EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
N Morgan	v	Arriva Rail London Ltd

Heard at: London Central

On: 18 – 19 October 2022
In chambers: 20 October 2022

Before: Employment Judge Lewis
Mr M Baber
Mr P Madelin

Representation

For the Claimant: Represented himself

For the Respondent: Ms G Hirsch, Counsel

RESERVED JUDGMENT ON LIABILITY

The unanimous decision of the tribunal is that

1. Mr Tourlamain's allegation in September / October 2019 that the claimant was threatening and intimidating was direct race discrimination.

2. Mr Paton's statements in the 27 January 2020 investigation report that the claimant was late for duty and angry were direct race discrimination.

3. Since we found direct race discrimination in respect of each of the above two claims, we have not addressed the alternative claims that these were race harassment.

4. Mr Toms statement in a WhatsApp group that 'if we are bringing Carnival into the office who is bringing the drugs and knives'.

5. The claims are allowed out of time.

6. The remedy hearing will take place by CVP on Tuesday 6 December 2022 starting a 10 am.

REASONS

Claims and issues

1. The claimant, Mr Morgan, brought claims for direct race discrimination and race harassment.

2. The issues were agreed at the case management hearing on 15 March 2022. At the start of this full hearing, the tribunal went through the issues again and it was confirmed that they were correct. However, the tribunal did state that it would not necessarily take the two stage approach set out in paragraphs 2.3 and 2.4 to direct discrimination, but would record that issue as 'Was that less favourable treatment because of race'? The issues were as follows:

Time-limits

2.1. If the claims were out of time, were they made within a further period that the tribunal thinks just and equitable? (This includes why the complaints were not made in time and whether in any event it is just and equitable in all the circumstances to extend time.)

Direct race discrimination

2.2. Did Mr Tourlamain on or around October 2019 make an allegation that the claimant was threatening and intimidating? (During the hearing, it became clear that this referred to the allegation made on 22 or 23 September 2019 and repeated in an interview on 11 October 2019.)

2.3. In the 27 January 2020 investigation report, did Mr Paton make untrue statements that on the date in or around October 2019 the claimant was late for duty and angry?

2.4. Was that less favourable treatment because of race? (The claimant describes his race as Black Caribbean.)

2.5. Did that treatment amount to a detriment?

Harassment

2.6. The respondent admits that on 25 August 2018, Mr Toms said in a group chat on WhatsApp regarding the Notting Hill Carnival, 'if we are bringing Carnival into the office who is bringing the drugs and knives?'

2.7. Did Mr Tourlamain on or around October 2019 make an allegation that the claimant was threatening and intimidating? (This is the same allegation as referred to in issue 2.2.)

2.8. In the 27 January 2020 investigation report, did Mr Paton make untrue statements that on the date in or around October 2019 the claimant was late for duty and angry?

2.9. If so, with regard to each of these –
  2.9.1. Was it unwanted conduct?
  2.9.2. Did it relate to race?
  2.9.3. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
  2.9.4. If it did not have that purpose, did it have that effect? (The tribunal will take into account the claimant's perception, the other circumstances of the case, and whether it is reasonable for the conduct to have that effect.)

Procedure

3. This hearing was held on a video platform (CVP).

4. The tribunal heard from the claimant, Mr Morgan, and on his behalf, Mohammed Patel. For the respondent, we heard from Scott Paton and Ruth Elkin. They had all supplied witness statements which were in a separate witness statement bundle. There was an agreed chronology and cast list. Ms Hirsch also provided written closing submissions.

5. There was an agreed trial bundle of 235 pages. The numbering of the pdf pages did not match the numbering of the hard copy pages, the latter being used in the witness statements.

6. We did not hear from Colin Toms or Aaron Tourlamain. The respondent did not proffer any explanation as to why not.

Fact findings

7. Mr Morgan started work for the respondent on 18 May 2015. Since 4 April 2016, he has been employed as Information Controller. Mr Morgan identifies as being of black Caribbean descent.

<u>The 'Carnival' comment</u>

8. Mr Morgan's line manager was Colin Toms, the Duty Control Manager. He remained Mr Morgan's line manager until approximately early 2021, after the alleged incidents of race discrimination and harassment.

9. On 24 August 2019, there was a WhatsApp chat amongst Mr Morgan's team (six members of staff) about Notting Hill Carnival, which was taking place the next weekend. One team member (San San) texted 'Hey ppl tomorrow we have Jerk chicken or curry chicken … Lets bring carnival into the office'. Mr Toms responded 'If we are bringing carnival into the office who is bringing the drugs and knives?'

10. Mr Morgan was shocked and upset. He said nothing. His colleague asked if he was OK. Notting Hill Carnival historically plays a very large part in Mr Morgan's black Caribbean culture. He was extremely offended. He felt the remark was, by analogy, like someone making a gratuitous remark about the Catholic Church that it was full of paedophiles. In other words, it was a stereotyped remark which picked out the negative aspects of an organisation or event based on a minority of bad examples and ignored the positive aspects of it.

11. Mr Morgan was the only black member of staff on his team and the only black Caribbean member of staff. San San may be of North African ethnic origin, but no one was completely sure in their evidence. Mr Toms would have known Mr Morgan was of black Caribbean heritage.

12. Mr Morgan felt that Mr Toms had gone out of his way to mention the negative, knowing that Mr Morgan was the only black person in the group. He had had issues with Mr Toms before, which made him feel it was deliberate and targeted behaviour.

13. From early 2018, Mr Toms had started to make hostile remarks towards Mr Morgan about being lazy and about 'whipping him into shape'. In July 2018, Mr Toms called him a 'prick' in front of colleagues. Mr Morgan wrote an email to Mr Toms, Mr van Dyke and Ms Kelley on 13 July 2018 complaining about a number of issues, including that Mr Toms had belittled him in front of his peers on 6 July 2018 'by calling me a word I took offence to and which I thought was highly unprofessional conduct as he said it quite aggressively. I will not disclose what he said, but if Colin wishes to do that, that is on him, in his defence he did eventually apologise'. Mr Morgan said that this together with other matters was not conducive to an environment which wants an individual to succeed and thrive.

14. On 26 November 2018, during a WhatsApp exchange when Mr Morgan said he would be responding to a letter from Mr Toms, Mr Toms texted back, 'one for the confidential waste'.

15. The respondent suggested that Mr Toms had a generally macho style. Mr Morgan said Mr Toms 'had form' for belittling him in front of his peers, and this was not something he had noticed him do to others. We accept that Mr Toms did belittle Mr Morgan from time to time. There is documentary evidence of the two WhatsApp exchanges and the respondent did not deny that the 'prick' remark was made – certainly Mr Morgan is insistent and credible about it. So this seems all of a piece in terms of how Mr Toms treated Mr Morgan. We were not given any reliable evidence from the respondent that Mr Toms treated others the same way.

16. When Shona Elkins later heard Mr Morgan's stage 2 grievance (see below), she said in the grievance outcome letter that she did not believe the 'Carnival' remarks were deliberately intended to cause offence, but she agreed they could be taken to be racially offensive. She said, 'Notting Hill Carnival is an integral part of the ethnic and cultural heritage of London.

Therefore, the comments could be offensive and insulting.' She said she thought the use of the comments in the workplace was inappropriate, especially from someone's line manager. The comments could also make others feel uncomfortable.

17. In cross-examination in the tribunal, Mrs Elkins accepted that Mr Toms would be likely to deny that the comments were offensive.

18. In her outcome letter, Mrs Elkins also said that she did not think the remark 'one for the confidential waste' was appropriate for a line manager.

The 'bagel' incident

19. On 22 September 2019, Mr Morgan had been asked by the Control Shift Manager, Mr Collen-Jones, to do the Sunday 'breakfast run' for his team and pick up bagels for his colleagues from Brick Lane. Mr Morgan arrived late at work in a stressed state having had a long and stressful journey from his home in West London to Brick Lane in East London to work in North West London. As well as travel problems due to engineering works, when he had got to the head of the shop queue and placed his large order, he was told that the shop did not accept credit cards, so he had to go in search of a cash point in an area he did not know, and then return to the shop again and queue again.

20. Mr Morgan was also irritated that when he had telephoned to give a time estimate, he had overheard some of his colleagues murmuring about how long he was taking. He was the person who most often did the breakfast run and he felt they were ungrateful. When he arrived back at work, he told the whole room that he would not be doing the breakfast run again and that if they wanted breakfast next time, they could 'get off their fat arses' and go for it themselves. He accepts that was an unprofessional way to have conducted himself, but he denies that he was aggressive.

21. Mr Collen-Jones asked what the total cost was. Mr Morgan paid for the breakfast of people he considered were his friends and the remainder were told the balance to pay.

22. There were six or seven members of staff in the Control Room during this incident. The room is small, about 20' by 24' (at a guestimate) and everyone can easily hear each other, as that is important for handling safety critical incidents together. It was not Mr Morgan's usual team, as he was doing overtime. There are a number of teams in the department. However, teams are fluid with people often covering other shifts, and as we understand it, they all knew each other.

23. The next day, Mr Tourlamain, a Train Service Controller, and one of Mr Morgan's colleagues, emailed a complaint to a Mr van Dyke.as follows:

> ' …I arrived for my shift at 0730. The previous evening it had been arranged that Nick Morgan could come in late as he was getting bagels for the office. At around 11.30 nick arrived in the office very angry and shouting about he was never doing bagels again as people were moaning about the time it had taken. He then sat down and after a few minutes told David Colleen Jones if he needed to know about the anger management tablets he was taking and that he may have to take more due to this morning. He advised that boxing is helping him with his anger issues. Something in my opinion is another way of threatening the office. He then kept mentioning bagels throughout the morning a commented people are lucky that they are not getting stabbed.. He later on told DCJ that people are lucky they didn't get stabbed and Dcj replied that that was a bit extreme. I am no longer willing to except nick's behaviour as I know for a fact that other people in the office are scared and uneasy about the way he behaves.'

24. As a result of this complaint, Mr Morgan was suspended on 25 September 2019 pending investigation.

<u>The investigation into the bagel incident</u>

25. Scott Paton, the Strategic Command Network Interface Manager, was appointed to investigate. He had considerable experience of complex disciplinary and grievance investigations and had not previously worked with any of those involved..

26. Mr Paton interviewed everyone present except Mohammed Patel, who was the person sitting closest to Mr Morgan. Mr Paton could not explain to the tribunal why he had not interviewed Mr Patel or why he said in his investigation report that he had interviewed the whole team that was on shift. He simply said it was an oversight.

27. When interviewed on 11 October 2019, Mr Tourlamain repeated his written allegations. When asked how others felt, he said 'To be honest, not a lot of people heard the stabbing comment. However, I believe most of them finds his behaviour intimidating sometimes'. He added that he was not comfortable in a room where he felt intimidated since he was aware that Mr Morgan did not like him. He wanted to put it formally in writing that he did not want to be in a room with him.

28. Mr Collen-Jones, who was interviewed initially on 3 October 2019. said that Mr Morgan had had a stressful journey, so when some of his colleagues started questioning him for turning up late, Mr Morgan did 'mouth off' by saying 'They are lucky that I am not taking my hands on them'. However, he was stressed, not aggressive. No one had complained to Mr Collen-Jones afterwards about Mr Morgan's manner and Mr Collen-Jones did not think he was an aggressive type of person; he was a nice guy and they had never had an issue with him. Mr Collen-Jones repeated this when interviewed a second time, on 16 January 2020. He did not hear any comment about 'stabbing'. He said there was no threat on the day and he did not feel threatened. Mr

Morgan had ‘mouthed off’ off in response to ‘some funny jokes going on, regarding Nick being late and emphasising the fact that they were hungry’ Mr Collen-Jones said he was really surprised when he found out about the complaint and investigation.

29. Ms James was interviewed on 3 October 2019. She said that Mr Morgan was agitated when he arrived. When he placed the food down, he said to Mr Collen-Jones, ‘Someone is lucky that they didn’t get stabbed today!’ She felt this referred to people outside the room, not to anyone in the room. She said he also mentioned to Mr Collen-Jones in a bantering way that he took his anti-anger management medication before coming to work. She said Mr Collen-Jones took it as normal banter and it was a normal shift atmosphere after that. Ms James generally referred to the control room culture where ‘there are a number of banters going on’.

30. Ms Jaghri was interviewed on 11 October 2019. She said she heard a bit of banter towards Mr Collen-Jones, but she didn’t hear any comment about anger management, or boxing to manage anger or ‘people are lucky they are not getting stabbed’. She did not feel intimidated. The rest of the shift was a usual Sunday shift with banter going on.

31. Mr Palmer, interviewed on 11 October 2019, also confirmed that Mr Morgan was unhappy about the bagel run and said he would not do it again, but did not swear and the shift was normal. Mr Morgan was frustrated and everyone brushed it off.

32. Mr Rhind-Tutt, interviewed on 11 October 2019, said Mr Morgan was a bit pissed-off about the time it had taken him to get the bagel, but it was not directed towards anyone in particular. Mr Morgan didn’t cause anything uncomfortable. Mr Rhind-Tutt didn’t hear any other comment. He and Mr Morgan were also having a little banter about football.

33. Mr Paton interviewed Mr Morgan on 8 October 2020. Mr Morgan denied he had made any threatening comments. He said he despised anything like that, stabbing. He told Mr Paton that the whole incident was captured on video. He was not prepared to say who had made the recording or to disclose the video at that stage. Mr Morgan said he had told Mr Collen-Jones that he was on antibiotics. They had a running joke whereby they called any medication ‘loopy pills’ as you must be mad to work in control.

34. In his interview, Mr Morgan said people were saying things like ‘Nick is taking his time and dragging his heels’. It was the nature of the control room. ‘People say things and then smile.’ He said everyone was laughing and joking the rest of the shift. He said ‘If you know the control room, you know stuff like that happens on every shift’.

35. Mr Morgan admitted he made the comment about people getting off their fat arses.

36. Mr Morgan referred to his 'legal team' a few times. He said there had been a lot of incidents of racial discrimination and banter and nothing was done in those cases, so why was his case being treated the way it was, when it was just hearsay from one person?

37. Mr Paton did not explore with any of the witnesses the relationship between Mr Tourlamain and Mr Morgan and matters which might indicate whether Mr Tourlamain had any motive to report Mr Morgan or to exaggerate or mislead. Mr Paton did not explore with Mr Morgan his comments about other banter and race discrimination.

38. Mr Paton asked Mr Morgan how he had been since his suspension. Mr Morgan said he was in a state of shock. He then asked HR whether he could disclose his sickness. HR said that was fine. Mr Morgan said he was off sick with stress and anxiety; that he had never taken medication prior to this apart from antibiotics and that he had ended up taking anti-depressants and sleeping medication.

39. Mr Morgan did not mention his hobby of boxing during the interview. Nor was he asked about Mr Tourlamain's allegation that he said 'boxing was helping with his anger-management issues'.

<u>The investigation report</u>

40. Mr Paton submitted his investigation report on 27 January 2020. Not all the Appendices were included in the trial bundle.

41. Mr Paton said in his investigation report that investigatory interviews were undertaken with the whole team that was on shift. That is not accurate. As we have said, Mr Patel was not interviewed.

42. The report started with a three paragraph 'Introduction' which stated the purpose of the investigation was '(1) to explore the allegation that Mr Morgan demonstrated threatening / inappropriate behaviour whilst in the workplace (2) to compile a report based upon evidence gathered in support of and/or in conflict with the allegations, and if appropriate to recommend, based on the evidence gathered, whether or not these allegations should be considered further in a formal disciplinary hearing.'

43. The Introduction was followed by a section on 'Background'. This section carefully distinguished between purely factual matters and allegations. The first two paragraphs were factual. The third paragraph started with a sentence presented as fact: 'On Sunday 22nd September 2019, Mr Morgan attended for duty late, upon his arrival Mr Morgan was very angry/frustrated about a number of factors.' That was followed by 'It is also alleged that Mr Morgan used threatening/aggressive language …' The fourth paragraph was again presented as fact – it stated that an arrangement had been made with Mr Collen-Jones that Mr Morgan would do the breakfast run allowing Mr Morgan to arrive for work 'slightly later' than his 0730 book on. The fifth paragraph

said, 'It is alleged that Mr Morgan took an excessive amount of time to attend for work, eventually arriving between 1030-1130.'

44. As it happens, the security pass log showed that Mr Morgan arrived at 10.52 am, but this appears to have been established only in March 2021 when HR made a query.

45. Later in the Report is a section on 'Findings', with points for and against, and then Conclusions and Recommendations. Mr Paton concluded that:

'a. Mr Morgan demonstrated unacceptable behaviour in direct contravention of ARL Bullying and Harassment Policy & Code of Practice policy – 05/2017.

b. Mr Morgan failed in his responsibility not to behave in a way that could be deemed offensive to others.'

46. He recommended that Mr Morgan be brought to a disciplinary hearing to answer the charge that 'he reported for duty on Sunday 22 September 2019 and acted in a verbally aggressive and threatening manner, in direct contravention of the ARL Bullying and Harassment Policy & Code of Practice policy – 05/2017'.

47. Mr Paton also recommended that senior management reviewed the current arrangements whereby there were regular 'breakfast runs' during shifts, and the risk of desks being uncovered.

48. In his points for and against the charge, Mr Paton mentioned that there had been previous history between Mr Morgan and Mr Tourlamain in relation to disagreements around union-related issues. He did not elaborate on this. He did not mention the prevailing control room culture or that, despite the impression created by Mr Tourlamain, no one else said they were scared or upset and that everyone else said the atmosphere was normal for the rest of the shift.

<u>The recording</u>

49. The tribunal was provided with a very short video recording. In it, Mr Morgan says, 'Do I need to let you know, Dave, I'm taking the loopy pills, do I need to let you know?' Mr Morgan's tone is calm. It does show that Mr Morgan was talking - at that point anyway - about 'loopy' pills, not about 'anger-management' pills. But the problem is that it is a very short extract without context. It therefore does not help us a great deal. Also, it was not shown to Mr Paton, although it was played to the appeal manager later.

<u>The reprimand</u>

50. A disciplinary hearing was held and the decision-maker, Ms Bunyan, issued Mr Morgan with a reprimand for 'acting in a verbally aggressive and

threatening manner' in contravention of the respondent's Bullying and Harassment Policy. Mr Morgan appealed. The decision to give a reprimand was overturned by Mr Salmon, Head of Relationships. Mr Salmon said he could not find evidence that showed beyond reasonable doubt that Mr Morgan had acted in a verbally aggressive and threatening manner.

51. Mr Salmon said he felt Mr Tourlamain had possibly made the complaint because he felt other people in the office were scared and uneasy rather than because he felt that way himself. It had therefore been appropriate to suspend Mr Morgan and investigate. However, subsequent interviews showed that the people who provided statements did not feel personally threatened. Also, things which Mr Tourlamain said Mr Morgan had said to Mr Collen-Jones were not backed up by Mr Collen-Jones - although Mr Salmon was not discrediting Mr Tourlamain's right to report something he felt was inappropriate.

52. Mr Salmon also referred to the fact that Mr Morgan had said Mr Tourlamain might have something against him and that the Investigation report acknowledged a previous history of disagreements around union matters.

53. Mr Salmon acknowledged that the short recording did show Mr Morgan was not angry at that point. But it was not possible to know how the moment in the video related to the rest of the morning's events.

54. In addition, there were a number of mitigating factors, including that banter had a disproportionate contribution to the workplace culture; Mr Morgan had been sent on an inappropriate errand and then overheard unfair comments about the errand; Mr Morgan had explained that other inappropriate comments had been made by others in the past which had not been followed up in investigation.

55. Finally Mr Salmon said that Mr Morgan and others in the team needed to reflect on their behaviours, and Mr Salmon was setting in motion a process of personal development reviews and behavioural conversations with the team.

<u>Mohammed Patel's experience</u>

56. Mr Patel gave evidence to the tribunal. He gave his evidence in a straightforward way, answering questions and not seeking to embellish. We accepted his evidence.

57. Mr Patel said he was not interviewed by Mr Paton. He said he was the closest to Mr Morgan during the incident because he was on the ELL desk when Mr Morgan was in the centre of the room. He said Mr Morgan never made a comment about stabbing someone. In his experience, Mr Morgan is always calm and composed, although he will stand up for himself.

58. Mr Patel said the control room had a toxic environment created by people like Mr Toms and Mr Tourlamain, with a culture of groups and bullying and talking about people. He has himself been subject to racist remarks based on being a man of Asian ethnic origin. There was a group of mainly four people including Mr Toms and Mr Tourlamain who repeatedly made 'jokes' about Mr Patel being an Uber driver, which Mr Patel believes was due to his colour. Mr Patel eventually had to block this out of his mind because it became too much for him. One of the four, Barry, also made so-called 'jokes' about Mr Patel having a bomb in his bag.

59. We accept Mr Patel's evidence about the racist remarks made to him. There was no reason to disbelieve him. He honestly told us that the 'bomb' remark (probably the worst remark of all) was made by Barry, a person who he knew was not involved in Mr Morgan's case. As far as Mr Toms and Mr Tourlamain were concerned, he said that they both made such remarks and allowed the others to make such remarks without challenge.

60. We also accept Mr Patel's evidence about the control room culture and people talking about each other. We saw an example of that from Mr Paton's evidence that he had later concluded, from what other people in the control room told him, that Mr Morgan played the race card. We also saw glimpses of bullying from the way Mr Toms addressed Mr Morgan which we have discussed above.

<u>Our view of what happened during the bagel incident</u>

61. We will now set out our own findings of what happened in the bagel incident by way of context. This may be relevant when we consider later what Mr Tourlamain saw and decided to report; and what his perceptions could credibly have been, if not affected by any conscious or unconscious bias..

62. Mr Morgan was not actually 'late'. He had been asked by his manager to go on the bagel run on his way into work. He arrived in the control room, as had been contemplated, after his start time. But he had been on a task given to him by his manager prior to that. It is misleading to use the word 'late' in a critical way.

63. The task had turned out to be a nightmare. Mr Morgan was understandably fed up when he returned to work. He was tetchy about his colleagues' banter and sniping about him being late with the breakfast. He responded to that, maybe a little sharply with the 'fat arses comment', but this was in line with the prevailing control room culture. It's clear from the witnesses (apart from Mr Tourlamain) that the shift carried on as normal, no one felt intimidated, banter resumed.

64. As for whether Mr Morgan said anything about 'stabbing', the tribunal has not heard directly from the two witnesses who suggested that he did (Mr Tourlamain and Ms James). But the tribunal did hear from two witnesses who said that he did not (Mr Morgan and the person sitting next to him, Mr Patel,

who inexplicably was not interviewed at the time.) We also note the denial of the manager in charge, Mr Collen-Jones, that Mr Morgan said anything about stabbing and the witness evidence about the mood being normal during the remainder of the shift.

65. We further note Mr Tourlamain's statement during his interview, when asked how other people felt, that that not a lot of people heard the remark. That is not the impression he gave when writing his initial statement of complaint. It strikes us that, by the time he was interviewed, he may have been anticipating that other employees would not agree with his evidence. We find it unlikely that others would not have heard such a remark given the small size of the control room. Even the one other witness who said she heard something, Ms James, felt it was a remark addressed only to Mr Collen-Jones that she overheard, which did not refer to anyone in the room, and was in the context of normal shift banter. We therefore find that on the balance of probabilities, Mr Morgan did not make any remark about stabbing. He may have muttered to Mr Collen-Jones, something like 'They are lucky that I am not taking my hands on them', but if he did so, it was not addressed to the room and it was obviously not in any way aggressive or threatening but more in the vein of how many of us might mutter, 'I could kill that bloody postman' without meaning it literally. It was not in our view intimidating and it did not breach the respondent's policy on bullying and harassment. No one apart from Mr Tourlamain said during the investigation that they were intimidated nor sounded as if they were intimidated nor acted on the day as if they were intimidated. We will discuss Mr Tourlamain in our conclusions.

66. The evidence from the witnesses to the investigation as well as from Mr Morgan and what was written in subsequent letters shows that there was a culture in the control room which involved banter, which sometimes had a barbed edge, and sometimes stepped over a line. We do not think Mr Morgan's response to complaints or jokes about being made to wait for breakfast (that in future people could 'get off their fat arses' and get their own breakfast) was out of line with that culture.

<u>Mr Paton's views about the 'race card'</u>

67. On 11 March 2022, Mr Paton was interviewed by a more senior manager, Mr Furr, regarding the control room culture and issues potentially relating to Mr Morgan, who would be returning to the team after long-term sickness.

68. Mr Paton had still only met Mr Morgan once, when he interviewed him in relation to the bagel incident.

69. Mr Paton said several times that Mr Morgan 'plays the race card'. By this time, Mr Paton had been moved and was working in the control room.

70. Mr Paton told Mr Furr that his personal opinion was that 'Nick plays the race card, everything comes up as a barrier or o be awkward against the process and I have heard similar things from peers about interactions with

him, also heard what others have said about what Nick's done. There are things Nick will use to slow down the process and he has used his race in the past.' He said that 'Nick's a big character, probably aggressive and tries to intimidate individuals … during the interview, he talked about how he does boxing and is on medication and portrays himself as a very physical character. Individuals were scared in case Nick used the race card … that's the type of character he is.'

71. In the tribunal, Mr Paton said that he did not at the time of the interview have the opinion that Mr Morgan plays the race card because he had only just met him. He said it was a view he had developed since working in the control room from what others said and hearsay. Mr Paton felt that saying Mr Morgan 'plays the race card' was no different to Mr Morgan's personal opinion that everyone had 'fat arses'.

72. When asked what he meant by 'that's the type of character he is', Mr Paton told Mr Morgan, who was cross-examining him, 'You are a big guy. You come across in my personal opinion as quite intimidating as well…. Big physical guy and quite intimidating.'

73. The tribunal asked Mr Paton whether Mr Morgan was the only 'big guy' in the control room. Mr Paton said there were three others – Mr Tourlamain, Mr Toms and another person. Mr Toms is six foot 7 or 8. Mr Morgan tells us he is himself six foot one or two.

74. Mr Paton told the tribunal he also felt Mr Morgan was trying to intimidate him because prior to the investigation interview, he had mentioned the name of a woman and Mr Paton happened to be having an extra-marital affair with that woman. Mr Morgan denies having mentioned her, as he did not know Mr Paton. We did not know what to make of this, but there is no mention in HR's notes of any such comment. We therefore find on the balance of probability that it was not said.

Mr Morgan's grievance and alleged delays in resolving it

75. On 6 August 2020, Mr Morgan attended a grievance hearing chaired by Mr King. This related to a grievance about some matters which were not the subject of the present claims. On 7 August 2020, Mr Morgan emailed HR to report Mr Toms' previous comment about carnival. He said that as Notting Hill carnival is historically a Caribbean celebration of black culture, he considered the remark to have negative connotations both culturally and in relation to race.

76. The respondent suggested adding this to the existing grievance investigation. The stage 1 grievance hearing with Mr King was heard on 14 October 2020; the outcome letter was on 19 November 2020 and Mr Morgan appealed the next day. On 2 December 2020, Mr Morgan was invited to a stage 2 grievance meeting on 5 January 2021. Mr Morgan cancelled this due

to sick leave. Up to this point, Mr Morgan does not complain about any unreasonable delays in hearing the grievance.

77. Mr Morgan was on sick leave with stress from 5 December 2020 until returning on 17 March 2021; from 22 April 2021 until 25 April 2021 (reason unstated); from 3 – 20 June 2021 (reason unstated); from 21 June 2021 – 26 July 2021 (Covid isolation); from 9 – 11 August 2021 (Covid symptoms); from 3 – 4 September 2021 (allergies); from 20 – 29 September 2021 (Covid symptoms); and from 30 September – 6 October 2021 (back pain). He was also absent from 18 October 2021 – 27 October 2021 (annual leave 7 – 8 October 2021; the rest of it sick leave).

78. On 11 June 2021, Mr Morgan was invited to the stage 2 grievance meeting on 23 June 2021. He complains that since he had returned to work on 17 March 2021, he should have been invited much sooner to the meeting.

79. In the tribunal, Mrs Elkin explained that she had not been responsible for arranging dates. She felt these 3 months did look like an unreasonable delay, but HR was aware that HR were trying to coordinate everyone's attendance – possibly she was struggling to come up with a date when everyone could attend.

80. The 23 June meeting did not go ahead because Mr Morgan was on sick leave.

81. On 27 October 2021, Mr Morgan was invited to the stage 2 meeting to take place on 2 November 2021. This did not go ahead because the hearing manager, Ms Ellis, had a car accident. On 18 November 2021, the meeting was rescheduled for 26 November 2021. This did not go ahead because Ms Ellis was unwell. On 2 December 2021, Mr Morgan was invited to a meeting on 8 December 2021. This went ahead.

82. Mr Morgan complains of the delay between 23 June and 2 November 2021 – nearly 5 months. He says that he was not continuously off sick in that period. As regards Mrs Elkin's accident, he says the respondent is a large company with a very large HR department. He says that the respondent could have sent a different hearing manager even if, as Ms Ellis stated, once a hearing manager is appointed, that manager usually sees it through.

83. Mrs Elkin accepted the 5 months was an unreasonable amount of time.

<u>Evidence relevant to time-limits</u>

84. Mr Morgan notified ACAS under the early conciliation procedure on 4 October 2021.

85. Mr Morgan says he did not put in his claim sooner because of a combination of mental and physical health issues, Covid lockdowns, and other pressures.

86. Mr Morgan was suspended because of Mr Tourlamain's complaint on 23 September 2019. His GP signed him off sick with work-related stress, which was renewed several times until 7 March 2020. He had weekly visits with his GP during that period.

87. From late March 2020, there was the first Covid lockdown. There were varying levels of restrictions and occasional lockdowns occurred for some time going forward. Everything took much longer and was harder to access at that stage. From 9 April 2020 until 23 April 2020, Mr Morgan was absent from work on Covid isolation, and again from 21 May – 8 June 2020, and 21 June – 6 July 2020. From 28 October 2020 – 17 November 2020 Mr Morgan was in Covid isolation again. Also, In August 2020, he was diagnosed by his GP with a small cyst.

88. As well as dealing with Covid and his mental health issues, Mr Morgan was helping with the care of his friend's mother who was dying, and he also had his own relationship issues.

89. The GP notes on 26 September 2019, record that Mr Morgan saw his doctor regarding stress with work, with his personal relationship and helping with care of his friend's mother. He reported he had drunk some alcohol when he does not usually drink. He was put on a short course of diazepam. This was the first time Mr Morgan had ever taken anti-depressants. He saw his GP again on 3 October 2019 and reported panic symptoms. He still felt anxiety and stress. He was given an increased dosage of diazepam. He was signed off to 16 October 2019. He had regular meetings with his doctor. On 13 November 2019, he reported feeling a panic attack coming on when he had to see OH at work and had to get off the train. Mr Morgan was given a renewed prescription of diazepam. On 26 / 27 November 2019, Mr Morgan was prescribed a different medication for not sleeping. He had his fit note extended until 16 December 2019. Mr Morgan was signed off sick again from 26 February 2020 to 7 March 2020 with stress at work. On 23 March 2020, he discuss with his GP seeing a private specialist for his hernia. This caused him a lot of pain but he could not get an immediate operation because of lockdowns.

90. During Covid, grievances were cancelled for a while. Then in July and August 2020, he had the reconvened grievance and disciplinary appeal hearings and was focusing on them. Between September and December 2020, a new difficult issue arose when Mr Morgan was required to attend medicals because his post had become safety critical and he had disputes with management over that.

91. Because of his mental health difficulties, which he had never previously experienced, Mr Morgan found it difficult to deal with two things at once. There were other work issues which caused him difficulties, eg the respondent changed his work shifts which impacted his care arrangements for his friend's mother. He was off sick again with stress from December

2020 – March 2021, and then for regular short periods as set out above up to 27 October 2021.

92. The stage 2 grievance hearing did not go ahead on 5 January 2021 or 23 June 2021 because of Mr Morgan's ill health. Although Mr Morgan did manage to attend the stage 1 grievance hearing on 14 October 2020 and to deal with some grievance correspondence during some of this period, he still found that difficult. Finding out about the legal process was far more daunting and difficult. His then partner had been helping him with matters, but there was a limit to how much he could ask her to do. He could not get representation from RMT because he had not joined them before the events in question took place. He did not want to ask TESSA to represent him because Mr Toms and Mr Tourlamain were key TESSA reps. His reference to a 'legal team' in some of his internal meetings simply meant his then partner (who was not a lawyer) and a friend who belonged to RMT (who was not a lawyer or an official).

93. We were given no evidence of any prejudice faced by the respondent caused by the delay. Mr Toms and Mr Tourlamain were not called to give evidence. We were not told why.

Law

Direct discrimination

94. Under s13(1) of the Equality Act 2010 read with s9, direct race discrimination takes place where a person treats the claimant less favourably because of race than that person treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

95. In many direct discrimination cases, it is appropriate for a tribunal to consider, first, whether the claimant received less favourable treatment than the appropriate comparator and then, secondly, whether the less favourable treatment was because of race. However in some cases, for example where there is only a hypothetical comparator, these questions cannot be answered without first considering the 'reason why' the claimant was treated as he was. (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] IRLR 285)

Detriment

96. In order for a disadvantage to qualify as a "detriment", the tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. The test must be applied by considering the issue from the point of view of the victim. If the victim's opinion that the treatment was to his detriment is a reasonable one to hold,

that ought to suffice. While an unjustified sense of grievance about an allegedly discriminatory decision cannot constitute "detriment", a justified and reasonable sense of grievance about the decision may well do so. (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] IRLR 285)

Harassment

97. Under s26, EqA 2010, a person harasses the claimant if he or she engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of (i) violating the claimant's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In deciding whether conduct has such an effect, each of the following must be taken into account: (a) the claimant's perception; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.

98. By virtue of s212, conduct which amounts to harassment cannot also be direct discrimination under s13.

99. In Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336, EAT, Mr Justice Underhill (as he then was) gave this guidance:

> 'an employer should not be held liable merely because his conduct has had the effect of producing a proscribed consequence. It should be reasonable that that consequence has occurred. The claimant must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created, but the tribunal is required to consider whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so……..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 discriminatory grounds) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'

100. In Grant v HM Land Registry [2011] EWCA Civ 769, Elias LJ pointed out that the words 'violating dignity', 'intimidating, hostile, degrading, humiliating, offensive' are significant words. 'Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment.'

101. A single one-off event can constitute harassment if sufficiently serious. A flippant or light-hearted remark can constitute harassment, just as much as one which is made aggressively. What is relevant is whether such a remark, whether flippant or not, meets the legal definition.(See eg Driskel v Peninsula Business Svices Ltd and ors [2000] IRLR 151, EAT.)

Burden of proof

102. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision. Guidelines were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258 regarding the burden of proof.

103. The tribunal can take into account the respondents' explanation for the alleged discrimination in determining whether the claimant has established a prima facie case so as to shift the burden of proof. (Laing v Manchester City Council and others [2006] IRLR 748; Madarassy v Nomura International plc [2007] IRLR 246, CA.)

104. The burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another. (Hewage v Grampian Health Board [2012] IRLR 870, SC.)

Time-limits

105. The relevant time-limit is at section 123(1) Equality Act 2010. Under section 123(1)(a), the tribunal has jurisdiction if the claim is presented within three months of the act of which complaint is made. By subsection (3), conduct extending over a period is to be treated as done at the end of the period. A series of different acts, especially where done by different people, does not (without some assertion of link or connection), constitute conduct extending over a period. In Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96, the CA held that 'an act extending over a period' can comprise a 'continuing state of affairs' as opposed to a succession of isolated or unconnected acts

106. Under s123(1)(b), if the claim is presented outside the primary limitation period, ie the relevant three months, the tribunal may still have jurisdiction if the claim was brought within such other period as the employment tribunal thinks just and equitable. This is essentially an exercise in assessing the balance of prejudice between the parties using the following principles:

107. The burden of persuading the tribunal to exercise its discretion to extend time is on the claimant. There is no presumption that the discretion should be exercised unless the tribunal can justify failure to exercise the discretion. (Robertson v Bexley Community Centre [2003] IRLR 434, CA.)

108. It is not helpful to think in terms of taking a strict or liberal approach. These are subjective terms. It is simply a matter of whether it is just and

equitable to exercise the discretion. (Chief Constable of Lincolnshire Police v Caston [2010] IRLR 327, CA.)

109. The tribunal should take in to account anything which it considers relevant, including whether it is still possible to have a fair trial of the issues. A tribunal may also form and consider a fairly rough idea of whether the claim appears weak or strong. It is generally more onerous for respondents to be put to defending a late weak claim and less prejudicial for a claimant to be deprived of such a claim.

110. The existence of other claims which were presented in time may be relevant. On the one hand, it will mean that the claimant is not entirely unable to assert his or her rights. But on the other hand, the very facts which the claimant may seek to rely on for the late claim may already have to be explored for the timeous claims.

ACAS uplift

111. The ACAS Code of Practice 1: Disciplinary and Grievance Procedures (2009) is issued under s199 TULCRA 1992. The provisions regarding adjustment of compensation apply, inter alia, to discrimination claims. Under s207A(2), if it appears to the employment tribunal that –

(a) the claim to which the proceedings relate concerns a matter to which a relevant Code of Practice applies,
(b) the employer has failed to comply with that Code in relation to that matter, and
(c) that failure was unreasonable

the employment tribunal may, if it considers it just and equitable in all the circumstances to do so, increase any award it makes to the employee by no more than 25%.

112. In the section on grievances, the Code emphasises the importance of dealing with every stage without unreasonable delay. This includes at paragraph 42 the requirement that appeals should be heard without unreasonable delay.

Conclusions

Harassment claim: Remark about Notting Hill Carnival (Issues 2.6; 2.9

113. The respondent admits that on 24 August 2019, Mr Toms said in a group chat on WhatsApp, ‘If we are bringing carnival into the office who is bringing the drugs and knives?’ This was a response to a team member having texted ‘Hey ppl tomorrow we have Jerk chicken or curry chicken … Lets bring carnival into the office’.

114. This conduct was unwanted by Mr Morgan. He did not want to hear that kind of gratuitous negative remark about Carnival.

115. The remark was related to race. Notting Hill Carnival is an event associated with black Caribbean culture. The reference to drugs and knives is a derogatory stereotype of people with African Caribbean heritage.

116. Mr Toms knew Mr Morgan was of African Caribbean heritage and on the WhatsApp group. This type of remark is similar to 'bantering' remarks made to Mr Patel about being an Uber driver.

117. The respondent's argument is that Mr Tom's comment was a 'stupid macho' comment, but it did not have the purpose or effect of violating Mr Morgan's dignity or creating an intimidating hostile degrading humiliating or offensive environment for him ('the unlawful purpose or effect').

118. Mr Toms was not called as a witness at the tribunal hearing. It is possible that Mr Toms intended to violate Mr Morgan's dignity or create an intimidating hostile degrading humiliating or offensive environment for him, but we have insufficient evidence. There is clear evidence of belittling and abusive comments prior to this remark (the 'prick' comment and the 'confidential waste' comment) but these have no explicit racial connotation. It is possible that Mr Toms thought he was simply indulging in banter and did not consider its impact.

119. However, we find that the remark did have that effect on Mr Morgan. The fact that he did not take a grievance about it until some time later does not mean it did not have a serious impact on him. Many people who are subjected to racist abuse, do not complain at the time, even if they might be prepared to raise other 'safer' topics. Although it could be argued that Mr Morgan was prepared to raise concerns in writing in his email of 13 July 2018, he was noticeably coy about spelling out the exact word (which we now know was 'prick'). This shows a certain reticence in raising even that kind of matter. The Whats App chain shows that Mr Morgan did not join in with the so-called 'banter'. We accept his evidence that he was shocked and upset and that his colleague asked if he was OK. Carnival was a proud part of his cultural identity and his line manager had said something demeaning about it in front of his colleagues, none of whom were black Caribbean. He said it felt like a Catholic hearing the first thing said about the Catholic church was that it was full of paedophiles. We find that Mr Morgan felt the comment violated his dignity.

120. We find it reasonable in the circumstances that it should have this effect for much the same reasons. Mr Morgan's white line manager, in a group WhatsApp where no one else was black Caribbean, chose to talk about drugs and knives in response to a joyful chat amongst team members about what food to bring in to celebrate Carnival. It may be factually correct that some people take recreational drugs at Carnival – as doubtless they do at other events – and that a very tiny minority commit a knife crime, as again can happen in many other contexts. Why should this be the first association with Carnival, and why did it need to be stated in the particular workplace context? It was demeaning of the event.

121. In our view, it would have been reasonable for Mr Morgan to feel his dignity was violated even if he perceived the remark as intended to be 'banter'. Offensive jokes based on racist stereotyping can be just as demeaning as hostile remarks.

122. Further, in the overall context, we find it reasonable for Mr Morgan to have perceived that the remark was a barbed comment directed at him, given that he had experienced such comments before from his line manager, albeit not ones overtly related to race.

123. The claim that this remark was harassment is therefore upheld.

Direct discrimination claim: Mr Tourlamain's allegation (Issues 2.2, 2.4, 2.5)

124. Mr Tourlamain made an allegation that Mr Morgan was threatening and intimidating. This was a detriment because it led to a suspension and investigation, with damage to Mr Morgan's reputation with his employer, and all the stress that was involved.

125. We first asked ourselves whether we could conclude in the absence of an explanation that Mr Tourlamain's allegation that Mr Morgan was threatening and intimidating was direct race discrimination. We found that we could.

126. In his email of complaint in September 2019, Mr Tourlamain effectively alleged that Mr Morgan had been threatening and intimidating during the bagel incident. In his interview, Mr Tourlamain said he felt intimidated because he was aware Mr Morgan did not like him and did not want to be in a room with him. He also said that most of the others found Mr Morgan's behaviour intimidating sometimes.

127. Given the evidence about the prevailing culture of the control room, we find it surprising that Mr Tourlamain chose to report this one incident, which involved the only black Caribbean member of the team. We also find it surprising that he reported it, given the evidence that no one else was upset. He said others were intimidated, but there is no reliable evidence that they were, or – more importantly - as to why he should genuinely think that they were.

128. We note that Mr Tourlamain in his interview, when asked how others felt, said 'not a lot of people heard the 'stabbing' comment'. This is not the impression created in the initial letter of complaint, where he talks about other people being 'scared and uneasy' about the way Mr Morgan behaves. This adds to our impression that he knew nothing threatening or intimidating had been directed at the room.

129. Mr Tourlamain then embellished in the interview by saying he was not comfortable in a room where he felt 'intimidated' by Mr Morgan because he was aware that Mr Morgan did not like him, and he did not want to be in a

room with him. This is a switch of emphasis from his initial complaint where he talked about others. There is no suggestion at either point that the alleged remark was directed at him personally. We were not shown any evidence as to why Mr Tourlamain, who incidentally was the same height as Mr Morgan, should feel so 'intimidated' that he did not want to be in the same room as him.

130. No one else said Mr Morgan was 'very angry' and 'shouting'. If that had been true, then everyone would have heard the alleged stabbing remark.

131. We have earlier described our findings of what happened and Mr Morgan's behaviour. Mr Morgan was frustrated and irritable as any of us would have been after such a morning. He 'mouthed off' when faced with complaints or jokes about having to wait for breakfast. In the context of communications within the control room, it was not a big deal. The atmosphere was fine for the rest of the shift with banter resuming. There was no reason for this to have been reported. The manager did not report it. No one else reported it or complained to the manager. The one person who also said she heard a remark about stabbing did not take it to refer to people in the control room, and took it in the context of control room banter.

132. Mr Tourlamain's exaggeration, the picture he created of Mr Morgan being a frightening intimidating man, the suggestion that Mr Morgan's boxing hobby was an indirect way of threatening colleagues is all consistent with conscious or unconscious racial stereotyping that finds black men aggressive.

133. Mr Tourlamain was also one of the four individuals who made the Uber comments, which is another example of racial stereotyping. In our experience, people who have a propensity to negatively racially stereotype one ethnic group, often do the same with other ethnic groups.

134. We therefore find that a tribunal could conclude from the above evidence that Mr Tourlamain would not have made his allegations if Mr Morgan was not of Black Caribbean heritage.

135. The respondent did not prove that Mr Tourlamain's decision to allege that that Mr Morgan was threatening and intimidating was in no sense whatsoever because of race. We did not hear from Mr Tourlamain. The respondent suggested that one explanation why he reported Mr Morgan might be that there were trade union tensions between Mr Morgan and Mr Tourlamain and Mr Toms. We accept that there may have been some level of conflict over trade union issues, but we were not given nearly enough evidence to suggest that would have led to making a report of this kind to management or with the particular characterisation.

136. The claim that Mr Tourlamain's allegation was direct race discrimination is therefore upheld.

137. Applying the two stage burden of proof was a slightly artificial exercise in relation to this allegation since it is hard to separate Mr Tourlamain's action

from the explanation. We therefore also looked at the matter differently, considering all the primary facts together to see whether we would reach a concrete conclusion. On this basis too, we drew a clear inference from the primary facts that Mr Tourlamain's allegation was direct race discrimination.

138. As we have found direct discrimination, we do not need to consider whether Mr Tourlamain's allegation alternatively amounted to harassment.

Direct discrimination claim: Mr Paton's wording in his report: (Issues 2.3 – 2.5)

139. The alleged act of race discrimination is that Mr Paton in his Investigation report made untrue statements namely that, on the date in or around October 2019, the claimant was late for duty and angry. The relevant sentence in the Investigation report said this:

'On Sunday 22nd September 2019, Mr Morgan attended for duty late, upon his arrival Mr Morgan was very angry/frustrated about a number of factors.'

140. We have not applied the two stage burden of proof to our analysis. We are in a position to make findings without going through the two stages.

141. It is necessary to view the report as a whole. What Mr Morgan is saying is that Mr Paton, by making this apparently factual statement so early in the report, and by it not being founded on clear uncontradicted evidence, created an impression on the reader that Mr Morgan was highly likely to have been aggressive, out of control, and that disciplinary action should be taken.

142. We agree that this is likely to be the effect on a reader, It had the effect on us as a tribunal when we first read the report. It created a negative early impression that Mr Morgan had behaved unacceptably and was not in control. It was therefore reasonable for Mr Morgan to consider that the wording was to his detriment.

143. The stated purpose of the report was to explore the allegation of threatening / inappropriate behaviour. Mr Morgan was not charged with arriving late. While the time Mr Morgan arrived might have formed part of the factual matrix, that is not the same as creating an impression of unauthorised lateness so early in the report. Indeed, later in the section, Mr Paton states, 'It is alleged that Mr Morgan took an excessive amount of time to attend for work, eventually arriving between 1030-1130.' It is not clear who made that allegation because it was not in the formal charge. In his interview, Mr Tourlamain says Mr Morgan arrived at 11.30 and that he believed the time was 'quite excessive'. Mr Paton does say an arrangement had been made with Mr Collen-Jones that Mr Morgan do the breakfast run, but he adds 'allowing Mr Morgan to arrive for work slightly later'. This does not make it clear that Mr Collen-Jones had positively asked Mr Morgan to do the run and go to Brick lane. It also implies that Mr Morgan only had permission to arrive at work 'slightly' late, but this is not something which Mr Collen-Jones says in his interview.

144. It appears to us that the only relevance of the 'lateness', as it was not a charge against Mr Morgan, is that it helped to explain why he was frustrated when he arrived and why his colleagues were complaining or teasing him about being hungry. We would therefore have expected a more neutral framing of the facts in the Background, eg 'Mr Morgan was asked by his manager to collect bagels from Brick Lane on his way into work. He did not arrive until 10.30 or later due to the relative location of his home, Brick Lane and the workplace, combined with transport and other problems'.

145. We do not think it was accurate to say he was 'late', since he was sent on a task of uncertain duration by his manager, and there was no suggestion that the time he arrived was due to anything other than performing that task.

146. We also consider it inaccurate to say that when he arrived he was 'very angry / frustrated'. He may have been frustrated, but we have already expressed our views on his mood, based on the overwhelming evidence. No one except Mr Tourlamain said Mr Morgan was 'angry' or 'very angry'. Mr Morgan did not need to say he was 'very angry' as a fact and to put it so early in the report. 'Frustrated' or 'irritated' would have been more neutral at this stage in the report, before going into the differing witness evidence.

147. We do not consider these are mere matters of drafting. As we have said, the emphasis on Mr Morgan having been 'late' and 'very angry', as a matter of fact, right at the start of the Investigation report, created a negative impression which was likely to condition the reader's response to the whole report and therefore affect the decision as to whether to take further action.

148. We have asked ourselves whether this wording was because of Mr Morgan's race. We think that it was. We believe that Mr Paton had a conscious or unconscious stereotyped perception of Mr Morgan as intimidating and aggressive because he is a black man, which led to him almost unquestioningly accepting Mr Tourlamain's complaint including his allegations that Mr Morgan was 'late' and 'very angry'. These are our reasons.

149. Mr Paton met Mr Morgan only once. Yet when he was interviewed by Mr Furr, a senior manager, considering important issues which could involve Mr Morgan's future treatment in the workplace, he confidently and repeatedly asserted his view that Mr Morgan was someone who 'plays the race card'. This was based on hearsay, on what (unnamed) others in the control room had told him. Mr Paton was prepared to convey a very prejudicial race-related impression of Mr Morgan based on hearsay.

150. We also have concerns not only that it was based on hearsay, but by the casual use of the expression itself. It is dismissive of a black person's genuine perceptions. It suggests a failure to listen to a black person's viewpoint. A black person who makes allegations of race discrimination should not be assumed to be 'playing the race card' unless there is very clear evidence that they do not believe what they themselves are saying and are cynically trying to manipulate a situation. None of which Mr Paton had, since he was relying

on hearsay. We would add, that we find the phrase itself distasteful. It is disrespectful to dismiss allegations of race discrimination in these terms.

151. During the same conversation, when asked why people apparently had not wanted to give the full picture about Mr Morgan during the investigation, Mr Paton said, 'I would say they felt very intimidated, he's influential, a big character, probably aggressive and tries to intimidate individuals. Do not know what his behaviour was like before so whether people know of him but during the interview he talked about how he does boxing and is on medication and portrays himself as a very physical character.'

152. We are struck by these comments. First, Mr Paton had only ever met Mr Morgan once. Second, he jumps from someone being 'influential, a big character', to 'probably aggressive'. Third, we cannot see why someone talking about being on medication would be an attempt to portray themselves as a 'very physical character'. On the contrary, it most naturally suggests someone describing their stress and vulnerability. Indeed, that's what the transcript shows – Mr Paton had asked Mr Morgan how he had been since his suspension. Mr Morgan said he was in a state of shock; he asked HR whether he could disclose his sickness. HR said that was fine. He said he was off sick with stress and anxiety; that he had never taken medication prior to this apart from antibiotics and he ended up taking anti-depressants and sleeping medication. Fourth, Mr Morgan did not in fact mention boxing in his interview with Mr Paton and he was not asked about Mr Tourlamain's allegation that he had said 'boxing was helping with his anger-management issues'.

153. In the employment tribunal, when asked what he meant by 'that's the type of character he is', Mr Paton told Mr Morgan, who was cross-examining him, 'You are a big guy. You come across in my personal opinion as quite intimidating as well…. Big physical guy and quite intimidating.'

154. In our view, this pervading perception of Mr Morgan as big, physical, aggressive, threatening because he did boxing and 'played the race card', is the type of stereotyped perception that is all too frequently held of black men. We believe Mr Paton, consciously or unconsciously, held these stereotyped views at the time he wrote the Investigation report and it affected how he wrote that report, his unequivocal findings against Mr Morgan, including finding that he was 'very angry' and choosing to emphasise at the start of the report that he was 'late' even though he was on an authorised task.

155. If we look at the evidence before Mr Paton, it very strongly showed that Mr Morgan was not aggressive or intimidating on the day in question. He was mouthing off. No one felt upset or intimidated. The shift was normal. Joking banter continued later in the shift. The manager in charge was not concerned. Mr Paton did not even explore any motivation that Mr Tourlamain might have had for making his complaint beyond a one line reference to union disagreements. He simply believed it, in the same way he later believed the hearsay, because of his underlying stereotyped perceptions.

156. One final matter we note. Mr Paton said he interviewed everyone on shift, but he did not. He omitted Mr Patel, a person of Asian ethnic origin, who was sitting next to Mr Morgan. He was unable to explain why he had made this 'oversight'.

157. For these reasons, we uphold the claim that Mr Paton describing Mr Morgan at the start of the report as 'late' and 'angry' was direct race discrimination.

Harassment claim: Mr Paton's wording his report (Issues 2.8 – 2.9)

158. As we have found Mr Paton's words to be direct discrimination, we do not need to consider whether they are alternatively harassment.

Time-limits (Issue 2.1)

159. Mr Morgan notified ACAS under the early conciliation procedure on 4 October 2021. Events before 5 July 2021 are therefore outside the primary three month time-limit.

160. We consider that the three actions which we upheld, ie Mr Toms' Carnival comment on 24 August 2019, Mr Tourlamain's accusation on 23 September 2019 and the words in Mr Paton's investigation report on 27 January 2020 formed part of a continuing racially discriminatory state of affairs.

161. The Carnival comment and Mr Tourlamain's reaction to the bagel incident took place in a context of a control room culture of banter, which included racially offensive banter such as the Carnival comment and the Uber comments made to Mr Patel by the same two people (Mr Toms and Mr Tourlamain as well as two others). The conscious or unconscious stereotyping which manifested itself in Mr Toms' comment about Carnival, Mr Tourlamain and Mr Paton's description of Mr Morgan, was all of a similar kind. Although different people were involved, we believe there is sufficient to link the events to constitute an act of discrimination extending over a period of time. The link between Mr Tourlamain's complaint and Mr Paton's description of events in his report, wholesale adopting Mr Tourlamain's characterisation, is particularly close.

162. The time-limit for notifying ACAS for all three acts of discrimination should therefore be counted from the last, ie 3 months from 27 January 2020, which is 26 April 2020. Mr Morgan did not notify ACAS until 4 October 2021. This is just over 17 months later than the deadline, a very substantial delay. If we do not rely on any continuing discriminatory state of affairs and consider the Carnival comment on 24 August 2019 separately, ACAS should have been notified for that on 23 November 2019. Instead, the notification was 22 months 11 days late. We considered the delay on both bases in our analysis and came to the same conclusion on both, for the same reasons.

163. The delay was extensive and we cannot ignore that. However, there were a number of good reasons why Mr Morgan either could not or did not notify ACAS sooner. We are not saying that he is able to account for every single week of delay. Were the test whether it had been reasonably practicable for him to have notified ACAS sooner, we might have been uncertain at a few points. However, in the context of the just and equitable test, we can see that he was overwhelmed by a lengthy period of mental ill health which he had never experienced before; short periods of physical ill health; tensions in his personal relationship with his partner, which eventually broke down; caring duties he had undertaken for his friend's mother; ongoing stresses with work including disciplinaries, grievances, appeals, meetings and reschedulings; the Covid pandemic with all that entailed; and no ready help which he felt he could access from a trade union.

164. For example, he was off sick with 'stress at work' from 23 September 2019 until 7 March 2020. That included anti-depressants, difficulty sleeping and panic attacks. This led into the start of the pandemic and four periods of Covid isolation during the rest of the year, as well as physical issues (particularly his hernia, which he was having difficulty getting treated at that time). Work issues were stressful at the same time, cancelled disciplinaries and grievances, and other matters, His relationship was struggling and he was helping care for a friend's mother over a long period. His mental health issues did not disappear and he was off sick again with stress from December 2020 – March 2021, and then for regular short periods as set out in our fact findings up to 27 October 2021. It is likely that he would have been fragile in the periods between such absences.

165. The fact that Mr Morgan could write grievances and participate in the grievance process at certain times did not mean that he felt particularly robust (indeed he missed many grievance appeal hearings because he was off sick). Nor is finding out how to follow a formal legal procedure the same as negotiating internal procedures, In any event, we note that Mr Morgan's grievance and grievance appeal letters, those we saw anyway, were just short emails. He did not have a 'legal team' to help him. His reference to such was just flannel. It comprised his then partner and his GMB friend who had no special knowledge or experience.

166. As we have said, we do note certain periods when there were fewer absences but even at those times there were the other strains we have mentioned.

167. In terms of prejudice to Mr Morgan if we were not to allow his claims, it would be very severe. The outcome is clearly important to the workplace, as we were urged to provide a swift outcome because he is still employed. We have heard the evidence and upheld three acts of race discrimination / harassment. If we disallow the claims on time grounds, he will lose the benefit of a successful case.

168. As against that, we cannot see any prejudice at all to the respondent caused by the delay. Obviously if we allow the late claims, the respondent will

have to face findings which it would otherwise avoid. But it has already gone through the process of the hearing. We were not told that any witness or document had disappeared. We were not told that Mr Toms or Mr Tourlamain in fact could not remember the events in question. The Carnival comment was admitted and in writing. The Tourlamain complaint and the investigation interviews and report were all in writing. Analysing events which took place 3 years before the tribunal hearing is not unusual in discrimination claims. Also, issues had continued to be discussed in the workplace right up to when Mr Morgan notified ACAS and beyond, by reason of his grievance, grievance appeals, and Mr Paton's discussion with Mr Furr in March 2022.

169. Therefore, although there was a very long delay by Mr Morgan, this is outweighed by the fact that the delay caused no problems for the respondent in havng a fair tribunal hearing; there were strong reasons for much though not all of the delay; and ultimately the tribunal has upheld three serious allegations of discrimination where Mr Morgan is still employed in the workplace.

170. For all these reasons we find it just and equitable to allow each individual claim out of time and alternatively to allow the last claim out of time with the earlier ones forming part of a continuing act of discrimination.

<u>The ACAS Code</u>

171. Mr Morgan sought an uplift under the ACAS Code on Disciplinary and Grievance Procedures. He says that his stage 2 grievance appeal was not heard 'without unread delay'.

172. Ms Hirsch did suggest at the start of the proceedings that the respondent was caught by surprise concerning the need for evidence regarding any delays in hearing Mr Morgan's grievance. We explained that we did not agree with her on that point. The case management letter identified possible breach of the ACAS Code as an issue. Mr Morgan was ordered to provide particulars of how the Code was broken. He did so. He referred to the delays. It was therefore clearly a potential issue. We could also see from Mrs Elkin's witness statement that one of the issues before her at the stage 2 hearing was whether it had taken an unreasonable amount of time to arrange the various grievance appeals. She had looked into the matter at that point. We told Ms Hirsch however that she could ask any of her witnesses supplementary questions on the matter. Having taken instructions, Ms Hirsch said that Mrs Elkin had said she was happy to address the issue of delays in her evidence.

173. Mr Morgan brought a grievance about the Carnival comment. He says the respondent broke the ACAS Code in relation to that grievance by not dealing with the appeal without unreasonable delay. The claim for an uplift is not made in relation to Mr Tourlamain's actions or Mr Paton's report.

174. We do find that there was unreasonable delay in dealing with the stage 2 appeal caused by the respondent at certain points, ie after Mr Morgan's return

to work on 17 March 2021, he was not invited to the stage 2 grievance hearing on 23 June 2021 until 11 June 2021. Then when that did not take place because Mr Morgan was unwell, there was a further delay until the hearing finally took place on 8 December 2021.

175. We were not given any convincing explanation for the delays. The only concrete explanation given of any kind was Mrs Elkin's car accident, but that is only a tiny part of the explanation. Mrs Elkin effectively admitted that the delay was unreasonable at the points identified by Mr Morgan. We also feel that such a large employer with a large HR department should not have allowed such lengthy delays.

176. However, this is not a case where an employer did nothing right. The respondent did deal with every stage of the grievance. In terms of time-scales, there is no complaint until it comes to the stage 2 appeal, and then some of the momentum was lost because Mr Morgan was unable to attend scheduled dates. So for example, Mr Morgan appealed the stage 1 outcome on 20 November 2020 and on 2 December 2020 he was invited to a grievance meeting on 5 January 2021. Allowing for Christmas, that is prompt dealing with the matter. It had to be delayed because Mr Morgan was on sick leave till 17 March 2021. The fault lies with the respondent at that point, when he did not receive an invitation for a rescheduled meeting until 3 months later. Then again, the 23 June 2021 meeting could not go ahead because Mr Morgan was on sick leave. He returned from that sick leave on 6 July 2021, but he was not invited to a rescheduled meeting until 27 October 2021 to take place on 2 November 2021. Again, it is the delay between 6 July 2021 and 27 October 2021 (3 months) where the fault most seems to lie. There was a further delay caused by Mrs Elkin's car accident and illness. Given the length of the delays so far and the size of the respondent, it should have been possible to arrange a different hearing manager even if that was not usually done. We therefore apply an uplift of 10% to any award we make in relation to Mr Toms' Carnival comment.

Remedy

177. The remedy hearing will take place by CVP on **Tuesday 6 December 2022** starting a 10 am. We will consider:
    177.1. Whether to make any recommendations
    177.2. An award for injury to feelings
    177.3. An award for any financial loss
    177.4. Interest.

178. We have already made our finding about an ACAS uplift regarding the Carnival comment.

179. Mr Morgan should remember that the tribunal can only make an award for injury to feelings related to the three complaints which we have upheld, and not in relation to his feelings about other matters which were not the subject of this case.

180. From the facts of this case, there is unlikely to be any financial loss directly caused by the discrimination. However, if Mr Morgan intends to claim that there is, he must notify the respondent at least two weeks prior to the date of the remedy hearing.

Employment Judge Lewis

26th Oct 2022

Judgment and Reasons sent to the parties on:

26/10/2022

For the Tribunal Office