THE EMPLOYMENT TRIBUNAL

SITTING AT: **LONDON SOUTH**

BEFORE: **EMPLOYMENT JUDGE K ANDREWS**

MEMBERS: **Mr S Huggins (by video)**
Mr S Sheath

BETWEEN:

Mr K Eremionkhale

Claimant

and

Network Rail Infrastructure Limited

Respondent

ON: **21 – 29 April 2022**

Appearances:
For the Claimant: **In person**
For the Respondent: **Miss I Ferber, Counsel**

REASONS FOR THE JUDGMENT DATED 29 APRIL 2022
PROVIDED AT THE REQUEST OF THE CLAIMANT

1. In this matter the claimant complains that he was unfairly dismissed and discriminated against because of his race, age and perceived disability. He also says that he was harassed and victimised.

2. The issues arising in the claims of unfair dismissal were identified at the preliminary hearing before Judge Crossfil in July 2018. They can be summarised as whether the respondent can establish a potentially fair reason for the dismissal. They rely upon capability. Thereafter, was there a reasonable basis for the belief that the claimant was incapable of performing his role, did they give him adequate warnings and appropriate support and was the decision to dismiss within the range of reasonable responses open to a reasonable employer?

3. The issues in respect of the claims of discrimination were helpfully set out in the form of a schedule which is appended to this Judgment for ease of reference.

Evidence & Submissions

4. For the respondent we heard from:
    a. Ms N Williams, former Planning and Resource Manager;
    b. Mr S Sidgwick, former Engineering Manager;
    c. Mr K Chee, Project Manager Delivery;
    d. Mr B Straw, Head of High Speed Projects;
    e. Mr P Cook, Programme Manager (Change);
    f. Mr O Oluwarotimi, former Structures Examiner;
    g. Ms D Iverson, Asset Protection Coordinator ; and
    h. Mr P Millgate, Asset Protection Project Manager.

5. During the course of the Hearing the claimant indicated that he had previously applied for a witness order in respect of other witnesses in the employment of the respondent and that he wished those witnesses to attend the Hearing. It became apparent that that application was dealt with by Judge Webster at a preliminary hearing in April 2020 and the claimant was advised that if he did wish to apply for a witness order he must do so on or before 20 September 2020. The claimant did not make any such application.

6. We also heard from the claimant - he relied upon two written statements with documents appended.

7. We had an agreed bundle of documents before us.

8. A great deal of latitude was given to claimant both regarding the presentation of additional documents throughout the Hearing (which were added to the bundle when they were not already there) and his approach to cross examination. Although the Judge sought to give him guidance throughout on how to question the respondent's witnesses, and the importance of challenging their evidence where he disagreed with it, he struggled to do so and to only deal with relevant matters. He also frequently sought to give his own evidence whilst questioning witnesses. The claimant also referred to relevant documents having been stolen from his flat (he thought by or on behalf of the respondent) but it was made clear we could only proceed on basis of what is in front of us. Miss Ferber for the respondent took a pragmatic and constructive approach to all these matters for which we are grateful.

9. Both parties presented written submissions, supplemented orally, on the conclusion of the evidence. Again, the claimant introduced new matters in the course of those submissions but no objection was raised.

Relevant Law

10. <u>Unfair dismissal</u>

11. The dismissal was admitted by the respondent and accordingly it is for them to establish that the reason for the dismissal was a potentially fair one as required by section 98(1) and (2) of the Employment Rights Act 1996. Those

potentially fair reasons include capability which is to be assessed by reference to skill, aptitude, health or any other physical or mental quality (section 98(2)(a) and (3)(a)). In this case it was the claimant's skill – in other words performance – that was in issue.

12. If the respondent establishes a potentially fair reason then it is for the Tribunal to determine whether the dismissal was fair in all the circumstances (including the size and administrative resources of the respondent business) having regard to equity and the substantial merits of the case (section 98(4)). In applying this test, the burden of proof is neutral.

13. In considering whether the respondent has acted reasonably in treating the claimant's capability as sufficient reason for dismissing him the Tribunal looks to whether the respondent's decision fell within the band of reasonable responses to the claimant's capability which a reasonable employer could adopt (Iceland Frozen Food v Jones [1983] ICR17). That case also confirms that the correct approach is to consider all the circumstances of the case, both substantive and procedural.

14. In cases of dismissal for performance a respondent will usually be expected to show evidence of a dialogue with the claimant advising him of the performance issues together with giving him opportunities to improve together with appropriate guidance and support.

15. In coming to this decision the Tribunal must not substitute its own view for that of the respondent.

16. <u>Direct discrimination</u>

17. Section 13 of the Equality Act 2010 ('the 2010 Act') provides that a person discriminates against another if, because of a protected characteristic, he treats that person less favourably than he treats or would treat others. Race - which includes colour, nationality and ethnic or national origins - and disability are both protected characteristics. Tribe is not expressly referred to in the definition of race but it can, depending on the circumstances, fall within it. Someone who is perceived to be disabled and is treated less favourably because of that perception can have the benefit of the protection of the 2010 Act even if they are not actually disabled.

18. To answer whether treatment was 'because of' the protected characteristic requires the Tribunal to consider the reason why the claimant was treated as he was. The Equality and Human Rights Commission Code of Practice states that whilst the protected characteristic needs to be a cause of the less favourable treatment it does not need to be the only or even the main cause.

19. It is a matter for the Tribunal to determine what amounts to less favourable treatment interpreting it in a common sense way and based on what a reasonable person might find to be detrimental.

20. Section 23 of the 2010 Act refers to comparators and says that there must be no material difference between the circumstances relating to each case.

The relevant circumstances are those factors which the employer has taken into account when treating the claimant as it did with the exception of the protected characteristic (Shamoon v Chief Constable RUC [2003] IRLR 285).

21. Harassment

22. Section 26 of the 2010 Act provides that A harasses B if A engages in unwanted conduct related to a relevant protected characteristic and that conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. When deciding whether conduct has had that effect subsection (4) requires the Tribunal to take into account the perception of B, the other circumstances of the case and whether it is reasonable for the conduct to have that effect. Conduct is 'related' to a protected characteristic where it is by reason of that characteristic or because of the form it takes.

23. Victimisation: section 27(1) of the Equality Act 2010 provides that a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act. A protected act includes making an allegation (whether or not express) that A or another person has contravened the 2010 Act.

Findings of Fact

24. The Tribunal's task is to assess all the evidence before us, both oral and written, and find what is more likely than not to be what happened. In this case there was at times, a very stark conflict between the claimant's account of what happened and the respondent's witnesses'. In coming to the findings that we have we do not find that the claimant has been dishonest. However his evidence did include some extremely serious, and at times remarkable, allegations with no supporting evidence such as to call into question his credibility. Many of the allegations were often confused, difficult to follow and without supporting evidence.

25. The claimant was born in November 1959, making him 56 years old when he commenced employment with the respondent in September 2015. He is a British citizen but was born in Nigeria and is black. He has no specific tribal background or allegiance although because of the part of Nigeria in which he was born, he says that certain colleagues of his believed him to be from the Ibo tribe. He is a civil engineer having completed his degree in Greece. He also obtained a driving licence in Greece but exchanged it for a full UK licence when he moved here in 2002. At all relevant times his licence was clean.

26. The claimant had previously worked for Network Rail in circa 2007-09. He was interviewed for the role of Structures Examiner with the respondent, a separate though related entity, in August 2015. The interview panel comprised Mr Sidgwick, Mrs Williams and Mr Chee. In the course of that interview it was made clear that it was a requirement that the jobholder should have a full UK driving licence as they would have to drive to

sometimes remote locations and sometimes at night. The claimant produced a copy of his driving licence together with other professional documentation at the interview which were all copied. The claimant made it clear that he did not have a car at that time but said he would buy one if necessary.

27. The claimant was offered the role and accepted it. When he commenced in September 2015 he, and all other members of the team, reported directly to Mr Sidgwick. It was a racially diverse team. In particular Mrs Williams is black Jamaican and Mr Chee is of Malaysian origin. Mr Oluwarotimi is black British but of Nigerian origin. He gave compelling evidence that the team was a happy one where no discrimination would be tolerated. He also confirmed that any possible issue of tribal allegiance would play no part in the working environment. He said that his best friend is from the same area of Nigeria as the claimant and that the allegations of motivation by tribal hatred were 'nonsense and absolute fabrication'. Further that he considered the term 'tribe sister' to be inappropriate.

28. In 2016 there was a reorganisation (which had been commenced some time before and was the subject of union consultation) after which the organisation chart shows that only Mr Chee reported to Mr Sidgwick and the rest of the team reported to Mr Chee. There was however a distinct lack of clarity from Mr Chee regarding the structure and also an apparent discrepancy in correspondence sent to the claimant at the time in this regard. In any event, Mr Sidgwick remained in overall charge of the team.

29. Our specific conclusions regarding the varied allegations of discrimination are set out below. In summary, however, the claimant's case is that not only Mr Sidgwick but other members of the team behaved badly towards him - including 'contaminating' members of external organisations and setting him up to be dismissed - because of his race, age and what they believed to be a disability. Our overarching finding is that there was no such general atmosphere or campaign within the team.

30. Concerns were raised by some colleagues about the claimant's standard of driving which undoubtedly led to some friction within the team and the refusal by some to be driven by him. It is more likely than not that this was a topic of general knowledge, and conversation, within the team. There also seems to have been some interpersonal issues arising from the team's perception of the claimant's demeanour at work leading to some sort of comments about why he did not smile. It is quite possible that there were also some sort of disparaging comments made about the claimant's educational background and in particular the degree he obtained in Greece given the friction in the team. None of these circumstances however were related to any protected characteristic of the claimant. Further we do not find, as the claimant has alleged, that that friction deteriorated to the point of anyone threatening him physically.

31. As far as the allegation that members of the team perceived that the claimant was disabled, there was very little evidence before us regarding the claimant's medical position. His offer of employment was conditional upon a medical assessment. There was some delay in that being completed and he commenced work in the meantime but on restricted duties. The occupational health report produced in due course, in December 2015, noted that the claimant had sustained a fractured right ankle earlier in the year but had made a full recovery and no adjustments were required to his role. It expressly stated that the condition was not such as to qualify as a disability.

32. In summary, the claimant's role involved examining structures on or around the railway and reporting whether they were safe or required improvement. As already noted, this could involve travelling to remote locations and at night. The nature of the respondent's business and in particular the claimant's and his colleagues' roles were such that safety is clearly an extremely important issue. Any breaches of safety regulation, or even perceived breaches, must be dealt with appropriately.

33. For the claimant to be able to carry out his role fully and independently, he needed to achieve a certain number of competencies. These included rail safety leader (RSL) which would allow him to be trackside alone or in charge of a group. The RSL competency was assessed by the in-house training team including Mr Tilling. The assessment was in two parts: first, on-line and second, in writing. The claimant passed the online test but despite two attempts in 2016 and 2017 did not pass the written one.

34. The claimant says that when he took the written test in 2016 he overheard someone called Wayne and Mr Fairman discussing how he should not be allowed to pass. In light of the contents of Mr Tilling's email dated 26 July 2017 (which showed he had reviewed the RSL test process and was satisfied that the claimant had been unable to achieve the competency) later sent to Mr Straw as part of the performance improvement process, and the absence of any other supporting evidence, we do not find it likely that this conversation happened. The claimant also says that he was marked incorrectly because the questions on the test did not correspond to his answers. It was not entirely clear which test he was referring to but Mr Chee's explanation was that the questions were deliberately scrambled so that no one sitting the test had the same question paper as anyone else to avoid cheating. All candidates however had the same questions overall. We note that that is contradicted by Mr Tilling's email referred to above which said all candidates had the same paper in the same order. Nonetheless we find no evidence of any inherent unfairness in the way the test was administered to the claimant. There was also no evidence of the claimant specifically asking for results of the test and being refused.

35. To fully perform his role he claimant also required a danger zone entry permit (DZEP) which he had but following an allegation by Mr Tolame, the claimant's mentor at the time, in July 2016, his DZEP was suspended which resulted in him losing two shifts. The claimant wrote a lengthy letter on 9 July 2016 setting out his complaints in this respect and making wide-ranging

allegations. The incident was however investigated and the claimant's DZEP reinstated relatively quickly.

36. The claimant was also working towards achieving a further competency known as STE4 but he did not achieve this before his dismissal. He also wished to undertake various other on line learning but his managers encouraged hm, during working hours, to concentrate on achieving the outstanding competencies that he required to perform his job.

37. Given that concerns about the claimant's standard of driving had been raised, Mr Sidgwick dealt with this initially by arranging for the whole team to take part in a vehicle familiarisation training programme in September 2016 that had already been arranged elsewhere in the organisation (known as the Wessex trial). This (and subsequent sessions) were provided by an external specialist driving organisation called NFE. The claimant says that prior to starting this session an unidentified black man who was a friend of Mr Oluwarotimi shouted words to the effect of 'the claimant can't drive he will kill us'. Mr Oluwarotimi's evidence, which we accept, was that this unidentified man was possibly someone called Ese but he had had no conversation with him regarding the claimant's driving.

38. On the conclusion of that session the claimant was assessed as 'dangerous' and serious concerns were raised by the assessor with the respondent regarding the claimant's ability to drive. He was thereafter suspended from driving the respondent's vehicles and a contractor was engaged to drive him as required for work. The claimant also told Mr Sidgwick that he would arrange his own additional private instruction.

39. On 4 November 2016 Mr Sidgwick informed the claimant that there would be a second driving assessment and that was arranged in due course and took place on 12 December 2016. On that occasion the claimant was not assessed as dangerous but serious concerns were still raised e.g. the assessor recorded:

> 'In a nutshell, I'd describe your driving as at best inconsistent and unplanned and you tend to leave yourself vulnerable to being hit by other road users or encouraging them to do foolish things.'

and the claimant was assessed as 'not approved'.

40. A further intervention was arranged by the respondent in February 2017. This comprised a five day course which was a mix of training and assessments with a formal assessment on the final day at which the claimant was again assessed as dangerous. The outcome was confirmed in an email from NFE to Mrs Williams on 24 February 2017 stating that the claimant was still not considered to be safe to drive and reference was made to 'a catalogue of dangerous situations' over the series of sessions.

41. The claimant and Mr Sidgwick met again on 23 March 2017. It is clear from the notes of that meeting that the claimant did not accept the results of the assessments to be accurate and he continued to believe that he drove well. It also became apparent that the claimant had not arranged his own additional instruction as he had agreed to. Mr Sidgwick agreed that the claimant could propose an alternative company to undertake an assessment of his driving as long as that company was sufficiently qualified. At the conclusion of that meeting Mr Sidgwick made it clear to the claimant that he had to demonstrate that he was safe to drive.

42. The position was confirmed by Mr Sidgwick to the claimant in an email on 29 March 2017. He also recorded in that email that although the claimant had suggested an alternative company to undertake his driving assessment, it appeared to be a general driving school rather than one with the relevant specific accreditations. He asked the claimant to provide a list of the company's qualifications and relevant experience by the end of the week.

43. In April 2017 the matter was then referred to an independent manager, Mr Franks, to investigate as a potential misconduct matter but he recommended that it should instead be dealt with through the formal performance improvement process. Consequently, the claimant was invited on 5 June to what was described as a second performance improvement meeting with Mr Straw.

44. That meeting took place on 12 June 2017 and the claimant was taken through a written performance improvement plan. A final written warning was issued requiring him to undertake a fourth driving assessment which should conclude that he was not dangerous to drive and approve him to drive company vehicles alone by 12 July 2017 followed by a three-month review period to check no driver related accidents or incidents to ensure that the level of performance required was being maintained.

45. It was about this time that the claimant undertook the second RSL test which led to him complaining to Mr Sidgwick who raised it with Mr Tilling who sent the email already referred to above.

46. The claimant undertook a final driving assessment on 3 July 2017. The outcome was that he was 'not approved'. NFE sent a copy of the assessment to Mrs Williams on the following day confirming that the claimant should not be permitted to drive on company business. He also confirmed that the assessor had not been aware of any of the previous training sessions (as Mr Straw requested).

47. The claimant attended a final performance improvement hearing on 24 August 2017 with Mr Straw. The relevant background was discussed and the claimant given every opportunity to comment and put his case. They also discussed a letter the claimant had submitted to Mr Straw on 22 August in which he had set out a series of 19 complaints about the performance improvement warnings.

48. After an adjournment during which Mr Straw consulted with HR, the claimant was informed that he had failed his personal improvement plan and that he was dismissed on notice. He was informed of his right to appeal that decision.

49. That dismissal was confirmed in a letter sent on 31 August 2017. Mr Straw's evidence was that prior to dismissal he considered if there were any other vacancies in his team but there were not. He confirmed that he did not consider the possibility of alternative employment in any other team.

50. There were allegations made by the claimant in relation to events after the dismissal hearing in relation to the behaviour of both Mr Millgate and Ms Iverson. In relation to the allegations against Mr Millgate we prefer the evidence of Mr Millgate and specifically find that he did not prevent the claimant from going to the toilet and did not push him. We note that in the claimant's own later document in relation to the appeal he referred to going to the toilet and that Mr Millgate knocked on the door. As far as Ms Iverson is concerned we do not find that she pursued the claimant as he has alleged and she did not threaten to call the police. What she in fact said was that if the claimant did not leave the respondent's premises within a short period of time she would call the land sheriff. We find her to have perhaps been a little overzealous in saying that in all the circumstances but it went no further than that.

51. The claimant submitted a letter of appeal on 24 August 2017 to Mr Straw. He replied on 31 August 2017 clarifying the position regarding various items of correspondence received from the claimant and confirming that if there were any outstanding matters that he wished to pursue as grievances he should follow the Individual Grievance Policy & Procedure a copy of which he enclosed. He also asked the claimant to confirm within 10 days if he still wish to appeal against the decision which he did on 9 September 2017.

52. On 12 September 2017 Mr Cook wrote to the claimant inviting him to an appeal hearing on 22 September 2017. He was informed of his rights to representation and asked to provide copies of any documents that he wished to be considered at the appeal.

53. The appeal hearing took place as planned during which Mr Cook considered in detail with the claimant the grounds of his appeal and related matters. Mr Cook had a fact-finding interview with Mr Straw on 2 October 2017 and reconvened the appeal meeting with the claimant on 9 October 2017. Mr Cook updated the claimant on the three areas that he had investigated following the first meeting and confirmed that his decision was to uphold the dismissal decision. That decision and reasons for it was confirmed in writing to the claimant on 20 October 2017.

54. Correspondence continued between the claimant and Mr Cook and others within the respondent following confirmation of the outcome of the appeal. This led to Mr Cook lodging a grievance on the claimant's behalf due to the allegations he had made regarding bullying, harassment and discrimination. The claimant was invited to a grievance hearing but although

he requested on one occasion for that hearing to be rearranged, ultimately he confirmed that he had decided not to pursue the matter any further. Mr Hawkins confirmed this in a letter to the claimant on 4 December 2017 but still invited the claimant to consider changing his mind and to pursue it if within the term of his notice period.

Conclusions

55. Unfair dismissal

56. We conclude that the respondent has established that the reason for the claimant's dismissal was his capability, and in particular his ability to drive to a sufficient standard so as to be able to perform his role. This was therefore a potentially fair reason for dismissal. In this regard we found the evidence of Mr Straw and Mr Cook compelling. There was significant contemporaneous evidence to demonstrate that that was the real reason for the dismissal including the reports following the claimant's driving assessments by an external and independent organisation. There is no evidence to support the claimant's allegation that that external organisation had been 'contaminated' by the respondent. Indeed, Mr Straw very appropriately made efforts to ensure that the final assessment was done by an examiner who had had no previous knowledge of the claimant or his background.

57. As to whether the respondent gave the claimant adequate warnings about the standards required and gave him appropriate support to assist him to achieve those standards, there were differing shades of opinion amongst the Tribunal panel but we all agreed that in this respect the respondent did act reasonably. In coming to that conclusion we considered in detail the chronology between the claimant's suspension from driving respondent vehicles in September 2016 and his first formal performance meeting in June 2017 at which he was issued - for the first time - a formal performance improvement plan together with a final written warning. We consider that better practice by the respondent would have been to have made it clearer to the claimant by an earlier formal PIP what was required rather than a somewhat truncated approach in June/July 2017.

58. However in all the circumstances at the time - in particular the claimant refusing to accept that his standard of driving was in any way lacking, his own delay in arranging his own outside driving instruction (to an acceptable level to the respondent) and the urgency of ensuring the safety of the claimant and other road users - we conclude that the respondent's actions in this regard were within the band of reasonableness.

59. Further, in all those circumstances, we conclude that the decision to dismiss once the claimant had been given a reasonable level of support, training and opportunity to improve, was within the bands of reasonable responses. Again, given the size of the respondent (according to its Response it has 36,000 employees and undoubtedly operates over many sites), we consider that more efforts with regard to possible redeployment of the claimant to a role that did not require driving could have been made. However, the failure

to do so was insufficient to take the decision to dismiss outside the band of reasonableness. (For completeness, we make no finding - as alleged by the claimant - that the respondent blocked him from applying for other jobs.)

60. Finally, we find that the process followed by the respondent in dismissing the claimant was reasonable. He was given a full opportunity to make representations at every relevant stage, he was given the opportunity to be represented (which he did not take up) and was given the right of appeal. We also consider that Mr Cook's actions in carving out from the eventual appeal against dismissal specific matters that the claimant had brought to his attention that should properly be dealt with as a grievance and lodging them as a grievance on behalf of the claimant, were entirely reasonable and appropriate. In the event, of course, the claimant did not pursue that grievance and it was withdrawn.

61. Accordingly we conclude that the dismissal of the claimant was fair.

62. Turning to the <u>discrimination claims</u>.

63. The allegations of <u>direct race discrimination</u> are put forward on two bases - tribal allegiance and colour. At the 2018 case management discussion it was established that issues 3, 4, 7 & 8 were in relation to tribal allegiance and issues 1, 2, 5, 6, 9, 10 and 11-19 were on the basis of colour.

64. As far as the claims based on tribal allegiance are concerned we find there is no evidence to support the claimant's allegations in this regard. Issues 3, 7 & 8 all involve Mr Oluwarotimi. We found his evidence to be compelling that he had no motivation in relation to tribal allegiance and indeed he was very persuasive that he was not at all interested in any such allegiance. The remaining issue, number 4, relates to Mr Tilling and an alleged request to see medical records. We did not hear from Mr Tilling but there was no evidence to support this allegation.

65. Accordingly, we conclude that the allegations of race discrimination based on tribal affiliation fail.

66. Turning to the remainder of the allegations of race discrimination based on colour:

    a. Issues 1, 6 & 12 (part) relate to the RSL tests. The facts as we have found them do not support the claimant's allegations. The test process was made as robust and fair as possible.

    b. Issues 2, 5, 11 & 12 (part) in summary relate to the alleged hostile environment. We have found that there were some interpersonal issues within the team but these were not because of or related in any way to the claimant's colour.

    c. Issue 9 relates to the allegation of being shouted at at the Wessex trial. There is not enough evidence for us to find that this happened but even if it did, it is an allegation of race based on colour and given

that allegation is made against another black man, it seems unlikely to be on that ground.

d. Issues 10 & 13 & 19 (part) relate to the alleged contamination of the external driving assessments which has not been found on the facts.

e. Issue 12 relates to the removal of the claimant's DZEP. It was removed and as a result he lost two shifts but this was because of a genuine safety issue having been raised. It was not because of his colour.

f. Issues 14 & 18 relate to the dismissal and PIP process. We have found that the dismissal was not premeditated in any way and that a fair process was followed including the PIP process. Whilst we have identified some concerns about that process, we do not conclude that those shortcomings were because of the claimant's colour.

g. Issue 15 relates to the events immediately after his dismissal. Our findings on the facts do not support the claimant's allegations. He was not prevented from using the toilet, he was not pushed, and was not 'pursued'. He was checked on by Ms Iverson but this was not because of his colour.

h. Issue 16. There was no evidence to support the allegations such as it is about possible searches of the claimant's bag after dismissal and theft of documents.

i. Issues 17 & 19 (part). The respondent's requirement that he should be a competent and safe driver was properly related to his job role. It was nothing to do with his colour.

j. Issue 19 (part). The allegation about attempts to push the claimant into a lorry were not made out on the facts.

67. Accordingly, we conclude that the allegations of race discrimination based on colour fail.

68. As for the allegations of <u>direct age discrimination</u> (issues 34 - 37) these are all complaints about Mr Sidgwick.

69. Issues 34 and 35 arise out of the DZEP incident. Apart from the statement by the claimant that Mr Sidgwick told Mr Chee and Mr Tolame that a younger person would get the job done, there is no specific allegation relating this incident to age nor any evidence to support any connection to age. Mr Sidgwick of course knew the age of the claimant when he recruited him the year before. There is no explanation, or even speculation by the claimant, as to why Mr Sidgwick would do so and then shortly thereafter want to hold the claimant's age against him. Furthermore, in his email dated 9 July 2016 in which the claimant set out in detail his complaints about this incident and also wider allegations of mistreatment of him by his team, he does not refer to age being a factor nor any statements by Mr Sidgwick to the effect that a

younger person would get the job done. We conclude that there is no evidence supporting these allegations and they fail.

70. Issue 36 relates to an undated five minute one-to-one with Mr Sidgwick. No evidence has been given by the claimant as to how this relates to his age and the same comments as above apply as to why Mr Sidgwick would recruit the claimant and very shortly thereafter want to disadvantage him because of his age.

71. Issue 37 appears to relate to both the informal part of the performance management process of the claimant and also allegations regarding him being blocked from e-learning and an unreasonable workload being given to him. Both Mr Sidgwick and Mr Chee gave cogent reasons why the claimant was told not to pursue asset management e-learning in his working time when there were outstanding competences relevant to his role that he still had to achieve as well as improving his driving. Further, there was no evidence to support the claimant's allegation regarding workload (indeed at other times the claimant said that he had no work to do). There is no evidence to support the claimant's allegation that these matters - even if they took place as he alleges - were in any way connected to his age.

72. Turning to the allegations of direct disability discrimination and harassment related to disability (issues 20 - 33 and 38 - 40), the claimant's case is that he is not disabled but that members of the respondent perceived him to be so disabled.

73. There was very limited evidence before us relating to the claimant's medical position and the relevant respondent witnesses denied that they had such a perception. The occupational health report in December 2015 specifically stated that the claimant was not disabled and there was no further evidence, apart from the claimant's allegation, that there was any such perception on the part of any member of the respondent.

74. We conclude that there was no such perception and therefore those claims fail.

75. As far as the allegations of victimisation are concerned, it was established at the case management hearing in July 2018 that the alleged protected act relied upon by the claimant was a conversation with Mr Sidgwick on 14 October 2015 in which the claimant alleged he said to Mr Sidgwick 'this is discrimination'.

76. No such allegation was put to Mr Sidgwick in cross examination and no evidence was given by the claimant in either of his witness statements or at any time in the course of the hearing or in any documents to that effect. We conclude, therefore, that there was no such protected act.

77. We note that, despite what was said at the case management hearing, the basis of the allegation of victimisation at issue 52 relates to threats to withdraw the claimant's claim in 2018. Clearly, submitting a Tribunal claim of discrimination is a protected act and we are willing to afford the claimant

some flexibility if he wants to rely upon that as the protected act for issue 52. However, the alleged resulting detrimental treatment (hacking emails, stealing information, tracking his job search and 'cleaning up' his computer with a virus) is supported by no evidence whatsoever and even on that basis, we conclude no such act of victimisation has occurred.

78. Consequently the claims of victimisation fail.

Respondent's application for costs

79. Having given the parties our decision and oral reasons, the respondent applied for costs against the claimant.

80. First, on the basis that a deposit order was made back in 2018 in relation to the disability claims. We find that our reasons for dismissing the disability claims are substantially the same as the reasons given by the Judge for making the deposit order in the first place. Accordingly there is a presumption that we should make an award in the respondent's favour as the claimant has acted unreasonably in pursuing those claims.

81. The Judge asked the claimant if there was any basis upon which he says that that presumption is rebutted but he failed to make out any such reasons. Therefore we do find that a costs order is appropriate in relation to the disability discrimination claims.

82. Second, the respondent relied upon the general provisions in rule 76 of the Employment Tribunal Rules 2013 as the basis for a costs order against the claimant who, they say, has acted unreasonably in relation to the claims of race and age discrimination.

83. Having considered this application carefully we are not minded to make any award in relation to the claim of race discrimination. We do consider however that the claimant acted unreasonably in pursuing a claim of age discrimination on the basis that really there was there was no evidence of any substance, and no submissions even, from him supporting those allegations. Taking that together with the terms of a costs warning letter sent to the claimant by the respondent in February 2020 (which we conclude the claimant did receive despite him saying that he did not, because in the list of discrimination allegations he referred to receiving 'threats' to withdraw his claim), we conclude that a costs award is appropriate.

84. Turning to what amount of costs to award to the respondent, we heard very general evidence from the claimant as to his means which we take into account. It is of course impossible to accurately apportion the additional costs incurred by the respondent in relation to just the disability and age discrimination claims, which throughout have been relatively minor parts of the overall picture, but adopting a broad-brush approach and noting the amount claimed by the respondent in respect of the counsel's fees they

have incurred, we order the claimant to pay the respondent a total sum of £1,500 to the respondent in respect of costs.

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Employment Judge K Andrews
Date: 7 June 2022