Case Number: 3335596/2018

EMPLOYMENT TRIBUNALS

Claimant **Respondent**

Mr Kossitse-Konku Tete Bah-Kodzo **v** Green Core Food to Go Limited

Heard at: Cambridge

On: 25, 26, 27 and 28 April 2022
Deliberations in Chambers: 29 April 2022

Before: Employment Judge Tynan

Members: Ms J Costley and Ms H Gunnell

Appearances
For the Claimant: In person
For the Respondent: Mr Nick Bidnell-Edwards, Counsel

Interpreter: Ms Shelley De Ste Croix, Spanish speaking

RESERVED JUDGMENT

The Claimant's complaints that he was discriminated against on the grounds of race, are not well founded and are dismissed.

RESERVED REASONS

Background

1. By a claim form presented to the Tribunals on 25 December 2018, following ACAS Early Conciliation between 14 and 27 November 2018, the Claimant brings claims against the Respondent that he was discriminated against on the grounds of race.

2. The history to the proceedings is somewhat protracted, albeit it is not necessary to go into detail as to the reasons for this, save to note that the issues to be determined in the proceedings were identified in fairly broad

terms at an initial Case Management Preliminary Hearing on 29 August 2019 (page 60 – 66 of the Hearing Bundle) before being finalised and seemingly agreed at a subsequent Case Management Preliminary Hearing on 27 April 2021 (pages 313 – 317 of the Hearing Bundle). However, when the matter came before us there were two Lists of Issues, the parties having been unable to agree a single List. The principle differences are at paragraph 5.1.1 of the respective Lists of Issues. We have had regard to both Lists in reaching our findings and coming to a Judgment.

3. There was a single agreed Hearing Bundle running to 323 numbered pages. The page references in this Judgment are to the corresponding pages of the Hearing Bundle. The Tribunal was additionally provided with data regarding the alleged discriminators, including their job title, start and leave dates (where relevant) and any protected characteristics of theirs. In addition, we were provided with ethnicity and nationality statistics for the Respondent's workforce for the years 2019 to 2022. However, we did not have access to corresponding ethnicity and nationality data for the local population, including those who are active within the labour market, to be able to reach any informed view as to whether particular ethnic or national groups were under or over represented within the Respondent's workforce.

4. The Claimant had made a 23 page statement in support of his complaints. For the Respondent, we heard evidence: from Madhuben Patel who is employed by the Respondent as a Machine Minder and has worked for the Respondent for over 30 years; Jevgenija Nenaseva, employed as an Area Manager for the Respondent; and Steve Neale, Site Director for the Respondent. They had each made written statements.

Findings of Fact

5. The Claimant, as with the Respondent's witnesses, endeavoured to provide a truthful and accurate account of the relevant events. We do not accept, as Mr Bidnell-Edwards suggested to the Claimant in the course of cross examination, that the Claimant was lying to the Tribunal or that he sought to mislead it. The Claimant is someone with a professed deep faith and he was clearly offended by the suggestion that he might have lied on oath. However, the fact that he endeavoured at all times to be truthful in his evidence to the Tribunal, does not mean that his recollection or perception of events is necessarily accurate, or that we must accept his evidence uncritically.

6. The Lists of Issues identify 17 discrete matters or incidents about which complaint is made. In the course of the Hearing the Claimant confirmed that Issue 17 simply repeats the allegation identified as Issue 12. At the heart of this case is whether the Claimant was trained, or adequately trained, to perform the role that he was employed to do and whether, during his employment, he was redeployed to other areas of the Respondent's factory and / or asked to undertake tasks outside his core responsibilities and, if so, what the reasons were for this.

7. The Claimant first worked for the Respondent through an Agency. After what we understand to have been a few months, he left the Respondent and accepted a placement elsewhere, before returning a relatively short time later to take up direct employment with the Respondent. He was recruited by the Respondent's HR team without any involvement by the various individuals about whom he now makes complaint.

8. The Claimant's Statement of Terms and Conditions of Employment is at pages 193 – 195 of the Hearing Bundle and confirms that he was employed as a Machine Minder. Throughout the Hearing, he expressed the position that he had been employed as a Machine Minder in 'gluten free'. The Statement of Terms and Conditions of Employment does not in fact specify that the Claimant would work on a designated production line, or within a specific area or zone of the Respondent's factory. There is no explicit probationary period or probationary arrangements in the Statement of Terms and Conditions of Employment, though the termination of employment provisions state that during, *"the probationary period"* the disciplinary procedure will not apply. In her evidence, Ms Nenaseva referred to the Respondent operating a three month probationary period. The New Starter Probationary Review form at page 192nn – qq of the Hearing Bundle is structured on the basis that it is completed by employees at the end of the first and fourth weeks of their employment, with a more detailed assessment being undertaken by a Reviewing Manager during the probation period, possibly on an ongoing basis, and that there is a final review by both the employee and Manager in the 24th week when the Reviewing Manager confirms whether or not the employee has successfully completed their probationary period. The copy of the New Starter Probationary Review form in the Hearing Bundle is a blank copy of the Respondent's template document. We were not provided with a completed copy for the Claimant. We find that the form was never completed for him. The reviewing Manager in his case would have been Cosmin Barbu, Daniel Barbos or Wojciech Jaworski.

9. There is no documentary evidence in the Hearing Bundle regarding the Claimant's induction nor are there any structured training records beyond the toolbox training records, at pages 206 to 214 of the Hearing Bundle, many of which evidence on-the-job training lasting just a few minutes. In his decision on the Claimant's Grievance Appeal, Mr Neale stated that the Claimant had passed his probation period (page 275) albeit it is unclear to the Tribunal what informed his comments in this regard. Likewise, Mr Neale could not provide any particular clarity when asked about the comment in his Grievance Appeal outcome letter (page 273) that there was documented evidence that the Claimant had received training in the role of Machine Minder. The only substantive documented evidence of the Claimant having been trained are emails sent by Carole Brede, Skills Improvement Trainer in October and November 2018 and an L & D Audit Form completed by her in January 2019. However, these post-date Mr Neale's decision on the Grievance Appeal.

10. The Claimant commenced employment with the Respondent on 17 July 2018. By his own account he began working on Line 1 on 21 July 2018. Depending upon what shift pattern he worked, that indicates to us there may have been some form of induction process between 17 and 21 July 2018. The Claimant states that there were no issues during his first two days on the production line, when he worked alongside Mr Dragos and Mr Ciugurean. He alleges that on 23 July 2017 Mrs Patel refused to train him. This was the first day of her shift that week following two rest days. The Moulton Parkway site is a large operation that employs hundreds of staff and the Claimant could not recall having previously worked with Mrs Patel during his Agency placement such that she might have any reason to be hostile towards him. His evidence is that he introduced himself to Mr Jaworski who, like Mrs Patel, was on the first day of his shift that week. The Claimant alleges that Mr Jaworski in turn introduced him to Mrs Patel on Line 2 and *"ordered"* her to train him. There are no witnesses to any subsequent conversation that took place between the Claimant and Mrs Patel. Mrs Patel has little or no recollection of speaking with the Claimant on 23 July 2017, her recollection as to any interactions between them relates to a later period in October 2017. Be that as it may, we find it inherently unlikely that Mr Jaworski *"ordered"* Mrs Patel to train the Claimant. That does not reflect the language used in any of the documents in the Bundle, or how the Respondent's witnesses expressed themselves in their evidence at Tribunal regarding the Respondent's operations. English is not the Claimant's or Mrs Patel's first language. The Claimant gave his evidence and conducted the entire proceedings in Spanish through Ms de Ste Croix, never once lapsing into English. For her part, Mrs Patel had significant difficulty at Tribunal in understanding the questions being put to her and expressing herself clearly in English; early in the proceedings the Tribunal gave consideration to adjourning the Hearing to enable a Gujarati interpreter to be sourced for Mrs Patel. It is apparent to the Tribunal, particularly given what we observed during the hearing itself, that there was very significant potential for misunderstanding between the Claimant and Mrs Patel. We find that the Claimant was almost entirely dependant upon non-verbal instructions from Mrs Patel during their interactions. We do not accept that Mrs Patel immediately refused to train the Claimant on 23 July 2017 as he alleges or that she *"rejected"* him when he tried to observe what she was doing. The Claimant refers to this as the start of his *"hell in gluten free"*. We find that although he was initially placed with Mrs Patel on 23 July 2017 to observe what she was doing, he was almost immediately taken off the line and asked by Mr Jaworski to help out as a Porter on Line 1. We find that this was not at Mrs Patel's request or in response to any refusal by her to train the Claimant, and that the Claimant's perception otherwise reflects a misunderstanding on his part.

11. Whilst the significant language barrier that existed between the Claimant and Mrs Patel was an obstacle to effective communication, including basic social discourse between them, we do not find Mrs Patel to have been impolite or hostile to the Claimant, or that she was actively resistant to

allowing him to observe her. However, we conclude that the Claimant was initially deflated because he had a very different expectation of the role and of what action the Respondent would take to ensure he succeeded in the role. As he said in his formal Grievance submitted on 1 June 2018,

> *"I was stunned because I have a legal contract which allowed me to be trained as Machine Minder and the FLM who's supposed to ensure the execution of the order, because my contract is an order, told me to look for something else…"* (page 222)

12. We do not criticise the Claimant for believing that he would receive a structured and comprehensive training. However, we find that is not the reality of working in the Respondent's business where staff at the Claimant's level are trained *"on the job"* in an otherwise largely unstructured way. In the Claimant's case, during at least the first two to three months of his employment, we find that there was no particular structure to his induction or training, and that no one took particular responsibility for ensuring he was trained or capable to perform the role for which he had been employed. We can well understand his frustration and that it led him to question why this was. However, we find that it reflected poor oversight on the part of the First Line Managers ("FLMs"), exacerbated by the absence of a structured training programme. In essence, new recruits were expected to get on with the job and largely learn it for themselves through observing others.

13. We accept that the Claimant attempted to raise his concerns with Ms Nenaseva on at least three separate occasions during August 2017, but find that she failed to address them other than to ask others to train the Claimant. However, this is in the context that she is responsible for a very large number of operatives (upwards of 300 individuals) and relies upon her direct reports, including the FLMs, to manage employees at the Claimant's level. We can understand why she may not have recognised the nature or extent of the Claimant's concerns, or attached particular significance to their conversations in August 2017. Having spoken with Ms Nenaseva, the Claimant evidently felt that he was making little or no progress. After 17 August 2017, he felt that he was receiving no training at all, but instead was simply being put to work on the lines and accordingly that he was not undertaking or learning the job of Machine Minder.

14. There is no reference in the job content document at page 196 of the Hearing Bundle to Machine Minders working on the lines, though the roles and responsibilities document at page 197 refers to,

> *"…carrying out other duties from time to time as is reasonably required".*

15. We find that the Respondent failed to manage the Claimant's expectations insofar as it failed to communicate to him what training he might expect to

receive, who would be responsible for delivering it and over what period of time.

16. When the Claimant spoke a third time to Ms Nenaseva on 22 August 2017 and told her that he had been sent to work in the main production hall, she replied that this was because 'gluten free' was not busy. She was not seeking to mislead him in this regard, even if, on that occasion, his other colleagues had remained in 'gluten free'. As an Area Manager (which she was at the time) she had a good understanding of the factory's day to day operations, which lines were busier than others and where pinch points may have existed. We discern that the Claimant's substantive complaint is that Mr Barbu asked him to go to the main production hall on 22 August 2017, which forms part of his wider complaint under Issue 1. We return to this.

17. We find that the Claimant's concerns during the early weeks of his employment came to a head on 23 September 2017, when a new member of staff, Stefan Chicira was brought to Line 9, where the Claimant was working at the time and told the Claimant that he was a new Machine Minder in 'gluten free'. The Claimant was given to understand that Mr Chicira was in training from the previous day. The Claimant inferred from this that he had himself been taken off 'gluten free' so that Mr Chicira could be trained (Issue 5) and concluded from this that he was being lied to regarding his own training,

> *"…so that they can bring somebody of their family, friend or from their country"* (the second page of his Grievance at page 223 of the Hearing Bundle)

He went on to write in the Grievance,

> *"You are welcome if you are from their countries, family or friend: brothers, wife, nephew, cousin, husband and they can work together with their contract without any problem but a black cannot. There is a very big high favouritism* ***(We are in UK and not in Romania or Poland)****."*

18. Mr Chicira is Romanian. Insofar as the Claimant contrasts his interactions and experiences with Mr Chicira's, Mr Chicira was not from Mrs Patel's family or her country of origin, India, nor was it was suggested that they were friends. Insofar as the Claimant identifies Mr Barbos as potentially responsible for any alleged difference in treatment, Mr Barbos is Romanian, though the Tribunal was not told that he and Mr Chicira are related or were friends. We return in our conclusions below to the reasons why Mr Chicira was trained as a Machine Minder and whether, as the Claimant alleges, this was in order to push the Claimant out.

19. Whether or not the Claimant perceived it specifically at the time as race discrimination, as opposed to nepotism, we find that Mr Chicira's comments on or around 23 September 2017 served to reignite the

Claimant's concerns that he was not being trained, or adequately trained, in the role of Machine Minder and, in practice, that he was not doing the job he had been employed to do. Although his witness statement does not address this, we infer that he raised the matter again with Ms Nenaseva, because by early October 2017, when Mrs Patel started her shift again, she had been tasked by the FLMs with training the Claimant in the role of Machine Minder.

20. The Claimant alleges that on 5 October 2017 Mrs Patel refused to train him, telling him,

> *"Nobody pays me to teach so you have to discover yourself, I will not tell you anything".*

The Claimant's evidence in this regard was unsatisfactory. He repeatedly stated at Tribunal that he had not been trained by Mrs Patel. However, when Mr Bidnell-Edwards and subsequently the Tribunal, asked him to describe the nature of his interactions with Mrs Patel, including whether they had spoken at all, he failed to answer the increasingly specific questions that were put to him, even when the Tribunal returned to the issue and expressed some concern that he was failing to answer questions being put to him. He held steadfastly to the position that he had not been trained leaving the Tribunal with an unsatisfactory picture as to the nature and extent of any interactions with Mrs Patel. It was not a communication or comprehension issue since he and Ms De Ste Croix had an excellent rapport and understanding; for whatever reason, we find the Claimant resolved not to answer the specific questions that were put to him on this issue, notwithstanding the Tribunal explained to him that this may undermine his credibility, at least in relation to this issue. According to the Claimant's List of Issues, Mrs Patel refused to train and / or work with the Claimant on five discrete dates, indicating even on his own account that they interacted with one another on five separate occasions. We contrast the Claimant's evidence with the evidence of Mrs Patel. Even if she struggled to describe their interactions in detail in English, she nevertheless gave a sufficiently detailed and cogent account for us to be satisfied, and accordingly to find, that she provided some form of training to the Claimant during the first two weeks or so of October 2017.

21. By 9 October 2017, the Claimant had gone to HR to complain about the training being provided by Mrs Patel. She, in turn, learned that he had spoken with HR and we think this is hardly likely to have enhanced their working relationship. By 15 October 2017, the Claimant alleges that Mrs Patel was refusing to train him. At some point prior to this, as we return to, the Claimant perceived Mrs Patel to be laughing at him and not showing him respect. On any view the working relationship was not developing as might have been envisaged. The Respondent accepts that Mrs Patel eventually refused to be further involved in the Claimant's training. In her evidence she said this was because he would not listen to her and accordingly she felt there was nothing more she could do for him. She described him as quite slow and that she told him he needed to work more

quickly, albeit he failed to take on board her comments, focusing his attention instead on completing paperwork.

22. As to the Claimant's work rate and ability to do the role of Machine Minder, we note as follows:

    a. When interviewed on 13 June 2018 in connection with the Claimant's Grievance, Mr Ciugurean said,

    "Tete is just not quick enough. Tete takes too long to change over (twenty to forty minutes).

    Tete has problems and he explains that he would have to keep showing Tete how to input the plan and he would continuously get it wrong."

    "…after six months advised Jev that Tete just can't understand. Reiterates that you have to be quick for work as a [Machine Minder]";

    b. Mr Jaworski's expressed view on 7 June 2018, when he was interviewed as part of the Grievance process, was that,

    "… Tete wasn't up to speed, mistakes have been made…"

    and that the Claimant,

    "just failed. It was too much for him perhaps … He was making mistakes… Maybe he chose to do the wrong role?"

    c. An Incident Investigation form dated 6 January 2019, signed off by Mr Chiriac identifies an incident when the wrong film was used in a food product for children and that the relevant coding matrix had not been checked by the Claimant;

    d. Subsequently, in autumn 2018 Carole Brede, Skills Improvement Trainer, was involved in providing the Claimant with more structured training for the role of Machine Minder. An email dated 26 October 2018 (page 276) evidences that the training commenced on 11 October 2018 and was conducted on a one to one basis. After 13 hours training, Ms Brede informed Ms Nenaseva that the Claimant had not met the set expectations for the role and that she had scheduled further time for training with him in November 2018. In a further update to Ms Nenaseva on 12 November 2018 (page 277), Ms Brede confirmed that 18 hours of training had been provided, as against a standard training time of between 6 and 8 hours. She noted that the Claimant was struggling in his understanding of allergenic awareness. Further training on audit was scheduled for 22 November 2022. A completed L & D audit form dated 10 January 2019 (page 280) includes feedback from Ms

Brede that she had stopped her audit as the Claimant needed a lot more training. She wrote,

"My honest opinion from training with Tete and my experience, I believe this role of Machine Minder is not suitable from a business and food safety perspective. We have a fast paced environment which Tete is struggling to keep up with."

Whilst the Tribunal did not hear evidence from Ms Brede, her emails and the audit form are detailed and balanced. We are satisfied they reflect an objective assessment of the Claimant and as such that they corroborate the observations and feedback of the Claimant's colleagues, including in relation to his work rate. The Claimant does not allege that Ms Brede was influenced by his race in her treatment of or interactions with him or in her assessment.

23. Other than the Claimant's evidence, the only evidence which might support the Claimant's case is to be found in the meeting notes of Mr Dongba's interview with Ms Allen on 26 July 2018. He told Ms Allen that one of the Machine Minders, who he described as an Indian lady (we find that he was referring to Mrs Patel),

"did not speak to him at all".

He referred to her as *"unfriendly"*. He also said that the Claimant had told him that she had said she was not paid to train the Claimant. Mr Dongba went on to say that in his view,

"…the Indians and the East Europeans have cliques and they won't allow a black person to do the skilled jobs."

When asked to explain further, he said,

"…they want to occupy all of the positions and it's a clique – you cannot come in."

24. During cross examination, we observed that on occasion the Claimant failed to fully listen to questions being put to him, instead becoming distracted by looking at documents in the Hearing Bundle, even though he had not been asked about a specific document. We further observed the Claimant to take quite some time in formulating his questions of the Respondent's witnesses and that he was easily distracted, or at least not always precise, in the answers he himself gave during cross examination. It is not that the Claimant lacks intelligence, on the contrary he is evidently a highly educated and intelligent individual who speaks three or four different languages and holds two degrees. However, his thinking and communication style can reasonably be described as unhurried. Whatever his undoubted qualities and strengths, we conclude that he does not necessarily excel in a manual work environment and that Mrs Patel (and others) genuinely regarded him as a slow worker. We accept Mrs Patel's

evidence that Mr Ciugurean shared her views and that they fed back their views to Ms Nenaseva. We accept Mrs Patel's summary at paragraph 4 of her witness statement in which she identifies what she genuinely perceived to be the Claimant's weaknesses and that these views were both genuinely held and based upon her interactions with and observations of the Claimant over a period of approximately two weeks; in other words, they reflected her objective assessment of the situation. On this issue we strongly preferred Mrs Patel's evidence to that of the Claimant and in the circumstances conclude that Mrs Patel did not refuse to train the Claimant or work with him on 17 August 2017, 5, 8 and 15 October 2017, as he alleges, but that she did refuse to continue training the Claimant after 19 October 2017, albeit the reason for this was her genuinely held belief that the Claimant would not listen to her and, accordingly, that there was nothing further that she could do to support his training.

25. We return to the allegation that Mrs Patel was aggressive towards the Claimant and/or showed a lack respect towards him (Issue 4). It was touched upon only briefly in the course of the parties' evidence. The allegation does not appear in the Claimant's Claim Form, nor is it referred to in his further information document (pages 67 – 80 of the Hearing Bundle) or in his response to the Respondent's Grounds of Resistance (pages 97 – 116 of the Hearing Bundle). His witness statement is also silent on the matter. The Claimant has the burden of establishing the primary facts upon which his claim is pursued. On this issue he has failed to discharge that burden of proof and his complaint fails.

26. The Claimant complains about how he was treated by Mr Jaworski. He says he was shouted at and ordered *"to go"* on 22 October 2017 (Issue 7), scolded on 5 November 2017 and / or blamed for a mistake that caused the line to stop (Issue 9) and shouted at on 26 November 2017 because he opened the "guides" and was then was intimidated because it was suggested that it was not the first time he had done so (Issue 12).

27. The only evidence available to the Tribunal on these issues, apart from the Claimant's Grievance and testimony at Tribunal, are the typed notes of Mr Jaworski's meeting with Ann Marie Allen on 7 June 2018 when he was interviewed by Ms Allen as part of her investigation into the Claimant's Grievance. The Claimant's evidence about the matter in his witness statement is limited. Nevertheless, we accept that production was disrupted and that when Mr Jaworski arrived on the scene he raised his voice with the Claimant and told him to go home, by which he effectively meant *"get out of my sight"* as he was annoyed with him for the confusion and disruption that he had witnessed. We return below to the reasons why Mr Jaworski behaved as he did.

28. In his Grievance letter and meeting, the Claimant identified an incident on 5 November 2017 which accords with Issue 9 in the Lists of Issues. Nothing turns on the date. Whilst the evidence is limited, we accept that Mr Jaworski scolded the Claimant and blamed him for a stoppage on the

line on 5 or 15 November 2017. Mr Jaworski's account on 7 June 2018 was as follows,

> *"No, no, Tete has made a mistake, everyone is learning from their mistakes but it wasn't his first mistake, we gave him the chance to play with it, and I would definitely not have shouted at him. I could tell him that every mistake costs money, as previously someone has made a mistake which costed the company 20k. It's a very responsible job and I keep telling guys you need to think twice before you press the button."*

29. As regards the alleged events of 26 November 2017, these are referred to, albeit very briefly, in paragraph 18 of the Claimant's witness statement. Ms Allen raised the matter with Mr Jaworski on 7 June 2018, when Mr Jaworski's explanation was,

> *"I can't remember this. I can't say it didn't happen but Tete takes everything to himself. I don't think I was shouting."*

30. Mr Jaworski went on to say,

> *"He takes everything too personally, some people catch things quicker but he takes time, and I think five months as a machine minder you should see some results but he just failed. It was too much for him perhaps, Jevgenija has made the right decision. He was making mistakes like placing two products on the same line, this is not acceptable, and it is not allowed. Maybe he chose to do the wrong role?"*

We find on the balance of probabilities that he did raise his voice at the Claimant on 26 November 2017 even if he could not recall doing so when asked about the matter some months later and thought it was unlikely he would have done so.

31. The Claimant alleges that he spoke to Daniel Barbos on 9 November 2017 about his training and that having done so, and having first called Mrs Patel into his office, that Mr Barbos told him he had a week to prove his ability as a Machine Minder otherwise he would be sacked. It is a very specific allegation, yet the Claimant did not refer to it in his Grievance letter of 1 June 2018. It is referred to in his diary/chronology of events produced for these proceedings. It is difficult for the Respondent to answer allegations raised in this manner some time after the event. We find that Mr Barbos conveyed to the Claimant that he had only a limited further amount of time to prove himself as a competent Machine Minder, but that Mr Barbos did not threaten him with dismissal.

32. The Claimant complains that he was excluded from a briefing with the other Machine Minders on 2 December 2017 (Issue 13). The briefing was in relation to a new machine that had been installed on one of the lines. The Claimant alleges that Mr Barbu pointed his finger at him and said,

"you stay there, I will tell you"

The Claimant further alleges that all the Machine Minders except himself received a card to operate the machine.

33. In her evidence at Tribunal Ms Nenaseva believed that the Claimant had not been part of the briefing because it was not a priority. However, the contemporaneous evidence supports that the Claimant was excluded from the briefing because it had been identified by that date that he was not competent to do the role of Machine Minder. We refer in this regard to the notes of Mr Barbu's meeting with Ms Allen on 13 June 2018. When asked about the events of 2 December 2018, he said,

> *"It was at that point that it was decided that he was not fit to do the Machine Minder role"*

34. This is further supported by the meeting notes from Mr Jaworski's interview with Ms Allen on 7 June 2018. He said,

> *"I have reported the whole situation to Jevgenija and she has decided to do a performance review and decided not to let Tete carry on with the Machine Minder role. I was told by Jevgenija as Tete wasn't up to speed, mistakes had been made, the coding matrix was wrong and miscommunication issues."*

When asked by Ms Allen when this was, his recollection was that it was perhaps towards the end of October / November 2017.

35. When asked about the matter by the Claimant at Tribunal, Ms Nenaseva denied being the decision maker. She said that she was new to the business and would have involved HR. However, Mr Jaworski's comments already referred to indicate, and we find, otherwise.

36. Having been excluded from the briefing on 2 December 2017, the Claimant spoke again with Ms Nenaseva on 3 December 2017. The Claimant alleges that she promised to resolve the issues he raised with her, but that she failed to do so. The Claimant alleges that, *"somebody on top"* of Mr Barbu gave orders discriminating against the Claimant (Issue 15). It is a difficult allegation for the Tribunal to understand and further clarity was not provided by the Claimant during the Hearing. In the further context of Ms Nenaseva's alleged failure to resolve the Claimant's concerns, it is alleged that the Claimant's Trade Union Representative, Andrew Williams, spoke with Ms Nenaseva to organise a meeting but that the meeting never happened (Issue 16). This is not referred to in the Claimant's witness statement. In paragraph 25 of his witness statement, he refers to a conversation between Mr Williams and Mr Barbu, in which Mr Barbu is alleged to have said,

> *"I am not the one who gives the orders"*

However, there is no reference to any meeting between Mr Williams and Ms Nenaseva. Again, on this issue, the Claimant has failed to discharge the burden of proof upon him to establish the primary facts upon which this particular complaint of discrimination is based.

37. Finally, the Claimant alleges that on 10 November 2017, Mr Barbu called Edgars Austrins away from supporting the Claimant in order that the Claimant might,

> *"struggle and make mistakes".*

38. Mr Barbu did not give evidence to the Tribunal and he was not asked about this alleged incident when interviewed by Ms Allen on 13 June 2018. We conclude that this is because it was not mentioned in the Claimant's Grievance letter of 1 June 2018. Nor can we identify any reference to this alleged incident in the Claimant's Grievance meetings on 4 and 18 June 2018. It is not referred to in the Claimant's witness statement. Once again, the Claimant has failed to discharge the burden upon him to establish the primary facts upon which his complaint is based, let alone put forward facts or circumstances from which we might infer or conclude that any actions by Mr Barbu on 10 November 2017 were designed to ensure that the Claimant struggled and made mistakes, and that it was because of the Claimant's colour.

Law and Conclusions

39. For the reasons set out in our detailed findings above, the Claimant has failed to establish that the acts and omissions about which he makes complaint in paragraphs 5.1.3, 5.1.4, 5.1.11, 5.1.15 and 5.1.16 of the Lists of Issues occurred. In the circumstances, his complaints that such alleged, but unproven, acts and omissions amounted to direct race discrimination, alternatively race harassment cannot succeed and are dismissed.

Preliminary Observations

40. Before we set out the Law and our conclusions, we think it relevant to include some preliminary observations in relation to two matters, namely: how the Claimant identified his race in the course of the Hearing; and whether the claims were brought in time (and the related question of whether it would be just and equitable to permit any out of time claims to be pursued by the Claimant).

41. Ms De Ste Croix was present at the first Hearing on 29 August 2019 when Employment Judge Johnson identified in discussion with the Claimant that he believed that he had been discriminated against as a black man, i.e. on grounds of his colour. In the course of the Final Hearing, we heard evidence regarding the treatment and career progression of Sinclair

Morton and Andrew Williams, two black employees, including evidence that Mr Morton had allegedly treated the Claimant unfavourably. The Claimant sought to differentiate their circumstances, initially on the basis that, unlike them, he is not a British National, though he finessed this further in relation to Mr Williams, who he said was Jamaican but had been settled in the UK for many years. By way of further differentiation in terms of their respective circumstances, he sought to rely upon the fact that English is not his first language and inferred that Chike Dongba, who he claims experienced similar treatment to himself, likewise may not speak English as his first language.

42. The Claimant struggled with this issue in his final submissions. He did not suggest that it was a matter of his nationality; though born in Togo, we understood from his evidence that he is either a French or Spanish national. In any event, there is no evidence before the Tribunal that the various individuals whom it is alleged discriminated against him, were aware of or made assumptions regarding his nationality such that it may have been a factor operating in their minds in their treatment of him. Moreover, the available nationality data confirms that fewer than one third of the Respondent's workforce are British, with a broad range of nationalities represented amongst its workforce. In the absence of any further submissions, or any application by the Claimant to amend his claim or the List of Issues, we have proceeded on the basis that we are required to decide whether the Respondent's colour was a factor in his treatment, this being the protected characteristic relied upon by him when he asserted to the Respondent in 2018 that he had been discriminated against and also being how identified his protected characteristic to Employment Judge Johnson on 29 August 2019.

43. As to whether the Claim, or any complaint comprised within it, has been brought in time, when the Tribunal invited the Claimant's closing submissions on the issue, he indicated some surprise in the matter. He had not addressed the issue in his witness statement, nor did he respond to our invitation at Tribunal to do so. Whilst it is not identified as an issue with the Lists of Issues, Employment Judge Johnson identified time as an issue in paragraph 13 of the Case Management Summary from the Hearing on 29 August 2019**.**

<u>The Equality Act 2010</u>

44. Section 26 of the Equality Act 2010 provides,

> 26. Harassment
>
> (1) A person (A) harasses another (B) if-
>
> a. A engages in unwanted conduct related to a relevant protected characteristic; and
> b. the conduct has the purpose or effect of-

(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2) …
(3) …

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account-

a. the perception of B;
b. the other circumstances of the case; and
c. whether it is reasonable for the conduct to have that effect.

45. In Richmond Pharmacology v Dhaliwal [2009] ICR724 it was observed,

> "A Respondent should not be held liable merely because his conduct has had the effect of producing a prescribed consequence: it should be *reasonable* that that consequence has occurred… overall the criterion is objective because what the Tribunal is required to consider is whether, if the Claimant has experienced those feelings or perceptions, and it was reasonable for her to do so. Plus if, for example the Tribunal believes that the Claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for the Claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the Tribunal as to what would important for it to have regard to all the relevant circumstances including the context of the conduct in question. One question that may be material is whether it should reasonably be apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the prescribed consequence): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt…
>
> (22) …dignity is not necessarily violated by what was said or done which was trivial or transitory, which should have been clear but any offence was unintended. But it is very important that employers and Tribunals are sensitive to the hurt which can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

46. In Land Registry v Grant [2011] ICR 1390,CA, Elias J said,

> "It is not importing intent into the concept of effect to say that intent would generally be relevant to assessing effect. It would also be relevant to deciding whether the response of the alleged victim is reasonable".

47. Section 13 of the Equality Act 2010 provides,

> 13. Direct Discrimination
>
> (1) 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.

48. During the hearing we explained to the Claimant that in considering his direct discrimination complaints we would focus on the 'reasons why' the Respondent had acted (or failed to act) as it did. That is because, other than in cases of obvious discrimination, the Tribunals will want to consider the mental processes of the alleged discriminator(s): Nagarajan v London Regional Transport [1999] ICR 877.

49. We further explained to the Claimant that in order to succeed in any of his complaints he must do more than simply establish that he has a protected characteristic and was treated unfavourably: Madarassy v Nomura International plc [2007] IRLR 246. There must be facts from which we could conclude, in the absence of an adequate explanation, that the Claimant was discriminated against. This reflects the statutory burden of proof in section 136 of the Equality Act 2010, but also long established legal guidance, including by the Court of Appeal in Igen v Wong [2005] ICR 931. It has been referred to as something "more", though equally it has been said that it need not be a great deal more: Sedley LJ in Deman v Commission for Equality and Human Rights [2010] EWCA Civ 1279. A Claimant is not required to adduce positive evidence that a difference in treatment was on the protected ground in order to establish a *prima facie* case.

50. It is for the Tribunal to objectively determine, having considered the evidence, whether treatment is "less favourable". Whilst the Claimant's perception is, strictly speaking, irrelevant, his subjective perception of his treatment can inform our conclusion as to whether, objectively, the treatment in question was less favourable.

51. The grounds of any treatment often have to be deduced, or inferred, from the surrounding circumstances and in order to justify an inference one must first make findings of primary fact from which the inference could properly be drawn.

52. This is generally done by a Claimant placing before the Tribunal evidential material from which an inference can be drawn that they were treated less favourably than they would have been treated if they had not been a particular race, gender, religion etc: Shamoon v RUC [2003] ICR337. 'Comparators', provide evidential material. But ultimately they are no more than tools which may or may not justify an inference of discrimination on the relevant protected ground, in this case race. The usefulness of any comparator will, in any particular case, depend upon the extent to which the comparator's circumstances are the same as the Claimant's. The

more significant the difference or differences the less cogent will be the case for drawing an inference.

53. In the absence of an actual comparator whose treatment can be contrasted with the Claimant's, the Tribunal can have regard to how the employer would have treated a hypothetical comparator. Otherwise some other material must be identified that is capable of supporting the requisite inference of discrimination. This may include a relevant statutory code of practice. Discriminatory comments made by the alleged discriminator about the Claimant might, in some cases, suffice. There were no such comments in this case.

54. Unconvincing denials of a discriminatory intent given by the alleged discriminator, coupled with unconvincing assertions of other reasons for the allegedly discriminatory decision, might in some case suffice. However, we found the Respondent's witnesses to be convincing and consistent in their explanations for why they acted as they did.

55. Discrimination may be inferred if there is no explanation for unreasonable treatment. This is not an inference from unreasonable treatment itself but from the absence of any explanation for it.

56. It is only once a *prima facie* case is established that the burden of proof moves to the Respondent to prove that it has not committed any act of unlawful discrimination, so that the absence of an adequate explanation of the differential treatment becomes relevant: Madarassy v Nomura [2007] EWCA Civ 33.

57. In our discussions regarding the Claimant's direct discrimination complaints, we have held in mind that we are ultimately concerned with the reasons why each of the alleged perpetrators acted as they did in relation to the Claimant. In our Judgment, whilst the Claimant has not proved facts from which we could properly conclude that the alleged perpetrators committed any unlawful acts of discrimination, in any event, for the reasons below, we are satisfied that their reasons for acting as they did had nothing whatever to do with the Claimant's race.

ISSUE 1

58. In his List of Issues the Claimant identifies that prior to issuing his Claim in these proceedings, he was instructed to work in different areas of the Respondent's factory on 113 separate occasions. His witness statement identifies fewer specific incidents. However, it seems clear to the Tribunal that the Claimant was keeping a diary record from early on in his employment. We proceed for these purposes on the assumption that his records are accurate or certainly not materially inaccurate. However, as set out in our findings above, the Claimant's contract of employment does not specify that he would work on a particular production line or within a particular area of the Respondent's factory. The roles and responsibilities document identifies that he would carry out other duties from time to time

as reasonably required. In our judgment, it inevitably follows from the fact he did not meet the required standards for the role of Machine Minder, that he would have been redeployed into other duties, possibly more often than other colleagues who had successfully completed their training and met the required standard.

59. The Claimant has not identified whether he was asked to work elsewhere for just a few minutes or over longer periods of time. Whilst the Claimant has asserted in general terms that he was treated differently to other Machine Minders, there is no evidence before us as to the frequency, if at all, with which they were redeployed. It is reasonable to assume that their role and responsibilities were identically defined, in which case it was clearly envisaged that all of them would experience some degree of redeployment according to business needs. In any event, Mrs Patel, Mr Ciugurean and Mr Chiriac are not appropriate comparators for the purposes of section 13 and 23 of the Equality Act 2010, since they had all met the requirements of the role and were capable therefore of performing the role without ongoing supervision.

60. One of the difficulties in the Claimant's case is that he identifies seven individuals as having discriminated against him, yet does not explain why it is that their discriminatory thinking and biases manifested in exactly the same way, namely that they instructed him to work in different areas of the factory. In the absence of some conspiracy between them, as to which there was no evidence at all, in our judgment it is inherently unlikely that seven perpetrators might have been influenced by the Claimant's race to act in exactly the same way in relation to him. The Claimant also does not explain why he believes that Mr Morton, who is also black, discriminated against him. Whilst it is entirely possible that a person may discriminate against someone with a shared protected characteristic (section 24 of the Equality Act 2010), the fact of the shared characteristic highlights the need for the Claimant to put forward primary facts and circumstances that will support an adverse inference being drawn. Stepping back, we conclude that the reason the Claimant was redeployed on a regular basis, had nothing whatsoever to do with his race, but instead everything to do with the fact that he had not met the required standard, could not be supervised constantly and therefore needed to be kept productively occupied on other lines if he was to be retained in the Respondent's employment. In the circumstances, his complaint about the matter, whether pursued under section 13 or 26 of the Equality Act 2010, fails. In terms of section 26, the Respondent's actions may have been unwelcome, but they were unrelated to his race

ISSUE 2

61. The Respondent's List of Issues identifies Mr Ciugurean as one of 8 named individuals who are alleged to have moved the Claimant to different areas of the factory and / or asked him to work in a different role over a period of approximately 8 months. Whilst Mr Ciugurean is not specifically identified in corresponding paragraph 5.1.1 of the Claimant's List of

Issues, he is identified in paragraph 3 of the Claimant's Witness Statement as someone who failed to train the Claimant notwithstanding he had been *"ordered"* to do so by Ms Nenaseva. The Claimant does not apparently claim that Mr Ciugurean's failure to train him was an act of race discrimination, though in that case he does not explain in his witness statement, nor did he explain at Tribunal, why he concluded that this was not an act of race discrimination whereas Mrs Patel's earlier alleged failure to train him was an act of race discrimination.

62. As set out in our findings above, the Claimant has largely failed to establish the facts upon which his complaint of discrimination is founded. Mrs Patel did not refuse to train the Claimant prior to 19 October 2017. In our judgement, her refusal to be further involved in his training beyond that date, whilst unwelcome to the Claimant, had nothing whatsoever to do with the Claimant's race but instead reflected her genuine and reasonably held belief that the Claimant worked too slowly and would not listen to her, and accordingly that there was nothing further she could do to support his learning and development. She would have treated someone of a different race in exactly the same way in the same or similar circumstances. His complaint about the matter, whether pursued under section 13 or 26 of the Equality Act 2010, fails.

ISSUE 5

63. It remains unclear to the Tribunal why the Claimant regards Ms Nenaseva's comments on 22 August 2017 as an act of direct discrimination or, in the alternative, harassment of him, particularly given, as we find, Ms Nenaseva was offering her genuine explanation for why she understood him to have been redeployed into the main hall. In any event, we do not consider that the Claimant might reasonably have concluded that her comments created a hostile etc working environment for him. By the Claimant's own account, Ms Nenaseva had endeavoured to address his concerns on 11 and 17 August 2017 by asking Mr Ciugurean and subsequently Mrs Patel to train him. He does not explain why his race was not a factor in Ms Nenaseva's response to his concerns on 11 and 17 August 2017, yet informed her innocuous comments to him on 22 August 2017. Moreover and in any event, it was not Ms Nenaseva's decision that the Claimant should be redeployed to the main production hall, she was merely conveying her understanding as to why additional resource was required elsewhere. We are satisfied that she was not lying to him or otherwise seeking to mislead him on 22 August 2017. There is nothing in what she said, or how she expressed it to cause offence or to indicate any link to the Claimant's race, nor did the Claimant suggest such to Ms Nenaseva at Tribunal. When Ms Nenaseva explained to the Claimant on 22 September 2017 that he had been sent to the main production area to work because Gluten-free was not busy, she was putting forward her genuine and reasonably held understanding as to the reasons he had been moved. There is nothing to suggest or from which the Tribunal might infer that she gave him that explanation because of his race or that she would not have offered the same explanation to an

employee of a different race who raised the same issue. His complaints do not succeed.

ISSUE 6

64. There is no evidence to link Mr Chicira's training with the fact that the Claimant was taken off the line. But even if it had been the case, there is nothing from which we might infer that this was with a view to pushing the Claimant out. Had the Respondent wished to end the Claimant's employment it could have done so on one week's notice as he did not enjoy statutory protection against unfair dismissal. It is somewhat unrealistic and illogical for the Claimant to suggest that rather than give him one week's notice, the Respondent embarked upon a campaign to force him out by other means. We conclude that Mr Chicara was brought onto the line for some initial training, in the same way that the Claimant had initially shadowed Mrs Patel during his first week at the Respondent. It was unreasonable for the Claimant to regard it as creating a hostile environment for him. In any event, it had nothing whatever to do with the Claimant's race. His complaint about the matter, whether pursued under section 13 or 26 of the Equality Act 2010, fails.

ISSUES 7, 9 and 12/17

65. Mr Jaworski's comments were undoubtedly unwelcome, but in our judgement they had nothing whatever to do with the Claimant's race. They were an expression of Mr Jaworski's frustration in the pressure of the moment when problems arose on the production line and which he perceived the Claimant to be responsible for. Mr Jaworski would have treated anyone in the Claimant's situation in the same way. His complaint about the matter, whether pursued under section 13 or 26 of the Equality Act 2010, fails.

ISSUE 8

66. The Claimant was not given a key to operate the machine on the line during the probationary period because he had not met the required standard to be confirmed in the role. This was a widely held and consistently expressed view, including on 10 January 2019 when, after approximately 18 months with the business, working on the lines and observing others, Ms Brede's conclusion as Skills Improvement Trainer was that the Claimant was still struggling to keep up with the fast paced working environment and was not meeting the required standards for the role. It was unreasonable for the Claimant to regard it as creating a hostile environment for him. In any event, it had nothing whatever to do with the Claimant's race. His complaint about the matter, whether pursued under section 13 or 26 of the Equality Act 2010, fails.

ISSUE 10

Mr Barbos' comments to the Claimant on 9 November 2017 may have been unwelcome but in our judgment they had nothing whatever to do with the Claimant's race. They reflected the team's shared sense of frustration with an employee who, after over three months in the job, was (reasonably) considered to be failing to meet the required standard of job performance, even if the Claimant had good reason to be dissatisfied with the lack of structured training and development on offer. In our judgement Mr Barbos would have expressed similar impatience with any other employee in the same or similar circumstances. The Claimant's complaint about the matter, whether pursued under section 13 or 26 of the Equality Act 2010, fails.

ISSUE 11

If Mr Austrins was called away from the line, this would have been to support the production lines elsewhere. This had nothing to do with the Claimant's race. We have set out under Issue 1 above why we do not accept the Claimant's case that he was being set up to fail.

ISSUE 13

67. Whilst the Claimant was excluded from the briefing on the new machine, this was because Ms Nenaseva had concluded and shared with the FLMs that the Claimant had not met the required standard to continue to be employed as a Machine Minder and accordingly would need to be redeployed into another role. In the circumstances no useful purpose would be served in briefing him about a machine for which he would never assume responsibility as a Machine Minder. That had nothing whatsoever to do with his race.

ISSUES 14 and 16

If Ms Nenaseva was distracted from addressing the Claimant's concerns or failed to address them on a more timely basis or to the Claimant's satisfaction, this had nothing whatsoever to do with the Claimant's race but instead reflected the reality of the significant demands on Ms Nenaseva's time given the significant numbers of operatives for whom she was responsible. It is possible that she lost sight of the matter after her conversation with the Claimant on 3 December 2017, but equally the Claimant did not raise the issue with her again before raising his formal Grievance in June 2018. It is in the nature of busy work environments that people overlook matters up unless and until prompted about them. There is no basis for us to infer that any failure on the part of Ms Nenaseva to follow their conversation up was influenced by the Claimant's race.

68. In conclusion, and for all the reasons set out above, the Claimant's complaints that he was unlawfully discriminated against on grounds of race are not well founded and are dismissed.

_____
Employment Judge Tynan

Date: 16 June 2022

Sent to the parties on:

23 June 2022

For the Tribunal Office: