EMPLOYMENT TRIBUNALS

Claimant:	**Ms Theresa Georges**	
Respondent:	**Pobl Group Ltd**	
Heard at:	**Cardiff**	**On: 11th and 12th March 2019**
Before:	**Employment Judge A Frazer** **Ms S Hurds** **Mr M Pearson**	

Representation:

Claimant:	**In person**
Respondent:	**Mr G Graham (Counsel)**

JUDGMENT

The unanimous decision of the Tribunal is:

The claim for racial harassment under s.26 of the Equality Act 2010 is well founded and there shall be a hearing listed to consider compensation.

REASONS

1. The claimant was employed by the respondent as a cleaner from 4th January 2018 until 23rd March 2018. The respondent is a housing association. As part of her induction training the claimant attended an equality and diversity training course at the respondent's main premises on 8th March 2018. The training was held between 0930 and 1230 and was attended by 16 employees including the claimant. The claimant alleges that the trainer wrote the word 'nigger' on the flipchart and it was then repeated three times by other colleagues in the context of a discriminatory words training session. The claimant claims that the use of the word in the training environment amounted to racial harassment.

The Hearing

2. We received a joint bundle of documents running to 306 pages and a document 'R1' from the respondent, which was handed to us on day two of the hearing. This was an 'Investors in Diversity Reaccreditation Report'. We also received a printout of an email from the claimant ('C1 to C3') sent at 1703 on 15th March 2018 which she produced on the second day of the hearing. We heard oral evidence from the claimant and from Lucie Thomas and Lisa Hearn for the respondent. We heard oral submissions in closing from the claimant and from Mr Graham.

3. We canvassed the issues with the parties at the outset of the hearing. It was accepted that the 'n' word was used by the trainer and other delegates in the training course. Whilst the respondent was taking issue with each element of s.26, it was agreed that the main area of contention was whether it was reasonable for any unwanted conduct to have the effect in s.26(1)(b).

Findings of Fact

4. Our relevant findings of fact are as follows. The claimant commenced work with the respondent as a cleaner at its Clarence Place hostel. She was line managed by Kirsty Thomas who was the manager of the hostel. We heard that on the morning of the equality and diversity training the claimant received a letter dated 6th March 2018, which is at page 44 of the bundle, inviting her to a probation review meeting to discuss concerns in relation to her performance and conduct. The claimant had had a supervision meeting with her line manager on 5th March. The probation review meeting was to take place on 13th March 2018.

5. After the supervision meeting on 5th March, Kirsty Thomas spoke to the claimant regarding Saturday 3rd March, which she had taken off as a snow day. Kirsty Thomas showed the claimant a timesheet, which she claimed to have filled in a week earlier, which claimed for the hours on the Saturday. Another employee had told Kirsty Thomas that the claimant had said that it was not her problem about not getting into work and that she should be paid for it. There was therefore some insinuation that the claimant had fraudulently filled in her timesheet when she had in fact taken the day off as a snow day.

6. Kirsty Thomas informed the claimant on 5th March that a note would have to be put in her file. It was put to the claimant under cross-examination that before her attendance of the meeting on 8th March she would have been aware that she was in trouble. Her response was that she did not think that she was since as far as she was concerned, she had done nothing wrong.

7. On 8th March 2018 the claimant attended the respondent's main office for equality and diversity training which was taken by Lisa Hearn, who was employed as a facilitator within the respondent's Learning and

Development Team at the time. The respondent had rolled out the course about 180 times by then and Ms Hearn had been a trainer for some 8 years. The respondent has an Equality, Diversity and Inclusion policy which mandates induction training for staff on equality, diversion and inclusion.

8. Shortly before the break Ms Hearn delivered some training on discriminatory words. The slides for the training are at pages 239 to 246 and they were put together by Ms Hearn. The slides for ‘discriminatory words’ raises the question ‘what are discriminatory words?’ and makes the point that people find different words offensive and just because you don’t find something offensive it doesn’t mean that no-one else will. The guidance slides for the trainer are at pages 265 to 266 of the bundle. This provides the trainer with some guidance as to how to conduct the ‘discriminatory words’ exercise.

9. The evidence of Ms Hearn, which is consistent with the guidance note, was that the discriminatory words exercise was ‘top and tailed’. That is, there was an introduction and a conclusion to it. The claimant disputes that there was any introduction. We find that it is more likely than not that Ms Hearn would have said something along the lines of ‘we are about to do an exercise which is going to be hard but there is a purpose to it’. Ms Hearn also stated that she advised the delegates not to swear, although we found this a somewhat superfluous softener, if indeed it was intended to be such, since the words that were subsequently shouted out had a greater impact than many commonly used swear words.

10. Ms Hearn conducted the exercise by writing on the flipchart the words ‘nigger’ and ‘paki’ in their full form and then asked the delegates to shout out the most derogatory and offensive words that they could think of. There were 16 delegates in the room. The claimant offered the word ‘cabbage’ as a word that was offensive to those with a mental disability albeit she was uncomfortable doing so. As Ms Hearn went around the room and people shouted out words, she wrote the words on the flipchart. She then encouraged people to shout out the words that really got to them and put ticks next to each offensive word that was shouted out if it was repeated more than once. The word ‘nigger’ was shouted out three times and there were three ticks next to it. The claimant was the only black person in the room and as such, she felt under pressure to say the ‘n’ word but instead offered the word ‘cabbage’.

11. After the exercise Ms Hearn asked people what the purpose of the exercise was and it was agreed that it was to illustrate that some people found some discriminatory words offensive but that they did not have the same impact on everyone. Ms Hearn acknowledged that the exercise can be uncomfortable and to that end, scheduled it before break time and asked delegates if they were ok following the exercise. We accept that if this was her usual method of delivering the course, it was more likely than not that she would have done this on this occasion.

12. The claimant left the training and left the building. She felt in a state of shock afterwards. She walked to the top of the high street and told a black male selling gas on behalf of a supplier whom she did not know about the training. The claimant returned to the course and at the end of the training filled in a feedback sheet (page 193). She ticked a sad face for 'the trainer was understandable and approachable', 'the level of the course was appropriate to my needs' and 'the course was relevant to my work'. She ticked a happy face for 'the pace of the course was right for me'. She provided no feedback in the boxes provided on the form.

13. The claimant did not return to work thereafter. She requested annual leave online before she left the training. The claimant's leave was not authorised but she did not come into work the following day. On Monday 12th March the claimant called her line manager and explained that she was unable to come into work because of the equality and diversity training. The note of her line manager of the telephone call records; '*Theresa went on to say that she had heard the 'N' word several times that day and didn't think it was right…..*'

14. The claimant did not attend work that week. On 15th March 2018 she wrote a letter of complaint to HR. Her evidence, which we accept, was that she obtained the email address from the customer service line and emailed the complaint on 15th March. The aspect of the complaint regarding the training was as follows:

    *The trainer had wrote the title 'Discriminatory Words' on the flipchart. She then asked the group to shout out the most derogatory words that we could think of. There were about 3-4 words that people had said which were written down. As you can imagine it is uncomfortable to think about or hear these words so people were not exactly forthcoming and we did have a bit of silence at first. She then said 'I am going to write 2 words down which are offensive, and that's nigger and paki she proceeded to write both the words down on the board. In my opinion she was so blaze and said them as if they were not even offensive. We continued to carry on saying words. Someone else mentioned the word chinkie as offensive to Chinese people and there were a number of other various words including junkie, window licker, old codger, bimbo, pikey, gypsy, raghead etc.etc. and as uncomfortable as I was saying this word I chose cabbage as I find this so offensive towards disabled people. I also wondered what the point of this was and also wondered why she had only mentioned the N word and the P word and not suggested any words as offensive to any other races or even explained that all races can suffer racism. She seemed to fixate on the N and P words in my opinion. And also when later giving examples of racist language in context of her racist uncle George again she used only examples of racism towards the black and Asian minority. She mentioned the P word again giving an example of a racist comment and connotation 'I am going to the P*** shop ad something about black people carrying knives which was another example given.*

The next exercise was for her to go around the room and for everyone to individually shout out the word that they found the most offensive from the list, the one that 'really gets your goat going'. I was sat over the far corner so would have been one of the last persons to say a word. As we were going round the room I heard the N word shouted out 3 times. I did wonder why but to hear this and other highly offensive words aired around the room disgusted me. When it came to me I cannot express how uncomfortable I was feeling. It was as if I felt that everyone was waiting for me to say the N word. Obviously that would be the most offensive to me but refusing to degrade myself by saying it yet again I said the word I had initially chosen. Also the fact that the words cabbage and the N word had 3 votes each were the words most said around the room.

I found no point or motive in this exercise and to be honest found it so shocking. I strongly considered not returning after the 25 minute break. For some reason I did and for the rest of the training I could not concentrate, felt upset, physically sick, anxious, distressed, angry and uncomfortable and unable to participate in group discussion.

15. The claimant was signed off sick from 15th to 28th March 2018 with 'stress at work'. There is a GP letter dated 27th November 2018 which records '*she consulted one of my colleagues on 15/3/18, very upset over the incident at work on 8th March during a training session. My colleague noted that she had physical symptoms of stress and issued sick notes from 15th to 28th March and from 28th March to 28th April*'.

16. It follows that we find that the claimant was genuinely shocked and distressed following the discriminatory words training on 8th March and that the use of the 'n' word in a group context by the trainer and by others in the group had caused her to feel this way.

17. Ben Hurrell, Senior HR Business Partner (Learning and Development) investigated the complaint. The claimant did not attend a grievance meeting to discuss her concerns as she was off sick. Mr Hurrell did not uphold the grievance. He found that the intention of the training was to highlight to delegates that using discriminatory language in any context could potentially cause offence. He felt that by discussing this language openly in a very controlled environment (i.e. the training room), the intended purpose would be achieved and there would be no room for doubt on the part of any of the respondent's staff about the importance of understanding the sensitive issues in the workplace. He took on board the claimant's points and recommended that the activity was replaced with some discussion where people used euphemisms or that the group's understanding was measured in some other way, for example by written exercises.

18. The claimant appealed against the grievance outcome by letter dated 29th May 2018. The appeal officer was Lucie Thomas, Director of

Learning and Development. As part of her investigation into the claimant's appeal she interviewed Christopher Davies, who was also a facilitator. She spoke to him to find out more about Lisa Hearn's delivery style. She then interviewed Vicky Bebb, Jonathan Burgess, Samantha Trinder and Georgia Rose. She spoke to Lisa Hearn herself. She attempted to contact the two individuals that the claimant had named in her grievance documentation, namely Lisa Chantler and Christine Robbins but she was unable to make contact with them. She found that Lisa Hearn had explained the context of the exercise to the delegates and that delegates were given the opportunity to raise concerns or leave the exercise if they chose to do so. She also noted that everyone she had interviewed had spoken positively about the session and about Lisa as the trainer. She did not uphold the appeal in the circumstances.

The Law

19. Section 26 of the Equality Act 2010 provides that a person (A) harasses another person (B) if A engages in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. Section 26(4) states that in deciding whether the conduct has the effect referred to in subsection (1)(b), account must be taken of the perception of B, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

20. In **Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham** **[2018] IRLR 542** at paragraph 88 Underhill LJ revisited the guidance that he had given in the EAT in **Richmond Pharmacology v Dhaliwal** **[2009] IRLR 336** and reformulated it as follows: *'In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of subsection (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.'*

Submissions

21. On behalf of the respondent it was submitted that the claimant may have been affected by the dealings that she had had with her line manager

about the alleged fraudulent timesheet and absence reporting prior to the training on 8th March and that this could have affected her perception of events. She received a letter inviting her to a probationary review on the morning of the training and she would have been aware that she was in trouble and that dismissal was a potential outcome. It was submitted that the evidence showed that the discriminatory words training was 'book-ended'' and that the claimant's evidence about the training having no purpose was not accurate. It was also the case that the training was designed to deal with delegates' perceptions of discriminatory words. It was not reasonable for the claimant to have been offended in circumstances where the purpose of using the words was to highlight that they ought not to be used. The respondent knows the composition of its workforce and what training they need on equality at a basic level. It had found it necessary to deliver this training to prevent discrimination. The practical significance of a finding of harassment would be that the respondent would have to deliver the training by telling its delegates that there were certain words that they were not permitted to say but the respondent would be unable to tell them what they were. Mr Graham drew our attention to the case of **Reverend Canon Pemberton v Right Reverend Inwood, former acting Bishop of Southwell and Nottingham [2018] IRLR 542.**

22. The claimant relied on the case of **Morgan v Halls of Gloucester Ltd UKEAT/0573/10,** in which a race discrimination complaint was upheld where a work colleague of the claimant had referred to him as a 'gollywog'. She also referred to the EAT decision in **English v Thomas Sanderson Blinds [2009] ICR 543** in outlining to the tribunal that the issue was whether the conduct was taken to be unwanted and demeaning to the person concerned. The word itself was capable of creating a hostile environment by its very nature. It was a trigger word. The claimant said that the experience had impacted her deeply.

Conclusions

23. As we have found above, we do find that the subjective element of the test is satisfied. We accept that the use of the full 'n' word by the trainer and by the three others in the training course had the effect of creating a degrading and offensive environment for the claimant and of violating her dignity. The 'n' word is by its very nature a deeply loaded and offensive word with distressing racial connotations which, we find, would necessarily have caused the claimant to feel deeply offended and uncomfortable.

24. Whilst the claimant did not raise her upset with the trainer at the time, we accept that she wanted to get out of the training environment because of the way that she felt. She did not return to work and we find that this was because the training had caused her some symptoms of stress. The letter from the GP bears this out. The claimant did raise her concerns about the content of the course with her line manager on 12th March. Further she communicated her concerns to her GP who is

recorded to have noted that she was very upset by the comments in the training. We did not consider that the claimant's perception was affected by the events which led to her upcoming probationary review meeting. The evidence before us indicated that the claimant was affected by the words used on the training course, which were said both by the trainer and by individuals in the context of a group exercise on discriminatory words.

25. We have considered whether it was reasonable for the discriminatory words training to have had the effect that it did on the claimant. The respondent's stated purpose of getting delegates to state the full words was so that the trainer could raise their awareness that those words were not to be used under any circumstances. We understand that the respondent has a duty to prevent discrimination and harassment in the workplace and we also understand some of the respondent's workforce may not be particularly enlightened or astute to some of the nuances of what is and what is not appropriate to say in a workplace context. For example, the point that was made to us was that it was necessary to make explicit to people that just because they are not offended by a discriminatory word does not mean that someone else will not be as well. We take on board the respondent's stated purpose and find that the underlying purpose of the training was entirely appropriate.

26. However we also find that the chosen method of delivery of this training was a risky strategy. The respondent was aware that there was a risk that the words used could create an offensive environment for some and to that end warned the delegates that they may find the exercise uncomfortable. The respondent referred to the training as a 'safe space' and even suggested that people were advised that they could leave if they wanted to. We do not find that any of the protective measures employed would have in any way softened the blow to a person within the training course who had heard words, which were loaded and deeply racially offensive. The 'topping and tailing' or contextual placing of the exercise did not make the words any less offensive in our finding. The delegates were obliged to be there. It was part of their workplace training. It was not a voluntary undertaking. We find that their encouragement to say words that were deeply offensive was a crude and unnecessary way of delivering the training in circumstances where some other more sensitive means of delivering the message could have been employed.

27. We also find that there was no explicit rationale as to why the words 'nigger' and 'paki', both racially offensive, were written on the flipchart to start the ball rolling. Whilst delegates used different discriminatory words and not just the 'n' word, the 'n' word was repeated three times within earshot of the claimant, which would have been particularly uncomfortable for her.

28. In our finding the training was conducted insensitively. There was no use of euphemism or other means of allusion to words or phrases which

would have avoided the need for the trainer and the delegates to express particularly loaded and offensive words explicitly. There are undoubtedly other means of training which would deliver the stated objective of highlighting to delegates that the use of certain words was prohibited and offensive without those words having to be expressed in full in a group context.

29. In our finding it was reasonable for the claimant to have been offended by the conduct. It was not reasonable for the respondent to have encouraged people to shout out offensive words by putting two racially offensive words on the board without any explanation as to why those words were singled out. It was not reasonable to expect people to shout out full discriminatory words in a group context even in circumstances where they had been given a 'trigger warning' so to speak. The respondent had warned delegates that the words could not be used under any circumstances but was prepared to allow its employees to be 'trigger happy' with discriminatory words in a group context.

30. We find therefore that the respondent harassed the claimant on racial grounds and the claim succeeds.

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Employment Judge A Frazer
Dated: 11 April 2019

REASONS SENT TO THE PARTIES ON

………14 April 2019…………….

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FOR THE SECRETARY OF EMPLOYMENT TRIBUNALS