EMPLOYMENT TRIBUNALS

Claimant:		**Respondents:**
Mr E Kumordji	**v**	Royal Mail Group Limited **(R1)**
		Mr Abbas Ashraf **(R2)**
		Manpower UK Limited **(R3)**

Heard at: Reading **On:** 2 and 3 May 2017

Before: Employment Judge S Jenkins
Members: Miss J Cameron and Mr G Edwards

Appearances
For the Claimant: Mr J Khalid (Counsel)
For the Respondents: **(R1)** Ms V Duddles (Solicitor)
(R2 and R3) Mr A Sutherland (Solicitor)

RESERVED JUDGMENT

1. The First Respondent harassed the Claimant on the ground of his race and the Claimant's claim of racial harassment against the First Respondent therefore succeeds.

2. The First Respondent is ordered to pay to the Claimant the sum of £3,000.00 by way of compensation in respect of injury to the Claimant's feelings, together with interest on that sum of £328.77, making a total sum of £3,328.77.

3. The Claimant's claims of racial harassment against the Second and Third Respondents are dismissed.

REASONS

Background

1. The case before the Tribunal related to claims of racial harassment brought by the Claimant against each of the three Respondents. We heard evidence from the Claimant on his own behalf; from the Second

Respondent on his own behalf; from Mr Raza Ban, Account Manager, on behalf of the Third Respondent; and from Mr Devinder Bithal, Area Manager, and Mr John Atkins, Despatch Section Lead, on behalf of the First Respondent. We considered the documents in a bundle spanning 141 pages to which our attention was drawn together with two other documents, namely the First Respondent's "Stop Bullying and Harassment Policy" and extracts from Mr Ban's diary in May and June 2014 which were handed to us at the commencement of the second day of the hearing.

Issues and law

2. As noted in the Case Management Summary issued by Employment Judge Vowles following a preliminary hearing in this case on 18 October 2016, the following claims and issues were to be considered by the tribunal at the hearing, with no other claims or issues to be considered without permission of the tribunal:

Racial Harassment – section 26 Equality Act 2010

1. The Claimant is of African origin.

2. He claims that he was the subject of racial harassment on 19 May 2014 when the 2nd Respondent racially abused him.

3. He also claims that he was the subject of racial harassment in December 2015 when the 2nd Respondent was allowed to return to work at the same location.

4. The Respondents deny the claims of harassment. It will be submitted that the first claim was presented out of time and the Tribunal has no jurisdiction to consider it.

3. Expanding upon that, in relation to either or both of the claims of racial harassment, we would need to consider the following:-

3.1 Did any or all of the Respondents engage in unwanted conduct as follows:

3.1.1 by virtue of the Claimant being racially abused by the Second Respondent in May 2014 by being referred to as a "gorilla";

3.1.2 by virtue of the Second Respondent being allowed to return to work at the same location as the Claimant in December 2015?

3.2 If so, was the conduct related to the Claimant's race?

3.3 If so, 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 the conduct have the *effect* of violating the Claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant?

3.5 In considering whether the conduct had that effect, we would need to take into account the Claimant's perception, the other circumstances of the case, and whether it was reasonable for the conduct to have had that effect.

4. If we decided in favour of the Claimant in relation to all or any of his claims we would then need to consider remedy which, bearing in mind that the Claimant has remained in employment with the First Respondent throughout, would encompass the assessment of an injury to feelings award and, if appropriate, consideration of how any such award should be allocated as between the Respondents.

5. Prior to considering those issues however, we had to address a preliminary issue as to whether the Claimant had presented his claims of race discrimination in time, pursuant to section 123(1)(a) Equality Act 2010 ("EqA"); and, if we concluded that the claims, or any of them, had been presented out of time, we would need to consider whether it was just and equitable to extend the time for submission of the claims pursuant to section 123(1)(b) EqA. We confirmed at the outset of the hearing that we would hear all the evidence and subsequently form our conclusions on the preliminary issue before, if appropriate, going on to consider the substantive issues.

Findings

6. The Claimant is, and was at all material times, employed by the First Respondent as a postman. He was, up until the incident in May 2014, employed at the First Respondent's International Logistics Centre ("ILC") but was, shortly after that, transferred, at his request, to the Respondent's Heathrow Worldwide Distribution Centre ("HWDC"). The two buildings are located in the same vicinity but operate separately. A significant number of direct employees are employed by the First Respondent at those locations, but, in order to address fluctuations in demand, the First Respondent also engages a number of agency workers, particularly in the Christmas period. The Third Respondent is an agency which is used by the First Respondent for that purpose and the Second Respondent had been provided to the First Respondent by the Third Respondent as an agency worker in the past and was working at the First Respondent's ILC when the first alleged incident in May 2014 occurred.

7. The incident in fact occurred towards the end of the shift on 19 May 2014 at approximately 8.30 pm. The Claimant reported that he had been

working as usual and heard from behind someone call out “Excuse me big gorilla”. This was seen to be the Second Respondent who was pushing a trolley behind the Claimant and who appeared to wish to move past the Claimant in a confined space. The Claimant immediately reported the incident to the First Respondent’s Section Lead Manager who was nearby, Mr Shaun Williams, who asked the Second Respondent to confirm what he had said, to which he replied “Gorilla, but I was thinking of something else”. Mr Williams then asked the Second Respondent what he had been thinking about and the Claimant stated that he had been “thinking about Jamaica zoo”. Mr Williams then indicated that what the Second Respondent was saying did not make sense and that it was a serious issue, at which point the Second Respondent apologised. The Claimant confirmed however that he would not accept that apology and that he was going to take matters further.

8. The Second Respondent’s version of those events does not accord with the summary outlined immediately above. In the response submitted on his behalf to the Claimant’s claim, there was a denial that he had made the alleged comment and an assertion that he had been talking to himself, which was his habit, when the Claimant had called him a racist. He had then been confused and did not understand what was happening, and when two managers from the First Respondent took him into a room to fill out a report, they pressured him.

9. In his evidence before us however, the Second Respondent confirmed that he had used the word “gorilla” and indeed, in a state of panic, had told Mr Williams that he had been thinking about Jamaica zoo. However, he explained his use of the word by noting that he had shortly previously seen a large toy gorilla at Hamleys toy store in London, costing £1,000, which had, at that point, popped into his head and caused him to say something out loud. He confirmed that he was not directing that word at the Claimant or indeed anyone else. He confirmed that he was not racist, worked with people from different backgrounds, and had never had any problems with any other people and had never been called a racist before.

10. Overall, we accepted the version of events outlined by the Claimant, as had also been accepted by the First Respondent following its investigation at the time. We do record however, as contended by the Second Respondent’s representative in his submission to us, that we did not consider that there was any intent or malice behind the comment made.

11. The Second Respondent’s representative asked us to accept that the comment was “made naively and gauchely by a man who is clearly not sophisticated”. He went on to submit that the Second Respondent was “in his own world, and simply voiced his thoughts”. Having observed the Second Respondent give evidence before us, which encompassed several lengthy pauses before answering questions, during which he seemed either to take time to comprehend the question being asked or to formulate his answers, together with a rather stilted delivery of his answers and his general bearing, we had ourselves, prior to those submissions, formed the

impression that the Second Respondent was indeed "not sophisticated". We felt that the description of the Second Respondent as someone who was "in his own world" was an accurate one and we could understand that he might have difficulty in controlling his comments (in his own evidence before us, he recorded that when he was working he sometimes liked to talk or sing to himself and sometimes did that quite loudly) such that he might blurt out the particular thought that was in his head, without necessarily being conscious of doing so. Consequently, whilst we concluded that the incident happened as described by the Claimant, and without wishing to minimise the impact on the Claimant of those events, we did not consider that the Second Respondent had intended to cause any offence to the Claimant.

12. The following day, the Claimant submitted a report of the incident to the First Respondent. A gap of about a week then appeared to arise during which it seems that the First Respondent was attempting to deal with the issue informally, but with both the Claimant and the Second Respondent being present on site. It was only on the bank holiday, 26 May, when the Claimant was adamant that the issue needed to be dealt with formally, that steps were taken to separate the Claimant and the Second Respondent.

13. This was done by way of the Claimant being removed to the HWDC and with the Second Respondent continuing to work at the ILC. The First Respondent explained that this was due to the Claimant having the appropriate security clearances to work at the HWDC which the Second Respondent did not have. We note that the First Respondent's anti-bullying and harassment policy notes that separation in these circumstances would normally be achieved by moving the individual about whom the complaint had been made, but we accepted that this was not necessarily the normal situation.

14. Following the Claimant's confirmation that he wished to pursue the matter formally, he submitted, following a request by the First Respondent, a formal bullying and harassment complaint form, known as an H1, together with a summary of the issues that had arisen and his previous report of the incident at the time. The Second Respondent was sent home from site at that time.

15. Some confusion appears to have arisen as to which of the First and Third Respondents was then carrying out an investigation, which we did not find surprising bearing in mind that two employers were separately involved. There appeared however to have been an expectation that the Third Respondent would procure a statement from the Second Respondent and that the First Respondent would speak to the other individuals involved. There was however no evidence before us of the investigation that was undertaken.

16. It seems however that the First Respondent's managers, Mr Bithal and Mr Gurpal Sidhu (Mr Bithal's line manager), formed a conclusion that the incident had taken place as alleged. A meeting took place between those

two and Mr Ban, on behalf of the Third Respondent, on 11 June 2014 during which this was discussed and it was concluded that, whilst it appeared that the First Respondent accepted the lack of any intent on the part of the Second Respondent to cause offence by the comment, he should be removed from site.

17. There was a difference of view between the parties, which ultimately came to be of significance in relation to the events of December 2015, regarding the length of this "ban". Mr Ban's evidence, as was ultimately supported by his diary entries for the month of June 2014, which we were satisfied had been made contemporaneously, was that the Second Respondent would not be allowed to work at the site for six months. Mr Bithal's evidence, whilst being somewhat equivocal in that he confirmed that he could not necessarily recall the discussion in detail, some three years after the event, was that he was of the view that he did not recall any particular time period being discussed.

18. Nevertheless, what was clear was that, following some chasing by the Claimant's union representative, a letter was issued to the Claimant by the First Respondent on 24 June 2014 following a discussion held with the Claimant on 17 June 2014. This was sent by Mr Bithal, although he confirmed that he had been instructed to prepare that letter by Mr Sidhu. This letter contained three commitments by the First Respondent as follows:

> "…in good faith, I can say that the manpower agency member Abbas Ashraf, who made a racist comment by calling you a gorilla, and when questioned by a manager he said he was thinking of a zoo in Jamaica will not be attending any Royal Mail site within the area in the future."
>
> "I will also agree to your request to go back to HWDC and will submit your preference to HWDC."
>
> "If due to any administrative error by manpower that this manpower agency worker does attend site for work he will be escorted off site immediately."

19. We noted that this letter put no time limit on the direction that the Second Respondent should not attend either of the relevant sites and concluded that this was because of the First Respondent's interpretation of the discussion with the Third Respondent that the "ban" would be indefinite. We record here that we do not in relation to this consider that Mr Ban's evidence is in any sense flawed, merely that there seems to have been a misunderstanding between the First and Third Respondents as to the final outcome of that discussion. It appeared to us that the Third Respondent was under the impression that the "ban" would last for six months, but that the First Respondent did not consider that there was any limitation.

20. The Claimant was asked to confirm that he found this resolution satisfactory and that he was therefore happy to close off the bullying and harassment case he had raised. He confirmed in his evidence, which we accepted, that he did find this resolution satisfactory in the way that it was

expressed, i.e. following the three commitments made by the First Respondent, and therefore did not wish to pursue the bullying and harassment matter further. He also confirmed in his evidence before us that he had considered taking tribunal proceedings in relation to the alleged harassment at that time but had been prevailed upon not to do so by the First Respondent's managers in light of the commitments given. The Claimant also confirmed that he had been taking advice from his union representative at this time.

21. The Claimant underwent a period of sickness absence during this period to the extent that the First Respondent commissioned an occupational health report in relation to him on 8 July 2014 which recorded the incident and that it had caused the Claimant to feel stressed and that he was using medication to aid with his sleep and was having some counselling under the NHS. The Claimant initially remained working at the ILC, due to difficulties in arranging appropriate times to work at the HWDC, but he did, some time thereafter, move to the HWDC.

22. Although this became apparent from evidence in relation to the 2015 incidents, we could see that the First Respondent had not taken any steps to record the "ban" via its internal processes. Mr Ban in his evidence confirmed that when there was a request that one of the Third Respondent's employees should not return to work at the First Respondent, a form was sent to him for him to complete the relevant details which was then returned to the First Respondent's central HR office in Sheffield to be recorded. Mr Bithal and Mr Atkins on behalf of the First Respondent indicated that they had no knowledge of such processes, but a document in the bundle relating to the Second Respondent's subsequent application to work at the First Respondent's premises, submitted in September 2015, noted that a stage 1 vetting process referred to as "RMG debarment checks" had been passed. We took from that that the First Respondent did indeed operate a form of "debarment" list, on which the Second Respondent could have been included and, in light of the content of the First Respondent's letter of 24 June 2016, should have been included.

23. In light of subsequent events, we also noted that there did not appear to have been any steps taken by the First Respondent internally to communicate the fact of the Second Respondent's "ban". Mr Atkins, who works at the HWDC, indicated that he had no knowledge of any ban, whether time limited or otherwise, until the incidents of December 2015 arose and no evidence was put before us by the First Respondent of any internal communication about that issue.

24. Moving to the events of 2015, we could see that the Second Respondent made an application, via the Third Respondent, to work at the First Respondent over the Christmas period. An application form and a security check consent form were completed by him in conjunction with one of the Third Respondent's administrators on 17 September 2015 and the outcome of the vetting checks was confirmed on 25 September 2015 and

6 October 2015. The Second Respondent thereafter attended at the First Respondent's HWDC site in December 2015 to work in conjunction with many other agency workers to deal with the influx of post during the Christmas period.

25. The Claimant was not informed about the Second Respondent's attendance, and was not aware of it until he observed the Second Respondent at the premises. This led to the Claimant submitting a further H1 form albeit not until January 2016, with the form being dated 1 January 2016 but received by the First Respondent, as evidenced from its date stamp, on 6 January 2016. In this form, the Claimant referred to the incident in 2014 and that the Second Respondent would never attend at one of the First Respondent's sites thereafter. He referred in the form to the fact that he kept "bumping into" the Second Respondent, although we found, from the Claimant's own evidence and that of the Second Respondent, that they only came across each other on one, or at most, two occasions in the period leading up to Christmas 2015 and had no direct contact with each other. We noted that the Second Respondent's period of engagement ended on 2 January 2016 and he did not attend site thereafter.

26. The Claimant's bullying and harassment complaint was handled by the First Respondent's central case management team based in Sheffield, where a member of that team, Mia Edris, co-ordinated matters. There appears to have been some confusion within the First Respondent about the extent of the previous "ban" on the Second Respondent attending on site, with Ms Edris checking the position with Mr Ban of the Third Respondent. She ultimately reported internally that the ban was in place for six months, that there had been no direct contact between the Claimant and the Second Respondent, and therefore that no further action would be taken. A letter to that effect was sent by Ms Edris to the Claimant on 15 January 2016 and a copy was circulated, along with the 24 June 2014 letter, to various managers including Mr Atkins.

27. Matters were not however left there and, our conclusion was that developments arose following receipt of a further occupational health report on the Claimant dated 20 January 2016. This referred to the Claimant reporting that he had ongoing PTSD following the incident in April 2014, that this would take up to two years to fully recover from, and that the First Respondent needed to arrange cognitive behavioural therapy because of the perceived work-related re-trigger of the PTSD. The report went on to confirm that the First Respondent needed to consider the Claimant's mental wellbeing and to ensure that his "attacker", i.e. the Second Respondent, did not work with him to avoid triggering his PTSD symptoms or that a written plan should be put in place to manage the risk.

28. This seems to have led to something of a *volte face* by the First Respondent. Mr Atkins, who although was the individual who then wrote a letter to the Claimant dated 29 January 2016 confirming that the Second Respondent should not have been at the site and that an error had

occurred due to a breakdown in communication between the First Respondent and the Third Respondent, confirmed in his evidence before us that he had simply written that letter on instructions and had not taken an actual decision in relation to this issue. We therefore had no direct evidence on the intention behind this letter and the change of approach. It appeared to us that the First Respondent had changed its approach in light of the medical evidence and had then formed the conclusion that the Second Respondent should not be allowed to return on site. This was, as we have noted, confirmed to the Claimant in a letter dated 29 January 2016 sent by Mr Atkins during which he apologised for the breakdown in communication and for how it had made the Claimant feel.

29. The only subsequent facts, which we record in passing, are that the Claimant remained on sickness absence for some time after January 2016, ultimately returning to work in March 2016. He appears to have been issued with an attendance review warning under the First Respondent's policy but that this appeared to have been removed following the submission of a grievance by the Claimant.

Conclusions

30. Applying the findings we made to the issues we identified at the outset of the hearing, our conclusions were as follows. It must be noted that, due to the differing nature of the potential scope for liability of the Respondents, that our conclusions would not necessarily be, and indeed are not in fact, the same for each of them.

31. The first issue for us to address was whether the Claimant's claims had been brought within the relevant time period set out in section 123 EqA. In this regard, claims to the tribunal must be brought within the period of three months starting with the date of the act to which the complaint relates or such other period as the tribunal thinks just and equitable (section 123(1)), but with section 123(3)(a) noting that for the purposes of the section, conduct extending over a period is to be treated as done at the end of the period.

32. In relation to this claim, as noted above, we were considering two incidents alleged to amount to racial harassment, which were ostensibly unconnected; the first incident which took place on 19 May 2014 and the second incident which took place shortly before Christmas 2015. If the first incident was viewed as an entirely isolated one, then the time by which a claim should have been instituted in respect of it (or more accurately, the time by which contact with ACAS for the purposes of early conciliation should have been made) would have been 18 August 2014. Had there been contact with ACAS at that time, then time for submission of the claim could have been extended by a month, i.e. up to 18 September 2014. In the event, contact was not made with ACAS until January 2016 in respect of the First Respondent, and February 2016 in respect of the Second and Third Respondents, with the claim form in respect of all Respondents being submitted on 25 February 2016. The claim in respect of the first

incident would therefore on the face of it be out of time unless it was considered to be part of a course of conduct extending over a period or unless we considered it to be just and equitable to extend time.

33. It was at this juncture that we formed different views in relation to the respective Respondents. With regard to the First Respondent, we were satisfied that, in its case, conduct extended over a period such that we considered that the Claimant's claim had been brought in time against the First Respondent in relation to both the first and second incidents, on the basis, as we note below, that we considered the two incidents to be part of the same course of conduct.

34. At first glance, this would not necessarily be seen as an intuitive conclusion as the particular conduct in each case, i.e. that in May 2014 and that in December 2015, is quite different. However, we noted the outcome of the First Respondent's treatment of the first incident, as confirmed in its letter to the Claimant of 24 June 2014 and as has been extracted above at paragraph 18, and that caused us to conclude that the First Respondent had been involved in a course of conduct extending over a period.

35. Crucially, the outcome of the First Respondent's investigation into the 19 May 2014 incident, as confirmed in its 24 June 2014 letter to the Claimant, was that the Second Respondent would not be attending any of the First Respondent's sites within the area in the future and that if, due to any administrative error on the part of the Third Respondent, the Second Respondent did attend site for work, he would be escorted off site immediately. We considered that whatever the potential miscommunication between the First Respondent and Third Respondent on this issue, the letter to the Claimant was clear. The state of affairs set out in that letter, i.e. that the Second Respondent would not attend at the relevant sites in the future, was something that the Claimant understood to be continuing and permanent and we also considered that it was the state of affairs that the First Respondent had committed to maintain, notwithstanding that the Third Respondent's perception of the time period was different.

36. As we have noted above, no action was taken by the First Respondent to implement its commitment to the Claimant by way of putting the Second Respondent on its debarment list or by way of any form of internal communication of the state of affairs to the First Respondent's managers. The Second Respondent then was cleared by the First Respondent to work and was engaged to work at its site in December 2015 and was not escorted off site at that time. We concluded that that therefore amounted to conduct extending over a period up to the Respondent's failure to prevent the Second Respondent from working at its sites in December 2015, and therefore that the claim brought in February 2016 had been brought in time against the First Respondent.

37. We concluded however that the position of the Second and Third Respondents was significantly different. In the case of the Second

Respondent, the only conduct on his part in December 2015 was his attendance at work, for which he had been cleared by the First Respondent and engaged by the Third Respondent. There was no indication that he had committed any further act of any sort towards the Claimant at this point.

38. Similarly, the Third Respondent only provided the Second Respondent to work at the First Respondent's site, it being their understanding that they were perfectly free to put him forward for work. Neither the Second Respondent nor the Third Respondent had given any form of commitment to the Claimant about the state of affairs that would prevail after June 2014 and therefore we did not consider that either or both of the Second or Third Respondents could be said to have participated in conduct extending over a period. Consequently, the Claimant's claim against the Second and Third Respondents was confined to the May 2014 incident, the Third Respondent being potentially vicariously liable for the Second Respondent's acts pursuant to section 109 EqA. We concluded, as a result, that the Claimant's claims against the Second and Third Respondents had been brought out of time. We therefore needed to consider whether it was just and equitable to extend time.

39. In that regard, we noted the direction provided by the Employment Appeal Tribunal in the case of British Coal Corporation v Keeble [1997] IRLR 336, that, when considering whether to extend time, it is appropriate to take into account the factors set out in section 33 of the Limitation Act 1980 relating to the extension of time in civil cases.

40. Those factors are: the length of and reasons for the delay, the extent to which the cogency of the evidence is likely to be affected by the delay, the extent to which the parties sued had co-operated with any request for information, the promptness with which the Claimant acted once they knew of the possibility of taking action, and the steps taken by the Claimant to obtain appropriate professional advice once they knew of the possibility of taking action.

41. Of those factors, the extent of co-operation by the Second and Third Respondents had no bearing as there had been no request to them for information. Further, whilst we were now looking at matters some three years after they had taken place, we did not think that the cogency of the evidence was materially affected by the Claimant's delay. We were looking at only one isolated incident and there was documentary evidence available from the period which we considered enabled the witnesses to be reasonably certain of their recollections. We were however concerned that the consideration of the other factors weighed heavily against the Claimant.

42. By any assessment, a delay of well over 18 months was lengthy and the reasons for that delay, essentially the Claimant's belief that matters had been addressed satisfactorily by the First Respondent and that the Second Respondent would not be in attendance at any time in the future, did not

have any direct bearing on the Claimant's claim against either the Second or Third Respondents. Notwithstanding the Claimant's ostensible satisfaction with the First Respondent's actions at the time, the Claimant could have nevertheless issued proceedings against the Second Respondent, and by application of section 109, the Third Respondent, at that time but did not do so. Furthermore, whilst the Claimant did not take legal advice, he was advised by a union representative at this period and he indicated that he was clearly aware of the possibility of instituting tribunal proceedings at the time but consciously chose not to do so. In our view, those factors led us to the conclusion that it was not just and equitable to extend time to enable the Claimant to pursue his claims against the Second and Third Respondents and therefore that his claims against those Respondents should be dismissed.

43. Turning to the assessment of the substantive claim against the First Respondent, we reached the following conclusions. We considered that the Second Respondent's action in saying to the Claimant "Excuse me big gorilla" did amount to unwanted conduct related to the Claimant's race. We noted the submissions made by both Respondents' representatives that the mere use of the word "gorilla" in the presence of a black person would not be sufficient to relate that conduct to race, but considered that, in the circumstances of our finding that the words used by the Second Respondent were as asserted by the Claimant, and in the circumstances where the Second Respondent was seeking to pass the Claimant in a physically limited space, we had no hesitation in concluding that the words used were related to the Claimant's race. Similarly, we had no hesitation in concluding that making such a comment would amount to unwanted conduct.

44. We then needed to consider whether the conduct had the purpose or effect of creating an intimidating, hostile, degrading, humiliating or offensive environment for the Claimant. As noted in our findings above, we did not consider that there was any malice or intent behind the Second Respondent's words, and that he uttered them inadvertently. We therefore did not consider that there was any *purpose* behind that conduct. We did however consider that the conduct had the *effect* of creating the relevant environment. In this regard, and taking into account the issues set out in section 26(4)(a) EqA, we observed that the Claimant clearly perceived that he had been the recipient of unwanted conduct related to his race and that this had caused the creation of an offensive environment for him. Also, in the circumstances, we were satisfied that it was reasonable to consider that the words used by the Second Respondent would indeed have the required effect.

45. Of course, our conclusions in relation to these issues related to the Second Respondent's conduct and we therefore needed to consider whether the First Respondent could be considered to be liable for that conduct.

46. The First Respondent's representative submitted that we should not consider that any such liability arose. We considered closely the provisions of section 109 EqA and in particular section 109(2) which notes that anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal. Section 109(3) goes on to note that it does not matter whether that thing is done with the principal's knowledge or approval.

47. We observed that the Employment Appeal Tribunal in the case of Mahood v Irish Centre Housing Ltd (EAT 0228/10) noted that an employer's vicarious liability for the acts of an agency worker could arise in two situations: either where an employment contract could be implied between the employer and the agency worker under the principles outlined by the Court of Appeal in James v London Borough of Greenwich [2008] ICR 545, or where the agency worker was acting as the employer's agent within the meaning of what is now section 109(2) EqA.

48. We did not see that there was any indication that an employment contract could be implied between the Second Respondent and First Respondent. However, we were satisfied that the attendance by the Second Respondent to work at the First Respondent's premises alongside the First Respondent's own employees meant that there was a relationship of agent/principal between the First Respondent and Second Respondent and therefore that the First Respondent was liable, pursuant to section 109(2), for the acts done by its agent, i.e. the Second Respondent, in the course of his work. As we have noted, section 109(3) notes that it does not matter whether what is done by the agent is done with the principal's knowledge and therefore, even though the First Respondent did not in any way approve of the Second Respondent's comment, or indeed even know that the Second Respondent was going to make the comment that he did, it could be liable for his action. Looking at the section as a whole, we considered that had such a comment been made by one of the First Respondent's own employees, then it would have been vicariously liable under section 109(1) and we did not see any reason to apply different considerations to the agent/principal relationship under section 109(2).

49. Notwithstanding our conclusions on the potential liability of the First Respondent in relation to the racial harassment that we concluded took place in May 2014, we needed to consider whether they formed part of a course of conduct, taken with the issues of December 2015. In this regard, we formed the same conclusion as we did in relation to the application of the relevant time limit and, for the reasons set out at paragraphs 35 and 36 above, considered that the First Respondent's actions, or perhaps more accurately its omissions, following the commitment given to the Claimant in his letter dated 24 June 2014, meant that the conduct that occurred in May 2014 formed part of a course of conduct extending over a period up to and including December 2015. We considered that it was all part of the same whole and that the First Respondent's failure in December 2015 to honour the commitments it had given the Claimant in June 2014 was part of the same act of racial harassment. We concluded that the course of conduct

amounted to unwanted conduct related to the Claimant's race which had the effect of violating his dignity or creating an offensive environment.

50. In that regard, we also concluded that there was an alternative basis for us to reach that conclusion, which was on the basis that the action taken by the First Respondent in December 2015, or again perhaps more accurately, the failure that arose on the part of the First Respondent in December 2015, was itself an act of racial harassment which derived, in terms of the factual background, from the 2014 incident. By this analysis, we concluded that the unwanted conduct was the failure on the part of the First Respondent to prevent the Second Respondent from attending at the relevant sites, or to remove him from those sites following the fact of his attendance. This contravened the commitment given by the First Respondent to the Claimant in June 2014 and therefore we concluded that that conduct, building on the initial incident in May 2014, had the effect of violating the Claimant's dignity or creating an offensive environment for him. Again, we concluded that there was no intent or *purpose* on the part of the First Respondent to violate the Claimant's dignity or create the offensive environment but we considered that the Claimant clearly perceived that his dignity had been violated and an offensive environment had been created and, in the circumstances of the nature of the initial incident and the commitments given by the First Respondent to the Claimant, which it had failed to abide by, we considered that it was reasonable to conclude that the conduct in December 2015 would have had the relevant *effect*.

51. Ultimately therefore on both those bases, we considered that the First Respondent had harassed the Claimant on the ground of his race.

Remedy

52. Turning finally to remedy, we noted the longstanding direction as set out in the case of Vento v Chief Constable of West Yorkshire Police (No 2) [2003] IRLR 102 that we needed to consider which of three bands of potential awards our award should fall within. We also noted that the particular bands had been increased since the Vento case in line with inflation. We noted that the assessment of awards for injury to feelings were compensatory and not punitive and we should consider all the factors in the case. We noted that the Court of Appeal in Vento had noted that the top band should be used for the most serious cases, such as where there has been a lengthy campaign of harassment; that the middle band should be used for serious cases which do not merit an award in the highest band; and that the bottom band should be used for less serious cases such as a one-off incident or an isolated event.

53. We concluded that in this case, we were looking at an award which would fall within the bottom band as there had only been the one-off initial incident of the Second Respondent's comment in May 2014 and then the First Respondent's failure to prevent the Second Respondent from returning to work in December 2015, which we felt fell within the

parameters of the bottom band. We noted that the bottom band currently goes up to £6,600.00, although there is still judicial debate as to whether that figure should be increased to a slightly higher sum.

54. In considering where within the band we felt our award should lie, we noted that the Claimant had suffered some periods of ill health, generally described as post-traumatic stress disorder, following the incident in 2014 and again in 2016. However, we noted that the Claimant had returned to work within a relatively short period and we also noted that, in relation to the events of 2015, despite observing that the Second Respondent was in work on two occasions in December 2015, the Claimant had not complained about the Second Respondent's presence until January 2016 and that he had continued to work during December and indeed had, along with, we presumed, a significant number of the First Respondent's employees and the agency workers working at the First Respondent's premises, worked overtime in December 2015 which would only have increased the potential for the Claimant to have come across the Second Respondent at that time.

55. Overall therefore we felt, doing the best that we could, that it would be appropriate to position our injury to feelings award to the Claimant approximately in the middle of the lower Vento band and concluded that an award of £3,000.00 would be appropriate.

56. We then considered the application of interest to that award pursuant to the Employment Tribunals (Interest on Awards in Discrimination Cases) Regulations 1996. Regulation 6(1) notes that in the case of awards for injury to feelings interest shall be calculated for the period beginning on the date of the contravention or act of discrimination complained of and ending on the day of calculation.

57. As we have noted above, the evidence in relation to the attendance by the Second Respondent at the First Respondent's site in December 2015, which led to the First Respondent's failure to honour its commitment given to the Claimant, was not clear and no party was able to put a precise date on it. All parties appeared to agree however that it was shortly before Christmas 2015.

58. We therefore considered it appropriate to apply interest from 20 December 2015 up to the date of our conclusion on remedy, 3 May 2017, which, without intention, neatly led to a period of 500 days. Applying the required interest rate of 8%, this led to an order that interest in the sum of £328.77 should be paid in addition to the sum ordered in respect of injury to feelings.

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Employment Judge S Jenkins

Date: ……22 May 2017……

Judgment and Reasons

Sent to the parties on: .....

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For the Tribunal Office