EMPLOYMENT TRIBUNALS

Claimant: Mr H Miah

Respondent: Daiwa Capital Markets Europe Ltd

Heard at: London Central - hybrid hearing **On:** 3 to 6 October 2023

Before: Employment Judge Nash
Mr Pell
Mr McLaughlin

Representation
Claimant: In person
Respondent: Ms Hirsh of counsel

JUDGMENT having been sent to the parties and written reasons having been requested by the respondent in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

1. Following ACAS early conciliation from 17 July to 23 September 2022, the claimant presented his application to the tribunal on 13 October 2022.

2. At this hearing the tribunal had sight of a bundle and agreed bundle to 292 pages. All references are to the bundle unless otherwise stated.

3. In respect of witnesses, the tribunal heard from the claimant on his own behalf. From the respondent it heard from, in order, Mr A Joylal, an infrastructure support analyst, Mr G Sullivan an infrastructure support analyst, Mr J Shippam the claimant's line manager, Ms Cindy Bamba a senior HR business Partner, and Mr S White, Mr Shippam's line manager.

4. All witnesses provided written witness statements to which they swore.

The claims

5. The tribunal confirmed with the parties that the claimant pursued the following claims—

    a. direct race discrimination under section 13 Equality Act 2010;
    b. harassment under section 26 Equality Act 2010;
    c. failure to permit the claimant to be accompanied under section 10(2) Employment Relations Act 1999.

The Issues

6. The tribunal checked with the parties that the list of issues at page 52, and attached to these reasons, was accurate and agreed.

7. The claimant amended the list of issues, stating that the dates of the comments on which he relied in respect of his harassment claim were incorrect. The comments did not occur as stated in the list of issues on 3 July and 8 August and other dates in July. In fact, they occurred on 7 and 8 August.

Applications

8. The tribunal heard a number of applications from the parties during the hearing. The tribunal heard submissions on each application and provided reasons for its decisions orally at the time. No request for these reasons has been received. The tribunal decisions on these applications were as follows.

9. At the beginning of the hearing the claimant applied for an anonymity order in effect under rule 50(3)(b) of the 2013 Rules of Procedure. The respondent objected. The tribunal refused the claimant's application.

10. At the beginning of the hearing the claimant applied for further documents and a video lasting about 20 seconds to be admitted into evidence. The respondent did not object. The evidence was added to the bundle.

11. During the hearing the respondent applied for an order that the claimant provide a copy of his claim form in respect of his previous employment tribunal claim, the judgement to which was in the bundle. The claimant objected. The tribunal refused the respondent's application.

12. After the close of evidence and before submissions, the claimant applied for an order that the respondent disclose unredacted versions of the documents provided in respect of a subject access request. The respondent objected. The tribunal rejected the claimant's application.

13. After the close of evidence and before submissions, the claimant applied for a witness order against a Ms Marsham, a respondent employee who was observing the hearing. The tribunal refused the claimant's application.

The Facts

The claimant starting work

14. The respondent is the UK arm of an international brokerage and financial services company. It employs about 500 people.

15. The claimant who identifies as Asian of Bangladeshi origin, started work for the respondent as an infrastructure support analyst on 16 May 2022. His was 1 of 3 such roles recruited. The other 2 starters were Mr Sullivan, who is black, and Mr Joylal who is Asian of Indian origin. All started work within a few days of each other.

16. The claimant was employed subject to a written contract of employment containing a probationary period. According to the staff reference book, a guide to the respondent's HR practice and procedures, employment may be terminated during or at the end of the probationary period if an employee is considered unsuitable.

17. The claimant's line manager was Mr Shippam the infrastructure support head, who had recruited the claimant. He managed the 3 infrastructure support analysts and reported to Mr S White the respondent's head of technical operations team. Both Mr Shippam and Mr White are white.

18. The primary responsibility of Mr Shippam's unit including the claimant was to provide support across the respondent infrastructure and IT. The claimant and his colleagues had a front-line role as the 1st point of contact, including for senior staff.

19. The team was mostly office-based and dealt with worldwide enquiries. Much of their work involved dealing with queries from IT users who typically call or email the IT desk and raise a ticket. The claimant and his colleagues dealt with a ticket by resolving the IT problem, this was usually a quick process. If the problem was complex the user was kept updated. Mr Shippam dealt with any escalations due to, for instance, delays or any complex problems. By its nature the team needed to be reactive

20. The 1st day when both the claimant and Mr Shippam were in the office was 24 May 2022. Mr Shippam discovered that the claimant had asked if he could work from home and take a Friday and Tuesday as annual leave around the bank holiday. Mr Shippam emailed Mr White stating that he saw this as another "red flag". Mr Shippam granted the annual leave and refused the working from home request. Mr Shippam's evidence was that he was concerned that the claimant was not showing commitment early in his role. He had been told that there were problems with the claimant's pre-employment checks and therefore there were now 3 concerns. Mr White replied today that if (emphasised) problems continued they would consider ending the claimant's probation early. Accordingly, the tribunal found that the respondent at a very early stage had concerns about the claimant.

21. The was a dispute between the parties about whether the claimant had delayed completing his onboarding checklists. The respondent relied on an email from the claimant to Mr Shippam of 1 July. The claimant alleged that this email has been fabricated by the respondent because he had sent an email in this form on an unknown date in June, and accordingly he had not delayed.

22. The tribunal did not accept the claimant's allegation for the following reasons. The document on its face appeared plausible and the claimant was unable to state the date on which he said that he had sent the email. An allegation of the fabrication of documents is a serious matter and the claimant had not made this application before cross examination. In the view of the tribunal if the claimant had genuinely believed this document to be a fabrication he would have raised it earlier. The tribunal found that the claimant during cross-examination decided that the document did not assist his case and made an unpremeditated and unsubstantiated allegation of fabrication. The tribunal was deeply concerned by his conduct.

The claimant's performance

23. The claimant's evidence was that his performance was good. The claimant was not given a target for instance for the number of tickets expected to resolve. It was not disputed that the resolved in the region 150 tickets during his employment.

24. Mr Shippam stated that whilst the claimant was good at some tasks, there were significant and concerning gaps in his knowledge. For instance, he did not know how to set permissions for a local group on Microsoft products. Accordingly, his troubleshooting was sometimes weak. Mr Shippam had to spend time getting him up to speed.

25. Mr Shippam's evidence was he discussed the claimant's performance with HR on 10 June 2022. The tribunal saw a message to HR referring to concerns with 1 of the new joiners. The tribunal accepted that was the claimant because he was the only one of the new joiners who was not confirmed in post.

26. Mr Shippam stated that he was concerned at the claimant's overuse of his mobile phone during work hours. It distracted the claimant from his work and gave a poor impression to other staff, including senior staff. He first mentioned this in a team meeting. When the claimant continued to use his phone, he spoke to the claimant personally. The claimant denied that he had been spoken to about mobile phone use.

27. The tribunal preferred the evidence of the respondent for the following reasons. The Claimant contended in cross examination that because there was no specific respondent policy as to the use of mobile phones it was not something to which the respondent could legitimately object. The tribunal drew no adverse inference from the lack of a specific policy. The claimant should have known that this went without saying. The tribunal concluded that the claimant

did not fully appreciate the need for an employer to restrict mobile phone use. This indicated that the claimant had failed to engage with Mr Shippam's instructions because he did not understand.

28. Mr Shippam stated that he held a one-to-one meeting with the claimant on 13 June and the tribunal saw a diary entry for this date. There was a further one-to-one meeting on 16 June. Mr Shippam stated these were informal meetings and therefore no notes were taken. He said he told the claimant that improvements in his performance were required, and that he told the claimant that he was concerned that the claimant was struggling.

29. The evidence from both Mr Sullivan and Mr Joylal was that the claimant had separately told them that he was finding the job very difficult and was struggling. The claimant denied both accounts.

30. Mr Shippam was concerned about the claimant's performance in respect of a specific ticket created on 16 June which he thought should take about 30 minutes to result. Mr Shippam was on leave at this time and the claimant took no action for 4 days moving the issue unresolved on Mr Shippam's return. Mr Shippam was also frustrated as the claimant had not been reactive. Mr Shippam accepted that the issue was not all the claimant's fault, but the claimant had failed to keep everyone informed.

31. Mr Shippam was also concerned about the claimant's performance in respect of an issue of the respondent's Quod and he discussed his concerns with the claimant on 13 July.

32. The tribunal saw agendas/minutes of a meeting between Mr Shippam and Mr White on 13 July. Referring to the claimant it stated, "still unsure". According to minutes of a meeting on 19 July the claimant was "getting better". Mr White said at this point the claimant's performance had improved but was still not yet up to standard.

33. The respondent's evidence was that the claimant was slow at resolving queries, that is closing tickets. It relied on statistics it compiled after the dismissal as to the number of tickets resolved by the claimant and his 2 peers. According to the statistics, in respect of tickets resolved from 16 May to 14 August the claimant was only responsible for 16%. In contrast, Mr Sullivan and Mr Joylal were responsible for 29 and 25%. The tribunal saw a monthly breakdown of these tickets. There was no suggestion that the respondent had this data when making the decision to dismiss. The tribunal understood the respondent to be relying on it as corroborating evidence of the managers' views of the claimant's performance at the time of dismissal.

34. The tribunal accepted the claimant's submission that there were issues with this data. The data has been put together after the decision to be made. Accordingly, it was only natural the Mr Shippam and Mr White would be looking for data to justify their decision. Nevertheless, the tribunal relied on the data for the following reasons. The data was stark as to the gap between the claimant's

performance and that of his peers. Further it reflected the views of Mr Shippam and the claimant's peers, based on their impressions and interactions with the claimant during his employment. Further, the tribunal saw criticisms of the claimant's performance from other members of staff.

The harassment comments

35. The claimant's evidence was that he was excluded from lunch and social events. Before the tribunal, but not in his witness statement or claim form he said the other members of the team went out to the pub at lunch and came back adversely affected by alcohol. All witnesses denied this. The tribunal did not accept this allegation for the following reasons. The allegation was 1st made during cross-examination. This would be a surprising practice in a modern day work environment, in particular for those who carry out relatively complex work and who have close personal interaction with other staff.

36. The respondent witnesses denied that the claimant was excluded from social occasions. Mr Shippam said he assisted with the claimant's arrangements for Friday prayers. he was not challenged on this. The tribunal did not accept that the claimant was excluded from social activities. There was no evidence of social activities at this workplace. The claimant mainly brought his lunch to work and therefore did not need to go out with his colleagues to get lunch.

37. According to the claimant statement of 9 May 2023, Mr Shippam and Mr White "regularly" made comments that were offensive to him, in particular comments that he found to be "most irregular" between 3 July and 9 August 2022. According to his witness statement,

> Steve White made comments relating to condiments that reflected on my skin colour which is brown. For example, Steve White said "why is Coffee brown HM". HM'S reply to this was because it's the colour of coffee beans are I'm afraid. Steve White then said "wouldn't it be better if coffee beans were "white". HM replied "I don't know".

38. Further, Mr Shippam made comments relating to chocolate biscuits and how this reflected "HM's" skin colour.

39. In his claim form the claimant referred to the same comments being made on a regular basis between 3 July and 9 August.

40. In the list of issues agreed following the case management hearing, the claimant relied on comments made "on 3 July and 8 August and other dates in July 2022". Accordingly, up until the date of the hearing the claimant's account of the dates when the comments were made was broadly consistent.

41. In its witness statements and opening note provided to the claimant before the hearing, the respondent's pointed out that 3 July 2022 was a Sunday when the office was closed.

42. At the beginning of the hearing the claimant amended the list of issues to say the comments were made on 7 and 8 August. It was then put to him in cross examination that 7 August was also a Sunday. The claimant replied that he had told the tribunal that the comments were made on 8 and 9 August. However, the notes of all 3 members of the tribunal and the respondent recorded that the claimant had altered the list of issues at the beginning of the hearing to refer to comments made on 7 and 8 August. The claimant then said that the comments were made on 8 August.

43. In cross examination the claimant stated that the comments were only made during his final week of employment because Mr White and Mr Shepherd had already made the decision to dismiss and were in effect had nothing to lose.

44. The claimant's evidence as to witnesses to these comments was inconsistent. In his claim form he stated that the comments were witnessed by Mr Joylal, Mr Sullivan and a colleague called Martin. When it was put to the claimant that Sullivan was on leave on 8 August, he said that someone else was present and he might have mistakenly stated it was Mr Sullivan because he was stressed following termination. However, the allegation in respect of the comments was not made until 3 months after termination, in the claim form.

45. Mr Joylal and Mr Sullivan separately gave evidence saying they had not witnessed these comments. They both said such comments would be very surprising and entirely uncharacteristic of Mr Shippam and Mr White. The claimant's cross examination of Mr Joylal and Mr Sullivan was very brief and he did not put to them any details as to where, when and how these comments were allegedly made.

46. Further, the claimant's account of the comments was not consistent with other documents and evidence. According to the claimant he was addressed by Mr White as "HM". However, there was no other example of the claimant - or indeed anyone else being addressed by his initials. All the evidence was that staff addressed each other by their first names. Indeed, the claimant addressed Mr Shippam as "James" during cross-examination.

47. The claimant stated that he did not raise these comments with HR because he was vulnerable as a new employee.

48. The claimant did not mention these comments in his emails to the respondent of 12 and 15 August in which he challenged the respondent's reasons for dismissal. Nevertheless, he did mention race discrimination on 15 August. In his emails he said it was very bad that he did not receive a warning about termination meeting.

49. Both Mr Shippam and Mr White robustly denied making the comments.

50. The tribunal found that these comments did not occur, and that the claimant knowingly did not tell the truth in this regard. He had made these comments up. The tribunal made this finding for the following reasons.

51. The claimant failed to make this allegation until 3 months after the date of termination, in his claim form. He had failed to make these comments earlier in circumstances when he had raised detailed concerns about the respondent's conduct and referred to race discrimination.

52. The claimant's account of the dates was inconsistent. The tribunal was particularly influenced by the fact that the claimant in his original account referred to a Sunday. When this was pointed out, he changed his dates. When it was further pointed out that he had relied on another Sunday, he denied what he had told the tribunal and then changed the dates again. Further, his original account was that the comments were made regularly starting from 3 July and during July. However, in cross examination he gave a very different account - stating that the comments only occurred in the final week.

53. Further, the claimant relied on three witnesses to the comments. Two of these gave evidence on oath denying his account. There was no evidence from the further witness called Martin and neither side had called him to give evidence.

54. In contrast, the evidence of the respondent witnesses and the respondent's case was entirely consistent. It denied the comments were made.

55. Accordingly, this is not the common situation in which a Tribunal has to decide between different accounts or between different explanations of a witness's motivation but is not able to make a definitive finding of what happened. In those circumstances, the Tribunal weighs the evidence on the balance of probability and prefers one account or explanation over another. In this situation the tribunal was able to find that the claimant knowingly gave a false account.

<u>Dismissal</u>

56. The respondent's case was that on 10 August a Ms Brunton of HR emailed to remind the managers that the probationary period for the claimant and one of his peers was ending shortly. The claimant's case was that the respondent appeared to have fabricated either or both Ms Brunton's email to Mr Shippam and Mr Shippam's forwarding email to Mr White. The claimant's case was that the date on one email was formulated according to the 24-hour clock and the other was formulated on a 12 hour clock. He stated that it was not possible for different employees to have different clock formats. The respondent denied that the emails were fabricated. Mr Shippam said different employees could format their email timings differently.

57. It was unclear to the tribunal whether the claimant's allegation was against Ms Brunton Mr Shippam or both. The claimant said that he was not sure how this fabrication misled the tribunal and how it assisted the respondent's case.

58. The tribunal rejected the claimant's allegation fabrication for the following reasons. The tribunal could see no benefit to the respondent in fabricating these emails, and the claimant could not suggest such a motivation. The emails referred to no decision or any reasoning as to the claimant's termination or to his performance. It appeared to be a standard HR process. In respect of the clash of evidence as to whether or not employees could format the timings differently, the tribunal preferred the evidence of Mr Shippam who was the longest serving employee and more likely to know how the respondent systems operated.

59. The tribunal was again deeply concerned about a second unsubstantiated allegation that the respondent had fabricated documents.

60. Following a discussion with Mr White, and with his consent, Mr Shippam decided to terminate the claimant's employment. Together with Ms Bamba of HR a script was drafted for a dismissal meeting. The tribunal had sight of an email from Ms Bamba to Mr Shippam copying in Mr White on 10 August containing a script for the termination meeting. She advised Mr Shippam to go through emails to identify dates of meetings when he had previously raised the claimant's performance.

61. Mr Shippam closely followed HR advice in respect of the termination. For instance, when the claimant asked Mr Shippam what the meeting was about, he was advised to tell the claimant it was about probation and say nothing further.

62. The claimant met with Mr Shippam on 12 August with Ms Bamba of HR in attendance. Mr Shippam told the claimant that his performance was not up to standard, and his employment was terminated. The claimant said he received no express prior warning that the meeting might lead to dismissal which the tribunal accepted. Nevertheless, the claimant knew that he was in his probationary period and accordingly could be terminated prior to completion of the period. The respondent did not give the claimant the right of appeal because he was in his probationary period. It was not in dispute that the claimant said relatively little and that the meeting lasted 10 minutes.

63. At another meeting that day Mr Joylal passed his probation. Mr Sullivan passed his probation at around this time.

64. According to the claimant, the respondent procedures allow for probationary meetings and the right to be accompanied. According to Ms Bamba, the respondent did not offer the claimant the right to be accompanied. The tribunal found the claimant did not ask for a companion, because he did not say that he had done so either in his statement or in cross examination. Further it appeared unlikely that the claimant would have asked for a companion because the respondent had not told him it was a meeting at which he was going to be terminated. That the respondent deliberately gave him little information as possible. The tribunal did not accept the claimant's evidence that he was "paranoid" by the time of the dismissal. There was no evidence consistent with this. In view of the tribunal, the claimant did not expect to be terminated and this is why, as all agreed, he was shocked in the meeting.

65. The claimant emailed HR on 12 August at 2215. This was a two-page email containing a detailed refutation of the criticisms of his performance. The email made no reference to racial comments or motivation. The email referred to an Employment Rights act claim. The claimant asked the respondent for a comparison of his performance with that of his colleagues. Mr Shippam said that he provided the statistics concerning tickets to HR.

66. Ms Bamba sent the claimant a letter confirming his dismissal on 15 August 2022. She stated that there had been meetings during the employment in which the shortcomings in his performance were highlighted. He had unfortunately still not met the standards required for the position and was terminated due to unsatisfactory performance. He was paid one-month in lieu and his outstanding holiday.

67. The claimant emailed HR of 15 August stating, "I don't believe it was to do with performance and I believe it was personal. These two (referring to Mr Shippam and Mr White) have a very close relationship. I guess the easy target was to get rid of me." He went on to say that he believed it was to do with his religion, race and skin colour, but provided no details beyond this.

68. Ms Bamba replied in a letter of 19 August setting out further criticisms of the claimant's performance.

69. The claimant did not raise the specific allegations of racial harassment before he presented his claim form to the tribunal over three months later.

The law

70. The law in respect of discrimination is found in the 2010 Equality Act as follows:

> 13 Direct discrimination
>
> (1)A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.
>
> …
>
> (5)If the protected characteristic is race, less favourable treatment includes segregating B from others.
>
> 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.
>
> (2)A also harasses B if—
>
> (a)A engages in unwanted conduct of a sexual nature, and
>
> (b)the conduct has the purpose or effect referred to in subsection (1)(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.

136 Burden of proof

This section applies to any proceedings relating to a contravention of this Act.

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.

But subsection (2) does not apply if A shows that A did not contravene the provision.

71. The law on the right to be accompanied is found at in the Employment Relations Act 1999 as follows: –

10 Right to be accompanied.

(1)This section applies where a worker—

(a)is required or invited by his employer to attend a disciplinary or grievance hearing, and

(b)reasonably requests to be accompanied at the hearing.

13 Interpretation.

…

(4)For the purposes of section 10 a disciplinary hearing is a hearing which could result in—

(a)the administration of a formal warning to a worker by his employer,

(b)the taking of some other action in respect of a worker by his employer, or

(c)the confirmation of a warning issued or some other action taken.

Submissions

72. Both parties provided written opening statements which the Tribunal treated as part of their submissions. Both provided written submissions and made oral submissions.

73. The claimant sought to rely on a number of Employment Appeal Tribunal authorities. The tribunal could not see the relevance of any of these cases to the issues. Many appeared to go to a tribunal's discretion to extend time, which was often issued in this case. Following lengthy discussions, and the tribunal taking the claimant through many of the cases, the claimant was unable to explain the relevance. The claimant said he had been looking for cases where the Employment Appeal Tribunal had dismissed the appeal. However, at least one of the cases was where the appeal was successful. After submissions closed he asked to rely on another case. The tribunal determined that this was not proportionate.

Applying the Law to the Facts

Direct race discrimination section 13 Equality Act 2010

74. The tribunal had determined that two of the acts relied on by the claimant, the comments by Mr Shippam and Mr White, had not occurred.

75. The tribunal accepted that the claimant's performance was reviewed as shown by the evidence in the bundle and the fact that Mr Shippam, Mr White and Ms Bamba gave evidence as to the review. Further, it was entirely plausible that managers would review a probationer.

76. It was agreed that dismissal had occurred.

77. The Tribunal accordingly went on to consider whether the respondent had acted as it did because of the claimant's race.

78. In this case, the acts were not inherently discriminatory, therefore (as per *James v Eastleigh Borough Council* [1990] IRLR 572), the Tribunal must look for the operative or effective cause. This requires consideration of why the alleged discriminator(s) acted as they did. Although their motive will be irrelevant, the Tribunal must consider what consciously or unconsciously was their reason? This is a subjective test and is a question of fact.

79. The tribunal reminded itself of the guidance in *Nagarajan v London Regional Transport 1999 ICR 877, HL* (a case under legacy race legislation) as follows,

'Many people are unable, or unwilling, to admit even to themselves that actions of theirs may be racially motivated. An employer may genuinely believe that the reason why he rejected an applicant had nothing to do with the applicant's race. After careful and thorough investigation of a claim members of an employment tribunal may decide that the proper inference to be drawn from the evidence is that, whether the employer realised it at the time or not, race was the reason why he acted as he did.'

80. It does not matter if the decision-maker was consciously or subconsciously racially motivated. The tribunal asks why they acted as they did.

81. The Tribunal also had regard to the comments of Lord Phillips, then President of the Supreme Court, in *R* (*E*) *v Governing Body* of *JFS* [2009] UKSC 15, also a case under legacy race discrimination. In deciding what were the grounds for discrimination, a Tribunal is simply required to identify the factual criteria applied by the respondent. This is simple shorthand for determining whether the prescribed factor operated on the alleged discriminator's mind. Whilst any discriminatory reason must be an effective cause of treatment, it does not have to be the only reason.

82. The Equalities and Human Rights Commissions Employment Code states that the protected characteristic needs to be a cause of the less favourable treatment, but it does not need to be the only or even the main cause.

83. Further, the House of Lords in *Najaragan* stated that for discrimination to be made out "racial grounds" (the material test at that time), it must have a significant influence on the decision. According to *O'Neill v Governors of St Thomas More Roman Catholic Voluntarily Aided Upper School and anor 1997 ICR 33, EAT*, the discriminatory reason does not have to be the main reason, as long as it is an effective cause. See also the judgment of the *Employment Appeal Tribunal in Amnesty International v Ahmed* [2009] IRLR 884.

84. As to the burden of proof, the Tribunal directed itself in line with the guidance of the Court of Appeal in *Igen Ltd v Wong and Others* CA [2005] IRLR 258. At the first stage, the Tribunal has to make findings of primary fact. It is for the Claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed an act of discrimination. At this stage of the analysis, the outcome will usually depend on what inferences it is proper to draw from the primary facts found by the Tribunal. It is important for Tribunals to bear in mind in deciding whether the Claimant has proved such facts that it is unusual to find direct evidence of discrimination. Few employers would be prepared to admit such discrimination and in some cases the discrimination will not be an intention but merely an assumption.

85. The Court of Appeal reminded Tribunals that it is important to note the word "could" in respect of the test to be applied. At the first stage, the Tribunal must assume that there is no adequate explanation for those facts. At this first stage, it is appropriate to make findings based on the evidence from both the Claimant and the Respondent, save for any evidence that would constitute evidence of an adequate explanation for the treatment by the Respondent.

86. However, the burden of proof does not shift to the employer simply on the Claimant establishing a difference in status and a difference in treatment. Those bare facts only indicate a possibility of discrimination. "Could conclude" must mean that a reasonable Tribunal could properly conclude from all the evidence before it: see *Madarassy v Nomura International* [2007] IRLR 246: -

    "the bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a Tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination".

87. If the Claimant does not prove such facts, the claim will fail.

88. If, on the other hand, the Claimant does prove on the balance of probabilities facts from which the Tribunal could conclude, in the absence of an adequate explanation, that the Respondent has committed the act of discrimination, unless the Respondent is able to prove on the balance of probabilities that the

treatment of the Claimant was in no sense whatsoever because of her protected characteristic, then the Claimant will succeed.

89. The Tribunal also directed itself in line with *Hewage v Grampian Health Board* [2012] UKSC 37 that the burden of proof provisions will require careful attention where there is room for doubt as to the facts necessary to establish discrimination. They have nothing to offer where the tribunal is able to make positive findings on the evidence one way or the other.

90. In *Laing v Manchester City Council* [2006] ICR 1519, the EAT stated that:

"No doubt in most cases it will be sensible for a Tribunal formally to analyse a case by reference to two stages. But it is not obligatory on them formally to go through each step in each case… An example where it might be sensible for a Tribunal to go straight to the second stage is where the employee is seeking to compare his treatment with a hypothetical employee. In such cases the question whether there is such a comparator – whether there is a prima facie case – is in practice often inextricably linked to the issue of what is the explanation for the treatment, as Lord Nicholls pointed out in *Shamoon* …. it must surely not be inappropriate for a Tribunal in such cases to go straight to the second stage. … The focus of the Tribunal's analysis must at all times be the question of whether or not they can properly infer race discrimination. If they are satisfied that the reason given by the employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is the end of the matter. It is not improper for a Tribunal to say, in effect, "there is a nice question as to whether or not the burden has shifted, but we are satisfied here that, even if it has, the employer has given a fully adequate explanation as to why he behaved as he did and it has nothing to do with race."'

91. In *Chief Constable of Kent Constabulary v Bowler EAT 0214/16* Mrs Justice Simler (then President of the EAT) stated that tribunals.

"…must avoid a mechanistic approach to the drawing of inferences, which is simply part of the fact-finding process. All explanations identified in the evidence that might realistically explain the reason for the treatment by the alleged discriminator should be considered. These may be explanations relied on by the alleged discriminator, if accepted as genuine by a tribunal; or they may be explanations that arise from a tribunal's own findings.'

92. In respect of the review and the dismissal, the tribunal considered whether this conduct amounted to less favourable treatment, and if so whether this was because of the claimant's race.

93. The tribunal accepted that the review and the dismissal were unfavourable treatment. The tribunal found that the review was inextricably linked to the dismissal. The review led to the dismissal. In effect they were the same action. The purpose of a probationary period is to permit an employer to review an employee and to decide about whether or not to confirm them in post.

94. The tribunal went on to consider whether the review and dismissal constituted less favourable treatment because of the claimant's race. The claimant did not rely on an actual comparator in his claim form, at the case management hearing, in the list of issues or in his submissions. However, in his witness statement he listed 28 respondent employees as comparators. He told the tribunal that he had chosen these people only because they were not dismissed on the grounds of poor performance, not because they had failed to pass the probationary period. None of the 28 employees had previously been identified as actual comparators.

95. The tribunal did not understand the claimant to be relying on any of these 28 employees as an actual comparator under section 13. Nevertheless, in the event that the claimant did seek to rely on them as actual comparators, he provided no evidence as to the circumstances of these people, or any indication as to why their circumstances were materially the same as his. The only exception was Mr Sullivan, about whom he gave scant evidence and no material evidence in respect of his performance. He did not rely on Mr Joylal.

96. The list of 28 individuals included Mr White, Ms Brunton and the respondent's CEO and COO. Save for Mr Sullivan, there was nothing to indicate let alone establish that their circumstances were materially the same as those of the claimant. The claimant had selected this group, he told the tribunal, only because they had not been dismissed. In the view of the tribunal, they were in effect randomly selected.

97. However, the tribunal found that Mr Sullivan could be a suitable actual comparator because he was recruited in the same recruitment as the claimant to the same role and was confirmed in post at a similar time to the claimant's failing his probation period.

98. The claimant must prove on the balance of probabilities facts on which the Tribunal could conclude in the absence of an adequate explanation that the respondent has committed the act of discrimination. As stated above, applying *Madarassy,* difference in treatment and difference in race do not in and of themselves shift the burden of proof.

99. The tribunal accepted that Mr Joylal was an evidential comparator or what had been termed in *Shamoom* as a "building block" of a hypothetical comparator. That is, the tribunal could use the facts concerning Mr Joylal to construct a hypothetical comparator or as evidence to help determine if the burden of proof shifted to the respondent.

100. Mr Joylal was of South Asian origin, the same as the claimant, but was of Indian rather than Bangladeshi origin. The claimant did not argue that the reason that he was treated less favourably than Mr Joylal was that he was of Bangladeshi origin, as opposed to Indian origin. Although the tribunal had found that the claimant had made up the verbal harassment it found that these allegations were likely to reflect the claimant's case as to why he had been discriminated against. The comments related only to skin colour rather than to

race or being Bangladeshi. The claimant did not contend that his skin colour was darker or indeed materially different to that of his colleagues, thereby indicating why a comment might be made about his skin colour rather than that of his colleagues.

101. The tribunal understood that Mr Sullivan identified as black. The claimant did not allege that he had been treated less favourably than Mr Sullivan because Mr Sullivan was black whilst the claimant was Bangladeshi.

102. The fact that Mr Shippam and Mr White retained both Mr Sullivan and Mr Joylal was not consistent with their being prejudiced on the grounds of race or in some general way against ethnic minorities. The claimant did not argue or provide any evidence to suggest that the respondent in general, or Mr White and Mr Shippam in particular, were prejudiced against people of Bangladeshi origin.

103. Further, the claimant in cross examination suggested that Mr White and Mr Shippam were considering exiting him, because of his race, as early as 24 May. This was his second week at work and the first day when both he and Mr Shippam were in the office. This did not fit well with Mr Shippam having recently recruited the claimant and having worked less than one day with him in the office. In these circumstances, it seemed unlikely that Mr Shippam should so very quickly move to considering exiting the claimant because of his race.

104. The claimant's case, absent the statements which the tribunal found he had made up, appeared to be that because his performance was good enough the reason for his dismissal must be race. However, the respondent had provided evidence that the claimant's performance was not as good as that of his peers. He had closed notably fewer of the total number of tickets, having been responsible for 16% as opposed to 25 to 30%. The claimant contended that he never got a chance to improve and was not given a target. However, there was no suggestion from him that his peers were treated any differently.

105. The claimant further alleged that one document relating to one ticket was fabricated by the respondent. The tribunal did not accept this allegation for the following reasons. Firstly, the tribunal took into account that the claimant had made two earlier unfounded and unsubstantiated allegations of fabrication. In addition, there was no very obvious motive for the respondent to fabricate this document which related to one ticket out of nearly 150. Despite the claimant being in possession of the documents during litigation, he had not raised this allegation of fabrication before the hearing.

106. The tribunal did not accept the claimant's submissions that the ticket numbers were materially inaccurate. This was not put to the witnesses. The claimant submitted that two tickets were inaccurate. However, one of these alleged inaccuracies in fact increased the claimant's ticket numbers by one, and the other was not connected to the claimant. The claimant further contended that the respondent's calculations were wrong in that the number of tickets was 147 rather than 145. The tribunal found this statistically not significant.

107. The tribunal did not find that the claimant's phone use was a significant part of its reason for dismissal, but it was consistent with the claimant not having reached the required standard of performance. The fact that the claimant stated in cross examination he was entitled to use his phone because the respondent had no specific policy is consistent with the claimant not been aware of the shortcomings in his performance.

108. The claimant was notably reluctant to put to the witnesses that he was subjected to the treatment because of his race. The respondent invited the tribunal to draw an adverse inference from this. The tribunal, however, did not draw such an inference because the claimant was unrepresented and in the experience of the tribunal, claimants can be reluctant to make direct allegations of race discrimination to a witness.

109. The tribunal took into account that the respondent failed to take notes of the termination meeting and failed to warn the claimant of the termination meeting so he could exercise his right to be accompanied. However, the tribunal did not draw adverse inferences against the respondent from these facts or the following reasons. The claimant was one of three probationers taken on at the same time. There was no evidence that the other two probationers were treated differently. The tribunal noted that the respondent had put in the bundle a probationary review form which it admitted it had not used for any probationer. This indicated that at least in the claimant's unit, the respondent's procedures were not followed. Whilst this may not have been best practice, it was consistent with the claimant being treated the same as his peers, rather than differently. The respondent had failed to follow its procedures in respect of all three.

110. Further and relying in particular on the industrial experience of its members, the tribunal accepted it was not unusual for employers to apply a truncated or indeed no procedure when terminating an employee for failure to pass probation.

111. Accordingly, the tribunal viewed this as a case as identified in *Laing*. The tribunal could say that it was satisfied that the reason given by this employer was a genuine one and did not disclose either conscious or unconscious racial discrimination. Accordingly, this is the end of the matter, and the claim is dismissed.

<u>Harassment Section 26 Equality Act 2010</u>

112. The tribunal had found that the acts relied upon did not occur. Accordingly, the harassment claim was dismissed.

<u>The Right to Be Accompanied Section 10 Employment Relations Act 1999</u>

113. The tribunal first considered whether the right to be accompanied under section 10 was engaged, that is whether the dismissal hearing was a disciplinary hearing as defined in section 13.

114. The respondent did not make the case that the dismissal hearing was not a disciplinary hearing. In section 13(4)(b) a "disciplinary hearing" is not defined in any other way than a hearing at which an employer administers a formal warning or takes "some other action" or confirms a warning or some other action. The tribunal was taken to no authority on the interpretation of section 13.

115. The tribunal was taken to the case of *Toal and anor v gb oil ltd* EAT 0569/12/LA, which is authority that the ACAS code is not an aid to interpretation of statute including the interpretation of the provisions of the Employment Relations Act relating to the right to be accompanied. Accordingly, the limitations of the ACAS code, for instance relating to redundancy dismissals, do not apply under sections 10 or 13.

116. The tribunal sought to apply the approach in *Toal* and applied the plain words of the statute. There was no question that terminating an employee was an action. The tribunal accepted that the heading in the statute of disciplinary meeting was an aid to interpretation. This termination was due to the claimant's performance, it was not an exogenous event such as a closure of a department, which might fit less well under this heading. The Tribunal found that the dismissal meeting was a disciplinary hearing as defined in section 13 and the claimant's rights under section 10 were engaged.

117. However, the claimant did not request a companion. The claimant did not say he requested a companion either in his claim form, in his witness statement and nor did he put this to any witness. Ms Bamba in her statement expressly stated that the claimant had not requested a companion. Further, the Tribunal had found it unlikely the claimant would have requested a companion because he was unaware that this was a dismissal meeting.

118. The respondent argued that because the claimant knew the meeting related to his probation, this meant that he was on constructive notice that it was a disciplinary meeting. The tribunal accepted that the claimant was aware of the terms of his probationary period. Nevertheless, the tribunal had found that the claimant did not expect to be dismissed. The claimant had quickly told the respondent after his dismissal that his performance was in fact better than that of his peers. This did not indicate that he expected to be dismissed.

119. The claimant drew the respondent and tribunal's attention to a first instance decision, Y*oshovska v Goldman Sachs* 161221 EJ Coughlin QC. The facts in *Yoshovska* were similar. In fact, the situation in *Yoshovska* was more extreme in that the claimant was misled because she was told that the dismissal meeting was only a "catch up".

120. A first instance decision does not bind an employment tribunal but may, in some circumstances, be of assistance. The tribunal noted that *Yoshovska* was not a decision on the interpretation of section 10. It was a decision on a strikeout application where the tribunal determined that the law on section 10 was such that a claim had no reasonable prospects of success on these facts.

121. The tribunal found that the careful and considered analysis of the tribunal in *Yoshovska* was of assistance. Before it was aware of the decision in *Yoshovska,* this tribunal had come to the same conclusions as to interpretation of section 10 as had the tribunal in *Yoshovska.*

122. The respondent's submission was in effect the same as the submission of the respondent in *Yoshovska*, that is that the tribunal was bound by the plain words of the statute. Because the claimant in *Yoshovska,* and the claimant in this case had not made a request for a companion, the right did not "bite". To put it another way, there is no right to be accompanied until there is a request. Accordingly, the respondent had infringed no right.

123. This tribunal shared the concerns of Employment Judge Coughlin in *Yoshovska* that the result of this legal analysis was somewhat surprising. An employer who does not warn an employee that their job is at risk or indeed actively misleads the employee (which was not the case on these facts) is in an arguably better position than an employer who earnestly sends the employee a letter in advance informing them of what is happening, thereby allowing the employee to exercise their right to request a companion.

124. Nevertheless, applying the spirit of the decision in *Toal,* the tribunal was required to concentrate on the plain words of the statute. The claimant had not requested a meeting and therefore the respondent had not infringed his right. This tribunal also adopted Employment Judge Coughlin's findings that it was not possible to look to either European Union law or human rights law for an aid interpretation of a purely domestic right.

125. Accordingly, as the claimant did not make a request to be accompanied, the right under section 10 was not engaged. It is no matter that the claimant did not have a real opportunity to make a request.

126. The claim must therefore stand dismissed.

Claimant's conduct after judgment and reasons

127. The tribunal delivered its oral judgment and reasons on the afternoon of the fourth day. The claimant soon after stood up, made to leave the room, and shouted homophobic abuse in the direction of the respondent witnesses and representatives. Upon being reprimanded by the tribunal, he left the room. The tribunal enquired of the respondent counsel if she and the witnesses were content to leave or if further intervention was required from the tribunal. The respondent confirmed that they were content to leave forthwith and did so.

128. The tribunal did not move to consider a strike out of the claim on the grounds of scandalous conduct because the claim had already been dismissed.

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Employment Judge Nash
Date 15 October 2023

REASONS SENT TO THE PARTIES ON

16/10/2023

FOR THE TRIBUNAL OFFICE