EMPLOYMENT TRIBUNALS

Claimant: Mr M Carradice

Respondent: Springfield Bus and Coach Company Ltd

Heard at: Liverpool **On:** 11, 12, 13, 14 and 15 June 2018

Before: Employment Judge Horne

Members: Mr M Gelling
Mrs C Ormshaw

REPRESENTATION:

Claimant: Mr S Pinder, solicitor
Respondent: Mr R Aireton, solicitor

JUDGMENT having been sent to the parties 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

Preliminary

1. Part of this claim is about the use of offensive racist language. For some, the very appearance of such words on a page can be shocking, even when it is to report what someone else has said. Perhaps for this reason it is often thought preferable, when referring to some racially offensive words, to use abbreviations, such as "the N-word" or "n…..". Whilst recognising the extreme care with which one must tread when repeating racist language, we have decided that we cannot adequately explain our decision without reproducing the words themselves. Different derivatives of words were used at different times by different people and it is important to distinguish between them. We have tried, to the greatest extent possible, to avoid repeating racist language gratuitously.

Complaints and issues

Complaints

2. By a claim form presented on 30 of June 2017, the claimant brought the following complaints:

   2.1. direct discrimination because of race, contrary to sections 13 and 39 of the Equality Act 2010 ("EqA");

   2.2. harassment related to race, contrary to sections 26 and 40 of EqA; and

   2.3. victimisation, contrary to sections 27 and 39 of EqA.

Harassment

3. The claimant is, and self-describes as, black.

4. The occasions on which the respondent was alleged to have harassed the claimant were set out in paragraphs (a) to (h) in his document headed "Particulars of Claim". These were:

> "a) Not long after starting employment the Claimant was told by a manager that a colleague in the Respondent's garage is referred to as "nig nog".
>
> b) Between August and October 2016 a colleague of the Claimant had referred to a job in the Black Country and had stood up and said, "Right I am off to the Black Country, sorry Mike". The Claimant had responded by saying that not everything black relates to him.
>
> c) The Claimant was assaulted by a work colleague on 12 December 2016 in the workplace and he believes this was motivated by factors related to his race. This matter was canvassed fully within the grievance process and the Claimant asserts that the conclusions reached were acts of less favourable treatment connected to his race.
>
> d) Between June and July 2016 work colleagues had discussed in front of the Claimant watching videos of Alf Garnett (Until Death Us Do Part) and Love Thy Neighbour programmes known to include material which offends on grounds of race.
>
> e) The Claimant undertook a driving duty to Chester Zoo and when he returned he was informed by a work colleague that he was being "ripped to bits" (by colleagues). The Claimant understood this to involve comments being made of a racist nature because the Claimant is black and there are connections being made to animals in a zoo.
>
> f) The Claimant was treated in such a way as to exclude him from work related activities, such as using the break room and attending social events. The Claimant was treated differently by being subject to unfair criticism as to whether he worked hard enough and colleagues accusing him alone of not pulling his weight. This was entirely incorrect.

g) After the December 2016 assault the Claimant was speaking to a colleague about racism when another colleague came into the room. The colleague insisted upon telling a story which was about a black man, referred to as a "darkie". The story concerned a black man wearing dark clothes on a dark night. The Claimant had asked the colleague not to tell the story and had said he would report him. The Claimant's protestations were ignored. In relation to this allegation, the grievance outcome included a statement that the comments were not racially motivated, which is simply perverse."

5. It was not put to any of the alleged harassers that they had acted for the purpose of violating the claimant's dignity or creating the relevant adverse environment. We have to decide:

   5.1. whether the conduct occurred as alleged;

   5.2. whether it was unwanted;

   5.3. whether it was related to race; and

   5.4. whether it had the purpose or effect of creating the environment described in Section 26 of EqA (taking into account all the circumstances including the claimant's perception and whether it would be reasonable for the claimant to perceive it in that way).

6. For any act alleged to have been done before 3 February 2017 we also had to consider whether it was part of a single continuing state of affairs or – in the statutory language an act extending over a period – which ended on or after 3 February 2017 or whether it was one of a series of isolated events. If it was not part of an act extending over a period we had to consider whether or not it was just and equitable to extend the time limit.

7. Whilst denying that any of the individuals harassed the claimant, the respondent accepted that, in the event of any of the named individuals being found to have harassed the claimant, the respondent would be liable for that harassment.

<u>Direct discrimination</u>

8. The complaint of direct discrimination was based on the same factual allegations as the complaint of harassment. Each incident of alleged harassment was also said to have been less favourable treatment because of the claimant's race. The issues (where we think it necessary to determine them) are:

   8.1. whether or not the claimant was treated in the way in which he alleged; and

   8.2. if so, what was the reason why he was treated in that way? Was it because he is black? Or was it for some other reason?

9. The complaint of direct discrimination did not stop there. In addition, the claimant alleged that he was less favourably treated than a white person would have been treated in the following ways:

   9.1. Mr Howard did not uphold his grievance.

   9.2. Mr Howard dismissed the claimant.

   9.3. Mr Howard decided that an investigation meeting should take place in the claimant's absence.

9.4. Mr Howard decided to conduct an investigation meeting before awaiting the conclusions of a grievance appeal.

9.5. Mr Howard decided to dismiss the claimant without a disciplinary hearing.

9.6. Mr Howard decided to dismiss the claimant based on a report which introduced new complaints about the claimant's conduct, about which the claimant had not had the opportunity to comment.

9.7. Mr Howard failed to send the claimant documents relevant to the issues that had been determined in his grievance.

9.8. Mr Howard failed to disclose the records of conversations between the consultant who heard the appeal and witnesses to whom she had spoken.

9.9. Mr Howard rejected the claimant's appeal, despite there being errors in the report on which his decision was based.

10. It ought to be apparent that, for these allegations of discrimination, the only person alleged to have acted with the discriminatory motivation was Mr Howard.

11. There was no dispute that Mr Howard had treated the claimant in the ways described above. The only issue for us to determine was, in each case, what was the reason why Mr Howard acted as he did? Was it because the claimant is black? Or was it for some other reason?

Victimisation

12. It was common ground that the claimant did a protected act by raising a written grievance on 7 February 2017 complaining of race discrimination. It is the claimant's case that Mr Howard's treatment of the claimant (as set out in paragraph 9 above) were improperly influenced by the fact that the claimant had alleged race discrimination in the claimant's grievance.

13. This complaint raised once again the issue of why Mr Howard treated the claimant as he did. Was his decision-making influenced by the discrimination allegations? Or were his actions wholly for other reasons?

Evidence

14. We considered various documents in an agreed bundle, which we marked "CR1", and in a supplemental bundle ("C1") submitted by the claimant. A variety of further documents was passed to us during the course of the hearing and we also took these into account.

15. The claimant gave evidence on his own behalf and called Ms Kassim as a witness. The respondent called Mr Howard, Ms Franklin, Mrs Hughes, Mr McAllister-Partridge, Mr Mullen and Mr Stonehouse. All of these witnesses confirmed the truth of their written statements and answered questions.

16. At the outset of the hearing, Mr Aireton for the respondent indicated that he was not proposing to call Mr Mitchell or Mr Garside as witnesses. He asked the tribunal to read records of what these two individuals had said during interviews conducted under the respondent's internal procedures. Mr Pinder, representing the claimant, positively assented to this course of action, but raised an issue about the "status" of the interview records. They ought not, he submitted, to be treated as witness statements, but merely as documents. Warming to his theme, he took us through some of the procedural history of this case and the

circumstances in which the documents came to be disclosed late on in the proceedings. We did not think that this was a dispute of any significance. It did not matter what label we attached to the documents. There was nothing to stop us from considering assertions made by Messrs Mitchell and Garside, as recorded in those documents, as evidence of the truth of their contents. Late disclosure, and the absence of the two individuals from the witness table, were factors that merely affected the weight that we were able to place on those assertions. As it was, we were not able to place much reliance on what they had said in relation to matters of controversy, especially where their assertions appeared to be self-serving.

17. This is a convenient opportunity for us to record, in broad terms, what we made of the various witnesses from whom we heard:

    17.1. First of all the claimant himself. He spoke in a confident and apparently credible manner. His evidence was vague about the dates on which things had happened. It was very difficult, based on his evidence alone, to place events into anything approaching a precise timeline. He was, however, very specific in his recollection of the incident on 12 December 2016. To the extent that it was necessary to make findings, we were able to rely on his recollection of that incident.

    17.2. Ms Kassim was able to recall events with which she was concerned in some detail. Her evidence was straightforward when it came to telling us what happened and when. Where any part of her evidence depended on impression or opinion, we found it less reliable. This was because, at times, her evidence lacked objectivity. For example, Ms Kassim could not see anything threatening about the claimant's Facebook post.

    17.3. Mrs Hughes struck as a straightforward witness. So did Mr McAllister-Partridge.

    17.4. As with Ms Kassim, Ms Franklin struck us as giving us a truthful account of the events as she saw them, but also appeared from the undisputed evidence to have taken sides. She had obviously fallen out with the claimant. Again, where it came to her impressions and opinions, we had to be careful.

    17.5. We now turn to the evidence of Mr Howard. We could not accept his evidence about when he was first aware of the claimant's Facebook post. He told us that he was aware of it in March 2017 during the grievance investigation. In fact, he must have known from February 2017 at the earliest not just that the Facebook post existed, but also that its contents were menacing. One part of his evidence, however, came across compellingly. He told us that he relied unquestioningly on the advice and recommendations given to him by Peninsula's human resources service, HRF2F. He said that he had "paid a lot of money" to Peninsula for their service, that he trusted the three independent professionals whom they had sent. His blind faith in Peninsula was also apparent from quite spontaneous throwaway phrases when answering questions on different topics. When asked about his reason for dismissal, his reply was, "I was led to believe it was mainly because of the Facebook post". That strongly suggests that he had entirely delegated the decision about whether to dismiss or not to somebody else. The idea that he had placed total reliance Peninsula was not a recent invention. Each time

he informed the claimant of an important decision (such as dismissal), he simply forwarded the HRF2F report with a covering letter stating that the report "represents" his decision. The covering letters showed no hint of any analysis or independent scrutiny of the recommendation in the HRF2F report.

17.6. Mr Mullen came across to us as credible in the manner in which he gave his evidence. His evidence clashed with that of the claimant. We could not resolve the conflict simply by comparing the manner in which the two witnesses gave evidence. What we had to decide which of the competing narratives was inherently more likely.

17.7. The final witness from whom we heard was Mr Stonehouse. We had to treat his evidence with some caution. His witness statement suggested strongly that he knew that the nickname "Nig-nog" could at the very least be understood as being racist. In his oral evidence, however, he told us that he did not know of any possible meaning of the word "Nig-nog" other than a nickname for Mr McCall, or any possible connection between "Nig-nog" and the appearance of dirty skin. We found it much more likely that he did know that this phrase could have a racist meaning and that he had been trying to play it down in giving his evidence to us.

Facts

18. The respondent is a bus company. Its managing director is Mr Ian Howard. His buses operate from a depot in the Warrington area.

19. The claimant, who is black, was employed by the respondent as a bus driver from 1 October 2015. He was one of three employees of another bus company who were recruited at the same time. Another of these was Mr McGlinchey. All three were interviewed by Mr Howard and Mr Gareth Hughes. Mr Howard approved the decision to offer the claimant a job, knowing of the claimant's ethnicity.

20. The claimant was provided with a copy of the respondent's Employee Handbook. Within the Handbook was the respondent's written disciplinary procedure. At paragraph F1, the procedure listed a scheme of warnings for various levels of misconduct. Paragraph F2 stated, "We retain discretion in respect of the disciplinary procedures to take account of your length of service and to vary the procedures accordingly. If you have a short amount of service you may not be in receipt of any warnings before dismissal".

21. Prior to the claimant's arrival, the respondent's workforce was exclusively white. One driver, Mr McCall, had previously been a regular visitor to the garage as an enthusiast for restored vehicles. He would work on bus engines and emerge covered in dirt and grease. His appearance earned him the nickname, "Nig-nog".

22. Within a few weeks of the claimant joining the respondent, a manager, Mr McAllister-Partridge, asked the claimant for a word. Mr McAllister-Partridge told the claimant that Mr McCall had been called "Nig-nog" by his colleagues. He added that he had instructed staff not to carry on using this nickname. If the claimant heard anyone say it, he should report it to Mr McAllister-Partridge. At no time, from that conversation until Mr McAllister-Partridge left the respondent in 2016, did the claimant report to him that he had heard the name, "Nig-nog" or any other racist language. As these reasons go on to illustrate, however, it is beyond doubt that the use of this nickname continued.

23. The claimant quickly built up a good reputation amongst his colleagues. He kept his bus impeccably clean, he had an excellent rapport with customers and was known as a "grafter" for his willingness to help out other drivers, even after the end of his shift. At least for the first few months, the claimant was also welcomed socially. He went with other drivers on a karting trip on 14 May 2016. He joined a WhatsApp group as part of the staff lottery syndicate. He struck up a friendship with Ms Lorraine Franklin, another driver. When the claimant organised a bus trip to the Notting Hill Carnival in August 2016, Ms Franklin's family joined the claimant's family on the trip.

24. On 15 June 2016, Ms Franklin sent a message to the claimant asking to talk to him. She added, "…just me being stupid I suppose, but then something that involved you upset me…sent me over the edge a bit." They then spoke to each other, following which the claimant messaged Ms Franklin to say "thanks for letting me know about the situation but don't worry about the lads at work talking about me I can handle that but they shouldn't be making you feel like that…" Ms Franklin's reply was, "Thank you for talking sense… I just need to get a grip…xxx"

25. During her oral evidence, Ms Franklin was asked about this exchange. In order properly to understand Ms Franklin's evidence on this point, it is necessary to set out some of the background. It was Ms Franklin's evidence to us that the claimant used to play music in which the artists used the word, "nigger". She told us that she and Mr McGlinchey had challenged the claimant and shared their view that the word was unacceptable, even in that context. Because of the claimant's behaviour (of which this was the only example Ms Franklin gave), other drivers had started to say negative things about the claimant. According to Ms Franklin's oral evidence, it was these comments about the claimant's behaviour that prompted her to send the initial message on 15 June 2016. In our view, this part of Ms Franklin's evidence cannot be right. Her message cannot have been referring to criticism of the claimant's choice of music. On her own evidence, such criticism would have been justified and Ms Franklin would have stood by it. Following their talk Ms Franklin would have been unlikely to say, "Thank you for talking sense".

26. Before leaving this topic, we ought to make clear that we were unable to resolve the clash of evidence about whether the claimant's music actually did include the use of the word, "nigger". In our view it was not determinative. It is quite possible that a person might appreciate music from artists of a particular heritage and culture, even if the music included that word, and yet be appalled by the use by work colleagues of the language of which this claimant complains.

27. In about June 2016 the claimant and Mr McGlinchey were in the break room. So were Mr Mullen, Mr Ford and Mr Stonehouse. A conversation took place about old television programmes. There are competing versions of how the conversation started, but it is clear that the subject came round to the comedy series *Till Death Do Us Part* and *Love Thy Neighbour.* Those programmes were popular in the 1970s and 1980s. *Till Death Us Do Part* featured the central character, Alf Garnett. Nowadays, both these programmes are notorious for their stereotypical portrayal of black people and the use of language about minority racial groups that is now widely regarded as offensive. There is a clash of evidence as to exactly what happened. On the one hand there is claimant's version, supported by the account of Mr McGlinchey given to the investigation. Set against that, we have to consider the version of Mr Mullen and Mr Stonehouse. Mr Mullen told us that he did search for "Alf Garnett" on his phone, but it was not to try to find videos of those

programmes. Rather, he said, it was to settle a debate about which football team Alf Garnett supported. In his witness statement, Mr Mullen stated that he had said, "You can't get away with it in this day and age". That must have been a reference to the racially offensive content of the television programmes and not to Mr Garnett's football allegiance. We also question why, if the debate was about Alf Garnett as a football supporter, anybody would have mentioned *Love Thy Neighbour,* in which Alf Garnett did not feature at all. What actually happened, we find, is that Mr Mullen and others were looking for the videos with a view to playing the racist content. They did not mean to cause offense, but that was the effect it had on the claimant. He thought his dignity was being violated. We must stress that this finding is not the same as saying that Mr Mullen and Mr Stonehouse were themselves "racists", in the sense that the word is commonly understood. The claimant's solicitor did not put to them that they were. Our finding is about their behaviour and the effect it had.

28. On 11 August 2016, the claimant was in the office when he overheard Mrs Hughes talking about Mr McCall. Out of habit she referred to him as "Nig-nog." When she realised that the claimant had heard the nickname, she was mortified. She Whatsapped him to say,

> "…I'm really sorry for my inappropriate comment before…I'm mortified beyond belief…as it's always me that says it's wrong…then it's me that blurts it out…I'm really really sorry if I offended you. It wasn't my intention. Please accept my apologies [sad face emoji]"

29. The claimant replied, accepting Mrs Hughes' apology and adding that he had "really debated about leaving the company as the amount that has happened in the last year is a joke". Later in the WhatsApp conversation, he clarified, "I was talking about how much racism I've faced in the last year at the company." They agreed to draw a line under the episode and their subsequent message exchanges were friendly.

30. On an occasion which were unable to pinpoint in time, Mr McGlinchey was in the break room when he heard a colleague use the nickname, "Nig-nog" and challenged him. Mr McGlinchey's account to the subsequent investigation was that the colleague who had uttered the word was Mr Mullen. According to Mr McGlinchey's investigation interview, when Mr McGlinchey challenged Mr Mullen, he sought to defend his use of the word, saying it was only a name. Unfortunately, none of this was put to Mr Mullen in cross-examination. We could not, therefore, fairly make a finding that it was Mr Mullen who said the word on that occasion. We do think it likely, however, that Mr McGlinchey did hear someone say "Nig-nog" in the break room. Though we did not hear directly from Mr McGlinchey, we have no reason to think that he would have wanted to lie about hearing a racist word in the workplace. It is not an easy thing to have to tell one's employer about.

31. There was another time when the claimant was walking along the side of a bus and heard Mr Stonehouse talking to a colleague who was covered in oil. Commenting on his dirty appearance, Mr Stonehouse said, "You'll be after Nig-nog's job". The claimant immediately took objection to the nickname. Mr Stonehouse apologised, saying he did not mean it to be racist. We are quite sure that Mr Stonehouse did not mean to cause offence. The word, "Nig-nog" just slipped out. Contrary to his oral evidence to us, we think he knew that the name could have a racist meaning. We find that he thought it was acceptable to use it as a nickname because Mr

McCall was white and, in the days when everyone else was white, nobody had minded.

32. On a day in August, September or October 2016 (nobody could be more specific than that), Mr Mullen was in the break room with a group of other drivers, including the claimant. Mr Mullen said, to the group as a whole, "I'm off the Black Country." We find that, immediately upon having uttered these words, Mr Mullen looked at the claimant and said, "No offense, Mike" or "Sorry, Mike". The claimant looked up and replied, "Not everything black is about me." Our finding is controversial. It involves preferring the claimant's evidence over the account of Mr Mullen, which is that the claimant looked up disapprovingly immediately on hearing the words, "Black Country", prompting Mr Mullen to apologise. We prefer the claimant's version because it seems to us inherently more plausible. We can quite easily see Mr Mullen having immediately turned to the claimant, possibly out of well-meaning panic at having used the word "black" in the presence of a black person and not knowing the correct thing to say. In our experience, this kind of mentality can be pervasive among groups who are unused to diversity and have not been properly trained. Quite possibly through no fault of their own, they often do not know the right thing to say. On the other hand, Mr Mullen's version seems to us to be unlikely. First, we think that Mr Mullen would not have apologised to the claimant for overreacting to the words, "Black Country". It is more likely in our view that Mr Mullen would have simply said that he was talking about a place. Second, the claimant had no reason to look askance at the mere mention of the Black Country. The claimant had relatives in Birmingham. He knew that the Black Country was an area of the West Midlands and had nothing to do with race. What offended him was Mr Mullen singling him out and associating him, even with apologetic words, with things that were black. He felt that Mr Mullen's remark created an offensive environment.

33. In late 2016 there was a staff-management meeting. Again, the date is unclear. Amongst the items on the agenda was drivers' pay. Mr Stonehouse, as lead driver, attended the meeting to represent the drivers in the negotiations. The claimant was invited into the meeting to support Mr Stonehouse. Ms Franklin was also present. The claimant walked out part-way through the meeting. Exactly why the claimant walked out – and whether anybody in particular was to blame – is something of a mystery. We accept, however, the evidence from a number of sources that, from the time of the meeting, the claimant's relationship with other members of staff deteriorated. The claimant would chose to have breaks at different times from other drivers. He already had reasons for preferring not share the break room with the other drivers. He did not like fumes from e-cigarettes and he found that insects tended to be attracted into the room. Increasingly, however, he had another reason for staying away. There was a sour atmosphere in the break room. The claimant noticed it and so too did Mr McGlinchey, who told him that he ought not to go in because of things being said that could upset him.

34. In the morning of 12 December 2016 the claimant walked into the break room to see three colleagues standing in front of the notice board. They were Mr Nick Garside, Mr Leigh Mitchell and a man known as Ben. On the board was a note about drivers' pay and the three men were discussing it. Mr Mitchell told the claimant to go into a meeting with management and sort it out. The claimant replied along the lines of "It's nothing to do with me". Mr Mitchell said that it was not for his own benefit: he was self-employed and his own terms had already been

negotiated. The claimant said "what the fuck has it got to do with you then?" Mr Mitchell's reply was, "Your attitude stinks". Mr Garside said something along similar lines.

35. At this point there was a physical altercation between Mr Mitchell and the claimant. Mr Hughes entered the room and stood between them to try and keep them apart. Both the claimant and Mr Mitchell were visibly very angry.

36. The only person to describe the encounter in oral evidence was the claimant himself. He told us that Mr Mitchell had grabbed him round the neck and pinned him to the wall. In the words the claimant used when interviewed later, the claimant "got him off non-forcefully and walked straight out". We have also seen written accounts from other people who tell a much different story. According to them, the claimant moved aggressively towards Mr Mitchell, possibly with his fists clenched, or possibly not, depending on which version one reads. Seeing the claimant moving towards him, Mr Mitchell pushed him away and then pushed him claimant a second time. Mr Hughes then intervened. We have considered whether we need to resolve this clash of evidence. In our view we do not. This is because the dispute does not affect the essential question for us to decide, which is whether or not Mr Mitchell's conduct was related to race. Whatever the precise mechanics of Mr Mitchell's use of force – whether two pushes or a grab round the neck – we are quite satisfied that there was nothing to connect it to the fact that the claimant is black. Mr Mitchell's behaviour was quite plainly prompted the heated argument that he and the claimant were having, which was about who should take on management about drivers' pay.

37. After the incident the claimant went home. At 11.58am he posted a message on Facebook. At the time, his privacy settings were configured so that the message was visible to all his Facebook friends, including Mr Mullen. The message read:

> "So today i was physically assaulted at work, grabbed around the neck shoved against a wall and pushed. My first thought was to grab the screwdriver that was in my pocket and turn him into a dot to dot image and go crazy on him, but somehow god saved that coward and kept me calm.
>
> All i could think of was how thankful that i didn't open my hatred box fully on him.
>
> #Bethebiggerman #ilovebeingme #youarelucky"

38. The same day, the claimant reported the incident to the police and complained that Mr Mitchell had assaulted him. The police recorded the incident and began an investigation. We heard a considerable amount of evidence about how the police recorded the claimant's complaint, and how it ought to have been recorded. The point of contention was whether or not the police should have categorised the incident as a hate crime. Without wishing to trivialise the importance of this issue to the claimant, we do not see how it helps us to determine the issues we have to decide. The label that the police attach to a reported offence, and their methodology for deciding upon it, does not alter the underlying facts of the incident itself. What we are concerned with are the facts themselves, to the extent that they might connect what happened to the claimant's race. In our view, the vivid evidence of the build-up points strongly towards race having nothing to do with the incident.

39. The next day, 13 December 2016, the claimant returned to work. He spoke to Mr Hughes and Mr Howard. He told them that he had been assaulted, that he was taking the matter out of their hands and going to the police. There is a dispute between the claimant and Mr Howard as to what else the claimant told them. As to this, we find that the claimant did say to Mr Howard and Mr Hughes that there was a history of racist behaviour, but he did not describe it in detail. Our reason for this finding is that, by December 2016, the claimant had started making generalised assertions of racism, so we think it unlikely that the claimant would have kept quiet about it altogether. On the other hand, his descriptions of the sequence of events during these proceedings has been so vague that we think it unlikely that the claimant mentioned much in the way of specific details.

40. At some point during 13 December 2016, Ms Franklin saw the claimant walking across the yard. He had a screwdriver in his hand. She thought – whether accurately or not – that the claimant was smirking at her and looking her up and down.

41. The claimant met with police officers to give a witness statement. Mr Howard cooperated with the police investigation by releasing Mr Mitchell and Mr Garside to attend the police station to give statements. He did not take any action to investigate the matter for himself. Having heard Mr Hughes' account, he considered that there had been a "petty squabble" between the claimant and Mr Mitchell. He thought it was one driver's word against another's. As his later actions showed, he did not believe in taking formal action in response to complaints by employees if it could possibly be avoided. He also thought that the claimant had taken matters out of his hands by taking his complaint to the police.

42. Relations between the claimant and his colleagues continued to deteriorate. The claimant chose not to go to the staff Christmas party. One day in early 2017, Ms Franklin saw the claimant approaching a doorway and held the door open for him to pass through. The claimant stopped short of the doorway with his arms folded and refused to walk through the open door. His reason was that he did not want to have to thank her.

43. One day, the claimant had a driving assignment to Chester Zoo. On his return, Mr Stonehouse told him that he was being "ripped to bits" by his colleagues and that it needed to be sorted out. The claimant thanked Mr Stonehouse and walked away. There was no discussion about why the claimant was being "ripped to bits", and nothing was said to suggest any connection with the claimant's driving assignment for that day.

44. The claimant's evidence about when this happened is inconsistent. He told us that he thought it was in October 2016, but, when interviewed as part of the investigation into his grievance (see below), he said that it had happened on 7 February 2017. We think the likelihood is that it happened nearer to February 2017 than to October 2016. His memory of the date, or approximate date, of the incident is likely to have been more accurate at the time of his grievance investigation than it is now.

45. Returning to the incident itself, the claimant assumed that he was being mocked because, he, a black man, had gone to a zoo. We think the claimant's assumption was mistaken. We could not conclude from the facts that we have found that this is what the claimant's colleagues were doing here. We have not forgotten that, by this time, there had been a number of occasions on which the claimant had

endured casual, sometimes accidental, remarks related to his race. But even those facts, added into the mix, do not enable us to conclude that his colleagues were indulging in the extreme racism that involves likening black people to zoo animals. There are also other facts that point strongly towards a different explanation for the claimant being "ripped to bits". By this time, the atmosphere had soured to the point that other drivers were critical of the claimant for reasons entirely unrelated to race.

46. On 7 February 2017 the claimant and another driver, Mr Luke Hughes, were having a conversation whilst on wash duty. The topic was something to do with racism. A third driver, Mr James Patrickson, joined them and offered to tell a story. The claimant had a hunch that, whatever Mr Patrickson was going to say, it was likely to be offensive. He warned Mr Patrickson not to continue or else he would report him. Undeterred, Mr Patrickson proceeded to tell a story about a black passenger who was wearing dark clothing and was difficult to see. The claimant was offended. In our view it was reasonable of the claimant to react in that way. His story insinuated either that black people are camouflaged by dark clothing or that they are hard to see in the dark. The claimant challenged Mr Patrickson, who made the situation worse by denying that he could be causing offence, and saying "my best friends are darkies". Hearing the word, "darkies", the claimant decided that enough was enough. He immediately complained and submitted a written grievance. His letter complained not just about that particular incident, but also, in general terms, of racist behaviour amongst his colleagues.

47. By 16 February 2017, Ms Franklin had also had enough. She wrote to Mr Howard to complain about the claimant's behaviour. She stated that her concerns had started the day after the management meeting out of which the claimant had walked. According to Ms Franklin, the claimant used to record people's conversations secretly and had the habit of staring her up and down. She referred to the recent door-opening incident and to their screwdriver encounter on 13 December 2017. To put that event into context, Ms Franklin quoted from the "dot to dot" Facebook message that the claimant had posted the day before. Ms Franklin did not specify what action she wanted Mr Howard to take, but asked for the claimant's "continual condescending and threatening behaviour to be addressed to the point of resolve".

48. Mr Howard initially decided to deal with both the claimant's and Ms Franklin's grievances in-house. He had a one-to-one conversation with Ms Franklin, who asked him "broach the subject" with the claimant with a view to sorting out the issue amicably. Mr Howard then met with the claimant on 10 March 2017 to discuss his grievance. The claimant was accompanied by Ms Kassim, a full-time Unite official. We do not know precisely what they said to each other, but the contrast between this meeting and Mr Howard's conversation with Ms Franklin could hardly have been more marked. Ms Kassim asked for various documents including written policies. At some point, Mr Howard, at Ms Kassim's prompting, acknowledged that he felt out of his depth. Ms Kassim suggested that he should take some legal advice. Following the meeting, Ms Kassim followed up her suggestion in writing. Her letter indicated that the claimant was proposing to bring claims under the Equality Act 2010.

49. At this point Mr Howard realised that he was not going to be able to deal with matters himself. He turned for help to the well-known employment consultancy, Peninsula, and engaged the services of their Human Resources function, HR

Face2Face ("HRF2F"). Their services cost Mr Howard (in his words) "a lot of money". In return, HRF2F provided a professional HR consultant, Ms Carmel Walberg, whose task it was to investigate the grievance, report her findings and make recommendations as to the outcome.

50. Mr Howard did not ask HRF2F, as part of their remit, to conduct any investigation into the complaints brought by Ms Franklin against the claimant. He did not think it was necessary to do so. His difference in approach towards the two aggrieved complainants is explained, in our view, by the fact that one of them was asking for him to broach the subject informally, and the other was insisting on formality and warning that a discrimination claim might follow.

51. On 15 March 2017, Ms Walberg met with the claimant and Ms Kassim. Over the course of the next 95 minutes, he mentioned various incidents which now form Allegations (a) to (g) of harassment (listed at paragraph 4 above). Ms Walberg helped to draw out some of the detail by asking appropriate questions. The claimant told Ms Walberg that the Chester Zoo incident (Allegation (e)) had happened on 7 February 2017.

52. Ms Walberg interviewed Mr McGlinchey on 22 March 2017. He told her about having heard the name "Nig-nog" in the break room. He did not say when this had occurred; nor did Ms Walberg ask him. He also recounted Mr Mullen trying to find the videos of the old television programmes. In Mr McGlinchey's view, Mr Mullen was not racist, but perhaps was ignorant and failing to understand why the videos were offensive.

53. As part of her investigation, Ms Walberg interviewed 16 other people. She also examined statements made Mr Mitchell and others. She looked at the Facebook post of 12 December 2016 and other documents. On 22 March 2017 she finalised her report. It picked out the essential points of the claimant's grievance letter, as amplified in their meeting, and addressed each one in turn. Under each heading she recited some of the evidence and recorded her findings. Relevantly, she found as follows:

    53.1. The claimant's complaint of assault by Mr Mitchell was unsubstantiated. Witnesses to the incident supported Mr Mitchell's version over that of the claimant. The Facebook post was consistent with the claimant having been the aggressor.

    53.2. With regard to the use of the nickname, "Nig-nog", Ms Walberg noted the occasion in August 2016 when Mrs Hughes had let the nickname slip and then apologised. Nevertheless, she found that staff had "refrained from using the terminology except in the incident above."

    53.3. In relation to the old television programmes such as *Till Death Us Do Part,* Ms Walberg noted Mr McGlinchey's evidence, but concluded that "the context in which the videos were viewed, was that the drivers were comparing how times have evolved and these behaviours are no longer [acceptable]. [Ms Walberg] therefore does not believe that any harassment took place and therefore the point of grievance is rejected."

54. Overall, her recommendations were as follows:

> "90. Having given full and thorough consideration to the information presented I recommend that this Grievance be dismissed in its entirety.

> 91. [Ms Walberg] does note that there is damage to Employer/Employee relationship and that this is causing disturbance to the work place and therefore would recommend that they consider work place mediation…
>
> 92. [Ms Walberg] does believe that all staff members would benefit from Diversity and Inclusion training in order to rebuild the working relationships between the other drivers and [the claimant].
>
> …
>
> 95. [The claimant] has made a number of unfounded allegations regarding vexatious claims of victimisation, bullying and harassment. None of these allegations is upheld. [The claimant] has acted in a threatening manner towards colleague namely writing Facebook post threatening one individual. I therefore recommend that these matters be fully investigated and that consideration given for potential disciplinary action.
>
> …
>
> 98. It is a matter for the Employer to decide whether they wish to accept any or all of [Ms Walberg's] recommendations.

55. These recommendations are heavily criticised by Mr Pinder on behalf of the claimant. In our view, certain of his criticisms have some force. It is difficult to understand how Ms Walberg, in rejecting the claimant's grievance about the nickname, "Nig-nog", concluded that it had fallen out of use in October 2015. Mr McGlinchey had told her that he had heard the word used in the break room, but she did not try to find out when this had happened. In relation to the old television programmes, Ms Walberg appeared to have accepted that drivers had tried to view videos of racist television programmes. Her conclusions about the context did not fit comfortably with Mr McGlinchey's evidence. Ms Walberg did not appear to have asked herself why the drivers would have needed to look at the videos themselves in order to discuss what was socially acceptable. But more importantly, even if her conclusions about the context of the videos were sound, and the claimant had taken offence too readily, it would be harsh to dismiss the claimant's complaint as "unfounded" or "vexatious". Generally speaking, Ms Walberg appeared not to have distinguished between, on the one hand, finding insufficient evidence to uphold a complaint and, on the other hand, positively concluding that the complaint was vexatiously brought. In addition to Mr Pinder's criticisms, we would also add that the recommendations did not appear to have been particularly well thought through. Mediation was unlikely to work whilst one party to the mediation faced disciplinary action for making supposedly malicious complaints about the other parties.

56. Mr Howard read Ms Walberg's report and adopted its conclusions without a second thought. He did not spot the deficiencies in the report that Mr Pinder skilfully exposed during the hearing. To the report he attached a covering letter, working to a template provided to him, and sent it to the claimant. The letter, dated 30 May 2017, stated, "Please find attached their report, which represents my decision," and gave information about how to appeal. Mr Howard knew, of course, that, by forwarding the report, he was rejecting the claimant's grievance. We are satisfied that Mr Howard took this step for reasons entirely unrelated to the claimant's race. Nor was it anything to do with the fact that the claimant's grievance had been about

race discrimination. The reason why Mr Howard adopted Ms Walberg's recommendation was because he had paid a lot of money for HRF2F to take the problem off his hands. He trusted Ms Walberg to act professionally and make the right decision.

57. Unsurprisingly, the claimant was dissatisfied with the report. By e-mail dated 6 April 2017 he expressed his intention to appeal and stated that he would forward his grounds of appeal in due course. At, or very near, this time, the claimant began a period of sick leave from which he did not return until 3 May 2017.

58. Ms Kassim then entered into correspondence with Ms Walberg with a view to obtaining disclosure of documents related to the grievance. She asked for various policies, schedules of information, witness statements and the records of the many interviews that Ms Walberg had conducted. Ms Walberg agreed to provide the statements, but did not do so. Much of the material was not in fact provided until late in the employment tribunal proceedings.

59. On 25 April 2017, Mr Howard sent two letters to the claimant. In his first letter, he acknowledged the claimant's appeal. He invited the claimant to an appeal meeting with an HRF2F consultant, scheduled for 3 May 2017. He asked for the claimant to provide "reasons for your dissatisfaction with the original decision" by 1 May 2017.

60. The second letter invited the claimant to attend an investigation meeting, also due to take place on 3 May 2017. According to the letter, the purpose of the meeting was for the claimant to provide an explanation for two "matters of concern":

> "
>
> - Alleged persistently raising unfounded/vexatious complaints
> - Alleged acting in a threatening manner toward colleague namely writing Facebook post threatening one individual"

61. The letter went on to warn that,

> "Possible outcomes from the meeting are that we may decide that it is necessary to pursue a formal disciplinary procedure with you, or alternatively we may decide that there are no grounds for this."

62. The first of the two "matters of concern" arose directly out of Ms Walberg's findings about the claimant's grievance. Those findings were subject to appeal. We agree with Mr Pinder that ordinary principles of fairness would normally require the appeal to be dealt with first. If, on appeal, it was decided that the claimant's grievance had some merit, there would be no "matter of concern" to investigate. We have asked ourselves why Mr Howard proceeded with a conduct investigation prematurely. Was it either consciously or subconsciously because of the claimant's race? Was it because the claimant had complained of race discrimination? We are quite satisfied that it was nothing to do with either of these things. Mr Howard knew that the claimant was black when he recruited him. He was just doing what Peninsula was telling him to do. He had paid for their advice and was now following it. The possibility of following a fairer procedure never crossed his mind.

63. There followed something of a stand-off with regard to the claimant's appeal. By e-mail dated 27 April 2017, Ms Kassim repeated her requests for disclosure of information. Her e-mail made clear that, until she received the information she sought, she was not prepared to send the claimant's grounds of appeal to the

respondent or attend the forthcoming appeal meeting. This was an unhelpful stance. The claimant and Ms Kassim already knew a good many of the claimant's grounds of appeal. Ms Kassim was able to list them to the tribunal. They were perfectly capable of being formulated without waiting for the respondent's disclosure. For his part, Mr Howard, acting on advice from HRF2F, indicated on 28 April 2017 that he would seek the consent of witnesses to the release of their statements, but that the appeal meeting would proceed on 3 May 2017.

64. On 3 May 2017, Ms Sharlene Hernandez of HRF2F went to the respondent's premises to conduct the two meetings. In line with her stance taken on 27 April 2017, which she had repeated on 2 May 2017, Ms Kassim did not attend. The claimant was on his first day back at work. He spoke to Ms Hernandez and refused to join either meeting without Ms Kassim. Mr Howard then spoke to Ms Hernandez about what to do. During the conversation he told her about some of the difficulties that the claimant's colleagues were having with the claimant. He said that it was the claimant's first day back at work and already two drivers had complained about him. One of them had described the claimant looking at him slowly up and down. Mr Howard showed Ms Hernandez Ms Franklin's letter of 16 February 2017. Although we do not know exactly what Mr Howard said, he must have said something to Ms Hernandez to suggest to her that he had lost trust and confidence in the claimant. Ms Hernandez advised Mr Franklin that the claimant had no statutory right to a companion at an investigation meeting. Together, he and Ms Hernandez decided that the appeal meeting should be adjourned, but that the investigation meeting should proceed in the claimant's absence and that Ms Hernandez should immediately proceed to prepare her report.

65. We pause here to examine Mr Howard's conscious or subconscious motivation for these procedural decisions:

    65.1. First, the decision to proceed with the meetings without disclosing the information that Ms Kassim had requested. This decision was nothing to do with race, or the fact that the claimant had complained under the Equality Act 2010. Mr Howard was acting on Peninsula's advice. We also think that it is likely that, at that time, he had a genuine concern about protecting the confidentiality of the witnesses whom Ms Walberg had interviewed. We draw this conclusion from Mr Howard's e-mail of 28 April 2017 and from the fact that the respondent subsequently disclosed the interview record of Mr McGlinchey. Of all the witnesses interviewed and referenced in Ms Walberg's report, Mr McGlinchey appears to have been the most openly supportive of the claimant. He is the person most likely to have consented to his report being disclosed. If Mr Howard was deliberately manipulating the process (because of the claimant's race or his complaint of discrimination or otherwise) he would hardly have chosen to disclose the interview record that was most helpful to the claimant.

    65.2. We next consider the reason why Mr Howard decided to proceed with the investigation meeting in the claimant's absence. Again, the reason was that Mr Howard was following Peninsula's advice. It happened to be true that there was no statutory right to be accompanied at an investigation meeting, but even if the circumstances called for the meeting to be postponed for the claimant to find a companion, that was the sort of decision Mr Howard was paying Peninsula to make. It was nothing to do with the subject-matter of the claimant's complaint, or his race.

66. Later on 3 May 2017, Ms Hernandez gave her report to Mr Howard. It set out the procedural history and noted what Mr Howard had just told her about the drivers' complaints. At paragraph 19 the report summarised Ms Franklin's letter, without attributing it to her. Under the heading, "Finding", Ms Hernandez declined to consider the allegation of raising unfounded or vexatious complaints. She stated, however, that "with regards to the Facebook post and the complaints made by [the respondent's] other employees, I was able to consider these allegations in his absence." Ms Hernandez expressed the view that the Facebook post was "very strong and threatening in its nature", and that the other complaints from the claimant's colleagues were "consistent with the content of such". She noted that, because of the Facebook post and complaints, the respondent "no longer has any trust and confidence in their employment relationship". Accordingly, Ms Hernandez' recommendation was to dismiss the claimant summarily. Her report came with the usual caveat that it was up to the respondent to decide whether or not to accept her recommendation.

67. Ms Hernandez' report did not explain in terms why she thought it appropriate to dispense with a disciplinary meeting. The nearest she got to such an explanation was to quote from paragraph F2 of the disciplinary policy. That paragraph did not expressly authorise the respondent to dismiss an employees without a disciplinary meeting - it appeared to be aimed at dispensing with disciplinary warnings – but it did give the appearance of advising Mr Howard to dispense with procedures. Ms Hernandez did not mention the ACAS Code at all. In our view, the report was symptomatic of the view often held by employers, and organisations who advise them, that disciplinary procedures exist purely for the purpose of protecting employers against complaints of unfair dismissal, and can be jettisoned for short-serving employees. That disciplinary procedures might help employers make better and fairer decisions appears to have been lost on her.

68. One of Mr Pinder's justified criticisms of the report was that it found that the colleagues' complaints about the claimant were well-founded, without giving the claimant any chance to comment on them first. Ms Hernandez did try to pre-empt such criticism in her report by stating that, in her opinion, the claimant would have been aware of "most of the complaints" about him that were set out in her report. This statement was plainly wrong. The claimant could not have known about the complaints made about him on 3 May 2017. Mr Howard knew that he had not discussed Ms Franklin's letter with the claimant. Ms Hernandez' report mentioned few, if any, other complaints.

69. Another criticism of Ms Hernandez' report is her reliance on complaints about the claimant that had, in all likelihood, come from the same people about whom the claimant had complained in his grievance. Ms Walberg had essentially preferred the accounts of those colleagues to the version of events told by the claimant. That conclusion was subject to a live appeal. Had the claimant's appeal been successful, considerable doubt might have been cast on the reliability of these new complaints. Ms Hernandez did not wait to find out.

70. Just as with Ms Walberg's report, Mr Howard sent the claimant a copy of Ms Hernandez' report without any independent scrutiny. Once again, the covering letter simply stated that it "represents my decision". The deficiencies in the report, brought into such sharp focus by Mr Pinder, passed unnoticed before Mr Howard's eyes. He did not think about the interrelationship between the decision to dismiss and the the ongoing grievance appeal process, nor about the unfairness of relying

on complaints upon which the claimant had not had the chance to comment. His omission to consider these things was nothing to do with the claimant's race or the subject-matter of his grievance. He was just following Ms Hernandez' recommendation.

71. Both the report and the letter were delivered by hand to the claimant on 3 May 2017.

72. There is no doubt that it was unfair of Mr Howard to dismiss the claimant without holding a disciplinary hearing. Why, we wonder, did he miss out such a basic procedural step? He clearly had a difficult situation on his hands, with colleagues complaining about having to work alongside the claimant. That concern could have been addressed by suspending the claimant rather than dismissing him outright. Mr Howard's explanation, again, is that he was following Peninsula's advice. The claimant does not accept that this is the real reason. His case is that, whatever advice Mr Howard got from Peninsula, he must have known it was wrong to dispense with a disciplinary meeting because it was so obviously unfair. There are three things, in particular, which (according to the claimant) Mr Howard must have realised:

    72.1. First, the respondent's written disciplinary policy provided for a disciplinary procedure.

    72.2. Second, the ACAS Code requires a disciplinary hearing for long- and short-serving employees alike.

    72.3. Third, the claimant had been misled into believing that the worst outcome of the "investigation meeting" would be that further disciplinary procedures would follow. There was nothing to suggest that he could be dismissed at that stage.

73. Whilst we recognise that these three factors point strongly towards the dismissal being unfair, we do not think that they mean that Mr Howard was being untruthful when he told us that he was merely following advice. As we have stated, employers commonly dispense with procedures for employees with less than two years' service. It is plain from the report, and paragraph 10 in particular, that Ms Hernandez had read the invitation letter and knew what potential outcomes the claimant had been warned to expect. The report gave the appearance that, having taken the contents of the invitation letter into account, Ms Hernandez was nonetheless recommending dismissal without a further hearing. Mr Howard thought he was being given reliable advice. That is why he acted on it. His thinking was not influenced in any way, consciously or subconsciously, by the claimant's race or his complaint of discrimination.

74. We must now consider Mr Howard's motivation, both conscious and subconscious, for dismissing the claimant. In our view it had nothing to do with the claimant's race or with his having complained about race discrimination. It was because he trusted Ms Hernandez to make the right recommendation. We must remind ourselves that it was *not* alleged, as a separate act of discrimination, that Mr Howard had told Ms Hernandez that trust and confidence had broken down. We are satisfied that he left the decision in the hands of HRF2F.

75. The claimant appealed against his dismissal. His letter set out well-thought-out grounds of appeal. One of these was that the real reason for dismissal had been the claimant's race, or the fact that he had complained of race discrimination.

76. In due course the claimant was invited to an appeal meeting, chaired by Ms Victoria Hart, another of HRF2F's consultants. The meeting took place on 1 June 2017. This time the claimant attended and was accompanied by Ms Kassim. The meeting, which lasted about 95 minutes, was audio-recorded and subsequently transcribed. Following initial introductions, Ms Hart began the meeting by asking the claimant to explain the background. Ms Kassim immediately interjected, insisting on presenting her grounds of appeal and stating that the background was irrelevant. Eventually the meeting settled down into Ms Hart asking appropriate questions of the claimant to explore his grounds of appeal. From time to time, Ms Kassim interrupted to answer questions on the claimant's behalf. In response to a question about his Facebook post, the claimant sought to make the point that his post had been describing his thought processes at the time of the alleged assault. In that context, he said,

> "I suppose it's very similar to…if you're in a house on your own, or you're stuck in a corner, or God forbid, you're being raped. The first thing you'll think of is, 'How can I protect myself?' That's the first thing you're going to think of."

77. About 40 minutes into the meeting, Ms Hart said that the claimant had been dismissed purely because of the Facebook post. That remark appeared to be inconsistent with Ms Hernandez' report. When Ms Kassim argued back, the meeting became sidetracked into a dispute about whether or not Ms Kassim was behaving aggressively. When they returned to discussing the substance of the appeal, Ms Kassim made, in broad terms, similar points to those deployed by Mr Pinder at the hearing before us. They also discussed the alleged assault by Mr Mitchell in some detail.

78. Following the meeting, Ms Hart carried out some further investigations. She interviewed Mr Howard and Mr Mitchell. The notes of Mr Mitchell's interview were only recently disclosed to the claimant. They show Mr Mitchell giving, once again, his version of the 12 December incident, but this time omitting to mention a potentially significant detail. Whereas in previous accounts Mr Mitchell had stated that the claimant had had his fists clenched, this time Mr Mitchell left that detail out.

79. We do not know what Mr Howard told Ms Hart. The notes of his interview were never disclosed. Mr Aireton told us that he had asked Peninsula to search their records, but the notes could not be found. From Ms Hart's summary of his evidence in her report, we infer that Mr Howard told Ms Hart that the Facebook post was only brought to his attention during the grievance investigations in March 2017. We know this statement to be incorrect. From 16 February 2017 at the earliest, Mr Howard knew what the Facebook post had said.

80. Having completed her enquiries, Ms Hart prepared her report. It recommended that the claimant's dismissal should stand. She gave her reasons for rejecting each ground of appeal. Dealing with the ground of appeal relating to the reason for dismissal, Ms Hart made two significant points:

    80.1. She quoted the claimant's remarks from the appeal meeting about his thought processes. She opined that the claimant's "mitigation for his reasoning" was "inappropriate". Pausing there, it would have appeared to most reasonable readers of the report that Ms Hart's opinion, in this regard at least, was soundly based. The claimant's Facebook post was describing a level of violence that went way beyond self-defence.

80.2. Ms Hart expressed her view that the claimant's actions resulted in a breach of the respondent's social media policy. Whether or not this was an accurate statement, it was not fair to rely on it a reason for dismissing the appeal. It was the first time during the whole disciplinary and appeal process that the social media policy had ever been mentioned, and the claimant had never had the opportunity to comment on it.

81. Ms Hart's report also addressed the ground of appeal that related to the lack of a disciplinary hearing. She mentioned, more than once, the fact that colleagues appeared to be in fear of the claimant and the right under the "Short Service Clause" to proceed straight to dismissal.

82. The report went on to deal with the claimant's ground of appeal that the respondent had failed to provide evidence or statements of complaints made against him by colleagues. Her conclusion was that "this evidence was not presented as this allegation had not been investigated nor used as the decision to dismiss [the claimant]". This conclusion, in our view, was based on an unreasonable interpretation of Ms Hernandez' report. It was clear that Ms Hernandez had based her dismissal recommendation at least partly on the complaints made about the claimant in Ms Franklin's letter and on the further complaints made on 3 May 2017.

83. The report's final paragraph repeated the usual reminder that it was up to the respondent to decide whether or not to accept Ms Hart' recommendations.

84. As with the previous reports, Mr Howard forwarded Ms Hart's report to the claimant with a covering letter stating that it represented his decision. He followed Ms Hart's recommendation without analysing it in the way we have done. He did not spot, as Mr Pinder did, that two of Ms Hart's points were bad ones.

85. We must now consider the reason why Mr Howard accepted Ms Hart's recommendation. Again, he did so because that is what he had paid Peninsula to provide. It was not because of the claimant's race or the fact that he had raised a grievance complaining about discrimination.

86. The same goes for the respondent's failure to disclose Mr Howard's record of interview at all, or to disclose Mr Mitchell's interview notes until a late stage in the tribunal proceedings. Mr Howard entrusted the conduct of the litigation to Peninsula. HRF2F, as the outsourced Human Resources function, would be more likely than Mr Howard to keep records of investigation interviews. If Mr Howard had kept the records, we would expect Peninsula to have advised him that he would need to disclose them, and to have ceased representing the respondent if Mr Howard did not take that advice. Even if Mr Howard had deliberately concealed the documents from disclosure – and it was not put to him that he had – the most obvious motivation for doing so would be to gain an unfair advantage in the litigation, rather than because of the claimant's race or the subject-matter of his internal grievance.

87. In parallel with Ms Hart's conduct of the dismissal appeal, Ms Hernandez took on the role of considering the claimant's adjourned appeal against Ms Walberg's grievance decision. She drafted a letter for Mr Howard to send, which he did on 8 May 2017. The letter gave the claimant a further opportunity to submit his grounds of appeal. None were forthcoming. In a report dated 9 June 2017, Ms Hernandez recommended that the appeal be allowed in part and the remainder dismissed. The successful part of the appeal was little more than a technicality. Based on her

understanding of the criminal law, she concluded that Mr Mitchell's actions, on his own version of events, had come "within the strict terms of the definition of assault". This outcome, which was adopted in full by Mr Howard, was of little comfort to the claimant. Because it does not feature as a separate allegation of discrimination or victimisation, we say no more about it.

Relevant law

Direct discrimination

88. Section 13(1) of EqA provides:

> (1) 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.

89. Section 23(1) of EqA provides:

> (1) On a comparison of cases for the purposes of section 13…there must be no material difference between the circumstances relating to each case.

90. Employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. Was it because of the protected characteristic? That will call for an examination of all the facts of the case. Or was it for some other reason? If it was the latter, the claim fails. These words are taken from paragraph 11 of the opinion of Lord Nicholls in *Shamoon v. Chief Constable of the Royal Ulster Constabulary* [2003] UKHL 11, updated to reflect the language of EqA.

91. Less favourable treatment is "because" of the protected characteristic if either it is inherently discriminatory (the classic example being the facts of *James v. Eastleigh Borough Council,* where free swimming was offered for women over the age of 60) or if the characteristic significantly influenced the mental processes of the decision-maker. It does not have to be the sole or principal reason. Nor does it have to have been consciously in the decision-maker's mind: *Nagarajan v London Regional Transport* [1999] IRLR 572.

92. Tribunals dealing with complaints of direct discrimination must be careful to identify the person or persons ("the decision-makers") who decided upon the less favourable treatment. If another person influenced the decision by supplying information to the decision-makers with improper motivation, the decision itself will not be held to be discriminatory if the decision-makers were innocent. If the claimant wishes to allege that that other person supplied the information for a discriminatory reason, the claimant must make a separate allegation against the person who provided the information: *CLFIS (UK) Ltd v. Reynolds* [2015] EWCA Civ 439.

Harassment

93. Section 26 of EqA relevantly provides:

> (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 … 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.

94. By subsection (5), race is one of the relevant protected characteristics.

95. In deciding whether conduct had the proscribed effect, tribunals should consider the context, including whether or not the perpetrator intended to cause offence. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct related to other protected characteristics), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase: *Richmond Pharmacology Ltd v. Dhaliwal* [2009] IRLR 336.

Time limits

96. Section 123 of EqA provides, so far as is relevant:

> (1)… proceedings on a complaint [of discrimination] may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> …
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.
>
> (4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—
>
> (a) when P does an act inconsistent with doing it, or
>
> (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

97. In *Commissioner of Police of the Metropolis v Hendricks* [2002] EWCA Civ 1686; [2003] ICR 530, a police officer alleged racial and sexual discrimination Mummery LJ, with whom May LJ and Judge LJ agreed, gave guidance on the correct approach to “an act of extending over a period”. I shall read out the

> 48. [the claimant] is, in my view, entitled to pursue her claim beyond this preliminary stage on the basis that the burden is on her to prove, either by direct evidence or by inference from primary facts, that the numerous alleged incidents of discrimination are linked to one another and that they are evidence of a continuing discriminatory state of affairs covered by the concept of an 'act extending over a period'…
>
> 52. ... The question is whether that is 'an act extending over a period' as distinct from a succession of unconnected or isolated specific acts, for which time would be given to run from the date when each specific act was committed"

98. In considering whether separate incidents form part of "an act extending over a period", one relevant but not conclusive factor is whether the same individuals or different individuals were involved in those incidents: see *British Medical Association v Chaudhary*, EAT, 24 March 2004 (unreported, UKEAT/1351/01/DA & UKEAT/0804/02DA) at paragraph 208, cited with approval by the Court of Appeal in *Aziz v. FDA* [2010] EWCA Civ 304.

99. A one-off act with continuing consequences is not the same as an act extending over a period: *Sougrin v Haringey Health Authority* [1992] IRLR 416, [1992] ICR 650*, CA.*

Burden of proof

100. Section 136 of EqA applies to any proceedings relating to a contravention of EqA. By section 136(2) and (3), if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person contravened the provision concerned, the tribunal must hold that the contravention occurred, unless A shows that A did not contravene the provision.

101. In *Igen v. Wong* [2005] EWCA Civ 142, the Court of Appeal issued guidance to tribunals as to the approach to be followed to the burden of proof provisions in legislation preceding EqA. They warned that the guidance was no substitute for the statutory language:

> (1) … it is for the claimant who complains of … 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 ... 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 … 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 claimant 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 s. 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 …from an evasive or equivocal reply to a [statutory questionnaire].
>
> (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…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.

102. The initial burden of proof is on the claimant: *Ayodele v. Citylink Ltd* [2017] EWCA 1913

103. It is good practice to follow the two-stage approach to the burden of proof, in accordance with the guidance in *Igen v. Wong,* but a tribunal will not fall into error if, in an appropriate case, it proceeds directly to the second stage. Tribunals proceeding in this manner must be careful not to overlook the possibility of subconscious motivation: *Geller v. Yeshrun Hebrew Congregation* [2016] UKEAT 0190/15.

104. We are reminded by the Supreme Court in *Hewage v. Grampian Health Board* [2012] UKSC 37 not to make too much of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or the other.

Conclusions on allegations (a) to (h) of harassment and discrimination

(a) "Nig-nog"

105. It hardly needs to be said that an employer should not permit its employees to use the nickname "Nig-nog" in the workplace. We have to remind ourselves, however, of the way in which the claimant actually puts his case. Allegation (a) is not about what Mr McGlinchey heard in the break room, or about Mrs Hughes' remark in the office, or what Mr Stonehouse said by the side of the bus. The only event to which Allegation (a) refers is the conversation between the claimant and Mr McAllister-Partridge. The background to the conversation was a problematic culture which permitted the casual use of a racist nickname. Against that background, in our view, Mr McAllister-Partridge acted appropriately in alerting the claimant to the problem, trying to reassure him and providing him with an avenue of redress if the problem recurred.

106. In the language of direct discrimination, Mr McAllister-Partridge may well have treated the claimant *differently* from others, in that we have not heard any evidence that Mr McAllister-Partridge sought to reassure anybody else, or instructed anybody else to report use of the nickname to him. It may well be that the reason for any such difference is because the claimant is black. Our use of the phrase, "may well" is deliberately guarded: it was not put to Mr McAllister-Partridge that he treated the claimant differently from others or that the claimant's race was the reason for the difference. In any event, however, we are positively of the view that Mr McAllister-Partridge's did not treat the claimant any *less favourably.* The claimant could not reasonably think that Mr McAllister-Partridge's intervention put him at any disadvantage.

107. We next consider the complaint of harassment. Mr McAllister-Partridge certainly brought unwelcome *news* that was related to race. But that is not the same as saying his *conduct* in bearing that news, coupled with reassurance and an avenue of redress, was unwanted. Even if Mr McAllister-Partridge's conduct was unwanted, it would not be reasonable of the claimant to perceive that conduct as violating his dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

108. This does not, of course, mean that the three specific instances when the word, "Nig-nog" was used are irrelevant. They demonstrate the existence of a culture in which a racist nickname thought acceptable, and a continuing state of affairs in which that nickname would occasionally slip out.

(b) Black Country

109. The respondent harassed the claimant on this occasion. Whilst the Black Country was not related to the claimant's race, Mr Mullen's conduct in mentioning it immediately followed by the claimant's name clearly was. The claimant did not want Mr Mullen to single him out for association with black things, even if it was in

innocent-sounding language. As we have found at paragraph 32, the claimant thought it created an offensive environment for him.

110. That is not the end of the matter. We must still decide whether it was reasonable for the claimant to have that perception. As Mr Aireton reminded me, "context is everything". Perhaps in a different workplace setting the claimant might be seen as having been overly sensitive. Not so here. The claimant already knew of the culture in which racist nicknames had been seen as acceptable. He was already aware of the attempt to view videos of racially offensive television programmes. The claimant's perception was reasonable. Mr Mullen's conduct had the effect of creating an offensive environment and violating his dignity.

111. Given our conclusion that the claimant was harassed, we did not find it necessary to consider whether the same conduct also amounted to direct discrimination.

(c) The encounter with Mr Mitchell

112. On any view, Mr Mitchell made physical contact with the claimant in a way that the claimant did not want. As we have found at paragraphs 36 and 38, however, Mr Mitchell's conduct was neither because of the claimant's race, nor related in any way to it. Those findings mean that there was no direct discrimination or harassment.

(d) *Love Thy Neighbour* etc

113. To determine the complaint of harassment under this heading, we need do little more than remind ourselves of our findings at paragraph 27. It was perfectly reasonable for the claimant to regard his dignity as having been violated and an offensive environment created for him by the unwanted attempts to view the racist content of old television programmes.

(e) Chester Zoo

114. The claimant naturally did not want to be "ripped to bits" by his colleagues. As we have found in paragraph 45, however, there were no facts from which we could conclude that this conduct was related to the claimant's race or because of his race. There was no direct discrimination and no harassment here.

(f) Exclusion

115. The claimant was not excluded from social occasions. He was positively included in events such as the karting trip. As far as we know, there was only social event that he did not attend and that was because he chose to avoid it.

116. Towards the later stages of his employment, the claimant increasingly kept away from the break room. Whether it is fair to say that he was "excluded" is rather a moot point. He stayed away partly for reasons of his own and partly because he received tip-offs about things that his colleagues were saying about him. The evidence about those tip-offs, and what his colleagues were saying, is too vague to enable us to conclude whether or not there were any racially offensive comments made on these occasions.

117. We have considered whether this allegation encompasses the making of further racially offensive remarks, not separately alleged, that had the effect of keeping the claimant away from the break room. We have borne in mind that there are at least two proven acts of harassment that occurred in the break room, and these

would undoubtedly have contributed to his reluctance to use the room. We are also aware that, from November 2016 onwards, there were also many criticisms about his attitude, his Facebook post and his role in the pay negotiations. Those sorts of things would also have been unpleasant to hear and would also contribute to his staying away. Against that background it is unproductive to strain to reach a conclusion about whether there was any other harassment in the form of unknown comments obliquely reported to the claimant.

118. The claimant's colleagues did not accuse the claimant of failing to pull his weight. All the evidence was that his colleagues thought of him as a "grafter".

(g) "Darkies"

119. Mr Patrickson's story, and his use of the word, "darkies" was unwanted conduct related to race. It had the effect of violating the claimant's dignity and amounted to harassment.

Time limit

120. The incident involving Mr Patrickson (Allegation (g)) took place on 7 February 2017. It is common ground that, for that incident, the claim was presented within the statutory time limit. The acts of harassment under Allegations (b) and (d) both occurred several months before 3 February 2017. We have to decide whether they were part of an act extending over a period which ended on or after that date. In our view, they were. These incidents were symptomatic of an ongoing culture of casual, often unintended, racism amongst the respondent's drivers. Though the formulation of the claim means that we have not found a separate breach of EqA in this respect, the culture was typified by the ongoing use of the nickname, "Nig-nog". Mr Mullen was involved in two of the incidents. He was not involved in the final incident, but as *Aziz* tells us, that fact is not determinative. We are satisfied that from June 2016, and possibly earlier, there was a single ongoing state of affairs which lasted at least up to 7 February 2017.

Conclusions on the 9 allegations of direct discrimination and victimisation

121. Our findings of fact dispose of the 9 further allegations of discrimination and victimisation with little need for further analysis. See in particular, our findings at paragraphs 56, 62, 65.1, 65.2, 70, 73, 74, 85 and 86. In each case, we were able to reach a positive finding of fact and did not find the burden of proof provisions to be of particular assistance. Our finding was that Mr Howard's treatment of the claimant, whilst unfair, was not motivated consciously or subconsciously in any way by the claimant's race or the fact that he was complaining of race discrimination. It was because Mr Howard was doing what Peninsula's HRF2F consultants were advising him to do.

Next steps

122. There will be a hearing to determine the claimant's remedy. At that hearing it will be necessary to make further findings as to the extent to which any losses flowing from the termination of the claimant's employment are attributable to the acts of harassment that we have found. This will not be a straightforward task. The claimant was dismissed because Ms Hernandez recommended it. Part of her recommendation was based on the Facebook post, which has nothing to do with the claimant's race. It was also based on complaints made by colleagues. Whilst the acts of harassment were not the only factors in the deterioration in the

claimant's relationship with his colleagues, it is likely that the tribunal would find that they contributed to some extent. Whether or not Ms Hernandez would, or might, have ultimately recommended dismissal if there had been no harassment is a question on which the tribunal will need to hear further argument.

_____

Employment Judge Horne

_____

30 July 2018

SENT TO THE PARTIES ON

10 August 2018

FOR THE TRIBUNAL OFFICE