EMPLOYMENT TRIBUNALS

Claimant:	**Mr R Smith**	
Respondent:	**John Raymond Transport Limited**	
Heard at:	**Mold & CVP**	**On: 22nd & 23rd September and 30th November (in chambers) 2021.**
Before:	**Employment Judge R F Powell**	
Members:	**Ms Kiely** **Ms Bishop**	
Representation:		
Claimant:	**Ms Da Costa, solicitor**	
Respondent:	**Ms Donovan, Counsel of the Irish Bar**	

JUDGMENT

The unanimous judgment of the Employment Tribunal is:

1. The claims of harassment, for reasons related to race and age, are not well founded and are dismissed.

2.The claims of direct discrimination, because of race and age, are not well founded and are dismissed.

REASONS

1. By a claim form presented to the Employment Tribunal on the 31st March 2020, Mr Richard Smith alleged that his former employer, John Raymond Transport Limited, subjected him to direct discrimination and/or harassment on the grounds of his protected characteristics of race and age. He also presented a claim a for notice pay and unpaid accrued holiday pay;

matters which were resolved by a judgment of Employment Judge Fowell on the 21st June 2021.

2. Mr Smith describes himself as a person of black Jamaican origin and, at the material time, he was 77 years of age. He describes his working background as an HGV driver for around 50 years and owning his own vehicle transport business for a substantial period prior to 2009.

3. The Respondent is a substantial transport company which operates from several sites of which its Cannock site is material to this case. The respondent operates a fleet of heavy goods vehicles, transporting goods and materials to and from customers' premises.

4. It is agreed between the parties that Mr Smith was employed by the respondent for three days between the 4thand 6th December 2019. In that period, Mr Smith avers that he was subject to seven incidents of harassment/direct discrimination on the grounds of his race or age, the last of which was his dismissal. Those claims were helpfully analysed and set out at paragraphs 7 to 11 of the Case Management Order of Employment Judge Fowell.

5. The respondent denies the claims. It does not plead any justification for any incident of harassment. It does assert that it had taken all reasonable steps to prevent its employees from acting in a discriminatory manner in accordance with Section 109 of the Equality Act 2010.

6. This case was listed for two days Unfortunately, Non-Legal Members had not been allocated to this hearing and there was some delay whilst arrangements were made to remedy this. The hearing of the evidence commenced on the afternoon of the first day and, consequently, judgment could not be given orally as our deliberations, although largely complete, could not be finalised within the allotted time.

The Evidence

7. The parties provided an agreed bundle of documents which also included the witness statements of the following relevant people who gave evidence before us:

8. Mr Smith gave evidence in accordance with his handwritten statement.

9. Mr Maurice Watson, Manager of the respondent's Cannock Depot who interviewed the claimant and offered him employment subject to a driving assessment, which Mr Watson also conducted. He considered the claimant, with some concerns, competent to drive the respondent's vehicles.

10. Mr Daniel Woodward, a driver who, on the 4th December 2019, accompanied the claimant on his first day of work for the respondent and reported concerns about the claimant's driving.

11. Mr Jason Walton, a driver who accompanied the claimant on the second and third days of his work and reported concerns about the claimant's driving.

12. Mr Clinton Harrison, Transport Manager of the Cannock depot, who dismissed the claimant on the 6th December.

13. Each of the witnesses gave evidence in chief in accordance with their witness statements (the respondent's statements were dated February 2020 and appear to have been prepared for its grievance process) and were cross-examined.

Findings of Fact

14. In this case, all but one of the alleged incidents of less favourable treatment or unwanted conduct is denied and our findings of fact could determine several of the claims. We have first set out a summary of the parties' evidence and noted facts which we consider were not in dispute. Thereafter, we have given our analysis of the evidence and our findings on the contentious issues

The evidence and facts which were not contested

15. Mr Richard Smith was, at the material time, 77 years old and living in the village of Trawsfynydd in North Wales. He had previously been an HGV driver working for a number of companies[1] and was then running his own transport business until it closed during the financial crisis of 2009. He then worked as a driver for companies such as Tesco and Unilever until he moved to North Wales. He told us that he had not worked regularly as an HGV driver for 6 or 7 years prior to his application for employment with the respondent.

16. Mr Smith sought work HGV driving in North Wales without success and then looked further afield. Through a friend, he became aware of a vacancy with the respondent in Cannock which was about 100 miles from his home. The job was for an LGV driver who would be driving throughout the week and sleeping in the cab of his vehicle; a role colloquially known as "a tramper".

17. The claimant telephoned Mr Watson and was interviewed during that call. Mr Watson then invited the claimant to attend the Cannock depot . The claimant did so, and was given a conditional offer of employment. That offer was subject to a driving assessment and the successful completion of the induction process.

18. It was an agreed fact that Mr Watson accompanied Mr Smith on a driving assessment which lasted in the region of 40 minutes and Mr Smith agrees that he signed a Driver Risk Assessment form on the 4th December 2019. He further agrees that a document titled Driver Risk Assessment, at page 77 of the bundle, bears his signature.

19. Where the evidence of Mr Watson and Mr Smith differ is whether the form was blank when Mr Smith signed it or, as Mr Watson stated, he had been completing the form during the assessment before Mr Smith signed it.

[1] We accepted the facts set out under the title "My Professional History"; page 100-101 of the bundle.

20. Before turning to that dispute, we find that Mr Watson marked twenty-one of the twenty-four criteria listed on the assessment form as "passed" and three as requiring "further training ". None of the criteria was marked as "fail". The three elements of inadequate performance were viewed by Mr Watson as "nerves and rustiness", not bad driving.

21. The three criteria which Mr Watson thought needed further training were: "Lane discipline/position awareness", "Vehicle position awareness-roundabouts" and "Use of signals". There was no note of concern over Mr Smith's reversing.

22. Mr Smith, at paragraph 5 of his statement, describes sitting down in a small office with Mr Watson and states that he was given 150 sheets of documentation to sign. Mr Watson, in cross-examination, agreed that the claimant had been given about 100 pages of employee information, a contract and the Driver Assessment Sheet. It is therefore common ground that Mr Smith signed the Driver Assessment Sheet after the assessment had been completed and Mr Watson had agreed he could commence employment.

23. On the balance of probabilities, it is more likely than not that Mr Watson's recollection is correct that, in the course of the 40-minute assessment, he "ticked" the relevant box for the criteria and, whilst in the cab at the end of the driving, summerised his judgment to Mr Smith. This was a natural precursor to his statement that Mr Smith would be offered employment.

24. We have concluded that when Mr Smith signed the Driver Assessment sheet it was evident that each of the criteria had been marked.

25. We also find that the assessment recorded on the Driver Assessment sheet, and confirmed by Mr Watson's oral evidence, was Mr Watson's genuine contemporary judgment. Mr Watson is not alleged to have acted in a discriminatory manner.

26. After Mr Smith accepted the offer of employment Mr Watson emailed his colleagues to inform them of Mr Smith's start with the company and that he would be "d-manned" (accompanied by another driver) during the week of the 4th December 2019 [see page 78 of the bundle].

27. Mr Smith then went out to work with a cab and trailer in the company of David Woodward. Mr Woodward was a recently-qualified HGV driver and his purpose was to introduce Mr Smith to some of the regular sites which the lorries of the Cannock Depot visited. He was also expected to show Mr Smith the site procedures and methods at the customer depots.

28. Mr Smith and Mr Woodward agree that they took loads between Unilever and the Tesco depot at Lichfield and did a collection in Wakefield. They agree that Mr Smith undertook the driving but they differ as to the standard of Mr Smith's driving and in particular Mr Smith's confidence in reversing with a trailer.

29. We note that Mr Woodward is not alleged to have harassed or treated Mr Smith less favourably[2].

[2] EJ Fowell's Order of the 4th June 2021 at paragraph 7(a) to (f) and 10

30. Mr Woodward, as confirmed by Mr Harrison's evidence, spoke to Mr Harrison following his return to the Cannock Depot.

31. Mr Woodward confirmed that he could not have spoken to Mr Harrison face-to face on his return to the respondent's depot because the uncontested record of his tachograph for the 4h December 2019 [supplemental documents, 19] show Mr Smith's lorry did not return until after 9pm; a time by which Mr Harrison was no longer at the depot.

32. Mr Woodward's account of Mr Smith's driving is very different to that Mr Watson experienced on the same day. He described Mr Smith "struggling a bit with manoeuvring at the Tesco distribution centre and later, at the Wakefield site, taking an initial 20 attempts to reverse into a bay, then getting out and asking Mr Woodward to complete the manoeuvre. He described similar, if less severe, difficulties with parking in the bays at the respondent's depot.

33. This conflict of evidence reflects the essence of the parties' dispute. The respondent states that its only reason for dismissing Mr Smith was his intolerably poor standard of driving. Mr Smith argues that the allegations of poor driving are false; a disguise to hide the true motive: his race and age.

34. Mr Woodward's account of events before us is materially similar to that Mr Harrison recalled Mr Woodward giving to him on the evening of the 4th December. Mr Harrison's evidence is that, in response to Mr Woodward's account, he allocated Mr Smith a more experienced companion for the following day: Mr Walton.

35. On the next day Mr Smith was allocated Mr Jason Walton as his companion. The evidence of Mr Smith and Mr Walton are contrary, so much so that it is difficult to consider that their dispute could be one of misunderstanding or personal perceptions. This is also true of the matter disputed

36. Mr Smith's witness statement does not mention his driving on the 5th December 2019. In a written response to the reasons for his dismissal, dated the 22nd January 2020 [84-88], Mr Smith did give an account of that day and this was put to Mr Watson in cross-examination

37. It was stated that Mr Smith had driven Mr Walton's cab throughout the day. There was no fault with his driving. That Mr Smith had securely attached a safety chain on each occasion they picked up a trailer. Having attached it correctly, it was impossible for the chain to detach by accident and he implies that Mr Watson had detached the safety chain. Mr Walton disagreed and remained firmly of the view that aspects of Mr Smith's driving had been poor.

38. Mr Watson's account states that Mr Smith struggled to reverse at the Unilever site so much that Mr Walton left the vehicle to stand alongside and assist. He said that at Muckley corner on the A5 Mr Smith approached an island at an excessive speed, mounted the kerb with the trailer and drove on the footpath. He also stated there had been several "kerb strikes". He stated that later, at the Tesco site, Mr Smith again had difficulty reversing and again Mr Walton got out of the cab to direct him but Mr Smith reversed into a bay traffic light.

39. Mr Walton stated that he had conveyed his concerns to Mr Harrison on the evening of the 5th December; an assertion which Mr Harrison confirmed in his evidence.

40. On the 6th December, at Mr Harrison's direction, Mr Walton again accompanied Mr Smith on his journeys, using Mr Walton's cab.

41. Again, the two witnesses accounts are at odds;

42. Mr Smith's witness statement's account of the 6th December begins at noon, whilst they were at the Tesco site. He describes Mr Walton removing Mr Smith's tachograph from the driver's slot and putting it half into "slot 2" of the tachograph and removing Mr Smith's traffic camera and replacing it with his own. This he believed, with hindsight, was Mr Walton dismissing him at that time.

43. He then then recalled Mr Walton said: "You're 75, aren't you? Say it, say it, you're 75" and "Smith, that's a funny name, what kind of name is that?" To which Mr Smith replied; "have you not heard of Iain Duncan Smith?"

44. Mr Walton denies that he said these words at all. He does accept that he spoke to Mr Harrison by telephone, informing him of contained incidences of poor driving and was asked by Mr Harrison to take over the driving and return to the depot. That evidence was corroborated by Mr Harrison

45. Mr Smith went on to state that Mr Walton had been on his phone to Jeff (who it is now agreed is Mr Harrison) and that Mr Walton was "relaying it all back to Jeff". This is agreed.

46. it is agreed that Mr Walton drove the vehicle back to the Cannock Depot and, upon their return, Mr Smith was asked to see Mr Harrison.

47. It is agreed that Mr Harrison dismissed Mr Smith. There is substantial dispute as to what was said. Mr Smith's does not refer to the discussion with Mr Harrison ("Jeff" in Mr Smith's written statement) but the content of his letter of the 22nd of January was put to Mr Harrison that he shook the claimant's hand and said "no hard feelings". When asked what the problem was, Mr Harrison had said no more than "a couple of things".

48. Mr Harrison's evidence was consistent with his letter of the 18th December 2019 [81], which in response to a request from Gwynedd CAB, set out the reasons for Mr Smith's dismissal.

Findings of fact on the disputed evidence

The parties' submissions on the disputed facts.

49. The claimant emphasised a number of points which we have considered carefully, which are:

50. That Mr Woodward was an inexperienced HGV driver and not competent to make any judgment on a vastly experienced driver such as Mr Smith.

51. That Mr Watson's description of the claimant's reversing was in conflict with Mr Watson's assessment of the claimant the previous day.

52. That Mr Harrison's account of seeing Mr Woodward at the depot on the evening of the 5th December was untrue.

53. That Mr Walton's evidence was inconsistent with Mr Watson's assessment of the claimant's reversing and no one disputed the accuracy of Mr Watson's judgment.

54. That Mr Walton's comments about Mr Smith's age were unambiguous and evidence that he was consciously influenced by that factor

55. That Mr Walton's question about a very common surname was a barely-disguised reference to Mr Smith's colour or Jamaican origin.

56. That Mr Walton's criticisms of Mr Smith were fabricated and, when viewed in the context of his comments, his motive was clearly discriminatory.

57. That Mr Harrison's recollection was unreliable, that the account of the meeting on the 6th December was not true and the fact that he had not warned Mr Smith, nor given any reason or notified him of a right to appeal were indicative that, consciously or unconsciously, his decision to accept the word of Mr Woodward and Mr Walton without hearing the claimant's account, was indicative that he had been influenced by Mr Smith's age or race.

58. That the employment tribunal had to be astute in its analysis. Discrimination is rarely overt and the explanations of the respondent required rigorous testing. In doing so, it should be taken into account that the respondent had not retained potentially relevant traffic camera recordings and that there were significant contradictions in the respondent's evidence.

59. The respondent emphasised the degree of corroboration between its witnesses, the burden of proof resting upon the claimant, and adopted its witnesses' answers in cross-examination that a driver on an assessment may be on their "best behaviour" but not so when driving with a colleague whom they do not suspect is monitoring their performance.

Analysis

The descriptions of Mr Smith's driving

60. As we have noted above, the parties' evidence of Mr Smith's driving is in stark contrast to his. In many cases, disputes of fact are evidently a consequence of partial recollection, subjective perception or misunderstanding. In a case such as this where a witness says that the driver made 20 attempts to reverse into a bay before giving up and the other witness says he reversed without difficulty, the issue is not one of reliability but honesty.

61. With regard to Mr Woodward, we have considered the fact that he was inexperienced and had very recently passed his HGV test. Had the dispute between his evidence and Mr

Smith's been less stark or one of impression and opinion, his inexperience might have been a powerful point. However, his recent qualification is, in our judgment, not a sound basis for doubting his ability to give an account of someone making 20 attempts (and giving up) to reverse a long trailer into a bay at a warehouse or depot.

62. We make the same observation in respect of a dispute between the witnesses as to whether the bay was one marked with white lines or a physical structure.

63. We take into account the degree of corroboration of Mr Woodward's account from Mr Harrison's evidence which confirms that Mr Woodward gave a similar account on the day.

64. We also take into account the element of corroboration in Mr Walton's evidence of his experience on the 5th December, his report to Mr Harrison on the 5th, his telephone call to Mr Harrison on the 6th and Mr Harrison's instruction to Mr Walton to take over the driving and return to the Cannock depot.

65. We also take into account that Mr Walton's account described driving errors of the sort which Mr Watson had noted during the formal assessment [77] on the 4th December: position awareness at roundabouts, and lane-changing.

66. We take into account the fact that Mr Smith's evidence on reversing is corroborated by Mr Watson's evidence and the driving assessment record. We take into account that Mr Smith had 50 years of experience, albeit he had not exercised those skills frequently in the years preceding 4th December 2019.

67. We took into account that the respondent had not produced an accident report for the alleged contact with the parking bay traffic light and that the respondent had not kept the recording from the claimant's "dashcam" – which was explained by the respondent's evidence that the recordings were only kept for 30 days and it was not apparent it might be relevant to this case until some weeks after the 6th January 2020.

68. Most significantly, we considered the apparent conflict between Mr Watson's assessment of the claimant's parking on the 4th December with the accounts of Mr Woodward and Mr Walton. We have considered whether Mr Woodward, Mr Walton and Mr Harrison have lied to the tribunal. Whilst that is a possibility, we have taken into account, having had the benefit of considering their evidence given during robust cross-examination, we have concluded that it is more likely that Mr Smith's performance on his assessment was his driving at his best, and that aspects of his driving, over a period of sustained work, was of a lower standard in some respects.

69. Taking all of the oral and documentary evidence into account, we have reached the conclusion that the respondent's evidence is the more reliable.

70. We therefore find that Mr Woodward's account of Mr Smith's driving is, more likely than not, an accurate description. We reach the same conclusion with respect to Mr Walton's account of the claimant's driving on the 5th and 6th December 2019.

71. We find that Mr Harrison received the reports from Mr Walton and Mr Woodward and was genuinely concerned that the claimant was not driving in a competent manner.

72. We find that it was the genuine concern about the claimant's competence which motivated Mr Harrison to instruct the Claimant and Mr Walton to return to the Depot

73. We find that Mr Harrison dismissed the claimant because of the reports of poor driving which he had received and which he believed.

The incidents of unwanted conduct on the 6th December 2019

" *Jason Walton shouting "Oi, you're coming with me today and I don't mean tomorrow" and "Pick that trailer up*".

74. Mr Smith sets out this allegation in his statement and in his correspondence to the respondent dated the 22nd January and the 16th March 2020.

75. Mr Walton does not accept that he spoke in a rude manner. While we do not consider Mr Walton to be dishonest, we noted that, as a witness before the tribunal his communication was gruff, occasionally brusque, and plain spoken.

76. We are satisfied that, in the context of speaking to someone in a transport yard, it is likely that Mr Walton, on first meeting Mr Walton, genuinely perceived him to be rude.

77. We find that ,on the balance of probabilities and regardless of Mr Walton's self-perception, it is more likely than not that he presented as a discourteous and rude person.

"*Jason Walton spending a lot of time on the phone and cutting the conversation when Mr Smith came near".*

78. This allegation concerns Mr Walton's telephone calls to Mr Harrison and the reference to "when Mr Smith came near" refers to points in time when Mr Smith and Mr Walton were not in the cab which, on the evidence before us, referred to one occasion when they were at a depot where they were receiving or delivering goods.

79. Mr Smith's evidence in his statement does not refer to this allegation and probably for this reason, he was not cross-examined on this issue. His written account in his letter of the 22nd January 2020 [85] does: "While we were waiting for the load, Jason spent a lot of time on his phone, cutting off his conversation when I came near. I now wonder if he was blaming me for the delivery delay."

80. From the claimant's pleaded case, at paragraph 17 [17], this alleged conduct occurred on the 5th December 2019 during a lull of activity at a depot.

81. It is evident from the witness evidence before us that Mr Walton had not blamed the claimant for any delay on the 5th.

82. In cross-examination, Mr Walton denied he stopped his telephone call when Mr Smith approached. It was put to him, which he denied, that he spoke "goobledy-gook" when Mr Smith approached him, a question which Mr Walton did not understand or admit.

83. On the balance of probabilities, we find that Mr Walton did not act as alleged.

"Clinton Harrison refusing to let the claimant get some hot water before setting off"

84. The claimant's pleaded case, set out at paragraph 23[17] states that the claimant asked if he could get some hot water before his shift started at 07.00. In his written account of the 22nd of January, he stated that he made this request at 06.50. The Tachograph record for Mr Smith records "driving" at 06.30 and "entering geofence Unilever/DHL" at 06.43.

85. Mr Harrison could not recall being asked by the claimant, stated he would not refuse such a request and, in re-examination stated that hot water was available in the respondent's canteen for drivers to use.

86. On the balance of probabilities, we find that there was no refusal by Mr Harrison.

Jason Walton saying "Smith what kind of name is that?" and Jason Walton saying: " say it, say it, you're 75 aren't you?"

87. These are pleaded as separate complaints but Mr Smith describes them (as set out above) occurring in a single conversation on the 6th December 2019

88. Mr Smith's first account was set out in his letter of the 22nd January 2020 [86]. In the third paragraph of page 86 he describes the exchanges taking place whilst he and Mr Walton were preparing a loaded trailer. After the exchange he describes both of them getting back into the cab when Mr Walton removed Mr Smith's tachograph and dashcam to replace with his own.

89. In Mr Smith's witness statement, his account, at paragraph seven, had changed. The conversation occurred after Mr Walton had removed the tachograph and dashcam put in place his own tachograph and camera.

90. Mr Walton's evidence remained consistent in cross-examination but was simple denial.

91. The tribunal reviewed all the evidence in the round before making its provisional findings and then reviewed the whole again before agreeing these decisions. In doing so, we determined these two allegations in the context of our other findings on the relative reliability of Mr Smith's evidence and have concluded that Mr Smith's account is the less reliable and accept Mr Walton's evidence.

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***Jason Walton saying: I don't know I'm not a mind reader" when the claimant asked why Mr Harrison wanted to see him*.**

92. This allegation was not addressed in Mr Walton's statement (which had been prepared for the respondent's internal grievance investigation and prior to the presentation of the ET1) or in his oral evidence under cross-examination. Nor was it in Mr Smith's witness statement although it is referred to in his 22nd January 2020 letter and at paragraph 30 of his particulars of claim.

93. On the evidence before us, Mr Walton was aware, from his telephone call with Mr Harrison, that the claimant's driving standards were a concern for Mr Harrison and that Mr Harrison had asked them to return to the respondent's premises so he could speak to the claimant. Mr Walton would not have known what Mr Harrison intended to say but he would have been able to hazard an opinion.

94. However, neither Mr Smith nor Mr Walton gave any evidence in chief or cross-examination on this point and in the absence of direct evidence and our concerns over Mr Smith's reliability as a witness we find that the alleged statement was not made.

Mr Clinton Harrison dismissing the claimant without any proper explanation of the reasons

Mr Smith's case:

95. On the 11th January 2020 Mr Smith's representative wrote to the respondent on this subject thus:

"On the Friday, he was called into the office and dismissed, being simply told that "this job was not for you". When Mr Smith asked for further clarification, he claims that none was given" [79].

96. Mr Smith's written account in his letter of the 22nd January 2020 was thus;

"I went in, he shook my hand and said "no hard feelings". I asked what the problem was, he replied " a couple of things" but gave no reasons.

97. His witness statement , at the second paragraph 5 mentions his dismissal in "Jeffs" office but without any detail of what was said or done. In cross examination he confirmed that Mr Harrison had shaken his hand and said; "no hard feelings."

98. Mr Harrison's evidence in his witness statement was equally brief:

" I then called Richard into the Office, sat him down and explained that his driving had not come up to are (sic) standard and he would not be suitable for a job driving with the

company. I asked him to hand in his dashcam, timesheet and door fob and that he would be paid for the 3 days he worked for us…"

99. In cross-examination he referred to what he had been told by Mr Woodward and Mr Walton and confirmed that Walton had not mentioned anything about reversing problems on the 6th December.

100. As to what he said to Mr Smith, the dispute seems narrow: did he say "a couple of things" or did he say; "your driving has not come up to our standard and you aren't suitable for a job driving with the company".

101. We have greater confidence in the evidence of Mr Harrison, on this point. We accept that his reason for calling Mr Smith to his office was the description of Mr Smith's driving in the first two and a half days of his employment . The accounts of the two drivers gave an impression of a poor standard of driving by Mr Smith. Mr Walton's account went so far as to say he did not feel safe with Mr Smith.

102. It is however common ground that Mr Harrison did not forewarn Mr Smith of his intention to dismiss him, did not investigate Mr Smith's version of events and did not view any dashcam footage nor offer any details of the actions of Mr Smith which Mr Harrison had in mind.

103. Further Mr Harrison did not set out his reasons for dismissal, until the respondent received a request for such reasons.

104. Finally, we record that Mr Harrison accepted that he had not conducted a dismissal hearing before and that Mr Smith was in his probationary period at the date of dismissal.

The Legal Matrix

105. Section 4 of the Equality Act 2010 provides that:

The following characteristics of age and race
age are protected characteristics.

a. Section 13 of the same Act deals with "direct discrimination" and provides that:

> (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. …

106. Section 23 of the same Act provides that:

> (1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.

107. The relevant parts of Section 25 of the Equality Act 2010 provide that:

… (1) Age discrimination is —

(a) discrimination within section 13 because of age;

(b) discrimination within section 19 where the relevant protected characteristic is age.

…

(6) Race discrimination is —

(a) discrimination within section 13 because of race;

(b) discrimination within section 19 where the relevant protected characteristic is race.

108. Section 26 of the 2010 Act deals with "harassment" and provides that:

> (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.
>
> (2) A also harasses B if —
>
> (a) A engages in unwanted conduct of a sexual nature, and
>
> (b) the conduct has the purpose or effect referred to in subsection (1)(b).
>
> (3) A also harasses B if —
>
> (a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
>
> (b) the conduct has the purpose or effect referred to in subsection (1)(b), and
>
> (c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.
>
> (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.
>
> (5) The relevant protected characteristics are —
>
> age; …
>
> race; …

109. Section 120(1) of the Equality Act 2010 provides that:

> (1) An employment tribunal has, subject to section 121, jurisdiction to determine a complaint relating to —
>
> (a) a contravention of Part 5 (work);
>
> (b) a contravention of section 108, 111 or 112 that relates to Part 5.

110. Section 136 of the Equality Act 2010, states that:

(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.

(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.

(5) …

(6) A reference to the court includes a reference to —

(a) an employment tribunal;

(b) …

111. The proper interpretation of the relevant statutory provisions on harassment is explained in the following authorities: Richmond Pharmacology v Dhaliwal [2009] IRLR 336 and Grant v HM Land Registry & anor [2011] IRLR 748, which set out the following general principles:

112. The prescribed elements of unlawful harassment are:

a. unwanted conduct;
b. having the purpose or effect of either:
c. violating the claimant's dignity; or
d. being related to the prohibited grounds.

113. Although many cases will involve considerable overlap between those elements of harassment, it would normally be a 'healthy discipline' for tribunals to address each element separately and to ensure that factual findings are made in each regard (Dhaliwal).

114. When considering whether the conduct had the prescribed effect on the claimant, although the tribunal must consider objectively whether it was reasonable of the claimant to consider that the conduct had that requisite effect, the claimant's subjective perception of the conduct in question must also be considered.

115. In Dhaliwal, the EAT (Underhill P) said that:

"We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

116. The Court of Appeal echoed these sentiments in Grant v HM Land Registry & anor [2011] IRLR 748 when it stated in relation to whether an effect could 'amount to a violation of dignity' or properly be described as 'creating an intimidating, hostile, degrading, humiliating or offensive environment' that:

'Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

Direct Discrimination

117. The applicable legal principles were summarised by the Employment Appeal Tribunal in London Borough of Islington v Ladele (Liberty intervening) EAT/0453/08, and remain good law.

118. In every case the Employment Tribunal has to determine the reason why the claimant was treated as he was. In most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator: Nagarajan v London Regional Transport [1999] IRLR 572 HL

119. If the Employment 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.

120. Direct evidence of discrimination is rare and Employment 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 Burden of Proof Directive (97/80/EEC). The first stage places a burden on the claimant to establish a prima facie case of discrimination. That requires the claimant to prove facts from which inferences could be drawn that the employer has treated them less favourably on the prohibited ground. 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 they fail to establish that, the Tribunal must find that there is discrimination.

121. The explanation for the less favourable treatment does not have to be a reasonable one: Zafar v Glasgow City Council [1998] IRLR 36 HL 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.8 If the employer fails to provide a non-discriminatory explanation for the unreasonable treatment, then the inference of discrimination must be drawn. 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, the burden is discharged at the second stage, however unreasonable the treatment.

122. It is not necessary in every case for an Employment Tribunal to go through the two-stage process. In some cases, it may be appropriate simply to focus on the reason given by the

employer ("the reason why") and, if the Tribunal 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, but the employer may be, because the Employment Tribunal is acting on the assumption that the first hurdle has been crossed by the employee.

123. It is incumbent on an Employment 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[3].

124. It is implicit in the concept of discrimination that the claimant is treated differently than the statutory comparator is or would be treated. The determination of the comparator depends upon the reason for the difference in treatment. The question whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was.

125. However, as the EAT noted (in Ladele) although comparators may be of evidential value in determining the reason why the claimant was treated as he or she was, frequently they cast no useful light on that question at all. In some instances, comparators can be misleading because there will be unlawful discrimination where the prohibited ground contributes to an act or decision even though it is not the sole or principal reason for it. If the Employment Tribunal is able to conclude that the respondent would not have treated the comparator more favourably, then it is unnecessary to determine the characteristics of the statutory comparator.

126. If the Employment Tribunal does identify a comparator for the purpose of determining whether there has been less favourable treatment, comparisons between two people must be such that the relevant circumstances are the same or not materially different. The Tribunal must be astute in determining what factors are so relevant to the treatment of the claimant that they must also be present in the real or hypothetical comparator in order that the comparison which is to be made will be a fair and proper comparison. Often, but not always, these will be matters which will have been in the mind of the person doing the treatment when relevant decisions were made. The comparator will often be hypothetical, and that when dealing with a complaint of direct discrimination it can sometimes be more helpful to proceed to considering the reason for the treatment (the "reason why" question).

Conclusions

Harassment

127. The Tribunal concluded that the following unwanted conduct occurred:

[3] The tribunal directed itself in accordance with the guidance in Bahl v Law Society [2004] IRLR 799 CA 9, Brown v London Borough of Croydon [2007] IRLR 259 CA and Anya v University of Oxford [2001] IRLR 377 CA.

a. Jason Walton shouting "Oi, you're coming with me today and I don't mean tomorrow" and "Pick that trailer up".

b. Clinton Harrison dismissed Mr Smith without any detailed explanation of the reasons.

The conduct of Mr Wilson; section 26(4)

128. We find that Mr Smith found the word "Oi" and the absence of a more courteous introduction , belittling as was the implied criticism " and I don't mean tomorrow". Similarly, the absence of "please", or some equivalent term, before the instruction to pick up a trailer, was similarly humiliating. He also took offence at Mr Walton's volume; shouting. In each of these respects and cumulatively, Mr Smith perceived these as unwanted.

129. The tribunal considered the above comments in the context in which they occurred; a heavy good vehicle depot at the start of the morning shift for drivers who were connecting long good trailers to their tractor units and then leaving the depot. Equally, the exchange was the first meeting of the Mr Smith and Mr Walton.

130. In our judgment Mr Walton's shouting was not conduct which could reasonably be perceived to be unwanted in the circumstances noted above. The lack of common courtesies and the implied criticism noted above could be reasonable viewed as unwanted conduct.

131. Were the unwanted words related to either of Mr Smith's protected characteristics?

132. The words, or absence of words in this case, are not overtly related to Mr Smith's age or race His claimant's primary case on this point was based on anticipated findings of fact; that Mr Walton had lied about Mr Smith's standard of driving and that Mr Walton made overt references to his age, and thinly veiled references to his race the day after the exchange in question.

133. Had the tribunal found the claimant's evidence to be reliable on either of those points, there would have been a sound factual foundation for the inference that Mr Walton's abrupt behaviour was related to one, or both, of Mr Smith's protected characteristics. Our findings of fact demonstrate that we preferred Mr Walton's evidence.

134. The absence of the primary factual foundations does not necessarily determine the matter. The tribunal did not accept Mr Walton's denial on this issue and a tribunal may, albeit is not mandated by law to do so, consider that the rejection of a witness' evidence along with the primary findings on the "actus reus" discharges the burden open a claimant for the purposes of section 136 of the Equality Act 2010.

135. In this case we did not conclude that Mr Walton had been dishonest, rather he lacked an objective view of his own manner. It was his own conduct as a witness (rather

that the claimant's evidence on its own) which persuaded us he was likely to have behaved as he did on the 5th December 2019.

136. Taking all of the above into account we have concluded that the evidence available to the claimant in this case was insufficient to discharge the burden of proof upon him.

137. Moreover, the tribunal are wholly persuaded that Mr Walton's behaviour was not affected by his knowledge of the claimant's protected characteristics, we are convinced that Mr Walton's manner is all but innate to him. Thus, had the claimant discharged the burden of proof our conclusion would remain; the proven conduct did not relate to either of the claimant's protected characteristics.

138. Lastly, and obiter given our judgment above, the character of the proven unwanted phases are those which fall properly within the ambit of the guidance in Dhaliwal, as cited above at paragraph 115 of these reasons.

139. By reason of our discrete conclusions above, this claim is not well founded.

<u>The Conduct of Mr Harrison</u>

140. We made a finding of fact that Mr Harrison did give an explanation for Mr Smith's dismissal; his standard of driving was below that which the respondent could accept.

141. He did not however offer any specific examples from the accounts of Mr Woodward and Mr Walton. At the highest, based on Mr Smith's evidence, when asked directly what the problem was, he said; " a couple of things". Thus Mr Smith, through Mr Harrison's open concession in cross examination, did not provide a detailed explanation.

142. We find that, certainly after the meeting, when Mr Smith was reflecting on his experience, the absence of an explanation was unwanted.

143. The tribunal is persuaded that to dismiss a person without sufficient explanation to understand the employer's rationale is reasonably viewed as unwanted in all the circumstances of this case.

144. In this instance the tribunal did not consider it necessary to apply section 136 because for the reasons set out below, we found Mr Harrison's evidence persuasive; in effect his explanation, in the context of the accounts of Mr Smith's driving standards which he received, demonstrated that his reasoning was not, consciously or unconsciously, tainted by Mr Smith's age or race .

145. In reaching the above conclusion we considered the following:

146. Whether any inference could be properly drawn from the procedural failures in Mr Harrison's meeting with the claimant.

147. Whether Mr Harrison may have been subconsciously influenced by the claimant's age; thinking that a person in their seventies was too old to improve or too old to be driving

148. Whether subconsciously Mr Harrison might have been more forgiving of the errors of a person who was not of black Jamaican origin; or unconsciously might have expected such a person to demonstrate higher standards.

149. Whether for a reason related to Mr Smith's race or age, Mr Harrison did not allow Mr Smith more leeway; perhaps a few more days to demonstrate a sustained period of competent professional driving

150. We also consciously "stood back" are reviewed our provisional conclusions against all of the evidence and our findings of fact.

151. In this case the degree of the claimant's underperformance was fundamental. M Harrison had been informed that:

a. The claimant made twenty attempts to manoeuvre his trailer into a bay without success and then got out of his cab and asked Mr Woodward, a driver with only four weeks qualified experience (as against Mr Smith's fifty years), to complete the manoeuvre, which he did without difficulty.
b. That the claimant's difficulties in the above respect continued.
c. That the claimant had driven with one side of the vehicle's wheels on a footpath along with other incidents which created a risk to the safety of other road users
d. That the claimant's driving was, on the 6th December 2019, so bad that Mr Walton told Mr Harrison that he didn't feel safe whilst Mr Smith was driving.
e. That Mr Harrison had not undertaken a dismissal before
f. That the claimant was in the first week of his probationary period and a person who professed that he was fully competent and very experienced.

152. In hypothesis, the submissions on behalf of the claimant had a potential logic and the factual findings for which the claimant argued were those which could well support an inference of discrimination. However, the tribunal's findings of fact were rather contrary to those for which the claimant argued.

153. Had the criticisms of Mr Smith's driving been less serious, the tribunal might well have been more inclined to infer discrimination by the combination of procedural failures and lack of reasoning. However, we found Mr Harrison's explanation credible. The severity of the underperformance and the risk to other road-users described by two of his drivers was so serious, and so blatant, that we have reached the conclusion that Mr Harrison was not affected by any subconscious motivation. On the contrary he was reacting to two descriptions of Mr Smith's driving, which corroborated each other, and indicated that Mr Smith represented an immediate risk to safety and was far from competent at reversing a long trailer; a fundamental function of his role which he would be expected to undertake a number of times every day.

154. We find that Mr Harrison has proved that the only considerations which affected his decision making on the 6th December 2019 was the information he received.

155. We find that Mr Harrison's decision was wholly untainted by considerations, whether consciously or unconsciously, of the claimant's protected characteristics.

156. We find that the "procedural failings" and the limited explanation Mr Harrison offered to Mr Smith were solely related to his prior inexperience in conducting such a meeting.

157. By reason of the respondent's evidence, we find that Mr Harrison's conduct was not in any part, or to any degree, related to the claimant's protected characteristics.

158. For the above reasons, this claim of harassment is not well founded.

Direct Discrimination

159. Based on our findings of fact, there were two instances of alleged less favourable treatment proven:

a. Dismissal.

b. Jason Walton shouting "Oi, you're coming with me today and I don't mean tomorrow." and "Pick that trailer up."

160. We record that, these two issues have a largely common evidential foundation with the harassment allegations addressed above.

161. We note that we have reached the conclusion that the conduct of Mr Walton was not, in any sense or to any degree, influenced by Mr Smith's protected characteristics. We have also reached the same conclusion in respect of Mr Harrison's decision making on the 6th December.

Less favourable Treatment

162. A comparator should be person who is not in materially different circumstances[4]. The claimant has proposed Mr Walton as a comparator. One material circumstance in this case would be working with Mr Walton on the 5th December 2019. In our judgment he is not a suitable comparator in respect of an allegation in which Mr Walton is also the alleged discriminator.

163. In respect of the dismissal Mr Walton is said to be an appropriate comparator because he is much younger than Mr Smith and of white British origin. He is a person who has, on two occasions committed a speeding offence, which led to his licence being endorsed. These occasions both occurred during his sixteen years of employment with the respondent and Mr Walton was not dismissed.

[4] Section 123 EA 2010

164. We did not receive evidence as to whether Mr Harrison was involved in the management or decision making in respect of Mr Walton's endorsements.

Mr Walton's 5th December comments to Mr Smith.

165. For this issue the employment tribunal has adopted a hypothetical comparator of a white British driver who was younger that a common retirement age of 65 years old.

166. In our judgment, because we have concluded that Mr Walton's brusque manner is, more likely than not, innate, we have concluded that he would have treated every qualified driver who had just joined the respondent in the same manner; if he had first met them in the same environment and at the same point in the working day as he did with Mr Smith.

167. In respect of this allegation, we conclude that the respondent has proved that its treatment of Mr Smith was not less favourable and it has proved that the respondent's treatment was wholly untainted by consideration of Mr Smith's protected characteristics.

Dismissal

168. The claim of direct discrimination was pleaded and argued on the basis that the respondent's allegations of poor driving were untrue and that untruth could not be explained; from which inferences could be draw that the conduct of Mr Walton was discriminatory and either tainted Mr Harrison's decision or was part of pattern of discriminatory behaviour between Mr Walton and Mr Harrison.

169. We have already found that Mr Harrison's conclusion that the claimant was not a sufficiently competent driver was wholly untainted by consideration, consciously or unconsciously, of Mr Smith's protected characteristics. We have also found that the evidence provided to Mr Harrison (and by Mr Woodward and Mr Walton) was more than likely to be true.

170. That a person is incompetent, even in their probationary period, does not necessarily justify a dismissal. It is, for example, possible to impose a warning or provide training. We therefore considered whether Mr Harrison's decision to impose the sanction of dismissal was affected by his knowledge of the claimant's protected characteristics.

In our judgment his decision to dismiss was not tainted by his knowledge of the claimant's protected characteristics. Mr Harrison's evidence has established that his reasoning was solely based on the degree to which he believed Mr Smith's driving was inadequate; that Mr Smith posed a risk to other people and that, with many years of experience, albeit, little recent practice, his reversing was far below the expected standards when he had to ask a colleague to complete such a manoeuvre. Mr Smith had not been appointed to a trainee or junior role; he been appointed to work five days a week as a "tramper" who was fully able to work independently.

171. For these reasons we have concluded that Mr Harrison's evidence has proven that it is more likely than not that a hypothetical comparator, in not materially different

circumstances, would have been dismissed and that Mr Harrison's decision was not in any respect tainted by consideration of Mr Smith's protected characteristics.

172. By reason of the above the claims of direct discrimination are not well founded.

Employment Judge R F Powell
Dated: 9th December 2021

Judgment sent to parties on 13 December 2021

For the secretary of employment Tribunals
Mr N Roche