EMPLOYMENT TRIBUNALS

Claimant: **Mr A Artyunov**

Respondent: **Staffline Recruitment Limited**

Heard at: **East London Hearing Centre**

On: **12-14 April & (in chambers) 5 May 2023**

Before: **Employment Judge Scott**

Members: **Mr Hutchings**
Mr O'Callaghan

Representation
Claimant: **Dr Siwek (lay representative)**
Respondent: **Mr Francis (Counsel)**

RESERVED JUDGMENT

The unanimous judgment of the Employment Tribunal is that:

1. **The Claimant's complaint of direct race discrimination, having been withdrawn by the claimant, is dismissed under Rule 52 of Schedule 1 of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013.**

2. **The Claimant's complaint of constructive unfair dismissal under Part X of the Employment Rights Act 1996 is not well-founded and is dismissed. The claimant did not resign.**

3. **The claimant's claim for holiday pay due upon termination of employment under Regulation 14 of the Working Time Regulations 1998 is dismissed. The claimant's employment has not ended.**

REASONS

Introduction

1. The Tribunal convened on 12-14 April 2023 to hear the claimant's claims. This was an in-person public final merits hearing. The tribunal and parties agreed that it would be

sensible to determine liability first and consider remedy, if appropriate, thereafter. The Tribunal reserved its decision.

2. The claimant was represented by Dr Siwek, his step-father, who told us that he had some experience of Employment Tribunals/Law in Scotland. The claimant confirmed to the Tribunal in December 2022 that he authorised Dr Siwek to represent him [64]. The respondent was represented by Mr Francis. We are grateful for their assistance.

Background

3. There were two Preliminary Hearings (PH) prior to this Hearing (one a private case management PH, one a strike out/deposit order PH (public)). At the second hearing, the claimant's wages complaint was struck out and a deposit order made in respect of the unfair dismissal complaint.

Preliminary and other matters

4. The claimant had provided a 'joint' witness statement on behalf of himself and Ms Siwek, a witness. It was agreed that the Tribunal would rely upon the witness statement (such as it was), and also the ET1, Further Information and the List of Issues as the claimant's evidence in chief. The parties were told that we would only read documents that we were referred to. Dr Siwek was asked to refer us to documents over and above those referred to in the respondent's witness statements if he wished us to read other documents in the Bundle.

5. Having taken the morning to deal with housekeeping matters, including finalising the List of Issues and reading, Dr Siwek made a request for an adjournment for the Tribunal to secure the services of an interpreter because the claimant's and Ms Siwek's first language is not English. The claimant and Ms Siwek's ethnicity is Armenian. For reasons given orally on the day, we refused the application to adjourn the Hearing, after we deliberated in private. We had regard to the overriding objective to deal with cases fairly and to Article 6 of the ECHR, which provides that every litigant is entitled to "a fair trial within a reasonable period" and to the fact that if a party wishes to have an interpreter present at a hearing, there will in general be no reason why an Employment Tribunal should not facilitate this as best it can. We also had regard to the Equal Treatment Bench Book:

> *'Those sections consider communication with witnesses, but difficulties are likely to become more acute when a person is also presenting his or her own case, without any representative to mediate cultural and linguistic understanding…. Situations may arise where the judge has to take a proactive role, and make some effort to clarify and resolve the extent of any language difficulty faced by a witness. It is part of the judge's function to check everyone understands each other so as to ensure a fair hearing. If a judge hearing a case considers that an interpreter is required, an adjournment should be granted for that purpose.*
>
> *It can happen that an interpreter was not arranged in advance or that an interpreter who has been booked, does not arrive. It may be tempting for everyone involved to continue without an interpreter in that situation if the party or witness says they can manage in English. Judges should exercise caution about accepting such reassurances. Ultimately it is the judge's responsibility to ensure that there is a fair hearing.'*

6. The Tribunal was satisfied, both from written materials in evidence from the Claimant and its interactions with him and Ms Siwek, that the Claimant's written and the claimant's and Ms Siwek's verbal command of English was good and more than sufficient for them to fully and fairly participate without the assistance of an interpreter. It was our assessment, in the light of the available evidence and the standard of understanding and expression that an interpreter was unnecessary and that the claimant's and Ms Siwek's command of language was more than sufficient to enable them to give the best account to the Tribunal which they would wish to give in respect of the issues to be determined. The claimant was represented by Dr Siwek for whom English is a first language; he was not representing himself. The claimant moved to the UK in 2005 when he was 11 years old and attended school in the UK from then. The claimant and Ms Siwek communicated with Mr Gill at the grievance meeting and with Mr Pascal on the telephone on 10 April 2021. We were also inclined to agree with the respondent's representative that the request for an interpreter at this stage was a stalling tactic to 'kick the matter into the long grass', given that a request for an interpreter had not been made before Day 1 of the Final Merits Hearing. We made it clear that we would ensure that the claimant and Ms Siwek would be given as much time as needed to accommodate the burden of any internal translation processes to read documents and answer questions and that we would clarify questions if they did not understand them and/or if their answers indicated they had not understood the question.

7. The Tribunal also reminded itself of the guidance given in paragraphs 102 - 108 of the Equal Treatment Bench Book (e.g. the need for breaks, clear questioning, checking understanding regularly) and agreed that if it considered at any time during the Hearing that an interpreter was needed to ensure a fair hearing, the Judge would not hesitate to adjourn and begin the hearing again at a later date with an interpreter. Had the Tribunal had any doubt during the Hearing as to the claimant's or Ms Siwek's ability to participate fully and fairly in the Hearing, we would have ordered an adjournment and arranged for an interpreter, notwithstanding the Respondent's submission that it had expended time and money in preparing their witnesses who were present for a 3 day-hearing and that it considered that the Claimant was probably not in a financial position to pay costs which would be incurred by the Respondent as a result of a late postponement. In the end, we had no doubt whatsoever that the claimant and Ms Siwek understood the questions that they were asked - they gave lucid and considered responses to questions from Mr Francis, Dr Siwek and the Tribunal. We did not observe the claimant or Ms Siwek having any difficulties participating in the hearing or struggling with language during their evidence and Dr Siwek did not alert us to any difficulties during Days 2 and 3 of the Hearing.

8. It transpired later on Day 1 of the Hearing that Dr Siwek did not have a copy of the agreed Bundle of documents. The respondent had sent it to him in advance of the hearing as directed. Nonetheless, we arranged for the clerk to provide Dr Siwek and the claimant each with a copy of the Bundle. We adjourned early on Day 1 (at 3.25pm) to allow Dr Siwek and the claimant time to read the Bundle and for the claimant to discuss his case with Dr Siwek prior to the claimant giving evidence on Day 2.

9. At the outset of Day 2, the Tribunal handed a written copy of the List of Issues agreed on Day 1 of the Hearing to the parties.

10. Before we heard evidence from the claimant on Day 2, Dr Siwek asked for permission for the claimant to be assisted by 'the English equivalent of a *Scots Law* '*McKenzie Whisperer*'. We discussed the role of a McKenzie friend and we confirmed to Dr Siwek that if he had concerns about questions being asked in cross examination or any other matters that he could raise those with the Tribunal, but that he could not assist the claimant with his

answers to questions being asked. He could, along with the Tribunal, assist the claimant and Ms Siwek, where necessary, to ensure they understood questions asked.

11. Dr Siwek also asked for copies of the respondent's witness statements on Day 2. The clerk copied them for him. The witness statements had been sent in advance of the hearing by the respondent, as directed, but Dr Siwek did not have hard copies with him.

12. During the claimant's evidence, the claimant said that he had not seen/read the ET1 before it was sent to the Tribunal (or before the Final Merits Hearing), had not told Dr Siwek what to write in the ET1, nor seen the List of Issues drafted by EJ Jones prior to the Final Merits Hearing, nor told Dr Siwek what to write in the email at [94] or by way of further information. When asked by counsel whether *he* (the claimant) was complaining that *he* had been discriminated against on the grounds of his race/nationality the claimant said that he was not. The Tribunal Judge went through each allegation of race discrimination carefully with the claimant (see the Day 1 List of Issues in the Appendix below) and asked him whether it was *his* case that he considered that he had been treated in any of the ways alleged because of / anything connected with his race / nationality. He said again that it was not. In the circumstances, when then asked whether he wished to withdraw the complaint of race discrimination, which would mean that part of his claim would come to an end, the claimant said that he did. The Tribunal was and is entirely satisfied that the claimant understood what he was being asked. The claimant did not consider that he had been treated in any of the ways alleged because of his race/nationality. The complaint of race discrimination was not the ***claimant's*** complaint. It was Dr Siwek's complaint, written without the claimant's input. The Tribunal explained that a judgment would subsequently be issued under Rule 52 of Schedule 1 of the Employment Tribunals (Constitution & Rules of Procedure) Regulations 2013 dismissing the complaint of race discrimination.

13. On Day 3 of the Hearing, Dr Siwek explained that because he now (Day 3) had a copy of the respondent's skeleton argument that he wished to reserve the right to make an application to amend the claim to re-introduce the race discrimination complaint, to re-examine the claimant and to strike out the respondent's response. The Tribunal Judge explained to Dr Siwek that if he wished to make an application now was the time to do so. Mr Francis explained to the Tribunal that he had sent a copy of the skeleton to Dr Siwek by email prior to the Hearing and that he had also given Dr Siwek a hard copy on Day 1. Dr Siwek accepted that. Dr Siwek applied:

13.1 to recall the claimant so that the claimant could be re-examined as to whether or not he had resigned/told Dr Siwek to call the respondent to advise the respondent that he was resigning, as the claimant '*could not understand what he was meant to say*' on Day 2 and thought the questions related to events before 9 July. Although Dr Siwek initially suggested that the claimant had been under '*some duress*,' he clarified that to say that he was not suggesting that the claimant had been put under any pressure but rather that that the claimant's 'cognitive capability' meant that he could not '*understand what he was meant to say*.' The claimant's evidence on Day 2 was that he had not resigned/asked Dr Siwek to advise the respondent that the claimant was resigning (see below);

13.2 to amend the claimant's claim to re-introduce the withdrawn direct race discrimination complaint (see above), for the same reason.

Dr Siwek did not make an application to strike out the respondent's response.

14. Mr Francis resisted the application to recall the claimant to re-examine him about the resignation issue because Dr Siwek had the opportunity to re-examine the claimant about the resignation issue at the end of day 2 – he had re-examined the claimant more generally. Importantly, the claimant had now had the opportunity to discuss his evidence with Dr & Ms Siwek in the period between Days 2 & 3.

15. Mr Francis also resisted the application to amend the claim to re-introduce the race discrimination complaint. The claim had been withdrawn on Day 2, the claimant's evidence had now been completed; cross examination had re-focused on the constructive dismissal complaint and that there was no prejudice to the claimant because the merits of the claim were weak; the claimant's evidence was clear – his case was not that the treatment set out at 3.2.1-3.2.5 (Appendix 1) was meted out because of/connected to his race/nationality.

16. The Tribunal adjourned to consider its decisions on Dr Siwek's applications. The Tribunal decided:

16.1 In respect of the resignation issue, Dr Siwek's application to recall the claimant to re-examine him was refused. We were sure that the claimant had understood the questions asked of him during cross-examination on Day 2 – and that there was no 'duress'. The claimant's answer to the question 'so, you did not resign?' was that he did not, his answer to the question 'did you ask Dr Siwek to call to say you were resigning?' was that he did not. The claimant's evidence was that he understood that if he resigned, he could not bring a court claim. It was the Tribunal's view that the claimant had understood the questions asked and that he had not hesitated in his responses. His answers were clear. Dr Siwek had the opportunity to re-examine the claimant on Day 2. We decided that it was not in line with the overriding objective for the claimant to be recalled to give further evidence by way of re-examination so that he could '*say what he was meant to say*.' The claimant had finished giving his evidence at the end of Day 2. He had therefore had the opportunity to discuss his evidence with Dr (& Ms) Siwek between the end of Day 2 and Day 3.

16.2 In respect of the claimant's application to amend the claim to re-introduce the race discrimination complaint withdrawn on Day 2, the Tribunal considered Rule 51 which provides that the withdrawn part of the claimant's claim has '*come to an end*'. In *Campbell v OCS Group UK Ltd and anor 2017 ICR D19, EAT*, the EAT confirmed that where a claim is withdrawn and comes to an end under rule 51, the tribunal must issue a dismissal judgment unless either of the exceptions in rule 52 apply. In fairness to Dr Siwek, the Tribunal treated the claimant's application to amend as an application under rule 52:

> *'Where a claim, or part of it, has been withdrawn under rule 51, the Tribunal shall issue a judgment dismissing it (which means that the claimant may not commence a further claim against the respondent raising the same, or substantially the same, complaint) unless—(a) the claimant has expressed at the time of withdrawal a wish to reserve the right to bring such a further claim and the Tribunal is satisfied that there*

would be legitimate reason for doing so; or (b) the Tribunal believes that to issue such a judgment would not be in the interests of justice'.

The Tribunal refused the application to amend. The Tribunal concluded that there was no reason to grant permission to amend/bring a further claim in the Employment Tribunal based upon the same facts or that it was unjust to dismiss the claim. There was no good reason for permitting the claimant to resurrect the claim; the claimant withdrew the race discrimination complaint because his evidence was that he did not consider that the treatment meted out to him was because of his race/nationality. The balance of prejudice favoured the respondent. The Tribunal had taken time on Day 2 to ensure that the claimant understood what he was asked and that it was his clear case that race/nationality had not been a factor in the things that had happened to him. The claimant's evidence was clear – he did not consider that the treatment complained of in the List of Issues was because of his race/nationality. The claimant's case had closed at the end of Day 2. The balance of the proceedings (the claimant's unfair constructive dismissal complaint) continued, unaffected by the withdrawal of the race discrimination part of the claim. The claimant could still succeed with the unfair constructive dismissal complaint. The race discrimination part of the claimant's claim is therefore dismissed under Rule 52.

The amended list of issues for us to determine were therefore as follows (Day 1 issues are set out in Appendix 1 below for completeness):

The issues

17. **Unfair dismissal:**

17.1 Was the Claimant dismissed?

17.1.1 Did the Respondent do the following things:

17.1.1.1 Breach its health and safety obligations by:

During a nightshift in 2020, at approximately 1am, upon lifting a pallet of potatoes within the provisions of the respondent's performance criteria (computerized system regarding speed of delivery of producing pallets to Tesco), the claimant suffered acute lower back pain. The claimant reported the matter to the night shift supervisor. There was no examination or first aid provided. The claimant had to finish the shift (6am);

17.1.1.2 Fail to accept the SSP form from the Claimant, submitted to the Respondent on 10 April 2021;

17.1.1.3 Fail to offer the claimant new assignments after his period of sickness;

17.1.1.4 Fail to address the Claimant's concerns raised in Dr Siwek's email dated 21 April 2021;

17.1.1.5 On 10 April 2021[1], Mr Pascal spoke to the Claimant and his mother, Ms Svetlana Siwek, in a racist, rude and disrespectful manner.

17.1.2 Did the above breach the implied term of trust and confidence?

17.1.3 The Tribunal will need to decide:

17.1.3.1 whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; and

17.1.3.2 whether it had reasonable and proper cause for doing so.

17.1.4 Did the Claimant resign on 9 July 2021. Dr Siwek says that he telephoned the respondent on 9 July to advise that the respondent that the claimant was resigning.

17.1.5 If so, did the Claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

17.1.6 Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions showed that they chose to keep the contract alive even after the breach.

17.2 If the claimant was dismissed, was there a potentially fair reason for dismissal? The respondent does not seek to rely upon a potentially fair reason. Its position is that the claimant was not dismissed.

17.3 If the claimant was dismissed, is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed?

17.4 If the claimant was dismissed, did he cause or contribute to the dismissal by blameworthy conduct (contributory conduct)?

17.5 If so, is it just and equitable to reduce the basic and/or compensatory award? By what proportion?

[Remedy issues to be decided, if relevant, after a decision on liability].

[The claimant's Holiday Pay claim to be decided, if relevant, after a decision is made on liability. Holiday pay due upon termination depends upon there having been a dismissal].

Law

[1] The claimant accepted in evidence that his one telephone conversation took place with Mr Pascal on 10 April, not 17 April.

18. Mr Francis provided a brief summary of the relevant law in his skeleton argument.

19. Section 95 Employment Rights Act 1996 sets out the circumstances amounting to a constructive dismissal:

> *'(1) For the purposes of this part an employee is dismissed by his employer if (and subject to subsection (2)…, only if) –*
>
> *…*
>
> *(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.'*

20. It is well established that:

20.1 The employee must have resigned (with or without notice).

20.2 There must have been a fundamental breach of contract by the employer. The breach of contract must be sufficiently serious, or repudiatory – '*a significant breach going to the root of the contract of employment, or one which shows that the employer no longer intends to be bound by one of more of the essential terms of the contract*' (*Western Excavating (ECC) Ltd v Sharp* [1978] QB 761). The implied duty of trust and confidence has been defined as a duty that the '*employer shall not, without reasonable and proper cause, conduct itself in a manner calculated and/or* (see *Baldwin v Brighton & Hove City Council* [2007] IRLR 232) *likely to destroy or seriously damage the relationship of confidence and trust between an employer and employee*'. It is irrelevant that the employer does not intend to damage his relationship provided the effect of the employer's conduct, judged sensibly and reasonably, is such that the employee cannot reasonably be expected to put up with it (*Leeds Dental Team Ltd v Rose* [2014] IRLR 8). The conduct of the parties must be looked at as a whole and its cumulative impact assessed. It is the impact of the employer's behaviour on the employee that matters, not the intention of the employer, but the impact on the employee must be judged objectively, to be judged from the viewpoint of a reasonable person in the position of the claimant. (*Courtaulds Northern Textiles Ltd v Andrew* [1979] IRLR 84/*Malik v Bank of Credit and Commerce International* [1997] IRLR 462 affirmed by the Court of Appeal in *Bournemouth University Higher Education Corporation v Buckland* [2010] IRLR 445). In *Parsons v Bristol Street Fourth Investments Ltd trading as Bristol Street Motors* UK EAT/0581/07 HHJ Peter Clark reminds us that whilst the employee's subjective reaction to his employer's conduct is not determinative of the breach, it is a factor which the tribunal is entitled to take into account in deciding objectively whether the conduct is likely to destroy trust and confidence and in assessing whether there has been a breach what is significant is the impact of the employer's behaviour on the employee. A breach of the implied term of trust and confidence is necessarily a fundamental breach of contract (see *Safeway v Morrow* [2002] IRLR 9).

20.3 The employee must have resigned in response to the breach, not for some other reason. But the breach need only be an effective cause, not the sole or primary cause, of the resignation.

20.4 That the employee did not, by his conduct, lose the right to resign in consequence of the breach (affirmed the contract before resigning).

21. In *Kaur v Leeds Teaching Hospital NHS Trust* [2018] EWCA Civ 978 [2019] ICR 1, the Court of Appeal held (at [55]) that, in the normal case where an employee claims to have been constructively dismissed as a result of a breach of the implied term of trust and confidence it is sufficient for a tribunal to ask itself the following questions:

21.1 What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?

21.2 Has he or she affirmed the contract since that act?

21.3 If not, was that act (or omission) by itself a repudiatory breach of contract?

21.4 If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a (repudiatory) breach of the implied term of mutual trust and confidence? (If it was, there is no need for any separate consideration of a possible previous affirmation because the final act revives the employee's right to resign in response to the prior breach.)

21.5 Did the employee resign in response (or partly in response) to that breach?

22. In determining whether a course of conduct comprising several acts and omissions amounts to a breach of the implied term of trust and confidence, the approach in *Omilaju v Waltham Forest LBC* [2004] EWCA Civ 1493, [2005] ICR 481 will be applied. A breach of the implied obligation of trust and confidence may consist of a series of actions on the part of the employer which cumulatively amount to a breach of the term, though each individual incident may not do so. The 'final straw' may be relatively insignificant but must not be utterly trivial. Where prior conduct has constituted a repudiatory breach, however, the claim will succeed provided that the employee resigns at least in part in response to that breach, even if their resignation is also partly prompted by a 'final straw' (provided there has been no affirmation of the breach) (*Williams v The Governing Body of Alderman Davie Church in Wales Primary School* (UKEAT/0108/19/LA).

23. Section 95(1)(c) provides that the employee must terminate the contract (resign) with or without notice and that resignation must be by reason of the employer's conduct. Assuming that the employee has terminated the contract, the question is whether the repudiatory breach(es) played a part in the dismissal. It need not be the sole factor but can be one of the factors relied on. If, however, there is an underlying or ulterior reason for the employee's resignation, such that he would have left anyway irrespective of the employer's conduct, then there has not been a constructive dismissal. Where there are mixed motives, the tribunal must decide whether any breach was an effective cause of the resignation. At paragraph 20 of *Wright v North Ayrshire Council* [2014] IRLR 4, Langstaff P said, 'where there is more than one reason why an employee leaves a job the correct approach is to examine whether any of them is a response to the breach, not to see which amongst them

is the effective cause.' See too *United First Partners Research v Carreras* [2018] EWCA Civ 323. An employee who remains in employment whilst attempting to persuade the employer to remedy the breach of contract will not necessarily be taken to have affirmed the contract *W E Cox Turner (International) Limited v Crook* [1981] IRLR 443.

24. The respondent does not seek to assert a potentially fair reason for dismissal, if the Tribunal decides that the claimant was constructively dismissed. It follows that if the claimant was constructively dismissed, the dismissal is unfair.

The Tribunal's findings of fact

25. There was one bundle of documents. We were also provided with a witness statement signed jointly by the claimant and his mother, Ms S Siwek and a witness statement from Dr Siwek. The Tribunal decided, with the parties agreement (see above), that it would rely upon the witness statement, the ET1, Further Information and the List of Issues as the claimant's evidence in chief. We had witness statements from Mr Gill, Regional Accounts Manager; Mr Pascal, Planner and Ms Radziszewksa, Employee Relations Specialist, for the respondent. We read the witness statements and the documents we were referred to and we heard oral evidence from the claimant, Ms Siwek, Dr Siwek, Mr Pascal and Ms Radziszewksa.

26. Mr Gill did not attend the Hearing. We were told that he was on a pre-arranged holiday. We accept that. The fact that a statement has not been given under oath, or tested at a Hearing, are considerations that can inform this Tribunal's assessment of its reliability or credibility, or otherwise of what weight to attach to it. In fact much of Mr Gill's witness statement evidence is corroborated by documentary evidence (see below). Had he been present, we do not think he would have added anything much to our findings of fact.

27. We have taken the evidence into account in reaching our decision and refer in our reasons to the evidence which is relevant to our specific findings. We also took into account the parties' submissions. References to page numbers [x] are to pages in the bundle. Not all the matters that we were told about are recorded in our findings of fact. That is because we have tried to limit them to points that are relevant to the legal issues we have to determine. Having considered all the evidence, we find the following facts on a balance of probabilities.

28. It transpired that the claimant had not seen or read the ET1, the Further Information, the records of the Preliminary Hearings or the joint witness statement he and his mother submitted, nor the Bundle of documents before the hearing. He was asked to read them before Day 2 when he gave his evidence. Dr Siwek drafted the documents on behalf of the claimant.

29. The claimant began his employment with the respondent, a recruitment business, in May 2019. The respondent has approximately 1600 clients and 40,000 workers (with about 1 million on the books). The claimant was assigned to work at Tesco, one of the respondent's clients, between May 2019 and 1 April 2021, when he began a period of sickness absence. This was the claimant's first job. His contract of employment is at [71-87]. The claimant signed the contract electronically. The claimant was entitled to be paid between assignments, as long as he informed the respondent of his availability for work. The claimant had 5 days of training when he started, including manual handling training.

30. The claimant's workplace whilst on assignment was the Tesco Distribution Centre at Dagenham. There were approximately 50 Staffline workers per shift at the Tesco branch. He worked the nightshift from 10pm – 6am. The claimant would indicate which shifts he was available for and check on a Sunday or Monday whether he had been allocated shifts for the week. The clamant was a "picker". In that role, he was required to pick different products from locations in a warehouse and process them as required by Tesco. For example, to collect grocery products for sending out to a particular Tesco store. Mr Pascal did not work with the claimant on the nightshift. Mr Pascal is responsible for allocating shifts to 'pickers'. Sometimes shifts would be cancelled. The claimant usually worked 5 days per week but he accepted that sometimes there might not always be a shift available. The claimant was line managed by Ms Chaudhary, Account Manager. Mr Pascal had previously worked with Ms Siwek on the day shift.

31. Each picker gets their shift assignments from a small handheld computer device that they carry with them in the warehouse. This device gives them all the information they need to complete including the location of the pallet, type of product and number of products they are required to 'pick'. The pickers use this device to scan the products out of the site and into the cage to be sent to store. The warehouse is a fast paced environment. Workers are expected to achieve a certain output which is monitored using data generated by each individual's handheld scanner. It is hard work. Both Tesco and the respondent see the data collected for each picker. It is automatically uploaded to the system from the handheld device controlled by Tesco. Mr Pascal's evidence was that the data cannot be manipulated by the respondent – we accept that.

32. The claimant hurt his back lifting a pallet in 2020. He reported the injury to the shift supervisor, and he was permitted to go home about 40 minutes after completing the pallet he was working on. He returned to work on his next shift. He was provided with manual handling training when he began his employment with the respondent. He did not make any complaint to the respondent about the incident at the time or later (he did not raise the matter with Mr Gill as part of his grievance) and there is no medical evidence documenting an injury.

33. Unrelated to the above, the claimant was off work sick from 1 April 2021 [196]. Mr Pascal had spoken to the claimant previously about his sick leave and had suggested that he should contact his GP if he had health issues. On 10 April 2021 the claimant sent the respondent an employee statement of sickness form that his GP had given him to complete. The claimant completed the form himself and sent it by email to Mr Pascal so that he could be paid for his period of absence [196-197]. The form sent by the claimant was dated 10 April 2021; it stated that the claimant's ill-health began on 1 April 2021 but it did not state an end date for the claimant's ill-health. Mr Pascal's understanding was that an end date had to be included in order for the respondent to process a claim for Statutory Sick Pay (SSP). He was aware of another employee not receiving SSP because an end date had not been provided. Mr Pascal wanted to make sure that this did not happen to the claimant and so he telephoned the claimant on 10 April 2021 to speak to him about his form. Mr Pascal initially had a productive conversation with the claimant. He advised the claimant that he could not accept the form as it had no end date for the period of ill-health [197]. The claimant accepted during cross examination that Mr Pascal had telephoned to help him and that the reason Mr Pascal had not accepted the note was done to assist the claimant to ensure that he would be paid for his period of ill-health. During cross examination, the claimant was asked whether Mr Pascal had been 'racist' towards him and he said that Mr Pascal had been rude and disrespectful but not racist. He then accepted that Mr Pascal

had not been rude or disrespectful towards him but maintained that Mr Pascal had been rude and disrespectful but not racist towards Ms Siwek (below).

34. After a short while, the claimant's mother took the phone from the claimant. The phone was on speaker. Mr Pascal was not immediately aware that he was speaking to Ms Siwek (he knew he was speaking to the claimant's mother). That the claimant's mother was Ms Siwek became clear during the call. Ms Siwek raised her voice during the call. That is perhaps understandable as she was protective of the claimant as he was sick. When Mr Pascal asked to speak to the claimant again, Ms Siwek refused to let him do so. The claimant accepts that by now Ms Siwek was shouting at Mr Pascal because Mr Pascal suggested that she was not an employee of the respondent (we accept Mr Pascal wrongly thought that she had left the respondent by then). Ms Siwek accepted that she was angry. She raised belongings left in her locker with Mr Pascal. Mr Pascal did not speak to Ms Siwek in a racist manner during the call. The claimant's evidence during cross examination was that Mr Pascal had then said to Ms Siwek that she 'was unwell and needed to see a doctor'. Ms Siwek's evidence was that Mr Pascal said that she had 'issues with her head' and should see a doctor. Mr Pascal was not asked about that allegation, made for the first time during cross examination of the claimant and Ms Siwek. Mr Pascal ended the call soon after it began, as Ms Siwek would not let him speak to the claimant again.

35. We accept that Mr Pascal telephoned the claimant to advise the claimant that in order to be paid, the form required an end date. He did not refuse to accept the form. Rather, he advised that the form should first be amended to ensure that the claimant would be paid his sick pay. He did not speak to the claimant or Ms Siwek in a racist manner and did not shout at the claimant or Ms Siwek. Ms Siwek did raise her voice. She was upset.

36. The claimant subsequently spoke to his GP following the phone call and the GP completed a Fit Note dated 16 April 2021, which gave an end date for the claimant's ill-health as 17 April 2021 [93]. The claimant was subsequently paid for his period of sickness.

37. Mr Pascal's evidence was that he did not allocate shifts to the claimant following the end of the claimant's period of sickness because the volume of available work at Tesco had fallen as a result of the lockdown. Tesco required, he said, approximately half the staff it had previously required for each shift. We found that odd because until the claimant was sick on 1 April, the claimant had been working 5 days per week on a regular basis [137]. There was no documentary evidence that Tesco required half the number of workers it had previously required (lockdown restrictions were diminishing by April 2021) but we accepted Mr Pascal's candid oral evidence that he chose to prioritise workers with better attendance records for the shift work that was now available. The respondent's approach to preferring workers with better attendance records is questionable and one that might fall foul of the Equality Act's disability provisions, but that is not an issue before us (there is no disability discrimination complaint). The claimant's contract did not guarantee that he would be provided with shifts but it does provide for pay between assignments if the claimant has notified the respondent of his availability. The claimant did not notify the respondent of his availability for work when his period of sickness ended [114]. He was not contacted by the respondent until 13 May [114] (see below).

38. On 21/23 April 2021, Dr Siwek emailed the respondent raising the concerns that he had about the way that the claimant had been treated [94-95/96-97]. Ms Siwek was copied into the email but the claimant was not. Dr Siwek wrote:

> *'grossly aberrant behaviour that has been meted out to him by in particular …[Mr] pascal….Artur has been the subject of harassment and feels he has constantly been undermined by the podium staff…. Not only this but his work percentages have been tampered with and manipulated in what appears to be a cynical attempt to portray him as an unsatisfactory employee.*
>
> *Additionally Artur had a nasty viremia at the beginning of the month complicated by a bacterial infection. He received a course of strong antibiotics….His doctor furnished him with the statutory sick notes which Artur submitted. For some reason these have been rejected by Pascal and Artur has been denied any sick pay or note regarding his shift recommencement. Ms Siwek tried to reason with Pascal on the phone but was treated with total disrespect …..'*

The claimant told us that he had not told Dr Siwek what to say in the email and did not see the email before it was sent.

39. The People team emailed the claimant on 26 April 2021 to advise him that Mr Aaron Rymill-Quinn, the respondent's Regional Account Manager, would like to meet with him and Ms Siwek to discuss the complaint that had been made by Dr Siwek [107-109].

40. Shortly after the above meeting on 7 May 2021, Mr Rymill-Quinn sent an email to Ms Radziszewska stating that Ms Siwek would be '*trying to get the [claimant] back to work soon'*. He noted that the claimant and Ms Siwek had issues with the site and that in his view "*its (sic) difficult because it is a really fast paced hard working environment and if workers pick rates are too slow we don't keep them (driven by the client)*" [102-103]. As to an allegation that the claimant's pick rate was lower because the system had been tampered with, Mr Rymill-Quinn noted that this data was set in Tesco's system and could not therefore be '*manipulated*' [102]. That accords with Mr Pascal's evidence.

41. On 13 May 2021 Ms Chaudhary (Account Manager) sent the claimant a message asking that he confirm his plan for returning to work [114]. The claimant sent a response later that day [116] which was prepared for him by Dr Siwek [113]. A further email from the claimant followed on 14 May 2021 [119] which again was prepared by Dr Siwek [117]. Those responses raised various further complaints in relation to holiday pay and the alleged mismanagement of the claimant's return from sickness absence. The claimant did not confirm a plan for returning to work, nor state when he would be available for work, despite the request that he do so. The claimant was wating, he said, to be provided with a reason for not offering him shifts. Ms Chaudhary subsequently placed the claimant on the 'no contact list', following contact from the claimant's mother to say he would not be returning to work, as he was bringing a claim. This was a list of people who should not be contacted to be offered work due to a range of reasons. There is, as far as we are aware, no check as to why someone is placed on the list and we did not see any policy document. The Tribunal did not consider this to be good industrial relations practice more generally.

42. On 17 May 2021 Dr Siwek sent an email to the respondent's HR team making accusations that they had been "grossly incompetent and negligent". He indicated that he might pursue ACAS/court assistance [118]. The claimant did not see/review the email before it was sent. He had however discussed the possibility of a Tribunal claim with Dr Siwek. On 25 May 2021, Dr Siwek emailed the respondent again stating that he had contacted ACAS in respect of claims made by the claimant and his mother [134].

43. The claimant was invited to and attended a grievance meeting, which eventually took place on 27 May 2021 [121 & 141-146]. Mr Gill conducted the meeting. There had been

some confusion about the nature of the claimant's contract as to whether the grievance procedure applied (the respondent ultimately accepted that it did; Ms Radziszewska accepted that she had initially made an error) and whether Ms Siwek could accompany him to the meeting (the respondent ultimately accepted that she could). Mr Gill had made an initial error and assumed that Ms Siwek was not one of the respondent's workers, so she could not accompany the claimant, as she was not, he thought (wrongly) a colleague or trade union representative [132-3]. The claimant and Ms Siwek attended the meeting with Mr Gill [142-146]. The meeting was conducted remotely on Teams as Mr Gill was not on site that day – he was at Tesco Didcot [139]. In evidence, the claimant said that he does not make any complaint about the conduct of the meeting. His grievance was that Mr Pascal had been rude to him on the phone (he thought the date was 3 or 4 April), that Mr Pascal had 'put him on holiday', that Ms Chaudhary had said if she did not hear from him she would remove him from the work allocation system, that a Tesco supervisor had been rude to him, that his performance had gone down at around the end of March. The claimant did not allege that the respondent had breached Health & Safety rules in 2020. At the end of the meeting Mr Gill said that he would investigate the claimant's complaints.

44. Dr Siwek sent two emails to Mr Gill on 27 May alleging that Mr Pascal had followed the claimant and Ms Siwek into the building on 27 May and followed them out again and that they felt threatened and that he understood that the meeting had been conducted remotely [147-8]. We accept Mr Pascal's evidence that he simply passed the claimant and Ms Siwek in the car park.

45. Mr Gill sent an email to Ms Chaudhary and Mr Aaron Rymill-Quinn on 27 May, attaching the meeting notes and Dr Siwek's emails. Mr Gill asked that Mr Pascal be asked for his account and that Ms Chaudhary advise him whether Mr Pascal saw the claimant and his mother on and off site and what Mr Pascal's attitude was with them. He asked that screenshots of messages between Mr Pascal / Ms Chaudhary and the claimant be sent to him, that the claimant's performance indicators for March be looked into, that an investigation be conducted into what conversations Mr Pascal had with the claimant about his SSP and why the claimant was paid for 5 days holiday, when he did not request it, and that someone contact the claimant to offer some shifts moving forwards [149]. A statement was taken from Mr Pascal [154]. At the end of the investigation, the claimant's grievance was not upheld for the reasons set out in an outcome email sent to him on 9 June 2021 [155/160]. The claimant was advised of a right of appeal. The claimant was told that he would be contacted about booking further shifts. The claimant accepted in evidence that there was therefore an investigation into the concerns raised in Dr Siwek's email of 21 April in which his complaints were addressed [155].

46. On 9 July 2021 the respondent received an email from Dr Siwek stating that the claimant and his mother were making claims in the Employment Tribunal and that he (Dr Siwek) would be representing them [162]. The claimant's ET1 was received by the Tribunal on 18 July 2021 [2]. On 13 January 2022, Dr Siwek wrote to the Tribunal in response to a request for further information from the respondent [27]. In that email Dr Siwek states that the claimant resigned on 27 May 2021 by 'verbal followed by letter' [29]. Dr Siwek said in evidence that date was stated in error. Following the 17 January 2022 PH, EJ Jones ordered the claimant to write to the Tribunal and the respondent by 7 March 2022 providing further information [31-42]:

> *1. The date on which the claimant says he resigned from the respondent's employment, if he says he resigned verbally the details of who he spoke to, where and on what date;*

> *2. The date of the email he sent to confirm his resignation….*

Dr Siwek responded on 7 March 2022 [46-47] . He stated that

> *'…following receipt of an early conciliation certificate from ACAS, Dr Siwek, on the instruction of [the claimant] sent by way of email at 13.12 hours on [9 July 2021] stating that gross breach of trust, confidence and egregious dealings of Staffline made it mandatory to RAISE the appropriate claims within the jurisdiction of the [Tribunal]. The email was sent to PEOPLETEAM@STAFFLINE.CO.UK. Not only this but Dr Siwek made telephone class to the aforementioned manager. I trust that this further specification satisfies the spirit of ORDER 7.1 and, 7.2….'*

The email sent by Dr Siwek on 9 July in fact stated [162]:

> *WITHOUT PREJUDICE*
>
> *Be advised that the above is now proceeding to ETs. As you may be aware I am representing the said Ms Siwek and [the claimant].*

47. On 30 November 2022 at a second Preliminary Hearing [65-69], Dr Siwek told EJ Brannan that the claimant resigned in a telephone call by him (Dr Siwek) to the respondent on 9 July. He told the Judge that he could not remember the name of the person he spoke to. EJ Brannan considered that '*the claim that the claimant resigned on 9 July in a telephone call by Dr Sivek (sic) ha[d] little reasonable prospects of success.*' Dr Siwek's evidence to this Tribunal was that he spoke to the receptionist who transferred his call and that he told someone at the respondent along the lines of *'disappointed that things had deteriorated …can't go to work – breakdown trust – be advised no longer employee'* and that the person he spoke to simply said '*thanks*'. Ms Radziszewksa can find no record of Dr Siwek telephoning the respondent on 9 July to resign on the claimant's behalf. We accept that and we accept her evidence that if Dr Siwek had called and resigned on the claimant's behalf that it would have been followed up formally with the claimant. It was not followed up with the claimant.

48. The claimant said very clearly in evidence that he had not resigned. Dr Siwek accepted that to be so – he asked to recall the claimant on Day 3 to re-examine him on the issue. We were sure that the claimant understood the question he was asked by counsel because he said in response in evidence that it was his understanding at the time that if he left the respondent's employment, he would be unable to bring court proceedings. The claimant also said that he did not ask Dr Siwek to resign on his behalf. The claimant can still access the respondent's online portal and indicate his availability for work. He has not, however, worked for the respondent since he was sick in April 2021. He has secured a new job.

49. Dr Siwek's evidence was that he resigned on the claimant's behalf on 9 July in a telephone call to a person unknown. He said that the initial reference to 27 May 2021 [29] was an error. There is no record of a telephone call on 9 July. We accept the respondent's evidence that if Dr Siwek had telephoned the respondent to resign on the claimant's behalf that they would have followed it up with the claimant. There is evidence that the respondent followed up written correspondence and we accept Ms Radziszewska's evidence that a telephone call would have been followed up too [162]. We find as a fact that Dr Siwek did not telephone the respondent on 9 July 2021.

Submissions

50. Both parties had the opportunity, which they took, to make oral submissions to the Tribunal at the end of the evidence. The respondent also provided written submissions. We had regard to those submissions in reaching our decision. We do not repeat them here.

Discussion and Decision

51. The Tribunal took into account its findings of fact and the relevant law before reaching its decision.

52. We start with our conclusion as to whether the claimant resigned. We unanimously and unhesitatingly conclude that he did not. The claimant says that he did not resign; nor did he ask Dr Siwek to resign on his behalf. It was his understanding that, if he resigned, he would not be able to bring a claim. Dr Siwek initially stated in January 2022 that the claimant resigned on 27 May 2021 both by verbal and written communication [29]. He later stated, during the November PH, that he (Dr Siwek) resigned on the claimant's behalf on 9 July in a telephone call to a person unknown. The ET1 does not assert that the claimant resigned. There is no record of a telephone call on 9 July. We accept the respondent's evidence that if Dr Siwek had telephoned the respondent to resign on the claimant's behalf that they would have followed it up with the claimant. There is evidence that the respondent followed up written correspondence and we accept Ms Radziszewska's evidence that a telephone call would have been followed up too [162]. All in all, we conclude that Dr Siwek did not telephone the respondent on 9 July 2021. If he had done so, we think he would have said so in the ET1 and/or in January 2022 and/or followed the telephone call up with an email. If we had found as a fact that Dr Siwek telephoned on 9 July, we would have concluded that the claimant had not given Dr Siwek authority to resign on his behalf.

53. Given our conclusion that the claimant did not resign, that is the end of the claimant's unfair constructive dismissal complaint and it is dismissed. But, for completeness, we will also express our brief conclusion as to whether the respondent committed a fundamental breach of contract. We remind ourselves that the test to be applied is one of objectivity. We therefore needed to consider matters not through the eyes of the claimant, but through an objective person approach – from the viewpoint of a reasonable person in the position of the claimant. In essence, we must look at the Respondent's conduct and determine whether it is such that its effect, judged sensibly and reasonably, is such that the Claimant could not be expected to put up with it. The question is whether, objectively speaking, the Respondent has conducted itself in a manner likely to destroy or seriously damage the relationship of trust and confidence between the Respondent and the Claimant. We consider each act in turn below.

54. For the reasons below we are not satisfied that there has been a fundamental breach of contract in this case.

55. Taking each allegation in turn:

54.1 Did the Respondent do the following things and, if so, did the respondent breach the implied duty of trust and confidence?

1. **Breach its health and safety obligations by:**

During a nightshift in 2020 at approximately 1am upon lifting a pallet of potatoes, within the provisions of the respondent's performance criteria (computerized system regarding speed of delivery of producing pallets to Tesco), the claimant suffered acute lower back pain. The claimant reported the matter to the night shift supervisor. There was no examination or first aid provided. The claimant had to finish the shift (6am).

We accept that the claimant hurt his back lifting a pallet, that he reported it to the shift supervisor, that he was permitted to go home about 40 minutes after completing the pallet he was working on (as opposed to the shift referred to by Dr Siwek [50]) and that he returned to work on his next shift . He was provided with manual handling training when he began his employment with the respondent. He did not make any complaint about the incident to the respondent at the time or later (he did not raise the matter with Mr Gill as part of his grievance) and there is no medical evidence documenting an injury. We conclude that the facts do not get close to establishing that there was a breach of contract, far less a fundamental breach, on the respondent's part. There is no conduct on the part of the respondent identified that can be said to amount to a breach of the implied duty of trust and confidence (or the implied term that the employer should take reasonable care for the safety of their employees). There must be identified some conduct by the respondent which, in the circumstances, is repudiatory conduct, which creates or amounts to a fundamental breach of the health and safety term or a breach, unjustified by proper and reasonable cause, of the term as to trust and confidence. There is no evidence that the respondent failed to take steps which it should have taken or took steps which it ought reasonably not to have taken, which led, in either case, to the harm in question, and which conduct amounted to a repudiatory breach of the contract of employment. There was, we conclude, no breach of the implied duty of trust and confidence.

2. **Fail to accept the SSP form from the Claimant, submitted to the Respondent on 10 April 2021.**

The respondent did not fail to accept the form from the claimant on 10 April for no reason. Quite the opposite. Mr Pascal telephoned the claimant to ask him to amend the form to provide an end date because he knew that the claimant would not receive SSP without an end date. The implied duty of trust and confidence has been defined as a duty that the 'employer shall not, without reasonable and proper cause, conduct itself in a manner calculated and/or likely to destroy or seriously damage the relationship of confidence and trust between an employer and employee'. Mr Pascal was trying to ensure that the claimant was paid his sick pay. Following the telephone conversation, the claimant contacted his GP, and the fit note was completed with an end date and the claimant was paid his sick pay. There was no breach of the implied duty of trust and confidence.

3. **Fail to offer the claimant new assignments after his period of sickness.**

Whilst we were surprised that the respondent did not produce documentary evidence of the reduction in work available in April 2021, we accepted Mr Pascal's evidence that the reason the claimant was not offered shifts between April 17th - May 13th was because he had a higher sickness absence rate than others who were offered work.

Whilst we do not condone that approach, we accept it was the reason. The claimant was subsequently placed on a no contact list, following Ms Siwek's communication to the respondent that he would not be attending work because he was taking the respondent to court. There was no breach of the implied duty of trust and confidence. The reason the claimant was not offered work was because he had a higher sickness absence rate. Whilst we do not consider that to be the best industrial practice, we do not find that the conduct was such to conclude that the Respondent, without reasonable and proper cause, had acted in such a manner intended or likely to seriously damage or destroy the relationship of trust and confidence. The claimant's contract did not guarantee him shifts – although it did provide that he would be paid between shifts if he notified the respondent of his availability for work. The claimant did not so notify the respondent.

4. **Fail to address the Claimant's concerns raised in Dr Siwek's email dated 21 April 2021.**

The claimant's concerns were investigated and reasoned conclusions reached by Mr Gill, an outcome letter sent and a right of appeal provided. If the claimant was unhappy with the outcome, he could have appealed. He did not. There was, in our conclusion, no breach of the implied duty of trust and confidence.

5. **On 10 April 2021, Mr Pascal spoke to the Claimant and his mother, Ms Svetlana Siwek, in a racist, rude and disrespectful manner.**

Mr Pascal did not speak to the claimant in a 'racist, rude or disrespectful' manner towards the claimant on 10 April. Ms Siwek was upset during the call and as a result she raised her voice towards Mr Pascal. Mr Pascal did not speak in a racist manner towards Ms Siwek. *If* Mr Pascal was impolite/disrespectful towards Ms Siwek (suggested to Ms Siwek that she should see a doctor as she was unwell), we would not regard what had happened during the brief conversation between Ms Siwek and Mr Pascal as amounting to a breach of the implied term of trust and confidence existing between the claimant and the respondent. The respondent did not, in our conclusion, conduct itself in a manner calculated or likely to destroy trust and confidence between an employer and employee.

56. In conclusion we would have decided that there was no breach of the implied term of trust and confidence either individually or cumulatively.

57. For completeness, had the claimant not withdrawn the race discrimination claim, we would have concluded, on the basis of the evidence that we did hear from the respondent (we did not, of course, hear the race complaint), that the respondent had discharged the burden of proving that its actions had nothing whatsoever to do with the claimant's race (nationality) (the reason why question).

58. We end with an observation. The claim was drafted by Dr Siwek, the claimant did not see or read the ET1 before Day 1 of this Hearing, he did not attend either Preliminary Hearing, did not see or read the List of Issues, nor read his joint witness statement before Day 1 of the Hearing. Dr Siwek wrote most of the emails sent to the respondent. The claim was, in all but name, Dr Siwek's claim. The claimant did not have any meaningful input into this claim until the Final Merits Hearing. We do not doubt that Dr Siwek's intention was to assist the claimant but, in the end, a key reason that the claimant's claim has failed is

because it was not the *claimant's* claim. The claimant's oral evidence was clear and honest. The allegation that the claimant resigned was denied by the claimant; he did not ask Dr Siwek to resign on his behalf, and the complaint that the treatment meted out to the claimant during the relevant period was because of race/nationality was denied by the claimant.

Employment Judge Scott
Dated: 25 May 2023

Appendix 1: Day 1 List of Issues

1 **Unfair dismissal**

1.1 Was the Claimant dismissed?

1.1.1 Did the Respondent do the following things:

1.1.1.1 Breach its health and safety obligations by:

During a nightshift in 2020 at approximately 1am upon lifting a pallet of potatoes, within the provisions of the respondent's performance criteria (computerized system regarding speed of delivery of producing pallets to Tesco), the claimant suffered acute lower back pain. The claimant reported the matter to the night shift supervisor. There was no examination or first aid provided. The claimant had to finish the shift (6am).

1.1.1.2 Fail to accept the SSP form from the Claimant's GP, submitted to the Respondent on 10 April 2021;

1.1.1.3 Fail to offer the claimant new assignments after his period of sickness;

1.1.1.4 Fail to address the Claimant's concerns raised in Dr Siwek's email dated 21 April 2021.

1.1.1.5 On 10 April 2021, Mr Pascal spoke to the claimant and his mother, Ms Svetlana Siwek in a racist, rude and disrespectful manner.

1.1.2 Did the above breach the implied term of trust and confidence?

1.1.3 The Tribunal will need to decide:

1.1.3.1 whether the Respondent behaved in a way that was calculated or likely to destroy or seriously damage the trust and confidence between the Claimant and the Respondent; and

1.1.3.2 whether it had reasonable and proper cause for doing so.

1.1.4 was the breach a fundamental one?

The Tribunal will need to decide whether the breach was so serious that the claimant was entitled to treat the contract as being at an end.

1.1.5 Did the Claimant resign on 9 July 2021.

Dr Siwek says that he telephoned the respondent on 9 July to advise that the claimant was resigning.

1.1.6 If so, did the Claimant resign in response to the breach? The Tribunal will need to decide whether the breach of contract was a reason for the Claimant's resignation.

1.1.7 Did the Claimant affirm the contract before resigning? The Tribunal will need to decide whether the Claimant's words or actions showed that they chose to keep the contract alive even after the breach.

1.2 If the claimant was dismissed, was there a potentially fair reason for dismissal? The respondent does not seek to rely upon a potentially fair reason. Its position is that the claimant was not dismissed.

1.3 If the claimant was dismissed, is there a chance that the claimant would have been fairly dismissed anyway if a fair procedure had been followed?

1.4 If the claimant was dismissed, did he cause or contribute to the dismissal by blameworthy conduct (contributory conduct)?

1.5 If so, is it just and equitable to reduce the basic and/or compensatory award? By what proportion?

[2. Remedy issues to be decided, if relevant, after a decision is on liability].

3. **Direct race discrimination (Equality Act 2010 section 13)**

3.1 The Claimant's ethnicity is Armenian. He compares himself with the Respondent's other employees who were on assignment at the Tesco Distribution Centre, Dagenham who were not Armenian. It is the Claimant's case that he and his mother were the only persons of Armenian ethnicity employed at that site.

3.2 Did the Respondent do the following things:

3.2.1 Before he went off sick, the Claimant alleges that Mr Pascal discriminated against him at work by manipulating his work percentage, undermined and disrespected him;

3.2.2 Fail to accept the Claimant's fit notes, which he sent on 10 and 19 April, and which confirmed that he was well enough to return to work;

3.2.3 Mr Pascal disrespected the Claimant and his mother in a telephone conversation on or around 20 April;

3.2.4 Failed to properly address the matters raised in the Claimant's grievance dated 21 April 2021, either on receipt or in the grievance process;

Did each of the above acts amount to a detriment (s39(2)(d) EqA 2010)?

3.2.5 Constructively dismiss the claimant (s39(2)(c)EqA 2010)?

3.3 Was that less favourable treatment? The Tribunal will decide whether the Claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the Claimant's. If there was nobody in the same circumstances as the Claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated. The Claimant has not named anyone in particular who he says was treated better than he was, and he relies on a hypothetical comparator.

3.4 Has the Claimant proved primary facts from which the Tribunal could conclude that the difference in treatment was because of the protected characteristic of race (nationality)?

3.5 If so, what is the Respondent's explanation? Has the Respondent proved that the Claimant's race had nothing whatsoever to do with the less favourable treatment?

[4. Remedy issues to be decided, if relevant, after a decision on liability]

[5. The Holiday Pay claim to be decided, if relevant, after a decision is made on liability. Holiday pay due upon termination depends upon there having been a dismissal].