EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr L Ofoeme	**v**	**Abellio East Anglia Ltd**

Heard at: London Central **On**: 14-16 September 2022

Before: Employment Judge B Beyzade

Members: Mrs H Craik, Tribunal Member
Mrs A Brosnan, Tribunal Member

Representation

For the Claimant: In person
For the Respondent: Ms B Breslin

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1. **The unanimous judgment of the tribunal is that:**

1.1. The complaint of direct race discrimination is not well-founded, and it is hereby dismissed;

1.2. The remedy hearing provisionally listed to take place on 14 November 2022 is vacated (cancelled) as this is not required in light of the Tribunal's judgment. Parties are therefore not required to attend any hearing on 14 November 2022.

REASONS

Introduction

2. The claimant presented a complaint of direct race discrimination which the respondent denied.

3. A final hearing was held between 14 and 16 September 2022. This was a hearing held by CVP video hearing pursuant to Rule 46 of Schedule 1 of the *Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013* ("the ET Rules"). We were satisfied that the parties were content to proceed with a CVP hearing, that it was just and equitable in all the circumstances, and that the participants in the hearing were able to see and hear the proceedings.

4. The parties prepared and filed a Joint Index and Bundle of Documents in advance of the hearing consisting of 132 pages. In addition the claimant and the respondent filed additional pages and further documents were added at pages 133-163 on the first day of the hearing, neither party objecting to this.

5. At the outset of the hearing the parties were advised that the Tribunal would investigate and record the following issues as falling to be determined, both parties being in agreement with these:

(i) Direct race discrimination (Equality Act 2010 section 13)

A) The claimant's describes his race as being black and he compares himself with the following actual comparators who are both said to be white:

(a) Hillary Stanley: and
(b) Robert Willock

B) Did the respondent do the following things:

(a) Did the respondent treat the claimant less favourably than it treated or would have treated an appropriate comparator (see 1.1 above) by failing to pay the claimant in respect of his entitlement to additional travelling time to his new work location at Bishops Stortford (May 2017 to July 2021)?

C) Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

The claimant says he was treated worse than Hillary Stanley and Robert Willock.

D) If so, was it because of race?

(ii) Remedy for discrimination

a. What financial losses has the discrimination caused the claimant?

b. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

c. Should interest be awarded? How much?

(iii) Time Limits

(a) Was the claimant's claim presented within the relevant time limit under section 123(3)(b) of the Equality Act 2010?

(b) If not, should the Tribunal extend the time limit to allow the claimant to pursue his claim on the grounds that it is just and equitable to do so?

6. The first two issues were recorded in the list of issues in the Case Management Orders dated 21 March 2022. At the Case Management Hearing on 21 March 2022 a timetable was agreed, and parties confirmed that they were content to follow that timetable during this hearing.

7. It was agreed that matters relating to liability only will be investigated and determined at this hearing, and if the claimant's claim is successful that there would be a separate remedy hearing on the afternoon of 14 November 2022.

8. The Tribunal were also provided with a reading list showing essential reading for the Tribunal to undertake prior to hearing any witness evidence, and in addition a chronology and cast list.

9. The claimant gave evidence at the hearing on his own behalf, and he provided a written witness statement. The claimant also sent written statements to the Tribunal from Ms H Stanley and Mr R Willcocks (both were employed as Revenue Protection Officers) and although they did not attend the hearing the Tribunal gave appropriate weight to their statements. Mr A Collins (Senior Revenue Protection Manager), Mr B Davies (Customer Service Project Manager) and Mr F Lopes (Right Time Railway Manager) gave evidence on behalf of the respondent, all of whom had produced a written statement. Mr Collins made some changes to his statement which were recorded by the Tribunal.

10. The respondent was represented by Ms B Breslin (Counsel), and the claimant appeared in person. The respondent produced written submissions on the afternoon of the second day of the hearing. Both parties made oral closing submissions, which the Tribunal found to be informative.

Findings of Fact

11. On the documents and oral evidence presented the Tribunal makes the following essential findings of fact restricted to those necessary to determine the list of issues -

Background

12. The claimant was employed by the respondent as a Revenue Protection Officer from 11 May 2015.

13. The respondent is a private limited company, and it is (and was) a rail operator. It operates local, regional and commuter services from London Liverpool Street to Greater London and other areas.

14. The claimant was originally employed at the respondent's depot located at Hertford East.

15. On 31 January 2017, the respondent proposed to close the depot at Hertford East. As part of that process the claimant and his colleagues were asked

whether they agreed to transfer to the respondent's premises at Bishops Stortford.

16. In relation to the proposed transfer the respondent operated its Promotion Transfer Redundancy and Resettlement Policy ("the PTRR"), which was incorporated into the claimant's contract of employment dated 10 May 2015 pursuant to clause nineteen.

17. Paragraph 18 of the PTRR stated as follows:
"A redundant employee, either married or single, who transfers to a vacancy on the Railway at a place where they would not normally be required to move their home, but involving additional travelling time, shall be paid a personal daily travelling allowance.
…
(b) In the case of a member of staff employed on shift working the mean journey time should be established for the overall shift cycle of the post in which redundant and this should be compared with each of the actual journey times, to and from work, on the day for which payment is being made."
(See page 114 of Hearing Bundle)

18. The PTRR compensates employees, for the first 3 years following the date of transfer, for the additional time spent travelling to the new location (where this is longer than the travel time to the old location). The amount payable becomes less in the 4th, 5th and 6th anniversary following the date of transfer. The payments end after the sixth year.

2017 meetings

19. On 02 March 2017, the respondent met with trade union representatives to discuss the closure of the depot at Hertford East. Mr R Williams (union representative) gave the claimant as an example and said that he commutes from Stamford Hill, whereas Mr Collins had his nearest station recorded as Tottenham Hale.

20. Ms K Bucknell (Head of Customer Services East & Revenue Protection) said that Stamford Hill is a Transport For London station and asked what the claimant's nearest Greater Anglia station is.

21. Mr Collins said the main thing is that is not what he is doing now and that he chooses to travel from Tottenham Hale, whereas Mr Williams said this will take the claimant well over an hour and under the PTRR he is entitled to an allowance. Mr Collins said they will come back to this, albeit they did not appear to revisit this issue at that meeting.

Letter dated 22 March 2017

22. By a letter dated 22 March 2017 the claimant was invited to attend a meeting on 26 April 2017 to discuss the proposed closure of the Revenue Protection Depot at Hertford East. The claimant and Mr Williams met with Mr Collins to discuss the closure of the depot at Hertford East on 26 April 2017.

23. On 08 May 2017 Ms R Churchill, HR Business Partner informed the claimant that the depot at Hertford East will close at midnight on 27 May 2017. She also stated:
"I understand that you have also had a recent discussion with Andy Collins, Senior Revenue Protection Depot Manager and Ray Williams on an individual basis to discuss your options along with any travelling time that you may be entitled to in line with the current PT&R conditions." **(See page 47 of Hearing Bundle)**

Analysis conducted by Mr Collins in 2017

24. Around that time Mr Collins conducted an analysis of employees' travel allowances which appears at page 49 of the Hearing Bundle. In that document he continued to refer to the claimant's home station as Tottenham Hale.

25. That document also records:
    a) The "*Before*" section recorded average travelling times of 36 minutes and 34 minutes to Hertford East and Bishops Stortford respectively; and

b) The "*After test period*" section records different average travelling times. It records average travelling times of 74 minutes and 60 minutes to Hertford East and Bishops Stortford, respectively.

26. The result of that analysis was as follows:
a. The claimant (who described his race as black, and his home station was recorded as Tottenham Hale) was not entitled to any travel allowance.
b. Mr Willcocks (whose race was described by parties as a white male and whose home station was recorded as Waltham Cross) was entitled to 32 minutes PTRR. This was based his additional travel time of 16 minutes on each of leg of the journey.
c. Ms Stanley (whose race was described by parties as a white female and whose home station was recorded as Cheshunt) was entitled to 20 minutes PTRR. This was based her additional travel time of 10 minutes on each of leg of the journey.
d. Mr Ogunnowo (whose race was described by parties as a black male and whose home station was recorded as Enfield Lock) was entitled to 32 minutes PTRR.

27. Another employee named D Rigley (and whose home station was recorded as Harlow Town) is recorded as not being entitled to a travel allowance in the before test period.

28. Thereafter Mr Collins informed the claimant on 11 May 2017 as follows:
"Further to our meeting on Wednesday 26th April 2017 I am now able to confirm the following to you, the revenue protection department at Hertford East will close at midnight on Saturday 27th May 2017.

If you choose to move to Bishops Stortford as an RPO from Sunday 28th May 2017 you will receive no travelling time." **(See page 50 of Hearing Bundle)**

PTRR entitlements of Mr Willcocks and Ms Stanley

29. On the same date, Mr Collins informed Mr Willcocks and Ms Stanley of their entitlement to travelling time if they chose to move to the depot at Bishops

Stortford (on 28 May 2017). The claimant was not aware of their travelling time entitlements at that time.

Claimant's email correspondence with Mr Collins on 30 May 2017

30. On 30 May 2017, the claimant emailed Mr Collins in the following terms: *"Further to our meeting on Wednesday 26th April 2017 I would like to confirm that my home station is Stamford Hill?"* **(See page 53 of Hearing Bundle)**

31. Mr Collins replied by way of an email of the same date advising as follows: *"You will be rostered as explained in the letter you were sent, for example if the train arrives at Bishops Stortford from Stamford Hill at 1314 you will be booked to start work at 1314. Your home station is Stamford Hill and if there are engineering works meaning that your journey to Bishops Stortford involves a bus rail replacement service you will be rostered to work at Liverpool Street, this could be customer service or revenue protection duties (as required)."* **(See page 53 of Hearing Bundle)**

Claimant's concerns raised with Mr Collins in January 2021

32. In January 2021, the claimant spoke to Mr Collins about travel allowance and enquired as to why he was not eligible to receive this. Mr Collins stated he was unable to assist the claimant and told him to contact human resources.

33. In around January/February 2021 the claimant enquired to Ms G Arnolds, of the respondent's Human Resources department, about his travel allowance. The claimant was told that his '*home station'* had not been updated from his original site in Hertford East to his current site in Bishops Stortford.

Claimant's Grievance

34. On 08 February 2021, the claimant raised a grievance in relation to Mr Collins. He stated that his grievance about Mr Collins was on the grounds of: *"-Equal Opportunities and Diversity Policy (please refer to Equal Opportunities and Diversity Policy)*
-Racial discrimination (please refer to Equal Opportunities and Diversity Policy)

- And breach of the PTR&R (Promotion Transfer Redundancy & Resettlement) Policy"

35. The claimant set out further details relating to his grievance, a copy of which can be found at pages 61-64 of the Hearing Bundle. He included information about Ms Stanley and Willcocks who were both British and white and were paid travelling time. He added "*I am a black man who lives the furthest from Bishop Stortford*" and that "*The direct and indirect discrimination continues to this very day*."

36. On 10 February 2021 Mr Williams sent an email to Ms Bucknell in relation to the claimant's grievance which stated:
"After speaking to Carlos, Can you please hold on to the grievance and Carlos will contact you once he return from sickness." ***(See page 147 of the Hearing Bundle)***

37. Ms K Swaray, Senior Business HR Business Partner advised on the same date by email: "*I can confirm the grievance, as requested will not progress at this time*."

38. Mr Williams sent a further email to Ms Bucknell on 16 February 2021 stating, "*After speaking to Carlos today, He would like for his grievance to be taken off hold and progress through the company procedure.*

Thanks for organising the review meeting with Andy Collins re: (Carlos PTR&R), unfortunately Carlos no longer want to proceed this way.

As you know Carlos is off sick and will return next week. Can you please organise for Carlos to be spoken to about his grievance."

39. Ms Bucknell replied on the same day stating,
"Evening Carlos,
I hope you don't mind me contacting you whilst you are sick, I do hope you are feeling better?

I just wanted to confirm with you that no meeting was arranged by me, for you to go through your queries around PT&R with Andy Collins today. I confirmed that I would go through the issues with you once you have returned to work and this has always remained my approach since confirmation was received about placing your grievance on hold. I am more than happy for us to catch up on your return and discuss the issue further if you are comfortable with that.
I also totally understand if you wish to progress further with your grievance if this is the case then I will of course speak with HR and an appropriate hearing officer will be appointed.
I look forward to hearing from you Carlos." **(See page 143 of the Hearing Bundle)**

40. A letter was sent to the claimant on 17 February 2021 from Ms Arnold confirming that due to the seriousness of the claimant's complaints against Mr Collins it is not appropriate for the grievance to be put on hold and that Mr Lopes will investigate it.

41. Mr Collins prepared a statement on 08 March 2021 for Mr F Lopes, the manager appointed to investigate the claimant's grievance, a copy of which appears at page 77 of the Hearing Bundle. He denied the allegations against him in the following terms:
"There are no grounds for insinuating he has been treated differently because of his skin colour these comments are malicious accusations and should be investigated as such."

42. Mr Lopes had telephoned Mr Collins prior to this statement being supplied.

43. On 11 March 2021, a meeting took place between the claimant (who was accompanied by his union representative) and Mr Lopes.

44. The claimant was informed about the outcome of his grievance on 13 April 2021 by way of a letter from Mr Lopes, which included the following points:

a) There was no follow up discussion about the claimant's home station after 02 March 2017 and nothing more was discussed until the claimant raised the matter again on 25 January 2021;
b) That there was a breach of the PTRR Policy;
c) He felt that a meeting was required between the claimant and Mr Collins to formally record his home station location and discuss his entitlement for travel allowances moving forward from 25 January 2021.
d) He believed that the error in terms of his home station was made because of this being recorded as Tottenham Hale in 2017 and that this was not followed up by both parties. He was satisfied that this was a management oversight and saw no grounds to believe that this was based on racial discrimination. (**See page 85 of the Hearing Bundle)**

45. On 28 April 2021 Mr Lopes met with the claimant and Mr Williams to discuss grievance outcome.

46. On 11 May 2021, the claimant sent an email to Mr Lopes in relation to the grievance outcome and he expressed dissatisfaction with a number of points in the outcome letter.

47. On 12 May 2021 Mr Lopes sent an email to the claimant advising him that: "*I have reached my decision based on all my findings and my recommendations are detailed in the outcome letter. Within the outcome letter it stated that you had the right to appeal to which you advised me that you did not wish to do so, this therefore brings the matter to a close.*
As part of my recommendations, the only outstanding action is to schedule a meeting to discuss Travelling Allowance (PT&R) to ensure you are able to claim for the correct entitlement. Please can I ask for some availability dates from yourself so I can arrange this meeting as soon as possible?" **(See page 94 of the Hearing Bundle)**

48. On 26 May 2021 Mr Lopes sent an email to the claimant following up his request for the claimant's availability in order to schedule a meeting.

49. On 05 July 2021 Ms Swaray sent an email to Mr Williams requesting information from the claimant to be able to process his claim for additional travelling time.

50. On 06 July 2021 Mr Williams replied to that email stating: "*Have spoken to Carlos [the claimant] and he stated that he will email Flavio about his travelling time*."

51. On 13 July 2021 Mr Lopes emailed the claimant to inform him that as he has not received a response to his previous emails, the matter will be referred back to the claimant's line manager.

52. On 06 June 2021, the claimant contacted ACAS to start Early Conciliation and on 18 July 2021 the ACAS Early Conciliation Certificate was issued.

53. On 19 August 2021 Mr B Davies sent an email to the claimant attaching a letter and calculation of what the respondent believed the claimant was entitled to by way of additional travelling time and a meeting to discuss the matter further was arranged for 10 September 2021.

54. On 07 September 2021 Mr Williams informed Mr Davies that the claimant was off work sick and that the meeting could not go ahead until the claimant returned to work, and he also pointed out that the claimant was not happy with the offer and would like a meeting to explain why.

55. The claimant presented his claim to the Tribunal on 29 September 2021.

Events after the claimant's claim was presented

56. Mr Davies subsequently instructed Mr Collins to prepare a revised calculation of the claimant's additional travel time, a copy of which appears at page 101 of the Hearing Bundle.

57. The claimant has been unable to comment in detail on that calculation to date as he has been off sick.

58. On 08 December 2021 Mr Davies sent a letter to the claimant to inform him that as there have been no further developments he will arrange for the sum of £4,183.76 in respect of additional travelling time to be paid to him. He stated that the offer of a further meeting to address any remaining issues remained open **(see page 106 of the Hearing Bundle)**.

59. On 17 December 2021, the claimant was paid the sum of £4,183.76 gross in relation to additional travelling time.

60. The claimant's employment with the respondent is continuing. He has been off sick from work since July 2021, and he has since taken annual leave. Mr Davies indicated during his oral evidence that upon the claimant's return from sickness absence the claimant will be able to raise any further issues he may have with regards to the calculations of his additional travelling time.

Mr Collins's supplemental oral evidence to the Tribunal

61. Mr Collins explained in his supplemental evidence that when he looked further at the calculations at page 49 of the Hearing Bundle (at the time he received this from the respondent's representative) he noted at that point that the after test period figures were based on the journey being from Stamford Hill and not from Tottenham Hale. He assumed that that was not the case when he made the statement which he gave to Mr Lopes and his statement for the Tribunal.

62. He advised that in relation to page 49 of the Hearing Bundle, this was based on an average of different journeys. He said that they looked at 4 to 5 different train times from Stamford Hill to Hertford East, and also 4-5 different train times from Stamford Hill to Bishops Stortford and then they would arrive at an average of journey times. He compared this with the document at page 101 of the Hearing Bundle which he explained was specific for each journey.

63. Mr Collins explained that in 2017 he believed that Stamford Hill was not a Greater Anglia station, and he recorded Tottenham Hale as the claimant's home station. During the hearing he accepted that this belief was erroneous.

Observations

64. On the documents and oral evidence presented the Tribunal makes the following essential observations on the evidence restricted to those necessary to determine the list of issues –

65. At the meeting on 02 March 2017 there was no conclusion reached in respect of the claimant's home station for the purposes of calculating his travel allowance.

66. We were not provided with a copy of any notes or record of the meeting that took place between the claimant, Mr Williams, and Mr Collins on 26 April 2017. This meant that we were not aware of the extent of any discussions or the basis of any conclusion in respect of the claimant's travel allowance.

67. We were concerned that despite the claimant sending an email to Mr Collins on 30 May 2017 confirming his home station was Stamford Hill and Mr Collins replying on the same day acknowledging this, he did not update the table at page 49 of the Hearing Bundle to record the correct name of the claimant's home station. It was unfortunate that Mr Collins had not properly followed up this matter as he said he would at the meeting on 02 March 2017, and that he did not properly check the calculations at page 49 of the Hearing Bundle (until after the claimant made his claim to the Tribunal).

68. We also found it unusual that Mr Collins did not discuss the matter with the claimant substantively on 25 January 2021 and seek to resolve the issue at that stage. He referred the claimant to HR, who most likely had less operational knowledge than he did.

69. The Tribunal noted that there were no notes of the telephone conversation that took place between Mr Collins and Mr Lopes during the grievance investigation, and there was no apparent explanation for this in the witness evidence. Our concerns were accentuated by the fact that no further questions were asked of Mr Collins following the production of his statement. Mr Lopes

appeared to form the view that Mr Collins's explanation was genuine and that there was no race discrimination based on his impression from the telephone call (which was not documented) and the statement he provided at the time. The statement did not properly analyse or record the errors in terms of the documentation, and the failure to pay the claimant's allowance pursuant to the PTRR. Furthermore there was no apology forthcoming from him following the grievance outcome.

70. Mr Lopes made no effort to consider the fact that two white employees received the travel allowance, and the claimant did not. There was no evidence before us to suggest that he looked at the documents relating to the claimant's two white colleagues from 2017 nor that he compared the processes followed in respect of those employees with the process followed with the claimant in relation to the PTRR.

71. Mr Collins stated in his oral evidence that he believed in early 2017 that the home station had to be a Greater Anglia station. This was not a matter to which reference was made in his witness statement nor was there any requirement in relation to this in the PTRR. Moreover the other witnesses called by the respondent did not share Mr Collins's belief. When the claimant emailed Mr Collins on 30 May 2017 to confirm that his home station was Stamford Hill, he did not reply to the claimant to say that he believed the home station had to be a Greater Anglia station.

72. We formed the view that Mr Davies acted reasonably by paying the amount of £4,183.76 in respect of the claimant's travel allowance in December 2021 on the basis that the claimant could still attend a meeting to discuss any further settlement that may due.

73. The Tribunal observed that in terms of the witness evidence it heard, different witnesses were able to assist with or comment on specific aspects of this case. Where there was a conflict of evidence, the Tribunal made findings of fact on the balance probabilities based on the documents, and having considered the

totality of the witness evidence, and accepted the evidence that set out the position most clearly and consistently.

Relevant law

74. To those facts, the Tribunal applied the law –

Race discrimination

75. The claimant makes claims alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("the EqA"). The claimant complains that the respondent has contravened provisions of part 5 (work) of the EqA. The claimant alleges direct discrimination.

76. The protected characteristic relied upon is race, as set out in section 9 of the EqA.

Direct race discrimination

77. By section 13 of the EqA a person discriminates against another if because of a protected characteristic, in this case race, he or she treats the employee less favourably than he or she would treat others.

78. The basic question in a direct discrimination case is: what are the grounds or reasons for treatment complained of? In *Amnesty International v Ahmed [2009] IRLR 884* the EAT recognised two different approaches from two House of Lords authorities - (i) in *James v Eastleigh Borough Council [1990] IRLR 288* and (ii) in *Nagarajan v London Regional Transport [1999] IRLR 572*. In some cases, such as James, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as *Nagarajan*, the act complained of is not inherently discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did.

79. It is unusual to have direct evidence as to the reason for the treatment (discrimination may not be intentional and may be the product of unconscious bias or discriminatory assumptions) [*Nagarajan*]. The Tribunal should draw appropriate inferences as to the reason for the treatment from the primary facts with the assistance, where necessary, of the burden of proof provisions, as explained in the Court of Appeal case of *Anya v University of Oxford [2001] IRLR 377*. "Most cases turn on the accumulation of multiple findings of primary fact, from which the court or Tribunal is invited to draw an inference of a discriminatory explanation of those facts" (*Madarassy v Nomura International Plc [2007] IRLR 246*).

80. In *Shamoon v Chief Constable of the RUC [2003] IRLR 285*, a House of Lords authority, Lord Nichols said that it was not always necessary to adopt a sequential approach to the questions of whether the claimant had been treated less favourably than the comparator and, if so, why. Instead, they may wish to concentrate initially on why the claimant was treated as they were, leaving the less favourable treatment issue until after they have decided on the reason why the claimant was treated as they were. What was the employer's conscious or subconscious reason for the treatment? Was it because of a protected characteristic, or was it for some other reason?

81. A statutory comparator must "*be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class*": *Shamoon* per Lord Scott at paragraph 110.

82. The *EHRC: Code of Practice on Employment (2011)* states, at paragraph 3.5 that 'The worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to have been treated differently from the way the employer treated – or would have treated – another person.'

83. For direct discrimination to occur, the relevant protected characteristic needs to be a cause of the less favourable treatment 'but does not need to be the only or

even the main cause' (paragraph 3.11, *EHRC: Code of Practice on Employment (2011)*). The protected characteristic does however require having a '*significant influence on the outcome*' (*Nagarajan*).

Burden of proof

84. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that 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. However, this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an Employment Tribunal.

85. There is a two-stage process in applying the burden of proof provisions in discrimination cases, explained in the authorities of *Igen v Wong [2005] IRLR 258*, and *Madarassy v Nomura International Plc [2007] IRLR 246*, both from the Court of Appeal. The claimant must first establish the first stage or a prima facie case of discrimination or harassment by reference to the facts made out. If the claimant does so, the burden of proof shifts to the respondent at the second stage to prove that they did not commit those unlawful acts. If the second stage is reached the Tribunal is obliged to uphold the claim unless the respondent can show that it did not discriminate.

86. In *Madarassy*, it was held that the burden of proof does not shift to the employer simply by a claimant establishing that they have a protected characteristic and that there was a difference in treatment. Those facts only indicate the possibility of discrimination. They are not of themselves sufficient material on which the Tribunal "*could conclude*" that on a balance of probabilities the respondent had committed an unlawful act of discrimination. Something more is required, but that need not be a great deal (*Deman v Commission for Equality and Human Rights and ors [2010] EWCA Civ 1279, CA*). The Tribunal has at the first stage, no regard to evidence as to the respondent's explanation for its conduct, but the Tribunal must have regard to all other evidence relevant to the question of whether the alleged unlawful act occurred, it being immaterial whether the evidence is adduced by the claimant or the respondent, or whether it supports

or contradicts the claimant's case, as explained in *Laing v Manchester City Council [2006] IRLR 748*, an EAT authority approved by the Court of Appeal in *Madarassy*.

87. The burden of proof provisions are not relevant where the facts are not disputed or the Tribunal is in a position to make positive findings on the evidence (*Hewage v Grampian Health Board [2012] UKSC 37, SC*).

88. In order for there to be unfavourable treatment, the claimant must be subjected to some form of detriment. The question of whether there is a detriment requires the Tribunal to determine whether "*by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work*" (*Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 HL*).

89. It is a well-established principle that Tribunals are entitled to draw an inference of discrimination from the facts of the case. The position is set out by the Court of Appeal in *Igen v Wong [2005] ICR 931* (as approved by the Supreme Court in *Hewage v Grampian Health Board [2012] IRLR 870*).

Time limits for bringing a claim

90. The provisions relating to the time limits for bringing a claim under the EqA to the Employment Tribunal are set out in s123 of the EqA:- (1) Subject to section 140B [a reference to the provision extending time for ACAS Early Conciliation] proceedings on a complaint within section 120 [the section giving the power to the Tribunal to hear claims under the EqA] 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.

91. The burden of proof in the exercise of the discretion lies on the claimant and past cases have made it clear that it should be the exception and not the rule, with no expectation that the Tribunal would automatically extend time

(*Robertson v Bexley Community Centre [2003] IRLR 434*). This does not, however, mean that exceptional circumstances are required for the Tribunal to exercise its discretion and the test remains what the Tribunal considers to be just and equitable (*Pathan v South London Islamic Centre UKEAT/0312/13*).

Parties' Submissions

92. Parties made detailed submissions which the Tribunal found to be informative. The Tribunal considered both the respondent's representative's and the claimant's oral submissions, and the respondent's written closing submissions and referred to the authorities cited therein. References are made to essential aspects of those submissions and the authorities relied on by the respondent's representative with reference to the issues to be determined in this Judgment, although the Tribunal considered the totality of the submissions from the parties.

93. The respondent's representative referred to the cases of:

92.1 Chief Constable of West Yorkshire Police v Khan [2001] 1 WLR 1947 (HL) per Lord Scott at paragraph 76;

Burrett v West Birmingham Health Authority [1994] IRLR 7 (EAT) per Knox J;

Nagarajan v London Regional Transport [2000] 1 AC 501 per Lord Nicholls at 510H-511A;

Chief Constable of West Yorkshire Police v Khan [2001] 1 WLR 1947 (HL) per Lord Scott at paragraph 76;

Robertson v Bexley [2003] EWCA Civ 576 per Auld LJ at paragraph 24;

Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 (HL);

Igen v Wong [2005] ICR 931;

Network Rail Infrastructure v Griffiths-Henry [2006] IRLR 865 (EAT) per Elias J at paragraph 20;

Madarassy v Nomura International [2007] ICR 867 (CA) per Mummery LJ at paragraph 56;

Khan v Home Office [2008] EWCA Civ 578 per Maurice Kay LJ at paragraph 12;

Watt (formerly Carter) v Ahsan [2008] ICR 82 (HL);

Hewage v Grampian Health Board [2012] ICR 1054 (SC) per Lord Hope at paragraph 32.

Edomobi v La Retraite RC Girls School EAT 0180/16;

Chief Constable of Greater Manchester Police v Bailey [2017] EWCA Civ 425 per Underhill LJ at paragraph 99;
Abertawe Bro Morgannwg v Morgan [2018] EWCA Civ 640 per Leggatt LJ at paragraph 19;
Adedeji v University Hospitals Birmingham NHS Foundation [2021] EWCA Civ 23;
Royal Mail Group v Efobi [2021] 1 WLR 3863 (SC) per Lord Leggatt at paragraph 30;

94. The respondent's representative highlighted that in paragraph 19 of *Morgan* Leggatt LJ stated on time limits the factors which will "*almost always [be] relevant to consider*" are: (a) the length of and reasons for the delay, and (b) whether the delay has caused prejudice to the respondent, and that time limits are enforced strictly in Employment Tribunals. The respondent contends that an extension of time would cause substantial prejudice to the respondent, including in relation to Mr Collins's evidence and his ability to recall events from 2017.

95. In terms of time limits the claimant submitted that he was under the impression from ACAS that he had three months from July 2021 within which to submit his claim and that since July he had suffered from mental health issues, and he had not been attending work. He said that the respondent's Occupational Health adviser had reported that he was not fit for work.

Discussion and decision

96. On the basis of the findings made the Tribunal disposes of the issues identified at the outset of the hearing as follows –

97. The Tribunal will deal with each of the issues we are required to consider in turn below given the specific factual and legal issues to be determined in the claim.

Time limit under s 123 of the EqA

98. The claim form was presented on 29 September 2021.

99. The primary limitation period requires under the EqA s 123 that any claim is presented within 3 months of the date of the act or omission complained of.

This means that any act or omission that took place prior to 30 June 2021 is potentially out of time. The period of time spent by the claimant engaging in ACAS Early Conciliation was 42 days. However, due to the decision to not pay the claimant a travel allowance being made in 2017, the claimant's claim is made out of time, and he is not entitled to the benefit of an extension by reason of entering ACAS Early Conciliation (as he did not start ACAS Early Conciliation during the relevant primary limitation period).

100. Accordingly, any acts or omissions which took place before 30 June 2021 are potentially out of time, so that the Tribunal may not have jurisdiction to consider the claim. The decision to not pay the claimant a travel allowance was made in May 2017.

101. We considered the circumstances including that the claimant was not aware of the fact that his two colleagues (who were described as being white) were in receipt of a travel allowance until January 2021 and that he raised his concerns with Mr Collins upon discovering this on 25 January 2021. A trade union representative represented the claimant both during negotiations in 2017 and in respect of his grievance. Mr Collins having declined to discuss and resolve the matter with the claimant, the claimant promptly issued a grievance on 08 February 2021 and the grievance outcome was sent to him on 11 May 2021. The claimant challenged the findings of the grievance and Mr Lopes attempted to arrange a meeting repeatedly in May 2021, but this did not take place and the claimant did not engage with him further. The claimant started ACAS Early Conciliation from 06 June 2021 (which lasted for 42 days), and he presented his claim on 29 September 2021 (thereby a delay of over two months). The claimant had been off sick since July 2021, he presented sick notes to the Tribunal (he did not present any medical evidence to the Tribunal in relation to why he was not able to present his claim earlier whether by reason of his mental health or otherwise), and his representative informed his employer that he was unable to attend a meeting by email dated 07 September 2021.

102. We did not consider that it would be just and equitable to extend time based on the evidence we heard and considered. We have recognised that the claimant

has been off sick, and that this has been a difficult time for him. His Union were corresponding on his behalf throughout the grievance process and in September 2021 and we had no explanation (or no adequate explanation) in terms of why he could not have started a claim, instructed a solicitor, or conducted research in relation to the relevant time limits earlier. He could have used a solicitor or his union representative to inform himself about timescales. It was not appropriate for the claimant to rely on ACAS for advice in the circumstances. There was potential prejudice to the respondent as some allegations were rather dated and in the absence of proper recordkeeping it made it more difficult for the Tribunal to gain a full picture of what happened at certain meetings. We therefore concluded that balancing the prejudice between the parties, we would not extend time on a just and equitable basis. Therefore, we did not have jurisdiction to consider the claimant's claim, and claim stands dismissed.

103. However in the event we are wrong not to extend time on a just and equitable basis (notwithstanding the conclusion we reached), we proceeded to consider the claim on the basis of the evidence that was before us.

Section 13 of the EqA: Direct discrimination because of race

Did the respondent treat the claimant less favourably than it treated or would have treated an appropriate comparator (see 1.1 above) by failing to pay the claimant in respect of his entitlement to additional travelling time to his new work location at Bishops Stortford (May 2017 to July 2021)?

104. The first question for the Tribunal in the discrimination claim is whether the failure to pay the claimant in respect of additional travelling time between May 2017 to July 2021 amounted to less favourable treatment in the sense that a reasonable worker would consider that they had been disadvantaged.

105. We accepted that a decision was made in May 2017 that the claimant was not entitled to travel allowance.

106. We accepted that the fact that the claimant was not paid travel allowance was in breach of the respondent's PTRR Policy and indeed the claimant's contract of employment into which paragraph 18 of that policy was incorporated.

Was that less favourable treatment?

107. We find that a reasonable worker would consider that they were being disadvantaged in the circumstances and that this was less favourable treatment. The claimant clearly considered this as less favourable treatment which was made apparent in his complaints made both to Mr Collins in January 2021 and in his letter of grievance dated 08 February 2021.

Claimant's comparators

108. We did not accept that the two comparators named by the claimant were appropriate comparators. Ms Stanley is a female and both comparators lived in different locations from the claimant. Those are material differences and therefore they are not appropriate comparators.

109. Where there is no statutory comparator available, the Tribunal is entitled to consider how the respondent would have treated a hypothetical comparator. Although the fact the Tribunal should consider a hypothetical comparator was mentioned in the respondent's submissions, the respondent's representative did not detail any key characteristics of a hypothetical comparator in her written submissions. In oral submissions the respondent's representative indicated that the attributes of a hypothetical comparator would be a white employee making the relevant journey in 2017 from Stamford Hill to Hartford East, whereas the claimant said he would leave the construction of a hypothetical comparator to the Tribunal. The Tribunal determined that any hypothetical comparator would have required to be a white male employee whose home station was wrongly identified, and all other material circumstances were not materially different.

110. The respondent points out in their written submissions that the Tribunal is entitled to rely on an individual who does not qualify as a statutory comparator as an "*evidential comparator*": *Watt (formerly Carter) v Ahsan [2008] ICR 82 (HL) per Lord Hoffman at paras 36-37*. However, the Tribunal should bear in mind that "*the evidential value of an evidential comparator is variable and will inevitably be weakened by material differences in circumstances*": *Shamoon* per Lord Scott at paragraph 110.

If so, was it because of race?
Primary facts

111. We considered whether there are primary facts from which the Tribunal could decide, in the absence of any other explanation, that the respondent contravened the provision concerned.

112. We considered the claimant's position that there were two other white employees (albeit who lived in different locations) who were awarded a travel allowance. Other than the document at page 49 of the Hearing Bundle, it was not clear what process was followed by the respondent in terms of deciding to award them an allowance compared with the process followed in respect of the claimant (and the decision to not award him a travel allowance in 2017).

113. We did not find Mr Collins's explanation in relation to why he did not address the issue himself in January 2021 when it was raised with him by the claimant to be satisfactory. Mr Collins refused to address the issues with the document at page 49 when the claimant approached him in January 2021, and we were not satisfied with his explanation in respect of this.

114. He provided supplemental evidence during the hearing which was not contained in his witness statement. He said he realised this when he reviewed the witness statements in preparation for this hearing. We found this explanation difficult to follow.

115. Although this meant that the claimant's home station not being a Greater Anglia station was not as relevant as previously envisaged, we considered the impact of this in terms of his credibility. This was not referenced in his witness statement or in his statement provided to Mr Flavio. There was no apparent explanation for this.

116. We also considered that there was no evidence that Mr Collins followed up the claimant's home station issue after the 02 March 2017 meeting. The meeting in April 2017 to which reference was made by him was not documented.

117. There was no evidence that Mr Collins had properly consulted the PTRR Policy

prior to making his decision not to pay the claimant a travel allowance.

118. There was another employee whose race was described as black who was allocated a travel allowance, but he left employment with the respondent before he received a travel allowance.

119. There was an absence of any proper analysis in Mr Lopes's grievance investigation and the outcome that was issued in terms of the errors that occurred, the reasons for any errors and any remedial steps that were required. Without such reasoning it was difficult to see how we can place anything other than no or little weight on his belief that there was a genuine error. He did not undertake or any proper analysis in respect of why he considered Mr Collins's error was a genuine mistake.

120. Furthermore, Mr Lopes failed to conduct a reasonable investigation in respect of the claimant's grievance and appeared to place significant weight on Mr Collins's statement and his undocumented telephone conversation with him.

121. He also failed to resolve the grievance by making a finding in relation to the claimant's home station and failed to investigate the amount the claimant was in fact owed. We did however consider that Mr Davies undertook this task at a later date and instructed Mr Collins to conduct the calculations. However by that stage the claimant had been off sick since July 2021 (and this meant the claimant's outstanding payments were delayed).

122. For all these reasons, we had little difficulty deciding, unanimously, that the claimant had established a prima facie case.

Respondent's explanation

123. This meant that the onus shifted to the respondent to prove that the way the claimant had been treated was "*in no sense whatsoever*" because of race. The reasons why we concluded that we could not be satisfied that the claimant's treatment was because of race are set out below.

124. Mr Collins's explanation in relation to his belief in 2017 that the claimant's home

station should be a Greater Anglia station was entirely inconsistent with the documents and the respondent's PTRR Policy.

125. Mr Collins denies that his conduct amounted to race discrimination. We considered in this respect that a black employee was allocated a travel allowance albeit he did not receive the allowance for the reasons indicated above. We also took account that the calculations at page 49 of the Hearing Bundle were incorrect albeit he revised these at a later date.

126. Mr Collins said in paragraph 12 of his witness statement that it was an error not to have addressed the claimant's comment about his home station. However he replied to the claimant's email at the relevant time acknowledging the claimant's home station.

127. He acknowledges in his statement that the claimant's home station was not recorded correctly, and it should have been recorded as Stamford Hill. Although he did not offer a clear explanation which we were able to accept for this, as the respondent's representative points out, this was an error (and this error was recognised during the grievance process). As the respondent's representative says, it has now transpired that the document at page 49 of the Hearing Bundle reflects the travel times for both Hertford East and Bishops Stortford by train in the after test period.

128. Paragraph 40 of the respondent's representative's submissions summarises the reasons why the respondent says the claimant's treatment was not because of race.

129. The respondent says that it offered another black employee a travel allowance and it therefore cannot be inferred that the claimant was not paid that allowance because of his race. We reject this submission because the employee in question was never paid a travel allowance and he did not transfer to Bishop Stortford. In any event even if he remained employed and he was paid a travel allowance, this matter alone, would not necessarily preclude the Tribunal from making a finding of race discrimination depending on the other circumstances

and context a whole.

130. We did not accept the submission at paragraph 40(2). The grievance officer determined to leave the issue of recording the home station with Mr Collins and he did not resolve the issue relating to calculating the claimant's entitlement.

131. We also rejected the contention at paragraph 40(3) in relation to the claimant not making a travel allowance claim. This is because the claimant was told that he was not entitled to a travel allowance in May 2017 and no reasonable employee would submit a claim form in those circumstances. He was also not requested to make a claim by Mr Collins who expressly advised him that he was not entitled to make a claim.

132. In any event, we concluded on the evidence that the respondent having made the error in terms of the claimant's home station in 2017 and having failed to pay him a travel allowance were in no sense whatsoever connected with race.

133. Mr Lopes's letter of 13 April 2021 attempts to explain the reason for the claimant's treatment in which he stated that this was due the claimant's home station being recorded as Tottenham Hale, but this was not followed up by the management team or by the claimant. He subsequently describes this as being a management oversight.

134. We formed the view that there were a catalogue of failures which amounted to gross negligence and poor record keeping that we have detailed above which we consider to be the principal reason (and explanation) for the respondent's conduct.

135. In the House of Lords case of *Nagarajan* it was held that the applicant only has to prove that the proscribed ground had *'a significant influence on the outcome*' (per Lord Nicholls of Birkenhead, at p.576). Having reviewed all the evidence before us, we could not be satisfied that race had a significant influence on the respondent's decision not to pay travel allowance to the claimant or that their failure to do so was because of race.

136. Therefore, on the balance of probabilities, we did not find that the non-payment of the claimant's travel allowance from 2017 onwards was because of race. We set out our findings and observations relating to this matter above.

137. In light of the above, if we concluded that the time limit should have been extended to enable the claimant to bring his claim, we would have decided that the claimant's claim for direct race discrimination is not well founded, and it is therefore dismissed.

Disposal

138. The claimant's direct race discrimination claim against the respondent does not succeed.

Remedy

139. We did not determine any matters relating to remedy given our conclusions on liability. We therefore also vacate (cancel) the remedy hearing that was provisionally listed for 14 November 2022.

Conclusion

140. The claimant's claim for direct race discrimination is dismissed.

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Employment Judge B Beyzade

Dated: 31 October 2022

Sent to the parties on:
01/11/2022

For the Tribunal Office