EMPLOYMENT TRIBUNALS

Claimant: Mr K Bhardwaj

Respondent: dnata Ltd

Heard at: Watford Employment Tribunal (in public; by video)

On: **28 February 2022 and 1, 2, 3, 4 March 2022**

Before: Employment Judge Quill; Mr L Hoey; Mr T Maclean

Appearances
For the claimant: Mr Issar, friend
For the respondent: Mr Sanders, counsel

RESERVED JUDGMENT

Unanimously

(1) The Claimant was unfairly dismissed. All remedy issues, including Polkey and contributory fault decisions, will be made after a remedy hearing.

(2) The claims of harassment related to sex all fail and are dismissed.

(3) The claims of sexual harassment all fail and are dismissed.

(4) The claims of harassment related to race fail and are dismissed in relation to the following items from the particulars of harassment: 1, 3, 4, 5, 8, 9, 10, 11, 13.

By a majority (Mr Maclean and Mr Hoey)

(5) The claim of harassment related to race at Item 7 of the particulars of harassment fails and is dismissed.

REASONS

Introduction

1. The Claimant is a former employee of the Respondent who brings claims arising out of his dismissal and the treatment which he alleges he received during his employment.

The Claims

2. The claims are of unfair dismissal and for notice pay; and claims of harassment on related to race, related to sex and of a sexual nature. The claimant identifies as a Hindu British Indian.

3. The claims relating to the dismissal are of unfair dismissal only, and it is not alleged that the dismissal was discrimination or harassment.

The Issues

4. Following a preliminary hearing before EJ Lewis on 8 June 2020, the Claimant produced a particulars of harassment document dated 22 August 2020 (pages 42 to 48 of the hearing bundle) and the Respondent produced an amended grounds of resistance in response pages 51 to 56.

5. The particulars of harassment contained 14 numbered items, as did the response. We discussed the particulars document with the parties on Day 1, and we were told which numbered items referred to which type of harassment, and which (items 2, 12 and 14) referred to background information only.

6. The list of issues which we had to determine was therefore as follows. The "Item" numbers are for identification purposes and cross-refer to the particulars of harassment document which contains the details.

Time limits / limitation issues

6.1 Were all of the complaints presented within the time limits set out in
  6.1.1 section 123 of the Equality Act 2010 ("EQA")
  6.1.2 section 111 of the Employment Rights Act 1996 ("ERA")?

Unfair dismissal

6.2 What was the principal reason for dismissal and was it a potentially fair one in accordance with sections 98(1) and (2) of the Employment Rights Act 1996 ("ERA")? The respondent asserts that it was a reason relating to the claimant's conduct.

6.3 If so, was the dismissal fair or unfair in accordance with ERA section 98(4), and, in particular, did the respondent in all respects act within the so-called 'band of reasonable responses'?

Remedy for unfair dismissal

6.4 If the claimant was unfairly dismissed:

6.4.1 Should reinstatement or re-engagement be ordered
6.4.2 What adjustment, if any, should be made to any compensatory award to reflect the possibility that the claimant might still have been dismissed had a fair and reasonable procedure been followed?
6.4.3 Would it be just and equitable to reduce the claimant's basic award because of any blameworthy or culpable conduct before the dismissal, pursuant to ERA section 122(2)? If so to what extent?
6.4.4 Did the claimant, by blameworthy or culpable actions, cause or contribute to dismissal to any extent? If so, is it just and equitable to reduce the amount of any compensatory award, pursuant to ERA section 123(6)?

<u>EQA, section 26: harassment related to race</u>

6.5 Did the respondent engage in conduct as follows:

6.5.1 Item 1. Invasion of personal space, including physical touching. 23 November 2018.
6.5.2 Item 3. Bullying in the workplace. Ongoing from February 2019 until May 2019.
6.5.3 Item 4. Invasion of personal space including physical touching. 14 March 2019.
6.5.4 Item 5. Racist language and bad mouthing. 16 April 2019.
6.5.5 Item 7. Invasion of Personal Space, including physical touching, racist language and bad mouthing. Ongoing from April 2019 until 9th June 2019.
6.5.6 Item 8. Sexual Images. Ongoing from April 2019 until May 2019
6.5.7 Item 9. Invasion of Personal Space including physical touching. 6 May 2019.
6.5.8 Item 10. Invasion of Personal Space, including physical touching, racist language and bad mouthing- Dnata Mismanagement. [9 May 2019 as stated originally in the document]
6.5.9 Item 11. Invasion of Personal Space including bad mouthing/serious breach of health & safety. 5 June 2019.
6.5.10 Item 13. Bullying at workplace. 9 June 2019.

6.6 If so was that conduct unwanted?

6.7 If so, did it relate to the protected characteristic of race?

6.8 Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

<u>EQA, section 26: harassment related to sex</u>

6.9 Did the respondent engage in conduct as follows:

6.9.1 Item 4. Invasion of personal space including physical touching. 14 March 2019.

6.9.2 Item 6. Invasion of Personal Space, including physical touching: Sexual Harassment. Ongoing from April 2019 until June 2019
6.9.3 Item 7. Invasion of Personal Space, including physical touching, racist language and bad mouthing. Ongoing from April 2019 until 9th June 2019.
6.9.4 Item 8. Sexual Images. Ongoing from April 2019 until May 2019.
6.9.5 Item 9. Invasion of Personal Space including physical touching. 6 May 2019.
6.9.6 Item 10. Invasion of Personal Space, including physical touching, racist language and bad mouthing- Dnata Mismanagement. 9 May 2019

6.10 If so was that conduct unwanted?

6.11 If so, did it relate to the protected characteristic of sex?

6.12 Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

EQA, section 26: harassment of a sexual nature

6.13 Did the respondent engage in conduct as follows:

6.13.1 Item 4. Invasion of personal space including physical touching. 14 March 2019.
6.13.2 Item 6. Invasion of Personal Space, including physical touching: Sexual Harassment. Ongoing from April 2019 until June 2019
6.13.3 Item 7. Invasion of Personal Space, including physical touching, racist language and bad mouthing. Ongoing from April 2019 until 9th June 2019.
6.13.4 Item 8. Sexual Images. Ongoing from April 2019 until May 2019.
6.13.5 Item 9. Invasion of Personal Space including physical touching. 6 May 2019.
6.13.6 Item 10. Invasion of Personal Space, including physical touching, racist language and bad mouthing- Dnata Mismanagement. 9 May 2019

6.14 If so was that conduct unwanted?

6.15 If so, was it of a sexual nature?

6.16 Did the conduct have the purpose or (taking into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect) the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

Remedy

6.17 If the claimant succeeds, in whole or part, what compensation and/or damages and/or other remedy should be awarded.

The Evidence

7. The original bundle had around 360 pages, and we also had the Claimant's supplementary bundle of around 166 pages. We admitted some further documents during the course of the hearing.

8. We had written witness statements from 8 persons, and all 8 attended the hearing, swore to their statements, and answered questions. The Claimant's 3 witnesses were: himself; Kenneth Fisher; Waqas Zarait. The Respondent's 5 witnesses were: Steven Smith; Andrew Saunders; Dominic Tong; Amarjit Kalsi; Josephine Delargy.

9. We also had some still images and some video clips.

The findings of fact

10. The Respondent provides baggage handling services at airports, including at Heathrow which is where the Claimant was based. At the relevant time, it had around 2700 employees. The Claimant commenced work in around 2005 with a different entity and, via TUPE transfers, came to be employed by the Respondent.

11. From 2018 until the end of his employment in July 2019, the Claimant worked in Terminal 2. The Claimant was employed as a "ramp agent", which meant that his duties included loading and unloading baggage onto aircraft. The ramp agents tended to work in teams which were led by a Team Leader/Supervisor who was responsible for day to day operational management of the various teams. At the times relevant to this dispute, one of those team leaders was JL, and he was the supervisor to whom the Claimant reported at the relevant times.

12. Typically there were 6 Team Supervisors on shift at any one time covering the baggage/ramp and customer service teams and the employees in those teams were required to take instructions directly from the Supervisors. The Team Supervisors reported into the Duty Managers.

13. There was a team of four Duty Managers in Terminal 2 who reported into the Terminal Business Manager who, at the relevant Michael Ansell. The Duty Managers included three of the witnesses for the hearing: Dominic Tong; Amarjit Kalsi; Josephine Delargy.

14. For Item 1 of the Particulars of Harassment, the allegation is:

    Date: 23 November 2018

    Summary: Whilst KDB was resting on his break in the communal staff area, JL tied KDB's shoelaces together, with the intention of causing KDB to trip and fall in public, so he could embarrass him.

    Who was there: This act was carried out in the presence of Mr Jagseer Dhillon, Ramp Service Agent with the intention of humiliating, degrading and cause harm to KDB. The incident was filmed so it could be circulated to cause further embarrassment.

15. Our finding is that the incident did occur and was video recorded. We have no specific evidence of the reasons for filming this particular incident on a mobile phone. However, it is clear from the totality of the evidence that several employees were in the habit of making videos on their mobile phones for reasons which were not directly connected to the duties which the Respondent required them to perform. In some cases, the video (or audio) recording has apparently been made because the person making the recording seemed to think that they were capturing some wrongdoing by a colleague. In some cases, the recording or photo has apparently been made because the person making the recording or taking the photo seemed to think that something amusing was being captured, and that sharing the document later on (with colleagues) might cause further amusement.

16. The plan, presumably, was that the Claimant would stand up without realising that his laces had been tied together and fall over. We are not persuaded that there was an intention to humiliate the Claimant or violate his dignity. The intention was – we assume, having heard no direct evidence from the perpetrators – to laugh if the Claimant did fall over. However, we are satisfied that, at the time of this, the Claimant and JL were longstanding colleagues who each played tricks on each other as part of a general plan to pass the time at work and to cause laughter. While, for any given trick or prank, there was the potential for one of them to be the one doing the laughing, and the other to be the butt of the joke, overall, at this stage, it was give and take and, rather than seeking to intimidate the other, the person responsible for any given prank (including this shoe lace incident circa 23 November 2018) was expecting that their colleague would get them back on some future occasion by playing a prank on them.

17. We observe that, of course, tying someone's shoe laces together is potentially very dangerous, and serious injury could occur. However, we are not persuaded that there was any intention to injure the Claimant, or to do anything other than cause mild inconvenience and/or embarrassment.

18. For Item 2 of the Particulars of Harassment, the allegation is as follows. It is relied on only for background, not as harassment.

    Date: 8 January 2019

    Summary: KDB advised JL of a potential health and safety risk regarding a flight they were working on. JL abruptly and rudely dismissed KDB experience advice putting the flight at high risk in order to achieve his targets. KDB escalated the matter to the Dnata Ramp Manager Josephine Delargy who advised KDB to make the necessary changes to ensure the flight left safely. This has clearly upset JL and furthermore and was advised to apologise to KDB. Josephine Delargy then ask KDB to email her regarding this matter.

19. The Claimant says that this was a turning point in his relationship with JL.

20. Our finding is that on Tuesday 8th January 2019 the Claimant was working on an ANA flight (NH212). He was operating the front hold of the air-craft using a High-loader. He noticed prior to the aircraft being fully loaded that there was an error inside the plane. He followed the company procedures and reported it to JL, who was the Supervisor on the shift that day. There was a disagreement because of

the issue. The Claimant challenged JL's proposed course of action for remedying the matter. The Claimant referred the matter to the Duty Manager, who was Ms Delargy. Her decision was that the Claimant's proposed course of action be followed. She asked each of JL and the Claimant to email her to explain what they thought had been the cause of the problem. The Claimant did so (see page 99 of bundle) and Ms Delargy thanked him forwarded his email to Mr Ansell, who said he was glad "the team" had highlighted, and suggested that Ms Delargy might need to speak to the airline about the issue (which the Claimant's email had said was not a one off occurrence).

21. We accept that it was Ms Delargy's genuine opinion at the time that this incident, while not being strictly "business as usual" (because it was something that she had reported to her line manager) was fairly minor; she did not see it as a huge disagreement between the Claimant and JL. Apart from the fact that a safety issue had been raised, a delay to the flight's departure had been caused, and it was routine for the Respondent to create records about such delays. Ms Delargy's request for written accounts from JL and the Claimant was about the baggage loading issue and flight delay, and not about the disagreement between the Claimant and JL. We accept that, in giving evidence to the tribunal, she genuinely had no recollection of the Claimant and JL strongly disagreeing; her perspective on the incident was different to the Claimant's. At the time, the Claimant made no written complaint about JL. Further, he is not suggesting that the cause of the argument was related to race, rather he is suggesting that JL felt undermined and became determined to try to treat the Claimant badly as a means of revenge.

22. For Item 3 of the Particulars of Harassment, the allegation is as follows.

    Date: Ongoing from February 2019 until May 2019

    Summary: KDB was suffering from multiple medical issues all documented by his doctors. KDB advised Dnata senior management of these issues. KDB received approval from senior management to attend these appointments. However, when JL was made aware of these appointments, he used his leverage as KDB line manager to cause KDB further stress by trying to deny his leave from work and on several occasions would threaten KDB to report him for disciplinary action because leaving his post without permission. KDB did address this to Mr Amarjit Kalsi, Josephine Delargy and Mr Dominic Tong who confirmed he could attend his appointments and they would address this with JL.

23. The Claimant was aware that it was the duty managers, and not JL, who approved time of for medical appointments.

24. We do accept that JL made comments about the Claimant's appointments and was disparaging about the Claimant's need for medical attention and/or was seeking to imply that the Claimant was in some way getting away with something by taking the time off.

25. We do not accept that any threat was made by JL to lie to the Duty Managers so as to prevent the Claimant having future time off and we do not think that, at the time, the Claimant was particularly concerned about JL's comments. Rather, at the time, the Claimant's opinion was that it did not matter to him whether JL liked

the idea of his having this time off or not. He had the Respondent's approval, and that was all that mattered.

26. We do not accept that the Claimant specifically complained to any of the Duty Managers to ask them to intervene in relation to any comments made to him by JL about medical appointments.

27. For Item 4 of the Particulars of Harassment, the allegation is as follows:

    Date: 14 March 2019

    Summary: On several occasions JL would come from behind of KDB and would physical bear hug him. KDB told JL on each occasions that he did not want to be physical touched by JL. This account was witness by several staff as recorded by Dnata Management in the investigation hearing. The bear hug would intend to take place in the Terminal 2 Restroom area. KDB spoke to Mr Dominic Tong, Dnata Ramp Manager and informed him that he was feeling uncomfortable with JL making physical contact with KDB in giving him bear hugs. Having escalated this mater to Dominic Tong, KDB was not made aware of any follow up actions or resolution to his complaint to Dnata management. More concern after escalating this matter JL continued to physical touched KDB.

    Who was there: KDB and Dnata Ramp Manager Mr Dominic Tong

28. There were occasions on which JL would come up behind the Claimant (or another colleague) and seek to put arms around the colleague (all of whom were male) and squeeze them and/or lift them up.

29. Our opinion is that what the Claimant said to Ms Delargy on 24 June 2019 (page 164) accurately reflects the Claimant's views of incidents of this nature at the time. In other words, regardless of whether the Claimant ever instigated any similar contact with JL, at the time, he generally regarded it as playfighting. He understood at the time that JL was not seeking to humiliate the Claimant, or to be genuinely aggressive to the Claimant, but the Claimant realised that JL's perspective was that this was good-natured fun, and acceptable behaviour in the workplace. In the Claimant's words to Ms Delargy "He [JL] loved it".

30. The Claimant was not frightened of JL's behaviour. He found it annoying and he would have preferred that JL did not do it. However, he did not complain to any Duty Manager about it.

31. On around 6 May 2019, there was a physical tussle which JL instigated and in which the Claimant defended himself. As he had done on other occasions, JL sought to put the Claimant in a bear hug. JL thought this was funny and, at the time, the Claimant knew that JL did not think it was funny. The Claimant threw JL off him, using no more than a reasonable amount of force.

32. For Item 5 of the Particulars of Harassment, the allegation is as follows:

    Date: 16 April 2019

Summary: Outside the Terminal 2 Restroom, during a disagreement between KDB and JL, JL called KDB a 'Paki' and 'Big Nose,' and threatening KDB that he will make sure he will lose his job before they got into the Terminal 2 Restroom. JL humiliated, offended and insulted KDB in the presence of his colleague Mr Balangodaau Lewis.
In the Terminal 2 Restroom, KDB responded by swearing and saying things that was out of character of him. KDB was over frustrated and said things heat of the moment. It was the first time KDB has ever responded this way after working for the company for over 14 years. He was set up and provoked after JL continuously threatening him. In addition to this, KDB wasn't made aware of the fact that JL was recording him, what he failed to do was record what he was saying to provoke KDB before.

Who was there: Outside the restroom: Mr Balangodaau Lewis
Inside the restroom: Mr Stuart Burton, Mr George Vaughan, Mr Balangodaau Lewis and there were a few more which I couldn't remember.

33. The individuals named as being present are ramp agents

34. They were subsequently interviewed during Ms Delargy's investigation as discussed below.

    34.1 Mr Burton was witness 3. Interviewed 25 June 2019. (page 169 of bundle).

    34.2 Mr Lewis was witness 7. Interviewed 25 June (167) and 12 July 2019 (179).

    34.3 Mr Vaughan was witness 8. Interviewed 8 July 2019. (175)

35. There was also a recording made by another agent, Harjeet Nijjar, who was witness 2, interviewed on 25 June 2019 (168) and 8 July 2019 (177).

36. Although we have not heard from either Mr Nijjar or JL, we have no evidence, and no reason to assume or infer, that Mr Nijjar and JL were working together to entrap the Claimant in any way. Our finding is that the recording has not been deliberately edited to show the Claimant in a poor light (or JL in a good light). We have no reason to doubt the account which Mr Nijjar gave to Ms Delargy, which was that it was the bad behaviour which (in his opinion) he was witnessing which caused him to covertly make an audio recording. We have no reason to believe that, at the time, JL was aware that an audio recording was being made.

37. The Claimant's claim to the tribunal is that:

> On the Tuesday 16th April 2019, outside the Terminal 2 Restroom, I was having a disagreement with James Lee, I can't recall the conversation, but I felt he was up to something as he kept calling me names. I felt he wanted a reaction out of me as he called me a "Paki", "Big Nose" and "oi paki" I can't wait to get you out". Lewis was at present at the time.

38. We are not persuaded of that. We accept that one of the insults (or one theme of some of the insults) which JL directed at the Claimant was about his nose. (See, for example, image at page 122, which is an image circulated in a Whatsapp group

that some employees had created for a lottery syndicate, in which JL has used a photo of the Claimant and replaced the nose with the image of a penis.

39. We are also satisfied that, as discussed below the word "paki" was used by JL about the Claimant. We are also satisfied that Mr Lewis heard JL use that word towards the Claimant.

40. However, we are not satisfied that the Claimant's account of what happened shortly before the recording started is accurate. Mr Lewis's account is not linked to 16 April 2019. The Claimant does now accept that he uttered the words heard on the recording "Voice 003" (which match the transcript at page 109 of bundle). He did not accept uttering those words when first questioned by the Respondent about them. His allegation to have been provoked into these words came much later. We do accept the possibility that, by June/July 2019, the Claimant had no specific recollection of what he said on 16 April 2019. However, during the discussion, there was ample opportunity for the Claimant to say (if it were true) that a few minutes earlier he had been called "paki" or other insults, and that was the explanation for his behaviour towards JL as demonstrated on the recording. JL criticised the Claimant's conduct and some colleagues were also critical of the Claimant's conduct. In particular, at one point, JL stated: "I've asked you for a work-related thing I haven't been personal". In our opinion, had the things which the Claimant has mentioned in his statement really been said, then it would have been natural for him to say something along the lines of "what do you mean 'not personal', you just called me … as we were about to come into this room".

41. It is true that on the recording JL was implying that the Claimant might be the subject of disciplinary action because of his conduct. He was not, however, threatening to make things up. Rather, it is quite clear in the context, that he was simply saying that an accurate account of the Claimant's conduct, and truthful statements from witnesses, would be grounds for management to take action against the Claimant.

42. For Item 6 of the Particulars of Harassment, the allegation is as follows

Date: Ongoing from April 2019 until June 2019

Summary: JL continued to grab KDB and make physical contact despite KDB telling him repeatedly to not make physical contact with him. This inappropriate behaviour then began to escalate. On several occasions JL would physical kiss KDB on the cheeks. KDB made it absolutely clear he did not want this.
JL then attempted to pull down KDB pants down in public and in the Terminal 2 Restroom.

Who was there: Witnesses presence were Mr Waqas Mohammed Zarait, Mr Stuart Burton, Mr Kenny Fisher (Manager), Mr Balangodaau Lewis, Mr Jagseer Dhillon and Mr Levie Cererio. KDB escalated this matter to Mr Amarjit Kalsi (Ramp Manager) in the presence of Mr Jagseer Dhillon to address his concerns about JL sexual harassment behaviour and his unprofessionalism in the workplace.
Again the matter was not documented and KDB was given no follow up information of how the matter would be resolved. Mr Amarjit Kalsi simply replied 'I would have a word with him'

43. Mr Zarait and Mr Fisher were witnesses for the tribunal hearing, but not interviewed by Ms Delargy at the time of her investigation.

44. Mr Cererio was an agent who was witness 1 in Ms Delargy's investigation and interviewed on 28 June 2019 (page 173).

45. There were occasions when JL sought to kiss the Claimant or other colleagues. At the time, the Claimant regarded this as being worse than the bear hugs. He did not want it to happen and made that clear to JL. However, at the time, he did not regard it as a sexual gesture by JL. At the time the Claimant regarded it as annoying behaviour which he did not want JL to do, but the Claimant saw it as being broadly in the same category of horseplay as the bear hugs. In other words, it was unwanted physical contact which the Claimant regarded as being something that JL thought was funny even if the Claimant and others did not.

46. The "restroom" is the large room, with seating, in which the employees could gather together while awaiting the next flight that required their attention. It is not a reference to a toilet area.

47. We accept that, on more than one occasion, JL attempted to pull the Claimant's trousers down. One witness (Lewis) reported to Delargy that this was mutual, ie that the Claimant pulled down JL's trousers sometimes as well. We are satisfied that Lewis is not biased in favour of JL, but he has not given evidence. The Claimant, supported by his tribunal witnesses) suggests that it was only done by JL to him, and not vice versa, and we accept the Claimant's account.

48. We do not accept that the Claimant complained to Mr Kalsi about the kissing, the pulling down of trousers, or any other physical contact. At the time, it was not the Claimant's opinion that these were the type of things to go to the Duty Managers about. While he was not kissing JL or pulling JL's trousers down, he generally was satisfied that he could give as good as he got and – as the recording of 16 April makes clear – he was not intimidated by JL and was willing and able to stand up for himself verbally using firm and strong language. For example:

    JL: I am your ramp supervisor show respect

    KB: you're a ramp stupid cunt if you want my honest opinion like everyone tells ya

    JL: yeah sackable yeah sackable

    KB: let me ask you have anyone let me ask you one honest question

    …

    KB: has one person ever said anything positive about you? No

    And

    JL: you don't work on facts you work on fiction

    KB: Yeah I'm fair I'm fair I'm fair fuck your fair

    ?: 'Muffled' Too much isn't it fucking hell

KB: they won't be I'm gonna knock him out you think I'm joking

49. For Item 7 of the Particulars of Harassment, the allegation is as follows:

Date: Ongoing from April 2019 until 9th June 2019

Summary: Ongoing from April 2019 until June 2019, on several occasions JL continued to call the KDB a 'Paki' and would again, greet KDB with kissing him on the cheeks and threatening KDB about getting him out of the business and this was ongoing in the Terminal 2 Restroom. KDB, time after time again explained to stop this. Mr Waqas Mohammed Zarait and Mr Balangodaau Lewis had witnessed this on several occasions from April 2019 until June 2019 in the Terminal 2 Restroom.
On the 9th June 2019, JL called KDB 'a paki' again and would again kiss him on the cheeks and told KDB 'you'll be out of the company soon' in the Terminal 2 Restroom. Mr Kenny Fisher who did overtime on the day and Mr Waqas Mohammed Zarait who was on shift both witnessed this. KDB spoke to management team about JL's behaviour and how he was being treated and that the banter is escalating because things are getting very personal.

Who was there: Witness were Mr Kenny Fisher, Mr Waqas Mohammed Zarait and Mr Balangodaau Lewis.

50. On the totality of the evidence, we are satisfied that, on one or more occasions, JL said the word "paki" to the Claimant, including, on one or more occasions, "big nose paki". Mr Lewis reported this when interviewed by Ms Delargy. JL has not given evidence in the hearing. We found Mr Zarait to be a credible witness.

51. Regardless of whether that word was uttered on 9 June 2019, we are satisfied, on the balance of probabilities, that Mr Fisher did not hear it said on that date and did not report to Ms Delargy on that date that JL was being racist to the Claimant or that JL had used the word "paki" to the Claimant or anyone else.

51.1 Mr Fisher and Mr Zarait used a similar sequencing of events in their statements as part of their accounts of 9 June 2019 and then straight after discussing that date, going back in time to discussing April.

51.2 Mr Zarait's statement is dated June 2020 and Mr Fisher's is dated September 2021. We have no reason to doubt that Mr Zarait produced his independently. However, the striking similarities between the way Mr Fisher's statement has been drafted means that we are not confident that he has produced his own statement independently and without being influenced by what Mr Zarait had already written.

51.3 Mr Fisher's statement was written around 27 months after the date of the incident in question does not demonstrate an independent recollection of the actual events.

51.4 Both Mr Fisher and Mr Zarait first mention the meeting between Josephine Delargy, Mr Fisher and JL on 9 June 2019. Their respective next paragraphs are:

> Zarait: Later that shift, myself and Kenneth Fisher witnessed JL telling Krishan “big nose paki” and “can’t wait to get you out of the business”.
>
> Fisher: Later, I witnessed James calling Krishan a ‘Big Nose Paki.’ He said, “can’t wait to get you out of the business,” along with some other comments but I can’t recall. He mentioned something about managers keeping an eye on you, but I can’t fully remember the details.

51.5 During cross-examination, Mr Fisher attempted to say that the “big nose paki” comment had been made before the meeting with Delargy and was something he specifically mentioned to her in the meeting. He tried to explain away his use of the word “Later” as quoted above in a way which we found implausible.

51.6 We are satisfied that it was JL who asked for the meeting with the Duty Manager, Ms Delargy, not Mr Fisher or the Claimant and that Ms Delargy is correct (and Mr Fisher is wrong) to say that there was no mention of the word “paki” being used by JL to the Claimant (or anyone else).

52. For these reasons we have not regarded Mr Fisher's statement as providing reliable corroboration of what Mr Zarait has said. However, taking into account that we found Mr Zarait to be credible, and that JL did not give evidence we are satisfied that on 9 June 2019 (later in the shift than the meeting which Ms Delargy attended), JL did use that particular expression towards the claimant.

53. In reaching this conclusion, we do not ignore the fact that the claimant did not refer to this incident in his ET1 or the investigation meeting with Ms Delargy. However, we are satisfied that it did happen. We note that one of the witnesses who were interviewed by the respondent in June and July 2019 did state that they had heard that comment being made, albeit they did not specify a particular date. The appeal officer, Mr Saunders, said that he accepted the claimant's account that the word had been used towards him, albeit he did not necessarily make a specific finding about whether it was said on 9 June 2019 or not.

54. We note that JL’s apparent reason for calling the meeting with Ms Delargy on 9 June 2019 is that he thought (whether rightly or wrongly) that the Claimant had been mocking him that day. In other words, some time earlier the same day, before he used the expression “big nose paki cunt”, he had been upset about the way that he perceived the Claimant was treating him. On that particular day, 9 June 2019, relations between the Claimant and JL did not seem to be jovial.

55. It is our unanimous decision that 9 June 2019 was not the only occasion on which JL ever used the particular word “paki”.

56. The majority's (Mr Hoey and Mr Maclean) opinion is that the evidence is that the word was used frequently. The minority’s (EJ Quill) opinion is that other than by JL there is not evidence of the word being used by white staff to staff with Asian heritage while at work, but there is evidence that the word was used at least occasionally by Asian staff and/or away from work.

57. For Item 8 of the Particulars of Harassment, the allegation is as follows

Date: Ongoing from April 2019 until May 2019

Summary: JL was editing pictures and sending them in the work WhatsApp group. These included inappropriate sexual images of KDB face, placing a penis onto his nose and sharing this in a personal work WhatsApp group.

Who was there: WhatsApp Group which had majority of Dnata staff from Terminal 2 including Mr Jagseer Dhillon, Mr Stuart Burton, Mr Levie Cererio, Mr Balangodaau Lewis and many other work colleagues from another department.

58. There was an image of the Claimant with a penis instead of a nose. It was created by (we assume), and circulated, by JL in the lottery syndicate WhatsApp group. Our finding is that this was not a group used by Duty Managers and above to issue instructions to staff. It was seen by staff as their space, not the Respondent's space.

59. The Claimant's attitude to the back and forth exchange of insults was discussed in his meeting with Ms Delargy on 12 July 2019. See pages 184 and 185 of bundle. Although the notes are not verbatim, he is recorded as saying "Banter is in my blood" and he accepts he said that. He said that JL might call him "big nose cunt" and he might respond with "fat cunt". He said that everyone did it, and it was regarded as "banter". In other words, to Ms Delargy, the Claimant was saying that the insults were not intended to be taken seriously and that both the maker and the recipient of the insult knew that.

60. He also referred specifically to the penis nose photo in the context of discussing what he regarded as banter. In context, he was responding to the allegation that he had said to JL "'you're a cunt when you're happy and when unhappy still a cunt". As part of his explanation for why that was acceptable, he used the penis nose photo of something similar (ie something that might seem offensive to someone else but that JL and the Claimant did not regard as offensive in their exchanges with each other). Later, when asked to send the penis nose photo to Ms Delargy, he is recorded as saying: "Can do. Didn't bother me but I would class as banter as well. Showed you to prove not just me." Although this is not necessarily verbatim, it is an accurate representation both of what the Claimant said to Ms Delargy and of what the Claimant thought at the time about that photo in particular, and the sexual imagery - used as part of so-called "banter" - in general.

61. We note, for example, pages 130, 132 and 134 of the Claimant's supplementary bundle, but do not find that the Claimant was offended by these images at the time that he saw them.

62. For Item 9 of the Particulars of Harassment, the allegation is as follows:

Date: 6 May 2019

Summary: Whilst on a rest break in the restroom, JL tried to take down KDB trousers down again in front of his colleagues, despite KDB addressing that he doesn't want to be touched or exposed. KDB had swung JL onto the floor so he would get off- (no reports were made at the time, no bruises were made as he later claimed: no evidence whatsoever as KDB asked to see in the Disciplinary hearing to see the evidence).

Who was there: This act was carried out in the presence of Mr Jagseer Dhillon, Mr Stuart Burton, and Mr Balangodaau Lewis.

63. We have already commented on this incident above. However, we do not find that JL was attempting to take the Claimant's trousers down. He was seeking to bear hug him from behind and the Claimant successfully threw JL off him.

64. On 10 June 2019, JL sent an email to Michael Ansell at 11:29 (page 130 of bundle). This email set a chain of events in motion, by the end of which both the Claimant and JL had been dismissed. In the email, he confusingly refers to 6 May 2019 as being "last week". To the extent that he suggests in that email that the Claimant instigates "play fights" and he suffered bruises on 6 May 2019 as a result of alleged aggression by the Claimant, we find those things are not accurate. We note, for example, that on 30 July 2019, in his disciplinary meeting with Mr Smith, JL did accept that he had lifted people up (page 299).

65. Given the date of the email to Mr Ansell, and given the fact that he refers to his perception that he had been insulted by the Claimant on 9 June 2019 (in the incident that led to the meeting between JL, Fisher and Delargy) it seems likely that one of JL's motivations for sending that email is that he was still annoyed about that incident the following day. At the time he sent this email on 10 June 2019, JL was not feeling jovial towards the Claimant or engaging in banter.

66. For Item 10 of the Particulars of Harassment, the allegation is as follows

Date: 9th May 2019

Summary: KDB was asked to meet with Mr Amarjit Kalsi in regard to matters escalated by JL. JL had alleged that KDB had behaving inappropriately. KDB defended himself by pointing out all inappropriate behaviour including physical touching, physical kissing, attempting to pull his trousers down in public, the racial verbal abusive received, the constant threat of disciplinary action and threats of losing his job. Mr Amarjit Kalsi still didn't document anything, blue box or follow the formal process with an investigation. Mr Amarjit Kalsi said to KDB 'what shall we do'. KDB said 'I'm not the only one who is not happy and perhaps moving JL or KDB to another line as per the process'. Mr Amarjit Kalsi said 'I will look into it'. There were no further follow up action.

Who was there: KDB and Dnata Ramp Manager Mr Amarjit Kalsi

67. Mr Kalsi is sometimes referred to as "Ammo" at work.

68. The Claimant points out that in his meeting with Ms Delargy on 22 July 2019 (page 188 of bundle), JL has said that Ammo has "pulled them in" meaning, the Claimant argues, that there was a meeting between Mr Kalsi, Mr Dhillon and the Claimant and the Claimant says that that was a meeting at which he complained about JL.

69. In his statement for the tribunal, however, he says that he might have the date wrong for this Item 10 and it might have been 10 June 2019 when he met Mr Kalsi.

70. After JL's 10 June email to Mr Ansell, Mr Ansell asked for volunteers amongst the Duty Managers to take it forward. Since Mr Tong was potentially going to be leading on a capability process for JL, he ruled himself out at 17:25 on 10 June by writing to Mr Ansell and the other Duty Managers. In the email (page 128) he said:

> "[I] ask that in the meantime we come down hard on Krishan. As I've mentioned previously, he is clearly baiting James and that has to stop."

71. Our finding was that Mr Tong was not suggesting that the Claimant be dismissed. Furthermore, he was writing to colleagues whom he regarded as sensible and experienced. He knew that they would know that there were proper procedures to be followed before any formal sanction could be applied and he did not expressly refer to such procedures because he thought it was too obvious to need stating.

72. At 22:41, Mr Kalsi emailed Mr Ansell and the Duty Managers to report that he had spoken to each of JL and the Claimant. We are satisfied that what Mr Kalsi wrote in that email is a reasonably accurate summary of the conversation he had had earlier the same day with each. He was aware that matters were potentially going to lead to a formal investigation, and he took seriously Mr Ansell's request for feedback.

73. If the Claimant had told Mr Kalsi that there was any allegation of racism by the Claimant against JL or against the Respondent, then Mr Kalsi would not have forgotten to mention that in his email. Furthermore, he would not have deliberately decided to fail to mention it either. Firstly, he had nothing to gain by failing to mention it. Secondly, on the contrary, he knew that he would be leaving himself open to criticism if he failed to record / act upon such an allegation. Had the Claimant actually said to Mr Kalsi, on 10 June, that he was alleging that JL's (allegedly bad) treatment of him was related to race, then Mr Kalsi had every reason to expect that the Claimant would repeat that claim later on, and would also say "And I told Ammo this on 10 June". For the same reasons, Mr Kalsi would also have noted the Claimant's allegations had the Claimant alleged that he was being inappropriately kissed or having his trousers pulled down.

74. The reason that Mr Kalsi's email made no mention of any allegations of racist motivations (or overt racist acts) by JL is that the Claimant made no mention of such things to Mr Kalsi. Rather, the Claimant told Mr Kalsi, and Mr Kalsi accurately noted, that JL's suggested motivations were more along the lines that he treated some people (such as Mr Nijjar) better than others because of friendship (not because of race, which was not mentioned) and that (what the Claimant perceived as) JL's bad behaviour was that JL was expecting to move up to Duty Manager (or some other promotion) and was throwing his weight around because he thought he could.

75. Furthermore, as Mr Kalsi's email makes clear, the Claimant knew on 10 June that the topic of conversation was his, the Claimant's, behaviour to JL. Mr Kalsi accurately noted that the Claimant's position was that his conduct to JL was simply "banter" and that he, the Claimant, was not a bad person. The Claimant's position at the time was that JL was usually happy to give and take "banter" but that sometimes, when the Claimant sought to engage in "banter" with JL, it was JL who would be the one to object.

76. Our finding is that the Claimant did not complain to Mr Kalsi on 9 May, 10 June, or any other date, that we was receiving racial abuse or sexual harassment from JL.

77. For Item 11 of the Particulars of Harassment, the allegation is as follows

Date: 5th June 2019

Summary: JL would frequently assigned KDB with the most labour intensive job. This is recognised by the business that these jobs required most physical labour. JL would use his leverage as KDB line manager to assign him to these jobs and then would make fun of KDB by saying 'i would like to see you in physical pain'.

KDB had no choice to complete the requests from him because he continuously threatened KDB about getting him sacked. KDB completed the task safely and secured.

JL have also mentioned in his investigation notes:

"… and he did the job and performed well and praised him after the job. When he does the job he's very good."

2. James would be open about wanting to see the KDB in pain, sharing this through the work WhatsApp group. 05/06/2019 James Lee messaged in the WhatsApp group:

(i) Excellent you want to do the rear lifter on the spinner as well tomorrow

I like it when your in pain 😂😂😂

(ii) Very generous Mr Bhardwaj

(iii) 👌

78. It is true that, as supervisor, JL could and did allocate particular tasks to the Claimant.

79. The WhatsApp messages are at page 123 of the bundle and are from 5 June at 15:27. We do not have the full context of the discussion and, in particular, we do not have the Claimant's message at 15:26 to which JL's 3 messages are a reply. Stuart Burton also replied to the Claimant shortly before JL with "Lol". So we infer that the Claimant has posted something which was intended to cause amusement, and it had caused amusement. We infer that JL's comments are intended to be in the same vein. We do not treat this as being JL seriously allocating a work task to the Claimant for the following day for the following reasons: (a) It is a post in the non-work WhatsApp group used for the lottery syndicate; (b) it is intended to be regarded as a comment made by way of a joke; (c) it is posed as a question not an instruction. Similarly, the comment "I like it when [you are] in pain" was not intended to be taken literally, and we are not persuaded that, at the time the Claimant read it, he did take it literally.

80. There was some discontent about JL's performance as team leader. Prior to 10 June, Mr Tong was intending to follow capability procedures in relation to JL.

Furthermore, there was a group grievance (the precise date of which is discussed in more detail below) in or around June 2019 which the Claimant, Bradley Sanders, Liban Mahdi, Mr Lewis, and Mr Zarait signed. In it, there were complaints about JL's attitude and alleged poor communications skills and management skills. However, there is no specific reference to allocating work unfairly to the Claimant.

81. One of the signatories, Bradley Sanders, had previously had a discussion with Ms Delarrgy which he followed up with an email on 23 May (page 118 of bundle) which was referred to Mr Tong for investigation. Amongst other things, Mr Sanders believed that JL was inappropriately claiming to have more authority than he actually did have over Mr Sanders (who was not on JL's team) and others. The Claimant relies on this email as evidence of JL seeking to give him harder tasks than others (and/or the hardest tasks available). In context, it is clear that the point that Mr Sanders was making was not that JL had purported to give the Claimant an unduly onerous task. Mr Sanders' point was that JL was purporting to contradict/undermine the instructions of the supervisor in charge of the flight in question who already had allocated work to the Claimant. Furthermore, Mr Sanders perspective seemed to be that the Claimant was not necessarily a particularly hard-working colleague.

82. In Mr Burton's interview with Ms Delargy (page 169), it was not his view that the Claimant was particularly hardworking. Mr Cererio (page 173) expressed the view that the Claimant always got the easy jobs. Mr Nijjar (who the Claimant regards as being particularly on good terms with JL) stated that the Claimant did less than anyone else (page 177).

83. The Claimant has not persuaded us on the facts that JL gave the Claimant more work than others or that he gave the hardest tasks to the Claimant more often than to others. We are not persuaded that the Claimant was being particularly targeted by JL for harder work.

84. For item 12 from the particulars of harassment (which is background), the Claimant comments as follows:

Date: 7th June 2019-9th June 2019

Summary: Bradley who is a Ramp Service Agent for Dnata had several conversations with the management team, regarding the way he was being treated by JL. He made a document to highlight the key behaviour that JL demonstrated throughout his time in working in Terminal 2. Bradley asked colleagues to sign this petition if they agree and if they disagree, they don't need to sign the document. JL's behaviour and the way he was managing the team, was significantly impacting the team's atmosphere in a negative way. Barbara Lilley (Dnata Ramp Manager), mentioned to Bradley that this will be shared with Mr Michael Ansell who is the Head of Terminal 2 Manager, however, shortly after, Bradley was informed that no further action will be taken, and this is a witch-hunt. 5 people including KDB agreed and signed this petition/complaint.

Who was there: Barbara Lilley, Mr Balangodaau Lewis, Mr Waqas Mohammed Zarait, Mr Harjeet Nijjar, Mr Bradley Sanders, Mr Balangodaau Lewis, Mr Jagseer Dhillon and Mr Shane Earp-Jones

85. We accept that this document (154-155) was drafted by Mr Sanders (who the first signatory) and that where it refers to "I" that is a reference to Mr Sanders specifically. We are not persuaded that JL had seen this particular document before he sent his 10 June emails to Mr Ansell complaining about the Claimant.

86. On balance of probabilities, the petition was submitted to the Respondent around 18 or 19 June 2019, which is consistent with Ms Delargy's evidence (and we found her to be a credible witness) albeit she stated that she only had a vague recollection of when she first saw it. However, the outcome letters sent by Mr Smith to the signatories who were still employed as of 12 August specified a petition date of 19 June 2019. Whatever the source of Mr Smith's information on that point, that was written when the events were much fresher in everyone's minds, and we have seen no evidence of anyone challenging Mr Smith over the date.

87. The petition did not state or imply that the Claimant was being treated worse than anyone else. The petition did not state or imply that JL was treating anyone differently because of race or that he was using racist insults or language.

88. For Item 13 of the Particulars of Harassment, the allegation is as follows

Date: 9th June 2019

Summary: JL had made it very clear when they last spoke that he was looking to get KDB out of the business, following on from the petition, that he believed he did. KDB received a friend request on Instagram from JL. This is very confusing for KDB, KDB didn't accept it because he felt that JL was up to something, one minute it's just banters from his side but then when KDB responds, he is reporting him to the manager.

Who was there: Witness presence was Mr Kenny Fisher and Mr Waqas Mohammed Zarait.

> Statement: Witness Minutes June 2019- Staff Member 4: ("JL said we have a love/hate relationship and he tells everyone he is trying to get rid of KB. The boys on that line have banter and it quickly goes over the line with JL. He doesn't think it is funny, when often it is not about him. He not a calm person, when you talk to someone in a dictatorship fashion it doesn't go down well.")

89. The statement to Ms Delargy which is quoted is what Liban Mahdi said to her on 25 June 2019 (page 170 of bundle). For context, the full note says:

> **JD**: We are undertaking an investigation into allegations made by JL towards KB surrounding his performance, behaviour both verbal and physical towards JL. Your name was mentioned as being in the crew room on the 14 May 2019 when JL was given verbal abuse regarding his weight and you were involved and everyone was laughing
>
> **LM**: I don't know what is going on as I don't work on that line, I popped in to see everyone as I don't see anyone. They were having a laugh and banter and JL felt he was being picked on, everyone was saying things, all were talking as a joke and not to take offence. One of the guys wasn't happy as JL had spoken about him in a group chat and was approached by JL and said come into my office now. I said to JL that's not how you

> speak to people. He then pulled both myself and KB and said come in to my office. Both KB and JL were arguing with each other, I thought it was a joke, a love/hate relationship. They go out together and sometimes JL is someone who can take a joke and have a laugh. But JL sometimes can't take a joke, he makes out he is a Manager and can't take it. He said, this is my area, T2, I run it. I said you don't run it, you are the TS, not the Manager. He automatically assumes when people are laughing he thinks everyone is talking about him. They are not. When you work with guys, you have a joke, and make fun of each other. If they use inappropriate language and behaviour, how can you go out for drinks. In the past, I have asked, how you go out for drinks then put a grievance in. JL said we have a love/hate relationship and he tells everyone he is trying to get rid of KB. The boys on that line have banter and it quickly goes over the line with JL. He doesn't think it is funny, when often it is not about him. He not a calm person, when you talk to someone in a dictatorship fashion it doesn't go down well.

90. In summary, Mr Mahdi (one of the petition signatories) does not have a high opinion of JL. He also states that he does not generally work on the team and does not claim first hand knowledge of what goes on. Nothing in Mr Mahdi's statement to Ms Delargy implies that JL was intending to tell lies about the Claimant in order to get the Claimant fired. To the extent that Mr Mahdi suggests that JL was implying that there might be some action taken by him against the Claimant (either disciplinary action intended to lead to dismissal, or some action to have the Claimant moved to another team), Mr Mahdi is apparently stating that JL was making these comments openly, and not as part of an intended secret conspiracy to gather fake evidence about the Claimant. The panel also has had the benefit of the audio and the transcript for the 16 April 2019 incident in which JL said to the Claimant's face that the Claimant's behaviour was (according to JL) grounds for disciplinary action and that JL believed that some of the agents present in the rest room at that time might be willing to give (truthful) evidence about what the Claimant was saying and doing.

91. As discussed above, the petition was submitted to the Respondent around 19 June 2019, and we are not persuaded that JL had somehow seen it while it was being circulated for signatures (or that he had seen it prior to his 10 June complaint about the Claimant). In any event, Mr Mahdi was being specifically asked about events of mid-May 2019.

92. We have no reason to doubt the Claimant's account that JL made a friend request on Instagram, but that does not assist us with any of the matters that we have to decide in this case.

93. For item 14 from the particulars of harassment (which is background as far as the Equality Act claims are concerned, and expressly stated not to be anything to do with sex or race, but which is potentially relevant to the unfair dismissal complaint), the Claimant comments as follows:

> **Date**: 14th June 2019
>
> **Summary**: Having dismissed the group petition without investigation KDB was invited to an investigation process due to allegations raised by JL. During this investigation process there were a number of breeches of KDB investigation rights.

- KDB was not given details of a witnesses making statements against him and was therefore unable to put together appropriate defence.

- A tape recording was used as the main material evidence against KDB. This recording was referred to throughout the investigation process but was not shared with KDB until the end of the appeal hearing. Again this did not allow KDB the opportunity to defend himself against the allegation made against him.

94. We accept that, initially, the Respondent was not proposing to treat the petition (received on 19 June 2019) as a formal grievance. After the Claimant and JL had been dismissed, it did give formal outcome letters, dated 12 August 2019, to the remaining signatories.

95. At 9:09 on 10 June 2019 (pages 132-133), JL wrote to Mr Ansell in terms which make clear that he is criticising the Claimant's conduct (including allegedly directing abuse at JL, and allegedly being regarded by team mates as lazy) and that the Claimant is allegedly causing JL distress, but proposing that Mr Ansell resolves the matter informally by moving the Claimant to a different team, rather than JL making a formal complaint. Mr Ansell responded by asking for specific details, which JL supplied in the 11:29 email previously mentioned, and which read in full:

> Incidents/ dates
>
> 16th April 2019, Verbal abuse regarding my weight, I was sat at computer, Krishan in the rest room amongst the team.
>
> 14th May 2019, Verbal abuse regarding my weight and this also fuelled another party Liban Mahdi from T3 to get involved, I was sat at the computer at the time. Everybody laughing.
>
> 31st May 2019, Krishan on phone not pulling his weight on the SQ321, Harjeet expressed his feelings to me and after discussion in the office to resolve the issue, Krishan told me to go fuck myself several times as I requested Krishan to stop shouting and arguing. I recieved kind words of support from Harjeet after this as I showed him support as he was subjected to poor behaviour.
>
> 6th June 2019, I requested Krishan to do rear lifter on SQ306/305, Krishan refused and tried to pick his own jobs in front of the team, Because I stood firm I recieved verbal abuse, Such as Fat C##t and go and die. Krishan eventually carried out my request and I did praise him the the work he did after the flight.
>
> 9th June 2019, Kenny Fisher working overtime, As soon as Kenny entered office Krishan started praising Kenny's arrival and proceeded to slate me, Whilst I was sat at the computer minding my own business. I did react to this and I did sate about Krishan already being pulled up by management for exactly similar behaviour, Krishan did not care.
>
> Krishan also like to do this so called play fight with me, When I have told him not to he proceeds to punch relatively hard and slap me on the back which is painful, Last week on 6th May 2019 he bundled me to the ground and did what he calls a play fight on me, I went home with bruises as a result

96. There is no mention of any audio recording. We are not persuaded by the Claimant's contention that JL knew that (on 16 April 2019) Mr Nijjar had made an audio recording. In any event, Mr Ansell and any other reader of this email would not have been alerted to the existence of any such recording.

97. As mentioned above, Mr Ansell forwarded this to the Duty Managers. Mr Tong and Mr Kalsi each responded as mentioned above. Ms Delargy volunteered and was appointed to take things forward. She commenced an investigation into the 6 specific matters referred to in JL's email. She interviewed JL around 18 June 2019 and obtained details of witnesses.

98. She interviewed the Claimant for the first time (as part of this process) on 24 June 2019. Her letter calling him to this meeting was dated 18 June 2019 (page 152 of bundle) and included:

> Re: Request to attend investigation interview
>
> This Letter is to confirm you are required to attend an investigation interview on Monday 24 June 2019 at 1230 hours in the Duty Manager Office, Landside Terminal 2.
>
> The purpose of the investigation is to discuss alleged matters of concern raised by James Lee, Ramp Team Supervisor relating to you in terms of your underperformance, use of inappropriate behaviour and language directed towards James, and Derogatory comments to James.
>
> I will be conducting the interview, and Duty Manager, Helen Lilley, will also be present.
>
> You do not have the right to be accompanied at the investigation stage of the process, however we have extended this right i.e. to be accompanied by a work colleague or official Trade Union Representative, provided this does not cause delay to the investigation. When making contact to confirm your attendance, please advise who you wish to accompany you.

99. It is our finding that the Claimant did understand, as a result of this letter, that there were allegations against him which were being investigated by Ms Delargy under the disciplinary procedure. He was not under the mistaken belief that this was part of an investigation into complaints about JL. Furthermore, at the end of the interview on 24 June 2019, Ms Delargy made clear that (while the Respondent had not called the investigation meeting because of a finding of "guilt") the matter was not concluded and formal disciplinary proceedings was a possible outcome.

100. During the meeting on 24 June 2019, the Claimant was asked to give his side of things in relation to each of the incidents. He made no allegations of being called "paki" or of any racial or sexual element to (what he described as) JL's conduct. In general terms, he suggested that he and JL had a relationship in which they would each seek to wind each other up for amusement, and implied that JL was falsely seeking to portray these incidents – which had been give and take "banter" at the time, according to the Claimant – as misconduct by the Claimant.

101. There was no mention of the audio recording of 16 April 2019, because Ms Delargy was not aware of its existence at the time. During her investigation, Ms Delargy interviewed the potential witnesses suggested to her by JL, one of whom was Mr Harjeet Nijjar, referred to "witness 2". She interviewed him on 25 June 2019 (page

168). During this meeting, Mr Nijjar played to Ms Delargy an audio recording which he had covertly made (and the parties agree this is of 16 April 2019 and, as discussed above, includes a discussion/argument between the Claimant and JL with some input from others present in the rest room at the time). He said he would be willing to provide a copy to Ms Delargy, and she took him up on that offer.

102. She met Mr Nijjar again on 8 July 2019, to discuss the recording. Her notes of that meeting are on page 177. She asked why he made the recording, and he said it was done on spur of the moment. He said that - while he had seen colleagues swearing at each other before - this was out of the ordinary. He told Ms Delargy that the argument had been more extreme before the start of the recording and that his perception was that it had escalated from a disagreement between Mr Zarait and JL. In the meeting, he said that no-one else knew about the recording, including JL, and supplied it on a USB to Ms Delargy.

103. An invitation to a further meeting was sent to the Claimant dated 5 July 2019. It is at page 174. It was sent on Ms Delargy's behalf, but pp'ed by a colleague. This letter had the potential to mislead in that it commenced:

> Re: Witness Statement Invite
>
> Further to your witness investigation meeting on Tuesday 25th June 2019 regarding alleged matters of concern that have been raised by James Lee, Ramp Team Supervisor, relating to the use of inappropriate behaviour, language and derogatory comments towards him from another member of staff, additional evidence has come to light, therefore, we would like to invite you to attend a further witness investigation interview on Friday 12th July at 11.30a.m. in the HR Office, Room 2513, 2 nd floor South Wing Offices, Terminal 3.
>
> I would like to clarify that you are not under investigation, however, I believe you may be able to provide relevant information as a witness, regarding the further evidence.
>
> I will be conducting the interview and Alison Beaney, HR Business Partner, will also be present.

104. On the morning of 12 July, prior to the meeting with the Claimant, Ms Delargy conducted a second interview with Mr Lewis (Witness 7). Amongst other things, the interview notes record him as saying:

> **JD**: Re. meeting, further to 25 June. Things commented on re. JL/KB - push ing/pulling, trousers down. Good pals in T3. Affecting the team. Banter sometimes okay, sometimes not. Affecting team. Anything to add re. JL/KB conversations?
>
> **BL:** Recent. Probably a month or two. I'm not like the young lads. They chat. Now everyone having a problem because of both of them.
>
> **JD** What's happened?
>
> **BL** As an example, JL will ask me to do something. I'll say, 'come on, man'. To others, different. All different. KB is mouthy. Will turn around and say. They not realised. JL looked after old man on the team, Harjeet. Why does he come to Bradley, Waqas, Krishan?
>
> **JD** They have concerns why someone is treated differently?

BL Yes.

JD How is the team affected?

BL You have a job, just do it. You should be happy. Enjoy. 1 can see the way things are happening now, you know?

JD One concern raised by JL is verbal abuse from KB. You mentioned trousers, pushing etc. Have you heard verbal abuse?

BL What?

JD 'Cunt'.

BL Yes. He called him big nose, Paki. Like lover, went to canteen (together). Best mates. Swear, pull each other. Heard a manager in T2 who is supposed to leave, Helen.

JD Not happening.

BL He made himself powerful. We're older. Have kids. They're young lads. It's crazy. Very wrong

JL. They were good friends. Should shake hands. Told me personally he'll sort him out. Thought he'll grass him up. If me, I'd shake hands and finish it.

JD You said banter...'cunt, fatty, big nose'?

BL Yes. Gone too far.

JD Beyond banter?

BL That's what's happened. Last couple of months.

JD What's acceptable banter?

BL Up to them. I'd say, 'excuse me, don't bring family into it'. Pushing/pulling? One asleep on the sofa, the other ties up shoelaces.

JD Both?

BL Yes, but thought could now control but too late.

JD Would say?

BL 'Fuck off you big cunt'. Not just them.

JD Who says?

BL KB to JL. JL says 'big nose'. Fighting and swearing. Big argument then goes for coffee/tea.

JD When was last argument then tea?

BL Recently. Week or two before. Were good pals. I speak to some allocators. What I've heard is

> **JL** is giving trouble to people, to team leaders, allocators. His habit. Previous companies, he had problems with others. Trevor and Nick worked together. Said calm down, do the job.
>
> **JD** What you heard rather than know?
>
> **BL** Yes. They were best friends, sweethearts. We're all in it now.

105. Although these are only one person's opinions and recollections, and although Mr Lewis has not testified, in many respects what he says in that extract is representative of what other witnesses said to the Respondent (Ms Delargy) during the investigation stage. In summary, that both JL and the Claimant were seen as having been – in the past – mutually involved in jokes (including insults not intended to be taken literally or seriously) at the other's expense. However, more recently, there had been some disagreements or arguments that had not been "jokes" or "banter".

106. Mr Lewis's reference to the word "paki", however, was not typical, and he was the only one of the witnesses to have said that.

107. Mr Lewis was asked again about 16 April in the light of "additional evidence" (which the panel is aware is a reference to the recording, but Mr Lewis was not told that) but had no new specific information to add.

108. The second meeting with the Claimant took place on 12 July 2019. Notes are at page 182. Like the first meeting, the Claimant was accompanied by Mr Dhillon, a work colleague.

109. At the outset of the meeting, Ms Delargy referred back to the fact that they had met on 25 June (in a meeting which the Claimant was aware was investigation meeting into his alleged conduct) and said that during that meeting the Claimant had referred to having evidence about JL's conduct. He said he had that evidence on his phone, and during the course of the meeting, from time to time he showed Ms Delargy items on his phone to illustrate a point he was making. These included the penis nose photo and other items sent by JL referring to the Claimant's nose.

110. During the meeting, the Claimant made no reference to the word "paki" and no allegation of any racial element to JL's behaviour. More than once he said that JL had a good heart, and was likeable outside work, but a different person at work.

111. During the meeting, amongst other things, the Claimant mentioned that staff did not like working with JL and spoke about a person who had asked to move teams to (according to the Claimant) get away from JL. (Mr Lewis has made a similar remark.) The Claimant also said that he accepted, "There are faults on my side, banter."

112. During the meeting, Ms Delargy, without telling the Claimant about the recording, asked some questions that were based on what she had heard about the incident, approximately 3 months earlier, on 16 April.

> **JD** Re. specific additional evidence, have you sworn?
>
> **KB** He calls me a 'big nose cunt'. I call him 'fat cunt'. Everyone does it. Banter.

JD Generally, or to someone?

KB Banter is in my blood. Sometimes he calls me a 'cunt'. I call him one to him. He also starts things as well. Don't know what he's trying to achieve. Like bear hug.

JD Evidence we have is you said, 'you're a cunt when you're happy and when unhappy still a cunt'.

KB Yes, when he threatened me if I don't work the way he wants, he'll report me. You get to the point when you've had enough.

JD You remember saying that?

KB A while back in a What's app message.

JD In April. Not in What's app, in the crew room.

KB The way he treats people. Enough is enough. No one treats me the way he does. You can keep me on the line.

JD So, you said?

KB Not in crew room. He says, 'big nose cunt'. Know not serious, just banter.

JD That word 'cunt', used by all? Supervisors?

KB Yes. Ramp environment. Not in front of managers. Can't tell you I didn't say but not in crew room.

JD (restates words used - 'you're a cunt when you're happy and when unhappy still a cunt'.

KB From where? Harjeet?

JD A confidential source.

KB I can show you another thing too (shows photo on group What's app showing image of KB with penis nose, sent 5/6/19). Ask Stuart Burton how many photos but I wouldn't do that (face & hold).

113. After that last remark of the Claimant's there was no further attempt to divert the discussion back to 16 April. Neither the Claimant nor Ms Delargy made any reference to the fact that the invitation letter said that the Claimant was being treated as a witness rather than the subject of an investigation. Towards end of meeting, she said the investigation was still ongoing.

114. The Respondent decided, based on Ms Delargy's investigation, that there was a case to answer. Mr Steven Smith, Terminal Business Manager, was appointed to hear the case. He was of comparable seniority to Mr Ansell and more senior than Ms Delargy, Mr Tong and Mr Kalsi. As well as being appointed to hold a disciplinary hearing in relation to the Claimant's conduct, he was also appointed to hold a disciplinary hearing in relation to JL's conduct.

115. On 22 July 2019, the Claimant and JL was each suspended on full pay pending disciplinary hearing. This was confirmed by Ms Delargy in writing the following

day, and she also wrote to JL that day to say his grievance of 10 June 2019 had been upheld following her investigation.

116. By letter dated 24 July 2019 (page 194 of bundle), the Claimant was invited to a disciplinary hearing on Monday 29 July 2019. The 6 allegations specified on page 1 matched the contents of JL's 10 June 2019 (second) email to Mr Ansell, and matched the topics about which he (and other witnesses) had been asked questions by Ms Delargy. On the second page, it stated:

> There is evidence to support that you subjected [JL] to aggressive behaviour and abusive language over a period of time which constitutes harassment, bullying and insubordination in the workplace, examples of what you have said to him or directed to him in the crew room being:
>
> 1. 'Nobody wants you in the company, including Azzura, the police, you'll be surprised what people say about you'.
>
> 2. 'If you think you can come to this company thinking you're another top shot here, think twice'.
>
> 3. 'Good mood he is a cunt, bad mood he's a bigger cunt'.
>
> 4. When asked by James Lee to show some respect you replied, 'You are a ramp, stupid cunt, like everyone tells you. Let me ask you one question, has anyone ever said anything positive about you? No'.
>
> 5. 'I am going to knock him out, you think I'm joking'.
>
> 6. 'If you're going to give it, you're going to take it. You threatening me with managers and stuff, I'm going to carry on'.
>
> 7. 'Watch outside. I'm going to kill him. He thinks he's a copper the way he talks'.
>
> Evidence from all the interviews was fully reviewed, after which the outcome decision was made to uphold the grievance in [JL's] favour.
>
> It was decided that you had a case to answer in respect of your own behaviour and actions which would be referred to another line manager who would invite you to attend a disciplinary hearing.

117. The 7 points listed are quotes from the recording made by Mr Nijjar. However, the letter did not say that they were from any recording. The disciplinary policy was supplied with (and referred to in) the letter and so was the investigation pack of redacted witness statements (197.A to 197.N) and index of those statements (197). The redactions concealed the identities of the person making the statements, and some other information. The part in Witness 7's statement that said that JL had called the Claimant "paki" was not redacted. The panel has reviewed the unredacted versions, and has not found anything suspicious; that is, we are satisfied that there was no attempt to conceal comments that the witnesses had made which were exculpatory of the Claimant. We accept that, by making the redactions, the Respondent's intention was to preserve anonymity of the witnesses, and to exclude comments (whether for data protection reasons or otherwise) that were not seen as relevant. We also accept that Mr Smith only saw and took into account the redacted versions.

118. The letter stated that if the Claimant was found to have committed gross misconduct, he might be dismissed without notice.

119. The hearing took place, and there are reasonably accurate notes from 201 to 269. These are handwritten and we do not treat them as verbatim. The allegations from the letter were each put to the Claimant and he was given the chance to respond to each of them. He admitted, for example, calling JL "fat cunt", and said language of that type was common place (and, by implication, that it was the opinion of all the ramp agents and supervisors that it was acceptable). He suggested that JL had built a (false) case against him to try and portray his actions in a different light (by implication that the abusive language was one-sided and that it was serious, not joking). He mentioned that JL would provoke him by kissing him by calling him the "p word". (Mr Smith knew that the Claimant was referring to the word "paki").

120. The Claimant stated that, in relation to alleged quotes on the second page of the letter, he did make the third comment in a Whatsapp exchange, and denied the rest. He said "all made up". (Bottom of page 229). Upon being pushed (with Mr Smith asking what he would say if told there was credible evidence) he said that, other than banter on Whatsapp, he was sure he had not said those things.

121. The Claimant's responses included complaining about the bear hugs which he said were unwelcome and claiming he had raised this with management, and talking about the flight safety issue which had led to his email to Ms Delargy (as discussed above) and suggested that JL had been annoyed with him since then. He referred to the petition commenced by Mr Sanders. He showed Mr Smith videos and pictures which he said supported his comments about JL. At bottom of page 258, he suggested one possible reason for Mr Smith to take into account as a potential reason for JL's antagonism. However, that is not an argument pursued in these proceedings. He stated that it was not reasonable for him to have been called "p word" and that if he was to work with JL in future, he would want that to stop.

122. The Claimant accepted that his reactions to JL had been terrible, while stating that he was the victim of JL's conduct.

123. The meeting concluded with Mr Smith stating that the Claimant was being dismissed with immediate effect for gross misconduct. Mr Smith said he had been persuaded by the evidence (not all of which was being disclosed, he said, meaning the recording) that the Claimant had exhibited bullying and insubordinate behaviour to JL and used intimidatory, threatening, offensive and abusive language and behaviour.

124. We accept that it was Mr Smith's genuine opinion that the Claimant had behaved in that manner and that he formed that opinion in reliance on the statements in the investigation pack (which had been shared with the Claimant) and the audio recording (which had not). We also accept that it was his genuine opinion that the Respondent's whistleblowing policy meant that the audio should not be shared with the Claimant.

125. The letter dated 31 July 2019 (pages 316 and 317) is consistent with what the Claimant was told during the hearing; it supplied written confirmation that he had been dismissed without notice and of his right to appeal.

126. It was Mr Smith's opinion, that the Claimant had not proved the word "paki" was used, and that that would not have been an excuse for the Claimant's behaviour in any event.

127. The Claimant did appeal, within time, by email to Mr Ansell on 5 August 2019. Amongst other things, he challenged the basis for withholding evidence from him and mentioned that racism and sexual harassment were contrary to the Equality Act 2010.

128. Andrew Saunders, who is more senior than Mr Smith, was appointed to deal with the appeal. The meeting took place on 8 August 2019. Detailed and reasonably accurate handwritten notes appear at pages 325.

129. By the time of the appeal, the Claimant had still not heard the recording. It was a surprise to him when it was played to him during the appeal hearing. In response to it, he suggested that JL was trying to get him out of the organisation and JL had sexually harassed him and used the word "paki". He did not specifically say that word had been used shortly before the events on the audio recording.

130. By letter dated 20 August 2019 (339), Mr Saunders gave the appeal decision. He rejected the appeal and upheld the dismissal. With the letter, a transcript of the recording was included. This was the first time that the Claimant had received this. The letter contained Mr Saunders genuine opinions, including that he was satisfied that there was no entrapment, that the Claimant had made the comments in front of several people, that Mr Smith had reached the correct conclusion on the evidence, and that the Claimant's long service and prior record were not a reason to change the dismissal decision.

Respondent's procedures

131. We were supplied with some extracts from the Respondent's policies.

132. In the staff handbook 2016 version, the Dignity at Work policy refers to acts of discrimination, harassment, bullying or victimisation being disciplinary offences and matters which could potentially lead to dismissal.

133. The grievance procedure stated that employees could bring matters to the respondent's attention formally or informally, including complaints about immediate managers/supervisors.

134. The policy statement for the disciplinary policy and procedure states that employees have the right to "state their case before decisions are reached and to challenge evidence against them".

135. At 5.2, the procedure states that when a disciplinary hearing is arranged, the items sent to the employee should include: "Witness statements, investigation meeting notes, any relevant documents, and operational policies including the disciplinary policy".

136. At 5.3, for conduct of hearings, it states employees have the right to: "Be given a clear account of the offence they are alleged to have committed, presented with all evidence against them and be given an opportunity to state their case and to

respond to the allegations" and "Examine all evidence, and to both call and question witnesses"

137. The list of gross misconduct includes:

- Indecent conduct / behaviour including physical violence and sexual assault to colleagues, customers, suppliers or other parties
- Acts of incitement, bullying or harassment on the grounds of race, sexuality, ethnic origin, nationality, religion, gender, age and appearance
- Wilful and gross insubordination
- Intimidatory, threatening, offensive or abusive behaviour. This will also include attitude problems

Other Matters

138. The videos and pictures show various incidents of unruly behaviour by the Respondent's employees and also show that it was not unusual for them to decide to photograph or record each other including while on an aircraft.

139. To the extent that the Claimant relies on the material in his supplementary bundle to show that racist language was widely tolerated by the Respondent's employees, the evidence from, for example, 30 November 2007 (page 138) is of no evidentiary value to the matters that we need to decide given the fact that is from so long ago, and there is no evidence of which persons condoned it. Furthermore, it does not necessarily follow that a manager who was content for the phrase "welsh twat" to be used would also allow the word "paki" to be used.

140. Apart from JL using the word "paki", which we have found did occur, in the documents and videos, the other uses of the word appear:

140.1 On page 163 of the Claimant's bundle, in a non-work-related text exchange between him and a colleague. In context, the colleague is asking the Claimant for a favour and was presumably (therefore) confident that the Claimant would not be offended by the word. The colleague was seemingly correct in their assumption, because the Claimant's reply started with "lol". This was in April 2016.

140.2 In a video which the Claimant filmed on his phone and presumably allowed others to see (given that it has been found by the Respondent). In it the Claimant films a colleague (who is of Asian heritage, judging by his appearance) calling another colleague (Dipesh Patel, who is not present, but who is also of Asian heritage, judging by his appearance in another video) "paki". The Claimant himself does not repeat the word, but nor does he object to it. In his witness statement, the Claimant says "Regardless that this was out of work hours, and it was banter, Dnata is clearly using this to tarnish my character." He also says, which we accept, that the video was not part of the investigation into his conduct.

141. ACAS early conciliation commenced 5 August 2019 and finished 5 September 2019. The claim was presented less than one month later, on 2 October 2019.

The Law

Unfair Dismissal

142. Section 98 of the Employment Rights Act 1996 says, in part:

> 98.— General.
>
> (1) In determining for the purposes of this Part whether the dismissal of an employee is fair or unfair, it is for the employer to show—
>
> (a) the reason (or, if more than one, the principal reason) for the dismissal, and
>
> (b) that it is either a reason falling within subsection (2) or some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held.
>
> (2) A reason falls within this subsection if it—
>
> (b) relates to the conduct of the employee,
>
> (4) Where the employer has fulfilled the requirements of subsection (1), the determination of the question whether the dismissal is fair or unfair (having regard to the reason shown by the employer)—
>
> (a) depends on whether in the circumstances (including the size and administrative resources of the employer's undertaking) the employer acted reasonably or unreasonably in treating it as a sufficient reason for dismissing the employee, and
>
> (b) shall be determined in accordance with equity and the substantial merits of the case.

143. The respondent bears the burden of proving on the balance of probabilities that the claimant was dismissed for the reason which the employer relies on. The well known excerpt from Abernethy v Mott Hay & Anderson makes clear that: "The reason for the dismissal of an employee is a set of facts known to the employer or it may be of beliefs held by him which cause [it] to dismiss the employee."

144. If the respondent fails to persuade the tribunal that it had a genuine belief that the claimant committed the misconduct and that it genuinely dismissed for that reason, then the dismissal will be unfair.

145. Provided the respondent does persuade us that the claimant was dismissed for the conduct relied on, then the dismissal is potentially fair. That means that it is then necessary to consider the general reasonableness of that dismissal under section 98(4) ERA 1996. In considering this general reasonableness, we take into account the respondent's size and administrative resources and we decide whether the respondent acted reasonably or unreasonably in treating the misconduct as a sufficient reason for dismissal. We have had regard to the guidance in British Homes Stores Ltd v Burchell [1980] ICR 303 EAT; Iceland Frozen Foods Ltd v Jones [1993] ICR 17 EAT, and Foley v Post Office / Midland Bank plc v Madden [2000] IRLR 82 CA.

146. In considering the question of reasonableness, we must analyse whether the respondent had a reasonable basis to believe that the claimant committed the misconduct in question. We should also consider whether or not the respondent carried out a reasonable process prior to making its decisions. In terms of the sanction of dismissal itself, we must consider whether or not this particular

respondent's decision to dismiss this particular claimant fell within the band of reasonable responses in all the circumstances. The band of reasonable responses test applies not only to the decision to dismiss, but also to the procedure by which that decision was reached. (Sainsburys Supermarkets Ltd v Hitt [2003] IRLR 23 CA).

147. There is no requirement that fairness / reasonableness prevents an employer on relying on the evidence of a witness whose identity is not disclosed to the employee. It is important that an employee should know precisely what the accusations against him are, and have a full opportunity to state his case, but there is no default position that employers must require witnesses to attend a disciplinary hearing and answer questions. In Linfood Cash and Carry Ltd v Thomson and ors, the EAT considered what an employer ought to do if concerned about disclosing the identity of witnesses to the accused employee. Although, has subsequent cases have confirmed, this is not a checklist that must always be followed, it provides some useful guidance. In that case, the EAT suggested that :

147.1 The accounts of the anonymous witnesses should be put in writing (although they might need to be redacted later to preserve anonymity)

147.2 A person taking such statements should note the date, time and place of each incident and whether the witness had the opportunity to observe clearly and accurately.

147.3 Investigation should take place to see if there is corroboration (or the opposite) and whether the witness was believed to have any reason to lie

147.4 If a witness says that they are scared of retaliation, and if the employer is satisfied that the witness's fear is genuine, the employer must actively consider whether a fair disciplinary hearing can take place if anonymous evidence is used

147.5 the decision maker should potentially personally interview the witness and decide what weight is to be given to his or her evidence

147.6 the written statement — redacted if necessary to avoid identification — should be made available to the employee and his representative

147.7 if the employee or his representative raises an issue that should be put to the witness, it may be appropriate to adjourn the disciplinary hearing so that the chair can question the witness about that issue

148. It is not the role of the Tribunal to assess the evidence and to decide whether the claimant should or not have been dismissed or to decide whether the claimant did or did not commit the misconduct in question. It is not the Tribunal's role to substitute its decisions for the decisions made by the respondent.

149. The ACAS Code of Practice on Disciplinary and Grievance Procedures must be taken into account when it is relevant to a question arising under the proceedings.

Harassment

150. In relation to the Equality Act 2010 ("EA"), time limits are covered in s.123 of that Act, which states (in part):

> (1) Subject to sections 140A and 140B proceedings on a complaint within section 120 may not be brought after the end of—
>
> (a) the period of 3 months starting with the date of the act to which the complaint relates, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (2) Proceedings may not be brought in reliance on section 121(1) after the end of—
>
> (a) the period of 6 months starting with the date of the act to which the proceedings relate, or
>
> (b) such other period as the employment tribunal thinks just and equitable.
>
> (3) For the purposes of this section—
>
> (a) conduct extending over a period is to be treated as done at the end of the period;
>
> (b) failure to do something is to be treated as occurring when the person in question decided on it.

151. S.136 of the Equality Act deals with burden of proof. It is applicable to all the Equality Act claims in this litigation.

> (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.

152. S.136 requires a two stage approach.

152.1 At the first stage the Tribunal considers what facts have been proven to the Tribunal (and the findings could be based on evidence from the respondent or evidence from the claimant, it does not matter) and decides whether the tribunal has found facts from which the Tribunal could conclude - in the absence of an adequate explanation from the respondent - that the contravention has occurred. At this stage it is not sufficient for the claimant to prove that what she alleges happened did in fact happen. There has to be some evidential basis from which the Tribunal could reasonably infer that there was a contravention. That being said, the Tribunal can look at all the relevant facts and circumstances and make reasonable inferences where appropriate when deciding whether the burden shifts at Stage 1.

152.2 If the claimant does succeed at Stage 1 then that means the burden of proof does shift to the respondent and that the claim must be upheld unless the respondent proves the contravention did not occur.

153. If the Tribunal is not satisfied on the balance of probabilities that particular incident did happen then complaints based on that alleged incident fail. S.136 does not require the respondent to prove that alleged incidents did not happen.

154. Harassment is defined in s.26 of the Equality Act.

> Section 26 of EA 2010 states (in part)
>
> (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.

155. For brevity we will refer to the list in section 26(1)(b) as "the prohibited effect", while not ignoring that either purpose or effect is sufficient (it does not have to be both).

156. Sex and race are relevant characteristics for the purposes of s.26, as mentioned in section 26(5)

157. To succeed the claimant needs to establish on the balance of probabilities that he has been subjected to unwanted conduct and that it had the prohibited effect.

158. However. it is not sufficient to succeed for the claimant to prove that the conduct was unwanted and that it had the prohibited effect; the unwanted conduct also has to relate to the protected characteristic. However, because of s.136 the claimant does not need to prove on the balance of probabilities that the conduct was related to sexual orientation in order to shift the burden of proof. We would need to be persuaded that there are proven facts from which we might infer that the conduct should be so related.

159. In section 26(2)

(2) A also harasses B if—

(a) A engages in unwanted conduct of a sexual nature, and

(b) the conduct has the purpose or effect referred to in subsection (1)(b).

160. It is possible for the same conduct to fall within both Section 26(1) and 26(2).

161. In most cases, whether or not the conduct in question can be categorised as "of a sexual nature" will be self-evident. This is something which should be decided on a common-sense basis by reference to the facts of each particular case, including the intentions of the person making the contact and the perception of the recipient of the conduct.

162. The following examples of sexual harassment are given in the EHRC's Employment Code: unwelcome sexual advances, touching, sexual assault. Other conduct could amount to conduct of a sexual nature, depending on the circumstances. The EHRC's 2020 guidance points out that conduct "of a sexual nature" includes a wide range of behaviour, such as: sexual comments or jokes; displaying sexually graphic pictures, posters or photos; suggestive looks, staring or leering; propositions and sexual advances; making promises in return for sexual

favours; sexual gestures; intrusive questions about a person's private or sex life or a person discussing their own sex life; sexual posts or contact on social media; spreading sexual rumours about a person; sending sexually explicit emails or text messages; unwelcome touching, hugging, massaging or kissing. Again, these are just examples of conduct which might fall within the definition, and not an exhaustive list.

163. The fact that alleged harasser did not regard the conduct as sexual harassment does not mean that it cannot be harassment contrary to section 26(2) and/or section 26(1).

164. It is important that when considering whether the prohibited effect has occurred and applying s.26(4) in particular we have regard to an appeal court guidance including HM Land Registry v Grant 2011 ICR 1390. We must not to cheapen the effects of the words in section 26(1)(b), and the mere fact alone that a claimant was, to some extent, upset by what was said (or done, or not done) is not necessarily enough to meet the definition.

165. When dealing with a series of alleged incidents of harassment (and the same principle applies to discrimination as well), it is important not to carve up the allegations and only consider them one by one. Obviously considering the allegations one by one on their own merits is an important part of the analysis but it is also important, see Querishi v Victoria University of Manchester to also have regard to the entirety of the alleged conduct; this is particularly important when considering whether it would be reasonable to regard the conduct as having the prohibited effect and whether to draw inferences that the conduct was related to the protected characteristic.

Analysis and conclusions

Unfair dismissal

166. We are satisfied that the reason that the Claimant was dismissed was that Mr Smith formed the genuine opinion that the Claimant had acted in the way described in the dismissal letter. This conduct matched what the Claimant had been informed of in the disciplinary hearing invitation letter and were the 6 alleged incidents towards JL as per his 10 June email (on dates from 16 April to 9 June 2019 inclusive) and the 7 alleged comments taken from the audio.

167. We are satisfied that Mr Smith had reasonable evidence upon which he could base these conclusions. The 6 incidents, as alleged by JL, were not so much flatly denied by the Claimant as that the Claimant was alleging that they should be seen as (a) he being the victim and responding to JL or, at worst, (b) a pattern of banter that he and JL had each engaged in.

168. We are satisfied that Mr Smith had reasonable evidence upon which he could conclude that the Claimant had not complained to the Duty Managers about JL inappropriately touching or kissing him, or sexually harassing him, or using the "p word" (as the Claimant put it in his meeting with Smith) to him.

169. Ms Delargy commenced a reasonable investigation into the matters raised by JL's 10 June 2019 correspondence with Mr Ansell. It was reasonable for her to collate the evidence of the audio recording once it was mentioned to her by Mr Nijjar. It was directly relevant to one of the incidents mentioned by JL, 16 April 2019. The wording of the letter inviting the Claimant to the second interview had the potential to make it appear that this was somehow a separate process/issue than the disciplinary investigation, but, overall, the Claimant was aware that Ms Delargy was investigating his conduct, based on allegations raised by JL. She made clear in the second meeting that it was a follow up to the first.

170. In our view, the Respondent is not a small employer. The nature of its work for various airports is such that it would be expected to invest in HR or legal advice of a reasonable standard in relation to staffing issues, given the health and safety and security issues which might arise if its employees performed negligently or in deliberate breach of their obligations.

171. Our decision is that the Respondent failed to give proper consideration to the issue of whether the witness statements needed to be anonymised or not. Neither Ms Delargy nor Mr Smith have clearly explained what issues the Respondent took into account, nor even who it was, specifically, who made the decision and when.

172. Not all of the statements were damaging to the Claimant. Mr Lewis's statement, in particular, contained some helpful points. It would have benefitted the Claimant at the hearing before Mr Smith to know exactly which witness was saying what, so that he could make any specific comments about whether that witness was (say) particularly friendly with JL. (This is a comment he made about Mr Nijjar, but without knowing which was Mr Nijjar's statement). Further, since there were different dates for different incidents, not knowing the witnesses' identities deprived him of any opportunity to (for example) challenge whether that witness had been on shift at the relevant time. Importantly, without knowing which witnesses had actually given statements, he was at a disadvantage in knowing whether there was a further person who should be interviewed.

173. Importantly, not revealing the existence of the audio recording to the Claimant was unreasonable and, in our judgment, was so unreasonable that no reasonable employer would have conducted the disciplinary hearing in that manner. We are not necessarily persuaded that:

    173.1 It was necessary to keep Mr Nijjar's identity, as the person who made the recording, a secret. The Claimant and his colleagues frequently filmed each other, including making videos and taking photos of persons who were asleep, so it is not self-evident that the mere fact alone that he made a covert recording would have subjected him to criticism from colleagues. And there is no evidence that the Respondent actively considered whether Mr Nijjar had any reason to be concerned about retaliation from the Claimant.

    173.2 That, if it was necessary to keep Mr Nijjar's identity a secret, it was necessary to deprive the Claimant of the opportunity to listen to the audio in order to conceal Mr Nijjar's identity. At the very least, even if it was necessary to edit out things that Mr Nijjar might have said (to conceal that his voice was close to the recording device), it would still have been possible to play to the

Claimant the extracts of the Claimant uttering the words mentioned in the disciplinary invite letter.

174. However, even if it is arguable that some reasonable employers might have taken the view that keeping Mr Nijjar's identity secret was so important that the audio could not played in case it accidentally gave a clue to the recorder's identity, we are satisfied that no reasonable employer would have kept the existence of the recording a secret. Further, in the scenario where the audio is not being played aloud, no reasonable hearing officer would fail to arrange for the employee to have a full transcript of the conversation to jog his memory.

175. By 12 July 2019, the Claimant was being asked to recall events of almost 3 months earlier (16 April 2019) without anything more to prompt his recollection than the extracts in the invite letter. It is not necessarily to the Claimant's credit that the fact that he had a conversation of this nature with his supervisor was not so unusual that it stood out in his memory. However, there had been other encounters between him and JL. He did not deny calling JL "cunt" preceded by various adjectives, including references to JL's weight. He even offered that he might have made one of the alleged remarks in writing in a WhatsApp message.

176. However, the Claimant's denial of the specific remarks was held against him. Mr Smith says that he found the Claimant to have been deliberately dishonest. It was not fair to reach that particular conclusion after the particular investigation that the Respondent had adopted.

177. Our decision is that this defect was sufficiently grave that the dismissal was unfair. The issues of what difference it made (if any) to the outcome, and of what contributory fault (if any) there was on the part of the Claimant will be considered as part of the disciplinary hearing.

178. The defect was not cured by the fact that, part way through the appeal hearing, the existence of the recording was revealed, and the audio was played. This did not give the Claimant a sufficient opportunity to gather his thoughts, to think about which other voices were on the recording, and to decide what other evidence or witnesses (if any) he might wish to suggest were relevant, or which submissions he might wish to make about his words as per the audio.

Harassment related to sex

179. We have no realistic way of knowing how JL would have acted towards a female ramp agent, because all of the workers on his team were male. Speculatively, it is conceivable that he might have behaved differently to a female ramp agent. However, such speculation does not demonstrate that the unwanted conduct was related to the Claimant's sex. The burden of proof does not shift. Our decision is that none of the conduct itemised at Items 4, 6, 7, 8, 9, 10 of the particulars of harassment was related to the fact that the Claimant is a man.

Harassment of a sexual nature

180. JL's specific reasons for seeking to pull the Claimant's trousers down, seeking to kiss him, and seeking to hug/bear hug him are somewhat obscured by the fact that each of JL and the Claimant argued, in the internal proceedings, that the other

person was the main instigator. Furthermore, JL has not given evidence to the employment tribunal.

181. However, based on the contemporaneous evidence, we do not believe that the Claimant regarded the incidents at the time as being of a sexual nature. We did accept that it was unwanted conduct but he thought it was annoying and silly, not sexual.

182. We are satisfied that, whatever JL's reasons for his unpleasant and anti-social conduct, there are no facts from which we could conclude that he was doing it for the purposes of sexual arousal or pleasure, or because he was seeking to attract the Claimant, or because he was seeking to intimidate the Claimant sexually.

Harassment related to race

Item 1

183. It was unwanted conduct to tie the Claimant's shoelaces.

184. It did not have the purpose or effect of violating the Claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. It is important not to cheapen these words. JL was playing a stupid (and potentially dangerous) practical joke on the Claimant, but he thought that the Claimant would see the funny side.

185. There are no facts from which we might conclude it was related to race.

Item 3

186. We were not satisfied that the Claimant was particularly concerned about JL's attitude to his medial appointments. Our finding was that he did not complain to Duty Managers, and that he knew that it was only the Duty Managers' decisions/opinions which counted.

187. We did accept that JL made some unwanted comments (including in front of others).

188. There are no facts from which we might conclude it was related to race.

Item 4

189. The bear hugs were unwanted.

190. The panel is not unanimous about the purpose or effect.

191. However, the panel is unanimously of the view that there are no facts from which we might conclude the conduct was related to race, taking into account that JL behaved in a similar way to employees of other races.

Item 5

192. On the facts, we were not persuaded that JL used the word "paki" to the Claimant on 16 April 2019.

193. According to the audio recording (and transcript), the Claimant was being aggressive to JL. JL's unwanted conduct (if any) that day went no further than suggesting that there were ground for him to take the Claimant to a disciplinary, a suggestion that the Claimant treated with derision.

194. JL's unwanted conduct (if any) that day was not related to the Claimant's race. It was a response to the things which the Claimant was saying to him.

Item 7

195. The kissing was unwanted.

196. The panel is not unanimous about the purpose or effect of the kissing.

197. However, the panel is unanimously of the view that there are no facts from which we might conclude the unwanted kissing was related to race, taking into account that JL behaved in a similar way to employees of other races.

198. We did find that there was more than one occasion on which JL used the word "paki" but that the only specific occasion demonstrated by the evidence is that it was said on 9 June 2019. It was after the meeting between Ms Delargy, Mr Fisher and JL. It was before JL sent emails to Mr Ansell the next day. It was also after the incident earlier on 9 June 2019 in which JL had become angry with C for (in JL's opinion) being disrespectful to JL.

Majority Decision that there was no harassment related to race for Item 7

199. The majority (Mr Maclean and Mr Hoey) decision is that the evidence demonstrates that the Claimant did not regard the use of the word "paki" by his colleagues as unwanted. For example, in his 2016 text exchange with a colleague, both he and the colleague treated the white colleague's use of the word as being unsurprising and uncontroversial.

200. Furthermore, the Claimant himself had been involved in filming one colleague use that word to another.

201. The majority's view is that the use of that word between colleague (out of the earshot of the Duty Managers) was so normalised that the finding is:

201.1 It was not JL's purpose to violate the Claimant's dignity, etc, by the use of that word. JL was simply using a particular word, without putting much thought into it because he had used the word frequently in the past.

201.2 The effect of the word was such that the Claimant's dignity was not violated, and nor was there an intimidating, hostile, degrading, humiliating or offensive environment created for the Claimant. The Claimant found the word to be acceptable banter.

Minority Dissent is that there was harassment related to race for Item 7

202. The minority (EJ Quill) opinion is that the evidence demonstrates that the Claimant tolerated the use of the word by at least one white colleague and at least one colleague of Asian heritage. In both proven examples of the word being used, it

was out of work. EJ Quill accepts that it was unwanted conduct for JL to use that word towards him.

203. EJ Quill is satisfied that the timing of the use of the word (after Delargy had become involved on 9 June as a result if JL being upset with the Claimant and before he made a semi-formal approach to Mr Ansell, one up from Ms Delargy) shows that this was not an encounter between JL and the Claimant in which either (i) JL was trying to be amusing or jocular or (ii) JL was under any illusion that the Claimant might be amused. EJ Quill is persuaded by the evidence that JL intended the word to be hurtful and that JL's intention was to create a hostile and offensive environment for the Claimant.

204. Since EJ Quill has found that that was the purpose of the remark, section 26(1)(b) EQA is satisfied regardless of the effect. In terms of the effect, EJ Quill would not have been satisfied that JL's use of the word had the prohibited effect on the Claimant in all the circumstances, including the usage of the word as discussed above, and including the fact that, as of 16 April 2019, the Claimant was clearly very dismissive of JL and not at all intimidated by him; and EJ Quill is not persuaded that the Claimant's attitude to JL had significantly changed in the following 8 weeks. Furthermore, the Claimant did not regard the word as sufficiently important to mention to Ms Delargy in two meetings with her not long afterwards.

205. EJ Quill finds that there are facts from which he could decide the unwanted conduct was related to race. It is not in dispute that the word "paki" is a well-known and very offensive term that is abuse on the grounds of (perceived) race.

206. The Respondent has not discharged the burden of proof. In particular, it has not called JL to explain his use of the word on 9 June 2019.

Item 8

207. We are not persuaded that the penis nose photo was unwanted conduct or that it had the prohibited effect. The Claimant said to Ms Delargy that he regarded it as banter, and was not offended by it.

208. We have no reason to think that the purpose of the photo was to violate the Claimant's dignity, etc. He was not offended, and we have no reason to think that JL thought he would be.

209. There are no facts from which we might conclude the conduct was related to race.

Item 9

210. The trouser pulling was unwanted.

211. The panel is not unanimous about the purpose or effect.

212. However, the panel is unanimously of the view that there are no facts from which we might conclude the conduct was related to race, taking into account that JL behaved in a similar way to employees of other races.

Item 10

213. The Claimant did not complain to Mr Kalsi on 9 May 2019 or 10 June 2019 about physical touching, physical kissing, attempting to pull his trousers down in public, the racial verbal abusive received.

214. The alleged unwanted conduct (the Respondent failing to follow up on such complaints) therefore did not occur. That is, there was nothing raised by the Claimant to follow up on. In any event, by this time JL had complained, and the investigation by Ms Delargy was about to commence.

Item 11

215. This fails on the facts as we were not persuaded that JL assigned the Claimant the more labour intensive jobs more frequently. Furthermore, we rejected the argument that the 5 June message(s) should either be seen as unwanted conduct in their own right, or evidence of other unwanted conduct (being the unfair or unreasonable allocation of work).

Item 13

216. It is correct that JL wanted disciplinary action against the Claimant. That was unwanted conduct as the Claimant did not wish to be disciplined.

217. JL did not seek the Claimant's dismissal and approached Mr Ansell with a view to having the Claimant transferred from his team, potentially without formal action.

218. JL's approach to Mr Ansell was before JL was aware of the petition, and not motivated by the petition.

219. Taking into account that JL had threatened the Claimant with disciplinary action on 16 April 2019, we are unanimously of the view that his complaint about the Claimant was not related to race.

220. Furthermore, we are not persuaded that JL's threats of taking action against the Claimant had the effect on the Claimant of violating his dignity, etc. The Claimant was relaxed about the prospect on 16 April, in particular. During the meetings with Ms Delargy, the Claimant was not particularly concerned. Even in the meeting with Mr Smith, he was confident that, at most, he might have to move to another team or terminal. He was surprised and upset about the outcome (dismissal) but he had not been alarmed about JL's actions in starting the process.

Time Limits

221. An Equality Act claim which related to an act or omission on 6 May 2019 (including to a continuing act which ended on or after that date) would be in time.

222. Since the Equality Act claims have failed on the merits, there was no successful complaint which was in time. The alleged incidents on 23 November 2018 (item 1), 14 March 2019 (item 4), 16 April 2019 did not form part of a continuing act with

any successful complaint. They are out of time, and we have not extended time for them.

223. The unfair dismissal claim was in time.

Employment Judge Quill

Date: 1 June 2022

RESERVED JUDGMENT & REASONS
SENT TO THE PARTIES ON

6 June 2022

FOR EMPLOYMENT TRIBUNALS