EMPLOYMENT TRIBUNALS

Claimant:	**Mr F Liengo**
Respondent:	**UPS Limited**
Heard at:	**Sheffield** **On: 21, 22 and 23 August 2018**
Before:	**Employment Judge Brain**
Members:	**Mr M Lewis**
	Mr A Senior
Representation	
Claimant:	Dr R Ibakakombo, International Faith Assembly (a charity)
Respondent:	Ms K Balmer, Counsel

RESERVED JUDGMENT

The Judgment of the Employment Tribunal is that:

1. The claimant's complaints of direct discrimination upon the grounds of the protected characteristic of race fail and stand dismissed.

2. The claimant's complaints of victimisation fail and stand dismissed.

3. The claimant's complaint of wrongful dismissal fails and stands dismissed.

REASONS

1. The Tribunal heard evidence from the claimant on 21 August 2018. We then heard evidence from the respondent on 22 August 2018. Helpful submissions were received from each representative on 23 August 2018. At the conclusion of the hearing the Tribunal reserved Judgment. We now give the reasons for the Judgment that we have reached.

2. The respondent is a very well-known international express courier and package delivery company. On behalf of the respondent we heard evidence from:

    2.1 Lisa Bradshaw. She works for the respondent in the capacity of area HR manager.

2.2 Nathan Leversidge. He is the HR manager for the north and central areas. He is Mrs Bradshaw's line manager.

3. Mrs Bradshaw, in her printed witness statement, gave some useful background evidence about how the respondent is organised. Unsurprisingly, this evidence was not (and could not be) challenged by Dr Ibakakombo. It is helpful therefore to set this out in full:

"(5) Globally, UPS is split into 17 regions. Within each region there are a number of different Districts. The UK falls within the UK, Ireland and Nordics District, which is within the Europe Region.

(6) East District is made up of a number of Divisions, split by geographical area. I am the area HR supervisor for the North which includes the whole of Scotland everywhere north of Deeside in England. However, at the relevant time, I was acting up as the area HR manager for the North. In this role I was responsible for all employee relations issues and human resource issues across the North. There are 16 separate UPS locations across this Division and approximately 1500 employees working within various operational and functional roles."

4. The claimant commenced work for the respondent on 27 February 2017. He was employed as a 'local sort sorter/loader' working from the respondent's premises in Sheffield. His contract of employment was terminated without notice on 25 August 2017. Mrs Bradshaw dismissed the claimant that day in the course of a telephone call. She wrote a letter to him the same day (but which is erroneously dated 24 August 2017) to confirm her decision. The dismissal letter is at pages 221 to 223 of the hearing bundle.

5. Prior to his dismissal, as we shall see, the claimant was suspended from work. It is the claimant's case that the suspension and dismissal of him, the dismissal of his appeal and the surrounding circumstances that pertained in August and September 2017 constituted discrimination which is prohibited conduct within the meaning of chapter 2 of part 2 of the Equality Act 2010 (and which prohibited conduct is made unlawful in the workplace by the provisions in part 5 of the 2010 Act).

6. This case benefited from a preliminary hearing which came before Employment Judge Little on 3 April 2018. There it was clarified that the claimant pursues complaints relating to the prohibited conduct of direct discrimination (under section 13 of the 2010 Act) and victimisation (under section 27). That prohibited conduct is made unlawful in the workplace pursuant to the provisions of section 39(2) and (4) of the 2010 Act. The direct race discrimination case was alleged to be because of the protected characteristic of race. Employment Judge Little recorded in the case management summary following the hearing (copied at pages 57 to 60 of the bundle) that the relevant aspect of race as a protected characteristic is national origin and/or a nationality. The claimant describes his national origin/nationality as Congolese.

7. For the purposes of the victimisation complaint, the following were said by the claimant to be protected acts:

- The content of his letter to the respondent of 19 August 2017.

- The content of his appeal letter of 28 August 2017.
- The content of his letter of 1 September 2017.

8. It is accepted by the respondent that the claimant was dismissed without notice. The claimant also brings a complaint of breach of contract by way of wrongful dismissal. We shall deal with the issues in the case in more detail later in these reasons.

9. Before turning to the issues, we shall make our factual findings. We shall then go on to set out the relevant law before going on to apply the relevant law to the facts as found so as to address the issues in the case.

10. The claimant was born in the Democratic Republic of Congo. In his printed witness statement he says that "my national origin/nationality is Congolese". The claimant's mother is a British citizen. The claimant was granted a visa to enter the UK. This was endorsed in the claimant's passport issued by the Democratic Republic of Congo. The passport expired in June 2011. The visa granted to the claimant (copied at page 180 of the bundle) says that he was given UK entry clearance *"to join/acc relative".* It was endorsed *"indefinite leave to enter the UK".*

11. We presume (although we were not told) that 'acc' is an abbreviation for "accompany". Therefore, the claimant was given entry clearance to join his mother who is settled in the UK. Although giving indefinite leave to enter the UK the visa says that it was only valid until 2 October 2010.

12. Upon the expiry of his Congolese passport that expired in June 2011, the claimant obtained a replacement. A copy (or at any rate a copy of part of it) is in the bundle at pages 177 to 179. We can see that this passport ran from 15 July 2011 to 14 July 2016. The claimant gave evidence in paragraph 4 of his witness statement that he enquired of the Home Office whether the visa in the expired passport may be transferred to the one which expired in July 2016. The claimant's evidence is that, "I was told that it was not feasible and that my 'visa settlement to join/acc relative' and 'indefinite leave to enter the UK' was valid as long as I was in the UK".

13. For the political reasons explained by the claimant in paragraphs 5 and 6 of his witness statement, he was unable to obtain a third passport upon the expiry of the second one in July 2016. The claimant's evidence was as follows:

"(5) The Congolese-Diaspora in the UK is one of the most resistant opposition against the RD Congo President Joseph Kabila who the presidential mandate to rule was to run out on 19 December 2016 but he was determined to extend term therefore the Congolese passport were not openly given to Congolese-Diaspora in London following the protest organised by Congolese combatants in London on 3 June 2016 and this situation lasted until around December 2017. *[We interpose here to say that this situation therefore pertained for the whole of the period of the claimant's employment with the respondent].*

(6) During that period from June 2016 to around December 2017, it was impossible for a simply Congolese from the Congolese-Diaspora in the UK to get a new Congolese passport without any intervention of a political figure in Congo-Kinshasa. I would like to say that Congolese–

Diaspora in the UK apply to renew their passports from Congolese-Embassy in London and all applications will be sent to Congo, Congo authority will make a decision and send passport to the Congolese Embassy in London who will then contact each individual who applied".

14. The claimant goes on to explain in paragraph 8 of his witness statement that because he doesn't "have a political figure in Congo-Kinshasa to help me to obtain a new passport" he was without an in-date passport from July 2016.

15. His evidence was that due to the political situation in the Democratic Republic of Congo he could not obtain an up to date passport. In evidence given under cross-examination he said he had applied for a new passport upon expiry of the second one but "it was taking too long because of the war". The claimant fairly accepted that he had no evidence of actually having applied for a new passport to the Congolese Embassy in London.

16. On 17 January 2017 the claimant completed an application for employment with the respondent. This is at pages 153 to 157. He declared his nationality to be Congolese. He declared no restriction upon his ability to take up employment in the UK. He also declared that he had not been convicted of any criminal offences excluding any that are spent under the Rehabilitation of Offenders Act 1974. He signed and dated the form on 17 January 2017.

17. The respondent discovered on or around 28 March 2017 that the claimant in fact had a criminal conviction which should have been disclosed in the application form. The claimant had been convicted in the Leeds Magistrates' Court in 2012 of taking a vehicle without consent, driving without insurance or a valid driving licence and dangerous driving.

18. The respondent had in force a 'new employee hiring procedure' at the material time. Coincidentally, that procedure (in the bundle commencing at page 63) came into force on the same day that the claimant made his job application (that being 17 January 2017). The hiring procedure requires a candidate for employment to complete a disclosure application (or CRC) form. If an individual has been convicted of offences regarded by the respondent as disqualifying convictions then the guidance provides (at page 70) that such may be regarded as a reason not to hire. The list of disqualifying convictions is at pages 81 and 82. This says that a candidate will fail the criminal records check where it is revealed that the candidate has a conviction for a disqualifying offence which has been received (amongst other things) within the last five years where the disposal was other than a term of imprisonment. Amongst the non-exhaustive list are offences of theft and dishonesty. The respondent's position therefore is that the claimant should have but did not disclose to the respondent the fact of the convictions at Leeds Magistrates' Court in 2012 as the date of the conviction was within five years of the date of his job application and was for offences which (while not specifically set out in the list) were offences of theft and dishonesty.

19. When questioned about this, the claimant said that he was new to the UK at the time of the offences and his limited English at the time meant that he could not understand the proceedings. The Tribunal found this to be an unconvincing explanation. While we accept that the claimant's

understanding of English in 2012 was not as good as it is now he told us that he had the benefit of an interpreter in court and was aware that he had been found guilty. Furthermore, by the time that he completed the employment application form his English had improved to the point that he was able to read and understand the form. He also disclosed (at page 154) that he was currently undergoing a course in electrical and electronic engineering at Sheffield Hallam University having studied at Leeds City College and Bradford College. This will demand a very good understanding of English. Therefore, it stretches the Tribunal's credulity to have us accept that the claimant had a reasonable belief that he may honestly answer in the negative the question from the respondent in the application form about criminal convictions. Were the claimants to be in any doubt as to whether he should have answered "yes" or "no" to the question on the form he could have sought guidance but did not do so.

20. Shortly before he applied for the position with the respondent, the claimant completed an application form for a Home Office travel document and a biometric residence permit. This is in the bundle commencing at page 138.

21. The claimant explained in this document (at page 149) that he entered the UK as a child in order to join his mother who had entered the UK as an asylum seeker and had been granted refugee status. He went on to say that the Congolese government are not issuing new passports (page 149). He said that he entered the UK on 5 April 2009 (when he was 17 years of age). He declared (at page 148) that he "entered on my Congolese passport having been granted indefinite leave to enter. I did not have any immigration status letter or a leave to remain status letter. I lost my Congolese passport in 2016 and reported this to the police on 5 May 2016".

22. In evidence under cross-examination, the claimant told us that he in fact had in his possession (when completing the form) the first passport which expired in 2011 but had lost the second one (although the claimant in fact subsequently found it). He accepted that he had not told the respondent of the subsequent discovery of the second passport.

23. We can see from page 146 that the claimant was asked whether he had any criminal convictions. Those deemed as spent under the 1974 Act need not be disclosed. The Tribunal was not addressed upon the application of the 1974 Act to the offences of which the claimant was convicted in 2012. It is our understanding that as no custodial sentence was imposed upon the claimant the offences of which he was convicted would be deemed spent for the purposes of the legislation (albeit not for the purposes of the respondent's own internal processes).

24. A letter confirming the claimant's offer of employment dated 23 February 2017 is at pages 83 and 84. This was sent to the claimant by James Law, recruitment co-ordinator within the respondent's human resources department. The offer of employment was said to be subject to satisfactory completion of a number of conditions including:

    - Where the respondent considers it necessary for the purposes of carrying out the employee's duties, the respondent receiving satisfactory additional checks and clearances such as criminal record checks and;

- The employee showing the respondent the original of one of a number of specified documents showing that the employee is legally entitled to work in the UK without any additional immigration approvals and, where relevant, that the employee is entitled to drive, allowing the respondent to keep copies of such documentation.
- The claimant accepted the terms of the offer on 27 February 2017 (page 86).

25. The respondent's standard contract of employment (commencing at page 91) was incorporated as a term of the claimant's engagement. The claimant accepted this to have been incorporated into his contract of employment. He maintained that he had not had chance to read it before signing his acceptance of it. Nonetheless, no issue was taken that the standard terms at pages 92 to 98 were incorporated into the claimant's contract. The following was drawn to the Tribunal's attention:

    - By clause 4.2, employment by the respondent was subject to the receipt of (amongst other things) inspection by the respondent of the employee's passport together with valid authority and permission to work in the UK. Failure to provide satisfactory evidence may result in termination of employment with immediate effect. We refer to clause 4.2 on page 93.
    - It was a condition of employment that the claimant retain a valid work permit to work in the UK (where appropriate). Again, in the event of failure to produce such documents, the respondent would treat that as gross misconduct for which dismissal may follow. We refer to clause 4.3 (again at page 93).

26. It was put to the claimant that the respondent's position regarding the prevention of the employment of illegal workers was consistent with the Home Office guidance in the bundle commencing at page 99. This the claimant fairly accepted. The Home Office guidance is dated 16 August 2017. Plainly therefore it post-dated the date of commencement of the claimant's employment with the respondent. However, there was no suggestion from either party that the Home Office guidance published on 16 August 2007 differed in any material respect from the guidance in force between February and August 2017.

27. The Tribunal takes judicial notice of the *'Code of Practice on preventing illegal working: civil penalty scheme for employers'* of May 2014. This was issued by the Home Office under the authority of section 19 of the Immigration, Asylum and Nationality Act 2006 and came into force on 16 May 2014. The introduction says that, *"As an employer, you have a responsibility to prevent illegal working in the UK by ensuring that your employees have the right to work here. The illegal working provisions of the Immigration, Asylum and Nationality Act 2006 ('the Act') came into force on 29 February 2008. Section 15 of the Act allows the Secretary of State to serve an employer with a notice requiring the payment of a penalty of a specified amount where they employ a person aged 16 or over who is subject to immigration control unless:*

- *That person has been given valid and subsisting leave to be in the UK by the government, and that leave does not restrict them from taking the job in question; or*

- *The person is in a category for which employment is also allowed."*

28. An employer found employing an illegal worker is liable to be issued with a notice from the Secretary of State that consideration is being given to imposing a liability upon the employer for breaching section 15 of the 2006 Act. In considering whether or not to impose a penalty the Home Office will determine if the employer has available what is known as a 'statutory excuse' against liability for a civil penalty.

29. An employer will have a statutory excuse if the employer has correctly carried out the prescribed right to work checks using acceptable documents before employment commences. Where an employee has a time limited right to work, and the employer has therefore established a time limited statutory excuse, then the employer is required to conduct repeat document checks to retain the excuse. The Code of Practice says that the employer will not have a statutory excuse if the employer cannot provide evidence of having conducted the prescribed document checks before the employment commenced. If the Home Office is satisfied that the employer has a statutory excuse for an individual that turns out to be an illegal worker then no liability will arise for a civil penalty.

30. Guidance is then given in the Code of Practice about how to conduct a right to work check. There are three basic steps:

    - Obtaining the original version of one or more of the acceptable documents;
    - Checking the documents in the presence of the holder of the documents; and
    - Making copies of the documents, retaining the copies and a record of the date on which the check was made.

31. There is then set out in tables four and five the list of acceptable documents. Table four (known as 'list A') at page 126 sets out those documents which are acceptable to establish a continuous statutory excuse. Table five (known as 'list B') at page 127 sets out acceptable documents to establish a statutory excuse for a limited period of time.

32. Mr Leversidge told us that the respondent has a diverse workforce. He in fact recently conducted a survey in anticipation of Brexit and ascertained from this survey that the respondent employs 77 different nationalities in the UK. This includes 7 Congolese nationals (although it seems that none of those are employed in Sheffield).

33. Unsurprisingly, therefore, the respondent has written procedures (within the new employee hiring procedure document) for establishing a person's identity and eligibility to work in the UK. Although not identical, the list of acceptable documents (in paragraph 2.2 of the respondent's 'new employee hiring procedure' document at page 66) closely follows those in the Home Office guidance of August 2017 and the Code of Practice. Thus, in the case of British Nationals a person's identity shall be established on production of an in-date full 10 year passport or a British photocard driving

license. For other nationals one of a number of documents will be acceptable. The provision relevant to this case is that for nationals of non-EEA countries for whom there must be produced a full passport together with an original Home Office document confirming the individual's right to work in the UK. Also acceptable will be a biometric visa issued by the Home Office showing unrestricted right to work with a future date recorded. It was for the biometric residence permit that the claimant applied in January 2017 (page 138 to 152).

34. The claimant acknowledged and fairly accepted that the respondent's position in the new hiring procedure document is consistent with the guidance published by the Home Office and that the respondent has to carry out right to work checks. He accepted that the requirement to carry out an initial right to work check applied to British citizens as well as those from overseas. He also accepted that the respondent had a contractual right to sight of original documents and would be in breach of good practice (pursuant to the Home Office guidance) by not obtaining originals. When it was put to the claimant by Ms Balmer that a copy of an out of date document set out in list A or list B of the Home Office guidance (at pages 126 and 127) and in the respondent's own procedure at page 66 would not be acceptable the claimant said he "did not know". This was a somewhat unsatisfactory and evasive answer to a question that in reality gives only one answer.

35. The claimant did fairly accept that there were serious consequences for an employer found not to have carried out an adequate and robust check and for an employer that cannot demonstrate that the prescribed checks for acceptable documents were carried out before employment commenced. It was the respondent's position therefore that they were contractually entitled and legally obliged to seek from the claimant original documents which were in date.

36. The claimant's application for a Home Office travel document and biometrics residence permit was unsuccessful. There is a letter to this effect dated 4 May 2017 in the bundle at page 210. The claimant had paid the requisite fee of £218 but had not produced a letter from the Congolese authorities of a formal and reasonable refusal of passport facilities. He was not entitled to a refund of the fee that he had paid.

37. The Tribunal did not have the benefit of hearing evidence from any of those involved in the recruitment of the claimant. Mrs Bradshaw became involved when she received an email on 18 August 2017 from Mr Leversidge asking her to arrange to see the claimant. The emails are at pages 205 and 206. Mr Leversidge took this step having been alerted to concerns about the claimant's right to work in the UK.

38. It was fairly accepted by Mr Leversidge and Mrs Bradshaw that the catalyst for the actions that took place in August and September 2017 was the letter received by the respondent from Immigration Enforcement dated July 2017 (page 170). This letter was addressed to the payroll supervisor of the respondent. It said that, "the Home Office has information to indicate that you have been employing Freddy Liengo and that he/she may not have permission to be in the UK and work". The respondent was urged to check whether he has valid permission to work by conducting a right to

work check and to stop employing him if following those checks the conclusion was reached that he does not have the right to work. The respondent was warned that if the claimant had been employed without undertaking the correct checks then there was a potential liability to a civil penalty of up to £20,000 or criminal prosecution (pursuant to the 2006 Act).

39. At this stage the claimant's position had been made permanent with effect from 1 June 2017. He had successfully completed his three months' probationary period with the respondent.

40. We can see from an email from Mr Law dated 8 February 2017 that at the time of his recruitment the claimant informed him that he has not yet received his passport back from the Congolese Embassy. He (Mr Law) asked Karen Westwood, workforce planning specialist, whether the documents that the claimant had available (including a copy of the expired passport) would suffice. Colette Spencer of the respondent's HR department said on 9 February 2017 that she was not comfortable hiring him without seeing original ID. We refer to pages 194 and 195. Mrs Bradshaw said that on file was a photocopy of the passport that expired in July 2016 and a copy of the entry clearance visa bearing the expiry date 2 October 2010 and giving indefinite leave to remain in the UK.

41. On 23 February 2017 Mr Law telephoned the Home Office. He referred to the documents provided by the claimant in a note of this call (recorded in the file note which is at page 175). Mrs Bradshaw says that the Home Office would not discuss over the telephone any individual cases and would only give advice upon a generic basis. We therefore understand that Mr Law's file note is a record (in the first paragraph) of the documents upon file and in the second paragraph of what was discussed with the Home Office. It is not the position that Mr Law gave details of the documents referred to in the first paragraph of the file note to the Home Office official with whom he spoke.

42. The file note is therefore valuable in that it helps us to identify what was in the respondent's possession at the time of the claimant's employment. The file note says that, "Freddy has a visa which states 'indefinite leave to enter the UK'. The visa however states that it is 'valid from 26/03/09' and 'valid until 02/10/10'. Given that these two pieces of information seem contradictory I contacted the Home Office". Mr Law was told that "the 'valid dates' were in regards to when the claimant was legally allowed to <u>enter</u> the UK. The Home Office explained that he is allowed to remain and work in the UK going forwards from these dates."

43. When the matter came to light, Colette Spencer (who had overall responsibility for the claimant's hire) met with the claimant and his team leader Callum Fisher. The claimant was asked in advance to produce documents from which could demonstrate his entitlement to work in the UK. The meeting took place on 2 August 2017. He produced a number of documents (at pages 181 to 193). However, none of those documents fell within the requirements for non-British and non-EEA nationals as set out in the respondent's hiring policy at page 66. The claimant was therefore suspended on full pay with effect from 2 August 2017.

44. It is recorded in Colette Spencer's letter of 4 August 2017 (at page 197 confirming the fact of the suspension) that the claimant had referred to the

possibility of the respondent obtaining a 'right to work check'. Steve Pratt, HR specialist, submitted a request to the Home Office's employer checking service in accordance with the claimant's suggestion. The request is at pages 199 and 200. It was sent on 3 August 2017. The employer checking service replied on 8 August 2017 (page 199) to say that, *"At this time a further application has not been recorded on the UK visa and immigration database".*

45. Therefore the position at the date of the claimant's suspension was that there was no pending application for a Home Office travel document and biometrics residence permit, the claimant's application having been refused on 4 May 2017. The claimant had also not been able to obtain a replacement Congolese passport, the second one in his possession having expired in June 2016. The respondent was therefore in the position of not having seen an original in-date passport and there being no pending application for a Home Office travel document and biometric residence permit.

46. On 15 August 2017 Mr Pratt emailed Mr Leversidge (pages 203 and 204). He appraised Mr Leversidge of having received the letter at pages 170 and 171 on 1 August 2017 and the subsequent enquiries that he had made. The information that Mr Leversidge received was concerning enough for him to instruct Mrs Bradshaw to investigate the matter.

47. She says at paragraph 21 of her witness statement that when she started to look into the matter she "saw from the documentation that when Freddy was employed, he was unable to provide his original passport or visa as he had sent these to the Home Office as part of an application he had made. I saw from the documents that he had provided photocopies of his passport and his visa showing his right to enter the UK. However, his passport (of which he had provided the photocopy) had expired on 16 July 2016 (page 211) and his visa (of which he had provided a photocopy) showed his right to enter the UK expired on 2 October 2010 (page 212)."

48. She says at paragraph 23 that it was clear "that the documentation that Freddy had provided at the time of his recruitment did not comply with section 2.2 of the new employment hiring procedure (pages 66 to 67). It was deficient because:

    (a) Original copies of the passport and visa were not provided: and
    (b) None of the alternative documents to originals were provided (see section 2.2A to F at pages 66 and 67).

    While it is not explicit in the procedure that passports and visas need to be current (ie not expired), it was known by those carrying out recruitment that documents need to be in date (page 195). It is also confirmed in the Home Office guidance …"

49. She went on to say at paragraph 24 that "this meant, basically, that Freddy should not have been offered employment (or allowed to commence employment) in the first instance because the new hire procedure had not been complied with. Further we did not have documentation which complied with the Home Office guidance". She says at paragraph 35 of her witness statement that she "was very concerned that we did not have the appropriate documentation on file".

50. On 18 August 2017 the claimant was invited to a meeting to be held on 21 August 2017. The letter of invite and email are at pages 207 and 208. The purpose of the meeting was to discuss concerns which the respondent had about the information held on file and whether that was sufficient to allow the respondent to legally employ the claimant to work in the UK. The claimant was invited to bring forward any other documentation to which he may wish to refer. He was warned by the respondent that there may be no option but to terminate his employment with immediate effect if the respondent was unable to obtain comfort in relation to its concerns.

51. On 19 August 2017 the claimant wrote to Mrs Bradshaw (pages 213 and 214). He said that he felt that he was "being racially discriminated on ground of my nationality since my suspension and particularly, when it is stating that you are at present not comfortable that the information you hold is sufficient to allow you to legally employ me to work in the UK". He maintained that he had indefinite leave to enter the UK and opined that the respondent was "under immigration continuous statutory excuse for the duration of my employment with you". He then said that on 18 August 2017 he had submitted "an application requesting the Home Office to transfer my indefinite leave to remain from my passport to a separate document and I believe this will be done despite that my passport has expired". He attached proof of postage of that application.

52. The respondent did not dispute that the claimant had made a further application on or around 18 August; *(in fact, the proof of postage is dated 17 August).* This was a second application for a Home Office travel document and biometric residence permit. It was acknowledged by the Home Office on 29 August 2017 (pages 228 to 231). This letter required the claimant to provide his biometrics (being a facial image and 10 scanned fingerprints) within 15 working days.

53. In the letter at pages 213 and 214 the claimant said that, "my current health condition is not allowing me to attend the hearing on 21 August 2017 because I am so stressed by the situation. Therefore if any decision is to be made in my absence, you will have to provide me with a letter from the Home Office indicating that I am no more entitled to work in the UK including your decision at the same date".

54. Mr Leversidge obtained legal advice from Clyde & Co, the respondent's solicitors. The respondent waived legal advice privilege. The memorandum setting out the advice is in the bundle at pages 216(a) to (d).

55. The advice firstly considered the issue of indefinite leave to enter the UK. The advice was that indefinite leave to enter is commonly endorsed in a passport with an expiry date that coincides with the expiry of the passport. This does not necessarily mean that the indefinite leave to enter expires on this day and may well continue to be in place. Indefinite leave carries a right to work in the UK. However, indefinite leave could be lost in certain circumstances.

56. The legal advice was that it appeared to be the case that the claimant's indefinite leave was not time limited although the UK entry clearance had an expiry date of 2 October 2010 which did not coincide with the expiry date of the first passport. Mrs Bradshaw said in evidence that she was concerned about the apparent inconsistencies with the dates in the

documentation. The advice from Clyde & Co was that "Mr Liengo may or may not have the right to work in the UK on the basis that he has indefinite leave to enter. The fact that he has an expired passport, with an expired endorsement, indicates that he may have this right. However, UPS does not ***know*** that he has this right".

57. The legal advice went on to say that the respondent had not taken copies of compliance documents prior to the commencement of the claimant's employment and so does not have a statutory excuse against any illegal working. Plainly, this was a matter of great concern to Mrs Bradshaw. Of course, the possession by the claimant of a valid indefinite leave to enter visa would mean that he had a right to work. However, should he not have that right (and the legal advice said that the respondent could not be sure that he actually did so) then the advice was that the respondent would not be able to demonstrate that it had carried out the necessary checks beforehand (as summarised in the Home Office guidance at page 111 of the bundle).

58. The fact of the matter is that the respondent did not carry out those checks. Mrs Bradshaw candidly accepted this to be the case. She said that disciplinary action had been intimated against Colette Spencer who had in fact resigned her employment with the respondent before disciplinary proceedings took place. Mr Law remains with the respondent but in a different role.

59. The legal advice from Clyde & Co went on to say that where an employer is found to have employed somebody illegally and is unable to demonstrate a statutory excuse then a civil penalty may be imposed. There was also the possibility of a criminal offence having been committed. Mrs Bradshaw was concerned about the potential for reputational damage.

60. Clyde & Co advised that the claimant's second application for a biometric residence permit would take around six weeks to process. The advisor said that, "it also remains to be seen whether that application is approved, in part because of the lack of a current passport being submitted". The status of the application could be verified by use of the employer checking service (which the respondent had made use of earlier in the month as we have seen).

61. The advice went on to say that the Home Office guidance indicated that such a request should only be made at least 14 days after submission of the application for the biometric residence permit and that it would take the Home Office five working days to respond. The advice was, therefore, to enquire of the employer checking service on or around 1 September with a likely response being received around 8 September 2017. The advisor then said that the Home Office may issue a positive verification notice. Effectively, this would give a six months' grace period which would afford the respondent with a time-limited statutory excuse enabling it to employ the claimant.

62. Against that background, Clyde & Co advised that the respondent had the following options:

    62.1 Termination of the claimant's employment. This was said to be "the lowest risk option for UPS from an immigration perspective" given that the respondent was on notice that the claimant may not have the right to work in the UK. The

advice went on to say that there was still a risk to the respondent having employed the claimant from the end of February 2017.

62.2 To maintain the claimant in employment until the outcome of his application. The respondent's solicitor advised that there was a risk associated with the second option as the respondent does not have a statutory excuse against any illegal working and therefore if the claimant's indefinite leave to enter was found to be invalid the respondent was likely to receive a £20,000 civil penalty. Worse still, to continue employ him pending the outcome of his application in the face of the letter of July 2017 at pages 170 to 171 may be construed as the respondent having reasonable cause to believe that it was employing someone without them having the right to do the work in question which gave rise to the possibility of the commission of a criminal offence.

62.3 To terminate the claimant's employment with a view to reviewing the situation pending his current application. The advice was that upon receipt of a positive verification notice the respondent may offer fresh employment to the claimant but without any promise of back pay. The advice concluded that, "it is our view that option C *[this option]* provides the safest, lower risk option of UPS from an immigration perspective as well as demonstrating good employer behaviour".

63. On 21 August 2017 Mrs Bradshaw acknowledged the claimant's letter. She said that she was sorry to hear that he was unable to attend the meeting that day and that he was feeling stressed. On 23 August 2017 she wrote to update him as to the position. She said that the respondent was continuing to review the documentation provided, the contents of the claimant's letter of 19 August 2017 and "appropriate professional advice". The emails are at pages 217 to 218.

64. After considering all matters Mrs Bradshaw decided to terminate the claimant's contract of employment. She telephoned him on 25 August 2017 and confirmed her decision in her letter sent the same day (but erroneously dated 24 August 2017) (pages 220 to 223). She said that in the circumstances she had no option but to end his employment with immediate effect in accordance with clauses 4.2 and 4.3 of his contract of employment. The contract of employment was terminated without notice. The claimant was given the right of appeal to Mr Leversidge.

65. Mrs Bradshaw concluded the letter by saying that, "we genuinely hope that you are able to resolve this matter with the Home Office. Whilst we are required to terminate your employment with UPS with immediate effect, we would still like to help you as far as we are able to. Therefore, we are prepared to undertake further checks pending your current application to

the Home Office with a view to obtaining a positive verification notice (PVN) through the employer checking service. If we are successful in obtaining a PVN in relation to you, this may enable us to establish a statutory excuse and permit us to offer you knew employment with UPS for a period of six months whilst an application progresses. Please therefore provide a copy of all of the documentation you submitted with your application to the Home Office as soon as possible to me … Subject to receiving this information from you, we will run a further check in early September and apply for a PVN for you. We will therefore be in contact with you regarding the outcome of the PVN application and to discuss next steps, if applicable".

66. The claimant exercised his right of appeal. The letter containing his appeal dated 28 August 2017 is at pages 224 to 226. He said that, "it is racial discriminatory for Lisa Bradshaw to conclude that she has no option but to end my employment with immediate effect and that if UPS continue to employ me, it may be in breach of UK immigration law." The claimant referred to his visa giving him indefinite leave to enter the UK.

67. On 29 August 2017 the claimant wrote to the Home Office. He informed them of the fact of his dismissal notwithstanding that he was in possession of a visa giving him indefinite leave to enter the UK. We refer to page 227.

68. Mr Leversidge said, at paragraph 22 of his witness statement, that "on reading his appeal letter, it was clear to me that Freddy did not understand that the issue with his documentation was that both his passport and his visa were expired. UPS needed him to provide documentation that showed his right to work in the UK and that was not expired as provided for in the Home Office guidance on right to work checks. It was clear that Freddy strongly held a belief that he was entitled to work in the UK, unfortunately from my review of documentation, he had been unable to provide current (*i.e* in date) documentation that would be acceptable to the Home Office as proof of that entitlement (pages 126 to 127)."

69. The claimant asked for his appeal to be stayed until he had received the response from the Home Office to his application. Mr Leversidge says at paragraph 23 of his witness statement that "as the appeal hearing was to review the decision that had been made to terminate his employment based on the information available to Lisa *[Bradshaw]* at the time, and the information that was available to him in the appeal, it was not appropriate to delay that process".

70. Accordingly, Mr Leversidge wrote to the claimant on 31 August 2017 (pages 232 to 234) inviting him to attend an appeal hearing on 4 September 2017. Mr Leversidge asked the claimant to provide the documents that he had referred to in his appeal letter. In particular he asked for a copy of any letter or form sent to the Home Office on or around 18 August 2017 accompanying his Congolese passport requesting the transfer of the visa to another document and a copy of the letter that he sent to the Home Office referred to at paragraph 6 of the appeal letter (which we presume is that of 29 August 2017 at page 227).

71. Mr Leversidge also enclosed copies of documentation to be considered at the appeal. Mr Leversidge sent to the claimant a copy of section 15 of the 2006 Act and the other documents set out at paragraph 25 of his

witness statement (at pages 236, 237, 238, 239, 240 to 241, 209, 210 and 170). We have referred to all of these documents in these reasons and shall not set them out here; *(the document at pages 240 and 241 is the negative response to the employer checking service request which is also in the bundle at page 199).*

72. On 1 September 2017 the claimant wrote to the Home Office. He referred again to the fact of his dismissal and that he had a visa granting indefinite leave to enter the UK which afforded him the right to work. This is at page 249.

73. On 1 September 2017 the claimant wrote to Mr Leversidge (pages 250 and 251). He again maintained that he had been racially dismissed on the grounds of his nationality as there was no good reason to dismiss him given his visa affording him indefinite leave to remain in the UK. He said that section 15 of the 2006 Act did not therefore apply to him and in any event he had provided documents identified in Annex A of the Home Office guidance (which annex had been copied to the claimant by Mr Leversidge; page 236). He said that the decision to terminate his employment should be overturned as it was an act of race discrimination and victimisation as he had said in his letter of appeal of 28 August 2017. The claimant invited Mr Leversidge to contact the Home Office and contended that Mr Pratt had failed to "ask a correct investigation question".

74. Mr Leversidge says at paragraph 27 of his witness statement that, "Again, Freddy was adamant that he was entitled to work in the UK and I appreciated that he was trying to set this out. However, it was still clear to me that Freddy did not understand that it was the fact that his visa showing he had indefinite leave to enter the UK had expired meant that it did not meet the required standards set by the Home Office as being proof of his right to work in the UK, as set out in Annex A of the Home Office guidance on right to work checks (pages 126 to 127). I genuinely felt for his situation and wanted to make sure that he felt that he had every opportunity to put his case forward".

75. Mr Leversidge wrote to the claimant on 4 September 2017 (page 255). He re-arranged the appeal hearing for 7 September.

76. On 4 September 2017 Mr Pratt received a positive verification notice following a further employer checking service request. This gave the respondent a time limited statutory excuse against liability for a civil penalty for a period six months to 3 March 2018. There were no restrictions upon the claimant's right to work.

77. The respondent did not produce for the benefit of the Tribunal a copy of the respondent's application for this check. Thus, we do not know when it was carried out. Given the timescales postulated by Clyde & Co it appears surprising that the PVN notice was issued as soon as 4 September 2017.

78. Ms Balmer suggested that the speedier-than-anticipated response may have been prompted by the claimant's letter of 1 September 2017 at page 249. There is some merit in her surmise by reference to the emails at page 252 in which the Home Office confirmed that the claimant's letter had been added to the database enabling "a revised response" to be issued to the respondent. The Tribunal was not in fact taken to page 252. However,

it appears to be the case that the PVN may have been issued by way of an amendment to the application made by the respondent on 3 August 2017 as opposed to any subsequent application.

79. At all events, the respondent now had in its possession a PVN giving it a statutory excuse for a period of six months. Mr Leversidge was therefore prepared to offer the claimant new employment for a fixed term of six months.

80. The appeal hearing took place on 7 September 2017. The notes are at pages 260 and 261. Mr Leversidge said that determination of the claimant's employment was not motivated by race but rather by the need for the respondent to comply with immigration law. The claimant was offered new employment for a period of six months to coincide with the PVN. The respondent asked the claimant to keep them informed of progress with his application for a biometric residence permit. Mr Leversidge offered the claimant new employment with effect from 8 September.

81. The claimant asked if the respondent was prepared to pay anything for injury to feelings. He said that he had been humiliated when he was suspended and that he had had to give back his safety boots in the presence of others. He complained that he had been made to feel like a thief.

82. Mr Leversidge said that he was unable to pay any compensation to the claimant for injury to feelings but was able to offer him a new role for a period of six months. The claimant complained again of having felt humiliated. Mr Leversidge referred him to the respondent's grievance procedure.

83. The claimant followed up on the appeal meeting by writing to Mr Leversidge the same day (page 262). He complained that he was dismissed "for no good reason". He said that, "I would like to request the company to pay me injury to feelings for being racially dismissed and humiliated when all my colleagues who knew me saw me returning the company equipment and as a result believed I was dismissed because I was illegal in the UK. As I was dismissed on the grounds of my nationality therefore, I request the company to pay injury to feelings. Refusal to pay will lead me to bring the case to the Employment Tribunal." The claimant enclosed a sick note for a period of four weeks from 28 September 2017. The claimant was assessed as being unable to work because of "stress at work".

84. On 19 September 2017 Mr Leversidge wrote to the claimant (pages 273 to 275). This letter was headed "offer of new employment". In reality, it contained an offer together with rejection of the claimant's appeal. Mr Leversidge agreed with Mrs Bradshaw's conclusion that the respondent was left with no other option than to terminate the claimant's employment at the time. He said that the respondent did not hold satisfactory evidence demonstrating that the claimant had the right to work in the UK which could have serious repercussions for the respondent. The visa at page 212, although giving indefinite leave to enter the UK, had expired on 2 October 2010 and was endorsed within an expired passport. The respondent had not had sight of or taken copies of the original documentation nor did it

have any in-date documentation. Once the respondent received the letter from the Home Office on 1 August 2017 (that being the letter at pages 170 and 171) Mr Leversidge agreed with Mrs Bradshaw that the respondent had no option but to look into the matter and upon investigating found that the documentation provided by the claimant during his recruitment did not satisfy the requirements set out by the Home Office. The claimant was unable to provide any documentation complying with Annex A of the Home Office guidance (at page 126). The PVN had not come to hand until 4 September 2017. Mr Leversidge's conclusion (set out at paragraph 48 of his witness statement) was that, "These factors led me to believe that the decision to terminate his employment was not due to his race but his inability to provide the proper documentation that would comply with the Home Office immigration requirements."

85. On 7 October 2017 the claimant wrote to Mr Leversidge attaching a further sick note. This again certified the claimant as unfit for work because of stress at work for a period of one month until 19 October 2017. Mr Leversidge wrote on 12 October 2017 to inform him that there was no need for him to supply sick notes given that he was not an employee of the respondent (page 277). Mr Leversidge took the opportunity of reminding the claimant of the offer of new employment.

86. The claimant had not told Mr Leversidge that the was accepting the offer of new employment. Therefore on 30 November 2017 Mr Leversidge wrote to the claimant to say that unless he accepted the offer by 6 December 2017 it would be withdrawn (page 277).

87. Happily, the claimant has obtained his biometric residence permit. This is at pages 278A and 278B of the bundle.

88. The claimant said in evidence before us that he had not accepted the offer of employment from the respondent because he was unwell. In paragraph 56 of his printed witness statement the claimant said that he had not accepted the offer because he was unhappy with it. It was put to the claimant in cross-examination that the reality was that he was seeking monetary compensation. The claimant replied that, "it was not about that".

89. In cross-examination, it was suggested to the claimant that the delays in him applying for a biometric residence permit had not helped. The first application had been refused on 4 May 2017. It was not renewed. When Colette Spencer wrote to him on 4 August 2017 having alerted him to the problem, he still delayed until 17 or 18 August 2017 in making a second application.

90. There is much force in this point made on behalf of the respondent by Ms Balmer. A PVN was issued 21 days after the claimant's application made in August 2017. Assuming the same timescales, an application made by the claimant on 3 August would possibly have produced a PVN on or around 24 August. That may have led to a different outcome when Mrs Bradshaw came to consider the matter.

91. We now turn to a consideration of the relevant law. As we have said, the statutory provisions as to prohibited conduct are to be found in chapter 2 of part 2 of the 2010 Act. The relevant sections for our purposes are: section 13 (direct discrimination); and section 27 (victimisation).

92. By section 13 of the 2010 Act, *"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".*

93. This prohibited conduct is made unlawful in the workplace pursuant to the provisions to be found in part 5 of the 2010 Act. As the claimant was at the material time an employee of the respondent then section 39(2) is engaged. This provides that "*An employer (A) must not discriminate against an employee of A' s (B) by* [amongst other things] *dismissing B or subjecting B to any other detriment."*

94. The questions for the Tribunal are firstly whether the claimant received less favourable treatment and secondly if he did was the less favourable treatment upon the grounds of race or was it for some other reason? The focus primarily must be on why the claimant was treated as he was.

95. The concept of discrimination imports the need for a comparative analysis. By section 23 of the 2010 Act on a comparison of cases for the purposes of section 13 there must be no material difference between the circumstances relating to each case. In other words, it is necessary to look at how a comparator has been treated or would be treated in comparison with the claimant. The circumstances of the claimant and an actual or hypothetical comparator do not have to be precisely the same but they must not be materially different as one has to compare like with like. The treatment of a person who does not qualify as an actual comparator because the circumstances are in some material respect different may nevertheless be evidence from which a Tribunal may infer how a hypothetical comparator would be treated. Inferences may be drawn and one permissible way of judging a question such as that is to see how unidentical but not wholly dissimilar cases were treated in relation to other individual cases.

96. If the discrimination alleged is inherent in the act complained of there is no need to enquire further into the mental process, conscious or unconscious, of the alleged discriminator. However, where the discrimination is not inherent in the act complained of it may be rendered discriminatory by the motivation, conscious or unconscious, of the alleged discriminator.

97. Turning to the victimisation complaint, by section 27 of the 2010 Act *"a person (A) victimises another person (B) if A subjects B to a detriment because B does a protected act or A believes that B has done or may do a protected act."* Protected acts include making an allegation that A or another person has contravened the 2010 Act. Victimisation by A of B is rendered unlawful in the workplace pursuant to section 39(4) of the 2010 Act.

98. There is no statutory definition of the word *"detriment".* The Equality and Human Rights Commission's *Code of Practice on Employment (2011)* provides (at paragraph 9.8) that "detriment" in the context of victimisation is not defined by the 2010 Act and could take many forms. Generally a detriment is anything which the individual concerned might reasonably consider changed their position for the worse or put them at a disadvantage.

99. By section 136 of the 2010 Act, once there are facts from which a Tribunal could decide that an unlawful act of discrimination has taken place, the burden of proof shifts to the respondent to prove a non-discriminatory explanation. Where there are facts from which the Court or Tribunal could decide, in the absence of any other explanation, that a person contravened a provision of the 2010 Act the Court or Tribunal must hold that the contravention occurred. However, that is disapplied if the person shows that he or she did not contravene the relevant provision.

100. Although section 136 involves a two-stage analysis of the evidence, the Tribunal is not prevented at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the claimant's evidence of discrimination. The respondent may adduce evidence to show that the acts alleged to be discriminatory never happened or if they did were not less favourable treatment of the claimant or even if there has been less favourable treatment of the claimant it was not upon the grounds of race. Such evidence from the respondent could, if accepted by the Tribunal, be relevant as showing that, contrary to the claimant's allegations of discrimination, there is nothing in the evidence from which the Tribunal could properly infer a *prima facie* case of discrimination on the proscribed ground. The key question, as always in discrimination cases, is to ask why the claimant was treated as he was.

101. Something more than less favourable treatment compared with someone not possessing the claimant's protected characteristic is required. The bare fact of a difference in status and a difference in treatment only indicates a possibility of discrimination. Something more is required. Further, unreasonable treatment is not sufficient. A Tribunal may draw an inference of discrimination from unexplained unreasonable conduct but Tribunals should not too readily infer unlawful discrimination on prohibited grounds merely from unreasonable conduct where there is no evidence of other discriminatory behaviour on such ground.

102. We now turn to the issues in the case. Dr Ibakakombo represented the claimant at the preliminary hearing before Employment Judge Little heard on 3 April 2018. The respondent was represented at that hearing by Miss Smith of Counsel.

103. It was noted by Employment Judge Little that the respondent accepts not having properly followed its own hiring procedure at the time of recruitment. A succinct summary of the background then followed before the Employment Judge turned to the issues in the case.

104. The following issues were identified (at paragraph 3 of the case management summary). These are as follows:

Direct race discrimination

3.1 Was the less favourable treatment of being suspended and subsequently dismissed because of the claimant's national origin or nationality (race)?

3.2 Was it less favourable treatment for the claimant subsequently to be offered new employment but only a fixed term to expire 3 March 2018?

3.3 If so was that because of the claimant's national origin/nationality (race)?

3.4 The claimant has proposed a hypothetical comparator as being an employee who was not of Congolese origin but who had been granted indefinite leave to enter the UK within his national passport. However it was agreed today that in order that there could be a true comparison the comparator's passport containing that endorsement would also have to have expired.

Victimisation

3.5 Did the claimant do the following protected acts?

- *The content of his letter to the respondent of 19 August 2017.*
- *The content of his appeal letter of 28 August 2017.*
- *The content of his letter of 1 September 2017.*

3.6 Was the claimant subjected to one or more detriments because of one or more of those protected acts? The detriments are in respect of the same subject matter that is relevant to the less favourable treatment, save that this cannot include the suspension as that pre-dated the first protected act.

105. Employment Judge Little then went on to consider the claimant's wrongful dismissal complaint. The following was recorded:

3.7 The claimant's agenda for today set out a broader case than that contained in the claim form. That was because reference was made to the offer of new employment that had been made to the claimant, post dismissal. On the basis that the claimant had never accepted that offer, there was no contract in relation to proposed further employment. It followed that the only complaint which the claimant could pursue was in respect of wrongful dismissal from the actual employment. Today it was agreed that the respondent had dismissed the claimant summarily but it was unclear why this had been done. It follows that the relevant issues will be:

3.7.1 Was the claimant's dismissal without notice or payment in lieu of notice a breach of contract? In other words did the respondent have a lawful reason to dismiss without notice?

3.7.2 If the claimant was wrongfully dismissed what is the appropriate level of damages (in lieu of notice entitlement)?

106. The Tribunal received helpful submissions from each representative. These were supplemented on the morning of 23 August with oral argument. We shall not set out the respective submissions in detail in these reasons. No disrespect to either representative is intended by us not doing so. We can assure the parties that the submissions have been carefully read and considered.

107. We now come to our conclusions. We shall start with a consideration of the direct race discrimination complaint. The first question is whether the claimant was less favourably treated than was a comparator of a different race in the same or similar circumstances. If so, then (as has already been said) the Tribunal must consider the reason why. As Ms Balmer says at

paragraph 82 of her submissions, "*the reason why is essentially a question of causation; what was the cause of any less favourable treatment; why did the respondent act as it did? In determining the reason why, the respondent's state of mind is critical."*

108. Dr Ibakakombo drew the Tribunal's attention (in paragraph 5 of his written submissions) to the case of **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 HL. In that case, Lord Nicholls considered that the sequential approach to the burden of proof may give rise to needless problems (particularly where the claimant is relying upon a hypothetical comparator). In his words: *"Sometimes the less favourable treatment issue cannot be resolved without, at the same time, deciding the reason why issue. The two issues are intertwined".* We must therefore ask the reason why the claimant was suspended and then subsequently dismissed.

109. Ms Balmer submits there was no less favourable treatment (as any non-Congolese employee in the same or materially similar circumstances would have been treated in the same way). She says in any event that the reason why the claimant was suspended was not because of his nationality but because the respondent held a genuine and serious concern that the claimant may not have the right to work in the UK. This also was the reason why the claimant was dismissed: because the respondent was attempting to comply with immigration rules and was concerned (based upon legal advice) that continuing to employ the claimant could result in civil and criminal penalties.

110. Dr Ibakakombo invites the Tribunal to draw adverse inferences against the respondent. A theme running through his written submissions (and which he pursued in his oral submissions) was that Mrs Bradshaw and Mr Leversidge did not carry out any or any adequate investigations. In evidence given under cross-examination Mrs Bradshaw confirmed that she had not interviewed Mr Pratt, Miss Spencer or Mr Law. Mr Leversidge confirmed under cross-examination that he had not interviewed Mrs Bradshaw or any of the others involved. Dr Ibakakombo submitted that this was an egregious omission in circumstances where the claimant had raised allegations of race discrimination in his letters of 19 August, 28 August and 1 September 2017.

111. He also submitted that Mrs Bradshaw acted hastily in dismissing the claimant. She did so within seven days of contacting him (on 18 August 2017) in order to arrange a meeting to discuss his right to work in the UK. She also did so in the knowledge that the claimant had on 18 August 2017 (or thereabouts) applied for a biometric residence permit and was awaiting the outcome of that. Further, she knew from Clyde & Co's advice that the timescale for the processing of such an application was around six weeks but there was a possibility of a positive verification notice being issued which would afford the respondent with a statutory time limited excuse should it transpire that the claimant was working illegally.

112. Dr Ibakakombo said at paragraph 33 of his written submissions that:

"Supposed that claimant's failure to provide the respondent with any additional documents regarding his eligibility to work in the UK after his suspension on 4 August 2017, the claimant will submit that the respondent

has failed to properly investigate the claimant's eligibility to work in the UK following the claimant's application for immigration biometric on 18 August 2017 as per the principles laid in ***British Home Stores v Burchell*** *[1978] IRLR 379: the employer must*

112.1 Establish the fact of its belief, that the employer did believe it. There must also be

112.2 Reasonable grounds to sustain that belief and

112.3 After a reasonable investigation.

113. Dr Ibakakombo recognised, of course, that this is not a complaint of unfair dismissal. As we have said, it is not enough for a claimant simply to show that he or she has been treated badly in order to satisfy the Tribunal that he or she has suffered less favourable treatment. Unreasonable treatment is not of itself sufficient to form the basis of an inference of discrimination so as to cause the burden of proof to shift. It may do in circumstances of unexplained unreasonable conduct upon the part of the employer. That said, unreasonable treatment may justify a Tribunal in more readily rejecting the explanation given by an employer then it would if the treatment was reasonable. In short, the issue goes to credibility. The more unreasonable the circumstances of the dismissal the more likely a Tribunal is to conclude that the dismissal requires an explanation (particularly if there is evidence of a marked disparity in treatment with other employees).

114. Had this been an unfair dismissal case, the respondent would have had a statutory permitted reason for the dismissal of the claimant by reason of holding genuine and well-founded concerns as to whether or not it was permissible for the claimant to continue in the respondent's employment. The procedure followed by the respondent and the investigation conducted by it would come under sharp focus.

115. Ms Balmer cited a number of factors telling against the drawing of an adverse inference against the respondent. We shall now set those out.

116. The first factor which she drew to our attention was that the respondent has an equal opportunities policy (as set out in paragraph 13 of the respondent's standard contract of employment). The Tribunal was not in fact presented with a copy of the equal opportunities policy itself but we nonetheless accept that one exists. The respondent's witnesses were credible and it is plausible that a respondent such as this would have one for the reasons given at paragraphs 117 to 120.

117. In and of itself, merely having an equal opportunities policy will rarely suffice. There is evidence that the respondent can point towards in support of its case that equality of opportunity is one of its core values. The respondent employs over 8,000 staff from 77 different nationalities and employs seven Congolese employees in the UK. This was said by Mr Leversidge during oral evidence on 22 August 2018. He said that equality and diversity is one of the respondent's core values. Further, the standard terms and conditions (at page 96) refer to the grievance procedure should an employee wish to raise an issue relating to some form of discrimination.

118. Mr Leversidge and Mrs Bradshaw both gave evidence about undergoing equal opportunities training. Mrs Bradshaw gave evidence that she in fact

delivers equal opportunities training to high level employees. Mr Bradshaw said that he had studied employment law dealing with equality issues as part of his CIPD qualification. Mr Bradshaw also gives training to others.

119. That the respondent charged Mrs Bradshaw and Mr Leversidge with the task of dealing with the claimant is also indicative of an employer taking its statutory duty not to discriminate seriously. The Tribunal found Mrs Bradshaw and Mr Leversidge both to be very impressive witnesses.

120. A further factor cited by Ms Balmer in favour of not drawing any adverse inferences against the respondent was the prominence given to the need to comply with the 2006 Act and the Home Office guidance. We have referred to the respondent's new employee hiring procedure and the terms of the offer of employment and contract of employment both of which emphasise the need to comply with the relevant legislation and government guidelines.

121. We also know that those responsible for hiring the claimant in breach of internal and external guidelines were dealt with. As Ms Balmer suggests, this is indicative of an employer that takes such issues seriously.

122. All of these factors together persuade us that the respondent is not an employer merely paying lip service to issues of equal opportunities and diversity. It is also an employer conscientious about its obligations to avoid engaging those working illegally.

123. Ms Balmer suggested that there were further factors in the respondent's favour. The first of these was that the respondent gives anxious and conscientious consideration to its duties under the 2006 Act and compliance with the Home Office guidelines for reputational reasons. The respondent undertakes work for HMRC and also because it holds internationally recognised quality marks indicative of its role in the international supply chain as a secure organisation and that its customs controls and procedures are efficient and compliant. In short, there are significant reputational reasons for the respondent to be alive to its obligations.

124. Against this promising background, Ms Balmer then turned to the specifics of the case. She said that had the respondent been consciously or subconsciously motivated against the claimant by reason of his nationality then he may have been rejected for employment following his declaration of his nationality upon his employment application form. That the claimant was offered employment tells against the relevant individuals of the respondent having a mental process discriminatory against those from the Democratic Republic of Congo. She also prayed in aid the fact that seven of the respondent's workforce are Congolese (albeit there are none currently in Sheffield).

125. Furthermore, the claimant worked without incident between the end of February and the end of July 2017. The claimant raised no complaint against the respondent. Further, the respondent had no complaint about the claimant. There was no issue about the quality of the claimant's work. There was no complaint of any discrimination or differential treatment either because of the claimant's nationality or otherwise during this period.

126. Furthermore, when the letter from the Home Office was received on 1 August 2017, the respondent put in hand steps to commence a general audit for all non-British citizens in relation to compliance with the right to work checks. We refer to pages 172 and 173. On 1 August 2017 Colette Spencer said, *"We are reviewing ALL our backlog files now to check if any non-British citizens to see if we have any other concerns".* That all non-British nationals working for the respondent were subject to the general audit again tells against a discriminatory course of conduct against the claimant by reason of his nationality or national origins.

127. Ms Balmer also prayed in aid the efforts made by the respondent during August 2017. The respondent invoked the assistance of the Home Officer's employer checking service to see whether or not the claimant had any outstanding applications or appeals. She submitted that the respondent would hardly have done this had it wished to dismiss the claimant because the respondent did not "*like [*the claimant*] because of* [his] *nationality"* (as it was put by Ms Balmer).

128. Ms Balmer also submitted that there was nothing in the claimant's point about the speed of events between 18 and 25 August 2017. She reminded us that the respondent had taken legal advice as to the options that were open at that time. Further, the respondent had eschewed the possibility of simply dismissing the claimant. Rather, the respondent dismissed him but expressly upon the basis of the possibility of him being offered new employment once he had resolved matters with the Home Office.

129. Additionally, the respondent, following the claimant's dismissal, received a PVN and offered the claimant a contract of employment. This was for a period of six months coterminous with the PVN. However, Mr Leversidge expressed hope that the claimant's biometric travel permit application was successful and alluded (in his letter of 19 September 2017) to the possibility of a review of the fixed term nature of employment should the claimant receive a positive response for the Home Office to that application. There was no obligation upon the respondent so to do.

130. In summary, Ms Balmer submitted that inferences in favour of the respondent should be drawn from all of the circumstances. We find ourselves in agreement with her submissions. In summary, the Tribunal is satisfied that the respondent practices what it preaches in its documentation. Any employer motivated (consciously or subconsciously) to treat an employee unfavourably or less favourably upon the grounds of race would be unlikely to act as has this employer.

131. We are satisfied that the reason why the claimant was dismissed was because the respondent was anxious to comply with immigration law. The respondent held a genuine and serious concern that the claimant may not have the right to work in the UK. The Tribunal accepts that he did have such a right. However, that does not mean that the respondent could not have a reasonably held and genuine belief giving rise to concerns that he had been unable to prove his right to work. The respondent's anxious consideration of the matter is demonstrated by the prudent step it took to obtain legal advice and to follow that legal advice. The respondent avoided taking the riskiest of the three options presented by Clyde & Co by keeping the claimant employed (that being 'option b' at page 216b) but

also did not take up the simplest option of simply dismissing the claimant. The responded heeded Clyde & Co's advice and took 'option c' (at page 216(d)) which served the respondent's interests from an immigration perspective as well as demonstrating good employer behaviour towards the claimant.

132. We agree with Ms Balmer that the reason why the claimant was suspended and was then subsequently dismissed was not because of race but because of the difficulties presented by the circumstances of demonstrating compliance with immigration law and Home Office guidance. We are satisfied that if presented with a non-Congolese employee in the same or similar circumstances the respondent would have acted in the same way. We say this because of the prominence given to the need to ensure compliance with the 2006 Act in the respondent's documentation and the awareness of this from highly qualified individuals such as Mrs Bradshaw and Mr Leversidge.

133. The claimant said that he felt humiliated when suspended. His work possessions were removed from him. His evidence (at paragraph 33.2 of his printed witness statement) is that upon suspension Colette Spencer said to him that he had a visa giving him indefinite leave to remain but the issue was with the claimant's Congolese passport which has expired. The claimant attached significance to her mention of his nationality.

134. Ms Balmer submitted that there was no evidence that Colette Spencer had made that remark. The Tribunal disagrees. There was evidence in the form of the claimant's printed witness statement. The respondent did not call evidence from Colette Spencer or anyone else who was present at the time of the claimant's suspension. We therefore see no reason not to accept the claimant's evidence that this remark was said by her.

135. We take Ms Balmer's point that the claimant's credibility is affected by the issue around the criminal conviction from 2012. However, although that impacted upon the claimant's credibility it does not of course mean that the Tribunal must reject all of his evidence. It is credible and plausible that when suspending him Colette Spencer said that there was an issue with his Congolese passport.

136. We have sympathy for the claimant about how he felt at the time of suspension. Suspension of an employee very often will be an unwelcome act. Employers often have little option but to effect a suspension during working hours when the employee is there and when others are also there. We can accept the subjective feelings of humiliation felt by the claimant when he had to hand in his equipment.

137. However, a difficulty for the claimant is that the reason why Colette Spencer referred to the expiry of the Congolese passport and the reason why the claimant was suspended was because of the letter from the Home Office of July 2017 and the need for the respondent to take steps to safeguard its position. The respondent had received a letter from the Home Office warning that the continued employment of the claimant may render the respondent liable to civil penalties and possible criminal prosecution. We see nothing inherently discriminatory about her mentioning the claimant's nationality. The reason why the claimant was

suspended is the respondent's concerns about the claimant's immigration status.

138. An analysis of the reason why the claimant was treated as he was is sufficient to dispose of the complaint of direct race discrimination. There is simply insufficient evidence before the Tribunal from which an adverse inference may be drawn against the respondent that the reason for the claimant's treatment was his race. We are satisfied that Mrs Bradshaw and Mr Leversidge did not see the need to interview those involved (which in Mr Leversidge's case of course included Mrs Bradshaw). Their explanation that the position was clear upon the face of the documentation is credible and plausible. It is difficult to see how an interview with the interested parties would have advanced Mrs Bradshaw and Mr Leversidge's stock of knowledge when they came to consider the matter.

139. The reason why Mrs Bradshaw acted as quickly as she did was again because of her concerns about the respondent's compliance with immigration law and Home Office guidance. By this stage, she had obtained advice from Clyde & Co and acted upon it straightaway.

140. We can see how subjectively the claimant may consider that to be an unreasonable step given that the respondent knew that a second application for a biometric residence permit had been made by the claimant very shortly after Mrs Bradshaw became involved. We can understand how the claimant may consider it unreasonable for the respondent not to have awaited the outcome. However, we are satisfied that Mrs Bradshaw was concerned that the continued employment of the claimant pending the outcome of the biometric residence permit was a risky strategy. It would have been foolhardy for her to have disregarded Clyde & Co's advice to this effect.

141. In all the circumstances, the claimant's complaints about the respondent's procedural failures (to not interview those involved and to move quickly to dismissal) are small pegs upon which to hang the heavy coat of an allegation that the respondent directly discriminated against him. This is all the more so given the numerous factors that we have set out in the conclusions to these reasons telling against any adverse inference being drawn against the respondent.

142. A further difficulty for the claimant is that there was no evidence as to how a comparator of a different nationality and with different national origins was treated or would have been treated in the same or similar circumstances and thus no evidence of the claimant being less favourably treated than another. This is a finding which properly ought to be recorded notwithstanding that our findings of the reason why he was so treated is sufficient to dispose of the direct race discrimination claim. The claimant adduced no evidence of any actual comparator's treatment or of the treatment of a non-Congolese employee in not dissimilar circumstances to enable the construction of how a hypothetical comparator would have been treated.

143. We agree with Ms Balmer that the claimant's evidence about Colette Spencer's comment concerning the *Congolese* passport is insufficient material from which to draw an adverse inference against the

respondent in all the circumstances that present in this case. There is no evidence to suggest that Colette Spencer would have spoken any differently to anyone of a different nationality in the same or similar circumstances. We are satisfied that when speaking to somebody of a different nationality Colette Spencer would have referred to the individual's nationality when referring to the passport. There was therefore no less favourable treatment (or at any rate no evidence of such) by having referred to the claimant's nationality just prior to his suspension.

144. We now turn to the final act of direct race discrimination which is the allegation that there was less favourable treatment for the claimant by being offered new employment but only upon a fixed term to expire on 3 March 2018. Again, we shall address the reason why. The same issues around the drawing of adverse or favourable inference arises. We shall not of course repeat them.

145. Against that rather unpromising background for the claimant, we have to address the question of the reason why the claimant was only offered employment upon a fixed term to expire on 3 March 2018. It is plain, in our judgment, that this offer was made by the respondent to the claimant because the respondent was still not satisfied that the claimant had permission to work in the UK and the PVN gave the respondent a time limited statutory excuse should it transpire that he had no such right. That is the reason why a fixed term contract of employment was offered to the claimant. We are therefore satisfied that the offer of fixed term employment was not by reason of the claimant's nationality or national origins but rather, again, because of the respondent's wish to comply with immigration law and Home Office guidance.

146. It would be an odd step indeed for an employer motivated (consciously or subconsciously) to discriminate against an employee by reason of his or her nationality or national origins to offer a contract of employment in circumstances where there was no obligation so to do. This is in fact all the more the case given the claimant's circumstances where the respondent discovered that there was an undisclosed criminal conviction. In addition, the respondent has seven Congolese nationals within its workforce which tells against the respondent discriminating against Congolese nationals.

147. Again, the claimant has adduced no evidence of any actual or hypothetical comparators who were or would have been treated differently than was he but who were of a different race to him. There is no evidence that a non-Congolese comparator would have been offered employment on more favourable terms in the same or similar circumstances. We are satisfied that the respondent (through Mrs Bradshaw and Mr Leversidge) would not have done so as otherwise they would have run the risk of not having available a statutory excuse should it transpire that the employee in question was working illegally.

148. We now turn to the question of victimisation. The respondent accepts that all three of the claimant's letters in question are protected acts. The three protected acts post-date the claimant's suspension. Therefore, the claimant plainly cannot complain of suspension as an act of detriment by reason of any of the protected acts.

149. The first issue therefore is whether the claimant was dismissed by reason of the protected acts (or any of them). There is no question of course that dismissal of an employee will be a detriment for the purposes of section 27 of the 2010 Act. However, there must be a causal link between the doing of the protected act on the one hand and the detrimental treatment upon the other.

150. In her written submissions (at paragraph 83) Ms Balmer cites the words of Lord Nicholls in **Chief Constable of West Yorkshire Police v Khan** [2001] IRLR 830 where he says (at page 833):

"Contrary to views sometimes stated, the third ingredient ('by reason that') does not raise a question of causation as that expression is usually understood [we interpose here to say that the statutory wording is now the subjecting of the employee to a detriment because of the protected act but the principle remains the same]. *Causation is a slippery word but normally is used to describe a legal exercise. From the many events leading up to the crucial happening, the court selects one or more of them which the law regards as causative of the happening. Sometimes the court may look for the 'operative' cause or the 'effective' cause. Sometimes it may apply a 'but for' approach. For the reasons I sought to explain in* ***Nagarajan v London Regional Transport*** *[1999] IRLR 572, 575 to 576, a causation exercise of this type is not required either by section 1(1)(a) or section 2* [being the provisions then in force]. *The phrases 'on racial grounds' and 'by reason that' denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact".*

151. It is the case that but for the claimant being a Congolese national he would not have been dismissed. It was the fact of his national origins and nationality that led the Home Office to write to the respondent as it did and that ultimately led to his dismissal. However, that is not the question. The question to answer is why Mrs Bradshaw dismissed the claimant. Was it because he raised an allegation of race discrimination (being the protected act of 19 August 2017) or was it for another reason?

152. For the same reasons as with the direct race discrimination complaint, we determine that the reason why the claimant was dismissed was because the respondent was attempting to comply with immigration rules. There is nothing from the surrounding circumstances to suggest that Mrs Bradshaw decided to dismiss the claimant because he had done the protected act when otherwise she would not have done so. It is noteworthy that Clyde & Co's advice makes no reference to the claimant's letter of 19 August 2017. It formed no part of the respondent's solicitor's deliberations. From that, we infer that it formed no part of Mrs Bradshaw's decision making process either. Given all of the circumstances we find that the reason why she acted as she did was to ensure compliance with immigration law and Home Office guidance. That was her overwhelming priority and was, we find, uninfluenced by the claimant having done a protected act.

153. The other act of detriment alleged was the offer of new employment but only for a fixed term to expire on 3 March 2018. In so far as the claimant

alleges victimisation by way of dismissal, that can only relate to the first of the protected acts. (We have dealt with this at paragraphs 150 and 151). However, the allegation of victimisation by reason of the offer of the fixed term contract potentially encompasses all three of the protected acts given that the offer of employment made by Mr Leversidge post-dated them.

154. It is difficult to see how the offer of a new contract of employment could be considered to be a detriment. As at 25 August 2017 the claimant was unemployed. The respondent then offered him new employment two weeks later. It is difficult to see in the circumstances how the claimant might reasonably consider his position to have changed for the worse or that he was put at a disadvantage by reason of the offer. If anything, the offer of employment changed his situation for the better and was an advantage to him. Upon that basis alone, therefore, the victimisation claim must be dismissed.

155. Even if we are wrong upon that we are quite satisfied that Mr Leversidge made a fixed term contract offer coterminous with the PVN to ensure that the respondent had available a time limited statutory excuse. That was the reason why the offer was made in those time-limited terms.

156. We take account of the fact that the respondent had no obligation to make any offer to the claimant after 25 August 2017. The respondent did so in the interests of good employee relations.

157. Dr Ibakakombo urges upon us the drawing of an adverse interest against the respondent by reason of the fact that the respondent did not investigate the claimant's complaints notwithstanding that Mr Leversidge said he would do so in the meeting of 7 September 2017 (page 260). However, Mr Leversidge invited the claimant to utilise the respondent's grievance process. We also read his promise to investigate the claimant's complaint in the context of him expecting the claimant to return to work. The claimant did not do so. Mr Leversidge was therefore in a position of having received complaints from an individual no longer an employee of the respondent.

158. We take Dr Ibakakombo's point that the respondent could nonetheless have investigated the matter regardless of the claimant's employee status. However, when weighed against all of the factors that have been identified by the Tribunal telling against an adverse inference being drawn against the respondent we find that failure (if such it be) is insufficient to persuade us of a *prima facie* case that the offer of a fixed term of employment expiring on 3 March 2018 was act of victimisation.

159. We now turn to the breach of contract claim. The reason given for the dismissal of the claimant (as set out in the letter at pages 221 and 223) was all around the question of immigration status. There was no mention by Mrs Bradshaw of the fact that the claimant had failed to disclose his criminal conviction.

160. We agree with Ms Balmer that this in and of itself does not prevent the respondent from subsequently relying upon that failure as a fundamental breach of contract. The respondent's argument is that the claimant made a material misrepresentation about his criminal record. This was an extremely serious failure amounting to dishonesty. It was therefore argued that the claimant was in repudiatory breach of contract because of his

failure to make the relevant disclose and that he acted in a manner calculated or likely to destroy or seriously damage mutual trust and confidence between the parties.

161. The Tribunal accepts that the claimant did so act. Had the respondent discovered this shortly before or after 25 August 2017 then the respondent would have been able to rely upon that repudiatory breach as a defence to a complaint of wrongful dismissal. An employer may defend a wrongful dismissal claim upon the basis of after-acquired facts which would have justified summary dismissal for gross misconduct.

162. The difficulty for the respondent in this case of course is that it knew of the fact of the claimant's failure as early as 28 March 2017. Knowing of that failure, the respondent took no steps to bring the contract of employment to an end and accept the claimant's repudiatory breach. On the contrary the respondent kept the contract of employment alive. It continued to provide the claimant with work to do. The claimant did his work and was paid for it. In the circumstances, we hold that the respondent by its conduct treated the contract of employment as continuing, affirmed it and therefore by its actions waived its right to summarily bring the contract of employment to an end for that reason.

163. The alternative argument advanced on behalf of the respondent by Ms Balmer was that there was conduct upon the part of the claimant amounting to a repudiatory breach of the whole contract or a particular part of it of fundamental importance. The fundamental importance in this case was, of course, the question of the legality of the claimant working for the respondent. Ms Balmer submitted that this was centrally important. As the claimant was unable to produce upon request evidence of his right to work in the UK he was in breach of his obligations and the obligations of which he was in breach were fundamental to the contract of employment thus entitling the respondent to dismiss him without notice.

164. Dr Ibakakombo drew our attention to the fact that the contract of employment at clauses 4.2 and 4.3 made reference to a work permit and not to a visa such as that held by the claimant giving him a right to live and work in the UK. In that in our judgment that is a point well made.

165. However, the difficulty for the claimant is that the letter of offer at pages 83 and 84 made employment conditional upon the claimant showing to the respondent the original of one or more of a number of specified documents showing a legal entitlement to work in the UK. The claimant failed to comply with this condition. We agree with Ms Balmer that this was to some degree of the claimant's own doing. He took no steps to apply for a biometric residence permit after the refusal of the first application in May 2017 until 17 August 2018. That application itself was dilatory in circumstances where the claimant ought to have known of the importance of matters by the time of his suspension at the very latest.

166. We do have some sympathy with Dr Ibakakombo's submission upon behalf of the claimant that as far as he was concerned he was in settled employment having satisfied the respondent that he had an entitlement to work. It was of course no fault of the claimant that the respondent took him on with effect from the end of February 2017. Also, applying for such a permit is a costly exercise of in excess of £800.

167. That however only takes the claimant so far. The simple fact of the matter is that the claimant was contractually obliged to produce original documents to the respondent to demonstrate his right to work in the UK. He failed to do so. That was of central importance to the contract. It was a continuing breach. Therefore, there was no question of the respondent affirming the contract and waiving the breach. We agree with Ms Balmer that the establishment of the right to work for an employer engaging such a diverse workforce encompassing over 70 nationalities is fundamental and a failure to satisfy the respondent was a repudiatory breach. The respondent accepted the claimant's repudiatory breach and brought the contract of employment to and end summarily (as it was entitled to do).

168. The respondent did not run its defence to the wrongful dismissal complaint upon the basis of frustration of the contract. The Tribunal heard no argument upon this point. We expressed the provisional view that this may have been an alternative defence open to the respondent.

169. The claimant did not advance a case of harassment related to race pursuant to section 26 of the 2010 Act in relation to the remark that we found to have been made by Colette Spencer at the time of the claimant's suspension. Had the claimant brought such a complaint then we would in any event have found that not to be harassment as it could not reasonably be said to have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offence environment for him. Simply giving the nationality (Congolese) as an adjective for the noun (being the passport) cannot in our judgment reasonably be said to have had that effect (albeit that we accept that the comment from Colette Spencer was unwelcome as far as the claimant was concerned).

170. There is nothing in Dr Ibakakombo's point that the respondent should have disclosed to the claimant Clyde & Co.'s legal advice (at pages 216(a) to (d)). He submitted that the respondent's failure to disclose the advice to the claimant was a breach of the *ACAS Code of Practice: disciplinary and grievance procedures.* This is a misplaced observation as the document was one protected by legal advice privilege. The respondent was under no obligation to disclose the document to the claimant at any stage and the failure so to do prior to the claimant's dismissal can therefore have had no effect upon the fairness or otherwise of the procedure adopted by the respondent.

171. Notwithstanding his failure to disclose the criminal conviction, the Tribunal does have a great deal of sympathy for the claimant. We accept that he applied for employment and worked for the respondent in good faith believing that his visa provided him with the right to work in the UK. Indeed, the visa provided him with that right and the claimant was not acting illegally by working for the respondent. Difficulties in the employment relationship arose because of the statutory and governmental requirements aimed at the mischief of avoiding illegal working.

172. This doubtless laudable public policy can, as evidenced by this case, create difficulties in particular for those coming overseas to work in the UK and lead to individual difficulties as exemplified in this case. A difficult balance has to be struck between the interests of the employer and the employee in such circumstances involving weighing the interests of the

employer in avoiding engaging illegal workers against the interest of the individual employee in question. Plainly, the respondent sought to strike a balance between those competing interests by bringing the contract of employment to an end straightaway but with the prospect of employment under a new contract once the respondent had the comfort of having available documentation affording it a statutory time limited or definite excuse. The respondent also followed up upon its assurance to the claimant that it would act in that way. We therefore venture the provisional view that had a complaint of indirect race discrimination been brought the respondent had a defensible position.

173. In the circumstances, the claimant's complaints fail and stand dismissed.

Employment Judge Brain

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Date: 12 October 2018