EMPLOYMENT TRIBUNALS

Claimant: Mr Attila Nagy

Respondents: 1. Ms Kinga Bakalarz
2. Deli Solutions Limited

Heard at: Manchester (by CVP) **On:** 24-28 May 2021

Before: Employment Judge Phil Allen
Mrs J Pennie
Mrs J E Williams

REPRESENTATION:

Claimant: In person
Respondent: Mr R Bhatt, Counsel

JUDGMENT

The unanimous judgment of the Tribunal is that:

1. The respondents did not treat the claimant less favourably because of race. The claimant's claims for direct race discrimination against the first and second respondents do not succeed and are dismissed; and

2. The respondents did not harass the claimant related to race. The claimant's claims for unlawful harassment against the first and second respondents do not succeed and are dismissed.

REASONS

Introduction

1. The claimant was engaged by the second respondent as a Production Operative or temporary agency worker. The claimant alleged that he suffered direct race discrimination and harassment related to race in the period between 8 January 2019 and the end of August 2019. The second respondent informed the agency who engaged the claimant that he should not return on 5 August 2019, and confirmed that decision later in August 2019. The first respondent is a Production Manager with

the second respondent. Both respondents denied direct discrimination and harassment.

Claims and Issues

2. The claimant's claim against the first respondent was lodged at the Employment Tribunal on 8 October 2019, following ACAS early conciliation between 13 September and 3 October 2019. The claim against the second respondent was entered at the Tribunal on 1 November 2019, following ACAS early conciliation between 13 September and 9 October 2019. The claims were joined.

3. A preliminary hearing (case management) was conducted on 2 March 2020 by Employment Judge Barker. Following that hearing, the claimant's claims of indirect discrimination and direct discrimination arising from a change in start time, were dismissed on withdrawal. The claimant's remaining claims were clarified as recorded in the Case Management Order.

4. Following that Case Management Order, and in accordance with directions made, an agreed List of Issues was prepared by the respondent (64-66). At the start of this hearing that List of Issues was highlighted to the parties and they agreed that they were the issues to be determined at the final hearing. As is confirmed in the List of Issues below, one of the allegations recorded in the List of Issues was changed by the claimant in the course of the final hearing. During the hearing the claimant also accepted that some of the comparators referred to were not in fact appropriate comparators.

5. The agreed List of Issues recorded the following:

(1) The claims before the Tribunal are:

(a) Direct discrimination because of race as defined by section 13 of the Equality Act 2010, contrary to section 39(2)(d) Equality Act 2010;

(b) Racial harassment as defined by section 27 Equality Act 2010, contrary to section 40(1)(a) Equality Act 2010.

<u>Direct Race Discrimination (section 13 Equality Act 2010)</u>

(2) Was the claimant treated less favourably by the respondents?

(3) If so, was this less favourable treatment because of the claimant's race?

(4) With respect to paragraph (2), the acts of less favourable treatment alleged by the claimant are:

(a) In January 2019 the first respondent's comment that the claimant's "brother" was working on the second shift (against both the first respondent and the second respondent).

(b) In early June 2019 Ewa Wasilewska allegedly telling the claimant that the second respondent is a Polish factory, that the claimant

needs to speak Polish and if he does not do so he needs to change his job (against the second respondent only).

(c) In early June 2019, in respect of the claimant's fiancé's request that the claimant be permitted to change his shift to the afternoon shift, the first respondent, Mr Vyroubal and Mr Hubisz, suggested that a bottle of whiskey each would be required in return (against both the first respondent and the second respondent).

(d) At the end of June 2019, the claimant allegedly being told by Chris Walsh that he could not apply for a Quality Assurance position (against the second respondent only) - In the course of the hearing the claimant confirmed that he did not make this allegation against Chris Walsh as recorded in the list, but rather he alleged this was discrimination by Marzena Stolarska.

(e) On 30 July 2019, the claimant spoke to the first respondent and said to her, *"good morning darling"* in Polish. The first respondent took offence at this and subsequently issued a grievance. The claimant alleges that the first respondent taking offence to this greeting and issuing a grievance was an act of race discrimination, as the first respondent frequently accepted this form of greeting from others in the workplace such as Dan Shaw (who is English and used this greeting in English), Adam Vyroubal (Czech who used this expression in Polish) and Szymon Golubek (Polish and who used the Polish form of this greeting) (against both the first respondent and the second respondent) - In the course of the hearing the claimant withdrew his contention that either Dan Shaw or Szymon Golubek were appropriate comparators for this allegation.

(f) On 1 August 2019, the second respondent allegedly minimising the "number" of unpaid breaks that smokers could take but only informed and enforced this against the claimant. The claimant alleged that this was done by Ms Stolarska who asked Ireneusz Jagielka to enforce the new rule. Previously the claimant, along with the rest of the smokers in the second respondent's workforce, had been allowed to take unpaid smoking breaks in addition to his 30 minute allocated break. The claimant was the only Hungarian smoker in that section of the factory and therefore alleges that this was an act of direct discrimination on the basis of his nationality (as clarified at the preliminary hearing) (against the second respondent only).

(g) The claimant's dismissal. It was the claimant's case that both the first respondent and Donato Ventricelli made the decision to dismiss. The claimant makes no allegations of race discrimination against Mr Ventricelli. It is the claimant's case that the first respondent was a joint decision maker in respect of the decision to dismiss the claimant and that the first respondent acted with a discriminatory motive (against both the first respondent and the second respondent).

(5) With respect to the issue of whether or not any less favourable treatment has been suffered, the claimant (who is Hungarian) relies upon the following comparators:

(a) Szymon Szeweczak (Polish), Izabella Paczkowska (Polish); and Darja Gliebine (Russian-Latvian) in respect of the allegation at paragraph 4(c);

(b) Izabella Paczkowska (Polish) in respect of the allegation at paragraph 4(d);

(c) Dan Shaw (English); Adam Vyroubal (Czech) and Szymon Golubek (Polish) in respect of the allegation at paragraph 4(e) - As confirmed at 4(e) above, in the course of the hearing the claimant withdrew his contention that either Dan Shaw or Szymon Golubek were appropriate comparators for this allegation.

Harassment (section 26 Equality Act 2010)

(6) The claimant relies upon the act stated at paragraph 4(a) as unwanted conduct.

(7) If the claimant was subjected to unwanted conduct, was it related to his race?

(8) Did the conduct complained of have the prohibited purpose or effect?

Limitation

(9) Are all, or some, of the claimant's claims out of time? - The respondent ultimately contended that allegations 4(a), 4(b), 4(c) and 6-8 were out of time.

(10) Do the acts alleged amount to conduct extending over a period within the meaning of section 123(3)(a) Equality Act 2010?

(11) If not, is it just and equitable to extend time?

Procedure

6. The claimant represented himself at the hearing. Mr Bhatt, counsel, represented both respondents.

7. The hearing was conducted entirely remotely by CVP remote video technology. All the parties and all witnesses attended remotely.

8. The Tribunal was provided with an agreed paginated bundle of documents. It contained 200 pages. The Tribunal read only the pages in the bundle to which it was referred, either in a witness statement, as identified from the pages to which the claimant's statement referred, or as brought to the Tribunal's attention during the hearing. Where numbers are included in brackets in this Judgment, the number is a reference to the page number in the bundle.

9. The Tribunal read the witness statements provided on the morning of the first day. That was the witness statement of the claimant and the statements of 12 witnesses called on behalf of the respondents (including the first respondent).

10. A Hungarian language interpreter attended throughout the hearing. The interpreter provided interpretation for the claimant. In practice, the claimant was able to understand parts of the hearing and to provide his input on occasion during the hearing without interpretation, as his English was of a standard to enable him to do so. However, the interpreter was able to, and did, interpret whenever the claimant was assisted by her doing so. Throughout cross examination of the claimant and during his questioning of witnesses, full interpretation was provided for the claimant.

11. The hearing was also attended in part by: an interpreter for the Czech language; and an interpreter for the Polish language. Each of those interpreters interpreted for specific witnesses of the respondents during their evidence and cross-examination, as detailed below. During the claimant's cross examination of those witnesses, the claimant's questions were interpreted from Hungarian to English, and then were interpreted into Czech or Polish for the relevant witness. The witness' replies were then interpreted from Czech/Polish to English, before being interpreted into Hungarian for the claimant.

12. The Tribunal heard evidence from the claimant, who was cross examined by the respondents' representative, as well as being asked questions by the Tribunal. The claimant did not call any other witnesses. The tribunal did not hear any evidence from Ms D Drofti, the claimant's fiancé, nor was it provided with a statement of evidence for her.

13. The Tribunal heard evidence from each of the following witnesses called by the respondents, with each witness being cross examined by the claimant as well as being asked questions by the Tribunal (where it wished to do so):

(1) Ms L Chadwick, HR Adviser;

(2) Mr D Ventricelli, Head of UK Manufacturing;

(3) Mr J Cook, Group HR Manager;

(4) Mr C Walsh, Process and Innovation Manager (at the relevant time Production Manager);

(5) Mr A Cramsie, Group Procurement Manager;

(6) Mr A Vyroubal, Production Supervisor (for whom Czech interpretation was provided);

(7) Ms E Wasilewska, Line Operative (for whom Polish interpretation was provided);

(8) Mr S Golubek, Quality Assurance Supervisor (for whom Polish interpretation was provided);

(9) Mr A Hubisz, Production Supervisor (for whom Polish interpretation was provided);

(10) Ms K Bakalarz, Production Manager and the first respondent; and

(11) Ms M Stolarska, Senior Production Supervisor (for whom Polish interpretation was provided).

14. The Tribunal was also provided with a witness statement for Mr D Shaw, the second respondent's engineering supervisor. The Tribunal did not hear oral evidence from Mr Shaw, as the claimant confirmed that the content of his statement was agreed.

15. At the start of the hearing the respondents' representative provided an opening note which included a detailed breakdown of the law which applied to the case. After the evidence was heard, each of the parties was given the opportunity to make submissions and each party made submissions orally. At the end of the third day of hearing the Employment Judge had highlighted that, in the light of the fact that the opening note relied upon the case of **CLFIS (UK) v Reynolds**, the respondents' representative would be asked to make submissions upon whether that authority remained applicable following the decision in **Royal Mail Group v Jhuti**. As a result, at the time of his submissions the respondents' representative provided a bundle of authorities, which in particular included those two cases and one other case which is detailed in the legal section below. The respondents' representative's submissions were lengthy, the claimant's relatively brief.

16. Judgment was reserved and accordingly the Tribunal provides the Judgment and Reasons outlined below.

Facts

17. The claimant is Hungarian, as is his fiancé (Ms Drofti). Ms Bakalarz is Polish.

The engagement

18. On each occasion that the claimant was engaged by the second respondent he was engaged as an agency worker through Rapid Recruit Limited. The Tribunal was provided with a copy of the terms of business between the second respondent and Rapid Recruit Limited for the supply of agency workers (95) and a copy of the claimant's contract with Rapid Recruit Limited (108). That contract (110) stated that no contract should exist between Rapid Recruit Limited and the agency worker, and that Rapid Recruit Limited would provide the agency worker to a hirer. The terms stated that they did not give rise to a contract of employment between Rapid Recruit Limited and the agency worker, or the agency worker and the hirer (in this case being the second respondent).

Events of 2015

19. The claimant was engaged by the second respondent as an agency worker through Rapid Recruit Limited in 2015. Whilst working at that time, the claimant and his fiancé (Ms Drofti) became friends with Ms Bakalarz.

20. There was no dispute that in 2015 there was a discussion about having a threesome. This took place in a branch of McDonald's outside of work. The possibility was raised by the claimant, who explained that if it happened it would

involve the claimant and two women. This was said to Ms Bakalarz. Ms Drofti was also present during the conversation. Ms Bakalarz did not wish to do so. The subject of the conversation was changed.

21. At approximately the same time, Ms Bakalarz taught the claimant Polish. The claimant provided driving lessons to Ms Bakalarz.

22. There was a dispute between the parties about what occurred in the course of the Polish lessons, and why it was that the claimant and Ms Bakalarz socialised less, thereafter. Ms Bakalarz's evidence was that the claimant informed her that he loved her. Her evidence was that she made clear to the claimant that she was not interested, and their relationship changed as a result. The claimant denied that this occurred and contended that the claimant and Ms Bakalarz ceased to socialise because the claimant ceased to work at the second respondent. The Tribunal did not need to resolve this dispute of fact in order to reach its decision in the case.

23. It was Ms Bakalarz's evidence that these events formed the background context to her subsequent responses to the claimant and his conduct towards her. This related, in particular, to the conversation in McDonald's in 2015.

Christmas 2018 and the "brother" comment

24. The claimant's evidence was that he worked for another employer permanently from April 2016 until April 2019. During the Christmas 2019 period, that employer had a shutdown of approximately three weeks. During that period the claimant decided to take the opportunity to earn some extra money and accordingly he was re-engaged by the second respondent through Rapid Recruit Limited. The claimant was engaged for a short period of time.

25. The Tribunal was provided with a statement regarding breaks which was signed by the claimant on 12 December 2018 (132). By signing that statement the claimant acknowledged that, whilst working for the second respondent, he was required to clock in and out using the biometric system when he entered and left his work area, including at the start and end of the day, and at any time during the day when he went for a break. The statement signed by the claimant was a document prepared by the second respondent, provided to the claimant by Rapid Recruit Limited. That document contained the relevant statement in two languages: English; and Polish.

26. There was no dispute that on Tuesday 8 January 2019, whilst they were both at work, Ms Bakalarz made a comment to the claimant to the effect that he had a "*brother*" working on the other shift. This was reference to an apparent likeness between that other person and the claimant.

27. Ms Bakalarz's evidence was that she made the comment because she thought the claimant looked like the person on the other shift. She described it as "*light-hearted banter*". She emphasised that she was not mocking either person. When challenged in evidence, Ms Bakalarz was clear that she did not have an adverse view of Romanians, nor did she know that the claimant had an adverse view of Romanians.

28. The claimant's witness statement said that he was really insulted, because the guy who was addressed as his brother was *"a Bulgarian short and skinny guy with glasses"*. The claimant, in his witness statement, described this as being really humiliating and said that after it was said he could not sleep. In his evidence to the Tribunal, the claimant was very clear and forthright in his explanation of why he did not like the comparison. Whilst he did not know the nationality or even the name of the person to whom he was compared, his evidence was that he believed that the person to whom he was compared was Romanian or looked Romanian. The claimant's evidence was that he did not like Romanians. Indeed, in his evidence to the Tribunal he explained that he believed that all Hungarians did not like Romanians. He explained his evidence, that all Hungarians were prejudiced against Romanians, by reference to the Treaty of Trianon in 1920. The claimant was very clear, making no attempt to disguise the fact, that he disliked the comparison made by Ms Bakalarz's because of his own prejudice towards the ethnicity/nationality of the person to whom he was compared.

29. The 8 January 2019 (the day that the comment was made to the claimant) was his last day at work with the respondent before returning to his permanent job. At ten minutes after midnight on 9 January 2019 the claimant texted Ms Bakalarz (149a) and said, *"It's funny. Because everyone else first question was, how am I, or did I come back to deli permanently, how was my day, etc etc., but YOU started with an idiot and rude question. Congrats, you can be proud to yourself".* The text concluded with a clapping emoji. It was clear from the text that the claimant was upset by this comment, as he confirmed in evidence to the Tribunal.

Re-engagement in April 2019 and the comment about Ms Bakalarz's child

30. In April 2019 the claimant was re-engaged as an agency worker by the second respondent through Rapid Recruit Limited. The claimant worked consistently for the period from 8 April 2019 until 6 or 7 August 2019.

31. During the course of the hearing the Tribunal heard evidence from Ms Bakalarz that an unnamed employee (called only employee A) had, on one occasion, felt uncomfortable at the gym as a result of way in which the claimant looked at her. The employee was not named, and the Tribunal did not hear any evidence from her. The claimant was not provided with a genuine opportunity to respond to this allegation as it was an allegation from an unknown person. As a result, the Tribunal gave no weight whatsoever to this evidence and did not taken it into account in reaching its decision.

32. On an occasion at the second respondent's premises in April 2019, the claimant asked Ms Bakalarz about her child. The Tribunal heard evidence that the claimant had met Ms Bakalarz's child during the time when Ms Bakalarz and the claimant were friendly (in, or around, 2015). Ms Bakalarz's evidence was that when the claimant did so he used a *"suggestive tone".* The claimant acknowledged that he did ask Ms Bakalarz about her child, but denied the tone attributed to him, and explained that it was a normal thing to say when he had met the child previously. As with many of the issues of communication between individuals raised in this case, those involved may have perceived matters differently, based upon linguistic differences and the different ways in which things can be perceived where there are differences of national and cultural background. This was an allegation which the Tribunal did not entirely understand, and it understood the claimant's explanation of

why it was said. However, the Tribunal also finds that Ms Bakalarz herself perceived that the comment (and how she perceived it was said) made her uncomfortable, whatever the intention.

33. The issue of the claimant asking Ms Bakalarz about her child was something that was later recorded by Ms Bakalarz in the statement she wrote as a grievance on 5 August 2019 (144). In that document, what Ms Bakalarz recorded was that the claimant said *"How are you, how is my child".* Ms Bakalarz was clear in her evidence to the Tribunal that she had not been alleging that the claimant had referred to the child as being his own (and he did not do so). When it was highlighted that the use of the word "*my*" carried this suggestion, Ms Bakalarz explained that the way that this was recorded in the grievance document was a linguistic error based upon Ms Bakalarz's own use of English, which was not her first language. In his cross-examination of her, the claimant challenged this explanation. The Tribunal accepts Ms Bakalarz's evidence and finds that the way in which this was phrased by Ms Bakalarz in the grievance was a linguistic error.

June 2019 and Ms Wasilewska's comment

34. The claimant alleged that in early June 2019 Ms Wasilewska, a Production Operative who was Polish and spoke Polish, spoke to the claimant in the Polish language. The claimant's evidence was that he asked another employee, Ms Dadynska, what it was that Ms Wasilewska was saying to him. The claimant alleged that Ms Wasilewska told Ms Dadynska in Polish that it was a Polish factory and the claimant needed to speak Polish or change job, and Ms Wasilewska asked the claimant what he was doing in the factory. The claimant did not raise any complaint about this matter with anyone at the time.

35. Ms Wasilewska vehemently denied this allegation. Her evidence was that she was talking to a colleague, Ms Szczerba, in Polish as they both spoke Polish. Her evidence was that the claimant thought that Ms Szczerba and Ms Wasilewska were talking about the claimant, albeit as they were speaking in Polish he would not have been aware whether that was the case. She said that the claimant commented on Ms Wasilewska and Ms Szczerba speaking in Polish, and said they should not speak Polish. After leaving where they were, he came back a few moments later with Ms Dadynska, and she informed Ms Wasilewska and Ms Szczerba that the claimant thought that they had been talking about him and asked them not to speak Polish in front of him. Ms Wasilewska's evidence was that, although they had not been speaking about the claimant, they avoided speaking in Polish in front of the claimant after that occasion.

36. The evidence heard by the Tribunal was that nearly 90% of the staff working in the factory for the second respondent were Polish. The Tribunal was also provided with examples of arrangements made by the second respondent to support workers for whom Polish was their first language. These included the statement (132) about breaks already referred to, and the provision of training in Polish when training courses were attended by only Polish speakers. The Tribunal was accordingly unsurprised by the fact that Ms Wasilewska and others spoke Polish to fellow Polish workers, when they worked in the factory.

37. In relation to this allegation and based upon the evidence that Ms Wasilewska gave, the Tribunal preferred the evidence of Ms Wasilewska to that of the claimant.

The Tribunal found Ms Wasilewska to be a straightforward, frank and genuine witness. Her account, and the reason why she stated the claimant raised the issue, accorded with the Tribunal's own view of the claimant from his evidence. The claimant did not raise the issue at the time with Mr Walsh, the claimant's manager, with whom it was acknowledged by the claimant that he was friendly. Had Ms Wasilewska said what the claimant alleged, he would have been highly likely to have done so.The Tribunal finds that Ms Wasilewska did not say what the claimant alleged, and that the conversation occurred as described by Ms Wasilewska.

The whiskey issue

38. Mr Vyroubal and Mr Hubisk were both Production Supervisors employed by the respondent. In early June 2019 Ms Drofti asked Mr Vyroubal and Mr Hubisz whether the claimant could be allowed to change shifts (so that he could work on a shift which coincided more frequently with her own). There was no dispute about the fact that Mr Vyroubal and Mr Hubisz told Ms Drofti that she should give them each a bottle of whiskey if they were to allow him to change shifts.

39. Mr Vyroubal and Mr Hubisz's evidence was that they did not have the ability to agree to a change in shift for the claimant, and it was their evidence that they informed Ms Drofti of this in the conversation. They suggested that Ms Drofti spoke to Ms Bakalarz (Production Manager).

40. Mr Vyroubal accompanied Ms Drofti to speak to Ms Bakarlarz. Ms Bakalarz was the manager who would have had the authority to change the shifts of Mr Vyroubal and Mr Hubisz, which is why they had suggested that Ms Drofti speak to her. Mr Vyroubal informed Ms Bakalarz about what had been said about the whiskey. Ms Bakalarz told Ms Drofti the same thing, that is that she needed to give her a bottle of whiskey. Ms Bakalarz's evidence was that she also did not have the ability to change the claimant's shift. That authority was Mr Walsh's, the Production Manager on the relevant shift.

41. It was suggested to the witnesses during questioning that the following day Ms Drofti repeated the same question to Mr Vyroubal and Mr Hubisz, and they replied by asking where the whiskey was. Neither Mr Hubisz or Mr Vyroubal could recall whether or not the request had been repeated.

42. The claimant was not present when any of these conversations took place and therefore was unable to provide the Tribunal with any evidence about what was said or (more importantly) the way in which it was said. The Tribunal did not hear from Ms Drofti. All three of the witnesses from whom the Tribunal heard who were present when the conversations took place (Mr Vyroubal, Mr Hubisz and Ms Bakalarz), were clear in their evidence that what was said was intended as a joke and that everyone was laughing and smiling at the time. They were sure that Ms Drofti understood and knew that they were joking. Ms Bakalarz had continued the joke, when it was explained to her. These witnesses were also clear that none of them (including Ms Bakalarz) had authority to change the claimant's shifts.

43. In the light of the fact that the Tribunal has heard from three witnesses who were clear that the conversation was a joke and that everyone involved in the conversation (including Ms Drofti) understood it was a joke, the Tribunal finds that what was said was a joke, and it was taken as a joke by Ms Drofti at the time. The

Tribunal finds that Mr Vyroubal, Mr Hubisz and Ms Bakalarz were not genuinely requesting a bottle of whiskey and did not expect to receive one.

44. After the claimant's engagement was ended, Ms Drofti raised the incident with Ms Chadwick, the second respondent's HR Adviser. Ms Drofti provided a written report on 9 August 2019 (157). In the allegation made, Ms Drofti drew a comparison between the complaint about the claimant and what had been said by Ms Bakalarz (in relation to whiskey), asking "*Is it professional to ask alcohol in exchange for shift change".* Her statement did not allege race discrimination. In an email of 4 September 2019 (166) Ms Drofti provided a further account in an email headed *"Bribery report"*. That email made it clear that Ms Drofti's main concern was that this was a potential bribery issue. The word "*discriminated*" was used in that email, but not in connection with alleged race discrimination.

45. Mr Vyroubal, Mr Hubisz and Ms Bakalarz were all ultimately given a verbal warning by the second respondent as a result of this issue, following an investigation.

46. The list of issues recorded the claimant as having name three individuals as being appropriate comparators in respect of this issue: Ms Szewczak; Ms Paczkowska; and Ms Gliebine. Mr Cook's evidence was that the line manager for all three individuals named as comparators was Ms Wiola Beziuk, who at the time was Packing Manager and would have been the one to decide whether to allow the changes for those employees. Accordingly, the decision maker was not Mr Vyroubal, Mr Hubisz or Ms Bakalarz and there was no evidence that the three were approached by any of the named comparators to request a change (or sought whiskey in exchange for doing so). Mr Cook's unchallenged evidence was that the second respondent's records showed that Ms Szewczak changed shifts on 21 August 2019; Ms Paczkowska changed on 1 August 2019; and Ms Gliebine changed shifts in September 2015 (and was on maternity leave at the time of the claimant's engagement in mid-2019). All three individuals worked in Packing, which had different requirements and different flexibility for changes in shifts/roles.

Quality Assurance position

47. At the end of June 2019, the claimant's evidence was that he asked Ms Stolarska, senior Production Supervisor, about whether he could move to a Quality Assurance position.

48. The claimant's evidence was that Ms Stolarska said to the claimant that she needed to think about it because it was an important position. His evidence was that Ms Drofti also spoke with Ms Trzupek after the claimant's conversation with Ms Stolarska, and she was told that the second respondent did not want to start training any agency workers. He alleged that a week later an agency worker, Ms Paczkowska, who was Polish, started the QA training.

49. Ms Stolarska's evidence was that the claimant did not directly ask her about a move to the Quality Assurance position, but that she heard about his interest from someone else. Her evidence was that it was a decision for Mr Walsh, who was more senior to her. However, on this occasion, because it was busy, Ms Stolarska spoke to the claimant about what he was seeking. Ms Stolarska's evidence was that she explained to the claimant that June was one of the busiest times for the company. As

the claimant did not have any experience working in a QA role, the production team would not have the time or capacity to enable him to be trained. Her evidence was that she explained that the company was looking for individuals with experience in the QA role so they could begin straightaway. Her evidence was that when she explained this to the claimant, he appeared to understand why it was not practicable for him to move to a QA role at that time. She also gave evidence that she had trained others, including the claimant's fiancé (who was Hungarian) for the QA role.

50. The Tribunal found Ms Stolarska's evidence on this issue to be genuine and credible and to explain a decision that she and the second respondent were perfectly able to make. The claimant had no QA experience, as he accepted. The claimant was not suitable for the role. Ms Stolarksa provided a genuine explanation of why he could not undertake training at the time. Where there was any dispute between the accounts of the claimant and Ms Stolarska on this issue, the Tribunal preferred Ms Stolarska's evidence.

51. Mr Walsh in his evidence confirmed that Ms Packowska did move to a QA role temporarily. However, there was no evidence before the Tribunal about her experience in a QA role or why the decision was made.

Other matters involving the claimant and the first respondent

52. In July 2019 the claimant spoke to Ms Bakalarz and told her that he had had a dream about her. The claimant accepted that he did say this to Mr Bakalarz. He contended that he had also told her that he had dreamed about her in the past. Ms Bakalaraz's evidence was that the tone of voice which the claimant used was *"different to his normal tone, he was using a more sexual tone and after telling me he had a dream about me, the claimant looked away with a sexualised expression"*. Ms Bakalaraz's evidence was that she felt really uncomfortable. The claimant denied that it was said in a sexualised tone or as described. The Tribunal accepts Ms Bakalarz's evidence and finds that she perceived the claimant's comment (and the way it was said) in the way she described, however it was intended.

53. In Ms Bakalarz's evidence she also complained that the claimant started to say "*hi*" to her every time he saw her. She also alleged that his fiancé, Ms Drofti, would also tell Ms Bakalarz that the claimant said "*hi*" to her when she saw him. The Tribunal accepts the claimant's evidence that he was simply saying hello to someone he knew in the workplace, which is what he did to others. Nonetheless, the Tribunal also accepts Ms Bakalarz's evidence, that this made her feel "*unnerved*" given the background context of other conversations as recorded in this Judgment. The Tribunal finds that the context and history meant that Ms Bakalarz perceived relatively innocuous comments as something which caused her more concern.

The 30 July 2019 comment

54. On 30 July 2019 the claimant said to Ms Bakalarz *"dzien dobry kochanie".* There was no dispute whatsoever that the claimant did so. There was also no dispute that at the time Ms Bakalarz informed the claimant that she did not want him to speak to her like that and that she was clearly unhappy with what he had said. The claimant's own evidence was that Ms Bakalarz told him *"it's not funny and don't say this again",* and after he had raised a concern about what had been said, she replied *"we are not friends anymore".*

55. The Tribunal heard a considerable amount of evidence about this phrase. There was no dispute that the words *"dzien dobry"* mean "*good morning*", and there is nothing inappropriate about the use of those two words.

56. The issue arose from the use of the word *"kochanie".* The claimant's evidence was that the use of that word was comparable to use of the word *"darling"* or *"love"* In English. His evidence was that such a greeting was accepted by the respondents from many other people. His own evidence was that he used this phrase to others. He also compared it to Mr Shaw, an English speaking employee, who (it was not in dispute) often said (in English) *"good morning luv"* to people around the site.

57. Mr Golubek's evidence was that *"you would only use a word like 'kochanie' to someone particularly close to your heart, such as a girlfriend or wife".* When she was asked, Ms Wasilewska said that she would not say these words to anyone and denied that they should be used in a work context. Ms Bakalarz's evidence was, *"the phrase he used is not one you would expect to be used in a workplace…I would only use it towards a boyfriend"*. Ms Bakalarz denied that she used the greeting to anyone else at work or accepted it from anyone. Mr Vyroubal, who the claimant alleged used the same greeting towards Ms Bakalarz, stated that he had never used those words towards Ms Bakalarz and that he would never use the phrase to anyone else. His explanation was that, *"in my country it is not normal to use this phrase for someone you are not in a relationship with"*. Mr Vyroubal spoke Czech not Polish.

58. For the claimant, the words used were not his first language. The Tribunal prefers the evidence about the meaning and use of the relevant word from the witnesses who were Polish speakers. In particular, the Tribunal accepts Mr Golubek's evidence about what the word means and the circumstances in which it would be used, which was corroborated by the other witnesses. The Tribunal also accepts the evidence of the respondents' witnesses (including Ms Bakalarz herself) about the use of the word. The Tribunal does not find that the use of the word by the claimant to Ms Bakalarz was comparable to the use of the word *"luv"* as used by Mr Shaw, nor does the Tribunal find that Mr Vyroubal used the word to others or to Ms Bakalarz as alleged.

59. The claimant accepted that he said the phrase to Ms Bakalarz. The Tribunal accepts that using the word *"kochanie"* in the workplace was over-familiar and finds that Ms Bakalarz certainly felt uncomfortable as a result of the claimant using it. It was not Ms Bakalarz's evidence that this alone was the reason why she subsequently raised a grievance. It was her evidence that she did not want the claimant to speak to her like that, and it made her uneasy, in the context of the history of comments which has been described in this Judgment. The Tribunal accepts that Ms Bakalarz felt this way about the use of that word in the context of issues having built up in the way recorded. It may have been the case that Ms Bakalarz might have accepted the word being said by someone else, but on top of the previous issues she had had with the claimant and the various conversations, the use of this phrase in the workplace made her uncomfortable and was why she subsequently complained.

Breaks

60. The claimant alleged that he was spoken to by Ms I Jagielka, a Production Supervisor, about a change in the approach to unpaid breaks. He also alleged that

Ms Stolarska called Ms Jagielka on the phone and told her that only a 40 minute unpaid break was allowed and the claimant was to be told this by Ms Jagielka. The claimant contended that if such a rule had been applied, it would have been applied to all but it was only applied to him personally.

61. The respondents' evidence about breaks differed significantly from that of the claimant. Ms Stolarska in her evidence provided a detailed explanation about the obligation on workers to clock in and out of the electronic system when they were taking smoking breaks. This reflected the training provided to agency staff. Her evidence was that at some point, around this time, she identified that there was a Feeder missing from one of the lines (the claimant was employed to undertake the role of Feeder). She asked who was missing, and was told that the claimant was missing from the line and had taken "*another*" smoking break without informing his colleagues. Her evidence was that several other Feeders had approached Ms Stolarska in her role as Production Senior Supervisor and complained that the claimant was taking quite a few cigarette breaks, staying on breaks longer than he should be, and not informing colleagues. Mr Stolarska emphasised the importance of colleagues being told if someone took a smoking break so that their role could be covered.

62. As a result of these informal complaints Ms Stolarska raised the issue with the claimant when he returned from a break. She reminded him of his duties. There was a conversation about breaks. Her perception was that the claimant apologised for his actions and accepted what she had said. Her evidence was also that she had also spoken to others where they took extended breaks, other than those to which they were entitled, including Polish employees. Ms Stolarska could not recall speaking to Ms Jagielka about the issue, but confirmed that Ms Jagielka could have raised it with the claimant if she chose to do so.

63. When the claimant was highlighting his issues for Rapid Recruit Limited he prepared a timeline document (178). Notably this issue does not appear in that timeline at all.

64. The Tribunal was provided with a summary breaks report (190) which recorded the claimant as taking 74 extra breaks during 97 shifts, which notably contrasted with the others contained in the report. However, the Tribunal took little notice of this report. It recorded only that the claimant had taken less than one smoking break per shift. It also became clear during evidence that the sheet recorded only agency workers, rather than recording the breaks of all employees.

65. The claimant's own evidence was that employees took smoking breaks without logging in and out of the system. The Tribunal noted that those who would have taken smoking breaks would have been permanent staff and not agency staff, based on the claimant's own evidence that he was the only agency worker who took smoking breaks. Ms Stolarska's own evidence was that she took smoking breaks.

66. The Tribunal found that Ms Stolarska's decision to speak to the claimant about his breaks was an entirely appropriate managerial action which she was entitled to take. The Tribunal accepted entirely her explanation for doing so. There was no evidence that the claimant was either aggrieved about this at the time, or that the decision was based upon the claimant's race. The Tribunal accepted from her evidence that Ms Stolarska was a conscientious manager who took her

responsibilities seriously. Based upon the evidence of Ms Stolarska which the Tribunal accepts, the conversation with the claimant was not one that raised any particular issues for him. Ms Stolarska was perfectly entitled to remind him of his obligations around breaks and the claimant was neither singled out for doing so nor was there any evidence that it was on the grounds of race.

The end of the engagement

67. The evidence of both Ms Chadwick and Ms Bakalarz was that Ms Bakalarz spoke to Ms Chadwick about the claimant on 31 July 2019, that is on the day after he had spoken to her using the word *"kochanie".* At that time Ms Bakalarz told Ms Chadwick that she just wanted to make her aware of the matter and did not want her to do anything. After considering the issue Ms Bakalarz raised a written grievance on 5 August 2019 (144). Ms Bakalarz's evidence was that she did not want to raise this issue, and was concerned about it, which is why she did not do so immediately formally. Ms Bakalarz subsequently went on holiday on 10 August 2019, a holiday that was pre-planned.

68. Ms Chadwick's evidence was that another employee, Ms Wiola Beziuk, had spoken to Ms Chadwick about the claimant and the fact that he had made her feel uncomfortable. The Tribunal did not hear evidence from Ms Beziuk and therefore the claimant did not have the opportunity to address or respond to this complaint. Nonetheless the Tribunal accepts Ms Chadwick's evidence that she had issues raised by two employees and this was a relevant factor in her decision. Ms Bakalarz also gave evidence that she had spoken to Ms Beziuk about the issues, but she only did so after Ms Bakalarz had raised her own grievance and therefore it was not a factor in Ms Bakalarz doing so.

69. Ms Chadwick's evidence was that she addressed the matter with Ms Curston, the HR Manager at Rapid Recruit Limited, and that she asked Ms Curston not to send the claimant back to the respondent. Ms Bakalarz's statement was provided to Ms Curston. The claimant did not allege that Ms Chadwick discriminated against him on the grounds of race.

70. The claimant did attend work on 7 August 2019. Mr Walsh met with the claimant as the second respondent did not believe that the claimant should have done so. Mr Walsh explained to the claimant that he could not comment on the matter and suggested that if he had any comment he should put them in a statement to discuss with Rapid Recruit Limited.

71. Mr Ventricelli subsequently considered the issues that had been raised. He met with Mr Bakalarz following her return from holiday at the end of August 2019. Ms Bakalaraz's evidence was that she recounted what had occurred, but was not involved in the decision as to what should happen to the claimant. Mr Ventricelli in evidence explained that it was clear that Ms Bakalarz had been emotionally impacted by the events and he could see that she felt uncomfortable and anxious about them. He concluded that Ms Walsh's decision was justified and that the claimant should not return to work at the company, and he confirmed this decision to Rapid Recruit Limited. Mr Ventricelli's evidence, which the Tribunal accepts, is that he made the decision on his own. In the course of the hearing the claimant was very clear in emphasising that he did not allege that Mr Ventricelli himself discriminated

against the claimant on the grounds of race. His contention was that he made the decision based upon what Ms Bakalarz told him.

72. The claimant appealed against the decision to end his engagement. As an agency worker the claimant was not entitled to an appeal under the second respondent's procedures. Nonetheless Mr Cook, in an attempt to respond in a fair and reasonable way, considered the appeal. The claimant's appeal (161) complained about the decision but did not allege discrimination. In an email to Mr Walsh of 3 September 2019 (164) the claimant recounted that he had taken employment law advice, had been advised to appeal, and raised various complaints about the process. In that email he did not allege discrimination. The claimant also provided a timeline to Rapid Recruit Limited which provided his account of the issues leading up to dismissal and was a relatively lengthy document (178). The claimant did not allege in that document that the reason for his treatment was because he was Hungarian.

73. Mr Cook did consider the claimant's appeal but decided that no further action was required following the second respondent's decision to inform Rapid Recruit Limited that the claimant's services were no longer required. A decision letter of 12 September 2019 explained this (181). Mr Cook's evidence was that he did consider whether to allow the claimant to return to work, particularly because he had suggested returning on a different shift, however Mr Cook was concerned that the welfare of staff could be compromised and he did not think that the claimant working on a different shift would allay concerns for staff.

The Law

Direct discrimination and the burden of proof

74. The claim relies on section 13 of the Equality Act 2010 which provides that:

> **"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."**

75. Section 41 of the Equality Act 2010 provides that a principal must not discriminate against a contract worker. It sets out various ways in which discrimination can occur and these include: by not allowing a contract worker to do, or continue to do, their work; by not allowing access to opportunities; and any other detriment. The characteristics protected by these provisions include race.

76. In this case the respondent will have subjected the claimant to direct discrimination if, because of his race, it treated him less favourably than it treated or would have treated others. Under Section 23(1) of the Equality Act 2010, when a comparison is made, there must be no material difference between the circumstances relating to each case.

77. Section 136 of the Equality Act 2010 sets out the manner in which the burden of proof operates in a discrimination case and provides as follows:

> **"(2) If there are facts from which the Court could decide, in the absence of any other explanation, that a person (A) contravened**

the provision concerned, the Court must hold that the contravention occurred.

(3) But sub-section (2) does not apply if A shows that A did not contravene the provision".

78. In short, a two-stage approach is envisaged (the respondent relied upon **Efobi v Royal Mail [2019] EWCA Civ 18** as authority for this):

a. At the first stage, the Tribunal must consider whether the claimant has proved facts on a balance of probabilities from which the Tribunal could conclude, in the absence of an adequate explanation from the respondent, that the respondent committed an act of unlawful discrimination. This can be described as the prima facie case. However it is not enough for the claimant to show merely that he has been treated less favourably than his comparator(s) and that there is a difference of race between them; there must be something more.

b. The second stage is reached where a claimant has succeeded in making out a prima facie case. In that event, there is a reversal of the burden of proof: it shifts to the respondent. Section 123(2) of the Equality Act 2010 provides that the Tribunal must uphold the claim unless the respondent proves that it did not commit (or is not to be treated as having committed) the alleged discriminatory act. The standard of proof is again the balance of probabilities. However, to discharge the burden of proof, there must be cogent evidence that the treatment was in no sense whatsoever because of race.

79. In **Shamoon v Chief Constable of the RUC 2003 IRLR 285** the House of Lords said the following:

"**Employment Tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as [he] was, and after postponing the less favourable treatment issue until after they have decided why the treatment was afforded. Was it on the proscribed ground or was it for some other reason?"**

80. In **Johal v Commission for Equality and Human Rights UKEAT/0541/09** the EAT summarised the question as follows:

"Thus, the critical question we think in the present case is the reason why posed by Lord Nicholls: "Why was the claimant treated in the manner complained of?""

81. In **Hewage v Grampian Health Board [2012] ICR 1054** the Supreme Court approved guidance given by the Court of Appeal in **Igen Limited v Wong [2005] ICR 931**, as refined in **Madarassy v Nomura International PLC [2007] ICR 867**. In order for the burden of proof to shift in a case of direct discrimination it is not enough for a claimant to show that there is a difference in race or other protected characteristic, and a difference in treatment. In general terms "something more" than that would be required before the respondent is required to provide a non-

discriminatory explanation. In **Madarassy v Nomura International PLC [2007] ICR 867** Mummery LJ said:

> **"The court in *Igen v Wong* expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent 'could have' committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal 'could conclude' that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination."**

82. Unfair or unreasonable treatment by an employer does not of itself establish discriminatory treatment: **Zafar v Glasgow City Council [1998] IRLR 36.** It cannot be inferred from the fact that one employee has been treated unreasonably that an employee of a different race would have been treated reasonably.

83. The protected characteristic does not have to be the only reason for the conduct provided that it is an "*effective cause*" or "*significant influence*" for the treatment. Authorities for this are: **Owen and Briggs v James [1982] IRLR 502; Nagarajan v London Regional Transport [199] IRLR 572**; and **O'Neill v Governors of St Thomas More RCVA Upper School [1997] ICR 33** (the question is the "*effective and predominant cause*" or the "*real and efficient cause*").

84. In the opening note produced by the respondents' representative at the start of the hearing, he stated that: when considering whether there has been discrimination, it is the mental process of the person making the decision and not that of those providing information to that person, that is relevant unless it can be considered to be a joint decision: **CLFIS (UK) v Reynolds [2015] IRLR 562**, per Underhill LJ at [30], [32] and [34]; and in **Commissioner of Police of the Metropolis v Denby EAT 0314/16**, Kerr J held that the ratio of **CLFIS** was such that an innocent agent acting without discriminatory motivation is not liable. The Tribunal asked him to address in submissions whether **CLFIS** remained good law following the decision of the Supreme Court in **Royal Mail Group v Jhuti [2020] IRLR 129**. Accordingly, in his submissions the respondents' representative referred in detail to the Judgments in **CLFIS**, **Jhuti** and **Malik v Cenkos Securities Plc EAT 0100/17**. In summary (and his submissions were much more detailed than this) he submitted that: **CLFIS** did remain good law; **CLFIS** was binding on this Tribunal when considering a race discrimination claim; and the different way in which the Equality Act (for discrimination as applied in **CLFIS**) and the Employment Rights Act (for public interest disclosures as applied in **Jhuti**) applied to organisations and individuals, meant that **CLFIS** remained correct for applying the Equality Act. The Tribunal accepted the respondents' representative's submissions that **CLFIS** remained good law binding on the Tribunal, and therefore the point made in the opening note was correct.

Harassment

85. Section 26 of the Equality Act 2010 says:

> **"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."**
>
> **"In deciding whether conduct has the purpose or 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."**

86. The EAT in **Richmond Pharmacology v Dhaliwal [2009] IRLR 336**, stated that harassment is defined in a way that focuses on three elements: (a) unwanted conduct; (b) having the purpose or effect of either: (i) violating the claimant's dignity; or (ii) creating an adverse environment for her; (c) on the prohibited grounds. Although many cases will involve considerable overlap between the three elements, the EAT held that it would normally be a 'healthy discipline' for Tribunals to address each factor separately and ensure that factual findings are made on each of them.

87. The alternative bases in element (b) of purpose or effect must be respected so that, for example, a respondent can be liable for effects, even if they were not its purpose (and vice versa). It is important that the Tribunal states whether it is considering purpose or effect.

88. In each case even if the conduct has had the proscribed effect, it must also be reasonable that it did so. The test in this regard has both subjective and objective elements to it. The assessment requires the Tribunal to consider the effect of the conduct from the claimant's point of view; the subjective element. It must also ask, however, whether it was reasonable of the claimant to consider that conduct had that requisite effect; the objective element.

89. The respondents' representative placed reliance upon what was said by Underhill LJ in **Dhaliwal**:

> **"not every racially slanted adverse comment or conduct may constitute the violation of a persons dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct …it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase"**

90. He also referred to what was said by Elias LJ in **Land Registry v Grant [2011] ICR 1390**:

> **"Furthermore, even if in fact the disclosure was unwanted, and the claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment."**

91. In ***Nazir and Aslam v Asim and Nottinghamshire Black Partnership [2010] ICR 1225***, the EAT placed particular emphasis on the last element of the question, i.e. whether the conduct related to one of the prohibited grounds. When considering whether facts have been proved from which a Tribunal could conclude that harassment was on a prohibited ground, the EAT said it was always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on that ground. That context may in fact point strongly towards or against a conclusion that it was related to any protected characteristic.

92. The respondents' representative highlighted that harassment is different to direct discrimination. He identified two ways in which this was relevant to this case. A broader test of causation applies to harassment then direct discrimination ("*related to*" rather than "*because of*"), which is correct. He also submitted that the bar was set higher for harassment than discrimination (based on the test repeated above, as contrasted to a detriment). The tests are different (less favourable treatment, compared to the harassment test explained above), albeit one is not necessarily the subject of a higher bar than the other.

Time limits/jurisdiction

93. Section 123 of the Equality Act 2010 provides that proceedings must be brought within the period of three months starting with the date of the act to which the complaint relates (and subject to the extension for ACAS Early Conciliation), or such other period as the Tribunal thinks just and equitable. Conduct extending over a period is to be treated as done at the end of the period. A failure to do something is to be treated as occurring when the person in question decided on it.

94. The key date is when the act of discrimination occurred. The Tribunal also needs to determine whether the discrimination alleged is a continuing act, and, if so, when the continuing act ceased. The question is whether a respondent's decision can be categorised as a one-off act of discrimination or a continuing scheme. The Court of Appeal in ***Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96*** makes it clear that the focus of inquiry must be not on whether there is something which can be characterised as a policy, rule, scheme, regime or practice, but rather on whether there was an ongoing situation or continuing state of affairs for which the respondent was responsible in which the claimant was treated less favourably. **Lyfar v Brighton & Sussex University Hospitals Trust [2006] EWCA Civ 1548** highlights that Tribunals should look at the substance of the complaints in question as opposed to the existence of a policy or regime and determine whether they can be said to be part of one continuing act by the employer. **Aziz v FDA [2010] EWCA Civ 304** shows that one relevant factor is whether the same or different individuals were involved in the incidents, however this is not a conclusive factor.

95. If out of time, the Tribunal needs to decide whether it is just and equitable to extend time. Section 123(1)(b) of the Equality Act 2010 states that proceedings may be brought in, *"such other period as the Employment Tribunal thinks just and equitable"*

96. The most important part of the exercise of the just and equitable discretion is to balance the respective prejudice to the parties. The factors which are usually considered are contained in section 33 of the Limitation Act 1980 as explained in the

case of **British Coal Corporation v Keeble [1997] IRLR 336** (and these were reproduced in the respondents' representative's opening note). Those factors are:

- the length of, and reasons for the delay;
- the extent to which the cogency of the evidence is likely to be affected by the delay;
- the extent to which the relevant respondent has cooperated with any request for information;
- the promptness with which the claimant acted once he knew of the facts giving rise to the cause of action; and
- the steps taken by the claimant to obtain appropriate advice once he knew of the possibility of taking action.

97. Subsequent case law has said that those are factors which illuminate the task of reaching a decision but their relevance depends upon the facts of the particular case, and it is wrong to put a gloss on the words of the Equality Act to interpret it as containing such a list or to rigidly adhere to it as a checklist. This has recently been reinforced by the Court of Appeal in **Adedeji v University Hospitals Birmingham NHS Foundation Trust [2021] EWCA Civ 23** where it was emphasised that the best approach for a Tribunal in considering the exercise of the discretion under section 123(1)(b) is to assess all the factors in the particular case which it considers relevant to whether it is just and equitable to extend time and that factors which are almost always relevant to consider when exercising any discretion whether to extend time are: the length of, and reasons for, the delay; and whether the delay has prejudiced the respondent (for example, by preventing or inhibiting it from investigating the claim while matters were fresh).

98. The burden to convince the Tribunal that it is just and equitable to extend time, falls on the claimant. **Robertson v Bexley Community Centre t/a Leisure Link [2003] IRLR 434** confirms that the exercise of a discretion should be the exception rather than the rule and that time limits should be exercised strictly in employment cases. It says, of the discretion,

> **"there is no presumption that they should do so unless they can justify failure to exercise the discretion. Quite the reverse, a Tribunal cannot hear a complaint unless the claimant convinces it that it is just and equitable to extend time. So, the exercise of discretion is the exception rather than the rule".**

Conclusions – Applying the Law to the Facts

99. There was no dispute that section 41 of the Equality Act 2010 applied in this case and the claimant, as a contract worker, was able to bring the relevant claims against the respondent, as a principal (and even though the respondent was not his employer). When confirming this during submissions, the respondents' representative did highlight that it was important that the Tribunal did not consider this claim as one akin to unfair dismissal. The claimant did not have the right to claim unfair dismissal. The Tribunal has been mindful to ensure that it focuses only on the

claims which it has been required to determine. It was not in issue whether the decision to end the claimant's engagement was fair. It was also not in issue whether or not the claimant had subjected Ms Bakalarz to unlawful harassment. The issues were only those contained in the list of issues.

Harassment

100. The Tribunal started its consideration by determining issues 6-8 from the list of issues, that is the claimant's allegation of harassment. The claimant's harassment allegation related to the comment made by Ms Bakalarz towards him that the claimant's *"brother"* was working on the second shift. This was an allegation brought against both the first and second respondents.

101. It was clear from the claimant's evidence that the comparison made by Ms Bakalarz, of the claimant and the person who was working on the other shift, was unwanted conduct. The claimant did not want the comment to be made.

102. The second issue which the Tribunal needed to consider, was whether the conduct had the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. That is, the question for the Tribunal was what was the purpose of the comment made by Ms Bakalarz. The Tribunal finds that the purpose of the comment was not to violate the claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for him. Ms Bakalarz was making what she perceived to be a light-hearted comment about what she believed to be a similarity in appearance between the claimant and someone else. She did not know that the claimant had a particular dislike of Romanians or would have a particularly adverse view of the person with whom the comparison was made. Her purpose was not to undermine his dignity or create an offensive etc environment for the claimant.

103. The next issue for the Tribunal was to determine whether in fact the conduct did have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him, however it was intended. That test has both subjective and objective elements.

104. Subjectively, the Tribunal accepts that the claimant was deeply offended by the comparison made. That much was clear from the text message the claimant sent the night after the comment was made (143A). Accordingly, the Tribunal does find that the comment did have the effect of creating what the claimant perceived to be an adverse environment for himself.

105. Section 26(4)(c) of the Equality Act 2010 requires the Tribunal to take into account whether it is reasonable for the conduct to have that effect. The reason in this case why the conduct had that effect for the claimant, was because of the claimant's racist views and his own prejudice about Romanians. Accordingly, the Tribunal does not find that it was reasonable for Ms Bakalarz's comment to have that effect for the claimant. The serious effect arose purely because of the claimant's own discriminatory views and his views of Romanian people. He was outraged that he was being compared to someone who was Romanian because of his own prejudice. It was not reasonable for Ms Bakalarz's comment to have the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

106. The Tribunal also noted that whilst the comment did have an adverse effect at the time, the claimant himself perceived Ms Bakalarz and himself to be on friendly terms on his return to working for the second respondent from April 2019, therefore the effect was of a relatively transitory nature. The respondents' representative submitted that such a comment fell into the category of trivial acts identified in **Land Registry v Grant** or the trivial or transitory acts described in **Richmond Pharmacology v Dhaliwal**. That is, the type of comment which is not significant enough to meet the test of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. The Tribunal finds that a single comment comparing the claimant to someone he was perceived to look like, made in the circumstances evidenced in this case, is the type of trivial or transitory comment which does not meet the requirements of the test (violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him).

107. The Tribunal also does not find that the comment made was related to race. Whilst it is possible for a comment about appearance and similarity of appearance to be related to race, in the circumstances in which it was said by Ms Bakalarz in this case, the Tribunal does not find that it was related to race.

Direct discrimination

108. The Tribunal then turned to considering the claimant's allegations of direct race discrimination.

Issue 4(a)

109. The first allegation (4(a) was the same allegation that has already been considered in relation to harassment. Ms Bakalarz did not make the comment because the claimant was Hungarian; she made it because she perceived that the other employee looked like the claimant. Accordingly, the Tribunal finds that the treatment of the claimant was not because of race. In any event, the Tribunal would not have found that comparing the claimant to another employee to whom he was perceived to look similar, was of itself less favourable treatment.

Issue 4(b)

110. Allegation 4(b) was that Ms Wasilewska told the claimant in early June that it was a Polish factory and he need to speak Polish. As has been recorded in the findings of fact above (see paragraph 37), the Tribunal does not find that that this comment was made at all. As the Tribunal has not found that the comment was made as alleged, this allegation does not succeed.

Issue 4(c)

111. Allegation 4(c) related to the whiskey comment by Mr Vyroubal, Mr Hubisz and Ms Bakalarz. As recorded in the section on facts above (see paragraphs 38-46), Ms Drofti was informed by the individuals that she needed to provide a bottle of whiskey for the claimant's shift to be changed. However, that was said as a joke, was understood by Ms Drofti to be a joke, and was made in circumstances where none of the three individuals were in a position to be able to carry out the request. They did not have the ability to change the claimant's shift.

112. The claimant's comparators (Ms Szewczak, Ms Paczkowska, and Ms Gliebine) were treated differently in as much as their shift was changed at their request, but for the reasons explained in the facts section above (paragraph 46) their circumstances were materially different to those of the claimant. Those decisions were made by a different person and the circumstances which applied to the work they undertook differed from the claimant.

113. The Tribunal finds that the comment made was a joke. It was not because of the claimant's race. The claimant has not demonstrated the "*something more*" required to reverse the burden of proof. As a result, the burden of proof did not revert to the respondent, who did not therefore have a positive obligation to prove why the events occurred.

114. The Tribunal finds that the three individuals' circumstances were materially different to the claimant for the reasons given in Mr Cook's unchallenged evidence. He was not treated less favourably then them (or than a hypothetical comparator in materially the same circumstances would have been).

Issue 4(d)

115. Allegation 4(d) was recorded in the list of issues as an allegation against Mr Walsh, but in the hearing it was converted by the claimant to being an allegation made against Ms Stolarska. This relates to the Quality Assurance position.

116. As recorded in the facts section above (see paragraphs 47-51), the Tribunal finds that Ms Stolarska had a perfectly reasonable and appropriate explanation for why the claimant could not convert to the Quality Assurance position when he was interested in doing so. The claimant was not suitable for the role as he did not have the relevant experience, and there was not an ability to train the claimant at the time.

117. On the evidence available Ms Packowska was treated differently to the claimant and was of a different race. However, the claimant has not prove the "*something more*" required to show that the effective cause of, or a significant influence on, the decision was race. The Tribunal finds that the reason why the claimant was not allowed to take up a Quality Assurance position was for the reasons explained by Ms Stolarska, which were not race.

Issue 4(f)

118. The respondents' submissions addressed issue 4(f) prior to issue 4(e) and the Tribunal also considered the issues in that order. Issue 4(f) related to smoking breaks. As recorded above (see paragraphs 60-66) and based upon the Tribunal's acceptance of Ms Stolarska's evidence about what she said to the claimant and why, the Tribunal does not find that the reason for the conversation with the claimant was his race. In any event, as with the other allegations, the claimant has not demonstrated the "*something more*" which would reverse the burden of proof. The subject matter of this allegation appeared to be a relatively minor issue which the claimant accepted at the time and which he has only raised subsequently as part of his Tribunal claim. The Tribunal cannot see that the conversation which Ms Stolarska had with the claimant amounted to discrimination at all. There was also no less favourable treatment in the claimant being spoken to about the need to tell

others he was taking breaks and to abide by the second respondent's process for doing so (as an agency worker).

Issue 4(e)

119. In relation to allegation 4(e), the Tribunal would highlight that it is not necessary for the Tribunal to determine whether or not the claimant's comment to Ms Bakalarz amounted to unlawful harassment, and/or whether the respondent was required to take action against the claimant. The only issue for the Tribunal to determine is whether the claimant was treated less favourably by Ms Bakalarz because of his race, as a result of her being upset by what the claimant said and raising a grievance. That is, the question for the Tribunal is whether Ms Bakalarz did so because of the claimant's race.

120. As is outlined in detail in the factual section above, there was a long and relevant personal history which preceded the way in which Ms Bakalarz responded to the comment made by the claimant. In this case and for this allegation, context was important. Ms Bakalarz's adverse response to the claimant needed to be considered in the context of the issues outlined, including the McDonald's conversation in 2015 and Ms Bakalarz's more recent uneasiness with the claimant telling her that he had had a dream about her and her perception of how that comment was said. A hypothetical comparator would be someone who made the same comment to Ms Bakalarz, having caused her unease and having made her uncomfortable over time with the same previous history of comments. The Tribunal finds that Ms Bakalarz would have treated such a hypothetical comparator in the same way and would have raised a grievance about them. That is, the context in which the comment was perceived was central to how Ms Bakalarz chose to react.

121. As is explained in the factual section above (see paragraphs 55-59), the use of the word *"kochanie"* by the claimant was over-familiar and the Tribunal finds that it did make Ms Bakalarz feel uncomfortable. In the context where the history demonstrated that the claimant had a sexual interest in Ms Bakalarz, this was the final straw for her and the thing which caused her to raise a grievance. The Tribunal accepts that Ms Bakalarz did so because she felt uncomfortable, not because of the claimant's race.

122. The Tribunal does not accept that the word used was comparable to the use of the word *"luv"* used by Mr Shaw and others. The Tribunal accepts the evidence of the Polish speakers and, in particular Mr Golubek, of the meaning of the word used. Ms Bakalarz was entitled to and did genuinely take offence, and that is why she raised a grievance. It was not due to the claimant's race.

123. The claimant has not demonstrated the "*something more*" required to reverse the burden of proof.

124. The Tribunal does not find that any of the claimant's named comparators used the word *"kochanie"* to Ms Bakalarz or in the workplace. The claimant was not treated less favourably than any named comparator.

125. In considering the background issues and context, the Tribunal also thinks it necessary to address one issue raised in relation to the claimant's comment to the Ms Bakalarz that he had had a dream about her. The respondents' representative

submitted that it would never be appropriate for one employee to tell another employee that they had dreamt about them, in a work context. The Tribunal does not agree with that submission. However, the way in which such a comment is perceived is important, and it may be affected by the tone in which it is said and the way in which it is communicated. As with many of the issues of communication in this case, it is possible that the difference in view about way the comment was intended or perceived, arose from the fact that communication was taking place in a language which was not the first language for all of those involved. The Tribunal does accept that Ms Bakalaraz felt uncomfortable in the light of the claimant telling her that he had been dreaming about her, and accepts that it was not unreasonable for her to do so if she perceived the statement to have made in the way that she described. Whilst not, of itself, a separate allegation, this comment and how it was perceived, was important context for Ms Bakalarz's response to the claimant saying to her *"dzien dobry kochanie"* and her raising a grievance as a result.

Issue 4(g)

126. In relation to allegation 4(g), the claimant's claim cannot succeed because of the law as explained in more detail above. The Tribunal has accepted that it is bound by the decision of **CLFIS (UK) v Reynolds** and therefore the focus must be on the mental process of the person making the decision.

127. The decision to end the claimant's engagement was made by Ms Chadwick and no allegation of discrimination was made by the claimant against her. Mr Ventricelli made the decision not to overturn Ms Chadwick's previous decision. Mr Ventricelli decided that the claimant should not be re-engaged. The allegation brought focussed on that decision. The claimant accepted that Mr Ventricelli did not make his decision because of race. The Tribunal accepts the respondents' evidence that the decision was Mr Ventricelli's alone, it was not a joint decision made with Ms Bakalarz as was alleged. As a result the claimant's claim cannot succeed because the decision maker was Mr Ventricelli. Mr Cook also subsequently made a decision to maintain the request that Rapid Recruit Limited no longer send the claimant to the second respondent, but the claimant also did not allege that Mr Cook had discriminated against him.

128. In any event, for the reasons explained above, the Tribunal does not find that Ms Bakalarz raised the grievance or pursued matters as she did because of the claimant's race. She raised the issues because she felt uncomfortable in the light of what the claimant had said on 30 July 2019, in the context of the history of the other events described. Therefore, even had the Tribunal needed to consider the motive of the person who raised the issue as well as the decision maker, the Tribunal would not have found that the reason for the claimant's treatment was race.

Time limits/jurisdiction

129. As a result of the decisions reached on the primary issues it is not necessary for the Tribunal to address the issue of jurisdiction/limitation, that is whether the claim was entered in time. However, as issues 9-11 were time issues, the Tribunal will record what it found.

130. As the Tribunal has not found any of the acts of discrimination occurred as alleged, there was not a continuing act which concluded within the primary time limit.

131. For allegations 4(a), 4(b), 4(c) and 6-8, they all occurred prior to 14 June 2019 (the date which would have been the first day upon which an event could have occurred (or a continuing act ended) for the claim to have been entered in time). As a result, the claimant's only allegation of harassment and three of his allegations of direct discrimination were not brought within the primary time limit (even when ACAS early conciliation is taken into account). The other claims were entered within the time required.

132. The claimant provided no reason for extending time, nor did he provide a genuine basis for it to be just and equitable to do so. The claimant's explanation was that he did not know that he could bring claims for discrimination when the engagement had not ended. As the respondent submitted, the claimant could have obtained this information in the same way as anyone else. The claimant did take legal advice in early September 2019. He did not bring his claims until 9 October for the first respondent and 1 November for the second respondent.

133. For the one allegation of harassment and direct discrimination allegation 4(a), the act complained of occurred on 8 January 2019. The claimant ceased to be engaged by the second respondent for the period until April 2019, when he re-commenced engagement. The time to claim (or enter early conciliation) expired on 7 April 2019. Accordingly, the complaint was entered more than six months late. That was a significant delay which caused prejudice to the respondent as a result of the delay reducing the ability of its witnesses to remember what occurred.

134. For allegations 4(b) and 4(c), the period which the claimant was out of time was considerably shorter and the adverse impact on the respondents' witnesses less obvious. Nonetheless the exercise of the discretion to extend time should be the exception and not the rule.

135. In the circumstances described and, in particular because of the absence of any genuine reason why the claim was not entered in time (save that the claimant had not looked into the ability to claim whilst engaged and the time limits for doing so), the Tribunal is satisfied that it would not have been just and equitable to extend time.

Conclusion

136. The Tribunal would highlight that it can understand why, from the claimant's point of view, he could not see that anything at the time of termination was particularly serious, or of a nature which should lead to the end of his engagement. The Tribunal accepts that the claimant did not understand why his engagement was terminated at the time. That clearly formed the backdrop to the claimant's sense of grievance. This is a case which is, to a great extent, about the fragility of the working relationship of an agency worker where that engagement can be brought to an end without any process or the usual employee safeguards applying (at least those which apply where an employee has achieved two years service).

137. The only way that the claimant could pursue a claim in the Employment Tribunal was by asserting that the decision was one based on race. The Tribunal does not accept that the claimant genuinely believed (at least at the time) that what occurred happened because of race, as he did not assert that at the time. In any event, what the Tribunal has been required to determine are claims for direct

discrimination because of race and harassment on grounds of race. The claimant has not shown that he was less favourably treated or harassed because of/on grounds of race.

Summary

138. For the reasons explained above, the Tribunal does not find that either Ms Bakalarz or Deli Solutions Limited discriminated against the claimant because of his race or unlawfully harassed him on the grounds of race. The claimant's claims against both respondents have not succeeded.

Employment Judge Phil Allen

7 June 2021

RESERVED JUDGMENT AND REASONS
SENT TO THE PARTIES ON

10 June 2021

FOR THE TRIBUNAL OFFICE