EMPLOYMENT TRIBUNALS

Claimant: Mr G Ataho Mwesigye
Respondent: AFE Recruitment Ltd

Heard at: Watford Employment Tribunal
On: 5,6,7 and 10 March and 1 April 2025
Before: Employment Judge S Matthews

Representation
Claimant: Mr Mayanja (Legal Executive)
Respondent: Ms L Rosser, Payroll Manager
Mr Elia, Director

JUDGMENT

The judgment of the tribunal is that:

1. The complaint of unfair dismissal is not well founded and is dismissed.
2. The complaint of direct race discrimination is not well founded and is dismissed.
3. The complaint of harassment related to race is not well founded and is dismissed
4. The complaint of victimisation is not well founded and is dismissed.
5. The complaint of being subjected to a detriment or dismissal for making a protected disclosure is not well founded and is dismissed.
6. The complaint of breach of contract is not well founded and is dismissed.

JUDGMENT having been given orally to the parties on 1 April 2025 together with reasons and written reasons having been requested by the claimant on 11 April 2025 in accordance with Rule 60 of the Employment Tribunals Rules of Procedure, the following reasons are provided:

REASONS

Procedural matters

1. The claimant was a driver's mate and the respondent is a Recruitment Agency that supplies temporary workers. The claimant alleges that he was unfairly constructively dismissed by the respondent. He says that he resigned because he wanted to be taken on as a driver rather than a driver's mate. He also brings claims of race discrimination, harassment related to race, victimization, protected disclosure detriment and breach of contract. The respondent denies all allegations and says that he was not taken on as a driver because he did not pass their required driving assessment.

2. The claimant's claim form was received by the tribunal on 19 November 2023. The claim was initially brought against two respondents, the second being the respondent's client, Booker Ltd, trading as Best Foods Logistics, the company the claimant was supplied to as a driver's mate. The claim against the Second Respondent was struck out for having no Acas certificate on 16 November 2024.

3. The hearing was listed for 4 days, to be heard by video. It was listed to be heard before an Employment Judge and 2 non legal members but that direction was amended to Employment Judge sitting alone because of judicial resources.

4. I heard evidence from 4 witnesses. Each produced a written statement and were asked questions about their statements. All the witnesses, apart from the claimant, gave evidence by video.

5. The claimant's witnesses were himself and Simplice Yamgoue, (HGV driver). The claimant also served a statement by Ismail Foard (HGV driver). The claimant's representative, Mr Mayanja, decided not to call the latter because his evidence related to the claim against the Second Respondent who is no longer a party to the proceedings. I disregarded his statement when I reached my decision.

6. The respondent's witnesses were:

   David Turner (Driver Trainer and Assessor, Accredited DVSA Examiner).

   Daniel Jones (claimant's line manager at the relevant time).

4 The bundle of documents was not prepared in time for the beginning of the hearing. There was a dispute between the parties about whose responsibility it was to prepare it. The case management order had given responsibility to the second respondent, but they were no longer a party.

5 The parties were therefore required to construct a bundle at the beginning of the hearing. Most of the documents in the resulting bundle were ones which the claimant had referred to in a list dated 4 February 2025. I was satisfied that neither the claimant nor the respondent was put at a disadvantage by the late finalisation of the bundle. However it did significantly delay the start of the hearing.

6 On the second day of the hearing, the claimant's representative asked for a further 44 documents to be added to the bundle which I allowed. The final bundle now consisted of 78 pages.

7 In addition, at the request of the claimant's representative, the respondent

produced a print out showing all the shifts the claimant worked from September 2022 to July 2023 (the shift print out).

8 References to pages in the bundle below are set out in brackets(x). References to paragraphs in the witness statements consist of the witness's initials and number of the paragraph (AB-YZ).

9 The claimant's representative made an application for an amendment to the Particulars of Claim. In brief the claimant wished to add dates on which he says his shifts were cancelled, and a detriment claim which he said arose out of a post-employment subject access request. I declined the application for reasons which I set out fully at the hearing. In short I considered the balance of prejudice was in favour of the respondent in respect of adding dates when shifts were cancelled because the respondent does not keep records of cancelled shifts and cannot be expected to remember after this period of time. I decided that the claimant was unlikely to establish that the respondent had refused to deal with the request for documents because the respondent's (credible) case was that they did not have the documents requested and in any event the matter could be dealt with by an application for specific disclosure.

10 By 2pm, on the second day, the claimant was ready to start giving evidence. Unfortunately, there were difficulties with the claimant hearing the questions he was being asked because of background noise and we could not continue. We decided to start hearing evidence at the beginning of Day 3, and the claimant came into the tribunal to give evidence. Mr Elia and Ms Rosser also came into the tribunal to aid communication. The remaining witnesses gave evidence by video and the claimant's representative attended by video.

11 Because of the delay in hearing evidence it was necessary to list a further day on 1 April 2025 when I gave Judgment.

The issues

12 The issues to be decided at the hearing are set out in the case management order of Employment Judge Quill dated 5 June 2024. I amended these at the outset of the hearing to reflect that the Second Respondent was no longer a party. Issues relating in particular to Personal Protective Equipment and a claim for wages against the Second Respondent were no longer relevant.

13 I informed the parties that the first part of the hearing would deal with liability and not remedy. If the claimant was successful, we would deal with remedy in the second part of the hearing.

14 For the purposes of the discrimination claims I clarified at the beginning of the hearing that the claimant identifies as a black male and that his ethnic origin is African. He compares his treatment to Polish and white Europeans.

15 The issues to be decided were therefore as follows:

1.Time limits / limitation issues

1.1 Were all of the claimant's complaints presented within the time limits set out in:

1.1.1 section 123 of the Equality Act 2010 ("EqA")

1.1.2 section 48 of the Employment Rights Act 1996 ("ERA")?

1.1.3 section 111 of the Employment Rights Act 1996 ("ERA")?

Dealing with this issue may involve consideration of subsidiary issues including: when the treatment complained about occurred; whether there was an act or conduct extending over a period, and/or a series of similar acts or failures; whether time should be extended.

2. Constructive unfair dismissal

2.1 Did the Claimant have 2 years' continuous employment (or, if not, was the dismissal reasonable within section 103A of the Employment Rights Act 1996)

2.2 Was the claimant dismissed by R1, i.e. did R1 breach the so-called 'trust and confidence term', i.e. did it, without reasonable and proper cause, conduct itself in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence between it and the claimant?

2.3 Did the claimant affirm the contract of employment before resigning?

2.4 Did the claimant resign in response to R1's conduct?

2.5 The conduct the claimant relies on as breaching the trust and confidence term is:

2.5.1 Around 7 July 2023, Dave told the Claimant that R2 was not willing to take the Claimant on as a driver, but would only keep him as a driver's mate.

2.6 If the claimant was dismissed: what was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA").

2.7 If not a reason within section 103A ERA 1996, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called band of reasonable responses?

3. Protected Disclosures

3.1 Did the claimant make one or more protected disclosures (ERA sections 43B and 43C to 43H) as set out below? The alleged disclosures the claimant relies on are as follows:

3.1.1 Around 16 March 2023, the Claimant sent an email to Amanda Aylott, who is an employee of R1 (and then on 20 March, he sent a further email in response to her reply to him). The emails gave details of what the Claimant said was improper allocation of driving shifts by R2 and unfair treatment (failure to properly allocate work and/or cessation of assignment) by R2 directed towards a Mr Darmott (which R1 believes is a reference to a "John McDermott"). [The Claimant alleges that he raised the issues with R2 and was told that he should raise it with R1]

3.1.2 Around 20 May 2023, the Claimant emailed Wayne Aylott who is employee of R1. This was about smoking in vans. Again, the Claimant alleges that he raised it first with R2, and R2 told him to raise it with R1. The employees of R2 to whom the Claimant spoke / texted about the smoking issue were Ben (transport manager), Tom (office manager), and Zak (who also worked in the office).

3.2 The claimant relies on the following subsection(s) of section 43B (1) in relation to these alleged disclosures.

(a) that a criminal offence has been committed, is being committed or is likely to be committed,

(b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,

…

(d) that the health or safety of any individual has been, is being or is likely to be endangered.

3.3 If the Claimant was dismissed by R1 (in other words, if the constructive dismissal argument succeeds), was the principal reason for the dismissal that the Claimant had made a protected disclosure?

3.4 Did the respondent subject the claimant to any detriments, as set out below? (Included within this issue are the questions of what happened as a matter of fact and whether what happened was a detriment to the claimant as a matter of law.)

3.5 If so, for each detriment, was the Claimant subjected to that detriment on the ground that he had made one or more protected disclosures?

3.6 The alleged detriments the claimant relies on are as follows:

3.6.1 Fewer shifts

3.6.2. Last minute cancellation of shifts

3.6.3. No payment for cancelled shifts.

3.6.4. Failure to provide reference

3.6.5. Refusal to give the Claimant a “pass” for his driving qualification

3.6.8. R1’s failure to supply a reference (in around October 2023) when Staff Solutions referred the Claimant to R2.

<u>4. EqA, section 26: harassment related to race</u>

4.1. Did the respondent engage in conduct as follows:

as set out at 5.1 below for direct discrimination

4.2 If so was that conduct unwanted?

4.3 If so, did it relate to the protected characteristic of race?

4.4 Did the conduct have the purpose or (taking into account the claimant’s perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

<u>5.EQA, section 13: direct discrimination because of race</u>

5.1 Did the respondent subject the claimant to the following treatment:

5.1.1 On or around 14 June 2023, R1 (acting through Dave, an individual supplied by R1 to R2) refused to accept the Claimant's driving licence as "worthy" and asked which country the Claimant was from.

5.1.2 In around June 2023, R1 (acting through Dave) informed the Claimant that he would not pass his test and that he required retraining.

5.1.3 In around June 2023, R1 (acting through Dave) failed the Claimant on a driving test

5.1.4 In around June 2023, R1 (acting through Dave) shouted at the Claimant (calling him a "failure") when he asked to know if he had passed or failed

5.2 Was that treatment "less favourable treatment", i.e. did the respondent treat the claimant as alleged less favourably than it treated or would have treated others ("comparators") in not materially different circumstances? The claimant relies on hypothetical comparators where necessary.

5.3 If so, was this because of race?

6.Equality Act, section 27: victimisation

6.1 Did the claimant do a protected act? The claimant relies upon the following:

6.1.1. Email of 16 March 2023 to Amanda Aylott which referred to John McDermott's situation and in which the Claimant alleged that drivers were being treated differently to each other based on race.

6.2. Did the respondent subject the claimant to any detriments as follows:

6.2.1. Same alleged detriments as for whistleblowing complaint at 3.6

6.3 If so, was this because the claimant did a protected act and/or because the respondent believed the claimant had done, or might do, a protected act?

7.Breach of contract

7.1 The Claimant alleges that R1 has a contractual liability to make payment to him for shifts which he alleges were cancelled on 19/4/23, 28/4/23 & 03/05/23.

7.2 The Claimant alleges that R1 breached his contract because other workers smoked in the vans in which the Claimant was working.

7.3 The Claimant alleges that R1 breached his contract by suspending him (without proper cause) around 24 March 2023.

Findings of fact

16 This Judgment does not seek to address every point about which the parties have disagreed. It only deals with the points which are relevant to the issues that the tribunal must consider in order to decide if the claim succeeds or fails. If I have not mentioned a particular point it does not mean that I have overlooked it, it is simply because it is not relevant to the issues.

Background

17 The claimant commenced working for the respondent on 15 May 2021 under a written contract (17-22). The contract identifies the parties to the contract as 'Agency Worker', and 'Employment Business' and states the Agency Worker is engaged on a contract for services by the Employment Business. Clause 2.2 states that it is a contract for services and not a contract of employment. Clause 2.1 states that no contract shall exist between the Employment Business and the Agency Worker between assignments. Clause 3 provides that the Agency Worker is not obliged to accept any work offered by the Employment Business and the Agency Worker acknowledges that there may be periods when no suitable work is available. Clause 3.2.2 provides that the Employment Business shall incur no liability to the Agency Worker should it fail to offer opportunities to work. Clause 3.4 states: 'Nothing in this agreement shall render any Agency Worker an employee or worker of either the Employment Business or the Hirer'.

18 The 'Hirer' in the claimant's case was Best Foods Logistics (BFL). The claimant worked as a driver's mate 'attached to' BFL (AM/4).

19 The claimant stopped working for the respondent sometime in October 2021. The claimant says from early October 2021; the respondent says from 24 October 2021. The exact date is not material. He joined BFL and worked for them until 19 February 2022. He left BFL and went to Uganda. He started work for the respondent again on 9 July 2022. In evidence to the tribunal the claimant said that his return to work for the respondent came about because he contacted the respondent and asked to return.

20 The date that the claimant left the respondent is disputed. The claimant's last shift, as evidenced by the shift print out, is 10 July 2023. The respondent continued offering the claimant shifts until 23 July 2023. There is a series of text messages to the transport team culminating in a text to Sofia on 23 July 2023 where the claimant states "I am driving elsewhere". That follows text messages on 13, 15 and 18 July 2023 to the team where he expresses his disappointment at having failed the driving assessment and says that he is looking elsewhere. His case is that he decided to leave on 20 July 2023 and that he notified the respondent on that date. As he was driving elsewhere by 23 July 2023, I accept that 20 July 2023 was the date he terminated his employment.

<u>Whistleblowing and Victimisation claims</u>

21 The claimant alleges he raised complaints which he says were protected disclosures in emails to Amanda Aylott (AA) (office manager) on 16 March 2023 and to Wayne Aylott (WA) (night manager) on 21 May 2023.

22 The email on 16 March 2023 to AA (43) referred to another worker, John McDermott (JMD) (a driver). It states

> 'Three days ago, Mr John Dermott (sic) received a rather disturbing message on his phone terminating his services with immediate effect. The content, tone and manner in which the message was delivered was extremely brutal. This manner of communication and language employed demoralizes others and puts one's loyalty to company on a weighing scale... It's my humble request that Mr John Dermott's dismissal is looked into by your honourable office and salvage the situation in Transport office especially with day team'.

23 He refers to JMD being a victim of 'office politics' and states:

> 'Shifts are allocated based on one's personal relationship with transport team (especially day team) not on merit and one's capabilities to perform'.

24 The claimant's case is that this email was a protected act and a protected disclosure. He claims the email alleges that drivers were being treated differently on the grounds of their race. On an objective reading of the email I find that it does not allege that. It does not make any allegations about race or any type of discrimination. The email is about the treatment of JMD. The claimant said in oral evidence that JMD was 'Scottish'. He also confirmed in oral evidence that he did not think JMD was being treated the way he was because of his race.

25 The email concludes by asking AA to look at JMD's dismissal. In his Particulars of Claim he says that he 'helped a dismissed employ (sic) challenge his dismissal and as a result I was singled out for less favourable treatment'. JMD was not dismissed but moved from driving for BFL and onto another contract for Pret (Grounds of Response). I find that the claimant was not challenging a dismissal at the time he sent the email. He thought the respondent had acted unfairly in the way it dealt with JMD but he was not suggesting that there had been a breach of a legal obligation.

26 AA acknowledging the email, wrote 'We will get back to you once we have completed our investigation' (44). The claimant thanked her for responding on 20 March 2023 (44). The claimant followed up that email with another email to AA on 30 April 2023 (44). The email this time was still headed Mr John McDermott, and states:

> 'The working situation is getting extremely unprofessional and toxic. Communication channels are deliberately shut down and team members are cherry picked to work with varying reasons to others'.

27 Again I do not find that the email alleges any form of discrimination based on a protected characteristic or breach of a legal obligation.

28 The other protected disclosure that the claimant relies on is an email to WA dated 21 May 2023 (46). He refers to a shift he worked the night before when the driver he was paired with kept smoking:

> 'he started smoking in the cabin. I made him aware of my situation and how smoke was affecting my sight and breathing. He asked me to lower my window glass to which I responded that because of wind, smoke will flow my side and make it even worse. He didn't stop and over the entire route, he kept smoking… I told him again how uncomfortable I was with him smoking in the cabin and it's effects on my health but by this time, he pretended not to understand what I was saying and he seemed unbothered by my concerns.'

29 I find that was a protected disclosure because it clearly asserts that his health and safety is being endangered.

30 WA responded 31 minutes later thanking him and saying it was now being looked into (46). The claimant conceded in evidence that the respondent's employees had been sacked for smoking previously. He does not explain why he thinks that the respondent would react adversely to reports of smoking and I found no

evidence that they did.

31 The claimant sent a further email to WA on 16 October 2023 (45), following the termination of his employment. It states that the 'level of harassment, bullying and work related discrimination is stiff and common'. Although this refers to work-related discrimination it does not refer specifically to race or any other protected characteristic. It was suggested by the claimant's representative that this meant that the emails to AA could be read as asserting a breach of a legal obligation or making allegations of discrimination. I do not accept this argument. It was sent post employment and, as I set out below, no detriments flowed from it.

Alleged suspension

32 On 25 March 2023 the claimant says that he was told by Tom (an employee of BFL) to go home because he had worked in the morning. DJ explained in evidence that was due to the working time regulations. He was not suspended, he was stood down. The claimant acknowledged that he had done some work in the morning, helping out a friend on voluntary basis. He accepted at the time that he was at fault, saying his actions were "an oversight on my part, and I do promise that such shall not happen again" (60-61).

Cancellation of shifts

33 Clause 9.2 of the contract (17-22) states:

> '...the Employment Business may without notice and without liability instruct the Agency Worker/Intermediary to cease work on an Assignment at any time'

34 Daniel Jones (DJ) (the claimant's line manager) was responsible for allocating shifts. DJ explained in evidence that he and the transport team usually finalised rotas in the morning for workers starting work in the afternoon. Accordingly, it was common for workers to have less than 8 hours' notice of whether they would be needed for a shift. Sometimes BFL would cancel shifts if a route was not required. The respondent had no control over this.

35 The claimant claims that after he had sent the emails referred to above more shifts were cancelled and he was offered less shifts. The shift print out for September to March shows that his shifts for each month were respectively 22,21, 22, 25, 23, 23, 21, reducing to 17 in April, going back up to 20 in May, reducing to13 in June and to 4 in July. In June and July he did driving training and assessments. He left in July. The respondent only retains records of the shifts he did, not the ones he was offered and turned down, so it is not possible to identify from the print out how many shifts he was offered.

36 In order to demonstrate that shifts were cancelled because of emails sent to AA and WA the claimant would have to show that DJ, the person who decided which shifts to offer him, was influenced by the emails. DJ's oral evidence to the tribunal was that he cannot remember if he was told by AA and WA about the emails. He certainly does not remember being shown them. He would not have been surprised if the claimant had complained about unfair allocation of shifts; it was not uncommon for drivers to grumble about shift allocation. I accept his evidence that it would not be a reason to deny them shifts, because it was so commonplace. Likewise he would not decide to cancel shifts because the

claimant or any driver had complained about people smoking.

Driving Assessment

37 Although the claimant already had a 7.5 tonne licence it was the respondent's policy that their agency workers had to pass a driving assessment with them before being allowed to work as a driver. The claimant took a driving assessment with David Turner (DT) (Driver Trainer and Assessor) on 14 June 2023. DT was an employee of the respondent.

38 The claimant asserts in his statement that DT:

'Made derogatory and racial remarks towards me in the presence of other colleagues in the transport office before even assessment' (AM/20).

'Since I was from Uganda he didn't think I had chances of passing the assessment' (AM/21)

'He moved out of his office shouting derogatory words'(23).

39 In the Particulars of Claim he said DT:

'refused to accept my driving licence as worthy, asking me which country I was from',

'making remarks of don't think you will pass and advising me to retrain with them, eventually failing me',

'he also humiliatingly shouted at me in a crowded office after passing when I asked for my licence'.

40 I need to decide what happened on a balance of probabilities.

41 DT has a limited memory of that particular assessment. He has done over a hundred assessments since. DT is a very experienced assessor and I accepted his evidence that he would have gone through his normal routine and used his normal script. He was doing assessments routinely, around four a day.

42 The claimant was unable to state what words DT actually used. His account of what was actually said is not clear in his witness statement or in the Particulars of Claim and he was unable to be any more specific when giving evidence in the tribunal. The credibility of the claimant in relation to what happened is put significantly in doubt because in his witness statement he refers to DT carrying out the second assessment as well as the first (MW/24). That is incorrect, the second assessment was carried out by another individual, Grant McKenzie (GMK) (42). When questioned about that in the tribunal he said he named DT because he could not remember the name of the second assessor. Evidently, he was prepared, in a sworn statement, to accuse DT of something that did not happen.

43 I therefore prefer DT's version of events. The claimant failed the theory test, but DT took him out on the assessment in any event, in accordance with his normal practice. The claimant failed the driving assessment. There were numerous serious faults and two dangerous faults. DT recommended three hours of retraining. On the assessment tracker he stated:

'Three hours instructor led training required. Very little road craft shown. Numerous serious faults. 2 dangerous faults. Conversely was able to reverse onto a bay albeit very slow and didn't understand how to straighten out. On repeated occasions I had to go instructional in order to ensure safety. George is a nice guy but was unable to show me the required standard today.'

44 In accordance with his normal practice he would have used the following words when informing the claimant he had failed, "You have failed to meet the required standards." He would not have shouted at him. He may have said words like "Stop" during the assessment if he thought there was some sort of danger. He would have told the claimant in advance what words he was going to use.

45 Overall, DT was supportive of the claimant. He wrote on the tracker that he was a "nice guy", suggesting that their meeting had been amicable.

46 I do not find it credible that DT would have asked where the claimant was from because his country of birth would have been stated on his driving licence. As part of the assessment, DT needed to take a photocopy of the licence and other documents. DT accepts that he may have commented on the claimant being born in Uganda by way of small talk. He would not question whether it was a valid licence because it would have been clear on the face of it that it was a UK licence.

47 The claimant had a second assessment with the other assessor (GMK) on 12 July 2023. He committed 9 serious faults and over 10 minor faults. GMK commented that he had real concerns about the claimant's ability to read and react to traffic signs and when he compared his assessment with DT's they were almost identical (42).

48 In summary, the decision maker on the failure of the first assessment was DT. He decided to fail the claimant because the claimant did not meet the required standard. He accepts he may have known that the claimant was a driver's mate but apart from that, as someone whose role involved carrying out assessments, there is no reason why he could have been expected to know anything about the emails that the claimant had sent making complaints about unfair allocation of shifts or smoking in vehicles. I am satisfied that he followed a proper and thorough process. The claimant's failure was warranted, and DT did not have any ulterior motive in failing him. The decision was not related to the claimant's race. The fact that he was not of the required standard is corroborated by the fact that GMK failed him as well.

<u>Reason for termination of employment</u>

49 The claimant discovered he had failed the second assessment on 13 July 2023 when he sent a text message to the transport office (48). When he was told that he had not passed he replied that he needed to apply for jobs with different companies and he might not turn up for shifts.

50 The claimant's oral evidence was that his reason for leaving was the realisation that he would not get a driving job. He blamed that on the complaints he had made rather than failing the driving assessments, his case being that he failed the assessments because he had made the complaints.

51 I am satisfied that the decision by both assessors to fail him was not motivated

in any way by the claimant's race, the alleged protected disclosures or protected act.

Post employment: reference

52 When the claimant left the respondent, he received an entirely positive reference dated 8 August 2023 from AA (office manager) (24). It stated, 'he is a very hard and reliable worker' and assessed him as 'excellent' in all respects, including attendance and work performance.

53 The claimant says the respondent failed to give a reference in October 2023. He says Staffing Solutions sent a reference request to the respondent that was never returned. The respondent say they did not receive the reference request (Grounds of Response). The claimant did not provide documentary evidence of the request in the bundle. It is possible that the request was sent to BFL and not the respondent. I accept the respondent's evidence that they were unaware of any request. They had provided a good reference immediately after he had left (which was subsequent to the alleged protected disclosures and act). There is no credible reason or evidence to establish that they would refuse at a later date.

Law

Time Limits

54 The time limit for detriment and dismissal relating to a protected disclosure and unfair dismissal is set out in s.111 of the Employment Rights Act (ERA) 1996. A complaint must be presented within 3 months (subject to an extension for ACAS conciliation) or within such further period as the tribunal considers reasonable in a case where it is satisfied that it was not reasonably practicable for the complaint to be presented before the end of that period of three months.

55 Section 123 (1) Equality Act (EqA) 2010 requires that any complaint of discrimination within the Act must be brought within three months of the date of the act to which the complaint relates, or such other period as the Tribunal thinks just and equitable.

56 In a detriment claim, time starts to run from the date of the act (or failure to act) on which the complaint is based, not from the date on which the employee becomes aware of that act, or the date on which the detriment was suffered. The claimant must present their claim within three months of the date of the act of which complaint is made. Where this is not reasonably practicable, then it should be within such further period as was reasonable.

57 Where there is a series of similar acts, then time runs from the last of those acts. Such a series could involve a number of acts of detriment by different people where there is "some link between them which makes it just and reasonable for them to be treated as in time and for the complainant to be able to rely on them": Arthur v London Eastern Railway Ltd (t/a One Stansted Express) [2007] ICR 193, CA.

58 If the last of the acts is dismissed as unfounded or because it was not on grounds of a protected disclosure and that act is the only act within the primary limitation period, then the entire series will be out of time: Royal Mail Group Ltd v Jhuti EAT

0020/16.

Constructive unfair dismissal

59 Section 95 ERA 1996 provides, so far as is relevant to the facts of this case:

(1)For the purposes of this Part an employee is dismissed by his employer if ...

(a)the contract under which he is employed is terminated by the employer (whether with or without notice),

(b).....

(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct.

60 Section 39 (2) EqA 2010 provides, so far as is relevant to the facts of this case:

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

....

(c)by dismissing B;

....

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

(a)....

(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."

61 Accordingly, dismissal includes constructive dismissal, which occurs where, owing to the repudiatory conduct of the employer, the employee is entitled to resign and regard himself as dismissed. Section 39 EqA 2010 requires the tribunal to decide whether the claimant's protected characteristic (in this case race) was the reason for the acts or omissions which amounted to a breach of contract.

62 The right to bring an automatic unfair dismissal claim under Section 103A is only available to employees. Workers must argue that the dismissal was a detriment and bring a claim instead under Section 48. Where an employee has less than two years continuous service, the burden of proving on the balance of probabilities that the principal reason for the dismissal is a protected disclosure rests with the claimant. Where an employee resigns claiming constructive dismissal, it is still open to the employee to claim that the principal reason for the dismissal was that they have made a protected disclosure. The Tribunal should examine the principal reason for the fundamental breach of the contract of employment that led to the resignation.

63 The protection extends not just to present workers, but to former workers: Section 43K. They have a right not to be victimised by detriments occurring after their

employment has ended (Woodward v Abbey National [2013] IRLR 338, CA). Even where disclosures are made after employment has ended, those disclosures are still capable of amounting to protected disclosures and founding a detriment or a dismissal claim against a former employer (Onyango v Berkeley (t/a Berkeley Solicitors) [2013] ICR D17 (EAT).

Protected Disclosures

64 The statutory test is whether the worker was subjected to the detriment by the employer "on the ground that" he or she had made a protected disclosure. It is for the claimant to prove, on the balance of probabilities, that there was a protected disclosure, that there was a detriment and the employer subjected the claimant to the detriment. If so, then the burden shifts to the employer to show the ground on which the detrimental act was done: Section 48(2) ERA.

65 Section 43B (1) defines a protected disclosure as follows:

> (1)In this Part a " qualifying disclosure " means any disclosure of information which, in the reasonable belief of the worker making the disclosure, is made in the public interest and tends to show one or more of the following—
>
> (a)that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b)that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c)that a miscarriage of justice has occurred, is occurring or is likely to occur,
>
> (d)that the health or safety of any individual has been, is being or is likely to be endangered,
>
> (e)that the environment has been, is being or is likely to be damaged, or
>
> (f)that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.

66 In Kraus v Penna [2004] IRLR 260 the EAT held that to be a qualifying disclosure, the information disclosed should tend to show, in the claimant's reasonable belief, that failure to comply with a legal obligation was "probable or more probable than not". It is not necessary to state explicitly that they reasonably believe that the disclosure tends to show one or more of the matters set out in S.43B(1)(a)-(f). The extent to which it is apparent from the disclosure itself that the worker had the matters in mind is evidentially relevant to the question whether they had any of these matters in mind at the time of the disclosure, and whether any such belief about what the information tended to show was reasonable. In less obvious cases, a failure by the worker to set out the nature of the legal wrong they believe to be at issue might lead a tribunal to conclude that the worker was merely setting out a moral or ethical objection rather than a breach of a legal obligation.

67 The test for "detriment" is the same as in discrimination law. If a reasonable worker might regard the treatment as a detriment, and the claimant genuinely does so, that is sufficient to establish there has been a detriment. There does not

necessarily need to be any physical or economic consequences. An unjustified sense of grievance cannot amount to a detriment *(*Derbyshire v St Helen's MBC [2007] ICR 841).

68 The Tribunal must consider what, consciously or unconsciously, was the employer's reason for the detriment. It will need to consider whether to draw an inference from its findings of fact. Causation will be established unless the employer can show that the protected disclosure played no part whatsoever in its acts or omissions: Fecitt v NHS Manchester [2012] ICR 372, CA. The causation test for detriment claims is less onerous than the causation test for dismissal claims under Section 103A.

69 Where an employee resigns claiming constructive dismissal, it is still open to the employee to claim that the principal reason for the dismissal was that they have made a protected disclosure. The Tribunal should examine the principal reason for the fundamental breach of the contract of employment that led to the resignation.

Harassment

70 Section 26 EqA 2010 provides:

> (1)A person (A) harasses another (B) if—
> (a)A engages in unwanted conduct related to a relevant protected characteristic, and
> (b)the conduct has the purpose or effect of—
> (i)violating B's dignity, or
> (ii)creating an intimidating, hostile, degrading, humiliating or offensive environment for B.
> ....
> (4)In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—
> (a)the perception of B;
> (b)the other circumstances of the case;
> (c)whether it is reasonable for the conduct to have that effect.

71 The EAT in Richmond Pharmacology v Dhaliwal 2009 ICR 724, EAT, gave some guidance as to how the 'effect' test should be applied. It noted that the claimant must actually have felt, or perceived, his or her dignity to have been violated or an adverse environment to have been created. If the claimant has experienced those feelings or perceptions, the tribunal should then consider whether it was reasonable for the claimant to feel that way.

Direct Discriminaton

72 Direct discrimination is defined in section 13(1) EqA 2010:

> "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."

73 Race is a protected characteristic under s. 9 EqA 2010 and includes (a)colour, (b)nationality and (c)ethnic or national origins.

74 The EqA 2010 provides for a shifting burden of proof. Section 136 provides as

follows:

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

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

75 Consequently, it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

76 In Shamoon v Chief Constable of the Royal Ulster Constabulary (2003) ICR 337, Lord Nicholls in the House of Lords said that the Tribunal should focus on the primary question which was why the complainant was treated as he or she was? The issue essentially boiled down to a single question: did the complainant, because of a protected characteristic, receive less favourable treatment than others?

Victimisation

77 Section 27 EqA 2010 provides as follows:

(1)A person (A) victimises another person (B) if A subjects B to a detriment because—

(a)B does a protected act, or

(b)A believes that B has done, or may do, a protected act.

(2)Each of the following is a protected act—

(a)bringing proceedings under this Act;

(b)giving evidence or information in connection with proceedings under this Act;

(c)doing any other thing for the purposes of or in connection with this Act;

(d)making an allegation (whether or not express) that A or another person has contravened this Act.

78 The critical question is 'Why did the employer subject the employee to that detriment? Was it because they had done (or might do) the protected act? Or was it wholly for other reasons? (Chief Constable of West Yorkshire Police v. Khan [2001] ICR 1065)

79 As in direct discrimination it is necessary to identify the decision maker and the "significant influence" test and burden of proof provisions apply.

Breach of contract

80 The Employment Tribunal's Extension of Jurisdiction (England and Wales) Order 1994 allows employees to bring claims for breach of contract in the employment tribunal for the recovery of damages (other than a claim for personal injuries) if

the claim arises or is outstanding on termination of the employee's employment. It must relate to a claim for damages for breach of contract of employment or other contract connected with employment (Article 3 of the 1994 Order and s.3(2) Employment Tribunals Act 1996).

Submissions

81 I heard submissions from the claimant's representative, accompanied by written submissions, and from the respondent.

Conclusions

Time limits (Issue 1)

82 Although 10 July 2023 was last day the claimant accepted and worked a shift I have found that he resigned on 20 July 2023 (paragraph 20).

83 Anything that occurred before 19 July 2023 is not within the time limit unless there was a continuing course of events. Accordingly, the alleged dismissal claim is in time, but the detriments, including failing the driving assessment, are not in time unless they were part of a series of acts culminating in the alleged dismissal.

84 I find that there was no connection between the resignation and the alleged discrimination, protected disclosures and protected act for the reasons discussed below. As I have found that his act of resignation was not on the grounds of a protected disclosure, protected act or discrimination I find the claims for detriment are out of time (see paragraph 58).

Constructive ordinary unfair dismissal (Issue 2)

85 A claim for 'ordinary' unfair dismissal (s.95 ERA 1996) requires the claimant to have 2 years of continuous service. The claimant did not. There was a break in service between 24 October 2021 and 9 July 2022. During that 10 month gap the claimant did not do any work for the respondent (paragraph 19). He was working for BFL or he was in Uganda and that broke the continuity of employment.

86 Accordingly, the tribunal has no jurisdiction to decide the claim for ordinary unfair dismissal, and the claim does not succeed.

87 Moreover, in order to bring a claim for unfair dismissal the claimant must be an employee within the definition of the ERA 1996. I was not asked to determine the claimant's employment status. However, the claimant's representative appeared to accept that he was not an employee, referring to him in written submissions as an 'agency worker' and in oral submissions conceding that the respondent was not obliged to provide work.

88 In any event I found the claimant did not resign because of a breach of trust and confidence. The claimant confirmed in evidence that he left because he wanted to be a driver. He could not be a driver because he did not pass the respondent's assessments. I found that the failures were warranted and genuine failures and accordingly the respondent's conduct was not a breach of the term of trust and confidence (paragraphs 37-48).

Dismissal under s.103(A) of the Employment Rights Act 1996 (Issue 2)

89 The right to bring a claim of automatic unfair dismissal claim under s.103(A) ERA 1996 is only available to employees. Workers must argue that the dismissal was a detriment and bring a claim instead under Section 48 (paragraph 62). As the claimant appears to accept he was a worker and not an employee he is not able to bring claim under ERA 1996 but can bring a claim that his dismissal was a detriment under s. 48 ERA 1996.

90 Although dismissal is not listed in the list of issues under detriment, I consider it below as a detriment.

Whistleblowing: protected disclosures (Issue 3)

91 In order to succeed in a whistleblowing the claimant first needs to establish that the disclosures he made were protected disclosures.

92 I have found that the first email to AA was not a protected disclosure because it did not allege one of the matters required by s.43(B) of the Employment Rights Act.

93 In submissions the claimant's representative argued it was alleging a breach of legal obligation because the email was purporting to support JMD in asserting his employment rights. I reject that contention. The email does not refer to employment rights. It refers to office politics and shifts allocated according to the personal relationship with the Transport Team. Moreover, JMD had not actually been dismissed, and the claimant has not specified what legal rights he was referring to. I find the claimant was at most setting out a moral or ethical objection rather than alleging a breach of a legal obligation (paragraph 25).

94 I find that the email to WA on 21 May 2023 was a protected disclosure because it relates to smoking in vehicles which was a health and safety matter.

Victimisation: Protected Act (Issue 6)

95 The claimant relies on the email to AA about JDM's treatment as a protected act. I find it does not amount to a protected act under s.27(2) of the Equality Act 2010. It did not assert that JMD's treatment was due to race or any other protected characteristic.The claimant confirmed that in oral evidence (paragraph 24).

Detriments (Issues 3 and 6)

96 The claimant asserts that he was subjected to detriments for whistleblowing and victimisation. For completeness I discuss these below, even though I have found that the claims are out of time (paragraph 83). I will include dismissal in the list of detriments for the reasons set out in paragraph 89 above.

97 I have found that there was not a protected act. I have found that the only protected disclosure was the email to WA dated 21 May 2023. Accordingly, only detriments on or after 21 May 2023 need to be considered.

98 The relevant alleged detriments are therefore fewer shifts, failure to provide a reference in October 2023 and refusing to give the claimant a "pass" for his

driving qualification. The statutory test is whether the worker was subjected to the detriment by the employer "on the ground that" he had made a protected disclosure.

99 The claimant did fewer shifts in June and July 2023, but the claimant did not establish that arose from the email to WA. I found it unlikely that DJ knew anything about the email. Even if he had known about it, I accepted DJ's evidence that it would not have affected the number of shifts he decided to offer the claimant (paragraph 36).

100 Regarding failure to give the claimant a pass for his driving assessment I find that DT did not know about the email the claimant sent to WA (paragraph 48). The assessment failure was for a genuine reason and was not on the grounds of the protected disclosure.

101 Regarding failure to give a reference, the respondent gave a very complimentary reference in July 2023. They did not give a reference in October 2023 because they were either not asked or were not aware that one had been requested (paragraph 53). The failure to give a reference was not related to protected disclosure.

102 In respect of the detriment of dismissal, I have found that the claimant was not constructively dismissed. He resigned because he failed the assessments and could not be a driver for the respondent. Failing him was not a breach of the trust and confidence term; it was a genuine failure because the claimant did not reach the required standard. Neither the failure of the test nor the subsequent resignation of the claimant was on the ground that the claimant had made a protected disclosure.

103 Accordingly, I find the claimant was not subjected to any detriments as a result of his email to WA.

<u>Harassment and discrimination on the grounds of race (Issues 4 and 5)</u>

104 I found that the conduct set out at 5.1.1 and 5.1.4 of the list of issues did not occur (paragraphs 40-46).

105 Although DT informed the claimant that he had failed to meet the required standard and suggested retraining, that was not related to the claimant's race but because he had not met the required standard (paragraph 48).

106 I have accordingly found no facts from which I could decide in the absence of any other explanation that the respondent contravened the Equality Act 2010, and the burden of proof does not shift.

107 In respect of harassment, I did not find that the claimant was intimidated or subjected to a humiliating or offensive environment by DT. As stated above, I did not find that the conduct at 5.1.1 and 5.1.4 occurred. I accepted DT's evidence that DT followed his normal professional practice and conducted the assessment amicably and fairly. He did tell the claimant that he had failed to reach the required standard, and he required retraining, but the failure was warranted, and it was not reasonable for the claimant to find it violated his dignity or was

intimidating, hostile, degrading, humiliating or offensive.

Breach of contract (Issue 7)

108 The claimant asserts that allowing smoking in vans was a breach of contract. Although his representative referred in submissions to s.100 ERA 1996, that was not referred to previously in evidence or the issues. In any event, I have found that the reason the claimant resigned was failing his driving test, not because of the smoking in vehicles.

109 I decided that there was not a contractual liability to pay for shifts which the claimant alleged were cancelled on 19 April 2023, 28 April 2023, and 3 May 2023. I took into account the wording of the contract and I accepted DJ's evidence that the normal practice was to give notice of a cancelled shift on the day of the shift.

110 The claimant alleges that the respondent breached his contract by suspending him without proper cause around 24 March 2023. I find that the claimant was stood down by an employee of BFL because of concern about the Working Time Regulations and that was not a breach of his contract (paragraph 32).

Summary

111 Accordingly, all of the claimant's claims are dismissed.

Approved by:

Employment Judge S Matthews

9 June 2025

JUDGMENT SENT TO THE PARTIES ON

13/06/2025

FOR THE TRIBUNAL OFFICE

Notes

Reasons for the judgment having been given orally at the hearing, written reasons will not be provided unless a request was made by either party at the hearing or a written request is presented by either party within 14 days of the sending of this written record of the decision. If written reasons are provided they will be placed online.

All judgments (apart from judgments under Rule 51) and any written reasons for the

judgments are published, in full, online at *https://www.gov.uk/employment-tribunal-decisions* shortly after a copy has been sent to the claimants and respondents.

If a Tribunal hearing has been recorded, you may request a transcript of the recording. Unless there are exceptional circumstances, you will have to pay for it. If a transcript is produced it will not include any oral judgment or reasons given at the hearing. The transcript will not be checked, approved or verified by a judge. There is more information in the joint Presidential Practice Direction on the Recording and Transcription of Hearings and accompanying Guidance, which can be found here:

www.judiciary.uk/guidance-and-resources/employment-rules-and-legislation-practice-directions/