EMPLOYMENT TRIBUNALS

Claimant: Mr Karon Byfield

Respondent: Global Motoring Hub Ltd

Heard at: Reading Employment Tribunal (by CVP)
On: 3-5 April 2023

Before: Employment Judge Cotton
Mrs C Bailey (Member)
Mrs F Betts (Member)

Appearances
For the Claimant: Mr K Byfield (in person)
For the Respondent: Mr E McFarlane (Consultant)

This has been a remote video hearing, to which the parties agreed.

JUDGMENT

1. The claimant did not, at the relevant time, have a disability within the meaning of section 6 of the Equality Act 2010.

2. The claimant's claim of disability-related harassment contrary to section 26 of the Equality Act 2010 is dismissed.

3. The claimant's claim of race-related harassment contrary to section 26 of the Equality Act 2010 is dismissed.

4. The claimant's claim of victimisation contrary to section 27 of the Equality Act 2010 is dismissed.

5. This is the unanimous decision of the Tribunal.

REASONS

1. An oral judgment dismissing the claimant's claim was given during the hearing. The claimant requested written reasons.

Introduction

2. The respondent operates as a motor vehicle bodyshop repair centre, based in Ashford. It is a small company. At the relevant time it employed 6-7 members of staff. The repair centre began operating in 2020.

3. The claimant was employed by the respondent as a MET (Mechanical, Electrical and Trim) technician for roughly five weeks, from 5 October 2021 to 10 November 2021. His job was to help repair vehicles which had been damaged.

4. ACAS was notified under the early conciliation procedure on 10 November 2021 and the certificate was issued on 10 December 2021. The ET1 was presented on 27 December 2021. The ET3 was received by the tribunal on 3 March 2022.

5. In this decision, individuals who did not take an active part in proceedings are referred to by their initials. All references to the Equality Act are references to the Equality Act 2010.

Claims

6. The claimant has brought claims for harassment relating to disability, harassment relating to race (he is Black Caribbean) and victimization. He claims compensation for loss of earnings and injury to feelings.

Issues

7. The issues were identified at the preliminary hearing on 16 November 2022 and confirmed at the start of the hearing. They are set out below.

Whether claimant has a disability

8. Did the claimant have a disability as defined in section 6 of the Equality Act at the time of the events this claim is about? The questions to be determined are:-
   8.1. Did he have a physical or mental impairment: epilepsy, tendency to seizure, and/or PTSD?
   8.2. Did it have a substantial adverse effect on his ability to carry out day-to day activities?
   8.3. If not, did the claimant have medical treatment, including medication, or take other measures to correct or treat the impairment?

8.4. Would the impairment have had a substantial adverse effect on his ability to carry out day-to-day activities the treatment or other measures?
8.5. Were the effects of the impairment long-term? The Tribunal will decide:-
8.5.1. Did they last at least 12 months, or were they likely to last at least 12 months?
8.5.2. If not, were they likely to recur?

Harassment related to race and, if relevant, disability

9. Did the respondent do the following things as alleged by the claimant:-
9.1. During the period 5-19 October 2021, Mr Valenti Cosferent pointed out to Nikola Dojkov unnoticeable faults on vehicles the claimant had worked on, encouraging him to believe there was a problem then laughing and claiming it was a joke.
9.2. On 15 October 2021, Mr Eduard Leau made derogatory comments about the claimant to the claimant's friend D, saying that he had caused damage to vehicles and he was underperforming.
9.3. On 22 October 2021, when the claimant was asked to work on Saturday 23 October 2021, and said he might not be able to work some Saturdays but would consider a reduction in wages, Mr Leau told Mr Maher Harb that the claimant had refused to work, like a co-worker, S, who was on notice of termination.
9.4. On 22 October 2021, Mr Harb had a meeting with the claimant at about Saturday working and was intimidating and disrespectful towards him.
9.5. On 28 October 2021, Mr Dojkov said to Mr Cosferent, referring to another worker, A: 'Hey Val look what this guy done, stupid English.'
9.6. On 10 November 2021, in a meeting, Mr Harb and Mr Leau made demeaning comments to the claimant about his performance, timekeeping and lack of respect.
9.7. If so, was that unwanted conduct?
9.8. Did it relate to race and/or (with the exception of 9.5 above) disability?
9.9. Did it have the purpose of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
9.10. If not, did it have that effect?

Victimization

10. Did the claimant do a protected act as follows:-
10.1. On 29 October 2021, the claimant reported to Mr Harb the comment by Mr Dojkov 'Hey Val, look what this guy done, stupid English' and said that this was discrimination.

10.2. Did the respondent do the following things:
10.2.1. On 3 November 2021, in a meeting with all staff, Mr Harb said no one could start work at 7.30am, and this was directed at the claimant who usually got to work at about 7:30 am.
10.2.2. On 5 November 2021, Mr Harb told Mr Leau that 5 minutes should be deducted from the 30 minute break time for smoking breaks, and this was directed at the claimant.

10.2.3. On 10 November 2021, Mr Harb and Mr Leau had a meeting with the claimant which the clamant thought was a meeting to talk about how he felt but the purpose of the meeting was to terminate his employment.

10.2.4. On 10 November 2021 the respondent dismissed the clamant.

10.3. By doing so, did it subject the claimant to a detriment?

10.4. If so , was this because the claimant did a protected act?

10.5. Was it because the respondent believed the claimant had done, or might do, a protected act?

Procedure, documents and evidence heard

11. The Tribunal heard evidence from the claimant, and from the following witnesses on behalf of the respondent: Mr Maher Harb (Managing Director), Mr Eduard-George Leau (Workshop Manager) and Mr Nikola Dojkov (Technician and Supervisor.)

12. In addition, the respondent produced a witness statement from Mr Valenti Cosferent. The intention had been for Mr Cosferent to attend as a witness, but the Tribunal were informed on the day of the hearing that he would not attend as he no longer works for the respondent. We read the witness statement but as Mr Cosferent was not present it could only be given limited weight.

13. There was a bundle of approximately 560 pages. The respondent also provided written closing submissions. During the course of the hearing, we received a pre-hearing checklist for each party, and a document from the claimant providing additional information about the compensation he was seeking.

14. Upon the application of the respondent, we permitted Mr Harb give evidence first. The reason given for this was that, unexpectedly, he had childcare responsibilities which meant that he was unable to attend on the second and third days of the hearing.

Claimant's application for disclosure

15. Prior to the hearing, the claimant had applied in writing for an order that the respondent disclose an audio recording of two meetings which took place on 25 November 2021, concerning his appeal against dismissal and his grievance. Only the respondent's transcripts were included in the bundle; their position was that the transcripts were accurate.

16. The claimant's request was refused. He confirmed that he had his own recording of these meetings, so he could have made a transcript or provided the recording if he wished to contest the accuracy of the respondent's transcript. Also, if relevant, he could address any alleged discrepancies in his

oral evidence.

Respondent's application in relation to Issue Estoppel

17. The respondent submitted that the tribunal had no jurisdiction to consider the claimant's claim for disability discrimination because the question of whether he had a disability at the relevant time had already been determined against him.

18. In a case brought by the same claimant against a different employer (which is still 'live') an Employment Judge decided, as a preliminary issue, that the claimant did not, at the material time (which was February 2019-September 2021) have a disability. The respondent argued that unless the claimant had developed a disability between September 2021 and 10 November 2021, this issue has already been determined and, pursuant to the doctrine of 'Issue Estoppel', cannot be re-visited.

19. The claimant objected to this application, and said that he was in the process of challenging the decision of the Employment Judge.

20. We rejected the respondent's application. Critically, this is a case against a different respondent, so that the parties involved are not the same parties. It also involves a distinct time period. Therefore the doctrine of Issue Estoppel does not apply.

Preliminary issue: did the claimant have a disability at the relevant time

21. We considered whether the claimant, at the time of the alleged discriminatory acts, had a disability within the meaning of section 6 of the Equality Act. At the hearing we explained to the claimant that – as set out in the Case Management Order date dated 16 November 2022 - this was a matter for him to prove.

22. The claimant said his disability was a tendency to seizures and 'PTSD'. He said that he no longer sought to argue that he had epilepsy. We noted that it was clear from the medical evidence in the bundle that this had been extensively explored, due to a number of seizures or 'absences' experienced by the claimant, and excluded as a diagnosis. (Letter from Imperial College Healthcare NHS Trust, dated 13 July 2020, page 357 of the bundle.)

Law

23. Section 6 of the Equality Act says that a person has a disability if they have a physical or mental impairment that has a substantial and long-term adverse effect on their ability to carry out normal day to day activities. Part 1 of Schedule 1 to the Act sets out supplementary provision relevant to determining disability. We also took account of the Government's Guidance on matters to be to be taken into account in determining questions relating to the definition of disability and the relevant parts of the Equality and Human

Rights Commission's Employment Code.

Evidence

24. Included in the bundle was the claimant's medical records and an undated Impact Statement. We also heard oral evidence from the claimant about his alleged disability.

Tendency to seizures

25. As regards the claimant's tendency to seizures (variously described as 'deju vu' 'absence seizures', 'transitory loss of consciousness' and 'blackouts') the evidence was that he experienced such incidents in June 2016, November 2017, May and June 2018 and 17 July 2020. He was referred to hospital when the incidents occurred. The incidents lasted for short periods – from 30 seconds to 3 minutes. At one point, he was prescribed an epilepsy drug called Levetiracetam. His medical records (page 425 of the bundle) indicate that he was last prescribed Levetiracetam on 14 November 2017, and the claimant confirmed in oral evidence that he was not taking this drug during or around the time of his employment with the respondent.

26. The claimant said that no incidents of this nature occurred while he was working for the respondent, or during the preceding period. It was common ground that the claimant did not inform the respondent about these episodes and that they were not aware of it.

PTSD

27. While the claimant asserted that he has or, at the relevant time, had PTSD, this particular diagnosis is not referred to in his medical records and the claimant described it as a self-diagnosis. However, the claimant also made a number of references to difficulties with stress and mental health, both in his documentary and his oral evidence. For example, in the transcript which was made of his grievance hearing on 25 November 2021 he is recorded as having said – in answer to the question 'what do you class as your disability' – 'I class my disability as my mental health.' In his Impact Statement, the claimant referred to feelings of guilt and worry about the past and future; low self-esteem; loss of interest in daily activities; self-isolation and loss of confidence. He made reference to phobias and depression, and to sleeping difficulties which cause fatigue. The medical evidence notes that, during June 2021-September 2021, he was unable to attend work and in September 2021 he was given a diagnosis of 'stress'. This was said to be work-related stress connected to previous employment. The claimant was prescribed some medication (amitriptyline) from around June 2021, although he said he was not taking this medication while he was working for the respondent. However, during this employment he did attend a talking therapy session with a psychologist (this was on 12.10.2021.)

Conclusion

28. We find that, based on the evidence we read and heard, the claimant has not demonstrated that, at the relevant time, he had a disability because of his tendency to seizures, or because of PTSD or his stress/mental health difficulties, or because of the cumulative effects of both.

29. While he has clearly experienced his 'absences' or seizures on a number of times over the years – ie they have recurred - they have been isolated incidents with lengthy gaps in between, the most recent one having occurred in July 2020. No underlying condition has been diagnosed despite extensive investigations. Critically, the claimant did not assert that this tendency has any impact on his normal day to day activities, or describe what that impact is. We find that these episodes affect him while they are occurring – and it was clear that in the past he has been admitted to hospital a number of times in connection with them - but otherwise do not impact his normal activities. Also, this tendency to seizures was not manifest while he was employed by the respondent - the relevant time period for when the claimant must show he had a disability – and, during this period, the claimant he was not was taking any drugs to control it.

30. In relation to stress and mental health, it was clear that, unfortunately, the claimant has had to cope with a number of issues in his personal life, and that these issues have impacted on his mental health and wellbeing, including at the time when he was working for the respondent. However, we find that the evidence about the claimant's alleged PTSD/stress/mental health issues was not sufficient for us to conclude that, at the time of the alleged discriminatory acts, the claimant had a mental impairment within the meaning of section 6. While the medical evidence included a diagnosis of 'stress', this was not linked to a condition such as – for example - PTSD or clinical depression or some other form of mental impairment. The information in the claimant's impact statement about the impact on his daily life was given in very general terms. Little additional, more specific information was provided in his oral evidence, although he did say 'I can't overload myself.' We could not assess, for example, which day to day activities he was able to do prior to his mental health difficulties which, due to those difficulties, he can now no longer do, or can no longer do to the same extent, so as to assess whether the impact is 'significant' or merely minor. It was not the case that, during the relevant period, he was taking medication to correct or control the alleged impairment, although he did attend a therapy session on 12 October 2021.

31. In conclusion, we find that the claimant has not demonstrated that, at the material time, he had a disability within the meaning of section 6.

32. Having reached this conclusion, there was no need to consider the claimant's claims about disability-related harassment.

Facts and evidence

33. The facts are set out below insofar as they are relevant to the decision we have to make. Where the parties were in dispute, this is identified; and, where

relevant, the tribunal's findings, and reasons for making those findings, are set out.

Background

34. The claimant responded to a job advertisement from the respondent for a MET (Mechanical, Electrical and Trim) technician and was interviewed on 27 August 2021. The respondent was impressed with him and offered him the job. For various reasons, the claimant did not accept this offer until late September. He began work on 5 October 2021. His job was to help repair vehicles which had been damaged.

35. The claimant's employment contract stated that his working hours were 8am – 5:30 pm. His normal hours of work were given as 47.5 per week (which included a 30 minute paid break per day). In addition, the contract said 'You may be required to work additional hours as necessitated by the needs of the business including weekends….' The claimant was on a 3 month probationary period, during which his employment could be terminated if his performance was not up to the required standard or he was considered generally unsuitable.

36. On. 11 October, the claimant signed an agreement 'opting out' of the Working Time Regulations. All staff were asked to sign such an agreement. In practice, the respondent asked each worker to work one Saturday in each month, for a slightly shorter day – 9am to 4pm. Staff had flexibility about which Saturday, but at least two members of staff needed to be present in the workshop.

37. Initially – for about the first two weeks - the employment went very well and the respondent was pleased with the claimant's performance and attitude. However, during the second two weeks, tensions arose following a number of incidents and interactions.

Interactions with Mr Dojkov and Mr Cosferent from 5-19 October

38. During his first two weeks, the claimant was working with colleagues Mr Dojkov and Mr Cosferent. He was still 'finding his feet' and he made a number of mistakes, including on the first car he worked on, a BMW. Mr Cosferent, whose duty it was to sign off work, pointed out these faults.

39. There was a dispute about the manner in which this happened, and the intention of the alleged perpetrator. The claimant said that Mr Cosferent pointed out to Mr Dojkov unnoticeable or imaginary faults on vehicles he had worked on, encouraging him to believe there was a problem then claiming it was a joke. Mr Dojkov said that Mr Cosferent did not point out imaginary faults (ie as a form of ridicule) but real ones, and that 'all the mistakes for everyone were sorted between us' unless a mistake was serious, in which case it would be reported to management. Mr Cosferent, who did not give evidence, said in his written statement that he had provided support to the claimant in a friendly way.

40. No one else witnessed this alleged behaviour, and the claimant did not complain about it at the time. It was therefore difficult to form a view on what actually happened, and what motivations were at play. We find that it is more likely than not that, while Mr Cosferent did point out faults in the claimant's work, these were real faults rather than faults which were fabricated with a view to ridiculing the claimant. This alleged behaviour took place during the first two weeks of the claimant's employment, when he was perhaps more likely to fall into error. Faults in others' work was likewise pointed out – for example, when A, a colleague, carried out sub-optimal work on a bumper Mr Dojkov remarked upon it. Mr Harb's evidence was that he took steps to try to make the workshop a friendly and supportive environment. It seems to us unlikely that if the claimant felt ridiculed or bullied during his first two weeks he would have recommended the respondent to his friend D as a potential employer (see below.)

Interview of D for job as a painter

41. On 15 October, a friend of the claimant, D, arrived at the workshop for a discussion about a potential job as a painter. The respondent was expanding, and had a practice of asking current staff to recommend friends or acquaintances who may be interested in joining the team. The claimant had recommended D. No formal appointment had been made, and Mr Harb was away from the workshop. However, Mr Leau was there, and had a discussion with D; and Mr Harb arrived after about half an hour. He was present for part of the discussion but was 'in and out'.

42. It was common ground that the discussion was about the painter job, and that during this discussion the claimant was referred to. However, the parties were in dispute about what was said.

43. The claimant was not privy to this discussion, but he spoke to D after the interview. He said that D said that Mr Leau had told him that the claimant had done damage to cars and was underperforming. Mr Leau's evidence was that he had mentioned to D that the claimant had made some mistakes and needed to take more care; but that the claimant had reported these to management, which was the right way to behave. Mr Harb, who had been 'in and out', said he had not heard anything negative being said about the claimant.

44. We preferred the evidence of Mr Leau because he was present at the interview and we found his explanation of the context in which the comments had been made convincing. Mr Leau's aim was to convey to D, whose position would potentially be a managerial one, that the respondent was a family business whose aim was to support staff and 'not to blame people but to find solutions…we don't execute people for making mistakes'; and he used an incident involving the claimant to illustrate this. At this point in time – 15 October – the respondent was overall pleased with the claimant's performance, and Mr Leau would have been unlikely to have told D that the claimant's performance was poor, or to have spoken about him in a derogatory way, particularly since he knew that D was a friend of the claimant.

The claimant, on the other hand, was not present at the interview and based his understanding on what D conveyed to him afterwards. D was not himself present to give evidence about his recollection of the interview.

45. In the event, D was not offered the job because his required rate of pay was too high for the respondent.

Saturday working

46. On 22 October, Mr Leau asked the claimant if he could work on Saturday 23 October. The claimant agreed, but he raised concerns about Saturday working in general, saying that he might not be able to work some Saturdays – because, for example, he might be working for his brother, also he was concerned about becoming fatigued - but that he would consider a reduction in wages.

47. There was a dispute about exactly what was else said. Mr Leau's evidence was that the claimant said 'I'm going to work this Saturday because it's part of my contract but I'm not happy about this Saturday working.' The claimant's evidence was that he told Mr Leau he needed further information about Saturday working.

48. Later that day, Mr Leau spoke to Mr Harb about this discussion. There was no independent witness to this conversation, and the claimant formed an impression about what was said which differed from the recollections of Mr Harb and Mr Leau.

49. The claimant said he believed that Mr Leau had falsely told Mr Harb that he, the claimant, was refusing to work on Saturdays, and had compared the claimant's position with that of S, a colleague, who had also raised issues about Saturday working and who was going to be terminated as a result.

50. Mr Leau's evidence was that he had told Mr Harb that, after 2-3 weeks of employment, the claimant was not happy with the Saturday working arrangement; that he felt the contract was a little unfair about working on Saturdays; and that the concerns raised were similar to those that had been raised by S and other employees who had misconstrued the half-hour paid break as part of their working time. He also said that S's employment had not been dismissed but had resigned. Mr Leau denied falsely telling Mr Harb that the claimant had refused to work on Saturday 23 October or on Saturdays generally.

51. We accept Mr Leau's evidence that he did not tell Mr Harb that the claimant had refused to work on Saturday 23 October or on Saturdays in general. We found Mr Leau to be a credible witness with a clear recollection of what he had told Mr Harb. His recollection was supported by that of Mr Harb, the recipient of the communication. The claimant did not witness the discussion; his understanding was conjecture based on his conversation with Mr Harb the following day.

52. Later on 22 October, Mr Harb, having discussed the matter with Mr Leau, approached the claimant to discuss the issue of Saturday working. There was a dispute about what was said and the manner in which it was said. Again, there was no independent witness to this discussion.

53. The claimant said that Mr Harb and been intimidating and disrespectful, aggressive and angry. He was in a hyperventilated state and had a loud tone of voice; he asserted that he had heard from Mr Leau that the claimant was refusing to work on Saturday; and he intimated that the claimant would be fired if he refused to work on Saturdays.

54. Mr Harb's recollection was that he had asked the claimant to confirm (which he did) that the Saturday working arrangements, and the reason for them – including the fact that the 'working time opt out' was necessary due to the obligation on each worker to work one Saturday per month, which brought the working hours above 48. Mr Harb said 'Why are we going on again and again. I explained it all to you.'

55. We find that Mr Harb did not accuse the claimant of refusing to work on Saturday 23 October or on Saturdays in general, or threaten him with being fired if he did so refuse. Mr Harb was a credible witness with a good recollection of what had happened; and his recollection was in line with other evidence about the claimant's stance on Saturday working. That is to say, he did not refuse to do it but was not happy about it. As to Mr Harb's manner, we find, based on the evidence from both witnesses, that more likely than not that the discussion was robust, and that Mr Harb expressed a degree of frustration, possibly influenced by other staff having raised similar though not identical issues.

56. On 25 October, a new timekeeping system (Autofill) replaced the previous system. This was a system though which staff time and attendance was managed.

57. That day, the claimant asked to leave early – having only worked for about 2.5 hours - because he had personal issues. He was permitted to do so. Before he left, Mr Harb shook his hand and said 'We are going to be good friends; we are here if you need anything.'

58. On 26 October, the claimant – whose practice was to arrive at work, and begin work, shortly after 7am - had a discussion with Mr Harb about arrival times. Mr Harb said that, although the contractual start time was 8am, in practice staff (including the claimant) had been arriving earlier than that, and starting work; and there was now a rule that staff either started at 7am (as did some staff such as S and A) or 8am, but not in between. The reason was that disparate arrival times made the workshop hard to manage, and could lead to one worker being present on his own.

Comment about work on car bumper

59. On 28 October, Mr Dojkov spoke to Mr Cosferent about some work to a car bumper which had been done by a colleague, A (who was absent that day) in a sub-optimal manner. This conversation was overheard by the claimant.

60. There was a dispute about what Mr Dojkov said. The claimant's version was that he heard Mr Dojkov say to Mr Cosferent 'Hey, Val, look what this guy done, stupid English.' Mr Dojkov's recollection, on the other hand, was that he said 'That's a stupid way to do a bumper.' This was supported by the evidence in Mr Cosferent's statement, although we gave limited weight to this because Mr Cosferent was not present to give evidence. There was no independent witness to this exchange.

61. We find it more likely than not that Mr Dojkov said 'That's a stupid way to do a bumper' but that he probably did not say 'stupid English' – although the claimant may have believed that this is what he heard. We accept Mr Dojkov's evidence that, at the time the comment was made, he did not know whether A – who was English – had done the work or whether it was S, who was Polish, though he suspected it was A.

62. That same day, the claimant reported the incident to Mr Harb. He did not tell Mr Harb exactly what was said, or who said it. That is, he did not say that the words 'Stupid English' had been uttered, merely that he had overheard a comment in the workshop that was discriminatory. The first time the words 'Stupid English' were reported to Mr Harb and Mr Leau was during the probation review meeting on 10 November.

63. Having heard the claimant's report, Mr Harb questioned the workmen. Mr Dojkov told him he had said 'That's a stupid way to do that bumper.' Mr Harb considered this comment to be rude but not discriminatory. However, he called a meeting to remind staff about equality and company rules, and about good behaviour in the workplace.

64. Mr Harb also spoke to Mr Leau about this incident. He told Mr Leau that the claimant had reported that 'bad words had been used in the workshop' about a worker's workmanship. Mr Leau reminded staff about the necessary work ethic, and told them to pay attention about how they expressed themselves. However, Mr Leau was not made aware that the claimant had described the comment as discriminatory.

65. Relevant training about the correct way to handle the work on car bumpers was given to A at a later date.

Start times

66. On 3 November, Mr Leau called a meeting with staff about starting times. This was to remind staff about the new policy, which was that, although staff could arrive at work whenever they wished, they had to start work at either 7 or 8am. The reason for this meeting was that staff – including the claimant – had been in the habit of arriving between 7 and 8 and beginning work immediately.

67. On 4 November the claimant arrived at work at 7:10. He was reminded that he should wait until 8am, in accordance with the policy, although on that particular day Mr Harb permitted him, exceptionally, to start at 7:30.

Smoking breaks

68. On 5 November, on arrival at work, the claimant went into the office to collect his electronic device. A conversation was taking place between Mr Harb and Mr Leau about smoking, and the claimant overheard some of it.

69. There was a dispute about the content of the conversation. The claimant said it had been a discussion about reducing the half hour break time of smokers to reflect the breaks they took in order to smoke; and he felt that this was directed at him, in particular, as a smoker. Mr Harb's evidence was that reducing break time was not, and had never been, discussed. The conversation had been about how to address the actual or perceived injustice of smokers taking more breaks than non-smokers, as this had been raised by a former member of staff. This was supported by Mr Leau, who said 'We don't want to treat people unfairly.'

70. We accept the evidence of Mr Harb and Mr Leau who were the participants to the discussion and both very credible witnesses. It is consistent with Mr Harb's other evidence that he would be concerned about injustice or perceived injustice in the workplace. Since all staff except one was a smoker, and since Mr Leau himself was a very heavy and regular smoker, it seems unlikely that the discussion was directed at the claimant in particular.

Priority job on Mercedes

71. On 5 November, there was a particular job on a Mercedes that was a priority job from Mr Leau's perspective. Mr Leau informed the claimant about this on 4 November. At some point on 5 November, he asked the claimant to stop working on the BMW he was working on and work instead on the urgent job on the Mercedes.

72. There was a dispute about the claimant's reply. Mr Leau's recollection, and his understanding at the time, was that said that claimant said that since he had omitted to take a lunch break that day he had decided to leave early. The claimant's evidence was that he said, 'Ok but I haven't had my break and I want to leave early.' In the event, Mr Leau worked on the Mercedes with other workers, and the claimant stayed on to complete the work.

73. On Monday 8 November, the claimant did not turn up to work and did not make contact with the respondent. On 9 November Mr Harb made a telephone call to the claimant. He did not answer, but called back a few hours later. Mr Harb, who was in Manchester that day, said 'If you are not coming into work you must call me.' He asked the claimant to come to the workshop the following day.

74. There was a dispute about the extent to which the purpose of this meeting was made clear to the claimant. It was not spelled out in the documentation. The claimant said his understanding at the time was that the meeting was to discuss how he was feeling. However, in an email to Mr Harb dated 9 November 2021, at 17:12, he referred to the possibility of his position being 'reconsidered because of the circumstances and or me being off work past days.'

75. We find that the claimant was well aware that his unexplained absence from work was to be the subject of the meeting, and that his employment might be terminated.

76. On 10 November a probation review meeting took place. Mr Harb, Mr Leau, the claimant and a notetaker were present. The claimant's employment was terminated. The reasons given were performance, time keeping, lack of contact (ie while being absent without leave) and lack of respect to senior managers. The decision to terminate was made by Mr Leau.

77. There was a dispute about whether the transcript of this meeting which was included in the bundle was an accurate reflection of what had been said. Mr Harb and Mr Leau both said it was. The claimant disputed this, but did not produce an alternative version or explain to the Tribunal the ways in which his recollection diverged. There was a suggestion in the documentary evidence that the claimant had made his own recording of this meeting, but if so, he did not produce this, or a transcript of it; and during the hearing he said he had in fact only recorded the first 3 minutes. In the absence of contrary evidence, we accepted the transcript as a fair reflection of what was said during that meeting.

78. The claimant appealed against this decision on 13 November, and also raised a number of grievances. An in-depth investigation by a company called Peninsula, which provides HR services to the respondent, was carried out. Two meetings – one about the appeal, the other about the grievances – took place on 25 November. Neither the appeal nor the grievances were upheld.

The law

79. The relevant law is set out below.

<u>Harassment related to race</u>

80. Section 26 of the Equality Act provides that A harasses B if A engages in unwanted conduct related to a protected characteristic, and the conduct has the purpose or effect of (i) violating B's dignity or (ii) creating an intimating, hostile, degrading, humiliating or offensive environment for B.

81. In deciding whether conduct has this effect, the tribunal must take into account (i) the perception of B, (ii) the other circumstances of the case, (ii)

whether it is reasonable for the conduct to have that effect.

82. The relevant protected characteristic in this case is race. The claimant's race is Black Caribbean.

Victimization

83. Section 27 of the Equality Act provides that A victimizes B if he subjects B to a detriment because B does a protected act or A believes that B has done or may do a protected act. The relevant protected act in this case is 'doing any other thing for the purposes of or in connection with this Act' (section 27(2)(c)) or 'making an allegation, whether or not express, that A or another person has contravened this Act' (section 27(2)(d).

Conclusions

84. Our unanimous conclusions in relation to each issue are set out below.

Harassment related to race

Claimant's performance during the period 5-19 October 2021 – faults pointed out by Mr Valenti Cosferent.

85. Our finding was that faults in the claimant's work were pointed out by Mr Cosferent. We find that this was unwanted conduct, in that the claimant did not welcome being told he was at fault.

86. We considered whether the claimant had proved or alleged facts from which, if unexplained, the Tribunal could conclude that the unwanted conduct was related to his race. There was nothing inherent in the actual or alleged conduct that linked it to race. Beyond asserting that he was the only Black employee at the relevant time, the claimant did not explain why he believed that the conduct related to race. He did not complain about the behaviour, or link it to his race, at the time it occurred. He did not link the conduct to his race during his probation review on 10 November, or when he raised his grievance on 13 November. There was no circumstantial evidence about the ethos, behaviour and attitudes of staff in the workplace from which any such connection could be inferred. On the other hand, there was a convincing alternative explanation, which was that Mr Cosferent was responsible for ensuring that the claimant's work was carried out to the required standard, and had to sign it off, and that therefore he pointed out mistakes. Other staff, such as A, also had their mistakes pointed out.

87. Even if Mr Cosferent had, as the claimant alleged, pointed out imaginary or unnoticeable faults and then said that this was a joke, there was no evidence to connect such conduct with race.

88. Having concluded that the unwanted conduct was not related to race, we did not need to consider whether it had the prohibited purpose or effect.

Comments made by Mr Leau to D on 15 October 2021

89. We find that Mr Leau's comments to D about the claimant was 'unwanted conduct.' The claimant would, understandably, have preferred Mr Leau not to draw D's attention to his mistakes.

90. We considered whether the claimant had proved or alleged facts from which, if unexplained, the Tribunal could conclude that the unwanted conduct was related to his race. There was nothing inherent in the actual or alleged conduct that linked it to race. Beyond asserting that he and D were both Black, the claimant did not explain why he believed that the conduct related to race. He did not complain about the behaviour, or link it to his race, at the time it occurred. He did not link the conduct to his race during his probation review on 10 November, or when he raised his grievance on 13 November. There was no circumstantial evidence about the ethos, behaviour and attitudes of staff in the workplace from which any such connection could be inferred. On the other hand, there was a convincing alternative explanation, which was that Mr Leau used company's response to the claimant's mistakes to illustrate to D, a potential employee and manager, the ethos and supportive atmosphere of the workplace.

91. Having reached the conclusion that the unwanted conduct was not related to race, there was no need to consider this matter further.

Mr Leau's conversation with Mr Harb about Saturday working on 22 October 2021

92. We find that the fact that Mr Leau reported to Mr Harb that the claimant was not happy with Saturday working was not unwanted conduct in that, on the claimant's own evidence, he *did* have concerns about Saturday working and he *did* wish to engage in further discussions about it with Mr Harb. However, he may well have preferred his concerns to have been reported to Mr Harb in a different, more diplomatic manner, and to this extent the conduct was unwanted.

93. We considered whether the claimant had proved or alleged facts from which, if unexplained, the Tribunal could conclude that the unwanted conduct was related to his race. Even if, contrary to our finding, Mr Leau had falsely conveyed to Mr Harb that the claimant had refused to work on Saturday, there was no basis upon which such a link could be made. There was nothing inherent in the conduct to link it to race, and the claimant did not explain why the believed the conduct was related to his race. He did not complain about the conduct at the time, or link it to his race when he did complain about it, ie when he raised his grievance on 13 November. There was no circumstantial evidence about the ethos, behaviour and attitudes of staff in the workplace from which any such connection could be inferred. On the other hand, there was a convincing alternative explanation, which was that Mr Leau used company's response to the claimant's mistakes to illustrate to D, a potential employee and manager, the ethos and supportive atmosphere of the

workplace.

94. Having reached this conclusion, there was no need to consider this matter further.

Mr Harb's conversation with the claimant about Saturday working on 22 October 2022

95. We find that Mr Harb's conversation with the claimant about Saturday working was unwanted conduct in that the claimant would have preferred, for example, not to have been reminded in a robust manner about company policy about Saturday working. He may have preferred to have been permitted a dispensation from it.

96. We considered whether the claimant had proved or alleged facts from which, if unexplained, the Tribunal could conclude that the unwanted conduct was related to his race. There was nothing inherent in the actual or alleged conduct that linked it to race. The claimant did not explain why he believed that the conduct related to race. He did not complain about the behaviour, or link it to his race, at the time it occurred. He did not link the conduct to race during his probation review on 10 November, or when he raised his grievance on 13 November. There was no circumstantial evidence about the ethos, behaviour and attitudes of staff in the workplace from which any such connection could be inferred. On the other hand, there was a convincing alternative explanation for the unwanted conduct. The requirements about Saturday working were applied equally to all staff, and had been explained to the claimant at the outset. On the claimant's own evidence, other workers had raised issues about Saturday working and been told the same thing as he was. We accept the respondent's explanation that this was an ordinary workplace discussion about company policies and practices, and was not related in any way to the claimant's race.

97. Having reached the conclusion that the unwanted conduct was not related to race, there was no need to consider this matter further.

Comment by Mr Dojkov on 28 October 2021 about poor work to bumper

98. We concluded that Mr Dojkov's comment was unwanted, in that the claimant did not like hearing the work of his colleague, A, described as poor. Had we found that Mr Dojkov had described A as 'stupid English' this would similarly have been unwanted conduct. The claimant was sufficiently upset by this incident that he complained to Mr Harb that he had heard a discriminatory comment made in the workplace.

99. We considered whether the claimant had proved or alleged facts from which, if unexplained, the Tribunal could conclude that the unwanted conduct was related to his race. A comment about poor workmanship which was unconnected with the racial characteristics of the person who had carried out the work is not, in the absence of other factors linking the comment to race

(which were absent) related to race. On the other hand, a comment describing a worker as 'stupid English' is related to race.

100. We found that Mr Dojkov did not utter the words 'stupid English'. However, we find that even if he had, his purpose was not to violate the claimant's dignity or create an intimidating, hostile, degrading humiliating or offensive environment for the claimant. His purpose was to point out to Mr Cosferent, whose responsibility it was to ensure that work was carried out to the required standard, that the work was sub-standard. In relation to the effect of the comment – the claimant said that it made him feel that, if Mr Dojkov could refer to A in such terms behind his back, then he was capable of making similar comments about the claimant. However, the comment was not made to the claimant but to Mr Cosferent; the claimant merely overheard it. It was not made about the claimant, or about his work, or about his race, but about that of an absent English colleague, A. If, contrary to our finding, the race-related words 'stupid English' were uttered by Mr Dojkov, we find that, taking into account the claimant's perception, the circumstances, and reasonableness, the effect of the comment would not have been sufficient to violate the claimant's dignity or create the relevant hostile environment. This is a high threshold, and would not have been met.

Meeting on 10 November 2021 at which the claimant's employment was terminated – demeaning comments made by Mr Leau and Mr Harb

101. We find that the comments made during this meeting by Mr Leau and Mr Harb about the claimant's performance, timekeeping and lack of respect was unwanted conduct, in that the comments were unwelcome from the claimant's perspective.

102. We considered whether the claimant had proved or alleged facts from which, if unexplained, the Tribunal could conclude that the unwanted conduct was related to his race. On the face of it, the meeting was about the claimant's performance and conduct. The claimant said that he found the comments demeaning, but did not explain why he believed they were related to his race, or why he believed that this was so. He did not make this link during the meeting on 10 November, or when he raised his grievance on 13 November. There was no circumstantial evidence about the ethos, behaviour and attitudes of Mr Leau or Mr Harb from which any such connection could be inferred. On the other hand, there was a convincing alternative explanation, which was that Mr Leau and Mr Harb had valid concerns about the claimant's performance and conduct – including the fact that, on 5 November, he had unilaterally decided to leave work early without seeking leave (though in the event he did not do so) and that failed to come to work for two days and had not initiated contact with his employer.

103. Having reached this conclusion, there was no need to consider this matter further.

104. We then considered whether each incident of unwanted conduct, considered cumulatively, could be related to race. We concluded that this was

not the case. There was nothing whatsoever to link the unwanted conduct to the claimant's race or to race in general, whether the incidents were considered separately or cumulatively.

105. In conclusion, the claimant did not experience harassment related to his race contract to section 26 of the Equality Act. Unwanted conduct occurred, but it was not related to race.

Victimization

106. We concluded that, when the claimant reported to Mr Harb on 29 October 2021 that a discriminatory remark had been made in the workplace, concerning the poor work done on a car bumper, he did a protected act within the meaning of section 27(2)(c) of the Equality Act. A complaint about discrimination can be described as an act done in connection with the Equality Act even where the allegation is not true, provided that it is made in good faith, and even where the complaint concerns discrimination against someone other than the claimant. There was no evidence that the claimant acted in bad faith.

107. We then considered whether the claimant had been subjected to detriments, as alleged. We considered whether, in all the circumstances, the claimant reasonably felt that what happened was a disadvantage at work.

108. We find that the instruction to start work at either 7am or 8am, but not in between these times, was directed at all staff equally, and was an expression of the respondent's policy on start times. A number of staff, not just the claimant, had been arriving and starting work in between these hours, and this was difficult for the respondent to manage, hence the new policy/practice. Therefore it was not reasonable for the claimant to feel that this represented a disadvantage to him.

109. The discussion between Mr Leau and Mr Harb, overheard by the claimant, about how to manage actual or perceived injustice arising from the fact that smokers took more breaks than non-smokers concerned all staff not just the claimant. Indeed, at the relevant time there was only one non-smoker employed at the respondent. Also Mr Leau and Mr Harb were talking to each other – the claimant just happened to overhear their conversation when he entered the office to collect an electronic device. Therefore it was not reasonable for the claimant to feel that this conversation was a disadvantage to him.

110. The act of Mr Harb and Mr Leau in arranging a probation review meeting on 10 November was a detriment. It was reasonable for the claimant to feel that having his probation reviewed was disadvantageous.

111. The decision to dismiss the claimant on 10 November was also a detriment, in that having his employment terminated was disadvantageous.

112. We then considered whether the claimant was subjected to the two identified detriments because he had done a protected act.

113. There was no evidence of a connection between the meeting being arranged and the protected act. We accept the evidence of Mr Harb and Mr Leau that the meeting was set up because the claimant had been absent for two days and failed to initiate contact with the respondent; and because of Mr Leau's concerns about his behaviour on 5 November (in saying, despite being aware that urgent work needed to be done on a Mercedes, that he had decided to leave work early without having sought permission to do so). Mr Leau said, in oral evidence, 'You left me speechless with that comment.'

114. During the meeting, as set out in the transcript, the claimant made a link between recent events and his protected act. He referred to 'the way my colleague spoke in the bodyshop where I had to intervene'. However, until that point Mr Leau, the decision maker, had not been made aware that the claimant had done a protected act; therefore he could not have been influenced it in making his decision to dismiss. His evidence was that the decision to dismiss 'had nothing to do with anything you said to Mr Harb', and we accept this evidence.

115. Mr Harb had been aware of the protected act, although prior to this meeting he was not aware that the claimant believed that Mr Dojkov had uttered the words 'Stupid English.'

116. There was a convincing explanation for why the claimant was dismissed – including his attitude, performance and unauthorized absence – and no evidence that the dismissal was because the claimant did a protected act.

117. In conclusion, the claimant was not victimized by the respondent.

Employment Judge Cotton

Date: 18 April 2023

Sent to the parties on: 29.4.2023

GDJ
For the Tribunal Office

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The claimant did not explain why he believed that the relevant conduct related to race. He did not complain about the conduct, or link it to his race, at the time it occurred. H or during his probation review on 10 November, or when he raised his grievance on 13 November. There was no circumstantial evidence about the ethos, behaviour and attitudes of staff in the workplace from which any such connection could be inferred. All staff were subject to the same rules about Saturday working, and all had been asked to sign the opt-out. On the other hand, there was a convincing alternative explanation, which was that Mr Leau was carrying out his managerial duties by reporting a conversation with the claimant about company policy and practice on Saturday working to his managing director, Mr Harb, in order that Mr Harb could resolve matters with the claimant.