EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr D Burke	**v**	**The Embassy of the United Arab Emirates**

Heard at: London Central
On: 9 – 20 May 2022

Before: Employment Judge Hodgson
Mr D Carter
Ms C Ihnatowicz

Representation
For the Claimant: Mr Peter Ward, counsel
For the Respondent: Mr Lawrence Davies, solicitor

JUDGMENT

1. **The claims of unlawful harassment fail and are dismissed.**
2. **The claims of unlawful direct discrimination fail and are dismissed.**

REASONS

Introduction

1.1 On 29 September 2020, the claimant filed a complaint with the London Central employment tribunal alleging, amongst other matters, discrimination and harassment. That case was consolidated with another claiamt's, it would appear for the purpose of deciding whether the respondent had state immunity. It was agreed at the hearing that the claims should not continue to be heard together. These reasons concern Mr Burke's case.

The Issues

2.1 The parties had agreed a list of issues. We clarified Mr Burkes' claims at the hearing.

2.2 The claimant made allegations of direct discrimination and harassment related to race. He relied on two allegations as follows:

2.2.1 first, on unspecified dates, by Mr Berkane routinely referring to the claimant as "Jamaican Mafia" when greeting him;
2.2.2 second, on 30 June 2020 by the respondent dismissing the claimant purportedly on the grounds of redundancy.

2.3 The claimant alleged there were two actual comparators being Mr Berkane who was said to be "white/Algerian/Arab" and Mr Waheed Mustafa whom he described as black/Sudanese/Arab.

2.4 To the extent there were other claims, they were not pursued.

Evidence

3.1 The claimant gave evidence. We also heard from a former colleague, Mr Anthony Harsum. The claimant relied on the written statements of Mr Abdel Halim Nakd and Mr Mario Santos.

3.2 For the respondent, Mr Abdelhak Berkane gave oral evidence and the respondent relied on the written statement of Mr Hassan Al Mazmi.

3.3 We received a bundle of documents.

3.4 Following day one, the respondent filed a chronology and cast list.

3.5 Both sides relied on written submissions.

Concessions/Applications

4.1 On day one, we noted that the claims of Mr Burke and Ms Hodzic had been consolidated and were now being heard together. Mr Ward now represented only Mr Burke, and Ms Hodzic was acting in person. No party could identify the order which provided for consolidation. There had been various preliminary hearing to deal with the question of state immunity. Those matters had, largely, been resolved. It is possible that the claims were consolidated for that purpose; it was unclear.

4.2 We considered whether the claims should continue to be heard together. Neither claim referred to the other, save that there was an assertion that they both formed part of a multiple claim, albeit the basis was not explained. Both claimants were employed by the embassy. Both were made redundant at the same time, and in the same round of redundancies. They occupied different positions and no one alleged they were part of same redundancy pool. Both brought allegations of

discrimination. Those allegations were different and were not based on common facts. The only overlapping facts were that they were made redundant, at the same time, following an alleged direction to reduce cost. All agreed these were two separate claims and that they should be heard independently. By consent, any order for consolidation was revoked. It would appear likely the claims were initially heard together because of a common question of state immunity. That matter has now been resolved and the resolution was a material change of circumstances. There was no reason to continue hearing the claims together. Hearing them together would create confusion, which would not be in the interests of justice. All agreed Mr Burke's claim should be heard first. Ms Hodzic's claim would then be heard after. If there was insufficient time for the tribunal hearing, we would consider whether it needed to be reserved to this tribunal

4.3 We reviewed the issues in Mr Burke's claim. We noted was that Mr Berkane referred to the claimant as "Jamaican Mafia." His claim form identified no specific date when this occurred. Paragraph 16 of his particulars of claim stated Mr Berkane regularly called the claimant 'Jamaican Mafia' as a greeting, making out it was a joke." We noted that a failure to have a specific date caused problems, including the inability to determine whether the claim was in, or out of time. We noted that any subsequent allegation that a specific time could be identified would involve creating a new fact and therefore would require amendment of the claim form.

4.4 We noted the claimant had provided three witness statements, which in turn also referred to the claim form. We noted this was not a helpful approach, as it led to cross-referencing and uncertainty. The respondent said it was unclear what was being relied on. We sought clarification.

4.5 In addition, Mr Ward indicated Mr Burke wished to apply for the inspection of documents . We confirmed that we would not deal with any application in relation to Ms Hodzic. Following discussion, we confirmed any application must be in writing.

4.6 Mr Ward sent an email on 9 May 22. The first part stated, "The last occasion when [Mr Burke] says he was called 'Jamaican mafia' was on or about 2 March 2020... Whilst I am happy to amend the ET1 to include this date it is not, with respect, considered necessary... " It follows this was, expressly, not an application to amend.

4.7 Mr Ward clarified that the claimant relied on paragraph 7 and paragraphs 1 to 8 of his first and second statements respectively.

4.8 The third part of Mr Ward's email was an application "that the respondent produces for inspection the 'real' copies of documents copied at pages 1395 and 1445 of the bundle." It was denied that Mr Burke had received any written warning and it was alleged the document "may ... be a fabrication, an unhappy contention that is fortified by the signatures on the

two documents appearing identical to the point they could only be computer-generated."

4.9 On day one, we also noted that there was a claim for holiday pay. It was not adequately pleaded. Further, the respondent alleged it had paid any outstanding holiday, but the claimant had sent it back. We suggested that the parties may wish to consider their respective positions and confirm whether this matter was being proceeded with.

4.10 On day three, we heard the claimant's recusal application. On day four, EJ Hodgson considered the application. On day five, 13 May 2022, EJ Hodgson refused the application to recuse himself, and reserved the reasons. Those reasons will be dealt with separately.

4.11 The parties had been asked to ensure he was ready to proceed, should the application for recusal be refused. The claimant was sworn in, but it became apparent that he had inadequate access to his own statements, and those of others. He indicated that he had not expected to give evidence. Further, he did not have adequate access to the bundle, it appeared that he may be attempting to view both on his telephone. Mr Ward suggested it may be possible for the claimant to download the bundle and the statements onto another laptop or tablet. We adjourned for an early lunch to allow this to take place. When we returned, it was clear there were still problems. The tribunal asked whether Mr Burke was satisfied that he could adequately access both the statements and the bundle, and it appeared there continued to be difficulties. Following discussion, it was agreed that we could not proceed that day; instead, steps would be taken to provide the claimant with adequate electronic access, or hard copies of the relevant documents. Mr Ward confirmed he would assist the claimant over the weekend, and if necessary, provide the relevant documents. We agreed a timetable to complete the hearing.

4.12 On day five, Mr Ward complained that he had not been allowed to inspect the original documents of two warnings, from which PDF scans had been produced. He produced a written application dated 12 May 2022 for inspection of two documents, being a warning relating to Ms Hodzic and an alleged warning relating to Mr Burke. The tribunal noted that one of the documents related to Ms Hodzic in claim 2206948/2020. That document was not disclosed for the purposes of Mr Burke's claim. Second, Mr Burke had no right, in the context of his claim, to view the document. It followed that Mr Ward, who did not represent Ms Hodzic, had no right to inspect it.

4.13 The respondent's position was that Mr Burke had been shown the document they had on file. Following discussion it was agreed that the respondent should be ordered to provide inspection by midnight 13 May 2022. If the respondent could not provide the inspection requested, it should set out its reason inwriting.

4.14 It was noted that a senior member of the respondent's Royal family had died and the embassy was going into a period of mourning. It was unclear what assistance which embassy could give.

4.15 No further inspection was permitted, the respondent provided an explanation on 16 May 2022. In essence, the document that it had found, and which was scanned as a PDF, was a copy of a copy. The respondent had no other document.

4.16 We should deal with one matter arising out of the respondent's submissions. The tribunal noted with concern paragraph 12(d) of Mr Ward's submissions. It is wrong to say that Ms Ihnatowicz "pointed out" that "the claim does not sit well with the allegation that Mr Burke left his post 'almost every day' to visit the bank." Ms Ihanatowicz asked a number of relevant and legitimate questions; she did not express an opinion. Her questions arose out of the cross-examination of Mr Berkane, and the answers he gave.

4.17 In relation to the Waitrose incident. She noted that Mr Berkane asked the claimant to come straight back, but he also allowed him to go to the bank daily. She asked how the two fitted together. Mr Berkane explained that the claimant did not seek permission to go to Waitrose, but he did seek permission to go to the bank. He would be allowed to go to the bank, unless it was a busy period. When he visited Waitrose, he was the only available drever, and this led to difficulty when he was not available.

The Facts

5.1 The claimant describes himself as "black/Afro Caribbean/British." He also relies on the fact he is "non-Arab." On 1 December 2002, he was appointed as a car driver. He was responsible for driving members of the Embassy, and others, as and when required. Initially, he did not pay tax; however, that changed. By 2019, he was required to sign a contract of employment. He became a senior driver in or around 2015 and had responsibility for driving major VIPs, including Sheiks and foreign ministers.

5.2 He alleges that, in or around 2014 He was passed over for promotion, and instead Mr Berkane was appointed as his manager. The alleged failure to promote him had originally been part of this claim, but that claim had been dismissed. The allegation remained an allegation in his claim form. In his statement he alleges Mr Berkane's appointment was an act of race discrimination because the claimant "was not Arab" or possibly in addition because he was black.

5.3 During the course of his employment, the claimant received a number of warnings. He was unable to say whether he received any written warnings.

5.4 The claimant maintained that he could not recall whether he had received any written warnings and, simultaneously, that he was positive he had received no written warning dated 11 February 2019.

5.5 The claimant does accept that he did receive warnings. He alleges that on 1 August 2017, he complained to Mr Berkane that he had been working for almost a month without a day off. He alleged Mr Berkane responded negatively and threatened him physically. He alleges the incident was reported to Mr Al Mazmi and as a result the claimant "received a warning."[1] The nature of that warning is not explained.

5.6 The claimant states he received a second warning following events of 9 May 2019. He alleges that he had spent "many hours in the car" and then he walked to the local Waitrose about 500 metres away. Whilst at Waitrose, Mr Berkane telephoned him and required him to return. The claimant alleges Mr Berkane subjected him to abuse and started shouting at him. He alleged he was physically threatened. The claimant did not report the matter to Mr Al Mazmi. We accept Mr Berkane's s evidence that the claimant was required to remain with his car, at the embassy, ready to accept instructions, and that he was not permitted simply go to Waitrose without permission. The claimant does not dispute this evidence; he accepts that his action, in leaving his post, was "reprehensible." He allegedly received a warning. The circumstances of that warning are unclear. He also alleged that Mr Berkane forced him into a cubicle and said they should "sort this out man-to-man." We do not need to explore this further. The exact circumstances of the warning are not set out in the claimant's statement.

5.7 The claimant does refer to other warnings he received, albeit he does not set out the detail. The claimant's evidence in his statement is confused and incomplete. He states he referred a matter, it may be the Waitrose incident, to Madam Rawadab Mohamed Jummal, the chargé d'affaires's, at the embassy. This resulted in an alleged meeting with Mr Al Mazmi in which he referred to the alleged incident. However, the outcome of this remains unclear. At paragraph 27 of his statement, the claimant goes on to say that the result was he received a warning from Mr Gaber, Head of HR, in two parts. The first was for not buying suits having been given money, and the second was for sleeping in his vehicle outside the Mandarin Hotel. The claimant refers to being "fitted up on trumped up charges." He alleges that the embassy management were in Mr Berkane's "pocket." He alleges that the allegation he was asleep outside the Mandarin hotel came immediately after the difficulties concerning Waitrose.

5.8 It follows that the claimant accepts that there were a number of difficulties and that he received several warnings. However, he appears to have no recollection as to whether any warning was in writing.

---

[1] See paragraphs 18 and 19 of the claimant's statement.

5.9 The respondent alleged the Waitrose incident occurred sometime around February 2019 and that resulted in some form of oral warning which was evidenced by a formal written warning. The respondent's case is that the written warning was about the Waitrose incident, and the failure to purchase suits or use the funds appropriately; it formed a two-part written warning, which was dated 11 February 2019. This letter does not set out any detail of the reasons for the warning. The claimant alleged it was a forgery. We do not accept there is sufficient evidence to find that it was forged, and it is possible the claimant simply forgot he had received it.

5.10 The respondent alleges that it was a diplomat, who had been taken to the Mandarin hotel around May 2019, who discovered the claimant asleep, and then reported him.

5.11 We accept that Mr Berkane raised with the claimant various complaints and difficulties. These included the failure to keep his car clean and tidy; failure to dress sufficiently smartly; and eating in his vehicle. We have accepted that these matters were raised repeatedly.

5.12 We accept Mr Berkane frequently acted generously to the claimant. He allowed the claimant to go to the bank. Mr Berkane allowed the claimant to see his daughter. He allowed the claimant to divert, having been on airport run, to see his mother, who lived nearby. Mr Berkane ensured the claimant was reimbursed when the claimant damaged the car and paid for the repairs himself.

5.13 It follows that it is common ground the claimant received warnings following various incidents. We do not need to resolve the detail of when he received warnings. We find there were concerns about his conduct. Some of those concerns led to warnings. Some were dealt with by repeated managerial guidance, including guidance on the dress code, and requests not to break rule, such as not eating in his car.

5.14 Mr Al Mazmi was the head of administration and finance in the UK embassy at the material time. He has now transferred to the Germany embassy. We received a statement from him, but he was unable to give oral evidence. Following the latest protocol,[2] the respondent asked for permission for him to give evidence. That permission had not been granted at the time of this hearing, otherwise he would have given evidence.

5.15 Much of Mr Al Mazmi's evidence is confirmed by the claimant or is not contentious. If necessary, we will highlight any area of potential disagreement.

5.16 It is agreed that Mr Al Mazmi received instructions to reduce costs, which resulted in his making embassy staff redundant. There were three rounds

[2] Concerning when evidence from abroad will be permitted.

of redundancy: January 2020, March 2020, and June 2020. Mr Al Mazmi was given no direction as to how to implement the savings. He made 17 staff redundant in 2020. There was a mixture of races, including those described as Arab. Of the 13 staff made redundant in June 2013, two (including the claimant) were black people, the others were not.

5.17 Mr Al Mazmi considered all the departments and decided which could sustain a reduction in staff, and thereafter, which individual in each department should be made redundant. This general approach is not disputed.

5.18 In January 2020, he considered that the total number of drivers could be reduced. He selected two drivers, Mr Yassser Mohammed and Mr Abdel Halim Nakd. Both have been described as Arab, one being Egyptian and one Sudanese. The claimant described both as black men, albeit Mr Al Mazmi does not appear to agree on the description of colour. However, the claimant does agree that those two individuals were the weakest performing drivers. This is consistent with Mr Al Mazmi's evidence that he selected the weakest performing drivers.

5.19 In March 2020, Mr Al Mazmi states he made two further redundancies, including a senior political researcher who is described as "Emirati/Arab." No driver was made redundant. This is not disputed.

5.20 In June 2020, Mr Al Mazmi received further instructions to make reductions in cost. Mr Al Mazmi's unchallenged evidence was that he was given limited time to make the relevant deductions, which necessitated making redundancies. On Monday, 29 June 2020, 13 staff were made redundant. Public relations lost two. One driver was made redundant: the claimant. Other departments, including accounts and security, lost staff. The same procedure was adopted for all. There was no consultation. There was no warning. The decision was communicated to the selected staff on 30 June 2020. They were told of the need to make budget cuts and the need for immediate redundancies.

5.21 The claimant accepts that, particularly given the lockdown, there was a reduced need for drivers. However, he alleges that his selection was unfair because Mr Al Mazmi relied on various warnings and oral reports, and it was unfair because the warnings were unfair. The claimant accepts that he did not appeal the warnings. He accepted in cross-examination that he did not believe that he had been given any warning as an act of race discrimination.

5.22 It follows the claimant's evidence is largely consistent with Mr Al Mazmi's account. Mr Al Mazmi states:

> **108. Although Mr Burke had not been viewed as the weakest in terms of performance and two of the drivers had been accordingly made redundant in January 2020, I considered him to be the next weakest driver based on performance (including disciplinary warnings (first claimant had received a**

> **verbal warning and subsequently a written warning dated 11 February 2019…))" and he was made redundant for that reason on 30 June 2020.**

5.23 It follows that both say warnings were taken into consideration. The claimant believes the warnings were unfair. However, there is no allegation Mr Al Mazmi did not genuinely believe that warnings had been given and had been given reasonably.

5.24 Mr Al Mazmi alleges that he made the decision to select the claimant, and thereafter informed Mr Berkane and communicated his decision. Mr Berkane says he was not consulted, but agreed with Mr Al Mazmi's decision, when it was communicated to him, as he had agreed with the previous decision relating to the first two drivers. The claimant speculates that it was Mr Berkane who put him forward for redundancy. The claimant has no evidence to support. We find Mr Berkane evidence is credible on this point and is consitent with Mr Al Mazmi's. We have no reason to reject Mr Al Mazmi's evidence. It was Mr Al Mazmi who made the decision to select the claimant as the driver who should be made redundant.

5.25 The claimant alleges that Mr Berkane referred to him using the description, or name "Jamaican Mafia". The particulars of claim state "Mr Berkane regularly called the claimant "Jamaican Mafia" as "a greeting, making out it was a joke." He also alleges Mr Berkane made anti-gay comments (no detail is given), and swore regularly and profusely. He states: "The claimant regularly objected to him saying such things as, although he said that he could take it, other black persons might not be so forgiving. Nonetheless Mr Berkane continued, and the claimant was hurt by such comments. His working environment became oppressively in consequence." The claimant identifies no single date when any comment occurred. He does not describe the circumstances more fully.

5.26 The claimant's statement also fails to provide any detail. At paragraph 12 he states

> **12. I shall now respond to the points raised in paragraphs 16 to 18 of the Grounds of Resistance. It is suggested that I was not offended by the *"Jamaican mafia"* taunts because I had said that I *"could take it".* This is not correct. As I have said, my response was in the context of me pointing out that others of my race/skin colour would not be so forgiving and might have reacted more aggressively to such abuse. It does not mean that I was not offended. On the contrary, I was trying to avoid confrontation whilst hoping he would stop, but he did not. It was also clear that, perhaps like all bullies, if Mr Berkane knew that the name-calling *etc* was upsetting me then he would do it all the more.**

He continues at paragraphs 13 and 14.

> **13. So then, the fact that I was trying to stop the unwanted comments by doing my best to avoid Mr Berkane does not mean that I did not find his name-calling and other conduct to be deeply offensive harassment related to my race. Although I cannot be sure about the frequency, he called me *"Jamaican mafia"* as his usual greeting and this was week-in, week-out.**

> **Although he was verbally abusive to others, for instance to someone who might have been homosexual, no-one else was singled out with this name. I was deeply hurt.**
>
> **14. I also respectfully contend that anyone in my position would have considered this conduct as racial harassment, and it was reasonable for me to do so.**

5.27 He confirmed he raised no formal grievance at any time.

5.28 At the start of the hearing, the tribunal noted there was a failure to support the allegation of discrimination or harassment by use of the term “Jamaican Mafia” with any date and confirmed that this would lead to potential difficulties when deciding the claim, not least of all because of the need to establish the claim was in time. The tribunal confirmed specifically, on more than one occasion, that if a date were to be alleged, it would be necessary to amend.

5.29 On 9 May 2022 Mr Ward sent an email which included the following: "The last occasion when [Mr Burke] says he was called 'Jamaican mafia' was on or about 2 March 2020... Whilst I am happy to amend the ET1 to include this date it is not, with respect, considered necessary... "

5.30 It was confirmed on the following day no application for amendment was made.

5.31 In his evidence, Mr Anthony Peter Harsum stated "…whenever Mr Berkane met Mr Burke, he called him 'Jamaican Mafia.' This was his routine mode of address, rather than his actual name." He identified no specific date. In evidence he confirmed that he never discussed this term with the claimant and made an assumption that the claimant found it unwelcome. He assumed this was why the claimant preferred to stay in his car.

5.32 In his own evidence, the claimant explained, in his witness statement, at paragraph 19, that he decided to keep his distance from Mr Berkane, and therefore decidied to spend time in his car, following the warning in 2017.

5.33 Mr Harsum was employed from November 2017 until he resigned on around or July 2018. It is apparent that Mr Harsum had an exceptionally negative view of Mr Berkane, albeit he denied, during his evidence, that he held any negative view. In his statement he criticises Mr Berkane in trenchant terms, describing him as a "sociopath, control freak, and bully."

5.34 We received a statement from Mr Nakd. This was signed on 3 May 2022. It is unclear why he did not attend to give oral evidence. Mr Ward stated that attempts had been made to contact him, but he was failing to respond. His statement alleges that Mr Berkane once referred to Mr Nakd as a " black bastard." No further detail is given, and this is not an allegation made in the claimant's statement. This statement says, "I confirm that I heard Mr Berkane greet my colleague Dwayne Burke with,

'Jamaican Mafia' on several occasions – in fact it was his routine address to him." He goes on to say that he would have been upset, but gives no indication that he discussed the matter with the claimant. There is no indication in the claimant's statement that he discussed the matter with Mr Nakd.

5.35 Mr Nakd left on 2 January 2020, when he was made redundant.

5.36 We have considered the statement of Mr Mario Santos, who we understand to be in Portugal. He did not give oral evidence. Mr Santos left on 2 January 2020

5.37 He alleges there was racial abuse of a person of "Indian race." No detail is given, and this is not an allegation made in the claimant's case. Mr Santos says, "I did also hear on a couple of occasions Mr Barkane greet my then colleague Duayne Burke with the words, *'Jamaican mafia'*. Obviously this was his nickname, so to speak, that he called him that as an insult because he could get away with it. I felt sorry for Mr Burke but, in that workplace, verbal abuse was quite normal. Nothing could be done…"

5.38 As to why he formed the view the use was insult, as well as a nickname, there is no explanation. We note that this description of occasional use is inconsistent with the claimant's allegation that it was the normal term of greeting over a period of many years.

5.39 We have no doubt that Mr Harsum held a negative opinion of Mr Berkane, and there is evidence of his having significant hostility towards Mr Berkane. We therefore treat his evidence with some caution. Mr Nakd provided no good reason for failing to attend. The evidence of Mr Santos was limited and he did not explain why he considered Jamaican Mafia to be a nickname.

5.40 Mr Berkane's evidence was simple: he did not use the term Jamaican Mafia. For the reasons we will come to, it is not necessary for us to resolve whether the term was ever used.

The law

6.1 Direct discrimination is defined in section 13 of the Equality Act 2010.

> **13(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**

6.2 **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 is authority for the proposition that the question of whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was. Accordingly:

> **"employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate**

comparator by concentrating primarily on why the claimant was treated as she was." (para 10)=

6.3 **Anya v University of Oxford** CA 2001 IRLR 377 is authority for the proposition that we must consider whether the act complained of actually occurred (see Sedley LJ at paragraph 9). If the tribunal does not accept there is proof on the balance of probabilities that the act complained of in fact occurred, the case will fail at that point.

6.4 Harassment is defined in section 26 of the Equality Act 2010.

> **26(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.**
>
> **(3) A also harasses B if—**
>
> > **(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,**
> > **(b) the conduct has the purpose or effect referred to in subsection (1)(b), and**
> > **(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.**
>
> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account--**
>
> > **(a) the perception of B;**
> > **(b) the other circumstances of the case;**
> > **(c) whether it is reasonable for the conduct to have that effect.**
>
> **(5) The relevant protected characteristics are—**
>
> > **age; disability; gender reassignment; race; religion or belief; sex; sexual orientation.**

6.5 In **Richmond Pharmacology v Dhaliwal [2009] IRLR 336** the EAT (Underhill P presiding) in the context of a race discrimination case, made it clear that the approach to be taken to harassment claims should be broadly the same. The EAT observed that 'harassment' is now defined in a way that focuses on three elements. First, there is the question of unwanted conduct. Second, the tribunal should consider whether the conduct has the purpose or effect of either violating the claimant's dignity or creating an adverse environment for him or her. Third, was the conduct on the prohibited grounds?

6.6 In **Nazir and Aslam v Asim and Nottinghamshire Black Partnership UKEAT/0332/09/RN, [2010] EqLR 142**, the EAT emphasised the importance of the question of whether the conduct related to one of the

prohibited grounds. The EAT in **Nazir** found that when a tribunal is considering whether facts have been proved from which a tribunal could conclude that harassment was on a prohibited ground, it was always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on that ground. That context may in fact point strongly towards or against a conclusion that it was related to any protected characteristic and should not be left for consideration only as part of the explanation at the second stage.

6.7 In **Dhaliwal** the EAT noted harassment does have its boundaries:

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

6.8 Harassment may be unlawful if the conduct had either the purpose or the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

6.9 A claim based on 'purpose' requires an analysis of the alleged harasser's motive or intention. This may, in turn, require the tribunal to draw inferences as to what that true motive or intent actually was: the person against whom the accusation is made is unlikely to simply admit to an unlawful purpose. In such cases, the burden of proof may shift, as it does in other areas of discrimination law.

6.10 Where the claimant relies on the 'effect' of the conduct in question, the perpetrator's motive or intention even if entirely innocent does not in itself afford a defence. The test in this regard has both subjective and objective elements to it. The assessment requires the tribunal to consider the effect of the conduct from the complainant's point of view: the subjective element. It must also ask, however, whether it was reasonable of the complainant to consider that conduct had that effect: the objective element. The fact that the claimant is peculiarly sensitive to the treatment does not necessarily mean that harassment will be shown to exist.

6.11 The requirement to take into account the complainant's perception in deciding whether what has taken place could reasonably be considered to have caused offence reflects guidance given by the EAT in **Driskel v Peninsula Business Services Ltd [2000] IRLR 151**, which concerned the approach to be taken by employment tribunals in determining whether alleged harassment constituted discrimination on grounds of sex. In **Driskel** the EAT held that although the ultimate judgment as to whether conduct amounts to unlawful harassment involves an objective

assessment by the tribunal of all the facts, the claimant's subjective perception of the conduct in question must also be considered.

6.12 In considering the burden of proof the suggested approach to this shifting burden is set out initially in **Barton v Investec Securities Ltd [2003] IRLR 323** which was approved and slightly modified by the Court of Appeal in **Igen Ltd & Others v Wong [2005] IRLR 258.** We have particular regard to the amended guidance which is set out at the Appendix of **Igen**. We also have regard to the Court of Appeal decision in **Madarassy v Nomura International plc [2007] IRLR 246.** The approach in **Igen** has been affirmed in **Hewage v Grampian Health Board 2012 UKSC 37**

6.13 **Wisniewski (a minor) v Central Manchester Health Authority** [1998] EWCA 596 is often cited as authority for the proposition that an adverse inference may be drawn from the absence of a witness. In that case, Brooke LJ considered the relevant authorities and derived the following principles

> **(1) In certain circumstances a court may be entitled to draw adverse inferences from the absence or silence of a witness who might be expected to have material evidence to give on an issue in an action.**
>
> **(2) If a court is willing to draw such inferences they may go to strengthen the evidence adduced on that issue by the other party or to weaken the evidence, if any, adduced by the party who might reasonably have been expected to call the witness.**
>
> **(3) There must, however, have been some evidence, however weak, adduced by the former on the matter in question before the court is entitled to draw the desired inference: in other words, there must be a case to answer on that issue.**
>
> **(4) If the reason for the witness's absence or silence satisfies the court then no such adverse inference may be drawn. If, on the other hand, there is some credible explanation given, even if it is not wholly satisfactory, the potentially detrimental effect of his/her absence or silence may be reduced or nullified.**

6.14 This case was decided in the context of medical negligence, and it follows that the reverse burden was not relevant; caution may be needed when applying it in the context of the reverse burden.

6.15 In **Efobi v Royal Mail Group Ltd [2021] UKSC 33**, Lord Leggatt said:

> **The question of whether an adverse inference may be drawn from the absence of a witness is sometimes treated as a matter governed by legal criteria, for which the decision of the Court of Appeal in [Wisniewski] is often cited as authority. Without intending to disparage the sensible statements made in that case, I think there is a risk of making overly legal and technical what really is or ought to be just a matter of ordinary rationality. So far as possible, tribunals should be free to draw, or to decline to draw, inferences from the facts of the case before them using their common sense without the need to consult law books when doing so. Whether any positive significance should be attached to the fact that a**

person has not given evidence depends entirely on the context and particular circumstances. Relevant considerations will naturally include such matters as whether the witness was available to give evidence, what relevant evidence it is reasonable to expect that the witness would have been able to give, what other relevant evidence there was bearing on the point(s) on which the witness could potentially have given relevant evidence, and the significance of those points in the context of the case as a whole. All these matters are inter-related and how these and any other relevant considerations should be assessed cannot be encapsulated in a set of legal rules." (paragraph 41)

6.16 Section 123 Equality Act 2010 sets out the time limits for bringing a claim.

> **(1) Subject to section 140A 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.**
>
> **…**
> **(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.**
>
> **(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something--**
>
> > **(*a*) when P does an act inconsistent with doing it, or**
> > **(*b*) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.**

6.17 It is possible to extend time for presentation of the Equality Act 2010 claims. The test is whether the tribunal considers in all the circumstances of the case that it is just and equitable to extend time.

6.18 It is for the claimant to establish grounds for why it is just and equitable to extend the time limit. The tribunal has wide discretion but there is no presumption that the tribunal should exercise its discretion to extend time (see **Robertson v Bexley Community Centre TA Leisure Link 2003 IRLR 434 CA**).

6.19 It is necessary to identify when the act complained of was done. Continuing acts are deemed done at the end of the act. Single acts are done on the date of the act. Specific consideration may need to be given to the timing of omissions. In any event, the relevant date should be identified.

6.20 The tribunal can take into account a wide rage of factors when considering whether it is just and equitable to extend time. The tribunal notes the case of **Chohan v Derby Law Centre 2004 IRLR 685** in which it was held that

the tribunal in exercising its discretion should have regard to the checklist under the Limitation Act 1980 as modified by the Employment Appeal Tribunal in **British Coal Corporation V Keeble and others 1997 IRLR 336**. A tribunal should consider the prejudice which each party would suffer as a result of the decision reached and should have regard to all the circumstances in the case particular: the reason for the delay; the length of the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued had cooperated with any request for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to a cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

6.21 This list is not exhaustive and is for guidance. The list need not be adhered to slavishly. In exercising discretion the tribunal may consider whether the claimant was professionally advised and whether there was a genuine mistake based on erroneous advice or information. We should have regard to what prejudice if any would be caused by allowing a claim to proceed.

6.22 As to acts extending over a period, the claimant referred the tribunal to **Hendricks v Commissioner of Police for the Metropolis** [2003] IRLR 96 and the need to show some form of link between incidents

Conclusions

7.1 We first consider whether the dismissal was an act of discrimination. For the reasons we will come to, we do not need to decide whether Mr Berkane used the term Jamaican Mafia at any time. However, for the purpose of this analysis, we will assume that he did use that expression, the last occasion being 2 March 2020.

7.2 The circumstances are set out above. We accept Mr Al Mazmi received instructions to reduce cost, which necessitated reducing staff. As a result of separate instructions, redundancies were made in January 2020, March 2020, and June 2020. The claimant was not made redundant in the first two rounds. Two drivers were made redundant in January 2020. No drivers were made redundant in March 2020. The claimant was the only driver made redundant in June 2020, and he was one of 13 people made redundant at that time.

7.3 We have direct evidence that Mr Berkane did not put the claimant forward for redundancy, or seek to influence Mr Al Mazmi's decision in any manner, or at any stage. The claimant speculates that it must have been Mr Berkane who put his name forward. There is no evidence in support of this. Mr Al Mazmi's written evidence confirms he was the sole decision maker and he did not consult with Mr Berkane. We accept Mr Berkane's evidence that he played no part in the selection process.

7.4 There is no evidence on which we could find that Mr Al Mazmi had any knowledge of the use of the term “Jamaican Mafia.” He did not use the term himself. There is no reason to believe that he was aware of the use of any racist language.

7.5 We accept that Mr Al Mazmi believed the claimant had received a number of warnings. His written evidence indicates that he had received negative feedback and complaints about the claimant.

7.6 There was at least one occasion when it is alleged the claimant was found to be asleep in his vehicle outside the Mandarin Hotel. The claimant's evidence on this point is sketchy and incomplete. We find his evidence on this matter to be unreliable. Mr Al Mazmi’s evidence was to the effect that he received a report from a diplomat. It was that diplomat who found the claimant asleep. We have no reason to doubt that account, and we accept his evidence on the point. Further, there is strong evidence that Mr Berkane spoke to the claimant frequently about several concerns, which included the need to ensure he wore smart attire at all times, the need to keep his vehicle clean, and the importance of not eating or drinking in his vehicle. We have accepted Mr Berkane's evidence on this point.

7.7 There is clear evidence that there were concerns about the claimant's performance and on the balance of probability we accept that Mr Al Mazmi believed that there were problems with the claimant's performance and that he believed the claimant had received a number of warnings. Mr Al Mazmi believed the claimant to be the weakest performer of those remaining.

7.8 The claimant accepted that the two drivers who were made redundant before him were the weakest performers. His evidence fails to identify any reason why any of the remaining eight individuals should have been seen as a weaker performer than the claimant. This despite the fact that he sought to rely on actual comparators. In all the circumstances, we accept that Mr Al Mazmi believed the claimant to be the weakest remaining driver.

7.9 We asked Mr Ward to identify those facts from which we could find the dismissal amount to discrimination. He relied on a number of broad allegations; he stated the dismissal was part of continuing conduct; the fact that the term “Jamaican Mafia” was used; the fact that there was reference by Mr Berkane to black people being late; by receiving warnings that related to the claimant's race; and by Mr Berkane directly influencing the dismissal.

7.10 We do not find any of these facts or alleged facts turn the burden. Even if the term “Jamaican Mafia” were used, or if Mr Berkane referred to black people always being late, this was not a matter known to Mr Al Mazmi and did not influence his decision whether consciously or subconsciously.

7.11 We do not accept there is any evidence that any warning received by the claimant related to his race. The claimant expressly conceded during cross examination that no warning was related to race. Whilst this is an opinion, we should take it into account because the concession that it did not form part of his case prevented the respondent from pursuing the matter in cross examination. In any event, there were clear reasons for the warnings given: he should not have gone to Waitrose absent permission; he should not have fallen asleep in the car; and there were real concerns that he did not dress smartly enough at times.

7.12 We cannot find Mr Berkane influenced the dismissal. He took no part in the decision-making process.

7.13 It follows that there are no facts from which we could find that the dismissal was because of race.

7.14 We should note that the respondent has relied on **Reynolds**[3] as authority for the proposition that even had Mr Berkane given warnings because of the claimant's race, and those warnings were relied on by Mr Al Mazmi when dismissing the claimant, the alleged discriminatory motive of Mr Berkane would not taint the decision by Mr Al Mazmi. Following the decision in **Juhti**[4] we doubt that the respondent's interpretation of **Reynolds** is correct. However, it is not relevant in this case because we have found that there is no evidence that any warning was because of race. It follows that any question of the final decision being tainted by some form of previous discriminatory act cannot arise.

7.15 In any event, we have considered carefully the explanation put forward. This can be summarised briefly. In June 2020 it was necessary to lose approximately 25% of the staff at the embassy. Thirteen people were made redundant. Two drivers had previously been made redundant. Given the reduced need for drivers, particularly because of the lockdown and there being fewer individuals needing transport, there was a diminished need for drivers. There were clear objective grounds for Mr Al Mazmi to conclude the claimant was the weakest performing driver, and that was Mr Al Mazmi's conclusion. He selected the claimant for redunancy based on his belief that the claimant was the poorest performing driver.

7.16 We accept that the process followed may not have been considered unfair for the purpose of unfair dismissal. However, Mr Al Mazmi applied the same approach to all individuals; to the extent that this was unreasonable conduct, any unreasonableness is entirely explained by a non-discriminatory reason. It follows the unreasonableness cannot be a fact from which discrimination can be inferred – there is an explanation for it. To the extent it is suggested that relying on the warnings the claimant received is unreasonable, we find that submission to be without merit. It

---

[3] *CFLIS (UK) Ltd v Reynolds [2015] EWCA Civ 439*
[4] *Royal Mail Group Ltd v Jhuti [2019] UKSC 55*

follows that the respondent has established an explanation which in no sense whatsoever is because of race. The respondent did not contravene the provision. The claim of direct race discrimination in relation to the dismissal fails.

7.17 We have considered whether the dismissal could be an act of harassment. There is no fact from which we could conclude that harassment was the purpose of the decision. In any event, even if there were facts from which we could conclude that harassment was the purpose, any claim that it was the purpose must fail given the explanation stated above.

7.18 Undoubtedly, the dismissal was unwanted conduct. We have considered whether it had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. This involves subjective elements and objective considerations. Redundancy is, no doubt, upsetting. However, the claimant's evidence falls short of establishing he subjectively thought the effect was not one of harassment as defined. It cannot be seen, objectively, as harassment. In any event, in no sense whatsoever did the dismissal relate to the claimant's race.

7.19 The claimant alleges that Mr Berkane repeatedly referred to him as "Jamaican Mafia." The claimant's evidence on this point is poor. He fails to set out when it first started or when it ended. There are occasions when it may be difficult, or even impossible, for a claimant to identify when an event occurred. Having a start date is helpful, but not critical. The claimant appears to say that this comment was repeated two or three times a week for a period of years. He, implicitly, claims the usage was offensive, such that he found it violated his dignity. He stated that he had cause to raise it with Mr Berkane. He stated he continued to put up with it. Despite all this, he failed to file any grievance. He failed to make a formal complaint. He failed to make a single note confirming when it occurred. His evidence falls short of saying he asked for it to stop. There is no evidence that he discussed it with anyone else and we note, in particular, that Mr Harsum confirmed that he did not discuss it with the claimant but instead made an assumption about the claimant's attitude. This would suggest that the claimant did not even make complaint to his colleagues - the colleagues who may have been sympathetic, particularly given Mr Harsum's dislike of Mr Berkane. Given Mr Harsum's alleged view of Mr Berkane and the ample opportunity he must have had to discuss his views with the claimant, it is most surprising that this alleged racial harassment was not raised by the claimant or Mr Harsum. The lack of documentation and contemporaneous proof is extraordinary, and it does leave us to doubt the claimant's evidence, at least to the extent that he found the use of any term inappropriate or offensive.

7.20 For the reasons we have given, even if the words were used, it is far from clear that the claimant found them offensive. The claimant's evidence refers to his responding to Mr Berkane and suggesting that others may not be as forgiving as the claimant. This may indicate an ambivalence. We

are not satisfied the claimant has given full or frank disclosure of these conversations. However, even on his own account, his evidence does not go as far as to suggest that he asked for it to stop, despite there being some form of conversation. On the claimant's evidence, Mr Berkane stated he was not racist, as he was married to a black woman and considered his children to be black. It is not every use of a term which relates to race which will ultimately be found to be harassment. There is at least some evidence that if the words were used, the claimant's response was ambiguous, even if he subjectively felt offended.

7.21 If the words were used, there is very poor evidence as to when they were used. Mr Harsum gives some support and alleges that he heard the term. However, he left in July 2018, and for the reasons we have given, we view his evidence with some caution. Mr Santos also alleges the words were used, albeit he left in May 2018, and his description is not entirely consistent with the claimant's allegation that the term was used to up to three times a week. We view Mr Nakd's evidence with some caution. He was made redundant in January 2020. He brought a claim against the respondent. There is a real possibility he holds a negative view of the respondent. He refers to “Jamaican Mafia” being used but gives no indication he discussed it with the claimant. Whilst we have a signed statement from him, we have no proper reason for his not giving evidence. We were told that he stopped communicating with the claimant or answering emails, and this leads us to treat his evidence with some caution.

7.22 It is unclear when Mr Berkane is alleged to have last used the term “Jamaican Mafia.” This was a matter discussed at the start of the proceedings. The claimant was invited to clarify, and he was invited to amend. We confirmed to Mr Ward the consequence of failure to amend may be that we were unable to find the date when the alleged term was used.

7.23 The tribunal may only adjudicate on claims which are pleaded. It is necessary to consider whether we have jurisdiction to hear a claim. Time limits are set out in paragraph 123 Equality Act 2010. The complaint may not be brought after the end of a period of three months starting with the date of the act to which the complaint relates. It follows that it is necessary to identify the act and the date. We do not accept the claimant's primary submission that there is a neutral burden. (Even if the burden were neutral, the respondent advanced no evidence to establish that it occurred at all.) It follows that the claimant must prove when the act occurred. Failure to prove the date the act occurred is problematic because the claimant cannot demonstrate the claim was brought in time. It would be wrong to infer a claim has been brought in time. A tribunal should not infer a primary finding of fact. As there is no date, there is no solid ground from which to consider whether time should be extended.

7.24 Paragraph 9 of **Anya** makes it clear that the first stage for any discrimination claim is to identify if the event happened at all. If the

alleged treatment did not occur, that is the end of the claim. The reverse burden group does not apply, as there is no detrimental treatment. It follows that the tribunal cannot examine the thought process of any individual, because there is no treatment to consider. As there is no treatment established, no explanation can be required.

7.25 However, there is a further point which should be considered. Failure to identify the date potentially prevents a fair hearing for the respondent. A respondent has three broad defences. The first is the treatment did not occur. The second is the burden does not shift. The third is there is an explanation. In addressing the first defence, it is important that the respondent should have sufficient understanding of when the event was said to have occurred, because it is then possible to consider whether the respondent has established the treatment did not happen. When the alleged treatment is clearly identified, particularly by date, the respondent can ascertain whether there is relevant evidence to show the treatment occurred: the alleged perpetrator may not have been in the country; there may be witnesses who could gainsay the claimant's evidence. Without a date, that evidence cannot be identified, and the respondent is denied a fair hearing, as the possibility of establishing the first line of defence is denied. Moreover, it may be that inappropriate language was used at some point, but not continuously. Failure to identify the final date, prevents the respondent investigating adequately, whether there is an explanation. It follows that failure to set out the dates adequately, as well as having jurisdictional implications, impinges upon the fairness of the hearing. In situations where it may be expected that a date can, and should, be given, failure to set out a date may be grounds for striking out a claim on the basis that there can be no fair hearing.

7.26 In this case, on 9 May 2022 Mr Ward sent an email which identified 2 March 2020 as the final date the term “Jamaican Mafia” was used. Despite the tribunal confirming the previous day that if a date were to be relied on, an application to amend must be made, no application was made. That need for amendment was reiterated during the recusal application. Yet, the claimant made no application to amend. The date, 2 March 2020, does not appear in the claim form. The date is not in the claimant's statement. The claimant gave no oral evidence confirming 2 March 2020 was the final date the term “Jamaican Mafia” was used. Despite the lack of pleading and the lack of evidence, Mr Ward sought to submit that we should accept 2 March 2020 was the final time Jamaican Mafia was used.

7.27 The respondent notes that if the final date was 2 March 2020, absent any conduct extending over a period, the claim is out of time. This is the matter which we should consider first.

7.28 In considering whether we have jurisdiction, we are going to take the most generous view that we can. We will assume for this purpose (and for the purpose of considering the dismissal claim) that the term “Jamaican Mafia”

was used consistently over a period of years several times a week. We will assume that the final time it was used was 2 March 2020.

7.29 We reject the claimant's submission that it forms part of conduct extending over a period culminating in the dismissal. The dismissal was entirely unconnected for the reasons we have already given. The dismissal did not form part of any continuing course of conduct with any alleged discrimination being use of the term Jamaican Mafia. It was not in any sense connected. Mr Berkane did not directly influence the claimant's dismissal. Any warnings were not tainted by discrimination.

7.30 The claim form was issued on 29 September 2020. The ACAS conciliation opened on 20 August 2020 and concluded on 20 September 2020. The claim for harassment and discrimination based on the final act on 2 March 2020 should have been brought no later than 1 June 2020. The conciliation period started nearly 2 months after the time for bringing the claim had expired.

7.31 It is for the claimant to establish the reason why the claim was not brought in time. He has given no explanation at all. He has given no reason. He does not address the matter in his claim form or in his evidence. The written submissions referred to the applicable law, but do nothing to establish the reason for delay. They do not address why we should find it is just and equitable to extend time.

7.32 The tribunal has a wide discretion, but it should not exercise that discretion capriciously. There should be some reason for saying why it is just and equitable to extend. The reality is the claimant has given no explanation for his delay during a period of years when it is alleged he was harassed, or the subsequent delay after 2 March 2020. There is no reason why the claimant could not have brought the claim earlier. There is no reason why he could not have given proper particularisation of the last occasion when the term was used.

7.33 If we were to extend time, there are considerable conceptual difficulties, not least of all the fact that there is no evidence as to a single date when it occurred. Whilst for the purpose of considering extension of time, we have taken the claimant's case at its height, despite the failure to apply to amend, we note there are still considerable difficulties, not least because the respondent cannot deal adequately with the allegation given the lack of particularisation. If we now extend time, given the claimant's approach, despite the guidance given be the tribunal, the respondent may be prevented from fully exploring its defence. The fact that the respondent may be denied a fair hearing is important when considering if the extension is just and equitable. We take the view it is no answer to say that use of the term is denied. The respondent is denied the opportunity to look at the detail and to consider how far it accepts Mr Berkane's evidence. In all the circumstances we decline to extend time. It is not just equitable to do so.

7.34 As we have decided that time should not be extended, it is not necessary for us to finally decide whether the term “Jamaican Mafia” was used.

7.35 It follows that there is no jurisdiction to hear the claims of harassment and or direct discrimination, so far as they relate to the allegation that the term “Jamaican Mafia.” Those claims are dismissed.

_____

Employment Judge Hodgson

Dated: 28 June 2022

Sent to the parties on:

.28/06/2022

For the Tribunal Office