EMPLOYMENT TRIBUNALS

Claimant: Z

Respondent: Y

Heard: (partly remotely via video) **On:** 16th, 17th & 18th December 2020
Chambers discussion on 6th January 2021

Before: Employment Judge Howden-Evans
Mrs Smith
Mrs Owen

Representation
Claimant: In person
Respondent: Counsel

RESERVED JUDGMENT

The tribunal's unanimous decision is that:

1. The Respondent has not contravened s39(2) and s13 Equality Act 2010. The Claimant has not been subjected to direct race discrimination.

2. The Respondent has not contravened s40(1)a and s26 of Equality Act 2010. The Respondent has not harassed the Claimant by unwanted conduct related to his race.

3. The complaint of constructive unfair dismissal is not well founded. The Respondent has not unfairly dismissed the Claimant.

REASONS

1. References to the hearing bundle appear in square brackets throughout this Judgment.

Background

2. The Respondent, researches, develops, manufactures and supplies technology services to various sectors for the UK government. It employs over 1,000 people in Great Britain, 8 of whom were working at the same site as the Claimant.

3. The Claimant commenced full time employment with the Respondent on 15th April 2019 as a Cyber Security Laboratory Engineer.

4. The Claimant describes his place of birth as being Country X.

5. The Claimant was on sick leave between 19th June 2019 and 1st July 2019. On 2nd July 2019, the Claimant returned to work. There was an incident between the Claimant and Mr A, following which the Claimant indicated he would not be returning to work.

6. On 3rd July 2019 the Claimant resigned with immediate effect and sent a resignation letter alleging bullying. On 4th July 2019, the Respondent's employee relations officer contacted the Claimant and invited him to retract his resignation and allow the allegations to be investigated as a formal grievance. The Claimant confirmed he did not want to retract his resignation. The Claimant did submit further information which the Respondent considered as part of its internal investigation, undertaken by Mr C, Head of Cyber and Network Security; ultimately, he concluded there was no evidence to support the Claimant's allegations.

7. On 28th August 2019 the Claimant contacted ACAS. ACAS early conciliation procedures continued until 26th September 2019.

8. The Claimant presented his ET1 claim on 28th October 2019 [p1 to 15]. This alleged harassment, direct discrimination and constructive unfair dismissal (by reference to the protected characteristic of race).

9. On 17th January 2020, the Respondent submitted their ET3 Response [p16 to 26]. A preliminary hearing was conducted on 24th February 2020 [p48 to 56]. The Claimant agreed to provide a further information and the Respondent was permitted to provide an Amended Response.

10. In light of the pandemic and the need to make adjustments to hearings, a further preliminary hearing was conducted on 22nd June 2020 [p57 to 63].

11. The Claimant provided further information about his claims on 29th July 2020 [p27 to 35] which included a number of new allegations. On 25th August 2020 the Respondent provided an Updated Grounds of Resistance [p36 to 40]. On

14th September 2020 the Claimant provided further information about his claims [p41 to 47].

The Issues

12. At the start of the final hearing, the Employment Judge discussed the Amended List of Issues. Parties agreed this captured the issues between the parties. This list of issues / matters the tribunal needed to determine was as follows:

13. The issues to be determined in the **direct race discrimination claim** were as follows:

13.1. Was the Claimant treated less favourably than a hypothetical comparator would be, because he was born in country X, in the following ways?

a. Mr A told the Claimant that he was his line manager when he was not, (unspecified dates between 15 April 2019 and 20 June 2019 and/or on 2 July 2019).

b. Mr A instructed the Claimant to report to him on everything he was doing as soon as possible, saying 'understand?' in an aggressive manner, (unspecified dates between 15 April 2019 and 20 June 2019 and/ or on 2 July 2019).

c. Mr A instructed the Claimant to relocate server and firewall devices within the Cyber Lab, (unspecified date between 15 April 2019 and 20 June 2019 and /or on 2 July 2019).

d. Mr A told the Claimant he would have to use his annual leave entitlement to attend CISSP training, (on an unspecified date between 15 April 2019 and 18 20 June 2019 and/or on 2 July 2019).

e. On or around 23 May 2019, on the first day of Cyber Range training, Mr A failed to prepare a computer station for the Claimant, but told him to sit and just take notes.

f. Mr A made adverse comments to the Claimant about his use of a laptop at work, (unspecified dates between 15 April 2019 and 18 20 June 2019 and/or on 2 July 2019).

g. Mr A questioned the Claimant as to why the Claimant had administration rights via the laptop, (unspecified dates between 15 April 2019 and 18 20 June 2019 and/or on 2 July 2019).

h. Mr A questioned the Claimant as to why he was able to delete entities on his laptop when Mr A could not, (unspecified date between 15 April 2019 and 18 20 June 2019 and/or on 2 July 2019).

i. Mr A and Mr D told the Claimant they were employed by M15 and M16, that they were watching the Claimant constantly and that he should be very careful what he was doing, (unspecified dates between end of May 2019 and 18 20 June 2019 and/or 2 July 2019).

j. Mr A refused to let the Claimant move the wireless router on his desk to a safe distance away, (unspecified date between 15 April 2019 and 20 June 2019 and /or 2 July 2019).

k. The Respondent's South West office issued the Claimant with a security pass with the flag of Country X on it, despite the fact the Claimant had the right to reside in the UK, when other overseas employees were given badges with the Union Jack on them (date unspecified).

l. (Additional allegations in the Claimant's Further and Better Particulars (which are not part of the original pleaded case):

(i) Mr A stamping feet behind the Claimant while he was trying to focus on his job, (unspecified date between 15 April 2019 and 20 June 2019 and/or 2 July 2019).

(ii) the Claimant found his coffee mug in the bin in the kitchen, (unspecified dates between 15 April 2019 and 20 June 2019 and/or 2 July 2019).

(iii) Mr A asked the Claimant not to wear his lanyard (work pass) in public as this could make him a potential threat to terrorists, (unspecified date between 15 April 2019 and 20 June 2019 and/or 2 July 2019).

(iv) Mr A checked up on the Claimant while he was in the bathroom or the kitchen, (unspecified date between 15 April 2019 and 20 June 2019 and/or 2 July 2019).

(v) Mr A checked the Claimant's coat pocket while he was in the kitchen preparing his lunchbox, (unspecified date between 15 April 2019 and 20 June 2019 and/ or 2 July 2019).

13.2. If the Claimant has established facts, on the balance of probabilities from which, absent any explanation, the Tribunal could conclude the above, has the Respondent shown a non-discriminatory explanation for it?

14. The issues to be determined in the **racial harassment discrimination claim** were as follows:

14.1. *Was the Claimant subjected to unwanted treatment as alleged [as set out in all of the subparagraphs within paragraph 13.1 of this Judgment]?*

14.2. If so, was the treatment related to the Claimant's race?

14.3. If so, did it have the purpose or effect of:
   a. Violating the Claimant's dignity or
   b. Creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant, having regard to the perception of the Claimant, the other circumstances of the case, and whether it was reasonable for the conduct to have that effect?

14.4. If the Claimant has established facts, on the balance of probabilities from which, absent any explanation, the Tribunal could conclude the above, can Respondent show a non-discriminatory explanation for it?

15. The issues to be determined in the **discriminatory constructive dismissal claim** were as follows:

15.1. By the acts [set out in all of the subparagraphs within paragraph 13.1 of this Judgment], or any of them, did the Respondent act in such a way as to destroy or seriously damage the Claimant' confidence in it, in breach of Section 13, alternatively Section 26 Equality Act 2010?

15.2. If so, did the Claimant affirm the contract?

15.3. If not, did the Claimant resign because of the breach?

16. The issues to be determined in relation to **time limits** were as follows:

16.1. Did any of the acts of which the Claimant complains occur more than 3 months before he presented his ET1, taking into effect the extension of time afforded by Early Conciliation?

16.2. In respect of any matters which are prima facie out of time, can the Claimant prove that they formed part of a course of conduct extending into time, so as to bring them into time?

16.3. If not, can the Claimant show that it would be just and equitable for time to be extended in respect of those complaints?

The Hearing

17. The case was heard by an employment tribunal siting remotely via video link. The Claimant attended the hearing in person; all other participants attended the hearing via video link. The case was listed for 3 days; during this time we were able to hear all the witness evidence and oral closing submissions from both parties. There was insufficient time for the tribunal to consider its decision. The tribunal met for a chambers discussion via video link on 6th January 2021.

18. At the final hearing, the Claimant presented his own case – he was assisted by a solicitor to draft the original claim form and grounds of complaint, but has represented himself since. Counsel represented the Respondent.

19. At the outset of the Hearing we discussed the timetable and order of evidence. The morning of the first day was devoted to reading the bundle of documents (of 356 pages) and the 4 witnesses' statements.

20. In the afternoon of Day 1 and through to Day 3 we were able to hear 4 witnesses' evidence. These were:

    20.1. On Day 1 and the morning of Day 2, the Claimant gave evidence;

    20.2. In the afternoon on Day 2 we heard Mr A, who continues to be employed by the Respondent and was the Cyber Range Lead at all relevant times; and

    20.3. On Day 3 we heard:

    - Ms B who, at all relevant times, was also employed by the Respondent as a Cyber Security Engineer, but since 11th September 2020 has worked for a different employer; and

    - Mr C, who continues to be employed by the Respondent as Head of Cyber; Mr C undertook an internal investigation into the Claimant's grievance.

21. All witnesses gave evidence on oath. In relation to each witness, the procedure adopted was the same: the Tribunal had read each witness's statement, there was opportunity for supplemental questions (or in the Claimant's case, for the Claimant to address matters raised in the Respondent's witnesses' statements) before questions from the other side, questions from the tribunal and any re-examination (or in the Claimant's case, opportunity for the Claimant to clarify anything he felt he had not been able to explain fully in answering questions).

22. The tribunal heard oral closing submissions from both parties. The tribunal considered all the evidence during a chambers discussion on 6th January 2021. Given the seriousness of the allegations and the number of factual disputes in this case, the tribunal took great care making its findings of fact.

Findings of Fact

Background

23. The Claimant is a bright and talented gentleman – since entering the UK as an asylum seeker in 2004, when he tells us he had no English Language knowledge and no computer skills, he has completed a postgraduate degree in computer security systems and is now fluent in 5 languages including English. He is described as being "extremely technically competent" by the Respondent's employees [p243].

The UK Cyber Range Team

24. In Spring 2019 the Respondent started a new enterprise in the UK. It invested £500,000 in purchasing a "cyber range" of computers and software, which could be used as a virtualisation environment to create cyber-attack demonstrations affecting industrial control system networks. This technology, was built in Europe and managed remotely by the Respondent's employees in Europe. The intention was that a new Cyber Range team would be appointed in UK, to learn the new technology and then be able to use it for projects for the Respondent's clients.

25. Ms B was the first member of the UK Cyber Range team to be employed by the Respondent – she commenced work in November 2018, but was initially working on other projects.

26. In March 2019 the Respondent's European employees visited the UK site and set up the Cyber Range facility.

27. On 8th April 2019, Mr A started working for the Respondent, as a security consultant, but within weeks he was given a permanent employment role and became the Cyber Range Team Lead. The Claimant commenced employment with the Respondent on 15th April 2019 and joined the team of three tasked with delivering projects for clients using the Cyber Range. Whilst each member of the team had slightly different areas of expertise, this team of three worked together in close proximity on a daily basis, using an engineering room and a room which had the Cyber Range computers installed. All three employees had equal "administrator rights" on the cyber range. At a later date, Mr M joined the team, as a temporary consultant.

The Claimant's line manager

28. As the Cyber Range team was becoming established, the Claimant's line manager changed. The Respondent's computer systems recorded Mr P as the Claimant's line manager, but Mr C was his career manager and Mr E was initially his local on-site manager. By May 2019, Mr A had been asked to be the day-to-day manager of the Claimant and Ms B. If there had been any confusion at the outset, by May 2019 and particularly following the 23rd May 2019 team induction, the Claimant and Ms B had been told that Mr A was their day-to-day line manager and they were to follow his instructions.

29. (On 23rd May 2019 there was a team induction for the Claimant's team, which the Claimant attended. In one of the presentation slides, the Cyber Range Lead is identified as "technical owner of Range and daily tasking of security engineers" [p153])

30. By May 2019 the team (the team of 3 Cyber Range employees plus approximately 5 others working in the building) had a chat messaging facility set up for light-hearted comments, sharing articles, passing on items of news etc. The Claimant was a member of this chat group at all relevant times and participated in the friendly chatter on this facility, as did Mr A and Mr M.

31. Mr A had offered the Claimant lifts to the train station and on occasion the Claimant had accepted these.

32. During the first four weeks of employment, the Claimant was free to read company induction materials on the Respondent's employee portal and undertake self-guided research. One particular task that the Claimant and Ms B were asked to undertake (by Mr A) was to scan the building's internal network and identify any possible vulnerabilities. The Claimant spent hours undertaking this scanning and creating a full technical report; subsequently it transpired that Mr A hadn't required a full technical report. We mention this, as it indicates there were some communication difficulties between the three team members – we believe this stemmed from each member of the team having a different area of expertise (and a different understanding of what was involved in each task) and this being a new team in which each member was learning their role and what was expected of them.

Training on the Cyber Range

33. The Cyber Range was set up in a separate room. It comprised of a large video wall of 9 individual screens and 6 computers each with its own workstation. 3 of these computers / workstations (the "blue machines") were facing the video wall; 2 of these computers / workstations (the "red machines") were not facing the video wall and there was a separate administration computer/workstation (the "purple machine") located in the room.

34. Whilst in a simulation of a cyber attack, the blue machines would be tasked with "defence" and the red machines were tasked with "hacking", each of the computers (red, blue or purple) had the same software and could be used for either function. However, the team were still learning the capabilities of the machines, so the tribunal accept that the Claimant may not have been aware of this at the time.

35. During the week commencing 3rd June 2019, the Respondent's employee "W" came over from Europe, to train the UK Cyber Range team. None of the UK employees had prior knowledge of this particular new technology.

36. On the first day of training, upon arrival Mr A realised that only 3 of the computers (the blue machines) faced the video wall (that was going to be used for training). He chose to share a workstation and computer with Mr M, leaving 2 computers / workstations free for the Claimant and Ms B. Ms B arrived at the training session and was seated at a work station before the Claimant arrived. The Claimant sat at the remaining blue machine, which it transpired was experiencing a fault and could not be used. The first part of the training was a demonstration by W, so Mr A suggested the Claimant could share Ms B's computer (as Mr A and Mr M were doing) and take notes, just like the other members of the team were doing. When it came to the part of the training where the team started to use computers, W helped the Claimant to use a laptop that formed part of the Cyber Range equipment. The Claimant completed the training using that laptop.

Demonstrating the Cyber Range to clients

37. On 14th June 2019 the Respondent had arranged to give a demonstration of the Cyber Range's capabilities to an important client. This placed the Cyber Range team under some pressure, as they had a limited amount of time to become confident in using the range and become familiar with the needs of this particular client. Mr A thought the Claimant was getting the cyber range machines (blue/red /purple) ready for the presentation. However, the Claimant couldn't get the blue machines to work, so he was using the cyber range laptop to prepare large parts of the demonstration. On 13th June, things came to a head, when during the practice run of the demonstration, the Claimant, in an agitated voice, admitted the range computers couldn't perform the tasks they needed to perform for the demonstration the next day. It transpired that one of the problems was that a software update was needed, which Mr A was able to complete ahead of the demonstration.

38. To their credit, the demonstration on 14th June 2019 was a complete success; every member of the team had risen to the occasion.

39. The Claimant was off work ill with gastroenteritis for 8 days between 19th June and 2nd July 2019. This sickness bug affected a number of employees in the building at the time.

40. On 20th June 2019, the team had another Cyber Range demonstration arranged – again, to his credit, despite being ill with gastroenteritis the Claimant made it to work, to assist with his part of the demonstration.

Incident on 2nd July 2019

41. The Claimant returned to work from sick leave on 2nd July 2019. This was also Mr A's first day back in work as he had been on annual leave and then off with a chest infection. During a meeting in the morning, Mr A had emphasised that the Claimant needed to focus on working on the Cyber Range, so senior managers could see they were making progress with the new technology.

42. Two hours later, Mr E asked Mr A to check on the Claimant as he appeared to be working on the laptop again, rather than on the range's computers. As an aside, the tribunal accept that the Claimant was actually working on the range using the range laptop, however, managers were anxious that the Claimant should be using the range's 6 computers. Managers did not realise that there were still problems with some of the range's computers – these technical glitches were not identified and resolved until after the Claimant had ceased employment. As the Claimant hit a problem with a computer, he would revert to working on the range laptop.

43. When Mr A asked the Claimant why he wasn't using the Range Computers, the Claimant stated that "Blue 1" wasn't working. Mr A said this wasn't acceptable as the Claimant knew Blue 1 wasn't working (it was the machine that hadn't worked during training) – why wasn't the Claimant using the other machines? Mr A said that managers were becoming concerned that the Claimant was continuing to use the laptop rather than the machines. The

Claimant raised his voice and said that Mr A didn't know anything, that Mr A wasn't his manager, and that Mr A was a bad manager. The Claimant told Mr A that if he (Mr A) had problems at home he shouldn't bring them into work and take them out on him (the Claimant). Mr A then raised his voice, in part to be heard over the top of the Claimant, and asked the Claimant who he thought he was talking to and instructed the Claimant to stop what he was doing and leave the room.

44. At some point, alerted by the shouting, Mr E had entered the room and witnessed the Claimant say "No you leave the room!". Mr A did leave the room. Mr E stayed with the Claimant who continued to let off steam for some while. The Claimant complained to Mr E that he felt Mr A was "micro managing him". This was the first time that the Claimant had ever made any allegation of bullying. When the Claimant stood up and went to leave, Mr E tried to calm the Claimant and suggested he sit down and clam down, but the Claimant remained agitated and wanted to leave, so Mr E said he could go home. The Claimant said he didn't like coming into work anymore and said he wouldn't be coming back. The Claimant left his laptops and door key. Mr E suggested he take his security pass home with him so he could think about it overnight and if he changed his mind could come back to work the next day. The Claimant collected his belongings and left the building.

Resignation letter

45. On 3rd July 2019, the Claimant emailed a resignation letter to Mr E, which included the following:

"I got subjected to corporate bullying since I have recognised lots of micromanagement from one of my co-workers….Looking back I really asked myself, well, how did I end up in the circumstances that I ended up with now?...And I could never answer that, until I read about corporate bullying and then it all clicked together…I began to look at bullying itself. It was a regular and repeated belittling and humiliation or in some occasions intimidating me and its usually a single person in the workplace on a regular basis….It was involved things like regular verbal conflict against me whilst I was doing tasks giving to me lots of micromanagements, rudeness in the workplace directed at me"

46. After 3rd July 2019, the Respondent's Ms O spoke to the Claimant on a number of occasions and invited the Claimant to withdraw his resignation and explained the Respondent would investigate and action his complaints through its grievance procedures. The Claimant did not wish to return to work with the Respondent, but did forward further allegations for the Respondent to investigate as set out on pages 222 to 224 of the bundle. The tribunal notes that these allegations are described as occuring between 15th April to 3rd July, but they do not have specific dates or describe particular incidents. For instance they list "stamping feet behind me while I was trying to focus on my job. Not able to even make a simple suggestion…..huge amounts of micromanagements….regular verbal conflict..."

47. Even though the Claimant had not requested a grievance investigation, quite properly, the Respondent decided these were serious allegations and ought to be investigate.

48. Mr C conducted a thorough and fair internal investigation, interviewing 6 different witnesses that may have observed the Claimant's relationship with Mr A and/or Mr A's management style. As part of this he interviewed Mr E, who observed that the Claimant's relationship with Mr A was *"ok at first but then I sensed there was some tension, personally I think that was down to having to refocus [the Claimant] regularly. I am not sure [the Claimant] appreciated being told what to do and being 'micro-managed'. If anything Mr A was making sure he was on task due to the fact he would 'do his own thing' too often" [p254]".*

49. From the documents we have seen, we can see that there were genuine concerns about the Claimant's performance and in June 2019, the Respondent's managers were considering extending his 3 month probation. This had not yet been raised with the Claimant, but was being discussed by managers in emails preparing for probation interviews. In particular, the Respondent had two concerns:

    49.1. Mr A and Mr E were having to keep an eye on the Claimant to ensure he was devoting his time to the tasks that were needed at that point in time. Ms B has also noted that the Claimant was keen to undertake "cyber penetration work" (which is technically challenging and is a demonstration of the Claimant's technical ability), but this work was not required at this point in time. The Respondent needed the Claimant to focus on becoming confident in using the Cyber Range computers to be able to present demonstrations and to his managers, it often appeared that the Claimant was working on something else.

    49.2. The Respondent's managers were concerned that the Claimant had sometimes been late for work and was not making up the time to work his full hours in the week. The Claimant was commuting to work and on occasion the train was delayed causing the Claimant to be late. The Claimant was not familiar with the Respondent's flexi-working policies, which suggested that it was fine for him to start work later, whenever there was a problem, provided he made up the time by working later that day or later in the week.

    49.3. We are confident that, had the Claimant attended his probation meeting, which would have taken place in July 2019, and had these concerns been explained to him, these issues would have been resolved. These were issues that commonly arise when employees are learning a new role with a new employer. We are conscious that Mr A was also learning a new role as a manager and we are sure that, had the Claimant continued to work for the respondent, they would have found a better way of working together and overcome the communication difficulties that they had experienced.

50. After an extensive investigation, Mr C concluded that there was no evidence to substantiate any of the allegations that the Claimant had made. He recommended there was no need to take any further formal action. He did make the following recommendations as learning points from his investigation:

    50.1. he suggested Mr A have training on how to handle confrontational situations; and
    50.2. he suggested the Respondent could do better at communicating change to staff, for instance regarding line management changes.

Findings of Fact in relation to each allegation

51. ***Mr A told the Claimant that he was his line manager when he was not:***,

    51.1. Mr A was the Claimant's line manager from May 2019 onwards, so if he said it at all, he was telling the truth. The Tribunal are satisfied that from May 2019 onwards the Claimant (and Ms B) were aware that Mr A was their line manager on a day-to-day basis and that they ought to be following his instruction.

52. ***Mr A instructed the Claimant to report to him on everything he was doing as soon as possible, saying 'understand?' in an aggressive manner***

    52.1. Ms B was working alongside the Claimant and observing the interaction between the Claimant and Mr A. She is no longer employed by the Respondent. She has no reason to embellish her evidence. Her evidence was that she had <u>never</u> witnessed Mr A speak to the Claimant in an intimidating or aggressive manner at any time. She described Mr A's management style as relaxed.

    52.2. Mr A was having to check the Claimant was remaining on task as the team were being encouraged to use the Cyber Range computers and had to give demonstrations on those computers. We accept Ms B's evidence, that the Claimant had given her and Mr A the impression that he was more interested in undertaking technically more challenging work, such as cyber penetration work, so Mr A was having to check that the Claimant was completing the work he had been instructed to undertake.

    52.3. We do not accept the allegation that Mr A spoke to the Claimant in an aggressive manner. In addition to Ms B's evidence, this allegation does not fit with the relationship that existed between the Claimant and Mr A. In oral evidence, the Claimant recalled a conversation with Mr A in which Mr A was supporting the Claimant and expressing his sympathy in response to the Claimant's concern about recent events in Country X. Mr A offered and indeed gave the Claimant lifts to the train station. It is not likely that Mr A would be interacting with the Claimant like this, if he was prone to speaking to the claimant in an aggressive manner.

53. ***Mr A instructed the Claimant to relocate server and firewall devices within the Cyber Lab***

53.1. Mr A did ask the Claimant to help him to relocate the server and firewall devices. Mr A was also carrying servers and equipment and Ms B was involved in checking these were placed correctly. Mr A asked the Claimant to help in this task and the Claimant agreed to help.

54. **Mr A told the Claimant he would have to use his annual leave entitlement to attend CISSP training**,

54.1. Here we believe the Claimant has genuinely misunderstood the discussion. The Claimant and others were invited to attend CISSP training. The Claimant explained this was very valuable training and a privilege to be invited to attend this. Had he continued in employment he would have attended this as it would have been valuable for his career. This course was not available locally; it would have required the Claimant and other attendees to travel and stay away from home. Mr A enquired whether the Claimant and Ms B would like to attend this training. As part of the discussion, Mr A suggested the Claimant check when it would be convenient for the Claimant to attend, as the Claimant has family commitments. Mr A has never suggested the Claimant would need to use his annual leave to attend this training.

55. ***On the first day of Cyber Range training, Mr A failed to prepare a computer station for the Claimant, but told him to sit and just take notes***.

55.1. As explained in paragraph 36, it was just a matter of luck that the Claimant sat at the machine that turned out to be faulty. Any one of the 4 attendees could have sat at that machine. Mr A and Mr M were having to share a computer and the Claimant could have shared a computer with Ms B.

55.2. Mr A was not responsible for setting up the room – this had been completed by W earlier in the year.

56. ***Mr A made adverse comments to the Claimant about his use of a laptop at work***

56.1. We accept that Mr A did tell the Claimant on a number of times that he should not be using the laptop. Mr A was trying to direct the Claimant to use the 6 Cyber Range machines as senior managers were keen for the team to be using these. The Respondent had invested £500,000 in this equipment and the team had to be able to use these machines for demonstrations to clients.

57. ***Mr A questioned the Claimant as to why the Claimant had administration rights via the laptop***

57.1. We did not have any evidence as to when this alleged conversation took place and none of the witnesses could recall a particular conversation.

Mr A and Ms B understood that all 3 members of the team had administration rights on the Cyber Range as they needed this to be able to set up and demonstrate the system.

58. Mr A questioned the Claimant as to why he was able to delete entities on his laptop when Mr A could not

58.1. We did not have any evidence as to when this alleged conversation took place. No witness could recall a particular conversation and neither Mr A nor Ms B recalled the Claimant ever being asked this.

59. ***Mr A and Mr M told the Claimant they were employed by M15 and M16, that they were watching the Claimant constantly and that he should be very careful what he was doing***

59.1. We find it more likely than not that the Claimant had misunderstood a conversation. Mr A and Mr M had met once before, years earlier, working on a project for the Ministry of Defence and may have discussed this previous work experience. Neither man had ever worked for MI5 or MI6. We do not accept that this remark was made to the Claimant.

60. Mr A refused to let the Claimant move the wireless router on his desk to a safe distance away

60.1. To assist with Wi-Fi connection, initially a Netgear Orbi was placed on the Claimant's desk – Mr A was working equally as close to this wireless router as the Claimant. When the Claimant complained, Mr A arranged for it to be moved to a corridor and it was relocated within a day or two.

60.2. During oral evidence, the Claimant suggested there was another router (in addition to the Netgear Orbi) that was placed on his desk. Neither Ms B or Mr A recall there ever being any additional router on the Claimant's desk.

60.3. The tribunal find it unlikely that there were two routers placed on the Claimant's desk – the Claimant had complained about the Netgear Orbi and this had been relocated – if a second router had appeared on his desk, we are confident the Claimant would have felt able to complain about that one and get it relocated. As it is agreed that Mr A relocated the Netgear Orbi, we do not accept the allegation that he refused to relocate a router.

61. ***The Respondent's South West office issued the Claimant with a security pass with the flag of Country X on it, despite the fact the Claimant had the right to reside in the UK, when other overseas employees were given badges with the Union Jack on them***

61.1. The Tribunal are satisfied that this was a necessary security measure – the security passes are issued by the Respondent's South West office, where a number of employees are required to attend government sites.

Often the Respondent's work requires security clearing by United Kingdom Security Vetting – this is a government provider and is not under the control of the Respondent. A person's nationality is a factor that is considered by UKSV. The Claimant was aware of colleagues with European flags on their security passes as well as UK flags. The Claimant seemed to be particularly aggrieved that Welsh employees had a Union Jack rather than a Welsh Dragon flag. We are satisfied that the Respondent was simply applying the protocols required by UKSV.

62. ***Mr A stamping feet behind the Claimant while he was trying to focus on his job***

62.1. Ms B has never witnessed Mr A behave in this manner. The Claimant has not provided us with any evidence relating to any specific incident and therefore he has not been able to prove this did occur.

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63. ***The Claimant found his coffee mug in the bin in the kitchen***,

63.1. The first time the Claimant made anyone aware of this was in the further information that he provided to the Respondent on 24th July 2019. Again unfortunately we have not seen or heard any evidence about specific date(s) on which this occurred. None of the Respondent's witnesses have ever seen the Claimant's mug in the bin. The Tribunal note that the kitchen is shared by a number of other individuals besides the Cyber Range team of employees. The Claimant has not able to prove this did occur.

64. ***Mr A asked the Claimant not to wear his lanyard (work pass) in public as this could make him a potential threat to terrorists***

64.1. We note that the Respondent advises <u>all</u> employees not to wear their lanyard in public. The type of work undertaken by the Respondent, for instance working on cyber security projects for government bodies, etc could be of interest to hostile parties, such that any individual employee could find themselves in a dangerous situation if, outside of work, they were identified, by a hostile party, as working for the Respondent.

64.2. If Mr A did advise the claimant not to wear his lanyard in public, he was doing so out of genuine concern for the Claimant's safety.

65. ***Mr A checked up on the Claimant while he was in the bathroom or the kitchen***

65.1. In evidence, Mr A admitted that he did check on the Claimant when he was in the bathroom as this was when the Claimant had been ill and the Claimant had been gone for a long period of time. The tribunal are satisfied that Mr A was genuinely concerned about he Claimant's health.

66. ***Mr A checked the Claimant's coat pocket while he was in the kitchen preparing his lunchbox***

66.1. In evidence, the Claimant confirmed that he had never actually see anyone check his coat pocket – this was a suspicion that he formed when he noted his coat pocket had fallen open whilst the coat was hanging up. The Claimant has no further evidence to offer on this allegation. The Claimant did not make any enquiries at the time and so he cannot be sure whether there was an innocent explanation for the coat pocket hanging open, such as someone brushed against the coat and it rearranged its position. The Claimant has not been able to establish that it is more likely than not that Mr A checked his coat pocket.

Relevant law

67. The provisions of the Equality Act 2010 ("EqA") apply to these claims. EqA protects employees from discrimination based on a number of "protected characteristics". These include race (see Section 9 EqA).

68. Chapter 2, EqA lists a number of forms of "prohibited conduct". In this claim, the Claimant alleges two types of prohibited conduct: direct discrimination and harassment.

The claim of direct discrimination

69. S 39(2) EqA provides an employer must not discriminate against an employee by dismissing them or subjecting them to any other detriment.

70. Direct discrimination is defined by S13 EqA (so far as is material) in these terms:

(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats of would treat others.

71. Direct discrimination is comparatively simple: It is treating one person less favourably than you would treat another person, because of a particular protected characteristic that the former has. The protected characteristic has to be the reason for the treatment. Sometimes this will be obvious, as when the characteristic is the criterion employed for the less favourable treatment. At other times, it will not be obvious, and the Tribunal will need to consider the matters the decision maker had in mind, including any conscious or sub-conscious bias. No hostile or malicious motive is required. However, direct discrimination expressly requires a causal link between the less favourable treatment and the protected characteristic.

72. The Claimant has to demonstrate less favourable treatment: it is not enough to show he has been treated differently.

73. S 23(1) EqA provides there should be no material difference in circumstances between the claimant and any comparator or hypothetical comparator (save for the protected characteristic of race).

The claim of Harassment

74. S40 EqA provides an employer must not harass an employee.

75. Harassment is defined in S26 EqA, which provides:

> *(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.*

76. The effect of s26 is that a claimant needs to demonstrate 3 essential features: unwanted conduct; that has the proscribed purpose or effect; and that relates to his race. There is no need for a comparator.

77. The EHRC Employment Code explains that unwanted conduct can include "a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour".

78. "Unwanted" is the same as "unwelcome" or "uninvited."

79. When considering whether the conduct had the proscribed effect, the tribunal undertakes a subjective/objective test: the subjective element involves looking at the effect the conduct had on the claimant (their perception); the objective element then considers whether it was reasonable for the claimant to say it had this effect on him (see *Richmond Pharmacology v Dhaliwal [2009] ICR 724).* The EHRC Employment Code notes that relevant circumstances can include those of the claimant, including his/her health, mental health, mental capacity, cultural norms and previous experience of harassment; it can also include the environment in which the conduct takes place.

80. In *Weeks -v- Newham College of Further Education UK EAT 0630/11* Mr Justice Langstaff said that ultimately findings of fact in harassment cases had to be sensitive to all the circumstances; context was all important.

81. It was pointed out by Elias LJ in the case of *Grant v HM Land Registry [2011] EWCA Civ 769* that the words "violating dignity", "intimidating, hostile, degrading, humiliating, offensive" are significant words. As he said:

"Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."

82. Exactly the same point was made by Underhill P in *Richmond Pharmacology*

"..not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

83. "Violating" is a strong word. Offending against dignity, hurting it, is insufficient. The same might be said of the words "intimidating" etc. All look for effects which are serious and marked, and not those which are, though real, truly of lesser consequence.

84. In *Warby v Wunda Group plc, UKEAT 0434/11, 27 January 2012,* context was again emphasised

"…we accept that the cases require a Tribunal to have regard to context. Words that are hostile may contain a reference to a particular characteristic of the person to whom and against whom they are spoken. Generally a Tribunal might conclude that in consequence the words themselves are that upon which there must be focus and that they are discriminatory, but a Tribunal, in our view, is not obliged to do so. The words are to be seen in context;"

85. The Tribunal should consider the circumstances shown by the facts it found as a whole. In *Read and Bull Information Systems Ltd v Stedman [1999] IRLR 299* , Morison J noted:

"It is particularly important in cases of alleged sexual harassment that the fact-finding tribunal should not carve up the case into a series of specific incidents and try and measure the harm or detriment in relation to each. As it has been put in a USA federal appeal court decision (eighth circuit) [USA v Gail Knapp (1992) 955 Federal Reporter , 2nd series at page 564]: 'Under the totality of the circumstances analysis, the district court [the fact finding tribunal] should not carve the work environment into a series of incidents and then measure the harm occurring in each episode. Instead, the trier of fact must keep in mind that "each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created may exceed the sum of the individual episodes." ""

An Employer's liability?

86. S109 EqA provides that anything done by an employee in the course of his employment must be treated as being also done by the employer. It does not matter whether that thing is done with the employer's knowledge or approval. However, it is a defence for the employer to show that it took all reasonable steps to prevent that employee from doing that thing, or from doing anything of that description.

The burden of proof in discrimination claims

87. S136 Equality Act 2010 establishes a "shifting burden of proof" in a discrimination claim. If the claimant establishes facts, from which the tribunal could properly conclude, in the absence of an adequate explanation, that there has been discrimination, the tribunal is to find that discrimination has occurred, unless the employer is able to prove that it did not. In the well-known cases of *Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 332 and Igen Ltd & others v Wong & others [2005] IRLR 258*, the Court of Appeal gave the following guidance on how the shifting burden of proof should be applied:

    87.1. It is for the claimant to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant that is unlawful. These are referred to below as "such facts".
    87.2. If the claimant does not prove such facts their discrimination claim will fail.
    87.3. It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination, even to themselves.
    87.4. In deciding whether the claimant has proved such facts, remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.
    87.5. It is important to note the word "could". At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.
    87.6. In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.
    87.7. These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw …from an evasive or equivocal reply to a questionnaire….
    87.8. Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in

determining, such facts. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

87.9. Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of [eg race], then the burden of proof moves to the respondent.

87.10. It is then for the respondent to prove that he did not commit that act.

87.11. To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of race, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.

87.12. That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that race was not a ground for the treatment in question.

87.13. Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

88. In *Madarassy v Nomura International plc [2007] IRLR 246*, the Court of Appeal warned against allowing the burden to pass to the employer where all that has been shown is a difference in treatment between the claimant and a comparator. For the burden to shift there needs to be evidence that the reason for the difference in treatment was discriminatory. It is also well established that treatment that is merely unreasonable does not, of itself, give rise to an inference that the treatment is discriminatory.

89. It is also established law that if the tribunal is satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious discrimination, then it is not improper for a tribunal to find that even if the burden of proof has shifted, the employer has given a fully adequate explanation of why they behaved as they did and it had nothing to do with a protected characteristic (see *Laing v Manchester City Council 2006 ICR 1519)*.

90. Very little direct discrimination is overt or even deliberate. The tribunal should look for indicators from the time before or after the decision, which may demonstrate that an ostensibly fair-minded decision was, or equally was not affected by racial bias. (see *Anya v University of Oxford [2001] ICR).*

91. Having reminded ourselves of the authorities on the burden of proof, our principle guide must be the straightforward language of S136 EqA itself.

Time Limits

92. S123 EqA prescribes time limits for presenting a claim:

(1) …Proceedings…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 tribunal thinks just and equitable

…

(4) For the purposes of this section-

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

93. The leading authority on determining whether "conduct extends over a period of time", or not, is the Court of Appeal decision in the *Commissioner of Police of the Metropolis v Hendricks 2003 ICR 530*. This established that the employment tribunal should consider whether there was an "ongoing situation" or "continuing state of affairs" (which would establish conduct extending over a period of time) or whether there were a succession of unconnected specific acts (in which case there is no conduct extending over a period of time, thus time runs from each specific act). As Lord Justice Jackson indicated in *Aziz v First Division Association [2010] EWCA Civ 304*, in considering whether there has been conduct extending over a period, one relevant but not conclusive factor is whether the same individuals or different individuals were involved in those incidents.

Conclusions

Direct discrimination

94. The tribunal asked itself whether the Claimant had been treated less favourably than a person that did not originally live in Country X would have been treated:

95. ***Mr A told the Claimant that he was his line manager when he was not:***,

95.1. We found as a fact that this assertion was not factually correct. There is no "less favourable treatment".

96. ***Mr A instructed the Claimant to report to him on everything he was doing as soon as possible, saying 'understand?' in an aggressive manner***

96.1. We did not accept the allegation that Mr A spoke to the Claimant in an aggressive manner. There is no "less favourable treatment".

97. ***Mr A instructed the Claimant to relocate server and firewall devices within the Cyber Lab***

97.1. Mr A was also carrying servers and equipment and Ms B was involved in checking these were placed correctly There is no "less favourable treatment".

98. ***Mr A told the Claimant he would have to use his annual leave entitlement to attend CISSP training****,*

98.1. We accepted that Mr A has never suggested the Claimant would need to use his annual leave to attend this training. There is no "less favourable treatment".

99. ***On the first day of Cyber Range training, Mr A failed to prepare a computer station for the Claimant, but told him to sit and just take notes***.

99.1. We accepted that Mr A was not responsible for setting up the room and that Mr A was suggesting the Claimant do what the other members of the team were doing, sharing computers and taking notes. There is no "less favourable treatment".

100. ***Mr A made adverse comments to the Claimant about his use of a laptop at work***

100.1. We accepted that Mr A did tell the Claimant on a number of times that he should not be using the laptop. Mr A was trying to direct the Claimant to use the 6 Cyber Range machines as senior managers were keen for the team to be using these. The Respondent had invested £500,000 in this equipment and the team had to be able to use these machines for demonstrations to clients. We are satisfied that Mr A would have taken exactly the same approach with an employee that did not share the Claimant's race – the reason Mr A was asking the Claimant to do this was because the Respondent had demonstrations coming up; it had nothing whatsoever to do with the Claimant being originally from Country X. There is no "less favourable treatment".

101. ***Mr A questioned the Claimant as to why the Claimant had administration rights via the laptop***

101.1. We did not accept that this had occurred. There is no "less favourable treatment".

102. ***Mr A questioned the Claimant as to why he was able to delete entities on his laptop when Mr A could not***

102.1. We did not accept that this had occurred. There is no "less favourable treatment".

103. ***Mr A and Mr M told the Claimant they were employed by M15 and M16, that they were watching the Claimant constantly and that he should be very careful what he was doing***

103.1. We did not accept that this had occurred. There is no "less favourable treatment".

104. ***Mr A refused to let the Claimant move the wireless router on his desk to a safe distance away***

104.1. We did not accept the allegation that Mr A had ever refused to relocate a router. There is no "less favourable treatment".

105. ***The Respondent's South West office issued the Claimant with a security pass with the flag of Country X on it, despite the fact the Claimant had the right to reside in the UK, when other overseas employees were given badges with the Union Jack on them***

105.1. The tribunal accepted that other employees did not have a UK flag on their badges – there were employees with European flags. We are satisfied that the Respondent was simply applying the protocols required by UKSV. The Claimant has not been treated less favourably than employees were not born in Country X.

106. ***Mr A stamping feet behind the Claimant while he was trying to focus on his job***

106.1. We did not accept that this had occurred. There is no "less favourable treatment".

107. ***The Claimant found his coffee mug in the bin in the kitchen***,

107.1. We did not accept that this had occurred. There is no "less favourable treatment".

108. ***Mr A asked the Claimant not to wear his lanyard (work pass) in public as this could make him a potential threat to terrorists***

108.1. We note that the Respondent advises <u>all</u> employees not to wear their lanyard in public. There is no "less favourable treatment".

109. ***Mr A checked up on the Claimant while he was in the bathroom or the kitchen***

109.1. The tribunal found that Mr A checked on the Claimant as he was genuinely concerned about the Claimant's health. We are satisfied that Mr A would have taken exactly the same approach with an employee that did not share the Claimant's race – Mr A knew the Claimant had just returned from sick leave and was checking he was ok. There is no "less favourable treatment".

110. ***Mr A checked the Claimant's coat pocket while he was in the kitchen preparing his lunchbox***

110.1. We did not accept that this had occurred. There is no "less favourable treatment".

111. The Claimant has not been able to establish facts, from which we <u>could</u> conclude there has been less favourable treatment. For the avoidance of doubt, even if the Claimant had been able to establish facts, we are satisfied

that the Respondent's treatment of the Claimant, has at all times had nothing whatsoever to do with the Claimant's race. The Respondent has not subjected the Claimant to direct race discrimination.

Harassment

112. Of the incidents listed, the only experience that could be described as unwanted conduct was:

113. ***Mr A made adverse comments to the Claimant about his use of a laptop at work***

113.1. We accepted that Mr A did tell the Claimant on a number of times that he should not be using the laptop and that this might amount to unwanted conduct.

113.2. However, we did not find this to be "Unwanted conduct related to race". There is no link between this conduct and the Claimant's race.

113.3. Mr A was trying to direct the Claimant to use the 6 Cyber Range machines as senior managers were keen for the team to be using these. We are satisfied that Mr A would have taken exactly the same approach with an employee that did not share the Claimant's race – the reason Mr A was asking the Claimant to do this was because the Respondent had demonstrations coming up; it had nothing whatsoever to do with the Claimant's country of birth.

114. The Tribunal considers that there are no facts from which the Tribunal could properly infer that either consciously or sub-consciously, Mr A was motivated, by the Claimant's race in subjecting the Claimant to this unwanted conduct.

115. As such the Tribunal finds there has been no act of racial harassment.

Discriminatory Constructive Dismissal?

116. The Tribunal asked itself whether the Respondent had acted in such a way as to destroy or seriously damage the Claimant' confidence in it, in breach of Section 13, alternatively Section 26 Equality Act 2010. We found that there has not been any act that breached s13 or s26 Equality Act 2010. For the sake of completeness, the Respondent has not acted in a way that would have seriously damaged the Claimant's confidence in it. In particular the Tribunal would praise the Respondent for the lengths it went to, to encourage the Claimant to return to work and the fair and thorough investigation that it conducted.

117. We understand the Claimant was anxious about working in this particular industry given his race. We understand his concern about his family in Country X, if it were to become public knowledge that the Claimant worked

in this field. Unfortunately, that anxiety appears to have tainted the Claimant's perception. For the Claimant, his race was a big issue; for those working alongside him, it was not. It is a great shame that the Claimant did not continue with his employment as we are sure that his probation review would have given everyone an opportunity to resolve the challenges involved in settling into a new working environment and would have helped the Claimant to overcome his anxieties. The Claimant has a lot to offer future employers; we hope he is able to put this experience behind him and find new employment where his obvious talents are suitably rewarded.

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Employment Judge Howden-Evans

Date: 13 February 2021

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

18 February 2021

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FOR EMPLOYMENT TRIBUNALS