



EMPLOYMENT TRIBUNALS

Claimant: Mr C S Bailey

Respondent: Lookers PLC

HEARD AT: Manchester **On:** 30 + 31 May, 1 June 2018
15 June 2018
(in Chambers)
2 July 2018
(in Chambers)

BEFORE: Employment Judge Batten

Members: Ms H D Price
Ms B Hillon

REPRESENTATION:

Claimant: In person
Respondent: Ms L Quigley, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that the claimant's claim of race discrimination is not well-founded and is dismissed.

REASONS

1. This judgment is given with reasons because the oral evidence and submissions were only concluded at the very end of the third hearing day and there was insufficient time for the Tribunal then to deliberate and reach a judgment. The Tribunal therefore met in chambers on 15 June and again on 2 July 2018 to reach this decision.

The Hearing

2. The hearing took place over 3 days, on 30 and 31 May, and 1 June 2018.
3. The Tribunal was provided with an agreed Bundle of documents prepared by the respondent together with a Chronology and List of Issues prepared by the respondent. The List of Issues was subsequently discussed with the parties at the beginning of the hearing and agreed as set out below.
4. The Tribunal heard evidence from the claimant who tendered a written witness statement and was subject to cross examination. The respondent called the following witnesses, who all tendered written statements and were subject to cross examination: Debbie Bishop – Service Adviser; Grant Digby – General Manager; Mark MacDonald – Seat Master Workshop Controller; Zachary Gooding – Service Adviser; Adam Fletcher – Sales Executive; Daniel Jackson – Technician; Naomi Franklin – Sales Manager; Stacie Wake – HR Business Partner; and Victoria McLean- HR Business Partner.

The claims

5. At the commencement of the hearing, the Tribunal discussed the claims with the parties. The claimant confirmed that he claimed direct race discrimination, harassment and victimisation. A reference in the ET1 to a failure to allow him to take paternity leave was confirmed not to be a separate claim.
6. The claimant further confirmed that the acts of direct race discrimination and/or harassment that he relied upon are as follows:
 - (1) The Facebook post of 29 May 2017;
 - (2) A comment by Debbie Bishop, made in May 2016, “I cannot stand the thought of black skin on white skin”.
 - (3) Derogatory statements by Debbie Bishop, about Pakistani people including the word “Pakis”;
 - (4) Asking the claimant to move desks but not asking Debbie Bishop to do so;
 - (5) The respondent’s handling of the Claimant’s grievance.
7. In relation to the claim of victimisation, the claimant confirmed that the detriments he relied upon were:
 - (1) On 10 July 2017, being asked to drop his grievance by Zachary Gooding;

- (2) On 21 July 2017, being accused of making false allegations by Adam Fletcher resulting in an argument between them in which Mr Fletcher threw keys at the claimant;
- (3) The respondent asking the claimant to move desks but not so asking Debbie Bishop;
- (4) The respondent's handling of the claimant's grievance.

Issues

8. The parties discussed the claims with the Tribunal, in light of the above clarification by the claimant and agreed that the issues which the Tribunal would need to determine in this case were as follows:

Jurisdiction – Limitation Issues

- 8.1 Were the claimant's claims of direct race discrimination, harassment and/or victimisation presented in time?
- 8.2 Do any of the complaints constitute conduct extending over a period of time?
- 8.3 If so, was the claim presented within the relevant time period from the end of that period?
- 8.4 If not, was the claim submitted within such other period as the Tribunal thinks is just and equitable?

Direct Race Discrimination (section 13 Equality Act 2010)

- 8.5 Did the respondent treat the claimant less favourably than it treated or would treat others?
- 8.6 If so, was the less favourable treatment because of the claimant's race?
- 8.7 Did any alleged less favourable treatment because of the claimant's race by Debbie Bishop occur during the course of her employment with the respondent? If so, must it be treated as also done by the respondent?
- 8.8 Who is the correct comparator?

Harassment (section 26 Equality Act 2010)

- 8.9 Did the respondent engage in unwanted conduct relating to the claimant's race for the purposes of the Equality Act 2010?

8.10 Did any alleged unwanted conduct by Debbie Bishop take place during the course of her employment with the respondent? If so, must it be treated as also done by the respondent?

8.11 If so, did the unwarranted conduct have the purpose or effect of:

8.11.1 violating the claimant's dignity; or

8.11.2 creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

8.12 If so, having regard to all the circumstances of the case and the perception of the claimant, was it reasonable for the conduct to have that effect?

Victimisation (section 27 Equality Act 2010)

8.13 Did the respondent subject the claimant to a detriment because:

8.13.1 the claimant had done a protected act; or

8.13.2 the respondent believed that the claimant had done a protected act; or

8.13.3 the respondent believed the claimant may do a protected act?

8.14 The claimant relies on his statement on 30 May 2017 to Grant Digby verbally about the Facebook post and also his email of 8 June 2017 to Mr John Stokes by way of a grievance, as protected acts.

8.15 Was the protected act done in bad faith?

Compensation

8.16 If the claimant was discriminated against, what level of compensation should be awarded to the claimant?

Findings of Fact

9. The Tribunal made its findings of fact on the basis of the material before it, taking into account contemporaneous documents where they exist and the conduct of those concerned at the time. The Tribunal resolved such conflicts of evidence as arose on a balance of probabilities. The Tribunal has taken into account in our assessment the credibility of witnesses and the consistency of their evidence with surrounding facts.

10. Having made findings of primary fact, the Tribunal considered what inferences should be drawn, for the purposes of making further findings of fact. The Tribunal has not simply considered each particular allegation, but has also stood back to look at the totality of the circumstances, and to consider

whether, taken together, they may represent an ongoing regime of discrimination.

11. The Tribunal's findings of fact relevant to the issues which are to be determined are as follows.
12. On 24 August 2011 the claimant commenced work with the respondent as a Sales Executive.
13. The respondent is a large organisation in the motor trade which sells cars under a number of brand franchises and also provides after-sales and servicing facilities. The claimant worked at the Seat franchise in Stockport. At that franchise the respondent employs in excess of 30 employees. The respondent employs over 8,500 employees in the United Kingdom and engages 11 HR Business Partners.
14. The claimant is a black man who is in a relationship with a white woman. The respondent employs a number of employees at the Seat dealership in Stockport who are of Asian ethnic origin in addition to the claimant; however the majority of employees in the franchise are white.
15. The respondent has an intranet where its Staff Handbook and employment policies appear. The respondent has a Code of Conduct which says that it expects the highest standard of conduct from all its employees and warns that conduct outside the workplace and whilst "off duty" may also impact on the respondent, such that employees should take care to ensure the appropriate image is projected at all times. Where employees engage in social networking outside of work through social media such as Facebook, the Code says employees must be mindful that they observe the standards of behaviour expected of them as set out in the Employee Handbook. The Code of Conduct goes on to say that this is essential when interacting with colleagues outside of work as well as at work and that it is essential in any messaging, given the ease and speed with which comments can be transmitted electronically.
16. The respondent has a Social Media Policy. This provides that employees who use social media sites such as Facebook must remember that they are operating in a public space and their conduct may have serious consequences for the respondent, whether employees are using social media during or outside of working time. Employees are reminded that conversations between "friends" on Facebook are not truly private and can still have the potential to cause damage. The Social Media Policy instructs employees not to make comments which could damage the reputation of the respondent or its employees, and not to use social media to insult, embarrass or offend a colleague, customer or supplier, or to bully or harass or discriminate against any colleague in a way which contravenes the Bullying and Harassment Policy.
17. The respondent has an Equality Policy which aims to ensure that no person who is employed by the company is discriminated against. Employees' rights and responsibilities are defined and the Policy states that every member of staff, regardless of the position they hold, is expected to treat their colleagues,

customers and others in the course of their work with respect and dignity. Examples of what is not acceptable include: banter or jokes or other kinds of remark that are liable to cause offence because they are about a protected characteristic; making comments whether positive or negative about personal characteristics and clothing which are unconnected with work. Guidance is given on “banter” to the effect that it is not the intention of “banter” that matters and that what matters is whether there has been discriminatory conduct or conduct that may be considered to violate a colleague’s right to be treated with respect and dignity.

18. The respondent confirms in its Equality Policy that it will investigate discriminatory conduct. It also says that if, after investigation, the respondent decides that an employee has acted in breach of the Policy, they may be subject to disciplinary action up to and including dismissal.
19. The respondent also has a Harassment and Bullying Policy and procedure. This warns employees that they should appreciate that behaviour that they may find acceptable may not be so regarded by others. It provides that all employees have a duty not to bully or harass each other, nor to help anyone else to do so. Conduct which is not tolerated includes where the conduct is a one-off act or a repeated course of conduct and whether done purposefully or not. Examples of bullying and harassment in the Policy include: verbal abuse or offensive comments, jokes or pranks related to race amongst other protected characteristics; deliberate exclusion from conversations or work activities; and physical abuse such as hitting, pushing or jostling. The policy further states that, “It is important to recognise that conduct which one person may find acceptable, another may find totally unacceptable. All employees must, therefore, treat their colleagues with respect and appropriate sensitivity”.
20. The Harassment and Bullying Policy provides that where an employee and an alleged perpetrator work in proximity to each other, the respondent may think it inappropriate for the employees concerned to continue to do so whilst the complaint is being investigated and during any consequent disciplinary proceedings. If so, the respondent may decide to:-
 - Transfer one of the employees; or
 - Transfer both of the employees; or
 - Send one of the employees home on full pay; or
 - Send both employees home on full pay.
21. The Harassment and Bullying Policy provides that, after an investigation, the respondent will meet with the employee to consider their complaint and the findings of the investigation. At that meeting, the employee may be accompanied and after the meeting the respondent will write to the employee to inform them of its decision and to notify them of their right to appeal.

22. On Monday 29 May 2017, a Bank Holiday, Debbie Bishop, an employee of the respondent, posted on her Facebook page, a post previously set up by another individual. Ms Bishop added her own words "Fucking black twat" with four angry emojis. The post was racist and offensive.
23. The claimant was a 'friend' of Ms Bishop on Facebook and he saw the post. The claimant was upset.
24. On 30 May 2017, the claimant came to work and avoided speaking to Ms Bishop. In the course of the morning, Ms Bishop asked the claimant what was wrong and he made it clear to her that he was upset by her Facebook post, and that he did not wish to speak to her. Ms Bishop had not realised that her post was offensive or racist. She apologised to the claimant for the post but she did not remove it and the claimant was unconvinced by her apology.
25. The claimant raised the issue of Ms Bishop's post with his manager, Mr Digby, and said that he wished to complain about it. The claimant showed Mr Digby the Facebook post, said that he was offended by it and asked Mr Digby to take action.
26. Later that day, Mr Digby viewed the post again through the assistance of a manager, Naomi Franklin. The Facebook post was still on Ms Bishop's Facebook timeline in full. At this stage Mr Digby's concern was to check whether the Facebook post could be linked to the respondent.
27. Mr Digby consulted HR and eventually made telephone contact with Ms Stacie Wake, who was driving at the time. They had a rushed conversation in which Ms Wake referred Mr Digby to the respondent's Social Media Policy.
28. Mr Digby kept a paper copy of the Social Media Policy in his desk drawer. The copy was out of date. He reviewed his paper copy of the Policy rather than the up-to-date policy which was on the respondent's intranet. Mr Digby decided that the respondent's Social Media Policy was not applicable to Ms Bishop's Facebook post.
29. Despite Mr Digby's view of the inapplicability of the Social Media Policy, the following day, 31 May 2017, Mr Digby spoke to Ms Bishop. He told her that her post was offensive and that she should take it down.
30. Ms Bishop then made an effort to remove the post. She asked Zach Gooding to help her. Ms Bishop took the post down because Mr Digby had told her to do so and not because it was offensive nor out of any concern for the claimant or other employees or individuals who might be similarly offended. Ms Bishop acted because she was concerned that she would get into trouble at work.
31. On 1 June 2017, Mr Digby spoke to the claimant again and told him that the Social Media Policy was not applicable and that there was nothing that he could do about Ms Bishop's post.

32. The claimant was not satisfied with Mr Digby's response and he decided to take it further. He spoke to the respondent's Regional Manager, John Stokes, about the post. Their conversation led to the claimant's grievance email.
33. On 8 June 2017, the claimant emailed Mr Stokes with his grievance about the Facebook post. He included further allegations about Ms Bishop's conduct, namely that she had made racist comments at work. The claimant complained that Ms Bishop had said "It makes me feel physically sick to imagine black skin touching white skin", and that on numerous occasions she had openly used a derogatory term towards Asians. This was understood to be a reference to use of the words "Paki". The claimant's grievance included a complaint that Ms Bishop had shown no remorse whatsoever for her actions. He asked for appropriate measures to be taken.
34. The claimant's grievance was referred to the respondent's HR department.
35. On 9 June 2017, HR wrote to the claimant inviting him to a grievance meeting on 13 June 2017, to discuss his complaint further. The claimant was to meet with Mr Stokes and Stacie Wake, an HR Business Partner.
36. At this time, the claimant's partner was heavily pregnant and was rushed to hospital, in the belief that she was about to give birth. The respondent misunderstood the position and thought that the claimant had started his paternity leave and Mr Digby erroneously told Ms Wake that the claimant had started paternity leave. The grievance meeting was therefore rearranged to 28 June.
37. In the intervening period, Mr Stokes spoke to Ms Bishop. There was no evidence before the Tribunal as to the content of this conversation or why it was thought necessary to speak to the subject of a grievance investigation before the initial grievance meeting. Following their conversation, on 27 June 2017, Ms Bishop sent Mr Stokes an email which was designed to shift the focus of attention to Ms Bishop and the difficulties which Ms Bishop said she was experiencing as a result of what she alleged was gossip at work.
38. On 28 June 2018, an initial grievance meeting with the claimant took place. By this time, the claimant was on paternity leave but was pressed by the respondent to attend the meeting because, by then, it had been almost a month since his original complaint was made.
39. The record of the initial grievance meeting consists of undated handwritten notes with no indication of who was present although it is understood that Mr Stokes and Ms Wake were there. The notes are limited and part of the notes is redacted. Two names are recorded within the notes: David Bishop and Preston Logan. There is no indication as to why they were included in the discussion and neither were interviewed as part of the subsequent investigation. Further, it is not clear what action was decided to be taken after the meeting. The notes were never given to the claimant.

40. The respondent then commenced an investigation. However, Mr Stokes unfortunately suffered a serious accident and was incapacitated. The matter was therefore passed to Ms Wake to progress. Mr Stokes was not replaced.
41. On 10 July 2017, Zach Gooding approached the claimant and asked him to drop the grievance. Zach was concerned about the atmosphere at work and wanted to stay working with Ms Bishop, who he sat next to at work.
42. On the morning of 12 July 2017, Ms Wake emailed Ms Bishop at 10:33 in response to a call from Ms Bishop to Ms Wake. Ms Wake's email referred to the grievance investigation of Ms Bishop and the allegations against her in an informal tone, starting with "Hi Debbie" and referring to Mr Stokes as "John". Ms Wake's email said that none of the allegations had been substantiated due to the investigation not taking place yet. This was incorrect. The Facebook post was an accepted fact and did not require substantiation. In the final sentence, Ms Wake said that she will call Ms Bishop that afternoon "and we can discuss your concerns", although Ms Bishop had not raised a formal grievance, and Ms Wake said she will also diarise some time for Ms Bishop's investigation meeting. Later in the string of emails in the bundle, Ms Bishop replies using a smiley face emoji.
43. Later that day, at 17:56 Ms Wake emailed the claimant. She informed him that Mr Stokes had had an accident and was unable to handle the investigation. No replacement was nominated. Ms Wake said that she would be handling the investigation together with an unnamed colleague. The formal tone and style of the email to the claimant is in contrast to the informality of the email to Ms Bishop.
44. On 13 July 2017, there was a telephone conference call between HR and Ms Bishop. The call opened with Ms Wake asking Ms Bishop to "talk through". Ms Bishop was given considerable licence to go beyond her response to the allegations in the claimant's grievance and Ms Bishop raised accusations about the claimant's behaviour. Within a few moments of the telephone conference starting, Ms Bishop had alleged that the claimant was threatening another employee and saying that HR were not dealing with matters. Ms Bishop's account of her Facebook page sought to justify that post on the basis that she put it as she saw it, that the whole country was angry and that a friend's daughter had been involved in the Manchester bombing, out of which the Facebook post arose. Ms Bishop told Ms Wake that she had asked her son to remove the post and suggested that she had already taken the post off of Facebook when Mr Digby spoke to her.
45. Ms Bishop went on to allege that the claimant was asking others to make complaints and she gave second and third-hand reports of such. The 'black on white skin' allegation was put to Ms Bishop but the allegation of derogatory language about Asians was not put to Ms Bishop. When asked about racism in the dealership, Ms Bishop confirmed that there had been some racist comments "in a joking way". When asked (bundle page 78) about whether she deals with a range of ethnic backgrounds she said, "I've heard people say

I won't deal with Asian customers, outrageous". Neither of these issues were probed or taken further by HR.

46. The notes of the conference call read as if the subject of the investigation was the claimant and not Ms Bishop. At one point, Ms Bishop was asked about anyone she thinks will be key and Ms Bishop alleged that the whole dealership was in disbelief and she asks "what is Carl doing?" In the course of the meeting, Ms Bishop is recorded as having commented, "It's my life he's playing with, after 20 years at Lookers". Ms Bishop also says that she is uncomfortable coming into work and that she does not want to work with the claimant and that she feels sick coming in. The meeting ended with Ms Bishop dismissing her Facebook post as a mistake: she is recorded as saying it "was silly".
47. There followed a series of interviews by HR personnel, including Ms Wake and Megan Cranage, which appear in the bundle. The HR Business Partners who conducted the interviews had no agreed or consistent plan of the questions to be asked and the records of the interviews are undated. Some refer to the interviewee by first name only and some have no name of the interviewee recorded. The questions asked are limited and many of the records are not signed or dated.
48. Megan Cranage asked interviewees about an allegation that Ms Bishop refuses to deal with ethnic minority customers. That was not an allegation which appears in the claimant's grievance and it is unclear why that suggestion was put to witnesses.
49. Ms Wake, when interviewing 'Dominic', stated that what she was trying to do was to speak to everyone to "get background". It is not apparent that the allegations are specifically put to all the people that she interviews.
50. When Ms Cranage interviewed 'Najim', she commented at the end of the interview that "[the claimant] is trying to bring other people into it and asking for them to support his complaint". At no point did Najim agree with this assertion nor did he say that the claimant had asked him to complain. He did say that the claimant sent him a text but he was not asked about that text or what it said, nor was he asked for a copy. This evidence is in contrast to the evidence of Naomi Franklin who suggested, in her witness statement, that Najim had been asked by the claimant to make a complaint about racism.
51. The interview with 'Ifzal' was described as "a quick conversation". The interview of Ms Franklin consisted largely of her being asked about the claimant and his behaviour and not about Ms Bishop's conduct or the allegations which formed the claimant's grievance.
52. Mr Digby was not interviewed, even though he was the person to whom the claimant first complained, who had seen the Facebook post and asked Ms Bishop to remove it.
53. On 14 July 2017, the claimant was interviewed by Ms Wake. He was not asked about his grievance nor was any of the evidence that had been

gathered put to him but he was asked about comments made by Ms Bishop. Ms Wake said that "... everyone is talking about it. Some of that stems from things you have said to them". The claimant confirms in the course of the interview that he feels as if he is now being investigated. In response, Ms Wake asked the claimant how he thinks his colleagues feel.

54. Within the course of the claimant's interview, the claimant said that he could not work with Ms Bishop. There was a discussion about the claimant moving desks because Ms Wake said that Ms Bishop's desk could not be moved. The claimant said that he did not want to move as he believed his sales would suffer. Ms Wake did nothing to investigate whether Ms Bishop herself could be moved.
55. The claimant was not asked about the 'black on white skin' comment except about why he did not raise the comment at the time. In response the claimant points to the situation he found himself in as a result of raising a grievance, and the way his grievance was being handled. Later in the interview, the claimant was asked about 'Jackie' and was told "now we have Jackie upset, so we need to work with her and resolve".
56. The investigation continued. In the interview with 'Craig', at the end of page 100 of the bundle, Craig is asked about Carl and Debbie's relationship and he refers to "the previous comment". The potential for evidence about a previous comment by Ms Bishop was not followed up nor probed at all.
57. The record of the interview with Jenny Saville shows that she confirmed there had been racist comments at work, which she described as "lads when they are joking around". She also commented in relation to Ms Bishop that, "what she puts on Facebook, people may see it the wrong way".
58. Zachary Gooding also confirmed in his interview that there was "banter" at work.
59. In the interview with Daniel Jackson, he confirmed that he has witnessed racist remarks from Ms Bishop. He says, "Yes, unfortunately, you hear it all the time" and that "It's not just against black people or Asian people. We have quite a lot of Eastern European people working for us, and everybody laughs and makes the comments ok". When he was asked if this meant everyone in the dealership he confirmed that it was. Mr Jackson also said that the comments could be quite hurtful and he gave examples of himself being called "bald bastard" and "fat bastard" by the Brand Manager, which he said was quite hurtful, and that "it's not right".
60. When Mr Jackson was asked about whether Ms Bishop had refused to deal with ethnic minority customers he said, "It's more of seeing the customer coming in and going to the back".
61. On 21 July 2017, there was an incident between the claimant and Adam Fletcher. The claimant asked Mr Fletcher for the keys to his car, a demonstrator vehicle, to show it to a customer. Mr Fletcher initially refused to

give the claimant the keys and then he threw the keys towards the claimant in an aggressive manner.

62. Later, in the canteen, the claimant asked Adam Fletcher what he meant by throwing the keys, and a very heated argument ensued during which the claimant said that Mr Fletcher had accused him of making things up about Ms Bishop. In turn, Mr Fletcher challenged the claimant about an earlier comment about sitting on the fence making someone a racist - Mr Fletcher was adamant that he was not a racist. On the balance of probability the Tribunal considered that both these things had been said.
63. The canteen incident was reported to Naomi Franklin by others and, 20 minutes later, Ms Franklin called the claimant and Mr Fletcher to her office. A further discussion became very heated, very quickly, and Ms Franklin had to intervene. As a result both the claimant and Mr Fletcher were called to Mr Digby's office shortly afterwards, where Mr Fletcher apologised to the claimant for his behaviour and for acting in an unprofessional manner.
64. The grievance investigation notes, compiled by HR, were not agreed or signed by many of the interviewees and some confirmed that their notes were accurate only after the grievance outcome had been sent to the claimant. The grievance outcome letter was sent to the claimant on 28 July 2017 at 16:47. Adam Fletcher did not confirm that his interview notes were correct until 17:34 that evening when the decision and outcome letter had already been produced. 'Jackie' had said that there were gaps in the record of her interview but this was not followed up (bundle page 110).
65. On 28 July 2017, a grievance outcome letter was sent to the claimant by Ms Wake. In dealing with the claimant's grievance, Ms Wake appointed herself as investigator, decision maker and communicator of the decision to the claimant. She did not put evidence to the claimant once she had gathered it, nor did she give him copies of the witness interview records. Neither of the meetings with the claimant in the course of the investigation constituted a formal grievance hearing.
66. The grievance outcome letter appears in the bundle at page 113 and made 3 points. The first 2 points related to matters raised in the claimant's grievance. Under each of the first 2 headings, there is a brief analysis of Ms Wake's conclusions without reference to the evidence relied upon. The third point of the grievance outcome letter is titled "Debbie refuses to deal with customers of certain ethnicity, due to her racist views". This was not an allegation made in the claimant's grievance letter and it is not clear why it appears in the grievance outcome letter. Ms Wake concluded that "there does not appear to be sufficient evidence to substantiate areas of your grievance" but then goes on to say that she feels the dealership would benefit from training with regard to Equality and Diversity.
67. The claimant appealed the grievance outcome. His appeal letter appears in the bundle at pages 118 and 119. The claimant's points of appeal are that Ms Bishop had clearly breached the Social Media Policy of the respondent but that no formal action had been taken against her; that the claimant felt

isolated for speaking up and raising a grievance; that he did not want to sit near Debbie Bishop at work; that colleagues had asked him to drop the grievance and that he believed this would not have happened if management had taken action; the length of time it had taken to deal with the grievance; that the claimant considered the grievance investigation lacked impartiality; and the detrimental impact on the claimant. The claimant asked for the notes of Ms Wake's grievance interviews and he also made a subject access request of the respondent for all emails or communication that had been sent that included his name. The claimant did not receive a copy of the evidence gathered by the grievance investigation from the respondent's HR personnel, nor is it apparent that the subject access request was complied with. Therefore the claimant proceeded to appeal with no idea of what evidence had been gathered or which way it pointed.

68. On 11 August 2017, Ms McLean was tasked to deal with the claimant's grievance appeal. She asked to meet him so she could "review your appeal and gain as much information as possible so that I can start to investigate".
69. The claimant replied the same day, saying that everything was set out in his appeal letter and that he was reluctant to have another meeting. The claimant repeated his request for the notes and evidence from the meetings under the grievance investigation and also repeated his subject access request.
70. On 13 August 2017 Ms McLean insisted that the claimant meet her.
71. On 23 August 2017 the claimant met with Ms McLean. The note of that meeting is headed, dated and lists the attendees, in contrast to previous records of meetings/interviews. However, the contents reflect a brief conversation about the claimant's appeal during which the claimant made the point that he did not feel protected as an employee. There is no review of the evidence gathered in the grievance investigation or the grievance outcome letter. In any event, the claimant had not been given any of the evidence and was told that his subject access request was being dealt with. The respondent in its evidence described this as a grievance meeting but it was little more than an informal discussion of the grounds for the claimant's appeal, following which Ms McLean said that she would investigate.
72. On 31 August 2017 Ms McLean met with Ms Wake for a "review". The notes of this meeting commence with the words "Had to speak to Carl about his behaviour as at points he was causing conflict with other team members" and end with a discussion of Carl's performance. It is entirely unclear what, if any, evidence was reviewed by the HR Business Partners at this meeting, but the note reads very much as if the HR Business Partners were gathering reasons to turn down the claimant's appeal.
73. After the "review", Ms McLean attended the respondent's premises in Stockport. She spoke to 4 random employees who happened to be there on the day. It is unclear what they were asked or whether their witness statements were referred to. Ms McLean's brief notes do not address the points of the claimant's appeal. She also spoke to Mr Digby who had not been interviewed as part of the original grievance investigation, although she did

not ask him about the substance of the Facebook post or his actions to deal with it.

74. On 22 September 2017, Ms McLean produced a letter notifying the claimant of the outcome of the “grievance appeal hearing” which was a reference to their meeting on 23 August 2017. The claimant was still not provided with any of the evidence compiled by the grievance investigation or appeal. Indeed, the claimant was not provided with any of this evidence until disclosure within the Tribunal proceedings.
75. The grievance appeal outcome letter made a number of points, including at point 2 a description of the “unrest in the team” which Ms McLean says was a “two way process” and she goes on to say that the claimant had been openly discussing the grievance which impacted the general unrest in the team. At point 3, in response to the claimant's point about not wanting to work near Ms Bishop, Ms McLean says, “we weren't apportioning any blame”, and that the business was providing a solution to support his concerns, despite the fact that nobody moved desks.
76. On 27 September 2017, Ms Bishop emailed Ms Wake about the grievance appeal outcome, wanting to know whether the matter was still ongoing. In response, Ms Wake replied that, “Following the investigation that took place I can confirm that there was no evidence to support the allegations made that was specifically in relation to yourself with regards to race discrimination”. The email ends with, “Thanks for your time and patience with this investigation”.
77. On 8 November 2017, the respondent held Equality and Diversity training for all staff at the Seat dealership in Stockport. A further session took place on 13 February 2018, for those staff unable to attend in November 2017. The claimant declined to attend.
78. On 26 February 2018, the claimant was signed off work sick with stress.

The applicable law – race discrimination

79. A concise statement of the applicable law is as follows.
80. A claim of unlawful discrimination under the Equality Act 2010 (“EqA”) must be presented within the period of 3 months, less 1 day, of the act complained of, or the last in a series of acts complained of.
81. The EqA provides that to present a claim of discrimination, a claimant has to show that they have or can point to a protected characteristic within the categories set out in EqA. Section 9 EqA defines race as a protected characteristic including colour, nationality and ethnic or national origin, or racial group.
82. The EqA defines various forms of prohibited conduct which will be unlawful if they take place in the context of employment. Section 109 EqA provides that anything done by a person in the course of their employment must be treated

as also done by the employer, whether or not the employer knew or approved of the conduct in question.

83. Direct discrimination is contained in section 13 EqA, in which subsection (1) states that:

“a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.”

84. Harassment is contained in section 26 EqA which provides that:

(1) *A person (A) harasses another (B) if-*

(a) *A engages in unwanted conduct related to the relevant protected characteristic, and*

(b) *the conduct has the purpose or effect of -*

(i) *violating B’s dignity, or*

(ii) *creating an intimidating, hostile, degrading, humiliating or offensive environment for B*

...

(4) *In deciding whether conduct has the effect referred to in subsection (1)(b) each of the following must be taken into account-*

(a) *the perception of B*

(b) *the other circumstances of the case*

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

85. The concept of harassment under previous equality legislation was the subject of guidance given in Richmond Pharmacology and Dhaliwal 2009 IRLR 336. The Tribunal has applied that guidance, namely:

“There are three elements of liability (i) whether the employer engaged in unwanted conduct; (ii) whether the conduct either had (a) the purpose or (b) the effect of either violating the claimant’s dignity or creating an adverse environment for her; and (iii) whether the conduct was on the grounds of the claimant’s race (or ethnic or national origins).”

86. Victimisation is contained in Section 27 EqA which provides that:

“a person (A) victimises another person (B) if A subjects B to a detriment because:

(a) *B does a protected act or*

(b) *A believes B has done or may do a protected act.”*

A protected act includes making an allegation (whether or not express) that A or another person has contravened the Act.

87. In *Martin v Devonshires Solicitors* UKEAT/0086/10, Underhill J said:

“The question in any claim of victimisation is what was the “reason” that the respondent did the act complained of: if it was, wholly or in substantial part, that the claimant had done a protected act, he is liable for victimisation; and if not, not. In our view there will in principle be cases where an employer has dismissed an employee (or subjected him to some other detriment) in response to the doing of a protected act (say, a complaint of discrimination) but where he can, as a matter of common sense and common justice, say that the reason for the dismissal was not the complaint as such but some feature of it which can properly be treated as separable. The most straightforward example is where the reason relied on is the manner of the complaint.”

88. The burden of proof in discrimination cases is found in section 136 EqA and provides that if there are facts from which the Tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the Tribunal must hold that the contravention occurred. However, this does not apply if A shows that A did not contravene the provision.

89. In *Igen Ltd v Wong* [2005] EWCA Civ 142 the Court of Appeal gave guidance on how to apply the previous similar provisions concerning the burden of proof under the previous equality legislation, namely that it is for the claimant who complains of discrimination to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful. If so, the burden shifts to the respondent to prove, on the balance of probabilities that the treatment complained of was in no sense whatsoever on the proscribed ground.

90. In relation to the question of whether there was a series of continuing acts of discrimination over time, the case of *Hendricks v The Commissioner of Police of the Metropolis* [2000] ICR 530 guides a Tribunal to focus on the substance of the claimant’s allegations, namely that the respondent was responsible for an ongoing situation or a continuing state of affairs in which employees of one race were treated less favourably than those of other races employees; or whether in fact what is alleged is a succession of unconnected or isolated specific events.

91. The Tribunal also considered cases to which it was referred by the parties in submissions. The cases were:

Garamukanwa –v- Solent NHS Trust [2016] IRLR 476

Hendricks –v- Commissioner of Police for the Metropolis [2003] IRLR 96

Jones –v- Tower Boot Co. Ltd [1997] IRLR 168

Lister and others –v- Hesley Hall Ltd [2001] IRLR 472

London Borough of Islington –v- Ladele and Liberty [2009] IRLR 154

Martin –v- Devonshires Solicitors [2011] ICR 352

Mohamud –v- WM Morrison Supermarkets plc [2016] IRLR 362

The Tribunal took those cases as guidance and not in substitution for the provisions of the relevant statutes.

Submissions of the Parties

92. Ms Quigley for the respondent tendered written submissions which she spoke to. In brief, it was contended that the Facebook post was not done in the course of Ms Bishop's employment so the respondent could not be liable for it and that the other comments relied upon by the claimant were out of time. Submissions were also made that the Tribunal has to determine the 'reason why' the claimant was treated as he was, particularly in relation to asking the claimant to move desks and the claimant being asked to drop his grievance by Zach Gooding and Adam Fletcher. On the issue of victimisation, much reliance was placed on the case of *Martin v Devonshire Solicitors*. The Tribunal were asked to examine the reasons for any alleged victimisation, which the respondent contended were not the grievance as such but some feature of it which could properly be treated as separable. The respondent also highlighted the claimant's conduct after he raised the grievance, and reliance was placed upon a number of concessions the claimant made in his evidence with regard to the issue of the handling of the claimant's grievance by the respondent.
93. The claimant made brief submissions to the effect that the case had led to an extremely tough period of his life and that he never expected to end up in Tribunal as a result of his grievance. The claimant contended that the respondent had not dealt with the investigation swiftly and had left him to work side by side with Ms Bishop as though nothing had happened. The claimant said that he felt dejected and extremely concerned at the friction with colleagues which had an impact on his health, leading to his being signed off work, sick, since February 2018.

Conclusions

94. The Tribunal has applied its relevant findings of fact and the applicable law to determine the issues in the following way.
95. In relation to the time points and questions of jurisdiction and liability, the Tribunal first considered the Facebook post. This was clearly an act of racial harassment. However, the Tribunal accepted that the post had been put onto Facebook by Ms Bishop on a Bank Holiday, when she was not at work and in a forum unconnected to her work or to the respondent. There was nothing to link the Facebook post to Ms Bishop's employment or to the respondent and the Tribunal therefore concluded that this act had been done outside of work and was not a matter for which liability could attach to the respondent. The post was not done in the course of Ms Bishop's employment and therefore did not fall within the jurisdiction defined by section 109 of the Equality Act 2010.

96. The Tribunal did consider that the Facebook post came within the remit of the respondent's Social Media Policy and its Code of Conduct although the respondent did not follow its own policies and institute a disciplinary investigation in relation to Ms Bishop's conduct. Mr Digby took an incorrect view of the applicability of the Social Media Policy based on an out-of-date document which he kept in his desk. When the correct policy was put to him in evidence he confirmed that the Facebook post would come under that policy and that, had he known so at the time, he would have sought advice on taking appropriate action against Ms Bishop. Nevertheless, the fact that the Facebook post would fall within the respondent's Social Media Policy is not sufficient to create a liability for the respondent under the Equality Act 2010.
97. In relation to the comments alleged by the claimant about black on white skin and comments about Pakistani employees, the Tribunal could find no evidence to support the claimant's allegations. The respondent's evidence to the Tribunal consisted of blanket denials by its witnesses and the claimant was unable to supply any corroboration of what he contended.
98. In any event, the black on white skin comment, alleged to have been said in May 2016, is clearly out of time. The other comments relied upon were unspecified, undated and also lacked corroboration. Nevertheless, what was clear to the Tribunal was that the grievance investigation did uncover conflicting evidence from several witnesses which tended to point to a culture of "banter" in this workplace and which made employees, not only the claimant, feel uncomfortable and which included racist content. That situation was underlined by Mr Digby's frank admission to making a comment himself about "the banana boat". HR clearly considered there was a culture that would benefit from training. In this regard, the Tribunal was also concerned that, although the respondent's workforce had received training on Equality and Diversity in the last 7-8 months, at least 3 of the respondent's witnesses were unable to articulate what they thought was meant by the term "racism" when cross-examined. The witnesses appeared to be muddled. Some recognised that the Facebook post content was racist while suggesting that Ms Bishop herself was not a racist.
99. The claimant's claim relied on allegations about Ms Bishop's conduct alone. The alleged comments relied upon were out of time without the Facebook post and it was unclear that the comments could be said to be extending over a period of time, in the absence of specific details. There was no explanation from the claimant as to why he had not raised matters at the time the comments were said to have been made. In those circumstances, the Tribunal considered whether it would be just and equitable to extend time in respect of those comments and decided that it would not.
100. In relation to the respondent's handling of the claimant's grievance, Counsel for the respondent put to the claimant that Ms Wake was not racist, and he agreed with that assertion. The claimant was then asked about Ms Wake's handling of the grievance and whether he thought that was because of race. He said not. The claimant was also asked whether he thought Ms Wake's handling of the grievance was tainted by his having raised an issue of race

discrimination, to which the claimant said he “would have to say no to that”. In light of such concessions, the Tribunal was bound to dismiss the claimant's claim that the respondent's handling of the grievance was an act of direct race discrimination, harassment or victimisation.

101. On the issue of moving desks, the Tribunal considered that the respondent had not engaged seriously with the possibility of moving Ms Bishop whilst it continued to ask the claimant if he wanted to move. The claimant rightly said he had done nothing wrong and questioned why he should be the one to move. The respondent's reasons for its approach to this issue were that logistics, and the requirements of the Seat brand franchise, meant that it could not move the service desk where Ms Bishop worked. Whilst accepting that explanation, the Tribunal was concerned that this did not address the issue of whether Ms Bishop herself could be moved. The respondent's explanation here centred on how long it might take to train Ms Bishop in another franchise area, and took no account of the fact that it was her offensive Facebook post that had led to the difficulties between her and the claimant in the first place. The Tribunal considered that the respondent's reasoning displayed a degree of post-event justification for its actions.
102. In evidence, the claimant conceded that Ms Wake simply thought that it would have been easier to move him logistically and that he did not know why Ms Wake was not prepared to move Ms Bishop. The claimant was asked specifically in cross-examination whether he thought the respondent's approach to moving desks was because of his race or because of his grievance, and he said he really did not know why the respondent behaved as it did.
103. In light of all the above conclusions, and concessions, the Tribunal considered that the claimant's harassment claim must also fail. The Tribunal were unable to find a continuing course of conduct amounting to harassment because of race.
104. In relation to the victimisation claim, it was accepted by the respondent that the claimant made two protected acts, namely his verbal complaint, on 30 May 2017 to Grant Digby and, on 8 June 2017, by his grievance email sent to Mr John Stokes regarding Ms Bishop's conduct.
105. In respect of those matters upon which the claimant relied as detrimental treatment, first the Tribunal found that Mr Gooding's request to the claimant to drop his grievance was not an act of victimisation arising from the grievance itself. Mr Gooding was concerned that he wanted to continue to work with Ms Bishop and not to work with another employee whom he might have to work with if Ms Bishop was moved from the service desk. Mr Gooding was also concerned about the atmosphere in the workplace which had become noticeably tense. Mr Gooding approached the claimant only once and the context of the discussion was friendly. The Tribunal considered that Mr Gooding approached the claimant not because of his grievance but because of the potential consequence of that grievance for Mr Gooding and, therefore, for a matter separable from the grievance itself.

106. The Tribunal considered the altercation(s) between the claimant and Mr Fletcher. The Tribunal considered that that the reason why Mr Fletcher behaved in the way he did was because of his belief that the claimant was not telling the truth about some allegations. Mr Fletcher was also adamant that he himself was not a racist, and that he had not seen or heard anything, so he could not and would not take sides in the matter. The Tribunal therefore found that the altercation between these two arose out of the tension in the workplace in consequence of the ongoing grievance investigation and not as a detriment because of the grievance itself.
107. In relation to the moving of desks, the claimant confirmed in his evidence that he did not know why the respondent had approached this issue in the way it had or whether it was to do with his grievance. On that basis the Tribunal was unable to conclude that the respondent's approach to the moving of desks was an act of victimisation relating to the claimant's grievance.
108. In closing submissions, the respondent made much of the claimant's behaviour and conduct during the grievance process. The Tribunal accepted that the claimant spoke to people about his grievance; however the Tribunal rejected the respondent's view of this. The Tribunal considered that the claimant had asked individual employees about the Facebook post, not for the purpose of encouraging them to complain but to canvass views on the seriousness of the offence caused. There was no evidence to support the respondent's view that the claimant had been trying to encourage other employees to complain. Indeed, Ms Franklin's suggestion, in her witness statement, that the claimant may have tried to encourage Najim Uddin to make a complaint was not supported by the evidence. Ms Cranage had put the suggestion to Najim that the claimant was trying to bring other people into things and asking them to support his complaint. However, Najim does not confirm that was the case, nor does he at any time say he has been asked to complain by the claimant. In addition, the Tribunal noted that the claimant was, for a significant period of time away, on paternity leave followed by a holiday, and was therefore out of the workplace for some of the time when it was alleged that such gossip was happening.
109. The Tribunal found Ms Bishop's evidence to be inconsistent and noted that it changed significantly over time. When interviewed by HR, she told them that her son had taken the words off Facebook on the first day when she was alerted to the matter. However, Mr Digby's evidence, and that of Zach Gooding, contradicted this. Mr Gooding said that he was asked by Ms Bishop to help her to make sure that the Facebook post was taken down after Mr Digby had spoken to her. Mr Digby confirmed that he had viewed the post again and it was in view on 31 May 2017. The Tribunal concluded that it was only after Mr Digby spoke to Ms Bishop that she removed the post. The evidence was that Ms Bishop was told to take it down by Mr Digby and she said she would then do so; not that she had already done so.
110. Further, the Tribunal was concerned that Ms Bishop did not appreciate that the Facebook post was wrong - she sought to justify it in her interview with HR. In the bundle, at page 75, she mentions the whole country being angry

and a friend's daughter being involved in the Manchester bombing (to which the post related) and at page 78 she suggests that she is not racist because she has a mixed race family. It was apparent that Ms Bishop continued to seek to justify her actions/post and did not see what she had done as wrong, even after the claimant had raised a grievance or after the significant issues created at work as a result of her conduct.

111. The Tribunal considered that there were significant weaknesses in the conduct of the grievance investigation and appeal which highlighted a case to answer despite the conclusion of HR that there was "no evidence" to support the allegations made in relation to Ms Bishop. That conclusion takes no account of the offensive nature of the Facebook post or the comments made by a number of employees when interviewed in the course of the investigation, about the culture in the workplace. However the Tribunal was bound to accept the concessions made by the Claimant in relation to Ms Wake and the handling of the grievance as detailed in paragraph 100 of this judgment.
112. In light of all the above, and taking account of the claimant's concessions, the Tribunal determined that the claimant's claims were not well-founded and shall be dismissed.

Employment Judge Batten

Date: 20 July 2018

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

24 July 2018

FOR THE TRIBUNAL OFFICE

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