EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Devon Miller	**v**	**Inverde Limited**

Heard at: London Central
On: 22 April 2025 to 30 April 2025

Before: Employment Judge Hodgson

Representation

For the claimant: Mr Devon Miller
For the respondent: Mr C Ilangaratne, counsel

1. All claims of direct race discrimination fail and are dismissed.
2. All claims of direct age discrimination fail and are dismissed.
3. All claims of harassment fail and are dismissed.
4. All claims of victimisation fail and are dismissed.

REASONS

Introduction

1.1 By a claim form presented on 21 June 2023 to London Central Employment Tribunal, the claimant brought various allegations pursuant to the Equality Act 2010.

The Issues

2.1 The issues were clarified at the hearing and the agreed issues are set out below. The claimant alleges the following acts of detrimental treatment:

2.1.1 Allegation 1: by Mr Attila Szintay on or around last two weeks in March 2022 saying that the chair he sat on in the mess was a “white only chair”

and refusing to allow the claimant to sit in the chair by saying, “Don’t sit in my chair.”

2.1.2 Allegation 2: by Mr Attila Szintay on or about the end of March 2022 saying that the claimant’s microwaved food was “smelly” on two occasions.

2.1.3 Allegation 3: on 12 July 2022 by Mr Attila Szintay making a knowingly false complaint to the respondent that the claimant was drinking at work

2.1.4 Allegation 4: on 12 July 2022 by Mr Garthwaite, the respondent’s operations manager, requiring the claimant to take an alcohol breath test at 16:45.

2.1.5 Allegation 5: on 16 November 2022 in a grievance outcome email by Mr Chudasama suggesting that the claimant had cheated the alcohol test by delaying the test.[1]

2.1.6 Allegation 6: on 13 July 2022 by Mr Dave Pickup, a contract manager, moving the claimant to a “one-man park” to work in a two-person team, effectively leaving him in a redundant role.

2.1.7 Allegation 7: on 14 February 2023 by Mr Dave Pickup, finding the claimant had failed his probationary period.

2.1.8 Allegation 8: 0n [date unspecified] by making up information being ‘notices of conversation’ where no conversation had taken place with him.[2]

2.1.9 Allegation 9: on [dates unspecified] by the respondent refusing to provide to the claimant [in a manner not specified] statements of other employees during grievance meetings, grievance appeals, and disciplinary proceedings being statements from Mr Szintay, Mr Richards, Mr Mason, Mr Garthwaite, and Mr Chudasama.[3]

2.1.10 Allegation 10: on 1 September 2022 by Mr Garthwaite accepting that the a comment was made about a “white only” only chair but failing to accept

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[1] On day one of the hearing, the claimant was unable to specify the date on which this occurred, or in what manner the suggestion had been made. The claimant was ordered to clarify. On day 2 he identified the relevant email was from 16 November 2022.

[2] On day one of the hearing, the claimant was unable to explain this allegation, or specify what were the notices of conversation which recorded matters that are not taken place. The claimant was ordered to provide clarification to identify the contents and dates of the specific notice of the conversation, which in some manner were said to reflect matters which had not "taken place." On day 2 the claimant provided a response which failed to identify the relevant notices of conversation but instead took issue with a number of findings made by the respondent’s employees.

[3] On day one of the hearing, the claimant was ordered to provide further clarification specifying which statements he requested, when they were requested, and if or how they were refused. On day 2 the claimant’s response failed to identify the relevant detail but instead asserted that the statements should have been disclosed to him.

the reason was on grounds of the claimant's race and stating that a BAME colleague was white.

2.1.11 Allegation 11: on 1 September 2022 by accepting in the grievance outcome that an allegation was made by Mr Szintay that the claimant had been drinking but failing to accept the reason for the allegations was on grounds of his race.

2.1.12 Allegation 12: on 1 September 2022 by the grievance outcome accepting that comments were made about "smelly" food but failing to accept the reason why was on grounds of his race.

2.1.13 Allegation 13: on 14 February 2023 by Mr Pickup by dismissing the claimant.

Direct race discrimination (s.13 Equality Act 2010

2.2 Allegations 1 – 13 inclusive were advanced as allegation of direct race discrimination.

Direct age discrimination (s.13 Equality Act 2010)

2.3 Allegations 7, 8, and 13 were advanced as allegations of direct age discrimination.

2.4 It is the claimant's case that he was treated less favourably than those younger than him.

Harassment related to race (s.26 Equality Act 2010)

2.5 Allegation 1 -12 (inclusive) were advanced as allegation of harassment.

2.6 The claimant relies on the protected characteristic of race.

Victimisation (s.27 Equality Act 2010)

2.7 The claimant alleges that is written grievance of 9 July 2022 a protected act. He alleges he was victimised because he undertook the protected act.

2.8 The claimant relies on the following allegations.

2.9 Allegations 3 – 12 (inclusive).

2.10 The claimant was allowed to advance allegation 13 (dismissal) as an allegation of victimisation, following his application to amend.

Time

2.11 Where any of the complaints not made to the tribunal in time?

2.12 If so, is it just and equitable in all the circumstances to extend time?

Evidence

3.1 The claimant gave evidence.

3.2 For the respondent I heard from the following: Mr David Pretorius, contract supervisor; Mr Attila Szintay, cleansing team leader; Ms Kerrie Kemsley, HR business partner; Mr Mark Garthwaite, operations manager; and Mr Dave Pickup, contract manager.

3.3 The respondent relied on the statement of Mr Christopher Talbot, HR business partner, but he was not called to give evidence.

3.4 I received a bundle of documents and admitted other documents when requested.

3.5 The respondent provided a chronology and a reading list.

3.6 Both parties gave oral submissions.

3.7 Both parties supplemented their oral submissions with further written submissions.

Concessions/Applications

4.1 This hearing was originally listed before a panel of three. One member was taken ill before the hearing. I considered if the case should be adjourned. I considered the hearing was suitable for hearing by judge alone. I sought representations from the parties as to whether they wished to proceed before a judge sitting alone or seek an adjournment. Neither party objected to the matter proceeding before a judge sitting alone.

4.2 On day one of the hearing, I noted the issues had been set out on 5 September 2023 by EJ Emery. However, the issues had not been finalised and were described as being in "draft." A draft list of issues, based on EJ Emery's list of issues, was provided by the respondent.

4.3 It was clear there remained a number of difficulties. I explained that only those claims which are sufficiently set out in the claim form could proceed.

4.4 I sought clarification from the claimant in relation to a number of the draft allegations.

4.5 The draft issues variously recorded the alleged detrimental treatment allegations of direct discrimination, harassment, and victimisation.

4.6 The claimant was unable, on day one, to provide any or any adequate detail to clarify a number of the allegations which have been outlined by EJ Emery. I ordered the claimant to provide clarification of those allegations identified as 2.5, 2.7, and 2.8, as recorded in the list of issues prepared by the respondent. He was to provide clarification by 09:00 on day two.

4.7 On day one, the claimant clarified that he described his race in the following terms, "African-Caribbean melanised." He confirmed this was the description he wished the tribunal to apply.

4.8 During the discussion on day one, the claimant indicated that he considered the dismissal was also an act of victimisation. The respondent objected to the dismissal being included as an act of victimisation on the grounds that dismissal had not been included as an allegation of victimisation by EJ Emery.

4.9 Following further discussion, it was the respondent's position that the claim form contained no allegation of victimisation at all. However, the respondent had not raised that matter before EJ Emery and had not raised it since, instead it had included allegations of victimisation in its draft issues to be decided by the tribunal.

4.10 The respondent's position was unclear. It is unclear why the respondent consented to the inclusion of the claim of victimisation before EJ Emery when it is its position is that victimisation was not contained in the claim form. It is unclear or why it failed to raise the matter at the start of the hearing.

4.11 The claimant was unable to identify where the claim of victimisation was set out in the claim form.

4.12 The claim form is drafted in general terms. It lacks details. The identification of many of the claims implicitly involved a generous interpretation. It is arguable that claims have been included in the issues which are not set out in the claim form, including the allegations of victimisation.

4.13 The respondent did not ask the tribunal to exclude all claims of victimisation on the basis that they have not been pleaded, or to exclude any other claims.

4.14 The claimant requested that the allegations of dismissal be included as an act of victimisation by way of amendment.

4.15 The respondent has not sought to dispute that the dismissal was set out as an act of race discrimination in the claim form. It follows that the respondent was prepared to deal with the reason for the dismissal. In addition, the respondent has been aware of the alleged protected act and has been able to obtain and give evidence on the alleged protected act.

4.16 It follows that the evidence relevant to consideration of the protected act and evidence relevant to the consideration of the reason for dismissal had already been put before the tribunal. I found there was no hardship to the respondent in allowing the amendment; there was more hardship to the claimant not allowing it. In the circumstances, I have allowed an amendment to the extent that the dismissal may be considered as an allegation of victimisation. Time would, potentially, remain a substantive issue.

4.17 I was not asked on day one to rule on whether the other claims of victimisation, or any other claims included in the list of issues, were in fact included in the claim form.

4.18 Prior to the hearing on day two, 23 April 2025, the claimant sent a number of documents. He clarified the relevant date for allegation five. He failed to give relevant information in relation to allegations eight and nine. Following receipt of his further information, the issues were updated, finalised, and provided to the parties. The parties were instructed to review the issues and to inform the tribunal if any claim had been improperly included, or any claim was inaccurately recorded.

4.19 On day two of the hearing, the claimant noted the bundle contained an email from a member of the public which was critical of his work. The respondent had considered this complaint which is why the email was included.

4.20 The respondent stated that the person's name was not relevant and therefore redaction did not require a specific order pursuant to rule 49 Employment Tribunal Procedure Rules 2024. The claimant did not agree. I invited him to set out his position in writing.

4.21 On day three of the hearing, the claimant sent a document which stated inclusion of the redacted document "severely impedes what is otherwise a just legal process," He went on to say that it was for the tribunal to "decide the redacted documents fate." The claimant failed to explain why he believed the legal process was impeded.

4.22 I am satisfied the document was relevant and its inclusion in the bundle appropriate. In no sense whatsoever did its inclusion undermine the fairness of the hearing.

4.23 It is for the tribunal to consider whether the document has been redacted because information within it sensitive and irrelevant to the hearing, or whether redacting the document engages questions of open justice. In

this case, I am satisfied that the identity of the member public is marginal and ultimately irrelevant. The document may be redacted to remove the person's name.

The Facts

5.1 The respondent is a horticultural and grounds maintenance business providing a range of green services to customers in the private and public sector. The claimant was initially engaged by the respondent as an agency worker to provide work as a ground's maintenance operative, as part of the mobile cleansing team. His engagement as an agency worker began on 14 March 2022.

5.2 The claimant became a full-time employee on 11 July 2022 with a probationary period of six months.

5.3 On 9 July 2022, the claimant raised concerns in an email of 9 July 2022, which the respondent treated as a grievance. He referred to a Hungarian colleague who had suffered a temper tantrum. He referred to being accused of cooking smelly food and being called lazy. He made a general complaint of racism.

5.4 On 12 July 2022, Mr Szintay, who was the team leader working with the claimant, and who was the Hungarian employee referred to by the claimant, reported to his manager that the claimant had been drinking alcohol at work.

5.5 The respondent has an alcohol, drugs, and substance misuse policy and procedure. It covers the use and misuse of intoxicating substances including alcohol. The policy is expressed to raise awareness of the risks and potential harm to health associated with the use of intoxicating substances. Employees are not permitted to work under the influence of alcohol or other drugs.

5.6 It states, "consumption of alcohol by colleagues during all work hours is prohibited."

5.7 Rule 9 of the policy provides that breach of the policy may be treated as a disciplinary matter under rule nine.

5.8 Rule 10 of the policy provides that the respondent "may require colleagues to submit to a test or tests." This operates where it may be suspected there has been use of drugs or alcohol at work. Under rule 10.5 of the policy, a refusal to submit to an alcohol test will be treated as a positive test. It provides that in all cases written consent must be obtained before the test takes place. It defines a positive test for alcohol as being "two consecutive breath tests giving a reading equal to, or greater than, the specific cut-off which is… 35 mg/100 ml…"

5.9 On 12 July 2022, the claimant consented to a breathalyser test which was carried out at 16:45. The test did not reveal alcohol in his bloodstream.

5.10 As a result, HR partner, Ms Kemsley recommended, believing it to be part of the respondent's policy, that disciplinary action be considered against Mr Szintay for making a false allegation.

5.11 An investigation was undertaken against Mr Szintay, which included his being interviewed by Mr Mark Garthwaite, operations manager, on or about 18 July 2022. Mr Garthwaite believed Mr Szintay gave a clear and detailed account, and he was satisfied that there was insufficient evidence to conclude that Mr Szintay had made any false allegation for malicious reasons. No further disciplinary action was taken against Mr Szintay. No disciplinary action was taken against the claimant.

5.12 Mr Garthwaite investigated the claimant's complaint of 9 July 2022. He undertook an initial investigation meeting on 21 July 2022. He wished to understand the issues and the detail of the complaint. Mr Garthwaite found the claimant's response to be unhelpful and evasive. He had difficulty obtaining clear information. He found the claimant to be obstructive.

5.13 The claimant did confirm the grievance concerned Mr Szintay. It was Mr Szintay who had referred to the claimant's food as being smelly. The claimant stated that Mr Szintay had told him to get off his chair.

5.14 Mr Garthwaite conducted a further grievance hearing on 28 July 2022. He wished to agree the main points of the grievance. He found the claimant be obstructive, The claimant alleged his data had been breached, as Mr Garthwaite was dealing with the matter rather than Mr Dave Pretorius. Following this meeting, Mr Garthwaite undertook various investigations.

5.15 On 1 August 2022, Mr Garthwaite gave a summary of what he understood to be the claimant's grounds of grievance. This ultimately led to a further grievance document from the claimant dated 6 August 2022, which appears to include allegations that Mr Garthwaite was not competent to chair the grievance.

5.16 Mr Garthwaite undertook further investigations when he returned from annual leave on 22 August 2022. He met with the claimant on 1 September 2022 and sent his outcome letter on the same date. He concluded there was no evidence that Mr Szintay had temper tantrums. Mr Szintay had told the claimant that he should not sit in his chair. The mess room was used by two regular teams, and they all preferred to sit in the same places. He accepted the comment could cause distress. He noted that another individual, Tyler, who was of mixed race, and whom Mr Garthwaite had interviewed, had also been asked not to sit in a chair.

5.17 Mr Szintay had made a comment about the claimant's "smelly food" he found Mr Szintay had called the claimant lazy, and that was inappropriate.

However, he found no evidence that any of the treatment related to, or was because of, the claimant's race.

5.18 Before this tribunal, the claimant has alleged that when Mr Szintay asked the claimant not to sit in his chair that Mr Szintay also specifically said it was a "white only chair." The claimant did not, in any contemporaneous document, including both documents viewed as his grievance, or in any email, or in any meeting, alleged that Mr Szintay had used words to the effect that the chair was a "white only chair." In his evidence before the tribunal he stated that this omission was "remiss."

5.19 On 5 September 2022, the claimant appealed the grievance outcome. The appeal was dealt with by Mr Sunil Chudasama, commercial director. He found the claimant's grounds to be unclear and so interpreted the claimant's appeal as including complaints about factual findings, breach of policy, and severity of decision.

5.20 Prior to Mr Chudasama meeting with the claimant, the claimant raised two further grievances, the first concerned being required to take a breathalyser test and the second was the reporting of his alleged drinking was racial discrimination. Mr Chudasama decided to consider the two new grievances before going on to consider and finalise the appeal.

5.21 The new appeal concerned the requirement to take the breathalyser test and the allegation that the action of Mr Szintay in reporting misuse of alcohol, were acts of race discrimination. It is not necessary to set out the full detail of this investigation, or the findings. I have had regard to entirety the evidence when reaching my conclusions.

5.22 On 23 October 2022, the claimant sent a document headed "Sunil: passive-aggressive, sellouts." In this document, the claimant stated: "for example, the racist 'whites' only chair incidents were witnessed by two or three colleagues on more than one occasion." This was the first reference the claimant made to a chair being, in some manner, a white only chair. The document still fell short of saying that Mr Szintay used the term.

5.23 The grievance outcome letter relating to these new matters was sent on 16 November 2022.

5.24 Mr Chudasama reached a number conclusions on the appeal against the grievance outcome and sent his; findings in a letter of 12 December 2022. I do not need to consider all of his conclusions. I would note that in his conclusions, he referred to Tyler as being white. This was an error. It is unclear why the error was made. The claimant has alleged before me that the error occurred because Mr Garthwaite told Mr Chudasama that Tyler was white. This would be inconsistent with Mr Garthwaite's original finding. Mr Chudasama could not remember how the error occurred. I find that there was a genuine error. There is no evidence on which I could find that Mr Garthwaite, in any manner, misled Mr Chudasama.

5.25 On 1 December 2022, the claimant attended a probationary review meeting before Mr Pickup. The detail was recorded in the contemporaneous review meeting document which was countersigned by the claimant. The claimant has indicated in his evidence that there was some form of additional agreement whereby Mr Pickup agreed that a number of the matters referred at that meeting did not apply. I find on the balance of probability that the alleged conversation, whereby there was some form of qualification to the matters recorded in the contemporaneous documentation, did not take place and that the written document accurately reflects what was discussed on 1 December 2022.

5.26 The probation extension was confirmed by letter 1 December 2022. In that letter, a number of areas of difficulty were noted and the claimant was asked to improve.

5.27 On 14 February 2023, there was a further probationary review meeting undertaken by Mr Pickup. During that meeting, the claimant's performance was discussed. Mr Pickup concluded that the claimant had failed his probation, and his contract should be terminated. Mr Pickup's reasons are set out in a letter. The following areas were identified:

> **• Performance - complaint from public over Devon's work rate, daily tasks issued to Devon so that his work could be checked.**
> **• Conduct " Email sent to line manager with inappropriate title.**
> **• Conduct - Devon undermined an instruction given to a film crew by the Park Keeper, he twice told the film crew to ignore the Park Keeper, Devon was spoken to about this by his Supervisor.**
> **• Attendance - On two occasions Devon has been issued with Notes of conversation for leaving work early without authorisation and without notifying line management.**
> **• H&S Failure to wear PPE**
> **• Time wasting - getting a bus between parks which were a 5-minute walk**

5.28 Mr Pickup reached a number of conclusions. He concluded that there had been no improvement, despite a supportive action plan being in place. He concluded there had been misconduct has taken place and that the claimant's performance had not been sufficient. He elected to dismiss.

5.29 The claimant appealed the dismissal. I do not need to record the detail. I have had regard to the evidence. The claimant does not allege that the appeal process itself was an act of discrimination.

The law

6.1 Direct discrimination is defined in section 13 of the Equality Act 2010.

Section 13 - Direct discrimination

> **(1) A person (A) discriminates against another (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others.**

(2) If the protected characteristic is age, A does not discriminate against B if A can show A's treatment of B to be a proportionate means of achieving a legitimate aim

6.2 **Shamoon v Chief Constable of the Royal Ulster Constabulary** [2003] ICR 337 is authority for the proposition that the question of whether the claimant has received less favourable treatment is often inextricably linked with the question why the claimant was treated as he was. Accordingly:

> **employment tribunals may sometimes be able to avoid arid and confusing disputes about the identification of the appropriate comparator by concentrating primarily on why the claimant was treated as she was. (para 10)**

6.3 **Anya v University of Oxford** CA 2001 IRLR 377 is authority for the proposition that I must consider whether the act complained of actually occurred (see Sedley LJ at paragraph 9). If the tribunal does not accept that there is proof on the balance of probabilities that the act complained of in fact occurred, the case will fail at that point.

6.4 Harassment is defined in section 26 of the Equality Act 2010.

Section 26 - Harassment

(1) A person (A) harasses another (B) if--

(a) A engages in unwanted conduct related to a relevant protected characteristic, and
(b) the conduct has the purpose or effect of—

(i) violating B's dignity, or
(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

(3) A also harasses B if-

(a) A or another person engages in unwanted conduct of a sexual nature or that is related to gender reassignment or sex,
(b) the conduct has the purpose or effect referred to in subsection (1)(b), and
(c) because of B's rejection of or submission to the conduct, A treats B less favourably than A would treat B if B had not rejected or submitted to the conduct.

(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.

(5) The relevant protected characteristics are--

age; disability; gender reassignment; race; religion or belief; sex; sexual orientation.

6.5 In **Richmond Pharmacology v Dhaliwal [2009] IRLR 336** the EAT (Underhill P presiding) in the context of a race discrimination case, made it clear that the approach to be taken to harassment claims should be broadly the same. The EAT observed that 'harassment' is now defined in a way that focuses on three elements. First, there is the question of unwanted conduct. Second, the tribunal should consider whether the conduct has the purpose or effect of either violating the claimant's dignity or creating an adverse environment for him or her. Third, was the conduct on the prohibited grounds?

6.6 In **Nazir and Aslam v Asim and Nottinghamshire Black Partnership UKEAT/0332/09/RN, [2010] EqLR 142**, the EAT emphasised the importance of asking whether the conduct related to one of the prohibited grounds. The EAT in **Nazir** found that when a tribunal is considering whether facts have been proved from which a tribunal could conclude that harassment was on a prohibited ground, it was always relevant, at the first stage, 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 and should not be left for consideration only as part of the explanation at the second stage.

6.7 In **Dhaliwal** the EAT noted harassment does have its boundaries:

> **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. We accept that the facts here may have been close to the borderline, as the Tribunal indeed indicated by the size of its award.**

6.8 Harassment may be unlawful if the conduct had either the purpose or the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

6.9 A claim based on 'purpose' requires an analysis of the alleged harasser's motive or intention. This may, in turn, require the Employment Tribunal to draw inferences as to what that true motive or intent actually was: the person against whom the accusation is made is unlikely to simply admit to an unlawful purpose. In such cases, the burden of proof may shift, as it does in other areas of discrimination law.

6.10 Where the claimant simply relies on the 'effect' of the conduct in question, the perpetrator's motive or intention even if entirely innocent does not in itself afford a defence. The test in this regard has both subjective and objective elements to it. The assessment requires the tribunal to consider

the effect of the conduct from the complainant's point of view: the subjective element. It must also ask, however, whether it was reasonable of the complainant to consider that conduct had that effect: the objective element. The fact that the claimant is peculiarly sensitive to the treatment does not necessarily mean that harassment will be shown to exist.

6.11 The requirement to take into account the complainant's perception in deciding whether what has taken place could reasonably be considered to have caused offence reflects guidance given by the EAT in **Driskel v Peninsula Business Services Ltd [2000] IRLR 151**, which concerned the approach to be taken by employment tribunals in determining whether alleged harassment constituted discrimination on grounds of sex. In **Driskel** the EAT held that although the ultimate judgment as to whether conduct amounts to unlawful harassment involves an objective assessment by the tribunal of all the facts, the claimant's subjective perception of the conduct in question must also be considered.

6.12 Victimisation is defined in section 27 of the Equality Act 2010.

Section 27 - Victimisation

(1) A person (A) victimises another person (B) if A subjects B to a detriment because-

(a) B does a protected act, or
(b) A believes that B has done, or may do, a protected act.

(2) Each of the following is a protected act-

(a) bringing proceedings under this Act;
(b) giving evidence or information in connection with proceedings under this Act;
(c) doing any other thing for the purposes of or in connection with this Act;
(d) making an allegation (whether or not express) that A or another person has contravened this Act.

(3) Giving false evidence or information, or making a false allegation, is not a protected act if the evidence or information is given, or the allegation is made, in bad faith.

(4) This section applies only where the person subjected to a detriment is an individual.

6.13 Prior to the Equality Act 2010 the language of victimisation referred to less favourable treatment by reason of the protected act. Under the Equality Act 2010, victimisation occurs when the claimant is subject to a detriment because the claimant has done a protected act or the respondent believes that he has done or may do the protected act.

6.14 I have to exercise some caution in considering the cases decided before the Equality Act 2010. However, those cases may still be helpful. It is not in necessary to consider the second question, as posed in **Derbyshire**

below, which focuses on how others were or would be treated. It is not necessary to construct a comparator at all because one is focusing on the reason for the treatment.

6.15 When considering victimisation, it may be appropriate to consider the questions derived from Baroness Hale's analysis in **Derbyshire and Others v St Helens Metropolitan Borough Council and others 2007 ICR 841**. However as noted above there is no requirement now to specifically consider the treatment of others.

> **"37. The first question concentrates upon the effect of what the employer has done upon the alleged victim. Is it a 'detriment' or, in the terms of the Directive, 'adverse treatment'? But this has to be treatment which a reasonable employee would or might consider detrimental… Lord Hope of Craighead, observed in *Shamoon v Chief Constable of the Royal Ulster Constabulary* [2003] IRLR 285 at 292, paragraph 35, 'An unjustified sense of grievance cannot amount to "detriment"'.**
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> **40. The second question focuses upon how the employer treats other people…**
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> **41. The third question focuses upon the employers' reasons for their behaviour. Why did they do it? Was it, in the terms of the Directives, a 'reaction to' the women's claims? As Lord Nicholls of Birkenhead explained in *Khan*'s case [2001] IRLR 830, 833, paragraph 29, this**
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> > **'does not raise a question of causation as that expression is usually understood ... The phrases "on racial grounds" and "by reason that" denote a different exercise: why did the alleged discriminator act as he did? What, consciously or unconsciously, was his reason? Unlike causation, this is a subjective test. Causation is a legal conclusion. The reason why a person acted as he did is a question of fact.'"**

6.16 Detriment can take many forms. It could simply be general hostility. It may be dismissal or some other detriment. Omissions to act may constitute unfavourable treatment. It is, however, not enough for the employee to say he or she has suffered a disadvantage. An unjustified sense of grievance is not a detriment.

6.17 The need to show that any alleged detriment must be capable of being objectively regarded as such was emphasised in **St Helens Metropolitan Borough Council v Derbyshire 2007 IRLR 540**. **Shamoon v Chief Constable of the Royal Ulster Constabulary 2003 IRLR 285** was cited and it was confirmed an unjustified sense of grievance cannot amount to detriment. That in our view remains good law. In **Derbyshire**, Lord Neuberger confirmed the detriment should be viewed from the point of view of the alleged victim. Rather than considering the 'honest and reasonable test as suggested in Khan' the focus should be on what constitutes a detriment. It is arguable therefore that whether an action amounts to victimisation will depend at least partly on the perception of the employee provided that perception is reasonable. It is this reasonable perception that the employer must have regard to when taking action and when considering whether that action could be construed as victimisation. Detriment exists if a reasonable worker would or might take the view that

the treatment was in all the circumstances to his detriment. The detriment cannot be made out simply by an individual exhibiting mental distress, it would also have to be objectively reasonable in all the circumstances. The stress and worry induced by the employer's honest and reasonable conduct in the course of his defence cannot, except in the most unusual circumstances, constitute a detriment. The focus should be on the question of detriment.

Reasons for unfavourable treatment

6.18 When the protected act and detriment have been established, the tribunal must still examine the reason for that treatment. Of course, the questions of reason and detriment are often linked. It must be shown that the unfavourable treatment of a person alleging victimisation was because of the protected act. A simple 'but for' test is not appropriate.

6.19 It is not necessary to show conscious motivation. However, there must be a necessary link in the mind of the discriminator between the doing of the protected act and the treatment. If the treatment was due to another reason such as absenteeism or misconduct the victimisation claim will fail. The protected act must be a reason for the treatment complained. It is a question of fact for the tribunal. **Chief Constable of West Yorkshire Police v Khan 2001 IRLR 830 HL** is authority for the proposition that the language used in the Sex Discrimination Act 1975 is not the language of strict causation. The words by reason that suggest that what is to be considered, as Lord Scott put it, is "the real reason, the core reason, the causa causans, the motive, for the treatment complained of that must be identified." This in our view remains good law.

6.20 It is not necessary for a person claiming victimisation to show that unfavourable treatment was meted out solely by reason of his or her having done a protected act.

6.21 Lord Nicholls found in **Najarajan v London Regional Transport 1999 ICR 877**, HL, that if the protected act has a significant influence on the outcome of an employer's decision, discrimination will be made out. It was clarified by Lord Justice Gibson in Court of Appeal in **Igen and others v Wong and others 2005 ICR 931** that in order to be significant it does not have to be of great importance. A significant influence is an influence which is more than trivial.

Subconscious motivation

6.22 The House of Lords in **Nagarajan** rejected the notion that there must be a conscious motivation in order to establish victimisation claims. Victimisation may be by reason of an earlier protected act if the discriminator consciously used that act to determine or influences the treatment of the complainant. Equally the influence may be unconscious. The key question is why the complainant received the treatment.

6.23 Section 23 refers to comparators in the case of direct discrimination.

> **Section 23 Equality Act 2010 - Comparison by reference to circumstances**
>
> **(1) On a comparison of cases for the purposes of section 13, 14, or 19 there must be no material difference between the circumstances relating to each case.**

6.24 Section 136 Equality Act 2010 refers to the reverse burden of proof.

> **Section 136 - Burden of proof**
>
> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.**
>
> **(3) But subsection (2) does not apply if A shows that A did not contravene the provision.**
>
> **(4) The reference to a contravention of this Act includes a reference to a breach of an equality clause or rule.**
>
> **(5) This section does not apply to proceedings for an offence under this Act.**
>
> **(6) A reference to the court includes a reference to--**
>
> **(a) an employment tribunal.**
> **(b) …**

6.25 In considering the burden of proof the suggested approach to this shifting burden is set out initially in **Barton v Investec Securities Ltd [2003] IRLR 323** which was approved and slightly modified by the Court of Appeal in **Igen Ltd & Others v Wong [2005] IRLR 258.** I have particular regard to the amended guidance which is set out at the Appendix of **Igen**. I also have regard to the Court of Appeal decision in **Madarassy v Nomura International plc [2007] IRLR 246.** The approach in **Igen** has been affirmed in **Hewage v Grampian Health Board 2012 UKSC 37**

> **Appendix**
> **(1) Pursuant to s.63A of the SDA, it is for the claimant who complains of sex discrimination to prove on the balance of probabilities facts from which the tribunal could conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination against the claimant which is unlawful by virtue of Part II or which by virtue of s.41 or s.42 of the SDA is to be treated as having been committed against the claimant. These are referred to below as 'such facts'.**
>
> **(2) If the claimant does not prove such facts he or she will fail.**
>
> **(3) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of sex discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will**

not be an intention but merely based on the assumption that 'he or she would not have fitted in'.

(4) In deciding whether the claimant has proved such facts, it is important to remember that the outcome at this stage of the analysis by the tribunal will therefore usually depend on what inferences it is proper to draw from the primary facts found by the tribunal.

(5) It is important to note the word 'could' in s.63A(2). At this stage the tribunal does not have to reach a definitive determination that such facts would lead it to the conclusion that there was an act of unlawful discrimination. At this stage a tribunal is looking at the primary facts before it to see what inferences of secondary fact could be drawn from them.

(6) In considering what inferences or conclusions can be drawn from the primary facts, the tribunal must assume that there is no adequate explanation for those facts.

(7) These inferences can include, in appropriate cases, any inferences that it is just and equitable to draw in accordance with s.74(2)(b) of the SDA from an evasive or equivocal reply to a questionnaire or any other questions that fall within s.74(2) of the SDA.

(8) Likewise, the tribunal must decide whether any provision of any relevant code of practice is relevant and if so, take it into account in determining, such facts pursuant to s.56A(10) of the SDA. This means that inferences may also be drawn from any failure to comply with any relevant code of practice.

(9) Where the claimant has proved facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the respondent.

(10) It is then for the respondent to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.

(11) To discharge that burden it is necessary for the respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of sex, since 'no discrimination whatsoever' is compatible with the Burden of Proof Directive.

(12) That requires a tribunal to assess not merely whether the respondent has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.

(13) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or code of practice.

Conclusions

7.1 The allegations of alleged discriminatory treatment are advanced as direct discrimination, harassment, and victimisation.

7.2 All of the allegations are put as claims of direct race discrimination, and some are put as allegations of age discrimination. It is convenient to consider the allegations of direct discrimination first, as many of the explanations advanced by the respondent are potential answers to the claims of harassment and victimisation.

Direct discrimination

Allegation 1: by Mr Szintay on or around last two weeks in March 2022 saying that the chair he sat on in the mess was a "white only chair" and refusing to allow the claimant to sit in the chair by saying, "Don't sit in my chair."

7.3 This allegation comes in two parts. The first is a reference to Mr Szintay using the term "white only chair." The first question is whether the incident happened at all. Before the tribunal, the claimant has confirmed that the words were used by Mr Szintay. Mr Szintay denies using such words. I reviewed the available evidence. In his initial grievance, and throughout the interaction with Mr Garthwaite, the claimant did not use the term or make the allegation. The first reference to a white only chair occurred during the appeal against the grievance, and as noted above, it was not a clear allegation that the words had been used by Mr Szintay.

7.4 Had the term being used, it would be self-evidently inappropriate racial language and racially discriminatory. It would also be powerful evidence of a more general discriminatory attitude and conduct by Mr Szintay. I have no doubt that the claimant understands now, and understood at all times, how inappropriate such language would be, and how compelling it would be as evidence. However, the claimant failed to make the allegation clearly at any time. He failed to make the allegation at all before Mr Garthwaite who was conducting the investigation. When asked to explain the omission, the claimant stated that the omission was "remiss" of him. I do not accept this explanation. I find on the balance of probability that had such language been used by Mr Szintay the claimant would have raised it by no later than the point that he brought the grievance. Moreover, the allegation would have been made clearly and would have been repeated.

7.5 It is possible that the claimant believed that Mr Szintay's unwillingness to share his seat was an act of racism. However, Mr Szintay was one of a number of individuals who viewed particular seats in the mess as their own. This was communicated to all new employees. It appears that the claimant's view was that the underlying motive was racist. This has become an allegation that the term whites only chair was used. I find on the balance of probability that the term was never used by Mr Szintay. Had it been the claimant would have raised it as an early stage. Had it happened, this failure to raise it is inexplicable. I conclude that it never happened. It follows that this allegation of race discrimination fails, as the treatment never occurred.

7.6 The second part of allegation one concerns the comment "Don't sit in my chair." Mr Szintay does not agree that he used that term. However, I find there was an incident whereby Mr Szintay explained to the claimant that a chair was his, and he asked the claimant to move. In his statement Mr Szintay says that he asked if he could have his chair back. Whilst there is some doubt about the words use, I find the description sufficiently clear to identify the incident occurred.

7.7 I must consider whether there are any facts which would turn the burden. I have noted that the term "white only chair" was not used. The claimant alleges that Mr Garthwaite inexplicably referred to Tyler as a white person, when he was mixed-race. For the reasons I have set out, I find that Mr Garthwaite never said Tyler was white. It is the claimant's case that only those who were of his race, or otherwise mixed-race, were treated differently. I find that is not supported by the evidence. In the mess room, there were approximately five chairs. Two teams used the mess room. It was common practice for the members of the team to choose their own chairs. There was a degree of territoriality, and it is arguable the practice was potentially unpleasant. It was not a practice which met with approval by the respondent's managers when investigated pursuant to the grievance. It was not just Mr Szintay who claimed a chair. Moreover, it was not directed at any specific individual. The claimant was invited to choose a chair. Tyler was invited to choose a chair. There is no evidence to demonstrate any difference in treatment. The fact that the claimant and Tyler may have been of a different race to Mr Szintay is not in itself sufficient to turn the burden.

7.8 In any event, I find the respondent has established its explanation. The two teams sharing the mess had, in practice, an agreement whereby various workers in the two teams each viewed a specific chair in the mess room as their own and each made it clear to newcomers who sat in which chair, and which chairs were available. This happened regardless of race.

7.9 This allegation fails as a claim of race discrimination.

Allegation 2: by Mr Szintay on or about the end of March 2022 saying that the claimant's microwaved food was "smelly" on two occasions.

7.10 Mr Szintay accepts that he referred to the claimant's microwaved food as smelly. He admits to only one occasion, but nothing turns on whether it was said once or twice.

7.11 Are there any facts which would turn the burden? It is necessary to have regard to the totality of the evidence when considering all of these allegations. I particular, I note the findings set out pursuant to allegation one. There was some suggestion that the type of food was particularly associated with the claimant's race. However, the claimant identified the particular food as garlic quiche. There is no particular connection between that type of food and the claimant's race. I find that there are no facts

from which I could conclude that referring to the food as smelly was an act of race discrimination.

7.12 In any event, I find that the respondent has established an explanation which on the balance of probability is in no sense whatsoever because of race. Mr Szintay says that he could not stand the smell of the food and so he left the room. In his statement he says the following, "all I said was the smell was a bit much for me." I think it is likely that the actual words used were strong enough to cause the claimant's offence. However, rudeness and insensitivity is not necessarily race discrimination. Here, even though the action was insensitive and rude, the explanation is clear. He didn't like the smell of the food, and he made his feelings plain.

7.13 It is the claimant's case that in some manner Mr Szintay was asserting his "whiteness." By this, the claimant means that he was, in some manner, trying to assert dominance because of his attitude towards the claimant's race. That may be the claimant's view. However, for the reasons given allegation 2 fails. I should note that the remaining allegations do not directly concern the action of Mr Szintay.

Allegation 3: on 12 July 2022 by Mr Szintay making a knowingly false complaint to the respondent that the claimant was drinking at work.

7.14 There are two broad elements to this allegation. The first concerns whether Mr Szintay reported to the respondent, on 12 July 2022, that the claimant had been drinking at work. The second concerns the assertion the report was false because the claimant had not been drinking at work and Mr Szintay knew this. Essentially, the allegation is one of malicious reporting.

7.15 I do not have to finally resolve whether the claimant was drinking at work. However, it is appropriate to make a finding of fact as to whether Mr Szintay genuinely believed the claimant had been drinking at work.

7.16 The claimant's primary position is that there was no direct corroborative evidence and he tested negative for alcohol when he was breathalysed at 16:45.

7.17 I should deal first with the breathalyser point. Mr Szintay alleged he saw the claimant drinking out of one can of beer at lunch time. He could not know for sure whether the claimant finished the can or whether he drank more than one can of beer. Before me the claimant has argued that alcohol would stay in his system for one day. The respondent's position is that alcohol may have left his system before the test. Neither party has put any direct expert evidence before me. I discussed whether the rapidity with which alcohol may be metabolised is a matter on which I can take judicial notice. Ultimately, I conclude that I can take judicial notice of the fact that alcohol, when it is consumed, will initially show in the bloodstream. Alcohol is metabolised through the liver and how long it stays in the blood stream will depend upon how much alcohol is

consumed, the speed at which it is metabolised (which may vary), and how long it has been in the bloodstream before the test is taken. It is possible that a single can of beer consumed around 12:00 – 13:00, which appears to be the relevant time, would have been completely metabolised and left the system by 16:45. It follows that the breathalyser was inconclusive, and it cannot be relied on to show that no alcohol had been consumed at lunchtime. That view was reached appropriately and reasonably by the respondent's managers.

7.18 The claimant has further indicated during the course of this hearing that he is teetotal, albeit the claimant did not say how long he had been teetotal. That was not a matter he raised during the course of the investigation, and it is a surprising omission. I find that evidence is of little weight. I do not rule out the possibility that it is untrue, not least because there is evidence before me that he was drinking on 12 July 2022. As it was raised for the first time at the hearing, the respondent has not had a reasonable opportunity to consider the claimant's assertion.

7.19 The claimant points to the lack of corroboration. Mr Szintay says that he had a conversation with the claimant who responded negatively saying, "Don't tell me what to do it's not your business." The claimant is critical of Mr Szintay for not taking a photograph at the time. However, given the apparent conversation, the difficulties which clearly existed between the colleagues, and the sensitivity of the situation, it is not surprising that no photographs were taken.

7.20 I accept that Mr Szintay did take steps, as the matter developed, to approach local businesses to try to obtain CCTV images. However, the various shops were reluctant to cooperate. I find that his attempt to obtain supporting information is consistent with his account that the claimant had been drinking beer.

7.21 In the circumstances, I conclude, on the balance of probability, that Mr Szintay genuinely believed the claimant has been drinking alcohol and for that reason he reported the claimant. It follows this his report was not knowingly false. It follows that the allegation must fail. In any event, the explanation for reporting the claimant's alleged drinking is clear. Mr Szintay genuinely believed that he had seen the claimant drinking a can of beer.

7.22 This allegation fails.

Allegation 4: on 12 July 2022 by Mr Garthwaite, the respondent's operations manager, requiring the claimant to take an alcohol breath test at 16:45.

7.23 Mr Garthwaite did ask the claimant to take a breath test. The breath test was triggered because Mr Szintay reported he had seen the claimant drinking alcohol. Ms Kemsley initiated the arrangements, and an independent person attended the premises. The claimant was asked to take the breath test because that was in accordance with the procedures

noted above. He had an option not to take the breath test but chose to. It was explained to him that if he did not take the breath test then under the policy he would be assumed to have tested positive.

7.24 There is no fact from which I could find that the claimant was treated differently because of his race. Further, the explanation is established. He was asked to take the breath test because there was a credible report that he had been drinking alcohol and the breath test was envisaged by the policy. The policy was explained to the claimant.

7.25 It follows this allegation fails...

Allegation 5: on 16 November 2022 in a grievance outcome email by Mr Chudasama suggesting that the claimant had cheated the alcohol test by delaying the test.

7.26 This allegation fails. At no time did Mr Chudasama say that the claimant had cheated the alcohol test by delaying the test. The claimant has given no clear evidence to demonstrate how, or when, Mr Chudasama is alleged to have stated he cheated the test.

7.27 In his outcome letter 16 November 2022, Mr Chudasama states that it is possible Mr Szintay genuinely believed the claimant had been "drinking alcohol at 12 pm" but that there would be no alcohol in his system some five hours later. This falls far short of saying the claimant cheated the test. It is a simple assessment of the evidence, and a consideration of the proper conclusions that could be reached from the evidence.

7.28 Mr Chudasama did not suggest the claimant had cheated the alcohol test by delaying, or otherwise. This allegation fails.

Allegation 6: on 13 July 2022 by Mr Dave Pickup, a contract manager, moving the claimant to a "one-man park" to work in a two-person team, effectively leaving him in a redundant role.

7.29 There are a number of aspects to this allegation. It is accepted that the claimant and Mr Szintay were separated. This was achieved by Mr Pickup sending the claimant to a different park. Mr Pickup agreed this with Mr David Pretorius, a contract supervisor. The claimant was sent to work at St Luke's Park. Mr Pickup says his reason was because Mr Szintay was the team leader, and he was far more experienced than the claimant in the daily round. His intention was to move the claimant back when the difficulties and grievances had been resolved.

7.30 Mr Pickup does not accept that the role was in some way redundant. It is accepted that it was a one-man park, in the sense that there were normally two operatives whose worked a pattern of days on and days off. The underlying contact did not provide for another employee. However, he was satisfied there was sufficient work for the claimant to be useful, and this arrangement was temporary. I accept his evidence; it was not

intended to put the claimant in a position where he was made redundant, and he was not made redundant.

7.31 I do not accept there is any fact from which I could find that the reason for moving the claimant was because of his race.

7.32 In any event I accept the explanation. The claimant was moved because of the breakdown in the relationship between the claimant and Mr Szintay. This created a practical difficulty which needed to be resolved, and it was resolved in a pragmatic way. The respondent was entitled to take into account its own operational requirements. In any event, at no point did the claimant complain about being in St Luke's Park. The feedback the claimant gave was that he did not mind being in the park, and it was good for his commute.

Allegation 7: on 14 February 2023 by Mr Dave Pickup, finding the claimant had failed his probationary period.

7.33 It is common ground that the claimant failed his probationary period and was dismissed.

7.34 In support of the claim of race discrimination, the claimant seeks to argue that in some manner Mr Pickup acted unreasonably, and further that his reason for this was unexplained. He seeks to do this by challenging the legitimacy of the reasons relied on by Mr Pickup. It is therefore necessary to consider, briefly, the grounds on which Mr Pickup relied.

7.35 The difficulties with the claimant's performance were raised in December 2022. It would have been possible for Mr Pickup, at that point, to simply dismiss the claimant. His giving the claimant a clear indication of the areas of improvement, and allowing the claimant time to improve, is inconsistent with the alleged conscious discrimination.

7.36 The review took place in February and Mr Pickup had regard to the matters that had been raised in the December meeting. He relied on a number of points I do not need to give all the detail. I have had regard to the totality of the evidence. He found the following -

7.36.1 The claimant had sent an inappropriate email to his line manager who did not accept that it was intended as a joke.

7.36.2 The claimant had failed to follow instructions regarding film crews needing authority before filming in the park and thereby undermined his manager.

7.36.3 On two occasions the claimant had left work without notifying his line manager when he was in a position to do so.

7.36.4 There had been a complaint about failing to wear appropriate PPE, and the claimant acknowledged that the complaint had been

received, and he agreed that he was not wearing gloves when picking litter.

7.36.5 He had wasted time by getting a bus between parks instead of walking between them, which would have taken five minutes. Mr Pickup did not accept the reason given by the claimant which related to uncomfortable boots and the possibility of rain.

7.37 Mr Pickup reflected on the discussion and reached the conclusion that the claimant had not shown the required improvement. I find that Mr Pickup genuinely believed that the claimant's performance was not adequate and that he had not shown the improvement required when given an opportunity to do so. For that reason, he dismissed the claimant. I find this explanation was in no sense whatsoever because of the claimant's race. This allegation fails.

7.38 Allegation seven was also put as an act of age discrimination, it being the claimant's case that he was treated less favourably than those who were younger. There are no facts from which I could conclude that the treatment was because of the claimant's age. In any event, the explanation as given is also an answer to the claim of age discrimination.

Allegation 8: 0n [date unspecified] by making up information being 'notices of conversation' where no conversation had taken place with him.

7.39 The respondent operates a system whereby when there are particularly important, or significant, conversations they are recorded in a written note. The employee is invited to countersign but does not have to.

7.40 The claimant has failed to clarify which notes of conversation are said to have been in some manner fabricated or invented. He has referred to a number which he did countersign which he says are false. For at least one says he signed because he received some form of oral representations that he would not be held to its content.

7.41 It is for the claimant to establish, on the balance of probability, that the alleged treatment occurred. Here the essence of the treatment is the respondent's managers making up notices of conversation, that is to say fabricating conversations, or otherwise recording conversations untruthfully, or in a manner which did not reflect any conversation that took place. I find the claimant has failed to prove that such treatment occurred at all.

7.42 To the extent the claimant has pointed to specific notices of conversation, I find all those notes genuinely reflect the conversations that took place. None is fabricated or false.

7.43 The respondent's explanation is that each notice of conversation simply reflected the conversation with took place; I accept that explanation.

7.44 This allegation fails.

7.45 This allegation is also put as a claim of age discrimination. There are no facts from which I conclude that any treatment was because of age, in any event, the explanation is established and is also an answer to this claim.

Allegation 9: on [dates unspecified] by the respondent refusing to provide to the claimant [in a manner not specified] statements of other employees during grievance meetings, grievance appeals, and disciplinary proceedings being statements from Mr Szintay , Mr Richards, Mr Mason, Mr Garthwaite, and Mr Chudasama.

7.46 It is the claimant to establish the treatment occurred.

7.47 The respondent accepts that the claimant was not given full statements during his grievance.

7.48 The claimant was never subject to disciplinary proceedings. The respondent's explanation is that the claimant would not be entitled to statements in relation to any disciplinary proceedings taken against any other employee.

7.49 As for the statements produced during the grievance process, Mr Garthwaite confirms that the claimant was not given witness statements because HR's advice was there are issues of confidentiality and GDPR, and therefore it was not the policy to give out full statements.

7.50 The claimant has not sought to challenge the explanation.

7.51 There are no facts from which I conclude that the claimant was treated differently to anyone else in a similar position. There are no facts from which I conclude that the treatment was because of the claimant's race.

7.52 The explanation is clear and is established on the balance of probability; it was no sense whatsoever because of race.

Allegation 10: on 1 September 2022 by Mr Garthwaite accepting that the comment was made about a "white only" only chair but failing to accept the reason was on grounds of the claimant's race and stating that a BAME colleague was white.

7.53 This allegation fails. Mr Garthwaite did not accept that the "white only" comment had been made. The claimant did not allege before Mr Garthwaite that the comment had been made. Moreover, as noted above, Mr Garthwaite did expressly refer to the BAME colleague as mixed race.

Allegation 11: on 1 September 2022 by accepting in the grievance outcome that an allegation was made by Mr Szintay that the claimant had been drinking but failing to accept the reason for the allegations was on grounds of his race.

7.54 This allegation fails. It is correct that Mr Garthwaite did not accept the allegation of drinking had been made because of the claimant's race. I have explored the circumstances in relation to this. Mr Garthwaite concluded that Mr Szintay genuinely believed the claimant had been drinking. This was a reasonable conclusion. It was Mr Garthwaite's belief that the report reflected a genuine belief, and the possibility of drinking existed, which explains why he did not conclude that the allegations because the claimant race. The respondent establishes this explanation.

Allegation 12: on 1 September 2022 by the grievance outcome accepting that comments were made about "smelly" food but failing to accept the reason why was on grounds of his race.

7.55 Mr Garthwaite did find the comment about smelly food to have been made. He partly upheld the grievance, observing that the comment was rude and inappropriate. This ultimately led to Mr Szintay being given dignity training to make him more aware of the potential consequences of his own actions. It is also true that he did not conclude the comment had been made because of the claimant's race.

7.56 For this to be an act of race discrimination, there would have to be some facts from which I could conclude that either he and some manner deliberately refused to accept it was because of the claimant's race, despite the evidence, or he was subconsciously influenced because of the claimant's race, and chose to believe Mr Szintay. I find there are no facts which I could conclude either.

7.57 Here the respondent establishes its explanation. Mr Garthwaite concluded Mr Szintay had referred to smelly food because that was his perception of the food and in particular its aroma when microwaved. He then behaved in a rude manner. However, there was insufficient evidence to conclude that it was because of race, and hence Mr Garthwaite's conclusion.

Allegation 13: on 14 February 2023 by Mr Pickup by dismissing the claimant.

7.58 Dismissal was a consequence of failing his probation period, and I consider that above. This allegation fails. Allegation thirteen is also put as an act of age discrimination, it being the claimant's case that he was treated less favourably than those who were younger. The explanation is made out, and it again fails the same reasons as set out above in relation to allegation seven.

<u>Harassment related to race</u>

7.59 Allegations 1 to 12 are put as acts of harassment.

7.60 I will consider each the allegations. I have full regard to the finding of facts and my findings on the respondent's explanations for any treatment as set out in relation to direct discrimination.

7.61 Allegation one - Mr Szintay did not refer to a "white only chair". He did ask the claimant not to sit in his chair. Asking the claimant not to sit in his chair was unwelcome conduct. Although it was rude, I do not find that there are facts from which I could conclude it was his intention to harass the claimant. He was asserting the general position that existed in the mess room at the time.

7.62 It is necessary to consider whether it is reasonable for the treatment to have the effect of harassment. In this case, although I accept that there is a degree of rudeness involved in the various team members claiming their own chairs, it is not that unusual for there to be a degree of territoriality in any business. Individuals who customarily sit at desks may be offended if others sit at what they perceive to be their desks, or their chairs. Claiming a specific chair in a mess room is not wholly dissimilar to claiming one in an office.

7.63 This claim fails because the alleged harassment is not related to race. It is the claimant's case that it was because of his race, and that has failed for the reasons given. It related to the accepted practice at the time, not to race.

7.64 Allegation two - Referring to the claimant's food as smelly was unwelcome conduct. There are no facts from which I could conclude that it was the purpose to harass. However, I do accept Mr Szintay showed a degree of insensitivity, and it may be that there was a degree of insensitivity because of the degree of tension between those two individuals. However, rudeness flowing from tension may not demonstrate an intention to harass. Harassment should not be trivialised. Being deliberately offensive, which may reflect ongoing arguments, is unfortunate and unwelcome, but is may not demonstrate an intention to harass.

7.65 The comment was transitory and brief. In those circumstances, I find that it cannot reasonably be said to have had the effect of harassment.

7.66 In any event, it was not related to race, the respondent's explanation being a complete answer.

7.67 Allegation three - This was not harassment, either by way of purpose or effect, because the complaint was not false. I find that Mr Szintay genuinely believed the claimant had been drinking. It did not relate to race.

7.68 Allegation four - Requiring the claimant to take a breath test was not harassment either by way of purpose or effect. It did not relate to the claimant's race. He was asked to take a breath test because that was in

accordance with the respondent's policy following the credible report that he had been drinking.

7.69 Allegation five - This allegation of harassment fails. The claimant was not accused of cheating the alcohol breath test.

7.70 Allegation six - The claimant alleges that moving him to another park was an act of harassment. There are a number of difficulties. First, I do not accept that the treatment was unwelcome. The claimant did not wish to continue working with Mr Szintay and he was moved to a park to which he did not object and which was suitable for his commute.

7.71 It was not the intention to harass; the intention was to manage a difficult situation. It cannot reasonably be said to be the effect of the treatment. In any event, the alleged harassment did not relate to race.

7.72 Allegation seven – It is the claimant's case that failing his probation was an act of harassment. This allegation fails.

7.73 Mr Pickup gave the claimant an opportunity in December to improve. He then reviewed the progress carefully and reached rational conclusions based on the information before him. In no sense whatsoever are there any facts from which I could conclude that the intent was to harass. Dismissing the claim was no doubt unwelcome. Given the failure of the claimant improve, it cannot be reasonably said to have had the effect of harassing him.

7.74 In any event, the alleged harassment did not relate to his race.

7.75 Allegation eight - The claimant fails to establish that there were conversation that had not taken place. The treatment is not established. There is no basis to conclude it was the intent to harass. There is no basis on which I could find the effect was harassment. The production of the notice of conversations did not relate to race.

7.76 Allegation nine - The claimant may have found the failure to provide statements of others is welcome. There are no facts from which I could conclude it was the intent to harass. It would not be reasonable for it have the effect of harassment. It did not relate to race.

7.77 Allegation 10 - Mr Garthwaite did not accept that the alleged white only comment was made. It was not raised before Mr Garthwaite. He did not state the claimant's colleague was white. The treatment is not established. If follows it cannot be established that it was intent to harass, nor can it be the effect. There is no basis for establishing that any finding relating to the chair related to the claimant's race.

7.78 Allegation 11 - Mr Garthwaite did not accept that the allegations relating to drinking was on grounds of the claimant's race. For the reasons already given, he had proper evidence on which to base his findings. As there

was proper evidence, there are no facts from which I could conclude that his intent was to harass. It would not be reasonable for the decision to have the effect of harassment. It did not relate to the claimant's race.

7.79 Allegation 12- The allegations of harassment is a failure to accept the comment about smelly food related to race. However, the evidence before Mr Garthwaite did not support a finding that the comment about smelly food relate to race. There are no facts from which I could find his alleged failure was intended to harass. It is not reasonable for the failure to have the effect of harassment. It did not relate to race.

Victimisation

7.80 The claimant alleges his written grievance of 9 July 2022 was a protected act.

7.81 It is the respondent's case that it could not be a protected act because it made false allegations that the allegations were made in bad faith.

7.82 The respondent accepts that a number of the allegations made have a factual basis. The respondent asserts that the fact that the allegations were made in bad faith also makes them false. I do not have to finally resolve this point for the reasons I will come to. However, I think the respondent's interpretation is unlikely to be correct. There are two broad stages. The first is a consideration of whether the allegation is false. Where treatment is alleged, the most common basis for finding that it was false is a finding that it did not occur. There is then a question of whether the allegation was also made in bad faith. This is generally established by a finding of some form of dishonesty or possibly recklessness. It may be possible to find a false wrong allegation of treatment may not be made in bad faith.

7.83 There may be occasions when the nature of the allegation is so fundamentally bound up with the allegations of discrimination, the concept of false allegations and bad faith effectively merge. A bare allegation of discrimination may fall into that category. However, section 27 Equality Act 2010 envisages two stages. First, an identification of the false allegations, and second a finding that the false allegation was made in bad faith. When the factual allegation is not false, it is unlikely that the defence is available.

7.84 Here, it seems to me that it is strongly arguable that there were allegation of treatment that did occur and which are said to be acts of discrimination. I will proceed on the basis that the grievance of 9 July 2022 was a protected act.

7.85 For the allegations victimisation to succeed, the alleged treatment must have occurred, and the reason for the treatment must be because of the protected act.

7.86 The claimant cites all thirteen allegations of discriminatory conduct as allegations of victimisation.

7.87 In the context of direct discrimination, I considered whether the treatment occurred, and if so, whether there is an explanation for it. In each case, where the treatment did occur, the respondent has established an explanation. In each case that explanation is as much an answer to the claim of victimisation, as it is to the claim of direct discrimination. None of the alleged treatment was because of the protected act. It follows all the allegations of victimisation fail because the respondent has established the treatment did not occur or because there is an explanation which no sense whatsoever is because of the prohibited ground.

Time

7.88 I do not have to determine whether any of the claims is out of time. Each claim fails on its merits, and therefore I do not need to resolve whether time should be extended. For any claim.

7.89 For the reasons given all claims fail and dismissed.

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Employment Judge Hodgson

Dated: 18 June 2025

Sent to the parties on:

.....25/6/2025.....

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For the Tribunal Office