Case No: 2600569/18

EMPLOYMENT TRIBUNALS

Between:

Mr F Kabengele	**and**	Amazon UK Services Ltd
Claimant		**Respondent**

At an Open Attended Preliminary Hearing

Held at: Leicester

On: 12 and 16 November 2018

Before: Employment Judge P Britton (sitting alone)

Representation

For the Claimant: In person
For the Respondent: Mr S Lewinski of Counsel

JUDGMENT

The following claims are struck out

1. The following are dismissed as allegations of direct race discrimination pursuant to s13 of the Equality Act 2010 on the basis that they have no reasonable prospect of success. The numbering is as per the list at paragraph (8) in the record of Employment Judge Camp's lengthy telephone preliminary hearing heard on 31 July 2018:

> 10. Failure to investigate properly and undertaking an unreasonably long time: perpetrator – Wes Griffiths. Objectively the evidence does not sustain such an allegation. The investigation was reasonably thorough and was undertaken in a reasonable period of time.

14. Failure of Stephen Lumsden, who dealt with the Claimant's grievance on appeal, to also fail to get evidence from people who supported the Claimant is untenable. All the Claimant's colleagues appear to have been interviewed.

15. Failure of Mr Lumsden to meet the Claimant face to face on 9 February 2018 to give his grievance appeal outcome. This was not unreasonable as Mr Lumsden is based in Edinburgh. What I can conclude is that there was a most detailed meeting (presumably by Skype or video link) when Mr Lumsden went through with the Claimant his reasoning.

17. Casper Sorensen, who dealt with the Claimant's appeal against the termination of his employment, unreasonably delayed from 17 January to 5 March 2018, in giving his decision. I do not find there is evidence which would sustain on the face of the papers an unreasonable delay. The timescale is not unreasonable.

18. Casper Sorensen (who was based in the USA) failed/refused to come to England on 5 March 2018 to msimialr the reasons as per 15 above that claim is also untenable.

Under paragraph (9) of EJ Camp's record

2. (9). The allegation of the deduction from wages as being a deliberate act of victimisation pursuant to s27 of the Equality Act 2010, it being the only "protected act" as defined by EJ Camp that is relied upon, is dismissed for the reasons as set out below there being no link on the papers at all between it and the discriminatory treatment where I find there is a prima facie case to answer.

The following claims are made the subject of deposit orders

3. In relation to the following accusations, I find that there is only little reasonable prospect of success and I order therefore that the Claimant will pay a deposit as a condition precedent of pursuing each of the same. Given his means, I am going to order that in respect **of each one he pays a deposit of £5**. What that means is that if he does not want to proceed with any one of them, he does not pay the £5 in respect of it. But in relation to any one that he wants to proceed with, he has to pay by the deadline that is hereinafter set out and **as per the notice that is attached**. These allegations are not all on the list of EJ Camp but have emerged via the further and better particularisation and the Claimant's additional clarification of his claims today. Thus:

1. That in the time before 15 October 2017, Karolina Jablonska ("KJ") made a directly discriminatory remark about him to the effect that he was a big and tall black man and she feared that he might break her back. This is a claim of direct race discrimination.

2. That Alex Ali made up allegations – this relates to telling KJ that the Claimant would sexually harass him. As there is no claim based upon sex

discrimination it is treated as a claim of victimisation pursuant to s27 for the reasons as set out below.

Then as per the Employment Judge Camp list at (8):

Item 1: Removal of his name from the email distribution list by KJ on 16 October 2017. This is a claim of direct race discrimination pursuant to s13.

Item 2: Not providing him with the probation forms to complete circa 19 October 2017.Also a claim of direct race discrimination.

Item 3: The extension of his probation period after only 78 days. Also a claim of direct race discrimination.

Item 5: The arranging of the 3 month review meeting only 2 weeks or so after his 2 month probationary review meeting and when he had been on holiday for one of those 2 weeks. Also a claim of direct race discrimination.

Item 8: Suspension on 7 November 2017, which includes for the purposes of this decision, KJ deliberately ordering a security guard to remove him from the shelter where he was sheltering from the rain. A claim of direct discrimination and also of victimisation pursuant to s27.

Item 11: The decision by Wes Griffiths to dismiss the Claimant with effect from 20 December 2017. A claim of direct discrimination and also of victimisation pursuant to s27.

Item 12: The failure of Lee Cooke to deal with the Claimant's grievance properly by getting evidence "from people who supported the Claimant". A claim of direct discrimination and also of victimisation pursuant to s27.

Item12: On 20 December 2017, Lee Cooke did not uphold the Claimant's grievance. A claim of direct discrimination and also of victimisation pursuant to s27.

Item 16: On 9 February 2018, Stephen Lumsden not upholding the Claimant's grievance appeal. A claim of direct discrimination and also of victimisation pursuant to s27.

Item 19: On 5 March 2018, Casper Sorensen "did not overturn the decision to terminate the Claimant's employment". A claim of direct discrimination and also of victimisation pursuant to s27.

4. The Claimant must make the deposit payments or a deposit payment where he intends only to rely on that particular allegation, **not later than 28 days from the issuing of this decision and reasons**.

5. For the avoidance of doubt, subject to the payment of the deposits, these are the only claims proceeding.

Additional directions

6. All current directions for the main hearing were stayed by EJ Camp. As I have already said, the fixture (namely 3 days of hearing 23 – 25 April 2019) currently remains. For the purposes of the next telephone case management discussion, I would invite the Respondent's solicitors to consider what directions are needed for the main hearing and their view on the current time estimate, and including on the face of it that there clearly should be one day of reading in. They will then share their proposed directions with the Claimant so that he knows what they are proposing. The Claimant of course then needs to consider his own time estimate in terms of whether or not he is calling any witnesses to support his case. This can then all be looked at the resumed case management discussion.

7. Assuming the Claimant pays all or some of the deposits, there **will now be listed a** further telephone case management discussion to give final directions for the main hearing currently scheduled for 23 – 25 April 2019.

REASONS

Introduction

1. I am seized with the task, consequent upon the orders of Employment Judge Camp, sitting as he did on 31 July 2018, to determine first whether all or part of the claim before the tribunal should be stuck out as per rule 37(1) (a) of the Employment Tribunals (Constitution and Rules of Procedure) Regulations 2013 ("the Rules") on the basis that the claim (or some of it) has no reasonable prospect of success. In the alternative, I am to decide as per rule 39(1) as to whether the claim (or some of it) has little reasonable prospect of success. In which case, I can order the Claimant to pay a deposit not exceeding £1,000 as a condition on continuing to advance the relevant sub claim.

2. I should make plain that Employment Judge Camp thoroughly rehearsed the issues as he saw them to be in what was a lengthy telephone case management discussion as held on 31 July and to which I have referred. He identified what he saw, with the agreement of the Claimant, to be the claims of direct race discrimination pursuant to s13 of the Equality Act 2010 (the EqA)[1] at paragraph (8) 1 – 19 of his adjudication.

3. At paragraph 9 he set out what the Claimant was saying was the allegation of a deliberate act of victimisation pursuant to s27 of the EqA:

"*relying on his grievances of October 2017 as the relevant protected acts…*

[1] I have inserted the reference to the appropriate section of the EqA.

1. Making deductions from wages – allegation 5 above[2].

4. The Claimant had also brought a claim for unpaid wages. Employment Judge Camp made an unless order in respect of that. Subsequently my colleague Employment Judge Heap struck out that element of the claim for non-compliance with the unless order.

5. Then what EJ Camp did at his paragraph (12)(i) – (iv) was to set out what the Claimant saw as being the factual allegations to support his case in terms of the direct discrimination and the very limited victimisation claim. I stress that in respect of the latter claim at paragraph (13) Employment Judge Camp stated:

> "*No facts at all are alleged from which it could be inferred that the reason for any mistreatment was that the claimant did a protected act. In relation to this, he appears to be relying entirely on his belief that this was the reason and, as with the discrimination claim, on the [alleged] unreasonableness and unfairness of the respondent's actions and on the fact that he was [allegedly] the only one subjected to the particular mistreatment he is complaining about.*"

The law

6. As per the Claim Form (ET1), it is clear that primarily the Claimant brings a claim based upon direct race discrimination pursuant to the provision at section 13 of the EqA. Thus, it is essential to set out what he needs to show in terms of providing a prima facie case. Thus, I will refer to the section:

> **"*13 Direct discrimination***
>
> *(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.*"

7. It follows that there has to be a comparator not sharing the same relevant protected characteristic who is treated more favourably. In this particular case, the Claimant relies upon his protected characteristic of being a black Congolese, having been born in the Democratic Republic of the Congo although he is now a naturalised British Citizen.

8. The second limited claim as set out above is based upon victimisation. The definition is set out at section 27 of the EqA. It reads:

> **"*27 Victimisation***
>
> *(1) A person (A) victimises another person (B) if A subjects B to a detriment because—*

[2] This as per the list at paragraph (8)

(a) B does a protected act, or

(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act—

(a) bringing proceedings under this Act;

(b) giving evidence or information in connection with proceedings under this Act;

(c) doing any other thing for the purposes of or in connection with this Act;

(d) making an allegation (whether or not express) that A or another person has contravened this Act."

9. So there has to be a protected act which comes within the definition in order for the claim to get off the ground.

10. As to strike out/deposit orders, I am very grateful for the jurisprudence that has been put before me by Mr Lewinski and the very fair way in which he has put the Respondent's case, bearing in mind that the Claimant is unrepresented.

11. I approach the task of striking out with the utmost caution: In essence, of course flowing through from the jurisprudence before me and for instance ***Glasgow City Council v Zafar [1998] IRLR 36, HL*** and thence by way of example, the observations of Langstaff J (the then President of the EAT) in ***Ukegheson v Haringey London Borough Council*** **[2015]** ***ICR 1285*****,** ***EAT***.

12. Essentially, I adopt the dicta as given by Mr Justice Langstaff because it accurately reflects the jurisprudence. The correct approach to strike is to take the allegations in the claim at their highest: unless upon analysis, namely that undertaken by me today, they are conclusively disproved as demonstrably untrue. And whilst there is no blanket ban on the use of strike out in any particular class of case, the discretion to do so should be used sparingly and cautiously based on the Claim Form.[3] Of course in a case such as this of an unrepresented claimant whose original claim may be somewhat sparing in the particularisation, one should take into account subsequent particularisation and argument, as I have in this case. Thus taking that collective narrative if it sets out the essential facts the respondent is required to answer and which are disputed that should not result in a case being dismissed by strike out on the grounds of no reasonable prospect of success. But if there are parts of a case which are plainly simply based on an assertion or belief and in a context where the actual documented factual history it being incontrovertible, flies in the face of that assertion, then a claim, for which read where engaged the

[3] For that read the elaboration by Mrs Justice Simler in particular in the case of ***Hemdan v Ishmail and another [2017] IRLR 228.***

specific claim, can be safely struck out. However, if there are issues that would require findings of fact, then the matter should be allowed to proceed.

13. That brings me onto the approach to making deposit orders. This is accurately set out by Mrs Justice Simler DBE in the ***Hemdan*** case to which I have referred. The purpose of the deposit order is to identify at an early stage claims with little prospect of success and to discourage pursuit of those claims. Albeit it is a lesser test than for strike out ie less rigorous (as to which see her paragraph 12), nevertheless "*…there must be a proper basis for doubting the likelihood of a party being able to establish facts essential to the claim…. The fact that a tribunal is required to give reasons for reaching such a conclusion serves to emphasise the fact that there must be such a proper basis*".

14. The last point I wish to make apropos ***Hemdan*** is that I am well aware that if a deposit order is made and thus a claimant has to pay a sum as a condition precedent of continuing, it should not set at a level such as to mean that he cannot pay and thus stops his access to the justice seat by the back door. The deposit order must reflect the ability to pay. The significance of the deposit order of course is the potential cost consequences for a claimant who loses on the issues in respect of which he/she has been made to pay a deposit.

The scenario and my analysis

15. Having considered all the documentation before me at considerable length and heard the submissions, for the purposes only of today I find the following to be the scenario. I should make absolutely clear that my findings do not bind the tribunal at the main hearing in terms of their findings of fact.

16. The Claimant started to work for Amazon at its very large installation at Coalville in Leicestershire on 14 September 2016 as an agency worker. I find the Claimant to be a very intelligent man, most articulate in both spoken and English language. Employment Judge Camp had indicated that he thought that nevertheless as a safeguard, the Claimant should have an interpreter for the purposes of this hearing. Unfortunately, the clerks failed to book one. The Claimant was prepared to continue. He has been able to acquit himself before me well and I think he will agree with me that he has not been disadvantaged. He speaks five languages.

17. On 23 July 2017, he became an established employee of Amazon. He worked in a department of French speakers who handle calls from both van drivers delivering Amazon products and from Amazon customers in French speaking countries, ie in particular France. They also deal with English language calls on an overspill basis. There are other teams in Amazon at Coalville who deal with, for instance, queries in German or queries in Italian and Spanish. This was a small team in which the Claimant worked of about 25 French speakers.

18. Coinciding with the Claimant becoming a permanent employee into the picture enters his direct line manager, Karoline Jablonska (KJ). She is Polish. She in turn

appears to have reported at the material time to Nicola Reynish (NR). KJ worked alongside Alexandre Aly (AA) and Vicky Allen. The picture the Claimant paints is that AA, KJ and Vicky were too close a management coterie.

19. The Claimant was in a probationary period. His contract of employment at clause 1.3 made plain that on commencement of the permanent role on 23 July 2017, he would be subject to a 3 month probationary period. In that context, on 22 August 2017, KJ held a 30 day review with him. I have read that document and as far as I can see, there is nothing wrong with the process. It is an objective generically created template for scoring the call handlers and it includes random listening into their calls. I am well aware of how call centres work having heard many cases in relation to them over my many years as an employment judge.

20. There were good things about the Claimant's performance and there were things that needed improvement. Taking the totality of the evidence and all the interviews eventually conducted with the team, I am persuaded for the purposes of today that the Claimant was not being treated inconsistently with his colleagues in a way that might raise any inference of race discrimination.

21. On 3 October 2017, he had his 60day review with KJ. The same observations by me apply. Shortly thereafter, the Claimant had a holiday of about a week. The reason that becomes important is that the 3 months is classed as 90 days, so if this is meant to mean that in the 90 day window thus there remains 30 working days left on 3 October (which is 5 weeks), then should that not mean that the Claimant has 25 working days in which to improve. The Claimant's point being that in the period up to the next review which took place on 18 October 2017 (being the 90 day all-important one), because of his leave, he in fact only had 5 working days in which to perform.

22. During the period between 3 and 15 October, the rest of the team raised what I would describe as a petition against KJ. It was about her management style and included the way in which she was handling changes in the rota. To cut a long story short and taking by the end of the investigations conducted in particular in the early stages of 2018 by Casper Sorensen ("CS") and Stephen Lumsden ("SL"), the picture becomes that there were indeed management failings by KJ directed at everybody. The team has a significant ethnic minority but again to cut a long story short, none of the staff when interviewed said that they themselves ever considered that her treatment of them, which was poor, was by reason of their race. The issue in terms of this allegation therefore confines itself to the Claimant.

23. In this period, once she knew about the 'petition', KJ had taken her team to task, but not including the Claimant because he was on leave, accusing them of "stabbing her in the back". That she should not have said was a conclusion reached in due course by both CS and SL. It can be again noted, this is not singling out of anybody, it is the collective team.

24. On 15 October, KJ asked to see the Claimant to sign off the record of the 3 October probationary review assessment meeting. In the meeting, the Claimant says that she accused him also of being a party to the petition and thus being one of those

who had "stabbed her in the back". In that respect, the Claimant says that the following day he went and complained to Nicola Reynish (NR) and that KJ must have learnt about that because at around that time, the Claimant was on 16 October not copied into a circular to all his other colleagues asking them to complete their 90 day review forms.

25. Prior to this, he also seems to have been not circulated another document but I cannot see a causal link in that respect because it is before any complaint was made to him by KJ viz the stabbing in the back.

26. Absent what I am about to come to and therefore so far, I see no race discrimination engaged in this issue at all just taking the papers on the face of them and the extensive interviews/investigations which eventually took place in this case to which I have referred.

27. But, says the Claimant, he had by now learnt that KJ had referred to him by way of talking to another employee as a big black man of whom she felt frightened and who could break her back. That of course is on the face of it a specifically racial stereotyping remark. I do not need to explain why, it is self-evident. If said, it would of course be deeply offensive to the Claimant and it would be a remark which could be used as direct discrimination pursuant to section 13 on the basis of the stereotyping would be confined to him as the largest person and the only big black male in the team.

28. But was it said? The Claimant says that he went along and told NR accompanied by a work colleague who he did not name at any stage in the internal proceedings despite being invited to do so – that person is Mbayo Kisempla. In the context of the latter Sorensen and Lumsden investigations, he was seen at least twice. Once this matter had come more fully to light: specifically at page Bp[4]166 on 23 January 2018 asked in the context of race discrimination as alleged by the Claimant – CS not having spelt out what the accusation was perhaps because if he did he would have been leading - was asked this "… *anything else you would like to share*?" MK: "*No. The way Karolina came to him …"* This is a reference to the 3 November 2017 and the probation issue and that the Claimant did not have sufficient time to improve. He had otherwise nothing to offer.

29. That mirrors all the other staff who were interviewed, with the exception of Samia Zouanat[5]: "*Do you think any behaviours of KJ demonstrated racial discrimination?* Answer: "*With FK, yes"*. Question: "*Can you give me specific examples please?* Answer: "*Way she speaks to FK is different. He was extended without good reason. First person to be told. The way she was behaving with him*". This is all a reference to the probation issue.

30. What it means is that in two very extensive sets of interviews, none of his colleagues corroborated that which I am going to come back to, ie the 'big black man

[4] Bp=bundle page.
[5] This is in her interview with SL on 22 January 2018. It is one of many additional documents put before during the hearing and is not numbered.

break my back' issue. The Claimant says to me that they would have all been too frightened to say anything. For the purposes of today, that flies in the face of what I have now referred to. Everyone one of them was not backward in coming forward. They were highly critical of KJ. They had signed the petition to which I have referred; and in the course of events relating to the Claimant, they signed a statement in support of him. This did not by the way raise race discrimination. It was about the treatment of KJ in relation to him on the issue of the extended probationary period. So this very serious allegation is already looking somewhat thin.

31. Going back to material events, I come to 18 October 2017. The Claimant was seen by KJ. She came in off leave to do his 90 day review. She found that there were still issues with his performance albeit he had improved. The Claimant says that she was unfair. But looking objectively at what she was doing, it does not look like she was behaving in an inconsistent way. If the Claimant did yawn during a phone call with a service user, then she is entitled to record it.

32. Also by now there was an issue involving Vicky. The Claimant had asked to change his lunch break so it came more in the middle of his working day. Vicky refused him that adjusted break, albeit the Claimant had agreed it with another employee. But is this just not further evidence of an employer who is perhaps unreasonable in the way that via its line managers it deals with its staff? In other words, tough, possibly uncommunicative and insensitive. Of course that does not support in itself race discrimination as my colleague Employment Judge Camp observed and is of course made plain the case of ***Zafar***[6]. There has to be more than just that.

33. As to the 18th October, it was clearly a difficult meeting and I have read the extensive note of it. The Claimant was deeply upset that he was going to be extended on probation rather than simply signed off as satisfactory. What he therefore did was on 24 October to raise three grievances, which I have read. Do they constitute a protected act? For the purposes of today (and no more) as there was a reference to "equality" in the first of them and then a regurgitation in the second of the extracts of the Respondent's equality of opportunity policy and then a detailed complaint in the third grievance, for the purpose of today, I would treat them as collectively possibly constituting a protected act apropos section 27.

34. To turn it around another way and of course there will have to be a finding of fact, if the Claimant had not raised a protected act prior thereto and I am talking about making a complaint to VR on the 'big black' issue, then I cannot see how causatively the Claimant will be able to argue that the treatment by KJ of him on 18 October 2017 is either direct race discrimination and that is because she treated everybody else in the same over bearing manner so to speak, or victimisation as per s27. I should add in one other factor on that part of the exercise. The Claimant says why did she come in off her holiday to do his review? Is it not indicative of victimising him? I use that word more loosely. But the investigations showed that she was under huge pressure, along with other line managers, to review a very

[6] Zafar v Glasgow City Council (1998) IRLR 36 HL.

substantial number of people on probationary periods. She had two priorities for probationary assessment at this stage; the Claimant and an employee called Mo. The Mo assessment could not go ahead because an HR officer could not be found. That with the Claimant could because Terri-Ann Boxall (TAB) from HR was available.

35. There is of course the issue of the Claimant not being on the feedback list as at 21 October 2017. This is because of what had happened on the 18th. but where is it linked to race discrimination? In other words, it is back to, absent the remark to which I have now referred several times having been made, no evidence of race discrimination. There might possibly be a victimisation claim however arising out of the 21 October if she had seen the grievance before the feedback list email went out. Otherwise, it will not engage.

36. What is obviously now self-evident is that the Respondent decided to treat these emails from the Claimant as a grievance and utilise its grievance procedure. But on 3 November an event overtook events. My take on this from reading all the documentation in front of me is as follows. The Claimant had two short spells of absence over the preceding days. On each occasion, it was just taking an hour or so early. By this stage, from what I heard from him today, he was beginning to suffer from the effects of possible depression. He certainly was to refer to feeling under stress and depressed in the subsequent interviews. Amazon has a return to work policy. Incidentally the Claimant's record so far had been first-rate and he had an unblemished disciplinary record. Should KJ have therefore dealt with the return to work interview on the 3rd November as she attempted to do that day? Add in, should she in any event have been doing it given the difficult working relationship and the criticisms of her made by all the team in the "petition" which should have been addressed by now by Amazon and had not been, and therefore perhaps an understandable feeling of paranoia in that respect and distrust by inter alia the Claimant.

37. Suffice it to say she went ahead because that was the process. She therefore wanted the Claimant to come and see her in a side room. The totality of the evidence by the end of the Lumsden and Sorensen investigations does not on the weight of the evidence on the face of it support that it was the Claimant who was then aggressive in refusing to go with her. There are three witnesses in the investigation pack who speak to the contrary. AA at the time alleged the Claimant had told him that he was not prepared to go into a meeting in a side room alone with KJ least she might accuse him of something like sexual harassment. Of course, if she had said the words about "big black" at some stage previously and the Claimant was aware of that, then of course the Claimant would have justification for not wanting to go into a side room with her. There is some evidence that even so, KJ found him to be physically intimidating from the bundle. That is without giving it any discriminative nomenclature such as black.

38. So, objectively speaking it is to me understandable that things became very difficult. The Claimant would not go into a meeting with her without knowing why and wanted a witness. KJ told him it was about his absence the day before and said he could have AA. The Claimant did not trust AA as being part of the coterie, as indeed

so did others, and therefore wanted somebody independent. The situation became very difficult. The weight of the evidence steers towards that KJ shouted at the Claimant rather than the other way around. In the context was she told by AA what the Claimant was alleged to have said to him on the issue of sexual harassment? The evidence is weak for the Respondent: indeed AA became equivocal when interviewed by CS.

39. As it is, the Claimant was then seen by another manager, Matt Spott, because he had asked TAB at HR for help, and there was a perfectly reasonable RTW meeting. As it is, this this incident was complained about by KJ and AA and as a result, the Claimant was suspended on 7 November. The act of suspension is said to be a direct discrimination act. Of course it will have to go to the main hearing, but on the face of the evidence where is the evidence that the Claimant was treated less favourably than a white employee might have been in the same circumstances? The Claimant produces no evidence to support the proposition and has not provided comparators. So, if this case proceeds, I shall expect Amazon to produce disciplinary records for let's say 6 months either side of the suspension setting out the number of suspensions made at Amazon and the ethnicity or colour of the persons concerned.

40. As a consequence, the Claimant was then the subject of a disciplinary investigation by Wes Griffiths and at the same time there was a grievance investigation into his grievances by Lee Cooke. The two of them reached conclusions by the end of the year. I now know from the additional documentation put before me that Wes Griffiths did reasonably investigate the issues: his investigation meets ACAS CP best practice in terms of an unfair dismissal case. But of course, the Claimant has not got 2 years' qualifying service for that. In the context of what he was doing, in came the collective letter of support for the Claimant from his colleagues to which I have referred. Mr Cooke did his investigation. As to the extent of it, I may not have all the paperwork. It would seem that in any event (as I have already said) that any shortcomings were cured by the subsequent investigation by SL.

41. The Claimant was dismissed by Mr Griffiths following a hearing on 20 December 2017 and on the same day, Mr Cooke dismissed his grievance. I stop there. The Claimant suggests this is an inordinate delay such as to raise the inference that this was a further act of race discrimination. I will add in for the sake of completeness on what I have heard from him, that he is relying upon it being victimisation because of raising the grievance. I do not conclude, as a Judge of extensive experience, that there was an inordinate delay such as to raise an inference. The whole exercise has been completed in under 2 months. That is not an inordinate delay. Furthermore in neither of those investigations during which he was extensively interviewed did he raise the "big black" issue at all. I observe that if the Claimant could start to raise, as he was at this time, the treatment of him over a year previous by another by now departed employee including the use of the words "little old monkey", why did he not remember this all-important remark and indeed that he had been to NR about it? It begs the question.

42. The Claimant appealed on both fronts. The appeal into the dismissal was undertaken Casper Sorensen (CS), who is based in the USA. The Claimant says that a further act of discrimination is that he did not come across to the UK for the purposes of the appeal. But we live in an age of high tech and Amazon is at the forefront. It is to my knowledge that many international companies these days hold hearings and ensuing investigations using such as video conferencing or Skype. Indeed many court hearings are now conducted using video links and which will increase as new technology rolls out. It follows that I fail to see that this supports in the slightest the accusations of race discrimination. The same applies to the hearing of the grievance appeal by Mr Lumsden (SL) who is based in Scotland.

43. Also, despite what the Claimant may say, they both undertook extensive investigations. I have already said that the evidence from his colleagues just did not support his accusation that there was a racist environment.

44. That therefore leaves me with the "big black" issue. I repeat that at no time in 2017 in the context of events, and the bundle to this effect is quite plain, had the Claimant raised the issue. Thus, he first flagged it up in his appeals. Thus to SL (Bp 126) :

> "*It's clear that it is a prove of race discrimination. I'm aware of how she said to some members of staff that I'm too big and I look intimidating just the way I am. I was the tallest and biggest black agent in the French team but that is the way I am. …*"

45. He did not raise the sexual stereotyping part of any such remark, to which I have referred. He did not say that immediately learnt about this, he raised it with NR or that in so doing he had taken along with him MK.

46. He first raised the stereotyping remark at the actual appeal hearing (Bp145b)

> *" Someone from the team did not want his name revealed to protect his job. On the first time Karolina saw me on the floor she said: " this one is too big, he looks intimidating and can break my back"* (Bp 188).

47. And as to the appeal against dismissal (Bp119) initially just:

> *" Am I intimidating because of my size, or how I look? As I was the tallest and biggest black agent into the French team"* .

This was then limited to the 3 November incident and what AA had alleged; and that his witnesses were being discounted *"as they are black."*

48. Take the latter point first, I do not see any evidence to that effect. Each was fairly asked to give their account on the environment they were working and the interface to KJ; and they answered very frankly indeed and in a way that did not help KJ. They were asked otherwise about race discrimination and answered in the negative with the limited exception of SZ and I have dealt with that.

49. When interviewed by SL on 22 January 2018 at which he had present a work colleague, and incidentally at some of these meetings he had a trade union official, he went further and the point became engaged (see Bp 145b):

> "*… Another colleague she said that Karolina Jablonska (KJ) said the way I look is that I look intimidating, I could break her back. I heard this after these things. That's what she said.*

50. He was asked who made the comment and he said:

> "*A colleague at work, another colleague heard this and told me, she said he is too big and he looks intimidating.*

He was asked if he had a name and he said that they did not want to give their name but he said that he will go and see if they were happy to speak.

51. That then brings me back, taking it full square, to that every one of the team was interviewed and this would in fact be for the second time and not one of them corroborated what he said. Most important, I come back to MK and what I observed early on. That is a summary of the position.

52. It follows that although I am not going to strike out this allegation as of course the tribunal at the main hearing will have hear particularly KJ and the Claimant to make findings of fact, I am of the view that this allegation is very thin and therefore I am ordering a deposit. Of course, the Claimant must be aware that he will need to get MK to come and give evidence and if he is not willing but would support the Claimant otherwise, then he will have to obtain a witness summons.

53. That leads me on to what then happened. SL upheld the grievance in part in the sense that he reiterated that he agreed that there were shortcomings in the management by KJ. But by now Amazon had taken steps to cure that situation and it is self-evident from the interviews by then with the members of the team, and as I have already said mainly these were second interviews; they were confirming that the steps the management had taken were working and it was a much happier place. On the face of it, and no more than that, it follows that the conclusion of SL who otherwise found that there was no race discrimination is objectively sustainable.

54. However, when this case comes back before the main hearing, both SL and CS will need to explain why KJ was not pushed at least a little harder on the issue of the alleged remarks. It is very much a one line question – have you discriminated or words to that effect. The specifics are not put to her. Why not? Is there an inference to be drawn that they did not want to? Is that because of sensitivity for KJ's feelings or is there some other reason, ie that as the Claimant did not have qualifying service, they could in that sense simply cure the problem by dismissing him. Of course, I do not know the answer but it is an articulated part of the bullet points that the Claimant raised before EJ Camp. That is going to need answering.

55. CS upheld the dismissal. What concerns me is that he now of course did what should have been done before by WG and evaluated the shortcomings in the evidence as to whether or not the Claimant was the one who had behaved in an aggressive fashion on 3 November and whether in fact he had actually made the sexual harassing remark. One of the reasons why he needed to evaluate was that AA had watered down his evidence, albeit I note Mr Lewinski's observation that AA was saying that it was a long time ago and that his earlier statement was in effect his best recollection. Be that as it may. There was of course the evidence of the three witnesses in corroboration of the Claimant. Therefore, SL concluded that the evidence that the Claimant had behaved in this way towards KJ was "inconclusive".

56. So that could no longer be a disciplinary finding. It had been a reason for the dismissal. That left of course the Claimant's refusal to agree to the instruction of KJ to go into the side room with her to discuss his sickness absence as per the policy. On the face of it, CS did not fully evaluate the mitigation in that respect which had been made clear by the Claimant and advocated by his trade union official.

57. To turn it around another way, did CS not see that there was a possible element of provocation by KJ. Did he not link that on the face of it she could have known about the grievances that the Claimant had raised on 23 October? Should she therefore have backed off on the basis that the Claimant might have reasonable grounds for his stance. Given the Claimant cooperated with Matt, should that not have been an end of the matter? Thus should CS have upheld the decision to dismiss?

58. Of course, the Claimant has not got the 2 years' QS to bring a claim for unfair dismissal per se. So in that respect the Respondent does not have to behave fairly. And I am well aware as per the point made by Mr that an unreasonable employer is not necessarily a discriminatory one. It requires more than that; but nevertheless CS will need to explain why he still decided that the Claimant should be dismissed. What was the reason? On the face of it, the reason he gives does not stack up once he made the inconclusive finding. But is it such as to raise an inference of race discrimination? Overall on my analysis the evidence to support the Claimant is very thin. But that is a matter for the tribunal on the next occasion.

59.That leaves the allegation at paragraph 8(6) of EJ Camp's list linking underpayment of wages to direct race discrimination. From the documentation it is clear that the primary problem was tax coding changes by HMRC for the purposes of the Claimant and thus PAYE. This Amazon itself cannot change the code and that is obvious from the correspondence before me. Otherwise shortfalls in payment for a short period was a payroll error and it was corrected. I see no link between this issue and the other remaining alleged discriminatory acts.

Overall conclusion

60. It follows that although I am not going to strike out other than those aspects of this claim which are simply not supported as a contention on the face of the papers,

that I am going to make deposit orders as I conclude that which remains has only little reasonable prospect of success.

Means

61. The Claimant is in a parlous financial situation. Since losing his job with Amazon I accept, that he went downhill mentally very fast. His wife has separated from him, because of the difficulty of living with him because of his mental health, and gone to Manchester with their two children, including a new arrival. The Claimant is being prescribed anti-depressants and has been for some months. Although a highly intelligent man with a degree obtained in this country, he has not therefore been able to intellectually hold down doing such an interpreter's job. He is therefore doing the job of a weekend security guard. The work is intermittent and he is dependent on Universal Credit. He may of course have earning prospects for the future but that is not a matter for me today, that would become engaged if at the main hearing a costs order was made against him.

62. Finally, he does not own his own home and lives in Council property. He has substantial debts given his limited income of some £7,000. He has been discussing a CVA with debt advisers. It follows that I cannot order substantial deposits in this matter. If I did, I would be simply preventing him from the justice seat by the back door. But I do remind him, and it will be set out in the notice he gets regarding the deposits orders, that there are potential costs consequences should he lose his case.

63. Thus I am making deposit orders requiring the payment of £5 per claim to be continued with.

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Employment Judge P Britton
Date: 4 December 2018

JUDGMENT SENT TO THE PARTIES ON

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