EMPLOYMENT TRIBUNALS

Claimants		**Respondent**
Mr Ali Haydari **Mr Alexis Naraghi**	**v**	**Narvar UK ltd**

Heard at: London Central
On: 27 and 28 April 2023 and chambers 2 – 3 May 2023

Before: **EJ G Hodgson**
MR S Hearn
Mr D Scholfield

Representation

For the Claimants: **both in person**
For the Respondent: **Ms S Berry, counsel**

JUDGMENT

Claim 1 - 2206629/2022

1. **The claim of whistleblowing detriment contrary to section 47B Employment Rights Act 1996 is dismissed on withdrawal and in the alternative on its merits.**
2. **The claim of harassment fails and is dismissed.**
3. **The claim of direct discrimination fails and is dismissed.**

Claim 2 - 2206631/2022

4. **The claim of whistleblowing detriment contrary to section 47B Employment Rights Act 1996 is dismissed on withdrawal and in the alternative on its merits.**
5. **The claim of harassment fails and is dismissed.**
6. **The claim of direct discrimination fails and is dismissed.**

ORDER

7. The respondent's application for anonymisation of Mr Richard Terry-Lloyd is refused.

REASONS

Introduction

1.1 Both Mr Haydari and Mr Naraghi presented claims to the London Central employment tribunal on 5 September 2022.

1.2 Both allege that they were subject to harassment and/or direct discrimination by Mr Richard Terry-Lloyd.

1.3 Following a case management discussion on 16 January 2023, both claims have proceeded together.

The Issues

2.1 At the commencement of the hearing, we considered and agreed the issues.

2.2 There are allegations of detrimental treatment which are advanced both as allegations of direct discrimination and harassment. The claimants rely on the protected characteristic of race.

2.3 The allegations of detriment are the same in each claim and are as follows:

2.3.1 In the evening of 9 June 2022, at a team dinner at the AMICI restaurant in London attended by the UK teams, by Mr Richard Terry-Lloyd, saying in the presence of the claimants, "Fuck Iranians; fuck Iraqis."

2.3.2 Later the same evening by Mr Richard Terry-Lloyd referring to Mr Naraghi, repeatedly, using the name "Iranian Tom." It being the claimants' case that it is a racial slur derived from the North American racial slur "uncle Tom."

2.4 The respondent does not deny use of the terms but does deny that the language amounted to either direct discrimination or harassment.

2.5 Further, the respondent alleges that it is not responsible for any discriminatory act of Mr Terry-Lloyd.

2.6 The respondent denies that it employed Mr Terry-Lloyd. In the alternative, if it did employ MrTerry-Lloyd, it relies on section 109(4) Equality Act 2010 and alleges that it took all reasonable steps to prevent the discrimination.

2.7 Further, the respondent denies that Mr Terry-Lloyd acted as an agent. In the alternative, it alleges that it took all reasonable steps to prevent the discrimination, such that it should be taken not to have authorised the alleged discriminatory act.

2.8 The respondent denies that it should be held responsible for the acts of Mr Terry-Lloyd as a third party.

2.9 Whilst the claim forms appear to raise allegations of whistleblowing detriment, those claims are not actively pursued before us for the reasons set out below will be dismissed.

Evidence

3.1 We received a bundle of documents, and a supplemental bundle. The supplemental bundle contained an agreed statement of facts, although a number of the fact remains disputed.

3.2 Both claimants served schedules of loss which contained some information concerning alleged injury to feelings. These were treated as statements. Neither claimant relied on any additional witness statement.

3.3 The respondent relied on a statement from Mr Amit Sharma. He was not called. No proper explanation was given for the failure to call him. He was simply said to be unable to attend.

3.4 The respondent relied on written submissions.

3.5 The claimants relied on written submission.

Concessions/Applications

4.1 At the commencement of the hearing, we clarified the issues as noted above.

4.2 We note that the case management discussion of EJ Norris indicates that the respondent accepted that the words of Mr Terry-Lloyd amounted to discrimination. However, that was not the respondent's position before us, and has not been respondent's position in its submissions. The response does not admit the treatment was discrimination or harassment.

4.3 In the case management discussion of 16 January 2023, employment Judge Norris referred to the potential whistleblowing claims. In her record of the discussion she states, "The claimants confirmed that as at the date of lodging their claims, they had not been subject to any detriment as a result of raising this matter and therefore there is no complaint under this head before the tribunal."

4.4 We sought clarification of this comment, at the hearing. The respondent called evidence to confirm that both claimants had made the representation as recorded by EJ Norris. Mr Haydari was unable to recall the exchange at all, and Mr Naraghi's evidence did not contradict EJ Norris's record.

4.5 At the hearing, neither claimant sought to say that they had suffered any specific detriment as a result of whistleblowing. It was accepted that Mr Haydari had raised, using the whistleblowing procedure, the allegations of detrimental treatment asset out in the issues above. There was no dispute this could be a protected disclosure. The only dispute was whether there was detriment. Mr Naraghi did not make a specific disclosure in writing, albeit he raised, on a number of occasions, the allegation that the alleged detrimental events referred to above were acts of discrimination and harassment. He failed to identify any specific detriment suffered.

4.6 It is not clear to me whether EJ Norris intended to declare that there were no claims of whistleblowing detriment pleaded, or whether she was recording that, to the extent they were pleaded, they were no longer pursued, and if so whether this was a record of withdrawal of the claims by the claimants.

4.7 We are satisfied that it is arguable that Mr Haydari alleged whistleblowing detriment, albeit there is a lack of particularisation. Mr Haydari stated, in his claim, "I feel that I am under more scrutiny." That additional scrutiny could be an allegation of detrimental treatment. He specifically linked it to the whistleblowing. We can find no equivalent in Mr Naraghi's claim, and it is arguable that no claim is brought by him at all.

4.8 It is apparent that since the case management discussion, neither claimant has actively advanced a whistleblowing claim. Neither has given any evidence in relation to it. The respondent has not prepared to defend a whistleblowing detriment claim.

4.9 We have reached number of conclusions. Where the words of withdrawal may themselves be unclear, it is appropriate to consider all the relevant circumstances to ascertain the intent when deciding whether there has been a withdrawal. This claim should be dismissed on withdrawel. The admission that there was no whistleblowing detriment at the time the proceedings were issued is, when seen in the light of the subsequent treatment by the claimants in failing to pursue the whistleblowing detriment claims further or at all, demonstrates both claimants withdrew the claims of whistleblowing detriment. If we were wrong in that, we would take the view that the section 47B Employment Rights Act 1996 claims were not actively pursued, and they should be struck out. If we were wrong in that, we would take the view that no evidence has been advanced on which we could find that there was any detrimental treatment because of the disclosures identified by either claimant. We need considered the claim of whistleblowing detriment no further.

The Facts

5.1 Narvar, Inc. is described as the parent company of the respondent, Narvar UK Ltd. Narvar, Inc. is a US corporation with headquarters in United States and a central office in California. We can refer to all the Narvar companies, generally, as the group of companies. Narvar, Inc. is a technology company that develops online platforms for retailers to support customers with post purchase orders, tracking, messaging, and returns.

5.2 The respondent operates in the UK and is described as providing "business support services" to Narvar, Inc. The respondent employed Mr Haydari from 28 February 2022 as an account executive based in London. He resigned effective 3 January 2023 and took up new employment. Mr Haydari was raised in Canada but born in Iran. One of his parents is Iranian.

5.3 The respondent employed Mr Naraghi from 10 January 2022 until his employment was terminated on 31 October 2022. He worked as a sales development representative based in London. He is a French national. Both of his parents are Iranian.

5.4 We have little if any detail of the corporate structure of either Narvar, Inc., or the respondent. It is accepted they are independent companies.

5.5 Mr Richard Terry-Lloyd was, at all material times, employed by Narvar, Inc. as the chief revenue officer. Prior to his signing a contract of employment on 16 February 2022, he was described as a consultant for Narvar, Inc. He is South African.

5.6 We have some detail of the reporting structure. Mr Haydari reported to Mr Joe Klin, an employee of the respondent whose title was vice president sales. Mr Klin reported to Mr Michael Schirrmacher, an employee of the respondent. Mr Schirrmacher reported to Mr Terry-Lloyd, as from 1 November 2022. Prior to then, Mr Haydari reported to Mr Haydariansen, an employee of Narvar's French company. Mr Haydariansen reported to Mr Shirrmacher.

5.7 Mr Naraghi reported to Mr Ramesh Narayan, an employee of the respondent who was the senior manager. Mr Naraghiarayan reported to Mr Michael Cammarata, an employee of Narvar, Inc., who in turn reported to Mr Terry-Lloyd. The reporting lines are set out in the agreed statement of fact. We have limited detail. We have seen no job descriptions or memoranda of agreement between the companies. As to what is the extent, role, or nature of the reporting line, we have little or no detail.

5.8 Mr Terry-Lloyd's contract records that he is a "full time, exempt position as chief executive officer" for Narvar, Inc. He is paid in American dollars. His employment contract is with Narvar, Inc.

5.9 It is agreed that Mr Terry-Lloyd travelled to London to attend an annual retail industry event called "Shop Talk", which took place between 6 and 8 June 2022. That involved a number of companies. Whilst in London, on 9 June 2022, a dinner was arranged at Amici in London to enable the respondent's employees to socialise with, and meet, Mr Terry-Lloyd, who was new to Narvar, Inc. Thirteen of the respondent's employees attended, including the claimants.

5.10 During that dinner, two alleged instances of discrimination and harassment took place. It is accepted by the respondent that the incidents happened as described by the claimants. First, during a conversation between the claimant and Mr Terry-Lloyd, whilst discussing Mr Haydari's work experience selling second-hand cars in other parts of the world, Mr Terry-Lloyd said to both claimants, "Fuck Iranians. Fuck Iraqis." Second, later in the evening, Mr Terry-Lloyd referred on more than one occasion to Mr Naraghi by the term "Iranian Tom." It is the claimant's case this is a racial slur and references the derogatory racial term "uncle Tom." The respondent has not sought to argue that the term could not be a racial slur.

5.11 The detail given by the claimants is poor and incomplete. Both had an opportunity to file statements, neither did. With the consent of all, the tribunal treated any disputed matters in the agreed statement of facts as the claimant statements.

5.12 Neither claimant, on 9 June, made any specific complaint. Mr Haydari left early making an excuse, albeit he maintains before us the reason he left was the inappropriate comments from Mr TerryLloyd. Mr Naraghi stayed longer but raised no specific complaint.

5.13 We have limited evidence of context. The first comments appear to have occurred during a general conversation about work and are said to be out of context and simply offensive. There is evidence that Mr Terry-Lloyd was drinking and may have been inebriated, but how inebriated is unclear. As for the second comment, there is some evidence that Mr Terry-Lloyd had forgotten Mr Naraghi's name, and when Mr Naraghi asked him his name, he mistakenly thought he was aother employee whose first name was Tom. It appears that when challenged he maintained the name Tom, but attached the epithet "Iranian." Thereafter, he referred to Mr Naraghi as "Iranian Tom."

5.14 Mr Terry-Lloyd has given no evidence before us. The respondent has called no witness to the events.

5.15 Mr Haydari reported the incident through the respondent's whistleblowing procedure. He was contacted and agreed to waive anonymity. The respondent undertook an investigation conducted by Ms Caroline Shuyler, who we understand is an American attorney. The report states "Narvar retained the undersigned on June 16, 2022, to conduct an impartial investigation of a complaint brought by account executive Alexander

Haydari and sales development representative Alexis Naraghi concerning comments made by chief revenue officer Richard Terry-Lloyd." It is said to be an independent report.

5.16 The claimants were interviewed. Other individuals interviewed included Mr Terry-Lloyd. The claimants were not initially shown the report, as it was deemed to be confidential and/or subject to legal privilege. The report was disclosed following the case management discussion of 16 January 2023 with EJ Norris. The report makes extensive findings about the events of 9 June 2022. It states "The preponderance of the evidence supports the finding that RTL made comments involving Haydari and Naraghi's national origin (Iranian) and that these comments were unwelcome to them."

5.17 We do not have any direct evidence from Mr Terry-Lloyd. The report, which we accept contains hearsay, gives an account of what Mr Terry-Lloyd is reported as having said in the investigation. It is reported he denied using the words, "fucking Iraqis, fucking Iranians, fucking Afghanis." When asked about the term "Iranian Tom" the report states, "RTL said he told Naraghi that he was "Tom from Iran." RTL said he probably said at some point "Iranian Tom," and this came to his mind because he had met Tom Allen, who is from Wales. RTL said he now knows Naraghi's name, but at the time he did not. RTL said when they assembled to take a group picture, he called for "Iranian Tom," but that he was "just joking around."

5.18 It is apparent from the report that the investigator also viewed "video evidence." She says the following:

> **The undersigned reviewed the "fireside chat," which is a recorded video in which Sharma introduced RTL to the company. This chat was recorded on April 4, 2022, approximately two months before RTL's trip to London. In the video, between three minutes and three minutes and 50 seconds, RTL states that the United States is the "best country in the world," and that while he did not want to offend anyone, it is the "best country."**
>
> **This fact is relevant to the findings below because it relates to statements concerning national origin, which is the subject of the allegations. It shows a lack of awareness concerning how statements about his own national pride could affect the impression he makes on and his relationships with his international colleagues.**

5.19 We have no direct evidence of the parameters of the business relationship between Narvar, Inc. and the respondent. There is no evidence that the respondent required Mr Terry-Lloyd to act on its behalf, whether in internal management, or in its relations with other companies and individuals.

5.20 The respondent relies on a statement from Mr Amit Sharma who is the founder and chief executive officer of Narvar, Inc., which he describes as the parent company of the respondent. He did not attend to give evidence and we received no adequate or proper explanation for his failure to attend. We treat his evidence was some caution. It contains a number of

opinions and limited facts. We find that we can accept some of his evidence, as it is consistent with the admitted facts, the positions of both claimants, and the available documents. We have no reason to doubt his assertion that he is responsible for assigning responsibilities to Mr Terry-Lloyd. We accept that he and Mr Terry-Lloyd travelled from the United States to London in early June 2022 in their respective capacities as chief executive officer and chief revenue officer of Narvar, Inc. to attend the industry event, Shop Talk. They both attended a "leadership dinner," with the respondent's employees on 5 June and he confirms that Mr Terry-Lloyd attended a further dinner on 9 June 2022. We have no reason to doubt his evidence when he states, "RTL did not travel to Europe at the behest of the respondent." We accept that Mr Terry-Lloyd's instructions were given by Narvar, Inc., and his employer. We have no reason to doubt his assertion that "the respondent had no material control over RTL's travel or what he did while he was there."

The law

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

Section 13 - Direct discrimination

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

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

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

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

> **9 This reasoning has been valuably amplified by Mummery J in *Qureshi v Victoria University of Manchester* (EAT 21 June 1996), a decision which Holland J in the present case in the Employment Appeal Tribunal understandably described as 'mystifyingly unreported'. It is therefore worth quoting at length from Mummery J's judgment.**
>
> **…**
>
> **The industrial tribunal only has jurisdiction to consider and rule upon the act or acts of which complaint is made to it. If the applicant fails to prove that the act of which complaint is made occurred, that is the end of the case. …**

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

> **Section 26 - Harassment**
>
> **(1) A person (A) harasses another (B) if—**
>
> **(a) A engages in unwanted conduct related to a relevant protected characteristic, and**
> **(b) the conduct has the purpose or effect of—**
>
> **(i) violating B's dignity, or**
> **(ii) creating an intimidating, hostile, degrading, humiliating or offensive environment for B.**
>
> **(3) …**
>
> **(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account--**
>
> **(a) the perception of B;**
> **(b) the other circumstances of the case;**
> **(c) whether it is reasonable for the conduct to have that effect.**
> **…**

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

6.6 In **Nazir and Aslam v Asim and Nottinghamshire Black Partnership UKEAT/0332/09/RN, [2010] EqLR 142**, the EAT emphasised the importance of the question of whether the conduct related to one of the prohibited grounds.

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

> **"We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase. We accept that the facts here may have been close to the borderline, as the Tribunal indeed indicated by the size of its award.**

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

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

6.10 Where the claimant simply relies on the 'effect' of the conduct in question, the perpetrator's motive or intention even if entirely innocent does not in itself afford a defence. The test in this regard has both subjective and objective elements to it. The assessment requires the tribunal to consider the effect of the conduct from the complainant's point of view: the subjective element. It must also ask, however, whether it was reasonable of the complainant to consider that conduct had that effect: the objective element. The fact that the claimant is peculiarly sensitive to the treatment does not necessarily mean that harassment will be shown to exist.

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

6.12 Liability of employers and principals is defined by section 109 Equality Act 2010 -

> **(1) Anything done by a person (A) in the course of A's employment must be treated as also done by the employer.**
> **(2) Anything done by an agent for a principal, with the authority of the principal, must be treated as also done by the principal.**
> **(3) It does not matter whether that thing is done with the employer's or principal's knowledge or approval.**
> **(4) In proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A--**
>
> > **(*a*) from doing that thing, or**
> > **(*b*) from doing anything of that description.**
>
> **(5) This section does not apply to offences under this Act (other than offences under Part 12 (disabled persons: transport)).**

6.13 Employment is defined by section 83 Equality Act 2010 -

> **(1) This section applies for the purposes of this Part.**
> **(2) 'Employment' means--**
> **(*a*) employment under a contract of employment, a contract of apprenticeship or a contract personally to do work;**
> **(*b*) …**

Conclusions

7.1 Is the respondent liable for the alleged discriminatory conduct of Mr Terry-Lloyd? Under section 109 Equality Act 2010, the respondent would be liable for the actions of Mr Terry-Lloyd if he were an employee, or if he were an agent.

7.2 We first consider whether he was an employee. An employee is defined by section 83 Equality Act 2010. In the of case Mr Terry-Lloyd employment would mean employment under a contract of employment, contract of apprenticeship, or a contract personally to do work. The evidence we have demonstrates that Mr Terry-Lloyd entered into a contract of employment with Narvar, Inc., and not the respondent. There is no evidence, at all, that there existed any form of contract between Mr Terry-Lloyd and the respondent. It follows there was no contract of employment, no contract of apprenticeship, and no contract personally to do work for the respondent. He was not an employee.

7.3 The next question is whether he was an agent and the respondent a principal. If so, anything done by the agent for the principal, with the authority of the principal, is treated as also done by the principal.

7.4 We have regard to **Kemeh v Ministry of Defence** [2014] EWCA Civ 91. [As followed in UNITE the Union v Nailard [2018] EWCA Civ 1203]. Elias LJ in **Kemeh** confirmed that an agent's discriminatory acts are governed by common law principles. The term agency, as used in the Equality Act 2010, is to be interpreted in accordance with ordinary common law, rather than being susceptible to a wider interpretation.

7.5 As for the concept of agency, Elias LJ said the following:

> **[37] The question is whether there are genuinely competing constructions of the concept of agency properly available to the court. Mr Purchase submitted that Yearwood was plainly right and no other general concept of agency could have been intended, essentially for the reasons given by HH Judge McMullen QC s 32(2) uses terms which the law employs when defining the scope of common law agency; there is no readily available, consistently understood broader meaning in the public domain which Parliament can reasonably be taken to have intended. Furthermore, none of the subsequent discrimination legislation, including the Equality Act itself, has sought to reformulate the principle in the light of the case law. Tower Boot was different because the phrase "in the course of employment" was an everyday term, and in any event s 32(1) does not strictly apply principles of vicarious liability at all.**
>
> **[38] I am not sure how significant are the differences between the two concepts of agency advanced by the parties in Yearwood. The concept of agency at common law is not one which can be readily encapsulated in a**

> **simple definition. As the editors of Bowstead and Reynolds point out, "no-one has the correct use of this or any term". Moreover, HH Judge Peter Clark appears to have had reservations about the requirement, considered to be an essential part of the definition by the EAT in Yearwood, that an agent must have power to affect the principal's legal relations with third parties. In fact the authors of Bowstead and Reynolds (see para 1-04) recognise that someone might quite properly be described as an agent even where this feature is missing. An example is someone who merely introduces or canvasses custom on behalf of the principal without in fact having the power to bind the principal contractually. An estate agent is a typical example. This is not, therefore, an essential element in a common law definition of agency.**
>
> **[39] Even in the so-called "general concept of agency" advanced in Yearwood, it would be necessary to show that a person (the agent) is acting on behalf of another (the principal) and with that principal's authority. Once it is recognised that the legal concept does not necessarily involve an obligation to affect the legal relations with third parties, I doubt whether the concepts are materially different.**

7.6 It follows that the person said to be the agent, must be acting on behalf of the principal, and with that principal's authority. That authority may fall short of giving express authority to the agent to bind the principal legally, such as by entering into contracts.

7.7 Particular difficulties arise when one individual is employed by another company, and it is claimed that he may be the agent of the second company.

7.8 Elias LJ, consider this; at paragraph 42 he said:

> **.... there is some authority for the proposition that "a man cannot be the servant of A and the agent of B in performing the same piece of work. He is either the servant of A or the servant of B": per Lord Goddard CJ in Sykes v Millington [1953] 1 QB 770, [1953] 1 All ER 1098, 51 LGR 352, 775. Arden LJ tentatively approved that dictum in Interlink Express Parcels Ltd v Night Trunkers Ltd [2001] EWCA Civ 360, [2001] RTR 38. However, in Man Nutzfahrzeuge AG v Ernst and Young [2005] EWHC 2347 (Comm) para 99 Moore Bick LJ, sitting as a judge in the Commercial Court, expressed the view that whilst that principle might hold in the particular statutory context in which the point arose (concerning the licensing of road haulage vehicles), there was in principle no reason why an employee of A could not be an agent of B, even in relation to the same transaction.**

At paragraph 43 he stated:

> **[43] I would respectfully agree that the fact that someone is employed by A would not automatically prevent him from being an agent of B, and I would not discount the possibility that the two relationships can co-exist even in relation to the same transaction. But in my judgment there would, particularly in the latter case, need to be very cogent evidence to show that the duties which an employee was obliged to do as the employee of A were also being performed as an agent of B. It is in general difficult to see why B would either want or need to enter into the agency relationship. That is so whichever concept of agency is employed. There is a complete lack of such cogent evidence here.**

7.9 Elias LJ recognised that this may leave a lacuna, such that individuals may be left without a remedy. He said this at paragraph 47:

> **[47] In reaching this conclusion I fully recognise the force of what, in policy terms at least, was Ms Romney's most powerful argument. If the Appellant cannot bring a claim against the MoD, there is a real risk that he has no remedy at all …**

7.10 It follows when considering the concept of agency, in the context of the Equality Act 2010, it is necessary to apply common law principles. Each case must be considered on its merits. It is necessary to consider whether the individual is acting on behalf of the respondent, and with that respondent's authority. Where it is asserted that the individual is acting on behalf of the company, it is necessary to identify in what manner it is said he is acting on behalf of the company, and to identify the source of the authority. In circumstances where the alleged agent is employed by another firm, even where there is close connection between the firms, there must be cogent evidence demonstrating the relationship of agency.

7.11 With those principles in matters in mind, we consider the circumstances in this case.

7.12 The claimant was not an employee of the respondent, he was an employee of Narvar, Inc. There is a business relationship between Narvar, Inc. and the respondent. The nature of that relationship is unclear. It is clear that the respondent is an independent company, albeit there is a commercial relationship within the group of companies. Mr Terry-Lloyd undertakes his duties for Narvar, Inc. The employers of Narvar, Inc. attended at Shop Talk in their capacity as employees of Narvar, Inc. The employers of Narvar, Inc. met with employees of the respondent in a social context to allow the individuals to meet. There is no evidence that that Mr Terry-Lloyd was required to attend by the respondent or that he attended on behalf of the respondent. There is evidence that he was required to attend by Narvar, Inc. and attended on behalf of Narvar, Inc. There is no evidence that the respondent gave any direct authority to Mr Terry-Lloyd in relation to any function. He did not have a direct line management function within the respondent. There is no evidence that he acted as an agent in seeking, securing, or agreeing work on behalf of the respondent. There is evidence of a business relationship. There is evidence that Mr Terry-Lloyd commented on the abilities and actions of other employees. There is evidence that there was a commercial relationship and the products which may have emanated from Narvar, Inc. were marketed by the respondent. There is evidence of some form of reporting line. However, in a situation where there are two independent companies with a close business relationship, it is not unusual for there to be reporting lines between the companies. This does not in itself imply that authority from one company has been relinquished, assigned, or given, to any employee from another company.

7.13 In order to find agency, there must be cogent evidence which demonstrates that the alleged agent is acting on behalf of the company.

The evidence should identify in what manner the alleged agent is acting on behalf of the company, and how, authority was given. The evidence we have falls far short of showing any relationship of principal and agent, and we find that Mr Terry-Lloyd was not an agent of the respondent.

7.14 We acknowledge that the types of business arrangements seen within this group of companies are not unusual. What may be seen by the outside world, and to many of the participants, as a single organisation may be underpinned by a complex corporate structure. That corporate structure may, ultimately, mean that an employee of one company is not the agent of another. As observed by Elias LJ, that may leave a statutory gap, such that the respondent is not liable for potential discrimination by an employee of a closely related company. In our view that is the case here. Mr Terry-Lloyd was not the respondent's agent.

7.15 We have considered the concept of third-party liability.

7.16 The current position is that the employer would be liable for third-party harassment, if it occurred because the employer had failed to take appropriate actions, for reasons which were in themselves discrimination. We have regard to **MacDonald v Advocate General for Scotland; Pearce v Governing Body of Mayfield Secondary School** [2003] UKHL 34.

7.17 The alleged discrimination occurred on the evening of 9 June 2022. The respondent could not have reasonably anticipated the actions of Mr Terry-Lloyd. The actions of Mr Terry-Lloyd were not complained about during the evening by either claimant. The respondent knew nothing of the action and could not properly be said to have failied to take action. It follows that the motivation, whether conscious or subconscious, for failing to take action does not arise, and it cannot be found that there was a failure to act which was itself any form of discrimination.

7.18 We are conscious that the law in respect of third-party harassment is under review and may change. However, as the law currently stands, we find that the respondent does not have liability for the actions of third party, whether that is viewed as responsibility for third parties action, or for a discriminatory failure to act.

7.19 We note there is no allegation before us the respondent knowingly helped Mr Terry-Lloyd undertake a relevant contravention of the Equality Act 2010. We therefore do not need to consider section 112 Equality Act 2010.

7.20 Lest we be wrong in our analysis that the respondent is not liable for a discriminatory acts of Mr Terry-Lloyd, we should consider whether his actions amount to discriminatory conduct, whether harassment or direct discrimination, on the assumption that he was either an employee or an agent.

7.21 We consider first harassment. We find there is no material difference between the various acts, as between the acts themselves, and as between the claimants. We can therefore consider them all together. We take the view they are essentially, part of a continuing course of conduct.

7.22 In saying “Fuck Iranians” and “Fucking Iraqis” and using the term “Iranian Tom." We find the conduct was unwanted.

7.23 The words themselves are racially specific and are clearly related to a protected characteristic, being race.

7.24 We must consider whether the purpose was to violate dignity or create an intimidating hostile degrading humiliating or offensive environment (which we refer to generally as a hostile environment). When the question is one of purpose, the burden may shift, as for other forms of discrimination. There are clear facts which would cause the burden to shift. The words were used without warning. The words themselves refer to race. The use of the word "Fuck" may demonstrate hostility towards Iranians and Iraqis. The use of the epitaph “Iranian” prior to the name “Tom” may be seen as insulting, particularly in the context of the previous comment, “Fuck Iranians" which could demonstrate hostility. In our view there can be no doubt that the burden shifts.

7.25 Once the burden shifts it is for the respondent to provide an explanation. We specifically enquired, during submissions, whether the respondent advanced any explanation for any of the alleged discriminatory conduct. No explanation was advanced. We can identify no explanation, let alone an explanation which is supported by cogent evidence. We observed Mr Terry-Lloyd could have attended to give evidence, but chose not to.

7.26 Mr Terry-Lloyd’s conduct was harassment. We should add that if we had not not found the purpose was to harass, we would have found that it had the effect of harassment, having regard to the perception of both claimants, the circumstances of the case, and whether it is reasonable for the conduct of have that effect.

7.27 In reaching our decision, we have noted there may be references to race which should not be viewed as harassment. In such cases, liability may not arise without a warning that the terminology may be seen as offensive. This is not one of those cases. The evidence suggests intent and conscious hostility to Iraqis and Iranians, and knowledge of the connection of both claimants to Iran. In those circumstances, we are satisfied liability should, in principle, follow.

7.28 If the allegations did not constitute harassment, we would find, in alternative, they were direct discrimination. We identified matters which turn the burden when considering whether the purpose was to harass. Those facts would be, equally, relevant to a claim of direct discrimination. On the face of the words used, they are racially specific acts from which we could find that they were used on grounds of race. Use of those words

is detrimental. No explanation has been given. We would find the treatment complained of to be detrimental and acts of race discrimination.

7.29 The respondent alleges a defence pursuant to section 109 (4) Equality Act 2010. Where an employee discriminates in the course of employment, the respondent may have a defence if it took all reasonable steps to prevent the employee doing that thing or doing anything of that description. We observe it is not enough to simply say that some training has been given. Where the defence is based on training, the evidence must be sufficient to demonstrate the training itself was appropriate, administered correctly, and reviewed when needed. In doing so, it will be rare that an employer can simply assert that training has been given, without further detail, and expect the tribunal to accept the defence is established. The training must be sufficient to stop an individual from doing the particular act of discrimination or discrimination of the relevant description. The respondent has given evidence that employees received training, which appears to have consisted of some form of online training together with a subsequent test. As for the training, we know nothing of the content, the appropriateness of the content, the engagement of the employee, or any monitoring to assess the effect the training. That does not provide sufficient evidence from which we could find the defence is established.

7.30 In any event, the person said to discriminate, Mr Terry-Lloyd, received no training from the respondent. Moreover, there is some evidence to suggest that it had been identified, at least by Narvar, Inc., that some of Mr Terry-Lloyd's views were questionable, such that training was appropriate. We have regard to the report of Ms Caroline Schuyler, and her comments on the video. We have not viewed the video. We observe that use of patriotic language would not in itself indicate that the individual may hold stereotyped views, which could either lead to conscious or subconscious discrimination. However, it is clear that she, having viewed the video, considered the content to be such that it raised questions as to whether Mr Terry-Lloyd needed training. If that were her view, it is at least possible that the respondent could have, and should have, identified the potential need for training. However, the evidence we have is that there was a failure to address this, and that would be fatal to any defence under section 109(4).

7.31 Section 109(4) does not apply directly to agents. However, there may be an equivalent defence on the basis that appropriate training would limit the extent of authority. Whilst this is a theoretical possibility, there was no training, and this defence would fail on the facts.

7.32 It follows, for all the reasons we have given, that the claims of harassment and discrimination fail. Mr Terry-Lloyd was not an employee or agent. The respondent does not have responsibility for his actions as a third party.

7.33 Finally, we must deal with the respondent's application to anonymize Mr Terry-Lloyd. We have received no application from Mr Terry-Lloyd, albeit

we are satisfied that he knows of these proceedings, and would have been in a position to apply himself.

7.34 We drew the party's attention to the case of **Piepenbrock v London School of Economics** [2022] IRLR 957. The decision of HHJ Shanks is authority for the proposition that a person who is not party to the proceedings, and who does not reside in this country, may nevertheless benefit from an anonymity order when that application was made by the respondent. Under rule 50, the tribunal may anonymize witnesses, parties, and others.

7.35 Rule 50 provides, in so far as relevant:

> **(1) A Tribunal may at any stage of the proceedings, on its own initiative or on application, make an order with a view to preventing or restricting the public disclosure of any aspect of those proceedings so far as it considers necessary in the interests of justice or to protect the Convention rights of any person …**
>
> **(2) In considering whether to make an order under this rule, the Tribunal shall give full weight to the principle of open justice and to the Convention right to freedom of expression.**
>
> **(3) Such orders may include:**
> **…**
> **(b) an order that the identities of specified parties, witnesses or other persons referred to in the proceedings should not be disclosed to the public, by the use of anonymization or otherwise …**
>
> **(4) Any party, or other person with a legitimate interest, who has not had a reasonable opportunity to make representations before an order under this rule is made may apply to the Tribunal in writing for the order to be revoked or discharged, either on the basis of written representations or, if requested, at a hearing.**
>
> **(5) …**
>
> **(6) "Convention rights" has the meaning given to it in section 1 of the Human Rights Act 1998.**

7.36 When considering whether to make an order, full weight must be given to the principle of open justice.

7.37 Article 6 of ECHR recognises the right to a fair hearing, which means a public hearing.

7.38 Art 8(1) of ECHR provides "Everyone has the right to respect for his private and family life, his home and his correspondence." Art 8(2) permits interference with these rights where it is justified, in the sense of being necessary and proportionate, for a number of reasons including "the protection of the rights and freedoms or others". The right to reputational protection is an element of private life which is protected by Art 8 and being named in a judgment in connection with disreputable allegations (even if true) potentially engages Art 8.

7.39 Art 10 provides for the right to freedom of expression.

7.40 The burden of establishing a derogation from the principle of open justice or full reporting lies on the person seeking the derogation and a balancing exercise must be carried out to establish which of the competing rights or principles or interests should prevail.

7.41 The application to anonymize Mr Terry-Lloyd was not made until day two of the hearing. It was unsupported by evidence. It is brief and it can be set out in full.

> **Application for a third party anonymity order**
>
> **1. R applies to anonymise the name of Mr Terry-Lloyd in the Tribunal's judgment. He is not a party to this claim, he is not an employee of R and he is not appearing as a witness in it. He was made aware of the fact that these proceedings had been issued some time ago, but he was unaware until yesterday (27 April 2023) that the hearing of those claims was occurring on 27 – 28 April 2023.**
>
> **2. The list of issues set out in Employment Judge Norris' order focused on the question of R's liability rather than on Mr Terry-Lloyd's conduct on 9 June 2023. However, it appears from the Tribunal's re-written the list of issues for this hearing that the judgment will make findings regarding the context around very serious accusations against Mr Terry-Lloyd without hearing him on these matters. The content of the internal investigation report and a subsequent email from him to Marielle Smith demonstrate that he disputed the characterisation of his actions as racist or as race discrimination/harassment. It would plainly damage his reputation and standing to have such allegations placed in the public domain in a publicly accessible judgment.**
>
> **3. The Tribunal has the power to anonymise Mr Terry-Lloyd pursuant to Rule 50(3)(b). It should use that power in order to protect the Article 8 Convention rights of this third party (see A v Secretary of State for Justice [2019] ICR D1, EAT; A v B [2010] IRLR 844 per Underhill J and F v G [2012] ICR 246 per Underhill J at [21]; [37] and [49 – 52]). There is simply no real public interest in the details mentioned above. The individual's Convention rights should prevail.**

7.42 We remind ourselves that it is for the person making the application to justify the order for anonymisation. Here the justification appears to revolve around the following assertions: the tribunal rewrote the list of issues; findings will be made concerning the actions of Mr Terry-Lloyd (it being implicit that this is alleged to be some form of departure); Mr Terry-Lloyd has been denied an opportunity to be heard; Mr Terry-Lloyd disputes the characterisation of his actions as racist; and Mr Terry-Lloyd's reputation will be damaged.

7.43 We will consider each these matters in turn.

7.44 In no sense whatsoever were the issues in this case rewritten. The issues were clarified. The detrimental treatment alleged remained the same. The defence, namely that he was neither an employee nor an agent remained the same. The section 109(4) defence remained the same. We

asked the parties to consider specifically third party liability. That may have been new, but the defence was technical in nature and required no new evidence. The use of the words alleged to be detrimental was admitted, but the allegation that they constituted harassment or discrimination, was not disputed, as it had been throughout.

7.45 The suggestion that making findings in relation to Mr Terry-Lloyd's actions was, in some manner, a departure from the course expected is without merit. At all times Mr Terry-Lloyd was identified as the person accused of the discriminatory conduct. The respondent has chosen to defend the matter on three main grounds: the respondent was not liable as Mr Terry-Lloyd was not their servant or agent; the respondent had taken reasonable steps to prevent the discriminatory conduct; and the conduct was not in any event harassment or discrimination. N either the claimants nor the tribunal, at any time, agreed to consider the jurisdictional defence in isolation from the conduct itself. In support of the defence that the conduct was neither direct discrimination nor harassment, Mr Terry-Lloyd could have given evidence. The fact the respondent has not chosen to advance evidence Mr Terry-Lloyd, or to offer any explanation, does not remove that as an issue from these proceedings, nor does it prevent the tribunal making findings of fact in relation to the conduct that is the subject matter of the complaints before it.

7.46 The one significant variation to the issues was the requirement to deal with any potential liability for third party discrimination. That variation is not relevant to the application for anonymity.

7.47 Even if the respondent were to submit that it was confused, it was open to the respondent to seek to adjourn the proceedings, and call Mr Terry-Lloyd to give evidence. It has chosen not to do so.

7.48 There is no merit in suggesting that Mr Terry-Lloyd did not know of these proceedings or that he could not have reasonably taken action. The respondent could have called him as a witness. He could have applied to intervene or to be added as a respondent. Those options remained open to him, even during the hearing.

7.49 We do not accept that he has been denied any opportunity to give evidence.

7.50 We accept that there is evidence that he disputes the characterisation of his actions as discriminatory.

7.51 As to reputational damage, we observe that he is not, directly, a party to these proceedings.[1] In seeking to defend the claim, it is for the respondent to decide what evidence is to be called. That is the respondent's litigation choice. The facts decided in the claim are binding as between parties.

[1] Section 109 Equality Act 2010 provides the employer or the principal is treated as having done the act, and there is no need to name the alleged perpetrator as a party.

Whilst, theoretically, Mr Terry-Lloyd could have been joined as a party and a claim brought against him pursuant to section 110, no application was made, and he is not a party. He has not given evidence, and the findings are on the balance of probability in the context of the dispute between these parties. When considering any potential reputational damage, we take the view that the public should be able to understand that he is not party, and the findings are made in context the litigation between the parties to this claim.

7.52 In **Piepenbrock**, Ms D, an American national who was not a party, was anonymized. We do not need to set the facts in **Piepenbrock** in detail. The circumstances were extreme. Dr Piepenbrock's behaviour towards Ms D was extreme, offensive, and detrimental. HHJ Shanks approved the findings of the tribunal which described Dr Piepenbrock's behaviour towards those who wronged him as "frequently malicious and actively destructive." Dr Piepenbrock vilified Ms D and others on a public website, and it was accepted by HHJ Shanks his campaign would continue. There was evidence this would have a continuing a serious negative effect on Ms D and to secure her rights to private life, the derogation of open justice was necessary. The order was not made to protect her reputation.

7.53 There is no treatment of Mr Terry Lloyd that is remotely equivalent to the treatment of Ms D. In no sense whatsoever have either claimant acted inappropriately towards Mr Terry-Lloyd, or given any indication they would. The respondent has decided not to call Mr Terry-Lloyd, when it could have done so. That is its decision. Mr Terry-Lloyd could have taken action, but he has not; that is his decision. In considering the balancing exercise we find none of that justifies a derogation from open justice when considering the balancing exercise, particularly the matters relevant to both article 8 and article 10, we are satisfied that any article 8 rights of Mr Terry-Lloyd do not outweigh the principle of open justice or any article 6 and article 10 rights. The respondent has failed to justify any derogation from open justice. It has not established that an order is necessary in the interests of justice to protect his convention rights. We reject the application for anonymisation.

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Employment Judge Hodgson

Dated: 4 July 2023

Sent to the parties on:

04/07/2023

For the Tribunal Office