EMPLOYMENT TRIBUNALS

Claimant: Mr G Subhani

Respondent: Solent Blue Line Limited

Heard at: Southampton **On:** 19 and 20 November 2024

Before: Employment Judge Self
Mr L Wakeman
Mr P English

Appearances

For the Claimant: In Person

For the Respondent: Ms S Cummings - Counsel

JUDGMENT

1. By consent Claim No. 1401418/2024 shall be heard at the same time as 1401417/2024.

2. The Age discrimination claim in 1401418/2024 is dismissed upon with withdrawal.

3. The Claims of Indirect Associative Disability Discrimination pursuant to section 19 of the Equality Act 2010 are dismissed as the Tribunal does not have jurisdiction to consider the Claims brought thereunder.

4. The Claims of Race Discrimination set out at paragraphs 3.1.1 to 3.1.4 inclusive of the Revised List of Issues, as further amended at this hearing, were not part of an act continuing over a period and have all been lodged outside of the statutory time limit and it is not just and equitable for time to be extended. Those claims are dismissed.

5. The Claim for holiday pay / unlawful deduction of wages (one day's pay) was not brought within the statutory time limit when it was reasonably practicable for it to have been so brought and, accordingly, the Tribunal has no jurisdiction to consider that claim.

6. The Claim of Race Discrimination set out at 3.1.5 is not well-founded and is dismissed.

WRITTEN REASONS

(AS REQUESTED BY THE CLAIMANT ON 17 DECEMBER 2024 AND COMMUNICATED TO THE EMPLOYMENT JUDGE ON 12 JANUARY 2025)

1. The Claimant lodged his Claim on 22 June 2023 following ACAS Early Conciliation between 19 May 2023 and 2 June 2023. On his Claim Form the Claimant marked that he was claiming disability discrimination, race discrimination and a claim for holiday pay.

2. The Claimant remained an employee of the Respondent at all material times and issued ACAS Early Conciliation on 7 March 2024 which concluded on 18 April 2024 He then issued a second claim on 14 May 2024 for age and disability discrimination.

3. There was a Case Management Hearing on 15 May 2024 which was heard by EJ Christensen. At that appointment, directions were given to bring the matter to this final hearing today. The issues were considered and it was identified that the disability discrimination claim was an indirect associative discrimination claim based upon his children's disabilities (autism). Whether or not the Tribunal had jurisdiction to consider such a claim was marked as an issue to be determined at this final hearing.

4. It was noted at that hearing that the Claimant's race discrimination claim was wholly unparticularised save that it was related to his Pakistani origin. Directions were given for the Claimant to particularise those claims and in the final list of issues the race discrimination claims were as follows:

   a) 2010 – paid Alan Swanick industrial injury payment following an assault but only paid Claimant 5 weeks' sick pay
   b) 2012-granted T Johnstone a weekend off to care for his adopted grandson.
   c) 2013- granted B Tull a request to work Friday and Saturday.
   d) Issued a final written warning to claimant and did not issue the same sanction to Kevin green for the same offence (3 August 2017).
   e) 2023 - allowed a couple with a new child a fixed line rota so that one parent could work earlies and one parent could work lates.

5. In addition the Claimant sought one day's unpaid holiday.

6. The Tribunal following discussion with the parties determined that it was appropriate to consider the issue of time limits in respect of the race

discrimination claims and the holiday pay claim. It was accepted that the Claim set out at paragraph 4 (e) above had been lodged within the time allowed but other claims going back some 14 years required some consideration.

7. Time limits under the Equality Act 2010 are dealt with at section 123 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…

(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.

8. To establish whether a complaint of discrimination has been presented in time it is necessary to determine the date of the act complained of, as this sets the time limit running. S.123(3) EqA makes special provision relating to the date of the act complained of where there are a number of alleged acts in that conduct extending over a period is to be treated as done at the end of that period and failure to do something is to be treated as occurring when the person in question decided on it.

9. Consideration of time limits in discrimination cases is centred on whether there is continuing discrimination extending over a period of time or a series of distinct acts. Where there is a series of distinct acts, the time limit begins to run when each act is completed, whereas if there is continuing discrimination, time only begins to run when the last act is completed.

10. In **Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530, CA**, the Court of Appeal made it clear that it is not appropriate for employment tribunals to take too literal an approach to the question of what amounts to ‘continuing acts’ by focusing on whether the concepts of ‘policy, rule, scheme, regime or practice’ fit the facts of the particular case. Those concepts are merely examples of when an act extends over a period and should not be treated as a complete and constricting statement of the indicia

of 'an act extending over a period' The question was whether that was an act extending over a period, as distinct from a succession of unconnected or isolated specific acts for which time would begin to run from the date when each specific act was committed.

11. In **Lyfar v Brighton and Sussex University Hospitals Trust 2006 EWCA Civ 1548,** the Court clarified that the correct test is to look at the substance of the complaints in question and determine whether they can be said to be part of one continuing act by the employer.

12. In **Aziz v FDA 2010 EWCA Civ 304, CA** the Court noted that, in considering whether separate incidents form part of an act extending over a period, ***'one relevant but not conclusive factor is whether the same or different individuals were involved in those incidents'***.

13. In a case concerning a continuing act of discrimination, an employment tribunal will be required to determine when the continuing act came to an end in order to calculate the limitation date. **Aziz v FDA** (above) also dealt with the procedural issue of on what basis should employment tribunals approach the question whether a claim is time-barred at a preliminary hearing or as a preliminary point. The test to be applied at the preliminary stage is to consider whether the claimant had established a prima facie case, or, to put it another way***, 'the claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs'***.

14. **Conclusion on conduct extending over a period** – The point at issue was explained to the Claimant but notwithstanding that the Claimant's representations were tangential at best. The Respondent pointed out that the incident before the in-time issue was approximately six years before and did not specifically relate to the issue in 2023. Three of the allegations had taken place over 10 years before the Claim with different individuals taking one off decisions about staff of whom there was no indication that they were appropriate comparators. The Tribunal were unable to discern anything that might be supportive of there being any suggestion that the acts could be linked to be a continuing act or constituted an ongoing state of affairs. We were satisfied that they were properly considered as a series of individual allegations.

15. In those circumstances we then had to consider as to whether it would be just and equitable for time to be extended.

16. The three-month time limit for bringing a discrimination claim is not absolute: employment tribunals have discretion to extend the time limit for presenting a complaint where they think it 'just and equitable' to do so.

17. In **Robertson v Bexley Community Centre t/a Leisure Link 2003 IRLR 434,** the Court of Appeal stated that when employment tribunals consider exercising the discretion to extend time the burden of showing why falls on the Claimant.

18. In exercising the discretion to allow out-of-time claims to proceed, tribunals may also have regard to the checklist contained in S.33 of the Limitation Act 1980 (as modified by the EAT in **British Coal Corporation v Keeble and ors 1997 IRLR 336)**. S.33 deals with the exercise of discretion in civil courts in personal injury cases and requires the court to consider the prejudice that each party would suffer as a result of the decision reached and to have regard to all the circumstances of the case — in particular, the length of, and reasons for, the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued has cooperated with any requests for information; the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action. **In Department of Constitutional Affairs v Jones 2008 IRLR 128**, the Court of Appeal emphasised that these factors are a ***'valuable reminder'*** of what may be taken into account, but their relevance depends on the facts of the individual cases, and tribunals do not need to consider all the factors in each and every case.

19. The relevance of the factors set out in British Coal Corporation (above) was revisited in **Adedeji v University Hospitals Birmingham NHS Foundation Trust 2021 ICR D5**. It was concluded that the best approach for a tribunal in considering the exercise of the discretion is to assess all the factors in the particular case that it considers relevant, including in particular as noted in Keeble, the length of, and the reasons for, the delay. The Court noted that, while it was not the first to caution against giving Keeble a status that it does not have, repetition of the point may still be of value in ensuring that it is fully digested by practitioners and tribunals.

20. An important factor is to weigh up the relative prejudice that extending time would cause to the Respondent on the one hand and to the claimant on the other.

21. **Conclusions re Just and Equitable extension** – Again the Claimant offered the Tribunal nothing by way of explanation as to why it would be just and equitable for time to be extended, despite being given every opportunity. The Tribunal reflected upon the difficulties a litigant in person faces in relation to proceedings such as these and sought to take into account the difficulties of bringing claims especially when still employed and also weighed into equation how little spare time the Claimant would have taking into account

his child-care responsibilities. Having said that these claims were only raised with the Respondent following orders from the Tribunal and so in reality they did not know about them until mid- 2024 by which time at least three were over ten-year-old and one just under seven. The Respondent made representations about the difficulties they had in relation to the allegations. They had no information or details about the 2010 – 2013 allegations and the information in relation to the 2017 matter was only recorded in documents and no witnesses were available to deal with the issue first hand.

22. In conclusion we are satisfied that the Claimant has failed to discharge the burden upon him that it would be just and equitable for time to be extended. We have balanced all the matters above and concluded that in the absence of any good reason for time to be extended and the undoubted prejudice the Respondent would face in defending these claims after such a length of time it would not be just and equitable for time to be extended and the Tribunal does not have jurisdiction to consider the race discrimination matters set out at 4 (a) to 4(d) above.

23. **Time Limits and the Holiday Pay claim –** The holiday pay claim is in respect of a day's pay which the Claimant asserts that he should have been paid and is pleaded as an unauthorised deduction from wages. The Claimant's day he was claiming should have been paid should have been paid at the end of August 2022. It follows that the Claimant should have been brought on or before 29 November 2022 and so his claim was just under 7 months out of time. The test for unauthorised deductions is whether or not it was reasonably practicable for the Claimant to have brought within the statutory time limit and if it presented within a reasonable time thereafter. Despite being told of the legal test to be applied the Claimant did not put forward any cogent argument as to why his claim was filed late and why it was filed when it was. Again we took into account the Claimant's family and work commitments and also that he was not in receipt of legal advice but in all the circumstances we were satisfied that it would have been reasonably practicable for such a claim to be brought in time and so the Claim was dismissed. In any event we note that when the Claimant brought the issue to the attention of management in his grievance which is detailed below he was given an extra day's holiday. We are satisfied that even had the Claim been brought in time it was of no merit.

24. The next issue to consider is whether the Tribunal has the jurisdiction to consider an indirect associative discrimination claim as set out at paragraph 4 of the List of issues. The allegation is that the Respondent applied as a PCP the Flexible Working Policy and whether that policy placed the Claimant and others who shared the characteristic at a disadvantage i.e. not being able to attend to his caring and parental responsibilities for his disabled children. The Respondent asserts that the way it dealt with the Claimant under the

Flexible Working Policy was a proportionate means of achieving the legitimate aim of ensuring that the Respondent's services were met.

25. Again the Claimant was able to offer little in his representations about this particular issue which we accept was a legally difficult one and it was incumbent on the Tribunal to consider with close scrutiny the Respondent's legal representations that such a claim should be dismissed on account of the Tribunal not having jurisdiction to do so.

26. The Respondent's representations ran as follows:

a) Under section 19 of the EqA the Respondent contended that the EqA did not allow for a claim of associative indirect discrimination because the Claimant must have the protected characteristic and must share the protected characteristic of the disadvantaged group.
b) Whilst section 19A of the EqA was not relevant to this Claim because it only came into force on 1 January 2024 it was considered relevant to see the progression of the case law that led to it being enacted.
c) In the Bulgarian case of **Chez (C-83/14) EU:C:2015:480** the ECJ had held that a Claimant could establish indirect discrimination even if they did not share the protected characteristic with the disadvantaged group. It was contended that this development had led to section 19A EqA being enacted.
d) The Respondent took the Tribunal to a number of first instance authorities where the issue had been looked at such as **Follows v Nationwide Building Society ET/2201937/18**, **Rollett v British Airways Plc ET/3315412/2020** and **Ahmed v Bristol City Council ET/1406711/2020**. Of these three cases only one was appealed and it came before Mrs Justice Eady in the Employment Appeal Tribunal and it was said that there were a number of comments by Eady J that was supportive of the Respondent's position in this case. It should be noted that **Follows** decided in a way that would be favourable to the Claimant in this case whereas **Rollett** and **Ahmed were** found in a way beneficial to the Respondent's position. We remind ourselves that none of the first instance decisions bind the Tribunal.

27. We have considered each of the authorities cited and have concluded that we do not have jurisdiction over the type of indirect claim brought by the Claimant. In **Rollett** the Tribunal Judge discussed the two types of associative discrimination claims, which were described as a Chez style claim or a Follows type claim. The former involves a Claimant who did not have the relevant protected characteristic but who nonetheless suffered from the same disadvantage as those who did have it. The latter type of case involves situations where the Claimant who did not possess the same protected characteristic associated with a person who did and suffered a

disadvantage which was unique to that association. The person to whom he associated did not suffer the same disadvantage.

28. The Claimant in this case is in a **Follows** type situation. It was not a **Chez** situation where the Claimant who was suffering the same substantial disadvantage as those around them who suffered the relevant protected characteristic. This Claimant was asserting that the disadvantage was suffered uniquely through their association with his children who were not disadvantaged in the same way. We agree that the Respondent's position is supported by the obiter comments of Eady J at paras 56-58, 62 and 64 of the **Rollett** decision, particularly the latter two paragraphs where Eady J effectively endorses the Tribunal's rejection at first instance. Further we note that the addition to the EqA of section 19A also seems to endorse the findings we have made. Section 19A was designed to bring UK law into line and effectively implement a Chez type situation as Claimants utilising that section must share the disadvantage with the protected group.

29. The Indirect Claim as pleaded is dismissed because the Tribunal do not have the jurisdiction to consider it.

30. It is clear to the Tribunal that the Claimant's primary position is that over a period of time his requests for amended hours to ensure that he can spend what he considers to be the optimum time with his disabled children have not been properly considered and that the Respondent has acted unfairly and discriminatorily in the way that they have balanced the needs of the employee against the needs of the employer. His disappointment and concern over the rejections are clear.

31. Due to the legal findings made above the Claimant is left with a direct discrimination claims on account of his Race (Pakistani heritage and non-white). Erroneously in the original Judgment issues a paragraph was inserted re direct associative discrimination but the final List of Issues does not include such a claim. The Claimant has remarked the difficulty in proving such claims and has largely relied upon what he describes as ***"a feeling"*** he has. We deal with the evidence before us.

32. Nothing which we say should be taken as being critical of the Claimant. He is clearly a man who has done all that he can to try and bring about a work life balance which is favourable to his children. That is human and entirely understandable. Any Flexible Working request needs to be considered by the Respondent carefully but they have to balance the needs of the Claimant with their own needs and it is inevitable that not everything that is asked for can always be done.

33. The Respondent is a company that runs bus services in Southampton and the surrounding areas. Unilink is one trading name and Blue Star is another

trading name and the Claimant was one of 70-80 drivers working for Unilink. The Claimant is a bus driver who has long service with the Respondent and its predecessors.

34. There is a flexible working policy in place which follows closely the statutory scheme. There is no need to go into further detail about the specifics of the policy.

35. We accept that normally PCV drivers such as the Claimant work any 5 days in 7 on a rota system that would normally consist of early, middle, and late shifts, seven days a week, due to length of the weekly operation. Prior to 2015 it was agreed that the Claimant would work a fixed 4-day pattern over Monday, Tuesday, Wednesday, and Saturday.

36. The Tribunal notes that the Respondent were content for the Claimant not to work Fridays because of the Claimant's religious obligations. The Claimant is a Muslim. When considering the allegations of race discrimination against the Claimant because of his race we bear in mind the Respondent's attitude towards his religion and note that the Claimant's needs in that regard were facilitated.

37. This case focusses upon an application for flexible working that requested finishes no later than 5 pm so that the Claimant could attend to his children's needs. The Claimant made regular requests for Flexible Working in 2015, 2016, 2017, 2019, 2020, 2021 and 2023. The Claimant did not challenge the evidence from Respondent in this regard.

38. The outcome of these requests were as follows:

    a) July 2015 – the Claimant asked to change his pattern to work Monday, Tuesday, Thursday, and Saturday and this was agreed.

    b) June 2016 – the Claimant wanted to finish at 1800 as opposed to 2007 on a Thursday. The Respondent indicated that this would not be possible at that time but there were planned structural changes in September when the matter could be looked at again. When September came the Claimant was offered an 1844 finish which he accepted and a permanent change to that effect was applied.

    c) In August 2017 the Claimant applied to work Monday to Thursday because of the needs of one of his sons. At a meeting it was pointed out that because of a swap that the Claimant had already made with another driver informally the Claimant was already doing these days and the Claimant elected to continue with the informal arrangement.

d) In June 2019 the Claimant sought to finish at 1800 to 1830 on three days with a 1615 finish on one day. That was refused by the Respondent because an inability to reorganise work among the Claimant' colleagues and insufficiency of work during the hours he had requested. The Respondent confirmed that if the Claimant moved to Bluestar as opposed to Unilink they could organise a fixed line rota Monday to Thursday finishing no later than 1830. That would have also meant a change to the Claimant's terms and conditions (Bluestar not Unilink) and the Claimant declined.

e) The Claimant made the same request in September 2020 and again it was refused. The Claimant was already benefitting from not working any weekends and the vast majority of buses did not return to the depot until after 1830.

f) In September 2021 the same request was made. The Claimant's finish times were 1845 on two days, 1850 on one day and 1740 on the fourth day. The Respondent indicated that if the Claimant worked different days than Monday to Thursday the matter could be looked at further but the Claimant wanted to work the same days as it dovetailed into his wife's work and was not prepared to look at other options.

g) The Claimant applied again in September 2022 but due to an administrative oversight it was not considered until the very end of January 2023. It was refused but the Respondent pointed out that the Claimant had been swapping shifts with another driver for 18 months in order to achieve the required finishing times and whilst the Respondent was content for that to continue they could not offer him a specific fixed line shift that accommodated his requests.

39. The Tribunal finds that at the end of these discussions the Claimant was not working what could be described as a standard pattern. He had the benefit of not working over what was a long weekend which was to the Tribunal's mind highly favourable. It accommodated both his religious and childcare needs – Friday prayer and Sat and Sun children - whilst his wife was working.

40. We find that he had been given an option to his working times that would accommodate precisely what he wanted but he did not wish to do this because of certain perks that came with the Unilink role – Attendance Bonus, better overtime rates and paid breaks. It was a matter of priority and the Claimant chose not to have the guarantee of an early finish. That was his choice although we find, in any event, that all of the above demonstrates flexibility on the part of the Respondent. The Claimant did none of the arguably more antisocial shifts i.e., late at night or at the weekends which needed to be picked up by other colleagues.

41. We understand that the Claimant did not get all he wanted but he got a substantial amount. He considered the Respondent to be unreasonable but we find that proper consideration was given and substantial efforts made by the Respondent to assist the Claimant.

42. The discrimination claim we have to consider is in relation to the Claimant's application for Flexible Working made on 1 September 2022 and first dealt with around 31 January 2023. We accept that there was a substantial delay in dealing with the application but note that we do not have an application for breach of the Flexible Working provisions within the Employment Rights Act 1996 before us. The Respondent should be mindful, however, that such claims could be brought in the event that applications are not dealt with in a reasonable manner or not dealt with in the decision period.

43. We note that Ms Perkins' explanation was ***"administrative error"***. We are prepared to accept that evidence. It was the reason given at the time and an apology was given at the meeting on 9 February 2023. At the meeting Ms Perkins asked why the Claimant was putting in the request and the Claimant explained that it was to look after his children who had been diagnosed with autism. He needed to be home at 5 pm so that he could spend time with the children until their bedtime at 2000. The Claimant stated that he needed to entertain the children, to take them out for a walk or to go to Sainsburys.

44. The Claimant was accompanied by his Trade union representative who understood that there were limited shifts available and that he understood the point made by the Respondent about ***"fairness across the depot"***.

45. The application was refused and Ms Perkins considered that there were ***"profound implications"*** if the guaranteed finishes were permitted. She confirmed that if he could swap duties with another willing driver then that would be permitted but she could not guarantee early finishes each day on a fixed line, She informed the Claimant that he could appeal her decision and all of the above was confirmed in a letter dated 9 February.

46. On 11 February the Claimant did appeal now stating that he would like to finish at 1600 which was even earlier than his request at first instance (193-194).

47. On 3 March Ms Friend who had recently started in HR asked the Claimant for a meeting and it was scheduled for 8 March. It was a wider meeting as the Claimant had also raised complaints in respect of the handling of his flexible working request. She dealt with it as a grievance and also as an appeal.

48. At that meeting much of the same ground was covered. It was confirmed that the difficulty for the Respondent was that they had been unable to rearrange their work among existing staff nor would the Respondent be able to recruit

for the changes required and further that consent would have an impact upon the ability to meet customer demand. It was also pointed out (again) that a solution had been provided by the Respondent that had been rejected because certain benefits would be lost by the Claimant and that the Respondent had permitted informal swaps to assist the Claimant. The Trade Union representative also remarked that if the Claimant's request was granted it would likely be unpopular with colleagues who themselves would want similar changes.

49. On 14 March Ms Friend wrote back to the Claimant and stated that she was satisfied that the Claimant's applications were considered thoroughly and fairly. She stated that ***"We accommodated elements when we could and offered alternatives / compromises for other elements which (the Claimant) declined".*** She upheld the grievance in relation to the time it had taken to deal with his last request and that communications had been held with managers to ensure that in the future such delays did not occur. She offered the Claimant the right of appeal her grievance and in effect a second appeal of the Flexible Working.

50. The Claimant did appeal that grievance but the original decision was upheld by Mr Sherrington. The Claimant was given a further opportunity to state his position and it appears went through the lengthy history. We have considered the findings of Mr Sherrington and find them to be compelling. The Claimant's grievance in respect of one day's holiday was granted and the Claimant was given an extra day off which he needed to take in the holiday year.

51. Section 136 of the Equality Act 2010 deals with the burden of proof to be applied for both harassment and direct discrimination claims. That section reads as follows so far as is relevant:

> **136 (1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2)If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**

52. As discrimination is frequently covert and therefore can present special problems of proof, section 136 EqA provides that, once there are facts from which an employment tribunal could decide that an unlawful act of

discrimination has taken place, the burden of proof 'shifts' to the respondent to prove a non-discriminatory explanation.

53. If a Claimant is unable to establish a clear case of discrimination, he or she can attempt to shift the burden of proof onto the respondent by establishing what is commonly known as a ***'prima facie case of discrimination'***. It is clear from S.136(2) that a prima facie case of discrimination is established if there are facts from which the court could decide, in the absence of any other explanation, that the Respondent has contravened the provision concerned (i.e. unlawfully discriminated against the Claimant).

54. The issue of what amounts to a prima facie case of discrimination lies at the heart of the shifting burden of proof. It will depend on what inferences can be drawn from the surrounding facts.

55. In **Madarassy v Nomura International plc 2007 ICR 867**, it was stated that: ***"The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."***

56. A failure of the Respondent to provide an explanation, without more, is not capable of shifting the burden of proof. Having said that Tribunals have been encouraged to retain a flexible approach when applying the burden of proof. In **Laing v Manchester City Council and anor 2006 ICR 1519** the EAT, emphasised that ***"the process of drawing an inference of discrimination is a matter for factual assessment and is situation-specific"***.

57. Direct Discrimination is defined at section 13 of the Equality Act 2010 which, so far as is relevant, reads that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.

58. A successful direct discrimination claim depends on a tribunal being satisfied that the claimant was treated less favourably than a comparator because of a protected characteristic. It is for the tribunal to decide as a matter of fact what is less favourable. The test posed by the legislation is an objective one. Under the EHRC Employment Code when it explains less favourable treatment in the context of direct discrimination it records that: ***"The worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to be treated differently from the way the employer treated, or would have treated, another person."***(Para 3.5).

59. It follows from the wording of section 13 (1) of the EqA that the statutory comparator must not share the claimant's protected characteristic. S.23(1) of

the EqA provides that on a comparison for the purpose of establishing direct discrimination there must be ***'no material difference between the circumstances relating to each case'***. In **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337**, Lord Scott explained that this means that ***"the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class***". That said the EHRC Employment Code makes it clear that ***"what matters is that the circumstances which are relevant to the Claimant's treatment are the same or nearly the same for the Claimant and the comparator"*** (para 3.23).

60. In this matter the Claimant has not identified an actual comparator and in those circumstances a hypothetical comparator is put forward at 3.2.1 of the List of issues ***"an employee who did not share the Claimant's philosophical belief but who in all other material respects did not differ from the Claimant."***

61. The existence of an evidential basis for a tribunal to find that the Claimant has suffered detrimental treatment by reason of the relevant protected characteristic is not, in itself, sufficient grounds for holding that he or she has been unlawfully discriminated against contrary to S.13. It has also to be clearly established that, in the absence of a real comparator, a hypothetical comparator, correctly constructed to include all the relevant circumstances apart from the relevant protected characteristic, would have been treated differently (i.e. more favourably). In **Gould v St John's Downshire Hill 2021 ICR 1, EAT**, Mr Justice Linden put it in the following terms: ***"Where a tribunal does construct a hypothetical comparator, this requires the creation of a hypothetical "control" whose circumstances are materially the same as those of the complainant save that the comparator does not have the protected characteristic… The question is then whether such a person would have been treated more favourably than the claimant in those circumstances. If the answer to this question is that the comparator would not have been treated more favourably, this also points to the conclusion that the reason for the treatment complained of was not the fact that the claimant had the protected characteristic."***

62. There may be circumstances in which the construction of any hypothetical comparator adds little. In **Stockton on Tees Borough Council v Aylott 2010 ICR 1278, CA**, Lord Justice Mummery was of the view that where it was absolutely clear that the treatment in question was on a prohibited ground, the need to construct a comparator was less of an issue. Mummery LJ did acknowledge, however, that a hypothetical comparator should not be dispensed with altogether in such cases as ***"it is part of the process of identifying the ground of the treatment and it is good practice to cross check by constructing a hypothetical"***.

63. In **Shamoon**, the view was taken that, at times, attempting to identify an appropriate actual or hypothetical comparator, may run the risk of failing to focus on the primary question, namely, why was the complainant treated as he or she was? If there were discriminatory grounds for that treatment, then,

as Lord Nicholls said there will ***"usually be no difficulty in deciding whether the treatment… was less favourable than was or would have been afforded to others"***. The Court viewed the issue as essentially boiling down to a single question: did the complainant, because of a protected characteristic, receive less favourable treatment than others? Similar comments were made by the Court of Appeal in Stockton on **Tees Borough Council v Aylott 2010 ICR 1278** where it was stated that***, "…the decision whether the Claimant was treated less favourably than a hypothetical employee of the council is intertwined with identifying the ground on which the claimant was dismissed. If it was on the ground of disability, then it is likely that he was treated less favourably than the hypothetical comparator not having the particular disability would have been treated in the same relevant circumstances. The finding of the reason for his dismissal supplies the answer to the question whether he received less favourable treatment"***.

64. It may be helpful in some cases to consider whether the question of less favourable treatment should be postponed until after the Tribunal have decided why the particular treatment was afforded to the Claimant. In **Law Society and ors v Bahl 2003 IRLR 640, EAT**, one of the consequences of this approach was that where the tribunal has addressed the primary question, it will not generally be necessary for it actually to formulate the precise characteristics of the hypothetical comparator. Once it is shown that the protected characteristic had a causative effect on the way the complainant was treated, it is almost inevitable that the effect will have been adverse, and therefore the treatment will have been less favourable than that which an appropriate comparator would have received. Similarly, if it is shown that the characteristic played no part in the decision-making, then the complainant cannot succeed and there is no need to construct a comparator.

65. A complaint of direct discrimination will only succeed where the tribunal finds that the protected characteristic was the reason for the Claimant's less favourable treatment. In **Gould v St John's Downshire Hill 2021 ICR 1, EAT**, Mr Justice Linden, explained: ***"The question whether an alleged discriminator acted "because of" a protected characteristic is a question as to their reasons for acting as they did. It has therefore been coined the "reason why" question and the test is subjective… For the tort of direct discrimination to have been committed, it is sufficient that the protected characteristic had a "significant influence" on the decision to act in the manner complained of. It need not be the sole ground for the decision… and the influence of the protected characteristic may be conscious or subconscious."***

66. The crucial question, in every case, is why the complainant received less favourable treatment and was it on the ground of the relevant protected characteristic or for some other reason?

67. In some cases there is no dispute at all about the factual criterion applied by a Respondent. In other words, it will be obvious why the complainant received the less favourable treatment. If the criterion, or reason, is based on

a prohibited ground — in other words, inherently discriminatory or indissociable from the protected characteristic, direct discrimination will be made out.

68. In some cases the reason for the less favourable treatment is not immediately apparent — i.e. the act complained of is not inherently discriminatory. In those it is necessary to explore the mental processes, conscious or subconscious, of the alleged discriminator to discover what facts operated on his or her mind.

69. Direct discrimination can arise in one of two ways: where a decision is taken on a ground that is inherently discriminatory, or where it is taken for a reason that is subjectively discriminatory.

70. The 'but for' test remains one way of showing direct discrimination, but principally in cases where some kind of criterion has been applied that is indissociably linked to a protected characteristic and, in that sense, is inherently discriminatory. However, in other cases, the best approach may be to decide whether allegedly discriminatory treatment was because of' a protected characteristic is to focus in factual terms on the reason why the employer acted as it did. This entails the tribunal considering the subjective motivations — whether conscious or subconscious — of the putative discriminator in order to determine whether the less favourable treatment was in any way influenced by the protected characteristic relied on. To do this, the tribunal will be required to examine evidence as to what the relevant mental processes were in order to identify what operated on the putative discriminator's mind and caused him or her to decide to act in that particular way. Such evidence will include evidence of the decision maker but also evidence as to the context in which the decision was made.

71. We have considered all of that evidence. The Claimant asserts that he has been the victim of direct race discrimination.

72. We find that as an organisation the Respondent have made many accommodations of the Claimant's requests both formally and informally, in reality, a Monday to Thursday pattern finishing in the relatively early evenings either as per his shift pattern plus shift swaps was a uniquely beneficial working pattern compared to others as suggested by Mr Sherrington. We are satisfied that C's requests have been dealt with reasonably save for the one delay. That is not to say that others may have come to a different view but we consider R looked objectively at each request and came to sound conclusions based upon the putative effect of any proposed change. The respondent have been very flexible and they are not obliged to simply agree with everything the Claimant proposes.

73. The process was not perfect i.e., the delay in dealing with the last application, but save for that the process is sound. A process is not flawed just because

the conclusion is contrary to what the Claimant wants. It is a balancing exercise and it appears to the Tribunal that the line was drawn reasonably and for reasons which the R genuinely believed, and were, sound business reasons.

74. We do not consider that Polish couple are actual comparators. We were told and we accept that following the birth of their child they requested to be on opposite duties to accommodate their childcare. Both work full time including weekends and one tends to work early shifts and the other later shifts but with flexibility. When considered that was something that the Respondent could accommodate. At all material times we accept that the Respondent's consideration was based on business efficacy and that an individual's race had nothing to do with agreement or rejection. The Claimant has provided no cogent evidence to suggest why race may have played any part in the decision-making process or that it was a contributor to the decision to reject his request. We are satisfied that a non-Pakistani employee making the same request as the Claimant would also have been rejected. circumstances objectively viewed. We take into account that over a substantial period of time many of the Claimant's requests have been allowed.

75. In fact many others might consider that the Claimant has been heavily favoured and treated far more favourably than others by not working lates or weekends.

76. We note that the first-time race discrimination has been mentioned is in this claim. It was not suggested in the internal process and the Claimant's explanations for why not were inconclusive and lacked any real cogency.

77. For reasons advanced claims we have no hesitation in considering the Claims are not well founded and accordingly they are dismissed.

WRITTEN REASONS APPROVED BY EMPLOYMENT JUDGE SELF

21 February 2025