



EMPLOYMENT TRIBUNALS

Claimant: Mr L Busca

Respondent: Rygor Group Limited
Mr Terry Craven
Mr Christopher Baker
Mr Sean Joyce
Mr Ross Heffernan
Mr Nigel Clear

Heard at: Reading **On: 26, 29, 30 November, 1, 2,
and 3 December 2021**

Before: Employment Judge Gumbiti-Zimuto
Tribunal Members: Ms A Brown and Mr F Wright

Appearances

For the Claimant: Mr P Wilson, Counsel

For the Respondent: Mr J Tunley, counsel

JUDGMENT

1. Upon the application of the claimant Mr Nigel Clear is added as a party to the proceedings.

REASONS

1. In claim forms presented on the 25 November 2019 and 27 January 2020 the claimant brings complaints of unfair dismissal, race discrimination, harassment, victimisation and unlawful deduction of wages or breach of contract. The respondent defends the claims.
2. The claimant was assisted by an interpreter in the Romanian language.
3. At the start of proceedings, the claimant made an application to join Nigel Clear as a party to the proceedings. The claimant originally issued a claim against Nigel Clear in the Watford Employment Tribunal. The claim was rejected because the claimant had failed to comply with the requirements for early conciliation relating to Nigel Clear. The claimant at the same time presented in similar terms a claim against the other five respondents which were accepted. The claimant re-issued a claim against Nigel Clear at the Employment Tribunal in Bristol. The Bristol claim was transferred for hearing together with the other claims at the Reading Employment Tribunal.

4. The claimant set out the basis of his application in an email of 28 February 2020 (p125) and written submissions dated 3 September 2020 (p150).
5. The claimant referred to some key dates: the presentation of the claim on the first occasion on 25 November 2019 (the claim been accepted it would have been in time). The second date is 18 December 2019 when the time limit extended Early Conciliation expired, and finally 27 January 2020 when the second claim was presented. The claimant asked us to approach the application by considering whether it is just and equitable to extend time for the presentation of complaints to the later date.
6. The claimant states that there was a mistake made when the claim was first presented, the intention was always to bring proceedings against Nigel Clear but due to an error in the Early Conciliation Certificate (ECC) number included in the ET1 form the claim was rejected. Nigel Clear and all the other respondents have always understood that the claimant's intention was to bring proceedings with Nigel Clear included as a respondent and it is evident from the trial bundle that Nigel Clear presented his response on the 5 February 2020 intending it to stand as a response to the first case and to the second case. It is submitted by the claimant that the prejudice to the claimant, if we extend time, when compared with the prejudice to the respondent is greater to the claimant. Nigel Clear will face a claim that he would have had to defend but for procedural error by the claimant, in respect of which any delay, other than the fact of the delay between 27 January 2019 and 5 February 2019 itself, has not prejudiced his ability to defend the claim. Nigel Clear will in any event be a principal witness in the case of the first respondent, he is an alleged perpetrator in some of the claimant's allegations of race discrimination.
7. The respondents agree that the question we must consider is whether it is just and equitable to extend time as the relevant claim form was presented out of time. The respondents contend that there is no prejudice to the claimant in refusing the application to extend time because he has a remedy against the first respondent and all he has lost is the possibility of bringing the claim against Nigel Clear personally.
8. We consider that it is just and equitable to extend time. We approached the matter by considering where the balance of prejudice lies, whether for or against allowing the application to amend the claim.
9. The factors we have taken into account are the following. The claimant obtained a ECC for the claim and attempted to commence the claim. The intention was to commence the claim against Nigel Clear and others, but an error resulted in the claim being rejected. On the 10 January 2020 the claimant was informed that the claim had been rejected; by that date time for presentation of a complaint had expired. The claimant issued a new claim on 27 January 2019 in Bristol. The delay from 10 January to 27 January has not been explained but we do not consider that this has

resulted in any prejudice to the respondent. The proposed respondent has been aware that a claim was being made against him for a long time, there is no question of the proposed respondent, or the other respondents being taken by surprise. The proposed respondent has filed a response, so far unnecessarily to the first claim at the same time as the other respondents. On the basis of the claimant's allegation Nigel Clear is a key figure in the discriminatory conduct which the claimant complains of. Nigel Clear will be a participant in the proceedings as a witness in any event. Nigel Clear and the first respondent, the employer, do not have any conflict of interest. The first respondent does not rely on the statutory defence, so the claimant's claim will succeed or fail irrespective of whether Nigel Clear is a party to the proceedings or not. Nigel Clear has been in a form of limbo not knowing whether he is to be a party to the proceedings or just a witness for some time but that is not a matter that is relied on as having caused him prejudice in respect of presenting a defence to the claim.

10. Having regard to all the circumstances of this case in particular the matters set out above we consider that it is just and equitable to join Nigel Clear as a party to the proceedings because we consider that there is little or no prejudice to the respondents or proposed respondent in doing so. While denying the application will deprive the claimant of the possibility of a remedy against a principal discriminator against him.
11. The claimant gave evidence in support to of his own case and was supported by the evidence of Sahid Hussain and Mark Legister. The respondents, Terry Craven, Chris Baker, Sean Joyce, Nigel Clear and Ross Heffernan gave evidence in support of their defences to the claims and that of the first respondent. Additionally, the respondents relied on the evidence of Brendan Sajoe. We have been provided with an agreed bundle of documents of 319 pages of documents. From these sources we made the findings of fact set out below.
12. The issues to be decided in this case were set out in an agreed list of issues (p143-149).
13. The claimant was employed by Rygor Group Limited ("the respondent") as a Technician Mechanic on a salary of around £35,000 a year. The claimant's work involved repairing and maintaining Mercedes motor vehicles. The claimant and individuals named as respondents were all employed by the first respondent at Heathrow.
14. The claimant's witness statement includes the following passage:

"I listened to daily comments about Brexit by Terry Craven who was encouraged or egged on by Chris Baker, Sean Joyce, Nigel Clear, and Ross Heffernan ... Chris, Sean, Nigel and Ross would laugh at the comments and made no attempt to stop him. Other white English workers in the garage would also laugh at the offensive comments. ... The comments

included: *“all the foreigners should pack up and leave England, England for the English or they should be put in the Sahara where there is no water” or “let’s put all the fucking foreigners in a ship to leave England because it should be only the English that are here”*. These types of comments were made from the beginning of my employment right up to the date that I was signed off from work on 20th August 2019. This was a clear case of race discrimination and harassment which made me feel uncomfortable at the Company. I would mention it to Chris Baker who was the senior line manager ... and he said he would have a word with the individuals referred to above but nothing changed. I believe that HR was aware of the comments being made but took no action despite the comments being not political but racist with the intention to upset and make fun of foreigners including myself. This was an act of race discrimination. I felt uncomfortable but would not say anything to Terry as it would have only made it worse for me and others so I had to suffer in silence.”

15. The respondent’s witnesses all denied that comments as suggested by the claimant were made. “I cannot recall any specific time or place that the claimant may be referring to and certainly never heard or said any of the suggested quoted paraphrases mentioned” (Terry Craven). “There were discussions about Brexit at the time, but nothing came to our attention which was discriminatory against the claimant” (Sean Joyce). “I never heard anything said of this manner in the workplace. There clearly must have been conversation as there would have been at the time anywhere in society around what was happening with Brexit, but nothing I heard was racially motivated or malicious” (Nigel Clear). “I have never heard these allegations, nor have I heard any racially motivated comments like this. I am not English, and I would have also found this very offensive myself” (Ross Heffernan). “It has been alleged that supervisors and white colleagues would make loud racial comments during the Brexit news on the radio... I never heard anything like this. If I was aware or heard this... I have never and would never engage or condone conversations of such a nature and would have immediately addressed it” (Chris Baker).
16. Sean Joyce gave hearsay evidence that it was the claimant who was reported, by a colleague, as having stated to another member of staff who was not British that he should “pack his bags and go home”.
17. The claimant’s witness Sahid Hussain attended to give evidence after a witness order was issued requiring his attendance. A draft witness statement was prepared for him by the claimant’s solicitor. The statement was prepared following a telephone conversation with the claimant’s solicitor. Sahid Hussain saw the draft statement for the first time when he arrived at the employment tribunal. The draft statement provided to him

was extensively amended by him with substantial portions of the prepared draft struck out by him.

18. While the original version of the statement had a section on “Comments about Brexit”. The signed copy of witness statement he gave to the Tribunal did not contain any evidence about Brexit. In his live evidence when asked about the fact that the portion of the statement which referred to Brexit was struck out Sahid Hussain responded by saying “*They always talk about Brexit*”.
19. The Tribunal is satisfied that there were discussions and comments about Brexit. We are not able to conclude that the comments and discussions were taking place in the way that the claimant alleged. In coming to this conclusion, we rely significantly on the fact that Sahid Hussain while accepting that there were discussions about Brexit was not willing to go so far as to say that the nature of those discussions was as the claimant alleged, racist comments as opposed to opinions and comments around Brexit expressed at times in a provocative manner.
20. The claimant contends that he was called derogatory names, such as immigrant and foreigner, from the commencement of his employment until he was signed off from work on 20 August 2019. The claimant gives details of one incident that occurred on the 5 April 2019 in support of this aspect of his case. Sahid Hussain gave some evidence about how he was treated by work colleagues:

6. Since working at the company I have been called numerous names such as “paki” “fxxng Indian”, Saddam Hussein, idiot, immigrant, foreigner etc... The people who called me those names include Terry Craven, Nigel Clear, and other technicians *Jamie/Jason/Dave**. Nigel Clear in particular has been cruel and derogatory with his comments calling me fxxng paki more than the rest of them and is quite hostile towards me. *Not anymore – 1 year has lessened over 2021, but I still feel uncomfortable around these people because comments are still passed**.

7. In about 2017 Terry Craven, hit me for no good reason. He called me a fxxng idiot and I asked him not to do so, so he hit me. I reported the matter to my line manager *Nigel/Sean**. Terry later (*5days*)* apologized at the request of *Sean. We don't speak now**.¹

Sahid Hussain also set out evidence of how other non-white British colleagues were referred to including the claimant of whom he said:

11. Before Lucien left the Company in September 2019 I witnessed Terry Craven, Nigel Clear and others

1. * The comments in italics were manuscript additions to the statement made by Shahid Hussain

*Jamie/Jason/Dave** call him foreigner, fxxng Romanian and other such names.

21. Terry Craven stated that he worked on the day shift and could start work from 6am, he accepted that there were occasions when there was overlap with the claimant's night shift finishing, and the day shift starting. Terry Craven denied knowledge of the claimant's nationality, he thought until recently that the claimant was from Lithuania.
22. The account given by the claimant and Sahid Hussain was challenged by the respondents. Terry Craven accepted that he made passing comments on Brexit that were not aimed at anyone in particular, he says that he laughed and joked with the claimant about Brexit. Terry Craven denied making any racist comments and said that he would not do this, his wife is not British. Terry Craven denied the version of events given by Sahid Hussain. The incident was a heated argument, there was no name calling, there was no racial motivation, he might have said "fuck off"- otherwise he denied the account given by Sahid Hussain. The incident occurred when he asked Sahid Hussain to move a vehicle, there were raised voices, Sahid Hussain came towards him and he pushed him away, Sahid Hussain did not fall over but went backwards.
23. Nigel Clear said the evidence was "*Not true*". In respect of comments alleged to have been made about another colleague, Ross Heffernan said of Sahid Hussain's evidence, "*I cannot understand where that statement comes from*".
24. Sean Joyce stated that Sahid Hussain had told him that he felt "*uncomfortable in work and in society*". Sean Joyce spoke about how posters were put on the wall about equality and inclusion. This appears to have occurred after the alleged incident between Sahid Hussain and Terry Craven. Sean Joyce was also aware an incident involving Sahid Hussain and another colleague. On this other occasion Sahid Hussain was referred to as "*not that cunt*" but Sean Joyce denied knowledge of any racist language being used. Sean Joyce accepted that he worried about the potential racism and for an employee (Sahid Hussain) who was uncomfortable at work.
25. The conclusion of the Tribunal is that it is likely that from time-to-time offensive comments would have been made on occasion by some of the claimant's colleagues, these comments were of a racially derogatory nature as set out above, including calling the claimant an immigrant, foreigner or referring to him and his Romanian nationality in a derogatory manner such as "fucking Romanian" and "Romanian cunt".
26. The claimant makes a specific complaint about an incident on the 5 April 2019. The claimant says that on 5 April 2019 Nigel Clear called him a "Romanian cunt" and that this occurred in front of others whom he names. The claimant describes Nigel Clear marching up to him in a very threatening way and pushing him on both shoulders forcing him to move

backwards with the force of the push nearly causing him to fall to the ground. The claimant says that Nigel Clear told him to *“get out of the gates with my toolbox or else he would push me with my toolbox out of the gate”*. The claimant says that the conduct by Nigel Clear was triggered by the claimant enquiring about overtime pay.

27. Sahid Hussain did not witness the incident but stated that the claimant told him what happened at the time.

“Nigel swore at him and called him a Romanian Cxxt, and hit him. Lucien was very upset and distressed by this.”

28. Nigel Clear, Night Shift Supervisor, denies the claimant’s version of the incident. Nigel Clear says the allegation was fabricated by the claimant in retaliation for not being allowed to claim the unwarranted overtime. Nigel Clear says that on 5 April 2019 he

“confronted the claimant about some overtime he had recorded and that could not be substantiated as I knew he was not physically in work at the time”.

This led to an argument and raised voices as the claimant took offence to being questioned. Nigel Clear says that

“I did not lay a hand on the Claimant or push him in any way shape or form, nor did I call him what he said I called him (“a Romanian cunt”). This is completely untrue... I agree that things got heated but as I said, I never pushed him and I never called him a derogatory name as alleged. I don’t know why the Claimant has fabricated this allegation.”

Nigel Clear’s account however is not correct in so far as he says, “I did not lay a hand on him”, a colleague reported that Nigel Clear had pushed the claimant on the shoulder during this incident.

29. The claimant states that the incident was reported to Chris Baker on the day. Chris Baker denies that the incident was reported to him. This incident was part of an investigation carried out by Brandon Sajoe in September 2019 where Brandon Sajoe preferred the account given by Nigel Clear to that of the claimant whom he concluded could have exaggerated the incident and made up the allegation (that he was called a “Romanian cunt”) “to entrench his position”.

30. On 8 April 2019, the claimant spoke to HR and reported what had occurred. Later that day the claimant spoke to Sean Joyce who told the claimant that the incident would be investigated. Sean Joyce made no note of the conversation with the claimant but does observe that the claimant *“was clearly upset”*; in cross examination he described the claimant as *“emotional”* during their telephone call. Sean Joyce also took the action of moving Nigel Clear, the night shift supervisor, to the day shift.

In the course of his evidence to the Tribunal Sean Joyce stated that he could not remember exactly what the claimant told him. Sean Joyce did recall that the claimant said to him that he was assaulted and that he thought it was because he was Romanian. Sean Joyce did not remember the claimant saying that he was called a “Romanian cunt” at that point. Sean Joyce recalled that the claimant was however emotional when he spoke to him.

31. Sean Joyce and Chris Baker spoke on the 8 April 2019 after the claimant had spoken to Sean Joyce. There is no contemporary record of the conversation. The conversation is not addressed in the witness statements of either Christopher Baker or Sean Joyce. In cross examination Christopher Baker said that when he spoke to Sean Joyce on 8 April 2019 Sean Joyce, after speaking to the claimant, said that there was a “clock incident and that Nigel pushed the claimant.” When it was put to him that this was a racial incident Christopher Baker said, “*Not initially only later became aware that it is alleged that it was a racial incident*”.
32. By 8.41am on 9 April 2019 Christopher Baker is reported by Sean Joyce to HR as having “*spoken to everyone this morning about equality and discrimination*” (p181). Sean Joyce was that morning having email exchanges with HR in which mention was being made of “harassment and victimisation” and the respondent’s equal opportunities policy. Christopher Baker said in cross examination that by 8.41am he had spoken to all of the day shift individually but could not remember precisely what he said to them, but he would have discussed the equal opportunity policy and said that if anyone heard anything it should be brought to the manager’s attention. Christopher Baker was unable to say on whose initiative it was that he spoke to everyone, when asked why he did so and why there was an element of urgency his response was, “*Why leave it – if allegation of race discrimination- no reason to delay if something needed to be brought to attention it needed to be brought to our attention then*”.
33. The actions taken on the 9 April 2019 were in response to the claimant’s report to Sean Joyce. It is the view of the Tribunal that whatever the claimant told Sean Joyce, and whatever he reported to Christopher Baker it was such as to cause him to speak to all of the day shift and to stay late to speak to the night shift about “equality and discrimination”. We consider that it is likely that the claimant did, as he stated in his evidence, tell Sean Joyce that he had been assaulted by Nigel Clear and that Nigel Clear had referred to him as “Romanian cunt”.
34. The claimant was to meet in person with Sean Joyce on 9 April 2019, however the claimant did not attend work, the claimant says that he did not go to work because “*I was so depressed by what happened*”.
35. The claimant and Sean Joyce exchanged text messages. Starting with Sean Joyce asking the claimant to “*give me a call when you are free and awake*”. The claimant replied “*tom(orrow) 9 o’clock I will be ther (sic) to drop the charges to have a talk cause I was in deep depression.*” Sean

Joyce's response was *"OK pal speak tomorrow"*. The claimant in his witness statement explains that he was *"depressed by everything"* and *"knew that a fair outcome would not occur as the discriminators were not going to find in my favour"*.

36. The claimant met with Sean Joyce and Nigel Clear on 10 April 2019. The claimant describes the meeting as follows

"Sean Joyce encouraged me not to take matters further and said that I was doing the right thing in dropping the grievance. Sean Joyce even had me shake hands with Nigel and promised that things would move on and that I would not be treated badly for having raised a grievance. ... I confirmed that I would be dropping the charges against Nigel. ...

On the same day Sean called a meeting for everyone to attend and said that the company operated an equal opportunities policy and that there was not to be any form of discrimination.

37. The claimant's version of events is similar but not the same as that given by Sean Joyce. Sean Joyce's account is

8. The next morning on 10 April 2019, I received a text from the Claimant asking me if he could come in and talk to me as he had been dealing with a lot of stress and issues in his personal life and that he wanted to drop the issues he had raised. I agreed and met with him that day at his request and as per the text message, not at my request.

9. At this meeting he proceeded to explain about how he was feeling and the stress in his life had over-taken him. I asked him if he was ok and was empathetic and calm and we had a long reasonable conversation where we discussed outside help and I explained that we had an employee assistance program and I could provide details for if he needed it, but he didn't respond.

10. We arrived at the point where I felt I could ask the Claimant if it was ok to bring Nigel Clear into the meeting, and he responded 'yes'. Nigel came in and we had a fair three- way conversation where everyone agreed they would move on amicably. At no stage was Nigel asked to confirm or deny any of the allegations, as it was clear the Claimant wanted to move forward and retract his allegations. I categorically deny forcing any handshake between the Claimant and Nigel Clear, I do not recall if they shook hands or not.

11. My final conversation was 'are we ok to continue working together' and they both said yes. Nigel Clear continued on dayshift for the rest of the week, so not to disrupt his sleep pattern. As far as I was aware, they would both continue to work as normal from the following week onwards.
38. The account given by Sean Joyce in his statement includes at paragraph 12 reference to a letter dated 12 April 2019 (p207). This letter misrepresents the meeting that took place on the 10 April 2019, and purports to conclude the claimant's grievance as though it was investigated when in fact it was not as the matter was withdrawn by the claimant. Further the claimant denies that the letter was ever received by him.
39. It was put to the claimant that the reason he dropped the grievance was because it was not true. The claimant denied this stating that the reason he dropped the grievance was because he did not trust Sean Joyce or Christopher Baker to consider his grievance fairly, in his view they were corrupt. The claimant stated that he wanted HR to investigate his grievance: the claimant also stated that he did not trust HR.
40. The claimant complains that following the meeting on the 10 April 2019 he was subjected to a campaign of less favourable treatment, harassment and micromanagement. The claimant says that he was ignored by his colleagues and given more difficult jobs to do. The claimant complains that he was given excessive workloads by Christopher Baker, Nigel Clear and Ross Heffernan.
41. The claimant says that he was criticised for the quality of his work when there was nothing wrong with the work. How he carried out his work was criticised when nothing was wrong with it. There was constant fault finding in front of work colleagues with the aim of belittling him. The criticism about his work was unfair and false, the criticism was due to his raising a grievance against Nigel Clear alleging race discrimination and harassment.
42. Sean Joyce states that following the meeting on 10 April 2019 Nigel Clear and the claimant agreed to move on amicably. Sean Joyce was made aware that the claimant was quiet and not interacting much with any of the team and noticed a change in the claimant after the incident with Nigel Clear. Terry Craven says that he saw no change in the claimant after the incident on the 5 April.
43. Nigel Clear denied that after April he "constantly and oppressively" monitored the claimant's work. Nigel Clear denied that he gave the claimant heavy work changing clutches. The claimant did not like being challenged about paperwork and there was an occasion when Nigel Clear had to challenge the claimant about working on his car during work time.

Nigel Clear said that there was no difference in the relationship he had with the claimant and others had with him. He stated that he was not aware of anyone behaving any differently to the claimant, though he did say that “people may have been a bit quieter with each other as they were aware something had happened but nothing specific to the claimant.” Nigel Clear denied that the claimant had been sent to Coventry “maybe people were quiet around him, after the incident people keep quiet, the claimant was not sent to Coventry”.

44. The conclusion of the Tribunal is that it is more likely than not that the claimant was treated differently by colleagues after he raised his complaint about the incident on 5 April. We consider that the claimant may have been ignored by colleagues in some instances. As to the suggestion that the claimant was given more work or dirty work, we are not satisfied that the evidence allows for such a conclusion. The incident between Nigel Clear and the claimant may have left the claimant feeling vulnerable and therefore perceiving that he was being more severely scrutinized by Nigel Clear but in our view the evidence does not support this.
45. The claimant’s father fell ill, and the claimant wanted to take leave to go on a visit him in Romania. There was an issue about the claimant’s leave and a suggestion that the claimant could not take leave, he says that he was told to take sick leave. This was cleared up and the claimant was able to take leave to visit his father. The claimant complains that on his return he was not paid for two days for which he should have been paid. In the course of answering questions in cross examination the claimant appeared to make the concession that he was not paid for just the one day, 9 July 2019. The claimant was shown payslips which appeared to show that he was in fact paid for this day. It was not clear whether the claimant was still maintaining that he was not paid but the evidence the claimant accepted appeared to show that the claimant had been paid.
46. The claimant asked to move from night shift to the day shift and this request was granted. The claimant only lasted on the day shift for the period from 10-13 July 2019. The claimant complains that this was because of the way that he was treated by Ross Heffernan. The claimant says that when he raised the fact that he was being subjected to harassment with Christopher Baker, he was told that it was because he had raised a grievance. Sean Joyce said that there is more pressure working on days, this comes from contact with clients wanting to discuss progress and asking for updates on work.
47. We consider it unlikely that Christopher Baker would have said to the claimant that his treatment by Ross Heffernan was because he made a grievance. We are not satisfied that Ross Heffernan mistreated the claimant. We accept the evidence given that there is more pressure on the day shift caused by more interaction with clients than on the night shift.
48. On the 20 August 2019 the claimant was signed off sick with stress (p223). The claimant was due to return to work on 6 September 2019.

49. The claimant did not return to work on the 6 September 2019. The claimant resigned his employment. The claimant's resignation came in an email from his legal representatives. The email contained the following passage:

We are instructed to confirm that as a result of the treatment that has been afforded at work he is tendering his resignation with immediate effect and regards himself as constructively dismissed, as the position at work is intolerable. (p225)

The claimant's legal representatives then sent a longer email letter setting out the claimant's grievance. (p227) The claimant gave evidence that he had been looking for new employment from about April to August 2019.

50. The claimant's grievance was investigated by Brandon Sajoe. His conclusion was to reject the claimant's grievance. The claimant criticises the investigation by Brendan Sajoe, in particular that he failed to speak to Sahid Hussain. Brendan Sajoe explained that Sahid Hussain declined to be involved in the grievance investigation.

51. Sahid Hussain gave a different account stating that he spoke to Sean Joyce about the discrimination faced by the claimant. Commenting on the email from Sean Joyce to Brendan Sajoe (dated 25 September 2019) p295, that begins with the statement that Sahid Hussain did not want to be involved, Sahid Hussain made the point that *"I did give a statement"*. Sahid Hussain said he told Sean Joyce that, *"I mentioned to him he (the claimant) is working hard but he is weak on paperwork. Other people not speaking him the right way - did not talk about that much – Sean Joyce said how we going to improve. ... He (Sean Joyce) started do you know about Lucian's case? I said not much but I heard. He (Sean Joyce) said what happening in the Worksop I said I am uncomfortable in the workshop, and I am facing this issue"*. In reexamination Sahid Hussain was asked "what was missing from p295?" His response was, *"Talk about treating people equally the right way. Should not talk about other country other colour. Racism everywhere not just the workshop, everywhere. A lot of things missing, they did not give me my statement so that I can sign it."* The respondent's contention that Sahid Hussain was unwilling to participate in the grievance investigation by Brendan Sajoe in our view is not correct. Brendan Sajoe made no effort to speak to Sahid Hussain personally but merely relied on what was reported to him. Had Sahid Hussain been spoken to his account was likely to lend support the claimant's account about the atmosphere in the workshop. The Tribunal conclude that Sahid Hussain was kept away from Brendan Sajoe for that reason and his account was provided in an edited version that did not contain all that he said to Sean Joyce.

52. In his witness statement the claimant says that

"I was also concerned about the failure of the Company in providing safety helmets for the repair pits and for not taking action in respect of a broken light and its loose wire that was left lying on the floor in the repair pit. I had raised this with Nigel and the Company over a number of months but nothing was done, all they kept saying was it would be fixed. It was dangerous particularly if the floor of the pit got wet."

The respondent's witnesses asked about this all stated that the broken light in the pit had been isolated and so posed no danger to anyone. Christopher Baker additionally stated that the issue of the pit light and the helmet had never been raised with him by the claimant. He was aware of the pit light, and it was isolated so safe, had the claimant requested a helmet he would have provided the claimant with one even though it was not standard PPE.

Law

53. Section 13 of the Equality Act 2010 (EqA) provides that, "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". Section 23 (1) EqA provides that, "On a comparison of cases for the purposes of sections 13, 14 or 19, there must be no material difference between the circumstances relating to each case."
54. Igen v Wong [2005] EWCA Civ 142 considers the application of the provisions concerning the burden of proof, section 136 (2) and (3) EqA which provide that, "(2) If there are facts from which the court could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred. (3) But subsection (2) does not apply if A shows that A did not contravene the provision".
55. The claimant must show that a protected characteristic may or could have been the reason for the treatment alleged. Something more than a difference in treatment or status and a difference in protected characteristic is required.
56. The respondents' explanation for any treatment should be considered at the second stage of the exercise. The Tribunal may take into account all of the factual evidence at the first stage, but ignore explanations or evidence as to motive within it (Madarassy v Nomura International plc [2007] EWCA Civ 330).
57. Section 26 EqA requires consideration of whether or not a person engaged in unwanted conduct and, second, whether any proven conduct is related to the relevant characteristic. Thirdly, the Tribunal must consider whether that conduct had the purpose, or if not whether it had the effect, of either violating the claimant's dignity or whether it has purpose or effect of

creating an intimidating; hostile; degrading; humiliating or offensive environment for the claimant.

58. In order to decide whether any conduct falling within sub-section 26 (1)(a) EqA has either of the prescribed effects under sub-section (1)(b), the Tribunal must consider both whether the victim perceived the conduct as having had the relevant effect and (by reason of sub-section 26 (4)(c)) whether it was reasonable for the conduct to be regarded as having that effect. The Tribunal must also take into account all of the other circumstances (s. 26(4)(b)).
59. Section 27 EqA, provides that the claimant must prove that he has carried out a protected act and that he has been subjected to detriment because of doing the protected act or acts.
60. The test of causation under section 27 requires consideration of whether the claimant has been victimised 'because' he had done a protected act. The protected act has to have been an effective cause of the detriment, but it does not have to be the principal cause. It has to have been the act itself that caused the treatment complained of, not issues surrounding it.
61. Any act or omission which took place more than three months before 9 July 2019, is out of time. The claimant must show, in respect of matters before that date, prove that they were part of a course of conduct extending over a period of time and ending after that date, or persuade the Tribunal that it would be just and equitable to extend the normal time limit.
62. In a claim of constructive dismissal, four conditions must be met:
- (1) There must be a breach of contract by the employer. It is not enough for an employee to resign merely because the employer has acted unreasonably (Western Excavating (ECC) Ltd v Sharp [1978] IRLR 27).
 - (2) The breach must be sufficiently serious to justify the employee resigning, or else it must be the last in a series of incidents which justify resignation.
 - (3) The employee must resign in response to the breach and not for some other, unconnected reason.
 - (4) The employee must not delay too long in terminating the contract in response to the employer's breach, otherwise they may be deemed to have waived the breach.
63. The claimant relies on "a breakdown of trust and confidence". The implied term of trust and confidence, namely the term that "the employer shall not without reasonable and proper cause conduct itself in a manner calculated [or] likely to destroy or seriously damage the relationship of confidence and trust between employer and employee" (Malik v Bank of Credit and Commerce International SA [1997] IRLR 462). In considering whether there has been a breach, the employer's conduct has to be considered objectively.

64. In Western Excavating v Sharp [1978] IRLR 27 it was stated that where there is a repudiatory breach, “the employee must make up his mind soon after the conduct of which he complains. If he continues for any length of time without leaving, he will be regarded as having elected to affirm the contract and will lose his right to treat himself as discharged”. Affirmation of the contract may be express or implied. It will be implied if the employee acts in a way which is only consistent with the continued existence of the contract.

Parties’ submissions

65. The claimant submits that there are three key issues. Whether Nigel Clear assaulted the claimant; whether in doing so he called him Romanian cunt; whether throughout working for the first respondent the claimant was subjected to comments about Brexit as the claimant alleges. Four times the claimant complained that he was subjected to discrimination. The conclusion on these matters, the claimant says, are determinative. If the Tribunal accept what the claimant says the conclusion to be drawn is that the respondents, who are principal protagonists, have not told the truth. There was an altercation and no investigation contemporaneous to the events on 5 April. The claimant submits that the evidence of Sean Joyce and Christopher Baker should be treated with caution because they both say that initially they were unaware that it was being alleged that racially abusive language was used towards the claimant. However, Nigel Clear about whom the allegations were being made was aware that it was being alleged racially abusive language was used. The respondents conceded that the claimant said he was assaulted because he was Romanian, but this does not make sense. It is more likely he would have explained to Sean Joyce, Christopher Baker and Lyn Pasco (HR) that he was being racially abused.

66. About the claimant withdrawing the allegation made against Nigel Clear, the claimant says this is explained by the fact that the people who condone the abusive and racist environment Sean Joyce and Christopher Baker are the persons tasked with investigating the claimant’s complaint of being assaulted and racially abused. Although Nigel Clear was moved from the night shift, where he was supervisor, to the day shift without demur suggests that it is more likely than not that the claimant’s account is correct.

67. The claimant says that we should attach significant weight to the account given by Sahid Hussain, who continues to be employed by the respondent. The fact that Sahid Hussain came to the employment tribunal to give evidence and the difficult position his evidence puts him in with the respondent means he is not likely to come to the employment tribunal and lie about what had happened.

68. There was little evidence of training or awareness of equal opportunities.

69. As for constructive dismissal it is said that there was direct discrimination

(assaults), victimisation (claimant's treatment after 5 April incident), harassment (Brexit comments). The claimant states that Sean Joyce turned a blind eye to complaints raised by the claimant about the treatment he was subjected to after 5 April incident.

70. The respondent has produced outline submission in writing. The respondent points to several matters which we are asked to conclude reflect poorly on the claimant and bring into doubt his credibility as a witness. We also note the comments about the evidence of Sahid Hussain. We have taken these matters into account in arriving at our conclusions on the evidence given. We do not set out the respondents' submissions further because they were set out in a detailed written document.

Conclusions

71. The claimant is claiming unfair dismissal (constructive dismissal), race discrimination, harassment, victimisation and unlawful deduction of wages/ breach of contract.

72. The claimant alleges that he was called derogatory names such as immigrant and foreigner from the commencement of his employment (28 March 2017) to the claimant being signed off from work on 20 August 2019. The Tribunal found that from time-to-time offensive comments were made by some of the claimant's colleagues, these comments were of a racially derogatory nature, including calling the claimant an immigrant, foreigner or referring to him and his Romanian nationality offensively ("fucking Romanian"), on one occasion at least referring to him as a "Romanian cunt".

73. The Tribunal is satisfied that there were discussions and comments about Brexit, as set out above, we do not conclude that the comments and discussions were taking place in the way that the claimant alleged. While we accept that there were things said about Brexit the nature of those things being said was not as the claimant alleged racist comments but were opinions and comments about Brexit expressed at times in a provocative manner.

74. The Tribunal do not accept that the claimant was bullied after the meeting on 10 April where he withdrew his allegation against Nigel Clear. We have not been able to conclude that the claimant was given unreasonable workloads, the claimant was not denied annual leave to visit his sick father. The claimant was not forced to return to night shifts. The claimant did not ask for helmet and it was not standard PPE for the respondent's employees. The light in the repair pit was broken but it had been isolated so that it presented no danger for the claimant or any other employee of the first respondent.

75. We did not conclude that the claimant was told that life was being made hard for him because he had made a grievance. We did find that the first

respondent did not make any enquires as to the claimant's wellbeing after his grievance in April. We did find that the claimant was isolated by the behaviour of some colleagues following his grievance.

76. The Tribunal has come to the conclusion that the claimant was called "Romanian cunt" by Nigel Clear and further that Nigel Clear assaulted the claimant as alleged by the claimant. The Tribunal prefer the evidence of the claimant on these points to that of Nigel Clear. We found the claimant to be a credible witness who sometimes found it difficult to express himself clearly in English. We note that the claimant had the services of a Romanian interpreter and made use of her skill and understanding at time when answering questions. We note however that the claimant attempted much of the time to give his answers to questions in English and in doing so did it in a way that we found was in our view credible. We considered that Nigel Clear gave a clear account of the principal incident on the 5 April 2019 however we note that it was accepted by the respondent that the claimant complained about being assaulted because he was Romanian. We consider it likely that the claimant was in fact sworn at when assaulted and his account to managers at the time was that he was called "Romanian cunt" in our view is more likely than the claimant saying that he was assaulted because he was "Romanian".
77. For the reasons set out above we have not been able to conclude that the claimant was subjected to comments about Brexit as he alleges. While we are satisfied that comments were about Brexit were made and that such comments were likely to have been made frequently and on occasion in terms that might have been objectionable. We have not been able to conclude that the claimant's characterization of the way these comments were made is established. In reaching this conclusion we have been influenced significantly by the evidence given by Sahid Hussain.
78. The claimant contends that he was ignored by White colleagues after the 5 April 2019 incident. There is some evidence from the claimant on this aspect of his complaints and a denial from the respondents. The Tribunal however note that it was recognized by the respondent that the claimant's demeanor changed after the incident on the 5 April 2019. While Nigel Clear stated that he was not aware of anyone behaving any differently to the claimant, he did say that "people may have been a bit quieter with each other as they were aware something had happened but nothing specific to the claimant" and that "maybe people were quiet around him, after the incident people keep quiet, the claimant was not sent to Coventry". From this we are able to conclude that on balance it is likely that there was some change of attitude towards the claimant and the claimant is correct when he states that he was ignored by White British colleagues.
79. The claimant gave evidence that he was subjected to criticism by his supervisors that this was unfair and constant criticism. We have not been able to conclude that this is established by the evidence. We note that the claimant found some aspect of his duties, involving paperwork, more

challenging and this may have been part of the reason why the claimant moved back to the night shift after having his request for a move to the day shift granted. The respondent's evidence appears to have been that the approach of Nigel Clear as night shift supervisor may have been more benevolent towards the claimant, especially prior to 5 April 2019, than the approach of Ross Heffernan who was on the day shift supervisor. We do not consider that the claimant has established that such criticism as there was of him was constant and unfair.

80. The evidence presented by the claimant and the respondents did not establish that the claimant was initially denied annual leave pay to visit his sick father. The evidence showed that the claimant was paid for his annual leave. There may have been some discussion and confusion or misunderstanding about how much leave the claimant had available to him but otherwise we do not consider that the claimant has established that he was initially refused annual leave pay.

81. The Tribunal is satisfied that the claimant has shown that there was an environment on the shop floor where the language used was at times offensive. The Tribunal is satisfied that the claimant was called "Romanian cunt" and that Sahid Hussain was referred to by a variety of offensive terms. We are satisfied that this would have been known to management as being something that happens, we note in particular that Sean Joyce stated that he was aware of Sahid Hussain being referred to as "that cunt" by a work colleague. When the matters were raised with management (the claimant after 5 April 2019 and Sahid Hussain after the incidents with Terry Craven and the occasion when he was referred to as "that cunt" by a colleague) the approach of management was to seek a rapprochement between the victims and their abusers. The Tribunal is satisfied that there was a culture or environment in this workplace when employees were subjected to abuse including racial abuse that management was aware of. The way that there were hastily arranged discussions with all staff about "equality and discrimination", harassment and discrimination on 9 April 2019 and also the evidence of Sean Joyce that after Sahid Hussain had told him that he felt "*uncomfortable in work and in society*" further illustrate that those in management were aware of what was happening. Sean Joyce accepted that he put posters up on the wall about equality and inclusion. The purpose of this, in our view, was to address inappropriate behaviour which they were aware at times took place.

Constructive and unfair dismissal

82. From the matters set out in the list of issues the Tribunal has found that the claimant was called derogatory names, was called "Romanian cunt", and the first respondent failed to make enquiries regarding the claimant's health. The Tribunal is of the view that this conduct amounted to a breach of contract. It is the view of the Tribunal that the breach of contract was a serious breach of contract because it created an environment where the claimant was subjected to abuse which included racial abuse. There was

a fundamental breach of contract.

83. The claimant resigned because he considered that the respondent had failed to protect him from bullying, harassment and discrimination. While the Tribunal did not find that all aspects of the claimant's perception of the behaviour of the respondents were correct we are satisfied that he perceived himself as being a victim of harassment, and that he was "sent to Coventry" by some colleagues because he had raised a grievance. The claimant resigned because of the treatment he received.
84. There was a delay between 5 April 2019 incident and the claimant's resignation on the 6 September 2019. The claimant in that time had hoped that there would be an improvement in his relations with colleagues but found that there was not. The claimant instead became unwell suffering from stress and depression. The claimant instead of returning to work after his period of illness resigned. We are of the view that the claimant did not wait too long. We do not consider that the claimant's resignation was premature.
85. The claimant was dismissed. The respondent has not shown that there was a fair or potentially fair reason for the claimant's dismissal. The claimant was unfairly dismissed. The claimant did not contribute towards his dismissal.

Direct race discrimination and harassment

86. The Tribunal found that the following proved
- (a) The claimant being called "Romanian cunt"
 - (b) The claimant being hit by Nigel Clear; and
 - (c) The claimant being ignored by white British colleagues.
87. The claimant's race was specifically reference by Nigel Clear when he pushed and insulted the claimant on the 5 April 2019. The claimant was ignored by colleagues after he made a complaint about Nigel Clear in which he complained about his treatment. We are a satisfied that a white English Technician of British Origin would not have been treated in this way. We are satisfied that the claimant was discriminated against on the grounds of his race.
88. The conduct referred to in paragraph 74 above was unwanted conduct relating to the claimant's race, which had the purpose or effect of violating the claimant's dignity and or creating an intimidating, hostile, degrading, humiliating or offensive environment of the claimant and that it was reasonable in all the circumstances for the conduct to have that effect.

Victimisation

89. We found that the claimant's oral grievance to Sean Joyce on 9 April 2019 was to the effect that he had been assaulted by Nigel Clear and called "Romanian cunt". The claimant in our view has carried out a protected act

in making this grievance. The claimant's written grievance of the 17 September is in our view also a protected act within the meaning of section 27 Equality Act 2010.

90. The as regards the matters set out in the list of issues at 2.1.4 to 2.1.11, relating to the 9 April grievance the Tribunal found that the respondent failed to make enquires regarding the claimant's health and or well-being. It is not clear to the Tribunal that the respondent in the case of any other employee who was off work sick that the respondent would have taken steps that they did not take in the claimant's case.
91. As regards the 17 September protected act the tribunal concluded that Sahid Hussain was kept away from Brendan Sajoe investigation because had he been spoken to his account would have given support to the claimant's account about the atmosphere in the workshop. The Tribunal consider that the claimant has made out his complaint that the first respondent has not fairly and properly investigated the grievance but not taking a statement from a key witness, Sahid Hussain.
92. The claimant's complaint about unpaid wages is not well founded and is dismissed.
93. The claimant's complaints about incidents on 5 April 2019 were presented outside the time limit for the presentation of complaints. Those events however are the start of the matters that led to the claimant's employment coming to an end. It is not possible to understand the claimant's position or the nature of the respondent's response to the events that have occurred without *considering* those events. The parties have been on an equal footing in respect of the presentation of evidence relating to those events, with neither party more prejudiced than the other. It is just and equitable to extend the time for consideration of the complaints arising from the events from 5 April 2019. The Tribunal therefore has jurisdiction to consider the complaints.

Remedy hearing

94. The parties are to supply dates to avoid for the in listing a remedy hearing within 14 days of the date on which this judgment is sent to the parties.

Employment Judge Gumbiti-Zimuto

Date: 25 February 2022

Sent to the parties on: 3/3/2022

N Gotecha - For the Tribunals Office

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