EMPLOYMENT TRIBUNALS

BETWEEN

PHILIP RUSH

Claimant

AND

WILTS & DORSET BUS COMPANY LTD

Respondent

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD at Southampton **ON** 2 to 4 August 2023

EMPLOYMENT JUDGE H Lumby **MEMBERS** P English
M Richardson

Representation

For the Claimant: In person
For the Respondent: Ms R Jones of counsel

JUDGMENT

The unanimous judgment of the tribunal is that:

(a) the claimant's claims for discrimination and harassment on grounds of race are dismissed;
(b) the claimant succeeds in his claim for unlawful deduction from wages against the respondent and the respondent is ordered to pay the claimant the gross sum of £202.52 comprising unpaid sick pay of £97.50, unpaid holiday entitlement of £104 and unpaid overtime of £4.02
(c) the claimant's claims are otherwise dismissed

REASONS

1. In this case the claimant Mr Rush claims that he has been discriminated against because of a protected characteristic, namely his race. The claim is for direct discrimination and harassment. He also brings claims for unlawful deduction of wages relating to the non-payment and the loss of overtime, the non-payment of holiday pay and the non-payment of sick pay. Finally, he questions whether he is on the correct pay grade and so correctly remunerated. The respondent contends that there was no discrimination. They accept that he is owed sick pay amounting to £97.50 and overtime amounting to £2.04 but otherwise contend that he has been correctly paid and is on the correct grade.
2. The documents that we were referred to are in a bundle of 362 pages, the contents of which we have recorded. The order made is described at the end of these reasons.
3. We have heard from the claimant. For the respondent we have heard from Ms Jones and two witnesses, Paul Weller and Richard Wade. Mr Weller was until 30 September 2022 the operations manager at the bus depot where the claimant worked and has now retired. Mr Wade is the general manager at the respondent. We received witness statements from the claimant, Mr Weller and Mr Wade.
4. There was a degree of conflict on the evidence. We have heard the witnesses give their evidence. We found the following facts proven on the balance of probabilities after considering the whole of the evidence, both oral and documentary, and after listening to the factual and legal submissions made by and on behalf of the respective parties.

Facts

5. The claimant is an Iranian national, this is agreed as his protected characteristic for the purposes of this case. He commenced work on 18 November 2013 with Hants & Dorset Motor Services Limited, transferring to the respondent on 26 October 2014, working as a PCV driver. He is currently also studying for a degree and is based at the respondent's Bournemouth depot.
6. The respondent operates a public bus service, operating a fleet of buses over defined routes to specific timetables. The service typically starts early in the morning and continues until late into the night.
7. The RMT union was recognised for the purposes of his employment and entered into a collective agreement with the respondent, governing the claimant's terms and conditions.
8. Drivers apply to be on specific rotas which can vary from week to week. They are guaranteed a minimum level of hours of pay, irrespective of how long they work. Rotas are in practice for longer hours and require early starts or late finishes, reflecting the respondent's hours of operation. The earlier starts tend to be more popular with drivers.

9. In 2015, the claimant had raised with Mr Wade concerns about his pay grade. This was looked into by Mr Wade, who realised he was on the wrong grade. He arranged for the claimant to be placed on the B393 grade level and back pay to be paid to him.
10. On 13 October 2019, the claimant emailed Mr Wade requesting a "rescheduling my work time pattern" and citing the needs of his partner (see page 159 of the bundle). The claimant states that his objective was to be moved to earlier shifts although in practice he was generally being swapped into earlier shifts in any event.
11. Mr Wade did not reply for some time, citing uncertainty as to the nature of the request.
12. On 28 January 2020 Mr Wade informed the claimant that he could not accommodate the claimant's request to finish always by between 5pm and 7pm but pointing out that it was happening due to the swaps he was entering into in any event.
13. The tribunal finds that Mr Wade did not delay unduly in dealing with the request. Nothing has been provided to suggest that this was less favourable treatment. We find that the delay was not related to his race and there is nothing to suggest that it was. In addition, the tribunal finds that the refusal was not motivated by reason of race and again there is nothing to suggest that it was. The delay in responding was due to confusion as to the nature of the request, the refusal was a reasonable management decision based on the way the rotas worked. It was not practical to allow individual drivers to unpick this system.
14. The first lockdown followed and the claimant did not pursue his request for an earlier finish time at this stage, until September 2020. He argues that this period should count as delay in dealing with his request but the tribunal finds that his initial request had been dealt with by the January refusal. There was no ongoing request for the respondent to respond to.
15. On 11 September 2020, the claimant emailed Mr David Lee-Kong, the operations director for the respondent, in relation to late working and the fact that this was causing him mental distress (as opposed to his wife, which was mentioned in the first application). He followed up with another email on 20 September 2022 asking to be able to finish work by no later than 3pm (see pages 165 and 167 of the bundle).
16. Mr Lee-Kong responded on 29 September, explaining that he had discussed this with Mr Wade and it had been agreed that Mr Wade and Mr Weller would meet with him "without further delay to discuss your request and see if it can be accommodated".
17. Following this, one of two newly created posts was offered to the claimant on 16 October 2020, working on a standby rota in the depot. The claimant would begin at 5am and finish by 1pm unless he had any ongoing duties. The claimant acknowledged that this role and the hours worked fulfilled his needs.
18. The claimant claims that the time taken to address his request was unacceptable and arose due to discrimination because of race. The tribunal

has already made findings on the first application. We find that this was a separate application which was dealt with expeditiously from application to conclusion. The tribunal finds no basis for complaint by the claimant. It finds no unfavourable treatment and no evidence that the process was delayed in any way by reason of his race. It was dealt with promptly by the respondent and very much in accordance with the claimant's wishes, even though it had no reason to do so. It was very much favourable treatment.

19. As a new role, this was created on a temporary basis, with a review every three months. The claimant brought a formal grievance in relation to this in October 2020, maintaining that three monthly review was worsening his anxiety and that his mental health condition was not being taken seriously.
20. The claimant approached Mr Lee-Kong with this grievance on 4th November 2020, who referred him the next day to the grievance policy and to Mr Wade as his line manager. A meeting was promptly arranged by Mr Wade and occurred on 16 November 2020. Mr Wade explained by a letter on the same date that the new role was operating as a trial and therefore could not be made permanent at this stage. He provided reassurance that "although nothing can ever be certain, we are very likely to continue the arrangement provided you are performing well in the role and that the business needs don't significantly change" (page 186 of the bundle).
21. The claimant claims that the three monthly reviews forms part of his complaint about the respondent not taking his complaints about excessive hours seriously and arose due to discrimination because of race. The tribunal finds no evidence that the decision to review the role every three months was in any way unfavourable treatment or by reason of his race. In addition, it finds that there were reasonable business reasons to keep a new role under review and finds no basis for complaint by the claimant. His desire for a guaranteed early finish had been addressed and his complaints in relation to it promptly addressed. It is noted that throughout this whole process, no suggestion was made by the claimant that any action or delay was as a result of his race. It is further noted that, although the claimant's claim is that the respondent did not take his complaints about excessive hours seriously, there was no evidence that this was his complaint – instead, his motivation was to be able to finish in sufficient time to allow him to study and look after his wife. Starting earlier, as he requested, did not reduce the numbers of hours he wanted to work, merely the time of day when this occurred.
22. The claimant began to question the basis of remuneration for his new role and in particular whether he was paid correctly for overtime worked. He also questioned the basis upon which holiday pay was calculated; this included in due course complaints about what are referred to as lieu days – extra days holiday paid if certain bank holidays were worked. He also subsequently raised complaints about the calculation of sick pay.
23. The claimant refers to an incident which occurred with Mr Weller when he raised the calculation of his pay in his new role with him. It was established during evidence that this occurred on a Saturday in November 2020 when

Mr Weller was in the office working on the Christmas rota. He had come in specially on a Saturday to work on this in peace and without interruption. The claimant approached him with questions which Mr Weller was not able to answer quickly. When the claimant persisted with questioning, Mr Weller raised his voice and told him to leave his office; Mr Weller accepts that he used bad language.

24. The claimant says that this incident was the other instance of direct discrimination of him on grounds of race. The tribunal finds that there is no evidence at the time or in the parties' subsequent behaviour for this. At no point until the claim was brought did the claimant even refer to race, even though he continued to raise questions about his pay. The reaction of Mr Weller was unfortunate and one which he regrets. There was no evidence that it was unfavourable treatment compared to anyone else or a hypothetical comparator. The tribunal finds that the reason for it was exasperation at the claimant when he was trying to finalise a rota.
25. The claimant asked Mr Wade on 29 November 2020 to explain the overtime arrangements, which he does at some length in an email on 8 December 2020 (page 187 of the bundle). It is noted that there is no mention of Mr Weller's behaviour in the claimant's query.
26. On 25 January 2021 the claimant's position on the standby rota was extended for a further three months, subject to review at the end of that period.
27. The claimant has claimed that he was subjected to harassment by Mr Wade on the grounds of his race. He cites two instances, first an incident in the canteen on an unspecified date and secondly an exchange of emails in March 2021.
28. There is conflict between the parties as to the incident in the canteen. The claimant asserts that Mr Wade, by purportedly making a comment about the claimant knowing the canteen well, was accusing him of laziness. Mr Wade does not recall the incident precisely but surmises it was in relation to finding some information published there. He denies any suggestion that he expressly or impliedly said the claimant was lazy, nor does he consider him to be lazy.
29. The tribunal finds that there was a comment made in relation to the claimant knowing the canteen better than Mr Wade. As the claimant was based at this depot, this was to be expected. The tribunal finds that the suggested comment was not to imply any laziness by the claimant and he has misconstrued this. There is no evidence that the comment was motivated in any way by race. It finds that it was not made with the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Furthermore, although the claimant has sought to claim it had that effect, the tribunal finds that it was not reasonable for him to reach that conclusion.
30. On 24 March 2021, at 20.06, the claimant emailed Mr Wade as follows (see bundle page 197):

"Just a quick inquiry regarding my pay for week 28.
I have worked from 0500 till 14:45 covered duty 8107 but I have been paid only a 29 minute for it. I need this to be corrected soon as possible, please. How do sounds like to you? Finish an hour and forty-five minutes late and paid only 29minut?
Disgraceful."

31. The claimant contends that this is a polite email and the word 'disgraceful' is not insulting as it does not refer to either the respondent and/or Mr Wade.
32. Mr Wade replied the following day at 09:08 (the response is at page 196 of the bundle). He explained the basis of the pay, stating that the pay was correct. He then goes to say:

"Firstly, you have skipped two levels of managers in coming to me, Secondly, DO NOT use the word "disgraceful" when addressing me in an email ever again. Your opinion is, in my view, and as part of a team that works many additional unpaid hours to keep this business afloat and satisfy the personal complaints of many people who make demands on my time, I have very different feelings towards this than you do and I will not tolerate such rudeness from people who don't want to work in the best interests of the company. You have a very fortuitous position in that most of the time you are paid to spend your time being available and you busy yourself with your own interests, at £11.80 per hour. When the company can foresee it doesn't need you, then you will not enjoy this privilege.

I understand that Paul recently extended your time period on this rota, which is not for your exclusive benefit but for the company's too. If you do not wish to continue with the trial please advise Paul in writing and he will return you to a different rota at the next opportunity."

33. The claimant says that this email was racial and threatening. He considered it to be a threat that he would lose his job if he raised issues. It violated his dignity, took four to five months to digest, making him fearful to approach Mr Wade and took away his rights.
34. Mr Wade told the tribunal that he regretted the tone adopted in his email and apologised during the hearing to the claimant in unequivocal terms. He said that the use of the word "disgraceful" was insulting to him and he responded out of annoyance at that in a manner which he should not have. He did not intend the email to be threatening to remove the claimant's job but was simply a reference to his paid breaks (the claimant had paid breaks in his new role whatever the length except when on duties, whilst other drivers were not paid for breaks over 30 minutes). He accepts with hindsight it could be construed that way. He states that it was in no way motivated by or related to race.
35. The tribunal finds no evidence that Mr Wade's email was related to race. It also notes that in subsequent complaints about this email, the claimant did

not suggest it was related to race. The tribunal finds that the use of the word 'disgraceful' by the claimant was capable of being construed as rude. Mr Wade's reply was unwanted and had the effect of creating an intimidating and hostile environment for the claimant, even if that was not its purpose.

36. On 29 March 2021, the claimant raised the issue of his overtime pay with Mr Lee-Kong who the next day advised him to follow the grievance procedure. A formal grievance was raised in relation to Mr Wade's email on 19 April 2021, again with Mr Lee-Kong and formally submitted to HR on 12 August 2021.
37. The claimant ceased to work overtime on the grounds that he was not being paid properly for this.
38. On 23 April 2021, the claimant's role was extended for a further three months.
39. The grievance hearing took place on 1 September 2021, covering Mr Wade's email for which an apology was sought, as well as a request for fixed break times in his standby role, clarity on overtime and a fixed cut off time for work. The claimant did not raise race as a reason for Mr Wade's email. It was explained that the lack of a fixed break was compensated for by being paid all his break but breaks are deducted when doing duties. A fixed cut off of 5pm was agreed and Mr Wade agreed to be in touch for a conversation.
40. The claimant had a right to appeal the outcome but instead stated that he did not agree it and instead would forward it to an external body.
41. The claimant was off sick for a while after the hearing outcome was given and so Mr Wade decided to apologise for his email in writing (see page 219 of the bundle). The claimant does not accept that this is a proper apology. The tribunal finds that is a proper apology.
42. The claimant continues to work for the respondent and is now in a permanent role with which he is happy.

Law

43. Having established the above facts, we now apply the law.

Unlawful deduction of wages

44. The claimant claims in respect of deductions from wages which he alleges were not authorised and were therefore unlawful deductions from his wages contrary to section 13 of the Employment Rights Act 1996.
45. Under section 24(2) of the Act, where a Tribunal makes a declaration that there has been an unlawful deduction from wages it may order the employer to pay such amount as a Tribunal considers appropriate in all the circumstances to compensate the worker for any financial loss sustained by him which is attributable to the matter complained of.
46. The claimant also claims in respect of holiday pay for accrued but untaken holiday under the Working Time Regulations 1998 ("the Regulations").

Regulation 14 explains the entitlement to leave where a worker's employment is terminated during the course of his leave year, and as at the date of termination of employment the amount of leave which he has taken is different from the amount of leave to which he is entitled in that leave year. Where the proportion of leave taken is less than that which he is entitled, the employer is required to make a payment in lieu of leave in accordance with Regulation 14(3). In the absence of any relevant agreement which provides for payment of accrued leave, then the sum is calculated according to the formula (A x B) – C. For the purposes of this formula A is the period of leave to which the worker is entitled under Regulations 13 and 13A; B is the proportion of the worker's leave year which expired before the termination date; and C is the period of leave taken by the worker between the start of the leave year and the termination date.

47. The Deductions from Wages (Limitation) Regulations 2014 apply to claims issued on or after 1 July 2015. These regulations have introduced section 23(4A) to the Employment Rights Act 1996 which limits claims for unlawful deductions to the period of two years ending with the date of presentation of the complaint.

Holiday Pay

48. The claimant claims that the respondent failed to pay the claimant for annual leave at the correct rate. He contends that holiday pay in respect of bank holidays ought to have been paid at his annual weekly earnings, rather than guaranteed weekly earnings based on an eight hours per day.
49. The specific claim relates to lieu days taken on 20 to 23 July 2023.
50. Lieu days are dealt with in Part 1 of Schedule 3 of the collective agreement. This provides at paragraph 11 that the "rate of pay for Bank and Public Holidays taken on the day, or taken later as a lieu, shall be a proportion of the holiday pay rates, as set out in Schedule 2". The information referred to in Schedule 2 has not been provided. However, we find that the payment for the lieu days should have been calculated by reference to holiday pay not basic pay.
51. Holiday pay is calculated on a 52 week average, the claimant has stated on page 58 of the bundle that correct holiday pay is calculated on this basis is 9.54 hours and this has not been denied. We therefore find that the holiday pay payable for these four days should have been calculated on the basis of his rate of pay (£13 per hour) multiplied by 9.54 hours a day.
52. He was actually paid on the basis of 7.54 hours a day and therefore has been underpaid by two hours per day. Four days at two hours a day gives a shortfall of eight hours. Applying the £13 per hour rate to this, the tribunal determines that he has been underpaid by £104 and that this amount is due from the respondent to him.

53. The claimant has also claimed an uplift for non-compliance with the ACAS code. The tribunal finds no non-compliance and does not consider any uplift appropriate.

Sick pay

54. The claimant claims that the rate at which sick pay is calculated should be by reference to average weekly earnings whilst the respondent asserts it should be calculated by reference to base hours (ie the guaranteed paid hours). However the collective agreement (at page 116 of the bundle, paragraph 3a) clearly states that the contractual sick pay is such amount as would supplement statutory sick pay "up to the appropriate basic rate for the guaranteed week". It is therefore clear that sick pay is calculated by reference to the basic hours not the average weekly earnings.
55. The claimant's guaranteed week has in fact increased over the course of the contract, rising in August 2022 to 40 hours a week. The respondent has identified that his sick pay for the period from 7 August 2022 to 12 November 2022 was calculated on the basis of a 39.5 hourly week when it should have been calculated by reference to a 40 hour week. He has therefore been underpaid by 30 minutes each week for this period, which works out at £6.50 a week based his hourly rate then of £13 per hour. This amounts to £97.50 which the tribunal determines is payable by the respondent to the claimant.
56. In addition, the collective agreement provides that sick pay is not paid for the first three days of sick leave (see 2a) on page 115 of the bundle. The claimant accepts this and sought to alleviate this by taking lieu days on the first three days of sick leave in July 2022. Nothing in the bundle prevents lieu days being on the same days as sick days. These lieu days have, however, been accounted for under the Holiday Pay section above and so nothing further is payable.
57. The claimant has also claimed an uplift by reference to the ACAS code on the sums due but the tribunal finds that no uplift is appropriate, this is simply an oversight.
58. The claimant's claims in relation to sick pay are otherwise dismissed.

Unpaid overtime

59. The claimant is currently guaranteed a minimum of eight hours pay per day. The nature of his role meant that he was paid during the breaks, unlike other drivers who under the collective agreement would not be paid for breaks of 31 minutes of more. If he was appointed to a duty on a particular day, he would be paid for that duty, including any extra time spent by him over his minimum contractual hours. However, if that duty contained a break of 31 minutes or more, he would not be paid for that break, on the basis that such breaks were not paid under the collective agreement (see p106 of the bundle).

60. The claimant objected to not being paid for those breaks and claims for them. He has set out the days for which he claims he was so underpaid.
61. Mr Wade has analysed all the claimed underpayments in his witness statement and cross-referred to supporting evidence in the bundle. He identifies one underpayment – on 14 February 2022, in respect of an allocation of 20 minutes signing off at the end of his duty. The tribunal has considered this analysis and finds that it is accurate.
62. The claimant therefore succeeds in his claim for unpaid overtime in respect of the 20 minutes on 14 February 2022. Based on his then hourly rate of £12.05, this amounts to £4.02 which is payable by the respondent to the claimant. The other claims for overtime are dismissed, together with the request for an uplift pursuant to the ACAS code, on the basis that no such uplift is justified.

Unworked overtime

63. The claimant claims that he stopped working overtime because he considered he was not being paid the correct amount for overtime worked. This is considered above. He claims that he should in any event be paid for the overtime he would have undertaken if he had worked this.
64. The tribunal considers that overtime should only be paid for overtime worked. There is no entitlement to overtime if an employee refuses to work overtime, except in exceptional circumstances. The tribunal has identified no exceptional circumstances here, contractual or otherwise. This was an entirely voluntary choice by the claimant. This claim is therefore dismissed.

Pay grade

65. The claimant raised a query about his pay grade and therefore whether he was receiving the correct pay. He had previously agreed with Mr Wade that he would be on level BB393 but the information accompanying certain payslips referred to his level at BB01. The tribunal finds that this was simply a computer error, that he was on level BB395 and paid accordingly. Any claim in relation to his grade is therefore dismissed.

Discrimination and harassment

66. This is also a claim alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 (“the EqA”). The claimant complains that the respondent has contravened a provision of part 5 (work) of the EqA. The claimant alleges direct discrimination, indirect discrimination, harassment; and victimisation.
67. The protected characteristic relied upon is race, as set out in sections 4 and 9 of the EqA.

68. As for the claim for direct discrimination, under section 13(1) of the EqA 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.
69. The definition of harassment is found in section 26 of the EqA. A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B.
70. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an employment tribunal.
71. We have also considered section 207A of the Trade Union and Labour Relations (Consolidation) Act 1992, and in particular section 207A(2), (referred to as "s. 207A(2)") and the ACAS Code of Practice 1 on Disciplinary and Grievance Procedures 2009 ("the ACAS Code").
72. We have considered the cases of Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] IRLR 285 HL; Igen v Wong [2005] IRLR 258 CA; Madarassy v Nomura International Plc [2007] ICR 867 CA; Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham [2018] EWCA Civ 564 Betsi Cadwaladr University Health Board v Hughes and Ors EAT 0179/13; Ahmed v the Cardinal Hume Academies EAT 0196/18; Grant v HM Land Registry [2011] EWCA Civ 769; and Richmond Pharmacology v Dhaliwal [2009] ICR 724 EAT. We take these cases as guidance, and not in substitution for the provisions of the relevant statutes.

Direct discrimination

73. With regard to the claim for direct discrimination, the claim will fail unless the claimant has been treated less favourably on the ground of his race than an actual or hypothetical comparator was or would have been treated in circumstances which are the same or not materially different. The claimant needs to prove some evidential basis upon which it could be said that this comparator would not have suffered the same allegedly less favourable treatment as the claimant.
74. In Madarassy v Nomura International Plc Mummery LJ stated: "The Court in Igen v Wong expressly rejected the argument that it was sufficient for the claimant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of

probabilities, the respondent had committed an act of discrimination". The decision in Igen Ltd and Ors v Wong was also approved by the Supreme Court in Hewage v Grampian Health Board. The Court of Appeal has also confirmed that Igen Ltd and Ors v Wong and Madarassy v Nomura International Plc remain binding authority in both Ayodele v Citylink Ltd [2018] ICR 748 and Royal Mail Group Ltd v Efobi [2019] EWCA Civ 18.

75. The principles to be applied in determining a direct discrimination claim are as follows. In every case the tribunal has to determine the reason why the claimant was treated as he was (per Lord Nicholls in Nagarajan). This is "the crucial question." It is for the claimant to prove the facts from which the employment tribunal could conclude that there has been an unlawful act of discrimination (Igen Ltd and Ors v Wong), i.e. that the alleged discriminatory has treated the claimant less favourably and did so on the grounds of the protected characteristic. Did the discriminator, on the grounds of the protected characteristic, subject the claimant to less favourable treatment than others? The relevant question is to look at the mental processes of the person said to be discriminating (Advance Security UK Ltd v Musa [2008] UKEAT/0611/07). The explanation for the less favourable treatment does not have to be a reasonable one; it may be that the employer has treated the claimant unreasonably. The mere fact that the claimant is treated unreasonably does not suffice to justify an inference of unlawful discrimination to satisfy stage one (Ladele).
76. Where the claimant has proven facts from which conclusions may be drawn that the respondent has treated the claimant less favourably on the ground of the protected characteristic then the burden of proof has moved to the respondent. It is then for the respondent to prove that it did not commit, or as the case may be, is not to be treated as having committed, that act. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic. That requires the Tribunal to assess not merely whether the Respondent has proven an explanation, but that it is adequate to discharge the burden of proof on the balance of probabilities that the protected characteristic was not a ground for the treatment in question.
77. The burden of proof does not shift to the respondent simply on the claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that the respondent had committed an unlawful act of discrimination (Madarassy). "Could conclude" must mean that "a reasonable Tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the claimant in support of the allegations of discrimination. It would also include evidence adduced by the respondent contesting the complaint.
78. The tribunal needs to consider all the evidence relevant to the discrimination complaint, that is (i) whether the act complained of occurred at all; (ii)

evidence as to the actual comparator(s) relied on by the claimant to prove less favourable treatment; (iii) evidence as to whether the comparisons being made by the claimant were of like with like; and (iv) available evidence of the reasons for the differential treatment.

79. The circumstances of the comparator must be the same, or not materially different to the claimant's circumstances. If there is any material difference between the circumstances of the claimant and the circumstances of the comparator, the statutory definition of comparator is not being applied (Shamoon). It is for the claimant to show that the hypothetical comparator in the same situation as the claimant would have been treated more favourably. It is still a matter for the claimant to ensure that the Tribunal is given the primary evidence from which the necessary inferences may be drawn (Balamoody v UK Central Council for Nursing Midwifery and Health Visiting [2002] IRLR 288).
80. It is accepted that the claimant's protected characteristic is that he is an Iranian national and his claim for discrimination is brought on grounds of race. He claims his comparator is a notional non-Iranian employee.
81. He claims that there are two incidences of direct discrimination, the first being the slow response to his complaints about excessive hours of work and the second his treatment by Mr Weller when he approached him about his pay in November 2020.
82. We have considered these two complaints in the facts above. We have found that there was no material delay in dealing with his requests for earlier starts (not as stated a reference to excessive hours) and that these were addressed in a reasonable manner. There was no evidence that any decisions related to race, no reference to a comparator or less favourable treatment and no evidence of discrimination.
83. We have found that Mr Weller's comments to the claimant were not appropriate but again there is no evidence that this related to race, there is no evidence a comparator would be treated less favourably and there is no evidence of discrimination.
84. In this case, we find that no facts have been established upon which the tribunal could conclude (in the absence of an adequate explanation from the respondent), that an act of discrimination has occurred. In these circumstances the claimant's claim of direct discrimination fails.
85. If the tribunal is incorrect on these facts, we have gone on to consider whether the respondent is able to prove a reason for the two treatments occurring for a non-discriminatory reason not connected to race. In both cases, we are satisfied that the respondent has proved such reasons.
86. In the first case, any delays were caused by difficulty understanding the request, by volume of work and by taking reasonable business decisions.
87. In the second case, the behaviour was caused by annoyance at being interrupted when seeking quiet time to complete the rota.
88. The tribunal concludes that in both cases the explanations are adequate to discharge the burden of proof on the balance of probabilities that the protected characteristic was not a ground for the treatments in question.

89. In these circumstances the claimant's claim of direct discrimination also fails.
90. For all these reasons, the claimant's claim for direct discrimination is hereby dismissed.

Harassment

91. Turning now to the claim for harassment, A person (A) harasses another (B) if A engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of violating B's dignity, or creating an intimidating, hostile, degrading, and humiliating or offensive environment for B. The assessment of the purpose of the conduct at issue involves looking at the alleged discriminator's intentions. In deciding whether the conduct in question has the effect referred to, the tribunal must take into account the perception of B; the other circumstances of the case, and whether it is reasonable for the conduct have that effect (s26(4) EqA).
92. The Court of Appeal gave guidance on determining whether the statutory test has been met in Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham: "In order to decide whether any conduct falling within subparagraph (1)(a) has either of the proscribed effects under subparagraph (1)(b), a tribunal must consider both (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of subsection (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all other circumstances - subsection (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.
93. Whether unwanted conduct has the proscribed effect is matter-of-fact to be judged objectively by the Tribunal. Although the claimant's subjective perception is relevant, as are the other circumstances of the case, it must be reasonable that the conduct had the proscribed effect upon the claimant Betsi Cadwaladr University Health Board v Hughes and Ors. If it is not reasonable for the impugned conduct to have the proscribed effect, that will effectively determine the matter Ahmed v The Cardinal Hume Academies. It is well established that not all unwanted conduct is capable of amounting to a violation of dignity, or being described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Per Elias LJ in Grant v HM Land Registry at para 47 "Tribunal's must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

Similarly, Langstaff P emphasised in Betsi at para 12: “The word “violating” is a strong word. Offending against dignity, hurting it, is insufficient. “Violating” may be a word the strength of which is sometimes overlooked. The same might be said of the words “intimidating” etc ...”

94. The intent behind unwanted conduct will not be determinative. However, it will often be relevant, per Underhill P in Richmond Pharmacology v Dhaliwal [2009] ICR 724 EAT at para 17: “one question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt.”
95. The claimant relies on two incidents as the basis of his harassment claim. The first is the purported comment by Mr Wade in the canteen which the claimant has construed as an accusation of laziness. The second is Mr Wade’s email of 25 March 2021, in response to the use of the word ‘disgraceful’.
96. The tribunal has found that any comment made by Mr Wade in the purported incident was innocently made, was not related to race and was misconstrued by the claimant. Although he claimed that the comment was unwanted and it had the effect of offending him, that position was not in the circumstances reasonable. For those reasons, this could not amount to harassment.
97. The email of 25 March 2021 did amount to unwanted conduct and had the effect of creating an intimidating and hostile environment, even though that was not the intention. However, the comments in the email did not relate to race and so did not amount to harassment.
98. Accordingly, the claimant’s claim for harassment related to race is dismissed.

99. For the purposes of Rule 62(5) of the Employment Tribunals Rules of Procedure 2013, the issues which the tribunal determined are at paragraph 1; the findings of fact made in relation to those issues are at paragraphs 5 to 42 ; a concise identification of the relevant law is at paragraphs 44 to 47, 66 to 79 and 91 to 94; how that law has been applied to those findings in order to decide the issues is at paragraphs 48 to 51, 53 and 54, 56 to 61, 63 to 65, 80 to 90 and 95 to 98; and how the amount of the financial award has been calculated is at paragraphs 52, 55 and 62.

Employment Judge H Lumby
Date: 5 September 2023

Judgment sent to Parties: 26 September 2023

For the Tribunal Office