EMPLOYMENT TRIBUNALS

Claimant: **Mr J Johal**

Respondent: **United Biscuits (UK) Limited**
t/a Pladis

Heard at: **Leicester** **On:** **Friday 15 June 2018**

Before: **Employment Judge Legard**

Members: **Mr M E Robbins**
Mr M Alibhai

Representatives

Claimant: **In Person**
Respondent: **Mr D McCrum, Solicitor**

JUDGMENT

1. The complaint of direct race discrimination is not well founded and is dismissed.

2. The complaint of harassment related to race is not well founded and is dismissed.

REASONS

1. Introduction

1.1 By a claim form presented on 17 October 2017 the Claimant brings complaints of direct race discrimination and harassment related to race. There have been two Preliminary Hearings (one as recently as 11 June) and attempts made by both Employment Judges Macmillan and Ahmed to identify the issues and clarify the factual allegations of both direct discrimination and harassment upon which the Claimant relies.

2. Issues

2.1 The Issues in this case are as follows:

Direct discrimination (s.13; s.39(2)(d) EqA)

(i) Did the Respondent treat the Claimant less favourably than it treated or would have treated others?

(ii) If so, was such treatment because of race?

The allegations of less favourable treatment relied upon by the Claimant in support of his direct discrimination complaint are:

- An alleged failure by the Respondent (more specifically Mr Bowater) to supply the Claimant with relevant CCTV footage;

- A non-specific allegation that the investigation, conducted by Mr Bowwater, was biased against the Claimant;

- An alleged failure by the Respondent to provide the Claimant with an

opportunity to present his case fully or fairly at every stage of the disciplinary process.

The Claimant specifically did not seek to advance a complaint that his resignation/dismissal was itself an act of direct discrimination.

Harassment (s.26 EqA)

(iii) Was the Claimant subjected to unwanted conduct related to race and, if so, what was that conduct?

(iv) If so, did such conduct have the purpose or effect of violating the Claimant's dignity or creating for him an intimidating, hostile, degrading, humiliating or offensive environment?

(v) Was it reasonable for such conduct to have that effect taking into account the other circumstances of the case including the Claimant's own perception?

The specific allegation of unwanted conduct relied upon by the Claimant in support of this complaint is:

- An allegation that Mr Bowater said to the Claimant: "you lot shouldn't be on the books. I want a word with you."

3. Evidence

3.1 The Tribunal heard evidence from the Claimant himself and, on the Respondent's behalf, from Mr Bowater (the Fleet Maintenance Unit Manager at the Midlands distribution centre), from Mr Limb (a Hire Vehicle Operations Manager) and from Mr Leckie (employed at the time as National Transport and Planning Manager). All witnesses were cross-examined. The Tribunal was also referred to a number of documents contained within an agreed bundle comprising approximately 175 pages.

3.2 The Tribunal was also shown camera ('dashcam') and exterior CCTV recordings taken from the Claimant's LGV.

4. Relevant Law

Direct discrimination (s.13 EqA)

4.1 Direct discrimination arises where race, in this case, is the reason for subjecting someone to a detriment in employment. Usually direct discrimination is intentional but not always (for example, direct discrimination based upon stereotyping or assumptions). Direct discrimination is therefore taken to occur where one person is treated less favourably than another is (or has been or would be) treated in a comparable situation because of (race).

4.2 It follows that the key question, in direct discrimination claims, is one of causation – was [race] the effective (even if not the sole) cause of the treatment, judged objectively?

4.3 To show direct discrimination it will generally be necessary for a Claimant to persuade a Tribunal that a person of a different race was or would have been treated differently in the same or similar circumstances. s.23 EqA provides that, on a comparison of cases for the purpose of s13, there must be no material difference between the circumstances relating to each case.

Burden of proof

4.4 The burden of proof provision is set out at s.136(2) EqA and provides as follows:

"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."

It remains for the Claimant to prove his case, and the first stage is that he must raise a prima facie case. First the claimant must prove that the

facts (on which he places reliance for the drawing of the inference of discrimination) actually happened. This means, for example, that if the complainant's case is based on particular words or conduct by the Respondent, he must prove (on the balance of probabilities) that such words were uttered or that the conduct did actually take place—not just that this might have been so - Laing v Manchester City Council *[2006] IRLR 748*.

4.5 The Court of Appeal, in Igen Ltd v Wong [2005] IRLR 258, clarified the position with regard to the drawing of inferences in discrimination cases. The CA specifically endorsed the principles set out in Barton v Investec Securities Ltd [2003] IRLR 332, EAT as applicable to all the types of discrimination affected by the changed burden of proof (the two-stage process). According, to the Court of Appeal in Madarassy v Nomura International plc [2007] IRLR 246 CA, 'could conclude' must mean 'a reasonable tribunal could properly conclude' from all the evidence before it.

4.6 The focus of the tribunal's analysis must at all times be the question whether they can properly and fairly infer [race] discrimination, and, in deciding whether there is enough to shift the burden of proof to the respondent, it will often be necessary to have regard to the choice of comparator, actual or hypothetical, and to ensure that he or she has relevant circumstances which are the 'same, or not materially different' as those of the claimant – *Laing (supra.)*. Simply showing that conduct is unreasonable or unfair would not, by itself, be enough to trigger the transfer of the burden of proof—see Bahl v Law Society [2003] IRLR 640, EAT per Elias J, later approved by the Court of Appeal. See also Khan v Home Office *[2008] All ER (D) 323* in which the Court of Appeal conducted a comprehensive review of the law relating to the reversal of the burden of proof, and commented that 'the recent statutory provisions…need not be applied in an overly mechanistic or schematic way'. This approach was endorsed by the Supreme Court in Hewage v Grampian Health Board [2012] ICR 1054 SC.

4.7 Conduct on the part of an employer that is merely bad or unreasonable is not in itself sufficient to support an inference of discrimination – see, for

example, Bradford Hospital Trust v Al-Shabib [2003] IRLR 4; Eagle Place Services v Rudd [2010] IRLR 486 and Qureshi v London Borough of Newham. In the latter case Leggatt LJ put it thus:

"incompetence does not without more become discrimination merely because the person affected by it is from an ethnic minority."

Harassment (s.26 EqA)

4.8 s.26 EqA provides as follows:

(1) *A person (A) harasses another (b) if-*

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

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

(i) violating B's dignity, or

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

4.9 Conduct shall be regarded as having the effect referred to if, having regard to all the circumstances, including in particular the perception of the person, it should reasonably be considered as having that effect. Liability for harassment requires an investigation either into the alleged perpetrator's state of mind or into the form their conduct takes.

4.10 It is well established, as in other areas of discrimination law, that the simple fact that an employer has behaved badly will not, of itself, prove anything. This point was made by Underhill J in HM Prison Service v Johnson [2007] IRLR 951, EAT *at para 64*, a case in which it had been found by the employment tribunal that the claimant's health problems had been incompetently and insensitively dealt with. That is not enough to prove discrimination or harassment. The employment tribunal in that case was found to have fallen into error by taking the fact of bad treatment as

dispositive of the question whether disability (or something related to it) was the reason for that treatment.

4.11 The fact that the individual is peculiarly sensitive to the treatment accorded him or her does not *necessarily* mean that harassment will be shown to exist. In giving general guidance on 'harassment' in Richmond Pharmacology v Dhaliwal [2009] IRLR 336, EAT Underhill P said that it is a 'healthy discipline' for a tribunal to go specifically through each requirement of the statutory wording, pointing out particularly that (1) the phrase 'purpose *or* effect' clearly enacts alternatives; (2) the proviso in sub-s (2) is there to deal with unreasonable proneness to offence (and may be affected by the respondent's purpose, even though that is not per se a requirement); (3) 'on grounds of' is a key element which may or may not necessitate consideration of the respondent's mental processes (and it may exclude a case where offence is caused but for some other reason); (4) while harassment is important and not to be underestimated, it is 'also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase'.

5. Findings of Fact

5.1 The following findings of fact have been reached on the balance of probability and, unless the contrary is expressly stated, unanimous.

5.2 The Respondent is a relatively large food manufacturing company employing approximately 350 employees. The Claimant is British Asian. He was employed as a LGV driver and based in the Respondent's distribution centre at Ashby-de-la-Zouch.

5.3 There was some evidence before us that the Claimant had had a run-in previously with a particular security guard when based in or visiting the Respondent's depot in Southport. Apparently similar difficulties with this security guard had been experienced by other drivers. There was also passing reference made to a previous driving incident involving the

Claimant, the same having been reported by an off duty Police Officer. However, in both cases, such matters was in no way relevant to the issues that the Tribunal had to decide and indeed precious little time was spent on either matter in evidence.

5.4 The key event in this case took place on 6 August 2017. At the time the Claimant was driving his LGV northbound on the M6, somewhere between junctions 21 and 22. The Claimant was in some roadworks governed by a 50mph speed limit. He was occupying the middle lane. As he approached the end of the roadworks (and 50mph limit zone) a white BMW occupying the slow lane was effectively keeping pace alongside his vehicle. The traffic was relatively light.

5.5 As both vehicles exited the speed limited zone, the Claimant pulled over into the slow lane causing the BMW both to swerve, brake and take immediate evasive action. Fortunately there was a slip road on the BMW's offside which gave it sufficient room to avoid a collision.

5.6 In the investigation and again in evidence, the Claimant maintains that the BMW was or may have been indicating to pull over. The Tribunal scrutinised the relevant CCTV footage and, having done so, could see no suggestion of the BMW indicating. Indeed it is abundantly clear that the Claimant's sudden manoeuvre caught the BMW by surprise and it was simply fortuitous that there was an adjacent slip road.

5.7 The BMW then passed alongside the Claimant's lorry and, in doing so, took photographs of both the cab and trailer, presumably for identification purposes. The BMW then overtook the Claimant's vehicle before pulling back into the slow lane.

5.8 At both the investigation and disciplinary stages the Claimant suggested that, once the BMW had overtaken him and pulled back into the slow lane, it performed a "brake and dive" manoeuvre. Once again the CCTV footage simply does not bear that out. On the contrary there is no evidence whatsoever of the BMW braking. The BMW pulls into the slow lane at a safe and respectful distance from the Claimant's vehicle and then begins to accelerate away. However, as the BMW does so, the Claimant

pulls his vehicle back into the middle lane, flashing his lights as he does so. There is no reason for that manoeuvre other than to vent his frustration and displeasure at the occupants of the BMW.

5.9 Approximately two days after this incident, the Respondent received a complaint by e-mail from the driver and occupant of the BMW alleging that the Claimant had driven aggressively and dangerously. Within that e-mail the facts (broadly as narrated above) are rehearsed. The author goes on to say as follows:

"I have the highest regard for professional drivers of large vehicles. It is a demanding and pretty skilled job and does not generally get the appreciation deserved. However instances such as this do a great disservice to both the driving profession and (AS I AM SURE YOU ARE AWARE) to your company image."

5.10 At the time the complaint was received Mr Leckie was on holiday. The matter was passed to Mr Hooton, the National Transport Controller. In turn Mr Hooton instructed Mr Bowater to conduct an investigation. Mr Bowater was very well placed to do that on account of his extensive experience and expertise in LGV matters. The Tribunal accepts that Mr Bowater had had no prior dealings with the Claimant.

5.11 The Claimant suggested in evidence there had been a couple of occasions when Mr Bowater had failed to acknowledge him as they passed each other on site. However he could provide no dates or context in support. Mr Bowater was unable to recollect either incident. The Tribunal simply does not accept that Mr Bowater deliberately chose to ignore the Claimant in the manner alleged. On the contrary the Tribunal accepts Mr Leckie's and Mr Limb's description of him as a reasonable and approachable manager. The Tribunal is in no doubt that, had the Claimant greeted him in passing in the manner alleged, the greeting would have been reciprocated. There was no possible motive or reason for Mr Bowater to ignore the Claimant.

5.12 On 10 August Mr Bowater met up with the Claimant in the 'McVitie's' meeting room. The main purpose of that meeting was to hand deliver a

letter inviting the Claimant to an investigation meeting. Mr Bowater was accompanied by Mr Limb. Shortly before the meeting took place, Mr Bowater had seen the Claimant in the open plan area of the transport office. Mr Bowater had entered that office through double doors that were on the diametrically opposite side from the doors that led to a staircase that in itself led down to the reception area.

5.13 The Claimant alleges that he met Mr Bowater at the top of the stairs and, on doing so, that the latter had said to him

"you lot shouldn't be on the books. I want a word with you."

The Tribunal unhesitatingly rejects that allegation. First of all the Tribunal was impressed by the evidence of Mr Bowater. The Tribunal found him to be not only credible but also coherent and straightforward. The Tribunal was equally impressed by the evidence of Mr Limb, short though it was. The Tribunal noted that the Claimant said nothing about this alleged remark or comment at the time or indeed subsequently at any stage, whether to his trade union representative or to his manager or indeed Mr Leckie. Interestingly the Claimant went out of his way to describe Mr Leckie in extremely favourable terms, describing him as "open minded and liberal" and so on. In those circumstances, the Tribunal considers it strange that the Claimant did not seek to confide in Mr Leckie what he alleged Mr Bowater had said to him. He could have also, of course, confided in one or other of his trade union representatives but elected not to do so. The Claimant was familiar with the internal grievance process which he could also have followed and the Tribunal does not accept the Claimant's position that he simply failed to do so for fear of jeopardising his job. This was a large organisation, well used to dealing with grievances of that nature. This complaint only emerged as a consequence of these Tribunal proceedings.

5.14 The Claimant was invited to an investigation meeting. Shortly before the meeting took place, he wrote to Mr Bowater asking for, amongst other things, an opportunity to watch the relevant CCTV/dashcam footage. Mr Bowater duly provided him with that opportunity. In fact, during the course of the investigation meeting on 17 August, a significant amount of time

was taken up with the Claimant watching and re-watching the footage in the company of his trade union representative. There are numerous references such as "can we look again".

5.15 One of the Claimant's allegations of direct race discrimination relates to a failure on the part of the Respondent to provide him with the physical copies of the CCTV footage, be that in the form of a DVD disc or similar. However, it is abundantly clear to the Tribunal that the Claimant never in fact made that request. He only requested to see and/or review the CCTV footage. That request was acceded to. In any event the Claimant was provided with the physical copies of the CCTV, albeit subsequent to his resignation. Further, and in any event, there was no evidence whatsoever to support a finding that anything to do with the production of CCTV footage had anything to do with the Claimant's race.

5.16 On the day of the investigation meeting the Claimant was represented by Mr Blake. Mr Blake is a trade union representative. He describes himself as of 'mixed race' and he speaks in very positive terms about Mr Bowater. That said the Tribunal did not attach any significant weight to the 'character reference' styled statements that came at the end of the bundle.

5.17 The Claimant was suspended by Mr Bowater on or about 17 August 2017. There was some discussion as to whether that suspension should have taken place earlier if Mr Bowater's concerns about potential dangerous driving were genuine. However the Tribunal accepted Mr Bowater's explanation, namely that it would be fairer to the Claimant to await the outcome of the preliminary investigation and the establishment of some primary facts before deciding to take any action, including suspension. In the Tribunal's view, whether the Respondent had suspended the Claimant before or after the investigative process had begun makes no difference. The Tribunal also note that, whilst suspension is often referred to as a "neutral act" in the vast majority of cases it is far from being so.

5.18 On 18 August the Claimant wrote again to Mr Bowater seeking a list of further information, specifying his requests in separate paragraphs (a) to (f). Mr Bowater replied on 23 August and gave fulsome responses to each and every one of the Claimant's requests. In that same letter, Mr Bowater

enclosed a comprehensive investigation pack. Mr Bowater also produced an investigation report. The Tribunal found it to be a balanced, objective and entirely fair report. Part of Mr Bowater's investigation included gauging the distance between the Claimant's LGV and the BMW when it pulled back in. This the Tribunal found to be a secondary, less important part of the incident. The most important and serious part of this incident was the Claimant's LGV pulling over into the slow lane initially, causing the BMW to brake and take evasive action. Nevertheless, for the avoidance of any doubt, the Tribunal also found Mr Bowater's investigation into second part of the incident (including the gauging of distance between the vehicles) to have been thorough, balanced and credible. Overall, the report's findings and conclusions are relatively moderate. It simply recommends an escalation to formal disciplinary proceedings. Mr Bowater does not advocate for any particular sanction.

5.19 Much of the Claimant's case revolves around Mr Bowater (for reasons that the Claimant conspicuously failed to articulate or explain) being motivated or biased against him on racial grounds and then having used his "influence" upon the likes of Mr Leckie to bring about his dismissal. The Claimant failed to provide any evidence in support of this belief. In any event the Tribunal found Mr Bowater to be the polar opposite of the person that the Claimant attempted to portray him as. The Tribunal found him to be careful and conscientious and someone who acted throughout this case with exemplary fairness. In the Tribunal's view the Respondent had no choice but to investigate a complaint of dangerous driving made by a third party. There was no other option available to it.

5.20 Prior to the disciplinary hearing taking place on 30 August there was a request by the Claimant to postpone the meeting. That request was refused by Mr Leckie. The Tribunal finds that this was an entirely reasonable refusal. It is not for us to act as the employer would have acted. It is for the employer to apply its own policies in the manner in which it considers fit. There is nothing untoward about the way in which Mr Leckie dealt with that application and, in any event, at the hearing itself neither the Claimant nor his Trade Union representative raised any complaint or suggested that they were unprepared in any way. There was certainly no evidence that the refusal of the postponement was in any way

motivated by the Claimant's race.

5.21 The disciplinary hearing took place on 30 August and was chaired by Mr Leckie. Mr Leckie was clearly somebody wholly unsusceptible to being 'influenced' by anyone, whether that be Mr Bowater or anyone. Mr Leckie was a person who clearly knows his own mind and (as stated above) described by the Claimant as "very liberal with an open mindset." Indeed the Claimant was quick to praise him. The Claimant was represented by the regional Trade Union representative, Mark Petiffer. Once again the CCTV/dashcam footage was reviewed. Of significant concern to Mr Leckie (and indeed this Tribunal) was the fact that, during the course of the disciplinary hearing, the Claimant conceded that, at the time he performed his manoeuvre into the slow lane, he had been aware of the BMW's presence. He says so in clear and explicit terms during the disciplinary hearing. The driving offence was therefore deliberate as opposed to accidental and inevitably meant that Mr Leckie would have considered it with the utmost seriousness. It is no surprise to the Tribunal that Mr Leckie was considering dismissing the Claimant for gross misconduct and would have done so but for the events that followed.

5.22 Towards the end of the disciplinary meeting, and presumably because his representative saw the writing on the wall, the Claimant asked for a short adjournment. On returning from that adjournment the Claimant made a profuse apology saying as follows:

"I would like some compassion from the company. If there is any training I am happy to participate. I am very regretful. I let my guard down and I apologise if I have caused any form of doubt of the company name and so forth."

5.23 The Tribunal finds that apology to be insincere, a matter conceded in evidence. It was given simply as a last ditch attempt to preserve his employment. Unfortunately for the Claimant it became quite clear that that apology was not going to have the effect that he had hoped it would. Accordingly a further adjournment was requested and granted. The Claimant and his representative came back and, on that second occasion, and in order to protect his ability to seek and secure alternative

employment, the Claimant resigned with immediate effect. It was at the forefront of the Claimant's mind that the likely alternative to resignation was dismissal for gross misconduct.

6. Conclusions

6.1 The conclusions follow naturally from the above findings of fact. There is no evidence to support a finding that any of the four alleged matters were motivated, or influenced, materially or otherwise, by the Claimant's race. The words attributed to Mr Bowater, namely "you lot shouldn't be on the books" were never said. Accordingly the claim for harassment must fail (and, for the avoidance of doubt, if brought as a complaint of direct discrimination).

6.2 Mr Bowater did not treat the Claimant less favourably by reason of his race during the investigation process. Any one of the Respondent's drivers, whatever their race and who was the subject of a third party complaint of dangerous or careless driving, would have been treated in the same way. Indeed the Tribunal finds that Mr Bowater treated the Claimant with commendable compassion throughout.

6.3 The Claimant was not treated less favourably because of his race for not having had the opportunity to present his case fully or fairly. On the contrary, and as the minutes of the disciplinary hearing bear out, the Claimant was given every opportunity to present his case fully and fairly. He was very well represented throughout, particularly at the disciplinary hearing.

6.4 There is no evidence to support a finding that the Claimant was treated less favourably by not having relevant CCTV footage supplied to him. He did not ask for it. He only asked to review it and that request was acceded to. In any event once again there is no evidence that any of the matters relied upon or alleged by the Claimant were motivated by his race.

6.5 This was a relatively straightforward case where an LGV driver was quite properly investigated and disciplined for alleged dangerous driving. The Claimant's decision to resign and escape the stigma of a gross

misconduct dismissal was, in the Tribunal's opinion, well judged. In light of the above findings and conclusions, the Tribunal has no option other than to dismiss the complaints of race discrimination and harassment.

Employment Judge Legard

Date 9th July 2018

JUDGMENT SENT TO THE PARTIES ON

12 July 2018

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FOR THE TRIBUNAL OFFICE