EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4109434/2021

Held in Glasgow on 27-29 September 2022

Employment Judge Sangster
Tribunal Member McColl
Tribunal Member Gallacher

Mr S Kimani	**Claimant** **In Person**
HFD Security Limited	**Respondent** **Represented by:** **Mr N McDougall - Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous judgment of the Tribunal is that the claimant's complaints of direct discrimination because of race and harassment related to race do not succeed and are dismissed.

REASONS

Introduction

1. The claimant presented a complaint of direct discrimination because of race and harassment related to race. The respondent denied that the claimant had been discriminated against.

2. At an open preliminary hearing held on 17 May 2022, it was determined that the complaints of harassment were presented out of time, but it was just and equitable to extend time. The Tribunal accordingly had jurisdiction to hear these complaints.

3. The claimant gave evidence on his own behalf and led evidence from Mr Qasim Ali (**QA**), formerly a security guard with the respondent.

4. The respondent led evidence from 7 witnesses, namely:

   a. Mr Richard MacKenzie (**RM**), Security Operations Manager for the respondent, formerly a Security Supervisor;

   b. Mr David Wilson (**DW**), retired, formerly Security Operations Manager for the respondent;

   c. Mr Viktoras Rozenbergas (**VR**), formerly a security guard with the respondent;

   d. Mr Stephen Scobie (**SS**), formerly a security guard with the respondent;

   e. Mr Ian Steel (**IS**), formerly a security guard with the respondent;

   f. Mr Kenneth Kerr (**KK**), formerly a security guard with the respondent; and

   g. Mr William Strachan (**WS**), a security guard with the respondent.

5. While the respondent had intended to call a further witness, Rosemary Hill (**RH**), a director of the respondent, she was unfit to attend and the respondent indicated that they no longer wished to do so.

6. The other individuals referenced in this judgment are as follows

   a. **JR**, formerly a security guard with the respondent;

   b. **WW**, formerly a security guard with the respondent; and

   c. **CY**, formerly a security guard with the respondent.

7. The parties agreed a joint bundle of documents extending to 236 pages, in advance of the hearing. The parties applied to add a further 6 pages to the bundle at the commencement of the hearing. This was done, with neither party objecting to the additional documents tendered by the other.

Issues to be Determined

8. It was agreed at the outset of the hearing that the issues to be determined were as noted below.

*Direct discrimination because of race - s13 Equality Act 2010 (**EqA**)*

9. Did the respondent subject the claimant to less favourable treatment by dismissing him i.e. did the respondent treat the claimant less favourably than they treated, or would have treated, others in not materially different circumstances? The claimant relied upon two named comparators, namely WW and CY.

10. If so, was this because of the claimant's race? The claimant relies upon the fact that he is Kenyan.

Harassment related to race – s26 EqA

11. Did the respondent engage in the following conduct?

    a. On 8 October 2019, JR advising a number of the claimant's colleagues that he had worked with him before at SecuriGroup and that the claimant was not good at his job, which was not true;

    b. On 6 December 2019, SS telling WW that the claimant was a 'fat Eduardo';

    c. In the period from summer 2019 to December 2020, VR making comments on a regular basis to QA that he hated working with the claimant as he could not do his job properly and that '*I do not like Muslims'*;

    d. On 5 August 2020, WS alleging that he had worked with the claimant before and dismissed him for being lazy, which was untrue;

    e. On 10 September 2020, IS refusing to change over duties with the claimant after the claimant's shift had ended and telling the claimant to 'fuck off';

    f. Around mid 2020 VR making a comment to QA that the claimant refused to hand over his shift, which was untrue; and/or

g. On 1 November 2020, and prior to this, KK telling QA that he didn't understand the claimant as he was from a different country.

12. If so, was that conduct unwanted?

13. If so, did it relate to the protected characteristic of race? The claimant relies upon the fact that he is Kenyan.

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

Remedy

15. If any complaint is upheld, what compensation should be awarded to the claimant?

Adjustment of issues to be determined during course of hearing

16. During the course of the hearing, the claimant confirmed, in relation to the issues to be determined by the Tribunal, as set out in paragraph 11 above, that:

a. The time period in paragraph 11.c. should read summer to December 2020;

b. VR did not state to QA *'I do not like Muslims'*; and

c. He accepted that the conduct of VR, as asserted in 11.f. above, was in no way related to race.

17. The issues to be determined were adjusted to reflect these points.

Findings in Fact

18. The Tribunal found the following facts, relevant to the issues to be determined, to be admitted or proven.

19. The respondent provides security for construction sites, tenanted buildings and business parks in Scotland.

20. The claimant commenced employment with the respondent on 30 September 2019, as a security guard. He worked at a site in Bothwell Street, Glasgow where the respondent had a contract with its sister company, HFD Construction Limited, to provide security services. He worked day and night shifts, in accordance with a rota. He was initially supervised by RW, latterly by RM. They both reported to DW. The supervisor and DW attended the Bothwell Street site on a daily basis. They had good relationships with all the security guards at the site, including the claimant.

21. On/around 8 October 2019, JR advised a number of the claimant's colleagues that he had worked with the claimant before at SecuriGroup, that the claimant was not good at his job. CY stated to JR that he did not believe him, as he knew where the claimant had worked previously, and did not believe that the claimant had ever worked at SecuriGroup. CY stated that he would ask the claimant when he arrived, which he did. The claimant indicated that he had never worked with JR, or at SecuriGroup. JR indicated that he must have been mistaken and apologised to the claimant.

22. The claimant did not however accept JR's apology. While JR's employment with the respondent came to an end shortly thereafter, the claimant remained of the view that his colleagues had believed what JR had stated to them. The claimant felt that all his problems in the workplace started from that point, as his colleagues perceived that he was no good at his job, as a result of JR's comments.

23. Later in October 2019, DW attended the Bothwell Street site to have a discussion with one of the claimant's colleagues, CY. Allegations had been made that CY had been leaving the site without authorisation. A preliminary investigation indicated that there may be merit in the allegation. On entering the office, DW found CY asleep. DW informed CY that a formal investigation

would now be conducted in relation to him sleeping on duty and leaving the site without authorisation, which would likely result in disciplinary proceedings. On being informed of this, CY resigned with immediate effect and left the site.

24. If CY had not resigned, and the allegations against him had been substantiated at/following a disciplinary hearing, he would have been dismissed for gross misconduct.

25. On 6 December 2019, SS stated to his colleague, WW, that the claimant looked like a 'fat Edouard'. This was a reference to a Celtic Football Club player, who SS thought the claimant resembled.

26. In January 2020, RM took over from RW as the claimant's supervisor.

27. In around March/April 2020, WW and the claimant worked on night shift together. WW became unwell during the course of the shift. He stated to the claimant that he could not continue working and needed to go home. He asked the claimant to email the respondent to let them know, which he did. WW contacted the respondent the following day and the company's sickness absence procedures were followed in relation to his absence.

28. On 31 July 2020, DW was asked to work at the Bothwell Street site. He was reluctant to do so, as he was aware that the claimant worked there. He had previously worked with the claimant, for another organisation. There had been a falling out between the two in their previous employment and WS had made it clear to DW and his supervisors, when he learned that the claimant had become an employee of the respondent, that he did not wish to work with him. WS understood that the claimant would not be present on the day he was asked to cover a shift at the Bothwell Street site.

29. When WS arrived at the Bothwell Street site on 31 July 2020, it became clear that the security guards on duty knew who he was, that he had previously worked with the claimant and personal information about him. IS and WW stated to WS that they felt the claimant was lazy and that his work required to be checked. WS stated that he had that impression too, from working with the

claimant previously. He stated however that he did not want to be drawn into a discussion in relation to the claimant. He was wary of doing so, given his previous experiences with the claimant.

30. On 5 August 2020 the claimant raised concerns with DW. His concerns were that WS was spreading lies about him, that WS was stating that he had worked with the claimant previously and that WS had sacked him for being lazy and leaving the site he was working on. DW asked the claimant to put this in writing. The claimant then sent an email to DW stating this. The email did not mention race, or assert that WS's actions amounted to harassment related to race.

31. DW asked RM to investigate the claimant's concerns. He did so and concluded that there had been discussions about the claimant on 31 July 2020, albeit he was unable to determine the precise content of these or who had said what. He recommended that 'letters of concern' be issued to each of the individuals involved. This was done on 24 August 2020. On the same date the claimant was informed that an investigation had been conducted and was now concluded, that it was clear that there was an inappropriate discussion, which was not acceptable, and that appropriate action had been taken in relation to this.

32. On/around 10 September 2020, the claimant complained to RM that IS had sworn at him at the end of his shift, telling him to 'fuck off'. RM investigated this allegation. IS admitted that he had sworn at the claimant and apologised for doing so. IS was admonished and reminded about the requirement to remain professional and polite in the workplace. Matters were left that the claimant had accepted this apology. There was no assertion or allegation that IS's conduct was in any way related to the claimant's race.

33. In the latter part of 2020, VR stated to QA that he did not like working with the claimant, or receiving handovers from him, as thought he was terrible at his job. He said this because he felt the claimant did not complete the required reports properly, or file things in the correct folders on the respondent's online system.

34. On/around 1 November 2020, KK stated to QA that he didn't understand the claimant at times. QA reported this to the claimant and either QA or the claimant suggested that this was perhaps due to the claimant being from a different country. The claimant asked to speak to KK about this about a week later. KK stated to the claimant that he did not state that this was due to him being from a different country, and it was not related claimant personally, but rather due to a more general issue which he had understanding people at times.

35. On 12 November 2020, RM sent an email to all security guards assigned to the Bothwell Street site reminding them of the out of hours contact details for the control room and for DW and RM. The email confirmed that, when two officers are on duty at night (on Friday to Sunday inclusive), patrols should be conducted hourly by one security guard, with the other monitoring them via CCTV from the office.

36. On Friday 20 November to Saturday 21 November 2020 the claimant was due be on shift from 7pm to 7am. WW was also working that shift. Two security guards were due to be on shift, to ensure the property was secure and to allow the property to be patrolled safely.

37. On 29 November 2020 it came to the respondent's attention that there were irregularities in the patrol procedures for the night shift from 20-21 November 2020. On checking the CCTV, it appeared that the claimant had left the site without permission from 7.04pm to 8.10pm and then from 8.36pm to 12.41am, and that WW had left the site from 03.09am and did not return. It also appeared that the claimant had not conducted patrols in the period from 12.57am to 5.47am. Patrols ought to have been conducted every hour and it was recorded in the daily occurrence report that the patrols had been conducted by the claimant in that period.

38. The respondent considered this to be a serious matter. The claimant and WW were suspended on full pay, by letter dated 4 December 2020, and invited to a disciplinary hearing on 7 December 2022 to answer allegations which could amount to gross misconduct. The allegations against both individuals related

to being absent from site without permission. There were also two additional allegations to be discussed at the claimant's disciplinary hearing, namely failing to carry out site security patrols and falsifying the daily occurrence report to indicate these patrols had been conducted.

39. WW did not attend a disciplinary hearing. He resigned from his employment with the respondent, with immediate effect and prior to the scheduled disciplinary hearing which was scheduled to take place on 7 December 2020.

40. The claimant attended a disciplinary hearing on 7 December 2020. DW conducted the disciplinary hearing. The claimant admitted that he had left the site at the stated times, without authorisation, and that he had falsified records stating that he carried out patrols, when he had not done so.

41. At the conclusion of the disciplinary hearing, the claimant stated that his colleagues, KK and VR, were colluding against him as they did not like working with him as he was not from this country. He had not raised any concerns related to his race, with DW or his supervisors, prior to this point.

42. DW adjourned the hearing to consider the outcome. He concluded that the allegations were substantiated and the claimant's conduct amounted to gross misconduct. He concluded that the claimant should be summarily dismissed as a result, notwithstanding the mitigation he put forward. The claimant was informed of this by letter dated 8 December 2020.

43. If WW had attended his disciplinary hearing, and the allegations against him were also substantiated, he would also have been dismissed for gross misconduct.

44. In DW's letter to the claimant, confirming the termination of his employment, DW stated *'In relation to the point that you raised at the end of the meeting regarding [KK and VR] I do not believe that this has any bearing on your decision making with regards to the allegations against you. However, these are serious accusations and I would ask that you put these concerns in writing to allow me to investigate them separately.'* The claimant did not do so.

45. The claimant lodged an appeal against his dismissal by letter dated 10 December 2020.

46. Given the allegations which had come to light in relation to the claimant and WW leaving site without authorisation, the respondent conducted a broader investigation to ascertain if any other security guards were doing so. They identified that QA had done so on two occasions, in October and November 2020. On 16 December 2020, QA was invited to a disciplinary hearing to discuss that allegation and was informed that it could constitute gross misconduct, if substantiated, and result in disciplinary action up to and including dismissal. QA did not attend a disciplinary hearing: He resigned with immediate effect prior to this.

47. The claimant's appeal hearing took place on 22 December 2020. It was conducted by RH. By the date of the appeal hearing, as a result of the broader investigation conducted by the respondent, there was further evidence available which suggested that the claimant had left site without authorisation on 3 other occasions in October and November 2020, for approximately 5 hours on each occasion.

48. The claimant was informed, by letter dated 22 December 2020, that his appeal was not successful.

49. The claimant engaged in early conciliation from 1 March to 12 April 2021 and lodged a claim with the Tribunal on 12 May 2021.

Respondent's submissions

50. Mr McDougall for the respondent, lodged a written submission, setting out the legislative provisions and relevant case law. He supplemented his written submission orally. In summary, he submitted that:

    a. WW was an appropriate comparator, but he was treated in the same way as the claimant, and also the same way as QA. CY is not an appropriate comparator. The claimant has not established less favourable treatment. Even if he had, there is no evidence to suggest that the claimant's dismissal was because of race. He was dismissed because of gross misconduct.

b. In relation to the complaints of harassment, whilst some of the unwanted conduct asserted is established, there is no evidence that this was related to race. The fact that the claimant did not report any harassment related to race until the conclusion of this disciplinary hearing, despite having a good relationship with his supervisors and DW and the claimant raising other concerns with them, supports this. If any unwanted conduct related to race is established, the Tribunal should be mindful of the dicta in ***Richmond Pharmacology v Dhaliwal*** 2009 ICR 724, EAT.

Claimant's submissions

51. The claimant was given the opportunity to make a submission, but indicated that he did not wish to do so.

Relevant Law

Direct Discrimination

52. Section 13(1) EqA states that:

> ***'****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.'*

53. The basic question in a direct discrimination case is: what are the grounds or reasons for treatment complained of? In ***Amnesty International v Ahmed*** [2009] IRLR 884 the EAT recognised two different approaches from two House of Lords authorities - (i) in ***James v Eastleigh Borough Council*** [1990] IRLR 288 and (ii) in ***Nagaragan v London Regional Transport*** [1999] IRLR 572. In some cases, such as ***James***, the grounds or reason for the treatment complained of is inherent in the act itself. In other cases, such as ***Nagaragan,*** the act complained of is not inherently discriminatory but is rendered so by discriminatory motivation, being the mental processes (whether conscious or unconscious) which led the alleged discriminator to act in the way that he or she did.

54. It is unusual to have direct evidence as to the reason for the treatment (discrimination may not be intentional and may be the product of unconscious

bias or discriminatory assumptions) (***Nagarajan***). The Tribunal should draw appropriate inferences as to the reason for the treatment from the primary facts with the assistance, where necessary, of the burden of proof provisions, as explained in the Court of Appeal case of ***Anya v University of Oxford*** [2001] IRLR 377. *"Most cases turn on the accumulation of multiple findings of primary fact, from which the court or tribunal is invited to draw an inference of a discriminatory explanation of those facts"* (***Madarassy v Nomura International Plc*** [2007] IRLR 246).

55. In ***Shamoon v Chief Constable of the RUC*** [2003] IRLR 285, a House of Lords authority, Lord Nichols said that it was not always necessary to adopt a sequential approach to the questions of whether the claimant had been treated less favourably than the comparator and, if so, why. Instead, they may wish to concentrate initially on why the claimant was treated as they were, leaving the less favourable treatment issue until after they have decided on the reason why the claimant was treated as they were. What was the employer's conscious or subconscious reason for the treatment? Was it because of a protected characteristic, or was it for some other reason?

56. The ***EHRC: Code of Practice on Employment (2011)*** states, at paragraph 3.5 that *'The worker does not have to experience actual disadvantage (economic or otherwise) for the treatment to be less favourable. It is enough that the worker can reasonably say that they would have preferred not to have be treated differently from the way the employer treated – or would have treated – another person.'*

57. For direct discrimination to occur, the relevant protected characteristic needs to be a cause of the less favourable treatment *'but does not need to be the only or even the main cause' (*paragraph 3.11, ***EHRC: Code of Practice on Employment (2011)***). The protected characteristic does however require to have a '*significant influence on the outcome'* (***Nagarajan***).

Harassment

58. Section 26(1) EqA states that:

'(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.'

59. Section 26(4) EqA states that:

'(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.'

60. There are accordingly 3 essential elements of harassment claim under section 26(1), namely (i) unwanted conduct, (ii) that has the proscribed purpose or effect and (iii) which relates to a relevant protected characteristic.

Burden of proof

61. Section 136 EqA states that:

***'**If there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned the tribunal must hold that the contravention occurred. But this provision does not apply if A shows that A did not contravene the provision.'*

62. The burden of proof provisions are not relevant where the facts are not disputed or the Tribunal is in a position to make positive findings on the evidence (***Hewage v Grampian Health Board*** *[2012] UKSC 37, SC*).

63. There is a two-stage process in applying the burden of proof provisions in discrimination cases, explained in the authorities of ***Igen v Wong*** [2005] IRLR 258, and ***Madarassy v Nomura International Plc*** [2007] IRLR 246, both from the Court of Appeal. The claimant must first establish the first stage or a prima facie case of discrimination or harassment by reference to the facts made out. If the claimant does so, the burden of proof shifts to the respondent at the second stage to prove that they did not commit those unlawful acts. If the second stage is reached the Tribunal is obliged to uphold the claim unless the respondent can show that it did not discriminate.

64. In ***Madarassy***, it was held that the burden of proof does not shift to the employer simply by a claimant establishing that they have a protected characteristic and that there was a difference in treatment. Those facts only indicate the possibility of discrimination. They are not of themselves sufficient material on which the Tribunal "could conclude" that on a balance of probabilities the respondent had committed an unlawful act of discrimination. Something more is required, but that need not be a great deal (***Deman v Commission for Equality and Human Rights and ors*** 2010 EWCA Civ 1279, CA). The Tribunal has, at the first stage, no regard to evidence as to the respondent's explanation for its conduct, but the Tribunal must have regard to all other evidence relevant to the question of whether the alleged unlawful act occurred, it being immaterial whether the evidence is adduced by the claimant or the respondent, or whether it supports or contradicts the claimant's case, as explained in ***Laing v Manchester City Council*** [2006] IRLR 748***,*** an EAT authority approved by the Court of Appeal in ***Madarassy***.

Discussion & Decision

Direct Discrimination

65. The Tribunal considered the allegation of direct discrimination, considering whether the alleged treatment occurred, whether it amounted to less

favourable treatment and, if so, what the reason for that treatment was: was it because of race?

66. The Tribunal concluded that the alleged treatment occurred – the claimant was dismissed. This was not in dispute. The Tribunal concluded however that the claimant's dismissal was not less favourable treatment. The claimant was treated in the same way as others would have been treated, had they not resigned – namely CY, WW and QA. The Tribunal accepted that each of these individuals were appropriate comparators – each was in the same, or nearly/materially the same, circumstances as the claimant, all being invited to disciplinary proceedings as a result of unauthorised absence from work. These individuals would have been treated in the same way as the claimant, had they attended a disciplinary hearing.

67. For the avoidance of doubt, while the Tribunal accepted that WW was an appropriate comparator, this was only in relation to his circumstances in November/December 2020. The Tribunal did not accept the claimant's assertion that WW was an appropriate comparator in relation to his circumstances in March/April 2020, as described at paragraph 27 of this Judgment. His circumstances on that occasion were materially different: He was unfit to work due to illness, the respondent was informed at the time by the claimant that WW required to leave the site and the reasons for this and WW followed the respondent's absence procedure thereafter. His absence was accordingly not unauthorised.

68. The Tribunal had no hesitation in concluding that the reason for the claimant's dismissal was the fact that the respondent believed he had committed gross misconduct by leaving the site without authorisation, not conducting patrols and falsifying records to indicate that he had done so. It was in no way whatsoever related to race. The claimant's race did not influence (consciously or otherwise) the respondent's decision to summarily dismiss the claimant.

69. The claimant's complaint of direct race discrimination accordingly does not succeed and is dismissed.

Harassment related to race

70. The Tribunal considered each allegation of harassment, considering whether there was unwanted conduct, whether it related to race and, if so, whether the conduct had the proscribed purpose or effect. In relation to whether the conduct was related to race, the Tribunal was mindful of the need to analyse the words/conduct relied upon, together with the context, in order to establish whether there is any connection or association between the two. The Tribunal reached the following findings in relation to each alleged act of harassment.

a. **On 8 October 2019, JR advising a number of the claimant's colleagues that he had worked with him before at SecuriGroup and that the claimant was not good at his job, which was not true.** JR did not give evidence to the Tribunal. The Tribunal accepted the claimant's uncontested evidence as to what JR stated. The Tribunal accepted that this amounted to unwanted conduct. The Tribunal concluded however that it was not related to race. There was no evidence before the Tribunal to suggest that it was so related in any way. The evidence was that JR made a mistake, which he quickly acknowledged and apologised for. There was no suggestion from the claimant that this related to race in any way, prior to the claim form being lodged some 19 months later. Given that unwanted conduct related to race has not been established, the complaint under s26 EqA in relation to this does not succeed.

b. **On 6 December 2019, SS telling WW that the claimant was a 'fat Eduardo'.** The Tribunal found that SS stated to WW that the claimant looked like a 'fat Edouard'. Edouard being a professional football player, with Celtic Football Club, who SS thought the claimant resembled. The Tribunal accordingly accepted that the conduct occurred and that it amounted to unwanted conduct. Whilst a comment of this nature may have had the proscribed effect, however that came from the use of the word 'fat', not from the comparison to a professional football player. If SS had simply stated that he thought the claimant looked like Edouard, that would not, reasonably, have had the proscribed effect and would not therefore amount to harassment. The use of the word 'fat', which caused

any proscribed effect, was unrelated to race. For these reasons, the complaint under s26 EqA in relation to this does not succeed.

c. **In the period from summer to December 2020, VR making comments on a regular basis to QA that he hated working with the claimant as he could not do his job properly.** This conduct was established. VR accepted in his evidence that he said and thought this. The Tribunal accordingly accepted that this conduct occurred and it amounted to unwanted conduct. The Tribunal accepted however that VR genuinely thought that the claimant could not do his job properly: he provided a detailed explanation as to why he thought this, providing examples to support his belief. VR's statements were entirely unrelated to race and solely based on his belief that the claimant could not do his job properly. Given that unwanted conduct related to race has not been established, the complaint under s26 EqA in relation to this does not succeed.

d. **On 5 August 2020, WS alleging that he had worked with the claimant before and dismissed him for being lazy, which was untrue.** The Tribunal found that, when IS and WW stated to WS that they felt the claimant was lazy and that his work required to be checked, WS stated that he had that impression too, from working with him previously. WS stated however that he did not want to be drawn into a discussion in relation to the claimant. He did not state that he had dismissed the claimant, or expressly state that he thought the claimant was lazy. The Tribunal found WS to be a particularly credible witness and it was clear that WS had considerable concerns about working with the claimant again, due to his experiences of working with the claimant for a previous employer and certain issues which arose (which are not relevant for the purposes of this judgment). The Tribunal found that, aside from those issues, WS genuinely had concerns about the claimant's ability to undertake his role: he provided a detailed explanation as to why he thought this, providing examples to support his belief. His comments to IS and WW were solely based on that belief and were entirely unrelated to race. There was no evidence before the Tribunal to suggest that it was

so related in any way. Given that unwanted conduct related to race has not been established, the complaint under s26 EqA in relation to this does not succeed.

For the avoidance of doubt, the Tribunal did not accept the claimant's assertion, that the use of the word 'lazy' to describe the claimant was inherently related to race. Whether the use of that word, reasonably, had the proscribed effect did not require to be considered given that unwanted conduct related to race was not established.

e. **On 10 September 2020, IS refusing to change over duties with the claimant after the claimant's shift had ended and telling the claimant to 'fuck off'.** The Tribunal found that IS stated this to the claimant, but not that he refused change over duties with the claimant. There was no evidence to support that assertion. The Tribunal accordingly accepted that the conduct, insofar as it related to the comment made by IS, occurred and that it amounted to unwanted conduct. There was no evidence however to suggest that this was related to race. The Tribunal accepted IS's evidence that he had had a bad day and the claimant bore the brunt of this as he was in the vicinity at the time. The Tribunal found that IS would have said this to any of his colleagues, if they had been in the vicinity. The Tribunal concluded that IS telling the claimant to 'fuck off' was not related to race. There was no evidence before the Tribunal to suggest that it was so related in any way. Given that unwanted conduct related to race has not been established, the complaint under s26 EqA in relation to this does not succeed.

f. **Around mid-2020 VR making a comment to QA that the claimant refused to hand over his shift, which was untrue.** The claimant accepted in his evidence that this comment was entirely unrelated to race. In light of that concession, this complaint under s26 EqA cannot succeed.

g. **On 1 November 2020, and prior to this, KK telling QA that he didn't understand the claimant as he was from a different country.** The Tribunal found KK to be a particularly credible witness also. They

accepted that he had difficulties understanding people generally at times. The Tribunal found that KK stated that he had difficulties understanding the claimant at times, but did not state that this was due to him being from a different country. His comments, whilst they may have been unwanted, were accordingly unrelated to race. Given that unwanted conduct related to race has not been established, the complaint under s26 EqA in relation to this does not succeed.

71. The Tribunal accordingly concluded that the complaints of harassment related to race do not succeed.

Employment Judge: **M Sangster**
Date of Judgment: **13 October 2022**
Entered in register: **14 October 2022**
and copied to parties