Case Nos: 2302472/2017
2302682/2017
2301252/2018

EMPLOYMENT TRIBUNALS

Claimant: Mr M Soltani

Respondent: Signature Senior Lifestyle Operations Ltd

Heard at: **London South Employment Tribunal (by CVP)**

On: **8-9 March 2021**
& 10 March 2021, 29 April 2021 (in chambers)

Before: **Employment Judge Ferguson**

Members: **Ms L Lindsay**
Mr R Singh

Representation
Claimant: In person
Respondent: Mr Z Malik (solicitor)

RESERVED JUDGMENT

By a majority (Ms Lindsay dissenting), it is the judgment of the Tribunal that:

1. The Claimant was subjected to harassment related to religion or belief on 7 June 2017.

It is the unanimous judgment of the Tribunal that:

2. The complaint of unfair dismissal is dismissed upon withdrawal.

3. The complaint about holiday pay is dismissed upon withdrawal.

4. The complaint of harassment related to Mr Salcim's statement fails and is dismissed.

5. The complaints of victimisation fail and are dismissed.

6. A remedy hearing will take place by CVP at 10am on 8 July 2021 with a time estimate of three hours.

REASONS

INTRODUCTION

1. The Claimant has brought three separate claims. The first two are essentially identical. They were presented on 12 September 2017 and 2 October 2017 respectively, following a period of early conciliation from 3 to 30 August 2017. They relate to an incident of alleged harassment related to religion or belief on 7 June 2017 and alleged victimisation as a result of the Claimant's complaint about the incident. The third claim, presented on 12 April 2018, relates to a document disclosed to the Claimant in the course of disclosure for the first two claims, which the Claimant says amounted to a further act of harassment related to religion or belief.

2. The Claimant originally claimed unfair dismissal in his first two claims, but withdrew the complaint at a case management hearing on 22 December 2017 because he did not have two years' qualifying service.

3. A complaint about holiday pay, which was never fully particularised, was withdrawn on the first day of the final hearing.

4. It was agreed at the start of the hearing that the issues to be determined were as follows:

   Section 26: Harassment related to religion or belief

   4.1. Did the Respondent engage in unwanted conduct by:

      4.1.1. Justyna Johnson subjecting the claimant to verbal harassment during the incident on 7 June 2017?

      4.1.2. On 12 June 2017, Gabriel Salcim "describing the Claimant as a terrorist and referring to his two non-British children" in a statement given for the internal investigation into the above incident?

   4.2. Was the conduct related to the Claimant's religion or belief? The Claimant is a Muslim.

   4.3. Did the conduct have the purpose or effect of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant? In considering whether the conduct had that effect, the Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Section 27: Victimisation

4.4. Was the Claimant's verbal complaint on 8 June 2017 a protected act? The Respondent argues it was made in bad faith, but accepts it would have been a protected act if not made in bad faith.

4.5. If so, has the Respondent carried out any of the treatment set out below because the Claimant had done a protected act?

4.5.1. Failing or refusing to hold the grievance hearing away from the Workplace?

4.5.2. Otherwise failing to make suitable arrangements for the Claimant to return to work?

4.5.3. Failing to take action in response to Mr Salcim's statement?

5. It was agreed that the hearing would be limited to liability only.

6. We heard evidence from the Claimant. On behalf of the Respondent we heard from Justyna Johnson, Niroshan Gunasena, Gabriel Salcim (via a Romanian interpreter), Lorraine Sharp and Sonya Fenwick.

7. Our factual findings and conclusions are unanimous except where expressly stated below.

FACTS

8. The Respondent operates a number of care homes. The Claimant was employed as a maintenance assistant at the Respondent's Coombe Hill Manor care home from 18 March 2016 until June or July 2017.

9. Between 4.30pm and 5.00pm on Wednesday 7 June 2017 there was a discussion between some of the staff in the smoking area. Those present included, at various times, the Claimant, Justyna Johnson (Dementia Manager), Niroshan Gunasena (Care Assistant), Gabriel Salcim (Kitchen Assistant), Anastasia Yianna (Restaurant Assistant), Tom Nurse (Chef) and Miles Cassidy (Commis Chef). One of the topics discussed was the London Bridge terrorist attack that had taken place a few days earlier, on 3 June 2017. This led to a wider discussion about religion and politics. There is disagreement about what precisely was said and by whom.

10. The next day, 8 June 2017, the Claimant attended work and immediately asked to see Lorraine Sharp, Human Resources Manager for the Coombe Hill Manor site. The Claimant gave an account of what happened the previous day and was visibly upset. Ms Sharp went to get Sonya Fenwick, General Manager for the site, and asked the Claimant to repeat his account.

11. Ms Sharp's evidence to the Tribunal of what the Claimant said was as follows:

> "He explained that Ms Justyna Johnson, our Dementia Care Manager, during a conversation regarding the recent terrorist attacks had verbally abused him using the f-word on many occasions and had made offensive remarks relating to his Muslim faith. He said incident was apparently witnessed by a number of other members of the Respondent's staff, including Gabreil (sic) Salcim, Tom Nurse, Anastasia Yianni, Andrea Nagymihaly, Miles Cassidy and Niroshan Gunasena."

12. The Claimant was asked to put his account in writing and was told that Ms Johnson was now on annual leave for 10 days or so. They offered for him to go home, but he declined. The Claimant said in his evidence that Ms Fenwick asked him to stay at work as a favour because she wanted him to show the new maintenance manager around the site. Ms Fenwick and Ms Sharp both deny this, but nothing turns on the dispute so we do not need to make a finding about it.

13. There is no dispute that the Claimant was stressed before this incident took place. The Respondent had been without a maintenance manager for a time, meaning that the Claimant had been the only member of staff dealing with maintenance issues. His wife was also heavily pregnant and had some complications with the pregnancy.

14. That evening at 12.01am the Claimant emailed Ms Sharp as follows:

> "Hi Lorraine,
>
> This email is just to let you know that I have made my mind after what happened and decided not to come to work anymore and will contact my solicitor who will get in touch with you soon.
>
> I'm very sorry for any inconvenience because I know you were always very kind and helpful but i don't need any more stress in my life and my family."

15. The email was passed to Ms Fenwick, who replied asking the Claimant to reconsider. She confirmed that they were beginning a formal investigation into the incident on 7 June and that the matter was being treated very seriously. She also said that his decision to leave without notice caused considerable issues because they had no maintenance cover in place.

16. In the meantime, on 8 June, Ms Sharp had contacted Ms Johnson to inform her that a concern had been raised by the Claimant about the conversation in the smoking hut the day before. Ms Johnson was asked to provide a statement before going on annual leave. She did so the same day.

17. Ms Fenwick and Ms Sharp also met with several other employees over the following week and took notes of their accounts.

18. Ms Fenwick chased the Claimant for his statement on 14 June 2017, and on 19 June 2017 the Claimant provided by email his full account of the incident as follows:

> "Justyna started the conversation by saying she was trying to call her husband but he is not picking up the phone and she added to that he is working in central London.
> I asked… 'did you know that people who are working in central London can stay at home and not to go to work these days if they feel scared to do after the terror attack on London Bridge?'
> Justyna said 'why these stupid Muslims are doing these attacks? Why do they love killing people?' - and she was looking at me.
> I answered back saying 'the government still didn't say anything about who did the the attack so please don't suspect anyone yet.'
> Justyna answered back saying: 'that's not true. There is a group who admitted it and it is an Islamic group. I just would like to know who the fuck is this God who people are killing themselves for? Is he a fucking person? Is he a fucking creature? Is he a fucking animal?? I don't believe in all this shit.' Then she added: 'why all these fucking Muslims believers don't go and do their fucking prayings and their fucking Ramadan?'
> Then, She looked at me and said: 'Mehdi. You are a Muslim too, no?'
> I answered: 'yes I am. And you know that i am.'
> She said: 'then why are you sitting with us smoking and drinking coffee? Why aren't you doing your fucking Ramadan?'
>
> I felt very badly hurted when i had to hear all what she said about the God I believe and about the people that I am one of them as a Muslim. I felt she was judging me for all what other are doing.
> And especially it was very painful for me to hear about the Ramadan and she asked me why I'm not fasting when I was between 6 people who I strongly believe they don't know anything about my religion and Ramadan. And because of the way they were looking at me and the very embarrassing situation she put me in I felt I had to give explanation and tell them the reasons why I'm not doing Ramadan.
> So I answered: 'since George (the maintenance manager) left the job I've been working on my own, and I'm looking after the whole building. Plus l have a pregnant wife at home who picked up pregnancy diabetes and she is not well enough to look after herself and our 2 years old son. So I'm working here and at home. If I add fasting to all these it would he too much to handle.'
> So I had to explain something which I shouldn't have because it's personal and confidential.
> Then she didn't stop there and carried on saying: 'you guys (she meant Muslims) are everywhere in Europe. You are in fucking France. In fucking Italy. In fucking England. You come here and want to brain wash people's brain and you enjoy killing people and you want to change women how to dress. If someone loves me he has to love how I look like. Why don't you fucking go back to your country and you do anything you went in your countries?'

> Then she added: 'I have a friend and her husband is a fucking Muslim and he wants her to be a Muslim and he doesn't let her to so out or dress in short clothes.'
> I had to stop her there And I answered: 'I'm a Muslim and I have a non Muslim wife. She is Hungarian. and we are having a 2 years old boy and another one on the way. And I have never forced her to be Muslim. This is something between you and God. And very personal and no one can force you to do something what you don't want to do at least in this country (England)'
> Then she looked at me and said: 'I HOPE ONE DAY YOU WILL NOT EXPLODE YOURSELF IN THIS FUCKING BUILDINGS AND YOU WILL NOT FUCKING KILL EVERYONE HERE'
> Then she left the smoking area.."

19. The Claimant claimed that what happened was "without any doubt a harassment and using of a position power and the most important a religion direct discrimination". He continued:

> "What happened it took all my confidence away and added a new pressure and stress into my life on top of what I'm already having and you know about my wife health condition, no need to remind you.
> To expect someone to come back to work when he cannot even look into his colleagues' eyes with the same confidence and self stem (sic) is just wrong and it will make the situation more complicated.
> So my decision to stop coming to work was not my choice and was not a resignation without notice, it was just a result of what I went through and I'm expecting the company to pay for all my absent days."

20. The Claimant said that in order to resolve the matter amicably he would also need compensation for hurt feelings and aggravated damages. He said he would allow 20 days for the company to make a decision, after which he would go to the Employment Tribunal.

21. After receiving this email Ms Sharp decided to hand over the investigation to Monica Garbutt, the Group HR Partner. Ms Garbutt arranged further interviews with some of the witnesses, including Ms Johnson, on 21 and 22 June 2017. Most of the interviews were conducted by Helen Bayliss, Group Operations Manager.

22. On 23 June Ms Garbutt invited the Claimant to a grievance hearing on 28 June. In fact the Claimant's wife had given birth that day, 23 June. The Respondent knew that she was in the late stages of pregnancy, but we accept the evidence of Ms Sharp and Ms Fenwick that they did not know when she was due to give birth.

23. The Claimant responded on 25 June, saying that there were four reasons why he could not attend:

    23.1. He did not have the courage to meet his colleagues again after what happened.

23.2. His wife had given birth on 23 June and both she and the baby needed to spend at least 5 days in hospital for observation and treatment.

23.3. He had already told them everything and put it in writing, therefore he did not have anything to add.

23.4. Whatever decision was taken it would only concern the Respondent as a company. "The decision will help you maybe in front of the Judge but it will not change anything to the damage and the pain I went through and it will always be a discrimination".

24. He said he would be happy to end the matter amicably "if I get what I asked for in my statement", but if they wanted to meet to discuss this he requested that the meeting take place away from the Respondent's premises.

25. On 3 July 2017 Ms Bayliss wrote to the Claimant to confirm the outcome of his grievance. She explained the process of the investigation and concluded as follows:

> "Having considered all of the available evidence and the facts of the case I came to the conclusion that although the discussion that took place was inappropriate for the workplace there is no evidence that the discussion was directed at you or that you were harassed, victimised or discriminated against in any way on the basis of your religion. Following receipt of your email with details of your concerns the matter was further escalated to be investigated by myself given you had expressed the views that you did not feel the GM or HR Manager had been sympathetic or supportive towards you. I believe that when you reported the matter it was treated very sensitively and seriously by them and an investigation began immediately. You were offered the opportunity to go home, reassured on a number of occasions regarding the nature of investigation, confidentiality and the high regard in which you were held by staff and residents at Coombe Hill Manor. In addition you were paid for the time off during this period. Therefore, it is my decision that your grievance has not been upheld."

26. Ms Bayliss offered mediation to aid the Claimant's return to work. She said that if the Claimant did not make contact by Thursday 6 July "we can only assume that you have ended your employment contract by your own volition with immediate effect and therefore have repudiated your contract".

27. The Claimant responded on 5 July objecting to the contents of the letter and asking a number of questions. He also reiterated that he believed the company should compensate him. The Respondent treated this email as an appeal and offered the Claimant an appeal hearing. The Claimant was informed that his employment would be treated as at an end if did not attend.

28. On 9 July the Claimant wrote to Ms Garbutt confirming that he was not interested in coming back to work "due to the fact that I'm now positively sure that I no longer can trust you (Management)."

29. The Respondent treated 10 July 2017 as the Claimant's last day of employment.

Witness accounts of the incident

30. The evidence provided by each of the witnesses to the incident on 7 June 201, insofar as relevant, may be summarised as follows.

Justyna Johnson

30.1. In her written statement on 8 June 2017 Ms Johnson said the conversation started by the Claimant saying that London streets are empty this week because of what happened at London Bridge. Ms Johnson mentioned that she was going on holiday. The statement continues:

> "Then I said that people talks of why the attacks happen during Ramadan?"

Then the Claimant said there was a video on Facebook with evidence that the police did it, and he showed the video on his phone. Ms Johnson said the news had said the Islamic country admitted they did the attack. There was then a discussion between the Claimant and Mr Gunasena about suicide bombs.

Ms Johnson's statement reads:

> "There was a time in all this conversation that I have asked Mhedi [the Claimant] what is his religion and he replied that he was a Muslim so I reply or you not fasting- seeing him smoking and drinking his coffee, so he replied no as I am under lots of stress and very busy at work so not this time unfortunately."

She also said there was a conversation about god and she read a lot of books about Muslim culture but "what I don't get who was Allah". She said that she had a friend who married a Muslim man and "he asked her to change her religion why is that and Mehdi said that not all Muslims do that is their choice and his wife did not changed (sic) her religion".

30.2. In her interview on 21 June 2017 Ms Johnson was given the Claimant's statement to read. She accepted that the "F word" may have "come out", but denied using it in the way the Claimant alleged. When asked about the tone of the conversation she said it was "a normal conversation". She said she was possibly trying to call her husband at first. The Claimant then started the conversation about the London Bridge attack. She accepted asking the Claimant if he was a Muslim. When asked why she had asked him about that she said "It was a general conversation. We were talking

about smoking and drinking and I asked him if he was fasting." She said the Claimant was a friend and they have a good relationship. He did not give a reaction or seem upset by the conversation. She also accepted there was some conversation about God and Allah. She said "It is interesting subject to me and I have read about it. I asked a general question, it was no directed to him… Christians have God and Jesus who is Allah? Is he like God or Jesus?" She accepted saying that her friend married a Muslim and took his religion, and that the Claimant said his wife was Hungarian and that she did not convert and wears her own clothes. She denied all of the other allegations in the Claimant's statement.

30.3. In her evidence to the Tribunal Ms Johnson was asked why she brought up the topic of Ramadan. She said she could not recall. She claimed that the question "Who is Allah" was not directed specifically at the Claimant. She accepted she had mentioned her friend who was married to a Muslim, but again denied asking the Claimant about his wife. The Tribunal asked Ms Johnson whether, as far as she was aware, any of the others present were Muslims. She said she did not know their religions.

Niroshan Gunasena

30.4. In his initial interview Mr Gunasena said that he and Ms Johnson arrived at the same time. Ms Johnson sat next to the Claimant. The Claimant was talking about the terrorist attack and showing Ms Johnson a video on his phone and saying it was the UK government who planned it. Mr Gunasena said the conversation carried on and became heated. He said Ms Johnson asked the Claimant "something about muslim people", then the Claimant started to go on and on about terrorism and religion. He and the Claimant then discussed suicide bombers. He was asked if any inappropriate language was used and he said "Yes Justyna was". He said the Claimant seemed calm. Ms Johnson was "not calm, a bit angry about what was being said, she then said she had to go". He said, "Justyna was just asking a question, just curiosity. Mehdi was ok his body language was the same, but looked a bit stressed he was just trying to prove a point, it was like a debate."

30.5. Mr Gunasena later submitted a written statement. He said the question Ms Johnson had asked the Claimant was, "Why proper Muslim people don't wear hijab or cover them self?" The Claimant replied "Even my wife don't wear these religious uniform, it's totally up to them".

30.6. Mr Gunasena also provided two diagrams of the smoking hut area, the first showing the Claimant and Ms Johnson sitting next to each other in the smoking hut. The second, entitled "the moment before I left the smoking hut" shows Ms Johnson leaving the area and the Claimant sitting with Mr Salcim in the smoking hut.

30.7. In the second interview the Claimant's allegations were read out to Mr Gunasena and he denied that the words claimed were said. He said Ms Johnson had used one "F word" like "why are people fucking killing".

30.8. In his evidence to the Tribunal Mr Gunasena agreed that the Claimant was the only Muslim present during the incident.

Gabriel Salcim

30.9. Mr Salcim's initial interview was conducted via a Romanian interpreter. He said the discussion was between the Claimant and Ms Johnson. He said, "They were discussing about religion talking about Islam. Justyna asked a question to Mehdi, I did not hear the question properly only the response and it was in the Koran there are no words about fighting. In the bible there are more than 10 words talking about fighting in the Koran there is only one story one word." Towards the end of the interview Mr Salcim is recorded to have said the following:

> "I have had some concerns over this maintenance guy [the Claimant] he has a lot of responsibility here he says I am his friend. He approaches me he does not like Sonya [Ms Fenwick] and wants to change his job, when he speak to me he was adgitated (sic). I am concerned for the company about the access this man has to security, laptop, I think last Wednesday he exploded. Everything came out.
> This man was also saying to me that his son was refused a British passport and he was pursuing this and was going to take them to court.
>
> I think cctv should be checked, also computers. I have concerns."

30.10. In his second interview the Claimant's allegations were read out to Mr Salcim. He denied that the alleged words were said. There was no interpreter at the second interview.

30.11. In his evidence to the Tribunal, given via a Romanian interpreter, Mr Salcim said the conversation was between the Claimant and Ms Johnson. He could not recall any swearing. He said the voices were quite loud, and that when Ms Johnson left you could see she was not happy. When asked about the "concerns" mentioned in his first interview Mr Salcim said that the Claimant had told him about a month before the incident that he did not like Ms Fenwick and he was not happy in the job. He could not say exactly what his "concerns" were, but said he had never seen the Claimant so upset. As for the comments about the Claimant's son, he said the Claimant had told him about two months before the incident he has having problems with his son's passport, but it was resolved over the phone. Mr Salcim said he suggested they check the CCTV and laptop because they might give information about why the Claimant was so upset.

Others

30.12. Mr Nurse said in his initial (and only) interview that it was a "politically heated conversation also immigration was spoken about, other countries Palestine and Israel was discussed". He said no inappropriate language was used. When asked "Who was asking the questions?", he said "Justyna

I guess, Mehdi was defensive". He described the conversation as "heated but not aggressive".

30.13. Ms Yianni said in her initial interview that she was unsure who was having the conversation, but they were "talking about immigration something like should'nt let people here and we need better security in light of the terror attacks in London". She said Ms Johnson was "trying to clarify what Mehdi was saying to her, I think justyna had tried to calm the situation down". In her second interview she said she heard Ramadan being mentioned and heard someone swear, "Justyna I think". She denied that the other comments alleged by the Claimant were said.

30.14. Mr Cassidy said the conversation was "difficult to follow due to the language barrier this can be a problem". In his second interview he said it was "heated and political discussion. Not for work". He said there was probably swearing, but denied that the comments alleged by the Claimant had been said.

Earlier Tribunal proceedings

31. The Respondent relies on an earlier judgment of the Employment Tribunal in proceedings brought by the Claimant against another employer, New England Seafood International Ltd (2302647/2015). The Respondent contends the Claimant misled the Tribunal in those proceedings which, it argues, is highly damaging to his credibility overall. The judgment shows that the Claimant succeeded in a disability discrimination complaint (failure to make reasonable adjustments) against New England Seafood on the basis that he had a serious back condition and they should have provided him with light duties. He was sent home without pay on 1 December 2014 and dismissed in June 2016. The remedy hearing took place on 10 January 2017 and the Claimant claimed loss of earnings up to that date. In his evidence to the Tribunal he said he had worked in an ice cream shop from August 2015 until February 2016 when he had to give up due to the pain he was experiencing. It is apparent from the judgment that the Claimant did not disclose to the Tribunal that he had started work for the Respondent in this case in March 2016. He was awarded loss of earnings for the period up to 19 October 2016, the date on which the Tribunal found he would have been lawfully dismissed due to the deterioration in his condition. No credit was given for his earnings from the Respondent. The Tribunal found there was no failure to mitigate loss.

32. When asked about this in cross-examination the Claimant denied that he had been dishonest. He said he was not asked whether he had a job, and he had "the right to keep quiet". He said he was not lying about being disabled and unable to work. He had to provide for his family and would often be crying while working for the Respondent because of his back.

LAW

33. The Equality Act 2010 ("EQA") provides, so far as relevant:

26 Harassment

(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.

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.

34. "Religion or belief" is a protected characteristic under the EQA.

35. In Richmond Pharmacology v Dhaliwal [2009] ICR 724, EAT, Underhill J, then President of the EAT, gave guidance on the elements of harassment as defined under the Race Relations Act 1976 ("RRA"), which was in slightly different terms to s.26 EQA. Underhill LJ revised that guidance as it applies to s.26 in Pemberton v Inwood [2018] ICR 1291, CA, as follows:

> "In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of subsection (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of subsection (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances—subsection (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so." (para 88)

36. Although s.26(4)(c) only requires the Tribunal to "have regard" to the reasonableness question, whereas under the RRA it was expressed to be a requirement of liability, his view was that the wording of s.26(4) was not intended to, and did not, make any substantive difference.

37. As to the threshold for establishing conduct that violates a person's dignity, it is clear from Dhaliwal and other cases that a serious one-off incident can amount to harassment. This is essentially a question of fact and degree (see also Insitu Cleaning Co Ltd v Heads [1995] IRLR 4, EAT). However, Underhill J said in Dhaliwal:

> "Not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase." (para 22)

38. In that case the EAT upheld a finding of harassment in relation to a comment made to the claimant, who was British and of Indian ethnic origin, "We will probably bump into each other in future, unless you are married off in India". The tribunal held it was an ill-judged remark but not deliberately racially offensive, however it was reasonable for the claimant to make a connection between what was said and stereotypical views of Indian women and for her to find that offensive. The EAT said the facts were "close to the borderline", as reflected in the size of the award for injury to feelings (£1,000), but the tribunal was entitled to find that the comments fell on the wrong side of the line.

39. The EAT gave further consideration to the guidance in Dhaliwal in Betsi Cadwaladr University Health Board v Hughes and others UKEAT/0179/13.

Langstaff J, then President of the EAT cited paragraph 22 of Dhaliwal and commented:

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

CONCLUSIONS

Factual findings

40. In reaching our conclusions as to what happened on 7 June 2017 we have taken into account the Respondent's submissions as to the Claimant's credibility generally. We agree that the earlier Tribunal judgment in the New England Seafood case shows that the Claimant misled the Tribunal on that occasion and was awarded compensation to which he was not entitled as a result. That is seriously damaging to his credibility. It does not follow, however, that he is necessarily being untruthful about what happened in this case or that his account cannot be relied upon at all.

41. We note that the Respondents' own witnesses' accounts of what happened and what was said are not consistent with each other.

42. It is not an easy task to resolve a factual dispute of this kind, especially given that the incident took place almost four years ago. There are also language issues because English is not the first language of any of the main witnesses. We are assisted by the fact that there was a prompt and thorough internal investigation. We therefore place heavy reliance on the statements and interviews given at the time. Our findings are based largely on Ms Johnson's own evidence and on the other witnesses' evidence where there are areas of agreement. We find that the incident took place, broadly speaking, as follows.

43. The Claimant was one of the first to arrive. Very soon afterwards Ms Johnson and Mr Gunasena joined. Ms Johnson sat next to the Claimant in the smoking hut. Ms Johnson said something about not being able to get in touch with her husband. The Claimant said something along the lines that her husband could have stayed at home because of the terrorist attack, and that he knew someone who had done so. Ms Johnson then mentioned that there had been some speculation about why the attack happened during Ramadan, and she also at this stage said something along the lines of "why are people fucking killing". She mentioned that she was going on holiday.

44. The Claimant said that the government had not confirmed who was responsible, and people should not assume that it was connected to Islam, and he then showed Ms Johnson and others a video on his phone which put forward a conspiracy theory that the attack was orchestrated by the police.

45. Following this, there was a discussion, principally between the Claimant and Ms Johnson, about Islam. At this time there were at least three other staff present near the smoking hut and within earshot of the conversation. There is no dispute that Ms Johnson asked the Claimant a number of personal questions about his religion and religious practices, and we are satisfied that she asked questions of the Claimant along the following lines:

    45.1. "Are you a Muslim?" The Claimant said he was.

    45.2. Referencing the fact that he was smoking and drinking a coffee, "Are you not fasting?" He said he was not fasting this time because he was too stressed and his wife was heavily pregnant.

    45.3. She asked him about women who marry Muslim men having to convert and/or change the way they dress. He said that his wife was Hungarian, non-Muslim, and she had not converted, and wears her own clothes.

    45.4. "Who is Allah?" It's not clear if the Claimant or anyone else answered this question.

46. Very shortly after this Ms Johnson left the area. By then, Mr Salcim had arrived. The conversation continued between the Claimant, Mr Salcim, Mr Gunasena and possibly others, and included broader discussion of politics and suicide bombing.

47. The whole incident lasted around 20 minutes, of which Ms Johnson was present for around 10 minutes.

48. As far as the Claimant and Ms Johnson were aware, the Claimant was the only Muslim present.

49. It was a heated and difficult discussion throughout. We do not accept it was a "normal conversation" as Ms Johnson said in her interview. We find, consistent with the majority of the witnesses' accounts, that both the Claimant and Ms Johnson were somewhat agitated.

50. It follows from our findings above that we consider the Claimant significantly exaggerated the incident when he gave his account by email on 19 June 2017. Some elements of the Claimant's account were accurate, in that Ms Johnson did bring up the subject of Ramadan and specifically questioned the Claimant about his own practices; she did ask about Allah and she did query whether it was right for women to have to change their dress or religion if they marry a Muslim man. However, the questions were not punctuated with the "F word" in the way the Claimant alleged and she did not say anything along the lines of "go back home" or "I hope you will not explode yourself".

Harassment

7 June 2017 incident

51. As to whether it was "unwanted conduct", we bear in mind that this was a one-off incident and the Claimant did not indicate that he objected to the conversation until the next day. We also bear in mind that he continued the conversation after Ms Johnson left. We consider, however, that Ms Johnson's comments fall into the category of "inherently unwanted" conduct (Reed and another v Stedman [1999] IRLR 299, EAT) because they were offensive and disrespectful towards the Claimant's religious beliefs.

52. The comments took place in the context of a discussion about a very recent terrorist attack, commonly believed to have been connected to Islam. Although the Claimant was a willing participant in the conversation, Ms Johnson's questions had the effect of turning the focus from a general debate to a discussion about the Claimant and his religious beliefs and practices. Although the Claimant may have invited controversial discussion by showing a video on his phone that promoted a conspiracy theory, he did not invite questions or discussion of his own beliefs. Ms Johnson's comments were liable to make the Claimant feel uncomfortable by calling into question whether he was following his own beliefs by not fasting. They also carried an implied criticism of Islamic attitudes towards women. They prompted the Claimant to feel that he had to defend both his own conduct, in not fasting, and his faith generally by pointing out that not all Muslim men make their wives convert to Islam or change the way they dress. Given the Claimant's strong reaction to the comments the following day, we accept that he found them offensive and conclude they were inherently unwanted.

53. It is obvious and not in dispute that the conduct was related to the Claimant's religion.

54. As to whether the conduct had the proscribed effect for the purposes of s.26 EQA, we have focused our consideration on whether it had the effect of violating his dignity. Given that the Claimant left work the following day and did not return, we consider it doubtful that it can have created a hostile etc. "environment" for him, and in any event as explained in Dhaliwal there is substantial overlap between the types of environment described in s.26 and violation of dignity.

55. We have had regard to the three mandatory factors in s.26(4). As to the Claimant's perception, we are satisfied that he perceived Ms Johnson's conduct violated his dignity. It is not disputed that he was visibly upset when he reported the matter the following day. Despite the fact that his wife was due to give birth imminently, so job security would have been important to him, the Claimant felt unable to return to work and resigned almost straight away. We take account of the fact that he was already feeling stressed by the job and his personal circumstances, but nevertheless we consider he would not have given up the security of his income at that time unless he felt very seriously hurt and offended. We consider that the Claimant's exaggeration of his account on 19 June was partly deliberate embellishment to make it sound worse than it was, but also partly reflective of how the comments made him feel, and what he considered to be implied by them.

56. The relevant "other circumstances of the case" are the fact that the Claimant instigated a discussion of controversial and at least potentially offensive topics. He also continued a heated discussion after Ms Johnson had left. There is no dispute that the Claimant and Ms Johnson had a good relationship at work prior to the incident. She claimed in her interview that they were friends, but there is no evidence – and the Respondent does not assert – that they were friends outside of work.

57. The only matter on which the Tribunal could not agree was whether it was reasonable for the conduct to have had the effect of violating the Claimant's dignity. By a majority we have concluded that it was. The topic of discussion, namely the recent terrorist attack, was already liable to make a Muslim employee, in the company of non-Muslim colleagues, feel uncomfortable. As noted above, the Claimant willingly engaged in the conversation at first, but Ms Johnson's questions shifted the focus to the Claimant and were bound to cause him to feel offended and defensive. They were addressed to the Claimant in the course of a heated discussion, not in a friendly inquisitorial way. They were intrinsically personal questions and there was also implied criticism of his religion. In particular, referring to the fact that the Claimant was smoking and drinking coffee and then asking him about fasting called into question his religious observance in front of several colleagues. We do not consider Ms Johnson intended to be hurtful, but her comments were thoughtless and she should have realised that they could cause serious offence. We consider this is a borderline case, not least because it was a one-off occurrence, but we conclude it was reasonable for the Claimant to have felt that the conduct violated his dignity.

58. Ms Lindsay also considers the facts of this case to be borderline, but she concludes that it was not reasonable for the conduct to have had that effect. She does not agree that the questions were put to the Claimant "not in a friendly and inquisitorial way". Her assessment is that Ms Johnson used the questions, somewhat clumsily, to move the conversation on. She agrees that the questions were intrinsically personal and implied some criticism, but this was a one-off, brief incident of misjudged and inappropriate conversation between colleagues who had previously had a good relationship. Ms Johnson's comments were not intended to cause offence and are properly characterised as transitory. Ms Johnson left the smoking area as things became difficult, whereas the Claimant remained and continued a sensitive political discussion with other colleagues. Ms Lindsay also considers that the Claimant's significant elaboration of the language and comments used by Ms Johnson implicitly recognised that what Ms Johnson had actually said was not so serious. Ms Lindsay noted that the Claimant's false statement of the true content of the discussion had potentially serious consequences for Ms Johnson's continued employment and reputation.

59. We therefore conclude, by a majority, that the incident on 7 June 2017 constituted harassment.

Salcim statement

60. The circumstances of the alleged harassment are unusual in that the Claimant relies on the record of an interview at which he was not present and about which he was unaware until part-way through these proceedings.

61. We can see why the Claimant took offence at the comments when he saw them. They carry the implication that the Claimant was volatile and had some grievances with the Respondent, and perhaps others. During the hearing the Claimant was somewhat fixated on the fact that he could not have made the comment about his son's passport because both of his sons have had British passports from birth. We do not consider it reasonable for the Claimant to have interpreted the comments as "describing the Claimant as a terrorist and referring to his two non-British children". The Claimant did not put to Mr Salcim in cross-examination that that was what he meant and that is not an obvious reading of the document. Further, given that the Claimant was not aware of the comments at the time, or at any stage until the document was disclosed to him in the course of these proceedings, long after he had left the Respondent's employment, we do not accept that they had the effect of violating his dignity or creating any of the proscribed environments for him. Alternatively, in all the circumstances it was not reasonable for the conduct to have had that effect.

Victimisation

62. The Claimant's complaint of 8 June 2017 clearly constituted a protected act. The Respondent argues that it was not made in good faith. The only evidence we have about what was said on 8 June 2017 is Ms Fenwick's account, that the Claimant "explained that Ms Justyna Johnson, our Dementia Care Manager, during a conversation regarding the recent terrorist attacks had verbally abused him using the f-word on many occasions and had made offensive remarks relating to his Muslim faith". The reference to using the f-word on many occasions may have been an exaggeration but there is no evidence of any other dishonesty or embellishment at that stage. Given our findings above as to what happened on 7 June and the Claimant's genuine feelings of hurt, there is no basis on which we could find the Claimant's complaint was made in bad faith.

Failing or refusing to hold the grievance hearing away from the Workplace

63. This complaint is not made out on the facts. The Claimant did not request a grievance hearing away from the workplace. He replied to the grievance meeting invitation saying that he did not intend to participate for a number of reasons. None of those reasons related to the venue for the meeting. The only mention of a meeting away from the workplace was the Claimant's separate suggestion of a settlement meeting. We therefore do not accept that any detriment occurred in relation to the venue of the grievance hearing.

Otherwise failing to make suitable arrangements for the Claimant to return to work?

64. Again, this complaint is not established on the facts. The Claimant resigned on 8/9 June 2017. The Respondent did not treat his email as a resignation and attempted to persuade him to come back. They told him at the meeting on 8

June that Ms Johnson was away on annual leave. They also conducted a thorough investigation into the incident and paid the Claimant during his absence. After the conclusion of the grievance, albeit the grievance was not upheld, the Respondent offered mediation and invited a discussion about the Claimant's return to work. The only deadline imposed was for the Claimant to make contact by 6 July. He was also offered the possibility of transfer to a different site. The Claimant has never suggested, and did not suggest at the time, that it would have made any difference to his decision if other arrangements were made. His sole request, from 19 June onwards, was for compensation.

Failing to take action in response to Mr Salcim's statement

65. We have already found above that Mr Salcim's statement did not carry the implication suggested by the Claimant. It was not an obviously discriminatory statement, so we do not consider the Respondent had any obligation to take action in relation to it. There was therefore no detriment to the Claimant.

Remedy hearing

66. Two matters are noted in advance of the remedy hearing:

    66.1. The Claimant claims financial losses (as well as injury to feelings, etc) on the basis that his employment ended as a result of the discrimination. He was paid by the Respondent up to 10 July 2017 and in his oral evidence he said that he started new employment on 20 July 2017. His financial claim is limited to the loss of income between those two dates.

    66.2. The Respondent argues that compensation should be awarded to the Claimant because it would not be just and equitable to do so given that he misled the Tribunal in the earlier case and was awarded compensation to which he was not entitled.

67. The parties must comply with the following directions to prepare for the remedy hearing:

    67.1. On or before **27 May 2021** the Claimant must provide to the Respondent and the Tribunal a schedule of loss and any evidence, including a witness statement for himself, on which he wishes to rely.

    67.2. On or before **17 June 2021** the Respondent must provide to the Claimant and the Tribunal a counter-schedule and any evidence on which they wish to rely.

    67.3. The Respondent must produce an electronic bundle for the remedy hearing and provide a copy to the Claimant by **24 June 2021**. A copy must be sent to the Tribunal three working days before the hearing.

Case Nos: 2302472/2017
2302682/2017
2301252/2018

Employment Judge Ferguson

Date: 29 April 2021