



EMPLOYMENT TRIBUNALS

Claimant: Mr Gregory Dunning

Respondent: Grange Motors (Brentwood) Ltd

RECORD OF A FINAL HEARING

Heard at: London South
(in person and CVP)

On: 14-16 February 2024
20-24 May 2024
19 June 2024 (in chambers)
12 September 2024 (CVP)

Before: Employment Judge Hart, Ms Beeston and Ms Boyce

Appearances

For the claimant: Litigant in person
For the respondent: Ms Cheng (counsel)

JUDGMENT having been sent to the parties on 14 October 2024 and written reasons having been requested in accordance with Rule 62(3) of the Employment Tribunals Rules of Procedure 2013, the following reasons are provided:

REASONS

INTRODUCTION

1. These are our **unanimous** reasons in relation to Mr Dunning's complaints for wrongful dismissal, direct race discrimination / harassment and unlawful deduction of wages / breach of contract.
2. Mr Dunning was involved in an incident at work on 13 May 2022, following which he was summarily dismissed. He complained that the respondent was not entitled to dismiss him without notice since his conduct was not such as to constitute a repudiatory breach of the contract. Further he complained of race

discrimination in relation to a number of instances where the respondent referred to him as 'The South African' / 'South African Cunt' and in relation to the respondent misconstruing his use of the words 'do you want to fight me' during the disciplinary process that followed the incident. Mr Dunning's money complaints were in relation to £1,000 deducted from his wages to pay Ms Saunders, non-payment of expenses and outstanding commission of £9,200 on cars that he sold.

THE HEARING

3. The liability evidence and submissions was conducted in person, with oral judgment and remedy conducted by CVP. Mr Dunning represented himself. The respondent was represented by Ms Cheng (of counsel).
4. During the hearing we were provided with the following documents:
 - 4.1 A joint agreed hearing bundle which by the end of the hearing amounted to 341 pages, the references to page numbers in this judgment are to the pages in this bundle.
 - 4.2 A supplementary bundle provided for the resumed hearing which by the end of the hearing amounted to 126 pages (referred to in this judgment with the prefix 'SB').
 - 4.3 CCTV footage of the incident.
 - 4.4 Two audio files containing comments by Mr Lee.
 - 4.5 Two audio files of 21 minutes and 29 minutes of the disciplinary and appeal meetings.
 - 4.6 Witness statements for Mr Dunning and respondent witnesses (identified below).
 - 4.7 Supplementary witness statements from Mr Lee and Mr Morrison for the resumed hearing and a single page table that stood as Mr Dunning's supplementary witness statement (see below).
 - 4.8 An agreed chronology and cast list.
 - 4.9 An initial list of issues provided by the respondent (disputed) and an updated list of issues (see below).
5. Mr Dunning (the claimant) gave evidence on his own behalf.
6. The respondent's witnesses were:
 - 6.1 Mr Lee, then Head of Business at Grange Tunbridge Wells and Mr Dunning's line manager
 - 6.2 Mr Hughes, then Sales Divisional Used Car manager
 - 6.3 Mr Morrison, Branch Financial Controller
 - 6.4 Mr Murray, Chief Operating Office and Board Director
 - 6.5 Mr Murphy, General Manager at Invicta Maidstone
 - 6.6 Ms Boon, Group HR Director and Board Director
7. The initial hearing was listed for three days (14-16 February 2024). Due to insufficient hearing time the hearing went part-heard with the completion of Mr Dunning's evidence (on his wrongful dismissal and discrimination complaints).

Case management directions were made for determining the money claims at the resumed hearing: **pg SB3-SB10**. At the resumed hearing we proceeded to hear from Ms Boon, Mr Hughes, Mr Murray and Mr Muphy on the wrongful dismissal and discrimination complaints. We then heard evidence from Mr Dunning on the money complaints and finally from Mr Lee and Mr Morrison on all the complaints. This was to assist Mr Dunning who had failed to particularise his claim for unpaid commission (see below). Both parties provided oral closing submissions. The panel deliberated on 19 June 2024 and announced its decision and reasons orally to the parties on 12 September 2024. This was followed by a remedy hearing to determine compensation in relation to the successful wrongful dismissal claim. Mr Dunning requested written reasons at the conclusion of the hearing.

List of Issues

8. At a Preliminary Hearing on 30 June 2023 Employment Judge (EJ) Hena had identified that Mr Dunning was claiming wrongful dismissal and direct race discrimination. His complaints for ordinary unfair dismissal, automatic unfair dismissal on grounds of a protected characteristic and discrimination on grounds of sex and sexual orientation were struck out.
9. Prior to the commencement of our hearing a list of issues had been agreed by the parties setting out Mr Dunning's complaints for wrongful dismissal and direct race discrimination. However when discussing the issues at the commencement of the hearing with Mr Dunning it was clear that he did not agree that his complaints should be limited to those set out in the list of issues. We went through the claim form and identified that Mr Dunning had 'obviously pleaded' a number of other complaints. Of these the following complaints were subsequently dismissed for reasons provided orally at the hearing: accrued holiday pay, National Minimum Wage, the application of the non-competition clause, defamation (reputational damage), personal injury (health) and victimisation. Judgment in relation to these complaints was sent to the parties on 15 March 2024. This left the following complaints to be added to the list of issues: harassment (on the same facts as the direct discrimination complaints) and three money complaints (£1,000 deducted from his wages to pay Ms Saunders, non-payment of expenses and outstanding commission. Oral reasons were provided to the parties at the hearing and summarised in the Case Management Order sent to the parties on 15 March 2024.
10. At the resumed hearing the money claim for non-payment of business expenses was struck out because it has no reasonable prospect of success and because Mr Dunning had not complied with a tribunal order. He had failed to particularise this complaint, which was not dependent on any information from the respondent, and refused to disclose his bank statements as proof of payment. The respondent's application to strike out the other two money complaints did not succeed. Oral reasons were provided to the parties for these decisions at the hearing and judgment sent to the parties on 4 June 2024.

11. The updated list of issues (as amended) is attached at Appendix A.

The commission complaint

12. In his claim form Mr Dunning stated that he would like 'payment for all the cars that I sold that I am yet to be paid for': **pg 15**. In order to be able to determine this complaint the tribunal required further particulars. To assist Mr Dunning, prior to adjourning on 16 February 2024 (day 3), the respondent was ordered to send him copies of all relevant documents and / or spreadsheets relating to the cars that he had sold. Mr Dunning was then to identify whether there were any other documents that he required. Mr Dunning was then ordered to provide the respondent with a schedule providing a breakdown of the sums he said he was owed. Both parties were ordered to disclose any other documents in their possession relating to this claim and given permission to provide supplementary witness statement/s for the resumed hearing.
13. By 20 May 2024 (day 4) Mr Dunning had failed to provide a schedule of what he said he was owed and failed to provide a witness statement. Mr Dunning stated that the reason was because the respondent had failed to disclose to him the information ordered by this tribunal. We did not accept his submission. The supplementary hearing bundle included email correspondence with Lamborghini dated 27 February 2024 evidencing the respondent's request for a report of all orders validated on the Loom computer system between February 2021 to May 2022: **pg SB19-SB20**. The report generated was disclosed to Mr Dunning: **pg SB16-SB18 and SB61, SB63**. Mr Dunning suggested that this was a manually edited document, but provided no evidence to support this allegation: **pg SB75**. The respondent also disclosed the monthly profit by dealer reports: **pg SB22-SB29 and SB81**. When discussing this issue before this tribunal Mr Dunning suggested that the respondent could provide him with the equivalent to page SB54 (the commission sheet for Ms Saunders which related to the £1000 money claim). The respondent was ordered to disclose this the next day and did so: **pg SB108-SB117**. During the discussion, Mr Dunning admitted that he had a list of deposit orders that he had obtained in April 2022 on his phone which he had not disclosed to the respondent, claiming that he had '*just re-found it yesterday afternoon*'. Mr Dunning was ordered to disclose this: **pg SB105-SB107**. In response to tribunal questioning Mr Dunning confirmed that on the basis of this document and the Loom report previously disclosed by the respondent he could now provide a witness statement setting out his commission claim. He was therefore ordered to provide a statement with numbered paragraphs by the morning of day 6. He was informed that there would be no further orders for disclosure, that he was to do his best to put in writing what he was owed and why, and if he was unable to do this to explain why. He was informed that he could include in his statement any representations that he wished to make about the incompleteness or veracity of the information disclosed by the respondent.
14. On the morning of day 6, Mr Dunning had provided a 1 page table of commission owed in relation to (a) a £600 shortfall, (b) commission on 10 orders amounting to £8,600 and (c) an unspecified and unparticularised claim

for 'undisclosed orders'. He did not provide a witness statement. He informed us that he was not applying for an adjournment in order to provide a statement. The respondent applied for the complaint to be struck out. We rejected the respondent's application for reasons given orally at the hearing (see paragraph 10 above). However we did apply rule 6(c) of the Employment Tribunal rules (permitting a tribunal to bar or restrict the party's participation in proceedings where there has been non-compliance with a tribunal order). We ordered that Mr Dunning's table stand as his supplementary witness statement and that he not be permitted to add further evidence in chief. This was in accordance with the overriding objective to deal with parties fairly and justly and to avoid unnecessary formality, delay and expense. The respondent was provided with time to take instructions.

Other matters arising during the hearing

15. Mr Dunning applied to add 24 pages of documentary evidence attacking Mr Lee's character, some of this related to issues that had already been struck out by EJ Hena. We went through the documents provided and permitted Mr Dunning to add those that were connected to his complaints but not those that were neither relevant nor necessary for the determination of the claim: **pgs SB97-SB102**.
16. Mr Dunning applied for the audios of the appeal hearing to be listened to in full. This application was refused on the basis that it was not proportionate use of tribunal time given that we had a full transcript in the hearing file. Instead Mr Dunning was ordered to provide his own transcript identifying any inaccuracies that he was relying on. He did so and these were added to the hearing file at **pgs 320 to 330**. We also agreed to listen to specific sections identified by Mr Dunning in relation to the tone of voice used.
17. Mr Dunning was given considerable assistance during the hearing to help him understand the tribunal process, understand the questions when he was being cross-examined and in questioning the respondent's witnesses. Mr Dunning was also provided with considerable assistance by the tribunal staff, for example downloading documents that he had brought on his phone but not in paper form. At the end of the hearing Mr Dunning stated 'you have been very good to me so thank you'.

The Remedy Hearing

18. The remedy hearing was conducted by CVP. Mr Dunning was in South Africa; therefore he was able to make representations but not give evidence without obtaining permission from the South African state. Since remedy was a straight forward calculation based on facts already determined, we decided that there was no need to adjourn to enable Mr Dunning to give evidence. Accordingly the remedy hearing proceeded on the basis of representations only.

FINDINGS OF FACT

19. We have only made findings of fact in relation to those matters relevant to the issues to be determined. Where there were facts in dispute we have made findings on the balance of probabilities, the burden of proof to establish primary facts being on the claimant. We confirm that we have taken into account all the documentation and evidence that we were referred to during the hearing. If something is not specifically mentioned that does not mean that we have not considered it as part of our deliberations.

About the Respondent

20. The respondent is an automotive main dealer franchise for selling and servicing Bentleys and Lamborghinis. It deals in new and pre-owned cars. It has two branches. The events in this claim relate to the Tunbridge Wells branch. The branch contained a Bentley sales and servicing team and a Lamborghini sales and servicing team, but they were separate teams and in separate (albeit adjoining) premises.
21. New Lamborghini cars are individually built to customer specifications in the Lamborghini factory in Italy. They take up to 18 months to build. A new car would only be built once a customer had paid a deposit and an order registered with Lamborghini (i.e. loaded onto the Loom computer system). Prior to registration an order was known as a 'forward order'. This occurred when a customer paid a deposit to register an interest in a model that had not yet been announced. If the model did not materialise then the deposit was repaid. It was in effect a waiting list.

About Mr Dunning

22. Mr Dunning is a white South African.
23. On 22 February 2021 Mr Dunning commence employment with the respondent as a sales manager. Mr Lee was his line manager. It was not disputed that Mr Dunning was exceptionally good at sales and achieved good results.

The terms of Mr Dunning's employment

24. As a sales manager Mr Dunning's salary was £20,000 pa plus non-contractual bonus / commission: **pg 97**.
25. The respondent's standard commission scheme provided a payment of £200 on order and then payment of between £300 and £800 on delivery of a new car. There was a different scheme that applied to pre-owned cars: **pg 279**. The criteria for payment included a clause that '*no commission will be paid on vehicles not delivered, if sales executive leaves our employment*': **pg 280**.

26. The respondent negotiated a 'fast start' commission agreement with Mr Dunning to enable his commission payments to be front loaded, due to the delay between the placement of an order and delivery of a car. This was to run from March 2021 to the 31 December 2021. The main terms of the scheme were that:
- 26.1 Mr Dunning was to receive payments '*at the point of a proper order*' for the Urus model of £800 and the Huracan Evo and Aventador model of £1000. The point of proper order was when the order was '*signed off by S Lee*' which included the order being loaded 'into key and into Loom' i.e. it was registered with Lamborghini and entered onto the computer systems: **pg SB 125**.
- 26.2 Mr Dunning was to receive in addition a one-off end of year bonus of £5000 if he met the target of selling 40 new cars. Mr Dunning achieved this target and was paid this sum.
27. On 18 January 2022 Mr Dunning signed a transaction manager contract backdated to come into effect on 1 December 2021. Mr Dunning was not happy about this. He wanted the 'fast start' arrangement to continue but the respondent was not prepared to extend it. Further he objected to the restrictive covenant clause and the longer notice period in the new contract. It was these objections that had led to a delay in the contract being signed and the subsequent backdating. The new contract was a promotion. It provided Mr Dunning with a higher basic salary of £25,000 plus payment in accordance with a payment plan. Mr Dunning admitted in evidence that he did not understand this plan. We accept Mr Lee's evidence that over time Mr Dunning would have earned significantly more as a Transaction Manager than he would have done as a Sales Manager. This was because he would be paid not just on the cars that he had personally sold but on the performance of the department that he now managed. However a consequence of this promotion was that commission was to be paid on delivery rather than on orders, in accordance with the respondent's standard commission scheme.
28. Mr Dunning claims that between 1 December 2021 and 18 January 2022 he placed 10 orders for new cars for which he was owed £8,600 commission. In addition there was a claim for £600 shortfall on an additional order. He claimed that because he was required to sign the transaction manager contract he lost out on the commission he would have received under the fast start scheme. Mr Lee denied that Mr Dunning would have received payment for these orders under the fast start scheme. This was because the orders were 'forward orders' that had not yet been registered with Lamborghini.
29. We preferred the evidence of Mr Lee over Mr Dunning in relation to the nature of the orders made over this period. Mr Dunning did not provide a witness statement to explain his case despite being given ample opportunity to do so by the Tribunal. Under cross examination he accused Mr Lee of manipulating the situation and firing him so that he could get more money. Other than attempting to attack Mr Lee's general character, Mr Dunning adduced no

evidence to support this specific allegation. We did not consider that Mr Dunning's accusations were credible and preferred the evidence of Mr Lee on this issue.

Being referred to as 'the South African' / 'South African cunt'

30. Mr Dunning and Mr Lee had a friendly relationship and socialised outside work. They both engaged in inappropriate and racist banter. This was evidenced by the exchange of WhatsApp and text messages. Mr Lee used the word 'yid' (**pg 312p**) and Mr Dunning used the words 'chutney ferret' 'slant eyed' 'yella' 'paki' (**pgs 312a, 312e, 312g, 312i**) to describe various customers. The word 'cunt' was also frequently use in these exchanges by both Mr Dunning and Mr Lee: **pgs 311, 312b, 312d, 312h, 312j**. We did not accept Mr Lee's evidence that he only used such language in text messages and not when speaking to each other; the casual nature of the text exchanges suggests that it was commonplace and habitual for both of them to use such language.
31. In addition we heard an audiotape of Mr Lee referring to a South African vendor as 'part-time saffa'. Mr Lee's explanation for this was he thought the word was 'southers' not 'saffa', similar to how 'Aussie' is used as a shortened term for 'Australian'. Having listened to the tapes we find that Mr Lee did use the word 'saffa', however we did not accept that Mr Lee said 'dirty saffa' as alleged by Mr Dunning in his evidence. We accept Mr Lee's evidence that 'saffa' was a term that he had learned from Mr Dunning who used it and that he did not intend to cause Mr Dunning offence by the use of that term in his message to Mr Dunning.
32. Mr Dunning says that Mr Lee would regularly refer to him as 'the South African' or 'the South African cunt' in front of staff and managers (**issue 2.2.2.1**). This was disputed by Mr Lee. When considering whether Mr Dunning's evidence on this was reliable we took into account that:
 - 32.1 Mr Dunning had not complained of being referred to as the 'South African' or the 'South African cunt' during his employment by the respondent. He did not even refer to any of these comments during the investigation of his grievance in relation to the incident referred to below. It was particularly surprising that Mr Dunning did not refer to being called South African when he recounted the Silverstone incident which comprises issue 2.2.2.2 (see investigation hearing on 17 May 2022 where Mr Dunning referred to Mr Lee stating 'don't wind him up I've got to be in the car with this C.u.n.t'); **pg 160**.
 - 32.2 In his claim form Mr Dunning had only referred to race with reference to his use of the phrase 'do you want to fight me?' and made a complaint (not pursued) that he was being replaced by a cheaper British female. Further we noted that although he complained that Mr Lee swore at him and use the word 'cunt', he did not allege that Mr Lee had referred to him as 'the South African cunt'.

- 32.3 It was only when asked to provide further information that on 13 December 2022 Mr Dunning stated that Mr Lee would call him 'The South African' and 'South African cunt' on a regular basis, but even then did not provide further details (**pg 49**), only doing so on 28 July 2023 in response to a Tribunal Order to provide further particulars (**pg 89**).
33. Mr Dunning's explanation in evidence before us for not referring to the 'South African' comments at an earlier opportunity was that he at the time had considered Mr Lee a friend and that this was '*banter and very silly words*'. It was only on reflection after his dismissal and following advice from friends that he became aware that it was discrimination and that he '*realised the gravity*'.
34. Mr Lee denied that he had ever referred to Mr Dunning as 'the South African' or made reference to him being South African. He accepted that he regularly use the word 'cunt', and that he used that word at work although he was careful about who he used it in front of.
35. The respondent called a number of witnesses who all denied that they had heard Mr Lee refer to Mr Dunning as 'the South African' or the 'South African cunt' or that he used the word 'cunt' at work. Their evidence was that the only person who referred to Mr Dunning as being South African was Mr Dunning himself. We accept that Mr Dunning would refer to himself as being South African and that he came across being proud of his nationality and identity but we did not accept that no-one else referred to him as being South African. In particular:
- 35.1 We were concerned about the identical evidence provided by Mr Morrison and Mr Paddock. They claimed that the words in their witness statement were their own but they were almost identical.
- 35.2 In any event, it is not believable that none of the respondent's witnesses had heard Mr Lee use the word 'cunt' in the workplace given his own admission that it was a word that he regularly used at work. This called into question the reliability of their evidence on this matter.
- 35.3 We considered the evidence of Mr Hughes to be evasive. When asked about whether he had called Mr Dunning 'South African' his response was he could not recall if he had done so but if he had it was not in a derogatory way. He accepted that he had used the word 'cunt' and that this was a word normalised in the sales office and that there was a lot of banter. However his evidence that he had not heard Mr Lee use that language even outside the workplace was not believable given Mr Lee's admission.
- 35.4 We did not consider that Mr Paddock's evidence was credible when he stated that Mr Dunning's nationality was never referred to, even in a positive way.
- 35.5 We considered that it was unlikely that Mr Lee would not have referred to Mr Dunning as 'the South African' or 'the South African cunt'. It was clear from his audio and text messages that it was part of his normal discourse to refer to people's race and nationality. Therefore we do not

consider it believable that he did not refer to Mr Dunning's, particularly in the context of Mr Dunning referring to his own nationality on a regular basis.

36. Therefore on balance we preferred the evidence of Mr Dunning. In relation to the specific instances that Mr Dunning relies upon we found as follows:
- 36.1 In April 2001 in front of a client Mr Lee referred to Mr Dunning as the '*South African with no idea of social media*' (**issue 2.2.1.1**). Mr Lee accepted that he had met the client in the showroom and that Mr Dunning was present.
 - 36.2 In late 2021 Mr Lee informed Mr Dunning that Mr Lavey (the CEO of Cambria Automobiles) had referred to Mr Dunning as '*The South African*' at a management meeting with Mr Lee (**issue 2.2.1.2**).
 - 36.3 In 2022 Mr Lee referred to Mr Dunning as '*the South African*' in monthly management meetings at Lamborghini Tunbridge Wells, with Mr Paddock, Mr Hughes and Mr Morrison present (**issue 2.2.1.3**). Whilst we did accept that these were more formal meetings we noted that the same persons were present as in the showroom and therefore were likely to be less careful about the language used than at a meeting involving outside personnel.
 - 36.4 In 2022 Mr Lee referred to Mr Dunning as '*the South African who doesn't have a clue*' at budget meetings when he was asked to explain costings, with Mr Paddock, Mr Hughes and Mr Morrison present (**issue 2.2.1.4**). Mr Lee admitted in evidence that he was frustrated with Mr Dunning because he failed to prepare for meetings and tried to hijack them. Mr Morrison also gave evidence that he spent time with Mr Dunning to explain the accounts which he did not understand. It therefore provides the context for this comment being made.
 - 36.5 In Summer 2021 Mr Lee referred to Mr Dunning as '*the South African cunt*' in front of Ms Dunning's wife in the Bentley showroom in Tunbridge Wells when they came to pick up a Bentley (**issue 2.2.2.4**).
 - 36.6 In September 2021 Mr Lee called Mr Dunning '*the South African*' at a clay pigeon shooting event with clients (**issue 2.2.2.5**).
 - 36.7 In early 2022 Mr Lee said '*please don't wind Greg up as I have to sit in the car with the South African cunt*' in front of Mr Paddock, Mr Hughes and Mr Morrison whilst at a work conference at Silverstone racetrack (**issue 2.2.2.2**). This was in the context of a conversation about travel arrangements.
 - 36.8 In 2022 Mr Lee called Mr Dunning a '*South African cunt*' whilst speaking to a particular client at events such as Goodwood, and in the Grange showroom in Tunbridge Wells. (**issue 2.2.2.3**). We considered that Mr Lee would not have normally used the word '*cunt*' in front of a client but that there was a particular relationship with this client and we did not consider that Mr Dunning was being untruthful or mistaken in his evidence.

The incident 13 May 2022

37. The respondent displays the Lamborghinis in a large car showroom with a clear glass front. There are three staff offices at the back of showroom, 3½ car-lengths away from the glass front. Mr Dunning's office was next to Ms Saunders' office (a more junior member of his team), with a solid partition between them and a glass front and door. It had a desk with single seat against the far wall facing the glass front / door and two seats on the other side facing the far wall (plan at **page 334**). It would only be possible to see into the office when standing in front of the office.
38. The car showroom had a number of internal and external CCTV cameras.
- 38.1 Of the internal cameras only one captured the area of Mr Dunning's office. It was situated on the mezzanine above his office (which formed his ceiling) pointing down and away from his office. It showed the seating area and corridor to the right of his office but not the office itself.
- 38.2 Of the external cameras, two pointed across the car park towards the car showroom (cameras C08 + C09). We did not accept Mr Dunning's case that these would have been able to view the offices based on their angle, distance and the effect of the glass barrier (which was reflective). Although the cars were visible, the offices were located at the back behind the cars.

Therefore we did not accept Mr Dunning's case that there were other CCTV cameras which recorded what had happened in addition to the one provided to this tribunal in evidence.

39. Prior to the incident described below, the relationship between Mr Dunning and Mr Lee had deteriorated. Mr Lee gave evidence that it had slowly changed over time. In particular in the run up to the incident there had been a disagreement over payment of expenses following Mr Dunning's trip to Italy.
40. On the morning of 13 May 2022 Mr Lee and Ms Saunders entered Mr Dunning's office to have a discussion about Ms Saunders' pay. Mr Dunning had been paid commission in advance for the sale of a car having placed the original order (in accordance with the 'fast start' agreement). Ms Saunders had been involved in the subsequent contact with clients and was claiming commission for her role in the sale. Mr Lee's view was that Mr Dunning should hand over some or all of his commission to Ms Saunders. It was a difficult discussion and during the discussion Ms Saunders got upset and left, closing the door behind her. At the point that Ms Saunders left we find that both Mr Lee and Mr Dunning were seated with a desk between them, Mr Dunning facing the door and Mr Lee with his back to the door.
41. Mr Lee threatened to take the commission already paid to Mr Dunning off him to give to Ms Saunders. Mr Lee's evidence was that the threat was to deduct £650, Mr Dunning says that he threatened to deduct £1000. We find that it was more likely that he threatened to deduct £1000 since this was the commission

that Mr Dunning had earned under the fast start scheme. Mr Dunning's response was 'if you do that I will be the person walking out of the door'. It was not disputed that Mr Lee said 'grow some Fucking balls and do it'. We accept Mr Dunning's evidence that Mr Lee leaned over the desk to say this, since it is likely that this was said when he got up to leave. Mr Lee in evidence had initially stated that the reason he got up to leave was because Mr Dunning had threatened to fight him, but then accepted that this was contrary to what he had stated in the investigation interview and that the interview records were more likely to be accurate: **pg 178**. We accept Mr Lee's evidence that he left going backwards because he was still arguing with Mr Dunning. He opened the door to leave and went to close it behind him.

42. Mr Dunning got up and approached the door putting his arm between the door and the wall to stop it being closed. We do not accept Mr Dunning's case that Mr Lee deliberately slammed the door on his hand, we consider that instead Mr Lee accidentally caught Mr Dunning's hand as the door was closing. We based this finding on Mr Dunning's reenactment of what he did during the hearing.
43. Mr Dunning then pulled the door open which resulted in Mr Lee and Mr Dunning facing each other (chest to chest). We consider that it is at this point that Mr Dunning said '*do you want to fight me?*' We do not find that he said '*let's go outside and fight*' as Mr Lee alleges. We considered that Mr Dunning was more consistent in the evidence he gave than Mr Lee, who had provided different accounts of what was said and whether the comment was made before or after the alleged push. For example in evidence he said that this comment was made earlier and was the reason he got up to leave, at the grievance interview Mr Lee said '*we need to go outside and have a fight and he has pushed me out of the door*' (**pg 139**) and at the investigation interview Mr Lee said '*.... It was at that point he's pushed me and said we need to have a fight, we need go and have a fight, me and you need to go and have a fight... He's pushed me and told me we need to go and have a fight*' (**pg 178**).
44. We find that Mr Dunning then went to walk past Mr Lee to exit his office in order to check on Ms Saunders. We think there was physical contact as Mr Dunning went to pass Mr Lee and that the contact was chest to chest. However it was not intentional but as a result of Mr Dunning leaving the office. We did not consider that Mr Dunning deliberately pushed Mr Lee with his chest as alleged by Mr Lee. Nor did we accept that Mr Lee went flying backwards as Mr Paddock claimed. Mr Lee is then seen on CCTV gesturing towards Mr Dunning and pointed his finger at Mr Dunning a number of times, whilst Mr Dunning is standing with his hands in his pockets. On this footage the person who was the most irate was Mr Lee not Mr Dunning. We did not accept Mr Lee's evidence that this was merely him gesticulating as opposed to berating Mr Dunning.
45. The respondent had initially and wrongly believed that Mr Dunning was the person on the camera who was gesticulating and he faced an additional charge of gross misconduct for this conduct. When interviewed during the internal grievance and disciplinary processes, Mr Lee did not correct this error and only did so in his witness statement, having been shown the CCTV footage. This

failure undermined Mr Lee's account of what had happened and suggested that he was trying to minimise his role in the incident. It was the main reason we have preferred Mr Dunning's account over that of Mr Lee's.

46. Mr Lee then saw Mr Paddock and asked him to provide a statement and Mr Dunning said to Mr Lee *'sums you up that is a mark of you as a man'*.
47. Mr Paddock was passing by Mr Dunning's office at the point that they were at the doorway and gave an account on 17 May 2022, shortly after the incident that he saw Mr Lee *'flying out of the door'* and that Mr Dunning had his chest puffed out. He thought Mr Dunning had *'barged'* or *'shuvved'* Mr Lee out of the office with his chest, but did not actually see this.
48. We considered the evidence of Mr Paddock to be unreliable. We considered it odd that he had made no reference to being a witness to this incident in his witness statement. On being asked by the Tribunal what happened after he saw Mr Lee *'flying out of the office'* he was very clear that he saw Mr Dunning go back into office and that he followed Mr Lee up stairs. From the CCTV footage this was clearly not correct. This is not a case of faded memory, since the account given to the Tribunal was the same as that given during the internal investigations a few days after the incident: **pg 144-149**.
49. There was another potential independent witness, Mr Santer, who was not called to give evidence before us. He was behind Mr Paddock and therefore would not have had such a good view. In the investigation interview he did not refer to seeing any physical contact, but did refer to seeing Mr Dunning rush out of office chest to chest and face to face. He suggested that the person moving was Mr Dunning, stating that Mr Lee was just standing there. This is more consistent with Mr Dunning's account that he was trying to pass Mr Lee to leave the office. Mr Santer stated at the time he did not think anything of it: **pg 180-181**.
50. At 09:22 Mr Lee texted and then phoned Mr Hawkes to complain about Mr Dunning. On the basis of the information provided by Mr Lee, Mr Hawkes decided to suspend Mr Dunning: **pg 116 + 118**
51. At 09:39 Mr Dunning submitted a grievance stating *'I have been threatened by my manager Stuart Lee. He slammed a door on my hand after belittling me. What do I do to as I feel he is very manipulative and turns all the staff on me to put me in a bad light....'*: **pg 117**
52. Mr Hawkes decided that Ms Boon should investigate both complaints.
53. On 17 May 2022 Mr Dunning attended a grievance meeting with Ms Boon (**pg 124**) followed by an investigation meeting with Ms Boon: **pg 150**. During this meeting Mr Dunning said that he had said to Mr Lee *'do you want to start a fight with me'* (**issue 2.2.3.1**). He did not explain that this was a standard South African phrase and that it meant *'do you want to take me on / argue with me'*.

Ms Boon then conducted an investigation and grievance meeting with Mr Lee (part 1 and 2): **pg 137 and 142.**

54. On 23 May 2022 Ms Boon conducted a further grievance and investigation meeting with Mr Dunning: **pg 168.** She then interviewed Mr Santer, Ms Saunders and Mr Hughes: **pgs 180, 181a and 181j.**
55. On 26 May 2022 Ms Boon sent the grievance report to Mr Dunning, dismissing his grievances: **pg 185.** Mr Dunning was invited to attend a disciplinary meeting: **pg 192.** The allegations were:

‘Aggressive and intimidatory behaviour towards Stewart Lee on 13th May 2022 as detailed below:

(a) Physical confrontation i.e., chest to chest.

(b) Intimidating behaviour towards him when gesturing with pointed finger at him in the showroom’: pg 195.

56. On 31 May 2022 Mr Dunning attended a disciplinary hearing conducted by Mr Murphy. Mr Murphy having viewed the CCTV evidence accepted that the person gesturing with a pointed finger was Mr Lee and not Mr Dunning and this allegation was removed.
57. Mr Murphy does not dispute that during this meeting he said the following comments to Mr Dunning *‘In the notes somewhere...there is mention of fighting or fight, do you wanna go out for a fight, do you wanna have a fight?’; ‘Your reaction is to open the door and ask him if he wants a fight?’; ‘You said to the General Manager of the business, do you want to have a fight?’; ‘Your reaction was do you wanna have a fight?’ (issue 2.2.3.2).* Mr Dunning did not inform Mr Murphy that ‘do you want to fight me’ is a standard South African phrase which means ‘do you want to take me on / argue with me’.
58. On 7 June 2022 Mr Dunning attended a further disciplinary hearing conducted by Mr Murphy. At the end of the meeting Mr Murphy dismissed Mr Dunning without notice. Mr Dunning was provided with a letter confirming his dismissal the same day: **pg 247.** It was not disputed that at this meeting Mr Murphy said to Mr Dunning *‘...you also admitted that you asked him if he wanted to go outside and have a fight’ (issue 2.2.3.3).* Again Mr Dunning did not inform Mr Murphy that ‘do you want to fight me’ was a standard South African phrase.
59. On 16 June 2022 Mr Dunning submitted an appeal against his dismissal: **pg 254**
60. On 22 June 2022 Mr Dunning attended an appeal hearing with Mr Murray: **pg 256.** It is not disputed that during this meeting Mr Murray said *‘You were dismissed for asking your general manager if he wanted to have a fight’; ‘If you have offered your general manager out for a fight’ (issue 2.2.3.4).* Mr Dunning again did not explain the meaning of ‘do you want to fight me’ or that it was a standard South African phrase.

61. On 30 June 2022 Mr Dunning was informed that his appeal against dismissal had not been upheld: **pg 268**.
62. On 5 July 2022 Mr Dunning commenced early conciliation, on 9 August 2022 he received the early conciliation certificate: **pg 1**. On 31 August 2022 he submitted his claim form: **pg 2**.

THE LAW

Wrongful Dismissal

63. An employer is only entitled to terminate a contract without notice if there has been a repudiatory breach of the contract by the employee. In order for a breach to be repudiatory there must be a deliberate intention (viewed objectively) to disregard the essential requirements of the contract and / or undermine the relationship of trust and confidence. Gross misconduct may be sufficient but is not automatically so, it is a different test.
64. The tribunal must assess the evidence and reach its own decision as to what occurred and the seriousness of the employee's conduct. It is not enough for an employer to prove (as for unfair dismissal) that it had a reasonable belief that the employee was guilty of gross misconduct.

Direct Discrimination

65. Section 13 of the Equality Act 2010 (EA 2010) defines direct discrimination as where:

'a person (A) discriminates against another (B) if, because they protected characteristic, that person treats B less favourably than a treats or would treat others'.

Race includes colour, nationality and ethnic or national origins.

66. In order to succeed in a claim for direct discrimination there must be a detriment. Detriment is not defined under the act but is understood to mean some form of disadvantage, to be assessed from the view point of the worker. However the view point of the worker must be reasonable and justified in the context.
67. In addition the treatment must be less favourable to that of an actual or hypothetical comparator. The relevant circumstances of the comparator must be 'the same, or not materially different': Section 23 EA 2010.
68. When considering the reason for any less favourable treatment, the tribunal is considering the mental processes of the discriminator. Discrimination may be, and often is, unconscious and unintended, therefore the Tribunal's decision will often depend on what inference it is proper to draw from all the relevant surrounding circumstances: see **Qureshi v Victoria University of Manchester** [2001] ICR 863 EAT and **Anya v University of Oxford** [2001] EWCA Civ 405.

Harassment related to race

69. Section 26 of the EA 2010 defines harassment as where:

- (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.*

....

- (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.'*

70. 'Unwanted' means essentially the same as 'unwelcome' or 'uninvited'. It is well established that a single act, if sufficiently serious, may constitute harassment.

71. Conduct will not be unwanted if the employee has made it clear, through words or conduct, that he personally has no objection to the conduct. This may involve participation in the banter, comments made in the context of a friendship or over a period of time without objection. All depends on context.

72. Violation of dignity and creation of intimidating etc environment are strong words and should be accorded the appropriate weight.

73. Purpose and effect are alternatives and should be considered separately. Purpose requires intention, whereas effect is unintentional. Effect requires consideration of a subjective question, whether the claimant perceives themselves to have suffered the effect in question and an objective question as to whether it was reasonable for the claimant to consider that the treatment had that effect: **Pemberton v Inwood** [2018] CR 1292; **Richmond Pharmacology v Dhaliwal** [2009] IRLR 336.

74. 'Related to' is a broad term that does not require a direct causal link but only a connection or association: **R (EOC) v Secretary of Trade and Industry** [2007] ICR 1234.

Burden Of Proof

75. Section 136 of the EA 2010 provides that:

'(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.'

76. Thus the burden of proof is initially on the claimant to establish primary facts from which the tribunal could decide in the absence of any other explanation that discrimination took place (stage 1). The burden then shifts to the respondent to prove that the discrimination did not occur (stage 2). Guidelines on the application of the burden of proof provisions is set out in **Igen Ltd (Formerly Leeds Career Guidance) and Oth v Wong** [2005] ICR 931. The EAT has recently confirmed its importance: see **Field v Pye & Co** [2022] EAT 68.

DISCUSSION AND CONCLUSIONS

WRONGFUL DISMISSAL

77. We have found as a fact that Mr Dunning was not being physically aggressive towards Mr Lee, that he may have made physical contact on leaving the room but it was not intentional but caused by him going past Mr Lee as he was trying to leave the office. We have not accepted the evidence of Mr Lee that Mr Dunning pushed him or the evidence of Mr Paddock that he saw Mr Lee came flying out of the room. We have also found as a fact that the words said by Mr Dunning was 'do you want to fight me'. We consider this to be an ambiguous phrase and that it could be construed as do you want to have an argument rather than an invitation for a physical fight. This is a natural construction of these words regardless of whether or not they are a standard South African turn of phrase. We find that taking into account all the circumstances, including how Mr Dunning appeared on the CCTV footage and how he came across in evidence before us, Mr Dunning meant do you want to have an argument and not do you want to have a physical fight. On this basis of those findings we do not find that Mr Dunning's conduct fundamentally breached the contract entitling the respondent to dismiss him without notice.

78. This complaint is UPHeld.

HARASSMENT

(1) Mr Lee's comments

79. We have found that Mr Dunning was referred to as 'the South African' and 'the South African cunt'. We accepted that this is conduct related to a protective characteristic, namely Mr Dunning's race, since he was South African.

80. We also accepted that repeated reference to a person's nationality is capable of being unwanted conduct, particularly if also accompanied with offensive words like 'cunt' or other criticism such as 'not having a clue'. However it is important to consider not just the words said but the context within which the words were said.
81. We have concluded that, taking the whole context into account, it was not unwanted conduct on the specific facts of this case, for the following reasons:
- 81.1 Mr Dunning was referred to as 'the South African' regularly throughout the period of his employment with the respondent. He referred to himself as South African, was proud of his heritage therefore it was unsurprising that others would refer to him in this way. There was no evidence to suggest that 'the South African' or even 'the South African cunt' comments were said other than in jest.
- 81.2 Mr Dunning did not object to being referred to as South African orally or in writing and did not raise any grievance. More significantly when he submitted his claim form he complained of Mr Lee swearing at him and referred to the use of the word 'cunt' but does not refer to any comment about him being referred to as 'South African'. He only referred to his race in the context of his allegation that the respondent had misconstrued the 'do you want to fight me' comment and an allegation that he was discriminated against because he was replaced by a 'cheaper British female'.
- 81.3 Mr Dunning gave no evidence that he felt undermined or upset by the reference to him being South African, indeed the opposite since he described it as 'very silly words' and banter between friends. He engaged in shocking racist text and WhatsApp exchanges with Mr Lee about customers and it is clear from these exchanges that he was an equal and willing contributor to the use of this type of language. His evidence was that he only considered that being referred to as 'South African' or 'South African cunt' was discriminatory, on being told so by friends after he had been dismissed.
82. Further or alternatively, there was no evidence to suggest that Mr Lee intended to violate Mr Dunning's dignity or create an adverse environment, the comments were made in jest in the context of a friendship. Further there is no evidence that it had that effect on Mr Dunning at the time. On the basis of Mr Dunning's own evidence he did not perceive his dignity to have been violated, or an adverse environment created at the time. It was only on speaking to friends following his dismissal that he reached this view.
83. This complaint is NOT UPHOLD.

(2) Unwanted conduct – misconstruction of fight comment

84. The respondent has not disputed that the various ‘fight’ comments as alleged by Mr Dunning were made. His case was that his comment ‘do you want to fight me’ was ‘misused’ against him and that the respondent failed to take into account that this was a standard South African turn of phrase.
85. We do not consider that the comments were misused by Ms Boon, Mr Murphy or Mr Murray. There was a dispute of fact between Mr Dunning and Mr Lee as to what was said and the respondent were entitled to put Mr Lee’s account to Mr Dunning for a response. This was not misconstruing Mr Dunning’s comments.
86. Further and in any event saying to a colleague at work ‘do you want to fight me’ is an ambiguous comment which could have been construed as wanting a physical fight or as wanting an argument. It was therefore a legitimate area of enquiry for the decision-makers to explore what Mr Dunning meant by that comment. Whilst we accept that being questioned about the comments was unwanted conduct, we did not consider that the purpose was to create a hostile environment or that it was reasonable in all the circumstances for Mr Dunning to consider that it did.
87. Even if the comment was ‘misused’ there is no evidence that this was related to Mr Dunning being South African. There is no evidence before us that Mr Dunning informed Ms Boon, Mr Murphy or Mr Murray that it was a South African turn of phrase. Further Mr Dunning has not adduced any evidence to support his contention that it is in fact a typical South African turn of phrase and that this is something that the respondent should have known. Therefore there is no basis for considering that any misuse or misconstruction was consciously or sub-consciously related to his being South African (race).
88. This complaint is NOT UPHELD.

DIRECT RACE DISCRIMINATION

(1) Mr Lee comments

89. For the same reasons as the complaint for harassment we find that there was no evidence that Mr Dunning was subject to a detriment. Whilst we have found that Mr Dunning was referred to as ‘the South African’ and ‘the South African cunt’ etc., this was part of the office banter and Mr Dunning did not take offence at the time but considered it to be ‘very silly words’ and friendly. Therefore it was not a detriment to him.
90. Nor has he adduced any evidence that he was treated less favourably than an actual or hypothetical comparator because of his race.
91. This complaint is NOT UPHELD.

(2) Misconstruction of fight comment

92. For the same reasons as the complaint for harassment we do not consider that Ms Boon, Mr Murphy or Mr Murray misused Mr Dunning's comment. But even if they did there is no evidence that any misuse or misconstruction was because Mr Dunning was South African. There is no evidence that they were aware that it was a South African turn of phrase and therefore there is no evidence that any misuse was consciously or sub-consciously because he was South African.
93. This complaint is NOT UPHELD.

MONEY COMPLAINTS

Deduction of £1000 commission

94. Whilst we have found that during the incident on 13 May 2022 Mr Lee threatened to deduct £1000 from Mr Dunning's pay to pay Ms Saunders for the sale of the car, we do not find that this sum was in fact deducted from his wages. This is because Mr Dunning has not provided any evidence of such a deduction being made either from his commission or pay. We accept Mr Morrison's evidence that no deduction was in fact made and Mr Lee's evidence that he considered it too much bother. This is supported by Mr Dunning's May and June 2022 payslips which confirmed that no deduction was made: **pg 308-309**.
95. This complaint is NOT UPHELD.

Commission

96. In order to succeed in an unlawful deduction of wages claim Mr Dunning must establish that the sum is 'properly payable' i.e. he was owed the sum sought under his contract of employment.
97. Mr Dunning alleged that the respondent owed him money on orders made between 1 December 2021 and 18 January 2022 on the basis that he would have received these under the fast start commission scheme. We have accepted Mr Lee's evidence that the orders that Mr Dunning relies on were 'forward' orders and that even under the fast start scheme Mr Dunning would not have been entitled to be paid commission on these orders. Further and in any event Mr Dunning signed a new contract on 18 January 2022, which was backdated to start on 1 December 2022. Therefore what he was entitled to after 1 December 2022 is determined by the terms of that contract (payment of commission on sale rather than on orders). Under his new contract he would have been paid on those orders once the sale had gone through. The only reason he was not paid for these orders was because his contract was terminated, and under the terms of the commission scheme he has no entitlement to be paid on outstanding sales.
98. This complaint is NOT UPHELD.

REMEDY

99. The remedy for wrongful dismissal is notice pay. At the time of his dismissal Mr Dunning was employed on the transaction manager contract: **pg 102**. His basic salary was £25,000 pa: **pg 103**. His notice period was 3 months: **pg 105**. Under the provisions on 'Pay in Lieu of Notice', Mr Dunning was not entitled to any commission, bonus or benefits that might otherwise have been due during the period for which payment in lieu was made: **pg 106**. Mr Dunning's monthly pay was £2083 gross, therefore his notice pay was £6,250 gross (£2083 x 3), which after tax comes to **£4085.84 net**.
100. Mr Dunning requested that this sum be paid gross because he was not currently earning. The respondent preferred to pay net and there was no reason presented to us to depart from the normal method of calculation which is net. Mr Dunning was informed that he could recoup any overpayment of tax from the Inland Revenue.

CONCLUSION

101. Our conclusions were that:
- 101.1 The complaint for wrongful dismissal was UPHELD and Mr Dunning was entitled to notice pay. The respondent was ordered to pay Mr Dunning three months' notice pay amounting to **£4085.84 net**.
- 101.2 The complaints of direct race discrimination or harassment related to race in relation to being referred to as 'The South African' / 'South African Cunt', and /or the misconstruction of the comment 'do you want to fight me', were NOT UPHELD and were dismissed.
- 101.3 The complaints of unlawful deduction of wages and / or breach of contract in relation to £1,000 deducted from Mr Dunning's wages to pay Ms Saunders, and /or outstanding commission of £9,200 on cars that Mr Dunning sold, were NOT UPHELD and were dismissed.

Employment Judge Hart
Date: 14 October 2024

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Appendix A

IN THE LONDON SOUTH EMPLOYMENT TRIBUNAL

CASE NO. 2303074/2022

BETWEEN:

MR G DUNNING

Claimant

-and-

GRANGE MOTORS (BRENTWOOD) LTD

Respondent

UPDATED LIST OF ISSUES

1. Wrongful Dismissal / Notice Pay

- 1.1. What was the claimant's notice period?
- 1.2. Was the claimant paid for that notice period?
- 1.3. If not, was the claimant guilty of gross misconduct? / did the claimant do something so serious that the respondent was entitled to dismiss without notice?

2. Direct Race discrimination (Equality Act 2010 section 13)

- 2.1. The claimant is South African, his protected characteristic is his race. The claimant compares himself with people who are not the same race as him and their more favourable treatment.
- 2.2. Did the respondent do the following things:
 - 2.2.1. Refer to him as 'The South African'. In particular, whether:
 - 2.2.1.1. Stuart Lee ("Stuart") called the claimant a "South African with no idea of social media" to Archie Hamilton (a client of the respondent) who

bought a Lamborghini from the respondent, sold by the claimant, in April 2021.

- 2.2.1.2. Mark Lavery (the CEO of Cambria Automobiles) referred to the claimant as “The South African” in late 2021 at a management meeting with Stuart.
 - 2.2.1.3. Stuart referred to the claimant often as “the South African” in the monthly management meetings at Lamborghini Tunbridge Wells during 2022, with Tom Paddock, Tim Hughs and David Morrison present.
 - 2.2.1.4. Stuart called the claimant “the South African who doesn’t have a clue” at budget meetings when he was asked to be explained costs, with Tom Paddock, Tim Hughs and David Morrison present.
 - 2.2.1.5. Stuart called the claimant “the South African” at a clay pigeon shooting event with clients in September 2021.
- 2.2.2. Refer to him as ‘The South African Cunt’. In particular, whether:
- 2.2.2.1. Stuart called the claimant a “South African cunt” on a regular basis and repeatedly referred to him as “The South African” or “The South African cunt” in the company of other managers and staff members.
 - 2.2.2.2. Stuart said “please don’t wind Greg up as I have to sit in the car with the South African cunt” at a work conference for Cambria Automobiles at Silverstone racetrack in early 2022, with Tom Paddock, Tim Hughs and David Morrison present.
 - 2.2.2.3. Stuart called the claimant a “South African cunt” whilst speaking to a client of the respondent called Parvez Kayani at events such as Goodwood, and other social occasions in 2022 and in the Grange showroom in Tunbridge Wells.
 - 2.2.2.4. Stuart referred to the claimant as “the South African cunt” in front of his wife in the Bentley showroom in Tunbridge Wells in the summer of 2021 when they came to pick up a Bentley.

2.2.3. Misconstrue a South African turn of phrase ‘do you want to fight me’.

In particular, whether:

2.2.3.1. At the meeting with Natalie Boon on 17 May 2022 the claimant said that he had said to Stuart “do you want to start a fight with me?”.

2.2.3.2. Darren Murphy said to the claimant on 31 May 2022, “In the notes somewhere...there is mention of fighting or fight, do you wanna go out for a fight, do you wanna have a fight?”; “Your reaction is to open the door and ask him if he wants a fight?”; “You said to the General Manager of the business, do you want to have a fight”; “Your reaction was do you wanna have a fight?”

2.2.3.3. Darren Murphy said to the claimant on 7 June 2022, “...you also admitted that you asked him if he wanted to go outside and have a fight.”

2.2.3.4. Brian Murphy said to the claimant on 22 June 2022, “You were dismissed for asking your general manager if he wanted to have a fight”; “If you have offered your general manager out for a fight.”

2.2.3.5. The claimant’s use of a ‘standard South African phrase’ was repeatedly misused (in various formats) against the claimant during the whole process and was a major part of the decision to dismiss him for gross misconduct.

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 has not named anyone in particular who he says was treated better than he was.

2.4. If so, was it because of race?

2.5. Did the respondent's treatment amount to a detriment?

2.6. The Tribunal will decide in particular:

2.6.1. Was the treatment an appropriate and reasonably necessary way to achieve those aims;

2.6.2. Could something less discriminatory have been done instead;

2.6.3. How should the needs of the claimant and the respondent be balanced?

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

3.1. In the alternative, if the Tribunal finds facts to support the allegations at paragraph 2.2 above, was that unwanted conduct?

3.2. Did it relate to race?

3.3. 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?

3.4. 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. Money claims for unlawful deduction from wages and/or breach of contract

4.1. Has the Claimant proved on the balance of probabilities that he is owed the following:-

4.1.1. £1,000 unlawful deduction from wages and paid to fellow employee (Eloise);

~~4.1.2. £3,500 in business expenses;~~

4.1.3. Outstanding commissions on cars sold by the Claimant.

- 4.2. In respect of the unlawful deduction from wages claim at paragraph 4.1.1 above, the Claimant will have to show that he was lawfully owed the £1,000 and that this was not paid.
- 4.3. In respect of the breach of contract claims at paragraphs ~~4.1.2 and~~ 4.1.3 above, the Claimant will need to prove the existence of the term(s) of the contract(s), the breach of that clause by the Respondent and that the alleged losses flowed from such breach.
- 4.4. The Claimant will also have to show that the above claims are within the jurisdiction of the Tribunal, having been brought within 3 months of (i) (in respect of the unlawful deduction from wages claim at paragraph 4.1.1 above) the date of payment of the wages from which the deduction was made; or (ii) (in respect of the breach of contract claims at paragraphs ~~4.1.2 and~~ 4.1.3 above) the alleged breach.

5. Remedy

- 5.1. How much should the claimant be awarded?
- 5.2. Any other remedy?