EMPLOYMENT TRIBUNALS

Claimant: Mr M Johnson

Respondent: DHL Services Ltd

Heard at: Watford Employment Tribunal (in public; in person)

On: **25 to 28 April 2022**

Before: EJ Hyams (Day 1); EJ Quill (Days 2 to 4)
Mr A Scott and Mr D Bean (all days)

Appearances
For the claimant: Mrs A Johnson, family member
For the respondent: Mr R Dunn, counsel

REASONS

Introduction

1. Judgment and reasons having been given orally, written reasons were requested and these are those reasons. I apologise for the delay.

2. The Claimant is a former employee of the Respondent. At the time he presented his claim, he was still a current employee. This claim does not relate to the termination of his employment.

The Claims and Issues

3. At a hearing before EJ Skehan on 11 March 2021, a list of issues was produced. In the summary, she stated:

> The parties are reminded, and it was explained during the hearing that list of issues is intended to be a comprehensive list of the issues within this litigation that cannot be extended without the permission of the employment tribunal.

And

> It is noted that the claimant's employment has, since the issue of these proceedings, terminated. There is no claim relating to the termination of the claimant's employment within the proceedings.

4. There was no subsequent request to amend the list of issues either before or during the final hearing. On Day 1 of the final hearing, there was discussion between the panel and the parties and the parties were reminded that, unless there was an application to amend, the panel would decide the case on the basis of that list of issues.

5. On Day 2, both parties confirmed that EJ Skehan's list was still accurate and correct, and acknowledged that the only complaints which we would address would be those contained in that list of issues.

6. Retaining the original numbering, for ease of reference, the list of claims and issues was:

Time limits / limitation issues

(i) Were all of the claimant's complaints presented within the time limits set out in sections 123(1)(a) & (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, and/or a series of similar acts or failures; whether time should be extended on a "just and equitable" basis; when the treatment complained about occurred.

(ii) Given the date the claim form was presented and the dates of early conciliation, any complaint about something that happened before **[29 November 2019]** is potentially out of time, so that the tribunal may not have jurisdiction to deal with it.

EQA, section 13: direct discrimination because of race. The claimant is black British.

(iii) Has the respondent subjected the claimant to the following treatment:

a. on or around April 2018, the claimant informed Mr Dan Price of the respondent that he would be absent for one month on prearranged honeymoon leave. In response Mr Price told the claimant that had he known this he would not have employed the claimant as 'he could get 10 of me for a penny'.

The claimant says that the expression '10 a penny' is a racist expression with its origins within the slave trade. The claimant says that it was meant by Mr Price and understood by the claimant in this way. The respondent submitted that the general understanding of the expression does not have any racial connection but refers to something that is common or easily available and the likely meaning of the above expression, if made, was that ambulance drivers with the claimant's experience and skills were easy for the respondent to find.

(iv) 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.

(v) If so, was this because of the claimant being black and/or because of the protected characteristic of race or colour more generally?

EQA, section 26: harassment related to race

(vi) Did the respondent engage in conduct as follows:

a. Subjecting the claimant to a drug test in January 2019?

b. Subjecting the claimant to a drug test in March 2019?

c. On 9 January 2020, commencing disciplinary investigations/proceedings in relation to the claimant arising from health and safety allegations and continuing with those proceedings up to 30 March 2020, [date of issue of ET1]

(vii) If so was that conduct unwanted?

(viii) If so, did it relate to the protected characteristic of race?

(ix) In relation to allegation a and b above, the claimant says that he was subjected by Mr Dan Price to these drug tests because Mr Price had seen him drive an expensive car and made an assumption based on his race that the claimant was a 'drug dealer'

(x) In relation to allegations c, the claimant says that the commencement of these proceedings was a continuation of detrimental conduct taken against him on the grounds of his race.

(xi) Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

EQA, section 27: victimisation

(xii) Did the claimant do a protected act? the claimant relies upon the following:

a. The claimant says that in April 2018, he complained about the Mr Price's comments relating to '10 a penny', alleging race discrimination in person to the depot manager~~/line manager~~ called 'Harry'. He went to Harry's office to complain. The claimant says that he followed up to these complaints in person. **[He had also reported the comment to his line manager.]**

(xiii) Did the respondent subject the claimant to any detriments as follows:

a. Subjecting the claimant to a drug test in January 2019?

b. Subjecting the claimant to a drug test in March 2019?

c. On 9 January 2020, commencing disciplinary investigations/proceedings in relation to the claimant arising from health and safety allegations and continuing with those proceedings up to 30 March 2020, [date of issue of ET1]

(xiv) If so, was this because the claimant did a protected act?

7. We have made two slight amendments for clarity.

   7.1 At roman numeral (ii) we have inserted the date of 29 November 2019, based on the dates of the early conciliation certificate and presentation of the claim form.

   7.2 At (xii)(a), we have added the words "[He had also reported the comment to his line manager]" to make it clearer that, as stated in the particulars of complaint attached to the ET1, the Claimant was not claiming that his line manager and the depot manager were the same person. However, as per the list of issues, the protected act relied upon related to informing the depot manager, nicknamed "Harry", that the Claimant regarded Mr Price's words as race discrimination.

8. We have also noted that the grounds of resistance asserted that the Respondent denied liability for the alleged acts and omissions even if any of the Respondent's employees were found to have discriminated, or harassed, or victimised the Claimant.

The Hearing and Evidence

9. This was a 4 day hearing which was mainly in person. Two witnesses (Mr Dave Gardner and Mr Sivarajah Harriharan) attended remotely by video and all the other participants were in person.

10. We had an agreed bundle of around 335 pages. We had the bundle and the witness statements in hard copy format and also electronically.

11. On Day 1, the hearing commenced with the panel Employment Judge Hyams and non-legal members Bean and Scott. After discussion of some preliminary matters, and before any evidence was heard, the parties were sent away so that the panel could commence its pre-reading. The intention was that the evidence would start later that day.

12. During the pre-reading time, EJ Hyams became unavailable for unavoidable reasons. REJ Foxwell therefore made a decision that he would be replaced by EJ Quill. The parties were informed of this on Day 1, and also told that the evidence would now start on Day 2. The hearing resumed on Day 2 with the panel of EJ Quill and non-legal members Bean and Scott.

13. A technical issue with the video facilities (CVP) prevented the hearing starting promptly at 10am on Day 2, but that lost time was made up by taking shorter lunch breaks on Days 2 and 3.

14. Following confirmation that the list of issues was correct, the evidence started on Day 2 with the Claimant being the first witness for his side. He had prepared a written witness statement. He swore to his written statement and answered questions from the other side and from the panel.

15. The next witness was Mr Gardner. He was called by the Claimant and attended because a witness order had been issued. He gave his evidence in chief by answering questions from the Claimant's representative (Mrs Anette Johnson, the Claimant's wife) and then answered questions from the other side and the panel.

16. On the morning of Day 3, each of the Respondent's witnesses gave their evidence. In each case, they had prepared a written statement which they swore to, and then answered questions from the other side and the panel. They had not previously signed their statements, but they did so during the hearing. The Respondent's witnesses were Mr Ben Craib, Mr Jonathan King and Mr Darren Matthews.

17. At 2pm on Day 3, we heard from the Claimant's final witness. This was Mr Harriharan (who was known by the nickname "Harry" at work). He attended because a witness order had been issued. He gave his evidence in chief by answering questions from the Claimant's representative and then answered questions from the other side and the panel.

18. There were some delays caused to Mr Harriharan's evidence because of audio problems with the tribunal's equipment. However, these issues were resolved, and all of his evidence could be heard in the room, and he was able to hear all of the questions put to him.

19. We heard submissions on Day 3 (oral and written) and gave our decision on the afternoon of Day 4.

20. The Claimant's statement attached, as an appendix, a statement signed by an individual who is named in the document, and whom we will refer to as TD. It is dated 24 May 2021. We gave TD's signed statement such weight as we saw fit, taking account of the fact that he did not attend the hearing. We had also been supplied with documents from the Claimant which were described as summaries of the evidence of Gardner and Harriharan. These were prepared by the Claimant rather than by the witnesses, and we have not given them any weight.

The findings of fact

21. The Claimant had previously worked for the Crown Probation Services and National Association for the Care and Resettlement of Ex-Offenders (NACRO). He worked for the Respondent from March 2018 as a highly skilled Ambulance Driver.

22. On 28 February 2020, the Claimant commenced ACAS early conciliation which lasted until 16 March 2020. On 30 March 2020, he presented his claim to the tribunal. Our findings of fact therefore relate only to the events up to and including 30 March 2020, save to note that it is common ground that:

    22.1 The disciplinary proceedings which are the subject of some of the complaints (as discussed in more detail below) continued after 30 March 2020, and the Claimant was invited to a hearing, having been told that the allegations potentially amounted to gross misconduct. Following the hearing, he was issued with a final written warning.

    22.2 The Claimant's employment later ended

23. In around April 2018, the Claimant had a conversation with Dan Price, Transport Shift Manager. Mr Price is white. The Claimant told Mr Price that he, the Claimant, was due to shortly take 4 weeks leave because of honeymoon.

24. In response, Mr Price said words to the effect that he would not have employed the Claimant had he been aware of this fact. In doing so, he used the expression "ten a penny" referring to the Claimant.

25. This was an expression which Mr Price frequently used when referring to workers. The Claimant had never met Mr Price before and never heard him use this expression to others. However, the Claimant's witness Mr Gardener has heard him use it several times, including to and about white employees.

26. The Claimant alleges that he did not like the remark and that he regarded it, at the time it was said, as racist. Specifically that he regarded it as a reference to slavery. Whether he held those opinions at the time or not, he did not report the remark to the respondent at the time, as alleged race discrimination. He claims that he spoke to the depot manager, known as Harry, 3 times about the remark and that he made clear he regarded it as racist and expected Harry to investigate and take action on behalf of the Respondent.

27. However, during live evidence, Mr Harriharan said he had no recollection of this (while admitting generally that he did not have good recollection of events from that time).

28. We are satisfied that, although he does not recall it, Mr Harriharan was interviewed by Mr King, Aviation & Travel Operations Director, who acted as Grievance Appeal Manager as part of the investigation of the Claimant's appeal.

29. As per page 247 of the bundle, we are satisfied that Mr Harriharan signed a statement on 20 April 2020, to say he had no recollection of the Claimant making any allegation to him of racism, including about the alleged remark.

30. The Claimant's own line manager, was also interviewed by King and (as per 250 ad 251) also denied in April 2020 that the Claimant had complained about racism or this remark by Mr Price.

31. Furthermore, when the Claimant put in a formal grievance in January 2020, which was after Mr Price had left the organisation, the Claimant did not say in the grievance that he had previously complained about Mr Price to Mr Harriharan.

32. February 2020 was the first documented occasion when the Claimant mentioned the ten a penny comment. This was during the discussions with Mr Craib Service Development Manager, who dealt with the Claimant's grievance at first instance. Even then, the Claimant did not allege that he had previously raised this with Mr Harriharan.

33. On the balance of probabilities, the first time that the Claimant complained to the Respondent that he was alleging that Mr Price had made a racist comment, or that the ten a penny comment was racist, was in February 2020, to Mr Craib.

34. Mr Gardener left the Respondent in December 2019. Some time between April 2018 (the first time the Claimant met Price) and, at the latest, December 2019 (when Gardener left) (or possibly earlier than December 2019, when Mr Price lest) there was a conversation in the car park with all 3 of the Claimant and Mr Gardener and Mr Price. Mr Gardener was telling the Claimant that the Claimant must not park his car, a Porsche, across 2 parking spaces. In particular, Mr Gardener was telling the Claimant that a director had instructed him to pass the message on and that it did not matter what car someone drove, they must only use one space.

35. During this conversation, Mr Price walked over and said words to the effect that the Claimant must be a drug dealer to be able to afford a car like that. The Claimant was upset by this remark. He made that clear to Mr Gardener. He did not report it to the Respondent at the time, or during his grievance, or include it in his claim form when presented to the tribunal. He referred to it on 11 March 2021 at the preliminary hearing, which is why it is in the list of issues.

36. It is not possible to fix a date when this remark was made. However, we are satisfied that it was made.

37. There was an incident on 14 January 2019 where the Claimant was injured. He was not at fault. The Claimant's colleague, crew member, Irfan Hafesji, accidentally pushed the stretcher trolley into the back of the Claimant's foot. The Claimant was puzzled when he came into work the next day (15 January 2019) and was summoned by Mr Price to take a drug and alcohol ("D&A") test. This test was conducted by Mr Price 24-hours after the incident in which the injury occurred. The D&A test was negative. The Claimant attended a training session straight after this test as required by Mr Price.

38. Since we have decided that the Claimant did not complain about the ten a penny comment until February 2020, it follows that it had not come to Mr Price's attention that the Claimant had alleged racism by him (or made any complaint about the comment) prior to this January 2019 conduct.

39. The Respondent accepts that there was inconsistency in its testing practices. According to the health and safety manager Mr Allsey (see 234 for his interview with Craib during the grievance) both the workers should have been tested. However, Irfan was not, and there is no specific explanation for why not.

40. The Respondent's position is that there was no random testing and that the policy and procedure was supposed to be clear about:

    40.1 Which incident would lead to a test being done

    40.2 Which person would be tested

41. We have not seen the policy. We therefore cannot read it ourselves and reach our own conclusions about how transparent and unambiguous it was. The Respondent relies on the witness evidence prepared for these proceedings and the evidence collated during the grievance investigation.

42. There was later an incident on 26 March 2019. The Claimant was using an ambulance with Mr J Francis. When neither of them was in the vehicle, which was parked, another car hit it.

43. After this, the Claimant was tested and Mr Francis was not.

44. We note that the January test document was signed by the Claimant but left blank by the person who carried out the test. (137). It is common ground that it was Mr Price who carried out the January 2019 test and so there is some evidence that the person who did the test did not always complete the form, or, at the least, that Mr Price did not always complete the form when administering a test.

45. On the face of the corresponding document for March 2019 it was signed by Mr Mark Pottinger and by the Claimant. (145). The chain of custody form on page 144 says that Mr Pottinger was the "collection officer" and also appears to contain both of their signatures.

46. The Claimant says he is certain that it was Mr Price who did the test. He says that he remembers that he challenged Mr Price who went to check with Mr Allsey and then came back and said that Mr Allsey had said the test should be performed on the Claimant. As per the notes on page 234, Mr Allsey does not provide positive corroboration for the Claimant's recollection. However, that is neutral as to whether Pottinger or Price performed the test; it would be conceivable, for example, that Mr Price had lied to the Claimant about speaking to Mr Allsey or that Mr Allsey simply did not remember.

47. We are satisfied based on the documents that it was Mr Pottinger who carried out this test on 26 March 2019 was carried out by Mark Pottinger.

48. We are satisfied that Mr Pottinger had no reason to misrepresent the truth on these important documents and that he did not do so. We reject any suggestion that, after Mr Pottinger died (in around March 2020), the Respondent or anybody else decided to forge his signature on the documents.

49. On the balance of probabilities, the reason Mr Pottinger decided to carry out the test was because during the investigation which he conducted, both Mr Francis and the Claimant implied that the Claimant, rather than Mr Francis had been driving the vehicle most recently before the accident.

50. The Respondent has not convinced us that its policies actually required a test to be done in these circumstances. (That is an unattended stationary vehicle being hit by another vehicle). However, we are satisfied that it was not Mr Price who made the decision. The Claimant does not allege that Mr Pottinger was motivated by race. On the Claimant's evidence. Mr Pottinger and Mr Francis are each, like the Claimant, black British.

51. On 30 October 2019, an incident occurred during a shift when Mr Francis and the Claimant were using the vehicle. As they were taking a patient into an address using a wheel chair. Mr Francis ended up on the floor and was concussed, and the patient and wheelchair ended on top of him.

52. The Claimant helped lift the patient and the wheelchair off Mr Francis. The Claimant believes he injured his back in the process.

53. An investigation into the incident started. The Claimant was present at work the next day and for around the next 2 weeks or so, until around 17 or 18 November (according to his fit notes) before going onto sickness absence because of his back. He did not resume work in the period relevant to this dispute.

54. On 2 January 2020, Ms Toni Whiteing, who had previously visited the patients address, and taken photos from the outside without gaining access to the premises, and gathered some information about the incident, wrote a letter to the Claimant inviting him to an investigation meeting, the outcome of which could be a decision to commence disciplinary proceedings (or could be no further action).

55. He attended that meeting on 9 January and the notes are in the bundle.

56. An undated letter was sent, some time between 9 January and 21 January, which appears at page 181 of the bundle. In the letter, Ms Whiteing says that the Claimant had already been supplied with the notes from the investigation meeting. In the letter she says

> My decision in light of the information discussed and evidence heard from both yourself and your crew mate, I will be putting your case forward to a disciplinary meeting. In the next few days you will receive a letter from your assigned DP manager and I will hand the notes along evidence over to them for review.

57. After receipt of that letter, the Claimant issued a grievance dated 21 January 2020

> Dear Dan
>
> FORMAL GRIEVANCE - VICTIMISATION
>
> I am registering a formal grievance against DHL “the Company” on the grounds of victimization.
>
> On two occasions over the past year I have been drug tested following incidents which were no fault of my own. On both occasions my crew members/employees who were responsible for these incidents were not tested.
>
> On the first occasion took place at the Royal Free Hospital where my crew member/employee (Irfan) pushed a stretcher into the back of my leg and injured me which required me to go to the hospital, in my own time and with loss of pay; and on the second occasion my crew member/employee (John) who was driving the ambulance and parked it up when someone hit and damaged the wing mirror.
>
> On both occasions I was drug tested but both of my crew members/employees who were more involved were not. I have raised my concerns over this with local management to no avail. I am therefore registering a formal grievance on the grounds of victimisation.

I will be represented at my grievance by my Trade Union Rep.

58. The letter was addressed to Dan Crossey. He handed it to Mr Craib. We have seen no evidence of how a decision was made, or why, that Mr Craib would deal with it. However, he agreed to deal with the grievance as he regarded himself as sufficiently senior, and because he had the capacity.

59. The disciplinary was put on hold until after Mr Craib had supplied an outcome letter

60. The outcome letter was 18 March 2020 (216). The grievance was partially upheld.

61. The Claimant appealed and Mr King investigated. Unlike Mr Craib, Mr King interviewed both Mr Crosssey and Mr Harriharan.

62. That appeal outcome was 30 April 2020 (see page 276). So it was after the claim was presented and post-dates the acts and omissions which appear in the list of issues. Mr King carried out some additional investigations. In effect, his outcome was that he agreed with the decisions and outcomes given by Mr Craib.

63. Subsequently Mr Matthews issued a final written warning to the Claimant as a result of the Claimant's role in the 30 October 2019 incident. This was on 4 May 2019 (page 279) and is also after the claim was presented, and also post-dates the allegations which appear in the list of issues.

64. There was no appeal against the disciplinary outcome.

65. Our finding is that the notes in the bundle of what was said in the various meetings are not verbatim, but are reasonably accurate and sufficiently reliable that we can use them to decide what was said in those meetings to Mr Craib and Mr King.

66. The Claimant was sent copies of the notes of the meetings with him and given the opportunity to comment. To some extent, he did so. He did not fully respond, partly because he did not agree with the contents of the notes and partly because the meetings with Mr King (conducted by telephone, in part because of Covid) had been difficult and complex.

The Law

Time Limits

67. In the Equality Act 2010 ("EQA"), time limits are covered in s.123, which states (in part):

> (1) Subject to sections 140A and 140B proceedings on a complaint within section 120 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 employment tribunal thinks just and equitable.
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

68. In applying Section 123(3)(a) of EA 2010, the tribunal must have regard to the guidance in Commissioner of Police of the Metropolis v Hendricks ([2002] EWCA Civ 1686; [2003] ICR 530); Lyfar v Brighton and Hove University Hospitals Trust [2006] EWCA Civ 1548. Applying that guidance, the Court of Appeal has noted that in considering whether separate incidents form part of an act extending over a period, one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents: Aziz v FDA 2010 EWCA Civ 304. The tribunal must consider all relevant circumstances and decide whether there was an act extending over a period or else there was a succession of unconnected or isolated specific acts. If it is the latter, time runs from the date when each specific act occurred.

69. In considering whether it is just and equitable to extend time the Tribunal should have regard to the fact that the time limits are relatively short. That being said, time limits are there for a reason and the default position is to enforce them unless there is a good reason to extend. That does not meant that the lack of a good reason for presenting the claim in time is fatal. On the contrary, the lack of a good reason for presenting the claim in time is just one of the factors which a tribunal can take into account, and it might possibly be outweighed by other factors.

70. The Tribunal has a broad discretion to extend time when there is a good reason for so doing. Parliament has chosen to give the Employment Tribunal the widest possible discretion. Unlike, say, the Limitation Act 1980, s 123(1) of the Equality Act does not specify any list of factors to which the tribunal is instructed to have regard. A tribunal can consider the list of factors specified in s 33(3) of the Limitation Act 1980, but if it does so, should only treat those as a guide, and not as something which restricts its discretion.

71. The factors that may helpfully be considered include, but are not limited to:

71.1 the length of, and the reasons for, the delay on the part of the claimant;

71.2 the extent to which, because of the delay, the evidence is likely to be less cogent than if the action had been brought within the time limit specified in Section 123;

71.3 the conduct of the respondent after the cause of action arose, including the extent (if any) to which it responded to requests for information or documents

Burden of Proof

72. S.136 EQA deals with burden of proof. It is applicable to all the Equality Act claims in this section (the claims of harassment, victimisation and direct discrimination).

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

73. S.136 requires a two stage approach.

73.1 At the first stage the Tribunal considers what facts have been proven to the Tribunal (and the findings could be based on evidence from the respondent or evidence from the claimant, it does not matter) and decides whether the tribunal has found facts from which the Tribunal could conclude - in the absence of an adequate explanation from the respondent - that the contravention has occurred. At this stage it is not sufficient for the claimant to prove that what he alleges happened did in fact happen. There has to be some evidential basis from which the Tribunal could reasonably infer that there was a contravention. That being said, the Tribunal can look at all the relevant facts and circumstances and make reasonable inferences where appropriate when deciding whether the burden shifts at Stage 1.

73.2 If the claimant does succeed at Stage 1 then that means the burden of proof does shift to the respondent and that the claim must be upheld unless the respondent proves the contravention did not occur.

74. If the Tribunal is not satisfied on the balance of probabilities that a particular incident did happen then complaints based on that alleged incident fail. S.136 does not require the respondent to prove that alleged incidents did not happen.

Direct Discrimination

75. Direct discrimination is defined in s.13 of the Equality Act.

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

76. It has two elements; firstly whether the Respondent has treated the Claimant less favourably than it has treated others ("the less favourable treatment question") and secondly whether the Respondent has done so because of the protected characteristic ("the reason why question").

77. For the less favourable treatment question the comparison between the treatment of the claimant and the treatment of others can potentially require decisions to be made about the characteristics of a hypothetical comparator. That being said, the two questions are intertwined and sometimes an approach can be taken that the Tribunal deals with "the reason why question" first. If the Tribunal decides that the protected characteristic was not the reason even in part for the treatment complained of it will necessarily follow that the person whose circumstances are not materially different would have been treated the same way. That might mean that in those circumstances there is no need to construct the hypothetical comparator.

78. Section 23 Equality Act 2010 provides that, on a comparison of cases in claims of discrimination, there must be no material difference between the circumstances relating to each case. For direct discrimination that means that any comparator relied upon, whether an actual person, or a hypothetical comparator, must be in the same relevant circumstances as the claimant.

79. When considering the reason for the claimant's treatment we must consider whether it was because of the protected characteristic or not. We must analyse both the conscious and sub-conscious mental processes and motivations for actions and decisions and s.136 applies.

80. In approaching the evidence in a case and considering the burden of proof provisions the Tribunal can have regard to the guidance given by the Court of Appeal in, for example, Igen v Wong [2005] ICR 931; [2005] EWCA Civ 142 and Madarassy v Nomura [2007] ICR 867; [2007] EWCA Civ 33. The burden of proof does not shift simply because the claimant proves a difference in race and a difference in treatment. That only indicates the possibility of discrimination, and that in itself is not sufficient. Something more is needed. The "something more" does not need to be a great deal more; it could, for example, depending on the facts of the case, be an untruthful or evasive answer from the Respondent or an important witness.

81. As per Essex County Council v Jarrett EAT 0045/15, when there are multiple allegations, the Tribunal has to consider each allegation separately when determining whether the burden of proof has shifted in relation to each one. It should not take a broad-brush approach in respect of all the allegations.

Harassment

82. Section 26 of the Equality Act defines harassment. It states (in part):

> (1) A person (A) harasses another (B) if—
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of—
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
> …
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
> (a) the perception of B;
> (b) the other circumstances of the case;
> (c) whether it is reasonable for the conduct to have that effect.

83. Race is a relevant characteristic for the purposes of section 26. The facts needs to establish - on the balance of probabilities - that the Claimant has been subjected to "unwanted conduct" which has the "the prohibited effect". To succeed, in a claim of harassment, it is not sufficient for a claimant to prove that the conduct was unwanted or that it has the purpose or effect described in Section 26(1)(b) Equality Act 2010. The conduct also has to be related to the particular protected characteristic (in this case race). However, because of section 136, the claimant does not necessarily need to prove - on the balance of probabilities - that the conduct was related to the protected characteristic. To shift the burden of proof, we would need to find facts from which we can infer that the conduct could be so related.

84. In HM Land Registry v Grant 2011 ICR 1390, the court of appeal stated that – when considering the effect of the conduct, and taking into account section 26(4)

– it was important not to "cheapen" the words used in section 26(1).

85. When assessing the effects of any one incident which is one of several incidents, it is not sufficient to consider each incident by itself in isolation. The impact of separate incidents can accumulate and the effect on the work environment may exceed the sum of the individual episodes. In **Qureshi v Victoria University of Manchester**, the EAT warned against taking too piecemeal an approach to the analysis of a set of incidents which were each said to amount to harassment or discrimination. Taking the allegations as a whole (as well as considering each individually) is necessary not just when assessing the effect of the Respondent's conduct on the claimant, but also when deciding whether to draw inferences that the unwanted conduct (or any of it) was related to race.

Victimisation

86. The definition of victimisation is contained in s.27 of the Equality Act.

> 27 Victimisation
>
> (1) A person (A) victimises another person (B) if A subjects B to a detriment because—
>
> (a) B does a protected act, or
>
> (b) A believes that B has done, or may do, a protected act.
>
> (2) Each of the following is a protected act—
>
> (a) bringing proceedings under this Act;
>
> (b) giving evidence or information in connection with proceedings under this Act;
>
> (c) doing any other thing for the purposes of or in connection with this Act;
>
> (d) making an allegation (whether or not express) that A or another person has contravened this Act.

87. There is an infringement if a claimant is subjected to a detriment and the claimant was subjected to that detriment because of a protected act. The alleged victimiser's improper motivation could either be a conscious motivation or an unconscious motivation. A person is subjected to a detriment if they are placed at a disadvantage. There is no need to prove that the claimant's treatment was less favourable than a comparator's treatment.

88. To succeed in a claim of victimisation the claimant must show that he was subjected to the detriment because he did the protected act or because the employer believed that he had done or might do a protected act. Where there is a detriment and a protected act then those two things alone are not sufficient for the claim to succeed. The tribunal has to consider the reason for the treatment and decide what (consciously or otherwise) motivated the respondent to subject the claimant to the detriment.

89. The claimant does not have to demonstrate that he protected act was the only reason for the detriment. If the employer has more than one reason for the detriment, then the claimant does not have to establish that the protected act was the principal reason. The victimisation complaint can succeed provided the protected act has a significant influence on the decision making. An influence can

be significant even if was not of huge importance to the decision maker. A significant influence is one which is more than trivial.

Analysis and conclusions

90. In relation to the April 2018 comment about 10 a penny, we are not satisfied that the burden of proof has shifted to the respondent. The evidence from Mr Gardner was that he had heard Mr Price use this expression many times to many different employees, at least some of whom were white. Mr Gardner was the claimant's witness, but in any case, the claimant did not present evidence of his own to suggest that the comment was not also made by Mr Price to white people. The claimant's main argument for inviting us to find that the burden of proof has shifted is that he asks us to take account of his opinion that it is an expression connected with slavery and he invites us to decide (based on that) that Mr Price could have been aware of a connection with slavery and, whether consciously or unconsciously, was using the expression because of its (alleged) connection to slavery.

91. However, even on the claimant's own case, including in the internal documents the claimant did not suggest that everybody would have heard the expression used in that particular context (ie connected to slavery). On his account, the issue of whether someone had heard the expression being used in a way which was connected to slavery depend on age, in particular. He also believed that it might potentially depend on the person's race, as well as their age, although he points out that his union representative Ted was white and had heard the remark commonly used as a reference to slavery.

92. However, the Claimant's own opinion about the history of the expression (and his reports about Ted's opinion) are not sufficient to persuade us that Mr Price might have been aware of the (alleged) connection to slavery.

93. Having decided that the burden of proof has not shifted are we are not satisfied that the claimant has proved that the remark was less favourable treatment because of race. The context of it was that the claimant was going to be absent for around four weeks or so. On the claimant's account (which we accept) that displeased Mr Price and Mr Price suggested he would have hired another employee instead. The claimant has not proven that he meant another black employee, and he has not proved that Mr Price was any more likely to respond with these words to the claimant as a black employee than had a white employee informed him of a four-week absence for honeymoon shortly after commencing work.

94. In relation to the victimisation complaints we have not been satisfied that the protected act occurred. We are not satisfied that the claimant spoke to Harry to state either expressly or by implication to Harry that the 10 a penny comment was regarded by the claimant as race discrimination or any other breach of the Equality Act.

95. Given that were not satisfied the report was made to Harry it follows that were not satisfied that Harry communicated to Dan Crossey or Toni Whiteing or Mr Price or anybody else that the claimant had made any complaint or allegation of the type

that might fall within the definition in section 27 EQA. We are not satisfied that those individuals had any reason to believe that the Claimant had done a protected act, or was likely to, at the time of the alleged detriments which were January 2019, March 2019, and 9 January 2020, according to (xiii) of the list of issues. In relation to the last item, the disciplinary proceedings, it was after those proceedings had commenced, and been put on hold because of the grievance, that the Claimant first complained (to Mr Craib) about the 10 a penny comment. However, the Respondent put the disciplinary on hold while the Claimant's grievance was investigated. The disciplinary proceedings did not resume because of any complaints/allegations made during the grievance process, but because the Respondent was satisfied that the grievance had been appropriately dealt with, and the temporary freeze on the disciplinary proceedings could be lifted (this being, in any event, after the claim form was issued, and not a specific detriment complained of in the tribunal proceedings).

96. In terms of the harassment allegations there are three examples of unwanted conduct (the same as the victimisation detriments): the drug testing January 2019; the drug test in March 19 and the disciplinary investigation.

97. In connection with the drug test in January 2019, it was unwanted conduct.

98. We do take account of the fact that we have not received a copy of the substance abuse policy. We also take account of the fact that the health and safety manager, Mr Allsey's view was that if there was an incident involving two people and one of them was injured while carrying a stretcher, then both of them should be tested. However, the fact that both people should have been tested and only one of them was in fact tested does not imply that the purpose in testing the claimant was to intimidate the Claimant. We are not persuaded that it was the respondent's intention or Mr Price's intention to violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant by applying the drug test to him.

99. In considering the effect on the claimant, we take into account that he was very offended by having to be tested. In particular, he was offended by the fact that his colleague was not also tested. However, he was not so offended that he put in a formal complaint about it either in writing or otherwise. In fact, he did not complain about it until 12 months later, and then only after disciplinary proceedings had been instigated.

100. We also take into account that the test was 24 hours after the event, and so the claimant regarded the exercise as pointless. He regarded it as particularly problematic because – from his perspective - he was the victim of an incident in which he was the innocent party and had suffered an injury and yet the respondent was testing him (and only him) rather than the other person. Had the respondent put its substance-abuse policy into the bundle and shown us that it was a regular occurrence (or express policy) for people to be tested after they had suffered an injury, regardless of who or what caused the injury, then that might have been a persuasive factor to persuade us that this did not have the forbidden effect on the claimant.

101. However, on balance, in all the circumstances, even taking account of the fact that there was no formal complaint by the claimant for 12 months, we are satisfied that this did have the effect of violating the claimant's dignity and creating what the claimant regarded as an offensive intimidating, et cetera environment for him.

102. We therefore have to decide whether there is evidence from which we could infer that the unwanted conduct was related to race.

103. One thing which the claimant relies on specifically was the comment in the car park about the claimant's been a drug dealer. We do not have any dates for that remark. We are not being asked to directly decide a complaint that that remark was related to race, but rather we have been asked to infer that that remark was related to race, from that, decide that the testing decision in January 2019 could have been related to race.

104. In all the circumstances we are not persuaded that the burden of proof should shift. We are satisfied that it would be considered normal by the respondent to carry out a drug and alcohol test on any employee regardless of race, when they were injured in an incident at work similar to the one on 14 January 2019. The fact that the policy was applied inconsistently does not in itself shift the burden of proof. For one thing, we have not been shown any evidence that employees of any particular race were either more likely or less likely to be tested than members of any other racial group.

105. The burden of proof has not shifted, and the claimant has not persuaded us that the unwanted conduct was related to race. While he asks us to draw inferences from the comments in the car park about being a drug dealer, Mr Gardener's evidence was that the comment was made as something that Mr Price seemed to regard as a joke. We accept Mr Gardener's evidence that Mr Price was in the habit of making jokes that Mr Gardener regarded as "silly".

106. The fact that it was intended as a joke would not be something which, in itself, would prevent us finding that the comment was in some way connected to race. However, what the claimant is actually asking us to infer is much more than that it is that this comment on some unknown date was sufficient evidence for us to conclude that the decision by Mr Price in January 2019 to subject the claimant to a drug test was related to race. The claimant would not of course have to prove that race was the main reason for testing him, so long as it played some part (including an unconscious part). However, we are not satisfied on the evidence (including the that race played any part in the decision.

107. In relation to the March 2019 testing as per our findings of fact itself use it with Mr Pottinger not Mr Price, who tested the claimant on this occasion. There are no facts from which we could decide that the unwanted conduct was related to the claimant's race. The background circumstances are that the claimant had completed paperwork in which he was told that it was important that he given accurate description of events and in which he had said that he was the most recent driver.

108. In the absence of the policy, we cannot say that it was the respondent's policy to always test the most recent driver of a vehicle if it had been parked, with nobody in the vehicle, when another vehicle had crashed into it.

109. However, as per the findings of fact, the claimant's recollection is wrong and it was not Mr Price who tested him. Mr Pottinger is not somebody whom the claimant alleges ever made any comments (as a so-called "joke", or otherwise) about the claimant's being a drug dealer and Mr Pottinger is not someone alleged to have made any racist remarks, either about the Claimant or anyone else. On the contrary, the claimant's evidence was that he regarded Mr Pottinger as a friend. His case is not that Mr Pottinger made a decision that was related to race; his case is that Mr Pottinger did not make the decision and that it was Mr Price who did so. We rejected that argument.

110. The claimant has not persuaded us that the March 2019 conduct by the respondent was related to race.

111. In relation to the disciplinary proceedings the respondent has not produced a full and complete set of all the documents which are likely to be in its possession. Furthermore, we have not really had a satisfactory explanation for why Ms Whiteing could not have been asked by the Respondent to come and give evidence. (We do accept that she no longer works for the Respondent.)

112. We do not find it necessary to draw any adverse inferences against the respondent in relation to either of these omissions, but it would have been preferable if we had a complete record of everything the respondent had done after 30 October 2019 to investigate the incident with the patient in which Mr Francis and the claimant had apparently suffered injuries.

113. We do accept, and we think it is a matter of common sense, that this type of incident is always going to have some degree of formal investigation for various purposes. The Respondent is going to want to make records, and that was done on this occasion. Ms Whiteing (or somebody acting on her behalf) took photos from outside the patient's home.

114. At some stage or other somebody must have made the decision that an accident investigation should also be a disciplinary investigation. That might have been Ms Whiting or it might not. We simply do not know.

115. The claim that we need to consider is that the commencement of (and continuation of) the disciplinary investigation/proceedings is harassment related to race.

116. The decision to use the disciplinary procedure was unwanted conduct.

117. The claimant has not proved to us that the respondent's purpose was to violate his dignity et cetera in relation to this decision.

118. The claimant has not proved, for example, Mr Price played any part in the decision to commence an investigation. Mr Price had left the organisation prior to the 2 January 2020 letter which was sent by Ms Whiting inviting the claimant to an investigation meeting.

119. Regardless of the effect of the letter on the Claimant, the burden of proof does not shift in relation to whether the decision was related to race.

120. Both the employees involved were the subject of the investigation. That is neutral as to whether the decision was related to race as both individuals were (according to what we were told) black British.

121. However, we are satisfied from Mr Matthews evidence (based on the photos he has seen) that, within DHL, the practice was that a carry chair should have been used. We are also satisfied that the evidence reviewed by Ms Whiteing prior to deciding there was a case to answer, included calling the Claimant to the meeting, and reviewing he Claimant's training record

122. Ms Whiteing's decision that there was a case to answer is not inherently suspicious given that she had interviewed the claimant and noted his answers and submitted details of the interview, together with the other evidence that she had collated to the Human Resources Department for them to arrange the disciplinary hearing.

123. The claimant's suggestions that a more detailed investigation could have been done and/or that she could or should have reached a different decision are only relevant if, and to the extent, those arguments persuade us that there were facts from which we could infer that the decisions made, and Ms Whiteing's conduct, was related to race.

124. In actual fact, we are satisfied that - on the face of the documents and other evidence presented to us - a reasonable investigation was carried out and, further, that the decision to recommend that there be a disciplinary hearing is not surprising or unusual. It is not our role to consider whether the Respondent got it "right" or not. However, the burden of proof does not shift and we have not been persuaded that there are facts from which we could conclude that the instigation of the disciplinary proceedings or the decision to move from the investigation stage to the disciplinary hearing stage was related to race.

125. We are also satisfied that the reason that matters were put on pause after Ms Whiteing's decision that the matter would proceed to a disciplinary was because of the grievance and then the grievance appeal.

126. We have therefore found against the claimant on all of the complaints on the merits of the alleged acts and omissions, and it is not necessary for us to consider the respondent's argument that it was not vicariously liable for the actions of the employees in question.

127. However, we will go on to consider the time limit issues as they go to jurisdiction.

128. The complaints in relation to the disciplinary investigation were in time. However, the fact that they were in time would not have enabled us to find that there was a continuing act which included the drug tests and/or the 10 a penny comments, because none of the complaints in relation to the disciplinary proceedings were found to be any breach of the Equality Act.

129. Therefore, the claimant would have had to rely on just and equitable extension in relation to the other complaints.

130. In relation to all of those other complaints a crucial individual was Mr Price. The Claimant said he had made the April 2018 comment to the claimant and had tested him in both January and 2019.

131. Mr Price left the respondent's organisation during 2019. Mr Price had left the organisation before the claimant had made any formal complaints about the matters which are the subject of this litigation.

132. Even as per the January 2020 written complaint about the way the drug tests 12 months earlier and 10 months earlier respectively, the Claimant did not mention race was a factor, and nor did he mention the 10 a penny comments.

133. In fact, he did not even mention the 10 a penny comments when he first met Mr Craib and it only came up in subsequent meetings.

134. Even when the 10 a penny comment was mentioned, the claimant did not claim that he had previously reported it to Harry as alleged race discrimination and that assertion was made until after the Craib grievance outcome.

135. The respondent has been significantly prejudiced by the delay in raising these matters. In relation to the alleged remarks in April 2018, it was almost 2 years later by the first time the claimant raised these comments. Even had the respondent been able to get hold of Mr Price it might have been difficult Mr Price to remember the conversation. Furthermore, it is not an incident for which there will be any documentary evidence and so the respondent's defence would rely entirely on whether or not Mr Price was able to recollect the incidents and whether or not he was willing to cooperate in the litigation.

136. We note that the Claimant has said that during 2018 he was waiting for Mr Harriharan to come back to him and that he, the Claimant, as a new employee, did not know how long it would typically take Mr Harriharan to look into something of his nature. However, our finding of fact was that no complaint had been made.

137. In any event, on the Claimant's own account a few months after he first reported the remark, he spoke again to Harry who was dismissive. The Claimant waited over a year even after that second alleged interaction and we do not accept the explanation that he did not put something in writing, or more formal because he was still waiting for or expecting a response to an oral complaint. The Claimant's own description of the second interaction would have made clear to anyone that – even if the Claimant had mistakenly thought an investigation was underway - Mr Harriharan did not see it that way.

138. For these reasons, the balance would be against using the just just and equitable extension taking into account, amongst other things, the fact that we have found that the complaints did not succeed in any event, and therefore the claimant is not losing anything valuable by having time refused.

COSTS

139. Having given our decision and reasons on liability, we went on to deal with the parties' respective submissions about what we should order in relation to the deposit paid by the Claimant. There was also a costs application. After hearing submissions, we retired to deliberate, and then invited the parties back to receive the oral judgment and reasons.

140. Rule 39 deals with deposits and includes:

> (5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—
>
> (a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and
>
> (b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders), otherwise the deposit shall be refunded.
>
> (6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

141. In this case, the Claimant had been ordered to pay a deposit following a hearing on 11 March, the order stating:

> The Employment Judge considers that the claimant's allegations or arguments that he has been discriminated against contrary to the Equality Act on the grounds of race have little reasonable prospect of success. The claimant is ORDERED to pay a deposit of £200 not later than 28 days from the date this Order is sent as a condition of being permitted to continue to advance those allegations or arguments. The Judge has had regard to any information available as to the claimant's ability to comply with the order in determining the amount of the deposit.

142. The reasons for making the order included, in relation to the complaints about Mr Price:

> There is no explanation as to why no application was made to the tribunal by the claimant in a timely matter. As Mr Price no longer works for the respondent, the delay in bringing this claim is likely to have seriously affected the cogency of the evidence available to the employment tribunal and I consider that there is little reasonable prospect of a tribunal finding a just and equitable to extend time in these circumstances.

143. The reasons included, in relation to the disciplinary proceedings:

> I consider that there is little reasonable chance of an employment tribunal drawing a link between the events of January 2020 (the commencement of the disciplinary process) and the previous allegations or finding that there was a course of conduct extending over a period or the continuing act of discrimination stretching from October 2018 to January 2020.

144. In relation to victimisation (for the disciplinary proceedings)::

> Even if the claimant is able to show that his verbal complaint in 2018 constitutes a 'protected act', I am unable to identify any link between this protected act and the initiation of disciplinary proceedings against the claimant in 2020. Mr Price has departed from the employer and considerable time has passed since the previous allegations of victimisation and the protected act itself. I have seen nothing to suggest that the decision-makers were aware of any protected act. I conclude that the claimant's claim of victimisation, relating to the disciplinary proceedings in January 2020 has little reasonable prospect of success.

145. In relation to harassment (for the disciplinary proceedings):

> The tribunal explained that to be successful within his claim the claimant must as a first step show a prima facie case or facts from which the tribunal could decide, in the absence of any other explanation, that the respondent actions in raising and dealing with the disciplinary matters were in some way related to his race or colour.

146. We had regard to the whole of the reasons in the 5 numbered paragraphs. The reasons which we gave for the claims of discrimination, harassment and victimisation failing were substantially the same as those stated in the reasons accompanying the deposit order. Thus the condition set out in Rule 39(5) is satisfied.

147. Rule 39(5)(b) therefore applies. The deposit of £200 shall not be returned to the Claimant, but, instead, will be paid to the Respondent. As per Rule 39(6), this £200 is taken into account as part satisfaction of any costs award which we make.

148. Because of Rule 39(5)(a), unless the contrary is shown, the Claimant is deemed to have acted unreasonably in pursuing the allegation or argument. In this case, the contrary has not been shown. In other words, the relevant condition in Rule 76(1) is met and we "shall" consider whether to make an award of costs (within the scheme set out in Rules 74 to 84).

149. However, while we "shall" consider such an award, it remains the case that an award of costs is a matter for the panel's judicial discretion and an award is the exception rather than the rule, even where the gateway is met. If we do award costs, they must be compensatory rather than punitive, and we should take account of the ability to pay and all of the relevant circumstances.

150. We note the schedule of loss stated a figure which was higher than a well-informed and well-advised claimant might have reasonably expected to have been awarded, had all of the claims been fully successful. However, it does not follow from that that the Claimant would not have been willing to compromise for a lower sum had

one been offered and the mere fact alone that the schedule of loss stated a high sum is not of huge significance. If he had been successful, the tribunal would have been able to deal with remedy within the hearing slot.

151. We can potentially take into account, if raised, and argument that the party relied on advice from a professional that their claim was a reasonable one. The Claimant took advice from the union at the time was issued that it was likely to succeed. However, that advice was around about a year prior to EJ Skehan's deposit order decision and reasons. No matter what the Claimant might have thought about the reliability of the union's opinion in around March 2020, by March 2021, he had the benefit of a carefully worded explanation, in plain and everyday language, about some of the weaknesses in the arguments he would need to succeed on in order for the respective complaints to be decided in his favour at the end of the 4 day final hearing. By May 2020 (so after the union's advice), the grievance had been given an outcome (albeit not the one which the Claimant wanted) and the disciplinary proceedings had concluded without dismissal (but with a final written warning).

152. For these reasons, we are satisfied that we should exercise our discretion, and make an award of costs in relation to the Claimant's decision to continue the litigation even after the deposit order had been made.

153. We take into account the Claimant's ability to pay. We also take into account the fact that the Respondent will have £200 towards its costs (the deposit). However, we think an award higher than £200 is appropriate.

154. The Claimant (and his wife) has no income at the time of the hearing (though was about to have some income not long after the hearing, for the reasons which he described). He and his wife have the usual outgoings for energy costs, council tax, food, and other household bills. They own their home and have no mortgage. They have little in the way of disposable assets.

155. The Respondent seeks a sum of £4080. The sums sought are reasonable in the circumstances, and would be compensatory not punitive. We are sure that the full legal costs of preparing for the hearing would have been much higher than the amount requested.

156. However, taking account of the means to pay, we think we should make a lower award. In addition to the £200 deposit, we order the Claimant to pay a further £1000.

Employment Judge Quill

Date: 15 August 2022

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

.....

. .....
FOR EMPLOYMENT TRIBUNALS