EMPLOYMENT TRIBUNALS

Claimant: Mr K Clarke

Respondent: GXO Logistics Drinks Limited (formerly XPO Logistics Drinks Limited)

Heard at: Manchester **On:** 24, 25, 26, 27 and 28 April 2023

Before: Employment Judge Ross
Ms V Worthington
Mr B Rowan

REPRESENTATION:

Claimant: Ms S Nulty, claimant's partner
Respondent: Mr T Wood, Counsel

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The claimant's claim that he was unfairly dismissed because of race pursuant to Section 13 Equality Act 2010 is well founded and succeeds.

2. The claimant's claim that he was unfairly dismissed (Section 94 and Section 98) Employment Rights Act 1996 is well founded and succeeds.

3. The claimant's claim that Mr Meiring stopped speaking to him was an act of victimisation pursuant to s27 Equality Act is well founded and succeeds.

4. The claimant's claim that in November 2019 Mr Daniel Smith told the claimant to "stop playing the race card" was an act of harassment related to race pursuant to Section 26 Equality Act 2010 is well founded and succeeds.

5. The claimant's claim that following a memo in December 2019 about accidents in the yard Mr Darren McDuff and Mr Garry Baron said to the claimant words to the effect of "we will now face a disciplinary because of you" is an act of race related harassment pursuant to Section 26 Equality Act 2010.

6. The claimant's claim that "prior to the disciplinary process which led to the claimant's dismissal, Mr Carroll asked the claimant if he wanted to resign" is an act of race related harassment pursuant to Section 26 Equality Act 2010.

7. The claimant's other claim of victimisation/harassment that "Mr Carroll stopped greeting the claimant and making any other friendly conversation with him" does not succeed.

8. The Tribunal finds that in accordance with the principle in Polkey v AE Dayton Services and s123(1) Employment Rights Act 1996 there was a 10% chance that the claimant would have been fairly dismissed and his compensatory award will be reduced by 10%.

9. The Tribunal finds there was contributory fault pursuant to s122(2) and s122(6) Employment Rights Act 1996 and the basic award will be reduced by 50% and the compensatory award will be further reduced by 50%.

10. Leave is granted to amend the name of the respondent to GXO Logistics Drinks Limited.

11. **The case will proceed to a Remedy Hearing, estimated length of hearing 1 day, as agreed with the parties, on 14 August 2023 at Manchester Employment Tribunal, starting at 10am**.

12. Orders relating to preparation for remedy hearing will be sent under separate cover.

REASONS

1. The claimant was employed by the respondent as a Fleet Operative-Drayman from 8 July 2013 until his employment was terminated by reason of gross misconduct on 11 March 2020.

2. The respondent is a company providing the delivery of large beverage orders to the drinks industry including pubs, clubs and other entertainment venues.

3. The claimant worked out of the respondent's Preston depot. He was the only non-white employee at that depot.

4. It was the claimant's claim that there was a long history over many years when he was discriminated against by colleagues and managers. He says the behaviour was exclusionary and he has no explanation for it and accordingly believes the only reason was race. He relied on those incidents because he said they were facts from which the Tribunal could conclude that the conduct complained of in his case including his dismissal related to his race.

5. For the respondent all claims are denied. The respondent says the claimant was dismissed because he used his mobile phone when driving.

6. For the claimant we heard from the claimant himself and from the full-time union officer Ms K Craddock. A statement was also provided for the claimant by Ms Chanerley but she did not attend.

7. For the respondent we heard from Mr Carroll, the claimant's immediate manager, Mr Meiring the manager senior to Mr Carroll, both based at Preston depot, Mr Lea the Dismissing Officer and Mr Connaughton the Appeals Officer. All four of the respondent's managers had left the respondent business. Mr Carroll had retired and the other managers were working elsewhere. The

Tribunal accommodated the respondent's witnesses by changing the running order and permitted Mr Connaughton to give evidence remotely by video link. The Tribunal also hear from a fleet operative Mr D McDuff, based at Preston depot, who remains employed by the respondent.

8. The respondent also provided witness statements for Mr D Smith, a colleague at Preston depot and Mr G Barron a colleague and a trade union representative at Preston depot.

9. The Tribunal attached limited weight to the witness statements of those witnesses who did not attend.

10. The Tribunal had a bundle of documents of 373 pages which was agreed between the parties. During the course of the hearing the respondent, at the Tribunal's request also supplied two policy documents which were before the Dismissing Officer, one was the whistleblowing policy and the other was a policy relating to CCTV. The Tribunal was also shown three video clips. One clip was of an accident in August 2019 when the claimant was driving a truck into the depot when it collided with a trailer. The second clip was mobile phone footage of the claimant holding a mobile phone whilst driving. The third clip was an offensive video posted on the Facebook page by one of the claimant's colleagues.

11. The Tribunal had the benefit of the clear and cogent representation of the respondent by Mr Wood of Counsel and the claimant being ably represented by his partner Ms Nulty.

The complaints

12. The claimant brought a claim for "ordinary" unfair dismissal contrary to Section 94 Employment Rights Act 1996 and alleged to be unfair within the meaning of Section 98 of ERA, a claim of direct discrimination because of race pursuant to Section 13 Equality Act 2010 and in contravention of Section 39(2)(c) Equality Act, a claim for victimisation within the meaning of Section 27 of the Equality Act and in contravention of Section 39(2)(c) and (d) Equality Act 2010, and a claim for harassment pursuant to Section 26 Equality Act 2010.

The Issues The issues are as listed below and as agreed before Employment Judge Horne at a case management hearing on 13 July 2021 at p 36-8.

" Ordinary" Unfair dismissal s95 and s 98 Employment Rights Act 1996.

13. It is common ground that the claimant had the right not to be unfairly dismissed, and that the respondent dismissed him.

14. The first question for the tribunal will be whether or not the respondent can prove that the sole or main reason for dismissal was its belief that the claimant had used a mobile phone whilst driving. (The claimant contends that this was not the real reason, but accepts that, if it was, it was a reason which related to the claimant's conduct.)

15. If the respondent proves the reason, the tribunal must next ask whether the respondent acted reasonably or unreasonably in treating that reason as sufficient to dismiss the claimant.

16. Where the reason for dismissal was conduct, tribunals commonly assess reasonableness by asking the following questions:

    a. Did the respondent have a genuine belief that the claimant had committed the misconduct?

    b. Were there reasonable grounds for that belief?

    c. Did the respondent carry out a reasonable investigation?

    d. Was the sanction of dismissal within the range of reasonable responses?

    (This series of questions is often referred to by employment lawyers as "the Burchell test".)

17. If the dismissal is found to be unfair, the respondent will argue that the claimant's compensation should be reduced on the ground that, had the respondent acted fairly, the claimant would or might have been dismissed in any event.

18. The respondent will also seek a reduction in compensation to reflect what the respondent says was alleged culpable and blameworthy conduct.

19. The parties agreed that these issues should be determined at the same time as the fairness or otherwise of the dismissal.

Time Limits

20. The first issue relates to the tribunal's legal power to consider the claim. In this case, the jurisdiction to consider some of the discrimination allegations is affected by the statutory time limit.

21. For anything done on or after 23 February 2020, the claim was presented within the time limit and the tribunal has jurisdiction.

22. For anything done before 23 February 2020, the tribunal must determine these jurisdiction issues:

    a. Was the allegation part of an act extending over a period which ended on or after 23 February 2020?

    b. If not, would it be just and equitable to extend the time limit?

Direct Race Discrimination

23. The claimant's race discrimination complaint is a complaint about the decision to dismiss him. The claimant says there is a background of discriminatory treatment of him which the Tribunal should take into account when considering whether his dismissal was discriminatory. His case is that, by dismissing him, the respondent treated him less favourably than it actually treated others. These other people are often referred to as "comparators". The comparators were:

    a. Mr Joseph Taylor

    b. Mr Matthew Holmes

    c. Mr Stephen Parkey

d. Mr Gary Swift

e. Mr Ian Wilcox

f. Mr Ryan Edwards

g. A new starter in Manchester, whose name the claimant cannot recollect

24. The claimant contends that the reason why he was treated less favourably than them is that they are white and his is mixed race.

25. In respect of each comparator, the tribunal will need to determine these issues:

a. Were the claimant's circumstances the same as, or at least not materially different from, the comparator's circumstances?

b. Were they treated more favourably than him by not being dismissed?

c. If so, what is the reason why he was dismissed and they were not? Was it because of his race? Or was it wholly for other reasons?

Victimisation

26. It is common ground that the claimant did a protected act in October 2019 by raising his grievance.

27. The claimant's case is that, because he did this protected act, the respondent subjected him to a number of detriments: Here is a complete list of those detriments:

a. Mr Meiring stopped speaking to him;

b. Mr Carroll stopped greeting the claimant and making any other friendly conversation with him" does not succeed.

c. In November 2019, Mr Daniel Smith told the claimant to "stop playing the race card";

d. Following a memo in December 2019 about accidents in the yard, Mr Darren McDuff and Mr Garry Baron said to the claimant words to the effect of, "We will now face disciplinary because of you";

e. Prior to the disciplinary process which led to the claimant's dismissal, Mr Carroll asked the claimant if he wanted to resign; and

f. He was dismissed.

28. The other issues for the victimisation claims were as follows. In the case of each alleged detriment for which the tribunal has jurisdiction:

a. Did the alleged conduct happen?

b. Could the claimant reasonably understand it to be detrimental to him?

c. If so, what was the reason why he was subjected to that detriment? Was it because he had done the protected act? Or was it wholly for other reasons?

Harassment

29. The claimant relies, in the alternative, on the same factual matters set out at paragraph 27 a-f above as allegations of unwanted conduct. The issues here are, for each alleged act of unwanted conduct:

a. Jurisdiction issues as above:

b. Did the respondent subject the claimant to the alleged conduct?

c. Was it unwanted?

d. Was it related to the claimant's race?

e. Did it have the purpose of violating the claimant's dignity or creating a hostile environment for the claimant?

f. If not, did the claimant perceive it as having that effect? Was that perception reasonable?

The Law

Race Discrimination

30. The Tribunal had regard to Section 13 Equality Act 2010, Section 39(2)(c) Equality Act 2010. The Tribunal reminded itself of the burden of proof provisions at Section 136 Equality Act 2010. We noted the established authorities which demonstrate there is a two-stage process in a direct discrimination case. These authorities include **Wong -v- Igen Limited 2005 III All ER812, Madarassy -v- Nomura International 2007 IRLR 246** and **Efobi -v- Royal Mail Group Limited 2019 II ALL ER917**. We also reminded ourselves that a difference in treatment and a difference in protected characteristic are not sufficient to shift the burden of proof. There must be a "something more" see Mummery LJ in **Madarassy -v- Nomura International Plc**. We also had regard to the guidance of Lord Nicholl **in Nagarajan -v- London Regional Transport 1999 ICR 877** which reminds us that it may be necessary to explore the alleged discriminators mental processes. We took into account that bias may be unconscious.

31. For the harassment claim the relevant law is Section 26 Equality Act 2010. We reminded ourselves of the principle in Richmond Pharmacology -v- Dhaliwal 2009 ICR 724 which gives guidance as to how the "effect" test in 206(4) should be applied.

Victimisation

32. The relevant law is s27 Equality Act 2010. The Tribunal has to consider did the alleged victimisation arise in any of the prohibited circumstances covered by the Act. In this case 3 39(4))c) Act 2010 is relevant for the dismissal claim and s 39(4)(d) Equality Act 2010 for the other allegations.

33. We reminded ourselves that as stated in although **in Nagarajan -v- London Regional Transport 1999 ICR 87** victimisation has a ring of conscious targeting, this is an insufficient basis for excluding cases of unrecognised prejudice. That case is also authority that the protected act does not have to be the sole reason for the detriment, a "significant influence" is sufficient.

Overlapping provisions in the Equality Act.

34. The Tribunal reminded itself of s212(1) Equality Act 2010. The claimant has brought his claim of dismissal as an act of direct discrimination and in the alternative an act of victimisation or of harassment. The claimant has brought

the other 5 allegations as claims of victimisation or in the alternative harassment**.**

"Ordinary" Unfair Dismissal

35. The relevant law is found at Section 95 and Section 98 ERA 1996 and the Tribunal had regard to the well-known case of **British Home Stores -v- Burchell**.

Facts

36. We found the following facts. The claimant started work for the respondent as a Fleet Operative/Drayman on 8 July 2013. His contract was temporary and he was based at the Manchester depot a few miles from his home. The name of the respondent at that time was Kuehne and Nagel Drinks Logistics (KNDL). The claimant was issued with a contract pages 52 to 55.

37. Later that year an opportunity arose for the claimant to have a permanent contract. He applied and was successful but he was based at the Preston depot. We accept his evidence that he received a short letter stating that his position was now permanent and that all other terms remained the same as in his original contract.

38. We find in 2014 there was an incident. The claimant was asked by Gary O'Dea, the Manchester Depot Manager at that time, to work from Manchester on a night shift travelling to Anglesey, covering holidays. We found at that time there was an internal union dispute at the Manchester depot relating to backpay. The claimant was a member of the union but he was not based at Manchester. The claimant says he was bewildered to discover after he had agreed to a request from Mr O'Dea to work a shift out of Manchester to Anglesey he was subject to a petition entitled "the Kenny Clark issue" page 56 to 58. The petition stated, "we the undersigned as a body of men will refuse to work with Kenny Clark and are willing to ballot to take up and including industrial action if he is brought back to the Manchester depot to work in any capacity". We accept the claimant's evidence that the petition was signed by up to 30 of his colleagues at Manchester. We find the claimant raised this issue. We find he was told by Mr O'Dea that he was no longer permitted to drive the Anglesey route out of Manchester because of the petition against him.

39. At the Tribunal hearing, we did not hear from the union representative at the Manchester depot. We did hear from Karen Craddock. She is a full-time Reginal officer and had no involvement in the petition at Manchester. She said she was shocked by it, apologised for it and said it should never have been issued.

40. We find that the claimant continued to work out of the Preston depot.

41. We find that later in 2014 the claimant was asked to complete a day shift at the Middlewich depot. When he arrived he was met by a Fleet Operative who said to him "I thought we were not supposed to work with you". The claimant was very shocked as he did not know that Fleet Operative and although he was aware that the Draymen at Manchester depot would not work with him he did

not know about any other depots. The claimant found that operative was uncooperative and did not communicate with him on that shift. The Tribunal finds that following that shift Mr O'Dea told the claimant he had received a complaint from that operative at Middlewich who said the claimant's driving was unsafe. The claimant asked for more details but was not given any further information. The claimant was told he needed a driving assessment because of the complaint.

42. We find the claimant had a driving assessment in Manchester when he started employment which he passed and he also passed a further driving assessment following this incident.

43. At this stage the Tribunal pauses to note that apart from an email in the bundle in relation to one driving assessment none of the driving assessments carried out by the claimant during the course of his employment are in the bundle. The claimant's partner says she asked for those documents to be provided.

44. The respondent's witness Mr Meiring said that the claimant's driving assessments during his employment would be "in the cabinet in the manager's office at Preston depot". There was no explanation from the respondent as to why the driving assessments were not provided.

45. Accordingly we find that as early as October 2014 colleagues at Manchester had refused to work with the claimant and management allowed this to happen. There was no clear or credible explanation provided to the Tribunal as to why the respondent's management had permitted this situation to arise.

46. We find that in 2015 the claimant continued to work out of Preston. We find a different Fleet Operative said he did not want to work with the claimant. That operative, IW told Jim Meiring the Preston Depot Manager that he did not want to work with the claimant and we find that the claimant was not crewed with him after that date.

47. We find that there were approximately 20 operatives working out of the Preston depot at that time. We find that a crew consisted of two men, one was a driver and the other was the driver's mate (although the driver's mate was often also licensed to drive a heavy goods vehicle). The men had to work together. It was the responsibility of the driver's mate to navigate the route and once at the site it was the responsibility of the driver's mate to do the heavier work in terms of unloading barrels. The two men had to cooperate to ensure that the tasks were done.

48. We find that the crews worked together spending long hours in each other's company. One of the respondent's witnesses Mr Meiring told us that from time to time a crew member might fall out with his mate. This was known as "divorce". The crew might spend as much time with each other as they did with their wives.

49. However we find that the claimant was in the unusual situation that out of twenty employees at Preston depot sixteen refused to work with him.

50. We have found that in 2015 IW complained to Jim Meiring that he did not want to work with the claimant. Later on that year IW was crewed to work with the claimant again. The claimant believes that to avoid working with him IW thought of an excuse. We find he told Mr Meiring that the claimant was dangerous when handling the kegs and refused to go out and work with the claimant. We find IW was suspended because he had refused a management request to work with the claimant.

51. We find that whilst IW was suspended the trade union representative at Preston, Garry Baron, also a Fleet Operative, said aloud in the yard "We're going to have a Manchester situation here" implying that he was going to get a petition signed saying that no one was going to work with the claimant. We find this was said in front of the claimant and his work colleagues at the Preston depot.

52. We believe the claimant's evidence on this point. Mr Baron provided a witness statement to the Tribunal but he did not attend. The Tribunal was informed by Mr McDuff who did attend the Tribunal that Mr Baron remains employed by the respondent although he works out of the Manchester depot now.

53. We find that Mr Baron asked colleagues at Preston to sign a petition against working with the claimant but to the best of the claimant's knowledge nobody signed.

54. The Tribunal was shown an offensive social media recording dated 7 May 2015. The claimant informed the Tribunal and the Appeal Officer (see page 359) that the offensive recording was posted by Mr Baron on his private Facebook page. The recording is of a child being encouraged to say the word blackcurrant but what the child actually says is offensive. Although that offensive recording was brought to the Appeal Officer's attention and Mr Connaughton told us that he had sent an email after the appeal was concluded asking for the matter to be investigated no email from Mr Connaughton about that matter was included in the bundle and no evidence was produced to suggest that and that any further investigation about offensive posts took place.

55. The Tribunal accepts the claimant's evidence that about a week after IW had complained about him he received a phone call from Manager Mr O'Dea informing him that because there had been a complaint about him by IW, the company needed to assess him again. He was told it was to assess his manual handling.

56. We find that although IW was suspended for his refusal to work with the claimant, we find no disciplinary sanction was issued against him for refusing to obey a management instruction of working with the claimant. We rely on the evidence of Mr Meiring. We find Mr Meiring 's evidence was not very satisfactory on this point. The Panel had to ask a number of questions to secure an answer to the question.

57. We rely on Mr Meiring's evidence that at some point after that he introduced a rota of the few individuals who were willing to work with the claimant.

58. Mr Meiring said no clear reason was given as to why the other men would not work with the claimant other than generalised allegations that he was unsafe. Mr Meiring said he did not investigate the complaints because he could not do so because they were not specific.

59. The claimant's direct manager Mr Carroll who has now retired said although the claimant's colleagues complained to Mr Carroll about the claimant he never saw any evidence of any unsafe working practices, no accident report forms completed, no evidence of any health and safety issues. He said he always got on with the claimant whom he considered to be "a nice family man".

60. We find that following IW's complaint that the claimant was unsafe Mr O'Dea came out on a shift with the claimant together with his Fleet Operative. We find Mr O'Dea watched the claimant handle the kegs safely. He informed the claimant that the company might send a qualified assessor out with him at a later date.

61. We find that on 3 September 2015 Mr Wheeler came to assess the claimant. We find Mr Wheeler told the claimant he had failed his driving assessment; the claimant was puzzled as he had been informed it was a manual handling assessment and not a driving assessment. Mr Wheeler set out details in an email (page 60) why he considered the claimant's driving to be unsafe. The Tribunal finds it odd that it does not have the formal documentation of that driver's assessment in the bundle. The respondent are a large operation and had a detailed process document of how an assessment should take place (pages 77 to 89). There is no dispute that the claimant was told after the assessment on 3 September 2015 that he was "stood down from driving".

62. The claimant says he refused to sign the driving assessment because he considered it to be inaccurate and says he informed Mr Meiring that he disagreed with the assessment and would not sign it. We find Mr Meiring said he would be in trouble if he didn't sign it. We find he still did not sign it.

63. We find Mr Meiring told the claimant he was not allowed to drive for the company because he was not up to the company standards. We find the claimant frequently asked Mr Meiring to be permitted to drive.

64. We find the claimant was stood down from driving from September 2015 until he was permitted to resume driving on 26 February 2018 (page 112).

65. We accept the claimant's evidence that the claimant passed other driving assessments but was not permitted to return to driving. We rely on paragraph 36 of his statement where the claimant explained that with support of his Unite union full time official Karen Craddock, the claimant had an independent assessment with Mantra Learning in Middleton. We find this was a four-hour assessment of his driving at test standards by a fully qualified HGV instructor. We find he successfully passed that assessment despite the length of time he was "off the road" and had not received any additional training during that time.

66. We find that during the period he was not driving the claimant's work colleagues began to make fun of him ridiculing that he was not allowed to drive. We find that his colleague Mr McDuff posted messages on social media ridiculing the

claimant over a lengthy period of time. We viewed posts on 21 July 2017 (page 110), 11 September 2019 (page 170), 2 October 2019 (page 182) and 22 January 2020 (page 241). We find the claimant was labelled as a bad driver and told he should stick to being in the cellars instead. We rely on the claimant's evidence to find the cellar work was harder because it was physically demanding. We find the claimant was regularly called lazy when he was in the cellar.

67. We find there were two What's App groups to which many of the drivers at Preston depot belonged. The first What's App was a group organised by the company. Mr Meiring and Mr Carroll explained that it gave information about routes and shifts. The second What's App group was a group to which Mr Meiring and Mr Carroll as managers did not belong although they were aware that it existed. Mr Darren McDuff confirmed there was such a group. He said the content included "banter" and circulated jokes, porn and items considered to be humorous.

68. We find there are examples of images circulated on that group in the bundle although it is unclear who posted them.

69. We find there is an image of the man who is suggested to resemble the claimant when he was older, being mocked about his driving in the year 2034 (bundle page 92). We also find there was a picture of Klu Klux Klan members which was said to be a union meeting at the Preston depot (page 93).

70. We find that during this period the claimant continued to ask for the reinstatement of his driving duties. We find Jim Meiring told the claimant that he was to be taken off driving "indefinitely". We find in 2017 the claimant raised a grievance concerning unfair treatment and it was on that occasion that the union full time officer, Karen Craddock started to become involved. We rely on an email which unfortunately is partly redacted at page 90 of the bundle on 22 August 2017 which we find to be an email from the claimant's full time union officer about his driving.

71. We find that at that time Mr Meiring stated "in true Kenny fashion he will not listen" see page 90.

72. We accept the claimant's evidence that there was a grievance meeting where Karen Craddock, full time union officer was present where she stated that she did not understand why the claimant was still not driving and directly asked if it was because the claimant was black. Unfortunately the Tribunal has not been supplied with minutes of that meeting.

73. We find in February 2018 after the claimant passed another driving assessment he was permitted to drive again. We find he continued to be ridiculed by his colleagues and was still labelled as a bad driver. We find the rota, organised so the majority of the claimant's colleagues did not work with him, remained in place.

74. We find the claimant was crewed with different people daily. He was crewed on their "heavy days" meaning when they had lots of weight to deliver or when

delivering to drops known to be difficult. We find the claimant's colleagues would make fun about who was on "Kenny time".

75. We also find that as the claimant did not have a regular crew pattern he was regularly doing wholesale driving runs which could be completed solo, or he was put on "spare" which consisted of yard duties. We find he liked the wholesale runs as he did not have to face working with colleagues who did not like him or want to work with him.

76. We find the respondent stopped the claimant from regularly doing the wholesale runs because Daniel Smith Fleet Operative (Colleague A) complained to Jim Meiring that this was unfair and that the claimant should be working on the dray as much as everyone. We find Daniel Smith complained to Peter Carrol and Jim Meiring. We find that following Daniel Smith's complaint the claimant did very few wholesale driving runs. When the claimant asked Mr Meiring about the rota he said: "what else am I supposed to do with you".

77. We find in early 2019 the claimant wanted to leave the Preston depot. We find the claimant wanted a fresh start. We rely on the claimant's evidence to find find the Preston depot was forty-five minutes' drive away (18-mile round trip) whereas the Manchester depot was a few miles from his home. The claimant said in his statement that he put in transfer requests to move away to Manchester but those requests were declined.

78. The claimant raised a grievance because he felt he was being discriminated against and victimised. His grievance is at page 137. He lodged it on 26 July 2019. There was a meeting on 27 August 2019 at page 161 to 7. The outcome of the grievance was issued on 30 August 2019 page 168 to 9. The claimant's grievance was rejected. The respondent explained that during the relevant time period there were only two roles available at the Manchester (Newton Heath) Depot: one was a vacancy which was only three days a week and so was not of interest to the claimant and the other was a warehouse vacancy at a reduced rate of pay.

79. Meanwhile on 21 August 2019 the claimant was involved in a collision with a trailer at the respondent's depot when he was driving a vehicle slowly into the yard. The accident happened when the claimant misjudged a space. Nobody was injured. See page 140 to 147. Statements taken from witnesses at the time: page 148 and 149. The` claimant was not immediately removed from driving but a few days later Peter Carroll informed him that he was to be taken off driving. The claimant was not permitted to drive for approximately three months and had to take another driving assessment. We accept his evidence that he passed the assessment with the assessor in the Manchester depot in or around November 2019. We find it was Mr Meiring who decided to remove the claimant from driving. Peter Carroll simply informed the claimant.

80. Almost a month after the accident occurred the claimant was invited to an investigatory meeting about it by Russ Brookes see page 171. Mr Brookes was the Preston Depot Support Manager (he had previously worked at Manchester and had recently transferred to Preston). The claimant attended an investigatory meeting on 24 September 2019 relating to the incident where he

explained what had happened page 172. On 25 September 2019 the claimant was informed he would face disciplinary action in relation to the incident on 21 August 2019 page 176. The claimant had become very anxious and had a short period off work due to stress and anxiety. The claimant was concerned about the fact he had been placed into the disciplinary process. He was aware that other white drivers had not been disciplined when they had been involved in a collision. On 2 October 2019 he therefore submitted a grievance against his line manager Jim Meiring. Mr Meiring agreed in cross examination that he had taken the decision to remove the claimant from driving following the accident and refer it for disciplinary investigation. The claimant's grievance at page 179 and 184 to 5.

81. On the same day Mr Meiring contacted the Area Manager, his superior who was in charge of both Preston and Manchester depots Darragh O'Dwyer .In his response Mr O'Dwyer stated "we will have a collective knowledge that we are dealing with a vexatious individual here, with I consider a known history of citing discriminatory aspects in the past". Mr O'Dwyer did not give evidence to the Tribunal. It was difficult for the Tribunal to understand why the Area Manager would make such a statement. The Tribunal understands that the claimant had lodged two grievances in the past. One was because he had been removed from driving for an extended period without being provided with training and having passed further assessments and the second was because his transfer requests to Manchester had been refused.

82. On the same day, 2 October Mr McDuff posted on his Facebook page "F**KING Kenny again". He then posted a picture of a truck next to an obstacle which it could not clear.

83. The claimant was invited to a hearing to discuss his grievance. It took place before Mr O'Dea on 29 October 2019. See minutes at page 187 to 190. The claimant was represented by a union representative from Manchester. His grievance- that Mr Meiring had discriminated against him and acted unfairly by removing him from driving and placing him into the disciplinary process following the accident in the yard in August 2019 -was not upheld. Mr O'Dea stated, "we acknowledge that accidents prior to your incident may not have been resulted in disciplinary action, however going forward any instances will be due to the new focus on unscheduled maintenance within the company".

84. The claimant presented an appeal against his grievance . Meanwhile on 20 November 2019 he was issued with a new invitation to a disciplinary hearing arising out of the incident in August 2019.

85. The claimant's grievance appeal was chaired by Mr Lea and took place on 3 December 2019 (incorrectly dated 3 November). The minutes are at page 212 to 214.In the meanwhile the claimant's disciplinary hearing was re-arranged to Monday 9 December (page 205).

86. The claimant was represented at the grievance appeal hearing by the full-time union official Karen Craddock. She explained that the claimant was being treated unfairly and believed it was direct race discrimination. Other employees had been involved in driving accidents and not faced any action. They had not been removed from driving and had not had to undertake a driving assessment

and had not faced disciplinary action. The claimant was aware of at least four accidents. The claimant expressly stated "if you are white you can have any accident and it doesn't matter. If you are black then the whole system comes down on you".

87. On 4 and 5 December Mr Lea wrote to Peter Carroll asking about any previous accidents. It is not disputed that Mr Lea was relatively new to the business and was based at the Manchester depot.

88. On 4 December 2019(p348) Mr Carroll posted a notice which stated

> "Damage to vehicles/property employee briefing. There has been a recent spike in Preston's unscheduled maintenance costs caused by a situation where vehicles/property damage could have been avoided.
>
> In order to draw a line in the sand and deliver a clear message in line with the company directive that causing unnecessary damage to a vehicle is not acceptable, all future damage to a company vehicle that is believed to be blameworthy will be dealt with through the disciplinary investigation process".

89. Both the claimant and Mr McDuff confirmed that the notice had been put up on the notice board at Preston depot.

90. The previous accidents which the claimant says occurred and were not investigated occurred to the colleagues named at page 215. The incidents occurred in 2016 and April and May 2019.

91. The Tribunal saw no direct evidence such as an email or a directive from the business to the employees informing them of a change in approach in terms of investigation of accidents. The Tribunal was referred to a general policy document at 231 which was referred to by Mr Lea in his rejection of the claimant's grievance. He stated at 231 that in "2018 the business unit executive had introduced a programme called Serious about Safety and as part of that programme there was a process called Actions and Consequences in May or June of 2019 which was rolled out to all secondary sites". He stated that the process from that point was for all incidents resulting in damage or harm were investigated based on the investigation each individual case was then dealt with on its own merits, whether it was deemed minor or major. Removing a driving from driving duties was at the discretion of the investigating manager.

92. However the respondent did not provide the document identifying that change in procedure nor any information bringing it to the attention of the workforce except for the notice on the noticeboard which was dated 4 December 2019 several months after the claimant's accident and after he was entered into the disciplinary investigation procedure and after he presented his grievance, dated 2 October 2019.

93. Mr O'Dea's grievance outcome letter made it clear that other employees had been treated differently particularly in April and May of 2019.

94. Although Mr Lea rejected the claimant's grievance appeal (see page 229), the claimant was informed verbally on 16 December 2019 that the disciplinary hearing relating to the incident in August 2019 had been cancelled.

95. The disciplinary hearing was cancelled at the last moment. The email on 16 December 2019 from Mr O'Dwyer to Mr Meiring refers to cancelling the disciplinary hearing "for tomorrow".

96. The respondent's witnesses did not clearly identify who made that decision. Mr Meiring explained that he communicated the decision as it was informed to him by Mr O'Dwyer, page 227 to 228. There was no document in the bundle informing the claimant that the disciplinary process had been withdrawn. The Tribunal finds it strange that the respondent did not clarify the date of the introduction of the new policy or draw the attention of the Tribunal to an email or other document informing the workforce of the change in policy. The only document notifying the workforce of change in policy was notice referred to above dated 4/12/2019.

97. As part of the grievance investigation process Mr Meiring was interviewed, see pages 192 to 194. Mr Meiring said in relation to the claimant's accident that the claimant was someone from the footage "looks to be driving aggressively". He also referred to "the claimant steamed into the warehouse" and noted "his aggression". The Tribunal is not satisfied there was any evidence of aggression in the video clip shown.

98. We find in November 2019 the claimant was permitted to return to driving and by 16 December he was informed the disciplinary against him for the August accident was withdrawn although his grievance appeal was unsuccessful. We rely on his evidence that he was not invited to the Christmas Party.

99. On 22 Jan 2020 the claimant was asked to return to the office by Peter Carroll. Mr Carroll showed the claimant a five second clip of a video on his(Mr Carroll's) own mobile phone. The clip showed the claimant driving and holding a mobile phone. The claimant was shown the clip in the presence of Garry Baron the Preston trade union representative. There is no dispute that the claimant did not like Garry Baron. The claimant was not asked by the respondent whether or not he wished Mr Baron to be present or to represent him.

100. Mr Meiring says he was informed about the video clip which was sent to him and he sent it to Peter Carroll and asked Mr Carroll to suspend the claimant the following day. He said he also sent the clip to Mr Baron because he believed that was "the policy".

101. Evidence obtained later from colleague A (Daniel Smith) who took the video clip records that it was taken in the latter part of 2019 (page 350) and Mr Smith showed it first to Russ Brookes, Deputy Manager at Preston (who had investigated the claimant for the accident in August which had been withdrawn from the disciplinary process before the day before the disciplinary hearing.) The statement from Mr Smith suggested Mr Brookes told him to use the whistleblowing policy.

102. The claimant went home and his suspension was confirmed by letter dated 27 January 2020 where he was also invited to an investigation meeting on 3 February 2020.

103. Meanwhile on the same day 22 January 2020 Mr McDuff made another Facebook post "FFS Kenny," see page 241.

104. The claimant attended a disciplinary investigation meeting on 3 February 2020 see page 244. The claimant was told by the investigator that it was "CCTV footage" although the Tribunal now knows it was mobile phone footage taken by Daniel Smith.

105. The claimant requested a copy. He admitted the clip showed that he was holding his mobile phone whilst driving. He said he was using it as a sat nav to navigate and that the "second man" should normally do this but he obviously wasn't doing his job, so the claimant had to do it. He admitted it was out of character for him and not safe.

106. His union representative asked who had reported the allegation and how the information was collected and whether it complied with GDPR together with date and time of the allegation.

107. The claimant was invited and attended a disciplinary meeting before Mr Lea on 18 February 2020. The charge against him was "bringing the companies name into disrepute as per the KNDL and Unite the union's secondary network recognition and procedural agreement and a serious breach of company health and safety procedures. The letter stated he should have a copy of the disciplinary procedure but could ask for a further copy. It also stated, "I have enclosed the relevant disciplinary pack".

108. In cross examination it became clear that the disciplinary procedure referred to is at pages 61 to 76 of the bundle and the claimant's union representative, Karen Craddock agreed they had a copy. Other than that, the only other item, apart from the mobile phone video footage, which the claimant was sent in advance of the hearing was a government extract about driving and mobile phones.

109. We find that the disciplinary hearing on 18 February 2020 was attended by the claimant and his full-time trade union representative Karen Craddock. Also in attendance were, the senior steward Mr Stott for the union, Mr McIntyre from HR as well as Mr Lea the Disciplinary Officer.

110. From the outset the claimant's representative Ms Craddock expressed concern that it appeared to be a "set up". She expressed concern that the claimant had not seen the whole video only a 5 second clip and there was" no date or time stamp on the video". The union also asked for the company CCTV policy and the whistleblowing policy and a timeline when the clip was taken. There were a number of adjournments.

111. We accept the evidence of the union's full-time official that she found the meeting very frustrating. We accept her evidence that normally the union had good relationship with the management at that site but on that occasion she felt

the hearing was not fair because of the limited information which had been provided. She raised concerns about bias. During the hearing she presented three grievances. The first grievance at page 282 was in relation to the disciplinary process and in particular the evidence which had been requested. The second grievance, p283, was in relation to a collective agreement called the Manchester Agreement. (The Tribunal was informed this was a procedural agreement between the union and the respondent, but it was not included in the bundle for hearing). The third grievance was about Mr Lea and the concern that he was potentially biased. P284.

112. We accept the evidence of Ms Craddock whom we found to be a genuine and forthright witness that she had never previously had cause to present three grievances during one disciplinary hearing in an effort to achieve a fair hearing.

113. She expressed concern that the respondent stated on a number of occasions in the meeting "we are going to hold the hearing now" and "we are going to progress the hearing now" despite the fact that the claimant's side had raised concerns and grievances.

114. The meeting was adjourned.

115. At this stage the respondent obtained a statement from Mr Meiring dated 21 February 2023 at page 303 as to how he had received footage from another employee's mobile phone of the claimant driving. It was not disputed that there is no internal CCTV camera within the cab of the vehicle and that the footage of the claimant driving was taken by a colleague sitting beside him in the cab. Although Mr Meiring's statement at 303 states Daniel Smith had approached him on 21 January 2020 about a serious health and safety matter Mr Meiring could not say, when questioned by the Tribunal , who had taken the statement from Mr Smith (page 350)

116. Although the respondent had agreed to remove the charge of bringing the company into disrepute at the first disciplinary hearing, see page 280 it continued to be referred to in the next invitation to the resumed disciplinary hearing, pages 304 and 307. The resumed hearing took place on 2 March 2020 page 310. The union raised concerns that it was entrapment and that the video had been taken maliciously by colleague.

117. The claimant explained that he had had an argument with Daniel Smith on or around 19 December and believed that was the day that the footage had been taken. The Tribunal finds that Mr Smith was an employee who had previously complained about the claimant. Mr Smith provided a statement to the Tribunal hearing but did not attend. There is no dispute that the grievances raised by the claimant's representative about the disciplinary process were not investigated. There is no dispute Mr Lea continued as the Disciplinary Officer despite a grievance being lodged which suggested he was biased.

118. It was agreed that by the time of the resumed disciplinary hearing on another date, the Dismissing Officer had the statements of Mr Meiring at page 303, the minutes of the first disciplinary hearing p308, the whistleblowing policy and the CCTV footage policy together with the minutes of the investigatory meeting. He also had documents provided by the claimant page 285 to 290.

119. The claimant also raised examples of other employees who had been treated differently.

120. After the resumed disciplinary hearing HR wrote to Mr Meiring informing him to obtain a statement from" witness A" in relation to particular matters namely how the footage had come to the attention of management. See page 326. At the Tribunal Mr Meiring said he had no recollection of taking a statement from Mr Smith. It seemed very surprising to the Tribunal that Mr Meiring had no recollection at all of taking the statement.

121. There was no clear evidence before the Tribunal where the information in statement A, which is anonymised and unsigned, had come from.

122. Mr Smith did not attend the Tribunal hearing and there was no clear explanation why he did not. The Tribunal were informed he remains employed by the respondent

123. Mr Lea wrote to the claimant to inform him that he had been dismissed in a lengthy letter dated 10 March 2020, page 329 to 349. The first time the claimant received the statement from witness A was with the outcome letter.

124. The claimant appealed against the decision to dismiss him on 12 March 2020, page 351. He complained that three grievances that he had raised had not been heard. He raised concerns that he had given examples of other people and how they had committed driving offences and did not lose their jobs. He also raised his concerns again about discrimination.

125. On 13 March 2020 Mr Lea emailed Mr O'Dwyer suggesting that the company should have a briefing document for their drivers about using mobile phones while operating a company vehicle, signed for by all drivers. He referred to an incident on the A34 that killed a family with a "Polish driver charging his iPod**"** He stated the information should be "rolled out to all mates and company car drivers". P352

126. The claimant attended an appeal on 31 March 2020 before Mr Connaughton, page 356. The claimant's appeal was rejected at page 363. The claimant expressly raised his concerns page 359 about evidence on Facebook. Mr Connaughton separated all the discrimination issues away from the decision to dismiss by saying "can I request separately for evidence of race discrimination for me to investigate". He did not investigate that the disciplinary process with which he was concerned was discriminatory as the claimant set out in his appeal letter "this is an attack on me and is discriminatory".

127. There was no evidence to suggest that Mr Connaughton investigated separately any issues of race discrimination. He said he sent an email following his hearing but it was not in the bundle and the Tribunal was not shown any other evidence to suggest that the issue of discrimination was dealt with by Mr Connaughton. He does not refer to discrimination at all in his outcome letter at page 363 and 364.

Applying the Law to the Facts

128. The Tribunal turns to consider the claimant's claim that his dismissal was an act of direct race discrimination.

129. The claimant describes himself as mixed race or black. The claimant relied on seven comparatives at the case management hearing Mr Joseph Taylor, Mr Matthew Holmes, Mr Steven Parkey, Mr Gary Swift, Mr Ian Wilcox, Mr Ryan Edwards and a new starter in Manchester whose name the claimant could not recollect.

130. A comparator for the purposes of the Equality Act should be in the same material circumstances as the claimant. Although the Tribunal had regard to the comparator information supplied by the claimant, the Tribunal is not satisfied that they are appropriate comparators because there were not in exactly the same material circumstances as the claimant. However the Tribunal has had regard to that information as part of the general evidence of the case.

131. Therefore in terms of comparator the Tribunal relied on a hypothetical white comparator otherwise in the same set of circumstances as the claimant, namely a white driver based at the Preston depot who attended a disciplinary hearing arising out of an incident where he was filmed holding a mobile phone when driving an HGV, which he said he was holding to navigate via Sat Nav.

132. The Tribunal reminds itself that the first stage, having regard to the burden of proof, is for the claimant to adduce facts which could suggest that the reason for his dismissal was race.

133. The Tribunal reminded itself that a difference in protected characteristic, in this case race, and unfavourable treatment, in this case dismissal, is not sufficient to shift the burden of proof. There must be "something more".

134. At this stage the Tribunal has stepped back and looked at the entirety of the evidence. The Tribunal heard clear evidence that from 2014, not long after he started working for the respondent, other employees refused to work with the claimant.

135. The Tribunal finds the claimant a credible witness. On his own admission he is "not the sharpest tool in the box" and the Tribunal finds that the claimant sometimes struggled to answer a so called "tag question" or questions which were not phrased simply. Occasionally his evidence was contradictory. However the Tribunal finds that the claimant was answering questions honestly.

136. The Tribunal finds there was an unpleasant situation involving a petition at the Manchester depot for which the full-time regional union officer, who was not involved, apologised. The petition had been organised by the union at the depot and was signed by colleagues who refused to work with the claimant. Management condoned that behaviour because we accept the claimant's evidence that from that point onwards he was not asked to work out of the Manchester depot.

137. There was no clear explanation for such a drastic course of action which the regional union official said appeared to have arisen from a misunderstanding.

138. We find that the claimant was withdrawn from driving duties for a lengthy period of time. That period was from a complaint in late 2015 leading to a suspension in September 2015 until the claimant was returned to driving in February 2018. There was no clear explanation from Mr Meiring, the manager of Preston depot, as to why the claimant was not permitted to drive for such a long period of time. He could not explain why the driver assessments were not provided to the Tribunal or why the claimant had not been provided with re-training or returned to the road earlier.

139. We accepted the evidence of Mr Carroll who has now retired that he never found any specific evidence of the claimant's inability to do the job just unspecified complaints from other employees. He said the claimant was a nice family man.

140. Despite this Mr Carroll and Mr Meiring arranged a rota so that the claimant did not work with employees at Preston depot who said they did not like him. Although Mr Meiring did suspend one employee IW at one point for refusing to follow a management instruction to work with the claimant, no disciplinary action was taken against that employee and the rota, which was organised to avoid the majority of drivers working with the claimant, continued. We accept the claimant's evidence that he was placed on solo driving, which he did not mind because he did not have to work with the other drivers who had complained about him, but after a complaint by Daniel Smith (also known as colleague A) he was removed from solo driving.

141. It is difficult to understand the reason why the workers refused to work with the claimant and why both the managers at Manchester and Preston management condoned that.

142. The Tribunal reminds itself that it is rare in the modern day to find overt evidence of discrimination. The Tribunal also reminds itself that discrimination can be unconscious. The Tribunal refers to the What's App messages and Facebook posts in the bundle. It is true that the Facebook posts of Mr McDuff ridiculing the claimant were on his private Facebook setting. However it is clear that other employees saw them. Indeed if other employees were not friends of Mr McDuff on Facebook it is difficult to see how pictures of lorries in awkward positions and comments like "FFS Kenny" would be considered amusing.

143. There is no date on the What's App message showing the Klu Klux Klan with a comment stating: "union meeting at Preston". p93 Neither is there a date on the video clip, shown to the Tribunal, which is stated by the claimant to be dated 7.5.15. The clip, which the claimant says was posted by Garry Baron, the union representative at Preston, shows a young child being encouraged to say the word "blackcurrant" by an adult with predictable consequences, which are offensive: " black cxxt " .

144. The claimant told us there was a What's app group of work colleagues at Preston to which he belonged to for a while but left because he did not like the content. Mr McDuff agreed there was a What's app group which circulated

jokes, banter and porn. We accept the evidence of Mr Carroll and Mr Meiring that they knew that group existed but were not members of it.

145. The Tribunal finds the claimant to be a truthful witness and accepts his evidence on this point that the messages and images referred to above appeared either on the What's app group for work colleagues (to which the managers did not belong) or Mr Baron's social media page or Mr Mcduff's social media page.

146. The Tribunal had regard to an email in the bundle from the most senior manager (Area Manager Darragh O'Dwyer). Mr O'Dwyer did not attend the Tribunal. The Tribunal finds it concerning that he sent an email dated 2 Oct 2019 to Mr Meiring where he described the claimant as vexatious because he had raised concerns about discrimination in the past: "we all have a collective knowledge that we are dealing with a vexatious individual here with I consider a known history of citing discriminatory aspects in the past".p181

147. That email was sent on the same day the claimant had informed Mr Meiring that he was bringing a discrimination grievance against him about the decision to place him in the disciplinary process for the August yard accident. (p179, 184-5)

148. The Tribunal finds that the claimant was placed into the disciplinary process for an incident in August 2019 when he hit a trailer in the yard. The respondent said that was due to a change in policy. The respondent failed to produce any evidence other than mere assertion that the policy had changed between April/May 2019 when white colleagues had been involved in accidents and were not placed into the disciplinary process and the claimant's accident in August 2019.

149. The Tribunal considers it to be significant that somebody chose to stop the claimant's disciplinary process relating to the accident in the yard the very day before the final disciplinary hearing in December 2019. See email Mr O'Dwyer to Mr Meiring dated 16 December 2019:"Have you cancelled the hearing for tomorrow" p228. The respondent's witnesses could not explain who had made that decision or why. The claimant said he was told verbally ,which is confirmed by Jim Meiring's email,p228, although the claimant said it was Mr Carroll who informed him. We accept the claimant's evidence he never received written notification that the disciplinary case relating to the accident in the yard had been dropped.

150. The Tribunal also had regard to the evidence of the full-time officer Karen Craddock that "it was always Kenny" in terms of him being excluded from driving and being placed into a disciplinary process. It caused her to query if it was because he was black.

151. In terms of possible unconscious bias, the Tribunal had regard to the arguably minor issue of Mr Lea referring to the "Polish driver" in his email recommending action for all drivers after the earlier incident. The use of the name Polish could be a mere descriptor, but it is difficult to see how it is relevant to the issue in hand page 352. When asked about this, Mr Lea said that was how the incident was reported in the press.

152. The Tribunal finds there was a long period where the claimant was subjected to ridicule from other drivers, a refusal of other drivers in Preston to work with him underpinned by unkind remarks on social media (p92,241) and offensive racist posts on social media (the video clip was shown to the Tribunal about a child being asked to say "blackcurrant" and the undated Klu Klux Klan What's App message p93). That was behaviour of the claimant's work colleagues not the managers. However the management colluded in the ostracisation of the claimant by organising a rota so he did not work with individuals who objected to him and also removed the claimant him from solo driving when another colleague objected.

153. Mr Meiring chose to remove the claimant from driving for a period of over two years with no clear documentary justification and chose to place the claimant into the investigatory process and then disciplinary process for an accident in the yard when the evidence suggests that white drivers in April and May 2019 were not, meaning the claimant was treated less favourably than they were. The Tribunal is sceptical that the policy changed between June and August 2019 because the only contemporaneous notification of the application of a policy change to the workforce at Preston is dated 4 December 2019, p348, months after the claimant's accident.

154. Mr Lea investigated the claimant's appeal against the outcome of his grievance. His grievance alleged he had suffered discrimination by being placed into the disciplinary procedure when he had the accident in August 2019.

155. We find Mr Lea accepted what he was told at face value by the company which he had recently joined, that the policy about disciplinary investigation and accidents had changed. We find he relied on that information to reject the claimant's grievance appeal. Mr Lea issued an appeal outcome stating that there had been a change in policy and the claimant's appeal was not upheld.

156. However that finding seems surprising and inconsistent with the decision to drop the disciplinary process against the claimant at the last minute on 16 December 2019 (it is unclear who made that decision).

157. The claimant was filmed using a mobile phone when driving. The footage was taken by another employee on his own mobile phone. That image was not taken by the company CCTV. It was given to the respondent by that colleague, who had previously complained about the claimant. The claimant had a clean license with no points on it and a clean disciplinary record. The Tribunal had regard to the specific factual evidence adduced before us of a white driver Joseph Taylor at page 358 who was not dismissed by the respondent for holding a mobile phone when driving an HGV , p41, 101, 102. On that occasion the driver had been stopped by the police, page 103 to 108 and the outcome letter at page 108 to 109, final written warning. (The claimant's representative raised this case at the disciplinary and appeal stage but the respondent only produced the details to this Tribunal.)

158. For all these reasons the Tribunal is satisfied that the burden of proof has shifted to the respondent.

159. The Tribunal reminds itself of Section 136 of the Equality Act, 136(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. The act goes on to state (3) "but subsection (2) does not apply if A shows that A did not contravene the provision".

160. The Tribunal reminds itself that according to the Court of Appeal in **Igen Limited -v- Wong 205 ICR 931 CA** the respondent must at this stage prove on the balance of probabilities that its treatment of the claimant was in no sense whatsoever based on the protected ground.

161. Therefore for the purposes of direct discrimination under Section 13 of the Equality Act 2010 the respondent must prove that the treatment (dismissal) was not (or in no sense whatsoever) because of a protected characteristic, in this case, race. We reminded ourselves of the EHRC Employment Code states "the characteristic needs to be a cause of the less favourable treatment but does not need to be the only or even the main cause".

162. The case of **Nagarajan** reminds us that if a protected characteristic had a "significant influence on the outcome", discrimination is made out and that discrimination may be unconscious. Motive is not required.

163. The Tribunal finds Mr Lea did not approach the disciplinary hearing with an open and enquiring mind.

164. Firstly we consider his role in the claimant's grievance appeal which had taken place a few weeks earlier in December 2019. We find that he had ruled against the claimant in his grievance appeal outcome where the claimant had alleged race discrimination. The claimant said he was being discriminated against because 4 white drivers who had accidents in the yard were not placed into the disciplinary procedure. Mr Lea did enquire of Mr Carroll whether the other four incidents in relation to white drivers had occurred. However when he was informed the information was correct, which suggests potentially discriminatory treatment, he then simply repeated what Mr O'Dea had said in the first grievance outcome hearing and refused the claimant's appeal, stating the claimant's treatment was not discriminatory. The reason he gave for the difference in treatment was that the policy in relation to accidents and disciplinary investigation had changed. Mr Lea did not ask for documentary evidence of the policy change or when it occurred. He was at this stage new to the company, having joined in September 2019. He accepted, he said in cross examination, what he was told by the other managers that the policy had changed. He did not ask for evidence of that policy change.

165. The fact that the disciplinary hearing involving the accident damage in August 2019 against the claimant was withdrawn at a very late stage and at the very last minute(the day before the disciplinary hearing) suggests that someone in the respondent business was concerned that the claimant was being treated in a discriminatory fashion. The Tribunal was given no explanation and neither was the claimant as to why that disciplinary process was stopped.

166. The other evidence which suggests Mr Lea did not approach the disciplinary hearing in this matter with an open mind was the way he dealt with the nature of the evidence against the claimant. The circumstances were unusual because the video evidence against the claimant was not CCTV footage supplied by the respondent company as is usual in a misconduct case involving video footage. The respondent, as requested by the union, provided a copy of its extremely detailed policy about CCTV. However this was not (despite what the investigatory officer told the claimant) CCTV footage. It was a mobile phone video clip supplied by another employee.

167. Mr Lea was remarkably unenquiring about that clip. He did not feel the need to find out in a formal manner how it came into the respondent's possession or why. It was not until after the first disciplinary hearing that a statement was obtained from Mr Meiring. No statement was obtained from the individual who had supplied the footage until after the disciplinary hearing was concluded and the outcome letter issued.

168. Furthermore, Mr Lea said in cross examination that he spoke on many occasions with Mr Meiring about the case during the period when the disciplinary process was ongoing. This is surprising and irregular. Mr Meiring was someone about whom the claimant had complained : Mr Meiring was the person who had arranged for the claimant to be suspended and investigated about driving and holding a mobile phone. Mr Meiring was the main witness in relation to how the footage had come to be supplied. Mr Meiring was the person against whom the claimant alleged discriminatory treatment, both in his previous grievance(where Mr Lea conducted the appeal) and in this disciplinary process.

169. A further concern for the Tribunal was that Mr Lea did not deal at all with the three grievances lodged by the claimant's full time trade union official in relation to the disciplinary process- either himself or by ensuring that they were dealt with separately.

170. So far as the claimant's concerns about the disciplinary process being an act of discrimination, Mr Lea did not actively show any evidence of how he had considered this.

171. Mr Lea does not appear to have actively engaged with the question of any alternative sanction for the claimant. The claimant had lengthy service of many years and an unblemished record. He had no points on his driving licence. He had worked for at least two years as a drivers mate in the past instead of driving. We are not satisfied that Mr Lea gave any active consideration to any alternative sanction. Indeed, he stated in a forthright fashion at the Tribunal that for conduct of this type he would have dismissed 100 times out of 100 which suggests he was not open minded and did not have regard to the particular circumstances of the case.

172. Neither did Mr Lea engage with the claimant's concern that he felt he could not return to Preston, raised within the second disciplinary hearing.

173. The claimant specifically raised in his statement at page 344 that "I have raised grievances related to racial discrimination and believe this action could be

victimisation because of my previous claims". There is no evidence that Mr Lea actively considers this. He simply stated, "there is no evidence to suggest that you are being victimised due to any previous allegation of discrimination".

174. Mr Lea was asked whether he had received any training in the Equality Act. He said that he has received some from a previous employer but not with this employer and received no training in investigating grievances of race discrimination.

175. The reason relied on for dismissal by Mr Lea is that the claimant was holding a mobile phone to check his sat nav whilst driving. Mr Lea says he would have dismissed any employee in the same situation 100 times out of 100 and that the dismissal was non-discriminatory.

176. The Tribunal considers that the situation is more nuanced. Once the burden of proof has shifted, it is for the respondent to show that it did not contravene Section 13 Equality Act 2010 that a person A discriminates against another B if because of protected characteristic (in this case race) A treats B less favourably than A treats or would treat others.

177. We turn to the appeal hearing. We rely on our finding above that Mr Connaughton separated all the discrimination issues away from the decision to dismiss by saying "can I request separately for evidence of race discrimination for me to investigate". He did not investigate that the disciplinary process with which he was concerned was discriminatory as the claimant set out in his appeal letter "this is an attack on me and is discriminatory".

178. There was no evidence to suggest that Mr Connaughton did investigate separately any issues of race discrimination later. He said he sent an email following his hearing but it was not in the bundle and the Tribunal was not shown any other evidence to suggest that the issue of discrimination was dealt with by Mr Connaughton. He does not refer expressly to discrimination at all in his outcome letter at page 363 and 364.

179. He does refer to the "screen shots referring to you by name and video you found offensive" saying "this must be addressed" and "this will be a recommendation from this appeal outcome" but no evidence was produced to suggest this had occurred and Mr Connaughton could not suggest that it had.

180. Accordingly for these reasons the Tribunal is not satisfied that the respondent has shown that the decision to dismiss the claimant and the decision to reject the appeal was in no sense whatsoever based on the protected characteristic of race. This claim therefore succeeds.

Unfair Dismissal- Section 95 and Section 98 Employment Rights Act 1996

181. The Tribunal having found that the dismissal was discriminatory because of the claimant's protected characteristic of race, we find it is inevitably an unfair dismissal because race is not a fair reason for dismissal. Accordingly that claim also succeeds.

Allegations of Victimisation or Harassment

182. We now consider the first of the allegations.

183. **(1) Mr Meiring stopped speaking to him.**

184. The claimant relied on this allegation as either a detriment for the purpose of a victimisation claim or unwanted conduct for the purpose of a harassment claim.

185. The Tribunal finds that this allegation is factually incorrect in the literal sense because we find Mr Meiring did not speak to the claimant completely. Mr Meiring confirmed in cross examination after the claimant presented his grievance that he did not "tittle tattle" with the claimant although he continued to speak to him professionally to give instructions required for his work and the Tribunal accepts his evidence on that point.

186. There is no dispute the claimant did a protected act in presenting a grievance against Mr Meiring on 2 October 2019 alleging that he was discriminating against him.

187. The next question is whether the claimant suffered a detriment. We find that he did. We accept his evidence that he minded about the actions of management, more than the way his colleagues treated him. We accept the evidence of Mr Meiring that although he continued to give instructions as required professionally to the claimant, after he presented that grievance in October 2019, he was no longer was chatty or "tittle tattled" with the claimant. We are satisfied that not engaging in pleasantries with an employee, when he had previously done so, amounts to a detriment.

188. We turn to the next issue: what was the reason the claimant was subjected to that detriment? Was it because he had done the protected act? Or was it wholly for other reasons?

189. Although the claimant when questioned the claimant was rather unclear and inconsistent about whether or not this was because he had presented a grievance, Mr Meiring's evidence was clear on this point. He said it was because the claimant had brought a grievance alleging discrimination against him that he felt cautious about speaking to him. Mr Meiring's concern about the grievance is reflected in a email to Mr O'Dwyer on 2 October 2019 when he asks whether he(Mr Meiring) should be suspended.

190. Accordingly, the Tribunal finds Mr Meiring stopped speaking to the claimant, except to give work related directions and the reason for his action was that the claimant had presented a grievance alleging discrimination against him on 2 Oct 2019. There the claim for victimisation succeeds and there is no need to consider the claim for harassment.

191. The Tribunal turned to consider the second allegation as an act of victimisation. There was no dispute the protected act was the grievance of 2 October 2019.

(2) **"Mr Carroll stopped greeting the claimant and making any other friendly conversation with him".**

192. The claimant's evidence was not entirely clear about Mr Carroll. On the one hand , he said he liked Mr Carroll but he said he thought towards the end of his employment Mr Carroll had changed towards him. The claimant did not name Mr Carroll in his grievance of 2 October 2019, only Mr Meiring, who was Mr Carroll's manager. Mr Carroll denied that he stopped greeting the claimant and making any other friendly conversation with him. He said that he had very limited contact with the claimant in any event as he was not usually in the yard when the claimant was there and he did not change his demeanour or behaviour after October 2019. The Tribunal found on this point that Mr Carroll a clear and straightforward witness. The Tribunal preferred his evidence on this and accordingly the allegation fails at that stage because the Tribunal is not satisfied that the alleged detrimental treatment occurred. For the same reason there can be no claim for harassment because we have found the alleged "unwanted conduct" did not occur.

193. We then considered the third allegation of victimisation/harassment.

(3) "**In November 2019 Mr Daniel Smith told the claimant to stop playing the race card."**

194. The Tribunal considered the allegation of victimisation. There is no dispute that the protected act was the grievance of 2 October 2019.

195. The Tribunal considered the factual circumstances of the allegation, which were disputed.

196. Mr Daniel Smith was the person who complained about the claimant working solo shifts and the person who took the covert video footage of the claimant holding his mobile phone in the cab of the vehicle following an argument with the claimant and who then produced it sometime later, (exactly how long is unclear) to Mr Meiring and Mr Russ Brooks and to the Union official Garry Baron. Mr Smith, we were informed by Mr McDuff still works for the respondent but he did not attend the Tribunal hearing although he had supplied a statement. The statement says about the allegation :"I do not remember saying this at all, and it is definitely not something I would say."

197. There was no clear explanation as to why Mr Smith did not attend the Tribunal. The Tribunal attached little weight to his statement because Mr Smith did not attend to answer questions about it.

198. The Tribunal accepts the claimant's evidence that this remark was made. We find that although remarks and ridicule the claimant received from the other workers did upset him, we rely on his evidence to find was not as bad as the treatment he received from management by putting him into the disciplinary process. However we find he did find it upsetting.

199. We rely on the claimant's evidence that this remark took place in the context of a conversation where the claimant was trying to explain how he felt discriminated against, saying how would Mr Smith feel if 5 workers had an accident, 4 were black and one was white but only the white driver was put in the disciplinary process.

200. We are satisfied that the remark was detrimental treatment. It has a negative connotation and suggests that the claimant is cynically using his race to complain of discrimination.

201. We therefore turn to the next issue which was causation. what was the reason why he was subjected to that detriment? Was it because he had done the protected act? Or was it wholly for other reasons?

202. The claimant was unsure whether Mr Smith knew about the claimant's grievance and whether he made the remark because the claimant had brought a grievance in October 2019 .

203. Given these circumstances the Tribunal was not satisfied there was a casual connection and the claim for victimisation did not succeed.

204. However, the Tribunal turned to consider the allegation as an act of race related harassment. The Tribunal is satisfied that the remark amount to unwanted conduct for the reasons we relied on above in relation to detrimental treatment.

205. We considered the next issue: Was it related to the claimant's race? We find it was the comment expressly refers to race and that was conceded.

206. We turn to the next issue. Did it have the purpose of violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? If not, did the claimant perceive it as having that effect? In answering that question, we must consider the perception of the claimant, the other circumstances of the case and whether it was reasonable for the conduct to have that effect.

207. It is difficult to know the intention of Mr Smith in making the remark without being able to question him, so the Tribunal proceeded to consider whether the remark had the disadvantageous effect required by Section 26 Equality Act 2010 of an intimidating hostile degrading or humiliating environment. We find it did. The claimant said he found the remark made to him upsetting, although not as upsetting as the actions of managers putting him into the disciplinary process. We find it is reasonable for the conduct of telling the claimant he was "playing the race card" to cause the claimant to feel the working environment was hostile. In reaching this conclusion we have taken all the circumstances of the case into account including the previous behaviour of Mr Smith who had complained about the claimant and had him removed from solo runs as well as the behaviour of other drivers refusing to work with the claimant.

208. Accordingly, this allegation is well founded.

209. We then considered allegation four.

(4) **"Following a memo in December 2019 about accidents in the yard Mr Darren McDuff and Mr Garry Baron said to the claimant words to the effect of "we will now face disciplinary because of you**".

210. The Tribunal considered this as an allegation of victimisation. There is no dispute that the protected act was the grievance of 2 October 2019.

211. The Tribunal considered the factual circumstances of the allegation, which were disputed.

212. Mr Garry Baron still works for the respondent. He provided a statement but did not attend. The Tribunal has found that Mr Garry Baron posted an offensive video on social media. We have also found that he was hostile to the claimant in particular suggesting to the workmates at Preston that there was a "Manchester situation" in relation to the claimant . The Tribunal has found that was an attempt to get a petition signed to state colleagues at Preston depot would not work with the claimant, as had previously occurred in the Manchester depot. The Tribunal heard clear and cogent evidence that before the claimant's accident in August 2019 when he was placed into the disciplinary procedure, when white operatives in Preston had an accident they were not put into the disciplinary procedure (see named individuals as set out in the emails at page 215 and 216).The Tribunal has found the first formal notification to the workforce the policy had changed was some months following the claimant's accident when the notice at page 348 was posted on the noticeboard on the 4 December 2019. The Tribunal finds it entirely credible that the notice which refers specifically to "unscheduled maintenance cost caused by a situation where a vehicle/property damage could have been avoided" was a clear reference to the claimant's accident in August 2019.

213. Mr Lea dealt with this point at page 348 in his dismissal letter. The Tribunal finds his reasoning to be implausible. He says the wording of the statement is poor English and it should simply say that it should state "situations" and that in the claimant's recent accident "he had not damaged any property so how could it be about his accident". This reasoning is surprising because the note specifically states it was by a situation where "vehicle/property damage could have been avoided". The Tribunal heard that the claimant's incident had caused damage to the vehicle.

214. The Tribunal heard from Mr McDuff who denied the words were said.

215. There was therefore a factual dispute between the claimant and Mr McDuff. Mr Baron did not attend the Tribunal so the Tribunal attached limited weight to his evidence,

216. The Tribunal prefers the recollection of the claimant to the recollection of Mr McDuff who says the words were not said. The Tribunal finds it entirely believable that Mr McDuff and Mr Baron said those words. The context was the notification of a change in policy of putting drivers into the disciplinary process when involved in an accident, explained to the Preston operatives in a memo in the context of an accident (p348), which the Tribunal finds is clearly referring to the accident when the claimant was driving in August 2019.

217. We accept the claimant's evidence that although remarks and ridicule that he received from the other workers did upset him it was not as bad as the treatment he received from management by putting him into the disciplinary process. However he did find the remark upsetting. We remind ourselves of the context in which the remark was made, namely a long period of time where drivers refused to work with the claimant.

218. We are therefore satisfied that it was detrimental treatment.

219. We therefore turn to the next issue which was causation. What was the reason the claimant was subjected to that detriment? Was it because he had done the protected act? Or was it wholly for other reasons?

220. The Tribunal finds it is not clear whether Mr McDuff and Mr Baron knew of the grievance although given that Mr Baron was a trade union representative at Preston and the claimant was a member, we find it is likely he was aware.

221. However the claimant himself said when questioned that it was unrelated to his grievance and the Tribunal finds the remark was not made because he presented his grievance.

222. The Tribunal has then considered this allegation as a claim of harassment.

223. The Tribunal relies on its finding in relation to detrimental treatment that it amounted to unwanted conduct.

224. The next issue for the Tribunal is: was the conduct related to race? In terms of the burden of proof we reminded ourselves we must consider whether the claimant can adduce facts which could suggest the conduct related to race. We find he can. We rely on the offensive What's App message which refers to the Klu Klax Klan in relation to a trade union meeting at Preston. Mr Baron was a trade union representative at Preston. The Tribunal has found that Mr Baron was hostile to the claimant and suggested raising a petition to ask operatives not to work with the claimant.

225. We rely on our finding that Mr McDuff over a period of two years posted images on social media ridiculing the claimant. We find that both men were part of a group of colleagues at Preston who isolated and ridiculed the claimant and were not prepared to work with him. Having regard to that evidence the Tribunal is satisfied that although the words themselves were not related to race, these words were spoken to the claimant who is of mixed race and the background evidence suggests that the reason could relate to race. Mr Baron did not attend the Tribunal and Mr McDuff has simply denied saying the remark.

226. We therefore find that the respondent has been unable to show that the conduct was in no sense whatsoever related to race.

227. The Tribunal proceeded to consider whether the remark have the purpose of violating the claimant's dignity or creating a hostile environment for the claimant?

228. The Tribunal is satisfied it did. It is difficult to understand why Mr Baron and Mr McDuff would make the remark, unless they intended to create a hostile environment for the claimant. We found they succeeded because when asked how he felt the claimant said " I didn't feel good, I felt everyone will blame me"

229. Earlier in his evidence the claimant had said he was demeaned by colleagues at work and it was "horrid".

230. If we are wrong about that and the remark did not have the purpose of creating a hostile environment for the claimant, we must consider whether the remark had the disadvantageous effect required by Section 26 Equality Act 2010 of an intimidating, hostile degrading or humiliating environment. We find it did. The claimant said he found the remark made to him upsetting and he felt everyone was blaming him. We are satisfied that in the circumstances we have described above it was reasonable for the conduct to have that effect. We are therefore satisfied that the disadvantageous effect under Section 26 in other words apply.

231. Allegation (5) **"Prior to the disciplinary process which led to the claimant's dismissal Mr Carroll asked the claimant if he wanted to resign".**

232. The Tribunal considered the allegation as an act of victimisation. There is no dispute that the protected act was the grievance of 2 October 2019.

233. The Tribunal considered the factual circumstances of the allegation, which were disputed.

234. The Tribunal is aware that sometimes when an individual is facing a disciplinary process, an employer will ask him or her if they wish to resign and that suggestion can be made with benign motivation and can be an action which an affected employee welcomes.

235. However, the Tribunal had regard to the very particular facts of this case.

236. We find on the evening of 21 January 2020 Mr Meiring contacted Mr Carroll and sent him the mobile phone footage. He told him to attend the Preston depot early in the morning in order to suspend the claimant.

237. On 22 January we find Mr Carroll contacted the claimant and asked him to return to the depot. We find Mr Meiring had previously contacted Garry Baron, trade union representative and had sent him a copy of the mobile footage and asked him to attend the meeting arranged to suspend the claimant (neither of which were requested by the claimant). We rely on our previous findings that Mr Baron was hostile to the claimant and the claimant did not like him.

238. We find Mr Meiring, who was Mr Carroll's line manager, instructed Mr Carroll what he should do.

239. When giving evidence Mr Carroll made it clear that he did what he was told by Mr Meiring. The Tribunal finds it highly unlikely it was Mr Carroll's idea to ask the claimant if he wanted to resign. Mr Carroll when giving evidence was very focussed on the fact that the claimant struggles with writing and that Mr Baron could write the letter of resignation for the claimant.

240. He was less willing to engage with why the claimant was being asked to resign in the first place. The claimant had presented a grievance in October 2019 complaining of race discrimination by Mr Meiring because he had removed him from driving and placed him into the disciplinary process for an accident in the yard when no white drivers who had been involved in an accident had been placed into the disciplinary process, removed from driving or asked to do a driving assessment. The claimant's grievance and appeal had been

unsuccessful but the disciplinary procedure into which he had been entered had been withdrawn at the last moment.

241. The Tribunal found Mr Meiring to be an unconvincing witness at times. He had little recollection of the events. We were concerned to hear from Mr Lea that he spoke extensively to Mr Meiring during the disciplinary process involving the claimant using a mobile phone.

242. We are satisfied that Mr Meiring had not taken kindly to the claimant complaining about discrimination. Although he continued to speak professionally to the claimant he no longer engaged in "tittle tattle" and his opinion of the claimant was not complimentary. Previously he had said "in true Kenny fashion he will not listen" see page 19. Mr Meiring was the person responsible for removing the claimant from driving for the lengthy period 2015 to 2018 and again following the accident in the yard. He was responsible for creating a rota so that the claimant did not work with certain individuals and was responsible for removing him from solo working.

243. We considered the issue of whether the claimant suffered a detriment when Mr Carroll asked him if he wanted to resign. We find he did. We accept the claimant's evidence that felt the issue was being prejudged and he was being "pushed out". Mr Carroll admitted he stood very close to the claimant when he made the remark. He explained it was because he was showing the claimant the footage on Mr Carroll's own mobile phone. We find Garry Baron a union representative whom the claimant did not like, who had been hostile to the claimant previously and whom the claimant had not requested to be in attendance was present and Mr Carroll was suggesting Mr Baron could write out a resignation letter for him.

244. We are therefore satisfied that he considered being asked to resign by his immediate manager particularly after being shown a clip of mobile footage before any type of investigation and in the circumstances described above was capable of amounting to a detriment.

245. The next question is whether there is a causal connection: what was the reason he was subjected to that detriment? Was it because he had done the protected act? Or was it wholly for other reasons?

246. The Tribunal reminded itself **Nagarajan -v- London Regional Transport 1999 ICR 87** authority that the protected act does not have to be the sole reason for the detriment, a "significant influence" is sufficient

247. The Tribunal is satisfied that Mr Carroll was acting on instructions from Mr Meiring when he asked the claimant if he wanted to resign.

248. The claimant had brought a claim for discrimination against Mr Meiring in relation to his action in placing the claimant into the disciplinary process for the accident in the yard in August 2019. On his own evidence, Mr Meiring changed his behaviour onwards the claimant after that.

249. Although the claimant said at his case management hearing that suggesting he resign was an act of victimisation, when he was asked in cross examination

whether he agreed Mr Carroll suggested he resign because of the video clip, he agreed. He also agreed when it was suggested to him it was nothing to do with his grievance. For those reasons the Tribunal is not satisfied that there was a casual connection between the grievance and this allegation and accordingly we find that the claimant was not victimised pursuant to Section 27 Equality Act 2010.

250. The Tribunal then considered this as an allegation of race related harassment.

251. The Tribunal relies on its finding in relation to detrimental treatment that this was unwanted conduct.

252. The next issue for the Tribunal is: was the conduct related to race? In terms of the burden of proof we reminded ourselves we must consider whether the claimant can adduce facts which could suggest the conduct related to race. We find he can.

253. We find Mr Carroll was acting on instructions from Mr Meiring to suspend the claimant. We have had regard to the circumstances of the meeting whereby Mr Baron, whom the Tribunal has found to be hostile to the claimant, was brought into the meeting without the claim being asked if he wanted him to attend, and that the mobile phone footage was sent to Mr Baron, without asking the claimant whether Mr Baron was representing him and without asking whether the claimant consented to Mr Baron seeing the footage.

254. We have had regard to our finding that Mr Meiring, had changed his behaviour towards the claimant after he presented an earlier grievance, that both Mr Caroll and Mr Meiring had condoned the behaviour of the work force and organised a rota so the claimant did not work with 16 out of 20 colleagues, that Mr Meiring had removed the claimant from solo driving and that it was Mr Meiring who had removed the claimant from driving for a period of over 2 years with no objective evidence to justify a ban of that length of time and finally it was Mr Meiring who suspended the claimant placed the claimant into a disciplinary process for damaging a company vehicle, when white drivers involved in accidents were not placed into the disciplinary process.

255. We find these are facts which could suggest the real reason the claimant was asked to resign were related to race.

256. The burden of proof then shifts to the respondent to show that the decision to ask the claimant to resign was wholly unrelated to race. We are not satisfied they have done so. When asked questions about why the claimant was asked to resign Mr Carroll struggled to give a clear answer, focusing on the mechanics of the situation by stating Mr Baron was present to assist the claimant with writing a letter of resignation because he was dyslexic, but not answering the question of why.

257. In the absence of a clear explanation, the Tribunal is satisfied that the conduct was related to race.

258. The Tribunal then considered whether the conduct had the purpose of violating the claimant's dignity or the effect of creating an intimidating hostile degrading humiliating or offensive environment for the claimant.

259. Given the circumstances of sending the video footage to Mr Baron and requesting him to attend the meeting without consulting the claimant and Mr Carroll suggesting " if he wanted to resign, Garry would be able to help him write it out" when Mr Baron was an individual who was hostile to the claimant and would not work with him, we find does about to evidence to suggest the respondent had the purpose of creating a hostile environment for the claimant.

260. In case we are wrong about that, we have considered the disadvantageous effect described in s26 (1)(b) Equality Act 2010. We rely on the claimant's evidence that he found this being asked to resign in these circumstances to be hostile behaviour. He told us he felt" pushed out".

261. Even Mr Carroll seemed to concede this when he said: "It might not look it now, but I was trying to be fair and helpful".

262. We are satisfied that it was reasonable in the circumstances of this case for the claimant to feel that the conduct created a hostile environment for him so that claim for harassment succeeds

263. We did not consider the final allegation of victimisation/harassment because that was the claimant's dismissal and we have already found that amounted to an allegation of direct race discrimination.

Time Limits

264. Finally, the Tribunal deals with the issue of time limits-s123 Equality Act 2010.

265. Allegation 1 occurred from 2 October 2019 to the claimant's suspension on 22 January 2020, allegation 3 occurred in November 2019, allegation 4 occurred in December 2019 and allegation 5 on 22 January 2020.

266. The Tribunal considered s123(3) Equality Act 2010.The Tribunal is satisfied that although different individuals were involved this was part of a course of conduct which culminated in the claimant's dismissal on 11 March 2020. There is no dispute that the claimant's dismissal was within time.

267. The Tribunal has found that the Preston depot at the relevant time was a depot where the management and the union colluded in making the working environment difficult for the claimant. Mr Smith who told the claimant in November 2019 to "stop playing the race card" had objected to the claimant solo driving and was the person who submitted the video footage of the claimant holding a mobile phone while driving. Mr Baron who told the claimant "we will now face disciplinary because of you" was the union representative present at the meeting with Mr Carroll when the claimant was asked if he wanted to resign even though the claimant had not requested Mr Baron to be in attendance and did not like him.

268. There was a long history of the workforce treating the claimant in an unpleasant way and refusing to work with him and the management colluding with that situation. Mr Meiring, who stopped speaking to the claimant, apart from to issue work related instructions after October 2019,was the senior manager at Preston removed the claimant from driving duties for a long period of time, suspended him and removed him from driving after an incident in the yard in August 2019 and was closely involved in the decision to suspend the claimant and later was in regular discussion with the Dismissing Officer about the decision to dismiss him for the mobile phone incident.

269. For all these reasons the Tribunal is satisfied there is a course of conduct and therefore the claimant's claims are within time.

Polkey deduction

270. We must now engage with the principle in Polkey v AE Dayton Services. The Tribunal has found the claimant's dismissal was an act of direct race discrimination.

271. We must consider, having regard to the Polkey principle and s123(1) Employment Rights Act 1996, whether the respondent could have fairly dismissed the claimant for holding a mobile phone whilst driving.

272. Case law reminds the Tribunal we must engage with this issue, which was identified as relevant at the case management hearing before Judge Horne. (p37).

273. This requires the Tribunal to enter a counter factual world.

274. The first question we considered is whether the claimant would have driven while holding the phone to navigate if he had not had a disagreement with his co-driver Daniel Smith, a person whom we have found had previously made a race related remark to the claimant and had previously complained about the claimant.

275. The claimant said it was exceptional behaviour for him to drive holding his phone and that it was done in the context of being goaded by Mr Smith who refused to navigate and therefore he had to navigate using his phone. The Tribunal accepted his evidence on this point.

276. However the Tribunal finds there must have been some risk, however small, that the claimant might have driven holding a phone in circumstances where he fell out with a colleague, unrelated to race.

277. The Tribunal then considers if the claimant had driven while using a phone to navigate, would his colleague have filmed it and crucially would the colleague have informed management and provided them with the mobile phone clip. (There is no CCTV in the cab of the vehicle). The Tribunal finds it highly unlikely that a colleague working closely with the claimant would go to the extent of filming him, reporting him to management and to provide the film clip.

278. The Tribunal is satisfied from the respondent's evidence that if a driver and colleague who were crewed together had a disagreement then it was termed "divorce" and each crew member was reallocated to a new partner, without any questions being asked.

279. Therefore the Tribunal finds that in this "counter factual" world, if there was a disagreement to the extent that the claimant ended up using his mobile phone to navigate whilst driving, that work mate would not film or report the behaviour but ask to be re allocated to a different crew mate. For that reason, the Tribunal finds it highly unlikely that such a transgression would ever come to the attention of management.

280. Even if the colleague took the extraordinary step of filming the conduct we find it unlikely it would be passed to management. In his statement as witness A, Mr Smith said he had retained the footage for "several months". Even if filmed on 19 Dec 2019 as the claimant thought likely, there was a delay of over a month where the witness said he deliberated over whether or not to hand it in.

281. Finally even if the claimant had held the phone whilst driving, his colleague had filmed it , reported it and handed the clip in to management, the claimant may not have been dismissed. He had lengthy service, a clean disciplinary record and no points on his licence. He could have been required to work as a driver's mate for a period of time (as he had done in the past) and issued with a lesser sanction such as a final written warning as was the white driver who used a mobile phone whilst driving and who was reported to the police by a member of the public.

282. Although Mr Lea said he would sack "100 times out of 100" for this conduct, the evidence shows that another disciplinary officer did not dismiss for similar behaviour and there is no guarantee in the counter factual world that Mr Lea would have been the dismissing officer.

283. So for all these reasons the Tribunal finds the likelihood of the claimant being dismissed in the counter factual world is very low and we consider 10 percent deduction of the compensatory award to be just and equitable.

Contributory Fault

284. Finally, the Tribunal deals with the issue of contributory fault in accordance with s123(6) Employment Rights Act 1996. This issue was identified in the case management hearing by Judge Horne.P37.

285. The reason the claimant was dismissed was because he was holding a mobile phone when driving a heavy goods vehicle. We have found that dismissal was discriminatory in the particular circumstances of this case.

286. It is unusual to make a reduction for contributory fault where the dismissal is discriminatory. However in this particular circumstance there is no dispute the claimant admitted he was holding a mobile phone whilst driving. We rely on his evidence he was looking at it for sat nav purposes.

287. However we find there must be a degree of contributory fault. Regardless of the very precise nature of road traffic offences it is obviously dangerous to have one hand off the wheel holding a device and looking at it however momentarily and under whatever provocation. The claimant agreed it was not acceptable behaviour for a professional driver. p248.

288. We must consider: was there culpable or blameworthy conduct? The answer is yes for the reasons given above.

289. The next question is, did it cause or contribute to dismissal. The answer is clearly yes.

290. We must then consider what is a just and equitable deduction.

291. We have taken into account our finding that the dismissal was discriminatory, and we have also taken into account that the claimant had clean disciplinary record and lengthy service. We have taken into account that the respondent did not dismiss a white driver who drove one of their vehicles when holding a mobile phone to speak to his wife. We have taken into account the claimant was using the mobile phone as a sat nav in circumstances where he had been provoked by his driver's mate who refused to navigate.

292. Balanced against that we have taken into account that holding a mobile phone whilst driving an HGV, even whilst using the device as a sat nav, is dangerous because it means the driver has only one hand on the wheel and is glancing at the phone, however momentarily. The claimant, a professional driver, agreed that it was dangerous.

293. We have considered too the overall picture, taking into account that we have already made a Polkey deduction of 10 percent.

294. In these circumstances we consider a deduction to the compensatory award of 50 percent is just and equitable.

295. We now consider contributory fault and the basic award s122(2) ERA 1996. We are satisfied that it is just and equitable to reduce the basic award for the same reasons we have given above also by 50 percent.

Employment Judge Ross

24 May 2023

RESERVED JUDGMENT AND REASONS SENT TO THE PARTIES ON

26 May 2023

FOR THE TRIBUNAL OFFICE

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