EMPLOYMENT TRIBUNALS

Claimant: **Mr J Parkinson**

Respondent: **Wyvern Theatre Limited**

Heard at: **Bristol** **On: 21 & 22 March 2018**

Before: Employment Judge Maxwell
Mrs C Monaghan
Mr G Jones

Representation
Claimant: In person
Respondent: Miss Peacock, Solicitor

JUDGMENT

1. The claimant's claim of harassment related to race is well-founded and succeeds.

2. The claimant's claim of less favourable treatment because of race is not well-founded and is dismissed.

3. The claimant is entitled to compensation in the sum of £7,114.

REASONS

Preliminary

4. By a claim form presented on 8 June 2017, the claimant brings claims against the respondent of race discrimination under the **Equality Act 2010** ("EqA"), namely less favourable treatment and harassment. The claimant complains about three things said to him by the second respondent's employee, Jeremy Cain, on 27 January 2017, namely:

   4.1. he hated all races and cultures;

   4.2. he hated all Jews and was anti-Semitic;

   4.3. he was compared to a plantation owner who sleeps with his slaves.

5. The claimant says these statements amounted to less favourable treatment because of race, or unwanted conduct related to race. He relies upon his own race, which he identifies as "white Caucasian" and / or that of his first wife, which he identifies as "African".

6. The respondent denies the claimant's claims. Whilst it admits that comments similar to those alleged were made, it disputes the sequence and says this was in the context of a political discussion.

7. At a preliminary hearing for case management before EJ Pirani on 9 November 2017, the respondent conceded that for the purpose of EqA section 41, it was a principal and the claimant a contract worker.

8. At the beginning of this hearing, Miss Peacock for the respondent indicated the respondent would no longer seek to rely upon EqA section 109 ('the statutory defence') and conceded the treatment complained of was unwanted within EqA section 26.

9. Accordingly, the issues to be determined by the Tribunal are:

   <u>for direct discrimination:</u>

   9.1. whether the treatment complained of amounted to a detriment;

   9.2. whether the claimant was subject to less favourable treatment;

   9.3. whether any less favourable treatment was because of race (the claimant's and / or that of his first wife);

for harassment:

9.4. whether the unwanted conduct related to race (the claimant's and / or that of his first wife);

9.5. whether the conduct had the purpose or effect of:

9.5.1. violating the claimant's dignity;

9.5.2. creating an intimidating, hostile, degrading or offensive environment for the claimant.

Witnesses

10. We heard evidence from

for the claimant

10.1. John Parkinson, the claimant and formerly Cleaning Supervisor at the respondent;

for the respondent

10.2. Jeremy Cain, Technician;

10.3. Simon Francklin, Buildings and Technical Manager;

10.4. Elly Stimpson-Duffy, Theatre Manager;

10.5. Derek Aldridge, Theatre Director.

Documents

11. We were provided with:

11.1. an agreed bundle of documents running to 109 pages;

11.2. the respondent's written submissions;

11.3. case law relied upon by the respondent.

Hearing

12. As a result of a listing error by the Tribunal, a full-panel was not available to begin to hear the claimant's claim on 21 March 2018, and that occasion was used for the purpose of further case management. The procedure to be followed during the hearing was explained to the claimant and it was identified that he had attended without bringing the document bundle, witness statements, paper or a pen. On enquiry as to any preparation

undertaken for this hearing, the claimant said he had started to read Mr Cain's witness statement but did not complete this because he did not want to read more "lies". The Tribunal encouraged the claimant to read all of the documents and bring his copies of those to the hearing on the next day, along with some means of taking notes. Separately, the claimant had provided two schedules of loss, one with a claim for loss of earnings (on the Tribunal file) and one without (in the bundle of documents). It appearing to the Tribunal at least arguable, if his claim succeeded, that loss of earnings might flow despite the lack of an employment relationship with the respondent, the claimant was given an opportunity to revise his schedule and attend early on 22 March 2018 with copies of any documents relevant to his losses and attempted mitigation.

13. On 22 March 2018, the claimant confirmed that he did not wish to pursue a claim for loss of earnings because of the passage of time and he had "moved on". The Tribunal then being fully constituted, the hearing began with the claimant's evidence. The claimant took offence at the propositions contained within questions being asked by Miss Peacock for the respondent, who was putting her client's case in a proper way. It was necessary for the Tribunal to intervene on several occasions so as to request the claimant wait for Miss Peacock's question to finish before he began responding.

14. After his evidence concluded, the claimant asked if he could leave, saying that revisiting these matters and the prospect of having to listen to more "lies" was making him "feel sick". The Tribunal explained that it was necessary to be fair to both sides, this included hearing evidence from all relevant witnesses and allowing challenges to be made. The claimant asked whether if he left that meant he would "lose". The Tribunal explained that he would put his case at a disadvantage if he did not attend, as he would miss the opportunity to ask questions of the respondent's witnesses, challenging their evidence where he disagreed with it and to make a closing submission.

15. After taking an early lunch break to allow for the claimant to collect his thoughts and compose himself, he did not reappear. A call put to his mobile phone went to voicemail.

16. The Tribunal decided, applying the overriding objective, in particular seeking to put the parties on an equal footing, that it was appropriate to continue with the hearing. The claimant had given his evidence and been fully challenged in that regard by the respondent. Whilst the claimant was not in attendance to put a positive case to the respondent's witnesses, relevant questions could be asked by the Tribunal, including those which would ensure they had an opportunity to comment upon what the claimant had said.

Facts

17. The claimant was employed by Emprise Services plc ("Emprise") to work as Cleaning Supervisor, at the premises of its client, the respondent.

Prior History

18. The respondent's response to the claimant's claim included an assertion that he had spoken "negatively about some races and religions in previous conversations". No details of these alleged conversations were then provided. The first time any specific negative comments attributed the claimant were set out in writing, was in the respondent's witness statements. When challenged in cross-examination, the claimant denied many of these conversations. The claimant did, however, agree that he had discussed Israel and Palestine, asserting that he was anti-Zionist rather than anti-Semitic. The claimant says he is on the political left and a supporter of Jeremy Corbyn. Mr Cain describes himself as having a "fairly liberal social view while being fiscally and governmentally conservative".

19. We find that the claimant and Mr Cain did have robust "political" arguments at work, over which they fell out and at times were not on speaking terms. We find they discussed Israel and Palestine. They disagreed as to whether the claimant's views were or were not anti-Semitic. Beyond that particular context, we are not satisfied the claimant made any other negative comments which were related to race, or which the respondent's witnesses at the time believed were related to race.

27 January 2017

20. On Friday 27 January 2017, the claimant was present in the "Green Room" along with Jeremy Cain and Simon Francklin; Mr Franklin was Mr Cain's line manager.

21. The central factual dispute in this case concerns what was said on that occasion and, in particular, whether Mr Cain's remark that plantation owners slept with their slaves came before or after the claimant had cited the ethnicity of his first wife as evidence that he was not racist.

22. We will return to our findings of fact about the material conversation later in this decision.

Subsequent Events

23. An email of 28 January 2018, sent by the claimant to Darren Whiting, his line manager at Emprise, provided:

> **Hi Darren, I was accused of being a racist on Friday morning, which I take great offence to. He actually compared me to a plantation owner sleeping**

with his slaves, he also said I hated Jews which is completely untrue. All this was said in front of witnesses, witness being the stage manager, I worked for a children's charity for five years which operated in Africa, my first wife was African my partners Asian I have two mixed raced children who I'd defend with my life. Like I say I take great offence to this accusation and will be speaking to Derek and my union next week.

24. Mr Whiting met with the claimant on Monday 30 January 2017 to conduct an investigation meeting, the notes of which included:

JP: I asked Simon if he had heard what Trump had said (Donald Trump) Simon replied no then asked what was said.

I replied he was going to open the coalmines again (Beautiful clean coal) was the phase Donald Trump had used. I then said to Simon do you think Theresa May will reopen our coalmines, he replied we haven't got any to which I replied we have hundreds. Jeremy then said that he intended not to listen to him (Donald Trump)

DW: how was the mood in the room at this time?

JP: the mood was jovial Simon and I regularly chat, politics is often subject we cover

JP: Jeremy then said to me 'but you hate all races and you are anti-Semitic.

I replied to him 'some of my Jewish friends would disagree with you on that. I then tried to explain Zionism to him.

I then went on to explain that my first wife was African and was considering at one point living there.

My current wife is Asian and I have two mixed raced children, I am hoping to retire to Indonesia in the future

DW: how did Jeremy respond?

JP: Jeremy said 'yes the plantation owners used to sleep with their slaves

DW: how did you react to this comment?

JP: I said is that the best you can do? I then asked how much your parents had spent on your education.

DW: How did he respond?

JP: he said nothing

DW: was there anything else said.

JP: no but I was very angry I carried on talking to Simon about water bill is a council tax

25. There was then communication in this regard between Mr Whiting of Emprise and its client, the respondent. In an email of 30 January 2017, Elly Simpson-Duffy, the respondent's theatre manager, said:

> **Are you able to send the statement over. I have spoken to our theatre director and we are keen to get statements from staff on site.**

26. Mr Whiting provided a copy of the claimant's interview to the respondent. Contrary however, to Ms Stimpson-Duffy's email, the respondent took no statement from Mr Cain or any other witness.

27. Ms Stimpson-Duffy gave the claimant's interview to Mr Francklin and tasked him with speaking to Mr Cain about the matter. We note that Mr Francklin was himself a witness to this conversation and Mr Cain's line manager at the time.

28. Mr Franklin met with Mr Cain on 1 February 2017. There was then some discussion about the claimant's complaint and Mr Cain agreed to apologise. No notes were made of this meeting.

29. A letter of 2 February 2017 from Mr Aldridge to Mr Cain included:

> **I understand that you accept that one of your comments in the conversation has offended John and that consequently you should apologise to John for this offence.**
>
> **Having taken into account the fact you accepted and apologise for your comment and having reviewed your hitherto exemplary record as an employee with Wyvern Theatre Ltd I am writing to let you know that no further disciplinary action will be taken against you on this occasion.**

30. The letter to Mr Cain did not amount to a warning under the respondent's disciplinary procedure.

31. On 3 February 2017, Ms Stimpson-Duffy accompanied Mr Cain as he apologised to the claimant. Whilst the respondent made no note of what any witness said in response to the claimant's complaint, Ms Stimpson-Duffy has provided what appears to be a near verbatim note of the apology:

> **Jeremy said the following to John**
>
> **"John I wanted to come and apologise to you for the comment I made Monday. On reflection I know it was inappropriate and I'm sorry I offended you"**
>
> **John replied "I just can't work with you mate. I have mixed-race children"**
>
> **Jeremy responded "I know. It was said out of anger and it was not appropriate"**
>
> **John "Well I'm not working here, I am going. You weren't even in on the conversation and you batted in with that I think that's disgusting"**

John directed comments to me "Do you think it is acceptable to have people like that working for you"

I replied "I'm not discussing the comment with you I'm here to mediate while Jeremy apologises. I think he has come to you to apologise and that I do find acceptable"

John "Well I am not working anywhere with people like that. I have not taken legal advice yet but I will. I'm going to my union and you will hear from me. I'm not going to be treated like this. I'm leaving site now. I may be putting my job in jeopardy but I still need to go"

Ellie "okay"

I followed John to the service entrance door, in the bottom corridor engaged with me again saying" I don't think you understand Ellie. These people are unacceptable"

I replied "John I'm not willing to discuss the matter any further at the moment, Jeremy has trying to make and apologise for causing offence"

32. Asked by the Tribunal why she had declined to discuss the comment with the claimant, Ms Stimpson-Duffy said she was alone with him in a corridor and had felt threatened. Asked whether her note suggested the conversation with the claimant in a corridor came later, at the end of their exchange, Ms Stimpson-Duffy said the note was wrong. We find the note is accurate. Ms Stimpson-Duffy was with Mr Cain when the claimant asked her about the comment and we do not accept her explanation for declining to discuss it. Our conclusion is that Ms Stimpson-Duffy wished to close the matter and she was content with Mr Cain's apology.

33. The claimant was dissatisfied with the response to his complaint, believing that Mr Cain should have been dismissed or disciplined. The claimant did not feel able to work alongside Mr Cain and told his employer, Emprise, he could not do so. Following some discussion between the claimant, Emprise and the respondent, the claimant left the Wyvern Theatre and was, thereafter, assigned to work for a different client, albeit on a contract with fewer hours.

Material Conversation

34. Returning to the material conversation on 27 January 2017, we prefer the claimant's account of this, in particular as to the sequence. The claimant had begun a discussion with Mr Francklin in which he referred to a recent pronouncement of US President Trump about coal mines, before asking Mr Francklin whether he thought it likely that our Prime Minister would reopen British coal mines. Mr Cain then interjected expressing his surprise the claimant was supporting a Trump policy, as he was "a friend to the Jews and Israel" and told the claimant "you hate all races" and "you are anti-Semitic". The claimant sought to contradict Mr Cain's assertion by replying that "some of my Jewish friends would disagree with you", repeating that he

was anti-Zionist, before going on to add that his "first wife was African and [he] was considering at one point living there". Mr Cain's response to this latter statement was to observe that plantation owners used to sleep with their slaves.

35. Our reasons for preferring the claimant's evidence in this regard are:

35.1. the claimant was interviewed about this matter by his line manager on 30 January 2017, and his account recorded in writing at a time when his memory of it will still have been fresh, and this provided that Mr Cain's plantation owner remark came last in the relevant part of the exchange;

35.2. no written account was obtained from Mr Cain or Mr Francklin until January 2018 (a year after the event), when they made their statements in these proceedings and their recollection was then unsupported by any contemporaneous notes;

35.3. the claimant's interview record was provided to Mr Francklin shortly after it was taken and he did not then challenge its accuracy;

35.4. Mr Francklin was given the claimant's interview record for the express purpose of discussing the matter with Mr Cain, and Mr Cain did not then challenge its accuracy;

35.5. whereas Mr Cain and Mr Francklin now seek to explain the claimant's offence on the basis he misunderstood the difference between a comparison and an analogy, citing the difference in their respective levels of educational attainment as an explanation for the same, we were not so persuaded;

35.6. the claimant had put forward his own family circumstances as evidence that he was not racist, Mr Cain sought to discount that by giving the example of plantation owners taking slaves for sex - his point being a simple one, namely the fact of a sexual relationship did not preclude hate by the claimant for the race of his partner;

35.7. whilst Mr Cain was recorded by Ms Stimpson-Duffy as saying, on 3 February 2017, that he knew his comment was inappropriate, in evidence before us he could not explain why it was inappropriate, other than on the basis the claimant was offended;

35.8. whilst Mr Cain was recorded by Ms Stimpson-Duffy as saying, on 3 February 2017, that his comment "was said out of anger", in evidence before us he could not explain how the comment was an angry one, other than that he had been speaking quickly;

35.9. whereas Mr Cain said that he now thought the words he used to convey his apology were not accurate (in the sense they did not reflect his contemporaneous views), we find that in a moment of

anger he made the plantation owner comment knowing it would be hurtful given the claimant's personal circumstances;

35.10. beyond the fact of the claimant having taken offence, none of the respondent's witnesses were able to identify anything inappropriate in Mr Cain's comments save for the fact of the claimant having taken offence, which demonstrated a lack of candour and / or realism on their part.

36. The claimant was deeply angered and offended by the plantation owner remark. In cross-examination it was suggested he could not have been much bothered by it as he had gone on to discuss Council Tax, to which the claimant replied that if had not managed to keep up a conversation at that point with Mr Francklin, he would probably have hit Mr Cain. We accept the claimant's evidence on the intensity of his reaction, which was consistent with the steps he took in the workplace thereafter. Whilst the claimant explored a return to working at the respondent, ultimately, he was not satisfied by the steps they had taken in response to Mr Cain's behaviour and told his employer, he would not work at the respondent any more. The claimant took up an alternative assignment with fewer hours.

Law

37. We agree and adopt the summary of relevant law in the order of EJ Pirani on 9 November 2017, to which we have added some observations of our own on alternative claims and the burden of proof.

Direct Race Discrimination

38. Direct discrimination occurs when a person treats another less favourably than they treat or would treat others because of a protected characteristic. To decide whether an employer has treated a worker 'less favourably', a comparison must be made with how they have treated other workers or would have treated them in similar circumstances.

39. The worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to be treated differently from the way the employer treated – or would have treated – another person.

40. Direct discrimination can take place even though the employer and worker share the same protected characteristic giving rise to the less favourable treatment. The characteristic needs to be a cause of the less favourable treatment, but does not need to be the only or even the main cause.

41. Direct discrimination is unlawful, no matter what the employer's motive or intention, and regardless of whether the less favourable treatment of the worker is conscious or unconscious.

42. It is direct discrimination if an employer treats a worker less favourably because of the worker's association with another person who has a protected characteristic.

Harassment

43. As to harassment, the relevant provisions of the EqA are in section 26 which provides as follows:-

> **(1) A person (A) harasses another (B) if—**
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
> **(b) the conduct has the purpose or effect of—**
> **(i) violating B's dignity, or**
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **(2) A also harasses B if—**
> **(a) A engages in unwanted conduct of a sexual nature, and**
> **(b) the conduct has the purpose or effect referred to in subsection (1)(b).**
>
> **(3) A also harasses B if—**
>
> **(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,**
>
> **(b) the conduct has the purpose or effect referred to in subsection (1)(b), and**
>
> **(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.**
>
> **(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.**

44. The Equality and Human Rights Commission's Code of Practice on Employment ('the EHRC Employment Code') notes that unwanted conduct can include 'a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour' - para 7.7.

45. The code also provides at para 7.9 that unwanted conduct 'related to' a protected characteristic has a broad meaning in that the conduct does not have to be because of the protected characteristic.

46. The second limb of the statutory definition of harassment requires that the unwanted conduct in question has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him or her.

47. Accordingly, conduct that is intended to have that effect will be unlawful even if it does not in fact have that effect; and conduct that in fact does have that effect will be unlawful even if that was not the intention.

48. Some of the factors that a tribunal might take into account in deciding whether an adverse environment had been created were noted in **Weeks v Newham College of Further Education EAT 0630/11**. Mr Justice Langstaff, President of the EAT, held that a tribunal did not err in finding no harassment, having taken into account the facts that the relevant conduct was not directed at the claimant, that the claimant made no immediate complaint, and that the words objected to were used only occasionally. However, he noted that tribunals should be cautious of placing too much weight on the timing of an objection, given that it may not always be easy for an employee to make an immediate complaint. Langstaff P also pointed out that the relevant word here is "environment", which means a state of affairs. Such an environment may be created by a one-off incident but its effects must be of longer duration to come within what is now section 26 EqA.

49. A claim brought on the basis that the unwanted conduct had the purpose of violating the employee's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment obviously involves an examination of the perpetrator's intentions. As the perpetrator is unlikely to admit to having had the necessary purpose, the tribunal hearing the claim will need to draw inferences from the surrounding circumstances. If the conduct is found to have had the purpose of violating dignity, it does not matter that it did not actually have that effect. However, as noted by Underhill P in **Richmond Pharmacology v Dhaliwal 2009 ICR 724, EAT**, it will be rare for a tribunal to find that conduct has the purpose but not the effect of violating dignity.

50. In **Warby v Wunda Group Plc** Langstaff P quoted from a Judgment of HHJ David Richardson at paragraph 16 as follows:

> **"We wish to emphasise this last question. The provisions to which we have referred find their place in legislation concerned with equality. It is not purpose of such legislation to address all forms of bullying or antisocial behaviour in the workplace. The legislation therefore does not prohibit all harassment, still less every argument or dispute in the workplace; it is concerned only with harassment which is related to a characteristic protected by equality law…**
>
> **In our judgement, when a Tribunal is considering whether facts been proved from which it could conclude that harassment was on the grounds of sex or race, it is always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on the grounds of sex or race. The context may, for example, point strongly towards or strongly against a conclusion that harassment was on the grounds of sex or race. The Tribunal should not leave the context out of**

> **account at the first stage and consider it only as part of the explanation at the second stage, after the burden of proof has passed…"**

51. When interpreting "intimidating, hostile or humiliating environment for the Claimant" as Elias LJ explained in **Land Registry v Grant [2011] ICR 1390** at [47]: "Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

Alternative Claims

52. Pursuant to EqA section 212(1), "detriment" does not, subject to subsection (5), include conduct which amounts to harassment. In most cases, therefore, a claimant cannot succeed under both EqA sections 13 and 26, with respect to the same factual matter. The claimant may pursue claims in the alternative, but a Tribunal cannot find that given conduct amounts to direct discrimination and harassment.

Burden of Proof

53. The burden of proof is addressed in EqA section 136, which so far as material provides:

> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision occurred.**

54. When considering whether the claimant has satisfied the initial burden of proving facts from which a Tribunal might find discrimination, the Tribunal must consider the entirety of the evidence, whether adduced by the claimant or the respondent; see **Laing v Manchester City Council [2006] IRLR 748 EAT**.

55. Furthermore, a simple difference in treatment as between the claimant and his comparators and a difference in protected characteristic will not suffice to shift the burden; see **Madarassy v Nomura [2007] IRLR 246 CA**.

56. The burden of proof provisions will add little in a case where the ET can make clear findings of a fact as to why an act or omission was done or not; see **Martin v Devonshires Solicitors [2011] IRLR 352 EAT**, per Underhill P:

> **39. This submission betrays a misconception which has become all too common about the role of the burden of proof provisions in discrimination cases. Those provisions are important in circumstances where there is room for doubt as to the facts necessary to establish discrimination generally, that is, facts about the respondent's motivation (in the sense defined above) because of the notorious difficulty of knowing what goes on inside someone else's head "the devil himself knoweth not the mind of man" (per Brian CJ, YB**

> **17 Ed IV f.1, pl. 2). But they have no bearing where the tribunal is in a position to make positive findings on the evidence one way or the other, and still less where there is no real dispute about the respondent's motivation and what is in issue is its correct characterisation in law […]**

Statutory Defence

57. An employer will not be liable for unlawful acts committed by an employee if they can show that they took 'all reasonable steps' to prevent the employee acting unlawfully. It could be a reasonable step for an employer to have an equality policy in place and to ensure it is put into practice. It might also be a reasonable step for an employer to provide training on the Act to employees. (Part 2 of the Code provides detailed explanations of the types of action employers can take to comply with the Act.)

Liability for Discriminatory Acts

58. The EqA contains specific provisions prohibiting discrimination against contract workers (such as agency workers) by the end-user of their services (known in the Act as a 'principal'). S.41 EqA provides that a principal must not discriminate against or victimise a contract worker. Section 41(5) defines a 'principal' as a person who makes work available for an individual who is (a) employed by another person and (b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it). S.41(6) defines 'contract work' as work of the type mentioned in S.41(5), i.e. work made available by a principal. S.41(7) goes on to define a 'contract worker' as an individual supplied to a principal in furtherance of a contract to which the principal is a party.

59. According to the Explanatory Notes, S.41 is designed to replicate the effect of previous legislation, while codifying case law to make it clear that there does not need to be a direct contractual relationship between the employer and the principal for the protection to apply (see para 148). This point is further emphasised in the EHRC Employment Code, which states: 'There is usually a contract directly between the end-user and the supplier, but this is not always the case. Provided there is an unbroken chain of contracts between the individual and the end-user of their services, that end-user is a principal and the individual is therefore a contract worker' — para 11.8.

Conclusion

Harassment

60. In light of EqA section 212(1), we consider firstly whether the claimant's harassment claim succeeds.

61. Miss Peacock conceded the conduct complained of was unwanted with EqA section 26(1)(a).

62. As to whether that unwanted conduct related to a protected characteristic, namely race, we are satisfied it did. The conversation initiated by the claimant was about President Trump, US coal mines and UK domestic coal policy. By his intervention, Mr Cain steered the discussion, sharply, into the arena of race. The first two comments related to race (the claimant's alleged hatred of all races and his anti-Semitism). Mr Cain's comment about plantation owners related, directly and deliberately as we have found, to the race of the claimant and the race of his first wife.

63. The next question is whether the conduct had the purpose or effect within EqA section 26(1)(b). We do not find that Mr Cain had such a purpose. Mr Cain said, and we accept, that he found arguing with the claimant and the dismissal of his own arguments, a frustrating experience. We think Mr Cain made this (very ill-judged) plantation owner comment, in the heat of the moment, without thinking though quite how hurtful and offensive it might be. Whilst it was intended to be hurtful, Mr Cain did not intend to go so far as to violate the claimant's dignity, or create an intimidating, hostile, degrading, humiliating or offensive environment.

64. We are satisfied, however, that Mr Cain's plantation owner comment had the effect of creating an offensive environment for the claimant. We do not make this finding lightly. Whilst the verbal exchange was a one-off, its effects were long-lasting. The claimant was deeply angered and offended by Mr Cain's remark. The comment was received as an attack, not only on the claimant's attitude toward the race of his first wife, but by extension also to the race of his own children. The claimant sought to have this situation remedied by raising a complaint with his line manager. Although an apology was, thereafter, forthcoming from Mr Cain, we find the utility of this as a remedial measure was undermined by Ms Stimpson-Duffy closing down any discussion of the offending remarks and the lack of a disciplinary sanction being imposed. This approach by the respondent would, and did, tend to convey to the claimant that the respondent viewed Mr Cain's conduct as a minor matter. In these circumstances, the claimant felt unable to continue working at the respondent's premises alongside Mr Cain, requesting an alternative assignment even though the hours available elsewhere were fewer. We are not persuaded the claimant's perception or reaction in this regard was unreasonable.

65. Accordingly, we find the claimant was subject to unlawful harassment related to race.

Direct Discrimination

66. Given our finding that the behaviour complained of amounts to harassment, pursuant to EqA section 212(1), it cannot also amount to a detriment for the purposes of the claimant's claim of direct discrimination, which must, therefore, fail. In case, however, we are wrong in finding the conduct amounted to harassment, we have gone on to consider what our

findings would have been under EqA section 13 (as if the EqA section 26 claim had failed or never been pursued).

67. The claimant was deeply angered and offended by the comments made, especially that about plantation owners. The latter comment suggested the claimant's hate of other races extended to his first wife and, as above, could also be applied to his children. The claimant could, reasonably, and did consider himself at a disadvantage in the workplace thereafter. This would, plainly, amount to a detriment.

68. As to whether the detriment was less favourable treatment because of race, with respect to the first two comments about hating all races and being anti-Semitic, we are not satisfied these were said because of race (in a relevant sense). Had Mr Cain worked alongside a hypothetical black colleague who expressed himself in like fashion as did the claimant and with whom there were similar arguments, we accept Mr Cain may well have accused that person of being racist and / or anti-Semitic. We do not, however, believe that Mr Cain would have made the plantation owner comment to such a comparator (in evidence he said he would have done). Mr Cain has emphasised his considerable knowledge of American politics and the Antebellum South, and we do not believe, even in a moment of anger, he would have sought to compare a black colleague to a white slave owner. We should also say that in this context, the respondent's attempt to distinguish a comparison from an analogy is a distinction without a difference.

69. Further and separately, Mr Cain's comment was made specifically because of the race of the claimant and that of his first wife. The claimant had referred to his wife's ethnicity as evidence he was not a racist. Mr Cain sought to discount the claimant's marriage as being inconsistent with his alleged racism. Mr Cain's words were tailored to the ethnicity of the claimant and his wife, a white man and black woman, the parallel being the white slave owner and black slave. Thus, on Mr Cain's argument, the claimant's marriage was no more a bar to race hate, than was the plantation owner taking a slave to his bed.

Remedy

70. We have reminded ourselves of the guidance in **Vento v Chief Constable of West Yorkshire Police (No. 2) [2003] IRLR 102 CA** and the Presidential Guidance on awards for injury to feeling issued on 5 September 2017.

71. We believe that an award at the upper end of the lower **Vento** bracket is appropriate. The claimant was deeply angered and offended by the plantation owner comment. He sought redress within the respondent and did not achieve the same. The claimant was sufficiently upset by this turn of events that he felt unable to continue to work in the respondent theatre. By his answers and demeanour when giving evidence, and his unwillingness to

listen to the respondent's denials, we are satisfied that a sense of hurt continues.

72. The claim was issued in June 2017, at which time the Office for National Statistics provides the RPI All Items Index was 272.3. Accordingly, the upper boundary of the lower band is £5,000 / 178.5 x 272.3 = £7,627.45.

73. We consider that at sum of £6,500 is appropriate to compensate the claimant for his injury to feeling.

Interest

74. The claimant is entitled to interest upon his award at the rate of 8% per annum:

74.1. period from 27 January 2017 to 3 April 2018 is 431 days;

74.2. 431 / 365 x 8% x £6,500 = £614

Total Award

75. The claimant is entitled to compensation of £7,114.

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Employment Judge Maxwell

Date: 3 April 2018

JUDGMENT SENT TO THE PARTIES ON

11th April 2018

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FOR THE SECRETARY TO THE TRIBUNALS