EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Catalin Malasinc	**v**	DHL Services Limited

Heard at: Cambridge

On: 13, 14, 15 May 2024
18 and 19 June 2024

Before: Employment Judge Tynan

Members: Mrs C A Smith and Mr K Rose

Appearances
For the Claimant: In person
For the Respondent: Mr Ismail, Counsel
Interpreter: Romanian speaking

JUDGMENT

The Claimant's claim that he was directly discriminated against by reason of the protected characteristic of race, contrary to section 13 of the Equality Act 2010, is not well founded and is dismissed.

REASONS

Background

1. The Claimant, who is Romanian, was employed by the Respondent as an HGV Driver from 1 December 2021 until 14 October 2022 when he was summarily dismissed for alleged gross misconduct. He initially pursued claims that he had been unfairly dismissed and discriminated against by reason that he is Romanian. However, he had less than two years' continuous service with the Respondent at the date of his dismissal. Following a strike out warning, he withdrew his unfair dismissal complaint at a case management preliminary hearing before Employment Judge T Brown on 18 July 2023.

2. The issues in the case are recorded in a List of Issues appended to Employment Judge T Brown's record of the 18 July 2023 hearing. There are 11 discrete issues to be determined and they are each pursued as complaints of direct race discrimination.

The Hearing

3. The Claimant gave evidence at Tribunal. He was supported throughout the hearing by an interpreter, though relied upon the interpreter to a limited extent. He has a good, albeit not a perfect, understanding of English. The limitations in terms of his ability to express himself in the English language became apparent when he questioned the Respondent's witnesses; it was necessary at times for the Tribunal to reframe his questions to ensure they were understood by the witnesses. We think this goes beyond mere inexperience of legal proceedings and reflects instead his difficulty in expressing himself at times in English in nuanced terms, something we have borne in mind when considering how he expressed himself during his meetings with the Respondent.

4. Mr Keith Gooch, Transport Operations Manager and Mr Mark Doyle, Regional Operations Support Manager gave evidence on behalf of the Respondent. Mr Gooch took the decision to dismiss the Claimant from the Respondent's employment. Mr Doyle heard the Claimant's appeal against that decision.

5. There was also a witness statement from Ms Lorna Scrivens, an HR Business Partner with the Respondent. Ms Scrivens was unwell, with the result that she could not attend Tribunal on 18 June 2024. Her evidence touches indirectly upon the issues in the case insofar as she attended the disciplinary hearing on 7 October 2022 and took notes at the hearing. She was also involved in certain discussions regarding other concerns that arose in late September/early October 2022 regarding the Claimant's alleged conduct. As Ms Scrivens did not attend Tribunal there was no opportunity for the Claimant to question her and, as appropriate, challenge her evidence. Inevitably, we attach less weight to her evidence given it has not been tested at Tribunal.

6. There was a single Hearing Bundle comprising of 231 numbered pages, supplemented by a further 24 numbered pages and approximately 22 un-numbered pages. Any page references in the course of this Judgment correspond to the Bundle.

The Law

7. Section 13 of the Equality Act 2010 ("EqA") provides as follows:

> 13. Direct Discrimination
>
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

8. In considering the Claimant's direct discrimination complaints we have focused upon the reasons why each of the alleged discriminators acted, or failed to act, as they did. That is because, other than in cases of obvious discrimination (this is not such a case), an Employment Tribunal will want to consider the mental processes of the alleged discriminators: Nagarajan v London Regional Transport [1999] IRLR 572, HL.

9. In order to succeed, the Claimant has to do more than simply establish that he has a protected characteristic and that he was treated unfavourably: Madarassy v Nomura International Plc [2007] EWCA Civ 33,. There must be facts from which we could conclude, in the absence of an adequate explanation from the Respondent, that the Claimant was discriminated against. This reflects the statutory burden of proof in s.136 EqA 2010, but also long standing legal principles including those set out by the Court of Appeal in Igen Limited v Wong [2005] IRLR 258.

10. It is often said that a Claimant has to establish 'something more' than merely unfavourable treatment and a protected characteristic. However, that 'something more' need not necessarily be a great deal more.

11. The grounds of any treatment often have to be deduced or inferred from the surrounding circumstances. In order to justify an inference of discrimination a Tribunal must first make findings regarding the primary facts, identifying 'something more' from which an inference can properly be drawn. This is often done by a Claimant placing before the Tribunal evidential material from which an inference can be drawn that they were treated less favourably than they would have been treated if they had not had the relevant protected characteristic: Shamoon v RUC [2003] ICR337. 'Comparators' often provide that evidential material. Comparators are others in the workplace who may have been treated in a different way. The usefulness of any comparison depends upon the extent to which the comparator's circumstances are the same as a claimant's. The more significant the difference or differences, the less cogent will be the case for drawing an inference.

12. If there is no obvious comparator, the Tribunal can contrast the Claimant's treatment with a hypothetical comparator, that is to say how the Respondent would have treated somebody without the relevant protected characteristic in the same, or not materially different, circumstances.

13. Otherwise, some other material must be identified that is capable of supporting the requisite inference of discrimination. This may include a relevant statutory code of practice. Discriminatory comments made by the alleged discriminator(s) about the Claimant might, in some cases, suffice. There were no such comments in this case.

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

from the absence of any explanation for it. Mere proof that an employer has behaved unreasonably or unfairly will not by itself trigger the transfer of the burden of proof, let alone prove discrimination (see in particular Bahl v The Law Society and others [2004] IRLR 799; Quereshi v London Borough of Newham [1991] IRLR 264; and Glasgow City Council v Zafar [1998] ICR 120 HL). Mr Ismail has cited paragraphs 98 to 101 of the Court of Appeal's judgement in Bahl in his written closing submissions.

15. In Chief Constable of Kent Constabulary v Bowler EAT 0214/16, it was held that a Tribunal had impermissibly inferred direct race discrimination solely from evidence of procedural failings in dealing with the claimant's grievances and appeal against the rejection of those grievances. The EAT said:

> *'Merely because a tribunal concludes that an explanation for certain treatment is inadequate, unreasonable or unjustified does not by itself mean the treatment is discriminatory, since it is a sad fact that people often treat others unreasonably irrespective of race, sex or other protected characteristic.'*

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

Findings of Fact and Conclusions

Issue 1

On 12 September 2022, did the Respondent change the Claimant's shift pattern without telling him?

17. The Claimant complains that his shift pattern changed on 12 September 2022 and that he was not given advanced notice of the change. It is not in dispute that his shift pattern, or more correctly the trips he was required to undertake that night, changed at short notice. The Claimant was evidently inconvenienced by this last minute change to his previously communicated work schedule. He had left work the previous Friday with the understanding that on Monday he would be undertaking relatively local jobs for a client, Aspall. It was a trip he undertaken a number of times before: as well as refreshments being available at the client's site, all other things being equal he could expect a reasonably early finish, certainly earlier than if he was allocated a long distance job. Had he known his schedule would change, he might have had some extra rest on the Sunday, would have brought additional provisions with him to work and would have alerted his partner to the situation so that she could work around his situation.

18. However frustrating or even annoying the changes may have been, the question is not whether the Respondent failed to give adequate thought to

the Claimant's situation, but whether he was treated differently in the matter to how others would have been treated. There is no evidence of colleagues being treated differently to the Claimant, namely that British or other non-Romanian colleagues' personal and family circumstances were accommodated in ways that the Claimant's circumstances were not. Although the complaint is not specifically addressed in the Respondent's witness statements, on the Claimant's own case the complaint is not made out. He addresses the matter in paragraphs 3 and 4 of his witness statement. The alleged discriminator is James Blake, one of the Traffic Operators on duty that evening. The Traffic Operators are primarily responsible for resourcing the various jobs that needed to be covered during a shift. This is not always predictable, particularly given late requests from clients and unexpected staff absences, vehicle breakdowns and the like.

19. In his witness statement, the Claimant refers to a rather testy exchange with Mr Blake who he felt was not doing his job properly. Whether or not it is a fair criticism on the Claimant's part, his evidence is that Mr Blake was not doing his job properly. He does not say that Mr Blake treated him differently to others.

20. Furthermore, in so far as he might seek to contrast his treatment with that of his colleague, Cameron Campbell, who he says worked 8.5 hours that night, as against his 12:10 hours we note that the following night the Claimant worked 7:34 hours whereas Mr Campbell finished work slightly later than the Claimant had the previous night. Mr Campbell's documented Working Time Directive hours on 13 September 2022 were 10 hours 52 minutes.

21. There is no available information as to Mr Campbell's hours on 14 September 2022 to enable a further comparison to be made. Thereafter the Claimant was suspended, meaning that we cannot undertake any further comparison between the two men's driving or working hours. However, looking at 12 and 13 September 2022, the Claimant and Mr Campbell were at work for a very similar length of time.

22. The Claimant has not established primary facts from which we could conclude, in the absence of any explanation from the Respondent, that he was discriminated against by being allocated different jobs to those he had expected to be given. His complaint is not well-founded.

Issue 2

On 13 September 2022, did Keith Gooch say to the Claimant that he "did not care whether [the Claimant] finished work in time to care for [his] son and if [the Claimant] had time on a shift he would be given a brush to clean the yard"*?*

23. Mr Gooch denies making these alleged comments to the Claimant. However, when questioned about the matter, Mr Gooch accepted that when speaking to the Claimant on 13 September 2022 he had made a comment about drivers being required to sweep the yard. He could not

satisfactorily explain why the comment might have been made or provide context for it.

24. We are certain that it was not said because the Respondent routinely, or indeed possibly ever, expects its drivers to sweep the yard. It is irrelevant in this regard that the Claimant's contract required him to carry out any duties reasonably required of him. Mr Ismail's cross examination of the Claimant to this effect rather misses the point that this was not a task normally assigned to drivers.

25. We find that Mr Gooch was asserting his authority in a fairly crude way. We prefer the Claimant's evidence to Mr Gooch's on this issue and that the Claimant has captured the gist of what Mr Gooch said to him that day. We find that Mr Gooch believed the Claimant was being unreasonable and inflexible, and was wanting things on his own terms. Mr Gooch had no time for such perceived behaviour: we find that he sought to put the Claimant in his place by telling him that he effectively did not care if the Claimant finished work a little later than expected and that if the Claimant was going to be inflexible and 'clock watch', he might give him a brush to sweep the yard. The clear message was that if the Claimant was going to be inflexible the company would be inflexible in return.

26. Mr Gooch might reflect that he was, of course, the Transport Operations Manager and that he could be expected to manage the situation appropriately, rather than descend to the Claimant's level if he believed he was being petty or difficult or a 'jobsworth'. However, we do not infer from the fact that he might have managed the situation more effectively that he was discriminating against the Claimant. There would need to be something more for us to infer that Mr Gooch's comments reflected more than mere irritation with the Claimant and that he was instead bullying him because he was Romanian and somehow felt he could therefore put him in his place. Mr Gooch's comments were unhelpful, indeed petty, but we conclude that Mr Gooch would have reacted in the same way had Kevin Stevens the Claimant's named comparator, or indeed any other employee, complained in a similar manner about the events of 12 September 2022 and told the Traffic Operator they were not doing their job properly. The complaint is not well-founded

Issue 3

On 14 September 2022, did the Respondent ask the Respondent to do a "fourth shunt"?

27. The Claimant complains that he was asked to do a "fourth shunt" on 14 September 2022, that is to say a fourth driving job. It is not in dispute that he was asked to do a fourth shunt for Aspall, something he refused to do.

28. Notwithstanding that the Claimant's refusal to undertake a fourth shunt led to a disciplinary investigation and thereafter a disciplinary hearing, within moments of being questioned about the matter by the Claimant, Mr Gooch

conceded that drivers are not asked to undertake fourth shunts because these cannot be completed within drivers' contracted hours, or more importantly, within applicable legal limits on working time.

29. His concession in the matter rather begs the question why the Claimant's refusal to undertake a fourth shunt was the subject of a disciplinary investigation, let alone why it proceeded to a disciplinary hearing. Be that as it may, we have to decide whether being asked to do the fourth shunt was an act of discrimination. The Claimant identifies Mr Gooch as the discriminator, linking the request to the events of 12 and 13 September 2022. The Claimant perceives it as further retaliatory or tit-for-tat behaviour on the part of Mr Gooch. Even if we were to be persuaded that Mr Gooch was directing matters behind the scenes, the question would remain whether this was simply further petty behaviour on his part or an act of less favourable treatment because the Claimant is Romanian.

30. However, the question does not arise since we find that the request was made by Beth Wakefield, who had relatively recently joined the Respondent as a Traffic Operator, and that Mr Gooch had no hand in the matter. On the Claimant's own account, Ms Wakefield was acting on a request from a night shift fork lift driver at Aspall. That is consistent with the explanation provided by Ms Wakefield herself when she was asked to make a statement about the matter - see in that regard her written statement at pages 91 – 92 of the Hearing Bundle.

31. The further context is that Ms Wakefield was relatively inexperienced in scheduling jobs and, we find, had limited knowledge of the Working Time Directive and Regulations, and limited insight as to the length of time jobs took. The night shift fork lift driver at Aspall had implied that it would be a quick job as there were trailers already fully loaded to return to the Respondent's depot.

32. The Claimant seeks to contrast his treatment with how other drivers were treated. In particular, he says that drivers undertaking deliveries to or from Aspall only ever did a maximum of three shunts whether they were working on a day or a night shift. Whilst it is understandable why he might frame the matter in that way, the comparison is not an appropriate one. The Claimant does not suggest that he had ever previously been asked to undertake a fourth shunt. In other words it is not a case where he was routinely or even from time to time being asked to do fourth shunts and that he contrast this with the expectations of other drivers.

33. In our judgement, the question is whether Ms Wakefield would have asked any other driver to do the fourth shunt in the circumstances that arose that night. We conclude that she would have done. She was inexperienced and, we find, keen to accommodate the client's request in the matter. Her focus in that moment was on the client's needs. The Claimant's situation and his circumstances, let alone his race, never entered her mind. As far as she was concerned, the job simply needed to be done. The Claimant has not put forward anything further from which we might infer that she would not have made the request of him had he not been Romanian, i.e.

whether consciously or otherwise because she thought he should not complain, but simply do as he was told, alternatively because she was stereotyping him as a hard working Romanian who would accept a job when perhaps a British driver would not.

34. Ms Wakefield's statement provides her contemporaneous explanation in the matter at a point in time when questions of race had not arisen and litigation was not contemplated. Her explanation at the time was that she was trying to accommodate a request from a client. If, as the Claimant clearly asserts, she failed to appreciate that the fourth shunt could not be completed within his core hours, that was her lack of knowledge and experience in the matter. It was nothing to do with him being Romanian.

35. Finally, we note that on both the Claimant's and Ms Wakefield's accounts, her colleague Vlad Chim, who is Romanian, also asked the Claimant if he would do the fourth shunt. According to the Claimant Mr Chim essentially asked the Claimant whether he would do him a favour. The Claimant does not suggest that Mr Chim was discriminating against him, nor does he explain, if it is the case, why Ms Wakefield's request was an act of race discrimination but Mr Chim's was not.

36. The complaint is not well founded.

Issue 4

On 15 September 2022, the Respondent suspended the Claimant.

37. The Claimant complains that he was suspended on 15 September 2022. It is not in issue that he was told by Troy Watkins on that date that he was being suspended. There is a letter signed by Will Gardiner, Transport First Line Manager at pages 96 – 97 of the Hearing Bundle purportedly confirming his suspension. We accept the Claimant's evidence that he did not receive any such letter. In particular, we note that as late as 29 September 2022 the Respondent was still addressing correspondence to the Claimant at his old address in Diss (see page 123). We conclude that the suspension letter was sent to the Claimant at the same old address and that the copy in the Hearing Bundle is an updated version that was prepared once the Respondent became aware of the Claimant's change of address, most likely on 27 or 28 September 2022 when the Respondent chased up the Claimant as it had not heard from him in response to a further letter it had sent him dated 21 September 2022. That subsequent letter was also initially addressed to the Claimant at his old address, but on learning that the Claimant had moved, arrangements were made for a further copy to be sent to the Claimant on 28 September 2022 by courier or some form of special or recorded delivery. We find that the Respondent overlooked sending the Claimant a copy of the suspension letter of 15 September 2022 even if a revised version was prepared.

38. Nothing ultimately turns on the matter except perhaps that it is one of a number of shortcomings in the disciplinary process. If the Respondent

became aware that correspondence had not been received by the Claimant, it seemingly gave no thought to whether the meeting scheduled for 29 September 2022 should go ahead if the Claimant was being given less than 24 hours prior notice of it, particularly in circumstances where English is not his first language and he might otherwise have arranged for a trade union representative to accompany him at the meeting.

39. The letter of suspension contained two allegations, namely that the Claimant had allegedly failed to follow a reasonable work request and that he had verbally threatened violence. In the absence of any statement from Mr Watkins, who no longer works for the Respondent, we do not have his account as to what he said to the Claimant on 15 September 2022 when he suspended him. The Claimant says the given reason for suspension was his failure to follow a reasonable management request. There are no contemporaneous documents in the Hearing Bundle which shed any further light as to whether Mr Watkins understood on 15 September 2022 that the Claimant had allegedly threatened violence. The first reference to the matter are comments by Ms Wakefield in her written statement of 16 September 2022, namely that the Claimant had said to her and Mr Chim that if they wanted to see a fight the following evening they should come in early for their shift as there was going to be one.

40. The Claimant does not dispute making those or similar comments, but that by *"fight"* he meant a vocal row about being asked to do a fourth shunt.

41. The Claimant's email at page 72 of the Hearing Bundle and his various messages with Mr Watkins in March this year (which were inserted at the back of the Hearing Bundle) evidence his direct, sometimes blunt communication style which Mr Watkins perceived to be threatening.

42. Be that as it may, the question is whether the Claimant was discriminated against by being suspended. He makes the same comparison he makes in respect of 'Issue 3'. The question, to our mind, is whether Mr Watkins and, to the extent he was involved in the decision, Mr Gardiner would have suspended a non-Romanian employee who disobeyed a management instruction in circumstances where they considered the refusal to be potential gross misconduct and where it was understood, or it came to light the following day, that threats had been made.

43. Notwithstanding Mr Gooch's ready concession that a fourth shunt was not ordinarily achievable, we do not infer from this that this was also necessarily understood by Mr Watkins or Mr Gardiner or, more pertinently, that even if it was or should have been understood by them, that we can infer from this that the Claimant was discriminated against. The Claimant's suspension certainly has the appearance of a knee jerk, heavy handed reaction to the situation, but whilst it might support a finding of unfairness in a relevant case, we do not infer that the Claimant's race was a relevant factor. We have regard to the EAT's observations in Chief Constable of Kent Constabulary v Bowler. The complaint is not well founded.

Issue 5

On 29 September 2022, did Steve Luck refuse to look into the reasons why other drivers were required to work only three shunts?

44. The Claimant complains that Steve Luck, who was appointed to investigate the Claimant's alleged conduct on 14 September 2022, refused to look into the reasons why other drivers were only required to work up to three shunts when the Claimant raised the matter with him on 29 September 2022. Mr Luck's approach to the investigation was lacking. His investigation comprised of a single interview with the Claimant, which was notified to the Claimant on less than 24 hours' prior notice. Ms Wakefield and Mr Chim had already provided written statements by the time of Mr Luck's involvement. He seemingly did not speak to anyone else and there is no evidence that he looked at the Claimant's tachograph records or any other materials in order to reach an informed view as to whether a fourth shunt was capable of being completed within the time contractually and legally available to the Claimant.

45. Mr Luck's investigation report, if indeed it can be described as such, is woefully inadequate: it runs to seven lines – see page 104 of the Hearing Bundle. He purported to set out findings rather than reporting neutrally on any evidence collated by him in the course of his investigation and identifying whether there was a case to answer. Ms Scrivens seems to have recognised the deficiencies in his approach in her email of 4 October 2022, at page 132 of the Hearing Bundle.

46. Once again, the Claimant has supplied the explanation for why he was treated as he was. It is clear from page 110 of the Hearing Bundle that when the Claimant asked Mr Luck to speak to other drivers, he was rebuffed by Mr Luck who said,

> *"This investigation is about you and not others, you are the one that needs to do the explaining not others"*

47. Whilst Mr Luck was needlessly aggressive in his approach, we do not infer from this that he discriminated against the Claimant on grounds of race. The language used does not indicate any racial motivation or prejudice or in any other way suggest that he felt able to communicate with the Claimant in those terms because he was Romanian. We agree with the Claimant that Mr Luck might usefully have spoken to the Claimant's colleagues to understand what was possible within a night shift and accordingly whether the Claimant had reasonably refused to undertake the fourth shunt. Mr Luck's failure to do so, and his ill-tempered response to the Claimant's request in that regard, is further evidence to us of his shoddy approach rather than facts from which we infer that he discriminated against the Claimant. The complaint is not well founded.

Issue 6

Following a meeting on 29 September 2022, did the Respondent alter the meeting notes so that they were not an accurate record of what had been said?

48. The Claimant alleges that the 29 September 2022 meeting notes were altered so that they are not an accurate record of what was said. The notes were kept by Mr Watkins and were signed by Mr Watkins, Mr Luck and the Claimant as having been taken at the meeting and that they summarised the main points discussed. The Claimant signed them on 3 October 2022, meaning that he had an opportunity to reflect upon their accuracy before signing them. Whether or not he read them before signing them was entirely a matter for him. He may not have initialled the individual pages, but there is no evidence that the notes were subsequently tampered with. The Claimant had been specifically invited by Mr Watkins on 30 September 2022 to read the notes carefully and to initial every page. Those are not the actions of someone who had altered the notes and was seeking to hide their tracks.

49. When the Claimant emailed the signed notes back to Mr Luck on 4 October 2022, he highlighted two separate matters to Mr Luck that he referred to as "the correct procedures". If he was correcting Mr Luck on procedure it seems unlikely to us that he had not by then satisfied himself as to the accuracy of the notes. We find that he signed them on the basis set out in the declaration immediately above his signature, namely that they had been taken at the meeting and they summarised the main points discussed.

50. For completeness, we would add that if, as the Claimant's handwritten annotations to the notes of the subsequent meeting on 7 October 2022 now suggest, he told Ross Prior on 7 October 2022 that Mr Luck had altered the notes of the 29 September 2022 meeting, it is inexplicable why the Claimant initialled the third page of the 7 October 2022 Notes (see numbered page 18 of the supplementary pages of Hearing Bundle) if he believed that those notes had in turn failed to record his stated concerns about the accuracy of the earlier notes. In our judgement, if he had concerns by 7 October 2022 as to the accuracy of meeting notes, he would have paid particular attention to the 7 October 2022 meeting notes before signing them. We do not need to hear from Ms Scrivens to conclude that the Claimant's position on this issue is not credible.

51. Since we do not uphold the Claimant's allegation that the 29 September 2022 meeting notes were altered, the complaint fails.

Issue 7

On 5 October 2022, did Keith Gooch falsely accuse the Claimant of "knowingly and intentionally" *working through break times?*

52. The Claimant complains that on 5 October 2022 Mr Gooch falsely accused him of *"knowingly and intentionally"* working through break times. He is referring to a letter dated 4 October 2022 emailed to him on 5 October 2022 in which Mr Prior invited him to attend an investigation meeting to discuss the Respondent's concerns regarding an alleged breach of tachograph rules, specifically whether he had knowingly and intentionally worked through a required break (see page 135 of the Hearing Bundle).

53. Mr Gooch signed the letter on Mr Prior's behalf. There is no evidence from which we might infer that Mr Prior was not the author of the letter and that Mr Gooch was acting without his knowledge. In any event, it is immaterial whether the Claimant complains about Mr Prior's or Mr Gooch's actions in the matter. We have already found that the notes of the 29 September 2022 meeting were not altered, in which case we are satisfied that the notes accurately capture the following exchange in the course of the meeting. We refer in this regard to pages 116 – 117 of the Hearing Bundle. Mr Luck said,

> *"I need to stop you there and ask you a question. Are you telling me that you have been working through your breaks?"*

The Claimant responded,

> *"Yes, I must do this so that I can finish early and get more rest."*

Mr Luck continued,

> *"Do you know that is illegal?"*

The Claimant responded,

> *"Yes, I know, but I must."*

54. The question is not whether the Claimant had knowingly and intentionally worked through a break, but whether the Respondent had reasonable grounds to suspect him of having done so, such that further enquiry was warranted. In our judgement, even allowing for the fact that English is not the Claimant's first language, his comments gave reasonable grounds for suspicion that he had contravened applicable laws and rules. Mr Prior acted in the matter on the advice of Ms Scrivens and her colleague, Ms Harper.

55. In order to succeed in his complaint, the Claimant would need to establish facts from which we might infer that Ms Scrivens, Ms Harper, Mr Prior and possibly Mr Gooch were acting in concert in order to discriminate against him, or that Mr Prior or Mr Gooch, or both of them, used Ms Scrivens and Ms Harper's advice as cover to discriminate against the Claimant. Neither scenario is credible or likely. Instead, Ms Scrivens and Ms Harper's email exchange at pages 131 and 132 of the Hearing Bundle speaks for itself. They were concerned about tachograph infringements and that the Claimant had potentially been working through breaks.

56. The complaint is not well founded.

Issue 8

On 7 October 2022, did the Claimant complain that previous meeting notes had been altered, and did Ross Prior and Lorna Scrivens refuse to look into this complaint?

57. The Claimant says that he complained to Mr Prior and Ms Scrivens on 7 October 2022 that the notes from the 29 September 2022 meeting had been altered, but that they refused to look into this.

58. As we have said in relation to 'Issue 6', it makes no sense that the Claimant initialled the relevant notes, the unmarked version of which appear at supplemental numbered pages 16 – 24 of the Hearing Bundle, if he believed that the notes failed to capture his stated concerns during the meeting that earlier notes had been altered.

59. The 7 October 2022 meeting notes do not support that the Claimant complained during the meeting that the notes of the 29 September 2022 meeting had been altered, as his handwritten manuscript suggests (page 142). Instead the notes record that Mr Prior told the Claimant that their meeting was not to discuss the reasons why the Claimant had originally been suspended, rather it was to discuss further concerns that had arisen as a result of the Claimant's documented comments on 29 September 2022 (set out at paragraph 53 above).

60. We find that the Claimant first took issue with the accuracy of the meeting notes after he had been dismissed (see page 199 of the Hearing Bundle), at which point he realised that he would need to address the damaging comments he was said to have made.

61. We are reinforced in our conclusions in the matter by the Claimant's failure to mention the accuracy of the notes in a second detailed email to Mr Gooch on 4 October 2022 (see in that regard pages 138 – 139 of the Hearing Bundle) or in his subsequent email to Mr Gooch of 19 October 2022 (see pages 177 – 178 of the Hearing Bundle). Over the course of two weeks or more therefore, whatever the Claimant's stated concerns, the accuracy of meeting notes was not one of them.

62. The primary facts by reference to which this complaint is pursued have not been established. The complaint is not well founded.

Issue 9

On 14 October 2022, did the Respondent dismiss the Claimant?

63. The Claimant was summarily dismissed at the conclusion of the disciplinary hearing on 14 October 2022. The decision to dismiss was taken by Mr Gooch. His stated reasons are documented in the disciplinary hearing notes at page 167 of the Hearing Bundle. He told the Claimant,

> *"In relation to the second allegation your blatant disregard for the legalities surrounding driver breaks concerns me greatly. By your own admission you are fully aware as an experienced and professional driver the rules and laws around the Working Time Directive and Driver breaks, yet you still made the conscious decision, to continue to work through your breaks. You agreed that following interruption of your break, you had ample opportunity to re-start your break, however chose not to do so to save time, and because you did not feel tired. You also stated that if DVSA was to stop you, they would not be aware that you had breached the rules as your tachograph covered the breach. Throughout the hearing you showed no remorse for your actions, and have led me to believe that this is not the first occasion. Based on this, I do not have the trust and confidence to put you back on the road."*

64. The original allegations that the Claimant had failed to follow a reasonable management request and that he had verbally threated violence were effectively not upheld, though Mr Gooch's findings and conclusions in this regard could be said to have been expressed begrudgingly.

65. It is not lost on us that on 12 September 2022 the Claimant's documented Working Time Directive working hours totalled 10 hours 28 minutes (page 75). He was a night time worker for the purposes of the Road Transport (Working Time) Regulations 2005. In the admitted absence of a workplace or collective agreement in place at that time, he should not have worked more than 10 hours in each 24 hour period. Mr Campbell's tachograph records at page 79 of the Hearing Bundle likewise indicate a contravention of the 2005 Regulations in so far as his documented working time was 10 hours 52 minutes. The Claimant would potentially also have breached the 2005 Regulations had he undertaken the fourth shunt as requested on 13 September 2022, because his total working time might then have gone above 10 hours. In April 2022 the Claimant was suspended after he challenged an instruction to move a trailer because he said he would exceed his contracted working hours. The Respondent's position on these various matters stands in contrast with the firm stance it took in response to the Claimant allegedly disregarding the law regarding driver breaks.

66. Mr Gooch was adamant at Tribunal that night workers can be required to work up to 15 hours in any period of 24 hours, notwithstanding the absence of a workplace or collective agreement. In his submissions, Mr Ismail accepts that is wrong as a matter of law. As the Respondent's Transport Operations Manager, one might expect Mr Gooch to have a better grasp of working time laws than the Claimant, particularly in circumstances where he took the decision to dismiss the Claimant for alleged breaches of the law.

67. Had this been a claim for unfair dismissal there would have been a number of uncomfortable questions for the Respondent to address on these matters and in respect of the process more generally. We deal with the appeal below, but certainly at the point at which Mr Gooch dismissed the Claimant we question whether the Respondent had undertaken a reasonable investigation and whether dismissal was within the band of

reasonable responses. However, the question is not whether the Respondent treated the Claimant unfairly, but whether it discriminated against him.

68. Mr Gooch's approach on 14 October 2022, is consistent with his heavy handed approach when he spoke with the Claimant on 13 September 2022. Whilst the Claimant is certainly not blameless in the matter, Mr Gooch might have brought greater objectivity and managerial professionalism to the task. We are satisfied, nevertheless, that Mr Gooch genuinely believed the Claimant to be guilty of misconduct and genuinely believed that he was unapologetic for his actions. In seeking to explain and justify his treatment of the Claimant, Mr Gooch has been unwilling to acknowledge fairly obvious shortcomings in the process, including in terms of how he dealt with the matter, in case these might cast the Respondent or himself in a less than favourable light. Borrowing from Bahl v The Law Society [2004], these facts nevertheless provide little, if any, evidence to support a finding of unlawful discrimination. It was a poor process, culminating in a somewhat harsh decision, but in our judgement the Claimant was not discriminated against because he was Romanian.

69. For completeness, we would add that the fact the Claimant has seemingly, within the course of these proceedings, been able to identify potential Working Time Directive/Regulation breaches by colleagues from their available tachograph records does not support an adverse inference. These alleged breaches were only brought to Mr Gooch's attention in the course of his evidence at Tribunal. There is no evidence that the Respondent was previously aware of any specific breaches in relation to others to which it turned a blind eye. On the contrary, as set out below, it asked the Claimant to make available any information he may have that may evidence others breaching the law, but he refused to do so.

70. The complaint is not well founded.

Issue 10

Did the Respondent refuse to investigate the allegation other drivers had made similar mistakes to the Claimant regarding his Tachograph?

71. In one sense the Respondent did refuse to investigate allegations by the Claimant that other drivers had also breached tachograph rules, albeit in circumstances where it had no further specific details to warrant or support an investigation. The Claimant failed, indeed refused, to provide the names and dates, or approximate dates, or any other relevant information that might have enabled further enquiries to be made. Instead, the Claimant effectively wanted the Respondent to trawl its records and embark upon a random review of other drivers' tachograph records to identify potential issues. The Respondent already operated a policy of spot checks and, we accept, followed up where issues were revealed. Page 165 of the Hearing Bundle evidences that the Claimant understood from the Respondent that it could not investigate further without further information to help direct its enquiries. That, rather than the fact the

Claimant is Romanian, provides an obvious and credible explanation for the treatment complained of. The complaint is not well founded.

72. Issue 11

On 10 November 2022, did the Respondent refuse to uphold the Claimant's appeal against his dismissal?

73. The Claimant complains that his appeal against his dismissal was not upheld. He has not put forward any facts to support that Mr Doyle was biased or influenced in any way by the fact he is Romanian, in deciding not to uphold the appeal. Mr Doyle gave evidence of having been involved in the dismissal of at least one other employee, a non-Romanian driver who had driven beyond the prescribed legal limit and who was unrepentant, indeed abusive when caught. It provides some evidence that Mr Doyle has been consistent in his approach, even if we do not have sufficient information to be able to conclude that these were directly comparable situations.

74. We are concerned to note that the substantive part of the appeal hearing lasted a mere 12 minutes, with the overall hearing concluding after just 20 minutes. Amongst other things, Mr Doyle failed to explore with the Claimant whether he had in fact admitted to having worked through his breaks. He effectively took the meeting notes at face value, notwithstanding the Claimant stated concerns at the appeal stage as to their accuracy and veracity. It does not matter that we have upheld that the notes are an accurate record of the meetings, this is something that Md Doyle should have given active thought to and looked into.

75. Mr Doyle failed to explore further with the Claimant which other drivers might have breached Working Time Directive/Regulation requirements, whether in relation to breaks or otherwise. He said he would look into the matter, but in fact all he did was establish with Mr Gooch that details had previously not been forthcoming from the Claimant when these had been requested. Mr Doyle might have followed up directly with the Claimant and his trade union representative and warned them as to the potential consequences should this information not be provided, namely that Mr Doyle would effectively be unable to look into the matter further.

76. These matters alone point to an unfair appeal process. But they do not mean that the Claimant was discriminated against. We refer again to Bahl v The Law Society [2004]. They are not facts from which we consider there was something more than unfairness.

77. In summary, the Claimant's complaints of race discrimination are not well founded and accordingly his claim shall be dismissed.

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Employment Judge Tynan
Date: 9/7/2024

Sent to the parties on: 14/8/2024

N Gotecha
For the Tribunal Office.

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