EMPLOYMENT TRIBUNALS

Claimant: Mr S Cardarello

Respondent: Manheim Limited

Heard at: **London South Employment Tribunal**

On: **12-16 June 2023**

Before: **Employment Judge Ferguson**

Members: **Ms J Jerram**
Ms N Beeston

Representation
Claimant: In person
Respondent: Mr E Beever (counsel)

Interpreter (Italian): Ms Beeson

JUDGMENT

It is the unanimous judgment of the Tribunal that:

1. The complaints of race-related harassment, discrimination arising from disability and failure to make reasonable adjustments are dismissed because they were brought out of time and the Tribunal has no jurisdiction to hear them.

2. The complaint of direct disability discrimination relating to the Claimant's dismissal fails and is dismissed.

3. The complaint of unfair dismissal is dismissed upon withdrawal by the Claimant.

REASONS

INTRODUCTION

1. By a claim form presented on 21 May 2021, following early conciliation between 13 January 2021 and 22 February 2021, the Claimant brought complaints of unfair dismissal, race discrimination and disability discrimination.

2. At the time of presenting his claim the Claimant was represented by a Citizens' Advice adviser. The Respondent requested further particulars of the claim and a Scott Schedule was produced, again with the assistance of the adviser. A Preliminary Hearing (Case Management) took place on 11 November 2022. Before this hearing the Claimant had changed his representatives and instructed a firm of solicitors. He was represented by a trainee solicitor at the Preliminary Hearing, which took place by video, but he did not attend the hearing himself. Prior to the hearing his solicitors had produced a draft list of issues.

3. A list of issues was agreed at the Preliminary Hearing. The race-related harassment complaints were three alleged comments by "David" in 2017 and an act by "Richard" in February 2019. The Claimant was ordered to provide further information in respect of some of the complaints. It was also noted that the Claimant sought to pursue a further allegation of race-related harassment relating to alleged comments by David in January 2021, but as this had not been included in the claim form it was ordered that if the Claimant wished to pursue the allegation he should submit an application to amend by 9 December 2022. No such application was made. The Claimant continued to be represented by solicitors until early 2023 and the further information ordered was provided.

4. Following the Preliminary Hearing the Respondent alleged in correspondence that one of the identified complaints of discrimination arising from disability, the Claimant allegedly being rejected for the role of inspector in February 2021, was not included in the claim form and required permission to amend.

5. By the time of the final hearing the Claimant was no longer represented. The whole of the first day was spent clarifying the complaints and issues. During the discussion the Claimant sought to amend the list of issues in three respects:

    5.1. To add the further complaint of race-related harassment identified at the Preliminary Hearing, namely David saying to the Claimant "are you still here?", referring to Brexit, during a meeting in January 2021.

    5.2. To extend the time period of his complaint that David "regularly" made comments such as "stupid dumb Italian", "go back to Italy" and not being welcome in Britain. The Claimant sought to amend this complaint to allege that the comments were made regularly from 2017 up to and including at the meeting in January 2021.

    5.3. To pursue the complaint that Jaci Hubbard rejected the Claimant for the role of inspector in February 2019 because of something arising in consequence of disability, namely the Claimant's inability to bend down and the fact that he was slower at doing the work.

6. We refused the first amendment, partially allowed the second and allowed the third. We gave oral reasons at the time and written reasons are provided here.

7. As regards the first two amendments, the Claimant argued that the allegation of racist comments at the meeting in January 2021 was in fact included in his claim form. He relied on paragraph 4 of the grounds of complaint, which reads:

    > "The claimant also suffered racial harassment on a regular basis, he would be called names such as "a stupid dumb Italian", or be shouted at "go back to Italy".

> Since Brexit, the Claimant was repeatedly met with taunting about "no longer being welcome here (in Britain) and will be sent home". These incidents were witnessed by Peter Malcinicolov and Mo Hithkhan."

8. It is not in dispute that both of those witnesses left the Respondent's employment in 2019. We also noted that the Claimant had commenced a period of sickness absence in March 2019 and did not return to the workplace until he was dismissed due to redundancy on 15 January 2021. The meeting the Claimant relied on was a telephone meeting for all affected employees on the day the redundancies were confirmed. There is no reference in the claim form to any allegations of race-related harassment during the January 2021 meeting. Although no dates are given in paragraph 4 of the grounds of complaint, it can only fairly be understood to refer to matters that took place while the Claimant was still physically at work and the witnesses were still employed, i.e. up to March 2019 at the latest.

9. We therefore concluded that the Claimant required permission to amend the claim in order to pursue both of the first two matters. We considered and applied the guidance of the Employment Appeal Tribunal in Vaughan v Modality Partnership [2021] ICR 535, noting that the key test is that set out in Cocking v Sandhurst (Stationers) Ltd [1974] ICR 650:

> "In deciding whether or not to exercise their discretion to allow an amendment, the tribunal should in every case have regard to all the circumstances of the case. In particular they should consider any injustice or hardship which may be caused to any of the parties, including those proposed to be added, if the proposed amendment were allowed or, as the case may be, refused."

10. The "are you still here?" allegation first appeared in the draft list of issues prepared by the Claimant's then solicitors the day before the Preliminary Hearing on 11 November 2022. As noted above, the case management orders stated that this allegation required permission to amend and no such application was made. The Claimant said the omission from the claim form was the fault of his first representative, the Citizens' Advice adviser, and the failure to make the application to amend was the fault of his second representatives, Clement Solicitors. He also said that the confirmation of the earlier allegations relating to David having occurred "in 2017" was done without his agreement.

11. The Claimant's witness statement does not include any evidence of alleged race-related comments by David or anyone else in a meeting of January 2021. Nor is there any such evidence in the statements of his witnesses.

12. Whether we allowed or refused the amendments was significant because all of the other allegations of race-related harassment are on the face of it out of time.

13. The Respondent has attended the final hearing prepared to deal with the allegations as agreed at the Preliminary Hearing, i.e. that these comments happened in 2017. We note that paragraph 10 of the case management orders states:

> "The claims and issues, as discussed at this preliminary hearing, are listed in the Case Summary below. If you think the list is wrong or incomplete, you must write to the Tribunal and the other side by 25/11/22. If you do not, the list will be treated as final unless the Tribunal decides otherwise."

14. Even if the Claimant's representatives made mistakes, we must consider fairness to both parties. Weighing the balance of injustice and hardship, we decided it would cause greater prejudice to the Respondent to allow these amendments than would be caused to the Claimant if we refused them. We recognised the difficulties in pursuing

legal proceedings as a litigant in person without knowledge of the law or procedures, and especially if English is not your first language, but we considered it was somewhat casual of the Claimant not to attend the Preliminary Hearing at which the list of issues was finalised, and if comments made during the meeting in January 2021 were a significant part of the Claimant's case one would expect them to be covered in his witness statement, whether or not he had the benefit of legal help or representation.

15. It would clearly be difficult for the Respondent to respond to these allegations now. David is no longer employed by the Respondent and has refused to engage with its solicitors about the claim. They have made such enquiries as they can about the allegations as they were agreed at the Preliminary Hearing, not including any allegations about the meeting in January 2021. They have come prepared to defend the case on that basis. There is no prospect of them being able to obtain evidence about the meeting in January 2021 at such short notice, and it would be wholly unfair and disproportionate to postpone the final hearing.

16. We did, however, allow the Claimant to amend the list of issues to the extent that the allegations against David continued from 2017 to 2019 because that was consistent with the way the complaint was put in the claim form and would not make any significant difference to the Respondent's ability to defend the complaint.

17. As for the allegation about the meeting in February 2019 about the inspector role, we were not satisfied that this required permission to amend. We accepted that it was included at paragraph 24 of the grounds of complaint, albeit it was rather confusingly linked to what happened in February 2020 and it required a great deal of further particularisation. That further information was provided by the time of the Preliminary Hearing in November 2022. It is true to say that the Claimant's witness statement does not include any evidence about this allegation, but the Respondent has known the essence of the allegation for several months and that the Claimant wished to pursue it as a complaint under section 15 of the Equality Act 2010. According to the case management orders the Respondent did not dispute its inclusion in the list of issues at the time. The Respondent has since argued that this allegation is not included in the claim form, but did not ask for a determination of the point before the final hearing. We note the Respondent has adduced evidence, albeit hearsay, responding to the allegation. It has therefore defended the allegation as fully as it can, and if the Respondent wished to adduce further evidence on the issue we would allow it to do so. We therefore decide that the Claimant should be allowed to pursue this allegation.

18. Having determined that the race-related harassment complaints covered a period ending in 2019, two years before the claim form was presented, we considered whether we should determine as a preliminary issue whether the Tribunal has jurisdiction to consider the complaints in view of the applicable time limits. With the Respondent's agreement we decided that it would not save significant time to do so and that we should determine the issue having heard all of the evidence.

19. A final list of issues was therefore agreed as follows:

Unfair dismissal

1. The parties agree that the Claimant was dismissed on 15.01.2021
2. Did the Respondent dismiss the Claimant for a potentially fair reason falling within section 98(2) of the Employment Rights Act 1996 ('ERA')? The Claimant accepts that there was a redundancy situation and that the Respondent's reason for dismissal was redundancy.
3. Did the Respondent act reasonably or unreasonably in treating this as a sufficient reason for dismissing the Claimant, considering S 98 (4) ERA, in particular:

a. Did the decision to dismiss fall within the range or reasonable responses that a reasonable employer may have adopted in the circumstances?
b. Was the decision to dismiss the Claimant influenced by the Respondent's reluctance to allow the Claimant back to work?
It is accepted by the Claimant that:
c. The Respondent warned and consulted with the Claimant about the proposed redundancy.
d. The Respondent adopted a fair basis on which to select for redundancy.
e. The Respondent fairly considered suitable alternative employment for the Claimant, and provided the Claimant with a fair opportunity to apply.

Harassment related to race

4. Did the Respondent engage in the following conduct?
   a. Between 2017 and March 2019, David R___ regularly calling the Clamant names such as a "stupid dumb Italian", shouting "go back to Italy" and telling the Claimant that he was "no longer welcome here and will be sent home". The Claimant alleges this was witnessed by Mo Hithkhen and Petar Malcinicolov.
   b. The Claimant being struck on the right hand with a scanner by Mr Richard P___ in February 2019. The Claimant alleges this was witnessed by Mo Hithkhen.
5. Did the conduct relate to the Claimant's race (the Claimant being Italian)?
6. Was this conduct unwanted?
7. Did this conduct have the purpose or effect of violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?
8. Was it reasonable for this conduct to have the above effect on the Claimant, taking into account the Claimant's perception and the other circumstances of the case?

Disability discrimination

<u>Disability status</u>

9. It is not in dispute that the Claimant was disabled at all material times with
   a. diabetes and
   b. lumbago with Sciatica

<u>Unfavourable treatment arising in consequence of the Claimant's disability (section 15)</u>

10. Did the Respondent know or should the Respondent have known at all material times of the Claimant's disability?
11. Did the Respondent subject the Claimant to unfavourable treatment:
    a. Around February 2019, it is alleged that the Claimant was rejected by Jaci Hubbard for the role of inspector in the presence of Chris O'Brian and Jane White.
    b. On 6 March 2019, Jane White told the Claimant to remain on sick leave (until he no longer needed the adjustment of time off work, if his sugar levels spiked).
12. Was that because of something arising in consequence of the Claimant's disability? The "something arising" was:
    a. Due to his back issues, the inability to bend down and being slower at doing his work.
    b. Due to both diabetes and back issues, the risk of not being able to attend work on a particular day or having unreliable attendance, in part because of not being allowed to drive when blood sugar levels were high.

13. Can the treatment be justified as a proportionate means of achieving a legitimate aim? The Respondent relies on (i) the maintenance of a workforce that was fit for work and (ii) the proper and consistent application of absence procedures.

Failure to make reasonable adjustments (section 20)
14. Did the Respondent know or should it have known at all material times of the Claimant's disability and that he was likely to have been at the relevant substantial disadvantage?
Allegation (1)
15. Did the Respondent maintain a PCP of requiring the Claimant to work on "barrier duties" in 2018?
16. Was this of a substantial disadvantage to the Clamant because of his disability compared to those without his disability, because owing to one or both of the Claimant's disabilities he struggled with his mobility and his back undertaking this duty?

17. Should the Respondent have made the reasonable adjustment of removing the Claimant's barrier duties and/or providing an alternative job that did not involve barrier duties? It is the Claimant's submission the reasonable adjustment should have been provided by 8 June 2018.
Allegation (2)
18. Did the Respondent maintain a PCP from around 2017 that the Claimant had to work an additional 30 minutes at the end of his shift to make up for a 30-minute break he required due to his disabilities?
19. Was this of a substantial disadvantage to the Claimant compared to those without his disability(ies) in that others could take a 15-minute break without the need to make up the time at the end of the shift?
20.Should the Respondent have made a reasonable adjustment by allowing the Claimant to work only 15 additional minutes at the end of his shift? The Claimant alleges that this adjustment should have been provided from 17 February 2017.
Allegation (3)
21. Did the Respondent maintain a PCP from March 2019 whereby the Claimant would only be permitted to return from sick leave until his diabetes no longer meant that he might need time off, on those occasions where his sugar level spiked?
22. Was this of a substantial disadvantage to the Claimant because of his disability compared to those without his disability, owing to his predisposition to spiking?
23. Should the Respondent have made a reasonable adjustment by allowing the claimant to return to work, but to have a reasonable level of time off, on those occasions where his sugar level spiked? The Claimant alleges that this adjustment should have been provided from March 2019.

Direct disability discrimination
24. Did the Claimant suffer the less favourable treatment of being dismissed?
25. Was this because of his disability.
26. Who is the Claimant's comparator, hypothetical or actual? The Claimant relies upon all other part-time Line Drivers employed by the Respondent.
27. Can an inference be drawn from the Respondent's alleged reluctance to allow the Claimant back to work because of one or more of his disabilities?

Time limits
28. Were the complaints pursuant to the Equality Act 2010 made within the time limit in section 123 of the Equality Act 2010?

a. Was the claim made to the Tribunal within three months (plus early conciliation extension) of the act or omission to which the complaint relates?
b. If not, was there conduct extending over a period?
c. If so, was the claim made to the Tribunal within three months (plus early conciliation extension) of the end of that period?
d. If not, were the claims made within a further period that the Tribunal thinks is just and equitable?

Vicarious liability
29. Was any relevant act done by an employee in the course of their employment and as such treated as having also been done by the Respondent (section 109(1) EqA)? If so, did the Respondent take all reasonable steps to prevent the employee from doing the discriminatory act or from doing anything of that description (section 109(4) EqA)?

Remedy
30. Should the Claimant be entitled to:
a. Financial Losses
b. Injury to Feelings
c. Personal Injury
31. Should any award of compensation be reduced because it is just and equitable to do so because of the conduct of the Claimant, or to the extent he has caused or contributed to his dismissal, or to take into account the chance of dismissal at a later date (Polkey)?
32.ACAS Code: Should any award of compensation be reduced to reflect the Claimant's failure to raise a grievance?

20. We decided to determine all issues on liability, plus Polkey, contributory fault and any ACAS uplift, before determining any other issues on remedy.

21. We heard evidence from the Claimant and from Mr Roger Smith on his behalf. The Claimant also relied on witness statements from Petar Malchinikolov and Mo Hithkhan. On behalf of the Respondent we heard evidence from Richard Farrar, Gillian Bowen and Ross Allen.

22. The Claimant had requested and was provided with an Italian interpreter. The Claimant's English was reasonable, such that he could sometimes participate in the proceedings with the assistance of the interpreter, but for most of the hearing Ms Beeson translated everything that was said. We are extremely grateful to her for her skill and professionalism. There were a number of occasions during the hearing when it was apparent that the Claimant had not read, or not properly read, or not understood documents in the bundle or parts of the Respondents' witness statements until they were translated for him by Ms Beeson. We pointed out to the Claimant that the interpreter was provided to enable his participation in the hearing and was not a substitute for having read the documents in advance. Anyone bringing proceedings in the Tribunal needs to ensure that they have read and understood all of the relevant documents. For those for whom English is not their first language this may involve finding someone who can translate the documents for them. The Tribunal is not ordinarily able to provide any assistance with that.

23. During closing submissions the Claimant withdrew the complaint of unfair dismissal. We took particular care, given the language issues, to check that this was an unequivocal withdrawal and we were satisfied that it was. He confirmed that he did not wish to take issue with the decision to make redundancies or with the process. He said he never intended to claim unfair dismissal, and this was another thing done wrongly by his then representative. He confirmed he wished to pursue the complaint of direct disability discrimination, put in the list of issues on the basis that the dismissal had

been influenced in some way by his disability/ies, but not any complaint of unfair dismissal.

24. We discussed adjustments with the Claimant at the start of the hearing. The Claimant was provided with an adjustable chair on wheels for the duration of the hearing. Apart from informing the Tribunal if he required additional breaks, and occasionally standing if his back was uncomfortable, he confirmed that no other adjustments were required.

FACTS

25. The Respondent is part of the Cox Automotive group. A major aspect of its business is in auctioning second-hand cars. It has a number of sites in the UK and as at the date of the response to this claim, June 2021, it employed approximately 1200 employees in the UK.

26. The Claimant is an Italian national. He has type 2 diabetes and lumbago sciatica, causing back pain, following a motorbike accident in 2008.

27. The Claimant commenced employment with the Respondent as a part-time Line Driver at the Wimbledon site from 28 September 2016. The Claimant's role involved the preparation of sale vehicles for auction, driving sale vehicles through auction halls, the movement of vehicles into on-site storage and sold vehicles for collection post sale. For a short period between November 2016 and February 2017 the Claimant worked in the role of Yard Assistant.

28. From February 2017 onwards the Claimant was employed as a Line Driver for two 6-hour shifts a week on Wednesdays and Fridays. He reported to Jaci Hubbard, Operations Manager. The General Manager of the Wimbledon site until July 2018 was Richard Farrar.

29. The normal hours of work for Line Drivers was 10am to 4pm. The Claimant informed the Respondent that because of his diabetes he required a 30-minute break in order to eat a meal at lunchtime. It was therefore agreed that he would have an unpaid 30-minute break at around 1pm after the sale had ended, and he would work an additional 30 minutes at the end of his shift.

30. Other drivers were not entitled to a break during the shift, but it is not in dispute that it became standard practice that they could have a short break after the sale to warm up or cool down, including having a drink if they wanted. There is a dispute as to the length of this break, the Respondent said five minutes and the Claimant said 15-20 minutes, but we are prepared to proceed on the basis that it was often around 15 minutes. We heard from Roger Smith, another Line Driver employed at the same time as the Claimant, that he personally did not take a break, but he said "there were times where we were allowed a tea-break".

31. On 7 April 2017 the Claimant was asked to attend a meeting with Jaci Hubbard and Richard Farrar. This was prompted by the Claimant ignoring Ms Hubbard during a briefing to drivers in the morning. The Claimant accepts, and accepted at the time, that he deliberately ignored her. His evidence was that he did so because he had been the subject of racist comments which he had reported to her but she laughed at the comments and told the Claimant he should take it as a joke.

32. There is a dispute as to whether the Claimant raised that issue during the meeting on 7 April 2017. The notes of the meeting do not include any mention of it. They state that when the Claimant was asked why he refused to say good morning, he said "In a meeting a long time ago Jaci said if they don't want to speak with you then you shouldn't answer them so I said I don't like you so I won't speak. I will be polite." The Claimant accepts saying at the meeting something along the lines that he was simply

following Ms Hubbard's advice. He says that Ms Hubbard deliberately omitted any reference to the racist comments in the notes because it "went against her". The Claimant accepts he was sent a copy of the minutes and did not raise any issue about their accuracy at the time. He said that was because it was "impossible to tell them that they're wrong".

33. The Claimant's case about the racist comments has been difficult to pin down. The claim form said:

> "The claimant also suffered racial harassment on a regular basis, he would be called names such as "a stupid dumb Italian", or be shouted at "go back to Italy". Since Brexit, the Claimant was repeatedly met with taunting about "no longer being welcome here (in Britain) and will be sent home". These incidents were witnessed by Peter Malcinicolov and Mo Hithkhan"

34. In the Scott Schedule the Claimant repeated this allegation, naming "persons involved" as: "Line drivers, David, Jaci Hubbard, Mo Hithkhan". The dates given were "Morning shifts wed/fri over period in 2017".

35. In the list of issues agreed at the Preliminary Hearing, the alleged racist comments were all said to have been made by "David". There were three alleged incidents "on or around 2017". A further allegation, that David said in January 2021 "you're still here", referring to Brexit, required permission to amend and as explained above the Claimant did not make any application to amend until the first day of the final hearing when the application was refused. We did, however, allow the list of issues to be amended to the extent that the alleged racist comments by David were made "regularly" in the period 2017 to March 2019, after which the Claimant did not physically attend work.

36. In his witness statement the Claimant said:

> "Jaci would lead the line-driver morning meetings, at the end of these she used the opportunity to mock me with the other line drivers, in particular David. They would say things such as 'Now that Brexit is coming, all the Italians will go back to Italy and we won't have to keep Salvatore anymore' this was often followed with a response such as 'He doesn't want to work anyway, he's Italian'. There were many race related jokes and bullying towards me by Jaci and the other line drivers."

37. The Claimant also referred in his witness statement to an incident where a team leader called Rolland called him a "stupid Italian". The Claimant relied on witness statements from the two colleagues mentioned in the claim form, Peter and Mo. Neither of them attended the hearing to give evidence. Neither of their witness statements mention any comments by David to the Claimant. Peter's statement does not mention comments by anyone referring to the Claimant's Italian nationality. Mo's statement refers to an inspector called Stewart shouting at the Claimant, calling him "Stupid" and saying "he's Italian".

38. During his oral evidence the Claimant referred to David having called him "dirty Italian", but then later retracted that and said he called him "Stupid", not dirty.

39. The bundle included a written complaint by the Claimant in May 2018 when "Stuart" called the Claimant "idiot and more". The complaint was investigated and Stuart was spoken to and agreed not to call the Claimant an idiot again. The Claimant's also said in his oral evidence that another colleague was dismissed for making racist comments to someone else.

40. The Respondent's solicitors made contact with David, who was made redundant along with all other line drivers in January 2021, about these proceedings. He replied saying

he did not know what they were talking about, his wife was battling cancer, and asked not to be contacted again.

41. We find on the balance of probabilities that the Claimant did not raise any issue about racist comments by David or anyone else in the meeting on 7 April 2017. We accept the Respondent's evidence that the Claimant never made any complaint about such racist comments. We find that if the Claimant had made such a complaint there would be some documentary evidence of it and the Respondent would have investigated the matter.

42. During the meeting on 7 April 2017 the Claimant also complained about the other Line Drivers getting a lunch break. He said he was being treated differently. Mr Farrar responded "If someone wants a drink we won't say no. That goes for you as well".

43. The Claimant emailed Mr Farrar and Ms Hubbard, copying in a number of other managers, on 10 April 2017. Regarding his lunch break, the Claimant said:

> "I would like to request if my lunch break at 13:00 to the 30 minutes not paid deal could be changed with the 15 minutes paid deal as Mr Tim give to some Yard Assistant how are in the 6 hours day shift as they told me."

44. Mr Farrar's evidence was that he could not recall whether there was any response to that query. There was no email response in the bundle. Mr Farrar said that there was no official paid break for other line drivers and he did not believe they would have agreed to a paid break for the Claimant. It is not in dispute that the arrangement remained the same throughout the Claimant's employment, i.e. he took a 30-minute unpaid break and worked 30 minutes longer than others at the end of his shift.

45. The Claimant's evidence was that he followed this up once a few months later, but then gave up on the issue.

46. In March 2018 the Respondent made an Occupational Health referral for the Claimant because of numerous short sickness absences due to back pain. A report was produced on 27 March 2018. The report notes that the Claimant had been experiencing an exacerbation of his lower back pain since starting his job. The pain would travel to his right leg. It was also noted that the Claimant was due to have spinal injections. It states:

> "He states that remaining in one position for prolonged periods of time or repetitive bending, twisting or lifting can exacerbate his pain. He particularly complains about poor quality of sleep at night due to his lower back pain. According to him, the main reason for him having sickness absence in the past was the lack of sufficient sleep in the nights before, resulting in him feeling not fit to drive due to the day after drowsiness."

47. As to the Claimant's fitness to work, the report notes that it would be necessary to await the outcome of the pending spinal injections, but that the Claimant was currently fit to work. It was expected that he would have episodes of flare-ups which may result in future sickness absence. As to adjustments, the report states:

> "Given Mr Cardarello's job description and physical demands of his role as described by him, there is probably limited room for any specific form of adjustment. Management may wish to give consideration for supporting Mr Cardarello on the days that he has more back symptoms to be engaged in a different role which does not require repetitive bending or twisting (when he is required to get in and out of the cars), and any other lighter duties that may be available at this workplace."

48. The report was discussed at a meeting between the Claimant and Ms Hubbard on 30 March 2018. It was noted that the spinal injections had not been able to take place due to issues with the Claimant's diabetes. As to adjustments, Ms Hubbard's notes of the meeting state:

> "I have informed Salvatore that unfortunately we do not have light duties however I can find him alternative duties by working in Collections on a day that he feels line driving would be too painful but he would need to notify me upon arrival of his shift so that I can make the necessary adjustments."

49. In the afternoon on 13 June 2018 Ms Hubbard asked the Claimant to operate a barrier to the car park. It is not in dispute that this was not a normal part of the Claimant's duties. There are photographs of the barrier in the bundle. It is a manually operated barrier with a long bar and a counterweight at the end. The weight has a handle at the top for manually lifting and lowering the bar. It is not in dispute that the Claimant would have had to lift and lower the barrier repeatedly in the three-hour period. There is, however, a dispute about the amount of force required to operate the barrier. Mr Farrar's evidence was that it is designed to be operated with minimal effort by one person, although he accepted it might need two hands to push down and pull open. The Claimant said it requires considerable effort.

50. The Claimant's witness statement states:

> "Operating the barrier includes the lifting and lowering of the bar which caused excruciating back pain and significantly damaged my pre-existing condition. I would like to highlight that this duty was not a line driver responsibility and was not included within my job description. I believe this was a punishment and clear example of abuse of power by Jaci Hubbard as she was aware of my condition and the limitations it imposed on me, that she chose to ignore. On the 13/06/2018 I was made to lift the barrier for 3 hours, during these 3 hours I felt a sharp, shooting pain in my lower back, as though I had been stabbed. I could no-longer move one of my legs. The debilitating pain led me to cry out for help, however nobody was around. I staggered to the tea-room; a route that would usually take 1-2 minutes took me 10 minutes to walk. On my way to the tea-room, I notified the security guard at the main gate on the situation and that I would have to leave my post for a few minutes. As confirmed by Mo Hithkhan in his witness statement, Jaci Hubbard arrived, and I notified her on what had occurred. She proceeded to shout and threatened to make me clean the toilets if I did not return to operate the barrier. I then returned to the barrier but was unable to operate it."

51. Ms Hubbard was not called as a witness by the Respondent. She was made redundant when the Wimbledon site closed in November 2022. Mr Farrar says he asked Ms Hubbard whether she would be willing to provide a statement but she said she did not want to get involved.

52. Ross Allen, the Respondent's Head of HR, gave evidence that he spoke to Ms Hubbard about this claim and she said that the Claimant was placed on the gate "to support him in response to concerns he raised about his ability to carry out his usual duties".

53. The Claimant says that on 15 June he was asked to operate the barrier again but he refused. He said he was prepared to do other tasks which would not affect his back, but nothing was available so he went home. The Claimant says he went to see his GP and was signed off for 2 weeks.

54. On 4 July 2018 the Claimant had a return to work meeting with Ms Hubbard. The Claimant said he was fully fit to return. He was able to fulfil his driving duties, but he

could not do anything that involved lifting, pushing or pulling.

55. It is not in dispute that the Claimant was never asked to operate the barrier again.

56. On a date in July 2018 the Claimant wrote to Mr Farrar as follows:

> "I am writing to seek your help in resolving a problem that I am experiencing at work. It is a problem that is causing me some concern and that I have been unable to solve without bringing to your attention. I hope in doing so we can deal with the issue quickly and amicably.
>
> The company is asking me to carry out tasks which aggravate a pre-existing condition.
>
> I raised this matter informally but haven't been satisfied with the outcome. None This has caused considerable aggravation to my pre-existing back injury resulted in extreme pain knock on effects such as loss of sleep.
>
> The Company is aware of this problem, and I have made it clear that operating the car park barrier makes the condition worse. On 13th June I was asked to operate the barrier for 3 hours which resulted in extreme pain. On the Friday, 15th June I was asked to operate the barrier again after lunch, but I said I was not prepared to do this since I was still suffering the effects from the 13th of June. I was prepared to do other tasks which would not affect my back but was told there was nothing else available. I therefore had no option but to go home sick. I do not, however, feel it is far to penalise me by reducing my sick pay because it was the company's action that created the sickness absence.
>
> I understand that you might have other ideas about this, but I have thought about the following possible solutions to the problem: I am happy to do alternative tasks but not anything which will aggravate my back condition.
>
> I would welcome the chance to talk this through with you at a convenient time and place."

57. There are three versions of this letter in the bundle with different dates, two unsigned. The Claimant accepts that the letter was written with the help of an adviser from Citizens Advice, to whom he went for advice about the issue in July 2018.

58. It is not clear what happened to this letter. Mr Farrar left the business around this time and there does not appear to have been any response to it by him or his successor.

59. An absence review meeting took place on or around 19 September 2018. Notes of the meeting were included in the bundle. They are not signed or dated.

60. The Claimant said for the first time in his oral evidence that he believed the notes had been fabricated and he denied that the meeting took place at all.

61. We do not accept that the notes were fabricated. There is absolutely no basis for such an allegation or finding. There is a letter in the bundle inviting the Claimant to an absence review meeting on 19 September 2018. The dates referred to in the minutes are consistent with the meeting having taken place on or around that date. We have no reason to believe that it did not take place. We note that the Claimant's evidence was wholly unreliable in other respects. For example he repeatedly and strenuously denied that a union representative had been present at meetings in 2020 despite very strong documentary evidence to the contrary, and he eventually accepted that he had made a mistake about the dates. In the absence of any other evidence, we accept that

the meeting took place and the notes in the bundle accurately record what was discussed at the meeting.

62. The Claimant said during the meeting that he still had not had the injections in his back because of his blood sugar levels. He was due to have them on 2 October 2018. The notes then record the following exchange:

> "JH [Ms Hubbard] - What else, if anything, can Manheim do to support you as your current job role of a line driver has the lightest duties of the site?
>
> SC [Claimant] — Adjustments have been made, I do less walking and have been taken away from movements.
>
> JH — What about an inspector role?
>
> SC — That would not be suitable for me"

63. In February or March 2019 there was an incident when a yard assistant named Richard hit the Claimant's hand with an electronic scanner. The Claimant says this caused injury to his right thumb. The Respondent does not dispute that this happened. The Claimant's evidence about the incident was:

> "He told me he did not like working in the yard as he had been removed from Hall 1 to work as yard assistant. Walking behind him I placed my right hand on his left shoulder in a friendly way, in this moment he had his back to me and as I placed my hand on his shoulder, he struck it with force with the scanner he was holding, hitting my right thumb. I asked him why he struck me with the scanner, and he replied, 'it's better if you go or it will be worse'."

64. The Claimant says that a meeting took place in February 2019 with Ms Hubbard, Jane White (HR administrator) and Chris O'Brien, a yard assistant. The Claimant did not give any evidence about this in his witness statement, but in his oral evidence he said that he was due to attend the meeting and that it included discussion of problems with his feet and the shoes he needed. He said on the way to the meeting Chris advised him to ask about being moved to the inspector role. He says he did ask about that in the meeting and Ms Hubbard said he could not do it because of problems with his back, because you have to bend forward. The Claimant said Jane White said she would check whether the role was a possibility for the Claimant and she would leave the minutes of the meeting open while she checked the position. The Claimant accepted he did not follow up with her on the matter.

65. There are no minutes of such a meeting in the bundle. Mr Allen said the following in his witness statement:

> "62. There was no suggestion in the claim form that Mr Cardarello was rejected for the job of inspector in February 2019, as he alleges in paragraph 11 of the list of issues.
>
> 63. Jaci did separately mention to me (around the time of the claim) that Mr Cardarello had expressed a speculative interest in an inspector vacancy in 2018 in conversation with her and that he was advised by her that the Inspector role is quite a physical role and he should consider before applying whether this would aggravate his medical conditions. She said she did not tell him that he would be unsuccessful if he applied or that the business believed he wasn't capable of carrying out the role.
>
> 64. My recollection is that there was a vacancy for an Inspector at the Wimbledon

site in 2019. Mr Cardarello did not apply for this nor do I therefore believe he was 'rejected' for the role."

66. The Claimant accepted in his oral evidence that the inspector role involved getting in and out of vehicles, including bending and twisting. He said it involved less walking than the Line Driver role, which would have been better for him.

67. We do not accept that Ms Hubbard "rejected" the Claimant for the role of inspector. The Claimant's evidence at its highest is that she said it would not be suitable, but Jane White said she would look into it, and it was left at that. The Claimant's case on this issue also inconsistent with the documentary evidence of the meeting in September 2018 when the Claimant himself said the role would not be suitable for him. Even if the Claimant returned to this issue in February 2019, having changed his mind about whether it would be suitable, it is not surprising that Ms Hubbard would have queried whether the Claimant was fit for the role given his the difficulties carrying out his existing role due to his health issues and the physical demands of the inspector role.

68. A meeting took place on 6 March 2019 between the Claimant, Ms Hubbard and Ms White. There are no minutes of the meeting in the bundle. The Claimant had, on 28 February 2019, provided Ms Hubbard and Ms White with a leaflet about diabetes. The Claimant says this was because his doctor had told him that he should not drive if his blood sugar levels were high and that he would not be insured if he had an accident.

69. The Claimant says that at the meeting he was informed that he had exhausted his entitlement to sick pay. In the Claimant's WS he says:

> "I was informed that in order for my paid sick days to replenish I would have to not take any sick days for an entire year. As my physical condition could not withstand an entire year without sick days, Jaci suggested I take un-paid sick leave until my situation improved. Jaci asked me to confirm with my GP if I was fit to work prior to returning."

70. The Claimant also said that Ms White told him she had two people in her family with diabetes, and she seemed to be suggesting that what the Claimant was saying about his condition was not true. There was also discussion of the Claimant's back condition.

71. In his oral evidence the Claimant said they "wanted me to continue working without paying my sick note". He queried this because it would mean he would lose money if he was ill every 2-3 weeks. He said:

> "We talked about what was best for me and what the company could do. We decided then, all three of us together, without saying bad things between each other. I said I can't continue the contract if I can't be paid when I'm off ill. They had said you could continue. She said in my family there are 2 people who are diabetic and they don't behave like you behave. I said ok, then it's better that the GP tells you about my condition, if you don't believe what I'm saying. So she said ok, go to the GP, do this programme, and I can't remember exactly if it was Jane or Jaci. They mentioned the accident with the back. They said – close the problem and the back problem, and then return."

72. On 14 March 2019 the Claimant emailed Ms Hubbard and Ms White as follows:

> "Dear Jane/Jaci
> Thank you all for your support to my health situation of diabetes.
> Please find attached my seek note from my GP.
> I have to inform you that I am going in a treatment that will sorts the problems I have with my foots, legs and spine. I am now taking as medical treatment

Pregabalin till my pain and numbness will reduce in order to avoid the risk that could cause an incident at work as you kindly point out in our meeting on 6st March 2019.
I will update my situation soon a will be in a better conditions.
Regards"

73. Jane White was not called as a witness by the Respondent either. She also left the business in October 2022 and was not willing to provide a statement.

74. The Claimant remained off sick, and accepts that he was not fit to work, from 6 March 2019 onwards.

75. Towards the end of 2020 the Respondent commenced a redundancy consultation. Because of the pandemic the Respondent had ceased all physical auctions and a decision was made to remove all line drivers nationally including the 16 Line Drivers at Wimbledon. The Claimant does not take issue with that decision. Collective and individual consultation took place. The Claimant's redundancy was confirmed by letter dated 15 January 2021. It is not in dispute that the Claimant was kept informed of vacancies within the business nationally and did not apply for any. The Claimant did not appeal his dismissal.

THE LAW

76. The Equality Act 2010 ("EqA") provides, so far as relevant:

> **13 Direct discrimination**
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> …
>
> **15 Discrimination arising from disability**
> (1) A person (A) discriminates against a disabled person (B) if—
> (a) A treats B unfavourably because of something arising in consequence of B's disability, and
> (b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.
> (2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability.
> …
>
> **26 Harassment**
> (1) A person (A) harasses another (B) if—
> (a) A engages in unwanted conduct related to a relevant protected characteristic, and
> (b) the conduct has the purpose or effect of—
> (i) violating B's dignity, or
> (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
> …
>
> (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
> (a) the perception of B;
> (b) the other circumstances of the case;
> (c) whether it is reasonable for the conduct to have that effect.
>
> **39 Employees and applicants**
> …
> (2) An employer (A) must not discriminate against an employee of A's (B)—

(a) as to B's terms of employment;

(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;

(c) by dismissing B;

(d) by subjecting B to any other detriment.

…

123 Time limits

(1) Subject to section 140B proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

…

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

…

77. Pursuant to section 20 EqA, where an employer has a provision, criterion or practice ("PCP") that puts a disabled person at a substantial disadvantage in relation to a relevant matter in comparison with persons who are not disabled, it has a duty to take such steps as it is reasonable to have to take to avoid the disadvantage. The duty does not apply if the employer does not know, and could not reasonably be expected to know that the disabled person has a disability and is likely to be placed at the disadvantage referred to (paragraph 20 of Schedule 8 EqA).

78. Section 21 provides that an employer discriminates against a disabled person if it fails to comply with a section 20 duty in relation to that person

79. The Tribunal has a broad discretion in deciding whether it is just and equitable to extend time under s.123(1)(b) (Southwark London Borough v Afolabi [2003] IRLR 220). Factors that may be considered include the relative prejudice to the parties, the length of the delay, the reasons for the delay and the extent to which professional advice was sought and relied upon. The onus is on the claimant to show that it is just and equitable to extend the time limit.

CONCLUSIONS

Race-related harassment

80. We are not satisfied on the balance of probabilities that the alleged comments by David occurred. We accept the Claimant genuinely believes that some comments along the lines alleged were said by one or more colleagues, but his own evidence was vague and inconsistent in many respects and we have already noted that his recollection was also unreliable about other matters. The Claimant was clearly not afraid to raise issues, not only regarding his disabilities, but also about perceived unfair behaviour by

colleagues. There is documentary evidence of such complaints, but absolutely nothing about any racist comments. Further, the witnesses relied upon by the Claimant specifically to support his race-related harassment complaint do not provide any support at all. Neither of the witnesses says anything about racist comments by David. In those circumstances we cannot find on the balance of probabilities that the comments occurred.

81. As for the incident when Richard hit the Claimant's hand, the Claimant does not allege that this had anything to do with his race and there is no basis on which we could find that it was related to the Claimant's race.

82. In any event, we dismiss this complaint on the basis it is out of time and the Tribunal has no jurisdiction to consider it. It was presented almost two years after the latest date on which the alleged harassment occurred. The Claimant's explanation for not presenting this complaint earlier is that he "did not know it was discrimination" until late 2020 when he spoke to a lawyer and to ACAS. We do not accept the Claimant had a good reason for the delay. We acknowledge that the fact that English is not his first language may have contributed to the delay to some extent, but he had access to advice in July 2018 when he went to Citizens' Advice about the barrier issue, so if he had been experiencing abuse of the kind alleged he could have asked about it then. We also note that he was a union member by mid-2020 at the latest so had access to advice from the union. Even on his own case, he knew he could bring a claim about these issues by November 2020 at the latest, yet he did not commence early conciliation until 13 January 2021 and did not present his claim until 21 May 2021. As the Respondent points out, that was a critical delay because in January 2021 all of the Line Drivers were made redundant so by the time the Respondent was notified of the allegations of race-related harassment, as unclear as they were at the time, it was not possible to conduct an investigation involving the Line Drivers.

83. The prejudice to the Respondent in defending these complaints is obvious. The Respondent is having to respond to allegations about things said to have happened 2-4 years before the claim was brought and 4-6 years before this hearing. The main alleged perpetrator left the business before the claim was presented and was unwilling to get involved. The prejudice to the Claimant in not extending the time limit, however, especially given our factual findings, is negligible. We do not consider it just and equitable to extend the time limit and therefore the Tribunal does not have jurisdiction to consider the complaint.

<u>Discrimination arising from disability</u>

Being rejected for the role of inspector in February 2019

84. We do not accept that Ms Hubbard rejected the Claimant for the role of inspector. At most she expressed her opinion that it would not be suitable because of the Claimant's health issues, but Ms White agreed to look into the matter and the Claimant never followed up the issue or applied for the role. To the extent that Ms Hubbard expressed her opinion, that was not unfavourable treatment in the context of the Claimant himself having said the role was not suitable for him a few months earlier and in view of the Claimant's concession that the inspector role also involved a large amount of bending and twisting.

6 March 2019 meeting

85. As for the 6 March 2019 meeting, again, we do not accept there was any unfavourable treatment. On the Claimant's own case, he was raising issues about his safety to drive because of his diabetes and Ms Hubbard and/or Ms White suggested that he get advice and input from his GP as to his fitness to work. They also explained the

consequences of the sick pay rules, the Claimant having exhausted his sick pay entitlement. The Claimant said they decided together that he should sort out his health issues and return when they were resolved. As a result of the discussion the Claimant remained on sick leave and he accepts that at all times after this he was not fit to work. To the extent that the Claimant was told to remain on sick leave, therefore, this was not unfavourable treatment in the circumstances.

86. We also find that these complaints are out of time and we do not consider it just and equitable to extend the time limit. The complaint about the inspector role was not clear in the claim form. We allowed it to proceed, but the Claimant did not even give evidence about it in his witness statement. The prejudice to the Respondent in responding to it is very substantial. The same goes for the complaint about 6 March 2019 meeting. Neither Ms Hubbard nor Ms White are employed by the Respondent. They were not willing to give evidence. Even if they had done, they would be asked to give evidence about things that happened more than four years ago, for which there are no contemporaneous notes. Again, given our findings, there is no real prejudice to the Claimant in not extending the time limit.

Failure to make reasonable adjustments

PCP1

87. It is not in dispute that the Claimant was asked to operate the barrier on 13 June 2018. The Respondent does not accept that this was a PCP, applying the guidance in Ishola v Transport for London [2020] EWCA Civ 112. We agree that it would more properly have been pursued as a section 15 claim, but we are prepared to proceed on the basis it could be a PCP albeit a one-off act.

88. We would also be prepared to accept for present purposes that it put the Claimant at a substantial disadvantage because it exacerbated his back issues.

89. The real difficulty is in establishing whether the Respondent knew or should have known that the Claimant was likely to be at the relevant disadvantage. If this had been pursued as a section 15 claim it would also be difficult for us to determine whether it constituted unfavourable treatment. For both of those questions we would need to make findings as to the suitability of the task for someone with the Claimant's back condition, what Ms Hubbard knew or should have known and, possibly, her motivation for giving him the task.

90. We have no expert evidence on the suitability of the task for the Claimant and we are not in a position to say on the evidence before us that it was obviously unsuitable. It is possible that proper operation of the barrier required very little effort so was not obviously inconsistent with the OH recommendations. As to Ms Hubbard's knowledge and motivation, she has not given evidence and we have a very limited report of what she said to Mr Allen about the issue.

91. We do not consider it would be fair to the Respondent to reach conclusions on those matters in circumstances where the complaint is substantially out of time. We do not accept it is just and equitable to extend the time limit. The Claimant took advice specifically about this issue in June 2018. There is no good reason for the lengthy delay and it has caused very significant prejudice to the Respondent which outweighs any prejudice to the Claimant in the claim being dismissed.

92. This complaint is therefore dismissed on the basis we do not have jurisdiction to consider it.

PCP2

93. We accept the PCP about breaks was applied to the Claimant. We are not satisfied, however, that it placed the Claimant at a substantial disadvantage compared to someone without his disability. The proper comparison is between the Claimant and a non-disabled employee who has the same arrangement, i.e. an unpaid 30-minute break and having to work an additional 30 minutes at the end of the shift. There would be no disadvantage to the Claimant; the comparator would be in exactly the same position.

94. Again, this complaint should perhaps have been more properly pursued as a section 15 complaint. We do not, however, consider it would have succeeded. We would need to be satisfied that it was unfavourable treatment to have a formalised 30-minute unpaid break, as opposed to an informal, paid, 15-minute break. We would not accept it this was necessarily unfavourable to the Claimant. In any event, it would almost inevitably have been justified on the basis the Claimant had said he needed a 30-minute break because of his diabetes.

95. Further and in any event, this complaint is also out of time. The alleged discriminatory act occurred, at the latest, in mid-2017 when the Claimant requested a change to the arrangement and it was not agreed. The claim is therefore nearly four years out of time and again, no good reason has been given for the delay and there is substantial prejudice to the Respondent in defending it which outweighs any prejudice to the Claimant.

96. This complaint is also therefore dismissed.

PCP3

97. Given our findings above in relation to the meeting on 6 March 2019, we are not satisfied that the third alleged PCP was applied.

Direct disability discrimination

98. Finally, on the complaint of direct disability discrimination, there is simply no basis on which we could infer that the Claimant's sickness absence or disability itself had anything to do with the decision to dismiss. The Claimant has not challenged the redundancy process at all. All Line Drivers were made redundant. Even if the Claimant had been fit to work, he would inevitably have been made redundant anyway. He did not allege at any stage that his disability was a factor in the redundancy process and did not appeal the dismissal.

99. This complaint is also therefore dismissed.

Employment Judge Ferguson

Date: 19 June 2023