EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Kehinde Frank Isewon	**v**	Niftylift Ltd

Heard at: Cambridge (by CVP)

On: 4, 5, 6 and 7 October 2022
In Chambers: 7 and 26 October 2022

Before: Employment Judge Tynan

Members: Ms E Deem and Ms C Smith

Appearances
For the Claimant: In person
For the Respondent: Mr K Zaman, Counsel

JUDGMENT

1. The Claimant's complaint of harassment pursuant to section 26 of the Equality Act 2010 succeeds in so far as the Respondent called the police on 23 June 2020 to attend its site and remove the Claimant.

2. The Claimant's remaining complaints that he was discriminated against contrary to the Equality Act 2010 are not well founded and are dismissed.

REASONS

3. The Claimant presented his Claim to the Employment Tribunals on 4 September 2020, following Acas Early Conciliation on 6 July 2020. He complains of direct race discrimination and that he was subject to race harassment. Any claims relating to matters that occurred prior to 6 April 2020 are potentially out of time.

4. There was a single agreed Hearing Bundle running to 263 pages. The page references in this Judgment correspond to that Bundle.

5. The Claimant gave evidence and we heard from three witnesses on his behalf, Adeline Uwimana, Emeline David and Saif Sayed. Ms Uwimana and Mr Sayed's evidence was not in a conventional form, in each cases comprising an exchange of text messages. However, Mr Zaman did not raise any objection to the Tribunal admitting their evidence. Additionally there were written statements by Lucy Hoyte and Allen Santos; we have read their statements but give limited weight to their evidence in circumstances where they did not attend Tribunal.

6. On behalf of the Respondent, we received witness statements and heard evidence from:

    a. Mr Steve Redding, Development Director – Mr Redding scored the Claimant against the Respondent's redundancy selection matrix and took the decision to make the Claimant redundant;
    b. Dr Martin Cross, Engineering Infrastructure Manager – Mr Cross was the Claimant's line manager, though was not involved in the Claimant's redundancy as he was furloughed at the relevant time;
    c. Ms Kerry Lyall, HR/Payroll Manager;
    d. Mr Peter Marshall, who was employed as a Project Engineer at the Respondent until February 2020 – the Claimant and Mr Marshall were work colleagues, though had different line managers;
    e. Ms Katie Smith, who was employed as an Expeditor at the Respondent until October 2020 – the Claimant alleges that he was harassed by Ms Smith in the course of their employment with the Respondent; and
    f. Mr Kieran Parsons, Maintenance Team Leader – Mr Parsons was involved in the arrangements in June 2020 whereby redundant employees collected their belongings from the Respondent's site.

Findings of Fact

7. We set out our primary findings of fact below. The Tribunal is required to determine a total of eight issues, as set out in the record of preliminary hearing held on 16 July 2021 (page 42).

8. The Claimant commenced employment with the Respondent on 29 October 2018 and was terminated on grounds of alleged redundancy on 22 June 2020. He has insufficient qualifying length of service to bring a claim of 'ordinary' unfair dismissal.

9. The Claimant's main terms of employment and signed Job Description are at pages 118 – 121 and 112 – 113 respectively of the Hearing Bundle. There is an Employee Handbook at pages 49 -111 of the Hearing Bundle, that contains, amongst other things, the Respondent's policies and procedures in relation to Equality, Harassment, Disciplinary and Grievance. The Respondent does not have an established Redundancy Policy and Procedure. In the course of the hearing we were taken to a standalone one page document entitled, "Company Training Policy" (page 227).

10. We accept the Claimant's evidence that he was not provided with a copy of the Employee Handbook on joining the Respondent, nor was he told where he might find a copy, though he would have been aware from the main terms of employment document signed by him that there was an Employee Handbook. Ultimately, nothing turns on the matter.

11. The first year of the Claimant's employment passed without incident. There does not seem to have been any probationary review of the Claimant's performance during his initial months with the Respondent. The Respondent's approach to appraisal could be described as 'patchy'. Dr Cross acknowledges in his statement that its appraisal system could be more consistent and transparent. He suggests that he gave on the job feedback to his reports. However, we find that this too could be patchy and, in the case of the Claimant, that the lack of communicated feedback is a factor in the Claimant coming to believe that he was discriminated against. The lack of a consistent and transparent appraisal system at the Respondent meant that discussions around performance and career development often did not happen or, to the extent they did, they were unstructured and undocumented. We return to this.

12. In his witness statement, Mr Marshall describes frustrations with the Claimant and states that he felt the Claimant was not fully invested in his job. He describes this as disheartening when others were working hard. However, Dr Cross accepted that the Claimant often worked long hours; he did not call into question his commitment, rather the issue for him was whether the Claimant was fully effective in his role. In her witness statement Ms Smith states that she had formed the view that the Claimant was not competent at his job, though she also states that she did not have much involvement with the Claimant. We discount her comments regarding the Claimant's competence; she is not in a position to judge his performance and, in any event, we do not think she necessarily expresses herself in measured terms. If there were any concerns regarding the Claimant's performance, we find these were never shared with him and accordingly that it came as a shock to him in 2020 when his performance was rated by Mr Redding as "meets some expectations of the role" when he was scored against the Respondent's redundancy selection matrix.

<u>Issue 2.1</u>

13. At the preliminary hearing on 16 July 2021 it was identified that the Claimant's first complaint is that he was not provided with management training. Five named comparators are identified in this regard. In the course of the final hearing, the Claimant clarified that his complaint in fact relates to Dr Cross' failure to progress or approve his request for TRIZ training. Whilst the Claimant's five named comparators did not request or undergo TRIZ training, the Claimant relies upon them as evidential comparators in so far as he believes they received management training appropriate to their identified career development needs.

14. TRIZ training is about inventive problem solving. From the materials in the Hearing Bundle, it is relevant to the Claimant's role as Engineering Project Manager, since it is focused on how to deliver change, increase innovation and problem solve on a timely basis, these being skills self-evidently required of a Project Manager. In any event, it has not been suggested by the Respondent in the course of these proceedings that TRIZ training was not relevant to the Claimant's role. The Claimant approached Dr Cross on 2 January 2020 about a TRIZ course that was of interest to him. This is in the further context that approximately 24 of the Claimant's colleagues across all production and engineering teams had been sent on a Level 3 Management Course in October 2019.

15. The Claimant's approach to Dr Cross was in accordance with the Company Training Policy which notes the Respondent's commitment to continuing development. The Policy positively encourages staff to identify their training requirements, with an emphasis on cost effective training that relates to the individual requirements of a job (page 227).

16. It was necessary for the Claimant to chase Dr Cross for a response on 16 January 2020. This led to a discussion during which the Claimant was tasked by Dr Cross with investigating whether it might be more cost effective for TRIZ training to be offered to a group of staff. The Claimant reported his findings to Dr Cross by email on 3 February 2020 but heard nothing further from him. Dr Cross explains that this was "due to immediate pressures", including Brexit related issues and a declining order book. Dr Cross' evidence is that when Covid-19 restrictions were introduced in March 2020, the Respondent put all non-essential training on hold. Ms Lyall is less specific as to when this was; she refers to a moratorium on training costs in early 2020. We find that there were no specific restrictions on staff training in January 2020 or into early February 2020, since Dr Cross would otherwise have explained this to the Claimant at the time and would not have tasked him with looking into the cost of training a group of staff. We are further supported in this conclusion by the FAQs document from the redundancy consultation process (page 151) which makes no mention of a moratorium on training as one of the measures implemented by the Respondent to control costs.

17. In the course of the redundancy consultation process, the Claimant raised concerns with Ms Lyall regarding the TRIZ training. He asked her, "where is the fairness and equality here?" Her response was perfunctory; she referred to the company having worked towards reducing costs for some time (page 175). It was an inadequate explanation. We find that she did not investigate the Claimant's concerns or give active consideration as to whether the Respondent had acted in accordance with its own documented Policy or how the Claimant had been treated compared to others.

<u>Issues 3.1 and 3.2</u>

18. Issues 3.1 and 3.2 follow in the chronology of events. The Claimant alleges that an email sent by Mr Marshall at 18:24 on 15 January 2020

constitutes harassment. The email is at page 127 of the Hearing Bundle and followed a stoppage on line HR15/17 MK3/MK4.

19. In his email, Mr Marshall confirmed that the line was affected by a single part which was expected by 16 January 2020, with the result that the line would be operational again on 17 January 2020. He concluded by stating that he would discuss the matter again in a stakeholder meeting on 16 January 2020. Mr Marshall's email was a continuation of a short email chain started by the Claimant albeit, as we return to, Mr Marshall brought others additionally into copy. His email generated a somewhat testy response from the Claimant at 19:11. The Claimant attached a 'shortage report' to his email and went on to say, "Next time, please double check and ensure information is accurate before sharing". The Claimant's response was needlessly defensive, partly, we find, because he perceived Mr Marshall's email to implicitly criticise him as the lead Project Manager, but mainly because the Claimant recognised that he had not been contactable, as he might have been, when the issue on the line had arisen and, more significantly, that he had failed to follow the matter up after he had initially discussed the situation with Mr Marshall. This had left Mr Marshall in the awkward position of having to continue to deal with the situation even though the Claimant was principally responsible for the line.

20. The Claimant's email at 19:11 led to a further exchange of emails between himself and Mr Marshall, into which others continued to be copied. Dr Cross intervened and made clear his displeasure that any dispute between them was being conducted in a group email. The Claimant and Mr Marshall were both still at work and might have spoken about the matter rather than continue to 'spar' about it in emails. Dr Cross asked them to put together a timeline of what happened so "we can work out how to avoid this in the future". We regard that as a sensible approach that allowed the Claimant and Mr Marshall to provide their perspective and which was focused on resolution, rather than on attributing blame.

21. The following day, the Claimant and Mr Marshall provided their respective timelines to Dr Cross; in fairness to each of them, they provided a factual account without seeking to attribute blame. Mr Marshall additionally identified a practical solution to avoid the situation occurring again.

22. When Mr Marshall did not hear back from Dr Cross he chased him for a response to his email on 20 January 2020. There is no evidence that any response was forthcoming or that Dr Cross spoke to either Mr Marshall or the Claimant. The Claimant did not chase Dr Cross for any response, though his email of 16 January 2020 gives no indication that he was expecting one.

<u>Issues 3.3 and 3.4</u>

23. The Claimant alleges that he was harassed by Ms Smith during a production meeting on 23 January 2020 and again when she sent him a "belittling" email the following day.

24. Issues 3.3 and 3.4 are linked to Issues 3.1 and 3.2, in so far as Ms Smith was the original recipient of the Claimant's 15 January 2020 email regarding the line stoppage that day. Her response to him on 15 January 2020 (page 128) is implicitly critical of him and it fits with her witness statement in which she questions the Claimant's competence.

25. Ms Smith's evidence is that she cannot remember what was said during the subsequent production meeting on 23 January 2020. In section 6 of his witness statement the Claimant does not describe in terms what is alleged to have been said by Ms Smith on 23 January 2020, except that he felt bullied and humiliated. He provides a more detailed account in his Particulars of Claim and also relies upon Mr Santos' witness statement. Mr Santos was unable to attend Tribunal to give evidence. Mr Santos' witness statement is not entirely consistent with the Particulars of Claim; he refers to the Claimant having issued a request/command to Ms Smith and that this led her to answer the Claimant "as if Frank knows nothing and told Frank to go and get a training in-front of everyone". That is not what the Claimant alleges happened; he says that Ms Smith questioned who he was to tell her what to do and that he was not her boss, but does not allege that Ms Smith said in front of others that he needed training.

26. We find that the gist of what Ms Smith said to the Claimant during the production meeting on 23 January 2020 was that he was not her boss and could not tell her what to do. We further find that she had been provoked by what she perceived as rudeness on the part of the Claimant in issuing an instruction to her in front of others. It was only in her email sent at 07:56 on 24 January 2020 that Ms Smith asked the Claimant, a little tartly we think, if he required training on Visual, the Respondent's stock control system (page 137). Whilst she did not say this in front of others at the production meeting, she did copy various of the Claimant's peers in on her email. We find that she was having a public dig at the Claimant, partly because she had formed an adverse view of his competence but mainly because she felt embarrassed or even slightly humiliated by how he had spoken to her the previous morning in front of others. It was petty behaviour on her part even if she felt provoked in the matter.

27. The Claimant alleges that Ms Smith said "he is black, what does he know to be telling me and asking me to do things". This comment was allegedly overheard by the Claimant in a corridor. The Claimant did not raise this aspect with the Respondent at any time before submitting his Claim Form. We find that surprising given the alleged explicit reference to his colour. We note the Claimant made no mention of Ms Smith's alleged comments during a covertly recorded conversation with Dr Cross on 24 January 2020. Dr Cross is rightly affronted that the Claimant recorded him without his knowledge or agreement. Be that as it may, given the Claimant made a recording, presumably on the basis that he might wish to rely upon it in the future, and that he was at an advantage in being able to choose his words more carefully than Dr Cross, he did not state in terms that he considered he was being discriminated against (he referred towards the

end of the conversation to being excluded) or that Ms Smith had made reference to his colour. Again, we find that surprising. More importantly, when giving evidence at Tribunal, the Claimant was less certain about what he may have overheard on 23 January 2020. He accepted that he had been unable to hear clearly and that Ms Smith might simply have said, "he's back". He has the burden of proof in the matter and has failed to satisfy the Tribunal, on the balance of probabilities, that Ms Smith made any reference to his colour when speaking to a colleague on 23 January 2020 within earshot of him.

Issue 2.2

28. The Respondent embarked upon a significant restructuring exercise in May 2020. We accept the Respondent's evidence that it was facing financial and business pressures due to Brexit, reduced orders and the Coronavirus pandemic. It commenced a collective consultation process before moving to individual consultation. The Respondent decided that only employees with less than 103 weeks' service would potentially be at risk.

29. Had the Claimant been eligible to claim unfair dismissal, we may have had more to say about the consultation process, which fell some way short of what might reasonably have been expected of an organisation of the Respondent's size and resources, even allowing for the inevitable difficulties it faced during the Coronavirus lockdown, particularly when the majority of its staff were furloughed. We acknowledge, for example, that Mr Redding scored the Claimant against the Respondent's redundancy selection matrix without input from Dr Cross who was then furloughed. Nevertheless, avoidable errors were made. The Claimant was scored in circumstances where, we accept, he was in a stand-alone role, but this was never properly explained to him, instead the Respondent 'dug in' and continued to justify his scores. The scoring achieved nothing except to upset and antagonise the Claimant when he realised he had received a relatively low score for his skills and knowledge. There was also significant confusion in terms of email communications and, as we return to, the Claimant's appeal was initially overlooked and then dealt with unsatisfactorily. However, we conclude that the Respondent's errors reflect the significant pressures it was under; it effectively had a skeleton team handling the ongoing furlough arrangements for several hundred staff as well as a large scale redundancy exercise. Initially, Ms Lyall had no HR support and then only limited additional support. It seems that Ms Lyall was not even fully involved in the redundancy process itself; for example, she said at Tribunal that she was not involved in devising the selection matrix. We find that she and her colleagues were fire-fighting and that avoidable errors were made.

30. At paragraph 1 of his witness statement, the Claimant identifies that he was one of a pool of three people comprising himself, Sam Thornton and Ross Johnstone. However, on his own evidence Mr Thornton and Mr Johnstone had more than 103 weeks' service, meaning that in accordance

with the Respondent's policy in relation to redundancy they were out of scope for consideration for redundancy. The other three individuals in the Design & Development department specifically identified by the Claimant, namely Satish Patel, Allen Santos and Simon Etherington are all said by the Claimant to hold stand-alone roles. In any event, Mr Etherington was also out of scope due to his length of service. Having been provided with Job Descriptions for the Claimant and his colleagues, and having had the opportunity to question Dr Cross, Mr Redding and Mr Marshall, each of whom has a good understanding of the various roles within the department, we are satisfied that the Claimant was performing a unique stand-alone role within the department, but that even had he been pooled with Mr Thorton and Mr Johnstone, as the Claimant asserts should have happened, they would in any event have been out of scope due to their length of service, meaning that he would have been selected for redundancy anyway.

<u>Issue 2.3</u>

31. The Claimant's redundancy was confirmed on 19 June 2020 (pages 167/8), albeit the Claimant did not receive the Respondent's letter until 22 June 2020. The letter confirmed that the Claimant could appeal his redundancy. The Claimant immediately submitted an appeal (pages 182/3). We are satisfied that his appeal only came to Ms Lyall's attention several weeks later on or around 13 August 2020 when the Claimant chased her for a response. Although he is mistaken in the matter, we can understand from the emails that passed between the Claimant and Ms Lyall in June 2020 why he mistakenly believed that she had been aware of his appeal earlier than 13 August 2020. However, he and Ms Lyall were evidently at cross-purposes, something he seemed to recognise at Tribunal once he was taken through the various emails. On becoming aware of the Claimant's appeal, Ms Lyall wrote, "If you had appealed against the Company decision to make your role redundant, please be assured that we would have dealt with this in accordance with our appeal policy and procedure" (page 216). Notwithstanding that assurance she in fact proceeded to deal with his appeal in complete disregard for the Respondent's documented policies and procedures regarding appeals (see pages 71 and 76 of the Hearing Bundle). The appeal was not referred to a more senior manager to deal with and there was no appeal hearing at which the Claimant had the right to be accompanied. Furthermore, Ms Lyall only considered those aspects of his appeal that she felt had not already been addressed during the redundancy consultation process; in other words, to all intents and purposes she denied him any right of appeal. We found her evidence at Tribunal in this regard to be unsatisfactory. She acknowledged that in hindsight she might have treated his various emails following his dismissal as his appeal. She struggled to articulate how her limited response to the Claimant on 17 August 2020 might be said to accord with generally accepted standards for appeals or, indeed, the Respondent's own policy and practice, as well as the assurances she had offered to the Claimant just four days earlier. We find that she was at least partly influenced in her thinking and approach by

the fact that those at risk of redundancy had insufficient length of service to complain of unfair dismissal. In the main, however, we conclude that, having exchanged quite a number of detailed emails with the Claimant during the redundancy consultation process and given the events on 23 June 2020 referred to below, by August 2020 Ms Lyall was keen to close the matter down and accordingly was unwilling for the process to continue any longer. Whilst she dealt with the appeal unfairly, we return below to the question whether the Claimant was discriminated against.

Issue 3.5

32. The Claimant's final complaint concerns the Respondent's actions in calling the police to its site on 23 June 2020 to remove the Claimant. He has pursued the matter as a complaint of harassment, though it is clear from his witness statement and evidence at Tribunal that he might also have pursued the matter as a victimisation complaint.

33. The Claimant went to the Respondent's site on 23 June 2020 to collect his personal belongings. Although it was one of at least two days allocated for redundant staff to collect their belongings, they had been requested to make an appointment for this. The Claimant failed to make an appointment and instead simply turned up on site. He was not intending to be difficult and the Respondent seemingly took no issue with the fact that he had come without an appointment. His companion at the time, Ms David, described him as calm when he left her in the Respondent's car park and also as calm, though humiliated, when he returned to the vehicle some time later, having been escorted out of the building by the police.

34. Mr Parsons was tasked with supporting colleagues when collecting their personal belongings. He had no particular prior experience of managing colleagues in such situations, though he does manage the facilities team and various third party contracts for services. He is not from an HR background and as with the Respondent's other witnesses had not been given meaningful training in equality, harassment, diversity or inclusion.

35. In the course of collecting his belongings, the Claimant began to 'wake up' his laptop using the laptop mouse. Mr Parsons texted the Respondent's IT Manager, Anthony Hurley to check whether this was allowed and received a visible sign from Mr Hurley to the negative in response. He therefore explained to the Claimant that he was not permitted to access the laptop for data security reasons and that any request to access files should be submitted to HR. This prompted the Claimant to explain that he wanted certain personal files rather than any property belonging to the Respondent and that he was happy to demonstrate this to Mr Parsons. He went on to say that he was willing for the company to control the laptop and oversee this process. It confirms to us that the Claimant understood that the Respondent may have legitimate concerns in the matter and that from the outset he was mindful of those concerns and was not seeking confrontation. Mr Parsons spoke with Ms Lyall and Mr Hurley who agreed that Mr Hurley would deal with the matter. However, it seems that Mr

Parsons remained in close proximity and was able to hear much of the ensuing conversation. Mr Parsons is not to be criticised for remaining in the vicinity, particularly as he would still have been required to escort the Claimant from the premises at the conclusion of his visit. Mr Parsons observed that difficulty arose between the Claimant and Mr Hurley as to what materials would be made available to the Claimant and where these could be found. We find that the exercise was proving more involved than had initially been anticipated, with the result that Mr Hurley went to speak to Ms Lyall. Mr Parsons states that at this point the Claimant began to be agitated and asked to meet with HR. It is regrettable that Ms Lyall did not immediately go and speak with the Claimant. Instead, after Mr Parsons had spoken with her, she asked him to relay certain provisions of the Employee Handbook to the Claimant. In our view, the sensible course would have been for her to speak to the Claimant, not least given that she had been in ongoing contact with him by email; instead she remained in her room and 'hid' behind the provisions of the Employee Handbook. We think it hardly surprising that this impersonal approach failed and that the Claimant remained dissatisfied when Mr Parsons returned and relayed Ms Lyall's message.

36. Ms Lyall was not the only one who was reluctant to manage the situation more proactively. Mr Redding was also on site at the time and at some point in the course of the Claimant's visit emerged briefly from his office but chose not to become involved. He said at Tribunal that he did not wish to complicate the situation. We found that comment difficult to understand given that he had scored the Claimant and identified his role as redundant. He is a senior Director level employee and was aware that the Claimant was unhappy. Given his understanding of the background, not least that the Claimant was dissatisfied with his scoring and the overall process, he was well placed to intervene to try to resolve the situation.

37. Mr Parsons asked the Claimant to leave but he declined to do so. We find that the Claimant was agitated but not aggressive and that he never became aggressive during the remaining time he was on the Respondent's premises.

38. Mr Parsons went back to speak to Ms Lyall and they agreed that a senior member of staff would accompany Mr Parsons and ask the Claimant to leave. This was an escalation on the Respondent's part, particularly in circumstances where Ms Lyall and/or Mr Redding might have stepped in. Instead, Mr Steve Beckwith, the Respondent's Operations Director was involved. Mr Parsons states that he briefed Mr Beckwith, including that the Claimant had "insisted on accessing the laptop" after he had been unable to provide details of the files he wanted. If so, that is not Mr Parsons' evidence in the earlier part of his statement, where he acknowledges that the Claimant accepted the laptop would need to be controlled by someone from the Respondent. It seems therefore that Mr Parson potentially escalated the situation in terms of how he briefed it to Mr Beckwith. As we return to, he and Mr Beckwith discussed that the police might be called,

something he disclosed at Tribunal for the first time but did not mention in his statement.

39. Ms Lyall joined the Claimant and Mr Beckwith in discussion. The transcript of that conversation, which was openly recorded by the Claimant, is at pages 184 to 189 of the Hearing Bundle. It is difficult for us to gauge how long the conversation lasted. We find that Mr Beckwith immediately asked the Claimant to leave, rather than take time to understand his concerns. Indeed, there is evidence at page 184 that when the Claimant began to explain his concerns, saying, “But the question is …”, he was cut off by Mr Beckwith who said, “Can we please now make a move.” He used the same expression a few minutes later and then again a number of times in the ensuing conversation. We cannot identify that he once referred to the Claimant by name. By contrast, the transcript evidences that the Claimant continued to acknowledge the Respondent’s interests and concerns in safeguarding company information, and also that he referred to both Mr Beckwith and Ms Lyall by name throughout. His polite and respectful language stands in contrast to Mr Beckwith’s more terse communication style.

40. The Claimant sought to explain to Ms Lyall that he was seeking to secure evidence and from the outset he framed this in terms that he had raised concerns regarding his redundancy. They had been speaking for what seems to have been a matter of minutes when Mr Parsons asked Mr Beckwith whether he would like him “to make a phone call”. At Tribunal, Mr Parsons confirmed that he was referring to the police and that he had already discussed with Mr Beckwith whether the police might need to be called. Mr Beckwith replied in the affirmative, though it seems that the police were not immediately called. We remain unclear why Mr Beckwith thought police involvement might be justified before he had even spoken with the Claimant. He did not attend Tribunal to provide an account of his actions that day.

41. There is a further reference to the police being called at the bottom of page 186 of the Hearing Bundle. This followed an ongoing exchange between the Claimant and Ms Lyall during which the Claimant asserted that he was being treated differently to other staff. Mr Beckwith’s first intervention following that assertion was, “Can we please make a move now?”, which he repeated moments later before seemingly asking Mr Parsons to ring the police. The Claimant went on to explain his concerns that the information might be lost and reiterated that he was looking for information that would support his account of what he had said to the business. The transcript does not evidence that Mr Beckwith engaged with the Claimant, rather he repeated a number of times that the Claimant could not take company files, which we think mischaracterises what the Claimant was asking to do. Mr Parsons states that the conversation went in circles, but if so we think Mr Beckwith has a significant responsibility in the matter as he was dogmatic in his approach. When the Claimant said, “I want to move away from company file personal file”, Mr Beckwith’s response was, “I’ve repeated myself on too many occasions now decided to call the police”. It was at this point that the police were then called.

They attended within a matter of minutes and the Claimant was then escorted from the Respondent's site.

The Law and Conclusions

42. For the reasons set out in our findings above, the Claimant's complaint that Ms Smith referred to him as "black" is not well founded. We address the Claimant's remaining complaints below.

Direct Discrimination

43. Section 13 of the Equality Act 2010 provides,

> 13. Direct Discrimination
>
> (1) 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.

44. During the hearing we explained to the Claimant that in considering his direct discrimination complaints we would focus on the 'reasons why' the Respondent had acted (or failed to act) as it did. That is because, other than in cases of obvious discrimination, the Tribunals will want to consider the mental processes of the alleged discriminator(s): Nagarajan v London Regional Transport [1999] ICR 877.

45. We further explained to the Claimant that in order to succeed in any of his complaints he must do more than simply establish that he has a protected characteristic and was treated unfavourably: Madarassy v Nomura International plc [2007] IRLR 246. There must be facts from which we could conclude, in the absence of an adequate explanation, that the Claimant was discriminated against. This reflects the statutory burden of proof in section 136 of the Equality Act 2010, but also long established legal guidance, including by the Court of Appeal in Igen v Wong [2005] ICR 931. It has been referred to as something "more", though equally it has been said that it need not be a great deal more: Sedley LJ in Deman v Commission for Equality and Human Rights [2010] EWCA Civ 1279. A Claimant is not required to adduce positive evidence that a difference in treatment was on the protected ground in order to establish a *prima facie* case.

46. It is for the Tribunal to objectively determine, having considered the evidence, whether treatment is "less favourable". Whilst the Claimant's perception is, strictly speaking, irrelevant, his subjective perception of his treatment can inform our conclusion as to whether, objectively, the treatment in question was less favourable.

47. The grounds of any treatment often have to be deduced, or inferred, from the surrounding circumstances and in order to justify an inference one

must first make findings of primary fact from which the inference could properly be drawn.

48. This is generally done by a Claimant placing before the Tribunal evidential material from which an inference can be drawn that they were treated less favourably than they would have been treated if they had not been a particular race, gender, religion etc: Shamoon v RUC [2003] ICR337. 'Comparators', provide evidential material. But ultimately they are no more than tools which may or may not justify an inference of discrimination on the relevant protected ground, in this case race. The usefulness of any comparator will, in any particular case, depend upon the extent to which the comparator's circumstances are the same as the Claimant's. The more significant the difference or differences the less cogent will be the case for drawing an inference.

49. In the absence of an actual comparator whose treatment can be contrasted with the Claimant's, the Tribunal can have regard to how the employer would have treated a hypothetical comparator. Otherwise some other material must be identified that is capable of supporting the requisite inference of discrimination. This may include a relevant statutory code of practice. Discriminatory comments made by the alleged discriminator about the Claimant might, in some cases, suffice. We have found that there were no such comments in this case.

50. Unconvincing denials of a discriminatory intent given by the alleged discriminator, coupled with unconvincing assertions of other reasons for the allegedly discriminatory decision, might in some case suffice. Discrimination may be inferred if there is no explanation for unreasonable treatment. This is not an inference from unreasonable treatment itself but from the absence of any explanation for it.

51. It is only once a *prima facie* case is established that the burden of proof moves to the Respondent to prove that it has not committed any act of unlawful discrimination, so that the absence of an adequate explanation of the differential treatment becomes relevant: Madarassy v Nomura [2007] EWCA Civ 33.

52. In our discussions regarding the Claimant's direct discrimination complaints, we have held in mind that we are ultimately concerned with the reasons why each of the alleged perpetrators acted as they did in relation to the Claimant.

53. The matters relied upon by the Claimant as being less favourable treatment are set out at paragraph 2 of the List of Issues. Our conclusions in relation to those Issues are as follows:

2.1 We conclude that Dr Cross' initial failure to respond to the Claimant's email of 2 January 2020 regarding TRIZ training and, thereafter, his failure to progress the proposals for group TRIZ training reflect his neglect of the matter over a period of several weeks. Quite

simply, it was not high on his list of priorities. We accept his evidence that from March 2020, following his earlier oversight of the matter, there was a moratorium on training both in light of the Coronavirus pandemic and in order to save costs. We have given careful consideration to what, if anything, we should infer from Dr Cross' failure to communicate with the Claimant and/or from Ms Lyall's failure to adequately investigate the Claimant's concerns later in the year. Whilst regrettable, we have concluded that neither had anything to do with the Claimant's race. We note around the same time that Dr Cross failed to come back to the Claimant that he also failed to respond to Mr Marshall's emails of 16 and 20 January 2020. Mr Marshall is white. In our judgement, Dr Cross's failure to deal with the Claimant's request for TRIZ training was not personal to the Claimant but instead reflected poor communication practices on Dr Cross' part. We conclude that he is not someone who prioritises timely and effective communication with his team. We return below to Ms Lyall's handling of the Claimant's concerns and his appeal against his redundancy. However, in summary, whilst we consider that she dismissed his concerns too readily, we cannot infer from her failure in this regard a discriminatory mindset on the part of Dr Cross. Whilst the Claimant's request for TRIZ training was not handled strictly in accordance with the Company Training Policy, the Policy itself recognises that cost may be a relevant consideration. We are satisfied, following Dr Cross' initial neglect of the matter, that cost became the sole driver of his failure to progress the matter further in March 2020.

The Claimant's identified comparators are not valid comparators for 'Shamoon' purposes, though provide some evidential material to the Tribunal that others' training and development needs were addressed by the Respondent in 2019. Nevertheless, we are satisfied that by early 2020 the Respondent was experiencing challenging trading conditions and that by March 2020, even if this was not communicated internally, the senior management resolved to address its overheads and to that end decided that all training should be put on hold. That alone provides a non-discriminatory explanation for why the TRIZ training was not taken forward whereas certain of the Claimant's peers were enrolled on the Level 3 Management Course in October 2019. In any event, there were many others who, like the Claimant, already possessed the requisite management skills and experience and were therefore excluded from consideration for attendance on the Level 3 Management Course; it was not specific to the Claimant or his race.

2.2 The Claimant was not selected for redundancy because of his race, he was selected for redundancy because, as we have found, he was in a stand-alone role as Engineering Project Director and it was genuinely identified by the Respondent that it no longer had any requirement for that role. That had nothing whatever to do with his race.

2.3 The Respondent failed to progress the Claimant's appeal against his redundancy because Ms Lyall was not aware until 13 August 2020 that he had submitted an appeal. Even though criticisms can be made of how

his appeal was dealt with, Ms Lyall notionally gave the Claimant a decision within 4 days. As to the reasons why she did not uphold the appeal, for the reasons set out above, we conclude that she had previously engaged with the Claimant and by August 2020 was impatient to close the matter down. Whilst the Respondent failed to follow its own policies and procedures, and notwithstanding our reservations as to Ms Lyall's evidence in relation to her handling of the appeal, we have ultimately concluded that this was nothing whatever to do with the Claimant's race. We have weighed in our deliberations that over a number of weeks Mrs Lyall had endeavoured to engage with and address each of the Claimant's concerns, she wasn't simply ignoring the Claimant or his concerns. We also have regard to the significant pressures she was under at the time. The Claimant was patently treated unfairly in the matter, but in our judgement his treatment was not related to his race, rather it was a combination of error, incompetence and the pressures Ms Lyall was then under, as well as a desire to bring the redundancy process to a final conclusion in circumstances where the Claimant did not enjoy legal protection against 'ordinary' unfair dismissal. We are satisfied that any other employee in the Claimant's situation would have been treated identically.

Harassment Claims

54. Section 26 of the Equality Act 2010 ("EqA") provides,

> (1) A person (A) harasses another (B) if-
>
> > (a) A engages in unwanted conduct related to a relevant protected characteristic; and
> >
> > (b) the conduct has the purpose or effect of-
> >
> > > (i) violating B's dignity, or
> > > (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

55. In Richmond Pharmacology v Dhaliwal [2009] ICR724 it was observed,

> "A Respondent should not be held liable merely because his conduct has had the effect of producing a prescribed consequence: it should be *reasonable* that that consequence has occurred… overall the criterion is objective because what the Tribunal is required to consider is whether, if the Claimant has experienced those feelings or perceptions, and it was reasonable for her to do so. Plus if, for example the Tribunal believes that the Claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for the Claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the Tribunal as to what would important for it to have regard to all the relevant circumstances including the context of the conduct in question. One question that may be material is whether it should reasonably be apparent whether the conduct was, or was not, intended to cause offence (or, more precisely, to produce the prescribed

consequence): the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt…

(22) …dignity is not necessarily violated by what was said or done which was trivial or transitory, which should have been clear but any offence was unintended. But it is very important that employers and Tribunals are sensitive to the hurt which can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase."

56. In Land Registry v Grant [2011] ICR 1390,CA, Elias J said,

> "It is not importing intent into the concept of effect to say that intent would generally be relevant to assessing effect. It would also be relevant to deciding whether the response of the alleged victim is reasonable".

57. The conduct relied upon by the Claimant as being unwanted conduct is set out at paragraph 3 of the List of Issues. Our conclusions in relation to those Issues are as follows:

3.1 Mr Marshall's actions in sending the email timed at 18:24 on 15 January 2020, in particular in bringing others into copy, was not welcomed by the Claimant. In that sense it was unwanted conduct. However, Mr Marshall had good reason to bring others into copy. He stepped in to deal with a situation in the Claimant's absence and, having spoken to the Claimant at approximately 1pm, was informed at about 3.30pm that the line had stopped. It was important that others were promptly made aware of this, including when the line was expected to resume production. Having become involved earlier in the day, Mr Marshall took responsibility for seeing the matter through to a conclusion, ensuring in particular that the Cell Leaders who had immediate responsibility for resourcing, Dr Cross and the Respondent's Chief Operating Officer were all kept informed as to when the line was expected to resume production. We consider that Mr Marshall would potentially have been failing in his own responsibilities in the matter had he failed to do so. He was not seeking to undermine the Claimant nor was he usurping the Claimant's role or authority in the matter. Mr Marshall copied in the Respondent's Stores by way of a reminder that once the required parts arrived on site it would need to be brought to the line to ensure production could resume on time. Mr Marshall's email was entirely factual. He did not seek to point the finger of blame. If the Claimant perceived Mr Marshall's email to be critical of him, we conclude that is because he was a little defensive in the matter and perhaps overly sensitive to criticism given that colleagues had been uncertain as to his whereabouts and seemingly unable to contact him. Had he considered the situation objectively, he would have recognised that Mr Marshall's sole intention was to ensure that those who needed to know were kept informed, including as to the

basic reasons why production on the line had been stopped. In all the circumstances, we consider that it was unreasonable for Mr Marshall's actions to have the effect of creating a hostile, embarrassing etc working environment for the Claimant. The complaint is not well founded.

3.2 As regards Dr Cross' alleged failure to progress any further enquiry into the events, having sought accounts from the Claimant and Mr Marshall on 16 January 2020, there is no evidence that the Claimant wanted or anticipated that Dr Cross would take any further action in the matter. Notwithstanding the Claimant's initial irritation with Mr Marshall on 15 January 2020, by the time he provided his account to Dr Cross by email at 09:33 the following day, there was no indication of any ongoing concern on his part. We conclude that he had brought some greater perspective to the situation. There is no evidence that the Claimant followed the matter up with Dr Cross. On the contrary we have found that he did not. Even when Mr Marshall followed up with Dr Cross four days later and copied the Claimant into his email, the Claimant took no further action in the matter. We conclude that he regarded the matter as closed and accordingly that Dr Cross' alleged failure to progress any further enquiry in the matter was not unwanted conduct. On the contrary, in our judgement, the Claimant welcomed a line being drawn under the matter, recognising that he had failed to follow up on a timely basis on 15 January 2020, such that he bore some personal responsibility for the line having stopped. As above, the complaint is not well founded.

3.3 & 3.4 We have not upheld the Claimant's allegation that Ms Smith referred to him as "black", though have found that she made audible comments to the effect that the Claimant was not her boss and should not be issuing her with instructions. Ms Smith admits to being "a bit fiery". For the reasons set out above we find that Ms Smith was having a dig at the Claimant when she emailed him on 24 January 2020 and asked if he needed training on Visual. Her comments were unwanted and, particularly given they were copied to the Claimant's peers, they violated the Claimant's dignity and created a degrading and humiliating environment for him as they suggested that the Claimant was not fully competent. However, in our judgement, there is nothing from which we might infer that Ms Smith's conduct related to the Claimant's race. We have not upheld the suggestion that Ms Smith may have referenced the Claimant's colour in comments overheard by the Claimant the same day. Ms Smith was straightforward in her evidence at Tribunal and gave an unvarnished account. In particular she disclosed that she had called the Claimant 'useless', something the Claimant had not known she had said of him. In other words, Ms Smith sought to put the full facts before the Tribunal regardless of the fact that calling the Claimant 'useless' painted her in a bad light. She apologised to the Claimant for having done so and we accept that the apology

was genuinely expressed. We further accept that the comment was said 'in the moment' to a colleague who was 'venting' about the Claimant and that it was intended to demonstrate solidarity rather than anything more. We conclude that whilst the comments on 23 January 2020 and in the email the following day were a little caustic and, in the case of the email, amounted to a dig, and were uncalled for, they had nothing whatever to do with the Claimant's race.

3.5 As regards the events on 23 June 2020, in our judgement the Claimant has established primary facts from which the Tribunal could infer, in the absence of a satisfactory explanation from the Respondent, that he was harassed on grounds of race when the Respondent called the police to attend its site and remove the Claimant, such that the burden shifts to the Respondent to establish that race had nothing whatever to do with its treatment of him. We refer to our primary findings above. We consider it highly unusual for the police to be called to deal with an employee whom an employer wishes to leave its premises; there was no suggestion that consideration had ever been given to involving the police in relation to others. In circumstances where Mr Parsons' contemporaneous account was that the Claimant had become agitated but not aggressive (page 195), we consider that the Respondent's decision to involve the police requires a non-discriminatory explanation, albeit this has not been forthcoming.

There are unanswered questions as to why Mr Beckwith became involved rather than Ms Lyall and Mr Redding. Be that as it may, we have noted already that notwithstanding his senior position within the organisation and direct involvement, Mr Beckwith did not attend Tribunal to give evidence. That is unfortunate, given it was his decision that the police should be contacted even if Mr Parsons made the call. We are primarily concerned with Mr Beckwith's motives in this matter, yet we do not have the benefit of hearing his first-hand account of his actions and decisions, merely his written account the day after the incident.

As set out in our findings, what only emerged in the course of Mr Parsons' evidence, but was not included in his witness statement or in the written accounts provided at the time by Mr Parsons and Mr Beckwith, is that he and Mr Beckwith had discussed the potential for the police to be involved before Mr Beckwith even spoke with the Claimant. In our judgment that is a material omission on both their parts. Furthermore, we have no explanation from Mr Beckwith as to why, from the outset, he thought police involvement might be warranted.

As regards Mr Parsons' account of the events on 23 June 2020, in our judgement he has embellished his original account in a misguided attempt to justify Mr Beckwith's decision to involve the police. In his witness statement he states, inaccurately, that the

Claimant was insisting on accessing the laptop (paragraphs 25 and 29), that he was "concerned of how the matter would conclude if the Claimant would not listen to us" (paragraph 27) – implying the Claimant may become aggressive - and that he "kept the Claimant in view so that he could assist Mr Beckwith if the situation escalated (paragraph 28) – again, implying aggression or even violence. He has sought to portray the Claimant as potentially aggressive and the situation as tense and liable to escalate. We find particularly troubling Mr Parsons' concluding statement in paragraph 42 of his witness statement that the Claimant's behaviour was calculated and suspicious. We consider those comments unattractive and entirely unfounded.

We infer that the Claimant was stereotyped at the time as a black male aggressor and that he has been further stereotyped as an aggressor by Mr Parsons in these proceedings in an ill-considered attempt to justify both his own and Mr Beckwith's actions on 23 June 2020. The Claimant was agitated and his presence was no doubt unwelcome, but we consider that it was heavy handed and disproportionate on the part of Mr Beckwith to identify the potential need for police involvement at the outset of his own involvement in the matter. We note from the transcript of what happened that at the point Mr Beckwith first indicated to Mr Parsons that the police might be called, the Claimant and Ms Lyall were having a sensible conversation regarding the preservation of evidence. That conversation was still ongoing a few minutes later when Mr Beckwith stated that the police might be called. We have considerable difficulty in understanding why Mr Beckwith felt that the police should be called at that moment. Mr Zaman suggests that it may have de-escalated the situation. We disagree; in any event, the question is whether the Claimant reasonably perceived the Respondent's actions to create a hostile etc environment for him. In our judgement, he did. The Respondent's actions in calling the police were indisputably unwelcome on the part of the Claimant. The Respondent has failed to satisfy the Tribunal that its conduct was unrelated to his race. On the contrary, as noted already, we infer that he was being stereotyped as a black male aggressor. We have found aspects of Mr Parson's account to be unconvincing and reiterate that Mr Beckwith, who might have given a first hand account of his actions, failed to make a witness statement or attend Tribunal to give evidence and be questioned. The Respondent has failed to satisfy the Tribunal that its actions had nothing whatever to do with the Claimant's race and in those circumstances the Claimant's complaint of harassment succeeds.

58. This case will be listed for a remedy hearing. Notice of that hearing together with any case management orders will be notified to the parties separately.

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Employment Judge Tynan

Date: 3 November 2022

Sent to the parties on: 1 December 2022

GDJ
For the Tribunal Office