EMPLOYMENT TRIBUNALS

Claimant: Mr T Kolaitis

Respondent: DX Network Services Limited

Heard at: Birmingham Employment Tribunal (in person)

On: 23, 24, 25, 26, 27 and 30 November and 01 December 2020.

Before: Employment Judge Mark Butler
Mr D McIntosh
Ms E Shenton

Representation
Claimant: In person
Respondent: Mr L Wilson (Counsel)

JUDGMENT

1. The unanimous decision of this Employment Tribunal is that:
    a. The claims of direct race discrimination are ill-founded and dismissed.
    b. The claims for harassment related to race are ill-founded and dismissed.
    c. The claim of constructive unfair dismissal is ill-founded and dismissed.

2. For the avoidance of doubt, all claims in this case have been dismissed.

There was been a request for written reasons made by the claimant, having received oral judgment. These are those written reasons.

REASONS

3. The claims in this case arise following the presentation of a claim form on 06 February 2019. The claimant brought a number of different complaints.

Through a series of Preliminary Hearings (noted below), the claims being brought were recorded as being for race discrimination, harassment related to race and constructive unfair dismissal. This claim was brought following the claimant resigning from his position on 14 January 2019.

4. In readying this case for final hearing, this case was considered before three closed Preliminary Hearings: first, before Employment Judge Richardson on 21 May 2019 (see p.108 of the bundle), Secondly, before Employment Judge Kelly on 08 October 2019 (see p.143D of the bundle), and finally, before Employment Judge Findlay on 21 November 2019 (see p.143I of the bundle).

5. Although there was no request for an interpreter to be present at the first or the second of these Preliminary Hearings, it was at the second of those hearings before EJ Kelly that the claimant asked for an interpreter in the Lithuanian language to be available at the final hearing. An interpreter was present at the Preliminary Hearing before EJ Findlay, and an interpreter was also present at the final hearing.

6. The claimant had an excellent grasp of the English language. At the final hearing, he proceeded for the majority of the hearing without the need for interpretation. It was made clear to the claimant that if there was anything he did not understand or felt that he could not articulate then he could simply seek assistance form the interpreter. The claimant did adopt this approach on numerous occasions throughout the hearing.

7. The culmination of the Preliminary Hearings resulted in a ‘Scott Schedule’, which listed the allegations being brought as part of the claim. This ran to some 52 entries.

8. Helpfully, EJ Findlay considered the status of the schedule, and following consideration by the claimant at the Preliminary Hearing on 21 November 2019, recorded the following:

The Issues:

1. So far as his **race discrimination** case is concerned, the claimant says that James Wood, Joanne Walker (formerly, Joanne Michael), Dave Ritson and Graham Corney treated him less favourably because of his race (and in some cases harassed him for reasons related to his race). He defines his racial origin as Lithuanian/Eastern European. The respondent says that Mr Corney, Mr Wood and Mr Ritson are not giving evidence, as it regards the claimant's complaints as those of unfair management rather than race discrimination.

2. Allegations 2-43 in the schedule (there is no allegation 1) are said to be allegations of direct race discrimination or racial harassment.

3. The claimant agreed that allegation 44 in the Scott schedule is not a complaint of race discrimination, although it may be relevant to the constructive unfair dismissal claim.

4. The claimant agrees that allegation 45 (which refers to page 138 in the bundle) is relevant to the constructive dismissal claim only.

5. The claimant agreed that items 46 – 48 and 50-52 in the Scott schedule are not allegations but simply set out what happened (by way of chronology) on those dates.

6. The claimant agreed that item 49 in the Scott schedule was relevant only to the constructive unfair dismissal claim and any uplift claimed, not the race discrimination claims. The claimant said that the **last straw** was what he called the respondent's "complete failure" to investigate his grievances and the grievance appeal outcome.

9. As part of preliminary discussions in this case, the claimant confirmed that this remained an accurate record of his complaint, and that the Schedule contained all of the allegations which he was seeking to bring to final hearing.

10. We were assisted by a bundle that runs to some 700 pages. Although, I note that there were actually 736 pages according to the electronic count of pages.

11. The claimant gave evidence on his own behalf and had no further witnesses. The claimant attended the tribunal in person.

12. On behalf of the respondent, we heard evidence from:

    a. Ms J Michael, who due to her role would need to liaise with the claimant on planning matters. Ms Michael attended the tribunal remotely.
    b. Mr S Bescoby, who investigated and determined the claimant's grievance. Mr Bescoby gave evidence in person.

13. We were also due to hear evidence from Mr S Patton. Mr Patton considered the claimant's appeal against the grievance outcome. However, Mr Patton had left the employ of the respondent and was unable to attend due to work commitments. The tribunal placed such weight on Mr Patton's evidence that it considered appropriate in these circumstances. Given that he was not in attendance to have his evidence tested. In doing so, we also gave careful consideration to contemporaneous documents referred to in Mr Patton's witness statement.

14. The tribunal did not consider it necessary to question the credibility of the

witnesses of fact in this case.

15. This tribunal was mindful of a number of matters throughout this hearing. The claimant explained to the tribunal that he was suffering from depression. Something which had been noted from the evidence that we had read. The claimant was a litigant in person. And his first language was not English. In ensuring that the claimant had a fair opportunity to participate in these proceedings, the tribunal was mindful and applied guidance from the Equal Treatment Bench Book. This was to ensure that the hearing was conducted fairly. We also thank Mr Wilson for his approach in these proceedings. He showed understanding and patience with the claimant where it was necessary to do so, and even assisted the claimant with presenting his case where he considered it important to do so, without overstepping the mark.

List of issues

16. The list of issues are contained in the Scott Schedule that was prepared for this case. This was at pp117-138 of the bundle. I have attached a copy of the Scott Schedule to the back of this judgment. This must be read alongside that recorded by EJ Findlay at the Preliminary Hearing on 21 November 2019 (see paragraph 8 of this judgment, above).

17. There was one addition to the Scott Schedule. And this concerns comments made by Mr Graham Cornes in October 2016. Having reviewed the claimant's particulars of claim, and noting reference to the comments made by Mr Cornes at para.42 of the particulars of claim, and despite the unclear pleading on this matter, this tribunal concluded that it would determine this issue so as to ensure that the claimant had all of his complaints determined. This not appearing on the Scott schedule appeared to be an oversight on the claimant's behalf. And in the circumstances, we allowed this issue to also be brought at this hearing.

Law

Constructive Dismissal

18. The principle of constructive dismissal was given authoritative consideration by Lord Denning MR in Western Excavating (ECC) Limited v Sharp [1978] ICR 221, with a useful summary of the principles of law which apply in claims of constructive dismissal set out by the Court of Appeal in **London Borough of Waltham Forrest v Omilaju [2005] IRLR 35**.

19. The first question is whether the employer committed a fundamental (or repudiatory) breach of the terms, express or implied, of the claimant's contract of employment. A Tribunal must decide in each case whether a breach of contract is sufficiently serious to enable the innocent party to repudiate the contract. This is question of fact and degree.

20. The employer's repudiatory breach must be the effective cause of the employee's resignation but it does not have to be the sole cause: **Jones v F Sirl & Son (Furnishers) Ltd [1997] IRLR 493**.

21. It is for the Tribunal in each case to determine, as a matter of fact, whether or not the employee resigned, wholly or partly, in response to the employer's breach rather than for some other reason: **Weathersfield Ltd v Sargent [1999] IRLR 94**

22. An employee must not delay too long in resigning, thus affirming the contract and losing the right to claim constructive dismissal.

Equality Act 2010: burden of proof

23. The burden of proof in relation to Equality Act claims is dealt with at s.136 of the Equality Act 2010. At s.136(2) it is provided that

> If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

24. Lord Justice Mummery (with which Laws and Maurice Kay LJJ agreed) in **Madarassy v Nomura International plc [2007] ICR 867**, at paragraphs 56-58, provided a summary of the principles that apply when considering the burden of proof in Equality Act Claims:

> "56. The court in *Igen v Wong…* expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination**. 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 a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.**
>
> 57. "Could… conclude" in section 63A (2) must mean that **"a reasonable tribunal could properly conclude" from all the evidence before it.** This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; **for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by section 5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment**.

> 58. The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim." (emphasis added)

25. Mummery LJ also explained further how evidence adduced by the employer might be relevant, noting that it could even relate to the reason for any less favourable treatment (paras. 71-72):

> "71. Section 63A (2) does not expressly or impliedly prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the complainant's evidence of discrimination. **The respondent may adduce evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or the situations with which comparisons are made are not truly like the complainant or the situation of the complainant; or that, even if there has been less favourable treatment of the complainant, it was not on the ground of her sex or pregnancy.**
>
> 72. Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the complainant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination on the proscribed ground…."

26. Lord Justice Mummery also pointed out that it will often be appropriate for the tribunal to go straight to the second stage. An example is where the employer is asserting that whether the burden at the first stage has been discharged or not, he has a non-discriminatory explanation for the alleged discrimination. A claimant is not prejudiced by that approach since it is effectively assumed in his favour that the burden at the first stage has been discharged.

27. To summarise, the claimant must prove, on the balance of probabilities, facts from which a Tribunal could conclude, in the absence of an adequate explanation that the respondent had discriminated against him. If the claimant succeeds in doing this, then the onus will be on the respondent to prove that it did not commit the act. This is known as the shifting burden of proof. Once the claimant has established a prima facie case (which will require the Tribunal to hear evidence from the claimant and the respondent, to see what proper inferences may be drawn), the burden of

proof shifts to the respondent to disprove the allegations. This will require consideration of the subjective reasons that caused the employer to act as he did. The respondent will have to show a non-discriminatory reason for the difference in treatment.

Direct Race Discrimination

28. Direct discrimination is provided for by section 13 of the Equality Act 2010. It is defined as occurring when:

> A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

29. Mr Justice Elias, in **Islington Borough Council v Ladele [2009] ICR 387**, explained the essence of direct discrimination in the following way:

> "The concept of direct discrimination is fundamentally a simple one. The claimant suffers some form of detriment (using that term very broadly) and the reason for that detrimentor treatment is the prohibited ground. There is implicit in that analysis the fact that someone in a similar position to whom that ground did not apply (the comparator) would not have suffered the detriment. By establishing that the reason for the detrimental treatment is the prohibited reason, the claimant necessarily establishes at one and the same time that he or she is less favourably treated than the comparator who did not share the prohibited characteristic."

Detriment

30. The concept of detriment was given consideration before the then House of Lords in **Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 227**:

> Lord Hope at paragraphs 34-36 explained that "This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to "detriment""
>
> Whereas Lord Scott at paragraph 105 explained that "…If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought, in my opinion, to suffice"

Racial Harassment

31. Harassment is defined under the Equality Act 2010 at section 26. Where it is defined as occurring where

> (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.

(2) A also harasses B if—
(a) A engages in unwanted conduct of a sexual nature, and
(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—
(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
(b) the conduct has the purpose or effect referred to in subsection (1)(b), and
(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(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.

Submissions

32. We heard both closing submissions from both Mr Wilson on behalf of the respondent, and finally from the claimant. These are not repeated in full, but merely summarised below.

33. With respect to the discrimination complaint, Mr Wilson's primary submission was that the first stage of the burden of proof, that being that the claimant must establish a *prima face* a case of discrimination, has not been established. And that if the tribunal is not with him on that, then there are alternative explanations as to the treatment which explain that the treatment was not a discriminatory act. With respect the constructive dismissal complaint, Mr Wilson submitted that the claimant has simply failed to establish a fundamental breach of his contract which caused him to resign.

34. The claimant, and this is no criticism of him, was brief in his closing submissions. He touched upon a couple of matters in the evidence. And focused, in the main, on what he perceived to be failings in the grievance and appeal process.

Findings of fact and conclusions on each allegation respectively

We make the following findings of fact based on the balance of probability from the evidence we have read, seen, and heard. We do not make findings in relation to all matters in dispute but only on matters that we consider relevant to deciding on the issues currently before us. Below our findings, we have added conclusions in relation to each incident. We considered this a more appropriate way to present our judgment in a case with a large number of allegations. The sub-heading 'Item' refers to the item number with reference to the Scott Schedule. In brackets, are the relevant pages in the bundle.

Item 2 (pp.237-238)

35. On 07 June 2018, Mr Perkins emails Mr King asking whether he is happy with route numbers dropping from 8 to 7.

36. Ms Michael (who was previously Ms Walker), asks the claimant to confirm those numbers and whether the consignment numbers for next week were achievable on 7 routes. Ms Michael is seeking this information.

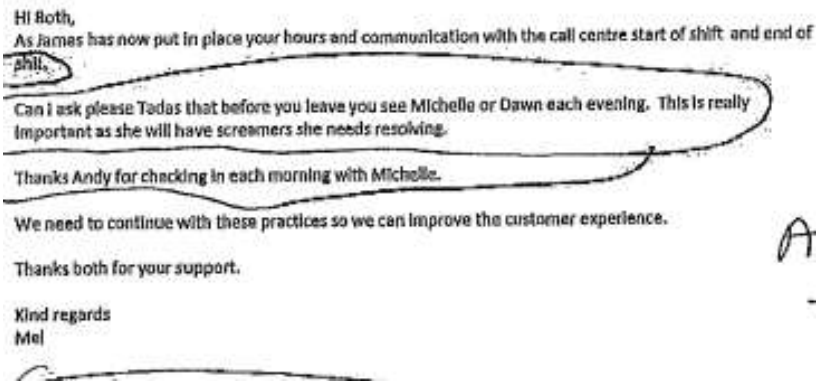
37. There is email discussion between the claimant and Ms Michael on 07 June 2018, relating to the number of vehicles booked and discussion concerning reloads.

Conclusion on Item 2: The claimant has not satisfied the tribunal that Ms Michael was pursuing harassing actions or setting unachievable instructions, nor that this was Ms Michael failing to assist or support the claimant. There is no evidence brought to support that this was less favourable treatment. Nor that any treatment was because of or related to the claimant's nationality.

Item 3 (p.241)

38. When Mr James Wood started his employment with the respondent, he put in place a process whereby planners would communicate with the call centre at the start of the shift and the end of the shift. This was with a view to improving customer experience.

39. Ms Melanie Bowring emailed both the claimant and Mr Andy Webb on 21 June 2018, with a number of other individuals cc'd in. She wrote:



Hi Both,
As James has now put in place your hours and communication with the call centre start of shift and end of shift.

Can I ask please Tadas that before you leave you see Michelle or Dawn each evening. This is really important as she will have screamers she needs resolving.

Thanks Andy for checking in each morning with Michelle.

We need to continue with these practices so we can improve the customer experience.

Thanks both for your support.

Kind regards
Mel

40. The tone of the email is not offensive.

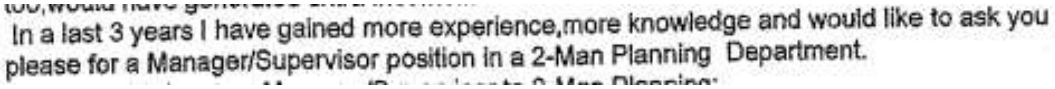
41. The claimant responded to this email by simply explaining to Ms Bowring 'already doing this'. Mr James Wood was copied into this response. There was no request for Mr Wood to respond to this email.

42. There was no reply to this email form Mr Wood.

    Conclusion on Item 3: This does not reach the level of being unwanted or less favourable treatment. This is an innocent reminder by Ms Bowring. There was no requirement for Mr Wood to reply. Further, the claimant has not established that Mr Webb was in materially same circumstances. And there is no evidence to establish a causal link to the claimant's nationality.

    Item 4 (pp.249-251)

43. On 30 June 2018 the claimant emailed Mr James Wood to introduce himself to his new line manager. Within this email the claimant wrote the following:


In a last 3 years I have gained more experience,more knowledge and would like to ask you please for a Manager/Supervisor position in a 2-Man Planning Department.

44. In fact, during the claimant's time with the respondent there was never a Head of Planning/Manager/Supervisor role. No role ever existed. This was the claimant's live evidence.

45. Mr Wood did not reply to this email directly.

    Conclusions on Item 4: The claimant has not satisfied the tribunal that he has been subjected to a detriment in that he made a request for promotion which was ignored. There is no evidence of any formal application, nor did the claimant raise this matter again. But further, there was simply no role in existence. The claimant has produced no evidence to show a causal link to his nationality.

    Item 5 (pp.252-255)

46. The email at the top of p.252 of the bundle was never sent to Ms Michael (with Mr Wood copied in). We reach this finding as there is evidence of other emails in the bundle being composed by the claimant but not sent to anybody else other than himself. Ms Michael's clear evidence was that she never received this email. And the claimant has not produced the necessary evidence to show that this email was sent, in that the mailing information is missing. On balance, we accepted Ms Michael's evidence, especially given that the evidence in the bundle suggests that Ms Michael's did consistently respond to emails sent from the claimant.

47. Mr Paddocks was appointed by Mr Woods to deal with overarching systemic issues. We accept this evidence from Ms Michael, and this is consistent with what we have seen throughout this case.

48. The situation in this email chain concerned incorrect weight of goods. This was considered a systemic issue, which Ms Michael's considered to be within the role that Mr Paddock was brought in to address.

49. Mr Paddock completed a re-organisation of the planned routes, which resolved the identified problem.

    Conclusion on Item 5: The claimant has not presented evidence to establish this as being less favourable treatment or unwanted conduct. It would be unreasonable to consider senior management instructing a person to complete a role within that person's remit as a detriment to the claimant. There is no evidence presented from which we can conclude that the email at p.252 was sent and required a response. There is no evidence that any of the treatment complained of was in any way linked to the claimant's nationality.

    Item 6 (p.256)

50. An IT issue is identified by Mr Dominic Best, in terms of travel time not matching up. He commits this to an email to the claimant on 10 July 2018.

51. The claimant forwards this matter to Mr James Wood, and states:

> Hi James,
>
> please see below,exactly what I mentioned some time ago.
>
> Mark Langford is looking in to it.
>
> Thanks
> Tadas

52. There was no response to this email

    Conclusion on Item 6: The email sent by the claimant did not require a response. He has not adduced sufficient evidence to support that he has been subjected to less favourable treatment or unwanted conduct, nor that any such treatment was in some way caused by his nationality.

    Item 7 (pp.259-261)

53. An issue concerning covering of a route due to an absent driver is raised with the claimant by Mr Stuart Binnie on 10 July 2018.

54. The claimant responds to Mr Binnie raising a query.

55. Mr Binnie emails Mr Dave Ritson asking him to explain to the claimant that it is ok to split the route as he had planned.

56. Mr Ritson called the claimant to explain to the claimant that he was to re-plan the routes based on the requirements of Mr Binnie.

57. The claimant then agrees in his email at 14.50 that he will redo the routes 'as per Dave'. This resolves the identified problem.

Conclusion on Item 7: There was no need for any further involvement by Mr Ritson in this situation as the matter had been resolved. The claimant has no adduced sufficient evidence to establish that he has been subjected to less favourable treatment or unwanted conduct, nor that any such treatment was in some way connected to his nationality.

Item 8 (p.524)

58. Dave Ritson used unprofessional language in the email at p.524. This is accepted by the respondent.

59. The email was not aimed at anybody, but was concerning the system that was being used.

60. The claimant never raised this matter as an issue before his raising of a grievance.

61. The claimant never replied to this email to explain the effect that it had on him, nor to request that such language should not be used.

Conclusion on Item 8: the claimant has not satisfied the tribunal that he had been subjected to less favourable treatment or unwanted conduct, nor that any such alleged treatment was connected to his nationality.

Item 9 (pp.264-265)

62. The email at the top of p.264, sent to the claimant by Ms Michael (then Walker), with Mr Woods copied in, is an email where Ms Michael is giving the claimant praise. This was a genuine email. And the genuineness of the email was unchallenged by the claimant.

63. The claimant uses emojis in her emails to be nice. We accept Ms Michael's evidence on this, which is supported by her further use of an emoji at p.285.

64. There is no complaint to Mr Wood for which a response was needed.

Conclusion on Item 9: the claimant has failed to satisfy the tribunal that there was any less favourable treatment or unwanted conduct present, nor that any alleged treatment was connected to his nationality.

Item 10 (p.263)

65. The claimant identifies an issue at a depot, and informs the depot manager by email on 19 July 2018.

66. The claimant then emails Mr Ritson, with Mr Woods copied in, to explain the actions he has taken to resolve the issue that he had identified.

67. The claimant's actions resolved the situation.

68. The claimant did not receive any acknowledgment from either Mr Ritson or Mr Wood.

Conclusion on Item 10: the claimant has not satisfied the tribunal that there is any case of less favourable treatment or unwanted conduct, nor that any such alleged treatment was in any way connected to his nationality.

Item 11 (p.262)

69. An email was sent from Mr Phil Carter to Ms Michelle Profitt and Mr Dave Ritson. Within the email, a potential routing issue is raised. The claimant was not party to this email, no was any matter concerning him raised in this email.

Conclusion on Item 11: the claimant has not produced any evidence that satisfies the tribunal that he has been subjected to any less favourable or unwanted conduct during this email correspondence. Further, there is no evidence linking any allegations to the claimant's nationality.

Item 12 (p.266)

70. The claimant was not copied in to the emails on p.266.

71. Kevin Paddock was not failing in his employment duties. Put simply, the claimant has not produced any evidence that would support any other finding.

Conclusion on Item 12: the claimant has produced no evidence to support that he was treated differently in the same circumstances or that he has been subjected to unwanted conduct. There is no evidence to support that Mr Paddock was failing in his duties and not subject to management actions, whilst the claimant was subject to management actions for failings in relation to planning obligations. There is no less favourable treatment, nor any evidence to link any alleged detriment to the claimant's nationality.

Item 14 (p.269)

72. The claimant sends an email to Mr James Wood on 03 August 2018. He is wanting clarification on a number of matters. This included as to why he was no longer being trusted, and why Mr Paddock was involved in what the claimant describes as his duties. This email was inviting a response from Mr Wood on specific matters.

73. Mr Woods did not respond to this email.

Conclusion on Item 14: although we have some sympathy with the claimant on this matter, in that he is clearly seeking a response to some of concerns that he has, and that given the lack of any response presented before us, we have concluded that no response was provided. However, there is evidence presented to satisfy the tribunal that this was less favourable or unwanted conduct and was in some way related to his nationality.

Item 13 (p.269-270)

74. Mr Matthew Sparks raised an issue in relation to a delivery, this went to the claimant and Ms Michaels.

75. The claimant responded to this issue on p.269. He did not offer a solution to the problem.

76. Ms Michaels weighed up the workload of her team and considered how she could help. Having appreciated that the claimant was under immense daily work pressure she decided to make use of Mr Paddock. Ms Michael's live evidence on this matter was consistent with her witness evidence, which went unchallenged by the claimant.

77. Mr Paddock took action which solved the issue.

    Conclusion on item 13: this appeared to be a supportive step taken by Ms Michael, rather than a means of subjecting the claimant to a detriment. The claimant has not satisfied the tribunal that this was an act that was less favourable treatment or unwanted conduct, nor that any such alleged treatment was in any way connected to his nationality.

    Item 15 (pp271-272)

78. Mr David Gray, by email of 04 August 2018, alerts the claimant (and others) to an issue when loading a vehicle for round 611 on Monday, and offers a solution to how this matter could be resolved.

79. The claimant provides Ms Michael with his views on the situation, by email of 06 August 2018, .

80. Ms Michael agrees with the solution put forward by Mr Gray. Which is actioned by Mr Ben Diponio.

    Conclusion on item 15: it is unclear on what basis the claimant is submitting that he has been treated less favourably. This is not a complaint about the claimant, nor was he present or responsible for the issue that arose. This is simply a problem that arose and was resolved through teamwork. The claimant has failed to satisfy the tribunal that he has been treated less favourably or subjected to unwanted conduct, nor that any was in some way caused by his nationality.

    Item 16 (pp.273-274)

81. On balance, Mr Ritson likely read the email that forms the basis of this allegation. Although the claimant says this was deleted without him reading, looking in the round, Mr Ritson did read emails sent by the claimant and often responded. On balance, Mr Ritson likely read this email from an alternative device, such as a mobile phone device, which does not generate a read receipt.

    Conclusion on Item 16: there is no evidence of less favourable treatment or unwanted conduct. However, even if we are wrong on that, no evidence has been produced to satisfy the tribunal that any such detriment, if it existed, was in some way caused by the claimant's nationality.

Item 17 (pp.275-276)

82. Mr Dave Ritson sought views on a route in Swansea from both Mr Andy Webb and Mr Kevin Paddock. Views are sought by email dated 09 August 2018.

83. Mr Webb passed the query on to the claimant.

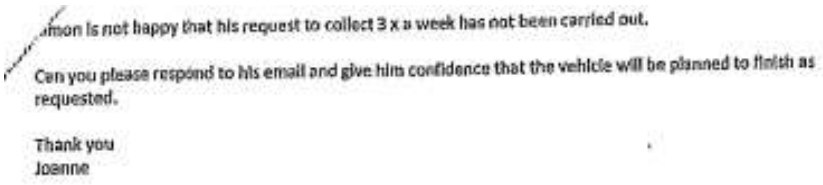
84. The claimant responded directly to Mr Ritson, providing his views in line with that requested by Mr Ritson. The email does not require a response.

Conclusion on item 17: the claimant has not been subjected to the detriment as pleaded, nor has the claimant produced any evidence to show that any such alleged detriment has been caused by his nationality.

Item 18 (pp.278-280)

85. Ms Michael sent an email to both the claimant and Mr Paddock on 09 August 2018, following Mr Simon Eggleston raising an issue that had arisen.

86. There is not blame attached to the claimant in Ms Michael's email, nor is there evidence of harassing behaviour. Ms Michael merely wrote:



Simon is not happy that his request to collect 3 x a week has not been carried out.

Can you please respond to his email and give him confidence that the vehicle will be planned to finish as requested.

Thank you
Joanne

Conclusion on Item 18: The claimant has not satisfied the tribunal that he has been subjected to a detriment as that pleaded. Nor has he adduced any evidence to support that any such allegation was in some way connected to his nationality.

Item 19 (p.281 and p.237)

87. On 09 August 2018 there were some significant issues at a depot that had a new depot manager in place (Mr Jon Mitchell) and was being covered by Mr Andy Webb. In effect the depot had 'fallen over'. This depot was in great difficulty and needed significant input.

88. In order to support this depot, Ms Michael formulated a plan of action, which she committed to an email that was sent to Jon Mitchell, with others, including Mr Webb copied in.

89. The situation that led to the email of 10 August 2018 at p.281 is not comparable to the situation that the claimant described in relation to the emails of p.237.

90. Ms Michael is responsible for training throughout her time with the respondent.

91. The claimant, in his terms of conditions at p.558, could be invited to support training of crew, but this was not one of his responsibilities.

    Conclusion on item 19: the situations that the claimant is seeking to compare to evidence less favourable treatment are not comparable. Further, the evidence produced does not show a different of treatment between the claimant and Mr Webb. To support such a submission, the claimant would need to have evidenced that in a situation where a depot which needed similar significant input, and it was his responsibility for routing of that depot, he was treated less favourably than a comparator. There is simply no evidence that reaches this level. It is also relevant that he email at p.281 is not directed at supporting Mr Webb, but instead is intended to support Mr Mitchell. Further, the claimant has not produced any evidence that supports that any such allegation was in some way caused by his nationality.

    Further, the claimant has not adduced requisite evidence to establish that he was responsible for training, and that removing this from him was subjecting him to a detriment for a reason connected to his nationality.

    Item 20 (pp.285-289)

92. An issue arose in relation to routing on or around 13 August 2018.

93. The team worked together to resolve the issue. Which is clear form the claimant's response in his email at 16.19 on 143 August 2018 (p.289), where he states 'I am glad this has been sorted out…'

    Conclusion on item 20: the claimant has not satisfied the tribunal that he has been subjected to less favourable or unwanted treatment as alleged. Nor has he established that any such alleged treatment was in any way due to his nationality.

    Item 21 (pp.288-292)

94. In his email to Ms Michael on p.289, the claimant does ask a question for Ms Michael to respond to.

95. Ms Michael did not provide a reply to this question. Ms Michael's evidence wa that she did not recall receiving this email and in any event did not require an immediate response as the situation that this had concerned had been resolved.

    Conclusion on item 21: although there is a question asked by the claimant that has gone unanswered, the claimant has not adduced evidence to support that this was less favourable treatment or unwanted conduct for some reason connected to his nationality.

    Item 22 (pp.282-284)

96. During the period in question Mr Kevin Paddock was covering the claimant's route planning responsibilities.

97. The claimant has produced some report which he sent to himself. There is

no clear indication as to what this report shows or where the data has come from.

98. This data/report was not presented to anybody of the management team.

Conclusion on item 22: the claimant has adduced no evidence to support any findings that he was subjected to a detriment and that this was in some way connected to his nationality.

Item 23 (pp.290, 294 and 295)

99. The claimant does not produce evidence to show that Mr Kevin Paddock was failing in his duties.

100. A problem arose on 14 August 2018 in relation to routes that were to be in place for the following day. This was Identified by Mr John McPhillips.

101. The claimant emailed to himself on 14 August 2018 (see p.294) an email explaining that Mr Paddock did not send the routes. However, there is nothing to support that Mr Paddock was at fault.

102. Ms Michelle Proffit arranged for the routing to be sent to Mr Phil Carter on the same day, that being 14 August 2018. This is clear from the email sent from Mr Carter at p.295. This email was sent to Ms Proffit, the claimant and Mr Andy Webb.

Conclusion on item 23: there is no evidence adduced by the claimant to support that he is been subject to a detriment, and that is for a reason related to his nationality.

Item 24 (p.293)

103. An email was sent from Mr Dave Ritson on 14 August 2018 querying why 3 routes were being run in Northampton the following day. This email was sent to the claimant, Ms Heidi Stanton and Mr Kevin Paddock.

104. The claimant responded explaining that this was due to training.

105. Mr Ritson responded to the claimant's reply by stating that 'that does not justify 3 routes'.

Conclusion on item 24: there is no evidence that the claimant was harassed or blamed during this email exchange. Mr Ritson's email was querying a situation and was asking for views from the team. Nothing was targeted at the claimant. The claimant has not adduced evidence that he was subjected to a detriment and that this was for a reason relating to his nationality.

Item 25 (pp.296-297)

106. Mr Dave Ritson emailed both the claimant and Mr Kevin Paddock at 07.35 on 16 August 2018 to try to identify as to why a rule relating to 1

man deliveries was not being followed.

107. The claimant responded to this email with the relevant information.

108. Mr Ritson replied to the claimant to explain that the instructions of 18 months were till valid, and that 1 man deliveries without advance approval should not happen.

109. Mr Paddock replies to this email chain at 09.16, explaining that 'going forward we will ensure that no 1 man orders are put into routes unless there is authorisation from yourself or Joanne'.

Conclusion on item 25: the claimant's comparator, Mr Paddock, is treated in exactly the same way as the claimant. Mr Paddock was simply providing support in assisting the planning team, which was part of his role. The claimant has not adduced evidence that established that he has been subjected to less favourable treatment or unwanted conduct for reasons related to his nationality.

Item 26 and Item 30 (pp.298-300)

110. The email exchange on p.298 is merely informational. There is no action or inaction by the claimant identified. The claimant checks on a route, which is part of his job. And he is informed that they would be going out 'on one man as per Dave Ritson'.

Conclusion on item 26: the claimant has not satisfied the initial burden that rests on him to establish that he has been subjected to a detriment and that this is for a reason related to his nationality.

Item 27 (p.301)

111. An email was sent from Mr Daniel Seabrook to Mr Kevin Paddock on 15 August 2018 at 09.56, with the subject matter: Important GDPR Training and Awareness communication. Within the body of this email, Mr Seabrook state that 'there is no record of your team completing the training video…'

112. There was no role of Head of Planning. And this was the claimant's own evidence.

113. There was use of ownership terms in the workplace. The claimant accepted in evidence that this was commonplace, and he himself used terminology referencing 'his depot'.

Conclusion on item 27: the claimant has not discharged the burden that rests on him in establishing a prima facie case of less favourable treatment or unwanted conduct, nor has he adduced evidence of the allegation being related to his nationality.

Item 28 (p.302)

114. The claimant requested from Mr James Wood a copy of his personnel files by email on 16 August 2018.

115. Mr Wood failed to provide these files as requested. Mr Wood accepted this to be the case during the grievance process, but that it was an error on his part.

Conclusion on Item 28: the claimant has failed to adduce evidence that there was any link between this failing and his nationality.

Item 29 (pp.303-305)

116. The claimant does not produce any objective evidence that Mr Kevin Paddock failed to plan 14 Orders.

117. The claimant produced some unverified data at pp303-305. This report was never sent to management, and the claimant never raised this matter before.

118. There was no evidence adduced which showed that the claimant was treated differently for failing to plan an order.

Conclusion on item 29: the claimant has failed to adduce any evidence to support this allegation, either in that he has been subjected to a detriment or that any such treatment was for a reason related to his nationality.

Item 31 (p.306)

119. Ms Michael sent an email on 20 August 2018 to Iulian Novac, the claimant and Kevin Paddock, with others copied in. Asking all to ensure that Mr Paddock was copied in to all planning correspondence.

Conclusion on item 31: This was a blanket request by Ms Michael. Everybody was treated the same way. The claimant has not satisfied the tribunal with evidence that he has been subjected to a detriment, nor that any such alleged detriment is in some way connected to his nationality.

Item 32 (p.309)

120. During a period of holiday leave for the claimant around 28 August 2018, Mr Kevin Paddock provided cover for the claimant's duties. In preparation for the claimant returning from leave, and Mr Paddock taking annual leave, Mr Paddock provided a detailed handover for the claimant, which explained all the route plans of the following week. This was sent to the claimant on an email on 28 August 2018.

121. The claimant responded to Mr Paddock on 29 August 2018 by email, with Ms Michael copied in, highlighting a number of matters. He concluded his email by thanking Mr Paddock for covering for him, and explaining why he made the observations he did. There is no complaint about Mr Paddock in this email, nor is there anything present that required a response form either Mr Paddock or Ms Michael.

Conclusion on item 32: This incident further supports other findings int his judgment that MR Paddock was part of the planning team. In respect of this allegation, there is no evidence presented to support that there is

anything that reaches the level of less favourable treatment or unwanted conduct, and there is no evidence presented to suggest that any such allegation was in some way connected to the claimant's nationality.

Item 33 (pp.307-308)

122. On 29 August 2018, the claimant advised Mr Matthew Sparks (and others) by email that a number of routes were overbooked and they would need to increase the number of routes to 6.

123. Mr Sparkes responded that same day and explained that this was not possible from a resource perspective. This led to the claimant emailing Ms Michael to seek advice.

124. Ms Michael phoned the claimant to explain that she was releasing an extra vehicle to the claimant to complete the deliveries a booked.

125. The claimant relayed this information back to the depot at 13.51, explaining that 'Joanne authorised it and arranged a vehicle for me on Saturday'.

Conclusion on item 33: it is difficult to accept that the claimant perceived the phrase 'arranged a vehicle for you' as being detrimental treatment, given the use of ownership language was common in this environment (which has been referred to earlier in this judgment). The claimant has not discharged the initial burden that rests on him to satisfy the tribunal that this reaches the level of less favourable treatment or unwanted conduct because of his nationality.

Item 34 (pp.313-314)

126. On 31 August 2018, Ms Michael, by email, gave the claimant a task. This was to draw up a dummy route plan, covering certain postcodes.

127. The claimant replied by email on that same day (at 12.53) with details of his thoughts, but without the dummy route plan that Ms Michael had requested.

128. Ms Michael replied to the claimant with the comment 'Not exactly the brief I gave you but never mind', before Ms Michael gave further instruction in relation to the initial task.

Conclusion: The claimant was set a task, and failed to complete the task as required. The claimant's email provided content that was not what Ms Michael was requesting. It is clear form the content of the emails that Ms Michael was not asking the claimant to plan exactly the same matters that the claimant had raised in his reply. The claimant has adduced no evidence to support that this was less favourable treatment for any reason connected to his race.

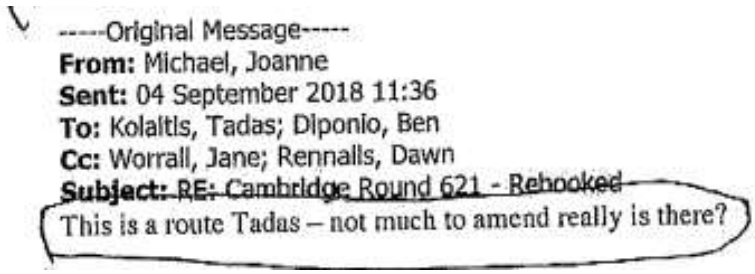
Item 35 (pp.316-318)

129. A route had been planned for deliveries on 04 September 2018.

However, these were not completed due to a mechanical failure of the vehicle that was due to be used to complete the deliveries. Mr Ben Diponio informed Ms Joanne Michael (and others), with e claimant copied in, that the customer orders had been rebooked for delivery on 05 September 2018, using the same route plan, which was attached to his email).

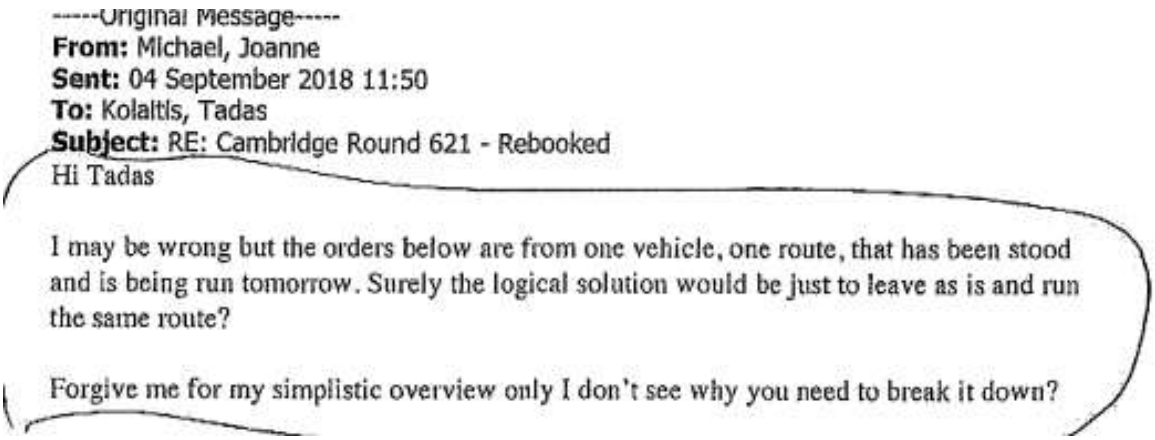
130. A vehicle that was on standby was effectively rotated into the pool of vehicles, and was to be used to complete the route.

131. In response to an email from the claimant, Ms Michael explained that



-----Original Message-----
From: Michael, Joanne
Sent: 04 September 2018 11:36
To: Kolaitis, Tadas; Diponio, Ben
Cc: Worrall, Jane; Rennalls, Dawn
Subject: RE: Cambridge Round 621 - Rebooked
This is a route Tadas – not much to amend really is there?

132. In a later email Ms Michael explained:



-----Original Message-----
From: Michael, Joanne
Sent: 04 September 2018 11:50
To: Kolaitis, Tadas
Subject: RE: Cambridge Round 621 - Rebooked
Hi Tadas

I may be wrong but the orders below are from one vehicle, one route, that has been stood and is being run tomorrow. Surely the logical solution would be just to leave as is and run the same route?

Forgive me for my simplistic overview only I don't see why you need to break it down?

Conclusion on item 35: the claimant has failed to satisfy the tribunal that he had been subjected to a sarcastic comment from Ms Michael, and that any such comment was because of his nationality. Ms Michael was faced with a problem, and there was a simple solution: use a spare vehicle to complete the deliveries on a route that had already been planned. Ms Michael's response is merely stating this fact.

Item 36 (pp.319-321)

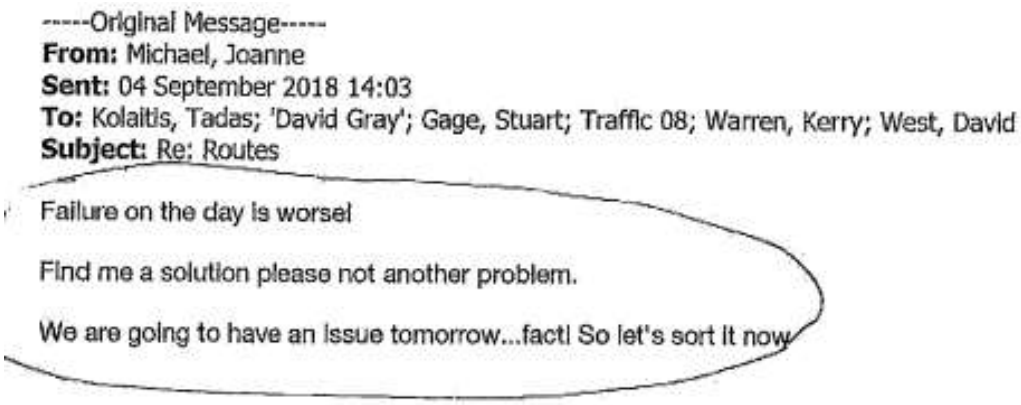
133. Mr David Gray identifies an issue regarding route 630 on 04 September 2018, and seeks some advice.

134. The claimant responds. In essence, his reply was that there was not much he could do to resolve the problem.

135. Ms Michael then sends an email with what appears to be a solution to the issue.

136. The claimant responds to Ms Michael by highlighting further upcoming issues over the coming week.

137. Ms Michael further replies to the claimant with the following:



-----Original Message-----
From: Michael, Joanne
Sent: 04 September 2018 14:03
To: Kolaitis, Tadas; 'David Gray'; Gage, Stuart; Traffic 08; Warren, Kerry; West, David
Subject: Re: Routes

Failure on the day is worse!

Find me a solution please not another problem.

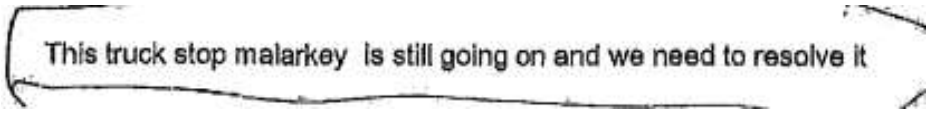
We are going to have an issue tomorrow...fact! So let's sort it now

138. The claimant in his response to this, although highlighting some other issues, does identify a solution to the following days problem, in that he suggests an extra half route.

Conclusion on item 36: An urgent problem arose that required a solution. Ms Michael was seeking a solution form the claimant, which was her role with the respondent. The claimant has not satisfied the tribunal that the correspondence by Ms Michael reaches the level of being unlawful discrimination.

Item 37 (pp.322-323)

139. Ms Norma Gates sent an email to Mr James Wood and Mr Kevin Paddock on 31 August 2018, where she stated that



This truck stop malarkey is still going on and we need to resolve it

140. The claimant was not in this email chain.

141. The claimant was not the subject of this comment.

142. The claimant is clearly, on the face of the emails that we have read, is about the system used by the respondent that is called 'Truck Stop'.

143. The claimant has no responsibility for this system.

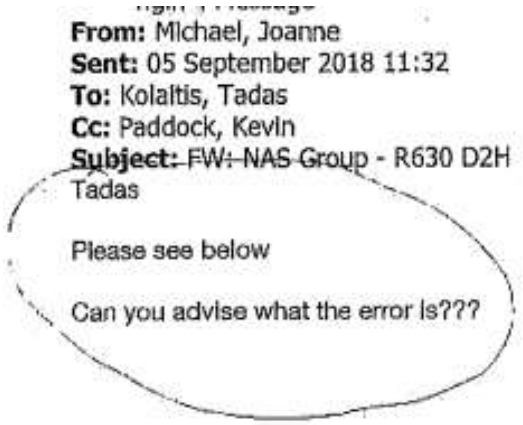
Conclusion on item 37: Although the term malarkey was used, the claimant does not satisfy the tribunal that this reaches the level of being a detriment to him. Further, there is no evidence presented that supports that the use of this term had any connection to the claimant's nationality.

Item 38 (pp.324-327)

144. An issue is identified by Mr john Rooney in relation to routes 630

and 631 on 05 September 2018. This issue is escalated to Ms Michael by Mr John Fenwick.

145. As this is appears to be a planning issue, Ms Michael contacts the claimant and states:



From: Michael, Joanne
Sent: 05 September 2018 11:32
To: Kolaitis, Tadas
Cc: Paddock, Kevin
Subject: FW: NAS Group - R630 D2H
Tadas

Please see below

Can you advise what the error is???

146. The claimant provides an initial response to this email, identifying that the problem was at the depot. The claimant's response was forwarded to Mr Fenwick by Ms Michael.

147. Mr Fenwick disputed what the claimant was saying. He accepts that the route was finalised twice, but that the problem was caused by the consignment appearing on two routes, which led to this problem. Mr Fenwick's response was forwarded to the claimant by Ms Michael.

148. The claimant disputes Mr Fenwick's explanation. Before then undertaking some investigation to identify who he says was at fault. In his email to Ms Michael, the claimant states 'can we please investigate first before blaming me…'

149. Ms Michael responds at 12.40 on that same day, starting her email with 'Tadas I asked you to advise "what the error is"?? I made no reference to blame.'

Conclusion on item 38: there is no blame of the claimant. And the claimant has not adduced sufficient evidence that he is being subjected to a detriment for a reason connected to his nationality. Interestingly, the claimant copies Mr Paddock back into the email chain having fallen off it mid-way through. This again supports our earlier findings that Mr Paddock was a member of the planning team, and that the claimant was aware of this. This was a planning issue being discussed, and the claimant copied in Mr Paddock to the conversation.

Item 39 (pp.328-329)

150. The claimant sent an email to Mr James Wood on 05 September 2018. This explained a number of matters relating to his health and relating to some of the treatments he says he was being subject to at work.

151. There was no response to this email by Mr Wood.

Conclusion on item 39: although we have much sympathy with the claimant in that this email expresses that he was clearly struggling with certain matters. And it would be good practice for a line manager to respond to such an email, the claimant has not adduced evidence to connect this lack of response to his nationality. And therefore he does not satisfy the initial burden that rests on him.

Item 40 (pp.331-332)

152. There is no allegation of an act or omission against the claimant in respect of this pleaded issue.

Conclusion on item 40: there is no evidence presented that Mr Kevin Paddock was doing anything wrong, there is no evidence presented that the claimant had subjected to a detriment, and there is no evidence presented of any casual connection with nationality in respect of any allegations.

Item 41 (pp.333 and 237)

153. Around 20 September 2018, Mr Kevin Paddock reduced the number of vehicles needed for the following week's planned routes from 416 to 386. This is a reduction of 30 vehicles. Ms Michael by email on 20 September 2018 praised Mr Paddock. This was considered to be long term gains, as this was expected to be replicated going forward. We accepted Ms Michael's unchallenged evidence on this.

154. On 07 June 2018, the claimant managed to reduce the number of vehicles on one route from 8 to 7. In total there was a reduction of 4 vehicles identified by the claimant. We accepted the unchallenged evidence of Ms Michael that this was a short term gain and related to a particular day and a particular route.

155. Ms Michael as part of this correspondence asked the claimant to confirm that the numbers were achievable (email top of p.237, the sending information is at the bottom of p.238).

Conclusion on item 41: the claimant is seeking to compare very different situations to indicate a difference in treatment. The two situations were very different, with Mr Paddock identifying long-term efficiencies for the respondent. The claimant does not satisfy the tribunal that he has bene subjected to less favourable treatment to that of Mr Paddock in materially the same circumstances. But even if we are wrong on that, no evidence is adduced to support that any such treatment was in any way connected to his nationality.

Item 42 (p.334)

156. The claimant started a period of sick leave during September 2018. On 21 September 2018, the claimant notified Mr James Wood that the doctor had extended his sick note by a week.

157. In response to this notification, Mr Wood replied stating:

Tadas

I need the original documents from your doctor (from two weeks ago and this one) and I need them on Monday to allow me to pay you. If you can't make it in with them can you get someone to drop them into Crestwood for you FTAO Kevin Paddock.

Regards

James

158. The claimant understood that Mr Wood required the original documents in order for his pay to continue.

Conclusion on item 42: the claimant has not adduced any evidence that he has been treated less favourably or unwanted conduct because of his nationality.

Item 43

159. This pleading is not particularised, which made it difficult to understand. However, it is clear that there is no evidence produced that supports any finding that Mr Andy Webb worked significantly less hours than the claimant.

160. In his email of 30 June 2018 (pp.249-251) to Mr James Wood, the claimant was seeking to take on further responsibilities.

Conclusion on item 43: the claimant has produced no evidence that he worked excessive hours, and that this was because of his nationality. Further, he appears in his email to James Wood to want to take on additional work. This is alongside a number of allegations that form part of this case where the claimant is complaining that work is being taken off him. These appear to contradict this allegation pertaining to excessive work load.

Mr Graham Cornes comments

161. On balance, we find that Mr Cornes did not make the comments which the claimant raised in his grievance (p.338). Mr Cornes did not make comments such as 'it's because you are foreign' or 'oh you foreign you always have problems with everything'. The reason why we reached his conclusion includes due to the vagueness of the allegation. The claimant cannot provide any specifics about these incidents, including the date on which he alleges he was subjected to this treatment. The claimant gives no evidence about his in his witness statement. But further, the individuals the claimant says witnessed these comments were all asked during the grievance investigation and followed up with further questioning by Mr Patton in the appeal. All those questioned confirmed that they did not hear any such comment. This supported the finding that we made.

162. Even if we are wrong on that, these unspecified allegations were brought out of time. Mr Cornes left the employ of the respondent in Summer 2018, but the claimant identified in oral evidence that such comments took place in April/May/June 2018. So even if we adopted a generous view on this, the comments must have been made at the very latest, based on the claimant's oral evidence, on 30 June 2018. ACAS Early Conciliation would have to have been commenced by 29 September 2018 to trigger the stay in the running of time for time limit purposes. Whereas it was commenced on 29 November 2018. The claim for this allegation was therefore brought out of time, unless the tribunal considered that it was just and equitable to extend time in the circumstances. The burden of proof rests on the claimant to establish that it would be just and equitable to extend time. However, the claimant did not put forward any explanation for the delay. Given that the claimant accepted that he had received legal advice in producing his grievance, he had knowledge of a potential claim for discrimination at this point, which should have put him on notice of time limits, and he failed to put forward any explanation for delay, then this tribunal in these circumstances would not have extended time on a just and equitable basis and the claim would have been rejected for want of jurisdiction.

Conclusion on Graham Cornes comments : the claimant was found not to have been subject to the comments he alleges. But further, if the tribunal had found in his favour then the claim would have been dismissed as it was brought out of time, and the claimant had not satisfied the tribunal that it would be just and equitable to extend time.

Items 44, 45 and 49 Constructive Dismissal

163. The claimant raised a grievance on 30 October 2018. A copy of the grievance is at pp338-340 of the bundle.

164. Mr Bescoby was appointed to investigate and determine the claimant's grievance.

165. The initial grievance meeting was arranged to take place on 07 November 2018. The intention of this meeting was to discuss with the claimant his 'grievance in more detail' (see p.346). However, due to unforeseen events concerning an emergency on a new work contract, this meeting was rescheduled to take place on 22 November 2018 (see p.348).

166. In advance of the meeting, Mr Bescoby had prepared a number of questions to ask the claimant based on his consideration of the claimant's grievance letter. This was with a view to informing him as to how to proceed with the investigation.

167. Mr Bescoby, for work reasons, was unable to conduct this meeting as planned. However, rather than re-schedule the meeting a second time, he decided that the meeting could proceed with Ms Sharon Rothwell, a Senior Regional HR Business Partner of the respondent, chairing the meeting, and asking his pre-prepared questions.

168. The initial grievance meeting took place between the claimant and Ms Rothwell on the 22 November 2018, with Mr James Mackintosh present as a note taker. A copy of the notes can be found at pp356-361 of the bundle.

169. Following meeting with Ms Rothwell, being given a copy of the meeting notes and a copy of evidence given by the claimant to Ms Rothwell following the meeting (see pp.362-366), Mr Bescoby investigated the grievances raised by the claimant. This involved a series of investigatory meetings and phone calls undertaken by Mr Bescoby, at which Ms Rothwell was present. This included:

a. Joanne Michael on 03 December 2018. The notes are at pp.367-373.
b. Dave Ritson on 03 December 2018. The notes are at pp.374-383.
c. Dawn Reyonolds on 03 December 2018. The notes are at pp.384-387.
d. Natasha Jones on 03 December 2018. The notes are at pp.388-391.
e. James Wood on 03 December 2018. The notes are at pp.392-398D
f. Mel Bowring on 03 December 2018. The notes are at pp.399-404.
g. Andy Webb on 12 December 2018. The notes are at pp.409-411.

170. Having considered all of the evidence, Mr Bescoby, although identifying areas where there was a need for some improvement and made a series of recommendations to support the claimant's return to work, concluded that there was no evidence to support the claimant's grievances. An explanation of the decision, along with reasoning, was contained in an outcome of grievance letter, dated 14 December 2018 (at pp.412-417). This letter was handed to the claimant in a meeting between Mr Bescoby and the claimant, with Ms Rothwell present, which took place on 14 December 2018 (a copy of the notes form this meeting are at pp.418-419).

171. The claimant appealed against the grievance outcome, by a letter dated 18 December 2018. In total there were 19 points of appeal. This letter was sent by post to the respondent, and followed up with a copy emailed to the respondent's HR services and Ms Rothwell on 20 December 2018. The claimant's appeal can be categorised into two distinct groups: Point 1 and 12 (and touched upon in point 16), concerns the investigation into racial language, and includes that colleagues were asked the wrong questions when questioned about offensive and racist comments by Graham Cornes and that Michelle Profit should have been questioned, and points 2-19 where the claimant disagreed with the outcome and wanted the point to be reconsidered. (see pp.420-427).

172. The claimant was invited to attend the grievance appeal hearing on 03 January 2019 (see pp.430-431). The hearing was initially due to be chaired by Mr Ian Bolton, with Ms Becca Worrell in attendance, however, Mr Simon Patton was later appointed to take the role of chair due to work pressures on Mr Bolton (see p.432). Alongside this letter, the claimant was sent copies of the notes from meetings with those interviewed as part of the grievance investigation (see p.434).

173. At some point between being appointed to chair the appeal hearing, and the meeting on 03 January 2019, Mr Patton interviewed Ms Profitt in relation to whether she had witnessed Mr Graham Cormes using racial language toward the claimant. To which, Ms Profitt confirmed that she had not. There are no notes of this meeting. And Mr Patton was not present to be cross examined. However, given the consistency between Mr Patton's witness statement and the contemporaneous notes in relation to other meetings he had as part of his investigation during the appeal process, we find that, on balance, this is likely to be accurate. Especially in circumstances, where there is nothing to suggest otherwise.

174. The initial meeting into the grievance appeal took place between the claimant and Mr Patton, with Ms Worrell in attendance, on 03 January 2019. The minutes of this meeting are at pp.435-441.

175. Mr Patton undertook further questioning of Ms Jones (see note at pp.442-443), Mr Webb (pp.444-445) and Ms Reynolds (pp.446-447. And asked them the specific questions that the claimant had said should have been asked of these individuals in relation to racial comments, either by Graham Cormes or by anybody else.

176. Mr Patton met with Mr Wood, with Ms Worrell in attendance, on 08 January 2019. Mr Wood was asked specific questions in relation to points 3, 4, 5, 6 and 10 of the claimant's appeal.

177. Mr Patton concluded, following consideration of all of the evidence that he had, that he would uphold the original grievance decision. This outcome was contained in a letter dated 09 January 2019 (pp.454-458).

178. The claimant resigned from his position with the respondent by letter dated 14 January 2019 (at p.459). The reasons the claimant's resignation are as follows:

a. That no actions were taken by Mr Wood of Ms Michael to ensure that he was treated fairly in the workplace;
b. That his grievance was not fully investigated. This related to what the claimant describes as incorrect questioning by Mr Bescoby during the investigation process and a failure to question Ms Profitt.
c. Delays in the process
d. What the claimant says is a threat from Mr Patton, when he mentions reinstating the claimant with the same people who he says was acting unlawfully toward him.
e. The outcome of the grievance and the subsequent appeal.

Conclusion on constructive dismissal complaint

179. Although not criticising the claimant, the constructive dismissal part of the compliant does not appear to be particularised in any meaningful way. It remained unclear throughout these proceedings as to what the claimant was criticising as shortcomings with respect both the grievance and appeal hearing.

180. However, what appears to be key in the claimant's decision to

resign and claim that resignation to be a constructive dismissal is that he did not agree with the outcome, firstly of the grievance investigation, and secondly of his appeal to the grievance outcome. Although, there are other matters raised too, this appears to this tribunal as being the central reason behind the claimant's decision to resign. This was clear from the claimant's oral evidence under cross examination when he explained that if his grievances were properly investigated then the outcome would have been different, and it is that that caused him to resign.

181. This tribunal considers that, on the whole, the grievance, when considered objectively, was a fairly reasonable process. There is clear evidence of investigation into the matters raised, evidence was gathered and considered, the claimant was given every opportunity to participate in the process and to send in all evidence he had, Mr Bescoby produces a detailed reasoned decision to explain why he concluded on matters the way he did. There were delays in the process, but this was inevitable given the amount of evidence the claimant had submitted, and the need to interview a number of individuals.

182. Mr Patton, conducted a fair appeal process. He undertook further investigation when there were questions raised about the initial investigation process, including further questioning of Ms Jones, Mr Webb, Ms Reynolds and Mr Wood. And, asked questions of Ms Profitt. This in essence, fixed the issues raised by the claimant in terms of failings in the process.

183. When looked at objectively, we do not find the treatment of the claimant by the respondent to be such to support a finding of a fundamental breach of contract. The claimant may well be disappointed with the outcome of his grievance and his subsequent appeal. But we do not find anything that would support there to be such a fundamental breach.

184. There were some flaws in the process, and the respondent ought to learn from them. First, the tribunal considered that it was a flaw in the process that the investigating officer into the grievance was not present in the initial meeting to discuss the grievance before investigation started. It is unclear why this meeting was not simply put back. This is important so that the investigating officer fully understand the grievance in advance of any investigation. Secondly, there appears to be a lack of a grievance hearing during which the claiamnt can respond to the evidence collected. And thirdly, there was a suggestion that the appeals officer had had a relationship with a person included in the original grievance. And that this was known by the claimant and others employed by the respondent. Although we were satisfied that none of the these matters had any impact upon the claimant's decision to resign from his post, those are matters that the respondent should reflect on going forward.

<u>Overall conclusions on race discrimination complaints</u>

185. In the majority of the allegations, please see the individual conclusions above, the claimant did not adduce evidence to support a finding that that as alleged reached the level of being considered a

detriment, either to support a finding of less favourable treatment for the purpose of a direct race discrimination complaint, or unwanted conduct for the purpose of a race harassment complaint.

186. Furthermore, and more fundamentally, the claimant did not adduce evidence to draw any form of causal link between the treatment as alleged and his nationality, on which he brought his complaints.

187. The claimant did not satisfy the initial burden that rested on him with respect his race discrimination complaints.

188. There is one further matter I do want to note here, and this is a matter that was expressed to the claimant on a couple of occasions during the hearing. This is a case where there was no criticism of the claimant's performance. And we heard evidence form the claimant's former colleagues where his performance was actually praised. It was explained that he worked hard and understood his job to a very high level. The claimant's competency and capability were not in issue. Whereas, the claimant appeared to focus on where he considered he was being criticised. Although this does not compensate in any way for the claimant now having lost his job, we as a tribunal were concerned that the claimant was focussing on criticism of him, of which we heard none.

Employment Judge **Mark Butler**

Date__01 February 2021___