EMPLOYMENT TRIBUNALS

Claimant: Mr K Dziura

Respondent: RF Bellis Haulage Ltd

HELD AT/BY: Mold **on:** 13-16th February 2023

BEFORE: Employment Judge T. Vincent Ryan
Ms L Bishop
Ms Y Neves

REPRESENTATION:
Claimant: Mr Dzura represented himself
Respondent: Mr G Lomas, Tribunal Advocate

JUDGMENT having been sent to the parties on 21 February 2023 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

The Liability Issues

1. It was agreed at the outset of the hearing that the tribunal would have to decide the following issues to reach a judgment in respect of the claimant's claims namely:

   1.1. Unauthorised deduction of wages: there was such a claim at the outset of the hearing but the respondent conceded that it owed to the claimant £38.54 in respect of two days' pay; this claim was settled between the parties without the Tribunal having to determine any issues.

   1.2. The Unfair Dismissal claim:

      1.2.1. What was the reason for the claimant's dismissal where the respondent says that it was for a reason related to conduct (a potentially fair reason)?

1.2.2. Did the respondent hold a reasonable and genuine belief in the claimant's responsibility for the conduct in question at the date of dismissal?

1.2.3. Was that belief formed following and based upon a reasonable investigation?

1.2.4. Did dismissal for the said conduct fall within a reasonable range of responses of a reasonable employer to the conduct?

1.2.5. Were the respondent's actions generally reasonable and those of a reasonable employer?

1.3. Direct race discrimination claims:

1.3.1. Did the respondent treat the claimant in the following ways as alleged:

1.3.1.1. allocating inferior or unsatisfactory trucks for the claimant's use;

1.3.1.2. on 1 May 2020 double-booking drivers and sending the claimant home so that a British driver could complete his route;

1.3.1.3. on 11 February 2021 requiring the claimant to drive excessive hours, that is in excess of the regulated driving hours;

1.3.1.4. on 19 March 2021 requiring the claimant to drive excessive hours, that is in excess of the regulated driving hours;

1.3.1.5. changing rostered routes;

1.3.1.6. refusing holiday requests;

1.3.1.7. ignoring his complaints and subjecting him to unwarranted criticism;

1.3.1.8. failing to pay him statutory sick pay that was due to him;

1.3.1.9. failing to invite him to a meeting on 20 May 2021;

1.3.1.10. treating him with contempt at a grievance hearing on 23rd April 2021;

1.3.1.11. failing to address the claimant's grievances;

1.3.1.12. inaccurately recording details in relation to hours worked, pay, and notice of termination in the respondent's ET3 Response form presented to the Tribunal in relation to this claim.

1.3.2. was any of the above treatment less favourable than the way that the respondent treated or would treat British drivers? In particular the claimant relied upon the following comparators:

Alan Roberts and David Brockhurst. During his evidence he also referred to the British drivers Tony Griffiths, Gareth Peirce, Robert Harper, and Alistair Emmet or Emlets.

1.3.3. Was the reason for the less favourable treatment the fact of the claimant's nationality, Polish.

The Facts

2. The respondent (R):

2.1. R is a family run haulage company. At the material time it employed approximately 50 people. The directors are family members. We heard evidence from Mr James Bellis, Operations Director, and Ms Katie Bellis, the Customer and Marketing Director.

2.2. Ms Bellis is not a HR professional but she has gained experience over the years in running personnel matters for R; she relies on outside legal advice and assistance when required. We found her to be a truthful and conscientious witness.

2.3. Mr Bellis was somewhat vague in some of his answers. We do not think that he was untruthful or evasive but he had less grasp of, and recollection of, the events than his sister, Ms Bellis.

2.4. R employs mostly drivers with class I or class II HGV licences. It employs drivers of various nationalities, the majority being British. It also employs a fairly large number of Polish drivers (the second biggest national group), a Lithuanian driver, and two Bulgarian drivers. The numbers of drivers and their nationalities vary from time to time.

2.5. Drivers are assigned to particular contracts and customers. They could be asked to drive in relation to other contracts but generally most of their work was bespoke for one customer.

2.6. When drivers are appointed they are asked the type of work that they want to do and what hours suited them best. Based upon the drivers' wishes, and the needs of the business at the time, R would assign a driver to a contract/customer.

2.7. R runs a mixed fleet of vehicles. Most of the fleet is made up of Volvos, Scanias, Renaults and MANs. When a new driver starts they are allocated a truck. To an extent this therefore meant that there was an element of first-come first-served in the allocation of trucks. There were however further factors in respect of the allocation. The truck must suit the contract or customer to which the driver was assigned. The truck had to suit the work.

Another criterion was whether or not the route was what was referred to as a "tramper", that is it would necessarily involve an overnight stay away from home; that stay may be of varying durations. For tramper's a more comfortable truck would be allocated to accommodate the overnight stays. To an extent there was also some acknowledgement, in the allocation of trucks, of an unofficial seniority with longer serving drivers sometimes getting new vehicles (all else being equal); in part this would happen in any event as each vehicle was replaced therefore the older vehicles driven by the longer serving employees would be replaced by newer vehicles. By the same token, if a driver left employment then their vehicle may be allocated to their replacement driver and that might result in a new model being given to a recent recruit. Nationality of the driver was not a factor in the allocation of vehicles.

2.8. Whilst trampers know that they will be staying out at night, and may have to do so for more than one night, routinely, all drivers know that they may have to stay overnight in their trucks at the roadside. This might happen to comply with regulated driving and working time. If a driver can be retrieved from the roadside by a car sent from the depot then so be it, but otherwise if any driver is too far from the depot for a convenient pick-up they will, as a matter of course, stay in the cab of the truck. To that extent therefore all fleet trucks can accommodate a driver; drivers know to come to work prepared for an overnight stay for example in the event of delay caused by traffic disruption or a delay at the customer's depot.

2.9. The industry is regulated. R was at all material times conscious of and conscientious about the health, safety and welfare of its drivers, the requirements of driving and working time regulations, and the need to maintain vehicles to a safe road standards. Vehicles were subject to frequent, regular and documented inspection and maintenance regimes.

3. The claimant (C):

3.1. C is a Polish national. He has been resident in the United Kingdom for many years.

3.2. At the relevant time C was a class I HGV driver. During his first period of employment with R, October 2016 to July 2017, he was a class II driver. Being a class II driver, there were limitations on the work he could carry out and therefore the work that was available for him with R. He was unhappy about this and left his employment. R asked C to return to work for them giving him the opportunity to obtain his class I HGV licence. C accepted the offer. He subsequently obtained a Class I licence.

3.3. C was then employed by R for a second and final period, the material time for these claims, from 3 April 2018 until 21 May 2021 when he was dismissed.

3.4. Upon resumption of employment C indicated his preference as to hours of work and days. He has a family and wanted to spend time with his wife and

children. The hours and routes that suited both him and R's business needs was the Very contract; Very is a clothes retailer. C was not a tramper.

3.5. From the commencement of C's second period of employment with R, April 2018, until May 2019 he drove a MAN registration number (reg) FVX. He was then allocated a different vehicle namely a MAN reg YSW which he used until October 2019. His next allocated vehicle was a Renault BHN reg PO15 which he used until the effective date of termination of his employment approximately 18 months later.

4. Vehicle allocation:

4.1. The changes in vehicles described above were as a result of complaints made by C. He complained over time about the lack of air-conditioning, an uncomfortable seat causing him back pain, an old-fashioned or antiquated gear system, and other such matters. Some of these complaints will have been justified although it seems that his complaint about the gearbox in one vehicle had more to do with a comparison with newer designs rather than the gearbox being faulty. R made the changes, and indeed offered a further vehicle change which C rejected in favour of BHN reg PO15, as a direct result of C's complaints. Each time the vehicle was changed it was to placate C. The same vehicles would then be used by other drivers and, as we understand the evidence, without complaint; some of those mentioned were in due course sold as roadworthy vehicles, and some of those are known to be still in service. C's primary allocated vehicle at any given time would be used by other drivers when C was on leave, rest periods, ill or for any other reason not using his usual truck. No other drivers complained in respect of C's primary truck as he did, although the old style gearbox was not preferred by anyone.

4.2. C considered that the fleet Volvos were the best vehicles. A Volvo HGV was his idea of the ideal vehicle. He was never allocated one. Two British drivers on the Very contract were allocated Volvos on the basis that they were the longest employed drivers; that was the reason for the allocation. Two Polish drivers on the very contract, AT and MM, also drove Volvos at some point of the material time during C's employment by R. R wanted to acknowledge long and loyal employment but also to ensure that appropriate vehicles were allocated to appropriate drivers for the most appropriate contracts and at all times R had to ensure that the vehicles provided suited the needs of the customer. C's nationality had nothing to do with R's allocation of Volvos and the fact that C did not have one allocated to him.

4.3. BHN reg PO15 was generally to C's satisfaction except that he believed there was a 3 mph disparity between the vehicle's speedometer on the one hand and the tachograph and the respondent's own tracking device on the other. His belief, for which he produced some evidence which suggested the possibility of fault, was that the vehicle travelled at a maximum of 53 mph whereas his speedometer would show that it was travelling at a maximum of 56 mph in accordance with the limiter. C says that this accounted for him being a little slower throughout the course of an entire shift because he was

always travelling at 3 miles an hour less than his speedometer showed. The Tribunal is unable to make a finding of fact as to the cause of C's lateness on any occasion or whether the gauge's disparities complained of were causative of delay. No other driver complained to R about this vehicle and its speedometer. Other drivers used this vehicle when C was not using it. All vehicles in the fleet are calibrated biannually and all undergo six weekly checks by the manufacturer's main dealer. None of the reports of the recalibration or checks indicated there was any problem with the speedometer or that the vehicle could not travel to the permissible limit of 56 mph.

4.4. C was not treated less favourably in respect of the allocation of vehicles than his comparators or any other driver. The allocation of trucks was not by reason of nationality.

5. 1st May 2020:

5.1. C was due to work on this date on the Very contract. R double-booked a casual driver (SH) for the same run. When C arrived at the depot SH had gone to collect the truck from a neighbouring parking yard in readiness. C may have seen SH either at the depot or as he left it. In any event Ms Bellis quickly realised that she had erroneously double-booked drivers.

5.2. SH is British.

5.3. Believing that SH had already commenced his preparation of the truck for the run she apologised to C and explained what had happened.

5.4. C commented that he was in any event tired. Ms Bellis said that the claimant could take the day as an additional day's paid holiday and that he could return home.

5.5. C was content to take the holiday but complained that he had been inconvenienced by having driven to work in the first place.

5.6. Ms Bellis paid to the claimant £20 in compensation for his fuel and any inconvenience. Drivers, including C, are not usually paid for fuel, travelling time or inconvenience in attending at work, travelling from their home. C had not commenced working and did not work on this date. He returned home. He accepted the payment.

5.7. This day was allocated to C as an additional day's annual leave on full pay. As holiday pay is averaged out over the year, C confirmed that he would have received more in pay for that one day's additional holiday than he would have received had he completed the 9 hour shift in question.

5.8. SH completed a nine hour shift on this date; he was paid wages for his working day; he completed the contractual deliveries and collections; he was not paid for fuel or as compensation for travelling to and from work; he was

not allocated or allowed an additional day's paid annual leave in respect of this day.

5.9. The reason for the double booking was a mistake on the part of Ms Bellis. The mistake was not because of or contributed to by the nationality of either C or SH. The mistake was costly for R. Usually when there was an available salaried driver R would not engage a casual driver, as to do so would add to its cost. That additional cost was not recoverable from the customer.

6. 11th February 2020:

6.1. On this day C was the only salaried driver available to R with available driving time to his name when it had a requirement to do an additional run to Rocester for the client JCB. JCB is R's second biggest client. It has very specific contractual requirements. R is careful always to satisfy its needs.

6.2. Ms Bellis allocated this run to C. She believed that although it would be a long shift the return journey could be completed within it.

6.3. C said to her that he did not think that he would have sufficient time to complete the return leg within his working day. Ms Bellis was wary of this suggestion, believing it to be an excuse as some drivers will say that there is insufficient driving working time if they are reluctant to accept a certain run; this was not on C's usual contract.

6.4. C was delayed at the customer's depot. The consequence of that delay was that on his return journey home his working time expired when he was some 25 minutes from the home depot; he still had available driving time but he would be unable to complete his work with in the allocated shift. He parked up at the side of the road. R arranged to collect him and return him to the home depot.

6.5. We accept the evidence of R that there was no infringement of the driving hours restrictions. R was never challenged or queried about an infringement by any regulatory authority. R did not apply pressure let alone require C to break the law as alleged, or at all. He was allowed his statutory rest periods. He was not required to drive beyond his working hours and was collected in accordance with the usual arrangements and regime. Delays happen; drivers cannot always get back to base; sometimes drivers park up and are collected by car and driven back the short remaining distance to the depot. This is what happened on this occasion to C.

6.6. C was chosen for this run as the only available option without R incurring additional cost in engaging a casual or agency worker. No other salaried drivers could have undertaken the run. Had C not been delayed by the customer at the customer's depot it is more likely than not that he could have completed the return leg of his journey in good time as the delay was longer than 25 minutes.

7. 19th March 2021:

   7.1. On this date a similar situation arose as is described above.

   7.2. On this occasion C was driving on the Very contract.

   7.3. On the return leg of his journey he reached Wrexham Industrial Estate where R is based but thought that his driving time would elapse before reaching the depot. He contacted IS who was on duty in the role of transport manager at the time to tell him that he anticipated that driving to the depot would mean that he had exceeded his permitted driving time by one minute. IS reassured him that he would not suffer sanction, such as a fine or otherwise, for the sake of one minute. We did not hear evidence from IS but we did from both Mr Bellis and Ms Bellis and we are satisfied of the accuracy of their account of their knowledge of that evening as they had dealings with IS about it.

   7.4. R has not received a financial penalty in respect of alleged breaches of driving hours or working time in over 20 years as a company. If anything it was more likely that it would receive advice on working practices but only if there was an apparent pattern of breach or seeming wilful disregard of regulations. R would not have expected a fine or advice for a one-minute unavoidable excess. It did not receive any fine or advice on this occasion. R through IS merely gave C reassurance of this likely scenario. All drivers are "at the mercy of the road system". The Tribunal accepts R's evidence that such things can happen to any driver at any time. Delay, a slight overrun, and giving of assurance to drivers are commonplace and affect drivers of all nationalities at some time or other.

8. Changes to work roster/rotas:

   8.1. The Very contract is volatile generally, and subject to changes, except in respect of the late deliveries. The latest runs are for next day delivery by Very and this means that they are less susceptible to change than earlier deliveries where orders may be changed by the customer during the course of any day. Any delivery at any time could be changed or cancelled but the likelihood is less as the day progresses.

   8.2. C's preferred hours were for deliveries earlier in the day. This facilitated him getting back in the afternoon or early evening. He indicated this on his appointment; in general he was rostered for early runs.

   8.3. Having indicated his preference, C generally worked to his preferred regime. These were the runs that were more likely to be subject to change than those later in the day. They were more subject to change by the customer including at short notice. R did not seek or require changes to runs but preferred certainty; changes were at the behest and requirement of the customer for its needs and demands.

8.4. R's practice was to send text messages to drivers notifying them of changes as soon as it received notification itself from the customer. The reason for this was twofold, namely so that notification was not forgotten in the general busy-ness of the day, but also so as to give a driver as much notice of the cancellation or change as possible to reduce his/her inconvenience. Almost as soon as R knew of any change, such as a variation in route/destination or cancellation, that information was passed on to the driver. The driver could then plan their day accordingly. R did not require acknowledgement of receipt or any response to its text messaging in these circumstances. Some drivers were in the practice of sending an acknowledgement whereas others did not; there was no general rule. Drivers were not required to check their phones or emails for messages during rest periods. R was satisfied that the information had been sent promptly and it was a matter for the driver as to when he/she checked. The practice of R as so described applied in respect of all its drivers of all nationalities.

9. C's holiday requests:

9.1. In April 2021 C applied to take three consecutive weeks' holiday from 26th July to 13 August 2021.

9.2. The general practice is that R will not allow any driver to take three weeks' consecutive annual leave. R however has a practice that when it can accommodate overseas nationals who want to visit their home country then they may take three consecutive weeks. This is a concession for overseas nationals. C had previously been allowed even four weeks consecutive leave.

9.3. R would generally consider all holiday requests, having looked at a holiday record chart for all its drivers, checking whether other drivers had pre-booked holidays for the same period.

9.4. On checking the record in April 2020 R could see that a new recruit PZ, who is not British, had notified it upon starting his employment that he had a pre-booked holiday in the week commencing 26th July.

9.5. In these circumstances R refused C the first week requested but approved the request in respect of weeks two and three, and in addition offered the next week. C would be allowed three consecutive weeks annual leave but not exactly for the dates he requested.

9.6. The reason for the refusal of the first week of the claimant's request was that R would not have had sufficient drivers to meet its contractual obligations. In compensation it offered an alternative week immediately following the claimant's requested third week. As a general rule British drivers would only be allowed two consecutive weeks holiday.

9.7. C did not take the leave as granted.

10. C's complaints:

    10.1. As referred to above in relation to the allocation of trucks, the claimant complained serially about a number of what he considered to be deficiencies in a number of different vehicles;

    10.2. R serially addressed C's complaints by finding him an alternative vehicle and providing it to him.

    10.3. All vehicles allocated to C during his employment were roadworthy and serviceable. They all passed their relevant maintenance checks. No other drivers complained in relation to those vehicles for the same reasons as C.

    10.4. R offered a further change of vehicle to C which he refused even though at that time complaining about the vehicle he was using, which turned out in his view to the best that he drove, namely BHN reg P015. He drove the latter vehicle for the last 18 months of his employment despite complaints and despite being offered MAN reg ME19 EPL as a replacement.

    10.5. There is no evidence before the Tribunal that any British driver or any driver who was not Polish was allocated or offered so many replacement vehicles. There is no evidence that any other driver complained as much as C about the vehicles.

    10.6. C's complaints were addressed by the said changes in vehicles and offer of alternative vehicles. His complaints were not ignored. Nationality played no part in the way in which R addressed C's complaints.

11. 13th April 2021:

    11.1. On this date a transport manager, SW, said to C that he was the only driver who was always late and told him he had been instructed by Ms Bellis to monitor his timekeeping.

    11.2. SW had raised concerns about C's timekeeping to Ms Bellis.

    11.3. Ms Bellis shared the concern expressed by SW and for this reason instructed to monitor C.

    11.4. C raised a grievance about the comment and monitoring, both of which he felt were unwarranted. He produced evidence to Ms Bellis in defence and mitigation of the criticism.

    11.5. Ms Bellis investigated the grievance and gave due consideration to all that C said and the evidence he produced.

    11.6. She upheld C's complaint about SW. She accepted C's defence and mitigation. She instructed SW not to monitor C.

11.7. The reason for the criticism and monitoring was a perception that C's timekeeping was poor and this was at least in part based upon a report received by R. Once C explained his position R upheld his complaint and stopped the monitoring. It did this having followed a grievance procedure.

12. C's latter absence(s):

12.1. C was absent through ill-health 18 to 22 April 2021.

12.2. At his request he then took unpaid leave pending resolution of his grievances of 20th and 22nd April, neither of which mentions non-payment of SSP.

12.3. In essence C was concerned about returning to work for fear of further criticism or accusation about punctuality and that he might be monitored.

12.4. There was no evidence before the Tribunal to support C's stated concerns because his grievance about punctuality and monitoring had already been upheld.

12.5. C's absence on unpaid leave extended until the effective date of termination of employment.

13. SSP:

13.1. R outsourced its payroll. The person who usually dealt with it was at this time on maternity leave. Her position was temporarily covered by another person who was less experienced. That person advised R that in respect of the first five day's absence three days would be waiting days that were unpaid, and then a worker had to provide a medical certificate or self-certificate of ill-health for the remaining two days without which SSP would not be payable.

13.2. Ms Bellis acted on advice from a temporary payroll clerk. She did this because she thought the advice was correct.

13.3. Subsequently R took formal legal advice about the payment of SSP and other matters. Upon receiving legal advice R realised that it had made a mistake in following the advice of the temporary payroll clerk. In effect C have not received his entitlement to payment of SSP. The reason for non-payment was human error.

13.4. R offered to pay C the unpaid SSP. The separate claim in respect of this money as a claim of unauthorised deduction from wages was settled at the commencement of the hearing. C continue to maintain however that non-payment was an act of direct race discrimination. Non-payment, or late payment. Was not in any way related to C's nationality.

14. Invitation to meet on 20th May 2022:

14.1. R send an invitation to C to attend a formal meeting on this date.

14.2. The message was received by C in his email inbox but he did not see it before he presented his claim to the Employment Tribunal.

14.3. He discovered it later.

15. Grievance Hearing:

15.1. C alleges that Ms Bellis was contemptuous of him at the grievance hearing and did not enquire after his well-being. He appeared to the Tribunal to be genuine and to be offended.

15.2. Ms Bellis denied the allegations and appeared to the Tribunal to be genuine and offended that such an allegation would be levelled at her.

15.3. The Tribunal considers it unlikely in the light of the evidence and its perception of Ms Bellis that the allegation is true. We also however accept that the allegation reflects C's perception of what occurred. There is no other evidence to corroborate the claim or denial.

15.4. There is no evidence before the Tribunal to indicate that Ms Bellis treated, or would treat, a British driver any differently to the way that she treated C.

16. The grievances:

16.1. C accepted that his grievances at the end of his employment boiled down to what would happen on his return to work, principally in and around the SW comments about punctuality and monitoring.

16.2. The grievance was addressed and upheld.

16.3. At this final hearing C alleged that the grievances related to non-payment of SSP and that this was not addressed at the time.

16.4. The claimant's latter grievances did not relate to SSP.

17. R's ET3:

17.1. Upon receipt of C's claim and the notice of claim, Ms Bellis sought advice. She obtained some basic information from the payroll clerk and administrative staff so that R could address C's details of his hours and pay in its ET3 Response form.

17.2. Had R received a claim from a British national it would have confirmed details through enquiry of payroll and administration; it would have relied on the information provided.

17.3. R completed the response by giving a range of hours which is not inaccurate; it is not precise. C's pay varied sometimes week by week and the Tribunal does not know the basis of calculation relied upon by him in his claim form.

17.4. There is no evidence before the Tribunal to suggest or indicate that a British claimant would have been treated any differently by R in the completion of the response form.

18. Comparators:

18.1. Alan Roberts and David Brockhurst are both British drivers on the Very contract. They have each been employed by R for in excess of 10 years. They are considered to be senior drivers. They were both allocated their initial trucks prior to C's second period of employment by R. Their vehicles came up for replacement and they were given better vehicles. They tend to work on the later deliveries where there was more certainty and less risk of change or cancellation than with the earlier deliveries. For these reasons they were allocated the vehicles that they drove which were latterly Volvo and their routes were rarely subject to change. C has not established to the satisfaction of the Tribunal that C was treated less favourably than either of these named comparators because of C's nationality.

18.2. Tony Griffiths is a tramper. He requires a particular specification of truck because of his overnight stays and therefore a higher specification than C. He is not a true comparator.

18.3. Gareth Peirce is engaged on heavier work than the Very contract, and works nights rather than day shifts. He requires a truck with a specification suited for the work and shifts. He is not a true comparator.

18.4. Robert Harper is a tramper and so once again is not a true comparator for all the reasons previously stated.

18.5. The Tribunal was not given sufficient information about Alistair Emmett to consider whether or not he was a true comparator but he was not named by C as one until the hearing. C has not established to the satisfaction of the Tribunal that he was treated less favourably than Mr Emmett because of C's nationality.

19. The dismissal:

19.1. During C's absence, on 29 April 2021, he sent an email to R asking for payment for the week of his absence through stress, and he indicated that he would not be returning to work. Our findings in respect of payment of SSP are set out above.

19.2. Ms Bellis replied to C and, amongst other things, requested clarification as to whether he intended to return to work or was tendering his resignation.

19.3. In the absence of a response she wrote to him again on 4 May with the same enquiry.

19.4. She wrote to him again on 5 May 2021 informing him that his continued absence from work was now unauthorised as his grievance had been attended to and an outcome provided. He had been on an agreed period of leave pending resolution of the grievance until that time. He was warned that he must either attend work or risk facing formal disciplinary action for failing to follow a management instruction and return to work. He was invited to contact Ms Bellis if he was still unfit.

19.5. As C still did not reply, Ms Bellis sent to the claimant an invitation to attend a disciplinary hearing on 10 May 2021, the hearing to take place on 12 May 2021. It was explained to him that he was required to answer allegations of gross misconduct namely failing to return to work and to follow a reasonable instruction from management. He was considered absent without leave. His statutory rights were explained to him. He was forewarned of the potential consequences.

19.6. C did not reply nor attend the disciplinary hearing on 12 May 2021.

19.7. R re-scheduled the meeting to 19 May 2021. A further invitation was sent to C on 17 May 2021 repeating the information previously given about the nature of and potential consequences of the hearing. C was given a copy of R's evidence. His statutory rights were explained. It was further explained to him that if he failed to attend the rescheduled hearing without reasonable cause or explanation R may proceed in his absence. He was warned of the risk of summary dismissal.

19.8. On 18 May 2021 C responded. He expressed a wish to return to work. R converted the proposed disciplinary hearing to an investigation meeting so that R could now investigate with C his apparent failures to comply with instructions, his unauthorised absence from work together with apparent failure to follow absence reporting procedures. C replied to the effect that he could not attend as he would be working, and by this he meant elsewhere than for R. He complained that he had not been granted an appeal to his grievance.

19.9. R was surprised that C had indicated a willingness to return to work and saying he was working elsewhere. He was then required to attend the rearranged meeting which was now for investigation as it was during his normal working hours; he was forewarned that R would proceed in his absence if he did not attend. With regard to any grievance appeal he was referred to R's earlier correspondence to him about the grievance.

19.10. C did not attend the investigation hearing; R therefore invited him to a disciplinary hearing to take place on 20 May 2021. The disciplinary charges were similar to those raised previously save that additional dates of non-attendance were added. He was again warned that a decision may be taken

in his absence; he was again advised of the risk of a finding of gross misconduct that could lead to summary dismissal.

19.11. C did not attend the disciplinary hearing on 20 May 2021; it proceeded in his absence; he was found to have committed acts of gross misconduct as alleged; he was summarily dismissed. That outcome was sent to him on 21 May 2020. C was advised of his right to appeal.

19.12. C replied to the dismissal letter saying he disagreed with this and raising the matter of a grievance appeal. On 26 May 2021 R invited C to an appeal hearing on 1 June 2021. In response to that invitation C said that he would be working on that date and he would not attend the appeal hearing. He was asked by R to provide alternative dates when he could attend and he was given five working days to respond failing which it would be assumed he did not wish to pursue his appeal against dismissal.

19.13. C did not respond to R2 to re-arrange the appeal hearing or otherwise. He did not attend at work for a meeting or hearing on 1 June 2021.

The Law

20. Unfair Dismissal:

20.1. An employee with two years continuous employment has the right not to be unfairly dismissed.

20.2. A dismissal should therefore be for a potentially fair reason, and a reason related to conduct is one such.

20.3. It is then incumbent on an employer to act fairly and reasonably in treating that reason is sufficient reason to dismiss.

20.4. A respondent to a claim must establish the reason for the dismissal. Once that has been done it is for the Tribunal to decide whether the respondent acted fairly and reasonably in all the circumstances and taking into account its size and resources.

20.5. It is not the Tribunal's function to decide what it would have done had it been the employer. It cannot substitute its judgment. If a potentially fair reason is established, the Tribunal's function is to decide whether the respondent to the claim acted fairly and reasonably in dismissing the claimant. If the respondent's conduct falls outside the range of reasonable responses of a reasonable employer, that is they have done something that no reasonable employer would have done, it will be an unfair dismissal.

21. Direct Race Discrimination:

21.1. Nationality falls within the protected characteristic of race.

21.2. Unlawful race discrimination includes direct discrimination.

21.3. Direct discrimination is where a person discriminates against another because of a protected characteristic by treating that person less favourably than another person was treated or would be treated, someone not sharing the same protected characteristic.

21.4. The key here is one of causation. A Tribunal will ask itself whether a claimant was treated less favourably than another person not sharing the same protected characteristic and whether the reason for the treatment was race.

21.5. Claims ought to be presented within 3 months of the discriminatory act, or last in such a series of acts, complained of. That is of course subject to extension in respect of early conciliation, such that to "stop the clock" a claimant ought to commence early conciliation within that 3 months period. The Tribunal has a wide discretion to extend time if it considers that it would be just and equitable to do so; that is not however a given and is in fact an exception rather than the general rule.

Application of law to facts

22. In respect of the allegations of direct race discrimination the tribunal has made a finding of fact in each case that the reason for C's treatment was innocent or non-discriminatory.

23. The Tribunal has been unable to find that C was treated less favourably than the British named comparators, either those named initially (Alan Roberts & David Brockhurst) or latterly. Some of those named are not true comparators in any event.

24. At all times R's treatment of C and his colleagues was based on R's commercial needs and commercial imperative bearing in mind the terms of its contracts with customers and the desire to achieve customer satisfaction.

25. The allocation of trucks was to suit contracts, customers and the needs of individual drivers regardless of nationality. Nationality was not a factor in the allocation of trucks to either see or anyone else.

26. When R double booked SH on the same shift as C on 1 May 2020, C was treated more favourably than SH who is British. SH had to do a full day's work and was paid his hourly rate, whereas C was compensated for his fuel and inconvenience of driving to work without having to work whereupon he was paid a full day's pay additional holiday pay. It is worth noting that because the holiday pay is worked out annually, even C conceded that he probably received more pay for the notional day's holiday than he would have received had he worked a nine-hour shift. He was not treated unfavourably. The reason for the treatment was human error and nothing whatsoever to do with nationality.

27. C was never required to break driving rules and regulations concerning duration of work and driving. All drivers suffer the vagaries of the traffic conditions and the capacity of customers to effect a quick turnaround. In this regard C was no

different to any other driver; he was not treated unfavourably compared to any British driver.

28. His contract was honoured at all times even though he was disgruntled. Other drivers similarly sought to avoid some of the longer runs and it appears to the Tribunal that they too were prevailed upon to accept any run if they were available. Ms Bellis was reluctant to accept excuses. Delivery runs were calculated and estimated as appropriate and as accurately as possible. R has a clear record with regard to compliance with applicable rules and regulations concerning drivers' hours. There was no unfavourable treatment on the ground of nationality as alleged.

29. Changes to shifts were at the behest of customers. There is no evidence to support the allegation that changes were made to better suit British drivers. The contract on which C worked was volatile especially so during the earlier deliveries which were the ones that C preferred to undertake. He was accommodated in his preference; he took the risk that his deliveries could be changed or cancelled. That was just the way the business ran. Any changes had nothing to do with the nationality the driver.

30. C was treated favourably with regard to holiday requests compared to British drivers who were not generally allowed three consecutive weeks' annual leave. On at least one occasion C was given four consecutive weeks annual leave. In respect of July and August 2020 C was offered three consecutive weeks but not week 1 requested. The difference between the request and what was permitted was down to commercial reasons. R did not have enough available drivers to meet its commercial obligations to customers. There is no evidence of unfavourable treatment let alone less favourable treatment than a comparator on the grounds of race.

31. C's complaints about his vehicles were taken into account and there were multiple changes of vehicle and even a further offer of a change which he did not accept. This was so despite R accepting all of his complaints were significant. The vehicles were regularly checked and maintained. They were roadworthy. At least one other Polish driver had a better vehicle than C. If R appeared to be reluctant to make changes, the Tribunal does not find such reluctance; it may have been because of the number and regularity of C's complaints which were on each occasion accommodated as far as was able. There is no evidence to support the allegation that he was treated either unfavourably or less favourably than British comparator because of his race.

32. SW reported C because he appeared to be occasionally or frequently late, and for that there was to be a period of monitoring. When C complained to R it investigated the matter and upheld his complaint stopping all monitoring. R had acted on a complaint against C. It then took appropriate action in respect of C's complaint and reversed its decision. There is no evidence of unfavourable treatment on the ground of nationality.

33. R made a mistake in not paying two days SSP due to C. It relied on professional advice. There is no evidence to suggest the professional advice was tainted in any sense by C's nationality. There is no evidence to suggest that he was treated less favourably than a British comparator. The Tribunal draws an inference that had R received professional advice as to a British driver's entitlement to SSP which was mistaken, it would have mistakenly followed it. When R's solicitors advised that there had been an error and money was due, money was offered in payment and settlement.
34. C complained that he was not invited to a meeting on 20 May. He accepted latterly that he had been invited but that he did not see the invitation in his inbox; any claim of less favourable treatment must therefore fail.

35. The Tribunal cannot uphold the allegation that R treated C with contempt and did not enquire about his well-being at the grievance hearing; this is a case of one word against another. The Tribunal accepts R's denial while accepting the evidence of C that his perception was that he was treated with disdain. The Tribunal is unable to find that a British driver in the same circumstances would not have felt the same or would have been treated any differently.

36. C does not consider that his grievances were addressed. The grievance was about returning to work in his complaint about monitoring for poor timekeeping which he felt was unfair. That matter was dealt with by R. His grievance was upheld. C may well have had concerns about returning to work but there was nothing R could do to address them when C then refused to engage with R; he failed to attend meetings. The grievance had in any event been addressed. There is no evidence to suggest that C was treated less favourably than a British comparator with regard to the grievance. The outcome of the grievance was what he would have expected and hoped for and yet he still complains.

37. The Early Conciliation period was 11th June 2021 – 21st June 2021; the claimant presented his claim on 22nd July 2021. The claimant's claims that he was subjected to direct race discrimination on 1st May 2020 and 11th February 2020 were presented out of time. The Tribunal has found that there was no course of discriminatory conduct. The claimant led no evidence as to why time should be extended for the presentation of claims relating to events on 1st May and 11th February 2020. In these circumstances it is not just and equitable to extend time to the date of early conciliation or presentation of his claim; the Tribunal has no jurisdiction, but if it had jurisdiction then these claims would have failed and the Tribunal would have dismissed them too.

38. C did not return to work once the grievance had been resolved. He was on unauthorised absence pending its resolution; he then refused to return to work. He did not engage properly with R when it invited him to a disciplinary hearing, then to investigate, and then again to disciplinary hearing. He was given due notice of finding of gross misconduct. He was duly informed that R could proceed in his absence. He still refused to engage. He indicated he was working elsewhere while still employed by R.

39. C received an explanation of his statutory rights in respect of the disciplinary procedure. He also received copies of the evidence upon which R intended to

rely. He was made fully aware of all risks facing him if he failed to attend the meetings to which he had been properly invited and to engage.

40. In all of the above circumstances R held a reasonable and genuine belief that the claimant was guilty of gross misconduct in being absent from work without leave (including whilst working elsewhere) and failing to follow reasonable management instructions to return to work. In the eyes of the respondent that amounted to gross misconduct. Based on its reasonable and genuine belief R considered it had to bring matters to a head and it duly dismissed C. The Tribunal considers that this was reasonable or put another way it fell within the bounds of reasonable responses of a reasonable employer. Perhaps some reasonable employers would have given even more notice and more opportunity to C to engage with it, but it cannot be said that no reasonable employer would have dismissed given the number of opportunities that C had been given.

41. The Tribunal did not consider that R's processes were perfect and noted that some of the timelines were relatively short. That said, it was evident to the Tribunal that it would have given C more time if he had asked for it. R was willing to change the nature of the meetings from disciplinary to investigation if it would assist C and lead to his proper engagement in the process. C was intransigent and uncooperative.

42. In all of those circumstances R formed a reasonable and genuine belief that the claimant would not return to work and did not wish to. Dismissal in these circumstances was for a potentially fair reason and fell within the range of reasonable responses of a reasonable employer.

43. The claim for unauthorised deduction of wages was settled. All other claims fail and are dismissed for the reasons stated.

Employment Judge Ryan

Date: 14 April 2023

REASONS SENT TO THE PARTIES ON 17 April 2023

FOR THE TRIBUNAL OFFICE Mr N Roche