Case No: 1810960/2018

EMPLOYMENT TRIBUNALS

Claimant: **Mr S Black**

Respondent: **The Salvation Army Trustee Company**

Heard at: **Leeds** **On:** **1, 2, 10 and 14 May 2019**

Before: **Employment Judge Bright**
Mr D Wilks
Mr G Corbett

Representation
Claimant: Mr Kenealey (Solicitor)
Respondent: Mr Parmar (Solicitor)

RESERVED JUDGMENT

The claim of harassment related to religion or belief fails. The claim is dismissed.

REASONS

The claim and issues

1. Mr Black's claim is that the respondent subjected him to harassment related to religion. He worked as an assistant support worker at a day centre run by the respondent. He says that Mr Emery, a support worker, made comments about his religion, Islam, on 12 June 2018. The respondent accepts that these comments were made, but says they were made by a service user rather than Mr Emery.

2. It is agreed by the parties that, if the claimant can prove that Mr Emery made the comments in question, they would amount (by virtue of sections 10, 26 and 40 of the Equality Act 2010 ("EQA")) to unlawful harassment of Mr Black related to religion or belief. The respondent has not argued that, if Mr Emery made the comments, they were made outside the course of his employment, nor that it has a defence that it took all reasonable steps to prevent him from making the comments or doing anything of that description. If we find that the claimant has done sufficient to show that the comments were made by Mr Emery, it is

therefore accepted that the respondent will be liable for the harassment in accordance with section 109 EQA.

3. The only issue before us is therefore a factual one: can the claimant show, on the balance of probabilities, that Mr Emery make the alleged comments on 12 June 2018?

The evidence

4. The claimant gave evidence on his own behalf and called no further witnesses.

5. The respondent called:

   5.1. Major D Lees, Service Manager;
   5.2. Major J Lees;
   5.3. Mr S Emery, Support Worker;
   5.4. Mr D Myers, Programme Co-Ordinator;
   5.5. Mr T Thornton, Regional Manager.

6. The parties presented an agreed bundle of documents. Page numbers in these reasons are references to the page numbers in the agreed bundle.

7. We were also provided with an agreed plan of the layout of the respondent's premises where the claimant worked.

Submissions

8. Mr Kinealey made submissions for the claimant, which we have considered with care, but do not rehearse here in full. In essence it was submitted that:

   8.1. Mr Thornton's inadequate investigation of the claimant's grievance puts the Tribunal in a difficult situation because much of the relevant evidence was not collected;

   8.2. The existing evidence supports the claimant's account. In particular: Mr Emery's apology to the claimant on 25 December 2017 evidences his guilt in relation to the comments made on that day; the claimant showed compassion to Mr Emery when he did not report the comments on 25 December 2017; witnesses to the 12 June 2018 incident were not interviewed because they would support the claimant's story; Mr Emery's evidence was inconsistent and there was no investigation into G's behaviour the on 12 June 2018; the claimant was not interviewed for his account of events on 19 June 2018; the only witness evidence gathered regarding the incident on 19 June 2018 was from one of the two workplace cliques who would support Mr Emery; Mr Myers was complicit in brushing the abuse under the carpet and management were wholly supportive of Mr Emery.

9. Mr Parmar made submissions for the respondent, which we have considered with equal care, but do not rehears here in full. In essence it was submitted that:

9.1. The case is all about credibility. The claimant's evidence was dishonest. There were various themes running through the claimant's evidence which brought his credibility into question: his poor recollection of events; the lack of documentation evidence to support his story; the repeated changes in his account of events in cross examination; the manner in which he sought to distance himself from unhelpful documents; his willingness to be dishonest to Mr Myers; the crucial omission of the key allegations from all of his complaints until after 19 June 2018; the contradiction between his account and the other witness evidence and documentation; his repeated references to evidence or witnesses who were not present as providing the key to the case.

9.2. The claimant's case is less plausible, in that it relies on Mr Emery, Mr Myers and to some extent, Majors D and J Lees all being dishonest. The chronology of events, in particular the failure by the claimant to complain until after the events of 19 June 2018, suggest that the complaint against Mr Emery is just an attempt to justify the claimant's behaviour on 19 June 2018 and to discredit Mr Emery and the respondent.

Findings of fact

10. Primarily, we are required to make a finding as to who made the comments about the claimant's religion on 12 June ("**the 12 June comments**"). However, we are also asked to make a number of findings of fact relating to contextual circumstances. In particular, the claimant says Mr Emery had made comments on previous occasions about his race, from which we can infer that he made the 12 June comments. The respondent says there are circumstantial facts, including potential disciplinary action against the claimant, from which we can infer that he had a motive for blaming Mr Emery for the 12 June comments.

11. Making findings of fact in this case has been difficult. In essence, the evidence was the word of one person against the word of another. We therefore feel the need to explain, in brief, the tools available to assist us in our fact finding and why we have attached greater weight to some and treated others with caution:

<u>Our impression of whether the witnesses were telling the truth</u>

11.1. We have treated the impression formed by the witness with great caution in the present case. The dangers of relying on a witness's demeanour under questioning on the witness stand are well known. A confident witness is not necessarily a truthful one. A nervous witness is not necessarily lying. A genuinely held belief which is wrong or one untruth told, does not necessarily render other evidence from that witness unreliable. People often deny unlawful actions. Generally good historians still tell untruths. People do, on occasions, behave in unexpected ways, whatever the overarching likelihood. Skilled cross examination can demolish an otherwise cogent case.

11.2. A particular danger is that witnesses from different social or cultural backgrounds may behave differently or have different communication styles to each other and/or to the Tribunal panel members. We are

conscious how easy it might be to jump to wrong conclusions about credibility based on particular social or cultural signals (for example, eye contact or directness) which may or may not be exhibited by the witness or witnesses in question. For these reasons we have exercised extreme caution and have placed little weight on how the witnesses presented in the course of their evidence in the present case.

The nature of memory

11.3. We have had regard to the comments of Mr Justice Leggatt in **Gestmin** (see below) and we are aware of studies showing that human memories appear to be re-assembled on each occasion they are recalled. As noted in **Gestmin**, the repeated re-assembling of memories required on the journey to a court hearing (including, in this case, a grievance letter, a grievance meeting, an appeal letter, an appeal meeting, ACAS early conciliation, the claim form, a preliminary hearing, witness statements and finally cross examination) can distort the memory. People may become convinced of the veracity of a particular memory or aspect of a memory which was, in fact, not objectively correct. A witness may be telling the truth as they recall it, but their evidence may be unreliable.

Inherent likelihood

11.4. Another difficulty we have faced in this case is that both accounts are so very similar, that both appear almost equally likely. The case turns on a word here or who particular words are attributed to. We have not been able to draw many conclusions about the inherent likelihood of one account in contrast to the other, from the totality of the chronology or circumstances.

Corroboration

11.5. We have preferred, where possible, to rely on an examination of which account is more consistent with contemporaneous material, and with subsequent investigations or witness statements or documentary evidence. We have attached weight to the evidence of other witnesses about Mr Emery and Mr Black's conduct and demeanour at the time, both before and after any allegations. We have also attached some weight to other evidence regarding the way they behaved on other occasions.

Credibility generally

12. Mr Parmar asked us to find that the claimant was not a credible or reliable witness. By way of example, in cross examination he took the claimant to a sick note (page 47) on which the claimant had ticked a box to say he had seen his doctor, although the claimant's GP records (page 143) for the same period did not show any such consultation. Mr Parmar also took the claimant to a specific date cited at paragraph 6 which contradicted the claimant's evidence about the date in cross examination. The claimant was unable to account for these disparities, which Mr Parmar characterized as evidence of dishonesty. However, we did not feel it was safe to make a general assessment of the claimant's credibility on the basis of this type of discrepancy. In our view, ticking a box on a fit note which may or may not have any significance to one's employer is qualitatively very different to maintaining allegations of religious

harassment to the extent of swearing to the truth of them on a holy book in the witness stand. Nor, in our view was it clear that the specificity of the date in the witness statement was any more than an error or that the claimant did not simply forget or mistake the date on the witness stand under pressure of cross examination. We were not persuaded that the inconsistencies or contradictions in the claimant's evidence were the product of deliberate dishonesty. We therefore do not accept that either of these inconsistencies rendered the claimant's evidence generally incredible or unreliable. We have preferred to assess each incident separately and in turn.

The colour comment

13. The claimant sets out at paragraph 8 of his witness statement an allegation that, on a previous occasion Mr Emery made a comment to him about his colour. He says Mr Emery told him he was "blacker than the average black people" (hereafter referred to as "**the colour comment**").

14. Mr Emery accepted that race was discussed on one occasion. At document 107, his version of the conversation is recorded from his interview during the grievance investigation. He maintained that he said there were "not enough black role models in the media". The question is whether Mr Emery said the words the claimant alleges, or whether they are a misrepresentation or invention by the claimant. The second question is whether, if Mr Emery made the colour comment, we should draw an inference from that comment that Mr Emery made the 12 June comments.

15. Mr Parmar pointed to the fact that, in cross examination, the claimant said Mr Emery told him he was "darker than the average black person". Mr Parmar invited us to conclude from the inconsistent use of 'darker' and 'blacker' that the claimant's evidence was not reliable. However, we had the impression that the claimant focused on the meaning of the comment, rather than the precise words used. He used 'darker' and 'blacker' interchangeably because, to him, they meant the same thing in that context and the precise semantics had no significance. We did not consider that an inability to recall the precise words, or using the words interchangeably, implied that the claimant was inventing or misremembering the allegation.

16. Mr Emery gave evidence that he would never make offensive comments about someone's race or religion. He gave evidence that he was a socialist who had moved to an ethnically diverse area, to whom race or religious discrimination would be anathema. It seems unlikely that someone with discriminatory views around race or religion would choose to work for a charity which, it is agreed, espouses diversity and racial/religious equality and is engaged in actively helping people in need from all backgrounds.

17. However, we were not inclined to give great weight to this factor in relation to the colour comment. A person does not have to be racist to commit race discrimination. In fact, a person who is positively anti-racist can, in certain circumstances, be found to have committed race discrimination (as in the case of **Amnesty International v Ahmed** [2009] ICR 1450, although the facts and cause of action were quite different to those in the present claim. Antipathy towards the victim's race or religion is not therefore a requirement of the definition of harassment, as demonstrated by the fact that someone of the

same race or religion can be guilty of such discrimination. Nor is an intention to hurt someone a requirement of the definition. Innocent comments can amount to harassment if they have the effect of hurting that person. Mr Emery's political and other convictions do not therefore assist us to determine the facts relating to the colour comment. They may be more relevant to the 12 June comments, as set out below.

18. More significant evidentially is the claimant's failure to mention the colour comment to anyone at the time. He accepted that it was not until his grievance on 1 July 2018 (page 89) that he made this allegation. This delay, in itself, is not conclusive evidence that the colour comment was not made. However, the claimant wrote to Major J Lees on 6 January 2018 (page 45 – 46) explicitly describing how Mr Emery had been making "my life at work a leaving [sic] hell" and accusing him of "harassment and intimidation". The failure to include any reference to the colour comment in that letter is therefore surprising.

19. It is agreed that there was a conversation about race between the claimant and Mr Emery. However, in the absence of any corroborating evidence either way, the claimant's failure to mention the comment until 1 July 2018 is the strongest evidence available to us. The burden of showing that, on the balance of probabilities, the colour comment was made rests on the claimant. We find, on the evidence, that he has not discharged that burden. We cannot therefore draw any inference from this part of the claimant's allegations.

<u>The African comment</u>

20. The claimant makes an allegation, set out in paragraph 6 of his witness statement, that Mr Emery made a comment to him along the lines of "you Africans don't think" ("**the African comment**"). It is not entirely clear when this comment is alleged to have been made, although it was connected in the claimant's evidence with an occasion when he was making sandwiches. The claimant gives a specific date in his witness statement at paragraph 6, but mentions comments about 'thinking' at both paragraphs 4 and 6, and they appear to be two different incidents.

21. Mr Emery accepted that he told the claimant to "think" during a disagreement on 25 December 2017, but did not recall any other occasion. The accounts of what happened are very similar and it may be inferred from Mr Emery's acceptance that he told the claimant to "think" on one occasion that he may have made similar comments on other occasions. But the step from "you don't think" or "you should think" to "you Africans don't think" is a big one. In Mr Emery's account it is merely an exhortation (albeit a rude one) to be more careful. In the claimant's account it is explicitly racist.

22. As with the colour comment, there is no contemporaneous corroborative evidence. However, the claimant's letter of complaint to Major J Lees on 6 January 2018 (pages 45 – 46) includes a whole paragraph describing what happened: "One Thursday evening in December at 4pm, [when] I was making Sandwiches for the outreach, Simon came and started saying that I do not think, I need to start thinking and use my head properly". While the claimant's account in that letter describes bullying by Mr Emery and repeatedly refers to him accusing the claimant of not thinking, there is no mention of any reference by Mr Emery to race. The first time this comment is linked with race is in the

claimant's grievance letter of 1 July 2018. There he records that he complained to the then Service Coordinator, Paul Bickerdyke, that, on an occasion when he was making sandwiches, Mr Emery told him "Africans don't think because if you did you guys wouldn't be in the mess you are in" (page 88). He says Mr Bickerdyke "put it on the system". It is not clear how or what records Mr Bickerdyke might have made, Mr Bickerdyke was not called to give evidence and there was no documentary evidence presented to us recording any such complaint.

23. The fact that the claimant, despite dedicating a whole paragraph of his letter of complaint of 6 January 2018 to Mr Emery's comments about him not thinking, omitted any reference to race suggests to us that, by the time he came to write the 1 July 2018 grievance, he had misremembered or misrepresented what occurred. The burden of proof rests on the claimant and we find, on the evidence, that he has not shown on the balance of probabilities that the African comment occurred and we cannot therefore draw any inference from this part of the claimant's allegations.

<u>December comment</u>

24. It is agreed that, on 25 December 2017, the claimant and Mr Emery had a disagreement regarding the claimant's decision to mop an area of floor near the upstairs kitchen. Preparations were underway to serve Christmas dinner to the service users and we had the impression from the evidence that the day was busy and somewhat stressful for the staff on duty. There was a dispute about the time of day the incident occurred, but that is not material, except in so far as it may be indicative of the accuracy of the individuals' memories. The claimant says the floor was dirty and he began mopping at least an hour before lunch was served, whereas Mr Emery says it was not an appropriate time to be mopping in that location as he was carrying large pots of food up from the downstairs kitchen shortly before lunch and was concerned about slipping. He says he put his pot down and came back to challenge the claimant about mopping. It seems from both accounts that Mr Emery told the claimant to stop mopping and told him something along the lines of 'you need to think', or 'you don't think'.

25. The core dispute is whether Mr Emery added the words "you ape" ("**the 25 December comment**"**)**. The claimant says he clearly heard those words and was not mistaken. Mr Emery vehemently denies saying those words. No one else was present to witness the incident.

26. It is agreed that there was a heated argument about the claimant's decision to mop the floor and that Mr Emery and the claimant both had hold of the claimant's mop. It is agreed that Mr Emery called Major D Lees on the radio asking for his assistance. Major D Lees' evidence was that he could tell from the tone of Mr Emery's voice that it was urgent. Mr Kinealey submits that Mr Emery made the urgent call to Major D Lees because he could see that the claimant was angry about the comment.

27. It was agreed that both the claimant and Mr Emery were angry and that Major D Lees told them to "shut up" and asked Mr Emery to leave the scene. We accepted Major D Lees' evidence that this was to diffuse the conflict and because Mr Emery was nearest to the door. It was agreed that Major D Lees

waited with the claimant while he finished mopping, but that the claimant did not mention Mr Emery's comment to Major D Lees during that time.

28. There were inconsistencies in the claimant's evidence about what he said to Major D Lees during that time. He initially told us in cross examination that he "kept going on about what had happened" to Major D Lees and agreed that he had time to tell Major D Lees about the racial comment, but failed to do so. The claimant told us this was because, when he asked to have a word with Major D Lees, he was told, "today's Christmas, we've got to get on with dinner" and/or "You guys need to get on with your work and I'll speak to you later", implying that there was no time or opportunity to discuss it. In his submissions, Mr Parmar asked us to picture the scene: "This isn't a calm atmosphere in which Mr Emery, the claimant and Mr Myers were talking about the incident. They were wrestling over a mop, adrenaline pumping. Was the claimant really going to be able to withhold, not mention the horrible name he was called in those circumstances?" We agree that, in the heat of the moment, and when the claimant himself tells us he kept going on about what had happened, and had the time and opportunity to report the comment to Major D Lees, he would probably have done so.

29. When pressed on this point later in his cross examination, the claimant explained that he did not tell Major D Lees at the time because Mr Bickerdyke had previously told him he would need to record any comments, otherwise it would simply be his word against Mr Emery's. This seems somewhat unlikely to us for two reasons. A line manager would not ordinarily give such advice to any employee, although it may happen. More significant, however, is the context. The claimant was provoked and angry enough to physically grapple with Mr Emery over the mop, causing him to call Major D Lees on the radio for assistance. According to his account, he had just been racially abused and was upset. We find it implausible that, in this scenario, the claimant would have the presence of mind to recall Mr Bickerdyke's words and pass up the opportunity of immediately telling Major D Lees what had just occurred.

30. When this was put to the claimant, he explained that it was a feature of his culture that, when offended or abused by another, a person would keep it in and "put up a face" to hide it. We acknowledge that that is the case for many people from some cultures and for some people from any culture. However, in our view, it remains unlikely that, having been abused in the extraordinarily offensive manner alleged, the claimant would have made no mention of it to Major D Lees in the moments just after the incident occurred, particularly given how angry he was at the time.

31. The claimant gave evidence at the hearing, although it was not mentioned in his witness statement, that he tried to call Mr Bickerdyke on his phone after the incident. It was accepted by the respondent, once the claimant had produced his mobile phone records (page 194), that the claimant tried to call Mr Bickerdyke at 13.47 and 13.48 and again at 19.12 on 25 December 2018. That certainly suggests that the claimant wanted to speak to Mr Bickerdyke very urgently and that it was sufficiently serious for him to call at lunchtime and repeatedly on Christmas day. However, the fact of the phone calls merely suggests that the claimant was upset and anxious to talk to Mr Bickerdyke, following the altercation with Mr Emery. The fact of the phone calls does not assist us in determining what was said during that altercation. Mr Bickerdyke

is not present to tell us what the claimant reported to him and, if Mr Bickerdyke made a record of the claimant's concerns, there is no document in the bundle containing that record.

32. The claimant did not dispute Major Jeanette Lees' evidence that, at the end of the Christmas day shift, the staff all sat down and chatted in a friendly manner. He accepted that he did not mention the 25 December comments to Major J Lees nor Major D Lees at that point, despite having the opportunity. He says this was because Mr Emery had apologized to him in the meantime. Mr Emery accepts that he apologized to the claimant, but says it was in relation to the upsetting altercation. We consider that the claimant would be inherently more likely to accept Mr Emery's apology if it merely related to the altercation rather than racial abuse. The claimant's own evidence about accepting the apology therefore appears to corroborate Mr Emery's account in this instance.

33. In cross examination the claimant said he expected Major J Lees to ask him about what happened on 25 December and, when she did not, he approached her to report Mr Emery's treatment of him on 25 December. It is agreed that she asked him to put his concerns in writing.

34. The claimant sent an email to Major J Lees dated 6 January 2018 headed "Re: incident 25/12/2017" (pages 45 and 46). It was clear to us that this email raised a grievance against Mr Emery, though it did not expressly make any reference to the respondent's grievance procedure. It plainly set out complaints against Mr Emery and asked the respondent to look into them. The respondent's failure to treat this as a grievance and failure to properly investigate the allegations it contained showed a poor understanding of an employer's obligations in that regard. Major J Lees told us it "didn't appear of high importance" and, although she tried to arrange a meeting with the claimant to discuss it, that meeting never took place.

35. The claimant's email of 6 January 2018 recounts what happened between the claimant and Mr Emery on 25 December in detail and refers to "this type of harassment and intimidation". However it makes no reference to race and, significantly, does not report Mr Emery using the word "ape". If Mr Emery's apology was the reason the claimant did not report the incident on the day it happened, it is not clear why he then complained about it in his letter on 6 January 2018. Separately, it would be surprising, in our view, if Mr Emery's apology was insufficient to deter the claimant from making a written complaint to Major J Lees, but sufficient to deter him from mentioning the most blatantly offensive part of the incident to her.

36. The claimant said that he did not report the racial slur, because he felt sorry for Mr Emery and that Mr Emery's son and the service users needed Mr Emery as a role model. We find it surprising that the claimant would consider someone who made the alleged racial slurs to be a suitable role model for others. The claimant also told us he did not mention the 25 December comment or other racial remarks in his complaint email on 6 January 2018 because he did not want to get Mr Emery "into trouble". Mr Kinealey characterized this in his submissions as "showing compassion". However, the wording of the complaint email itself contradicts the claimant's evidence. From the fact and content of the complaint it is clear that claimant's sole

purpose in sending the email was to report Mr Emery and so get him into trouble. The email complained about there being no end to the "harassment and intimidation" by Mr Emery, accused him of lying and of making the claimant's life a "living hell". Yet it makes no mention of Mr Emery calling the claimant an "ape" or any other racial comments. It is not plausible, in our view, that the claimant would have complained in those terms but withheld the most serious complaint. Since the email is the closest thing to contemporaneous documentary evidence available to us we consider it is the best indication of what actually happened.

37. Mr Black had a further opportunity to mention the allegation to Major J Lees on 28 February 2018, when he had a supervision session with her. The performance review record from that meeting (pages 49 – 51) reported that the claimant told Major J Lees that he did "not want to make a big issue of it and feels that he is getting along with Simon, recognizing the journey he is on".

38. The notes of a further performance review meeting with Mr Myers on 2 May 2018 (pages 52 – 55) record that the claimant was "feeling fantastic…the team were working well together and everyone seemed to be getting on with each other very well…He enjoys his job and he loves to come to work". It records that "the issue with support worker SE was much better. He said they had managed to have a conversation in which he was able to express how he felt. SB said that he felt that SE had listened and that it had all been resolved". It seems implausible that someone who had been racially abused in the terms described would later have reported such positive feelings to his manager. The claimant accounted for this contradiction in his witness statement and in cross examination, telling us that he had not meant what he said to Mr Myers. He told us he did not tell Mr Myers the truth because of what had happened just before the meeting. He said that, just before he went in to talk to Mr Myers, Mr Emery had come out of his own performance review meeting and told the claimant that Mr Myers was his (Mr Emery's) friend and that Majors D and L Lees "loved him". The claimant says Mr Emery told him "there's nothing you can do to me, no matter what you say". The claimant says Mr Emery's words prompted him to tell Mr Myers what he thought Mr Myers wanted to hear in the performance review meeting. We find it surprising that the claimant would report such very positive feelings about work to Mr Myers in these circumstances. In effect, the claimant told us that he told Mr Myers untruths. Either he was lying to Mr Myers, as he suggested at the hearing, or he was telling the truth at the time. The claimant accepted that he later signed the performance review record to say that he agreed with its contents. On that basis we find that he told Mr Myers the truth in the performance review meeting.

39. The claimant accepted in cross examination that he knew about the respondent's human resources provision and that it was open to him to contact them about issues at work. However, he said he did not approach them because he did not think anyone would believe him without having a recording to support his account.

40. We have considered whether it is plausible, in these circumstances, for the claimant to have complained about Mr Emery, but deliberately to have omitted any mention of the racial abuse. We are aware that victims of harassment,

whether racial, sexual or of other kinds, may often be reluctant to name the abuse and may give a perpetrator the 'benefit of the doubt' for a wide range of reasons. However, we are not psychologists and are required to make findings of fact on the evidence before us. Given that there is no mention made of the racial abuse to the respondent from Christmas 2017 until the grievance letter of 1 July 2018, despite there having been a number of opportunities, we find that the claimant has not discharged the burden of showing, on the balance of probabilities, that the 25 December comments were made. We are therefore unable to draw any inferences from the events of 25 December 2017, other than that there was some animosity between Mr Emery and the claimant, which is in any event accepted.

<u>12 June comments</u>

41. The claimant alleges that, during the course of the afternoon of 12 June 2018 Mr Emery and a service user G, insulted his religion (paragraph 19 of his witness statement). He says Mr Emery criticized and insulted Muslims, saying they were "child molesters", that "it was Muslim people who groom children for sex", "the groomers are all Muslim Asian males", and that grooming/molesting "was an Islamic thing, that it was in the Quran, and that the prophet Mohammed married a 9 year old girl" ("**the 12 June comments**"). Mr Emery denies saying these words. The respondent says it was the claimant who initiated a discussion about religion and that it was a service user, G, who made the comments.

42. Mr Emery and the claimant have different recollections of where and when this conversation took place. It is agreed that the claimant and Mr Emery always served lunch to service users between 12 noon and 1pm. It is also agreed that the respondent runs a session for service users called 'Cook and Eat' from 1.30pm to 3pm on Tuesdays. An arts and crafts session is held at the same time in another room, run by a staff member called Andrea. The claimant says Mr Emery made the 12 June comments during a Cook and Eat session. The respondent says the claimant was not in Cook and Eat on that day and that the comments were made by G during the lunch period. In his grievance letter (page 91) the claimant mentioned a 'Richard' being present at the time the comments were made. The respondent's log (page 195) shows two service users called Richard in attendance for lunch, but none on the list for the Cook and Eat session. The claimant's account of those present during the conversation about religion therefore supports the respondent's assertion that the comments were made during lunch.

43. The claimant also conceded in cross examination that his recollection of aspects of the afternoon was mistaken. He recalled carrying arts and crafts materials downstairs to the Church, but the respondent showed that the Church was not in use at that time due to demolition works. Further, while the claimant maintained that he had attended lots of Cook and Eat sessions, the respondent's witnesses were in agreement that the claimant had always been adamant that he would not take part in Cook and Eat. The claimant also, during his evidence, referred to having his own reasons for not wanting to lead or attend Cook and Eat. On balance, we therefore considered that the respondent's evidence that the claimant did not attend Cook and Eat on 12 June was more plausible and consistent with the claimant's own evidence of other occasions.

44. The claimant was also unable to explain the timing of events that afternoon in a way which tallied with his account of how those events unfolded. By contrast, the accounts of the respondent's witnesses regarding the timings and locations of the key players were more coherent. The respondent said that, following the conversation about religion, Mr Emery left the dining room to report the matter to Sharon Grieg, who was on reception. Mr Myers told us he was passing reception just after lunch and saw Mr Emery and Ms Grieg and they told him about the conversation about religion. Mr Myers said that, following lunch, the claimant was on reception during the Cook and Eat session. Mr Myers said he walked past reception some time between 3pm and 3.45pm and noticed the claimant sitting there, so had a conversation with the claimant, which he identified as a 'pastoral chat'.

45. The entries on the respondent's 'Atlas' software for that day support Mr Myer's recollection of events, including the claimant being on reception during the afternoon, rather than in Cook and Eat. We accepted the evidence of Major D Lees that the respondent's Atlas IT support provider had identified that the entry was made at 15.53 on 12 June 2018 and had not been amended thereafter. We were taken to a screen shot of the Atlas entry (page 193), which included a 'pop out' box identifying those individuals attending the Cook and Eat session. While the respondent accepted there were some anomalies in the information recorded on page 193 in relation to other activities and on other days, we accepted the respondent's evidence that the entry for 12 June 2018 had been made by the claimant, as recorded by the entry itself. We accepted that the claimant was the only person who could log in as himself and the entry must therefore have been made by him. The alternative, suggested to us by the claimant, would be that the respondent's employees and managers had conspired to create a false entry by the claimant and falsified considerable other unnecessary information without having a clear idea of its future potential relevance in evidence. That seemed singularly unlikely to us and would have required foresight about the future course of these legal proceedings. We therefore accepted that the claimant, while he did not recall having made the entry on Atlas, was the source of that entry.

46. We therefore concluded that the conversation about religion must have occurred during lunch, not during Cook and Eat when the claimant was on reception. While that finding does not rule out Mr Emery having made the comments to the claimant, it does tally with Mr Emery's version of events overall.

47. More significant, in our view, is the claimant's failure to report the 12 June comments. Mr Myers told us that he had the 'pastoral chat' with the claimant on reception and asked him how he was, because of the report of the conversation about religion made to him by Mr Emery and Ms Grieg. Mr Myers says the claimant played down the conversation and said it did not need to be investigated. That would seem to be consistent with the claimant having initiated the conversation about religion, as reported by Mr Emery, and the 12 June comments being made by the service user. The claimant attended work as normal on 13 and 14 June 2018 and did not report the 12 June comments to Major J Lees or Mr Myers despite having the opportunity to do so.

48. During cross examination on this issue, the claimant said for the first time that he had discussed the incident with another person. However he was not prepared to name that person. He told us this was because that person was a staff member of the respondent who was scared of losing his job. In the absence of any clear identification of or evidence from that person, we cannot draw any inferences from the claimant's evidence that he apparently told them what happened.

49. The respondent's witnesses acknowledged that the service user, G, had a history of making discriminatory comments about Islam and people of Muslim faith. The claimant also acknowledged in his witness statement that G was present and was insulting his religion. By contrast, Mr Emery's undisputed political and social convictions and anti-racist background suggest that it was unlikely to be him who was the source of the 12 June comments. We find, on balance, taking account of all of the above factors, that it was the service user, G, not Mr Emery, who made the 12 June comments insulting Islam and Muslims. The respondent asked us to infer from the respondent's failure to discipline the service user, G, that it was not G who was responsible for the comments. However, we accepted the respondent's evidence that, although service users could be and were sanctioned for offensive comments, on this occasion it believed the claimant had initiated the conversation so no action was taken. G had been excluded on previous occasions for his behaviour.

Staff meeting

50. On Friday 15 June 2018 the claimant had a day of pre-booked annual leave arranged for Eid and he was not scheduled to be at work over the weekend or on Monday 18 June 2018. He returned to work on 19 June 2018.

51. It is accepted that there was an altercation between Mr Emery and the claimant at a staff meeting on 19 June 2018. The respondent says that it was only after this altercation that the claimant, faced with possible disciplinary action, fabricated the allegations against Mr Emery as a way of justifying his own behaviour at the meeting.

52. The dispute appears to have arisen in part because of a late holiday request by the claimant and the claimant's management of a football team. Mr Myers made some comments at the staff meeting on 19 June about holiday bookings and the way the football team was being run. Mr Myers' evidence was that these were general comments, not addressed to nor naming the claimant. However, we find that it must have been obvious to the claimant that Mr Myers' was raising these matters because of issues with the claimant.

53. The claimant says (paragraph 22 of his witness statement) that he felt that Mr Myers' criticism of him resulted from complaints by Mr Emery about the claimant. But he says he did not become angry in the meeting nor do anything which might have caused him to expect a disciplinary investigation or sanction. In cross examination, however, he said Mr Emery was making comments at the meeting which provoked him into responding. The respondent says the claimant became angry and aggressive towards Mr Emery and indicated that he was willing to fight him. Mr Myers gave evidence, supported by his notes of the staff meeting were in the bundle at pages 56 – 58, that the claimant became angry in the meeting and shouted at Mr Emery,

and he had to "get between them". Mr Myers was frank that his notes of the staff meeting were partly made during the meeting but that when the 'incident' occurred he was too busy dealing with it to make notes. We accepted that he completed the notes later, but within 24 hours of the staff meeting. These almost contemporaneous notes corroborate Mr Myers' account of the meeting, as does the later statement of Ms Grieg (page 68).

54. It is agreed that there was a lengthy meeting between Mr Myers and the claimant following the staff meeting. This also suggests that the claimant exhibited inappropriate behaviour during the meeting. Mr Myers' account of the discussion is detailed and records a number of the issues which the claimant made reference to during this hearing. But Mr Myers is adamant that the claimant made no mention of any acts of racial or religious discrimination. While the claimant's evidence is that he did mention the 12 June incident to Mr Myers, given his previous failure to mention any of the race discrimination despite having sufficient opportunities, we preferred Mr Myers' account of the meeting.

55. We accepted Mr Myers' evidence that he told the claimant he would discuss the incident with Major J Lees and Major D Lees on their return from holiday. This, in fact, is what Mr Myers did, as reported by Majors D and J Lees in their witness statements.

56. The claimant was signed off sick after his meeting with Mr Myers.

<u>Disciplinary investigation</u>

57. Major J Lees accepted that the claimant would not have been aware that, on her return from holiday, she initiated an investigation into the staff meeting incident. She did not notify him of the investigation or indicate to him that he might be subject to disciplinary action. However, we accepted the respondent's submission that the claimant would have inferred from his meeting with Mr Myers and from his own behaviour and people's reactions at the staff meeting that the matter would be referred to Major J Lees and may well lead to an investigation or even disciplinary action.

58. Major Lees' investigation was halted when the claimant submitted his grievance on 1 July 2018 (pages 88 – 94). That letter sets out, for the first time, the claimant's allegations concerning the race comments and religious harassment by Mr Emery.

<u>Grievance investigation</u>

59. Mr Thornton was appointed to investigate the grievance and, on 31 July 2018, he met with the claimant to discuss it. Mr Thornton subsequently met various other witnesses, including Mr Emery. The grievance was not upheld and the claimant appealed. A grievance appeal meeting was held on 26 September 2018. The claimant tendered his resignation on 15 October 2018 and received the outcome of the grievance appeal (not upheld) on 26 October 2018.

60. It was apparent from Mr Thornton's evidence that, despite being experienced in conducting grievance hearings, his handling of the claimant's grievance

was poor. Mr Thornton accepted that the grievance meeting notes at pages 99 – 100 were a summary of what was discussed, produced by him after the event from an audio recording of the meeting which was not provided to the claimant, nor adduced in evidence. The summary does not contain any record of the questions put to the claimant nor his answers. Mr Thornton did not check entries on Atlas or the claimant's emails to corroborate his account of events. Nor did he check the available CCTV footage. He interviewed Majors D and L Lees, Mr Myers and Mr Emery, but he did not interview the nine service users the claimant identified as witnesses to the various incidents. Nor did he speak to Ms Grieg, whom both the claimant and Mr Emery recalled as being present during part of the 12 June conversation. While we accepted that it may not have been appropriate to interview the service users, we found Mr Thornton's explanation that he made a "judgment call" not to interview Ms Grieg or any other staff unsatisfactory. Although Mr Thornton referred repeatedly in his evidence to looking at the "bigger picture of the whole grievance", it was apparent to us that he failed to investigate the earlier incidents cited in the claimant's grievance. He justified the lack of investigation on the grounds that he felt "the management team had dealt with all the previous incidents appropriately" and that there was "no need to unpick those incidents any further". However, he was unable to satisfactorily explain the grounds for that conclusion. When asked why he believed Mr Emery's account in preference to that of the claimant, he explained that he formed his view based on "body language, my own personal opinion and perception of the person telling me their events. I felt it was one person telling the truth and one person that wasn't". While we would not expect an employer to conduct the kind of forensic analysis of evidence which is required in litigation, it was plain to us that Mr Thornton's assessment was based mainly on a mistaken belief that he was able to "spot" who was lying and who was telling the truth. His investigation of the objective evidence was therefore cursory.

61. The grievance outcome letter (page 114) conveyed Mr Thornton's conclusions thus: "it has been decided that no further action will be taken in relation to your grievance because many of the issues have insufficient evidence to provide an unequivocal account, others have been dealt with under other procedures and has already been remedied". It fails to address the particular allegations raised by the claimant and does not properly explain the basis for the rejection of his grievance. The grievance appeal outcome letter (page 123) indicated that, although some further investigation of the claimant's appeal grounds occurred, evidence relevant to his original allegations remained largely unexplored.

The law

62. Section 40 EQA reads,
An employer (A) must not, in relation to employment by A, harass a person (B) –

(a) who is an employee of A's;
(b) who has applied to A for employment.

63. Section 26 EQA reads,
(1) A person (A) harasses another (B) if—

(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b)the conduct has the purpose or effect of—
(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

…
(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.

64. Sections 4 and 10 EQA provides that religion is one of the characteristics which is protected by the provisions of the EQA.

65. Section 109 provides that anything done by a person in the course of their employment must be treated as also done by their employer unless the employer can provide the 'statutory defence' set out in section 109(4) EQA.

66. Section 136 of the Equality Act 2010 set out what is known as the 'shifting burden of proof' applicable in discrimination claims. However, where the conduct complained of is clearly related to the relevant protected characteristic, as in this case, there is no need to revert to the shifting burden of proof.

67. The burden of proof is on the claimant and the standard of proof is the balance of probabilities. The claimant must show, on the balance of probabilities, that the conduct occurred. While it is rarely satisfactory to have to decide a case on the balance of probabilities, there are some cases in which, owing to the unsatisfactory state of the evidence, deciding on the burden of proof may be the only just course of action.

68. In relation to the reliability of the evidence, we have borne in mind the observations of Mr Justice Leggatt in the High Court at paragraphs 15 – 22 of **Gestmin v Credit Suisse (UK) Ltd and one other** ([2013] EWHC 3560 (Comm), in particular that:

One of the most important lessons of… [psychological] research is that in everyday life we are not aware of the extent to which our own and other people's memories are unreliable and believe our memories to be more faithful than they are. Two common (and related) errors are to suppose: (1) that the stronger and more vivid is our feeling or experience of recollection, the more likely the recollection is to be accurate; and (2) that the more confident another person is in their recollection, the more likely their recollection is to be accurate.

Underlying both these errors is a faulty model of memory as a mental record which is fixed at the time of experience of an event and then fades (more or less slowly) over time. In fact, psychological research has demonstrated that memories are fluid and malleable, being constantly rewritten whenever they are retrieved. This is true even of so-called 'flashbulb' memories, that is

memories of experiencing or learning of a particularly shocking or traumatic event. (The very description 'flashbulb' memory is in fact misleading, reflecting as it does the misconception that memory operates like a camera or other device that makes a fixed record of an experience.) External information can intrude into a witness's memory, as can his or her own thoughts and beliefs, and both can cause dramatic changes in recollection. Events can come to be recalled as memories which did not happen at all or which happened to someone else (referred to in the literature as a failure of source memory).

Determination

69. As identified above, we have found the fact finding in this case particularly difficult. It is essentially one person's word against the other's, in part because of the paucity of evidence caused by the respondent's failure to treat the 6 January 2018 letter as a grievance and the failure to properly investigate the grievance in July 2018. Had the respondent properly investigated in January or July we believe this claim would have been unlikely to reach the Tribunal because the true facts would have become apparent to the parties and the matter would have been resolved without recourse to litigation. As it is, the respondent has done Mr Black, Mr Emery and itself a disservice by failing to properly investigate.

70. We are required to find the facts on the balance of probabilities, on the basis of the evidence before us and that is what we have done, reaching the unanimous conclusions set out above. It is possible that we have reached the wrong conclusion (factually, rather than legally) because of the inadequacy of the evidence and the need to fall back on the burden of proof. Either way, we recognize that the emotional, psychological and other consequences for the individuals involved, in particular the losing party, cannot be underestimated.

71. We have not found that the claimant or Mr Emery was deliberately dishonest, despite Counsel for both parties inviting us to do so. We consider that it is far more likely, bearing in mind the fallibility of memory and the ability of the human mind to persuade and deceive itself, that both Mr Black and Mr Emery have related what they recall of events. However, for the reasons set out in our findings of fact, above, we find that the claimant's evidence was, in many regards, less reliable than that of Mr Emery and the other witnesses. The

claimant has not discharged the burden of proof, to show that Mr Emery made the 12 June comment abusing his religion. Nor has he shown that Mr Emery made the racial comments before 12 June, and we are not therefore prepared to draw any inferences about what occurred on 12 June. The claimant has not shown, on the balance of probabilities, that Mr Emery and the respondent, harassed him related to his religion. The claim is dismissed.

Employment Judge Bright
Date: 22nd July 2019