



# EMPLOYMENT TRIBUNALS

**Claimant:** Mr M Khan  
**Respondent:** Mitie Limited  
**Heard at:** Nottingham and remotely by CVP  
**On:** 23 – 27 August 2021 and in chambers on 10 September 2021.  
**Before:** Employment Judge Clark  
Mr Pitman  
Mr Purkiss

## Representation

**Claimant:** Mr C Fender of Counsel  
**Respondent:** Miss T Hand of Counsel

## JUDGMENT

The unanimous judgment of the tribunal is that: -

1. The claim of harassment under s.26 Equality Act 2010 **succeeds.**
2. Remedy will be determined at a future hearing, if not agreed.

# **REASONS**

## **1. Introduction**

1.1 This is a single claim of harassment. There are three specific incidents from which unwanted conduct is said to have occurred constituting harassment under s.26 of the Equality Act 2010 (“the Act”). The claimant originally claimed unfair dismissal. This was subsequently dismissed on withdrawal. At a preliminary hearing before EJ Adkinson on 16 December 2020 a proposed amendment to add a claim of victimisation was refused. Permission was otherwise given to amend the ET1 in respect of the claim of harassment and time for the presentation of that claim was extended on the basis it was just and equitable to do so.

## **2. Issues.**

2.1 The live issues are set out in an agreed list of issues prepared by the parties. We adopt those and use that as a basis to structure our conclusions. In summary, the three factual allegations behind the claim are: -

- a) On a date in or around September/October 2019, racist language was used by Luke Kendall, Nick Down or Sean Connolly about Chinese people in the presence of the claimant.
- b) In September/October 2019, Jason McLoughlin said “ey up my nigger” to the claimant. Mr McLoughlin says he was telling a story and repeating what he had heard whilst working at Nottingham jail.
- c) On 4 November 2019 Luke Kendall, Nick Down or Jason McLoughlin used the words “Paki Bastard” and or openly viewed on social media. Mr McLoughlin says he was telling a story and repeating what another colleague had said when he used the words “Paki Bastard”. A version of these events was then relayed to Mr Khan by Mr Connelly.

2.2 All the alleged perpetrators are employees of the respondent. The respondent does not rely on the statutory defence.

2.3 In this case we have before us the parties’ evidence of the incidents themselves and the employer’s subsequent responses. Those later responses are not said to be acts of harassment nor, otherwise, to amount to any prohibited conduct. Significantly, the same applies to Mr Connolly’s communication to Mr Khan of the third of the three incidents set out above which is not, in itself, said to be unwanted conduct. We shared

with Counsel at the outset that our focus was on what happened in respect of the 3 incidents. The remainder of the chronology was therefore only relevant for the purpose of finding those primary facts of what happened and, if the claim is made out, may go to issues of remedy. Neither Counsel opposed that approach. We return later to the implications of the facts of the third incident being relayed indirectly through a third party.

### **3. Evidence**

3.1 For the claimant we heard from Mr Khan himself.

3.2 For the respondent we heard from James Boote, Jason McLoughlin, Nicholas Down and Sean Connolly who were involved in the events during which the allegations arise. We also heard from Jonathan Clare who conducted the grievance process and Jacki Ball, who conducted the grievance appeal. We did not hear from Luke Kendall, the small works manager to whom Mr Mcloughlin reported and who was present at one of the incidents. He no longer works for the respondent and has not been called.

3.3 We received a bundle running to 504 pages. All witnesses gave affirmed evidence and were questioned.

3.4 We had timetabled oral submissions and deliberations within the initial time estimate for this hearing. Unfortunately, Ms Hand fell ill towards the end of the listing. She invited us to conclude the final stages of evidence but, thereafter, we agreed with both Counsels' agreed position that submissions and any replies should be made in writing and we would reconvene to deliberate on our decision. We have subsequently extended the initial timetable to further accommodate Ms Hand in filing those submissions. We have now considered both the written submissions and the replies.

### **4. The Facts**

4.1 It is not our role to resolve each and every last dispute of fact between the parties. Our function is to make such findings of fact as are necessary to answer the issues in the claim and to put them in their proper context. On that basis, and on the balance of probabilities, we make the following findings of fact.

4.2 The respondent provides facilities management services to clients. The services include building maintenance services, cleaning and other facilities management functions. One such contract is provided to Rolls Royce across a number of its sites in the East Midlands. The particular division we are concerned with is the Hucknall site. It provides the base for a small team of 6 maintenance engineers of various trades who service that site and a satellite site at Annesley. The small volume of work generated by Annesley emerged as a feature of this case during evidence. We find there is limited

work at that site, being enough to occupy the equivalent of only one engineer for one day per week across all trades.

4.3 The team reported to Jonathan Clare, the regional Manager and was itself made up of two parts, small works and engineering. The small works team was made up of a manager, Mr Kendal, and an engineer, Mr Mcloughlin. The engineering half was made up of a manager, Mr Boote, a mechanical engineer, Mr Connolly and an electrical engineer. That latter post had previously been occupied by a long standing and experienced electrician. He left in 2019 and Khan was recruited by Mr Boote as the replacement, beating other candidates to the post.

4.4 The claimant took up his employment on 20 May 2019. He describes his race as British Pakistani. He was the only member of the team on the Hucknall site who was not white. His appointment was subject to a probation period lasting 3 months. It transpired that his experience was not what the team had previously been used to and his probation was extended to 6 months. However, we find this extension was genuinely part of a plan to support the claimant to get up to speed and he was subject to close supervision and support. We find Mr Boote was genuine in regarding him as having the potential to become a good engineer and was prepared to support and invest in him.

4.5 As might be expected of an employer of this size, it is resourced with specialised HR advisers and applies various written employment policies. We have seen the employee handbook which contains aspects of a discipline procedure. Within that, the typical examples of conduct this employer will regard as amounting to gross misconduct include discrimination and harassment on grounds of race. We have also seen the grievance procedure which follows typical stages of decision making and rights of appeal to a higher level.

4.6 The handbook includes a statement on treating all with respect and recognising diversity. This employer boasts a number of awards including some relating to its diversity aims, particularly in respect of encouraging females what were previously male dominated engineering roles. Mr Khan accepted the employer's aims were more than empty words and acknowledged the awards where third parties have recognised its achievements. Despite that accolade, we find this employer does not provide any training to managers or staff on dealing with diversity or harassment issues in the workplace. At best, there are some online materials available, but we cannot say what they contain nor can we find that any of the key players had viewed it. When Mr Boote found himself dealing with the claimant's initial complaint, we find he genuinely and instinctively tried to do his best.

4.7 The team's physical home is in semi-permanent offices described as being in the nature of shipping containers. They are stacked one above the other with a metal staircase. The upper was the office of Mr Boote, Mr Kendall and Mr Down. Mr Mcloughlin would also use it at various times during the day but spent most of the day on site. The lower office was where Mr Khan and Mr Connelly were based.

4.8 The evidence has also established various characteristics of this working environment, described as "banter". Whenever workplace interactions are described as banter, a tribunal will instinctively be alert to scrutinise what lies behind it. As always, the local culture arises from the particular dynamics in the team. First, we find this is akin to a construction site environment. Secondly, it was all male. Third, most of the staff were relatively long serving and knew each other very well. Fourth, three of the team were ex-military. The day-to-day interactions between those in the workplace were lively and we find they included debates about politics and public events. There was often disagreement on those matters and views were sometimes expressed strongly. Individuals were also subject to ribbing of various forms often based on aspects of their personality, characteristics or appearance. We find that was universal. That was the culture Mr Khan joined.

4.9 One particular aspect of this case is the extent to which Mr Khan chose to engage in any of these debates or discussions or participated in the "banter". We find that to some degree he did and one particular aspect of that has featured in the respondent's evidence. In addition to the three ex-servicemen in the team, there were others across the site working for the client or other contractors. Mr Mcloughlin was undergoing treatment for PTSD. A number of witnesses alleged Mr Khan had made comments to the effect that western forces were killing his Muslim brothers and sisters. He denied this. We have considered this contention carefully and there are reasons to be cautious about the accounts of some of the respondent's witnesses. However, Mr Boote, and to a lesser extent Mr Connolly, stood apart from the other protagonists. They too referred to this conduct. Mr Boote's recollection was moderate. Whilst we do not find the comment was repeated in the manner or frequency that it was advanced in evidence by some, we do accept Mr Boote's recollection that it was said, was repeated more than once, that it was said and received as a funny comment the first time but the joke wore thin when repeated. No action was taken against Mr Khan and it prompted no immediate adverse response. No reports were made and, notwithstanding the number of ex-military, no actions taken in response including anything that might broadly be described in the nature of "prevent" actions. We find the only basis on which we could accept the respondent's evidence was that all those who encountered it understood it to be a joke, albeit not in good taste.

4.10 We have to consider why such a joke might be made. We find the reason is found in the dynamics of the team and Mr Khan's position within it. We have already

described the other members, Mr Khan was not only the only non-white member but he was much younger, possibly a little immature and only just starting out in his career. That career was proving a little more demanding than might have been hoped and, whilst we find the extended probation was focused on supporting him, it also meant he was vulnerable. We reach two further findings of relevance. First, we find he attempted to integrate by participating in the banter. Secondly, he tolerated things he experienced far more than he otherwise might have done.

4.11 Despite these growing tensions, we also find that the claimant was actually accepted into the team. He was well regarded by his colleagues. Mr Connolly included him in personal social occasions.

4.12 For his part, however, over those first 5 months or so over the summer of 2019, certain discussions caused Mr Khan to begin to feel distanced from his colleagues. The topics of discussion engaged in socially and politically controversial topics such as Brexit and immigration. There were also tensions amongst the other members of the team as political views were not universal. Nothing in what was said in those discussions forms the basis of the claim before us and nothing we have heard suggests there was anything improper said or done. However, we find they began to shape the view he formed of his colleagues and his perception of how he might, or might not, fit in was something he came to question.

4.13 There then followed a few occasions where he found himself subject to criticism, minor chastisement or other tensions arose in his working relationships with others. For our part, the interventions seemed to be appropriate, but they nonetheless contributed to undermine his confidence about his membership of the team. He was described as having big shoes to fill. His work and development were being closely monitored, albeit in the context of support. His probation had been extended. One minor incident of chastisement concerned him apparently stamping on the metal stairs which vibrated and resonated through the metal offices. Another was in response to him pressing to borrow the company credit card. This was for legitimate use but was demanded at a time when the person holding it was engrossed in dealing with an immediate crisis prompting a sharp response. In themselves they amount to little and are not said to be discriminatory. We find they did, however, have an effect on amplifying his sense of being an outsider to the group despite attempts to integrate.

4.14 For what it adds, we do not find these occasions on which Mr Khan was chastised were the motivation for his later complaints as was at times suggested in evidence.

4.15 It is against that background that we come to the three events that form the basis of the claim of harassment. We summarise them here as they were then known to the

claimant. We do so to maintain the chronology and put the employer's response in context. We will return to each of them in order to set out our own findings of fact on what actually happened.

4.16 In September or October 2019, the first matter is said to occur. In evidence, it was actually put as occurring approximately two weeks or so before 4 November 2019. Mr Khan says he was present at a time when the other members of the team were making racist comments about Chinese people. This did not prompt comment or complaint at the time. It is something that was not subsequently stated in his later grievance although it was referred to in passing during the grievance outcome meeting and was then raised in his appeal. The substance of it was never particularised either at the time or in the claim before us. We would add, however, that it seems not to have been probed in any respect by the employer when it was said to be investigated. The closest it gets to any form of detailed particularisation arises for the first time in the claimant's witness statement. In short, it amounts to the fact he might have overheard the phrase "ching-chang" used by someone. We return to our detailed analysis of this event later.

4.17 The second matter occurs sometime in October, about a week before 4 November 2019. Mr Khan alleges that at the end of the day he was greeted by Mr McLoughlin with the phrase recalled as "Ey up my nigger" or "Yo yo my nigger". His evidence was clear in what he heard but confused as to what he did in response. In oral evidence he said he did nothing but went to speak to others. In his written statement he suggested he rebuked Mr McLoughlin and told him not to say that. We do not accept that there was any immediate response to Mr McLoughlin which in itself raises some caution about his written statement. Mr Mcloughlin denies he said it. We deal with our own detailed findings on this event later.

4.18 Whilst this did not prompt an immediate grievance, we find Mr Khan did take two steps in reporting it at the time. First, we find an individual working for another organisation on site identified only as Rohan became aware of it. He was described as a black man with his own race related grievance against his own employer. According to Mr Connolly, Rohan is said to have spoken to both himself and Mr Mcloughlin about this incident. Mr Khan's witness statement is curiously silent on this. The second is that we find Mr Khan also spoke with Mr Connolly towards the end of that same day. We found Mr Connolly's extensive and sometimes intensive evidence on this was difficult to keep on a consistent track. When considered in the totality of the evidence, we are led to reach the following findings of fact:-

- a) There is no dispute Mr Khan spoke to Mr Connolly on the same day as the incident and reported to him that Mr Mcloughlin had greeted him with what Mr Connolly recalls was the phrase "yo yo my nigger".

b) We reject Mr Mcloughlin's account that Mr Khan relayed this experience in a way that indicated he understood it to be a joke and that he took it in that way or that he fell into "inane laughter" when retelling the story. This fact was not mentioned in his statement and its omission was explained on the basis that "you can only fit so much in". We are prepared to find Mr Khan may have attempted to brush it aside for reasons we have already stated as Mr Connolly would later attempt to refer to his use response to this issue as a reason why he should not have been offended by the later "Paki Bastard" comment. Overall, however, we do not find Mr Khan's response was one of a relaying an hilarious joke nor that he was not displaying concern about it.

c) We find Mr Khan was sharing a significant event and seeking support from his more experienced colleague. Mr Conolly's evidence was that it was always his practice to advise people to report concerns to managers and he repeated that here. The notion of advising someone to report something to management is not consistent with someone retelling an amusing story and accepting the conduct as a joke. We find Mr Connolly knew about the referral to another BAME colleague all of which we find points away from this response being portrayed as a joke he had accepted.

4.19 No further complaint was made about this incident at the time but it would feature in the grievance investigation. As we have stated, it was then raised by Mr Mcloughlin to defend the basis on which offence should have been taken about the Paki-Bastard comment.

4.20 About a week later, on 4 November 2019, most of the team were gathered in the top office around lunchtime. Mr Khan was not present at any time. It is a room configured with a pair of 2 desks at each end of the room arranged as companion desks, back-to-back. Sitting at one desk meant the user faced into the room, the other meant the user had their back to the room. Mr Boote was sat at his desk facing into the room. At the other end of the room, the other pair of desks were occupied by Mr Kendal, facing into the room and facing Mr Boote. Mr Kendal's desk was paired with that of Mr Down who, accordingly, faced him and had his back to the room and Mr Boote. Also in the room was Mr Mcloughlin who had attended the office at lunch time and was sat on a bench at 90 degrees to Mr Kendal's desk. Mr Kendal was talking with Mr Mcloughlin and the two were looking at a laptop. They were not working at this time. We find a radio was on low volume in the office as it always was.

4.21 Mr Connelly had dropped into the office. He had been in the office for about 4 or 5 minutes before he heard something said in relation to the video being watched by Mr Kendall and Mr McLoughlin. He described this video in evidence as a "vile video". Comments related to it were made by those watching. Those comments caused Mr



Boote to sit up from his work and call out across the office words to the effect of “steady on with that language lads”. Mr Connolly left what he described as childish behaviour amongst some of the others. This is the event that forms the third aspect of the claimant’s case. We return to our detailed findings later.

4.22 For present purposes the significant aspect of this case then happens towards the end of the same day. Mr Connolly returned to the office that he shared with Mr Khan around 3:20pm to clear up for the day. His finish time was 4pm. It is during that 40 minutes that Mr Khan learned from Mr Conolly what had happened at lunchtime and it forms the basis of his knowledge of events that, in turn, inform his claim of harassment. What he was told and the context of it are therefore crucial.

4.23 Mr Connolly accepted he told the claimant what he had heard that lunchtime and that he told the claimant that “he would not have liked what he had heard”. His account to the later internal investigation, and his written account to us, has put the prompt for that disclosure in a very specific context. That context is that he says he only raised it with Mr Khan as some form of response to offensive comments made by Mr Khan and which was said to highlight his own “hypocrisy to racial difference”. That context has never been explained to us. It was explored at length during cross examination and the tribunal invited Mr Connolly to talk through the actual exchange he had, but without success. What we did learn has led us to conclude that the allegation of hypocrisy has been wholly misconceived in the way it has been portrayed in his evidence. That is not necessarily Mr Connolly’s fault. Mr Connolly’s statement suggest he shared the events that lunchtime *in response to* hypocritical comments by the claimant. In fact, his oral evidence to us explained that his sense of the claimant’s hypocrisy only arises because the claimant had said inappropriate things in the past and that he was a hypocrite for *now* bringing this claim. That clearly does not explain why, or in what context Mr Conolly disclosed the events of that lunchtime.

4.24 The best we have is that Mr Khan may have been talking about something occurring in respect of the disputed Kashmir region. That may have involved rather graphic descriptions of what was happening to some of the people in that conflict. Mr Connolly did not want to hear what he described as “brutal stories”. He described himself getting angry and frustrated with his topic of conversation, which for some reason then seems to be what prompted him to tell Mr Khan about what the others had said that lunchtime.

4.25 In the circumstances of this case, it is important that our findings are as clear as they can be about what was said to the claimant. We find the information Mr Connolly conveyed was: -

- a) That the three guys (Mr Down, Mr McLoughlin and Mr Kendal) were watching a video on social media in which an Asian man was being berated by a white woman.
- b) The video contained expletives and reference to the Asian man being a “Paki” and referring to him as a “Paki bastard”.
- c) The guys were mimicking her and the phrase Paki-bastard was used.
- d) The guys were finding it all amusing including a repetition of the words used and all contributing to the shared moment in their encouragement.
- e) That he found it disgusting.
- f) That it had caused Mr Boote to say words to the effect of “steady on with that language lads”
- g) What he had seen that lunchtime was something Mr Khan would not have been happy with.

4.26 We find Mr Khan was shocked by this. We find it upset him to think the people he was working closely with might hold negative and aggressive views about someone of his ethnic origins and that that attitude might be transferred to him. The phrase Paki Bastard also caused him upset beyond the obvious connotations as it exposed a generic attitude to anyone of Asian origin, as they could not have known his nationality.

4.27 We find Mr Khan wrestled with what to do with this for some days and began to distance himself from his colleagues. We find he consulted with his father and drafted a letter of complaint. We find that was a big step to take and we find he was struggling with whether the inevitable consequences to him of doing it outweighed the issues raised. Later that same week, on Friday 8 November, he shared that draft with Mr Conolly. The fact that happened reinforces our view that Mr Khan and Mr Connelly were not in conflict when the disclosure had happened 4 days earlier.

4.28 The following week, on Tuesday 12 November 2019, Mr Khan asked to speak to Mr Boote. They met early that same morning, around 9:30. We have Mr Boote’s brief notes. We exercise some caution about the level of detail contained in those very brief notes and the time they were drafted but accept Mr Boote listened to Mr Khan’s complaint. We find he tried to deal with the situation by proposing that he get everyone together to talk through what had happened. We accept Mr Boote’s approach was well intended. However, we find although not objecting at the time, Mr Khan was not comfortable with this proposal and something in the proposed execution of that plan caused Mr Khan further concern. Whether Mr Boote meant it in this way or not, Mr Khan left that meeting believing Mr Boote was more concerned that if matters

progressed to a formal grievance, the “lads” would not be able to express themselves freely.

4.29 Later that morning, Mr Khan chose to raise a formal grievance about these matters. It said: -

***Last week on Monday 4th of November, in our cabin office 3 members of staff used language which caused great offence to me, racism and derogatory language quoting "Paki Bastard.***

***Within the office were 5 members of staff. Including my line manager Jim Boote. The other 4 were as follows Small works Manager Luke Kendall, Small works Electrician Jason Mcloughlin, Lead Technician Nick Down and Engineer Sean Connolly.***

***The language was used by Luke, Jason and Nick.***

***Sean was sat there on his PDA and heard clearly with disgust with my line manager about what was said.***

***With to my Manager Jim Boote replied 'Steady on with that comment that's going far boys'***

***The topic which was being discussed was something related to social media about a Asian complexion person in a car park and a Mercedes. Now they did not know if that person was Indian Pakistani bangladesian or anything else etc yet still the phrase Paki Bastard was said in a crescendo effect as if it was ok to say it openly and freely at work and acceptable.***

***This language regardless should not be accepted tolerated in any form of way I being a British born Pakistani have took great offence of the language used by members of staff at my workplace.***

***I am entitled as to is everyone else at work in 2019/ 21st century dignity' at work.***

***By the members of staff behaving in this manner has caused me great upset.***

***I genuinely want to avoid these members off staff at work, do not wish to liaise or converse or even enter the office. Since this has occured I have mainly been communicating via my telephone with my manager.***

***I have had great thought about this over the past few days and gradually it has got worse. I thought maybe I could avoid any confrontation and brush it off, however I cant as mentally its effecting me.***

***Therefore today on the 12/11/2019 I decided to speak to my manager regarding the issue.***

***The conversation that took place today with my manager regarding the issue is of how I'm feeling and the effect it has had on me physically mentally my capabilities at work while knowing this sort of language exist and yet nothing has happened.***

***I believe with what they have done they have potentially brought the organisation into disrepute and require to formally be investigated and reprimanded.***

4.30 We set that out in full not only because the grievance is a contemporaneous record of the claimant's position at that time, but because we find the essential facts alleged in it can only have come from the conversation he had with Mr Conolly at the end of the day on 4 November and the fact he shared a draft with him goes some way to minimise the risk of inaccuracy.

4.31 We are satisfied Mr Khan did feel intimidated by what he felt to be a working environment hostile to non-white racial origins.

4.32 We find when Mr Boote learned of the formal grievance he told the others. He used words to the effect of "listen lads, this has just got real". We find that the rest of the team knew the detail of the allegations in the grievance. We reject the accounts given in evidence that the first they knew of the detail was when the matter was introduced to them by Mr Clare in what would become the grievance investigation meetings. We further find that they spoke about it amongst themselves. We have no evidence of any instruction to them not to discuss it but it was alluded to by some witnesses. If there was such an instruction, we find they either ignored it or the discussions took place before such instruction was given.

4.33 Mr Clare was appointed to investigate the grievance. He described his task as simply to determine if the phrase Paki-bastard had been used and if so, in what context. Despite defining those terms of reference, we find his investigation to have been cursory and aimed at closing the issue down and directing it towards mediation whilst being seen to do something.

4.34 Mr Clare met with the claimant on 14 November 2019 to discuss his grievance. He explained how the phrase Paki bastard had been used by the others. Mr Khan explained how he came to know about it and knew that Mr Boote had said in response "steady on with that comment". He shared his concern and feeling awkward that if they used this language behind his back, is that what they think about him. Mr Khan did not refer to the allegation about Chinese racist comments or being greeted with "Ey up nigger".

4.35 Later that morning, Mr Clare interviewed all the other members of the team except Mr Connolly. Most notes show the times of interview. Mr Boote's was not shown but on the balance of probabilities, we find he was interviewed first. Mr Kendall was interviewed at 10:25; Mr Mcloughlin at 10:40; Mr Downs at 11:05. There are no end times of the interviews but the start time of each, and the brevity of the notes, confirms they were short, lasting in the region of 10-20 minutes each.

4.36 Mr Clare says he did not send any notice to the interviewees and did not tell them why they were being interviewed. He said they were told the allegations at the start of their interview and asked to comment. That may be so, but it is clear to us that they did in fact know for the reason already given. That conclusion becomes beyond doubt when Mr Kendall's interview notes are considered as he attended the investigation meeting refusing to answer any questions and instead provided a prepared written statement addressing the issue. That can only have happened by prior notice. His statement contained: -

- a) His own unrelated criticisms of the claimant's conduct and when he had been taken to task.
- b) In respect of the "Paki Bastard", he gave an account that Mr Mcloughlin was in fact telling a story about the behaviour he had seen displayed by a previous Indian employer, relaying that third party's language in those terms and that the claimant was not in the office at the time.
- c) That he wanted a representative in any future meetings
- d) That the claimant was himself making inappropriate statements towards other employees including "terror-based language" towards family members of armed forces who have lost their lives in conflict and statements about the elimination of other religions.

4.37 During the interview with Mr Mcloughlin he said: -

- a) That he could not recall the incident.
- b) The only time he used it was when explaining about a previous employer who was an Indian person. He used to hand out of his window and shout at people of Pakistani origin. That Mr Khan had misconstrued what was said.
- c) He denied being racist and had provided help to Mr Khan.
- d) He could not recall who was present at the time.
- e) That the claimant had not been in the room for several weeks since the altercation about stomping up and down the stairs.
- f) That there had previously been discussions between them referring to his previous military work in Afghanistan which Mr Khan referred to him as "killing his Muslim brothers and sisters". That he could have complained about that but brushed it under the carpet. That he was not sure if he meant it but he would not work with someone who says that about him.

4.38 Nicholas Down said: -

- a) He recalled reference to the term was used in the context of how people spoke previously and that you would not get away with that nowadays. He did not recall when. It was not used against Mr Khan.
- b) He felt aggrieved himself. How could he work with him again in the future?

- c) He found the claimant's interest in ex-serviceman strange and that he is vocal about other religions including Jewish people and his own religion. Mr Khan had previously mentioned his brothers in the gulf and how all other religions are wrong.
- d) That he has heard about this conversation through a 3<sup>rd</sup> party.

4.39 James Boote said: -

- a) He couldn't remember exactly when but recalled an incident where a number of people were discussing something on social media and heard the term "Paki Bastard" and at that point I said words to the effect of "stop that as not appropriate language"
- b) That he met Mr Khan on 12 November for a private meeting because he felt the butt of racist comments. Said he would speak with them and warn them not to use that language again. That he did not hear any comments aimed at Mr Khan.
- c) That he felt Mr Khan had agreed to wait until he had spoken with the individuals concerned before taking it further but had emailed people support before he had chance.

4.40 Sean Connolly was interviewed about 4 days later on 18 November. He said: -

- a) Guys discussing a video on social media about a parking issue. He was not sure of the details.
- b) That the phrase "Paki bastard" phrase was not heard but the word "Paki" was, as were a number of expletives.
- c) That the week before this incident, there was another incident when Mr Mcloughlin said to the claimant "yo yo Nigger" in jest. He did not take offence and found it amusing and repeated it. He questioned why, when not present at this incident, did he raise a grievance now?
- d) That he was later discussing Mr Khan's own hypocrisy about racial issues as he was vocal about such things. He shares his views about Kashmir.
- e) That his complaint was not a true record.

4.41 We record that the typed version of Mr Connolly's short interview had been changed to suggest that certain questions and answers had been asked. We find that to be inaccurate. The comments about "yo yo nigger" were volunteered by Mr Connolly and not a question posed by Mr Clare. Words have been added by someone to create the impression of an exchange of questions and answers when they were all statements by Mr McLoughlin.

4.42 We find the evidence emerging from the witnesses to the internal investigation has painted two distinct accounts. Mr Mcloughlin, Mr Down and Mr Kendall are collectively consistent with an account that admits the use of the words and puts it in an exculpatory setting, that is relaying a story about a third party's past conduct. We find they make no mention of any social media video or the response to it. We also find, no one mentioned at this stage any prompting by a programme on the radio such as a phone-in discussion about racism. These three accounts contrast with the accounts of Mr Boote and Mr Connolly which, whilst they also say nothing about any radio programme, clearly place the comments in the context of a group discussion in response to a social media video which they contributed to in their group discussion and encouraged each other by their conduct in finding it amusing. We spent some time in evidence trying to understand how the various pieces of evidence fitted together, in which order and the sequence of events, especially as there was only said to be one point when Mr Boote heard the phrase Paki bastard. Unfortunately, the subsequent findings and conclusions within the grievance and appeal have only served to confuse the picture further still. In summary, it is our finding of fact that these varying accounts are not all different stages of the same event on the same day, but that the retelling of the third-party story has been agreed between the three concerned to exculpate them from what was actually happening.

4.43 In the weeks following his grievance becoming known, we find Mr Khan was ostracised by his team. Two had indicated they could never work with him again. We find he felt totally isolated and became ill as a direct result of the situation at work. A period of sickness absence commenced on 9 December 2019 from which he would not in fact ever return to work.

4.44 On 18 December 2019, Mr Khan attended a second meeting to receive Mr Clare's outcome to the grievance investigation. During that meeting they discussed his current sick note from 8 December and how he felt about coming back after that. At that stage, we find the claimant confirmed he wanted to come back at the end of his current fit note. Mr Clare explained his decision. He told Mr Khan: -

***“From the feedback I've got, the video of the incident was reviewed and language has been used which is offensive. The people involved have apologised and said they won't use it again.”***

That much seems to have reasonably indicated to Mr Khan that Mr Clare found that the language was used in the way that had been described to him by Mr Conolly, that it was actually used by those present, and not on the video, that he concluded more than one person had used the language and that they had all given an apology for it. For our part it also seems to us to have reasonably indicated that Mr Clare had rejected the alternative account of an innocent story being told about an experience in an previous

employment, although at the time of this meeting the claimant was not yet aware of that account.

4.45 We find the rest of the meeting then turned to focus on the emerging counter allegations raised against the claimant by the others. This was said to have been raised because they wanted to “defend themselves”. The issue was opened by Mr Clare with the phrase

***“so if you want to take it the formal route, there will be investigations on both sides”.***

4.46 We find the parties were already in “the formal route” as far as the claimant’s grievance is concerned. At that time, we find Mr Clare had no indication that the others would raise their complaints in any formal sense. We find this statement was therefore part of Mr Clare’s overall intention to steer the matter to an informal mediation by discouraging the claimant to take matters any further. We find this was the first the claimant knew of these counter allegations. They raised a new area of concern for him about his relationship with his colleagues in the workplace.

4.47 Things then only deteriorated further in the meeting when the apparent apology for wrongdoing was qualified somewhat, although we suspect the subtle change of meaning was not picked up by the claimant until he received the later correspondence. Mr Khan asked if “they’ve accepted what they said?” Mr Clare said “No, they say it was not aimed at you. There was a video where various words were said, they admit language like that is wrong, it’s not acceptable and they’ve been warned”. Mr Clare was unequivocal in concluding that: -

***“ the words were used but they were used in the context of repeating words they’d seen on a video and Jim heard and said that language is not acceptable”.***

4.48 Mr Khan himself explained his position in these terms: -

***“I am not saying it was aimed at me personally. It wasn't aimed at me personally. But the fact that they can say that and it be ok, it's wrong. Personally, I've not seen that video, so I don't know where it's come from. Like I said, one week it was the N word, then it was the Chinese. I don't want it to carry on. If they've heard something from me that's caused offence, then I'd like that to be investigated also.”***

4.49 We note Mr Clare had not seen the video either and its existence, still less any attempt to view it, seems not to have featured in his enquiries at all.

4.50 The outcome of the grievance was sent to Mr Khan in a letter dated 30 December 2019. A mediation session was proposed. The essential part of the outcome was now put in these terms: -



***“On balance, I believe that a comment was made but it is impossible for me to ascertain whether it was made by the group watching the video or a person in the video. Therefore, I can partially uphold your grievance given that it is unacceptable for employees to watch such videos in the office during work time particularly those that contain offensive language. As a result this matter will be dealt with separately. If any action is taken against anyone involved, we are unable to inform you of the outcome.*”**

4.51 This written conclusion is fundamentally different to the one given verbally at the meeting of 18 December. We are satisfied, again, that it can only mean there was a conclusion that the alternative account of the story from past employment had been rejected. The only other explanation for its complete omission from the terms of the conclusions is that it had not been considered at all which only then potentially makes things worse as it points towards a predetermined outcome. We find the outcome also contains findings of fact attributed to witnesses whose evidence does not support the findings. Things attributed to James Boote and Sean Connolly were not said by them.

4.52 We have not been able to understand Mr Clare’s logic and his explanations in evidence did not help clarify his position. His verbal outcome to the claimant was that the words were used, the individuals apologised and promised not to use it again. In the letter he said he could not tell whether used by those present or by the person in the video. We find there was no apology for anything by anyone. On the contrary, a number of the individuals concerned were now indicating a refusal to work with the claimant again. The most that could be said is there was an acknowledgment that they should not watch this sort of video at work. This was a construction of Mr Clare’s own making in an attempt to appease the claimant and diffuse the situation. We suspect that had the mediation occurred, the mismatch between what the claimant had been told and what the other members of the team actually felt would have quickly emerged and would have led to new conflict. In his live evidence, Mr Clare’s account was not consistent with the outcome letter. We have, however, been able to reconcile this to some degree by another finding of fact. That is that we find neither this outcome letter nor, in due course, the outcome of the appeal, were written by the ostensible author. They were a construct of input from various others, particularly individuals in HR. The content of both letters is hard to make sense of. It is difficult to discern what conclusions have actually been reached. They reinforce further the conclusion that this was not a genuine attempt to understand what had happened, but an attempt to be seen to do something but with the aim of boxing it off and drawing a swift conclusion.

4.53 One significance of this outcome letter was that it came with all the investigation notes enclosed with it. Mr Khan could now see the evidence that was before his employer. Understandably, he could not understand how Mr Clare could now say it was not possible to be sure if the words came from any of the individuals or on the video when it was admitted that the words had been said.

4.54 Consequently, the proposed mediation did not take place. Mr Khan remained off work sick. On 5 January 2020, he appealed against the grievance outcome. He stated

- a) That investigations were not true and findings not appropriate.
- b) That he needs his case considering by someone who was totally unbiased.
- c) That he was concerned longer serving employees were being preferred to his accounts as someone with short service.

4.55 Within the body of his appeal he also specifically raised the two other factual allegations referred to at the grievance outcome meeting. These are said to have arisen earlier in time and which form allegations 1 and 2 in this case. He also explicitly alleged a turning point in his initial complaints leading to the sense of isolation as a comment by Mr Boote at the conclusion of the initial meeting on 12 November said to be: -

***“Haz you know what the lads in the office will think now, that they can’t express freely”.***

4.56 By 7 January 2020, we find the respondent took a number of steps to manage this situation.

- a) First, it began exploring options to relocate the claimant to a different site. The scope to do this, however, proved impossible and we find, despite it being considered at various stages thereafter, it was never a feasible option. For reasons given already, we do not accept the suggestion in evidence before us, but not raised at the time, that the Annesley site would have been such an option. Not only was this serviced by the Hucknall team but there was insufficient work to justify it.
- b) Secondly, guidance was given to undertaking a full fact-finding investigation.
- c) Thirdly, that the three other individuals in the team implicated should be issued with letters of concern. They were issued to Mr Down, Mr McLoughlin and Mc Kendal on 8 January 2020. Curiously, despite its absence from the grievance outcome so far, each letter referred to the admission that the phrase had been used in respect of Mr Mcloughlin telling the story of a past employer. Even more curious still is the fact that the letters then immediately go on to conclude: -

***On balance I believe that a comment was made but it is impossible for me to ascertain whether it was made by the group watching the video or a person in the video.***

4.57 We find that there is still absolutely no basis on which it is possible to discern how the employer had reconciled the two accounts. It again seems to prefer the

account relating to watching the video over the unrelated account of retelling a story by a third party.

4.58 Jackie Ball was the senior manager appointed to deal with agreements appeal. She was not known to the individuals concerned. She was based at a distant site and the focus of her work was different. The initial grievance appeal meeting took place on 30 January 2020. At that meeting Mr. Khan made clear he wanted to come back to work but did not feel able to do so at that site. He wanted suitable action taking against the individuals concerned. As to what was suitable action, he accepted in evidence that he could not on that day say that suitable action had not been taken and did in broad terms except that letters of concern could amount to suitable action.

4.59 Progress on the appeal was delayed as Ms Ball undertook some further investigation meetings with Mr Clare, Mr Kendall, Mr Boote and Mr McLoughlin and a second interview with Mr McLoughlin. Those further interviews took place between 7 February and 31 March.

4.60 We have seen detailed exchanges between Ms Ball and various HR advisers on her initial concerns, findings and plans. In her initial position, she seemed to have concerns about the deficiencies in the substance of the grievance investigation and its outcome. She felt firmer findings were warranted against the individuals. She appears to have analysed matters in a logical way and could not reconcile how the evidence supported the conclusion that Mr Clare had reached. In particular, she could not see how the video played any part in the accounts given by the three team members or why, if their account had been accepted, there had been an apology. She concluded further action should have been taken to address the comments, not just the watching of the video. She also identified the likelihood that this was part of a wider picture of ongoing behaviour and that the investigation had missed lines of enquiry leading to a conclusion of reasonable doubt that a thorough investigation had been concluded. She proposed further investigations.

4.61 On 7 February, HR advised Ms Ball on the implication of the wider allegations and whether they were part of the appeal which she advised could be. It is also clear as to the authorship of the various outcome correspondence. The Employee Relations adviser referred to the fact he had: -

***Brought up new allegations which you mentioned- indirect discrimination and offensive language used on site - aside of the specific incident that was discussed but I guess this does support his feelings that he is not comfortable on site so can be included.***

***I have updated the appeal outcome letter based on the points below as per the attached.***

***I would be happy to include within the outcome that to support him in a return to work as soon as possible we will actively seek alternative employment. We can then begin a welfare process as a follow on from the outcome.***

4.62 At this stage we find Ms Ball was intending to embark on what appears to be a thorough process. Aspects of the advice from HR was equally indicative of a thorough process. This is the high point of the respondent's investigation. The part we have not been assisted with is why this correspondence discloses that the outcome letter was (a) in existence at all and (b) being updated at a time before that further investigation. This wholly undermines what until now had given us some confidence that Ms Ball's involvement meant the issues were genuinely to be explored.

4.63 On 7 February 2020 Ms Ball interviewed Mr Clare. She asked him why the individuals had apologised for he answered, "watching the video on works time, this is a misinterpretation in the minutes". She asked him about the grievance outcome letter and why it said "it is impossible for me to ascertain whether it was made by the group watching the video or a person on the video closed quote Mr Clare replied there is an error in the minutes as the apology was for watching a video in works time.

4.64 On 11 February 2020 Ms Ball met Mr Kendall, Mr McLaughlin and Mr Boote.

4.65 In the interview with Mr Kendall, he referred to how the phrase Paki bastard was "a disgusting term but it controls peoples thoughts and people should be able to express them" but not in the workplace,...cross an unacceptable line". He referred to banter in the office. On 12 March she met him again to explore what he meant by "banter". It was an extremely short interview in which he said simply "taking the mickey out of people's personal differences, that it was "given and received in good place" but that "Race and religion was out of bounds" and "he had never heard it in the workplace".

4.66 In the first interview with Mr McLoughlin, he repeated the account of retelling a story of a previous employer. This time it was told as being prompted by a discussion on the radio about racism. He went on to make allegations of the comments made by Mr Khan of UK military deaths being deserved for killing his Muslim brothers and sisters. He set out various other reasons he felt Mr Khan might have had reason to be disgruntled about him arising from his work performance.

4.67 Ms Ball met him again on 31 March 2020 for another extremely short interview comprising of 14 short questions and answers. He asked him about the use of the word nigger. He did not remember saying it but did offer a possible situation when it might have used it saying: -

***If it has ever been used it would have been to describe an experience as I used to work in Nottingham jail and there were many different nationalities and a lot was said at this place. If it was said it would have been describing my experiences during this time.***

4.68 No question was asked of Mr Mcloughlin to provide the context in which the phrase “Ey up nigger” might have arisen at Nottingham jail.

4.69 In her interview with Mr Boote on 11 February 2020 he stated he did not witness anything and repeated his account that he wasn't really listening, but when he heard the conversation he did say “steady on lads”.

4.70 The outcome of the grievance appeal was sent in a letter dated 9 April 2020. Despite what we find was a relatively detailed forensic analysis by Miss Ball at the outset, by the time of its conclusion her analysis seems to have been redirected. Her investigation did not attract the same attention or, at least, the rigour with which the inquiries were conducted waned in their execution. The extent to which she was dependent on HR advice to direct her to the various lines of inquiry and a final outcome again undermines the sense that she followed through her initial independent and encouraging consideration of the issues being raised. We find control of the findings and conclusions remained with other unidentified individuals, probably those within HR. The appeal outcome letter itself is lengthy, covering 7 pages. It appears at first blush to be detailed in that it identifies a large number of matters raised, or pieces of evidence gathered as part of the grievance or appeal investigations. However, it is difficult to discern which parts of the letter are expressing a conclusion by the employer or merely restating those points. To the extent that that is possible to identify the conclusions, it simply repeats the conclusions reached at the grievance stage. We have expressed our view that it was difficult to understand the initial outcome against Mr Clare's own understanding. We found that difficulty was compounded after Miss Ball's further investigations because, as with Mr Clare, her personal views given to us in evidence were also inconsistent with the content of the outcome letter.

4.71 The letter again says the ‘Paki bastard’ comment was said, but it was not possible to say if it was said by those present or on the video. It repeats the offer of mediation. On the question of the “Ey up nigger” allegation it concludes there was no evidence or witnesses to this comment and as such it is rejected despite the issue not being tested in the further investigations, especially as there was a witness of relatively close proximity to the alleged incident in Mr Connolly and with who the investigation could reasonably have at least tested the claimant's account of the events of that day. It then deals with the counter allegations against the claimant which the claimant denied but it includes the line “however we have an allegation that you made this comment but without any further evidence we are unable to investigate any further which is reflective of this case”. We are not aware that the circumstances of these comments have been investigated. It confirms “necessary action had been taken” against the individuals concerned. It recasts the apology in the terms stated by Mr Clare that they had apologised for watching the video. The appeal was dismissed.

4.72 It is clear to us that there has been no meaningful assessment of the available evidence, even by the lower forensic standard that might be expected of an internal investigation by an employer. Where there has been conflict of evidence about the claimant's allegations, we find the accounts of the other members of staff have been preferred and accepted as true and accurate, over the claimants, and even where there was inconsistency amongst the others' accounts and that inconsistency has not been reconciled. The lines of enquiry that were identified as having been missed remained so, or at least the questions asked of them were superficial. We struggled to understand how the three individuals apologising could, on their case, apologise for watching a video which did not feature in any of their evidence given to the grievance investigation. Similarly, if their account of a discussion about a prior employer prompted by a radio debate was accepted, they would seem to have done nothing at all wrong to demand any apology at all.

4.73 The claimant thereafter remained off work. Various welfare meetings were held. The claimant indicated he did not want to return to the same site and attempts were made to relocate. Steps were taken to involve occupational health and a transition back to work was planned in July 2020.

4.74 In a letter dated 11 May 2020, Mr Clare updated Mr Khan on plans to return him to work. He agreed to an Occupational Health referral which resulted in an appointment on 28 May. The resulting report stated: -

***In my clinical opinion Mr. Khan could be fit to return to work with recommendations, however the ongoing perception of work issues is acting as a barrier for him to return to work.***

***... until his perception has been resolved one way or another, symptoms are likely to continue. At this point more could be achieved by management rather than clinical intervention.***

4.75 By late June 2020 the parties had effectively reached something of an impasse. The claimant wanted to return to work but to a different location. After taking some steps to try to identify alternative locations without success, the respondent then concluded it had exhausted any opportunities. It is not irrelevant to say by this time of course the company was dealing with the implications of COVID 19 and facing various reductions in demand for its services which was only making the prospect of alternative relocation even less likely still.

4.76 Mr Khan was invited to attend a return to work meeting. This took place by telephone on 14 July and was chaired by Mr Clare. The aim was to review what had happened and whether there was anything else that could be explored. At the meeting the respondent's position was that all other options had been exhausted; that occupational health had stated he was fit for work; that mediation had not been taken up; that he had been offered a phased return with extra support and his roll was still

available. The respondent had been unable to identify any other suitable roles and the only option was now termination of employment.

4.77 A letter confirming the decision was sent on 17 July 2020 confirming the date of termination was 24 July 2020.

*Our own findings in respect of the three alleged incidents*

4.78 We return to the three allegations in order to make findings of fact about the incidents themselves. The first allegation in time is said to be that in September or October that “racist language was used by Mr Kendall, Mr Down or Mr Connolly about Chinese people.

4.79 It has been denied by everyone it has been put to. Moreover, until exchange of witness evidence, the detail of the allegation, such as it is, has never been known to the respondent. The incident is mentioned, but not particularised, in the ET1. It was not known to the respondent’s witnesses. It was not particularised or explored during what would become the internal investigation. It had been raised by the claimant at the grievance outcome and in the appeal but without detail. Cross examination of the respondent’s witnesses on this point has been similarly, perhaps necessarily, limited and generalised.

4.80 The evidence we have is therefore extremely thin. It occupies one short paragraph in the claimant’s evidence where he states: -

***I heard them talking about Chinese people. The office was with all members present and discussions were on going about something in the news referring to China from the Night before. Suddenly frustration and anger was shown in words towards Chinese people. I wasn’t paying much attention as I was on my phone trying to figure something out but I can recall racist language said “ching changs” with laughter following from Nick and Luke while Jason and Sean are talking over about other stuff. I am not sure of the date. I let it pass, but it did make me feel uncomfortable to hear their open racism.***

4.81 From the limited evidence before us of this matter, we have difficulty in understanding what it is that we are expected to find happened on the claimant’s own account. The context is that of him trying to concentrate on his own work activities whilst not just one but two other separate conversations are taking place. He is not listening to either but perceives he heard something said in one of the conversations that may have been an offensive or derogatory reference to Chinese people. It did not prompt any action at the time. It may be that he heard correctly. It may be that he has misheard. He has no context and the sentence in which the phrase is said is incomplete and so too is the context for any laughter that followed. There are any number of alternative possibilities for what may have been partially overheard including

mishearing or hearing an attempt to pronounce a province of China or other Chinese word.

4.82 We find that by this time he had acquired some degree of hypersensitivity to political discussions, Brexit and world affairs and his perception may simply be wrong. The respondent may not have explored this very far in its investigations, but equally the claimant has not advanced very much when having the opportunity to do so before us. We are not able to make any finding that any of the individuals said anything that could be said to be inappropriate or unwanted in relation to the Chinese race.

4.83 The second allegation is the use of the phrase Ey-up my nigger. The claimant says he was greeted by Mr Mcloughlin with the phrase Ey up Nigger. There is a conflict in his evidence as to what then happened. In his statement at paragraph 3 he replies with words to the effect of “who are you calling nigger – watch your language”.

4.84 We do not accept that the claimant said anything in response to Mr Mcloughlin. In oral evidence he told us he saw him drive into the car park at the end of the day as he was about to pack up for the day. He says he wound the window down and greeted him saying “Ey up my nigger”. Mr Khan says he used the word to his face to address him. He says he ignored it. The difference in Mr Khan’s witness statement and his oral evidence is one part of the claimant’s case that has led us to be cautious about his evidence. That much of the evidence would cause us some difficulty in accepting his account but it is not the entirety of the evidence and we have examined the totality of the evidence carefully. The most significant aspect of which is that there is no dispute that Mr Khan went into the office soon afterwards and told Mr Connolly what had happened, although Mr Connolly’s recollection of the actual words is slightly different, being “yo yo nigger”. We do not regard that difference as material having regard to the way memory works. We have already recorded how Mr Connolly would himself raise this in the course of the internal investigation.

4.85 Mr McLoughlin says he did not say it, or at least did not say it in the way it has been portrayed but he does also say he *may* have used it in the context of a conversation with Mr Khan about his previous work in Nottingham Prison. Part of that conversation included asking about how they interacted with each other. The inference in Mr Mcloughlin’s explanation is that he might have used the phrase “nigger” when relaying the way they spoke. The respondent did not press this in its internal investigation. The witness statements before us do not expand on the context. Apart from the generalised statement that it arose in the context of a discussion about his previous work at the prison, we do not know when or how it was said to have been said. We asked Mr Mcloughlin to explain what he meant by the way the prisoners spoke. We asked him to put the phrase in context. He did give a detailed account of an exchange



in the prison but which did not provide us with any understanding of why the phrase nigger might have been used with Mr Khan.

4.86 A curious gap in Mr Khan's evidence, is Mr Connolly's evidence of Rohan approaching him and others about the incident. His understanding was that Mr Khan had reported it to him. It would have been an unusual fact for Mr Connolly to imagine and we accept that he was genuinely of the view the claimant had reported the incident to Rohan. The only alternative explanation would be that, unbeknown to the claimant, Rohan had witnessed it.

4.87 Whatever the value of Rohan's involvement, there is no dispute that there was a contemporaneous report to Mr Connolly of the incident. Mr Connolly does not regard it as being false or made in error. He regarded it as part of the banter that Mr Khan took in good humour. We have rejected that Mr Khan took it in good humour. We find he was upset by it although he may have downplayed it to attempt to brush it off.

4.88 To reject Mr Khan's account of what happened we would not only have to reject the substance of it as being fabricated but would have to be able to explain why it was then reported to Mr Connolly. We would have to find that Mr Khan was set on some sort of course to dishonestly construct a claim of racial harassment. We do not reach such a conclusion. In fact, Mr Khan did not immediately raise a complaint. The respondent says that is indicative of its falsity or error. On its own, it may demand answers but the fact the incident was immediately raised with Sean Connolly gives it credibility. The next consideration is whether Mr Khan has simply misheard or misinterpreted what was said. The difficulty for us is that there is no positive account of the discussion by Mr Mcloughlin from which we might attempt to interpret the possibility of an innocent misunderstanding. The explanation as to why the word nigger might have been used in different circumstances has not proved any value in us understanding why it would have been said outside the context given by Mr Khan. We are satisfied on balance of probabilities that Mr Khan has not fundamentally misheard or misconstrued the words.

4.89 Our finding, therefore, is that it was said. However, we are struggling to find any surrounding context in which this could have been said with any malice or intended disrespect. The two men seemed to work reasonably well together as, indeed, was the case with all the colleagues. It may be that the nature of the relationship was one in which Mr Mcloughlin tried to use the phrase in a jokey, "street" fashion and, as bizarre as it sounds, was probably some form of expression of his own perception of the closeness of their working relationship as opposed to overt hostility or disrespect. To a point, we accept Ms Hand's submission that there may well some manner of social interactions amongst certain groups where that extreme language may be said and received in that way. However, we suspect they would be very rare and to use it in a

work setting with a junior colleague known only for a short time is an extremely risky strategy. For all that speculation, there is no positive case before us that this how it was intended.

4.90 As an aside, on this point in the course of live evidence there was some, understandably, confused questions and answers founded on the relationship of paragraphs 8 and 9 of Mr Connolly's statement. They were founded on a presumption that they were a continuation of the same subject matter. We accept Mr Connolly's clarification that they are independent points. He did not report the "ey up Nigger" comment to Mr Boote but we do find he did report the fact that the claimant was generally unhappy to Mr Boote.

4.91 We then turn to the final incident and the use of the phrase Paki bastard. We have made our findings of what Sean Connolly told the claimant. The significance of our findings of what actually happened that lunchtime away from the claimant's eyes and ears is only of any relevance to the essential assessment of whether what Sean Connolly said was accurate.

4.92 We are satisfied that the incident that was relayed by Sean Conolly related to Mr Kendall, Mr Mcloughlin and, to a lesser extent, Mr Down watching or listening but otherwise jointly participating in the subject of the video that was being played. We are satisfied the three were collectively enjoying the video and there was contribution to the moment from all three in their laughter and, specifically, at least one of them repeating the language in the video which was being used in a way that was aggressive and offensive towards the Asian man in it. We find the words Paki Bastard were used by someone in that group as part of that and its use contributed to the laughter and collective enjoyment of the situation. Each person behaving in such a way reinforces the acceptance of the others similar participation. We are satisfied that outside these three, no one else would have been able to hear the content of the video itself so as to be mistaken as to whether the words were spoken only on the video or by a person in the room. Mr Boote was clear he could not hear the content of the video and others close to it commented that the volume was so low that those not in the immediate vicinity would not be able to hear the content clearly. His reaction was equally clear in being directed towards the group of three. There is repeated reference in the accounts of the event to their 'conversation' and 'discussions' which does not naturally reflect something being said on the video itself. It more naturally reflects the state of affairs where all three were involved in talking about it.

4.93 We accept that the radio was on as it always was. We do not accept the radio programme was material to the events on this day. It may be that there was such a discussion on another occasion but the absence of any reference to it in the initial reports and the inconsistency with the accounts of the others leads us to conclude it has

either been constructed for the purpose of providing an exculpatory account to the investigation or that another conversation at a different time has been superimposed on the actual events of 4 November. It is significant that none of the three accused of participating in the racially derogatory humour refer to the video and all refer to the story, albeit without reference to it being prompted by the radio debate.

4.94 We are satisfied, therefore, that Mr Connolly's account to Mr Khan of what had happened that lunchtime was an accurate reflection of those events.

## **5. Law**

5.1 Section 26 of the Equality Act 2010 provides: -

- (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.*
- (2)...*
- (3)...*
- (4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account-*
  - (a) The perception of B;*
  - (b) The other circumstances of the case;*
  - (c) Whether it is reasonable for the conduct to have that effect.*

5.2 We are required to consider separately the discrete elements of this provision, namely whether any conduct found to have taken place was unwanted, had the proscribed purpose or effect and was related to the relevant protected characteristic (***Richmond Pharmacology v Dhaliwal [2009] IRLR 336***). The ***Richmond*** case is also particularly relevant to the threshold test of when conduct amounts to harassment, Underhill P (as he then was) said at para 22: -

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

hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.”

5.3 Whilst that passage focused on the violation of dignity as a proscribed purpose or effect within s.26(1)(b)(i), the essence of a threshold test applies similarly to the nature of the other prohibited purposes or effects listed in s.26(1)(b)(ii) and that threshold is regulated by the concept of the reasonableness of the conduct having the prohibited effect as set out in s.26(4)(c). As the Court of Appeal stated in **Grant v HM Land Registry & Another [2011] IRLR 748**, the significance of the words in that section must not be cheapened.

5.4 At paragraph 11, Elias LJ observed how under what is now s.26 of the 2010 Act:-

*there is harassment either if the purpose of the conduct is to create the circumstances envisaged in (a) or (b), or if that is the effect of the conduct, even though not intended. Where it is the purpose, such as where there is a campaign of unpleasant conduct designed to humiliate the claimant on the proscribed ground, it does not matter whether that purpose is achieved or not. Where harassment results from the effect of the conduct, that effect must actually be achieved. However, the question whether conduct has had that adverse effect is an objective one - it must reasonably be considered to have that effect - although the victim's perception of the effect is a relevant factor for the tribunal to consider as sub-regulation 2 makes clear.*

5.5 And at para 47, when dealing with the words used to define the proscribed effect of the unwanted conduct, he said: -

*They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.*

5.6 The cause of action arises by section 40. An employer's liability for discriminatory acts of its employees done in the course of their employment arises under section 109(1). The statutory defence to such liability provided by section 109(4) is not relied on in this case.

5.7 Where there is factual disagreement between the parties, it is important that an employment tribunal makes clear findings as to what conduct actually took place, such as what words were used (**Cam v Matrix Service Development and Training Ltd EAT 0302/12**). We take the view that that instruction is particularly important in this case as the claimant's knowledge of one of the incidents is learned second hand and so we must be clear about not only what was relayed to the claimant, but also its accuracy of what actually happened in the event itself.

5.8 The word 'unwanted' is essentially the same as 'unwelcome' or 'uninvited' or simply conduct that is unwanted by the employee in question. (**Thomas Sanderson Blinds Ltd v English EAT 0316/10**)

5.9 In **Pemberton v Inwood 2018 ICR 1291, CA**, the approach to assessing reasonableness of the effect was revisited in these terms.

*'In order to decide whether any conduct falling within sub-paragraph (1)(a) has either of the proscribed effects under sub-paragraph (1)(b), a tribunal must consider both (by reason of sub-section (4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also, of course, take into account all the other circumstances – sub-section (4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.'*

5.10 The necessary process of case management, and clearly identifying issues, can force the tribunal to single out each alleged incident and assess it in isolation. Whilst findings of fact are necessary on that basis, we remind ourselves that the legal test is being applied to an overall state of affairs which may be made up of a number of discrete incidents. It is the cumulative effect of all matters to which we apply the statutory test, not each part. (**Reed v Stedman [1999] IRLR 299**). Reed endorsed this cumulative approach and illustrated the point by quoting the sentiments expressed within a USA Federal Appeal Court decision that: -

*The trier of fact must keep in mind that each successive episode has its predecessors, that the impact of the separate incidents may accumulate, and that the work environment created may exceed the sum of the individual episodes'.*

## **6. Discussion and Conclusions**

6.1 We should start by saying something about the quality of the evidence before us. This is a fact sensitive case which comes with the added complexity of the intermediary nature of how one of the events comes to the claimant's attention. We regret to say that the evidence before us has proved lacking in a number of respects and at times there have been reasons to reject aspects of the evidence of all witnesses on certain matters, or at least to be cautious. The clarity of the respondent's evidence of what happened at the respective times and what conclusions were drawn in its own subsequent enquiries was unclear. After five days of evidence, it was, if anything, even less clear. Our findings to resolve head on conflicts of fact have been informed largely what supporting evidence has existed.

6.2 There is added complexity arising from the act of relaying an event not otherwise witnessed by the victim of harassment. The act of relaying the information (in this case what Mr Conolly did) is not itself said to be an act of unwanted conduct nor in anyway continuing it. The act is said to be, in part at least, the subject of what was relayed to

Mr Khan as having occurred earlier that day. Were we to find Mr Connolly was wholly mistaken or inaccurate about the substance of what he relayed, there could therefore be no unwanted conduct related to a protected characteristic arising from that matter. To illustrate, at an extreme one can conceive a situation where an individual might completely make up and relay a story purely for devilment. If the act of relaying that story to the apparent victim was, as here, not said to be unwanted conduct in itself, a later finding that the substance did not happen has to be fatal to a claim of harassment. Of course, making up such a story could itself be the unwanted conduct related to race which had the purpose or effect of creating the necessary prohibited consequences. In that case the truth or accuracy of what was relayed does not arise. However, that is not our analogy as it is not the way the case has been put before us.

6.3 In short, for Mr Khan to be harassed by something that happened beyond the reach of his own senses, the facts conveyed by the intermediary about that event must be sufficiently accurate in all material respects. If it is, we are satisfied it can form the basis of conduct which can cause the necessary proscribed effect on dignity or the environment, just as it would be if an employee were to see an email or report of another's views or conduct relevant to them or even a video or CCTV etc. We have found that Mr Connolly did accurately convey what had happened on 4 November.

6.4 We have also found that Mr McLoughlin did greet Mr Khan with words to the effect of "ey up nigger". We are entirely satisfied that they are both acts of unwanted conduct. We might suspect that the nature of this working environment and the relationship between all individuals was such that Mr Khan's third allegation relating to the Chinese race probably also occurred, but the evidence has not permitted us to reach that conclusion. We therefore exclude it as a fact from any further consideration.

6.5 We are entirely satisfied that the conduct we have found relates to a protected characteristic on its face. It would be a rare case to reach any other conclusion where words spoken include Nigger and Paki Bastard. We do not need to resort to the shifting burden on this point. We have been able to make clear and obvious findings to reach that conclusion.

6.6 We are equally satisfied that none of the conduct was done with the purpose of violating the claimant's dignity or creating the proscribed environment. There is no basis for concluding the greeting "Ey up Nigger" was said with overt hostility, although even amongst close work colleagues its connotations are such that it must be obvious that offence could be taken. Similarly, the Paki bastard comment was said at a time where it was clear Mr Khan was not in earshot and we keep in mind the fact that we have also reached findings that he was otherwise genuinely being supported in his trade by the team members.

6.7 The alternative provision in section 26 is that it is reasonable in all the circumstances that the conduct had the proscribed consequences. That requires us to find (a) that it did in fact have the effect and (b) that it was reasonable in all the circumstances for it to have that effect which includes having regard to the perception of the claimant.

6.8 An important consideration for us, which the parties have not particularly addressed in the presentation of their cases, is that it is not necessary to find this with each discrete incident. It is the totality of the effect of the conduct as a whole on this employee in this working environment which we have to consider. Individual or initial events may be tolerated. Repetition or escalation or other changing circumstances can alter the way unwanted conduct is received. In this case the others in the team were not alert to the extent to which the banter and conversations were making Mr Khan feel an outsider.

6.9 A common feature of harassment cases is the initial attempts of a victim to brush off the treatment, to display uncomfortable tolerance to it or even to join in in similar terms. That is what we found Mr Khan was doing. In doing so, an employee does not waive the effect that those initial events may have on the later totality of the situation. We are satisfied these were coping mechanisms in the circumstances and did not alter the fact that he found them hurtful and offensive.

6.10 That leads us to whether Mr Khan's contribution to the working environment rendered his response unreasonable. A significant aspect of this is the allegation that he joined in the discussions with comments about killing his Muslim brothers which is clearly capable of causing offense, particularly amongst those who may have had first-hand experience of the conflict in Afghanistan and associated loss of colleagues. The question is whether that led to an environment where it is no longer reasonable for the unwanted conduct Mr Khan experienced to have the proscribed effect. We have concluded that in this case it does not for two reasons. First, we are satisfied that his conduct falls into the category of attempting to engage with a culture, which is itself reason to explain the initial absence of reports to management. Secondly, the most reliable evidence we have on what was said was clear it was said as a joke and accepted as a joke albeit it wore thin when repeated. There were differences in how this was recounted by the respondents' witnesses and it took on a more aggressive form when conveyed in the context of defending the allegations against them. However, we found it hard to imagine that if these comments had been said to a number of ex-service men in any other context than an ill-judged joke there would not have been some immediate reply. Particularly as at least one of them was dealing with his own issues arising from his experiences in the conflict and with experience of losing colleagues. In short, whilst it may have had the potential to significantly affect the

reasonableness of the unwanted conduct, we have not found it to be sufficient to do so in this case.

6.11 We have also considered some other factors of the case that are potentially relevant. First, it is clear there was a growing sense of isolation through non-discriminatory banter and discussions. That might be relevant to later considerations of causation but we do not regard it to be relevant at this stage. We have excluded those matters from the analysis and they are not advanced as unwanted conduct in any event. We rejected the contention they were the reason for these allegations being made. There may have been some wearing down of Mr Khan's resilience or tolerance but these acts of unwanted conduct do not seem to us to require a particularly "egg-shell skull" before they were likely to cause the proscribed adverse effect.

6.12 We have also considered the fact that one of the acts arises away from his first-hand senses and the extent that the comment not being directed at Mr Khan might reduce the reasonableness of its effects. We take the view that learning of unwanted conduct said behind ones back, even where it clearly was not directed at the individual concerned, can be just as concerning in certain circumstances as it can tend to demonstrate a true state of mind and therefore be the basis for a greater adverse affect on the perception of the working environment.

6.13 In the context of reasonableness, the respondent also addressed us on two aspects of the relationship between the claimant's own racial characteristic and the comments alleged. This was, in summary, that he was not Chinese and that the word "Nigger" is not typically associated with those of Asian origins. We do not regard that distinction as carrying any real weight in this case. Of course, the first contention falls away as we have rejected that particular conduct as a fact and disregard it for our present considerations. Beyond that, a person can be harassed by reference to *any* protected characteristic, even if one does not possess it. We agree with Ms Hand that the principle that whether or not one personally possesses the particular characteristic concerned it is potentially relevant to the assessment of the reasonableness of the proscribed consequences having the effect but, in this particular case, we do not accept that it renders Mr Khan's reactions unreasonable.

6.14 We therefore have concluded the effect was reasonable with the result that the claim of harassment is made out.

## **7. Remedy**

7.1 The matter will be listed for a remedy hearing unless the parties can reach agreement before hand. In that regard, we have indicated as much as we can of the issues we anticipate having to deal with and which the parties can take account of in



any discussions. These are observations only expressed in the spirit of assisting the parties resolve the remaining issues.

7.2 First, we are not able to give any indication of injury to feelings at this stage save to say that there would appear to be other factors affecting the claimant's injury arising from the workplace which fall outside the scope of the harassment which may have contributed to injure the claimant's feelings. We will have to consider whether that is a separate cause of injury and, if found, potentially discounted in any award reached or a factor which simply rendered the claimant vulnerable to a greater degree of injury. We note the discriminatory treatment is relatively short lived and limited. In itself, that might superficially point to an award at the lower part of the total range of awards available but we remind ourselves, and the parties, that compensation for injury to feelings is focused on the injury, not the manner of discriminatory conduct.

7.3 Secondly, there was a stage when the claimant could contemplate returning to the workplace which changed when faced with the employer's response to the grievance. That cannot add to the injury to feelings as it is not said to be a discriminatory act but we will have to consider the question of whether anything in the employer's response to the matter aggravated the injury such that aggravated damages become appropriate.

7.4 Thirdly, there does not appear to be any evidence to show the claimant's absence was in relation to anything other than the allegations of harassment and if that is the conclusion we reach after hearing the parties, the financial losses during his absence would appear to flow from the act of harassment.

7.5 Fourthly, we will have to assess the implications of the final termination of employment and how this unfolds as a remedy issue and whether losses continue. We note the claimant has limited this to a very small sum in the order of £130 and it may be that proportionality overtakes the substantive issues in respect of this head of claim.

**Employment Judge Clark**

15 October 2021