



EMPLOYMENT TRIBUNALS

Claimant

Respondent

MR JOSHUA MUNEMO

v

**LONDON UNITED BUSWAYS LIMITED
T/A RATP DEV LONDON**

Heard: On: 26-28 October 2020

**Before: Employment Judge Sutton QC
 Ms L. Jones
 Ms S. Aslett**

Representatives

Claimant: Mr Neckles (PTSC Union).
Respondent: Mr Nuttman Solicitor

JUDGMENT

The claim is dismissed.

REASONS

INTRODUCTION

1. By a claim received by the Tribunal on 7 February 2020, the Claimant brought complaints of constructive unfair dismissal; direct race discrimination; harassment and victimisation.
2. The Claimant's claim was heard over three days. At the outset of the hearing, the Tribunal indicated that it would firstly provide its determination on issues of liability, with remedy to be decided, if appropriate, in the light of that determination. The listing provided sufficient time for the completion of the evidence and submissions in relation to liability and time for deliberations.
3. Unfortunately, the hearing was halted on the final day when Mr Neckles notified the Tribunal that he was unable to attend because of sickness. The Claimant, who did attend, informed the Tribunal that Mr Neckles had told him that morning that he had experienced food poisoning. The hearing was therefore adjourned. The Tribunal decided, in the interests of proportionality, that it would direct the parties to provide their closing submissions in writing and dispense with a further hearing before determining issues of liability. Neither party objected to this approach being adopted.
4. In the course of the hearing, the Tribunal heard evidence on behalf of the Respondent from Mrs Kelly Rahman, General Manager at the Stamford Brook garage; Mrs Sheila Biddle, driver and formerly Staff Manager at Stamford Brook garage and Mr David Bushnell, the Respondent's Head of Human Resources. The Claimant also gave evidence. The Tribunal was provided with an agreed hearing bundle.

THE ISSUES

5. At a case management hearing conducted by Employment Judge Pearl on 10 June 2020, the issues were agreed. In somewhat reformulated terms, and as discussed at the commencement of the full hearing, the issues which arose for determination are as follows:-

Constructive unfair dismissal

- 5.1 The Claimant relies on the following matters as triggering his resignation and providing the basis for his complaint of constructive dismissal. He contends that these matters, whether viewed singly or cumulatively, gave rise to a breach of the implied term of mutual trust and confidence and that he tendered his resignation in response.

- (i) the Respondent's failure to apply the 'TUPE guidelines' in his case;
- (ii) the Respondent's failure to deal with his 8 October 2019 grievance fairly and in accordance with the grievance procedure in two respects:- by appointing David Bushnell to hear and determine the same and being unfairly denied an opportunity to appeal the outcome;
- (iii) undue pressure being placed upon the Claimant by Sheila Biddle to resign on 5 November 2019, despite her being aware that this was contrary to his wishes;
- (iv) unfair selection for a TUPE transfer when the Claimant had communicated his wish to remain employed by the Respondent and where other employees, who were formerly assigned to both the N9 & 27 Routes, had their requests accepted with their terms and conditions left intact.
- (v) failure to deal with the Claimant's December 2018 grievance fairly and in accordance with the Respondent's grievance procedure.

5.2 Did the Claimant affirm the contract since those alleged breaches of contract?

5.3 If not, were any of the act(s), viewed singly or cumulatively, repudiatory breach(es) of contract entitling the Claimant to resign?

5.4 Did the Claimant resign in response to such repudiatory breach(es)?

5.5 Have the terms contained within the Respondent's Equality & Diversity Policy, Grievance Policy Procedure & TFL TUPE Guidelines Policy Procedure been incorporated into the Claimant's Contract of Service?

Direct race discrimination (section 13 Equality Act 2010)

5.6 The Claimant alleges that he was subjected to less favourable treatment by Ms Kelly Rahman, Ms Sheila Biddle and Mr David Bushnell.

5.7 The Claimant contends that he was subjected to less favourable treatment because of his race.

5.8 For the purposes of this heading of complaint, the Claimant relies upon the same matters as are set out at paragraph 4.1 above as amounting to 'less favourable treatment'.

5.9 At the point when the issues were agreed, the Claimant identified the following as actual comparators for the purposes of his complaint of race discrimination :-

- (i) M Lakor;
- (ii) K Beagan;
- (iii) M Sottile;
- (iv) S. Sghaier;
- (v) B. Cumberbatch;
- (vi) D. Tesfai;
- (vii) L. Delahaye.

5.10 Has the Respondent proved a non-discriminatory reason for any less favourable treatment?

Harassment

5.11 Did the Respondent subject the Claimant in unwanted conduct. The Claimant again relies upon the matters set out at paragraph 4.1 above as amounting to unwanted conduct under this heading.

5.12 If so, was such conduct related to the Claimant's race?

5.13 If so, did such conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant? Was such an effect reasonable?

Victimisation

5.14 Did the raising of the Claimant's grievance on 8 October 2019 amount to a protected act?

5.15 Was the grievance made in good faith?

5.16 Was the Claimant subjected to any of the detriments set out at paragraph 4.1 (i)-(iv) above?

5.17 Were any of the alleged detriments as a result because of the alleged protected act?

5.18 Alternatively, has the Respondent proven a non-discriminatory reason for any proven detriment?

Jurisdiction / Out of Time?

- 5.19 In relation to the Claimant's complaint that the Respondent's conduct of his February 2019 grievance was an act of direct race discrimination / harassment, was such conduct an act extending over a period of time? Alternatively, is the time limit applicable to such complaints to be extended on just and equitable grounds?

Wrongful dismissal

- 5.20 Did the Respondent breach the Claimant's contract of employment such as to entitle him to treat himself as discharged from further performance of the same? The Claimant claims notice pay.
6. As Mr Nuttman observed at the outset of the hearing, no complaint was being advanced on behalf of the Claimant that the relevant events gave rise to a 'material detriment' complaint under the provisions of TUPE regulation 4(9). Mr Neckles did not contend otherwise. The Tribunal accordingly proceeded on the footing that the issues for determination were comprehensively stated and confined to those set out above.
7. In his written closing submissions, Mr Neckles on behalf of the Claimant sought to introduce for the first time a case under the provisions of TUPE and the assertion that the transfer of his employment to Abellio would have given rise to a 'substantial disadvantage' in respect of his contractual terms. This was not amongst the issues raised in the Particulars of Claim, agreed at the case management directions hearing or identified at the commencement of the full hearing.
8. Without an application to amend, it was not appropriate to seek to introduce a new case in closing submissions and the Tribunal declines to entertain the same. The evidence which would have been necessary to examine the new issues, had such a case been properly advanced, was not placed before the Tribunal for consideration in the course of the hearing. Neither did it hear argument from the Respondent in response to the same.

PRELIMINARY APPLICATIONS

Application to rely upon further comparators

9. At the commencement of the hearing, the Claimant's representative raised for the first time an application to rely upon further actual comparators: namely Mr Briani and Mr Ebrahim.
10. The application was opposed by the Respondent. In support of its objection, the Respondent pointed out that these proposed further named comparators were reassigned to alternative duties in October 2018 following the deletion of Route 10 to

which they had been previously assigned. These were not individuals to whom the lockdown provisions of the Guidelines were applicable. In the circumstances, they were not relevant comparators whose treatment could be measured against the Claimant's.

11. Furthermore, it was submitted that the request was made far too late in the day. The Respondent's head office would not be able to secure the relevant documentation pertaining to these individuals' working arrangements at short notice. Personnel files were not held centrally nor electronically. Instead, paper files were stored at the various depots.
12. The Respondent also asserted that the Claimant had offered no convincing explanation for the lateness of the application to introduce further comparators.
13. The Tribunal decided to refuse the Claimant's application to rely upon further named comparators in support of his claim. In short, the application was made far too late and would cause significant prejudice to the Respondent and disruption to the proceedings were it to be acceded to. No proper explanation had been provided as to why the proposed comparators had not been identified at a far earlier stage. Additionally, it was far from clear that the circumstances of the two individuals were comparable to those of the Claimant so as to provide any meaningful support for his claim.

Application for disclosure of further documents

14. The Claimant requested further disclosure of drivers' terms and conditions of employment both pre- and post-transfer. Mr Neckles stated that his state of health during the period of the pandemic had not been good and had impeded his ability, as he put it, to do 'due diligence' on the Claimant's case.
15. The Respondent opposed the application on various grounds, including the disproportionate nature of the request, its lateness and the history of chasing that it had engaged in to try and secure the Claimant's cooperation and compliance with the Tribunal's case management directions.
16. The Tribunal decided that the application should be refused. The application was once again made very late in the day. Had the Tribunal allowed the application, it would have necessitated an adjournment and thus caused disruption to the proceedings. This would have been unfair to the Respondent and wasteful of Tribunal resources. Although not central to the decision to reject the application, it was unclear why the material was considered potentially relevant in any event.

FINDINGS

17. The Claimant is of Zimbabwean nationality and describes his identity as Black British of African origin.

18. The Respondent is a bus service operator, providing transport services across central west and south London from eight garages. It operates its services under contract with Transport for London (TfL).
19. The Claimant commenced employment with the Respondent as a bus operator / driver on 6 December 2004. His contract of employment, which he signed on 24 November 2004, provided that he must be prepared to work at any of the Respondent's garages. The agreement allowed for drivers to apply to work at a location closer to their homes and stated that such requests would usually be agreed if a vacancy existed.
20. At all material times, the Claimant was based at the Stamford Brook depot and primarily assigned to Route 27. When he transferred to that route following the deletion of route 10, he was warned that he might not be able to keep the night driving hours, although any rostering change would be discussed before being implemented.

The Guidelines

21. The process leading to a transfer of a route from one of TfL's operators to another is undertaken in accordance with a set of agreed guidelines for dealing with TUPE transfers (referred to hereafter as 'the guidelines'). The recognised trade unions were consulted in the formulation of the guidelines and it is common ground that they were applicable in this case. The material version of these guidelines is dated January 2016. It is these guidelines which feature in the Claimant's complaints of breach of contract and unlawful discrimination.
22. The guidelines are regarded as non-contractual, 'best practice' guidance and are not intended to modify the legal obligations which arise under TUPE. Instead, their purpose is to provide a means of ensuring a smooth transfer; that good industrial relations are maintained; that expensive legal challenges are avoided and that operators are fully aware of potential costs associated with the acquisition of a route when tendering.
23. A key provision of the guidelines for present purposes is set out under the heading 'Information Exchange'. This provides as follows:-

After the award of a contract to a non-incumbent operator, the incumbent operator should immediately "lock-down" the rota for that route and only transfer staff to and from it where absolutely necessary.
24. This 'lock down' arrangement is aimed at providing a fixed and ascertainable state of affairs in the lead up to the transfer. It enables both the incumbent and receiving operator to have a definitive appreciation of the number and grades of drivers and other staff to whom TUPE is expected to apply; details of any applicable roster guarantees; the average weekly pay bill for the relevant group of staff; contractual relocation provisions and any other information that might be relevant to the transfer.

25. The guidelines also set out a range of provisions aimed at facilitating the pre-transfer consultation process. They also detail information that both operators are required to provide to London Bus Services Limited (LBSL), a subsidiary of TfL that manages bus services in London, including a full list of employees intended to be transferred and associated employment related information about each of them.

Events leading to transfer

26. In 2019, TfL made Route 27, to which the Claimant was assigned, available for tender. The Respondent's bid to remain the operator of the route was unsuccessful. The successful tenderer was Abellio, with a scheduled start date for their operation of the route of 8 November 2019.
27. Once the announcement had been made that the Respondent had lost Route 27, the Respondent's consultation with affected staff members, whether individually or via Unite, the recognised Trade Union, and Abellio commenced. On 23 July 2019, a consultation meeting took place at which Mrs Rahman was in attendance. After an initial debate it was accepted by Unite that the transfer of the route was governed by TUPE.
28. On 29 July 2019, the Respondent wrote to Unite confirming details of the transfer. Although not as a matter of contractual entitlement, it was made clear that affected employees would be offered the opportunity to move to a vacancy within the Respondent as a means of avoiding transfer, but in doing so such employees would have to accept the terms and conditions currently applicable to the vacancy in question. In practice, this change in terms could affect the maximum permitted time on duty (ToD), which would increase from 8 hrs 30 mins to 10 hours.
29. Further consultation meetings took place on 12, 14, 19 and 21 August held in conjunction with Unite. All drivers were advised of these meetings in writing and invited to attend. The purpose of these meetings was to consult about the loss of the route and what options were available for affected employees. The Claimant chose not to attend any of these meetings.
30. On 14 August 2019, employee liability information was sent to Abellio. As one of the drivers assigned to Route 27, this information also included the Claimant's details. On 19 August 2019, Abellio wrote to all affected employees confirming that their employment, continuity and contractual terms would be preserved following the transfer. The only practical difference was the location of the depot from which the route operated: Abellio's Route 27 depot would be located in Battersea, about 5 miles from the Respondent's Stanford Brook depot.
31. On 21 August 2019, Ms Rahman wrote to the Claimant to explain the options available to him: retaining his current terms and conditions and transferring to Abellio with effect from 9 November 2019. Alternatively, and subject to vacancies being available, transferring to another route within the Respondent's operation. As noted above, this

would necessitate acceptance of the Respondent's terms and conditions offered for such roles with a potential increase in Time on Duty dependent on rota. Finally, the Claimant could elect to resign. Ms Rahman intended the last option to refer to the consequences of the Claimant declining to transfer.

32. On 5 September 2019, the Claimant wrote to Ms Rahman stating that none of the above options was acceptable to him. He stated that he would only resign if he was offered a considerable severance package or a redundancy payment. He contended that the travel implications for him were he to continue as a Route 27 driver with Abellio would present difficulties for him in terms of his daily schedules and rest times. He was unattracted to the idea of being reassigned to an alternative route within the Respondent given the contractual changes that would entail and the loss of opportunity to work night shifts.
33. In response, Ms Rahman proposed an in-person meeting at her office on 11 September 2019. When the Claimant arrived at this meeting he said that he was unwilling to discuss the matter and wished to have a written response to the concerns he had flagged. Ms Rahman agreed to respond in this manner, but made it clear to the Claimant that redundancy was not an option as his role was not redundant and his terms and conditions were protected in relation to the transfer.
34. The Claimant subsequently telephoned and apologised for his behaviour at the meeting. Ms Rahman ran through the options once again and repeated that the Claimant's role was not redundant so his proposal was not an option. The Claimant responded that he would resign.
35. Following this call, Ms Rahman spoke with Ngoma Knight, an HR Business Partner with the Respondent, who wrote to the Claimant again explaining his options. In her letter dated 4 October 2019, Ms Knight pointed out that it was open to the Claimant to object formally to being transferred and that his employment would in such circumstances come to an end on 9 November 2019.

October 2019 Grievance

36. By letter dated 8 October 2019, the Claimant raised a grievance. In this grievance the Claimant complained about the fact that he had been assigned to route 27 and locked onto that route in advance of the transfer. He asserted that the respondent had 'carefully chosen' drivers whom it wished to assign to that route and allowed others they preferred to stay with the company to be assigned to route N9.
37. The Claimant also raised as a grievance events which had occurred almost a year previously, and which involved the allegedly abusive behaviour towards him of another driver called Shafique. He contended that the matter had never been concluded, although he understood that Shafique had resigned. He understood that the process was being managed by Ms Rahman. For that reason, the grievance was directed to HR rather than being raised with his line manager.

38. The Claimant further complained in his grievance that the working arrangements, were he to agree to transfer to Abellio, would suit him less well and will force him to relinquish his night shift.
39. This grievance was investigated by David Bushnell, the Respondent's interim head of HR, who met with the Claimant on 31 October 2019 and provided a written outcome to the grievance on 6 November 2019. In summary, Mr Bushnell concluded:-
- (i) the grievance relating to the episode with Shafique should have been raised in a timely manner and was only being brought up at this juncture to support another issue of complaint. In fact, a response had been provided to the Claimant in February 2019 explaining that the matter would not be taken forward because Shafique was no longer with the company;
 - (ii) accurate information had been provided to the Claimant in relation to the TUPE transfer and how it affected his position. There had been no misrepresentation as he contended. The Claimant, in his meeting with Mr Bushnell, had neglected to mention the follow up discussion which had taken place with Ms Rahman.
 - (iii) the Claimant could not be assigned to the N.9 route as there were no vacancies. It was noted that the Claimant had neglected to respond to a personal preference form which had been sent to him by Ms Biddle, the staff manager at Stamford Brook, on 21 August 2019. Accordingly, the company was only in a position to offer a generic contract, should he choose to remain with the Respondent.
40. At the end of his decision letter, Mr Bushnell notified the Claimant of his right to appeal the decision by supplying his written grounds within 7 days.

Resignation

41. Ms Rahman informed Ms Biddle that the Claimant had notified her that he wished to resign. As noted above, he had subsequently raised his grievance but had not at that point confirmed his resignation in writing. On 5 November 2019, in response to the information she had been provided with, Ms Biddle informed the Claimant by email that he should record his resignation in writing. The purpose of the email was to make clear that the grievance letter which he had submitted did not serve as a letter of resignation.
42. The Claimant responded by email of 6 November 2019 that he wished to have confirmation as to whether the Respondent was prepared to let him stay or whether his employment was being transferred to Abellio under TUPE. These matters were addressed in the grievance outcome letter referred to earlier.

43. On 7 November 2019, the Claimant submitted a letter of resignation to Ms Biddle. He cited a number of factors in support of his decision to resign, although he stated that these did not represent an exhaustive list. The Claimant asserted:-
- (i) that he had made a reasonable request not to be transferred to Abellio. Vacancies existed within the Respondent that he could be assigned to. The Respondent had afforded certain unidentified operators the opportunity to remain but not him and that this gave rise to breaches of the Equality Act 2010.
 - (ii) the Respondent's actions constituted a fundamental breach of contract and specifically the implied trust and confidence term.
44. The Claimant made it clear that his resignation was to take place with immediate effect.

New employment with Abellio with effect from December 2019.

45. In fact, the Claimant went on to accept employment as a driver with Abellio on 4 December 2019, less than a month after the effective date of termination of his employment with the Respondent. He explained to the Tribunal that the working arrangements with Abellio were convenient for him given the proximate location to his home of the depot to which he was assigned.

Comparators

46. Turning to the named comparators the Claimant has identified, their circumstances were as follows:-
- (i) M Lakor is a black African whose employment transferred to Abellio.
 - (ii) M Beagan is white Irish and accepted new contract terms as a condition of transferring to Stanford Brook as a night driver. He was originally assigned to Route 10 before that route was deleted. He was then assigned to Route 9.
 - (iii) M Sottile was Italian whose employment transferred to Abellio.
 - (iv) S Sghairer, who was Tunisian, accepted new contract terms as a condition of transferring to Stanford Brook as a night driver. He was originally assigned to Route 10 before that route was deleted. He was then assigned to Route 9.
 - (v) B Cumberbatch was British and accepted new contract terms as a condition of transferring to Stanford Brook. He was originally assigned to Route 10 before that route was deleted. He was then assigned to Route 9.

- (vi) D Tesfai was Swedish and accepted new contract terms as a condition of transferring to Stanford Brook. He was originally assigned to Route 10 before that route was deleted. He was then assigned to Route 9.
 - (vii) L. Delahave was Black Caribbean. He was never assigned to route 27 and was unconnected with the transfer process. Instead he was relied upon by the Claimant as an individual whose grievance was followed through to a conclusion. The Claimant invited the Tribunal to compare Mr Delehaves treatment with his own in relation to the earlier grievance he raised in connection with Mr Shafique, which had been curtailed following the latter's departure from the company.
47. Contrary to the case advanced on behalf of the Claimant in closing submissions, save for Mr Lakor and Mr Sottile, whose employment did transfer to Abellio, none of the above-named comparators was assigned to the same rota as the Claimant himself, namely Route 27. None of them provided support for the Claimant's contention that he was treated unfavourably relative to others by reason of the treatment alleged. Neither could the Tribunal identify any evidence to support the Claimant's assertion that a hypothetical comparator, in materially the same circumstances as himself, but of a different race or ethnic background, would have been treated differently.

SUBMISSIONS

48. The Tribunal received written closing submissions from both parties. It is not intended to summarise their contents, where are a matter of record. The Tribunal wrote to the parties on 10 December 2020 inviting submissions in reply. Neither side availed itself of that opportunity.

ANALYSIS AND CONCLUSIONS

Constructive Dismissal

49. Section 95(1)(c) of the Employment Rights Act 1996 (ERA) states that there is a dismissal when the employee terminates the contract, with or without notice, in circumstances such that he or she is entitled to terminate it without notice by reason of the employer's conduct. This form of dismissal is commonly referred to as 'constructive dismissal'.
50. In Western Excavating (ECC) Ltd v Sharp 1978 ICR 221, CA, the Court of Appeal ruled that, for an employer's conduct to give rise to a constructive dismissal, it must involve a repudiatory breach of contract. As Lord Denning MR put it: 'If the employer is guilty of conduct which is a significant breach going to the root of the contract of employment, or which shows that the employer no longer intends to be bound by one or more of the essential terms of the contract, then the employee is entitled to treat

himself as discharged from any further performance. If he does so, then he terminates the contract by reason of the employer's conduct. He is constructively dismissed.'

51. In order to claim constructive dismissal, the employee must establish that:
 - (i) there was a fundamental breach of contract on the part of the employer
 - (ii) the employer's breach caused the employee to resign
 - (iii) the employee did not delay too long before resigning, thus affirming the contract and losing the right to claim constructive dismissal.

52. It should be noted that a constructive dismissal is not necessarily an unfair one. The issue of fairness falls to be considered once it has been determined that there has been a dismissal within the meaning of s.95 of the Act.

53. The Claimant has alleged that the Respondent fundamentally breached the implied term of trust and confidence in the employment relationship. This term, which is a feature of all employment contracts, provides that an employer (or in a relevant case an employee) shall not, without reasonable and proper cause, conduct itself in a manner calculated and likely to destroy or seriously damage the relationship of confidence and trust between itself and the employee.

54. In *Kaur v Leeds Teaching Hospitals NHS Trust* [2018] EWCA Civ 978 the Court of Appeal identified five stages in the analysis of whether an employee was constructively dismissed in consequence of a single repudiatory breach or the cumulative impact of several acts or omissions said to constitute such breach:-
 - (i) what was the most recent act (or omission) on the part of the employer which the employee says caused, or triggered, his or her resignation?
 - (ii) has he or she affirmed the contract since that act?
 - (iii) if not, was that act (or omission) by itself a repudiatory breach of contract?
 - (iv) if not, was it nevertheless a part of a course of conduct comprising several acts and omissions which, viewed cumulatively, amounted to a repudiatory breach of the implied term of trust and confidence?
 - (v) did the employee resign in response (or partly in response) to that breach?

55. With those principles in mind, the Tribunal turned to the agreed issues under this heading as detailed above.

56. The Tribunal rejects the contention that the Respondent failed to apply the guidelines appropriately in the Claimant's case. The flaw in the Claimant's case, which goes to the root of his complaints generally, is his contention that he was assigned to a mixed rota rather than being to route 27. It is clear that this was not the case and that he was correctly treated as being assigned to route 27. Indeed, the Claimant accepted in cross-examination that, following the deletion of route 10, he was assigned to route 27. The guidelines were applicable to the Claimant's case and were applied appropriately.
57. In terms of the handling of the Claimant's grievance of October 2019, the Tribunal considered that the decision to ask Mr Bushnell to undertake the task of first stage grievance investigator was entirely appropriate, in circumstances where the actions of the Claimant's line manager were criticised. Neither is it correct to say that the Claimant was denied the right of an appeal. He was notified of the opportunity to pursue a grievance appeal but did not exercise that right.
58. There was no undue pressure applied by Ms Biddle to persuade the Claimant to resign. Ms Biddle's email was intended to ensure that the Claimant appreciated that correspondence exchanged in the grievance process was not to be confused with his notification to his employer of his intention to resign. There was nothing pressurising in the tone of her communication with the Claimant and neither did the Claimant view it as such.
59. There was nothing in the evidence to support the Claimant's contention that he was treated differently from others in being selected for TUPE transfer. The argument is premised upon the erroneous assertion that the Claimant should not have been treated as being assigned to Route 27. None of the comparator cases provides any support for the Claimant's argument on differential treatment, a point returned to below in relation to the complaint of direct discrimination.
60. Finally, in relation to the allegations of breach of contract, the Claimant's contention that he was treated unfairly in relation to his earlier grievance about a fellow worker's behaviour is without substance. Leaving aside the delay in the Claimant's complaint about this issue, and potential issues of affirmation, the reality of the situation is that the Respondent acted reasonably in regarding the issue as closed following the departure from the organisation of the staff member who was the subject of the Claimant's complaint. The Claimant appreciated soon after the closure of the grievance process that this was the stance the Respondent intended to adopt and, understandably, raised no objection at the time.
61. In the light of the above, the remaining issues raised under the heading of constructive dismissal fall away. None of the matters relied upon by the claimant, whether viewed singly or in combination, is capable of amounting to a breach of contract, still less one going to the root of the employment relationship.

Direct Race Discrimination

62. Section 13 (1) of the Equality Act 2010 provides that "a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others". As noted above, the Claimant relies upon the protected characteristic of race. The Tribunal was directed to the following principles and guidance from the decided cases.
63. Applying the statutory burden of proof provisions, it is for the Claimant to establish facts from which, in the absence of an adequate explanation from the Respondent, the Tribunal can infer discrimination.
64. The Tribunal can take into account the Respondent's explanation for the alleged discrimination in determining whether the Claimant established a prima facie case of unlawful discrimination.
65. The burden of proof does not transfer to the employer simply on the Claimant establishing a difference in status (in this case race, ethnicity or nationality) and a difference in treatment. Those bare facts only indicate the possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination
66. As noted above, the allegations which the Claimant relies upon to support his complaint of constructive dismissal are repeated under this heading in like terms.
67. The complaint of direct discrimination is not established. The Tribunal repeats its earlier findings. The Claimant has failed to show evidence sufficient to discharge the first stage of the statutory burden of proof. The named comparators that he seeks to rely upon provide no support for his complaint of less favourable treatment. In respect of each of the instances of treatment complained of, the Tribunal is satisfied that none was affected by considerations of race to any degree. Neither is there any evidence to sustain the Claimant's case on the basis of a hypothetical comparison.

Victimisation

68. In his closing submissions, the Claimant contends that the Respondent 'contrived to designate' him to the undertaking to be transferred because of his performance of protected acts. The Claimant neglects to identify the protected act which is contended for or to examine their causal effect. But in any event, the Tribunal does not accept that there was any evidence that the Claimant's assignment to Route 27 was contrived in any way. It simply reflected the reality of the working arrangements at the point when the transfer was given effect to. There was no evidence of bad faith on the Respondent's part.

69. The Claimant also contends in his closing submissions, as a further complaint under this heading, that the Respondent had failed 'to incorporate into the transfer agreement conditions which pertain particularly to the Claimant about his own personal terms'. It is not clear what is here being asserted. But it does not reflect any of the agreed issues which the Tribunal has been asked to determine.
70. In summary, the Tribunal was unable to discern any basis for the Claimant's complaint that he was subjected to detrimental treatment, whether in the respects alleged or at all, in consequence of performing a protected act. The complaint under s.27 of the Equality Act 2010 is not established.

Harassment

71. The complaint of harassment under s.26 of the Equality Act 2010 is similarly without substance. The Claimant has identified no conduct on the part of the Respondent which could reasonably be viewed as falling within the scope of that statutory provision.
72. In his closing submissions, the Claimant asserts that the conduct relied upon for the purposes of this heading of his complaint was his assignment to the route to be transferred. This is simply a reformulation of the complaint which he advanced under the earlier headings of complaint, which the Tribunal considers to be unfounded.

CONCLUSION

73. For the reasons set out above, the Tribunal was unable to uphold any of the headings of complaint which the Claimant advanced.

Employment Judge Sutton QC

9 March 2021

JUDGMENT SENT TO THE PARTIES ON

10/03/21....

FOR THE TRIBUNAL OFFICE