EMPLOYMENT TRIBUNALS

Claimant:	Mr Rene Rajcok
First Respondent:	Glyn Hopkin Limited
Second Respondent:	Mr Russell Clark
Heard at:	Bury St Edmunds
On:	13, 14, and 15 May 2024 7 June 2024 (in chambers)
Before:	Employment Judge Graham
Members:	Ms L Durrant Mrs L Salmon

Representation

Claimant:	Mr M Raffell, Litigation Executive
Respondents:	Ms R Mellor, Counsel

RESERVED JUDGMENT

It is the unanimous decision of the Tribunal that:

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

2. The complaints of harassment related to the Claimant's race fail and are dismissed.

REASONS

Introduction and procedural history

1. By way of ET1 dated 5 April 2023 the Claimant brings complaints of direct race discrimination and harassment related to race. Whereas the Claimant alleges that the decision to dismiss him was an act of race discrimination, he does not bring proceedings for unfair dismissal. By ET3 dated 12 June 2023 the Respondent denies the complaints.

2. A private preliminary hearing for case management took place previously on 6 September 2023 where the claim was clarified, the List of Issues was agreed, and directions were made for trial.

List of Issues

3. The agreed List of Issues for determination at this final hearing were as follows.

Equality Act 2010 claims—jurisdictional Issues

Time limits

1. Have the Claimant's claims of Race discrimination been brought within three months of the acts complained of, taking into account the effect of the 'stop the clock' provisions in respect of early conciliation? (EqA 2010, ss 123(1)(a) and 140B))

1.1 In respect of any complaints which are out of time, do they form part of a continuing act, taken together with acts which are in time? (EqA 2010, s 123(3)(a))

1.2 If the complaints were not submitted in time, would it be just and equitable to extend time? (EqA 2010, s 123(1)(b))

2. Allegations of fact

The claimant advances the following allegations of less favourable treatment;
3.1 In around June July in 2022, his colleague, Garry Master Technician statement to the Claimant, "these fucking foreigners", the regular ongoing comments, 'fuck Foreigners', in front of other colleagues and management; [complaint against R1]

3.2 The Claimant's different treatment from his colleagues Garry to smoke regularly approximately every hour during the days, without issue or problems from management; [complaint against R1 and R2]

3.3 On 09 Jan 2023, the Respondent display of the large Nazi Cross drawn onto the magnetic board; [complaint against R1. Claimant to confirm whether complaint is against R2]

3.4 The Nazi Cross sign drawn on the board on at least three other occasions in or around November 2022 approx and during the summer 2022; [complaint against R1 and R2]

3.5 The Respondent Russell Clark the Foreman's awareness of the Nazi cross whilst he was writing jobs on the board all day with the work lists/information work instructions to be done, and tacit approval by omission to remove it; [complaint against R1 and R2]

3.6 The Claimant's disciplinary itself; [complaint against R1] and

3.7 The Claimant's dismissal of 15 February 2023. [complaint against R1]

4 Direct race discrimination contrary to section 13 of the Equality Act 2010

4.1 Did the Respondent treat the Claimant less favourably than it treats or would have treated others?

4.2 The Claimant advances allegations above at 3.1, 3.2, 3.3, 3.4, 3.5, 3.6, and 3.7 as allegations of direct race discrimination.

4.3 To the extent that these are factually well-founded: -

4.3.1 Was it less-favourable treatment by reference to an actual or hypothetical comparator? The claimant identifies Dan Page (White British Service Technician) as an actual comparator: -

4.3.2 Is this a valid comparator for the claimant's race discrimination complaints?

4.3.3 Alternatively, the Claimant refers to the hypothetical comparator of a White British Service Technician working at the Respondent.

4.4 Are there facts from which the tribunal could decide, in the absence of any other explanation, that the Respondent discriminated against the Claimant? (EqA 2010, s 136(2))

4.5 If so, has the Respondent shown that it did not discriminate against the Claimant? (EqA 2010, s 136(3))

5 Harassment related to a protected characteristic contrary to section 26 Equality Act 2010

5.1 The Claimant advances allegation above at 3.1, 3.2, 3.3, 3.4, 3.5, 3.6, and 3.7.

5.2 Did the Respondent's behaviour amount to:

5.2.1 unwanted conduct;

5.2.2 related to the Claimant's Race;

5.2.3 which had the purpose or effect of violating the Claimant's dignity and/or creating an environment that was intimidating, hostile, degrading, humiliating or offensive to the Claimant? (EqA 2010, s 26(1))

6 Equality Act 2010 claims—Remedy

6.1 What declarations, if any, as to the rights of the Claimant and Respondent would be appropriate? (EqA 2010, s 124(a))

6.2 What compensation, if any, should the Respondent be ordered to pay to the Claimant? (EqA 2010, s 124(2)(b)) In particular:

6.3 what financial losses has the Claimant sustained as a result of the any acts of discrimination which the tribunal finds to be made out?

6.4 has the Claimant made reasonable attempts to mitigate his losses?

6.5 what injury to feelings, if any, has the Claimant sustained?

6.6 what personal injury, if any, has the Claimant sustained?

6.7 did the Respondent unreasonably fail to comply with the Acas Code of Practice on Disciplinary and Grievance Procedures? If so, would it be just and equitable to increase the award of compensation? If so, by what percentage (up to a maximum of 25%)? (TULR(C)A 1992, s 207A(2))

6.8 What recommendations, if any, would be appropriate? (EqA 2010, s 124(2)(c))

The hearing

4. The hearing was originally listed to last for five days however it was reduced to four on the application of the parties. It was then reduced to three days by the tribunal because it coincided with regional judicial training commitments. We therefore sat on 13, 14 and 15 May 2024 and judgment was reserved. The Tribunal panel met again in private on 7 June 2024 for deliberations.

5. We were provided with two versions of the hearing bundle, one from either side. Whereas it is not ideal to have separate hearing bundles, it did not cause any disruption to the hearing as both versions appeared to be perfectly usable. We were also provided with a chronology and a cast list which we found helpful.

6. We were provided with three witness statements from the Claimant himself, a liability statement, an injury to feelings statement, and a remedy statement. We were provided with witness statements on behalf of the Respondent from Gary Durrell (Master Technician – Ipswich Nissan), Russell Clark (Workshop Controller and Master Technician – Ipswich Nissan), Paul Bond (HR Director), and Mark Goddard (former Service Director). All witnesses gave oral evidence which was limited to liability only.

7. We read the documents for the morning of 13 May, the Claimant gave evidence that afternoon and again on 14 May. Mr Bond then gave evidence on 14 May followed by Mr Goddard. Mr Durrell and Mr Clark gave evidence on the morning of 15 May, followed by closing submissions that afternoon. We were also provided with written versions of the closing submissions from both sides, which we again found most helpful.

8. There was some minor disruption to the hearing due to a noise in the light fitting in the ceiling of the tribunal hearing room which lasted very briefly (less than two minutes during witness evidence), and then due to an error with the CVP recording equipment (again during witness evidence) which was swiftly resolved and lasted no more than two or three minutes.

9. The Respondent provided a very small number of additional documents comprising the smoking at work policy (and an updated version) and also a

photograph of the notice board taken the week before the hearing. The Claimant did not object to them being admitted as evidence.

10. Part of the claim concerned the allegedly repeated display of a Nazi swastika on the notice board at work. The Claimant had taken a photograph of the board however there was a dispute as to how long the swastika had been displayed. I therefore asked the Claimant to take out his mobile telephone and show the Tribunal and the parties the date and time it was taken. The Claimant complied with that request, no objections were made by either party and it was agreed that it had been taken on Monday 23 January 2023 at 7:50am.

Findings of fact

11. From the information and evidence before the Tribunal it made the following findings of fact. We made our findings of fact on the balance of probabilities taking into account all of the evidence, both documentary and oral, which was admitted at the hearing. We do not set out in this judgment all the evidence which we heard but only our principal findings of fact, those necessary to enable us to reach conclusions on the issues to be decided.

12. Where it was necessary to resolve conflicting factual accounts, we have done so by making a judgment about the credibility or otherwise of the witnesses we have heard based upon their overall consistency and the consistency of accounts given on different occasions when set against any contemporaneous documents. We have not referred to every document we read or were directed or taken to in the findings below, but that does not mean they were not considered.

13. The First Respondent is a large new and used car dealership based in South East England with in the region of 50 dealerships. The Ipswich branch where the Claimant worked has dealerships for Nissan and Fiat vehicles. The Second Respondent is the workshop controller. The Claimant was employed by the First Respondent as a service technician at the dealership and he was line managed and supervised by several people including Ryan Smalley, however we were not provided with his specific job title. The Claimant ultimately reported to Ryan Rookard (Service Manager). The Claimant's employment commenced on 1 October 2018.

14. The Claimant is of Slovakian nationality. A number of staff work in the Ipswich dealership, and whereas those who worked alongside the Claimant were British, the Ipswich branch also employed staff who were from Bulgaria, Lithuania and the Caribbean. The staff working at the car wash are understood to be Middle Eastern.

15. The Claimant worked alongside a number of other colleagues including Gary Durrell (senior service technician) and Dan Page (service technician). Mr Durrell line managed an apprentice who was aged around 18 years at the time of the facts giving rise to this claim. Given that the apprentice did not attend these proceedings but is alleged to have placed a Nazi swastika on the staff notice board on a number of occasions, he will be referred to as the apprentice in this judgment. Mr Durrell, Mr Page, and the apprentice are all British.

16. During the Claimant's employment he had repeated incidents of sickness absence for a variety of reasons. The First Respondent's policy requires that staff telephone to report their absence. This was contained in paragraph 12 of the Claimant's contract of employment. It specifically states in bold and underlined the following:

    "Text messaging is not an acceptable form of communication and is a breach of company procedure."

17. The Claimant did not comply with that policy and would send a text message instead. Whereas the Claimant was interviewed by Ryan Rookard (Service Manager) about his sickness absence and his method of communication, he was not disciplined for this failure to comply, nor for the frequent periods of sickness absence. We were referred to text messages between the Claimant and the Second Respondent which were very friendly and it was clear that the Second Respondent thought very highly of the Claimant and would thank him for his hard work.

18. The Respondent has a disciplinary policy which sets out standards of behaviour. The policy lists a number of matters which could amount to gross misconduct and would justify summary dismissal (dismissal without notice). These include:

    i. Stealing from the company, members of staff or the public
    ii. Serious breach of the company's rules
    iii. Conduct that brings the company's name into disrepute
    iv. Discrimination or harassment of a fellow worker on the grounds of sex, sexual orientation, race, disability, age, religion or belief.

19. We were not provided with any specific equality and diversity policy by the Respondent beyond the limited section in the disciplinary policy which has been quoted above.

20. At some point in early 2022 the Claimant raised a complaint with the First Respondent about his overtime pay for December 2021 and January 2022. The matter was dealt with by Mr Bond as Manager of Human Resources ("HR") at the First Respondent's Head Office. Whereas the Claimant now says that it took too long to resolve and he only recovered half of what he said he was owed, nevertheless we find that he was aware of how to escalate a complaint, who to send it to, and moreover we find that contrary to the Claimant's evidence to us, he was not afraid to raise a complaint.

Smoking at work

21. The Claimant's contract of employment dated 27 September 2018 contains the following term:

    "The Company operates a total non-smoking policy and as such smoking is not allowed in any of the Company's premises, including Company Vehicles at all times. Failure to comply may result in disciplinary action."

22. The Respondent also has a smoke free policy and whilst that provides that all of the First Respondent's workplaces are smoke free, it says that there are designated external smoking areas where smoking is permitted. We

were referred to the version from December 2015 and also February 2022 which contains nearly identical provisions.

23. The Claimant is a non-smoker whereas Mr Durrell takes a number of smoking breaks during the day. Whereas we were referred to the prohibition against smoking in the Claimant's contract, this was produced after the smoking ban came into force in England. We did not have sight of Mr Durrell's employment contract, however he has worked for the First Respondent for approximately twenty years which was before the smoking ban. Whereas the Claimant argues that the policy is inconsistent with the Claimant's contract of employment, this appears to be a misunderstanding as the contract prohibits smoking "in" any of the First Respondent's premises or vehicles, it says nothing about smoking in designated smoking areas. We interpret the word "in" to mean inside of premises.

24. In any event Mr Durrell was permitted to smoke at work in the designated areas, this was consistent with the First Respondent's policy, and moreover the Second Respondent was content for him to do so because he was a hard worker who would arrive well in advance of his shift and would leave after it was due to end. The Second Respondent described Mr Durrell as "working his fingers to the bone" whereas the Claimant would arrive on time for his shift and would be ready to leave work the moment his shift ended.

25. Whereas in his evidence the Claimant argued that Mr Durrell appeared to be taking more breaks than he was due to his smoking, we noted that Mr Durrell did not take lunch breaks whereas the Claimant did, and there was no evidence that it ever interfered with his ability to perform his role. The evidence was that Mr Durrell would routinely arrive at work sometimes an hour before his shift started, he would work without lunch breaks, and he would leave work quite some time after his shift had finished. The Claimant would arrive on time for his shift, or just before, and he would take his lunch break as was his entitlement, and he would leave his shift on time.

26. The Claimant did not ever ask for a smoking break as he was a non-smoker, and there was no evidence that it would have been refused had he ever done so. The Claimant did not make any complaints about smoking breaks during the course of his employment.

Comments about foreigners

27. The Claimant has alleged that Mr Durrell made negative comments about foreign colleagues in or around June or July in 2022, and that he used words to the effect *"these fucking foreigners"* as well regular ongoing comments like *'fuck Foreigners'* in front of other colleagues and management.

28. In his evidence the Claimant referred to one alleged incident at some point in June or July 2022 when he was working on a car with Mr Durrell and they could hear the staff from the Middle East at the wash bay speaking loudly in their own language. The Claimant alleged that Mr Durrell said to him *"fuck foreigners"*, and then he said *"No, Rene don't worry, you're fine."* The Claimant said that Mr Durrell made comments like this when he would go to smoke by the wash bay, and that he made a further similar comment in June 2022 when the Claimant was taking a vehicle to the wash bay and Mr Durrell allegedly said to him *"these fucking foreigners"* by reference to staff who

were cleaning a car. The Claimant says that Mr Durrell then said *"that's not about you, it's about all of them over there."* Mr Durrell denies making the comments.

29. The Claimant did not complain about this at the material time although he was aware of how to make a complaint. The Claimant did not complain about this specifically when he subsequently raised a grievance after disciplinary proceedings (detailed below) were commenced against him in January 2023. The most the Claimant said in his grievance of 31 January 2023 was that he had evidence of discrimination in photographs and texts, but he never disclosed it to the Respondent during the course of his employment.

30. The Claimant first raised this specifically in the letter from his lawyer to the Respondent dated 31 March 2023 after his employment had ended. The complaint, together with the Nazi swastika matter was subsequently investigated by Lewis Gomm on 26 April 2023. Mr Gomm interviewed Mr Rookard, the Second Respondent, and Mr Durrell. Mr Rookard and the Second Respondent denied ever hearing such comments. Mr Durrell denied making the comments but added that it was the Claimant who said that he hated British people and black people. We note that Mr Gomm did not ask Mr Durrell why he had not raised this formally with the First Respondent until then.

31. The Claimant did not mention this matter during the subsequent grievance hearing (addressed below). The Claimant's evidence was that whilst he was not shut down from raising things by Mr Bond (HR Manager) who heard the grievance, he could not say all that he wanted due to the limited time available for that hearing. We find that whilst the hearing did appear to have been limited to one hour by Mr Bond, the Claimant was nevertheless given ample opportunity and invitations from Mr Bond to raise any additional matters prior to the grievance hearing, during the grievance hearing, and again afterwards, however he did not do so.

32. The Claimant's evidence as to why he did not complain about this at the material time was not particularly clear. The Claimant suggested that the situation at work was impacting his health, and he was worried about repercussions such as losing his job. We note that Claimant had been able to raise and progress an earlier complaint about his pay, however we were also mindful that complaining about a pay dispute would be different to raising complaints about racial discrimination as the only non-British member of a team. Nevertheless, we were satisfied that the Claimant was given every opportunity by Mr Bond to raise his complaints.

33. There was no evidence which would corroborate the Claimant's allegations about comments made by Mr Durrell. We were not provided with any evidence that anyone else overheard the alleged comments being made. Having considered all of the surrounding circumstances, including the Claimant's willingness and ability to pursue an earlier complaint about his pay, together with his failure to complain about this at the material time, and his failure to specifically reference this allegation in his grievance complaint of 31 January 2023, we are not satisfied to the level that we need to be (which is on the balance of probabilities) that Mr Durrell made any of the

comments which the Claimant alleges. The evidence before us falls far short of that.

34. We therefore find that Mr Durrell did not make the comments alleged.

Nazi swastika / German music

35. It is not in dispute that a Nazi swastika had been displayed on the work noticeboard within the workshop. The swastika had been made out of magnets used by the Second Respondent and Mr Rookard to put up job sheets on the notice board. The dispute between the parties related to the dates or frequency that it had been displayed.

36. It is also not in dispute that Mr Durrell routinely plays German music at work.

37. As to the identity of the person who made the swastika sign, the Respondents said that it was Mr Durrell's apprentice who did it as a joke to tease him because of his taste in German music, particularly the German band Rammstein. The Claimant did not witness anyone putting up the swastika, and he has not challenged the Respondents as to who else he says did it. We accept the Respondents' unchallenged evidence that it was the apprentice who did it.

38. As regards the purpose of putting up the swastika, the Claimant appeared to accept in his evidence that it had been done to tease Mr Durrell about his music taste (paragraph 32 of the Claimant's witness statement) although he later stated (paragraph 41) that he thought it had been done to make a point about the historical allegiance between his native Slovakia and Nazi Germany in World War Two, although he then added *"I'm not sure whether this had been drawn to specifically target me although I think it was. It could also be something about Mr Durrell's taste in music."*

39. Having heard the evidence of the Claimant and the Respondents' witnesses, it appeared to the Tribunal that it was far more likely that the apprentice displayed the swastika as an attempt to tease Mr Durrell about his music taste as this was consistent with his evidence about playing German music at work, including that of the German band Rammstein. There was no evidence that the apprentice had any particular knowledge of World War Two history, specifically the allegiance between Slovakia and Nazi Germany. It appeared unlikely from the evidence before us that the intention had been to refer to that allegiance, it was far more probable that the motivation was related to Mr Durrell's choice to play German music at work. We also note that there was no evidence at all of any accompanying conduct, for example it was not alleged that other colleagues had joined in or laughed or engaged in banter about it, nor was it alleged that there were any comments about Slovakia or Slovakians.

40. The factual dispute for the Tribunal to resolve is when this occurred and the frequency it occurred. We remind ourselves that we reach our findings on the balance of probabilities, that is, whether it is more likely than not that something occurred having taken all of the relevant circumstances into account. We start with the Claimant's version of events.

41. The Claimant says that the swastika was put up on multiple times including Summer 2022, the end of November 2022 and also again on 9th January 2023. The Claimant also says that it was only removed because the Second Respondent needed the magnets in order to put up the daily job cards. As regards the 9th January 2023, the Claimant said in his witness statement that he saw the swastika on the notice board as he arrived for work and he took a photograph of the swastika as he was upset and annoyed by it and he then showed the photograph to his line manager Mr Smalley as he felt intimidated and humiliated by it. The Claimant says that Mr Smalley responded *"oh my gosh, I didn't know about this*" and the Claimant believed that he would be doing something about it but he failed to do so.

42. However, in his oral evidence the Claimant maintained that it had been put up in Summer 2022 and November 2022, but he said about the 9th of January 2023 that it had been up *"Saturday to Monday, everyone saw it and did nothing."* This was the first occasion that the Claimant said he had seen it on the Saturday immediately before Monday 9 January 2023.

43. The Respondent for their part deny that the swastika appeared in the summer of 2022 or November 2022, however they accepted that it was displayed on Monday 9 January 2023. It had been the Respondents' case that the Second Respondent had removed the swastika when he arrived at work on 9 January. During his oral evidence the Second Respondent expanded on that and said that he had spoken to Mr Durrell who informed him that the apprentice had done it, and he then spoke to the apprentice and told him that it was not appropriate. This was new evidence which did not appear in his witness statement either.

44. However, during Mr Durrell's evidence he said that the apprentice had put up the swastika on the Saturday and he had taken it down and spoken to the apprentice to tell him that it was inappropriate. Given that Mr Durrell says that he took it down on the Saturday, yet it was still there on the Monday morning for the Second Respondent to see, we find that it was put up twice. In other words, having been told by Mr Durrell that it was inappropriate, and he had taken it down, it is highly probable that the apprentice put it back up a second time on the Saturday. That is the only logical conclusion of Mr Durrell's evidence given that the Second Respondent saw it on the Monday when he took it down.

45. We note that these conversations between the Second Respondent and Mr Durrell with the apprentice were not mentioned in their witness statements, nor where they mentioned in their interview notes with Mr Gomm in April 2023, nor where they mentioned in the letter from the Respondents' lawyers to the Claimant's lawyer around the same time. Nevertheless, the Tribunal finds that these conversations did occur. The reason for this is firstly that this evidence was not challenged by the Claimant. Secondly the evidence of Mr Durrell appeared plausible and candid, and did not seek to exculpate the First Respondent in any way – if anything it was evidence that the behaviour complained of had been repeated, albeit in a short space of time. In addition we have found the Second Respondent to be an honest and a reliable witness. Whilst this evidence could and should have been included in the witness statements, we find that the swastika was put up twice on the Saturday and that the apprentice was spoken to about it twice.

46. The parties disagreed about the time when the swastika was removed by the Second Respondent on 9th January. The Claimant's evidence was that the swastika was there when he arrived at work after the Second Respondent had arrived. The Claimant's evidence was that the Second Respondent had seen it, used some magnets to put up job sheets had and left the swastika up there.

47. The Second Respondent argued that he had removed it after he arrived at work, and he clarified during his oral evidence that upon arrival he does a number of things before he goes into the workshop so he had not immediately seen it upon arrival, but he had seen it soon after arriving and had removed it then.

48. To resolve this dispute about the time the swastika was seen by him, I asked the Claimant if the photograph was still on his telephone and if so, he should show the Tribunal when it was taken. The Claimant complied, and much to the surprise of all parties, the photograph was taken weeks later on 23 January 2023 at 7:50am. The parties agreed that this is when the photograph had been taken.

49. It was highly unfortunate that both parties were wrong about the date the swastika was seen. This could easily have been avoided had more care been taken by both sides in their preparation of their respective cases. It is not understood why the Claimant consistently referred to seeing it on 9 January when it was in fact 23 January and this could easily have been established just by looking at his mobile telephone. Likewise, it was not understood why the First Respondent had not asked for the date and time of the photograph given that it took issue with the time the photograph was taken.

50. The confusion about the date the photograph was taken did, to some limited degree, damage the credibility of the witnesses for the swastika incident, and it did cause the Tribunal to consider whether any of them could be relied upon with respect to the dates of other matters referred to in these proceedings. When asked why he was wrong about the date the Claimant replied that he could not say and it may have been due to stress, his medication or a mistake. This appeared implausible given that the mobile telephone with the correct date was in his possession up to the hearing.

51. This damaged the Claimant's credibility by a limited degree given that he bears the initial burden of proof, he had the photograph in his possession yet had still made an error with the date, and moreover it is the Claimant who alleged that he had seen the swastika at work before in Summer 2022 and November 2022. The Tribunal had cause to query whether that could be relied upon.

52. In any event we therefore find that the swastika was put up by the apprentice on Saturday 21 January 2023, it was observed by the Claimant at some point that day, and it was then removed by Mr Durrell. Mr Durrell then spoke to the apprentice and told him that it was inappropriate. We further find that the apprentice ignored the direction from Mr Durrell, and that he put the swastika back up at some point on 21 January 2023 where it remained until Monday 23 January 2023 when it was seen again by the Claimant and subsequently removed by the Second Respondent at some point soon after

7:50am when he used the magnets to put up job cards. The Second Respondent then spoke to the apprentice and told him that this was not appropriate. The Second Respondent did not speak to the other staff about the incident, however given that nobody complained to him about the matter it appeared unnecessary for him to have done so. Nevertheless, we note that a disciplinary investigation was not commenced as the Second Respondent dealt with the matter informally which he considered to be appropriate given the absence of any complaints made to him. It was clear from the evidence of both the Second Respondent and Mr Durrell that they both formed the view that the apprentice was young and immature and did not understand the significance of the swastika.

53. The Claimant took a photograph of the swastika and we find that he showed this to his line manager, Mr Smalley. Whilst this has not been admitted by the Respondent, and we did not have the benefit of Mr Smalley as a witness, we are able to draw that inference because the First Respondent has been on notice of this allegation since the letter from the Claimant's lawyer on 31 March 2023 and for whatever reason it has chosen not to call Mr Smalley as a witness. The Second Respondent confirmed in his oral evidence that despite Mr Smalley leaving the Respondent, returning and then leaving a second time, he remained in contact with him and had heard from him prior to the tribunal hearing. We therefore draw an inference that the Claimant showed Mr Smalley the photograph of the swastika. Neither Mr Durrell, Mr Smalley or the Second Respondent escalated the matter to the First Respondent's Human Resources or Head Office.

54. The Second Respondent was candid in his evidence and he told us that he was offended by the swastika when he saw it. Both Mr Bond and Mr Goddard gave similar evidence that the display of a swastika at work was offensive, and both told us that had they known then disciplinary proceedings would have been brought against the perpetrator. We found their evidence to be convincing as both appeared to be shocked and to some degree annoyed that this matter had happened but had not been brought to their attention.

55. The Claimant says that he felt intimidated and humiliated upon seeing the swastika, and he made reference to being Slovakian and his country's allegiance with Nazi Germany during the Second World War. The Claimant also mentioned that the display of a swastika was a crime in Slovakia. We accept that evidence because the Claimant took a photograph of it and showed it to his line manager. We find that this is consistent with someone feeling offended by the sight of the swastika.

56. Whereas we find that the swastika was displayed on two occasions (21 and 23 January 2023), we have not found that this was displayed in either Summer 2022 or November 2022 as alleged. There is no evidence to support such a finding. We have found that the swastika was put up twice in the short period between 21 and 23 January 2023, but that of itself is not sufficient in these circumstances for us to find that it was also put up on two separate occasions months apart in the previous year.

57. Various factors have influenced us in making that finding. Firstly there is a lack of corroboration from anyone else. Secondly the Claimant took a photograph on 23 January 2023 but did not take one earlier. We find it is

likely that had the Claimant seen it earlier he would have done the same then because of the offence he says that it caused him. In addition the Claimant has admitted covertly tape recording the disciplinary and grievance meetings. We find that had he seen a swastika at work repeatedly in Summer 2022 and November 2022 as alleged, then he would have also taken a photograph to document it as he had done in January 2023 and when he covertly recorded meetings.

58. Moreover we reach that finding because Mr Durrell has been candid in his oral evidence, he volunteered that the swastika appeared on 21 January and he had taken it down, however both he and the Second Respondent denied ever seeing at any time before. The Second Respondent would not have seen it on the Saturday as he did not work on Saturdays so that explained why he did not see it on 21 January. We also understand that the branch was closed on Sundays. We also have taken into consideration that the Claimant did not complain about it either Summer 2022 or November 2022, even though he was well aware of how to raise a complaint and had done so with respect to his pay. We also note that the Claimant raised a grievance on 31 January 2023, and whilst he did not refer to the swastika specifically he made reference to evidence of discrimination in photographs and texts – it is now clear, that is what the Claimant was referring to even though he did not express it at the time. We find that had the Claimant seen a swastika during 2022 he would have complained about it at that time.

59. We are therefore not satisfied to the level that we need to be, on the balance of probabilities, that the swastika was put up on the notice board in either Summer 2022 or November 2022. Nevertheless we find that it was put up twice in the period 21 – 23 January 2023, that it was seen by the Claimant on both dates, and that he found it offensive and to some extent intimidating and humiliating because he says that it is a crime to do so in Slovakia and because of the allegiance between that country and Nazi Germany in the Second World War.

60. The Claimant has also alleged that Mr Durrell playing German music was some how a factor in his feelings of feeling intimidated and humiliated. The Claimant's evidence on this point was vague, unclear and confused. Whereas we accept that the Claimant did not know at the time who was responsible for the swastika, the Claimant was well aware that Mr Durrell liked to listen to German music. The Claimant struggled to tell us why the playing of German music was offensive to him and he could not explain whether it was the fact of playing German music or the band Rammstein or the lyrics of the song which were the cause of these feelings. The most that the Claimant was able to explain was that it was the playing of German music at work where a swastika had been on display which caused him to feel that way.

61. The Claimant has provided a document with the lyrics in German and English of the song "Ich Will" which we understand to mean "I want" in German. This is alleged to be one of the songs which Mr Durrell played repeatedly. Having read the English translation of the lyrics, we did not see anything of a potentially offensive nature, and despite providing the lyrics to the song in the bundle the Claimant did not direct us to any particular line in this song which may have caused offence. The letter from the Claimant's

lawyer to the Respondent of 31 March 2023 makes references to Mr Durrell playing German music and discriminatory lyrics, however nowhere within that letter does it specify what lyrics are being referred to.

62. It appeared to be the mere playing of German music which had some how caused him offence. We were not satisfied that the playing of German music at work had in fact caused the Claimant the upset which he described in his written and oral evidence. The Claimant did not complain about this at the material time nor in his subsequent grievance of 31 January 2023 which would have been an opportune time to have done so.

The Claimant's disciplinary / grievance

63. On 12 October 2022 a memo was issued by the First Respondent's Head Office which was entitled "Staff internal rates". The purpose of the memo was to inform staff that due to rising cost of running the business there would be changes to the position on staff and family rates for work carried out. This included charges for MOT, labour, parts, oil costs, and repair costs. It was recorded that every vehicle that enters the workshop must have a job card and the technicians had been informed not to work on a car without one and that there would be no exceptions to the ruling.

64. The memo also stated the invoice for work must be paid on the day the repair or service or MOT is completed and that staff do not have credit. It was directed that the staff invoice must be signed off before work completion/invoicing by Brand Director or Service Director. Finally, it stated that any deviation from the policy would be met with the appropriate disciplinary action and the invoicing free of charge or vehicle in the workshop without authority or job card would be considered as theft and gross misconduct.

65. We heard evidence on this policy from all of the Respondents' witnesses, however it is fair to say that Mr Goddard (former service director) provided the most thorough explanation of that policy. That is not surprising as Mr Goddard was one of the authors and signatories of that policy. In short the purpose of the policy was to ensure that staff pay for work being undertaken on their vehicles given that they might be using the First Respondent's parts, equipment and also time that they are being paid for. Had someone come to work and worked on their own car without paying for it then the First Respondent would in effect be paying them to work on their own vehicle whilst at the same time work was not being done on customers' vehicles.

66. Mr Goddard also explained that it was a matter of fairness and he provided the example of a technician who would be able to work on their car due to their knowledge, and that it would be unfair upon non-technician staff if they had to pay for work on their vehicles if the technicians did not have to as well.

67. It was clear that whereas the First Respondent wanted to ensure that authority was obtained for jobs and that they would be paid for on the day, however the overriding requirement was that staff should notify the First Respondent what work had been completed so that an invoice could be raised and the appropriate charge issued. As will be discussed below, whereas some technical breaches of the memo might be viewed less

seriously, any failure to inform the First Respondent of what work had been completed would be treated as dishonesty and theft. Despite the contents of the memo which requires immediate payment of invoices, the priority was to get the work correctly recorded so that there was an audit trail of what work in progress there was and who has not settled their invoice. Mr Goddard was very consistent on this point and we found his evidence to be reliable.

68. This memo was sent to all staff to their work email addresses and also pinned on noticeboards at work. The Claimant claimed not to have received the memo as he preferred to use his personal email address for work. However, the Claimant confirmed during the disciplinary process that Mr Rookard had previously told him he had to pay for work done on his vehicle in work time (and that he had made a payment) and moreover he obtained a job card for a vehicle health check (set out below). In addition it was put to the Claimant in cross examination that this policy change was quite a significant change and was openly discussed at work to which he replied *"Yes, I heard something yet, I didn't know what I was supposed to say."* The Claimant then admitted that he knew that staff would not only have to pay for oil and parts, but also labour as well. We therefore find that the Claimant was well aware of the requirements of the policy at the material time in this case which was in January 2023.

69. Having heard the oral witness evidence of all those who attended the tribunal it appeared that the situation was more complex than as described in the memo. In brief a member of staff would need permission to bring their vehicle into the workshop and they would obtain this by speaking to a senior manager and informing them of what work was intended to be done and a job card would be issued with the authority to undertake this work. The job card would include a general time estimate of how long that job would take even if the job itself was not chargeable. A job card may be raised on the day the work is due to be carried out or it could be raised well in advance of the work to be undertaken, perhaps many days or weeks in advance.

70. Once a job card had been issued, the work could be carried out. It may become apparent during a service that additional work is required on a vehicle, in which case the member of staff is required to write this on the rear of the job card and then they will hand the job card to a member of the customer service team who will produce an invoice for them. Depending on the workload of the customer services staff it is possible that the invoice may not be produced immediately because they are required to prioritise customers' work. Similarly in some cases an invoice may not be generated immediately if parts have to be ordered in.

71. It is therefore possible that a member of staff's job card could be put at the bottom of the pile and an invoice may not necessarily be produced that day but there is a requirement that the invoice will be paid the date it is produced.

72. Not all of the work to be carried out on a vehicle is chargeable. Vehicle Health Checks ("VHC") are relatively brief inspections of a vehicle on the ramp in the workshop and these do not carry a charge. Similarly with respect to tyre changes, the First Respondent charges only for the tyre and

not the labour. Where labour is chargeable the charge at that time was around £45.

73. If for example a member of staff performs an oil change then they should notify the First Respondent in advance, they should obtain authority by way of the job card, and if they use the First Respondent's oil they must pay for it. The member of staff must also pay the First Respondent for the labour (the time they spent changing their own oil) – the point being that they are using work time for their own ends which could otherwise have been spent working on vehicles and generating income for the First Respondent. This information would need to be recorded on the job card. If it is not recorded then the customer service staff do not know to invoice for it and the member of staff would be obtaining something which the First Respondent says that they should pay for.

74. The memo specifically states:

"Any deviation from this policy will be met with appropriate disciplinary action and invoicing free of charge, or vehicle in the workshop without authority or job card, will be considered as theft and gross misconduct."

75. Mr Goddard also gave evidence that he had dismissed other staff for a breach of the requirement to pay for work done on their vehicles. We were not provided with evidence to substantiate that. This was new evidence which did not appear in his witness statement, and there was no supporting evidence in the hearing bundle. Whilst we find Mr Goddard to be an honest and credible witness, we place limited weight on that evidence simply because there was no evidence provided in support of it which would show who had been dismissed, when, and what for.

76. On Friday 20 January 2023 the Claimant asked the Second Respondent for authorisation to bring in his wife's car to conduct a VHC. This was agreed and a job card was produced. There was a dispute between the Claimant and the Second Respondent about which date he asked for authorisation, the Claimant says that it was a day earlier on the Thursday. This is not an issue which needs resolving, nevertheless given the Claimant's earlier mistake about the date of the swastika we prefer the evidence of the Second Respondent that the authorisation was given on Friday 20 January 2023.

77. Having heard all of the witness evidence we find that on Saturday 21 January 2023 the Claimant arrived at work on or around 8:23am for a shift commencing 8:30am. The Claimant brought in his wife's car, he put it on the ramp and performed an oil change using his own oil. Authorisation for this procedure had not been obtained in advance as the policy requires.

78. The car remained on the ramp in the day and the Claimant attended to it on a number of occasions during his shift in order to drain and replace the oil on at least one occasion, as well as putting in a cleaning fluid. The Claimant did not use any of the First Respondent's oil or parts. The Claimant combined this with undertaking his work. The car was taken off the ramp later in the morning and the Claimant left work on time at 12:30pm. The Claimant did not amend the job card to record that he had performed work on it in excess of the VHC, and as such an invoice was not produced as the

First Respondent's staff would have been under the impression that there was nothing to pay.

79. Also on that date Mr Durrell brought in his daughter's car to work on. Two job cards exist for Mr Durrell's daughter's car around this time. The first is for a VHC which does not involve a charge. Mr Durrell wrote on the front what tyres he needed to order for her. This was done for Mr Durrell's benefit so that he would not forget the type rather than recording this on the front for the purpose of invoicing. This job card was dated 10 January 2023.

80. A second job card was produced dated 23 January 2023 for the tyre replacement – as indicated above only the tyres are chargeable not the labour. The job card shows that there is a charge for the tyres. The invoice was generated the following day, that is 24 January 2023. The Claimant argues that this is a technical breach of the policy, and Mr Durrell agrees, however this is because the car was brought into the workshop but it was not worked on beyond taking the wheels off as there was insufficient time, Mr Durrell and the apprentice having stayed on past their end time in order to complete work on the customers' vehicles.

81. Whereas the Claimant suggested that there was up to a 14 day delay in paying the invoice, we disagree. Mr Durrell placed an order for the tyres on or around 10 January 2023 when he wrote on the first job card. The work on fitting the tyres was not commenced until 23 January and then completed on 24 January 2023. There was not a 14 day delay in paying the invoice, rather it was paid the day the procedure was completed. The situation is not comparable to that of the Claimant as Mr Durrell has recorded the work to be done and an invoice was generated and paid.

82. On Tuesday 24 January 2023 Mr Durrell informed Mr Rookard that the Claimant had performed the oil change without prior authorisation. Mr Rookard interviewed the Claimant and we have been referred to the notes of the interview. The allegation was put to the Claimant that he had serviced his own car and made no attempt to pay for the parts, the oil and the labour. The Claimant said that he had done so but had used his own parts and oil and he said *"I won't be paying anything"* and he denied knowing the Respondent's policy referred to above.

83. The Claimant denied that he had changed the oil twice and he said that he had only done it once. Mr Rookard informed the Claimant that not paying for labour would be classed as theft to which the Claimant said *"If you want me to pay for 10 minutes then I will."* The Claimant suggested that other people were doing similar things but it was only him being challenged.

84. The Claimant covertly recorded the conversation without the consent of Mr Rookard.

85. Mr Rookard then interviewed Mr Durrell who informed him that on 21 January the Claimant arrived at work at 8:20am, he informed Mr Durrell that he would working on his car, the car was put on the ramp before work started and customers came in, the Claimant worked on the car whilst it was up in the air and it came up and down a number of times and the oil drainer was placed under it twice, the car was cleaned in the morning and it remained in the workshop all morning until the Claimant left work on time.

86. Mr Rookard then interviewed the apprentice separately who gave a similar version of events to Mr Durrell however he added that he thought that the Claimant had worked on one customer's car and left on time, whereas he and Mr Durrell had been left to work late to finish the work that hadn't been completed that day.

87. The Tribunal was referred to a copy of the job card for the VHC for the Claimant's car. The job card only refers to a VHC, it does not record that the Claimant would be doing an oil change.

88. The First Respondent decided to bring disciplinary proceedings against the Claimant. On 25 January 2023 Mr Bond (HR Manager), wrote to the Claimant to invite him to attend a disciplinary hearing. The allegation against the Claimant was *"Servicing your personal vehicle on company premises using company equipment and materials without authorisation."*

89. On 25 January 2023 Mr Rookard produced an invoice for the Claimant which recorded a VHC and a brake service. There was no charge recorded. It was clarified by the Second Respondent during the hearing that the First Respondent's software, Pinnacle, often adds a brake service onto invoices for unknown reasons, however as there is not an associated charge it is not of concern. As regards why Mr Rookard generated this invoice, it would appear reasonable to conclude that having raised the matter of the oil change with the Claimant, this was produced to evidence what had been charged, and in this case, nothing had been charged.

90. The disciplinary hearing took place online via Teams on 30 January 2023 as the Claimant was unable to attend in person. The Claimant covertly recorded the disciplinary hearing and did not have the consent of Mr Bond to record him.

91. During the disciplinary hearing the Claimant repeated that he had used his own oil and parts. The Claimant was asked to confirm the usual process if he wanted to service his own vehicle at work, however the Claimant replied what he had done that day, not the process to be followed. The Claimant was asked a second time about the process to be followed, and he instead replied that he had asked the Second Respondent if he could do a VHC but he didn't ask if he could drain the oil – the Claimant said that he had been accused of doing something that others do, however he got the paperwork for a VHC and he added that "maybe it was wrong" that he did not ask to drain the oil but he had worked for the First Respondent for a long time and he did not know what the big problem was. The Claimant said that he arrived at work early and that he worked on his car in his own time, outside of normal working hours. The Claimant alleged that Mr Durrell was working on his own car during working time without paperwork.

92. We note that Mr Bond appeared unfamiliar with the policy himself and repeatedly asked the Claimant to explain it to him. We found this surprising given that he had been tasked with conducting the disciplinary process. During his evidence before the Tribunal Mr Bond remained unclear about some aspects of the policy as he was questioned about which services are chargeable and he asked that these questions be directed to one of the

other First Respondent's witnesses as he was not familiar with the *"ins and the outs"* of what was chargeable.

93. In any event, the Claimant confirmed to Mr Bond during the disciplinary hearing that he had previously brought his car in to work on and had been asked by Mr Rookard to pay for it which he did that time. However, the Claimant added that other people brought in cars and worked on them without paying so he said he did not see what the problem was with him. The only two specific names he mentioned were Mr Durrell and that of the apprentice whom he said had done it 4 or 5 times. Mr Bond explained to the Claimant the importance of treating people equally and that he could not treat him differently if other people were doing the same as him.

94. The Claimant suggested that Mr Rookard had a problem with him since he raised concerns about his pay a year and half earlier, and that his performance had been criticised since then and the Claimant said that this was discrimination. The Claimant made no mention of race discrimination, nor the comments about foreigners, nor the Nazi swastika, nor did he mention anything about smoking. The matters raised by the Claimant concerned Mr Rookard criticising his work since he raised his pay dispute and the contents of messages he had sent him when he was sick.

95. Mr Bond indicated how the Claimant could raise a grievance with HR or his director to which the Claimant said that his lawyers would do it and that he was the only person from another country and he was treated badly. The disciplinary hearing was adjourned for Mr Bond to make further enquiries about the policy for staff having work done on their vehicles.

96. On 31 January 2023 the Claimant commenced sick leave citing stress and depression.

97. On 31 January 2023, and following further enquiries made with Mr Rookard, including obtaining the October 2022 memo, Mr Bond then informed the Claimant that the reconvened hearing would take place on 2 February.

98. On the same date the Claimant sent his grievance to HR where he complained about Mr Rookard accusing him of wrongdoing, he said that Mr Rookard had become aggressive and the discrimination had started after he had raised issues with HR about not being paid his overtime. The Claimant added *"I have evidence of discrimination in form – pictures and text."* The Claimant made no mention of the alleged racist language, the swastika, German music, nor smoking.

99. Mr. Bond acknowledged the grievance on 1 February and invited the Claimant to attend grievance hearing the following day immediately before his disciplinary hearing. The Claimant was asked to provide details about the allegations as well as dates, times, witnesses and any documents or paperwork to substantiate them. The Claimant did not do so.

100. The grievance hearing took place on 2 February immediately prior to the reconvened disciplinary hearing. During the grievance hearing the Claimant repeated that there had been issues over his pay which HR had resolved and that since then Mr Rookard had been criticising the Claimant's work. The Claimant also complained about text messages he had received during

his sickness absence, and Mr Bond asked that he provide copies of these however the Claimant failed to do so.

101. The Claimant also explained that he had previously been given permission by the Second Respondent to work on his own car at work however Mr Rookard had challenged him and told him that he was not being paid to work on his own car and that he would have to pay for the work. The Claimant said that he had done the work in his lunch break and wanted to be refunded the payment.

102. The Claimant was asked if this was all he wanted to add to which he confirmed it was. The Claimant was asked to email Mr Bond anything he would like him to add. The Claimant did not send anything further.

103. The Claimant's disciplinary hearing was then reconvened. Mr Bond informed the Claimant that the issue was that whereas he had obtained a job card it related only to the VHC and that the Claimant had not been charged for the labour. The Claimant said that he had arrived work early and the work only took ten minutes and he asked if that was what was being asked for. Whereas the Claimant said he arrived at 8:15am, Mr Bond said that his shift started at 8:30am and the Respondent's system showed that he was clocked in at 8:23am.

104. Whereas the Claimant referred to other staff doing work on their own cars in work time without authorisation, Mr Bond said he had checked the Respondent's system Softworks which showed them leaving work later than their contracted hours whereas the Claimant left on time which meant that he must have worked on his car in work time, and further the colleagues had paid for their work. The Claimant then said he started work at 8:15am the work took 10-15 minutes and he said that Mr Rookard had not challenged Mr Durrell, the apprentice, a colleague called Ella, nor someone referred to as Mercedes Man (whom we understand to be Richard Buffrey) who had been given free oil for years although then said he was not sure if he had paid.

105. During the hearing we were referred to a job card dated 13 October 2022 for Mr Buffrey's vehicle which recorded that the job was to replace a fog light, and handwritten on top it states *"* Please check oil level."* We were referred to the invoice produced on 13 October 2022 which showed that Mr Buffrey had been invoiced for the fog light and three litres of oil. We were also provided with a second job card for Mr Buffrey for 31 January 2023 for various jobs and again it was recorded in hand writing *"*Pls chk oil level again!"* and we were again referred to an invoice which included all of these charges, including for five litres of oil. We were not provided with any evidence that Mr Buffrey had been given free oil as alleged, rather it was clear that he had obtained two job cards compliant with the policy, two invoices had been generated, again in compliance with the policy, and that he had paid for his oil. This was different to the Claimant's situation.

106. As regards the Claimant's use of oil, he said that he had used his own oil and that he would send proof and that this was clearly racism and discrimination. The Claimant again alleged that Mr Durrell had worked on his own car on the Saturday without a job card as authorisation and that he had worked on the tyres and stood around talking for 45 minutes. The

Claimant said that Mr Durrell told him that he did not have a job card. The Claimant also admitted that he should not have worked on the oil change at work and should have done it at home but he maintained he had done nothing wrong, he had been a good employee for ten years, and that it was ridiculous to penalise him for working on his own car for 10 minutes. The hearing was adjourned for Mr Bond to conduct further investigations.

107. On 15 February the Claimant was issued with the decision to dismiss him. Mr Bond found that the Claimant had obtained a job card for a VHC but not for the labour for the oil change and he did not have an invoice signed off, contrary to the policy. Mr Bond noted that the Claimant had admitted that Mr Rookard had previously made him aware of the need to pay for labour. Mr Bond recorded that he accepted that the Claimant had used his own oil but had not paid for his labour. Mr Bond said his investigations had demonstrated that the Claimant's colleagues had permission to work on their own cars and the invoices showed that they had paid for the work.

108. Mr Bond informed the Claimant that this amounted to gross misconduct, and having taken into account his length of service and clean disciplinary record, he had made the decision to dismiss him summarily. Mr Bond noted that the Claimant was well aware of the contents of the memo as he had obtained a job card in advance of the work, however he chosen not to pay for the work carried out on company premises in company time, and as the Claimant appeared not to appreciate the significance of what he had done he had little confidence it would not be repeated, therefore an alternative sanction of a final written warning would not be appropriate.

109. As regards the grievance outcome, it was noted that the Claimant had not provided Mr Bond with any additional evidence of discrimination, and the four matters about which he had complained (which do not form the subject matter of this claim) were dismissed.

110. The Claimant was notified of his right to appeal the outcome. On 17 February the Claimant indicated that he wished to appeal the outcome however no specific grounds were included. An appeal was set up to take place via Teams however this was rearranged at the Claimant's request. The Claimant was sent a Teams invite for the reconvened appeal hearing however he did not join and after waiting thirty minutes it proceeded in his absence and was dismissed by Mr Goddard, Service Director. The Claimant alleges that the invite did not arrive. We have been provided with a copy of the invite which contains his name but it does not indicate whether it was sent to his home email address or the work address. In any event the conduct of the appeal is not one of the issues to be decided in this case – the issues are clear that the decisions to discipline him and to dismiss him are alleged to amount to race discrimination, and it was accepted by Mr Raffell in the tribunal hearing that there was no reference to the appeal process in those Issues. We do not therefore need to consider the conduct of the appeal further.

111. During his evidence before the Tribunal the Claimant said that he had informed the Second Respondent that he would be performing an oil change. This was not only new evidence, it was also inconsistent with the version of events he had given to Mr Bond during the disciplinary hearing

and which appears in the transcript of the covert recording the Claimant had made. The Claimant had not suggested before that he had told the Second Respondent that he would do anything other than a VHC. We also note that the Second Respondent was not cross examined on this point either. We therefore find that the Claimant only told the Second Respondent that he would be performing a VHC.

112. During the hearing the Respondent's witnesses were referred to various job cards and invoices in the hearing bundle for the purposes of comparison with how the Claimant was treated.

113. We were referred to job cards dated 26 October 2022 for Nicolas Abbott's vehicle. Three jobs were recorded which were for investigation of noisy fanbelt, replacement of n/a link rod, and replacement of o/s inner CV boot. A second job card was provided for a VHC which we note is not chargeable. We were provided with an invoice dated 28 October 2022 where these three items were charged. We note that the parts were charged whereas the labour was not, and we are understand that there are no charges payable for those. The invoice is dated two days later than the job card, however it was not possible to reach any conclusion on the reason for the difference as this could have been due to time taken for parts to arrive or customers' invoices being prioritised. Mr Abbott is not in a comparable situation to the Claimant as he incurred charges which appeared on his invoice and which were paid.

114. We were also provided with a job card for the Second Respondent's vehicle dated 18 November 2022 for the replacement of three tyres. We were provided with the invoice dated 22 November 2022 for the cost of the tyres but not the labour as that this not chargeable. The delay in paying the invoice is likely to have been due to the time taken to order in the tyres.

115. We were also provided with a job card for the Second Respondent's car dated 15 July 2022 which recorded the work required would be an oil and filter change and a VHC. An invoice was produced for the same day which recorded a charge for the oil and filter change and a free VHC. In both cases the Second Respondent had recorded work done that was chargeable and he had paid his charges, whereas the Claimant had not recorded his oil change.

116. We were also referred to the job cards and invoices for the work done on Dan Page's car. A job card dated 13 October 2022 recorded the work to be done was an MOT. An invoice generated the same day showed that Mr Page had been charged for the MOT. Similarly a job card dated 21 January 2022 recorded the work to be done comprised a level one service and an EVHC. The invoice was generated the same day which showed charges for the level one service, replacing the N/S/F coil spring, and then oil filter, washer drain, screenwash 250ml, brake cleaner, engine oil and coil spring were all listed with respective charges. The EVHC was recorded with a zero charge. This appeared to be compliant with the memo and not comparable to the Claimant's situation.

117. We were also referred to a job card for Ryan Smalley dated 18 February 2022. The typed entries recorded the jobs as (i) 60K service and (ii) EVHC and free wash and vacuum. The handwritten notes record (i) oil and filter

and (ii) MOT. The invoice did not appear to have been generated until 2 March 2022 which recorded a £40 charge for 60k service and oil and filter (which included the charge for the oil itself), and a £30 charge for the MOT. Again it was not explained to us why there were two weeks between the job card date and the date of the invoice, nevertheless the situation as not comparable to that of the Claimant as the oil change had been recorded on the job card (in hand writing) and then charged.

118. Leaving aside the differences in dates on the job card as compared with the dates on the invoices, Mr Goddard gave clear evidence that the issue he had with the Claimant's conduct was one of deceit and a lack of trust, and whilst invoices should be paid on time, the Respondent had an audit trail if staff did not pay immediately, however they would not have this where someone did not properly record the work which was undertaken.

119. The Claimant explained that he had not been given time to pay the invoice unlike his colleagues, however this appeared to be a misunderstanding. In the Claimant's case he had not informed anybody that he was performing the oil change therefore it did not appear on the job card and accordingly there was nothing to record on the invoice, whereas in the case of his colleagues, they had indicated what work would be undertaken in advance (or had updated the job cards) and were charged the correct amounts even if the invoice was produced days after the vehicle had arrived.

120. It was the evidence of Mr Goddard that the Claimant had lied about the work to be done as the car had been booked in for one job whereas another had been performed. As regards the Claimant's offer to pay, Mr Goddard said he regarded that as flippant and that the Claimant had taken advantage of that manager (the Second Respondent) not being in on the Saturday and that this amounted to a breach of trust.

121. Following the Claimant's dismissal his lawyer wrote to the Respondent and made complaints of discrimination including references to the alleged comments about foreigners, the display of the swastika, playing German music, smoking breaks, and also different treatment as regards staff being allowed to work on their own cars. This letter was dated 31 March 2023. The discrimination complaints were investigated by Lewis Gomm on 26 April 2023 by conducting the interviews to which we have referred above. We note that Mr Smalley was not interviewed, however we understand that was because he had already left the First Respondent's employment before returning briefly after the investigation before leaving for a second time.

122. Whereas this was a very brief investigation and the witnesses do not appear to have been asked any follow up questions, Mr Gomm did put the main allegations to those he interviewed. We note that the apprentice was not interviewed, and we heard no evidence as to why this was the case although we understand that he is no longer employed by the First Respondent although we do not know the date that his employment ended. The Respondents' lawyers sent the Claimant a reply on 27 April 2023 denying the allegations. In any event the conduct of that investigation is not one of the Issues to be decided in this case, nevertheless we are able to take into account matters occurring before and after the dates of the specific allegations in order to gain an understanding of the wider context.

123. During the hearing the Second Respondent was asked about what equality and diversity training he had undertaken, to which he informed us that he had not received any. We were not provided with any evidence of any other member of staff having received training within the Ipswich branch either.

Submissions

124. We were provided with detailed written submissions from both parties which were also supplemented with oral submissions. We have found both sets of submissions to be helpful. The contents are not repeated here, however the relevant arguments will be addressed in the conclusions and analysis section below.

Law

125. Section 4 Equality Act 2010 provides:

The protected characteristics

The following characteristics are protected characteristics—

…

race;

…

126. Section 9 Equality Act 2010 provides:

Race

(1) Race includes—

…

(b) nationality;

(c) ethnic or national origins.

…

127. Section 39 Equality Act 2010 provides:

Employees and applicants

…

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

…

(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.

…

128. Section 40 Equality Act 2010 provides:

Employees and applicants: harassment

(1) An employer (A) must not, in relation to employment by A, harass a person (B)—

(a) who is an employee of A's;

…

129. Section 212(1) Equality Act 2010 provides:

General interpretation

(1) In this Act —

…

"detriment" does not, subject to subsection (5), include conduct which amounts to harassment;

…

130. Section 109 Equality Act 2010 provides:

Liability of employers and principals

(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.

(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.

(2) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

(3) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—

(a) from doing that thing, or

(b) from doing anything of that description.

…

Direct race discrimination

131. Section 13 Equality Act 2010 provides:

Direct discrimination

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

…

132. As regards comparisons, section 23 Equality Act 2010 provides:

Comparison by reference to circumstances

(1) On a comparison of cases for the purposes of section 13, 14, 19 or 19A there must be no material difference between the circumstances relating to each case.

133. As regards less favourable treatment, the test for direct discrimination requires an individual to show more than simply different treatment, there must be a quality in the treatment that enables the complainant reasonably to complain about it – ***Chief Constable of West Yorkshire Police v Khan*** **[2001] ECR 1065 HL**.

134. The Equality Human Rights Commission Code of Practice provides at paragraph 3.5 that an employee does not have to experience actual disadvantage for the treatment to be less favourable, it is sufficient that an employee can reasonably say that they would have preferred not to be treated differently from the way an employer treated or would have treated another person.

135. There is no justification defence for a direct race discrimination claim and in ***Ahmed v Amnesty International*** **[2009] IRLR 884** the court reaffirmed that a benign motive is irrelevant.

Burden of proof

136. Section 136 Equality Act 2010 provides:

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.

…

137. The lead authority on the burden of proof is the Court of Appeal judgment in ***Igen Ltd v Wong*** **[2005] IRLR 258**. This judgment refers to the law under the previous Sex Discrimination Act 1975 prior to the Equality Act 2010, however the decision of the Court of Appeal in ***Efobi v Royal Mail Group Ltd*** **[2019] ICR 750** confirms this guidance also applies under the Equality Act 2010.

138. A two stage applies. Initially it is for a claimant to prove, on the balance of probabilities, primary facts from which a tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination.

139. At the second stage, discrimination is presumed to have occurred, unless the respondent can show otherwise. The standard of proof is again on the balance of probabilities. In order to discharge that burden of proof, the respondent must adduce cogent evidence that the treatment was in no sense whatsoever because of the claimant's race. A respondent does not have to show that its conduct was reasonable for this purpose, merely that its explanation for acting the way that it did was non-discriminatory.

140. The Court of Appeal in ***Madarassy v Nomura International plc*** **[2007] IRLR 246** held:

'*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*.' [56]

141. As regards the something more needed to shift the burden of proof onto a respondent, this will depend upon the facts of each case but it may include evidence of stereotyping, statistical evidence, lack of transparency or inadequate disclosure, or inconsistent explanations. However, mere unreasonable treatment by an employer "casts no light whatsoever" as to the question of whether an employee has been treated unfavourably - ***Strathclyde Regional Council v Zafar*** **[1998] IRLR 36**. This has also been followed by the Employment Appeal Tribunal in ***Law Society and others v Bahl*** **[2003] IRLR 640** where it was held that mere unreasonableness is not enough as it tells us nothing about the grounds for acting in that way. Unfairness is not itself sufficient to establish discrimination on grounds of race or sex – ***Network Rail Infrastructure Ltd v Griffiths-Henry*** **[2006] IRLR 865.**

142. At the heart of this exercise it is clear that the key question to ask is why did the alleged discriminator act as he did? What consciously or unconsciously was his reason? The determination of the reason why is a subjective test and the reason why a person acted as they did is a question of fact – ***Chief Constable of West Yorkshire Police v Khan*** **[2001] IRLR 830**.

143. It may be appropriate on occasion, for the tribunal to take into account the respondent's explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof - ***Laing v Manchester City Council and others*** **[2006] IRLR 748**; and also ***Madarassy***.

144. It may also be appropriate for the tribunal to go straight to the second stage, where for example the respondent asserts that it has a non-discriminatory explanation for the alleged discrimination. A claimant is not prejudiced by such an approach since it effectively assumes in his favour that the burden at the first stage has been discharged - ***Efobi*** [13].

145. As the courts have noted in the cases of ***Hewage v GHB*** **[2012] ICR 1054 and *Martin v Devonshires Solicitors*** **[2011] ICR 352**, the burden of proof provisions will require careful attention where there is room for doubt as to the facts necessary to establish discrimination, however they may have little to offer when we in a position to make positive findings on the evidence one way or the other.

146. The burden of proof provisions were recently considered in ***Earl Shilton Town Council v Miller*** **[2023]** where the court held that there may be cases where there is an obvious reason for the treatment or there may be cases where a criterion is used which exactly corresponds with a protected characteristic. In such cases it will not be necessary to consider the mental processes of the alleged discriminator.

147. It will be for a claimant to show that any real or hypothetical comparator would have been treated more favourably, in doing so a claimant may invite the tribunal to draw inferences from all relevant circumstances and primary facts. Nevertheless, it is still for the claimant to establish a prima facie case. It is very unusual to find direct evidence of discrimination, normally a case will involve consideration of what inferences it is proper to draw from all the surrounding circumstances. When considering primary facts from which inferences may be drawn, a tribunal must consider the totality of the facts, and must not adopt a fragmented approach which would have the effect of diminishing any eloquence the cumulative effects of the primary facts might have on the issue of the prohibited ground – ***Anya v University of Oxford*** **[2001] IRLR 377**. In ***Anya*** the court emphasised:

"Very little direct discrimination is today overt or even deliberate. What King and Qureshi tell tribunals and courts to look for, in order to give effect to the legislation, are indicators from a time before or after the particular decision which may demonstrate that an ostensibly fair-minded decision was, or equally was not, affected by racial bias." [11]

148. Accordingly, it is necessary for there to be an evidential basis upon which it can be inferred that the claimant's protected characteristic was the cause of the less favourable treatment.

149. In ***Virgin Active Ltd v Hughes*** **[2023] EAT 130, [2024] IRLR 4** it was held:

"…where a claimant compares his treatment with that of another person, it is important to consider whether that other person is an actual comparator or not. To do this the Employment Tribunal must consider whether there are material differences between the claimant and the person with whom the claimant compares his treatment. The greater the differences between their situations the less likely it is that the difference of treatment suggests discrimination." [69]

150. Nevertheless, given that a tribunal may take into account a wide range of factors including circumstantial evidence, there may be cases where there is someone who, whilst materially different to a claimant, may be of assistance as an evidential comparator. They may, depending upon the circumstances and in conjunction with other material, justify a tribunal drawing an inference that a claimant was treated less favourably than he or she would have been treated. This will depend upon the facts and circumstances of the case.

151. Where a claimant has been treated less favourably than an actual comparator, it is more likely that it will shift the burden of proof, but it does not automatically follow that it will in every case. The Tribunal must apply the statutory test as set out in s. 136(1) Equality Act 2010 when deciding, in a particular case, whether the burden has passed to the Respondent - ***Martin v Governors of St Francis Xavier 6th Form College*** **[2024] EAT 22**.

152. The Tribunal must consider whether the fact that the claimant had the relevant protected characteristic had a significant (a more than trivial) influence on the conduct of which he complains – ***Nagarajan v London Regional Transport*** **[1999] ICR 877 HL**. That influence may be conscious or unconscious, and it does not need to be the main or sole reason, but it must have a significant influence to thus amount to an effective reason for the cause of the treatment.

153. If the burden does shift and if there is a genuine non−discriminatory reason, at least in the absence of clear factors justifying a finding of unconscious discrimination, that is the end of the matter.

Harassment related to race

154. Section 26 Equality Act 2010 provides:

Harassment

(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and

(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

…

race;

…

155. A similar causation test applies to harassment complaints as described above with respect to complaints of direct discrimination. The unwanted conduct must be shown to be related to the relevant protected characteristic.

156. The Tribunal must address the issue of whether the conduct complained of was unwanted. Unwanted conduct means the same as unwelcome or uninvited, and specifically unwanted by the Claimant – ***Thomas Sanderson Blinds Ltd v English*** **UKEAT/0316/10**.

157. The conduct complained of must be related to the protected characteristic. In ***Tees Esk and Wear Valleys NHS Foundation Trust v Aslam*** **[2020] IRLR 495** it was held:

"…Section 26 does not bite on conduct which, though it may be unwanted and have the proscribed purpose or effect, is not properly found for some identifiable reason also to have been related to the characteristic relied upon, as alleged, no matter how offensive or otherwise inappropriate the Tribunal may consider it to be." [25]

158. It is not necessary for harassment to be deliberate for it to be unlawful. If the unwanted conduct (related to the relevant protected characteristic) was deliberate and is shown to have had the purpose of violating a claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for them, the definition of harassment is made out. There is no need to consider the effect of the unwanted conduct.

159. Where the conduct complained of was not deliberate, it may still constitute unlawful harassment. In such a case it will be necessary to decide whether the conduct has the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In doing so it is necessary to consider the factors set out in section 26(4), which are the perception of the claimant; the other circumstances of the case; and whether it was reasonable for the conduct to have that affect.

160. In ***Weeks v Newham College of Further Education*** **UKEAT/0630/11** it was held that a tribunal must be sensitive to all the circumstances; the fact that unwanted conduct was not itself directed at the Claimant is a relevant consideration but it does not prevent that conduct being harassment; the timing of an objection has an evidential importance, however caution is urged before placing too much weight upon timing as it may be very difficult for the victim personally, socially and, in particular, in some circumstances, culturally, to make any immediate complaint about it. The lack of an immediate complaint cannot prevent a complaint being justified, but it may be a tribunal is entitled to consider. The fact that terms that are plainly related to a protected characteristic but which are used only once in a long period of time would not prevent (in an appropriate case, and with appropriate surrounding circumstances), such comments being found to have created the environment relied upon.

161. In ***Weeks*** it was further held that in determining whether the unwanted conduct has created the proscribed effect, the tribunal must bear in mind that an environment is a state of affairs, but that could include one off incidents with effects of a longer duration.

162. As to whether the conduct had the requisite effect, there are both subjective considerations – the Claimant's perception of the impact on him – but also objective considerations including whether it was reasonable for it to have the effect on the particular claimant, the purpose of the remark, and all the surrounding context - ***Richmond Pharmacology Ltd v Dhaliwal*** **[2009] ICR 724**. Conduct which is trivial or transitory is unlikely to be sufficient. In that case it was held:

"A respondent should not be held liable merely because his conduct has had the effect of producing a proscribed consequence: it should be reasonable that that consequence has occurred. That…creates an objective standard … whether it was reasonable for a Claimant to have felt her dignity to be violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question. One question that may be material is whether it should reasonably have apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt …" [15].

and

"…Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase…" [22].

163. In ***HM Land Registry v Grant*** **[2011] EWCA Civ 769** it was held:

"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment." [47]

Time

164. Section 123 Equality Act 2010 provides:

Time limits

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

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

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

....

(3) For the purposes of this section—

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

…

165. The normal time limit must be adjusted to take into account the early conciliation process and any extensions provided for in section 140B.

166. In ***Hendricks v Metropolitan Police Commissioner*** **[2002] EWCA Civ 1686**, the Court of Appeal stated that the test to determine whether a complaint was part of an act extending over a period was whether there was an ongoing situation or a continuing state of affairs in which the claimant was treated less favourably. In ***Hale v Brighton and Sussex University Hospitals NHS Trust*** **UKEAT/0342/17** it was found that the respondent's decision to instigate disciplinary proceedings against the claimant created a state of affairs that continued until the conclusion of the disciplinary process.

167. When determining if there was a continuing state of affairs the tribunal will consider what the acts were, the context and who was involved. A tribunal may decide that some acts form part of a continuing act, while others remain unconnected - ***Lyfar v Brighton and Sussex University Hospitals Trust*** **[2006] EWCA Civ 1548**.

168. It is for the claimant to show that it would be just and equitable to extend time - ***Bexley Community Centre (t/a Leisure Link) v Robertson*** **[2003] EWCA Civ 576**.

169. The court in ***British Coal Corporation v Keeble*** **[1997] IRLR 36** provided guidance to tribunals when considering whether to exercise its discretion to extend time on this just and equitable basis. This will include consideration of the length of and reasons for the delay, but might include the extent to which the cogency of the evidence is likely to be affected by

the delay; the extent to which the party sued had co-operated with any requests for information; the promptness with which the claimant acted once they knew of the possibility of taking action; and the steps taken by the claimant to obtain appropriate professional advice once they knew of the possibility of taking action. The court in ***Adedeji v University Hospitals Birmingham NHS Foundation Trust*** **[2021] EWCA Civ 23** has confirmed that the correct approach is for the tribunal to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time. The court advised against using a mechanistic approach and using the examples in ***Keeble*** as some sort of checklist.

170. In ***Dr Nicholas Jones v The Secretary of State for Health and Social Care*** **[2024] IRLR 275** the Employment Appeal Tribunal reiterated the long established principle that time limits in an employment law context are relatively short and should be complied with, however the tribunal has a wide discretion to extend time on just and equitable grounds and that appellate courts should be slow to interfere unless there is an error of law.

Liability of Second Respondent

171. In order for a named respondent, such as a line manager, to be held liable for discrimination undertaken by others in the respondent business, it is necessary for a claimant to show that they have done more than to create an environment in which discrimination can occur. In ***Miles v Gilbank and another*** **[2006] ICR 1297** the Court of Appeal upheld a finding that the named respondent had gone further than simply tolerating discriminatory conduct by others, and had instead consistently fostered and encouraged a discriminatory culture targeted at the claimant, and in doing so had subjected that claimant to a detriment.

Conclusions and analysis

Direct discrimination because of race

172. We will deal with each of the seven allegations in turn.

Comments about foreigners

173. There was no evidence to support this allegation. The Claimant did not complain about it at the material time, nor did he complain about it at all during the course of his employment. Mr Bond gave the Claimant numerous opportunities to raise this allegation and he went further than that by inviting the Claimant to provide evidence of matters he wishes to complain about. The Claimant did not do so. The first time the allegation was first raised was after his dismissal. The allegation was investigated and was denied. There was no evidence which would allow the Tribunal to draw an inference that the comments had been made by Mr Durrell.

174. The burden of proof has not shifted to the Respondent, and as the factual premise of the complaint is not made out the complaint is dismissed.

Smoking breaks

175. The First Respondent's smoking policy permits smoking at work only in designated areas, it is not at odds with the contents of the Claimant's

contract of employment which prohibits smoking in its premises or its vehicles. Mr Durrell was permitted to smoke at work and this was consistent with the First Respondent's policy. Mr Durrell was allowed to take frequent smoking breaks throughout the day, and the number of smoking breaks was not limited in the policy and moreover the Respondents were content with these breaks as Mr Durrell is perceived to be a dedicated worker who starts work early, works through his breaks, and finishes late.

176. The Claimant is not a smoker, he did not request smoking breaks, and he would start his shift on time (or just before the start time), he would take his breaks, and he would finish on time.

177. The Claimant fails to make a prima facie case as he has not told us what the less favourable treatment is given that he did not ask for smoking breaks and has not given evidence of asking for any other sort of break. There was no evidence from which we could draw an inference that had the Claimant asked for a smoking break that it would be refused. The mere fact that the Claimant's contract of employment produced after the smoking ban prohibits smoking in premises and vehicles at work does not of itself suggest to us that the Claimant would have been treated any differently under the smoking policy than Mr Durrell. The complaint fails and is dismissed.

Display of swastika on 9 January 2023

178. The swastika was not displayed on 9 January 2023. The swastika was put up by the apprentice on Saturday 21 January 2023 and it was seen by the Claimant on that date. It was then removed by Mr Durrell on that date who spoke to the apprentice about it, before it was then put back up again by the apprentice that day. It was not seen by the Second Respondent that day as he does not work on Saturdays. The swastika remained up until Monday morning, albeit the garage is closed on Sundays. The swastika was seen by the Claimant when he arrived at work on 23 January 2023 and he took a photograph of it at 7:50am. It was also seen by the Second Respondent but a short time after his arrival, and he then removed it at or around 8am and he also spoke to the apprentice about it.

179. The Respondents say that this was done as a joke by the apprentice to target Mr Durrell as he listened to German music. The Claimant has accepted that in his witness statement, although he later added he was not sure if it was done to target him (because of his Slovakian nationality) or because of Mr Durrell's taste in music.

180. There was no evidence that the apprentice had such an understanding of World War Two history that he would have been aware of the allegiance between Slovakia and Nazi Germany. No evidence was provided which would have helped us to draw an inference of that nature. It was clear that the intended recipient of this puerile or ignorant joke was meant to be Mr Durrell. The act was not committed because of the Claimant's race.

181. All those who we heard evidence from and who witnessed the swastika were offended by sight of it at work. Mr Bond and Mr Goddard also gave evidence of how offensive it was, even though neither had been present at the Ipswich branch where it was displayed.

182. The act of displaying the swastika on the notice board on 21 January to 23 January 2023 cannot however be said to be an act of less favourable treatment towards the Claimant because of his race. All those who witnessed the swastika were offended by sight of it.

183. Whereas this was highly distasteful behaviour, the Claimant has not set out a prima facie case of less favourable treatment of him because of his race. The burden has not shifted to the Respondent and the complaint fails and is dismissed.

Display of swastika on other occasions

184. We are not satisfied to the level that we needed to be that the swastika had been put up on the other occasions as alleged. The Claimant failed to complain about this on those occasions and even when he brought his grievance and was repeatedly invited by Mr Bond to provide evidence, he did not do so. We could not therefore find as a fact that the swastika was put up on those earlier occasions.

185. That said, even if we are wrong on that and that the swastika had been put up in Summer and November 2022 as alleged, we have found that the reason for putting it up was to tease Mr Durrell about his choice of music, and it had nothing whatsoever to do with the Claimant's race or nationality. There was no less favourable treatment of the Claimant and as he has failed to establish a prima facie case of direct discrimination the complaint fails and is dismissed.

Second Respondent's tacit approval of the display of the swastika

186. We have found no evidence whatsoever that the display of the swastika was done with the tacit approval by omission on the part of the Second Respondent.

187. We start by repeating our findings that it has not been established to our satisfaction that the swastika was put up in Summer or November 2022. The only occasions we have found that the swastika was put up was twice on 21 January 2023 where it remained until 23 January 2023.

188. The Second Respondent does not work on Saturdays and the Ipswich branch was closed on Sundays. The first time that the Second Respondent saw the swastika was on or around 8am on 23 January 2023 whereupon he removed it and then spoke to the apprentice about it. The Second Respondent did not conduct a disciplinary investigation however we find that he dealt with informally in what he considered to be a proportionate manner at the time. We of course note that Mr Bond and Mr Goddard would have instigated a disciplinary investigation had they been aware.

189. The facts do not in any way support an inference that the Second Respondent gave any form of tacit approval to put up a swastika in the first place. Had the Second Respondent ever been issued with any equality and diversity training in his twenty year career with the Respondent then his response may have been different, however we nevertheless repeat our earlier conclusion that this did not amount to less favourable treatment of the Claimant because of his race.

190. The factual premise of this complaint has not been made out and the Claimant has failed to establish a prima facie case of less favourable treatment. Accordingly, this complaint fails and is dismissed.

The Claimant's disciplinary

191. We remind ourselves that the Claimant has not brought a complaint of unfair dismissal. Our analysis is limited to the complaint of less favourable treatment because of his race. We are not looking at fair treatment or reasonable treatment, we are looking to see whether the treatment of the Claimant was less favourable.

192. The terms of the Respondent's memo of 12 October 2022 were generally clear as regards to staff having to obtain permission for work to be done on their vehicles and the requirement that they should pay for chargeable work. The practical application of the policy was less clear as some work needed to be paid for (such as oil changes) and other work did not (such as VHCs and tyre changes). Nevertheless, it was clear that breaches of the policy would be taken seriously and viewed as theft and gross misconduct.

193. In practice some breaches were treated more seriously than others. A late payment of an invoice might be treated less seriously as it could be explainable (due to awaiting parts or customer service staff prioritising customers' work), whereas the failure to record chargeable work being done would be taken far more seriously. The justification for this was explained convincingly by Mr Goddard who explained that if the work was recorded on a job card the First Respondent at least had an audit trail and could obtain payment from staff, whereas if the work was not recorded in the first place then there was nothing to charge against and it would be treated as theft. It is fair to say that Mr Goddard who was one of the authors of that policy perhaps explained it far better orally than it had been set out in writing.

194. The Claimant was aware of the Respondent's requirement to obtain permission and to pay for the work. Leaving aside whether the Claimant received the email with the memo sent to all staff, it was clear that he knew about the policy because he confirmed that he had heard staff discussing the memo and he had previously been told by Mr Rookard that he needed to pay for work done on his vehicle.

195. The Claimant did not ask for permission to do the oil change. It was not recorded on his job card which only recorded a VHC. The Claimant performed the oil change but did not record it on the job card, therefore it was not invoiced.

196. The Claimant was seen performing this oil change and it was brought to Mr Rookard's attention who then interviewed the Claimant who confirmed that it had been done and he initially said that he would not pay for anything before then offering to do so. The First Respondent was initially of the view that the Claimant had also used its oil, however it later accepted his evidence during the subsequent disciplinary process that he had used his own oil.

197. During the disciplinary hearing the Claimant alleged that he was being treated differently than his colleagues and the hearing was adjourned to allow Mr Bond to review job cards and invoices to ascertain whether this

was accurate. Whereas Mr Bond was not fully conversant with what was chargeable, he reviewed the job cards and compared them to the invoices and found that the work which had been recorded had been charged and paid for. He also explored a separate issue about Mr Buffrey receiving oil for free, and he identified invoices where he had paid for oil. The Claimant was also given the opportunity to raise a grievance during this process and was repeatedly invited to provide evidence of discrimination however he did not do so.

198. Whereas the Claimant has made reference to a number of the First Respondent's staff whom he says were treated more favourably, he has not identified a true named comparator. All of those to which we have been referred have recorded the work done on the job cards (whether by inputting it in the first place or by updating it by hand prior to handing over the job card) and they subsequently satisfied the invoice, although some invoices were paid later than the memo provides but there were reasons for this such as ordering parts.

199. We were not provided with a true specific comparator. Those named by the Claimant (Mr Page, Mr Durrell, Mr Buffrey and others referred to) had been invoiced and paid for work which appeared on the job card, and they are not true comparators.

200. We have looked at the possibility of an evidential comparator. Mr Durrell was permitted to have frequent smoking breaks. This was consistent with the First Respondent's smoking policy. The Claimant's contract of employment prohibits smoking "in" any of the Respondent's premises or vehicles. It says nothing about smoking in designated areas at the First Respondent's premises. Mr Durrell was treated consistently with that smoking policy, and as such he is not of use as an evidential comparator here.

201. The apprentice was not disciplined for putting up the swastika. This is because the Second Respondent dealt with it informally, taking into account the fact that he was a young apprentice. Mr Bond and Mr Goddard would have undertaken a disciplinary investigation had they known about the swastika incident. There is some evidence that the apprentice was treated more lightly than the disciplinary policy requires, however we note that the same is true of the Claimant as he was not disciplined for his failure to call the Respondent when he was sick, instead relying upon text messages.

202. The Claimant also relies upon a white British Service Technician as a hypothetical comparator. We find that the correct hypothetical comparator would have been someone not Slovakian who had also asked to perform a non-chargeable job but had also performed a chargeable one and not updated the job card so that they might be invoiced for the work.

203. We are able at the first stage to take into account all of the relevant circumstances including the Respondents' evidence before deciding whether the burden of proof has passed to the First Respondent to provide a non-discriminatory reason for the treatment. We do not find that the Claimant has established a prima facie case of less favourable treatment, the comparators he has identified were not true comparators, the evidential comparators to which we have referred are of no assistance, and we are

not satisfied that a hypothetical comparator (whichever version is used) would have been treated any more favourably than the Claimant was. The burden of proof has not shifted to the First Respondent and accordingly the complaint fails and is dismissed.

The Claimant's dismissal

204. We rely upon our conclusions and analysis as set out above with respect to the decision to subject the Claimant to the disciplinary process.

205. We have not been provided with a true named or specific comparator, all of those identified had either recorded the work undertaken correctly on the job card in the first place or it had been updated by hand and in all cases they had paid for the work undertaken.

206. The evidential comparators to which we have referred were of little assistance. Mr Durrell was treated according to the smoking policy so he is not an evidential comparator at all. The apprentice was not disciplined for putting up the swastika and this is of some evidential value, although we accepted the Second Respondent's explanation that he was a young apprentice and it was dealt with informally. We have noted that the First Respondent also treated the Claimant more favourably than the contract provides by not disciplining him due to his failure to report his sickness absence in the manner required.

207. We repeat our conclusion above about the correct hypothetical comparator. Whereas the Claimant also relies upon a white British Service Technician as a hypothetical comparator, we find that the correct hypothetical comparator would have been someone not Slovakian who had also asked to perform a non-chargeable job but had also performed one that was chargeable and not updated the job card so that they might be invoiced for the work. In any event, whichever version of the hypothetical comparator is relied upon we find that the outcome would have been the same.

208. We have discounted the evidence of Mr Goddard that other staff had been dismissed for similar offences as this was new evidence and we were not provided with any evidence in support of that assertion.

209. We are again able at this first stage to take into account all of the relevant circumstances including the Respondents' evidence before deciding whether the burden of proof has passed to the First Respondent to provide a non-discriminatory reason for the Claimant's dismissal.

210. The Claimant has referred us to the judgment in ***Ahmed*** and argued that a (constructive) dismissal may still be fair and amount to race discrimination at the same time. The facts in that case are very different to those in this case. In ***Ahmed*** the employer refused to appoint the employee to a post in Sudan on the basis that her racial origin could have presented a risk to her safety and that of her colleagues. The complaint of direct discrimination was upheld on appeal whereas the complaint of constructive dismissal was not. That case is distinguishable from the facts of this case not least because the Claimant has not brought a complaint of constructive dismissal or unfair dismissal, and moreover in this case the First Respondent dismissed the Claimant because of his conduct. We have not tested the fairness of the Claimant's dismissal because he did not bring an

unfair dismissal claim. Our task has been to identify whether there has been any less favourable treatment on grounds of the Claimant's race and we have found that there was not.

211. We have identified in this case instances where invoices were not paid on the day the work was undertaken, and we have observed that there can be a number of reasons why (including waiting for parts to be delivered, or customers' invoices taking priority). The Claimant is not comparing like with like in the manner he has pursued his claim. The colleagues to which he referred had correctly recorded the work being undertaken and they were invoiced for it and they paid for the work. The Claimant's situation was different. The Claimant did not tell the First Respondent that he was performing the oil change, therefore it was not in a position to invoice him for that work.

212. The Claimant has attempted to portray his situation as one of delayed payment but that is an error. With respect to the Claimants' colleagues whose invoices were not paid on time, they had informed the First Respondent of the work undertaken prior to invoicing. In the Claimant's case he had not. That is the critical difference and that is why we have found that there was not less favourable treatment of the Claimant. In the case of ***Ahmed*** which the Claimant relies upon, that claimant was able to demonstrate less favourable treatment on grounds of her race, and therefore the two cases are distinguishable.

213. We do not find that the Claimant has established a prima facie case of less favourable treatment. The comparators the Claimant has identified were not true comparators, the evidential comparators to which we have referred are of no assistance, and we are not satisfied that a hypothetical comparator (whichever version is used) would have been treated any more favourably than the Claimant was. The burden of proof has not shifted to the First Respondent and accordingly the complaint fails and is dismissed.

Harassment related to race

214. We will again go through each of the seven allegations in turn.

Comments about foreigners.

215. We have already made a finding that the factual premise of the allegation has not been made out. For the reasons we have already set out above, we do not find that Mr Durrell made the comments which the Claimant alleges.

216. Accordingly, the Claimant has failed to set up a prima facie case and the burden of proof has not shifted to the First Respondent. The complaint fails and is dismissed.

Smoking breaks

217. We have already found that Mr Durrell had smoking breaks and that this was consistent with the First Respondent's policy. The Claimant was not a smoker, the Claimant did not ask for smoking breaks, and there is no evidence that had the Claimant asked for smoking breaks that they would ever have been refused. The Claimant fails as a bare minimum to explain

why Mr Durrell's smoking breaks amounted to unwanted conduct or was related to his race. The complaint is misconceived.

218. As the Claimant fails to establish a prima face case, the burden of proof does not shift to the Respondent and the complaint fails and is dismissed.

Display of swastika on 9 January 2023

219. We have found that the swastika was displayed on 23 January 2023 and not 9 January 2023 as alleged. Nevertheless, it had been displayed. The Respondent conceded that this was unwanted conduct. We do not need to determine that issue. We should make it clear that the burden of proof has shifted to the First Respondent – the mere display of a swastika at work is of itself sufficient to shift the burden in the context of this case.

220. The next issue for us to determine is whether this unwanted conduct related to the Claimant's race.

221. The Claimant maintains that it was related to his race although in his witness statement and his oral evidence he said that he understood that the swastika had been made because of Mr Durrell's taste in music, although he then later went on to state he thought that it was done to make a point about the historical allegiance between his native Slovakia and Nazi Germany during the Second World War and he was not sure if it was done to specifically target him or that it could be something about Mr Durrell's taste in music.

222. The Claimant had particular difficulty explaining the link between Mr Durrell playing German music and the Claimant's race. It was unclear whether it was the mere playing of the music or the lyrics which were said to be the cause of his feelings of harassment. The lyrics to the song "Ich will" were provided in the bundle by the Claimant but they shed no light on why the Claimant says he felt harassed.

223. The Respondent maintains that the swastika was not put on the board due to the Claimant's race, it admits that it was inappropriately put up there by the apprentice because of Mr Durrell's taste in music, and as such it related to Germans however inappropriate that may have been, but there was no link between the Claimant's Slovakian nationality and the putting up of the swastika nor the playing of German music.

224. We have paid particular attention to the judgment of the EAT in ***Aslam*** which reiterates the importance of carefully articulating any findings that the unwanted conduct related to the protected characteristic relied upon. In this case we are unable to find that the conduct complained of related to the Claimant's race. We find that the swastika was put up to tease Mr Durrell about him playing German music, as such the conduct complained of related to Germans, it did not relate to Slovakians. This was clear from the evidence of Mr Durrell and to a lesser degree from that of the Claimant himself who expressed in his own statement why he thought that it had been done. We cannot therefore find that this unwanted conduct, as offensive and inappropriate as it was, related in any way to the Claimant's race.

225. We would add for the sake of clarity that we found that the unwanted conduct did not have the purpose of violating the Claimant's dignity or

creating an environment that was intimidating, hostile, degrading, humiliating or offensive to the Claimant. The purpose was to tease Mr Durrell, not the Claimant.

226. As regards whether it had that effect of creating an intimidating, hostile, degrading, humiliating or offensive environment we will consider the perception of the Claimant (the subjective element), the circumstances of the case, and whether it was reasonable to have had that effect (the objective element).

227. The Respondent accepted that subjectively the unwanted conduct did have that effect on the Claimant. We did not therefore need to determine that matter, save that we noted in particular the Claimant's evidence that it was a criminal offence to display the swastika in Slovakia and moreover he felt sufficiently upset by the display of a swastika at work that he took a photograph and showed his line manager. The Claimant's evidence in this regard was convincing and we had no hesitation in accepting it.

228. As regards whether objectively it was reasonable for it to have had that effect (the objective question) we find assistance in the judgment of the EAT in ***Weeks***. We note that the display of a swastika would likely be deemed inappropriate and offensive in most professional work environments (and the Respondents' witnesses agreed that they found it offensive) but we must consider all of the circumstances of the case and the wider context.

229. Firstly, whereas the display of the swastika was an ill judged puerile act on the part of the apprentice, it was targeted at Mr Durrell. It was not targeted at the Claimant, and he understood that to be the case as he recognised that in his witness evidence. That of course does not preclude a third party from feeling harassed, but it is a relevant factor to consider.

230. The race or nationality being targeted was Germans not Slovakians. The Claimant, as we have found, did raise it with his line manager at the time but he did not raise a formal grievance about it, nor did he raise it in the grievance process he subsequently initiated after the disciplinary process had begun. The Claimant was given numerous opportunities by Mr Bond to evidence his complaint of discrimination and he was asked for the documents, however the Claimant did not send them and he did not raise the issue of the swastika again until after his employment terminated.

231. We have found that this was a one-off incident, and the Claimant did not know that it was removed and put back up on the Saturday. As far as the Claimant knew, he saw it on Saturday 21 January and it was still up in the morning of Monday 23 January 2023 until around 8am when the Second Respondent removed it.

232. There was no ongoing state of affairs, this was an isolated event. We have not found that the swastika was put up in Summer or November 2022 as alleged. There was nothing which accompanied the putting up of the swastika so as to create a state of affairs, for example by colleagues joining or making comments about it. The Claimant referenced the playing of German music, however as we have found that was the reason why the apprentice put up the swastika – the mere fact of playing German music did not of itself create a state of affairs.

233. Whereas single incidents can amount to a state of affairs, there needs to be some evidence of ongoing effects, but we heard no evidence of that in this case. As it stands this was an isolated incident between 21 and 23 January 2023 with no ongoing effects. We therefore cannot find that it was reasonable for the conduct to have had that effect in these specific circumstances.

234. In any event, and as we have already found, the claim has been pursued on the basis that the unwanted conduct related to the Claimant's race. As we have already found that it did not, this complaint must fail and it is dismissed.

235. Nevertheless, we repeat that the display of a swastika at a professional workplace as a joke was wholly inappropriate and would cause offence to many people, and we observe that the First Respondent may wish to consider arranging for equality and diversity training for the Ipswich branch (if it has not already been provided).

Display of swastika on other occasions

236. We have not found that the swastika was put up on other occasions, either in Summer or November 2022 as alleged. The evidence does not support such a finding. Accordingly, the factual premise of this allegation has not been made out, the burden of proof has not shifted to the Respondent and we dismiss the complaint.

Second Respondent's tacit approval of the display of the swastika

237. We have found no evidence whatsoever that the display of the swastika was done with the tacit approval by omission on the part of the Second Respondent. We find that the Second Respondent removed the swastika as soon as he found it on 23 January 2023 and that he also spoke to the apprentice who put it up there.

238. The factual premise of this allegation has not been made out, the burden of proof has not shifted to the Respondents, and we dismiss the complaint.

The Claimant's disciplinary

239. The First Respondent concedes that the disciplinary was unwanted conduct so we need not consider that further. We will now consider whether this unwanted conduct related to the Claimant's race. Again we remind ourselves that we are not approaching this as a complaint of unfair dismissal, our task is to view this in the context of harassment related to the Claimant's race.

240. As we have already found, the terms of the First Respondent's memo of 12 October 2022 were generally clear as regards to staff having to obtain permission for work to be done on their vehicles and the requirement that they should pay for chargeable work.

241. We have also found that the Claimant only obtained permission to bring his car in to perform a VHC which would have been free, however the Claimant carried out an oil change using his own oil, and that would have attracted a charge from the First Respondent had it known about it.

242. The Claimant did not inform the First Respondent about the oil change he was planning to perform, nor did he tell them about it after he had performed it. The First Respondent only became aware of it once Mr Durrell informed Mr Rookard that the Claimant had done so. This was the reason for the disciplinary investigation.

243. An initial investigation conducted by Mr Rookard identified that the Claimant did not have permission on the job card to perform the oil change nor had he paid the First Respondent for undertaking one. The Claimant initially said that he would not pay anything before offering to do so. It was clear that based upon the terms of the First Respondent's memo, and based upon the answers the Claimant had given Mr Rookard, that there was a case to answer.

244. It was clear that the decision to subject the Claimant to the disciplinary process had absolutely nothing to do with the Claimant's race, specifically his Slovakian nationality, and instead the reason was because of the evidence identified which suggested that he was in breach of the First Respondent's policy regards working on staff vehicles.

245. Having found that this conduct was unrelated to the Claimant's race it is unnecessary to go on to consider the issue of whether this had the purpose or effect of violating the Claimant's dignity or creating an environment that was intimidating, hostile, degrading, humiliating or offensive to the Claimant. Nevertheless, we would observe that there was no evidence at all that this was the intention of the First Respondent. As regards whether it had that effect, we would note that it would not have been reasonable for it to have had that effect in circumstances where it was entirely legitimate of the First Respondent to investigate what appeared to be cases to answer for a breach of the policy as expressed in the memo of October 2022. It was not reasonable for the conduct to have had that effect in the circumstances of this case.

246. We are able to take into account the First Respondent's evidence even at this initial stage when looking at the reason for the treatment complained of. We find that the reasons for the conduct was because it reasonably appeared to the First Respondent that there was a disciplinary case to answer. Accordingly, we find that the burden of proof has not shifted to the First Respondent, the complaint fails, and we dismiss the allegation.

The Claimant's dismissal

247. The First Respondent concedes that the decision to dismiss the Claimant was unwanted conduct so we need not consider that further. We will now consider whether this unwanted conduct related to the Claimant's race.

248. It is clear that the reason for dismissing the Claimant was due to the First Respondent forming the view that the Claimant was in breach of the policy as regards staff working on their own cars in work time, and that he had failed to obtain permission to perform an oil change in working time and had subsequently failed to pay for it. The Respondent's policy indicated that this conduct would result in disciplinary proceedings and could amount to gross misconduct with dismissal as a potential penalty.

249. The reason for dismissing the Claimant had nothing whatsoever to do with his Slovakian nationality. We find that it had no bearing on that decision.

250. In addition, we would observe that there was no evidence at all that the decision to dismiss the Claimant had the purpose of violating his dignity or creating an environment that was intimidating, hostile, degrading, humiliating or offensive to the Claimant. As to whether it had that effect, we again observe that it would not have been reasonable for it to have had that effect in circumstances where the reason for dismissal had nothing whatsoever to do with the Claimant's race but was based solely upon his failure to comply with the terms of the memo from October 2022.

251. We record for completeness that the burden of proof has not shifted to the First Respondent, the complaint fails and is dismissed.

Time

252. Given that the complaints have been dismissed in full it was unnecessary to resolve the issues as regards time in this case. We have found the issues allegedly occurring in Summer and November 2022 did not take place. There was no evidence of a continuing act, and we were not provided with any reason by the Claimant for not bringing those complaints within time.

253. It is the unanimous decision of the Tribunal that all the complaints are dismissed in full.

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Employment Judge **Graham**

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Date 17 June 2024

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON 2 July 2024

FOR EMPLOYMENT TRIBUNALS