EMPLOYMENT TRIBUNALS

Claimant **Mr Daniel Hart**

Respondent **Birmingham Neoglory Ltd (R1)**
Ms Karen Price (R2)
Ms Linda Zhang otherwise known as Linda Xiong (R3)

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

HELD AT NORTH SHIELDS ON 2 August 2019
EMPLOYMENT JUDGE GARNON Members Ms A Tarn and Mr S J Li
Appearances
For Claimant in person
For R1 R2 and R3 no appearance

JUDGMENT

The unanimous judgment of the Tribunal is
1. The name of the third respondent is further amended to that shown above.
2. The claimant was harassed contrary to section 40 of the Equality Act 2010 (the EqA) by all three respondents . We so declare and order the respondents to pay compensation to the claimant of **£ 7000 and interest of £ 840** for which they are jointly and severally liable.

REASONS (bold print is our emphasis and italics quotes from documents)

1. Procedural History of the claim and the Issues for today

1.1. The claimant (C) was employed by R1 from 25 November 2017 to 3 February 2018 at a shop in the Gateshead Metrocentre called "Amon" ("the shop") which sells handbags and other accessories . He originally named Amon as the second respondent. He commenced Early Conciliation (EC) against all three respondents on 17 April and received an EC certificate on 25 April 2018. The claim, presented on 25 May 2018, is expressed as harassment only contrary to s 40 EqA. The claimant does not say he was constructively dismissed. as he confirmed at a preliminary hearing before Employment Judge Garnon on 13 December 2018 and the remedies he seeks are a declaration and compensation for injury to feelings only.

1.2. The claim was served on 20 June . A response form, due by 18 July, arrived on 17 July signed by R3 and Mr Yan Wang as Director of R1 **attaching payroll documents relating to C.** It did not answer the harassment claim but denied dismissal which was not claimed. It says R1 and R3 need not consult solicitors because it was a very easy case.

1.3. At various stages of claims most Employment Judges perform a company search to check they do not take steps against a company which has been dissolved or is in compulsory liquidation or administration. In this case one showed the sole director of R1 is a Mr Yan Wang. The company was shown as "active".

1.4. On 15 August 2018 Employment Judge Johnson conducted a preliminary hearing at which none of the respondents appeared. He ordered the removal of Amon from the proceedings , the joining of Ms Karen Price as R2 and made an order for further particulars from the claimant by 31 August. The claimant set out instances of things said, by various people and enclosed a manuscript 3 page signed statement of Ms Amanda Tilney. Employment Judge Johnson ordered a reply to the further particulars by 28 September. One arrived on 27 September 2018 under cover of a letter from Legis Chambers, Fitz Eylwin House, 25 Holborn Viaduct, London EC1A 2BP signed by Mr Nazar Mohammad , Barrister. It denied anyone for whose acts R1 is responsible had said what the claimant alleged. R2 was served on 26 October 2018 at an address c/o R1. No response arrived from R2. Employment Judge Johnson made an order R1 and R3 confirm whether R1 employed R2. By email it denied it did. He ordered a preliminary hearing to clarify the claim.

1.5. At that hearing before Employment Judge Garnon R1 and R3 were represented by Mr A Khan Solicitor **and R3 attended**. Employment Judge Garnon told Mr Khan he was not prepared to "play hide and seek the proper respondent" , needed to ascertain exactly the role various people held and broke for 15 minutes to enable Mr Khan ,whom he found cooperative and helpful, to take instructions. Mr Khan returned saying Amon shops are operated by franchisees ,R1 is one, and R3 provided services to R1 as a consultant. R2 was employed by **another Amon franchisee in Doncaster** and "lent" to R1 to help at the Metrocentre shop. R3 believed R2 left the employment of that franchisee in June 2018. The impression being given was that R3 had nothing to do with the Doncaster franchisee.

1.6. R2 had only ever been sent the claim c/o R1's Metrocentre address and Employment Judge Garnon suspected she had never had notice of the claim which would explain why she had not entered a response. It was the view of the claimant, Mr Khan and himself that before the issues of for whose conduct R1 could be liable and for what R2 or R3 may be liable under sections 110-111,were addressed , it was essential a further attempt be made to effect service on R2 .He wrote in notes sent to the parties that if it was not possible to do so, but the facts set out by C as to the role R2 and R3 played in the shop were accepted, it seemed likely R2 in acting as a manager (she actually claimed, according to C to be the managing director) and R3 were employees or agents of R1. It, as well as C, could be prejudiced in that without knowing what R2 has to say about the allegations against her, R1 would have difficulty running any defence to the claim if what C alleged was accepted as true , which it may well be if R2 not there to rebut his evidence. In written notes sent to the parties Employment Judge Garnon set out the essence of the claim as clarified and, to assist the parties , the relevant law in similar terms to that in part 2 below.

1.7. When this claim was presented the name of R3 was stated by the claimant as Linda Xiong. As Mr Khan requested, Employment Judge Garnon ordered the spelling of her surname, in the characters of the British alphabet ,to be amended to Zhang . A letter to the claimant dated 7 September 2018 , copied to the Tribunal is signed *" Linda Zhang On behalf of Birmingham Neoglory*" By 17 January 2019 R1 was to use reasonable

endeavours to provide the tribunal a service address for R2 . The file was to be referred to Employment Judge Garnon on that day, or before if R1 replied earlier, to consider what steps to take to effect service on R2 and/or convene a further preliminary hearing. Some correspondence sent to the shop was returned by Royal Mail on 27 December 2018. Employment Judge Garnon directed it be re-sent to Legis Chambers which it was on 8 January 2019. No reply was received so another letter was sent to Mr Mohammad at Legis Chambers on 6 February.

1.8. By email on 7 March 2019 at 15:31 Mr Mohammad replied R1 believed R2's last known address was "*129, The Oral, Cowlesbroush Doncaster DN12 3HZ*." The tribunal clerk did a postcode search and found the proper spelling was 129, The Oval, Conisbrough, Doncaster DN12 3HZ. Employment Judge Garnon directed R2 be served at that address which she was on 14 March. She had until 11 April to respond but she did not. Neither was the documentation returned by the Royal Mail.

1.9. Employment Judge Garnon then directed a public preliminary hearing to decide which respondents were **potentially** liable to C if his claims were proved and to give directions for a full trial. It was fixed for 4 June 2019. On 3 June at 17:15 an email was received from Mr Mohammad asking R1 and R3 be excused from attending. It said **C was not an employee of R1 or R3** and neither of them had harassed or caused ,encouraged or incited any other person to harass, C. It criticised the particularisation of the claim, said the allegations amounted to an abuse of the court process, the claim had no merit, was malicious, misconceived and should be struck out. When the public preliminary hearing came before Employment Judge Garnon only C attended. He gave evidence that as far as he was aware Mr Yan Wang was the husband of R3. He also said all wages paid to him went directly into his bank account and although originally his bank statements showed the payer as R1, a payment on 25 January 2018 (of which he produced a copy today) from " Xiong Neog" was, so R3 told him , from her. Employment Judge Garnon concluded the statement in Mr Mohammad's email "*The Claimant was not an employee of either R1 or R3*" contradicted what has been previously pleaded. All the documentary evidence he saw clearly showed C was at all material times employed by R1. It was also far more likely than not R3 was either an employee or agent of R1. The same was true of R2. In such circumstances insofar as the claim was proved, he held all three would be liable.

1.10. Finally, he ordered a full hearing be listed before a full panel and a witness order sent to Ms Tilney. That order was returned by Royal Mail but, as the claimant confirmed in sworn evidence today, he, accompanied by his brother , delivered it personally to Ms Tilney at 7:15 pm on 24 July at the same address from which it had been returned, which was also the address she gave for herself in her signed statement. Late on the day before the hearing Ms Tilney telephoned the tribunal saying she was a registered childminder and not available to attend. She was asked to email the tribunal if she could not.

1.11. These emails arrived :

From: Amanda Tilney
Sent: 01 August 2019 19:42
To: NO-NTMClisting <NO-NTMClisting@Justice.gov.uk>
Subject: 2501176/2018
My name is Amanda tilney. I have been called as a witness to give evidence for mr d Hart. I don't understand why or how I can give evidence as I left Birmingham neoglory in November mr Hart got my job as manager when I left so I can't tell you what went on as I didn't work there when Dan was the manager! I would be lying if I said I did. I also can not

come to court today as I am a ofsted Registered Childminder and I have children. If I had of worked there when Dan was manager I would of had an insight into it but like I said I was the manager but when I left dan said he got my job. Kind Regards Amanda Sent from my iPhone
From: *Amanda Tilney*
Sent: *02 August 2019 09:09*
To: *NO-NTMClisting <NO-NTMClisting@Justice.gov.uk>*
Subject: *Re: Auto-Response*
Hi I do hope my emails go to the right place so I have emailed both email address. I also did state to To Mr Hart that when I left my job at Amon in Metrocentre as manager Mr Hart got my job as he told me he got the manager job if I was a witness how could I say what had gone on as I didn't work there when he was manager so it would be a waste of everybody's time as I haven't a clue what had been done or said! Maybe the staff that worked with mr Hart as his time as manager maybe able to help but am not going to stand up and lie because I wasn't there so I really don't know so I am unable to help. I am also an ofsted Registered Childminder so I couldn't come today and even tell you what I have just said in an email as I have children booked in and to be honest it's just a waste of your time and mine, has he not asked any of the girls that worked with him because he said he had took a couple of girls on? I would be grateful if you could email me back to confirm you have received my emails. Kind Regards Amanda Sent from my iPhone

1.12. Employment Judge Garnon today repeated a company search. The sole director of R1 is a still Mr Yan Wang . The company is still shown as "active" ,changed its registered office from 35-40 Rea Street Digbeth Birmingham West Midlands B5 6HT to Unit 90, 14 Russell Way, Intu Metrocentre, Gateshead NE11 9YG on 15 February 2018. Its 2019 annual confirmation statement is overdue. When he searched the search engine produced other companies containing the name "Neoglory" . There were several , some had been liquidated or dissolved, one was called Xiong Neoglory Ltd. Its registered office is Unit 38 Frenchgate Shopping Centre Doncaster. Its director is shown as Xiong Wang . There was a shop called Amon in the Frenchgate Shopping Centre.

1.13. There has been no appeal or application for reconsideration of the judgment made by Employment Judge Garnon and sent to the parties on 5 June 2019. The issues to be decided today are whether the respondents or any of them engaged in unwanted conduct related to the relevant protected characteristics of race, sex and/or sexual orientation which had the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. If it did not have that purpose, in deciding whether it had that effect account has to be taken of C's perception , all the other circumstances of the case and whether it was reasonable for the conduct to have that effect.

2. Relevant Law

2.1. Section 40 EqA says

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.

and s 26 includes

(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.

2.2. Section 109 includes

*(1) Anything done by a person (A) **in the course of A's employment** must be treated as also done by the employer.*

*(2) Anything done by **an agent for a principal, with the authority of the principal,** must be treated as also done by the principal.*

(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.

*(4) In proceedings **against A's employer** (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A—*

(a) from doing that thing, or

(b) from doing anything of that description.

2.3. Section 110 includes

(1) A person (A) contravenes this section if—

*(a) A is an employee **or** agent,*

(b) A does something which, by virtue of section 109(1) or (2), is treated as having been done by A's employer or principal (as the case may be), and

(c) the doing of that thing by A amounts to a contravention of this Act by the employer or principal (as the case may be).

(2) It does not matter whether, in any proceedings, the employer is found not to have contravened this Act by virtue of section 109(4).

2.4. Section 111 includes

***(**1) A person (A) must not instruct another (B) to do in relation to a third person (C) anything which contravenes Part …, 5, … .. or 112(1) (a basic contravention).*

(2) A person (A) must not cause another (B) to do in relation to a third person (C) anything which is a basic contravention.

(3) A person (A) must not induce another (B) to do in relation to a third person (C) anything which is a basic contravention.

(4) For the purposes of subsection (3), inducement may be direct or indirect.

3. Findings of Fact

3.1. Daniel George Jason Hart ("C") gave evidence on affirmation. Ms Tilney did not attend but we read her written signed witness statement which had been produced and sent to the respondents much earlier , and questioned C about the content of her emails. He explained Ms Tilney had left on 24 December 2017 not in November, when he started as part-time help for the shop . On Christmas Eve, no staff including Ms Tilney attended to open the shop. It is a rule of the Metrocentre landlords that all shops must have a manager on site. R2 contacted C on his day off and he came in to open the shop, for which R3 later thanked him by telephone. From then until late January, C was acting manager of the shop. It was only then Ms Carol Thorpe arrived. After C had given had two days training R2 made her the manager and demoted him to assistant manager. We are entirely satisfied Ms Tilney was present until 24 December. We asked C whether he wished any steps to be taken against her with regard to her disregard of the witness order, and more significantly that she did not make any contact with the tribunal or him until as late as she did, despite having had the witness order for a week. The claimant did not wish any steps to be taken against Ms Tilney because he believed her non-attendance, though deliberate, was due to her being afraid of having to confront R3 , who could have attended today.

3.2. At all material times, C knew the person in charge of the shop, and C believed of the Doncaster shop, was the person he knows as" Linda" . That is R3. He had personally heard her say it was "her shop". C found out on the day after the preliminary hearing on 13 December 2018 the Metrocentre shop was closed and believes the Doncaster shop has too. The closed-circuit camera which covered the shop was directly connected to R3 and she would regularly telephone to instruct staff to move goods on display etc.

3.3. On 24 November 2017, C did a trial for employment at the shop. On 25 November 2017, Ms Tilney , then manager, was told by R2 to tell R3 C was gay as R3 does not like men working in the shop unless they are gay. Ms Tilney telephoned R3 and asked her to look at a camera recording of C whom she thought worked really well .Ms Tilney's statement says in a telephone conversation between herself and R3 , R3 asked if C was gay . Ms Tilney replied he was and R3 said " *Ooo good,* ***the boy*** *seems OK* ". The claimant heard Ms Tilney's end of the conversation and was told about three days later by Ms Tilney who it was with. The response form filed by R3 appears to be completed by her in manuscript and it starts with " ***The boy*** *D Hart was employed as a Christmas PT, after Christmas he started to take more shifts (over 25 hrs pw) to support store manager Carol Thorpe*." At the time R3 drafted this form she would not have seen Ms Tilney's statement. The use of the words "the boy" in both is strong corroboration of the truth of Ms Tilney's written statement. Also, C's evidence was R3 regularly referred to him as "the boy".

3.4. In the week of 18 December 2017, R2 told C, face to face , R3 was not to find out he was bisexual as she would not be able to process this and she was only happy for gay men to work in the shop. Prior to that R2 had said to Ms Tilney "*Amanda, whatever you do don't tell Linda Dan is bisexual because she wouldn't understand and it would only lead to one thing, he will have to go*". Ms Tilney said she thought that was unfair. R2 responded" *This is Linda we're talking about, just keep it shut Amanda*". The claimant overheard this.

3.5. During January with the claimant acting as stand-in manager R2 regularly came to the shop from Doncaster to hire staff. She and R3 would also send CVs for prospective employees to the claimant for him to assess them . R3 only ever sent the CVs of women whereas R2 sent women and men but told C to prefer the women because that is what R3

wanted .On 25 January 2018 R2 told C by telephone to hire new staff but not men who were not gay as R3 said women and gay men are more qualified for the positions. He found this offensive and being bisexual himself it made him feel he, and any prospective candidates for employment, were being judged on sex and sexuality and not capability.

3.6. On 31 January 2018 by telephone R2 told C not to hire "*coloured people*" as they are "*considered to be lazy smelly dirty bastards* " . R3 also expressed this view to Ms Tilney before she left and did so in earshot of customers. The claimant found this particularly offensive as he has many friends from ethnic minorities. Because R3 herself is Chinese he could not understand why she held these views but In context we accept C is right to interpret the words *considered to be* as considered **by R3**. Again in context *coloured* probably means people of Indian sub-continental or black African/Caribbean descent.

4. Conclusions

4.1. Before harassment became a separate statutory tort, in Wethersfield Ltd t/a Truck and Van Rental -v- Sergeant a claimant complained it was direct race discrimination to instruct her not to hire vans to Asian people. That argument succeeded. If C, who is white, male and bisexual was offended by comments made and/or instructions given which related to *coloured* people and/or non homosexual men , it would constitute harassment, provided the comments or instructions were unwanted conduct by his employer , prospective employer or persons for whom that employer was liable. There is the soundest possible evidence that at all times material to this case R1 was the claimant's employer.

4.2. S.109 (4), sometimes called the "statutory defence", is available to R1 if it **employed** R2 or R3. C believed R2 and R3 were employed by R1. It is R1 and R3 who say otherwise. In the absence of any evidence of any respondent on balance of probabilities we find R2 and R3 were employees of R1. There is no pleading of a statutory defence and certainly no evidence to support one.

4.3. If either was not an employee of R1, both were certainly R1's agent. R1 is affixed with liability for whatever it is shown R2 or R3 said when acting with its authority as its agent. At all material times on the balance of probabilities ,they were.

4.4. S 110 (1) has the effect that if R2 or R3 are found to be an **employee or agent** of R1 they too would be liable.

4.5. R1 and/ or R3 may be liable under section 111 too but have no need to consider that section because sections 109 and 110 clearly apply.

4.6. It does not appear likely any of the unwanted conduct was done with the purpose of harassing C but it plainly had that effect and it is entirely reasonable that it would.

4.7. The injury to feelings caused by the remarks and instructions related to sex and sexuality was significant but not as great as those related to race . It is not uncommon for people to believe certain types of shop eg those selling ladies accessories or cosmetics should be staffed by people who understand what women want, but there is absolutely no reason why an Asian or black woman or homosexual man would have any less understanding than a white woman or homosexual man. The degree of injury to feelings, in our judgment falls in the higher part of the lower band of compensation awarded in discrimination cases. The claimant had done some research and himself suggested a figure which we thought entirely reasonable of £5000.

4.8. Zaiwalla-v-Walia & Co establishes high-handed malicious conduct of the proceedings may lead to aggravated damages . It is now patently obvious R1 and R3 have set about

making C's task of achieving justice as difficult as possible. They made it as difficult as possible for C and the Tribunal to trace R2. They have by providing incomplete or misleading information prolonged a case for over a year without putting in any cogent defence. The damage to their credibility is enormous. R1 and R3 themselves, and by their representatives, are most culpable, but R2 could have responded and has not. An award of aggravated damage should be 40% of the award we would otherwise have made.

4.9. Where more than one respondent is found liable for the same acts of unlawful discrimination, we are entitled to make an award for compensation on a joint and several basis. This means C can take enforcement action against any one of the respondents for the full amount of the award. It is then up to each respondent to seek a contribution from the co-respondents. In Way v Crouch 2005 ICR 1362, the EAT did not think joint and several awards would often be appropriate and suggested apportionment should be the default position. Since, in Munchkins Restaurant v Karmazyn EAT 0359/09 Langstaff J thought the claimant should be entitled to receive the full extent of an award from any of the respondents as he or she chooses. Underhill P agreed in London Borough of Hackney v Sivanandan 2011 ICR 1374 in the EAT. In the Court of Appeal Lord Justice Mummery endorsed Underhill P's guidance in cases of 'indivisible' damage i.e. those where it is not possible to identify distinct elements of loss caused by individual tortfeasors. This will be so in most claims brought against an employer and its employees jointly where the employees are the actual 'doers' of the harm and the employer is liable by virtue of S.109 EqA. In Miles v Gilbank 2006 ICR 1297, the Court of Appeal agreed and noted the individual respondent was effectively the owner of the respondent company which had been voluntarily dissolved by the time of the tribunal hearing. Accordingly, if a joint and several award had not been made, the claimant would not have been able to recover any compensation. As Mummery LJ said in Sivanandan, it may be different where the claimant himself says one respondent injured his feelings less than the others. We specifically asked the claimant what his wishes were in connection with R2 and although he felt she was for most purposes the mouthpiece of R3, without her the harassing behaviour could not have continued.

4.10. Interest is awarded under the Employment Tribunal (Interest on Awards in Discrimination Cases) Regulations 1996 where the prescribed rate of interest is 8% and the period for which it is awarded is 18 months being for the acts of harassment to today.

Employment Judge Garnon

JUDGMENT SIGNED BY EMPLOYMENT JUDGE ON 2 August 2019