EMPLOYMENT TRIBUNALS

Claimant	**Respondents**
Ms E Zhang	**1. Heliocor Ltd** **2. Heliocor Consulting Ltd** **3. Mr V Tripathi**

Heard at: London Central **On**: 22, 23, 26 – 28 February 2024
In chambers: 29 February; 1 March 2024

Before: Employment Judge Lewis
Ms J Cameron
Mr D Wharton

Representation

For the Claimant: Represented herself

For the 1st respondent: Mr O Hall, Director
For the 2nd respondent: Unrepresented
For the 3rd respondent: Represented himself

RESERVED JUDGMENT ON LIABILITY

The unanimous decision of the tribunal is that

1. The claimant was not employed as an employee or worker by the 1st respondent and the first respondent was not a principal n relation to her as a contract worker under the Equality Act 2010.

2. The claim for unauthorised deduction from wages against the first respondent is not upheld.

3. The claims for race discrimination and for harassment related to race are not upheld.

REASONS

Claims and issues

1. The claims are for unpaid salary, unreimbursed expenses, direct race discrimination and race-related harassment.

2. The issues were agreed at the start of the hearing. They were essentially as set out in EJ Emery's case management letter except that the holiday pay claim was not pursued following the deposit order and we added in whether the 1st respondent was alternatively liable as a principal under s41 of the Equality Act 2020. The s41 issue was raised at previous case management hearings but had been overlooked in the List of Issues. The only other change was to tidy up the areas left as blanks or in the alternative.

3. The tribunal provided the parties with the tidied List of Issues, which were agreed as follows:

Employment status

1.1 It was agreed that the claimant was an employee of the 2nd respondent. The claimant says she was also a worker or employee of the 1st respondent. The 1st and 3rd respondent dispute this.

1.2 Was the claimant also an employee of the 1st respondent within the meaning of s230 of the Employment Rights Act 1996?

1.3 Was the claimant an employee of the 1st respondent within the meaning of s83 of the Equality Act 2020?

1.4 Was the claimant a worker of the 1st respondent within the meaning of s230 of the Employment Rights Act 1996?

1.5 Was the 1st respondent responsible as a principal under s41 of the Equality Act 2010 for any of the alleged discrimination / harassment against the claimant as a contract worker?

Time-limits

1.6 Were the discrimination claims under the Equality Act 2010 made in time? The tribunal will decide:

1.6.1 Was the claim made to the tribunal within three months (plus early conciliation extension) of the act to which the complaint relates?

1.6.2 If not was there conduct extending over a period?

1.6.3 If so was the claim made to the tribunal within three months (plus early conciliation extension) of the end of that?

1.6.4 If not were the claims made within a further period that the tribunal thinks is just and equitable?

1.7 Was the claim for unauthorised deductions made in time? The tribunal will decide:

1.7.1 Was the claim made to the tribunal within three months (plus early conciliation extension) of the date when payment was due?

1.7.2 If not was there a series of deductions and was the claim made to the tribunal within three months (plus early conciliation extension) of the last one?

1.7.3 If not, was it reasonably practicable for the claim to be made to the tribunal within the time limit?

1.7.4 If not, was it made within a reasonable period?

Direct race discrimination

1.8 Did the respondent do the following things:

1.8.1 On or around March 2019, when asking to visit her sick grandfather, Mr Tripathi shouted at the claimant and used words such as, ‘You are an asshole, you are just a piece of tool to me. If you don't come back with me your plane will crash, you will die on the journey’.

1.8.2 On or around June 2019, Mr Tripathi said to the claimant when she was late for a meeting, ‘Fuck you’ and ‘Shame on you’.

1.8.3 In or around June 2019, Mr Tripathi requested all employees come to work no more than one minute late. One day he came late and the claimant talked to her colleague Mohit Kumar in a very low voice and said ‘Vikas is late’. He later forced her to go into the small room and forced her to tell him what she had been discussing with Mohit. She refused to tell him, he told her, ‘I'm telling you to tell me, just tell me’. Then she had to tell Mr Tripathi what she was discussing with Mohit. He then abused her with comments such as ‘None of your fucking business’, told her to follow his orders and say ‘Yes Sir’ to him.

1.8.4 The claimant's grandfather passed away in June 2019, which occurred while she was on a business trip to Shenzhen. Mr Tripathi forced her to attend a business meeting instead of attending her grandfather's funeral. Therefore she had to miss her grandfather's funeral. He recorded her business presentation on that day and he criticised her on the basis that she didn't perform and verbally threatened her and abused her again.

1.8.5 Mr Tripathi took the claimant's mobile phone (on 4 October 2019) and then her USB (around October 2019 and handed back around December 2019) without her permission and kept them with him. He took her mobile phone with him and forced her to beg him to return it. This happened in front of her previous colleagues Roisin Hunter, Mohit Kumar and Heliocor Ltd investor Roger Sharma. He also recorded a video about her pleading with him to give back the phone. He returned the phone to her later the same day on 4 October 2019.

1.8.6 On 6 November 2019, the claimant applied for a business trip with Owen Hall and received permission to go to Malta. Since Mr Tripathi was not in the UK and she was mentally abused by him for a long time therefore she was not able to communicate with him. She didn't update Mr Tripathi of her schedule and later when he came back to London, he called her into the small room and abused her verbally for an hour and forced her to write an e-mail and apologise to him.

1.8.7 Before the 2019 company Christmas party, to stop her from attending the party at Barcelona, Mr Tripathi lied on behalf of the claimant to company CEO Owen Hall. He said that, because her colleague Mohit Kumar does not have a visa to go come out she therefore also didn't want to go. She never said this to him. The truth was discovered after Owen Hall mentioned it in the office and she also asked him in front of other colleagues, 'Why did you say this?' He texted her later and said, 'Don't shout'. This was seen and witnessed by other colleagues.

1.8.8 On or around March 2020 Mr Tripathi made overtly racist comments about people who are ethnically Chinese and their characteristics and appearance using the words 'Chinese are thieves, they steal everything. Indians will beat up the Chinese. Chinese have small eyes, China is going to kill all the Covid patients, what a stupid country it is'.

1.8.9 On or around 22 March 2020 Mr Tripathi made fun of the claimant's Chinese background and criticised her race by sending a WhatsApp message. It is common ground that Mr Tripathi sent a WhatsApp message on 22 March 2020 to a group chat that the claimant was a party to. The WhatsApp message was titled 'The Italy - Wuhan Connection' and was regarding Coronavirus. The respondent says it was a factual message, explaining why Coronavirus, which was becoming prevalent at the time, which originated in China, had caused a widespread outbreak in countries like Italy.

1.9 Did that treatment amount to a detriment?

1.10 Was that less favourable treatment because of race? (The claimant describes her race as Chinese nationality and origin.)

Harassment

1.11 In respect of each action alleged at paragraph 1.7 above, was it unwanted conduct?

1.12 Did it relate to race?

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

1.14 If not, did it have that effect? The tribunal will take into account the claimants perception, the other circumstances of the case and whether it is reasonable for the conduct to have that effect.

Unauthorised deductions

1.15 Did the 1st respondent make unauthorised deductions from the claimant's wages?

1.16 How much was deducted? The claimant says it was £1833.33 for December 2019 salary, £3333.33 for each of January and February 2020 salary, and March 2020 salary (unquantified) up to the date of the claim form. The 1st respondent agrees it did not pay the claimant's salary but says it had no legal responsibility to do so as it was not her employer.

1.17 Is the claimant entitled to reclaim expenses as an unauthorised deduction from wages?

1.18 If so, did the 1st respondent make unauthorised deductions by failing to pay these expenses:

1.18.1 Business trip to China: £691

1.18.2 Lunch with client SPD: £80.50
1.18.3 Printing expense: £20.20.

Procedure

4. We consider that these Reasons will be easier to follow if, rather than refer to the parties as 1st, 2nd and 3rd respondent, we refer to them by name or abbreviation. We will therefore refer to the 1st respondent, Heliocor Ltd, as 'Heliocor'. We will refer to the 2nd respondent, Helior Consulting Ltd, as 'HCL'. We will refer to the 3rd respondent as Mr Tripathi.

5. HCL is in creditors' voluntary liquidation. It was unrepresented at this hearing. The claimant was attending the tribunal only to represent herself.

6. The tribunal heard from the claimant and on her behalf, from Roderick Cameron and Ramesh Sharma. For the respondents, the claimant heard from Owen Hall, Vikas Tripathi and Roisin Hunter. They each had witness statements. We were also going to hear from Mohit Kumar, but on day 3 we were informed that Mr Kumar was no longer available to give evidence because he had had to fly to India over the week-end because his mother was unwell. We only had an unsigned witness statement from Mr Kumar.

7. The claimant wanted to call Ms Shikha Sharma as a witness. However, she is currently living in India. We informed the claimant that she would need to check whether the claimant was permitted to give video evidence from India, as that may well not be the case. If not, the tribunal could still read her witness statement, but we may have to give it less weight because she was not available to be cross-examined.

8. The claimant also produced a witness statement from Jane Wang. This was an unsigned statement and Ms Wang did not attend to give evidence.

9. There was an agreed trial bundle of 1246 pages including the witness statements. Mr Hall's witness statement for the preliminary hearing was provided separately and we have called it R1. We were given a number of other additional documents during the course of the case, which we numbered C1 – C6 and R2 – R3.

10. The claimant referred in her witness statement to a recording, but we were told there was an agreed transcript in the trial bundle.

11. Mr Tripathi asked for three items of disclosure at the start of the hearing, ie as set out in paragraphs 23, 25 and 27 of his witness statement. The claimant said she could not provide item 25 (her chat history) beyond what she has already disclosed because she had to change her mobile phone after her Apple ID was hacked and her chat history has all gone. The tribunal did not make an Order because no further chat history exists.

12. Regarding item 23, the claimant said it was not relevant. We agreed. The request was vague and extensive, and we could not see the relevance and need for it.

13. Item 27 was that the claimant disclose why she was arrested by the Metropolitan Police in 2020/1. Mr Tripathi was unable to convince us why this was relevant. His main concern was that if we were to allow the witness statement of Ms Sharma, his estranged wife, regarding his character, we ought also to investigate the arrest as it may shed light on the claimant's character. Our view was that Ms Sharma's witness statement was not obviously relevant to the claims and in any event, was not helpful to us because her evidence of his treatment was strongly contested through the Indian courts. Further, as she was based in India, she could not give oral evidence anyway. We proposed not to take account of Ms Sharma's witness statement or why the claimant was arrested. Both the claimant and Mr Tripathi were satisfied with this approach.

14. This was in general a difficult case to hear. There had been numerous case management hearings and an EAT decision. A great deal of time had elapsed since the events, which were largely unrecorded apart from in WhatsApps messages. The witness statements did not fully set out each person's evidence. We were drip fed documents not in the trial bundle by the claimant and by Mr Tripathi. None of the parties seemed to be working from the same page numbers in the bundle or to be on top of where documents were. None of the three parties were legally represented, although the claimant and Heliocor had previously been legally represented at various points. There were some tricky legal points regarding employment status, but no legal argument of any substance was put forward to us. To a large extent the parties were focussed on bringing up issues, often tangential, which they felt would discredit each other, but which ultimately we could not resolve and which in any event, would not help us resolve the specific issues in the case. For example, the issue of how Mr Tripathi did or did not treat his wife was subject of long-standing contested litigation in India. The issue of whether the claimant legitimately took over HCL in June 2020 was the subject of legal correspondence and a mediation. The issue of whether the claimant masqueraded as Jane Wang in Linked-In communications ostensibly sent by Jane Wang to Mr Tripathi's son-in-law was also insoluble. In addition, the other witnesses all appeared to be strongly aligned on one side or the other.

Fact findings

15. Heliocor is a Regulatory Technology company which provides software solutions to the financial services industry covering fraud detection, monitoring for money laundering, counter criminal behaviour and so on. It was founded in August 2014 and Owen Hall was the CEO.

16. HCL was founded on 13 July 2017 as a wholly owned subsidiary of Heliocor. The purpose was to separate revenue from software sales and from consulting services.

17. The claimant is a Chinese national and of Chinese ethnic origin. Having left a previous employer, the claimant was looking to invest in a company so that she could obtain a UK Tier 1 entrepreneur visa. This required her to invest £200,000 in a UK business. We were not told all the conditions of the visa.

18. The claimant was introduced to Heliocor's Managing Director, Vikas Tripathi, via a mutual contact. After a number of conversations between the claimant, Mr Hall and Mr Tripathi, it was agreed that she would invest in HCL and focus on gaining entry to the Crypto Consulting market by using her range of contacts as customers. On 10 October 2018, Mr Tripathi, Mr Hall and the claimant agreed that Heliocor would sell 20% of its shares in HCL to the claimant for £200,000. The claimant applied for the visa on 31 October 2018 and it was granted on 20 December 2018.

19. In November 2018, the claimant became a Director of HCL, alongside the original Directors, Mr Hall and Heliocor.

20. Mr Hall wrote a business plan for HCL dated 22 October 2018. This was required for the visa application. He described himself on the document as CEO of HCL.

21. The claimant's contract of employment is dated 22 September 2018 and signed by the claimant and by Mr Tripathi 'on behalf of Heliocor Consulting Limited'. The contract is stated to be between the claimant and HCL. It states that the claimant is employed in the capacity of Director of Partnerships. Her period of continuous employment started from 22 October 2018. Her normal working hours were Monday – Friday 9 – 5.30 and she may be asked to work reasonable overtime. The normal place of work was stated as at HCL's registered office, 20 Birchin Lane. Remuneration under the contract was £40,000 per annum, paid monthly, plus she may be paid a discretionary bonus.

22. The claimant was given a business card with the Heliocor logo. It stated the address as 'Heliocor, 20 Birchin Lane, London EC3V 9DU'. Mr Hall had no explanation as to why the business card did not explicitly say HCL, other than they were too busy to think about such things at the time. Heliocor was the trading name for the Group and the branding was also used by Heliocor Iberia, the Spanish company in the Group which was technically responsible for developing the products.

23. The claimant's email address was @heliocor.com. No separate domain was owned for HCL.

24. Photographs and videos of the claimant were put onto Helicor's social media. HCL did not have a separate social media account because dividing accounts reduces the chance to build momentum.

25. The contract of employment also had the Heliocor logo at the top. The logo was used by all the Group companies as a brand. Mr Hall compared this with, for example, when he worked for Deutsche Bank which had over 2000 companies in the Group; they all used the Deutsche Bank name and logo and they all used the same email.

26. On 2 December 2019, HCL wrote to Barclays Bank to assist the claimant's mortgage application. The letter described the claimant as an employee at HCL in the position of Director of Partnerships and on a basic annual salary of £40,000. The letter was signed by Laura Lluhen, HR Director. Ms Lluhen was employed by Heliocor Iberia as HR Director for the Group. The Heliocor logo was at the top of the letter and 'Heliocor Consulting Ltd' was typed in small print at the foot of the page.

27. The claimant's payslips were from HCL and her pay came out the HCL bank account. Mr Hall controlled the HCL bank account. He instructed the accountants to pay the claimant her wages and he was the person to authorise expenses.

Heliocor Consulting Ltd ('HCL')

28. Prior to the incorporation of HCL, Heliocor Iberia was producing the software products and Heliocor in London was selling the products and providing consultancy services. HCL was later founded in order to separate revenue for consulting from revenue from sales and, most importantly, to protect the intellectual property in the software product. This enabled Heliocor to retain ownership of the software products, while any problem-solving solutions developed by the consultants – because they were contracted through HCL – did not pass to the clients.

29. Heliocor and HCL had a symbiotic working relationship. Software sales made by Heliocor created consultancy opportunities for HCL and vice versa.

30. At one stage, HCL had 8 contractors providing consultancy services to Barclays through CapGemini and then Experis. HCL entered a Master Services Agreement with CapGemini in October 2017 which remained in force, but HCL did not actually provide any services under the contract from mid 2019. From July 2017 – July 2018, HCL turned over £486,569.

31. The October 2018 business plan valued the business at about £1 million, which may have been optimistic. It stated that HCL had been the consulting arm of Heliocor for the previous 10 months. It provided consulting services to institutions related to the application of regulations within Financial Services Organisations. It was currently focusing on hiring and placing contractors within these clients.

32. The plan said there was now a plan to grow the business and exploit a new gap in the market within blockchain projects. The claimant would be appointed a Director of HCL and be responsible for growing the business to exploit the market supported by the two Directors of the parent company,

Heliocor Limited, ie Mr Hall and Mr Tripathi. The plan proposed using the claimant's investment of £200,000 in three ways:
1. To invest in building skills within the HCL team focused on blockchain technology.
2. To build a network of specialist talent that could be used as subcontractors while they built a critical mass within Heliocor.
3. To invest in technologies that would bring rewards to consulting and that could be exploited by the team in provision of services.

33. In practice, the claimant chose to focus on fundraising and marketing for the new Crypto token which the Group was developing: the Helio. This was where the Group's main attention was focussed. The claimant worked closely with Heliocor on these activities.

34. The claimant was throughout the sole employee of HCL and everyone else was a consultant or intern (we heard no oral evidence about the latter). Heliocor employed about 5 people other than Mr Hall and Mr Tripathi.

Line management

35. Mr Tripathi was a salaried employee of Heliocor. He was Director / Managing Director of Heliocor from 30 August 2017 – 29 August 2020. He was not an employee, Director or shareholder of HCL.

36. At the time of the claimant's investment, Mr Hall held 50 – 60% of shares in Heliocor and Mr Tripathi held about 20% of shares in Heliocor. Heliocor held 100% shares in HCL and after the claimant's investment, 80%. As already stated, Mr Hall and Heliocor were Directors of HCL; Mr Tripathi was not. However, under the structure he was a Director of HCL's parent company.

37. There was a dispute regarding whether Mr Tripathi was the claimant's line manager. There are certainly many references in the WhatsApp messages by both the claimant and Mr Tripathi to him being her line manager, but we do not find that was meant in a formal sense. Mr Hall was the ultimate line manager who made all the key business decisions, but the claimant reported on a day-to-day basis to Mr Tripathi because she had got involved in his area of activities, ie fundraising and sales / marketing activities.

38. Heliocor and HCL were small, project based companies with fluid priorities. Apart from Mr Hall being the most senior person and CEO of both, there was in general a lack of clarity and reliability in work titles. There was no formal written organisational structure with clear reporting lines. For the functions of fundraising, marketing and PR where the claimant involved herself, Mr Tripathi was de facto in charge and the claimant took his steer and direction on those work streams.

Funds

39. At the time of her investment, HCL had a contract with Experis, which is part of the Manpower Group, which enabled it to supply contractors to banks. HCL generated cash from these consultancy contracts and was profitable prior to 2019. Consultant contracts were typically 6 months and as the Group focussed increasingly on the Helio token, the sales focus on providing banks with consultants diminished. HCL's income from external sources therefore gradually dried up as consultancies came to an end.

40. Some of the consultants had originally been employed by Heliocor, before HCL was founded and the Experis contract created the IP problem. This changed and HCL provided the consultants to Barclays Bank via Experis. As a result, the income came into HCL while Heliocor was obliged to pay the consultant fees. To cover this, money was sometimes transferred from HCL to Heliocor.

41. On the other hand, when consultancy fees dried up during 2019, Heliocor regularly transferred sums into the HCL bank account to pay its overheads, which by this time appear to have been mainly the salaries of Mr Cameron's service company and the claimant.

42. The claimant says that her £200,000 was immediately transferred following her investment to Heliocor Limited, but we did not see any evidence proving that. In any event, as we have said, Heliocor increasingly paid money into HCL to cover its outgoings.

43. Later, during Covid, the claimant applied for and obtained a government loan for HCL.

<u>Unpaid wages and transfer of HCL</u>

44. In October / November 2019, Mr Hall took over the day-to-day management of the claimant because of the deteriorating relationship between her and Mr Tripathi.

45. By November / December 2019, Heliocor was also struggling financially as the Crypto market cooled. Heliocor was no longer able to transfer funds to HCL. Mr Hall warned the management teams that Heliocor and HCL could only pay part salaries to staff. From January 2020, heavy redundancies were made in Spain and the UK.

46. From December 2019, the claimant was not paid her salary. On 24 March 2020, the claimant notified ACAS under the early conciliation scheme. ACAS issued its certificate by email on 25 March 2020. On 25 March 2020, the claimant made her tribunal claim against the 1st and 2nd respondents.

47. Around this time in March 2020, as HCL was not making any money, Mr Hall wanted to uncouple HCL from the Heliocor Group. He met the claimant and asked her whether she would like to take over the company which would also help her retain her UK visa status, and she could have a partnership agreement with Heliocor. The claimant was not sure. Mr Hall told her that if

she pressed for her wages, HCL would not be solvent, and it would have to be put into liquidation

48. The claimant secretly taped the meeting and we refer to it later in terms of Mr Hall's comments about Mr Tripathi.

49. On 26 March 2020, the claimant unilaterally changed HCL's registered office. On 30 March 2020, Mr Hall emailed the claimant to say that he had discovered she had changed HCL's registered office. He said she could not do that and he had instructed the accountant to change it back. Meanwhile, as he had not heard back from her regarding his offer to pass full ownership of HCL, he assumed she was not interested. If he did not hear from her by midday the next day, he would instruct the accountant to cease trading and start the process of liquidating the company.

50. The claimant responded by pushing through a transfer of the company into her hands. There is a dispute as to whether she correctly notified the other shareholders and Directors of HCL which we shall not enter into, but the end result was that Companies House recorded the claimant as a person of significant control and sole Director of HCL from 8 June 2020. The claimant took over the HCL bank account on 1 July 2020.

51. From April 2020 until the end of the furlough schemes in September 2021, HCL through the claimant claimed 80% (and then less) of her wages under the Coronavirus Job Retention Scheme. Under the Scheme, employers could claim 80% (and later less) of the wages of their employees who they had put on furlough.

52. The claimant appears to regard herself as no longer employed. We asked her how her employment had come to an end. She said it came to an end in November 2021. She regarded herself as no longer employed from that point. She had discussed the matter with the accountant.

53. The claimant did not explicitly resign, either orally or in writing.

54. The claimant was not clear in her evidence as to why she considered her employment had ended, but as far as we could tell, this was because the furlough money had ceased and HCL was insolvent. Bearing in mind her contention in this case that she was employed by Heliocor, we note that she did not say anything about Heliocor in relation to the termination of her employment. She did not suggest she was either still employed by Heliocor or that it had ended at this point or indeed any other point.

<u>General office atmosphere</u>

55. During the secretly taped March 2020 meeting, Mr Hall commented that Mr Tripathi had created a 'culture of fear' in the last year. He said the claimant had been in an environment that was actually quite abusive, but to their credit, she, Mr Kumar and Ms Hunter had all come out of that abuse. Mr Hall tried to play that down in his oral evidence. He told the tribunal that the

atmosphere in the office was generally quite friendly, open and jovial. He said he would not find a negative environment productive, so he would not let that occur. However, he did say Mr Tripathi was hard on everyone in the office and aggressive in terms of how he wanted things to be done across the board. He felt on reflection that the pressure of work caused Mr Tripathi to have a mental breakdown at some point in 2019.

56. Ms Hunter told the tribunal that Mr Tripathi was hard-going and very corporate. If he felt people were not pulling their weight, he would often clash heads. He clashed heads with her a lot and he certainly made her upset. They had arguments and they had ups and downs. He was tougher than she would like to have worked with, and she did not have a nice relationship with him at times. On the other hand, he was professional in the sense that if she needed him to help her with the work, he always would. Mr Cameron said it was a bullying environment and that he felt intimidated himself sometimes.

57. What we find most persuasive is what Mr Hall said to the claimant in March 2020 about an abusive environment, when he was unaware that he was being taped. Mr Hall said that he was simply using the tactic of appeasing the person he was speaking to in order to make them receptive to the message and proposal he wanted to deliver, in this case, regarding taking over the company. We do not find that convincing. What he said went beyond that.

58. Mr Hall took over the claimant's management in October/November 2019 because he could see increasing tension in the relationship between Mr Tripathi and the claimant. This was because Mr Tripathi was feeling more stress as the business was not doing well, and because, as part of that, the claimant was not delivering. Mr Tripathi stopped going into the office from about November/December and gradually stopped communicating with the claimant. The office was closed from about December / January 2020 because Heliocor had stopped paying the rent.

59. We were shown hundreds of pages of WhatsApp messages between Mr Tripathi and the claimant. They sent many WhatsApps to each other each day. From these, it appears the relationship was generally chatty and jokey. Mr Tripathi treated colleagues with whom he worked closely, including the claimant, as family. The claimant accepts there were many times when their relationship was good. For example, in July 2019, the claimant asked him to drop her home after a medical appointment. However, that did not stop him from being aggressive if he was unhappy about work matters. As we have said, Mr Tripathi had an aggressive management style which he directed towards everyone if tasks were not done to his satisfaction, and this became worse towards the end of 2019 when the stress of the business doing badly overwhelmed him.

60. We have made our fact-findings in relation to the specific allegations in our Conclusions section.

Law

Who was the claimant's employer?

61. In employment law, the written contract of employment does not always accurately reflect the terms agreed. The true agreement often has to be gleaned from all the circumstances of the case, of which the written agreement is only part. (Autoclenz Ltd v Belcher [2011] IRLR 820, SC.) Moreover, were the corporate structure of an employer comprises more than one entity, the question as to who is the employer might not be straightforward. The EAT recently summarised the principles governing the identification of an employer in Clark v Harney Westwood & Riegels [2021] IRLR 528 as follows:

'The following principles are relevant to the issue of identifying whether a person, A, is employed by B or C:
a. Where the only relevant material to be considered is documentary, the question as to whether A is employed by B or C is a question of law: Clifford at [7].
b. However, where (as is likely to be the case in most disputes) there is a mixture of documents and facts to consider, the question is a mixed question of law and fact. This will require a consideration of all the rel evant evidence: Clifford at [7].
c. Any written agreement drawn up at the inception of the relationship will be the starting point of any analysis of the question. The Tribunal will need to inquire whether that agreement truly reflects the intentions of the parties: Bearman at [22], Autoclenz at [35].
d. If the written agreement reflecting the true intentions of the parties points to B as the employer, then any assertion that C was the employer will require consideration of whether there was a change from B to C at any point, and if so how: Bearman at [22]. Was there, for example, a novation of the agreement resulting in C (or C and B) becoming the employer?
e. In determining whether B or C was the employer, it may be relevant to consider whether the parties seamlessly and consistently acted throughout the relationship as if the employer was B and not C, as this could amount to evidence of what was initially agreed: Dynasystems at [35].

To that list, I would add this: documents created separately from the written agreement without A's knowledge and which purport to show that B rather than C is the employer, should be viewed with caution. The primacy of the written agreement, entered into by the parties, would be seriously undermined if hidden or undisclosed material could readily be regarded as evidence of a different intention than that reflected in the agreement. It would be a rare case where a document about which a party has no knowledge could contain persuasive evidence of the intention of that party. Attaching weight to a document drawn up solely by one party without the other's knowledge or agreement could risk concentrating too much weight on the private intentions of that party at the expense of discerning what was actually agreed.'

62. There have been a few cases regarding whether it is possible to be employed by two employers at once for the same work, most recently Patel v Specsavers Optical Group Ltd (UKEAT/02086/18), and Fire Brigades Union v Embery [2023] IRLR 525, the EAT

Section 41

63. It can be discrimination under the Equality Act 2020 if a 'principal' discriminates against or harasses a contract worker. Under section 41(5) a 'principal' is a person who makes work available for an individual who is (a) employed by another person and (b) supplied by that other person in furtherance of a contract to which the principal is a party (whether or not that other person is a party to it).

64. There is no requirement that the employer is party to the supply contract with the principal, although that will often be the case. However, there does need to be a supply contract which the principal is party to.

Direct race discrimination

65. Under s13(1) of the Equality Act 2010 read with s9, direct discrimination takes place where a person treats the claimant less favourably because of race than that person treats or would treat others. Under s23(1), when a comparison is made, there must be no material difference between the circumstances relating to each case.

66. In order for a disadvantage to qualify as a "detriment", the tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. The test must be applied by considering the issue from the point of view of the victim. If the victim's opinion that the treatment was to his or her detriment is a reasonable one to hold, that ought to suffice. While an unjustified sense of grievance about an allegedly discriminatory decision cannot constitute "detriment", a justified and reasonable sense of grievance about the decision may well do so. (Shamoon v Chief Constable of the Royal Ulster Constabulary [2003] UKHL 11; [2003] IRLR 285)

Harassment

67. Under s26, EqA 2010, a person harasses the claimant if he or she engages in unwanted conduct related to a relevant protected characteristic, and the conduct has the purpose or effect of (i) violating the claimant's dignity, or (ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. In deciding whether conduct has such an effect, each of the following must be taken into account: (a) the claimant's perception; (b) the other circumstances of the case; and (c) whether it is reasonable for the conduct to have that effect.

68. By virtue of s212, conduct which amounts to harassment cannot also be direct discrimination under s13.

69. In Richmond Pharmacology Ltd v Dhaliwal [2009] IRLR 336, EAT, Mr Justice Underhill (as he then was) gave this guidance:

> 'an employer should not be held liable merely because his conduct has had the effect of producing a proscribed consequence. It should be reasonable that that consequence has occurred. The claimant must have felt, or perceived, her dignity to have been violated or an adverse environment to have been created, but the tribunal is required to consider whether, if the claimant has experienced those feelings or perceptions, it was reasonable for her to do so……..Not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers and tribunals are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other discriminatory grounds) it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase.'

Burden of proof under Equality Act 2010

70. Under s136, if there are facts from which a tribunal could decide, in the absence of any other explanation, that a person has contravened the provision concerned, the tribunal must hold that the contravention occurred, unless that person can show that he or she did not contravene the provision..

71. Guidelines on the burden of proof were set out by the Court of Appeal in Igen Ltd v Wong [2005] EWCA Civ 142; [2005] IRLR 258. Once the burden of proof has shifted, it is then for the respondents to prove that they did not commit the act of discrimination. To discharge that burden it is necessary for the respondents to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of the protected characteristic, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive. Since the facts necessary to prove an explanation would normally be in the possession of the respondents, a tribunal would normally expect cogent evidence to discharge that burden of proof.

72. The burden of proof provisions require careful attention where there is room for doubt as to the facts necessary to establish discrimination, but have nothing to offer where the tribunal is in a position to make positive findings on the evidence one way or another. (Hewage v Grampian Health Board [2012] IRLR 870, SC.)

Unauthorised deductions from wages

73. The right not have unauthorised deductions from one's wages is set out in part II of the Employment Rights Act 1996. Section 13 is the primary right and

s14 sets out exceptions where s13 does not apply. Under s14(1)(b), s13 does not apply where the purpose of the deduction is in respect of expenses incurred by the worker in carrying out his or her employment.

Conclusions

Employment status: issues 1.1 – 1.4

74. The claimant conceded that she was employed by HCL but says that was a sham or alternatively that she was at the same time an employee of worker of Heliocor. None of the parties presented any more developed legal argument on this. We did not simply rely on the claimant's concession. We examined the facts.

75. We find that the claimant was employed by HCL, and not by Heliocor, both for the purposes of the Employment Rights Act 1996 and the Equality Act 2010.

76. We are aware that the written contract of employment does not necessarily reflect the true intentions of the parties at the start of the employment. However, in this case, there was considerable evidence for our conclusion that it did reflect their intention.

77. The contract of employment was made with HCL. The claimant's job title was Director of Partnerships at HCL. She was paid out of the HCL bank account and on HCL payslips. PAYE and national insurance were deducted. Although her pay was increasingly funded by transfers from the parent company, Heliocor, when HCL ran out of funds, this is not unusual in our experience in a Group situation when a subsidiary runs out of funds: it is not inconsistent with HCL being the employer.

78. The claimant's mortgage application letter on 2 December 2019 was on HCL headed paper and described her as an employee of HCL. From April 2020 until the end of the furlough schemes in September 2021 the claimant completed on behalf of HCL a furlough application in respect of herself as an HCL employee. When that ran out, she considered herself no longer employed because HCL was insolvent. She did not say anything to the tribunal about continuing to be employed by Heliocor or about her employment also having ended with Heliocor. Heliocor, although in financial difficulty, was not insolvent at that time.

79. We note that the claimant used an email domain owned by Heliocor and that her business card said Heliocor not HCL, and that the Heliocor logo was on the card and letterheads. Again, in our experience this is not unusual in a Group situation. Groups often adopt a common brand and logo, and share the email domain of the parent company. It does not particularly indicate to us that the claimant was employed as an employee or worker by Heliocor.

80. We also note that photos and videos of the claimant appeared on Heliocor's social media site. Heliocor did not have a separate site. Given that the Group companies were working closely together on projects, it makes sense that they shared the same social media presence. A joint social media presence would build traction more than unnecessary separate sources. We do not think this signifies that the claimant was necessarily employed by Heliocor.

81. We do not draw any significance from the fact that HCL and Heliocor shared the same office. That is not unusual with small companies in a small Group.

82. Regarding line management, the ultimate authority and effective line manager for the claimant was Mr Hall. Mr Hall was CEO of HCL as well as Heliocor. Basically, he controlled the Group. The claimant did take direction from Mr Tripathi on a day-to-day basis because she was focusing on projects in his arena and working jointly with him. This could be a factor which helps suggest the claimant was employed by Heliocor, but equally, it is not inconsistent with her being employed exclusively by HCL. As we have said, Mr Hall was the ultimate authority. Mr Tripathi, though not employed by or a Director of HCL, was Director / Managing Director of Heliocor which owned 80% of HCL. It was always envisaged that they would work closely together on projects.

83. The claimant argues that the work she did was for Heliocor and that she carried out the same duties as Mr Kumar and Ms Hunter. They did not carry out the same duties, but everyone closely collaborated, bringing their different skills to the Helio project. Ms Hunter had Compliance experience and Mr Kumar had IT experience, both of which Heliocor required, but the claimant had neither. We accept that the fact that the claimant was working on the Heliocor project under the direction of the Heliocor Sales Manager could in some circumstances be factors which point towards the claimant being employed by Heliocor. However, they are not inconsistent with her being employed by HCL in a tight Group of small related companies who hold an overarching joint aim of developing and marketing a new product with a sales and consulting support structure.

84. The claimant argues that HCL was simply a vehicle or conduit for taking her investment. We do not think that is true. HCL had been set up over a year before the claimant was introduced to Mr Hall and Mr Tripathi. There was a reason it was set up, ie to protect Heliocor's IP on software products. It had signed consultancy contracts with CapGemini and Experis. When it stopped making money during 2019, Heliocor regularly transferred funds to pay wages and outgoings, until Heliocor itself got into financial trouble.

85. Overall, we find the evidence that the claimant was employed by HCL far stronger than the evidence which might have suggested she was employed by Heliocor. The intention of the parties at the outset was that she be employed by HCL alone. The parties consistently acted as if HCL was the employer. The claimant consistently acted as if that were the case from start

(her contract of employment), throughout (her mortgage application; her furlough application); to finish (her view about the termination of her employment). We see no need to imply any contractual relationship between the claimant and Heliocor to explain her work for the new Crypto project under the direction of Mr Tripathi. The claimant's contract said she must undertake duties as may be determined by HCL from time-to-time and her duties were using her Crypto knowledge and contacts to help fundraise and market on the new Group project.

Employment status: issues 1.5: section 41

86. When going through the List of Issues at the outset, before we had heard the facts of the case, we asked whether the claimant was making a section 41 contract worker argument. She said she was not. Nevertheless, bearing in mind that she was a litigant-in-person, we said we would add it to the List of Issues.

87. In advance of the parties' final summing up, we invited the parties to address section 41. Neither the claimant nor Mr Hall did so. Mr Tripathi very generally alluded to it in his written closing submissions.

88. We attempted to consider section 41 in any event, although we had no arguments to work with. In our view, it did not apply. We do not consider that Heliocor made work available for the claimant. The claimant was carrying out HCL work in collaboration with Heliocor. Nor do we find that the claimant was supplied by HCL in furtherance of a contract to which Heliocor was a party. We could not identify any such contract, express or implied.

Unauthorised deductions claim against 1st respondent: Issues 1.15 – 1.18

89. It is agreed that the wages were unpaid. The deductions were made by HCL who employed the claimant. They were not made by Heliocor because it did not employ the claimant. The claim against the 1st respondent (Heliocor) for unauthorised deductions of wages therefore fails.

90. The expenses are owed by HCL and not by Heliocor for the same reason. However, the claim for expenses also fails because unauthorised deductions claims cannot be made for reimbursement of expenses.

Time-limits on pay deductions claim: issue 1.7

91. This point is academic. However, the claim was made in time. ACAS was notified on 24 March 2020. This would mean wages due from 25 December 2019 onwards were directly in time, and in any event, this was a series of deductions.

Direct race discrimination and harassment: issues 1.8 – 1.14

92. Because of our finding regarding the claimant's employment status, she is unable to bring her race discrimination and harassment claims.

93. However, we have in any event gone on to consider whether discrimination / harassment took place. We first looked at each incident separately and we then looked at the incidents as a whole to see whether we still had the same opinion.

Allegation I.8.1: On or around March 2019, when asking to visit her sick grandfather, Mr Tripathi shouted at the claimant and used words such as, 'You are an asshole, you are just a piece of tool to me. If you don't come back with me your plane will crash, you will die on the journey'.

The facts

94. The claimant and Mr Tripathi were going on a business trip to China in April 2019. On 28 March 2019, the claimant asked to return a few days later to take advantage of the Bank Holiday in the UK. She said she wanted to spend time with her parents. She did not at that point say anything about her Grandfather being ill. We can see from the WhatsApp messages, that she had mentioned in passing on 6 January 2019 that her Grandfather was not well. She did not link it to a request to go to China. Then on 28 March 2019, there was a WhatsApp exchange at 8.40 am where Mr Tripathi begrudgingly agreed to the claimant staying a few more days. He tried to persuade her to come back with him, saying her plane would crash and challenging why one more day with her parents would make any difference. But he also said, 'Do it Elly. You are so irritating' and 'I just said. Do whatever you like'. There was then a 40 minute gap in the Whats Apps during which the argument continued orally and the claimant ended up in tears. The WhatsApps resumed at 9.26 am with Mr Tripathi telling the claimant not to let her crying become office gossip. He said he would get her onto a plane on the 19th, which is what she wanted. He then spent £200 of his own money changing the flight arrangement.

95. We accept the claimant's evidence that during this oral argument, Mr Tripathi said that she was an asshole. There is use of the word 'asshole' in the WhatsApps by the claimant in particular, but also by Mr Tripathi. The claimant had commented for example that 'every businessman is an asshole'. We do not think Mr Tripathi also said 'You are a piece of tool to me'. We do not see him using that language in the WhatsApps.

96. We do not think the row was quite as bad as it sounds. Looking at the language generally used in the WhatsApps by both parties and looking at the WhatsApp messages before and after the 40 minute break, this appears to us as a normal squabble between the two. Their communication style was informal and friendly, rather like one might communicate with a family member or close friend. Mr Tripathi was peevish in the exchange. The claimant was crying because she wanted to spend the extra time with her parents and because Mr Tripathi was indicating he did not like the idea.

Direct race discrimination

97. Looked at in itself – and we will consider the wider picture later – we see no evidence that Mr Tripathi approach and words were in any was because the claimant is of Chinese nationality or origin. He was a hard taskmaster generally with everyone. He wanted the claimant to come back with him and get on with her work. He was irritated at her request, but he also agreed it, and once she started crying, he paid for her flight booking to be rescheduled. There was no evidence he would have treated anyone who was not Chinese any differently. For these reasons, the claim for direct race discrimination would fail even if the claimant was eligible to bring such a claim.

Race harassment

98. Mr Tripathi's conduct was unwanted, but for the reasons we have already given, it was not related to race. The claim for race-related harassment therefore would also fail even if the claimant was eligible to make such a claim.

Allegation 1.8.2: On or around June 2019, Mr Tripathi said to the claimant when she was late for a meeting, 'Fuck you' and 'Shame on you'.

The facts

99. Although the evidence around this was extremely vague, we accept the claimant's evidence that Mr Tripathi said 'Fuck you' and 'Shame on you' when she was late for a meeting in around June 2019. Mr Tripathi was a hard taskmaster when it came to work. He got angry easily. He could be aggressive. He used the word 'fuck' frequently in the WhatsApp messages, though we note that the claimant does so even more. They both frequently refer to third parties with a 'fuck him' or 'fuck them', sometimes descending into inuendo regarding the literal meaning of the word. We can therefore well imagine that Mr Tripathi spoke to the claimant in this way when she was late for a meeting.

100. The language is unprofessional, and particularly unpleasant when directed at the claimant. However, given the liberal use of 'fuck him' by the claimant in the WhatsApps, it is not quite as shocking as it otherwise might be.

Direct race discrimination

101. We do not see any evidence that this incident was because of the claimant's race. As we have said, Mr Tripathi was harsh with everyone when he was displeased. Moreover, it was the type of language which the claimant had herself frequently initiated albeit not directed at Mr Tripathi. The claim for direct race discrimination would therefore fail even if the claimant was eligible to make such a claim.

Race-related harassment

102. The conduct was unwanted, but for reasons already given, it was not related to race. The claim would also fail even if the claimant was eligible to make such a claim.

Allegation 1.8.3: In or around June 2019, Mr Tripathi requested all employees come to work no more than one minute late. One day he came late and the claimant talked to her colleague Mohit Kumar in a very low voice and said 'Vikas is late'. He later forced her to go into the small room and forced her to tell him what she had been discussing with Mohit. She refused to tell him, he told her, 'I'm telling you to tell me, just tell me'. Then she had to tell Mr Tripathi what she was discussing with Mohit. He then abused her with comments such as 'None of your fucking business', told her to follow his orders and say 'yes sir' to him.

The facts

103. For similar reasons to the previous allegation, we find on the balance of probabilities that Mr Tripathi did haul the claimant into a side room to ask what she was whispering about and that he did tell her it was none of her fucking business and to follow his orders and say 'yes, sir' when she told him. We believe this because Mr Tripathi was the type of person at work who was likely to get angry about people whispering about him, and the WhatsApp texts showed that he did use the word 'fuck / fucking' aggressively on occasions.

Direct race discrimination

104. We do not see any evidence that this incident was because of the claimant's race. Mr Tripathi was regularly harsh and unpleasant with others as we have said. The direct race discrimination claim would therefore fail even if the claimant was eligible to make such a claim.

Race-related harassment

105. The conduct was unwanted. However, for the same reason, it was not related to race. Even if the claimant was eligible to make such a claim, it would fail.

Allegation 1.8.4: The claimant's grandfather passed away in June 2019, which occurred while she was on a business trip to Shenzhen. Mr Tripathi forced her to attend a business meeting instead of attending her grandfather's funeral. Therefore she had to miss her grandfather's funeral. He recorded her business presentation on that day and he criticised her on the basis that she didn't perform and verbally threatened her and abused her again.

The facts

106. The claimant's grandfather passed away when she was on another business trip to China with Mr Tripathi in June 2019. On 22 June 2019, the

claimant sent Mr Tripathi a WhatsApp at 4 am to say her Grandfather had passed away that morning. Mr Tripathi responded sympathetically. He said he was happy he had persuaded the claimant to go early to China. The funeral was in Shanghai on 24 June 2019. The claimant was unable to attend because she was in a pre-arranged business meeting in Shenzhen.

107. The claimant says that Mr Tripathi refused to allow her to attend the funeral. Mr Tripathi says she never mentioned the funeral to him. The claimant clearly feels very strongly about the fact that she did not attend the funeral and, looking back, she is upset about it. However, we find that she did not tell Mr Tripathi about the funeral. These are our reasons.

108. There are many WhatsApp messages from 22 June onwards. First of all, these show that Mr Tripathi was generally sympathetic and supportive. He had encouraged her to go early on the trip to visit her Grandfather. He was sensitive and sympathetic when she told him on 22 June 2019. It is hard to imagine that he would then have refused permission to attend the funeral.

109. Even if it is conceivable that he would have refused because he was worried over her missing the presentation, there is no hint in any of the WhatsApps in the following days that something had happened which the claimant upset about. The claimant did not hold back on complaining about other matters in other WhatsApps, eg over extending the April 2019 trip to China. But on this occasion, she not only did not say anything at all about the funeral, but her communications were normal and friendly. On 26 June 2019, she even suggested that Mr Tripathi get cake at the airport from Lady M.

110. Also, there is no reliable evidence regarding when she asked Mr Tripathi to go to the funeral. As we have said, it is not mentioned in the WhatsApps. The claimant says she asked in a WeChat conversation on the afternoon of 23 June 2019 (WeChat being more stable when they were both in China). However, Mr Tripathi produced air tickets which showed he was in the air all day on 23 June, before arriving in Hong Kong at 10 pm. He messaged his arrival to the claimant on WhatsApp and immediately took a 2 hour train to China. At 22.17, the claimant WhatsAppd Mr Tripathi to say she was at the airport (to Shenzhen).

111. When Mr Tripathi mentioned his tickets in the tribunal, the claimant said she may have got the dates and times wrong. We did not find this convincing.

112. Regarding the other part of the incident, we accept that Mr Tripathi was angry with the claimant and criticised her business presentation, threatening to send photos that she had fallen asleep to Mr Hall. The claimant admits she fell asleep. Knowing Mr Tripathi, we find that he did criticise her performance, because she had fallen asleep and that is the way he behaves over work matters he does not like.

Direct race discrimination

113. However, we do not believe this was because of the claimant's race. It was because Mr Tripathi was an aggressive and harsh taskmaster about work. She fell asleep. He saw it. He said something. That is how he operates. So even if the claimant was eligible to make this claim, we would not have upheld it.

Race-related harassment

114. Mr Tripathi reacting angrily to the claimant falling asleep was unwanted conduct. For reasons given, it was nothing to do with her race. The claim for race-related harassment therefore would fail even if the claimant was eligible to make such a claim.

Allegation 1.8.5: Mr Tripathi took the claimant's mobile phone (on 4 October 2019) and then her USB (around October 2019 and handed back around December 2019) without her permission and kept them with him. He took her mobile phone with him and forced her to beg him to return it. This happened in front of her previous colleagues Roisin Hunter, Mohit Kumar and Heliocor Ltd investor Roger Sharma. He also recorded a video about her pleading with him to give back the phone. He returned the phone to her later the same day on 4 October 2019.

The facts

115. We heard no oral evidence about the USB stick. Regarding the mobile phone, Mr Tripathi denies the whole incident. However, we find that he did take the claimant's mobile phone at the Mehfil restaurant and he kept it for 15 – 20 minutes while filming the claimant pleading to have it back. Mainly we believe this because of Mr Sharma's evidence who we found a straight forward witness, who did not exaggerate, and was happy to admit he was angry that he had lost a large investment with the company. Mr Tripathi, while cross-examining him, said he believed Mr Sharma more than anyone else and if Mr Sharma said Mr Tripathi had videoed the event, then Mr Tripathi believed him.

116. We suspect that Mr Tripathi was winding the claimant up in much the same way that she would wind him up. He possibly did not realise how upset she was getting. The claimant used to take and play with Mr Tripathi's items, eg his iPad and his watch. The mobile incident happened at a relaxed event after the claimant had just sung a song in Chinese.

Direct race discrimination

117. We do not see anything in this incident that could suggest it was because of the claimant's race. It was more a reflection of their close working relationship and mutual teasing which we see in the WhatsApps. We would not find this was direct race discrimination.

Race-related harassment

118. This was unwanted conduct but for the same reasons, we find it was not related to race. We therefore would not find race-related harassment.

Allegation 1.8.6: On 6 November 2019, the claimant applied for a business trip with Owen Hall and received permission to go to Malta. Since Mr Tripathi was not in the UK and she was mentally abused by him for a long time therefore she was not able to communicate with him. She didn't update Mr Tripathi of her schedule and later when he came back to London, he called her into the small room and abused her verbally for an hour and forced her to write an e-mail and apologise to him.

The facts

119. We accept the claimant's evidence that when he discovered she had gone to Malta without consulting him, Mr Tripathi called her into a small room and abused her verbally for an hour and forced her to write an e-mail and apologise to him. Mr Tripathi admitted to the tribunal that he was 'furious' because he had given the claimant tasks which she had not completed. Mr Tripathi was not a person who held back when he was angry and we can well envisage him doing this.

Direct race discrimination

120. We do not see any evidence that Mr Tripathi's behaviour was because of the claimant's race. As we have said many times, Mr Tripathi was aggressive with everyone when he did not like the way things were done at work. By November 2019, Heliocor and HCL were in serious trouble financially and Mr Tripathi was very stressed. The claimant was not achieving what had been hoped. It was nothing to do with the claimant being Chinese. The claim for direct race discrimination would therefore fail.

Race-related harassment

121. This was unwanted conduct but it was not related to the claimant's race for reasons already stated. The race-related harassment claim would therefore fail.

Allegation 1.8.7: Before the 2019 company Christmas party, to stop her from attending the party at Barcelona, Mr Tripathi lied on behalf of the claimant to company CEO Owen Hall. He said that, because her colleague Mohit Kumar does not have a visa to go come out she therefore also didn't want to go. She never said this to him. The truth was discovered after Owen Hall mentioned it in the office and she also asked him in front of other colleagues, 'Why did you say this?' He texted her later and said, 'Don't shout'. This was seen and witnessed by other colleagues.

The facts

122. We accept Mr Hall's evidence that the claimant was invited to the event, that they had bought the claimant a ticket and that she had told him she could not go. We believe this because it would be out of character for Mr Hall to have left her out. Mr Hall denies that Mr Tripathi told him the claimant did not want to go. It strikes us that there was some form of misunderstanding which led to the claimant raising her voice in the office and Mr Tripathi texting, 'Please don't raise your voice'. We accept Mr Hall's evidence that Mr Tripathi did not tell him the claimant did not want to go or that her reason was anything to do with Mr Kumar's visa.

Direct race discrimination

123. We would not find that it was direct race discrimination to tell the claimant in a WhatsApp to please not raise her voice, if she had been raising her voice in the office over the matter. We add that even if we thought Mr Tripathi had deliberately tried to stop her going to the Christmas party, which seems most unlikely and different from the other kinds of complaint about him, we would not believe it was because of race. This kind of allegation suggests Mr Tripathi would have acted out of hostility and we did not identify in any of the WhatsApp messages genuine hostility towards the claimant because she is Chinese. If Mr Tripathi was feeling hostile towards the claimant, it was because by this time their relationship had broken down under the work stresses.

Race-related harassment

124. For the same reasons, we would also not find it was conduct related to race.

Allegation 1.8.8: On or around March 2020 Mr Tripathi made overtly racist comments about people who are ethnically Chinese and their characteristics and appearance using the words 'Chinese are thieves, they steal everything. Indians will beat up the Chinese. Chinese have small eyes, China is going to kill all the Covid patients, what a stupid country it is'.

The facts

125. The claimant has clarified that she was talking specifically about an incident on pancake day in February 2020 when they all went out to a pancake restaurant in Holborn.

126. Apart from the pancake outing, the claimant and Mr Tripathi were not communicating by February and March 2020, so the alleged comments could only have taken place at that outing, as indeed the claimant alleges. Mr Tripathi denies the comments.

127. In about February 2020, Mr Tripathi forwarded an article suggesting China was seeking court approval to kill over 20,000 coronavirus patients to avoid spread of the virus. (We should say that this story was later identified as a

hoax.) Mr Tripathi forwarded the story to the office WhatsApp group with a comment 'This is what China is?'. The claimant, who was the only Chinese person in the WhatsApp group, replied, 'Impossible'.

128. Also, as stated in the next allegation, on 22 March 2020, Mr Tripathi sent the group chat a WhatsApp about the 'Italy-Wuhan' connection.

129. In the WhatsApps while the claimant and Mr Tripathi were still engaging in a friendly way, they did regularly chat in a mutually joking and sometimes flirtatious way about the relative merits of Chinese and Indian food, beautiful women, traffic jams etc. They teased each other. There is no evidence whatsoever that either of them took genuine offence about the teasing. On the contrary, there were smiling emojis and 'Hahahahs'. Much of the time, the claimant initiated this type of conversation.

130. They were in the habit of sending each other photos and articles on various matters and joking. In March 2019, Mr Tripathi found himself on a bus with a Chinese delegation . He sent the claimant a photo, commenting 'so many Chinese people'. The claimant responded 'LoL', then she added 'Don't be racist', Mr Tripathi asked how it was racist. She replied she could smell his tone. He answered 'You can feel and smell whatever you want Miss Zhang' She replied 'Hahahaha'. Then in turn she sent him a photo of a fat Chinese boy, and they started joking about that.

131. They also had discussion about news events, for example in March 2019 Mr Tripathi asked the claimant why China was being stupid and protecting a global terrorist. The claimant in turn talked about India protecting the Dalai Lama. It was a serious but friendly discussion. The claimant said she was a nationalist just like Mr Tripathi. She said China was the best country in the world. Mr Tripathi said neither India nor China were the best country in the world. The conversation then moved straight into gossip. There was no sign of any real upset on either side.

132. In December 2018, Mr Hall and Mr Tripathi were attending a conference in St Kitts and Nevis. The claimant was in charge of social media for the event. She put the wrong location. She asked Mr Tripathi, 'Is not west indie in Dominic??' Mr Tripathi commented, 'U need to improve your geography beyond mainland China'. We do not find this was a discriminatory remark. It was factual. The claimant knew the geography of China.

133. We cannot go through every single reference to India and China in the WhatsApp chat, but discussing India and China is not in itself racist. What we saw in the WhatsApp was not the same kind of comment as 'Chinese are thieves, they steal everything. Indians will beat up the Chinese. Chinese have small eyes'. Indeed, the person who was talking about Chinese eyes in the WhatsApp records was the claimant, who talked on a few occasions about getting cosmetic eye surgery. We therefore find that Mr Tripathi did not make these comments in the pancake restaurant or during February/March 2020 at any other time.

134. He did forward the tweet with the comment, 'This is what China is?' This was not directed at the claimant. At that time, there were unique circumstances. It was the run up to the lock down. Everyone was talking about Covid and very anxious. The fact is that the virus was coming out of China and unprecedented and extreme things were being reported which no one knew what to make of.

135. We will discuss this further together with the final allegation as to whether it would be direct race discrimination or race-related harassment.

Allegation 1.8.9: On or around 22 March 2020 Mr Tripathi made fun of the claimant's Chinese background and criticised her race by sending a WhatsApp message. It is common ground that Mr Tripathi sent a WhatsApp message on 22 March 2020 to a group chat that the claimant was a party to. The WhatsApp message was titled, 'The Italy – Wuhan Connection' and was regarding Coronavirus. The respondent says it was a factual message, explaining why Coronavirus, which was becoming prevalent at the time, which originated in China, had caused a widespread outbreak in countries like Italy.

The facts

136. Again, Mr Tripathi forwarded a newspaper article to the work WhatsApp group. Again, we do not find it was targeted at the claimant. He was sending it to the whole WhatsApp work group. As we say, at that time, Covid was a general topic of conversation. The entire public was reading newspapers, social media and talking about the virus and whether it would reach the UK from China.

Direct race discrimination

137. In both cases, ie forwarding both articles to the WhatsApp group as in allegation 8 and 9, together with the comment attached in allegation 8, we do not think this would be direct race discrimination. We do not consider it to be less favourable treatment of the claimant because of race, simply by virtue of referring to China being the origin of the Wuhan virus or talking about the reported policy of the Chinese government. There is no reason to think that Mr Tripathi would not have forwarded those messages with that comment whether or not the claimant was in the group.

Race-related harassment

138. The sending of the articles to the WhatsApp group of which the claimant with the comment 'This is what China is?' on the first, was unwanted conduct. Was this unwanted conduct related to race? We do not think the mention of China as a country and the government's apparent policy makes it 'related to race'. Regarding the Italy / Wuhan WhatsApp, we do not think that the reference to the Chinese population and 'hug a Chinese' campaign in the body of the article is sufficient to make Mr Tripathi's conduct in circulating it 'related to race'. He was circulating an article about a virus and a

geographical location, and the mention of Chinese people carrying the virus was ancillary to that.

139. Even if we are wrong on that, we do not think that Mr Tripathi's intention was to violate the claimant's dignity or to create an intimidating, hostile, degrading, humiliating or offensive environment for the claimant. Much of the population was talking anxiously about the virus all the time.

140. We thought carefully about whether it had the effect of violating the claimant's dignity or creating an intimidating, hostile, degrading or humiliating environment for the claimant. We understand why the claimant was distressed. It must have been uncomfortable for a Chinese person living in the UK at that time. As Managing Director, Mr Tripathi could have been more sensitive, and some people might have been more careful. Nevertheless, given all the circumstances, we do not think it was reasonable for the claimant to feel her dignity was violated by either or both these tweets or that such an environment was created for her by the conduct. The claimant must have been aware of the general discussion about the virus, its origin and how to prevent transmission, and that it was a matter of widespread concern which people would naturally discuss whatever their national or ethnic origin.

Totality of allegations of direct race discrimination / harassment

141. For the above reasons, we would not have found any of the indicts to be direct race discrimination or race-related harassment. We have also considered all the allegations together and whether they jointly amounted to direct race discrimination or race-related harassment. We find they do not. Mr Tripathi had a harsh and aggressive response when work was not to his satisfaction. He created a 'culture of fear' which Mr Hall perceived affected Mr Kumar and Ms Hunter (neither of whom were Chinese) as well as the claimant. Ms Hunter had numerous ups and downs and was often upset by his manner. The claimant worked closely with him so received the brunt of any dissatisfaction and when tension increased because the business was failing and the claimant not delivering to his satisfaction, Mr Tripathi became even more impatient and aggressive. The nature of the WhatsApp messages, though frequently referring to India this and China that, did not suggest any less favourable treatment or harassment of the claimant because she was Chinese. The two WhatsApp retweets of newspaper articles at the end were the result of the unique circumstances of a worldwide virus which had in fact originated in China.

<u>Time-limits on discrimination / harassment claims under Equality Act - issue 1.6</u>

142. As we have not upheld the claims for direct race discrimination and race-related harassment, it is not necessary for us to consider time-limits.

Employment Judge Lewis

Dated: 1 March 2024……..

Judgment and Reasons sent to the parties on:

20 March 2024

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For the Tribunal Office