufficient to establish that primary case of discrimination. Even if Mr Thomas acted unreasonably, the Tribunal has accepted that he was unaware of the Claimant's race at the time that he decided to send the Claimant on the assessment and at the time of his decision to suspend the Claimant. The loss of paid overtime was a consequence of suspension and not conduct in any way related to race. Finally, the Claimant refers to unfair harassment causing stress and distress, however, for the reasons given even if we were to find that Mr Thomas' conduct amounted to harassment it was not related to race. The claim of harassment related to race fails and is dismissed.

52 In the alternative section 13 claim, the Claimant is required to show less favourable treatment by reference to a comparator. He has advanced his case on the basis of an actual comparator, Mr Gaunt. A comparator must be in the same or not materially different circumstances. The Tribunal considers that Mr Gaunt is not an appropriate statutory comparator as he was not the subject of an unsatisfactory BCES report and, on his own evidence, had not been involved in "at fault" accidents. Even considering Mr Gaunt as an evidential comparator, in other words as evidence of how a hypothetical comparator may have been treated, does not assist the Claimant in circumstances where the Tribunal has found that Mr Thomas did not know or have reason to suspect the Claimant's race to be black African Caribbean. The decisions taken by Mr Thomas were not in any way, whether consciously or subconsciously, because of the Claimant's race. The direct discrimination claim fails and is dismissed.

Concluding Comments

53 For the reasons set out above, the Tribunal agrees with the conclusion of Mr Packman that this matter was handled badly and poorly communicated to the Claimant by Mr Thomas. Whilst the Claimant was properly told by Ms Steel that the BCES report would be passed to a more senior manager for review, the Claimant heard nothing further about it for over six weeks. When he did get the instruction to attend training, it gave a date which had already passed, did not refer to the BCES report as the reason but instead was drafted in terms which, objectively considered, suggested that the reason for the assessment was an accident. Whilst the Tribunal accepts Mr Packman's evidence that the Respondent intends such an assessment to be supportive and a positive learning experience, Mr Thomas' decision to refer to a possible disciplinary consequence was ill-judged and objectively likely to cause concern to an employee required to attend. If the Claimant had been disciplined for his refusal to attend the driving assessment, there is a very real chance that a Tribunal would have agreed that in the circumstances it was not a reasonable management instruction.

54 The Claimant genuinely feels aggrieved about underpayments of salary and the failure to respond to his complaints at the time. Whether or not the Claimant's concern

was well-founded (and we have found in part that it was), good industrial relations requires that an issue as fundamental to the employment relationship as pay must be addressed in a timely manner. Similar concerns about communication arose from the way in which the training assessment was handled. The Respondent may wish to consider addressing its payroll and payslip functions to address any lack of clarity in the way that hours are calculated, especially given the number of drivers who seem to have been affected at the Walthamstow depot. The Claimant must bear in mind that he is obliged to act upon a reasonable management instruction, even if he does not agree with the basis for the same. Had he refused to comply with an instruction to attend training sent in a timely manner, with the reason clearly expressed and without threat of disciplinary action, the Claimant's suspension would very likely have been objectively reasonable even if he disagreed that the BCES report gave rise to cause for genuine concern.

55 The Tribunal is mindful of the fact that the Claimant continues to be employed by the Respondent and of the risk of serious damage to the relationship of mutual trust and confidence which may be caused by adversarial litigation. It is for that reason that after hearing submissions and reserving our Judgment, we encouraged the parties to consider any practical steps that could be taken to enable them to move on positively from this hearing. To their credit, both parties expressed a willingness to do so and the Tribunal wishes them success in this regard.

Employment Judge Russell
Date: 29 April 2020