EMPLOYMENT TRIBUNALS

Claimant	**AND**	**Respondent**
Mr S Lewandowski		DHL Services Limited

RESERVED JUDGMENT OF THE EMPLOYMENT TRIBUNAL

(hearing type code "V")

Heard at: Birmingham (remotely by CVP)

On: 1, 2, and 3 March 2021

Before: Employment Judge Dimbylow **And** **Members**: Mrs N Chavda
Mrs I Fox

Appearances:
For the claimant: Ms D Janusz, Employment Law Consultant
For the respondent: Mr R Dunn, Counsel

This hearing took place against the background of the coronavirus pandemic; and was conducted remotely by video platform in accordance with safe practice and guidelines.

JUDGMENT

The unanimous judgement of the tribunal is that:

1. All the claimant's claims for direct race discrimination contrary to s. 13 of the Equality Act 2010 (EqA) and/or harassment related to race contrary to section 26 EqA which occurred before 21 June 2019 were presented out of time. They did not form part of a continuing act or omission to bring them within time. We declare that the claimant has failed to demonstrate that it would be just and equitable to extend the time for them. Therefore, the tribunal has no jurisdiction to hear these claims and they are dismissed.

2. We declare that the claimant was not subjected to direct race discrimination within the meaning of s.13 of the EqA and/or harassment contrary to s.26 EqA in relation to his claims which were within time. Therefore, this part of his claim is not well-founded, fails and is dismissed.

REASONS

1. The claim and its background. We do not propose to dwell on the background to the claim here as this is set out in some detail in the explanatory note to the orders made by Employment Judge Lloyd at a Closed Preliminary Hearing (CPH) on 6 April 2020. At that CPH judge Lloyd fixed the dates for this final hearing and gave tailor-made orders for its just disposal. At the same time he fixed a date for an Open Preliminary Hearing (OPH) to take place before a judge sitting alone on 20 July 2020. The judge was to deal with some preliminary issues which were set out by Judge Lloyd, which stated shortly were as follows: (1) whether the claims were commenced out of time, (2) if so should time be extended on a just and equitable basis, (3) whether the claims should be struck out as having no reasonable prospect of success, and (4) in the alternative, whether a deposit should be ordered because the claims have little reasonable prospect of success.

2. Employment Judge Perry dealt with the OPH on 20 July 2020, and again there is no need to repeat here everything that is set out in the case management order made on that date and sent to the parties on 27 July 2020. Briefly, the issues identified by Judge Lloyd were further refined in that the claim for victimisation was struck out as having no reasonable prospect of success, and the claimant's remaining seven complaints of harassment or in the alternative direct discrimination based on his race were allowed to proceed to the final hearing subject to the claimant paying a deposit for each of them in the sum of £8.50. We were advised by the representatives at the start of the hearing that the claimant had paid the deposit for all of them and the case was ready to be heard. Judge Perry did not deal with the time points, and left it up to the final hearing panel to determine them.

4. We canvassed with the parties whether or not the various case management orders made by Judge Perry had been complied with. The claimant had not served an up-to-date statement of loss, on the basis that there had been no change from his original version. Disclosure of documents had taken place, the parties had agreed a chronology and cast list which were in the bundle. An agreed trial bundle was produced. Witness statements had not been exchanged by the date of 16 November 2020 as ordered, and the parties agreed between themselves an extension of time to the middle of January 2021. The parties were asked to state their readiness for trial, including an order that the tribunal could determine if the time estimate of three days was adequate; but unfortunately that order had not been complied with. Finally, the parties were to send each other and the tribunal copies of any submissions/skeleton arguments they wished to rely upon but they did not avail themselves of that opportunity. The representatives agreed to exchange skeleton arguments or draft closing submissions by 1pm on the second day of this hearing.

5. At the start of the hearing the claimant made an application for him to be allowed to call a witness by the name of Mr Vaclav Fryc, notwithstanding the fact that a witness statement had not been exchanged for this witness when mutual exchange had taken place a number of weeks earlier. A statement of Mr Fryc had been served at 9:14am on the first day of the hearing. At the time

when the hearing commenced Mr Dunn had not seen it and we agreed that while we were reading into the case he would read it in the meantime and we would discuss the matter thereafter. When we resumed, Ms Janusz submitted the claimant's application to admit the statement. She submitted that the claimant had not been able to get in touch with the witness until the last few weeks and only by telephone. She advised us that the witness was available on the second day of the hearing and that this would give the respondent extra time to consider the contents of the statement. There had been difficulty getting hold of the witness, who had two jobs, and there had been limited opportunity to speak to him.

6. Mr Dunn submitted that he had been unable to discuss the contents of the statement with his professional clients and the witnesses involved. He submitted that the witness statement referred to incidents which were not covered in the respondent's witness statements. He urged us not to allow the statement to be produced in evidence at all or for the witness to be allowed to give oral evidence.

7. We retired to consider the application and concluded that it was just, fair and proportionate to refuse it. The fact of the witness having two jobs is not a persuasive point and we concluded that involvement in these proceedings by the witness was not a priority for him. Similarly, the claimant had had several months to track down the witness and take a statement from him. From what we understood from the advocates' submissions, the witness had no apparent knowledge of the specific allegations and any background information provided by him was dealt with by the claimant and his other witnesses. We were conscious of the fact that concluding the case may be difficult in the time allocated, and if it did go off for one reason or another, relisting it would be to a date a substantial time in the future, and probably into next year. We found that when balancing the prejudice of allowing it in, against not allowing it in, justice was best served by not allowing it to be taken in evidence. The claimant had been breach of an order to exchange witness statements and had given no satisfactory explanation as to why it was the case this witness's statement was not exchanged.

8. At the point when the claimant was about to commence his oral evidence we had the benefit of a Polish interpreter and she translated everything that was said during the hearing at the request of the claimant.

9. The issues. These were defined in a note in Judge Lloyd's CPH order at paragraph 10. We recite them here for ease of reference:

a) He was prohibited from speaking Polish, in contrast to employees of Romanian origin who were allowed to speak in Romanian.
b) Failing to act on complaints made by the claimant concerning conduct by named Romanian employees, specifically [OB, GP, DA and A].
c) The claimant also seeks to rely upon hypothetical comparators [this is not an issue - but a statement of fact].
d) Not permitting the claimant to go to the bathroom four minutes before the start of a rest break.

e) Criticising the claimant's willingness to work, and also accusing him of breach of health and safety procedures.
f) Allowing Romanian workers their choice of work, and requesting the claimant to do work which [OG] declined to do.
g) Requiring the claimant to take an alcohol test on 18 April 2019 and 31 May 2019.
h) Dismissing the claimant for alleged breach of health and safety procedure, and on allegations of theft on 24 June 2019.

The claimant's case is that he was treated less favourably than his colleagues of Romanian and Moldavian origin.

10. The evidence. We received oral evidence from the following witnesses:

The claimant
Mr Dariusz Stos

And on behalf of the respondent:

Mr Aidie Parkes
Mr Dryden Davies

We also received documents which we marked as exhibits as follows:

C1 Claimant's witness statement
C2 Mr Stos's witness statement
C3 Mr Miroslaw Maron's witness statement - we read this but he failed to attend at the hearing
C4 Claimant's closing submissions
R1 Agreed bundle of documents (186 pages)
R2 Witness statement of Mr Parkes
R3 Witness statement of Mr Davies
R4 Respondent's closing submissions

11. The law.

11.1 There is no claim for "ordinary" unfair dismissal, and if there had, this is largely governed by section 98 of the Employment Rights Act 1996 (ERA). There is an initial burden of proof upon the respondent to establish on the balance of probabilities a potentially fair reason for dismissal, and if it does that the test on overall fairness and reasonableness is neutral, and there is no burden on either side. In a case such as this where the reason put forward by the respondent was conduct, we would normally have to ask ourselves did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? We would have had regard to s.98(4) ERA, which includes the requirement that overall fairness is determined in accordance with equity and the substantial merits of the case. We mention this as the claimant asserted the procedure was unfair and this indicated the respondent (through Mr Davies) made a decision which was tainted by discrimination. The procedure adopted might be relevant to any

inference drawing by us. Usually, where the claimant has qualifying continuous service to bring an unfair dismissal claim regarding alleged misconduct then the tribunal will decide whether:

a) Mr Davies genuinely believed the claimant had committed misconduct;
b) there were reasonable grounds for that belief;
c) at the time the belief was formed the respondent had carried out a reasonable investigation;
d) the respondent otherwise acted in a procedurally fair manner; and
e) dismissal was within the range of reasonable responses.

11.2 Direct race discrimination (EqA section 13)

11.2.1 We approach our analysis in this way. We will decide:

1.1 The claimant is Polish and he compares himself with people who are Romanian and Moldavian.

1.2 Did the respondent do the things in paragraph 9: a), b), d), e), f), g) and h)?

1.3 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

The claimant says he was treated worse than OB and hypothetical comparators.

1.4 If so, was it because of race or nationality?

1.5 Did the respondent's treatment amount to a detriment?

11.3 Harassment related to race (EqA section 26)

11.3.1 Did the respondent do the things in paragraph 9: a), b), d), e), f), g) and h)?

1.1 If so, was that unwanted conduct?

1.2 Did it relate to race?

1.3 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

1.4 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

11.4 Time limits (EqA section 123)

1.1 Given the date the claim form was presented on 23 October 2019 and the dates of early conciliation (20 September 2019 and 20 October 2019), any complaint about something that happened before 21 June 2019 may not have been brought in time.

1.2 Were the direct discrimination and harassment complaints made within the time limit in section 123 of the EqA? The Tribunal will decide:

a) Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?
b) If not, was there conduct extending over a period?
c) If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
d) If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
1.2.d.1 Why were the complaints not made to the Tribunal in time?
1.2.d.2 In any event, is it just and equitable in all the circumstances to extend time?

11.5 The respondent took time points in defending the claims. In dealing with the issue of a continuing act, we had regard to the legacy case law which pre-dated the EQA, as it is still relevant. In the case of Calder –v- James Finlay Corporation Limited [1989] IRLR 55, which was approved by the House of Lords in Barclays Plc –v- Kapur and others [1991] IRLR 136, where it was held that an act extending over a period gave rise to continuing discrimination throughout employment when the claimant then was told that she was not "eligible" for a mortgage subsidy and alternatively this was subjecting her to a detriment whilst employment continued. A continuing act should be approached as being a rule or regulatory scheme which during its currency continues to have a discriminatory affect. The fact that a claimant continued to be paid less than a comparator was a consequence of the decision not to up-grade, not a continuing act of discrimination in the case of Sougrin -v-

Haringey Health Authority [1991] IRLR 447. The matter was looked at again in the case of Cast -v- Croydon College [1998] IRLR 318. The Court of Appeal held, amongst other things, that the claimant's complaint was of several decisions by the employer which indicated the existence of a discriminatory policy in her post and its application to her and that this constituted an "act extending over a period". The Court of Appeal considered the issue in Hendricks –v- Commissioner of Police for the Metropolis [2003] IRLR 96. The question is whether the acts complained of by the claimant amounted to an "act extending over a period" as distinct to a succession of unconnected or isolated specific acts, for which time would begin to run from a date when each specific act was committed. The claimant asserted that incidents were linked to one another and that they were therefore evidence of a "continuing state of affairs".

11.6 We then consider the exercise of our discretion over the three-month time limit applying to the EqA, and we have to consider whether it is "just and equitable" to let the case, or part of it, in after three months if the acts complained of are out of time and do not form part of an act extending over a period. The case of British Coal Corporation v Keeble [1997] IRLR 337 provides guidance on how to exercise our discretion. This was considered later in the case of Chohan v Derby Law Centre [2004] IRLR 685 EAT. We also considered the matters mentioned in s.33 of the Limitation Act 1980. Although that refers to the broad discretion for the court to extend the limitation period of three years in cases of personal injury and death, it also requires the court to consider the prejudice which each party would suffer as a result of a decision to be made. We are required to have regard to all the circumstances of the case and in particular, amongst other things, to –

(a) The length of and the reasons for the delay.

(b) The extent to which the cogency of the evidence is likely to be affected by the delay.

(c) The extent to which the respondent had co-operated with any request for information.

(d) The promptness with which the claimant acted once he knew of the facts giving rise to the cause of action.

(e) The steps taken by the claimant to obtain appropriate professional advice once he knew of the possibility of taking action.

11.7 In the case of Robertson v Bexley Community Centre [2003] IRLR 434 the Court of Appeal confirmed that the Employment Tribunal had a wide discretion in determining whether or not it was just and equitable to extend the time. The tribunal is entitled to consider anything that it takes to be relevant. Nevertheless, the case re-asserts that time limits are exercised strictly in Employment Tribunal cases. When considering the discretion over a claim that is out of time, and whether the time should be extended on just and equitable grounds, the Court of Appeal said that there was no presumption

that the tribunal should do so. The tribunal cannot hear a complaint, unless the claimant convinces it that it is just and equitable to extend the time. Thus, the exercise of the tribunal's discretion is the exception rather than the rule.

11.8 Section 136 of the EqA contains provisions regarding the burden of proof and, insofar as is material, states:

> "(1) This section applies to any proceedings relating to a contravention of this Act.
>
> (2) If there are facts from which the court could conclude, in the absence of any other explanation, that a person A contravened the provision concerned, the court must hold that the contravention occurred.
>
> (3) But subsection (2) does not apply if A shows that A did not contravene the provision."

11.8.1 The EqA, concerning the burden of proof, and when that burden reverses, is essentially the same as in the predecessor equalities legislation. However, in practice, few cases turn on the question of whether the burden has reversed. Either there is a prima facie case for the respondent to answer, or there is not. If the claimant has established a prima facie case of unlawful discrimination at stage 1, our enquiry then goes on to stage 2, where the burden shifts to the respondent to demonstrate on the balance of probabilities an adequate non-discriminatory explanation.

11.9 The subject of contributory conduct was a potential issue. Had the ERA been applicable the law in relation to the basic award at sections 118 to 122, and the compensatory award at sections 123 and 124. Both awards can be reduced because of contributory conduct. The basic award includes, at s.122(2):

"Where the tribunal considers that any conduct of the complainant before the dismissal (or, where the dismissal was with notice, before the notice was given) was such that it would be just and equitable to reduce or further reduce the amount of the basic award to any extent, the tribunal shall reduce or further reduce that amount accordingly."

And s.123(6):

"Where the tribunal finds that the dismissal was to any extent caused or contributed to by any action of the complainant, it shall reduce the amount of the compensatory award by such proportion as it considers just and equitable having regard to that finding."

11.9.1 If we held the dismissal to be unfair, we were asked to determine whether or not the claimant contributed to his dismissal insofar as it might affect the basic award and any compensatory award and if so to what extent.

The test applied is as set out in the case of Nelson v BBC (No.2) [1979] IRLR 346. These factors must be satisfied if we are to find contributory conduct:

1 The relevant action must be culpable or blameworthy.

2 It must have actually caused or contributed to the dismissal.

3 It must be just and equitable to reduce the award by the proportion specified.

Culpable or blameworthy conduct could include conduct which was “perverse or foolish”, “bloody-minded” or merely “unreasonable in all the circumstances”. This has to be dependent upon the facts of the case. Wide forms of conduct are envisaged. We have approached the subject with completely open minds. We know from Nelson that the conduct in question does not have to amount to a breach of contract or a tort and can be given a broad interpretation. We also know that contributory conduct can invoke a reduction in compensation for discrimination claims such as in the one before us.

12. Findings of fact. We make our findings of fact based on the material before us taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. We have resolved such conflicts of evidence as arose on the balance of probabilities. We have considered our assessment of the credibility of witnesses and the consistency of their evidence with the surrounding facts. We have made our findings of primary fact. We have considered what inferences we should draw from them for the purpose of making further findings of fact.

13. The respondent provides global logistics and a postal business, with a presence in 220 countries worldwide. It describes itself as the global leader in contract logistics, providing warehousing and distribution services to a number of national and international clients. The business operates through various different business divisions, including DHL Supply Chain. The claimant was employed by the respondent as an MHE (Manual Handling Equipment) operator at its Rugby site. The site at Rugby is a pick, pack and cross docking operation (a practice whereby stock items are unloaded from an incoming vehicle and reloaded into an outbound vehicle with little or no storage in between). The claimant was employed to drive VNA (Very Narrow Aisle) trucks and his role involved loading and unloading pallets of stock into the racking in the warehouse. We saw from the bundle at page 172 a list of 23 different nationalities of people based at Rugby. On its customer contract with 3M the respondent provides logistics support in relation to the distribution of customer products. At Rugby the respondent picks, packs, wraps and sends out pallets of customer stock ready for transportation to 3M customers. There are approximately 200 employees at the Rugby site. Presently, the respondent is providing global support in the distribution of facemasks at the Rugby site.

14. The claimant is now 47. He was born in Poland. He went to school in Poland and left when he was 18 or 19 years of age, having trained at a secondary technical building school. He went straight from school into work in Poland and because of his education and training he was able to build a house from start to finish with the skills that he acquired. In 2007 when aged 34 he came to the UK; and was joined by his wife and two children later. Unfortunately, the relationship with his wife did not thrive in the UK. The claimant is now divorced, and his wife and two children live in the north-east of England. The two children are now grown up and aged 22 and 19. Since coming to the UK he has worked generally as a forklift truck driver and has licences for all major types of forklift truck. At first in the UK he worked through various agencies to get experience over two or three years. Eventually he obtained a job via an agency with the respondent. Later he was offered and accepted a permanent position without the requirement of any interview on 11 November 2018. He worked at the Rugby site until 24 June 2019 when he was summarily dismissed for gross misconduct.

15. Since leaving the respondent the claimant found another job after one month; but he left that when he resigned because there was a change of hours that he did not want. He has had no other job since then. He blamed the coronavirus pandemic for making it difficult to find other work, although he said that in the background there were some medical reasons relating to the return of tumours which had spread, although he did not want to talk about it to us. He confirmed that he was looking for work with the job centre trying to help him find something. He lives alone but has a dog. He does not have many friends and explained to us that it took years to earn the trust of friends and although he had a number of acquaintances they were not friends. He also described having had some surgery on his hands which makes it difficult for him to work as a FLT operator/driver and on any machinery. The claimant also expressed the view that he had some depression because the case was ongoing. He doesn't talk about his problems to anyone and takes painkillers for any severe pain that he has at present. He is in receipt of state benefits.

16. We are going to proceed with our fact-finding not necessarily in chronological order. The most significant event in the relationship between the parties was the dismissal of the claimant. On Friday, 12 June 2019 the respondent received an allegation that the claimant had been seen quickly switching between MHEs from a VNA to a Powered Pump Truck (PPT) and without completing the required pre—operation (Pre-Op) check before using the PPT. The claimant was also seen to be acting suspiciously around his locker and subsequently a locker search was requested by the respondent. The claimant confirmed his agreement to the locker search and it was identified that his locker contained 3M stock which was subsequently identified as being missing from the claimant's pick area. An internal investigation into the potential health and safety breach and allegation of theft of the customer's products was carried out and a disciplinary investigation was later initiated. Mr Parkes was asked to deal with the disciplinary

investigation by Jay Goddard, who at that time was Shift Manager in chamber 1.

17. A letter dated 14 June 2019 was sent to the claimant inviting him to attend an investigation meeting (124-125). Mr Parkes confirmed that he had been appointed as the investigating manager and told him of the allegations. The meeting took place on 19 June 2019 and a copy of the signed minutes arising from that meeting were in the bundle at 126-133. In addition to the claimant and Mr Parkes there were two other people present in the investigation meeting and that they were Mr Thomas Koblasa, who is Czech and was a management representative (First Line Manager) and notetaker. However, Mr Koblasa was able to translate what was said into Polish on behalf of the claimant. Also present was Mr Vaclav Fryc, the claimant's representative. During the course of the tribunal hearing the claimant explained to us that he did not think Mr Koblasa had been any help to him. Nevertheless, the claimant signed the notes and did not produce any other version of them. Mr Parkes drew our attention to page 131 in the bundle where the claimant confirmed he did not fill in the Pre-Op check, and the conversation turned to a reminder that the claimant had recently attended a briefing which addressed the issue of Pre-Op checks. The briefing reminded colleagues to ensure that they followed their training in accordance with the respondent's policy and they were required to fill in the Pre-Op check book before the vehicle was used, to ensure that there was no defect. Failure to do so constituted a breach of health and safety procedure. Although the claimant at the tribunal complained about Mr Parkes conducting the investigation meeting, he did not raise this as a concern during the investigation meeting. Also, at no time did he suggest to anyone at that meeting that the investigation arose in connection with or because of his Polish nationality. At the end of the investigation stage, Mr Parkes concluded that there was an objective reason to progress this to a disciplinary case, in that the claimant had admitted to the health and safety breach and that there was an absence of adequate explanation for his possession of the customer products within his locker. On this basis Mr Parkes reasonably concluded that there were grounds to show that the claimant had engaged in the theft of the customer products belonging to 3M.

18. We know that the police were called to investigate the matter of the theft but no action was taken by them. We have had no independent information to explain the reasoning behind that, although the claimant's representative did speculate about it during the course of her oral submissions, and we will return to them later.

19. Mr Parkes is employed by the respondent as a Shift Manager at the Rugby site. As stated before, this site has a dedicated contract with its customer 3M. Mr Parkes has worked for the respondent for about seven years. As a Shift Manager he is operationally responsible for day-to-day activities relating to the deployment of colleagues, customer relations, achieving key performance indicators, and managing order queries and the order management system. He has responsibility for some 38 to 40 people on

shift. He has had training on how to deal with grievances and on the respondent's Diversity and Respect at Work Policy. Mr Parkes had dealt with a complaint that had arisen between the claimant and OG in January 2019 and he would see the claimant within the warehouse and at team capacity briefings at the start of a shift.

20. Once the investigation process was over Mr Davies was appointed to hear the disciplinary proceedings. He did not know the claimant personally as he had only worked on the 3M contract for a short amount of time. Mr Davies had no direct line management responsibilities for the claimant, had no direct dealings with him, and it was for this reason he was asked to deal with the disciplinary process. The claimant would have known and recognised the manager on the shift as Mr Davies. The claimant had never approached Mr Davies in his managerial capacity regarding any complaints or concerns prior to the disciplinary hearing. Mr Davies was aware in his capacity as Operations Manager of two instances where the claimant was requested to undertake an alcohol test under the provisions of the respondent's "for cause" testing process (92-95, and 111-112) on the basis that he smelt of alcohol while on duty on two separate occasions on 18 April 2019 and 31 May 2019. The claimant had tested positive or both occasions although he was under the substance misuse policy threshold.

21. Mr Davies has worked as the Operations Manager at Rugby since March 2019 and has worked for the respondent for 10 years, having previously been based within the NHS Supply Chain operation. As Operations Manager Mr Davies is responsible for managing a team of five Shift Managers and for the day-to-day operations at the Rugby site including warehouse management of inbound stock from the customer and outgoing stock across the UK. His duties include headcount and sickness absence management, health and safety, process adherence, investigations and liaising with the customer on a daily basis. As Operations Manager Mr Davies is often asked to deal with disciplinary hearings, grievances and appeals and is familiar with the process and dealing with these types of issues. He has received training in relation to the respondent's policies and procedures including the Disciplinary Policy and the Diversity and Respect at Work Policy.

22. In preparation for the disciplinary hearing Mr Davies reviewed the pack of documents that he had been supplied with, which included the investigating officer's meeting notes, statements from management, photographs, meeting invitation letters and a copy of the leaflet for the product owned by 3M found in the claimant's locker (113-135). Having considered the documentation he formed observations as follows: firstly, the claimant could not adequately explain how the 3M products had come into his possession and why they were found in his locker, and secondly between the initial fact-finding meeting and the disciplinary investigation meeting the claimant's account of events had changed in that the claimant attributed his reason for operating the PPT without authorisation and without a Pre-Op check was because his belt had

broken and therefore he had to go to his locker to change it (128), although previously he had stated he needed to use the toilet/needed a drink.

23. By letter dated 19 June 2019 (134-135) the claimant was invited to a disciplinary hearing on 21 June 2019. The letter of invitation made it clear that the conduct alleged could be regarded as gross misconduct for which the sanction may be dismissal. The respondent's disciplinary procedure indicated the level of punishment in relation to breaches that were found. The letter made it clear that the claimant had a right to be accompanied by a work colleague or trade union representative and Mr Davies was aware of the claimant's knowledge that he was at risk of dismissal.

24. When the disciplinary hearing took place the claimant was accompanied again by his colleague Mr Fryc. Notes were made (136-147). At the end of the hearing the claimant had the opportunity to review the notes and make any amendments and then sign them to confirm the accuracy. At the meeting in addition to Mr Davies, the claimant, and Mr Fryc there was an HR representative Rumbi Mukoyi.

25. We conclude that the disciplinary hearing was mainly conducted in English. The claimant did not complain about a lack of understanding of what was going on and he signed the document of record together with his colleague Mr Fryc. As far as his knowledge of English is concerned, we accept that someone in the tribunal process and at a hearing will want to have the benefit of translation; but it was not required by him in the workplace. Had it been, then we have no doubt that the claimant would have asked for an interpreter and such would have been provided to him. The claimant had someone to translate if he needed it. Again, the claimant provided no notes of his own. Stated shortly, the main points that Mr Davies gleaned from the interview were these. The claimant had confirmed to him that he had not completed a Pre-Op check on the PPT and had confirmed Mr Davies's understanding that it was important to do so for the purposes of health and safety. The claimant advanced the argument that he had had an emergency which was a bigger problem than the MHA not being adequate for use. The claimant also stated that he did not use the toilet closest to his working area and the reason was because it was dirty and he did not want to use it. Furthermore, the claimant had stated he was not aware that the items found in his locker were products made by 3M and had not seen these within the warehouse or his pick area. The claimant did accept to Mr Davies that 3M instructions for the product were also found within his locker. Having considered what had gone on during the disciplinary hearing Mr Davies then adjourned to consider all that had been said.

26. When the disciplinary hearing reconvened on 24 June 2019 Mr Davies delivered his decision (143-146). He sent a letter to the claimant confirming (148-150). The claimant was advised of his right to appeal against the decision, although he did not exercise such right. Mr Fryc the claimant's

colleague was present at the reconvened meeting and the notes were signed again.

27. The letter of dismissal is dated 27 June 2019, in it Mr Davies gave a summary of the discussions and evidence; and listed 10 key points which he relied upon in coming to the conclusion that the alleged incidents on 12 June 2019 had taken place. The letter confirmed the allegation was this: "It is alleged that an incident happened on 12th June 2019 where it was reported to a manager that you was driving MHE unauthorised without signing a Pre-Op check and was then seen acting suspiciously around your locker during work time. Upon completing a search of your locker 2 items [of] 3M stock was found. This allegation constitutes a breach of both the Health & Safety policy and the business's Theft and Fraud policy." Mr Davies' decision was that in the light of the information discussed and evidence was to summarily dismiss the claimant without notice on the grounds of misconduct. The claimant was not entitled to receive any pay in lieu of notice in the view of Mr Davies.

28. In relation to the other six issues that the claimant now puts forwards as acts of direct discrimination and/or in the alternative harassment, these were not raised as discrimination or harassment before the claimant was dismissed. They came about as part of these proceedings. There is one matter which was documented and that is in relation to a dispute that he had with a colleague OB (Moldavian). On 18 January 2019 the claimant made a verbal complaint to Mr Parkes, having initially raised it with DA, Team Leader/Performance Coach (who was not the appropriate person to deal with personnel matters). DA referred the matter to HR, the claimant approached HR and subsequently HR referred the matter to Mr Parkes who was the Shift Manager on duty. There was an incident on that day when the claimant and OB were carrying out their duties. Mr Parkes understanding of the matter was that the claimant entered the same VNA already occupied by OB. This was contrary to the safe system of work use of VNA (161-167) which then created a block in the pick aisle, and the confrontation ensued.

29. Mr Parkes asked the claimant how he wanted the matter to be addressed and he replied that he wanted it to be dealt with informally by way of mediation. Mr Parkes spoke to both individuals who blamed one another for the incident. At the conclusion of a mediation meeting the claimant confirmed that he was happy with the outcome and both employees apologised to one another. Mr Parkes considered the matter to be resolved and no further issues were raised with him by the claimant. Mr Parkes made a note of what happened (at page 159). Later, during these proceedings at the final hearing the claimant stated that he submitted a written grievance (173/4) at the time of the event and that this was a protected act. However, we noted that when the case was before Judge Perry he found that no protected act had been made and the victimisation claims were dismissed. It is notable that the claimant did not draw to Judge Perry's attention such a document and we conclude that this was not something that was in existence when the claimant worked for

the respondent. This appears to be an issue arising out of that identified by Judge Lloyd in the list of issues at 9 b) above.

30. Another significant event happened when the claimant was required to undertake an alcohol test under the provisions of the respondent's substance misuse policy (75-91). These came about when the claimant smelt of alcohol whilst on duty on two separate occasions (92-97, and 111-112). The claimant tested as being positive on both occasions; but was under the policy threshold and as such no further action was taken. The claimant signed notes confirming the test having been taken but made no allegations in respect of discriminatory treatment at the time. In cases where an employee tests positive, a second test is carried out 20 minutes later to verify the result. The unchallenged evidence of Mr Parkes was that this is a standard process for testing employees, applied consistently to everyone and is done to preserve the health and safety of the workforce and to prevent accidents. We find and conclude that on both occasions there were legitimate reasons for asking the claimant to take the test in that others had smelt alcohol on his breath and this was confirmed by the positive test results. The claimant also accepted that he had drunk alcohol the night before. Although the claimant suggested that no one would have been able to smell alcohol at that time we find that this was an accurate assertion given the surrounding facts.

31. The other matters contained in the list of issues were difficult to follow from the claimant's oral evidence, as confirmed in his witness statement. For example, at paragraph 13 the claimant refers to being told that he was not meeting his target on 15 May 2019; but there is no specific reference to that in the list of issues. Rather than dwell on these matters now we will return to them in our conclusions section.

32. These are the essential basic facts and chronology of events at this stage.

33.<u>The submissions</u>. **Mr Dunn went first**. He spoke to his written submissions and there is no need for us to repeat everything here that is set out in his written document. He took us through the law and why it benefited the respondent on the facts of this case. The evidence pointed to decisions being made by the respondent based on objective conduct. The variety of nationalities working for the respondent was vast. It was a nonsense for the claimant to say that the decision-makers preferred Romanians over Polish people. The claimant had a serious lack of credibility, especially over the failure of him to recognise his responsibilities over health and safety and alcohol consumption. Whilst the claimant had proposed to call witness Mr Maron he had failed to appear without good excuse and little or no weight should be given to his evidence as he was not present to be tested in cross-examination. As to Mr Stos, he too lacked credibility as he failed to answer questions throughout, was obstructive and made wild accusations and threats including threatening counsel with defamation proceedings.

34. Mr Dunn submitted that when we compared the claimant and his witnesses to the two witnesses for the respondent, we would find the

respondent's to have been clear, and candid in answering all of the questions put to them. He submitted that we should find that they treated people equally. Mr Davies had recently recruited two Polish people. At no point in the process did the claimant raise the issue of discrimination and made no appeal about the dismissal or any discrimination. There is a particular failing on the part of the claimant in relation to the document at page 173, which the claimant had said was his protected disclosure or act. This was particularly odd, as Judge Perry had struck out the victimisation claim because there was no protected act, and we should find that this document had been prepared after that hearing. If it had been prepared before and sent to the respondent the claimant would have told Judge Perry.

35. Mr Dunn then took us through each of the individual allegations and made submissions as to why we should prefer the respondent's evidence and why each claim should fail. In relation to the final item, the dismissal, he reminded us about the importance of health and safety in the respondent's premises and the failure to carry out a Pre-Op check of a vehicle could have serious consequences, as it had done in the past when another employee had failed to carry out a check and had lost a foot in the ensuing accident, which would have been prevented had that employee carried out the check. As to the allegation of theft of the items found in the claimant's locker, they had gone missing in the area where the claimant worked in the warehouse, and his explanation was very difficult to believe. The items were found in his locker together with a leaflet about them. Mr Davies had been presented with strong objective evidence to support the dismissal, and this was not tainted by discrimination. The claimant had failed to shift the initial burden of proof upon him and the claims failed at this stage, this applying to direct discrimination and harassment related to race.

36. Mr Dunn submitted that all of the claims except that in relation to the dismissal were out of time. If they were in time they were weak and should fail. There were no continuing acts to bring them in time, and it would not be just and equitable to extend the time. The claimant had made no attempt to get any legal advice, including from any free sources of it. If the claimant were to succeed, Mr Dunn addressed as briefly on remedy. There was a relatively modest amount of economic losses and the figure put forward in the schedule of loss was agreed, subject only to liability. As to any award for injured feelings, the claimant had given no evidence about this in the claim form, his witness statement or schedule of loss. There was no supporting medical evidence and a brief reference to depression (49). Any award would be at the lower end of Vento in the order of about £2,000 in the absence of any supporting evidence. The case of Polkey did not apply as the claimant did not have two years continuous service. Contributory conduct by the claimant was relevant and the claimant had caused or contributed entirely to what happened with his admission of the failure to do a Pre-Op check and on the facts surrounding the theft. The tribunal would be entitled to make a reduction of any compensation whether for economic losses or injured feelings by 100%.

37. **We then heard from Ms Janusz with her oral submissions**, and she too spoke to her written document. Again there is no need for us to recite it all here. She accepted that the evidence of Mr Maron had not been tested and she accepted that the weight of his evidence would be limited. She urged us to consider that all of the claims should be allowed to proceed as it would be just and equitable to do so, although her primary argument was that she believed all of the events were part of a continuing act. Although differing people were involved in the different issues there was a very short timeframe and this caused the claimant to feel that they were all connected in some way. She submitted that the tribunal should award such amounts of money as it thought just; but she modified the value of the injured feelings claim, and said that it would be more appropriate to value them at about £10,000 in view of the evidence that we had received from the claimant, rather than the sum of £25,000 claimed in the schedule of loss. Whilst there were many nationalities working for the respondent, we had no specific data about the nationalities of those working on the claimant’s shift and therefore we should accept evidence from the claimant that the majority on his shift were Romanian.

38. Having made her introductory remarks Ms Janusz then moved to her written document and to focus on each of the issues in turn. Where the comparator had not been identified she gave us the names of those that should be used.

39. When considering the circumstances of the dismissal she asked us to find that the claimant was required to take the breath tests by people who were prejudiced against him; he had not drunk any alcohol immediately before his shift, although he did have 2 or 3 pints the night before, and such a small amount of alcohol would not be smelt on his breath the next day. The test results were low, and the traces of alcohol could be produced naturally by the claimant’s own body. There was a procedural failure in carrying out the tests, and there was no evidence by the respondent of tests being carried out on any Moldavian and/or Romanian workers. We remind ourselves that the breath tests were not a reason for dismissal.

40. Furthermore, Ms Janusz submitted there were no witnesses to the actual theft of 3M products, no CCTV footage to support the respondent’s position and no action had been taken by the police, which she asserted was “due to lack of evidence”. However, she confirmed that she did not know that that was the case and it was an assumption. We had received no evidence on that point. The comparator would be a hypothetical Romanian/Moldavian employee in the same circumstances, and the perpetrator of the discrimination was Mr Davies. In relation to the Pre-Op check the comparators were OB and A. No checks were required by them. As a background fact, she submitted we should find that Mr Nicholson, the Manager who carried out the investigation before the dismissal was involved in the alcohol test issue and he was prejudiced against the claimant and acted deliberately against him because of his nationality. We should make a finding of fact on this point.

41. The respondent had not pleaded any Polkey issue and it was not a consideration for the tribunal. As to contribution, Ms Janusz said this was a

matter for the tribunal although she accepted that the claimant had admitted failing to do the Pre-Op check and had apologised. There was no acceptance by the claimant that he had anything to do with the theft of the goods. Any contributory finding by the tribunal would be no more than 30%, and she recognised this could apply to both economic losses and injured feelings.

42. We say something about the claimant's representative at this point. Ms Janusz has a law degree which she obtained in Poland. Having come to the UK she obtained a law degree here, from the University of Lancashire some three years ago. Presently, she is a Consultant in Employment Law and as such is a full-time representative in the Employment Tribunals. She has gained a lot of experience in such claims in the last three years. She aspires to be a solicitor in due course and is preparing for the professional exams. She speaks Polish.

43. Once we had concluded the submissions we canvassed with the parties how they would like to proceed. We indicated that we might be able to conclude our decision making process in the short time that was remaining; but we did not want to rush the decision, and we did not think we could do justice to the case in the time left. However, both parties were desirous of having a written judgement and full reasons. We suggested that we might reconvene with the parties present to deliver an oral judgement and reasons. We pointed out to them that the judgement and reasons would go online if we made a reserved judgement. However, the joint application of the parties was that they would prefer to receive a written judgement and reasons as it would provide a time/cost benefit to both of them. We therefore agreed to their application and indicated that we would send out the written judgement and reasons as soon as possible.

44. Our conclusions and reasons. We apply the law to the facts. We shall deal with the first six issues only at first. We remind ourselves that the tribunal identified at a previous hearing that anything before 21 June 2019 was potentially out of time. This applies to everything except those matters arising out of the dismissal. We ask ourselves whether there was a continuing act or omission which would bring these issues within time. We remind ourselves of the list of issues and we try to put a date or dates on the various matters that the claimant advanced. As to item a), this appears to have arisen on 12 February 2019, item b) on 18 January 2019 and 12 February 2019, item d) was on 4 February 2019, item e) was on 8 February 2019 and 15 May 2019, item f) is referred to in the claimant's witness statement at paragraph 11, but no date is applied to it. Item g) specifically refers to 18 April 2019 and 31 May 2019. We conclude that there is no continuing act or omission here. In coming to this decision we had regard to whether the claimant had established them as facts. They are unrelated to the matters that gave rise to his dismissal with breach of health and safety procedure and the allegation of theft, which arose on 12 June 2019. The claimant has established no viable connection in the terms of the EqA with the matters that were in time. In the circumstances we take the view that these matters are out of time. We have to consider the claimant's explanation for the delay. However, we prefer the respondent's submissions on the point. The claimant did nothing actively to make enquiry

about any course of action that he may take or tribunal proceedings or time for claims generally. He did nothing. He failed to explain what caused the delay. We considered the balance of prejudice, and we find that the balance is tilted against the respondent. To allow the claims in would be allowing the claimant to proceed with claims which were without merit. We considered whether it was just and equitable to allow the claimant to proceed; but he did not convincd us that it would be. In the circumstances we do not extend the time. Those claims are dismissed as being out of time. However, had we been wrong about the time point and they were part of a continuing act which was in time we go on to explain what we would have found. We would have found and concluded that the claimant had not established such facts either as direct race discrimination or harassment that would have reversed the burden of proof upon him, and the claims would have failed at that stage. Had the burden reversed we would have found the respondent had established that the matters complained of had not been tainted by discriminatory treatment.

45. In relation to item a) the claimant has failed to establish that there was such a prohibition. Far from it, the policy was entirely appropriate to protect the dignity of workers who did not speak the same language as their colleagues. The claimant was entitled to speak Polish in circumstances permitted by the policy. The workers were encouraged to speak English as the language of the business; but those of the same language could speak to each other in that language provided that they were not talking to someone who could not speak their language.

46. In relation to item b), there was no failure to act on complaints that the claimant made. There were two main items here. The first concerned OB, and this was plainly dealt with informally. With the agreement of the claimant and OB there was a mediated settlement. We find and conclude that the written document produced at this hearing by the claimant has been prepared some considerable time after the events before us and probably after the hearing before Judge Perry. Had it been in existence before that hearing the claimant would have produced it. The second incident that refers to GP (Line Manager) is over a complaint which was dealt with and resulted in GP receiving a final written warning. Again, the claimant has failed to prove such facts to reverse the burden of proof.

47. In relation to item d), there was a request for the claimant not to go to his break earlier than he was entitled. He did not establish such facts to reverse the burden of proof and this item would have been not well-founded. The rejection of his request was nothing to do with his nationality or race but the fact that he wanted to finish his shift break earlier and his manager would not agree.

48. We found item e) difficult to follow as an issue and we noted that the claimant's representative's written skeleton argument was silent on this particular issue. We do not know precisely who the claimant is suggesting is the comparator in this case although we can see the dates from his witness

statement. It is a difficult claim to understand and the claimant does not establish such facts to reverse the burden of proof.

49. Again, with item f), this was very difficult to follow on the facts advanced by the claimant to tie them in with the issue, and we were really given no route in to our understanding with the closing submissions on the claimant's behalf. We were told that the comparator was OB and the perpetrators were FB (First Line Manager) and GP. However the claimant was vague in his evidence about this, when he said he was "sometimes" told to do the work of OB. There was no specific task identified by the claimant. The claimant failed to establish such facts to reverse the burden of proof. The claim would have failed in any event.

50. As to the 2 items at g), these are both out of time. However, the request made to the claimant to take the tests we would have found to have been objectively justified. The claimant did smell of alcohol. This was the trigger for the test. The claimant has failed to shift the initial burden of proof upon him. Had the burden shifted we find that the claimant would have done the same to the comparator. This claim would have failed.

51. We now turn to the last item h) which is the dismissal for breach of health and safety procedure and an allegation of theft. As we said before, this issue is in time. We find and conclude that the reason for the claimant's dismissal was that advanced by Mr Davies in the fact of the claimant's conduct. The belief held by Mr Davies over the claimant's conduct was genuine. Such a belief was held upon reasonable grounds following a reasonable investigation. Dismissal was within the range of reasonable responses. The respondent dealt with this issue in a professional manner, keeping the claimant fully informed throughout, confirming the procedure in writing, and explaining in detail what happened during the process. Mr Davies gave a reasoned account as to why he came to the conclusions that he did. The claimant was given the right to be accompanied, and was accompanied. He was in a position to state his case. He knew the case he had to meet. He was given the right of appeal, which he did not undertake. The ACAS code of practice on grievance and disciplinary proceedings was followed, as if the claimant was entitled to bring a claim for ordinary unfair dismissal. We conclude that any comparator would have been dealt with in the same way.

52. The two matters arising out of the claimant's conduct were both serious. The claimant admitted the first part in relation to health and safety. The claimant's varying explanations for the theft were absurd and lacked credibility. The claimant was caught red-handed. His explanation that he bought the 3M stock with an instruction guide but no boxes from an unknown individual in a park in Rugby was reasonably rejected by Mr Davies. The explanation was fanciful to say the least. The evidence available to Mr Davies reasonably led him to the conclusion that the 3M stock in the claimant's locker was stock from the respondent's warehouse and which belonged to 3M. This fact was established on the balance of probabilities. A different standard of

proof is required in criminal cases, and it may be that the police did not think there was sufficient evidence to justify criminal proceedings where the prosecution have to prove the case beyond reasonable doubt. The inference to be drawn is that the claimant did not buy the goods from someone whom he did not know in the park for cash: but rather he obtained them without paying for them from the respondent's premises. This part of the claim is not well-founded, fails and is dismissed. Since it is not an act of discrimination whether direct, or harassment related to race, it supports our finding earlier that it does not form part of a continuing act or regime extending over a period of time to bring the acts which were out of time within time.

53. In coming to our decisions, we had regard to how the witnesses presented to us. We deal with the respondent's witnesses first. We say this about them individually and collectively. They were both entirely open, honest, transparent and credible. However, we know that credibility is not the end of the matter because credible witnesses can be mistaken. We considered that point very carefully; but we concluded that they were not mistaken. This is because so much of what they said was supported by the contemporaneous documents. They dealt with questions in cross examination without hesitation. We found that they were witnesses of truth.

54. Mr Stos added nothing to our understanding of the case. We found that he was bombastic, aggressive, failed to answer questions in cross examination and wholly unreasonably threatened Mr Dunn with defamation proceedings. Mr Stos had an axe to grind in this case because he had resigned from the respondent's employ when he was asked to undertake an alcohol test. He was not an independent and impartial witness, and he was not a witness of truth.

55. The statement of Mr Maron was of limited use to the claimant as that witness failed to attend the hearing and no reasonable explanation for non-attendance was provided. His evidence could not be tested in cross examination. It was largely opinion, unsupported by the evidence before us. Therefore, it had no significant impact upon our decision-making process.

56. We then turn to the claimant. He presented to us as someone who was contradictory, and inconsistent. During cross examination he often went off at a tangent, waffled in response to questions, was evasive and answered a question with a question. He wanted to control and manipulate. He was not open, not honest, not credible and was not a witness of truth. The matters which were held by us to be out of time were an attempt by the claimant to improve, in some way, his case over the one issue which was in time. However, what he complained about were routine management issues which were dealt with at the time, and which the claimant did not regard as direct discrimination and/or harassment. Had they truly fallen into those categories the claimant would have complained immediately and loudly. He knew how to raise a grievance, having done so in the dispute with colleague OB, and which was easily resolved at the time through mediation. The claimant later tried to put a different interpretation on this event; but this did not work, and to

suggest that any form of discrimination was at play here was simply part of the claimant's tissue of lies. The claimant presented as a stubborn personality, who was blinkered in his approach to the issues and could not or would not see another view of things other than his own. His propensity to lie and lack of credibility fundamentally undermined the whole of his case.

56. Thus, whenever there was a conflict on a material fact, we preferred the evidence of the respondent's witnesses.

Signed by Employment Judge Dimbylow on 23 March 2021