

JB1



## EMPLOYMENT TRIBUNALS

**Claimant:** Mr Y Gurung

**Respondent:** (1) Secured Guarding Limited (in voluntary liquidation)  
(2) Mr J Hughes

**Heard at:** London Central

**On:** 5 -7 June 2017

**Before:** Employment Judge Pearl

**Members:** Mrs D Olulode  
Ms J Collins

### Representation

**Claimant:** In person

**Respondent:** Neither appears nor is represented

**JUDGMENT** having been sent to the parties on 7 June 2017 (and corrected on 8 June) and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided.

## REASONS

1. This has been an unusual hearing and the procedural history is relatively complex. The Claimant has brought claims of unfair dismissal, discrimination, harassment and victimisation and he relies on his racial/ethnic identity for most of the discrimination claims. He also advances a claim of perceived disability harassment based on offensive comments that were directed towards him.
2. He is Nepalese and a member of the Gurung Caste or Group. The Respondent company has been in voluntarily liquidation since 12 February 2016. The ET1 was presented on 24 April 2015 and the company entered a Response. After the liquidation it has taken no part in the proceedings. The Claimant applied last year to add various individuals as Respondents. This application was allowed only in respect of Mr Hughes, who is the

Second Respondent. Various orders were made by Employment Judge Hodgson on 16 December 2016 and Employment Judge Lewis on 18 January 2017. It is not necessary to recite the details.

3. At the outset of this hearing, we considered whether it was permissible to proceed in the absence of the Second Respondent (the First Respondent was always likely to take no part and the liquidators did not wish to appear). The Second Respondent was served on 19 January 2017 at the address given by the Claimant. Mr Hughes has not defended the claim. A notice of hearing was sent to all parties, including the liquidator on 31 May 2017. We are therefore bound to assume that Mr Hughes has notice of this hearing and that he has also decided to take no part in defending the claim. However, the notice was technically short of the 14 days required by the Rules. We have decided to shorten that requirement so as to validate the notice and allow this old claim to proceed. We can see no injustice arising for the Second Respondent in doing so.
4. The Claimant is in person and gave most of his evidence through an interpreter. He has compiled a lengthy witness statement. The final matter to note is that we have located in the file a draft list of issues which Employment Judge Wade in 2015 referred to at the first case management preliminary hearing. The Claimant agrees that these were the issues identified at that point when he had legal representation. We have therefore gratefully adopted this list and it is annexed marked A.

## **Facts**

5. We are entitled to take into account all the documents we have been shown as well as the contents of the ET3. An overall assessment of the Claimant's evidence requires the Tribunal to judge its reliability, cogency and accuracy. There are various aspects of his statement which give rise to some concern and we will address this later on in these reasons. The Claimant has had a career in the Brigade of Gurkhas and his employment commenced with the First Respondent in July 2008 as a Security Officer on a 'floating' basis. Early in 2009 he was permanently assigned to the night shift security rota at Chelsea Harbour. He makes various allegations of discrimination for the period 2009 to 2014, but the actionable allegations of discrimination giving rise to claims begin on 14 October 2014 and he was dismissed on 4 February 2015.
6. A central feature of his claim is that he, a Gurung, was discriminated against at work by various colleagues and supervisors on the basis of his Gurung ethnicity. We have heard about three Nepalese employees; and Mr Pun who worked on nights, was a Pun Magar, described in the ET1 as "a rival tribe of the Gurungs." The Claimant's case is that Mr Pun influenced or incited almost all the others on the nightshift to discriminate against him from early on in 2009.
7. During the hearing it became apparent that there was another Gurung, Dil Gurung, employed as a floater. He sometimes did nightshifts and two incident reports in the bundle confirmed this to be the case (4 December 2014 and May 2014.) It is notable that the Claimant has referred to no incident of alleged discrimination in Dil's case. There is no evidence that Dil

complained of the same or raised any grievance. If he had experienced discrimination during these years, it seems to us to be highly improbable that this would not have come to light at some point and it would have been referred to in the Claimant's lengthy witness statement or earlier correspondence.

8. There is a repeated pattern of phrases and words that the Claimant uses in his witness statement. That statement is written in his individual style and alleges discrimination and racism throughout, but in very generalised terms. Thus, the early allegation of February 2009 is that he was "given ... racial discrimination and harassments on the daily basis" when assigned to the fixed site night shift. The initial allegations are directed against the supervisor, Mr Thomas (Nigerian) and Mr Pun. Mr Hughes (white, possibly Irish) is mentioned. We were told that he is the owner of the business. The chronology moves straight to August 2009 when the Claimant relates an operational problem. He says that Mr Thomas's aim was "to dismiss the Claimant on the grounds of his race and ethnic origin". In November 2009, Mr Thomas asked him to write a report and this has been claimed to be race discrimination.
9. These generalised allegations of less favourable treatment, based on the Claimant's race do not inspire great confidence. It is far from clear why this is said to be race discrimination as opposed to normal daily interaction with the job duties and so forth. The Claimant wrote a grievance letter or at least a letter of complaint about recent incidents on 2 December 2009. He alleged daily harassment on a racial basis, we do not know how this was resolved and the Claimant's witness statement is silent on the point.
10. He recites a relatively minor incident with Mr Pun on 28 January 2010 which ended with Mr Pun allegedly shouting foul abuse at him, including "... I hate you fucking Gurungs ..."
11. From February 2010 to May 2012, there is nothing of note. He alleges that on 2 May 2012, Mr McFarlane wrote an email about an incident in the Claimant's name and in an attempt to get him dismissed. This is a very unclear allegation. The incident report at page 72 is not an email and appears to be written by the Claimant. His letter of five days later on 7 May is difficult to understand. However, it appears to have something to do with the allegation concerning 7 May at page 8 of the witness statement. The Claimant here says that Mr Thomas and Mr Pun were trying to turn all the Security Officers against him. All of this is highly confused and, of course, is now over five years old. It also involves an allegation of race discrimination against Mr Hassan for swearing at him. Mr Hassan does not feature again in the case.
12. The chronology then moves on to October 2013, although this may be an error and it may be October 2012. This is also another very generalised allegation that another Officer, Mr Bashyal, who does not appear elsewhere in the story, was being briefed to complain against him. There is no other evidence of a complaint being raised or of disciplinary action occurring. Pausing at this point, it is the Tribunal's view that no useful inferences can be drawn from any of the chronological account up to this point.

13. The Claimant has described certain conflicts or disagreements, and has asserted in each case that they are racially motivated, but it is difficult to see precisely what is being alleged or why race is said to be a factor. Further, based on the Claimant's description of these incidents, we find it impossible to make any clear factual findings.
14. The same problem can be seen with the 3 November 2013 incident which leads to the allegation that Mr Thomas and Mr Clark (white British) "made a plot and unfairly picked ..." him to deal with a noise complaint from a resident. On the basis of what the Claimant has written we decline to make factual findings and we consider that it would be dangerous to do so. His account is far from clear even though it is evident that at all times he has alleged this to be an incident of race discrimination. There is an associated allegation which apparently was made against the Claimant, that he slammed his radio down on the table. He says that it accidentally fell on the table. The likelihood is that this was a further disagreement that arose at that time, but it is not easy to see how race could be involved.
15. The remaining allegations through from November 2013 to October 2014 fall into the same category and we would be disinclined to make any firm factual findings. These events all pre-date the issues in the claim. For the incident of 2 May 2014 Mr Pun is alleged to have sworn at the Claimant but there is no specific racial abuse alleged and the context seems to be the Claimant having gone to and returned from the toilet.
16. On 14 October 2014, the Claimant had an altercation with Mr Pathan who had not previously featured. The allegation seems to be that Mr Pathan was joining in a plot by Messrs Pun, Thomas and others to get the Claimant sacked. The Claimant believes that Mr Pathan had a special relationship with both Mr Thomas and Mr Hughes. However, we find the same difficulty as identified above in making any factual finding in which we could place any confidence. There was evidently more than one disagreement between them that morning but the allegation that Mr Pathan repeatedly lied to the Claimant is not secure. The Claimant did report this to Mr Hughes and he is alleged to have said to the Claimant at 7am, "you have mental problem" and that he should seek medical help. On the balance of probabilities, and we will return to this, we consider this allegation to be made out.
17. The next day the Claimant wrote a letter to Mr Hughes and this is not a protected act although there is one reference in a general sense to victimisation. On 16 October, Mr Hughes replied (page 127). He denied that he had said that the Claimant had a mental problem although he said he was concerned about his behaviour; he said that he did a first class job. He referred to an allegation that Mr Thomas was a racist and he said that his investigations show that he was not. He added that in his opinion this indicated that there was some difficulty with the Claimant's mental behaviour. He hoped that everybody would be able to work together.
18. The next incident is 20 November. As the Claimant's witness statement makes clear by this point, he believed that almost everybody at work was conspiring against him at the behest of Mr Pun and he named five individuals in the statement. There was a further incident in the control room on this day. Mr Thomas is also alleged to have said he had a mental

problem, should see a doctor and he said that the Claimant was “fucking crazy.” The Claimant also says that this was repeated in the early hours of 29 November.

19. The next claim is Mr Yeboah using offensive comments about his mental health on 11 December (page 23 of his witness statement) he also says that on 28 November he had been told by Mr Hughes that he was difficult to work with. This probably was said in our view, but by this point the parties were clearly moving towards the events that ended in dismissal.
20. There were further work problems on 13 December and it led to the Claimant being told he could only do outside duties. This produced two incident reports at pages 78 and 79 and the latter is written by Mr Thomas. The Claimant is said to have been worked up; and he also seems to have mentioned discrimination in a general sense. By this point there was obviously a major problem and the Claimant wrote to Mr Hughes on 15 December and expressly alleged race discrimination, particularly on the part of Mr Thomas. It also appears that the allegation had earlier been made in October but had been rejected, as evidenced by the letter we have referred to of 16 October at page 127. The Claimant wrote again the next day and also on 18 December when he invoked the grievance procedure and complained of “victimisation and discrimination”.
21. Mr Hughes replied on 18 December at page 128, he included the following:-

“I did do a very thorough investigation at the time as I will not tolerate having any of my employees acting in a racist manner. This would constitute gross misconduct and would certainly mean termination of employment, so I did do a very thorough investigation. It did become clear to me that [Mr] Thomas was not a racist in any way shape or form; it was merely that you had made a serious allegation against an innocent man in an attempt to get the better of him. ... You seem to think I said all the guards like you, well that is not what I intended you to think, I was trying to explain that all the guards respect your ability to do your job, but that is not the same as liking you, if I did not explain that clearly then I am sorry ... you are clearly a difficult man to work with due to your refusal to communicate in a reasonable way with your co workers. I strongly suggest that you make a special effort to change your attitude and lose your aggressive approach to dealing with your co workers ... you are a very capable security officer but have a very aggressive manner which makes your co workers nervous of working with you.”
22. On 9 January Mr Hughes agreed to deal with the matter under the grievance proceeding and acknowledged that the Claimant was saying that he was being discriminated against. On the next day, he interviewed five people, Mr Yeboah, Mr Pun, Mr Thomas, Mr Clarke and Mr McFarlane, although the notes do appear to be rather on the brief side. They denied the various allegations. The Claimant’s own grievance hearing was scheduled for 4 February.

23. Before this, on 27 January, the Claimant was involved in an incident with Mr McFarlane in the course of which it is alleged he grabbed the Claimant by the throat and racially abused him (“you fucking filthy Gurung”) and also said that he was crazy. This is not one of the allegations in the list of issues.
24. On 30 January there was a further flare up between Mr McFarlane and the Claimant and on the Claimant’s account the former accused him of threatening him. His account is fairly long and ends with an allegation that Mr McFarlane went to hide behind a chair in order (so says the Claimant) to boost his allegation, i.e. the allegation that the Claimant had been threatening him. The Claimant insists that Mr McFarlane was creating false allegations, plotting to dismiss him and trying to cover up his earlier discrimination, he says that Mr Hughes discriminated by asking Mr Clarke and Mr Pun, who were present, to write witness statements “to dismiss the Claimant.”
25. All of this clearly led directly to the Claimant’s dismissal. He attended on 4 February to receive the outcome of his grievance, but the upshot was that he was dismissed. The clearest evidence about this comes from Mr Hughes’s letter of 19 March at page 133:-

“The meeting ... was in response to your request for a hearing, it was not a Disciplinary Hearing against you ... whilst we were waiting for your rep to turn up I informed you that an allegation of violence had been made against you and that I had investigated the allegation and would be putting it to you in due course. You responded by asking what it was about and I informed you of the facts I had at that time. As this was a conversation we were having to use up the time for your Union Rep to arrive it was not in any way a hearing but a conversation, however, during this conversation you readily admitted that you had in fact left your work duties to go to the control room to confront Supervisor McFarlane with whom you were angry. You laughed and stated that he was a coward who ran behind another officer to seek safety from you. I immediately pointed out to you that you were admitting an act of threatening violence which is an act of gross misconduct. At this time your Union Rep arrived ... after a lengthy reading of statements ... I informed you and your rep that I found your allegations to be completely unfounded and dismissed your complaints ... I had fully and thoroughly investigated the allegation against you, it only remained for me to put the allegation to you and set a date for a hearing so you could defend the allegation. You are the person who readily admitted; in fact boastfully stated that Supervisor McFarlane was a coward by using another officer, Mr Clarke, as a shield. As you have readily admitted the offence I saw no reason to prolong things and informed you that as you have admitted an act of violence against another Officer, this being an act of gross misconduct. I informed you that you were dismissed for violence in the workplace.”

26. The Claimant appealed but it does not appear that the appeal procedure ever came to any conclusion and there is no trace of any outcome letter in the papers.

## Submissions

27. The Claimant has relied on a lengthy witness statement and he supplemented this with fairly brief closing remarks. In these remarks he wanted to tell us about the special relationship that he believed existed between Mr McFarlane and Mr Clarke. He noted that they had certain ties of religion, culture, language, single status and also age and family background.

### The Law (unfair dismissal omitted)

28. Section 13(1) of the Equality Act 2010 provides that a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. Race is a protected characteristic.

Section 23(1) provides that: “On a comparison of case for the purposes of section 13 ... or 19 there must be no material difference between the circumstances relating to each case.”

Section 27 of the 2010 Act in its material part provides that A victimises B if A subjects B to a detriment because – (a) B does a protected act, or (b) A believes that B has done, or may do, a protected act.

Section 26 provides that “(1) A person (‘A’) harasses another (‘B’) if – (a) A engages in unwanted conduct related to a relevant protected characteristic and (b) the conduct has the purpose or effect of –

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

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account – (a) the perception of B; (b) the other circumstances of the case; (c) whether it is reasonable for the conduct to have that effect.”

Section 136(2) provides that: if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. It is then provided that this subsection does not apply if A shows that A did not contravene the provision. This provision is mirrored in the antecedent legislation and there is no discernible difference in statutory intent.

As to burden of proof, the older law in **Igen Ltd v Wong** [2005] IRLR 258 still applies and the guidance is as follows (all references to sex discrimination apply equally to all the protected characteristics):

“ (1) Pursuant to section 63A of the Sex Discrimination Act 1975, it is for the claimant who complains of sex discrimination to prove on the balance of

probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of section 41 or 42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.

(2) If the claimant does not prove such facts he or she will fail.

(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the Applicant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in section 63A(2). At this stage the Tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a Tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with section 74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within section 74(2) of the SDA.

(8) Likewise, the Tribunal must decide whether any provision of any relevant code of practice is relevant and, if so, take it into account in determining such facts pursuant to section 56A(10) SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice."

There was further analysis of the burden of proof provisions made by Elias J in **Laing v Manchester City Council** [2006] IRLR 748, as well a re-consideration of burden of proof issues by the Court of Appeal in **Madarassy**. This case has



confirmed the Laing analysis. In particular, we refer to paragraphs 56 to 58 and 68 to 79. Paragraph 57, in relation to the first stage analysis, directs us to consider all the evidence. “‘Could conclude’ ... must mean that ‘a reasonable tribunal could properly conclude’ from all the evidence before it.” All the evidence has to be considered in deciding whether there is a sufficient prima facie case to require an explanation.

## Conclusions

### Claims That Succeed

28. We begin with the unfair dismissal claim. There was no disciplinary procedure adopted, indeed the Respondent maintains that the 4 February meeting was not disciplinary in nature, further the alleged threatening behaviour is not specified and we do not know what it was. It therefore has not been established that the Claimant was dismissed for a reason related to conduct. We have not seen an appeal outcome and it appears from the ET3 that none exists. This is, accordingly, an unfair dismissal because the reason has not been established (section 98(1),(2)), and further it is procedurally unfair (section 98(4)). Finally we consider that a different reason than conduct can be inferred for the dismissal.
29. The victimisation claim succeeds in relation to the dismissal. There is little added to the claim by the two further allegations of victimisation contained in the List of Issues at 16.1 and 16.2. These relate to (a) Mr McFarlane raising two grievances against the Claimant (and others supporting Mr McFarlane’s version); and (b) the Respondent taking these complaints seriously. There is nothing from which we could infer that these were acts done because the Claimant had raised a protected act or acts. The evidence is far too diffuse and the background strongly suggests that in a situation of major conflict these complaints or grievances against the Claimant were probably motivated by factors that had nothing to do with the written grievances or complaints that qualify as protected acts. The Claimant fails at stage one of lgén.
30. The dismissal is a very different matter. There is clear evidence that the Claimant was viewed by Mr Hughes as a difficult man to work with. He had brought recent grievances by way of protected acts and these had been rejected on the basis that they were unfounded. The correspondence itself shows a degree of irritation on Mr Hughes’ part that the allegations had been made. This in our view takes the matter into a different realm, beyond any normal day to day problems or disputes that would have arisen in the working environment.
31. By 4 February 2015, Mr Hughes was prepared to act on the McFarlane complaint in a meeting that was supposed to deal with something entirely different. He said that the Claimant had committed gross misconduct although a notable fact is that the Respondent has never specified what that was. It is evident that the Claimant comfortably surmounts the obligation to show a prima facie case. There is no defence asserted in evidence, indeed we would go further and say that on these facts it is more than likely that Mr Hughes dismissed the Claimant because he had alleged discrimination against colleagues. Mr Hughes accepted their denials, he was affronted by

the allegations and he regarded those against whom they had been made as innocent victims. The probabilities are that he had enough of the Claimant after these events and that he dismissed him in large part because of the complaints that are protected by statute.

32. We would also uphold the claim for wrongful dismissal as no gross misconduct has been established.

### **Partially Successful Claims**

33. The disability discrimination claim of harassment is based on the abuse that the Claimant relates from Mr Hughes (Issue 13.1) Mr Thomas (Issue 13.3) and Mr Yeboah (Issue 13.4). It is based on the perceived characteristic of mental illness. This claim succeeds in our view because we have concluded that the words were spoken and there is documentary evidence of a contemporaneous complaint to that effect by the Claimant in one instance. Moreover, there is also documentary evidence that Mr Hughes held a view that the Claimant might require medical assistance. We consider that when the ascertainable facts are looked at globally, it is likely that the Claimant's behaviour was regarded as being on occasions erratic or voluble. We think it likely that the word was put around by his colleagues and the supervisors that he was in some ways acting crazily and that this is what lay behind the insults that he has told us about. The claims succeed as they were words that plainly violated his dignity. He can succeed in a claim of harassment under Section 26 even though he was not himself disabled.
34. The remaining harassment claims fail. 13.2, 13.5, 13.6 and 13.7 are allegations that the Claimant was harassed. We are not persuaded that (with one exception) any of these incidents were related to race or ethnic origin. It is highly relevant that the one other Gurung we have referred to does not feature as a potential complainant. The exception we have referred to is the racist comment attributed to Mr Pun in January 2010. This is so old that even if it were an issue in the case, and it is not, we would decline to extend time. However, it does not appear to us to be clear that the allegation at 13.7 is related to 2010 and it is not made out for any later date.
35. The overlapping claims of direct discrimination do not need to be considered where we have found harassment. There is also Section 212, the definition section, which has this effect. For the remainder, the overwhelming majority of allegations are within the context of work complaints, some of which became heated. The Claimant is firmly of the view that all of these incidents are detriments to him because he is a Gurung. He has come to believe that he is the victim of an extensive plot (his term) by almost everyone else to further a campaign of harassment that had been orchestrated by Mr Pun and enthusiastically adopted by the Supervisors and Mr Hughes. His belief is genuine but his evidence is not persuasive and on none of the points, 9.1 to 9.13, do we consider that it would be open to a Tribunal to either find or infer that the Claimant was treated less favourably because of race or ethnicity. As we understand matters, only Mr McFarlane of the other employees, other than Mr Pun, are said to have referred to the Claimant disparagingly as a Gurung, but as to this allegation we do not accept that it has been factually made out. In part

this is because of the absence of any allegations by or concerning Mr Dill. In addition, it seems to the Tribunal improbable that others, such as Mr McFarlane, of widely differing ethnicity to the Claimant, would have concerned themselves with tribal conflicts in Nepal, to the point where they supported a racist campaign by Mr Pun.

### **Summary**

36. The unfair dismissal and wrongful dismissal claim succeed against the First Respondent only. The victimisation claim succeeds against the First and Second Respondents jointly and severally. A disability harassment claim succeeds both against the First Respondent as to abuse from Mr Thomas and Mr Yeboah and also the First and Second Respondents jointly and severally in relation to the abuse from Mr Hughes on two days in November 2014.

### **Remedy**

37. The wrongful dismissal claim for notice attracts no separate remedy as we have assessed the lost income from the date of dismissal.
38. We choose to deal first with the tortious claims. The victimisation claim relates only to the dismissal and this will give a potentially more effective remedy to the Claimant because of the involvement of the Second Respondent. The company went into liquidation on 12 February 2016.
39. The Claimant's schedule gives a figure for weekly wages that seems to us to be too low. Having analysed wage slips, we determine that he was paid £543.00 gross a week or £445.00 net.
40. From 4 February 2015 to 4 June 2015, his loss is 17 weeks x £445.00 = £7,565.00. From 5 June 2015 to 10 January 2016, he has claimed partial loss of £1,839.00 based on a difference in hourly rates, but using gross figures. We have adjusted this by substituting net figures and we award £1,471.00 (we have followed the Claimant in discounting the gross figure by 20%). For the period 10 January to 12 February 2016, 5 weeks at £445.00 produces a loss of £222.05. Thereafter, there is no loss as the Claimant's employment would have ended in any event. These three figures total £11,261.00. We consider that the tortious loss established, and which would put the Claimant back in the position he would have been in, but for the victimisation, allows for some loss of statutory rights to be included. We assess this at £350.00. Therefore these sums total £11,611.00, but as a matter of tortious compensation he must give credit for the £1,169.00 benefits received and this decreases the sum to £10,442.00. Interest is 8% from the mid point between 4 February 2015 and 7 June 2017 and allowing 8% for 243.5 days, this is £557.29. The total of these sums is £10,999.29.
41. Injury to feelings for the offensive remarks relating to his mental health, should in our view be assessed towards the lower end of the lower band of the Vento guidelines, it is important to bear in mind that there were multiple disputes ongoing at the time, between the Claimant and his colleagues, and that he was also being subject to robust industrial language when they insulted him in terms that had nothing to do with disability. The working

environment had obviously become very difficult. We consider that £1,500.00 is the correct figure and that there is no realistic distinction between the insult raised by Mr Thomas and Mr Yeboah and those spoken by Mr Hughes. The dates are slightly different and applying the 8% interest rate to 967 days in the case of the harassment for which the First and Second Respondents are liable we calculate interest to be £317.92. Applying 951 days to the harassment for which the First Respondent is liable, the sum is £312.66.

42. Finally, we come to the correct figure for injury to feelings for the successful claim of victimisation. This is a much more serious matter and the Claimant has demonstrated that he was affronted by the dismissal which, as he has rightly alleged, was occasioned by the claims he had made of discrimination. We consider that the correct figure should be towards the top end of the lower Vento band and we have assessed this figure at £6,000.00, bearing in mind the guidance in case law that we have referred to above. As to interest on that sum, we calculate this to be £640.44 based on the number of days from the date of contravention to the date of hearing being 487.

Employment Judge Pearl  
27 June 2017

ANNEX A

IN THE EMPLOYMENT TRIBUNAL

CLAIM NO:2201187/2015

LONDON CENTRAL

BETWEEN

MR YUBARAJ GURUNG

Claimant

v

SECURED GUARDING LIMITED

Respondent

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DRAFT LIST OF ISSUES

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Unfair Dismissal

1. What was the reason for the Claimant's dismissal?
2. Was the Claimant's dismissal for a potentially fair reason within the meaning of section 98 of the Employment Rights Act 1998, namely gross misconduct?
3. Did the Respondent act reasonably in treating gross misconduct as a sufficient reason for dismissing the Claimant?
4. Did the Respondent follow a fair procedure in reaching a decision to dismiss the Claimant?
5. Was the Claimant's dismissal fair in all the circumstances?

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Wrongful Dismissal

6. Was the Claimant wrongfully dismissed?

**Race Discrimination**

7. Does the Claimant have a protected characteristic, namely race (nationality and/or ethnicity)?
8. Because of the claimant's race did the Respondent treat the claimant less favourably?
9. The Claimant basis his allegations of race discrimination on the following:
  - 9.1 His colleagues, including John Clark and Kwadwo Yeboah refused to take the claimant's radio messages including the car check the Claimant made on 20 November 2014. The Same day John Clark called the Claimant 'a fucking idiot, fucking cunt'.
  - 9.2 On 14 October 2014 Mahmud Pathan was bragging that he was given the supervisor role rather than the Claimant. Mahmud Pathan deliberately gave the Claimant the wrong messages on the radio and/or failed to give radio messages during his patrol, which made it difficult for the Claimant to carry out his duties in the control room. Mahmud Pathan also shouted at the Claimant and tried to blame the Claimant for his failure to give adequate messages on the radio.
  - 9.3 Kwadwo dictated that he and the Claimant must sit in particular chairs when they were both working in the control room.
  - 9.4 On 18 December 2014 the Claimant was informed in writing by Joseph Hughes that he was a difficult man to work with.
  - 9.5 On 28 November 2014, the system failure and season ticket holders were supposed to be given immediate access to the car park. However, Phillip Thomas failed to inform the Claimant of this and subsequently, deliberately blamed the Claimant for delaying access to the car.
  - 9.6 Being called a 'fucking idiot, fucking cunt' by John Clark.
  - 9.7 Aga Pun has attempted to assault the Claimant on several occasions and would swear and blame the Claimant for minor things during their joint duties. Aga Pun has informed the Claimant that he hates Gurung's and that they are bad for society. Aga Pun would switch off the intercom so the Claimant could not communicate with other staff and turn up the volume of the radio loud when the Claimant took over from him in the control room. The Claimant contends Aga

Pun has been influential towards the other named employees in treating the Claimant less favourably because of his nationality and/or ethnicity.

- 9.8 On 27 January 2015, Donald McFarlane grabbed the Claimant's throat. On 30 January 2015, Donald McFarlane hid behind a chair when the Claimant entered the room to create false allegations against him.
- 9.9 Donald McFarlane generally declining to answer radio calls from the Claimant and turning off lights when the Claimant is in the room.
- 9.10 The Claimant wasn't offered opportunities that Aga Pun and other employees had such as first aid training and CCTV training and the Claimant was forced to work with CCTV without a license by the Respondent. Aga Pun and Kwadwo Yeboah were offered promotion to supervisor and the Claimant was not.
- 9.11 On 28 November 2014 Phillip Thomas informed the Claimant that he is a 'mad man' 'stupid man', that nobody likes him, that he is a 'creep', that he has 'mental problems' and on 29 November 2014 that he is a 'fucking prick', 'fucking crazy', that he 'will get rid of the fucking mad man'.
- 9.12 Phillip Thomas would always check the Claimant's patrols. However, he did not check other employees' patrols and would permit them to skip patrols. He would also help them with their commercial patrols. The Claimant could not skip patrols and was not given assistance with his patrols.
- 9.13 Mahmud Pathan criticised the Claimant's performance at work and stated 'how many times do I need to send you a message', when the Claimant requested for him to repeat his message as he was unable to hear him.
10. In respect of each of the above did the treatment occur? If so was it unfavourable due to his race (nationality and/or ethnicity)?

**Disability Discrimination**

11. Did the Respondent discriminate the claimant because of a perceived protected characteristic disability?
12. The Claimant basis his allegation or perceived disability discrimination on the following:

- 12.1 Joseph Hughes has mentioned on numerous occasions to the Claimant that he has mental health issues.
- 12.2 Phillip Thomas and Lwadwo Yeboah have also both called him a 'mad man' and made remarks about his mental health in general being unstable.
- 12.3 The Claimant therefore contends that the Respondent has treated him less favourably because of a perceived belief in the Claimant having mental health issues (a disability). He asserts that as a result of this, his grievances were not taken seriously and his employees version of events were preferred.

Harassment

13. Did the Respondent engage in unwanted conduct relating to the Claimant's protected characteristic of race and/or perceived characteristic of mental health disability, namely:
  - 13.1 Being told on numerous occasions, including in the dismissal letter of 5 February 2015 by Joseph Hughes that he has 'mental health' and 'anger' issues
  - 13.2 Being called a 'fucking idiot, fucking cunt' by John Clark.
  - 13.3 Being told by Philip Thomas on 28 November 2014 that he is a 'mad man' 'stupid man', that nobody likes him, that he is a 'creep', that he has 'mental problems' and on 29 November 2014 that he is a 'fucking prick', 'fucking crazy', that he 'will get rid of the fucking mad man'.
  - 13.4 Kwadwo Yeboah shouted at the Claimant on 11 December 2014 that he was 'crazy' a 'sick man', 'I beat you with this radio', 'you have mental health problems', 'I hate you', 'go away'.
  - 13.5 Kwadwo Yeboah dictating that the Claimant must sit in particular chairs when working in the control room.
  - 13.6 Donald McFarlane raising two grievances against him and other employees colluding with Donald McFarlane to support his version of events.
  - 13.7 Aga Pun trying to assault the Claimant, being aggressive, swearing at him, turning the intercom off, turning the radio volume up loud, telling him he hates



Gurung's and influencing other employees to mistreat the Claimant because he is Gurung.

14. Did that conduct have the purpose or effect of:

14.1 violating the claimant's dignity and/or

14.2 creating an intimidating, hostile, degrading, humiliating or offensive environment.

**Victimisation**

15. Did the Claimant do a protected act, namely:

15.1 making allegations of being discriminated against.

16. Did the Claimant suffer a detriment because of the protected act, namely:

16.1 Donald McFarlane raising two grievances against him and other employees colluding with Donald McFarlane to support his version of events.

16.2 Donald McFarlane's grievance being dealt with seriously which resulted in the Claimant's immediate dismissal.

16.3 The claimant being dismissed.

**Remedy**

17. Is the Claimant entitled to the declaration sought?

18. How much, if any, damages is the Claimant entitled to?

19. Did the Respondent fail to comply with the ACAS Code on grievances and, if so, should the Tribunal award up to a 25% uplift on any compensation awarded?

**Solicitors for the Claimant**

MTG Solicitors

17 July 2015