EMPLOYMENT TRIBUNALS

Claimant: **Mr. David Roy Crystal-Kirk**

Respondents: **Florentino's Pizzeria Limited (R1)**
Mr. Mansour Arjemandfar (R2)

Heard at: **Lincoln**

On: **4th, 6th, 7th, 11th March 2024 &**
13th March 2024 (In Chambers deliberations via CVP)

Before: **Employment Judge Heap**

Members: **Mr. J Purkis**
Mrs. C Hatcliff

Representation
For the Claimant: **In person**
For the Respondent: **Mr. R Clement - Counsel**

JUDGMENT

1. The complaint of constructive dismissal fails and is dismissed.

2. The complaints of direct race discrimination fail and are dismissed.

3. The complaint of a failure to provide a statement of initial employment particulars contrary to Section 1 Employment Rights Act 1996 against the First Respondent is well founded and succeeds and the Tribunal makes a declaration to that effect.

REASONS

BACKGROUND &THE ISSUES

1. By way of a Claim Form presented on 29th April 2022 following a period of early conciliation beginning and ending on 22nd April 2022 Mr. David Roy Crystal-Kirk

(hereinafter referred to as "The Claimant") presented a claim against his by then former employer Florentino's Pizzeria Limited (hereinafter referred to as "The First Respondent") and a director of that company, Mr. Mansour Arjemandfar (hereinafter referred to as "The Second Respondent"). The Claim Form set out that the Claimant was advancing complaints of discrimination relying on the protected characteristics of age and race; unfair dismissal and a complaint of a breach of the provisions of Section 1 Employment Rights Act 1996.

2. As is usual the matter was listed for a Preliminary hearing for case management and that came before Employment Judge Ayre on 27th September 2022. Employment Judge Ayre recorded the issues as they were explained at that hearing in respect of both the race discrimination and constructive dismissal complaints. She could not record the issues in respect of the age discrimination complaints which were said to be acts of harassment because they could not easily be identified and further information was needed from the Claimant. Orders were made for him to supply that detail and a further Preliminary hearing was listed to determine any application to amend the claim, to identify and agree a list of the final issues that the Tribunal would be required to decide and to deal with an application made by the Respondents if so pursued to strike out the complaint of a breach of Section 1 Employment Rights Act 1996 or to Order a deposit to be paid in the alternative as a condition of being permitted to continue with it.

3. We should note here that the issues identified by Employment Judge Ayre at the Preliminary hearing before her dealt with the basis of the constructive unfair dismissal complaint and set out four things which it would appear that the Claimant had told her that he contended amounted to a fundamental breach of contract. They were as follows:

   (a) Failure to bring pressure to bear on the First Respondent's chef and manager whose husbands the Claimant said were harassing him, to ask their husbands to stop harassing him;

   (b) Maintenance of amicable relationships with the people who were harassing the Claimant. The Claimant's evidence before us was that this was said to be the Second Respondent and Katie Revill and their relationship with the latter's partner;

   (c) Failing to deal with three grievances raised by the Claimant in breach of the ACAS Code of Practice on Disciplinary and Grievance Procedures; and

   (d) Failing to provide the Claimant with a statement of employment particulars contrary to Section 1 Employment Rights Act 1996.

4. However, the Claimant's evidence orally was that the "straw that broke the camels back" was in fact what was said to be the summary dismissal of another driver, Dan Casien, on 20th April 2022 when he then immediately terminated his own employment. Both his witness statement and his oral evidence were very clear on that point. That had obvious implications for the constructive dismissal

claim because that was not an act identified in the list of issues set out by Employment Judge Ayre. The Claimant's position was that that was an error on the Tribunal's part and that his claim had always been very clear. Part of the Orders of Employment Judge Ayre were that if any part of the issues identified were wrong then the parties must write to the Tribunal to correct the position or that would be treated as the final list. It is not in dispute that the Claimant did not write to the Tribunal. He also did not correct the position when asked about the accuracy of the relevant paragraph at a further Preliminary hearing on 8th December 2022 (see paragraph 19 on page 45 of the hearing bundle). Equally, the issue of Dan Casien's alleged dismissal was not contained in the Claim Form at all and it is therefore difficult to see how Employment Judge Ayre could have recorded that as being a live issue in that complaint given that the Claim Form is not simply the starting point and for claims to build from there without successful applications to amend. We made it plain that we would be determining the claim based on the issues recorded by Employment Judge Ayre which, as we have already observed, she made plain would be treated as the final issues if not corrected in accordance with her Orders.

5. The issue of the scope of the constructive dismissal complaint manifested itself again on the morning of the third day of the hearing part way through the evidence of the Second Respondent when the Claimant maintained that the constructive dismissal claim was also about harassment by third party drivers. That was not the way that the issues were set out in the Orders made by Employment Judge Ayre and we again made plain that those were the issues that we would determine. That was not least on the basis that that was the way in which the Respondent had understood and been preparing the case since September 2022; the Claimant had had two opportunities to correct that if it was wrong (once in accordance with Employment Judge Ayre's Orders and once at the Preliminary hearing in December 2022) and the Claimant and his witnesses had all been cross examined on the basis of how the claim had been framed at that time.

6. We are therefore satisfied that we should determine the constructive dismissal claim on the basis that it was put and recorded before Employment Judge Ayre from as long ago as September 2022. The Claimant asked for what he termed as a written ruling about that. As there was no Judgment or Order made the procedure for giving written reasons does not apply but we have nevertheless included this issue within this Judgment given that the Claimant indicated his intent to appeal this particular matter and so that he is accordingly able to do so if he wishes.

7. We should observe, however, that even if harassment by third parties had been framed as being part of the constructive dismissal complaint it is difficult to see how something done by someone who was not in the employ of the First Respondent could possibly be something that it could be said to be responsible for. That was raised at the December 2022 Preliminary hearing on the basis that the Claimant was saying that those acts were age related harassment

although as we shall come to that part of the claim was subsequently withdrawn.

8. The second Preliminary hearing had come before the Employment Judge allocated to this hearing on 8th December 2022. The application for a strike out of the complaint of a breach of Section 1 Employment Rights Act 1996 or for a Deposit Order was refused. Any issue as to amendment of the claim in respect of the complaints of age discrimination and finalisation of a list of issues could not be determined because it was still not possible to understand the factual and legal basis for them. Orders were made for the Claimant to set out the details of any age related harassment complaints and a schedule was provided to enable him to do so. Orders were also made for the scope of the direct race discrimination complaints to be clarified and we come to that further below.

9. Following that Preliminary hearing the Claimant wrote to the Tribunal withdrawing the claim of age discrimination and that was dismissed by the Judgment of Employment Judge V Butler. That is therefore no longer an issue before us although the Claimant's witness statement for the purposes of this hearing still contained references to age discrimination as indeed did his closing submissions. However, those complaints having been withdrawn and dismissed we have made it plain that we would not and could not make any findings in connection with those assertions.

10. A further Preliminary hearing took place before Employment Judge M Butler on 11th January 2024. That dealt only with the question of supplementary evidence and is not a matter that we need to deal with further within these Reasons.

THE HEARING BEFORE US

11. The hearing was listed for a period of five days of hearing time. That took place on 4th, 6th, 7th, 11th and 13th March 2024. Unfortunately, due to arrangements at Lincoln Magistrates Court where the claim was heard we could not accommodate consecutive days of hearing time and accordingly the claim was heard over a split period over two weeks. That was regrettable but unfortunately unavoidable. We are satisfied that it did not have any bearing on the fairness of the hearing and no one suggested to the contrary.

12. It was also regrettable that we were not able to proceed in accordance with the Presidential Guidance and Practice Direction: Recording and Transcription of Hearings in the Employment Tribunals because there were no recording facilities available in the Court room that we were occupying. We would have followed that process if we could but we remind ourselves that it only operates where there is such equipment to enable us to do so and regrettably that was not the case here. We are satisfied that this again did not effect the fairness of the hearing and no one suggested to the contrary.

13. The Tribunal spent the first two hours of hearing time reading into the papers. When we commenced the hearing with the parties there were a number of preliminary matters to attend to. The first of those was the issue of the reference to age discrimination within the Claimant's witness statement. The Claimant accepted that he had withdrawn those complaints and as such we could not determine them as we have already referred to above.

14. When discussing the running order of witnesses who were to attend the hearing the Claimant made an application that one of his witnesses, Colin Lambert, give evidence before he did. That was on the basis that Mr. Lambert had been expected to give evidence on Wednesday 6th March 2024 but that he now had a hospital appointment to attend on that day and his health was such that he may be admitted to hospital and not be able to attend at all.

15. Mr. Clement objected to that course on the basis that the Claimant's evidence might open more questions for Mr. Lambert and so he submitted that the Claimant should give evidence first. We determined that we would hear Mr. Lambert's evidence first because given what we had been told about his health there was otherwise a real risk that if he was admitted to hospital then we would be prevented from hearing his evidence at all. His witness statement was very short and his evidence could easily be dealt with on the afternoon of the first day when he was making efforts to attend the hearing centre.

16. A second issue that arose was that we enquired of Mr. Clement who the author of a transcript of a conversation in the hearing bundle at page 108 was because we may have questions about it and it was not entirely clear who had prepared it. Mr. Clement confirmed that that had been prepared by the Second Respondent. The recording from which that transcript had been prepared had not been disclosed to the Claimant and Mr. Clement made an application for the Tribunal to now listen to the recording on the basis that it gave context to the evidence surrounding that conversation and, particularly, the tone was important. As we had to adjourn to determine the Claimant's application regarding Mr. Lambert we suggested that he listen to the recording with Mr. Clement who had been provided with it that morning and see if he had objections to us hearing it. The recording was very short running only to just over a minute.

17. After that adjournment the Claimant objected to us hearing the recording on the basis that the Respondents had always been legally represented and that he would be ambushed with the recording because he had prepared his case for the hearing based on what was in the bundle.

18. We refused the application to admit the recording on the basis that it had been made too late in the day with no explanation as to why it had not been disclosed previously, when it was clear from the transcript that it existed, and the Respondents had at all times been legally represented.

19. During the course of the Claimant's evidence Mr. Clement made a renewed application to admit the recording on the basis that the Claimant said that all of the transcript was wrong albeit he would not be drawn on which parts indicating that that would become clear during his own cross examination of the Second Respondent. We determined the renewed application on the morning of the second day of the hearing and decided that we should listen to the recording. That was because the Claimant's argument that he was ambushed because he had prepared his case based on what was in the bundle could no longer be correct because he was saying that the transcript was entirely wrong; the recording was only 1 minute and 9 seconds long and the Claimant was a participant at the time so he was not being ambushed with an exchange that he had never heard before.

20. More importantly than that, we would need to make findings of fact about that exchange because it was the point that the Claimant resigned and the transcript was now in dispute (which we had not understood it to be before) and so the most accurate way assist us to make those findings of fact was to listen to the contemporaneous recording. It would also be potentially important as to credibility because if the transcript was, as the Claimant said, almost entirely inaccurate and the Second Respondent's note as presented to us was therefore misleading there would need to be questions asked of him about why that was the case. We therefore agreed to listen to the recording in question and it was played to the Tribunal before the Claimant re-commenced his evidence.

21. Finally, on the third day of the hearing the Claimant made an application to recall Mr. Casien on the basis that he had forgotten to raise with him in his evidence an issue about notes that he told us were kept by the drivers about the deliveries that they had undertaken. That was said to be relevant to whether another employee, Mr. Tezcan, with whom the Claimant compares himself was allocated more deliveries than the other drivers. We initially understood the notes to be in existence but not disclosed but later it transpired that none were available and it was presumed that they had been destroyed.

22. We refused the application. Without the comparative notes, including any kept by Mr. Tezcan, it was difficult to see what relevance the additional evidence from Mr. Casien would have that would assist us in determining the issues in the claim. In addition, the Claimant accepted that it was an oversight that this was something that had not been raised previously, He had prepared his own and Mr. Casien's witness statement at a time when it would have been fresh in his mind (oddly before any Orders had been made to produce one and before proceedings had even been issued) and could have included references to notes or scraps of paper that he said had been kept. This was not something arising from the evidence of the Respondent's witnesses or something unforeseen that Mr. Casien needed to be recalled to be asked about and the application was only made after the close of the Claimant's evidence and after one material witness, Ms. Revill, had already given her evidence.

23. We concluded the evidence and submissions in the late morning of the fourth day of hearing time. We determined that we would reserve our decision so as to save time and costs for the parties (particularly in view of the travel necessary for Mr. Clement who was travelling from Surrey) and the Tribunal; to ensure that our deliberations could be fully completed without the parties having to wait and possibly be told that there was no time for an oral Judgment; because it was likely that written reasons would have been asked for on one side of the other and that any remedy determination if the claim had succeeded would not be possible in the time remaining after delivery of a Judgment in all events.

THE EVIDENCE AND WITNESSES

24. We had before us a hearing bundle running to 144 pages.

25. During the course of the hearing we heard from the Claimant on his own behalf. We also heard from Colin Lambert and Dan Casien who had been former colleagues of the Claimant working for the First Respondent and we also heard evidence from the Claimant's wife.

26. On behalf of the Respondents we heard from the Second Respondent, from Katie Revill who was and is a manager at the First Respondent's premises and from Simon Lowther, a delivery driver for the First Respondent who was also employed at the same time as the Claimant and who remains in their employ.

27. We say a word about the credibility of the witnesses from who we have heard below.

28. In addition to the evidence that we have seen and heard we have also paid careful attention to the written and oral submissions made by the Claimant on his own behalf and those of Mr. Clement on behalf of the Respondents.

CREDIBILITY

29. We begin with the Claimant. We found him to be an unsatisfactory and self serving witness whose evidence was prone to change. Particularly, he told us initially that the transcript at page 108 to which we have already referred above and which was said to be a recorded conversation between himself and the Second Respondent was entirely inaccurate. He had listened to the recording earlier that morning before he commenced giving his evidence that day and so it would have been fresh in his mind when asked about the accuracy of page 108 of the hearing bundle. The Claimant would not be drawn when asked questions about what was incorrect within it to provide any real detail indicating that it would become clear when he cross examined the Second Respondent. That prompted the renewed application from Mr. Clement that we have referred to above.

30. Upon listening to the recording ourselves - something that the Claimant had vociferously resisted - it was plain that what he had told us in evidence about the transcript being wholly inaccurate was not the case at all. The substance

of the transcript was almost entirely accurate. When asked again after we had listened to the recording what parts of the transcript were inaccurate - it having been played again after the Claimant's evidence resumed because he said at this stage that he had not been able to hear it - he pointed out parts which were clearly typographical errors such as death which should have been deaf and parts which were plainly the Second Respondent's comments on the document and not what was said to have been stated. The Claimant continued to maintain inaccuracies when it was plain that in reality there were none or at least none that were material. His refusal to make sensible concessions in this and other areas of his evidence – such as whether he might be mistaken that Mr. Casien had been dismissed because he was not there to witness the conversation between himself and the Second Respondent - were not to his credit and damaging to his credibility.

31. A further issue as to credibility arose in respect of the recording in that when asked about the issue as to the alleged dismissal of Dan Casien the Claimant maintained that this was plain to hear on the recording - referring to it as us all having heard that. It had been played twice by then only a short while earlier. We arranged for the recording to be played for a third time because we had not heard anything about that asking the Claimant to inform us when the relevant section was played. Nothing on the recording evidenced the Second Respondent dismissing Mr. Casien. The Claimant's evidence then changed to the fact that the Second Respondent had only begun the recording after he had dismissed Mr. Casien. That was factually accurate in terms of the timing of commencement of the recording but directly contradicted his evidence given before the recording was played for the third time that the Second Respondent could be heard dismissing Mr. Casien.

32. A further issue arose over the recording. The Claimant's submissions on the second day of the hearing about the renewed application were that the recording was also inaccurate and he went so far as to suggest - without any evidence in support - that it may have been doctored. Despite that, he then accepted that he did not take issue with what was said in the recording despite still maintaining the possibility of it having been tampered with.

33. The Claimant was also argumentative, awkward and dogmatic during his evidence and on some occasions refused to answer a question indicating that he would instead deal with that in cross examination of the Respondent's witnesses. Whilst he later referred to his demeanour as being as a result of his "excitement at being before the Tribunal" and we are aware that often the strain of giving evidence can place a toll on a person to react as they otherwise would not, it is perhaps notable that we experienced a number of the same behaviours as referenced by the Second Respondent and Ms. Revill in their evidence.

34. Ultimately, unless we have expressly said otherwise we have preferred the evidence of the Respondent's witnesses to that of the Claimant.

35. We turn then to the evidence of Mr. Lambert. Unfortunately, we found him to be an unreliable witness. He initially told the Tribunal that he had not previously seen his witness statement that had been provided to us. He did however tell us that it was his signature on that statement, although that was difficult to reconcile how that could have happened if he had not previously seen it. After reading it he did, however, adopt it as his evidence. That position later changed when in cross examination he said that he was aware that the document had been prepared by the Claimant but that he had told him what he wanted to say.

36. We should say that we did not consider that Mr. Lambert was seeking to mislead us but that he simply could not recollect many things and it was clear to us that he was suffering in terms of his health. We did not feel, however, that we could place much weight on his evidence in regard to what he had put in his witness statement because he was clearly unfamiliar with it. That was also the case given that he gave evidence that contradicted it and also for the following reasons:

    a. His witness statement contradicted a letter that he had written to the Second Respondent in September 2022 which appeared at page 125 of the hearing bundle where he made plain that he did not feel that he had been discriminated against on the basis of his age or race;

    b. The witness statement also set out that Mr. Lambert had discussed Mr. Tezcan (who it is said was treated more favourably than the Claimant and other drivers) with the other drivers but his oral evidence was that he had never in fact discussed Mr. Tezcan; and

    c. He told us in his oral evidence that he could not really be sure of the basis upon which he had previously said that Mr. Tezcan was treated more favourably in terms of deliveries because he could not say whether he had been given multiple deliveries or more than one item for the same order (for example half a dozen pizzas for the same customer instead of six separate deliveries) because that information was on a screen which he never checked in respect of the driver in question.

37. We were concerned that the evidence in Mr. Lambert's witness statement, which was prepared for him by the Claimant, contradicted the letter to the Second Respondent which we have referred to above. That letter made it very clear that he did not consider himself to have been discriminated against in comparison to Mr. Tezcan in that he referred to him being treated more favourably than all the other drivers. His witness statement said the opposite. Mr. Lambert's evidence was that he stuck by what he had said in the letter to the Second Respondent. It appeared to us that he had probably simply accepted what was put in his witness statement without particularly considering it and whether it did in fact reflect his views. As such, we did not feel able to place any real weight on Mr. Lambert's evidence because we did not consider it to be reliable.

38. We turn then to the Claimant's wife. Ultimately, she was unable to materially assist us. Her evidence was largely comprised of what she told us that the Claimant had told her and which she had recorded in her diary. She had not witnessed anything first hand on which we needed to make relevant findings of fact.

39. We deal finally with the evidence of Mr. Casien. Whilst we do not believe that he was seeking to mislead us in his evidence, his statement had again been prepared by the Claimant and it is clear that he had not given it much particular thought or had input into it before signing it as absent from it was a key meeting that he told us that he had had with the Second Respondent when he said that he had made a complaint about preferential treatment of Mr. Tezcan over other drivers. Equally, under cross examination he readily accepted that at the time that he was engaged on a second occasion by the First Respondent that was on a self employed basis. He was unable to explain why he had therefore included in his witness statement a reference to not having received notice pay at the time of what was said to have been his dismissal when he would not be entitled to that when self employed.

40. Mr. Casien's evidence was also at times confused and contradictory. He had, for example, told us that he had made reference to race discrimination at a private meeting with the Second Respondent to discuss Mr. Tezcan. That later changed when asked by the Tribunal because the position was becoming unclear to nothing about race having been said by anyone at all.

41. We turn then to the evidence of those witnesses called by the Respondents. We heard firstly from Katie Revill. We considered her to be a candid and straightforward witness who sought to give us an honest account of events that were within her knowledge. That was to her credit given that some of the Claimant's cross examination became overly challenging and repeated. She was prepared to make concessions where she had got something wrong in her witness statement and the evidence that she gave to us was logical and consistent. We considered her to be a witness of truth and had no doubts over the credibility and reliability of the account that she gave to us.

42. We turn then to the Second Respondent. We considered him to be a less satisfactory witness than Ms. Revill. His evidence was in places confused and sometimes contradictory. That was very possible born out of what became something of a points scoring exercise on both sides during the Claimant's cross examination and a tendency to try and answer a question before it had been properly asked. We nevertheless still preferred his evidence to that of the Claimant unless we have said otherwise.

43. Finally, we turn to the evidence of Mr. Lowther. We considered him to be a straightforward and candid witness and he was asked very little during cross examination by the Claimant. We accepted his evidence as being both logical and credible and had no reason to doubt the account that he gave to us. We should note that the Claimant is critical of Mr. Lowther's account in respect of

page 81 of the hearing bundle which is an extract from what appears to be a instant message exchange between himself, another driver called Rob and, we were told, Mr. Casien. In that exchange there is mention of another driver - which we were told was Mr. Tezcan - being treated with favouritism. Mr. Lowther did not accept that it was about Mr. Tezcan. However, whilst it was clear to us that whilst in all likelihood that message was about Mr. Tezcan, Mr. Lowther was concerned that the message did not expressly say that nor was the whole message chain there for context. We do not consider that unreasonable nor an issue which affects the credibility of the remainder of his evidence, particularly in view of the fact that he accepted that he had initially believed that Mr. Tezcan may be getting preferential treatment because of what he referred to as a seed planted by the Claimant but that after speaking to the Second Respondent and then noting what deliveries he himself had been allocated had changed his view. In all events, the main part of Mr. Lowther's evidence had been about comments that the Claimant was said to have made in respect of Mr. Tezcan which he considered to have been racially discriminatory and which were not challenged at all by the Claimant in cross examination.

THE LAW

44. Before turning to our findings of fact, we remind ourselves of the law which we are required to apply to those facts as we have found them to be.

Constructive dismissal

45. Section 95 provides for a situation where an employee terminates the employment contract in circumstances where they are entitled to do so on account of the employer's conduct – namely a constructive dismissal situation.

46. Tribunals take guidance in relation to complaints of constructive dismissal from the leading case of **Western Excavating – v – Sharp [1978] IRLR 27 CA**:-

"If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment; or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract; then the employee is entitled to treat himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed. The employee is entitled in those circumstances to leave at the instant without giving any notice at all or, alternatively, he may give notice and say he is leaving at the end of the notice. But the conduct must in either case be sufficiently serious to entitle him to leave at once. Moreover, he must make up his mind soon after the conduct of which he complains; or, if he continues for any length of time without leaving, he will lose his right to treat himself as discharged. He will be regarded as having elected to affirm the contract."

47. Implied into every contract is a term that an employer will not, without reasonable and proper cause, conduct itself in a manner calculated or likely to

destroy or seriously damage the relationship of trust and confidence between the employer and the employee. Breach of that implied term, if established, will almost always inevitably be repudiatory by its very nature.

48. The question of whether or not there has been a repudiatory breach of the term of trust and confidence is to be judged by an objective assessment of the employer's conduct. The employer's subjective intentions or motives are irrelevant. The actual effect of the employer's conduct on an employee is only relevant insofar as it may assist the Employment Tribunal to decide whether it was conduct likely to produce the relevant effect.

49. If there is a fundamental breach of contract, an employee must, however, resign in response to it. That requirement includes there being no unconnected reasons for the resignation, such as the employee having left to take up another position elsewhere or any other such reason if that is unrelated to the breach relied upon. However, if the repudiatory breach was part of the cause of the resignation, then that suffices. There is no requirement of sole causation or predominant effect (see **Nottinghamshire County Council v Meikle [2004] IRLR 703**).

50. It is possible for an employee to waive (or acquiesce to) an employer's breach of contract by their actions, including continuing to accept pay or a lengthy delay before resigning. In those circumstances, an employee may affirm the contract and will be unable to rely upon any breach which may have been perpetrated by the employer in seeking to argue that they have been constructively dismissed.

51. Tribunals are also assisted by the guidance in **Kaur v Leeds Teaching Hospitals NHS Trust [2018] I.R.L.R. 833** which requires consideration of the following matters when determining a complaint of constructive dismissal:

    (i) What was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
    (ii) Has he or she affirmed the contract since that act?
    (iii) If not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of trust and confidence? and
    (iv) Did the employee resign in response (or partly in response) to that breach?

Discrimination relying on the protected characteristic of race

52. The Claimant's discrimination complaints all fall to be determined under the Equality Act 2010 ("EqA 2010) and, particularly, with reference to Sections 13 and 39.

53. Section 39 EqA 2010 provides for protection from discrimination in the work arena and the relevant parts provide as follows:

(1) An employer (A) must not discriminate against a person (B)—

(a)in the arrangements A makes for deciding to whom to offer employment;

(b)as to the terms on which A offers B employment;

(c)by not offering B employment.

(2) An employer (A) must not discriminate against an employee of A's (B)—

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

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

(c)by dismissing B;

(d)by subjecting B to any other detriment.

(3) An employer (A) must not victimise a person (B)—

(a)in the arrangements A makes for deciding to whom to offer employment;

(b)as to the terms on which A offers B employment;

(c)by not offering B employment.

(4) An employer (A) must not victimise an employee of A's (B)—

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

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

(c)by dismissing B;

(d)by subjecting B to any other detriment.

54. Section 13 EqA 2010 provides that:

"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".

55. It is for a Claimant in a complaint of direct discrimination to prove the facts from which the Employment Tribunal could conclude, in the absence of an adequate non-discriminatory explanation from the employer, that the employer committed an unlawful act of discrimination (see **Wong v Igen Ltd [2005] ICR 931**).

56. If a Claimant proves such facts, the burden of proof will shift to the employer to show that there is a non-discriminatory explanation for the treatment complained of. If such facts are not proven, the burden of proof will not shift.

57. In deciding whether an employer has treated a person less favourably, a comparison will in the vast majority of cases be made with how they have treated or would treat other persons without the same protected characteristic in the same or similar circumstances. Such a comparator may be an actual comparator whose circumstances must not be materially different from that of the Claimant (with the exception of the protected characteristic relied upon) or a hypothetical comparator.

58. Guidance as to the shifting burden of proof can be taken from that provided by Mummery LJ in **Madarassy v Nomura International Plc [2007] IRLR 246**:

"'Could conclude' ….. must mean that 'a reasonable tribunal could properly conclude' from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of …… discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage …. the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example evidence as to whether the act complained of occurred at all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like….. and available evidence of the reasons for the differential treatment.

The absence of an adequate explanation for differential treatment of the complainant is not, however, relevant to whether there is a prima facie case of discrimination by the respondent. The absence of an adequate explanation only becomes relevant if a prima facie case is proved by the complainant. The consideration of the tribunal then moves to the second stage. The burden is on the respondent to prove that he has not committed an act of unlawful discrimination. He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the tribunal must uphold the discrimination claim."

59. However, there must be something from which an inference could be drawn that the treatment complained of relates to the protected characteristic relied on. The fact that a person has that protected characteristic is not enough nor is a mere difference in treatment. Similarly, unreasonable treatment is not enough to establish that there has been discrimination (see **Bahl v The Law Society [2004] IRLR 799**).

60. The protected characteristic need only be a cause of the less favourable treatment but need not be the only or even the main cause. A Tribunal when

considering the cause of any less favourable treatment will be required to consider that question having regard not only to cases where the grounds of the treatment are inherently obvious but also those where there is a discriminatory motivation (whether conscious or unconscious) at play (see **Amnesty International v Ahmed [2009] ICR 1450.**)

The EHRC Code

61. When considering complaints of discrimination, a Tribunal is required to pay reference to the Equality & Human Rights Commission Code of Practice on Employment (2011) ("The Code") to the extent that any part of it appears relevant to the questions arising in the proceedings before them.

Complaints of a breach of Section 1 Employment Rights Act 1996

62. Section 1 Employment Rights Act 1996 ("ERA 1996"), at the material time with which we are concerned, provided as follows:

"Statement of initial employment particulars

(1)Where an employee begins employment with an employer, the employer shall give to the employee a written statement of particulars of employment.

(2)The statement may (subject to section 2(4)) be given in instalments and (whether or not given in instalments) shall be given not later than two months after the beginning of the employment.

(3)The statement shall contain particulars of—

(a)the names of the employer and employee,

(b)the date when the employment began, and

(c)the date on which the employee's period of continuous employment began (taking into account any employment with a previous employer which counts towards that period).

(4)The statement shall also contain particulars, as at a specified date not more than seven days before the statement (or the instalment containing them) is given, of—

(a)the scale or rate of remuneration or the method of calculating remuneration,

(b)the intervals at which remuneration is paid (that is, weekly, monthly or other specified intervals),

(c)any terms and conditions relating to hours of work (including any terms and conditions relating to normal working hours),

(d)any terms and conditions relating to any of the following—

(i)entitlement to holidays, including public holidays, and holiday pay (the particulars given being sufficient to enable the employee's entitlement,

including any entitlement to accrued holiday pay on the termination of employment, to be precisely calculated),

(ii)incapacity for work due to sickness or injury, including any provision for sick pay, and

(iii)pensions and pension schemes,

(e)the length of notice which the employee is obliged to give and entitled to receive to terminate his contract of employment,

(f)the title of the job which the employee is employed to do or a brief description of the work for which he is employed,

(g)where the employment is not intended to be permanent, the period for which it is expected to continue or, if it is for a fixed term, the date when it is to end,

(h)either the place of work or, where the employee is required or permitted to work at various places, an indication of that and of the address of the employer,

(j)any collective agreements which directly affect the terms and conditions of the employment including, where the employer is not a party, the persons by whom they were made, and

(k)where the employee is required to work outside the United Kingdom for a period of more than one month—

(i)the period for which he is to work outside the United Kingdom,

(ii)the currency in which remuneration is to be paid while he is working outside the United Kingdom,

(iii)any additional remuneration payable to him, and any benefits to be provided to or in respect of him, by reason of his being required to work outside the United Kingdom, and

(iv)any terms and conditions relating to his return to the United Kingdom.

(5)Subsection (4)(d)(iii) does not apply to an employee of a body or authority if—

(a)the employee's pension rights depend on the terms of a pension scheme established under any provision contained in or having effect under any Act, and

(b)any such provision requires the body or authority to give to a new employee information concerning the employee's pension rights or the determination of questions affecting those rights".

63. The Employment Rights (Miscellaneous Amendments) Regulations 2019 made amendments to extend the scope of Section 1 ERA 1996 which affected, amongst other things, the timing of provision of the statement but that does not affect this part of the claim and we are concerned with how Section 1 was originally enacted.

FINDINGS OF FACT

64. We ask the parties to note that we have only made findings of fact where those are required for the proper determination of the issues in this claim. We have therefore invariably not made findings in respect of each and every area where the parties are in dispute with each other on the evidence if it is not necessary to do so.

The First Respondent and the commencement of the Claimant's employment

65. The First Respondent is a takeaway restaurant based in Gainsborough, Lincolnshire, and the Second Respondent is a director of that company. The Second Respondent has been in business for a number of years and is clearly passionate about his operations, reputation and service to his customers.

66. The Claimant commenced employment for the First Respondent in November 2016 and continued in employment until he terminated his employment with immediate effect on 20th April 2022. We are satisfied that it was the First Respondent who was the Claimant's employer and that he was not engaged by the Second Respondent in a personal capacity. That was not a point that was put to any of the Respondents witnesses in cross examination, but it remained a live issue before us as identified by Employment Judge Ayre at the first Preliminary hearing (see page 36 of the hearing bundle).

67. It is not in dispute that the Claimant was not given a statement of initial employment particulars at the time that he first joined the First Respondent or within the first two months thereafter.

68. The first time that the Claimant was supplied with what was headed a contract of employment was on 20th October 2020 (see page 54 of the hearing bundle). The Claimant did not agree with the content of the contract of employment drafted by the Respondent. The reasons for that do not really matter for the purposes of dealing with this part of the claim for the reasons set out in our conclusions below. However, he signed the contract after he had marked up some parts with amendments including areas that he had crossed out that he considered did not apply to him and question marks and returned it to the Second Respondent.

69. Nothing appears to have been done about the matter and some time later in July 2021 the Claimant then drafted his own statement of main terms and conditions of employment and presented that to the Second Respondent. He invited the Second Respondent to adopt it not only for him but for all drivers on the basis that he believed that the version prepared by the First Respondent's solicitors was deficient and that he was assisting the Respondents by providing his own superior draft. The Second Respondent did not agree with that assessment and told us in his evidence that he had lawyers to provide advice and did not need the Claimant to assist him. That was a not unreasonable position to have taken. He did however send the Claimant's letter (but not the

draft statement of main terms and conditions) to his legal advisers and advised the Claimant that he had done so. He also made it plain orally to the Claimant that he did not accept his draft and did not need him to have provided it.

70. Nothing was ever agreed between the parties thereafter and the matter stalled there. The Claimant did not press the matter nor did it feature in any of his later grievances. We are satisfied that it had nothing at all to do with his later resignation.

The Claimant's first resignation

71. In March 2020 the United Kingdom had become affected by the Covid 19 pandemic and the Claimant had understandable concerns that he may be putting his health at risk if he continued to undertake deliveries for the First Respondent. He therefore determined that he would resign. It is not suggested that this was for anything other than concerns about health.

72. The Second Respondent did not simply accept the Claimant's resignation as he would have been entitled to do but instead contacted him and asked him if he would prefer to retract his resignation and be placed on the Government's then furlough scheme. The Claimant agreed that he would wish to do that and that is how matters proceeded.

73. The Claimant suggests that because he was invited to retract his resignation it was clear that he was a model employee and that there were no issues with his conduct in the workplace. We accept the evidence of the Second Respondent that that was not the case but that his view at that time was that the "World was ending" and that he wanted to do his best by everyone and help each other out. He gave an example of having baked fresh bread to be handed out to the residents of Gainsborough to show goodwill and help them out and that his offer to put the Claimant on furlough – which was to the Claimant's considerable benefit – was an extension of that goodwill.

Employment of Mr. Tezcan

74. During the later period of the Claimant's employment the First Respondent employed Mr. Onder Tezcan as a delivery driver. We are satisfied that Mr. Lowther's characterisation of the Claimant's demeanour towards Mr. Tezcan after the commencement of his employment as being obsessive was an accurate one.

75. In this regard it came to the attention of the Second Respondent from Simon Lowther, another delivery driver, that the Claimant had been making inappropriate remarks about Mr. Tezcan. He reported these matters to the Second Respondent in early July 2021 and told him that the Claimant referred to Mr. Tezcan as "The Turk" instead of using his name and had made references to whether he had the right to work in the United Kingdom. Mr. Lowther's view was that that was racially discriminatory.

76. The Second Respondent wrote to the Claimant on 5th July 2021 (see page 91 of the hearing bundle) about those matters. The Claimant accepted that he had received the letter but largely denied before us that he had exhibited the behaviour described and particularly that set out at paragraph 3.

77. However, the Claimant did not reply to it which we are entirely satisfied that he would have done if the content was inaccurate in any way. That would not only be the logical thing to do when being accused of serious things which have not been done but also the Claimant is not shy to raise written issue with things that he does not agree with. We did not find it credible that he would not have bothered to respond to this letter if it was plainly not true, or that it was ironed out in a heart to heart with the Second Respondent nor that he did not want to "wind up" the Second Respondent. We are satisfied that what was in the letter was accurate.

78. That was supported by the evidence of Mr. Lowther before us and it was of course he who made the complaint to the Second Respondent. Mr. Lowther was not challenged in cross examination about the fact that he had made that complaint nor about what he had heard. We accept his evidence that he had heard the Claimant refer to Mr. Tezcan as 'The Turk' rather than by his name and questioning if Mr. Tezcan had the right to work in the United Kingdom. Whilst the Claimant denies the comments we find it more likely than not that he did make them not only from his failure to respond to the letter and from Mr. Lowther's evidence but also from the fact that his cross examination of the Second Respondent included his views that there was nothing inappropriate in referring to someone by their nationality rather than their name. We are afraid that we are unable to agree with that view and are unsurprised that Mr. Lowther was concerned and raised a complaint.

79. We should also reference the fact that the Claimant accepted in his evidence that he had asked Mr. Tezcan about his right to work in the United Kingdom That accorded with entries in what the Claimant referred to as his work diary and which was before us in the bundle.

80. In this regard, the Claimant had embarked on some type of fact finding exercise with Mr. Tezcan. He appeared to suggest that this was necessary and justified because he was raising issues of unfairness about delivery allocation with Mr. Tezcan (which we come to further below) and that he wanted him to then raise those concerns with the Second Respondent but that was not a logical position to take. We were somewhat baffled about why he would have gone about matters in that way rather than just voicing any concerns to Ms. Revill as his line manager or raising them to the Second Respondent.

81. Moreover, the Claimant went well over and above raising issues about deliveries with Mr. Tezcan and entered into enquiries which were nothing to do with that issue and equally nothing to do with him. Particularly, he asked Mr. Tezcan about where he was living - although that in itself was odd given that his evidence was that he already knew that - how much rent he was paying, what his hourly rate was and, as we have found above, whether he had the

right to work in the United Kingdom. None of that was any of the Claimant's concern nor was it his job to be carrying out any form of fact finding. The latter issue as to having raised the matter of his right to work in the United Kingdom was clearly done against the backdrop of Mr. Tezcan being of Turkish ethnicity.

82. That questioning, his antipathy towards Mr. Tezcan by calling him The Turk instead of by his name and raising with other drivers whether he had the right to work in the United Kingdom and, as we shall come to, planting seeds about delivery allocations leads us to conclude that Mr. Lowther's assessment which we have referred to above about the Claimant being obsessional about Mr. Tezcan was accurate.

The nature of the Respondent's delivery operations

83. There are a number of ways in which food can be ordered by customers of the First Respondent. That is that they can order online or over the telephone and come in to collect their food or alternatively order online or by telephone for the food to be delivered to them. In the latter case the First Respondent employed or engaged (some were self employed) a number of delivery drivers, one of which was the Claimant. There were generally around five delivery drivers so that operations could run smoothly at busy times.

84. The way in which drivers are paid if they are employed directly is by a set hourly rate - at the time £9.50 per hour - with an additional pound being paid for each delivery undertaken. If a driver takes out three different deliveries at the same time they would therefore receive £3.00 over and above their hourly rate. A driver taking out a single delivery - i.e. one to the same address - would attract an additional payment of £1.00. That would be the case irrespective of how many items are being delivered. For example, a driver taking six pizzas to one address would receive £1.00 over and above their hourly rate whilst a driver taking three pizzas to three different customers at different addresses would receive £3.00 on top of their hourly rate.

85. Multiple deliveries (i.e. ones to different addresses) were therefore preferred because they enabled drivers to potentially earn more money and save on fuel by only making one single trip. That may be variable, however, depending on the proximity of the deliveries as a short trip would enable a driver to return more quickly to the takeaway to collect the next delivery.

How deliveries are allocated

86. The Claimant was Ordered at the Preliminary hearing on 8th December 2022 to set out additional information about the basis upon which he said that the driver with whom he compared himself - Mr. Tezcan - received more favourable deliveries. He confirmed in evidence that he understood what was required but that he did not provide that information. He also did not deal with the matter in his witness statement and we had no idea, for example, of when these things were said to have happened or, other than multiple deliveries allegedly being allocated to Mr. Tezcan, exactly what the issue was with delivery allocation. At

the Preliminary hearing on 8th December 2022 reference had been made to out of town deliveries or more geographically favourable deliveries (see pages 45 and 46 of the hearing bundle) but those matters were not referred to in the evidence before us.

87. The evidence of the Claimant, Mr. Lambert and Mr. Casien concentrated on the assertion that deliveries were unfairly allocated in respect of what was said to be an unequal amount of multiple deliveries being given to Mr. Tezcan. By multiple deliveries we again mean a delivery to more than one customer which would mean that drivers were able to earn more than a single one pound delivery fee for one single journey.

88. The Claimant, Mr. Lambert and Mr. Casien all gave evidence that they believed that Mr. Tezcan was being allocated multiple or more deliveries than the other drivers and that all white European drivers were being treated less favourably. Ms. Revill, the Second Respondent and Mr. Lowther maintained that that was not the case. We prefer the evidence of the Respondents witnesses on that point.

89. Firstly, it was clear from his evidence that the Second Respondent places a significant emphasis on efficiency and customer service and that he would not want drivers waiting around when they were being paid an hourly rate just to wait for Mr. Tezcan to return so that he could take a certain delivery. His priority is getting orders to customers as quickly as possible and he did not want customer complaints about cold food.

90. Secondly, Ms. Revill's evidence was that neither the Respondents nor she have any control over what orders come in and at what times. That makes logical sense as no one would know how many orders were going to come in, when or for what locations until it was received from the customer. Ms. Revill is assisted when she is on duty and responsible for allocating orders by a team of other workers including people answering the phone and chefs preparing the food. They are all white.

91. Once the order comes in work begins to prepare it and then it is allocated to whatever driver is available to take it. We accept the evidence of the Second Respondent that when things are busy orders will generally be taken straight back out when a driver returns because a significant volume are received at busy times. When things are quieter the order will be placed on the counter with a call for a driver to take it. That will be a matter between the drivers as to who has been waiting the longest.

92. If there are a number of single orders drivers will be asked to take those individually rather than wait for an order to come in which might be geographically proximate so that they can have a multiple. That was not only to ensure efficiency so that drivers are not sitting around being paid and not working and also more importantly to ensure that the food arrives hot for the customer. That last issue makes sense entirely and it was the evidence of both the Second Respondent and Ms. Revill which we accept.

93. We also found the evidence of Mr. Lowther about this matter compelling. His evidence was that he had spoken to the Claimant confidentially about his concerns that Mr. Tezcan was getting more multiple deliveries and that the Claimant had expressed the view that he was. He had then spoken to the Second Respondent about his concerns.

94. We accept his evidence that he had changed his view after speaking to the Second Respondent and noticing that he was at times himself getting multiple deliveries when they arose in preference to Mr. Tezcan who had been sent out with a single. He had also come to realise that it was difficult for a driver to differentiate between a multiple delivery and one that was an order of a number of items for a single customer. He gave an example of him having taken out eight bags of food for a single customer and we accept that that could have looked to other drivers like a multiple order when it was in fact a single one. Indeed, Mr. Lambert accepted that that could be a possibility in respect of Mr. Tezcan during his own evidence.

95. Mr. Lowther referred to the seed about Mr. Tezcan being given more preferable deliveries being planted by the Claimant. We can readily accept that to be the case given the Claimant's apparent antipathy towards Mr. Tezcan and his having sought to conduct his own investigations into him and his right to work. We have already dealt with those matters above.

96. We do not accept that the Second Respondent or Ms. Revill as was contended by the Claimant had any part to play in manipulating deliveries to ensure that the best ones went to Mr. Tezcan and we accept that because of the way in which orders are received that they would not be able to do that. We accept that it was the luck of the draw as to who got what. Sometimes that would be a single order and sometimes a multiple order would be able to be allocated if more than one customer within a proximate distance of each other had placed orders that were cooked and ready to go at the same time. In those circumstances it would make logical sense to have those orders delivered by the same driver rather than sending more than one driver to a similar part of the town.

97. We also do not accept – and there is no evidence at all to this effect – that the Second Respondent in some way instructed Ms. Revill or any of the other members of the team who were involved with allocating deliveries to give more preferential ones to Mr. Tezcan.

98. Some issue has also been made of times when Mr. Tezcan had undertaken more deliveries than other drivers. We have no real evidence of that either as to the comparative number of deliveries or when that was said to have taken place and that was not dealt with in the Claimant's evidence or in accordance with Orders made at the December 2022 Preliminary hearing. However, we accept the evidence of the Second Respondent and Ms. Revill that Mr. Tezcan was faster than some others in respect of his deliveries because he knew Gainsborough "like the back of his hand" given that he had operated his own

business there previously. If he was delivering efficiently whilst the Claimant was delaying his own deliveries by taking time to write down details of the orders that he was taking in his notebook as the Second Respondent told us and which did not appear to be denied, then it is unsurprising that he may have undertaken more.

Incidents with others not employed by the First Respondent

99. The Claimant contends that during the course of his employment he was subjected to harassment from delivery drivers employed by other establishments in Gainsborough. That included what can best be described as aggressive or intimidating driving. The Claimant contends that two of those drivers were either married to or in a relationship with Ms. Revill and a chef by the name of Nicole. As a result of the withdrawal of the age discrimination complaints there is no need for us to make any finding of fact about whether that did or did not happen and we are unsurprised that the Respondents did not call witnesses to deal with this issue.

100. The Claimant contends and put on more than one occasion to Ms. Revill that she had instigated or conspired with her partner to harass him. There is no factual basis for that proposition at all and we accept entirely her evidence that she had done no such thing. There is equally no factual basis at all to suggest that Nicole had conspired with her partner to harass the Claimant. We find it more likely than not from contemporaneous messages sent by Nicole (and which were sent well before these proceedings were contemplated) that the Claimant was himself driving in a way which was designed to annoy and provoke a reaction from other delivery drivers working for other establishments in the area and that if he was tailgated, that was as a result of him driving unnecessarily slowly in front of them.

101. As we shall come to, the Claimant raised grievances about such matters to the Second Respondent. It was plain that it was not in the gift of the Second Respondent to discipline any delivery drivers that were not employed by the First Respondent and his evidence on that was clear and consistent. It is also a matter of logic. Whilst the Claimant's grievances made call for disciplinary action to be brought against Ms. Revill (see page 103 of the hearing bundle) there was no basis for that either and it would have been entirely inappropriate and unfair to seek to discipline her for something that it was alleged that her partner had done and where she had not been present or involved.

102. The Claimant complains of the fact that there was a continued amicable relationship with those who he contended had harassed him. Those persons involved were identified by the Claimant in evidence as being the Second Respondent and Ms. Revill.

103. Insofar as Ms. Revill and the Second Respondent are concerned the sole issue in this regard appears to be that on 15th April 2022 the Claimant contended that he had been harassed by Ms. Revill's partner in respect of what he described as dangerous driving. His position was that he had told the Second

Respondent about that and handed him a further letter of grievance which we shall come to further below. His position is that approximately two hours later he returned from a delivery to see Ms. Revill sat in her partners car and the Second Respondent chatting amicably with them. His position is that he would not have expected that but for the Second Respondent to have discussed his complaints and ask that the incident not be repeated. Ms. Revill was unable to be sure if this visit by her partner would have been on the same date as the Claimant handed in his further grievance. That is because he would frequently visit with their child whilst she was on her break. We accept that evidence and do not find that to be unusual. Ms. Revill was of course entitled to enjoy her break with her partner and child irrespective as to any alleged harassment of the Claimant which he had reported.

104. The Second Respondent accepted that the Claimant had handed him a grievance letter albeit he had not read it until the day afterwards but that he was in fact talking to and pulling faces at Ms. Revill's child who was in the back of the vehicle. In all events, the Claimant could not have known what the Second Respondent was saying or to whom within the vehicle and so would not have known if pleasantries were being exchanged or otherwise.

Incident of 14th April 2022

105. On 14th April 2022 the Claimant was asked by Ms. Revill to take a single delivery. It is not in dispute that the Claimant refused to do so because he wanted to take at least one more delivery for a different customer with him. We accept Ms. Revill's evidence that there was not another delivery which was ready for the Claimant to take with him and if she had waited until there was then the original order would have been getting cold. Again, that makes logical sense. There is no dispute that the Claimant continued to refuse to take the order. As a result, he was asked to cash up early and Ms. Revill clocked him out of his shift. We find that unsurprising because the Claimant was unreasonably refusing to do his job and it was not for him to dictate the order of deliveries or which ones he should take. If he would not do as he was asked then Ms. Revill was perfectly entitled to end his shift early.

106. Whilst the Claimant paints himself as an exemplary employee, we prefer the assessment of the Second Respondent that that was not the case and there were issues with his conduct. That is clear from the things that he accepts that he did such as the challenging of Ms. Revill as his line manager, his refusal to take single deliveries when asked to do so and his conduct to the Second Respondent in respect of his resignation which we deal with below, although the Claimant does not appear to recognise himself that those things were inappropriate.

107. We also accept the evidence of Ms. Revill and the Second Respondent that the Claimant would attempt to be disruptive to slow down operations by, for example, very slowly counting and re-counting his float which obstructed other delivery drivers and taking time when allocated a delivery to slowly write that down in a notebook whilst in his vehicle which was ultimately unnecessary

because a record of who had been allocated what deliveries was already recorded electronically on the First Respondent's systems and only operated to slow things down.

108. Much has been made by the Claimant of the fact that he was not disciplined about these matters any had been invited to rescind his resignation in March 2020. We accept the evidence of the Second Respondent that his preferred way to deal with matters was to try and talk to an employee and seek to encourage a turn around. We accept that that was what he did with the Claimant by taking him to one side and asking him to stop his behaviour and to please work with him for the good of the business. We further accept his evidence that when he had done that the Claimant would – in his words – be "as good as gold" for a while before reverting some weeks or months later to being disruptive. That would then be dealt with by another conversation. We further accept that it was not in the interests of the Second Respondent to lose drivers because of issues that could be resolved via discussion because there was a shortage of drivers and he needed to continue to run the operations of the First Respondent smoothly and efficiently.

The Claimant's grievances

109. As we have touched upon above during the course of the latter part of his employment the Claimant raised three grievances. It is common ground that none of them received a written response from the Respondents.

The first grievance

110. The first grievance concerned complaints from the Claimant about Katie Revill.

111. It is common ground that there was a discussion about the first grievance between the Claimant and the Second Respondent and we accept the evidence of the Second Respondent that when he told the Claimant that Ms. Revill was going to be absent and of the personal circumstances that led to that absence the Claimant said that that changed things and he was not going to pursue things further.

112. The impression that he was under therefore was that the matter was resolved and the Claimant did not want to take it further. We prefer the evidence of the Second Respondent to that of the Claimant on that point and it is notable that if he had been wrong about the Claimant not seeking to pursue the matter then he would have raised the lack of progress very soon after Ms. Refill returned to work. He raised nothing further until an incident on 14th April 2022 regarding being clocked out early which we have already dealt with above and which was the catalyst for the second grievance and seeking to resurrect the first.

113. The Second Respondent accordingly did not formally deal with that fist grievance because he believed that the Claimant did not want to pursue it based on what he had told him at the time.

The second grievance

114. On 14th April 2022 the Claimant raised a further grievance. That was countersigned by Dan Casien.

115. That concerned Ms. Revill and also the harassment that he said that he was experiencing from her partner and that of Nicole. The Second Respondent again took the view that the Claimant had said that he did not want to progress anything against Ms. Revill although clearly given the matter had been repeated after the initial letter and discussion it would have been better to have clarified that with the Claimant formally. However, what we are satisfied of is that the second grievance was raised by the Claimant as a direct result of the incident earlier that day when Ms. Revill had clocked the Claimant out for refusing to take a delivery. The Claimant had not raised the issue of Ms. Revill and his original grievance if he was still intending to pursue it after her return to work and only raised the second issue when her actions had irked him. That chimed with the evidence of the Second Respondent that the Claimant would be "good as gold" after being spoken to but would then revert to being awkward and disruptive if he was displeased about something.

116. Insofar as the allegations of harassment were concerned, the Second Respondents view was that there was nothing that he could do about those matters because he did not employ either Ms. Revill's partner or Nicole's husband. He also did not employ a person who was later convicted of assaulting the Claimant and so he could not do anything about that either because as he pointed out that had become a police matter straightaway. He informed the Claimant at the times that his attention was drawn by the Claimant to what he alleged to be harassment against him and the assault that the proper course was for him to go to the police.

117. Particularly, we accept that there was nothing that he could do about the perpetrator of the assault because the Claimant had already reported the matter to the police and it was accordingly in their hands. Insofar as the issue of driving was concerned he also advised that the Claimant contact the police and recommended and sourced him a dash cam so that he would be able to evidence his position. In reality, there was nothing else that the Second Respondent could in fact do and his advice to contact the police was a sensible one. We accept that he had told the Claimant that on a number of occasions including in discussions about his grievance letters.

118. It would plainly have been better for the Second Respondent to have written to the Claimant to set out his position in respect of each of the grievances, not least because if there had been a misunderstanding about his wish to pursue matters against Ms. Revill then he could have corrected that. However, we do accept that he spoke to the Claimant about them and they were not ignored. We should also point out that very shortly after the second and third grievances were raised the Claimant resigned and did not return to work. That was nothing to do with those grievances not having been dealt with and we should note in all events that the Claimant's evidence was that he had not

anticipated a response to his later grievances because of the lack of reply to earlier one. We come to the circumstances of the Claimant's resignation and the reasons for it below.

The third grievance

119. On 15th April 2022 the Claimant raised a further grievance. This concerned what he alleged to be further harassment from third party drivers and an assertion that Ms. Revill and Nicole were somehow involved in that. Again, for the reasons that we have already given the Second Respondent's view remained that he could not do anything about that and he had already advised the Claimant on a number of occasions that he needed to report the matter to the police and had already sourced him a dash cam so that he could evidence any inappropriate conduct on the part of drivers from other establishments.

120. On 20th April 2022 the Claimant delivered a further letter to the Respondents which he referred to in his evidence as his fourth grievance. We do not need to say much about that letter because it was not part of the issues identified by Employment Judge Ayre as forming part of the constructive dismissal claim. In all events, the letter did not raise anything new in terms of complaints but simply requested a meeting to deal with the earlier grievances. There was no opportunity to deal with that correspondence in all events because as we come to further below the Claimant resigned with immediate effect on the same day.

The Claimant's resignation

121. On 20th April 2022 the Claimant resigned from employment verbally and with immediate effect.

122. This arose in the context of his understanding that Mr. Casien had been dismissed by the Second Respondent.

123. Mr. Casien had two spells working for the First Respondent. The first time he was an employee and the second period with which we are concerned was on a self employed basis.

124. It is not in dispute that Mr. Casien sent a message to Ms. Revill on 16th April 2022 indicating that he could not work the shift that he was due to work that day because his car had broken down (see page 106 of the hearing bundle). His message indicated that he did not know when he would be able to get it fixed and that he would not be able to work that day and he was not sure about whether he could work the following week. For context this was during a bank holiday weekend when no garages would be open.

125. Something had to be done to cover the shifts that Mr. Casien was scheduled to work and again as it was a Bank holiday weekend the likelihood was that the First Respondent would be very busy with deliveries. We accept the evidence of the Second Respondent that he spoke to Mr. Casien and gave him a week

to get his car back on the road. During that time arrangements were made for other drivers to cover his shifts.

126. Mr. Casien arranged insurance cover for a second car that he had pending his main vehicle being able to be back on the road and attended work on Wednesday 20th April 2022. He had not notified anyone that he was going to do that. He was not needed on that day because his shift had been covered and the Second Respondent told him that. There is then a dispute as to whether the Second Respondent then told him that he did not need him anymore and that he should not return or words to that effect. Contrary to what the Claimant wrongly asserted both in his evidence before us and in his closing submissions there was nothing on the recording that we heard that demonstrated that the Second Respondent had said those words or dismissed Mr. Casien. That is because the recording only started as the Claimant arrived and was only done then because of the way that he himself was presenting.

127. We are not satisfied that the Second Respondent did dismiss Mr. Casien but we accept that Mr. Casien believed - or at least came to believe - that that had happened. He did not return for any further shifts and the Second Respondent did not make any further contact with him. As we have already observed Mr. Casien had countersigned the Claimant's second grievance but we are satisfied - and there is absolutely no evidence to the contrary - that that had nothing to do with the Second Respondent's interactions with him on 20th April 2022.

128. At the latter stages of the discussions between the Second Respondent and Mr. Casien the Claimant arrived back from taking a delivery. He immediately embroiled himself in the matter although in reality whatever had taken place between Mr. Casien and the Second Respondent was nothing to do with him. During the exchange - which is by and large accurately recorded at page 108 of the hearing bundle - the Claimant made plain that if Mr. Casien was not working then he was not working. The Second Respondent asked the Claimant if he was refusing to work his shift. The Claimant made plain that he was referring to an assertion that the Second Respondent was getting rid of his "last ally" and that he would see him in the Employment Tribunal.

129. The Claimant's conduct during that exchange was entirely inappropriate. His voice was raised, he was rude and aggressive referring to the Second Respondent as "deaf man" and he even went so far at the end of the exchange as to poke the Second Respondent in the stomach before telling him to shut up and driving away. `He did not return to work after that point.

130. It was abundantly clear from the recording and from the Claimant's own witness statement and evidence in cross examination that the reason for his resignation was his understanding that `Mr. Casien had been dismissed. We are satisfied that had that not been the case then he would not have resigned and indeed that was his evidence in cross examination. That was the real reason for his resignation and not any of the four things that had been identified before Employment Judge Ayer and confirmed at the 9th December 2022 Preliminary hearing.

CONCLUSIONS

131. Insofar as we have not already done so we deal now with the remaining claims before us.

132. We begin with the complaint about a breach of the provisions of Section 1 Employment Rights Act 1996. At the time with which this complaint is concerned Section 1 required an employee to be provided with a statement of main terms and conditions of employment within two months of the date of commencement of employment. It is common ground that the contract of employment handed to the Claimant was not provided until nearly four years after the date that he commenced employment. The Respondent was therefore in breach of the provisions of Section 1 Employment Rights Act 1996 because the statement was not provided within two months of the commencement of employment. This complaint is therefore well founded and succeeds. It is not therefore necessary for us to address whether there should have been discussion with the Claimant on the content or that all terms should have been directly applicable to him to determine whether there had been any breach because the timing alone resolves that issue.

133. We turn then to the complaint of constructive dismissal. The Claimant had confirmed at the December 2022 Preliminary hearing that he was relying on there having been a breach of the implied term of mutual trust and confidence. As we have already observed, four things were identified as being destructive of that term and we deal with each of them in turn.

134. The first is the assertion that the Second Respondent should have somehow brought pressure to bear on Ms. Revill and Nicole to stop their partners/husbands from harassing him as he had complained about. He had gone so far as to suggest that Ms. Revill ought to be disciplined for gross misconduct. We accept entirely the evidence of the Second Respondent that it was not in his gift to do that. It would have been entirely unfair and inappropriate for either individual to be taken to task or placed under pressure to control alleged behaviours of their partners who did not work for the First Respondent.

135. We do not accept - and again there is no evidence to that effect - that either individual was in some way colluding with their partners in respect of the behaviour that the Claimant alleged was occurring and as such it was not a matter for them or for the Second Respondent to raise it with them. The Second Respondent gave the Claimant sensible advice to report any concerns to the police and to get a dash cam so that he could record any activity in support. He even went so far as to source a dash cam for the Claimant when he had asked him to do so. There was in reality little more that he could do and he took a more than reasonable course.

136. The second is the Claimant's contention that the Second Respondent and Ms. Revill (these being identified at the outset of the hearing as the people involved

in respect of this part of the complaint) had maintained amicable relationships with people who he alleged had harassed him.

137. The sole incident that was referred to in evidence was on 15th April 2022 when the Claimant says that he saw Ms. Revill sitting in her car with her child and partner and the Second Respondent talking to them. Ms. Revill was perfectly entitled to spend her break with her partner and her child as she had regularly done irrespective of any complaint that had been made about him by the Claimant to the Second Respondent. We would also observe that insofar as Ms. Revill was concerned the person that the Claimant alleged had harassed him was her partner and it is difficult to envisage what she was supposed to do in terms of her relationship with him.

138. Insofar as the Second Respondent is concerned we accept his evidence that his focus was on Ms. Revill's child and the Claimant has no way of knowing what, if anything, was said during that short period of time. Even if the Second Respondent had spoken amicably with Ms. Revill's partner he was entitled to do that and we accept his evidence that it was not open to him to take him to task for anything that the Claimant alleged that he had done because he was not employed by the First Respondent. He had already given sensible advice about how the Claimant should deal with those matters.

139. By the time of his written submissions the basis of this particular allegation had evolved to a suggestion that the Second Respondent had somehow colluded with drivers who were not employed by the First Respondent to publicly harass the Claimant. There was absolutely no evidence of any of that and in all events that did not form part of the issues that had been identified before Employment Judge Ayre.

140. The next issue that the Claimant had identified at the Preliminary hearing before Employment Judge Ayre that he relied on as part of a breach of the implied term of mutual trust and confidence was the failure to deal with the three grievances that he had raised in breach of the ACAS Code of Practice on Grievance and Disciplinary Procedures ("The ACAS Code"). Whilst it does not appear to be in dispute that the Respondents did not follow the steps set out in the ACAS Code in terms of inviting the Claimant to a meeting to discuss the grievance, providing a written outcome and offering a right of appeal, we accept that there were reasons for that. In terms of the first grievance we accept for the reasons that we have already given that the Claimant had indicated to the Second Respondent that in view of Ms. Revill's personal circumstances at that time that that changed things and he no longer wanted to pursue matters.

141. Insofar as the later two grievances were concerned, we accept that the Second Respondent's view remained that the issues with Ms. Revill had been dealt with in that the Claimant has said that he did not want to pursue matters and insofar as the allegations of third party harassment were concerned that he had spoken to the Claimant on a number of occasions and clearly explained that he could not do anything about that because the people who were said to be involved did not work for the First Respondent, that the Claimant should report the matter

to the police and sourced a dash cam for him to assist with that. The matters had not therefore been ignored as the Claimant alleged.

142. In all events, the failure to deal with those grievances in accordance with the ACAS Code had nothing to do with the Claimant's decision to resign and his evidence was such that in relation to the later grievances he had not expected any action to be taken about them in all events.

143. The final issue relied upon was the failure of the Respondent to provide the Claimant with a statement of initial employment particulars. The Claimant commenced employment in November 2016. Nothing was said about any formal written terms of employment by either party until nearly four years later in October 2020 when the contract of employment at pages 54 to 58 was produced. The Claimant had signed the contract but with question marks and crossings out and then prepared his own version which was given to the Second Respondent in July 2021. The Second Respondent had made it plain that he was not going to accept or implement the Claimant's draft and nothing more was said about the matter. It is clear that this issue had nothing at all to do with the Claimant's decision to resign from his employment some nine months later.

144. We are satisfied that neither singularly or cumulatively any of the four acts relied upon by the Claimant breached the implied term of mutual trust and confidence.

145. However, even if we had not found that to be the case it is clear that those four issues were not causative of the Claimant's resignation. The reason for resignation was clear from the Claimant's witness statement, his oral evidence before us and the way in which his case was put. That reason was his belief that the Second Respondent had dismissed Mr. Casien. That was not pleaded in his Claim Form, it was not identified before Employment Judge Ayre nor when he was asked at the later Preliminary hearing in December 2022 whether what had been recorded in respect of the constructive dismissal claim was accurate to which he had answered in the affirmative.

146. The complaint of constructive dismissal would therefore have failed in any event because the last straw now relied upon by the Claimant was not pleaded or previously identified and was not an issue before us.

147. We deal finally with the complaint of direct race discrimination. The Claimant relied on three acts as identified by Employment Judge Ayre which were giving more deliveries to Mr. Tezcan, giving better paid deliveries to Mr. Tezcan, and giving more geographically favourable deliveries to Mr. Tezcan. We heard no evidence at all about the latter point.

148. We do not accept that Mr. Tezcan was allocated more deliveries than the Claimant because there is no real evidence of that and it is merely an assertion without evidential foundation made by the Claimant. We have no dates of when that is supposed to have happened or how many deliveries the Claimant took as opposed to Mr. Tezcan. We cannot say that there was any detriment to the Claimant.

149. However, even if he had been allocated more deliveries the Claimant has shown no facts from which we could make any inference that that was because of race. He relies on an assertion that because Mr. Tezcan and the Second Respondent are both from the Middle East that this somehow gives them some affinity with each other which would motivate the Second Respondent to treat Mr. Tezcan more favourably. There is again absolutely no evidential basis for that assertion. The burden of proof quite simply does not shift.

150. However, if it had then it is clear that the reason that Mr. Tezcan may have taken more deliveries was not because of race but because he was more efficient than the Claimant was. He knew Gainsborough extremely well and delivered quickly. The Claimant did not because he was too busy engaged in writing deliveries down in his notebook. The faster that Mr. Tezcan returned to the shop then as a matter of logic the more deliveries he would take. This complaint therefore fails and is dismissed.

151. The second complaint was about Mr. Tezcan receiving better paid deliveries which were said to be the multiples. Again, there is no real evidence of that other than the Claimant's say so. We have no dates of when that is supposed to have happened or how many single/multiple deliveries the Claimant took as opposed to Mr. Tezcan. We cannot therefore say that there was any detriment to the Claimant.

152. However, even if Mr. Tezcan did do more multiple deliveries on any particular occasion the Claimant has again shown no facts that his race had anything to do with that. The burden is upon him to do so and it is not enough to simply assert that any difference in treatment was because of race and that is all the Claimant has done here by suggesting that because the Second Respondent and Mr. Tezcan are both from the Middle East there is some unspecified affinity between them. The burden of proof again does not shift.

153. However, even if it had we accept as a matter of logic that the "reason why" someone could obtain more multiple deliveries was the luck of the draw and race was not a factor. We accepted that no one was manipulating deliveries (whether multiples or otherwise) and that it was, as we have said, the luck of the draw. Particularly, Mr. Lowther's evidence was that he himself had received multiples in preference to Mr. Tezcan. Mr. Lowther is white.

154. The final complaint is about Mr. Tezcan receiving geographically more favourable deliveries. That fails on its facts as we have heard no evidence about it at all. However, even if we had accepted that Mr. Tezcan had received more geographically favourable deliveries the complaint would still have been

doomed to failure on the basis that there was no evidence of any issue related to deliveries having anything at all to do with race other than the Claimant's assertion to that effect.

155. All complaints of direct race discrimination therefore fail and are dismissed.

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Employment Judge Heap

Date: 17th March 2024

JUDGMENT SENT TO THE PARTIES ON

....06 April 2024.....

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FOR THE TRIBUNAL OFFICE

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