Case number: 2601034/2020 (V) Reserved

EMPLOYMENT TRIBUNALS

BETWEEN:

Claimant		**Respondent**
Mr R Justin	And	Pure Gym Ltd (1) Atlas Facilities Management Limited (2)

AT A FINAL HEARING

Held: Remotely via CVP **On**: 3 & 19 March 2021

Before: Employment Judge R Clark.
Mr R Loynes.
Mr A Wood.

REPRESENTATION
For the Claimant: Mr I Clay, Solicitor
For the 1st Respondent: No attendance as claim withdrawn
For the 2nd Respondent: Ms L Broom, Senior HR Adviser

JUDGMENT

The unanimous decision of the tribunal is that: -

1. The claim of harassment against the first respondent is **dismissed** upon withdrawal by the claimant.

2. The claim of harassment against the second respondent **fails and is dismissed**.

3. The second respondent shall pay the claimant's costs of and occasioned by the adjournment summarily assessed in the undisputed sum of **£1,173.90**

REASONS

1. Introduction

1.1 By a claim presented on 29 March 2020, Mr Justin claims financial compensation for harassment related to race. The claim arises from the language used to describe third parties by one of his colleagues.

2. Preliminary Issues & Costs

2.1 The claim against the first respondent has very recently been withdrawn and the matter proceeds against the second respondent only. This final hearing had been listed with a time estimate of two days. The case was reviewed by Regional Employment Judge Swann and the time estimate reduced to one day. The limited issues, reduced evidence and focused examination of witnesses meant that the case looked destined to conclude within that time. However, close to the conclusion of the evidence, what had begun with minor issues with the second respondent's disclosure turned into a more significant issue in respect of Ms White's notes of her investigation following Mr Justin's resignation. The tribunal and Mr Clay all understood that what we were being told was that those hand-written notes were still in existence but did not add anything. It is not the role of one party to decide what the other side may rightly seek inspection of when deciding whether a document is disclosable or not. On further exploration of the disclosure search undertaken by the second respondent, we became concerned that there were potentially significant deficiencies. Whilst we anticipated that disclosure of those and other documents identified might not alter the course of the case, we accepted that Mr Clay had a professional obligation to his client to consider what those documents showed before proceeding further. We granted his application for an adjournment for that further disclosure to take place and indicated that the associated application for costs incurred because a second day would now be required would be considered at the renewed hearing, should the application be maintained.

2.2 We made an order for disclosure and inspection by copy. Because of the apparent past failings, we included in the order a requirement for the respondent to file a disclosure statement. That was done. In the event, the resulting disclosure and supplementary bundle did not contain a great deal more and, significantly, it did not include the notes of the investigation. Mr Clay understandably intimated an application for an order striking out the response. In the event, that was not maintained. The explanation provided was that the respondent had conducted a full search but the notes that Ms White had referred to in evidence could not, in fact, be located and that they must have been destroyed in accordance with the standard practice of this respondent. Whilst we were not given an adequate explanation as to why the possibility of their destruction was not mentioned at the time the adjournment and costs were being raised two weeks earlier, Mr Clay took a philosophical approach and did not proceed with the application for strike out. He did, however, maintain his application for costs. We took the view that the adjournment was wholly caused by the second respondent's conduct of the proceedings. Its main objection to the principle of costs

was on the basis that both parties had been deficient in their disclosure. We were satisfied the power to award costs was engaged either on the ground of the respondents conduct of the proceedings being unreasonable in respect of disclosure and/or its failure to comply with a case management order. We were satisfied that once engaged, it was appropriate to exercise the discretion to make a costs order. In that regard, we did reflect on the fact that Mr Justin had not disclosed his resignation email but that had not led to any adjournment or other application by the either respondent. As to the amount of the costs order, Mr Clay had served a costs schedule adopting the formality of summary assessment in the County Court in accordance with our order. The second respondent, correctly in our judgment, did not take issue with the quantum claimed which was both modest and entirely proportionate. Accordingly, the question of the second respondent's ability to pay was not put in issue and we awarded the costs in the sum claimed.

3. The Substantive Issues

3.1 The claims are brought as claims of harassment under s.26 of the Equality Act 2010. Whilst, theoretically at least, an alternative claim of direct discrimination under s.13 of the 2010 Act could be advanced on the same facts, the circumstances of what is alleged and the consequences of the exclusionary definition of detriment in section 212 of the 2010 Act is such that the claimant confirmed this claim proceeds as one of harassment only.

3.2 The issues between the parties had been canvassed at a telephone preliminary hearing. They were identified as follows: -

a) Do the following allegations amount to unwanted conduct?

(i) ***it is not in dispute that the second respondent's employee, Markham Pell, made an entry in the comments book describing three men as "3 coloured guys".***

Whilst the allegation of unwanted conduct relates only to the entry in the comments book, we think it important to consider that comment both in itself, and in the context of the exchange that then followed.

b) If so, did it relate to the protected characteristic of race.

c) Did it have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? (what we refer to as the proscribed purpose)

d) Did it have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? (what we refer to as the proscribed effect) taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

4. Evidence

4.1 We have heard from Mr Justin himself. For the second respondent we have heard from Eileen White, the regional supervisor, and Markham Pell, the colleague who made the entry in the comments book. All adopted affirmed written witness statements.

4.2 We had also been provided with the witness statements of the witnesses that would have been called by the first respondent. They are Mr Jake Watkins, the Manager of the Derby Gym and Johanna Annets, Head of Compliance and Safety. They have not been called by either remaining party. Their evidence is not formally evidence before us albeit we have read it and, it seems, nothing much turns on it in view of the limited areas of factual dispute in this case that they could properly comment on.

4.3 We received a small bundle running to 145 pages. This was supplemented following the adjournment with a further 5 documents. Both parties made brief oral closing submissions.

5. Facts

5.1 It is not the Tribunal's purpose to resolve each and every last dispute of fact between the parties. Our focus is to make such findings of fact as are necessary to answer the issues in the claim before us and to put them in their proper context. Having said that, the central facts in this case can be stated with brevity and much of what happened is not seriously in dispute. On that basis, and on the balance of probabilities, we make the following findings of fact.

5.2 The first respondent, Pure Gym Limited ("Pure Gym") operates around 250 fitness gyms around the country. The second respondent, Atlas Facilities Management Limited ("Atlas") is a contract cleaning company. It is one of two contactors providing cleaning services to Pure Gym nationally under a commercial contract. One such Pure Gym establishment is its Derby Gym.

5.3 It has a particularly formalised recruitment process using an online platform called "Indeed.com." One feature of that seems to be that recruiters and candidates obtain an "indeedmail.com" email address which, we infer, is intended as a means of communication during the recruitment and selection process. In this case we have seen such an email address used for, and by, both Mr Justin and Ms White. In both cases, that is not their usual email address. Ms White was unable to explain how one gains access to that email account outside the recruitment process although both she and Mr Justin seem to have used those email addresses, possibly inadvertently, at subsequent stages of this case. In both cases, we accept the emails were innocently sent but, equally, that they were not always knowingly received by the intended recipient at that address, certainly in Ms White's case.

5.4 Ryan Justin was employed by Atlas from 18 December 2019 until his resignation given on 8 February 2020 with immediate effect. He worked under a written contract of employment. The purpose of his employment was to provide cleaning services at the Derby Gym. He also took on additional cleaning duties at other contracts operated by Atlas in the

region such that we find there clearly was other work available locally other than at the Derby site.

5.5 Mr Justin describes his racial identity by reference to skin colour as black.

5.6 He was one of three cleaning operatives employed to work at the Derby site. One was Steven Hayes who we have not heard from in evidence. The other was Markham Pell who is central to this case. Between the three of them they each worked to a rota of exclusively night work. On any night, one would be employed on a short shift from 10pm until 1am, another on a long shift from 10pm until 6am the following morning.

5.7 Mr Pell had worked there for about 2 years before the claimant joined and was familiar with the local systems and equipment. As such he took on the role of training the claimant although, apart from that, there was no hierarchy and they all worked in the same role as cleaning operatives. They each reported to the regional manager, Eileen White.

5.8 We find Mr Pell and Mr Justin had got on well and enjoyed a good working relationship over the previous 2 months and had not previously experienced any issues between them. The normal rota meant they would work together on at least 2 nights each week plus any additional coinciding shifts either performed.

5.9 Atlas operated a “comments book” at the Derby gym as a means of maintaining basic communications between shifts and as between its staff and the gym manager, in this case Mr Watkins. It is typically used to relay issues of a practical and operational nature and is a helpful tool as it is unlikely that there will be any Pure Gym staff remaining in attendance when the cleaning staff attend and vice versa. Typically, comments relate to areas not cleaned or the need for additional cleaning, matters of lost property and the like. Of the Pure Gym staff, we find it will normally be only the manager or assistant manager that would view the comments book. It is a private system kept in a locked cupboard. Members of the public should not have access to it.

5.10 On arriving at work on the evening of Wednesday 5 February 2020, Mr Justin viewed the comments book and noticed his colleague, Markham Pell, had written an entry in it a few days earlier referring to an incident (that is the Sunday evening’s night shift of 2, into Monday 3, February 2020). The entry said: -

> ***“Steve was training last night (this morning) and informed me that 3 coloured guys were messing around (i.e. play fighting and not really training) (in basement)”***

5.11 The context of the entry was that 3 customers of the gym had been misbehaving in their use of the gym facilities. The “Steve” referred to is the colleague, Steve Hayes, who was off duty, but using the gym facilities. He had relayed a concern to Markham and suggested it was put in the comments book. We find the material words used are Mr Pell’s own, notwithstanding the way the entry suggests as relaying comments from Steve. In that regard, we have not been told why the colour or race of these three individuals was relevant to the record being made but, equally, the circumstances in which Mr Pell comes to put the entry in the book is entirely second hand based on what Mr Hayes said. We conclude it is more likely

than not that Mr Hayes gave a description of their race or skin colour when relaying the message which Mr Pell struggled with adopting.

5.12 Mr Justin took exception to the reference to “3 coloured guys”. He underlined it and added his own annotation: -

“Not coloured”

5.13 Although upset by the use of the outdated word, he says things like this happen all the time and he decided to talk to Markham in a spirit of educating and explaining why that may be offensive to a black person. He says he was not happy but was content to wait what would be about three days until he next saw Mr Pell. We find he did not report his concerns to his manager or HR or to anyone else in authority.

5.14 As for Mr Watkins’ response to the comment during the previous week, we have not heard from him but there is a hearsay statement before us dealing with this matter. We find he saw the comment at a time after the additional annotation from Mr Justin had been added. Upon reading the note, Mr Watkins took the view he was not required to do anything with it but appreciated the sensitivities of the language that had been used and felt uncomfortable putting any response. Mr Watkin had no managerial responsibility as between Mr Pell and Mr Justin or any of the Atlas staff.

5.15 We found Mr Pell to be genuine in his explanation of how this term was used. We found him to be a particularly naïve and timid individual and, ironically, that he had chosen this word in the misplaced belief it was more appropriate, albeit he subsequently realised and accepts it could cause offense. We accept he has a general concern not to offend and some experience of being on the receiving end of negative attitudes in the context of cultural diversity. We accept he is himself upset that his language caused upset to Mr Justin. Mr Pell is an individual who presents as someone with certain vulnerabilities. He is an older man who describes himself as living a simple life and having been raised in an old-fashioned household. He suffers with anxiety and depression to such an extent that he has positively chosen this isolated, nocturnal cleaning work as he finds it brings him into contact with far fewer people. That, in turn, means he can manage and control the anxiety he experiences with interactions with others, particularly in conflict situations. We accept he will go some way to avoid confrontation if he can. His own life experiences are such that he is aware of the need to be culturally sensitive and is conscious of not inadvertently offending others, not least because that could itself be the source of the conflict he otherwise tries to avoid. On the night in question, we understand the individuals seen messing around in the gym might have been more accurately described as Asian or South Asian in their ethnic origin. Wrongly, he now understands, he had been anxious about describing anyone as “black” as he perceived that could be offensive generally and his restricted vocabulary was compounded further when trying to describe individuals from an Asian background as black.

5.16 Mr Pell could not recall receiving any equality and diversity training whilst working for this employer. In fact, there is no training to speak of. What exists is limited to some form of self-directed reading kept in the local sites with no apparent monitoring of what is or is not being undertaken by the staff.

5.17 Mr Justin and Mr Pell were next on duty together on the night of Saturday 8 February 2020, going into Sunday morning. Mr Pell was rostered for the long shift, Mr Justin the short shift. Mr Hayes was present but, once again, he was off duty and was either about to start or had just finished a session using the gym facilities. Mr Pell had arrived slightly before 10pm as he was aware Mr Justin needed training on the floor buffer machine and had planned to offer to train him at the start of that shift. The two accounts of what then happened between them that night do not wildly differ. What happened lasted a matter of a minute or two.

5.18 Mr Justin arrived and entered the staff room. Because of what then followed, we find he must have had the planned discussion about the entry in the comments book uppermost in his mind Because of the speed with which things degenerated into perceived threats of violence, we find what Mr Justin described as a discussion the spirit of education and information had become closer to one of confrontation. Mr Pell greeted him with the plan to conduct the training on the buffer machine and suggested that they did that first. Mr Justin refused saying he was not interested. We find this refusal took Mr Pell by surprise and signposted a conflict that he had not anticipated. He asked why. Mr Justin declined to answer but stated that the entry he had made in the comments book was a racial term that could offend black people. In what had by then quickly become a tense situation in which Mr Pell's anxiety was now physically manifesting with him shaking, we find he tried to explain himself. He said that he did not understand it to be nasty or upsetting and he was not being racist. Mr Justin described what had been written was racists. Mr Pell then referred to the fact that the gym manager, Mr Watkins, must have seen it and had not taken issue with it. Mr Pell also turned to Mr Hayes who was in the vicinity but otherwise not engaging in the exchange and asked him whether he had done anything wrong. Mr Hayes apparently replied with words to the effect of "you can't use that word".

5.19 We accept Mr Pell had not intended any offence to be caused by the word and, indeed, the claimant does not put his harassment claim on the basis that the conduct had the proscribed purpose. We find Mr Pell had in fact used it out of a naivety as to its potential connotations and in a wholly misplaced belief describing someone as black could itself potentially cause offence.

5.20 It is Mr Pell's response which Mr Justin describes as a defensive response suggesting there was nothing wrong. We do not find that is what Mr Pell was trying to convey in the midst of an unexpected moment of confrontation that he was ill equipped to deal with emotionally. We find what was understood by Mr Justin to be a denial of doing anything wrong, was Mr Pell articulating why he did not know there was anything wrong with what he had done. We do not find his references to what Mr Watkins did or did not do, or his attempt to seek explanation from Mr Hayes reasonably to be suggesting he was saying Mr Justin was wrong in his interpretation. In addition, this exchange unfolded in seconds and Mr Justin was interpreting Mr Pell's panic that he had caused offence to anyone as a denial that it was offensive to the extent he began to feel his own emotions rising causing him to say, "he had been in prison and had met people like [Mr Pell] before and he could either knock him to the ground right now or walk out".

5.21 Mr Justin says he made his mind up to resign there and then. He left the building and would not return to work again. As to why he resigned as opposed to raising his concerns with his manager, he told us it was because he had no faith in the area manager dealing with it because of his past experiences of her. We return to that reasoning below.

5.22 The speed with which these events unfolded is confirmed in the fact that after arriving at work at around 10pm and the exchange taking place, the claimant had had sufficient time to leave the workplace, formulate his decision to resign in writing and for it to be drafted in an email and sent to Ms White by 10:10pm. In it he said (as written): -

> ***I'm sorry Eileen but I refuse to work with Markham. A comment was put in the book which is highly offensive to me and any other black person. He refuses to accept the fault.***
>
> ***So I chose to resign with immediate affect.***
>
> ***I apologise if this puts any strain on the job but I'd rather walk then get into any conflict.***

5.23 We find the reference to "getting into conflict" reflects what both agree was said by Mr Justin as the final concluding comment that he could walk out or knock him to the ground.

5.24 Whilst we have no reason to doubt that email was sent, it was addressed to Ms White at the "Indeedmail.com" email address used for the recruitment. Her work email that she used for communication with staff, including Mr Justin, was her "@AtlasFM.com" email address although we accept that she had herself contacted the claimant on one previous occasion using her indeedmail.com account. She does not have any deep understanding of email technology and cannot explain why that was the case. We accept she does not know how to access that account and suspect the settings on a smart phone which are beyond her sometimes mean she inadvertently uses an account she does not intend.

5.25 We find as a fact that this email was not seen by Ms White. Indeed, it was not resent when the respondent later requested it. All Ms white knew about the events that night arose from the phone calls she had with the two employees remaining. Mr Hayes phoned her first soon after Mr Justin walked out to explain what had happened and that Mr Justin had left work. The essence of what was conveyed again reinforces that the exchange was over in a moment as the three issues raised all seem to blur into one. In summary, Ms White was told Mr Justin had refused to undertake training on the buffer because he was upset by what was written in the comments book and had threatened Mr Pell before walking out. Ms White spoke with Mr Pell and asked if he felt able to carry on working that shift alone and agreed he was as there were panic alarms and CCTV coverage. The following day, however, he would phone in sick and remained off sick for some time thereafter.

5.26 Ms White told us she tried to contact Mr Justin by email but got no response. In fact, we find that attempt was the following day after Mr Pell had phoned in sick for that night shift. She wrote (as written): -

> ***I was wondering if you are going in tonight or have you finished?***
>
> ***Markham as rung in sick so need to know whether to put the gym on high alert from 10pm or 1am.***

5.27 We need to reach a finding on the actual dynamic unfolding during the exchange that night. First, we do not understand Mr Pell's denials that he had done anything wrong to be a case of arguing from a principled position that Mr Justin was in the wrong. We find his stance was based on the same ignorance or naivety that Mr Justin had himself originally set out to educate. Secondly, the tone of the exchange set by Mr Justin was one of conflict and high tension. The exchange was extremely brief. There were no more than a handful of comments exchanged between all three before Mr Justin walked out. Mr Pell's reference to what Mr Watkins did or did not do after seeing the comment was misplaced but was again borne out of him struggling with why it was that if there had been anything wrong with his entry he had not been picked up on it by someone by now.

5.28 The next morning, Monday, 10 February 2020, Mr Justin contacted the respondent's HR department about the issue. We find Ms McNally, the HR adviser Mr Justin spoke to was concerned about the events and gave reasonable advice and information about investigating the matter, about the formal grievance process and encouraged him to reflect on his decision to resign. She confirmed this in an email. He was offered that week to reflect on things and decide if he wished to instigate a grievance and invited to retract his resignation. We find on balance that what is contained in this email was in line with the advice and information given during their phone call. However, he did not revert to Ms McNally, he did not instigate a grievance nor did he retract his resignation.

5.29 In the meantime, however, the HR adviser contacted Ms White. She was told about Mr Justin reporting the matter and that he felt that this comment was racist. Ms White was asked to look into the matter as part of what was expected to be a formal investigation under the grievance procedure. Her written report into that investigation is limited to a brief email dated 24 February 2020. Whilst limited in content, we accept she undertook an initial discussion with Mr Pell about what happened, principally by interviewing Mr Pell on the back of a welfare meeting on his return to work from sick leave. We were initially critical of the nature and extent of that "investigation", principally because the parties labelled this as the investigation. In fact, the evidence made it clear to all that this was little more than the initial enquiry and that the respondent was waiting a formal grievance before commencing a formal investigation. We do not accept there is much force in that distinction but it does at least explain why what was first thought to be the entirety of the investigation is so limited and leaves us with a conclusion that there hasn't really been any meaningful investigation of this incident. Nevertheless, the results of that initial enquiry were consistent with the earlier accounts and, indeed, the evidence adduced by all sides before us. Mr Pell told her he had written the note on the comments book to inform the general manager (Mr Watkins) that there had been an issue during the night with those individuals but never meant to cause any upset to anyone. He told her that Ryan had refused to undergo the training, and then said he was "going to put Markham on his arse" for writing what he had in the book.

5.30 It is that meeting with Mr Pell that we were told the respondent had notes of which had not been disclosed, the procedural consequences of which we have set out above. So far as that is relevant to our findings of fact, we are satisfied that there is sufficient consistency between what is recorded in that email and what both parties have told us in evidence so that

we do not need to be concerned that any hand-written notes were likely to disclose any new material matters.

5.31 Despite the respondent's conduct of this case being somewhat less than impressive, and we return to that again later, it is important to make clear that there is nothing in the evidence of the event after 8 February 2020 to suggest any inappropriate action or serious inaction on the part of Mr Justin's managers in Atlas. Whilst we might have expected to see a more thorough investigation, the claimant's resignation was given without first expressing any concerns to his employer either to investigate, intervene or take any other action. He says he did that because he felt he would not have the support from his own manager due to previous work problems which he had not particularised in his claim. In his evidence, he identified two issues where he says he did not get a reply to legitimate queries he had raised with Ms White. It is this which he says led him to conclude, why bother raising a complaint. We found these did not stand up to the slightest scrutiny. The first was a query about pay dates in his first month of employment. On this point we find he was simply wrong and that his email enquiry, sent in the small hours of 9 January 2020, was in fact answered by Ms White later that same morning. The other was in relation to a query about a vacuum cleaner not working properly which was raised in the days before the events of 8 February and did not seem to materially affect his or his colleague's ability to perform their cleaning duties. In short, we take the view that neither of these alleged complaints to his superiors could reasonably lead any reasonable employee to think that such a potentially serious complaint as he would intimate would not be properly dealt with. We do not accept that this was a genuine factor operating on Mr Justin when he resigned on that Saturday night. This is compounded by the fact that this employer had other local sites that it serviced and with which he was already familiar. If the focus of the perceived problem was Mr Pell, there does not appear to have been any thought given to simply refusing to work with Mr Pell and perhaps him or others being moved. There is nothing to show such a move was unlikely to be a possible solution. However, we do not need to reach a finding about any ulterior motives for Mr Justin's resignation and can simply conclude that he resigned because of his perception of Mr Pell's reaction to his complaint and his misplaced perception of Ms White's likely response. Viewing the exchange objectively, we find his decision to resign immediately seems an over-reaction.

5.32 In any event, whatever concerns Mr Justin might have had about his employer's likely response to any complaint ought to have evaporated when, on the next working day, he received the immediate and serious response from the HR adviser, had the grievance process explained to him and was invited to reflect on his employment and that a retraction of his resignation would be accepted.

6. Law

6.1 Section 26 of the Equality Act 2010 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.

(2)…

(3)…

(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.

6.2 We are required to consider separately the discrete elements of this provision, namely whether any conduct found to have taken place was unwanted, had the proscribed purpose or effect and was related to the relevant protected characteristic (**Richmond Pharmacology v Dhaliwal [2009] IRLR 336**). The **Richmond** case is also particularly relevant to the threshold test of when conduct amounts to harassment, Underhill P (as he then was) said at para 22: -

> ***"We accept that 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."***

6.3 Whilst that passage focused on the violation of dignity as one proscribed purpose or effect within s.26(1)(b)(i), the essence of a threshold test applies similarly to the nature of the other prohibited purposes or effects listed in s.26(1)(b)(ii) and that threshold is regulated by the concept of the reasonableness of the conduct having the prohibited effect as set out in in s.26(4)(c). As the Court of Appeal stated in **Grant v HM Land Registry & Another [2011] IRLR 748**, the significance of the words in that section must not be cheapened.

6.4 At paragraph 11, Elias LJ observed how under what is now s.26 of the 2010 Act: -

> ***there is harassment either if the purpose of the conduct is to create the circumstances envisaged in (a) or (b), or if that is the effect of the conduct, even though not intended. Where it is the purpose, such as where there is a campaign of unpleasant conduct designed to humiliate the claimant on the proscribed ground, it does not matter whether that purpose is achieved or not. Where harassment results from the effect of the conduct, that effect must actually be achieved. However, the question whether conduct has had that adverse effect is an objective one - it must reasonably be considered to have that effect - although the victim's perception of the effect is a relevant factor for the tribunal to consider as sub-regulation 2 makes clear.***

6.5 And at para 47, when dealing with the words used to define the proscribed effect of the unwanted conduct, he said: -

> ***They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.***

6.6 Whilst not law as such, we have had regard to any help we can glean from the February 2021 edition of the Equal Treatment Bench Book. That is a guide to how we go about conducting ourselves as a judicial body in respect of our interaction with litigants experiencing the justice process and it does not have direct application to the resolution of the cases before us. It is, however, a useful source of guidance on various cultural matters that may not immediately be within our own instinctive compass. Language describing race is potentially one such matter. At paragraph 285, it says:-

> ***People of colour / coloured:*** *The term 'people of colour' tends to be used more in the USA than in the UK, although it has been adopted more frequently in the last few years in the UK. 'Coloured' is offensive and must be avoided. A person of the older white generation in the UK may feel that they are being polite by using the word 'coloured' rather than 'black', but that is an extremely outdated view and not acceptable in any way.*

7. Discussion

7.1 The first question is a simple one of fact. Did the alleged conduct take place as alleged? There is no dispute Mr Pell used the word "coloured" in his entry in the comments book.

7.2 The next question is whether that conduct was *unwanted* conduct. That is often not the focus of dispute in claims of harassment and so it is with this claim. However, it can warrant some analysis where the conduct complained of is not directed at, or directly referring to, the claimant in question. In this case, it might be said the word was inappropriately used on two levels in that it is not an appropriate description for people of Asian ethnic origins any more or less than it is inappropriate for people of the claimant's ethnic origins. However, whilst the term was neither directed at the claimant nor used to describe someone of the same or similar ethnic origins as the claimant, it seems to us that is of little consequence and we conclude the threshold of what is unwanted is a relatively low one to clear. The comments book was certain to be seen by the claimant, when he read it he was not to know that the reference was in fact to people of an Asian ethnic origin and, in any event, he was still entitled to be aggrieved by its use in the sense that it renders such conduct as being "unwanted".

7.3 The third question is whether the unwanted conduct was related to the protected characteristic in question, in this case race. The causative link is expressed as "related to" which is a broad concept and much broader than the "because of" test used elsewhere in the Equality Act but in this case, we do not need a broad causative concept and we have no difficulty answering the question positively. We note the second respondent's averment in its ET3 response that the comment had "no racial connotations and was purely descriptive". At its best that was a rather ambitious, if not misconceived, averment and one we can confidently say was wholly wrong. If nothing else, the fact that section 9(1)(i) of the Equality Act 2010 includes "colour" in the definition of the protected characteristic of race means we cannot conceive of any "descriptive" term referencing colour that could be anything other than "related to" race.

7.4 The next questions turn to the proscribed purpose or effect of the unwanted conduct and this is where the real focus of this claim lies. The first limb is whether the conduct was done with the purpose, that is the intention to cause, the proscribed consequences of violating Mr Justin's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment. We are entirely satisfied that it was not, quite the opposite in fact. It occurs in the context of someone wishing to apply an appropriate term and getting it completely wrong. Mr Clay was right to put his client's case as he did, accepting that no one was suggesting Mr Pell intended his actions to have the proscribed purpose.

7.5 That takes us to the second limb, whether it had the proscribed effect. As **Grant** makes clear, that effect must actually be achieved and whether it has been achieved has to be assessed objectively. Section 26(4) sets out the factors that must be taken into account in assessing whether the proscribed effect has been achieved. The first is the perception of Mr Justin and if his perception of the conduct does not, subjectively, meet the proscribed effect it is difficult to see how, viewed objectively, it could then be seen to do so. However, assuming it does, the other two factors are where the objective threshold engage in the control sense envisaged by **Grant** and **Richmond**. They are the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

7.6 The perception of Claimant in this case does not lead to the obvious conclusion one might anticipate in a claim of harassment. On Wednesday, 5 February, he read Mr Pell's entry in the comments book and added his own annotation. He was rightly entitled to be aggrieved on seeing this outdated language used and, as he said in his evidence, to feel upset, to find it offensive and to consider it a racial slur. His instinctive reaction, however, was that this was the sort of thing he had encountered in the past, that it was written by someone who he otherwise felt he had a good relationship with and was a matter he felt could be addressed by, in his words, speaking to Mr Pell "as he might not have been aware of the connotations of the term". That was the claimant's perception and as such, we are not satisfied the measure of the effect of the unwanted conduct meets the threshold of the statutory proscribed effects. Our findings of Mr Justin's reaction reflect an assessment of his initial reaction which we fully accept was one in which he was properly entitled to be aggrieved and disappointed by the language that had been used. However, it does not display a sense that it violated his dignity or that the environment was one which could properly be described as hostile, degrading, humiliating or offensive.

7.7 As to the wider circumstances of the case, whether or not there was an underlying reason for Mr Hayes to describe the colour or race of the three individuals, that information was passed to Mr Pell in circumstances that led him to edit the description and use his own word. Regrettably, he struggled with that task and used a term that is outdated and should not be used. As inappropriate as it was, the term was not used gratuitously nor was it used in a way that was loaded with any other negative connotations that might have disclosed prejudice. The context is far from vituperative. Whilst Mr Justin would not have known the wider context there is nothing to suggest that this word was used in the entry with proscribed purpose. It was not directed at the claimant personally and this is not a case where it is

argued that the term was used in the context of “banter” (itself a misnomer which we often find is used dismissively to minimise what might otherwise actually be harassment).

7.8 Those factors all play into the objective test as to whether it is reasonable that the unwanted conduct has the proscribed effect. We conclude, at this stage of the chronology, that it would not be reasonable that it did.

7.9 However, we do think it appropriate to view the unwanted conduct again through the lens of what then takes place on the evening of 8 February 2020.

7.10 This is said to be aggravated by Mr Pell’s denial that there was anything wrong in the use of that term. We have been concerned to analyse with care whether that is an accurate description of what Mr Pell’s response amounted to as we have no doubt that a negative response to an initial, innocent event could be enough to change the objective view of the conduct in question from something for which it ***was not*** reasonable to have the proscribed effect into conduct for which it ***was*** reasonable to have that effect.

7.11 In this case, we do not regard Mr Pell to have been arguing a principled position that Mr Justin was wrong and he was right. What was said by Mr Pell was borne out of the very same ignorance and naivety that Mr Justin himself originally identified had led Mr Pell to use the term in the first place and which he felt warranted a response of educating. Had that subsequent discussion taken place in measured circumstances rather than the extremely brief and intense exchange of conflict, we have no doubt the course of the exchange would have been quite different. Nothing in what we say should be taken to shifting responsibility onto Mr Justin, and his desire to engage with the issue was proper and commendable but what took place on the evening of 8 February 2020 must also be seen in context. First, we do have to say Mr Justin’s evidence of wanting to “discuss and educate” seems in reality to have become more in the nature of “confronting” Mr Pell and we come to that conclusion by the fact it was clearly uppermost on his mind as a matter to raise at the outset and manifested itself in the initial refusal to engage in the proposed buffer training. Secondly, that set a tone of conflict. The two then each, understandably but wrongly, misunderstood the other’s statements and their respective positions and the fact that they were forced to assess the other’s statements in the mere seconds that they were engaged in this stressful exchange adds to the risk of misunderstanding. We do not accept Mr Pell was denying the rights and wrongs of the term used, he was grasping for understanding and Mr Justin was unable in the moment to differentiate the ignorance that is at the root of this issue from what he perceived to be denial that it was wrong. Nevertheless, we understand why Mr Justin formed that view. Similarly, we doubt Mr Justin was going to physically assault Mr Pell. Nevertheless, we understand why his comments led Mr Pell to fear he was at risk of being assaulted.

7.12 Those other circumstances of the case weigh heavily in our assessment of whether Mr Pell’s further conduct and comments in those seconds during that confrontation ought reasonably to have the proscribed effect. In conclusion, we do not accept that it would be reasonable for the conduct to have the effect even seen through the further events of 8 February 2020.

7.13 We recognise Mr Justin's response was to walk out and resign. That has been put to us as indicative of how serious Mr Pell's conduct was. We disagree. Mr Justin's subjective assessment was clearly that he did not want to work with Mr Pell any longer. If we accept Mr Justin's evidence that this was the only operative factor we think that was a rash decision for two reasons. First, there were other options reasonably open to him to address that without the necessity of leaving his employment. His concerns about the perception of lack of action by his employer was wholly misplaced in any event and especially after the positive response from the HR adviser on the Monday morning. Secondly, there was no apparent reason to justify dismissing other options to continue in employment without necessarily working alongside Mr Pell, at least such as to reasonably justify the peremptory resignation.

8. Conclusion

8.1 For those reasons, the claim fails. However, we wish to add two further observations about the circumstances of this case. In respect of the first observation, we draw on Mr Justin's own evidence at the close of his witness statement where he said: -

> ***"black people have had to put up with offensive nametags or described with offensive racist slurs for many years, however times have changed and this should not be accepted or considered OK in this current time. The guilty parties should be made to learn what effect this has had on individuals and communities."***

8.2 We agree entirely with that sentiment. Nothing we have concluded should suggest otherwise. The fact that this outdated language was once used descriptively by people who genuinely felt it to be a polite term, is only so because of the less polite alternatives that existed in that past era. As the Equal Treatment Bench Book notes, we accept white people of a certain age who perhaps have not had much opportunity to benefit from multi-cultural acquaintances in their day to day lives may draw on this outdated language in the mistaken belief it is polite and genuinely descriptive. The same may be said of younger people who have grown up in such households. That seems to apply to Mr Pell who, we accept, appears otherwise to try to conduct himself in life in an inclusive manner. We also note how people in high positions of power and authority may still inadvertently use this term and we can bring to mind several very high-profile examples reported in the national media only very recently. That puts the history and use of the term in context, but does not mean it may be any less inappropriate to use nowadays.

8.3 However, the question for us has not been simply whether this language was inappropriate. It clearly is but our task is not to express disapprobation to bring about social change outside of the legal jurisdiction given to us. We must determine whether a statutory tort has been committed by its use engaging legal consequences. In the particular circumstances of this case, we are not satisfied that the threshold has been met to say that it has.

8.4 The second observation we wish to make is this. The claim has failed despite, and not because of, the Atlas defence. The conduct of its case has been left wanting at times. We understand it is a large employer and the prospect of other cases is real and they may not have the same result. There are areas of this employer's practice that clearly demand review

and its systems are unlikely to satisfy the statutory defence to a claim of discrimination should it ever be engaged in a future case. It may be well advised to do what it needs now to learn from this experience.

EMPLOYMENT JUDGE R Clark
DATE 26 March 2021

JUDGMENT SENT TO THE PARTIES ON
29 March 2021

AND ENTERED IN THE REGISTER
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FOR SECRETARY OF THE TRIBUNALS