EMPLOYMENT TRIBUNALS

SITTING AT: **LONDON CENTRAL**

BEFORE: **EMPLOYMENT JUDGE F SPENCER**

MEMBERS: **MR R. PELL**
MR F BENSON

CLAIMANT **MR DE SILVA**

RESPONDENT **THE HIGH COMMISSION OF BRUNEI DARUSSALAM**

ON: **4,5, 8-10 January 2024**

Appearances:

For the Claimant: Mr J Sheng, counsel
For the Respondent: Mr J Davies, counsel a

RESERVED JUDGMENT

The Judgment of the Tribunal is that:

(i) The Claimants claims of discrimination because of race and/or religion or belief do not succeed.

(ii) The claim for failure to provide written particulars of employment does not succeed.

(iii) The Claimant's claim for holiday pay succeeds for part of the amount claimed. The Respondent is ordered to pay the Claimant £1,208* in respect of holiday accrued but not taken.

*NB This is the gross sum – any sums validly deducted and accounted to the Inland Revenue for tax or national insurance may be set off against this award

REASONS

Introduction

1. The Claimant was employed by the Respondent as a chauffeur from 16 March 1998 until he was dismissed on 17 October 2013. By a claim form presented on 6 December 2013 the Claimant bought claims of unfair dismissal, unlawful deduction of wages, statutory notice pay, holiday pay and discrimination because of race and religion/belief.

2. The Respondent initially presented a response to the claims asserting state immunity. The Claimant's claims were stayed pending a decision in the case of *Benkharbouche* v *Secretary of State for Foreign and Commonwealth Affairs*; *Secretary of State for Foreign and Commonwealth Affairs and Libya* v *Janah* [2018] IRLR 123. After that case was decided in late 2017 the Claimant chose not to pursue his claim on the basis that the government might issue a remedial order allowing him to progress his UK law based claims. That Remedial Order came into force on 2 February 2023 but only in respect of causes of action which arose after 18 October 2017.

3. Pursuant to the case management hearing on 9 June 2023, the Claimant's claims which relied solely on domestic law were dismissed; but he was permitted to continue his claim for rights derived from EU Law per *Benkharbouche* v *Secretary of State for Foreign and Commonwealth Affairs*; *Secretary of State for Foreign and Commonwealth Affairs and Libya* v *Janah* (above).

4. The remaining claims are therefore unpaid holiday pay, direct discrimination on grounds of race and religion and a failure to provide employment particulars. The need to wait for the law to be clarified has resulted in a lengthy delay between the issue of the claim and this hearing.

5. At a preliminary hearing on 7 November 2023 Employment Judge Brown declined to strike out the claim because a fair trial was no longer possible and/or for want of prosecution.

6. The issues At the Preliminary Hearing on 9 June 2023 and on 7 November 2023 the Claimant confirmed that acts of discrimination on which he relied were:

    (i) The Respondent giving him warning letters on 20 July 2012 and 24 August 2012.
    (ii) The Respondent making untrue allegations against the Claimant in the letters of 20 July 2012 and 24 August 2012.

(iii) The Respondent deciding to take disciplinary action against the Claimant as set out in the letters of 20 July 2012 and 24 August 2012.
(iv) Dismissing the Claimant by letter of 18 October 2013.
(v) Not responding to his grievance dated 6 August 2013.

7. The parties were ordered to produce a final list of issues by 28 November 2023. This was not done. The Claimant had also not provided a schedule of loss as ordered.

8. At the start of the hearing Mr Sheng produced a list of issues which added considerably to the issues identified above. (This had been given to Mr Davies some half an hour before the start of the hearing) Some of these issues did not appear in the original particulars of claim and would require an application to amend. It was not appropriate to simply produce a new list of issues in this way. Notwithstanding, after time in which to take instructions, Mr Davies told us that the Respondent did not object to the revised list of issues. We therefore allowed the amendments. The revised list of issues appears below.

9. We should, however, also say that the paper copy of the issues that Mr Sheng had handed up, and which the Tribunal worked from, was different to the copy that was emailed to the Tribunal on the second day. (The paper copy made no reference to the disciplinary issues which related to the congestion charge or the letters of 23 October 2012 – and these were not in the particulars of claim.) We did not notice this discrepancy until we met in chambers to discuss the evidence. In the end since, we had heard the evidence and Mr Davies had made submissions on those issues, we treated the expanded list as the final list of issues, though clearly this was an unsatisfactory way to proceed.

<u>The issues</u>
<u>Direct discrimination on grounds of religion and/or race</u>

10. Was the Claimant treated less favourably by the Respondent than his actual/ hypothetical comparator because of his race/religion considering the following:

a. The Respondent issued the Claimant warning letters on 20 July 2012, 24 August 2012 and 23 October 2012.
b. The Respondent made untrue allegations against the Claimant in the letters of 20 July 2012, 24 August 2012 and 23 October 2012.
c. The Respondent took disciplinary action against the Claimant as set out in the letters of 20 July 2012, 24 August 2012 and 23 October 2012
d. The Respondent did not investigate his grievance dated 7 September 2012
e. The Respondent suspended the Claimant from the role before its investigation by letter of 5 July 2013.
f. The Respondent ignored his grievance dated 31 July 2013.
g. The Respondent did not investigate his grievance dated 6 August 2013.

h. The Respondent did not respond to his grievance dated 6 August 2013.
i. The Respondent dismissed the Claimant by letter of 18 October 2013.
j. The Respondent decided the Claimant's appeal against the decision to dismiss him in his absence.
k. The Respondent dismissed the Claimant's appeal.

Unpaid holiday pay

11. Did the Respondent fail to pay the Claimant his accrued but untaken holiday?

12. To that list of issues we added a claim under section 1 of Employment Rights Act 1996 (failure to provide employment particulars) as this was pleaded in the original claim and was an EU derived right which had not been dismissed.

13. The Claimant's comparators for the purpose of his direct discrimination claim are Mr L Hanafi, Mr E Nayif and Mr A Abdesalam.

Evidence

14. The Tribunal heard evidence from the Claimant. We also heard evidence from Mr Abdullah, the High Commissioner at the time, and from Mr Ayup who was the Second Secretary at the High Commission at the time. We had a bundle of documents.

15. It is fair to say that all of the witness statements were short on detail and failed to address the issues in any comprehensive way. There was no evidence about the Claimant's holiday, whether he had taken any, what his holiday entitlement was, whether he had asked to take holiday but was refused, who he had asked and so forth. As to the alleged discrimination the factual matters relied on by the Claimant were not set out chronologically – instead the Claimant made a blanket assertion that he was framed. Equally the Respondent's witness statements do little more than set out the chronology of events as they appear from the documents in the bundle.

16. The evidence on both sides has been poor, and while some of this was, no doubt, because of the passage of time, there remained significant gaps in the evidence which could not be so explained. Much of the relevant evidence was not in the witness statements, or referred to in the pleadings, but emerged in cross examination or from Tribunal questions.

Relevant Facts

17. The Claimant was employed by the Respondent as a chauffeur on 16th March 1998. The Claimant is British of Indian heritage. He is Christian. The Claimant's comparators are Muslim, as are Mr Ayup and Mr Abdullah. Mr Nayif is Palestinian, Mr Juied is Moroccan. The Claimant accepted that there was no reason why Mr Abdullah would know his nationality. No questions

were asked about ethnic origin but the Claimant did accept that the drivers were from very diverse backgrounds.

18. The Claimant says that the Respondents knew that he was Christian as it was general knowledge among the drivers. He says he would talk about going to church. He said he had driven both Mr Ayup and Mr Abdullah, so they were aware. Mr Ayup accepted that he was aware that the Claimant was not Muslim from his name, though he told the Tribunal that he could not recall if he was aware that that the Claimant was Christian. Mr Abdullah said that he had never been driven by the Claimant and had only spoken to him briefly in the lift or in the lobby. He told the tribunal that he was not aware what the Claimant's religion was. We find that both Mr Abdullah and Mr Ayup were aware that the Claimant was not Muslim and, on the balance of probabilities, accept that they did not know whether the Claimant was Christian or of another faith.

19. The Claimant said that on average he worked about 140 hours a week despite his contracted hours being 40 hours a week. We do not accept that. 140 hours a week is 20 hours a day seven days a week, which is highly unlikely; although we do accept that he regularly worked over his contracted hours.

20. In the bundle there was a document headed "General conditions of service for locally engaged staff in Brunei commission" (147) together with an acceptance form signed by Claimant in which he accepted his appointment as a chauffeur on the terms and conditions stated. It is dated 11 March 1998. In cross examination the Claimant accepted that he was given these terms and conditions of employment. Then, in re-examination, he said that he had not received a copy. In his grievance (113) the Claimant asked to be sent copy of his employment contract while at the same time referring to "my current contract of employment which states that I am a chauffeur". Given the inconsistency of the evidence, and the fact that there is a signed copy in the bundle, we conclude that the Claimant was given a copy of his terms and conditions even if he did not recall them so many years later.

21. In 2009 the Claimant was asked to move to Leicester to act as Chauffeur to a Princess of the Brunei Royal Household while she was a student at the University. The Respondent provided a flat for the Claimant in Leicester and he relocated there. The Claimant says that the flat was maintained for him from 2009 until his dismissal in 2013 – although Mr Abdullah says that the Princess had finished her degree in June 2012. It is not clear whether the Claimant maintained his flat in Leicester until his dismissal.

22. From 1998 until July 2012 no disciplinary action was taken against the Claimant. Then, in the space of just over a year the Claimant received three formal warnings and was dismissed for various matters all related to his driving duties.

23. The first warning was issued to the Claimant on 20 July 2012 (reproduced as written) for:

> "(1) Offence of speed 38mph, exceed 30mph on restricted road (camera) on 22 May 2010 (Letter from Leicestershire Constabulary dated 23 June 2010);
>
> 2) Travelling at a speed of 93mph, 43mph in excess of the speed limit on 14 February 2011 (Letter from the Foreign & Commonwealth Office dated 22 February 2011);
>
> 3) Alleged offence of failure to conform red traffic light (camera) on 16 November 2011 (Letter from Leicestershire Constabulary dated 27 December 2011)".

24. The warning states that the conduct is deemed to be serious gross misconduct, a fundamental breach of trust and confidence and has tarnished the good name and image of the High Commission.

25. There was no disciplinary hearing prior to receiving this letter. Mr Abdullah said, in answer to a question from the Tribunal, that the practice of the High Commission was that the first 2 warning letters would not require a hearing. The Claimant says that while he did run a red light, he was not speeding and that the allegations against him are untrue. He says he was not prosecuted or convicted. We cannot say whether the Claimant was or was not speeding, but what is clear is that the Respondent had received notification from the Police (64) identifying that the BMW vehicle that the Claimant was driving had been speeding. It was therefore reasonable for the Respondent to accept that as being correct.

26. What is striking about the first warning, however, is that the offences were significantly out of date by the time the Claimant received his warning. The first speeding offence had been notified to the Respondent in June 2010, some two years before the first warning. The second speeding offence was some 17 months old before the Claimant received the warning, while the third was seven months old. We have had no explanation from the Respondent as to why, if they considered the matter to be so serious (and affecting the good name and image of the High Commission), they waited so long before issuing this warning. Neither witness for the Respondent was able to explain.

27. On 24th August 2012 the Claimant received a second warning (85) for:

    a. carelessness in taking reasonable care of the Respondent's car. It was noticed that the new engine had been replaced twice within a period of three years and had problems with the gearbox.
    b. Using the Respondent's car for his personal use.

28. No details were given of the journeys which the Claimant was alleged to have made for his personal use. The Claimant says that at this time he was in Leicester, he was driving the Princess around and was permitted to take the car back to his flat in Leicester, and that he had never used the car for his personal use. Mr Abdullah says (in response to Mr Benson) that the

Princess was no longer at Leicester University at that time and the Claimant took the car to his home in London - but the evidence was extremely sketchy from both witnesses.

29. In relation to the allegation that he had damaged the Respondent's car, the Claimant produced a letter from the garage dated 7 September 2012 (after the date of the warning) stating that the failures were due to manufacturing defects. Mr Abdullah, who issued the Claimant with the warning was unable to assist the Tribunal with why the Claimant was alleged to have damaged the car. He told the tribunal that the engine had had to be replaced twice – so it must have been the Claimant's fault.

30. On 7 September 2012 the Claimant responded to the warning. He said that he had received the letter on 6 September, and he wished "to respectfully go on record and that I totally repudiate any insinuation that I have misused High commission vehicles."

31. Two months later on 10 October 2012 the Claimant was notified that he should attend a formal disciplinary hearing to consider acts of "potential gross misconduct" in that he had incurred five congestion charge penalties on 5 dates in September. Those penalty charge notices are in the bundle. The Claimant failed to attend on the first date fixed for the hearing (16th October) which was rescheduled. We have no notes for that disciplinary hearing but the document in the bundle (96) records that on 23 October 2012 he was found guilty of gross misconduct and issued with "a stern and final warning". He was also told that he would be strictly monitored over a period of 12 months and that he should return to the High Commission as a "pool driver".

32. The Claimant does not refer to the congestion charge issue in his particulars of claim or in his witness statement. In cross examination the Claimant said that he found the charges against him inexplicable as the High Commission uses autopay to pay the congestion charge. He told the Tribunal he had done his own research at the time and found out that autopay against his car had been deliberately stopped on those five occasions. Mr Abdullah in cross examination suggested that while he, the High Commissioner, had autopay pay for his car, the Claimant would have had to have paid the congestion charge and then claimed reimbursement. On the other hand Mr Ayup said that the Claimant would have had to notify the office that he was driving to London so that they could arrange for the charge to be paid.

33. We find both explanations unlikely and it was clear that neither of the Respondent's witnesses really knew what the system was. It was not disputed that the Princess, for whom the Claimant drove, was frequently in London. While it is clear that the Respondent was issued with 5 penalty charge notices, it was not clear from the documentation that the Respondent regarded the Claimant as liable to pay the congestion charge and then claim a reimbursement. Given the frequency with which the car would be required to travel to London, requiring a driver to pay and then obtain reimbursement is implausible. Requiring the Claimant to tell the office that he was travelling

to London every time is equally implausible given that registration for autopay is so simple. Equally we considered it unlikely that the Respondent had deliberately stopped autopay on the Claimant's car on those 5 occasions, and the Claimant did not explain how he had ascertained that autopay was deliberately stopped for his car alone. The most likely explanation was that there had been an administrative error in the way autopay was handled.

34. In February 2013 the liaison officer from the Argentine Embassy in London wrote to the Respondent to complain that "on numerous occasions" a car with a particular number plate had been parked in the diplomatic parking space allotted to the Argentine Embassy and had caused inconvenience and expense. Mr Abdullah asked the Third Secretary to investigate the matter and advise the chauffeur (i) not to repeat the offence and (ii) to explain himself in writing. Mr Abdullah noted that if the chauffeur was found to have repeated the offence the High Commission would take decisive action including issuing a warning. (99) We accept that at that time Mr Abdullah did not know the name of the chauffeur who had parked in the spot reserved for the Argentinian Embassy.

35. On 6 March 2013 the Claimant wrote to the Protocol Department accepting that he had parked his car in the relevant bay from 8.30 to 9 AM in the morning when he went to buy his morning coffee and he did not realise it belonged to the Argentine Embassy. He said that other embassy drivers also parked in that bay.

36. In cross examination in Tribunal the Claimant said that he had only parked there once - but we find that he had parked there on more than one occasion, although once the Claimant had been told about the complaint he didn't park there again.

37. On 5 March 2013 the High Commission was notified of a speeding offence by the Claimant who had driven at 37 mph in a 30-mph zone. The Claimant accepted that he had driven at 37 mph but said that he thought it was a 40-mph zone.

38. On 19 March 2013 the Respondent received a list of 103 PCNs issued by the Leicester parking and enforcement team relating to the Claimant's vehicle. (The last of such tickets was issued on 30 June 2012 and there are none after that date.)

39. On 5 July 2013 the Claimant was suspended from his role as a chauffeur on half pay. The documentation does not indicate what the disciplinary charges are.

40. On 31 July 2013 (112) the Claimant asked the Respondent to reconsider their decision regarding the suspension and asking why this had happened. He received no response. We do not consider that this letter could reasonably be considered to be a grievance.

41. On 6 August 2013 the Claimant submitted a grievance to Mr Abdullah (11 3). He received no response.

42. On 22 August 2013 the Claimant was notified that he was required to attend a formal disciplinary hearing on 27th August 2013 to consider

    (i) That on 24th February 2013 he was speeding.
    (ii) that he had on numerous occasions parked in the parking space of the Argentine Embassy
    (iii) that he had incurred penalty charge notices totaling £3,175.

43. A report was prepared by what is referred to as the disciplinary board. It is dated August 21, 2013. Its members Mr Ayup, Lt Cln Karim, Mr Diah and Mr Damit. They are the same members of the panel that subsequently decided to dismiss the Claimant. It reports that (131) that the Board "made the following decision for support":

    (i) that the Claimant deliberately ignored the warning given to him in October 2012
    (ii) that he deliberately made mistakes that might result in dismissal
    (iii) that the Claimant be terminated from service.

44. On 22nd August the Claimant was informed that he was required to attend a formal disciplinary hearing to consider the three offences.

45. The Claimant then wrote to the defence attaché of the Argentinian Embassy (134b) saying that he had driven the particular vehicle in question for about one month and had not parked in the bay since his letter and the Embassy had taken it as a serious disciplinary against him. He received a reply (134a), to the effect that it had not been their intention to cause him a major incident and that he would take care of the matter.

46. We have no notes of the disciplinary hearing which took place on 2 September 2013. None of the witnesses have described what occurred at the hearing or what the Claimant said in his defence.

47. The outcome is set out in a letter sent to the Claimant on 18 October 2013. He was found guilty of driving at an excessive speed and of parking in the space allocated to the Argentinian Embassy. The panel did however find him not guilty of the issue relating to the 103 parking notices. Mr Abdullah told us that the Respondent had arrived at an arrangement with Leicester council and did not have to pay the fine. The Claimant says that the car was exempt.

48. The Claimant appealed (139). The basis of his appeal is that the evidence from the Metropolitan police relating to the speeding ticket was not reliable and he had not seen the evidence. He said that it was unfair to bring a charge against eight months after the event, that he had not been prosecuted for speeding, that the High Commission had manipulated the evidence in conjunction with the police and there was a plot to get rid of him.

The second charge, parking in the Argentinian Embassy's spot, was "wholly trumped up" because of his relationship with the princesses. He says that allegations of speeding and parking cannot be classified as misconduct and that the board had found him guilty of "spurious allegations" and "acquiesced with the allegations of the racial majority against me". He attributes the plot against him to his good relationship with the Princesses and because "some of you are jealous of my support for and her Highnesses support for me."

49. The Claimant was invited to an appeal hearing to take place on 19 November 2013. A copy of the letter from the Metropolitan police relating to the speeding offence was enclosed. The letter stated that, as the Claimant had accepted that he had been speeding, he had not suffered any prejudice by not having the letter earlier.

50. The Claimant wrote back (156) "*As you are aware this matter is in the hands of my legal counsel, and it is proper that you contact him as you have dismissed me."*

51. The Claimant did not attend the appeal hearing which was held in his absence and the dismissal was upheld. The Claimant now says he was ill and had sent a doctor's note but we have no record of that in the bundle and the letter which he sent in response to the invitation to attend the appeal hearing (156) implies that he did not intend to attend.

Comparators

52. The Claimant relies on three comparators. Mr Hanafi, Mr Juied and Mr Nayif. They are Muslim and not of Indian heritage. The drivers pool consists of drivers of many different nationalities including Lebanese, Moroccan, and Indonesian.

53. Mr Hanafi is a driver for the Respondent. In March 2012 he was convicted of driving without due care and attention and driving without a valid UK driving licence. Points were put on his provisional licence. Incredibly, Mr Hanafi had been driving for the Respondent for 11 years with only a provisional licence.

54. On 25th April 2012 Mr Hanafi was given a "first official warning.". He was suspended from his role as chauffeur and put onto half pay, backdated to 15th February 2012. Once he had obtained a valid full UK driving licence he was reinstated as a chauffeur with full salary. (87)

55. In November 2009 Mr Nayif, who was a driver for the Respondent was involved in a minor accident. Mr Nayif considered that this was not his fault. On 4th December 2009 he provided a lengthy written explanation to the Respondent. He submitted a grievance letter on 28th December 2009 (see p163)

56. On 15th March 2010 Mr Nayif was given a warning. (162) The letter giving him the warning notes that *"I have also been informed that this particular*

accident is not the first and only one and that you have been involved in previous incidents of carelessness resulting damages to very well maintained High Commission vehicles."

57. In response to the warning Mr Nayif wrote on 28th March (163) that he did not accept it, that the allegations/accusations in the warning were not true. He complained that he had no response to his grievance letter of 28 December 2009 and asked for a response to his grievance and for the warning to be removed. Mr Nayif chased again for a response on 26th April 2010 (165). On 11th May Mr Nayif received a brief response from Mr Abdullah to the effect that there was no question of withdrawing the warning and that no further correspondence on the matter would be entertained**.** There is no record of a response to the grievance**.**

58. MrJuied was also a driver for the Respondent. In 2003 he stole three sets of padlocks belonging to a company undertaking maintenance work at the Respondent. He was issued with a final warning but was not dismissed.

59. Holiday Pay. In the Claimant's particulars of claim (17) the Claimant claims "payment of all accrued but untaken annual leave up to the date of dismissal. As the Claimant was dismissed on 17 October 2013, the Claimant claims paid for 49 days. He does not refer to holiday pay in his witness statement and despite having been asked at the start of the hearing for an indication of how the 49 days had been identified and calculated, this did not happen. There is no reference to holiday pay in the Grounds of Resistance.

60. The Claimant's terms and conditions of employment provide that an employee with less than 10 years service is entitled to 21 days leave per calendar year; and an employee with more than 10 years service is entitled to 28 days per calendar year. It also provides that the employee must take his leave "at one stretch". In relation to carry forward it provides that "in exceptional cases" the Commissioner may grant an employee permission to carry over up to 1 year's holiday entitlement to the following year, and that any leave in excess of one year's eligibility will be forfeited (149)

61. None of the witness statements referred to holiday pay. No questions were asked of the Claimant about holiday pay in cross examination, nor any questions asked of the Respondent's witnesses in cross examination about holiday pay. In answer to questions from the Tribunal the Claimant said he had never had any holiday at all while he had worked at the Respondent. He said he had never asked for holiday but that it carried forward. He was unable to explain how he had calculated 49 days being due. In response to questions put to him in re-examination the Claimant said that he had never been told or encouraged to take annual leave.

The Law

62. Section 39 of the Equality Act 2010 prohibits an employer discriminating against or victimising its employees by dismissing them or subjecting them to any other detriment.

63. Section 13 defines direct discrimination as follows:-

"A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favorably than A treats or would treat others.

Race and religion or belief are protected characteristics.

64. Section 13 focuses on "less favourable" treatment. A claimant must compare his treatment with that of another actual or hypothetical person who does not share the same protected characteristic. In comparing whether the employee has been treated less favourably than another section 23 of the Equality Act provides that "on a comparison of cases for the purposes of section 13… there must be no material difference between the circumstances relating to each case." It is not necessary for all the circumstances to be the same provided that the circumstances are materially similar. In other words, for the comparison to be valid, like must be compared with like.

65. The burden of proof, is set out at Section 136. It is for the Claimant to prove the primary facts from which a reasonable Tribunal could properly conclude from all the evidence before it, in the absence of an adequate explanation, that there has been a contravention of the Equality Act. If a Claimant does not prove such facts he will fail – a mere feeling that there has been unlawful discrimination, is not enough. Once the Claimant has shown these primary facts then the burden shifts to the Respondent and discrimination is presumed unless the Respondent can show otherwise.

66. In *Igen Ltd v Wong* the Court of Appeal gave some guidance in how the burden of proof works. Those principles were approved by the Supreme Court in *Hewage v Grampian Health Board* [2012] UKSC 37, [2012] ICR 1054.

    (i) It is for the claimant to prove, on the balance of probabilities, facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. If the claimant does not prove such facts, the claim will fail.

    (ii) in deciding whether there are such facts, it is important to bear in mind that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In many cases the discrimination will not be intentional but merely based on the assumption that 'he or she would not have fitted in'

    (iii) the outcome at this stage will usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

    (iv) the tribunal does not have to reach a definitive determination that such facts would lead it to conclude that there was discrimination — it merely has to decide what inferences could be drawn.

    (v) in considering what inferences or conclusions can be drawn from

the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(vi) when there are facts from which inferences could be drawn that the respondent has treated the claimant less favourably on a protected ground, the burden of proof moves to the respondent.

(vii) 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.

(viii) to discharge that burden, it is necessary for the respondent to prove, on the balance of probabilities, that its treatment of the claimant was in no sense whatsoever on the protected ground.

(ix) not only must the respondent provide an explanation for the facts proved by the claimant, from which the inferences could be drawn, but that explanation must be adequate to prove, on the balance of probabilities, that the protected characteristic was no part of the reason for the treatment.

(x) since the respondent would generally be in possession of the facts necessary to provide an explanation, the tribunal would normally expect cogent evidence to discharge that burden — in particular, it will need to examine carefully explanations for failure to comply with a request for information under the 'ask and respond' procedure and/or with any relevant Code of Practice.

67. However, as stated in Madarassy v Nomura International plc (2007 ICR 867)… "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 unlawful act of discrimination."

68. It is however not necessary in every case for the tribunal to specifically identify a two-stage process. There was nothing wrong in principle in the tribunal focusing on the issue of the reason why. As the Employment Appeal Tribunal pointed out in Laing v Manchester City Council 2006 IRLR 748 "If the tribunal acts on the principle that the burden of proof may have shifted, and has considered the explanation put forward by the employer, then there is no prejudice to the employee whatsoever.

69. Holiday Pay . An employee has the right under EU law to 20 days annual paid leave. The right is to leave. It is not a right not to a payment in lieu. The exception to this is where the employee is owed outstanding holiday on the termination of his employment. The general rule is "use it or lose it". There is an exception where an employer has refused to pay holiday pay while an employee is on leave.

70. Mr Sheng has referred the Tribunal to Smith v Pimlico Plumbers Ltd 2022. In that case the Court of Appeal said that an employer must not only give

the worker the opportunity to take paid annual leave but must also encourage the worker to do so. The issue in that case related to an individual who had taken leave but whose employer had denied him the right to paid leave. In this case the Claimant had an entitlement to take paid leave. He would have been aware both from his contract of employment and from general awareness of UK rights that he was entitled to paid leave.

71. In Smith the Pimlico Plumbers the court said this:` *If a worker takes unpaid leave, when the employer disputes the right and refuses to pay for the leave, the worker is not exercising the right. Although domestic legislation can provide for the loss of the right at the end of each leave year, to lose it, the worker must actually have had the opportunity to exercise the right conferred by the WTD. A worker can only lose the right to take leave at the end of the leave year (in a case where the right is disputed and the employer refuses to remunerate it) when the employer can meet the burden of showing it specifically and transparently gave the worker the opportunity to take paid annual leave, encouraged the worker to take paid annual leave and informed the worker that the right would be lost at the end of the leave year. If the employer cannot meet that burden, the right does not lapse but carries over and accumulates until termination of the contract, at which point the worker is entitled to a payment in respect of the untaken leave.*

72. The Claimant was entitled to paid leave throughout his employment. The words in brackets in the above quote are key. The Claimant has not told us that the employer only permitted unpaid leave, and this would not be in accordance with his contract. In such circumstances the normal "use it or lose it" rule applies.

Conclusions

73. As should be apparent from our findings of fact above the Respondent takes a somewhat cavalier approach to the way in which it handles potential disciplinary offences by its drivers. The Tribunal considered that the Respondent treated the Claimant most unfairly in the following ways.

a. Warnings were given without giving the Claimant a chance to explain.

b. The first warning was given years after the offences in question.

c. The second warning was given without explaining the charges to the Claimant. It was not clear what journeys were said to have been for personal use or why he was responsible for damage to his vehicle. He was not given a chance to explain.

d. It was wholly unclear why the Respondent had issued the Claimant with a final warning in respect of the congestion charge notices. Neither Mr Ayup nor Mr Abdullah understood the system, and both gave different explanations as to why the Claimant may have incurred those charges.

e. It was wholly improper for the board of four diplomats who were going

to deal with the Claimant's disciplinary hearing – potentially leading to his dismissal – to write a report before the hearing in which they recommend the Claimant's dismissal.

f. The Claimant was suspended on half pay rather than full pay before the disciplinary hearing.

g. The Respondent failed to respond to his grievance.

h. No regard is given to the need for a fair hearing or to the ACAS code,

74. However, the Tribunal has to determine (i) whether the Claimant has been treated less favourably; and (ii) if so, whether that treatment was because of a protected characteristic.

75. The Claimant has referred to 3 comparators. None were in materially comparable circumstances to the Claimant so as to be actual comparators- but they all provide evidential value as to how a hypothetical comparator who was Muslim/not of Indian heritage might have been treated.

76. Mr Hanafi was treated astonishingly leniently by the Respondent. We find it surprising that he was not dismissed given the circumstances. However his was a single (if serious) offence, rather than, as with the Claimant, a number of more minor offences occurring after a series of warnings. Mr Juied also kept his job despite having stolen some locks – and was also leniently treated. His offence was in 2003, some 10 years before the Claimant's dismissal and under a different High Commissioner and there was no evidence that any further disciplinary matters relating to Mr Juied were brought to the Respondent's attention. Mr Nayif had been given a warning – he believed unfairly. We understand that he was subsequently dismissed, though we do not know why. The Respondent also failed to respond to his grievance in any meaningful way.

77. On the other hand it is not enough for a claimant to show that he has been treated badly in order to discharge the burden of proof that he had suffered less favourable treatment because of a protected characteristic.

78. The fact that the claimant has been subject to unreasonable treatment is not, of itself, sufficient to shift the burden of proof. (Glasgow City Council v Zafar 1998 ICR 120 HL). It does not matter if the employer acts in an unfair way, provide the reason has nothing to do with the protected characteristic. As Mrs Justice Simler (as she then was) observed in Chief Constable of Kent Constabulary v Bowler EAT0214/16 "merely because a Tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean that the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic."

79. We accept that that Mr Hanafi was dealt with leniently and the Claimant was not. But as has been said, a mere difference in treatment and a difference in race or religion is not of itself usually sufficient to shift the burden of proof.

80. We considered whether the unfairness of the treatment coupled with the potentially more lenient treatment accorded to his evidential comparators was enough to shift the burden of proof, and concluded it was not. In this case we have no actual comparators in materially comparable circumstances and no evidence from which to infer that the unfair treatment received by the Claimant was influenced by his religion or race.

81. In the Claimant's grievance, in his particulars of claim and again in his witness statement the Claimant attributes the treatment he received from the Respondent to a deliberate campaign by a Mr Naim – the private secretary to the brother of the Sultan of Brunei who, he says, was acting on the direct instruction of the Princess's father and the High Commissioner. In particular in paragraph 12 of the Claimant's witness statement he says that Mr Naim considered that he was too close to the princesses.

82. The Claimant had been employed by the Respondent since 1998. The drivers employed by the Respondent are of many different nationalities. The Claimant was unclear why the Respondent should wish to treat him less favourably (consciously or subconsciously) because he was of Indian heritage. The "something more" was simply not present.

83. The Tribunal has had no statistics as to the percentage of those working for the embassy as locally employed staff who are Muslim, but on the example of the comparators we accept the Claimant's position that most of the drivers were Muslim and that the diplomats including the High Commissioner and Mr Ayup were Muslim. Beyond those facts there was nothing to indicate that the treatment that the Claimant received was influenced by the fact that he was not Muslim. The Claimant's own primary explanation as set out in the documents referred to above gives a non-discriminatory reason for the treatment that he received.

84. We have looked at the particular acts of alleged discrimination individually and then stood back and considered the whole.

85. Issuing warning letters and making untrue allegations on 20 July 2012. It was not clear from the evidence why the Respondent chose to warn the Claimant for offences which were by then largely historic. The Respondent's witnesses have not offered any explanation. On the other hand we do not accept the Claimant's assertion that he had not committed these offences and that the Respondent was somehow in league with the police. The Respondent was slow in dealing with those charges but there was nothing to indicate that this related to his race or religion.

86. Issuing warning letters and making untrue allegations on 24th August 2012. The Claimant says that he never used the vehicle for his personal use and that he did not damage the car. Evidence which he has produced in the bundle suggests that any damage the car was not his fault – and there is no contemporaneous evidence in the bundle that the Claimant was using the car for his personal use. The Claimant's explanation was that he was entitled to drive the car back to his apartment in Leicester, (although by this time the Princess had finished her degree may have been back in London.) Despite

the unfairness, what seems to be missing is the something more we which we could infer that in giving the Claimant a second warning Mr Abdullah was influenced by his race or religion.

87. Issuing warning letters and making untrue allegations in October 2012. Documents in the bundle show that the Respondent was sent five penalty charge notices in relation to the Claimant's vehicle. On the balance of probabilities we do not accept the Claimant's contention that autopay for his car was deliberately stopped on those five occasions. We consider that the warning to the Claimant was unfair in the circumstances – but again it is difficult to infer from the unfairness alone that the reason that the Claimant was given this warning was because of his race or religion.

88. Not investigating the grievances of 7 September, 31st July and 6 August. Neither the letter of 7 September nor the letter of the 31st July could be construed as grievances. The 6 August letter plainly is a grievance. In the Grounds of Resistance the Respondent says that it did not respond to that grievance because it related to the potential disciplinary action against him, which would be dealt with during the disciplinary process.

89. That explanation was not repeated in the witness statements – and we doubt that it is true. Mr Abdullah says that the Respondent would have responded but we also regard that as unlikely. The Claimant says that Mr Nayif was treated more favourably because the Respondent responded to his grievance, but that is not the case. Mr Nayif's grievance was submitted according to his letter (163) on 28 December 2009, and after two chasing letters he received a two-line response on 11 May 2010. The evidence suggests that the Respondent's treatment of grievances fell far short of the standards of a reasonable employer, whatever the race or religion of the employee.

90. The Respondent suspended the Claimant on 5 July 2013. The Claimant was suspended pending disciplinary action. That of itself is standard. What is not standard, and it is manifestly unfair, is placing an employee on half pay before the disciplinary charges have been determined. Mr Hanafi was also suspended - but only after he had been given a warning, so there was some inconsistent treatment. On the other hand there was no evidence that the Claimant's treatment was, because he was not a Muslim or because he was of Indian heritage. (The Respondent had no contractual right to place the Claimant on half pay, but the Tribunal is unable to deal with any non-EU derived employment rights.)

91. Dismissing the Claimant. The whole process of the Claimant's dismissal was riddled with unfairness. The disciplinary board had produced a report in which they had determined to dismiss the Claimant before hearing his case. The Respondent says that the fact that it subsequently exonerated the Claimant from the penalty charge notices shows that the board approached the matter with an open mind, but if the car was indeed exempt from parking fines, then the charge should not have been brought at all.

92. On the other hand what emerges from this picture or is of an employer with

a cavalier attitude to employee rights rather than an employer who is influenced by an employee's race or religion.

93. Deciding the Claimant appeal in his absence and dismissing the appeal. The Claimant does not allege, in his particulars of claim, that the appeal was an act of discrimination. However as we have explained that the start of this judgment the Respondent did not object to this being allowed by way of amendment.

94. As we have said, the letter that the Claimant sent in response to the notice of the appeal hearing would indicate that he did not intend to attend. A fairer employer would have given the Claimant another chance to attend, but there was no evidence before us to suggest that the failure to reconvene, or the dismissal of the appeal related to the Claimant's race or religion.

95. We do not consider that the Claimant was fairly treated, and he would certainly have won an unfair dismissal claim, but we do not conclude the unfair treatment he received was influenced by his race or religion.

96. Holiday pay. The Respondent has provided no defence to the holiday pay claim . The Claimant has not explained how he arrives at 49 days holiday due. Mr Sheng refers to Pimlico Plumbers, but this is not a case where the Claimant had taken unpaid leave. Mr Abdullah told us that his own personal chauffeur did not take leave. On balance, in the absence of any defence from the Respondent, we accept that the Claimant did not take any leave in the last year of his employment and that he is entitled to pay in lieu of leave accrued, but not taken, in his last holiday year.

97. Although the Claimant's contract provides that he is entitled to 28 days per calendar year, his EU rights entitle him to only 20 days. We find that he is entitled to pay in lieu of holiday accrued during the 42 weeks from 1 January-18 October 2013. We calculate his entitlement as 3.2 weeks. His gross monthly pay at the time was £1,635.83 (77) or £377.5 per week. We therefore award him £1,208.

98. Finally in relation to the claim of failure to provide written particulars of employment this claim fails because the Respondent did provide such particulars. (147).

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Employment Judge Spencer
6 February 2024

JUDGMENT SENT TO THE PARTIES ON

14 February 2024
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FOR THE TRIBUNAL OFFICE