EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Moses Amankona	**v**	GXO Logistics UK Limited

Heard at: Cambridge **On:** 15, 16 and 17 May 2023

Before: Employment Judge Tynan

Members: Mrs A Carvell and Ms S Goding

Appearances
For the Claimants: In person
For the Respondent: Ms G Crew, Counsel

JUDGMENT having been given orally on 17 May 2023 and written reasons having been requested by the Claimant on 17 May 2023 in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided:

REASONS

1. The Claimant has brought two claims of race discrimination against the Respondent. He gave evidence at Tribunal, as did his former colleagues Mr Emmanuel Manu-Morris and Mr Eric Asare on his behalf. For the Respondent we heard evidence from Aleksander Nowak, Operation Team Manager, Peter Rafferty, Senior Shifts Operations Manager and Kingsley Day, Inventory Control Manager. There was a single agreed Hearing Bundle running to 247 pages, supplemented in the course of the hearing by a copy of the Respondent's grievance policy.

2. The Claimant was employed as a Warehouse Operative at the Respondent's Milton Keynes site from 26 October 2020 until 9 February 2022. He resigned his employment on 7 February 2022, his resignation taking effect, we understand, on 9 February 2022. The Claimant's resignation was the culmination of events that began on the night of 19 / 20 September 2021 when a battery that powered equipment used in the Respondent's warehouse operations caught fire. It is common ground between the parties that the Claimant had been trying to transfer the

battery from one piece of equipment to another when the fire broke out. Thankfully, the Claimant was talking to colleagues a short distance away at the time and no-one was injured.

3. There was an immediate investigation that night into the circumstances of the fire. A disciplinary investigation and disciplinary hearing followed, initially leading to the Claimant being issued with a first written warning under the Respondent's disciplinary policy, though this was subsequently overturned on appeal. Thereafter the Claimant raised a grievance. He gave notice resigning his employment the day before he received the Respondent's decision on his grievance. The decision itself therefore played no part in his resignation.

4. The Claimant has brought two claims: the first was issued prior to his resignation, the second in light of his resignation.

5. A case management preliminary hearing on 8 December 2022 dealt with the issues raised in the first claim. Employment Judge Fredericks identified that the Claimant was pursuing a complaint of direct race discrimination with reference to four specific matters – issues 1.a to d (pages 56 and 57 of the Hearing Bundle).

6. The second claim form is at pages 28 to 41 of the Hearing Bundle. The grounds of claim (pages 40 and 41) run to 22 numbered paragraphs. With the exception of a small amount of additional detail at paragraphs 8 and 19, the first 19 paragraphs of the grounds of claim replicate the first 19 paragraphs of the grounds of claim in the first claim. Whilst one might think therefore that the essence of the second claim is to be found in paragraphs 20 to 22 of the grounds of claim, those further three paragraphs are in fact essentially repetitive of the matters complained of in paragraphs 1 to 19. The only certain point that emerges from the second claim form is that the Claimant considered that he had been constructively dismissed. He lacked sufficient length of service to be able to claim 'ordinary' unfair dismissal. At a further case management hearing in respect of the second claim, Employment Judge Alliott recorded that the Claimant was claiming that his constructive dismissal amounted to race discrimination. Unfortunately, however, the specific matters relied upon by the Claimant in support of his complaint that he had been constructively dismissed were seemingly not explored or, at the very least are not documented in Employment Judge Alliott's record of the hearing.

7. The Claimant submitted a detailed letter of resignation (page 234 of the Hearing Bundle). It provides the most immediate and obviously reliable record of the things that were in his mind when he resigned his employment, specifically:

   9.1 He complained about being restricted from performing his role as a battery changer (which he said formed part of his regular duties) after his suspension was lifted on 12 October 2021, a decision he

said that had been taken without first engaging with him and in respect of which no explanation had been offered;

9.2 He claimed that his suspension from his duties between 20 September and 12 October 2021 was in breach of the Respondent's policies and procedures;

9.3 He said that he had been issued with a first written warning in breach of the Respondent's policies and procedures; and

9.4 He alleged that Mr Nowak and Mr Rafferty had "stated there was nothing wrong to breach Health and Safety which led to the fire incident, and further alleged that another employee, Mr Pelechacz corroborated their statements in this regard by forging a signed training document. This latter allegation regarding Mr Pelechahcz does not feature in the claim form or in the Claimant's witness statement, and we are satisfied therefore that it is not pursued as part of the Claimant's claim that he was constructively dismissed.

Findings of Fact

8. We were not provided with a copy of the Claimant's contract of employment or any record of his induction on joining the Respondent. Nevertheless, the Claimant did not dispute that the Respondent's disciplinary policy (pages 58 - 64 of the Hearing Bundle) was applicable to his employment. The relevant provisions of the policy are as follows:

Section 4.2 (page 60 of the Hearing Bundle)

9. Section 4.2 of the disciplinary policy deals with investigations. It begins with a statement that it is important that any investigation is conducted without unreasonable delay and that the amount of investigation required will depend on the nature of the allegations and the circumstances of the particular case. That is uncontroversial. It goes on to state that the Investigating Manager has the right to investigate a matter with the colleague directly, without prior notification.

10. As we shall return to, given that a fire had broken out on site, with the obvious risk that staff or others could have been seriously injured, a thorough investigation was plainly called for. In our judgement, any such investigation needed to look beyond the actions of the person most immediately involved, in this case the Claimant, and examine the Respondent's processes and systems of work, including what training or instructions were given to the Claimant and others, and whether by their actions, people other than the Claimant may have caused or contributed to any relevant chain of events. Inquests and Inquiries have a track record in this country of highlighting systemic issues and failings that extend beyond the acts and omissions of any principal 'actor'. It is often only by looking beyond the immediate events and individuals that an organisation can

identify and address systemic weaknesses that place people and, ultimately, the organisation itself at risk.

11. Notwithstanding our preliminary observations in this regard, as we shall return to, the question we have to consider is whether the Claimant was discriminated against because of his race, rather than whether he was treated unfairly or was the potential victim of an inadequate or narrowly focused investigation.

Section 4.3

12. Section 4.3 of the disciplinary policy deals with suspension. It provides:

> "A colleague may be suspended on full pay whilst further investigation takes place to establish whether disciplinary action is to be taken. Suspension on full pay during an investigation is not in itself disciplinary action."

13. Employers are, of course, expected to act with reasonable and proper cause, as well as consistently, in the exercise of their discretionary powers. In particular, employees with protected characteristics should not be suspended if colleagues who do not share their characteristics would not be suspended in the same, or not materially different, circumstances.

Section 4.5

14. Section 4.5 of the disciplinary policy deals with first written warnings. Such warnings are said to be appropriate "in the case of more serious offences". In order to understand what that means, it is necessary to have regard to Sections 4.4, 4.6 and 4.7 of the policy regarding verbal and final written warnings and dismissal. Verbal warnings are said to be reserved for minor offences. It follows that first written warnings are reserved for matters that amount to more than a minor offence. Final written warnings and dismissal are reserved, respectively, for:

> "very serious offences"

and

> "gross misconduct, serious offences or the accumulation of previous warnings"

If the Claimant was initially issued with a first written warning that would suggest he was adjudged to have committed more than a minor offence but not a very serious offence, and certainly not gross misconduct. We return to this.

Section 6

15. This section of the disciplinary policy contains a non-exhaustive list of offences that are said to be likely to result in dismissal without notice. The first example, at page 63 of the Bundle, is:

> "A serious breach of the company's Health and Safety Rules including the failure to wear any safety gloves or other protective clothing and equipment provided to them in the performance of their duties and otherwise comply with any other Health and Safety Rules in force."

16. The documented safe system of work for using walking PPT and charging a MHE battery at pages 66 – 75 of the Hearing Bundle (which is dated March 2021 and we find was in force at the date of the incident in September 2021) identifies various significant risks arising from the use of battery powered equipment and changing batteries in such equipment, including a risk of injuries, burns to eyes, face and hands. The Safe System of Work Record ("SSWR") states that before the procedure is undertaken the appropriate PPE must be worn by the employee, and that this includes a face shield with chin guard and acid proof apron. The SSWR contains a range of images to illustrate the relevant requirements.

17. The SSWR is in may respects an admirably clear document, illustrated throughout with photographs and symbols to highlight the safe system of work. However, the incident on 19 / 20 September 2021 brought sharply into focus the question of what was the safe system of work in the particular circumstances encountered by the Claimant. It was an issue that took up a great deal of time at Tribunal, albeit one that we can address relatively briefly. We are satisfied that the Claimant understood from his training with the Respondent that where a piece of equipment that is powered by a battery (widely referred to as a 'truck') has been taken out of use by being declared VOR (short for 'vehicle off road'), the truck battery should only be changed by an authorised engineer even if the battery itself has not been identified as potentially defective. However, whilst we accept that this was the Claimant's understanding in the matter, it did not reflect the SSWR. In order to support and press home his understanding in the matter, the Claimant has sought to rely upon an instruction in the SSWR at the top of page 70 of the Hearing Bundle, namely that trucks should be brought to the battery changing area, something which he maintains cannot be done if the truck in question is VOR. In other words, that whilst the SSWR does not explicitly state that batteries must not be taken from a VOR, that can generally only be achieved by either moving the VOR in breach of what he says is a documented safety rule or by changing the battery away from the battery changing area.

18. It is clear from the very spontaneous way in which Mr Nowak gave his evidence on this issue that the first time he had been required to consider the matter was at Tribunal. We find that is because the relevant instruction in the SSWR was only highlighted for the first time by the Claimant in the course of these proceedings. We were not taken to any minutes, emails, correspondence or other communications in the Hearing Bundle where this point was raised or highlighted to Mr Nowak in the course of his investigation.

19. In any event, Mr Rafferty, who was clear, concise and focused in his evidence to the Tribunal and, in our judgement, was a credible and reliable witness, explained that the Claimant was mistaken in his understanding as to what can be done with a VOR. We accept his evidence that unless a truck is deemed unsafe to move, in which case the Respondent's authorised engineers would be required to attend on site as an emergency to resolve the matter, a VOR can otherwise be moved to the battery changing area in order for the battery to be removed from the truck, alternatively that the 'tugger' (the equipment used to remove batteries from trucks) can be deployed across all indoor operational areas of the Respondent's site, even if the preferred location for battery removal and change is the battery change area.

20. By way of further background and context, Mr Rafferty explained that in September 2021 the Milton Keynes site had only relatively recently become operational and had not reached full capacity in terms of batteries and battery charging facilities. His evidence in this regard was not challenged by the Claimant. As a result of these operational challenges, we accept that batteries were routinely being taken from VORs in order to maintain operational capability across the site.

21. Whatever the Claimant's training and understanding in the matter, we find that this did not reflect the documented safe system of work or Mr Nowak's understanding in the matter, or indeed the understanding of a number of his senior colleagues in the chain of command who had implemented a bespoke solution to what was a short-term battery capacity issue at the site.

22. We find that when, on 19 / 20 September 2021, David Fenn and thereafter Mr Nowak, instructed the Claimant to take a battery from a VOR, they believed this to be not only a lawful, but an inherently safe, management instruction. We also find that when he compiled his initial report in the immediate aftermath of the fire, it never occurred to Mr Nowak that it might be suggested that he had some responsibility in the matter as a result of the instructions he had issued to the Claimant. He was relatively new to the role and somewhat inexperienced. It could be said that he failed to take a necessary step back in order to see the bigger picture. But if so, we find that he was certainly not embarked upon a cover-up or seeking to scapegoat the Claimant. As we say, it did not occur to him to look critically at his own or others' actions or responsibility in the matter, even if he did turn his mind to how the organisation responded after the fire broke out. In terms of the fire itself, he focused exclusively on the Claimant, on the basis that only the Claimant had handled the battery prior to it catching fire.

23. Whilst Mr Nowak failed to take a more holistic view, in our experience that is regrettably consistent with how many people in such situations, perhaps lacking training in and experience of risk assessment, approach those situations.

24. In his witness statement, the Claimant complains that the people appointed to investigate the incident had no knowledge about machines or VOR, that they were untruthful in reporting the incident and in not making available the VOR Certificate. We do not accept that anyone has been untruthful in this matter. For the avoidance of doubt, that includes the Claimant himself who has given a great deal of thought to what happened that night and evidently been affected by it. However, the lack of knowledge about which he complains, which seems to be borne out by Mr Nowak's actions in asking Mr Pelechacz to attend a further investigation meeting to assist him in relation to the technical aspects, merely reinforces our observations already that Mr Nowak's handling of the matter reflected his inexperience rather than anything else.

25. The initial Accident/Incident Report (page 93 of the Hearing Bundle) is a fairly basic standard form document. It does not indicate any attempt by Mr Nowak to attribute blame, or to cover up. The Claimant may say, with some justification, that it was for the Respondent to undertake an appropriate investigation, but the fact is that in his own initial handwritten Incident Statement Record, the Claimant did not identify that he had been instructed by Mr Fenn or thereafter by Mr Nowak to undertake the battery change in circumstances where he had flagged concerns to them. Nor did he identify in it that he believed their instructions were contrary to his training or the SSWR. Indeed, it seems to us, as Mr Nowak did, that the Claimant focused entirely on his own actions in the matter. Which rather begs the question why he now believes that Mr Nowak discriminated against him by likewise failing to take a step back and consider the bigger picture.

26. As we have identified already, a more detailed investigation followed. Regrettably, it was characterised by a catalogue of serious errors. Ms Crew referred to the Respondent as having not covered itself in glory. Whilst it was plainly not her intention to do so, that is potentially to understate the extent of the Respondent's failings in the matter.

27. The Claimant was called to an investigation meeting without warning at 5am on 20 September 2021. Emails at page 122 of the Hearing Bundle confirm that the meeting was planned some hours in advance, yet no-one thought to let the Claimant know in advance that the meeting would take place so that he could prepare for it. It is irrelevant that section 4.2 of the Respondent's policy envisages that investigations may take place without prior notification. That does not justify the Respondent's failure to do so. Kevin Tilley, Operations Training Lead's email timed at 09.44 on 20 September 2021 evidences that he asked Mr Pelechacz to list all the points in the SSWR that were not followed by the Claimant. It seems that by just after midday seven points of concern had been identified by Mr Tilley. Yet these concerns were not shared with the Claimant to enable him to prepare for his meeting with Mr Nowak some 11 hours or so later, a meeting held late at night that lasted over three hours. Given the serious

nature of the matter under consideration and the clearly understood effects of night time working, we question whether a meeting of such significance and duration should have been convened during night time working hours.

28. The meeting commenced at 11.25pm. Whilst the Claimant was afforded the opportunity to have Mr Asare as his witness, because he was given no prior notice of the meeting there was no opportunity for them to confer in advance of the meeting. The meeting notes evidence that there was an initial adjournment at 00.55am. It seems that Mr Nowak wanted to review CCTV footage of the incident, but that, because the footage could only be viewed in the warehouse reception area, Mr Nowak did not invite the Claimant or Mr Asare to join him in viewing the footage. At Tribunal, Mr Nowak explained that this was to avoid gossip within the workplace and to protect the Claimant's privacy. Whilst that is entirely understandable, it meant that the Claimant was at a significant disadvantage as he was questioned by Mr Nowak about the footage without however being able to view it to know what Mr Nowak may have seen in order to explain what the footage showed or provide relevant context. In our judgement this was patently unfair to the Claimant who was expected to defend himself with one hand effectively tied behind his back. The only sensible course would have been to adjourn the meeting whilst Mr Nowak worked out a way for them to review the footage together in private, or least in some other way that did not draw unnecessary attention to the matter. This seems only to have been belatedly recognised by Mr Nowak towards the end of the meeting. Once again, we find this was his inexperience in the matter. It also reflects the absence of an experienced guiding HR hand.

29. The Claimant was suspended at the conclusion of the meeting on 21 September 2022. The letter of suspension is at page 121 of the Hearing Bundle. There cannot be any criticism of the letter itself, even if the Claimant complains that his suspension was an act of direct race discrimination. He contrasts his treatment with the Respondent's failure to take immediate action in relation to Mr Fenn and Mr Nowak, whom he says instructed him to change the battery. We return to this.

30. Later that morning Mr Nowak reported to various managers in the organisation, including Mr Rafferty, that there was a case for the Claimant to answer, including his reasons why he believed this to be the case. He advised that it should proceed to a disciplinary hearing (page 124 of the Bundle). He referred to it as a "breach of H&S and Gross Misconduct". His email rather undermines Ms Crew's submission that the meeting had simply been in the nature of a preliminary fire investigation. We find instead that Mr Nowak had embarked upon a disciplinary investigation. He updated his initial Accident/Incident Report and followed up his initial email with a further email containing what were described as his "Investigation findings" (pages 129 and 130 of the Hearing Bundle). At that stage he had not in fact spoken to anyone else, nor seemingly followed up on any of the points that had been raised by the Claimant and

Mr Asare over the course of their lengthy meeting and he had not, of course, arranged for the Claimant to review the CCTV footage.

31. Mr Nowak's "Investigation findings" continued to focus on the Claimant's actions rather than consider the bigger picture. He expressed himself in emphatic terms, for example that there had been multiple breaches of Health and Safety and relevant training, that the Claimant had purposely failed to wear PPE and that there had been multiple occasions of negligence. Allowing for the fact that English is not Mr Nowak's first language, it was not couched in language that there was a potential case to answer or that these were his tentative conclusions. Nevertheless, once again, we find this was Mr Nowak's inexperience in the matter and the continued absence of an experienced guiding hand from HR.

32. The Respondent's errors continued. On receipt of Mr Nowak's initial comments, Mr Smith, the Assistant General Manager, referred the matter back to Mr Nowak to progress a disciplinary investigation. Given Mr Nowak's "findings" we think Mr Smith had in mind a disciplinary hearing. Section 4.2 of the Respondent's disciplinary policy, which reflects the ACAS Code of Practice, confirms that save in exceptional circumstances the investigating manager will not be involved in the disciplinary process. That said, there seems to have been some lack of clarity regarding next steps. We strongly suspect that neither Mr Nowak nor Mr Smith had had any particular or close regard to the provisions of the Respondent's disciplinary policy in the matter.

33. On 24 September 2021, the Claimant was invited by Mr Nowak to attend a further investigation meeting. The letter was drafted and issued by Mr Nowak's HR colleagues, seemingly without input from him. It identified an incorrect matter as the subject matter of the investigation and also failed to identify the investigation manager. The letter was copied to Mr Nowak who asked for a revised letter to be issued to the Claimant. That evidences to us that Mr Nowak was concerned to ensure the matter was dealt with correctly and that the errors were promptly corrected. His emails in this regard are at page 137 of the Hearing Bundle.

34. The Respondent's HR team continued to make very basic errors. They failed to correct the details of the incident under investigation, notwithstanding Mr Nowak's clear instructions to them in that regard, and they failed to specify the correct date and time for the investigation meeting. Mr Nowak was also identified in the revised letter as the investigation manager, though it is unclear this was done at his request.

35. Mr Nowak had to write a more detailed email to HR in the matter on 28 September 2021 in an effort to get them to address their ongoing errors. He noted in his email that he would be on his rest day on Thursday 30 September 2021, being the proposed revised date for the next meeting. It seems that this, rather than as Mr Nowak speculated in his evidence at Tribunal the need for a fresh set of eyes, was why another Team Leader,

Mr Mudge was then identified as the relevant investigation manager. In the event, the meeting was in fact chaired by Mr Nowak, we assume because, either of his own volition or at the Respondent's request, he came into work on his planned rest day to deal with the matter.

36. It is not clear what time the meeting invitation was sent to the Claimant, except that it was no more than 48 hours prior to the meeting on 30 September 2021, a Thursday. Wednesday night to Thursday night that week was said to be the Claimant's rest day. In which case, insufficient thought was given by the Respondent to the Claimant's need to rest and to receive reasonable advance notice of the meeting. It is concerning that the Respondent failed to respect the Claimant's rest day particularly in circumstances where he was working nights.

37. The Claimant became confused as to the timing of the proposed meeting. We find that his confusion in the matter was most likely the product of the fact he was working nights. He failed to attend the planned meeting, though realised his error within a very short time of the planned meeting, emailing the Respondent's HR and Payroll Co-Ordinator, Sylwia Czechowicz at 8.14am, approximately five hours after the meeting had been scheduled to commence. It is inexcusable that the Respondent failed to re-convene the meeting to another date and time when the Claimant could attend. Instead, the Respondent immediately escalated matters to the next stage in its disciplinary process by inviting the Claimant to attend a formal disciplinary meeting on 7 October 2021, to be chaired by Mr Rafferty. We find that this was done on HR advice rather than at Mr Nowak's or Mr Rafferty's instigation. It was poor practice driven by poor HR advice.

38. Having spoken with Mr Manu-Morris, the Claimant's trade union representative, and Mr Borg from the Respondent's HR team, Mr Rafferty identified that the disciplinary meeting invitation had been sent to an incorrect email address. The Respondent's errors did not end there. The HR team had failed to provide the Claimant with all of the relevant materials. Mr Rafferty sensibly adjourned the meeting. He took the further sensible step of verifying the Claimant's contact details with him to ensure there would be no further problems in that regard. The Claimant's criticisms of Mr Rafferty's actions in that regard are wide of the mark, even if he has good reason to be critical of the ongoing administrative incompetence that led to a situation whereby Mr Rafferty needed to verify his contact details in order to be confident that future communications would reach him.

39. The disciplinary meeting invite was reissued on 8 October 2021. The letter itself cannot be criticised in so far as it: identified the matters that were to be discussed and the documents pertaining to them; confirmed that they could amount to gross misconduct; and warned the Claimant that if the concerns were upheld the applicable disciplinary sanction could include dismissal. The Claimant was also reminded of his right to be

accompanied at the meeting. In our judgement, the letter plainly complied with the requirements of the ACAS Code of Practice.

40. The 12 October 2021 meeting minutes are at pages 155 to 160 of the Hearing Bundle. They are not a verbatim record, but they evidence that the disciplinary meeting was conducted in accordance with the ACAS Code of Practice and accepted industrial practice, specifically that the Claimant was able to state his case and that Mr Rafferty did not pre-judge the issues, but instead listened carefully to what the Claimant had to say. The minutes further evidence that when the Claimant and Mr Manu-Morris questioned whether what the Claimant had been instructed to do was compliant with a safe system of work and asserted that the battery change should have been undertaken by a trained engineer, Mr Rafferty adjourned the meeting in order to make further enquiries of Mr Pelechacz about this.

41. Mr Rafferty was uncertain in his recollection as to when the Claimant's suspension was lifted. We prefer the Claimant's evidence that he was contacted by HR later that morning, who confirmed that his suspension was being lifted. We find the reason for this decision was that Mr Pelechacz had raised an issue regarding the removal of batteries from VOR trucks, certainly those which were located in a restricted area of the warehouse to which only authorised engineers were permitted access (page 197 of the Hearing Bundle). It was sufficient information for Mr Rafferty to conclude that the Claimant's suspension should not be continued.

42. The Claimant received written confirmation that his suspension had been lifted with immediate effect in a letter by email from Carly Hambling, one of the Respondent's HR Advisors. The Claimant did not say what, if any, other dealings he had with Ms Hambling, or why he believes she may have been motivated or influenced by his race when she omitted to include in her letter the reasons why his suspension had been lifted. She did say that if he had any queries on her letter he should let her know. There is no evidence that the Claimant followed up the letter by seeking that explanation from her.

43. The disciplinary meeting re-convened on 21 October 2021. Again, the invitation letter (page 162 of the Hearing Bundle) complies with the ACAS Code of Practice and accepted industrial practice. Similarly, the minutes of the meeting (at pages 165 – 170) are consistent with how Mr Rafferty conducted the previous meeting on 12 October 2021. He began the meeting by immediately reassuring the Claimant that he would not be dismissed and explained that his primary concern was that the Claimant had not been wearing the correct PPE when the incident occurred. We accept without reservation Mr Rafferty's explanation at Tribunal that this was about protecting the Claimant and was borne of Mr Rafferty's direct knowledge and experience of the life-changing injuries that battery acid can cause. In short, Mr Rafferty decided to discipline the Claimant out of concern for him and in order to impress upon him how essential it was that

in future he protect himself against any potential hazards in the workplace. We find that these were the actions of a concerned manager, acting firmly but fairly in the matter and well within the band of reasonable responses. In our judgement, it does not matter that Mr Smith would later come to a different conclusion in the matter.

44. Mr Rafferty acknowledged on 21 October 2021 that it was important for everyone involved to learn from the incident. The Claimant in turn thanked him for the way in which he had handled the matter. Mr Rafferty concluded the meeting by reminding the Claimant of his right to appeal against his decision to impose a first written warning in respect of the Claimant's failure to wear PPE. We reiterate that the Claimant's failure in that regard was potential gross misconduct under the terms of the Respondent's disciplinary policy. As such, Mr Rafferty's imposition of a first written warning fell some way short of the highest level of sanction that might otherwise have been imposed.

45. The outcome of the disciplinary process was confirmed in a letter dated 21 October 2021. The letter complies with the ACAS Code of Practice and accords with accepted industrial practice. The Claimant would clearly have understood what he had been found guilty of, as well as the reasons for the decision, together with Mr Rafferty's reasons for imposing the sanction that he did. The Claimant's appeal rights were reiterated, rights which he exercised on 25 October 2021. It is unnecessary that we make any specific findings in respect of the appeal since the Respondent's handling of it does not give rise to any complaint within these proceedings. We simply note that the Claimant's assertion in the course of his appeal that Mr Rafferty had come to the process in order to simply carry out the wishes of HR and Mr Nowak, is entirely unsupported by the evidence. We reject that assertion without hesitation. It sits entirely at odds with the fact that, at an early stage in the process, Mr Rafferty dismissed four out of five of the allegations faced by the Claimant and thereafter imposed a relatively low-level disciplinary sanction in respect of an offence that was potentially gross misconduct.

46. We also note that on appeal the disciplinary sanction was overturned on the basis that Mr Smith considered it, amongst other things, to be a first offence. As with Mr Rafferty's handling of the matter at the first stage, it evidences to us an employer acting firmly, fairly and proportionately in the matter.

47. The Claimant wrote to Mr Smith on receipt of his decision on the appeal, expressing his ongoing dissatisfaction and his intention to pursue legal action, including in respect of alleged discrimination. The Respondent treated that letter as a grievance, even though he had not invoked its grievance policy or identified his letter as a formal grievance.

48. The Claimant was invited to a grievance meeting to be held on 10 December 2021, to be chaired by Mr Day. Unless there is an error in the

meeting minutes, it seems that the meeting went ahead instead on 12 December 2021. The meeting lasted an hour and a half. The minutes evidence a detailed exploration of the Claimant's issues of concern, and that Mr Day followed matters up promptly with Ms Holsten, the HR Manager then involved. Although this was not known to the Claimant, Mr Nowak was on an extended period of sick leave such that Mr Day could not interview him as part of his investigation. Instead, the Claimant was simply informed that the investigation was on hold and would not continue before the New Year. Ms Holsten said that she would contact the Claimant within 10 days, namely by 9 or 10 January 2022, with an update. However, she failed to do so. Her failure in that regard was compounded when the Claimant emailed her on 20 January 2022 to request an update, but his email went to her junk email folder. Ms Holsten was on leave the week commencing 24 January 2022, but seems to have spotted the Claimant's email when she returned to work on 31 January 2022. Thereafter, she sought to contact the Claimant to say that Mr Day had recently completed his investigation, was working on the outcome letter and that she hoped to invite him to an outcome meeting that week (in fact, in a follow up email to Mr Day a few minutes later, she asked for his availability the following week). Ms Holsten seems to have emailed the Claimant at an incorrect email address so that when the Claimant resigned his employment on 7 February 2022 he had not then heard from her in response to his email of 20 January 2022 and had effectively heard nothing from her since 30 December 2022. It is not possible for us to reach any conclusion as to how it is that an incorrect email came to be used by Ms Holsten in circumstances where she was responding to an email that had come from the Claimant's correct email address. Suffice to say, it is consistent with the sorry catalogue of HR errors already referred to.

49. Notwithstanding his lack of communication with the Claimant, Mr Day had not in fact been inactive, even if the Claimant did not know this. Mr Day had met with Mr Nowak on 11 January 2022 and with Mr Rafferty on 19 January 2022, and he exchanged emails with Mr Mudge between 23 and 26 January 2022, with Mr Rafferty between 27 and 28 January 2022, with Ms Holsten over the same period, and thereafter with Mr Smith on 1 February 2022.

50. Although the Claimant resigned before having sight of it, Mr Day issued a detailed six page letter in response to the Claimant's grievance. In his decision, Mr Day upheld certain aspects of the grievance.

The Law

51. Both claims are pursued with reference to s.13 of the Equality Act 2010 ("EqA"),

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.

52. During the Hearing we explained to the Claimant that in considering his direct discrimination complaints we would focus on the reasons why the Respondent acted, or failed to act, as it did. That is because, other than in cases of obvious discrimination (this is not such a case), the Tribunals will want to consider the mental processes of the alleged discriminator(s): Nagarajan v London Regional Transport [1999] ICR 877.

53. In order to succeed in any of his complaints the Claimant must do more than simply establish that he has a protected characteristic and was treated unfavourably: Madarassy v Nomura International plc [2007] IRLR 246. There must be facts from which we could conclude, in the absence of an adequate explanation, that the Claimant was discriminated against. This reflects the statutory burden of proof in section 136 of the Equality Act 2010, but also long established legal guidance, including by the Court of Appeal in Igen v Wong [2005] ICR 931. It has been said that a Claimant must establish something "more" than unfavourable treatment and a protected characteristic, even if that something more need not be a great deal more: Sedley LJ in Deman v Commission for Equality and Human Rights [2010] EWCA Civ 1279. A Claimant is not required to adduce positive evidence that a difference in treatment was on the protected ground in order to establish a *prima facie* case.

54. The grounds of any treatment often have to be deduced, or inferred, from the surrounding circumstances and in order to justify an inference the Tribunal must first make findings of primary fact identifying 'something more' from which the inference could properly be drawn. This is generally done by a Claimant placing before the Tribunal evidential material from which an inference can be drawn that they were treated less favourably than they would have been treated if they had not had the relevant protected characteristic: Shamoon v RUC [2003] ICR337. 'Comparators', provide evidential material. But ultimately they are no more than tools which may or may not justify an inference of discrimination on the relevant protected ground, in this case race. The usefulness of any comparator will, in any particular case, depend upon the extent to which the comparator's circumstances are the same as the Claimant's. The more significant the difference or differences the less cogent will be the case for drawing an inference.

55. In the absence of an actual comparator whose treatment can be contrasted with the Claimant's, the Tribunal can have regard to how the employer would have treated a hypothetical comparator. Otherwise some other material must be identified that is capable of supporting the requisite inference of discrimination. This may include a relevant statutory code of practice. Discriminatory comments made by the alleged discriminator

about the Claimant might, in some cases, suffice. There were no such comments in this case.

56. Unconvincing denials of a discriminatory intent given by the alleged discriminator, coupled with unconvincing assertions of other reasons for the allegedly discriminatory decision, might in some case suffice. Discrimination may be inferred if there is no explanation for unreasonable treatment. This is not an inference from unreasonable treatment itself but from the absence of any explanation for it.

57. It is only once a *prima facie* case is established that the burden of proof moves to the Respondent to prove that it has not committed any act of unlawful discrimination, so that the absence of an adequate explanation of the differential treatment becomes relevant: Madarassy v Nomura [2007] EWCA Civ 33.

Conclusions

58. The Claimant's first claim comprises of four complaints, as set out in paragraph 24 of Employment Judge Fredericks' case management summary (pages 56 and 57 of the Hearing Bundle). We deal with these complaints in turn.

Issue 1.a.

59. Neither the fact that the Claimant was investigated in relation to the fire that occured on 19 / 20 September 2021, nor the fact that he was initially suspended pending that investigation, was an act of race discrimination. When cross-examined by Ms Crew, the Claimant readily accepted that the fire was a serious incident that his employer would be expected to investigate. His complaint is that Mr Fenn and Mr Nowak's conduct was not investigated notwithstanding they instructed him to change the battery. In the course of his evidence at Tribunal, the Claimant said,

> *"You have to bring them in if the investigation is to be genuine".*

60. Effectively, the Claimant's complaint is that the investigation was unfair, that it was unduly focused upon his actions. However, the issue we have to determine is not whether he was treated unfairly but instead whether he was discriminated against. In our judgement, Mr Fenn and Mr Nowak are not direct comparators for the purposes of the Equality Act 2010, since the issue is not how others in the chain of command were treated, rather whether the Respondent would have treated a colleague who was of a different race to the Claimant and who was directly involved in changing a battery before a fire broke out, in the same way that it treated the Claimant. Put more simply, what would have happened had a non-black battery changer been identified as responsible for a fire within the warehouse? We consider that regardless of the protected characteristics of that person, any investigation, or certainly any investigation led by Mr

Nowak, who was inexperienced in such matters, would have focused on their actions as the principal actor in the matter. In circumstances where that person admitted to having not worn the prescribed PPE when undertaking the task and where their failure in that regard was confirmed on CCTV, then particularly given the potentially serious nature of the incident, we conclude that anyone in the Claimant's situation would have been suspended to facilitate an investigation. If there was an unduly narrow focus on the Claimant, that same narrow focus would have been the hallmark of the Respondent's (or more specifically, Mr Nowak's) approach regardless of the race or other protected characteristics of the battery changer on the night in question.

61. We have asked ourselves why the Claimant was treated as he was. The Claimant has not really put forward anything more than the fact of his race as an explanation for why he was treated as he was. He did not question any of the Respondent's witnesses as to their motives or attitudes to race, as to their awareness and insights, or otherwise, in respect of diversity and inclusion, or regarding how unconscious stereotyping might have informed their perception of the Claimant's actions and competence. We conclude that the reason the Claimant was investigated and suspended was because he was identified to be the immediate and principal actor in the handling of a battery that caught fire, in circumstances where his admitted failure to wear the prescribed PPE reasonably called into question his adherence to the Respondent's documented safe system of work.

62. Whilst the complaint fails as it has been identified in the List of Issues, we have gone on to consider the matter through the alternative lens deployed by the Claimant in his closing submissions. The Claimant submits that he was subjected to a detriment insofar as Mr Fenn and Mr Nowak were not formal investigated under the Respondent's disciplinary policy or suspended from their duties pending that investigation.

63. In Shamoon, it was said that in order to determine whether an employee has been subjected to detriment a Tribunal should ask itself whether the employee's treatment was such that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? We are satisfied that the Claimant's perception of how he was treated in comparison to Mr Fenn and Mr Nowak does not reflect an unjustified sense of grievance on his part. In our judgement, the Respondent's focus upon his actions to the exclusion of others' was something the Claimant reasonably considered impacted his position for the worse, put him at a disadvantage and was to his detriment. However, in our further judgement, the reason why those two individuals were not subjected to a formal disciplinary investigation is that by the time Mr Rafferty had a clearer view of the matter, including any management and systemic issues, the situation had moved on. Specifically, Mr Rafferty had a better understanding as to why there were differing views as to what amounted to a safe system of work when changing the battery on a truck that was VOR. Opening a further disciplinary investigation and suspending Mr

Fenn and Mr Nowak at that point in time would not have added anything further in terms of his understanding as to what had happened or in identifying how future risks might be mitigated. Mr Rafferty's approach was not to attribute responsibility or blame for the fire, or to seek to punish, rather it was to learn from what had happened, to move on and to implement necessary changes to ensure a safer working environment (or, as the Claimant contends, to secure immediate clarification as to the documented safe system of work). Mr Rafferty's balanced and sensible approach had nothing whatever to do with the Claimant's or Mr Fenn's or Mr Nowak's race.

<u>Issue 1.b.</u>

64. The Respondent's failure to issue the invitation to the disciplinary meeting on 7 October 2021 to the correct email address reflected well documented administrative incompetence within the Respondent's HR team. The errors in relation to the 30 September 2021 investigation meeting invitation speak volumes as to the Respondent's inability to get even the basics right, including its failure to correct the incident details even after its error was pointed out in fairly explicit terms by Mr Nowak. The error in relation to the letter sent by email on 5 October 2021 was not, as the Claimant alleges, evidence that Mr Rafferty planned to sack him in his absence. His allegation in that regard is entirely at odds with Mr Rafferty's actions: in postponing the meeting; in listening carefully to what the Claimant and his representative had to say at the subsequent two meetings; in lifting the Claimant's suspension at the first opportunity; in imposing a first written warning in circumstances where dismissal may have been justified; and in not upholding four of the five allegations of misconduct. In any event, the errors sat with the Respondent's HR team, Mr Rafferty was not responsible for sending the letter.

65. The Claimant has failed to establish the necessary primary facts, let alone that the Respondent's failure to invite him to the meeting on 7 October 2021 was an act of race discrimination by a member of the Respondent's HR team. The Claimant's complaint fails.

<u>Issue 1.c.</u>

66. The List of Issues does not elaborate as to which processes were allegedly not followed by the Respondent. Insofar as Mr Nowak seems to have undertaken two investigations, or an investigation in two stages, that was his inexperience in the matter rather than anything to do with the Claimant's race, as was Mr Nowak's decision on 30 September 2021, acting on HR advice, to proceed in the absence of the Claimant and thereafter to escalate the matter to the next stage of the disciplinary process. As we have said already it reflects poor practice on the part of the Respondent, borne we think of poor HR advice. Whilst it amounts to unreasonable conduct on the part of the Respondent, it does not provide grounds from which to infer that the Claimant was discriminated against

because of his race. In our judgement, all it evidences is ongoing administrative incompetence on the part of the Respondent.

67. Beyond the failure to invite the Claimant to the disciplinary hearing on 7 October 2021, we cannot identify any further matters that are said to amount to a contravention of the Respondent's documented procedures.

68. The Claimant complains that his suspension was lifted without explanation. Whilst it might have been helpful for that explanation to have been provided in the Respondent's letter of 12 October 2023, its omission was not a breach of the Respondent's disciplinary policy. The reason why this information was omitted from the letter was not a matter of the Claimant's race, rather Ms Hambling's failure to appreciate, or perhaps even give thought to the fact, that this was a matter of importance to the Claimant. Given how quickly the letter was issued to the Claimant (according to the Claimant it was within minutes of his meeting with Mr Rafferty concluding), it suggests to us that Ms Hambling's and Mr Rafferty's focus and priority was to communicate the lifting of the suspension as quickly as possible in order to alleviate the stress the Claimant was perceived to be under. That had nothing whatever to do with the Claimant's race. It reflected the Respondent's (or certainly Mr Rafferty's) concern for an employee who was experiencing a high degree of stress as a result of an unwelcome disciplinary investigation into a serious matter.

69. The Claimant's complaint fails.

<u>Issue 1.d.</u>

70. The Claimant complains that his grievance was not dealt with within a reasonable timescale. His complaint , as identified in the List of Issues, is not about poor communication. He submitted his claim to the Tribunals on 26 January 2022, so that it is the period up to that date that we are concerned with.

71. Mr Nowak's absence in December 2021 delayed Mr Day's investigation. We were not told when, in January 2022, Mr Day returned to work following the Christmas holidays. However, having met with the Claimant for one and a half hours on 12 December 2021, there were evidently quite a number of issues for him to look into. He had to balance this with his ongoing day to day responsibilities. Mr Day met with Mr Nowak on 11 January 2022 and thereafter with Mr Rafferty on 19 January 2022. His enquiries were ongoing on 26 January 2022 when the Claimant presented his first claim to the Tribunal. In our judgement, assuming Tuesday 4 January 2022 was Mr Day's first day back at work following the New Year Bank Holiday, 22 days does not amount to an unreasonable delay in providing a response on the grievance, nor indeed five weeks which is the time it took from 4 January 2022 for Mr Day to issue his comprehensive six-page letter addressing each of the Claimant's complaints in turn. The

primary facts have not been established in relation to the specific complaint identified in the List of Issues. In any event, the length of time taken by Mr Day was nothing whatever to do with the Claimant's race. It was initially caused by Mr Nowak's absence and thereafter by Mr Day's evident desire to provide the Claimant with a detailed and thorough response in relation to his issues of concern.

The second claim

72. As regards the Claimant's second claim, we must first decide whether the Claimant was constructively dismissed by the Respondent and, only if he was, then go on to consider whether his constructive dismissal was an act of direct race discrimination.

73. We have identified above the four matters that informed the Claimant's decision to resign his employment. Our conclusions in relation to them are as follows.

74. In circumstances where the Claimant was the subject of an ongoing disciplinary process, the Respondent did not act without reasonable and proper cause in preventing him from changing batteries following his return to work after his suspension was lifted. However, it failed to advise the Claimant at the point his suspension was lifted that this would be the case and it later failed to arrange relevant training for the Claimant once the disciplinary process had concluded with the imposition of a first written warning. It also failed to apprise the Night Operations Team of the situation and in turn they failed to take the matter up with the Claimant.

75. Mr Day upheld these various failings as part of his decision on the Claimant's grievance. In our judgement this was not simply a matter of depriving the Claimant of certain of his duties. Instead, it lent an impression that the Claimant remained under suspicion. In our judgement the Respondent acted in these matters without reasonable and proper cause, as Mr Day effectively accepted in his grievance findings. Looked at objectively, the Respondents actions (or lack of action) was conduct that went to the heart of the Claimant's ability to have continued trust and confidence in the Respondent as his employer in circumstances where his conduct and/or competence, and accordingly his reputation, seemed to remain in doubt. The Claimant resigned in response to the Respondent's conduct. In our judgement he did not waive his right to rely upon these breaches or affirm the contract by participating in the grievance process and waiting approximately sixty days from his meeting with Mr Day before concluding, in the absence of any decision from him, that he would wait no longer but instead treat the breaches as bringing the employment relationship to an end. It does not matter that, in resigning his employment, the Claimant relied upon other matters that, for reasons we shall come to, did not amount to fundamental breaches of his employment contract.

76. The Claimant was not illegally or unlawfully suspended from his employment as he asserts. His suspension was in accordance with the Respondent's documented policy and procedure. Regardless of the provisions of the disciplinary policy, the Respondent plainly acted with reasonable and proper cause in the circumstances described in our findings above.

77. Acting through Mr Rafferty, the Respondent acted with reasonable and proper cause in deciding to issue the Claimant with a first written warning on 21 October 2021. As we have said already, it is irrelevant that the warning was set aside on appeal. Whilst an appeal can serve to remedy a breach of contract, in this case there was no breach to be rectified. Mr Smith simply came to a different, equally valid decision. Their respective decisions sat firmly within the range of reasonable responses to the misconduct found to have been committed by the Claimant.

78. Neither Mr Nowak nor Mr Rafferty breached trust and confidence in having a different understanding and view to the Claimant as to the relevant safe system of work or more generally as to the practice of removing batteries from trucks that were VOR. Their views were genuinely and reasonably held. Where differing but genuinely and reasonably held views exist within a business regarding risks, and their management, we cannot see how it can be said that this fact of itself is destructive of trust and confidence.

79. We return then to the question of whether the Claimant's constructive dismissal was an act of direct race discrimination. We have looked at who was responsible for the issues referred to at paragraph 74 above: Ms Hambling wrote the email that lifted the Claimant's suspension; Mr Rafferty and / or an unidentified HR Advisor wrote the letter of 21 October 2021; the Respondent's Training Department failed to arrange the requisite training (and Mr Rafferty perhaps failed to chase the matter up with them); and the Night Operations Team, whoever they may have been, failed to ask the Claimant why it was that he was still restricted from undertaking battery changing duties. We have asked ourselves why all of this happened. In our judgement, it is inherently unlikely that each of these various individuals was motivated or influenced, even subconsciously, by the Claimant's race in respect of this one very specific matter but not more generally. The much more likely explanation, and the reason we find for the Claimant's treatment, is that oversight of the resumption of his duties fell through the gaps given the number of people involved, particularly as the process of managing the Claimant's return following his suspension was not supported by the input of an experienced, robust and consistent HR resource.

80. Whilst, therefore, the Claimant was constructively dismissed by the Respondent, his second claim that this amounted to direct race discrimination is not well founded and is dismissed.

Employment Judge Tynan

Date: 5 July 2023

Sent to the parties on: 24 July 2023

For the Tribunal Office.