EMPLOYMENT TRIBUNALS

Claimant: Mr G Pastrama

1st Respondent: Somerset Passenger Solutions Ltd

Heard at: Bristol **On:** 12 to 16 July 2021

Before: Employment Judge C H O'Rourke
Members: Ms Y Ramsaran
Ms E Smillie

Representation
Claimant: In Person (with interpreter – Ms Belu)
Respondent: Ms Jones, Counsel

(Writen Reasons having been requested by the Claimant, those reasons are now provided, in accordance with Rule 62(3) of the Tribunal's Rules of Procedure 2013)

REASONS

Background and Issues

1. The Claimant had been employed by Respondent, as a bus driver and continues to be so, for just over four years now. He is of Romanian nationality. The Respondent provides passenger transport for the Hinckley Point C project.

2. There have been three case management hearings in this matter, the most recent of 18 June 2021. The Hearing of 2 September 2020 set out the issues, to the extent then known and it is to that document that we refer during this Hearing.

3. The Claimant brings claims of protected disclosure detriment; detriment on grounds of alleging an infringement of the Working Time Regulations; discrimination on grounds of race/nationality (both direct and harassment) and arrears of holiday pay.

4. The issues in respect of these claims are set out in the full in the case management order and are as follows.

5. Time limits

5.1 This issue was not discussed in the case management hearing, however it appeared to the Judge that there might be time limit issues that will need to be addressed at the final hearing, after hearing all of the evidence.

5.2 Given the date the claim form was presented and the dates of early conciliation, any complaint about any act or omission which took place more than three months before that date (allowing for any extension under the early conciliation provisions) is potentially out of time, so that the tribunal may not have jurisdiction.

5.3 Were the discrimination complaints made within the time limit in s.123 123 of the Equality Act 2010? The Tribunal will decide:

5.3.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?
5.3.2 If not, was there conduct extending over a period?
5.3.3 If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
5.3.4 If not, were the claims made within a further period that the Tribunal thinks is just and equitable? The Tribunal will decide:
5.3.4.1 Why were the complaints not made to the Tribunal in time?
5.3.4.2 In any event, is it just and equitable in all the circumstances to extend time?

5.4 Was the detriment complaint made within the time limit in section 48 of the Employment Rights Act 1996? The Tribunal will decide:

5.4.1 Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act complained of and/or date of payment of the wages from which the deduction was made?
5.4.2 If not, was there a series of similar acts or failures and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?
5.4.3 If not, was there a series of deductions and was the claim made to the Tribunal within three months (plus early conciliation extension) of the last one?
5.4.4 If not, was it reasonably practicable for the claim to be made to the Tribunal within the time limit?
5.4.5 If it was not reasonably practicable for the claim to be made to the Tribunal within the time limit, was it made within a reasonable period?

6. <u>Protected disclosure ('whistle blowing')</u>

6.1 Did the Claimant make one or more qualifying disclosures as defined in s43B of the Employment Rights Act 1996? The Tribunal will decide:

6.1.1 What did the Claimant say or write? When? To whom? The Claimant says he made disclosures on these occasions:
6.1.1.1 At the beginning of November 2017, the Claimant said to

Ms Wood (head of HR) and Mr Watson (manager) that under his contract he needed to be paid for his meal breaks and he was not being paid;

6.1.1.2 In December 2017, the Claimant said to Ms Wood (head of HR) and Mr Watson (manager) that under his contract he needed to be paid for his meal breaks and he was not being paid;

6.1.1.3 Weekly, from December 2017 until April 2018, when he received written confirmation that he should be paid for his meal breaks, the Claimant said to Ms Wood (head of HR) and Mr Watson (manager) that under his contract he needed to paid for his meal breaks and he was not being paid;

6.1.1.4 In May 2018, the Claimant had a meeting with Mr Vey and told him that the meal break calculation for back pay was incorrect;

6.1.1.5 In August 2018, the Claimant spoke to Mr Berry, financial director, and said his meal breaks were not being paid correctly and that his back pay had not been correctly calculated;

6.1.1.6 In his grievance letter dated 21 September 2018 he said that his meal breaks had not been paid properly;

6.1.1.7 In August 2018, the Claimant spoke to Mr Berry, financial director, and said his holiday pay was incorrect, in that the wrong rate had been calculated ;

6.1.1.8 On a date in August 2018 the Claimant sent an e-mail saying his holiday pay was being incorrectly calculated;

6.1.1.9 In September 2018, the Claimant spoke to Mr Berry, financial director, and said his holiday pay was incorrect, in that the wrong rate had been calculated;

6.1.1.10 In the Claimant's grievance dated 21 September 2019 he said his holiday pay was being incorrectly calculated;

6.1.1.11 In October 2018 the Claimant, in a meeting with Ms King, said that his holiday pay was being incorrectly calculated.

6.1.2 Were the disclosures of 'information'?

6.1.3 Did he believe the disclosure of information was made in the public interest? The Respondent disputes that the disclosures were in the public interest. The Claimant believes that the issues affected all employees.

6.1.4 Was that belief reasonable?

6.1.5 Did he believe it tended to show that:

6.1.5.1 In relation to disclosures 1 to 6, a person had failed, was failing or was likely to fail to comply with a legal obligation, namely the obligation to pay employees for their meal breaks;

6.1.5.2 In relation to disclosures 7 to 11, a person had failed, was failing or was likely to fail to comply with any legal obligation, namely the obligation to correctly pay employees for annual leave;

6.1.6 Was that belief reasonable?

6.2 If the Claimant made a qualifying disclosure, was a protected disclosure because it was made to the Claimant's employer? If a disclosure was made, the Respondent accepts it was made to the Claimant's employer.

7. Detriment (Employment Rights Act 1996 section 47B)

7.1 Did the Respondent do the following things:

7.1.1 In the week 11 to 17 December 2017 changed the Claimant's duties and cut his hours;
7.1.2 In January and February 2018, the Claimant was not granted overtime and preferred controllers to work as drivers instead;
7.1.3 In March 2018, the Claimant's rota was changed without notice, including changing his rest days;
7.1.4 In May 2018 Mr Vey had a meeting with the Claimant and told him to stop bothering the HR office about his meal break payment. The Claimant was given a sheet of paper showing the calculation;
7.1.5 On 22 September 2018, the Claimant was threatened and suspended because he refused to drive the bus without a duty board;
7.1.6 Between August 2018 and December 2019, paid the Claimant less than it should for his average holiday payment;
7.1.7 In February 2019, the Claimant was investigated for being late;
7.1.8 In February and March 2019, the Claimant's rota was changed without notice, including changing his rest days;
7.1.9 In March 2019, the Claimant was subjected to an unfounded accusation of poor driving;
7.1.10 On 15 April 2019, a colleague did not want to do a duty and the Claimant was asked to do it for him;
7.1.11 On 22 April 2019, the Claimant's duty was changed by decreasing his hours for the week 22 to 28 April 2019, which forced him to take a week's holiday to receive normal pay;
7.1.12 On 27 May 2019, the Claimant's duty was changed by decreasing his hours for the week 27 May to 2 June 2019 and some of his hours were given to another member of staff;
7.1.13 In the week 3 to 9 June 2019, the Claimant was given the wrong duty allocation, following his medical report on 3 May 2019;
7.1.14 In the week 1 to 7 July 2019 the Claimant's rota was changed and his colleagues were given better shift patterns/duties;
7.1.15 In the week 14 to 20 October 2019 the Claimant was not granted an overtime request, despite only being given 3 days work rather than 4 and incorrectly recorded him as being off sick for the 4th day;
7.1.16 In January 2020, the Claimant was not granted overtime;
7.1.17 In January and February 2020, the Claimant was forced to drive without a duty board;
7.1.18 The recommendations in the medical reports in relation to operations on his left side and issues with his safety boots, dated 30 April 2019, 3 May 2019, 6 March 2020, 18 March 2020, and 19 May 2020 were ignored;
7.1.19 In January, February, March 2018, January, February, March, October, November and December 2019 and January, 25 February and March 2020 he was not granted overtime when asking for statutory rights;
7.1.20 Following the Claimant's complaints on February 2018, 31 August 2018, 6 May 2018, 21 February 2019 29 April 2019, 17 May 2019, and 22 May 2019, the Claimant's confidentiality was broken, in that the people he complained about were told about the complaints;

7.1.21 From October 2017 the Claimant asked, on a monthly basis, to be on fixed line/rota. This was not granted until October 2019;
7.1.22 From October 2019 onwards there were fixed line/duty modifications every 2 months in order to change the Claimant's hours.

7.2 By doing so, did it subject the Claimant to detriment?

7.3 If so, was it done on the ground that he had made the protected disclosures set out above?

8. Detriment (Employment Rights Act 1996 section 45A)

8.1 Did the Claimant allege that the Respondent had infringed a right under the Working Time Regulations 1998, namely his right to payment in respect of annual leave under reg. 16(1) on the following occasions:

8.1.1 In August 2018, the Claimant spoke to Mr Berry, financial director, and said his holiday pay was incorrect, in that the wrong rate had been calculated;
8.1.2 On a date in August 2018 the Claimant sent an e-mail saying his holiday pay was being incorrectly calculated;
8.1.3 In September 2018, the Claimant spoke to Mr Berry, financial director, and said his holiday pay was incorrect, in that the wrong rate had been calculated;
8.1.4 In the Claimant's grievance dated 21 September 2019, he said his holiday pay was being incorrectly calculated;
8.1.5 In October 2018, the Claimant, in a meeting with Ms King, said that his holiday pay was being incorrectly calculated.

8.2 If so, did the Respondent do the following things:

8.2.1 On 22 September 2018, the Claimant was threatened and suspended because he refused to drive the bus without a duty board;
8.2.2 Between August 2018 and December 2019, paid the Claimant less than it should for his average holiday payment;
8.2.3 In February 2019, the Claimant was investigated for being late;
8.2.4 In February and March 2019, the Claimant's rota was changed without notice, including changing his rest days;
8.2.5 In March 2019, the Claimant was subjected to an unfounded accusation of poor driving;
8.2.6 On 15 April 2019, a colleague did not want to do a duty and the Claimant was asked to do it for him;
8.2.7 On 22 April 2019, the Claimant's duty was changed by decreasing his hours for the week 22 to 28 April 2019, which forced him to take a week's holiday to receive normal pay;
8.2.8 On 27 May 2019, the Claimant's duty was changed by decreasing his hours for the week 27 May to 2 June 2019 and some of his hours were given to another member of staff;
8.2.9 In the week 3 to 9 June 2019, the Claimant was given the wrong duty allocation following his medical report on 3 May 2019;
8.2.10 In the week 1 to 7 July 2019, the Claimant's rota was changed and his colleagues were given better shift patterns/duties;
8.2.11 In the week 14 to 20 October 2019, the Claimant was not granted

an overtime request, despite only being given 3 days work, rather than 4 and incorrectly recorded him as being off sick for the 4th day;
8.2.12 In January 2020, the Claimant was not granted overtime;
8.2.13 In January and February 2020, the Claimant was forced to drive without a duty board;
8.2.14 The recommendations in the medical reports in relation to operations on his left side and issues with his safety boots, dated 30 April 2019, 3 May 2019, 6 March 2020, 18 March 2020, and 19 May 2020 were ignored;
8.2.15 From October 2017 the Claimant asked, on a monthly basis, to be on fixed line/rota. This was not granted until October 2019;
8.2.16 In January, February, March 2018, January, February, March, October, November and December 2019 and January, February and March 2020, he was not granted overtime when asking for statutory rights;
8.2.17 Following the Claimant's complaints on 31 August 2018, 6 May 2018, 21 February 2019 29 April 2019, 17 May 2019, and 22 May, 2019 the Claimant's confidentiality was broken in that the people he complained about were told about the complaints;
8.2.18 From October 2019 onwards there were fix line/duty modifications every 2 months, in order to change the Claimant's hours.

8.3 By doing so, did it subject the Claimant to detriment?

8.4 If so, was it done on the ground that he had made the allegation set out above?

9. Direct race discrimination (Equality Act 2010 section 13)

9.1 The Claimant describes himself as Romanian.

9.2 Did the Respondent do the following things:

9.2.1 In September and October 2017, the Claimant's rota was Changed;
9.2.2 In the week 11 to 17 December 2017, changed the Claimant's duties and cut his hours;
9.2.3 Between August 2018 and December 2019 paid the Claimant less than it should for his average holiday payment;
9.2.4 In January and February 2018, the Claimant was not granted overtime and preferred controllers to drive to work;
9.2.5 In March 2018, the Claimant's rota was changed;
9.2.6 On 22 September 2018, the Claimant was threatened and suspended because he refused to drive the bus without a duty board;
9.2.7 In February and March 2019, the Claimant's rota was changed;
9.2.8 In March 2019, the Claimant was subjected to an unfounded accusation of poor driving;
9.2.9 On 15 April 2019, a colleague did not want to do a duty and the Claimant was asked to do it for him;
9.2.10 On 22 April 2019, the Claimant's duty was changed by decreasing his hours for the week 22 to 28 April 2019, which forced him to take a week's holiday to receive normal pay;

9.2.11 On 27 May 2019, the Claimant's duty was changed by decreasing his hours for the week 27 May to 2 June 2019 and some of his hours were given to another member of staff;
9.2.12 In the week 3 to 9 June 2019 the Claimant was given the wrong duty allocation following his medical report on 3 May 2019;
9.2.13 In the week 1 to 7 July 2019 the Claimant's rota was changed and his colleagues were given better shift patterns/duties;
9.2.14 In the week 14 to 20 October 2019 the Claimant was not granted an overtime request, despite only being given 3 days work rather than 4 and incorrectly recorded him as being off sick for the 4th day;
9.2.15 In January 2020, the Claimant was not granted overtime;
9.2.16 From October 2017 the Claimant asked, on a monthly basis, to be on fixed line/rota. This was not granted until October 2019;
9.2.17 The recommendations in the medical reports in relation to operations on his left side and issues with his safety boots, dated 30 April 2019, 3 May 2019, 6 March 2020, 18 March 2020, and 19 May 2020 were ignored;
9.2.18 From October 2019 onwards there were fix line/duty modifications every 2 months, in order to change the Claimant's hours.

9.3 Was that less favourable treatment? The Tribunal will have to decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and those of the Claimant. 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 has not named anyone in particular who s/he says was treated better than s/he was and therefore relies upon a hypothetical comparator.

9.4 If so, was it because of race/nationality?

9.5 If so, can the Claimant prove primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?

9.6 If so, what is the Respondent's explanation? Can it prove a non-discriminatory reason for any proven treatment?

10. <u>Harassment related to race (Equality Act 2010 s. 26)</u>

10.1 Did the Respondent do the following things:

10.1.1 Between August 2018 and December 2019 paid the Claimant less than it should for his average holiday payment;
10.1.2 In March 2019, the Claimant was subjected to an unfounded accusation of poor driving;
10.1.3 On 22 April 2019, the Claimant's duty was changed by decreasing his hours for the week 22 to 28 April 2019, which forced him to take a week's holiday to receive normal pay;
10.1.4 On 27 May 2019, the Claimant's duty was changed by decreasing his hours for the week 27 May to 2 June 2019 and some of his hours were given to another member of staff;

10.1.5 In the week 3 to 9 June 2019, the Claimant was given the wrong duty allocation following his medical report on 3 May 2019;
10.1.6 In January and February 2020, the Claimant was forced to drive without a duty board;
10.1.7 On 27 January 2020, the Claimant was abused in a meeting;
10.1.8 Following the Claimant's complaints on 25 February 2018, 31 August 2018, 6 May 2018, 21 February 2019 29 April 2019, 17 May 2019, and 22 May 2019 the Claimant's confidentiality was broken in that the people he complained about were told about the complaints;
10.1.9 In January, February, March 2018, January, February, March, October, November and December 2019 and January, February and March 2020 he was not granted overtime when asking for statutory rights;
10.1.10 In September to October 2017, March 2018, and February to March 2019 his rota was modified after asking for statutory rights, as set out above;
10.1.11 The recommendations in the medical reports in relation to operations on his left side and issues with his safety boots, dated 30 April 2019, 3 May 2019, 6 March 2020, 18 March 2020, and 19 May 2020 were ignored;
10.1.12 From October 2019 onwards there were fixed line/duty modifications every 2 months, in order to change the Claimant's hours.

10.2 If so, was that unwanted conduct?

10.3 Did it relate to the Claimant's protected characteristic, namely race/nationality?

10.4 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?

10.5 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. Holiday Pay (reg. 16(1) and 30(1)(b) Working Time Regulations 1998)/Unauthorised deductions (Part II of the Employment Rights Act 1996)

11.1 Has this issue been determined by a settlement agreement? If not;

11.2 Did the Respondent fail to fully pay the Claimant for annual leave that he has taken?

11.3 If so, how much should the Claimant have been paid?

The Law

12. Sections 13(1), 26 (1,2 and 4) of the Equality Act (EA) 2010 state:

13 Direct discrimination
(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.

26. Harassment

(1) A person (A) harasses another (B) if-

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of-

(i) violating B's dignity

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B

(2) ….

(4)In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a)the perception of B;

(b)the other circumstances of the case;

(c)whether it is reasonable for the conduct to have that effect.

The Facts

13. We heard evidence from the Claimant and on behalf of the Respondent, from Mr Martin Day, at the time Head of Operations, who dealt with employment-related issues raised by the Claimant; Mr Gareth Jones, an Allocations Officer, who dealt with allocating driver duties, to include overtime; Mr Darren Eaton, a Commercial Director, who dealt with an appeal from the Claimant; Mr Adrian Dennington, Business Operation Director, who dealt with grievances by the Claimant and finally, Mr Simon Antonio Cursio, the Managing Director, who dealt with a final stage appeal by the Claimant.

14. We make the following general observations, prior to dealing with the specific allegations:

14.1 The whole tenor of the Claimant's approach to the problems he identified with his employer was suspicious, untrusting of explanations and combative. He said, in writing to the Respondent, in September 2018 [172] that he was speaking to a legal advisor and '*what will happen will be a surprise for the Company!*'. He said, in evidence that he was already, at that point, considering a Tribunal claim, despite the whole tone of the Respondent's handling of his holiday queries being measured and open, as exemplified by the Respondent's thorough examination of the lunch-break payments issue, in conjunction with the relevant union and which resulted in individual payments of several hundred pounds, across the workforce, to include the Claimant. The Claimant's attitude, therefore, was hard to understand in that context. He even, in cross-examination, stated that he believed Unite the Union to be effectively in the employer's pocket.

14.2 He was also reported by Ms Izzard, an HR administrator, as having told her in September 2019 that he '*would slam the Company'* and be a '*prick'* in future meetings [367]. He denied these comments, but his evidence was frequently evasive (including on this occasion) and we consider it very unlikely that Ms Izzard would have made up such comments.

14.3 In January 2019, he effectively attempted to blackmail Mr Cursio into acceding to his demands, for his choice of bus route and guaranteed overtime, saying that '*I won't contact Ops, I won't stress Ops with my requests'* and '*stop all the headaches'* [268].

14.4 The Claimant appeared entirely unwilling, including in this Hearing, to accept explanations, instead taking everything personally, as some form of victimisation, as opposed to routine management decisions, taken for operational reasons, or due to genuine accounting errors, which applied across the workforce of several hundred. Even when these situations were remedied, he continued to dispute the decisions, despite reaching better settlements than his colleagues. He seemed to expect this Tribunal to compensate him for admitted mistakes made by the Respondent, applying to the entire workforce, regardless of their rectification at the time, indicating to us an overly litigious approach on his part.

14.5 There have been three case management hearings in this matter, the first not attended by the Claimant. He brought twenty-two separate allegations of detriment, stretching over two years. Despite being requested, in particular at the most recent case management hearing and in this Hearing, to attempt to rationalise these allegations into those that were the most serious and for which he had the best evidence, the burden of proof being on him, he failed, or even attempted, to do so. This refusal was compounded by his utter failure, in this Hearing, to either adduce any worthwhile evidence to support the allegations, or, crucially, to make any challenge to the Respondent's witnesses' accounts of events. He asked an average of three questions of each of the witnesses and which were generally nothing to do with his claim, or were simply confirming what they had said in their statement. When he was cross-examined, he readily conceded, often with a shrug that his allegations were without evidence - for example, the Respondent's duty to investigate genuine concerns. But even then, when asked if he withdrew that allegation, he refused.

15. We turn now to the individual allegations, as follows. These allegations were replicated through all four major claims, protected disclosure, discrimination/harassment and working time detriment, with some minor exclusions.

15.1 A cut to hours of work in December 2017 – to support this allegation, the Claimant adduced only a timesheet [145]. He failed to explain the significance of this document and nor did he challenge the Respondent's evidence on this point. We note, generally that his contract guaranteed him 39 hours a week and if his actual worked hours fell short of that, he would be paid for 39 hours, nonetheless. There was no guarantee of overtime, but, as the graph at page 584 indicates, he was given a generous amount of overtime. This allegation is therefore dismissed.

15.2 In January and February 2018, not being granted overtime, with, instead 'controllers' being preferred for these duties. The above-referred to graph (the contents of which he did not dispute) indicates, however that generally he did considerable amounts of overtime, but not in this period. However, as stated, overtime is not guaranteed and he provided no evidence of any ill-intent by the

Respondent on that occasion. This cannot, therefore, be a detriment and this allegation is also dismissed.

15.3 A change to his rota in March 2018 – all the evidence indicated that this change was company-wide and not targeted at the Claimant and therefore cannot be a detriment, stemming from any alleged protected disclosure, or discriminatory act. The Claimant himself accepted that the Respondent was obliged to react to their principal customer's (EDF) demands for bus services for their workers, when changes were dictated by them, which is what occurred in this case.

15.4 Mr Day allegedly telling the Claimant not to 'bother' HR. Firstly, Mr Day was not questioned on this point (and which also is not covered in the Claimant's witness statement). Secondly, in any event, it is clear that even if said, which Mr Day denies, there is an entirely innocent explanation, in that Mr Day, as the Claimant's manager, sought to directly resolve the Claimant's concerns, which the Claimant accepted, in cross-examination, as possibly the case.

15.5 On 22 September 2018, being threatened and suspended, on pay, for refusing to carry out an instruction and failing to complete his driving duty, without a 'duty board'. Firstly, there was no evidence before us as to what a 'duty board' was, or whether it was, as the Claimant asserted, a 'legal requirement'. Secondly, if it is not a legal requirement, then clearly he was required to obey reasonable instructions. At a subsequent meeting [202], the Respondent agreed that there would no further action in respect of this incident. Again, we see no detriment in this case.

15.6 Between August 2018 and December 2019, the Respondent underpaying him holiday pay. This issue was conceded by the Respondent at the time, as a miscalculation on their part and the Claimant and hundreds of other employees received nominal sums in recompense. Again, no detriment is evident and even if there were, it was not targeted at the Claimant, due to any disclosure by him, or as a discriminatory act.

15.7 In February 2019, being investigated for being late. The clocking-in record [273] indicates that the Claimant was late on two occasions, but the Respondent accepted, at the time, following investigation that the relevant machine was faulty and withdrew the allegation. The Claimant accepted that it was reasonable, in the circumstances, to investigate this matter, but considered it nonetheless detriment. Clearly, an employer is entitled to and should investigate such matters and merely doing so, particularly when the employee is exonerated, cannot be a detriment. Again, there was no evidence that this action was prompted in any way by any disclosure or desire to discriminate.

15.8 Changes to the Claimant's rota in February and March 2019 – we come to the same conclusions in respect of this matter, as we did above in paragraph 15.3 above.

15.9 In March 2019, being subjected to an unfounded allegation of poor driving. The Claimant accepted, in cross-examination that as a complaint about his driving had been made by a member of the public [288], the Respondent was obliged to investigate it. The Respondent did investigate, looked at CCTV

footage and accepted his account and decided on no further action. This and the previous alleged lateness incident and non-compliance with instructions matter do not indicate, to us, an employer out to target, or victimise an employee, rather the opposite. An employer, if so minded, could have chosen to have pursued some of these allegations and even, if perhaps unmerited, could have sought to issue formal disciplinary warnings, strengthening their hand for the future. But this is not the case here. Generally, our overall impression here is of an employer going out of its way to accommodate the Claimant's demands.

15.10 In April 2019, being asked to do a duty for another driver, unwilling to do it. No evidence whatsoever was advanced on this matter, which is accordingly dismissed.

15.11 In April 2019, his hours being reduced. Generally, we refer back to our finding at paragraph 15.3, as to the Respondent needing to react to EDF's instructions and the inherent flexibility required of the drivers. The Claimant was paid for 39 hours, plus some overtime and it was his choice to take holiday to supplement a drop in overtime at that point.

15.12 In May 2019, his hours being reduced and work being given to others. The Claimant had raised a grievance on this point, which was fully investigated at the time and was found to be down to last-minute changes by EDF. The Claimant produced no evidence to support an allegation of favouritism.

15.13 In June 2019, being given an incorrect duty rota, contrary to an Occupational Health (OH) recommendation. That recommendation was that he be given an external route, which was relatively short and would allow him to take breaks, due to him having post-operative scarring. However, once this discrepancy was pointed out by him, the route was corrected and he never drove the previously-planned route. This incident emphasised for us the petty nature of much of the Claimant's complaints against the Respondent. No acceptance of error by them, or prompt correction of such errors was ever good enough.

15.14 In July 2019, his rota being changed, with colleagues given better shift patterns/duties. We simply refer back to similar findings of ours, above, in this respect. There was no evidence provided of any less favourable treatment of the Claimant.

15.15 In October 2019, not being granted overtime – we refer again to previous findings as to the existence of guaranteed hours of works and overtime not being guaranteed.

15.16 In January 2020, again refusal of overtime, with the same conclusion.

15.17 In January and February 2020, being required to drive without a 'duty board'. Firstly, the Claimant adduced no evidence on this allegation and secondly, as previously found, we had no evidence as to the significance, or otherwise, of a duty board.

15.18 Ignoring medical recommendations, over various dates, as to the Claimant's post-operative recovery, rest breaks and wearing of properly-fitting

safety boots. The Claimant provided no evidence on this point and all the evidence from the Respondent's side indicated that they had attempted, on six occasions, to provide him with boots to his satisfaction, but which, for unknown reasons, did not. We have already dealt with the point about breaks, the Claimant having been allocated his preferred driving route, for this purpose.

15.19 Refusing overtime requests over various dates – we make the same finding as before.

15.20 An alleged breach of confidentiality in respect of complaints made by the Claimant over various dates. The Claimant provided no evidence whatsoever on this issue, which is accordingly dismissed.

15.21 A delay, over two years, in allocating the Claimant his preferred route. Firstly, there is no corroborative evidence of prolonged and monthly requests by him, as he asserts. Secondly, he had no entitlement to be granted such a request and thirdly, it was, in any event, granted.

15.22 Changes to his rota from October 2019 onwards – we make the same finding as before.

16. Conclusion on Detriment Allegations. As should be clear from our findings, the matters alleged are not detriments, but even if they were, there is no evidence, whatsoever that the Claimant was targeted in any way, or that such alleged detriments were because of any protected disclosures of his, allegations of breach of working time, or his nationality.

17. The Claims. We deal therefore, briefly, with each claim.

17.1 Protected Disclosure. While the Claimant did make some disclosures, in respect of being paid for meal breaks and the correct calculation of holiday pay, they were not made in the reasonable belief of being in the public interest, but, in fact, simply in his interest alone. Whether others benefitted was coincidental to him and while he had every right to raise such concerns that is not the same as making a protected disclosure. In any event, as found above, he suffered no detriments, as a consequence.

17.2 Working Time. We make similar findings in respect of the working time claim. The alleged detriments were not detriments, but, even if they were, were not because of his allegations.

17.3 Direct Race Discrimination. The Claimant adduced no evidence whatsoever to support this very serious allegation and completely failed to question the Respondent's witnesses in respect of this matter. By way of comparators, he included several fellow-Romanian colleagues. It seemed, in fact, from his evidence that what he was asserting was favouritism due to 'coffee runs and candy' being provided for office staff by some of these comparators, which, of course, is completely irrelevant to his race or nationality. This claim must therefore clearly fail.

17.4 Harassment. Simply put, the allegations the Claimant makes (as set out in paragraph 10.1) go nowhere near meeting the definition for 'harassment' in

s.26. The Claimant provided no evidence to indicate how they could have, even in his own perception, amounted to unwanted conduct, creating a hostile, degrading or humiliating environment for him. On his own evidence, he said, in respect of the workplace that '*compared to other places of work, it's a good environment with colleagues. I like the moral value of the project.*' We note also that despite an alleged two-year campaign of racial discrimination and harassment against him, he has continued to work for the Respondent and wished to progress with them, clearly indicating the deep implausibility of his claims.

17.5 Holiday Pay. Finally, there is a claim of arrears of holiday pay. This is two-fold – firstly, the Claimant stated that the rate of pay for holidays is incorrect. However, he provided no alternative calculation and we note that following extensive negotiations with the Union, the Respondent has agreed a rate of pay encompassing all hours worked, including overtime. The matter is therefore clearly resolved. Secondly, the Claimant disputes the number of days' holiday granted, in his case twenty-four, considering that it should be thirty. However, both the contract of employment and the Working Time Regulations indicate that holiday entitlement is calculated on contractual days worked, i.e. a five-day contractual working week, results in thirty days' holiday, whereas a four-day contractual working week, as in the Claimant's case, results in a twenty-four day entitlement. That is clearly correct and therefore this claim fails.

Conclusion

18. Accordingly, therefore, the Claimant's claims of protected disclosure and breach of Working Time Regulations detriment, direct discrimination, harassment and arrears of holiday pay, fail and are dismissed.

Costs Application.

19. Following Judgment, the Respondent made a costs application, subject to Rule 76 of the Tribunal's Rules of Procedure 2013, as follows:

19.1 The Claimant had behaved unreasonably in the bringing of these proceedings and in his conduct of them and also they had no reasonable prospect of success.

19.2 While it is accepted that the award of costs in employment tribunals is the 'exception rather than the rule', the facts of any individual case do not themselves have to be exceptional, but, in fact, this is the case here. The claims were misconceived and the Claimant should have appreciated that fact (**Vaughan v London Borough of Lewisham [2013] UKEAT IRLR 713** – a costs judgment of £87,000 against an unrepresented claimant). The Respondent had compiled a vast amount of evidence, from which it should have been clear to the Claimant that he had no reasonable prospects of success and was acting unreasonably in pursuing these claims.

19.3 The Tribunal considered the Claimant's schedule of loss, of approximately £100,000, at one of the preliminary hearings and pointed out to him that it was an entirely unrealistic figure.

19.4 The Respondent compiled detailed witness statements and called those witnesses and from that evidence the Claimant should have appreciated that his claims had no reasonable prospect of success, or that he was behaving unreasonably.

19.5 His conduct at this Hearing, conceding claims at any challenge and failing to conduct any worthwhile cross-examination is very definitely unreasonable behaviour.

19.6 The Claimant has been warned on numerous occasions of the possibility of this costs application – in the original and amended grounds of resistance and in a costs warning letter, written without prejudice on 22 February 2021 and which set out the test for an award of costs. The Respondent's anticipated costs were set out and an offer made to him, to settle, of £8000.

19.7 On the issue of the Claimant's means and reliant on **Kovacs v Queen Mary and Westfield College [2002] EWCA IRLR 414**, poor litigants cannot escape a costs order.

19.8 In respect of the amount claimed, the total, including solicitor's and counsel's fees, not including VAT, is £17,600.

20. In response, the Claimant said that he '*had nothing to say'* and that '*it was the Tribunal's decision'*. He had been '*as polite as possible, his emails were not threatening'* and he'd merely sought agreement on the issues. In respect of his ability to pay any order, he said that he was bankrupt, having entered into an Individual Voluntary Arrangement (IVA).

Conclusion on Costs

21. The Respondent applies for their costs, subject to Rule 76, on the basis both that the Claimant had pursued claims with no reasonable prospects of success and that his conduct of the claims had been unreasonable.

22. As should be clear from our findings in respect of those claims, we agree that both factors apply in this case.

23. While costs are the exception rather than the rule that does not mean that the facts of the case have to be exceptional. However, in this case, we do, nonetheless consider those facts to be exceptional. The Claimant pursued twenty-two separate allegations, spread over four claims, to include very serious and potentially damaging claims of race discrimination and harassment, but with clearly no prospects of success or even, seemingly, intention of attempting to prove them. His entire rationale seems to have been to bombard the Respondent with claims, in the hope that they would concede.

24. His conduct of the Hearing was entirely unreasonable, making no attempt to either prove his claims, or to challenge the Respondent's evidence and even, when accepting that he could not prove an allegation, refusing to withdraw it.

25. He refused an extremely generous and undeserved offer of £8000 and himself made entirely unrealistic claims of loss, to include even his wife's loss of earnings,

in a total sum plus of £100,000.

26. The Claimant ignored a detailed and as it turned out, entirely accurate costs warning letter.

27. We agree with Ms Jones that this behaviour is the definition of unreasonable conduct and that therefore a costs order is appropriate.
28. The costs claimed by the Respondent, of approximately £17,600, excluding VAT are, from our experience, entirely routine for a case of this nature, running for over a year and involving three case management hearings and a four-day final hearing.

29. We deduct from that figure the costs incurred up to the first case management hearing, which, if the Claimant had attended it, may have been an opportunity for him to re-assess his claim, regardless of the fact, subsequently that even with several further opportunities, he declined to do so. We accordingly deduct £800, for that period of time.

30. The Claimant offered no defence to the application, leaving the matter in our hands, saying merely that he'd always attempted to be 'polite' and while he may have been that does not excuse his conduct of these claims. We note that he is a litigant-in-person (whether or not he could have sought legal advice through the Union is unknown, but we note his views, in any event, on the trustworthiness of that organisation), but merely being such does not excuse him from being at risk of a costs order where it is clear, in our view that he has acted unreasonably and pursued entirely unmeritorious claims. As noted in **Vaughan** (quoting from an earlier case), '*This is [not] to say that lay people are immune from orders for costs: far from it, as the cases make clear. Some litigants in person are found to have behaved vexatiously or unreasonably even when proper allowance is made for their inexperience and lack of objectivity.'*

31. Despite being aware in advance of the likelihood of the Claimant's application, he provided no evidence of his means to pay any order, or of the details of his stated IVA and which therefore we cannot take into account. We know that he has a steady job, with ample overtime and that his wife works and therefore that it must be assumed that, if not now, in due course, he will be able to pay a costs order. Any such order will be subject, as to enforcement, to the jurisdiction of the County Court, who can examine, in detail, what sums and at what rate it will be appropriate for the Claimant to pay, in due course.

32. The Claimant is therefore ordered to pay the Respondent's costs, in the sum of £16,800.

Employment Judge O'Rourke
Date: 17 September 2021

Reasons sent to the parties: 21 October 2021

FOR THE TRIBUNAL OFFICE