



EMPLOYMENT TRIBUNALS

Claimant: Mr J Daniel
Respondent: Lidl Great Britain Limited
Heard at: Midlands East Tribunal via Cloud Video Platform
On: 11, 12 and 13 November 2024
Before: Employment Judge Brewer
Ms K Srivastava
Ms J Dean

Representation

Claimant: In person
Respondent: Ms G Williams, Solicitor

JUDGMENT

The unanimous judgment of the Tribunal is as follows:

1. The claimant's claim for direct race discrimination fails and is dismissed,
2. The claimant's claim for harassment related to race fails and is dismissed, and
3. The claimant's claim for unauthorised deductions from wages fails and is dismissed.

REASONS

Introduction

1. This case was heard over three days. The first morning was taken up with Tribunal reading time. The claimant's case was completed by the end of the first day. The respondent's case was completed by lunchtime on day two and we heard the

parties' submissions on the afternoon of day two. We deliberated and gave an oral judgement on the afternoon of day three. Given that the claimant is a litigant in person we felt it would be appropriate to provide him with full written reasons which we set out here.

2. At the hearing the claimant represented himself and the respondent was represented by Ms. Williams, a Solicitor. Although the claimant had failed to provide the respondent with any documents in preparation for this case, nevertheless there was no suggestion that we had anything other than an agreed bundle of documents which ran to some 350 pages.
3. Witness statements proved rather more problematic. We had written witness statements from four witnesses for the respondent who appeared before us, and one written witness statement from a witness who was not available for the hearing, and we have given that appropriate weight in the circumstances.
4. For reasons which remain unclear the claimant failed to produce a witness statement but after some discussion he agreed that the document which appears at pages 58 to 68 of the bundle should be treated as his witness statement. That document was a response to an order for him to provide further particulars of his complaints and contains sufficient detail to amount to his evidence in chief. Furthermore, given that this document did set out the details of his complaints, the respondents witness statements dealt with what was set out in this document and thus respond to what has ended up being the claimant's pleaded case.
5. The claimant's failure to provide any disclosure or produce a written witness statement gave rise to an application by the respondent that the claimant's claims should be struck out which we heard prior to commencement of the evidence.
6. The respondent in fact made the application on alternative grounds; the first was that the claim had not been actively pursued, and the second was that it had no reasonable prospect of success.
7. We were able to deal with this application quite shortly. As to the first ground, the claimant was not obliged to provide disclosure, he only had to do so if he had documents relevant to his claims, and clearly, given that he did not send any documents to the respondent for inclusion in the bundle he presumably did not have any documents which were relevant and which were not already included in the respondent's disclosure. As to the non-provision of a witness statement we dealt with that in the manner described above and given, as we have said, that the respondent's witness statements were clearly drafted in response to what we ultimately took to be the claimant's witness statement, they were not prejudiced by his failure and it was clearly possible to have a fair hearing.
8. In relation to the application on the second ground, that is 'no reasonable prospect of success', given that there were issues of fact to be determined, and we were not in a position without hearing evidence to determine those or determine therefore that the claims had no reasonable prospect of success, we decided that we would not strike out the claims on that basis. The case therefore proceeded to a full hearing.
9. Finally, we did have an agreed list of issues as set out below.

10. Given that the claimant was a litigant in person we offered him such assistance as was reasonable which included helping him to understand the questions that were being asked of him, explaining the purposes of cross examination and on occasion assisting him to formulate questions for the respondent's witnesses.
11. At the end of the evidence, we heard submissions from the parties and we have taken into account the evidence and submissions in reaching our decision.

Issues

12. The agreed issues are as follows.

Direct race discrimination (s 13 EqA 2010)

- 12.1. Whether the claimant was subjected to less favourable treatment because he is Jewish:
 - 12.1.1. Whether James Flawn weekly threatened the claimant with dismissal?
 - 12.1.2. Whether Jason Gillespie weekly threatened the claimant with dismissal?*
 - 12.1.3. Whether James Flawn destroyed all the claimant's overtime details?
 - 12.1.4. Whether on or about the following dates employees of the respondent told the claimant 'You can fuck off and find a job elsewhere?':
 - 12.1.4.1. **7:10pm on 09.12.22** James Flawn and Jason Gillespie threatened the claimant saying 'fuck off- we don't like you – go and find another job – you are Jewish', JG said 'I've sacked 60-70 Asian people – I don't want them here', JF said 'Go and find a job somewhere else – we don't want you here. If you continue here we'll terminate your contract and get rid of you.' [Said in recycling unit at 'clear plastic only' sign],
 - 12.1.4.2. **9:20pm on 18.12.22** JF and JF told the claimant that they would terminate his contract and he was to 'fuck off and find work somewhere else – we told you before' [said in yard near skip];
 - 12.1.4.3. **20:58 on 22.12.22** JF and JF pointed finger at the claimant and JG said ' fuck off, we hate you working here, we don't want to see you again', JF agreed with JG, both JG and JF said 'we hate Jewish people working here, you don't have a future here, we'll terminate your contract and Sean McKay will do it [said at sloping ramp in yard opposite skip],

- 12.1.4.4. **6:45pm on 27.12.22** JG and JF said 'you're getting on our nerves – we don't want to see you again – we don't want Jews working here' [said by large blue metal skip in the yard],
- 12.1.4.5. **2:36am on 14.01.23** JG, JF, [Matthew? , Connor Hughes?] all shouted 'we told you many times – we hate Jews working here [next to portacabins],
- 12.1.4.6. **00:41am on 22.01.23** JF and JG screamed 'you can't have a permanent job here – is that clear? You are not listening. We hate you – fuck off somewhere else. You need to go – you are Jewish,
- 12.1.4.7. **19:58 on 29.01.23** JG and JF threatened ' you need to fuck off – leave – we hate your face – we'll terminate your contract' [at bays 33 and 34],
- 12.1.4.8. **1:38am on 05.02.23** JF and JG 'you'll never get work here – go elsewhere – you're Jewish- we'll terminate your contract, we hate you, just fuck off' [at the recycling unit by 'clear plastic only' sign],
- 12.1.4.9. **At 2:50am on 25.02.23** JF and JG shouted 'fuck off, leave this company and find another somewhere' [between aisles 71 and 72],
- 12.1.4.10. **18:21 on 05.05.23** 'we'll never let you get a job here as you're Jewish. We'll get Sean McKay to fire you. You need to fuck off' [at bays 31 and 32],

[C states that this behaviour never stopped from the above dates to the present]

- 12.1.5. The claimant relies on a hypothetical comparator.
- 12.1.6. Was the claimant subject to less favourable treatment?
- 12.1.7. If so, was it because of his race?
- Either:
- 12.1.8. What was the reason for the Claimant's treatment? (The reason "why")
- Or the two-stage test:
- 12.1.9. Has the claimant proved facts from which the tribunal could conclude in the absence of an adequate explanation that the respondent has discriminated against the claimant (i.e., a 'prima facie case')
- 12.1.10. If so, what is the respondent's explanation? Does it prove a non-discriminatory reason for any proven treatment?

Harassment (s26 EqA)

- 12.1.11. The claimant claims that the respondent engaged in unwanted conduct because of his race:
- 12.1.12. Whether James Flawn weekly threatened the claimant with dismissal?
- 12.1.13. Whether Jason Gillespie weekly threatened the claimant with dismissal?
- 12.1.14. Whether James Flawn destroyed all the claimant's overtime details?
- 12.1.15. Whether on or about the following dates employees of the Respondent told the Claimant 'You can fuck off and find a job elsewhere?':
- 12.1.15.1. **7:10pm on 09.12.22** James Flawn and Jason Gillespie threatened the claimant saying 'fuck off- we don't like you – go and find another job – you are Jewish', JG said 'I've sacked 60-70 Asian people – I don't want them here', JF said 'Go and find a job somewhere else – we don't want you here. If you continue here we'll terminate your contract and get rid of you.' [Said in recycling unit at 'clear plastic only' sign],
- 12.1.15.2. **9:20pm on 18.12.22** JF and JG told the claimant that they would terminate his contract and he was to 'fuck off and find work somewhere else – we told you before' [said in yard near skip],
- 12.1.15.3. **20:58 on 22.12.22** JF and JG pointed finger at the Claimant and JG said ' fuck off, we hate you working here, we don't want to see you again', JF agreed with JG, both JG and JF said 'we hate Jewish people working here, you don't have a future here, we'll terminate your contract and Sean McKay will do it [said at sloping ramp in yard opposite skip];
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- 12.1.15.9. **At 2:50am on 25.02.23** JF and JG shouted ‘fuck off, leave this company and find another somewhere’ [between aisles 71 and 72],
- 12.1.15.10. **18:21 on 05.05.23** ‘we’ll never let you get a job here as you’re Jewish. We’ll get Sean McKay to fire you. You need to fuck off [at bays 31 and 32] [C states that this behaviour never stopped from the above dates to the present],
- 12.1.15.11. Was the claimant subjected to unwanted conduct / the conduct referred to in paragraph 6 above?
- 12.1.15.12. If so, was this unwanted conduct because of his race.
- 12.1.15.13. If so, did this conduct have the purpose or effect of violating the claimant’s dignity and / or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant, and was it reasonable to so conclude?

Unauthorised deduction of wages

- 12.1.15.14. Whether the claimant is entitled to 50 hours overtime?

Time limits

- 12.1.15.15. Are the claimant’s claims in time?
- 12.1.15.16. Was there “conduct extending over a period”?
- 12.1.15.17. If not, would it be just and equitable to extend time, or was it not reasonably practicable for the claim to have been brought in time?

Law

13. We set out below a brief description of the relevant law.

Direct discrimination

14. In relation to direct discrimination, for present purposes the following are the key principles.

15. Under section 13 Equality Act 2010 (EqA), there are two issues: (a) less favourable treatment and (b) the reason for that less favourable treatment. These questions need not be answered strictly sequentially (**Shamoon v Chief Constable of the Royal Ulster Constabulary** 2003 ICR 337).

16. Given the treatment must be “less favourable” a comparison is required, and a comparator must “be in the same position in all material respects as the victim save only that he, or she, is not a member of the protected class” (**Shamoon** above).
17. The burden of proof is set out in section 136 EqA. The leading cases on the burden of proof pre-date the Equality Act (**Igen Ltd v Wong** 2005 EWCA Civ 142 and **Madarassy v Nomura international Plc** 2007 EWCA Civ 33, [2007] IRLR 246) but in **Hewage v Grampian Health Board** 2012 the Supreme Court approved the guidance given in **Igen** and **Madarassy**.
18. By virtue of section 136, it is for a claimant to prove on the balance of probabilities facts from which the Tribunal could conclude, absent any explanation from the respondent, that the respondent has discriminated against the claimant. If the claimant does that, the burden of proof shifts to the respondent to show it did not discriminate as alleged.
19. In **Madarassy** the Court of Appeal held that the burden of proof does not shift to the employer simply on the claimant establishing a difference in status (e.g. sex) and a difference in treatment. This merely gives rise to the possibility of discrimination. Something more is needed. Any inference about subconscious motivation has to be based on solid evidence (**South Wales Police Authority v Johnson** 2014 EWCA Civ 73).

Harassment

General

20. Three forms of behaviour are prohibited under S.26 Equality Act 2010 (EqA), which is entitled ‘Harassment’ but for our purposes the relevant definition is ‘general’ harassment, i.e. conduct that violates a person’s dignity or creates an intimidating, hostile, degrading, humiliating or offensive environment — S.26(1).
21. In short, the law is that a person (A) harasses another (B) if:
 - 21.1. A engages in unwanted conduct related to a relevant protected characteristic — S.26(1)(a); and
 - 21.2. 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 — S.26(1)(b).
 - 21.3. There are three essential elements of a harassment claim under S.26(1):
 - 21.3.1. unwanted conduct,
 - 21.3.2. that has the proscribed purpose or effect, and
 - 21.3.3. which relates to a relevant protected characteristic.

21.4. Mr Justice Underhill, then President of the EAT, expressed the view that it would be a ‘healthy discipline’ for a tribunal in any claim alleging unlawful harassment specifically to address in its reasons each of these three elements — **Richmond Pharmacology v Dhaliwal** 2009 ICR 724, EAT (a case relating to a claim for racial harassment brought under the Race Relations Act 1976 (RRA)). Nevertheless, he acknowledged that in some cases there will be considerable overlap between the components of the definition — for example, the question whether the conduct complained of was unwanted may overlap with the question whether it created an adverse environment for the employee. An employment tribunal that does not deal with each element separately will not make an error of law for that reason alone — **Ukeh v Ministry of Defence** EAT 0225/14.

21.5. The Equality and Human Rights Commission’s Code of Practice on Employment (‘the EHRC Employment Code’) notes that unwanted conduct can include ‘a wide range of behaviour, including spoken or written words or abuse, imagery, graffiti, physical gestures, facial expressions, mimicry, jokes, pranks, acts affecting a person’s surroundings or other physical behaviour’ — para 7.7. The conduct may be blatant — (for example, overt bullying) — or more subtle (for example, ignoring or marginalising an employee). An omission or failure to act can constitute unwanted conduct as well as positive actions (see, for example, **Marcella and anor v Herbert T Forrest Ltd and anor** ET Case No.2408664/09 below and **Owens v Euro Quality Coatings Ltd and ors** ET Case No.1600238/15, in which an employer’s failure to remove a picture of a swastika for some weeks amounted to unwanted conduct).

21.6. In **Reed and anor v Stedman (above) and Insitu Cleaning Co Ltd v Heads** (above) (both decided before the statutory harassment provisions came into force) the EAT held that the word ‘unwanted’ is essentially the same as ‘unwelcome’ or ‘uninvited’. This is confirmed by the EHRC Employment Code (see para 7.8). The EAT in **Thomas Sanderson Blinds Ltd v English** EAT 0316/10 pointed out that unwanted conduct means conduct that is unwanted by the employee. The necessary implication is that whether conduct is ‘unwanted’ should largely be assessed subjectively, i.e. from the employee’s point of view. This could possibly become an issue where employee B is alleging that he or she has suffered harassment by virtue of having witnessed harassment suffered by employee C. Depending upon the circumstances, the employer might be able to argue that although the treatment was unwanted by C it did not affect B and therefore was not unwanted conduct so far as B was concerned.

Unauthorised deductions

21.7. In relation to a claim for unlawful deductions from wages, the general prohibition on deductions is set out in section 13(1) Employment Rights Act 1996 (ERA), which states that:

‘An employer shall not make a deduction from wages of a worker employed by him.’

- 21.8. However, it goes on to make it clear that this prohibition does not include deductions authorised by statute or contract, or where the worker has previously agreed in writing to the making of the deduction (section 13(1)(a) and (b)).
- 21.9. Section 27(1) ERA defines ‘wages’ as:
- ‘any sums payable to the worker in connection with his employment’*
- 21.10. This includes *‘any fee, bonus, commission, holiday pay or other emolument referable to the employment’* (section 27(1)(a) ERA). These may be payable under the contract ‘or otherwise’.
- 21.11. According to the Court of Appeal in **New Century Cleaning Co Ltd v Church** 2000 IRLR 27, CA, the term *‘or otherwise’* does not extend the definition of wages beyond sums to which the worker has some legal, but not necessarily contractual, entitlement.
- 21.12. Finally, there is a need to determine what was ‘properly payable’ on any given occasion and this will involve the Tribunal in the resolution of disputes over what the worker is contractually entitled to receive by way of wages. The approach tribunals should take in resolving such disputes is that adopted by the civil courts in contractual actions — **Greg May (Carpet Fitters and Contractors) Ltd v Dring** 1990 ICR 188, EAT. In other words, tribunals must decide, on the ordinary principles of common law and contract, the total amount of wages that was properly payable to the worker on the relevant occasion.

Time limits

- 21.13. The relevant section of the ERA relating to time limits for bringing a claim for unauthorised deductions from wages is as follows,

23 Complaints to employment tribunals

- (1) *A worker may present a complaint to an employment tribunal*
- (a) *that his employer has made a deduction from his wages in contravention of section 13 (including a deduction made in contravention of that section as it applies by virtue of section 18(2)),*
 - (b) *that his employer has received from him a payment in contravention of section 15 (including a payment received in contravention of that section as it applies by virtue of section 20(1)),*
 - (c) *that his employer has recovered from his wages by means of one or more deductions falling within section 18(1) an amount or aggregate amount exceeding the limit applying to the deduction or deductions under that provision, or*

(3) For the purposes of this section

a. conduct extending over a period is to be treated as done at the end of the period;

b. failure to do something is to be treated as occurring when the person in question decided on it.

(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something—

(a) when P does an act inconsistent with doing it, or

(b) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.

21.15. On the evidence we are satisfied that the claimant's claims were brought in time.

Findings of fact

22. We make the following findings of fact (references are to pages in the bundle).

23. The claimant is Jewish, At all material times the claimant was employed by the respondent as a Warehouse Operative at its Regional Distribution Centre (RDC) in Lutterworth. His employment commenced on 7 December 2022.

24. The RDC operates 24 hours a day, seven days a week and therefore staff work various shift patterns. The claimant worked a shift pattern which started at 6.00 pm and finished at 3.00 am. On each shift, each part of the RDC comprises the relevant staff and one Assistant Team Manager (ATM).

25. The claimant's line manager was James Flawn, an ATM. Mr Flawn generally worked from 9.00 pm to 7.00 am. The ATM on the morning shift was Jason Gillespie. Mr Gillespie generally worked from 6.30 am to 5.00 pm.

26. All warehouse employees are hourly paid and are required to clock in and out, and record break times, using an electronic clocking system via a PZE Terminal. The information input to these terminals is linked directly to the respondent's payroll system as staff are paid for each minute they work.

27. The claimant was trained on the time recording system on 7 December 2022.

28. Sometimes clocking mistakes are made, and these are picked up by the system and flagged to managers. The information on the system can only be modified by using a Working Time correction form. Once the form has been completed it is signed by the employee whose information is being corrected and their manager. Once the form is signed it is sent for processing to the HR services team. It is not possible to amend an employee's working time data in any other way.

29. There is no evidence to support the claimant's contention that throughout the relevant period, that is from 7 December 2022 until May 2023 the respondent's time recording system was not working.
30. On each of the claimant's shifts there were around 50 warehouse operatives present.
31. When the claimant started work, he was on probation.
32. In December 2022, Connor Hughes, ATM in 'Selection', had an informal conversation with the claimant about him clocking into work earlier than his shift start time. Mr Hughes explained that he must not do this because the system would pay him from the time he clocked in, to the time he clocked out, even though he was not actually working until 6.00 pm.
33. On 19 December 2022 Mr Flawn also had a discussion with the claimant about him clocking in early for shifts. There is a note of this discussion signed by Mr Flawn and the claimant at [153].
34. On 29 January 2023 Mr Flawn conducted the claimant's probation review [163]. As part of that review Mr Flawn commented that the claimant was "*doing a good job tidying up the yard*", that he was consistent in turning up for work on time and noted that he did well stacking broken pallets and preparing pallets for the morning shift. Mr Flawn also stated that the claimant was "*experienced with the truck, good at stacking the pallets*" although he did say that the claimant needed to improve his time keeping around breaks. The probationary review form states that the claimant was "*happy with job. Using skills that he is fully trained for previously*". The form was signed by Mr Flawn and the claimant. There is no mention in the form of any concerns raised by the claimant about the matters which formed the subject of this Tribunal complaint.
35. The claimant's probation was passed without any extension.
36. On 31 March 2023 Joseph King, a member of the respondent's maintenance team, forwarded to Mr Flawn and others an e-mail he had received from the respondent's outsourced cleaning company [165]. That e-mail reports an incident which took place on 30 March 2023 and identified one of the respondent's staff as using inappropriate language and being disrespectful towards a member of the cleaning company's staff. The claimant was identified as the person who used the inappropriate language, and being disrespectful.
37. On 6 April 2023 one of the respondent's employees, Michael Gaszcz, told Mr Flawn that he had seen the claimant watching videos on his phone whilst sitting on the counterbalance truck. A short while later, at around 10.00 pm, Mr Flawn believed that he saw the claimant watching a video on his phone whilst using the counterbalance truck. Mr Flawn asked the claimant why he was using his phone and the claimant confirmed that he was using his phone to send a message but denied that he was watching a video.
38. As well as the above two concerns, Mr Flawn noticed that the claimant had again started to clock in as much as one hour before his scheduled start time as a result

of which he determined to meet with the claimant to discuss all three of the above concerns.

39. The claimant met with Mr Flawn during the shift on 7 April 2023 and notes of that meeting are at [168 – 170]. The notes were signed by Mr Flawn and the claimant.
40. During the meeting the claimant is recorded as saying the following: “*you don't have respect for me or any colleagues you don't like me your personality is aggressive and wrong, at the moment you are being bad to the people and making a problem asking me silly questions, I'm only doing 18.00 – 03.00*”. The claimant also alleged that Mr Flawn said he wanted to kick the claimant out and Mr Flawn responded, “*I did not say that*”.
41. On 8 April 2023 the claimant raised a grievance against Mr Flawn [186 - 207]. The grievance raises many concerns about Mr Flawn including that he “*is a committed racist*”. There is no mention in the grievance about any concerns the claimant had with another ATM, Mr Gillespie.
42. The claimant's grievance was passed to Georgina Jacobs to deal with. At the time she was the HR Project Consultant based at the respondent's RDC in Belvedere and did not work with or indeed know the claimant.
43. On 16 April 2023 the claimant commenced early conciliation.
44. The claimant received his early conciliation certificate on 17 April 2023.
45. The claimant presented his claim form to the Tribunal on 2 May 2023.
46. Ms Jacobs met with the claimant on 4 May 2023. Also present were a note taker, Zoe Freestone, HR services administrator. Notes of the meeting are at [219 – 223]. The claimant signed the meeting notes and has not previously suggested that they are not anything other than accurate.
47. Ms Jacobs also met with Mr Flawn, Mr Hughes, Natalija Ahmadi and listened to covert recordings the claimant had made of meetings with Mr Flawn.
48. Ms Jacobs delivered her conclusions on the grievance by letter dated 9 June 2023 [249 – 251]. She found no evidence to substantiate the claimant's allegations and did not uphold his grievance.

Discussion and conclusions

49. We turn now to our conclusions on the allegations set out in the list of issues. We shall deal with the issues of direct discrimination and harassment together because essentially, they are identical claims pleaded in the alternative.
50. Before we turn to our conclusions, we note the strength of the claimant's feelings about the way he says he was treated. In our experience strength of feeling is not necessarily a good guide to whether the matters complained of in fact took place or took place as subsequently recalled.

51. It was a very strong and central part of the claimant's case that the respondent had lied, had falsified documents and that all of the respondent's witnesses were lying yet he provided no evidence to substantiate such serious allegations. The claimant said that many people had been the subject to discrimination by the respondent, in particular, along with himself, Asian staff whom he said had been dismissed in their hundreds simply because of their race, and he said that he had been the subject of almost daily gross racist abuse. Despite this, he provided no corroborating witnesses testimony, no witness statements or indeed any other documentation to support these very serious allegations.
52. In particular there is no evidence that the respondent's time recording system was not working at any point during the claimant's employment, he could give no specific details of dates where he says he worked overtime for which he was not paid and he could not explain why, if he had been the subject of such gross racist abuse, he had waited months before complaining either by raising a grievance or indeed bringing a claim to the Employment Tribunal.
53. One other matter which is noteworthy is that the allegations of discriminatory language are expressed as either two or more people saying the same thing at the same time. This was a matter which was explored by Ms Williams in her cross examination of the claimant. The claimant was asked whether given how his complaints were drafted, he literally meant that for example Mr Flawn and Mr Gillespie both spoke to him at the same time and said the same thing. The claimant responded, "*they both spoke at the same time...they spoke together, exactly the same thing, same time*".
54. The respondent's witness evidence was both internally consistent and consistent with the contemporaneous documentation. It seemed to the Tribunal inconsistent for the claimant to say that from the start of his employment Mr Flawn did not want to employ him and indeed wanted to ensure that he left the respondent's employment, yet it was Mr Flawn who determined that the claimant passed his probation. We accept Mr Flawn's evidence that he did not have authority to dismiss the claimant and therefore had he really wished to ensure that the claimant did not remain in employment he would presumably have ensured that the claimant failed his probation.
55. Taking all of the above into account, we find that where there was a conflict of evidence, we prefer the evidence of the respondent's witnesses. Notwithstanding his strength of feeling we did not find the claimant to be a particularly credible witness of fact.

Direct race discrimination/harassment related to race

56. We shall deal with each allegation in turn.

Whether James Flawn weekly threatened the Claimant with dismissal?

- 56.1. There is simply no evidence to support this allegation and as we have referred to above, Mr Flawn had no authority to dismiss the claimant and had he wished the claimant to be dismissed in the way or for the reason suggested

by the claimant, it would have been simple enough for Mr Flawn to ensure that the claimant failed his probation, but he did not.

56.2. For those reasons this allegation fails and is dismissed.

Whether Jason Gillespie weekly threatened the Claimant with dismissal?

56.2.1. There is in fact no complaint about Mr Gillespie in the claimant's claim form. There was some discussion about this during the hearing and Ms Williams' view was that the inclusion of this allegation required the claimant to amend his claim but given that the respondent has responded to it it is not something she would object to and therefore we have allowed this claim to go forward. Having said that notwithstanding that Mr Gillespie could not attend the hearing, other than what the claimant says, there is simply no evidence to support the contention that on a weekly basis Mr Gillespie threatened the claimant with dismissal. Like Mr Flawn, Mr Gillespie is an ATM and therefore also did not have the authority to dismiss the claimant.

56.2.2. For those reasons this allegation fails and is dismissed.

Whether James Flawn destroyed all the Claimant's overtime details?

56.2.3. We have discussed in detail the respondent's clocking system. We accepted the respondent's evidence that it was not open to anyone other than the persons responsible for dealing with payroll to alter or amend the information gathered by the payroll system via the PZE clocking system. We accept that in order for the information which had been input directly to the system by the employees themselves, through clocking in and out, to be changed, a Working Time correction form had to be completed and signed by both the manager and the employee concerned and sent to payroll so that they could then alter the information on the system.

56.2.4. The claimant was not clear as to what his overtime details were or how they could have been destroyed. If he had clocked in and had worked longer than his shift before clocking out, he would have been paid for it because the system operates automatically. The only way overtime details could have been 'destroyed' is if a Working Time correction form had been completed, signed by the claimant and sent to payroll, and the claimant does not allege that this was done.

56.2.5. In the period to the end of December 2022 the claimant was in fact paid for 22.73 hours overtime and in the circumstances, it would seem odd that if overtime records were destroyed in this period it was on a selective basis. We consider the allegation implausible at best.

56.2.6. For those reasons this allegation fails and is dismissed.

Whether on or about the following dates employees of the Respondent told the Claimant 'You can fuck off and find a job elsewhere?'

7:10pm on 09.12.22 James Flawn and Jason Gillespie threatened the claimant saying 'fuck off- we don't like you – go and find another job – you are Jewish', JG said 'I've sacked 60-70 Asian people – I don't want them here', JF said 'Go and find a job somewhere else – we don't want you here. If you continue here we'll terminate your contract and get rid of you.' [Said in recycling unit at 'clear plastic only' sign]

56.2.6.1. Mr Flawn was not at work on 9 December 2022 [328]. This incident could not therefore have occurred and for that reason this allegation fails and is dismissed.

9:20pm on 18.12.22 JF and JG told the Claimant that they would terminate his contract and he was to 'fuck off and find work somewhere else – we told you before' [said in yard near skip]

56.2.6.2. There are three difficulties with this allegation. The first is that the information on the system shows that Mr Flawn left work at 9.01 on 18 December 2022 [328] and was not therefore at work when the incident is alleged to have taken place. Second, Mr Gillespie was not in work that day [337/338]. Third, the claimant's time recording information shows that he was on a rest day and not in fact at work on 18 December 2022 [300]. This incident could not therefore have taken place.

56.2.6.3. For those reasons this allegation fails and is dismissed.

20:58 on 22.12.22 JF and JG pointed finger at the claimant and JG said 'fuck off, we hate you working here, we don't want to see you again', JF agreed with JG, both JG and JF said 'we hate Jewish people working here, you don't have a future here, we'll terminate your contract and Sean McKay will do it [said at sloping ramp in yard opposite skip]

56.2.6.4. On this date, Mr Gillespie finished work at 5.01 pm [338] and was not there for working when this incident is alleged to have taken place.

56.2.6.5. For that reason, this allegation fails and is dismissed.

6:45pm on 27.12.22 JG and JF said 'you're getting on our nerves – we don't want to see you again – we don't want Jews working here' [said by large blue metal skip in the yard]

56.2.6.6. On 27 December 2022 Mr Gillespie finished work at 4.34 pm [338]. He was not therefore at work at 6:45 pm as alleged by the claimant.

56.2.6.7. For that reason, this allegation fails and is dismissed.

2:36am on 14.01.23 JG, JF, [Matthew? , Connor Hughes?] all shouted 'we told you many times – we hate Jews working here [next to portacabins]

56.2.6.8. Mr Flawn was not on shift on the morning of 14 January 2023 [331] and Mr Rye did not start work until 11.59 am on 14 January, therefore this incident could not have occurred as alleged.

56.2.6.9. For those reasons this allegation fails and is dismissed.

00:41am on 22.01.23 JF and JG screamed 'you can't have a permanent job here – is that clear? You are not listening. We hate you – fuck off somewhere else. You need to go – you are Jewish

56.2.6.10. On 22 January 2023 Mr Gillespie did not start work until 6.00 am and was not present when this incident is alleged to have taken place [339].

56.2.6.11. For that reason, this allegation fails and is dismissed.

56.2.6.12. **19:58 on 29.01.23** JG and JF threatened ' you need to fuck off – leave – we hate your face – we'll terminate your contract' [at bays 33 and 34]

56.2.6.13. On this date Mr Gillespie left work at 5.03 pm and was not at work when the incident is alleged to have taken place [340].

56.2.6.14. For that reason, this allegation fails and is dismissed.

1:38am on 05.02.23 JF and JG 'you'll never get work here – go elsewhere – you're Jewish- we'll terminate your contract, we hate you, just fuck off' [at the recycling unit by 'clear plastic only' sign]

56.2.6.15. Mr Gillespie was not working on this date [340] and so this incident could not have occurred.

56.2.6.16. For that reason, this allegation fails and is dismissed.

At 2:50am on 25.02.23 JF and JG shouted 'fuck off, leave this company and find another somewhere' [between aisles 71 and 72]

56.2.6.17. Mr Flawn was not at work on the morning of 25 February 2023. Further, Mr Gillespie did not start work until 6.44 am on that date [339].

56.2.6.18. For that reason, this allegation fails and is dismissed.

18:21 on 05.05.23 'we'll never let you get a job here as you're Jewish. We'll get Sean McKay to fire you. You need to fuck off' [at bays 31 and 32]

56.2.6.19. Mr Gillespie was not at work for the period 1 to 7 May 2023 and so could not have done what is alleged [344]. Further, Mr Flawn was on a rest day on this date, was not at work and could also not have done what was alleged [336].

56.2.6.20. For those reasons this allegation fails and is dismissed.

Overtime pay

57. The burden of proof is on the claimant to show that that has been the subject of unauthorised deductions from his pay or that in failing to pay him overtime pay, the respondent was in breach of contract.

58. The claimant has produced not a shred of evidence to show that he worked 50 hours of overtime for which he did not receive pay. His claim rests on an allegation that in some way, unspecified to date, unspecified evidence that he had worked this overtime has been destroyed. But as we have found, staff in the claimant's position are paid by reference to their clocking in and clocking out times and further, no one other than payroll has the ability to alter the information on the system.

59. It was not suggested by the claimant that at any point he was required to work without clocking in or after he had clocked out.

60. In the circumstances we reject this claim which therefore fails.

61. In summary,

61.1. all of the claimant's claims for direct race discrimination fail and are dismissed,

61.2. all of the claimant's claims for harassment related to race fail and are dismissed, and

61.3. the claimant's claim that he is owed 50 hours overtime pay fails and is dismissed.

Employment Judge Brewer

Date: 13 November 2024

JUDGMENT SENT TO THE PARTIES ON

.....14 November 2024.....

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FOR THE TRIBUNAL OFFICE

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