



EMPLOYMENT TRIBUNALS

Claimant
Mr V Taneja

v

Respondent
Phoenix Whirlpools Limited

Heard at: Watford Tribunal

On: 2,3,4 April 2024
and deliberation on 19 April 2024

Before: Employment Judge Cowen
Mr C Williams
Mr D Sagar

Appearances

For the Claimant: Mr Taneja (in person)

For the Respondent: Ms Rachel Senior (counsel)

RESERVED JUDGMENT

1. The Unfair Dismissal claim is dismissed as the Tribunal has no jurisdiction under the Employment Rights Act 1996 to hear this claim, due to the lack of qualifying continuous employment.
2. The Claimant's claim for Harassment on the grounds of race (s.26 Equality Act 2010) is upheld in respect of one allegation.
3. The Respondent shall pay the Claimant £8,000 in in jury to feelings and £1,329.23 in interest. A total award of £9,329.23.
4. The Claimant's claim of Direct Discrimination (s.13 Equality Act 2010) is dismissed.

REASONS

Background

1. The parties agreed a bundle of documents which was provided to the Tribunal. The Claimant provided a witness statement and the Respondent provided statements on behalf of Mr Davies, the Sales Director, Mr Thomas, Chief Operating Officer and Mr Holmes, Finance Director. All of them gave sworn

evidence during the hearing.

2. A number of additional documents were provided by the Respondent during the hearing, including Mr Davies' contemporaneous notes of the 21 March 2022. These were admitted to the Tribunal for consideration.
3. The issues for the hearing had been agreed by the parties as set out in the Case Management Order of 23 January 2023 and were added to at the start of the hearing as follows:

1. Unfair Dismissal

- 1.1 Was the Claimant dismissed?
What was the reason or principal reason for dismissal? The respondent says the reason was conduct. The Tribunal will need to decide whether the respondent genuinely believed the claimant had committed misconduct.
- 1.2 If the reason was misconduct, did the respondent act reasonably in all the circumstances in treating that as a sufficient reason to dismiss the claimant? The Tribunal will usually decide, in particular, whether:
 - 1.2.1 There were reasonable grounds for that belief;
 - 1.2.2 At the time the belief was formed the respondent had carried out a reasonable investigation;
 - 1.2.3 The respondent otherwise acted in a procedurally fair manner;
 - 1.2.4 Dismissal was within the range of reasonable responses.

2 Direct race discrimination (Equality Act 2010 section 13)

The claimant's claim for direct discrimination is brought on the basis that he says that Mr Dana Davies was responsible for dismissing him. The respondent denies this and states that the claimant was dismissed by Mr A Thomas due to misconduct.

- 2.1 The claimant describes his race as British Indian.
- 2.2 Did the respondent do the following things during a meeting on 21/3/22:
 - 2.2.1 Called him the incorrect name on four occasions;
 - 2.2.2 Made a comment that there was 'something wrong with his brain';
 - 2.2.3 Attacked the claimant's position and questioned his role;
 - 2.2.4 Had an aggressive and inappropriate tone;
 - 2.2.5 Subjected the claimant to 'intellectual bullying' which he says was trying to overwhelm him with facts, statistics and jargon within a setting where he was not equipped to answer (as he was driving).
 - 2.2.6 Mr Davies dismissing the Claimant

- 2.3 Was that less favourable treatment?

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

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

The claimant says he was treated worse than Mr Steven Cane, a

sales manager from another area.

2.4 If so, was it because of race?

3. Harassment related to race (Equality Act 2010 section 26)

The Claimant's position in the alternative to Mr Davies dismissing him, is that he was subjected to harassment by the respondent.

3.1 Did the respondent do the following things:

3.1.1 treat the claimant as described above in paragraph 2.2.

3.2 If so, was that unwanted conduct?

3.3 Did it relate to race?

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

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

4. Remedy for discrimination

4.1. Should the Tribunal make a recommendation that the respondent take steps to reduce any adverse effect on the claimant? What should it recommend?

4.2. What financial losses has the discrimination caused the claimant?

4.3. Has the claimant taken reasonable steps to replace lost earnings, for example by looking for another job?

4.4. If not, for what period of loss should the claimant be compensated?

4.5. What injury to feelings has the discrimination caused the claimant and how much compensation should be awarded for that?

4.6. Has the discrimination caused the claimant personal injury and how much compensation should be awarded for that?

4.7. Is there a chance that the claimant's employment would have ended in any event? Should their compensation be reduced as a result?

4.8. Did the ACAS Code of Practice on Disciplinary and Grievance Procedures apply?

4.9. Did the respondent or the claimant unreasonably fail to comply with it?

4.10. If so is it just and equitable to increase or decrease any award payable to the claimant?

4.11. 4.11 By what proportion, up to 25%?

4.12. 4.12 Should interest be awarded? How much?

Findings of Fact and Evidence

4. Having considered all the evidence, we find the following facts on a balance of probabilities.
5. The parties will note that not all the matters that they told us about are recorded in our findings of fact. That is because we have limited them to points that are relevant to the legal issues.
6. The Claimant was employed as a business development manager/area sales

manager for the Respondent company which sells bathroom fittings. He started work with them on 7 June 2021, having previously worked elsewhere. The events which led to all the claims occurred on 21 March 2022. Up to that point the Claimant had been regarded as one of the Respondent's best salesmen. He had impressive sales figures for whirlpool baths and the Respondent believed the Claimant to be impressive in his work.

7. Mr Dana Davies was engaged by the Respondent as their new Sales Director in March 2022. Mr Davies was a friend of the owner of the Respondent Mr Nicky Sharp. Mr Davies was brought in to provide his expertise to the area sales managers and to ensure that they were following the guidelines given to them by the Respondent with regard to how they carried out their work.
8. As part of his introduction to the company Mr Davies arranged to meet and accompany each of the area sales managers in turn. Spending two days with them as they visited customers. The purpose of this was for Mr Davies to get to know the sales team individually, but also to assess their capability and to understand what coaching and support they might need. Mr Davies' expectation was that the sales managers would want to impress him and to show themselves in their best light. As an experienced Sales Director in this industry Mr Davies expected to be given a significant level of respect by those he was tasked to oversee.
9. On 17 March 2022 Mr Davies phoned the Claimant to tell him that he would like to spend 21 and 22 March 2022 with him. The telephone line was poor but Mr Davies correctly pronounced the Claimant's first name. They made an arrangement for the Claimant to collect Mr Davies at King's Cross station at 8am on Monday 21 March 2022 and that they would then travel together to the Claimant's appointments for the day and the following day.
10. On Sunday 20 March 2022, the Claimant sent Mr Davies a whatsapp message which said that he had forgotten that his wife was on holiday that week, so he would have to do the school run, before he could come and meet Mr Davies. The Claimant indicated he thought he could be at King's Cross at 8.45am. Mr Davies' reply was accommodating and said that they should liaise when the Claimant was near by, so that they could meet up.
11. Mr Davies also asked the Claimant to send him a list of his customers and a list of who they would be visiting and what sales were involved. The Claimant failed to do this as he did not know of an email address for Mr Davies, but also failed to look for an address. The Claimant told Mr Davies in their telephone conversation that he had no booking for the afternoon of the 22 March and Mr Davies told him they could use that time to "go through things". From this conversation the Claimant was nervous of meeting Mr Davies as he understood that his work was to be scrutinised by his new Sales Director.
12. On Monday 21 March, the Claimant sent Mr Davies a message at 8.24am saying he was "on route" and would there in about half an hour. Mr Davies replied saying he would meet him at the collection/drop off point. At 8.52am the Claimant messaged again to say he was 1 mile away. Mr Davies said that the Claimant had failed to send a photo of his car (which he clearly now couldn't do as he was driving and Mr Davies was aware of that) so he should send the colour and registration number. The Claimant did so at 8.54am. At 9.02am the Claimant's message was that he was "just around the corner". We therefore find

that the Claimant met Mr Davies between 9.05 and 9.10am. By this time, Mr Davies had pointed out that the Claimant had failed to live up to Mr Davies' expectation in two separate ways, by failing to send the photo and by being late.

13. Mr Davies in his instructions to the Claimant had told him to ensure that he would have space in the boot of his car for Mr Davies' overnight bag. The Claimant had made some space, but there was some difficulty and one of Mr Davies' bags was placed in the back seat and one in the boot.
14. Once the two men were in the car, the Claimant introduced himself and shook hands with Mr Davies, who showed that he was a little irritated by the fact that the Claimant's lateness meant he had been waiting at the station for an hour or more. Mr Davies' disappointment also came to the fore when the Claimant told him that his first customer of the day had called to cancel the appointment and that the others were not confirmed. The Claimant saw Mr Davies' attitude towards him as negative and 'obnoxious'. Mr Davies was not impressed with the Claimant, whom he had understood to be an impressive salesman. In short, the two men did not like each other when they first met.
15. As they travelled from King's Cross towards Slough, Mr Davies asked the Claimant a series of questions about his work. These included questions about his work background, sales targets and current working figures. The Claimant had not prepared answers to these and did not know them by heart. He told Mr Davies he would have to show him on the laptop when they stopped driving. The Claimant felt that he was under pressure to perform, as well as driving through London traffic. He felt that it would be more appropriate to have such a conversation when they were sitting together and not in a moving car, whilst the Claimant was driving. He was surprised that Mr Davies did not engage in small talk and felt that Mr Davies was asking these questions as a way to create an atmosphere in which he could assert his authority over the Claimant.
16. By the time they were 15-20 minutes into the journey, the Claimant felt that the atmosphere in the car was 'toxic'. He was being placed under pressure by Mr Davies who was trying to assert his authority and was irritated that the Claimant was not more subservient to him. Mr Davies told the Claimant in response to one of his answers that he (Mr Davies) had a "good bullshit detector". The Claimant turned up the music on the car radio in order to attempt to move away from this type of conversation and language.
17. During the journey, Mr Davies referred to the Claimant as 'Vikesh', on two separate occasions. On each occasion, the Claimant corrected Mr Davies, saying that his name was Viveak. Mr Davies did not apologise for the error. We find that Mr Davies did not ask the Claimant how to pronounce his name.
18. The Claimant suggested that they stop at McDonalds at Acton in order to have a coffee and that they could have the conversation about the Claimant's work. By this point the Claimant was upset and wanted to have a break from Mr Davies and reset their relationship. They stopped and bought coffees at 9.42am. The Claimant went outside to make a call to his wife, who helped to call him down so he could go back into McDonalds and continue his meeting with Mr Davies.
19. During the meeting in McDonalds Mr Davies asked to see the Claimant's outlook diary to be able to scrutinise the appointments he had. Mr Davies asked him questions about where else they could visit during their time together and the

Claimant replied that it depended on timing, as he had to do the school run.

20. Mr Davies said that he had come to spend time with the Claimant and if it was not convenient then the Claimant should have said so. He also asked the Claimant if his arrangement to cover the school run had been approved by Mr Thomas. These questions further upset the Claimant who said that Mr Davies should not 'bring the kids into this'.
21. Mr Davies then said " we're going to have a problem if you say you are going to do something and you don't do it. Is there something wrong with your brain? You need to get your brain to stop thinking like you're still at Kartell".
22. Mr Davies also used the name Vikesh twice more to refer to the Claimant. After the third time, the Claimant became angry and upset and started to pack his belongings to leave. He told Mr Davies that he hadn't listened when he had corrected him previously and that if he didn't make the effort to pronounce his name correctly, then he (the Claimant) would make no effort with Mr Davies. As he walked away from Mr Davies the Claimant referred to him as both an 'idiot' and a 'racist'.
23. The Claimant then went outside once again to recompose himself. He made the decision to leave and to tell Mr Davies they would not be continuing their day together. The Claimant returned to the table inside and told Mr Davies that their time together was over and that Mr Davies should remove his cases from his car.
24. The Claimant went back outside and sat on a fence a little distance from his car. When Mr Davies came out, the Claimant opened the boot so Mr Davies could retrieve his case. Mr Davies then stood at the rear of the car which blocked the Claimant's ability to get into the car. At this point Mr Davies told the Claimant that if he were to drive away "you're finished, you're terminated. I've already spoken to Nicky you're finished". He then offered for the Claimant to speak to Mr Sharp, which the Claimant rejected. Mr Davies repeated the words " you're fired, you're finished, you're terminated" as the Claimant got into the car and drove away.
25. Shortly after driving away, the Claimant pulled over and called Mr Thomas. He was calling to find out if he had in fact been dismissed, as he was unsure whether Mr Davies's words really meant the end of his employment. The Claimant told Mr Thomas that he had an argument with Mr Davies and would not be spending any more time with him that day. He also told Mr Thomas that Mr Davies had said that if he drove away he was fired and therefore he wasn't sure if he was still employed by the Respondent or not. Mr Thomas replied that he would find out what was happening.
26. As Mr Thomas was speaking to the Claimant, Mr Davies had called Mr Sharp. In fact Mr Thomas and Mr Sharp were in the same room, so they were aware that they were receiving information from both parties. Mr Thomas spoke to Mr Davies shortly after his call from the Claimant. He told Mr Davies to write it all down in an email.
27. At 11.20 the Claimant emailed Mr Thomas his version of events. At 2.54pm Mr Davies sent his email record of the day.

28. Mr Thomas discussed the incident with Mr Sharp and they spotted the contradictions in the accounts they received. They did not carry out any other investigation, but broadly accepted Mr Davies' account, on the basis that there had been an argument and a falling out. They concluded that the Claimant and Mr Davies could not be expected to work together in the future. Mr Thomas believed that Mr Davies, like all staff, did not have authority to dismiss the Claimant without the approval of Mr Sharp. Mr Thomas therefore, with the agreement of Mr Sharp, indicated to the Claimant at 5.07pm the same day that he was dismissed.
29. At the time of his dismissal the Claimant did not have 2 years of continuous service.
30. The Claimant sent an email to the Respondent on 22 March responding to each of the points in his dismissal email.
31. On 24 March Mr Holmes, Finance Director, wrote to the Claimant to say he would hear an appeal of the dismissal. The Claimant set out his points of appeal in an email on 29 March.
32. Mr Holmes interviewed Mr Davies on 5 April 2022 and the Claimant on 4 May 2022. The Claimant also sent Mr Holmes additional documents.
33. Mr Holmes' outcome letter was sent to the Claimant on 6 May 2022 upholding the dismissal.

The Law

Unfair Dismissal – Continuous Employment

34. S.108(1) Employment Rights Act 1996 (ERA) states that s.94 does not apply to the dismissal of an employee who has not been employed for two continuous years by the employer at the effective date of termination.
35. An Employment Tribunal will not have jurisdiction to hear a claim brought by an employee who did not have the qualifying continuous service.

Direct Discrimination

36. S.13 Equality Act 2010 (EqA) says *“(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.”*
37. Race is a protected characteristic under s.4 EqA
38. In a case of direct discrimination the comparison between the treatment of the employee and others, there must be “no material difference relating to each case” s.23 EqA .
39. To decide whether there was less favourable treatment the Tribunal is required to consider the mental processes of the relevant decision/comment maker to determine the reasons why he made the decision/comment. The Tribunal must then consider whether objectively the action of the relevant person was to treat the Claimant less favourably than a comparator was/would have been treated.

40. The ET must then decide whether or not the alleged discriminator's reason for the impugned action was the relevant protected characteristic. In *Chief Constable of West Yorkshire Police v Khan* [2001] IRLR 830, Lord Nicholls said that the phrase "by reason that" requires the ET to determine why the alleged discriminator acted as he did? What, consciously or unconsciously, was his reason?." Para [29]. Lord Scott said that the real reason, the core reason, for the treatment must be identified, para [77].

Burden of Proof

41. The burden of proof of proving the claim lies on the Claimant initially; s.136
*"(1) This section applies to any proceedings relating to a contravention of this Act.
(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.
(3) But subsection (2) does not apply if A shows that A did not contravene the provision.
(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule."*
42. The case of *Efobi v Royal Mail Group* [2021] ICR 1263 set out stage 1 of the burden of proof test -that there was a requirement on the claimant in a discrimination case to prove, on the balance of probabilities, facts from which, in the absence of any other explanation, the employment tribunal could infer an unlawful act of discrimination.
43. Stage 2 of the test is for the Respondent to prove that it did not discriminate against the Claimant.
44. The burden of proof provisions requires 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.)
45. 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.
46. The Court of Appeal in *Madarassy*, a case brought under the then Sex Discrimination Act 1975, states: 'The burden of proof does not shift to the employer simply on the Claimant establishing a difference in status (e.g. sex) and a difference in treatment. Those bare facts 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. Case No: 2303131/2022 10.16 Corrected judgment with reasons – rule 69 March 2017

47. A false explanation for the less favourable treatment added to a difference in treatment and a difference in sex can constitute the 'something more' required to shift the burden of proof. (The Solicitors Regulation Authority v Mitchell UKEAT/0497/12.)
48. In Glasgow City Council v Zafar 1998 ICR 120, HL, Lord BrowneWilkinson said that in the context of a discrimination claim 'the conduct of a hypothetical reasonable employer is irrelevant. The alleged discriminator may or may not be a reasonable employer. If he is not a reasonable employer he might well have treated another employee in just the same unsatisfactory way as he treated the complainant, in which case he would not have treated the complainant "less favourably".' He approved the words of Lord Morison, who delivered the judgment of the Court of Session, that 'it cannot be inferred, let alone presumed, only from the fact that an employer has acted unreasonably towards one employee, that he would have acted reasonably if he had been dealing with another in the same circumstances'. It follows that mere unreasonableness may not be enough to found an inference of discrimination. Unfair treatment itself is not discriminatory.
49. In Amnesty International v Ahmed UKEAT/0447/08/ZT the EAT stated, paragraph 36, "...the ultimate question – is – necessarily – what was the ground of the treatment complained of (or – if you prefer – the reason why it occurred)...".
50. Evidence of discriminatory conduct and attitudes in an organization may be probative in deciding whether alleged discrimination occurred: Chief Constable of Greater Manchester Police v Bailey [2017] EWCA Civ 425.

Harassment

51. S.26 EqA - 299. Section 26 of the Equality Act provides:
“(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)
(3)
(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.”
52. In order to determine whether the conduct is related to the protected characteristic, the Tribunal must consider the mental processes of the alleged harasser (Henderson v General & Municipal Boilermakers Union [2016] EWCA Civ 1049). This may be conscious or unconscious: as stated by Underhill LJ in Unite the Union v Nailard [2018] EWCA Civ 1203: “it will of course be liable if the mental processes of the individual decision taker(s) are found (with the assistance of section 136 if necessary) to have been significantly influenced, consciously or unconsciously, by the relevant protected characteristic.”

53. The EHRC Code states that, “unwanted conduct” can include “a wide range of behaviour” (at paragraph 7.7) and it is not necessary for the employee to expressly state that they object to the conduct (at paragraph 7.8).
54. A single incident can amount to harassment provided it is sufficiently serious (Bracebridge Engineering Ltd v Darby (1990) IRLR 3).
55. The Tribunal must also look at the effect of harassment, this involves a subjective and objective test. The subjective test is to assess the effect that the conduct had on the complainant, and the objective test is to assess whether it was reasonable for the conduct to have that effect (Pemberton v Inwood 2018 ICR 1291, CA). The conduct complained about must however “reach a degree of seriousness” in order to constitute harassment, so as not to “trivialise the language of the statute” (GMB v Henderson [2015] IRLR 451, at 99.4).
56. In relation to the subjective element, different individuals may react differently to certain conduct and that should be taken into account. However, as set out in Richmond Pharmacology v Dhaliwal 2009 ICR 724 by Mr Justice Underhill: *“if, for example, the tribunal believes that the claimant was unreasonably prone to take offence, then, even if she did genuinely feel her dignity to have been violated, there will have been no harassment within the meaning of the section. Whether it was reasonable for a claimant to have felt her dignity to have been violated is quintessentially a matter for the factual assessment of the tribunal. It will be important for it to have regard to all the relevant circumstances, including the context of the conduct in question.”*

Discussion and Decision

Unfair Dismissal

57. The Tribunal has no jurisdiction to hear the unfair dismissal claim, as the Claimant does not have the required continuity of service. The unfair dismissal claim is therefore dismissed.

Direct Discrimination/Harassment related to race

58. The Claimant asserted that the 6 instances of discrimination were acts of harassment and/or direct race discrimination. The Tribunal therefore considered each in turn, applying the different tests to the same factual findings as follows (with reference to the list of issues);
59. 2.2.1 “Called him the incorrect name on four occasions”
The Tribunal accepted the evidence of the Claimant, who said that Mr Davies twice used the wrong first name, when they were in the Claimant’s car together and twice used the (same) wrong name when they were in McDonalds. The Tribunal accepted that they were together in the car for at least 30 minutes and in McDonalds for approximately 20 minutes together. The Tribunal accepted that the Claimant has a genuine emotion and sensitivity about his name, as it holds a significant meaning in Hindi. The Tribunal were satisfied that the recollection of the Claimant, for whom the misnaming was a significant issue, was likely to be the more reliable.
60. The Tribunal therefore accepted that this behaviour did occur and that it did amount to less favourable treatment. Mr Davies acted in a manner which was arrogant and lacked respect towards the Claimant to acknowledge his name, or take any time or effort to correct himself or to recognise his inappropriate

behaviour. Mr Davies did not say anything to the Claimant at the time about his dyslexia, or this affecting his ability to remember or pronounce names.

61. However, the Tribunal did not consider Mr Davies acted in this manner due to the Claimant's race. The Tribunal were satisfied that Mr Davies' actions were due to his superior position and his lack of care in dealing with those he considered subordinate. The Tribunal acknowledged Mr Davies' admission that he had also misnamed a white British member of staff.
62. The Tribunal concluded that this action did not amount to a direct discrimination.
63. However, the Tribunal considered that the action of misnaming the Claimant was an unwanted conduct and that it had the effect of violating the Claimant's dignity and creating an atmosphere which was intimidating, hostile, degrading, humiliating and offensive. We considered that it was related to the Claimant's race as the name which Mr Davies used is one which has direct connotation with race. Mr Davies' evidence that he was surprised that the Claimant called him a racist indicates that he did not understand that his action had been offensive and therefore he lacked the intention to offend. He did not take the time and effort to ensure that he was not offensive to the Claimant. His actions therefore amount to a breach of s.26 Equality Act 2010.
64. 2.2.2 "Made a comment that there was 'something wrong with his brain'"
The Tribunal noted that this was a comment made during a heated exchange between Mr Davies and the Claimant in McDonalds. The Claimant had been late to collect Mr Davies, had not been able to take him to a customer meeting, which was the main focus of the visit and had not been able to answer his questions about his sales figures. By this point, their relationship was not going well and both parties were exasperated by the other.
65. The Tribunal also noted that this issue was not raised until the Preliminary Hearing of this case on 23 January 2023. The Claimant's evidence about it was not consistent; having not raised this until after the claim had been brought, the Claimant said in evidence that it was one of the more aggressive things that Mr Davies had said. The Tribunal did not consider that if it was highly offensive to the Claimant that he would have failed to raise it in his dismissal, or his appeal, as he did.
66. The Tribunal also noted that the Claimant's witness statement places this comment in the context of Mr Davies talking about " you need to get your brain to stop thinking like you're still at Kartell". This is a reference to the Claimant's previous employer. The Tribunal therefore accept that this was a comment made by Mr Davies with regard to the Claimant's mindset about his work and not about his intellect.
67. We concluded that this did not amount to less favourable treatment of the Claimant, as it was a comment made with reference to the Claimant's business skill and outlook, which Mr Davies would have made to any other sales manager. The Tribunal considered that the Claimant had misconstrued the comment as being about his intellect. It was not one which was made due to the Claimant's race.
68. In relation to the harassment allegation – the Tribunal accepted that the comment was unwanted and had the effect of violating the Claimant's dignity

and creating an atmosphere which was intimidating, hostile, degrading, humiliating and offensive. Mr Davies was attempting to establish his credibility as a new sales director and the Claimant had failed to impress him with a lack of organization and preparation for the visit. By this point in the conversation neither of them wanted to back down. However, the Tribunal did not consider that these comments were related to the Claimant's race, as they were about a mindset in relation to their work and could not be inferred to be related to race.

69. The Tribunal therefore did not uphold either of the direct discrimination or harassment claim on this allegation.
70. 2.2.3 "attacked the Claimant's position and questioned his role"
As the Claimant's new manager Mr Davies asked the Claimant a number of questions during the time they were in the car together. This was in order that Mr Davies could understand the Claimant's targets and also how he approached sales. It was also to some extent to test the Claimant to gauge his reaction to being pushed by Mr Davies. The Claimant, who had not prepared for the visit by way of providing information about his sales or customers, took Mr Davies' questions to be intrusive and undermining.
71. Mr Davies' questions and attitude were appropriate for a new manager coming into a competitive sales environment. However, the conversation between Mr Davies and the Claimant became increasingly aggressive. Mr Davies did nothing to try to quell this. The Tribunal could find no reason to infer that Mr Davies' actions towards the Claimant were related to his race. Mr Davies was engaging with each sales manager individually and watching each of them at work. His actions with the Claimant would not have been any different than with other members of staff.
72. In relation to the allegation of harassment, the Tribunal accept that Mr Davies' style of questioning may be considered unwanted conduct and may have had the effect of violating the Claimant's dignity and creating an atmosphere which was intimidating, hostile, degrading, humiliating and offensive, but the Tribunal did not consider that this was related to race, it was a particular style of management.
73. The Tribunal therefore did not uphold either of the direct discrimination or harassment claim on this allegation.
74. 2.2.4 "Had an aggressive and inappropriate tone"
The conversation between Mr Davies and the Claimant in McDonalds was challenging. The evidence shows that Mr Davies took photos of the Claimant's laptop screen, without his knowledge. Mr Davies also took notes of comments made by the Claimant, indicating to the Tribunal that he was aware that the conversation was not convivial. Mr Davies was critical of the Claimant's work and challenged him over the fact that the Claimant was seen as being a very successful salesman. Mr Davies pointed out the Claimant's inadequacies and the Claimant was defensive about this.
75. The Tribunal concluded that the conversation was confrontational on both sides and therefore whilst it could be considered aggressive, given the context, it was not inappropriate in tone. The Tribunal therefore concluded that it was not less favourable treatment than any other salesman in that position would have received. The conversation was not of this nature due to the Claimant's race.

76. In relation to harassment – the conversation was clearly unwanted by the Claimant, who was subject to Mr Davies’ critical assessment of his ability. However, that was a professional assessment by a sales director of a sales manager. The Tribunal could find no basis on which to infer that the comments were related to the Claimant’s race.
77. The Tribunal therefore did not uphold either of the direct discrimination or harassment claim on this allegation.
78. 2.2.5 “subjected the claimant to ‘intellectual bullying’”
The Claimant was not fully prepared for his meeting with Mr Davies and therefore found his questions about the Claimant’s targets, customers and sales records to be oppressive. He had not realised that this would be the nature of the meeting with Mr Davies. Whilst Mr Davies wanted to ensure that the Claimant was aware of his status as having power and influence over the Claimant’s position and to be shown respect.
79. The Tribunal found no evidence of jargon being used to make the Claimant feel inferior. Mr Davies did ask the Claimant about his statistics and the Claimant was unable to provide figures immediately. He also asked about the Claimant’s territory and who his customers were. This is information the Claimant was expected to know. Whereas the Claimant had expected Mr Davies to engage in ‘small talk’. The Claimant was also distracted by the fact that he had to deal with family commitments at either end of the working day.
80. The Tribunal concluded that Mr Davies acted this way towards all sales managers and that his actions towards the Claimant were not in any way related to his race.
81. In respect of harassment the Tribunal were satisfied that the conduct was unwanted by the Claimant and may have had the effect of violating the Claimant’s dignity and creating an atmosphere which was intimidating, hostile, degrading, humiliating and offensive, but the Tribunal did not consider that this was related to race, it was an aspect of Mr Davies’ particular style of management.
82. 2.2.6 Mr Davies’ dismissal of the Claimant
The Claimant called the office and spoke to Mr Thomas who was unaware that there was any problem between the Claimant and Mr Davies. The Claimant explained to Mr Thomas that he thought he had been dismissed by Mr Davies and was calling to check what he should do. The Claimant’s evidence that Mr Davies told him “you’re done, you’re finished” and that he had “spoken to Nicky” is accepted by the Tribunal as having been said. The fact that the Claimant also emailed at 11.20am also fits with the timeline the Tribunal have established.
83. Mr Davies’ evidence on when he called the office does not fit with the rest of the evidence and is not accepted. We consider that he became frustrated with the Claimant’s inability to answer his questions whilst they were in the car and when they stopped at McDonalds and the Claimant retaliated and challenged Mr Davies by calling him racist and saying he did not want to continue the day together. Mr Davies then sought to stamp his authority on the situation. He considered that the Claimant’s actions lacked respect for his position.

84. The reason Mr Davies told the Claimant that he was terminated, was due to the argument they were having and the fact that Mr Davies did not want to continue to work with the Claimant as a result of this encounter.
85. We find that the Claimant did contribute to the situation by his lack of preparedness, and also by his action of asking Mr Davies to remove his bags from the Claimant's car. We consider that any manager who is left in this position by someone they manage, would feel irritated and disappointed. Mr Davies made it clear to the Claimant that his employment would terminate at that point, due to their dispute. Mr Davies did dismiss the Claimant.
86. We do not find that this act was carried out because of the Claimant's race. We conclude that anyone who had had such a challenging encounter would have been treated the same way by Mr Davies. We have found no evidence on which to infer that he considered the Claimant's race when deciding to dismiss.

Remedy

87. The Tribunal considered that as a result of the one act of harassment – that of using the wrong name in relation to the Claimant on four occasions, the Claimant has not incurred any loss of earnings. We have concluded that he was dismissed, but not for discriminatory reasons and that he would therefore have been dismissed in any event, had he had a confrontational meeting with Mr Davies. We therefore do not make any award for loss of earnings.
88. We have considered the appropriate award for injury to feelings. In particular we take into account the fact that the Claimant felt strongly about the use of his name and that it has specific meaning within his culture which leads him to be particularly proud of it. It was clear to the Tribunal that the Claimant felt besmirched by Mr Davies use of the wrong name. It was also clear to us, that even during the Tribunal hearing, some 2 years after the events, the Claimant still felt affected by seeing Mr Davies and that he benefitted from the support of his family at the Tribunal.
89. We also took into account that there was no medical evidence before the Tribunal to suggest that the Claimant's upset and feeling had caused any specific injury and therefore we were not considering a personal injury claim.
90. The Tribunal considered that an award towards the top end of the lower Vento band would be appropriate. We award the sum of £8000 to be paid by the Respondent. In addition to this the Claimant is entitled to interest on this sum at 8% per annum from the date of the discrimination. A sum of £1,329.23. A total award of £9,329.23.

Employment Judge Cowen
15 May 2024

JUDGMENT SENT TO THE PARTIES ON
16 May 2024

FOR THE TRIBUNAL OFFICE

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