



EMPLOYMENT TRIBUNALS

Claimant: Mr S Qasim

Respondent: Mercedes Benz Retail Group UK Limited

Heard at: Watford (by CVP)

On: 25 & 26 November 2021

Before: Employment Judge Maxwell
Ms C Whitehouse
Ms N Kendrick

Appearances

For the claimant: Mr Street, Solicitor

For the respondent: Mr Griffiths-Jones, Solicitor

JUDGMENT

1. The Claimant's race discrimination claim is not well-founded and is dismissed.

REASONS

Introduction

1. On 18 November 2020, the Claimant presented a claim form. At a case management hearing his claim was clarified as being one of direct race discrimination, with respect to the following alleged detriments:
 - 1.1. Investigation - The respondent subjected the claimant to a formal investigatory interview and disciplinary investigation. They did not do so for Theodorus Nicolaou at the time when he engaged with the rogue vehicle seller, started the process and instructed the claimant to put through the sale;
 - 1.2. Formulation - The respondent formulated serious charges including inter alia dishonesty against the claimant. They did not do so in relation to Theodorus Nicolaou;
 - 1.3. Suspension - They suspended the claimant but did not do so with Theodorus Nicolaou either at the time or later;

- 1.4. Prosecution and disposal - The claimant maintains the respondent prosecuted and disciplined the claimant but took no such action against Theodorus Nicolaou. This was even the case subsequently when in August 2020 it was discovered that Theodorus Nicolaou had been discovered to have previously engaged the respondent in the purchase of another stolen vehicle from the same seller as the transaction for which the claimant was disciplined.
2. The Claimant describes himself as “Asian” and his comparator, Mr Nicolaou, as “Caucasian”.
3. At the start of this hearing, the Claimant confirmed that he no longer relied upon the first detriment set out above, with respect to the investigation, as amounting to race discrimination. When he presented the claim, the Claimant had been under the impression that his white comparator was not subject to an investigation. Following disclosure in these proceedings of documents relating to Mr Nicolaou, it became apparent he too was investigated.

Procedure

4. Two days had been allocated and it was not suggested that more time was required or proportionate. In order to conclude matters it would be necessary to hear the evidence on day-1, so as to allow closing submissions, deliberation, judgment with oral reasons and remedy (if the claim succeeded) on day-2. Having given an initial time estimate of 2 hours and 30 minutes for his cross-examination of the Claimant, Mr Griffiths-Jones agreed to curtail this to 1 hour 30 minutes. Mr Street indicated he would have 30 – 40 minutes for each of the Respondent’s two witnesses. In the event, Mr Street spent considerably longer in cross-examination than indicated, the evidence continued on day-2 and the Tribunal reserved its decision.

Evidence

5. The Tribunal heard evidence from:
 - 5.1. Mr Suleman Qasim, the Claimant;
 - 5.2. Mr Richard Franklin, the Respondent’s Head of New Car Support;
 - 5.3. Stephen Trowell, the Respondent’s Sales Director for new vehicles.
6. We were provided with an agreed bundle of documents running to page 385

Facts

Background

7. The Claimant has been employed by the Respondent retail car dealership since 22 April 2018. His employment is continuing. He was recruited as a Sales Executive, although quickly secured promotion to the position of Retail Manager, in which role he learnt ‘on the job’ with support from a more experienced retail manager, Mr Nicolaou.

8. In early 2020, Mr Trowell was contacted by the Metropolitan Police. A criminal investigation was underway and it appeared that some of the Respondent's employees may have been implicated in this. The Police requested certain information from the Respondent.
9. The Police enquiry coincided with the Respondent having identified that it received a stolen Range Rover in a part-exchange transaction, which also included the fraudulent customer obtaining a cash payment from the business.
10. There was an overlap between the individuals relevant to the Police enquiry and those who appeared to be involved with the stolen Range Rover. Although the questions asked by the Police could have been answered by way of the Respondent carrying out a paper exercise, it decided instead to interview all of the staff connected with either matter.

Investigation

11. Mr Franklin was tasked with carrying out the investigation and interviews, supported by the Respondent's HR department. The Respondent's disciplinary policy provides that staff will be warned of a disciplinary interview and may be accompanied when attending. In this instance a conscious decision was made by the Respondent to dispense with such measures. Staff were called into an immediate interview, for which they would be unprepared. The Respondent's justification for so doing was the "severity" of the alleged misconduct. We pause to note that where employees are suspected of serious misconduct, in this case amounting to criminal behaviour, that is precisely when procedural safeguards will be most necessary. The approach adopted was deliberately unfair, being designed to avoid employees being able to collect their thoughts and prepare a response. This unfair approach, which was applied to the Claimant, has undoubtedly contributed to his sense of injustice.
12. The Claimant was called into a meeting at 4pm on 26 February 2020, without any warning or opportunity to be accompanied. He was then questioned at great length over the Police matter (about which he knew nothing at all) and then the Range Rover. At the end of this, he was suspended from work. Given the way in which he was brought in for questioning, the content of the interview itself and the fact of his immediate suspension from work, the Claimant believed he had been unfairly targeted. Furthermore, given that his white manager colleague who had also been involved with the Range Rover, Mr Nicolaou, had not by then been dealt with in the same way, the Claimant believed he had been singled-out because of race.
13. Although (by reason of his suspension) the Claimant did not know this at the time, it is now apparent that the following morning (i.e. 27 February 2020) at 10.45 am, Mr Nicolaou was brought in for interview, in precisely the same way as the Claimant had been. Several others were interviewed in connection with the Police matter. The Respondent had also wished to interview a Sales Executive who had been involved in the Range Rover transaction, although he was absent from work at this time and did in fact not return.
14. The Claimant complains that Mr Franklin was hostile and "prosecutorial". The record of the interview includes various adverse propositions being put by Mr

Franklin, who did not limit himself to asking open, exploratory questions. Looking at his comparator's interview, however, it is apparent that Mr Franklin approached Mr Nicolaou in a similar fashion, for example:

So you have a 2 hour window, from enquiry to order, £20 PX to a £10k smart and the only question we've asked is why is he downsizing, you've not thought it stinks. So what are we doing to make sure this is a genuine deal? So the first 2 hours we would do everything right, in the right order, from docuware you haven't done that, the site, hasn't done that. So 2 hours in, who are the same sales man, not the same retail manager, another alarm bell, loads of people to muddy water which has happened. So you've put the value, he's gone to Sully, and said he's valued at this much, I can guarantee you haven't seen that car. So we've given the customers £20k when we haven't seen. So that car is going out at 6.05 the release note signed by customers, well in realms of managers in the showroom. What checks have we put in place to ensure accuracy

15. We find that Mr Franklin went into all of these interviews with what he thought was strong evidence, believing he was likely to suspend each of the suspected employees from work. To this end, he had prepared suspension letters in advance, which were ready to hand over immediately and see them out of the business, whilst the investigation continued. That provided to the Claimant was in the bundle. That prepared for Mr Nicolaou was never used and not in the bundle for this hearing, although we accept there was such a letter, for reasons we will come on to.
16. The point at which the treatment of the Claimant and Mr Nicolaou diverges is the outcome. The Claimant was suspended and Mr Nicolaou was not. The reasons for this relate to evidence before Mr Franklin of their respective parts in the Range Rover transaction. Neither the Claimant nor Mr Nicolaou were found to have any involvement in the Police matter.
17. As far as the Range Rover is concerned, this transaction took place at the end of January 2020. A customer (the fraudster) approached the Respondent looking to part-exchange a Range Rover for a Smart Car. Because the second-hand Range Rover was worth more than the new Smart Car, this transaction would involve money being paid (we are not sure the term 'refund' is correct) to the customer for the difference. The customer explained the reason he wanted to do this is because his wife had decided the Range Rover was too big for her and wanted to downsize. This was a most unusual arrangement. Mr Franklin did not go so far as to say that such a transaction could never be legitimate but he thought it should have set off "alarm bells" and would tend to underline the need for great care on the part of all those dealing with it, to ensure everything was in good order and above board. The initial customer approach was made on 27 January 2020 and was dealt with by a Sales Executive, albeit Mr Nicolaou approved the transaction in principle, subject to the Range Rover being inspected when it was brought in. The Range Rover was delivered on 28 January 2020 and the transaction completed on the Respondent's systems that day, by the Claimant. The Sales Executive (absent from work at the point in time when Mr Franklin was investigating) actually dealt with the handover of vehicles.

18. Prior to the interviews, the documentary evidence Mr Franklin had obtained came primarily from the Respondent's 'docuware' IT system. This involved Mr Nicolaou and the Claimant as follows:
 - 18.1. Mr Nicolaou had approved the part-exchange, valued the vehicle and signed the vehicle release document;
 - 18.2. the Claimant had electronically signed to approve the transaction, confirm receipt and checking of all necessary documents.
19. During the Claimant's interview, he said that he had not been in work when the deal was agreed, the next day when he returned he was asked to process the paperwork by the Sales Executive, who told him it had been approved by Mr Nicolaou. The Claimant maintained this was standard practice at the time and he was following the lead of a more experienced Retail Manager. It was not suggested by the Claimant that he had been misled by the Sales Executive or pressured. Mr Franklin was persuaded of the honesty of the Claimant's account but not satisfied that the Claimant could side-step blame for approving and signing-off on this transaction, simply by saying he was told to complete it by the sales executive. Mr Franklin believed that if the Claimant signed (digitally) to say he had carried out all the checks, then it was necessary for him to have done them. In this case, a simple check of the V5 document would have revealed the name of the owner was not the same as that given by the customer. Mr Franklin decided to suspend the Claimant pending a disciplinary hearing, as this was a very serious matter and he could not leave the Claimant in post. He issued the suspension letter, which included 3 allegations, the first of which "involvement in the receipt, and assessment of, a stolen/cloned vehicle" implied dishonesty. This particular allegation did not apply, as although Mr Franklin thought the excuse given was poor, he accepted the Claimant's account as genuine. The reason the letter still included the first allegation was because it had been prepared before the interview, on the basis of what then appeared to Mr Franklin to be the most likely outcome.
20. During Mr Nicolaou's interview he told Mr Franklin his involvement had been limited to approving the transaction subject to the vehicle being seen. He was not at work when the customer had actually brought the Range Rover in and was not in a position, therefore, to check the vehicle itself and supporting documents. Mr Franklin plainly doubted this account and put the release note forward, signed by Mr Nicolaou, as demonstrating he had a more substantial involvement than he admitted to. In what must have been a surprising turn of events for Mr Franklin, Mr Nicolaou said he had not approved the release of the vehicle and that his apparent signature on the relevant document was a forgery. Mr Franklin did not immediately accept this and needed to be convinced. During an adjournment, Mr Nicolaou obtained existing documents from the Respondent's records which bore his true signature. Having spent some time making a comparison, Mr Franklin accepted that a forgery had indeed been created. There was then another comparison exercise, looking at whose signature (of several others) the forgery resembled. Mr Nicolaou was less reticent in 'pointing the finger' (than had been the Claimant) toward the (absent) Sales Executive. We are satisfied that had it not been for this unexpected turn with respect to the forged signature, Mr Nicolaou too would have been suspended and it is likely a letter had been prepared for him, as this is

consistent with what was said to him toward the end of the interview by the HRBP:

I know you said you hadn't said, but you were this close to being suspended today, and I know it's hard to stick your hand up when things are wrong, but there are other avenues, so for God's sake in future please speak to anyone. If we had any inclination that anything was happening when you said a year ago we would have been through this place. Understand that there are avenues, and don't keep it under your hat if you ever find yourself in a situation like this again.

21. It appeared to Mr Franklin that Mr Nicolaou had only limited involvement in the transaction at the beginning, whereas the checking and signing-off had all been certified by the Claimant as being done the following day. Several other employees were interviewed and suspended at the same time
22. Subsequently and with respect to the Claimant, Mr Franklin told Mr Trowell he had found evidence to justify suspension pending a disciplinary hearing. Mr Trowell understood this amounted to there being a case to be answered at a disciplinary hearing and supported the matter proceeding. No investigation report was prepared and nor was any record kept of the conversation between these two managers. This was one of a number of aspects in which the Respondent's approach may not have been procedurally fair. There is nothing, however, to suggest this was because of the Claimant's race. The discussion amounted, in effect, to a joint decision between the Mr Franklin and Mr Trowell (notwithstanding each appeared to have thought the other decided) to pursue disciplinary proceedings. The reasons for this decision were Mr Franklin's, namely those which he had relied upon for the suspension.

Grievance

23. The Claimant raised a grievance, setting this out in an email of 10 March 2020 to various members of the Respondent's HR function. He gave an account of events surrounding the Range Rover transaction. This included reference to Mr Nicolaou being involved in an earlier Range Rover transaction. Many of the points made were in the form of questions. The Claimant complained about his investigation and suspension, setting out various departures from the disciplinary procedure. The Claimant now suggested Mr Nicolaou may be involved with the Sales Executive and fraudulent customer. He complained about suspension, contrasted his treatment with Mr Nicolaou's and alleged race and religious discrimination. The Claimant said Mr Franklin told him to leave Theo out of it.

Disciplinary

24. By a letter of 13 March 2020, the Claimant was invited to a disciplinary hearing on 17 March 2020. In the event the hearing did not take place. We were not persuaded the delay was indicative of race discrimination as this was adequately explained by a combination of sick leave, lockdown and annual leave.
25. The allegations set out in the disciplinary investigation had been changed from those in the suspension letter. The original allegation of being involved with the stolen vehicle was removed and instead there were now included several

allegations relating to procedural failings. The issues as clarified by EJ Housego involve a complaint about the formulation of the allegations in the suspension letter rather than this one, as the former were understood by the parties to amount to an allegation of dishonesty and the latter not. Although the revised allegations can be criticised as being rather vague, there was an evident downgrade, from a lack of honesty to incompetence. This was consistent with the evidence as Mr Franklin saw it. Attached to the letter were copies of the documentary evidence management were relying upon.

26. On 28 May 2020, the Respondent wrote to say the Claimant's grievance would be considered at the disciplinary hearing:

I am aware that on 10 March 2020 you have submitted a formal grievance raising a number of points. As previously communicated to you, I will review the content of your grievance, and consider as part of the disciplinary hearing.

27. The grievance was all about the disciplinary process and allegations. These were matters that could simply have been raised by the Claimant as part of the disciplinary hearing, as arguments to the effect he had done no wrong at all, or as mitigation, or both. The ACAS code allows for such matters to be dealt with concurrently.
28. The Claimant attended a disciplinary hearing before Mr Trowell on 1 July 2020. The first part of this was used to discuss the Claimant's grievance. There was an exchange in which the Claimant put his case on race discrimination and Mr Trowell declined to provide information about how Mr Nicolaou had been dealt with:

SQ Does the company accept that Theo was involved in the process of valuation of the Range Rover, and not suspended, I think it was just me, as a brown guy that we were getting suspended. In his head, brown person, dodgy

ST Let me stop you there, lots were suspended and not all from a single race, It wouldn't be appropriate to discuss individuals and what process they went through and their outcome, we will pick up in the disciplinary your involvement. This could be where Richard said stop talking about others, we need to know your involvement. The others are irrelevant to you, we need to know your responsibility, competence and involvement

SQ Was Theo in this process as well

ST Yes

SQ But he wasn't suspended

ST it is not appropriate to discuss others outcome, this is the last time I'll say it, the action we have or haven't taken against others has no relevance to you. We're interested in your responsibility bringing this vehicle into this business and those are the points I'm bringing to you

29. At the disciplinary stage, the Claimant adduced witness evidence to support the proposition that it was common practice for one manager to start a transaction and another complete it. The Claimant also sought to call witnesses to address his good performance, generally. Mr Trowell wished to hear about the specific

transaction the subject of the allegations. At the disciplinary the Claimant said he had spoken to Mr Nicolaou on the phone on 28 January 2020 and was asked by him to conclude the transaction. Mr Trowell was interested to understand the checks the Claimant completed and his approach to the transaction:

ST In the 2 years you've been here, how many customers have gone from a Range Rover to a Smart car and £10k cash

SQ 2 or 3

ST So it wouldn't be suspicious to you

SQ Not if another manager has had the conversation

ST I'm not worried about that, I'm asking if it was suspicious to you.

SQ If someone else has seen and valued, I didn't know I had to question his authority

[...]

ST Start with the order form, in the name of Mr P Stevens, discount request under name of Mr Stevens, PX in the name of Mr Stevens, Docuware printout for Mr Stevens, order and release note for Mr Stevens

SQ Yes

ST So Mr Stevens is accepting deliver of new car and his trade in and you've signed that you've carried out those checks. However the registration doc is for Mr James Clarke and resides at a different address that is on all the V5

SQ I wasn't aware I had to check the V5s as not advised in my job role.

ST So how has that customer got to PX that vehicle

SQ No one's told me to check that. The declaration by the seller and buyer, the declaration was signed by Dre that he's seen the car and V5, this is what the sales executive does

ST You can't say then, you've been a sales exec for 2 years you're saying they should check and have authority, you're not saying as a manager you'd check that

SQ I wasn't told to do that

ST I'm not saying that, but as a manager, you're saying you wouldn't check the asset that is coming in is then registered to the correct keeper

SQ My V5s weren't checked, you'd do random checks and as long as the signature that the sales exec has checked. Similar there's a stamp on the order form

ST Who's defrauded you, who's misled you

SQ On this occasion Dre and Theo I believe but I wouldn't accuse them of fraud

ST You wouldn't

SQ Maybe they made a mistake

ST What's your mistake

SQ I can't find any

[...]

ST Why are you not checking what you're signing

SQ I've been passed a job that another manager has done the checks. HPI shows clearly and no other doc say to check the V5

ST So your defence is naivety and blindly signed something

SQ You've not mentioned the V5

ST You've signed on Theo's say so without checking

SQ I've checked HPI history and the BCA PX, what else shall I check

ST The V5

SQ I wasn't told to check that

30. Mr Trowell's main concern was that the Claimant had signed off on the transaction without carrying out any checks, in particular of the V5:

ST I've sat and listened to all the evidence, and the witness statements and I've got to say I'm happy to accept most things you've put forward but I can't accept you take no responsibility of taking a car into our organisation from a person who has no legal entitlement to do so

SQ What are your reasons

ST You've got your stamp on everything, verbal communication that its above board but no willingness to accept any responsibility

SQ It's HPI confirmation, it's not just verbal, there's the BCA evaluation to. Maybe based on your experience you feel that all sales executives should check V5s as well

ST No, my role as a manager is to check all documents

SQ I have

ST You haven't checked the V5

SQ It doesn't say anywhere to check the V5

ST Is that the best line of deference you have

SQ I'm not trying to defend myself

ST I'd appreciate it more if you held your hand up and said it was an oversight

SQ I do random checks

ST That's not good enough

31. After a 50-minute adjournment, Mr Trowell returned with his decision:

Thank you for your patience during the adjournment. I'm going to read through a short statement I've prepared. I've considered all the evidence and witness statement, I'm sure you've picked up my frustration towards the end of our meeting which was driven by my understanding of role of RM. I believe that you have not knowing contributed to this transaction, however the result of this is a £20k loss to the business which cannot be ignored. I find it extremely difficult that you have personally taken no responsibility or acceptance of wrongdoing for your actions and involvement with this transaction. This causes me to question your critical awareness as a manager in our business which we need from all of our employees in management positions across our organisation.

I can therefore only conclude that it was too soon for you to be in a management role. I do not believe that even as a performing sales executive you have developed the experienced needed to perform a management role. In addition I would expect someone in a management position to show some degree of understanding to their failings and take personal responsibility and accountability for their actions.

As a sanction this would normally result in the termination of your employment. However, I have as an alternative to dismissal propose to move you to another location with demotion to a sales executive along with a final written warning.

This outcome will be sent to you in writing and you have 10 days to appeal upon receipt of letter. The location available, if you are willing to accept the role of sales executive are, Colindale, Brentford or Loughton. We'd need your answer within 24 hours to accept one of those locations and we will transfer you as a sales executive. If you can come back to Jason within the next 24 hours please with your decision

32. The Claimant appealed against this disciplinary sanction, unsuccessfully. He does not, however, complain about the appeal outcome in these proceedings.
33. Some of the Claimant's representations at the disciplinary hearing concerned Mr Nicolaou. Whereas he had previously been reluctant to suggest that anyone else might be at fault, the Claimant produced a text message from a former colleague, which suggested the Land Rover vendor was actually a friend of Mr Nicolaou. Mr Trowell recommended Mr Nicolaou's part in all of this be looked into further.

Mr Nicolaou

34. Mr Taylor interviewed Mr Nicolaou on 14 August 2020. By this time it had become apparent that there were two fraudulent Land Rover part-exchange transactions:

34.1. that for which the Claimant had been disciplined;

34.2. an earlier deal (albeit later discovered) in which Mr Nicolaou had been involved.

35. As far as the earlier transaction (i.e. the first in time, rather than first discovered) was concerned, Mr Taylor asked Mr Nicolaou about the checks he had carried out:

TN I did look at the C220 on HPI, but did not check the V5 online. On HPI, it did not flag up to say there is something wrong, that the ownership of the vehicle had changed. No alarm bells rang and I assumed all was okay.

DT When you looked on the HPI and approved it, the ownership had not changed, it took a few days for the change to go through. The only thing I am concerned about is that the paperwork came in 3 hours later and the release form then showed that the V5 actually had a previous owner. It clearly showed 2 owners.

TN When I checked the HPI, the registration and name matched the V5 on paper. However, I did not check the previous owner online to see that there was a second owner.

DT In Autoline, it has showed that the process started @1:27pm. There was an evaluation done and 9 minutes later, a test drive was earned out. A quote was created at 1:29pm and then an order release at 1:57pm. Accounts had accounted for the delivery of the car in the evening at 6pm. All of this was done on the same day.

TN I do not remember the car going out on the same day. At the time, Dre was the salesperson

TN I would not have released a car that quickly, especially as I know that, that is impossible to do. The car cannot go anywhere without my signature.

DT Is it possible that this could have been released without your acknowledgment?

TN Yes, that is possible.

DT Mr Clark had signed the paperwork

TN Just to confirm, that I was not in the business on the 24th January. I came back to work on the 28th January.

DT I have here that Dre stamped purchase the invoice on the 24th January.

TN Yes, that is correct, but I was not there.

36. In the exchange set out above, Mr Nicolaou explained that he did check the HPI and V5 documents. The name of the vendor, the HPI and the keeper on the V5 all matched. It was pointed out that further checks could have revealed a discrepancy as to the number of previous owners and Mr Nicolaou said he did not check this online. Having seen the documents, the Tribunal notes the discrepancy could also be identified in the paper documents, if one looked closely enough. Thereafter, it appears that a different employee signed the paperwork for this earlier transaction and Mr Nicolaou said he was not on site when the vehicle went out (which does not appear to have been disputed).
37. Next, Mr Taylor put the text message suggesting Mr Nicolaou was friends with the vendor. Mr Nikolaou denied its contents and also refuted the suggestion he had spoken to the Claimant on 28 January 2020 about the second Land Rover. He was then asked about the checking process generally:

KB The process with checking the ownership of vehicles, can you explain?

TN Yes. When taking in part exchange vehicles, we have to check the HPI and we should check the V5. But the HPI system provides more efficient details, such as giving details if a car has been stolen, any changes made to the car, it basically gives us vital information about a vehicles history. However, the HPI did not flag up any information stating the vehicle was stolen. Taking in a Land Rover for part exchange for a Smart car was odd as we do not really sell many Smart cars, but I did not think of it in depth at the time.

38. There is no evidence of Mr Taylor recommending disciplinary action against Mr Nicolaou, following this interview. Although Mr Trowell did not make this decision on this, he commented upon it in his witness statement:

16. My understanding is that the subsequent investigation undertaken by Daniel Taylor dealt with both the transaction concerning the Claimant but also another transaction involving a Land Rover that was exchanged for a C220 vehicle. Again in that case, it transpired that the Land Rover was a stolen vehicle. This came to light after the Claimant's investigation and decision to take disciplinary action [...] I can only assume that Daniel Taylor conducted a proper investigation, and I cannot comment on the decision that was taken with regards to Theo Nicoalou. Having considered the transaction however, I am of the view that this was not comparable with the Claimant's transaction. First, it involved a trade of vehicles of broadly the same value and therefore was not a suspicious transaction on the face of it. Secondly, identifying the potential risk for fraud would have required a great deal more diligence. The V5 was in the name of the name of the rogue buyer [...] The one discrepancy would appear to be that the HPI check showed the car as having one owner [...] whereas the V5 suggested that the vehicle had previous owners. Theo Nicolaou had omitted to check and spot this, but the scam was clearly more sophisticated in this instance than the transaction approved by the Claimant.

Law

Direct Discrimination

39. Section 13(1) of the **Equality Act 2010** ("EqA") provides:

(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.

40. The Tribunal must consider whether:
- 40.1. the claimant received less favourable treatment;
 - 40.2. if so, whether that was because of a protected characteristic.
41. The question of whether there was less favourable treatment is answered by comparing the way in which the claimant was treated with the way in which others have been treated, or would have been treated. This exercise may involve looking at the treatment of a real comparator, or how a hypothetical comparator is likely to have been treated. In making this comparison the Tribunal must be sure to compare like with like and in particular to apply EqA section 23(1), which provides:
- (1) On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.**
42. As to whether any less favourable treatment was because of the claimant's protected characteristic, EqA section 136 provides for a two-stage test. The claimant has the initial burden of showing a prima facie case, which if discharged shifts the burden onto the respondent to prove there was no discrimination.
43. In **Madarassy v Nomura [2007] ICR 867 CA** the Court of Appeal confirmed that a mere difference in status and difference in treatment will not suffice to satisfy the first stage; per Mummery LJ:
- 56. The court in Igen Ltd v Wong [2005] ICR 931 expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which *879 a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.**
- 57. "Could... conclude" in section 63A(2) must mean that "a reasonable tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage (which I shall discuss later), the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required by section 5(3) of the 1975 Act; and available evidence of the reasons for the differential treatment.**
44. When considering whether the claimant has satisfied the initial burden of proving facts from which a finding of discrimination could be made, the Tribunal must

consider the entirety of the evidence, whether adduced by the claimant or respondent; see **Laing v Manchester City Council [2006] ICR 1519 EAT**.

45. Whilst EqA section 136 amounts to a two-stage test, it will not necessarily amount to an error of law if the Tribunal, in effect, assumes stage one in the claimant's favour and goes direct to whether it is satisfied by the respondent's non-discriminatory explanation. The burden of proof provisions will, however, add little in a case where the Tribunal can make clear findings of a fact as to why an act or omission was done or not; see **Martin v Devonshires Solicitors [2011] ICR 352 EAT**. The approach followed in **Martin** was endorsed by the Supreme Court in **Hewage v Grampian Health Board [2012] ICR 1054 SC**, per Lord Hope:

32 The points made by the Court of Appeal about the effect of the statute in these two cases could not be more clearly expressed, and I see no need for any further guidance. Furthermore, as Underhill J (President) pointed out in Martin v Devonshires Solicitors [2011] ICR 352, para 39, it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other. That was the position that the tribunal found itself in in this case. It is regrettable that a final resolution of this case has been so long delayed by arguments about onus of proof which, on a fair reading of the judgment of the employment tribunal, were in the end of no real importance.

Analysis

Investigation

46. Although the Claimant's complaint about the investigation was abandoned, we heard evidence and made findings of fact as set out above. The Respondent's approach was undoubtedly unfair. It was not discriminatory. The Claimant's white comparator was treated in the same way he was. Such unfairness did, however, cause the Claimant's sense of injustice and the fact it appeared to him that Mr Nicolaou was excluded from investigation, led him to believe race was involved.
47. Notwithstanding this particular detriment was no longer pursued, during the hearing before us, the Claimant sought to compare the (relatively light-touch) approach adopted by Mr Taylor in August 2020 when he interviewed Mr Nicolaou, with the (robust) approach followed by Mr Franklin in February 2020, so as to suggest the former was in some way tainted by race discrimination. Respectfully, that is the wrong comparison. How someone else approached matters on another occasion tells us nothing about why Mr Franklin did as he did. The correct comparison is how Mr Franklin interviewed both the Claimant and Mr Nicolaou, at about the same time. The result of that comparison is they were treated in much the same way.

Formulation

48. The formulation of these allegations, in particular insofar as they allege or imply dishonesty, is plainly capable of amounting to a detriment.
49. We are satisfied that Mr Nicolaou would be an appropriate comparator for these purposes.
50. Mr Franklin went into the Claimant's interview with a preprepared suspension letter, fully expecting that would be the outcome. The suspension letter included the allegations about which the Claimant complains in these proceedings, namely those which were understood to allege dishonesty. It follows, therefore, that these allegations were predetermined. They were drafted before the Claimant had been asked or had the opportunity to answer so much as one question. The charges were drawn-up before he had the chance to a single word in his own defence. The risk of unfairness from the Respondent's approach was considerable.
51. Nonetheless, we were satisfied that the same course had been adopted in the case of Mr Nicolaou. Although we did not see the letter, we accept that such a letter was drafted and would have contained the same or very similar allegations. The most likely explanation for it not being made available at this hearing is that it was not retained because it was not used.
52. In terms of the allegations being formulated (as opposed to the letter containing them being deployed) there was no difference in approach, as between the Claimant and Mr Nicolaou and, therefore, no less favourable treatment.
53. Further and separately, the formulation of the allegations in the Claimant's case had nothing to do with his race. Rather it reflected Mr Franklin's view of the state of the evidence before speaking with the Claimant, Mr Nicolaou or any other suspected employee.
54. We are not satisfied the Claimant has shown facts from which we could find discrimination, in the absence of an explanation from the Respondent. We were in any event satisfied by the non-discriminatory explanation advanced.

Suspension

55. The Claimant being suspended from work was plainly a detriment.
56. Mr Nicolaou was not a suitable comparator for these purposes, as there were material differences in their respective circumstances. The evidence against both was not the same. Their involvement in this transaction, as it appeared from docuware and what they themselves told Mr Franklin, differed considerably.
57. Further and separately, the reason the Claimant was suspended and Mr Nicolaou not had nothing to do with race.
58. As set out above, the Claimant was suspended because although Mr Franklin had been persuaded of his honesty, he thought the account the Claimant gave of why he has signed-off on this transaction was wholly unsatisfactory.

59. In the case of Mr Nicolaou, it is quite clear that he too came very close to being suspended from work. The only reason he was not in fact suspended is because his apparent signature on documents approving a part of this transaction, was shown to be a forgery. Nor could it be said that Mr Franklin was easily satisfied in this regard, as he required proof from existing documentary sources. When this came it did, necessarily, put matters in a different light. Mr Nicolaou's involvement appeared very limited. Furthermore, someone other than Mr Nicolaou was plainly involved in serious wrongdoing.
60. The reason for the difference in treatment, in terms of suspension, is that on the evidence before Mr Franklin, Mr Nicolaou had only limited involvement in the transaction at the beginning, whereas the checking and signing-off had all been certified by the Claimant as being done the following day. The turning point was the forgery of Mr Nicolaou's signature. This had the effect of markedly reducing his involvement in the transaction, at least insofar as this was suggested by the documentary evidence or admitted to. And, it would have appeared as though someone else was seeking to falsely implicate him. The Claimant on the other hand did not deny any of the documents which bore his digital signature and Mr Franklin was, genuinely, unimpressed with the explanation that this was all OK because the Claimant had been told to do it.
61. Much of Mr Street's cross-examination and argument at this hearing was predicated on his client's factual case, namely that Mr Nicolaou had spoken to the Claimant on the telephone on 28 January 2020 and told him to process the transaction. This is not, however, what the Claimant told Mr Franklin at the time. The Claimant's account then was that the Sales Executive told him Mr Nicolaou had approved the part-exchange. Mr Franklin's actions can only be judged by reference to his knowledge at the time. Similarly, Mr Street said that Mr Franklin's investigation was inadequate and that if he had carried out a more thorough paper investigation, including accessing employees' emails, he would have found more evidence to tie-in Mr Nicolaou. That may be so. This is not, however, an unfair dismissal claim. Mr Franklin did not carry out that additional investigation before these interviews. It was not suggested to Mr Franklin (nor could it, sensibly) that he did not make these additional enquiries because of the Claimant's race. Mr Street also relied upon a separate fraudulent Range Rover transaction, in which Mr Nicolaou was implicated. Although the actual transaction predated the one involving the Claimant, it did not come to the Respondent's attention until later, after Mr Franklin had concluded his investigation. Again, this is irrelevant to the reason why Mr Franklin did as he did. None of these arguments were indicative of race discrimination.
62. We are not satisfied the Claimant has shown facts from which we could find discrimination, in the absence of an explanation from the Respondent. We were in any event satisfied by the non-discriminatory explanation advanced.

Prosecution

63. The decision to pursue disciplinary proceedings was plainly detrimental to the Claimant.
64. We do not find that Mr Nicolaou was an appropriate comparator in this regard, as the evidence, at the point when Mr Franklin made his recommendation and

Mr Trowell accepted the same, differed insofar as it tended to implicate the Claimant on the one hand and Mr Nicolaou on the other. This is a material difference.

65. Further and separately, the reason for the difference in treatment of the Claimant and Mr Nicolaou was not race. Mr Franklin's reasons for recommending there was a case to answer against the Claimant and not Mr Nicolaou are the same as for him deciding to suspend the one and not the other. We have set-out our analysis of that immediately above and our conclusions apply here as well. Mr Trowell accepted the recommendation reached. In effect, he adopted Mr Franklin's reasons.
66. The pursuit of disciplinary proceedings in the Claimant's case was not less favourable treatment because of race.
67. Once again, we are not satisfied the Claimant has shown facts from which we could find discrimination, in the absence of an explanation from the Respondent. We were in any event satisfied by the non-discriminatory explanation advanced.

Disposal

68. The sanction of a final written warning and demotion was a clear detriment.
69. Mr Nicolaou is not an appropriate comparator for these purposes, as he was not made the subject of any disciplinary proceedings at this time.
70. Mr Trowell reached the decision he did because he believed that if the Claimant was signing (digitally) to say that the necessary documents were in order and a transaction should go ahead, then it was incumbent upon him to have checked these matters before doing so. Mr Trowell did not think it was a sufficient answer for the Claimant to say he processed the documents simply because Mr Nicolaou told him to. Furthermore, the fact that the name of the vendor did not match the registered keeper on the V5 was, in the genuine opinion of Mr Trowell, an obvious problem that should have been recognised. Mr Trowell was not persuaded by the Claimant's answer that he had not been trained to do this. Mr Trowell thought this would have been obvious to anyone, even if not in the motor trade. The Claimant's defence was, in effect, he simply did what he was told, whereas Mr Trowell believed that it had been necessary for him, as a manager, to exercise judgment and due diligence, which he had not done. Whilst Mr Trowell did not doubt the Claimant's honesty, he was concerned about the failure to acknowledge any fault or oversight and recognise the extent of his responsibilities as a manager.
71. We reflected on the interview conducted by Mr Taylor of Mr Nicolaou, in August 2020. Notwithstanding Mr Trowell did not deal with that subsequent investigation himself, he commented upon the outcome in his own witness statement, seeking to distinguish the facts applying in Mr Nicolaou's case (with respect to the other Land Rover transaction, in so far as they were identified by Mr Taylor) and those in the Claimant's case (which he had decided). We noted that the interview conducted by Mr Taylor was considerably less thorough than were the enquiries Mr Trowell made of the Claimant at the disciplinary. Ultimately, however, we did not find this consideration helped us in determining why Mr Trowell dealt with the

disciplinary as he did. Different managers have different styles. Mr Trowell did not carry out the interview with Mr Nicolaou himself. Mr Franklin is the only person who questioned both men and he was equally robust in both cases. We concentrated, therefore, on the adequacy of the justification advanced for the different outcomes. We were satisfied that Mr Trowell gave genuine and persuasive evidence on this. He believed the Claimant's failure to check the V5 at all, in circumstances where the name on that document was not the person selling the car, was a glaring omission. In the other case, the fraudster had gone to the effort of ensuring the name he used was the same as that on both the V5 and HPI documents. There was not the same obvious discrepancy. Uncovering this other fraud required a much closer scrutiny. Furthermore, the broad nature of the other transaction, swapping an SUV for a saloon car of similar value was not inherently suspicious, as was going from a 4x4 to a Smart Car with cashback. Although we considered this point at length, ultimately, it did not cause us to doubt the reasons why Mr Trowell dealt with the Claimant as he did in July.

72. In our judgment, Mr Trowell's treatment of the Claimant had nothing to do with race. If Mr Trowell had been hearing from a new white manager facing the same evidence, who responded in the same way as the Claimant – saying he signed the documents without checking because he was asked to and no-one told him he had to check the V5 himself – the outcome would have been the same. Mr Trowell's even-handed approach is reflected in his recommendation that Mr Nicolaou should be interviewed again, which suggests he wanted to follow-up leads and get to the bottom of what had gone on.
73. Once again, we are not satisfied the Claimant has shown facts from which we could find discrimination, in the absence of an explanation from the Respondent. We were in any event satisfied by the non-discriminatory explanation advanced.

Conclusion

74. For the reasons set out above, the Claimant's claims of race discrimination do not succeed.
75. We do, however, wish to make it plain that the manner in which the Respondent proceeded, at least initially, was unfair. It is entirely unsurprising that the Claimant believed he was being picked on. And in circumstances where it would have appeared to him that a more experienced white colleague who had also been involved in the material transaction was not subject to any investigation, the Claimant's belief that he was being discriminated against because of race is understandable.
76. We were also somewhat surprised by the piecemeal approach to investigating the various Land Rover transactions. Following the identification of a first fraudulent transaction, we would have expected the Respondent to conduct a review of all similar transactions to see if there were any others and investigate them all at the same time.
77. Finally, there was an obvious problem in this case with an absence of clear written procedures concerning the acceptance of part-exchange vehicles, regarding which documents need to be checked, for what information, when and

by whom. Whilst we accepted that Mr Franklin and Mr Trowell were genuine in their evidence about various matters being obvious to them, a very unfortunate series of events for the Claimant (who clearly found this all most upsetting) and the business (which lost a great deal of money) could have been avoided by the simple step of having written procedures to be followed.

EJ Maxwell

Date: 4 January 2022

Sent to the parties on:

10 January 2022

For the Tribunal Office: