EMPLOYMENT TRIBUNALS

Claimant: **Mr Idrien Daniel**

Respondent: **London Borough of Newham**

Heard at: **East London Hearing Centre**

On: **26, 27 January 2022 and**
in chambers on 30 January 2023

Before: **Employment Judge Jones**
Members: **Ms S Barlow**
Ms A Smith

Representation
Claimant: Mr V Daniel (claimant's brother)
Respondent: Mr D Moher (solicitor)

JUDGMENT

The Claimant's complaint of race discrimination succeeds.

The Claimant is entitled to a remedy. The Tribunal will set a date for a remedy hearing once it has dates to avoid from the parties.

REASONS

1. At a Preliminary Hearing on 29 March 2021 the Tribunal determined that the only complaint that it had jurisdiction to consider was the complaint of race discrimination. The agreed list of issues will be set out in detail below in the judgment section of these reasons.

Evidence

2. The Tribunal heard from the Claimant in live evidence. From the Respondent, the Tribunal heard from Mr Stephen Blackburn, who dismissed the claimant and Anthony Kett, Operations Manager who at the time was Assistant Waste Collections Manager, who investigated the allegations against the Claimant.

3. The Tribunal apologises to the parties for the delay in the promulgation of the reasons and judgment in this matter. This was due to pressure of work on the judge and to difficulties

in finding dates in chambers for the Tribunal to meet. One of the members was unwell on 22 October 2022, which had been scheduled as an in-chambers day. That day had to be cancelled. The next earliest date that a fresh in-chambers day could be scheduled with the full Tribunal was 30 January 2023.

4. The Tribunal make the following findings of fact from the evidence presented at the hearing.

Findings of Fact

5. The Claimant was a Refuse Loader working for the Respondent's Waste Services Department. The Claimant specifically worked on the Bulky Waste Collection Service which is the service used to pick up bulky waste such as fridges, sofas, beds and mattresses, which residents would place outside of their homes for collection. The Claimant was part of a crew working on one of two trucks in the borough collecting bulky waste such as mattresses, fridges, beds and sofas. He would have to alight and pick up the waste and load it on to the back of the truck before moving on to the next property which had booked a collection. They worked across three postcodes, E15, E16 and E13, starting their shift at 2pm and working into the evening. This meant that it was important for their safety that they could be seen by other road users. The Claimant and the driver were one team.

6. The Claimant began his employment with the Respondent in January 2010. The Claimant's employment was terminated on 6 January 2020 when he was informed that he was dismissed.

7. The Claimant described to us the normal procedure he followed when working for the Respondent. The Claimant would attend the depot, get dressed into his high-viz vest and boots, and wait with the other Loaders on what he described as '*the pad'*. The driver would go to the office to collect the work sheet and the keys for the vehicle. The driver would then do a vehicle check which would take between 15 – 20 minutes. While the driver is doing that, the Claimant would take the work sheet from him and try to map out the route that they would need to take in order to pick up the bulky waste items from the various properties and get back to the depot, within the shortest period of time. They would leave the depot at 2pm to start work.

8. When they left the depot, the Claimant would sit next to the driver so that he could assist him in finding the various properties on route. It was not the Claimant's job to plan out the route for the shift but because he lived locally and was very familiar with the local streets, it was quicker for him to do so and it worked efficiently for the team.

9. The Claimant wanted the Respondent to allow him to meet the vehicle on the road as he considered that this would be easier for him. The Respondent's case was that it was not possible to allow the Claimant to meet the lorry on the road. The Claimant gave evidence of drivers meeting crew along the route so that they did not always have to come to the depot. We find that this related to the crews on other refuse collection services such as general household waste, as they had a set route which they worked every shift. With bulky waste collection, the route varied a little - although it was across the same three postcodes - according to which residents had booked a collection so it was highly unlikely that there would have been a practice that drivers would collect other crew members on route on that service as the route varied every shift. That would only have been possible if they were aware of the actual addresses in advance.

10. As the Claimant also gave evidence of working out the route for the driver on being given the list of addresses from which they needed to collect bulky waste, we find that the actual addresses that he had to collect from were not known in advance, which meant that it was not unreasonable for the Respondent to require the Claimant and other loaders to have to come to the depot to meet their drivers at the start of his shift.

11. In his live evidence, Mr Kett confirmed that the Claimant had initially been employed as a recycling loader when he first started working with the Respondent. As a recycling loader, the Claimant would be working on the back of the lorry and had the option of meeting the crew on the road, as this would be an example of a service with a set route every shift. In 2017, the Claimant became part of the bulky waste collection team and as a loader for that service, he needed to report to be at the yard at the start of the shift, to meet his driver because the work that those teams did was different every day. The Claimant and his crew could also be asked to do other jobs or other routes if the Respondent was short of staff. The Claimant was therefore asked to come to the yard to meet the driver at the start his shift, as the work that he and the driver would have to do on the day could not be guaranteed at the beginning of the day.

12. As a Loader, it was the Claimant's job to jump off the truck and pick up the bulky items and load it on to the back of the vehicle. When the team consisted of just the Claimant and the driver, the driver would also come out of the vehicle to help him lift as according to the Respondent's health and safety practices, there needed to be two people lifting bulky items. The Claimant complained that he was sometimes expected to lift very heavy items on his own and that this caused him problems with his back. All members of the team were expected to wear their steel toe-cap boots and high viz vests while working.

13. They would finish the route at about 8:30pm at which time the Claimant would leave the driver wherever they did their last pick up. The driver would then drive to the tip in Dagenham to dispose of the items and return to Stratford to leave the vehicle. The Claimant was not required to go with the driver to the tip. The trip to the tip would last about 1.5 hours.

14. We had the Claimant's job description in the bundle of documents. The section reproduced at pages 47 and 48 listed the following duties: -

a. *to ensure contact is available through phone, radio or other equipment supplied, at all times;*

b. *to maintain a written log and any other records that are in place or requested, including hours of duty work etc, as requested,*

c. *to undertake training as and when necessary,*

d. *to ensure that personal protected equipment (PPE) wear and/or uniform that is provided is worn and maintained at all times;*

e. *the nature of this service is such that employees may be required to respond to many different situations, you must be prepared to work in a totally flexible manner. From time to time you will therefore be required to undertake other such duties within your competence;*

f. to respond to service needs by working on areas outside the normal beat if required. This may for example, include doing a special clean-up in areas of delivery of leaflets;

g. these duties will entail the lifting of heavy/awkward or bulky items;

h. to assist the driver in manoeuvring of the vehicle.

15. There were also additional operational requirements such as '*undertaking work to a high set standard within strict time targets, assessing and prioritising the work required and the best method to use, achieving a clean environment; utilising the GPS system to report defects and locations; being responsible for checking the condition of containers for waste storage and ensuring delivery of sacks; reviewing and recording participation/presentation standards of waste or recyclates and lastly, being responsible for, and organising staff to deliver agreed outcomes from partnership working to ensure a cleaner, greener, safer environment'.*

16. The Claimant would normally attend work with his high-viz vest in his bag. His high visibility (high-viz) vest was part of his PPE uniform. Usually, on arrival at the depot, he would go into the changing rooms and put on his high-viz vest and his steel toe-cap boots in time to be ready to start work at the beginning of his shift. He did this because he did not like walking in the local area wearing his uniform and hi-viz vest. We find it unlikely that the Claimant ever tried to start his shift without wearing his high-viz vest. Also, there were no occasions that we were told of where the Claimant was not present when the truck left the depot or that he had been reported by the driver as missing. We were not told of any occasion when the Claimant caused his crew to leave the depot late. The evidence was that there were supervisors in the yard before the shift started and it is likely that they were checking that everyone was wearing their PPE before they began their work and that the trucks went out on time. Those supervisors also drove around the area to check on the teams while they were working.

17. Mr Kett confirmed that there was a changing room at the depot. There is also a store of equipment including high-viz vest and boots. The Claimant, like other employees, could ask for a ticket and get new equipment and go into the changing room and change into items received. However, the store was not for people who have forgotten their uniform at home. It was mainly for new members of staff or where uniforms and hi-viz vests had been damaged while working. The changing room had lockers which staff could use to put their personal belonging. Although there was a changing room, Mr Kett was adamant that as a member of the bulky waste service the Claimant was expected to report to duty wearing his correct uniform rather than to change into it at work. It was not clear to us whether the Respondent expected the Claimant to attend work at 1.45pm or 1.50pm so that he could change and be on the pad at 2pm. This had also not been made clear to the Claimant in the correspondence or in the meetings that he had with management.

18. One of the earliest notes in the bundle of documents was at page 49. This was a note from a supervisor, which stated that on 14 August 2012, the Claimant had been seen at the depot without his high-viz vest. The supervisor recorded that he spoke to the Claimant about this. The Claimant was advised that he should wear it on all occasions when working and that if there were any further occasion when he did not do so, it would result in formal disciplinary action.

19. On 7 February 2017, another supervisor spoke to the Claimant about time keeping. The Claimant was due to start his shift at 2pm and although he was in the depot he did not come to the office until approximately 2:15pm to start his shift. The Claimant was recorded as being late, arriving at work just after 2.10pm on 15 May 2017 as he had been delayed by trouble with his ID card at the security gate. The Claimant was late the following day as he forgot that he had a meeting with his supervisor before the start of his shift. The supervisor recorded in his note that he told the Claimant that from now on he had to report to the Office window at the start of each shift so that he could be recorded as being present at 2pm.

20. Following the supervisor's instruction, the Claimant reported to the office at the start of every shift at 2pm. However, after a period of time he stopped doing so because he considered that he had proved that he could attend work on time and it no longer seemed necessary. He had not been given a set period of time during which he was expected to do so.

21. Mr Kett confirmed that when the Claimant was observed on 28 and 29 June 2018, those were reported by quality inspection rather than by any one the Claimant knew. On both occasion the Claimant was on duty but reported for not wearing the correct PPE. The Respondent wrote to him on 29 June to advise him on the need to wear the correct PPE while on duty.

22. The next time the Claimant's managers wrote to him was in November 2018. We had copies of two letters in the bundle of documents dated 16 November 2018 and 21 December 2018 from Mr Johnathan Payne, Recycling Supervisor. In the November letter, Mr Payne, reiterated his instructions that the Claimant was *'required to report to the recycling office by 2pm on the days that he was scheduled to work.'* He confirmed that it was vital that the Claimant had the correct uniform when he arrived.

23. In the December letter, he confirmed that the Claimant was required to report to the recycling office window by his shift start time of 2pm and added that when the Claimant did so, he must be ready to start work in full uniform, including all PPE. Mr Payne indicated that the Claimant had been following that instruction recently. When he did so, he did not yet have on his full PPE. It is likely that he did not have his hi-viz vest on. Mr Payne reminded the Claimant that he was still required to report to the recycling office by 2pm on the days he was scheduled to work. He indicated that he would deal with this on an informal basis on this occasion but that the Claimant should know that continued failure to keep to this requirement could result in him addressing the matter in a more formal way.

24. Although it was the Respondent's case that the Claimant was spoken to on numerous other occasions about his timekeeping, we did not have evidence of that or of how many times this happened. If managers had spoken to him after this, they had not made any note of it.

25. On 7 January 2019, the Claimant was invited to a disciplinary investigation meeting with Mr Kett about his time keeping as it was alleged that he failed to attend work at 2pm on 4 January 2019. The meeting happened on 23 January.

26. They discussed the allegations of poor timekeeping. The Claimant stated in the meeting and in live evidence in the hearing, that he was not late as he was always in the yard at 2pm. He always met the driver on time and worked his shift, in accordance with his contract. He stated that if he had not been there to start the round, the driver would have

complained to the office that he was absent. It was his understanding that on no occasion had a driver ever complained to the office that he was not there when it was time to leave the depot. We were not told of any such occasions. The Claimant did not accept the Respondent's position that his job required him to be at the recycling office window, with all PPE on and ready to start work at 2pm.

27. Mr Kett referred to a conversation the Claimant had with Jonathan Payne, Waste Collections Supervisor on 22 January regarding the Claimant not wearing his high-viz vest and not being visible in the yard at 2pm to start his shift.

28. Once they discussed that allegations of lateness, there is a dispute about what happened next. Mr Kett's evidence was that the Claimant stated that he *"did not want all of this and that you were sorry and asked if it could be dealt with in a different way and without it going to a hearing".* Mr Kett's evidence to us was that this was why he dealt with these allegations in this investigation meeting and gave the Claimant a first written warning, rather than refer it to a disciplinary hearing. The Claimant disputed this. It was the Claimant's live evidence to the Tribunal that he did not recall asking for this matter to be dealt with in an informal way rather than go to a disciplinary hearing. However, we find it likely that if he had not agreed to it being dealt with informally, the Claimant would have protested when he received the letter dated 25 January from Mr Kett in which it was confirmed that he had been given a first written warning, without first having the opportunity to defend himself in a disciplinary hearing, against the allegations.

29. Mr Kett wrote two letters to the Claimant after this meeting. The first letter dated 24 January, recorded that the meeting was *'due to your continuing failure to show for work in your uniform and at your contractual start time of 14.00hrs'.* It recorded that he told the Claimant that the issue could be dealt with in line with council's policy by issuing a first written warning which would be placed on his file for 12 months and that the Claimant accepted that. The written warning was given because of the Claimant's failure to comply with reasonable management instructions and work priorities i.e. attending work at the correct time and for failure to wear the personal protective equipment i.e. the high viz vest. The written warning would remain live on the Claimant's work records until 25 January 2020. The letter recorded that the Claimant apologised for his actions. In the hearing, the Claimant stated that he had finally accepted the warning because he knew that he had not reported to the office window on 4 January 2019, the particular day in question.

30. We had a copy of the Respondent's disciplinary policy and procedure in the Tribunal bundle. The flowchart at page 203 shows the progression of disciplinary case from an allegation of misconduct to appeal against dismissal. At the formal investigation stage, the Respondent's policy states the following:

> *'As part of the investigation the manager will arrange for a meeting with the employee and anyone else involved where appropriate, to discuss the allegation and to gather any supporting evidence. During the process the manager may determine that there is no case to answer or in some instances the employee may admit to the offence and accept a warning without the need for a full hearing.'*

31. The Respondent took disciplinary action in relation to these matters because they were seen as breaches of the employee code of conduct (page 310) in relation to *Section 2.0 attendance and timekeeping, a) employees are expected to adhere to their contractual*

hours. They are required to know and comply with start and finish times (or adhere to flexible working arrangements, including Home Working) and operate time recording as necessary; and *Section 2.1 Honesty, integrity, impartiality and objectivity*; *b) Employees must comply with reasonable management instruction and work priorities; and Section 2.2 Dress (including jewellery, hear styles and other decoration) and Personal Hygiene - a) comply with uniform/dress code requirements, d) Always wear uniform or protective clothing if these have been issued, or made available for particular tasks, and make sure that they are clean and in a good state of repair...'*

32. A second letter, also dated 24 January 2019, provided a record of their second discussion at the same meeting, on the separate matter of a report to management that the Claimant had been smoking cannabis at work.

33. It had been reported to Mr Kett that the Claimant had been smoking cannabis whilst at work. The day supervisors told him that the lorry the Claimant had been working from while on shift the shift on the previous evening, had a strong smell of cannabis in it on the following morning when they came to work. Mr Kett asked the Claimant if he had been smoking cannabis at work and the Claimant denied it. The Claimant denied that he had smoked cannabis at work. It was his evidence to us that he was not the only person spoken to about that on the morning of 23 January at the start of his shift. He recalled that the driver and the other loader who had worked with him on the shift, who might have been an agency worker, was also asked about the smell of cannabis in the lorry. In the letter, Mr Kett informed the Claimant that he was not going to take statements from anyone else and that he did not intend to carry out a full investigation but that he would do so, if this matter was ever reported to him again. It was the Claimant's case that he did not consider Mr Kett's conversation with him to be an accusation that he had smoked cannabis in the lorry during the shift.

34. It was agreed between the parties that the Respondent does not undertake drug testing at work. In the hearing Mr Kett confirmed that he had spoken to the Claimant's colleagues about it and after the Claimant denied smoking cannabis at work in this meeting, he decided to give him the benefit of the doubt. He accepted what the Claimant told him and no further action was taken on this matter. On a previous occasion, Mr Kett had spoken to the Claimant about smoking cannabis at work and given him an advice leaflet on it. The Claimant recalled receiving the leaflet and confirmed that Mr Kett had previously spoken to him about it but not written to him, as stated in Mr Kett's witness statement.

35. By May 2019, the Claimant had stopped reporting into the recycling office window and was going straight to the lorry to meet the driver at the start of his shift. There was never a report that he was not present when the driver was ready to leave the yard.

36. The Respondent's team managers and supervisors would usually drive around the routes during the night, monitoring performance of staff who were on shift. On 16 May 2019, the Claimant was seen working without his high-viz vest on. The Claimant was in someone's front garden when the supervisor saw him and called out to him. The supervisor reported that the Claimant did not have on his high viz vest and that when he looked closer, the Claimant was also not wearing his steel toe-cap boots. The Claimant agreed that he did not have his high-viz vest on as he had taken off his jumper as it was hot, and left the high-viz vest on his seat when he jumped out of the lorry to pick up a bulky item in someone's front garden.

37. On 17 May the Claimant was recorded as not having reported to work at his contracted start time. It is likely that he was at the depot and had been at the pad in time to be collected by the driver and start his shift at 2pm. However, the Claimant had not reported to the recycling window at 2pm.

38. By letter dated 17 May, Mr Payne wrote to the Claimant to advise him that he had been allocated to investigate the following two allegations against the Claimant:

a. *That on 17 May 2019, you failed to report at your contracted time despite previous informal reminders and being on a current first written warning in relation to such behaviour.*

b. *That on 16 May you failed to report for work wearing the correct uniform despite previous informal reminders and being on a current first written warning in relation to such behaviour.*

The Claimant was invited to attend the investigating meeting on 29 May, so that he could give an explanation of the circumstances relating to those allegations from his perspective. The investigation meeting was going to be conducted by Mr Payne and the Claimant was advised of his right to be accompanied by a colleague or trade union representative.

39. The notes of the investigation meeting conducted on 28 May 2019, were in the bundle of documents at page 67. In relation to the issue of timekeeping on 17 May, the Claimant confirmed that he had been at work on time on that day. He had not reported to the recycling office window before the start of his shift. He had seen his driver on the pad and decided to have a look at the work they had been given to do and begin to plan the route. The Claimant stated that he then went to the toilet near to the canteen as it was cleaner than the toilet near the office. Once he had finished, he met his driver on the pad and they went out on time. He did not go to the window as he felt that he was at work on time and ready to work. In relation to the incident on 16 May, the Claimant was adamant that he had been wearing his steel-toe cap boots at the time but agreed that he did not have his high-viz vest on at the particular moment that the supervisor drove past as it was on his seat in the vehicle. He had been wearing it before and had taken it off to take off his jumper. He forgot it on the seat when he jumped off the vehicle to collect waste. He put it on as soon as it was pointed out to him by the supervisor.

40. As part of his investigation, Mr Payne interviewed Andrew Leedham, who was the supervisor who had reported the Claimant for not wearing the correct PPE. He confirmed he saw the Claimant working, passing bulky items outside someone's garden not wearing his high-viz vest. Mr Leedham also confirmed that when he shouted over to the Claimant about his PPE, the Claimant said that he was going to put it on now. Mr Leedham stated that that was when he noticed that the Claimant was also not wearing his boots. There was therefore a dispute between the parties as to whether or not the Claimant was wearing his boots on that occasion. The Claimant agreed that he had not been wearing his high viz vest.

41. Mr Payne left the position of recycling supervisor before he completed this investigation.

42. In the hearing the Claimant told us that Johnathan Payne told him that he was unhappy about being instructed by senior managers to be strict with the Claimant by monitoring his performance in what the Claimant suggested was an attempt to catch him out. The Claimant's evidence was also that Mr Payne left the supervisor's role as he did not like the fact that he had been asked by Mr Kemp to discipline loaders. We did not hear from Mr Payne in evidence. The Claimant's evidence was that he had not said this before as he did not want to get Mr Payne in trouble.

43. Mr Kett concluded the investigation by using Mr Payne's notes to prepare the investigation report, which we had in the bundle of documents.

44. In the investigation report Mr Kett referred to the sections of the Respondent's Code of Conduct referred to above. In the report, he stated that the Claimant had failed to report to the recycling window at 2pm and that he had not been wearing his hi viz vest. The investigation report recorded that the Claimant had been spoken to on numerous occasions with regard to his failure to wear his complete PPE, which consisted of his steel toe cap boots and his high viz vest; as well as his frequent failure to attend work, ready to work, at his contractual start time of 2pm, to start his shift. The report also recorded that the Claimant had been issued with a formal first written warning, for timekeeping issues, on the 22 January 2019. This was not due to expire until 22 January 2020.

45. The report then set out Mr Kett's conclusions on the two incidents, that he believed had occurred after the Claimant was given the first written warning. Those were firstly, that on the 17 May 2019, he had been witnessed and challenged by Andy Leedham for not wearing his Hi Viz vest while at work and on 16 May, he failed to report to the recycling window at 2pm. Both of those matters were agreed by the Claimant although he did not agree that he was late as he was in the depot on time. The investigation report contained a summary of the interviews Mr Payne conducted with Mr Leedham and with the Claimant.

46. The investigation report then stated that due to the nature of the Claimant's duties and work areas, and especially during winter working times, when he is working in the dark; he is expected at all times to wear full PPE as supplied by the Respondent and that his failure to wear full PPE was a breach of health and safety and put himself and others in danger. The report confirmed that the requirement to wear full PPE was set out in the Refuse and Recycling Code of Safe Working Practices 2018, which the Claimant had previously signed for. A copy of the Claimant's signature can be found on page 54 of the hearing bundle.

47. The investigation report noted the following statistics: that the Claimant had been late to work on many occasions including the 7 February, 15 and 16 May 2017, failed to wear the correct uniform on 28 and 29 June 2018; he failed to wear correct PPE on 4 July 2018 despite being warned about it on 29 June 2018; he had poor time keeping and had failed to follow management instructions on 16 November 2018; he had not presented himself in uniform and ready for work on 21 December 2018; and lastly, on 4 January 2019, he failed to arrive on time for work or report to the office as he had been instructed, despite previous warnings. This covered the whole history of the Claimant's employment in the Respondent's bulky waste collection service.

48. The investigation report also noted that the Claimant's managers and supervisors had talked to him about this informally on a number of occasions but there was no note of any other times that he had been spoken to and no note that he had been told that a

consequence of failing to do so could be his dismissal. The report also recorded that the Claimant had provided reasons why he had not adhered to the management instructions and requirements on the occasions that he confirmed had happened. The matter was being referred for disciplinary action and it would be for the hearing officer to determine if the Claimant's explanations were acceptable or reasonable giving the frequency and repetition of the breaches. Mr Kett recommended that the matter should be considered at a disciplinary hearing.

49. The Claimant's evidence was that he frequently raised the issue of being treated differently on the grounds of his race with managers. He specifically referred to race discrimination in relation to the allocation of work as he believed that he was expected to lift heavier items than colleagues of other races and frequently had drivers who would refuse to help him do so. It was his case that the only other loader who had also been told that he had to come to the depot and report to the recycling window before beginning the shift, was another black loader called Bradley Pickett. He suggested that the requirement to report to the office window before the start of the shift was imposed on him because of his race and was less favourable treatment as everyone else was allowed to attend at the depot and start work without needing to go to the recycling window.

50. The Respondent's evidence was that out of a total of 56 members of staff working on the afternoon shift, all but 14 would be required to start their shift at the depot in accordance with the requirements of the service. We did not hear from Mr Pickett in evidence during the hearing. We also did not hear of anyone else apart from the Claimant and Mr Pickett being asked to report to the window before starting their shifts. Mr Pickett was asked to report to the window for a short period of time.

51. The Claimant had been asked to report to the recycling window in January and his evidence was that he stopped doing so in February 2019. The Respondent did not take it up with him as a matter requiring disciplinary action until May. We find it likely that the supervisors would have been aware that he was not reporting to the recycling window in that time. The Respondent stated in the hearing that this additional requirement was imposed on anyone who was suspected of having an issue with timekeeping but we were not told how many times they had to be late, for example of whether it was noted anywhere that such an additional requirement had been imposed or for how long or how many other people had to do so.

52. The Claimant's evidence was that Mr Leedham told him that he had asked him to report to the recycling window at the start of his shift because he did not believe that he would be able to keep it up and this would give him an opportunity to take disciplinary action against the Claimant and dismiss him. His evidence was that this was another attempt to catch him out. The Claimant did not complain about this during his employment. If this had happened, it would have been inappropriate conduct by senior managers.

53. Mr Kett confirmed that workers are asked to report to the window at 2pm with everything on, ready to go. The Claimant should be sitting in the lorry ready to go between 2pm and 2.15pm, whether mapping jobs out or doing nothing. He is expected to be ready to go at 2pm and not in the changing room.

54. The Claimant had some time off work sick in 2017 due to cluster headaches. He also had some time off sick in 2019 and on 23 July 2019 he attended a Stage 1 absence

management meeting with Mr Kett. We had no documents relating to this process in the bundle but in the hearing they both confirmed the meeting and its purpose.

55. The Claimant recorded this meeting and we listened to that recording during the Tribunal hearing. The Claimant wanted to raise the issue about the workload he was carrying and wanted to make sure that he had a recording to confirm that he had raised the matter with management. Having listened to the recording, we find that the Claimant was eager to make the points he made during the meeting but we did not find him combative or forceful about it. He was impatient during the discussion about the sickness absence and instead, he wanted to discuss his workload.

56. He did not ask Mr Kett's permission to record the meeting but he did turn his phone on to record and put it on the table during the meeting, with the recording light on. At the end of the meeting he picked up the phone and turned it off. Mr Kett heard the phone being turned off and asked the Claimant if he had recorded the meeting. The Claimant confirmed that he had. He was told that he could bring a grievance if he wanted to. He went away and wrote a grievance and brought it to Mr Kett at the end of his shift.

57. Although it had initially been the Respondent's case that the Claimant had not raised any issue of race discrimination with his managers, after the recording was played in the hearing in which we heard the Claimant ask Mr Kett why he was being given so much work and being left to lift heavy items, Mr Kett agreed that the Claimant had indeed raised the issue of race discrimination with him. The Claimant expressed his belief that he was being differently on the grounds of race in relation to the allocation of work. In his witness statement and in his live evidence, Mr Kett had denied that the Claimant had ever made a complaint of race discrimination to him. That evidence changed after he heard the recording. He was unable to tell us what happened to the written grievance the Claimant gave him on the same day.

58. Mr Kett did not note down the Claimant's complaint and did not pass it to HR to investigate or investigate it himself. He invited the Claimant to bring a grievance. Mr Kett agreed that an allegation of race discrimination was a serious allegation.

59. As nothing happened as a result of his complaint to Mr Kett, on 5 September 2019, the Claimant approached another manager, Stephen Blackburn and asked for a meeting to discuss the allocation of work. Mr Blackburn wrote to him the following day, 6 September and invited him to a meeting on Friday 13 September to discuss his concerns and the issues he briefly raised with him. A note of the Claimant's meeting with Mr Blackburn is contained in a letter which he drafted but did not send to the Claimant on the 17 September 2019. The Claimant was concerned that he was allocated more jobs to complete than any other loader. He felt that he and his driver were allocated 60 jobs a day while other crews did less. Although he completed the work, the Claimant told Mr Blackburn that he felt that 60 jobs was too much and unreasonable. Mr Blackburn did not deny the increase in workload but stated that this had been because of a change in the Respondent's policy to move from chargeable to free bulky weight collections which had resulted in an increase in demand from residents for the service. That had caused an increased workload for the Claimant.

60. Mr Blackburn also stated in his letter that he told the Claimant that the bulky refuse collection service ran a '*job and finish'* arrangement which meant that only when all jobs which had been allocated to a shift were completed could it be deemed that the job was finished for the day. The draft letter stated that he told the Claimant that he should not be

finishing at 8.30pm which would mean that having started at 2pm, he was only working 29 hours per week rather than 36 for which he was being paid. He informed the Claimant that at the start of the working week, the depot would have over 200 jobs booked in, which it had to complete, which meant that each team would need to be allocated more than 60 jobs each, in order for that volume of work to be completed by the end of the week.

61. Mr Blackburn's evidence was that the volume of work allocated to crews undertaking bulky waste collections were evenly distributed and the expectation was the same regardless of race.

62. The Claimant confirmed to us that he did not raise with Mr Blackburn his perception that he was being treated differently because of his race, as he did not know Mr Blackburn well enough to do so. He confirmed that the main part of their discussion was his desire to have an explanation from the Respondent as to why his workload had increased.

63. The Claimant reported to the Tribunal that many of the white drivers or drivers of other ethnicity did not want to work in a team with the Claimant as they felt that he was being targeted for an increased workload by the managers and that they would also have to do more work if they were on his team.

64. On 1 October 2019, Mr Kett wrote to the Claimant to invite him to a disciplinary hearing in respect of the incidents in May. The hearing was arranged for 21 October 2019. The allegations to be considered were as follows:

- Failure to wear your PPE
- Failure to attend work at your contractual start time
- Failure to follow management instructions.

65. The letter stated that if prove, those alleged acts of misconduct would be in breach of the attendance and time keeping requirement of the Claimant's contract, the requirement to wear the correct PPE, the requirement to comply with reasonable management instructions and work priorities and to comply with uniform/ dress codes. The letter advised the Claimant that should the allegations be substantiated, possible outcomes could be a first written warning, a final written warning and a dismissal with or without notice.

66. The Claimant was informed that Mr Blackburn would conduct the disciplinary hearing. He was advised of his right to be accompanied by a trade union representative or by a colleague. The Claimant was provided with a copy of the investigation report and supporting documentation and required to provide the names of any witnesses who would be coming to give evidence on his behalf, to the disciplinary hearing.

67. Mr Andrew Leedham had been the supervisor who reported seeing the Claimant in May, without his high-viz vest and steel-toe cap boots on. He was invited to attend the discplinary hearing as a witness for the Respondent and a copy of his invitation letter was also in the bundle of documents. The Claimant was informed that Mr Kett would attend the hearing to present the management case.

68. The Claimant tried unsuccessfully to get a trade union officer to accompany him to the disciplinary hearing. On the evening of 20 October, he emailed the Respondent to inform his managers that he was having difficulty getting hold of the trade union representative and therefore wanted the meeting to be postponed. Mr Blackburn agreed to postpone the meeting and it was rearranged for the 8 November. The Claimant had been trying to arrange for Donford Vardon, Unite branch secretary to accompany him but that was proving difficult.

69. In his instruction to HR to re-arrange the hearing, Mr Blackburn stated that the Claimant will be advised that the hearing will take place in his absence if he fails to attend the next time. A letter dated 21 October was sent to the Claimant which invited him to the re-arranged hearing. It stated that if he failed to attend the re-arranged hearing, it may be held in his absence.

70. On 4 November, Alex Owolade, branch activist for Unite union, notified the Claimant's GP by email that he was suffering from a lot of stress due to him being the subject of what he described as discrimination and harassment at work. He asked for the Claimant to be given a GP's appointment.

71. On 7 November 2019, the Claimant emailed Mr Kett to say that he had tried to call in sick the previous day but had been unable to get through. He reported that he was unable to come to work due to sickness and that he had a GP's appointment on Tuesday 12 November. He told Mr Kett that he would let the Respondent know the outcome of his appointment with the GP. He asked Mr Kett to inform the relevant people of his unavailability for work.

72. On 18 November, the Respondent referred the Claimant to Occupational Health (OH) for an investigation into the reason for his ill-health and to produce a report.

73. As the Claimant had reported sick to the Respondent, he did not realise that he also needed to either attend the OH appointment or telephone the OH number provided to cancel the appointment or cancel the appointment with the Respondent. The Respondent also did not remember to cancel the OH appointment or make sure that the Claimant was going to attend. In the end, the appointment was ineffective as neither the Claimant nor the Respondent cancelled it and the Claimant did not attend. The OH provider charged the Respondent a fee for the aborted appointment.

74. The OH appointment was reconvened and on 25 November, the Claimant had a telephone consultation with the OH provider. The OH provider produced a report dated 28 November 2019. The report referred to the Claimant's long history of cluster headaches for which he had attended his GP and been referred to OH several years earlier. The most recent presenting problem was increased back pain symptoms. The Claimant outlined a history of back problems which in the past had required treatment. He had been referred by his GP for psychotherapy and was due to have a psychotherapy assessment and sessions to help address his issues. The report noted that the Claimant outlined that there had been some improvement in his mental health symptoms whilst he had been off work and the incident of cluster headaches appeared to be improving in the previous week or two before the telephone appointment. Since his medication had been adjusted, his sleep had been improved but his concentration and focus remained changeable, due to the nature of the other medication he was taking.

75. The OH adviser assessed the Claimant as currently not fit for his duties, due to the level of symptoms of his cluster headaches, his mental health and his back condition. His concentration and focus remained changeable due to the nature of the medication he had been prescribed. The Claimant had a medical certificate which signed him off work until 12 December 2019.

76. The OH adviser's recommendation was that once the Claimant was certified fit to return to work, he should have a phased return to work, building up his hours from 4-5 hours a day in the first week, to 6-7 hours a day in the second week, returning to full duties in the third week. The OH adviser's opinion was that this would give the Claimant the ability to gradually build up his work-based activity as his symptoms continue to reduce. It was also recommended that the Claimant take care with lifting based activities being careful to build up these activities over a 2-3 weeks period. The Claimant's manager was to consider monitoring and agreeing the Claimant's work levels during this period.

77. It was the OH adviser's opinion that the Equality Act 2010 was likely to apply as there was likely to be a significant adverse effect on the Claimant's ability to conduct day to day activities and because the Claimant's condition had by then, lasted longer than 12 months. The OH informed the Respondent that the Claimant had been referred to the Mental Health Crisis Team due to reduced psychological well-being and mental health concerns.

78. Lastly, the OH adviser recommended that a meeting should be arranged as part of the Respondent's return to work procedures to plan the Claimant's return to work and provide an opportunity to discuss any work-related concerns that he might have. In the meantime, the Respondent was to carry out the recommended adjustments on the Claimant's return to work, including providing him with additional support and helping him to manage his symptoms as he returned to the work environment. It was also recommended that the Claimant should be reminded of the Employees Assistance Programme (EAP) support that was available to him in order to help him manage his symptoms at work.

79. On 29 November 2019, Mr Leedham wrote to the Claimant to invite him to a Stage Two meeting as part of the Respondent absence management. This was a reconvened meeting following the Claimant's failure to attend the earlier arranged meeting on the 19 November 2019. Mr Leedham referred to the OH adviser's recommendation that this meeting should take place. He stated that it was an opportunity to discuss the contents and recommendations in the OH report. It is likely that he had read the report before writing to the Claimant.

80. The Respondent considered that the Stage Two absence management meeting was necessary because of ongoing concerns about the level of the Claimant's sickness absence within the 6 months monitoring period, the fact that the Claimant had been off sick since 8 November 2019 and that at that moment, there was no indication of when he was likely to return.

81. The Claimant was advised that he could attend the meeting with a trade union representative or a work colleague and that if he failed to attend, the Respondent could conduct the meeting in his absence.

82. The Claimant was still unwell and felt unable to attend the reconvened Stage 2 absence management meeting.

83. The Respondent went ahead and conducted the meeting in his absence. The Respondent wrote to him on the 9 December to confirm the outcome of the meeting, which was that the Respondent would continue to monitor his attendance for a period of 9 months. In the meantime, Mr Leedham expressed an interest in having a meeting with the Claimant either at his home address or at the office to discuss the OH report and to see what could be done to assist the Claimant with returning to work. The letter stated that the Respondent would provide reasonable assistance to support the Claimant back to work however, if the level of his sickness absence was found to the unacceptable, further action could be taken under the Respondent's sickness absence procedure which could put the Claimant's future employment at risk.

84. On 10 December 2019, Mr Kett wrote to the Claimant to rearrange the disciplinary hearing for 3 January 2020. This letter repeated the same allegations as the invitations in October and notified him of the same possible outcomes as had been in the earlier letters. The letter also reminded the Claimant of the well-being solutions management and the Respondent Employee Assistance Programme (EAP), which he could access at any time. it also stated that as it was a re-convened meeting, it would be conducted in his absence if he failed to attend.

85. A note from the Claimant's trade union adviser, Mr Owolade, on 12 December to the Claimant's GP confirmed that the Claimant had been referred by Talking Therapies counselling and that they were waiting for an appointment for that process to start. Mr Owolade asked the Claimant's GP to refer him for full assessment as he had also been having hearing difficulties in addition to his cluster headaches, all of which needed to be properly assessed.

86. The Claimant produced a GP's fit note on 12 December which signed him off work until 19 January because of headaches and work-related stress.

87. It is likely that due to his ill-health Mr Owolade advised the Claimant against attending the disciplinary hearing on 3 January 2020. We did not hear from Mr Owolade in evidence and we did not have a statement from him.

88. On 2 January, Ms Roxanne Powell, the Claimant's partner, emailed Mr Kett to notify him that the Claimant was still unwell and unable to deal with matters related to work. Ms Powell stated that she did not understand why the Respondent considered that the Claimant was fit to attend the disciplinary hearing given that he was certified sick and the Respondent had not carried out a medical assessment to see whether he was fit to do so. She asked the Respondent to conduct a medical assessment through OH and depending on the result, rearrange the date for the hearing.

89. The Respondent decided not to do so. Mr Kett's evidence was that he felt that this communication had been sent too late. He passed the email onto Mr Blackburn who was conducting the disciplinary hearing. Mr Blackburn decided to proceed and held the disciplinary hearing in the Claimant's absence.

90. Mr Leedham attended to give evidence about what he witnessed and Mr Kett's investigation report was presented by another manager as he did not attend.

91. Mr Blackburn considered that the allegations against the Claimant had been substantiated. He took into consideration all the information provided in the report and

during the hearing by Mr Leedham. He also considered that the Claimant had a first written warning dated 25 January 2019 which had not yet expired. He considered the number of occasions that the manager had tried to address the behaviour with the Claimant both formally and informally. He concluded that the allegations against the Claimant constituted misconduct.

92. As the Claimant did not attend the hearing, Mr Blackburn did not have any background or mitigating factors from the Claimant to consider.

93. Mr Blackburn decided to terminate the Claimant's employment with immediate effect. Mr Blackburn live evidence in the hearing was that he considered the documents and concluded that the Claimant had failed to wear full PPE which usually meant the absence of his high-viz vest, on 5 occasion between 2012 and 2019 and he was late on many occasions but recorded being late on 5 occasions between 2017 and 2019. It was also his live evidence that the Claimant had been spoken to on numerous occasions, often off the record, about not wearing his PPE and not attending ready for work at 2pm, which was the start of his shift.

94. In the decision letter that Mr Blackburn sent to the Claimant dated 6 January 2020, he set out the allegations, the detail of the parts of the Code of Conduct which the Respondent considered had been breached and stated that he considered the details of the investigation report and concluded that the allegations were substantiated and that they did constitute misconduct.

95. The Claimant was informed that he had the right to appeal against the decision to dismiss him. He was told that his appeal should be in writing to the Deputy Director for Human Resources within ten working days of receiving the decision letter. The Claimant should specify his ground of appeal out of a list which included:

- The decision/sanctions were too severe;
- New evidence had come to light which had not previously been taken into account or were not all the evidence that were considered at the hearing that could affect the decision;
- The disciplinary proceedings were unfair and breached the rules of natural justice
- The original finding was against the weight of the evidence presented, and that
- There were procedural errors.

96. The Claimant was informed that the reasons for the appeal must be detailed and that the purpose of the appeal was to review the decision made at the original hearing and not an opportunity for the case to be reheard.

97. On 20 January 2020, the Claimant wrote to the Respondent to indicate that he wanted to appeal against his dismissal. He stated that he was delayed in presenting his grounds of appeal because of the physical and mental health issues he was suffering from. He asked the Respondent to arrange an OH assessment so that reasonable adjustments could be made to assist him in engaging in the appeal process.

98. The Claimant raised another grievance in writing to the Respondent. In the grievance the Claimant referred to himself as a disabled worker and stated that he suffered from stress-induced cluster headaches, hearing loss in one ear and constant back pain due to his workload and the environment he has been forced to endure at work. He also referred to suffering abuse which he believed was racist in nature and motivation. He referred to his colleagues commenting that they considered that the way he had been treated was racist and that he had tried to work hard to satisfy his managers but that had not worked. He complained that his managers had created a hostile working environment for him.

99. In the grievance he referred to suffering racial abuse early on in his employment from a driver who had been known for making racist comments. That driver eventually left the business. The Claimant referred to this person in the hearing and that he was older, white, male driver who has since left the Respondent's employment. Although we were not given exact dates, it is likely that the Claimant was teamed with him in or around 2018, at the start of or much earlier in his employment.

100. The Claimant complained that the Respondent was continually raising issues with his performance with the intention of building a case against him in order to get rid of him with formal written warnings and record of conversations going back to 2012. He complained about being described with racist stereotypes such as lazy, unreliable, fraudulent, a liar and a bully. He stated that all of this had had a detrimental effect on his physical and mental health leading to him being signed off as sick by his GP on the 12 November and a referral to OH. He complained that the recommendations from OH had been ignored by the Respondent and that the request for OH to assess his ability to take part in the disciplinary process had also been ignored which resulted in his dismissal. The Claimant asked for his grievance to be investigated and for Mr Owolade to be allowed to represent him in that process.

101. Although the Claimant submitted intention to appeal, he did not go on to submit any grounds of appeal. On 27 April, the Claimant emailed the Respondent to say that he wanted his grievance that he submitted on the 17 February to be treated as his grounds of appeal. The Claimant's grievance was part of a collective grievance. The Claimant was told, through Mr Owolade that the Respondent would apply a shortened process in considering his grievance as he was no longer an employee but we were not told of the outcome of that process.

102. The Claimant was also investigated for leaving work prior to his contractual hours on 17, 18 and 19 July 2019, having failed to complete the allocation of work given to him, without explanation; falsifying records relating to the 18 July by claiming that he had not been provided with applicable worksheets and lastly, on 13 and 15 August 2019 failing to complete allocation of work and deliberately falsifying record to say that the work had been completed. A separate investigation report was concluded on these allegations by the Respondent. Although the investigation report was completed on these allegations, the Claimant was never disciplined for it because he was dismissed before the Respondent could take any further action on those allegations.

103. The colleague who worked with him on that team, his driver Matt Russell, was disciplined for the same misconduct. They were working together on 17 – 19 July and 13 August. At the end of a disciplinary process Mr Russell was given a written warning for serious charges of leaving work prior to completing contractual hours, without explanation, deliberately falsifying records and claiming that the job had been completed. Mr Russell

attended his disciplinary hearing. Mr Blackburn decided Mr Russell had breached the Respondent's Code of Conduct.

104. The Respondent produced statistics for us of the ethnic breakdown of staff conduct issues within its waste collection service. The data was divided into 4 columns showing the makeup of the workforce in three service areas: waste collection service, 'Newham Council (corporate only)' and a service area described as RMS. We were not told what RMS was. The first column set out age brackets and a breakdown between those identifying as male and female. As this was a complaint of race discrimination, we focussed on the ethnicity information for comparison. The data showed that the percentage of staff described as BME in the waste collection service was 32% as opposed to 56% of staff in the Respondent's corporate section. The percentage of staff who were non-BME in the waste collection service was 63%, while the non-BME staff in the Respondent's corporate section was 45%. 11% of the corporate staff preferred not to give details of their ethnicity, while 5% of the waste collection staff preferred not to give those details. BME is likely to be an acronym for Black and minority ethnic staff. Such a category would include the Claimant.

105. The second page of the data showed a comparison of staff with conduct issues, including discipline and grievances. Within the waste collection service during this period, 3 members of BME staff were the subject of conduct issues, which would be around 10%. At the same time, 3 non-BME members of staff were also the subject of conduct issues, which would be 5%. We concluded that a larger percentage of BME staff within waste collection (approximately twice as much) were subject to conduct issues in comparison to staff who identified as being non-BME.

106. The claimant's dismissal took effect on 6 January 2020.

Law

107. The Claimant complaint is of direct race discrimination contrary to section 13 of the Equality Act 2010.

108. Section 13 states that a person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

109. The Claimant is a black man. His complaint was that the Respondent treated him less favourably than others would have been treated in the same circumstances, had they been of a different race. He referred to Matt Russell as an actual comparator and it is likely that he was also relying on a hypothetical comparator, which would be a white refuse loader who had also been reported for not wearing his hi-viz vest and not attending the despatch window, dressed and ready to start work at 2pm but had not been disciplined or dismissed for their failure to do so.

110. Section 23 of the Equality Act states that on a comparison of cases for the purposes of sections 13, 14 or 19, there must be no material difference between the circumstances relating to each case.

111. In its submissions, the Respondent referred to the case of *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285 as follows *'the comparator required for the purpose of the statutory definition of discrimination must be a comparator*

in the same position in all material respect as the victim save only that he, or she, is not a member of the protected class.'

112. Where the Tribunal constructs a hypothetical comparator based on the circumstances of a real comparator, it must take care to ensure all relevant circumstances are imparted to the hypothetical comparator (*Croydon Health Services NHS Trust v George* UKEAT/0139/15).

113. The burden of proving the discrimination complaint rests on the Claimant bringing the complaint. The burden of proof provisions in section 136 of the Act applies to this claim. It states at subsections (2) and (3), *"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."* But this does not apply, if (A) is able to show that it did not contravene the provision.

114. There is a substantial volume of case law which seeks to provide guidance on the burden of proof. It was fully addressed in the case of *Igen v Wong [2005] IRLR* and confirmed in subsequent cases including *Madarassay v Nomura International Plc [2007] IRLR 246.*

115. The Court of Appeal of *Igen Ltd v Wong specifically* endorsed these principles:

(1) it is for the claimant who complains of discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent had committed an act of discrimination against the claimant which is unlawful by virtue of the Act. These are referred to below as "such facts".

(2) If the claimant does not prove such facts s/he will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination - even to themselves.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) At this stage the tribunal does not *have* to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact *could* be drawn from them.

(6) In considering what inference is or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) Likewise, the tribunal must decide whether any provision in any relevant code

of practice is particularly relevant and if so, take it into account in determining such facts. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(8) Where the claimant has proved facts from which conclusions could be drawn that the respondent had treated the claimant less favourably on the grounds of race, then the burden of proof shifts to the respondent.

(9) It is then for the respondent to prove that he did not commit, or as the case may be is not to be treated as having committed, that act.

(10) To discharge that reason, it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of race.

(11) That requires the Tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that race was not a ground for the treatment in question.

(12) A tribunal will normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal would need to examine carefully explanations for failure to comply with any relevant code of practice.

The tribunal can consider all evidence before it in coming to the conclusion as to whether or not a claimant has made a prima facie case of discrimination (see also *Madarassay v Nomura International Plc [2007] IRLR 246)*

116. In every case the tribunal has to determine the reason why the claimant was treated as he was. As Lord Nicholls put it in *Nagarajan v London Regional Transport [1999] IRLR 572* "this is the crucial question". It was also his observation that in most cases this will call for some consideration of the mental processes (conscious or subconscious) of the alleged discriminator. If the tribunal is satisfied that the prohibited ground is one of the reasons for the treatment, that is sufficient to establish discrimination. It need not be the only or even the main reasons. It is sufficient that it is significant in the sense of being more than trivial.

117. If the Claimant is successful in his complaint of direct discrimination, he would be entitled to a remedy.

Applying Law to facts

118. The Tribunal will now set out the issues contained in the list of issues agreed at the start of the hearing and written in the case management orders sent to the parties on 7 April 2021.

The Issues

1. The issues the Tribunal will decide are set out below.

1. Direct race discrimination (Equality Act 2010 section 13)

1.1 The Claimant describes himself as black British.

1.1.1 Did the Respondent do the things set out at paragraph 45.1 of the list of issues?

1.1.2 Paragraph 45.1 listed the following:

1.1.2.1 Dismissed the Claimant

1.1.2.2 Constantly subjected him to allegations of misconduct during his employment which were untrue;

1.1.2.3 Required him to go to the depot to start work when the white refuse loaders were allowed to meet the truck on route, which made him late;

1.1.2.4 Made him work harder than his white colleagues which resulted in him damaging his back;

1.1.2.5 Treated him less favourably than a white colleague, Matt Barnes, which we conclude is likely to be Matthew Russell, also accused of failing to collect bulky items on 21 June 2019.

119. The Tribunal considered from the evidence set out above and applying the law above, whether the Claimant had proved any facts from which we could infer that the Claimant had been treated less favourably, in relation to that list. This the first part of the burden of proof test set out above. Addressing each in date order, our conclusions are as follows:

Reporting to the recycling office window at 2pm

120. It is our judgment that the drivers had to report to the window to collect their jobs. They did so at the start of their shifts and went from the window to the truck to carry out their safety checks before leaving the depot to start their shifts. The Claimant was not a driver, he was a loader and therefore his job description did not require him to report to the office. He simply had to attend work on time. According to the Code of Conduct, the Claimant had to adhere to his contractual hours, comply with reasonable management instructions and comply with uniform/dress code requirements.

121. Loaders met their driver on the pad from where they boarded the truck and left to start their shift. Loaders were not routinely expected to go to the window in the recycling office, before meeting their driver and starting their shifts.

122. It is our judgment that the requirement to go to the window was additional to the requirement to attend work on time. It placed an additional requirement on the Claimant to be at work in sufficient time to put on his vest and boots and be at the window by 2pm. In our judgment, he would have needed to be at work well before 2pm in order for him to be

dressed and at the window by 2pm. He was never instructed to be at work by 1.45 so that he could be ready and in the truck by 2pm. His shift started at 2pm.

123. In addition, the Tribunal only heard of two loaders who had been given the additional requirement of going to the recycling office window – that was the Claimant and Mr Pickett - both of whom were black members of staff. We were not told why Mr Pickett was given the added instruction to not only attend work on time but to attend with sufficient time to spare to be dressed and be at the window for 2pm, which in our judgment, was more onerous that being at the depot, ready to work by 2pm.

124. The Respondent told us that the Claimant would not have been given the added instruction of going to the window if he had only been late on one or two occasions. However, although we were told that he had been late on numerous occasions, we did not have evidence of those occasions as there was no note of those times or the informal conversations his managers say they had with him about it.

125. We did not have evidence that any white loaders were given the additional requirement of going to the window to show that they were present. They were allowed to simply arrive at the depot and start work.

126. The supervisors were in the yard at the depot. It is unlikely that only the Claimant and Mr Pickett were late to work. But they were the only loaders we were told about who had to go to the window to report that they were there, before starting their shift. Even if Mr Pickett had to do this for a shorter period than the Claimant, we were only told about him and the Claimant having to do this at all.

127. The evidence was that the Claimant was usually at work at 2pm. The last time he was recorded as having attended work after 2pm was in 2017 when he had just started on the bulky waste collection. He was late a few times in May 2017 and his supervisor told him to attend the office to ensure that he was there at the start of his shift. There was no record after that of him arriving late to the depot although he was recorded as being late to the recycling office window in November and December 2018 and on 4 January 2019. He sometimes failed to go to the window but was always present when the driver to whom he was assigned, was ready to leave the depot. He would frequently assist the driver in working out the route to the first job, which again demonstrated that he had sufficient time after his arrival at the depot to do so, before they left for their first job.

128. The Respondent required the Claimant to be at work by 2pm, which is the start of his shift. It is our judgment that the Claimant was at work on 17 May at 2pm. Mr Payne investigated an allegation that the Claimant failed to report to work at the contracted time of 2pm. In the investigation report Mr Kett concluded that he failed to attend the recycling window by 2pm. Those were two different things and the requirement to attend the window was, in our judgment, an additional requirement, which does not appear to have been applied to all loaders. The Respondent's Code of Practice referred to the requirement that employees adhere to their contractual hours and with their start and finish times. The evidence was that since 2017, the Claimant has been at the depot on time and therefore adhered to his contractual hours.

129. The Claimant had not been told that he had to attend work at 1.45 so that he would be dressed and ready to work by 2pm. His shift started at 2pm and he was not paid to be at the depot any earlier.

130. The allegation against the Claimant was that he failed to report to work at his contracted time. The allegation found against him was that he failed to report to the recycling office window at his contracted time. Those were two different things. The Claimant explained to Mr Payne in his investigation meeting that he was at work on time but that he did not go to the window but looked at the work and began to plan a route, got himself ready by using the toilet and waited to be collected by the driver.

131. It is reasonable for the Respondent to require the Claimant to have to comply with an additional step of going to the office so that he is seen in the yard as present, if there are concerns about his tardiness. However, the requirement to do so was not for a specific period and was applied on a random basis. At the beginning of 2019 he showed that he could attend the office window by 2pm. He stopped doing so as he considered that he had shown that he could. He continued to attend work on time as there were no complaints from drivers that the Claimant was absent when they set off for their route. There was no record that he was missing or that he had made a driver leave the depot late.

132. It is our judgment that the requirement to attend the recycling office window at 2pm was an additional requirement placed on black loaders which was not placed on white loaders.

133. On balance, it is our judgment that the allegation that the Claimant had committed misconduct in that he was late to work on 16 May 2019 was unlikely to be true. The Respondent has conflated attending the depot on time, which it is likely that the Claimant achieved; with attending the recycling window on time, which he did not as it was not clear that he was still required to do so and when he was actually getting on with the work.

134. In our judgment, the substitution of attending the recycling window, which was in addition to arriving at work on time, for the simple contractual requirement of attending work on time, was a fact from which we can infer less favourable treatment as it was only imposed on black loaders.

Requirement to wear full PPE

135. It is our judgment that on 16 May 2019, the Claimant failed to wear full PPE in that he was not wearing his hi viz vest when he was observed by Mr Leedham. The Claimant had been wearing his full PPE on the shift but it is likely that at the moment his manager saw him he had taken it off and left it on the seat when he jumped out to work. It is our judgment that it was likely that the Claimant was wearing his steel toe-cap boots at the time. It was unlikely that Mr Leedham could see the Claimant's feet clearly given the following circumstances: he was looking at the Claimant from his vehicle on the road, it was at night, the Claimant was standing a few feet away from him and in a resident's front garden where his was picking up bulky items for the truck.

Stage 1 absence management meeting on 23 July 2019

136. It is our judgment that the Claimant raised his concern that the Respondent was allocating him with more work that his white colleagues at this meeting. However, the Respondent failed to take that concern seriously.

137. The Claimant was told that he could raise a grievance. Although Mr Kett denied that the Claimant had given him a written grievance about this by the end of his shift, we preferred the Claimant's evidence on this as Mr Kett also had no recollection of the discussion that he had with the Claimant about the allocation of work and the Claimant's query whether he was being given more work to do because of his race. As the Claimant proved that he had indeed raised this issue, it is highly likely that he had given Mr Kett a written grievance about it by the end of the shift that day, as he had been advised to do. The Claimant was serious about this as demonstrated by the fact that he raised in with Mr Kett in July and with Mr Blackburn at the beginning of September, first orally and then in a meeting. He raised it again in the grievance that he submitted towards the end of his employment.

138. Mr Kett failed to treat this concern as a serious matter. The Claimant was a long-standing member of staff and his concern should have been investigated. According to Mr Blackburn's response in their September meeting, there had indeed been an increase in the workload since the Respondent changed the bulky waste collection from a chargeable to a free service. No one addressed the Claimant's query whether he was getting more jobs allocated to him because of his race. The Claimant also told us that he had a quick turnaround with his jobs, which meant that it was likely that he and his driver would get through 60 jobs in less time than the other crew. This may have meant that he was given more to do. All of that meant that it was therefore highly likely that the Claimant had seen an increase in the volume of work that he was being asked to do. However, as there was no investigation of the work he was doing against that of the other team, we are not able to say whether race was a factor.

139. The Respondent failed to treat the Claimant's complaint about race seriously or at all. Mr Kett failed to record that the Claimant made this complaint to him and failed to pass to HR or another manager the written grievance that the Claimant gave him.

140. It is our judgment that this is another fact from which we can draw an inference of less favourable treatment.

Dismissal

141. The Claimant had been late on occasions in 2017 and in 2018. He was written to about lateness in 2017 and 2018. He accepted a first written warning for being late to the window on 4 January 2019. It would not be fair for the Respondent to rely on the incidents in 2017 and 2018 in coming to its decision in January 2020, that he should be dismissed, if those instances had not been considered in January 2019.

142. After 4 January 2019, the next time the Claimant was written to about lateness was when he was invited for the disciplinary hearing over being late on 17 May 2019. The allegation in the invitation letter was that he had been late to work. in his statement to Mr Payne the Claimant confirmed that he had been at work but failed to report to the recycling office window. It is therefore our judgment that the Claimant was dismissed on 6 January 2020 because he failed to attend the recycling office window on 17 May 2019.

143. The Respondent had a sick certificate from the Claimant at the time that it went ahead with the disciplinary hearing on 6 January 2020.

144. The Respondent had an OH report dated 28 November which informed it that the Claimant suffered cluster headaches, which it knew about from a previous period of illhealth, back problems and that he had been referred to the Mental Health Crisis team. The OH report stated that he was not fit for his duties. OH also stated that the was likely to be a disabled person, within the Equality Act 2010. The OH advisor informed the Respondent that the Claimant was fit to attend a return to work meeting to plan how he was to be brought back into the workplace. That is completely different to a disciplinary hearing. OH did not say and had not been asked to comment on the Claimant's fitness to attend a disciplinary hearing.

145. The Claimant went off sick on 7 November on the grounds of stress. He was signed off until 12 December. The next certificate was dated 12 December and due to expire on 19 January. The sick certificate clearly covered the date of the disciplinary hearing.

146. The Respondent was reminded of this by the Claimant's partner's email which was passed to Mr Blackburn on the morning of the disciplinary hearing. She asked the Respondent to refer the Claimant back to OH for an assessment on whether he was well enough to attend a disciplinary hearing and if so, to recommend adjustments to enable him to be able to present his case. Mr Blackburn decided that the Claimant had chosen not to attend and that he would proceed with the meeting. This put the Claimant at a serious disadvantage as Mr Blackburn did not have the Claimant's explanations and his mitigation to consider.

147. The fact that the Respondent chose to go ahead with the disciplinary hearing even though the Claimant was too unwell to attend, knowing that he had a sick certificate covering the date, having had requests from his trade union advisor and his partner to rearrange the hearing due to his illhealth and knowing that his illhealth was serious enough to warrant a referral to the Mental Health Crisis team; is a fact from which we could draw an inference of less favourable treatment.

Difference in treatment between the Claimant and Matthew Russell

148. It is our judgment that allegations Mr Russell faced in July 2019 were serious allegations of fraud. These allegations related to more than one occasion.

149. The allegations are not the same as those made against the Claimant but in our judgment, they were more serious.

150. The Claimant was dismissed because he failed to wear his full PPE and failed to go to the recycling window when he got to work but instead, got on with his job. Mr Russell was found to have left work prior to completing contractual hours without explanation, deliberately falsified records and claimed that the job had been completed. In our judgment, those are more serious allegations than the Claimant faced, even when the existing first written warning on the Claimant's records was taken into account.

151. The sanction imposed on Mr Russell appeared to us to be lenient compared to the sanction imposed on the Claimant when we considered that the Claimant had attended work on 16 and 17 May 2019 and had attended work on 4 January 2019. There was no dishonesty in his conduct on those occasions. His offences were to be late to the recycling office window and not wearing his hi viz vest. In our judgment, those must be considered

to be minor offences in comparison to Mr Russell's offences of deliberately falsifying records and leaving work early, claiming that the job had been completed.

152. The Claimant was also investigated over the same allegations as Mr Russell as they arose out of them working together on those dates in July. However, there was no disciplinary hearing on the allegations against the Claimant and we do not know what would have happened if the Claimant had remained employed and been disciplined on them.

153. The stark difference in the career ending sanction imposed on the Claimant for lateness and failure to wear correct his high viz vest as opposed to the lighter sanction imposed on Mr Russell for fraud and leaving work without completing the job; is a fact from which we can draw an inference of less favourable treatment.

Whether the Claimant was made to work harder than white colleagues so that he injured his back

154. It is our judgment that the Claimant has failed to prove that the Respondent made him work harder than his white colleagues which resulted in him damaging his back. This is certainly what he believes. The evidence was that the Claimant had problems with his back, which was noted in the OH report. He had complained to Mr Kett and to Mr Blackburn that he was given more work and heavier work to do than other loaders and that some drivers were reluctant to work with him as it was well known in the yard that he was given heavier loads. This was never investigated or taken seriously by the Respondent. We were not told of the result of the investigation into the issues he raised as part of the grievance he brought which he also asked the Respondent to treat as his appeal. There was no response to it.

155. We did not have sufficient information as to when he began to have back problems, whether there were any other factors in his life that could have contributed to him having back problems, and whether there were any factors that needed to be considered before coming to such a conclusion on whether there was a distribution of work according to race.

156. The Tribunal is unable to reach a conclusion that the Respondent made the Claimant work harder than his white colleagues and that this resulted in him damaging his back. It is our judgment that the Claimant suffered from back problems while at work as well as cluster headaches and mental ill-health for which he was referred to Talking Therapies.

157. The fact that he raised the issue in two grievances – the grievance he gave to Mr Kett and the grievance he raised and asked the Respondent to treat as his appeal against dismissal – and that we were not told of an outcome to either – is a fact from which we can infer less favourable treatment.

The requirement to go to the depot to start work while white loaders met the truck on route

158. It is our judgment that the evidence showed that when the Claimant was on recycling, he was allowed to meet the truck on route. If he had been on the general household waste, he would also have been allowed to meet the truck on route as it would follow the same route on every shift.

159. With the bulky waste collections, the truck would only need to go to those addresses in the three postcodes that the Claimant and his driver had been allocated to, where there

had been a request for collection. The requirement to go to the depot was imposed on all but 14 of the loaders. In our judgment, there was no evidence to show that the white loaders on the bulky waste collection service met their trucks on route. We did not have that evidence.

160. The only requirement that the Claimant had imposed on him which in our judgment was not also imposed on the white loaders, was to report to the recycling window after arriving at the depot. We did not have any written procedures on reporting to the recycling office window and it is likely tht this is a local practice. From the evidence in this hearing, it is our judgment that this requirement was only imposed on the Claimant and Mr Pickett, who were both black loaders. This imposed an additional requirement on the Claimant, which he had difficulty meeting but which was not part of his job description and was not in the relevant Code. The relevant Code only required him to be at work on time.

161. It is our judgment that the Respondent did not require the Claimant to go to the depot to start work when the white refuse loaders were allowed to meet the truck on route, which made him late.

162. The Respondent's case had been that the Claimant had been written to about the use of cannabis at work. The evidence was that the Claimant had been given a leaflet about cannabis. The first time he had been written to about cannabis was January 2019. There had not been an earlier letter as Mr Kett indicated in his witness statement. The fact that the Respondent said that there had been an earlier letter, when there had not, is a fact from which we can draw an inference of less favourable treatment.

1.1 Was that less favourable treatment?

163. *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.*

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

Judgment

165. It is this Tribunal's judgment that the Claimant was subjected to less favourable treatment. He treated worse that Mr Russell. Mr Russell was not a comparator in the terms set out in the Equality Act as there were material differences between him and the Claimant in addition to there being differences in the protected characteristic.

166. Apart from differences in race, Mr Russell had been found to have committed misconduct involving dishonesty. The Claimant had been late but had worked the shifts on 16 and 17 May 2019.

167. However, the Tribunal found that the difference in treatment was instructive as the Respondent treated Matthew Russell more leniently than the Claimant for more serious offences. The Claimant had an existing first written warning on his record but, that was also for 1 day on 4 January 2019, when he admitted that he attended work late. He was being dismissed in January 2020, for lateness in May and for one instance of not wearing his high viz vest. As stated above, even taken together the Claimant's offences are not as serious

as those which had been found against Mr Russell of fraud, dishonesty and claims to have worked shifts when he had not.

168. The Claimant has proved that he was required to not simply attend work and keep to his contractual hours but also had to go to the recycling office window once he was at the depot and let the managers in the office see him by 2pm and then go and meet his driver for work. Not only was that an additional requirement but there was no set time period during which this was imposed and it was highly likely that it was only applied to black loaders. Action was not taken when he stopped, leading the Claimant to believe that he was no longer required to do it. This would have created uncertainty for him.

169. The Claimant was dismissed in his absence, when he had a sick certificate and the Respondent knew that although he wanted to attend the meeting, he was too unwell to do so and had been referred to the Mental Health Crisis team. Mr Blackburn considered that Mr Russell was given a more lenient sanction partly because he attended his disciplinary hearing but this ignores the fact that the Claimant was not well enough to attend his disciplinary hearing although he clearly wanted to attend.

170. The Respondent failed to take his complaint about race discrimination in the allocation of work seriously. It was not addressed or considered. The grievance that he submitted on the same day was not investigated and not passed to someone else who could investigate it. The Respondent has a dedicated HR team but the Claimant's complaint was not considered serious enough to pass it to them.

171. The Respondent's statistics also show that BME members of the waste collection service are disproportionately subjected to conduct issues in comparison to non-BME staff.

172. It is our judgment that the Claimant was subject to less favourable treatment in the instances set out above. In the requirement to report to the recycling office window at 2pm rather than simply to be at the depot by 2pm; in failing to investigate the Claimant's grievance that he gave to Mr Kett and the grievance that he raised and asked to be considered as his appeal; in going ahead with the disciplinary hearing when the Claimant, his GP in the form of a sick certificate, OH and the Claimant's partner had all informed the Respondent that he was unwell and unable to attend; and in the decision to dismiss him for lateness and not wearing his high viz vest when Mr Russell was only given a first written warning for fraud and leaving work early, which were instances of dishonesty.

173. In this Tribunal's judgment, the Claimant has proved facts from which conclusions **could** be drawn that the Respondent had treated him less favourably on the grounds of race.

1.2 If so, was it because of race?

174. The burden shifts to the Respondent to prove a non-discriminatory reason for the treatment described above. This is the second part of the burden of proof, as set out above. To discharge that burden, it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of race (*Igen*).

175. It is our judgment that the Claimant's driver never complained that the Claimant was not ready or absent when it was time to start work. The Claimant was always present, with his PPE on when they left the depot. The Claimant did his job and there were no complaints

that we were told about in relation to his performance of the job. The issues relating to the incidents in July 2019 were never considered at a disciplinary hearing so we do not know anything about them.

176. The Respondent had imposed a sanction of a first written warning against the Claimant for not reporting to the window on 4 January 2019. The Claimant accepted this although his evidence was that he was in the depot but started work without going to the window. The Respondent's next sanction, a year later, for a similar offence was dismissal.

177. It is our judgment that we query whether the rule of having to go to the window was applied to everyone who was late to work as it is highly unlikely that the Claimant and Mr Pickett were the only loaders who attended work late, yet they were the only loaders we heard about who were asked to do so.

178. As the burden shifts to the Respondent, we considered Mr Blackburn's reasons for going ahead with the disciplinary hearing when he was told of the Claimant's partner's email was that it was too late. The Respondent's position is that since the invitation letter stated that the Respondent would proceed in the Claimant's absence with the disciplinary hearing as the meeting had already been re-arranged once before. It was the Respondent's case that if he did not attend, it was reasonable and fair to go ahead with it. It is our judgment that the Respondent also had information that the Claimant could not attend the disciplinary hearing. It was not that he was choosing not to attend. In our judgment, he was too unwell to attend. This was evidenced by the GPs certificate signing him off until 19 January and the OH report which stated that he was likely to be disabled under the Equality Act and that he had been referred to the Mental Health Crisis team. This was more than simply being stressed. The Respondent failed to consider this when it decided to go ahead with the disciplinary hearing.

179. It is our judgment that in the particular circumstances, the Respondent did not have a cogent, non-discriminatory reason for going ahead with the Claimant's disciplinary hearing at that time. It could have been adjourned until the Claimant was fit to attend or OH had assessed him as fit to attend.

180. Did the Respondent have a non-discriminatory reason for the difference in sanction between the Claimant and Mr Russell, even after making allowances for the differences between their two situations? The Claimant did not attend the disciplinary hearing because he was unable to do so. Mr Russell did attend his hearing. We do not accept the Respondent's evidence that this was the reason for the difference in sanction. The sanction would reasonably relate to the seriousness of the misconduct that has been proved to have occurred. In the investigation meeting with Mr Payne the Claimant accepted that he had not gone to the recycling office window but was clear that he had been at work and that he had gone out on time with the driver. The Respondent had not checked whether this was true. The Claimant admitted that he had not had his high-viz vest on at the moment that the supervisor drove past the team, but it is likely that he did have it on when he left the depot and just before he took it off to take off his sweater. Once it was pointed out to him, he immediately put it on. In contrast, Mr Barnes as the driver, had been found to have done a fraudulent act against the Respondent, walked away from the job and left early. Given the seriousness of his offences, Mr Russell's sanction, also imposed by Mr Blackburn, of a first written warning is at odds with his decision to dismiss the Claimant for attending work late and not wearing his high viz vest on 16 and 17 May.

181. In our judgment, the Respondent does not have a cogent, non-discriminatory reason for the difference in treatment between the Claimant and Mr Russell.

182. It is our judgment that the Claimant's race was a factor in the decision to terminate his employment for lateness and because he did not have his high viz vest on. The Claimant was given a first written warning in January 2019 and the next sanction imposed was dismissal. The Respondent did not give evidence of any consideration of any other sanction. We were not told why dismissal was considered appropriate rather than a final written warning or any other sanction. The Respondent referred to the earlier incidents of lateness that occurred before the first written warning. This was not proportionate, given the seriousness of the offence in comparison to the way in which Mr Russell's much more serious offences were treated.

183. It is this Tribunal's judgment that the Respondent failed to take the Claimant's complaints about discrimination seriously. The Respondent failed to investigate his grievances and failed to give him a response. He did get an explanation from Mr Blackburn on the way in which the service had changed but this was not a response to his grievance about being allocated more work because of his race because the Claimant had not raised that grievance with Mr Blackburn.

184. The Respondent had no explanation as to why it did not investigate the issue that the Claimant raised with Mr Kett. The Respondent did not pass the written grievance from the Claimant to HR and did not investigate it. The Claimant raised these matters again in the grievance he raised at the end of his employment. As far as we are aware, those were never responded to.

185. It is our judgment that the Claimant has proved that he was treated less favourably on the grounds of his race, contrary to section 13 of the Equality Act 2010 in the requirement imposed on his to go to the recycling window, by the Respondent not taking seriously his grievance of race discrimination in the distribution of work and in the decision to dismiss him rather than impose a lesser sanction even if it was considered that he had committed misconduct by being at work but failing to go to the recycling window.

186. The Claimant succeeds in his complaint of race discrimination.

Remedy

187. The Tribunal will reconvene to determine the remedy due to the Claimant. The Claimant is to revise his Schedule of Loss to reflect the fact that he has not been successful in all his allegations against the Respondent.

188. The Claimant must submit a revised Schedule of Loss by **6 March 2023**. In the preliminary hearing orders sent to the parties on 7 April 2021, the Claimant was ordered to prepare a Schedule of Loss and it to the Respondent by 12 April 2021. There was no Schedule of Loss in the bundle of document. If it was prepared, the Claimant should revise it to take into account the judgment and send it to the Tribunal and the Respondent by 6 March 2023.

189. The parties must also send in dates to avoid between **1 July and 30 December 2023**, so that the Tribunal can arrange a one day remedy hearing.

190. The parties should also indicate whether their preference is for a hearing in person or by CVP (cloud video platform) which would be conducted remotely. The parties would need a laptop or computer and a working, good internet connection in order to be able to participate in a remote hearing.

191. The Claimant will also be required to produce a witness statement in support of his remedy. The Tribunal will give more instructions on this once a date for the remedy hearing is set.

Employment Judge Jones
Dated: 15 February 2023