



EMPLOYMENT TRIBUNALS

Claimant

Thomas Joseph

v

Respondent

Royal Mail Group Limited

Heard at: Cambridge

On: 11 to 14 December 2023 and
15 December 2023 in chambers

Before: Employment Judge de Silva KC, Mr A Hayes, Mr C Grant

Appearances

Claimant: In person

Respondent: Mr R. Chaudhry, Counsel

RESERVED JUDGMENT

1. The Claimant's claim for constructive unfair dismissal pursuant to section 98 of the Employment Rights Act 1996 is dismissed.
2. The Claimant's claim that he was subjected to harassment related to his race pursuant to sections 26 and 40 of the Equality Act 2010 is dismissed.
3. The Claimant's claim that he was discriminated against because of his race pursuant to sections 19 and 39(2) of the Equality Act 2010 is dismissed.

REASONS

THE PROCEEDINGS

1. By Claim Form presented on 22 September 2022, the Claimant brought claims against the Respondent for unfair dismissal under the Employment Rights Act 1996 and unlawful harassment and direct race discrimination under the Equality Act 2010.
2. At a Case Management Hearing on 23 June 2023, a list of issues was set out by the Tribunal, identifying 30 alleged acts which were said to contribute to repudiatory breach of contract and/or to be acts of harassment and/or direct race discrimination. The list identified the unfair dismissal claim as being a claim of constructive unfair dismissal.
3. The Tribunal set a deadline of 31 October 2023 for exchange of witness statements. In the event, witness statements were exchanged only on 29 November 2023 as the Respondent sought additional time to consider transcripts of recordings of meetings - which the Claimant had informed the Respondent that he had secretly recorded - before exchanging their statements.
4. The Claimant served witness statements for himself and a colleague, Giles Plumb (Operational Postal Grade). The Respondent served witness statements for Frank Garcia (Customer Operations Manager), David Austin (Customer Operations Manager), Steven Wood (Operational Postal Grade), Michael Collins (Operational Postal Grade), Donnah Oakey (Operational Postal Grade), Jean Noumssi (Manager) and Courtney Davey-Ward (Operational Postal Grade).
5. It was only on 5 December 2023 that the Respondent told the Claimant that it was calling only Mr Garcia and Mr Austin to give oral evidence. The Claimant had by this time started preparing cross-examination of the other witnesses. It was a matter for the Tribunal what weight to give to the statements of witnesses who were not called. In closing, Mr Chaudhry told the Tribunal that he had been instructed it had been a "*business decision*" taken by the Respondent not to call the other five witnesses as it was not "*cost-effective*", although the witnesses were willing to attend. These explanations were not in evidence (they were provided only as instructions to Mr Chaudhry).
6. The Tribunal heard oral evidence from the Claimant and Mr Plumb of behalf of the Claimant and Mr Garcia and Mr Austin on behalf of the Respondent. All were cross-examined. The Tribunal was referred to a bundle of documents running to 477 pages (including documents added by the Claimant with the consent of the Respondent).

FINDINGS OF FACT

7. The Tribunal makes the following findings of fact on the chronology of events which are relevant to the issues between the parties. Where there was no dispute between the parties as to a particular fact, the findings are recorded below without further explanation. Where there was a dispute between the parties on the evidence, the Tribunal explains why it made its findings of fact.
8. The Claimant commenced employment with the Respondent as a Christmas temporary staff member in December 2005 and became a part-time permanent employee in July 2006. His statement of terms and conditions signed on 11 January 2007 stated that:
 - a. His job title was Operational Postal Grade (“**OPG**”) and it was further that *“You will also be required to undertake such other duties as may be required from which [sic] Royal Mail considers you capable and competent to perform”*;
 - b. His initial place of work would be Milton Keynes Central and *“The needs of Royal Mail require mobility. You may therefore be required to work at any other work location at Royal Mail Group plc”*.
9. The duties of an OPG may include outdoor work, in particular postal deliveries and postal collections. This may require the OPG to drive a Royal Mail van which in turn requires them to have an ordinary driving licence. There is no additional driving licence requirement in order for them to be able to drive the smaller Royal Mail vans. The duties of an OPG may also include indoor work, such as sorting mail at a delivery office.
10. The Claimant started working at Kiln Farm Delivery Office in 2010 and initially had the role of segregating mail. In 2013, he was moved to a role in the Enquiries Office, also known as the Callers Office. The Enquiries Office was responsible for dealing with undelivered packages which had been returned to the Delivery Office and which customers would come to collect.

Incident in December 2019

11. In 2019, the Claimant was working in the Enquiries Office with Michael Collins among others. On 10 December 2019, Mr Collins told the Claimant that he could not have a lunch break since he was on overtime. He did this in a rude way which led to the Claimant complaining to his manager about it. The manager told him that he could take a 40-minute break.
12. Although Mr Collins denies saying this in his witness statement, we accept the oral evidence of the Claimant that Mr Collins made this comment and it is consistent with the Claimant having complained to his manager about it. It is also consistent with the evidence of Mr Garcia in these proceedings, which we accept, that there was tension between Mr Collins and the Claimant which related to concerns raised

by Mr Collins' about workload and the Claimant disappearing during the working day, especially when it was busy. These matters are the subject of Allegations 1 and 2 addressed below.

13. In the afternoon of 14 January 2020, while the Claimant was on duty in the Enquiries Office, he went into the office of Donnah Oakey to discuss an issue about his annual leave. He had been in there for a few minutes when Mr Collins came into the office and shouted words to the effect of "*Thomas you need to get off your arse and help*". This incident is the subject of Allegation 3.
14. On 13 February 2020, the Claimant made a formal complaint about the above incident under Stage 1 of the Respondent's individual grievance procedure. This grievance was upheld by Mr Garcia by letter dated 29 August 2020. The letter stated that Mr Garcia had concluded that Mr Collins' actions led to the Claimant feeling threatened and humiliated. It stated that Mr Garcia did not believe that Mr Collins' actions were racially motivated.
15. In that letter, Mr Garcia apologised for the delay in the investigation of the case which he said was due to witnesses being off work due to the Covid pandemic. In oral evidence, he explained that he had spoken to Mr Collins, Simon Terry and Shane Phillips. Mr Phillips worked on the morning shift, rather than the afternoon shift, and had not witnessed the incident but Mr Garcia wanted to form a view on the overall situation in the Enquiries Office (and not just the alleged incident) as it was a serious allegation. The delay in the investigation is the subject of Allegation 4.
16. Although it is not condoned by the Respondent, swear words are commonly used by those working at Kiln Farm. The Claimant complained on 1 May 2022 about use of swear words in the office generally.

Incident on 9 December 2020

17. The Claimant alleges in his witness statement that Mr Collins tried to take or took a photograph of the Claimant or videoed him from behind using his mobile phone, without the Claimant's knowledge of consent. This is the subject of Allegation 5. Mr Collins admits that he had his phone out which he says in his statement was to take a photo of an empty frame within a 'york' in order to prove to a customer that the contents had been taken. The Claimant was uncertain in his written statement as to whether a photo was in fact taken (he refers to "*tried to take*").
18. The Claimant made a written complaint on 10 December 2020 which made various allegations of intimidating behaviour by Mr Collins and he also raised a concern that insufficient action had been taken to stop this. In this complaint, the Claimant alleged that he had looked back and seen that Mr Collins was taking a photo of "*us*", being him and other agency staff that he was working with at the time (i.e. not just the Claimant as alleged in the witness statement). No explanation was put forward as to why Mr Collins might have done this.

19. In light of this evidence, the Tribunal finds that Mr Collins had his phone out when the Claimant was working with agency staff but, in the absence of evidence proving this, it does not find that Mr Collins was taking a photo or video of the Claimant.
20. The Claimant agreed with Mr Garcia to resolve this complaint informally. By letter dated 5 May 2021, Mr Garcia stated that the Claimant and Mr Collins agreed to an informal resolution whereby "*Management will monitor closely and daily*". This letter was countersigned by the Claimant and Mr Collins. The Claimant alleges in Allegation 6 that the matter was not dealt with.

Mr Collins Allegedly Making Flatulence Sound

21. The Claimant alleges in his witness statement that Mr Collins made a "*farting sound*" through his mouth whenever he passed the Claimant's workstation and made "*some special facial expression*". This is the subject of Allegation 7. Mr Collins denies this allegation.
22. No dates or range of dates for this alleged behaviour have been provided. It has not been clarified by the Claimant what the alleged facial expression was.
23. The Claimant made no written complaint about any such matter at the time (despite complaining about a number of other matters). When this was pointed out to him in cross-examination, the Claimant said that he had not raised it as it was a small matter. However, it is not a small matter: it would be a serious matter to treat a colleague in this way and the Claimant himself says in his witness statement that he found it "*really annoying*". For these reasons, in particular the fact that the Claimant did not complain about this at the time, the Tribunal finds that Mr Collins did not do this.

Alleged Interference by Mr Terry

24. The Claimant alleges that Mr Terry interfered to protect Michael Collins against any possible disciplinary action as a result of the Claimant's complaints. This is the subject of Allegation 8. It is not clear what the alleged 'interference' is and this in any event appears to be a matter of speculation on the part of the Claimant. There was no complaint about this matter raised by the Claimant at the time. Therefore, the Tribunal finds that Mr Terry did not interfere to protect Mr Collins from possible disciplinary action.

Events in April 2022

25. On 2 April 2022, the Claimant lost his brother in a motorcycle accident. He travelled to India to attend the funeral and returned to work on 19 April 2022.
26. On 20 April 2022, the Claimant was experiencing gastric issues which caused him to burp repeatedly. He had been doing this for a considerable period of time while working at his desk. He had his headphones in his ears. Mr Wood then said to the Claimant in a raised voice words to the effect of "*stop making that bloody noise*". This is the subject of Allegation 10. Mr Wood does not accept that he used these

precise words but we accept the Claimant's evidence on this. In the ensuing exchange, both Mr Wood and the Claimant spoke to each other in raised voices.

27. Although Allegation 9 is that Mr Wood bullied the Claimant on 20 April 2022 by rudely questioning him about how he was carrying out the task and then making disapproving faces when the Claimant took the mail cages out for segregation in front of the Claimant's colleagues, this is not mentioned at all in the Claimant's witness statement. When asked about this omission in cross-examination, the Claimant said "*This is a Silly question I would say. I did not take it as a serious matter at the time*". The Tribunal is of the view that had this taken place it would have been viewed as a serious matter and that, given in particular the omission from the Claimant's own witness statement, it is not established that Mr Wood did this.

Events on 17 May 2022

28. Throughout the period of Claimant's employment within the Enquiries Office, Mr Garcia received comments from the others working there about the Claimant not pulling his weight. One concern raised was that he would be missing from the Enquiries Office when it was busy. Another was that he would often be on the phone, using his headphones. Mr Plumb (who was the Claimant's witness) confirmed in oral evidence that the Claimant would often be on the phone. In the meeting of 1 July 2022 referred to below, the Claimant himself referred to listening to music and doing a lot of charity work – including contacting people for money - while at work.

29. On 17 May 2022, the Claimant was in the toilet for around 20 minutes. This was confirmed by Mr Plumb in evidence. Mr Wood looked for the Claimant for around 20 minutes until he found him in the toilet. He shouted at him to come out and take the mail cages. This is the subject of Allegation 11. Mr Wood does not expressly deny in his witness statement that he was shouting. Although the Claimant asserts that taking out mail cages was not part of his duty, this was one of the roles carried out by the OPGs within the Enquiries Office as it was part of the responsibility for dealing with returned packages.

30. Also on 17 May 2022, Mr Wood told the Claimant words to the effect that he was "*taking the piss*". This is the evidence of the Claimant and although Mr Wood says that he does not recall this, he does not specifically deny it. He also said words to the effect of "*you are a disgrace to the office and to the ladies here*". This was said in the context of the Claimant having been away from the Enquiries Office for a period of time that day and Ms Davey-Ward being the only other person in the office that day. This is the subject of Allegation 12.

31. By letter dated 17 May 2022, the Claimant made a formal written complaint about the events that day to Mr Garcia and also to Mark Proctor, the local union representative. This is the subject of Allegation 13. On 18 May 2022, Mr Garcia spoke to the Claimant and Mr Wood. He explained to the Claimant why Mr Wood felt as he did. Mr Garcia explains that the Claimant and Mr Wood decided to move on and that the Claimant did not pursue the matter afterwards or ask that his complaint be dealt with further, formally or otherwise.

Incident on 19 May 2022

32. On 19 May 2022, the Claimant asked Mr Noumssi, who was a trainee manager at that time, to sign an overtime sheet to authorise three hours' work he had done. Mr Noumssi questioned these hours (he had not been there at the time they were worked). This is the subject of Allegation 14. The Claimant felt that his integrity was being challenged and asked whether he was being accused of lying which Mr Noumssi said he was not. Mr Noumssi checked the hours and then signed off on the overtime.
33. The Claimant was signed off work from 19 May 2022.

Incident on 30 May 2022

34. Throughout this period, the Claimant had a part-time job at Morrison's supermarket on Mondays for four and a half hours (a day he was not rostered to work for the Respondent). Although his sick notes stated that he was not fit for work, he continued working for Morrison's on Mondays. Mr Wood was shopping in Morrison's on Monday 30 May 2022. The Claimant stated in his witness statement that he suspected that Mr Wood was attempting to take a photo or video of him. This is the subject of Allegation 15. Mr Wood says in his witness statement that he was using the phone to talk to his wife and denies taking a photograph of the Claimant.
35. The Tribunal can understand why the Claimant thought that Mr Wood was taking a photo of him as he was working at Morrison's while off sick from the Respondent and might have thought that Mr Wood was intending to draw this to someone's attention at the Respondent. The Tribunal does not however find that Mr Wood was taking a photo of or videoing the Claimant in the absence of evidence showing this. It is no more than a matter of suspicion on the part of the Claimant.
36. The Claimant raised this matter with Mr Garcia by phone and then WhatsApp that day (30 May 2022). Mr Garcia spoke to the Claimant about it the same day.

Meeting of 1 July 2022

37. Mr Garcia arranged a meeting with Mr Wood and the Claimant on 1 July 2022. the Claimant describes this as a formal meeting but it was an informal one, arranged by Mr Garcia to resolve the outstanding complaints and to bring resolution to the situation between Mr Wood and the Claimant. Mr Garcia invited two union representatives to this meeting, Mr Proctor, the local union representative, and also Neal Kidwell, the area representative, whom Mr Garcia invited as Mr Proctor was relatively new in post as a union representative. The Claimant was accompanied by Mr Plumb.
38. The Claimant covertly recorded this meeting and the Tribunal had a transcript of this recording which was agreed between the parties. The meeting started with the Claimant reading out a prepared statement. The transcript appears to start after he

had finished reading this out. It appears also not to cover the very end of the meeting.

39. At the meeting, they discussed the events of 20 April 2022 (Mr Wood allegedly shouting at the Claimant when he was burping), 17 May 2022 (Mr Wood alleged shouting at the Claimant after he spent time in the toilet) and of 30 May 2022 (Mr Wood's allegedly photographing the Claimant in Morrison's). Mr Wood accepted and apologised for some of the matters which the subject of complaint, such as saying that the Claimant was "*taking the piss*" but denied others, such as taking the photograph in Morrison's. As for the latter, Mr Plumb said to the Claimant that he should move on from it as there was no evidence in support of the allegation.
40. When the Claimant requested a commitment from Mr Wood in writing that the sort of behaviour he had experienced would not happen again in the office, Mr Kidwell said that this was not possible but there could be a commitment to improve the culture and try and reduce the banter. Mr Garcia expressed a commitment to brief staff about improving the culture.
41. There was in effect an informal resolution of the issues between Mr Wood and the Claimant. The Claimant said that the day was the end of the matter and that all that he wanted to do was work together as a team with respect.
42. Towards the end of the meeting, the Claimant asked that an earlier request that his hours be increased from 20 to 30 hours be considered. He said that this was a fair request given the current situation. Mr Kidwell told the Claimant that there were full time hours available at Bletchley where they were struggling for staff on the afternoon shift and where Ms Davey-Ward had refused to move. The Claimant replied that he did not want to move there. The alleged conduct of Mr Kidwell at the meeting is the subject of Allegation 17. The alleged refusal to increase his hours to 30 hours is the subject of Allegation 18.
43. On 6 July 2022, the Claimant messaged Mr Garcia to say that he hoped that Mr Garcia would ensure a peaceful atmosphere at work and if not he would appreciate Mr Garcia arranging voluntary retirement for him.

The Missing Chair

44. The Claimant had been using a chair at work which a colleague had obtained for him. Other people used it but it was generally used by the Claimant and it was known that he wanted to use it. Although the Claimant told the Tribunal that he used it because of his physical condition, including his back, the chair had not been purchased and it had not been brought in as a result of any Occupational Health referral.
45. The Claimant returned to work on Tuesday 12 July 2022 and found that the chair was missing. He looked for the chair but could not find it. On 15 July 2022, he made a verbal complaint to Mr Austin. He secretly recorded his conversation with Mr Austin and the Tribunal had before it an agreed transcript of the recording. At this meeting, Mr Austin:

- a. Said that people had been coming to him complaining that the Claimant had been accusing them of taking the chair, including his asking to check someone's bag to check if it had been taken out in pieces (the Claimant said in evidence that he had asked where the chair was but he did not deny asking to check someone's bag);
- b. Asked the Claimant to let him do an investigation to try and find out what had happened;
- c. Suggested in the interim looking for other chairs, while emphasising the importance of establishing what had happened to the first chair, saying "*We can always replace that chair, I can always get another chair, but want to find out what's happened*".

46. Mr Austin and the Claimant then spent a considerable amount of time looking for the chair. Mr Austin thereafter sought the necessary permission to watch the CCTV for the building to check whether there was evidence of the chair being taken from the building. Mr Austin and Mr Garcia then spent two to three hours viewing the CCTV footage. They were unable to ascertain who had taken the chair.

47. On 21 July 2022, Mr Austin completed a requisition form for a new chair. In this form, he referred to the Claimant's conditions as reported to him by the Claimant, i.e. a back and shoulder condition.

48. After the Claimant resigned, the chair was found in a locked cupboard operated by Quadrant, an external contractor, in an area that the Respondent's own staff did not have direct access to. The person with access to the key was a cleaner who was employed by Romec and who had previously been employed by Quadrant.

49. Although the Claimant suspects that someone deliberately took the chair, he does not know who this was and the Tribunal is unable on the evidence to say who this was - or even whether it was an employee of the Respondent who took it - or for what reason it was taken.

50. Allegations 19, 22 and 25 relate to the issue of the missing chair and the investigation into this.

Alleged Conduct of Chris Anderson on 22 July 2022

51. The Claimant's witness statement refers to alleged bullying and harassment by Chris Anderson. This is the subject of Allegation 20. The witness statement does not say what the alleged bullying conduct was. The statement refers to Mr Anderson being a favourite who always managed to get overtime.

52. The Claimant messaged Mr Garcia complaining that Mr Anderson had shouted at him, saying that he was not doing his job properly. The handling of this complaint is the subject of Allegation 21.

53. Mr Garcia spoke to Mr Anderson about the incident and Mr Anderson said that the Claimant had not been pulling his weight. Mr Garcia asked him not to be rude to the Claimant. Mr Garcia fed back to the Claimant about this and the Claimant said that he was happy to move on.
54. The Tribunal finds that Mr Anderson said that the Claimant was not doing his job and that this arose out of a belief that the Claimant was not pulling his weight. In light of the lack of the evidence about this in the Claimant's own witness statement, it does not accept that Mr Anderson shouted at the Claimant.

The Trolley

55. There was a trolley in the Kiln Farm Delivery Office on which several comments had been written. These were described by one witness as being silly jokes. One says, within in a heart, "*Mick loves Kezza more*". Another says "*we all hate Ben the twat*".
56. The Claimant alleges that one comment written on the trolley which states "*Shayne, Mick, Courts Dream Team*" was racially discriminatory as it did not name him as being part of the 'dream team'. This is the subject of Allegation 23. Others such as Mr Wood are also not mentioned in this written comment. The Claimant asserts that Ms Davey-Ward wrote this but this is no more than speculation on his part. There is no evidence that she wrote it and the Tribunal cannot say on the evidence who wrote it.
57. The Claimant complained about this to Mr Garcia who, in response, removed the trolley. Allegation 24 is that Mr Garcia ignored this complaint.

Letter of 1 August 2022

58. Around this time, the Respondent decided that the hours in the Enquiries Offices across the country would be reduced, as a result of reduced workload. This was in part the result of more people working from home during and after the pandemic which led to fewer packages being returned to Distribution Offices. The reduction was agreed with the union.
59. This decision was communicated to Mr Garcia and it was not his decision. So far as the Kiln Farm Enquiries Office was concerned, at that time, Mr Phillips and Mr Collins worked full-time 38 hours a week and the Claimant worked part-time 20 hours a week.
60. Although Ms Davey-Ward worked in the Enquiries Office, her substantive role was as an outdoor OPG (collections and deliveries) but, after suffering injuries to her arm in a car accident, she was on temporary recuperative duties working indoors. She was on a 30-hour-a-week contract. She was originally given a sorting role but, as there were less than 30 hours' work available in this role, she worked some hours in the Enquiries Office.

61. By letter dated 1 August 2022 (which Mr Garcia arranged to be handed to the Claimant by Mr Collins), Mr Garcia told the Claimant about the reduction in workload and informed him that there were two roles that he could offer the Claimant at Kiln Farm as a part-time OPG, one doing deliveries with a start time of 8am and one doing collections with a start time of 3pm. He told the Claimant that he could discuss the options with his union and let Mr Garcia know which role he would want to move to from the week commencing 8 August 2022. Allegations 27 and 28 concern this letter. Allegations 29 and 30 concern that proposed change in duties.
62. Prior to this letter, Mr Garcia had had a meeting with the Claimant about the proposed changes. When he explained the proposed changes, the Claimant had said to Mr Garcia *“that’s ok Frank, Royal Mail will have to pay me my monies”*.
63. Although the Claimant disputes that any meeting took place, we accept the evidence of Mr Garcia on this. It is entirely consistent with the supportive and considerate approach to the Claimant in his previous dealings with him and Mr Garcia was compelling on this point when repeatedly asked about the meeting in cross-examination. The Claimant’s comment at that meeting about the Respondent having to pay him monies is consistent with his raising the prospect of voluntary retirement less than a month earlier.
64. By email of 2 August 2022, the Claimant complained to Mr Garcia about a number of matters and sought an update on the investigation about the chair. On 5 August 2022, the Claimant submitted a formal bullying and harassment complaint raising many of the matters which had been discussed at previous meetings, including the issue of the missing chair. Allegation 25 is that the Respondent failed to respond to the Claimant’s request for an update about the chair.
65. By email of 8 September 2022 to Mr Garcia, the Claimant resigned. By email of 9 September 2022, Mr Garcia encouraged him not to resign.

Further Alleged Comments by Claimant

66. Some of the Respondent’s witnesses who were not called to give evidence in person said in their witness statements that the Claimant had made comments which may broadly be described as homophobic. It is not clear to the Tribunal why this evidence was in the witness statements and Mr Choudhry himself told the Tribunal that it was not relevant to the case (and the alleged comments were not put to the Claimant). In all the circumstances, the Tribunal finds that these alleged comments were not made by the Claimant.

RELEVANT LAW

Harassment

67. Section 26(1) of the Equality Act states:

“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.

68. Section 26(5) of the Equality Act states that race is a relevant protected characteristic for the purposes of section 26.

Direct Race Discrimination

69. Section 13(1) of the Equality Act 2010 states: “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”. Section 4 of the Equality Act provides that race is a protected characteristic.

70. Section 23(1) Equality Act states: “On a comparison of cases for the purpose of section 13 ... there must be no material difference between the circumstances relating to each case”.

71. Section 136 of the Equality Act states: “(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. (3) But subsection (2) does not apply if A shows that A did not contravene the provision”. This applies both to harassment and discrimination claims.

72. In **Igen Ltd v Wong** [2005] IRLR 258, the Court of Appeal explained that a claimant must first prove on the balance of probabilities facts from which the tribunal could conclude (in the absence of an adequate explanation) that the respondent has committed an act of unlawful discrimination. The burden of proof then passed to the respondent to prove that it did not commit that act, demonstrating on the balance of probabilities that the treatment was in no sense whatsoever because of the protected characteristic (here, race).

73. In **Madarassy v Nomura International plc** [2007] IRLR 246, the Court of Appeal held that the bare facts of difference in status and difference in treatment are not, without more, sufficient material from which a tribunal could conclude that a respondent had committed the act of discrimination.

74. In **Royal Mail Group Ltd v Efofi** [2021] UKSC 33, the Supreme Court, confirming the application of the two-stage approach to the burden of proof, held that a Tribunal may consider all the evidence from whichever party raises it when coming to the conclusion as to whether the burden has shifted.

Constructive Unfair Dismissal

75. Section 95(1)(c) of the Employment Rights Act 1996 states that an employee is dismissed by his employer if the employee terminates his contract, with or without notice, in circumstances in which he is entitled to terminate it without notice by reason of his employer's conduct.
76. The issues for the Tribunal in relation to the question of whether the Claimant was dismissed are:
- a. Whether the Respondent committed a repudiatory (fundamental) breach of contract, which goes to the heart of the contract;
 - b. Whether the employee resigned at least in part because of this breach and not for another unconnected reason;
 - c. Whether the employee has waived the breach or affirmed the contract by a delay in resigning (*Western Excavating (ECC) Ltd v Sharp* [1978] ICR 221).
77. If a claimant establishes that he was dismissed, the Tribunal will go on to consider whether the dismissal was unfair for the purposes of section 98 of the Employment Rights Act.

THE TRIBUNAL'S CONCLUSIONS

Conclusions on Claims Under the Equality Act 2010

General

78. Before addressing each of the thirty allegations of discrimination and harassment, the Tribunal makes the following general observations about the Claimant's discrimination and harassment claims.
79. The Claimant alleged that certain conduct was discriminatory or harassment at the time of the alleged events. Other acts he complained about in writing at the time but did not allege that the conduct was related to or because of race. As for the allegations he makes in these proceedings about Mr Garcia, he did not complain at the time about his conduct, in particular the way in which Mr Garcia dealt with the Claimant's complaints. On the contrary, he expressed deep gratitude to Mr Garcia about this. In evidence and submissions, the Claimant said that he loved and respected Mr Garcia like a brother. Mr Garcia is a manager who is clearly respected and well-liked by staff at Kiln Farm. It is very easy to see why, given the engaged and supportive way in which he dealt with workplace issues, including conflict.
80. The Claimant said in evidence that his views about Mr Garcia changed after the letter of 1 August 2022 was received, in particular because Mr Garcia had "*lied*"

about a meeting taking place between them before the letter was sent. The Claimant said that this had caused him to view the conduct of the Respondent prior to that letter – including but not limited to the conduct of Mr Garcia- as being related to race.

81. We do not accept this. First, as set out above, we have found that Mr Garcia and the Claimant did meet prior to the letter of 1 August 2022 being handed to the Claimant. In any event, this was not a significant matter and the Claimant did not attach any particular significance to it at the time. For example, in his email of 8 September 2022 he said that he was “*curious*” about when the briefings referred to in the letter of 1 August 2022 took place but does not suggest that he is upset at the assertion that briefings took place. In the judgment of the Tribunal, what made the Claimant unhappy about the letter of 1 August 2022 was not Mr Garcia’s reference to a meeting but the information that was to be moved from the Enquiries Office at Kiln Road and his understanding that Ms Davey-Ward would not be moved.

(1) On 10 December 2019 did Michael Collins, make a very rude statement - “you cannot have a lunch break since you are on overtime” and try and stop the Claimant from taking his lunch break.

82. The Claimant accepted in evidence that this was unrelated to race.

(2) Fail to take any action after the Claimant reported the above at paragraph (1) verbally to the Managers.

83. Action was taken after the Claimant reported the matter. As set out above, the Claimant was given a 40-minute break and he did not pursue the matter further. Therefore, the factual basis of this allegation of unlawful treatment is not made out.

(3) On 14 January 2020 did Michael Collins deliberately bully, harass and intimidate the Claimant in front of another colleague, Donna Oakey, in her office while he was discussing annual leave with her causing the Claimant to then be signed off from work by the doctor due to stress.

84. As set out above, the Tribunal accepts that Mr Collins shouted words to the effect of “*Thomas you need to get off your arse and help*” in Ms Oakey’s room. The evidence shows that there were ongoing genuine concerns from a number of managers and colleagues about the Claimant not pulling his weight in the Enquiries Office. This is consistent with the evidence of Mr Plumb and the Claimant that the Claimant would often be on the phone. Further, while the Claimant was in Ms Oakey’s office on this occasion dealing with his annual leave, he was not doing the work of the Enquiries Office. As set out above, swear words are commonly used by those working at Kiln Farm.

85. In the circumstances, the Tribunal concludes that Mr Collins’ comment and the way it was said were a product of frustration about the Claimant not pulling his weight, rather than anything to do with race.

(4) Fail to deal with the written complaint by the Claimant against Michael Collins about the above incident at paragraph (3) in a timely manner.

86. Although it took Mr Garcia several months to address the Claimant's complaint about Mr Collins, the Tribunal accepts Mr Garcia's explanation that this was due to delays in carrying out his investigation, including interviewing staff, something that he apologised to the Claimant for at the time. Again Mr Garcia was extremely supportive of the Claimant (including in relation to this complaint which he upheld) and nothing suggests that race might have been a factor.

(5) On 9 December 2020 did Michael Collins photograph and or video the Claimant from behind without his knowledge or consent.

87. For the reasons set out above, the Claimant has not established that Mr Collins did this. Therefore, the factual basis of this allegation of unlawful treatment is not made out.

(6) Fail to take any action as a result of the above incident after the Claimant's official written complaint to the Respondent.

88. Action was taken as a result of the incident above. As agreed with the Claimant, Mr Garcia addressed this complaint informally which led to the informal resolution set out in the letter dated 5 May 2021, countersigned by the Claimant and Mr Collins. Therefore, the factual basis of this allegation is not made out.

(7) On multiple occasions did Michael Collins, make offensive flatulence sounds through his mouth when he passed the Claimant's workstation.

89. For the reasons set out above, the Claimant has not established that Mr Collins did this.

(8) Did Simon Terry interfere to protect Michael Collins against any possible disciplinary action as a result of the Claimants complaints until Simon Terry was later sacked by the Respondent on or around February 2021.

90. For the reasons set out above, the Claimant has not established that Mr Terry did this.

(9) On 20 April 2022 did Steve Wood, bully the Claimant by rudely questioning how he was carrying out the task and then making disapproving faces when the Claimant took the mail cages out for segregation in front of the Claimant's colleagues.

91. For the reasons set out above, the Claimant has not established that Mr Wood did this.

(10) On 20 April 2022, did Steve Wood bully the Claimant by shouting loudly at him after the Claimant burped.

92. The Tribunal concludes that Mr Wood shouted at the Claimant to stop burping because the Claimant had been burping repeatedly over a period of time (which

the Claimant accepts) and the Claimant was wearing headphone (which he often did). Mr Wood's actions arose out of the particular situation, did not amount to bullying and were in no sense whatsoever related to race.

(11) On 17 May 2022 at 3.20pm on this day, did Steve Wood come to the toilet area and insist the Claimant come out from the toilet immediately and then shout at him, and accuse him of spending 20 minutes in the toilet whereas the Claimant contends this was untrue. Did he then order Claimant to take out the mail cages in an intimidating tone when the Claimant alleges it was not his designated duty or responsibility.

93. The Tribunal concludes that the reason that Mr Wood shouted at the Claimant was that he had been in the toilet for a significant period of time and there was work to be done, rather than anything related to race. The order to take out the mail cages was, as set out above, within the duties of the Enquiries Office and was part of the responsibility for dealing with returned packages.

(12) When the Claimant was about to go for his pre-agreed usual tea break at 4pm on 17 May 2022 did Steve Wood shout at him and say "you are taking the piss" in a loud and aggressive manner, with peculiar gestures. Did he also say "you are a disgrace to the office and to the ladies here"

94. As set out above, Mr Wood said to the Claimant words to the effect that he was "*taking the piss*" and "*you are a disgrace to the office and to the ladies here*" in the context of the Claimant having been away from the Enquiries Office for a period of time that day and Ms Davey-Ward being the only other person working in the office at that time. As also set out above, swearing was common in the office. Therefore, the Tribunal concludes that Mr Wood spoke harshly but the comment was again borne out of genuine frustration that the Claimant was not pulling his weight and was in no sense whatsoever related to race.

(13) After reporting the above incident did the Respondent fail to investigate the formal written complaint to Frank Garcia and to the C's CWU representative, Mark Procktor, on 18 May 2022

95. The Claimant made a formal complaint about Mr Wood by letter dated 17 May 2022. The letter refers to Mr Garcia calling the Claimant back and assuring him that he would take the matter seriously and deal with it. The Claimant asked for management and the union to take strong action to stop this bullying and harassment against him. The Respondent did not fail to investigate this. Mr Garcia spoke to Mr Wood and the Claimant about it and both of them decided to move on from it. This was in keeping with Mr Garcia's personal style of seeking to resolve matters informally.

96. The issue was under discussion at the meeting of 1 July 2022 which concerned the conflict between Mr Wood and the Claimant and which led to an informal resolution between Mr Wood and the Claimant. Therefore, the factual basis of this allegation of unlawful treatment is not made out. In any event, race played no part in the Respondent's approach to this.

(14) On 19 May 2022 did Jean Noumssi, the acting trainee manager, refuse to sign the overtime sheet, thus questioning the Claimant's honesty and integrity as a result of which Claimant says he was signed off sick.

97. As set out above, Mr Noumssi questioned the overtime hours in circumstances where he had not been present at the time they were worked. He signed off on the overtime once he had checked the hours. The Tribunal finds that this is entirely consistent with good management and doing so did not impugn the Claimant's honesty or integrity. It concludes that race was in no sense whatsoever a factor in Mr Noumssi's actions.

(15) On 30 May 2022 after the Claimant was signed off by his GP due to stress in the workplace, and when the Claimant continued with his part-time role at Morrison's, (4.5 hours on Mondays only) on the advice of his GP that it may help with his mental health issues, did Steve Wood, take a video or photograph the Claimant without Claimant's knowledge.

98. For the reasons set out above, the Claimant has not established that Mr Wood did this.

(16) After the Claimant reported the incident above to Frank Garcia on the same day through a WhatsApp message via his union representative, Mark Procktor and Neal Kidwell, did the Respondent delay in investigating this and/or did they fail to take any action against Steve Wood for this incident.

99. As a result of the Claimant's complaint about Mr Wood, Mr Garcia took the step of arranging the informal meeting of 1 July 2022. Again this was in keeping with his personal style of seeking to resolve matters informally by consent and there was no material delay.

100. At the meeting, Mr Plumb pointed out to the Claimant that there was no evidence to support the allegation that Mr Wood had photographed the Claimant and the allegation was thereafter not pursued by the Claimant. There was no question of the Respondent taking action against Mr Wood as the allegation against him was not proven and the matter was resolved informally.

(17) On 1 July 2022 when a formal grievance meeting was held on this day to resolve the issues in the office with Steve Wood did Neal Kidwell act in a biased, intimidating way to the Claimant throughout the meeting.

101. The agreed transcript of the 1 July 2022 meeting (which again was not a formal grievance meeting as the Claimant suggests) does not disclose any bias or intimidation on the part of Mr Kidwell himself and the Claimant was unable to point to anything in the transcript which demonstrated bias or intimidation. The interventions of Mr Kidwell, for example about alternative work, appear generally to the Tribunal to be pragmatic and broadly supportive of the Claimant.

(18) Did the Respondent ignore Claimant's request to increase his hours to a minimum of 30 hours, and then after the last written request made during the meeting held on 1 July 2022, decline his request.

102. The Respondent did not ignore the Claimant's request to increase his hours: as stated above, the Claimant was told about and in effect offered a role in another distribution office. Therefore, the factual basis of this allegation of unlawful treatment is not made out.

(19) On 12 July 2022 did an employee of the Respondent remove the special work chair, to help with the Claimant's back pain and used by Claimant, intentionally to upset Claimant.

103. For the reasons set out above, the Claimant has not established the identity of the person who moved the chair (or even if it was an employee of the Respondent who did so). Therefore, the factual basis of this allegation is not made out.

(20) On 22 July 2022 did Chris Anderson, shout at Claimant and accuse him of not doing his job properly.

104. As set out above, the Tribunal accepts that Mr Anderson said that the Claimant was not doing his job but does not accept that Mr Anderson shouted at the Claimant. The reason that Mr Anderson did so was that the Claimant was not pulling his weight. There is nothing that has been put forward by the Claimant which supports the suggestion that race was a factor. As set out above, the Claimant's assertion that he was bullied and harassed by Mr Anderson is unsupported by evidence even in his own witness statement.

(21) After raising a complaint to the Respondent about this on 23 July 2022, through a WhatsApp message to Frank Garcia did the Respondent fail to respond causing the Claimant to then raise the matter again in the office on 30 July 2022 with Frank Garcia.

105. As set out above, Mr Garcia dealt effectively with the issue by raising the incident with Mr Anderson and asking him not to be rude to the Claimant. Mr Garcia fed back to the Claimant about this and the Claimant said that he was happy to move on. If, as may have been the case, there was a short delay in Mr Garcia speaking to Mr Anderson, nothing in the evidence supports the suggestion that this was in any sense related to race. This was just one of a number of occasions on which Mr Garcia was supportive of and sympathetic to the Claimant.

(22) Did the Respondent, despite the Claimant's formal written complaint on 26 July 2022 to the management of the Respondent about the removal of the chair, and also his frequent verbal requests to investigate the matter fail to find the culprits after three weeks of investigation.

106. As stated in Allegation 22, the Respondent failed to find who moved the chair. This was despite the considerable efforts of Mr Austin and Mr Garcia. The Tribunal places great weight on the reaction of Mr Austin when the Claimant

complained to him on 15 July 2022 that the chair was missing. As set out above, the Tribunal has the benefit of a transcript of a recording of that conversation and reminds itself that Mr Austin was wholly unaware that he was being recorded by the Claimant.

107. His reaction was exemplary. He took the issue extremely seriously. He focused on what the Claimant accepted was the key issue, which was the absence of the chair and the Claimant's wish for a replacement chair (and he actioned this soon afterwards). However, he also fully recognised the possibility that the chair may have been deliberately hidden and the significance of this, i.e. that it may have been an act of bullying. He also made the perfectly reasonable point to the Claimant that he should not be accusing people of taking the chair.
108. As Mr Austin explained in evidence, he needed to carry out an investigation. The suggestion of the Claimant in cross-examination that Mr Austin was putting obstacles to the investigation in his own way to delay the process is without merit. For example, there was a genuine need to obtain authorisation before viewing CCTV footage and failure to do so would lead to the CCTV evidence being inadmissible in any potential disciplinary proceedings against any culprit.

(23) Did Courtney Davey-Ward produce a drawing on a wooden trolley while Claimant was signed off from work by the doctor, suggesting that she wanted to form a dream team of herself, Michael Collins and Shane Phillips in the Callers Office and which excluded the Claimant.

109. As stated above, there is no evidence of that Ms Davey-Ward wrote this (this is pure speculation by the Claimant) and the Tribunal cannot say on the evidence who wrote it. It is not even clear when it was written. Therefore, the factual basis of this allegation is not made out.

(24) After the Claimant showed the drawing to Frank Garcia on 30 July 2022 and expressed his concern and distress about it did Frank Garcia ignore this issue?

110. As set out above, Mr Garcia did not ignore the issue, he had the trolley removed. Again this was supportive of the Claimant and his reaction cannot be faulted. Therefore, the factual basis of this allegation is not made out.

(25) When Claimant wrote to Respondent on 2 August 2022, and to Frank Garcia, requesting an update in writing about the investigation about the missing chair did the Respondent fail to reply up until the Claimant resigned

111. The Claimant requested an update from Mr Garcia about the chair by email of 2 August 2022. The email noted that he appreciated that Mr Garcia had tried to resolve the matter by conducting the meeting of 1 July 2022.
112. The Claimant also submitted a formal complaint about the matter (among other matters) on 5 August 2022. The process dealing with the formal complaint was still ongoing at the time that the Claimant resigned on 8 September 2022 (and was not pursued thereafter as the Claimant withdrew the complaint, as

explained in the letter from Brian Potter (a Case Support Manager) to the Claimant dated 15 September 2022).

113. Thus, although Mr Garcia did not respond in writing to the Claimant's email of 2 August 2022, the matter was still ongoing and being addressed by the Respondent. Given Mr Garcia's supportiveness towards the Claimant generally, which included seeking to persuade him not to resign, it is clear to the Tribunal that race played no part in Mr Garcia's treatment of the Claimant.

(26) When the Claimant, on 5 August 2022, submitted an official complaint to the Employee Relations Case Management Team under the Respondent's Bullying and Harassment Complaint Form (H1); did the Respondent reply stating that due to industrial action they could not carry out the investigation and there would be a delay.

114. The letter in question from the Respondent, which was dated 22 August 2022, was written by Brian Potter, someone who has no connection to the allegations addressed above. The letter started with an explanation to the Claimant that due to industrial action, the Respondent could not carry out an investigation. He went on to say that he would do everything possible to conclude his investigation as quickly as possible. Nothing in the evidence suggests that anything in the letter was untrue or was in any sense whatsoever related to the Claimant's race.

(27) On 2 August 2022 did the Respondent without consulting Claimant, issue a letter dated 1 August 2022 ordering him to move to a new role in delivery or mail collections which the Claimant asserts he could not do due to his health conditions and which Claimant had never performed in the past.

115. The Respondent's letter was not sent without consulting the Claimant: as set out above, the Tribunal has found that Mr Garcia spoke to the Claimant before the letter was given to him. The letter did not order the Claimant to move to a new role, it told him what roles were available at the Kiln Farm Delivery Office following the commercial decision to reduce the hours of work available in the Enquiries Office at Kiln Farm. Further, the Claimant had been told about other work which was available at Bletchley. The Claimant did not provide any medical evidence to the Respondent support an assertion that he could not do the roles available at Kiln Farm.

116. In the circumstances, the allegation is not proved on the facts and the Tribunal in any event finds that race played no part in the Respondent's decision making. As set out above, the Respondent (in particular Mr Garcia) was seeking to support the Claimant.

(28) Did Respondent fail to give the Claimant 30 days' notice of the change in the duties, and instead give him only 7 days' notice of the change, without considering any of his medical or physical conditions including back pain, shoulder pain, a ganglion on the wrists, gastritis and his mental health issues.

117. This allegation concerns the letter of 1 August 2022 which referred to the two part-time OPG roles offered commencing on 8 August 2022. There was no requirement to give the Claimant 30 days' notice of the proposed change in his duties. He was not being asked to do a different role, he was being told what duties were available within his existing role as OPG. The Claimant had not asked the Respondent to consider medical or physical conditions or provided medical evidence when the letter was sent. Therefore there was no 'failure' on the part of the Respondent and in any event the Tribunal finds that race played no part.

(29) Did Respondent permanently take away Claimant's role in the Callers Office job to give Courtney Davey-Ward his position

118. As set out above, after suffering an injury, Ms Davey-Ward was on temporary recuperative duties, working some hours in the Enquiries Office, until she returned to her substantive role as OPG doing deliveries and collections. Her situation was different to the Claimant's and there is in any event no sense in which she can be said to have been given the Claimant's role after he was offered other roles. Race played no part in the decisions concerning hers or the Claimant's roles.

(30) As a result of the role change did the Respondent propose to reduce the Claimant's hours from 20 hours per week to no fixed hours per week.

119. The Claimant no longer had a role in the Enquiries Office but there was no question of him being moved on to no fixed hours per week. In the 1 August 2022 letter, he was offered other roles with fixed hours and there was also work with fixed hours available at Bletchley.

Summary

120. For these reasons, the Tribunal dismisses the Claimant's claims of harassment and race discrimination under the Equality Act. None of the treatment found by the Tribunal to have taken place had the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant or violating his dignity.
121. The Claimant has not proved facts from which the Tribunal could conclude (in the absence of an adequate explanation) that the Respondent has committed an act of unlawful harassment or discrimination. In any event, the Tribunal finds that the Respondent has proved that any treatment found by the Tribunal to have taken place was in no sense whatsoever related to or because of race.
122. The Tribunal would in any event have found that the complaints in relation to allegations 1 to 8 above were out of time and that it was not just and equitable to extend time, as the Respondent submits. There is long a break of well over a year between these allegations (which all occurred in 2020) and the later ones (which commenced in April 2022, so far as they are dated) and there is very limited factual overlap, in particular as the earlier allegations focus on Mr Collins who does not feature in the later allegations. The Claimant said that he was

satisfied with the outcome of his complaints about Mr Collins as the Respondent understandably took those complaints as resolved.

Conclusions on Unfair Constructive Dismissal Claim Under Section 98 of the Employment Rights Act 1996

- 123. In light of its findings set out above, the Tribunal finds the Respondent was not in breach of the implied duty of trust and confidence as it did not behave in a way which was calculated or likely to destroy or seriously damage the relationship of trust and confidence between it and the Claimant and in any event there was reasonable and proper cause for its actions.
- 124. Although there was some conflict within the Enquiries Offices, this cannot be characterised as bullying or conduct of the nature that would breach the duty of trust and confidence. The tensions arose out of events occurring on the days in question, such as the Claimant being away from the office or the Claimant burping and the issues were repeatedly addressed by Mr Garcia who was very supportive of the Claimant and whom the Claimant said he loved and respected like a brother.
- 125. The Claimant was understandably unhappy about the missing chair but it is not established who moved it (or even whether it was an employee of the Respondent who did so) and again Mr Austin could not have been more supportive of the Claimant in dealing with this.
- 126. The move from the Enquiries Office proposed by the Respondent in the letter dated 1 August 2022 accompanied offers of alternative roles which within the Claimant's job as a part-time OPG and again Mr Garcia was very supportive of the Claimant's position.
- 127. It was clear from the evidence that the Claimant did not want to move to another role and the Tribunal finds that this is the reason that the Claimant resigned. However, his resignation was not caused by any breach on the part of the Respondent. Therefore the Claimant was not dismissed and his claim for unfair dismissal must fail.

Employment Judge de Silva KC

Date:... 16 February 2024.....

Sent to the parties on:

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For the Tribunal:

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