EMPLOYMENT TRIBUNALS

Claimant		Respondent
Mr D Berhane	-v-	**Walkers Chocolates Limited**

FINAL MERITS HEARING

Heard at:	**Centre City Tower, Birmingham**	On:	**9-11 July 2018**
Before:	**Employment Judge Perry**		**Ms D Wood** **Mr N Forward**

Appearances

For the Claimant: **Mr E Komeng** (lay representative - Birmingham People's Centre)
For the Respondent **Mr B Henry** (counsel)

REASONS

Judgment and oral reasons were given at the conclusion of the trial in this matter. Written reasons were sought by the claimant's representatives by an email dated 25 July 2018.

1. This is a claim for race discrimination only. The issues were identified, and case management directions given at a Case Management discussion on the 6 March 2018. The complaints were clarified as direct discrimination and victimisation.

2. Whilst the panel were reading the various witness statements at the start of the Hearing on Monday we asked the parties' Representatives to prepare a list of issues. I do not propose to relay them in full now given they are agreed. I will annex them to the Judgment, although I need to record that Issues 7(a) and 7(d) were not pursued.

3. The Claimant started working at Walker's Chocolates in June 2010 as a member of agency staff. He was made a permanent employee on the 19 September 2012 and became one of their production operatives. The Respondent trades from premises at Hay Mills in Birmingham and employs approximately 100 employees plus some agency workers. The Claimant as of today, remains employed.

4. The principal matters about which the claimant complaints that we need to deal with (as opposed to the background matters which we are asked to consider) started in June 2017 when the Claimant was assigned to a new line, line M, as we will refer to it.

5. On the 18 October that year, the claimant and a number of other staff were removed from that line. In his Claim Form (ET1) he states that effective from

Monday 23 October four posts were filled by white employees from another line who had no prior experience working on line M. He states he queried that, no explanation was forthcoming, and his Line Manager has failed to respond to the grievance that he raised to-date.

6. The claimant alleges that following his complaint, he was consistently poorly treated by his employers, he no longer has a permanent post at work, rather, he was assigned to doing odd jobs on arrival at work each day, despite being an experienced machine operator. He lists amongst those duties being asked to stack pallets and undertake packing duties. He asserts he was required to doing labouring jobs in an effort to frustrate him.

7. In recent weeks, he stated that he was assigned to work in an air-conditioned unit without adequate protective gear, he was the only permanent member of staff who had been asked to work on that unit, also in recent weeks been allocated the work of two people.

8. The allocation of the work of two people was not pursued as an act of discrimination or by way of detriment before us.

9. The Respondent does not dispute that the Claimant was moved from line M, however it states that he was not permanently assigned to that line. There is a dispute over the number of times he worked on that line in the immediate run up to the incidents that concern us. Further, the Respondent suggests that his assignments to various roles (including stacking pallets) and so forth dates back to historical matters. I will return to that in due course. Similarly, in relation to the assignment in relation to working in an air-conditioned area; that was for a short period, but other permanent staff were asked to do that, and that role had been newly been created and worked in that air-conditioned area because of shortages of space elsewhere. The respondent states Mr Berhane was posted there because there were issues in relation to who he was working for and allocation of duties in that regard. Again, we will return to those matters in more detail in due course.

10. **THE EVIDENCE.** We heard from some six witnesses, Mr Berhane, Mr Ofiaeli and Mr Shafiq who were called by the Claimant and Mr Saho, Mr Payne and Mr Saidy for the Respondent.

11. The parties' representatives both provided written submissions and they orally elaborated upon the same. We had before us two bundles, the Respondent's bundle was agreed, that ran to some 68 pages and the Claimant's bundle ran to some 12 or so pages. We did not need to refer to the Claimant's bundle. The reason that was lodged was because the Claimant has brought a second complaint that was listed for a Case Management Hearing and at the start of this claim.

12. At the outset we queried with the parties if we had adequate time to do so and given that the Respondent had not lodged its response (ET3) in relation to the second claim at this point, I suggested we address Case Management of the second claim at the conclusion of this hearing if time allowed, but that it would

seem sensible in any event for the second claim to be determined by this panel because we had heard the facts. Both parties indicated that they were agreeable to that.

13. **THE LAW.** Section 13 of the Equality Act defines direct discrimination which arises where because of a protected characteristic an employee is treated less favourably than the perpetrator treats or would treat another. That connotes a comparison. 'Would treat' allows for a hypothetical comparator in addition to an actual comparator. Section 23 of the Equality Act provides that for any comparison there must be no material difference in the circumstances of the case (save for the protected characteristic).

14. Section 27 of the Equality Act provides:

> *"(1) A person (A) victimises another person (B) if A subjects B to a detriment because:-*
>
> *(a) B does a protected act, or*
>
> *(b) A believes that B has done, or may do a protected act."*

15. It is accepted here that despite some matters that I will return to in a moment, the Claimant's complaint of the 19 October 2017 was a protected act and thus the questions for the victimisation claim for us are:-

    a. was he put to any detrimental treatment and

    b. if so was that because of the protected act?

16. Detriment has been given a wide meaning by the courts [1] . Brandon LJ in *Ministry of Defence v Jeremiah [1979] IRLR 436 CA*, a case involving the interpretation of the 1975 Sex Discrimination Act, stated *"… I do not regard the expression* ***'subjecting to any other detriment',*** *as used in s.6(2)(b), as meaning anything more than* ***'putting under a disadvantage'*** *" and went on to say that was a question of fact for the Tribunal [2].*

17. Detriment is assessed objectively. Namely, how it would have been perceived by a reasonable litigant [3]. In making that assessment we must bear in mind that an unjustified sense of grievance cannot constitute detriment [4], and whilst it is not a defence per se that the employer behaved honestly and reasonably, save in the most unusual circumstances, it will not be objectively reasonable for an employee to view distress and worry caused by honest and reasonable conduct of the employer as a detriment [5]. A person may be treated less favourably and yet suffer no detriment.

18. Direct evidence of discrimination is rare and therefore the burden of proof provisions were enacted. Section 136 of the Equality Act provides that if there are facts from which the court could decide, in the absence of any other explanation, that there has been a contravention of the act the tribunal must hold that the contravention occurred unless the alleged perpetrator shows that the contravention did not occur. Discrimination complaints *"rarely deal with facts which exist in a vacuum. To understand them, a Tribunal has to place*

them in the context revealed by the whole of the evidence. It might be said, for instance, that one cannot understand a scene in act III of a play without first having understood what has happened in acts I and II and, it may be, having understood what happens in later scenes too, since these both provide the context for and cast light on the overall picture." [6] Thus, when considering whether a protected characteristic was a ground for less favourable treatment, the total picture has to be looked at and where there are allegations of discrimination over a substantial period of time, a fragmented approach looking at the individual incidents in isolation should be avoided as it omits a consideration of the wider picture [7].

19. The first stage is to establish if there are facts found on the balance of probabilities from which a Tribunal could conclude in the absence of an adequate explanation if an act of discrimination had taken place, if there are not, the claim will be bound to fail. In doing so the protected characteristic need not be the sole or even principal reason for the treatment so long as it has significantly influenced [8] the reason for the treatment (*Nagarajan as applied in Igen v Wong at [*37]). That said, it is unusual to find evidence of discrimination and accordingly it is for the Tribunal to draw appropriate inferences from primary facts. That stated the Tribunal does not have to reach a definitive determination at that stage [9]. The Tribunal can consider the relevant codes of practice and draw inferences from non-compliance with the codes. That said a difference in treatment alone would not be sufficient to establish that discrimination could have occurred and passed the burden of proof to a Respondent, similarly unreasonable conduct without more is not enough either.

20. Where facts are proved from which conclusions can be drawn of less favourable treatment because of protected characteristics, then the burden of proof moves to the Respondent and it is then for the respondent to prove that they did not commit or are not to be treated as being committed the alleged discriminatory act. To discharge that burden, it is necessary for the Respondent to prove on the balance of probabilities that treatment was no sense whatsoever on the ground of protected characteristic [10]. Accordingly, the Tribunal must assess not merely whether there was an explanation of the facts, but also whether such explanation is adequate to discharge the burden, cogent evidence is required to discharge that burden.

21. We referred the parties to the summary in *Serco Leisure Operating Ltd v Lau* [11] which they do not dispute is an accurate summary of the law.

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[1] Lord Hoffman in Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830 at [53].
[2] *adopted and approved by t***he HL in** *Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337* which in turn referred often to another HL decision in *Chief Constable of West Yorkshire Police v Khan [2001] IRLR 48*
[3] Ministry of Defence v Jeremiah [1979] IRLR 436 (CA), 31 per Brightman LJ approved in Chief Constable of West Yorkshire Police v Khan [2001] IRLR 830
[4] *Shamoon v Chief Constable of Royal Ulster Constabulary [2003] ICR 337 HL* per **Lord Hope [35].**
[5] *Pothecary Witham Weld (a firm) & Anor v. Bullimore & Anor* [2010] IRLR 572, [2010] ICR 1008, [2010] UKEAT 0158/09 at [19(3)] applying **Derbyshire v. St. Helens Metropolitan Borough Council** [2001] ICR 841
[6] see *Kansal v Tullett Prebon Plc* UKEAT/0147/16 at [31] where Langstaff J also *referred to Qureshi v Victoria University of Manchester* [2001] ICR 863 and *X v Y* [2013] a decision of the EAT (UKEAT/0322/12/GE

[7] *London Borough of Ealing v Rihal [2004] IRLR 642* CA applied in ***Laing*** [59] and endorsed in *Madarassy v Nomura International [2007] IRLR 246* also CA
[8] "A *'significant' influence is an influence which is more than trivial.*
[9] Where there is no doubt as to the facts, s.136 has nothing to offer of assistance per Lord Hope [32] in **Hewage v Grampian Health Board** *[2012] UKSC 37*,
[10] **Ayodele v Citylink Ltd & Another** *[2017] EWCA Civ 1913*.
[11] *[2018] UKEAT 0120/17 at [21]*

22. **OUR FINDINGS & CONCLUSIONS.** At the outset of the hearing we sought to clarify how the claim was put. A calendar was included within the bundle, apparently referred to by Mr Payne to cross-reference a list of the claimant's late starts and early finishes. That did not identify the detail of those late starts and finishes. On the second day, Mr Henry confirmed to us that Mr Payne wished to make a number of amendments made to his statement. We reminded him and Mr Komeng that if he sought that we do so, the Tribunal could draw adverse inferences in relation to those amendments if they were permitted. Where that takes us to is a matter for us in due course of course.

23. Notwithstanding that reminder amendments were made; to paragraph 10, whereby reference to the calendar of late starts was removed as was reference by Mr Payne to the Claimant not keeping to his assigned times once between 11 September and 31 October 2017. Further in paragraph 11 the reference to a "usual pattern of lateness and leaving early" concerning the period after the first three weeks of November 2017, was amended that assertion to relate to absences only and not punctuality. Finally, in paragraph 13 a reference to the respondent using agency staff and them not being considered for an assignment to line M was deleted, the respondent's evidence in the bundle having hinted that agency staff were used following the change in mid-October. Thus, the reason that Mr Payne gave that the claimant and three individuals (Mr Saho, Mr Shafiq and an individual called Mr Meron) were moved from line M, was because they were agency workers was also removed.

24. I should say that Mr Saho, Mr Meron and the Claimant were all described as black or black African, whereas Mr Shafiq was described as Asian. Two other descriptors were used before the Tribunal, white British and white European.

25. Thus, contrary to the assertion made in his witness statement, the explanations that Mr Payne gave for not including the Claimant, which the Respondent accepts that he was not in line M from mid October 2017 was that he was unreliable in terms of absence, that is relayed in the amended paragraph 10 of his statement.

26. The Claimant makes a number of points as to how that came about and questioning the rational and credibility of Mr Payne and the other witnesses. Before we list those and turn to our analysis of them, we need to place them into context. We do not propose to set out the historical background in full, where relevant, that should become apparent from our findings.

27. We were told Mr Balon, who was the supervisor of line M at the time of the matters that concern us, had been asked to provide a list of the thirty or so staff he felt would be the best operatives to work on line M. As a new line, the Respondent wished to ensure it was operating efficiently. There had been problems with it before, and the respondent was adopting an entirely new method of running the line, switching from normal shifts to twelve-hour shifts. That had been trialled on another line and the Respondent was thus testing if that way of working could be applied to line M.

28. As recompense for expecting staff to work twelve-hour shifts on line M, the staff selected were to be paid a £2.00 additional allowance. Thus, the Respondent accepted that the Claimant's non-selection for Line M could potentially be less favourable treatment.

29. The Claimant firstly made a point that the respondent did not disclose the list of staff that he had been provided by Mr Balon.

30. We will come back to what Mr Balon's view was in due course, but first the Claimant states that Mr Payne did not provided a copy of his rationale for viewing the claimant as unreliable nor had he looked or provided for us copies of any attendance records for any of the other staff. The Respondent's position on this is that it is because Mr Payne did not look and had not looked at them and thus the view he had formed was a matter of his perception.

31. We heard from Mr Saidy who was one of the Claimant's supervisors at one point and indeed they have been friends, they shared a house together at one time. Mr Saidy told us that if work was not done, he had to report to Mr Payne each day the reason why it was not. It appears to us that taking into account the absence record that the Claimant accepts that he had in 2016 and 2017 that there were a number of absences over that period. Whilst Mr Payne may not have looked at the absence record properly or indeed at all, if the Claimant or any other employee was absent on a given day, and Mr Saidy and Mr Payne's evidence is accepted, the supervisors would have to go to Mr Payne each day and report if work had not been done and why that was so. It would thus be clear if the Claimant was absent and given he was a machine operator and his absence had prevented a full run being undertaken on the day concerned, that that would be known to both the supervisor concerned and to Mr Payne.

32. Mr Komeng rightly makes the point that the schedule of absences does not identify accurately what the absences were for. From the Respondent's perspective that was not its purpose, it was to record whether staff were in work or not and it was only obliquely referring to whether staff were on shift for the whole of the shift. The point the schedule highlights in our view was that the Claimant was absent and leading on from that the Respondent took a view therefore that he could not be relied upon to be in attendance.

33. Save for comments made by Mr Saidy that were not evidenced by the Respondent about the Claimant taking time off from work so that he could attend forklift truck training, the Claimant's absences appeared to us to be for the reasons given in the sicknotes that were provided and they all appeared to be for good reasons. That however, does not mean that the Respondent was not entitled to take a view that the Claimant was unreliable. We say that because if a machine operator, which was the Claimant’s role prior to November 2016, was not in work, that would have a significant effect on the Respondent's ability to produce the output that was required of it on the day concerned. Only a limited number of people we heard were trained as machine operators on the various lines and if they could not be relied upon to attend, as unfair as that may be to a Claimant, the Respondent may have very good business reasons for taking the view that that individual could not be relied upon.

34. For those reasons, we accept that Mr Payne did not look at the Respondent's record-keeping to support the assertions that he made in his statement and it was only when Counsel relayed those matters to him, that he accepted that they were not supportable and therefore he did not pursue those arguments.

35. It may be that had the Respondent directed its mind to those matters, it could have provided evidence for those things, it did not, it thus takes the risk that because it has changed its view and decided not to pursue those matters that we can will adverse inferences from the same.

36. There were other issues with regards to the Claimant apart from his unreliability. The Respondent says that initially the Claimant had a good relationship with his first manager Mr Perry, and the Claimant having started as an agency worker, was made permanent. He then moved to work with Mr Saidy and it was after that point that Mr Saidy told us that the Claimant became disillusioned, started to look for jobs paying more money and sought to obtain a forklift truck driver's licence so that he could obtain the same.

37. The Claimant told us that he already had a forklift truck drivers licence and was merely taking an additional licence and he did that at weekends. He could have provided evidence of that eg. a certificate he had passed or the booking for the course. He did not. Irrespective of that, the Claimant says that he asked to be moved from "the Sugar Room" (what that was is not relevant for our purposes). There is a dispute over what happened next, but essentially, the Claimant then became somewhat of an itinerant worker. The Respondent says that he went back and worked for Mr Perry for a short period but principally and for the most part he then was assigned to report to one of the supervisors Ms Kobylanska (who was referred to before us by the claimant by her given name Renata). The Claimant's position is that it was only in July 2017 around the time that he moved to line M (or shortly before it) that he started reporting to Ms. Kobylanska.

38. The principal point that we draw from that is that it is common ground that the last time the Claimant acted as a machine operator was in November 2016.

39. The Claimant says he could have been trained to do other roles. That is so but the Respondent points to why would it train him to do so when there was an issue with his reliability (or perceived reliability). There was support elsewhere for the view that the Claimant was perceived as a problem worker. Mr Saidy told us that the Claimant was always complaining. When asked why he did not report those matters or take any disciplinary steps, he responded that if he did that in relation to the Claimant, he would have been doing so virtually all day.

40. Mr Komeng quite rightly raises a credibility issue in that regard; if the Claimant was such a difficult worker why did the Respondent continue to allow him to work for it without taking disciplinary steps? That marries also with something that we return to at (42) in relation to Mr Balon and his view of the Claimant's work whilst he supervised him on line M.

41. Those issues aside the fact that the Claimant was not assigned to other machine operating roles (or re-trained) for the fifteen months or so from November 2016 to the date that this claim was presented suggests in our judgment that the

Respondent had formed a view at that time that there was a reliability issue with the Claimant's attendance and whilst we find Mr Payne did not look at the attendance records, we accept his evidence in that regard, without making a comparison to other staff. We find therefore that Mr Payne had an issue with the Claimant's reliability and that stemmed from what he had been told by his supervisors. We return to that in a moment.

42. The claimant points to Mr Balon, who was the supervisor of line M placing him on a list of the staff that he had been asked to draw up that he wanted to use on line M. The Respondent clearly had an imperative in our judgment to make sure that line operated efficiently and it wanted its best staff on it. Mr Balon apparently named some thirty staff and we were told that twenty-two or so were assigned to work on the new Line M. Even if the Claimant was placed by Mr Balon on that list, that was no guarantee of a place on Line M. Mr Payne told us that the commissioning of the new Line M represented a change to working practices. The facts support that. The respondent was moving to twelve-hour shifts on that line and Mr Payne told us that the staff working on it needed to be experienced on that line and have an ability to work the longer hours, he needed to be satisfied of that. Not only that, in the context of the Claimant, he needed to be satisfied that he would be a reliable worker. We find there was an imperative to ensure Line M operated efficiently, and on any basis that was an objectively a reasonable view for him to take. Whether it was so or not, is a different matter.

43. The Claimant says that the Mr Payne's explanation is not reliable by reason of the following matters: -

    a. The changes to his witness statement as to reliability and punctuality,

    b. the removal from the statements of the exclusion of agency workers from working on line M and the evidence showed that they were working on there.

    c. The failure to provide attendance records for workers, (we have already dealt with that)

    d. The failure to provide Mr Balon's list.

    e. if it did have an issue in relation to his reliability the failure to inform the Claimant of the issues that it had with him or to commence a disciplinary process against him,

    f. the grievance that the Claimant made on the 19 October about matters was not addressed until it was repeated on the 19 January 2018 [43] and

    g. inconsistencies between Mr Saidy's version of events in relation to discussions that Mr Saidy had with Mr Payne.

44. The principal issue for us to consider here of course is what criteria did Mr Payne use to select staff? While the Claimant’s complaint is that three black staff and one Asian member of staff were removed and replaced by white British and white European staff, his evidence before us was not so clear. He accepted other staff

were assigned to line M who were black and Asian and that white staff were also taken off line M. There were disputes before us when those changes occurred.

45. Whilst the claimant did not work on line M after the change of personnel we accept that he was working on the same floor and therefore many have seen who was working there and was thus aware of its make-up both before and afterwards. However he did not provide a list of individuals who worked on line M before and afterwards, or state their ethnic or national backgrounds or colour of their skin.

46. The Respondent did provide a list [50] and what the list meant was very difficult to discern. A more detailed list was provided on day two. What that list shows as indeed the Claimant's evidence before us showed, was that there was a highly diverse workforce across the Respondent's business as a whole and that diversity was also reflected on line M both before and after the changes that the Respondent to it on the 18 October (and which became effective on the 23 October 2017).

47. The Respondent's characterisation of the make-up of that workforce post-change, adopting the styles used before us was :-

White-British	3
White-European	6
African	5
Asian	7

We would have preferred if some though had been given the different descriptors to be used. It was not. We make the point to reflect that we do not necessarily approve the use of such ethnic or racial categorisations - those phrases merely that those were the terms that were used for us and we repeat them for consistency only. We also note to that end that whilst the Claimant's first language is not English, he used a phrase that would not be used, or might not be considered appropriate in one of the grievances that he raises.

48. The Claimant accepted before us, that the above breakdown reflected very roughly and no more than roughly, the makeup of the Respondent’s workforce at the factory as a whole.

49. Mr Shafiq stated that he did not work on line M after 18 October. The Respondent states that he did. The Claimant suggests Mr Saho worked on the line before, but not afterwards. Mr Saho denies that. The Respondent denies that Mr Saho did so before or after. The Claimant suggests that we should ignore the Respondent's schedule, yet when the contents of the Schedule were put to him, save for Mr Shafiq, Mr Voynov and for workers the names of whom the Claimant could not recall, all those on the list that the Respondent provided were working on line M after the change of personnel about which the claimant complains. In our judgment therefore, the Claimant's evidence supports the veracity of the list.

50. The Claimant also raised with us orally his grievance of the 19 October. The claimant states he later re-submitted that on 19 January [43]. That was not pursued either at the time or before us as a specific issue. That was apparently

sent to Mr Jack Craig. All we have before us is a copy of the text that was forwarded on to the claimant's advisors on 15 November [42] but not details normally contained in the header (if by email) as to whom it was sent to and when. Whilst the Respondent accepts that that was lodged, no copy of the original was provided before us, nor does the Claimant say who it was handed to and how. Whilst he did say when that was, he only did that by way of oral elaboration. Mr Ofiaeli told us that that Mr Saho had signed a grievance and had provided that to the Claimant. A copy of that was not provided. No adequate explanation is given why neither was provided.

51. The Claimant in his witness statement did not give that detail and that was not raised as a specific issue before the Respondent when it came to provide its own witness evidence. If for instance that had been specifically raised as an allegation then Mr Craig would have had to be called to address it. It was not and he was not. Is not sufficient for the Claimant to do that orally and when it was not identified as an issue prior to (or even at the outset) of the hearing.

52. Had he done so we would have been required to consider whether the Respondent addressed it and if not why not? That was not done and so is not something from which we can look at to draw inferences from either generally or against Mr Payne, given his "motivation" is the critical issue here, because he was the decision-maker. We should record as we said above the Respondent accepted in its ET1 that that the grievance had been received and that it was a protected act, so there was no issue in that regard.

53. As part of the Respondent's investigation in relation to that grievance, it conducted meetings on 2, 6 and 9 February 2018 [40, 44, 46]. Mr Komeng rightly raised with us that there was a conflict of evidence concerning the complaint made by the Claimant namely when he was working in the "Sugar Room", he was not permitted to visit his GP/Hospital by Mr Payne and that Mr Payne had told the claimant he had never taken a day's work off in 25 years. The claimant asks how would I known Mr Payne had worked for the respondent for 25 years if that had not been said.

54. Mr Payne stated that he had never spoken to the claimant about his health at all and any comments had been relayed by Mr Saidy. Mr Saidy's evidence in his statement is that the Claimant had gone to hospital and his GP. Orally he elaborated and told us he took the Claimant to Mr Payne and Mr Payne had advised him that the Claimant should be allowed to go to the Doctors and then if he was sick, he would provide a sicknote. There is thus an issue not just in relation Mr Saidy's evidence but also Mr Payne's.

55. It is not unusual that once detail is given as to what was being said and when, by an individual that that might spark a memory. We accept that whilst those matters were not remembered straightaway that does not mean to say that the individual making the assertions that differ to what they had previously stated is not telling the truth, or at least telling what their perception of the truth is.

56. What we do draw from that is that Mr Saidy's evidence was consistent in the sense that Mr Payne had not prevented the Claimant from going to the Hospital

or GP. Indeed Mr Saidy's evidence was that Mr Saidy had been advised by Mr Payne to allow the Claimant to do so. Whilst Mr Payne denies those discussions occurred, in the context of his memory, they occurred some eighteen months ago. On balance we find based on the evidence before us that Mr Saidy may have remembered matters that he did not remember before as a result of memories being sparked by what the Claimant said. That is unsurprising in relation to the passage of time. In any event, Mr Saidy has merely supported the actual version of events that Mr Payne had, namely that he did not prevent the Claimant from going to the Hospital or GP. Whilst Mr Payne's evidence was in conflict with regards to whether or not he spoke to the Claimant in the context of passage of time, given the difficulties of memory that gives rise to, that is not something from which we consider on its own is something from which inferences of discrimination.

57. Turning to reliability generally, whilst the Claimant says all absences were for health reasons and the Respondent's health record is unreliable because that provides no explanation for his absences, that is not the issue here. The Claimant had a number of absences. The fact that they occurred is not disputed. The sick/fit-notes were provided for several of them. The Claimant says that they are explained by those sick/fit-notes. However, that does not address the issue there in our view, the issue is, could the Respondent count on the Claimant as a machine operator to be present? We find in this context that it concluded that it could not. Whilst that was based initially on a perception, given that Mr Payne had not checked the records, and Tribunals are very wary about people's perceptions and stereotypical assumptions, particularly in discrimination complaints, we looked at the records and they supported those perceptions.

58. The claimant accepted that he had not been undertaking the role of machine operator since November 2016 and that his rate of pay had not been reduced (on the basis he was not carrying out that function any longer) supports the respondent's contention that Mr Payne had formed the view that the Claimant was unreliable.

59. The respondent continued to pay him for doing a job that he wasn't doing and thus it would have made sense to have put him back to work on that role, but the respondent did not. Whilst that raises other questions having looked at matters in the round, we find that it is supports the contention that Mr Payne came to, that the claimant was unreliable because he had not been performing the role he was paid for, for all that time.

60. The Claimant did not bring forward any evidence to show that his rate of pay was amended and he made no complaint at the time about doing those other jobs and taking the higher pay for doing those other jobs, it was only when he lost the opportunity to achieve the additional allowance for line M that he complained.

61. Whilst, as a matter of good industrial relations practice, the Respondent should have raised its concerns about the Claimant's attendance earlier and it did not, we find on balance that the Claimant's attendance was and had been since November 2016 at the latest, an issue for the respondent. However, set against the diverse makeup of the workforce on line M both before and after the change,

and the view that we found that the Respondent formed, and was entitled to form albeit based on the retrospective evidence that we have seen, concerning the Claimant's attendance prior to that, we find that on balance whilst the Claimant was removed from line M and lost the ability to obtain the additional allowance and that was less favourable treatment, we find that having looked at all the circumstances and in the round, that the Claimant has not brought forward evidence as the initial burden is on him to do, to show that he was treated in any sense less favourably than others on account of his race or colour.

62. One other point that we add briefly in that regard, is that whilst the claimant suggests we should reject the Respondent's table and accept his evidence. We do not. We find it is inconsistent. The claimant evidence on oath did not show any basis to support a change in make-up of the line based on skin colour. Given our findings as to the diversity of the respondent's workforce, both before and after the change to line M we find that the burden has not shifted at the first stage and the direct discrimination complaint fails.

63. However, even if we are wrong on that and looking at the matters from which the Claimant states that we should draw inferences, we find notwithstanding there are also facts from which contrary indications can be drawn; for instance the permanent white worker Robert Gatco, was removed and the black African and Asian workers who came into the role support that view. We find that even if the Claimant had discharged the burden upon him at the first stage, looking at matters in the round, that the Respondent has discharged the burden upon it to show that the conduct or decision in issue was in no sense because of the protected characteristic.

64. In coming to that view we assessed not merely whether the Respondent has proved an explanation for the facts, but also if that explanation was adequate to discharge that burden. The test is on the balance of probabilities and looking at matters in the round and notwithstanding the credibility and consistency points and inferences that the Claimant advances, we find that even if the burden passed to the Respondent, on balance the Respondent has positively discharged that burden.

65. With regard to the detriment claims we find the Claimant ceased to undertake a machine operators role from November 2016 onwards. As a result he was required to undertake a variety of jobs. We find that he suffered no detriment because his higher rate of pay as a machine operator was removed. We find that that was not brought into issue and challenged by the Claimant.

66. We accept the Respondent's version that the Claimant was required to undertake a variety of jobs thereafter and whilst on his account he worked, on line M for several months, even if we accept his account, which is inconsistent with the Respondent's account, his account of the roles that he undertook for the Respondent shows that no role was permanent after November 2016 and his assignments were subject to the Respondent's business needs (and in that sense temporary). The machines that the respondent allocated to the claimant or the work it determined he do were business decisions for the Respondent. The

Respondent was entitled to move staff around the factory including the Claimant who was never contractually allocated to work on a given line.

67. Thus, as a result of the Claimant not undertaking the machine operator's role from November 2016 onwards, he was necessarily allocated a variety of jobs or "odd jobs" from then on. That had continued since November 2016 and was in our view in no sense connected to his complaint. Nor was his removal from line M connected to his complaint (nor could it have been) because it pre-dated his complaint about being removed from line M.

68. In relation to being assigned to work in the air-conditioned area, the Claimant's evidence again was inconsistent. He told us in his ET1 that he was the only permanent member of staff assigned there yet orally he told us that another permanent member of staff was required to work there for a similar period to him. He told us he was required to work there for five days. Whilst he may not have been required to work there previously, that was a new line. It had been set up because of a shortage of space in the factory following the creation of Line M. Whilst the Claimant may not have liked working in the cold, and he objected to that the Respondent was entitled to ask him to work anywhere in the factory.

69. Mr Henry put to the Claimant his assertion concerning the absence of PPE (protective clothing). Whilst the Claimant disputed that, Mr Komeng did not put its absence of to Mr Payne. Mr Payne when asked about it by Mr Henry said that it was provided. We find that if that was a specific issue it was for the Claimant to show that he was not provided PPE and he has not discharged that burden.

70. We find that it was an ordinary part of duties of the staff to work on the air conditioned line and having not shown that there was a failure to provide him with protective clothing and having found that other permanent workers were also expected to work there we find, the Claimant has not shown he objectively was subjected to detrimental treatment and accordingly the detriment claims also fail.

Employment Judge Perry

27 September 2018