EMPLOYMENT TRIBUNALS

Claimant Mr Leon James v **Respondent** British Telecommunications Plc

Heard at: Bury St Edmunds Employment Tribunal (via CVP)

On: 25 June 2024 - 28 June 2024

Before: Employment Judge S King

Members: Mr D Hart
Ms S Elizabeth

Appearances:
For the Claimant: In person
For the Respondent: Ms Jervis (In house representative)

JUDGMENT having been sent to the parties on 15th August 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunal Rules of Procedure 2013, the following reasons are provided. There has been a delay in providing this due to judicial absence and judicial resources for typing but oral reasons were given in full on the day:

REASONS

1. The Claimant was represented himself. The Respondent was represented by Ms Jervis an in-house representative. We heard evidence from the Claimant. We heard evidence from Mr Crowe the claimant's line manager, Ms Barnett, the dismissing officer and Mr Neil, the appeal officer on behalf of the Respondent.

2. The Claimant and Respondent, having exchanged Witness Statements in advance, had prepared an agreed bundle of documents which ran to 335 pages. The claimant also relied on two emails colleagues in the bundle about their use of the van and these were not formal statements, however they were considered by the tribunal.

3. There were issues over the bundle as the claimant did not have access to a copy for the hearing. He did print some pages on day one and was able to print the rest overnight. The respondent sent a hard copy to the claimant on day one. We were able to progress on the first day by sharing the screen for

documents. This made progress on the first day very slow. An additional email was disclosed by the respondent after it became apparent there was a dispute over whether the mediation had taken place or not. This was sent to the claimant and the panel and inserted at the back of the bundle.

The Issues

4. The claimant brought claims for unfair dismissal, direct discrimination because of race and harassment related to race. The issues as to liability have been set out in the record of preliminary hearing by Employment Judge Bloch QC on 1st of August 2023. At the outset of the hearing, we spent time clarifying the issues between the parties.

5. The following issues were dismissed and amended to allow for the final list of issues which are set out below before the hearing of evidence commenced. On time, it was agreed that the unfair dismissal and harassment claims were in time, but the issue arose potentially on time in respect of the direct race discrimination claims for the final written warning. The dismissal itself was in time, so it was really only the first issues as to warnings that had a potential time issues.

6. In respect of the unfair dismissal, the claimant advanced that the reason for dismissal was related to race and this was clear as he also claimed that the dismissal was an act of race discrimination.

7. On the first day of the hearing, the claimant withdrew his direct race discrimination complaint in respect to the written warning from the 15th of January 2019 as a specific allegation under the issues. The claimant's issue was with Martin Crowe who did not issue either warning or dismiss the claimant. In the harassment claim, we clarified that it was Martin Crowe as the person that the claimant complained of in respect of the comment alleged.

8. At the outset we confirmed we would deal with liability only at this stage and issues as to liability were clarified at the outset of the hearing, as amended at the outset of the hearing as follows:

<u>Jurisdiction - discrimination</u>

9. For the allegation of the final written warning as this occurred more than three months before the presentation of the claim (in addition to any applicable extension of time under the ACAS Early Conciliation('EC') procedure)?

10. Do the claimant's claims constitute conduct extending over a period of time within the meaning of section 123 (3)(a) of the Equality Act 2010?

11. Would it be just and equitable to extend the time limit for the presentation of this complaint in this case?

Unfair dismissal

12. Was the claimant dismissed for a fair reason pursuant to section 98(1)(b) of the Employment Rights Act 1996? The respondent contends that the claimant was dismissed by the respondent for a fair reason pursuant to s98(2)(a) ERA, namely conduct. The claimant asserts that he was dismissed because of his race.

13. If so was the decision to dismiss the claimant reasonable in all the circumstances? In particular, whether:

    a. There were reasonable grounds for that belief;
    b. At the time the belief was formed the respondent carried out a reasonable investigation

14. Did the respondent otherwise act in a procedurally fair manner within the meaning of section 98(4) of the Employment Rights Act 1996?

15. Was dismissal within the range of reasonable responses?

Direct race discrimination

The claimant describes himself as black British and compares himself with employees who were white British.

16. Did the respondent treat the claimant less favourably than it treats or would treat others because of his race by?:

    a. Disciplining the claimant on 18 September 2020 (final written warning) – claimant withdrew the first part of this head of claim in connection with the written warning on 15 January 2019 on the first day;

    b. Dismissing the claimant on 8th September 2021

17. As to the alleged facts on which the claimant relies to show his race was the grounds of the alleged difference in treatment, the claimant relies in particular on the fact that Derek Coughlan and Wesley Eldred (white British) also used vehicles at lunchtime for small private journeys but were not disciplined by the respondent, as was the claimant. The claimant also relies upon the fact that his line manager spoke to him in a hostile manner way in which he did not speak to Mr Couglan or Mr Eldred. He relies in particular on the fact that on the 8th September 2021 the claimant's line manager (after the claimant handed in his company equipment) stated that the claimant was leaving the company with just the shirt on his back.

18. Has the claimant satisfied the test in Madarassy v Nomura International Plc to shift the burden of proof to the respondent? If not the claim fails.

19. If so, is the respondent able to show that the reasons for the alleged difference in treatment were not because of race?

Harassment

20. Was the claimant subject to the following conduct, namely the claimant's line manager on 8th September 2021 saying that after the claimant handed in his company equipment that the claimant was leaving the company with just the shirt on his back?

21. Was the conduct related to race?

22. Was the conduct unwanted?

23. Did the conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading or humiliating or offensive environment for the claimant taking into account the claimant's perception and the circumstances of the case and whether it was reasonable for the conduct in question to have that effect?

Remedy - discrimination

24. Considering what compensation is to be awarded for financial loss the tribunal will consider whether losses occurred because of the alleged discrimination.

25. If any claim of race discrimination or harassment is upheld what award, if any, should be made in respect of compensation for injury to feelings?

Unfair dismissal

26. If the dismissal is found to be unfair what adjustment should be made to any compensatory award to reflect the possibility that the claimant would have been dismissed had a fair and reasonable procedure been followed?

27. Would it be just and equitable to reduce the amount of the claimant's basic award because of any blameworthy or culpable conduct before the dismissal pursuant to ERA s122(2) and if so to what extent?

28. Did the claimant by blameworthy or culpable actions cause or contribute to dismissal to any extend and, if so, by what proportion would it be appropriate to reduce compensation, if at all? Would it be just and equitable to reduce the amount for any compensatory award pursuant to section 123(6) of the Employment Rights Act 1996?

The Law

29. In terms of unfair dismissal, dismissal under section 95 of the Employment Rights Act 1996 was not in dispute and the Claimant had sufficient service not to be unfairly dismissed by the Respondent under Section 94 of the Employment Rights Act 1996.

30. Section 98 of the Employment Rights Act 1996 states that:

(1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—

(a) the reason (or, if more than one, the principal reason) for the dismissal, and

(b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.

(2) A reason falls within this subsection if it—

(a) relates to the capability or qualifications of the employee for performing work of the kind which he was employed by the employer to do,

(b) relates to the conduct of the employee,

(c) is that the employee was redundant, or

(d) is that the employee could not continue to work in the position which he held without contravention (either on his part or on that of his employer) of a duty or restriction imposed by or under an enactment.

(4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—

(a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and

(b) shall be determined in accordance with equity and the substantial merits of the case.

34 Depending on the reason for dismissal, if the reason was conduct then the ACAS Code of Practice on Discipline and Grievance (COP1), will be relevant and that an uplift may be relevant accordingly in accordance with s207A TULCRA.

35 The representative for the respondent made reference to a number of authorities in their written submissions to which we have had regard as follows:

Aziz v FDA 2010 EWCA Civ 304 CA
Allen v Worcestershire Health and Care NHS Trust 2024/EAT40
Robertson v Bexley Community Care t/a Leisure Link 2003 IRLR 434 CA
British Transport Police v Norman UKEAT/0348/14
Reed In Partnership Ltd v Fraine UKEAT/0520/10
Director of Public Prosecutions v Marshall [1998] ICR 518
Baynton v South West Trains Ltd [2005] ICR 1730 EAT
Reynolds v CLFIS (UK) Ltd [2015] EWCA Civ
Alcedo Orange Limited v Mrs G Ferridge Gunn [2023] EAT78
British Home Stores Ltd v Burchell 180 ICR 303
Iceland Frozen Foods Ltd v Jones 1983 ICR 17 EAT
Abernethy v Mott Hay and Anderson [1974] ICR 323

Wincanton plc v Atkinson and anor UKEAT/0040/11
Post Office v Fennel 1981 IRLR 221
West v Percey Community Centre [2016] UKEAT/0101/15
Hope v British Medical Association [2021] IRLR 206
D'Silva v Manchester Metropolitan and ors EAT 0328/16
Pemberton v Inwood [2018] EWCA Civ 564

36 In relation to the race discrimination complaint, the Claimant brings a direct discrimination complaint which falls within section 13 of the Equality Act 2010, which states that:

(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.

(2) .….

37 We must also have regard to section 39 Equality Act 2010 which states:

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

(a) in the arrangements A makes for deciding to whom to offer employment;
(b) as to the terms on which A offers B employment;
(c) by not offering B employment.

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

(a) as to B's terms of employment;
(b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service;
(c) by dismissing B;
(d) by subjecting B to any other detriment.

(3) …

(4) …

(5) ….A duty to make reasonable adjustments applies to an employer.

(6) …

(7) In subsections (2)(c) and (4)(c), the reference to dismissing B includes a reference to the termination of B's employment—

(a) by the expiry of a period (including a period expiring by reference to an event or circumstance);
(b) by an act of B's (including giving notice) in circumstances such that B is entitled, because of A's conduct, to terminate the employment without notice.

(8) Subsection (7)(a) does not apply if, immediately after the termination, the employment is renewed on the same terms."

38 We also have regard to s123 of the Equality Act 2010 which sets out as follows:

(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.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, 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;

(b) failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

39 Finally in respect of the harassment claim s26 Equality Act 2010 is also relevant which states as follows:

(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.

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

(3) A also harasses B if—

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,

(b) the conduct has the purpose or effect referred to in subsection (1)(b), and

(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(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—

- *age;*
- *disability;*
- *gender reassignment;*
- *race;*
- *religion or belief;*
- *sex;*
- *sexual orientation.*

40 The burden of proof is on the respondent to establish the reason for the dismissal. The burden of proof is on the claimant to establish a prima facie case of discrimination in order to shift the burden to the respondent to explain in accordance with the case of Madarassy v Nomura International Plc referred to in the list of issues.

Findings of Fact

42. The claimant was employed by the respondent as a multi-skilled mobile engineer. He was previously employed by another legal entity from June 2015. On the 26th of October 2016, the claimant transferred to the respondent in accordance with the Transfer of Undertakings protections such that his employment service was preserved. The claimant at that time had use of the company car which allowed for personal use.

43. By letter dated 18th of October 2016, the claimant was given notice of a change to his terms and conditions to the effect that from 3rd of March 2018 that he would lose the car and be provided with a van which would no longer be permitted to use the vehicle for personal use. The claimant and others raised a grievance about the loss of the car for personal use and the change in terms and conditions and the financial implications. At some point, the respondent made a buyout payment to the claimant to compensate him for no longer having a company car or personal use.

44. In March 2018, the claimant took possession of a company van. The claimant traveled to site and drove to work in the company van and across a number of sites, but his primary site was at Enfield where he had a computer and desk. It was clear that the claimant's contract had been varied and that this required him to no longer use the company vehicle (now van rather than car) for personal use.

45. We were taken to a number of documents that are relevant in respect of this matter. The first policy is the Commercial Vehicles Driver's Handbook and there are a number of parts of this policy that are relevant as follows:

   a. The conditions of use section outlines under authorised vehicle users *"vehicles in the commercial fleet are provided and insured for business use only*". "*Any request for use of a vehicle outside of its normal purpose requires prior authorisation from the individual's line manager." "The insurance does not provide cover for: use of a vehicle for any private purposes (authorized exceptions are possible such as driving to obtain a meal whilst away on business)*" and, "*any business use that is not strictly in connection with BT business e.g. carrying goods or passengers".*

   b. Under company image it states "*Always drive your vehicle with consideration for others. Other road users may also be BT's customers and their perception of the company will be influenced by your actions."*

   c. Under the section on insurance this states: "*The insurance arrangements that apply for commercial vehicles used in conjunction with BT business activities are outlined on the BT Group Risk website" "BT insurance only applies when using a vehicle with authority in accordance with authorized BT business activities. By using a BT vehicle without proper authority you could face disciplinary action and prosecution."*

   d. Under the section under 3.1, managers of drivers – duty of care and legal requirements, "*Managers have a direct responsibility for the health and safety of their people and others who may be affected by our work. These general requirements in BT's health and safety policy include all work activities involving the use of vehicles."*

46. On 17th January 2019, the claimant was issued with a written warning for 12 months by Beverly Barnett for misconduct. This followed a disciplinary hearing on 8th January 2018 and related to four allegations, all of which arose on 15th November 2018. This disciplinary issue came to light as another engineer complained that the claimant was not on site and this led to an investigation and disciplinary action in respect of four allegations:

   a. Unauthorised absence from work in that on 15th November 2018 the claimant was absent from work, not being on site either at Enfield or Beckton as per your planned schedule of work, to be on site the majority of the day. This is despite telling your line manager in a call on that afternoon that you had left the site, Enfield in your vehicle for lunch.

   b. Failure to inform your manager in that on 15th November 2018 the claimant claims to have taken himself home as he was suffering from back pain and did not inform the line manager of that decision to go home.

   c. Failure to follow correct company procedures on 15th November 2018 in respect to the Hot Work (Brazing) ATW, and

   d. Failure to comply with company's security procedures in that on 15th November 2018 you failed to sign in at the Enfield and Beckton sites even though it is a mandatory requirement.

47. On that occasion, the claimant accepted he did not follow procedures. Ms. Barnett concluded that he had not been honest, and she felt that "*a written warning was appropriate as Leon did not follow the procedures, and when challenged, did not initially tell the truth."* The claimant was warned that "*in future Leon must ensure that he adheres to all safety procedures, he must always sign in when on site and inform his manager if any time he needs to leave site. Leon is responsible for reporting sick in line with BT procedures and that must be adhered to in the future."*

48. Notwithstanding that a written warning was generous for the nature of the allegations, the claimant appealed on 24th January 2019. The appeal was dismissed. The nature of the allegations and the conduct found on this first occasion turned out to be highly relevant in time given the repeated issues the respondent found with the claimant's conduct.

49. On 22nd July 2020, Mr. Crowe turned up at site to speak to the claimant following a complaint about him executing tasks while not on site which the parties termed a PROC9 issue as this was around whether the claimant could close a task without visiting site. During the investigation into the complaint, the claimant's ILM data, which is tracking data from the company vehicle, was looked at and then an additional allegation arose relating to the vehicle for personal use. The claimant was not on site as expected and when Mr. Crowe spoke to him, he told him he was at the post office posting a parcel. The investigation was launched by Mr Crowe, in respect of three matters inappropriate use of the company vehicle, not attending site and progressing tasks, and carrying out personal business in company time.

50. Mr. Crowe concluded in his investigation report that:

    a. "*Leon James had used his company vehicle for private use. Whilst he can't remember what he used it for on the weekend of 4th/5th July 2020, he fully admits it was him driving and that he knew he had no private use of the vehicle. His comments that his own private vehicle was in the workshop for repair to accident damage are no mitigation. At no point, did he contact his manager to discuss this. He believe that he has done nothing wrong. He understand that he has no private use and is not insured but fails to understand the implications of his actions*."

    b. "*Leon James deviated from his route to site for personal business. He should leave home at 8.30am yet was in a post office posting private letters at 09.30 on 22nd July 202. He was approximately 10 miles from where he should be, assuming he started at Warwick place where he had a task in issue."*

    c. Further that the claimant "*appears to think that process, procedure and rules do not apply to him and he fails to take into account the business/legal ramifications of his actions."*

    d. The allegation in relation to the closing of the task, the PROC9 task, was not progressed to disciplinary.

51. By letter dated 24th August 2020, the claimant was invited to a disciplinary hearing on 1st September 2020. The claimant was warned that his conduct could amount to gross misconduct and given the right to be accompanied. The two allegations that processed to disciplinary were (a) and (b) above.

52. On 25th August 2020, the claimant complained that his line manager, Martin Crowe, had breached his confidentiality in relation to the investigation, harassed and bullied him, and threatened him. There was then a series of communications with Mr. Chudy about the claimant's allegations and in an email dated 25th August 2020, the claimant stated *"how would I know this is not exceptional circumstances, if there's clear pattern of increasing harassment, even noticed by other members of my own team. How would I know if someone who's in a position of authority is being proper or improper, a racist doesn't announce they are racist and an abuser doesn't admit to there (stet) abuse."*

53. The claimant then raised a formal grievance about Mr. Crowe in respect to breach of confidentiality, his management style in an email dated due January 2020 (some 6 months earlier but not raised at that time), but there was no reference to race in the grievance itself.

54. On 14th September 2020, Lee Chudy met with the claimant for the disciplinary meeting which had moved back by two weeks after the grievance was raised.

55. By letter dated 21st September 2020, the claimant was given a final written warning for 18 months. The claimant was found guilty of gross misconduct which was reduced from dismissal due to his personal circumstances and it being a difficult time with the COVID pandemic. Mr. Chudy upheld the allegations against the claimant in respect of unauthorised use of a BT van and stated:

"You said you had no desire to drive a BT van"….. "You thought that your line manager could have told you it was a breach of the policy and reminded you, but he went ahead with the disciplinary, I understand you feel your line manager could have given warning regarding using your BT vehicle out of hours but it's clearly stated in the driver handbook that this is a breach of the rules. I feel a fact finding interview regarding this was the appropriate action to take" and "*You mentioned on a number of occasions that you understood the vehicle policy guide where you are not to use your company vehicle for personal use. Despite, the fact you understood that and based on the evidence I have I believe you used your BT vehicle out of hours whilst not on work duties." "You said you're in your vehicle a lot due to the nature of your job and the fact you deal with a lot of hours call outs. You said you can't remember what you were doing on the days in question, you said you may have been working or may have used it for personal use. You questioned how it is ok to be working at home on your laptop but not ok to be driving the van. As discussed in the meeting, the only time you are authorized to use a BT vehicle is when you have an official task in your name and are signed on for work. On the occasions raised during this discipline this was not the case."*

56. Mr Chudy upheld the second charge in connection with the unauthorised journey in a BT vehicle. The claimant raised that "*You mentioned that you feel this is a witch hunt in relation to you visiting the post office on your way to work and that your line manager only knows about it because you told him"* which Mr Chudy did not accept as he accepted the claimant was in a disciplinary as his line manager believed he was in breach of the rules.

57. Both allegations were upheld and the claimant was informed that "T*he expectations moving forward are that you only use a BT vehicle during official BT business. Under no circumstances must you use the vehicle at any other time. All this information is in the vehicle policy guide of which should have been sent separately."*

58. The tribunal had reference to the disciplinary policy which set out in section six that there was a process for resolving matters informally. The informal process concerned minor matters and the guidance that most minor matters are best dealt with informally. It outlined the informal process and further that it was at the line manager's discretion whether any issues were managed informally and whilst it would be the case for most minor matters, you should not expect poor conduct to always be dealt with on an informal basis before it is considered under the formal disciplinary procedure. The claimant felt the matter should have been dealt with informally but we find that it was reasonable for the respondent to treat the matters as a disciplinary matter. They are gross misconduct offences and are clearly not minor and the claimant was beginning to show a pattern of conduct in this matter at this stage.

59. The disciplinary policy also set out what was gross misconduct in the usual way with a non-exhaustive list. In addition to the list, there was a general definition of gross misconduct that "*it's a serious offence which leads to a breakdown of trust which we've placed in you as an employee. It's a breach of your contract or employment. It also includes serious misconduct which is likely to have a negative impact on the business, brand or reputation."* It also confirmed that acts of gross misconduct may lead to summary dismissal.

60. The disciplinary policy also set out that there were alternatives to dismissal, that there was a final written warning which in exceptional circumstances could stay on your record for 18 months. Dismissal was referenced but also alternative roles, changes to roles and demotion.

61. The claimant appealed against the final written warning on 22nd September 2020, and the appeal meeting was arranged by letter dated 13th October 2020 to be heard on 20th October 2020. The claimant was however off sick and the meeting was rearranged and took place on 17th November 2020. In the appeal, Mr. Doherty upheld the final written warning. Within the body of the disciplinary appeal outcome, Mr Doherty quoted the policies and the quotes from the car policy we have referred to above.

62. It was around this time, November 2020, that the claimant's line manager had a sit down with the claimant to explain the rules around company

vehicles and signing in and out and the duty of care. This was a result of the appeal as the respondent was concerned that despite the policies the claimant was not understanding the seriousness of the issue given this was now a repeated pattern of behaviour so avoid any doubt that the claimant knew and understood the policies care was taken to explain them again. The claimant accepted in the end in his evidence that this meeting had taken place.

63. By letter dated 14th October 2020 the claimant was invited to attend a skype meeting to discuss his grievance on the 21st October 2020. The claimant attended the grievance meeting and the decision about his grievance was delivered on 9th November 2020. Lisa James found that there was no evidence to uphold the four alleged grievance points raised although areas of learning had been identified. There were recommendations that remedial action took place including that Mr. Crowe ensured a more direct dialogue with Mr. James to ensure mitigation is understood when agreeing annual leave and that any underperformance issues were discussed in the context of 121 feedback dialogue rather than email and documented going forward. There was a further recommendation that a mediation session would be helpful for the claimant to Mr. Crowe. Again there was nothing in the grievance outcome that would indicate this was a race complaint.

64. Mr. Crowe at that stage refused to attend the mediation meeting. His evidence was that he didn't agree to mediation because he felt frustrated by the unfounded grievance and did take it somewhat personally. Eventually, mediation did take place but this was not until July 2020. Mr. Crowe's evidence was that he later reconsidered the position but we accept Ms. Barnett's evidence that she told him to have the mediation session. Whilst he may have reconsidered his position this was because his line manager told him to. The mediation session did not take place until July 2021.

65. In the meantime, further issues of misconduct by the claimant came to light. BT Fleet received a fine for the claimant's van entering a restricted vehicle pedestrian zone on 11th May 2021 at 15:07 hours. This ticket, arrived after the event. It occurred in an area that was 6.9 miles away from the Enfield site. Upon receipt of this, it triggered an investigation as to what the claimant was doing at that time as he should have been on site. One of the May occasions involved the claimant's line manager, Mr. Crowe, and so this was passed to Mr. Cecil to investigate given that the claimant had raised a grievance against Mr Crowe.

66. An investigation was launched into 5 allegations. Following the investigation, four of these allegations progressed to disciplinary. These were allegation one, "*Leon was not on site on the 13th of May to be the supervisor for contractors when Martin Crowe attended site and he did not turn until 12:45 even though he had a task in issue at Enfield at 08.11 and progressed the task to onsite at 10.12*". Allegation two, that "*on the 14th of May Leon attended work in his personal vehicle and on this particular occasions he had not had a discussion with his line manager Martin Crowe to gain authorisation and although Leon states that he'd had conversations with Martin Crowe in the past about bringing his vehicle this hadn't happened on*

this occasion and would therefore if there had been an accident in his vehicle to or from work we would not have known where he was from a duty of care perspective". Allegation three was not progressed. Allegation four was "*on the 11th of May, Leon used his van for unauthorised use to visit a friend and whilst visiting his friend was caught on camera entering a restricted vehicle access road at 15.07, Leon stated that he was under the impression that you could use his BT vehicle for use during his lunch hour*". Finally allegation five was that "*on the 20th of May at 08.30 Leon should have attended site at Enfield by 09.00 but alleged to have had a puncture on his van and alleged to have called the AA which having asked the AA whether he'd actually called they could not find any incoming call data from his work mobile phone. Leon stated that the subsequently could not wait the time that they gave him to arrive on site and went and got his tyre inflated at a petrol station, at no point did Leon inform his manager Martin Crowe that he had an issue and would as such turn up late to site."* The investigating officer recommended the four allegations progressed to disciplinary.

67. By letter dated 28th July 2001, the claimant was invited to a disciplinary hearing with respect of one allegation of gross misconduct, the unauthorised journey in the company vehicle on 11th May when he got the penalty notice, and three allegations of misconduct, failing to comply with statutory driving regulations, unauthorised absence in respect of two matters, both 13th and 20th May, and also failing to follow reasonable request on 14th May.

68. The disciplinary hearing took place on 19th August 2021 with Ms. Barnett. By letter dated 7th September 2021, the claimant was dismissed for gross misconduct and given the right of appeal. We note in particular Ms. Barnett's conclusions effectively as to how she came to that decision which confirm that:

"As part of the previous process where you were issued an 18 month final formal warning, you were made aware and confirmed that you understood the use of your BT van is for working activity only and should not be used for personal use. I am therefore satisfied that you have not taken the previous issues as a serious matter. I have come to this decision because travelling 6.9 miles for lunch is unacceptable and breaks the PAH agreement. With regards to the traffic violation, I uphold the case for misconduct as the change of use was clearly signposted and you should be ensuring you read the appropriate road signed when driving a BT vehicle. It is brand affecting if you are driving your BT vehicle inappropriately. In response to the allegation of unauthorised absence I uphold the charge as you had no explanation as to where you were, you understood the importance of not putting a task into execute before you arrived at site. Not signing out when you left for lunch is a breach of H&S regulations as this wrongly would leave anyone attending site to believe you were still in the building. If there was a major incident on site other people could be put in danger looking for you. In response to failure to respond to a reasonable request, I uphold the charge as you clearly stated in the meeting that you were aware that you needed to seek authorisation to use your personal vehicle for work activities prior to this taking place. You understood this was critical due to the DOC process and being able to ensure your safety. "

69. Ms Barnett decided that summary dismissal for gross misconduct was the outcome of the disciplinary. She confirmed that she had considered possible alternative such as a lesser sanction when making her decision but that dismissal was the appropriate action to take as the claimant was already serving a 18 month final written warning for using the van for personal use.

70. One of the key areas of dispute arose around the issue of the communication of the message of dismissal. At the time this was communicated, the claimant was at Wembley with Mr. Crowe and Mr. Cecil. As he had been summarily dismissed, he had to return all company property, which included the van, and had to driven home by Mr. Cecil since he was no longer permitted use of the van. Company property also included mobile phone, laptop, passes etc and various items of branded clothing including polo shirts and jackets. The claimant alleged that Mr. Crowe as the claimant went to leave said that the claimant "was leaving with just a shirt on his back" and Mr. Crowe denied making that comment. The claimant accepted during the hearing itself that the comment of itself was not related to race but he felt it demonstrated what he felt the way in that he was treated by Mr. Crowe during employment.

71. We did not hear evidence from Mr. Cecil who was present when this comment was said to have taken place. When giving evidence, the claimant showed some inconsistency with factual recall on his own conduct. This was evident during the disciplinary process as well as his explanations for his own conduct were not always consistent, and this was highlighted by the respondent during those processes. His truthfulness was questioned by the respondent during the internal process and whether he was being honest. However, when it came to this comment, the claimant was consistent in his evidence. The questions that he put to his witnesses and both in his pleadings and witness statement, he maintains that this comment was made to him and the words used did not change.

72. Mr. Crowe denied the comment. The claimant felt very passionately that Mr. Crowe was lying and did not deviate from what appears to us to be the crux of his case, that he felt Mr. Crowe did say that comment and it had been covered up by the respondent. Mr. Crowe maintained he did not say it. When questioned, the only explanation he had was that the claimant could have misconstrued the reference to company property.

73. The claimant's evidence was that he also raised this with Mr. Neil in the appeal and he was told he would look into it, and if the comments were made, it was not treating somebody with dignity. Mr. Neil accepted in oral evidence that although he could not recall the exact words used, something of that effect was said during the appeal meeting.

74. There are inconsistencies in the respondent's evidence and case on this that is not expressly dealt with in many of the documents. The appeal meeting minutes do not reference it but is accepted by Mr. Neil that a discussion along those lines did take place. Mr. Neil said in oral evidence that on the

basis of those discussions he did look into it, including speaking to Mr. Cecil, and other regional managers about Mr. Crowe generally, including Ms. Barnett about whether any previous complaints had been raised, and he directly asked Mr. Crowe about this matter.

75. Those discussions are not in the outcome of the appeal as additional steps of investigation that he did conduct, although he did deal with other matters. They are not dealt with the respondent in their pleadings. Even the comment itself was not expressly dealt with in Mr. Neil's statement despite it being a specific complaint of harassment raised by the claimant. We accept Mr. Neil's oral evidence and we felt he was a credible witness.

76. The issue is more the confusion by the respondent as a whole in relation to the documentation, which left the claimant particularly grieved that he felt it had been swept under the carpet. The only place it has dealt with is Mr. Crowe's witness statement which denied that it had been said.

77. Taking all this into account, we find on the balance of probabilities that Mr. Crowe did say something to the claimant to aggrieve him to the extent that he felt Mr. Crowe was hostile towards him. On the balance of probabilities, we find that the comment was made to the claimant at the point when he was dismissed and removed from site.

78. The claimant appealed his decision on four grounds that the decision would cause the claimant extreme hardship, that he was dismissed from a job he loved and was passionate about, that he was an integral part of the team with vast knowledge and experience of EE sites and lastly that the complaint was not about his work standards but the use of his company vehicle during what he genuinely thought was an acceptable period of going to lunch. They are quoted in the appeal documentation, although we have not seen the appeal itself. The appeal outcome made reference to the claimant raising allegations of racial abuse and complaints about the mediation having not taken place closely after the grievance you raised in 2020 and this was passed onto HR to be investigations.

79. By letter dated 9th September 2021, claimant was invited to an appeal hearing on 21st September 2021, and the claimant was on this occasion accompanied by a colleague. As we have already outlined above, following the meeting, Mr. Neil was conducting further investigations and those already included the matters outlined above about Mr Crowe and he also looked at the signing in records for all sites. The claimant was not shown as signing in at any site on 11th May after the PCN notice, but it was in fact still signed in at Enfield site until 4:00 PM.

80. By letter dated 28th September 2021, the claimant's appeal was dismissed. Mr. Neil gave a detailed outcome about the conduct and how he had reached those conclusions and stated "*Overall, I do not find that presented any mitigations or further evidence which would challenge the original decision against all charges. The further investigation that I have conducted looking at BASOL information for the 11th and 13th May, the documentation from the*

sites you work at showing you did not attend any of the sites gives further justification to the original decision. The driving offence which you received a fine for was located in and around a school so the potential impact could have been severe, the restrictions have been put in place to help ensure that young children can walk home safely on the road without vehicles moving."

81. The claimant commenced ACAS early conciliation on 5th October 2021, which ended on 14th October 2021 and the certificate was issued. The claims before this Tribunal were presented on 5th November 2021.

82. After the claimant left, some of his colleagues did receive a redundancy package due to reductions on site and again this was something that the claimant was aggrieved about.

Conclusions

Unfair dismissal

83. Turning now to the list of issues, we took the time limit points later because obviously we would need to make findings first on whether any of the claims for direct race discrimination were founded before looking at time point raised. So we took the unfair dismissal claim first and the issues on unfair dismissal in turn:

<u>Was the claimant dismissed for a fair reason pursuant to section 98(1)(b) of the Employment Rights Act 1996? The Respondent contends that the claimant was dismissed by the respondent for a fair reason pursuant to section 98 (2) (a) ERA namely conduct. The claimant asserts that he was dismissed because of his race.</u>

84. We accept the respondent's position that the claimant was dismissed for conduct for the reasons set out below.

<u>If so was the decision to dismiss the claimant reasonable in all the circumstances? In particular, whether:</u>

a. <u>There were reasonable grounds for that belief;</u>

85. Turning first to whether there were reasonable grounds for the belief? The claimant was on a final written warning. Indeed, all the warnings he received were indicative of pattern for behavior, use of the van, unauthorised absence, and failure to follow procedures were the general theme. The PCN notice was clear evidence of misconduct and the claimant's explanations were not consistent with the documented evidence such as the BSOL, signing-in book, ILM, and he gave some inconsistent explanations. The respondent clearly doubted he was being open and honest with them and it is very rare to see a case where an employee is repeatedly disciplined for the same thing without any insight into the unacceptableness of their conduct.

86. By the time it came to dismissal, we do not accept that the claimant was unaware of the rules. He had been disciplined twice already, had the policies quoted in those letters and finally accepted (although he did not accept it initially) that his line manager had sat him down and discussed the rules with him.

87. There was a grey area around lunch and use of the company vehicle. There is a custom and practice of popping to the shops from a site, which was wider than the stop on route allowance in the policy. These would normally be to the nearest shop or food station for example. However, the issue the claimant was dismissed for was wider than that and he failed to appreciate that at tribunal even.

88. On the day he received the PCN notice, he left at 2:28 according to BSOL but signed himself out on the signing in book at 4:00 PM. He could not recall where he had been after going to his ex-partner's home (he again accepted this was not a friend in that sense but his ex partner), and there were no records to support him working that afternoon. The use of the van was for personal reasons wider than lunch because the claimant accepted he was on route to collect his mail. Even if we accepted that he had eaten lunch with his ex partner at close to 3pm it would not be reasonable for him to take an extended journey to run personal errands at the same time. The claimant's evidence on this was particularly evasive as to what he was actually doing. However, the issue was not really about the lunch break, but part of the wider issue that the claimant was not where he said he was. He was being paid to do a job he was not doing. Effectively there was a pattern of him being caught coming and going as he pleased. The Post office incident for which he was previously disciplined is another example. He failed to explain why when he should have been at work at 9.00am he was somewhere else taking post to the office miles away from a site where he should have been thirty minutes earlier.

89. Indeed, there were two further allegations around this on very issue on the 13th and 20th May, two instances of the similar pattern. The claimant was on a final written warning for similar conduct and had been given a second chance and clear guidance but he gave the impression of being above the rules. We find that the comment by Mr Crowe in his July 2020 investigation particularly telling in that the claimant felt the rules policies and procedures did not apply to him. He was resentful of being transferred to EE and felt he should be permitted to do what he had done back then and clearly had no desire to modify his behaviour. We are mindful we must not substitute our view for that of the respondent but we accept the respondent had reasonable grounds for its belief in the claimant's misconduct. Indeed, this was not the first time it had had to deal with these issues.

b. <u>At the time the belief was formed the respondent carried out a reasonable investigation</u>

90. At the time the belief was formed, the respondent had carried out a reasonable investigation. Mr. Crowe excused himself and Mr. Cecil was the investigating officer for the dismissal allegations. Not all charges were progressed following

the investigation so it reasonably reduced the charges before proceeding to disciplinary.

91. The respondent had the claimant's explanation from the investigation meeting. The claimant had had an opportunity to explain himself. It had LLM data, BSOL data, and the PCN notice. The respondent had not checked the signing-in book prior to dismissal which would have been further evidence. We must however be mindful of the fact that the respondent is not expected to investigate unnecessarily or indeed to turn over every stone. The test of reasonableness must be applied. In this case the conduct in question was evidenced by hard data and fact. It was not one person's word against another. The PCN data, BSOL data and LLM data were all objective data and quite conclusive in establishing the conduct in question. Mr Crowe excused himself from the investigation as well and the evidence obtained was objective evidence towards establishing conduct and the allegations.

92. In any event, failing to look at the signing in book as part of the initial investigation would not have assisted the claimant as it was looked at, at appeal and did not reflect the claimant's position that he had gone to other sites instead. It would have shown a further inconsistency and potential dishonesty in his explanations given to the employer at the time.

93. The test is well established following BHS v Burchell and it is not whether the respondent has uncovered every stone and taken every possible step, but whether the investigation is reasonable. We cannot criticise the respondent's investigation into the conduct allegations against the claimant. We therefore do find that the respondent had carried out a reasonable investigation.

<u>Did the respondent otherwise act in a procedurally fair manner within the meaning of section 98(4) of the Employment Rights Act 1996?</u>

94. Turning now to whether the respondent otherwise acted in a procedurally fair manner, the claimant did not have any specific challenges here. We considered that the ACAS Code of Practice was relevant. In respect of the dismissal, the respondent had independent people at each stage. The respondent held an investigation meeting, a disciplinary meeting and an appeal meeting.

95. The claimant was provided with information in advance, he was given an opportunity to explain the issues and put his case. He had written invitations to all meetings. He was provided with documentation including detailed investigation reports, the data and PCN notice etc in advance, so he had time to consider them and how he wished to respond. He did not provide hard evidence to defend the allegations or suggest that the respondent should look at something in particular concerning his own conduct which would have exonerated him.

96. Meetings were held and indeed with ample notice for him to attend. Indeed we find that the timescales in which meetings were held after the invites were

quite generous. He had generous warning of the meetings and was given the right to be accompanied.

97. There were no issues with the procedure identified by the claimant or the Tribunal considering the best practice for such matters. We therefore find that the respondent acted procedurally fairly in accordance with general principles in respect of conduct dismissals but also the ACAS code of practice.

Was dismissal within the range of reasonable responses?

98. Turning to whether dismissal within the range of reasonable responses, we remind ourselves that we must not substitute our view for that of the respondent. It matters not whether this tribunal would dismiss the claimant for such conduct, but whether the decision was in the range of reasonable responses. We are satisfied that dismissal was within the range of reasonable responses given the claimant's history of warnings and that it was reasonable for the respondent to conclude summary dismissal was appropriate on this occasion.

99. The respondent was given a second chance in respect to the final written warning. Many employers would have dismissed at the final written warning stage as the allegations were gross misconduct and he was already on a written warning showing a pattern of behaviour. He was given a second chance that he did not heed and then repeated similar misconduct issues within a short period of time.

100. We cannot say that no employer would have dismissed the claimant and it does not matter our own views on this matter. It is clear that there was a case of misconduct and dismissal was within the range. The dismissal letter sets out carefully (as referred to above) the rationale of the decision maker and why she reached the conclusions she did in respect of the decision to dismiss. The conduct was clearly gross misconduct and the respondent had established that the claimant had committed the acts of gross misconduct referred to. We take into account the conclusions they reached and find that dismissal was within the range of reasonable responses. Given the history in this case, it was hardly surprising that the respondent would not decide to implement a further final written warning. Where gross misconduct is established, as in this case, dismissal or a final written warning are within the range.

101. Given our conclusions above, the unfair dismissal claim must therefore fail.

Race discrimination

Did the respondent treat the claimant less favorably than he treats or would treat others because of his race by disciplining the claimant on 18th September 2020 and giving him a final written warning?

102. For the purposes of his race claim, the claimant describes himself as black British and compares himself with employees who are white British. We have dealt with the comparators upon which he relies below.

103. As outlined above the real issue the claimant had was in respect of Mr Crowe. At the outset of the hearing he withdrew the first part of the allegation that the first formal written warning was race discrimination as it was not given by Mr Crowe. This left the second part of the allegation in respect of the final written warning on 18th September 2020. The issue set by the Judge at the preliminary hearing needs to be broken down further, into whether the conduct alleged took place, whether it was less favourable treatment and then whether this was because of his race.

104. Of course, it is not in dispute that the claimant was given a final written warning in September 2020. It would not be a valid argument, and indeed that was not advanced by the respondent, that the given of a final written warning could not amount to unfavorable treatment. It is therefore accepted that the claimant was both given a final written warning factually and secondly that in law this amounts to unfavourable treatment. The issue of comparators is however relevant to whether the treatment was less favourable because of race and we have dealt with this below. The issue is whether they were less favorable treatment on the grounds of race. We have dealt with this below.

<u>Did the respondent treat the claimant less favorably than he treats or would treat others because of his race by dismissing the claimant on 8th September 2021?</u>

105. As set out above it was similarly not in dispute that the respondent dismissed the claimant on 8th September 2021 as a matter of fact. Further it is not in dispute that dismissal would amount as a matter of law to unfavorable treatment. The issue is whether they were less favorable treatment on the grounds of race. The issue of comparators is however relevant to whether the treatment was less favourable because of race and we have dealt with this below.

<u>As to the alleged facts on which the claimant relies to show his race was the grounds of the alleged difference in treatment, the claimant relies in particular on the fact that Derek Coughlan and Wesley Eldred (white British) also used vehicles at lunchtime for small private journeys but were not disciplined by the respondent, as was the claimant. The claimant also relies upon the fact that his line manager spoke to him in a hostile manner way in which he did not speak to Mr Couglan or Mr Eldred. He relies in particular on the fact that on the 8th September 2021 the claimant's line manager (after the claimant handed in his company equipment) stated that the claimant was leaving the company with just the shirt on his back.</u>

106. In respect of the reason for the treatment and whether it was less favourable, the claimant relied on a number of facts to show that race was the grounds for the alleged difference in treatment. The claimant relied on the fact that Derek and Wesley who were white British but said to have also used vehicles at lunchtime for small private journeys that were not disciplined by the respondent like the claimant was.

107. Taking first the vehicles at lunchtime, we find that Derek and Wesley did use their vehicles at lunchtime for small private journeys from time to time. The

respondent did not dispute that they were white British however in order for them to be comparators they must be no material differences between the circumstances of the two cases in accordance with s23 Equality Act 2010. There are two reasons why Derek and Wesley are not valid comparators for the claimant. Firstly, the only allegation which related to "popping out for lunch" as the claimant termed it was one of the four allegations for which he was dismissed. The offences for which the claimant received the PCN notice that day. The claimant was not disciplined for popping out for lunch in the final written warning it was for leaving site and visiting the post office on the way to work so the only relevance to this comparator is in respect of the dismissal allegation and whether inferences can be drawn in respect of this and then the earlier disciplinary offence.

108. There was no evidence to suggest that either comparator was on a final written warning for similar conduct as the claimant had been, that they had had the policies explained to them both verbally and in the final written warning correspondence, so the circumstances were not materially the same.

109. Further, even if we accepted that they were valid comparators for the purposes of the claim, the claimant did not undertake a small journey to get lunch when on site in the usual custom and practice way. As set out above the issue was that he was not that he was disciplined for popping out for lunch but rather for going 6.9 miles diversion, and in effect not returning to work and getting a PCN in the process of collecting his mail. He was signed in to a site he was not at and in effect had gone AWOL. This was not his first offence.

110. Had the claimant been dismissed in September 2021 for doing exactly the same as his colleagues in popping down the road for a burger or sandwich and only that (which in our mind is highly critical) this could show a disparity of treatment which may shift the burden to the respondent to explain further as we have set out below but we do not find that the situations are comparable.

111. In our view he was not dismissed for popping to lunch but for a second example supported by independent evidence of him committing acts of gross misconduct and which were closely related to the same pattern of behaviour that meant he was already on a final written warning. In our view his conduct was unacceptable and the decision to dismiss him or discipline him was entirely reasonable and wholly unconnected to race. The evidence as overwhelming that the respondent was right to hold that belief in his guilt and progress to disciplinary. We have seen no evidence that the comparators were conducting themselves in a similar manner but not disciplined or dismissed for that because of their race.

112. The claimant relied on the fact his line manager spoke to him in hostile manner in which he did not speak to those two individuals. He relied in particular on the comment made on 8th September 2021, that the claimant's line manager stated the claimant was leaving with just the shirt on his back.

113. The claimant has not advanced a case or any evidence of any hostile behaviour other than the comment. He made reference during the disciplinary process that Martin Crowe should have dealt with the matters informally. We do not accept that the conduct was not minor for which he received a final written warning or for which he was dismissed and the informal process was clearly not designed to be used with gross misconduct allegations. We therefore do not conclude that the decision to investigate or indeed any of Mr Crowe's involvement with the final written warning or dismissal was done as the claimant was being treated in a hostile manner. The claimant simply considered that the rules did not apply to him and it is not hostile to discipline the claimant for his own conduct issues which breach those policies. It is a requirement that the claimant be managed and he is not above the rules and policies.

114. The only example given expressly concerning being treated in a hostile manner was the comment made on 8th September 2021. We have found as a matter of fact that this did happen but the claimant accepted the comment itself was unrelated to race. In evidence the claimant explained that overall when dealing with the issue of race and his treatment by Mr. Crowe and generally during employment, he could not be certain that race was influential. He used the words that he had a "suspicion" but he accepted it could have been other things such as the difference in the way he operated prior to the TUPE transfer or his expertise and his desire to achieve or generally his knowledge that others took issue with to explain the treatment. In evidence, the claimant did not strongly assert that race was a factor and indeed advanced himself that it could have been two other reasons.

115. The claimant did not raise a formal grievance about race during his employment. In one email that we have referred to in our findings of fact above, he did make reference to racism but his formal grievance was about Mr. Crowe's management style generally and the changes to his terms and conditions following TUPE. At no stage in the disciplinary process until the appeal did he raise racism as an issue. He did not name his two comparators at that stage or at the disciplinary stage so that any differences could be investigated.

116. The final written warning was imposed by Mr. Chudy and the dismissal by Ms. Barnett. The claimant confirmed the only person he had an issue with in connection with race discrimination was Mr. Crowe. He did not have an issue with Mr Chudy or Ms Barnett and made no allegations against them personally. Mr. Crowe was not the decision-maker and did not impose either sanction.

117. In essence, this case that the claimant advanced was an issue about whether there was tainted information which was racially motivated. We are reminded of the legal tests in *Reynolds v CLFIS (UK) Ltd [2015] EWCA Civ and Alcedo Orange Limited v Mrs G Ferridge Gunn [2023] EAT78* in that the motivation of the decision-maker is the relevant issue. We are satisfied from the evidence having heard Ms. Barnett that race had no influence. We heard no evidence from Mr. Chudy, but Mr. Crowe was not the decision-maker in respect of the final written warning.

118. Even if the legal test was not as set out above, if Mr. Crowe was so motivated, (and we do not make this finding), his allegations relating to the disciplinary action on both occasions were not related to Mr. Crowe's subjective views. Even if he had instigated any investigation because of his own personal views, there was clear evidence which was documented and by the claimant's own admission, the issues were around the claimant's conduct. Therefore, however that disciplinary process started, the reason it started was not related to race but because of the claimant's conduct. In our view the outcome would have still been the same given the overwhelming evidence against the claimant and indeed the respondent could have dismissed on the first occasion when the claimant got a final written warning but it did not. The real issue was the claimant's conduct and that was what was being investigated.

119. We accept Mr. Crowe's evidence that he had a duty to escalate the matter on receipt of the PCN notice. The claimant felt the whole thing should have been dealt with informally under section six of the disciplinary policy to which we referred above. We do not accept that. The allegations were not minor, not first offenses, and demonstrated a pattern of behavior. A parking ticket, for example, could have been dealt with that way, but the PCN uncovered a bigger picture of the claimant's conduct. Given the interpersonal relationship issues between them, it was proper and appropriate that Mr. Crowe passed that to somebody else to investigate.

<u>Has the claimant satisfied the test in Madarassy versus Nomura International PLC to shift the burden of proof to the respondent? If not the claim fails.</u>

120. For all the reasons stated above, we do not find the claimant shifted the burden of proof to the respondent to explain. The claimant himself is not convinced it was race related, the comment made to him post dismissal he accepted was not race related so we instead needed to examine whether the disciplinary procedure or dismissal was used because of race and have also considered the mind and motivations of the decision maker in the dismissal. The claimant has failed to establish a prima facie case of race discrimination in relation to each matter to shift the burden.

<u>If so, is the respondent able to show the reasons for the alleged difference in treatment were not because of race?</u>

121. For completeness for all the reasons we have set out above, we find that the final written warning and dismissal were because of the claimant's conduct, not because of his race, and therefore the direct race discrimination fails. The respondent's explanation for the disciplinary process and dismissal we accept as the reason for dismissal.

122. The claimant advanced two other alternatives himself to race discrimination and in part we believe that the TUPE transfer and him coming from a different place before the respondent was in part related to this case. Not in the way the respondent treated him but how the claimant conducted himself and he

was both displeased about losing a company car with personal use and getting a branded BT van but also felt that he could continue to drive in the manner he did before and not follow BT rules.

123. Therefore, the claims for direct race discrimination fail and are dismissed.

Harassment

Was the claimant subject to the following conduct, namely the claimant's line manager's comment on 8th September 2021 saying that after the claimant handed in his company equipment that the claimant was leaving with just the shirt on his back?

124. We have found on a balance of probabilities that this comment was made as set out above in our findings of fact.

Was the conduct related to race?

125. The claimant accepted in evidence that the comment itself was not related to race. It was clear there were relationship difficulties as the claimant did not accept being managed and wanted to do his own thing and the claimant did not feel his role fitted into the BT way.

126. On this basis, the comment cannot relate to race and the claim for racial harassment fails. Harassment in the everyday use of the word is not the same as a section 26 Equality Act 2010 harassment claim. In order to establish the test in section 26 of harassment, the comment itself must relate to race. The comment did not.

127. We therefore do not need to go further and look at whether it was unwanted and whether it had the purpose or effect as set out in the legal test. We accept that the claimant was aggrieved by it but we do not accept that Mr Crowe made the comment that was related to race or that Mr Crowe treated the claimant differently because of his race although this comment was not brought as a direct race discrimination claim we do not find that it assists the claimant to shift the burden for the reasons set out above.

128. The claim for harassment fails and is dismissed.

Time limits

129. Given our conclusions, there is no need to consider time limits or indeed return to consider the issues of remedy and the claimant's claims are dismissed.

Employment Judge S King

Date: ………………18.12.24……….

Judgment sent to the parties on

23 December 2024 ....

…..............................
For the Tribunal office