EMPLOYMENT TRIBUNALS

Claimant: **Mr E Fadehan**

Respondent: **Total Resources (UK) Ltd**

Heard at: **East London Hearing Centre (final hearing in public via CVP)**

On: **12 - 14 October 2022**

Before: **Judge Brian Doyle**
Mr Duncan Ross
Ms Julie Clark

Representation:
Claimant: In person
Respondent: Mr F Jaffier, Advocate

JUDGMENT having been signed by the judge on 14 October 2022 and sent to the parties on 18 October 2022 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. These are the written reasons for an oral, *ex tempore* judgment delivered in summary form at the end of a 3 days hearing of complaints of direct race discrimination (as to dismissal and racial harassment). The claimant applied for written reasons at the hearing. Rule 62 is satisfied.

Procedural history

2. ACAS early conciliation took place 24 and 28 February 2020 [22].

3. The claimant presented his claim on form ET1 on 28 February 2020 [23-34]. He stated that he had been employed by the respondent company at its Brentwood site between 3 January 2020 and 14 February 2020. He complained of unfair dismissal and race discrimination. The particulars of complaint are brief. They focus entirely on the claimant's dismissal on 14 February 2020 following an incident on 13 February 2020 [29].

4. The respondent is Total Resources (UK) Ltd. It is a traffic management business with a head office in Boldon (Northumberland) and depots at Boldon, Leeds, Nottingham, Essex and Birmingham. The Essex depot is at Brentwood, which is managed by Mr Kevin Lyons.

5. The respondent's grounds of resistance on form ET3 are dated 7 April 2020 [35-45]. They give the respondent's account of the incident on 13 February 2020 and its agreement that the claimant was dismissed on 14 February 2020. It draws attention to the need for further and better particulars of the claim.

6. A case management hearing was conducted by Employment Judge Russell on 3 August 2020 [4-7]. At this hearing, for the first time, the claimant raised a complaint about his treatment more generally and not simply by virtue of his dismissal. He indicated an intention to bring a second claim about his wages. Such a claim is not before this Tribunal.

7. On 13 August 2020 the claimant gave further particulars of his claim [46-47]. He gave further details of the incident on 13 February 2020. He asserted that his dismissal was an act of race discrimination because he was not afforded a standard disciplinary procedure as any other employee would have received. He also referred to a WhatsApp chat group exchanges on 31 January 2020 which he said in essence were related to his race. The claimant is Black British.

8. A second case management hearing was conducted by Employment Judge Burgher on 21 September 2020 [8-17]. Judge Burgher struck out the claimant's unfair dismissal complaint on the ground that he had insufficient qualifying service, and it had no reasonable prospect of success [18]. That left only the race discrimination complaint to be determined. The judge permitted the claim to be amended by the particulars dated 13 August 2020. A schedule of the complaints and issues to be decided was set out as being: (1) direct race discrimination; (2) harassment related to race; and (3) time limits [13-15].

9. The respondent then presented amended grounds of resistance dated 21 January 2021 [48-52].

10. The claimant's schedule of loss up to 29 June 2020 was provided on 1 March 2021 [53-54].

The evidence

11. The Tribunal was presented with a main, indexed bundle of documents comprising 120 pages (2 pages index). References appear in square brackets. Various other documents were produced during the hearing, particularly from the claimant, and these have been considered as the need arose.

12. The Tribunal heard witness evidence from Mr Kevin Lyons, the respondent's Depot Manager (a main statement and a supplementary statement); Mr Shane Deeks, the claimant's supervisor at the relevant time.

13. The respondent also presented a witness statement from another witness, "AB", but he did not wish to attend the hearing, probably it seems because he had been contacted by the claimant shortly before the hearing. That contact was inappropriate, but not sufficiently so to consider sanctioning the claimant. The Tribunal received the statement and assessed the weight to be attached to it.

14. The claimant also gave witness evidence himself. In addition, he presented two versions of a witness statement from another witness, "CD". It was in the form an email.

15. AB and CD were fellow employees of the claimant, as was a third employee, EF. For the purposes of these written reasons only, the Tribunal will refer to these employees by these initials. It conscious that it has made findings of fact critical of them, but in circumstances where they have not appeared as parties or witnesses. Rule 50 and the right to a private life and the right to a fair hearing are in the balance.

Assessment of the evidence

16. Mr Lyons gave a straightforward, apparently honest account of events. That account was not embellished or exaggerated. He avoided giving evidence about matters that he was not involved in or could not recall. He avoided speculation. There was a question mark about one aspect of his evidence. That was about his recall of dates and chronology. The sequence of his account appeared questionable in one or two places. An example of this may be seen at paragraph 11 of his witness statement. However, as he explained, he was trying to recall evidence in October 2022 about events that occurred in 2019 and early 2020. The Tribunal considered him to be a compelling witness, even where his oral evidence was not corroborated by documentary evidence.

17. Mr Deeks came across as anxious to assist the Tribunal. He made concessions or admissions where appropriate to do so. He resisted the temptation to try to paint a perfect picture. He provided an easy-to-understand account of his limited participation in the WhatsApp chat group on 31 January 2020 (as did Mr Lyons). It was not reasonable to expect Mr Deeks or Mr Lyons to be monitoring the chat while off duty and while discharging domestic duties at home that evening. There is no evidence that either man had opened or viewed the video to which objection is taken. Neither man had actively participated in or in any way condoned the "banter" that formed the wider concern arising from that chat. Mr Deeks was a reliable and credible witness.

18. The Tribunal had a witness statement from the employee "AB". The respondent wished to rely upon this witness. It is unfortunate that the claimant made inappropriate contact with him. That contact is the likely explanation for his non-attendance. The Tribunal does not discount his evidence as a result. We conclude that it is likely that his relationship with the claimant was friendly, with a degree of acceptable "banter" between them, particularly referencing each other's hair or hair style.

19. Turning to the claimant and his witness, he did well in presenting his own case to the Tribunal and in questioning the respondent's witnesses – although in cross-examination of Mr Lyons and Mr Deeks he did little damage to their account or to their credibility. In contrast, however, when he gave evidence on his own behalf he did not present as an obviously credible or compelling witness (although not a dishonest or mendacious one). He persisted in adhering to an account on several matters despite the oral or documentary evidence contradicting him. The clearest example of this were his denials that he had been involved in two accidents or that he was at fault in respect of the job on the evening of 13 February 2020 or that the initial subject of the group chat on that evening was a genuine concern that he had picked up another company's equipment by mistake. He also persisted in suggesting that he had signed a contract of employment which the respondent had then withheld from him, and that they had continued to withhold it despite orders for disclosure made by Judge Burgher and this Tribunal. Where the claimant's account is not corroborated by other witness evidence or by the documents, we prefer the account given by Mr Lyons and Mr Deeks.

20. The witness evidence of the employee "CD" is very unsatisfactory, and the claimant wished to present it in a way that the Tribunal would not have countenanced. CD did not attend to give evidence. Instead, two different versions of his evidence had been prepared within a matter of days before the hearing. Neither version took the form of a signed witness statement with a statement of truth. Instead, the evidence took the form of two short emails. That lack of formality would not have been fatal if CD had attended the hearing to confirm his evidence and to be questioned about it. Whether he would attend was left open until the last minute and he did not do so. The Tribunal also had doubts as to the reliability of this witness who may well have had his own animosity towards his former employers and against Mr Lyons given his disciplinary record and the recent termination of his employment. In addition, much of what he wished to say was hearsay evidence – he was not present when Mr Lyons dismissed the claimant. The Tribunal is not bound to exclude hearsay evidence, but it was apparent that it would not be assisted by CD's account of a meeting at which he was not present. The Tribunal is unable to rely upon this witness or to give much, if any, weight, to his account.

21. This does not necessarily mean that the claimant's case is without potential merit. There is a case for the respondent to answer.

Findings of fact

22. The claimant initially worked for the respondent from June 2019 as an agency worker. He had met, or he had been introduced to, the Brentwood depot manager, Mr Kevin Lyons (or the respondent's then supervisor, Mr Shane Deeks) via an employee of the respondent, "EF", a friend or acquaintance of the claimant. The claimant was introduced to the agency by the respondent. He worked for the respondent for some 3 to 5 days per week under agency terms. Both Mr Deeks and Mr Lyons formed a favourable impression of the claimant. The respondent paid for some training courses to equip the claimant with skills necessary to be a traffic management operative.

23. During this time, however, the respondent had a few complaints from one of its main contracts in Essex and Suffolk Water about the claimant sitting in a van and not completing his duties, which would be manual control, and not wearing the required PPE. Mr Lyons recalls attending one of his sites on an occasion after he received the complaint and he met with the claimant and explained to him the importance of wearing the required PPE. He reminded the claimant of his responsibilities and confirmed to him that if he could not adhere to the policy, he would have no choice but not to use him through the agency. The Tribunal notes that, while it accepts Mr Lyons's recollection of this, it does not accept his evidence as to the timing. This could not have been mid-January 2020, but must have been earlier, because of the chronology that follows.

24. Mr Lyons considered that things improved. The supervisor, Mr Deeks, approached Mr Lyons at work and asked him to employ the claimant on a full-time basis. Following a full discussion with Mr Deeks, they agreed to take the claimant on. This would be on guaranteed hours and with use of a company vehicle, subject to a 90-days trial period. Although he agreed, Mr Lyons was a little hesitant because he was concerned that the claimant, after a bright start with the agency, was not always compliant with the respondent's dress code. However, Mr Deeks assured Mr Lyons that he considered that he had seen some improvements in the claimant, and he felt that due to his improvements he deserved a chance rather than working through the agency.

25. There is some confusion in the evidence as to when the claimant became an employee of the respondent. The claimant suggests that it was 3 January 2020. Mr Deeks's evidence is that it was 5 January 2020. The documentary evidence points towards it being later and perhaps from 20 January 2020. Nothing hangs upon this, except that it is symptomatic of the vagueness of the evidence in places.

26. On 13 January 2020 an internal email records that the claimant is to be a new starter commencing employment with the respondent on 20 January 2020 [55]. A new starter sheet was attached [56-58]. Documentary evidence provided by the claimant apart from the hearing bundle shows wage slips dated 31 January 2020, 7 February 2020 and 14 February 2020. An HMRC form P6 (recording the claimant's previous earnings for the purpose of his employment commencing with the respondent) is dated 2 February 2020. Form P46 shows that his employment was due to start on 20 January 2020. DVLA form D796 (used to check a driver's record) was signed by the claimant on 13 January 2020.

27. The claimant already had 6 months experience in traffic management. He held a NRSWA unit 2 qualification. The unit 2 qualification allows the operative to work alone, installing any type of traffic management on a local authority road. Mr Deeks, as his supervisor, considered that the claimant started extremely well, was always keen to learn and always requested as much overtime as the company was able to offer him. His attitude had impressed Mr Deeks, and the respondent booked him onto a 12D T1T2 training course on 9 January 2020. It also booked him onto his 12D M1M2 Assessments at Gkology in Sudbury on 6 and 20 February 2020 and on 5 March 2020.

28. After starting work for the respondent, Mr Lyons also initially regarded the claimant's work to be of a good standard. After a week of the claimant's employment, Mr Lyons had to go to the head office in Boldon, Northumberland to collect a van. He asked the claimant if he would come with him to drive the van back, which he agreed to do. They then went to the head office and the claimant met Mr Paul Thompson, Mr Lyons's line manager, who was very complimentary about the claimant's initial start, stating that he had all the signs to be an excellent operative.

29. In his second week of employment, Mr Lyons had a complaint about the claimant from Essex and Suffolk Water that he was sitting in the van on site and, when requested to come out of the van, he was belligerent. When he stepped out of the vehicle the client noticed that he was wearing tracksuit bottoms and a pair of sliders on his feet. Sliders are a casual, open sandal. The Tribunal has considered the timing of this complaint and concludes that this is a separate complaint from the one mentioned above and arose during the employment period rather than the agency work period.

30. Mr Lyons went to the site. When he got there, the claimant was sitting in his van without his PPE gear. Mr Lyons then told him that he had to wear his PPE at all times. In simple terms, the claimant's failure to wear his protective gear was in breach of the respondent's rules and procedures, putting himself at risk of injury if an accident occurred and bringing the company into disrepute with health and safety guidelines.

31. On another occasion (undated), one night the claimant was working with Mr Lyons on a site in New London Road, Chelmsford. At about 3am Mr Lyons went to tell him that the job was complete and that they could pick the job up. However, he could not find the claimant on the site. He had already left to go home without asking or telling Mr Lyons about his intention to leave. Mr Lyons later called the claimant to say that his conduct was not satisfactory and that he needed to stay on site until the job was finished.

32. A couple of days later (again undated), Mr Lyons was driving up the A12 in his transit van doing about 70 miles per hour when he saw one of the respondent's trucks fully loaded with equipment fly past him at about 90 miles per hour. When Mr Lyons pulled into the yard, he realised that it was the claimant's van. Mr Lyons approached him and told him that he would end up killing someone going that speed and that his conduct was not acceptable.

33. On 11 January 2020, the claimant messaged Mr Deeks with a photograph of his van where he had got stuck in a width restriction and caused significant damage to his van. This was reported to Mr Lyons. They had a chat with the claimant and put this down to his inexperience in driving larger vehicles and that he would need to pay for the damage, but no formal disciplinary process would be taking place.

34. On 11 January 2020, Mr Deeks received a message from a resident from Great Bardfield in Braintree, informing him that there had been an incident where her car had been hit. This is likely to have been on 9 January 2020. See the accident report form at [116-117]. The claimant has also provided

screenshots of his text exchanges with the resident. The claimant had stopped on site and was looking at the damage when she exited her property. He told her that he saw a vehicle crash into her and fled the scene and that he had stopped as he was concerned for her car. She noticed he had a dashcam, but he said he was unable to show her the footage or email her the footage and instead gave her Mr Deeks's phone number.

35. Mr Deeks considered the claimant was obstructive in allowing him to view the dashcam footage, and after many repeated requests he managed to download the footage and, unfortunately, the camera was facing into the sky on the day of the incident. This meant that the respondent was unable to see the footage. Mr Deeks advised the resident of this.

36. Then, on 24 January 2020, the resident received a statement from her neighbour who had witnessed the collision and confirmed it was the claimant's van, KP69 XPF, which had crashed into the resident's car. The damage was extensive and, therefore, the Insurance company had to write-off the vehicle.

37. Mr Deeks was disappointed with the claimant because he considered that he was not open and transparent with him about the accident. He believed that the claimant misled both the resident and him, as well as the company, with regards to the accident. He believed that a simple admission of exactly what had happened at the first instance, although not ideal, would have been acceptable.

38. On another occasion (again undated), the claimant was involved in a collision with a stationary vehicle and drove off. However, the victim got his registration number and contacted Mr Paul Thompson at head office. When confronted about the incident, the claimant initially denied it, but at a later stage he accepted responsibility. After this incident, Mr Lyons had a discussion with Mr Deeks and explained that he did not think that the claimant was going to make it through the 90-days trial period. He explained to Mr Deeks his concerns with regards to the claimant's breaches of procedures.

39. On 31 January 2020, the claimant was sent to collect a set of two-way lights and signs for High St, Great Wakering. Mr Deeks received another traffic management company, MLP, asking if the respondent had collected their lights and he said that this was unlikely to be the case.

40. Mr Deeks later spoke to the claimant. It appeared that he had removed the job by mistake. This was a mistake that possibly could have happened due to both jobs being near each other. MLP posted on Facebook that their lights had been stolen. Mr Deeks contacted them and asked them to remove the post as it was a genuine mistake made by the claimant. They agreed to do so.

41. This incident was the subject of the WhatsApp group chat to which the claimant takes objection as the basis of his race-related harassment complaint. This appears in screenshot form at [59-64] and in transcript form at [95-97]. The relevant part of the conversation commences at 18:45:02.

42. The claimant sent a photograph of a road to show that the job had been completed. He said “Twyford Road cleared” [59]. AB acknowledged. Mr Deeks replied “What’s Twyford Road” (18:55:33). The claimant responded at 19:37:50 that that was the name of the road that came up [60]. CD joined in asking that he go back to get a picture of the road name so that it could be signed off. AB added: “time stamp”. EF asked for a selfie of the claimant by the road sign.

43. Mr Deeks then added: “Yeah, you were meant to pick up High Street, Wakering. Are you sure you collected our lights.” AB interjected: “Throwing up gang signs” and included an emoji which appears to be the “sign of the horns”. He added: “MLP have put up on fb a two way has been stolen”. Mr Deeks replied: “Just seen that” and “From Great Wakering” [61].

44. Then at 19:41:14 EF contributed: “Some big black fella in sliders apparently”. At 19:41:19 CD posted a short mp4 video [62]. The Tribunal has not viewed the video. It is agreed that this video shows a naked black man with an abnormally large penis and it is accompanied by background noises of animals, most probably horses. EF added: “And it says on there he was wearing three quarters length track suit bottoms”. CD adds: “With no shin pads”. AB contributes: “And a head of hair that resembles a microphone”, together with a microphone emoji (19:43:49) [63].

45. Meanwhile, at 19:41:59, Mr Deeks asks the claimant: “Can you go to the van and check its our stuff you collected”.

46. At 19:45:14 CD posted a stock photograph of a very badly damaged car and “ebz driving I don’t think It hit them” [63]. Three minutes later the claimant replies with three “laughing with tears” emojis [63] and “Yeah I definitely didn’t do that” (19:48:28).

47. AB rejoins with: “Who’s lights did you collect my G”. The claimant replies: “I dunna but I wasn’t happy how they were left out” (with an angry red face emoji) and “It’s definitely ours”. AB asks: “5 cones?”. The claimant responds: “Big cones yeah” and It’s our”. AB says “That’s the one”.

48. At this point Mr Lyons makes his only contribution at 19:51:06: “OMG”.

49. At 19:52:04 AB says: “[CD]’s on route to check … #callout”; to which CD replied “£££”. The claimant then said: “Bet [CD]’s ready for that the greedy sloth” (with three laughing faces emojis). CD responded: “Sloth bit out of order mate” and attached a photo of Coolio [64]. Coolio is the (now deceased) American rapper and member of a gangsta rap group, perhaps most well-known for his popular hit Gangsta’s Paradise. The photo referenced Coolio’s distinctive braided hairstyle. AB replied: “That’s me if I grow my hair” and “Sloth” accompanied by three “rolling on the floor laughing” emojis.

50. At 20:01:27 Mr Deeks intervened: “You can’t be calling people sloths mate. [CD]’s got anxiety”. CD replies, with a “rolling on the floor laughing” emoji, “prick”. It is not clear to whom that is directed.

51. At 20:07:50 the claimant re-enters the chat: “See the lil shit since when doi I look like Coolio” with a red face angry emoji. CD replies: “U don’t buy you got those same lil frazzles for hair” with two laughing face emojis (20:08:41).

52. There is no further activity on the group chat until 20:59:16. There is nothing further of note and the claimant takes no further part that evening.

53. For context, the Tribunal has been provided with a transcript of the WhatsApp group chat from 3 January 2020 through to 15 February 2020. Apart from the exchanges on 31 January 2020 detailed above, there seems nothing otherwise remarkable or objectionable about the group chat. It is the usual mixture of work-related and non-work-related matters that are often a feature of such groups. There is no evidence there of any individual or group animus against the claimant or that he was unable to hold his own within the group. There is no evidence that the chat of the evening of 31 January 2020 was the subject of complaint or grievance or review.

54. On 13 February 2020, the claimant was instructed to attend a site at Chignal St James, Essex. (The claimant has disclosed a screenshot of his work instruction from Mr Deeks). Prior to arrival, the claimant was told to wait for the contractor to arrive to set up the site and not to guess the location. Despite this instruction, the claimant proceeded to set up the site on a dangerous 60 mile per hour road, without the contractor being present and in the wrong location. When the contractor arrived on site, the claimant had already left and could not correct his error. The contractor then rang Mr Deeks because the job was put out in the wrong place.

55. Mr Lyons’s evidence at this point is confusing two different matters. He refers to there being discussions on the respondent’s WhatsApp group chat about the claimant's failure to carry out his duties correctly. He says that the discussion starts on [59-61]. However, in the Tribunal’s assessment this is the discussion that took place on 31 January 2020 rather than on 13 February 2020. However, this does not affect the reliability of the essential ingredients of his account.

56. The contractor had a crucial three-hour window to start remedial groundworks. However, this was not possible due to the claimant's error. The claimant was contacted and asked to return to the site to rectify the issue. The claimant refused to return to the site and stated that it was not his responsibility. The respondent urged the claimant to return and eventually he agreed. However, he did not arrive until two hours later. The claimant admitted at the time that he had set the site up in a dangerous position on a winding road. The claimant later went back and moved the site 70 metres, but because he was rushing, he did not move the forward warning signs to the right place and he put a traffic light on a dangerous bend, and then left again.

57. On 14 February 2020, Mr Lyons and Mr Deeks asked the claimant to come in and discuss the above incident. When he came in, he became belligerent. Mr Lyons informed him that due to the incidents over the last few weeks he could longer keep him as an employee of the respondent. As he was in his 90-days trial period, Mr Lyons informed him that his services were no longer

required. He terminated his contract of employment. Mr Lyons told the claimant that he would still be welcome back in his previous role as temporary staff through the agency, but he would not be able to drive the respondent's vans, because in the short time he had been with it, he had had two driving accidents.

58. Mr Lyons told the claimant that he would drive him home. They went to clear his van. The claimant took out four blankets, two pillows and at least 20 McDonalds bags, which were behind the driver seat of the van. As he got in the van with Mr Lyons to drive him home, the claimant asked Mr Lyons if he was sure about his decision and if there was anything that could be done. Mr Lyons replied that the decision had been made and he wished him well for the future. Mr Lyons considered that they left on good terms when he dropped him off at his home.

59. On his return to the depot, Mr Lyons noticed text messages on his phone from the claimant calling him "lil racist pig" with an emoji of a pig, and to the effect that he did not like black men in his depot [118]. Mr Lyons sent the text to his line manager, Mr Thompson, as he was appalled at such a slur. Mr Lyons's evidence is that his policy in employing staff is all-inclusive and he gives evidence of that (which the Tribunal need not set out here). His evidence is that his only criterion is that an employee should do their job properly to HSE standards, follow reasonable management instructions, be always punctual, treat customers and the public with the upmost respect, and act as ambassadors of the respondent always. He suggests that he has built a stable team with a high retention of staff that have been trained at great expense and were all new to the trade.

60. In his amended particulars of claim [46] the claimant claimed that it was not legal for him to carry out the duties asked of him on 13 February 2020. Mr Lyons disputes that in his witness statement. The claimant put himself forward to carry out the job in question because he wanted to earn some overtime. The claimant also claimed that this was in breach of the working time regulations. Mr Lyons also disputes this on the basis that the claimant would have done a 10-hour shift and gone home. He would have had the opportunity to rest before going out on this specific job.

61. Mr Lyon's position is that the claimant was dismissed because within the short period he worked for the respondent, Mr Lyons had received two complaints, and he sped past him doing 90 miles per hour in a works vehicle. The claimant also refused to go back on site to correct a job he admitted he had done incorrectly [120]. He just was not suitable for the position.

62. On 16 February 2020, another employee (CD) approached Mr Lyons and told him that the claimant wanted a "straightener" with him [65]. On the same date, in a text message the claimant also asked CD if he would mind speaking to his solicitor, if needed, about the night he said he was too tired to do the job.

63. About 3-4 weeks after the claimant left the respondent's employment, Mr Lyons saw him driving another traffic management company's van. He parked up and came towards him. At first, Mr Lyons thought that he was going to be confrontational because of what he had told CD earlier. However, when

he approached Mr Lyons, he was smiling and very friendly, asking him how he was doing. Mr Lyons said to him that he had heard that he was taking the respondent for unfair dismissal, and he said: "Yes, I'm only doing it because they haven't paid me my wages (£800)". Mr Lyons said to him that he thought it is because he had smashed up a works van [116-117] and the company was holding the money to pay for the damage to the vehicle. After a brief exchange, the claimant said "see you" and he left.

64. The claimant's race discrimination complaint as to dismissal compares his treatment with that of CD. CD joined the company on 27 May 2019, some 8 months before the claimant. In September 2020 Mr Lyons had cause to discipline CD on two separate occasions for breach of company procedures. At the time he committed the misconduct, he was no longer on a 90-days trial. He had worked for the respondent for 16 months and was a long time out of his trial period. The claimant had been with the respondent just over one month and was still in his 90-days trial period. CD received a verbal warning for his conduct. The claimant had left the company some 7 months earlier. CD subsequently resigned in October 2022 in the face of another disciplinary matter. He had been with the company for over three years in total.

65. After his dismissal, the claimant did some work for the respondent through an agency. There was also some communication about unpaid wages and whether the respondent had provided a contract of employment. That is a dispute which is not before the present hearing.

Relevant legal principles

66. The relevant statutory provisions are sections 9, 13, 23, 26, 39(2), 40, 123 and 136 of the Equality Act 2010. No case law has been cited to the Tribunal.

67. Race is a protected characteristic. Section 9 provides that race includes colour, nationality, and ethnic or national origins. The claimant is a Black British man and he compares his treatment with a White British man.

68. Section 13 defines direct discrimination as arising when a person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others. Section 23 provides that on a comparison of cases for the purposes of section 13 there must be no material difference between the circumstances relating to each case.

69. Section 26 provides, so far as relevant, that 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. Race is a protected characteristic for this purpose. In deciding whether conduct has the effect referred to above, 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.

70. Section 39(2) provides that an employer (A) must not discriminate against an employee of A's (B): (a) as to B's terms of employment; (b) in the way A affords B access, or by not affording B access, to opportunities for promotion, transfer or training or for receiving any other benefit, facility or service; (c) by dismissing B; (d) by subjecting B to any other detriment.

71. Section 40 provides that an employer (A) must not, in relation to employment by A, harass a person (B) (a) who is an employee of A's; (b) who has applied to A for employment.

72. Section 123 provides that, subject to the Acas early conciliation provisions, proceedings on a complaint to the employment tribunal 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.

73. Section 136 provides that if there are facts from which the tribunal could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the tribunal must hold that the contravention occurred; but this provision does not apply if A shows that A did not contravene the provision.

74. No case law was cited to the Tribunal. The principles of law arising under section 13 (direct discrimination), section 123 (time limits) and section 136 (burden of proof) are very well known, and they are not reproduced here, as are the principles deriving from *Selkent Bus Co Ltd v Moore* [1996] ICR 836 EAT as to an amendment of a claim. However, it might be helpful to set out the more important legal principles deriving from the case law under section 26 (harassment), drawing upon the commentary in *Harvey on Industrial Relations and Employment Law* and the IDS Employment Law Handbook, Volume 4, *Discrimination at Work*.

75. Section 26(1) contains the general definition of harassment. It is subject to the important qualification in section 26(4) which contains both subjective and objective elements. The obligation on an employer not to harass an employee or applicant is contained in section 40(1).

76. The Tribunal notes the wider formulation of “related to” rather than “because of”. See paragraph 7.9 of the Equality Code of Practice, which states that it should be given “a broad meaning in that the conduct does not have to be because of the protected characteristic”. Whether there is harassment must be considered in the light of all the circumstances. Where it 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. On the other hand, even if the other elements of harassment are clearly present (for example, in a case of offensive or inappropriate language), the tribunal must still consider the “related to” question and, if so finding, make clear on what grounds.

77. As to section 26(4), if the claimant's subjective view is not established on the facts, the tribunal need go no further: *Pemberton v Inwood* [2018] EWCA Civ 564, [2018] IRLR 542, [2018] ICR 1291 CA. If it appears to the tribunal that it was not reasonable for the conduct to have the claimed effect, that too will

end the necessary inquiry. The importance of the objective element in section 26(4) (given that the primary question is the subjective perception of the claimant) was emphasised in *Ali v Heathrow Express Operating Co Ltd* [2022] EAT 54, [2022] IRLR 558, as was its nature as primarily a question of fact for the tribunal.

78. As to race-related harassment specifically, see *Richmond Pharmacology v Dhaliwal* [2009] IRLR 336 EAT where Underhill P (as he then was) said that it is a "healthy discipline" for a tribunal to go specifically through each requirement of the statutory wording. He pointed out that (1) the phrase "purpose or effect" clearly enacts alternatives; (2) the proviso in section 26(2) is there to deal with unreasonable proneness to offence (and may be affected by the respondent's purpose, even though that is not per se a requirement); (3) "on grounds of" is a key element which may or may not necessitate consideration of the respondent's mental processes (and it may exclude a case where offence is caused but for some other reason); (4) while harassment is important and not to be underestimated, it is "also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase".

79. The importance of the link to race as the protected characteristic was emphasised in *Nazir v Asim* [2010] ICR 1225, [2010] EqLR 142 EAT.

80. *Dhaliwal* remains a leading authority on the meaning of harassment, but in *Pemberton v Inwood* [2018] EWCA Civ 564, [2018] IRLR 542 Underhill LJ pointed out that a slight change in the wording now used in section 26 means that part of his guidance needs to be reformulated (see para [88] of the judgment). See also *Bakkali v Greater Manchester Buses* [2018] IRLR 906, EAT.

81. The latest guidance thus is that in order to decide whether any conduct falling within section 26(1)(a) has either of the proscribed effects under section 26(1)(b), a tribunal must consider both (by reason of section 26(4)(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of section 26(4)(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also consider all the other circumstances – section 26(4)(b). The relevance of the subjective question is that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The relevance of the objective question is that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for him or her, then it should not be found to have done so.

82. There can be harassment under this provision arising from an isolated incident. For an example, see *Lindsay v London School of Economics* [2013] EWCA Civ 1650, [2014] IRLR 218.

83. It might be possible for the employer to be liable for exacerbating the position by its own acts or omissions. However, the employer does not "create" the banned environment merely by inaction or by not dealing with the problem in

the way the claimant thinks it ought to have done: *Conteh v Parking Partners Ltd* [2011] ICR 341, EAT; although compare *Sheffield City Council v Norouzi* [2011] IRLR 897 EAT.

Discussion

84. The Tribunal begins by considering the dismissal complaint.

85. The claimant had no previous disciplinary record. There had been no previous verbal warnings. However, there was evidence of concerns about his performance, which had been discussed with him by Mr Lyons or Mr Deeks or made the subject of specific management instructions (for example, about the use of PPE).

86. As is apparent, in particular, from the witness statement of Mr Lyons, there had been complaints about him from one or more contractors. That was about the claimant sitting in his van, not wearing PPE and not taking manual control of the traffic management system. Mr Lyons explained the importance of wearing PPE (whether this was during his period as an agency worker or latterly once he was an employee matters little). It seems that, despite his protests, he was found to be wearing tracksuit bottoms and "sliders", rather than PPE (and, of course, this was later referenced in the chat group on 31 January 2020). Mr Lyons gave the claimant a specific instruction about this matter.

87. Mr Lyons's concerns went further. On one occasion the claimant left a job early and without informing anyone. On another, he was observed driving a company vehicle at an estimated 90 mph. He caused some (probably relatively minor) damage to a company vehicle in a restricted width zone. He was involved in damage being caused to a third party's vehicle in a residential area and exacerbated the matter by denying his responsibility while attempting to suggest that he had seen another vehicle as being at fault. On 31 January 2020 he picked up the wrong equipment and again appeared unwilling to accept that he might be to blame.

88. Then there was the incident on 13 February 2020 concerning setting up a traffic management system in the wrong place and initially refusing to return to correct his mistake. An account of this is given by Mr Lyons in his witness statement, although Mr Lyons's cross-references to pages of the documents bundle appears to confuse this incident with the earlier one on 31 January 2020. That matters little, as the facts of this last incident are tolerably clear.

89. The respondent was entitled to dismiss the claimant for this last occurrence and for the cumulation of incidents preceding this. He had less than 2 years' service. He did not qualify for unfair dismissal protection. He was on a 90 days trial period. The respondent would have been entitled to take the view that adopting and following a fair procedure was neither required not necessary. Whether the claimant had commenced employment on 3 January 2020 or later, he had at best 6 weeks service.

90. The evidence strongly suggests that the dismissal of the claimant had nothing whatsoever to do with his race. However, does the treatment of CD change

that perspective? In the Tribunal's judgement, it does not. CD had worked for the respondent for over 3 years by the time his employment terminated. Even at the time of the claimant's employment CD was long out of his trial period and had longer service than the claimant. He was subjected to the respondent's disciplinary procedures, and resigned before it could be completed, but the circumstances of the claimant and of his comparator were not the same. There are material differences between the two employees. The respondent has satisfactorily explained the difference in treatment, and it can be confidently concluded that the difference in race did not explain the difference in treatment.

91. The complaint of direct race discrimination in respect of dismissal is not well-founded and that complaint must be dismissed.

92. The Tribunal turns then to the complaint of race-related harassment. The Tribunal found this complaint to be more troubling and it was the more difficult complaint to determine.

93. This complaint concerns the WhatsApp group chat on 31 January 2020. The relevant passage commences at 18:45:02 [95] and concludes at 20:08:41 [96]. It begins because there was some initial doubt about the road details the claimant provided when signing off that evening's job. Mr Deeks raised some appropriate questions about it. That resulted in some, at first, unobjectionable "banter" about it from the claimant's fellow employees, AB, CD and EF, although it really had nothing to do with them. Neither Mr Deeks nor Mr Lyons were involved in that "banter".

94. Mr Deeks then questioned whether the claimant had collected the correct equipment. It was legitimate of him to do so. That was compounded when another traffic management company posted on Facebook that its equipment had been stolen. Both Mr Deeks and AB referred to that. At this point also there is nothing objectionable.

95. What then followed from AB, CD and EF was both unnecessary and objectionable. There is a reference to "throwing up gang signs". The Tribunal understands this to mean a reference to gang members using distinctive hand signs or hand gestures to signify gang membership. Although elsewhere, earlier in the chat there is a reference to "gangs", this is clearly a reference to the contractors and their crew or personnel working on a particular road. Then there is a reference to a "big black fella in sliders". That is followed by the short video of a naked black man with an abnormally large penis and with animal noises in the background. There is a reference to "track suit bottoms" and "no shin pads". There is a reference to "my G". It is a reference to a close friend or slang for "bestie". It concludes with a reference to hair like a microphone.

96. Taken in its individual parts or read as a whole, the Tribunal concludes that this last passage of chat is referring to or directed at the claimant. It contains racial stereotypes and/or references to supposed black culture. It is not actually suggesting that the claimant has stolen another company's equipment, but that is the platform on which the references to the claimant and indirectly to his race (Black British) are being made.

97. Mr Deek's contributions remain work-focused. He asked the claimant to check his van. CD is sent out on call to check the location. Mr Lyons's only contribution is "OMG", which was his expression of surprise at what was being alleged by the other traffic management company. Neither Mr Lyons nor Mr Deeks are involved in the "banter", if that is what it is.

98. The claimant himself then becomes involved. He calls CD a "greedy sloth". CD responds objecting and AB also participates. CD attaches a photo of Coolio (which the Tribunal interprets as directed at the claimant). AB makes a self-deprecating remark about his own hair and also repeats the word "sloth". Mr Deeks objects to the use of the word "sloth" and refers to CD's "anxiety". It seems that CD objects to this. CD calls someone – it is not clear who – a "prick". The claimant says: "See the lil shit since when do I look like Coolio" with a red face angry emoji. CD replies: "U don't buy you got those same lil frazzles for hair" with two laughing face emojis. This last passage is relatively less objectionable than the previous passage. Insults are flying, but they are perhaps less racially charged, although not completely so.

99. There are at least three aspects to this group chat: (1) the video; (2) the references that appear to be to the claimant by reference to his colour and unorthodox approach to not wearing PPE (there is also a later reference to the claimant's driving and accident record); and (3) the references to his hair or hair style. The issues in this complaint, as defined in the case management orders, are (1) and (3), but (2) provides some context within which to understand (1) and (3).

100. How does this fit into section 26 Equality Act 2010?

101. It cannot properly be suggested that either Mr Lyons or Mr Deeks participated in improper "banter" or condoned it. The evidence of the "read receipts" does not bear that weight. The Tribunal has accepted their explanation for the largely hands-off approach that they took that evening and generally in relation to the WhatsApp chat group. However, this was a work-related chat group, set up for that purpose, albeit using the participants' private mobile phone numbers. The respondent is statutorily liable for the actions of its employees within the chat group.

102. This was undoubtedly unwanted conduct in the sense that it was unwelcome and uninvited.

103. It is conduct that relates to the claimant's race or colour as a Black British man. The video content plays to a particular racial stereotype about black men and their sexual prowess or sexual organs. The references to hair are to styles of black (Afro) hair that are an important part of a black person's identity and culture.

104. There is little here to suggest that this is a "purpose" case. The evidence strongly points to this being a case that depends upon what was the "effect" of the conduct upon the claimant. It is an "effect" case.

105. The conduct has the potential to violate the claimant's dignity. It also has the potential to create a degrading, humiliating or offensive environment for the claimant. This is not a case involving hostility or intimidation taking the conduct in its proper context.

106. So, what was the claimant's perception of this conduct? What are the circumstances in which it took place? Was it reasonable for the conduct to have that effect?

107. Taking the last point first, it would have been reasonable for the claimant to have perceived this conduct as violating his dignity or as creating a negative working environment for him. Then as to the second question, the circumstances of the case also point to the possibility of this conduct having the undesired or undesirable effect. It was a work-based chat group. The concerns arose during a discussion of a work-related matter – regarding the address of the job and then the question about whether the claimant had picked up the right equipment.

108. However, what was the claimant's perception of it? There are several features in the evidence of note.

109. The chat group comprised the claimant's fellow employees. CD and EF, at least, were people he already knew outside the workplace. They were friends in a wider sense. There is no evidence, other than assertion, that this chat was typical of racially-related "banter" the claimant had had to put up with in this workplace before. There may well have been previous exchanges between the claimant and AB about each other's hair and hair styles, without objection. He raised no complaint about the chat within the chat or in subsequent chats. He engaged himself in the "banter". He appeared to be giving as good as he got in return. There is no evidence that he raised it with Mr Lyons or Mr Deeks after the event – or with AB, CD or EF. There is no evidence that the chat was intended to be malicious or other than (misplaced) humour.

110. The chat was not made the subject of a grievance by the claimant. The Tribunal accepts Mr Lyons's view that he was perfectly capable of doing so and that he had raised and stood his ground on other unrelated matters before about which he was unhappy. He did not raise it at the point of dismissal two weeks later nor when Mr Lyons drove him home that day. He did not raise it following his dismissal or when he accused Mr Lyons of being a racist pig who did not want black men in his workplace. There is no evidence that he raised it with Acas at the end of February 2020 or afterwards (the Tribunal appreciates that this is a confidential process, but the claimant does not allude to it). He made no mention of it in his ET1 – there is absolutely no reference to it.

111. The claimant raised it for the first time before Judge Russell at the case management hearing on 3 August 2020, over 6 months after the event. He did not particularise it until 12 August 2020. The complaint was further refined before Judge Burgher on 21 September 2020.

112. Despite his assertion, there is no other witness evidence or documentary evidence that this form of harassment was part and parcel of the claimant's working environment with the respondent, either before 31 January 2020 or afterwards, or while he was an agency worker or an employee of the respondent. The evidence to the contrary suggests that he returned to working for the respondent as an agency worker on an irregular basis, despite the incident on 31 January 2020 and his dismissal on 14 February 2020.

113. This does not suggest that his perception of the conduct is of the kind required by section 26.

114. The Tribunal is alert to the objectionability of material like the video and comments that rely upon a stereotype of black men and black culture. The respondent does have a problem that it needs to address if it does not regulate work-related WhatsApp groups such as this. The Tribunal is also sensitive to the characterisation of group chat as merely "banter", a word often used by participants in such groups to sanitise objectional behaviour and language. The Tribunal is further aware of the difficulty that an employee can face in objecting to such behaviour or language at the time or raising a complaint or grievance about it after the event. It is often easier to go along with it to fit in or to be accepted or to enjoy a quiet life or to avoid a negative reaction.

115. However, the claimant has given no evidence as to injury to his feelings. It is not addressed in his witness statement or in his schedule of loss or in his evidence before this hearing (at least, not adequately). We take account of him being a litigant in person, but we would have expected some signal of this given the judicial management of the case and the orders made. This all points away from the claimant actually perceiving this conduct to be of the kind that amounts to racial harassment <u>of him</u>, as opposed to generally objectionable racially tinged behaviour to which he objected.

116. If the Tribunal was wrong in that conclusion, the complaint is out of time, and it would not have been just and equitable to extend time. The claimant could have raised this very easily in the ET1, which was presented within 4 weeks of the incident and within 2 weeks of the dismissal. If not then, then shortly afterwards. He could and should have done so. In this hearing he has shown himself to be very aware of his rights and of how to pursue them. He is an obviously intelligent and articulate man. His evidence as to what advice he sought and when and from who was confused and contradictory. He has provided no real explanation for the delay

117. The harassment complaint has turned out to be not well-founded, and the respondent has obviously not had any real difficulty in defending it. There would be no obvious prejudice to it had it been allowed to proceed at an earlier stage. However, the claimant has failed to give an adequate explanation as to why he did not bring this second complaint in time when the first complaint was made so promptly. It is not just and equitable to extend time.

Decision

118. The claimant's complaints of direct race discrimination and of harassment related to race are not well-founded.

119. In addition, the complaint in respect of harassment related to race was not presented in time and it is not just and equitable to extend time.

120. The claim is dismissed.

Judge Brian Doyle
DATE: 28 October 2022