



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr L Costina

**Respondent:** Numatic International Limited

**Heard at:** Exeter

**On:** 3 – 5 December 2019

**Before:** Employment Judge Oliver  
**Members** Ms R Hewitt-Gray  
Mr C Williams

## Representation

**Claimant:** In person

**Respondent:** Mr S Ellerby, Solicitor

**JUDGMENT** having been sent to the parties on 13 December 2019 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

## REASONS

1. This was a claim for race discrimination based on direct discrimination and harassment.
2. There was a case management hearing on 13 June 2019. The issues were agreed as follows.
3. **Section 13 EqA: Direct discrimination on grounds of Race.**
  - a. Has the respondent subjected the claimant to the following treatment falling within section 39 Equality Act, namely:
    - i. On 2 August 2018 Mr Graeme Milne expressed an inappropriate attitude towards the claimant and sent him home in front of his colleagues without adequate cause, and Mr Milne then changed his attitude towards the claimant, with the result that the claimant's colleagues turned against him; and
    - ii. On 5 September 2018 the claimant's colleague Ryan Roberts also known as Ryan Pike swore at him; and

- iii. On 2 November 2018 the claimant's colleague Mr Mike Hearn challenged the claimant to a fight and swore at him; and
  - iv. On 14 November 2018 the claimant's colleague Anna Suchan swore at him and called him "not normal" and "an idiot"; and
  - v. On 3 December 2018 the claimant's colleague Craig Beasor swore at him and in particular called him "a wanker" and told him to "fuck off"; and
  - vi. The respondent failed to investigate the claimant's complaints and/or to provide outcomes, in respect of the following complaints made to the following people on the following dates:
  - vii. To Mr Mark Trump, about all of the above matters, on the same day that they happened, or if not, within two or three days of the event happening; and
  - viii. To Ms Justyna Wisniewska, about the first allegation involving Mr Milne on 2 August 2018, because she was present at the time; and
  - ix. To Mr Kevin Phillips, about the second allegation involving Ryan Roberts/Pike on the day it happened because he was there, and the third, fourth and fifth allegations involving Mr Hearn, Ms Suchan and Mr Beasor on the day they happened, although Mr Phillips is not said to have been present when any of these last three events actually happened; and
  - x. To Mr Jake Hardiman, about the fifth allegation and Mr Beasor swearing at the claimant, on the same day it happened, although Mr Hardiman is not said to have been present when it did happen.
- b. Has the Respondent treated the claimant as alleged less favourably than it treated or would have treated the comparators? The claimant relies on hypothetical English comparators.
- c. If so, has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic?
- d. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

**4. Section 26 EqA: Harassment on grounds of Race.**

- a. The claimant relies on the same allegations set out above as being unwanted conduct.
- b. Was the conduct related to the claimant's protected characteristic?
- c. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- d. If not, did the conduct have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- e. 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.

5. **Time/limitation issues**

- a. The claim form was presented on 22 February 2019. The dates on the claimant's Early Conciliation Certificate are (Day A) 7 February 2019 and (Day B) 20 February 2019. Accordingly, any act or omission which took place before 8 November 2019 is potentially out of time, so that the tribunal may not have jurisdiction.
- b. Does the claimant prove that there was conduct extending over a period which is to be treated as done at the end of the period? Is such conduct accordingly in time?
- c. Was any complaint presented within such other period as the employment Tribunal considers just and equitable?

**Evidence**

6. We took statements as read. We heard from the following witnesses. For the claimant – the claimant himself, Mr Marcin Walczak, and Ms Katarina Kuchnina who was subject to a witness order. For the respondent – Mr Mark Trump, Mr Ryan Pike, Mr Mike Hearn, Ms Anna Suchan, Mr Craig Beasor, Mr Kevin Phillips, Mr Roy Poole, Mr Jeff Darke, and Mr Jake Hardiman (written statement only).

7. We had an agreed bundle of documents. We also heard oral submissions from both parties.

**Facts**

8. We have taken account of all of the facts and the evidence that we have heard. We find those facts which are necessary to decide the issues in the case.

9. The claimant was employed by the respondent from 3 January 2017 and he had previously been an agency worker. The claimant is Romanian. The respondent is a multicultural employer and employs various nationalities, including some other Romanians. The claimant was employed as a Factory Operative on the vacuum cleaner assembly line, which is a fast-paced and target-driven environment.

10. We have seen copies of a number of "honest conversations" with the claimant's managers which raised some issues with the claimant about his performance and attitude. We are not going to make detailed findings about the claimant's performance, but we note there is evidence that some issues had been raised with him.

11. The claimant complains about his treatment during various incidents in the workplace and we address these in turn.

12. **The incident on 2 August 2018.** The claimant was asked to work in the metal shop department as there was a shortage of staff. Part of the way through his shift he told his team leader, Ms Justina Wisniewska, that he was not able to work there because of the smell and it was making him unwell. After discussion with his team leader and Mr Mark Trump, who is the Vac B cell manager, the claimant returned to his usual role on the line.

13. The Production Manager Mr Graham Milne, who is senior to Mr Trump and oversees the area, then came to speak to him. Mr Milne was not at the hearing to give evidence so we accept in outline the claimant's version of events. He was told to go back to the metal shop, and Mr Milne gestured to the door. This was a conversation on the production line which could be overheard by some other staff. The team leader witnessed the conversation. Mr Walczak provided a statement that confirms he saw Mr Milne gesture and the discussion attracted attention. Mr Craig Beasor's statement also confirms that there was a raised voice. We have seen notes of a later grievance meeting that was held with Mr Milne where he says he didn't want to set a precedent so gave the claimant a choice of going back to the metal shop or going home and seeing his GP. These also show that Mr Milne appears not to have been aware that the claimant was Romanian, as he was told this during the meeting.

14. The claimant was off work until 10 August. He then attended two return to work meetings. The first one was 10 August and notes his reason for absence was stress. The claimant says his stress was caused by his treatment by Mr Milne. There was a second meeting on 13 August with Mr Trump and Miss Abi Potter from HR. The claimant signed the notes of this meeting, but he says it is not a full record and he told them his treatment by Mr Milne had caused him stress. He says that Miss Potter asked him to sign the notes but she did not read out to him what she had recorded. Mr Trump says he doesn't remember the claimant saying this, and he would expect the notes to contain all of the conversation.

15. The Tribunal looked at these notes, and at the end the following is stated: "*Stayed at home because of stress, not because of oil. Nobody talks to me like that*". We take that statement in the notes as being a record that the claimant did complain at that meeting about how Mr Milne had talked to him. There is no record of any reply to this and it was not investigated or addressed any further.

16. The claimant raised this issue again at a meeting with Mr Trump on 6 November, and we have seen an extract from a transcript where he asked, "*what happen with the situation with Graeme? Nobody says nothing*". The parties then went on to talk about various other things in some forty minutes of conversation, and Mr Trump did not come back as a result of this comment to investigate any further.

17. All of the witnesses denied that this treatment by Mr Milne influenced their treatment of the claimant. We have considered which of the claimant's colleagues were aware of the incident. The incident happened after Mr Trump had left the site so he did not witness it, but he heard about it later. Ryan Pike did not witness it. He said he heard that the claimant went home in passing conversation. Mr Hearn did not witness it or hear about it afterwards. Anna Suchan did not witness it, she heard later but she is not sure when. Craig Beasor did witness the incident and he says that Mr Milne raised his voice during the incident. Mr Phillips was not at work that day, and he heard about it the next day because he was told by Mr Trump not to send the claimant to the metal shop.

18. **The 5 September incident.** The claimant was working with his colleague Ryan Pike on the blue line. The claimant says Mr Pike insulted him and swore at him. Mr Pike says there was a disagreement as the claimant had taken a reel from his stack. He worked with his own stacks of ten reels and they disagreed about

whether this was required by the SOP. Kevin Phillips the shift leader intervened. The claimant says Mr Pike swore at him and then Mr Phillips pointed and said to Mr Pike "*why did you swear at Luigi?*". Mr Pike says he swore at Mr Phillips as he did not like being told what to do. Mr Phillips also says that Mr Pike swore at him, and he then dealt with it.

19. On balance we accept the clear evidence of both Mr Pike and Mr Phillips that the swearing was actually directed at Mr Phillips and not at the claimant. This issue was brought to the attention of Mr Trump, and he spoke to Mr Pike informally who said he was aggravated by the claimant's attitude. Mr Trump says he was happy Mr Phillips dealt with this appropriately, it was nipped in the bud and there was no need for further investigation or to provide an outcome.

20. The transcript of the extract of the meeting on 6 November with Mr Trump shows that the claimant does ask what happened with Ryan, so this was raised by the claimant again. Mr Trump did not think it was necessary to investigate further, again following a forty-minute conversation.

21. **The 2 November incident.** The claimant was working with Mr Mike Hearn. Mr Hearn asked the claimant to assist with putting dots on boxes as he thought that was part of his job, and the claimant refused. The claimant says he was busy on the line and he had no time to put dots on boxes. We have seen a transcript of a recording of this conversation. Mr Hearn says the word "shit" and later on he says to the claimant "*you and me would you like to go outside*". His reasons for this are that he was frustrated by the claimant not doing his job, and he says the claimant blew him a kiss which the claimant denies. Mr Hearn was also upset at the time due to the illness of his sister. The claimant then called over Mr Phillips to deal with the incident. This was investigated by Mr Trump. He thought it was not clear what had happened as the CCTV showed an interaction between the two of them. There were no witnesses so he decided that both were at fault and both were issued with the same letter to go on their file.

22. **The 14 November incident.** The claimant says his colleague Anna Suchan swore at him and called him not normal and an idiot. We understand from the claimant that his reference to swearing is being called an idiot rather than other swear words. The claimant says he asked Ms Suchan to clean the floor before she moved to a different area, and he then asked for a red light to stop the line. She refused to clean and the claimant says she called him a stupid idiot and not normal. Ms Kuchnina who attended to give evidence confirmed that she heard Ms Suchan call the claimant an idiot. Ms Suchan also says she may have said something like "stupid idiot", her explanation is that she was frustrated by the claimant complaining about her not cleaning up the floor. Having heard the evidence we find on balance that Ms Suchan did call the claimant an idiot and also say that he was not normal, and she did this out loud as it was overheard by the witness.

23. Mr Phillips attended as the red light was on. We have seen a transcript of this conversation. The claimant complained about the mess and he also raised the issue of being called an idiot. There was a brief discussion about the review of CCTV. However, nothing was actually done and there was no further investigation. Mr Phillips said he saw this as a minor incident and further investigation was not necessary.

24. As shown by the extract of the transcript of the meeting with Mr Trump on 6 November, the claimant does explain what happened with Ms Suchan to Mr Trump. Again, this was not investigated any further by Mr Trump after the end of a forty-minute conversation.

25. **The 3 December incident.** The claimant was working on the line with Craig Beasor. Mr Beasor saw that the claimant was not helping a female colleague. He said she was struggling and holding up production, and that was affecting him meeting his targets which was important as he was a temp at the time. He felt the claimant was being lazy. He went over to tell him he was not doing his job properly and should help his colleague. The claimant then went to speak to Mr Jake Hardiman the shift supervisor. When he came back, he approached Mr Beasor, and Mr Beasor told the claimant to “fuck off” and called him a “wanker”.

26. Mr Beasor admits that he did say this. He says it was because the claimant was in his face. The claimant says he was called that name before he went off the first time to speak to Mr Hardiman. This appears to be shown in the transcript of a recording of his conversation with Mr Hardiman when he first reports this incident. The claimant then went back to speak to Mr Hardiman and Mr Phillips. He said what had happened and said he could not work like this. He said that his head felt like it was going to explode and he was going home. Mr Phillips did offer to discuss this with the claimant, but he did not want to do so at that point. The claimant then went home sick and did not return to work. Mr Phillips investigated this by getting a statement from Mr Beasor the next day. This was not then investigated further as the claimant was away from work.

27. Finally, there was a **grievance investigation**. The claimant submitted a written grievance on 10 December about the five incidents, and he said that these were in his view due to his race. We understand that this is the first time that the claimant alleged that there was any racism in his treatment.

28. There was a hearing on 7 January 2019 with Jeff Darke, and that led to an outcome letter on 21 January which found the grievance was not upheld. In brief, this found that Mr Milne had not shouted or sworn at the claimant on 2 August, and this had not affected others' behaviour towards the claimant. All incidents prior to 3 December had been investigated at the time and had found that the claimant's behaviour had contributed to disagreements. Mr Darke did find that various incidents had occurred, but there was no evidence that these were motivated by the claimant's race. He found that the respondent had not ignored or dismissed the incidents but acted appropriately. His conclusions focussed on race discrimination rather than specifically addressing other general complaints by the claimant.

29. There was an appeal by the claimant on 25 January. There was then an appeal meeting on 4 February with Mr Roy Poole. There were some further interviews before an outcome letter of 6 February which upheld the original grievance outcome.

## Applicable law

30. These claims are made under the Equality Act 2010 (“EA”) - direct discrimination under section 13 (less favourable treatment because of race), and harassment under section 26 (unwanted conduct related to race).

31. We have considered the burden of proof provisions at 136 EA and reminded ourselves of the relevant case law.

### *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.*

32. The key cases providing guidance on the burden of proof provisions are *Barton v Investec Henderson Crosthwaite Securities Ltd* [2003] IRLR 332, (EAT), *Igen Ltd and others v Wong and other cases* [2005] IRLR 258 (CA), and *Hewage v Grampian Health Board* [2012] IRLR 870 (SC).

33. The key question is whether the facts show a prima facie case of discrimination and, if so, whether the respondent’s explanation is sufficient to show there has not been discrimination. We are not to apply this in a mechanistic way, and there is rarely direct evidence of discrimination. The key question is finding why the claimant was treated as he was. However, under the burden of proof provision so we do require some facts to indicate that there may have been discrimination before we scrutinise the respondent’s explanations. A simple complaint of unfair treatment does not, on its own, provide sufficient facts for the burden to move to the respondent or for the tribunal to find that this treatment was unlawful discrimination.

34. Under section 123 EA, complaints of direct discrimination or harassment, “*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.*” Under section 123(3), conduct extending over a period is to be treated as done at the end of the period.

## Conclusions

35. Firstly, there is the time limitation issue. Any act or omission before 8 November 2019 is potentially out of time. We have found that at least some of the alleged events occurred after that date. It is arguable there is a series of acts of discrimination or harassment, particularly if there was a series of acts which were linked to the claimant’s original treatment by Mr Milne. Our conclusion on time limits will therefore depend on our findings on whether the various acts complained of were discrimination or harassment.

36. Starting with direct discrimination on grounds of race, we set out our findings on each of the issues as listed above. Each of these incidents is alleged to be less favourable treatment on grounds of race.

37. *On 2 August 2018 Mr Graeme Milne expressed an inappropriate attitude towards the claimant and sent him home in front of his colleagues without adequate cause, and Mr Milne then changed his attitude towards the claimant, with the result that the claimant's colleagues turned against him.* We have found that Mr Milne did send the claimant home. This was done in front of some of the claimant's colleagues and included Mr Milne gesturing to the door. However, we do not find that this was without any adequate cause. It was due to the fact the claimant said he was unwell when working in the metal shop, and so he was advised to go home and get advice from the GP. We understand that Mr Milne did not want to set a precedent by simply allowing the claimant to work elsewhere. We have also seen no evidence about an ongoing change of attitude from Mr Milne.

38. Looking at the claimant's colleagues and how they were influenced by this incident, our factual findings are that the majority of the colleagues did not witness this incident, some did hear about it later, some did not hear about it at all. In addition, we asked all of the witnesses at the hearing whether they were influenced by Mr Milne's treatment of the claimant. They were all clear that they were not influenced. On balance we do accept the evidence from each of those witnesses that they were not influenced by Mr Milne's treatment of the claimant.

39. *On 5 September 2018 the claimant's colleague Ryan Roberts also known as Ryan Pike swore at him.* We have found that Mr Pike swore at Mr Phillips and not at the claimant.

40. *On 2 November 2018 the claimant's colleague Mr Mike Hearn challenged the claimant to a fight and swore at him.* Mr Hearn did not specifically challenge the claimant to a fight or use the word fight. However, we have found he did invite the claimant to go outside and he also used a swear word during that conversation.

41. *On 14 November 2018 the claimant's colleague Anna Suchan swore at him and called him "not normal" and "an idiot".* We have found that there was no swearing other than the use of the word "idiot", but Ms Suchan did call the claimant an idiot and not normal.

42. *On 3 December 2018 the claimant's colleague Craig Beasor swore at him and in particular called him "a wanker" and told him to "fuck off".* We have found that did happen.

43. There are also the various allegations that the respondent failed to investigate the claimant's complaints or to provide outcomes in respect of various complaints.

44. *To Mr Mark Trump, about all of the above matters, on the same day that they happened, or if not, within two or three days of the event happening.* Taking the incidents in turn:

- a. Mr Milne. We found that the claimant did mention this to Mr Trump at the end of the second return to work meeting, and it was also mentioned



- at the start of the meeting on 6 November and was not investigated further.
- b. Mr Pike. We found that Mr Trump spoke to Mr Pike informally. He felt there was no need for further action as Mr Phillips had dealt with it appropriately. The claimant did mention it again at the start of the meeting on 6 November and it was not investigated further.
  - c. Mr Hearn. This was investigated there was an outcome which was a file note for both him and the claimant.
  - d. Ms Suchan. This was reported to Mr Trump on 6 November and there was no further investigation by Mr Trump.
  - e. Mr Beasor. Mr Phillips took a statement from him and the matter was not progressed further because the claimant did not return to work.

45. *To Ms Justyna Wisniewska, about the first allegation involving Mr Milne on 2 August 2018, because she was present at the time.* She was present, and she did not take any action. She did not attend the hearing and we don't know why she took no action, but we note that she wasn't asked by the claimant to take any action.

46. *To Mr Kevin Phillips, about the second allegation involving Ryan Roberts/Pike on the day it happened because he was there, and the third, fourth and fifth allegations involving Mr Hearn, Ms Suchan and Mr Beasor on the day they happened.* Mr Phillips viewed the incident with Mr Pike as a minor flare up, and we found that he swore at Mr Phillips and not at the claimant. There was no formal investigation or outcome. The incident with Mr Hearn was investigated by his superior Mr Trump. With Ms Suchan, the transcript shows that the claimant did report being called an idiot to Mr Phillips and that was not investigated any further. With Mr Beasor, he took the statement from Mr Beasor and the issue was not progressed further as the claimant was not at work.

47. *To Mr Jake Hardiman, about the fifth allegation and Mr Beasor swearing at the claimant, on the same day it happened.* We find that Mr Hardiman was aware of this. He did not investigate. This incident was investigated by Mr Phillips instead by taking a statement from Mr Beasor.

48. That concludes our findings on the list of things that are said to be unfavourable treatment. We have found that the majority of these things did happen as stated by the claimant. The next question is whether these things were acts of discrimination or harassment.

49. **Direct discrimination.** Has the respondent treated the claimant less favourably than it treated or would have treated hypothetical English comparators? We have no evidence of treatment of actual individuals in the same circumstances being different. We understand the claimant's case is that he would have been treated differently if he were English.

50. Applying the burden of proof provisions, we have considered whether there are any facts from which we could conclude that there has been less favourable treatment because of race. Has the claimant proved primary facts from which the Tribunal could properly and fairly conclude that the difference in treatment was because of the protected characteristic? We have found no such facts from the evidence that we have heard.

51. The claimant put forward his discrimination case in a couple of different ways. Firstly, he said that Mr Milne had set an example which were then followed by his colleagues. This sent a message to people that they could treat him like that. His colleagues then went on to intimidate and humiliate him, and he says that this happened because he is Romanian. We have not found facts to support this. It appears that Mr Milne did not know at the time that the claimant was Romanian. We have also had clear evidence from the witnesses that many of them did not witness the incident at all and, in any event, none of them were influenced by Mr Milne's treatment of the claimant. We have accepted this evidence from the witnesses.

52. Secondly, the claimant says he was forced to do things he didn't want, and treated like a slave or second-class race. His submissions made clear the strength of his feeling in this point. However, again we have found nothing in the facts to link any treatment to him being Romanian.

- a. We have heard explanations from the claimant's colleagues about why they acted as they did during the various incidents, and we have accepted these explanations.
- b. There was a direct comparison with his colleague Mr Hearn, but both were treated the same after an investigation which concluded that both of them were at fault.
- c. The claimant is not the only Romanian person in the organisation. As noted, it is multicultural with various different nationalities in the workplace.
- d. The claimant says he was an easy target as he didn't know the law or regulations. As found in the facts, there are some examples where he raised issues verbally with managers and there was then no formal investigation or outcome. The reasons given by the respondent's witnesses were that these were regarded as minor incidents, the type of flare ups that occur on the line, and there was no need for further action. When the claimant sent an email setting out his grievance this was then dealt with correctly under the procedures.
- e. We have had no evidence about any comments made to the claimant or about him which refer in any way to him being Romanian, either during the incidents or at any other time.

53. We have kept in mind the fact that there will not always be clear evidence of direct discrimination. However, we have found no facts that would be sufficient to shift the burden of proof to the respondent to show that it did not discriminate. We have found that a lot of the incidents that the claimant complained about did happen. Some of these included calling him names or swearing at him in front of other people in front of other people. We do appreciate that that would have been unpleasant for the claimant. These were not all investigated in the way that he would have liked. However, we have found no facts to support the claimant's case that this was due to him being Romanian. This what the Tribunal needs to find in order for a race discrimination claim to succeed.

54. **Harassment on the grounds of race.** The claimant relies on the same allegations that we have already considered as being unwanted conduct. We have found that a number of these did happen. Was that conduct related to the

claimant's protected characteristic, i.e. was this related to his race? For the same reasons as we have already explained, we have not found any facts that would indicate any link between the claimant being Romanian and his treatment by the respondent.

55. In conclusion, we found the claimant to be a genuine and honest witness during in the proceedings and we have no doubt that he genuinely feels he was not treated in the way he would have wished to be treated in the workplace. However, this is a claim of race discrimination and race harassment, and these claims have not succeeded. We know that is not the result the claimant wanted. We hope that this Judgment can help give the claimant a new starting point in his life, which is what he said he was looking for in his closing submissions.

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Employment Judge Oliver

Date: 5 March 2020

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