EMPLOYMENT TRIBUNALS

Claimant: **Mr J. Kelly**

Respondent: **Hoo Hing Ltd**

Heard at: **East London Hearing Centre**

On: **2 - 4 February 2022**

Before: **Employment Judge Massarella**
Members: **Mrs G. Forrest**
Mr L. O'Callaghan

Representation
Claimant: Mr M. Raffell (legal representative)
Respondent: Mr I. McCabe (counsel)

JUDGMENT

The judgment of the Tribunal is that: -

1. **the Claimant's claim of harassment related to race (s.26 Equality Act 2010 ('EqA')) in relation to the events of 5 August 2020 succeeds;**

2. **because that claim has succeeded, the claim of direct race discrimination in relation to the same events must fail, because of the operation of s.212(1) EqA;**

3. **the Claimant's claim of victimisation (s.27 EqA) in relation to the events of 20 August 2020 succeeds;**

4. **reasons for this judgment will be provided in writing.**

RESERVED REASONS

1. Judgment, but no reasons, having been announced at the hearing on 4 February 2022, the following reasons are provided in accordance with Rule 62(2) of the Employment Tribunals Rules of Procedure 2013.

Procedural history

2. The ACAS early conciliation period lasted between 28 August 2020 and 23 September 2020. The claim form was presented on 27 November 2020. The Claimant claimed race discrimination (direct discrimination, harassment and victimisation). A preliminary hearing before EJ Hallen took place on 28 May 2021, at which orders were made for preparation for the final hearing.

The hearing

3. We had a bundle of 259 pages. We heard evidence from the Claimant and, for the Respondent, Mr Michael Montgomery (health and safety manager) and Mr Fu Wah Poon (operations manager).

4. The issues were clarified at the beginning of the hearing. There were two alleged acts of discrimination. The first was in relation to Mr Montgomery's alleged mocking of the Claimant's Irish accent on 5 August 2020, which was characterised as harassment related to race, alternatively direct race discrimination. The second was an allegation that Mr Montgomery victimised the Claimant by restricting him to a single room on 20 August 2020. The Tribunal reminded the parties that, although a claim of direct discrimination and harassment may be pursued in the alternative in respect of the same act, the Tribunal may not uphold both claims by reason of s.212(1) EqA.

5. At the beginning of the second day of the hearing, the Tribunal was informed by the Tribunal clerk that Mr Montgomery (who was about to give evidence) was feeling unwell and had asked to take a lateral flow test, to establish whether this might be Covid-related. The Tribunal agreed and the clerk arranged for Mr Montgomery to take a test, which was negative. We asked Mr McCabe whether Mr Montgomery was feeling well enough to give evidence. He confirmed that Mr Montgomery wished to proceed; there was no application for an adjournment. After the mid-morning break Mr McCabe informed us that Mr Montgomery had been asleep during the break; again there was no application by Mr McCabe. The Tribunal asked Mr Montgomery if he wanted to take a further break before recommencing his evidence; if so, the Tribunal would retire for five or ten minutes. Mr Montgomery said that he did not need a further break and wanted to proceed. There was no indication that the quality of his evidence was affected by any health concerns.

6. All witnesses were cross-examined in some detail. Both representatives made oral closing submissions, to which the Tribunal had regard.

Findings of fact

<u>The Respondent</u>

7. The Respondent is a supplier of oriental food and catering products, operating from a distribution centre in Romford, Essex. Much of the work at these premises involves warehouse storage and the loading and unloading of lorries.

The Claimant

8. The Claimant is of Irish nationality. He has a pronounced southern Irish accent.

9. He was a long-standing employee. There was a disagreement as to when his employment started: the Claimant says 5 June 2002, the Respondent 5 March 2003. Nothing turns on this: the Claimant remains in employment; continuity of service is not an issue we need to determine.

10. The Claimant's contract of employment describes his role as 'warehouse/van assistant'. For most of his employment, he had worked as a van assistant/driver's mate, out on the road, doing overnight work. He had a period of serious ill-health in early 2020, and a period away from work. The nature of that ill-health emerged in the course of evidence. Because that information might be regarded as sensitive, we do not record it in this public judgment, other than to observe that we accept the Claimant's evidence that it left him with a degree of vulnerability, of which the Respondent (including Mr Montgomery) were aware.

11. When he returned to work in June 2020, he was told that he would be assigned to work in the warehouse. He was unhappy with the decision. He worked Monday to Friday, 8.30 a.m. to 6 p.m.

12. All the events with which we are concerned happened during the Covid-19 pandemic.

Mr Montgomery

13. Mr Michael Montgomery oversaw health and safety for the Respondent. He grew up in County Antrim in Northern Ireland; his family came to England when he was a young child. In cross-examination, Mr Montgomery described his original accent as 'a strong Northern Irish accent'. There was no trace of an Irish accent of any sort in Mr Montgomery's evidence, but he told us that, when with family and friends, he sometimes dropped back into his Northern Irish accent.

14. When the Claimant began his new role in the warehouse, he received no basic training, even though he was likely to be operating machinery, including power pallet trucks. The first recorded training to which we were referred was not until November 2020, after the events with which we are concerned. Part of that delay can be accounted for by the fact that the Claimant had a period of sick leave after 21 August 2020, although that does not explain why he was not given training at the outset.

The incident on 5 August 2020: 'Mr Montgomery mocked the Claimant's Irishness by imitating his Irish accent, gesturing and dancing like a leprechaun' (direct race discrimination / harassment related to race)

15. On the morning of 5 August 2020, the Claimant was loading a truck with a female co-worker, Shantal (surname unknown), who was an agency worker. Some heavy materials, which had wrongly been placed on top of lighter

materials, fell and nearly hit Shantal. The Claimant pushed them out of her way just in time. The goods should have been wrapped to prevent an incident of this sort; a supervisor had failed to do this; neither the Claimant nor Shantal was to blame.

16. The Claimant spoke to Mr Montgomery and said, more than once, words to the effect that 'it could have done damage to the poor girl'. We accept his evidence that the use of the expression 'poor girl' is a common vernacular usage among some Irish people to express sympathy and is neither critical nor patronising. Mr Montgomery told him that he should not refer to Shantal as 'poor girl' because it might be perceived as sexist. Although the Claimant did not think he had done anything wrong, he immediately apologised to Shantal, who said that there was no need to apologise and that he had not offended her.

17. We have no doubt that the Claimant was shocked by the incident and was very agitated; he kept stressing how nearly it had caused serious injury. He accepted that he may well have been speaking quickly: he was concerned by what had just happened and the last thing on his mind was how he was expressing himself.

18. The Claimant's evidence was that Mr Montgomery 'stood there and he bobbed his head and moved his shoulders from side to side and said "well maybe if you slowed down I might be able to understand what it is you're trying to say"' in an accent which the Claimant described as 'a mockery of an Irish accent'; it was not a Northern Irish accent.

19. We accept the Claimant's evidence that the way that Mr Montgomery spoke was mocking of the Claimant, and that the accent he adopted was a mockery of a southern Irish accent. The Claimant confirmed that the bobbing and moving of Mr Montgomery's head and shoulders which he described to the Tribunal was what he meant when, in the course of the internal investigation, he likened it to someone 'dancing like a leprechaun'. It was a mocking impersonation of a stereotypical Irish figure.

20. The Claimant asked Mr Montgomery to repeat what he had just said; he was very angry. Mr Montgomery replied that he was just trying to find out what had happened. The Claimant got off the truck, Mr Montgomery approached him and said that he sometimes dropped into an Irish accent because he came from County Antrim.

21. The Claimant was not satisfied and said he wished to speak to Ms Caroline Poon, a company director. Ms Poon still works for the Respondent but was not called to give evidence. They went together to speak to her. The Claimant told her what Mr Montgomery had said and done. At that point Mr Montgomery denied having adopted an Irish accent, even though he had just explained to the Claimant why he had done so. As for Ms Poon, she focused on Mr Montgomery's account of the Claimant's use of the expression 'poor girl'. She showed no interest in Mr Montgomery's conduct - or indeed the safety incident. It was put to the Claimant in cross-examination that he became aggressive in this conversation, which the Claimant denied. Mr McCabe drew his attention to the following passage in the grievance hearing:

> 'so I went out and I see Caroline I brought her out and I say – this man is mocking me mocking my flag mocking my country including my accent and basically I am not having it – basically he denied it all – and then he tried to say I don't like your tone of voice – you have been quite aggressive – I said you damn right I am being aggressive because you just insulted me'

22. In the light of that note, the Claimant accepted that this had been his evidence at the time. This was characteristic of his willingness to make concessions where appropriate. We also note that the Claimant, in this account, suggested that Mr Montgomery had mocked the Irish flag, which was not part of his case before us. However, we regard that not as an exaggeration (as Mr McCabe suggested) but as a reflection of his sense of outrage. Notwithstanding these minor discrepancies, we found the Claimant to be a thoughtful and credible witness.

23. Later Mr Montgomery approached the Claimant and said words to the effect of 'I'll put my hand out if you want to shake it'; the Claimant shook his hand.

The grievance on 7 August 2020: the protected act

24. The Claimant made a written grievance on 7 August 2020. He described the accident and reporting it to Mr Montgomery. He wrote that 'upon hearing this, Mr Montgomery racially targeted me and began to mock me, my accent and my country'. He referred to Mr Montgomery's 'revolting actions and words'. The Claimant wrote that he asked Mr Montgomery to repeat what he had just said, and Mr Montgomery explained 'that he sometimes puts on an Irish accent as he is from County Antrim.' The Claimant also recorded that, when they went to see Ms Poon, Mr Montgomery 'completely refuted his actions and outright lied to his superior about what had just occurred.' This near-contemporaneous account was consistent with the Claimant's account before us.

25. We noted that the Claimant referred to Mr Montgomery's 'actions and words', although he was not explicit as to what they were. In the grievance meeting on 20 August 2022, the Claimant referred to Mr Montgomery 'shrugging his shoulders from left to right – quite embarrassing – I was shocked'. It is right that the Claimant did not specify the words used until he drafted his witness statement. There was no evidence that the managers who investigated the matter asked him to do so at any point.

Mr Montgomery's later accounts

26. Mr Montgomery produced a written statement, dated 13 August 2020. In his evidence before the Tribunal he denied knowing when he did so that the Claimant had raised a grievance about him, and that his statement related to the grievance. We found that implausible, especially in the light of Mr Montgomery's evidence that he had a close working relationship with the HR Department. The letter concludes by referring to an unrelated incident with the Claimant, about which Mr Montgomery wrote:

> 'I'm unsure if these events are connected but I believe they may be relevant'.

27. We infer that by 'relevant', Mr Montgomery meant relevant to the grievance. We note that, although Mr Montgomery briefly described the accident, the focus of his account was not on the health and safety aspect of the events, about which he might reasonably have been asked to provide a statement. He referred to the Claimant's use of the expression 'poor lady' and his own observation that 'it may be taken as a sexist remark'. At this point in the statement, there was no reference to his using/not using an Irish accent; he referred to the Claimant 'ranting' and 'not making sense' and stated that 'I can't remember exactly what happened or what was said but I remember him asking to speak in front of Caroline'.

28. He then described going with the Claimant to speak to Ms Caroline Poon and recorded:

> 'He then spoke with Caroline and said I'd been rude, I think racist but can't remember exactly. He said something about his accent and I told him I was born in the same country as him and also have the same accent but choose not to use it all the time.'

29. In our view, that was a selective, and evasive, account of what had occurred. Given the Claimant's immediate and vehement reaction, we do not believe that, so soon after the event, Mr Montgomery had forgotten what had prompted it. We find that he was trying to gloss over the events because he knew that he had done something wrong.

30. The only reference in Mr Montgomery's Tribunal witness statement to this incident was in relation to the discussion in front of Ms Poon.

> 'He then said I'd been rude and racist towards him. He mentioned my accent. This was a surprise to me given I was also born in Ireland and had a very similar accent from a young age. Later on I learned to speak with an English accent to the point where I now do so naturally however, when I am amongst people speaking with Irish accents, such as friends and family, I can automatically revert to my original Irish accent. I don't actually remember speaking in an Irish accent with the Claimant but given I can automatically revert to one, I assume that was what happened.'

31. Again, we regard that account as evasive: we find it implausible that Mr Montgomery's memory of what prompted it would be so sketchy: he remembered that the Claimant 'mentioned my accent', but not why; it was 'a surprise' to him that the Claimant mentioned his accent in front of Ms Poon, even though (we have found), he had already tried to explain to the Claimant why he had done so before they went to see Ms Poon.

32. In cross-examination, Mr Montgomery said that he 'cannot remember the exact words I said'. He denied bobbing his head and shoulders. He accepted that when the Claimant spoke to Ms Poon, the Claimant accused him of using a mocking Irish accent.

33. In our judgment, at each stage Mr Montgomery was selective and evasive in his recollection of the events in question. Insofar as he continued to maintain before the Tribunal that he did not have a clear recollection as to what had happened and merely 'assumed' that he must have put on an Irish accent, we disbelieved him

The events of 20 August 2020: 'Mr Montgomery restricted the Claimant to a single room for the duration of 20 August 2020' (victimisation)

34. On 20 August 2020 the Claimant's grievance hearing was due to take place at 3.30 p.m. It was to be conducted by Mr Joseph (loading bay manager).

35. Near the beginning of his shift, shortly before 10 a.m., the Claimant was operating a pallet truck in the warehouse. Mr Montgomery saw him operating the truck incorrectly: he was pushing the goods, rather than pulling them. Mr Montgomery told the Claimant to turn the truck around. The Claimant did not do so. He accepted that, with hindsight, it was a reasonable instruction, and that he should have followed it. His explanation was that he did not realise he was doing anything wrong because he had received no training in the operation of the machine. We note that the only evidence of the Claimant's having received training in the operation of the power pallet truck was a certificate dated 15 January 2021, some five months later, which confirmed that he had 'completed 7.5 hours of basic training'.

36. The Claimant's line manager, Mr Mick Hodder, was also present. Mr Montgomery went to speak to him and asked him to give the Claimant some tips on how to manoeuvre the truck correctly. He also spoke to the Claimant; the Claimant thought that the way that Mr Montgomery was speaking to him was aggressive and said he did not want to speak to him. Mr Hodder told the Claimant that Mr Montgomery was responsible for health and safety and that the Claimant must follow his instructions. The Claimant accepted in his evidence before us that he then behaved in an uncooperative and argumentative manner. Mr Montgomery in turn raised his voice and the disagreement escalated.

37. The Claimant then told Mr Montgomery that he did not wish to speak to him because of the ongoing grievance, the hearing of which was happening later that day. He told Mr Montgomery to calm down and stop harassing him. Mr Montgomery told him to stop what he was doing and that they would have an emergency meeting. Mr Montgomery, Mr Hodder, Ms Brainerd (HR) and the Claimant then went to a meeting room.

38. In the meeting room Mr Montgomery explained to the Claimant the importance of following health and safety instructions. Ms Brainerd asked the Claimant if she could record the meeting; the Claimant said no. Mr Montgomery was walking up and down in the room, while the other participants were seated. The Claimant said he felt uncomfortable and intended to video the meeting. Mr Montgomery then asked Mr Hodder and Ms Brainerd to step outside the room with him.

39. After a minute or two, Mr Montgomery and Mr Hodder returned. Mr Montgomery told the Claimant that he would not be going back to his normal duties and that, after his break, he should return to this meeting room.

40. The Claimant remained in the room for the rest of the day, apart from break times. There was nothing of substance for the Claimant to do in the room; he was not given any work, apart from being required to fill in the two short forms referred to below.

41. The Claimant left the room and went to the canteen (where he spent all his breaks) to take his mid-morning break between 10:30 and 11 a.m. As he

returned from his break, he saw Mr Hodder and asked what was going on. Mr Hodder said that he did not know. Mr Montgomery then came through the warehouse and said to the Claimant 'if you'd like follow me' and asked Mr Hodder to accompany them, because the Claimant appeared to be 'scared'. He then punched in the entry code and asked the Claimant to return to the room.

42. Before the lunch break the Claimant was required to fill in a health and safety multiple choice questionnaire of the most elementary kind: a sample question was '[the] majority of back-related injuries occur when actually lifting a box or package? True or false?' None of the questions related specifically to the operation of power pallet trucks.

43. The Claimant left the room to take his lunch break between 1.30 p.m. and 2.15. When he returned to the room, he could not get in. Mr Montgomery came along and punched in the code and said: 'someone will be with you shortly'.

44. Ms Brainerd came into the room three times: the first time, shortly before the lunch break, to help Claimant fill out a health questionnaire; the second time after the Claimant had had lunch, to give him a letter relating to the events of the day (see below); the third time to tell the Claimant that the grievance meeting was being pushed back to 5 p.m. We accept the Claimant's evidence that she could not tell him why he was being kept in the room.

45. The letter which Ms Brainerd gave the Claimant recorded that the Claimant had been seen by Mr Montgomery 'misusing, operating [*sic*] the power pallet truck unsafely'. It then gave an account of the exchange between Mr Montgomery, Mr Hodder and the Claimant and alleged that the Claimant had failed to cooperate with instructions. It recorded that his behaviour was 'of concern so you were brought into a meeting room'.

46. The letter went on:

> 'At the meeting, the health and safety manager informed you that the meeting is a health and safety information meeting. The health and safety manager informed you that he had to approach you because you were seen operating the power pallet truck unsafely. The health and safety manager explained to you that the power pallet truck should be used correctly and safely with the advice and with the agreement of your line manager. This letter is to inform you that your attention has been brought to the unsafe way you were operating the power pallet truck on 20 August 2020. The unsafe manner you were operating the power pallet truck is under investigation and your subsequent behaviour. The Company will inform you of how it will proceed on the conclusion of the investigation.'

47. The Claimant phoned Mr Hodder to ask whether he should sign the letter; Mr Hodder came to the room and advised him to do so.

48. Another, more junior, HR officer, Amy surname not provided), came into the room twice to ask the Claimant if he was all right. He asked her if he could go to the toilet, she said that he did not need her permission. He asked her what was going on; she said she did not know.

49. The Claimant also left the room to take his afternoon break between 4 and 4.15 p.m. We accept the Claimant's explanation that, other than at break times, he was required to remain in the room.

50. The Claimant described himself as being 'a nervous wreck' by the end of the day. We accept that he found the experience bewildering and distressing: he was on his own, with nothing to do; no one could tell him what was happening; even the letter from Ms Brainerd provided no certainty as to what would, or would not, happen.

51. The grievance meeting did not begin until 5 p.m. Mr Joseph apologised for being late. The Claimant was interviewed for a mere 18 minutes. The verbatim notes of the grievance meeting confirm that the Claimant was extremely agitated and at points almost incoherent. After that day his health took a turn for the worse and he sought advice and support. He also saw his doctor and was signed off work from 22 August 2020 until 17 November 2020. He then had a period of annual leave, after which he was signed off again by his doctor from 10 to 15 December 2020.

<u>The evidence as to who took the decision and why</u>

52. Mr Montgomery's evidence in cross-examination was that the Claimant was kept in the room while Ms Brainerd took 'advice from expert human resources'. There was no documentary evidence before us to substantiate that. Ms Brainerd no longer works for the company; there was no contemporaneous account by her, whether in a statement or an interview.

53. It was put to Mr Montgomery in cross-examination that he was responsible for keeping the Claimant in the room and that he did so because he knew that the Claimant had a grievance against him. Mr Montgomery denied that he knew that the Claimant had a grievance against him. However, shortly after giving that answer, he volunteered that, while they were on the warehouse floor (i.e. before they all went to the meeting room) the Claimant had said to him: 'I'm not talking to you, I've got a grievance against you.' Mr Montgomery had given essentially the same account in his sworn witness statement (paragraph 22).

54. In re-examination Mr Montgomery was asked if it was his decision that the Claimant be kept in the room. He replied: 'there was no decision about leaving anyone in a room'. Asked if he knew why the Claimant had been left in the room, he repeated his evidence about Ms Brainerd seeking expert HR advice and further observed: 'we have a duty of care to everyone.' We found that answer to be incoherent: on the one hand he suggested that there was no decision; on the other hand, he purported to explain why the decision was taken.

55. At another stage in his evidence Mr Montgomery suggested that the Claimant was required to stay in the room because he had a grievance meeting later in the afternoon and there would have been no point in his going home. Asked why the Claimant could not sit in the canteen, for example, Mr Montgomery gave a convoluted explanation as to why that would not be possible, with references to the opening and closing times of the canteen and the Covid-19 restrictions in place.

56. In his grievance outcome letter, Mr Joseph recorded the following explanation:

> 'Given your attitude and the fact that you could not be retrained until the next day at the earliest, it was considered best that you remained away from the warehouse. There was no point in sending you home only for you to come back again for the grievance meeting. As I say it was always expected that this would take place sooner than it did. However, no prejudice was caused to you. I understand you took your usual breaks. You were being paid and were in a clean, safe meeting room which doubles as the training room and so could have availed yourself to any of the training material should you have wished. HR regularly checked you were okay and you were simply kept waiting for a scheduled meeting to start. That can happen in a busy workplace.

57. There were obvious anomalies in this explanation: even before the grievance meeting was put back from 3.30 to 5 p.m., the Claimant faced a five-hour wait; there was no evidence before us that anyone suggested that the Claimant spend the time 'availing himself' of training materials; indeed, as we have already found, no one gave the Claimant any sort of explanation as to why he was required to stay in the room, or what he was expected to do while he was there.

58. We find, on the balance of probabilities, that it was Mr Montgomery who decided that the Claimant should stay in the meeting room. We are also satisfied that Mr Montgomery personally ensured that the Claimant went back into the room at the end of his breaks. Further, we are satisfied that there was a punitive element in requiring him to do so.

<u>The grievance procedure</u>

59. Apart from being asked to provide the written statement (which he had already done before the Claimant was interviewed), Mr Montgomery was not interviewed by Mr Joseph at the initial grievance stage. Nor was Ms Caroline Poon, who plainly had relevant evidence to give as to whether Mr Montgomery had denied using an Irish accent, interviewed by Mr Joseph. Mr Poon, who conducted the appeal against the grievance outcome, told us in oral evidence that he had 'informal conversations' with Mr Montgomery and Ms Poon. There were no notes of those alleged conversations; Mr Poon made no reference to them in his witness statement.

60. Shantal, who had been present at the accident, and observed the exchange between the Claimant and Mr Montgomery, was not interviewed until December 2020, and not by Mr Joseph. In a minuted phone conversation Shantal wrongly stated that she was hit by the falling goods; she did not mention the exchange between Mr Montgomery, the Claimant and her about the Claimant referring to her as 'poor girl'; when asked about Mr Montgomery's intervention she initially stated that 'I can't really remember because it was some time ago'; asked about whether Mr Montgomery's voice or pitch was normal or 'did it sound rude or was there any different accent?', Shantal replied 'it was normal'.

61. Insofar as there are inconsistencies between Shantal's account and the Claimant's account, we prefer the Claimant's account. Shantal was not called to give evidence before us, nor was she contacted to provide a witness

statement. The December 2020 phone interview was taken several months after the event. It contains factual errors, most significantly her statement that the goods fell on her, rather than nearly falling on her. We think it likely that she wished to avoid being drawn into the dispute. We gave her account very little weight.

62. Although not essential to the issues we have to decide, we record our unanimous view that the Respondent did not take the Claimant's grievance seriously and that both Mr Joseph and Mr Poon (who dealt with the grievance appeal) approached it with a closed mind. That is reflected in the woeful lack of investigation and the failure formally to interview relevant witnesses, including most obviously, Mr Montgomery himself. If, as Mr Poon suggested, he did speak to Mr Montgomery informally, there is no record of what was said.

The law

The burden of proof in discrimination cases

63. The burden of proof provisions are contained in s.136(1)-(3) EqA:

> **(1) This section applies to any proceedings relating to a contravention of this Act.**
> **(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 subsection (2) does not apply if A shows that A did not contravene the provision.**

64. The effect of these provisions was summarised by Underhill LJ in *Base Childrenswear Ltd v Otshudi* [2019] EWCA Civ 1648 at [18]:

> **'It is unnecessary that I reproduce here the entirety of the guidance given by Mummery LJ in *Madarassy*.[1] He explained the two stages of the process required by the statute as follows:**
>
> **(1) At the first stage the Claimant must prove "a *prima facie* case". That does not, as he says at para. 56 of his judgment (p. 878H), mean simply proving "facts from which the Tribunal could conclude that the Respondent 'could have' committed an unlawful act of discrimination". As he continued (pp. 878-9):**
>
> > **"56. … 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.**
> >
> > **57. 'Could conclude' in section 63A(2) [of the Sex Discrimination Act 1975] must mean that 'a reasonable Tribunal could properly conclude' from all the evidence before it. …"**
>
> **(2) If the Claimant proves a *prima facie* case the burden shifts to the Respondent to prove that he has not committed an act of unlawful discrimination – para. 58 (p. 879D). As Mummery LJ continues:**
>
> > **"He may prove this by an adequate non-discriminatory explanation of the treatment of the complainant. If he does not, the Tribunal must uphold the discrimination claim."**

[1] *Madarassy v Nomura International plc* [2007] ICR 867, CA

> **He goes on to explain that it is legitimate to take into account at the first stage all evidence which is potentially relevant to the complaint of discrimination, save only the absence of an adequate explanation.'**

65. In *Royal Mail Group v Efobi* [2021] ICR 1263, the Supreme Court confirmed that a Claimant is still required to prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the employment Tribunal could infer an act of unlawful discrimination. So far as possible, Tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense. Where it was said that an adverse inference ought to have been drawn from a particular matter, the first step had to be to identify the precise inference which allegedly should have been drawn. Even if the inference is drawn, the question then arises as to whether it would, without more, have enabled the Tribunal properly to conclude that the burden of proof had shifted to the employer.

66. It is well-established that unfair treatment is not to be equated, as such, with discriminatory treatment (*Glasgow City Council v Zafar* [1998] ICR 12). Discrimination may, however, be inferred if there is no explanation for unreasonable behaviour (see the discussion in *The Law Society v Bahl* [2003] IRLR 640 (EAT) at [93] – [98], upheld by the Court of Appeal [2004] IRLR 799 at [100] – [101]).

67. In *Hewage v Grampian Health Board* [2012] ICR 1054 at [32], the Supreme Court held that the burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the Tribunal is in a position to make positive findings on the evidence one way or the other.

<u>Harassment related to race</u>

68. Harassment related to race is defined by s.26 EqA, which provides, so far as relevant:

> **(1) A person (A) harasses another (B) if-**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
> **(b) the conduct has the purpose or effect of—**
>
> **(i) violating B's dignity, or**
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **…**
> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—**
>
> **(a) the perception of B;**
> **(b) the other circumstances of the case;**
> **(c) whether it is reasonable for the conduct to have that effect.**
>
> **(5) The relevant protected characteristics are—**
> **…**
> **race**
> **…**

69. The test for whether conduct achieved the requisite degree of seriousness to amount to harassment was considered by the EAT in *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336 at [22]:

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

70. Elias LJ in *Land Registry v Grant* [2011] ICR 1390 at [47] held that sufficient seriousness should be accorded to the terms 'violation of dignity' and '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.'**

71. He further held (at [13]):

> **'When assessing the effect of a remark, the context in which it is given is always highly material. Everyday experience tells us that a humorous remark between friends may have a very different effect than exactly the same words spoken vindictively by a hostile speaker. It is not importing intent into the concept of effect to say that intent will generally be relevant to assessing effect. It will also be relevant to deciding whether the response of the alleged victim is reasonable.'**

72. The EAT in *Betsi Cadwaladr University Health Board v Hughes* [2014] UKEAT/0179/13/JOJ at [12], referring to Elias LJ's observations in *Grant*, stated:

> **'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.'**

73. The context in which a comment is made will be relevant to determining whether it is related to a protected characteristic, and the Tribunal must contextualise the comment appropriately (*Warby v Wunda Ground Plc* [2012] EqLR 536 at [21-24]). As observed by Underhill J in *Amnesty International v Ahmed* [2009] ICR 1450 at [37] (cited in *Warb*y in the context of harassment):

> **'The fact that a Claimant's sex or race is a part of the circumstances in which the treatment complained of occurred, or of the sequence of events leading up to it, does not necessarily mean that it formed part of the ground, or reason, for that treatment.'**

74. Although intention is not determinative, it can be a factor (*Dhaliwal* at para 15):

> **'One question that may be material is whether it should reasonably have been apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the proscribed consequences): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt.'**

Direct discrimination

75. S.13(1) EqA provides:

> **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.**

76. The conventional approach to considering whether there has been direct discrimination is a two-stage approach: considering first whether there has been less favourable treatment by reference to a real or hypothetical comparator; and secondly going on to consider whether that treatment is because of the protected characteristic, here race/religion.

77. More recently, the appellate courts have encouraged Tribunals to address both stages by considering a single question: the 'reason why' the employer did the act or acts alleged to be discriminatory. Was it on the prohibited ground or was it for some other reason? This approach does not require the construction of a hypothetical comparator: see, for example, the comments of Underhill J in *Martin v Devonshires Solicitors* [2011] ICR 352 at [30].

78. It is sufficient that the protected characteristic had a 'significant influence' on the decision to act in the manner complained of; it need not be the sole ground for the decision (*Nagarajan v London Regional Transport* [1999] ICR 877 at 886).

79. In *Reynolds v CLFIS (UK) Ltd* [2015] ICR 1010 at [36], the Court of Appeal confirmed that a 'composite approach' to an allegation of discrimination is unacceptable in principle: the employee who did the act complained of must himself have been motivated by the protected characteristic.

80. It is an essential element of a direct discrimination claim that the less favourable treatment must give rise to a detriment (s.39(2)(d) EqA). There is a detriment if 'a reasonable worker would or might take the view that [the treatment was] in all the circumstances to his detriment' (*Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] ICR 337 at [35]). An unjustified sense of grievance does not fall into that category.

81. S.212(1) EqA provides that the concept of 'detriment' does not include conduct that amounts to harassment. Thus, a Claimant cannot succeed in a claim of both harassment and direct discrimination in respect of the same conduct. However, there is nothing in the statutory language to prevent him from advancing claims in respect of the same conduct by reference to both causes of action in the alternative.

Victimisation

82. S.27 Equality Act 2010 ('EqA') provides as follows:

> **(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.**
> **…**

83. The Tribunal must determine whether the relevant decision was materially influenced by the doing of a protected act. This is not a 'but for' test, it is a subjective test. The focus is on the 'reason why' the alleged discriminator acted as s/he did (*West Yorkshire Police v Khan* [2001] IRLR 830).

84. There will be cases where an employer has subjected an employee to a detriment in response to the doing of a protected act but where he can, as a matter of common sense and common justice, say that the reason for the dismissal was not the complaint as such but some feature of it which can properly be treated as separable. For example, where the reason relied on is the manner of the complaint (*Martin v Devonshires Solicitors* [2011] EqLR 108 EAT). Before a case could be regarded as analogous to *Martin*, it is necessary to identify some feature of the protected acts, which could properly be regarded as separable from them, as being the reason for the treatment (*Woodhouse v West North West Homes* [2013] IRLR 773).

85. The Court of Appeal emphasised the importance of focusing on motivation, rather than 'but for' causation in *Dunn v Secretary of State for Justice* [2019] IRLR 298 at [44]:

> **'In the context of direct discrimination, if a Claimant cannot show a discriminatory motivation on the part of a relevant decision-maker he or she can only satisfy the 'because of' requirement if the treatment in question is inherently discriminatory, typically as the result of the application of a criterion which necessarily treats (say) men and women differently. […] There is an analogy with the not uncommon case where an employee who raises a grievance about (say) sex discrimination which is then, for reasons unrelated to his or her gender, mishandled: the mishandling is not discriminatory simply because the grievance concerned discrimination.'**

Conclusions

<u>The incident on 5 August 2020: harassment related to race/direct race discrimination</u>

86. We deal firstly with the harassment claim. There is no doubt that, on our findings of fact, Mr Montgomery's conduct towards the Claimant on the day was unwanted. Nor is there any doubt that it was related to the Claimant's race/nationality.

87. The next question is whether Mr Montgomery acted as he did with the purpose of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant ('the proscribed environment'). We found this a difficult question. However, by a slim margin we have concluded that Mr Montgomery's purpose, however misguided, was to defuse a difficult situation by humour. Unfortunately, the type of humour he chose to employ was of the most crass and insensitive kind. Although what he did was profoundly inappropriate, we have concluded that he acted unthinkingly; it follows from this that it was not his purpose to create the proscribed environment.

88. We then went on to consider whether, viewed subjectively from the Claimant's perspective, it had the effect of creating the proscribed environment. As to that question we are unanimous that it did. We have concluded that the Claimant was not merely upset by the conduct, he was deeply offended by it. We are satisfied that he felt that his dignity had been violated. We were struck in particular by the fact that he immediately, and urgently, sought the assistance of a senior manager (who did not provide that assistance) and was consistent thereafter in his vehement objections. We think he was genuinely outraged by the incident.

89. We then went on to consider whether, in all the circumstances of the case, and viewed objectively, it was reasonable for the conduct to have that effect. We have concluded that it was. The circumstances were exceptional: the Claimant and Shantal had narrowly escaped a serious accident. Mr Montgomery in response to that initially responded by focusing on the Claimant's conduct rather than the accident, which further heightened the situation. We think it reasonable, in these particular circumstances, that Mr Montgomery's mockery of the Claimant's nationality produced the effect which the Claimant described.

90. For these reasons the claim of harassment related to race succeeds. Because we have upheld the harassment claim, s.212(1) EqA provides that we cannot also uphold a direct discrimination claim founded on the same facts.

91. However, if our analysis of the harassment claim is wrong, we record that we would have found in the alternative that Mr Montgomery's conduct was direct discrimination because of the Claimant's race/nationality. Mr McCabe accepted in closing submissions that, if we found as a fact that Mr Montgomery had behaved as alleged, it would be difficult to argue that mocking somebody by adopting a stereotypical accent and set of gestures was anything other than inherently discriminatory. We have no hesitation in finding that it was. Alternatively, analysing the issues through the lens of the 'reason why' approach there can be no question that part of the reason why Mr Montgomery behaved as he did was because the Claimant is Irish. If he was seeking to defuse a difficult situation with a person who was not Irish, self-evidently he would not have adopted a mock Irish accent. For the avoidance of doubt, we reject Mr Montgomery's explanation that he was dropping into his own original accent, because the accent he adopted was not a Northern Irish accent, it was a mock southern Irish accent.

92. We have already identified the detriment to Claimant: he was deeply offended by Mr Montgomery's mockery.

<u>The events of 20 August 2020: victimisation</u>

93. Dealing firstly with the question of whether the requirement that the Claimant stay in the room all day (when not on a break) amounted to a detriment, we are satisfied that it did. We accept that the Claimant found it a distressing experience: that is apparent from his agitated state at the grievance hearing at the end of the day. It was clear that even recounting his memories of that day in his evidence before the Tribunal caused the Claimant considerable upset.

94. Applying the burden of proof provisions, we asked ourselves whether there were facts from which we could reasonably conclude that Mr Montgomery was influenced by the protected act.

95. It is right that, but for the Claimant's own poor behaviour, the events would not occurred: his failure to obey a reasonable instruction was the background to the treatment he later received. But that is not a complete answer to the question of whether the decision to keep him in the room was materially influenced by the fact that he had done a protected act which, we remind ourselves, need only be part of the reason for the decision.

96. Firstly, we have already found that it was Mr Montgomery who decided that the Claimant should remain in the room (para 58). We have also found that Mr Montgomery's evidence on the issue of who took the decision, indeed whether a decision was even taken, was incoherent (para 54).

97. Secondly, Mr Montgomery knew about the protected act, at the very latest on 13 August 2020 when he drafted his statement (para 26). His denial in his oral evidence that he knew about it before the 'emergency meeting' was inconsistent with his own witness statement, and his later oral evidence (para 53). His evidence on this issue was evasive.

98. Thirdly, we had regard to the fact that several witnesses, who must have been privy to the decision to keep the Claimant in the room, were not called to give evidence: it is right that Ms Brainerd no longer works for the company (although that is no bar on her being called, by way of a witness or order, if necessary); no explanation was given for the absence of Mr Hodder or the other HR officer, Amy. We infer that they were not called because their evidence might have been unhelpful to the Respondent.

99. Fourthly, the decision to keep an employee in a room for the best part of a day, without proper explanation and without any work being assigned to him, was not merely unreasonable, it was an extraordinary way of treating an employee in a modern workplace, which cried out for an explanation.

100. Fifthly, we reminded ourselves of our findings that Mr Montgomery personally ensured that the Claimant returned to the room at the end of breaks (para 58). We considered that a Tribunal could reasonably infer from this that his actions were not merely professionally, but personally motivated, and influenced by the fact that the Claimant had accused him of discrimination.

101. Taking together Mr Montgomery's evasive and contradictory evidence on two central matters of fact, the absence of evidence from relevant witnesses and our observations as to the exceptional nature of the decision and Mr Montgomery's personal enforcement of it, we are satisfied that the burden of proof passes to the Respondent to show that the fact that the Claimant had done a protected act played no part in Mr Montgomery's decision.

102. We have recorded above our findings of fact as to the various explanations provided by the Respondent for this decision. In our judgement, they were implausible and/or riven with contradiction.

103. Insofar as it was suggested that part of the purpose of keeping the Claimant in the room was to provide him with training, he was not provided with any training, apart from being required to fill in an elementary questionnaire.

104. Insofar as it was suggested that the Covid-19 pandemic provided an explanation for his not being able to wait elsewhere, for example in the canteen, we reject that as implausible: there was no concern about four people gathering in a meeting room at the beginning of the day, and HR coming in and out of the room in the course of it; there undoubtedly would have been times when the canteen was open and relatively quiet; it would have felt to the Claimant less like a confinement.

105. Insofar as Mr Montgomery relied on a 'duty of care', if he was referring to the Claimant's wrong operation of the power pallet truck, suspending the Claimant's use of it had already addressed that concern; keeping him apart in a room added nothing. If he was referring to a duty of care to the Claimant, for example if there were concerns about the Claimant's mental state, isolating him without explanation was self-evidently counter-productive.

106. Then there was the explanation given in Mr Joseph's outcome letter (para 56). This might have carried some weight, had Mr Joseph attended to give evidence, or if there had been any evidence before us as to who had given Mr Joseph the information he relied on: for example, a statement from, or interview with, Mr Montgomery, Ms Brainerd or Mr Hodder about the events of 20 August 2020; there was none.

107. None of the Respondent's explanations addressed a central question: if there was a valid reason for requiring the Claimant to stay in meeting room, why did nobody give it to him when he asked repeatedly on the day?

108. In all the circumstances, we are not satisfied that the Respondent, and specifically Mr Montgomery, has provided an adequate, non-discriminatory explanation for the decision. The Respondent has failed to discharge the burden on it and the victimisation claim succeeds.

Remedy

109. The only remedy available to Claimant is an award for injury to feelings, plus any interest due. At the conclusion of the hearing, and after we had given our judgment (but not our reasons), the parties invited us to give an indication in these reasons as to what *Vento* band the award is likely to fall into, which may assist them in agreeing the amount of compensation.

110. We are likely to approach the question by determining what the appropriate compensation is in relation to each of the two acts of discrimination which we have found occurred. We will then stand back and decide whether there is any overlap between the two amounts, which might give rise to double-counting. Because the two acts are closely related in time, we think there is likely to be some overlap, and that an adjustment of some sort will be necessary. Our preliminary view is that the final, combined award is likely to come within the middle *Vento* band. We go no further than that at this stage because we have not heard submissions from either party on this issue.

111. The parties must write to the Tribunal within 21 days of these reasons being sent out, stating whether they have been able to resolve the question of compensation by agreement. If so, they may inform the Tribunal of the agreed amount, and the Tribunal will make a judgment on remedy by consent; alternatively the parties may simply invite the Tribunal to make no order as to remedy, the parties having reached a settlement as to compensation.

112. If they have not reached agreement, they shall notify the Tribunal whether they are content to provide written submissions on the issue, or whether they consider a hearing required. Either way, they shall propose an agreed set of directions.

Employment Judge Massarella
Date: 17 February 2022