EMPLOYMENT TRIBUNALS

Claimant:	**Mr G Ayub**
Respondent:	**DHL Aviation (UK) Ltd**
Heard at:	Leicester Hearing Centre, 5a New Walk, Leicester, LE1 6TE
	Hybrid hearing (i.e. both CVP and attended)
On:	12, 13, 14, 15 July 2021
	16 July 2021 (deliberations, parties did not attend)
Before:	Employment Judge Adkinson sitting with
	Mrs J Barrowclough
	Mrs L Woodward
Appearances	
For the claimant:	In person
For the respondent:	Mr Liberadzski, Counsel

JUDGMENT

After considering the evidence and hearing each party's submissions, the Tribunal unanimously orders that

1. All of the claimant's claim for direct discrimination because of race, victimisation and less favourable treatment because of his part-time worker status that precede 27 November 2019 are out of time, and it is not just and equitable to extend time. Therefore, those claims are dismissed because the Tribunal lacks jurisdiction to hear and determine them.
2. All of the claimant's other claims for direct discrimination are dismissed
3. All of the claimant's other claims for victimisation are dismissed
4. All of the claimant's other claims for less favourable treatment because of his part-time worker status are dismissed.

REASONS

5. On 2 March 2020 the claimant, Mr Ayub, presented a claim to the Tribunal complaining about his treatment at the hands of his employer the respondent, DHL Aviation. Following a preliminary hearing on 6 May 2021 the claims were identified as direct discrimination because of race, victimisation and less favourable treatment because of his (then) part-time worker status. We set out the issues in detail below. He asserts there has been a continuing act of discrimination and less favourable treatment since at least 2011.

6. DHL Aviation deny these allegations. If they did treat him less favourably that a full-time employee, then they say they did so for objectively justifiable reasons. They deny there is any continuing act. They say the parts of the claims that relate to issues before 27 November 2019 are too late and so should be dismissed because there is no reason to extend time.

7. The parties undertook early conciliation for 1 day on 26 February 2020. The claimant presented his claim on 2 March 2020.

Hearing

8. Mr Ayub represented himself. Mr Liberadzki, Counsel, represented DHL Aviation. We are grateful to both of them for their help throughout this case.

9. We heard the oral evidence from Mr Ayub and from the following on Mr Ayub's behalf:

    9.1. His own evidence;

    9.2. Mr J Barnard, a former part-time colleague from 2011 to 2015;

    9.3. Mr G Mall, a colleague of Mr Ayub;

    9.4. Mr D Edwards, a colleague of Mr Ayub;

    9.5. Mr P Niewiadomski, a colleague of Mr Ayub;

    9.6. Mr G Badwal, a colleague of Mr Ayub and a person to whom Mr Ayub compares himself both in respect of his race discrimination claim and part-time worker claim; and

    9.7. Mr G Scott, a colleague of Mr Ayub;

10. We heard the following oral evidence on behalf of DHL Aviation:

    10.1. Mr W Henson, operations manager since April 2019 but an employee for 24 years;

    10.2. Mr P Bardens, vice-president of DHL Aviation;

    10.3. Mr L Grey, ramp operations supervisor and an employee of 17 years;

    10.4. Mr A Collins, training and ramp coordinator supervisor and an employee of 17 years; and

    10.5. Mr P Robey, a ramp operations supervisor, employee with the respondent for 8 years and 14 years before that with DHL

elsewhere. He was also Mr Ayub's supervisor from October 2019.

11. Each witness who gave oral evidence was cross-examined. We have taken into account all of their evidence in coming to our conclusions.

12. Mr Ayub also relied on the signed written statement of Mr R Stukey. He did not attend because he was on leave. We have considered his statement. However, we note that the claimant's witnesses often provided detail and nuance to their statements that showed to us things were not so stark as the statements suggest. We think the same could well have been true of Mr Stukey, therefore. In the circumstances we are not satisfied that his statement can be taken at face value without him being present to answer questions. Therefore, though we have taken it into account we think it has little to offer.

13. There was an agreed bundle of about 175 pages and we have taken into account that which the parties referred us to. Some additional documents were produced during the hearing by the respondent to deal with issues that arose. Mr Ayub did not object to their admission therefore we have considered them too.

14. Each party made submissions at the end which we have taken into account.

15. The hearing was a hybrid video-attended hearing. Mr Ayub, Mr Liberadzski and the Employment Judge attended in person. The lay members and all other witnesses attended by video link. There were a few technical problems (including a fire alarm at DHL Aviation's premises). The main difficulty was that some of Mr Ayub's witnesses could not connect by video. Instead they attended by telephone. No-one objected to this and we are satisfied the witnesses were able to take part effectively and give their best evidence.

16. Neither party required reasonable adjustments. We took a break each hour to allow those attending by video to take a break from the screen, in line with Health and Safety Executive guidance. We also took additional breaks to allow Mr Ayub to refine questions for the upcoming witness if that witness was giving their evidence earlier than anticipated and to allow both parties to refine their closing submissions.

17. One issue that arose was that Mr Ayub in closing asked the Tribunal to consider his claims as harassment because of race as well. The Tribunal declines to do so. At the beginning of the hearing, the parties agreed the issues identified by Employment Judge Broughton in her order of 6 May 2021 (which itself was made after hearing and then dismissing an application by Mr Ayub to amend his claim) represented the issues the Tribunal has to determine. The only claims identified in that list are direct discrimination because of race, victimisation and less favourable treatment because of his (then) part-time worker status. Employment Judge Broughton allowed the parties 14 days after the order was sent out to say if they disagreed with her list. Mr Ayub did not write to the Tribunal to say he disagreed with her list of issues. In addition, we noted that there had been a case management order made by Employment Judge Blackwell after a hearing on 2 June 2020. At that hearing he had allowed Mr Ayub to

amend his claim and he too identified the claims as direct discrimination because of race, victimisation and less favourable treatment because of his (then) part-time worker status. That order was not appealed. The mentions of harassment are in Mr Ayub's replies to the respondent's response and to their amended response. Those responses are not a method of bringing or amending a claim. Given there had been 2 applications to amend; two Employment Judges who identified the claims as direct discrimination because of race, victimisation and less favourable treatment because of his (then) part-time worker status; no correspondence or other actions (e.g. appeal) to suggest they were wrong; no claims for harassment either originally or added by amendment; that harassment was mentioned only in replies to the respondent's responses; and that Mr Ayub agreed Employment Judge Broughton's order reflected the issues at the start of the hearing; that he raised it only in closing; that he made no application to amend and besides it would be unfair to the respondent to change the case at that stage, the Tribunal declined to allow Mr Ayub to refer to or seek to pursue any allegation of harassment.

18. Neither party complained that the hearing had been unfair to them. We are satisfied that this was a fair hearing.

19. Though the Tribunal hearing ended on the 4th day, the Tribunal decided it would need the remainder of the 4th day and potentially the 5th day to deliberate. Rather than have parties attend and risk them leaving without judgment, the Tribunal decided to reserve its decision. This is that decision.

Issues

20. The agreed issues were set out by Employment Judge Broughton in her order. We believe these still represented the issues for us to resolve at the end of the hearing. We have reworded them to reflect the overlap between them. We have also added that we are to consider if the claimant were denied training on 3 March 2020. The parties gave evidence about this, were cross-examined about it and addressed us on it in closing submissions. Therefore, the issues were:

Factual issues

21. Did the respondent do the following:

    21.1. Not afford the claimant access to training during his employment up to and including **3 March 2020**?

    21.2. Did the claimant's line manager, Peter Robey on **12 December 2019**, threaten to mark him down in his appraisal, threaten to place him on performance management and tell him that he should not have carried out a petition to support a colleague who had been dismissed?

    21.3. Did the claimant's line manager, Peter Robey on **17 December 2019,** take him into an office and belittle him and instruct him to find him so that other tasks could be allocated to him?

    21.4. Did Mr Robey, on **18 December 2019** offer out the claimant to other teams to carry out tasks?

21.5. Did Mr Robey, mark the claimant down in his appraisal on **11 February 2020**?

21.6. Was the claimant told on the **3 March 2020** that he could not receive training because of his part time status?

Time limits

22.

22.1. Were the discrimination, victimisation and less favourable treatment complaints individual acts or continuous acts?

22.2. Were the complaints made within either 3 months of the act complained of or, if continuous, within 3 months of the end of that period?

22.3. If not, were the claims made within a further period that the Tribunal thinks is just and equitable?

Direct race discrimination (Equality Act 2010 section 13)

23. Of the allegations in 21.1 to 21.5 above that are established

23.1. Do they amount to less favourable treatment compared to:

23.1.1. Mr Domily, white?

23.1.2. Mr Barnard, white?

23.1.3. Mr R Kirby, white?

23.2. And/or someone not of the claimant's race but whose circumstances are not materially different?

23.3. If so, was the treatment because of race?

Part Time Workers (Prevention of Less Favourable Treatment) regulations 2000 ("PTW regulations")

24. Of the factual allegations in 21.1 and 21.6 above only that are established:

24.1. Who is the full-time worker to whom the claimant compares his treatment?

24.2. Is that full-time worker employed by the respondent, based at the same location as the claimant, doing the same or broadly similar work and working under the same type of contract?

24.3. Was the claimant's treatment less favourable that of the full-time worker?

24.4. Was that less favourable treatment on the ground that the claimant was part-time?

24.5. if so, was the less favourable treatment justified?

Victimisation (Equality Act 2010 section 27)

25. There is no dispute that the claimant did a protected act on 30 January 2019 when he raised a grievance.

26. Of the allegations in 21.1 to 21.5 above that are established:

26.1. did it subject the claimant to detriment?

26.2. If so, was it because the claimant did a protected act?

Remedy

27. It was agreed that remedy would be dealt with separately and so is not an issue for these proceedings.

Findings of fact

Witnesses generally

28. We begin with our observations about the witnesses.

29. We are satisfied that, overall, the witnesses who gave oral evidence did their best to assist the Tribunal and, generally, were honest and truthful.

30. We have only the following additional specific observations:

30.1. With the exception of the Mr Barnard, the claimant's witnesses and Mr Ayub himself were straightforward and made concessions where appropriate. In particular his witnesses were ready to concede matters that did not necessarily help Mr Ayub's case.

30.2. Mr Barnard, who has not worked there since 2015 seemed determined and adamant in his views and appeared less willing to make concessions. For example, in answer to a question from the Tribunal about why he so clearly thought there was race discrimination toward Mr Ayub he said only:

"He is of a different ethnicity".

When then asked if he felt any other matter had part to play (bearing in mind the claimant alleged his part-time worker status was a factor), he replied:

"That is the only reason. They got trained and he did not. They were all white and he is not. Paragraph 8 is what I think."

and declined to elaborate further.

The clarity of his evidence about events that happened at least 6 years ago at a place he has not worked at since contrasted starkly with the fact that there was no obvious reason why those events stood in his mind and that other witnesses who are the claimant's colleagues conceded things were not so clear cut. This leads us to have some adverse concerns about the reliability of his evidence.

30.3. The respondent's witnesses were asked about their own personal equality and diversity training. The Tribunal noted some vagueness from the witnesses about what they had been taught, what actual training they had received or the method of delivery. It was somewhat concerning because we received a copy of the training material that clearly shows some PowerPoint slides and 2 videos. We also were struck by the fact that many of them seem only to have received such training for the first time in

recent months and not regularly as the respondent appeared to imply. That said, the witnesses were reasonably free in admitting their vagueness about the training. We note also the respondent was not relying on the statutory defence. We did not therefore consider this undermined their general credibility on the issues we had to determine.

30.4. The Tribunal was struck by how politely, calmly and courteously Mr Ayub and the respondent's witnesses interacted: after all Mr Ayub was accusing them of racism. It would not have been surprising if he were angry or aggressive in tone: He was not at any time. Equally it would be no surprise if the respondent's witnesses were angry or aggressive because of the accusations they faced. They were not either. Indeed, the Mr Ayub and Mr Robey greeted each other with a cheery "hello" and asking how the other was before the cross-examination started.

Background

31. We now make the following factual findings on the balance of probabilities.

32. DHL Aviation is a company that specialises in air freight and, so far as this case is concerned, is based at East Midlands Airport, Leicestershire. Its operation is as follows: Flights arrive from all over the world, the inbound cargo is unloaded from the airplane, and outbound cargo is loaded onto it, and the plane departs for its next destination.

33. A few flights arrive in the day. These are flights operating dedicated cargo services on behalf of third parties. Most of the operations in fact take place at night on the weekdays when the demand of passenger traffic is at its lowest. There is a weekend team, but because there is less work, those teams are more fluid in their structure and not really comparable to the way things work in the week.

34. This is reflected in the employment figures. There are about 170-odd employees, most of whom work at nights. Of those only about 2 are part-time. Mr Ayub is one of those.

35. Where the aircraft park while they are loaded and unloaded is called the ramp. Those who work on loading and underloading aircraft are the ramp operatives. The ramp operatives are banded. On completion of the first level of training they become band A, moving up to band C. Mr Ayub worked on the ramp as a part-time employee in band A.

36. DHL Aviation used to have more part-time employees. However, it concluded some time ago that part-time shifts were incompatible with the work that was required and so moved to full-time shifts. A full-time shift is 40 hours per week and involves working weekends. Mr Ayub worked 20 hours per week. He did not work on Fridays or Sundays.

37. The ramp operatives load freight in to and out of the aircrafts. They have to drive various bits of equipment such as the luggage trollies (known as tugs and dollies) and various devices to do this.

38. One of these is a vehicle called a high loader (often shortened to "hi-lo" which is used to move the metal cargo containers (like those seen on ships)

into and out of aircraft. It takes a full-time employee 2 weeks full-time to train to use a hi-loader. Hi-loaders are operated by band B operatives. A person who works 50% of full-time hours would therefore need at least 4 weeks to become trained.

39. Another role that was required was crew runner. Their role was to convey crew from aircraft to immigration (if necessary), to and from the crew lounge and to and from hotels if the crew were stopping overnight. The crew runner was also responsible for providing the information to the aircrew about the aircraft's load, its mass etc. to enable the pilots to understand what they were flying and to prepare for flight. They check everything is loaded correctly. They must also confirm that all legal requirements about loading that are relevant to that flight have been met.

40. The impression we were left with is crew running is not a desirable job. Everyone, including Mr Ayub, said that. It involves driving and sitting in a van for most of the time and little social interaction with others. They tend to work alone. It is a lower paid than grade A.

41. Crew runner training takes 1 week or thereabouts for a full-time employee. It requires undertaking training delivered by the airport itself because a crew runner has access to a greater part of the airport including immigration.

42. There are only about 5 crew runners. Because aircraft are arriving and departing throughout the night-time, the crew runners must be available for the same hours as the full-time employees work. Mr Collins explained that if there were a part-time crew runner it would cause problems. This is because they would, in Mr Ayub's case, finish before the end of the working day. That would then create an issue for DHL Aviation of having to find a crew runner to take over, which would deplete the number of available operatives elsewhere because a crew runner is not available to do any other work on the ramp.

43. Ramp operatives are organised into teams of about 7 people. As the training and ramp co-ordinator, Mr Collins was responsible for organising those teams and rotas. Because Mr Ayub was part-time and would leave therefore earlier that the team he worked with would, Mr Collins often put him onto teams with 8 people so that when he left, there would be hopefully no need to rearrange the remaining teams. Mr Collins acknowledged when Mr Ayub left each night, his work had to be covered. He said this was why he was put into a team of 8 rather than 7 and that, in any case it is easier to replace a ramp operative than, say a crew runner, because there were more of them.

44. Each team was supervised by a ramp operations supervisor. Mr Robey was Mr Ayub's supervisor from October 2019.

45. Each team works on the loading and unloading of the aircraft allocated to them. When their tasks are done or (as often happened) if their aircraft is late arriving, then they are expected to be prepared to work with other teams to assist them. During the night the supervisors use radio communications to request help. The request may be for a specific skill (e.g., a hi-loader) or for general manpower. The supervisors who have free staff in their team will respond and send over their team member.

46. An issue arose about whether the supervisor would ever call out he has spare staff and in particular if he would name a particular member of staff as being available (e.g., "X is free!", or "does anyone have anything for X?"). The claimant alleges he was regularly named by Mr Robey, though his own witnesses are not so clear because they were neither part of his team nor listening on the radios constantly. Mr Scott was clear he had heard the names of employees being called over the radio, and not just the claimant's name. Mr Robey said it was common practice to name available employees in his evidence-in-chief.

47. We concluded that supervisors would say that they had staff free and would occasionally say by name the particular member of staff. It seems inherently plausible this would happen. However, we do not accept that it was just Mr Ayub who was named in this way. Mr Scott is clear he heard "employees' names" over the radio. That tallies with Mr Robey's own evidence. Other employees had limited access to the radio and accepted their knowledge of what was said was limited. Therefore, to the extent Mr Ayub alleges he was singled out, we reject that.

48. If a ramp operative was not required and had no tasks to do, they would wait in the canteen for work to become available and would have to be prepared to help another team. If there were about 30 minutes until the shift ended, they would be expected to be available. If it were 15 minutes or less, then they would simply be allowed to leave early.

49. During the working year, the supervisor and supervisee would meet for so-called 1-2-1 meetings which were like progress reviews. At the end of the year there would be an appraisal called a "Job Discussion". At each stage employees were graded on their performance in certain areas. The grades are a 5-step scale from "far exceeds" to "does not meet". There are 2 grades of significance to this case:

    49.1. "Fully meets expectations" (which means "is fully capable – behaviours fully correspond to what is expected in the current role"), and

    49.2. "Partially meets expectations" (which means "demonstrates minor deficiencies (coachable) in the behaviour that is expected in the current role").

Race

50. Mr Ayub self-identifies his race as Pakistani for the purposes of the **Equality Act 2010**.

Employment to 2018

51. Mr Ayub commenced his employment with DHL Aviation on 21 December 2006. By 2012 he was a band A ramp operative. He initially worked 30 hours per week and then at some point reduced it to 20 hours per week.

52. He alleges that since 2012 he was denied training to progress to band B which he alleges was due to his race or part-time worker status, and alleges he was denied training repeatedly until 3 March 2020. Though Mr Ayub says it was a continuing act and he was "repeatedly" denied training, he can only cite 3 examples before March 2020. These examples he cites are:

52.1. A fellow part-time employee Mr Domily and Mr Barnard were approved for hi-loader training when he was not. Mr Ayub says these 2 examples happened in 2012.

52.2. He then says that when Mr Domily left, a fellow part-time employee, Mr R Kirby, was approved to received hi-loader training when Mr Ayub was not. Mr Barnard has given evidence on this too so, given when he left this must be no later than 2015.

53. Mr Ayub maintains that these others had not completed their Band A training (a pre-requisite for hi-loader training). He says they are white.

54. We reject the suggestion he was repeatedly denied training. We accept he raised from time to time a desire to do other roles which would require training but do not accept he was denied the opportunity to train like he says. There is a distinction between expresses a hope or desire like "I would like to do X" and applying to do X but being told he could not do it. The former is about personal preference but bears no relation to whether the opportunities to do the training for anyone actually existed. The fact is he can cite only 3 examples from 2012 to 2020. It means the implication that this denial was continuous throughout is not supported by evidence and is simply misplaced. It was repeated in the sense he was denied training on 3 distinct occasions before 3 March 2020.

55. We reject the suggestion that these employees had been trained for hi-loader duties when they had not completed their band A training. It seems inherently implausible that DHL Aviation would do that. We also note that the only evidence is that of Mr Ayub and Mr Barnard. We have expressed our concerns about Mr Barnard's evidence and cannot accept it here. We also reject Mr Ayub's evidence on this. His assertions are vague, and he too is trying to tell us about events nearly 5 to 8 years before he presented his clam.

56. Mr Ayub says he did not complain out of fear of repercussions, he did not know whom to turn to and because he needed to build up his confidence.

57. We understand it is a big step to raise issues of training to an employer – and to add an allegation of discrimination is a bigger step still. However, we reject the suggestion that he feared repercussions or needed to build confidence up so much he could not raise the matter until 2019 or bring a claim about it until 2020.

58. There is scant evidence to support his explanation for his delay. Mr Ayub does not mention the reasons for delay it in his statement. Mr Barnard does not mention any reasons in his (e.g., oppressive workplace). Mr Ayub's answers in cross-examination about this were vague. There is no explanation why in 2019 he suddenly gained the confidence to raise the issues. We acknowledge that his grievance (see below) makes mention of the need to find courage but does not explain why it has taken since 2015 at the latest. There is no evidence of what steps he took to investigate his rights or seek advice. There is no evidence he was misled by anyone as to his rights. We also bore in mind the friendly demeanour between the witnesses. We recognise that a court room in 2021 is not the same as the ramp up to 2019. But given the vagueness of the other material we consider

it is the best we have to understand the dynamics in the workplace, and it does not support what Mr Ayub says about why he did not complain.

59. The respondent pointed out also that it did not have details of exercises for selecting those for training from before 2018. Mr Ayub suggested this was deliberate. We disagree. We can easily understand why such information is not kept: there is no obvious need to do so. We also note that reducing the amount of unnecessary data held is encouraged by legislation and good business practice. It follows that if the case were allowed to proceed, the respondent would have serious difficulties presenting a defence.

1-2-1 meeting in 2019

60. In early 2019 there was an appraisal for the year January 2018 to December 2018. It is not clear if it was before or after he presented his grievance, though the typed notes were not signed until 4 April 2019. We believe the precise timing does not matter and deal with it here for convenience. The supervisor was Mr L Pollard. Mr Pollard recorded that Mr Ayub fully met what was expected of him in a number of areas but recorded that he only partially met what was expected of him in relation to "problem solving" and "driving high performance".

61. Mr Pollard wrote:

"[Mr Ayub] will on occasions take immediate action to address and resolve problems but at times can adopt a passive style and wait for instructions.

"…

"[He] fails to manage time effectively. He is able to take responsibility for his own decisions and is able to recognise the contributions of other stuff.

"[He] is able to develop new skills and modify his behaviour based on feedback that is shared with him. He demonstrates a commitment to achieve the best results possible.

"[He] is able to help out with developing other members of staff by actively sharing his knowledge of the ramp he is a hard-working member of staff and is willing to go past his finish time to help out and see the job through to the end."

62. In the section labelled "negative behaviours" it records that Mr Ayub was often passive and awaited instructions rather than be proactive.

63. This coincides with the start of a period of time that Mr Ayub says he had become despondent, disinterested in work and was (in his words) "like a robot" at work.

Grievance of 30 January 2019

64. On 30 January 2019 Mr Ayub lodged a grievance with Mr Bardens which said:

"…Whilst I enjoy the actual job, I cannot say the same regarding the management or the way the ramp department is run with regards to part time members of staff. I have worked on the ramp for roughly 9 years but I have had minimal progression even though I have tried in the past to get trained further so that I made progress. I have been made to feel unwanted

and irrelevant as I do not get the same treatment as other employees. There are only two part time members of staff on the ramp operation that being myself and Glenn Scott. Both of us are not included in the employee opinion survey meetings (EOS) that all other staff participate in with their respective teams also Glenn and myself have been denied further training to progress from one day to the next banding due to being part time stuff this baffles me because as a company we claim to be employers of choice and offer equal opportunities for stuff whether part-time or full-time.

"I have had previous instances with regards to training where I've been overlooked, and two members of staff were trained to a band B even though they are not completed their band aid training. I was the only member of staff on that part-time team who was fully banned a trained this was demoralising and made me become a robotic worker who would just work at the required level without any vision for the future I have raised issues with regards to my training on my one-to-one sessions with supervisors but I've always been told I cannot be trained further due to my part time hours. I personally have also been told on numerous occasions that my current hours are not fit for purpose anymore and that I should look to work full-time ...

"There is another major worry which is quite shocking for the 21st century that has come to my attention that is regarding the progression of staff from other ethnic backgrounds. I have analysed this over the years and unlike other departments the ramp has only white Caucasian members of stuff in senior positions and only one senior loader of African descent. Whilst working on the ramp over 9 years I've only seen one supervisor of Indian descent. The rest have been white Caucasian. We have had many workers come and go on different ethnic backgrounds but have either remained as basic loaders or ever left us progression for them did not seem achievable. Even the annual employee opinion survey has always been negative in regard to the ramp department in key areas which have yet to be improved. It seems as though decisions on staff progression are not based on ability but rather on other factors.

"I had a renewed sense that change would come when you have made the managing director but unfortunately this did not happen the way out hopefully the right department. I can verify all I have said in the form of previous and current employees have also experienced this. It took a while for me to gather the courage to write that email and I hope this acts the catalyst to improve ramp department as a whole."

65. My Ayub accepted that his comments about racism in the penultimate paragraph we quoted were general comments and not about his personal experiences. He said in evidence he considered he was part of the "general" but did not explain further why he did not mention his own experiences. This is strong evidence in our view that he did not believe race played any part in what happened to him, otherwise he would have clearly said it did.

66. The issue with the EOS meetings was that they took place after 02:30 whereas his shift finished at that time.

Grievance investigation

67. Mr Bardens appointed Mr Osborne, the programme and performance director, to conduct a grievance investigation. Mr Ayub and other employees were interviewed. We are satisfied it was a thorough investigation after considering it. It involved interviewing Mr Ayub, fellow members of staff including those from ethnic minorities to see if they felt there was racism, and an interview with Mr Scott, a fellow part-time employee who is white. Therefore, it appeared to cover all the allegations Mr Ayub had made.

68. In the meetings the following exchanges took place that we believe are relevant (they are not verbatim transcripts, but we have no reason to believe that they do not capture the gist of the conversations:

68.1. Mr Scott said of training: "Whoever is running the team they ask if I want training, I said yes hi-lo I asked 3 times to help the team out, fine I will do it. It carried on they got back to me and because I was doing 20 hours it would not work. 3 supervisors had recommended I do the training, but nothing ever came of it". He also confirmed he was able to attend the EOS meetings.

68.2. Mr Ul-Rahman was asked about his application for a senior ramp loader in November 2018. He was interviewed for the post. but unsuccessful. Though he expressed a view that person eventually recruited should not have got the job, he did not suggest race played any part in the selection. It was common ground between the parties that Mr Ul-Rahman's was of minority ethnic background though we do not have any more precise detail.

68.3. Mr M Kurl was asked:

"In your opinion, would you say that employees from ethnic minority backgrounds are treated different on the ramp to other employees?

He replied:

"No, I would say that it's probably, someone who is hiding their lack of skills behind this comment. I have been given a good opportunity on the ramp, and it is probably one of the best companies I have worked for."

And later:

"I have not experienced anything like [racism] but have received an opportunity to grow in the company."

68.4. Mr Kurl was also of minority ethnic background though again we do not have any more precise detail.

Grievance outcome

69. The investigation concluded there was no evidence of racism.

70. It also confirmed that Mr Ayub had agreed he would stay for the EOS meetings that took place once per month. It was also agreed separately that he would be paid to attend.

71. In relation to training it said:

> "We then moved onto the training element of your grievance. We spoke about you trying to be more flexible so that training can be accommodated for you. I told you about the home workers and weekend stuff that come in during the day for training. They are flexible around the business requirements.
>
> "I confirmed during the meeting held on the 28 March that I would look into this and see what options would be available for you to conduct band be training on your current hours. In the meeting on two may I confirm to you that the ramp can accommodate your band be training in August for four weeks you have booked two days holiday in August and one of the options is to double on your training on another day so it is completed by the end of August rather than going into September when the winter ops training [begins]."

72. In relation to shifts, it noted that DHL Aviation had offered Mr Ayub full time shifts but that he was unable to work Fridays, Saturdays or Sundays. Mr Ayub confirmed to us that this was the case because he worked as a taxi driver and wanted to spend time with his family. There was a discussion about a possible new shift pattern that would be full time. It also confirmed Mr Ayub's current part-time shift pattern was not a concern to DHL Aviation.

73. The company also carried out an assessment of the ethnic make-up of its staff to see if there was an imbalance.

Further email of 16 May 2019

74. On 16 May 2019 Mr Ayub again emailed Mr Bardens. He said as follows (so far as relevant):

    74.1. For the first time he suggested that he had suffered discrimination personally since 3 white members of part-time staff were given band B high loader training though they had not finished their band A training.

    74.2. He suggested he had applied to be trained as a crew runner but was overlooked. He suggested this was because of race. He did not suggest this was because of his part-time hours. He did not give us any details of this application so we cannot assess it.

    74.3. He acknowledged that DHL Aviation had agreed to train him to use the high loader. He expressed a desire to do training to become a fully trained loader, to do marshalling (they marshal the aircraft) and push-back (they push departing aircraft from the ramp to the taxiway).

75. Mr Bardens again met with Mr Osborne and considered matters. He decided that Mr Ayub's hours were a problem. High loader training took place 5 days per week over 2 weeks full-time. However, Mr Ayub had declined to work outside his work hours so it would take 4 weeks at least.

Also, he would not work on Fridays which were training days. Training was in groups and his non-attendance would affect others. However, Mr Osborne did make an arrangement to allow Mr Ayub to complete the training over 4 weeks.

1-2-1 of June 2019

76. In June 2019 Mr Ayub had a 1-2-1 with Mr Blackmore, his then supervisor. Mr Blackmore noted:

"Since I have taken over the team [the claimant] has performed to a good standard and I am happy with his work. Mr Ayub has been given his high load of training which based on his recent performances he deserves, however I am less than pleased the way Mr Ayub has decided to take this into his own hands instead of coming directly to me and I expect from now on Mr Ayub will come to me first and follow the correct chain of command with any issues in the future."

Meeting of 31 July 2019

77. On 31 July 2019 Mr Bardens and Mr Ayub met to discuss his grievance. It was treated as a grievance appeal meeting. An outcome of the meeting was that DHL Aviation agreed to see if it could offer Mr Ayub a full-time role that still allowed him to have Fridays and Saturdays free.

Knowledge of the grievance (and appeal) and the allegation of racism in particular

78. Mr Ayub alleges that Mr Robey must have known about the grievance and the allegation of racism. Mr Robey denies this. We accept Mr Robey's evidence. Our reasons are as follows:

78.1. Mr Ayub did not explore this with Mr Robey in evidence.

78.2. There is nothing in Mr Robey's evidence, the evidence of others or the documents that suggests he must have known. We note the grievance was not addressed to him nor about him personally. There is therefore no obvious reason it would have been raised with him.

78.3. Mr Robey did not become Mr Ayub's supervisor until October 2019 yet this concluded in July-August 2019. There is no sensible, credible reason why Mr Robey would be concerned in October about matters that did not involve him either directly or indirectly that concluded 3 months' earlier.

78.4. Mr Ayub invites us to conclude he must have known because there was a general awareness that he had lodged a grievance on the ramp and that because Mr Robey was a member of the management team it must have been discussed at some time when he was present. However, we can see no reason why that would be so – it was none of his business and we have been given no reason to believe people cannot keep confidential matters like this confidential.

It may be Mr Ayub's genuine suspicion that Mr Robey knew, but there is no evidence to show he in fact knew or indeed suspected.

79. By implication he must be alleging Mr Collins, Mr Henson and Mr Wooldridge knew because of the allegations he makes. However, this was not explored in cross-examination either and in fact there was no evidence that suggested they knew. We conclude they did not know of the grievance or of its contents, nor suspected the claimant had complained of racism.

Offer and rejection of full-time employment

80. Mr Bardens did manage to create a post that offered Mr Ayub a full-time role from Sunday nights to Thursday nights. That was offered to Mr Ayub.

81. On 9 September 2019 Mr Ayub wrote to DHL Aviation declining the offer "for unforeseen circumstances".

Training as high loader

82. From 5 August 2019 to 10 September 2019 Mr Ayub was trained to act as a high loader. Mr Barsby (the trainer) marked him as competent on 10 September 2019.

1-2-2 in September 2019

83. Mr Blackmore carried out a 1-2-1 meeting with Mr Ayub in 2019. He wrote (so far as relevant):

> "Since [Mr Ayub's] last 1-2-1 he is now passed out of his hi-lo training and is enjoying a more fulfilling role within the team now I can fully rotate him through the jobs. I have been very happy with [his] work and attitude towards the job and I expect this to continue going forward. [He] was recently offered and accepted a knew 40-hour contract working with myself Sunday dash Wednesday leaving his Fridays free as he is unable to work on Fridays I feel somewhat disappointed that [he] now decided not to join us on this shift and as requested to remain on a 20 hour contract. [He] has for some time being feeling down thinking he is being overlooked but I now hope he realises that like I promised with hard work comes the rewards."

Petition to overturn a dismissal of Mr Rafiq

84. A fellow employee called Mr Rafiq had been dismissed by DHL Aviation. The circumstances leading up to and reasons for that dismissal do not matter. Mr Ayub arranged a petition that he passed among other fellow ramp workers. The petition was to seek the overturn of Mr Rafiq's dismissal. It was signed by about 45 of his colleagues.

85. Mr Ayub suggests that this petition impacted adversely on how DHL Aviation treated him because he says issues began 2 days after he circulated it.

86. We reject that. We do not believe that there was any evidence beyond the claimant's assertion that that the petition had any adverse impact. There is no evidence that DHL Aviation were or would have been perturbed in any way by the existence of this petition. If the claimant is right that people must have known because he was passing it around in the ramp area, it is telling, we think, that no-one from the management team intervened to stop it. It is also telling that no formal action appears to have resulted from it.

87. In particular Mr Ayub alleges that Mr Robey knew of the petition and told him he should not have organised it. Mr Robey denies any knowledge of it. We accept that evidence for the following reasons. Mr Ayub did not explore this issue with Mr Robey in cross-examination. In any case the only other evidence in support was Mr Scott's evidence. In chief he suggested that "management" was upset by it. However, there is no evidence of how that was manifested. In cross-examination Mr Scott conceded he had no knowledge of whether Mr Robey would have known. Mr Robey could not dismiss and could not reinstate. We cannot see why it would he his concern so long as it did not interfere with work.

October 2019

88. Mr Robey became Mr Ayub's supervisor in October 2019.

89. Nothing of note appears to have happened until 12 December 2019.

90. Mr Ayub was still, to use his own words, working "like a robot".

12 December 2019

91. On 12 December 2019 Mr Ayub alleges that Mr Robey threatened to mark him down in his appraisal, place him on performance management and told him he should not have started the petition we referred to above.

92. We can deal with the petition point summarily. We found as a fact Mr Robey did not know of the petition (and would not have cared if he did provided it did not interfere with work). Therefore, we conclude whatever else may have occurred, Mr Robey made no reference to the petition or the claimant's involvement in it.

93. Between October 2019 and 12 December 2019 Mr Robey had become concerned about Mr Ayub's performance. He had on a number of occasions to remind Mr Ayub to make himself available to help other teams. In addition, Mr Robey had radioed other teams to see if they needed help, on occasion naming Mr Ayub. As we noted above, this was part of the normal functioning of the teams on the ramp

94. Mr Robey noted Mr Ayub's performance had deteriorated in the run up to 12 December. He found him on a number of occasions sat in the canteen before 0200 (i.e., more than 30 minutes before his shift ended). On 12 December 2019 Mr Robey approached the claimant and asked him what he was doing. The reply was "nothing". Mr Robey took Mr Ayub into an office and forewarned him that appraisal was due in January 2020 and if his performance did not improve it would affect his appraisal.

95. We note that Mr Ayub denies his performance had deteriorated. However, we do not accept that. Firstly, his earlier 1-2-1's and reviews showed problems with his performance. We noted in particular that during the case Mr Ayub would focus on the positive marks and not the marks which showed he only partially met expectations. Taken as a whole they showed room for improvement. Secondly, we come back to Mr Ayub's description that he was like a "robot". These two things are entirely consistent with Mr Robey's description of things. Mr Ayub's glossing over areas and criticisms of him in earlier 1-2-1s shows to us he has a distorted recollection of the

past that does not tally with that shown by the contemporaneous documentary evidence.

96. We reject any suggestion the references to his forthcoming appraisal was said as a threat. It was merely said as an obvious statement of fact: poor performance results in poor marks.

97. We reject any suggestion that there was a threat to place him on performance management. We again accept Mr Robey's evidence for the same reasons we prefer his evidence about the forthcoming appraisal. It seems more credible and besides there was no reason to mention performance management.

17 December 2019

98. There was some dispute about whether these events were on 16 or 17 December. We do not think anything turns on that since everyone agrees the event about which Mr Ayub complains took place, even if their recollections differ.

99. Mr Robey says was expecting Mr Ayub to come to him that evening because Mr Ayub had finished his assigned work early should have therefore sought out Mr Robey to see if other work were available. Mr Ayub denies this because he says he was working on another team and not under Mr Robey's supervision. We cannot resolve this but believe it does not matter because it cannot impact on whether or not Mr Robey was entitled as a supervisor to remind Mr Ayub to ensure other work was done before he returned to the canteen.

100. What is agreed is that Mr Robey spoke to Mr Ayub about not simply returning the canteen when his tasks end, but instead checking if other work was required.

101. Mr Robey decided to take Mr Ayub into an office. He used Mr Richardson's office. He is a manager senior to Mr Robey. In fact, Mr Richardson was in there. In front of Mr Richardson, Mr Robey reiterated that Mr Ayub needed to ensure he was not needed elsewhere before he went to the canteen to await the end of his shift. Mr Ayub agreed in cross-examination that it was reasonable for Mr Robey to speak to Mr Ayub in front of Mr Richardson. He also accepted that Mr Richardson agreed that Mr Robey was correct to say that Mr Ayub should report to his supervisor before returning to the canteen.

102. In cross-examination Mr Ayub clarified that he felt it was bullying simply because he was being asked to do tasks above and beyond what could reasonably be expected of him. Given that refocus and his concessions in evidence, we do not accept that Mr Ayub was belittled by Mr Robey in front of Mr Richardson. Furthermore, we do not accept that Mr Robey was asking Mr Ayub to go above and beyond his duties as a ramp operative. As explained earlier, ramp operatives are expected to make themselves available to other teams when their tasks are done. Mr Robey was only saying that to Mr Ayub because he was not following the instructions given previously.

18 December 2019 radio call out

103. Mr Robey in his evidence-in-chief accepted that he may have called out over the radio that Mr Ayub was available to assist. We find as a fact it happened because of this concession and because it was a usual practice. As we noted earlier though, there was nothing special about the claimant himself being named – it was all part of the routine.

11 February 2020 appraisal

104. On 11 February Mr Robey appraised Mr Ayub for the year January 2019 to December 2019. Mr Robey based his assessment on what he had observed of the claimant since he became his supervisor in October 2019. There was a lengthy debate in the evidence about whether that was reasonable. The claimant suggested it should be an amalgam of the marks awarded in the 1-2-1 meetings over the preceding year and that Mr Robey should have had regard to his performance overall. Mr Robey suggested it was perfectly reasonable to base an assessment on current performance and not historic performance and said that to mark Mr Ayub as performing well when he was not at time performing well would be artificial. Mr Henson in cross-examination said if he were the supervisor, he would be looking at the more recent performance (he suggested 4 months) remarking "A lot can change in 4 months".

105. Insofar as Mr Ayub suggests this is unfair and improper, and so part of the evidence of discrimination or victimisation, we do not agree. It is not our place to advise about best employment practices, but we do not think an employer would be unreasonable in a yearly appraisal to take into account and attach significant weight to more recent performance, such as the preceding 3 months. As Mr Henson says, a lot can change. Turning it around if Mr Robey believed Mr Ayub had significantly exceeded expectations in those last 3 months, Mr Ayub would not complain that he had been marked up at top grades despite being marked as only partially meeting expectations in the earlier part of the year.

106. In the appraisal, Mr Robey marked Mr Ayub as meeting expectations on one measure, but only partially meeting expectations on everything else. As we noted earlier this indicated as minor deficiencies resolvable with coaching. Overall he marked him as partially meeting expectations. Some of the areas in which he marked Mr Ayub as partially meeting expectations were areas where previous supervisors had marked him likewise in the 1-2-1 meetings.

107. Mr Robey commented on why he awarded each grade. There is a constant theme which is that Mr Ayub was passive, awaited instructions rather than being proactive and would let others do the work. Mr Robey in his overall rating marked Mr Ayub as partially meeting expectations, and wrote

"Meeting expectations has been fleeting rather than sustained."

108. Mr Ayub added his comment to the form. He wrote that he did not agree and wrote that

"I believe the appraisal has some bias elements to it with regards to my supervisor."

109. There was no reference to racism, victimisation or being treated less favourably for being part-time. There was no expansion on why he believed Mr Robey was biased.

110. It is clear that Mr Robey marked Mr Ayub down. However, we are satisfied having heard the evidence that this is what Mr Robey believed was a fair assessment based on his own view, in turn based on his observations of and interactions with Mr Ayub. We also took into account the grades show some consistency with previous assessments at 1-2-1s (albeit their result overall was better). They also fit with the general theme from both Mr Robey and from Mr Ayub himself that he was not putting in the effort and was acting in a "robotic" way. It fits with the earlier conversations also where Mr Robey had reminded Mr Ayub of the need to ensure there was no other work before he returned to the canteen. We think these grades are a far more plausible representation of Mr Ayub's performance at the time than Mr Ayub is prepared to concede, and that Mr Ayub's recollection is distorted.

3 March 2020

111. In early 2020 there was an outbreak of a virus called Covid-19. By March 2020 this was spreading through the UK causing absences and illnesses. The result was that at the time DHL Aviation was short of staff. The respondent also had a crew runner away on long-term sick leave.

112. Thus, one of the roles in which there was a shortage was crew runners. We have noted above that there were only 5 of them. The absences meant that they did not have enough and because of the important nature of their functions, this affected DHL Aviation's efficiency.

113. Mr Ayub had wanted to train as a crew runner. Though we do not have the details of when exactly he mentioned this, we accept his evidence that he mentioned it on many times to some supervisors. However, he had not been provided with the training, had not made any formal application for training and no record had been kept of his expressions of interest.

114. Mr Collins was tasked with sourcing and urgently training up replacement crew runners. The process started on 25 February 2020 when he was assigned the task of finding people to be trained up quickly.

115. Mr Collins was aware that there was a vetting process. It had been in place since April 2019. In short, the vetting process required an invitation to staff to express an interest in training for a particular role. The candidates were then assessed against objective criteria that measured things like the number of unauthorised absences, lateness, sickness absences and any other data relevant to the particular role, and them to produce a score. The candidates were then interviewed. The results of those processes informed who was successful. The idea was to eliminate bias and present fair opportunities to all.

116. Mr Collins explained for human resources ("HR") to ascertain the data for the objective criteria and develop the marking systems would take about 2 weeks. We accept this. We do not consider 2 weeks to be particularly long, bearing in mind the work required and other work would be continuing in the background. We acknowledged that Mr Bardens could get information

almost instantly on demand. However we note that first he would not routinely be making such requests since it was others beneath him in the managerial hierarchy who had to deal with such matters and, secondly, he is the vice-president and it is not unrealistic someone in such a senior position should be privileged enough to get a much faster turnaround on the rare occasions he needed the data.

117. In relation to the 3 March 2020 exercise Mr Collins was aware that the need was urgent and so he dispensed with the formal expression of interest and vetting process. We accept that he did this because he believed the need for crew runners was too urgent to follow it.

118. He invited expressions of interest. 4 people put their name forward. We accept that one was Mr Ayub and the other was Mr Badwal. Mr Badwal was a full-time ramp operative. He was of Indian ethnicity. There is no suggestion he did not do the same or broadly similar work as Mr Ayub. There is no suggestion he did not work on the same type of contract as Mr Ayub. Obviously, he worked at the same establishment

119. Mr Collins was aware that Mr Badwal had expressed an interest in being trained as a crew runner before inviting expressions of interest. Mr Collins was unaware that Mr Ayub had expressed any interest in being trained up as a crew runner. Mr Collins also said the other 2 applicants had not expressed a prior interest either.

120. Mr Collins spoke to Mr Badwal who confirmed his interest for many years. Mr Collins spoke to Mr Badwal's supervisor who agreed Mr Badwal was interested and would be suitable for training. Mr Collins also confirmed Mr Badwal would be available for training over the next 2 weeks. This was so Mr Badwal could complete the training quickly and start on 2 March.

121. Mr Collins explained he chose Mr Badwal because of his previous expressions of interest and because he was able to start training immediately. We accept that is one of the reasons why he chose Mr Badwal.

122. We however conclude that Mr Collins was significantly influenced also by the need for a full-time worker. Our reasons are as follows:

122.1. Mr Collins knew that Mr Badwal was full-time, and that Mr Ayub was part time. He understood the preference for a full-time worker to take over the role (for the reasons we set out earlier);

122.2. He knew if a part-time worker were trained up, he would still have the problem of appropriate cover for the time after Mr Ayub's shift ended. The situation was urgent;

122.3. We find it inconceivable when he looked at the lists, this matter did not feature in his mind at all;

122.4. We also believe the claimant is correct when he said that at a team meeting on 3 March 2020 at 2100, he was told by Mr Henson and Mr Wooldridge that he was not trained as a crew runner because he was part-time, and they did not have enough crew runners to cover him after 0230 when his shift ended. This is entirely plausible and fits with the evidence about the practical

problems that would arise if he were a crew runner on any given night he was working. We do not accept he was told he would be denied training generally because of part-time worker status. The evidence does not show that was an issue raised at the time, and besides the fact is he had received some training on various things even though he was a part-time employee.

122.5. It is also emphasised by the fact there was no formal vetting. Therefore, one's personal views that one has in the moment are going to carry far greater weight that if there is the objective vetting. Mr Collins was clear in his evidence why a part-time worker would not be suitable. It is inherently plausible and credible that was on his mind.

Afterwards

123. Mr Collins also sought to have more crew runners trained up to provide cover. This was not urgent and so he followed the formal vetting process. His desire was that he could train up 11 people to do the role. DHL Aviation declined on the basis it was not necessary to have so many. Instead only a further 2 were to be trained up. Those selected were full-time employees.

124. In April 2020 Mr Ayyub was crowned "Employee of the Month". He suggests this was done after he presented his claim to try to cover up the treatment he received. Mr Robey says in fact it was because he had significantly improved his performance, he was nominated for it, and he deserved recognition. We also note in his 1-2-1 in June 2020 Mr Ayub's performance was marked as having improved which Mr Robey confirmed reflected his genuine opinion.

125. We do not believe there was any conspiracy like Mr Ayub alleges. There is no evidence to begin to support such a conspiracy. Besides we believed Mr Robey was genuine in his marks in the appraisal in January 2020 and have no reason to believe his assessment is wrong now.

Law

Direct discrimination

126. The **Equality Act 2010 section 39** prohibits an employer from discriminating against an employee. The **Equality Act 2010 section 13** provides as follows (so far as relevant):

"(1) 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.

"…"

127. Whether treatment is less favourable is to be assessed objectively: **Burrett v West Birmingham Health Authority [1994] IRLR 7 EAT**.

128. The section contemplates a comparator. In **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 33 UKHL** Lord Scott explained that this means that:

"the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class."

Where there is no real comparator, the Tribunal must consider how a hypothetical comparator should be treated (**Balamoody v United Kingdom Central Council for Nursing, Midwifery and Health Visiting [2002] ICR 646 CA**) unless the reason for the treatment is plain: **Stockton on Tees Borough Council v Aylott [2010] ICR 1278 CA.**

129. The protected characteristic need not be only reason. Provided it has a

"significant influence on the outcome, discrimination is made out'.

see **Nagarajan v London Regional Transport [1999] ICR 877 UKHL. The Equality and Human Rights Employment Code** ("the Code") **[3.11]** says

"the [protected] characteristic needs to be a cause of the less favourable treatment, but does not need to be the only or even the main cause"

130. When analysing whether the difference in treatment is because of race the Tribunal is entitled to take into account if the reason is inherently discriminatory (by asking "What were the facts that the discriminator considered to be determinative when making the relevant decision?') or, where the reason is not immediately apparent, to look at why it happened analysing the conscious or sub-conscious mental processes of the discriminator: **R(E) v Governing Body of JFS aors [2010] 2 AC 728 UKSC**.

131. Motive is irrelevant: The code **[3.14]** and **JFS**.

132. We have taken into account the guidance that discriminators tend not to advertise the fact (**Glasgow City Council v Zafar [1998] IRLR 36 UKHL**), people may be unwilling to admit to themselves they are discriminatory (**Nagarajan**) and that discrimination can be based on innocent or well-intentioned motives even (**King v Great Britain-China Centre [1991] IRLR 513 CA**; **Amnesty International v Ahmed [2009] ICR 1450 EAT**).

Victimisation

133. The Equality Act 2010 section 27 provides:

"27 Victimisation

"(1) A person (A) victimises another person (B) if A subjects B to a detriment because—

"(a) B does a protected act, or

"(b) A believes that B has done, or may do, a protected act.

"(2) Each of the following is a protected act—

"(a) bringing proceedings under this Act;

"(b) giving evidence or information in connection with proceedings under this Act;

"(c) doing any other thing for the purposes of or in connection with this Act;

"(d) making an allegation (whether or not express) that A or another person has contravened this Act.

"(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

"(4) This section applies only where the person subjected to a detriment is an individual.

"(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule."

134. The focus is on "why" A acted as they did: **St Helens BC v Derbyshire aors [2007] IRLR 540 UKHL**.

135. Like other areas of discrimination, motive is irrelevant to liability and the protected act need only be one of the reasons: **Nagarajan**.

136. We understand the word "detriment" requires us to establish if the claimant believes he has been subjected to a disadvantage and that his belief is reasonable: West Yorkshire police v Khan 2001 ICR 1065 UKHL; **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 33 UKHL; Derbyshire aors v St Helens MBC 2007 ICR 841 UKHL: Employment code [9.8]-[9.9]**

137.

Burden of proof: Equality Act 2010

138. The **Equality Act 2010 section 136** sets out the way that the burden of proof operates in claims under the legislation, and was explained in **Igen Ltd aors v Wong aors [2005] IRLR 258 CA; Efobi v Royal Mail Group Ltd [2019] 2 All ER 917 CA; Hewage v Grampian Health Board [2012] ICR 1054 UKSC and Madarassy v Nomura International plc [2007] ICR 867 CA**.

139. At the first stage, the Tribunal must consider whether the claimant has proved facts on the balance of probabilities from which the Tribunal could properly conclude that the respondent has committed an unlawful act of discrimination or harassment. The Tribunal presumes there is an absence of an adequate explanation for the respondent at this stage.

140. It is not enough for a claimant to show merely that they have been treated less favourably than the comparator and for them point to a protected characteristic: **Madarassy; Efobi**. There must instead be some evidential basis on which the Tribunal could properly infer that the protected characteristic either consciously or subconsciously was the course of the treatment.

141. The Tribunal may look at the circumstances and, in appropriate cases, draw inferences from breaches of, for example, codes of practice or policies.

142. If the claimant succeeds in showing that there is, on the face of it, unlawful discrimination or harassment, then the Tribunal must uphold the claim unless the respondent proves that it did not commit or was not to be treated

as having committed the alleged act. The standard of proof is the balance of probabilities.

PTW regulations

143. The **PTW regulations, regulation 5** provide that

"5.— Less favourable treatment of part-time workers

"(1) A part-time worker has the right not to be treated by his employer less favourably than the employer treats a comparable full-time worker–

"(a) as regards the terms of his contract; or

"(b) by being subjected to any other detriment by any act, or deliberate failure to act, of his employer.

"(2) The right conferred by paragraph (1) applies only if–

"(a) the treatment is on the ground that the worker is a part-time worker, and

"(b) the treatment is not justified on objective grounds.

"(3) In determining whether a part-time worker has been treated less favourably than a comparable full-time worker the pro rata principle shall be applied unless it is inappropriate.

"(4) A part-time worker paid at a lower rate for overtime worked by him in a period than a comparable full-time worker is or would be paid for overtime worked by him in the same period shall not, for that reason, be regarded as treated less favourably than the comparable full-time worker where, or to the extent that, the total number of hours worked by the part-time worker in the period, including overtime, does not exceed the number of hours the comparable full-time worker is required to work in the period, disregarding absences from work and overtime."

144. In **Hendrickson Europe Ltd v Pipe UKEAT/0272/02 EAT**, the Employment Appeal Tribunal held that the issues that the Tribunal must decide are:

144.1. what is the treatment complained of?

144.2. is that treatment less favourable?

144.3. is that less favourable treatment on the ground that the worker is part time?

144.4. if so, is the less favourable treatment justified?

145. We understand "less favourable" to have the same meaning as in direct discrimination and to be assessed objectively. The choice of the same words and striking similarity in the test points to this conclusion.

146. The comparator must be a real full-time worker: **Advocate General for Scotland v Barton [2016] IRLR 210 CSIH**.

147. To be comparable, **regulation 2(4)** provides that

"(4) A full-time worker is a comparable full-time worker in relation to a part-time worker if, at the time when the treatment that is alleged to be less favourable to the part-time worker takes place–

"(a) both workers are–

"(i) employed by the same employer under the same type of contract, and

"(ii) engaged in the same or broadly similar work having regard, where relevant, to whether they have a similar level of qualification, skills and experience; and

"(b) the full-time worker works or is based at the same establishment as the part-time worker or, where there is no full-time worker working or based at that establishment who satisfies the requirements of sub-paragraph (a), works or is based at a different establishment and satisfies those requirements.

148. There is no scope for a hypothetical comparator: **Carl v University of Sheffield [2009] ICR 1286 EAT**.

149. The words "same type of contract" are defined in **regulation 2(3)**. In **Matthews aors v Kent and Medway Towns Fire Authority aors [2006] ICR 265 UKHL**, the House explained a part-time worker who is not an apprentice will on the same type of contact as any full-time employee employed by the employer and who is not an apprentice.

150. A finding as to the reason for the treatment should only be made once the tribunal has decided that the worker has been treated less favourably under **regulation 5**: **Calder v Secretary of State for Work and Pensions UKEAT/0512/08**. The employer must identify the ground for the less favourable treatment or detriment: **regulation 8(6)**.

151. There are conflicting decisions about what needs to be proven to show treatment is "on the ground that".

152. The following cases suggest that the reason must be the sole reason why the claimant has been treated as he has:

152.1. **Gibson v Scottish Ambulance Service UKEATS/0052/04**;

152.2. **McMenemy v Capita Business Services Ltd [2007] IRLR 400 CSIH;** and

152.3. **Engel v Ministry of Justice [2017] ICR 277 EAT**.

153. The following suggest that part-time work must be the effective and predominant cause of the less favourable treatment complained of, but need not be the only cause

153.1. **Sharma v Manchester City Council [2008] ICR 623 EAT**,

153.2. **Carl v University of Sheffield [2009] ICR 1286 EAT**.

154. Because we have a conflict of authority, we have to decide which to follow. We prefer the "sole reason" interpretation. As the EAT concluded in in **Engel v Ministry of Justice [2017] ICR 277 EAT**, **Council Directive 97/81/EC** was intended to provide a remedy for those who were treated in a less favourable manner than comparable full-time workers 'solely

because they work part-time'. While the language of the **PTW Regulations** is wider than that used in the Directive, they are intended only to implement it. It is not clear why winder protection would be afforded when for example other comparable features like the burden of proof have not been incorporated. It is not intended to redress any and all injustices that may exist; it is to redress the less favourable treatment of part-time workers if and only if that treatment occurs because they are part-time workers. **Engel** is also the more recent decision and it is consistent also with the position in Scotland. However, we will consider both interpretations in case we are wrong about our view on the law.

155. The burden of proof does not shift like in discrimination claims. It is for the claimant to he has been subjected to relevant less favourable treatment and then for the respondent to identify the ground for it and that it is justified.

156. Objective justification should be approached in a similar manner to the approach to legitimate aims in discrimination legislation. To succeed the respondent must show that the difference in treatment must pursue a legitimate aim, must be suitable for achieving that objective, and must be reasonably necessary to do so. Unequal treatment can be justified only by the existence of precise, concrete factors, characterising the employment condition concerned in its specific context and on the basis of objective and transparent criteria for examining the question whether that unequal treatment responds to a genuine need and whether it is appropriate and necessary for achieving the objective pursued: see **Ministry of Justice v O'Brien [2013] ICR 499 UKSC at [45] and [46]**.

157. Reasons for justification can be advanced by respondent even if they did not think of them at the time though those decided at the time will accord more weight than those thought of only afterwards: **O'Brien at [47]**

Time limits for claims under the Equality Act 2010, PTW regulations and continuing acts

158. The **Equality Act 2010 section 123** and **PTW regulations 8(2)** require a claim to be presented within 3 months of the detriment/less favourable treatment, or such other period as the Tribunal thinks just and equitable. Where there is conduct extending over a period of time, time runs from the end of that period. To decide if there was a continuing act, the Tribunal must look at the substance and ongoing state of affairs to determine if the claimant was treated less favourably over that period: **Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548 CA.**

159. We believe that acts that fall under the **PTW regulations** cannot be relevant for acts under the **Equality Act 2010** and vice versa because their legal bases (e.g. part-time worker status compared to protected characteristics) marks them out as fundamentally different types of claim.

160. When deciding whether to extend time the best approach for a Tribunal is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular, "the length of, and the reasons for, the delay" (**Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23**) and the prejudice to the respondent if a claim that is out of time is allowed to

proceed: **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194 CA**. We remind ourselves that there is a public interest in enforcing time limits.

Conclusions

Did the respondent do the following

Not afford the claimant access to training during his employment up to 3 March 2020?

161. For the reasons set out above we conclude that he was not afforded access to training twice in 2012 on one occasion and only in 2015 at the latest.

162. We conclude that he was specifically not afforded access to training on 3 March 2020 when in fact Mr Badwal was. That is apparent from the fact he applied to be trained and was not selected for training.

Did the claimant's line manager, Peter Robey on 12 December 2019, threaten to mark him down in his appraisal, threaten to place him on performance management and tell him that he should not have carried out a petition to support a colleague who had been dismissed?

163. Our conclusions on our findings of fact are that:

163.1. Mr Robey warned Mr Ayub he faced being marked down on his appraisal if his performance continued as it was;

163.2. Mr Robey did not threaten him however, he was merely stating a fact that poor performance would result in lower marks;

163.3. Mr Robey did not mention performance management; and

163.4. Mr Robey did not mention the petition because he was unaware of it.

Did the claimant's line manager, Peter Robey, on 17 December 2019 take him into an office and belittle him and instruct him to find him so that other tasks could be allocated to him?

164. We conclude that Mr Robey did take Mr Ayub into Mr Richardson's office on 17 December 2019 and instruct him to find Mr Robey to see if other tasks were available. This was reiteration of the general instruction that operatives should see if they are needed elsewhere when they finish tasks before returning to the canteen.

165. It is agreed it was done in front of Mr Richardson. He was superior to Mr Robey. Based on our findings of fact and Mr Ayub's change of position that it was nothing improper that this was done in front of Mr Richardson we conclude it cannot sensibly be described as "belittling".

Did Mr Robey, on 18 December 2019 offer out the claimant to other teams to carry out tasks?

166. Based on our findings of fact we conclude that this happened but was no more than routine.

Did Mr Robey, mark the claimant down in his appraisal on 11 February 2020?

167. In the sense that Mr Robey marked the claimant as only partially meeting expectations, this happened.

Was the claimant told on the 3 March 2020 that he could not receive training because of his part time status?

168. Based on our findings of fact, we conclude he was told he was not selected for training for the urgent crew runner role because he worked part time.

Time limits

Were the discrimination, victimisation and less favourable treatment complaints individual acts or continuous acts?

169. No. Based on our findings of fact there is no basis not to treat these as isolated one-offs. This is not by any measure an ongoing state of affairs. There is too long between them. There is no evidence to show an underlying causative link like Mr Ayub alleges. In fact on other occasions he was given training which suggests there was no such link. Therefore each incident was isolated.

Were the complaints made within either 3 months of the act complained of or, if continuous, within 3 months of the end of that period?

170. Insofar as we consider action before 27 November 2019, no.

If not, were the claims made within a further period that the Tribunal thinks is just and equitable?

171. No. We can see no reason why the claimant delayed from 2015 at the absolute latest. We set out in our findings of fact the lack of any credible explanation for the delay and the prejudice it would cause the respondent were time extended. The claimant could, but did not, have brought proceedings earlier. We also bear in mind the public interest in enforcing the time limits Parliament has set.

172. Therefore, we decline to extend time and the claims affected are therefore dismissed because we do not have jurisdiction to consider them.

Direct race discrimination (Equality Act 2010 section 13)

173. Event prior to 27 November 2019 have been dismissed. However, if were wrong about not extending time, we comment as follows:

    173.1. It seems that Mr Ayub was treated less favourably that Mr Domily, Mr Barnard and Mr Kirby because he was not trained when they were.

    173.2. However, there is nothing to suggest that it was in any way connected to Mr Ayub's race. As **Madrassay** makes clear, it is not enough simply to point to differences in protected characteristics. There is no evidential basis to say that his race played any part in it.

    173.3. Therefore, these claims would have failed in any event.

174. As for events that are in time, we come to the same conclusions.

175. Anyone else in the claimant's situation in particular being passive, not seeking out other work before returning to the canteen and working "robotically", would:

175.1. Be warned they risk being marked down in forthcoming appraisals,

175.2. Be reminded in front of Mr Richardson by their supervisor they need to check if they are needed elsewhere before coming to the canteen,

175.3. Would have been offered out to others by Mr Robey when they were available,

175.4. Would have received the same marks in their appraisal.

Those conclusions are inherently plausible and align with our factual findings that Mr Robey was simply doing his job while the claimant was not doing his satisfactorily.

176. Moreover, we noted that Mr Badwal was trained. We appreciate Indian and Pakistani ethnicities are different. However, there was no evidence that anyone on the respondent's behalf showed such subtleties in their attitudes towards race. We thought it seemed inherently implausible that DHL Aviation would act less favourably towards those of Pakistani ethnicity and not Indian ethnicity. There was nothing to explain why they would make such distinctions, yet alone that they did. In fact, such evidence as there is shows that Mr Ayub was treated as he was in part because of his part-time worker status.

177. There is therefore no evidence from which we could properly conclude that the respondent treated Mr Ayub as it did because of his race. If we are wrong about that, we would have been satisfied that the respondent had shown race played no part in what happened.

178. These claims are dismissed.

Victimisation (Equality Act 2010 section 27)

179. There is no dispute that the claimant did a protected act on 30 January 2019.

180. On the basis of our findings of fact it is clear that the claimant felt aggrieved by being denied access to training on 3 March 2020. We are satisfied such a grievance is reasonable since it is obvious to be told you will not be trained to do something you want to do and when a colleague is being trained for that role is clearly going to be upsetting.

181. Similarly, we believe it is reasonable to be aggrieved when told that one will not be trained as a crew runner because of one's part-time status.

182. While the claimant may have felt aggrieved by the following, we are not satisfied he is justified to feel aggrieved:

182.1. Being warned he would be marked down if his performance did not improve on 12 December 2019 is merely a statement of fact and presents an opportunity to take action and improve in time for that appraisal;

182.2. Being reminded he needed to find Mr Robey and see if other work was required before retiring to the canteen is simply

reminding him to do his job. It is not unreasonable to remind an employee what they should be doing if they are not doing it;

182.3. Being offered out to other teams for tasks is part of the mode of operation;

182.4. Mr Robey marked the claimant down because of the claimant's performance. That is not unreasonable.

183. However, there is no evidence that the perpetrators of the detriments knew of the grievance, yet alone the allegation of racism in it when they acted as they did. There is in fact no evidence the grievance played any part in the detriments we find proven.

184. We noted in particular that having raised a grievance, DHL Aviation offered Mr Ayub a full-time position on a special shift pattern to accommodate him personally. We cannot believe that because he raised a grievance the respondent would subject the claimant to detriments he alleges while at the same time making special arrangements for him to become a full-time employee on hours that fitted with his personal life.

185. Therefore, there is no evidence from which we could properly conclude that the protected act played any part in the matters Mr Ayub complains of. If we were wrong, we would readily conclude the respondents have shown that the grievance in fact did not play any such role.

186. These claims are dismissed.

Part Time Workers (Prevention of Less Favourable Treatment) regulations 2000 ("PTW regulations")

Who is the full-time worker to whom the claimant compares his treatment?

187. Insofar as the claimant complains about matters other than 3 March 2020, the claimant's claims must fail because he has failed to identity an actual full-time comparator.

188. In relation to access to training on 3 March 2020 for emergency training as a crew runner, we are satisfied that Mr Badwal is a suitable full-time comparator because he did the same or broadly similar work at the same location under the same type of contract.

Was the claimant's treatment less favourable that of the full-time worker?

By not afford the claimant access to training during his employment up to and including 3 March 2020?

189. Because there is no full-time comparator, we conclude the claimant has not proven he was denied training up to 3 March 2020 because of his part-time worker status.

190. He was clearly treated less favourably that Mr Badwal on 3 March 2020. Mr Badwal received training he wanted. Mr Ayub did not.

Was the claimant told on the 3 March 2020 that he could *not receive training because of his part time status?*

191. Yes – see the findings of fact.

Was that less favourable treatment on the ground that the claimant was part-time

…by not afford the claimant access to training on 3 March 2020?

192. On our findings of fact one of the reasons he was denied access to training on 3 March 2020 was because he was a part-time worker. As we explained, we are satisfied on balance that the evidence shows Mr Ayub's part-time worker status was on Mr Collins's mind and was a factor in his decision as to whom training should be given.

by being told on the 3 March 2020 that he could not receive training because of his part time status?

193. Based on our findings of fact the answer is yes but qualified in that he was told it only in relation to the crew runner training. He would not have been told it if he were not a part-time worker. We are satisfied that this had an adverse effect on the claimant. He wanted to be trained but was told he could not have it on his current contract. We think that it is quite reasonable he felt disheartened by hearing such words.

if so, was the less favourable treatment justified?

194. The respondent argued it was justified based on the basis that it was offered to full-time staff so that they could do the role full-time and to ensure training resources were deployed properly.

195. In the hearing and submissions, the respondent expanded on this and pointed to the evidence that a crew-runner's role covers the whole of a full-time shift and that they therefore must be available throughout. To train a part-time crew runner would be of no benefit because they would have to be replaced part-way through in any event which would require a full-time member of the team to be trained up in any case. Furthermore, there was only a need for 5 or so.

196. The Tribunal had to give this argument careful consideration because we were not immediately persuaded by it.

197. For the Tribunal, the main issue with this proposition was that every part-time employee was going to require training to their role and various parts of it. Every part-time employee whose shift ended before the end of the full shift because of their part-time status was going to have to be replaced. If the respondent was prepared to employ people part-time then this was an inevitable problem of agreeing employees could work a part-time shift pattern. We also noted that at one time DHL Aviation had a significant number of part-time employees and indeed they had had a shift made up entirely of such employees. On those occasions they must have trained part-time employees and been able to replace them when their shift ended. It suggested they could therefore cope.

198. However, we eventually concluded that on balance DHL Aviation had justified the treatment. The main persuasive factors for us were that:

    198.1. DHL Aviation had moved away from part-time workers because of problems with such a system, and so the past was not a useful guide to the present situation;

198.2. The role of crew-runner was one that was required throughout the full shift. A crew-runner was away from his team and so not working on the ramp loading or unloading planes. It was clearly easier to allocate someone away from the ramp for the whole night than to swap them around during the night because the crew-runner's duties were constant.

198.3. Therefore, if the claimant were a crew runner, when he left part-way through the night because his shift ended, a person would have to be removed from the ramp for the remaining part of that shift. This would deplete the ramp operatives by one. To accommodate it would require either:

198.3.1. an extra ramp operative from the start, ready to back-fill when one of them left during the night to replace Mr Ayub, or

198.3.2. the remaining operatives to pick up the shortfall.

199. We accept that DHL Aviation is entitled to conclude that this is impractical. We appreciated that happened in some ways when Mr Ayub left and his team dropped from 8 to 7. However, the minimum team size is 7. The former approach would require an increase of full-time employees by one which adds further cost and unnecessary manpower. The latter would reduce a team below the minimum and therefore create extra physical demands on the remaining staff that could be expected to cause unrest and greater demands that would lead to yet more operatives having to swap repeatedly among the teams to cover the shortfall. Neither suggested another part-time employee whose hours mirrored the claimant's. We think that such an approach would be problematic. It would require employment of someone with very specific availability and who wanted to be a crew runner. That seemed unrealistic.

200. We also feel that DHL Aviation is entitled to conclude that it only requires a minimum number of staff. As we say, crew runners work alone and so are practically separate from the teams. They only require 5 to work effectively. It is reasonable to conclude that there is simply no need for more to be trained, as desirable as it might for Mr Collins to give him more flexibility. We accept that the work they provide throughout the night is continuous and it is more efficient and flexible with late aircraft that it be a full-time employee to avoid swap overs when part-timers end their work.

201. Overall, therefore the respondent has justified why they treated Mr Ayub less favourably than Mr Badwal. These claims are dismissed.

Employment Judge Adkinson

Date: 23 July 2021

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision.

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