EMPLOYMENT TRIBUNALS

Claimant: Ms J Fubara

Respondent: Certus Recruitment Group

Heard at: London Central (by CVP) **On:** 28, 29, 30 & 31 May 2024

Before: Employment Judge Emery
Ms J Griffiths
Mr A Adolphus

REPRESENTATION:

Claimant: In person
Respondent: Mr J Byrne (The respondent's CEO)

JUDGMENT

The judgment of the Tribunal is as follows:

1. The complaint of harassment related to race is well-founded and succeeds.

2. The complaint of failure to make reasonable adjustments for disability is not well-founded and is dismissed.

3. The complaint of unauthorised deductions from wages of commission payments is well-founded and succeeds.

4. The complaint of authorised deduction from wages of sick pay is not well founded and is dismissed.

5. The respondent shall pay the claimant the following sums:

    a. Award for injury to feelings: £8,500.00

    b. Unlawful deduction (commission) £2,350.00

c. Interest on (a)	£1,509.00	
d. Interest on (b)	£ 156.58	
TOTAL		**£12,515.58**

REASONS

The Issues

1. Judgment and reasons were given at the hearing, written reasons were requested.

2. The issues are as set out in the Order dated 27 April 2023:

Time

(1) Were all of the Claimant's complaints of discrimination and harassment presented within the normal three-month time limit in section 123(1)(a) Equality Act 2010 ("EQA"), as adjusted for the early conciliation process and where relevant taking into account that section 123(3)(a) says that conduct extending over a period is to be treated as done at the end of the period?

(2) If not, were the complaints presented within such other period as the Tribunal thinks just and equitable pursuant to section 123(1)(b) EQA?

(3) Were the complaints of unauthorised deductions in relation to her sick pay brought within three months of the deduction complained of, pursuant to section 23 Employment Rights Act 1996 ("ERA")?

Race-related harassment

(4) Has the Respondent done the following:

a. Told the Claimant that her hair (worn in braids) looks like an alien from the Avatar movie? This is said to have occurred on 15 March 2022 (the day the Claimant commenced her employment) and was said by Tom Morris (manager).

b. Asked the Claimant if she was listening to "Ghetto music"? This is said to have occurred on 21 July 2022 and was said by Dane Herridge (Department Head) in the office.

c. Said to another colleague that they should not bother contacting candidates with non-English names as it was probably a waste of time? This is said to have been said on more than one occasion and by more than one person, but the specific claim is that it was said by Duncan Simmons in or around August 2022.

d. Referred to a black candidate sourced via LinkedIn as a "roadman"? This is said to have been done by Jemma Puzey on 12 September 2022.

(5) Was any proven conduct unwanted by the Claimant?

(6) Did that conduct relate to race?

(7) Did it have the purpose of violating the Claimant's dignity or creating one of the kinds of environment described in section 26EqA?

(8) If not, did it have that effect? Specifically:

a. Did the Claimant perceive it to have that effect?

b. Taking account of all the circumstances, was that perception reasonable?

Failure to make reasonable adjustments for disability

(9) Did the Claimant have a physical impairment (namely, ENT-related conditions) that had a substantial (i.e. more than minor or trivial) and long-term impact on her ability to carry out normal day-to-day activities,

(10) If so, did the Respondent apply the provision, criterion or practice (PCP) of imposing a fixed seating plan on its employees when they were in the office?

(11) Did that PCP place the Claimant at the substantial disadvantage of being more susceptible to infections as a result of her allotted seat being under the only working air vent in the office, compared to those who do not have her disability?

(12) Did the Respondent know, or ought it reasonably to have known, that the Claimant had the disability in question and was likely to be placed at the disadvantage claimed?

(13) If so, was there a reasonable requirement on the Respondent to take steps to avoid that disadvantage by moving the Claimant to another seat?

Unauthorised deductions (Sick Pay)

(14) Did the Respondent make unauthorised deductions from the Claimant's wages by failing to pay her sick pay?

(15) The Respondent states that Claimant was only entitled to statutory sick pay but did not meet the statutory criteria for statutory sick pay (because of the requirement to apply "waiting days").

Unauthorised deductions/Breach of Contract (Commission)

(16) Did the Respondent make an unauthorised deduction from the Claimant's wages by failing to pay her commission? Alternatively: Was the Respondent in breach of contract by failing to pay the Claimant commission? The Claimant states that she is owed around £2,800-£3,000. The Respondent states that eligibility for commission payment was expressly subject to the Claimant being employed at the time the commission payment was due, and she was not.

Witnesses and evidence

3. The claimant provided a disability impact statement and a statement on liability issues and gave evidence. Mr Charlie Self provided a statement on the claimant's behalf and also gave evidence. Two witnesses provided statements for the respondent, Mr Duncan Simmons and Ms Jemma Puzey, both dealt with the allegations of harassment related to race and both gave evidence; Mr Tom Morris also provided a statement but did not give evidence.

4. There was no statement from a respondent witness detailing the issues relating to disability or breach of contract on dismissal. Mr Byrne said he was unaware one was needed. A statement was provided by him addressing these issues half-way through the first day of the hearing. The tribunal allowed this evidence even though submitted late contrary to the Tribunal's Order. The statement allowed the claimant and the tribunal to understand Mr Byrne's reasoning and to enable appropriate questions to be asked. We concluded that there was little disadvantage to the claimant, compared to the disadvantage to the respondent had this evidence not been allowed.

5. The Tribunal had concerns during the hearing about some of Mr Byrne's conduct. He sought advice from the tribunal saying he had no knowledge of the issues or the law despite being repeatedly told that the tribunal could not provide advice. However, we repeatedly set out the applicable legal tests and what they meant, one example which we discussed and defined repeatedly is the concept of "related to race" within the harassment Equality Act definition.

6. We found that Mr Byrne spoke over the Judge repeatedly complaining of unfairness at regular intervals and acted in an argumentative fashion throughout the hearing.

7. The tribunal considered that it attempted to assist by guiding Mr Byrne to stick to relevant issues. To ensure he dealt with all relevant issues, we gave him lengthy breaks to consult with his advisers.

8. For example, the final day of the hearing was to address remedy, the judgment on liability being read to the parties the previous afternoon. However, we needed to adjourn for two hours to midday; despite it being made clear to the parties, Mr Byrne said he did not realise we were going to address compensation that day, and we gave him time to prepare. Mr Byrne's position was that he was "not aware" of remedy, he was "not ready" and that it was "unfair" to proceed.

9. It was the Tribunal's view that we had explained the format of the compensation hearing the day before, he had provided a challenge to the commission structure, and was able to challenge the claimant's evidence on injury to feelings. We pointed out that the Case Management order of 15 March 2023 had made it clear that all issues "including remedy" would be determined at the final hearing. The Order of 26 April 2023 states: "If the Claimant succeeds in whole or in part, the Tribunal will consider remedy so the parties must be ready to deal with this (including addressing it in their witness statements)."

10. In seeking to ensure the respondent was not at a disadvantage, we allowed the adjournment; we also had a long discussion about the Vento criteria, the issues and claims set out in the claimant's statement. The claimant gave evidence on remedy and was asked questions by Mr Byrne after he had obtained some advice.

11. There was no agreed bundle: the claimant and respondent provided sperate bundles; the respondent also disclosed documents during the hearing.

The relevant facts

12. The claimant's role was Candidate Consultant. The respondent specialises in recruitment to the tech and IT industries.

13. The claimant's role and that of her witness Mr Self was to source potential candidates and, if potentially suitable, pass on their details to Recruitment Consultants, who would decide whether to take a candidate forward.

14. The 1st incident: The respondent accepts that at an early interview, Mr Peck made a comment about the claimant's hair, that it looked like a character from the film Avatar. In his statement, Mr Peck characterises this remark in his statement as a friendly comment, made in the context of the claimant talking about modelling. The claimant believes the comment was made after she had accepted the role, it

was made she believes because she was wearing her hair in braids; Mr Peck's statement says it was because she had a long ponytail.

15. The respondent's case to the claimant is that Avatars are blue, the comment "was not representative of race". The claimant's evidence, which we accepted, was that she was shocked by this comment, which she believed was clearly related to race; their skin colour "is not their only feature, they are cartoons who have long braids and hairstyles which resonate with black culture".

16. The claimant believed the remark was demeaning, being compared to an 'alien' cgi generated avatar; she wondered why it had been made, but she was prepared to accept it as a one-off error. We did not accept Mr Byrne's forceful position that because the claimant continued in the interview process and took the role she did not believe it was related to race. We accept that potential or new recruits who feel demeaned by a remark which they consider to be discriminatory are entitled to give the benefit of the doubt to the employer, which the claimant did.

17. The 2nd incident of concern to the claimant: the respondent accepts that the claimant was asked by Dane Herridge, a department head, on 21 July 2022 if she was listening to "Ghetto music" while working with her earphones. An email which followed from a recruitment consultant colleague who spoke to Mr Herridge: "Said he didn't mean to say it like that and instantly regretted it. Said he listens to that sort of music like Snoop dog… Wanted to come back in and apologise…"

18. The claimant's response was, we concluded, restrained but also communicated that she was upset by what she considered to be a serious incident: "Oh right.. I'm glad he regretted it and felt bad.." (C47).

19. Mr Byrne's evidence was that growing up the word was ghetto was for him only associated with tape decks (ghetto-blaster), however he accepted that meanings could change. He accepted "absolutely" the claimant's characterisation, that it's "pejorative and can be a racial stereotype". He accepted that it is "inappropriate" to use it, and that it could be a comment which causes offence.

20. The 3rd incident: Mr Simmons witness statement says that he has "no recollection" of saying to colleagues they should not bother contacting candidates with non-English names as it was probably a waste of time. In his evidence he was more categoric – he did not make such statements, pointing out that probably 50% of his placed candidates were foreign nationals, also he had left a previous agency because of racism and homophobia.

21. Mr Self's evidence was that racist comments were made "quite often, very often". He said the issue was "… mainly about accents, Indian accents, how can the client understand, and I was saying I could understand – their English was good – they did not want to put these candidates forward – this is how I felt. … A few times I would pass over candidates [to consultants], they were 'no' based on accent."

22. Mr Byrne's position was that these were maybe candidates "who cannot speak business English"; in response Mr Self argued that these were "candidates who have an accent but in perfect English, it seems bang out of order that we are not going to place a candidate with an accent".

23. We accepted Mr Self's evidence that these remarks were made in the office. We accept that the claimant heard Mr Simmons making such a remark.

24. The 4th incident: Ms Puzey accepts that she may have referred to candidates as a 'roadman'; she does not recollect doing so when the claimant presented a black candidate. The claimant's account was that the candidate was a professional black African male being put forward for an IT position. Her evidence was that she did not believe Ms Puzey would have made this remark about a professional white person.

25. The claimant says that the meaning to her is "someone who is hood, working class and no options, drug selling, illegal business. To provide a black candidate and told that he sounds like a roadman is something I will take offence to as I am half-black."

26. Ms Puzey strongly denied the remark was related to race, saying that it is a "flippant" word, it refers to youth hanging around on a street corner, "Someone who does not articulate well, uses slang…" possibly selling drugs, but it could equally refer to white youths; she says that this is a common meaning of the word; for her background if refers to "white boys selling weed". She accepted that it is an offensive term, one which a candidate would not want to hear being said.

27. The respondent's position is that 'roadman' was a phrase regularly used within the business, but that it has no connotations to race. Mr Byrne said it was "…regularly used to describe [candidates of] all backgrounds if they come across as unprofessional and not of a level required." He refers to the Collins dictionary, which states it means a young street gang member, often selling drugs, it does not refer to race.

28. The claimant argued there are other dictionary references which point to the word having a meaning related to race: we noted and discussed with the parties the reference in the online Oxford English Dictionary to "a man or youth who is part of an urban culture originating among young, black, working-class people…". She described it as a word of West Indian origin, that it was "disgusting" and unprofessional to use it at work, that it is a term of abuse.

29. The claimant was asked why she had not raised this with Mr Byrne or with the HR manager, Caitlin. The claimant says that the incidents "Slowly break you as a person, incident after incident", that she was not used to dealing with such issues "… and only later I was wow this is how the business is, and each incident was

making me feel smaller … the environment was toxic, which is why I kept to myself …". We accepted the claimant's evidence.

30. The claimant argues that she is disabled, with ENT issues. She has disclosed medical evidence stating that she has issues with vertigo and should not travel when she had an episode. She says that she told HR (Caitlin) that she had medical issues.

31. A return-to-work interview with Caitlin details her reasons for absence. Some are for sinus issues; the claimant's work assessment mentions that she has 'really sensitive sinuses' and when aircon is on high at work her sinuses are very painful. The claimant's disability impact statement does not address the impact of this condition on day-to-day activities.

32. The claimant was dismissed on 27 September 2022 She received a payment in lieu of notice for her contractual notice period of one week. She was not paid commission which she contends she is contractually entitled to. The respondent relies on clause 6 of her contract of employment: Clause 6.4 states that the employee "shall be entitled to receive commission … which she arranges in accordance with the commission arrangements …". 6.5 states that all commission will be paid "at the company's discretion." (R bundle page 6).

33. The "terms and conditions of employment" letter sets out the commission arrangements – 5% of all revenue billed to £10,000; 10% thereafter. Clause 4 – the company will provide a statement "… that summarises your revenues from the previous month and the commissions due. This will normally be made available by the 15th of month following the month in which they are generated". Mr Byrne said that when the commission statement was generated, payroll will have been informed to pay this sum on payday.

34. Clause 5: "Eligibility for commission /bonus payments is subject to you being employed at the time the commission payment falls due."

35. The claimant was called into a meeting on date and dismissed on 27 September 2022. The respondent says that this is 3 days before the end of the month, payday, the day the commission payment "falls due."

36. The claimant argues that the statement which sets out the "commissions due" is the date it "falls due" – i.e. 15 September 2022. and that she is entitled to payment of the commission set out in the commission statement dated 15 September 2022 – the agreed sum of £2,350.00.

37. The respondent accepted that when it dismissed an employee, it would always do so before the end of the month, to ensure payment of commission was not paid - "We never pay commission to those we dismiss."; "All staff leaving the business forgo rights to commission". Mr Byrne argued that this is the "recommended"

contract in the recruitment profession and by the Recruitment and Employment Confederation, the "governing body" for the sector; this is a "golden handcuff". He said it was always the case that employees would resign the day after commission was paid.

38. On staff training, Mr Byrne argued that when employees are promoted to management they are trained about inclusive environments in line with the company's values of "passion, energy, integrity, commitment and fun." All employees are required to read and sign that they have read the staff handbook.

The law

39. Employment Rights Act 1996

Right not to suffer unauthorised deductions.

s.13 (1) An employer shall not make a deduction from wages of a worker employed by him unless

(a) the deduction is required or authorised to be made by virtue of a statutory provision or a relevant provision of the worker's contract, or

(b) the worker has previously signified in writing his agreement or consent to the making of the deduction.

Complaints to employment tribunals.

s.23(1) A worker may present a complaint to an employment tribunal

(a) that his employer has made a deduction from his wages in contravention of section 13 …

(2) Subject to subsection (4), an employment tribunal shall not consider a complaint under this section unless it is presented before the end of the period of three months beginning with—

(a) in the case of a complaint relating to a deduction by the employer, the date of payment of the wages from which the deduction was made…

Meaning of "wages" etc

s.27(1): In this Part "wages", in relation to a worker, means any sums payable to the worker in connection with his employment, including—

(a) any fee, bonus, commission, holiday pay or other emolument referable to his employment, whether payable under his contract or otherwise,

(b) statutory sick pay under Part XI of the Social Security Contributions and Benefits Act 1992…

40. Equality Act 2010

s.6 Disability

(1) A person (P) has a disability if

(a) P has a physical or mental impairment, and

(b) the impairment has a substantial and long-term adverse effect on P's ability to carry out normal day-to-day activities.

s.26(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.

s.26(4): In deciding whether conduct shall be regarded as having the [above] effect, 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.

41. **Case law - harassment**

a. Richmond Pharmacology v Dhaliwal [2009] IRLR 336:

- It must be ‘reasonable for the conduct to have had that effect. Although 'purpose' is not determinative, it can be a factor: 'the same remark may have a very different weight if it was evidently innocently intended than if it was evidently intended to hurt'.

- Whether or not the test is met is 'quintessentially a matter for the factual assessment of the tribunal'.

- "We accept that 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 grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase. …".

(b) *Pemberton v Inwood [2018] EWCA Civ 564:* Reformulation of Dhaliwal to take into account the Equality Act change to 'related' to a protected characteristic: "a tribunal must consider both (by reason of sub-section 4(a)) whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) and (by reason of sub-section 4(c)) whether it was reasonable for the conduct to be regarded as having that effect (the objective question). It must also take into account all the other circumstances (subsection 4(b))."

The subjective question means that if the claimant does not perceive their dignity to have been violated, or an adverse environment created, then the conduct should not be found to have had that effect. The objective question means that if it was not reasonable for the conduct to be regarded as violating the claimant's dignity or creating an adverse environment for them, then it should not be found to have done so.

(c) *Nazir and Aslam v Asim and Nottinghamshire Black Partnership [2010] ICR 1225, [2010]:* When considering whether the conduct related to a prohibited ground, it is important to take into account the context of the conduct which is alleged to have been perpetrated on that ground. That context may in fact point strongly towards or against a conclusion that it was related to any protected characteristic.

(d) *Bakkali v Greater Manchester (South) t/a Stagecoach Manchester [2018] IRLR 906:* unwanted conduct *because of* a relevant protected characteristic would be related to that protected characteristic; but "*related to*" such a characteristic includes a wider category of conduct. A decision on whether conduct is related to such a characteristic requires a broader enquiry'.

(f) *Heafield v Times Newspapers Ltd UKEAT/1305/12:* A one-off shouted remark in a newsroom at the time of the Pope's 2010 visit to the UK 'Does anyone know what's happened to the f … g Pope?', did not amount to harassment of a Roman Catholic: there had been unwanted conduct, but that the necessary purpose or effect had not been present; any insult felt by the claimant was not reasonable.

(g) *Blanc de Provence Ltd v Ha EAT [2024] IRLR 184:* the concept of 'related to' is wider than the concept expressed by the words 'because of' in the current definition of direct discrimination. For example, telling sexist jokes may not have occurred 'because of' the sex of anyone present, but still clearly 'relates to' the protected characteristic of sex.

(h) *Hartley v Foreign and Commonwealth Office UKEAT/0033/15*: The tribunal must consider what was the conduct in question, and then must apply an objective test in determining whether it was 'related to' the protected characteristic in issue; the intention of the actors concerned might form part of the relevant circumstances but will not be determinative of the question. The tribunal wrongly focused on the perception on the managers in finding that there was no intent to aim at her medical condition when they remarked on issues related to the claimant's character; the question to consider is whether the overall effect was unwanted conducted related to disability. The tribunal must focus on all the surrounding circumstances, including the perception of the claimant.

(i) *Omooba v Michael Garrett Associates Ltd (t/a Global Artists) [2024] EAT 30*: An agent who terminated the contract with an actor because of a social media campaign had not committed an act of harassment. When determining whether conduct is "related to" a protected characteristic, while this potentially has a very broad application, it still requires that there be some feature of the factual matrix, identified by the tribunal, which has led to the conclusion that the conduct is related to that protected characteristic.

42. The Equality and Human Rights Commission: Employment Statutory Code of Practice - harassment:

(a) Following *Reed and another v Stedman [1999] IRLR 299*: the word "unwanted" means "unwelcome" or "uninvited"

(b) Relevant circumstances: circumstances which may need to be taken into account could include B's personal circumstances, such as their health, including mental health; mental capacity; cultural norms; or previous experience of harassment; and also the environment in which the conduct takes place (*paragraph 7.18(b) EHRC Employment Code)*

(c) *EHRC technical guidance (paragraph 2.27(b)* advises the following could also be relevant circumstances:

- Whether A is in a position of trust or seniority to B, or holds any other form of power over them.
- The race or cultural background of those involved. For example, a particular term may be offensive to people of one race because

historically it has been used as a derogatory term in relation to that race, whereas people of other races may not generally understand it to be offensive.

43. Definition of disability

(a) The Equality Act Guidance on matters to be taken into account in determining the question of disability: illustrative examples of when it would and would not be reasonable to regard an impairment as having a substantial adverse effect on the ability to carry out normal day-to-day activities include:

- A total inability to walk, or difficulty walking other than at a slow pace or with unsteady or jerky movements
- Difficulty in going up and down steps, stairs or gradients, for example because movements are painful, uncomfortable or restricted in some way.
- Difficulty going out of doors unaccompanied, for example because a person has a phobia.
- Difficulty co-ordinating the use of a knife and fork at the same time.
- Difficulty preparing a meal because of problems doing things like opening cans or other packages, peeling vegetables, lifting saucepans and opening the oven door.'

(b) *Chacón Navas v Eurest Colectividades SA C-13/05, [2006] IRLR 706, ECJ*. 'disability' covers those who have a 'limitation which results in particular from physical, mental or psychological impairments and which hinders the participation of the person concerned in professional life'.

(c) *Igweike v TSB Bank Plc [2020] IRLR 267, EAT:* the requisite effect on normal day-to-day activities may be established if there is a requisite effect on normal day-to-day or professional or work activities, even if there is none on activities outside work or the particular job. However, 'in many, perhaps most successful cases, disabled status is established because the requisite effects are found on normal day to day activities outside work, or both outside and in work'.'

(d) *Mutombo-Mpania v Angard Staffing Solutions Ltd UKEATS/0002/18:* when the question of whether a claimant is disabled is in issue, it is incumbent on the claimant to provide evidence to the tribunal of the activities it is claimed they are less able to carry out.

> "… it is clear from the Tribunal's assessment of the evidence that while the claimant provided evidence of his symptoms and sought to link those with night shift duties, he provided no information about particular activities, work related or otherwise that he was unable to undertake or that were adversely affected by his impairment.''

e. Abadeh v British Telecommunications plc [2001] IRLR 23, EAT: travelling by London Underground can be a 'normal day-to-day activity' – the test should have been 'using public transport'.

44. Case law – unlawful deduction

(a) *Cleeve Link Ltd v Bryla [2014] IRLR 86 EAT:* The provision or agreement relied on by the employer to authorise the deduction must be legitimate. As a result, if the sum deducted is an unenforceable penalty, then the employer has no right to make the deduction under s 13(1).

(b) *Fairfield Ltd v Skinner [1993] IRLR 4 EAT:* Where there is no dispute that a particular authority or agreement exists but there is an issue as to whether sums deducted do in fact fall within the scope of that authority or agreement, then it is for the tribunal to determine the matter by an appropriate factual enquiry

(c) *Potter v Hunt Contracts Ltd [1992] IRLR 108, EAT:* If there is ambiguity in the wording, the contractual term should be strictly construed in the worker's favour. Wording which said 'should you leave the company within 24 months from the date of your joining, you shall be required to return the fee on a diminishing basis based on £22 per month' did not allow for a deduction from the employees final wages, because it did not say that the employee agreed to the repayment being deducted from his wages.

(d) *Robertson v Blackstone Franks Investment Management Ltd [1998] IRLR 376 CA:* the statutory requirement is that the payment in question should be payable "in connection with" the worker's employment, but not that it should necessarily be payable during the worker's employment.

(e) *Johnson v Veritas Technologies (UK) Ltd [2023] EAT 15:* Commission payments that are subject to a prior condition cannot be claimed as an unlawful deduction unless that condition has been met. Commission payments required senior management approval. Unless and until the approval condition had been met, no commission payment was due.

(f) *Bannerman Co Ltd v Mackenzie and another UKEAT/275/95*: Discretionary bonuses: While the employees expected to receive a bonus, their contracts did not explain how to calculate the amount, but just that it was calculated by reference to the journeys made by the employee. The EAT noted that such a discretion, to be properly exercised, must be exercised reasonably, and had not done so. The employees had not consented in writing to those deductions.

(g) *Farrell Matthews and Weir v Hansen [2005] IRLR 160*: Once a discretionary bonus has been awarded, even if it has not yet been paid, it falls within the

definition of "wages". Once the employer has exercised its discretion and awarded a bonus there is a legal obligation to pay it, whether the bonus is payable under the contract, by custom and practice or by virtue of an ad hoc decision.

45. Case law – extension of time

    a. *Abertawe Bro Morgannwg University Local Health Board v Morgan UKEAT/0320/15:* the burden of proof is on the claimant to persuade the tribunal that time should be extended, however the burden is one of persuasion, it is not a burden of proof or evidence.

Closing arguments

46. Mr Byrne and the claimant made arguments on the legal and factual issues. I address their arguments where necessary in the "conclusions' section below.

Conclusions on the evidence and the law

Harassment

<u>'related to race'</u>

47. It is accepted that the claimant was told that her hair (worn in braids) looked like an alien from the Avatar movie. Mr Byrne "does not agree" with the claimant's interpretation of this comment, arguing it is "not racist in any way shape or form" and that it was not repeated after interview.

48. As I made clear at different times during the hearing, the law says that harassment can be intentional – i.e. a deliberately discriminatory remark, or it can be unintentional. The legal test is: does this comment relate to race, not was the remark racist.

49. We conclude that this remark does relate to race. Braids are a not-uncommon hairstyle amongst black and mixed-race people. The claimant describes herself as mixed-race, and she was wearing braids. The wearing of braids has led to well publicised issues such as compliance with school hairstyle policy, and such policies have been challenged as disproportionately affecting black and mixed-race pupils.

50. The claimant's hairstyle was being 'othered', treated as different and worthy of comment, the difference in her hair such that it merited comment and comparison with a cgi generated alien avatar. Comparing the claimant's hairstyle with such any 'other' was a comment about difference, it highlighted and commented on a hairstyle worn predominately by black people, it related to race.

51. It is accepted that a manager asked the claimant if she was listening to "ghetto music". The respondent accepts that it was wrong to make this remark. Was it related to race? Yes – we find in this context the claimant was being asked if she was listening to 'black music'. We noted one of the definitions given in the Oxford English Dictionary: "Chiefly *U.S. slang*. Of, relating to, or characteristic of the ghetto; or its predominantly African American inhabitants and culture." We conclude that the comment made in this context, while the claimant was at work and sitting at her desk working, was derogatory. It was a remark which was related to race and is stereotypical.

52. We also conclude that the remark was made because the claimant is black – we do not believe it would have been said to a white employee listening to music. In this sense also, it was related to race.

53. We considered the respondent's attempt to initially say this was not a remark related to race – his reference to a ghetto blaster - was surprising. It struck us that the respondent is not willing to accept that employees in his workplace were subjected to treatment – and Mr Self's evidence of bullying is also relevant – that others perceive to be very negative.

54. The reference to a black candidate as 'roadman'. We accept this remark was made by Ms Puzey, it is a word she accepts she uses, albeit we accept that she could not recall this instance.

55. We accept that Ms Puzey and others do not believe this work relates to race, they have a different view of the word; we accept meanings can morph over time. We accept also that words can have more than one meaning.

56. Mr Byrne's evidence was that it was a word used at work, and in his view, he's heard it numerous times in and out of work, but it is not related to race; "I can only say what understand its meaning. … It's not a term I am greatly familiar with". We found this answer to be defensive, Mr Byrne was not willing to accept that there are dictionary definitions which relate this word to black young men; he failed to accept that there may be other definitions, other than his own, despite his evidence he was not 'greatly familiar' with the phrase.

57. We have no doubt that many people in the black community in the UK would see roadman, if directed at them, as a pejorative and racial insult. We also have no doubt that many people of other ethnicities who witnessed such an incident would consider the same. The claimant was told this about an educated black African male candidate. We have no doubt that this is a word which is related to race. We have no doubt that the claimant saw this comment as related to race.

58. Did Mr Simmons say to another colleague that they should not bother contacting candidates with non-English names as it was probably a waste of time? This is said to have been said on more than one occasion and by more than one person.

59. We accept that Mr Simmons cannot recall saying such a comment. But we accept Mr Self's evidence in its entirety. He describes a pervasive culture of casualised pejorative comments, behaviours and attitudes which were considered by many participating within the workplace as 'banter'. We accept that much of the conduct he describes between colleagues in the workplace was in fact physical bullying – head-slapping, leg-hair-pulling, being told by a manager 'well done' when he reacted with anger to one bullying incident.

60. Similarly, we accept that 'banter' was personalised about candidates in a very pejorative way – 'roadman' being a significant example. We consider that within this culture of personalised abusive comments, Mr Self's evidence of casualised comments about accents rings true. We accept that the remark was made, it is one which clearly relates to race.

61. We accept that a high proportion of the respondent's candidate stream are professionals from Asia and Africa. We accept that the respondent regularly places such candidates. There is no evidence that there was actual bias in the process of selecting and placing candidates.

62. To conclude, in relation to the four remarks, all were said, and all relate to race.

<u>Avatar comment</u>

Intention or effect

63. We accept that there was no intention to harass the claimant. On the Avatar comment, it was not intended as an offensive remark, although we wondered why the recruiting manager felt entitled enough to comment.

64. We accept at the time that the claimant brushed off this comment as clumsy one-off comment. She did not like the comment, she was shocked, but it did not immediately demean her, or create a hostile workplace.

65. However, while that a one-off act may not in itself be an act of harassment, we can take into account the cumulative effect of the comments made to the claimant. We accept that the claimant was entitled to look back and see this comment as part of a chain of casualised and derogatory comments which were related to race.

66. In one question to Mr Byrne, the claimant described the shock of being described as an 'alien with braids'. His answer was 'I'm not sure I can answer'. He repeatedly asked, 'why did you not complain at the time'. These along with other answers we felt betrayed Mr Byrne's lack of understanding of issues of workplace dignity, what are acceptable comments in the workplace, including comments from managers towards interviewees / new starters. They showed a lack of understanding of how junior employees may react in such circumstances.

67. We accept the claimant's evidence of why she did not complain – her life experiences to date had not given her a mental map of how to deal with such issues. We accept that this comment contributed to a disorientating start for the claimant, who simply wanted to get on in her role. At the time it did not harass her, however when looking back we accept that the claimant felt this remark was one of a chain of comments which did have the effect of demeaning her, of violating her dignity. In hindsight, this remark did violate her dignity and was part of the chain of comments which for the claimant made her workplace a hostile one.

'Reasonable'

68. Was it reasonable for the remark to have this effect? As above, as a one-off comment the claimant was shocked, but we do not consider the shock of what the claimant saw as a one-off act violated her dignity, or crated an intimidating, hostile, (etc) workplace. She was puzzled but brushed it off.

69. However, over time, a picture emerged for the claimant, and she saw this comment in the context of a longer-line of comments which in her view were racist in effect if not intent – this is part of the wider circumstances the Tribunal must consider. There was the bullying and other derogatory comments in the workplace described by Mr Self – again part of the wider circumstances at work.

70. We conclude that in these circumstances, it was reasonable for the claimant to look back, see the remark in the context of the other remarks, and consider that it was one of a line of comments which violated her dignity, and which created a hostile workplace for her.

<u>Ghetto music</u>

Intention or effect

71. While we have no evidence from the maker of this remark, we accept that this remark was not intended to violate the claimant's dignity or create an intimidating, hostile (etc) work environment for her. We take this conclusion from the response of the comment's maker after he had been spoken to, that he felt bad.

72. Mr Byrne accepted the claimant's characterisation, that it's a "pejorative" term, that is racially stereotypical, he accepted it could cause offence.

73. We conclude that the claimant's response to this remark – that she was glad he regretted it and felt bad – shows that she was upset by this comment, and her colleagues recognised she was upset. She found it humiliating that it had been said to her. Other colleagues were aware the remark was made.

74. This was an abrupt remark made to the claimant while she was working, with no context, she was shocked and upset, and it was reasonable for the comment to have this effect.

75. We accept that this comment did have the effect of violating the claimant's dignity, and it added to her growing perception that this was a hostile place of work, where pejorative comments with a racial element could and would be used without filter. She was upset, she said so, she was aghast that such a comment would be used or directed at her, she wondered why it was said and whether it would be said to a member of staff of a different ethnicity.

Reasonable

76. Mr Byrne accepted that this comment could cause offense. We conclude it was reasonable for the claimant to feel her dignity was violated, that it contributed to her sense this was a hostile workplace. This was not a trivial remark, it was directed at the claimant and the music she was listening to and was heard by other staff members. This is not a question of the claimant being hypersensitive, particularly in the context of a workplace where other remarks related to race were used.

<u>Roadman</u>

Intention or effect

77. There was no intention to violate the claimant's dignity or create a hostile workplace. We accepted Ms Puzey's evidence that she was unaware – and in fact did not believe – it was a word which could relate to race.

78. We accept the comment did violate the claimant's dignity and create a hostile work environment in the context in which it was said – the claimant considering an application of a professional African male may have merit only for it to be dismissed with the comment 'roadman'. The claimant perceived, rightly, that there is a mainstream derogatory meaning of this word which does connect it to young black men, and she believed it was being used in this context. While it may have been used about white candidates, the claimant had not seen this.

79. We accept she was shocked and upset by this comment – she saw a candidate being dismissed with a pejorative and racist remark. While we accept it was not intended as a racist comment, given its meaning, above, we consider it was reasonable for the claimant to construe it as such, and for her to feel humiliated that a racist word was being used in the workplace – it also created an adverse work environment for her.

80. The claimant was at this stage of the view that this was a workplace which used words which have a racist meaning or are connected to race. This meant the

workplace became more uncomfortable and difficult for her, she felt demeaned by this comment.

Reasonable

81. We conclude that it was reasonable for this comment to have this effect particularly given the wider circumstances of casualised and unpleasant comments within the workplace which more that occasionally were related to race.

Don't bother contacting candidates with non-English names

Intention or effect

82. We accept that this comment was made on more than one occasion. It was not directed at the claimant, although she heard it being said. We do not believe that it was a comment made with the intention of violating the claimant's dignity, or to create a hostile working environment.

83. We accept that the comment did have this effect, it is clearly a prejudicial comment and the claimant was upset it had been made, it affected her mood and it was a remark which violated her dignity in the context of the other derogatory remarks (roadman, foreign names). The wider circumstances show casualised and unpleasant comments, sometimes related to race. The cumulative effect had by this stage caused a hostile workplace for the claimant.

Reasonable

84. Again, considering the wider circumstances and the cumulative effect of remarks, it was reasonable to have this effect. This was one of a line of comments made to or around the claimant which related to race. It was a remark which in the context of these wider circumstances, would negatively affect many employees. It was a racist comment, and one which we accept reasonably violated her dignity and caused a hostile workplace for her.

Tribunal's comment on harassment

85. Throughout the evidence, Mr Byrne's stance was "what more could we do"; he accepted that there were instances of inappropriate behaviour "but the business acted when given the chance to stamp-out" this behaviour, it did "as much as reasonable to create an inclusive and diverse environment".

86. Given the evidence we have heard, the obvious answer is that the respondent could do a lot more. It can provide training which makes it clear that personalised comments and comments which relate to any protected characteristic are unacceptable. Joking, laughter, high spirits can all be positive in the workplace, but on the evidence, we have heard this passed into unacceptable and on occasion abusive conduct. The Tribunal feels strongly that the respondent should

consider engaging in appropriate training on the use of acceptable language in the workplace.

Time

87. The individual acts of harassment are: 15 March, 21 July, August, and 12 Sept 2022. The ACAS conciliation process lasted from 5 October to 16 November 2022. The claim was made to the tribunal on 12 December 2022.s

88. The allegations from 21 July 2022 were all made within 3 months of the contact to ACAS and are in time. The 15 March 2022 comment is out of time.

89. We concluded that it was just and equitable for time to extended to allow the 15 March comment. We accept that it was only later in her employment when the claimant was processing the cumulative effect of the comments that she came to the dawning realisation that things were wrong, but she was unsure what to do about it. On the Avatar comment, the primary limitation period was 14 June 2022 and we accept that it was not reasonable for the claimant to conclude she should make a claim at this stage.

90. We note that the claimant made a claim in time for the other three remarks. We conclude that the claimant would be disadvantaged if this allegation were not allowed as out of time; there is little disadvantage to the respondent, who accepts that the remark was made.

Unlawful deductions – SSP

91. We accept that the claimant had no periods off work which lasted 3 days or more. SSP is only payable to employees after their 3rd day of sickness absence. We conclude that the claimant had no contractual or statutory entitlement to SSP, and her claim for SSP therefore fails.

Unlawful deduction– commission

92. During closing arguments, the tribunal queried with the parties the law on penalty clauses: in particular whether clause 5 of the terms and conditions of appointment, which the claimant characterises as unfair, may be a penalty clause as it does not equate to an identifiable sum or loss.

93. The implication of this clause and the respondent's practices of dismissing prior to pay-day means that all commission earned and otherwise payable in that month's salary will be deducted, no matter the amount, when the respondent dismisses employees.

94. The respondent's position is that this clause is the norm in the industry, Mr Byrne accepted that there was no identifiable loss to which the deduction relates, he

referred to the amount of training to new staff and the losses which occur if they leave early in their employment.

95. Mr Byrne was surprised by the penalty clause argument, the Tribunal pasted a quote from a legal text on this issue into the cvp chatroom, and gave him time to take advice on the issue. He did so during a break and then argued that there was a legitimate business interest in this clause, that it is consistent with industry standards. It's aim is to incentivise staff: the respondent's business terms are that if the candidate leaves within 12 weeks of placement it will replace the candidate for free, "therefore we need to be able to incentivise the consultant to replace the candidate – the money is not earned until guarantee period is over, withholding this payment for leavers protects the business in case the candidate needs to be replaced." He accepted that the amount of commission due could be £10,000 and "we would recoup it all" because of this business need.

96. The tribunal concludes that the meaning of this clause is ambiguous. The respondent says that this clause means that *payday* is "the time the commission payment falls due", that if they are not employed on payday, they are not entitled to the payment set out in their last commission statement.

97. However, we conclude there is another interpretation of this clause. Clause 4 says the commission statement "… summarises … the commissions due" to the employee, i.e. the sum payable to the claimant; that when the commission statement is received commission payment is due.

98. We accept that "falls due" can mean date of payment, but there is the reference to 'time' not date; against this ambiguity there is the certainty of an employee receiving a commission statement which says this is the sum "due" to her.

99. We accept that the latter meaning is the actual meaning of this clause. The commission payment falls due as a consequence of the commission statement being generated and given to the employee, setting out the sums that will be paid to the employee. We conclude that on receipt of the statement, this is what the employee has been told they will be paid, this is the payment falling due.

100. We conclude that this meaning of the clause entitled the employee to commission after they have received their commission statement. We do not accept that it means it is only payable if you are still employed on payday. Or, if there are two meanings to this clause, we are required to interpret it in the claimant's favour.

101. What of the discretionary nature of this commission clause? We accept that the respondent can change its commission structure, it is discretionary. But once a commission payment has calculated under a particular commission structure and the commission statement given to the employee, it is no longer a discretionary entitlement, the discretion has already been exercised to use that commission structure for this pay period.

102. Secondly, we conclude that this clause is a penalty clause. An employee may have earned several thousand pounds, receive their commission statement, but then be dismissed with no notice for any reason and not receive a penny: what is the loss that this sum equates to? Why *this* deduction? There is also the failure to make clear to the employee that any dismissal by the employer will always fall before payday and commission will not be paid. The clause is ambiguous.

103. We did not accept the respondent's rationale – the business need. It is, for example, possible to make payment of final commission dependent on the candidate remaining in post and have a provision to delay final payment of commission.

Disability

104. We accept the claimant has a medical condition which affects her sinuses and can be painful and debilitating. We accept also that the claimant can occasionally need not to travel on public transport so as not to exacerbate the condition. We note also that a change of desk at work, avoiding going under air conditioning, can assist mitigate the symptoms of this condition.

105. We did not see evidence that this condition has a substantial effect on day-to-day activity. The claimant's disability impact statement describes her as being "susceptible" to respiratory illnesses, that when she does experience ENT inflammation it can cause dizziness, weakness, vertigo and loss of hearing, during which travel and movement is not advisable. It was not clear how often these effects occur, or the extent to which the dizziness/vertigo has a substantial impact on day today activities. We did not consider the claimant was able to prove she has a disability.

106. In addition, we were unsure that the claimant can say that it had a policy which adversely affected her. The claimant could change desks to move away from an aircon unit; no policy required her to sit under it.

REMEDY

107. The claimant sought a Vento award in the sum of £12,000. Her evidence was that while working the incidents left her feeling "deeply uncomfortable" and "severely affected my confidence." Her statement says that after her dismissal she had around 4 months of anxiety, insomnia and reduced confidence. She says that a genuine apology from the respondent is important to her.

108. The claimant described the effect on her at work as follows: she was anxious working at the respondent "and it became progressive - worse and worse …. I felt

uncomfortable coming to the office most or all the time. I … felt scared that people would say things…". She described a "toxic environment, that as a junior employee, with no experience working in an office or in recruitment – "this was a shock to myself".

109. The claimant accepted that she had not discussed these symptoms with her GP. She also accepted that she was interviewing for roles: her evidence was that her experiences with the respondent "affected me on issues of trust and emotionally – coming from something like that I was and remain anxious…". The claimant said that she did not speak to her GP, she was speaking to her family and friends, that she initially felt "overwhelmed" but she was encouraged to move forward. She says that she was initially very nervous and was so anxious at her interview that she was surprised she got the job, she says that "it is not the same working environment, so I am able to cope."

110. Mr Byrne argued that the claimant's account of her symptoms is "categorically not true", saying that there are inaccuracies in her witness evidence which cast all her evidence into complete doubt. Paragraph 2 of her statement says that the claimant raised disability/health issues with her employer, which says Mr Byrne, she did not. He says that it is "unusual" that "someone so afraid and distressed to this level" did not discuss her symptoms with their GP, that it was "unusual" she did not get assistance from a health counsellor. He described the totality of her evidence as "untrue" that if there were as many incidents as she describes, he is "surprised" that she only called one other witness. He "categorically" does not accept the level of injury she describes, she is "significantly exaggerating" her symptoms to gain more compensation.

111. We accept as accurate the claimant's account of her symptoms. We noted her comments about the effect on her at work, her loss of confidence, her feelings of stress and insomnia. We accept that she did not exaggerate these in any way. We did not understand Mr Byrne's point that her evidence was all untrue: his point about whether the claimant discussed all her medical symptoms with HR was not raised in detail in evidence, he was not present at her rtw interviews and could not therefore say what was discussed.

112. Mr Byrne was unable to say the basis on which we must find her remedy evidence untruthful, apart from the fact that (i) all her evidence was untrue (ii) she had not seen her GP. But we accept that not everyone will visit their GP – this does not mean they have not suffered an injury, but it is a potential factor to consider in the overall assessment of the award.

113. In making an award of £8,500 for an award of injury to feelings, we take into account the following: as well as feelings of anxiety and insomnia, the claimant suffered a significant loss of confidence, she was undermined and unhappy at work, and suffered a loss of trust. These are all significant effects; they were the result of several months of feeling undermined in a hostile workplace. We accept

that this is significant, both in terms of the harm done to the claimant and the nature and length of time she experienced this treatment. Her symptoms were not transient, they lasted for several months during her employment and for several months after it had ended.

114. We accept that the harassment was not deliberate, but there was a culture issue within the respondent which caused the claimant distress throughout her employment. While not deliberate or concerted, the harassment was more than intermittent to the extent the claimant lost confidence in her professional abilities.

115. After her employment ended, the claimant remained vulnerable because of a lack of confidence and trust. We also take into account the lack of an apology for her treatment, instead at remedy the argument was that the claimant had lied throughout her evidence. An apology genuinely given can assist with recovery from injury and the lack of an apology is a factor we have taken into account in assessing the injury caused.

116. However, the claimant was also affected by her dismissal which should not be part of this award, and her claim in relation to disability discrimination has failed. We must be careful not to compensate for non-discriminatory harm. We accept that there was no intention to harass, we accept also that the claimant has largely overcome the issues she faced because of her treatment. She did not need medical treatment.

117. Taking the above into account, we conclude that the injury to the claimant was significant, but not one which merits a mid-band award. We conclude that the injury which resulted from the acts of race harassment amounts to an injury in the upper half of the lower Vento Band, an award of £8,500. This award encompasses a *Simmons v Castle* 10% uplift.

Interest

118. We awarded interest for injury to feelings for the whole of the period from the date of the 1st discriminatory act to the date of calculation. For non-pecuniary loss we awarded interest from the mid-way point from the date payment was due, 30 September 2022. We considered it appropriate to exercise our discretion to award interest – we did not accept that a serious injustice would be caused to the respondent if interest was awarded (SI 1996/2803 reg 6(3)).

119. Remedy award calculation - interest:

Injury to feelings award - Braids comment – 15 March 2022 to date of calculation – 31 May 2024 = 810 days.	£8,500.00
£8500 / 365 x 810 days @ 8% =	£1,509.00

Unlawful deduction award (agreed sum) 1 October 2022 to date of calculation: 608 days / 2 = 304 days	£2,350.00
£2,350 / 365 x 304 days @ 8% =	£ 156.58
TOTAL:	**£12,515.58**

Employment Judge Emery
24 July 2024

Judgment sent to the parties on:

2 August 2024

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For the Tribunal:

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