



# EMPLOYMENT TRIBUNALS

## Claimant

Mr R Hussaini

## Respondent

Demipower Limited

v

**Heard at:** Bury St Edmunds

**On:** 30 and 31 January 2023

**Before:** Employment Judge Laidler

## Appearances

**For the Claimants:** In person (assisted by interpreter on first day and then by his brother on second day).

**For the Respondent:** Mr R Moretto, Counsel

## RESERVED JUDGMENT

1. All allegations relating to incidents which occurred prior to 29 October 2021 are struck out as out of time the claimant having not produced any evidence as to why it would be just and equitable to extend time.
2. The allegations said to have occurred on 21 November 2021 (actions of co-worker Nobby) and 16 December 2021 (comments and actions of co – worker Zack) are relied upon as harassment on the grounds of race, direct discrimination on the grounds of race and direct discrimination on the grounds of sexual orientation, and the allegation of a failure to address the claimant’s concerns in November 2021, seven separate causes of action. The tribunal finds they have little reasonable prospect of success and a deposit order is made as set out in a separate order.
3. The claims of victimisation are struck out as having no reasonable prospects of success as the claimant has not identified a protected act within the meaning of section 27 Equality Act 2010 and the allegations of detriment are out of time.
4. The purported additional and separate claims under s39 Equality Act are struck out as not disclosing a discreet cause of action.

## REASONS

1. This hearing was listed to determine the Respondent's strikeout application. The history and what took place at the hearing leading to the adjournment was set out in a Case Management Summary sent to the parties on 6 February 2023. Orders were made for the Claimant to send to the Respondent, his written Response to the skeleton argument of the Respondent by 28 February 2023 and for the Respondent to serve a reply by 17 March 2023, if so advised. There was an administrative delay in referring the file back to the Judge for the decision to be finalised. No written submission was received from the Claimant. The Judge had by then experienced an injury, as a result of which she was unable to work. These Reasons have been finalised and sent to the parties as soon as was possible in all the circumstances.
2. The ET1 was received on 2 April 2022 and was drafted by Suffolk Law Centre on behalf of the Claimant. There had been a period of ACAS Early Conciliation between 28 January and 10 March 2022. The Particulars of Claim started at page 14 of the bundle to page 32. They brought the following claims: -
  - 2.1 Direct discrimination on the grounds of race.
  - 2.2 Harassment relating to race.
  - 2.3 Direct discrimination on the grounds of sexual orientation.
  - 2.4 Harassment relating to sexual orientation.
  - 2.5 Victimisation.
  - 2.6 Protection of employees from discrimination by their employer – s.39 of the Equality Act 2010.
  - 2.7 Protection of employees from victimisation by their employer s.39 of the Equality Act.
3. There can be no dispute that s.39 of the Equality Act does not set out discreet legal claims which can be brought. They are contained in s.13 through to s.27. All s.39 does is set out what an employer must not do in relation to employees and applicants. Subsequent sections deal with contract workers, partnerships, limited liability partnerships etc. Section 39 does not bring a discreet legal claim or claims.
4. The Particulars of Claim went on to list under each of the above categories the acts complained of. These have been summarised in the Respondent's provisional list of issues dated 2 November 2022 which the Claimant accepted at this hearing set out the matters he complains about. This is a 5 page document. Several of the allegations appear under the different heads of claim. For ease of reading and as the particular issues will need to be referred to in these Reasons the draft list, as prepared by the Respondent, is set out at this point.

5. *Respondent's draft list of issues:*

*References to [XX] are to pages of the PH bundle.*

This provisional list of issues is prepared by the Respondent ("R"), by reference to the Claimant's (C's) ET1 [2-33]. This is subject to R's application for strike out/deposit to be heard at the PH of 10 November 22, which may result in some, or all, of the issues falling away.

1. C's claims are for:
  - 1.1. Harassment relating to race.
  - 1.2. Harassment relating to sexual orientation.
  - 1.3. Direct race discrimination
  - 1.4. Direct sexual orientation discrimination
  - 1.5. Victimisation under the Equality Act 2010 ("EA 2010")

**Time**

2. What is the date of any matter about which C complains – including of any alleged act or failure to act (to be determined in accordance with s.123(3)(b)-(4) of EA 2010)?
3. Is the complaint in respect of each allegation in time?  
**(Acts which took place before 29 October 2021 are prima facie out of time, the ACAS EC dates being 28 January 2022 – 10 March 2022 [1]).**
4. In respect of any complaint that is on its face out of time, was it part of one continuing act which continued up to or beyond 29 October 2021 (s.123(3)(a), EA 2010)?
5. In respect of any complaint which is out of time, is it just and equitable for time to be extended to 7 April 2022 (the date of claim) (s.123(1)(b) EA 2010)?

**Harassment Related to Race**

6. The acts that C alleges amount to harassment related to race and are as follows [25-27]:
  - 6.1. Comments by a co-worker called Candi in **September 2019**.
  - 6.2. Comments by Candi, other unnamed co-workers and a co-worker called Mo in **January 2020**.
  - 6.3. Comments by Candi and Mo in **January 2020**.
  - 6.4. A manager called Brandon shouting, swearing and threatening C, and offering to fight him outside, in **August 2020**.
  - 6.5. Tom, a co-worker, shouting and swearing at C on **23 August 2020**.

- 6.6. A co-worker called Phil, threatening C with violence on **27 August 2020**.
- 6.7. Unnamed co-workers calling C very rude names such as “prick” and “dickhead” **between September and November 2020**.
- 6.8. Charmain, a manager shouting at C, and comments by unnamed co-workers, on **10 October 2020**.
- 6.9. A co-worker called Siva threatening C, and waiting outside for C, on **27 December 2020**.
- 6.10. A co-worker called Tom swearing at C and being very rude on **3 July 2021**.
- 6.11. Comments by Tom on **8 August 2021**.
- 6.12. Comments by Gabbie, a manager, on **8 September 2021**.
- 6.13. Comments by Siva, a colleague on **23 October 2021**, and another colleague, Alisha, laughing.
- 6.14. A co-worker called Nobby threatening and swearing at C on **21 November 2021** (words not pleaded).
- 6.15. A co-worker called Zack threatening and attacking C shouting “Get a backbone you spineless git”) on **16 December 2021**.

**Harassment related to sexual orientation**

7. The acts that C alleges amount to harassment related to sexual orientation [**28-30**] are as follows:
  - 7.1. Comments, by Candi, in **September 2019**.
  - 7.2. Comments by Candi, and other unnamed colleagues from **September 2019 - January 2020**.
  - 7.3. Comments by Candi and Mo in **January 2020**.
  - 7.4. Further comments by Candi and Mo in **January 2020**, in the staff room, and unnamed others laughing
  - 7.5. An unparticularised allegation that name-calling increased and others joined in
  - 7.6. Charmain, a manager shouting at C, and comments by unnamed colleagues, on **10 October 2020** and unnamed co-workers laughing.
  - 7.7. Comments by Siva, a co-workers on **23 October 2021**, and another co-worker, Alisha, laughing.
8. Insofar as it is contended that the above acts amount to harassment related to race or sexual orientation the issues will be:
  - 8.1. Did the alleged conduct occur?
  - 8.2. If so, did that amount to unwanted conduct?

- 8.3. If so, was the unwanted conduct related to the C's race or (actual or perceived) sexual orientation?
- 8.4. Did the conduct have the purpose of violating the C's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him?
- 8.5. If not, did the conduct have the effect of violating the C's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him (taking into account the perception of C, the other circumstances of the case, and whether it is reasonable for the conduct to have that effect)?

**Direct Discrimination because of race and sexual orientation**

9. The acts C relies upon as acts of direct discrimination because of race and sexual orientation [15-25, 27-28] and are as follows:
  - 9.1. The failure to display a photograph of him on the staff notice board (undated, but they were put up in **Nov 2020** (see ET3, para 48.1.1 [53-54]).
  - 9.2. The failure to award him 'Employee of the Month' (it is assumed since the start of his employment on 7 May 2019).
  - 9.3. The failure to progress his career or promote him (it is assumed some time after the start of his employment on 7 May 2019, but C does not say when).
  - 9.4. The failure to allow him to complete training modules (it is assumed since the start of his employment on 7 May 2019).
  - 9.5. The bullying C alleges he was subjected to by colleagues and managers – the allegations are as set out under direct race discrimination above, but in addition C alleges:
    - 9.5.1. On **31 December 2020**, Siva punched him on the shoulder
    - 9.5.2. On **31 December 2020**, a colleague called Josh swore at him
  - 9.6. A failure to provide him with a Christmas hat and t-shirt (undated, but this could only have been **Christmas 2020** (see ET3, para 48.6 [58]).
  - 9.7. The allocation of work in an unfair manner in 2020 (specific incidents pleaded from **23 Aug 2020 – Nov 2020 [24-25]**).
  - 9.8. A reduction in his hours of employment from 2020 – 2021 (C does not say specifically when this, but seems to say it was **early 2021 [20]**, and R believes it would have been around late 2020/early 2021 (see ET3, para 48.8.3 [60]).
  - 9.9. Rebuking C when late to work (undated, but letters of concern were issued on **6 March 2020 [97]; 30 Sept 20 [98]; 28 Jun 21 [113]; 2 Aug 21 [114]; 25 Oct 21 [115]**).
  - 9.10. A requirement that he wear his uniform when he clocks-in (undated).

9.11. An alleged failure to address C concerns and requests for help. C alleges 15 instances of this in his Statement of Claim from **Sept 19 – Nov 21 [21-23]**

9.12. Disciplinary proceedings on **5 Mar 20; 11 Jan 21; 24 Jul 21 and 21 Oct 21.**

10. In respect of each allegation, the issues will be:

10.1. Did the alleged discriminator treat C as alleged?

10.2. If so, was that detriment?

10.3. Is so, did they treat C, because of race or because of (actual or perceived) sexual orientation, less favourably than they treated or would have treated others?

### **Victimisation**

11. The acts C alleges amount to protected acts are set out in para 12 of his Details of Claim **[30]** and are as follows:

11.1. An oral complaint to Will Penney (store manager) about co-workers in September 2019.

11.2. A oral complaint to Will about Candi and co-workers in January 2020.

11.3. A oral complaint to Will and Magda Wilk (district manager) about work allocation on 23 August 2020.

11.4. A oral complaint of being bullied made in a 27 August 2020 meeting.

11.5. A email to Magda about Mo on 29 December 2020.

11.6. A oral complaint to Will about Josh and Siva on 31 December 2020.

11.7. A complaint of being treated differently in investigation notes dated 14 January 2021.

11.8. An oral complaint to Pete (manager) about Tom on 3 July 2021.

11.9. An oral complaint to Pete about Nobby on 21 November 2021.

12. The acts the Claimant alleges amount to detriment are **[31]**:

12.1. The reduction in his hours of employment from in **early 2021** (see para 8.8 above), and/or

12.2. Disciplinary proceedings on **5 Mar 20; 11 Jan 21; 24 Jul 21 and 21 Oct 21.**

(Although note this is inconsistent with paras 14(i)-(ii) **[31-32]** where C says the victimisation is not being given an opportunity for promotion and access to training in the learning zone).

13. In respect of victimisation the issues will be:

13.1. Did the Claimant do a protected act as alleged?

13.2. If so, was the Claimant because of that protected act?

6. In relation to the claims of direct race discrimination and direct discrimination on the grounds of sexual orientation, the same twelve acts are relied upon. It is therefore not clear how, in relation to swearing and the words used, they can be said to be because of both protected characteristics.
7. The Particulars of Claim do not make it clear how it is said the alleged less favourable treatment was because of race or sexual orientation. In relation to each allegation, it is stated that the actual comparator is “any or all of the employees as Bury Road KFC...” but no actual person is identified.
8. In relation to the allegations of harassment related to race, there are fifteen acts relied upon and in relation to sexual orientation, seven acts. Most of the acts relied upon are the same as for the claims of direct discrimination.
9. In relation to victimisation, nine protected acts are relied upon and two acts of detriment are said to flow from these. That, however, includes four disciplinary proceedings which are said to have been detriments.
10. The Respondent filed its ET3 on 6 June 2022 with detailed Grounds of Resistance. It asserted in those grounds that the claims were inadequately particularised. For example, that the Claimant had not explained why the alleged less favourable treatment was because of his race. This tribunal ascertained that the Claimant was born in Afghanistan but granted British citizenship 18 months prior to issue of these proceedings.
11. With regards to sexual orientation, the Claimant has not identified his sexual orientation or perceived sexual orientation that he alleges he was discriminated on the grounds of. He had failed to identify why the alleged less favourable treatment was because of his sexual orientation.
12. The Respondent further asserted that with regard to victimisation the Claimant had not identified which detriment flowed from which protected act.
13. At paragraph 10 of the Grounds of Resistance the Respondent set out how it considered that a number of the allegations were out of time.
14. By a notice a hearing dated 2 July 2022 the Employment Tribunal listed a telephone hearing to clarify the claims to take place on 10 November 2022. What had not been seen, at the time of that hearing, was the Respondent's application of 20 June 2022, applying for strike out or deposit order (in the bundle for this hearing at page 76.) Once that was seen by a Judge, the 10 November hearing was converted to a one day hearing to deal with the strike out application.

15. By email of 17 October 2022, the Suffolk Law Centre advised the tribunal they were no longer instructed to act on behalf of the Claimant.
16. Employment Judge Spencer was not able to proceed with the hearing on 10 November 2022, for the reasons set out in his Summary sent to the parties on 19 November 2022. The hearing was relisted but to take place over 2 days. The Judge made it clear in that Summary that this Hearing would deal with the strike out application, deposit application and that the grounds were as set out in the Respondent's application of 20 June 2022 and the Respondent's written skeleton argument of 2 November 2022.
17. On 23 December 2022 the Claimant applied to the tribunal for a postponement of this Hearing to give him more time to find a lawyer. That application was seen by this Employment Judge on 24 January 2023 and refused. The Claimant had had plenty of time to try and find new legal representation. The hearing in November had not been effective and the matter needed to proceed.
18. Employment Judge Spencer had ordered the Claimant to serve on the Respondent by 9 January: -
  - 18.1 His agreement or otherwise with the draft list of issues.
  - 18.2 Any documents he relied upon relating to the preliminary issues.
  - 18.3 A witness statement which should, it was stated, "include only his evidence about why he did not present his claim form to the Tribunal any earlier than 7 April and any other evidence that is relevant to the matters to be decided at the preliminary hearing".
19. The Claimant did not comply with any of those orders. He stated at this Hearing that he had misunderstood and believed that the Judge was saying that must find a solicitor to prepare the statement. That is not what the Order says. It is true that the summary stated the Claimant no longer had a representative and had sought more time to find another one. He has now had that time and still has not found legal representation. The Employment Tribunal is only too familiar with how difficult it is for litigants to find affordable legal advice and it was therefore not in accordance with the overriding objective for there to be a further postponement for the Claimant to continue his search.
20. The Claimant had not prepared anything for this Hearing. He came with files of papers which had not been disclosed and of which he did not have copies. It appeared they related to evidence in support of his allegations. The Judge explained numerous times that she was not at this Hearing deciding the merits of his allegations but was considering whether there were grounds to strike out the proceedings and/or make deposit orders. The Claimant made limited submissions dealing with the allegations themselves rather than focussing on the arguments being put forward by the Respondent.



**Time issues**

21. The Respondent's application is not that this tribunal should determine whether the claims are in time but that on the pleaded case the Claimant has no reasonable prospects of showing that there was a continuing course of conduct such as could bring all of the claims within time. In relation to any that may be in time, the Respondent argues the Tribunal should consider ordering a deposit as such claims have little reasonable prospect.
22. The Claimant started ACAS Early Conciliation on 28 January 2022 and the certificate was issued on 10 March 2022. The ET1 was issued on 7 April 2022 and any act which took place before 29 October 2021 is potentially out of time.
23. It is argued that the only allegations that are in time are: -
  - 23.1. Harassment relating to race:
    - 23.1.1. Draft list of issues paragraph 6.14 that a colleague called Nobby, threatened and swore at the Claimant on 21 November 2021 (words not pleaded).
    - 23.1.2. Draft list of issues paragraph 6.15 that a colleague called Zack, "threatened and attacked" the Claimant shouting, "Get a backbone you spineless git" on 16 December 2021.
  - 23.2 Direct discrimination on grounds of race and sexual orientation:
    - 23.2.1 the two allegations above against Nobby and Zack are relied upon again
    - 23.2.2 Draft list of issues paragraph 9.11, the one allegation of an alleged failure to address the Claimant's concerns that is in time, relates to the Nobby incident which, the Claimant says, he reported to Pete, his manager on 21 November 2021.
24. Although the Claimant has failed to file the written submissions ordered by this tribunal or the statement ordered by the previous tribunal, he will no doubt seek to argue that there was a continuing act and that such matters should be left to the final hearing. However, this is a case where there are numerous allegations which, on the face of them, are clearly out of time and there are complaints against at least 23 named individuals and yet more against unnamed.
25. The Tribunal was shown CCTV footage which the Claimant wished it to consider. The Respondent makes submissions about it at paragraph 15 but this Tribunal is of the view that any decisions about the CTTV footage should be left to the full merits hearing. However, there is relevant

documentation in the bundle which is of assistance when considering the allegations that have been made.

26. The Claimant contends that he was discriminated against by being told that he had been late. In a letter of intent sent to the Claimant on 25 October 2021 (bundle page 115), following a disciplinary hearing heard on 21 October, it was found that the allegation against the Claimant had been substantiated. The Claimant had provided further details of his lateness and these are recorded in the letter as follows: -

“Not being woken up after a poor nights’ sleep, needing the tablet code after being 3-4 minutes late to clock in and traffic made you late for your shifts”.

These explanations were considered to be unsatisfactory. The letter also recorded that the Claimant had already had three previous letters regarding lateness. The Claimant was given a written warning in respect of his lateness which would remain on his file for 12 months.

27. Another of the Claimant’s allegations of less favourable treatment is that he was not promoted or awarded employee of the month. However, the documentation shows he had an extensive disciplinary record and informal concerns had been raised against him. Those in relation to lateness have already been referred to but there were other concerns raised. For example, on 12 March 2020 (page 97 of the bundle) a hearing was arranged to discuss an allegation that the Claimant had threatened another employee in the staff room and had been rude and exhibited general bad behaviour towards another.
28. On 22 January 2021 (page 106) the Claimant received a final written warning in connection with his refusal to comply with reasonable requests from his line manager on several occasions and disrespectful and rude behaviour towards fellow employees. Even, therefore, before the evidence is heard, it is clear on the documentation that there had been a disciplinary record and this provides a potentially non-discriminatory reason as to why the Claimant was not promoted or awarded employee of the month.
29. The Claimant also alleges that the Respondent did not deal with his complaints. Again, in the documentation, are letters about a grievance hearing and outcomes. A letter was sent to the Claimant on 19 October 2020 (page 99), referencing a grievance hearing heard on 27 August 2020. One of the people against whom the grievance had been made had moved away so the employer was unable to pursue this further. The grievance, however, against a Candi Smith, was upheld and “appropriate action has been taken”. Regarding the grievance about other cooks and cleaning, the Claimant had been asked to provide a change over check list for the kitchen on three occasions, which he had failed to do.

30. There was a further grievance hearing on 20 October 2020 and an outcome letter sent to the Claimant on 17 November 2020. Extensive findings were given.
31. On 7 January 2021 (page 103) an outcome in relation to the Claimant's grievances of 17, 29 and 31 December 2020 were given.
32. On 12 January 2021 an outcome given in relation to grievance appeals dated 25 and 26 January 2021.
33. By letter of 12 July 2021 the Claimant was given an outcome in relation to a matter raised on 24 June 2021.
34. On 10 March 2022 the Claimant was given the outcome of a grievance meeting which took place on 14 January 2022.
35. On 10 June 2022 (page 128) the Claimant was given the outcome of his appeal.
36. The Claimant therefore may not agree with the outcome of the grievance hearings and his appeals but it cannot be said that the Respondent did not deal with them.
37. Also seen in the bundle at page 87 was an email the Claimant sent to the Respondent on 3 January 2021 about an alleged incident on 1 January. He stated that he wished to bring his brother to the grievance hearing as he could explain matters better, but he hoped that,

This time, please solve my problem otherwise I have seek legal advice and see Citizens Advice about my problem or I have to take it to court to solve my problem”.

The Claimant therefore was aware of his ability to take legal advice and proceedings as early as January 2021.

### **The acts relied on**

#### *Harassment relating to race.*

38. The Claimant relies on the following acts (paragraph 9 of the particulars of claim and the draft list of issues, paragraph 6).
  - 38.1. September 2019, comments of Candi.
  - 38.2. January 2020, comments by Candi, Mo and other unnamed workers.
  - 38.3. January 2020, comments of Candi and Mo. The ET1 was not issued until April 2022. There was then an eight month gap before the following allegations.
  - 38.4. August 2020 comments and actions of his manager, Brandon.

- 38.5. 23 August 2020, comments and actions of co-worker Tom.
- 38.6. 27 August 2020, threat of violence from Phil.
- 38.7. September to November 2020, comments of unnamed co-workers.
- 38.8. 10 October 2020, comments of Charmain and unnamed co-workers.
- 38.9. 27 December 2020 actions of Siva. There are then no other acts until July 2021.
- 38.10. 3 July 2021, comments of Tom
- 38.11. 8 August 2021, comments of Tom.
- 38.12. 8 September 2021, comments of his manager Gabbie.
- 38.13. 23 October 2021, comment of Siva, Alisha laughing.

39. The last two are acts that are potentially in time are: -

- 39.1. 21 November 2021, actions of co-worker Nobby.
- 39.2. 16 December 2021, comments and actions of Co-worker Zack.

40. It is not clear from the Particulars of Claim, how the alleged comments are said to be acts of harassment related to the Claimant's race. The words used are said to be, amongst others, "Gay boy", "Princess", shouting and swearing but the actual words are not stated. The co-worker, Siva, allegedly saying he did not want to talk to the Claimant and another allegedly laughing at him.

#### **Harassment relating to sexual orientation.**

41. All the alleged allegations of harassment relating to sexual orientation are potentially out of time. The Claimant relies on the following alleged acts: -
- 41.1. September 2019, comments of co-worker Candi.
  - 41.2. September 2019 to January 2020 comments of Candi
  - 41.3. January 2020, comments of Candi.
  - 41.4. January 2020, comments of co-workers Candi and Mo.
  - 41.5. Undated and unspecified comments of unnamed co-workers around the Claimant's sexual orientation. There is then a gap of 10 months.
  - 41.6. 10 October 2020, comments of his manager, Charmain and other unnamed co-workers.
  - 41.7. 23 October 2021, comment of co-worker Siva.
42. In the Particulars of Claim it is stated that the Claimant was regularly subjected to name calling and bullying by his co-workers and managers because of his sexual orientation, "or his perceived sexual orientation".

**Direct discrimination.**

43. There are then allegations relied upon as less favourable treatment on the grounds of both race and sexual orientation.

43.1. *Failing to display a photograph of the Claimant on the staff notice board.*

The Claimant does not give a date for this allegation. The Respondent pleads at paragraph 48.1.1(b) of its Grounds of Resistance, that it was about November 2020 when a colleague, E, chose to put photographs of herself and other staff on the notice board. The tribunal has seen a photograph in the bundle at page 144 of a mix of photographs, really fun snapshots pinned up on a board. Some of are of a small group and some are individuals. The Respondent states, in his ET3 that the Claimant refused to post or provide a photograph. Further, there are 34 different pictures shown on the board. The Respondent, at the time of the ET3, employed 51 staff at that branch so not all the staff had photographs displayed. It was not a formal display in any event.

43.2 *Failing to award Claimant with employee of the month.*

No dates are provided in the Particulars of Claim, it being alleged that this occurred throughout the Claimant's employment. In this case, the Claimant compares himself with 12 others, although their race and/or sexual orientation is not stated. The pleading does not set out the matters the Claimant relies upon, in stating that he should have been awarded this. The Respondent relies on the Claimant's disciplinary record as the reason he was not given this award.

43.3 *Being overlooked for promotion.*

No dates are provided for this allegation. The Claimant does not set out when he should have been promoted or when he applied for it, if at all.

44.4 *Not receiving training in the learning zone.*

The Claimant alleges the training was completed by his manager who is unnamed, using the Claimant's log-in details. No dates are given for this and it is assumed that the Claimant relies on it being a continuing act throughout employment. The Respondent pleads that its record shows the Claimant completed the training using his individual ID.

44.5 *Bullying by co-workers and management.*

This comprises 17 individual allegations. The last two are in time, namely, that on 21 November 2021, allegedly, Nobby threatened and swore at the Claimant and that on 16 December 2021, Zack threatened and swore at the Claimant. Neither Nobby or Zack are mentioned in the preceding 15 allegations. Those allegations are against Candi (September 2019 to January 2020), Brandon, Phil and Tom in August 2020 and unnamed co-workers in September and November 2020. Further, that 27 December, the Claimant was allegedly threatened by a co-worker, Siva, and 31 December 2020, Siva allegedly punching the Claimant on the shoulder which is the allegation disputed by the Respondent on the basis of the CCTV footage.

44.6 *Christmas hats and T-shirts.*

No date is provided by the Claimant. The Respondent pleads that no one got hats or T-shirts in the 2021 Christmas period. In 2020, some for who worked front of house did get a T-shirt. There was a limited supply. They were given to those in customer facing roles. There were none left in the Claimant's size. The Respondent was not able to order any more. The Respondent submits that the correct comparator would be another employee in a non-customer facing role who does not share the Claimant's race.

44.7 *Unfair allocation of work*

The dates given are from August 2020 to November 2020 but no specific incidents after that date are provided.

44.8 *Reducing hours.*

This is said to have occurred throughout employment, reducing the Claimant's hours from 40 to 12 hours per week. The Respondent states that the Claimant was contracted to work variable hours, with his contract providing that, as a part time member of staff, he should normally expect between 4 and 24 hours per week. The Respondent further disputes all assertions made about hours, not admitting that the Claimant worked 40 hours a week in 2019. It explains that changes to hours occurred due to the pandemic and lockdowns. The number of hours available to all reduced in 2020 to 2021.

44.9 *Rebuking the Claimant for being late.*

The Respondent's pleaded case, as has already been referred to, is that the Claimant was late on several occasions in 2020 and 2021 and received letters of concern because of that:

44.9.1 On 30 September 2020 (page 98), the letter recorded that the Claimant had been late five times within the last month.

44.9.2 28 June 2021 (page 113), the letter of concern noted the Claimant had been late in the last month, six times between 11 and 27 June.

44.9.3 On 2 August 2021 (page 114), the letter of concern noted the Claimant had been late three times in the previous month.

44.9.4 By letter of 25 October 2021, following a disciplinary hearing on 21 October, the Claimant was given a warning for lateness.

44.10 *Requiring the Claimant to wear his uniform to clock in.*

No date is provided for this allegation. The Respondent's position is that its policy is that all staff are required to wear work uniform when clocking in. The Respondent refers to its letter at page 96 of the bundle dated 6 March 2020 about lateness and reminding the Claimant to leave enough time to "get changed and be ready to start work...".

44.11 *Ignoring or failing to help Claimant's requests for health and concerns.*

The Claimant lists 15 allegations from September 2019 to 21 November 2021. It is accepted that the last is in time. That is an allegation that Pete, a manager, threatened the Claimant with a disciplinary when he reported that Nobby had been rude to him. The previous allegation against Pete in the list was 3 July 2021, four months previously and before that, December, September and October 2020. As has already been set out and as is pleaded in the ET3, the Respondent had conducted numerous investigations and given outcomes to the Claimant.

44.12 *Disciplinaries.*

The Claimant refers to 5 March 2020. The Respondent sets out, at paragraph 16 of its Grounds of Resistance, that the Respondent had received a letter of complaint from a co-worker and several others brought complaints. It had to investigate these and, following a disciplinary hearing on 5 March, the Claimant was given a written warning. The Claimant also refers to 11 January 2021 and that seems to refer to a final written warning of 22 January, following a hearing on 14 January. This was the refusal to comply with reasonable requests of a manager and being disrespectful and rude to fellow employees. That of 21 October is referred to above and was with regard to lateness. The Particulars of Claim state that the comparator for these allegations is, "Any or all of the employees at Bury Road Football KFC". That is not the appropriate comparator. It

would be someone who had committed the same offence but was not of the Claimant's race and/or sexual orientation.

#### **45 Relevant Law.**

##### **Employment Tribunal Rules 2013**

##### **Rule 37 Striking out.**

37.— (1) At any stage of the proceedings, either on its own initiative or on the application of a party, a Tribunal may strike out all or part of a claim or response on any of the following grounds—

- (a) that it is scandalous or vexatious or has no reasonable prospect of success.
- (b) that the manner in which the proceedings have been conducted by or on behalf of the claimant or the respondent (as the case may be) has been scandalous, unreasonable or vexatious.
- (c) for non-compliance with any of these Rules or with an order of the Tribunal.
- (d) that it has not been actively pursued.
- (e) that the Tribunal considers that it is no longer possible to have a fair hearing in respect of the claim or response (or the part to be struck out).

(2) A claim or response may not be struck out unless the party in question has been given a reasonable opportunity to make representations, either in writing or, if requested by the party, at a hearing.

(3) Where a response is struck out, the effect shall be as if no response had been presented, as set out in rule 21 above.”

#### **46. Rule 39 – Deposit Orders**

39.—(1) Where at a preliminary hearing (under rule 53) the Tribunal considers that any specific allegation or argument in a claim or response has little reasonable prospect of success, it may make an order requiring a party (“the paying party”) to pay a deposit not exceeding £1,000 as a condition of continuing to advance that allegation or argument.

(2) The Tribunal shall make reasonable enquiries into the paying party's ability to pay the deposit and have regard to any such information when deciding the amount of the deposit.

(3) The Tribunal's reasons for making the deposit order shall be provided with the order and the paying party must be notified about the potential consequences of the order.

(4) If the paying party fails to pay the deposit by the date specified the specific allegation or argument to which the deposit order relates shall be struck out.



Where a response is struck out, the consequences shall be as if no response had been presented, as set out in rule 21.

(5) If the Tribunal at any stage following the making of a deposit order decides the specific allegation or argument against the paying party for substantially the reasons given in the deposit order—

(a) the paying party shall be treated as having acted unreasonably in pursuing that specific allegation or argument for the purpose of rule 76, unless the contrary is shown; and

(b) the deposit shall be paid to the other party (or, if there is more than one, to such other party or parties as the Tribunal orders),

otherwise the deposit shall be refunded.

(6) If a deposit has been paid to a party under paragraph (5)(b) and a costs or preparation time order has been made against the paying party in favour of the party who received the deposit, the amount of the deposit shall count towards the settlement of that order.

## **47. Equality Act 2010**

### **Section 123 Time limits**

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

(a) the period of 3 months starting with the date of the act to which the complaint relates, or

(b) such other period as the employment tribunal thinks just and equitable.

(2) Proceedings may not be brought in reliance on section 121(1) after the end of—

(a) the period of 6 months starting with the date of the act to which the proceedings relate, or

(b) such other period as the employment tribunal thinks just and equitable.

(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.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

- (a) when P does an act inconsistent with doing it, or
- (b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.”

48. The Respondent provided a bundle of authorities for this hearing and in relation to time limits the Tribunal has had regard to Lyfar v Brighton and Sussex NHS Trust 2006 EWCA civ 1548 and Aziz v FDA 2010 EWCA civ 304.

49. At paragraph 36 of Aziz, the Court stated:-

“Another way of formulating the test to be applied at the Pre-hearing Review is this:-

The Claimant must have a reasonably arguable basis for the contention that the various complaints are so linked as to be continuing acts or to constitute an ongoing state of affairs...”

50. In that case, the Court also gave regard to whether separate incidents could form an act extending over a period of time and stated that, “one relevant but not conclusive factor is whether the same individuals or different individuals were involved in those incidents” (Paragraph 33).

51. In Lyfar v Brighton and Essex University Hospitals Trust, the Claimant complained of 17 incidents of racial discrimination over a period of many months. The Claimant in that case gave evidence at the Pre-hearing Review, following which the Employment Tribunal allowed five of the Claimant’s complaints to proceed but dismissed the other twelve as being out of time. Both the EAT and the Court of Appeal upheld that decision. It was stated that the test to be applied at the Pre-hearing Review was to consider whether the Claimant had established a prima-facie case. The tribunal must ask itself whether the complaints were “capable” of being part of an act extending over a period.

52. In Grecho v General Physics UK Ltd UK EAT/00114/16, the EAT upheld the Tribunal’s findings that seven alleged acts were not reasonably arguably linked, even though they involved the same manager.

53. If the complaints are not arguably in time, the Tribunal must consider whether it is just and equitable to extend time. The importance of time limits, however, has been emphasised in numerous authorities. For example, Robertson v Bexley Community Centre 2003 IROR 434. And in Caston v Lincolnshire Police 2010 IRLR 327, the Court stated that, “the burden of persuading the ET to exercise its discretion to extend time is on the Claimant...”.

54. The Tribunal also has the power to order the Claimant of a deposit where it considers that an allegation has little reasonable prospects. The rules permit a deposit not exceeding £1000.00 to be ordered in respect of an

allegation or argument. That can lead to multiple deposits being ordered in any case.

## **CONCLUSIONS**

55. The Claimant was ordered by Employment Judge Spencer at the hearing on 10 November 2022 to serve a witness statement, including his evidence, as to why he did not present the claim prior to 7 April 2022. The Claimant has never done that and did not bring one to this hearing. Neither did he take the opportunity that was given to him to file his comments on the Respondent's skeleton argument, including why he considered the acts to be a continuing act, why a deposit should not be ordered and his income and outgoings that he wished the tribunal to consider in relation to a deposit order.

### *Harassment on the grounds of race.*

56. There are no allegations against Candi after January 2020. There was a gap between incident 6.9 and 6.10 of seven months between 27 December 2020 and 3 July 2021, although there are other incidents elsewhere for example, allegation 9.5.1 and 2 of Siva punching the Claimant and Josh swearing. The disciplinaries the Claimant takes issue with were in January and July 2021 and the failure to provide a Christmas hat December 2020. The only two incidents which are in time, this tribunal finds are not connected with the others, namely, November 2021 Nobby threatening and swearing and Zack, in December 2021 allegedly threatening and attacking the Claimant.

57. The other allegations cannot be said to reasonably form part of a continuing act. No link has been put forward by the Claimant to show that they are so linked. Most involved completely different individuals. Although there are various allegations against Candi, these are significantly out of time.

58. In relation to the two matters that are in time, they cannot be said to be connected to the others as there are no complaints against either Nobby or Zack prior to 29 October 2021.

59. The Tribunal therefore has concluded that the allegations of racial harassment prior to that of 21 November 2021, are out of time, that there is no basis for time to be extended and the claims should be dismissed.

### *Deposit order.*

60. The Respondent's alternative application in relation to matters not struck out is that the Claimant be ordered to pay a deposit as a condition of continuing to advance those allegations.

61. In relation to the allegation against Nobby, there is no detail given of the words used and the Claimant never made any written complaint about it.

The Respondent does not even know who Nobby is and there is no one currently working there with that name.

62. In relation to Zack, this was the recording that the Claimant produced but as this Tribunal has already stated, it is not for this hearing to make findings in relation to that. What is significant, is that nothing has been put forward by the Claimant on which he contends or explains why those matters are related to his race.
63. In relation to a deposit order, the tribunal Rules provide that the Tribunal "shall make reasonable enquires into the paying party's ability to pay". In its Order made on the last on the last occasion, the Tribunal gave the Claimant every opportunity to provide details of his income and outgoings so that the Tribunal could consider his ability to pay. He did not comply with that Order. On the first day of the hearing the Tribunal also explained the deposit Rules to the Claimant and asked him to bring to the hearing on the second day, information about his finances that he wanted the Tribunal to consider. Unfortunately, on the second day the Tribunal never got to that point as the Claimant had not come prepared to deal with the Respondent's skeleton argument and wanted further time to put in a written submission. That he was given, but the submission has not been received.
64. This Tribunal is therefore of the view that it has taken reasonable steps to obtain information about the Claimant's ability to pay. Taking into account the type of role that the Claimant had with the Respondent and knowing that that employment was terminated, the Tribunal makes an order of £100.00 in relation to each of the allegations that are in time of harassment relating to race.

*Harassment relating to sexual orientation.*

65. The same comments are relied upon by Candi as for the claim of race discrimination. These were in January 2020 and then there is nothing further against them. There is then a gap of incidents between January and October 2020. Unlike the racial harassment claim there are no acts that are in time. The last act is Siva on 23 October 2021. All of the acts of harassment relating to sexual orientation are out of time and are dismissed.

*Direct discrimination.*

66. The Claimant pleads these acts as both direct discrimination because of race and direct discrimination because of sexual orientation and that, of itself, produces some difficulties as it is not clear what in fact the Claimant's case is. As has already been noted, the Claimant does not set out the detail of words used and how they relate to his race and/or sexual orientation. The allegations are set out in 12 paragraphs in the Particulars of Claim but in view of the sub-paragraphs there is a total of about 50 allegations. These are all out of time save for the two allegations relating to Nobby and Zack, which are relied upon again as they were in relation to harassment

and one allegation of an alleged failure to address the Claimant's concerns relating to the Nobby incident.

67. As, in relation to harassment, nothing has been brought forward by the Claimant to link the earlier incidents to the ones about Nobby and Zack. There is no complaint against either of those two individuals before 29 October 2021.
68. As with the harassment claims, the Tribunal is satisfied that there is no reasonable prospect of the Claimant establishing a continuing course of conduct. All to the claims, other than the last three, are struck out as being out of time.
69. In relation to the last three, as they are further discreet allegations and the Rules make it clear that the order of a deposit can be made in respect of each allegation, the Tribunal orders a further £100.00 to be paid in respect of those two allegations.
70. Had the Tribunal not struck out the allegations of harassment and direct discrimination, it would have made further deposit Orders on the basis that there is little reasonable prospect of any claim of direct discrimination and/or harassment being established.

*Victimisation.*

71. The Claimant relies on nine alleged protected acts. However, he has little reasonable prospect of establishing any of those as protected acts as he does not plead that he alleged discrimination in the complaints that he made and in relation to a number, they are oral and there is no written evidence of them. The only complaint in which he suggests he was treated differently to others is alleged protected act (e) (Particulars of Claim, page 30 of the bundle) an email dated 29 December 2020 to a district manager when he alleged that Mo was swearing at him. He does not, however, allege he said that that was because of his race or sex.
72. The only detriments are said to be that the Claimant's hours were significantly reduced and he was subjected to several disciplinaries. The disciplinaries were 5 March 2020, 11 January 2021, 24 July 2021 and 21 October 2021. They are all out of time. There is also an inconsistency in that, at paragraph 14 (i)(ii) the Claimant states that he was victimised for not being given access to opportunities for promotion or training since he started. He does not link the acts of detriment to the particular protected act relied upon.
73. All of these acts are out of time and time should not be extended as the Claimant has not explained why it would be just and equitable to do so.
74. If the claims of victimisation were not dismissed then the Claimant would be ordered to pay a deposit of £100.00 in relation to the two acts of detriment

specifically alleged of reducing his hours and subjecting him to disciplinary hearings.

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Employment Judge Laidler

Date: 11 October 2023

Sent to the parties on: 11 October 2023

For the Tribunal Office.