EMPLOYMENT TRIBUNALS

Claimant:	**Mr S Sheun**		
Respondent:	**Northern General Hospital (Sheffield Teaching Hospitals NHS Trust)**		
Heard at:	**Sheffield**	**On:**	**9 to 12 December 2019**
	Reserved Judgment	**On:**	**29 January 2020**
Before:	**Employment Judge Rostant**		
	Mrs S Robinson		
	Mr M Firkin		

Representation

Claimant:	Mr L Bronze of Counsel
Respondent:	Mr P Sangha of Counsel

RESERVED JUDGMENT

This claim succeeds in part. The Tribunal declares that the claimant has suffered harassment related to race to the extent detailed below.

REASONS

1. By a claim presented to the Employment Tribunal on 10 May 2019, the claimant complained of harassment related to race, victimisation, direct discrimination on the grounds of race and indirect discrimination on the grounds of race. The matter came before Employment Judge Brain on 2 July 2019 for a preliminary hearing for the purposes of case management. Following that hearing, the claimant withdrew the claims of direct and indirect discrimination and they were dismissed by a judgment of 5 July 2019. The matter was set down for hearing over four days on 9 to 12 December 2019. In accordance with Judge Brain's orders, all

witnesses produced witness statements which were duly exchanged and a file of documents was produced, running to two volumes totalling some 505 pages.

2. At the hearing in December 2019, the Tribunal heard from the claimant himself and, for the respondent, Mr R Conway, interim head of service support, Mr S Baldwin, systems engineer, Mr C Ringrose, systems engineer, Mr P Houghton, service support engineer, Mr D Bainbridge, systems engineer, Mr J-P Temple, senior systems engineer and interim third line support manager, Mr P Wilson, client infrastructure team manager.

3. The Tribunal hearing in December was able only to accommodate the completion of all of the oral evidence and the case was adjourned for reserved decision on liability to the next available day when all members of the Tribunal could meet, namely 29 January.

4. In accordance with case management orders made on 12 December, the parties submitted written submissions, which the Tribunal took into account when deciding the issue of liability.

The issues

5. As identified by Employment Judge Brain the issues were as follows:-

(a) <u>The claim of victimisation</u>

During the course of the hearing before this Tribunal, the claim of victimisation was withdrawn and dismissed by separate judgment.

(b) <u>Complaints of harassment</u>

These were clarified in a document setting out amended particulars of claim and comprised 13 allegations of harassment related to race. The claimant is of Chinese ethnic origin.

The respondent sought also to raise the statutory defence in section 109(4) Equality Act 2010 (the Act) and claimed that it took all reasonable steps to prevent harassment.

The respondent also contended that some of the claims were brought outside the statutory time limit

Finally the respondent asserted that some of the complaints of harassment are brought outside of the time limit provided for in the Act and that it would not be just and equitable to allow them to proceed.

The law

6. S26 Equality Act 2010 (as relevant) provides as follows:

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.

S40(1)(a) of the Act makes it unlawful for employers to harass employees.

S109 (as relevant) provides as follows:

109 Liability of employers and principals

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

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

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

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

(a) from doing that thing, or

(b) from doing anything of that description.

S123 provides (as relevant) as follows:

123 Time limits

(1) Proceedings on a complaint within section 120 may not be brought after the end of—

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(3) For the purposes of this section—

(a) conduct extending over a period is to be treated as done at the end of the period;

S136 provides (as relevant) as follows:

136 Burden of proof

(1) This section applies to any proceedings relating to a contravention of this Act.

(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;

The agreed relevant facts

7. The respondent's trust is made up of five hospitals, split across two sites. The claimant, has been employed by the respondent Trust as a service support engineer, supporting the IT functions of the Trust, since 15 March 2010 and remains so employed.

8. The claimant first worked as a senior IT engineer in the central site support team, based at the Royal Hallamshire campus.

9. Between 2012 and 2013, the claimant was moved temporarily to the Northern General Hospital site, to work in a team headed by Mr A Hamilton for four to six months. In that period, he worked with Mr S Baldwin.

10. In January 2013, a team called the New Corporate Desk-Top team was formed. That too was based at the Hallamshire Hospital site, although in a different office to that of the claimant. That team was managed by Mr Wilson and Mr Temple and included Mr Baldwin and Mr Ringrose and Mr Peacock and Mr Bainbridge. In that period, the claimant came into contact with the members of that team although not working alongside them.

11. The claimant was once again relocated on 1 November 2016, moving to the Northern General site. He was working in an open plan office and other people working in that office included Mr Baldwin, Mr Ringrose, and Mr Houghton. Occupying management positions were Mr Temple and Mr Wilson.

12. On 17 December 2018, the claimant made a formal complaint about Mr S Baldwin to Mr Conway his management grand-father and there was a meeting the following day to discuss the matter.

13. The claimant commenced a period of sick leave on 4 February 2019 and the claimant was given an outcome letter in connection with his complaint on 25 April 2019.

14. The complaint's complaint was about Mr Baldwin's behaviour and Mr Conway investigated the matter by speaking to Mr Baldwin, the claimant, Mr Houghton, Mr Temple and Mr Wilson. Because the claimant added to his initial complaint, citing a number of earlier incidents, statements were also obtained from a number of other staff members.

15. Mr Conway decided to treat the matter as a disciplinary investigation in relation to the complaint against Mr Baldwin. He recommended that Mr Baldwin be referred for a disciplinary hearing, on the basis that the allegation amounted to serious, but not gross, misconduct.

16. Ultimately Mr Baldwin was given a first formal warning. Mr Conway decided that it would be appropriate to set up a mediation process to support the claimant's return to work when he was ready and a mediation duly took place involving a variety of meetings between the claimant and his colleagues, facilitated by an outside mediator, Mr Sewell.

The Tribunal's approach to the evidence

17. Mr Bronze's submission on the credibility of the claimant could be summarised as saying that the evidence from the claimant's colleagues was that he is not someone who is prone to making trivial or pointless complaints and that the Tribunal should infer that when the claimant did actually make a complaint, it was justified. Mr Bronze points to the fact that there were only two complaints made, despite the length of the claimant's employment, the second of those being the formal complaint of December 2018 (see above) and the first being an informal complaint which will be covered in the Tribunal's Judgment in detail at a later point. In addition to the general view of the respondent's witnesses as to the claimant's lack of hypersensitivity, the claimant's own line manager, submits Mr Bronze, described the claimant as being very truthful and indeed that was his evidence in cross-examination.

18. Finally, Mr Bronze points to an incident during the course of the hearing which he says is evidence of Mr Sheun's credibility in general. The claimant was still on oath when the hearing adjourned at the end of one day. The claimant was given the appropriate warning as to not communicating with anybody about his case. Towards the end of the claimant's cross-examination, Mr Sangha put to him that despite that warning the claimant had contacted Mr Bronze by email at the end of day 1, passing on to him some information which he had already supplied to his solicitor and which it had become apparent to him had not been passed on by Mr Shevlin to Mr Bronze. The claimant immediately accepted that he had made a mistake and, submits Mr Bronze, demonstrated contrition and candour by admitting what he had done. Mr Bronze says that is a matter that the Tribunal can rely on concluding that the claimant's evidence was, on the whole, credible.

19. In contrast, Mr Sangha submits that some of the claimant's evidence was vague and lacking context. This was particularly so in his tendency to claim that he had overheard the use of words which might be offensive for example "chinky" but not the surrounding conversation that would explain the circumstances in which that word is used. At least one allegation of the use of the word "chinks" was put forward despite the fact that in cross-examination the claimant was unsure that it had had actually occurred. Mr Sangha also points to what he describes as the claimant's tendency to make bold and unreasonable allegations of fabrication or deceit. He cited four examples when the claimant, whilst giving evidence, complained of deliberate attempts on the part of the respondent to mislead the Tribunal. These allegations, says Mr Sangha, are without foundation. Mr Sangha also points to a complaint about colleagues describing all Chinses people as "communist bastards" and being disgusting and eating anything, as appearing for the very first time in the claimant's witness statement for these proceedings and that, given their deep unpleasantness, it is simply not credible that they would not have appeared in the claim or the formal

complaint or the subsequent email correspondence where 13 allegations are raised.

20. There is force behind both submissions. This is a case where, in many instances the evidence consists only of the claimant's assertion that an event occurred and a colleague's or colleagues' denial. The burden of proof provisions place the primary burden upon the claimant to prove, on the balance of probabilities, facts from which the Tribunal could conclude harassment had taken place (see **Hewage v Grampian Health Board** 2012 ICR 1054, approving **Igen Ltd (formally Leeds Careers Guidance) and ors v Wong** 2005 ICR 931). However, although the Tribunal understands the desire of respective counsel to establish the claimant as broadly credible or the opposite, the Tribunal has not found that a useful way of considering the evidence. Whilst we accept that there is evidence that the claimant was regarded by his colleagues as truthful and unlikely to invent matters, there are at least two incidents in the Tribunal's finding where we have concluded that the claimant has complained about matters where there is compelling evidence to suggest that they simply did not happen. We therefore we do not place much reliance, in assessing the evidence for each incident, on any suggestion that, when in doubt, we should prefer the claimant's evidence or indeed its opposite. Rather, in each case we have weighed the evidence for each incident, considered what inferences could be drawn from our findings on other incidents and, where we are not satisfied that the claimant has discharged that initial burden, found that the incident did not occur as alleged by the claimant.

The issue of the informal complaint

21. Although the parties agree that the claimant made an informal complaint about the conduct of his colleagues, there the agreement ends. Although that complaint and the events surrounding it do not form a complaint of harassment before the Tribunal, what did or did not take place at that time is an important matter upon which the Tribunal might wish to draw inferences in considering other matters which *are* complaints of harassment.

22. The parties agree that the colleagues about who the claimant was complaining were Mr Ringrose and Mr Baldwin. They were line managed by Mr Wilson. The claimant at the time was line managed by Mr Temple. It is also agreed that the claimant initially approached Mr Temple with his concerns and Mr Temple then took the matter to Mr Wilson. That resulted in Mr Wilson and Mr Temple together interviewing Mr Baldwin and Mr Ringrose. It was Mr Wilson's unchallenged evidence that as a result of that meeting, Mr Ringrose and Mr Baldwin were given an informal warning. However, the evidence from the respondent's witnesses about what matter Mr Wilson raised with Mr Baldwin and Mr Ringrose, and therefore the point and purpose of the warning, was, to put it mildly, hazy. The difficulty for the respondent and the Tribunal is that the meetings between Mr Wilson and Mr Temple on the one hand and, respectively Mr Ringrose and Mr Baldwin were not recorded. Nor was there a separate record of the informal warnings Furthermore, the routine one-to-one meeting between the claimant and Mr Temple, at which the claimant raised the complaint initially, was also not recorded, despite the fact that it is Mr Temple's normal approach to record one to one meetings. This has left the Tribunal

in a position of having no corroborative evidence as to what exactly was the subject matter of the complaint from the claimant, how that was relayed by Mr Temple to Mr Wilson and the exact nature and basis of the informal warning given by Mr Wilson to Mr Baldwin and Mr Ringrose. The difficulty was compounded by both Mr Wilson and Mr Temple saying one thing in their statements and another when they came to give live evidence.

23. There are two matters about the informal complaint over which there is disagreement. The first is when it took place and the second is what exactly was the subject matter of the complaint.

24. The rival dates for the informal complaint are December 2016 (the respondent's case) and December 2017 (the claimant's case). For reasons which need not be set out in detail, but which are based on what documentary evidence *is* available (pages 170 and 179) the Tribunal preferred the former date.

25. Having said that, it is the Tribunal's view that precisely when that complaint took place is not particularly significant. Of much greater significance is what the complaint was about.

What was the nature of the informal complaint?

26. It is the respondent's case that the complaint made by the claimant was about a conversation in which Mr Ringrose and Mr Baldwin had remarked that Chinese food was not their favourite because of the excess of monosodium glutamate (MSG) in its cooking. The claimant's case is that his complaint was that Mr Ringrose and Mr Baldwin regularly made racial slurs using the word "chink" or "chinky" and insulted Chinese culture by saying "all Chinese are disgusting they eat anything" and that Mr Baldwin had described the Chinese as "communist bastards". Also included in the complaint was a complaint that Mr Baldwin, when referring to the Chinese beer Tsing Tao, had pronounced the word in a stereotypically Chinese way elongating the final vowel sound. The Tribunal's conclusion as to the contents of the complaint are as follows.

27. We reject the claimant's evidence at paragraph 17 that the complaint included complaints about the use of the word "chinky" or "chink" or the suggestion that Mr Ringrose had described the Chinese disgusting because they would eat anything and that Mr Baldwin had described the Chinese as communist bastards. The principle problem for the claimant is the manner in which that detail about this complaint emerged. Although the claimant has had a number of opportunities to set down exactly what he was complaining about, including a detailed list of complaints to the respondent in the wake of his formal complaint in December 2017, a claim form and further particulars of claim designed to provide all of the details of the matters the claimant was now complaining about, these allegations did not emerge until the claimant's witness statement.

28. The Tribunal accepts that memory is a reconstructive faculty and that the act of recalling events a second or third time may well bring to light details not first remembered. Set against that however, is the Tribunal's view of the unlikelihood of the claimant omitting from his account, in the initial tellings of it, what strikes the Tribunal as easily the most offensive and striking statements alleged to have been made by Mr Baldwin and Mr

Ringrose. The obviously racially derogative assertions that the Chinese are disgusting because of their dietary habits and that the Chinese are all "communist bastards" are blatant and incapable of being explained by anything other than deliberate racial slur, calculated to cause offence. And that is to leave aside the use of the words "chinky" or "chink" which, in the view of the Tribunal are no less derogatory and insulting to a Chinese person than the use of the word "Paki" would be to somebody of Pakistani or Bangladeshi origin. The Tribunal takes the view that had those things been said, and then formed the subject of a complaint, it is not credible that they would not have been recalled at least by the time of the claimant's further and better particulars which go into detail about matters as far back as 2012. Mr Temple and Mr Wilson both deny that those matters were raised with them, and Mr Ringrose and Mr Balwin both deny saying them. We conclude that those matters were not part of the subject of the complaint.

29. However, since all parties agree that there was a complaint and that it was of sufficient substance to justify an informal warning to Mr Ringrose and Mr Baldwin, there must have been something that the claimant complained about that showed a potentially discriminatory or harassing use of language by his colleagues. If the respondent is right, Mr Baldwin and Mr Ringrose were admonished for making what appears to the Tribunal and indeed to the claimant, to be an entirely innocuous comment about their view of the excessive use of MSG. Mr Wilson was unable to explain why, if that was all the comment was about, it would justify any of the actions that he took. On the other hand, we note that Mr Temple's evidence was subject to an extremely strange *volte face*. His witness statement says that the complaint was about the mimicking of the Chinese accent (see paragraph 10). In that context, his subsequent actions, that is to say taking the matter to the line manager of the relevant colleagues and sitting in on the resulting investigations make complete sense. He was a line manager who had a direct report complaining about what would, in any properly trained manager's understanding, amount to potentially harassing behaviour related to race. However, at the outset of his evidence, in response to supplemental questions from Mr Sangha, Mr Temple completely changed his evidence by saying that the complaint was about Chinese food and that Mr Ringrose and Mr Baldwin were being derogatory about it because of the over dependence on MSG. It is the Tribunal's view that whatever Mr Temple may have subsequently passed on to Mr Wilson, the complaint to *him* was about the mimicking of Chinese accents. It is the case that Mr Wilson, Mr Baldwin and Mr Ringrose all said that the discussions that they had together were about Chinese food. That might be explained in one of two ways. Either Mr Temple failed to pass on to Mr Wilson the true nature of the complaint or that the respondents witnesses are now seeking to minimise the seriousness of the matter in the context of litigation. On balance we prefer the latter explanation. If Mr Wilson had started talking with Mr Baldwin and Mr Ringrose about Chinese food it is hard to see why Mr Temple, who was present, would not have corrected him if he knew the true nature of the complaint. On the other hand, it is difficult to see employees accepting a formal warning or managers thinking it appropriate to issue one, if the only complaint was about a comment

about excessive MSG. Further, the failure to properly record this episode must count against the respondent.

30. Finally, it should be noted that whatever position adopted by Mr Wilson now, it does appear that Mr Conway when investigating the formal complaint came to the conclusion that the informal earlier complaint had included a complaint about the mimicking of Chinese accents. It was never clear to the Tribunal where that understanding had come from and Mr Conway was not asked about it.

Evidence as to the claimant's aggressive tendencies

31. For reasons which were never explained during the course of the hearing, the claimant was cross-examined on his tendency to aggression and evidence was adduced from a number of the respondent's witnesses to suggest that the claimant had a tendency to react aggressively and to pose a potential, if not actual, physical threat. It is agreed that the claimant is a recreational body-builder and that fact is relied on by the respondent as explaining why, when he is angry and aggressive, he is seen to be more threatening than might otherwise be the case. Mr Sangha's detailed closing submissions make no mention of the relevance of that evidence at all. In the circumstances, the Tribunal takes the view that the respondent is not relying on that evidence as showing anything in particular and the Tribunal has therefore disregarded that matter when considering the other matters in this case.

The Tribunal's findings on the various complaints of harassment

32. It is the view of the Tribunal that the appropriate course is to set our findings of fact as to what was or was not said or done in each of the incidents about which the claimant now complains. Having decided the factual matrix, the Tribunal can then apply the legal test of harassments to each of those incidents where the facts relied upon by the claimant are proved, bearing in mind the necessity of not just of considering each incident individually but sitting back and approaching the whole matter in the round. The Tribunal does not, however, propose to take those incidents in the order in which they happened.

Incident of 18 December 2018.

33. This incident, the last complained of, is alleged to have occurred after the incident which provoked the claimant's formal complaint and which took place on 14 December. That is an incident that we will deal with in detail next. At this stage it is sufficient to note that the formal complaint was about Mr Baldwin using stereotypical martial arts noises in a humorous way.

34. The claimant complains that on 18 December, Mr Baldwin repeated the behaviour about which the claimant had already complained. The Tribunal finds on balance that that did not happen. Mr Bronze, despite an otherwise meticulous cross-examination put this incident to Mr Baldwin. Furthermore, the Tribunal takes the view that is inherently improbable that Mr Baldwin would have repeated the behaviour on 18 December that had provoked the formal complaint. It was the unchallenged evidence of the respondent's witnesses that, in the aftermath of 14 December incident, the atmosphere in the office had been quiet and subdued. That is explained by the fact that, on 14 December, the claimant had had stood up in the

office and complained loudly and bitterly about what he described as racist behaviour on the part of his colleagues. That had provoked a general angry discussion which had had to be calmed down by Mr Temple who had been called by one of the team in the office who feared matters were getting out of hand. In the light of that, it seems unlikely that Mr Baldwin would risk provoking the claimant by repeating behaviour that had caused the claimant's evident anger only days before. There is no evidence which corroborates the claimant's case.

The incident of 14 December

35. There is relatively little disagreement between the parties as to what happened on 14 December. Mr Baldwin and Mr Houghton were in the office having a discussion. Mr Ringrose was nearby. The claimant was also in the office and within earshot of the conversation, although not part of it. As part of the discussion, Mr Baldwin used a stereotypical vocalisation, typical of early Chinese martial arts films and used most often by the actor Bruce Lee.

36. The claimant took exception to this and the matter became the subject of the formal complaint on 17 December, followed up by a detailed complaint by email (see above). The question as to whether or not Mr Baldwin's use of that vocalisation amounts to behaviour which meets the definition of harassment will be dealt with later in our Judgment.

The use of the word "chinks" by Mr Baldwin in 2014

37. The complaint here is that Mr Baldwin was overheard by the claimant, in conversation with another colleague, using the derogatory word "chinks". When the claimant first raised this in any complaint to management, in the email to Mr Conway on 24 December (page 157) the claimant said of this incident and the next incident that "I could of (sic) easily mistaken the phrase chinks by something else that sounded similar such as links". In cross-examination, the claimant agreed that, in that email, had accepted that he might have misheard, although he went on to say that it was still his belief that what he heard *was* the word "chinks". The claimant accepted, in answer to a question from the Employment Judge, that he might have been mistaken. Set against that evidence it was Mr Baldwin's evidence that he has never used the word "chinks", that he understands that the word is offensive and that it is not a word in his lexicon. The Tribunal bears in mind that the burden of proving the matters relied on as to fact rests upon the claimant. It is the view of the Tribunal on the basis of that evidence the claimant cannot discharge the burden resting on him to show that on the balance of probabilities Mr Baldwin used the offensive word "chinks" in his hearing at some point in 2014. We are reinforced in that view by the fact that we do not accept that the claimant raised tis matter when making his 2016 informal complaint. The Tribunal therefore takes the view that there can be no instance of harassment in relation to this complaint.

The use of the word "chinks" in 2012

38. The claimant's further particulars list, as a second complaint, a matter which is supposed to have happened first in chronological time and that is the use of the word "chinky" by Mr Ringrose in July or August 2012. The

Tribunal agrees with Mr Bronze's submission that to place reliance on the fact that that claimant is unclear as to the exact date is not a particularly persuasive argument against the claimant's credibility. The event is a long time ago and it is unsurprising that the claimant would have difficulty in pinpointing the exact date. Nevertheless, the Tribunal rejects this claim also. In his email at page 157, and indeed in his evidence to the Tribunal the claimant accepted that here too he may have misheard. Further, we have rejected the claimant's evidence that this was part of his informal complaint. There was no corroborative evidence for the claimant and Mr Ringrose denied using the word. We had no grounds for not accepting his evidence on that point. For those reasons the Tribunal finds that there can be no evidence of harassment on this occasion either.

The use of the word "Paki"

39. The next matter of complaint is that around about the same time as the previous incident, Mr Baldwin was heard by the claimant to use the work "Paki" to describe the largely Asian population living in the Fir Vale area immediately next to the Northern General Hospital. The context for that complaint was supplied by the claimant when he said that at the time the office was regularly visited by Ms Shamila Azzam, a member of staff who was based in the nearby IT service desk area and who is of Asian ethnic origin.

40. Mr Baldwin's evidence is that he did not ever use that word and he confirmed that the word was offensive. The issue for the Tribunal is whether Mr Baldwin did use that word, there being no doubt that the use of such a word might easily be regarded as harassing relating to race even though the claimant is not himself of Asian ethnic origin. It is the view of the Tribunal that it is commonly understood n the modern workplace that the use of that word Paki is offensive. Tribunal takes the view that if Mr Baldwin used that sort of language it was, to put it mildly, reckless on his part given the fact that the respondent's workplace operates on the basis of policies which would treat that behaviour as a matter for discipline.

41. Although the respondent makes an issue of the fact that this complaint does not feature in the claimant's detailed set of complaints sent to Mr Conway in the immediate aftermath of his formal complaint (see page 157) the Tribunal does not place much weight on that. It is entirely plausible that the claimant may have recollected this incident later or may have recollected the incident at the time but had taken the view that it was not particularly relevant to a complaint he was making of racially discriminatory behaviour directed at him, a person of Chinese ethnic origin. Once again, the Tribunal is in a position of having to decide between two uncorroborated pieces of evidence with very little else to go on. Whilst of course we bear in mind that we are entitled to draw inferences from other matters, and in this context we are bound to bear in mind the fact that Mr Baldwin has been found by the respondent to have been guilty of racially derogative conduct, the Tribunal does not take the view that that is sufficient for us to infer that he is guilty of all of the matters alleged against him in this case. We take that view in relation to this complaint. There is simply not enough in front of us to allow us to conclude that this event did happen and some matters that would point away from the likelihood of that event.

The Kung Fu noise

42. The next complaint relates to Mr Ringrose's making a joke, in relation to discussions about Chinese martial arts and Chinese martial arts films. The joke was, according to the claimant to repeat the Bruce Lee vocalisation, described above in the context of 14 December 2018 incident. This is supposed to have been a regular occurrence between November 2016 and December 2018. The Tribunal finds that Mr Baldwin did make that vocalisation on more than one occasion during that period and we find that for the following reasons. It is the agreed evidence to the parties that there were regular discussions in the office about martial arts and martial arts films. In part, they were provoked by the particular interest displayed by Mr Houghton in martial arts and martial arts films. There is therefore a context and a reason why the Bruce Lee noise might have featured in conversations, particularly in an attempt to be light-hearted. Secondly, it is the agreed evidence of all concerned that that is exactly the vocalisation used by Mr Baldwin on 14 December 2018 and the Tribunal takes the view that it is entirely possible, indeed likely, that that was not the first time that he had made that particular joke. In that context the Tribunal take the view that we prefer the claimant's evidence to Mr Ringrose's bare denial that it was not uncommon for Mr Baldwin to make those vocalisations.

Making fun of the Chinese trainer

43. The next complaint relates to some training which the claimant and his colleagues received. The training was delivered in the form of webcast. The complaint from the claimant is that, of the two trainers used by the training company, one was a white person and the other was Chinese but that Mr Baldwin only poked fun at the Chinese trainer which, the claimant assumed, was because of that trainer's race. This training took place in April 2017, some nine months before the claimant sent his email of detailed complaint to Mr Conway. In the email, the claimant says that all of the trainers, including the trainer of Chinese origin Mr Wong, spoke with an American accent. He then went on to say "I'm not sure what is funny about Ronnie Wong but Sam would always poke fun of him which made me feel a bit uneasy especially when everyone found it funny and laughed. It is quite humiliating". The Tribunal infers from that that the claimant at the time believed that Mr Baldwin was picking on Mr Wong to make fun of because Mr Wong is of Chinese ethnic origin and the claimant found that humiliating. The claimant has now added to his evidence on that point by elaborating on what it was that Mr Baldwin made fun of in respect of Mr Wong That was Mr Wong's accent and his beard. In the first place, the Tribunal will observe that it is curious that the claimant should have mentioned Mr Wong's accent in the complaint but not pointed out that Mr Baldwin was choosing Mr Wong's accent as a reason for mockery. It is somewhat curious that the making fun of Mr Wong's beard was not mentioned at all. There is particular importance to be placed on that matter when one bears in mind the normal difference in the growth of facial hair for people from the Far East as compared to people from the west. It might well be that making fun of a Chinese person's beard could well be the basis for racially biased mockery. In evidence the claimant appeared to be more and more confused about what exactly the basis for his discomfort or complaint was and ended up by saying "I may have added one and two

and reached five". The claimant also accepted in cross-examination that the other trainer was generally regarded by everybody, including himself, as irritating and that his way of starting a webcast was indeed the subject of mimicry. If Mr Baldwin made fun of Mr Wong he was not therefore singling him out. In all the circumstances, the Tribunal takes the view that, if not quite abandoning this complaint it did not appear to us that the claimant was no longer placing much reliance on this incident as evidence of Mr Baldwin harbouring a racial bias against Chinese people. The Tribunal takes the view that the claimant cannot satisfy us that this is an incident in which Mr Baldwin was singling out Mr Wong for unreasonable or unfair criticism for comic or any other purpose.

Tsing Tao

44. The Tribunal has already referred to this matter in our discussion about the informal complaint when we concluded that we were satisfied that the claimant had complained about this matter. The precise nature of the complaint is that Mr Baldwin had elongated the final vowel sound in the word Tao to mimic what he understood to be the Chinese way of pronouncing that word. Mr Baldwin denies that that is the case. For Mr Baldwin, the matter is somewhat confused by the fact that at least on the basis of his evidence a complaint of this nature was *not* what Mr Wilson was talking about when he spoke to him and Mr Ringrose and invited them to be more cautious about their use of language in the office and to be more aware of the sensitivities of others. Whether or not it is the case that between them Mr Wilson and Mr Temple passed on to Mr Baldwin the true nature of the claimant's concern does not for the purposes of this issue seem to matter to the Tribunal. For us, it is sufficient to observe that it is our finding that the claimant did complain about this at the time and that in our view that is a matter upon which we can rely when considering whether or not we accept or reject the claimant's evidence on this point. Mr Baldwin, when having the matter put to him denied having mimicked the Chinese accent in this way but the Tribunal would observe that there is some similarity between the vocalisation Mr Baldwin is said to have used in relation to the martial arts films and the vocalisation that he was alleged to have used in this instance. The respondent's case is that there was a discussion about a Chinese beer, Chang, but in the context of that company's sponsorship of football. The Tribunal does not consider that there is likely to be any confusion by the claimant as between the two matters. Either Mr Baldwin talked about Tsing Tao in the manner described, or the claimant just invented the whole episode. For the reasons set out above we balance prefer the claimant's evidence and find that Mr Baldwin did pronounce the word Tsing Tao in a stereotypically Chinese way in the claimant's hearing. It should be pointed out that the Tribunal take the view that this must have happened some time in 2016 rather than in 2017 given our view as to when the informal complaint containing this matter was made.

The Indiana Jones jokes

45. The next complaint relates to conduct on the part of Mr Baldwin in allegedly mimicking the Chinese accent of the actor playing a Chinese or Tibetan boy in the second Indiana Jones film. In cross-examination the claimant elaborated on his concerns. The character in question is played as

irritating and it is certainly the case that he uses somewhat fractured English in his communications with the hero of the film Indiana Jone. The humour submitted Mr Sangha was to be derived from the character of the young boy rather than his use of English, in particular the fact that he was somewhat over-eager. Mr Sangha put to the claimant that the most that Mr Baldwin had done was to comment on the annoying nature of the character played by the actor and that he had not gone so far as to mimic the character's accent. That cross-examination was based on Mr Baldwin's evidence in chief in which he accepted that although he could not recall any specific conversation he may have commented on the annoying nature of the character. The Tribunal notes that Mr Baldwin denied the use of a stereotypical Chinese accent but prefers the claimant's evidence on this point for the following reason. The way in which the character in the film is irritating is, in part, to do with his constantly pestering the central character and in so doing using his fractured English heavily accented with a Far East accent. The Tribunal has very little difficulty in imagining anybody commenting on the irritating nature of the character by making a reference to, and probably mimicking, the manner in which that character pesters Indiana Jones. The Tribunal finds on balance, and particularly drawing an inference from Mr Baldwin's tendency towards humour and our findings in relation to his mimicking of the words Tsing Tao for humorous purposes, and the use of that martial arts vocalisation, that it is more likely than not that this complaint is made out as to its fact.

Police Academy

46. The next complaint which is about 30 November, is also levelled at Mr Baldwin. The evidence about this aspect of the case involved the Tribunal viewing a You Tube clip taken from one of the Police Academy films. The complaint by the claimant is that Mr Baldwin used a phrase taken from a scene in that film, the phrase being "if you want to fight, fight me". And the complaint by the claimant is that those words were said in a stereotypical mimicking Chinese accent accompanied by the stereotypical Kung Foo noise (the Bruce Lee noise).

47. The Tribunal's viewing of the film was instructive. The relevant clip begins with a Chinese grocer being menaced by two potential thieves (of ethnicity irrelevant). At that point, a black African American actor, playing a police officer and wearing a martial arts type headband, intervenes. He confronts the villains and uses the phrase said by all parties in this case to be common in early martial arts films "if you want to fight, fight me". It was evident to the Tribunal that in the film those words were said in an American accent, not a Chinese accent. At the same time as saying them however, the actor cleverly mouths silently for part of the interaction mimicking, again as agreed by the parties, the effect of the poor dubbing common to early Chinese made martial arts films when turned into English for western consumption. The joke is, therefore, contained in the clever way in which the poverty of the dubbing is imitated, and pokes fun at the early martial arts films and in particular the way in which western film companies dealt with them for western consumption rather than Chinese people or Chinese culture more generally. The Tribunal does bear in mind its findings about Mr Baldwin's propensity to humour and how that

propensity has on occasion led him into making stereotypical noises in relation to Chinese martial arts films. That might be said to be the basis for concluding that this complaint is made out. The Tribunal however does not accept that this complaint is made out, simply because it is inherently improbable that Mr Baldwin would have used a Chinese accent to say these words. The reason why that is so is that the words on the film are not said in a Chinese accent, they are said in an American accent and the humour lies not in the use of that typical phrase but in the way in which the actor mimics, whilst saying that, the effect of poor dubbing. If Mr Baldwin was referring to that particular joke when saying the words "if you want to fight, fight me" and doing so to somebody (Mr Houghton) who would have been thoroughly familiar with the film himself, there would have been no point or need for him to use a Chinese accent. The Tribunal is perfectly satisfied that Mr Baldwin did use that phrase but does not accept the claimant's case that he used that phrase in a Chinese accent and therefore the central plank of this complaint is not made out and the Tribunal dismisses it.

48. The following complaints, we are told, are all the subject of the claimant's contemporaneous notes. The claimant's case is that he was goaded into taking notes of various incidents by the regularity and frequency of the behaviour that was upsetting him particularly on the part of Mr Baldwin. Unfortunately for the claimant, who has been legally represented throughout, and for reasons entirely unexplained, those contemporaneous notes were not disclosed or produced to the Tribunal. They are therefore in the view of the Tribunal of no assistance at all when deciding whether or not the claimant's evidence is corroborated by the fact of a contemporaneous document detailing the matters he is unhappy about. A late application to include them was rejected by the Tribunal for reasons given o the parties at the time.

Chinese blood

49. The first of these complaints is about an incident said to have taken place on 12 December. The claimant alleges that in conversation with Mr Ringrose, Mr Baldwin asked him "have you got Chinese blood in there somewhere". The claimant is unable to explain in what context or circumstances that might have been said. Mr Baldwin's evidence, as was Mr Ringrose's, was that neither of them could recall any such conversation on that date or any other date in which they might have used the phrase "Chinese blood" or "have you got Chinese blood in there somewhere". Without any form of context, it was of course very difficult for Mr Baldwin or Mr Ringrose to have any more precise recall although they both seemed clear that they did not have any conversation in which Mr Baldwin was asking Mr Ringrose whether he had any Chinese blood. When cross-examined the claimant was still unable, having racked his memory, to explain what the conversation was about or in what circumstances that phrase was said. This is an instance of a complaint where, absent any context to make it more or less likely that that was said, and without the claimant being able to explain to us the circumstances in which he understood it to being said and why it might cause offence, the Tribunal takes the view that on balance the claimant fails to discharge the burden resting on him to show that this matter is made out on its facts. There is

no corroborative evidence either way and the burden rests upon the claimant.

Bangkok la

50. The next matter of complaint related to an incident on 13 December 2018 when Mr Baldwin is supposed to have said the words "this one time in Bangkok la". But in so saying mimicking an oriental accent. Once again, the claimant is unable to give any context or circumstance in which this is alleged to have been said and Mr Baldwin, Mr Wilson and Mr Temple, the three people allegedly involved in the conversation all deny that such a thing was said. The Tribunal takes the view that this is unlikely to have happened. Mr Temple and Mr Wilson were both Mr Baldwin's superiors. Mr Wilson was Mr Baldwin's line manager and had already warned Mr Baldwin about the use of offensive language in the context of a complaint by the claimant that Mr Baldwin had been using language offensive to Chinese people. Mr Temple was the recipient of that first complaint and knew (even if that was not passed on to Mr Wilson, see above) that the precise problem was the mimicking of a Chinese accent. It seems to the Tribunal to be most unlikely that Mr Baldwin would have risked further censorship from his line manager by mimicking an oriental accent to his face. It further seems to the Tribunal to be most unlikely that Mr Temple, who had taken the informal complaint seriously enough to pass it on to Mr Baldwin's line manager, would not have immediately ensured that the matter was dealt with. The Tribunal rejects this complaint as to its fact.

51. That concludes the Tribunal's findings of fact in relation to the complaints of harassment. Where we have found that the claimant has not proved the facts upon which he relies we have not needed to analyse the matter further and we find that those complaints are not made out.

The Tribunal's conclusions as to whether or not the claimant has suffered harassment in relation to race

52. It was the unchallenged evidence of the claimant that growing up in a small town in the west of England close to the Welsh borders, where there were few if any other families of Chinese ethnic origin, he had suffered regular and distressing discriminatory treatment at the hands of other people in the town and of his school mates. It was also the claimant's evidence that some of that discriminatory treatment included the use of the Bruce Lee Kung Foo noise. The films of Bruce Lee were common currency at the time that Mr Sheun was growing up. The question for the Tribunal is how that background affects the Tribunal's conclusions in relation to harassment.

53. The offence of harassment requires the following elements. First there be unwanted conduct. Secondly that that conduct relates to the protected characteristic in this case race. Third that that conduct has the purpose or effect of either violating the claimant's dignity or of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Subsection 4 of the Act provides that in deciding whether the conduct has the effect referred to above, the Tribunal must take into account the claimant's own perception, the other circumstances of the case and thirdly whether it is reasonable for the conduct to have that effect.

54. Mr Sangha's submission is that the background evidence of Mr Sheun's early experiences of discrimination forms part of the circumstances of the case and of the consideration under section 26(4) of the allegations. However, Mr Sangha also submits that those features are relevant in supporting his submissions that it was *not* reasonable for the claimant to treat the only conduct admitted by the respondent in this case (Mr Baldwin's mimicking of the Kung Foo noise on 14 December as having the prescribed effect) as having that effect. In effect, Mr Sangha's submission was that Mr Sheun has become over-sensitive. To the contrary, Mr Bronze, whilst agreeing that the claimant's background and experience of racism is a relevant matter which the Tribunal must take into account, submits that it supports his contention that the claimant was reasonable in treating the treatment as having the relevant effect.

55. The first and important point to be made here is that unlike the premise for Mr Sangha's submission, the Tribunal is not dealing with one incident in isolation but rather a number of incidents, as found above, where Mr Baldwin has mimicked the Chinese accent or made the Kung Foo noise. To be sure there are not as many incidents as the claimant would have us believe, but nevertheless the Tribunal's finding is that the 14 December incident was not an isolated one. Nevertheless, we will address this issue as if it were.

56. The first question is whether the conduct was unwanted. The respondent, it appears to us, is not seriously suggesting that there is any evidence to suggest that it was not unwanted and the Tribunal would observe that the claimant made an informal complaint in 2016 and a formal complaint in 2018, indicative of his unhappiness with the conduct detailed in those complaints. The Tribunal could infer that other similar conduct, not the subject of those complaints would similarly be unwanted. The next question appears to us also to be controversial and that is whether the matters complained of relate to race. Self-evidently they do. The mimicking of the accents of people China when speaking English of course refers to their Chinese ethnicity. Further, Chinese martial arts and the films that feature them are so closely associated with Chinese ethnicity and culture that any reference to those is likely to relate to the Chinese race unless it obviously does not. (For example, a neutral reference to cinematography or direction). It appears to the Tribunal that the real issue in this case is that consideration required by section 26(1)(b) and section 26(4).

57. Tribunal must first decide whether the unwanted conduct was done with the purpose of violating the claimant's dignity or creating the proscribed atmosphere. If it is, that is the end of the enquiry and the offence is made out. If it is not, then the Tribunal must go on to consider the section 26(4) question.

58. There is, in the view of the Tribunal, no evidence at all to suggest that Mr Baldwin, in making any of these comments or noises was doing so with an aim of targeting the claimant and causing him distress. They appear to the Tribunal to be efforts at misguided humour and appear in the view of the Tribunal to be without malice. The Tribunal found Mr Baldwin to be a generally plausible witness and there was nothing about the way in which he gave evidence to suggest that he has it within him to conduct a

campaign of deliberate harassment, picking upon a colleague because of their ethnicity. Nor was that put to him as his motivation. Indeed, we are not even sure that it is the claimant's case that that was Mr Baldwin's intent. Mr Bronze's submissions do not make that assertion and do not refer to any parts of the evidence before the Tribunal that might support such a submission. It is well established that harassment can happen unintentionally and so much so that it may even (for example in the case of disability) happen where the harasser is unaware of the existence to the protected characteristic let alone the likely effect of their conduct on the claimant.

59. This leaves the Tribunal with the question as to whether or not the conditions in section 26(1)(b) are met. The Tribunal takes the view that there is ample evidence to suggest that the claimant did feel his dignity to be undermined. He complained about the matter on two occasions and, on 14 December, he stood up and angrily challenged his colleagues**.** He enlarged upon that point in his subsequent email to Mr Conway of 24 December. It should also be noted that the respondent took the view that the behaviour by Mr Baldwin was sufficiently serious as to justify formal warning and therefore we can infer that it was not just the claimant's perception that this was discriminatory behaviour but also the respondent's. That it seems to us deals with the question of the claimant's perception.

60. The next question is whether or not it was reasonable for the conduct to have that effect. This is an objective matter. The Tribunal notes that the EHRC Code of Conduct (paragraph 7.1.8) says that "relevant circumstances" contemplated by S26(4)(b) can include those of the complainant such as his or her health including mental health, mental capacity, cultural norms and previous experience of harassment. It seems to us to be obvious that the assessment of reasonableness must take into account the circumstances of the case. The Tribunal is satisfied on the evidence before us that the claimant has suffered harassment in his earlier life and, moreover, harassment of a very similar nature to that which he is complaining of in this case. We take the view therefore that Mr Bronze's submission is to be preferred on this point. Whilst in other circumstances it might not be reasonable to treat light-hearted noises or mimicry as having the effect, in this case we find that it is. We reject any submission that the claimant is "over sensitive". His earlier experiences have sensitised him, to be sure, but they are all part of the circumstances of the case and part of the matrix of matters we may consider when considering the objective question of reasonableness. We take the view that, bearing in mind the fact of the claimant's earlier complaint and the facts of the claimant's earlier experiences the claimant was reasonable in treating the incident as undermining his dignity. We would have found that even if 14 December was an isolated incident. The fact that it was not can only reinforce that finding.

61. The Tribunal finds that all of the elements for section 26 exist in respect of each of those incidents we found to have happened. Our reasoning as set out above can be applied equally to each of the incidents where Mr Baldwin made the Kung Foo noise or mimicked a Chinese accent.

62. For the avoidance of doubt, the Tribunal therefore upholds the complains of harassment about the incident of 14 December, the earlier regular use of the Kung Fu noise and the accent mimicry when pronouncing Tsing Tao. The other complaints fail because the claimant has not proved the facts upon which he relies.

The issues of time

63. There is no merit in any of the respondent's submissions to the effect that any of the incidents in this claim are out of time. The question for the Tribunal is whether the events that we have found form part of a continuing act or state of affairs. In that respect the Tribunal has little difficulty in concluding that the answer to that must be in the affirmative. The last event in this chain is the incident of 14 December. It is not suggested that, bearing in mind the extension to be obtained as a result of the ACAS period of early conciliation, a claim in relation to 14 December is out of time. The question is therefore whether the earlier complaints form part of a continuing series of acts of which the 14 December act is the last event. The commonality of type of complaint and the common thread formed by Mr Baldwin is easily sufficient to establish the connection necessary (see **Hendricks v Commissioner of Police for the Metropolis** 2003 ICR 530).

64. The respondent next relies upon the provisions of S.108 EQAto provide a statutory defence. That is to say that it has done all that it could reasonably have done to prevent the harassment on the part of Mr Baldwin. That defence must fail. It is certainly the case that Mr Baldwin and Mr Ringrose were spoken to by Mr Wilson in December 2016 when the claimant first made an informal complaint. The Tribunal accepts that the respondent has a policy which makes it clear to employees that harassing conduct in relation to race or any of the other protected characteristics is not to be tolerated. There was surely an opportunity for the respondent to make plain to Mr Baldwin in December 2016 that the matters being complained about by the claimant were serious, that they were potentially disciplinary matters and to spell out to Mr Baldwin the consequence of them being repeated. With the exception of an apparently innocuous comment contained in the PDR the Tribunal has seen no evidence at all that (1) the true nature of the complaint was properly communicated by Mr Wilson to Mr Baldwin; (2) that the seriousness or potential seriousness of that complaint was made clear; (3) that the informal warning is reinforced in a letter setting out exactly why that warning is being given and with what potential future consequence or (4) any evidence that managers considered that they might have a problem which needed to be more generally addressed, for example by training, in the immediate aftermath of the complaint. There was no evidence at all that the informal warning, or the PDR outcomes was monitored or reviewed regularly at subsequent PDRs. Furthermore, for unexplained reasons Mr Temple did not record the contents or substance of the complaint when it was made to him and took no steps at all, as far as we can see, to check with the claimant in subsequent one to ones whether or not the claimant was still experiencing similar problems. In all of the circumstances the Tribunal has little difficulty

in rejecting the contention that the respondent took all reasonable steps to prevent harassment once it became aware of the potential problem in December 2016. On that basis this claim succeeds to the extent set out above in our findings.

Employment Judge Rostant

Date: 7 February 2020