EMPLOYMENT TRIBUNALS

Claimants: Mr F Gahungu & Mr J Hughes

Respondent: DHL Services Limited

Heard at: Birmingham (hybrid) **On:** 5-9, 12,13 September 2022; 15,16 December 2022

Before: Employment Judge J Jones
Mrs S Bannister
Mr R Virdee

Representation
Claimants: in person
Respondent: Ms G Roberts (counsel)

JUDGMENT having been sent to the parties on 19 December 2022 and written reasons having been requested by the claimant on 19 December 2022 in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The claim and the issues

1. By a claim form presented on 11 June 2020, following early conciliation between 13/14 May and 9 June 2020, the claimants brought claims for race discrimination, harassment and victimisation, arising from their employment with the respondent as warehouse operatives, which is continuing.

2. The claims were considered at preliminary hearings on 7 September 2020, 9 November 2020, 5 March 2021, 1 September 2021, 4 October 2021 and 18 February 2022. As a result of the discussions at those hearings, the claims and issues in the case were described and defined in a list of issues which the parties agreed at the outset of this hearing was accurate. This list of issues is annexed to these Reasons. Numbered issues in these Reasons are references to the numbers of that list.

The hearing

3. The hearing commenced in person but became a hybrid hearing using CVP (the Tribunal's video conferencing platform) from the second day, with the consent of the parties. The claimants attended the hearing from home via CVP on the second day of the hearing but thereafter attended the Tribunal, together with their witness Mr Ahmed Salad.

4. The Tribunal was provided with a joint file of documents 761 pages in length. The electronic version of the file had different page numbers due to the inclusion of pages with suffixes such as (a), (b) etc. This was navigated in the main by counsel for the respondent providing the alternative page numbers every time a document was referred to (in the main, by adding 62 to the hard copy page number). Page numbers in these reasons are references to the page numbers of the hard copy of the joint file or bundle.

5. The claimants produced an additional small bundle (20 pages in length) of short statements from work colleagues covering various issues. With the exception of Mr Ahmed Salad, the authors of these statements were not called to give evidence at the hearing. The statement of Mr Gareth Morgan (page 19 of the claimants' witness statement bundle), whom the claimants had proposed to call to give oral evidence, was accepted by the respondent. This dealt with factual matters that post-dated the claim form and were not mentioned in the list of issues.

6. The Tribunal heard oral evidence from the following witnesses (in the following order):

   For the claimants:

   - Justin Hughes, the second claimant
   - Ahmed Salad, Process Coach
   - Freddy Gahungu, the first claimant

   For the respondents[1]:

   - Mathew Jarvis – Senior Operations Manager
   - Mark Westwood – Senior Operations Manager
   - Paul Tompkinson – Site Lead
   - Paul Cook – Senior Operations Manager
   - Sally Astill – HR Business Partner
   - Chris Vincent – Senior Operations Manager

   Each witness produced a written statement as their evidence in chief. An unsigned witness statement was also produced by the respondent from Mark Coady, Front Line Manager (FLM) but he was not called to give evidence. The Tribunal was told that Mr Coady had left the respondent's employment and had declined to give evidence in these proceedings. He has brought his own

[1] Described by the job title the witness held at the time of the events in question

Employment Tribunal proceedings for reasons unconnected with the issues in this case.

7. The Tribunal was also provided with a chronology, and the respondent's counsel submitted an opening note and written closing submissions, which she supplemented with oral submissions. Mr Hughes, the second claimant, addressed the Tribunal orally by way of closing submissions on behalf of both claimants.

8. The issues in the case arose from a large number of separate incidents occurring during the claimants' employment from 2018 to 2020. The dates or sequence of these incidents was not always apparent in the claimants' witness statements which were in short-form and did not reference documents or, in many cases, give dates of events. Further, the claimants did not provide evidence in chief about all the allegations that they had made, as set out in the agreed list of issues.

Findings of fact

9. Based on this evidence, the Tribunal made the following findings of fact on a unanimous basis:

Background

9.1 The respondent is a logistics company. One of its largest clients is Jaguar Land Rover (JLR) for whom it carries out logistics work at three sites in the midlands. The site with which this claim was concerned is the Midpoint site. At Midpoint the respondent has direct staff working permanently and a shifting population of agency staff. Both direct and agency staff are from a range of ethnic backgrounds. In particular, the tribunal heard evidence that there were a significant number of colleagues who identify as Asian, black British, black African, white British and Polish amongst the respondent's staff population.

9.2 In simple terms, the respondent's work at Midpoint involves the receipt, movement and storage of the car parts used by JLR in manufacturing, together with the associated record keeping and administration. The tribunal heard about three areas of the Midpoint warehouse in particular - full pallet pick (FPP), wide aisles and CB Panels.

9.3 The claimants both identify as black African. They commenced employment with the respondent on 5 December 2015 (Mr Gahungu) and 8 February 2016 (Mr Hughes) as warehouse operatives at Midpoint. They are reach truck drivers and were, in the main, employed in the CB Panels area during the period in question. They are close friends and spent much of their time together at work.

9.4 The respondent provided 24-hour cover for JLR and, in order to do so, operated a number of different shift patterns. In 2018 when the events

in question began, there was a three shift system comprising earlies, lates and nights. In CB panels the three shifts were staffed by teams of 12 members of staff supervised by a front line manager (FLM). Each team comprised of 4 colleagues working in the office doing clerical work, 2 loaders, 2 feeders, 1 yard marshall and 3 drivers. The claimants were both carrying out the role of driver which involved an activity called "pick and put away". This was essentially an activity involving the following of instructions issued via the reach truck's computer screen to unload or find product and move it to specified racking in the relevant area of the warehouse.

9.5 For the most part, the claimants worked on red shift with an FLM called Mark Coady. Other members of the team working in CB Panels included Ahmed Salad, a Process Coach who assisted with training and clerical work, and Par Sarr, both of whom are also black African. As with the rest of the workforce, the CB panels area was staffed with teams which included members from a number of different ethnic backgrounds (p 343) although for much of the time the claimants were the only black African members of red shift.

Mr Gahungu's flexible working application

9.6 Although referred to in the list of issues as occurring in February 2019, Mr Gahungu confirmed during his oral evidence that the first issue chronologically was that his flexible working request made in February 2018 was "rejected for no reason". Accordingly, this narrative part of the tribunal's findings of fact starts then.

9.7 On 20 February 2018 the Mr Gahungu submitted a flexible working application form (page 152). He proposed moving to a fixed night shift from 9 April 2018 and explained that this need was prompted by his role as a lone parent caring for two young children. Daniel James, an FLM, was appointed to respond to the application. He met Mr Gahungu on 20 March 2018, 28 March 2018 and 9 April 2018. At the final one of these meetings Mr James explained to Mr Gahungu that unfortunately the request for permanent nights could not be accommodated because there was no space on that shift, and the day shifts would be left understaffed. An outcome letter was sent dated 17 April 2018 (page 180). Mr James arranged for Mr Gahungu's managers to provide shift swaps for him for a period of three months to enable him to make the necessary arrangements for childcare.

9.8 Mr Gahungu appealed against the outcome of his flexible working application on 26 April 2018 (page 183). The appeal was to be heard by a manager, Lee Heath, but he failed to action this leading to Mr Gahungu lodging a grievance on 31 October 2018. This coincided with another grievance lodged by Mr Gahungu on 17 October 2018 and was shortly followed by a third grievance he lodged on 3 December 2018 (page 250) about managers' Mr Coady and Mr Ian Femister's conduct towards him in a number of respects.

9.9 Mr Chris Vincent, then a senior operations manager at a different site, was appointed to investigate Mr Gahungu's three grievances which, by agreement, were dealt with together. He spoke to a number of managers during his investigation and met with Mr Gahungu and his Trades Union representative in the presence of Human Resources on 2 and 30 January 2019. During Mr Vincent's discussions with Mr Gahungu, he and his Union representative confirmed that, if Mr Gahungu was given the permanent night shift he had requested, then this would resolve his grievances.

9.10 Mr Vincent issued a written outcome following his grievance investigation on 19 March 2019 (page 337). In summary, he upheld Mr Gahungu's grievance in relation to Lee Heath's delay in dealing with the flexible working appeal. Mr Vincent also offered the claimant a permanent night shift in FPP. He told the Tribunal, and the Tribunal accepted, that it had taken him some time to negotiate the availability of this shift. Mr Gahungu did not take up the offer of the fixed night shift, however, to Mr Vincent's frustration. He explained to the Tribunal that, by this time, the respondent had reverted to a continental shift pattern which Mr Gahungu deemed more suitable than the nightshift to accommodate his caring responsibilities. The continental shift pattern involved alternating earlies, lates and nights with blocks of time off in between.

9.11 On 21 June 2019 the respondent announced a further proposed change to the shift pattern in CB panels (page 344). The proposal was a two shift alternating pattern (mornings/afternoons) with a fixed nightshift. The staff announcement stated "*if you have a preference for being considered for the fixed nightshift then please advise your FLM by Wednesday 26 June*". The Tribunal was not told by Mr Gahungu whether he indicated a preference for nights or not in response to this invitation.

9.12 The fixed nightshift was oversubscribed. It was a popular shift as it attracted financial enhancements. Mr Cook, Senior Operations Manager, was responsible for allocating the shifts. He did so based on the respondent's practice of assessing the skills required on the shift, time-keeping and length of service, when such decisions were to be made within a context of organisational change. This was different to the criteria used when considering a flexible working request.

9.13 Mr Gahungu was not allocated to the new permanent nightshift in CB panels. He made a second application for flexible working on 24 July 2019 (page 345) requesting to work nights Monday to Thursday. Mr Gahungu followed this up with a letter to Mr Cook requesting flexible hours on 12 August 2019 (page 348). This second request was dealt with by Mr Ousman Manneh, and declined (p364). Mr Manneh is also black African. Mr Gahungu confirmed to the Tribunal that the outcome of this second flexible working application did not form a part of his claim.

Mr Hughes' request to transfer sites

9.14 Meanwhile, on 11 March 2019 – Mr Hughes, the second claimant, wrote to Mr Cook requesting consideration of a transfer from Midpoint to a similar position in the Birmingham or Wolverhampton area (p334). The respondent did not dispute Mr Hughes' evidence that he did not receive a favourable response to this request.

9.15 The tribunal heard and accepted evidence from the respondent that jobs would be advertised internally from time to time at its various sites and that the process the respondent adopted was that staff wishing to transfer would apply for a position at a different site. Mr Hughes gave evidence that he did not know of this process or have access to the respondent's systems to be able to apply for jobs. The Tribunal did not accept this evidence, however, as it was in conflict with the documentary evidence at p205-207. This was a letter dated 23 August 2018 from Mr Cook to the second claimant giving the outcome of a grievance he had lodged relating to his failure to progress in the business and his lack of success in achieving an alternative position despite applying for "around 19 jobs through the on-line portal". The Tribunal noted that Mr Cook made the following recommendations in his outcome letter to the grievance:

- "*Access is arranged for you to My Talent World where there are a range of training courses and career planning tools to help you with future job applications. You have now been sent these access details by email;*
- *Lee Heath, Operations Manager, will meet with you to talk over career planning and learning opportunities;*
- *David James will provide feedback for you on the February 2018 interview;*
- *I will sit down with you and go through feedback from the FLM assessment centre you attended to identify where improvements can be made;*
- *I have offered to give you feedback on your CV;*
- *I have attached career transition information from the resourcing team which has tips on career planning and CV writing*."

Mr Hughes told the Tribunal he had shown his CV to Mr Cook but he did not provide any further evidence about whether and if so, how, he had followed up Mr Cook's recommendations about ways to move his career forward and what the outcome was.

9.16 In or about June/July 2019, William Hannon moved to the respondent's Midpoint site and began to work on the nightshift in CB Panels. He had been working previously at the respondent's Castle Bromwich site. Mr Hannon is white. He may have been an agency worker. The tribunal received no further evidence from either party as to the circumstances of or reasons for Mr Hannon taking up a position at Midpoint, save that

it was common ground that this was not the result of any decision-making on the part of the Midpoint managers, evidence which the Tribunal accepted.

Clerical training – Mr Gahungu

9.17 Mr Gahungu was also keen to progress within the business. He asked if he could be trained in clerical work so that he could carry out the administrative work in the office, which was conducted by a number of administrative staff, including Mr Salad. The Tribunal accepted Mr Salad's evidence that Mr Coady's response was that there was no vacancy for another member of staff to do clerical work at that time and therefore no-one else needed to be trained.

9.18 The Tribunal heard no evidence to suggest that Mr Gahungu had applied for an office-based or administrative role with the respondent although it accepted his evidence that he had some experience of such work from previous positions.

The collective pay grievance

9.19 On 14 June 2019 a grievance was submitted to Paul Cook on behalf of the CB panels staff and signed by the majority of them (page 342). The grievance alleged that the salary of the CB panels staff had been negatively adjusted without agreement and in breach of a collective agreement. The grievance was silent in relation to protected characteristics and raised discrimination only in the context that the CB panels staff as a "small group of employees" had been treated differently to other staff at the midpoint site and thereby "marginalised".

9.20 This collective grievance was the subject of a number of meetings during which the second claimant, Mr Hughes, spoke on behalf of the CB panels staff. It was common ground that Mr Hughes and, to a lesser extent, Mr Gahungu, led the collective grievance process. Mr Hughes described himself and Mr Gahungu, with the third driver on their team, Darren, who is Black British, as "the activists".

9.21 In the absence of a resolution, an Employment Tribunal claim was lodged in October 2019 by these claimants on behalf of the CB's panels staff claiming unlawful deduction from wages. The Tribunal was not told anything further about the outcome of those proceedings, save that the respondent disputed the claims.

Walking in the aisles

9.22 After the claimants had raised the collective grievance about pay, they noticed that Mr Coady (who was at that time the Operations Manager

in the CB Panels area) would sometimes walk up and down the aisles where they were working on the reach trucks (known as MHE or Material Handling Equipment). Both claimants interpreted this as Mr Coady subjecting them to increased scrutiny and, in evidence, Mr Hughes explained that, in his view, this was because they were the ones who were leading the charge in relation to the pay grievance. Mr Gahungu agreed, however, that he couldn't be sure that Mr Coady did not also walk in the aisles where others were working.

9.23 The claimants were, rightly, concerned that a pedestrian in the aisles when MHE was being used carried with it the risk of an accident. Mr Gahungu challenged Mr Coady about this but he said he could do as he liked as he was the Operations Manager. The claimants then raised the matter with the Health and Safety Manager who sent round an email reminding staff of the risks associated with this practice.

Confrontation about leaving early – Mr Coady/Mr Hughes

9.24 At or around this time, in approximately August 2019, as a result of a reorganisation, Mr Coady's role as Operations Manager was made redundant and he took up the management position of FLM on the red shift, which was the team within which both claimants were then working.

9.25 There followed an occasion when Mr Hughes' shift was due to finish at 2pm. At 1.45pm Mr Hughes, Piotr Bajon and Jacek Biernacki decided that, as there was in their view no work left to do, they would head to the top locker room to get their things ready to leave. En route, the three men bumped into Mr Coady who asked them where they were going. Mr Hughes replied "to the toilet".

9.26 Mr Hughes and the others were then called back to CB Panels to speak to Mr Coady who explained that they should not leave until 5 minutes before the end of the shift. Mr Coady asked why they were going to the toilets in the top locker room (there being facilities nearer to their workstations). At this, Mr Hughes retorted asking why Mr Coady was asking them and that he could not tell them which toilet to use. Mr Coady raised his voice in response to Mr Hughes and asked him if he knew who he was talking to. Mr Hughes replied "yes, you are Mark Coady!" Mr Coady re-composed himself, told the three men to carry on as they were and that was the end of the incident.

9.27 In relation to this incident, the Tribunal had the benefit of a written statement from Mr Bajon in an email dated 9 March 2020 which was adduced by the claimants (page 13, additional bundle).

9.28 In the list of issues, this incident was recorded as having occurred in June 2019 (1.1.4 and 3.1.6.1) but the Tribunal concluded that it was more likely to have occurred after August 2019 because that was when Mr Coady became the claimants' FLM.

Interruption to Training Session

9.29 In or about August 2019 the respondent introduced a new system involving the use of OMS codes. This was based on a time and motion study of the various tasks carried out by the warehouse operatives resulting in the creation of a time which each task was expected to take. The claimants and their colleagues needed to input the tasks they were carrying out to this system and their individual performance was then measured/reviewed weekly against a set of key performance indicators (KPIs). Errors in data input could create the false impression of activity or vice versa. There was some confusion about this new process amongst the drivers, including the two claimants.

9.30 The claimants, along with all members of the red shift, had weekly 121s with Mr Coady. At these meetings performance statistics from the previous week would be reviewed and discussed. Mr Coady would make observations and suggestions to the claimants for ways in which they could improve their KPIs. Mr Hughes in particular disagreed with Mr Coady about his performance. His view was that he met all the company KPIs, if not exceeded them, but the OMS system did not accurately reflect that. Mr Hughes told the Tribunal that he believed Mr Coady was "over-zealous" about the claimants' performance and that, as the claimants believed Mr Coady did not understand the OMS codes, they asked Mr Salad for some training.

9.31 Mr Salad was responsible for identifying training needs within the team and addressing them through the provision of training via the Excellence School, an internal training forum. Mr Salad agreed that the 3 drivers in the red team would be assisted by having some training on OMS codes and he agreed with Mr Coady that this could be provided by him in a session of around 30 minutes on 12 September 2019.

9.32 Mr Salad called the drivers away from the shift for their training and began the session. Shortly after the session had begun, Mr Coady rang Mr Salad and, after enquiring whether Mr Salad had taken biscuits for the drivers' training session (to which he replied that he had), Mr Coady asked Mr Salad to send the drivers back to their workstations. When Mr Salad explained that the training had not been completed but wouldn't take long, Mr Coady insisted that the drivers were sent back because a trailer had arrived that needed unloading.

9.33 The Tribunal found Mr Salad to be a credible witness and accepted his evidence. He did not understand why Mr Coady felt the need to have the drivers back and was clearly a little frustrated that the pre-agreed time for the training was interrupted. He indicated that Mr Coady's request was direct (i.e. "send them back") but gave no evidence that Mr Coady shouted or was rude in the phone call to him. Mr Salad told the Tribunal that it could happen that staff can be called back to work from training sessions but he had not experienced it personally before.

9.34 After unloading the trailer, both claimants returned to the Excellence School that shift to complete the training (p222 and p241). They each reported favourably on the training and Mr Gahungu told the Tribunal that he understood the OMS codes better afterwards and his performance improved as a consequence.

Time-keeping monitoring

9.35 In or about October 2019 Mr Hughes was in conversation with David James, the nightshift FLM, when Mr Coady gestured to indicate that it was time he was at work. When Mr Hughes raised this later in the shift with Mr Coady, he replied that Mr Hughes was on his shift and shouldn't have been talking with the manager from another shift.

Refusal of holiday leave

9.36 Also in October 2019, Mr Hughes asked Mr Coady for some holiday leave. The request was declined on the grounds of business need because there was a colleague on long-term sickness and other members of staff had pre-booked holiday.

Absenteeism workshop

9.37 In the week beginning 4 November 2019 Jaguar Land Rover's workload diminished leading to the decision for the red and blue shifts to carry out the reduced work on alternate days, with the other shift standing by in the canteen. Red shift (the claimants' shift) covered the work on the Thursday of that week and the intention was for blue shift to cover the work on Friday 8 November 2019.

9.38 The same day, 8 November 2019, an absenteeism workshop was being run by the respondent. This was a workshop that had been instigated by Jaguar Land Rover who had tasked the respondent with carrying out an enquiry into absence levels amongst its teams and the reasons, with a view to developing a strategy to reduce them. It was not a training session and those staff identified by Human Resources/Management to attend were asked on the basis that they

would have something to contribute to the fact-finding process based on their own attendance patterns. Members of the blue shift were invited to the workshop, including Sukhi Sohal and Par Sarr, who is Black African; the claimants were not. Mr Gahungu had expressed a wish to Mr Coady to go on the workshop.

9.39 As a consequence of the absence of the blue shift members of staff who were attending the workshop from the warehouse, Mr Coady came to the canteen where the claimants and a red shift colleague, Richard Hughes, who is white, were sitting. He asked them to "jump on their trucks" or words to that effect saying that there was work to do. Mr Hughes and Mr Gahungu took exception to this as they believed it was their day to sit in the canteen because they had worked the previous day. Richard Hughes went to work. The claimants only did so after Mr Coady had asked them three times and advised them that he believed that it would warrant disciplinary action if they failed to follow his simple management instruction. Mr Hughes told the Tribunal that at this point he and Mr Gahungu did go to the warehouse but only "reluctantly in protest" (Mr Hughes' witness statement paragraph 12).

Inventory work

9.40 The following day, Saturday 9 November 2019, the claimants attended work to carry out voluntary overtime. David James was the FLM on the shift.

9.41 Usually, when carrying out overtime, the claimants did "pick and put away" tasks, as they did during the week. On this occasion, Mr James asked the claimants to work through an inventory checking off stock which was part of a project being carried out by the respondent whilst there was a reduction in work from JLR. The inventory had been printed off by Mr Coady.

9.42 There were 4 people doing voluntary overtime that day. The other two were Mr Sukhvinder Sohal who is British Asian and a white colleague of the claimants, Steve Knight. They have different skill sets to the claimants. Mr Sohal and Mr Knight were not asked to do this work. Mr Knight had a disability which affected his sight and therefore ability to read data on the screen. The claimants did the inventory work assigned to them but were unhappy that they had been asked to do it and that Messrs Sohal and Knight were not required to do it. If they had not been doing the inventory work that day, there were no other tasks that were required because of the overall work shortage and they would have been "chilling out in the office", to use Mr Hughes' words.

Mr Hughes' comment about race to Mr Coady & subsequent discipline

9.43 On Monday 11 November 2019 Mr Coady held a team briefing with red shift as usual. During the briefing, Mr Coady told the entire shift that he would be applying the disciplinary policy in future if any individual failed to follow a reasonable management instruction. The claimants saw the link between this comment and their argument with Mr Coady the previous Friday. They asked Mr Coady why they had not been invited to the absenteeism workshop. Mr Coady replied that attendance had been based on an email with the names of those who should be asked to attend which he had shown to Mr Salad. Mr Hughes asked to see the email and the situation became argumentative, with Mr Hughes not letting the subject drop. Mr Hughes' comments culminated with the question, "don't you like to see two black men sitting down doing nothing?"

9.44 Mr Coady was very offended and upset by this comment, which was made in front of the rest of the shift, and he raised a complaint. He told management that he was especially sensitive to this remark, which he took to be a public allegation that he was behaving in a racist way, because half of his family is black.

9.45 Matthew Jarvis, Senior Operations Manager, was appointed to investigate the complaint. He sought and received statements from the 20 or so other employees who witnessed the incident (p408-417). The statements included one from an employee called Stavro Dako (page 417). Mr Dako was not a member of red shift but said he heard the briefing as he was waiting to put items back in his locker at the end of his shift.

9.46 Mr Jarvis interviewed Mr Hughes on 12 November 2019 in the presence of his companion, Mr Salad. Mr Hughes admitted making the comment alleged by Mr Coady, giving the background to it as relating to the events of the previous Friday.

9.47 Mr Westwood, who chaired the claimant's disciplinary hearing, concluded that the claimant's comment had been a breach of the respondents diversity equality and harassment at work policy and that a final written warning was appropriate. This was confirmed in writing in a letter dated 18 December 2019 (page 449).

9.48 Mr Hughes appealed the outcome of the disciplinary hearing. The appeal was heard by Paul Tompkinson, site lead. An appeal meeting was held on 8 January 2020 at which Mr Hughes was again represented by Mr Munir (minutes Page 459). Whilst Mr Hughes did not dispute making the comment, he based his appeal on the fact that

some of his colleagues have provided statements that he believed were biased. In particular, Mr Hughes was agitated that Mr Dako had claimed to have witnessed the events when according to Mr Hughes he was not within earshot.

9.49 Mr Tompkinson dismissed the claimant's appeal considering that the comment was completely unwarranted and, particularly as it had been made in front of a number of other people, was a breach of the Dignity at Work Policy and a final written warning was not unreasonable. This decision was confirmed in a letter to Mr Hughes dated 12 January 2020 (page 467).

9.50 Mr Hughes did not accept the appeal outcome and wrote to Mr Tompkinson on 10 February 2020 stating that he wanted to raise a grievance against Mr Dako. Mr Tompkinson did not consider it appropriate to hear a further grievance about this and, after a discussion with Mr Munir, the matter was dropped.

Move to work in wide aisles

9.51 It was considered best practice by the respondent to move both claimants away from being line managed by Mr Coady during the investigation into this complaint. They therefore worked in the wide aisles area for a different manager during this time. Mr Hughes did not want to stay in the wide aisles because the racking was taller and it was uncomfortable for him to operate his reach truck in that environment due to his stiff back and neck. He explained this to Mr Jarvis who permitted him to return to his work on the CB panels area.

9.52 The claimants were moved to work in the wide aisles on a second occasion after they had submitted a grievance against Mr Coady in February 2020. The grievance included allegations that the claimants' health and safety was at risk from working for Mr Coady, and it was this that motivated the respondent's decision to move the claimants. The claimants agreed to move once this allegation was pointed out to them and were advised that there would be no KPIs or monitoring of their performance in that area and that it was temporary whilst the grievance was investigated.

9.53 Mr Hughes had an accident on his reach truck whilst working in the wide aisles area. Following an investigation, the respondent concluded that this had been caused by driver error. Mr Jarvis coached Mr Hughes about this accident and how to avoid a repetition but no disciplinary sanction followed as there was no injury or significant damage to property caused.

9.54 Mr Hughes was subsequently moved back to the CB panels area working on blue shift for FLM Mr Phimister following receipt of medical advice outlining the issues with his back and neck.

9.55 An issue did arise with Mr Phimister on 12 March 2020 when the Mr Hughes said he was accused incorrectly by him of scanning the wrong label when it was in fact Mr Dako. The issue appears to have been quickly resolved but Mr Hughes was suspicious of Mr Phimister's motives and believed his behaviour was influenced by his knowledge of the grievance lodged by Mr Hughes against Mr Coady, with whom Mr Phimister was friendly.

Management of Mr Gahungu's sickness absence – January 2020

9.56 On 21 January 2020 Mr Gahungu commenced sick leave due to backache. The respondent's procedure for sickness absence management (page 68) required colleagues to contact their line manager one hour before their shift was due to start on the first day of absence where practicable. Text messages, emails or messages via colleagues were not acceptable. On the first day of sickness absence a colleague was to ensure that his or her manager was advised of the likely duration of the absence and agree the frequency for further contact. The policy explained that a failure to follow the absence notification procedure or late notification of absence might result in non-payment of sick pay and/or disciplinary action.

9.57 On 27 January 2020 Mr Coady wrote to Mr Gahungu asking him to make contact about his absence (page 474). The letter stated that Mr Coady had left multiple messages on his mobile telephone and that as he had not made contact in accordance with the sickness absence policy Mr Gahungu was on unauthorised absence, which would be unpaid.

9.58 Mr Gahungu had a fit note which stated that he was unfit to work from 23 January 2022 to 6 February 2020 due to backache (page 473). His brother took this in to the respondent at some point around this time but it did not come to Mr Coady's attention.

9.59 Mr Coady wrote again to Mr Gahungu on 7 February 2020 expressing his concern that, despite his letter of 27 January 2020 he had received no contact from Mr Gahungu. In the absence of a response to that letter, on 10 February 2020 Mr Coady wrote to Mr Gahungu inviting him to an AWOL hearing on 18 February 2020.

9.60 Mr Gahungu returned to work on 17 February 2020. The following day, the claimants jointly lodged a grievance against Mr Coady (page 484).

In it, the claimant stated that they had been "needlessly subjected to a systematic campaign of harassment, bullying, victimisation and discrimination". Mr Coady was stood down from dealing with Mr Gahungu's AWOL hearing as a consequence.

9.61 Mr Ousman Manneh replaced Mr Coady and the AWOL hearing took place on 26 February 2020 (Minutes page 528). In light of Mr Gahungu's contentions that he had submitted fit notes and that his telephone was broken, Mr Manneh changed the allegation from AW0L to failing to comply with the absence reporting procedure. He then forwarded that matter to be dealt with at a disciplinary hearing. Mr Gahungu confirmed to the Tribunal that he did not view this decision to escalate the matter to a disciplinary hearing as being discriminatory.

9.62 A disciplinary hearing then took place before Mr Jarvis on 3 March 2020 (minutes page 540) and this led to a verbal warning being issued to Mr Gahungu, which was confirmed in writing on 9 March 2020 (page 550). Mr Gahungu did not appeal against this decision.

Workload issue – Mr Hughes 25 January 2020

9.63 During Mr Gahungu's sickness absence Mr Hughes found himself with a workload that was heavier than usual. He was advised some time later by Martin Weaver that he, Mr Weaver, had volunteered to help out with the claimant's work but Mr Coady had not permitted him to do so. Mr Hughes did not complain about his workload at the time or ask for assistance but, on hearing this from Mr Weaver, concluded that it was another example of unfair treatment from Mr Coady which he linked to his race.

Mr Coady's instruction to take breaks alone & claimants' grievance against him – 18 February 2020

9.64 At the red shift team briefing on 18 February 2020, Mr Coady told the team that they were to take their breaks one at a time. This was put forward as being for operational reasons to maintain performance levels but the claimants concluded that it was a deliberate attempt by Mr Coady to keep them apart because of their role in the collective pay complaint. Until this point, it was the claimants' habit to take all their breaks together.

9.65 It was at this point, following this briefing, that the claimants lodged their written grievance against Mr Coady that we have already referred to.

9.66 Mr Jarvis was appointed to investigate the grievance. He held a meeting with each of the claimants on 24 February 2020 (minutes, page 514) and 26 February 2020 (page 535) respectively. During both meetings the claimants were adamant that they did not have an issue

working with Mr Coady and wanted to return to work in the CB panels team. Mr Jarvis found this confusing given the seriousness of the complaints being made against him. However, Mr Jarvis decided that it might be possible to resolve the grievance by mediation and recommended that as a way forward.

9.67 Mr Coady was initially reluctant to take part in a mediation because of the previous allegation of race discrimination that had been made against him by Mr Hughes. However he subsequently agreed and separate mediations took place between Mr Hughes and Mr Coady and then Mr Gahungu and Mr Coady on 3 March 2020. These mediations took a full day and both claimants were represented by their trade union representative, Mr Munir. Mr Jarvis communicated the outcome of the grievance process to both claimants by letter of 19 March 2020 (page 557).

Covid-19 and Furlough leave

9.68 From 24 March 2020, together with a majority of staff from the respondent's midpoint site, the claimants were placed on furlough leave as a result of the Covid19 UK national lockdown. Both claimants signed variation to contract letters confirming their acceptance of this arrangement (page 563 and 564). During furlough leave managers kept in touch with their team by weekly telephone calls.

9.69 In early May 2020 Jaguar Land Rover made the decision to recommence manufacturing support from the respondent to do so. It was JLR's decision to begin with work in its plant in Slovakia that required support from the CB panels area. This meant that the claimants' team was amongst the first to be brought back to work from furlough. The respondent did not decide who came back first – JLR told them what they required and it was for the respondent to staff it accordingly.

9.70 In discussion between the FLMs, Mr Phimister agreed to return to work and bring back his blue shift. The initial intake was four or five colleagues plus the FLM together with Mr Cook as site lead, some health and safety and planning managers. Mr Hughes was asked to return as part of this group with effect from 5 May 2020, which he did. He told the tribunal that he was on sickness absence at this time but the tribunal saw no evidence of that and concluded that, on the balance of probabilities, he did not submit a fit note during his furlough leave or advise the respondent of any medical reason why he was unable to return to work.

9.71 Pa Sar (Black African), Sukhi Sohal (Asian) and Paulina (white Polish) also came back with Mr Phimister supervising. Mr Phimister held a post-furlough return to work interview with Mr Hughes which comprised a series of questions about his health and well-being (page 565). The

first task to be carried out was for the site to be made "Covid 19 safe". This involved moving some furniture and putting up signs and stickers around the site. Mr Hughes objected to being asked to carry out this work and told the Tribunal "I'm a truck driver". He also made reference to his back ache. Once this task was finished, Mr Hughes was assigned work on the racking area but refused to carry this out and thereafter commenced a period of sick leave which continued from 14 May until 3 July 2020, during which time he was referred to Occupational Health.

9.72 Mr Gahungu was requested to return to work from 18 May 2020. His children were at home due to school closures at this time and he raised his childcare problem with the respondent. There were a number of the respondent's employees in this position and a decision was taken at a senior level in the business that such staff should be supported by being granted dependency leave. Such leave was made available to Mr Gahungu but this meant that he ceased to be on furlough leave and was instead on unpaid leave. The respondent took the view that it could not claim furlough payments from the government for employees who were needed at work but could not return due to childcare commitments. Naturally this placed Mr Gahungu in an incredibly difficult position and for six weeks he struggled to cope financially until the schools opened and he was able to go back to work on 6 July 2020. The tribunal felt sympathy for Mr Gahungu as he recounted his experience during this period, the memory of which is clearly still raw for him.

The current position

9.73 Since these events both claimants have been moved by the respondent to a new site, the Logistics Operating Centre (LOC) in Solihull where they work with Mr Coady, Mr James and Mr Brown, all formerly managers in CB Panels. The Tribunal heard no evidence to suggest that their working relationships at the LOC are problematic.

The law

Direct discrimination

10. Direct discrimination is defined in section 13 of the Equality Act 2010 (EqA) as follows: "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".

11. This definition is based on the comparison of the claimant with an actual or hypothetical other ("the comparator") who does not share the protected characteristic in question (in this case race) but whose circumstances are otherwise the same.

12. How to define a comparator when making this legal comparison is further addressed in section 23 EqA which states that there must be "*no material difference between the circumstances relating to each case*".

13. Comparators have also been considered by the higher courts in a number of cases, the leading one being *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, [2003] IRLR 285, ICR 337. As Lord Scott explained in that case 'the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects of the victim save that he, or she, is not a member of the protected class.'

14. The Tribunal also considered *London Borough of Islington v Ladele* UKEAT0453/08/RN which provides a useful reminder that the key question in a direct discrimination claim is **why** the claimant was treated as he or she was. That can often be answered without needing to even construct a hypothetical comparator. In other words, if the reason for the treatment afforded to the claimant was in no way, directly or indirectly, linked to the protected characteristic, but was some other reason, then it cannot have been direct discrimination. This is sometimes referred to as the "reason why" test.

15. In considering claims of discrimination, the Tribunal must also have regard to the burden of proof as set out in section 136 EqA as follows:
"(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."

Applying this provision, the Tribunal asked itself first and foremost whether there was evidence from which it *could conclude* that the alleged discrimination or harassment had occurred, before considering whether it was necessary to look at the respondent's explanation, if any, of the treatment in question.

Harassment

16. Harassment has a special definition in discrimination law which is to be found in section 26 EqA. This states 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.
….
(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.

The Tribunal must therefore consider the subjective feelings or perception of the claimant to the conduct in question, but also whether or not, objectively speaking, such perception was one which a reasonable person could have.

Indirect discrimination

17 Unlike the prohibition against direct discrimination, the law relating to indirect discrimination challenges employers who operate systems which appear on their face to treat everyone the same but which, in reality, mean that protected groups are worse off.

The statutory definition of indirect discrimination (section 19 EqA) sets this out as follows:

(1) A person (A) discriminates against another (B) if A applies to B a provision, criterion or practice which is discriminatory in relation to a relevant protected characteristic of B's.

(2) For the purposes of subsection (1), a provision, criterion or practice is discriminatory in relation to a relevant protected characteristic of B's if—

(a) A applies, or would apply, it to persons with whom B does not share the characteristic,

(b) it puts, or would put, persons with whom B shares the characteristic at a particular disadvantage when compared with persons with whom B does not share it,

(c) it puts, or would put, B at that disadvantage, and

(d) A cannot show it to be a proportionate means of achieving a legitimate aim.

Victimisation

18. The primary object of the victimisation provisions in the EqA… is to ensure that persons are not penalised or prejudiced because they have taken steps to exercise their statutory rights or are intending to do so"[2].

Victimisation is defined in section 27 EqA as follows:

(1) A person (A) victimises another person (B) if A subjects B to a detriment because—
(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

[2] Lord Nicholls in *Chief Constable of the West Yorkshire Police v Khan* [2001] UKHL 48

(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

To bring this type of claim therefore the claimant must show that there has been one of the 4 types of "protected act". Then, and only then, does the Tribunal go on to consider whether the claimant has been subjected to a detriment because of the doing of that protected act.

Time limits

19. When considering the applicable time limits, the Tribunal reminded itself that, if a claim is not in time, then the Tribunal does not have jurisdiction to determine it. The applicable time limit in this case is set out in section 123 EqA which states as follows:
(1) …. proceedings on a complaint within section 120 may not be brought after the end of—
(a) the period of 3 months starting with the date of the act to which the complaint relates, or
(b) such other period as the employment tribunal thinks just and equitable.
(2) …
(3) For the purposes of this section—
(a) conduct extending over a period is to be treated as done at the end of the period;
(b) failure to do something is to be treated as occurring when the person in question decided on it.
(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
(a) when P does an act inconsistent with doing it, or
(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

20. The Tribunal's discretion to extend time if it considers it just and equitable to do so must be exercised carefully having fully considered the balance of hardship between the parties. There is no presumption that Tribunals should extend time; the claimant must persuade the Tribunal that it is just and equitable to do so: *Robertson v Bexley Community Centre,* [2003] IRLR 434. Furthermore, the remedy of Employment Tribunal proceedings is considered to be sufficiently well known that ignorance of such recourse will not normally be accepted as an excuse for non-compliance with any time limit (*Partnership Ltd v Fraine* UKAEAT/0520/10, *John Lewis Partnership v Charmaine* UKEAT/0079/11 and *Walls Meat Co Ltd v Khan* [1979] ICR 52). The statutory

time limits should be sufficient for the claimant to investigate his or her options promptly and issue proceedings within the necessary 3-month period.

21. It can be a useful exercise to consider the factors set out in section 33 Limitation Act 1980 in considering the exercise of discretion in relation to time limits: the length of and reasons for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the respondent has cooperated with any requests for information, the promptness with which the claimant acted once she knew of the facts giving rise to the claim; and the steps taken by the claimant to obtain appropriate professional advice once she knew of the possibility of taking action, although this list should not be applied slavishly (*Adedeji v University Hospitals Birmingham NHS Foundation Trust* [2021] EWCA, Civ 27).

Conclusions

22. The Tribunal applied the law to the facts it had found to reach its conclusions. Each of the allegations in the list of issues was considered in turn, but before setting out the Tribunal's conclusions on each issue, it is worth making some general remarks.

23. Throughout the claimants' evidence, they each expressed strong views about what they saw as the unfairness of their treatment by the respondent. Mr Hughes for example felt that he should have progressed within the business and that Mr Coady spoke to him in a way that was rude and unnecessarily authoritarian. Mr Gahungu did not understand how a business with the size and resources of the respondent could have left him to struggle without an income for 6 weeks during Covid-19 when he was taking care of his children. These are by way of example only. When asked to link their allegedly unfair treatment to their race, however, they struggled to do so, other than to make general statements such as that they did not think that a white person would have been treated the same way.

24. The Tribunal was very alive to the fact that race discrimination is often subtle and covert and that bias is frequently unconscious. However, for a claim of discrimination to succeed, the Tribunal must be satisfied by evidence that there are facts from which it could conclude that the reason for the alleged unfavourable treatment is related to the protected characteristic – here, race. The Tribunal was not adjudicating upon the fairness of the claimants' treatment but only upon whether they have received such treatment because they are of black African heritage.

25. The Tribunal weighed the respondent's evidence carefully. Its witnesses were thoughtful and considered. During a long period of discord between the two claimants and their managers, the respondent had heard and attempted to resolve numerous grievances and appeals and spent many hours of management time in mediations and in trying to repair the company's relationship with each claimant, not to bring it to an end. The Tribunal was

frankly impressed that the employment relationships are ongoing, and apparently satisfactorily so, which reflects well on the respondent (as it does the claimants) and indicated to the Tribunal that there was unlikely to be an underlying or institutional bias from the respondent against the claimants on grounds of race.

26. Turning to the individual complaints, the Tribunal concluded as follows.

Direct race discrimination

27. [Issue 2.1.1] Mr Gahungu's flexible working request was not "rejected for no reason", as alleged. It was initially rejected because there was not a fixed night shift role available at the time. On appeal, a fixed night shift was found for him, but he no longer wanted it. There was no evidence that this matter would have been dealt with any differently if the claimant had been of another race. Mr Hannon was cited as a comparator but the Tribunal was not told why or even whether he too had applied for flexible working and sought a fixed nightshift. That he transferred across from another site did not make him a suitable comparator for this claim.

28. [Issue 2.1.2] The way for the claimant to transfer sites was to apply for a role at another site, which he later did. The respondent did not have a process for "transfer" or certainly one that the managers at Midpoint were aware of or used. The Tribunal did not have enough information about the reason for or mechanism by which Mr Hannon moved sites so was not satisfied that he was a suitable comparator. The decision was not taken in his case by the same management team in any event. There was no evidence of any link to race in the way this request was processed.

29. [Issue 2.1.3] Mr Gahungu did not receive clerical training because there was no need for additional clerical staff when he requested it. Agency staff were not suitable comparators and had to be multi-skilled to cover any role from their agency's point of view. The decision was not linked to race.

30. [Issue 2.1.4] Mr Coady did raise his voice to Mr Hughes and ask him if he knew who he was. The Tribunal concluded that, in the same circumstances, he would have been likely to have said the same to a person of a different ethnic background to Mr Hughes. Mr Hughes was challenging his authority by saying, effectively, that he had no right to tell him what to do when in fact it was Mr Hughes who was in the wrong for leaving his shift early without permission. Mr Hughes was at times insubordinate to Mr Coady. He struggled to do what he was told and thought he knew better. Mr Coady was quite driven and efficient and could be authoritarian in his management style. This, not race, led to their clashes in the Tribunal's judgment.

31. [Issues 2.1.5 & 2.1.6] It was no doubt very frustrating for the OMS training to be interrupted and the direct instruction from Mr Coady to "send them back" was triggering for Mr Hughes in particular. Mr Coady did not shout on the phone to Mr Salad, however, and his motivation was that he believed there was work that they needed to do because a trailer had arrived. The Tribunal

did not find any racial motive in Mr Coady's conduct in particular as both claimants returned and completed the training once the work issue had passed.

32. [Issue 2.1.7] Mr Coady did monitor the time keeping of Mr Hughes from time to time but that was his role as FLM. It was not less favourable treatment for Mr Coady to question Mr Hughes for spending time when he was meant to be working in conversation with a manager from another shift. The Tribunal did not find any evidence of a link to race in this conduct.

33. [Issues 2.1.8 & 2.1.9] The decision as to who went on the Absentee Workshop was not taken by Mr Coady. The Tribunal found that it was most likely to have come from HR and selection was based on attendance records, with a bent towards those with high absence levels. It was entirely reasonable for Mr Coady to ask the claimants to do some work to cover for others. They were being paid to be at work. The threat of disciplinary action only came after, by their own admission, the claimants had failed to follow this reasonable management instruction 3 times. The blue shift were not suitable comparators applying the statutory definition because they were not in the same position as the claimants. The Tribunal found no evidence whatsoever to link this incident to the claimants' race.

34. [Issue 2.1.10] There was inventory work to do on Saturday 9 November 2019. This was linked to the shortage of other work and was not a task dreamt up by Mr Coady because of the claimants' race, as they alleged. There were health reasons why the claimants' white comparator Mr Knight was not required to do the work and Mr Sohal had a different skill set and was not a suitable comparator for that reason. The Tribunal did not find that there was unfavourable treatment– the claimants were given reasonable work that they were qualified and able to do when they were at work and being paid.

35. [Issues 2.1.11, 2.1.12 & 2.1.15] The Tribunal viewed the Final Written Warning given to Mr Hughes as reasonable. He admitted accusing Mr Coady of a racist motive to a management decision without any basis and this was a serious allegation which could have cost Mr Coady his job. The respondent rightly took Mr Coady's complaint seriously and investigated it. The investigation was reasonable. There was little if any factual dispute as to the offending comment, which was admitted by Mr Hughes. This was the reason why the complaint about Mr Dako's statement was not pursued – it was not material to the outcome. The claimant was supported by a Trades Union representative at both disciplinary and appeal hearings who did not raise a concern of racial bias. There was nothing to suggest that a person of another race would have been treated any different in comparable circumstances.

36. [Issue 2.1.14] There was no direct evidence about whether Mr Weaver offered to help the claimant or not. Assuming that he did, the Tribunal was not able to draw any inference of racial bias from the fact that Mr Coady told him not to. There could have been a number of reasons for this and the claimants adduced no evidence was no evidence to indicate that it was race related.

37. [Issues 2.1.16 & 2.1.18] Mr Gahungu did not follow all the processes for reporting sick as alleged. He did not phone his manager. Mr Gahungu admitted that there was no racial bias in the decision of Mr Manneh to recommend that there was a disciplinary hearing arising from this set of facts and it was not in the Tribunal's judgment credible to then suggest that the first written warning Mr Jarvis gave him, which was the lowest possible disciplinary sanction, was motivated by race.

38. [Issue 2.1.17] It was not discriminatory for Mr Coady to tell the whole team, coming as they did from a variety of racial backgrounds, to take their breaks alone. Mr Hughes admitted in response to a question from Mrs Bannister that they did not see their comparators, Richard Hughes and Martin Weaver, taking their breaks together thereafter. It may have been an unpopular – or even unfair – decision, but it was not tainted by race.

39. [Issue 2.1.19] Mr Hughes alleged that Mr Ian Phimister's incorrect accusation that he had scanned a wrong label was motivated by Mr Phimister's solidarity with Mr Coady, not Mr Hughes' race. The Tribunal made no finding about whether this minor work criticism was true or not, but it did not find any evidence of a link to Mr Hughes' race.

40. [Issues 20.1.20 & 20.1.21] Mr Hughes was not pressured out of furlough. He returned on request and did not signal any health reason why he could not. He did not like the tasks he was given upon return and would have preferred to have stayed on paid furlough leave for longer but that did not raise an inference of race discrimination. Others of different races, including white managers, also returned when he did.

41. Mr Gahungu was not forced to attend work out of furlough either. On the contrary, he was given dependency leave. He was not paid because he did not qualify for furlough pay and because the respondent's policy was that dependency leave was to be unpaid. This was certainly difficult for him but not evidence of race discrimination by the respondent. All staff with dependents who could not return to work were treated the same regardless of race.

42. [Issues 2.1.22, 2.1.23 & 2.1.24] The Tribunal found these three general allegations also to be unfounded. There was evidence that considerable support had been offered to Mr Hughes to improve his chances of success in applying for other roles and no evidence that Mr Gahungu did apply for other roles. There was a legitimate non-racial reason for Mr Coady's decision not to offer clerical training to Mr Gahungu – namely that he did not need another person at that time. As indicated above, these claimants each received a considerable investment in management time and support with their many concerns over a long period of time.

Indirect discrimination

43. The respondent did ask the claimants to return from furlough leave. However, the claimants did not call any evidence which demonstrated that, as black Africans, that put them at a particular disadvantage when compared to other races and this was not alleged at the time. The disadvantage to Mr Gahungu was because of his parenting responsibilities and there was no ostensible disadvantage to Mr Hughes identified – his pay increased from 80% on furlough to 100% and he did not indicate that he was at increased risk from Covid-19 due to any underlying health conditions when a risk assessment was carried out upon his return. The Tribunal found that the key requirements for a claim of indirect discrimination were not demonstrated by the claimants.

Harassment

44. [Issue 4.1.1] The Tribunal rejected this allegation for the same reason as the direct race discrimination allegation based on the same facts.

45. [Issue 4.1.2] The Tribunal did not find that the claimants were overly criticised in 121s. Mr Coady was keen to improve performance. He ran through KPIs weekly with all his team members and made suggestions for improvement. There was no evidence that he treated the claimants any differently to other members of the team in this respect.

46. [Issue 4.1.3] The Tribunal rejected this allegation for the same reason as the direct race discrimination allegation based on the same facts.

47. [Issue 4.1.4] The Tribunal rejected this allegation for the same reason as the direct race discrimination allegation based on the same facts.

48. [Issue 4.1.5] The claimants did not identify which 4 grievance outcomes they were alleging were biased in a way that constituted harassment. The Tribunal did not find evidence of any unreasonable or biased outcomes to grievances in any event.

49. [Issue 4.1.6] Mr Coady was at times exasperated by the claimants – Mr Hughes in particular. As a consequence, Mr Coady raised his voice on occasion. He could be authoritarian. His manner irritated – even triggered - the claimants at time, who were keen to be treated as equals by him, not subordinates. Notwithstanding this clash of approaches, however, the Tribunal could not find any evidence that Mr Coady singled the claimants out for treatment any different to the rest of the team. Mr Coady had himself been demoted in 2019 due to a reorganisation and, from an army background, was strict, delivery-focussed and no nonsense. There was nothing to link his approach to the claimants' race, however.

50. [Issue 4.1.7] The Tribunal found that at times Mr Coady did walk where the claimants were working. There was no evidence that this was done to intimidate them, however, although the Tribunal found that it may well have been in an effort to check what they were doing. Mr Coady was their line manager and so that was not unreasonable. This was not harassment and there is no evidence that it was because of the claimants' race.

Victimisation

51. The Tribunal found that the only one of the 4 alleged protected acts that qualified as such was 5.1.4 – the grievance against Mr Coady on 18 February 2020. The respondent in fact admitted that this was a protected act. The other complaints cited by the claimants made no reference to race or any other protected characteristic whatsoever.

52. The Tribunal found that the alleged detriments were not linked to the fact that the claimants had lodge this grievance, however. In the case of moving the claimant to work in the wide aisles – the first time it happened was before the claimants' grievance and the second time, it was because the claimants themselves had said they felt it was a risk to continue to work with Mr Coady. In any event, when Mr Hughes raised an issue with the work there, he was moved back. The inventory work and Mr Hughes' declined holiday request occurred before the claimants' grievance, as did the allegation that Mr Weaver was not allowed to assist Mr Hughes with his work, and therefore could not have been a response to it. The decision to bring the claimants back from furlough leave was not linked to their grievance against Mr Coady in the Tribunal's judgment, but was because the client, JLR, needed support from staff in CB Panels where the claimants both worked.

53. It follows from the Tribunal's conclusions that the claims of direct race discrimination, harassment on the ground of race and victimisation fail and are dismissed.

54. In the circumstances, it was not necessary for the Tribunal to go on and consider the issue of time limits.

Employment Judge J Jones
6 February 2023