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EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**AND**	**Respondent**
Mr D P Evans		Xactly Corporation Limited

Heard at: London Central

On: 27, 28, 29 & 30 November and 4 & 5 December

Before: Employment Judge Wade
Ms M Taylor
Ms M Jaffe

Representations
For the Claimant: In person
For the Respondent: Ms A McColgan, Counsel

JUDGMENT

The judgment of the Tribunal is that the Respondent did not:

(a) Directly discriminate against the Claimant because of his race and/or disability.

(b) Harass the Claimant for a reason related to the protected characteristics of race and/or disability.

(c) Victimise the Claimant.

(d) Discriminate against the Claimant because of something arising from his disability.

The claims are accordingly dismissed.

REASONS

1 This is a claim arising from the Claimant's brief employment with the Respondent, a global software company. He was not employed for two years and so withdrew an unfair dismissal claim at the preliminary hearing on 19 April 2017.

The issues

2 The issues to be determined were definitively recorded at the preliminary hearing. They are set out below.

Disability

3 Is the Claimant disabled by reason of Type 1 diabetes or an under-active thyroid? Following the provision of evidence by the Claimant the Respondent conceded that he was disabled by reason of his Type 1 diabetes. However, the claimant had provided no medical evidence about his under-active thyroid or its effect and therefore this condition was not conceded.

Direct discrimination, Equality Act section 13

4 Was the Claimant less favourably treated because of his disability? Alternatively, was he less favourably treated because of race, the race being the protected characteristic of "traveller". The allegations of less favourable treatment are (a) that the Claimant was dismissed and (b) that he was subjected to disciplinary proceedings on 7 November 2016.

Harassment, Equality Act section 26

5.1 Did the Respondent engage in unwanted conduct which had the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment? Was any unwanted conduct related to a protected characteristic of disability and/or race? If so, when reaching its decision the Tribunal must take into account:

(i) the perception of the Claimant;

(ii) the other circumstances of the case;

(iii) whether it is reasonable for the conduct to have that effect.

Allegation 1

5.2 Various members of staff using derogatory names. The Claimant specifically relied on uses of the names "salad dodger", "fat yoda", "fat ginger pikey" and "gimli".

Allegation 2
5.3 The second allegation was of Mr Tom Castley telling him on 16 June 2016 in response his oral complaint about the name calling that he should sort it out for himself.

Allegation 3
5.4 Mr Castley being rude and aggressive and screaming at a meeting in October 2016.

Allegation 4
5.5 Putting details of the disciplinary meeting in a communal electronic diary visible to all.

Victimisation, Equality Act section 27

6.1 The Claimant alleges that he made two protected acts: the first on 16 June 2016 when he spoke to his line manager, Mr Castley and told him of the offensive and humiliating comments that he had made about him. He said that these allegations were repeated in October 2016 but in evidence agreed that he had not alleged discrimination or harassment so there was no second protected act.

6.2 The Claimant says that because of the protected act, the complaint about harassment, he was subjected to the two detriments recorded above as also being direct discrimination.

Discrimination arising from disability, section 15 Equality Act

7.1 The Claimant says that the Respondent treated him less favourably because of his weight and that this arose in consequence of his disability. The allegations relied on on the harassment part of the list of issues are relied on again here.

7.2 The Claimant says that he is "fat" and that this is because of his disabilities. No evidence was produced to establish a causal link between either condition and weight gain. In the middle of the hearing the Claimant produced a letter from his GP dated 29 November 2017 saying:

> "I confirm that he suffers with hypothyroidism (under-active thyroid) and Type 1 diabetes, both of which can cause weight gain, due to the nature of the conditions and their subsequent treatment".

This does not establish the link but merely raises it as a possibility since the conditions *can* cause weight gain.

The Evidence

8 For the Claimant the Tribunal heard from himself and Ms Bella Hodgson who appeared under a witness summons. For the Respondent the Tribunal heard from:

(a) Tom Castley former Managing Director of Sales, EMEA, and the Claimant's line manager.

(b) Amanda Fennell, former Senior Director, EMEA Marketing and Operations.

(c) Steven de Marco, former Worldwide Vice President of Sales.

(d) Leanne Bernhardt, Vice President of Human Resources.

(e) Patrick Morton former Enterprise Sales Executive (now employed by the Respondent as Director of EMEA).

(f) Kevin Henderson, former Regional Sales Manager.

(g) Colin Shurbrook, Senior Solution Consultant.

(h) Noel Paton, Regional Sales Manager.

9 We read the pages in the bundle to which we were referred. We admitted into evidence some additional documents from both sides.

10 We explained our reasons for various case management decisions carefully as we went along and also our commitment to ensure that the Claimant was not legally disadvantaged because he was a litigant in person. We regularly visited the issues and explained the law when discussing the relevance of the evidence.

11 We also encouraged the Claimant to make sure that his health was protected during the hearing and to do what he needed to do to control his blood sugar. No problems occurred.

The Facts

12 Having considered all the evidence we find the following facts on a balance of probabilities. The Claimant will notice that not all of the matters that he told us about are recorded in our findings of fact. That is because we have limited them to points that are relevant to the legal issues. The Respondent was not on trial for its general conduct towards him but for a number of specific alleged unlawful acts which were said to be discrimination.

13 The Claimant was recruited to start work as a sales representative on 4 January 2016. His colleagues knew from an early stage that he had type

1diabetes as he would regularly inject himself at work. Nobody had an issue with this and the Claimant does not allege any specific negative comments about the disability itself.

14 The race discrimination claim relates to the protected characteristic of "traveller". The Claimant does not rely on what he says are fairly remote genetic links of his own but says that he was closely connected to the traveller community because he was looked after by a traveller family as a child and had traveller friends. It is not necessary to be a member of a protected group to suffer race discrimination because of it.

15 When he first began he was given a generous "ramping" which basically meant that he was not expected to hit target as soon as he started because it was recognised that it would take a while to build up the sales "pipeline". He was not expected to make any sales in the first four months and then projected to hit 40% of a normal target for the rest of the year.

16 In February 2016, the Claimant had a difficult time personally and he found Mr Castley to be very supportive. The Claimant says that his colleagues became aware of his links to the traveller community because he had to take time off to go to the funeral of a close traveller friend (not a Romany Gypsy as the respondent thought was alleged). Mr Castley remembers supporting him but not the link to the traveller funeral nor did he know the Claimant's personal childhood history. It seems that the only person who knew of the link was Noel Paton, not himself accused of race discrimination.

The office culture

17 The office culture was of jibing and teasing; a way of operating which appears not to be unusual for competitive sales people working under stress to achieve their targets. Mr Castley called it "banter" in that, as he explained, no one was seeking to offend and the receiver was not offended. The Claimant says that these conversations were derogatory.

18 Some of phrases which the Claimant says were used cannot be said to amount to potential race or disability harassment. These included terms such as "secondhand car salesman" and "jellied eel salesman". Mr Castley cannot recall saying these things. The Claimant and Mr Paton often said "c***" and the Claimant called Mr Paton "fat paddy" on a regular basis. Thus it can be seen that the conversation was indiscriminatingly inappropriate and that nobody was either respecting or focussing on protected characteristics.

19 The Claimant says that Mr Paton was "lovely" and not malicious in that nothing he said ever seemed derogatory and this indicates the subjective nature of the issue. The word c*** is ugly and offensive to many women but the Claimant thought nothing of it. Also, Amanda Fennell, who was not part of the team but sat near it, did not personally like the style of conversation but did not perceive it as unacceptable in context and never noticed the Claimant being upset. She referred to the behaviour as "an extension of the friendship" between

colleagues which was an interesting way of putting it, meaning that this was all treated as normal friendly behaviour at work.

20 Mr Castley said that he would at times pull someone aside if he felt that their language had gone too far. He gave specific examples involving an individual called James and another called Solomon. The former was eventually dismissed when he failed to improve his behaviour. There were limits but as far as he was concerned the claimant's colleagues did not exceed them in relation to him.

21 Mr Castley's third example was of having to talk to the Claimant about his behaviour towards a colleague called Sarah. She had complained to her boss, Amanda Fennell, who had raised it with Mr Castley. She did not like the Claimant trying to hug and cuddle her and call her "pudding". She was upset that he was commenting on her size and said that she had asked him to stop but he had not done so. The managers discussed the issue and did not escalate it to HR because they did not think it a sexual assault; instead they took Mr Evans aside and explained to him that this behaviour was not appropriate. The Claimant's response is that Sarah "could be rather spikey", in other words not taking any responsibility. He denies that his managers ever even got involved but their evidence was detailed and they corroborated one another and we have no doubt that they did.

"Fat ginger pikey"

22 It is agreed that at some point during April 2016 Kevin Henderson, a colleague of the Claimant's in the sales team, called him a "fat ginger pikey". During the hearing, the Claimant said that this was repeated many times but he had previously only alleged that it had happened once and there is no evidence of any reoccurrence. The question for us is whether, in the midst of the offensive language being used by the Claimant and his colleagues, this reaches the threshold of racial harassment.

23 The Claimant did not react or complain at the time and all of the witnesses said that the "Dave [Evans] they knew" would have done so, even Colin Shubrook who the Claimant says he trusts to tell the truth. Very few colleagues heard the phrase being used and those who did found it not out of the ordinary in that context. At the hearing, Ms Hodgson could not recall what had been said.

24 This was particularly because nobody apart from Noel Paton seems to have thought that the Claimant had any connection to travellers and so just thought is a random comment. Amanda Fennell, Irish herself, thinks that travellers are generally Irish and do not live in a settled community so that the Claimant was not like that. She did hear what was said but on reflection did not think it as bad as the Claimant's treatment of Sarah; as far as she was concerned the Claimant did his share of name calling so that this was just part the reciprocal activity. She does not know why she remembers the phrase being used.

25 Mr Henderson, who admits he used the phrase, said that this was just one of the many things he said, some being potentially ruder than others, he also referred to the Claimant as "Starsky" because of the jumpers that he wore. Mr Henderson said that he had no idea that the Claimant had any links to travellers and that he certainly did not regard himself a superior to the Claimant having himself had a very modest up-bringing. He positively thought that the Claimant would not fit that label because he was much more of a "cockney geezer" than anything else. He also does not think of the claimant as fat.

26 Mr Henderson does regret saying it because he did not want to upset the Claimant, who he regarded as a friend; they had been out together socially and happily continued to do so after this phrase was used.

27 At the end of Mr Henderson's evidence the Claimant said that he did not believe that he had said this phrase with the intention of upsetting him.

"Salad dodger" and other size-related comments

28 The Claimant also complains that colleagues called him "salad dodger", "fat yoda" and "gimli", the latter being a character from Lord of the Rings. He particularly accuses Patrick Morton who is upset because the two had socialised together and he could not understand why the Claimant had not raised this with him if he had been upset, it was all meant in jest. Neither Patrick Morton nor any of the other witnesses thought that the Claimant was actually fat which would mean that such a phrase was less likely to be intended to upset. Some of these phrases probably were used but we struggled to see how they could have been particularly offensive.

Dismissal of a colleague for poor performance

29 On 28 April Ed, an Account Executive, was dismissed for poor performance. He was the first of a number of sales staff who were dismissed because they were not reaching target. As will be seen, the dismissal of the Claimant followed this pattern. The respondent did not discriminate when a member of the sales team was failing.

Alleged first protected act, 16 June 2016

30 The Claimant says that on 16 June 2016 he had a meeting with Mr Castley at which he complained about the harassment he was experiencing. He particularly complained about Mr Henderson's "fat ginger pikey" comment but did not give any other specific examples. He says that he was very upset when Mr Castley responded that the Claimant should sort it out for himself and alleges that from that point, having done a protected act by alleging harassment, he became a "marked man" and Mr Castley was determined to dismiss him.

31 The Claimant says the fact that Mr Castley said he did not remember the meeting is a sign that he was trying to cover up the evidence. The alternative explanation is more prosaic and, in our view, more credible: Mr Castley did not remember the conversation because it was unmemorable and did not contain a

discernible complaint. It had not been in his diary and rather than being a "meeting" the claimant agrees that they had a drink outside a pub in Moorgate after watching a football game on the television at work. The only bit of the conversation that Mr Castley remembers is that the Claimant said that he respected him and wanted to be his right-hand man.

32 In her evidence, Ms Hodgson recalls that the Claimant told her a couple of weeks later that he had complained to Mr Castley about Mr Henderson's behaviour. She does not mention in her evidence that the Claimant was upset that Mr Castley had told him to sort it out for himself and so she cannot help us by corroborating the allegation that the Claimant became a marked man after that meeting. There is indeed no evidence corroborating the allegation that there was a falling out.

33 We think that the most likely explanation is that there was a low-level discussion about Kevin Henderson's behaviour which the Claimant has now elaborated beyond recognition. It is not credible to us that Mr Castley would have rejected a serious complaint about Mr Henderson given his track record of dealing with other staff members, including the Claimant, when there was a problem. If he told the Claimant to sort it out for himself it was because he may have thought that the problem was better dealt with colleague to colleague because it was not very significant. Just as Mr Castley did not react against the Claimant after the incident with Sarah, there was absolutely no sign that he reacted against the Claimant after 16 June and there was no reason for him to do so.

The delay in raising the "fat ginger pikey" comment

34 To the extent that the Claimant raised a concern about Kevin Henderson, and Ms Hodgson seemed to think he had, the problem was not very pressing because he had waited approximately two months to raise it. As we have already said, the Claimant was not, according to his colleagues, someone who would sit upon a problem rather than reacting and he himself told us that he wore his heart on his sleeve. Also, colleagues said that it was uncharacteristic of the Claimant to "grass" on a colleague to a manager. The Claimant says that he was so upset by the comment that he appeared not to react but spent a couple of months turning it over in his head trying to decide what to do. This reaction is certainly possible, but unlikely given Mr Evans' character and we find that the reason he did not react in April was because he was not upset.

Discussion between the claimant, Ms Fennell and Ms Hodgson, 28 June

35 As mentioned in paragraph 32, the Claimant had a chat with Ms Hodgson and Ms Fennell on 28 June. Ms Hodgson says that he told her that he had reported his concerns about Kevin Henderson's language to Tom Castley but Amanda Fennell does not remember that although she remembers having a conversation. Suffice to say that he continued to function sociably in the team during the summer and Ms Fennell remembers the Claimant and Mr Castley getting on well at a team event in July. There was simply no sign of worsening

relationship between the Claimant and Mr Castley or of the Claimant be upset by Mr Henderson.

The sales team fails to hit target, sales meeting mid-October, no second protected act

36 What did become apparent was that the whole of Mr Castley's team was failing to hit target. Mr Castley himself, as its leader, was under increasing pressure to perform and at a sales meeting in mid-October he spoke frankly to the team members about what he wanted them to do to improve sales. He spoke not just about the Claimant's poor record but about Mr Henderson's as well. Unlike Mr Henson, however, the Claimant argued back and there was a bit of an altercation. Most of the witnesses said that Mr Castley's behaviour was not surprising given the stress that they were all under and the fact that the Claimant had not made any sales at all at this point. Mr Shurbrook thought that Mr Castley had treated the Claimant quite badly but not that he had screamed or behaved offensively.

37 What he is clear about this meeting, as the Claimant now agrees, is that he did not repeat any allegations about harassment. There was no second protected act for the purposes of a victimisation claim.

38 If Mr Castley did not take kindly to the way that the Claimant had argued back at the sales meeting, there is no sign of a causal link between this and his alleged reaction to the low-level complaint of 16 June. There was therefore in no sense a continuing act of hostility from Mr Castley which had been triggered by the alleged harassment. The office was in a dark mood because of poor sales and Mr Castley was focused upon that.

Performance improvement plan

39 On 24 October Mr Castley contacted HR to say that he would like to terminate the Claimant's employment because of his poor sales record, he had still not made any sales at all that year. Whilst at some point Mr Castley had said that the Claimant was the sales representative most likely to hit target, his pipeline prospects had slipped and things now looked bad. If there was a connection between this decision and earlier events it was to the Claimant's argumentative behaviour at the October sales meeting and not to the possibly that the Claimant had mentioned harassment a few months before.

40 Ms Bernhardt of HR suggested, indeed recommended, that Mr Castley should not terminate the Claimant straight away but should carry out a performance improvement plan, which Mr Castley reluctantly agreed to.

41 Mr Castley was also disturbed by the fact that the Claimant had declined to take up training opportunities which have been offered to his team. The Claimant appeared to think that he did not need much assistance and that had been upsetting his colleagues.

42 Mr Castley put together a suggested performance improvement plan and invited the Claimant to a meeting on 9 November. The plan was never discussed and never progressed because the Claimant then raised a grievance.

43 The date of the meeting appeared in the communal work diary. This possibly happened because the invitation was shared with Mr Shubrook who agreed to accompany the Claimant to the meeting, but for whatever reason we find that it was not intentional and, as soon as the Respondent's staff realised, it was removed within a very short time. Mr Shubrook did not think that it was intentionally shared on the communal calendar.

44 The Claimant was not happy to be invited to a performance meeting. Mr Shubrook said that although he was surprised at the speed at which the process had begun, it was not a surprise in itself as he knew that Mr Castley was under great pressure and, although he cared about his team, he needed to make some tough decisions.

The claimant's grievance, 8 November 2016

45 On 8 November the Claimant wrote to the Respondent raising a grievance "in response to your disciplinary meeting ….". He made it clear that he had taken legal advice and from this time on he referred to it regularly as he appeared to be attempting to negotiate an exit settlement.

46 The grievance was notable in that the alleged perpetrators of the comment such as "pikey" were not named. The Claimant said that Mr Castley and Ms Fennell would give evidence about what had happened, his purpose being to focus on management actions rather than his colleagues even though it had been Mr Henderson and not his managers who had called him a "pikey".

47 A telephone conversation, which was the first grievance meeting, took place between the Claimant and Ms Bernhardt, with Mr Shubrook as the Claimant's witness. Mr Shurbrook says that the Claimant was loud and animated and would talk for long periods to stop other people getting into the conversation. The Claimant came across as aggressive, as he did at times during the hearing, even sometimes banging the table. He does not recognise that he was aggressive.

48 On 16 November, the Claimant emailed Ms Bernhardt stating that he did not feel that he could stay in a business where he knew they were trying to fire him and that he had been in touch with his lawyers. He was attempting to discuss a settlement.

49 On 18 November a second grievance meeting took place, again with Colin Shubrook as the Claimant's witness and Ms Bernhardt was accompanied by Ms Namaseevayum, a UK HR professional. Ms Bernhardt works in the States and is not very familiar with English employment law and customs.

50 There was some frustration at the meeting because the Respondent's side did not understand, and would not accept, the negative

connotations of the "pikey" comment. On his part, the Claimant absolutely refused to allow the Respondent to interview Mr Henderson about the comment and said that he would resign and claim constructive dismissal if they talked to him. Colin Shubrook reports that the Claimant was again aggressive at the meeting. It was clear to both sides that a workable resolution was needed, involving the Claimant's exit from the organisation. Mr Shubrook and the Claimant disagree about what an amicable exit would look like, the Claimant requiring a higher payment than Mr Shubrook thought feasible.

51 A fairly rudimentary investigation then took place. Mr Castley and Ms Fennell were asked open questions about whether they had witnessed any inappropriate behaviour in the team and they said they had not. This was their genuine view as neither recalled unacceptable comments or the claimant complaining about them. The investigator asked no specific questions about Mr Henderson or any of the alleged comments and so no memories were triggered.

52 There was an issue about a client dinner on 28 November but this is not relevant to the legal issues.

Grievance outcome

53 On 1 December Ms Bernhardt sent a written grievance outcome to the Claimant. The grievance was rejected. She did not explicitly make a finding about whether the Claimant had been called a "fat ginger pikey". She seems still not to have understood that this phrase was more likely to be offensive than some of the other things that were allegedly said. The grievance process was not as diligent as it could have been but this was not helped by the Claimant being obstructive and also the Respondent knew that it had been raised in response to the disciplinary process and at a time when Mr Evans was trying to negotiate a paid exit. This was not an unfair dismissal case and the way the grievance was handled was not an alleged detriment.

54 On 9 December the Claimant appealed. The appeal itself did not protest that Ms Bernhardt had not dealt with the "pikey" comment but the Claimant did attach a text from Ms Hodgson where she said she remembered the phrase being said. By the time of the hearing she could not remember what it was. Mr Consul, based in the US, who heard the appeal, did not in fact hear it in that there was no meeting and he did not talk to the Claimant. The appeal process was not thorough to say the least but we draw no inferences of discrimination from it as he was too remote from the London sales team to have a view about the claimant personally. Mr Consul apparently no longer works for the Respondent and did not come to the hearing.

The claimant's dismissal, 16 December 2016

55 Thus the parties had reached the end of the road in every sense. What remained was either to successfully progress the discussions about an agreed exit or resume the disciplinary/capability process. Following discussions with the CEO and COO it was agreed internally that the Claimant's behaviour during the process had been unacceptable and his aggressive approach was

noted. As far as the managers were concerned, the relationship had become untenable and the Claimant had said that he no longer wanted to work for the Respondent; also he was still nowhere near hitting his sales target.

56 In a telephone call on 16 December, in a without prejudice conversation in respect of which the Respondent has waived privilege, Ms Bernhardt confirmed that Mr Evans was dismissed.

57 We listened to the claimant's recording of the telephone call as well as reading a transcript because he wanted us to do that. He said that this would reveal the truth, however what it revealed was not helpful to him. The Respondent's reason for dismissing him at the time has been consistent throughout and is repeated in the grounds of resistance. He was dismissed because the relationship had broken down and settlement talks had ground to a halt. Although the Claimant specifically says that there is no sign of him being aggressive during that call, he did sound aggressive and rather bullying in his tone, repeating certain phrases, alluding to the fact that he had legal advice and laughing sarcastically. The call also demonstrated that the working relationship had broken down.

58 Mr Shubrook says that he advised the Claimant on at least two occasions to take the money on offer, move on and forget about it. He also says that the Claimant could not possibly have expected to be paid commission for deals that he had not generated. Both Colin Shubrook and Noel Paton confirmed that the pipeline deals which the Claimant said were close to success were nowhere near and took some time to complete. One of them had been a disaster and the business model had to be changed before the deal was done.

59 On 28 March a sales representative was dismissed for his poor sales performance. A month later, another resigned because he was under pressure due to his poor performance. Thus, three of the Claimant's colleagues suffered action similar to that which the Claimant had faced in early November because of their poor sales performance. The Claimant cannot possibly say that he was singled out for disciplinary action when he had not make any sales at all in the 11½ months of his employment. As Mr de Marco said in his evidence, ultimately the measurement of the successful sales person is his sales, and if he has not made any after three quarters, his position is untenable.

Conclusions

Direct discrimination

60 The Claimant did not advance any arguments which could possibly lead us to conclude that the reason he was disciplined and then dismissed was his disability or race. The reason he was dismissed is very clear, cogent and consistent with the treatment of other staff members who failed to make sales. The problem started with his poor sales performance and deteriorated during a retaliatory grievance and settlement discussion into an untenable working relationship. The Claimant wanted to leave, but with a financial package which

was not agreed, hence the litigation. There is no room for any other motive and the reason for the termination is fully explained.

Harassment

61 It is important to look at the test as a whole as recorded above. The Claimant approached this whole case in a binary fashion, contrasting "truth" and "lies" and we tried hard to explain to him that shades of grey existed, context being all in harassment cases.

Allegation 1

62 By far the worst allegation is Mr Henderson's "fat ginger pikey" comment. This could have been harassment, but having looked at the context we conclude that it was not. A number of the key reasons for this conclusion are as follows:

(1) The Claimant does not say he was offended because he is a traveller himself but rather that he had close friends who were, although this fact was not well-known. The loose connection between the Claimant and travellers makes it very unlikely that the comment was intended to upset him, and indeed he agrees that Kevin Henderson would not have had that intention. It also makes it much less likely that the effect would be undermining of the Claimant's dignity because it was not very personal.

(2) The Claimant did not tell us of any previous experiences where he had been harassed in relation the traveller protected group. This is important because when people have had to put up with persistent comments for much of their lives it is more likely that even light-hearted comments will be unwanted and have the effect of undermining their dignity.

(3) Mr Henderson did not think that the Claimant was a traveller and indeed he thought the description did not fit with the Claimant's "cockney geezer" persona. Mr Henderson also did not know that the Claimant had traveller friends. Again, this makes an intention to harass unlikely.

(4) The phrase was one-off and so there was no damaging persistence.

(5) All indications are that the Claimant was not upset at the time, let alone that his dignity was undermined or that a hostile environment was created. Given his character, he would have reacted at the time if he had been upset. If he complained at all in June the complaint was not significant and so there was no recognisable complaint until the grievance some seven months later. We do not accept that he was the sort of person to absorb an insult quietly and dwell upon it so that it became more distressing.

(6) The alleged insult has taken on greater and greater proportions as time has gone by. The Claimant wrote an appeal but did not specifically challenge Ms Bernhardt's failure to deal with the allegation in the grievance outcome and we conclude that he has highlighted it now for tactical reasons.

(7) In the culture of the office the Claimant always gave as good as he got which makes it unlikely that he would be offended by anything which others might consider acceptable. He himself used the "c" word and called Mr Paton a "fat paddy". Ms Hodgson for example did not did not think that the phrase "fat paddy" crossed the line in the wrong direction although the "c" word did.

(8) The Claimant did not have a good sense of what was acceptable behaviour, Sarah was described as prickly because she complained about his touching her and calling her pudding. Whilst not amounting to sexual assault this behaviour, because it involves unwanted touching, was potentially much worse than Mr Henderson's comment but the Claimant does not see this.

(9) Although Mr Henderson admits what he said, and Ms Fennell heard it, many colleagues do not remember it which suggests that they thought nothing of it. Ms Hodgson for example did not remember the phrase being used although it was reported to her by the Claimant.

(10) There was a culture of managers, Mr Castley and Ms Fennell, intervening when they did experience unacceptable behaviour but they did not do so.

(11) Most importantly of all, the Claimant only reported the problem in writing and with any clarity on 8 November after he received the disciplinary letter. Therefore, it is likely that he made a tactical decision to raise this in order to head off the disciplinary or negotiate an exit. This was no coincidence of timing.

63 The other comments relate to disability. As is recorded above, we do not agree that a causal link between the Claimant's disability of diabetes and weight gain is made out. In any event, the Claimant cannot argue that he was particularly sensitive to use of the term "fat", "yoda", "salad dodger", "gimli" when he himself called Mr Paton a "fat paddy" and Sarah a "pudding".

64 On any analysis, these comments were very mild and they were said by friendly colleagues who did not think he was fat; nobody except the Claimant himself seemed to think that he was fat or to make a connection between his size and his disability. They were also said by colleagues who knew the Claimant was disabled but who showed no sign whatsoever of an inclination to joke about it. Indeed, why would they be intolerant of somebody with diabetes who managed to keep it under control so it did not affect his behaviour or work? The colleagues also

65 These allegations were not seriously pursued by the claimant and he never complained about them during his employment. They do not meet the threshold required to establish harassment.

Allegation 2

66 We have found that Mr Castley did not tell the Claimant to "sort it out for himself". There is no evidence of this. Even if there was it would not be reasonable to view this as an act of harassment.

Allegation 3

67 The Claimant's own trusted witness, Colin Shubrook, says that there was no screaming by Mr Castley. He may have behaved unfairly but he was under stress. It would not be reasonable to view Mr Castley's behaviour as harassment, not least because it was not related to race or disability.

Allegation 4

68 The inserting of the disciplinary meeting date in the communal diary was a mistake.

Out of time

69.1 Given our findings above it is not necessary to go on to consider the question of whether the harassment claims were out of time in any detail. However, certainly the "pikey" comment made in April 2016, is out of time given that the ET1 was not filed until 21 February 2017. In all the circumstances, we would not consider it just and equitable to extend time and there was no continuing act.

69.2 The claimant knew he could take legal action by November 2016 at the latest; this was out of time but considerably less so. He did not explain the delay or argue that he thought he had to wait until an internal grievance procedure was concluded. He is articulate, literate and able to access on-line advice. Since we have found that he was not upset by the comment at the time, which is why he took no action, it would not be fair to allow him to pursue the claim out of time.

70 It is relevant to refer briefly to the case of *Richmond Pharmacology -v- Daliwal 2009,ICR, 724* in which Underhill J, then President of the EAT makes the point that not all behaviour which offends can be said to be harassment. The words such as "violation of dignity" are powerful phrases not consistent with more minor events. As he said:

> *"Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly where it should have been clear that any offence was unintended. Whilst it is very important that employers and tribunals are sensitive to the hurt that can be caused by racially offensive comments or conduct, it is also important not to encourage a culture of*

hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase".

Victimisation

71 There was no protected act which resulted in Mr Castley subjecting the Claimant to detriment. To the limited extent that Mr Evans complained about harassment in June 2016, Mr Castley was not upset by the situation, indeed he did not remember it and nothing resulted from it. Mr Castley was not trying to cover up the truth when he said he could not remember the meeting and the Claimant's description of it was as inaccurate as Mr Castley's memory was poor. The decision to discipline the Claimant arose towards the end of the year when he had made no sales for three quarters and was not connected to the June discussion; the reason for the dismissal have been recorded at paragraph 60 above.

Discrimination arising from disability

72 As is said above, no causal link is established between the Claimant's size and his disability. Even if there were a link, his allegations are of harassment and do not sit comfortably as an allegation of detriment arising from disability. We have already found that those harassment allegations are unfounded.

Overall conclusion

73 In conclusion, as already recorded, the Claimant's employment was terminated because the relationship had broken down in circumstances where he had sold nothing since he started his employment. The decision to discipline him was not unusual given his poor record and that is demonstrated by the way colleagues who also performed poorly were similarly treated. It is impossible to say that the Claimant was singled out for bad treatment, and this would have applied even if there had not been a performance improvement plan in place and Mr Castley had moved straight to dismissal. There is no statutory obligation to follow a fair dismissal procedure where an employee has not been employed for two years, what is important is that the process must not be discriminatory, and we have found that it was not.

74 The Claimant suggests that the decision to dismiss him was premature and that we should draw conclusions from that but we have already found that his sales pipeline was not good so the decision was not premature.

75 When an individual clearly expresses that they want to leave because the relationship has broken down and that they have been taking legal advice, it is not a surprise that the employer considers their position to be untenable. This is particularly the case because (a) the Claimant wanted more money than was reasonable in the Respondent's view and (b) his behaviour through the grievance process was aggressive.

76 The Claimant has continually said that the Respondent is hiding the truth and that it should recognise its failings. We hope that in reading this judgment the Claimant will recognise that there was another perspective and understand why his claims have not been successful.

Employment Judge Wade on 4 January 2018