EMPLOYMENT TRIBUNALS

Claimant:	**Mr G Surma**		
Respondents:	**1. Rixonway Kitchens Ltd**		
	2. Easyrecruit.com Ltd		
Heard at:	**Leeds**	**On:**	**2, 3, 4, 5, 6 and 9 September 2019 and (deliberations) 4 and 8 November 2019**
Before:	**Employment Judge Davies** **Ms H Brown** **Mr K Lannaman**		
Representation			
Claimant:	In person		
Respondents:	1. Ms Levene (counsel) 2. Mrs Buckle (solicitor)		

RESERVED JUDGMENT

1. The Claimant's claim for holiday pay is dismissed on withdrawal by him.
2. The Claimant's complaint against the Second Respondent of a breach of the Agency Workers Regulations 2010 was not brought within the relevant time limit. It is not just and equitable to extend time for bringing it and it is therefore dismissed.
3. The Claimant's complaints of harassment related to race against the First Respondent are well-founded and succeed in part as regards laughing at his accent or pronunciation, calling him names, making derogatory references to his nationality and telling him that he had no rights.
4. The remainder of his complaints of harassment relating to race against the First Respondent are not well-founded and are dismissed.
5. The Claimant's complaints of direct race discrimination against the First Respondent are not well-founded and are dismissed.
6. The Claimant's complaint of victimisation against the First Respondent relating to the termination of his engagement is well-founded and succeeds.
7. The remainder of his complaints of victimisation against the First Respondent are not well-founded and are dismissed.
8. The Claimant's complaints of victimisation against the Second Respondent are well-founded and succeed.
9. There will be a further hearing to deal with the remedy to be awarded to the Claimant.

REASONS

INTRODUCTION

1.1 These were claims of direct race discrimination, harassment related to race, victimisation and breach of Regulation 5 of the Agency Workers Regulations 2010, brought by Mr G Surma against Rixonway Kitchens Ltd, the company at which he worked, and Easyrecruit.com Ltd, the employment agency by which he was employed. The Claimant represented himself. The First Respondent was represented by Ms Levene (counsel) and the Second Respondent by Mrs Buckle (solicitor). The Tribunal was grateful for the expert and professional assistance of Ms Collier, a Polish interpreter.

1.2 The Tribunal was provided with a joint file of documents and we considered those to which the parties drew our attention. A number of further documents were produced and admitted by agreement during the course of the hearing.

1.3 The Tribunal heard evidence from the Claimant and from Mr Suprun, Mr Warsala and Mr Zdziarstek on his behalf. For the First Respondent we heard evidence from Mr G Foley, Mr B Wilson (Chargehand), Mr D Bradley and Mr C McWilliams. For the Second Respondent the Tribunal heard evidence from Mr A Fofana and Mr K MacNeil.

1.4 The time allocated for the hearing was insufficient given the need for detailed cross-examination and the involvement of an interpreter. The evidence and submissions were concluded but the Tribunal had to meet at a later date to reach its decision. We explained to the parties at the time that there was no available date when all three members were available until November. It was then necessary to produce a detailed written judgment. We are sorry that the parties have therefore had to wait some time for this judgment.

THE ISSUES

2.1 The issues to be determined by the Tribunal were as set out in the Case Management Order of EJ Keevash and were as follows:

Harassment related to race

2.1.1 Did the First Respondent engage in unwanted conduct as follows:

- 2.1.1.1 when on many occasions Mr Wilson laughed at the Claimant;
- 2.1.1.2 when on many occasions Mr Wilson used the word “shit” when referring to matters raised by the Claimant;
- 2.1.1.3 when on many occasions Mr Wilson told the Claimant “if you will not pick how many I want, you will never get a permanent job”;
- 2.1.1.4 when on four or five occasions in or about May 2018 Mr Wilson told the Claimant “if you will not pick 1000 panels, I will not let you order a takeaway on Friday”;
- 2.1.1.5 when on many occasions Mr Wilson called the Claimant “knob” and “knobhead”;
- 2.1.1.6 when in or about January 2018 Mr Wilson put on the Claimant’s back a piece of paper bearing the word “knobhead”;

2.1.1.7 when in or about April 2018 Mr Wilson, when asked whether the Claimant was of Russian nationality, told Mr Patterson "no, he is Polish, but it's the same shit";
2.1.1.8 when in or about April 2018 Mr Wilson laughed at the Claimant who had explained that he felt scared about climbing to the highest rack level and asked him how he came to the UK if an aeroplane flew higher;
2.1.1.9 when on many occasions up to and including June 2018 Mr Wilson laughed about the Claimant's accent;
2.1.1.10 when on 7 May 2018 Mr Wilson shouted that the Claimant was an idiot, had no rights and no one would believe him?

2.1.2 Was the conduct related to race?
2.1.3 Did the conduct have the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?
2.1.4 If not, did the conduct have that effect?
2.1.5 In considering whether the conduct had that effect, the Tribunal will take into account the Claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Direct discrimination because of race

2.1.6 Did the First Respondent subject the Claimant to the following detrimental treatment:
2.1.6.1 when on about 100 occasions between August 2017 and June 2018 Mr Wilson refused to provide the Claimant with help from other members of the team;
2.1.6.2 when on about 50 occasions between August 2017 and June 2018 Mr Wilson refused to allow the Claimant to do jobs which were undertaken by other members of the team;
2.1.6.3 when after April 2018 it required him to use a lift platform without being given safety training;
2.1.6.4 when Mr Wilson instructed the Claimant not to speak to others during working hours?
2.1.7 By doing so did the First Respondent treat the Claimant less favourably than it treated or would have treated the comparators? The Claimant relies on the following comparators:-
2.1.7.1 in relation to the first three allegations above, British members of his team;
2.1.7.2 in relation to the fourth allegation above, Mr Karl Sellars;
2.1.8 If so, was the less favourable treatment because of race? [If the Claimant has proved primary facts from which the Tribunal could properly conclude that the difference in treatment was because of race, has the First Respondent proved a non-discriminatory explanation]?

Victimisation

2.1.9 Did the Claimant do a protected act on 8 May 2018 by telling Mr Foley that Mr Wilson had discriminated against him?
2.1.10 If so, did the First Respondent carry out any of the following treatment because the Claimant did so:
2.1.10.1 when on one or two occasions each day Mr Bradley and Mr McWilliams shooed him away from their departments;

2.1.10.2 when on a few occasions Mr Bradley and Mr McWilliams shouted at him;
2.1.10.3 when Mr Bradley came to his department and asked why he was working so slowly
2.1.10.4 when on 6 June 2018 Mr Foley terminated his assignment;
2.1.10.5 when on 7 June 2018 Mr Wilson shouted at him "fuck your back, pick faster, you have got a target"?

2.1.11 If the Claimant did a protected act, did the Second Respondent carry out any of the following treatment because he did so:
2.1.11.1 when Mr Fofana rejected his grievance;
2.1.11.2 when Mr MacNeil rejected his grievance appeal?

Agency Workers Regulations 2010

2.1.12 Did the Second Respondent infringe the Claimant's rights relating to pay when from May 2017 to 25 September 2017 it paid him less than he would have been paid for doing the same job if he had been employed by the First Respondent?

Time limits

2.1.13 Was the complaint of breach of the Agency Worker Regulations brought within the relevant time limit and if not is it just and equitable to extend time?

2.1.14 In respect of the discrimination complaints, was there conduct extending over a period and was the claim brought within three months (plus early conciliation extension) of the end of that period?

2.1.15 If not, was any complaint presented within such other period as the Tribunal considers just and equitable?

THE FACTS

3.1 The First Respondent is Rixonway Kitchens Ltd, a company that manufactures and supplies kitchens. It employs around 380 people and uses between 30 and 60 agency workers each week at its factory site in Dewsbury. The Second Respondent, Easyrecruit.com Ltd, is a recruitment agency used by the First Respondent to provide agency workers. The Claimant was employed by the Second Respondent from 2 February 2017. He was offered an assignment at the First Respondent. He started working in the flatpack department and the Second Respondent sent him confirmation of his assignment as a "Production Operative". Not long afterwards the Claimant moved to the Panel Store as a Transport Panels Picker. He was sent a new confirmation of assignment in April 2017, which gave his job title as "Panel Store Operative and Picker." It is his work in that role that was the subject of this claim. To begin with the Claimant was managed by Mr Foley. He got on well with him and regarded him as like a "good uncle."

3.2 Although not currently fit for work, at the time of the hearing the Claimant remained employed by the Second Respondent. When he started his employment, the Claimant was interviewed by Mr Fofana, the Second Respondent's Regional Manager. He completed a medical questionnaire indicating that he suffered back and neck pain after a car accident and was receiving physiotherapy. It appears that this information was never passed onto the First Respondent.

Pay Parity

3.3 Initially, the Claimant was paid at National Minimum Wage rates. He discovered in September 2017 that the First Respondent's direct employees doing the same work were being paid more than him. He raised this with Mr Foley, who in turn raised it with Mr Fofana. The Claimant was put on the same rate of pay as his directly employed colleagues with effect from September 2017. However, he did not receive back pay to cover the shortfall between May and September 2017. That formed part of his claim to the Tribunal. The Second Respondent made a payment to him in August 2019 to make good that shortfall. During the hearing the Claimant accepted that the payment covered the shortfall in wages between May and September 2017. However, he did not withdraw this part of his claim because he had taken annual leave during the 12 weeks starting September 2017. He thought that his holiday pay must have been calculated based on the incorrect lower pay rate. Mr MacNeil, the Chief Executive Officer of the Second Respondent, gave evidence about the calculation of the Claimant's holiday pay. He said that having recalculated it he had discovered that the Claimant owed the Second Respondent money. We do not go into the detail of the calculation, but the Tribunal found that Mr MacNeil's approach was misconceived. Essentially, it attempted to remove extra hours or overtime done by the Claimant from the calculation, when the whole point of recent case law is to ensure that a worker's holiday pay reflects their normal remuneration during the preceding period. The Tribunal was satisfied that the Claimant was underpaid by a few pounds.

3.4 However, the Claimant did not bring an Employment Tribunal claim about this until 5 November 2018. He had contacted ACAS on 28 and 29 August 2018 and received Early Conciliation certificates on 12 and 13 October 2018.

3.5 The Tribunal noted that the Claimant had been to the Citizens Advice Bureau in April 2018. He told the Tribunal that he used the CAB website for advice. That told him about pay parity. It also told him about Tribunal claims and the time limits for bringing them. The Claimant said that he wanted to try to resolve this informally first. He was also worried he would lose his job if he complained. It was the first time he had earned more than the National Minimum Wage. The Tribunal understood the importance of that to the Claimant. On the other hand, he clearly *did* complain about pay parity: he raised it with Mr Foley at the time. It was only the back pay that was not dealt with.

Background chronology

3.6 Returning to the chronology, in outline the Claimant had no real issue until August 2017 when Mr Wilson became chargehand in the Panel Stores for one of the two daily shifts. The Claimant says that from that time onwards Mr Wilson subjected him to harassment related to his race and treated him less favourably than his "English" colleagues. It is that treatment and the eventual termination of the Claimant's assignment that gives rise to the claims against the First Respondent. The claims against the Second Respondent relate to its handling of the Claimant's grievance about these matters.

3.7 Mr Foley had agreed in July 2017 that the Claimant could take three weeks' annual leave in September 2017. However, that leave was eventually cancelled by the First Respondent because it was short-staffed. Mr Foley agreed that the Claimant could take the annual leave in December 2017. There was again an issue with that

leave. Eventually, the Claimant took two weeks' annual leave at the end of March 2018. On 30 March 2018 he received a text from Ms Remeikaite of the Second Respondent, telling him that production numbers had dropped and the panel store had let him go. She said that she would try to give him some shifts in different departments. The Claimant texted her asking for an update on 11 April 2018. He said that he knew someone else from the panel store was back in work from last week. He had been working longer at the panel store than that person and was feeling discriminated against. Ms Remeikaite replied the following day to say that his friend had been requested by the team leader. She asked if the Claimant could work in other departments in the meantime. The Claimant replied to say that he had been promised a permanent job in the panel store a few times and was now waiting at home with no money for over a week. He could work in other departments but only if he was paid his wage from the panel store. He had been to the Citizens Advice Bureau the previous day and had been told that it was not legal to change his wage to the minimum wage if he was doing a similar job. On 16 April 2018 Ms Remeikaite asked the Claimant if he was available to work in the panel stores from 18 April 2018. The Claimant offered to start from 23 April 2018 and by 20 April 2018 Ms Remeikaite confirmed that he was needed every day from 23 April 2018 until further notice. The Claimant returned to work at the First Respondent from 23 April 2018 and remained there until he was told in early June 2018 that his assignment was to be terminated. We return to that below

3.8 The Claimant felt that his shifts had been cancelled in April 2018 because he had taken annual leave. His leave had repeatedly been cancelled by the First Respondent; when he eventually took it (because the leave year would otherwise have expired) his shifts were cancelled for two weeks. Then there was full-time work available for him again. It seemed to the Tribunal that there was some force in his concern that agency workers were discouraged from taking annual leave, perhaps even by the cancellation of shifts. The exchange of text messages also referred to promises of a permanent job. This was a recurrent theme. It was no secret that the Claimant wanted a permanent job with the First Respondent. Permanent jobs had been advertised in September 2017 and the Claimant had applied. However, he was told in October 2017 that full-time jobs were no longer available. The Tribunal was satisfied on the evidence that there were further discussions about full-time roles later in the year but this too came to nothing. Again, it seemed to the Tribunal that there was some force in the suggestion that the First Respondent used the possibility of permanent jobs to motivate its agency workers.

Credibility of witnesses

3.9 Before dealing with the detail of the Claimant's complaints, we make some remarks about the evidence. In this case the Tribunal did not find any of the witnesses particularly credible. There were difficulties with each person's evidence and we therefore approached it all with caution. In many respects the Tribunal had to make findings of fact on the balance of probabilities in circumstances where none of the witness evidence about the particular issue was convincing. We begin with a brief explanation of why each person's evidence lacked credibility.

3.10 The Tribunal found that the Claimant's claim contained lots of exaggeration. He complained of things happening fifty times or a hundred times or on many occasions, but when he was asked for detail in his oral evidence he was able only

to provide a very limited number of examples. The Tribunal found that this was not because he was only able to remember a small number of examples but because things had only happened on a more limited number of occasions. When the Claimant gave concrete examples in his oral evidence the Tribunal found that evidence clear and convincing.

3.11 Each of the Claimant's witnesses had written his witness statement with the Claimant. Each statement had the same structure and style, which it was clear was the Claimant's. They had all been run through the same translation software, which would account for some of the similarities, but not the overall similarity in content. Each person's oral evidence was much less clear and detailed. Many things that appeared from the witness statements to be things the witness had seen or heard personally turned out to be things they had found out about second-hand, usually from the Claimant.

3.12 When Mr Zdziarstek started his oral evidence, he indicated that he only understood about 80% of his written witness statement. The Tribunal therefore took a break so that the interpreter could go through it with him before he confirmed its truth. After that, Mr Zdziarstek made some changes to the statement before confirming its truth. For example, in the original written statement Mr Zdziarstek had said that in April 2018 when Mr Wilson found out that Mr Zdziarstek had agreed to give evidence in the Claimant's Tribunal case, Mr Wilson "tried to force" him to refrain from giving evidence. When Mr Zdziarstek refused, Mr Wilson started giving him a lot of extra duties to keep him on the run. Mr Zdziarstek said that those sentences should be deleted. Further, when Mr Zdziarstek was cross-examined, in many respects his evidence differed from his witness statement. For example, his witness statement said that after the Claimant left, two or three people would do the Claimant's job on his shift: it was not a "one-person job" any more. Mr Zdziarstek said maybe this was because all the people working there were British. On the opposite shift, a Polish worker and subsequently a Hungarian worker did the job alone. In cross-examination, Mr Zdziarstek said that he could not really say what people were doing because it was not his work area; he had simply seen one person doing picking, another near the computer and another with a trolley of some kind; and he did not know if the people he was referring to were British or not.

3.13 Similarly, Mr Warsala's evidence in cross-examination did not support his written witness statement in a number of respects. For example, in his witness statement he said that when the Claimant left there were three British employees doing the transport panels job on his shift and a Polish worker doing it on the other shift. In cross-examination his evidence was unclear and inconsistent. Eventually he accepted that he was guessing that the people doing the job on his shift were British. Mr Warsala did not work in the same department.

3.14 There were similar difficulties with Mr Suprun's evidence. By way of example, in his witness statement he said that the Claimant was required to pick 1000, 1200 or even 1500 panels on a shift and that when he told Mr Wilson that was not possible Mr Wilson did not want to hear him. Mr Suprun said that Mr Wilson's "favourite phrases" were, "Pick pick pick quick quick quick" and "F**k your back, you got a target to do." In cross-examination Mr Suprun agreed that the Claimant had told him that Mr Wilson had used such expressions. He said that he had

personally heard Mr Wilson use the first phrase but he was not sure if he had heard him use the second.

3.15 Turning to the First Respondent's witnesses, Mr Foley's evidence appeared to the Tribunal to be defensive and in many respects implausible. He seemed to say what he thought should be said rather than what was actually the position. For example, the Claimant asked him some questions about the targets for picking different elements. He put to him the simple proposition that the weight of an element would affect how many could be picked. Mr Foley initially disagreed. Only after a series of questions did he finally accept that the weight of an element would affect how many could be picked. The Claimant then suggested to him that picking 100 light hardboard elements was not the same as picking 100 heavy transport panels. Mr Foley asked how he would know. He was reminded of his earlier evidence that he had 15 years' experience and would when necessary roll his sleeves up and help the Claimant out. The Employment Judge eventually asked him whether he would consider picking 100 light hardboard elements to be easier, harder or about the same as picking 100 transport panels. Only at that stage did he admit that picking the hardboard elements would be easier.

3.16 Mr Foley was also asked about why the Claimant was not given forklift truck ("FLT") training. He agreed that the First Respondent sometimes struggled to recruit FLT drivers, that three drivers had left while the Claimant worked there and that he was aware that the Claimant had experience driving FLTs and wanted to be trained. He was asked why the Claimant had not been trained. He gave three different reasons. First, he said that the trainer was external and there was a cost associated with it. It was then pointed out to him that a Polish worker called Radic had received FLT training. He said that reason was that this was before the Claimant joined, but when the Claimant put to him that it had been after the Claimant joined he accepted that this might have been so: he could not remember. He then said that the reason the Claimant was not trained was because he was brought in to do transport picking. The Claimant put to him that Radic was an employee of the First Respondent and that this showed unfairness between agency workers and employees. Mr Foley denied it. By this time Mr Foley had given three different reasons why the Claimant did not get FLT training. He was asked what the reason was. He said that it was because Radic got his licence before the Claimant started. It was pointed out to him that he had just said he could not remember when Radic was trained. He agreed that he was not sure. This was another example of wholly unconvincing evidence from Mr Foley. However, we note at this stage that Radic was Polish, so although this evidence points to a lack of credibility on Mr Foley's part, it does not indicate less favourable treatment of the Claimant on the basis of nationality.

3.17 Mr Wilson's evidence was equally unconvincing. His witness statement (like all the First Respondent's) was clearly written in the language of the First Respondent's legal advisers not Mr Wilson's own words. There were inconsistencies and contradictions in his oral evidence. One example related to an exchange of Facebook messages. Both the Claimant and the First Respondent had disclosed a series of Facebook messages between the Claimant and Mr Wilson. The version disclosed by the Claimant included a message sent by Mr Wilson during a shift on 6 February 2018 saying, "get out of bog n get bk ere" and a message sent by Mr Wilson during a shift on 12 February 2018 saying, "get off Facebook and get to my

desk now". The version disclosed by the First Respondent did not include those two messages. It only disclosed the less abrupt and more friendly messages between the two. In his witness statement Mr Wilson said that he did not recall deleting those messages. On reflection he was a bit embarrassed about them. He was asked about this in his oral evidence. He said that he did not know when he had deleted the messages. He had been asked by HR when they were investigating the Claimant's grievance whether he had any relevant messages and he sent the exchange to them then. The messages had already been deleted when he did so. He got his phone out and sent the messages there and then in the HR office when he was asked about it. No relevant messages or emails between Mr Wilson and Ms Windle of HR had been disclosed by the First Respondent and the Employment Judge asked that enquiries be made overnight. The next morning the Tribunal was told on instructions that the relevant notes of a meeting between Ms Windle and Mr Wilson to discuss the Claimant's grievance were dated 16 August 2018. Ms Windle believed that the messages had been sent on that date. Emails had by now been automatically deleted from the First Respondent system, but Ms Windle was checking with Mr Wilson (who was at work that day) whether he still had a copy. Later in the day, the Tribunal was informed that the email had been obtained and it was dated 5 October 2018. That was almost two months after the meeting at which Mr Wilson said he had sent the emails to HR. Mr Wilson's evidence about how the two messages that were unfavourable to him had come to be deleted was wholly unconvincing. It seemed clear to the Tribunal that Mr Wilson had deliberately deleted them because they cast him in a bad light and might be said to support the Claimant's complaints about the way Mr Wilson was treating him. More than once in his evidence Mr Wilson referred to the fact that he knew when he became a chargehand that he needed to "raise the bar" and that behaviour that might be acceptable from one of the team was not acceptable from the chargehand. It seemed to the Tribunal that although Mr Wilson was aware of the standards expected of him as a chargehand he did not always meet them. When it came to giving evidence to the Tribunal he was covering his own back and was not prepared to admit to behaviour that he thought might get him into trouble as a chargehand.

3.18 Mr Bradley and Mr McWilliams both gave evidence that was generally about the Claimant's conduct in the workplace. Under cross-examination their evidence did not stand up to scrutiny. It was vague, unconvincing and exaggerated.

3.19 In his witness statement Mr Bradley said that the Claimant was a really good worker to begin with. However, he would often find him in his department talking for 15 or 20 minutes. He was constantly having to tell him to get back to his own department and stop disrupting Mr Bradley's team. On average 4 to 6 times per day Mr Wilson would come looking for the Claimant. Mr Wilson was new to the chargehand role so Mr Bradley would help him out. The Claimant would often try and hide from Mr Wilson and jump out from behind things. Mr Bradley might have shouted at him on occasion when asking him to get back to work but not in an angry way. Towards the end of his time with the First Respondent the disruption from the Claimant got worse and worse. Mr Bradley felt like he was constantly asking him to get back to work and was raising complaints with Mr Foley on a daily basis about him. In cross-examination Mr Bradley was unable to say even approximately when he had reported the Claimant to Mr Foley and Mr Wilson, despite saying in his witness statement that it was daily towards the end. He was

unable to say when Mr Wilson was looking for the Claimant several times per day. He said that sometimes because of the noise of the factory they could not talk. Mr Bradley would point at his watch and the Claimant would laugh and smile. He would bob down behind something out of sight. Mr Bradley said that this was childish. As we detail further below there was a great deal of behaviour in this workplace that could be described, at best, as childish. Mr Bradley was asked what made this different and he suggested that the Claimant took it too far. Mr Bradley said that it was towards the end of the Claimant's employment that Mr Wilson was looking for him 4 to 6 times a day. He was asked about the five-week period in March and April when the Claimant was not at work and he seemed wholly unaware of it. The Claimant's assignment was terminated only about six or seven weeks after that. Mr Bradley was asked when he started complaining about the Claimant and he said that it was a few weeks into his employment, adding "a few weeks or a couple of months." He was asked whether it was weeks or months and he said that he did not know. He acknowledged that all his colleagues said that the Claimant's behaviour only became a problem a year after he started work. The Tribunal found this evidence inconsistent, exaggerated and unconvincing.

3.20 In his witness statement Mr McWilliams said that he would find the Claimant talking to a colleague in his department daily for 5 to 10 minutes at a time. The Claimant would bring a panel over but instead of just dropping it off he would stay and chat. Mr McWilliams would give him five minutes grace and then send him back to work. Mr McWilliams said that the Claimant's behaviour became more and more disruptive. You could say that he "shooed" him away but that was because he had to. Mr McWilliams said that he regularly complained to several colleagues, including his own supervisor Mr Moon, Mr Foley and Mr Wilson, about the Claimant being disruptive. He may have shouted at the Claimant but only because of the noisy working environment to make himself heard. Mr McWilliams was asked in cross-examination when it was that he had to ask the Claimant to go back to work. He did not know. He could not say at all when in the period February 2017 to June 2018 this had taken place. He was asked how many complaints he had made about the Claimant and eventually he said that he had complained once to Mr Moon and twice to Mr Foley. He could not say when he had done so. He knew it was the summer because he was wearing a T-shirt but it could have been August 2017, Spring 2018 or May 2018 he could not remember. That was rather different from the suggestion that Mr McWilliams regularly complained to several colleagues about the Claimant. His clear link between the weather and the date of the complaints suggested to the Tribunal that this had indeed only happened once or twice.

3.21 In the course of his duties, the Claimant was required to go to other parts of the factory to deliver items. The evidence suggests that when he did so he would stop and talk to colleagues, often in Polish. The Tribunal's own experience of the Claimant was that he was quite talkative. On balance it seems likely to the Tribunal that he did stop and chat for longer than was strictly necessary on occasion. However, the Tribunal was equally satisfied that the First Respondent's witnesses were exaggerating the extent of this and the extent to which it was regarded as a problem at the time. It was much more likely that if the Claimant was chatting for too long in one of their departments, Mr Bradley and Mr McWilliams sent him back to work in a good-natured way. During most of the relevant period they thought no

more of it. There were complaints or discussions towards the end of the Claimant's assignment, in the context to which we return below.

3.22 We turn lastly to the Second Respondent's witnesses. Mr Fofana's evidence was wholly unconvincing. By way of example, he was assigned to investigate the Claimant's grievance and he met with him on 9 August 2018 to discuss it. Notes of the meeting were typed up and signed by the Claimant, Mr Fofana and Ms Holloway (the Second Respondent's client service manager). Each of them signed each page of the notes and dated each page of the notes 10 August 2018. The Claimant's evidence was that he waited at the Second Respondent's premises after the meeting to sign the notes. However, Mr Fofana said that he needed to review them before they were signed. Mr Fofana was changing the text for more than an hour and eventually decided that he would do it at home and that they would meet the next day to sign the notes. The Claimant returned the next day to sign the notes. When he did so, he found that information was missing or his answers had been changed. When he complained about it Mr Fofana changed some answers. The Claimant still thought that some parts of his answers had been deleted but Mr Fofana told him that he had only deleted parts that were not relevant to the investigation. The Claimant signed the notes. When Mr Fofana gave his oral evidence, he was asked a supplementary question about this by Mrs Buckle. He said that the Claimant's version of events was incorrect. He was insistent that there had been only one meeting on 9 August 2018, the notes had not been changed and the Claimant had signed them there and then. He suggested that the Claimant had signed the notes first and put the incorrect date, and that Mr Fofana and Ms Holloway had then replicated his mistake. The Claimant reminded him that the meeting started at 4pm and lasted around three hours. Mr Fofana agreed that this might have happened. He still insisted that the notes were signed the same day. The Claimant then indicated that he had an app on his phone that would show where he was on any date. The Tribunal took a short break, after which the Claimant produced evidence from his phone showing that he had been present at the Second Respondent's premises in the afternoon of 9 August 2018 and the morning of 10 August 2018. The Second Respondent did not object to that evidence being admitted. Mr Fofana remained insistent that no changes had been made to the notes and that they had been signed 9 August 2018 and wrongly dated. The Claimant's clear evidence, supported by the fact that each person dated each page of the documents 10 August 2018 and by the evidence from the Claimant's phone, left the Tribunal in no doubt that his version was correct. Mr Fofana did not say that he had difficulty remembering or that the Claimant's account might have been correct. He positively and insistently asserted the contrary position. That was wholly implausible and the Tribunal found that it was because Mr Fofana had indeed made changes to and deletions from the notes which, as he volunteered in his own evidence, was contrary to the Second Respondent's policies.

3.23 When he gave his evidence, Mr MacNeil gave the impression that he was not used to his views and opinions being challenged. When his answers were probed very often his assertions proved to be incorrect. For example, he relied on one of the Second Respondent's policies, which he said required grievances to be made immediately. When pressed he eventually produced the document he was referring to, which turned out to be the Health and Safety policy not the Equality policy. Overall Mr MacNeil's evidence fundamentally lacked balance and

objectivity. It gave the impression that he had acted with a view to the possibility of litigation and not with a view to fairly addressing the Claimant's grievance appeal. By way of example, at the grievance appeal meeting, conducted by Mr Szreniawski, the Claimant gave a list of people who had been willing to testify to Mr Fofana. Mr Szreniawski said that he was happy to speak to the people. Claimant gave eight full names. None of those people was in fact spoken to. Mr MacNeil was asked why. He said that it was because the Claimant only named two people in his original grievance. That was not correct. He then said that it was because the people named at the appeal meeting had promised to give statements in Employment Tribunal proceedings in future. He was asked where that was said in the notes of the appeal meeting and he said that he took it that that is what they had said. He added that anything they said would be unreliable or rehearsed. They could have colluded. One of the people Claimant named the appeal meeting was Mr Zdziarstek. The Employment Judge pointed out that he was one of the people whose name the Claimant gave to Mr Fofana and asked why he had not been questioned as part of the appeal. Mr MacNeil then said that this was a decision by Mr Szreniawski. That was plainly not true. He then said that Mr Zdziarstek would have been unreliable because of his relationship with the Claimant. He was asked what he knew about the relationship between the Claimant and Mr Zdziarstek and he said that he did not know anything about it. He was asked on what basis the decision had been taken not to question these additional witnesses. He said that the Second Respondent's process was that a concern had to be notified within 24 hours and that people would be interviewed as soon as possible. By now there "would have been a discussion" and it "would have affected the content." Mr MacNeil was asked how he could possibly know that without speaking to any of the individuals. He accepted that he could not and said that it was his mistake not to speak to Mr Zdziarstek.

3.24 That is the context in which the Tribunal had to make findings of fact about the Claimant's complaints. Our relevant findings are as follows.

Findings relevant to harassment allegations

3.25 The Claimant's harassment complaints are set out in the list of issues above. The context is that bad language, name-calling and inappropriate behaviour were commonplace. Evidence from the Claimant, his witnesses and the First Respondent's witnesses made that clear. People would regularly be called "knobhead". Mr Wilson was called "fat", "fat bastard" and "How many?" (in reference to his focus on how many items had been picked). Jackets that named the First Respondent's parent company, Nobia, would be doctored so that they said, "Nob." Warning stickers that said "glass" would be doctored so that they said "ass."

3.26 In his claim form the Claimant included complaints about Mr Wilson pushing him too hard; telling him that that what he had done was "shit;" laughing at him; referring to his complaints or concerns as "shit;" saying, "Pick pick pick quick quick quick;" telling the Claimant that if he did not pick enough panels he would never get a permanent job; and telling the Claimant that if he did not pick 1000 panels he would not be allowed to order a takeaway on Friday. He did not say on how many occasions these things had happened. He said that Mr Wilson called him a knobhead on a daily basis. He gave one example of going to ask Mr Wilson something when Mr Wilson was talking to a chargehand called Mr Patterson. The

Claimant said that Mr Wilson started laughing about his accent. Mr Patterson asked Mr Wilson if he was Russian and Mr Wilson replied, "No, he is Polish, but it's the same shit." The Claimant gave one more specific example in his witness statement, when he said that during a disagreement on 27 April 2018 Mr Wilson shouted at him that it was his country not the Claimant's and that as a "little Polish knobhead" he had no rights in the UK. Although his claim to the Tribunal is that name-calling and other things happened many times, or 50 or 100 times, his witness statement did not describe the many occasions on which these things were said to have happened.

3.27 In his grievance at the time, dated 15 July 2018, he complained about being forced by Mr Wilson to work harder than the "English part of the team." He said that Mr Wilson would not let him talk to other people while the "English part of the team" could talk for half an hour or more. He said that when he tried to talk to Mr Wilson about it he told him that he was wrong and did not understand the law because he was from Poland. The Claimant said that Mr Wilson repeatedly called him knobhead and laughed at his accent and pronunciation. The Claimant said that he spoke to Mr Foley about it on 8 May 2018 and that after that the other chargehands started to be unpleasant to him. He did not give any more detail about his complaints. Mr Fofana's grievance meeting was not satisfactory, because he did not ask the Claimant for further details in many respects and indeed much of his focus appeared to be on criticising the Claimant for not complaining sooner and questioning the Claimant's credibility. During the course of the grievance meeting, the Claimant did repeat his complaint that Mr Wilson pushed him and his Polish and Romanian colleagues but allowed the English employees to stand and talk for half an hour or more. Later in the meeting the Claimant said that Mr Wilson called him knobhead 2 to 3 times a week for the last two months of his work.

3.28 In cross-examination it was put to the Claimant that the expression, "Pick pick pick quick quick quick" was simply a jokey one. He said that it was not if it was used every half hour of every day for six months and not if it was used alongside other expressions such as "knobhead" and "fuck your back, pick quicker." The Tribunal thought that the Claimant was exaggerating about how often the expression was used. But we did accept his evidence that it was used alongside other phrases as he described on occasion. It was also suggested to the Claimant in cross-examination that even when Mr Wilson did laugh at him it had nothing to do with his race. The Claimant referred to the example of Mr Wilson telling Mr Patterson that the Claimant was not Russian but Polish and saying that it was the "same shit." He was asked whether he could give any other examples and he said that it he simply did not think Mr Wilson would laugh at him like this if he were English. He was asked again to give a specific example and he then described an occasion when he had referred to a pump truck and Mr Wilson started joking about him saying "bum crack." The Tribunal found that specific example credible and convincing. It was the kind of specific example that the Claimant was unlikely to have made up. It was not disputed that Mr Wilson used the word "shit" in the workplace, but it was put to the Claimant that this had nothing to do with his nationality. Twice the Claimant referred to the example involving Mr Patterson, but he did not give any other example.

3.29 In cross-examination the Claimant was asked about that fact that he went back to work at the Second Respondent in April 2018. This was after he said Mr Wilson's

poor treatment of him had started. He explained that this was the first work he had had that paid more than National Minimum Wage and that is why he returned. The Tribunal accepted that evidence, which was supported by the text messages at the time. It seemed to the Tribunal simplistic to suppose that the Claimant cannot have been ill-treated, otherwise he would have turned down this work with the First Respondent. The fact that he wanted to return to the First Respondent could indicate that any ill-treatment was at a level the Claimant could tolerate given the rate of pay he received, rather than necessarily meaning that there was no ill-treatment. The Claimant was also asked about evidence that indicated a level of friendliness between him and Mr Wilson. Some of the Facebook messages between them were friendly. Mr Wilson had given the Claimant a lift to the Christmas party and the Claimant had been to Mr Wilson's home before they left. The Claimant said that Mr Foley had organised the Christmas party lift and that he had gone along with it reluctantly. As late as May 2018 he and Mr Wilson were having discussions about a particular Polish dish. Mr Wilson sent the Claimant a humorous photo related to that, which the Claimant accepted was humorous. The Claimant prepared the dish for Mr Wilson. The Claimant talked about trying to be on friendly terms with Mr Wilson. The Tribunal accepted that someone who is being harassed or ill-treated may well continue to try and be friendly with the perpetrator. Indeed, that may be behaviour designed to reduce such ill-treatment. This evidence of friendliness in the relationship between the Claimant and Mr Wilson did not therefore mean that none of the treatment of which the Claimant complained took place. However, it did seem to the Tribunal that it pointed to a relationship between the two that was not as bad as the Claimant described. That was particularly so in respect of the Polish food and the photo Mr Wilson sent on 16 May 2018.

3.30 We have referred above to the difficulties with some of the evidence given by the Claimant's witnesses. However, the Tribunal did find some of Mr Suprun's evidence about these matters persuasive. In cross-examination he remained firm in his evidence that Mr Wilson had said "knobhead" and "Polish knobhead." He insisted that Mr Wilson had laughed at accents and he volunteered that he too had been on the receiving end of such treatment. Likewise, he said that Mr Wilson had called him "Polish knobhead." The Tribunal accepted that evidence and it leant some support to the Claimant's evidence that such language was used towards him.

3.31 The file of documents included a note made by Mr Fofana of a conversation with one of the Claimant's former colleagues, a Mr Constantin. Mr Constantin did not give evidence to the Tribunal and there were shortcomings in Mr Fofana's approach. Nonetheless, part of what Mr Fofana recorded that Mr Constantin said struck a chord with the evidence more generally before the Tribunal. Mr Constantin said that the work environment was good and friendly with a lot of "good workplace banter." He said that he, Mr Wilson and the Claimant would call one another "knobhead" and they would call Mr Wilson "fat bastard."

3.32 Mr Wilson simply denied each of the Claimant's allegations. When asked about the word "knobhead" he paused before saying that this was not a word he used, so, no he did not call the Claimant that. That was implausible in the face of the other evidence. It was an example of Mr Wilson trying to protect his own position as a chargehand rather than giving truthful evidence.

3.33 In the light of that evidence, the Tribunal found that there was a culture of swearing, name-calling and other such behaviour and that everybody was involved. The Claimant was not singled out to be laughed at, sworn at or called names and this general behaviour did not relate to his nationality. To some extent he too joined in. However, there were specific occasions where the conduct related to the Claimant's nationality. The Tribunal found it more likely than not that the specific examples the Claimant gave had happened. Mr Wilson did tell Mr Patterson that the Claimant was Polish not Russian but that it was "the same shit." Mr Wilson did laugh at the Claimant's accent on that occasion and on the occasion when Mr Wilson confused "pump truck" with "bum crack". He did call him a "Polish knobhead," including on 27 April 2018. The Tribunal found it more likely than not that there were other occasions when such comments were made or when Mr Wilson laughed at the Claimant's accent. That was supported to some extent by the Claimant's witnesses. We find that on a relatively small number of occasions throughout his time in Mr Wilson's team, until the termination of his assignment, the Claimant's accent or pronunciation were laughed at, he was called a "Polish knobhead" or called similar names that referenced his nationality. We accept his evidence that he told Mr Wilson not to do so on at least some occasions when it happened. That is consistent with what he said at the time of his grievance. It was repeatedly suggested to the Claimant that what was happening at work was "jokey". He did not accept this. In particular, his evidence was to the effect that comments related to his race or nationality were not humorous. He did not see it that way. The Tribunal found this evidence convincing. We accepted that the Claimant was offended by comments that related to his race or nationality and was upset when Mr Wilson laughed about his accent.

3.34 As referred to above, the Claimant made clear on a number of occasions that he wanted a permanent job with the First Respondent. It is clear that he had conversations with his managers about that. He also had concerns about the number of panels he was being asked to pick. Partly that was because of back pain and partly it was because he felt he was doing more than his fair share. It was clear that he raised those concerns with Mr Wilson among others. We have already indicated our view that the evidence does tend to suggest that some of the First Respondent's employees "used" the uncertain status of agency workers as a way of persuading them not to use annual leave or to work more shifts. In that context the Tribunal preferred the Claimant's evidence that Mr Wilson told him that if he did not pick enough panels he would never get a permanent job. The Tribunal did not accept that this happened on many occasions, rather we find that it happened on a handful of occasions. However, it related to the Claimant's status as an agency worker rather than to his race or nationality. The First Respondent had Polish employees and they did not receive such treatment. The Claimant's status as an agency worker was not intrinsically linked to his nationality.

3.35 There was a practice at the First Respondent that staff would order takeaway for their meal break on a Friday. The workers paid for their own food, but one person in each department would take responsibility for placing the order. The Claimant's case was that on four or five occasions in or about May 2018 Mr Wilson told him that if he did not pick 1000 panels he would not be allowed to order takeaway on Friday. Mr Wilson denied doing so. The Tribunal found that this allegation had its origins in a conversation that did take place. We found it more likely than not that during one of their numerous conversations about how many panels the Claimant

was picking or was required to pick Mr Wilson said to him words to the effect that there was a job to do and he should be picking panels not ordering takeaway. However, this was not a threat nor did we accept that it happened four or five times. Mr Wilson was not in a position to stop the Claimant from ordering takeaway.

3.36 We have already referred to the evidence from more than one person about jackets being doctored to change the word "Nobia" to "Nob." It was suggested to the Claimant in cross-examination that when he found the word "knob" on his back it was a jacket that had been doctored in that way and that he could not say Mr Wilson was the perpetrator. The Claimant disagreed. He said that it was not a logo it was a piece of paper that had been stuck on and that Mr Wilson had admitted doing it at the time. Mr Wilson denied this took place. The Tribunal preferred the Claimant's account. We considered it more likely that this happened as the Claimant described, particularly since there is no dispute that very similar behaviour did take place. We found that Mr Wilson was again trying to protect his own position. However, the Claimant was not singled out for this treatment: it was part of the culture we have described.

3.37 When the Claimant returned to work at the First Respondent on 23 April 2018 he started training in the doors area. That work required use of a lifting platform. The Claimant said in his witness statement that when he told Mr Wilson he was not trained to use the platform Mr Wilson told him that he did not care and that the Claimant should start working or go home. One time after that when he was working in the doors area Mr Wilson asked him to pick some items from the highest level of racking and the Claimant told him he would not do so because he was scared of the height (around 10 m). Mr Wilson laughed at him and asked him how he had managed to come to the UK by plane if he had a fear of heights. The Claimant told him that he had come by bus. Mr Wilson laughed and said that only an "idiot" would drive so far. Later, when the Claimant was picking items from the high level using the platform, Mr Wilson pushed an emergency stop button at floor level so that the Claimant was trapped and unable to lower the platform. He asked Mr Wilson to put the power back on and Mr Wilson refused. Mr Wilson told him he would only switch it back on if the Claimant told him he was the best boss he had ever had and promised to be his slave. The Claimant refused and said that he was use his phone to call for help. Only then did Mr Wilson stopped laughing and turn the power back on.

3.38 In his witness statement Mr Wilson said that he remembered having a conversation with the Claimant in around February 2018 in which the Claimant told him that he was scared of flying. Mr Wilson is also scared of flying and was interested in talking to the Claimant about this. He knew that the Claimant had recently been to Madrid and regularly went to Poland to see his family, so he may have asked him how he travelled from England to Poland and whether he had flown. If he did, this was in the context of a conversation about a shared fear of flying. In cross-examination Mr Wilson did not dispute the Claimant's evidence that he did not travel regularly to Poland and had not been since July 2016.

3.39 It was clear to the Tribunal that the Claimant and Mr Wilson each knew that the other was scared of flying and that they must have had a conversation about this. The Tribunal found on a balance of probabilities that there were two incidents. The first was a conversation prompted by the discovery that Mr Wilson and the

Claimant were both scared of flying. During that conversation the Tribunal found it more likely than not that Mr Wilson asked the Claimant how he had travelled to the UK if he was scared of flying. We find that that was a question asked out of curiosity not one designed to cause offence or insult. The second incident took place when the Claimant was high on the platform and Mr Wilson cut the power to stop him from lowering it. We find it more likely than not that this incident happened as the Claimant described. If there was a conversation about training to use the platform, the Claimant accepted in his evidence that a lack of training had nothing to do with his nationality.

3.40 The Claimant's last allegation of harassment arises from an incident on 27 April 2018. In his claim form the Claimant said that this happened on 7 May 2018, but he corrected it in his witness statement. He said that towards the end of the shift Mr Zdziarstek was helping him picking doors because Mr Zdziarstek had completed his own duties. When Mr Wilson saw, he came and sent Mr Zdziarstek away. The Claimant went to speak to Mr Wilson at his desk and told Mr Wilson that he did not like the way he was treating him and calling him names. He felt that he needed to work harder than the "English" part of the team and that he was not allowed to speak when other staff could stand for half the shift and talk. He told Mr Wilson that if he did not stop he would make an official complaint about him. He said that Mr Wilson went "crazy" and was shouting at him so loud that people from the panel store and line 1 stopped working to watch and listen. That was when Mr Wilson shouted that it was his country not the Claimant's and that as a "little Polish knobhead" he had no rights in the UK. He shouted that even if the Claimant reported it nobody would believe him and that Mr Wilson would do everything he could to destroy him. Mr Wilson then went straight to Mr Zdziarstek and shouted at him. In his witness statement Mr Zdziarstek also said that Mr Wilson shouted at him and the Claimant when he was helping the Claimant. The Claimant followed Mr Wilson to his desk and complained about his unfair treatment and Mr Wilson got mad and started shouting again. People stopped working to watch. After that Mr Wilson came to Mr Zdziarstek's area to "discharge the rest of his frustration" on him. Mr Zdziarstek's evidence about this in cross-examination was convincing. He gave some details about what was said and how. His version was broadly consistent with the Claimant's

3.41 Mr Wilson did not deal with this incident at all in his witness statement. In cross-examination Mr Wilson had clearly remembered that there was an incident on 27 April 2018. He said that Mr Zdziarstek was not helping the Claimant, they were chatting. He told Mr Zdziarstek that if he was not helping the Claimant he was hindering him and sent him back to his area of work. Mr Zdziarstek followed him and they had a conversation about targets. The Claimant did not come to his desk and he did not speak to the Claimant about it. It was near to the end of the shift and afterwards they all went home. Mr Zdziarstek was "a little bit angry" so Mr Wilson explained the position and then he left. Nobody raised their voice and nobody was watching. As Mr Wilson described the situation it sounded extremely insignificant. He was asked why it stood out so much for him. He then said that Mr Zdziarstek was "quite angry" and he remembered speaking to him at his desk.

3.42 The Tribunal found that Mr Wilson was downplaying the incident and that made his version of events less credible. We accepted that Mr Wilson was angry and shouting. We also accepted, as the Claimant had said in his claim form, that the

he went to Mr Wilson's desk and started to complain about his treatment of him. The Tribunal found that what actually happened was likely to be somewhere between the two versions of events. It was more likely than not that the Claimant made some complaint of unfairness compared with his English colleagues. It was also more likely than not that this provoked a response from Mr Wilson along the lines that the Claimant had no rights and would not be believed. In view of our findings above about the use of such language, the Tribunal also considered it more likely than not that in the context of this row Mr Wilson called the Claimant a "little Polish knobhead."

Findings relevant to direct discrimination allegations

3.43 The Claimant's role was primarily picking transport panels. This was hard work. The panels were heavy and the Tribunal accepted the Claimant's evidence that this was the hardest job in the department. The Claimant was under constant pressure to pick more panels. He felt overworked. He felt that the workers on the early shift were not doing their fair share of the transport panel picking. He had to do whatever was left for the second shift, which led to a feeling that he was doing the lion's share. Text messages in the file of documents lend weight to his evidence about that. The Tribunal also found that Mr Wilson was focused on the department's daily target. That is how he came to have the nickname "How many". The Claimant was evidently complaining with some regularity about his workload, about being required to pick too many panels and about not being given other roles within the Department. That happened from August 2017 onwards.

3.44 The Claimant complains that he was treated less favourably than English workers between August 2017 and June 2018, because Mr Wilson refused to give him help from other team members and refused to allow him to do the different (and less onerous) jobs in the department. There was no persuasive evidence that the transport panel picking role was carried out by more than one person after the Claimant left or on the other shift. We have referred above to the evidence of Mr Warsala and Mr Zdziarstek about this when dealing with credibility.

3.45 Mr Wilson said in his witness statement that only one picker was needed on each shift so the Claimant worked on his own in that role. He said that he did not remember the Claimant ever asking for help with his role, but if he had asked Mr Wilson would not have refused without good reason. That could sometimes be difficult because it would have meant taking someone away from a different role. Mr Wilson did not remember the Claimant asking if he could do other jobs within the Department. If he had done so it would not have been allowed because he was needed to do his transport panel picking role.

3.46 In this part of his cross-examination of Mr Wilson, the Claimant did not suggest that the transport panel picking role was done by one Polish worker (him) or two English workers. Rather, the thrust of his questions was that the transport panel picking role was the hardest in the Department and that the Claimant only did that role. He was not given help when he asked and he was not allowed to rotate between different roles in the department. Mr Wilson's answer fundamentally was that the Claimant was not moved to other duties because he was brought in to do the transport panel picking role. He was not rotated between roles in the Department for the same reason. Full-time non-agency workers in the Department, of all nationalities, were rotated. If he was refused help, it was because that would

have meant taking someone off a different task. In his cross-examination Mr Foley confirmed that the Claimant spent about 95% of his time doing the transport panel picking role. His fundamental explanation was that this was because the Claimant was brought in to do that role.

3.47 The Tribunal found that the Claimant was complaining about doing too much transport panel picking and was asking for new duties. Sometimes he asked for help, particularly alongside mention of back pain. This did not happen 50 or 100 times, but it did happen with some regularity. The Claimant was not given other duties and was not given help. However, there was no persuasive evidence that English workers were treated any differently. The Claimant was not given help because Mr Wilson did not want to take someone away from another task. The Claimant was the only transport panel picker on his shift and the evidence about what happened on the other shift or after the Claimant left was not credible for the reasons already described. In any event, it was entirely clear on the evidence why the Claimant was not allowed to do other roles within the department. It was because he had been brought in specifically as an agency worker to do that role. The First Respondent's direct employees within the Department, including Polish employees, did rotate between roles. The Claimant did not because he was the agency worker brought in to do the panel picking role. That might give rise to a complaint about his treatment as an agency worker, but that is not the complaint before us.

3.48 The Claimant's next complaint of direct discrimination is that he was required to use the lift platform without being given safety training. However, as we have already indicated, he accepted in his oral evidence that the lack of training had nothing to do with his race.

3.49 The Claimant's final complaint of direct discrimination is that Mr Wilson instructed him not to speak to others during working hours. There was lots of evidence that the Claimant spent too much time talking to others. Although the Tribunal found the evidence of the First Respondent's witnesses about this to be exaggerated, we accepted that there was some truth behind the point. Our own experience of the Claimant was that he tended to talk at great length. Further, he did not deny speaking to his co-workers regularly. Rather, he argued that they had been speaking about work, but because they were speaking in Polish that was not known. The Tribunal was not convinced by that. Taking into account all the evidence, it did seem to us that the Claimant had a tendency to spend too long talking to his colleagues when he had occasion to go to their work stations for work related matters. The evidence also suggested that Mr Wilson was increasingly active in making an issue of this. The Tribunal did not accept that the Claimant was banned from speaking to others during working hours, but we were quite satisfied that increasingly towards the end of his assignment he was being chastised for doing so and Mr Wilson was checking up on him wherever in the factory he might be. However, there was no convincing evidence before us that this had anything to do with the Claimant's race or nationality. On the contrary, one of the workers with whom the Claimant compared himself was Mr Wesoly. He said that Mr Wesoly was allowed to talk excessively. Mr Wesoly was Polish. Equally, the Claimant referred to a Mr Sellars and accepted that it was likely that he had been banned from talking but said that he still did it. If one of his comparators was Polish and if

an English colleague also had a ban, it is difficult to see how the Claimant's nationality can have played any part in this.

Findings relevant to victimisation claims

3.50 We have already referred to the argument on 27 April 2018 between the Claimant and Mr Wilson. The Claimant says that this led him to ask to meet Mr Foley. They met on 8 May 2018. The Claimant says that during the course of their meeting he made complaints of discrimination that amounted to a protected act for the purposes of bringing a victimisation claim. The evidence about this is directly contradictory.

3.51 In his claim form the Claimant said that when he met Mr Foley he reported that he was being discriminated against because he had to do more work than the English part of the team and was being harassed by Mr Wilson. He said that Mr Foley asked a lot of questions and took notes and promised to speak to Mr Wilson. He said that after that Mr Wilson treated him better, but only for about a week then everything started again. In addition, Mr Bradley and Mr McWilliams, the chargehands from other departments, started to treat him badly. In his witness statement the Claimant said that he spent an hour in Mr Foley's office on 8 May 2018. Mr Foley told him that Mr Wilson's behaviour was not acceptable. He asked him to leave it with him and spoke to Mr Wilson. He later told the Claimant that everything was solved and it would not happen again. The Claimant said again that Mr Wilson's behaviour improved for a few days and then everything started again. In cross-examination the Claimant confirmed that the meeting lasted about an hour. The Tribunal found his evidence about Mr Foley taking notes unconvincing. He was more focused on the fact that the First Respondent's policies required him to take notes, than on whether in fact he did so.

3.52 There was some support for the Claimant's evidence that he complained of discrimination to Mr Foley from the Claimant's other witnesses. This was based on the Claimant reporting to them at the time what he had said to Mr Foley.

3.53 Mr Foley said in his witness statement that the Claimant came to complain that Mr Wilson was always on at him to get on with his job and asking him to get back to the department. Mr Foley said that he was already aware of the Claimant's behaviour and had previously spoken to Mr Wilson about it. He therefore fed back to the Claimant and explained why Mr Wilson was asking him to get on with his work. He fed back the complaints he had received from Mr Wilson and other chargehands and team leaders. The Claimant agreed with him that he was being disruptive and said he was behaving in that way because he had been promised a full-time job and had not got it. Following the meeting with the Claimant, Mr Foley pulled Mr Wilson into a meeting and explained his conversation to him. He asked Mr Wilson if he was still having problems with the Claimant. Mr Wilson said that the Claimant was not doing what he was asked to do and continuing to be disruptive by disappearing from the department and talking to colleagues in other teams for long periods of time. Mr Foley then went back to the Claimant and let him know that he had spoken to Mr Wilson and that they needed the Claimant to do his job and stop disrupting other teams. Mr Foley said that the Claimant did not raise any concerns about discrimination with him on 8 May 2018 or at all during his time at the First Respondent. In cross-examination Mr Foley described the conversation as a "quick chat." He said that he did not make any notes. He said

that the Claimant had not said anything about back pain. He had not complained of being "shooed" away from other departments, laughed at because of his accent or treated differently compared with English workers.

3.54 The Tribunal considered the contemporaneous documents. There were no notes of the meeting itself. However, we noted that as soon as Ms Remeikaite told the Claimant on 10 June 2018 (see below) that the First Respondent was terminating his assignment, the Claimant replied to say that he had reported feeling discriminated against on 8 May 2018. Mr Foley heard him and agreed with him but after that the rest of the chargehands started to treat him worse and now he had been dismissed for a false reason. He had read a government website and thought that this looked like victimisation because he reported discrimination. That document, written much closer to the meeting itself, supported the Claimant's version of events. So too did his grievance, dated 15 July 2018. That described complaints of discrimination, including different treatment compared with English workers and laughing at the Claimant's accent. It said that the Claimant had told Mr Foley about the situation on 8 May 2018. A little later it said that the Claimant had tried to resolve "the discrimination problems" informally at work, including by asking Mr Foley for help. That too was consistent with his having made a complaint of discrimination to Mr Foley on 8 May 2018.

3.55 The Tribunal also considered the notes made by Ms Windle, the First Respondent's HR manager, on 15 August 2018 when she held an investigation meeting with Mr Foley. This was part of the grievance being dealt with by Mr Fofana. Mr Fofana did not meet Mr Foley. He sent questions through to the First Respondent. Ms Windle met Mr Foley and then produced this written response. The first question Mr Fofana had asked was whether the Claimant had ever raised complaints with Mr Foley about his treatment. Mr Foley said that the Claimant did come to see him about Mr Wilson. He said that he felt like Mr Wilson was on his case and like Mr Wilson had something against him. Mr Foley said that he told the Claimant that he would speak to Mr Wilson to resolve the matter. He did speak to Mr Wilson and Mr Wilson explained the issues he was having with the Claimant, i.e. disappearing from his work area for long periods of time, found talking in other areas, late back from breaks and sitting in his car when it was not break.

3.56 The Tribunal found this an important piece of evidence. It differed from the account of the meeting Mr Foley gave in his witness statement. It contained no suggestion that he immediately told the Claimant why Mr Wilson was on his case nor that the Claimant then admitted that he was being disruptive and said that it was because he had not been given a permanent job. On the contrary, Mr Foley's account to Ms Windle was to the effect that the Claimant told him he had a problem with Mr Wilson, he told the Claimant that he would speak to Mr Wilson to resolve it and then he spoke to Mr Wilson. That is much more consistent with the Claimant's account. Further, that version of events makes more sense. If the conversation was as Mr Foley described in his witness statement, it is not clear why Mr Foley would need to go and speak to Mr Wilson and report back to the Claimant.

3.57 Taking all that evidence into account, the Tribunal found that the Claimant's version of the conversation with Mr Foley was the more accurate. The Tribunal found that the conversation lasted closer to an hour than 10 minutes. The Tribunal considered it most likely that the Claimant reported his concerns in similar terms

to those set out in his grievance not long afterwards. Those were his long-standing complaints and remained so by the time of the Tribunal. Therefore, the Tribunal found that the Claimant's conversation with Mr Foley included a complaint about having to work harder than the English or British members of his team, a complaint about not being allowed to talk when the English or British part of the team could talk for half an hour or more and a complaint that Mr Wilson laughed at his accent and pronunciation.

3.58 It follows from that finding that when Mr Foley spoke to Mr Wilson, it was to tell him that the Claimant had made a complaint about him and to discuss that. It is more likely than not that this was when Mr Wilson told Mr Foley in any detail that he had concerns about the Claimant's conduct.

3.59 The Claimant's first complaints of victimisation are about Mr Bradley and Mr McWilliams "shooing" him away from their departments, shouting at him and, on one occasion, Mr Bradley coming to the Claimant's department and asking why he was working so slowly. We return to the last of those matters below.

3.60 Mr Bradley gave evidence that he did not know about the Claimant's complaint about Mr Wilson. We have referred above to his evidence about when issues with the Claimant's conduct arose, what he did about them and when things got worse. We have explained why we found that evidence unconvincing. Mr Bradley accepts that he "shooed" the Claimant away from his department on occasions and on occasions shouted at him, but only to overcome the factory noise. He did not accept that there was an occasion on which he came to the transport panels department and asked the Claimant why he was working so slowly. The Claimant says that happened towards the very end of his assignment when Mr Wilson was absent on a training course and asked Mr Bradley to keep an eye on him.

3.61 Mr McWilliams also said that he did not know about the Claimant's complaint about Mr Wilson. Again, we have already explained why we found his evidence about the Claimant's conduct and what Mr McWilliams did about it implausible. Mr McWilliams too accepted that he "shooed" the Claimant away on occasions and on occasions shouted at him to overcome the factory noise.

3.62 The Tribunal found it more likely than not that Mr Wilson told Mr Bradley and Mr McWilliams about the Claimant's complaint. We took into account evidence from the Claimant's witnesses that it was common knowledge he had complained, and that seemed likely to us. Mr Foley's office was quite visible to the factory, so people would have seen him and the Claimant talking, and the Claimant was likely to have told people what he had done. However, it is likely that discussion of any complaint about different treatment of Polish workers was confined to Polish (or other Eastern European) workers. Further, the Tribunal considered it unlikely that Mr Wilson told Mr Bradley and Mr McWilliams that there were discrimination complaints. Rather, in the context that there were some concerns about the Claimant talking too much and disrupting colleagues, Mr Wilson is more likely to have said something like, "Can you believe Greg has made a complaint about me being on his case? He's the one who's always talking and never where he is supposed to be."

3.63 Further, the Tribunal found it more likely than not that there was a change in the approach of Mr Bradley and Mr McWilliams after they were told about the

Claimant's complaint. Again though, that is not because he had made complaints of discrimination. It is because their view was that Mr Wilson's treatment of him related shortcomings with the Claimant's work. It is likely that in those circumstances they were more alert to those shortcomings and more likely to take the Claimant to task because of them.

3.64 The next complaint of victimisation is about the termination of the Claimant's assignment. That started on 6 June 2018 when Mr Foley emailed Ms Remeikaite to say that he no longer wanted the Claimant working at the First Respondent with effect from Monday, 11 June 2018. He set out his reasons, namely:

- Poor attitude towards myself and other supervisors.
- I have lost count of how many times I have had to tell [the Claimant] to get on with his work.
- Complains about what other people do and don't do, instead of just doing what he is supposed to do.
- Use of mobile phone during working hours.
- Wandering off from his work area to talk to others in other areas.

3.65 Mr Foley added that he had the impression the Claimant no longer wanted to work for the First Respondent and that he kept telling people he would be leaving soon.

3.66 In cross-examination Mr Foley was asked about a different document in the Tribunal file signed by him apparently setting out the reasons for ending the Claimant's assignment. Although it was his document, signed by him, he was unable to tell the Tribunal in his oral evidence when it was written or why. In that document he said that the Claimant's performance issues had got worse and worse despite his being told on numerous occasions. There was no mention of that in the original email to Ms Remeikaite. The later document also said that the Claimant had a poor work rate, that he was disappearing out of his work area for prolonged periods, that other team leaders were complaining about him being a distraction in their areas, that he was backchatting to chargehands and team leaders, and that he had been caught in his car outside break times. That was clearly substantially different from the reasons set out in Mr Foley's email of 6 June 2018. The later document also recorded that the Claimant had never reported an accident at work verbally or in writing to anyone (as the Tribunal understands it, this was because there was or was likely to be a personal injury claim). The Claimant drew Mr Foley's attention to an email dated 9 June 2018 (after Mr Foley's email to the Second Respondent but before the Claimant was aware of that email) from the Claimant to Mr Foley. In that email the Claimant said that he suffered a lower back injury during picking at work on Thursday, 7 June 2018. He gave more detail. Mr Foley's evidence was that this email had gone into his junk mail and he had not seen it at the time. It was suggested to him that he must have seen it by the time he wrote the later document and his evidence about when or why he wrote that document was vague and unconvincing.

3.67 Mr Foley was then asked about the reasons given in his email of 6 June 2018 for ending the Claimant's assignment. Given that the first reason was the Claimant's "bad attitude" Mr Foley was asked about his written answer to one of Mr Fofana's questions in August 2018. Mr Fofana had asked whether the Claimant was ever disrespectful to him or anyone else within the organisation and Mr Foley had

answered, “No.” He told the Tribunal that there were concerns about backchat to team leaders and other matters, but he could not explain why he did not refer to them when answering Mr Fofana’s questions. The fourth reason in the email of 6 June 2018 was that the Claimant used his mobile phone during working hours. Mr Foley accepted in cross-examination that he had expressly permitted the Claimant to use his mobile phone in the factory for work purposes. Mr Foley was unable to explain the differences between the email of 6 June 2018 and the later document satisfactorily. For example, he did not know why the later document said that the Claimant had a poor work rate. He accepted that the Claimant’s work rate could not be questioned when he was doing his job he. He did not know why poor work rate was referred to in the later document. He was equally unable to explain why only the later document referred to complaints from other team leaders. He said that he did get numerous complaints about the Claimant. He was asked how numerous those complaints were and he said that every other day he would get a phone call about the Claimant. Mr Foley was asked during what period that took place and he said that it was from January 2018 until the termination of the Claimant’s assignment. Mr Foley was asked why the Claimant was allowed to come back on 23 April 2018 if that was the case. He said that the First Respondent was struggling to find someone to do the job. He was therefore asked what changed in the six or seven weeks between the Claimant coming back and the email of 6 June 2018. He said that they were finding it “more difficult to manage him.” He also said that the Claimant wanted to leave and he was aware that he had done HGV training with a view to doing so. The Claimant had indeed passed his class II driving test and become a fully qualified HGV driver on 14 May 2018. He says that he was hoping to work in the First Respondent’s transport department.

3.68 The Tribunal found Mr Foley’s evidence unsatisfactory. The reasons he gave for ending the Claimant’s assignment varied, and in some respects did not stand up to scrutiny. Further, the situation as he described it lacked logic. If there were really such concerns about the Claimant’s performance from January 2018 onwards, it was surprising that he was allowed back in April 2018. It was also difficult to see what changed in the subsequent six or seven weeks, if Mr Foley had indeed been receiving complaints every other day since January.

3.69 The last victimisation claim against the First Respondent relates to a comment the Claimant says Mr Wilson made on 7 June 2018. We have already referred to the Claimant reporting that he had an accident at work on Thursday 7 June 2018. The Tribunal understands that is the subject of separate litigation and we make no findings about what happened.

3.70 In his witness statement the Claimant said that he felt a strong pain on 7 June 2018. He went to report it, but Mr Foley was on holiday and Mr Wilson was on a training course from 6 to 8 June 2018. However, a while later he spotted Mr Wilson at his desk. He went to tell him that he had strong back pain and was not able to lift anything. Mr Wilson told him that this was not his problem; the target needed to be picked and he did not care how the Claimant did it. Mr Wilson refused to fill in an accident report and said that if the Claimant was not able to continue picking he could start looking for a new job. The Claimant tried to continue picking. Mr Wilson came and asked him why he was picking so slowly and he told him about the pain again. Mr Wilson replied, “Fuck your back, pick faster, you got a target to

pick." The next day he was still in pain but went to work. He was working slowly because of the pain. At about 8pm Mr Bradley came to him and shouted asking why he was picking so slowly. The Claimant told him about the accident the previous day and his back pain. Mr Bradley said that that was not his business he was just doing what had been requested of him and went away. That is the incident referred to as a separate complaint of victimisation against Mr Bradley. Mr Bradley denied it entirely in cross-examination.

3.71 Mr Wilson denied having any such conversation with the Claimant on 7 June 2018 or making the comment alleged. He said that he was not at work that day, he was on a training course and he did not come into work after the course. In fact, he went to watch the England match at Elland Road. There is no dispute that there was indeed a match on that day. The First Respondent had also produced Mr Wilson's clocking-in records and these showed that he had not clocked-in at all on 7 June 2018. Taking that evidence into account, the Tribunal found that there was no conversation between Claimant and Mr Wilson on 7 June 2018 and the comment alleged was not made on that occasion. There was no corroborating evidence either way in respect of the conversation with Mr Bradley on 8 June 2018. On balance the Tribunal found that it did not take place as the Claimant described. Given that his account of what happened the previous day was inaccurate we found it more likely than not that this part of his evidence was inaccurate too.

Findings relevant to the claims against the Second Respondent

3.72 The Claimant's last two complaints of victimisation relate to Mr Fofana's handling of his grievance and Mr MacNeil's handling of the grievance appeal. We have already referred to the content of the grievance, which was sent to the HR manager at the First Respondent on 15 July 2018. On 23 July 2018 Ms Windle asked the Claimant to redirect it to Mr Fofana and he did so. On 6 August 2018 Mr Fofana confirmed receipt and invited the Claimant to a meeting on 9 August 2018 to discuss it.

3.73 The Tribunal has explained in detail above why the Tribunal found Mr Fofana's evidence about the notes of his meeting with the Claimant implausible. We accept the Claimant's evidence there are points missing from the notes, including names of people who were potential witnesses. In any event, the tone of the notes indicates that Mr Fofana focused to a significant extent on challenging or questioning the Claimant, rather than asking him questions to find out about his grievance. He asked numerous questions about why the Claimant had not raised a concern with the Second Respondent before, about his back injury and whether that had been reported, and about the Claimant's own behaviour. Very little of the meeting appears to have been spent asking the Claimant open questions about his grievance. At one point in the meeting the Claimant said that he thought the real reason he had been let go was because he reported Mr Wilson for discrimination to Mr Foley. Mr Fofana is then recorded as saying, "I remember speaking to you personally when you are laid off back in April, you were very upset when Lina told you that you were not required, you came back threatening the suing the company, I personally phoned you to offer you an alternative position then but you said that it was too far for you, so I can see it you did the same thing again this time as soon as you were told on 10 June 2018, you came back angrily with an email threatening to sue the company, then brought up this time about this mistreatment then you mentioned injuring your back working at Rixonway and that

you will claim, may I ask you why you are doing this?" That seemed to the Tribunal to exemplify Mr Fofana's approach to the grievance.

3.74 As mentioned above, Mr Fofana produced written questions for Mr Wilson and Mr Foley, which he sent to the First Respondent. Ms Windle met with Mr Wilson and Mr Foley and produced typed answers that were sent to Mr Fofana. The questions included questions about the Claimant's conduct and his back pain. They did not ask detailed or specific questions designed to investigate all of the Claimant's complaints. The Claimant gave Mr Fofana names of possible witnesses to interview but Mr Fofana only spoke to one of them, Mr Constantin. He did so by telephone. We have referred above to what his note of that telephone conversation says. We note that Mr Constantin's account was inconsistent with Mr Wilson's (and to some extent the Claimant's). Mr Fofana wrote to the Claimant on 13 September 2018 with the outcome to his grievance. The grievance was not upheld. Mr Fofana accepted the version of events given by Mr Foley and Mr Wilson in their written answers. Mr Fofana suggested that he had investigated the complaint of discrimination "thoroughly" and could find no evidence to substantiate it. Mr Fofana found that there was a culture of "shopfloor banter" and that it had been reported to him that Mr Wilson had called him a "knobhead" in a "good-natured" way. Mr Fofana wrote that Mr Wilson "denied that there had been any more insult intended." No such comment was included in the written answers Mr Wilson had given to Mr Fofana's questions.

3.75 In cross-examination Mr Fofana was asked about why he had not interviewed more witnesses. He said that he had not spoken to Mr Zdziarstek, one of the people suggested by the Claimant, because he and the Claimant were close friends. It became clear that this was little more than an assumption on his part. He accepted that he had introduced Mr Zdziarstek to the Claimant and suggested that the Claimant might give Mr Zdziarstek a lift to work because they lived near one another. He had no idea whether they saw each other out of work. On occasions when he was at the First Respondent's premises he had seen them together at a break time. During the grievance meeting with the Claimant, the Claimant told Mr Fofana that after he had left the First Respondent, Mr Wilson said in a meeting that the Claimant was no longer working at the First Respondent because he had reported Mr Wilson. That is why he was finished. Mr Zdziarstek was present at the meeting. Mr Fofana was asked why he had not asked Mr Wilson or Mr Zdziarstek about that. Eventually he accepted that it was a mistake not to do so. Mr Fofana was also asked about the suggestion in the grievance outcome letter that Mr Wilson had expressed regret calling the Claimant a "knobhead", when in fact Mr Wilson had denied doing so. Mr Fofana said that he spoke to a number of people including the HR manager at the First Respondent and that was where this comment came from. Again, he accepted that this was a mistake.

3.76 The Tribunal considered Mr Fofana's investigation of the grievance wholly inadequate. Further, much of the investigation was clearly handed over to the First Respondent's HR manager and there were evidently conversations between her and Mr Fofana that influenced the content of the grievance outcome letter. As the comments referred to above make clear, Mr Fofana's own view was antagonistic towards the Claimant for making a complaint and he did not approach the grievance in an open-minded or balanced way.

3.77 In a letter dated 17 September 2018 the Claimant appealed to Mr MacNeil against the outcome of his grievance. He identified five grounds of appeal: Mr Fofana had not spoken to all the people Claimant had named; Mr Fofana had not checked what the Claimant was expected to do or what was expected from other staff; Mr Fofana had spoken to one Eastern European person only about different treatment; Mr Fofana admitted that a chargehand calling someone "knobhead" was normal even if the person repeatedly asked him not to do so; and Mr Fofana did not investigate the whole of the complaint. The Claimant also mentioned that he had notified ACAS of the claim and was ready to put in an Employment Tribunal claim if necessary.

3.78 Mr Szreniawski wrote to the Claimant on 1 October 2018 inviting him to an appeal meeting on 5 October 2018. The notes of that meeting indicate that Mr Szreniawski went through each of the Claimant's grounds of appeal and asked him about them. The Claimant gave him a list of eight names of people to speak to about his complaints. Mr Szreniawski said that he would attempt to do so. In fact, that did not take place. It appears that the notes of the appeal meeting were simply passed to Mr MacNeil, who wrote to the Claimant on 10 October 2018 rejecting his appeal. Mr MacNeil quoted the Claimant's ACAS reference number in the second paragraph of his letter. The first section of the letter then purported to set out in detail why the Claimant was required to report any grievance he had in the first instance to the Second Respondent and not to the First Respondent. That was inconsistent with the content of the Second Respondent's own equal opportunities policy, which made clear that matters could be raised informally with an employee's immediate line manager or the local Easyrecruit office. Mr MacNeil then said that the Second Respondent had obtained witness statements from Mr Foley and Mr Wilson, which refuted the complaints of discrimination and harassment. That was not an answer to the Claimant's grounds of appeal. Mr MacNeil then went on to assert that there was no evidence of a negative atmosphere or culture of discrimination at the First Respondent. He again criticised the Claimant for not making a prompt report to the Second Respondent and argued that the Claimant's decision to return to the First Respondent in April 2018 was inconsistent with his complaint. Again, that did not investigate or deal with the Claimant's grounds of complaint or appeal. Mr MacNeil then addressed the Claimant's current status and whether the Second Respondent remained obliged to find him alternative assignments, before referring to his understanding that the Claimant had raised a separate industrial injury claim against the First Respondent. Mr MacNeil again made criticisms of the Claimant for not reporting the injury at the time of the incident. He concluded by finding that the work relationships and the Claimant's performance had deteriorated after it became clear that he would not get a permanent role at the First Respondent. He went as far as asserting that the Claimant was guilty of misconduct for failing to follow policies and procedures and might be subject to a disciplinary process if he returned to work. Put simply, Mr MacNeil did not investigate or deal with the Claimant's grounds of appeal. The letter refers more than once to the Claimant's legal claims or potential claims.

3.79 When dealing with credibility above we have already referred to Mr MacNeil's fundamental lack of balance and objectivity and his unconvincing evidence about why the people named by the Claimant, especially Mr Zdziarstek, were not questioned. It was suggested to Mr MacNeil in cross-examination that he appeared

to assume that if the complainant identified a possible witness, he assumed that they would collude and fabricate evidence. He gave an incoherent and evasive answer, including suggesting that the Claimant's grievance was "unorthodox." He was asked about the relevant policies. Again, we have referred to that above. The Claimant drew Mr MacNeil's attention to an Easyrecruit policy that says concerns can be reported to the immediate line manager *or* the local Easyrecruit office. Mr MacNeil said that he disagreed. When the clear words of the policy were drawn to his attention, he simply repeated that he disagreed. Mr MacNeil was asked why he had dealt with the appeal, when Mr Szreniawski had done the appeal meeting. He said that usually the Client Service Manager did the grievance meeting and the Regional Manager dealt with any appeal. He again referred to this as "unorthodox". He suggested that the Client Service Manager had been uncomfortable about dealing with the grievance because "she was also from Europe" so Mr Fofana did it. Mr MacNeil therefore invited Mr Szreniawski to do the appeal, because he was a Regional Manager, but was neutral because he came from a different region. However, Mr MacNeil "took on the final report." He said, "Because of all the elements and the sequence of events, I felt I was better placed to do that outcome."

3.80 It was suggested twice to Mr MacNeil that the repeated description of this grievance as "unorthodox" and the nature of his explanation were really code for saying that he was stepping in to head off a complaint of discrimination about a client. He did not give a clear answer.

LEGAL PRINCIPLES

Race discrimination, harassment and victimisation

4.1 Claims of race discrimination, harassment related to race and victimisation are governed by the Equality Act 2010. Section 39 makes it unlawful for employers to discriminate against or victimise their employees in the terms of their employment; their access to promotion, transfer, training or other benefits; by dismissing them; or by subjecting them to any other detriment. Section 40 makes it unlawful for employers to harass their employees. Section 41 makes the equivalent things unlawful if a principal does them to a contract worker.

4.2 Discrimination includes direct discrimination. Direct discrimination, harassment and victimisation are defined by the Equality Act 2010 as follows:

> **13 Direct discrimination**
> (1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
> …
>
> **26 Harassment**
> (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.

(5) The relevant protected characteristics are –

…

race;

… .

27 Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because –

(a) B does a protected act, or

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

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

(a) bringing proceedings under this Act,

…

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

…

4.3 The time limits for bringing claims of discrimination are governed by s 123 Equality Act 2010. Proceedings may not be brought more than three months (plus early conciliation extension) after the date of the act to which the complaint relates, or such other period as the Tribunal thinks is just and equitable.

4.4 Under s 123(3)(a) conduct extending over a period is treated as done at the end of the period. The focus of the inquiry is on whether there was an ongoing situation or continuing state of affairs in which the group discriminated against, including the Claimant, was treated less favourably: see *Hendricks v Metropolitan Police Commissioner* [2003] ICR 530, CA.

4.5 The Tribunal has a wide discretion to extend time under s 123(1)(b), but bearing in mind that time limits are exercised strictly in employment cases, and that there is no presumption that a tribunal should exercise its discretion to extend time. The factors that are to be considered by the civil courts under s 33 of the Limitation Act 1980 in determining whether to extend time in personal injury actions may provide a helpful checklist: see *Southwark London Borough Council v Afolabi* [2003] IRLR 220, CA. Under that section the court is required to consider the prejudice which each party would suffer as a result of granting or refusing an extension, and to have regard to all the other circumstances, which include: (a) the length of and reasons for the delay; and (b) the extent to which the cogency of the evidence is likely to be affected by the delay.

4.6 The burden of proof is dealt with by s 136 Equality Act 2010, as follows:

136 Burden of proof

…

(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.

(3) But subsection (2) does not apply if A shows that A did not contravene the provision.
…
(6) A reference to the court includes a reference to -
(a) an employment tribunal;
…

4.7 The Court of Appeal in *Igen Ltd v Wong* [2005] ICR 931 gave guidance as to the application of the burden of proof provisions. That guidance remains applicable: see *Ayodele v Citylink Ltd* [2017] EWCA Civ 1913. In essence, the guidance outlines a two-stage process. First, the complainant must prove facts from which the tribunal *could* conclude, in the absence of an adequate explanation, that the Respondent had committed an unlawful act of discrimination against the complainant. That means that a reasonable tribunal could properly so conclude, from all the evidence before it. A mere difference in status and a difference of treatment is not sufficient by itself: see *Madarassy v Nomura International plc* [2007] ICR 867, CA. The second stage, which only applies when the first is satisfied, requires the Respondent to prove that he did not commit the unlawful act.

4.8 The Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 made clear that it is important not to make too much of the role of the burden of proof provisions. They will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. But they have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

4.9 There are three elements to the definition of harassment: (1) unwanted conduct; (2) the specified purpose *or* effect; and (3) that the conduct is related to a relevant protected characteristic: see *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336. The burden of proof provisions again apply. When a tribunal is considering whether facts have been proved from which it could conclude that harassment was on the grounds of race, it is always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on the grounds of race. The context may, for example, point strongly towards or strongly against a conclusion that harassment was on the grounds of race. The tribunal should not leave the context out of account at the first stage and consider it only as part of the explanation at the second stage, after the burden of proof has passed: see *Nazir v Asim & Nottinghamshire Black Partnership* [2010] IRLR 336 EAT.

4.10 In considering whether the conduct had the specified effect, the Tribunal must consider both the actual perception of the complainant and the question whether it is reasonable for the conduct to have that effect. That entails consideration of whether, objectively, it was reasonable for the conduct to have that effect on the particular complainant. It is intended to exclude liability where the complainant is hypersensitive and unreasonably takes offence: see *Dhaliwal*.

Agency Workers Regulations

4.11 The Agency Workers Regulations 2010 entitle agency workers to the same basic working and employment conditions as they would be entitled to if they had been recruited directly by the hirer. That includes terms and conditions relating to pay:

see Regulations 5 and 6. The agency or the hirer may be liable for a breach of Regulation 5, depending on which is responsible: see Regulation 14. Under Regulation 18, a Tribunal may not consider a complaint of a breach of Regulation 5 unless it is presented within three months (plus early conciliation extension) of the date of the infringement, or the date of the last in a series of similar infringements. A Tribunal may consider a complaint brought outside that time limit if in all the circumstances it considers it just and equitable to do so. The same approach is taken to just and equitable extensions of time as under the Equality Act 2010.

APPLICATION OF THE LAW TO THE FACTS

5.1 Against the detailed findings of fact set out above, the Tribunal turns to the issues in this case. In many respects our conclusions flow inevitably from the findings of fact, so the conclusions can be more briefly stated.

Harassment

5.2 We begin with the complaints of harassment related to race. As set out above, with respect to complaints 2.1.1.1, 2.1.1.2, 2.1.1.5. 2.1.1.7 and 2.1.1.9 the Tribunal found that Mr Wilson did tell Mr Patterson that the Claimant was Polish not Russian but that it was "the same shit." Mr Wilson did laugh at the Claimant's accent on that occasion and on the occasion when Mr Wilson confused "pump truck" with "bum crack". He did call him a "Polish knobhead," including on 27 April 2018. On a relatively small number of occasions throughout his time in Mr Wilson's team, until the termination of his assignment, the Claimant's accent or pronunciation were laughed at, he was called a "Polish knobhead" or called similar names that referenced his nationality. He told Mr Wilson not to do so on at least some occasions when it happened. The context was the culture of swearing and inappropriate behaviour described above, in which the Claimant participated to some extent.

5.3 The Tribunal found that this conduct was unwanted by the Claimant and did relate to race. Given the context in which it took place, the Tribunal found that Mr Wilson did not intend to violate the Claimant's dignity or create an offensive environment for him. However, the Tribunal found that this was the effect of the conduct. We have found that the Claimant was in fact offended and upset by this conduct and the Tribunal found that it met the threshold of creating an offensive environment for him. Although it did not happen as often as the Claimant described, this was a course of conduct over a period of several months during which offensive comments relating to his nationality were made and during which the Claimant's accent or pronunciation were laughed at. In addition, as we have found, other Polish workers received similar treatment. That contributed to the overall environment. The fact that the Claimant returned to work at the First Respondent in April 2018 and that he shared some friendly exchanges with Mr Wilson did not change our view. Neither of those features was inconsistent with the Claimant being offended by this conduct relating to his race or nationality, and we accept that he was. Further, the Tribunal considered that it was objectively reasonable for the conduct to have the relevant effect on the Claimant. He was not being unduly sensitive, even given the overall culture of the workplace, in which he participated to some extent. There was a difference between general swearing, name-calling and "jokes", in which everybody participated, and swearing, name-calling or "jokes"

that related to the Polish nationality of the Claimant and others. That crossed a line that made the Claimant's perception objectively reasonable.

5.4 The Tribunal found that the complaint about this conduct was presented within the relevant time limit. We found that there was conduct extending over a period that ended when the Claimant's engagement was terminated. There was an ongoing situation or state of affairs in which the Claimant was subjected to conduct of the kind described that related to his Polish nationality. It was not as frequent as the Claimant described, but it was sufficiently regular to give rise to an ongoing state of affairs. Of course, there was also comments made to other Polish workers during the same period. It was not possible to be precise about dates, but the Tribunal was satisfied that the conduct occurred throughout the period when Mr Wilson was managing the Claimant. This meant that the state of affairs lasted until the termination of the Claimant's engagement.

5.5 These parts of the Claimant's harassment complaint therefore succeed.

5.6 As regards complaint 2.1.1.3, as set out in the findings of fact, the Tribunal accepted that on a handful of occasions comments were made to the effect that if the Claimant did not pick enough elements he would not get a permanent job. However, that conduct did not relate to the Claimant's race. It related to his status as an agency worker. The First Respondent had directly employed staff in the Claimant's department who were Polish. If the conduct did not relate to race or nationality, this harassment complaint cannot succeed.

5.7 For similar reasons, complaint 2.1.1.4 does not succeed. We have found that Mr Wilson may have made remarks to the effect that the Claimant should be working not ordering takeaway, but that he did not threaten the Claimant with not being allowed to order takeaway. Even if his comments amounted to unwanted conduct, they clearly had nothing to do with race or nationality.

5.8 As set out above, the Tribunal found that Mr Wilson did stick a piece of paper on the Claimant that said "knobhead" on it. However, this was in the context of the regular practice of doctoring jackets to say "nob". The Claimant was not singled out and in that context this conduct was not related to his race or nationality. Harassment complaint 2.1.1.6 therefore does not succeed.

5.9 Turning to complaint 2.1.1.8, the Tribunal has found that there were two separate incidents. The first was a conversation between the Claimant and Mr Wilson about a shared fear of flying. In that context, Mr Wilson asked the Claimant how he travelled to England from Poland. That was because he was curious not because he was being offensive or insulting. The Tribunal was not satisfied that there was any unwanted conduct: this was a conversation between two people who were scared of flying. Even if there had been unwanted conduct, and assuming it related to race, as set out above its purpose was not to violate the Claimant's dignity or create an offensive environment for him. Further, the Tribunal found that this was not the effect of the conduct. Even if the Claimant had been offended by it, that was not objectively reasonable in the context of the conversation. The second incident did not have anything to do with race or nationality. It was another, ill-judged, workplace prank.

5.10 In respect of harassment complaint 2.1.1.10, as set out above we found that on 27 April 2018 Mr Wilson was angry and shouting at the Claimant. He told him that he had no rights and would not be believed, and called him a "little Polish knobhead." The Tribunal found that this was unwanted conduct and that it related to race or nationality. The (incorrect) suggestion that the Claimant had no rights clearly related to the fact he was not a UK national. Although the pleaded complaint does not include the Claimant being called a "little Polish knobhead", the Tribunal has found that this was said in the same angry exchange. That, too, indicates that Mr Wilson's comments about the Claimant having no rights and not being believed related to his race or nationality. Mr Wilson was angry and shouting. The Tribunal found that on this occasion his comments were intended to violate the Claimant's dignity. Angrily shouting at him that he had no rights and would not be believed met the relatively high threshold required.

Direct Discrimination

5.11 In the light of the findings of fact above, the direct discrimination complaints can be briefly dealt with. In short:

5.11.1 While the Claimant was not given other duties and was not given help when he requested, there was nothing to suggest that English or British workers were treated differently and no basis on which an inference of discrimination could be drawn. In any event, the reasons were clear. He was not given other jobs or duties because he was brought in specifically as an agency worker to do the transport panel picking role and he was not given help because that would have meant taking someone away from a different task. Those reasons had nothing to do with his race or nationality.

5.11.2 The Claimant's own evidence was that any lack of training to use the lift platform had nothing to do with his race.

5.11.3 While the Claimant was chastised for talking to his colleagues during working hours, there was no basis on which it could be inferred that this had anything to do with his race or nationality. On the contrary, one of the two comparators he relied on, whom he said was permitted to talk excessively, was also Polish. The other comparator was British, but the Claimant's own evidence was that he, too, was banned from talking.

Victimisation

5.12 The Tribunal found that the Claimant did a protected act on 8 May 2018. As set out above, the Claimant's conversation with Mr Foley included a complaint about having to work harder than the English or British members of his team, a complaint about not being allowed to talk when the English or British part of the team could talk for half an hour or more and a complaint that Mr Wilson laughed at his accent and pronunciation. By doing so, he was plainly making an allegation (express or otherwise) that Mr Wilson had treated him less favourably because of his race or nationality and had subjected him to unwanted conduct related to his race or nationality, and as such had breached the Equality Act 2010.

5.13 The next question is whether he was mistreated because he did so. We deal with complaints 2.1.10.1-2.1.10.3 together. As explained in the findings of fact, the Tribunal found that Mr Bradley and Mr McWilliams were not told that the Claimant had complained of discrimination. They were told that he had complained about Mr Wilson being on his case or words to that effect. They did not know that he had

done a protected act. Therefore, this cannot have affected their treatment of the Claimant. There was no suggestion that Mr Wilson (who did know about the protected act) had manipulated them to act as they did, because of the protected act. It follows that any treatment of the Claimant by Mr Bradley and Mr McWilliams was not done because he did a protected act. In any event, the Tribunal found that while there was a change in their approach to the Claimant, and they were more likely to shoo him away or shout at him to return to his department, this was because they were more alert to Mr Wilson's concerns about this. For the reasons given in the findings of fact, the third complaint – Mr Bradley asking the Claimant why he was working so slowly – did not happen at all.

5.14 The next complaint relates to the termination of the Claimant's assignment by Mr Foley. Here, the Tribunal found that the Claimant had proved facts from which we could infer, in the absence of an adequate explanation, that the reason for the termination of his assignment was that he complained of discrimination on 8 May 2018. In particular:

5.14.1 Mr Foley gave different reasons for terminating the Claimant's assignment in his email of 6 June 2018 and the later, unexplained, document. He was unable to explain those differences.

5.14.2 A number of the stated reasons appeared incorrect or questionable, for example the suggestion that the Claimant had a bad attitude (in the light of the response to Mr Fofana's question); the reliance on the Claimant's use of his mobile phone at work when Mr Foley had authorised that; the suggestion that the Claimant had a poor work rate when Mr Foley accepted that was not correct.

5.14.3 All of those features call into question the reasons Mr Foley relied on for terminating the Claimant's assignment.

5.14.4 The sequence of events calls for explanation, in the light of Mr Foley's evidence that he was receiving complaints about the Claimant every other day from January 2018. It is surprising in those circumstances that the Claimant was allowed back in April 2018. It is also difficult to understand what then changed in the subsequent 5 or 6 weeks. The suggestion that the Claimant became more difficult to manage during that period seems implausible if Mr Foley was receiving complaints about him every other day from January onwards.

5.14.5 What clearly had changed is that the Claimant had made a complaint of discrimination to Mr Foley on 8 May 2018. That might be said to make him "more difficult to manage."

5.14.6 Further, Mr Foley's evidence, which the Tribunal rejected, was that no complaint of discrimination was made.

5.15 The burden of proof therefore shifted to the First Respondent, to show that the reason for terminating the Claimant's assignment was not that he did a protected act. The First Respondent did not satisfy that burden. This was Mr Foley's decision. The Tribunal found his evidence about the reasons for terminating the Claimant's assignment inconsistent and unconvincing. In those circumstances, this complaint of victimisation succeeds.

5.16 The last complaint of victimisation involving the First Respondent, number 2.1.10.5, does not succeed. For the reasons explained in the findings of fact, the Tribunal found that this did not happen.

5.17 There is no question that Mr Fofana and Mr MacNeil knew about the protected act. It was referred to in the grievance they were investigating. The question in each case is whether the protected act was the reason for rejecting the grievance/grievance appeal.

5.18 Starting with the grievance, again the Claimant proved facts from which the Tribunal could infer, in the absence of an adequate explanation, that the reason Mr Fofana rejected the grievance was because the Claimant had made a complaint of discrimination on 8 May 2018. In particular:

5.18.1 As set out in detail in the findings of fact there were wholesale shortcomings in Mr Fofana's handling of the grievance. He failed adequately to investigate it and focussed on challenging the Claimant rather than understanding and addressing his concerns. His approach was wholly inadequate. The brief notes of a telephone conversation with Mr Constantin were not an answer, particularly given that Mr Fofana did not address the fact that Mr Wilson's account was inconsistent with Mr Constantin's.

5.18.2 This went beyond mere incompetence. The First Respondent was the subject of the discrimination complaint and was the Second Respondent's client. The First Respondent influenced the grievance through the involvement of its HR manager. She was responsible for questioning the alleged perpetrator and the person to whom the initial complaint was made. She suggested wording to be used in the outcome letter that did not reflect the content of Mr Wilson's responses to Mr Fofana's questions. Mr Fofana wrote a grievance outcome report including that wording.

5.18.3 Mr Fofana was antagonistic to the Claimant's grievance, as reflected in the comment he made during the grievance meeting, set out in full in the findings of fact. He was criticising the Claimant for making complaints of discrimination or grievances.

5.18.4 Mr Fofana made changes to the contemporaneous notes of the grievance meeting with the Claimant and gave untruthful evidence to the Tribunal about that.

5.18.5 Mr Fofana did not investigate the Claimant's complaint that his assignment had been ended because of his complaint about Mr Wilson. The Claimant told Mr Fofana that Mr Wilson had essentially admitted that that was why the Claimant had left, in a meeting at which Mr Zdziarstek was present, but Mr Fofana did not speak to Mr Zdziarstek. His reasons for failing to do so were unconvincing.

5.19 The burden of proof therefore shifted to the Second Respondent to show that the reason for rejecting the Claimant's grievance was not that he did a protected act. The Second Respondent did not satisfy that burden. This was Mr Fofana's decision. As explained in detail in the findings of fact, his evidence was wholly unconvincing. His explanation for rejecting it was essentially that he had thoroughly investigated it and found it to be unfounded. As explored in detail in the findings of

fact, the Tribunal did not accept that this was his approach. This complaint of victimisation therefore succeeds.

5.20 As for the grievance appeal, the Claimant again proved facts from which the Tribunal could infer, in the absence of an adequate explanation, that the reason Mr MacNeil rejected the grievance appeal was because the Claimant had made a complaint of discrimination on 8 May 2018. In particular:

5.20.1 Mr MacNeil did not investigate or deal with the Claimant's grounds of appeal. Mr Szreniawski discussed them in detail with the Claimant and identified points for further investigation. He did not carry out those investigations or write a report upon which Mr MacNeil could base his decision. Rather, Mr MacNeil simply took the notes of the appeal meeting, carried out no further investigations, and purported to determine the appeal.

5.20.2 Mr MacNeil could not explain satisfactorily why the Chief Executive Officer was conducting the grievance appeal in this way. His references to the grievance as "unorthodox", to the fact that the Client Services Manager was "also from Europe" and therefore uncomfortable in dealing with the grievance, and to the fact that Mr MacNeil was best placed because of "all the elements and the sequence of events", particularly when coupled with the content of the outcome letter, tended to suggest that the reason Mr MacNeil took over *was* connected with the Claimant making complaints of discrimination about the Second Respondent's client.

5.20.3 Mr MacNeil's grievance appeal outcome letter does not adequately address the substance of the grievance appeal. It does not even appear to have been written as a grievance appeal outcome. It starts by referring to the ACAS reference number and it ends by referring to the Claimant's complaints of discrimination. It focusses on criticising the Claimant's conduct, it wrongly criticises him for failing to report matters appropriately, it addresses a separate personal injury claim and it threatens disciplinary proceedings against the Claimant. It has all the hallmarks of a letter written with the intention of frightening off an employee who is making complaints of discrimination and threatening legal proceedings. Those complaints of discrimination started on 8 May 2018.

5.21 The burden of proof therefore shifted to the Second Respondent to show that the reason for rejecting the Claimant's grievance appeal was not that he did a protected act. The Second Respondent did not satisfy that burden. This was Mr MacNeil's decision. As explained in detail in the findings of fact, his evidence was wholly unconvincing. He did not provide any convincing explanation why the grievance appeal was rejected. This complaint of victimisation therefore succeeds.

Agency Workers Regulations

5.22 The last live complaint relates to the failure to pay the Claimant the same rate as the First Respondent's direct employees between May and September 2017. As explained above, although in August 2019 the Second Respondent paid the Claimant the back pay, there was an issue about whether his holiday had been

underpaid in the subsequent 12 weeks. We have found that there was a small underpayment.

5.23 However, this complaint was not made within the relevant time limit. The last date on which any relevant holiday can have been taken is December 2017, and the Claimant must have been paid shortly after that. The claim was not presented until October 2018. There is no conduct extending over a period of which this complaint forms part. It is separate and distinct from any complaint of discrimination or harassment by Mr Wilson.

5.24 The Tribunal found that it was not just and equitable to extend time for bringing the complaint. The Claimant was using the CAB and their website. He knew about the time limits for bringing Tribunal claims. The Tribunal was not convinced by his explanation that the reason he did not bring a claim was that he was fearful of losing his job. He did complain about this to the First and Second Respondents and, apart from the back pay, it was put right. He did make subsequent threats, at least implicitly, of bringing legal proceedings relating to other matters. The Tribunal thought it more likely that the Claimant had chosen not to pursue a claim for back pay at the time, but wanted to do so now along with his other complaints. This is now a claim for a very modest sum. Balancing all the relevant factors, we found that it was not just and equitable to extend time to allow him to do so.

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Employment Judge Davies
28 November 2019
RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

28 November 2019