



EMPLOYMENT TRIBUNALS

Claimant: Mr Barry Moon

Respondent: Trax MX Ltd

Heard at: Manchester

On: 19, 20 January 2023 and 20 April 2023

Before: Employment Judge Serr, Mr Murphy, Ms Khan

Representation

Claimant: Ms Johnrose, Solicitor

Respondent: Mr Sutton, consultant

JUDGMENT having been sent to the parties on 21 April 2023 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

Background

1. By a claim form presented on 22/2/21 the Claimant brought claims for harassment related to race or in the alternative direct race discrimination. He also brought claims for holiday pay, notice pay and some unlawful deduction of wages.
2. A Preliminary Hearing (PH) took place on 11 February 2022 Employment Judge (EJ) Butler identified the issues in the case which formed a schedule. Within that PH there were matters said by Ms Johnrose, solicitor for the Claimant, as being background matters pleaded in the claim form but not allegations of race discrimination and matters that were alleged to be harassment or direct discrimination. Only the matters said to be discrimination were accordingly included in the issues list in the Case Management Order.
3. The Tribunal was very helpfully on the first day of the hearing presented with a document said to be an agreed issues document. Slightly confusingly the issues labelled A-H in this document consisted of both the matters said to be background matters in the PH and the allegations of discrimination, with 2 allegations from the PH not appearing at all (requiring the Claimant

to have a packed lunch and telling the Claimant he was furloughed). The Tribunal adjudicated on all of the matters in the list at A-H on the basis that the Respondent agreed they were in issue as allegations of discrimination and on the assumption, there had been an agreed variation from the PH list of issues with no prejudice to the parties or the conduct of the hearing. However, the fact that they were originally asserted as background matters unrelated to race did form part of the tribunal's considerations.

The Issues

Discrimination time limit appertaining to section 123 of the Equality Act (EqA) 2010

4. On or around 01.09.2020, did Mr Sloan subject the claimant to a rule that nobody else was subject to, that being to wear his uniform in full and wash daily?
5. If so: :
 - a. Is the claim, which relates to the claim for direct discrimination appertaining to section 13 of the Equality Act 2010, brought within three months (plus) early conciliation?
 - b. If the claim is not in time, was there conduct extending over a period?
 - c. If there was conduct extending over a period, was the claim made within a further period that the Tribunal thinks just and equitable?
6. The tribunal is invited to decide:
 - a. Why the complaint was not brought in time?
 - b. In any event, is it just and equitable in all the circumstances to extend time?

Direct Race Discrimination appertaining to section 13 of the Equality Act 2010

7. Did the following things happen:
 - a. On or around 01.09.2020, did Mr Sloane subject the claimant to a rule that nobody else was subject to, that being to wear his uniform in full and wash daily?
 - b. Around the end of October 2020, did Mr Sloane subject the claimant to comments along the lines of, "You stink like a pig. Have you had a shower? You blackies just stink. It's the testosterone and your genes".
 - c. On 06.11.2020 whilst sat eating at the table, whilst other staff were in the main building, did Mr Sloane referred to the Claimant as a "nigger";
 - d. On 10.11.2020, did Mr Sloane introduced the Claimant by saying, "This is Baz. Baz is here as a machine driver but he's shit at that so now he's my bitch";
 - e. Following an incident involving a radio, did Mr Sloane called the Claimant a "wanker" and/or a "knobhead".
 - f. Following the incident with the radio, Mr Sloane made the Claimant pay for a damaged radio.

- g. Did Mr Sloane send the Claimant home from work.
 - h. On 27.11.2020, did Mr Sloane threatened to punch the Claimant.
8. If so, did any of the things said or done in paragraph (7(a) to (h) above amount to less favourable treatment?
9. If so, were any of the things said or done at paragraph (7 (a)- (h) above) done because of the claimant's race?

Harassment appertaining to Section 26 of the Equality Act 2010

10. Did any of the following things happen:
- a. The claimant repeats 7 (a) to (h) above.
11. If so, did any of these things amount to unwanted conduct to the claimant?
12. Did any of these things relate to race?
13. Did the conduct have the purpose of violating the claimant's dignity or creating an intimidating, an intimidating, hostile, degrading, offensive or humiliating environment for the Claimant?
14. If not, did the conduct have that effect?

Unpaid Notice and Holiday Pay

15. Is the Claimant owed any outstanding holiday pay?
16. Is the Claimant owed any outstanding notice pay?

Remedy

17. If any of the claims are established, how much should the claimant be awarded?
18. Following discussions with the parties at the outset of the case there was some refinement of the money claims. The holiday pay claim was valued at 7 days pay £560. The notice pay was £400 and there was in addition said to be £240 of unlawful deduction of wages. On the second day of the hearing the tribunal was informed that the parties had resolved the holiday and unlawful deduction of wages claim.
19. The tribunal reminded the parties that the effect of s.212 EqA is that harassment and direct discrimination claims are mutually exclusive. EJ Butler noted that the claimant brings his allegations as direct race discrimination, and in the alternative as harassment related to race. The EJ observed that the allegations appear to fit more squarely with a harassment claim than a series of direct discriminations, to which this tribunal agrees. The tribunal understood from the Claimant's submissions to it that the claim was pursued as harassment under s.26 and the Tribunal approached it in that way.
20. Both parties were professionally represented. The tribunal heard evidence from the claimant and Mr Sloan the owner of the Respondent and read w/s from both witnesses. The tribunal was provided with a bundle running to some 172 pages. In the end the bundle was of only limited assistance to the Tribunal with only a few relevant documents contained within it.

The Facts

21. The tribunal makes the following findings of facts.
22. Trax MX Ltd operates a residential educational and activity site in Preston. At the time of these events in August 2020-November 2020 it was effectively a construction site. The intention was that it was to be a motorsport site where young people could ride motorbikes and undertake other related activities in a legal manner in a safe controlled space. There was also to be accommodation on the site for young people in the form of static caravan type homes.
23. Mr Sloan the owner of Trax MX had been in this line of business for many years and has owned and operated a number of companies that provided services mostly to young at risk people or young people looked after by the local authority. The bundle contained a website for one such company Pioneer Tec confirming it provided specialist therapeutic care and education for looked after children aged 11-18.
24. The claimant self identifies as a black or mixed heritage male. Now aged 34 he had been involved with Mr Sloan and his enterprises since he was 14. He started helping out at Trax at weekends. He would continue to return to work with Mr Sloan's businesses intermittently from when he was 16 onwards. Although he would work for other employers, he would continue to return to work for Mr Sloan's businesses. From 2014 onwards until 2019 he worked continually full time for Mr Sloan doing various tasks such as operating machinery being groundsman and undertaking security on the site etc. He lived on site and was provided accommodation in the form of a caravan. There is an issue about rent for this accommodation which the tribunal does not need to resolve. In essence the claimant said he had been made to pay for the caravan over time.
25. The claimant himself has had a troubled upbringing. His parents died in 2014 and 2019, he has been a regular user of cannabis and it seems has lived from time to time an itinerant lifestyle. That said he is now the father to two young children and the Pioneer Tec website within the bundle provides an uplifting biography of the claimant and his history with Mr Sloan. It indicates the strides he has made to better himself despite his difficult circumstances with the purpose no doubt being to provide an inspirational story to young people from similar troubled backgrounds. The website states:

Barry was first introduced to Trax care and Academy as an adolescent 14 year old with an interest in motorbikes and anything mechanical. His parents were living apart when Barry was growing up and sadly both are now deceased. Due to his regular contact with the instructors at Trax Academy, Barry felt they became a family to him at a very difficult time in his life. Barry

completed his education and then worked for Trax Academy as a residential childcare worker and practical skills instructor whilst he acquired his level 3 NVQ in Social Care and Young Children. In 2012 he decided to expand on his experience and has since worked as a mechanic valetter and scrapyard crane driver locally. Barry is now 27 a responsible family man and employed with Pioneer Tec as a plant drive and instructor. In addition Barry is responsible for the general upkeep and maintenance of the site with additional duties such as fencing, circuit construction, and maintenance and the use of plant and machinery. Barry is highly personable and offers an excellent role model and mentor for those young people who want to achieve success and economic independence. He will therefore act as an official mentor once students embark on their work experience and part-time employment at Pioneer Tec or at the Trax motocross facility.

26. It was signed off Eddie Sloan chairman of Pioneer Tec
27. It seems clear that the reference to now being employed by Pioneer Tec relates to the continual employment between 2014-2019.
28. Mr Sloan himself was complimentary of the Claimant in respect of his attitude, work ethic and efforts to overcome adversity. He also pointed out how he could have difficult periods where he was using cannabis to excess which would impact on his work and domestic circumstances. The Tribunal does find that the Claimant uses cannabis on occasion to excess. While he denied being addicted, he himself used that term both in his ET1 and witness statement. Likewise, the Claimant stated in evidence that Mr Sloan could be nice and supportive. He also said he could be aggressive and did not like to be challenged.
29. Understandably, given the background and the biography and history of the Claimant in respect of Mr Sloan, the relationship of Mr Sloan and the Claimant was highly atypical and to some extent transcends a traditional employer-employee relationship. It has something of a familial aspect to it. Indeed, the Claimant stated that in some ways he saw Mr Sloan as a "father figure". Mr Sloan himself disputed that description (at least as far as he was concerned) but accepted that they had a close relationship.
30. In August 2020 the claimant approached Mr Sloan about coming back to work for his company. At that time the claimant was working for a company called recycling lives in Longridge. The claimant was concerned that the company were going to start bringing in random drug and alcohol testing and as he was still using cannabis he was worried that that would show up on the system.
31. An exchange of emails took place between the claimant and Mr Sloan on the 8 to the 12th of August 2020. On 8 August 2020 the claimant wrote to Mr Sloan stating
hi ed. I forgot to thank you for the brew! Great to you and looking forward to working with you again. Keep me Posted.

32. On 9 August 2020 Mr Sloan replied by email stating

good evening as per our conversation please find attached job description. There will be plenty of opportunity to put more hours in and to step up within the structure I'm planning for staff on the site as it develops. I've attached an organisational chart for the Trax MX operations team the salary will match your existing £10 per hour and includes all holiday and sick pay and benefits, ill raise your salary once you can use the equipment and your skill level comes up, I will also fund your training and certification. Let me know your earliest start date and if you want to call in and discuss anything. I'm interviewing later this week for more crew.

33. On 12 August 2020 the claimant replied stating he was more than happy with the job offer and excited to join in developing pioneer Tec. He said I have the ball rolling and my notice is in with my current employer.

34. Within the hearing bundle the respondent evidenced an employee handbook and a contract but the claimant claims that he received neither. The tribunal finds that the claimant did not receive the employee handbook or the contract. The Tribunal notes that the employee handbook and contract included in the hearing bundle was for a different company Pioneer TEC. The contract was not signed and the date issued on the handbook was said to be 26 March 2021 with a review date 10 March 2022 both dates post dating the events giving rise to this claim. It is probable that the claimant received a job description as Mr Sloan's email of 9 August 2020 stated "as per our conversation please find attached job description" albeit the document itself is not evidenced within the bundle.

35. As with much of the case there was a conflict of evidence in respect of certain aspects of the Claimant's employment at the outset such as whether he was not provided with training to be a heavy goods vehicle driver and a raise in salary that was promised. There was also a conflict of evidence about his sleeping arrangements. It is unnecessary for the Tribunal to resolve the issue of training and indeed whether he was promised a raise as it doesn't form a direct part of his claim.

36. So far as the accommodation was concerned it is common ground that during his employment he did sleep in a brand new static caravan. The Respondent was in the process of installing a number of these new caravans as part of the new venture as a form of residential accommodation for young people on site. The Respondent says that the Claimant originally broke into an abandoned caravan (not apparently the old caravan) as he was homeless and living in his car and was then offered one of the new caravans. The Claimant denies that he was ever living in his car but did sleep in the new static caravans to test it for the Respondent. He was required to keep his belongings in the old caravan. The tribunals accepts the claimant's evidence on this point. He did not break into a caravan and

while he was keeping some of his belongings in his car he was not at any point homeless and living in it.

37. The Claimant was provided with a uniform as were other staff which he was required to wear as were other staff. He operated heavy machinery and this was a job liable to get himself and his clothes dirty. However, he was asked to wash his uniform daily and the Tribunal accepts the Claimant's evidence that he was the only member of staff asked to do this, having confirmed the matter at the time with his co-workers, and he objected to it. He was also queried on his personal hygiene by Mr Sloan from time to time.
38. At the end of October the Claimant alleges that Mr Sloan made the following comment to him along the lines of. "You stink like a pig. Have you had a shower? You blackies just stink. It's the testosterone and your genes". In oral evidence he elaborated that the comment happened in a tractor when the 2 of them were alone. His response was to say that he had had a shower that morning. The Claimant vehemently denied making this comment at all.
39. On 6 November 2020 the claimant was at a lunch table at work eating lunch with a number of co-workers. There were three other members of staff present a receptionist, an apprentice and another member of staff undertaking a similar role to the claimant. Mr Sloan was also present although it seems was not actually eating lunch with the other workers. The claimant alleges that Mr Sloan at some point joined in with the conversation that the others were having at the lunch table. The claimant says that during this conversation Mr Sloan referred to the claimant as a "nigger". The claimant went on to state in oral evidence that one of the co-workers approached him afterwards and asked him why he put up with it. His reply was to say that as a black man he got it all the time. Again, this allegation is highly contentious and disputed by the respondent who denies making the remark.
40. The Tribunal gave these allegations the most careful and anxious scrutiny. Did either or both of them occur as alleged or at all? The tribunal finds that they both occurred as alleged by the claimant. Its reasoning is as follows:
- 40.1 The tribunal found the claimant largely a credible and convincing witness. He did not seek to exaggerate his evidence. He made some significant concessions by accepting that he could not be clear on the precise language used in these allegations although what was alleged was essentially what was said. He said that he could not recall precisely in what context Mr Sloan used the later term nigger (although it was used in relation to him). In his evidence he said "I can't remember the actual conversation in context, Mr Sloan was in the vicinity, so was involved in conversation. Someone said something which prompted his to say it's because he's a nigger. I think he thought it was humorous". He also accepted that he was a regular user of cannabis and that while allegations D-H did happen they could well be for some other reason than his race (a matter the Tribunal will return to).

40.2 The tribunal was less impressed with aspects of Mr Sloan's evidence. Mr Sloan was vague and contradictory in a number of respects including evidence in respect of the handbook which as already indicated the tribunal finds was not given to the claimant as alleged, the payslips that were provided in the bundle were on cross examination undermined significantly and were found to be inaccurate in a number of respects and the website. Mr Sloan gave evidence that the term blackie was in fact used on site but not by himself but rather by the claimant who referred to himself as blackie and black Barry in a humorous way. The claimant denied ever using the term blackie or black Barry about himself. The tribunal rejects the assertion by Mr Sloan the claimant used the term blackie about himself. While it is significant that it is accepted that the term blackie was used in the tribunal's view and gives credence to the claimant's assertion it rejects the suggestion that it was the claimant himself who used it. Further the tribunal note that Mr Sloan in his witness statement does not say that the claimant use the term blackie about himself, only stating that the claimant would make fun out of himself and other black work colleagues.

40.3 It was asserted on behalf of Mr Sloan that Mr Sloan was like a father figure to the claimant and confided in him and in fact returned to his employment on many occasions and all of that was inconsistent with the assertion that Mr Sloan would use highly racialised highly offensive language with the claimant. The claimant asserted the opposite -that familiarity with the relationship had led to a point where Mr Sloan had become comfortable with using that sort of language with the claimant and did not see it as offensive. The tribunal accepts the claimant's assertion on this point the familiarity with the relationship its longevity its history and the fact that Mr Sloan to some extent saw the claimant still in terms of a troubled youth rather than an adult employee led him to use what objectively viewed was wholly unacceptable offensive highly racialised language towards him, misguidedly intending it to be humorous.

40.4 Both the claimant and the respondent produced supplemental statements in respect of an incident that occurred in around November 2022. In essence following an adjournment of the hearing in this claim in September 2022 the respondent contacted the claimant directly on 4 November by text and another text message in December 2022. These were friendly text messages asking the claimant if he was okay and wondering if he wanted to meet up for a drink and join the respondent's team who were seemingly having an activity on the racetrack for young people. The tribunal was troubled by these text messages. On Mr Sloan's case the claimant has made up serious and spurious allegations against him. It is difficult to understand why in those circumstances the respondent would then want to engage in friendly correspondence with him and meet up with him. Rather the tribunal

found that this was further support for the assertion that the claimant's allegations in this respect were true.

40.5 While reminding itself that the burden rested on the claimant to establish that these incidents occurred it noted that the respondent did not call any of the co-workers who were present on the day that Mr Sloan used the term nigger to refute it despite Mr Sloan confirming in evidence that those workers were still employed by him and that these allegations had unsurprisingly been a topic of conversation within the business since the claimant had issued his claim. The claimant said that he had attempted to contact himself one of these workers to bring evidence on his behalf but the worker had not replied. In the tribunal's view it was more understandable that a witness who was still working for the respondent would be reluctant to want to give evidence on behalf of the claimant. It was less understandable why if the witnesses had indeed not heard or seen anything that day and therefore undermined the claimant's case they would not want to come along to give evidence on behalf of their current employer.

41. On 10 November 2020 Mr Sloan was with the claimant when he introduced him to somebody who had come on to site. The tribunal accepts that he said "*Baz here is a machine driver but he's shit at that so now he's my bitch*". In evidence Mr Sloan accepted that albeit not these precise words, such language was used on site. The tribunal finds it is the sort of language that was used on this construction site by Mr Sloan and others in respect to workers routinely. The allegation is very specific, and the tribunal finds it is supported by the fact that Mr Sloan himself accepted that he did use terms like "wanker" and other industrial language in respect of the claimant (and others) from time to time. The tribunal is not in agreement about whether the words used had (in particular) the effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment. As will be seen however, it is unanimous in concluding that it was not conduct related to race.

42. On or around 25 November 2020 an incident occurred involving a radio on the site. Two-way radios were regularly used on the site and provided to workers. The claimant was operating some heavy machinery when the radio was lost possibly by falling out of the cab of the digger. The tribunal accept that following the loss of this radio the claimant was called "*a wanker*" and "*a knob head*" by Mr Sloan. The tribunal find that this was industrial language routinely used by Mr Sloan and others. The claimant made no complaint about them at the time to Mr Sloan or others. The tribunal is not in agreement about whether the words used had (in particular) the effect of violating the claimant's dignity, or creating an intimidating, hostile, degrading, humiliating or offensive environment for him. As will be seen however, it is unanimous in concluding that it was not conduct related to race.

43. The radio was subsequently found by the claimant. There was a discussion about reimbursing the respondent for the damaged radio. The tribunal does not find that the claimant was ultimately required to reimburse the respondent for the radio. The allegation of reimbursement is not contained in the claimant's claim form and there is no actual evidence of payment nor is there any evidence of how the monies were said to have been reimbursed back to the respondent.
44. The tribunal find that Mr Sloan had increasing concerns around the claimant's cannabis use during his employment and that it was having a detrimental effect on his performance. The tribunal find that these concerns were genuine and that the claimant did have a genuine problem with cannabis. The tribunal notes the use of the term addiction in the claimant's witness statement and in his ET1 and the fact that he left his last job because of concerns over the introduction of mandatory drug testing at that workplace. The tribunal also notes the text messages in the bundle from the claimant to his partner dated 26 November 2020. Those text messages read as follows:

Got more bollocking this morning. Just feel victimised today. Don't know why I bother

oh no why... You okay?

He was bollocking me because apparently drove like a bell end all afternoon and because I'm going back to the lodge for dinner he's suspecting I'm smoking weed or something. Because apparently I'm always a bell end in the afternoon.

45. The content of those text messages makes clear that the respondent had raised with the claimant concerns about the claimant smoking cannabis during the day and it affects his performance at work including with the operation of heavy machinery.
46. The tribunal accepts on 27 November 2020 there was an altercation between the claimant and respondent. The Tribunal finds that the reason for this altercation was entirely around the claimant's cannabis use concerns by Mr Sloan and the fact that Mr Sloan was concerned that the claimant's cannabis use was affecting his performance at work. The altercation got heated and it is accepted that Mr Sloan did square up to the claimant and did threaten to punch him. This was said in anger in the heat of the moment and the tribunal does not find that Mr Sloan did in fact intend to do physical violence to the claimant. The respondent Mr Sloan also told the claimant that he was on a final warning. On 27 November the claimant left site that day taking some of his belongings with him. He was not in fact sent home by the respondent.
47. On 28 November the claimant returned to site and the tribunal accepts that the respondent and the claimant had a further discussion again surrounding the claimant's cannabis use this time less heated.

48. On 30 November 2020 Mr Sloan sent an email to the claimant subject line being support. The email stated:

Baz these are the contacts that can help you. You need to want to change its up to you.

49. There was then a list of websites in respect of drug misuse treatment and support that had clearly been cut and pasted by Mr Sloan into the email following Mr Sloan researching the availability of such treatment. The email is further support for the finding that Mr Sloan had genuine concerns about the claimant's cannabis use which were in fact well-founded and that the altercation on 27 November and the subsequent conversation on 28 November were centred on that concern for the claimant's cannabis use.

50. The claimant did not return to work to serve his notice and was not available to work for the period of 1 week that he was required to give.

The Submissions of the Parties

51. Much of the claimant's and respondent's representatives' submissions focused on whether in fact the comments said to have been made in the list of issues said to have been made particularly at B and C had in fact been made. The tribunal has already addressed in its findings of fact which comments were made.

52. The respondent said that the first allegation on 1 September 2020 was out of time and that time should not be extended. The respondent through Mr Sutton accepted that allegations B and C were undoubtedly if said, acts of racial harassment. However, it disputed that any of the other allegations were related to race.

53. The claimant denied that allegation A was out of time, stating that all the allegations constituted a continuing act of discrimination.

54. The claimant also addressed the issue as to whether allegations A and D through to H were related to race. The claimant stated that if B and C were found proven invariably all of the other actions of Mr Sloan needed to be viewed through the prism of race. Ms Johnrose said that Mr Sloan saw the Claimant as inferior and subordinate. He viewed him as black Barry and his actions in subjecting the claimant to a detriment could not be divorced from that.

The Law

55. s.26 of the EqA is entitled harassment. It states inter alia:

26 Harassment

- (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 in subsection (1)(b), each of the following must be taken into account—
 - (a) the perception of B;
 - (b) the other circumstances of the case;
 - (c) whether it is reasonable for the conduct to have that effect.

56. Section 136 of the Equality Act provides (as relevant):

'136 Burden of proof

- (1) This section applies to any proceedings relating to a contravention of this Act.
- (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.'

57. The second limb of the statutory definition of harassment requires that the unwanted conduct in question has the *purpose or effect* of:
violating B's dignity — S.26(1)(b)(i), or creating an intimidating, hostile, degrading, humiliating or offensive environment for him or her — S.26(1)(b)(ii).

58. Accordingly, conduct that is intended to have that effect will be unlawful even if it does not in fact have that effect, and conduct that in fact does have that effect will be unlawful even if that was not the intention. As noted unlike direct discrimination, there is no requirement to make a comparison with the treatment afforded to others.

59. The two strands of the definition are also disjunctive, i.e. a claimant only has to show that the conduct had the purpose or effect *either* of violating

dignity or of creating the proscribed environment — he or she does not have to show both.

60. The words 'related to' in S.26(1)(a) have a broad meaning and holding that conduct that cannot be said to be 'because of' a particular protected characteristic may nonetheless be 'related to' it — *Hartley v Foreign and Commonwealth Office Services 2016 ICR D17, EAT*. The EHRC code of practice on employment at paragraph 7.10 states that protection from harassment also applies where a person is generally abusive to other workers but, the form of the unwanted conduct is determined by that workers protected characteristic.

61. In *Bakkali v Greater Manchester Buses (South) Ltd* (2018) IRLR 906 Slade J stated at paragraph 31

In my judgment the change in the wording of the statutory prohibition of harassment from 'unwanted conduct on grounds of race ...' in the Race Relations Act 1976 s 3A to 'unwanted conduct related to a relevant protected characteristic' affects the test to be applied. Paragraph 7.9 of the Code of Practice on the Equality Act 2010 encapsulates the change. Conduct can be 'related to' a relevant characteristic even if it is not 'because of' that characteristic. It is difficult to think of circumstances in which unwanted conduct on grounds of or because of a relevant protected characteristic would not be related to that protected characteristic of a claimant. However, 'related to' such a characteristic includes a wider category of conduct. A decision on whether conduct is related to such a characteristic requires a broader enquiry. In my judgment the change in the statutory ingredients of harassment requires a more intense focus on the context of the offending words or behaviour. As Mr Ciumei QC submitted 'the mental processes' of the alleged harasser will be relevant to the question of whether the conduct complained of was related to a protected characteristic of the Claimant. It was said that without such evidence the ET should have found the complaint of harassment established. However such evidence from the alleged perpetrator is not essential to the determination of the issue. A tribunal will determine the complaint on the material before it including evidence of the context in which the conduct complained of took place

62. The effect of section 212(1) Equality Act is that harassment and direct discrimination claims are mutually exclusive, meaning that a claimant cannot claim that both definitions are satisfied simultaneously by the same course of conduct. A claimant must choose or run alternative claims. As stated, the tribunal approached the claim as one of harassment.

Conclusions

63. Applying the facts as found by the tribunal to the law as stated the tribunal come to the following conclusions.

Allegations B-C

64. Turning firstly to allegations B and C on the list that is that at the end of October 2020 Mr Sloan said to the claimant “you stink like a pig have you had a shower you blackies just stink it’s the testosterone and your genes” and on 6 November whilst sat eating at the table whilst other staff were in the main building Mr Sloan referred to the claimant as a “nigger”. The parties agreed that these matters if found proved would undoubtedly constitute harassment within the meaning of section 26. They were right to do so- the comments as found by the tribunal were clearly related to the claimant’s race and clearly had the purpose or effect of violating his dignity and creating a hostile degrading humiliating and offensive environment for him. Indeed, it is difficult to envisage comments more likely to be offensive to a black or mixed-race heritage worker than these. The fact that Mr Sloan may have used the remarks in what he misguidedly believed was a humorous context and the fact that Mr Sloan may have felt that the claimant would not object to the use of such language does not change that position. This is serious conduct engaging s.26.

Allegation A

65. The tribunal then turns to allegation A -the requirement that the claimant was to wash his uniform daily. The tribunal considered this allegation with care. The conduct did have the effect of violating his dignity but was the conduct related to a relevant protected characteristic? On the face of it a requirement to wash uniform is unrelated to race. It is further noted that the claimant worked with heavy machinery and in a dirty working environment. All of these matters would suggest that a requirement as found by the tribunal would be nothing whatsoever to do with race. However, the tribunal bears in mind the guidance of the authorities and of the equality and human rights commission code of practice in respect of the relevant causal connection between the protected characteristic and the act. In this case the tribunal has found that the Mr Sloan did subsequently make a comment in respect of the claimant’s personal hygiene and linked it with his race and further this requirement was not similarly applied to others. These would be facts sufficient to place the burden on the respondent to show that it was in fact not related to race. The respondent has not demonstrated that it was not related to race.

66. The tribunal is satisfied that in this context the requirement to wash the uniform daily where the Claimant was the only worker so asked was at least in part related to race given the stereotyped assertions underpinning the comments made by Mr Sloan in October 2020.

67. The tribunal considered whether this claim was out of time as alleged by the respondent. Having considered section 123 of the equality act and the authorities under this section particularly that of the case of *Hendricks v The Commissioners of Police for the Metropolis* (2002) EWCA Civ.1686, the tribunal is quite satisfied that this act, albeit done on 1 September 2020 or around then, was an act extending over a period or a continuing act of discrimination. It notes that this is an allegation of harassment as are the

others undertaken by the same perpetrator and linked in terms of subject matter. Accordingly, the claimant's claim succeeds on this ground as well.

Allegations F and G

68. These allegations were rejected on their facts by the tribunal. The claimant was not made to pay for a damaged radio and was not sent home.

Allegations D and E

69. In respect of allegation D, Mr Sloan said that the claimant was a "shit" machine driver and so now he is his "bitch". The Tribunal were not in agreement as to whether these comments had, in particular, the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant or whether they were viewed somewhat humorously by him. Ultimately, it was unnecessary to resolve this issue.

70. The Tribunal went on to consider whether this was conduct related to race within the meaning of section 26. The tribunal carefully considered the submission of the claimant that having found remarks in B and C made all interactions had to be viewed through the prism of race. Although not expressly stating so (the tribunal were not addressed on s.136 by the parties at all) the tribunal read this submission as equating to an assertion that it shifted the burden of proof. The tribunal rejected this assertion. While the comments made at B and C were highly objectionable and undoubtedly discriminatory that does not equate to Mr Sloan harbouring a deep seated conscious or unconscious antipathy towards the Claimant because of his race that taints all of his actions towards him. Indeed, given the lengthy and complex history of their relationship the contrary could be said to be the case. Accordingly, the findings in respect to allegations B-C would not be sufficient to, in the tribunal's view, shift the burden of proof in themselves.

71. The tribunal is satisfied that the comments were nothing whatsoever to do with race. The comments were made by Mr Sloan in jest to someone on site. He did not seriously consider that the claimant was a poor machine driver. The comments were not overtly or implicitly racial on their face. They were the sort of industrial language that was used routinely on site by and to workers within the team. They were not to be taken literally, they were not intended to be degrading or to have any racial connotations.

72. The tribunal is emboldened in its view by the evidence of the Claimant himself. In questions from the tribunal, he confirmed that he had seen Mr Sloan display similar behaviours to other staff who did not share his race. He thought that the reason for his behaviour could be unrelated to race and could well be that given their long relationship and the dependency he had placed on Mr Sloan that Mr Sloan somewhat infantilized him (which the tribunal agrees). The tribunal also notes that the claimant did not originally assert in the PH that this was an allegation of race discrimination.

73. In respect of allegation E, the claimant was called a “wanker” and “knob head” by Mr Sloan following the incident with the radio. Again, as with allegation D, the Tribunal were not in agreement, considering how they were perceived by the claimant, as to whether these comments had the effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Ultimately, it was unnecessary to resolve this issue because of its conclusion on whether they were related to race.

74. The tribunal considered whether this was conduct related to race within the meaning of s.26. The tribunal found they were not, essentially for the same reasons as allegation D. The comments were not overtly or implicitly racial, they were not intended to be racially offensive and were not perceived as such by the claimant. Mr Sloan was not genuinely angry about the initial loss of the radio and the claimant was not made to pay for it. The tribunal observes this was originally said to be a background matter by the claimant, not an act of race discrimination in the PH.

Allegation H

75. There is no real doubt that this conduct had the purpose or effect of creating a hostile environment for the claimant. However, in respect of allegation H the tribunal has already found that Mr Sloan had a genuine concern in respect of the claimant’s cannabis use. It was this concern in respect of the cannabis use and its impact on both the claimant personally and the standard of his work on site that was the sole reason for the altercation and the threats. While Mr Sloan’s reaction was not appropriate it had nothing whatsoever to do with race.

Notice Pay

76. The claimant has a claim for wrongful dismissal. The claimant claims he is entitled to one week’s notice which was not paid by the respondent. The respondent’s response to this claim is simple the claimant was not available for work as required in order to be entitled to his notice. The tribunal notes that there is no claim for constructive dismissal in this case. The tribunal accordingly did not need to enquire as to the reasons why the claimant was not present for work. The fact of the matter is the claimant was required to either work his notice or be at least present and able to work in order to be entitled to his notice pay. Accordingly, this claim fails and is dismissed.

Employment Judge SERR
Date: 5 May 2023

Case No: 2402088/2021

REASONS SENT TO THE PARTIES ON
9 May 2023

FOR THE TRIBUNAL OFFICE