EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr L Kabzinski	**v**	**Vistajet International Limited**

Heard at: London Central

On: 7, 8, 11 and 12 April 2022
[& on 13 September 2022 in chambers]

Before: Employment Judge B Beyzade
Mr S Pearlman
Ms S Plummer

Representation

For the Claimant: In person
For the Respondents: Ms J Coyne, Counsel

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

1) The unanimous judgment of the tribunal is that:

1.1 The claimant's complaint of direct race discrimination is not-well founded and is dismissed; and

1.2 The claimant's complaint of harassment related to race is not-well founded and is dismissed.

REASONS

Introduction

1. The claimant presented a complaint of unfair dismissal, direct discrimination because of race, and harassment related to race, which the respondent denied.

2. At paragraph 2 (page 2) of Employment Judge Brown's Judgment following an Open Preliminary Hearing dated 02 December 2021 it was recorded that the claimant pursued his unfair dismissal claim pursuant to section 103A of the Employment Rights Act 1996 ("ERA 1996"). Employment Judge Brown struck out the claimant's complaint of automatic unfair dismissal and concluded that a final hearing would be required to determine the claimant's race discrimination/harassment claim (including the issue of whether the claim were presented in time).

3. A final hearing was held between 07 and 12 April 2022 (13 September 2022 was a chambers day [in private] during which the Tribunal conducted deliberations). This was a hearing held by Cloud Video Platform ("CVP"). The Tribunal were satisfied that it was just and equitable for the final hearing to proceed by way of a CVP hearing.

4. The parties prepared and filed a Joint Index and Bundle of Documents consisting of 384 pages ("the Joint Bundle"). The claimant also sent seventeen documents to the Tribunal in PDF format on the first day of the hearing. Parties were advised that the Tribunal will only read the documents to which they are directed by the parties and that are relevant to the issues to be determined by the Tribunal.

5. On the first day of the final hearing the claimant stated he wanted the Tribunal to consider documents to be included in the Hearing Bundle relating to his automatically unfair dismissal case. I confirmed that the automatically unfair dismissal claim was struck out following the Open Preliminary Hearing before Employment Judge Brown on 01 December 2021, so any documents related to that claim only did not appear to be relevant. The claimant confirmed that all documents relevant to the claimant's remaining claim were in the agreed Hearing Bundle. The claimant confirmed that he did not seek to rely on any further documents relating to his remaining claim.

6. As the claimant had connection difficulties and his internet connection kept dropping out on the first day of the hearing, arrangements were made for the claimant to attend the London Central Employment Tribunal in person to use the Tribunal's internet connection with his own laptop. The claimant confirmed that he was content to attend the Tribunal. The Tribunal used the time between the claimant travelling to the Tribunal and setting up his laptop to read the relevant documents to which the parties directed us.

7. During the hearing, the parties were advised that the Tribunal would investigate and record the following issues as falling to be determined, both parties being in agreement with these:

Direct race discrimination: s 13 EA 2010

6. Did any of the following acts occur as alleged?

a. October 2019, in front of "everyone" state "that most of Poles in the UK are criminals or most of foreign criminals in the UK are Poles"

b. In February 2020:

i. Daniel Beahan make "gypsy remarks"

ii. Grave Halstead say "Gyppo"

c. On 2 February 2020, Daniel Beahan state on a work WhatsApp "Ok ok gypsy"

d. On 24 February 2020, Daniel Beahan orally say to the Claimant "You are cheap boy "which he then followed by "Typical gipsy""

e. On 26 March 2020, Daniel Beaham state on a WhatsApp "Hello gypsy"

f. On 27 March 2020, Daniel Beahan state on a WhatsApp "Gypsy" (twice) and "You are good gypsy"

g. On 10 May 2020, Daniel Beahan use the words on a private chat "Jestes zwolniony, nie ma dla ciebie pracy cyganskiej" which translates "You are fired, theres no gypsy work for you". In the same conversation he also said "nie spoznij sie suko" which translates "don't be late you whore"/"don't be late bitch"

h. 3 July 2020, Daniel Beahan state "Gypsy"

i. 29 July 2020, Daniel Beahan state on a private chat "I am good gypsy"

j. 28 Oct 2020, Daniel Beahan state on a private chat ""Hello my little gypsy"

Jurisdiction

7. If upheld, did each of the actions of the Claimant complained of in paragraph 6 above take place within the primary time limit in section 123 Equality Act 2010: namely, the previous 3 months of the date the claim was issued (15 February 2021), save for (and the period increased proportionately) any part of that period falling to be discounted under section 140B Equality Act 2010? The Claim form was presented to the Tribunal on 15 February 2021. The primary limitation period for any claim under the Equality Act 2010 s 123 expired on 16 November 2020. The period of time spent in ACAS Early Conciliation was 26 days (15 Jan – 10 Feb 2021). The extension brings the date to 22 October 2020.

8. If not, were all or some of the acts and/or omissions relied upon continuing events?

9. If not, is it just and equitable to extend time?

10. Is each act upheld at paragraph 6 above less favourable treatment? (the Claimant relies on a hypothetical comparator).

11. If so, is the act because of:

a. Polish nationality

b. Polish national origin

c. Eastern European ethnic origin

Harassment related to race - s 26 of the Equality Act 2010

11. Was any conduct upheld in paragraph 6 above unwanted conduct?

12. If so, was it related to:

a. Polish nationality

b. Polish national origin

c. Eastern European ethnic origin

13. If so, did the conduct have the purpose or effect of:

a. Violating the Claimant's dignity, or

b. Creating an intimidating, hostile, degrading, humiliating or offensive environment for him?

8. It was agreed that the Tribunal will investigate and determine matters relating to both liability and remedy at the final hearing. Parties agreed to work to a timetable on the first day of the hearing.

9. The Tribunal were also provided with a copy of a Cast List and a Chronology by the respondent's representative. The claimant also sent his Chronology to the Tribunal in advance of the hearing. These documents appeared in a Supplementary Bundle consisting of sixteen pages.

10. The claimant gave evidence at the hearing on his own behalf and provided a written witness statement. Mr D Beahan (Account Manager-Demo Flights), Mr A Bonner (Commercial Manager) and Ms R Vaitkeviciute (Human Resources Manager) gave evidence on behalf of the respondent, all of whom had produced written witness statements. The claimant also provided written comments on the content of the respondent's statements.

11. The claimant appeared in person whereas the respondent were represented by counsel. The claimant provided a skeleton argument and the respondent's representative sent opening submissions to the Tribunal. In addition both parties provided written closing submissions which were supplemented by oral submissions on the fourth day of the hearing, and the Tribunal found these to be informative. Copies of the case law relied on in the parties' submissions were provided to the Tribunal on the final day of the hearing.

Findings of Fact

12. On the documents and oral evidence presented the Tribunal makes the following essential findings of fact restricted to those necessary to determine the list of issues -

Background

13. The claimant was employed by the respondent from 07 January 2019 until 17 December 2020 as a Customer Insight Analyst. The claimant describes himself as being of Eastern European descent and his nationality as Polish.

14. The respondent, a limited company, is an aviation company which provides private jets for charter flights. The respondent is headquartered in Malta, and it has (or had) offices in London, New York, Los Angeles, Hong Kong, and Dubai.

15. The claimant was in the Customer Experience Department, and he was later moved to the Marketing Department.

16. The claimant normally worked 40 hours per week.

17. The claimant was paid £3500.00 per month gross and approximately £2586.00 net per month. He was a member of the respondent's pension scheme and medical insurance scheme.

18. The claimant initially reported to Ms A Newcourt (Hiring Manager and Executive Vice President of Customer Experience) whose employment terminated at the beginning of March 2019. Thereafter the claimant reported directly to Mr I Moore (Chief Commercial Officer) from March 2019 until July 2019. During that time, and with Mr Moore's oversight, the claimant created the Customer Experience weekly/monthly reporting format and a recurring recipient list (including the most senior people in the company), which was his main deliverable. In July 2019, the claimant reported to Mr M Atti (EVP Marketing) and Ms J Edwards (Head of CRM), but he continued

to report/work mainly for Mr Moore. Around January 2020, his reporting line changed to Mr K Bonnici (Chief Project Officer). This lasted until April 2020, when the claimant was placed on furlough leave.

19. At the beginning of August 2020, the claimant returned to the office, along with other co-workers and he was placed in the newly formed Customer/Client Experience Team, led by Mr L Cassier (this reporting line continued until his employment ended on 17 December 2020).

The claimant's interactions with Mr Beahan

20. Mr D Beahan works for the respondent in his current role as Account Manager - Demo Flights (although prior to January 2021 he was Customer Experience Manager). The claimant was located in a small office next to Mr Beahan's desk. Ms C Ferreira advised the claimant to work on the ground floor due to the need to interact with the team. The claimant and Mr Beahan travelled to Malta in order to attend the respondent's annual strategy event in January 2019.

21. From around Mid-March 2020 (prior to the UK-wide lockdown being announced in relation to the Coronavirus pandemic) the claimant started to work from home. They kept in touch using their mobile telephones and the Houseparty social networking service (a mobile telephone app which allows users to instantly join video calls with their friends and colleagues).

22. Although they did not work in the same team as each other and there was no overlap in terms of the work that they did, they spent a lot of time with each other. They socialised together, and they went to bars and restaurants. The claimant and Mr Beahan exchanged a range of messages on their work and personal telephones in relation to non-work matters.

23. This included comments that they exchanged and links that were sent to video clips from the Ali G Show and of the Sacha Baren Cohen character of Borat. By way of example Mr Beahan sent a link to a Facebook clip of "Da Ali G Show – Borat's Most Outrageous Moments" to the claimant on 09 July

2020, to which the claimant replied with a number of laughing emojis and commented "*He's a legend*." They both found the Borat character to be amusing.

24. The "Borat" character makes a number of comments and references to "gypsy." This is referenced in the original Borat movie.

25. In around July 2019 at a social event with colleagues the claimant made inappropriate references to the Holocaust, and some colleagues felt uncomfortable, which led Mr Beahan to intervene and tell him to stop talking about that topic or to leave.

26. Around October/November 2020 the claimant and Mr Beahan had a WhatsApp conversation in relation to wearing an outfit during which the claimant mentioned a "butt plug" and sent a photograph of the same to Mr Beahan, and Mr Beahan replied, "*they really make me laugh*."

27. In a later WhatsApp message the claimant adds the words *"relatable bottom? No pun intended*" underneath the joke he sent to Mr Beahan on WhatsApp which reads "*2020 is like snorkelling but with no snorkel in a kiddie pool with no water and you're naked with a sunburn and your butthole hurts*."

Allegation 6a – events in October 2019

28. We do not accept that the allegation made in relation to October 2019 took place.

Allegation 6b – i) Mr Beahan

29. Around late February 2020 Mr Beahan made a couple of remarks that included references to "Gypsy" to the claimant. We were not provided with any details in respect of the context surrounding this.

Allegation 6b) ii) Ms Halstead

30. We did not accept that Ms Halstead made the comment attributed to her.

Allegation 6c) WhatsApp message with Mr Beahan

31. We did not have any WhatsApp messages before us in relation to 02 February 2020. We assumed that this allegation referred to 21 February 2020 which is allegation two in the claimant's schedule **(page 101 of the Hearing Bundle)**.

32. Mr Beahan initiated a WhatsApp conversation with the claimant on 21 February 2020 by saying "*Hello*" and "*Re that email*." The claimant replied "*gello tipsy gypsy*."

33. Thereafter there was a conversation about a work matter and reference to the smart sheet. During that conversation, the claimant said, "yes but no pax" followed by "*I mean no contactknfo*." Mr Beahan replied, "*What are you talking about gypsy*" and he stated, "*I added*." The work conversation then continued.

34. The claimant then stated, "*going for a sushi*" and "*man what a fup with this*."

35. Mr Beahan replied, "*Ok ok gypsy*." The claimant sent a link to Mr Beahan to an article about COVID-19 in Israel. Mr Beahan updated the smart sheet and asked the claimant to check this.

Allegation 6d. – conversation between Mr Beahan and the claimant

36. We accept that Mr Beahan stated to the claimant during a conversation "You are cheap boy" which he then followed by "Typical gipsy." We did not see any evidence to suggest that that conversation took place on 24 February 2020, however, it may have taken place during that month or in the month of March 2020.

37. As can be seen in WhatsApp messages from 24 March 2020 **(pages 268 and 287 of the Hearing Bundle)**, Mr Beahan addressed the claimant on these occasions as "*cheap boy"*. When reviewing those messages, it is apparent that Mr Beahan called referred to the claimant as a cheap boy because he spent £8 on an adaptor for his computer equipment. Mr Beahan

had asked the claimant for advice on how to connect his Dell laptop to an Apple monitor for his home office. Mr Beahan was not very comfortable with IT, and he needed some advice. The claimant sent him a few Amazon links for cables that should have been suitable. Mr Beahan expressed shock at how cheap they were. As he knew little about IT, he assumed everything would be expensive.

38. During that WhatsApp conversation after this, Mr Beahan said, "*you are a cheap boy*" and "*Typical gipsy*," and the claimant replied, "'*You've betrayed the Clan, but your DNA has the letter G in it*'' **(page 268 of the Hearing Bundle)**. We infer that the reference to ''G'' meant ''gypsy''.

6e. and f. WhatsApp messages with the claimant-26 and 27 March 2020

39. A further WhatsApp conversation took place between the claimant and Mr Beahan on 26 March 2020 which Mr Beahan started this by saying "*Hello Gypsy*." He then said that he had looked online and there was an Apple monitor which he wanted to buy. There followed a conversation in relation to the computer monitor which Mr Beahan wanted to purchase and the claimant provided him with advice about this.

40. The WhatsApp conversation about the monitor continued on 27 March 2020 which Mr Beahan started by saying "*Gypsy*" and then "*one of the cables had arrived*." He sent some images to the claimant, following which the claimant offered him advice and he also offered a video call to assist Mr Beahan further. Mr Beahan said that he had a migraine, he thanked the claimant, and he stated, "*you are good gypsy*." The conversation continued during which the claimant also said he had a headache, discussed the evolving situation with COVID-19, and offered further support with the monitor.

Allegation 6g 10 May 2020 work private chat

41. On 10 May 2020, Mr Beahan sent a request to the claimant via a private chat message to join a scheduled Zoom meeting. The claimant asked Mr Beahan to confirm that the meeting was taking place at 6.15 and Mr Beahan

replied in Polish confirming this. The claimant replied "*bardzo dobrze*" (in Polish).

42. Mr Beahan then said "*nie spoznij sie suko*" which translates "*don't be late you whore"/"don't be late bitch*." The claimant replied with several emojis (including three laughing cats, a thumbs up, an ok and an applause).

43. Mr Beahan further stated "*Jestes zwolniony, nie ma dla ciebie pracy cyganskiej*" which translates "*You are fired, theres no gypsy work for you*". The claimant replied to that message with three laughing emojis. He also replied using similar words to Mr Beahan as follows "*Nie ma dla ciebie pracy, cyganie*" (in Polish) and "*makes all the difference*." Mr Beahan stated "*twoja matka ma prace*."

Allegation 6h. 3 July 2020 private chat with Mr Beahan

44. On 3 July 2020 Mr Beahan sent the claimant a private message stating "*Gypsy*", "*How are you*", and "*I no hear about little gypsy boy for some time*?"

45. The claimant replied stating "*Lol*" and "*No ones on houseparty anymore*." Mr Beahan stated "*No*" and "*I think because everyone is bored of Covid, lockdown and houseparty*." The claimant told Mr Beahan that he was in Poland at the time.

Allegation 6i. 29 July 2020 private chat with Mr Beahan

46. On 29 July 2020 Mr Beahan sent the claimant on a private chat message a Tik Tok video in relation to Dean Marlowe with the automatically generated caption "*think I went a little too far…*" The claimant asked how Mr Beahan was and he updated him about his plans.

47. Mr Beahan replied, "*I am good gypsy*" and "*how are you?*" The claimant stated, "*back from furlough leave this Monday*" and "*Good goos*."

48. Mr Beahan confirmed that he was returning from furlough leave on that day also. He then sent a further TikTok video from Charlotte on TikTok with the automatically generated caption "*poor Stace #eastenders*."

49. On 29 July 2020, Mr Beahan stated on a private chat message sent to the claimant "I am good gypsy." The claimant commented that things were going back to normal and in relation to the video he commented "*hahahahahahaha*" and "*sooooo accurate!!!!*"

Allegation 6j.28 October 2020 private chat with Mr Beahan

50. On 28 October 2020 Mr Beahan sent a private chat message to the claimant stating, "*Hello my little gypsy*," "*Carol loved her gift and the video was brilliant*," "*you did a really good job*," and he also sent OK and thumbs up emojis.

51. The claimant replied, "*I just put it together thats all*," "*glad she liked it*," and "*what did you get for the £*." Mr Beahan said in response "*oh fuck sorry I thought I told you*."

Termination of claimant's employment

52. On 17 December 2020, the respondent terminated the claimant's employment.

Events after termination of claimant's employment

53. The claimant sent a letter to Ms R Vatkeviciute, HR Manager on 24 December 2020 stating as follows:
"This is to make a formal complaint about discriminatory actions/harassment that I was subjected to during the course of my employment by Daniel Beahan (CEM). He frequently referred to me as "gypsy", often times in front of HR Staff.
Please attached evidence of him doing so on my work WhatsApp."

54. Ms Vatkeviciute replied by email dated 06 January 2021 advising that the complaint will be investigated and depending on the findings appropriate

action will be taken. She also requested "*As you are claiming discrimination/harassment based on ethnicity, please confirm if you are of Romani Descent*."

55. The claimant complained on 07 January 2021 that he was excluded from the official WhatsApp group until March 2020, and he also made various other complaints.

56. The claimant made a further complaint on 13 January 2021 in the following terms:
"*This is to make a formal complaint about Daniel Connacher regarding his lack of reaction to numerous incidents where Daniel Beahan referred to me as "gypsy" in front of many people. This left me feeling hopeless and resulted in me never making a formal complaint since if there was no reaction from HR representative as the incidents were unfolding, I assumed the company will ignore it. This further increased my sense of alienation and workplace victimization*."

57. He made further complaints on the same date including but not limited to a complaint that Mr A Bonner wrote to him on Webex (work chat) "jabiesz jeze" which he said translates from Polish to English as "you f*ck hedgehogs."

58. The claimant commenced ACAS Early Conciliation on 15 January 2021 and ACAS issued a Certificate to confirm that the claimant complied with the ACAS Early Conciliation requirement on 10 February 2021.

59. The claimant presented his ET1 Form on 15 February 2021.

Observations

60. On the documents and oral evidence presented the Tribunal makes the following essential observations on the evidence restricted to those necessary to determine the list of issues –

61. On the balance of probabilities, we did not accept that the events described in allegation 6a. took place because there were no details provided in relation to this in the claimant's witness evidence, he did not raise a grievance at the material time, Mr Beahan strongly denied this (and said this was not a comment he would make), Mr A Bonner did not recall these comments being made, and there were no other witnesses called to give evidence (despite the claimant stating it was witnessed by number of colleagues). Although the claimant's schedule of allegations provided some information, we did not consider this to be properly particularised nor were we provided with any context surrounding the alleged comment.

62. In relation to allegation 6b. whereas we accepted that the alleged comments were made by Mr Beahan (albeit we did not have any details about the context surrounding this in the claimant's evidence), we did not accept on the balance of probabilities that Ms Halstead used the term "*Gyppo*." In terms of the latter comment we considered the fact that Mr Beahan did not recall this, the claimant did not complain about this at the time, and we were not provided with details of the context, or indeed, any other details about the purported participation and the role of Ms Halstead in the exchange.

63. While considering allegation 6c. we noted that the context of the comment that Mr Beahan made was a conversation about a number of matters, during which the claimant had initially said to Mr Beahan "*gello typsy gypsy*." Thereafter Mr Beahan used this term during the conversation, and the claimant did not indicate that he was unhappy with this.

64. We considered the totality of the documents we were provided with in relation to allegations 6d. to 6j. It was important to consider the context of those conversations, the relationship between the claimant and Mr Beahan, and the nature and extent of the conversations that they had on a regular basis. Many of these conversations were of a friendly nature and both the claimant and Mr Beahan were actively engaging in them.

65. The Tribunal made its essential findings of fact on the balance of probabilities. Where there was a conflict of evidence, based on the above findings of fact and observations, in general, the Tribunal preferred the respondent's evidence (including evidence from the respondent's witnesses, particularly in relation to evidence that was supported by contemporaneous correspondences or other documents).

Relevant law

66. To those facts, the Tribunal applied the law –

Race discrimination

67. The claimant makes claims alleging discrimination on the grounds of a protected characteristic under the provisions of the Equality Act 2010 ("EqA"). The claimant complains that the respondent has contravened provisions of part 5 (work) of the EqA. The claimant alleges direct discrimination, and harassment.

68. The protected characteristic relied upon is race, as set out in section 9 of the EqA.

Direct race discrimination

69. By section 13 of the EqA a person discriminates against another if because of a protected characteristic, in this case race, he or she treats the employee less favourably than he or she would treat others.

70. 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 *Nagarajan 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 *Nagarajan*, 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.

71. 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*).

72. 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?

73. 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 been treated differently from the way the employer treated – or would have treated – another person.'

74. 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 having a '*significant influence on the outcome*' (*Nagarajan*).

Harassment related to race

75. Harassment is defined in s26 of the EqA:-

(1) A person (A) harasses another (B) if— (a) A engages in unwanted conduct related to a relevant protected characteristic, and (b) the conduct has the purpose or effect of—

(i) violating B's dignity, or

(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(2)…

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account—

(a) the perception of B;

(b) the other circumstances of the case;

(c) whether it is reasonable for the conduct to have that effect.

(5) The relevant protected characteristics are—

…..

Race

76. There are accordingly three 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.

77. In *Hartley v Foreign and Commonwealth Office UKEAT/0033/15 (27 May 2016, unreported)* it was held that the question whether there is harassment must be considered in the light of all the circumstances of the case. Where the claim is based on things said it is not enough only to look at what the speaker may or may not have meant by the wording.

78. However, even where certain elements of the test for harassment are met (for example, unwanted conduct and the violation of the claimant's dignity), the Tribunal must still consider the "related to" question and make clear findings as to why any conduct is related to a protected characteristic (*UNITE the Union v Nailard [2018] IRLR 730; Tees, Esk and Wear Valleys NHS Foundation Trust v Aslam [2020] IRLR 495, EAT*).

Burden of proof

79. The provisions relating to the burden of proof are to be found in section 136 of the EqA, which provides that if there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. However, this does not apply if A shows that A did not contravene the provision. A reference to the court includes a reference to an Employment Tribunal.

80. 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.

81. 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*.

82. 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*).

83. In order for there to be unfavourable treatment, the claimant must be subjected to some form of detriment. The question of whether there is a detriment requires the Tribunal to determine whether "*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*" (*Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] ICR 337 HL*).

84. It is a well-established principle that Tribunals are entitled to draw an inference of discrimination from the facts of the case. The position is set out by the Court of Appeal in *Igen v Wong [2005] ICR 931* (as approved by the Supreme Court in *Hewage v Grampian Health Board [2012] IRLR 870*).

Time limits for bringing a claim

85. The provisions relating to the time limits for bringing a claim under the EqA to the Employment Tribunal are set out in s123 of the EqA:- (1) Subject to section 140B [a reference to the provision extending time for ACAS Early Conciliation] proceedings on a complaint within section 120 [the section giving the power to the Tribunal to hear claims under the EqA] may not be brought after the end of— (a) the period of 3 months starting with the date

of the act to which the complaint relates, or (b) such other period as the Employment Tribunal thinks just and equitable.

86. The burden of proof in the exercise of the discretion lies on the claimant and past cases have made it clear that it should be the exception and not the rule, with no expectation that the Tribunal would automatically extend time (*Robertson v Bexley Community Centre [2003] IRLR 434*). This does not, however, mean that exceptional circumstances are required for the Tribunal to exercise its discretion and the test remains what the Tribunal considers to be just and equitable (*Pathan v South London Islamic Centre UKEAT/0312/13*).

Parties' Submissions

87. Parties made detailed submissions which the Tribunal found to be informative. The Tribunal considered both parties' written, and oral submissions and we referred to the authorities cited therein. References are made to essential aspects of the submissions and the authorities relied on with reference to the issues to be determined in this Judgment, although the Tribunal considered the totality of the submissions from the parties.

88. The respondent's representative referred to the cases of:
    (i) *Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686*;
    (ii) *Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 ICR 337, HL*;
    (iii) *Lyfar v Brighton and Sussex University Hospitals Trust [2006] EWCA Civ 1548*;
    (iv) *Richmond Pharmacology v Dhaliwal (2009) ICR 724 EAT*; and
    (v) *R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and ors 2010 IRLR 136, SC*;

89. In addition the claimant claimant stated in his written closing submissions "*I would like to refer to cases of similar nature: 2500072/2019, 3302967/2020*

(also includes an unfair dismissal case of similar nature) & Edward Bell against Cordant (could not find the case no) to support my argument (Case judgements 2500072/2019, 3302967/2020 attached in submission).”

90. We noted that the cases cited by the claimant were first instance decisions (one of the cases related to an Australian court), and they are therefore not binding on us.

Discussion and decision

91. On the basis of the findings made the Tribunal disposes of the issues identified at the outset of the hearing as follows –

92. The Tribunal will deal with each of the claims in turn below given the specific factual and legal issues to be determined in each claim.

Time point

93. We observe that the Claim Form in relation to the claimant’s claim was presented on 15 February 2021 with the claimant entering ACAS Early Conciliation on 15 January 2021.

94. In relation to the primary limitation period for any claim under the EqA s 123, this means that any matter relating to which a claim was not brought 16 November 2020 is out of time. The period of time spent in ACAS Early Conciliation was 26 days (15 January 2021 – 10 February 2021). Taking account of the ACAS Early Conciliation extension, this means that any claim that was not brought by 22 October 2020 was presented outside the statutory time limit and is therefore out of time.

95. Accordingly, any acts or omissions which took place before 22 October 2020 are out of time, so that the tribunal may not have jurisdiction to hear those claims.

96. The claimant submitted that there were connected acts. However, in light of

our conclusions in relation to paragraphs 112-117 and 123-128 (please see below) and that these were not well founded, we are unable to find that there were any connected acts that were presented to the Tribunal within the statutory time limit.

97. We next considered whether it would be just and equitable to extend time. We did not consider that it would be just and equitable to extend time based on the evidence we heard and considered. The claimant did not provide any or any adequate explanation for the delay in terms of the late presentation of the relevant acts and/or omissions in his claim that occurred before 22 October 2020. The claimant had ample opportunity to seek legal advice or to find relevant information about time limits online. At the hearing, the claimant was able to research and provide copies of case law and to make submissions on the law. He was aware or ought to have been aware of any relevant time limits and to have been able to take steps to present his claims to the Tribunal within the relevant time limits. There was potential prejudice to the respondent as some allegations were rather dated and there were an employee referred to in the claimant's allegations who was no longer employed by the respondent (and, indeed, other employees including Mr Beahan had to recall events from some time ago with which we observed they had some difficulty). We therefore concluded that balancing the prejudice between the parties, we would not extend time on a just and equitable basis. Therefore, we did not have jurisdiction to consider the claimant's claims that occurred before 22 October 2020, and those claims stand dismissed. However in the event we are wrong not to extend time on a just and equitable basis (notwithstanding the conclusion we reached), we proceeded to consider the claims on the basis of the evidence that was before us.

Decision –harassment related to race

Allegation 6a.

98. As stated in our findings of fact, we did not accept on the balance of probabilities that the events described by the claimant in relation to October

2019 had occurred. We indicated the reasons for this in our observations (above).

Allegation 6b.

99. We did not accept on the balance of probabilities (see findings of fact above) that as described by the claimant in February 2020 Ms Halstead used the term "*Gyppo*." We detailed the reasons for this in our observations (above).

100. The first question for the Tribunal in the discrimination claim is whether "*gypsy remarks*" made by Mr Beahan amount to unfavourable treatment in the sense that a reasonable worker would consider that they had been disadvantaged.

101. We accepted that Mr Beahan made those remarks. We did not consider that on the balance of probabilities this amounted to unwanted conduct from the claimant's perspective. The claimant did not include any details in addition to those in his schedule at page 103 of the Hearing Bundle. In the circumstances we could not be satisfied that this was unwanted conduct from his perspective. Moreover similar comments were made in later communications in which the surrounding circumstances suggested that comments of this nature were not unwanted conduct. It could also be said that a reasonable worker would not consider that they were being disadvantaged in the circumstances. The claimant did not complain about this conduct until almost a month after his employment was terminated.

102. In any event, we considered that the making of this comment by Mr Beahan was in no sense whatsoever connected with race.

103. The reason for this comment being made is explained by Mr Beahan's and the claimant's friendly relationship and their general tendency to converse in a jovial manner. Mr Beahan accepted that he made the comments he was alleged to have made. However, considering all the circumstances, we infer that the context of any conversation with the claimant would have been in the same vein as subsequent conversations.

104. Turning to the question of whether this conduct had the purpose or effect prohibited by s26 of the EqA, we consider that whilst the claimant stated in his witness statement at paragraph 7 that being called a "gypsy" was obviously detrimental to his standing/reputation in the company, (notwithstanding the fact he never expressed this to Mr Beahan in any of the messages we were shown or raised a grievance during the course of his employment), we did not consider that Mr Beahan's purpose in saying these words to the claimant was that prohibited under section 26 of the EqA.

105. Even if the claimant found this communication upsetting, it must be the case that the overarching purpose of the communication was in the context of the claimant's and Mr Beahan's working relationship and the jovial manner of their conversations then it cannot be said, considering all the circumstances, that it was reasonable for such communications to have the prohibited effect.

Allegation 6c – i

106. Although we accepted that the comments ascribed to Mr Beahan in the WhatsApp messages and private messages referred to at allegations 6c – 6 I took place between February 2020 and 29 July 2020, we have set out in detail in our findings of fact the context of those messages and the exchanges that took place between Mr Beahan and the claimant.

107. We did not consider that any of those messages or exchanges amounted to unfavourable treatment in the sense that a reasonable worker would consider that they had been disadvantaged. The claimant did not state to Mr Beahan that his conduct was unwanted, and he did not raise a grievance during the course of his employment about any unwanted conduct.

108. It was difficult for the Tribunal to determine that this amounted to unwanted conduct even from the claimant's perspective due to the lack of any sufficient detail provided about the allegations by the claimant in his witness evidence or his schedule. In the circumstances we could not be satisfied

that this was unwanted conduct from his perspective. It could also be said that a reasonable worker would not consider that they were being disadvantaged in the circumstances.

109. We were further satisfied that the comments made to the claimant by Mr Beahan were in no sense whatsoever connected to race.

110. We find that the reason behind these comments were the relationship between the claimant and Mr Beahan and the jovial nature of the comments. They frequently made comments to each other which they perceived to be humorous. They had shared interests including in terms of the character of Borat and this informed the nature of comments that they exchanged.

111. Turning to the question of whether this conduct had the purpose or effect prohibited by s26 of the EqA, we consider that whilst the claimant stated in his witness statement at paragraph 7 that being called a "gypsy" was obviously detrimental to his standing/reputation in the company, (notwithstanding the fact he never expressed this to Mr Beahan in any of the messages we were shown or raised a grievance during e course of his employment), we did not consider that Mr Beahan's purpose in saying these words to the claimant was that prohibited under section 26 of the EqA.

Allegation 6j.

112. We found that on 28 October 2020 the comment "*Hello my little gypsy*" was made by Mr Beahan.

113. Considering the totality of the evidence and the messages exchanged in particular on 28 October 2020, we did not consider that the words used by Mr Beahan in that conversation amounted to unfavourable treatment.

114. The claimant did not advise Mr Beahan during this conversation that the conduct was unwanted, and he did not make a complaint about the conduct in question during the course of his employment. We could not be satisfied from the evidence before us that the conduct in question was unwanted

either from the claimant's perspective or that a reasonable worker would consider that they were being disadvantaged.

115. We were further satisfied that the comments made to the claimant by Mr Beahan were in no sense whatsoever connected to race.

116. Although the claimant stated being called a gypsy was detrimental to his status in the company, we concluded that the purpose or effect of Mr Beehan's comments were not that prohibited in terms of section 26 of the EqA.

117. We therefore concluded that the claimant's claim for harassment related to race was not well founded and it is hereby dismissed.

Section 13: Direct discrimination because of race

Allegation 6a. and 6b(ii)

118. As we indicated above, on the balance of probabilities, we did not find that these comments were made. We set out our findings and observations relating to these above.

Allegation 6b(i)

119. We accepted that Mr Beahan made "gypsy remarks" to the claimant. We considered that these remarks were made in the context of the claimant's and Mr Beahan's friendly relationship and their jovial conversations. We have seen WhatsApp messages and other private messages in which both the claimant and Mr Beahan use the term "gypsy" or related terms, and we consider that this was in the context of friendly exchanges that they repeatedly had. As stated above this was also informed by their common interests. We are satisfied that the remarks made by Mr Beahan were in no sense whatsoever connected with race.

Allegations 6c-6i

120. Whilst we were satisfied that the comments set out in the list of issues in relation to allegations 6c. and 6i. were made between February 2020 and 29 July 2020, it is important to view these in the context of the whole conversations which were before the Tribunal. We have set out the material conversations in our findings of fact above.

121. Taking into account the full content of those conversations, the relationship between Mr Beahan and the claimant, a number of jovial conversations that took place between them, it was clear to us that these were nothing other than friendly exchanges and both Mr Beahan and the claimant actively participated in them.

122. We find that the events described by the claimant at paragraphs 6c. to 6i. of the list of issues were in no sense whatsoever connected to race

Allegation 6j.

123. As stated above, we found that the comment "*Hello my little gypsy*" was made by Mr Beahan on 28 October 2020.

124. We considered the entire conversation that took place between Mr Beahan and the claimant. The opening line of that conversation from Mr Beahan reflected the friendly and jovial conversations that he enjoyed with the claimant on previous occasions.

125. We took into account both parties' submissions. The claimant acknowledges in paragraph 2 of his submissions that he did not report the allegations he has made in his claim during the course of his employment. Although he says this was "*in fear of being terminated*" there was no evidence before the Tribunal in relation to this or that the claimant even attempted to report any concerns during his employment.

126. Therefore, looking at the context of the messages that were exchanged, these were in no sense whatsoever connected with race.

127. We also noted that the respondent's representative submitted as follows

"*The Respondent does not shy away from the fact that the comments are prima facie very offensive and capable of being harassment. So too, for instance, are the Claimant's comments regarding sexuality, in relation to Mr Beahan's homosexuality, on the WhatsApp. Yet, context is key. In full context, in the little-'f' friendship between these two individuals, the statutory test cannot be satisfied*." Mr Beahan acknowledges similarly in his witness statement."

128. Accordingly the claimant's claim for direct race discrimination is not well founded and it is therefore dismissed.

Disposal

129. The claimant's claims against the respondent do not succeed.

Remedy

130. We did not determine any matters relating to remedy given our conclusions on liability.

Conclusion

131. The claimant's claims for direct race discrimination, and harassment related to race are dismissed.

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Employment Judge B Beyzade

Dated: 29 October 2022

Sent to the parties on:

31/10/2022

For the Tribunal Office