EMPLOYMENT TRIBUNALS

Claimant: Mr T Fenton

Respondent: Herringbone Kitchens Ltd

Heard at: London South (in person & by CVP)

On: 20-22 April 2022 (in chambers on the morning of 22 April)

Before: Employment Judge Tsamados
Members: Ms G Mitchell
Mrs R Serpis

Representation
claimant: In person and supported by his wife
respondent: Mr A Griffiths, Counsel

REASONS

These are the reasons for our Judgment which was sent to the parties on 7 May 2022. They are provided at the request of the claimant.

The Claim

1. The claimant presented a Claim to the Employment Tribunal on 26 August 2019 following a period of Early Conciliation between 15 July and 15 August 2019. This set out a complaint of race discrimination against his ex-employer, the respondent. In its Response received on 16 October 2019, the respondent denied the Claim.

2. A preliminary hearing on case management took place on 5 February 2020, at which Employment Judge Siddell identified complaints of direct race discrimination and race related harassment and set out the issues for the Tribunal at the final hearing to determine. She also set a series of case management orders for preparation of the case and listed it for hearing on 1 to 3 July 2020. Those dates were subsequently postponed and the case was re-listed on two occasions, the second of which being our hearing for three days commencing on 20 April 2022.

3. There was correspondence from the respondent seeking a CVP hearing because one of its witnesses now lives in Poland. The Tribunal responded by letter dated 24 January 2022 indicating that there was no objection to that

witness participating by CVP but advised the respondent of the need to comply with the requirements of Agbabiaka (evidence from abroad: Nare guidance) [2021] UKUT 286 (IAC) and make enquiries of the Foreign & Commonwealth Development Office in order to ascertain whether the Polish government has any objection to the giving of evidenced to the Employment Tribunal from its territory.

4. In a further letter dated 5 April 2022, the Tribunal made it clear that because the claimant was unable to attend a hearing by CVP, the parties were to attend in person, save for any witness who was overseas. The letter also restated the respondent's need to comply with the guidance in Agbabiaka.

Evidence

5. The respondent provided a paper bundle of 404 pages. Where necessary I will refer to this as "B" followed by the relevant page number.

6. We heard evidence from the claimant by way of a written statement and in answer to oral questions. We heard evidence on behalf of the respondent from the following persons: Adrian Winterbourn, Chris Dobson, David Tenters, Elly Simmons, , James Johnson, Joseph Purdie, Roy Kitch and William Durrant.

7. The respondent also provided a witness statement for Greg Bejger who now resides in Poland. It became apparent that the respondent's solicitors had only belatedly approached the Foreign & Commonwealth Development Office as directed and required. By the end of the evidence they had unsurprisingly still not received notification that the Polish government had no objection to the giving of evidence to this Tribunal from its territories. The respondent then withdrew its request to call evidence from Mr Bejger. The Tribunal attached the appropriate weight to his statement in view of his non-attendance.

Conduct of the hearing

8. On the morning of the first day of the hearing it was apparent that whilst the claimant and his wife were present in the Employment Tribunal building, the respondent had joined the hearing by CVP. Mr Griffiths apologised and said that he had been instructed on the basis that it was a CVP hearing. He further stated that he had only accepted the brief prior to the long Easter weekend on this basis, having several broken ribs. In addition, he added that Ms Simmons was on maternity leave and was breast feeding her 8 month old baby.

9. I made it clear that I was not happy about this situation and what appeared to be the respondent's solicitors' inability to read a plainly worded letter which made it clear that save for the attendance of overseas witnesses, this was an in person hearing. Further, we had not previously been advised of Ms Simmons' position.

10. However, having asked the claimant for his views, he indicated that whilst he was not happy, he was willing to proceed with the respondent attending by CVP out of concern that the matter should not be delayed any further. I told him that I did not want him to feel disadvantaged but he was clear that he was

willing to proceed.

11. After a short adjournment, I told the parties that we had decided to continue with the hearing with the respondent attending by CVP. However, I reiterated my concerns as to how we had got into this position in the light of a very clear instruction to the parties. I also indicated that for personal reasons, Ms Mitchell may need to attend by CVP on the remaining days.

12. We heard evidence and submissions over 20 and 21 January, sat in private to reach our decision on the morning of 22 January and gave oral Judgment and Reasons by CVP (the claimant indicating that he was able to participate using his mobile phone) on the afternoon of 22 January 2022. Unfortunately, the claimant was unwell and unable to attend that day and his wife attended with his permission on his behalf.

The issues

13. The issues for the Tribunal to determine are set out at B 34C-34E as identified at the preliminary hearing.

Findings of Fact

14. The Tribunal decided all the findings referred to below on the balance of probabilities, having considered all of the evidence given by witnesses during the hearing, together with documents referred to by them. Any failure to mention any specific part of the evidence should not be taken as an indication that the Tribunal failed to consider it. The Tribunal has only made those findings of fact necessary for it to determine the claim brought by the claimant. It has not been necessary to determine every fact in dispute where it is not relevant to the issues between the parties.

15. Where individuals have been referred to who did not give evidence at the hearing, if written reasons are requested, the Tribunal will use their initials.

16. The claimant is black. At the time of the incidents in question he had approximately 25 years' experience as a self-employed kitchen fitter fitting off-the-shelf kitchens for customers including those purchased from Wren Kitchens and Howdens. He describes himself as a very experienced fitter.

17. The claimant was employed by the respondent as an experienced kitchen fitter from 7 May to 17 June 2019.

18. The respondent is a small family business which manufactures and installs high-end bespoke kitchens, typically costing between £25-30,000 and on average £50,000. The respondent's customers expect near perfection in terms of workmanship and installation.

19. The two director/shareholders are Ms Ellie (aka Kelly) Simmonds and Mr William Durrant. Ms Simmons previously worked on women's rights issues and has an MA in Human Rights law. She and Mr Durrant are well aware of the discriminatory behaviours that can be found within the construction industry and equality and inclusion form a key part of the respondent's

approach to its business. This was referred to as the company's "ethos". Such matters are discussed with new staff at the interview stage, during staff reviews and are printed on a large poster in the workshop. There is an induction checklist at B 40-43 which sets out various matters which are discussed during the first week of employment and then after 1 month, 3 months, 6 months and 12 months.

20. At the time that the claimant was taken on, the respondent was in the middle of a company upscale having decided to bring kitchen manufacturing in-house rather than buying kitchens from an external supplier. The respondent had previously engaged sub-contractors to install kitchens but had decided to bring fitting in-house as well. These included two black fitters, Leroy and Gary, who were offered the opportunity to become employees but preferred to remain self-employed. At this time, the respondent had just started its own workshop and increased the number of staff from 5 to 15 in about a month. It had also recently hired two other fitters and 5 joiners for the workshop. At this point, the claimant was the only black member of staff although the respondent's workforce was otherwise diverse in terms of other protected characteristics.

21. Ms Simmons and Mr Durrant interviewed the claimant for the role of experienced kitchen fitter in April 2019. Although the claimant did not have the references that they normally required or photographs of kitchens that he had previously fitted, they both really liked him and felt that the photographs that he had shown of his previous work indicated that he had transferable skills, which meant he could fit kitchens. The claimant was hired as an experienced kitchen fitter and he assured the respondent that he would be able to fit their bespoke cabinetry from day one and had all his own tools. We were referred to email correspondence between the claimant, Mr Durrant and Ms Simmons at B 82-88. The claimant was initially taken on for the first week on a trial basis installing a kitchen in the respondent's canteen. This was seen by the respondent as a relatively straightforward job in order to test his skills.

22. The claimant's signed contract of employment is at B47-60. Clause 3 indicates that the first 3 months of employment were probationary during which the respondent would be monitoring the employee's performance and conduct. During the probationary period either party was at liberty to terminate the contract with one week's notice in writing and for the respondent by payment in lieu of notice. Clause 15 sets out the respondent's grievance procedure indicating that if an employee wants to raise a grievance, s/he may apply in writing to Ms Simmons in accordance with the procedure. Clause 18 is headed "Equal Opportunities" and sets out the respondent's commitment to equal opportunities, prohibitions on behaviour and the obligation to report any breach of the provision:

"The Company promotes equal opportunities for all and is a signatory of the REC Diversity pledge.. In order that the Company may maintain a positive work environment for all employees and any person who uses the services of the Company, the Employee is required not to engage in or permit or encourage any fellow employees to engage in any harassment or discrimination against any person (whether an employee of the Company or otherwise) during the course of his/her employment with the Company on the grounds of sex, sexual orientation, race, religion, disability, belief, age, trade union membership, or

part-time status. If the Employee knows or reasonably believes that any other employee is in breach of these provisions, she/he must report it to a suitable officer of the Company. Any breach of the provisions of this clause will be a disciplinary offence which could render the Employee liable to disciplinary sanctions up to summary dismissal. Further details are set out in the Company's Equal Opportunities Policy."

23. The claimant's job description is at B 60A-60C. This includes those matters which are either essential or desirable in terms of knowledge/skills and experience as well as additional requirements. We note in particular the first two bullet points at paragraph 11:

    "11. Required skills include:
    • The full installation of a kitchen/bathroom/wardrobes or other carpentry upgrade
    and/or be willing to learn.
    • Have joinery skills and experience to produce a high-quality product at all times."

24. The claimant commenced employment on 7 May 2019 on a trial basis. He received his contract of employment from Ms Simmons on 10 May 2019 when he was in the canteen/office.

25. A key part of the claimant's case relates to allegations he makes as to the way in which Mr Winterbourn behaved and spoke to him. Mr Winterbourn had recently been appointed as the Workshop Manager.

26. The claimant relies on a conversation which he says he had with Mr Winterbourn on 10 May just after he had received his contract from Ms Simmons.

27. His position as set out in his witness statement is as follows. He received his contract from Ms Simmons whilst he was in the canteen. Mr Winterbourn came into the canteen and said you got the job? The claimant replied yes but twice looked away because he was marking out the wall for the kitchen wall units. Mr Winterbourn approached him from his right side, pulled up his shirt with force and said you get the job if I say so! He left the canteen but returned 10 minutes later to the office and shut the door. He said to the claimant "do you believe in racism?" The claimant responded "why are you asking me that?" Mr Winterbourn then told him a story about Leroy and racism and then stated that he really had not ever noticed racism. The claimant paused and was shocked because of his last statement. Mr Winterbourn then asked the claimant "how do you deal with racism Trevor? Have you ever taken anyone to court?" The claimant responded that it "doesn't bother me, I haven't had to because I have to be twice as good at my job, that's what gets me through. I can take a black joke, it goes over my head, unless it is insulting." Mr Winterbourn responded "well that's our ethos we can't talk about anything like that." This conversation started alarm bells in the claimant's head. The claimant said "I thought considering the conversation we should be talking about equal opportunities". Mr Winterbourn then left the office.

28. The claimant also alleges that Mr Winterbourn made racist comments to him.

These were not set out within his claim form, the further information about his claim or his witness statement. It took some probing in oral evidence to obtain any further details from him. The claimant said initially it was little things like: "you lot all walk the same". He expanded that "it was not jokes all the time but simple things, quick and quiet, little things like the hand as if he was making me get used to the ethos". This was a reference to Mr Winterbourn putting his finger to his mouth, going "shhh" and saying "but we mustn't say that, because of the company's ethos". The claimant also stated that the jokes did not bother him, that he could take a black joke. But it was the games Mr Winterbourn was playing: "I could see it. Silly little things. I thought is he just testing the water with me?"

29. In essence, we understood that the claimant was alleging that Mr Winterbourn made jokes of a mildly offensive/racist nature which he ignored because he was used to these sorts of comments. These were in the style of the 1980's comedian Jim Davidson. When further pressed he stated that Mr Winterbourn put on the voice used by Mr Davidson as part of his act, that of an exaggerated Jamaican accent. The humour of Mr Davidson is largely viewed as offensive. We further understood that the claimant was alleging in essence that Mr Winterbourn would say things of this nature and cover them up by stating but of course we cannot say that because of the respondent's ethos. We understood this to mean that Mr Winterbourn was simply using this as a cloak or excuse by which to make offensive/racist remarks to the claimant.

30. Mr Winterbourn's position is as follows. He denies behaving in this manner at all. Indeed he states that it was the claimant who initiated the conversation about racism on 10 May and the claimant who made racist jokes and remarks. He said he felt very uncomfortable when the claimant said these things. However, he did not raise his concerns with the respondent at the time although in answer to questions in oral evidence he said that he was quite new to the manager role and that with the benefit of hindsight he has since realised that he should have done so. In his written evidence he failed to provide any specific examples of the behaviour he attributed to the claimant. But in oral evidence he stated that the conversation on 10 May was completely in reverse and that the claimant said all the things that he attributed to him. Specifically, he stated that the claimant was the one who spoke in the mock Jamaican accent that Jim Davidson used as part of his stage act. He further stated that the claimant often referred to the radio as a "wog box" and that there was one occasion on which the claimant was tiling in a dark room and Mr Winterbourn came in and said I can hardly see you in there Trevor, do you want some light and the claimant responded do you want me to turn round and smile. In answer to a further question in oral evidence as to why he had not put this in his witness statement he replied that with the benefit of hindsight he should have done so but his statement was responding to the allegations from the claimant as he understood them at the time.

31. The claimant gave evidence as to a conversation he had with Mr Winterbourn on the day that he was dismissed. What was said was in dispute and it was not a matter that the claimant had raised before. In fact it only emerged in the form of questions he put to Mr Winterbourn in cross examination. The claimant alleged that he said to Mr Winterbourn that he did not understand why he had been dismissed and told him that it was all racism. Mr Winterbourn denied

that the claimant mentioned racism and alleged that he told the claimant that it was to do with his standard of work.

32. None of the respondent's other witnesses heard either the claimant or Mr Winterbourn make any racist or offensive remarks. Neither the claimant nor Mr Winterbourn raised these matters with the respondent during the course of the claimant's employment notwithstanding the respondent's Equal Opportunities policy and the company's clear ethos. The claimant had a clear opportunity to do so during his first review meeting with Ms Simmons at B 63. Indeed whilst we were not taken to it we can see in the induction meeting on 7 May 2019 with Ms Simmons that the claimant was encouraged to speak up (objective 3 at B 107). Objective 3 is to "contribute to team meetings, challenging and finding new ways to do things" and Ms Simmons' note is "Elly suggested that if he ever does feel like he can't or that he'd get ridiculed for his opinion to say something". We noted the use of the word "ridiculed" on that page but we heard no evidence on it either way. Whilst this is curious we are not able to take it any further because it was not raised in evidence.

33. We had real difficulties in weighing up the evidence presented to us as to Mr Winterbourn's alleged behaviour and in reaching a conclusion. The claimant did not raise the allegations fully within his claim or his further information or even in his witness statement. In oral evidence he kept adding allegations, some of which he only said when pressed. The claimant stated that he had not raised the matters at the time because the respondent's directors and employees were all family and friends. When asked why he had not raised these detailed allegations before in his claim, he repeatedly stated that he had, but without being able to point to any document where he had done so. On reviewing the documents we find that he has not done so.

34. We understand that there may naturally be a degree of reluctance to raise such matters of discrimination and racism or to simply take the view that such behaviour was par for the course and to ignore it, particularly having just obtained a job. Indeed the claimant said he did not want to be seen as a troublemaker. But the point at which one would expect a reasonable person to do so would be, at the earliest, when they have been dismissed (and frankly have nothing to lose) and, at the latest, when they bring a claim alleging race discrimination.

35. After lengthy deliberation, we have reached the decision that we simply cannot find that Mr Winterbourn behaved in the way that the claimant has alleged, given the lack of detail when the claim was lodged and at any time before our hearing. Furthermore, there were opportunities for the claimant to raise these matters with Ms Simmons and he was clearly aware of the respondent's position on equal opportunities. Whilst the claimant alleged that he did raise the issue of racism with Mr Winterbourn on the day he was dismissed, on balance of probability we do not find that this conversation took place as he has alleged. We have taken into account that the claimant had not raised these matters before and if he had we believe it likely that Mr Winterbourn would have repeated this to the respondent at the time. The first time the respondent was aware of the possibility of a claim was several weeks later after the dismissal and via ACAS.

36. The claimant also alleges that only he was given work "snagging", that is, correcting other fitters' defective work and additionally having to appease angry customers. From the evidence before us we find the following. The first week the claimant was employed on a trial period on a daily rate fitting the respondent's canteen kitchen. Then he was taken on as an employee the following week. He then undertook snagging for one or two weeks. He undertook two jobs of his own either for two or three weeks at which he appears to have struggled.

37. The snagging for one or two weeks. The claimant alleged that he was sent out to do more snagging than other fitters. The respondent alleged that it was usual to send new fitters out to do snagging as well as sending experienced fitters out to do this work. Ms Simmons stated that for the first week or so it was usual to send a new fitter out to do snagging and she acknowledged that for the claimant this would involve correcting the work done previously by sub-contractors and to appease potentially angry customers. We were referred to WhatsApp messages at B 128-307 which indicate that there were others involved in what we would call snagging, that is by rectifying issues. Whilst we accept that the claimant was undertaking a lot of snagging during the one or two week period we could not see anything untoward in this.

38. The claimant then undertook two or three weeks on site doing his own jobs as Lead Fitter.

39. The first job we will refer to as the "K" job. This was the claimant's first full job and involved fitting two units and five panels in a small utility room in the client's house between 3 to 5 June.

40. Mr Durrant's evidence about the K job is as follows. The respondent got the job on the back of doing a great job for the client on a previous occasion. However, on this occasion the respondent had to replace three of the panels because they were poorly fitted, provide the client with compensation because the sink unit had been poorly fitted and send another fitter to rectify the issues because the respondent was not confident that the claimant could. We were referred to email correspondence between the client and the respondent and photographs taken of the job at B 91-100.

41. James Johnson, another fitter, gave evidence about the K job as follows. He was sent out to rectify the work. It was quite a small easy job. The client was not happy with the work and he could see that it was not up to standard. He had to replace three of the five panels and make good the base unit because it had been cut very roughly. The wall cabinet had to be moved and levelled up and afterwards the cornice to suit. He went out on several jobs with the client, either to help or to snag and always found the job sites very messy with rubbish, dust and tools everywhere.

42. The claimant denied that there was anything wrong with his work, said that the client had moved the wall cabinet and also denied that he was messy and said this was down to others (fitters or other trades).

43. Following the client's complaint about the standard work, the respondent held a meeting between Mr Durrant, Ms Simmons, the claimant and the client. Her

WS para 10. Ms Simmons said in oral evidence that the client was upset and the claimant agreed adding that he was distraught but that he offered to attend his house the following day to sort it out. Ms Simmons further stated in oral evidence that the claimant kept referring to the client as "he" to her and Mr Durrant, if the client was not there, that the client was complaining about the standard of work and the mess that the claimant had left. Ms Simmons also said in evidence that she thought the claimant was rude referring to the client as "he". The claimant did not deny that this conversation took place and that the client was dissatisfied, but simply did not accept that this was rude.

44. A review meeting was held with the claimant on 6 June 2019 (at B 63). Objective 2 deals with the "K" job. The claimant alleges that only the issue of rudeness was raised and not the allegations as to his quality of work. Given that he was at the client meeting, was aware that the client was upset about the work and that he was attempting to justify his position and offered to go and rectify the work, we find on balance of probability that this was raised.

45. We set out below the summary of how the claimant was doing from the bottom of B 63:

"Trevor feels that he hasn't had time to prove himself and that most of his work has been snagging. Elly explained that (the K job) was all his own project and this was the one where complaints have come. Elly explained that (the B job) would be just his, it is small, the client is not at home so should not be any issues. Elly explained that this would be Trevor's opportunity to prove his fitting ability, and we would discuss the continuation of his probation following this project."

46. In essence, the claimant is given the B job as his opportunity to prove his fitting ability and the respondent would discuss continuation of his probation following this. Indeed, the claimant referred to this in evidence as his warning meeting and so he was very clear this was his last chance.

47. The B job approximately two weeks later in June 2019. This was a small local kitchen job and the client was away on holiday during the project. The client was charged £30,000 for the work. The respondent felt this would be a great project for the claimant during which Mr Winterbourn and Mr Durrant could pop in and monitor his work, and for the claimant to prove his fitting ability.

48. Unfortunately, the project did not go to plan and was very costly to rectify. We were referred to photographs of this job at B 69-71 and B 73-79. The claimant finished the job on the Friday 14 June 2019. But when Mr D, the electrician, came in the following day, it was apparent that the job was not complete and that there were a number of minor as well as serious problems with the work. Mr D and Mr Durrant had to attend over the weekend to rectify and complete the work before the client came back from holiday.

49. Mr Durrant said in evidence that he visited the site at the beginning and halfway through to make sure that the project was going okay. When he arrived on site on Saturday 15 June 2019, he found that the job was not finished and the kitchen was fitted to a poor standard with some dangerous elements. All of the panels had been cut wrong and were floating in the air and so not scribed to the floor and so not providing sufficient support to the worktop. He explained that a panel was used on the ends of carpentry runs to support the worktop. This meant that if the worktop was under any pressure it would have just

snapped and could have hurt anyone standing near it. In addition he said that the kitchen was fitted in the wrong place, so that the washing machine did not fit where the customer wanted it. He also stated that Mr Johnson had to fix all of the doors so that they would line up properly. He and Mr D spent the entire weekend attempting to put things right and Mr Johnson was instructed to come back on the Monday to finish things up, including lining up doors, filling and painting where cabinetry had been fitted poorly and was not finished. He also stated that at the time client was annoyed that kitchen had not been completed in the agreed time frame.

50. We understood from the evidence that the spaces within the kitchen layout for the dishwasher and washing machine had not been installed correctly by the claimant and so the respondent had to install them the other way round to the plans. We were referred to the CAD drawing at B 80 and a photograph of the kitchen at B 72. These illustrated the above.

51. In evidence, the claimant offered no explanation as to why he was not responsible for the defects with this job. He simply said he could not explain it but he would not have done it.

52. On balance of probability we accept the respondent's evidence.

53. On Monday 17 June 2019, the respondent decided to let the claimant go and to pay him until the end of the month, although they were only obliged to give him 1 week's notice. This was communicated to the claimant or Mr Durrant that day. We were referred to an email dated 17 June 2019 sent to the claimant by Ms Simmons setting out the conversation that the Claimant had with Mr Durrant earlier that day (at B 106):

"Dear Trevor,

This email is to confirm the conversation you had with Will earlier, unfortunately this is not worked out.

We need a fitter with a more advanced skill level, and while we have really appreciated and enjoyed working with you, unfortunately this position was not the right one.

Someone will be to yours at 9 AM to pick up the van, we are happy to pay you until the end of the month as gesture of good will and wish you all the very best of luck.

If you do need a reference or anything please let us know.

We are sorry again this has not worked out.

All the very best,

Elly"

54. Later that evening the claimant replied to the email (at B 105):

"Thank you for your email. I'm still waiting for the photos that I asked from Will regarding the side panel and the rubbish that was left by myself and the plasterer. I'm a little confused at to your comment Advanced Level. I completed a kitchen in 5 days as specified apart from fitting a LED light that required an electrician. I went to many jobs doing snagging lists from previous gutters and clearing up their rubbish that was left outside for weeks. Thankfully I kept the snagging lists from these jobs. The Knightsbridge kitchen has taken at least 4 weeks to complete with 2 fitters and despite them flooding 3 floors of the building their work is more an advanced level than mine?

Look forward to receiving the photos as these are needed urgently.

Many thanks and it was a pleasure working with Herringbone.

Regards

Trevor"

55. We note in particular the final sentence which appears at odds with the claimant that is before us. Responding to notification of dismissal would certainly have been an opportunity at which the claimant, even if he had been concerned about raising the discrimination and racism during his employment, could certainly have done so now.

56. Ms Simmons responded to the claimant's email the following morning (at B 107)

"As discussed at your one to one, we had complaints from a client about the quality of your work when fitting a utility room, which we had to order additional materials for and needed to be rectified by another fitter. We also had concerns about your attitude in front of a client which was discussed separately with Will. At your one to one, we discussed both of these issues and that the job of Beckett would be a final opportunity, however there were vital issues with the fit that had to be rectified over the weekend by another fitter and Will so that the room was presentable to the client on Monday.

We will not send you our photos of these jobs and are not willing to discuss the performance of other staff. If you would like to take this further please put so in writing."

57. The claimant's response further at B 102-103. By this stage, the emails have taken on a more negative tone. But we make the point that this was another opportunity for the claimant to raise issues of race discrimination, the working relationship having come to an end and now turned sour, and he did not do so.

58. The claimant made some specific allegations that he had been treated less favourably than Mr Johnson and Luke, two of the respondent's fitters, in a number of regards set out at paragraph 5.1 of the list of issues at B34D.

59. In respect of 5.1.1, questioning a petrol receipt incurred on Saturday, 8 June 2019, we have dealt with this below. However, the claimant provided no comparative evidence of how Mr Johnson and/or Luke were or would have been treated in not materially different circumstances.

60. In respect of 5.1.2, sending him out to correct other fitters' work and appease angry customers, Mr Durrant said in evidence that at one point Mr Johnson and Luke were not doing as much snagging as the claimant but that was because they were working together on a particular job. The claimant did not provide any evidence to support his allegations.

61. In respect of 5.1.3, sending him out on jobs without the correct materials (for example the wrong paint), Mr Durrant said in evidence that there was one specific occasion when this occurred but it was not deliberate and it did happen to other fitters from time to time. The claimant did not provide any evidence that this happened any more or less to him than it did to Mr Johnson and Luke. We therefore accept Mr Durrant's evidence.

62. In respect of 5.1.4, Mr Winterbourn refusing to answer telephone calls, the explanation for this was given that Mr Winterbourn worked in a noisy workshop and did not answer his telephone to others. The claimant did not provide any

evidence that this happened any more or less to him than it did to Mr Johnson and Luke. We therefore accept the respondent's evidence.

63. The final sub-paragraph, 5.1.5, relies on the less favourable treatment of dismissing the claimant. In questions put in cross examination to Mr Durrant the claimant did refer to a big mistake that he said that Mr Johnson made with a cabinet that housed the fridge and that they (meaning other fitters) rallied round and fixed it. He referred to WhatsApp messages at B 141-142. Mr Durrant responded that this was nothing to do with Mr Johnson, the workshop cut the cabinet wrong and had to cut new doors, Mr Johnson went in and corrected the job. Whilst the photograph at B 143 appeared to show that the fridge had not been fitted properly this was simply the camera angle and in any event Mr Johnson corrected the defect. On balance of probability we accept the respondent's evidence. The claimant did not provide any comparative evidence in respect of Luke.

64. In what we take to be the further information EJ Siddall ordered the claimant to provide of his claim, at B 401-402, the claimant lists a number of specific allegations. Whilst these go further than the list of issues and what the claimant was ordered to di, we nevertheless deal with them below (unless they have otherwise been dealt with above):

    a) Mr Winterbourn not answering his telephone calls. To an extent we have already dealt with as above. The claimant provided no specific evidence of this beyond a general statement and the respondent said that Mr Winterbourn did not answer his telephone to anyone because he worked in a noisy workshop. On balance of probability we accept the respondent's evidence;

    b) Questioning a petrol receipt incurred on Saturday 8 June 2019. We dealt with this briefly above. The respondent queried the claimant's petrol receipt for which he was seeking reimbursement because it was dated on Saturday when the claimant was not working and the claimant would have been aware from his contract that the respondent was not insured for him to use their van for personal use (clause 6.3 at B 49). Once the claimant explained why he purchased petrol on a Saturday, the respondent accepted his explanation and reimbursed him. We accepted the respondent's explanation. We found nothing untoward in the matter not being raised by the respondent sooner prior to his dismissal;

    c) Not having a 3 month probationary period compared to others. We were not provided with any evidence about this or the others. We are satisfied on the evidence that we heard in our findings that the claimant was dismissed because of his standard of work and was warned on 6 June and given a final job to do, which he carried out to an unsatisfactory standard resulting in his dismissal;

    d) Being told that he would never make a fitter by Mr Winterbourn. Mr Winterbourn accepted he said this but there was nothing in the evidence to link it to race;

    e) Having to collect the customers' rubbish. The claimant did not raise this

in evidence and from what we could discern it was rubbish from the jobs and must have been part of the job;

f) Other fitters flooded 3 floors at the Knightsbridge job but still kept their jobs. This appears to be a reference to actions taken by Mr Johnson and Luke. The respondent provided an explanation for this. It was not the fault of the fitters as the claimant alleged. The building manager at a particular job had opened all the taps to drain down the water system but inadvertently left one open. The fitters were unaware of this. And so when they turned the water on the flood occurred;

g) Being shouted at by Ms Simmons. The claimant did not raise this in evidence;

h) That Mr Johnson agreed that the kitchen (at the B job) was finished. In the WhatsApp group we can see that members of the group do say that it was a great job. However, it was not until the Saturday that the defects were discovered by Mr D, Mr Durrant and Mr Johnson and the full extent was uncovered over the weekend. We understand the claimant's concerns but the major issues in the job were not identified until the following days;

i) Other fitters were bought tools and given help. This came down to one fitter who needed a particular tool to fit a larger piece of cornice and so the respondent lent the fitter the money to buy the tool and he had to repay it over 3 months;

j) That two new fitters were taken on after the claimant was sacked and were sent straight out kitchen fitting. The two new fitters were not the lead fitters and so did not go out unsupervised;

k) The vehicle the claimant received had problems with its tyres but the respondent would not take it back to correct this dangerous fault. We heard no evidence about this;

l) Other fitters asked to join the others for drinks after work. This is a reference to the messages in the WhatsApp group at B 168. The claimant was part of that group and so there was no evidence he was not invited to the social events that others were invited to. This is as much as Ms Simmons saying we are in the pub why not come down. We were told that this was a local meeting place. Indeed the claimant said in evidence that he would have declined to attend as he did not drink and drive;

m) Ms Simmons threatening the claimant. Clearly Ms Simmons gave the claimant a warning that if he did not do well on the B job then his employment could be ended. But there was no evidence that this was put as a threat or that other fitters in circumstances not materially difference were not threatened;

n) The claimant being told "you're too slow". We were not provided any evidence as to this;

o) Never being given correct parts. We have to extent deal with this above. The respondent accepted that there was one job where the claimant was given wrong materials as set out at paragraph 10 of Mr Durrant's witness statement. However, Mr Durrant stated that this was not on purpose and it would happen to other fitters at the time. The claimant did not give any specific instances. But the WhatsApp group indicates that generally the fitters were running around having to get parts. On balance of probability it seems to be a general problem;

p) Receiving continual phone calls from Maddie to collect other fitters forgotten parts and pulling the claimant off other jobs therefore making his jobs take longer. The claimant gave no evidence as to this;

q) Mr Durrant coming in everyday to one of the claimant's jobs. Standing behind him in intimidating manner. Not doing this to other fitters. This appears to relate to the B job during which the claimant was being monitored given the concerns about his standard of work. Mr Durrant denied anything untoward in this. We were not provided with any further evidence on this from the claimant. We were also not provided with any comparative evidence of how other fitters were treated in not materially different circumstances;

r) Always getting phone calls to get back to the warehouse to collect things that were not in his pack to take to customers when he got to the warehouse they were not ready. We were not given any evidence of this;

s) Sent to fit kitchen, started installing and Mr Durrant arrives, drawings wrong, took out units and restarted. This seems to be about the B job. The claimant did not present any coherent evidence as to this. It is therefore impossible to make any finding on it.

65. At B 403 the claimant has provided a list of "Section 13 additions". None of these were put in evidence, they included matters of remedy and go well beyond the identified case. With regard to the final paragraph which states that additional proof will be provided once the respondent has answered the allegations. No additional proof has been presented. Further, we are not sure how the respondent could respond other than to specific allegations. But in any event it is not for respondent to do so but for the claimant to set out his case.

66. We attached no weight to Mr Bejger's evidence given that he did not attend the Employment Tribunal hearing.

Relevant law

67. Section 13 Equality Act 2010

"Direct discrimination
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."

68. Section 26 Equality Act 2010

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

Conclusions

Burden of Proof

69. Under section 136 of the Equality Act 2010, if there are facts from which an Employment Tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision. We have taken account of the guidelines set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof.

70. We have also taken into account Madarassy v Nomura International plc [2007] IRLR 246, CA which found that the mere fact of a difference in protected characteristic and a difference in treatment will not be enough to shift the burden of proof. There needs to be *"something more"*. There has to be enough evidence from which a reasonable tribunal could conclude, if unexplained, that discrimination has (not could) occurred.

71. In Qureshi v (1) Victoria University of Manchester (2) Brazie [2001] ICR 863, the Employment Appeal Tribunal stated that a Tribunal should find the primary facts about all the incidents and then look at the totality of those facts, including the respondent's explanations, in order to decide whether to infer the acts complained of were because of the protected characteristic. To adopt a fragmented approach "would inevitably have the effect of diminishing any eloquence that the cumulative effect of the primary facts might have" as to whether actions were because of the protected characteristic.

72. We have considered the evidence that was put before us and have reached findings of fact as indicated having looked at the matters individually and then gone back and looked at the matters in their totality, drawing inferences from the primary facts if we felt it appropriate to do so.

Harassment

73. Harassment is defined under section 26 of the Equality Act 2010. A person "A" harasses another "B", if "A" engages in unwanted conduct related to a protected characteristic, which has the purpose or effect of violating the dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B. In deciding whether the unwanted conduct has such purpose or effect, the Tribunal must consider the perception of B, the other

circumstances of the case and whether it is reasonable for the conduct to have that effect.

74. The claimant's allegations of unwanted conduct are set out at B 34C of the list of issues at paragraph 4.1. Specifically, the claimant alleges that the unwanted conduct consisted of a) making statements to him of a racial nature and b) telling racial jokes. The claimant was required to provide further details of these allegations by 26 February 2020 and has provided a response at B 402. However, this goes further than his original allegations.

75. We have dealt with these matters in our above findings from which we have concluded by applying the relevant standard and burden of proof that a) these matters did not on balance of probability occur or there is no evidence in support of them and b) the claimant has not satisfied the burden of proof and so it did not shift to the respondent.

76. We therefore conclude that the complaint is unfounded and is dismissed.

Direct discrimination

77. Under section 13 of the Equality Act 2010 ("EQA"), it is unlawful to treat a worker less favourably because of a protected characteristic, in this case race, by reference to an actual or hypothetical comparator in the same or similar circumstances.

78. The claimant's allegations of less favourable treatment are set out at B 34D at paragraph 5.1. Again the claimant was required to provide further details of these complaints by 26 February 2020 and has provided a response at B 401. However, this goes further than his original allegations.

79. We have dealt with these matters in our findings above and in respect of sub-paragraphs 5.1.1 to 5.1.4, we have found non-discriminatory explanations for the treatment complained or that we simply did not hear evidence in support of the allegations.

80. With regard to sub- paragraph 5.1.5, dismissing the claimant, our primary findings are that the respondent had legitimate concerns as to his standard of work on his first solo and then final fitting job, he was given a further opportunity to prove himself but failed to do so. Indeed, the respondent had initial concerns about the claimant's abilities, put him on trial and then snagging, were generally content with his work until he was given his own jobs. The respondent liked the claimant and liked his personality but were unable to continue his employment.

81. The matters that the claimant relies upon in any event do not show the something more necessary to link them to the protected characteristic of race. There was also in any event nothing from which it was appropriate to draw any inference of unlawful discrimination.

82. Whilst the claimant relied upon actual comparators James Johnson and Luke were we not provided with satisfactory evidence in support of their circumstances being not materially different to the claimants.

83. We therefore conclude that the complaint of direct race discrimination is unfounded and is dismissed.

84. We recognise that the claimant has struggled to accept the reasons for his dismissal but we were unable to find evidence of discriminatory treatment or harassment. The respondent had concerns about the claimant's skill set at the time of interview but were willing to take him on a trial basis, they were content with his initial work and snagging, but had serious concerns about his solo work arising from a customer complaint and his behaviour towards that customer, gave him a further chance but unfortunately it did not work out. The respondent stated that they really enjoyed working with him but this job was not the one for him.

85. Both complaints are unfounded and so the claim is dismissed.

Employment Judge Tsamados
Date 12 August 2022