EMPLOYMENT TRIBUNALS

Heard at: Leeds (by video) **On:** 31 January to 2 February 2022

Claimant: Mr Barry Moore

Respondent: Sean Pong Tyres Limited

Before: Employment Judge Fowell

Ms Jane Lee

Mr Michael Brewer

Representation:

Claimant Mrs Moore (Spouse)

Respondent Mr K Antwi-Boasiako of R Spio & Co Solicitors

JUDGMENT

The unanimous decision of the Tribunal is as follows:

1. The claimant was constructively dismissed.
2. The complaints of (a) direct discrimination and (b) harassment on grounds of both age and race are upheld, but not on grounds of sexual orientation.
3. The complaint of unlawful deduction from wages is dismissed.
4. Compensation is awarded as follows:

    a. Compensation for Unfair Dismissal £7,486.00

    b. Compensation for Discrimination £14,541.21

    Total **£22,027.21**

REASONS

Introduction

1. Sean Pong Tyres Limited ("the company") is a small firm which recycles and exports tyres. Mr Moore worked for them at a small depot or yard, which in fact belonged to another company, Credential Environmental Limited ("Credential"). Credential collected used vehicle tyres and brought them into the yard on lorries. The tyres were then sorted and graded by the team at Sean Pong Tyres, and those which were good enough to reuse were then exported. The team of Tyre Graders comprised Mr Moore, Mr Desmond Owusu and two colleagues, both called Eric. The owner and manager was Mr Sean Frimpong – often referred to as Mr Pong.

2. Mr Moore resigned on 19 April 2021 after a period off sick with depression. He says this was the result of a dispute with Mr Owusu, and that Mr Owusu verbally abused him, calling him on one or more occasions an old, gay, white man. Mr Moore is a white man in his early fifties, but is not gay, as Mr Owusu knew, so the word 'gay' can only have been a term of abuse. Mr Owusu is a younger and describes himself as a black African man of Ghanaian origin, as is Mr Frimpong. As a result, Mr Moore brings complaints of constructive dismissal, direct discrimination, harassment and unlawful deduction from wages in relation to his sick pay.

3. Constructive dismissal is not a term used in the Employment Rights Act 1996, but section 95(1) gives the legal definition of a dismissal, and it includes where:

> "(c) … the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."

4. So there have to be circumstances justifying the employee in downing tools and walking out. In legal terms, there has to be a fundamental breach of contract by the employer, in particular there has to be a breach of what is known as the implied duty of trust and confidence. According to the House of Lords in the case of **Malik v BCCI** [1997] UKHL 23 that happens where an employer conducts itself "in a manner calculated or likely to destroy or seriously to damage the relationship of trust and confidence".

5. Where it is a member of staff acting in this sort of intolerable fashion, the employer becomes liable for the consequences, provided it is done in the course of his employment, and that is not in dispute here. After that, the next question is whether the employee, Mr Moore, did in fact resign in response to this behaviour rather than for some other reason. He also has to resign promptly, or at least not to take any further steps indicating that he is content to remain there as an

employee. That is known as “affirming the breach”.

6. The tests for harassment and discrimination are slightly different. Harassment is defined as unwanted conduct related to race, age etc, which has the purpose or effect of violating a person’s dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for them. Direct discrimination is similar, but involves less favourable treatment on grounds of race etc.

7. In each case, the claim has to be brought within three months of the end of the employment (for the claim of constructive dismissal) or within three months of the acts of discrimination, although there are some exceptions to this to which we will come. The focus of this hearing therefore has been on the events before Mr Moore went off sick, whether they amounted to acts of harassment or discrimination, or a breach of the duty of trust and confidence, whether he resigned in response to those acts and did not delay too long or otherwise affirm the breach.

8. The claim form also raised a complaint of unlawful deduction from wages. This related to the amount of SSP Mr Moore received. We heard no more about this at the hearing, and there is an email at page 61 of the bundle from ACAS to Mr Moore stating that all outstanding sums had now been paid. On that basis we will dismiss it.

Procedure and evidence

TUPE

9. A preliminary point related to the identity of the employer. According to Mr Owusu’s witness statement, his employment transferred to Credential shortly after Mr Moore left. This was supported by Mr Frimpong’s statement. If so, a defence was available to the respondent on the basis that their liability for this claim had passed to Credential by virtue of the Transfer of Employment (Protection of Employment) Regulations 2006 (“TUPE”).

10. Although this is not a question of the Tribunal’s jurisdiction, we raised it with the parties. Mr Antwi-Boasiako had given some thought to it. He proposed to ask us, in the event of a finding against the respondent, simply to transfer liability to Credential. We explained that that would not be acceptable as they would have had no chance to defend themselves. As an alternative, he applied to amend the company’s response to add Credential as a party. That would, he accepted, involve abandoning this hearing, and returning matters to square one, or at least to the position they were in when the company submitted its response to the claim on 1 July 2021. Credential could then file its own response and a further preliminary hearing would be needed before re-listing a hearing.

11. Reviewing the position, not only was there was no mention of TUPE in the

response form, it was not raised at the preliminary hearing on 9 September 2021. Mr Antwi-Boasiako drafted the grounds of resistance and appeared at that hearing. He was very frank in his application that this aspect had been overlooked but submitted that the interested of justice required that the correct respondent to be made liable, however late it was being raised.

12. We thought we should get some more information about the alleged transfer so we heard briefly from Mr Frimpong. He explained to us that all the work done at this site was for Credential. They would bring in the tyres for sorting, and his staff carried out the tyre-grading service. His company did not own or lease any property there. There was not even a written contract with Credential. It was, to say the least, a very informal arrangement. It came to an end in July 2021 when Credential told him that it was terminated with immediate effect. They offered to take on any staff. Mr Owusu agreed to work for them but the two Erics decided they did not want to, and just left. Despite the lack of any paperwork that sounds very much like a service provision change, as defined at Regulation 3 of TUPE, although of course Credential were not here to give their side of the story.

13. That was the factual background to this application to amend. The key test in such cases, applying the principles in the case of **Selkent Bus Company v Moore 1996 ICR 836,** is the balance of prejudice to the parties. Without setting out that guidance at any length, the main three considerations are:

    a. The nature of the amendment, i.e. whether it is a minor amendment or the addition of factual details on the one hand, or on the other hand raises entirely new factual allegations;

    b. The applicability of time limits to the new claim or cause of action; and

    c. The timing and manner of the application to amend.

14. Taking these in turn, firstly this was not a minor amendment. It raised an entirely new issue, and to resolve that issue there would need to be evidence from the respondent and from Credential about whether there had indeed been a TUPE transfer in July 2021. (Credential would also be entitled to bring a claim against Sean Pong Tyres Limited for failure to supply information about this potential claim (Regulation 12), so involving them may not have been without cost for the respondent.)

15. The second point concerned time limits. That was not such an important consideration here. Although some time had passed, a party can be added at any stage of proceedings where it appears that there are issues between them and the existing parties which it is in the interests of justice to have determined (Rule 34).

16. The last aspect however - the timing and manner of the application – seemed to us more clear cut. It was made at the 11th hour. Indeed, it was raised after Mr

Moore had given his evidence, and at our prompting. Rule 2 of the Employment Tribunal Rules of Procedure sets out the "overriding objective" of dealing with the case justly and fairly. That includes avoiding delay, but only "so far as compatible with proper consideration of the issues." Refusing the application meant avoiding delay, but would that be compatible with a proper consideration of the issues?

17. By way of comparison, we considered the approach taken when a claim form is presented late. If the employee has a solicitor or skilled adviser who has given the wrong advice or got the date wrong, that is generally the end of the matter. The employee loses the right to bring a claim and their remedy is against the solicitor. In this case, refusing the application meant that the respondent would lose the chance to put forward a defence, i.e. to shift responsibility to Credential. But Credential were not made aware of the potential claim at the time of the transfer and apart from the involvement of Mr Turner in trying to sort it out, described below, had no real part in it. No money changed hands, so it is not a case in which this potential liability was factored into the purchase price. Most significantly perhaps, there was no real explanation for the failure to raise this earlier. Overall it was a very late application involving a fundamental change of position, the abandonment of this hearing and a major delay in proceedings. In those circumstances, we took the view that the balance of prejudice was in favour of Mr Moore and we refused the application.

Evidence

18. They were relatively few documents. We were supplied with a bundle of 87 pages, which included the claim form, response form and witness statements. The only original documents are two emails from Mr Moore - one dated 10 January 2021 complaining about bullying by Mr Owusu, and his resignation email on 19 April - some text messages, payslips and sicknotes.

19. The witness statements are from Mr Moore, Mr Frimpong and Mr Owusu. A witness order was made for the attendance of a Mr Ben Turner, a manager at Credential, though it is not clear why. It may well simply have been assumed by Mr Moore that this was necessary. Mr Turner showed no reluctance to attend, and far from being an employee of the respondent, he is the manager at Credential, so in effect they worked for him rather than the other way round.

20. Despite a clear direction made at the preliminary hearing that all witnesses should provide a statement, he did not do so. Again, it seems to have been assumed by Mr Moore that this was how it worked and so he did not ask Mr Turner about this or take any steps to obtain one. Mr Moore is dyslexic and so struggles with reading and with this legal process generally. Nevertheless, before the hearing the parties agreed that Mr Turner would attend on the second morning and when he did so Mr Antwi-Boasiako was happy to ask him questions about his involvement.

21. Mr Moore appeared to us sincere in his evidence. It was consistent with the few records we have and he has been saying the same things throughout, although there was a lack of detail in his statement. However it is difficult to remember details of conversations and events at work months afterwards, especially if they are not written down at the time. Mr Turner appeared to give a fair and balanced recollection of events. He now employs Mr Owusu and told us he had known him for 20 years, and Mr Moore for five. He did not think that Mr Owusu would use any racist language and described that as completely out of character, so he was not by any means simply aiming to support Mr Moore's side of the argument. There was little cross-examination, and so less opportunity to form a view about Mr Owusu and Mr Frimpong, but Mr Owusu seemed very open and straightforward, and did not attempt to disguise the bad language used on each side or, on occasion, that he told Mr Turner that he enjoyed taunting Mr Moore. Mr Frimpong was more guarded, and did not recall that Mr Moore had ever raised allegations of discrimination with him, although they are set out in a written complaint, and which led to a meeting with Mr Frimpong to try to resolve things.

22. One major criticism made by Mr Antwi-Boasiako of Mr Moore's case is that he did not challenge the company's witnesses about many of their allegations, but we have to make allowances for unrepresented parties, and overall each side set out their rival cases clearly enough. Having heard that evidence we made the following findings.

Findings of Fact

23. The job of tyre-grader is not an easy one. It is physically tiring, and involves unloading heavy tyres from a lorry, so it pays to be fit and strong. It also involves working closely together in a small group. Since this claim concerns race discrimination, the ethnic makeup of the team is relevant. As already noted, Mr Frimpong and Mr Owusu are of Ghanaian descent. So was one of the other workers, Eric Barkoh. These three shared a different language. (We did not enquire which native language, so we will refer to it simply as Ghanaian). The other two were Mr Moore and the other Eric, both white. To some extent therefore, Mr Moore was on the margins. He did not have the same language and cultural connection with Mr Frimpong that Mr Owusu had. He was also well into middle age (55) and struggling with a shoulder injury. These things count in a manual job. It meant that when they fell out he was not in a good position to intimidate Mr Owusu, whereas Mr Owusu would have had no real cause for concern, and might have looked to Mr Frimpong for support if need be.

24. Mr Moore and Mr Owusu had known each other for many years. In fact Mr Owusu had dated Mrs Moore's sister at one time and for a long time they were on good terms. They worked closely together every day and took their breaks together. One source of disagreement was Mr Moore knocking off early. Text messages from 2019 show Mr Frimpong telling him off for this and docking his pay by an

hour. That, however, was long before they fell out, and no other action was taken. Since Mr Frimpong was threatening to sack him on one of those texts if it happened again it seems likely that he got the message, or at least that it did not become a regular problem. That view was supported by the evidence of Mr Turner. Unlike Mr Frimpong, Mr Turner was in the depot every day and often spoke to Mr Moore, but did not notice him leaving early, certainly not as a matter of course. Mr Moore denied it strongly.

25. Unsurprisingly for such a small firm there were no systems or procedures for dealing with issues at work. Very little was put in writing. In fact, those two texts are the only documents we have from Mr Frimpong during the period when Mr Moore was at work.

26. The following year Mr Moore went on furlough during the first Covid lockdown, although Mr Owusu and one or two others stayed on. That itself is a small indication of the pecking order at work. It is not quite clear when relations deteriorated, because he told us that he came back to work after the first lockdown period, and he struggled to come back to work because "he knew he would get it all again." That suggests that the disagreements started before lockdown, although in his claim form he said it began in late 2020.

27. As already mentioned, one problem we have had in attempting to work out what happened is the lack of detail given by Mr Moore, especially about dates and times. The claim form provides a reasonably good summary of what went on from his point of view but few specifics. At the preliminary hearing, perhaps realising that he struggled with the process, the Judge ordered him to provide his witness statement first, for the company to respond to, rather than providing the usual list of dates and events. That added some details but we still have no clear timeline or any list of key events. That does not mean that it is unreliable but it does make it difficult to reach specific findings. It seems to us most likely, from the fact that things went downhill fairly rapidly afterwards, that there were existing strains in 2020 but this tipped over into harassment towards the end of that year.

28. The company's case is that this was just banter: Mr Owusu used bad language to Mr Moore from time to time, but only in response to the same language from Mr Moore. It is best to state the language used to be clear about what went on. They might, Mr Owusu stated, call each other "fucking cunt" or "fucking dick head", indeed they often did, but neither, he insists, used any racist language. Our starting point therefore is that Mr Owusu used the worst sort of language to Mr Moore on a regular basis, which is excused on the basis that it was mutual. We agree that Mr Moore did respond in kind. The main difference is that he found it intimidating, and complained about it and tried to get Mr Frimpong to bring it to an end. There is no suggestion from Mr Owusu that he ever felt intimidated by Mr Moore. Indeed he accepted that he did enjoy winding Mr Moore up.

29. There is one exception to that point about Mr Owusu not feeling intimidated. They both agreed that on one occasion they came close to having a fight and that it was Mr Moore who suggested they go outside. Mr Owusu, in giving his evidence, did not seem very concerned about this. He said that he told Mr Moore that it was against his culture to have a fight with a senior, and he would rather stand with his hands behind his back and let Mr Moore hit him. The result was that they did not go outside. He added that he stayed at work for an extra two hours after work in case Mr Moore was waiting for him. That last point was not made in his witness statement and was out of keeping with the rest of his account about letting Mr Moore hit him. On that point we found ourselves unable to accept his evidence.

30. Mr Moore did not use the language of discrimination and harassment in his witness statement but he describes Mr Owusu as shouting abuse at him, coming up into his face, taunting him, telling him he was too old and threatening to hit him. His evidence was criticised by Mr Antwi-Boasiako on the basis that Mr Owusu's evidence was not challenged in various respects, but some aspects either. It was put to him that he used bad language too, which he accepted, but not that this was all banter or that it was good natured or enjoyable, as Mr Owusu seemed to find.

31. His claim form mentions some expressions in particular, such as being called a "gay white man", a lazy wanker, being too old to do his job, and on one occasion Mr Owusu being called him a cunt in Ghanaian. This was in front of Mr Barkoh and Mr Frimpong, who had to translate, and then tell Mr Owusu to stop. That incident was not challenged either. It was not repeated in Mr Moore's witness statement but it is at least a clear incident which he could have been asked about.

32. Mr Moore's account that he was mainly on the receiving end of such language seems to us more plausible. This sort of thing is not banter. There is no element of humour in it. In any event, Mr Moore went on to make clear that he found it intimidating and that it was affecting his health, as we shall describe. Although it is possible that two men in a robust working environment might use abusive language to each other without any bad feeling, there is a risk that it tips over into aggression. We conclude that that is what happened here. And once that has happened, once there is an intention to cause offence, anything might be said. There is no reason to believe that Mr Owusu would avoid calling Mr Moore lazy or old or gay given all the other abusive terms he was happy to use.

33. The later events are better evidenced and can be given in more detail. Mr Turner worked next door for Credential. He knew them both. When he came into work he often bumped into Mr Moore at the gate, having a cigarette before work. They would chat, and Mr Moore told him about the bad atmosphere and that he had spoken to Mr Frimpong about it. One day, when Mr Frimpong was not at the depot, Mr Turner decided to do something about it. This was at the beginning of Jan 21. He called Mr Frimpong to tell him what he planned, and then arranged a meeting between the two men and him. At the meeting Mr Moore said that Mr

Owusu was winding him up constantly and he could not work with him. No specifics were discussed, and he did not say he found it intimidating. That is understandable. Mr Turner noticed that Mr Owusu was smiling and asked him if he enjoyed winding Mr Moore up. He said that he did. Mr Turner then passed this to Mr Frimpong, who told him he was very unhappy about this. However, the outcome of the meeting was that the two men shook hands and went back to work. Mr Owusu says this was conversation with Mr Turner was in the yard after the meeting, but Mr Moore mentions the remark in his claim form so he must have been there to hear it. He and Mr Turner agree it was said in the first meeting, so we accept that as more likely to be the case.

34. The truce must have lasted only a few days, because it was only a few days later, on Sunday 10 January 2021, that Mr Moore made a written complaint about things. He wrote:

> "Unfortunately I have no choice but to lodge a complaint.
>
> I have spoken to you on several occasions via phone and in person in regards to the racism slander, and discrimination of my character and a lot of abuse.
>
> …
>
> Since Desmond started at the company he has done nothing but single me out and slurring abuse at me causing a lot of stress and sleepless nights.
>
> This letter is a last resort for me and in hopes you are able to resolve this matter and the "Desmond" issue.
>
> I know you have said previously you will "have a word" this doesn't seem to have worked.
>
> I feel intimidated at times this isn't acceptable I am 55 years old and don't come to work to be abused and victimised. If this matter isn't resolved I will have no choice but to seek legal advice.
>
> I have already spoken to professionals in regard to this situation and have been advised to see a solicitor as it's against the law to discriminate against anyone's Age, sex, race this comes under the Equality act 2010.
>
> This said employee (Desmond) also has responsibility to avoid adversely affecting myself and others health and safety this has been the case unfortunately Sean.
>
> I hope this can be resolved once and for all and I can start to feel safe and enjoy coming to work again.

35. Mr Frimpong replied promptly stating:

> "Thanks. I will have a meeting with you and Desmond once and for all and also set up your working conditions and hours for all you guys to follow. As according to Desmond all these has something to do with working hours."

36. In his evidence at this hearing Mr Frimpong suggested that the complaint from Mr Moore was in order to manufacture a claim, but he did not make any such point at the time. There is no reply to the effect, "what are you talking about? – this is the first I have heard of this." We conclude that Mr Moore had indeed been raising his concerns informally a number of times and that nothing had been done beyond a quiet word.

37. Mr Frimpong's reaction to the email also seems to assume that it was all about Mr Moore leaving work early. As already explained, we are not satisfied that Mr Moore did leave early after 2019. Mr Moore had some remaining complaints about Mr Owusu arriving late and vice versa, but that did not explain the extent of the bad feeling. This response is a further indication that Mr Frimpong was siding with Mr Owusu and minimising the concerns.

38. However, Mr Frimpong did organise a meeting to discuss things further. It was not a personal meeting, like a grievance hearing. Eric was invited in too, and Mr Turner. It took place on Monday 11 January 2021. Some description was given in Mr Moore's claim form which was not challenged either. According to this Mr Frimpong asked Mr Owusu why he was doing this, he replied "I don't know boss" and Mr Barkoh then confirmed that he was doing it. Mr Frimpong then said it had to stop or one of them would have to go.

39. This at least confirms that there was bad feeling and abuse, that it was affecting Mr Moore seriously, and that Mr Frimpong was aware of it. During that meeting Mr Moore stressed that the issue was not about hours. He described the abuse, and mentioned in particular that he had been called an old man. Mr Owusu denied it. The issue was not resolved but, as before, they shook hands and went back to work.

40. We have little evidence about what took place over the next three weeks, but there was no improvement. Mr Moore was stressed about coming to work but he needed a job and so he soldiered on. On Monday 1 February he came to work as usual but left early, without explanation. Later that day he sent some texts to Mr Frimpong to say that he had to have some blood tests and an MRI scan. All that suggests that Mr Moore may have had a panic attack or a suspected heart attack and either went straight to see his GP or went to the Emergency Department. He did not return to work the next day, and gave no explanation. On 3 February he certainly saw his GP as he was given a 2 week sick note, signing him off with depression.

41. He remained off work until 19 April. During that period he was paid Statutory Sick Pay (SSP). After the initial two weeks he was signed off again, and in the end

decided he could not return. There was a further exchange with Mr Frimpong on 3 March when he emailed about his various health problems. These now included serious paid down his right side of his neck and arm. Mr Frimpong responded:

> "Buzz if you are not coming again could you please be straight and tell me thanks."

42. Suffice to say, no real concern was shown. Hence, on 19 April, Mr Moore submitted his resignation. It read:

> "This is my notice of resignation with immediate effect
>
> I have spoken to you on many occasions and you yourself have always reassured me you will deal with the matter but unfortunately it never was resolved.
>
> The situation has gotten so bad causing me many days of stress, upset, and sleepless nights and loss of appetite
>
> This situation has also affected my mental health and gave me no choice but to seek medical help
>
> This resignation is my only option this is not a reflection on you personally nor my job that of a Co worker that I have told you about in previous emails and conversations bullying and intimidating me and discrimination against me
>
> I thank you for many years employment
>
> I feel for my own sanity I must move on"

43. There does not seem to have been any particular final straw to cause this decision, or the cause his sickness absence. It was simply a build up of events at work, then hanging on as long as he could on SSP. This is a far cry from a manufactured claim to get some money out of the company.

44. The sick notes continued throughout, and indeed are still continuing. The main difficulty now is his physical health, and his shoulder problem has been diagnosed as a rotator cuff injury, but the trigger for his absence, and the main cause in the following few months, was events at work and the effect on his mental health.

45. Some time later – it is not clear when - Mr Turner later offered him some work back at the same depot. He came in through an agency with a view to a permanent job in due course. This was not sorting the tyres but as a driver, bringing them in to the depot. However, given his shoulder injury he did not finish the day. It was too painful. He was paid about £100 for the day and that is all the work he has done since.

46. Before leaving our findings of fact it is important to be clear about what was said. Mr Moore said in his claim form and witness statement that he was told by Mr Owusu that he was too old to do his job. This was on more than one occasion. It

is clear that the abusive remarks were on a regular basis. Mr Turner also confirmed that he complained in the second meeting about this.

47. Other comments related to being white. In the claim form he referred to being called an old white guy. In his witness statement he said he was called a skinny white guy. That is not necessarily inconsistent if they are being said more than once, and we find that they were. Further, race or racism was mentioned in the complaint dated 10 January. There was no particular reaction to that or any enquiry so it seems to have been old news. Mr Turner thought this would be out of character, though it would be rare for anyone to say the opposite, and as we have already said, much worse things were undoubtedly said. So, we are satisfied that some such phrase or phrases was used more than once, including the word white. We do not believe this has been invented by Mr Moore. For very much the same reasons we accept that the word "gay" was used from time to time, as a disparaging comment.

Applicable Law

48. We have already summarised the legal tests relating to constructive dismissal, discrimination and harassment but we will set out in a little more detail the rules around time limits. The company argue that the claims are all out of time because Mr Moore went off sick on 3 February 2021, so any harassment must have been before then, over three months before he submitted a claim, or went to ACAS to start the early conciliation process.

49. There is no question however that the claim form was brought within three months of the end of the employment, so the constructive dismissal claim was brought in time. If that test is satisfied, the resignation is treated in law in exactly the same way as a dismissal. If it was in response to unlawful harassment related to race etc, it can amount to a further act of discrimination, and if so it took place on 19 April 2021.

50. Discrimination claims are governed by the Equality Act 2010. Section 123 provides for the three month time limit, but there are two exceptions. One is where it is just and equitable to extend time, and the other is where there is a campaign of harassment over a period of time. The phrase used is "conduct extending over a period." If there is such a continuing act of harassment or discrimination, it is treated as done at the end of that period. In other words, the employee has three months from the end of the harassment to bring a claim, and that may include the date of resignation. If so, there is no further issue over time limits. Given our conclusions, that is the case here, and we are satisfied that there were continuing acts of harassment on grounds of age and race.

51. There is a further issue, which applies if the claim is successful. Where an employer is in breach of its duty to give an employee a written statement of employment particulars, as is accepted here, the Tribunal must award an

additional two weeks' pay and may award four weeks' pay, in addition to any other compensation.

Conclusions

52. As already indicated, we are satisfied that this conduct by Mr Owusu, however it began, tipped over at some point into hostility, and that he was the main culprit. He may not have appreciated the effect he was having on Mr Moore but in our view it did create a hostile and intimidating working environment and amounted to bullying and harassment.

53. We are also satisfied that that harassment was related to race and age since this was expressly stated. There is no need to set out the burden of proof provisions. It does not depend on the drawing of inferences from otherwise neutral conduct. And since this was unlawful harassment, if follows that Mr Moore was entitled to resign in response to it. Hence the resignation was in our view a constructive dismissal and an act of direct discrimination on grounds of age and race.

54. Even if we are wrong on that point, and it was not unlawful harassment, the conduct was certainly a breach of the duty of trust and confidence. That is shown most clearly by the effect it had on Mr Moore, the terms of his complaint, his resignation letter and the fact that he was then signed off sick with depression for several months. We are quite satisfied that this harassment was the reason for his resignation, given the build-up and sudden departure. Finally we cannot see that he has done anything to affirm the breach. We were not referred to any cases, but the mere passage of time is not generally enough. He remained off work in receipt of SSP for about two and a half months at a time when his mental health was too poor to attend work. By extension, it would have been more difficult to take big decisions about his future.

55. There is also the remarks about being gay. It is not essential that Mr Moore is gay to prove harassment on this ground, or even that Mr Owusu thought he was gay: **English v Thomas Sanderson Blinds Ltd** 2009 ICR 543. But that case involved a long-running "joke" about Mr English being gay. The Court held that the "incessant mockery" created a degrading and hostile working environment. In the present case this was just the odd remark and not such, by itself, to reach the threshold for harassment. The main concerns in our view were over age and race, the main characteristics which separated the two men.

56. Having decided not to allow the respondent to include a defence based on TUPE, it is no answer for the company to say that his employment would have ended in July in any event. Mr Owusu is still working in the same employment and we conclude that but for these issues, Mr Moore would still be too.

57. Nor do we award any reduction for contributory fault. Mr Moore was in a difficult position. He used some bad language in return but that is essentially standing up

to bullying behaviour and did not amount to misconduct at work. At least it was not regarded as such. More importantly he did what he could to sort it out at work, raising it with Mr Frimpong, repeatedly, and then with Mr Turner. No effective action was taken. Mr Owusu was unrepentant and nothing changed. As we have already said, there was no real concern expressed about Mr Moore's behaviour, either by Mr Owusu or Mr Frimpong, and so no reduction is appropriate.

58. There is an obligation on employers to comply with the ACAS Code of Practice on Discipline and Grievances. A Tribunal can award an uplift of up to 25% for a failure to comply with those basic requires. In the case of a grievance this requires a meeting, then appropriate action, and the outcome followed up in writing. There was no real engagement with Mr Moore's complaint and even the meeting was not exclusive to his concern, including as it did other people. No appropriate action was taken or any written outcome. Even though this is a small firm, with no real processes in place, the ACAS Code applies to all places of work and we award a 10% uplift.

59. To that extent the claim is upheld and we must turn to deal with compensation. (Mr Moore did not seek reinstatement or re-engagement.)

Compensation

Unfair dismissal

60. The agreed figures for earnings are that Mr Moore was earning £380 gross per week, or £320 net. Hence, the basic award, based on his age (55) and length of service (3 years) amounts to **£1,710** (4.5 weeks' pay at £380 per week).

61. The next question is how long it should have taken Mr Moore to find another job at the same level, if all this had not happened. That has to ignore the effects of his rotator cuff injury. There is nothing to show that the company is to blame for that and in any event that is a not a claim raised in this Tribunal. On the one hand Mr Moore is still off work: on the other hand he did sign up with an agency and did a day's work for Mr Turner. Doing the best we can, and given the period of two and a half months off work before the resignation, to "save his sanity", we allow a further three months off work as a reasonable period. At £320 per week, that amounts to £4,160. We deduct £100 for the day working for Mr Turner, leaving £4,060.

62. It follows that the "protected period" as it is known for the purposes of the recoupment provisions, was from 19 April to 19 July 2021 and the amount awarded in that period is **£4,060**

63. Other losses for unfair dismissal include:

    a. £406 for the 10% uplift on the above,

b. £500 for loss of statutory rights,

c. 10% uplift on that - £50

d. £780 in respect of two weeks' gross pay for the failure to provide a statement of terms and conditions, on which no uplift is added.

64. This amounts to a further £1,310, bringing the total award for unfair dismissal, including basic award, to **£7,486.**

Discrimination

65. Turning to the award of compensation for injury to feelings, which can be awarded for the discrimination claim, this involves assessing the impact of all the harassment on Mr Moore. (The homophobic remarks made a negligible difference). We remind ourselves that the purpose of such an award is compensation rather than to punish the employer. The general guidelines that apply to compensation in discrimination claims were set out by the Court of Appeal in **Vento v Chief Constable of West Yorkshire Police** 2003 ICR 318, CA. These guidelines provide for three broad bands:

a. a top band applicable to the most serious cases, such as where there has been a lengthy campaign of discriminatory harassment;

b. a middle band applicable to serious cases that do not merit an award in the higher band; and

c. a lower band applicable to less serious cases, such as where the act of discrimination is an isolated incident or one-off occurrence.

66. The President of the Employment Tribunals has issued periodic guidance on the appropriate award in each Vento band, and the most recent applies to for claims submitted after 6 April 2021. This provides that:

a. awards in the lower band should fall between £900 to £9,100;

b. awards in the middle band should fall between £9,100 to £27,400; and

c. awards in the upper band should fall between £27,400 to £45,600, with the most exceptional cases capable of exceeding that upper limit.

67. We conclude that this case falls squarely into the middle band. It was not an isolated incident but it was also an episode which lasted a modest period, from late 2020 to 1 February 2021. We note that it resulted in medical treatment and a period of some months signed off with depression. It was suggested that this might be the result of his pain and physical injuries, but given the suddenness of his absence, coming hard on the heels of the difficulties at work, and Mr Moore's

own evidence that it was events at work that affected his mental health (such as in his resignation letter) we do not accept that.

68. The middle of the middle band is £18,250. After some consideration we agreed that a figure 25% up the middle band was more appropriate, and award **£13,675.**

69. Interest is awarded on that amount at 8%, as is required, over the 289 days from resignation, amounting to a further **£866.21,** bringing the total award for injury to feelings to **£14,541.21**

70. Hence the total award is **£22,027.21**.

Employment Judge Fowell

Date 07 February 2022