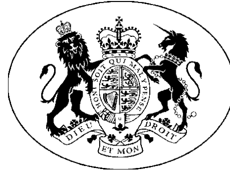
Case No: 3301191/2021



EMPLOYMENT TRIBUNALS

Claimant: Mr. L. Stafford

First Respondent: PSA Retail UK Limited
Second Respondent: Go Motor Retailing Limited

Heard at: Reading by CVP **On:** 21, 22 February 2023 and in chambers on 6 March 2023

Before: Employment Judge S. Matthews
Members: Mr. C. Juden
Mr. F. Wright

Representation
Claimant: In Person
Respondent: Mr. Lawrence (Counsel)

RESERVED JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The second respondent is dismissed from the proceedings.

2. The complaint of detriment contrary to section 48 of the Employment Rights Act 1996 fails and is dismissed.

3. The complaint of direct race discrimination contrary to section 13 Equality Act 2010 fails and is dismissed.

4. The complaint of harassment related to race contrary to section 26 Equality Act 2010 fails and is dismissed.

REASONS

Introduction

1. The claimant was employed by the First Respondent, firstly as an Assistant Sales Manager and latterly as a General Sales Manager, from 14th February 2019 until his dismissal on 16th November 2020. ACAS conciliation commenced on 12 December 2020 and the certificate was issued on 17 December 2020. The claim form was presented on 15th February 2021.

2. The claimant is making the following complaints:

    2.1 Detriment because of election as an employee representative.
    2.2 Direct race discrimination.
    2.3 Harassment related to race.

3. The response dated 15 March 2021 asserted that the claimant's employment was terminated by reason of redundancy and denies that the claimant was unlawfully harassed or discriminated against on the grounds of his race or subject to a detriment because he was an elected representative for the purposes of the redundancy consultation.

4. A List of Issues was agreed at the Case Management hearing before Employment Judge Eeley on 25 February 2022. The case was initially listed for one day's duration. It was postponed and then listed for two days to include the hearing of the preliminary issue set out in paragraph 5 below.

5. On the first day of the hearing it was necessary to hear evidence to determine a dispute between the parties as to the correct employer of the claimant. The claimant submitted that it was the First Respondent, Counsel for the respondents submitted that it was the Second Respondent.

6. After hearing oral evidence from the claimant and from Tim Pickering for the respondent the Tribunal decided that the claimant was an employee of the First Respondent (hereinafter referred to as the respondent) and the Second Respondent is dismissed from the proceedings. Reasons were given orally at the hearing at the beginning of the second day.

7. It was agreed that the evidence on liability and closing submissions would be heard on day two of the hearing and if the claim succeeded the claim would be listed for a separate hearing on remedy. The third day of the hearing was held in chambers.

Issues

8. The agreed List of Issues on which the Tribunal had to deliberate after hearing the evidence and submissions was as follows:

    "1 Detriment (Employment Rights Act 1996 section 48)

    1.1 Did the respondent do the following things:

    1.1.1 Ignore, ostracize or stop communicating with the claimant normally. The claimant asserts that his managers' attitudes towards him changed.

    1.2 By doing so, did it subject the claimant to detriment?

    1.3 If so, was it done on the ground that he was elected as an employee representative and performed or proposed to perform any functions or activities as such an employee representative within the meaning of section 47 of the Employment Rights Act 1997?

    2. Direct race discrimination (Equality Act 2010 section 13)

2.1 The claimant describes himself as 'mixed race' on the basis that one of his parents is Mauritian and the other British.

2.2 Did the respondent do the following things:

2.2.1 Dismiss the claimant;

2.2.2 Fail to appoint the claimant to the General Manager (GM) role at Hayes and appoint Lawrence Edwards instead;

2.2.3 Fail to appoint the claimant to the Junior ADP auditor role;

2.2.4 Make comments about the claimant's mixed racial characteristics such as "You don't look like one to me" (comment made by Tim Pickering).

2.2.5 Referring to the claimant as "C&C" (meaning "coffee and cream"). These comments started with Darren Roberts and spread to other colleagues.

2.3 Was that less favourable treatment?

The Tribunal will decide whether the claimant was treated worse than someone else was treated. There must be no material difference between their circumstances and the claimant's.

If there was nobody in the same circumstances as the claimant, the Tribunal will decide whether he was treated worse than someone else would have been treated.

The claimant says he was treated worse than:
Lawrence Edwards
The person who was appointed to the Junior ADP auditor role;
A hypothetical comparator.

2.4 If so, was it because of race?

3. <u>Harassment related to race (Equality Act 2010 section 26)</u>

3.1 Did the respondent do the following things:

3.1.1 Make comments about the claimant's mixed racial characteristics such as "You don't look like one to me". (comment made by Tim Pickering).

3.1.2 Referring to the claimant as "C&C" (meaning "coffee and cream"). These comments started with Darren Roberts and spread to other colleagues.

3.2 If so, was that unwanted conduct?

3.3 Did it relate to race?

3.4 Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

3.5 If not, did it have that effect? The Tribunal will take into account the claimant's perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect."

Evidence

9. The Tribunal heard evidence from the claimant and 4 witnesses on behalf of the respondent, each of whom confirmed the truth of a written statement before being questioned.

10. The respondent's witnesses were as follows:

    10.1 Tim Pickering (Divisional Operations Director)
    10.2 Bill Davey (General Manager from the Walton site)
    10.3 Sharon Mclean (Head of internal Audit team)
    10.4 Charlotte Purdie (HR Business Partner)

11. The Tribunal was referred to documents in a bundle of 239 pages. References to paragraphs in witness statements are in the form (AB/X). References in the form (X) are to the pages in the hearing bundle.

Findings of Fact

12. This section of the Reasons sets out the broad chronology of events. There were some points where the Tribunal resolved disputed issues of primary fact in order to decide the case and we give our reasons for the findings we made. We highlight where the factual allegations in the list of issues arise.

13. The respondent is an automotive retail company. At the time of the claimant's employment the respondent operated several car dealerships which traded under the name Robins and Day.

14. The claimant was initially recruited in February 2019 as an Assistant Sales Manager (ASM) at the Heathrow site. In August 2019 he was promoted to the role of General Sales Manager (GSM) at the same site. In his role as GSM he was responsible for six sales advisors and one ASM.

15. Unfortunately, the respondent made the decision to close the Heathrow site from 31 October 2020 and the claimant's employment was terminated with effect from 16 November 2020.

16. The closure of the Heathrow site was preceded by a redundancy process. The redundancy announcement was made on 6 October 2020 (121-122). Redundancy consultation meetings were held on 8 and 16 October 2020 (123) (148) and it was confirmed that a decision had been made to close the Heathrow site on 21 October 2020 (157).

17. The claimant was elected as an Employee Representative for the purposes of the redundancy consultation. He attended consultation meetings on 8 and 16 October 2020. The first meeting was chaired by Lawrence Edwards (LE) (Heathrow GM) and the second meeting was chaired by Tim Pickering (TP) (Divisional Operations Director). TP did not attend the first meeting. The claimant's final consultation meeting with LE took place on 16 November 2020 (159). On that date his employment was terminated with pay in lieu of notice.

18. The claimant alleges that he was ignored and ostracised and that the respondent stopped communicating with him on the grounds that he was an employee representative (Issue 1.1.1). In his statement he says

> …. I attended many meetings and raised concerns to Tim Pickering about how the staff were feeling. It was apparently clear that as soon as I attended the first meeting as the employee representative his attitude towards me changed, he became distant and aggressive. Tim Pickering refused to acknowledge me, would not speak to me nor show any form of support. The attitude towards me hurt my feelings given that I had worked so hard for the business and left me feeling depressed and isolated. (LS/12)

19. The only documentary record of the claimant's interaction with TP after the redundancy announcement is the minutes of the consultation meeting on 16 October 2020. The claimant accepted in evidence that the record was 'reasonably accurate' but stated that it does not reflect the 'tone' and that TP's tone was unfriendly and made him feel worthless. TP had a different perspective, explaining that it was a very emotional time for everyone and he was doing his best to support people.

20. The record of the meeting shows that the claimant asked detailed questions on behalf of the other employees and TP gave detailed answers. There is no evidence of TP ostracising or ignoring the claimant or using hostile language. The claimant did not refer to any other specific instances in evidence concerning TP or other managers. For this reason, the Tribunal found that TP did not ignore, ostracise or stop communicating with the claimant after the claimant was elected as employee representative.

21. The claimant appealed his selection for redundancy on the same date as the final consultation meeting, 16 November 2020 (164). The grounds of appeal (in so far as they relate to this claim) were as follows:

> 'A fact that I feel I have been unfairly treated and directly discriminated against based on ethnicity which contravenes the Equality Act 2010 and is centred on decisions made founded on my protective characteristics
>
> A fact that I feel that I was not offered a suitable alternative job when they were available nor given the same fair treatment to be considered as others relating to process and opportunity, decisions were clearly based on personal protective characteristics not experience or ability to complete the role.
>
> A fact that I am the only Mixed Race Employee that has been affected by redundancy at Heathrow despite my experience
>
> A fact that I am an elective representative and have been treated unfairly as a result
>
> A fact that I feel that Hiring Teams and Managers purposefully researched my background using social media to form a premeditated and predetermined opinion of suitability prior to interview. This was confirmed at the interview during a discussion and by notifications that I received from my social media platform security settings allowing me to see who and when my profile was accessed.'

22. The appeal was heard by Bill Davey (BD) (at that time General Manager of the Walton site) who was accompanied by HR Business partner, Holly

Brennan. The claimant waived his right to be accompanied. The meeting took place on 24 November 2020.

23. Minutes of the appeal meeting indicate that the claimant's appeal was about the fact that he had not been offered an alternative role. He states that he had not been offered the same opportunity as others in the business and the reason was either because of his race or because he was an employee representative (172/173).

24. During the redundancy consultation period the claimant had applied for 4 alternative roles: Commercial Manager, Head of Compliance, Internal Auditor and General Manager (GM) (Hayes site). He was not selected for any of the roles.

25. At the appeal meeting the claimant also referred to comments which he considered amounted to racial harassment. He said 'I have heard things I feel uncomfortable with. There is a line, there is banter, when you start being disrespectful that is when I don't like it' (174). He was not specific about who made the comments or when they were made. BD tried to encourage him to provide names and more detail so that he could investigate (BD/18) but the claimant was reluctant to do so, stating that he 'would never have a career in the company again' (175).

26. BD investigated the reason the claimant had not been offered alternative employment by interviewing TP and Sharon Mclean (SM) (Head of Internal Audit team). The appeal outcome letter is dated 3 December 2020 (182). The claimant's complaints were not upheld, on the grounds that BD considered there was no evidence that the decisions that led to his redundancy were related to his race or to his position as elected representative.

27. The claimant's first complaint regarding alternative employment relates to not being offered the role of GM (Hayes) (Issue 2.2.2). The role was offered to LE who the claimant relies on as a white comparator. LE was already the GM for Heathrow and another site, Kingston. TP stated in evidence that Kingston was only 20% of his role, and LE was at risk of redundancy as his main role was at the Heathrow site.

28. The claimant was not interviewed for the GM (Hayes) role. About 5 days after he applied he was called into the office by TP and in a short conversation, lasting around 5 minutes, he was told that even though he had applied for the role he would not be put forward. The claimant did not refer to his previous relevant experience as a General Manager in his conversation with TP but appeared to accept the situation.

29. In evidence TP said he saw the GM (Hayes) role as an 'exact job match' and therefore a 'suitable alternative' for LE. He said that he was acting on the advice of HR and that as far as he was concerned he had to offer the role to LE. He thought it would be inappropriate to offer it the claimant as it would be promotion for him and it was a role that LE was already undertaking.

30. The Tribunal formed the view that it would have been preferable to offer the claimant an interview and it is regrettable that it did not do so. There was no material difference between LE and the claimant. However the Tribunal

accepts that TP did not know that the claimant had prior experience as a General Manager. TP thought that the role was so close to the one the LE was already doing that he had to offer it to him. In his mind he was replacing like with like. We found the explanation credible and noted that he had stated from the outset that this was the reason that he was not putting the claimant forward for interview. consistent.

31. The claimant's second complaint relates to the Junior Auditor role (Issue 2.2.2). This was a role which was very different from the sales role he was doing. Unlike the GM (Hayes) role he was interviewed for this role. The person who was successful in applying for the role was not identified in evidence. The interviewer, Sharon McLean (SM) (at the time Head of the Internal Audit team) said she did not offer the claimant the role because she was not convinced that he had the type of experience of the Kerridge system that was required, when comparing him to the other candidates she interviewed. We accept her evidence that this was her reason for not offering the role to him.

32. The interview took place over the telephone. SM had looked at the claimant's profile on Linked In prior to the interview and saw reference to his appearance on Dragons Den. She denies looking at his other social media accounts. We find that race was not a factor in her decision, and we accept her evidence that she was not aware of the claimant's race when she interviewed him.

33. The claimant complains of harassment related to race and the list of issues refers to comments made by TP (3.1.1) and Darren Roberts (3.1.2). In his witness statement the claimant refers to additional comments that are not in the list of issues. The Tribunal has restricted findings to the comments set out in the list of issues.

34. The comments which relate to the complaint of harassment are set out in his witness statement as follows:

> "….. During my employment I was subjected to racist comments in the form of a nickname, this was given whilst in a meeting with Lawrence Edwards (GM) and Darren Roberts (Area Manager), a comment by Darren Roberts to me directly was "so you are mixed eh? We should call you C&C" (this is a term that is from that originated from a popular clothing store called C&A). I asked what this meant and Darren said, "Half Coffee, Half Cream" at this point Lawrence laughed, I felt extremely uncomfortable but as I was in a room with these two individuals I had to pretend that this did not affect me and smiled. I felt at this point that this was a racist comment. (LS/4)
>
> …. During a meeting with Lawrence Edwards and Tim Pickering, Lawrence Edwards said to Tim Pickering "Did you know Lee is mixed race", Tim Pickering responded with "You don't look like one to me" I was totally taken aback and simply responded by saying "I beg your pardon? What is one supposed to look like?" Lawrence then looked at me and laughed trying to make light of the situation. (LS/6)
>
> …. During a meeting with Lawrence Edwards and Darren Roberts a comment was made about the demographic of our business catchment area, Darren Roberts said "You have your work cut out here, the place is full of Asians and we all know how difficult that can be" Lawrence said to me at this point that "You are OK with that, being half coffee and half cream". (LS/7)

35. The Tribunal considered whether the comments were made as alleged. TP denies that he said 'You don't look like one to me'. In evidence TP said that he would not make a comment like that and that he would not survive in his role if did. The Tribunal found that, on a balance of probabilities, he did make the comment. The claimant is more likely to remember such a comment and it does not strike the Tribunal as the type of comment the claimant is likely to fabricate. TP may not remember it as it may have been an 'off the cuff' reaction to what was said to him and he may not have intended offence.

36. With regard to the alleged comments by Darren Roberts (DR) (employee of Vauxhall Motors Limited) and LE the Tribunal noted that neither gave evidence. Evidence was given by Charlotte Purdie (HR business partner) who had taken a statement from DR. DR denied referring to the claimant as 'coffee and cream', stating that his own ethnicity is identical (CP/6). We do not accept that this is determinative as to whether he made the comment. The claimant said that the comment 'spread' and he described it as a nickname used multiple times during his employment (LS/7). There was no specific evidence offered regarding other occasions when the terms was used, but we found that, on the balance of probabilities both DR and LE used the term.

37. The Tribunal are required to make a finding on whether the comments were 'unwanted'. It was clear to the Tribunal that the claimant was upset by the comments. It was understandable that he did not want to react to the comments at the time as we find they reflected the culture of the Heathrow site. A memo dated 14 February 2020 from LE states 'I have become aware of some potential cases of bullying and harassment here at Robins and Day Heathrow' (237). The Tribunal accept that there were, in the claimant's words, 'underlying tones of racism' at the Heathrow site.

38. The Tribunal need to consider the date on which the comment by TP and the comments referring to the claimant as 'coffee and cream' were made. This is relevant to the time limit for bringing a claim. In evidence the claimant said that the conversation where TP said 'You don't look like one to me' occurred shortly after or around the time he was promoted in August 2019. Under cross examination he said that he did not know when the words 'coffee and cream' were used. There was no indication that they were being used in the run up to the redundancy and it is notable that he did not refer to the words in his appeal. The Tribunal therefore finds that, on a balance of probabilities, the term was not used after the date when the site closed on 31 October 2020.

39. When asked in cross examination why he did not bring a claim at the time the comments were made the claimant stated that he did not realise that he could bring a claim while he was still employed.

Law

<u>Detriment (Employment Rights Act 1996 section 48)</u>

40. Under section 48 of the Employment Rights Act 1996 an employee may present a complaint to an employment tribunal that he has been subject to a detriment in contravention of section 47.

41. Section 47 provides that an employee has the right not to be subjected to any detriment by any act, or any deliberate failure to act, by his employer done on the ground that, being—

> “(a) an employee representative for the purposes of Chapter II of Part IV of the Trade Union and Labour Relations (Consolidation) Act 1992 (redundancies) ….
>
> (b) a candidate in an election in which any person elected will, on being elected, be such an employee representative, he performed (or proposed to perform) any functions or activities as such an employee representative or candidate.”

Direct Race Discrimination

47. Direct discrimination is defined in section 13(1) as follows:

> “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.”
>
> The concept of treatment being less favourable inherently suggests some form of comparison and in such cases section 23(1) applies:
> “On a comparison of cases for the purposes of section 13, 14 or 19 there must be no material difference between the circumstances relating to each case.”

48. The effect of section 23 is to ensure that any comparison made must be between situations which are genuinely comparable. The case law, however, makes it clear that it is not necessary for a claimant to have an actual comparator to succeed. The comparison can be with a hypothetical person of a different race. Further, as the Employment Appeal Tribunal and appellate courts have emphasised in a number of cases, including Amnesty International v Ahmed [2009] IRLR 884, in most cases where the conduct in question is not overtly related to race, the real question is the “reason why” the decision maker acted as he or she did. Answering that question involves consideration of the mental processes (whether conscious or subconscious) of the alleged discriminator to identify whether race had any material influence, and it may be possible for the Tribunal to make a finding as to the reason why a person acted as he or she did without the need to concern itself with constructing a hypothetical comparator.

Harassment

49. The definition of harassment appears in section 26 as follows:

> “(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...

(4) In deciding whether conduct has the effect referred to sub-section (1)(b), each of the following must be taken into account –

(a) the perception of B;
(b) the other circumstances of the case;
(c) whether it is reasonable for the conduct to have that effect. "

Jurisdiction

50. The complaints of race discrimination and harassment are brought under the Equality Act 2010. Section 39(2) (c) and (d) prohibits discrimination against an employee by dismissing him or subjecting him to a detriment. Section 40(1)(a) prohibits harassment of an employee. Conduct which constitutes harassment cannot also constitute a "detriment" (section 212(1)), meaning that it can only be pursued as a harassment complaint.

Burden of Proof

51. The Equality Act 2010 provides for a shifting burden of proof. Section 136 provides as follows:

"(2) If there are facts from which the Court could decide in the absence of any other explanation that a person (A) contravened the provision concerned, the Court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision."

52. Consequently it is for a claimant to establish facts from which the Tribunal can reasonably conclude that there has been a contravention of the Act. If the claimant establishes those facts, the burden shifts to the respondent to show that there has been no contravention by, for example, identifying a different reason for the treatment.

53. In Hewage v Grampian Health Board [2012] IRLR 870 the Supreme Court approved guidance previously given by the Court of Appeal on how the burden of proof provision should apply. That guidance appears in Igen Limited v Wong [2005] ICR 931 and was supplemented in Madarassy v Nomura International PLC [2007] ICR 867. Although the concept of the shifting burden of proof involves a two stage process, that analysis should only be conducted once the Tribunal has heard all the evidence, including any explanation offered by the employer for the treatment in question. However, if in practice the Tribunal is able to make a firm finding as to the reason why a decision or action was taken, the burden of proof provision is unlikely to be material.

Time limits

54. The time limit for Equality Act claims appears in section 123 as follows:

"(1) Proceedings on a complaint within section 120 may not be brought after the end of –

(a) the period of three 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 ...

(2) ...

(3) For the purposes of this section –

(a) conduct extending over a period is to be treated as done at the end of the period;

(b) failure to do something is to be treated as occurring when the person in question decided on it".

55. The case of British Coal Corporation v Keeble [1997] IRLR 336 sets out a list of factors that can be useful to take into account when deciding whether to exercise discretion to extend time. The factors are (a) the length of and reasons for the delay; (b) the extent to which the cogency of the evidence is likely to be affected by the delay; (c) the extent to which the party sued had co-operated with any requests for information; (d) the promptness with which the claimant acted once he or she knew of the facts giving rise to the cause of action; and (e) the steps taken by the claimant to obtain appropriate professional advice once he or she knew of the possibility of taking action.

56. In Abertawe Bro Morgannwg University Local Health Board v Morgan [2018] EWCA Civ 640 the Court of Appeal clarified that there was no requirement to apply a check list under the wide discretion afforded tribunals by s123(1), although it was often useful to do so. The only requirement is not to leave a significant factor out of account, (paragraph 18). Further, there is no requirement that the tribunal must be satisfied that there was a good reason for any delay; the absence of a reason or the nature of the reason are factors to take into account, (paragraph 25). Nevertheless it is important not to lose sight of the fact that the burden is on the claimant to persuade the tribunal to extend time.

57. In Chief Constable of Lincolnshire v Caston [2010] IRLR 327 it was emphasised that the discretion to extend time in which to bring Tribunal proceedings has remained a question of fact and judgment for the individual Tribunals, on a case by case basis.

58. The relative prejudice to the parties and having regard to the overriding objective will always be considerations in exercising judicial discretion.

Conclusions

Detriment (1 List of Issues)

59. The Tribunal has set out its findings at paragraph 20 that TP did not ignore, ostracize or stop communicating with the claimant from the date when he was appointed as an employee representative. The claimant did not put forward any other evidence of managers' attitudes towards him changing. Having found the alleged treatment did not occur there is no need for the Tribunal to consider if the respondent subjected the claimant to a detriment. It is not alleged in the list of issues that the claimant was made redundant or not offered alternative employment because of his role but, for the sake of completeness, we find that was not the case, for the same reason as we find

that there were non-discriminatory reasons for the decisions not to appoint the claimant to an alternative role.

Dismissal (2 List of Issues)

60. The claimant's complaint, as made clear by the appeal against dismissal which he raised, was that he should have been found alternative employment. He considers that he would not have been dismissed if he had been given opportunities and he submits that he was treated differently because of his race.

61. The alleged discrimination focuses on the failure to appoint the claimant to the GM (Hayes) role, appointing LE instead and the failure to appoint him to the auditor role. He relies on LE as a comparator in respect of the GM (Hayes) role. The Tribunal found that there was no material difference between LE and the claimant and the claimant should have been offered an interview. The claimant was interviewed for the auditor role. No comparator was put forward and the Tribunal considered whether the claimant was treated worse than a white comparator would have been treated.

62. We first considered whether the claimant had raised evidence to shift the burden of proof. We decided that the burden of proof shifted in respect of the failure to interview him for the GM (Hayes) role. We took into account our view that the respondent should have conducted the alternative employment process more fairly and interviewed the claimant for the role. We also took into account the comments which we found were made (paragraph 35) and the memo setting out concerns dated 14 February 2020 (paragraph 37). We found that there was an underlying culture of racism that reflects poorly on the respondent's Heathrow site.

63. However we were satisfied that TP had a non-discriminatory reason for not interviewing the claimant for the GM (Hayes) role. TP had made his mind up that the role was a suitable alternative for LE and we were satisfied that this was in no way related to his race. Although the claimant would have been interviewed in a fair process and we find LE was a comparator we accept that TP did not know about the claimant's previous experience. TP thought that he had to offer the role to LE as it matched the job he was already doing.

64. In respect of the auditor role we find that the claimant did not raise sufficient evidence to shift the burden of proof. The interviewer, SM, was not based at the Heathrow site and she was not aware of the claimant's ethnicity when she interviewed him. For the sake of completeness, we were also satisfied that she had a non-discriminatory reason for not offering him the role as we accepted her evidence that she did not consider the claimant had sufficient experience of the Kerridge system.

Harassment (3 List of Issues)

65. We found on the balance of probabilities that the comment 'You don't look like one to me' was made by TP and that the claimant was referred to as 'coffee and cream' by DR and LE. The comments were related to the claimant's race. We found that they were unwanted even though the claimant did not say so at the time and they had the effect of violating the claimant's

dignity and created an intimidating and hostile environment where the claimant felt that he could not speak up. We find it was reasonable for the comments to have had that effect.

66. Although we find that the comments were made the claimant's evidence indicated that they were made before 10 November 2021, being three months before presentation of the claim (allowing for the effect of early conciliation). On those grounds they are outside the time limit in section 123 of the Equality Act 2010.

67. The Tribunal has considered whether it would be just and equitable to extend time. The claimant offered no evidence in this regard, other than stating that he did not bring a claim within three months of the time limit because he was not aware that he could do so while still employed. The Tribunal has balanced the factors referred to in British Coal Corporation v Keeble and has decided that the balance of prejudice of extending the time would fall unreasonably on the respondent. The length of the delay is significant as the comment by TP was around August 2019, some 18 months before the claim was issued. The claimant was unable to specify when the 'coffee and cream' comment was made. The claimant was given the opportunity to refer to comments made in his appeal but did not do so. The respondent indicated that it was prepared to investigate but was unable to do so as he did not provide details. The respondent would clearly be prejudiced if the time was extended as the cogency of the evidence would be affected by the delay.

68. For those reasons all the claimant's claims failed and were dismissed.

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Employment Judge **S. Matthews**

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Date 29 March 2023

RESERVED JUDGMENT & REASONS SENT TO THE PARTIES ON

27 April 2023

GDJ
FOR EMPLOYMENT TRIBUNALS