EMPLOYMENT TRIBUNALS

Claimant:	**Mr A Murria**
Respondent:	**Innervate Technology Solutions Ltd (1)**
	Andrew Startin (2)
	Adam Martin (3)
Heard at:	Leicester Hearing Centre, 5a New Walk, Leicester, LE1 6TE
	By cloud video platform
On:	25, 26, 27, 28 and 29 January 2021
	17 March 2021
	18 March 2021 (Tribunal's deliberations, parties did not attend)
Before:	Employment Judge Adkinson sitting with
	Mr G Edmondson, and
	Mr J Hill
Appearances	
For the claimant:	Mr R Levene, Counsel
For the respondent:	Mr P Keith, Counsel

This has been a remote hearing by (V), video. The parties did not object to such a hearing. The reason for this method was that it was not possible to accommodate the parties safely at the Tribunal's Hearing Centre, given the need for social distancing. There was an agreed bundle and supplementary disclosure totalling about 580 pages. The order made is below.

JUDGMENT

For the reasons set out below, the Tribunal's unanimous conclusion is that

1. The respondents victimised the claimant both when they removed him from certain WhatsApp groups and when they dismissed him.

2. The claimant's claims that the second respondent's text message to him on 12 April 2019 reading "take extra meds and be bouncy" was an act of direct discrimination because of disability, was an act of discrimination arising from a disability or was harassment because of disability are out of time. It

is not just and equitable to extend time. The Tribunal therefore lacks jurisdiction to hear the claims and so dismisses them.

3. All of the claimant's other claims for direct discrimination because of race, direct discrimination because of disability, discrimination arising from a disability, harassment because of disability or harassment because of race are dismissed.

4. The first respondent has breached the claimant's contract of employment by failing to pay the Claimant expenses to which he is entitled. The first respondent must therefore pay £2,691.60.

5. The amount of compensation for victimisation will be determined at a further hearing.

REASONS

1. Following early conciliation between 15 July 2019 and 15 August 2019, the claimant (Mr Murria) presented on 12 September 2019 a claim to the Tribunal for disability discrimination and harassment, race discrimination and harassment and victimisation. We set out the legal details of the claim later. We note that, subject to being a continuing act or any extensions of time, anything that precedes 16 April 2019 is out of time and the Tribunal cannot consider it. Mr Murria is disabled by reason of attention deficit hyperactivity disorder (ADHD). In summary, he says that during his employment he was bullied because of his disability or race. He says that after complaining about discrimination, the respondents terminated his employment and removed him from WhatsApp groups. Additionally, he says that his dismissal and ostracization from those groups was itself an act of disability related discrimination.

2. The first respondent (Innervate) was Mr Murria's employer. Since February 2020 Innervate has been in creditors' voluntary liquidation. It did not take part in the final hearing. At all material times the chairman and *de facto* owner (through a scheme whose details were not before us but which do not matter in any event) of Innervate was a Mr P Lloyd, who lives in Jersey and who himself took no part in these proceedings.

3. At all relevant times to this case, the second respondent (Mr Startin) was the chief executive officer (CEO) of Innervate and the third respondent (Mr Martin) was Innervate's director of sales.

4. Disability was not in issue, though they dispute when they would have known about it. The effects of his disability were in dispute. However, the respondents deny in any event any act of discrimination or victimisation. They say, in summary, that Mr Murria was a willing participant in any conduct he now claims were discriminatory acts or harassment. They also say that in any event neither his race nor disability played any role in what happened. They do not accept that the reason for his dismissal was because he complained of discrimination or because of his disability.

The hearing

5. Ms Levene, Counsel, represented Mr Murria. Innervate did not attend, was not represented and submitted nothing to the Tribunal. Mr P Keith, Counsel, represented Mr Startin and Mr Martin.

6. The hearing took place over HM Court and Tribunals Service's Cloud Video Platform system. Each day ran from about 10am to 4pm with a break of 1 hour at lunchtime. About every hour we took a short break in line with Health and Safety Executive guidelines about working with screens for a long time. There were a few minor technical issues which were easily resolved. The Tribunal is satisfied that the overall hearing was a fair one. No party complained that they felt the hearing had been unfair to them either because it took place by video or for any other reason.

7. The Tribunal heard oral evidence from Mr Murria, Mr Startin, Mr Martin and on the second and third respondents' behalf from Mr D Mines, the then chief technical officer of Innervate, Ms D Brown, Innervate's then former operations and marketing manager, Mr S Wright, a former newspaper journalist who was never employed by Innervate and Mr A Wright, Innervate's then finance director of Innervate. The respondents also relied on a written statement from Mr M Nardin who was Innervate's then delivery director. We have taken the oral and written evidence into account in reaching our decision.

8. We wanted to recognise Mr Keith's adjustments to his cross-examination of Mr Murria to accommodate Mr Murria's ADHD. His cross-examination was thorough yet sensitive and showed regard to guidance in the Equal Treatment Bench Book. However, this compliment is not to detract from Ms Levene's own through and courteous professionalism in her cross-examination of the second and third respondents' witnesses. No other adjustments were requested or proved necessary.

9. During the hearing Mr Murria made an application to adduce text messages between him and his fiancée that he suggested would be relevant to the credibility of his allegations because they showed contemporaneous evidence of his contemporaneous belief that he was being discriminated against or harassed. The second and third respondent opposed this application. After deliberating, we refused him permission to rely on them. We gave our reasons at the time. In summary we concluded that they were disclosable documents that should and could have been disclosed in accordance with the Tribunal's orders (and certainly well before the final hearing) because he had only to talk to his fiancée to ask for them. In any case he would know if he sent relevant messages to her from his own knowledge and/or his own mobile phone. There was in realty no good reason for their late disclosure, let alone part way through the final hearing after his cross-examination. We concluded that to admit them would amount to an ambush of the respondents and would mean that the parties were not on an equal footing. If they were admitted, fairness would require the respondents have an opportunity to consider them and be at least allowed to apply to adduce any evidence that they felt was relevant to these messages. This would result in delay and potentially increase expense.

Considering this against the overriding objective and in the general interests of being fair to all parties, we concluded that application should be refused.

10. There was an agreed bundle and some supplementary documents the parties agreed could be put before us. We have taken into account those documents to which we were referred when reaching our decision.

11. It was not possible to hear all the evidence and submissions, deliberate and deliver judgment within the original allocated 5 days. Therefore, the Tribunal adjourned proceedings until 17 March 2021 to allow the parties to present oral submissions.

12. Before the resumed hearing, the Tribunal re-read its notes of the evidence and re-familiarised itself with the bundle.

13. The parties made their oral submissions, supplementing them with detailed written submissions. We are grateful for these oral and written submissions and have taken them into account in reaching our decision.

14. The Tribunal then spent a day considering the case and reaching its decision. Our decision is unanimous. This is that decision.

15. There has been a delay promulgating the decision. The Tribunal has kept the parties informed of the delay and reasons for it. No party has raised any concerns about it.

Issues

16. The attending parties prepared an agreed list of issues. Having heard the case and submissions, we are satisfied it still represents the issues that we must decide although in our conclusions we approach the issues in a different order, simply because that makes more sense in light of our findings.

17. In closing submissions Mr Startin and Mr Martin attempted to add to the allegation of victimisation the issue of whether any protected act was done in bad faith. Mr Murria resisted this being an issue for us to consider. We agree with Mr Murria that it is not an issue for us to consider. We note that it is not pleaded in the responses that Mr Murria's protected act was done in bad faith. There is no reason it was not pleaded. No application was made to amend their responses to add the allegation. We believe if it were an issue their responses should have said so in their responses: see for example comments about claims in **Chandhok v Tirkey [2015] ICR 527 EAT** which we believe applies to responses equally. It was not on the agreed list of issues either and there is no explanation why it was omitted. Furthermore, Mr Murria was not cross-examined about it. While cross-examination does not have to cover every single issue on which the parties disagree, it must generally be enough to highlight what significant issues are in dispute in relation to a witness's evidence and give them an opportunity to respond: See e.g. the discussion in **NHS Trust Development Authority v Saiger aors [2018] ICR 297 EAT** and **Howlett v Davies [2018] 1 WLR 948 CA**. While we do not want to encourage lengthy cross-examination, we believe that on this occasion an allegation that a protected act was done in bad faith was so significant an issue it should have been put in cross-examination if it were truly contested

18. The issues therefore are:

18.1. Are any of the claimant's claim is out of time, and if so, do they form part of a continuing act and/or would it be just and equitable to extend the time limit for submitting those claims?

18.2. Did the claimant's ADHD have the following symptoms or effects: vitiligo; stress and anxiety; difficulty performing and keeping up to date with administrative tasks; impulsive behaviour in a heightened emotional response to stressful situations?

18.3. In relation to direct discrimination because of disability:

18.3.1. Did the respondents treat the claimant less favourably than they treated or would have treated a relevant hypothetical comparator in the following scenarios:

18.3.1.1. Did the second respondent send to the claimant a text message on 12 April 2019 telling him to "take extra meds and be bouncy"?

18.3.1.2. Did the second respondent make jokes on 28 April 2019 regarding the claimant having to collect his P45 shortly after the claimant had confirmed his disability to the second respondent?

18.3.1.3. Did the second respondent accuse the claimant of "not contributing much" to a meeting in Bahrain and suggest that the claimant was "crazy" for not saying he was not at fault for a change of dynamics in that meeting?

18.3.1.4. Did the third respondent asked the claimant questions about his medication and his ADHD diagnosis during a meeting took place on 7 May 2019?

18.3.1.5. Did the second respondent say to the claimant "I didn't even notice – one of us white boys now!" After the claimant confided in him about his disability?

18.3.2. If so, was the treatment because of the claimant's disability?

18.3.3. Did the respondents know or ought they to have known that the claimant was disabled?

18.4. In relation to discrimination arising from disability:

18.4.1. Did the following happen:

18.4.1.1. [there is a repeat of paragraphs 18.3.1.1 to **Error! Reference source not found.**]

18.4.1.2. Was the claimant dismissed due to sickness absence?

18.4.1.3. Was the claimant dismissed from Innervate because of his alleged failure to follow its sickness policies?

18.4.2. Do the following arise as a consequence of his disability:

18.4.2.1. (In relation to the text message of 12 April 2019, the questions about his medication 7 May 2019 and the comment that day about him being a common denominator) the need to take medication?

18.4.2.2. (In relation to the comments about the P 45 on 20 April 2019, the accusation that he had not contributed much to the meeting in Bahrain and was crazy saying he was not at fault) his tendency to impulsive behaviour and showing a heightened emotional response to stressful situations?

18.4.2.3. (In relation to his sickness absence) his stress and anxiety?

18.4.2.4. (In relation to his failure to follow sickness policies) the difficulty performing and keeping up to date with administrative tasks?

18.4.3. If so, the respondent shown:

18.4.3.1. those maintaining practices of acceptable conduct and/all sickness absence reporting in the workplace is/are legitimate aim(s)?

18.4.3.2. If so, is/are the use of clause 52 of the disciplinary procedure in the staff handbook and/or dismissal proportionate to those legitimate aims?

18.4.4. Did the respondents know or ought they to have known that the claimant was disabled?

18.5. In relation to harassment because of disability:

18.5.1. Is the following conduct unwarranted and if so, did the respondents engage in that conduct:

18.5.1.1. [there is a repeat of paragraphs 18.3.1.1 to 18.3.1.5 above]

18.5.2. if so, did the conduct of the purpose or effect of violating the claimant's dignity, creating an

intimidating, hostile, degrading, humiliating or offensive environment for him?

18.5.3. If the conduct did not have the purpose but did have that effect, then taking into account the claimant's perception of the circumstances was it reasonable to have but effect?

18.5.4. Was the conduct related to disability?

18.6. In relation to direct discrimination because of race:

18.6.1. Did the respondents treat the claimant less favourably than they treated or would have treated a relevant hypothetical comparator in the following scenarios:

18.6.1.1. Did the second respondent make the following comment during a meeting with the claimant, Mr Wright and the third respondent in Bahrain "do you want a coffee? I can get the little Indian boy to get it. Not [the claimant], the waiter"?

18.6.1.2. Did the second respondent make a comment after the claimant confided in him regarding his disability to effects of "didn't even notice – you're one of those white boys now!"?

18.6.2. If so, was the treatment because of the claimant's race?

18.7. In relation to harassment because of race:

18.7.1. Is the following conduct unwarranted and if so, did the respondents engage in that conduct:

18.7.1.1. [there is a repeat of paragraphs 18.6.1.1 and 18.6.1.2 above]

18.7.2. if so, did the conduct of the purpose or effect of violating the claimant's dignity, creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

18.7.3. If the conduct did not have the purpose but did have that effect, then taking into account the claimant's perception of the circumstances was it reasonable to have but effect?

18.7.4. Was the conduct related to race?

18.8. In relation to victimisation:

18.8.1. On 14 May 2019 did the claimant carry out a protected act by complaining about discrimination he alleged he had experienced while working for the first respondent?

18.8.2. If so, did the respondent subject the claimant to the following detriments:

18.8.2.1. removing him from the first respondent WhatsApp groups about one hour after the meeting on 14 May 2019?

18.8.2.2. Dismissing him on 17 May 2019?

18.8.3. If so, did they happen because the claimant had done a protected act or because the respondents believed he had done a protected act?

Findings of fact

General observations about the evidence

19. The bundle contains numerous text messages, emails and messages in WhatsApp groups. We have read them and have been taken to many of them in evidence and submissions. It would be disproportionate to quote each one. However, we have taken them into account in our deliberations.

20. We have also reminded ourselves that:

20.1. The text messages can lack subtext because there is no tone of voice or body language. Thus it is the whole of the conversation that is important, including any symbols such as emoji used to convey emotions. We need to look at the messages as a whole to discern any general group dynamic.

20.2. We recognise that:

20.2.1. A party may be harassed by messages and behaviour but not complain for many reasons e.g., fear of losing a job;

20.2.2. A party may find some messages are acceptable but at some point, the behaviour or exchanges cross the line and becomes harassment;

20.2.3. A party may in fact be a willing and content participant to the exchanges or behaviours even if others in their situation would be harassed or a reasonable person would think the messages alone are questionable at best.

Witnesses generally

Mr Murria

21. We concluded that Mr Murria was doing his best to assist the Tribunal. Mr Murria is an honest and intelligent witness.

22. However, we conclude that he is prone to oversensitivity and subconsciously revising his memory of the past, reinterpreting things and so is an unreliable historian. For example:

22.1. He told us that he had extensions for his MBA assignments because of a family death. His disability impact statement says the extensions were because of the effects of his ADHD. There

is no explanation for the discrepancy, but we think it significant and not an easy mistake to make.

22.2. On 17 April 2019 there was a gathering at the British Embassy in Bahrain to promote UK businesses. Mr Startin and Mr Martin were there. Mr Startin sent a message to the WhatsApp group of which Mr Murria was a member:

"There must be [a] thousand guests at the embassy. I'm a fish out of water and Arun would be a pig in shit."

Mr Startin says he was referring to Mr Murria's excellent networking abilities with the words "pig in shit".

Mr Murria however alleges this is an example of the casual racism at Innervate. Mr Murria suggested it was racist because the pig would be brown, he had "brown skin" (they were his own words for describing his skin colour), and "shit" is inherently unpleasant. We are surprised Mr Murria did not recognise this as an (albeit vulgar) expression to denote that someone would be in their element. But even ignoring that, we struggle to see how any reasonable person could take racial offence at this. It requires so many logical steps on Mr Murria's part to find a racist undertone directed towards him we cannot accept this was his reaction at the time, and it only much later that he has interpreted it this way. In the context of a networking event where Mr Murria would perform well, and taking the message as a whole, no reasonable person could think this was racist or meant to be a racist insult. We noted how in cross-examination even Mr Murria himself appeared to struggle to justify the alleged racism in this remark, coming across as though even he was not now convinced it was racist. We noted he, rightly, did not raise this in his closing submissions as evidence of racism.

22.3. There was an incident at a networking event involving a third-party potential client who said to Mr Startin that he should "stop wasting time with Pakis". Mr Murria accepted that Mr Startin came over and repeated this comment to the Innervate group and instructed Innervate to have nothing further to do with that third party. We accept this was because Mr Startin found the comment offensive. We can see why with hindsight it may have been inapposite to repeat the remark but do not believe that Mr Murria was offended by it. This is because Mr Murria accepted that they remained friends, and in any case, it would seem implausible that he would be offended by the CEO turning down a potential source of work because he found that third party's racist views abhorrent. We conclude that if it did not affect the friendship at the time it means there must have been reinterpretation to see it now as offensive.

22.4. Mr Murria alleges that Mr Startin spoke about the Indian migrant workers who worked on the Burj Khalifa construction. In this speech (for want of a better description) Mr Startin alleged that

many lost their lives due to a lack of concern for their safety by the Bharani builders because they simply replaced those who died with more cheap labour from India. Mr Murria alleged he directed the story towards him because of his race and he felt it was disrespectful and dehumanising. We do not accept this. We think that is a reimagining. There are 2 reasons. Mr Murria admitted he remained friends with Mr Startin after this event. We believe that if it were as Mr Murria now describes, that friendship would not have survived or at least have had a rocky patch. Secondly if Mr Startin directed the speech to Mr Murria, we think it would be in stark contrast to Mr Startin's reaction to the racist comment of the third party at the networking event (described above).

22.5. There was an incident involving a birthday cake and the witness Mr S Wright. On 28 April 2019 Mr Wright was a guest speaker at an event organised by Innervate in Bahrain. Mr K Fenner, a senior member of Microsoft in the region and whose products Innervate used and integrated their own offerings with was also a guest speaker. Mr Wright had remarked in his speech that he had missed his previous birthdays because he was away working. Mr Murria, Mr Startin, Mr Wright and Mr Fenner were having dinner together that night after the event. It was a business dinner. That night and in secret Mr Murria organised a surprise birthday cake to be delivered at dinner to Mr Wright at the dinner table. We have seen a video of it. To us, it does not seem that the participants were particularly uncomfortable with the surprise cake. Mr Murria certainly was pleased with what happened. What strikes us is that if Mr Murria were suffering continual harassment and discrimination as he alleges, it is in our mind highly inconsistent that he would feel confident and comfortable enough to organise this type of event. It is clearly inappropriate and requires some courage and forward planning. There is no evidence it arose from his ADHD.

22.6. On occasions he has taken text messages out of context. For example, in relation to 12 April 2019 he was clear to emphasise the "take extra meds and be bouncy" comment but overlooked his reply of "😂😂" in his own disclosure. These emoji have the potential to shed a different light on the exchange. The failure to reveal them raises concerns about the accuracy of his disclosure or recollection, and that he is reinterpreting matters. We know of them only from the respondents' disclosure.

22.7. In addition, there are text messages that themselves could be seen as offensive but about which he makes no complaint and indeed appears to be a willing participant:

In a WhatsApp conversation with Mr Mines he says (so far as relevant)

"Mr Murria [AM]: [Referring to Mr Mines wooing an air stewardess on the flight]: legend.

"Mr Martin [AdM] Scratch and sniff

"AM: 😂😂 corr beat a good scratch and sniff

"…

"AM: Bet he cant wait to show her is Integration Acceleration Toolkit

"AM: … KY Jelly

"…

"AM: If it goes tits up, you might have to resort to your core wanking solution"

We make no judgment on the comments themselves except to say that they show a type of risqué humour – or "banter" – the tenor or which is like many of the comments he now complains of. Taken with the above it suggests he was a willing participant to the exchanges.

22.8. Furthermore, on what appears to be October 2018 the following 2 exchanges stand out (the dates are unclear):

22.8.1. He secured the business card from His Excellency the Bharani Ambassador to the United Kingdom. His colleagues described it as "only Arun could pull it off"

22.8.2. Later there is a photograph of Mr Murria with a male and a conversation in WhatsApp ensues in which he sends the message:

"One up the bum, no harm done."

Again, this comment is of a similar risqué tenor to the comments he now complains of.

22.8.3. Furthermore, in one group message the following exchange occurred:

"Mr Startin [AS]: I'm glad we had those business cards printed with "twat" as a job title.

"Mr Murria: You and Adam running out?

"AS: Director of Twat please… titles are important"

We think that if an employee feels comfortable enough to make this joke about his line manager and employer's CEO, it somewhat contradicts the suggestion that his superiors (including that CEO) are harassing him, or he feels an obligation to say things to fit in.

22.9. There is objective evidence that the parties had a strong relationship and mutual respect. Many of the comments above show the friendship since otherwise they could not have been said. In particular though Mr Startin showed he did not stand for

racism by his actions against the third party as described above. Moreover:

22.9.1. Mr Murria explained that Mr Startin had been supportive in February 2019 when Mr Murria's fiancée suffered a bereavement and when his own close family member was unwell. He told us that the relationship between him and Mr Startin at the time was mutually respectful.

22.9.2. Similar mutual support was demonstrated between Mr Martin and Mr Murria in January 2019 when Mr Martin suffered a family bereavement.

22.9.3. The claimant accepted that Innervate insisted family were seen as a priority. On 23 April 2019 he sent a text to Mr Martin that read "Understandable. As you guys say. Family first. 🙏"

22.9.4. In cross examination this exchange took place:

"Counsel: To engage in all that chat then you must actually have been quite good friends?

"Mr Murria: Yes for the most part. And for most part was part of the banter. Did feel uncomfortable sometimes."

22.10. Strikingly one text that appears to refer to colour of skin comes from the claimant himself. On what appears to be 4 February 2019, in a WhatsApp chat with D Mines, he enquires whether Mr Mines will be ready for a meeting and, unprompted, sends a photograph of a young Indian male carrying a kettle and six cups. He signs off with "I'm ready lads". It is clearly a parody of the stereotypical (and, depending on context, possibly racist) idea of an Indian tea boy. Later in the same conversation he calls Mr Mines "Chief Bro!!!". This is unprompted and there is no evidence Mr Murria did this for any reason other than he wanted to send it. It is self-deprecating humour of a racial nature and contradicts his assertions about how they behaved towards him. Again, it suggests he was a willing participant.

22.11. Mr Murria never submitted a grievance. He explained that he was fearful of losing his job which is why he played along and did not submit grievances. We see no evidence that fear existed or was justified based on the proven interactions. However, he felt comfortable enough to raise issues about travelling repeatedly to Bahrain and its impact, and of family issues. Though he said he had never held down a job for more than 6 months we find that difficult to accept given the job he was able to secure and his networking skills, which seem unlikely to be the case with repeated short-term employment. We are able to accept that perhaps he does not stay in role long-term. However,

the idea his jobs last 6 months only seems on balance to us to be exaggeration.

22.12. We also draw on a complaint that Mr Martin described Mr Murria as "common denominator" in the meeting of 7 May 2019. It is common ground the phrase was used – Mr Martin does not shy away from it. However, this is a mere statement of fact, albeit it might in hindsight (and under the glare of a Tribunal) have been better phrased. The circumstances were that Mr Murria had made a number of complaints about matters involving other members of staff, and some had complained about him. There were now concerns about his own behaviour. His presence or involvement in all these matters is a factor that is shared by two or more of the complaints. The Tribunal thinks therefore that "common denominator" is an accurate statement. The Tribunal does not agree that it follows, as Mr Murria suggested, that Mr Martin is saying he is at fault, or that one can infer a prima facie case he is at fault. We cannot see how it relates to disability or race as Mr Murria implied. In our view it is another example of Mr Murria working to find evidence of discrimination or harassment after the event when plainly there was none at the time.

23. We are conscious of the warnings we set out above about how harassment can be hidden, or a line crossed or that one topic may be acceptable but another not.

24. We have read every message. We cannot set each one out. However, the messages we have cited we believe are a representative nature of the tenor of communications between Mr Murria, Mr Martin and Mr Startin and other staff. It is not our role to judge the moral probity of them but they are of the same tenor and appear to be a free exchange of humour that in other contexts or with other people may have been offensive or unacceptable, but amongst this group were neither.

25. We believe that it is simply implausible that these exchanges would take place if the reality were as Mr Murria describes. It contradicts the free exchange of the messages and does not match up with the relationship between the parties that he himself acknowledges existed. This too undermines the credibility of his claim in our eyes.

26. However, in relation to the victimisation claim we, in short, accept Mr Murria's evidence because it is supported by the documentary evidence.

Mr Startin and Mr Martin

27. Generally, we accepted Mr Martin and Mr Startin's evidence about the build up to the end of Mr Murria's employment. Their evidence fitted with the text messages, emails and what contemporaneous evidence there was of Mr Murria's own behaviour and the evidence of the other witnesses that the respondents called.

28. We believe that Mr Startin has overstated the awkwardness of the birthday cake incident described above. It does not really reflect what we saw on the video and indeed he himself replied to a message from Mr Wright about it

with "😂". We think if it were as bad as he described he would have sent some sort of apology. There was none. However, we do not believe it affects his evidence sufficiently because there is plenty of other documents and evidence to supply context on which to assess credibility. The importance is that the event happened, not how those unwittingly involved reacted.

29. However, we have a very different view about the end of the working relationship. We will set out the findings of fact later. But for present purposes it suffices to say that their explanation about Mr Murria's dismissal is that there were a number of reasons for it, and that it was Mr Lloyd alone who decided he must go, they were merely the messengers. Such an approach if true would clearly absolve them from any victimisation allegations. The problem for them is that this completely contradicted by the documentary evidence in the case as we shall explain, and in short, we reject their evidence on those matters.

Other witnesses

30. Mr Wright gave is an independent journalist present at a couple of alleged incidents. He was present at the incident involving the birthday cake. Although the respondents seek to portray the incident as embarrassing, Mr Wright did not suggest it was nearly so bad. He was straightforward in his answers. He had no obvious reason to lie. We believe he was an honest witness.

31. Insofar as they go, we found the other respondent's witnesses who gave oral evidence were credible and did their best to assist the Tribunal. We note that none of them are any longer employees of Innervate and have neither anything to gain from giving evidence nor reason to co-operate in the first place.

32. We have disregarded Mr Nardin's evidence. We have no reason for his non-attendance and nothing by which to assess his credibility. He is in any case only able to give limited evidence based for the most part on what others told him about the reason for dismissal.

About the respondents

33. At all material times Innervate was a small business that specialised in provided software solutions (in particular customer relationship management systems) and technical support services to various customers in financial services, manufacturing retail, not-for-profit, higher education and the public sector.

34. So far as relevant (and ignoring name changes and exact legal structures at various points, neither of which are clear nor matter) Innervate's corporate history is as follows. Mr Lloyd set the company up in 1991. At some point and before October 2012 (we do not know the exact date and in any case it does not matter) Mr Lloyd sold it to an American company called Ciber Inc. Ciber Inc went bankrupt at some point before June 2017. In June 2017, Mr Startin led a management buyout of Innervate from its bankrupt American parent company. He became a director and CEO. In June 2018 Mr Lloyd, a Mr G Springall (now deceased) and Brightside

Solutions Ltd (Mr Lloyd's company) bought Innervate. They appointed Mr Startin to continue as CEO of Innervate.

35. Mr Startin and Mr Martin confirmed that at all material times to this case, whatever the legal structure, in practical terms Mr Lloyd owned Innervate.

36. Mr Martin was the sales' director from about April 2018.

37. Innervate had about 40 employees. Until March 2019 it was based in London but then moved to Sharnford, Leicestershire where it was based until its insolvency. It had a number of operations in the United Kingdom and in the Middle East (amongst other places). The Middle East was a focus for Innervate.

38. Innervate entered creditors voluntary liquidation on 28 February 2020. All employees were dismissed on this date.

About Mr Murria's job

39. Innervate employed Mr Murria from 26 February 2018 as a business development manager (BDM). The parties disagree about the job interview process. Mr Startin says that he carried out the final interview and made the decision to recruit him. Mr Murria this is incorrect. He says that he was interviewed by a Mr Allen and did not see Mr Startin until 2 weeks after starting. We conclude that Mr Startin conducted the final interview and made the decision to hire. He was after all the CEO and it seems more inherently plausible that he would have the final say and would therefore want to meet a potential recruit before deciding. However, we do not believe it is that important to the issues. What we do believe is significant is that the decision to recruit Mr Murria did not require Mr Lloyd's approval or consent, and that his approval or consent was never sought.

40. At all material times Mr Martin was Mr Murria's line manager.

41. The role of BDM was to source new work and develop relationships with existing clients to secure more work from them.

His employment's terms, conditions and policies

42. Mr Murria's employment was subject to various terms and conditions and policies. His employment contract provided the following (so far as relevant):

    42.1. Clause 7: his salary was £57,000 gross and any bonus was discretionary;

    42.2. Clause 8 (where "You" refers to Mr Murria):

    "8.1 You are required to work 40 hours per week.

    "8.2 Your Line Manager will determine your working pattern. The times and day you are required to work will be notified to you no later than 4 weeks in advance."

    42.3. Clause 12 prescribed that any absence due to sickness, injury or accident, and each party's obligations under it, were determined by Innervate's Managing Absence Policy.

43. The Employee Handbook provided the following (so far as relevant):

43.1. Under “Attendance” it reminded employees to be punctual and notify absences in line with the Managing Absence Policy;

43.2. There was an “Equal Opportunities Policy” and a “Personal Harassment Policy and Procedure” that, in short, emphasised that discrimination, harassment and victimisation were unacceptable and could adversely affect employees. In particular clause 3 said that “insensitive jokes and pranks; lewd or abusive comments about appearance” and “deliberate exclusion from conversations;” could be harassment. The policy provided a complaints procedure;

43.3. There was a social media policy that prohibited the use of social media for harassment or bullying (among other things);

43.4. There was an email and internet policy in effectively similar terms so far as relevant;

43.5. The handbook provided “Disciplinary Procedures”. So far as relevant they provided the following:

43.5.1. There were grades of misconduct, but only gross misconduct would justify dismissal without prior formal warning of some kind;

43.5.2. Examples of offences that would normally be deemed gross misconduct were (so far as relevant):

“theft or fraud…”

There is no mention of failing to complete expenses as an example of gross misconduct, nor of the failure to comply with the sickness policy;

43.5.3. The policy confirmed that Senior Managers had the power to impose any type of warning and to dismiss in respect of any employee;

43.5.4. Mr Startin and Mr Martin were senior managers of Innervate;

43.5.5. The policy made no reference to the decision to dismiss being dictated by or requiring the approval of Mr Lloyd or anyone in his position;

43.6. There was a grievance procedure that invited employees to raise the matter with the person specified in their contract of employment (though Mr Murria’s contract does not actually name anyone) unless it related to personal harassment in which case the policy required a grievance to be made to his line manager in writing;

43.7. Innervate had a sickness policy titled “Sickness/Injury” payments and conditions. It provided (so far as relevant):

“2. Evidence of incapacity

“I. Medical certificates are not issued for short-term incapacity. In these cases of incapacity (up to and including 7 calendar

days) you must sign a self-certification absence form on your return to work

"II. If your sickness has been (or you know that it will be) for longer than 7 days (Whether nor not they are working days) you should see your doctor and make sure he/she gives you a medical certificate and forward this to us without delay. Subsequently you must supply us with consecutive medical certificates to cover the whole of your absence.

"3. Payments

"…

"V. The company reserves the right to suspend or terminate Company Sick Pay in the following circumstances:

" a. where you fail to adhere to the correct reporting procedures/certification procedures with the appropriate timescales

"…

"4. Return to work

"…

"III. On return to work after any period of sickness/injury absence (including absence covered by a medical certificate), you are required to complete a self-certification absence form and hand this to your Line Manager

"…

43.8. Under "5. General, II" the policy explains that Innervate cannot operate with excessive levels of absence. It explains that monitoring may be put in place, and that frequent and persistent short-term absence may lead to disciplinary action resulting in dismissal. The policy does not suggest it would be gross misconduct;

43.9. Finally, so far as relevant, there is an expenses policy. It requires and employee seeking reimbursement of expenses to submit expense claims monthly and warns those that are not submitted within 3 months will be processed only in exceptional circumstances. It explains a person who submits a claim warrants the claim is for genuine and accountable business expenses. We accept that this policy was necessary to allow Innervate to account properly and legally for its expenses for accounting, audit and tax purposes.

44. Innervate provided its employees with private healthcare and access to a confidential independent employee counselling service called the Employee Assistance Programme.

Mr Murria's access to advice

45. There is no suggestion that the respondents at any time sought to mislead Mr Murria about his employment rights or seek to dissuade him from exercising them.

46. Mr Murria has not given any evidence that he was a member of a union but has not dissuaded from joining a union. He has given no evidence that he was unable to access advice or information on the Internet or from ACAS or the Equalities and Human Rights Commission. At all material times his father was a solicitor to whom Mr Murria could, and later, did turn to for advice. Indeed, his father wrote letters on his behalf. He explained that this his father did this not out of some obligation to his son but that their relationship was one of solicitor-client.

47. Mr Murria was not misled as to his employment rights by anyone.

48. We accept that a disability, particularly arising from a mental impairment, can cause people to delay taking action. However, we do not accept the medical evidence disclosed demonstrates that his ADHD would act as a barrier to him being able to bring a claim.

Mr Murria's race

49. For the purposes of his race, Mr Murria identifies it in paragraph 15 of his witness statement as follows: "the colour of his skin and his ethnic origin is from India."

ADHD and its effects

50. Mr Murria has ADHD. He was formally diagnosed with ADHD in March 2019. He has disclosed various medical documents. These are prescriptions, emails from Dr Clare Tong (his general practitioner) and letters from Dr M Sonasti (a consultant psychiatrist) and Dr F Mantia-Conaty (a consultant psychologist) – both at the Oaktree clinic. We consider that these confirm that his ADHD manifests in him as causing stress, anxiety, difficulty performing and keeping up to date with administrative tasks, impulsive behaviour and heightened emotional responses to stressful situations.

51. Some of those manifestations impacted on his ability to do certain tasks, like keep up to date with his expenses claims and keep track of appointments and tasks.

52. Mr Murria alleges that this ADHD also causes vitiligo. We have seen no evidence he suffers it beyond his assertion, but for present purposes we are prepared to accept he does indeed have vitiligo. We are not medical experts. We are conscious that medical issues, particularly mental health issues, can give rise to "common sense" assumptions that are fundamentally flawed. While we are open to the idea that vitiligo may be caused by e.g., stress or anxiety, we have confined ourselves to the medical evidence presented. The evidence is prepared by experts and is clearly prepared after thorough examination and consideration. The letters are details as to the nature and effects of his ADHD on him. They all support his evidence that his ADHD causes the symptoms described in the preceding paragraph. None of them suggests to us he has vitiligo, yet alone

vitiligo caused either directly or indirectly by his ADHD. If there were a link, we would have expected them to mention it like they have detailed the link between his ADHD and all other symptoms. Mr Murria did not take us to a medical document to pointed to a causal link. There is therefore a complete lack of documentary evidence to support any such link, in stark contrast to the position with the other symptoms. His own assertion in oral evidence is not enough because we do not believe he is sufficiently reliable a witness and in any case it does not explain the experts' failure to note this symptom. We conclude therefore that Mr Murria's vitiligo was not linked to his ADHD.

The respondent's knowledge of Mr Murria's ADHD

53. There is a dispute between the parties about when the respondents became aware that Mr Murria had ADHD.

54. Mr Murria says that he told them in November 2018 that his doctor had unofficially diagnosed him with ADHD. He says this was because of a conversation between Mr Startin, Mr Martin and him about his performance. They remarked on his excellent networking but expressed puzzlement about his difficulty with administration. He told them then about the ADHD and its effects.

55. Mr Startin and Mr Martin deny this. They say that it was on 9 April 2019 when Mr Murria told Mr Martin. There is a note of this meeting that confirms the same.

56. Mr Murria suggests it does not really matter since the allegations he relies on post-date 9 April 2019 in any event. We agree but believe it is relevant to his credibility. We believe Mr Murria is mistaken in his recollection. If he had mentioned it in November 2018 then either Mr Startin or Mr Martin would have noted it. We have not heard of nor can think of a convincing reason why they would not have recorded it in November 2018 but decided to do so in April 2019. Secondly, there is an obvious gap between November 2018 and April 2019 in which Mr Murria does not allege any discrimination or harassment occurs. If the respondents were prone to discriminate or harass Mr Murria because of disability or race, we can see no explanation why the alleged November 2018 disclosure did not trigger such behaviour but the disclosure in April 2019 would. Mr Murria suggested it was because the diagnosis was informal in November 2018 but formal in March 2019. We reject that. It is inherently implausible that someone only becomes discriminatory only once they are aware of a formal diagnosis.

57. We conclude therefore Mr Murria did not mention his ADHD in November 2018 to Mr Startin or Mr Martin.

58. If there were concerns about his performance of administrative tasks, we have been given no evidence that suggests to us that a reasonable employer would be put onto enquiry that Mr Murria might therefore be disabled. He did not suggest to them he had problems arising from his ADHD. Slackness with administrative tasks is not so unusual as to stand out or suggest it is down to a disability any more than simple lack of organisation or just plain difficulty with administrative tasks.

59. We conclude it was 9 April 2019 because that is supported by documentary evidence. It is another factor that points to difficulties with Mr Murria's recollection.

Mr Startin's comment to the claimant "I didn't even notice – one of us white boys now!" after the claimant confided in him about his disability

60. It is not clear when Mr Murria says Mr Startin made this comment but, from the way Mr Murria has phrased the allegation, it would appear to be reasonable to presume he alleges that it was about the time he disclosed his disability. The exact timing does not matter in our opinion, however, and we presume it was made in a time in which we have jurisdiction to consider it.

61. We have concluded that Mr Startin did not make this comment. We draw on the general credibility of the witnesses and on the following particular observations:

    61.1. We have concluded that Mr Murria did not suffer vitiligo because of his ADHD. It is not mentioned in the diagnoses provided. There is therefore no obvious reason why he would say he had vitiligo because of ADHD when the doctors had not diagnosed a link.

    61.2. We see therefore no reason for Mr Startin to make the comment.

    61.3. The only record is a document Mr Murria created on his iPhone dated 14 May 2019. Mr Murria asserts the document was a "living document" i.e., he added to it as matters arose. He says the date represents when he last updated it. We cannot accept this. It may be how the iPhone system records dates on notes. However, it appears more likely that it is the date the note is created. In the circumstances we cannot accept it as a contemporaneous note, especially as it lacks dates in any event recording when events are alleged to have occurred.

12 April 2019 – take meds and be bouncy

62. On 9 April 2019, the day he told the respondents of his ADHD, he started to take medication to help manage it.

63. On 11 April 2019 he sent the following group WhatsApp message:

    "I hope these meds kick in soon, I can't get the balance right, I'm either too bolchy, a shit shaft 😂"

    The only reply criticised his spelling. He replied:

    "If only English was my first language 🙈"

    There was no need or prompt for that reply. It was a self-motivated, self-deprecating comment. There is nothing to suggest he felt a need to send it to fit in. There was no complaint about the comment and nothing from the context or other messages that suggests Mr Murria was adversely affected by the comments.

64. On 12 April 2019, the following exchange took place in a WhatsApp group between Mr Startin and Mr Murria:

"Mr Startin [AS]: Hello. What ya doing Monday?

"Mr Murria [AM]: Just a call with [X] but relatively free rest of day

"AM: What you thinking?

"AS: Ok, Peter [Lloyd] is in our office for the Board meeting, would be good PR for you if you were in the office for the day, I know he's always keen to see you.

"AM: Sounds great. I have a 1-2-1 there with Adam too! Thanks for the heads up

"AS: No probs. Take extra meds and be bouncy 😂

"AM: 😂😂"

65. Superficially we think the message could appear insensitive. However, we must bear in mind the context of the friendship between the parties, his reply to the message and the nature of the willing communications between the parties. We also consider Mr Murria's tendency to recast things. We repeat our comments above that his non-disclosure of the "😂😂" in his copy of the message demonstrates to us that he has a selective view of words used and stripping of context. We therefore cannot accept what he now says about the effect of the words.

66. We conclude when Mr Murria received this message he was not offended and took it in good spirits instead. That is more apt to the context and relationship dynamics and reflects the tenor of his own text messages too. This was no more than an exchange between friends that happened to relate to their individual circumstances at the time.

Did Mr Startin make the following comment during a meeting with the claimant, Mr Wright and Mr Martin in Bahrain "do you want a coffee? I can get the little Indian boy to get it. Not [the claimant], the waiter"?

67. We have concluded that Mr Startin made this comment.

68. We acknowledge that Mr Wright in his evidence in chief told us:

"I have been asked if I recall any incidents during the Bahrain trip when [Mr Startin] made any comments about [Mr Murria] being Indian. I do not."

69. Mr Wright's evidence on this point was not challenged. However, what he has said is only that he does not recall such a comment. One might expect him to remember if such a comment were made in front of him; equally that one might expect him to be clear that he did not hear any such comments if that too were the case. At best his evidence is simply he has no recollection.

70. In a WhatsApp group of 2 February 2019 Mr Martin wrote:

"Don't worry dear, you're just going on one of those nice trips you like. The vampire and little Indian boy will take good care of you. Remember now, when you see someone with a tea town on their head just say, "Tiny British Business" and then you can have some cake"

Mr Startin was a member of that group.

71. We conclude that "The Little Indian boy" was a reference to Mr Murria because there was no-one else to whom it could refer.

72. Mr Startin's WhatsApp messages are of a similar type of humour, though we acknowledge he does not use the word "Little Indian boy". Furthermore, this is a tight-knit group that works closely together. Mr Murria himself had sent a photo of an Indian male carrying a kettle and cups. It is readily credible therefore to believe the phrase was used by Mr Startin.

73. However, we are quite satisfied that Mr Murria was not offended by this comment. In coming to that conclusion, we have reflected on his general credibility surrounding the events, his tendency to reinterpret past events and his own use of a message alluding to the same moniker. We see no evidence he sent the latter message under some obligation to be seen to fit in.

28 April 2019 – joke that the claimant will have to collect his P45

74. In Mr Murria's evidence in chief, Mr Murria told us about a walk back from a restaurant where he had dined with Mr Startin, Mr Wright and Mr Fenner. It was the meal at which Mr Murria had secretly organised the surprise birthday cake.

75. Mr Murria alleges that he told Mr Startin that he might have to reduce the trips to Bahrain because of personal issues (These are described above in paragraph 22.9 above). He told us it was taking a toll on him because of the ADHD and its effects. He said:

> "I felt [Mr Startin] was using this positive feeling to put pressure on me saying "let us know of you don't want to keep coming out, we can find someone who will" despite him knowing that the that the travel and heavy workload triggered symptoms of his ADHD. The comment from the P45 followed on from this. In view of the fact that had recently told the respondents about my disability and the comment relating to collecting my P45, I understood these comments to be a threat that my dismissal would follow."

76. Mr Startin denied mentioning the P45. He admits that he was angry however with Mr Murria's stunt of organising the cake. Though we think it was not as bad as Mr Startin alleges, we readily accept that any reasonable employer might be disappointed if an employee off their own back and secretly organised a surprise cake for attendees at what was a business meal. It clearly could have gone wrong if for example the guest was offended.

77. We conclude that Mr Startin did mention the P45 but that it had no connection to Mr Murria suggesting he wanted to reduce his trips out to Bahrain because of his ADHD, amongst other reasons. We conclude it was entirely because of what Mr Startin thought was Mr Murria's unprofessional behaviour organising the cake. Our reasons are as follows:

    77.1. We have firstly taken into account the credibility of the parties. This weights against Mr Murria;

    77.2. It is far more plausible that a manager would be angry with an employee for organising the cake stunt like Mr Murria did;

77.3. Whether the guests were really embarrassed or not, we accept that in fact Mr Startin was angry with Mr Murria for what he did. It is inherently plausible. Also, Mr Startin is a more credible witness on these issues in our view for reasons given above;

77.4. In such a context it is highly plausible that the manager would mention a P45 as shorthand for dismissal;

77.5. There is no reason to think that Mr Startin would mention it because Mr Murria indicated he wanted to reduce his trips to Bahrain. Innervate had other customers. Mr Murria was an excellent networker. There was a strong relationship at that time. The idea of dismissal because he did not want to travel to Bahrain does not seem plausible;

77.6. There is no suggestion that ordering a surprise cake is a manifestation of his ADHD. However, the medical evidence that we have seen would not in our opinion support such an allegation anyway;

77.7. Mr Murria's direct quote of Mr Startin's response does not indicate a threat of dismissal if he were to reduce his trips to Bahrain, merely that someone else would come in his stead;

77.8. Mr Murria's evidence "…In view of the fact that had recently told the respondents about my disability and the comment relating to collecting my P45, I understood these comments to be a threat that my dismissal would follow" came across to us as an after-the-event reinterpretation, to which he is prone. The fact he has to view it through an earlier conversation to link it to disability is in our mind an indication of someone trying to find evidence to support their conclusion rather than based on anything at the time that suggested any link to his ADHD.

77.9. We also note that on 30 April 2019 (when Mr Murria had taken ill) the following WhatsApp exchange took place with Mr Martin:

"Mr Murria: As you said we should have a discussion from your perspective these trips are taking their toll on me, so before we have that discussion I would like some thinking time to process why that might be the case"

This does not fit in our mind with someone who 2 days earlier had been threatened with dismissal for suggesting he would have to stop the trips to Bahrain.

77.10. We also noted that Mr Martin said in that conversation

"Appreciate that, I'm trying to help but you need to feed me what I can help with so you don't come back to a load of late stuff and Roger/Sam putting the boot in. Even record your rambling thoughts on a sound recorder and send it to me while you're laid up?"

We recognise Mr Martin is not Mr Startin. However, they clearly work closely together. His message does not fit with the Mr

Murria's allegation that Innervate's CEO had just threatened to sack him because (in part) of his ADHD and its effects.

Mr Murria "Not contributing much" to a meeting in Bahrain and a suggest that the claimant was "crazy" for not saying he was not at fault for a change of dynamics in that meeting

78. The next day, 29 April 2019, Innervate had arranged a sales meeting at the British University of Bahrain (BUB). BUB had senior members of staff there and Innervate was represented by Mr Murria and Mr Startin. The purpose of the meeting was to secure BUB's custom. The parties agreed that trade in Bahrain was different to that in Europe. Interpersonal relationships between client and supplier were very important and thus an important part of the sales process. Securing a sale took a lot longer because of the hierarchical culture of decision making, which was why the personal connections mattered so much.

79. Mr Startin chose Mr Murria because of his excellent networking skills.

80. However, Mr Murria did not contribute to the meeting. Instead, he remained silent until the end. Mr Murria alleges that this was because Mr Startin effectively excluded him. We reject that suggestion. We have already remarked on our doubts about the accuracy of Mr Murria's recollection of events. Moreover, the allegation is incongruous with Mr Startin taking him. Mr Startin well knew of Mr Murria's networking skills. It is therefore plausible he would expect Mr Murria to display those skills in the meeting. If he wanted someone merely to sit there, then no doubt he would have chosen someone else. No reason has been advanced (and we cannot discern one) as to why Mr Startin would take Mr Murria with him and then in essence exclude him from taking part. There is no obvious benefit.

81. After the meeting Mr Startin accepted he said to Mr Murria:

"Are you all right? You didn't contribute much in there."

We conclude this was because it was a factually accurate representation of what had happened in the meeting and was a genuine enquiry about whether Mr Murria was all right. Disability played no part of it.

82. After the meeting it appears that the parties had an argument. There are differing accounts about who was the aggressor. It is agreed it related to the dynamic between them in the meeting and that it was heated.

83. It is agreed Mr Startin called Mr Murria "crazy". Mr Murria version is this: He suggested the change in dynamic was Mr Startin's fault. Mr Startin replied to him that he was "crazy" to suggest this. Mr Murria described his reaction to this as follows:

"Having recently told [Mr Startin] that about my ADHD and the impact this has, specifically that I have a heightened emotional response to situations and can be talkative and energetic one minute then quitter and reserved the next, I took this comment to mean that [Mr Startin] was alleging that my silence was related to my ADHD and that it was affecting my performance at work."

84. Mr Startin says that after the argument, both were returning to the hotel they were both staying at. Mr Startin suggested they both get a taxi. Mr Murria refused saying he would make his own way back. Mr Startin told Mr Murria that this was “crazy.”

85. We accept Mr Startin’s version of events. We have reflected on our general assessment of Mr Murria’s credibility about events. However, there are 3 particular factors that on balance mean that Mr Startin’s version is to be preferred.

85.1. Firstly, it has an inherent plausibility to it. The idea that an employee would refuse to share a taxi with his employer’s CEO, when they were going to the same destination is something that the said CEO might well find difficult to understand. It is inherently plausible that therefore Mr Startin might describe such an arrangement as “crazy”.

85.2. Secondly Mr Murria’s evidence came across to us having to make logical leaps to draw an adverse inference from the word, like he did with the phrase “pig in shit”. In his evidence he gives no explanation why he should take one word expressed in a heated argument, relate it his ADHD and then extrapolate that it was suggesting his ADHD was having an adverse impact on work. We understand how “crazy” may be used to refer to mental health, we cannot see how it can be used to infer poor performance because of mental health.

85.3. Thirdly it is somewhat incongruous with the friendship that existed and with the general support that Innervate had provided that Mr Startin should decide to use such terminology there and then about Mr Murria’s ADHD.

85.4. Fourthly Mr Startin gave a clear and detailed account that we found plausible.

86. Therefore, we conclude that the use of the word “crazy”, while used, was not connected to Mr Murria’s disability in any way.

Mr Murria’s illness in Bahrain and subsequent issues

87. Following the meeting above Mr Murria took extra time in Bahrain. There were issues raised about him attending the Bahraini Grand Prix, but it seems that Innervate agreed he could stay with the purpose of promoting the business. There is dispute about whether he actually did this. We are not able to resolve the dispute on the evidence we have and so will presume he did. It is not why he was dismissed in any event. Therefore, we do not believe their resolution assists us either way in resolving this case. When he returned, he was away ill or on leave until 7 May 2019.

88. Mr Martin and Mr Startin exchanged messages about Mr Murria in which they expressed concerns about his behaviour. They were also concerned about Mr Murria’s expenses on the company credit card and the backlog in his claims for expenses.

89. Mr Startin also alerted Mr Martin to the fall out after the meeting at the university.

Mr Martin's questions about his medication and his ADHD diagnosis during a meeting on 7 May 2019?

90. On 7 May 2019 Mr Murria and Mr Martin met at Innervate's headquarters. The meeting took place in the afternoon and only Mr Martin and Mr Murria were present.

91. Mr Martin made his own notes. However, he did not send them to Mr Murria. No note taker was present. However, we have no reason on the evidence to doubt that they accurately summarise the gist of the meeting. This is in particular because Mr Martin readily accepted in evidence in chief that the notes are but a summary and did not seek to hide behind their brevity or to deny his conversation about the ADHD. In the notes he recorded that he had indeed used the contentious phrase "common denominator".

92. Mr Martin explained he wanted to enquire into events at the meeting at BUB and what happened afterwards.

93. Mr Martin accepts he asked about Mr Murria's medication for ADHD. His notes record that at the end of the meeting a conversation of the following gist took place

"• I asked you about medication

"• you are on medication from the Ritalin family and it didn't have any adverse side effects that we needed to be aware of in relation to your work

"• you didn't take your medication to Bahrain as you need a letter from your doctor

"• You asked why I was asking about meds, and I said as part of our duty of care"

94. Mr Martin accepts he said that he used the phrase "not important" in that part of the conversation. Mr Murria suggests this demonstrates that Mr Martin was not really interested in his ADHD but merely trying to draw a link between workplace issues, his medication and his ADHD.

95. We reject this. Taking into account general credibility and Mr Murria's tendency to find offence, the circumstances and the questions we conclude that Mr Martin asked these questions as part of a reasonable enquiry into what may be going on that is relevant to the situation in which an employee recently diagnosed with ADHD had had a row with his CEO and had been ill and was now trialling new medication. We think, rather, an employer in Mr Martin's situation would have been open to criticism if they did not seek to understand these issues.

96. While it is clear that Mr Murria's disability is in the background, Mr Martin's motive derived from his reasonable desire to seek to understand all the circumstances, not from the fact that Mr Murria was disabled.

His dismissal and the circumstances leading up to it

97. On 14 May 2019 there was a meeting between Mr Murria, Mr Martin with Ms Hines present.

98. Ms Hines was an HR consultant retained by Innervate to assist them with HR on this particular issue. It is agreed she provided advice to Innervate.

She was not called to given evidence about discussions, decisions taken or advice she gave. We found that striking. She is an obvious witness to give evidence about the circumstances of the dismissal. Even if she did not make the decision, she will be aware of the information she was given and the advice she gave. Because she is not a solicitor or barrister, her conversations would not be covered by legal advice privilege: **R (on the application of Prudential plc) v Special Commissioners of Income Tax [2013] 2 AC 185 UKSC**. This is something that we believe undermines the respondents' evidence on this issue because she could have confirmed how the decision had actually been reached and the reasons for it.

99. The meeting began by Mr Martin explaining it was a continuation of the meeting they had had on 7 May 2019. There is no suggestion at the start (or in prior correspondence) that an outcome could be dismissal.

100. There are notes. They are not verbatim. We have no reason to believe that they do not capture the gist of what each person said. At the meeting, the following exchanges took place:

"Mr Martin [AdM]: Stated as previously advised, he will be speaking to all the other people involved this was an investigation no decisions had been made, confirmed he had already [Mr Murria] when he spoke to Roger at the time of the incident when Roger made the complaint against [Mr Murria]

"Mr Murria [AM]: Thanked [Mr Martin] and advised he appreciated that, now felt less concerned than before.

"…

"AM: Recapped by advising that at the last meeting [they] had discussed the incident with [Mr Startin] following the meeting with the University in Bahrain on 29 April. [Mr Martin summarised the details of the allegations]

[Mr Murria set out his version of events]

"…

"AM: advised that Mr Martin had only started investigation with [him] once the issue had occurred with [Mr Startin]. Mr Martin had not started an investigation with Mr mines when Mr Murria advised him, this only started when Mr Startin complaint of the issue. Because Mr Startin is now involved Mr Murria now being investigated.

"AdM: advised as he had already started he will be speaking to everyone involved separately this is the start of the investigation no decisions or judgements have been made. Advised he wanted to know what medication Mr Murria is taking advised that when they spoke on the last occasion Mr Murria advised some kind of Ritalin. Asked when was Mr Murria diagnosed with ADHD want to ensure we support Mr Murria.

"AM: advised he was diagnosed 4 to 6 weeks ago felt it should have been discussed at the time not now as it is a disability.

"…

"AM: advised he felt he had done the right thing by taking the issue to Mr Martin then referred to the handbook pages 2 and nine. Mr Murria felt he

had tried to use the coping mechanisms Mr Martin had advised Mr Murria to use noted that Mr Martin had never said Mr Murria was at fault at the time. Mr Murria went on to refer to the handbook equal opportunities policy referring to the right of working in a neutral environment. [He] felt there had been incidents in the past where Mr Startin had said he could always get another salesperson. Mr Murria felt it was hard to accept these comments when he was junior and younger than Mr Startin. Mr Murria felt he had worked really hard to get the Leeds felt he had been marginalised and undervalued. Mr Murria advised he had to put up with the jokes and banter about Indians and being the Indian boy. Mr Murria advised he was of ethnic origin and it made it difficult to stomach being called the little Indian boy.

"AdM: Asked Mr Murria if he had ever refer to himself in the same way?

"AM: advised he had but difficult to communicate his concerns to the CEO. As raises concerns with Mr Mines.

"AdM: advised Mr Murria that Mr Martin had never received a complaint of this nature before from Mr Murria.

"AM: advised this is why he is raising it now it is difficult for him – went on to explain he is also suffering from vitiligo and when Mr Startin became aware he said "oh you're one of us now a little white boy". Mr Murria advised these were the main things that make you feel uncomfortable and an outsider. [He] advised he had tried to communicate but was just called a worse.

"…

"AM: … It had all been very hard for him, feel now he has been honest and has been suffering in silence in the working environment. Mr Murria advised he felt it was unacceptable not just banter and that he was a victim and has been working really hard.

"…

"AdM: advised he wished to be clear this is the first time Mr Murria raise these issues. Mr Martin here to investigate and ensure the business is ethical.

"Mr Murria confirmed he had put forward his concerns at the meeting."

101. The meeting ended with Mr Martin saying:

"confirm the investigation was ongoing and he would keep Mr Murria updated and asked Mr Murria to contact him the next day once he had seen his doctor

102. Within an hour of the meeting, the respondents removed Mr Murria from 2 of the company WhatsApp groups of which he was a member. The explanation was that they wanted to reduce the communications (and thus stress) on him by avoid him being disturbed by WhatsApp messages. They explained that that while the company had many such groups (of which Mr Murria was a member), these 2 were used for general communications.

103. On 17 May 2019 they decided to dismiss Mr Murria. A dismissal letter was drafted and on 17 May 2019 12:41 Ms Hines, wrote to Mr Kelly at Blacks Solicitors who had provided legal advice, that:

"Following my last email to you, Andy, Adam and I had a call and would like to add the additional sentences regarding company property etc…. I have now also attached the handbook and [Mr Murria]'s contract as the wording regard providing doctor certificate and completing a self-certification form on 7th day of absence is a bit woolly, and we want to be sure that my suggested wording for the letter is correct or you may suggest and alternative."

There is a then a discussion between Ms Hines and Mr Kelly. The contents are not known but emails show it took place. Mr Walker produced the final letter and posted it that day.

104. Thus, on 17 May 2019 they dismissed Mr Murria by letter. The letter read (so far as relevant):

"I write to advise that due to your failure to comply with the company's absence procedure, the company is terminating your employment with effect from today… for misconduct on the grounds that you were absent without leave.…

"The reason for this decision is that despite being asked you have failed to provide either a completed self-certification or a medical certificate covering your absence. This is in breach of clause 12 of your contract of employment and the company's absence reporting procedures as set out in the sickness/injury payments procedure as detailed in the company's handbook.

"…"

105. The respondents have attempted to put forward a number of reasons for the dismissal. In summary they have alleged:

105.1. Mr Lloyd said at a board meeting (at which Mr Startin and Mr Martin were present) that Mr Murria must go, and in consequence Mr Startin and Mr Martin were the mere conveyors of his will and not decision maker. There are no minutes of the board meeting (in apparent breach of the **Companies Act 2006 section 248**) to confirm this however;

105.2. There had been clashes with staff;

105.3. He had had an aggressive argument with the CEO of Purple Consulting who were strategic partners of Innervate;

105.4. He had not submitted his expenses on time, and some appeared inappropriate. We note that afterwards Innervate suggested that they would assist him to submit them;

105.5. He had attended the grand prix in Bahrain which had cost Innervate money instead of being costs neutral;

105.6. He had moved address to benefit from travel costs;

105.7. He had failed to respond promptly to a request for a tender for work from Orbit Housing;

105.8. He made promises to Equity and/or BECS and did not deliver on them; and

105.9. He tried to claim £1,300 for a flight from Dubai when in fact the money was owing from an outstanding debt.

106. We reject that these formed any part of the decision-making process and were not in the respondents' minds at the time. We are satisfied that they are after-the-event considerations searched for and found to justify the dismissal.

107. Mr Murria raises many arguments about why these do not stand up to scrutiny. For the Tribunal however it is apparent that none of these things had anything to do with the termination of his employment for the following reasons:

107.1. None of them is set out the letter of dismissal when they could easily have been because they were known of at the time;

107.2. That letter of dismissal was not written "on the fly"- it was written in consultation with an HR consultant and a solicitor. The HR consultant was well placed to tell the Tribunal what was in the respondents' mind because they would have discussed it with her. The failure to call her to give obvious evidence suggests to us that it is because her evidence would not have assisted. If the reasons for dismissal were really as alleged, then there is no satisfactory explanation why they are not in the letter.

107.3. None of the alleged reasons for dismissal was investigated, despite Mr Martin saying 3 days before that there would be an investigation;

107.4. In particular we reject the suggestion that Mr Startin and Mr Martin acted as mere vessels for Mr Lloyd's decision to dismiss:

107.4.1. There are no minutes supporting that assertion;

107.4.2. They are senior members of staff and we are satisfied they knew about principles of harassment, equality and victimisation. It is not conceivable they would agree to do something as significant as this if they disagreed with it;

107.4.3. Innervate's handbook makes it clear that the decision to dismiss lies with senior managers who are Mr Martin and Mr Startin. They suggested that was a relic from the time before Mr Lloyd became the owner. We reject that. The handbook is detailed, thorough and thought through. We believe its professionalism suggests such a significant change would be written into the handbook. It is in any case implausible that they could hire but not fire, and implausible the owner would retain such tight control over firing but not hiring: He would in

effect opening himself to being told he would have pay for incapable or unproductive staff (since others decided who became employees) until he alone decided they should be dismissed (after a fair process).

107.5. In addition to above, compelling evidence about the real circumstances comes from Mr Startin's own notes. He wrote in his own notes about the background to the dismissal as follows (so far as relevant):

"During those meeting [with Mr Murria in May] and in particular the second meeting [Mr Murria] started to suggest that he had been subjected to racial and disability discrimination – to which he could provide no evidence. His claimed [sic.] his disability was ADHD however declined us access to his medical records, could not provide proof of a diagnosis and could not recall which medication he was taking.

"After discussion, both myself, [Ms Hines] and Mr Martin could not see a way back for him into the business. I raised the issue at the board meeting and subsequently took the decision following guidance on process from [Blacks solicitors] to dismiss him for being in breach of the company's sickness policy"

108. We note that this detailed note did not spell out any of the other reasons that the respondents allegedly relied on at the time to dismiss but for some reason failed to put in the dismissal letter despite having had an opportunity to do so and having had input from a solicitor and HR consultant.

109. We are satisfied that the real reason for the dismissal was that Mr Murria had raised allegations of discrimination in the meeting on 7 May 2019. The reasons for that are:

109.1. The temporal coincidence;

109.2. The inherent plausibility it would be a reason to dismiss, especially in light of difficulties in Bahrain. It is inherently plausible that Mr Martin and Mr Startin could see this as a straw that broke the camel's back after the disputes in Bahrain with Mr Startin;

109.3. The compete contrast between the reasons given at the time and now advanced;

109.4. The reasons being advanced now not forming any part of the decision-making process at the time, suggesting the respondents are looking for reasons rather than advancing genuine reasons;

109.5. The incorrect assertion Mr Lloyd alone made the decision to dismiss even though responsibility lay with Mr Startin and Mr Martin;

109.6. Most significantly, Mr Startin's own contemporaneous notes that shows a clear link in Mr Martin and his own mind between the decision to dismiss and discrimination.

110. We find as a fact that neither Mr Murria's ADHD nor its effects were part of the reasons for dismissal. The respondents were aware of Mr Murria's behaviour and of his ADHD, yet they had not even apparently considered any disciplinary action, yet alone dismissal, until he raised allegations of discrimination. If ADHD were a factor then we would expect to see some clear evidence of it. There is none in our view. Also, if ADHD were a factor there is no obvious reason why the respondents were trying to gain an understanding of it. The evidence shows that the allegations of discrimination are the clear and, in our opinion, only fact that led them to decide to dismiss.

111. On the evidence we are satisfied that Mr Startin and Mr Martin took the decision to dismiss (whether with or without Mr Lloyd) and they are responsible for Mr Murria's dismissal going ahead.

112. Having analysed the real reason for dismissal, we are satisfied that Mr Startin and Mr Martin removed Mr Murria from the WhatsApp groups because he was going to be dismissed because of his complaints about discrimination. We cannot accept it was for altruistic reasons. If that were the case he would have been removed from all groups, or there would have been a discussion with him to seek his opinion. He was of course free to leave of his own accord did not do so. In light of the reasons for dismissal and the timing, it can only be linked to the complaints for discrimination. Even without the dismissal, his removal from the key WhatsApp groups so soon after he alleges discrimination and the respondent's reaction to the allegation shows this was effectively ostracization motivated by his complaints of discrimination.

113. Mr Murria has alleged that the reason for his dismissal was also because of sickness absence and emphasised this is in addition to victimisation. There is no evidence to support this contention in our view. While the documents are clear to show the complaints of discrimination were motivating factors, they do not in our opinion show has absences were a factor.

114. Mr Murria also asserts that he was dismissed for failure to follow the sickness absence procedure. On the evidence we reject that. Again, the clear evidence is it was his complaints of discrimination.

115. We note the letter refers to "absent without leave" and "failure to follow sickness absence procedure". On the evidence we believe on the evidence these reasons were grasped at to provide something to justify a dismissal and hide the real reason. We do not believe they represent the respondents' real state of mind, either in whole or part.

116. Matters followed on. Other than Mr Murria instructing his father's firm to advise and represent him in the dispute, we do think anything turns on subsequent events so we have put them to one side except as follows: We note that Innervate's finance team suggested Mr Murria simply provide expense receipts and they would do the required work to complete the claim forms.

Expenses

117. The claimant was owed £2,691.60 for expenses he had paid but had not bene reimbursed. He confirmed this amount on oath and adduced documents to support the sums he claimed. Both Mr Startin and Mr Walker accepted the figure was correct and the sums would be payable under the policy for reimbursement of expenses. Innervate adduced no evidence to the contrary.

118. Only the first respondent can be responsible for reimbursement. It is not alleged that the second or third respondents are liable.

119. Having considered the evidence, we find as a fact that Mr Murria had incurred expenses of £2,691.60 and the first respondent had not repaid them but should have.

Law

120. We have been referred to a number of cases. We have referred to only those we believe are necessary to explain our decision.

121. Race and disability are protected characteristics under the **Equality Act 2010. Section 6(4)** provides:

"This Act … applies in relation to a person who has had a disability as it applies in relation to a person who has the disability; accordingly (except in that Part and that section)—

" (a) a reference (however expressed) to a person who has a disability includes a reference to a person who has had the disability, and

" (b) a reference (however expressed) to a person who does not have a disability includes a reference to a person who has not had the disability."

122. Therefore, the focus must be on the claimant's actual disability rather than them being disabled generally.

Direct discrimination

123. The **Equality Act 2010 section 39** prohibits an employer from discriminating against or harassing an employee. Discrimination could include dismissal.

124. The **Equality Act 2010 section 13** provides as follows (so far as relevant):

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

"…"

125. Whether treatment is less favourable is to be assessed objectively: **Burrett v West Birmingham Health Authority [1994] IRLR 7 EAT**.

126. The section contemplates a comparator. In **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 33 UKHL** Lord Scott explained that this means that:

"the comparator required for the purpose of the statutory definition of discrimination must be a comparator in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class."

Where there is no real comparator, the Tribunal must consider how a hypothetical comparator should be treated (**Balamoody v United Kingdom Central Council for Nursing, Midwifery and Health Visiting [2002] ICR 646 CA**) unless the reason for the treatment is plain: **Stockton on Tees Borough Council v Aylott [2010] ICR 1278 CA.**

127. The protected characteristic need not be only reason provided it has a

"significant influence on the outcome, discrimination is made out'.

see **Nagarajan v London Regional Transport [1999] ICR 877 UKHL**. The Equality and Human Rights Employment Code (the Code) **[3.11]** says

"the [protected] characteristic needs to be a cause of the less favourable treatment, but does not need to be the only or even the main cause"

128. When analysing whether the difference in treatment is because of race the Tribunal is entitled to take into account if the reason is inherently discriminatory (by asking "What were the facts that the discriminator considered to be determinative when making the relevant decision?') or, where the reason is not immediately apparent, to look at why it happened analysing the conscious or sub-conscious mental processes of the discriminator: **R(E) v Governing Body of JFS aors [2010] 2 AC 728 UKSC**.

129. Motive is irrelevant: The code **[3.14]** and **JFS**.

130. We have taken into account the guidance that discriminators tend not to advertise the fact (**Glasgow City Council v Zafar [1998] IRLR 36 UKHL**), people may be unwilling to admit to themselves they are discriminatory (**Nagarajan**) and that discrimination can be based on innocent or well-intentioned motives even (**King v Great Britain-China Centre [1991] IRLR 513 CA**; **Amnesty International v Ahmed [2009] ICR 1450 EAT**).

Discrimination arising from a disability

131. The **Equality Act 2010 section 15** provides

"Discrimination arising from disability

"(1) A person (A) discriminates against a disabled person (B) if—

"(a) A treats B unfavourably because of something arising in consequence of B's disability, and

"(b) A cannot show that the treatment is a proportionate means of achieving a legitimate aim.

"(2) Subsection (1) does not apply if A shows that A did not know, and could not reasonably have been expected to know, that B had the disability."

132. "Knowledge" in **sub-section (2)** relates to the disability itself, not the something that arises from it: **City of York Council v Grosset [2018] ICR**

1492 CA. Something that arises includes anything that is the result, effect or outcome of a disabled person's disability: The code **[5.9]**.

133. The approach to cases under **section 15** was explained in **Pnaiser v NHS England aor [2016] IRLR 170** (after referring to the previous authorities):

133.1. the Tribunal had to identify whether there was unfavourable treatment and by whom;

133.2. it had to determine what caused the treatment. The focus was on the reason in the mind of the alleged discriminator, and an examination of the conscious or unconscious thought processes of that person might be required;

133.3. the motive of the alleged discriminator in acting as he did was irrelevant;

133.4. the Tribunal had to determine whether the reason was "something arising in consequence of [the claimant's] disability", which could describe a range of causal links;

133.5. that stage of the causation test involved an objective question and did not depend on the thought processes of the alleged discriminator;

133.6. the knowledge required was of the disability; it did not extend to a requirement of knowledge that the "something" leading to the unfavourable treatment was a consequence of the disability.

134. In **Williams v Trustees of Swansea University Pension and Assurance Scheme aor [2019] ICR 230 UKSC** the Supreme Court suggested at [27]

"I agree […] that in most cases (including the present) little is likely to be gained by seeking to draw narrow distinctions between the word "unfavourably" in section 15 and analogous concepts such as "disadvantage" or "detriment" found in other provisions, nor between an objective and a "subjective/objective" approach. While the passages in the Code of Practice to which [Counsel] draws attention cannot replace the statutory words, they do in my view provide helpful advice as to the relatively low threshold of disadvantage which is sufficient to trigger the requirement to justify under this section."

135. The parts of the code referred to are that the claimant must have been put to a disadvantage (The code **[5.7]**) and that it is enough the claimant can reasonably say they would have preferred to be treated differently: The Code **4.9**.

Harassment

136. The **Equality Act 2010 section 26** provides (so far as relevant):

"(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."

137. The Tribunal should:

137.1. consider the 3 elements separately even though they overlap,

137.2. have regard to the context to assess if it was reasonably apparent what was the purpose or effect,

137.3. be sensitive to hurt that result from offensive comments or conduct but seek not to encourage a culture of hypersensitivity (see **Richmond Pharmacology v Dhaliwal [2009] IRLR 336 EAT**).

138. The Tribunal's approach was explained in **Pemberton v Inwood [2018] ICR 1291 CA** by Underhill LJ and is as follows. A Tribunal must

138.1. consider **both**:

138.1.1. whether the claimant perceives themselves to have suffered the effect in question (subjective); **and**

138.1.2. whether it was reasonable for the conduct to be regarded as having that effect (objective).

138.2. It must also take into account all the other circumstances.

139. The Tribunal has reminded itself that it does not follow that because someone has put up with "banter" for years or joined in even, does not mean it is unwanted. It is important to look at all the circumstances: **Munchkins Restaurant Ltd aors v Karmazyn UKEAT/0359/09**; but that if a claimant makes it clear through words or conduct they take no objection, that may suggest the conduct is not unwanted (e.g., **English v Thomas Sanderson Blinds Ltd [2009] ICR 543 CA**; and acceptable conduct can cross the line and become unwanted: **English**. We have also considered the Code **[7.8]** which says

"7.8 The word 'unwanted' means essentially the same as 'unwelcome' or 'uninvited'. 'Unwanted' does not mean that express objection must be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment."

140. We have also had regard to the list of examples of unwanted conduct in the Code at **[2.8]**.

Victimisation

141. The **Equality Act 2010 section 27** provides:

"27 Victimisation

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

"(a) B does a protected act, or

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

"(2) Each of the following is a protected act—

"(a) bringing proceedings under this Act;

"(b) giving evidence or information in connection with proceedings under this Act;

"(c) doing any other thing for the purposes of or in connection with this Act;

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

"(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

"(4) This section applies only where the person subjected to a detriment is an individual.

"(5) The reference to contravening this Act includes a reference to committing a breach of an equality clause or rule."

142. The focus is on "why" A acted as they did: **St Helens BC v Derbyshire aors [2007] IRLR 540 UKHL**.

143. Like other areas of discrimination, motive is irrelevant to liability and it need only be one of the reasons: **Nagarajan**.

Burden of proof: Equality Act 2010

144. The **Equality Act 2010 section 136** sets out the way that the burden of proof operates in claims under the legislation, and was explained in **Igen Ltd aors v Wong aors [2005] IRLR 258 CA; Efobi v Royal Mail Group Ltd [2019] 2 All ER 917 CA; Hewage v Grampian Health Board [2012] ICR 1054 UKSC** and **Madarassy v Nomura International plc [2007] ICR 867 CA**.

145. At the first stage, the Tribunal must consider whether the claimant has proved facts on the balance of probabilities from which the Tribunal could properly conclude that the respondent has committed an unlawful act of discrimination or harassment. The Tribunal presumes there is an absence of an adequate explanation for the respondent at this stage.

146. It is not enough for a claimant to show merely that they have been treated less favourably than the comparator and for them point to a protected characteristic: **Madarassy; Efobi**. There must instead be some evidential basis on which the Tribunal could properly infer that the protected characteristic either consciously or subconsciously was the course of the treatment.

147. The Tribunal may look at the circumstances and, in appropriate cases, draw inferences from breaches of, for example, codes of practice or policies.

148. If the claimant succeeds in showing that there is, on the face of it, unlawful discrimination or harassment, then the Tribunal must uphold the claim unless the respondent proves that it did not commit or was not to be treated as having committed the alleged act. The standard of proof is the balance of probabilities. It does not matter if the conduct was unreasonable or not sensible: The question is if the conduct was discriminatory.

Burden of proof: Breach of contract

149. It is for the claimant to establish that a respondent has breached a contract between them, that the breach arises or remains outstanding at the termination of his employment and that it relates to his employment and the losses that flow from that breach. He must prove these matters on the balance of probabilities.

Time limits for claims under the Equality Act 2010 and continuing acts

150. The **Equality Act 2010 section 123** requires a claim to be presented within 3 months of the act complained of, or such other period as the Tribunal thinks just and equitable. Where there is conduct extending over a period of time, time runs from the end of that period. To decide if there was a continuing act, the Tribunal must look at the ongoing state of affairs to determine if the claimant was treated less favourably over that period.

151. The factors in the **Limitation Act 1980 section 33** can be a useful aide but are not prescriptive: **Southwark London Borough Council v Afolabi 2003 ICR 800 CA**. They are not a framework for thinking. Their relevance depends on the facts of the particular case. The best approach for a Tribunal in considering the exercise of the discretion is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time, including in particular, "the length of, and the reasons for, the delay": **Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23**. We remind ourselves that there is a public interest in enforcing time limits.

152. Ultimately the Tribunal has a broad discretion when weighing up all the circumstances, but length of delay and reasons for it are always relevant, as is the prejudice to the respondent if a claim that is out of time is allowed to proceed: **Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] ICR 1194 CA**.

The ACAS code of practice and relevance

153. The **Trade Union and Labour Relations (Consolidation) Act 1992 section 207A** applies to proceedings under the **Equality Act 2010** (see **Schedule A2** of the 1992 Act). It provides (so far as relevant):

"…

"(2) If, in the case of proceedings to which this section applies, it appears to the employment Tribunal that—

"(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,

"(b) the employer has failed to comply with that Code in relation to that matter, and

"(c) that failure was unreasonable,

the employment Tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

"…

"(4) In subsections (2) […], "relevant Code of Practice" means a Code of Practice issued under this Chapter which relates exclusively or primarily to procedure for the resolution of disputes.

"…"

154. Therefore, the uplift is discretionary and can follow only if the employer's failure is unreasonable. It is also compensatory and not punitive.

155. The **ACAS Code of Practice Number 1** ("COP1") says

"1. This Code is designed to help employers, employees and their representatives deal with disciplinary and grievance situations in the workplace.

"Disciplinary situations include misconduct and/ or poor performance. If employers have a separate capability procedure, they may prefer to address performance issues under this procedure. If so, however, the basic principles of fairness set out in this Code should still be followed, albeit that they may need to be adapted."

156. The code identifies the following key steps in any disciplinary procedure:

156.1. carry out an investigation to establish the facts of each case;

156.2. inform the employee of the problem;

156.3. hold a meeting with the employee to discuss the problem;

156.4. allow the employee to be accompanied at the meeting;

156.5. decide on appropriate action; and

156.6. provide employees with an opportunity to appeal.

157. The Tribunal is aware that the cases of **Lawless v Print Plus (Debarred), UKEAT/0333/09, 27 April 2010, EAT** and **Abbey National plc and anor v Chagger 2010 ICR 397, CA** suggest both the respondent's resources, and the size of the remedy before uplift are relevant factors (amongst others) before deciding whether to make an uplift and if so the amount.

Conclusions

158. Drawing on our findings of fact and applying the law as we understand it, we now set out our conclusions, using the list of issues set out above, with one modification. The issue of time limits will be considered only once we have determined if there are any acts in time (in order that we may assess if there are any continuing acts).

The symptoms of the claimant's ADHD

159. For the reasons set out above we conclude that Mr Murria's ADHD caused the following symptoms or effects: stress and anxiety; difficulty performing and keeping up to date with administrative tasks; impulsive behaviour in a heightened emotional response to stressful situations.

160. His ADHD did not cause vitiligo. There is no evidence to show it did beyond bare assertion.

Knowledge of the claimant's disability

161. For the reasons set out above, the respondents knew or ought to have known Mr Murria was disabled by reason of ADHD from 9 April 2019.

Direct discrimination because of disability

162. In each of the allegations below, and for the reason given, we conclude that that Mr Murria has failed to adduce evidence from which we could properly conclude there was discrimination; and that besides, the respondents have shown that it was not an act of direct discrimination because of disability.

P45 comment

163. Mr Startin mentioned the P45 to the claimant on 28 April 2019.

164. It was not a joke. It was said because of what Mr Startin thought was Mr Murria's unprofessional behaviour organising the surprise birthday cake incident. Mr Murria's ADHD played no part in what happened.

165. Mr Startin would have reacted the same way to any employee who had similarly secretly organised a surprise birthday cake for Innervate's guest at that meal.

Comments about "Not contributing much" and "crazy"

166. Mr Startin did say these things.

167. It was factually accurate statement that Mr Murria had not contributed much, contrary to what was expected of him. Mr Murria's ADHD played no part in what happened.

168. Mr Startin would have said the same thing to any other BDM who accompanied to that meeting and not contributed like was reasonably expected of them.

169. Mr Startin used the word "crazy" to describe Mr Murria's decision not to share a taxi to the hotel they were both going to. This is factually different to Mr Murria's allegation so he cannot succeed in any event.

170. In any case Mr Startin would have said the same thing in any other employee of Innervate who was travelling to the same destination had refused to share a taxi with him, preferring to travel separately. Mr Murria's ADHD played no part in what happened.

171. This claim fails.

Questions about medication and ADHD diagnosis during a meeting on 7 May 2019

172. Mr Martin did ask the questions.

173. However, he did so from his reasonable desire to seek to understand all of the circumstances of Mr Murria's ADHD not because of the specific fact that Mr Murria had ADHD.

174. We believe the proper hypothetical comparator is an employee who is disabled other than by ADHD but nonetheless has received a particular diagnosis of their disability and takes medication for it. Alternatively, it is an employee who is not disabled but nonetheless has received a particular diagnosis of their disability and takes medication for it.

175. In either case, Mr Martin would have asked the same questions in order to gain insight. They are appropriate questions. Objectively judged he was not treated less favourably than others.

176. This claim fails.

The comment "I didn't even notice – one of us white boys now!" After the claimant confided in him about his disability

177. Mr Startin did not say this.

178. This claim fails.

Discrimination arising from a disability.

179. In each of the allegations below, and for the reason given, we conclude that that Mr Murria has failed to adduce evidence from which we could properly conclude there was discrimination arising from a disability; and that besides, the respondents have shown that it was not an act of discrimination arising from a disability.

P45 comment

180. Mr Startin mentioned the P45 to the claimant on 28 April 2019. It was not a joke. It was said because of what Mr Startin thought was Mr Murria's unprofessional behaviour organising the surprise birthday cake incident. Mr Murria's ADHD played no part in what happened.

181. His ADHD did not lead to him organising this incident secretly.

182. The comment was not therefore made because of something arising from his ADHD.

183. This claim fails.

Comments "Not contributing much" and "crazy"

184. Mr Startin did say these things.

185. It was factually accurate statement that Mr Murria had not contributed much, contrary to what was expected of him.

186. His failure to contribute was not something that arose from his ADHD.

187. Therefore, Mr Startin did not make the comment because of something that arose from the ADHD.

188. Mr Startin used the word "crazy" to describe Mr Murria's decision not to share a taxi to the hotel they were both going to. This is factually different to Mr Murria's allegation so Mr Murria cannot succeed in any event.

189. Besides, his decision not to share the taxi was not something that arose from his ADHD. Therefore, the comment was not made because of something that arose from his ADHD.

190. This claim fails.

Questions about medication and ADHD diagnosis during a meeting on 7 May 2019

191. Mr Martin did ask the questions. However, he did so from his reasonable desire to seek to understand all of the circumstances of Mr Murria's disability not from the fact that Mr Murria had ADHD in particular.

192. On analysis we cannot see a sensible definition of the "something arising" from the ADHD that links Mr Murria's ADHD to the questions. It was not the ADHD that caused the questions to be asked, but a general need to understand enough to consider an employee's health.

193. If we were wrong about that analysis, we are not satisfied this was unfavourable treatment. He suffered no disadvantage by any from being asked the questions and an opportunity to provide insight to his ADHD.

194. This claim fails.

Was the claimant dismissed due to sickness absence?

195. Although the letter of dismissal refers to sickness absence, it was not the reason he was dismissed. He was dismissed for raising complaints about discrimination.

196. Therefore, while we accept his sickness absence arose from his ADHD, it did not form any part of the reason for dismissal

197. This claim therefore fails.

Was the claimant dismissed from Innervate because of his alleged failure to follow its sickness policies?

198. We repeat the above. He was not dismissed because of his failure to follow the policies. Rather, it was because he complained about discrimination.

199. His failure to follow the policies arose from his ADHD. However, he was not treated unfavourably because of that failure.

200. This claim therefore fails.

Legitimate aim and proportionality

201. These do not arise.

Harassment because of disability

202. In each of the allegations below, and for the reason given, we conclude that that Mr Murria has failed to adduce evidence from which we could properly conclude there was harassment because of disability; and that besides, the respondents have shown that it was not an act of harassment because of disability.

P45 comment

203. Mr Startin mentioned the P45 to the claimant on 28 April 2019.

204. It was not a joke. It was said because of what Mr Startin thought was Mr Murria's unprofessional behaviour organising the surprise birthday cake incident. Mr Murria's ADHD played no part in what happened.

205. It was unwanted conduct. Nobody would appreciate comments about a P45.

206. It was not done with the purpose of violating the claimant's dignity, creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

207. We are prepared to accept he felt it had that effect. We conclude it was not reasonable to have had that effect either. Unpleasant to hear no doubt, but it was a brief comment in context of what could reasonably be seen as capricious behaviour. A reasonable person would have reflected on their own conduct, seen the comment in context and have let it pass.

208. In any case, it was not made because the claimant had ADHD. It was made because of his behaviour. Mr Murria is reinterpreting events.

209. The claim fails.

Comments "Not contributing much" and "crazy"

210. Mr Startin did say these things.

211. It was factually accurate statement that Mr Murria had not contributed much, contrary to what was expected of him. Mr Murria's ADHD played no part in what happened.

212. Mr Startin used the word "crazy" to describe Mr Murria's decision not to share a taxi to the hotel they were both going to. This is factually different to Mr Murria's allegation so Mr Murria cannot succeed on this part of the allegation in any event.

213. Both were unwanted conduct. Nobody would want to hear comments like that.

214. It was not done with the purpose of violating the claimant's dignity, creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

215. We are prepared to accept he felt it had that effect, but we conclude it was not reasonable to have had that effect. The comments were in the context of a dispute between Mr Startin and Mr Murria about the meeting and the journey back to the hotel. We are satisfied that a reasonable person would properly appreciated the context in which they were made and disregarded them.

216. In any case, neither comment was made because the claimant had ADHD. They were merely expressions of frustration and would have been said in any event. Mr Murria is reinterpreting events.

217. This claim fails.

Questions about medication and ADHD diagnosis during a meeting on 7 May 2019

218. Mr Martin did ask the questions.

219. We are not satisfied this was unwanted conduct. This was an investigation meeting and we find it more likely that Mr Murria would have appreciated the opportunity to address these issues. That is more inherently likely. We see nothing inherently wrong with the questions. We conclude that Mr Murria has reinterpreted this with hindsight as unwanted conduct.

220. It was not done with the purpose of violating the claimant's dignity, creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

221. We do not accept that it had that effect. It was part of an investigation and would be sensible to try to understand the ADHD. We do not think Mr Murria felt it had the relevant effect. That is a reinterpretation with hindsight. We conclude it would not have been reasonable to have had that effect anyway. A reasonable person would appreciate the purpose and motive of the questions was to understand the circumstances. Mr Murria is reinterpreting events.

222. In any case, it was not made because the claimant had ADHD specifically, it was because of a need to understand Mr Murria's condition, that happened to be ADHD. It would have been the same if it were any other condition, whether or not technically a disability.

223. This claim fails.

The comment "I didn't even notice – one of us white boys now!" After the claimant confided in him about his disability

224. Mr Startin did not say this.

225. This claim fails.

Direct discrimination because of race

226. In each of the allegations below, and for the reason given, we conclude that that Mr Murria has failed to adduce evidence from which we could properly conclude there was direct discrimination because of race; and that besides, the respondents have shown that it was not an act of direct discrimination because of race.

The comment during a meeting with the claimant, Mr Wright and the third respondent in Bahrain "do you want a coffee? I can get the little Indian boy to get it. Not [the claimant], the waiter"

227. This was said.

228. We believe the correct comparator is someone not of the Claimant's race but who was otherwise in the claimant's position including having sent the WhatsApp messages to groups that he had sent.

229. In those circumstances, and particularly a close-knit group, we are satisfied that the message would still have been sent. We acknowledge that the reference to "Indian" would seem particular to the claimant, however the text message of 2 February 2019 also refers to "the vampire" (whom we assume was not an actual vampire). It is apparent they had nicknames for people, and we think it plausible the adjective "Indian" could easily in this group have been applied to someone of a different race to the claimant.

230. However, whatever the correct comparator, we do not see how it could be seen as less favourable treatment. The comment was made because it was part of the conversation – or "banter" – within the group amongst colleagues who were also friends. He was no less favourably treated than the unidentified "vampire". He was being included in the group dynamic and his own messages and behaviour show not only that he did not object but that he was a willing participant.

231. Therefore, this claim fails.

The comment "I didn't even notice – one of us white boys now!" After the claimant confided in him about his disability

232. Mr Startin did not say this.

233. This claim fails.

Harassment because of race

234. In each of the allegations below, and for the reason given, we conclude that that Mr Murria has failed to adduce evidence from which we could properly conclude there was harassment because of race; and that besides, the respondents have shown that it was not an act of harassment because of race.

The comment during a meeting with the claimant, Mr Wright and the third respondent in Bahrain "do you want a coffee? I can get the little Indian boy to get it. Not [the claimant], the waiter"?

235. This was said.

236. We do not accept that it was unwanted conduct. The comment was made because it was part of the conversation – or "banter" – within the group amongst colleagues who were also friends. He was no less favourably treated than the unidentified "vampire". He was being included in the group dynamic and his own messages and behaviour show not only that he did not object but that he was a willing participant. He would have seen it as part of the positive relationship within the group of which he was a key member.

237. It was not done with the purpose of violating the claimant's dignity, creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

238. We conclude it did not have that effect nor would it have been reasonable to have that effect. Our reasons are the same as to why we conclude the comment was not unwanted.

239. In any case, it was not made because of the claimant's race but because of the general nature of the conversations between the group.

240. This claim fails.

The comment "I didn't even notice – one of us white boys now!" After the claimant confided in him about his disability

241. Mr Startin did not say this.

242. This claim fails.

Victimisation by removing the claimant from the WhatsApp groups and dismissing him

243. For the reasons we set out below we are satisfied the claimant has adduced evidence from which we could properly conclude the respondents victimised him as he alleges. The respondents have failed to show that on balance they did not victimise him. Therefore all 3 respondents are liable to Mr Murria for victimisation.

244. On 14 May 2019, Mr Murria carried out a protected act. We are satisfied that at that meeting he alleged he had been subjected to unlawful acts that fall within the **Equality Act 2010**. We set out our reasons in the findings of fact.

245. We are satisfied that the respondents subjected him to the following detriments:

245.1. Removing him from the first respondent WhatsApp groups about one hour after the meeting on 14 May 2019. To be excluded from communication with colleagues by those colleagues is tantamount to ostracization, and is the label we have used. We conclude that is plainly a detriment.

245.2. Dismissing him on 17 May 2019 is clearly a detriment.

246. We conclude as set out above that the reason he was dismissed was because of the fact he had raised complaints of race and disability discrimination. None of the actual disciplinary process stands up to scrutiny. The allegation the decision was only that of Mr Lloyd (and so Innervate) is contradicted by Mr Startin's own notes and by Innervate's policies. It is contradicted by their own involvement in drafting and seeking approval of the dismissal letter. The brevity and paucity of reasons advanced in the dismissal letter that had been vetted both by an HR consultant and a solicitor is in stark contrast to those advanced now to the Tribunal. There is no good reason why they were not included if they were genuine reasons. There was no investigation despite the policies suggesting there should be one. The reasons set out in the dismissal letter would not warrant dismissal under Innervate's policies.

247. We are satisfied that Mr Martin and Mr Startin decided that Mr Murria should be dismissed. Whether or not Mr Lloyd agreed, they at least jointly made that decision on behalf of Innervate. They implanted the decision. Innervate as employer is clearly a party to the decision. Therefore all 3 are responsible.

The text message on 12 April 2019 telling him to "take extra meds and be bouncy"

248. The only claims that have succeeded so far are for victimisation.

249. We consider that the making of an allegedly discriminatory comment is a qualitatively different act to ostracising or dismissing someone for complaining about discrimination. Victimisation does not mean (or imply) there was discriminatory conduct before the victimisation. Furthermore, there is a gap of a month with nothing between. It is clear that his complaints were a motivator for dismissal and exclusion from the WhatsApp groups but

his disability played no part. We conclude that it cannot be said in this case that there is a continuing act in the circumstances.

250. We have considered if we should extend time. If we refuse then Mr Murria would not be able to pursue this allegation. However, if we extend it the respondents will face an allegation that they otherwise would not have to. We have borne in mind the importance of time limits. We note that there is no good reason for any delay. In particular we note that Mr Murria was able to instruct his father, who was a solicitor, and we cannot see why he could not have done so earlier. We cannot see any reason why he was unable to act sooner. We note he was not misled as to his rights or deterred from bringing a claim. We conclude there is no good reason for the delay. He could have presented the claim in time so any prejudice is attributable to him alone.

251. We have also taken into account the merits. On the facts we would have been satisfied that this was not direct discrimination because of disability or discrimination arising from a disability and it was not harassment because of a disability. It was no more than an exchange between friends:

251.1. Specifically, in the context of direct discrimination, it would have been said to an employee who was a friend on medication that affected mental functions but who was not disabled.

251.2. In the context of discrimination arising from a disability, he cannot reasonably say he was treated unfavourably. In context this was a willing exchange between friends. Therefore, it would have failed in any event.

251.3. In the context of harassment, it was not unwanted conduct. He was happy to be part of the conversation as is demonstrated by the emoji in the next message that he did not initially disclose. We would have concluded therefore that it had neither the purpose nor effect necessary for harassment, and besides, given the relationship between the parties and context, such an effect would have been unreasonable. In any case, his disability was not a factor in why it was said.

252. We conclude it is not just and equitable to extend time. The Tribunal dismisses the claims relating to the text message for a lack of jurisdiction.

The ACAS code COP1

253. The Tribunal is satisfied that COP1 applies to this case because Mr Murria was dismissed, and the dismissal is a detriment arising in the successful victimisation claim. Using the labels of **section 207A(2)(a)** of the **1992 Act** his dismissal was a “matter” in the proceedings (i.e. victimisation claim) to which a relevant code (COP1) applied.

254. The respondents have failed to comply with that code and on the facts of the case the failure was unreasonable. There was a clear policy for dismissal. It was not followed. Dismissal motivated by victimisation is also unreasonable. As Mr Startin and Mr Martin made the decisions to dismiss it follows that they are as culpable and, in our view, liable for any uplift.

Therefore, the Tribunal has the jurisdiction to increase the final award by up to 25%.

255. We do not have any evidence of the respondents' means or the size of the final award. The parties have not had the chance to give such evidence or test it. Therefore, the issue of the consequential uplift for the breach of the ACAS code is deferred.

The principle in Chaggar

256. Mr Startin and Mr Martin argued that the award should reflect the possibility Mr Murria's employment would have ended anyway. They rely on **Chagger** where the Court of Appeal said:

"43. The appeal Tribunal considered that the Tribunal had been wrong to fail to apply the **Polkey** case [**1988] ICR 142**, or at least an equivalent principle in the tort field. The appeal Tribunal cited the classic formulation by Lord Blackburn in **Livingstone v Rawyards Coal Co 5 App Cas 25**, to which we have made reference: what would the employee have earned if he had not suffered the wrong? They concluded that the "wrong" here was not the dismissal itself, but rather the act of race discrimination. Accordingly, the question was not what would have occurred had there been no dismissal, but what would have occurred had there been no discriminatory dismissal. That required consideration of the question whether dismissal might have occurred even had there been no discrimination.

"…

"57. We are satisfied that the analysis of the appeal Tribunal, reproduced in para 43 above, was entirely correct on this point. It is necessary to ask what would have occurred had there been no unlawful discrimination. If there were a chance that dismissal would have occurred in any event, even had there been no discrimination, then in the normal way that must be factored into the calculation of loss."

257. It is clear that Innervate's creditors' voluntary liquidation on 28 February 2020 is a limiting factor to compensation because Mr Murria's employment would have terminated then in any event. We therefore conclude that there can be no compensation for any losses for victimisation after that date.

258. However, we cannot be satisfied that there was a chance that the claimant would have been dismissed before 28 February 202 even without the victimisation.

258.1. There is no investigation of any of those allegations from which we might conclude that there was a chance that disciplinary proceedings might begin yet alone lead to dismissal.

258.2. The decision not to start a formal process despite all that had happened leads us to conclude that the possibility was so remote at best as to be discountable.

258.3. The reasons advanced for dismissal are all sourced after the event. They were known of before the dismissal but prompted no action. That suggests the respondents did not think them

serious enough to warrant any disciplinary process. We note that the investigation in place was in relation to Mr Murria's own complaints, not those of his employer.

258.4. Considering the policies, acts complained of, lack of formal action, the clear adjustment to him submitting expenses and that he was an excellent networker, we conclude that absent the complaint of discrimination he would have remained an employee until February 2020. In particular there is nothing in the policies that led us to believe that dismissal might have been appropriate sanction even for the matters the respondents now seek to rely on. Further there is no evidence he would have terminated his employment before then or that anything else might reasonably be expected to have happened before then.

Breach of contract

259. For the reasons set out in the findings of fact, we conclude that Innervate owed to the claimant expenses of £2,691.60 pursuant to his contract of employment. It remains outstanding at the termination of his employment and is connected to it. It still has not been paid. Therefore, we will give judgment for that amount.

Next steps

260. We will list a remedy hearing to determine final amounts of compensation for the tort of victimisation. Directions will follow separately.

Employment Judge Adkinson

Date: 7 May 2021

Notes

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Judgments and reasons for the judgments are published, in full, online at www.gov.uk/employment-Tribunal-decisions shortly after a copy has been sent to the claimant(s) and respondent(s) in a case.