



EMPLOYMENT TRIBUNALS

Claimant: Mr R Soares

Respondent: Office of Gas and Electricity Markets (Ofgem)

Heard at: East London Hearing Centre

On: 16, 17, 18 March 2022; 7 June 2022; 12 July 2022 (without the parties)

Before: Employment Judge Gardiner

Members: Mrs G Forrest
Dr J Ukemenam

Representation

Claimant: In person

Respondent: Ms K Loraine, counsel

Interpreter: Ms Marilise Jefferies (Portuguese language)

RESERVED JUDGMENT

The judgment of the Tribunal is that:-

All of the Claimant's complaints are dismissed.

REASONS

1. The Claimant is a Brazilian national. He was employed by the Respondent from 25 November 2019 until 3 August 2020. At that point he was dismissed. He was still in his probation period, which had been extended in March 2020. The reason given for his dismissal was that he had not shown he was capable of performing the role for which he had been employed. He had therefore failed his probation period. He was paid one months' notice, reflecting his contractual notice period.

2. In these proceedings, the Claimant complains about how he was treated throughout his employment, including the decision to end his employment. He argues that various incidents amount to acts of direct race discrimination and/or harassment. All complaints are disputed by the Respondent.
3. The Final Hearing was conducted as a hybrid hearing on 16, 17 and 18 March 2022. The Claimant attended the hearing in person. He was assisted in his participation with the hearing by a Portuguese interpreter. Portuguese is the Claimant's native tongue. The Respondent's counsel, Ms Kara Loraine participated by CVP, given that she had recently tested positive for Covid-19. All witnesses apart from Ms Clifton attended the Tribunal and give their evidence in person. Ms Clifton is based in Inverness and Employment Judge Barrett had previously ordered that she could give her evidence by CVP given the ongoing Covid-19 pandemic, her own clinical vulnerability and the extent of the travelling needed to attend the East London Hearing Centre.
4. Closing submissions took place on 7 June 2022 and took place over CVP. In advance, the Claimant had submitted written closing submissions which covered 19 pages, to which he spoke. Respondent's counsel made her submissions orally.
5. The Tribunal panel reconvened in the parties' absence on 12 July 2022 to deliberate and decide the issues. The issues to be decided had been set out in the order of Employment Judge Hallen following a hearing on 14 October 2021. These issues were clarified at the outset of the hearing.
6. The following witnesses gave evidence:
 - a. The Claimant
 - b. Kyle Kuenzel, who was the Claimant's line manager;
 - c. Alex Flucker, who heard the Claimant's grievance;
 - d. Ms Teri Clifton, who heard the Claimant's grievance about the way in which he had been treated.
7. The Respondent relied on a bundle of documents running to 749 pages. In addition, the Claimant provided an additional bundle of 518 pages. References in square brackets in these reasons are references to the Respondent's bundle unless otherwise stated. The Claimant also asked the Tribunal to view videos he had recorded of virtual meetings that had taken place at a point when staff had been asked to work from home; and to listen to an audio recording of the grievance outcome meeting.

Findings of fact

8. The Claimant started his employment as a Sharepoint Developer on 25 November 2019. His employment was subject to a six-month probation period. He was issued with a Job Description, although this Job Description was not included in the bundle. Part of the job description was quoted in the Claimant's grievance at page

[166]. The section of the Claimant's Principal Statement of Employment headed Job Title stated that his job title was Sharepoint Developer. The section stated that Ofgem reserved the right to require him to undertake alternative duties when reasonably required by Ofgem's business and added that Ofgem may redeploy him to other work to meet its business needs.

9. He was one of two employees working in the Sharepoint Team. The other employee was named Ms Jayshree Ostwal. He was managed by Mr Kyle Kuenzel, who also managed the Service Desk team, and the Digital Workplace team. Jayshree is of Indian national origin. Other team members came from a significant range of countries, namely England, Scotland, South Africa, Ghana, Pakistan, Guyana and Bangladesh.
10. During January 2020, the Claimant was asked to work on a project using PowerApps to address a particular issue for an internal client called Patrick Murphy. The Claimant alleges that on 12 February 2020, Kyle Kuenzel shouted at him saying "forget about the project and forget about Patrick Murphy". The Claimant alleges that Mr Kuenzel's failure to follow up on this project and his decision to speak aggressively to the Claimant and client was harassment related to his race. The evidence as to this incident has not been sufficiently clear for us to make any findings of fact as to what actually was said, when it was said, and the context in which any remarks were made. Even on the Claimant's own version of events, the comment was not made in front of Patrick Murphy.
11. On Friday 14 February 2020, the Claimant was unwell with an ear infection. He told Mr Kuenzel his ears were blocked and he had a procedure to treat the issue the following Friday. Mr Kuenzel told him at 14:09 "well, just log off. I'll book yesterday and today as sick leave its Friday. Take the rest of the day and the weekend to try to get better". The Claimant asked to work from home until the procedure had taken place. Mr Kuenzel responded that "if you can get a note from your doctor, I won't have a problem with you working from home all week". The Claimant told him that it was not possible to get a doctor's note until after 7 days. Mr Kuenzel said he knew that the tube can put pressure on ears as he had the same problem. He added "All kidding aside, let's play it by ear". The Claimant did not react to this deliberate pun, but continued with the conversation, discussing the practicalities of working in the office until the issue had been resolved. Mr Kuenzel's use of the phrase "let's play it by ear" later became a source of contention. We return to that issue below.
12. Mr Kuenzel had allowed the Claimant to work from home for most of the week commencing 10 February as well as 17 and 18 February 2020 [see 94]. He suggested that the Claimant should come into the office on Wednesday 19 February.
13. On 4 March 2020 the Claimant had his mid-probation review with Mr Kuenzel, who was his line manager. It had originally been scheduled to take place on 25 February 2020 but it was moved at the Claimant's request because he needed to go to the

airport to pick someone up. In advance of the meeting, Kyle Kuenzel completed a Probationary Assessment Form. Of note were the following comments:

“At present, it has been observed that tickets which are being assigned to Rodolfo are being completed inaccurately, causing confusion for the customer, delay on the request from the customer as well as possibly exposing sensitive data. Careful attention must be paid to execution of the task required of the role. It has been observed that Rodolpho is absent for extended periods of time. As mentioned previously, tickets/tasks are being completed erroneously.”

The form concluded:

“The above issues which have been highlighted are fundamental and basic to the role as well as working at Ofgem. The highlighted behaviours and objectives were outlined in the job profile when advertised and is expected of the successful candidate, as was demonstrated in the interview.

It is therefore my recommendation that Mr Rodolfo Soares has four (4) weeks to achieve successful output in terms of basic attitude, contribution to team efforts, completion of tasks related to Sharepoint issues as requested through the IT Service Desk tool.

Recommended immediate progress on fundamental aspects of the role, with weekly progress checkpoints to ensure quality of work is improved. This will continue until sufficient evidence support behavioural change.”

14. The mid-probation review on 4 March 2020 was also attended by Alison Davies, Strategic HR Business Partner. Mr Kuenzel’s concerns about the Claimant’s performance were discussed. The Claimant did not respond well to being criticised. He disputed the criticisms. He became aggressive and talked over Mr Kuenzel. In cross examination, he accepted that he was critical of Mr Kuenzel in certain respects during this meeting. At the conclusion of the meeting, the Claimant was told that his probationary period would be continuing for a further three months. He was asked to sign the probationary review form, but refused to do so, because he did not accept that any of the feedback he was receiving was accurate. He subsequently emailed Alison Davies a copy of the completed form, with all of Mr Kuenzel’s comments struck out.
15. The Claimant was told he would be having weekly 1-2-1 meetings in order to review his performance. These were to have taken place virtually. They did not happen. No clear explanation has been provided as to why these meetings did not take place.
16. The day after the mid-probation review meeting held on 4 March 2020, the Claimant emailed Alison Davies accusing Kyle Kuenzel of telling untruths about him and his work. Mr Kuenzel responded that evening, dealing point by point with the criticisms made by the Claimant. His essential point was that the Claimant did not need the specific training requested given his apparent level of skill and experience

as stated on his application form. The Claimant had turned down an opportunity to gain further experience by not attending the Microsoft Ignite event at the ExCel Centre. Mr Kuenzel did not comment specifically on the Claimant's allegation he had been telling untruths about him and his work. We accept the contents of the email as an accurate statement of Mr Kuenzel's concerns about the Claimant's performance.

17. On or around 5 March 2020, Mr Kuenzel joined a trade union. It was the PCS union, the same trade union of which the Claimant was already a member. This was Mr Kuenzel's personal decision. The Respondent imposed no restriction on the ability of its employees to join a trade union of their choice.
18. The Claimant alleges that on 6 March 2020 he tried to speak to Mr Kuenzel about work in the open plan office in front of others. His recollection is that Mr Kuenzel raised his hands aggressively and told him to go home. His evidence is vague as to how Mr Kuenzel behaved in this encounter and as to the surrounding circumstances. It is not referred to in any documents created around this time. Mr Kuenzel cannot remember acting in the manner described by the Claimant. We are unable to make any findings of fact as to what was said or done by Mr Kuenzel in this incident.
19. The Claimant believed that Jayshree was not doing her fair share of the tickets and had raised this with Mr Kuenzel. On 7 March 2020, Mr Kuenzel emailed the Claimant having analysed who had resolved SharePoint tickets raised from 1 December 2019 to 7 March 2020. He noted that Jayshree had resolved 42.26% of the 609 SharePoint tickets raised during this period. By contrast the Claimant had resolved 1 ticket, or 0.6% of all tickets. He set this out in a pie chart within the body of his email. From other data, he produced a bar graph showing that Jayshree had completed 294 tickets compared to the Claimant's 4.
20. Mr Kuenzel concluded his email as follows:

"So let me be clear, as I stated in previous emails as well as in person, I want you working on all service desk tickets. Jayshree is working on app development and maintenance and working on The Wire in Nordin's absence. The service desk tickets is the work that is required of your role"
21. The Claimant's position was that this was not part of his role, because he was employed as a Developer.
22. On 10 March 2020, Mr Kuenzel emailed the Claimant confirming how the workload would be allocated going forwards. The Claimant was to "work the queue of tickets" – described as "library creation, access provisioning, etc", whilst Jayshree was to concentrate on "development and maintenance of internal apps, support of the Wire". In his response, which was copied to Jayshree, the Claimant said: "I will not be able to deal with all tickets by myself". He misspelt Jayshree's name as Jaystree.

23. That prompted the following response from Jayshree:

“Hi Rodolfo,

Have you seen my name spelling anytime in To in outlook or Skype chat window? From last 3 and half months, you cannot write or note my spelling correctly. It's a bit annoying every time. Can you please pay attention?

Thanks,

Regards,
Jayshree”

24. The Claimant responded without making any reference to Jayshree's point about the spelling of her name. He accused Jayshree of trying to push him to do the network administrator job, despite not having the necessary skills. He used Jayshree's name twice in this email. On both occasions, he misspelt her name as Jaystree. In a further email sent on the same day he misspelt her name as Jastree.
25. In answer to questions asked in cross examination, the Claimant accepted that these misspellings in the email might appear deliberate to someone who had read the email in the light of the previous emails.
26. In late March 2020, the national lockdown in response to the Covid-19 pandemic was imposed, although government advice before then had been to work from home if possible. The Claimant, having previously worked from home for some days of the working week, as approved by Mr Kuenzel, worked from home throughout that week. His colleagues also worked from home.
27. On 25 March 2020, the Claimant lodged a grievance against his line manager Mr Kuenzel. His allegations included him being assigned tickets to address IT problems, arguing these tickets had disappeared from the system making it impossible for him to resolve those problems. He referred to the conversation with Mr Kuenzel about his ear infection but did not complain about him using the phrase “let's play it by ear”. He did not allege that the reason for any of the treatment he was raising in the grievance amounted to race discrimination.
28. There was to be a probation review meeting on 14 April 2020 to discuss whether the Claimant should be confirmed in his post. This meeting was postponed, given that the Claimant had lodged a grievance about his line manager, Mr Kuenzel.
29. On about 17 April 2020, during a Teams meeting for the work group to which the Claimant belonged, participants discussed reading a book, cooking and gardening. The Claimant wrongly assumed that this indicated his colleagues were engaged in these activities during normal working hours. We find that these team members were discussing what they had been doing outside of work, in circumstances where

they were unable to participate in their normal social activities. The Claimant had misunderstood what was being discussed.

30. The Claimant's grievance was heard on 22 April 2020. It was conducted by Alex Flucker. Susan Paget attended as the Claimant's trade union representative. Manjula Jayasuriya, HR Representative attended to take notes. The meeting lasted forty minutes. Mr Flucker stated at the outset of the meeting he had identified three strands to the grievance. These were disrespectful treatment towards him by Mr Kuenzel, insufficient training for the requirements of the role and lack of support in delivering some of the work he had been asked to complete.
31. In response, the Claimant did not dispute that formulation of his grievance. He said he wanted respect and wanted Mr Kuenzel to be dismissed with immediate effect, as Mr Kuenzel was still in his six-month probationary period. There was no evidence in the notes that the way Mr Flucker conducted the meeting was inappropriate or objectionable in any way.
32. Following the grievance hearing, Mr Flucker spoke to Louise Davis, Senior IT Service Desk Analyst, and Alison Davies, Strategic HR Business Partner.
33. On 24 April 2020, Robin Last, Senior Service Desk Manager, emailed the Claimant raising concerns about the way the Claimant had conducted himself in relation to members of Mr Last's team. Members of his team had reported to him that they had been threatened by the Claimant with formal complaints for passing him tickets that he did not regard as his responsibility. Mr Last accepted that a few tickets may have been passed across to the Claimant without the correct investigations being done. He concluded by saying that if the Claimant had a grievance with a member of Mr Last's team, he should contact Mr Last first rather than getting HR involved. He ended:

"I'm uncertain as to whether your intention is to come across like the way that people are understanding you are, but I hope that we can improve this relationship, as the better we work together, the happier we will all be" [260]

34. On 6 May 2020 Mr Kuenzel wrote to the Claimant in a letter headed "Probation Extension". The letter was worded in the following terms:

"Your probation period is due to expire on 24th May as you are aware your probation review meeting which was originally scheduled for the 14th April was postponed whilst the grievance that you have raised is investigated.

Therefore, I am writing to confirm the extension of your probation for a period of 3 months until 24th August. This will allow adequate time for the completion of the grievance process and the rescheduling of the probation review meeting."

35. On 7 May 2020, the Claimant emailed Jayshree, this time misspelling her name as Jayhree. Jayshree responded "Can you please check my spelling again? I am

getting annoyed everytime". The Claimant replied saying "Apologies I misspelled Jayshree".

36. On 18 May 2020, the Claimant was sent the Grievance Investigation Report, transcripts and supporting emails. The following day, 19 May 2020, Mr Flucker met with the Claimant to tell him the outcome of his grievance. He told the Claimant he had decided to reject the grievance.
37. On 20 May 2020, the Claimant was in email discussion with his trade union about the way he had been treated. He considered it amounted to discrimination and instructed his trade union representative to instigate Early Conciliation with ACAS. However, the ACAS Early Conciliation record on the Tribunal's file suggests that ACAS were first notified on 4 May 2020, and the ACAS Certificate was issued on 27 May 2020.
38. On 22 May 2020, Mr Flucker sent the Claimant a three-page letter explaining why his grievance had been rejected. Mr Flucker rejected the Claimant's complaints about lack of training and support, as well as about bullying and harassment by Mr Kuenzel. He considered that the Claimant had unreasonably taken offence at various email communications from Mr Kuenzel. He said that it would be beneficial for the Claimant to enhance his comprehension of English. He rejected the Claimant's contention that he had been pressurised into not taking time off work when he was sick, and into doing the job of a network administrator. He said that issues reported to the service desk are "often complex and require a collaborative, multi-disciplinary team to investigate so that the source of the problem can be identified ... providing support or assistance in those matters is expected from a person holding your role and so requests for support are normal and should be expected". He noted that the Claimant's behaviour had often been rude and aggressive towards his fellow colleagues. He noted that the result was that "some colleagues are no longer willing to work or to speak with you". He summarised the range of recommendations contained in his Investigation Report.
39. He concluded the letter by asking him to submit any appeal within 10 working days of receiving the letter, setting out the grounds of any appeal. Subsequently the Respondent checked with the Claimant's trade union representative to see whether he intended to appeal, conscious that he was on sick leave at the time. Despite this, there was no indication that the Claimant would be appealing still less any application for the time to appeal to be extended.
40. On 26 May 2020 the Claimant started a period of sickness absence. The following day, he obtained a Fit Note which signed him off work until 4 June 2020 with Anxiety Disorder. On 29 May 2020 the Claimant emailed Mr Kuenzel enclosing the Fit Note. He said "in good faith, without prejudice, I will even use my annual leave on the 5th and 8th of June 2020 to cover my absence. Even though the root cause for my health problem was caused by Ofgem and management." He concluded the email by stating that he should be able to return to work on 9th June 2020.

41. On 3 June 2020, two days before the proposed end of the Claimant's sick leave, Mr Kuenzel emailed the Claimant stating "Just wanted to check in on you. See if you are doing ok and if there is anything I can do for you". There is no record in the bundle of any response to this email from the Claimant.
42. The Claimant alleges that there was a union meeting on 26 June 2020 which was attended by both himself and by Mr Kuenzel. This was the first occasion on which the Claimant realised that Mr Kuenzel was a member of the same union. In his witness statement, he describes how he had accused Mr Kuenzel in this public meeting of discriminating, bullying and harassing him. As a result, he was told to leave the union meeting by Frank Hemmes, one of the union officials.
43. On 29 June 2020, the Claimant was signed off work for a fortnight with Anxiety Disorder. It was initially envisaged that there would be a meeting on 3 July 2020 to review the Claimant's performance during his probation. This was postponed to 3 August 2020 due to a further period of sickness absence on the Claimant's part.
44. On 2 July 2020, the Claimant presented his ET1 to the Employment Tribunal.
45. On 15 July 2020, the Claimant asked if he could appeal against the outcome of the grievance. Alison Davies, Strategic HR Business Partner, refused to allow the Claimant to appeal at that point. She pointed out he had been given the outcome of the grievance on 22 May 2020, which was nearly eight weeks ago. Although he had recently been on sick leave, this had not been the case for much of the period since the grievance outcome had been sent.
46. On 16 July 2020, the Claimant lodged a further grievance. This time he alleged that the reason for his treatment was because of his race. Specifically, he said that he was being treated differently by Mr Kuenzel because he was a Brazilian from South America.
47. On 21 July 2020, Alison Davies wrote to the Claimant informing him that his second grievance would not be considered. She gave two reasons for this decision. The first was that it was "substantially a rehash of the allegations you already made in the first grievance". The second was that he had been given the opportunity to appeal that grievance outcome within 10 working days (ie by 5 June) but made no such appeal. She said that it was not appropriate to bring another grievance, based on the same set of facts, because you are not happy with the outcome.
48. In advance of the probation review meeting scheduled to take place on 3 August 2020, Mr Kuenzel completed a probationary assessment form. It noted the following:

"Rodolfo is often completing tickets incorrectly.
Rodolfo is often unwilling to put in the effort required to investigate problems.
The work being completed by Rodolfo is often requiring further correction or fixing.

Personal behaviour is often found to be rude and abrasive towards other colleagues. Rodolfo was given opportunity to improve performance/behaviour from the midpoint probation meeting. Any points to correct behaviours were taken as offensive rather than as constructive. Therefore it is believed the relationship is completely broken and no improvements can be made. From conversation with the employee, he feels that the work environment and conditions are lacking the proper support. This is wholly untrue. Whether myself, or many members of Service Desk when approached have provided necessary information in a timely fashion. Overall Rodolfo performance has been mediocre at best. There is little to no effort to demonstrate his abilities or showcase his skills in the more modern technologies like PowerApps. During his tenure at Ofgem, he made hardly any effort to demonstrate his skills or the art of the possible using these technologies. As a subject matter expert in his field, I would expect him to take a consultory position to lead the overall conversation, and instead the response from Rodolfo has been it is always someone else's responsibility. Every offer or effort was rebuked by Rodolfo and the relationship between himself and the wider organisation further broke down"

49. Again, we accept that this assessment genuinely reflected Mr Kuenzel's view of the Claimant's performance.
50. On 3 August 2020, Mr Kuenzel conducted the rescheduled probation review meeting. It was held virtually. We accept the evidence of Mr Kuenzel that the Claimant was combative and frequently talked over him as he attempted to explain the reasons for the decision to terminate the Claimant's employment. The Claimant was told that he had failed his probation period and his employment would end.
51. In a letter dated 5 August 2020, the Claimant was told that a decision had been taken to end his employment on grounds that he had failed to successfully complete his probationary period. The areas where his performance was unsatisfactory were:
 - a. Ability to work collaboratively
 - b. Tone and language used with fellow colleagues
 - c. Quality and completeness of the work asked of you
 - d. Refusal to improve on same points which were raised at mid-point probation meeting through coaching meetings.
52. The Claimant subsequently appealed against his dismissal setting out the basis for his appeal on 14 August 2020, making nine points. His appeal hearing was conducted over Skype by Teri Clifton on 21 August 2020. It was attended by Laura Hutton as his trade union representative. It was also attended by Janice Haldane-Dorrian, an HR Business Partner, rather than Alison Davies who had attended the probation review meeting.
53. The Claimant made an opening statement, as detailed in an email sent at 12:58, very shortly before the start of the hearing. In it, he described Mr Kuenzel as

making racist, fake and defamatory lies, and criticised Alison Davies for lying on the transcript of the grievance outcome.

54. Having made his points, the Claimant decided to leave the meeting. The hearing proceeded in his absence. His union representative, Laura Hutton, continued to attend but declined to make any representations in the Claimant's absence. Ms Clifton's decision was to dismiss the Claimant's appeal. She considered that the Claimant had not performed to the required standard and the way in which he conducted himself was problematic. As a result, the dismissal decision stood. This conclusion was set out in writing, addressing each of the nine appeal points in turn.

Agreed list of issues

55. Following discussion at the start of the hearing, the final version of the list of issues was as follows:

The Claimant brings claims of direct race/nationality discrimination and harassment. The Claimant is Latin American.

In relation to his claim of direct discrimination, was the Claimant subject to less favourable treatment by the Respondent in relation to the following:

2.1 Alex Flucker protected Kyle Kuenzel, the Claimant's line manager in relation to the conduct of the grievance meeting and the grievance outcome.

2.2 The Respondent overloaded the Claimant with tickets (work) not related to his job description in or around 17 April 2020 whilst the rest of the team was not so overloaded;

2.3 The Respondent demoted the Claimant on 10 March 2020 to a role on the Service Desk;

2.4 The Respondent's decision to extend the Claimant's probationary period beyond the initial period of six months;

2.5 The Claimant was sick from 26 May 2020 to 4 June 2020 and Kyle Kuenzel made the Claimant use up his annual leave (on 5 and 8 June 2020) rather than permit him to have paid sick leave;

2.6 The Claimant's line manager (Kyle Kuenzel) was permitted to join the PCS union on 5 March 2020 by Frank Hemmes and Susan Paget;

2.7 The Respondent's termination of the Claimant's employment on 3 August 2020;

2.8 The Respondent's failure to allow him an extended time period to appeal against the dismissal of his grievance, which was communicated to the Claimant on 19 May 2020;

2.9 Alison Davies (HR Officer) failing to attend the appeal meeting on 21 August 2020.

The Claimant relies on a hypothetical comparator. The Claimant asserts that an appropriate hypothetical comparator is someone fulfilling the same role as the Claimant with the same performance issues, who is not Latin American.

The Respondent's position in relation to the Claimant's allegations of less favourable treatment are either that they did not occur, or in the event that they did occur the Claimant was not subject to such treatment because of his race/nationality but because of his performance in the role.

In relation to his claim of harassment, was the Claimant subject to the following acts of alleged unwanted conduct:

5.1 The Claimant's line manager (Kyle Kuenzel) using the expression "play it by ear" on 14 February 2020 when the Claimant was off sick with an ear problem;

5.2 The Respondent overloaded the Claimant with tickets (work) not related to his job description in or around 17 April 2020 whilst the rest of the team was not so overloaded.

5.3 The Claimant's line manager Kyle Kuenzel on 6 March 2020, when he tried to speak to him about work aggressively raised his hands to the Claimant and told me to go home.

5.4 The Claimant was sick from 26 May 2020 to 4 June 2020 and Kyle Kuenzel made him use his annual leave (on 5 and 8 June 2020) rather than permit him to have paid sick leave.

5.5 The Claimant was asked to leave the union meeting on 26 June 2020 in a dismissive/aggressive manner by Frank Hemmes and Susan Paget (employees of the Respondent) who was also the Claimant's union representative at which Kyle Kuenzel was also present.

5.6 The Claimant's line manager (Kyle Kuenzel) failing to follow up on a project during the period from 1 January 2020 to 12 February 2020 and speaking aggressively to the Claimant and to Patrick Murphy on 12 February 2020.

The Respondent's position in relation to the Claimant's allegations of unwanted conduct are that either they did not occur or in the event that they did occur they did not violate the Claimant's dignity or create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.

Legal principles

Direct discrimination

56. Section 13 of the Equality Act 2010 is worded as follows :
- (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.
57. The Claimant seeks to compare himself against the treatment of a hypothetical non-Latin American employee would have been treated. Such a hypothetical comparator must in all other respects be in a comparable position to the Claimant apart from his age.
58. The focus is on the mental processes of the person that took the decisions said to amount to discrimination. The Tribunal should consider whether the decision maker consciously or unconsciously was influenced to a significant (ie a non-trivial) extent by the Claimant's age. Their motive is irrelevant.
59. Section 136(2) of the Equality Act 2010 is worded as follows:
- (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.
60. Guidance on the burden of proof was given by the Court of Appeal in *Igen v Wong* [2005] ICR 931. This guidance has subsequently been approved by the Court of Appeal in *Madarassay v Nomura International plc* [2007] ICR 867 and by the Supreme Court in *Hewage v Grampian Health Board* [2012] ICR 1054 (at paras 22-32). It has been considered recently by HHJ Talyer in *Field v Steve Pye & Co Limited* [2022] EAT 68, where the EAT emphasised that if there is evidence that discrimination may have occurred the burden of proof cannot be ignored. It is an important tool in determining claims where there is room for doubt (paragraph 37). However, in a claim where there is no room for doubt, the burden of proof claims have nothing to offer where the employment tribunal is in a position to make positive findings on the evidence one way or the other (*Hewage* per Lord Hope of Craighead).
61. The burden of proof starts with the Claimant. It is for the Claimant to prove facts from which the Tribunal could infer, in the absence of a satisfactory explanation, that the Claimant's treatment was because he was of Latin American ethnicity.
62. In order for the burden of proof to transfer from the Claimant to the Respondent, it is well established that it is insufficient for the Claimant merely to show a difference in status and detriment treatment (see *Madarassay* at paragraph 54). In *Network Rail Infrastructure v Griffiths-Henry* [2006] IRLR 865, Elias J at paragraph 15 said that the mere fact that an unsuccessful candidate was a black woman and successful candidates were white men would be insufficient to be capable of leading to an inference of discrimination in the absence of a satisfactory non-discriminatory explanation. To shift the burden of proof a claimant must also prove something more. That is, in the present case the Claimant must prove facts from which the Tribunal could infer that there is a connection between the protected

characteristic of the Claimant's ethnicity and the detrimental treatment, in the absence of a non-discriminatory explanation.

63. If such facts are established, then the burden of proof transfers to the Respondent to establish on the balance of probabilities that the protected characteristic formed no part of the reasoning for the decision to reject the Claimant's application.
64. Whilst it is open to a Tribunal to move straight to the second stage in an appropriate case, with the burden at that point on the Respondent, the EAT in *Field v Steve Pye* cautioned against doing so:

"There is much to be said for making that finding [that there is no evidence that could establish discrimination] and then going on to say that, in addition, the respondent's non-discriminatory reason for the treatment was accepted" (paragraph 43)"

Harassment

65. Section 26 of the Equality Act 2010 is worded as follows:

(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 (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

66. In relation to a claim for harassment under Section 26, Tribunals should not place too much weight on the timing of any objection (*Weeks v Newham College of Further Education* UKEAT/0630/11). It is open to a Tribunal to find that conduct was unwanted even if a claimant chooses to stay in employment and even if a claimant chooses not to object whether formally or informally (*Munchkins Restaurant Ltd v Karmazyn and others* EAT 0359/09). The Equality and Human Rights Commission: Code of Practice on Employment (2011) states as follows:

7.7. Unwanted conduct covers a range of behaviour, including spoken or written words or imagery, graffiti, physical gestures, facial expressions,

mimicry, jokes, pranks, acts affecting a person's surroundings or other physical behaviour.

7.8 The word 'unwanted' means essentially the same as 'unwelcome' or 'uninvited'. 'Unwanted' does not mean that express objection has to be made to the conduct before it is deemed to be unwanted. A serious one-off incident can also amount to harassment.

67. When considering whether a comment was related to a protected characteristic under Section 26 Equality Act 2010, this covers a wider category of conduct than conduct "because of a protected characteristic" under Section 13 Equality Act 2010. A broader enquiry is required involving a more intense focus on the context of the offending words or behaviour (*Bakkali v Greater Manchester Buses (South) Limited t/a Stage Coach Manchester* [2018] UKEAT/0176/17).
68. Whether it was reasonable for the Claimant to regard treatment as amounting to treatment that violates her dignity or has an intimidating, hostile, degrading, humiliating or offensive environment is a matter for factual assessment of the Tribunal having regard to all the relevant circumstances, including the context (*Richmond Pharmacology v Dhaliwal* [2009] IRLR 336). In that case the EAT said:

"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."

Conclusions

69. We set out our conclusions on the issues for determination in the order in which the issues were detailed, even though this is not necessarily in chronological order. We have borne in mind all our findings of fact in reaching our conclusions.

Issue 2.1

70. We have made findings of fact as to how the grievance meeting was conducted by Mr Flucker and we have summarised his conclusions in his grievance outcome letter.
71. We do not find any basis in what was said or done either during the grievance meeting or afterwards to infer that the treatment could have been done on the grounds of the Claimant's race, but for an acceptable non-discriminatory explanation. The fact that the grievance was dismissed is not a sufficient basis for drawing such an inference. The Claimant has not established a prima facie case that the Claimant was treated unfavourably in comparison to how a person who was not of Latin American ethnicity would have been treated. Therefore, we conclude that the burden of proof has not passed to the Respondent to prove on the balance of probabilities a non-discriminatory explanation for the treatment.
72. Even if we had found sufficient evidence from which an inference of discrimination could potentially be drawn, so as to transfer the burden of proof to the Respondent, we accept that the reason why Mr Flucker conducted the meeting in the way that

he did was because it appeared to him to be a fair way to conduct such a grievance meeting.

73. We also accept Mr Flucker's evidence as to the basis for his grievance outcome. No part of the grievance outcome was influenced by the Claimant's race. It was wholly the result of the assessment carried out by Mr Flucker as to the extent to which there was any merit in the Claimant's grievance. He concluded that there was no merit in the Claimant's grievance. He did so for the non-discriminatory reasons given in the grievance outcome letter, which were genuine reasons. They were supported by the evidence gathered in the course of his grievance investigation.
74. In his closing submissions, the Claimant sought to widen allegation 2.1 beyond the way in which it had been clarified at the start of the hearing. At that point and subsequently, everyone was or ought to have been clear that the issue was limited to the way that Mr Flucker conducted the grievance hearing and outcome. It is not open to the Claimant to argue now that Mr Flucker's conduct amounted to race discrimination in other respects.

Issue 2.2

75. We have found that the Claimant misinterpreted references to cooking and other leisure activities made by his colleagues during the video meeting on 17 April 2020. Colleagues were not carrying out these activities during working hours. Rather this was a discussion during working hours about these activities which colleagues had undertaken outside of working hours.
76. We accept that some of the Claimant's colleagues may have said during the meeting that they were not particularly overworked. However, even if there was a disparity in the workload between that of the Claimant and that of some of his colleagues, we do not consider this disparity was in any way influenced by the Claimant's nationality or his race. The disparity reflected the inevitable peaks and troughs of workload between different individuals and different teams at different times.
77. In any event, the evidence provided to the Claimant by Mr Kuenzel on 7 March 2020 was that Jayshree – who was the most comparable employee to the Claimant, in terms of her job role - was resolving significantly more tickets than the Claimant. In comparison to Jayshree, the Claimant was not overloaded. Jayshree was not of Latin American ethnic origin.

Issue 2.3

78. We do not agree that the Claimant was demoted. He continued to be paid the same salary as he was previously. He was being asked to perform a particular aspect of his role as a Sharepoint Developer, namely to solve Sharepoint IT queries in response to tickets generated by internal clients. Being asked to concentrate on these tickets may have felt like less prestigious work for the Claimant than development work, but it was still work he could be asked to do as part of his role.

79. We do not consider that there is any basis on which the Tribunal could infer that at least part of the reason for allocating the Claimant this work was because of his ethnicity. Therefore the Claimant has failed to shift the burden of proof to the Respondent to prove a non-discriminatory explanation.
80. In any event, the reason why such work was allocated to the Claimant was, we find, the result of several different factors. The first was that there was a significant ongoing need for someone to address queries in relation to Sharepoint. These queries needed to be addressed. Only the Claimant and Jayshree were specialists in Sharepoint issues. The second was that the Claimant's employment contract allowed the Respondent to flexibility to deploy the Claimant as it saw fit. The third was that the Claimant appeared to be struggling with more complex project based tasks. The result was that it appeared to be a better use of resources to ask him to concentrate on resolving internal client problems by responding to tickets on the Service Desk. We accept the Respondent's case that no part of the reason for allocating the Claimant this work was because of his ethnicity.

Issue 2.4

81. By early May 2020, there was plenty of evidence that the Claimant was struggling with several aspects of his role. Serious concerns, which we accept were genuine concerns, were recorded on the Probationary Assessment form in March 2020. By contrast, there is no evidence from which the Tribunal could infer that his Latin American ethnicity was a potential reason for concluding that his probation period should be extended.
82. Even if the burden of proof transfers to the Respondent, we accept that the decision to extend the Claimant's probation period, communicated to the Claimant in May 2020, was taken because Mr Kuenzel was not confident the Claimant was mastering the main aspects of his role. The Respondent has discharged the burden of proof. Given that the Claimant had lodged a grievance on 25 March 2020, it had been decided that the probationary period should be extended so that his abilities in the role managed by Mr Kuenzel could be considered once the grievance had resolved. It was no part of the reason for extending the probation period that the Claimant was Latin American.

Issue 2.5

83. The Claimant was not required to take annual leave on 5 and 8 June 2020. He chose to take this as holiday as explained in the email dated 29 May 2020. Mr Kuenzel checked on the Claimant on 3 June 2020 to find out how he was feeling. It appears that there was no response to this enquiry. Therefore, the factual assumption underlying this issue is an incorrect one. As a result, we find that there was no race discrimination in relation to this allegation.

Issue 2.6

84. Mr Kuenzel was permitted to join a trade union on 5 March 2020. He joined the PCS union, which was the same trade union as the Claimant. The decision to allow Mr Kuenzel to join this union was not take because of the Claimant and his race. Rather it was taken because it was the policy of the Respondent than any

employee would be entitled to join a trade union of their choice. Mr Kuenzel chose to join a union and opted for the same union as the Claimant.

Issue 2.7

85. There is nothing in the evidence to suggest that the reason why the Claimant's employment was terminated could be because of his Latin American ethnicity.
86. The Claimant's employment was terminated because the Claimant had failed his probation, given the Respondent's negative assessment of his performance. We accept the reasons given by the Respondent both in the probationary assessment form prepared in early August 2020 and in the termination letter dated 5 August 2020 were genuine. They reflected very substantial concerns about the Claimant's abilities and attitude for which there was significant supporting evidence. They mirrored concerns which had been raised with the Claimant over several months that he had not been able or willing to address and rectify. The only basis for the decision to end the Claimant's employment was a perception that he was not capable of doing the role to the standard required.

Issue 2.8

87. Within the Claimant's grievance policy, the Respondent permits its employees ten working days to appeal against the outcome of grievances. During this ten-day period, the Claimant was on sick leave for most of the period. The Respondent had checked with the Claimant's trade union representative to see whether he intended to appeal, conscious that he was on sick leave at the time. Despite this, there was no indication that the Claimant would be appealing still less any application for the time to appeal to be extended. The first intimation that the Claimant intended to appeal was over seven weeks after the date of the grievance outcome letter. It was therefore substantially out of time and there were no particularly strong reasons to grant such a lengthy extension.
88. There is nothing in the evidence to suggest that the basis for refusing to extend time to allow the Claimant to appeal out of time was because of his ethnicity. Rather, we accept the Respondent's submission that the only reason why it refused to consider the Claimant's appeal on its merits was because it was substantially out of time.

Issue 2.9

89. Alison Davies had attended the probation review meeting. However, there was no need for her to attend the appeal against the conclusion that he had not passed his probation. There was suitably qualified representative from HR in attendance - Janice Haldane-Dorrian, an HR Business Partner. In any event, it appears from the notes of the appeal meeting that the Claimant was openly critical of Ms Davies. As such, she would not have been a suitable choice of HR Business Partner to attend this meeting.
90. There is nothing to suggest that the reason why Alison Davies did not attend the appeal against the probation review meeting was because of the Claimant's

ethnicity. She did not attend because there was no need for her to attend in circumstances where a suitable HR representative was able to be present.

Issue 5.1

91. Mr Kuenzel's remark "let's play it by ear" was a one-off comment made during the course of a dialogue recorded and transcribed. It was an appropriate comment in the context of uncertainty as to how the Claimant's health was going to evolve over the coming days, and so whether the Claimant would need to take time working from home. It was not a comment that the Claimant objected to at the time, or in the grievance lodged within six weeks of this incident when the Claimant was complaining about the conduct of Mr Kuenzel. It did not feature as a source of complaint until the Claimant's second grievance lodged on 16 July 2020. Whilst we note it is not necessary for the Claimant to have objected at the time, we find that this comment from Mr Kuenzel did not amount to unwanted conduct.
92. Even if we had found that it was unwanted conduct, we would have concluded that it did not have the proscribed effect. Having regard both to the Claimant's own perception but also to whether it was reasonable for the conduct to have that effect, we find it did not violate the Claimant's dignity nor did it create an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. Saying "let's play it by ear" was Mr Kuenzel attempt at a pun in circumstances where he considered it necessary to wait to see how the ear infection developed. In the context of the conversation as a whole, it was a trivial comment. The Claimant ought to have appreciated that any offence caused was not intended, given the concern that Mr Kuenzel had shown for the Claimant's wellbeing in the remainder of that communication.
93. Finally, no part of the reason for the comment was because of the Claimant's ethnicity. It was entirely because of Mr Kuenzel's sense of humour, in trying to make a pun given the discussion about the Claimant's ear infection.

Issue 5.2

94. This issue has already been addressed in issue 2.2 above. The allegation is factually misconceived because the Claimant was not overloaded with tickets.

Issue 5.3

95. As stated in our findings of fact, we have not been able to make any positive factual findings that Mr Kuenzel behaved in the manner alleged by the Claimant on 6 March 2020.

Issue 5.4

96. The factual premise of the allegation has already been addressed in issue 2.5. As there concluded, it was the Claimant's decision to take holiday on those two dates. The Respondent did not require him to take holiday then.

Issue 5.5

97. Although Mr Hemmes was an employee as well as a trade union official, the Respondent is not responsible for decisions taken by him during a union meeting on 26 June 2020. He was acting as a trade union official in imposing standards as to how participants should behave and whether all union members should be permitted to remain if considered not to be behaving appropriately. This is not a decision for which the Respondent is vicariously liable.
98. In any event, given the way in which the Claimant was behaving in this meeting, it was not harassment to exclude him. Having regard to whether it is reasonable for the conduct to have the proscribed effect, as well as the Claimant's own perception, we do not find that this conduct violated the Claimant's dignity or created an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant.
99. Furthermore, having regard to the whole context, we do not conclude that the treatment was related to the Claimant's ethnicity.

Issue 5.6

100. We have been unable to make any clear findings of fact as to the issue set out at paragraph 5.6 of the list of issues. Therefore this allegation fails because the Claimant has not established the factual basis for this allegation.

Conclusion

101. As a result, all of the Claimant's complaints fail and are dismissed on their merits.

**Employment Judge Gardiner
Dated: 20 July 2022**