EMPLOYMENT TRIBUNALS

Claimant: **Mr K Williams**

Respondent: **Essex Cares Limited**

Heard at: **East London Hearing Centre**

On: **24, 25 and 26 November**
In chambers 29 November 2021

Before: **Employment Judge C Lewis**

Members: **Ms S Harwood**
Dr J Ukemenam

Representation:

For the Claimant: **In person – with Ms A Foster assisting**

For the Respondent: **Mr I Wright - Counsel**

RESERVED JUDGMENT

The unanimous decision of the employment tribunal is that the Claimant's claims for direct race discrimination fail and are dismissed.

REASONS

1. By a claim form accepted by the tribunal on 3 May 2020 following a period of early conciliation from the 24 February 2020 to the 24 March 2020, the Claimant, who is black, brought complaints of direct race discrimination, naming Essex Equipment Services (ECL) Essex equipment care as his employer. The prospective Respondent named in the early conciliation certificate was Essex equipment services.

2. The Respondent presented its response on the 21 July 2020, giving its name as ECL and Essex Equipment Services, and disputed the claim.

Procedural background

3. At a preliminary hearing before Employment Judge Gardiner on the 24 August 2020 the Claimant identified the Respondent's name as Essex Equipment Services Limited and the tribunal's record was amended to reflect this. Following that hearing the Respondent solicitors' wrote to the tribunal on the 27 August 2020, confirming that they were instructed by Essex Cares Limited which was the Claimant's employer at all material times. The letter enclosed a copy of the Claimant's signed contract with Essex Cares Limited and invited the tribunal to substitute Essex Cares Ltd as the Respondent. By an order dated 1 October 2020 Employment Judge Gardiner amended the name of the Respondent to Essex cares Ltd. I am satisfied that Essex Cares Ltd is the correct respondent.

4. At the preliminary hearing before Employment Judge Gardiner, the issues were identified as follows:

Time limits/ limitation issues

(a) Were all the Claimant's complaints presented within the time limit set out in section 123(1)(a) and (b) of the Equality Act 2010 ('EQA')? Dealing with this issue may involve consideration of subsidiary issues including; whether there was an act and or conduct extending over a period; whether time should be extended on a '*just and equitable'* basis; and when the treatment complained about occurred.

EQA, Section 13; direct discrimination because of race, specifically the Claimant's colour

(b) Has the Respondent subjected the Claimant to the following treatment as the Claimant alleges;

1. On 19 September 2019, Sam Gooch said to him 'Black people are known to work hard and that's why I am giving him cross over'.

2. On the 17 January 2020, Billy Turner said to him, 'Black people do not know how to dress properly and that is why I do not want any black people or females on my team'.

3. On 7 February 2020, Sam Gooch said to the Claimant, when the Claimant was complaining to him about too much work, 'It's never too much for a black man'.

4. On the 10 February, in response to the Claimant's complaint about the amount of work he was expected to perform, Billy Turner told him, 'I don't care. You don't have a choice. You need to get it done'.

5. On the 10 February 2020, Trudi Foster told the Claimant that she did not see anything wrong with his workload. She said, 'You are an immigrant and always moaning'. When the Claimant told her that he had injured his knee at work and as a result of this, he was in pain, Ms Foster was not sympathetic and did not believe what the Claimant was reporting.

6. On 9 April 2020, during a lengthy Skype meeting between the Claimant and Trudi Foster and Barbara Harris, Ms Harris refused to adjourn the meeting so that the Claimant could take medication for his sore knee.

7. On 9 April 2020, both Barbara Harris and Trudi Foster conducted the meeting in a way that showed they were not interested in the Claimant's side of the story.

(c) Was that treatment '*less favourable treatment'*, i.e. did the Respondent treat the Claimant as alleged less favourably than it treated or would have treated others ('comparators') in not materially different circumstances? The Claimant relies on hypothetical comparators.

(d) If so, was this because of the Claimant's colour, the Claimant compares the treatment he received with the treatment he would have received if he had been white.

5. At that preliminary hearing, the Claimant indicated that this was a complete list of the matters on which he was asking the tribunal to make a finding in respect of direct race discrimination and references to earlier incidents in his ET1 were included by way of background only. References to other drivers and managers laughing at him, were included by way of context and did not raise free-standing allegations.

6. The Claimant also indicated that he had identified a further allegation relating to an incident on the 7 October 2020, which he wished to introduce by way of amendment, however, this had not been set out in writing in advance of the hearing and no notice had been provided to the Respondent or the tribunal. As a result, Employment Judge Gardiner indicated that he would not consider whether permission should be granted until the matter had been brought to the Respondent's attention and the Respondent had an opportunity to make representations to the tribunal on this issue.

7. After the hearing, the Claimant wrote to the tribunal and copied the Respondent solicitors' into an email on the 6 December 2020 for the attention of Employment Judge Gardiner stating he would like to amend his case to include a claim for wrongful dismissal.

8. On the 7 December 2020, the Respondent's solicitors wrote objecting to the amendment. On the 10 December, the application to amend was refused by Employment Judge Gardiner, the reason being that it related to an event (dismissal) which occurred after the claim form was issued and after the events with which the claim form was concerned. Employment Judge Gardiner informed the parties that 'if the Claimant wishes to make a claim about this later incident, he should instigate early conciliation and submit a second ET1 claim form once he has a certificate number.' The Claimant did not initiate early conciliation or submit a second ET1 claim form.

9. The parties had been offered the services of judicial mediation and a judicial mediation appointment was listed on the 29 January 2021. In the meantime, the matter had been listed for hearing, notice of hearing having been set to the parties on the 3 October 2020, listing the hearing for 24, 25, and 26 November 2021. For a reason which is not entirely clear, but possibly relating to the listing of the judicial mediation appointment, the parties were also sent a notice of hearing on the 8 March 2021, notifying them of hearing dates on the 29 and 30 June 2022 and the 1 July 2022. The receipt of the second notice of hearing caused some confusion. The parties were notified on the 14 October 2021, that the

hearing listed on the 29, 30 June 2022 and 1 July 2022 had been postponed, that should it have been cancelled and were asked to disregard the notice of hearing sent on 8 March 2021. The same notice informed them that the three-day hearing remained listed to be heard on the 24, 25 and 26 November 2021 as stated in the original notice of hearing. This prompted an application from the Respondent to postpone the hearing due to the unavailability of witnesses who had booked their leave and made other arrangements on the understanding that the hearing would take place in June 2022. The Respondent's solicitors also informed the tribunal that they had been working to a timetable for the preparation for a hearing in June 2022 which had been agreed with the Claimant in September 2021. That timetable allowed for a list of documents to be exchanged on the 2 December 2021, a final bundle to be prepared by the 17 February 2022 and exchange of witness statements by the 28 April 2022. The Respondent solicitors sought a postponement of the hearing listed in November, however the Claimant objected to that request. The request was refused by Employment Judge Burgher in a decision notified to the parties on the 27 October 2021; that application was renewed and again the Claimant objected, he had already sent his hearing bundle and witness statements to the Respondent in June 2021 and he was preparing his schedule of loss. Employment Judge Burgher reconsidered the renewed application and again refused that application on the 3 November 2021.

10. I include this background because it appears that this was in part the explanation for the hearing bundle containing the Respondent's documents but not all of the Claimant's documents, which resulted in some delay to the start of the hearing and a number of documents being added to the bundle on the first day.

Final hearing 24 November to the 26 November 2021.

11. The Tribunal were provided with a hearing bundle and a bundle of witness statements. The witness statement bundle contained statements from the Claimant, and Alliycia Foster, as well as three witnesses in support of the Claimant, Marcia McLeod, Kerry Greenslade and Charlie Park and, three witness statements for the Respondent, Barbara Harris, Trudi Foster and Sam Gooch. We were informed that Billy Turner no longer worked for the Respondent and would not be attending as a witness.

12. At the outset of the hearing Mr Wright indicated that he wished to make an application to strike out the claim on the basis that the early conciliation certificate had named Essex Equipment Services which was not the name of the Respondent in these proceedings, he had prepared a short written submission. The Judge pointed out that at the time the claim was issued, the name on the early conciliation certificate and the claim form were the same and the claim had been accepted, that the correct name of the Respondent had then been amended under the Tribunal's general case management powers at the Respondent's request and that the Claimant was not required to go through the early conciliation process again (see *Science Warehouse Ltd v Mills UK EAT/0224/15/DA*). Mr Wright did not pursue that application any further.

13. Time was allocated on the first day for the Claimant to consider which documents he wished to be added to the bundle and to prepare a supplementary statement setting out his evidence about those documents. The Claimant produced a supplemental statement with Ms A Foster's assistance and the documents that he wished to be included were added to the bundle. The Respondent and then the Claimant each added some further documents to the bundle. The Claimant told the Tribunal that of his witnesses only Alliycia Foster would be attending to give evidence. The Judge explained the availability of witness orders and

the ability to arrange for witnesses to give evidence via a video link. The Claimant was given time to consider whether to ask for witness orders or for a video link which might allow Ms McLeod to give evidence due to her ill health. Following the adjournment the Claimant confirmed that Ms McLeod would not be giving evidence and he was not seeking a witness order for Kelly Greenslade or Charlie Park. The Claimant relied on his own statements and that of Alliycia Foster.

14. The Tribunal was invited to listen to a recording taken by the Claimant on his phone of a meeting between himself and Billy Turner on the 14 April 2021. The meeting postdates any of the allegations before us, however, the Claimant asked us to listen to it to hear the tone of the meeting: according to the Claimant it demonstrated that Billy Turner was bullying him, raising his voice and using the phrase, 'I am not here to baby you'. The Claimant submitted this was consistent with his allegation that Mr Billy Turner was bullying him, and racist and aggressive towards him. During the meeting the Claimant complained about the events of the 9 April, which are the subject of two of the complaints before us.

15. The Claimant complains that on the 14 April Billy Turner was trying to get him sign a risk assessment which was back-dated and which related to an incident on the 10 February when he had injured his knee; he also complained that Billy Turner subsequently described the Claimant as aggressive when he had no basis for saying so. The Respondent confirmed that the recording was of the meeting in question but pointed out the sound quality was poor in parts. We agreed that we would listen to the parts of the recording identified as relevant by the Claimant and Respondent respectively.

16. Due to the various matters outlined above the evidence was not started until the second day of the hearing. The Tribunal heard evidence from the Claimant, and Ms Alliycia Foster and then from Trudi Foster, Sam Gooch and Barbara Harris for the Respondent before hearing submissions from both parties.

Finding of facts

17. We make the following findings so far as they are relevant to determine the issues we have to decide.

18. The Claimant was employed as a driver/fitter in the equipment service at ECL which was based in Essex. ECL provides health and social care to vulnerable adults in Essex, the London Borough of Havering and West Sussex areas and the equipment service operates within Essex. The role of the driver/ fitter was to collect mobility aids and equipment each morning from the depot in Witham, load and secure the equipment in their company van and drive a pre-planned route to fit and install the required equipment in the customers' homes. The workload changes daily depending on demand, including what is happening in hospitals in respect of discharge into the community. The Respondent delivers approximately 160,000 pieces of equipment per annum, it has a contract to provide same day delivery in respect of priority items and within a few days in respect of other items. The driver/ fitters were allocated a number of jobs each day and had responsibly for loading their own van; if any items would not fit in the van or there were any issues with the number of jobs, or the planned route for the day the driver/fitter could raise this with the Distribution and Installation Manager.

19. The Claimant was nominated by the management team for the ECL Staff of the Month Award in March 2019 and this was recorded in the company newsletter [178-179].

Allegation 1: 19 September 2019, Sam Gooch

20. In September 2019 the Respondent had 10 areas across Essex with routes allocated to each area; each area was paired with another area to cover if there was sickness absence within the team. On 19 September Sam Gooch arrived at work at approximately 6:45 am to be told that one driver was off sick. He recalls speaking to the Claimant to inform him about this and telling him that he would need to look at the routes and re- shuffle the jobs to ensure the urgent jobs for the two areas were completed. He advised the Claimant not to load the van until he had sorted the routes. By the time Sam Gooch had updated the paperwork the Claimant had loaded his van, contrary to his instructions. Sam Gooch recalled that the Claimant seemed angry. In spite of this he worked with the Claimant to organise the new items and helped him load the remaining items on to his van. We are satisfied that the Claimant was aware the routes had to be changed on occasions when drivers were absent, and jobs had to be reallocated because they had to go out that day.

21. Sam Gooch was aware that the area to be covered was large so made sure that the Claimant had fewer jobs than would otherwise have been the case in the circumstances and ensured the jobs were ones which would allow him to travel in one area. The Claimant's schedule for the 19 September 2019 [194- 200] showed that he was allocated 23 jobs. We were told that these were all in the Chelmsford area. Sam Gooch denied singling the Claimant out for extra work, he told us that there were no other drivers available that had a route close to the area and therefore the Claimant was the only option. On 24 September 2019, another driver (Phil) was allocated 18 jobs [page 201-207] which was a change to his normal route, this was also to cover another driver's absence.

22. Sam Gooch vehemently denied saying "black men are known to work hard" to the Claimant on 19 September or at any other time. He denied that he had made any remarks about black people, or the Claimant's race. He denied treating the Claimant any less favourably because of his race. He told the Tribunal that he believed he had a good working relationship with the Claimant. He had spent time supporting the Claimant with training when he first joined the Respondent. He thought they got on well and recalled the Claimant bringing him a present on one occasion. He was horrified when he first learned that the Claimant was alleging he had made racist remarks towards him. We accept Mr Gooch's denial and find that he did not refer to the Claimant's race.

October – December 2019

23. On 7 October 2019 the Respondent received an email from Alliycia Foster [308] complaining about the Claimant's treatment: at that time the Respondent was unaware that Alliycia Foster was the Claimant's partner and treated the email as an "anonymous" complaint, by which they meant from a third party outside the company. In summary, in the email Alliycia Foster made complaints about the way the Claimant had allegedly been treated that morning by someone called Billy, (that is Billy Turner) and in relation to the allocation of work (i.e the Claimant being overloaded). She alleged that Billy shouted and was being aggressive and that the Claimant had made it very clear that he was treated very badly because of his race and that he was singled out for an unfair allocation of work. In her email Ms Foster remarked, "If that is not discrimination, I do not know what is". There was a reference to how others, including female and black drivers were treated.

24. In her email Alliycia Foster did not suggest that she was present during the Claimant's conversation with Billy although her account was written as though she had witnessed the incident. In evidence she accepted that the email was her account based on information relayed to her by the Claimant on the phone that morning.

25. Alliycia Foster told us that the Claimant had spoken to her in the morning of 7 October 2019, explaining what had happened to him and how upset he was; she had previously suggested that he raise complaints with work and he had said he did not want to do that because he was scared of losing his job. He did like the job; he was just unhappy about some of his treatment and that was why she put in the complaint on his behalf.

26. The complaint was forwarded on to Trudi Foster, Head of Equipment Services, by Tracey Nunn, Employee Relations Manager who informed Trudi Foster that the same person had made a complaint before via Expolinks, to which they had not been able to respond as it came from outside the organisation and they didn't know who the person was.

27. On the 10 October 2019, Ms Trudi Foster sent an email to Tracey Nunn and copied in Barbara Harris, Regional Human Resources Advisor, [p309] informing them she had met with the Claimant that morning and discussed the email, that he confirmed that his wife was the owner of the email address and he had no knowledge that she had been sending the emails and was distraught. She had advised him that should he have any complaints that he would like investigated he can contact HR or use Expolink but the Claimant had stated that he loved working for the Respondent, that it was one of the best jobs that he had had but his wife was not happy because he works with females and wants him to leave. He told her that she had done exactly the same with his last company and he left his role there to save his marriage. He stated that he did not have any complaints to make. Ms Foster noted that she was confident that the Claimant had no involvement in sending the emails and he thought he was sharing his day with his wife, not realising she would send in complaints. She agreed that should they receive anything further from her, then they would let the Claimant know, she asked if there was anything else, she needed to do at that time.

28. The Claimant denied having this conversation with Ms Foster, he denied saying that Alliycia Foster was his wife, he also denied saying anything to the effect that she had sent in the email without his knowledge or that she had done something like that previously. He accepted however that Ms Alliycia Foster was his partner, he told us that she is not his wife, as they are not married.

29. Trudi Foster told the Tribunal [paragraph 9 of her witness statement], that she would often see the Claimant at work when she was outside with the smokers; she would see him in passing in the corridor and ask him how he was. On one occasion in October 2019 she had a conversation with him in which he said that he was under a lot of pressure at home and showed her a message on his phone. The message indicated that it was from someone called Alliycia, this made her think that the complaint was from the same person, however, acknowledging that the Claimant was upset at the time he spoke to her, she did not raise it with him at that point; she did raise it at her follow up meeting with him on the 10 October when she asked if he was aware that they had received a complaint from Alliycia Foster and wondered if it was the same person; he said that it was and that is when he gave the explanation recorded in her email.

30. We find that Trudi Foster met with the Claimant on 10 October 2019, as she had told Tracey Nunn and Barbara Harris that she would do and as she reported back in her

email dated 10 October 2019 [p.309]. We find on the balance of probabilities that it is more likely than not that Trudi Foster's account is truthful and that when she spoke to the Claimant about this email he sought to distance himself from the complaint and denied that he had anything to do with it. He may well have done this out of concern about any repercussions for his job, however, we find that the account given by Trudi Foster is an accurate account of what the Claimant said to her when she spoke to him. We accept that this does not mean that it is necessarily an accurate account of what Ms Alliycia Foster did, or her motivation.

31. We accept Trudi Foster's evidence that the Claimant showed her his phone on another occasion, when he told her he was experiencing pressures at home, and that she saw that the messages that he was referring to as being from his partner were from someone called Alliycia. During cross-examination by Alliycia Foster, Trudi Foster was asked to explain the content of this conversation, she declined to do so on the basis that it was confidential and she did not want to break that confidence. Ms Alliycia Foster did not press that question further. We are satisfied that the evidence given by Ms Trudi Foster that she had made the connection from seeing the name Alliycia on the Claimant's phone is truthful.

32. We find that when Trudi Foster asked the Claimant about the complaint, he did not make or pursue any allegation of having been subjected to any racist remarks by any of his colleagues, including Sam Gooch. We also find that he specifically disavowed the complaint made by Alliycia Foster on his behalf; he told Trudi Foster that the complaint was untrue and sought to distance himself from it. We are satisfied that the Claimant felt that his work allocation was unfair and that he was being singled out for more work. We accept that Ms Alliycia Foster believed that he was being singled out because of his race, however, we find that discrimination or race was not raised by the Claimant in October 2019 and he distanced himself from that allegation at that time.

21 November 2019

33. On 21 November 2019 the Claimant sent an email to Tracey Nunn, copying in Wendy Thomas, Director of Quality and Governance, complaining about a number of issues that had occurred between 1st and 19th November, including his phone not working, receiving racist abuse from a member of the public, and his work allocation: he asked if he had been singled out because he was black. [p. 310]

34. On the 22 November 2019, Barbara Harris forwarded the Claimant's 21 November email onto Trudi Foster and asked her to start the informal grievance process. Barbara Harris observed that if they were able to provide the Claimant with a mobile phone, that would be a good way to resolve [the issue] [p. 311]. Barbara Harris emailed the Claimant on the 22 November [p. 313] informing him that she had seen his concerns and that the Respondent would like to meet to discuss the situation. She explained that the initial meeting is usually undertaken by the line manager and that she had asked Trudi to arrange a meeting as soon as possible. She attached a grievance policy for his reference and told him that if he had any questions and would like to speak to someone, not to hesitate to contact her.

35. Trudi Foster wrote to the Claimant on 28 November 2019 [page 210 and 314], confirming that she had received the email dated the 21 November and would like an opportunity to meet informally on the 4 December at 3pm in meeting room 1. The letter was

headed “Initial grievance meeting” and delivered by hand. The letter informed the Claimant that the meeting would be held in accordance with the grievance policy and would discuss the issues the Claimant had raised and how they could be resolved.

36. We find that the Claimant contacted Ms Foster and asked for the meeting to be re-arranged to be within his working hours, this led to the meeting being re-arranged for the 5 December at 8am. Trudi Foster wrote to the Claimant on 4 December 2019 confirming the new date and time of the meeting [page 225]. That letter was also delivered by hand. We are satisfied that the meeting was re-arranged at the Claimant’s request and that he was told about the change to the meeting date and time.

37. We were taken to a copy of Trudi Foster’s electronic diary [225a] for 5 December 2019 showing a dairy entry between 8 – 9 am, “Meeting with KW/TF Meeting Room 1”. Also in the bundle was a copy of an email from Jacqueline Park, (PA to Equipment Services) to Sam Gooch, Distribution Team Leader, [page 225b] attaching the meeting notification for the meeting on 5 December 2019, asking Sam Gooch to make the Claimant aware of the meeting and informing him that a separate letter would be provided for him to give to the Claimant later that day.

38. Trudi Foster had told us that she had booked the upstairs meeting room but that she met the Claimant downstairs and on the way to the meeting room they went through the soft seating area. This area was deserted, as it usually was at that time in the morning, so they sat down in the soft seating area and had the discussion there. The Claimant denies that the meeting took place at all (see paragraphs 14 and 15 of his witness statement) and states that Trudi Foster is lying about this. He told the Tribunal that on the 4 and the 5 December, he arrived at work to find Sam and Billy laughing at him because they knew the meeting was not going to go ahead.

39. Trudi Foster told us that during the meeting they discussed workload and the Claimant’s concerns about the issues with his phone. The Claimant spoke a lot about his phone and his workload but he did not speak at all about his race, make any complaint in respect of race or the fact that he is black; he did not make any reference to that as being the reason for his treatment. After the meeting Trudi Foster told us that she and the Claimant went directly to see the Systems and Performance Officer to try to resolve the issue with his phone there and then. The problem with the phones was a systemic issue and it did not only affect the Claimant; there are still issues with the phone and some drivers are still complaining. The Respondent uses an App to record/log deliveries but unfortunately the App is not stable and the situation is exacerbated because the Respondent has to have the App on a phone that is approved by Essex County Council for GDPR reasons.

40. We find Trudi Foster’s account of arranging the meeting, what was discussed and what she did following the meeting credible, it is also consistent with the contemporaneous documents and we accept her account. We find that the meeting took place as she described: the Claimant raised his concerns about his phone and his workload and that she went with him to try to resolve the issue with the phone. Having found that the meeting took place on 5 December 2019 we reject the Claimant’s account of the events of that day [paragraph 16 of his witness statement]. We do not find that Billy and Sam were laughing at and mocking the Claimant because they knew the meeting wasn’t going ahead.

41. As a result of the Claimant’s complaints about his workload Trudi Foster asked for a review of the workload to be carried out. We accept that following their meeting on 5

December she arranged for the warehouse managers to conduct a floor walk to check that the allocation of work in the bins was as described and that no one driver was being singled out or overloaded. Trudi Foster was satisfied that although there were variations and fluctuations from day to day between drivers' work allocation, the Claimant was not being singled out he was not being given disproportionally large numbers of delivery to complete.

42. We accept that after the meeting initially Trudi Foster had understood that the phone issue was resolved, she had rung the Claimant to check that he had his phone and confirmed that he had, but that she later understood that it was not fully resolved as there were still some issues with either phone reception/signal or the app which were out of her control, which she described as "systemic". The Respondent was aware that all drivers experienced problems from time to time, and that when the phone app was not working the customer services team had to go through each order and close them off manually instead of the app automatically scanning the details of whether the equipment had been delivered or not; this meant that the driver had to write down the PAC numbers of the item and relay it to the customer services team who then had to enter that manually into the central records.

43. Trudi Foster was asked about notes that the Claimant had left on her desk. She recalled two occasions where he had left a note on his worksheet on her desk alleging that people were laughing at him. One of those was in relation to people in the customer service team and the other was in respect of his managers. She had looked into the note about his managers laughing at him and spoken to the individual managers. She met with the Claimant's managers Billy, Sam and Max and explained that she had a note from the Claimant complaining that they were laughing at him. They did not recall any occasion or incident when they had laughed at the Claimant and they said that they had not laughed at him. She did not carry out an investigation in relation to his complaint that the girls in the office were laughing at him; she explained that this was because sat next to them in the office and she had never witnessed them laugh at the Claimant. She had formed the view that the Claimant heard the girls in the office laughing and had assumed that they were laughing at him when in fact they were laughing at something else.

44. Trudi Foster had formed the impression from her conversations with the Claimant that he sometimes sees things differently to how they actually are, she found no evidence to suggest that people were not actually laughing at him and concluded that they had not been doing. She could not recall getting back to him after her investigation and had not documented it. This was because of the way the information was given to her, in that it was just a note left on her desk, but she recalled that she had looked into it. As far as she was aware the complaints were made on two occasions and it was not repeated. She saw the Claimant regularly and asked him how he was, he never raised it again, so she has assumed that it been resolved. She accepted that she did not go back and tell him what she had done. She observed that it was sometimes difficult to understand what the actual issue was that the Claimant was raising, as he would start off discussing one thing but then go on to another, he would jump from topic to topic and would give a lot of information from which it was not always easy to tease out what was the actual underlying complaint. We find that this description is consistent with the Tribunal's experience of the Claimant's evidence and also with the recording of his meeting with Billy Turner.

45. The Claimant had written comments about his lack of phone or problems with his phone on his worksheets on a number of occasions and had taken photos of them on his phone, copies of those worksheets were in the bundle, some of which showed the dates on

which they were printed, as follows: 20 November 2019 [p. 298], 15 November 2019 [at p 300 and at 306], on a date which is illegible but appears to be November 2019 [at 301], a print out which appears to be from December 2019 [p.305], illegible date [p307], also in the bundle was a diary entry from 1 November [at p302] referencing the fact that the Claimant's phone was not working. Trudi Foster told the Tribunal that the worksheets would not come back to her, they would go to customer services; they had been aware there were problems with the phones generally and with Claimant's phone, however the phone issue was systemic and not one that they could resolve immediately. Trudi Foster told us that those complaints were matters that she had attempted to address once the Claimant had brought them to her attention in their meeting. We accept her evidence.

Allegation 3 : 7 February 2020 remark by Sam Gooch

46. Sam Gooch denied saying "its never too much [work] for a black man" to the Claimant on 7 February 2020 when the Claimant was complaining about having too much work. He would not have used the words "crossover" as that did not have a meaning to him. He was at a loss to understand why the Claimant would much such allegations against him. After the allegations came to light Sam Gooch checked the Claimant's run for 7 February 2020 and found that he has 15 jobs that day [p. 228]. He did not consider this to be an excessive amount, as far as he was concerned the usual expectation would be for 20-25 jobs a day.

47. As far as Sam Gooch was aware the Claimant had never said anything about being racially discriminated against by him or raised any concern with him about anything he had said.

48. We found Sam Gooch to be a credible witness and we accept his evidence. We did not find the Claimant to be a reliable witness for the reasons set out below and we were not able to prefer his evidence to that of Mr Gooch.

Allegations 2 and 4: 17 January and 10 February 2020, Billy Turner

49. The first allegation in respect of Billy Turner was that on the 17 January 2020, he said that "black people do not know how to dress properly and that is why I do not want any black people or females on my team. "

50. In his evidence the Claimant alleged that he had told Trudi Foster that Billy and Sam had said" Black men don't know how to dress". There was no mention of Billy Turner also saying that is why he "did into want any black people of females on [his] team". The only contemporaneous reference to "females" or "female drivers" was in Allicyia Foster's email from 7 October 2019 in which she makes reference to the treatment of someone called Kerry, "and other female drivers".

51. The second allegation is that on the 10 February, in response to complaints about the amount of work that the Claimant had been expected to perform, Billy Turner had said the words 'I do not care. You do not have a choice. You need to get it done.' We find that these words are not in themselves discriminatory. For the reasons given below we are satisfied from the evidence before us that the Claimant was not singled out for additional work or extra workloads.

52. Billy Turner was not called to give evidence. Sam Gooch told the Tribunal that he considered Billy Turner had a good working relationship with the Claimant and remained professional around him at all times. He did recall that when Billy Turner was trying to support the Claimant with his workload that the Claimant started to become very irate or upset. Sam Gooch was aware that Billy Turner was also extremely upset when he heard the Claimant's allegation that he had been racist towards him.

53. The Claimant's supervision record from 8 August 2019 was in the bundle, [180-182] it appeared to show the Claimant able to discuss his work and equipment with Billy Turner, asking for a regular route if possible and expressing a preference for the Brentwood area with Billy Turner praising him for his work and excellent feedback from customers. The Claimant's mid-year review from October 2019 was also in the bundle [183-193]. The Claimant expressed in evidence his sense of grievance that that he did not have regular route. By his mid-year review he was described as covering the Brentwood area, occasionally combined with another area. Billy Turner endorses the Claimant's suggestion for a communication tray and provides positive feedback on his work. We find this is consistent with Sam Gooch's description of a good working relationship between Billy Turner and the Claimant. We also had the benefit of hearing the audio recording of the meeting in April 2020 in which Billy Turner could be heard trying to assist the Claimant.

54. The Claimant alleges that he told Trudi Foster about his complaints about comments from Billy and Sam prior to the 10 February 2020. We are satisfied that of the alleged discriminatory remarks or conduct, the allegation in respect of Sam Gooch on 19 September 2019 was the only incident that could have been potentially raised at their meeting in December; we find that the Claimant did not raise this allegation at their meeting. We find that the first time that the Respondent, Trudi Foster or Sam Gooch were aware of these allegations was in these proceedings.

55. We find that the Claimant did not make a complaint about Billy Turner's alleged comments on 17 January 2020 to anyone at the Respondent at the time. It was suggested that he wrote a note and placed it on Trudi Foster's desk but the Claimant gave no evidence to that effect. He did not on this occasion take a photograph or copy, unlike his previous complaints about his phone. We are unable to accept that he left this note. We are satisfied that if he had made such a serious complaint, he would have made a record of it. We are also satisfied that if he had made such a serious complaint it would have been investigated. We note that in the meeting on the 9 April 2020 the Claimant is specifically asked to give examples of discrimination or to say what had been happening to him and what he was complaining about and declined to do so.

Work allocation

56. We were taken to comparisons that the Respondent had carried out between the Claimant and three comparators in respect of work between November 2019 and May 2020, [page 211-224]. Trudi Foster told the Tribunal that she believed that the work allocation comparisons carried out by the Respondent showed the Claimant was not getting any more, or fewer, jobs on average than other drivers. This was also the view of Sam Gooch.

57. We have considered the comparison information [page 211-224]. We are satisfied that on some days the Claimant would have more equipment to deliver and more deliveries to do than he had on others but there was not a significant difference overall between the jobs he and other drivers were allocated. For instance, on the 10 February 2020, the

Claimant had 31 jobs on his van, that is a large number, but so did comparator number 1. We find that the number of jobs fluctuated: it was suggested by the Respondent, and not disputed by the Claimant, that 25 jobs was a normal amount. On occasions 25 to 28, 29, 30, or 31 jobs were allocated to the Claimant but we find that the other drivers were also allocated these numbers of jobs on different occasions. We find that the evidence does not demonstrate that the Claimant was getting disproportionately more days when he had a larger number of jobs to deliver than other drivers.

Issue 5: 10 February, Trudi Foster.

58. Matters came to a head on the 10 February 2020 when the Claimant injured his knee at work, he blamed his injury on his van being overloaded. The Claimant had 31 jobs to deliver, which is a large number, however comparator 1 also had 31 jobs on that day.

59. The Claimant rang Trudi Foster to inform him about his knee. He alleges that she took a long time to call him back and when she did she was unsympathetic and didn't see anything wrong with the amount of equipment on his van. The Claimant's statement did not mention the remark Trudi Foster is alleged to have made about immigrants and moaning. In the relevant paragraph [paragraph 33] the Claimant instead complains that Billy [Turner] told him that he moan[ed] too much.

60. The Claimant relied on a statement from Marcia McLeod in support of this allegation. In his witness statement the Claimant described Ms McLeod as a customer who had happened to be in the vicinity and came to speak to him in his van to explain something about a piece of equipment. The Claimant's account of Ms McLeod happening to come over to his van at 10.53 am on 10 February during the call, is not consistent with the available evidence in respect of the Claimant's likely whereabouts at 10.53am that morning. The Claimant could not explain how Ms Marcia McLeod was able to overhear what Ms Foster was saying to him on the phone, while he was sitting inside his van and she was standing outside.

61. It was put to the Claimant that Ms McLeod was in fact one of his referees on his job application and at that time he had said she had known him for some ten years. The Claimant had declined to call Ms McLeod to swear the truth of her statement despite the tribunal offering to make arrangements for her to do so by video or other means. The Claimant told us that he had obtained a statement from Ms McLeod some six months or more after the event. He could not explain how it was that Ms McLeod was able to reference the date and exact time of the call in question and how she knew the call was from Trudi Foster. We find that we are unable to place any reliance on Ms McLeod's statement.

62. Trudi Foster denied using the words attributed to her by the Claimant. She was clear that calling someone an immigrant is not something that she would do, or has ever done. Being an immigrant is not a category that she recognised as being something that would be relevant to attribute to anybody, let alone in the workplace.

63. We have found Trudi Foster to be a credible witness, we are satisfied that she has given an honest account to the Tribunal and we accept her evidence. We do not find that the conversation took place as described by the Claimant and do not find that Trudi Foster used the words "you are an immigrant and always moaning" or alternatively, as stated by Ms McLeod in her witness statement, "For an immigrant you moan to much". We find that the Claimant was upset with Trudi Foster on the 10 February and perceived that she was

not sufficiently sympathetic to him when he reported his injury. He was also upset at the amount of equipment/jobs he had been allocated on that day and vented some of his upset in his call to Trudi Foster.

64. The Claimant attended work on 11 February 2020 and was then signed off by his GP for 2 weeks from 12 February 2020 [315]. Further sick notes followed and the Claimant was off until 25 March 2020 [242,244,246]. His GP advised he return on light duties.

65. Billy Turner met with the Claimant on his return to work on 25 March and discussed risk assessments [p248]. We find that there were two risk assessments, one conducted generically before the Claimant injured his knee and which Billy Turner asked him to sign on 25 March 2020 and a second one which was to be put in place specifically for the Claimant to take into account his knee injury [248-249]. Billy Turner subsequently arranged to meet with him on 14 April 2020 to discuss the lighter duties he needed and to complete a personal risk assessment.

66. In the meantime, during his absence from work, the Claimant contacted ACAS and commenced early conciliation. The Respondent was notified of this on 27 February 2020. The Claimant forwarded his email of 21 November 2019 to ACAS as evidence of complaints of race discrimination and ACAS forwarded it to the Respondent on 12 March 2020. Barbara Harris contacted the Claimant on 25 March 2020 to invite him to a meeting.

Meeting on the 9 April 2020

67. From the Claimant's evidence it was apparent that he had not understood before the meeting on the 9 April that it was intended to be about the complaint that had been forwarded to ACAS. He thought the meeting was to do with Billy Turner and that it would be about his workload and his knee. The Claimant was upset that he was asked all about ACAS when he should not have been. He was also upset that the meeting was with Trudi Foster when he alleged that his complaints were about Trudi Foster. We find there were no complaints made to the Respondent about Trudi Foster by this point in time.

68. We were taken to Barbara Harris's notes of the 9 April 2020 meeting. We accept her evidence that she typed the notes of the meeting [page 260-264] during the meeting and they are a contemporaneous record. The part in italics were her notes to herself and the remaining notes were notes of what was said at the meeting. We accept that the notes are an accurate record.

69. Barbara Harris introduced the meeting by explaining that it was about the Claimant's complaints to ACAS about race discrimination. The Claimant talked about being bullied into completing a form, his workload and what had been done about his previous complaints. He was asked if he was referring to complaints about his phone. We find that is consistent with the focus of his concerns when giving evidence before us and we are satisfied that is what he chose to discuss at that meeting. We do not find that he was bombarded with questions. We find that he was asked to explain what his concerns were and was pressed to provide details of his complaints of his race discrimination and his response was that he did not want to discuss it.

70. We are satisfied that the Claimant was asked about instances where he felt had been bullied and that he did not use the term racism or discrimination in that meeting. He alleged he had been bullied on his return to work on the 25 March but did not say by whom

or what was done. He talked about being forced and bullied to complete a form, which we find is a reference to a risk assessment.

71. We find that the Claimant was very suspicious about being asked to sign a risk assessment on his return to work and this appeared to be a central focus of his upset. The Claimant had objected to signing a risk assessment which he described to the Tribunal as backdated.

72. The note records that the Claimant was asked by Trudi Foster whether he wished to carry on or to take a break and indicated that he wished to carry on [page 262]; he was also asked if he wanted to put his leg on a chair for support.

73. We do not find that he asked five times to take a break and be allowed to take his medication and that this was refused. We are satisfied that the notes of the meeting are not illustrative of either Barbara Harris or Trudi Foster not being interested in the Claimant's account. On the contrary, the Claimant is being asked to explain what his concerns were. The Claimant declined to specify any allegations in respect of race discrimination. When he was asked about his complaints of discrimination the Claimant only named Steve Rollins as someone with whom he had disagreements. He did not make any allegations of racist or discriminatory remarks, nor did he make any complaints about Sam or Billy making any remarks at all.

74. We find from the Claimant's contributions in the meeting that the Claimant appeared to be at cross-purposes as to what the meeting was about. His focus at that time was on his knee injury and being asked to sign a risk assessment and that is what he refers to when he is asked about bullying. It is clear that the Claimant came away from that meeting dissatisfied, but we find the Claimant's recollection of the meeting is not an accurate one.

75. The Respondent's grievance policy does not provide for there to be someone to accompany the complainant at a grievance meeting and the fact that the Claimant was not offered the opportunity to have someone attend to him was in line with the policy, however the Claimant had disclosed to his manager that he had dyslexia and we consider that it would have been of assistance to the Claimant to have had somebody with him to offer support and to be able to verify afterwards whether the notes were accurate one or not. Had he had this support it may possibly have given him some reassurance and allayed some of his concerns.

The Claimant's credibility

Recording of meeting with Billy Turner on 14 April 2020

76. We find that the meeting on the 14 April was arranged in order to discuss the Claimant's lighter duties, as stated by Billy Turner in his email to Barbara Harris and Trudi Foster[page 324]. Billy Turner had some ideas in respect of lighter duties that he wanted to run past the Claimant so that he could ensure Claimant was happy.

77. We listened to the audio recording of the meeting between the Claimant and Billy Turner on the 14 April 2020. This was 5 days after the Claimant's meeting with Trudi Foster and Barbara Harris. The Claimant accepted that Billy Turner did not know that he was being recorded. The Claimant relied on the comment by Billy Turner saying "I am not here to baby" you as evidence of his aggression towards and bullying of the Claimant.

78. During his evidence the Claimant was asked about a passage in the recording, where the sound of typing could be heard. The Claimant told us that he believed Mr Turner was pretending to type but that he was not actually typing. In the audio Mr Turner could be heard repeating back the Claimant's account of his meeting on the 9 April and his unhappiness with what had taken place. He can be heard offering to email Barbara Harris and Trudi Foster on the Claimant's behalf to explain to them the Claimant's unhappiness. Mr Turner can then be heard advising the Claimant that he can ask for a copy of the meeting note [with Barbara Harris and Trudi Foster] and that if he is not happy with the content, he can make amendments if he does not agree with them. The Claimant responds," I do not want it.". The Claimant told us he did not believe Mr Turner was typing because he had asked for the notes of the meeting and Mr Turner had not provided them.

79. The bundle contains an email [p. 326] from Billy Turner to Barbara Harris and Trudi Foster sent at 08.39 on 14 April 2020, with the title "HR meeting 09/04/2020". The content of that email is consistent with the audio recording of the meeting on the 14 April, it contains the words that Billy Turner can be heard repeating back to the Claimant, namely an account of the Claimant's complaints about the meeting with Barbara Harris and Trudi Foster. We accept that Billy Turner typed that account as he was sitting with the Claimant and that he sent the email as he told the Claimant he would.

80. In the recording Billy Turner can also be heard telling the Claimant that he will email Ben, a manager responsible for job allocations, to instruct him that the Claimant should not be allocated certain pieces of equipment anymore, as a result of his injury to his knee. At this point the Claimant can be heard becoming more upset; he suggests that this was not true because he had been allocated some of this equipment despite what Mr Turner was telling him. Billy Turner can be heard repeating that he would give the instructions confirming he was typing that as they sat there. He tells the Claimant that he could not guarantee he would not receive that equipment in his bin for pick up. but if he did so, then the Claimant was to come and tell him and he would try and resolve the matter and he would ensure that if he was assigned one by mistake that it was removed from his allocation. The Claimant disputed this, saying that the D25J had not been removed and that it was not in the letter. In response Mr Turner can be heard saying "I do not understand what you want, I am not here to baby you". At this point the Claimant talks over Mr Turner who then says "you are not listening to me,", the Claimant continues talking over him, saying loudly "I do not want to speak to you no more, you are two faced". The Claimant repeats that phrase a number of times whilst Mr Turner is talking in the background. Mr Turner can be heard saying "I could not make sure 100 per cent that you would never get a D25J but if you do, you should come to me. I have agreed that you should not have to do them so, if one is assigned by mistake, I expect you to come to me. I cannot overlook your route all the time", to which the Claimant responded, "You are the same". Mr Turner can be heard typing in the background and reading out an instruction not to allocate the Claimant any D25Js and repeating to the Claimant, "so you should have no D25J on your run and if you come to me I will make sure that it is removed and that is all I can do for you", that is where the recording ends.

81. The Claimant denied that he was at all confrontational or aggressive during the meeting, he said his voice was louder because he was closer to the phone, although acknowledged that his voice got louder towards the end of the recording. He described Mr Turner as bullying him and not listening to him and lying about what he was doing, i.e typing an email setting out the Claimant's concerns [see email at p. 326].

82. We do not find that the Claimant's account is an accurate reflection of the meeting that we heard. We find that Mr Turner did become frustrated with the Claimant and accused him of not listening, this was at a point where the Claimant had raised his voice and was speaking over Mr Turner, disputing what Mr Turner was saying he was in the process of doing. The Claimant equated the fact that he had received one of the pieces of equipment on his round with evidence that Mr Turner was lying about the instructions that he was in the process of writing.

83. It was apparent form the recording that they both were frustrated at that point. We do not find that Mr Turner saying, "I am not here to baby you" is evidence of race discrimination, as is suggested by the Claimant. We find, having considered the content of the recording as a whole that he was simply expressing his frustration when he had explained what his instruction was to the allocations manager and what the Claimant should do if he was allocated the equipment in spite of that instruction, namely that he should simply let Mr Turner know and he would arrange for it to be removed, but it appeared to him that the Claimant was not listening to him.

84. We find that Billy Turner repeated his instruction about the Claimant not having to do D24Ms equipment on 29 April 2020 in an email to Barbara Harris and copied to Trudi Foster [331]. Billy Turner also sought to make a referral to occupational health to help with the Claimant's stress and his knee injury and this was declined by the Claimant. The Claimant expressed suspicion about the purposes of that referral and said it was not explained to him properly.

85. We are satisfied that the Claimant's description of this meeting is one-sided interpretation which is not borne out by what Mr Turner actually said and did (i.e sending the relevant emails). We find the Claimant's misinterpretation of this meeting is in a similar vein to his dispute as to what took place at the meeting on 9 April, which he describes as very differently to the notes taken Barbara Harris and the recollection of Ms Harris and Trudi Foster.

86. We found the Claimant's evidence was unsatisfactory and that his description of events has developed and changed over the course of time We find that the Claimant formed a perception was that he was being singled out for more work and that his complaints about not having a phone were not being actioned promptly because he was black; this led him to an unjustified sense of grievance and of feeling unsupported and overlooked.

The law

Direct discrimination

87. Section 39 of the Equality Act 2010 provides that an employer must not discriminate against an employee of his by, amongst other things, subjecting him to a detriment.

88. Section 13 of the Equality Act 2010 sets out the legal test for direct discrimination. A person (A) discriminates against another (B) if, because of a protected characteristic (race in this case), A treats B less favourably than A treats or would treat others.

Causation

89. The House of Lords has considered the test to be applied when determining whether a person discriminated "because of" a protected characteristic. In some cases the reason for the treatment is inherent in the Act itself: see **James v Eastleigh Borough Council** [1990] IRLR 572. The council's motive, which had been benign, was besides the point. In that case the council had applied a criterion, though on the face of it gender neutral in that it allowed pensioners free entry, was inherently discriminatory because it required men to pay for swimming pool entry between the ages of 60 and 65 whereas women could enter the swimming pool free of charge. Sex discrimination was thus made out. In cases of this kind what was going on in the head of the putative discriminator – whether described as his intention, his motive, his reason or his purpose, will be irrelevant.

90. If the act is not inherently discriminatory, the Tribunal must look for the operative or effective cause. This requires consideration of why the alleged discriminator acted as he did. Although his motive will be irrelevant, the Tribunal must consider what consciously or unconsciously was his reason? This is a subjective test and is a question of fact. See **Nagarajan v London Regional Transport** 1999 1 AC 502. See also the judgment of the Employment Appeal Tribunal in **Amnesty International v Ahmed** [2009] IRLR 884.

Comparators

91. For the purposes of direct discrimination, section 23 of the Equality Act 2010 provides that on a comparison of cases there must be no material difference between the circumstances relating to each case. In other words, the relevant circumstances of the complainant and the comparator must be either the same or not materially different. Comparison may be made with an actual individual or a hypothetical individual. The circumstances relating to a case include a person's abilities if on a comparison for the purposes of section 13, the protected characteristic is disability.

92. In constructing a hypothetical comparator and determining how they would have been treated, evidence that comes from how individuals were in fact treated is likely to be crucial, and the closer the circumstances of those individuals are to those of the complainant, the more relevant their treatment. Such individuals are often described as "evidential comparators"; they are part of the evidential process of drawing a comparison and are to be contrasted with the actual, or "statutory", comparators; see, **Ahsan v Watt** [2007] UKHL 51.

93. Whether there is a factual difference between the position of a claimant and a comparator is in truth a material difference is an issue which cannot be resolved without determining why the claimant was treated as he or she was; see: **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337.

94. In **Ministry of Defence v Jeremiah** [1980] ICR 13, 31 Brightman LJ said that 'a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment'.

95. In **Deer v University of Oxford** [2015] ICR 1213 it was held that in order to establish less favourable treatment it is not necessary the Claimant show any sense of reasonable subjective grievance or injustice as is necessary to establish detriment (paragraph 26).
The burden of proof

96. Section 136 of the Equality Act 2010 sets out the burden of proof that applies in discrimination cases. Subsection (2) provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that person (A) has contravened the provisions concerned, the Tribunal must hold that the contravention occurred. However, subsection (2) does not apply if A shows that A did not contravene the provision.

97. Thus, it has been said that the Tribunal must consider a two stage process. However, Tribunals should not divide hearings into two parts to correspond to those stages. Tribunals will wish to hear all the evidence before deciding whether the requirements at the first stage are satisfied and, if so, whether the Respondent has discharged the onus that has shifted; see **Igen Ltd v Wong and Others** CA [2005] IRLR 258.

98. At the first stage, the Tribunal has to make findings of primary fact. It is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of any other explanation, that the Respondent has committed an act of discrimination. At this stage of the analysis, the outcome will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. It is important for Tribunals to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination and in some cases the discrimination will not be an intention but merely an assumption.

99. At the first stage, the Tribunal must assume that there is no adequate explanation for those facts. At this first stage, it is appropriate to make findings based on the evidence from both the Claimant and the Respondent, save for any evidence that would constitute evidence of an adequate explanation for the treatment by the Respondent.

100. However, the burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination. “Could conclude” must mean that a reasonable Tribunal could properly conclude from all the evidence before it; see **Madarassy v Nomura International** [2007] IRLR 246. As stated in **Madarassy,** “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 a Tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination”. If the Claimant does not prove such facts, his or her claim will fail. If, on the other hand, the Claimant does prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed the act of discrimination, unless the Respondent is able to prove on the balance of probabilities that the treatment of the Claimant was in no sense whatsoever because of his or her protected characteristic, then the Claimant will succeed. That explanation must be adequate, which as the courts have frequently had cause to say does not mean that it should be reasonable or sensible but simply that it must be sufficient to satisfy the tribunal that the reason had nothing to do with the protected characteristic in question: see **Glasgow City Council v Zafar** [1998] ICR 120 and **Bahl v The Law Society** [2004] IRLR 799."

101. In **Laing v Manchester City Council** [2006] ICR 1519, the EAT stated, among other things, that:

> *"No doubt in most cases it will be sensible for a Tribunal formally to analyse a case by reference to two stages. But it is not obligatory on them formally to go through each step in each case… An example where it might be sensible for a Tribunal to go straight to the second stage is where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator – whether there is a prima facie case – is in practice often inextricably linked to the issue of what is the explanation for the treatment, as Lord Nicholls pointed out in Shamoon …. it must surely not be inappropriate for a Tribunal in such cases to go straight to the second stage. … The focus of the Tribunal's analysis must at all times be the question of whether or not they can properly infer race discrimination. If they are satisfied that the reason given by the employer is genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that, even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race"'*

Guidance in the case law

102. In the case of **London Borough of Islington v Ladele** [2009] IRLR 154 the EAT gave further guidance on the question of comparison and the application of the burden of proof as follows:

> (1) In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in Nagarajan v London Regional Transport [1999] IRLR 572, 575 - 'this is the crucial question'. He also observed that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator.
>
> (2) If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reason. It is sufficient that it is significant in the sense of being more than trivial …
>
> (3) As the courts have regularly recognised, direct evidence of discrimination is rare and tribunals frequently have to infer discrimination from all the material facts. The courts have adopted the two-stage test which reflects the requirements of the section 136 of the Equality Act 2010. These are set out in Igen. That case sets out guidelines in considerable detail, touching on numerous peripheral issues. Whilst accurate, the formulation there adopted perhaps suggests that the exercise is more complex than it really is. The essential guidelines can be simply stated and in truth do no more than reflect the common sense way in which courts would naturally approach an issue of proof of this nature. The first stage places a burden on the claimant to establish a prima facie case of discrimination:

> 'Where the applicant has proved facts from which inferences could be drawn that the employer has treated the applicant less favourably on the prohibited ground, then the burden of proof moves to the employer.'

If the claimant proves such facts then the second stage is engaged. At that stage the burden shifts to the employer who can only discharge the burden by proving on the balance of probabilities that the treatment was not on the prohibited ground. If he fails to establish that, the tribunal must find that there is discrimination.

(4) The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employee has treated the claimant unreasonably. That is a frequent occurrence quite irrespective of the race, sex, religion or sexual orientation of the employee. So the mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one. As Lord Browne-Wilkinson pointed out in Zafar v Glasgow City Council [1997] IRLR 229:

> 'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee that he would have acted reasonably if he had been dealing with another in the same circumstances.'

Of course, in the circumstances of a particular case unreasonable treatment may be evidence of discrimination such as to engage stage two and call for an explanation: see the judgment of Peter Gibson LJ in Bahl v Law Society [2004] IRLR 799, paragraphs 100, 101 and if the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. As Peter Gibson LJ pointed out, the inference is then drawn not from the unreasonable treatment itself - or at least not simply from that fact - but from the failure to provide a non-discriminatory explanation for it. But if the employer shows that the reason for the less favourable treatment has nothing to do with the prohibited ground, that discharges the burden at the second stage, however unreasonable the treatment.

(5) It is not necessary in every case for a tribunal to go through the two-stage procedure. In some cases it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, absent the explanation, would have been capable of amounting to a prima facie case under stage one of the *Igen* test … The employee is not prejudiced by that approach because in effect the tribunal is acting on the assumption that even if the first hurdle has been crossed by the employee, the case fails because the employer has provided a convincing non-discriminatory explanation for the less favourable treatment.

(6) It is incumbent on a tribunal which seeks to infer (or indeed to decline to infer) discrimination from the surrounding facts to set out in some detail what these relevant factors are: see the observations of Sedley LJ in Anya v University of Oxford [2001] IRLR 377 …

(7) As we have said, it is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The proper

approach to the evidence of how comparators may be used was succinctly summarised by Lord Hoffmann in … *Ahsan* … a case of direct race discrimination by the Labour Party. Lord Hoffmann summarised the position as follows (paragraphs 36-37):

The discrimination … is defined … as treating someone on racial grounds "less favourably than he treats or would treat other persons". The meaning of these apparently simple words was considered by the House in *Shamoon* … Nothing has been said in this appeal to cast any doubt upon the principles there stated by the House, but the case produced five lengthy speeches and it may be useful to summarise:

> (1) The test for discrimination involves a comparison between the treatment of the complainant and another person (the "statutory comparator") actual or hypothetical, who is not of the same sex or racial group, as the case may be.
>
> (2) The comparison requires that whether the statutory comparator is actual or hypothetical, the relevant circumstances in either case should be (or be assumed to be), the same as, or not materially different from, those of the complainant …
>
> (3) The treatment of a person who does not qualify as a statutory comparator (because the circumstances are in some material respect different) may nevertheless be evidence from which a tribunal may infer how a hypothetical statutory comparator would have been treated … This is an ordinary question of relevance, which depends upon the degree of the similarity of the circumstances of the person in question (the "evidential comparator") to those of the complainant and all the other evidence in the case.

It is probably uncommon to find a real person who qualifies … as a statutory comparator. … At any rate, the question of whether the differences between the circumstances of the complainant and those of the putative statutory comparator are "materially different" is often likely to be disputed. In most cases, however, it will be unnecessary for the tribunal to resolve this dispute because it should be able, by treating the putative comparator as an evidential comparator, and having due regard to the alleged differences in circumstances and other evidence, to form a view on how the employer would have treated a hypothetical person who was a true statutory comparator. If the tribunal is able to conclude that the respondent would have treated such a person more favourably on racial grounds, it would be well advised to avoid deciding whether any actual person was a statutory comparator.' "

Time limits

103. Section 123(1) of the Equality Act 2010 provides that a complaint may not be brought after the end of (a) the period of 3 months starting with the date of the act to which the complaint relates, or (b) such other period as the Tribunal thinks just and equitable. Under section 123(3) conduct extending over a period is to be treated as done at the end of the period; and failure to do something is to be treated as occurring when the person in question decided on it. Under section 123(4) in the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something (a) when P does an act inconsistent with doing it; or (b) If P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

104. In **Robertson v Bexley Community Centre** [2003] IRLR 434 the Court of Appeal stated that when Employment Tribunals consider exercising the discretion under section 123(1)(b) there is no presumption that they should do so unless they can justify failure to exercise the discretion. A Tribunal cannot hear a complaint unless the Claimant convinces it that it is just and equitable to extend time so the exercise of the discretion is the exception rather than the rule. In accordance with **British Coal Corporation v Keeble** [1997] IRLR 336 a Tribunal may have regard to the following factors: the overall circumstances of the case; the prejudice that each party would suffer as a result of the decision reached; the particular length of and the reasons for the delay, the extent to which the cogency of evidence is likely to be affected by the delay; the extent to which the Respondent has cooperated with any requests for information; the promptness with which the Claimant acted once he knew of facts giving rise to the cause of action; the steps taken by the Claimant to obtain appropriate advice once he knew of the possibility of taking action. The relevance of each factor depends on the facts of the individual case and Tribunals do not need to consider all the factors in each and every case; see **Department of Constitutional Affairs v Jones** [2008] IRLR 128.

Conclusions

Allegation 1: 19 September 2019, Sam Gooch

105. We have not found that Sam Gooch made the remark “Back People are known to work hard and that is why I am giving him crossover.”

Allegation 2: 17 January 2020, Billy Turner

106. We have not found that Billy Turner said “black people don’t know how to dress properly and that’s why I don’t want any black people or females on my team”

Allegation 3: 7 February 2020, Sam Gooch

107. We have not found that Sam Gooch Said to the Claimant, “It’s never too much for a black man”, when the Claimant was complaining about having too much work.

Allegation 4: 10 February 2020, Billy Turner

108. We do not find any credible evidence that Billy Turner said, “I don’t care. You don’t have a choice. You need to get it done” on 10 February 2020.

109. Even if it was said we are satisfied that the words do not carry any racial connotations. We find that there is no evidence from which we could conclude, or infer, that the Claimant was treated any differently to how a white comparator would have been treated in the same circumstances.

Allegation 5: 10 February 2020, Trudi Foster

110. We have not found that Trudi Foster said to the Claimant, “You are an immigrant and always moaning”.

Issue 6. 9 April 2020, Barbara Harris refusing to adjourn the meeting

111. We have not found that the Claimant was refused the opportunity to adjourn the meeting so that he could take medication for his sore knee.

Allegation 7: 9 April 2020. Barbara Harris and Trudi foster's conduct of the meeting

112. We have not found the allegation to be made out. We do not find that there was no interest in the Claimant's story, nor do we find that there would have been any greater or less interest had he not been black.

113. We do not find there to be any evidence on which we could find that the allegations of race discrimination are made out. The claims therefore fail.

Time limits

114. We have not found the incident attributed to Mr Gooch in September to have occurred and therefore have not addressed the question of time limits.

115. The claims are dismissed.

Employment Judge C Lewis
Dated: 20 July 2022