EMPLOYMENT TRIBUNALS (SCOTLAND)

Case No: 4100816/2017

Held in Glasgow on 16, 17 and 20 April, 18 and 19 June 2018

Employment Judge: E J Bell

Members: Ms Ward and Mr Muir

Mr A Gorski	**Claimant** **Represented by:** **Ms Szarapow**
Allied Vehicles Ltd	**Respondent** **Represented by:** **Mr Hughes** **Advocate**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

The unanimous Judgment of the Tribunal is that the complaints of direct and indirect race discrimination and of harassment are dismissed.

REASONS

1. Background

1.1 The claimant submitted a claim to the Employment Tribunal in which he claimed that he had suffered unlawful discrimination on grounds of race. The respondent resists the claim. At a Preliminary Hearing convened on 27 July 2017, the Employment Judge set out for the benefit of the claimant and his representative the various categories of discrimination and the need for a comparator in a claim of direct discrimination. At that Preliminary Hearing, it was agreed that the claimant would provide further specification of his claim. The claimant did so in a document at page 36 (onwards) of the joint bundle of

documents produced for the Final Hearing. The Final Hearing took place over five days on 16, 17 and 20 April and 18 and 19 June 2018. The claimant was represented by Ms Szarapow, and the respondent by Mr Hughes, of counsel. The claimant had the benefit of an interpreter at the Hearing. As mentioned, a joint bundle of documents was produced, containing 275 pages.

2. The Hearing

2.1 At the Hearing, the claimant gave evidence on his own behalf. Ms Szarapow also gave evidence on behalf of the claimant. Those who gave evidence on behalf of the respondent were Graham Peoples, former pre-production manager, Lorraine Reilly, team leader, and Alex Francis, process engineer. Ultimately the hearing date of 16 April 2018 was discharged on application of the respondent's representatives due to him suffering from a back injury. There was no objection to that application by the claimant. On 17 April 2018, the claimant commenced giving his evidence to the Employment Tribunal though made a subsequent application to adjourn the hearing on that date for the purpose of preparing a witness statement. That application was granted on the basis that it would further the Overriding Objective to do so, there being no objection by the respondent. The conditions that applied to the discharge were that a witness statement be produced by the claimant, copied to the Employment Tribunal and the respondent's representative by 5pm on 19 April 2018, that an English version of that statement be produced and that the statement should contain evidence relevant only to the claims set out from page 36 of the bundle. On 20 April 2018, the claimant made an application for additional documents, which application was granted, there being no objection by the respondent and the Employment Tribunal being satisfied that the documents were relevant to the issues to be determined. On the afternoon of 20 April 2018, the claimant made an application to amend the claim form to include averments contained within the witness statement relating to September 2017. That application was opposed. The Employment Tribunal considered submissions from both parties. The bases of the application were that the claimant contended he had been unaware that he was allowed to include averments relating to September 2017, that it had

been a difficult time for the claimant and that the claimant's representative had poor knowledge of the law and understanding of the process. The bases of objection to the application were that the Employment Judge at the most recent Preliminary Hearing made it plain to the claimant that there would be an issue with making an application to amend the claim form to include fresh claims at this late stage, that the claimant had already been put on notice that the respondent would take a preliminary plea as to time-bar and that if the allegation of 13 January 2017 was not held as being a discriminatory act then these additional allegations would have the effect of bringing the remaining claims in on time. The Employment Tribunal found that this was an application to amend the claim form to include four new allegations of discrimination and harassment that are said to have occurred in September 2017. We noted that the original claim was lodged on 25 May 2017 and that Ms Szarapow had acted for the claimant throughout. The respondent had raised the preliminary plea of time-bar as a jurisdictional issue within the ET3. Ms Szarapow therefore ought to have been alive to that risk in relation to other claims. When the claimant raised these issues with her as his representative, she ought to have taken reasonable steps to establish what needed to be done to have them included in the claim. The Employment Judge had specifically put Ms Szarapow on notice that these allegations would be time-barred and she took no steps to establish the position at that stage. The claims sought to be made are almost four months out of time. If allowed they would, we believe, have the effect of bringing the remaining claims in time, which would be to the severe prejudice of the respondent. Furthermore, additional witnesses would require to be called (though we see that as a relatively minor matter). We had to balance the hardship and injustice as between the parties. The application was refused because the amendment introduced four brand new claims, those claims are almost four months out of time, the application comes at the close of the claimant's examination in chief and most importantly, the effect of allowing these significantly late claims would be to enable all claims to be treated as in time. Accordingly, the balance of hardship required us to refuse the application.

2.2 At the close of the claimant's evidence in chief, we noted that Ms Szarapow had failed to lead evidence about the issue of comparators as had been brought to her attention at the Preliminary Hearing in July 2017. Ms Szarapow indicated that she proposed to produce a witness statement in English on the comparator issue when the case next convened on 18 June 2018. That duly occurred. In the end, however, the claimant did not give evidence about the particular circumstances that applied to each of the comparators referred to in his witness statement, or how they had been treated differently.

2.3 The hearing was delayed on 18 June 2018 due to the late attendance of the claimant and his representative. When the claimant was due to restart his evidence, it became clear that he had left his reading glasses at home. To retrieve them involved a two-hour round trip and accordingly a further delay in the proceedings. We explored with the parties and their representatives the various options open to us in furthering the Overriding Objective. Ultimately, it was agreed that the respondent's witnesses would be interposed and accordingly evidence was heard from the respondent's witnesses before the claimant's evidence was resumed.

3. The Allegations and Issues to be Determined

3.1 The allegations made by the claimant can be summarised under the following headings.

3.1.1 The Time Shift Card Issue.

3.1.2 Speed of the Claimant's Work Issue

3.1.3 The Training Issue

3.1.4 The Work Clothes Issue

3.1.5 The Welding Certificate Issue

3.1.6 Thumb Injury and Request to Attend the Workplace

3.1.7 The Thermos Flask Issue

3.1.8 The Angle Grinder and Tig Torch Issues

3.1.9 The Kallan Tocher Issue

3.1.10 The Heating Issue

3.1.11 The Lorraine Reilly Issue

3.1.12 The Speed of the Claimant's Work Issue

3.1.13 The Allegations of Racist Remarks.

3.2 The issues to be determined in relation to the allegations are,

Allegations of direct discrimination.

3.2.1. Was the claimant subjected to less favourable treatment and if so was that because of his race?

Claims of indirect discrimination.

3.2.2. Did the respondent apply a provision criterion or practice which put the claimant at a particular disadvantage when compared with persons with whom the claimant did not share that characteristic (in respect of the protected characteristic of race) and if so, was it a proportionate means of achieving a legitimate aim?

In respect of the claims of harassment,

3.2.3. Did the respondent engage in unwanted conduct related to a relevant protected characteristic and did the conduct have the purpose or effect of violating the claimant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?

3.2.4 Have the claims been presented in time?

4. Findings of Fact

4.1 The claimant is employed by the respondent as a welder fabricator. His employment began on 22 September 2014 and is continuing.

4.2 Graham Peoples was employed by the respondent as a Pre-Production Manager during the period of time that these allegations relate to. Lorraine Reilly was employed as a Team Leader and reported to Graham Peoples. The claimant reported to Lorraine Reilly. Allied Vehicles converts vehicles such as private cars, taxis and mini buses for wheelchair access. The vehicles are stripped down so that the lights and so on are removed, together with the floor. A new floor is made in pre-production. Other parts are made or purchased and fitted to the vehicle and the vehicle is thereafter reassembled. In the production area, there is a mix of mechanics, vehicle electricians and skilled and semi-skilled staff. A fabricator welds components together to form fabrications and works to drawings or samples that illustrate how the parts should be welded together. Mr Peoples was in charge of the pre-production department that the claimant was in and the claimant was one of 12 fabricators within that department. All fabricators were doing variations on a theme depending on their experience. The claimant's work quality was good. The only issue Mr Peoples had with the claimant was that there were occasions when he (Mr Peoples) or one of his colleagues would have to speak to the claimant to tell him that he did not need to take so long to grind and polish the parts and that, on occasion, the claimant was trying to finish jobs to too high a standard. To do so was unnecessary, as those parts would not be seen on the finished job.

<u>The Time Shift Card Issue (7 December 2016)</u>

4.3 The recording of time by the fabricators was computerised. On occasion fabricators may be asked to complete a shift card manually if the system had broken down. However, there was no expectation that

a fabricator would be able to recall on what jobs he had worked or for what period over an 8-hour shift.

Speed of the Claimant's Work Issue

4.4 The claimant and other fabricators were required to work under pressure from time to time in response to a request given by Graham Peoples or Lorraine Reilly to complete orders urgently. Graham Peoples would attend at the workstation of the fabricators several times a day to expedite the completion of the work being carried out on parts because there was pressure to get parts through to the production area as quickly as possible, without waiting for the whole batch of those parts to be completed by the fabricator. Mr Peoples would receive many e-mails every day from the production department looking for new parts or parts which were running late and would take whatever action was required to supply those parts. On occasion the urgency status for a part would change. An example of an urgent job might be when something had gone wrong on the production line which had caused a part to become bent, a fabricator would require to stop what they were doing in order to repair that part or complete a new one. Mr Peoples and Ms Reilly allocated the urgent work broadly equally among the claimant and other fabricators. Mr Peoples would allocate work depending on what job the fabricator was working on and whether that job was more or less urgent than the one that was being prioritised at that time, or whether the particular fabricator had previous experience of completing a part of that kind.

The Training Issue

4.5 The claimant, together with other employees, had the opportunity to sign up for training. The claimant did so. The date for the claimant's course was postponed several times.

The Work Clothes Issue

4.6 The respondent provided fabricators with three pairs of overalls each. It was the responsibility of the individual fabricator to wash the overalls at home. The claimant asked Lorraine Reilly if the respondent could wash his overalls and Lorraine Reilly explained to the claimant that the respondent did not offer that service but that the claimant could take them home to be washed. The claimant was provided with the same number of overalls as all other fabricators in terms of the respondent's policy.

The Welding Certificate Issue

4.7 The claimant provided his international welder certificates to the respondent during the recruitment process (pages 172 to 183 of the bundle). In June 2015, the claimant asked the Technical Manager, Alex Francis to sign those welder certificates. Alex Francis spoke to Graham Peoples who told him that the claimant did not require the welding certificates to carry out his role with the respondent, and therefore it wasn't necessary for him to sign them. Every two to three years the respondent brings in an outside agency to certify the welders employed by it so that they have the welding qualification relative to the kind of work carried out by them with the respondent. A mediation meeting took place on 29 March 2017 to discuss a number of issues with the claimant. The claimant attended at that meeting together with a translator and Alex Francis and Nina MacDonald were also present. The contemporaneous notes of that meeting are contained at page 248 of the bundle. Regarding welding certificates, it is noted that Nina MacDonald told the claimant:-

> *"Again, I don't believe Allied Vehicles is under any obligation to sign these certificates. The only other recommendation I could make is that you speak to the Learning and Development Manager."*

And,

"I don't think we are going to resolve this, we do not sign certificates for any other members of staff, management in pre-production do not believe they must sign these certificates for qualifications that are not required for working at Allied. Like I said I would recommend speaking with someone in Learning and Development when you return to work."

Had the issue of the welding certificates been resolved, the claimant would not have raised his claim with the Employment Tribunal. The claimant believes that he is unable to find another job because the welding certificates have not been signed by the respondent. The respondent does not sign international welding certificates on behalf of other welder fabricators.

Thumb Injury and Request to Attend the Workplace

4.8 On an unspecified date, the claimant stuck a heated tungsten electrode into his thumb by accident. The claimant continued to work on that day and the following two days. The wound began to heal but then became inflamed and was causing the claimant some pain. The claimant went to the hospital and got antibiotics and painkillers returning home at around 3am. The claimant had a member of his family contact Graham Peoples by telephone to advise him that he would not be in work that day and that a fit note would follow. The claimant was aware that the respondent's absence policy requires the individual employee to personally contact the respondent within half an hour of the commencement time of his shift. Mr Peoples asked the claimant to attend personally at the workplace because previously (as on this occasion) the claimant had had members of his family phone in on his behalf and Mr Peoples wanted to see the claimant in person. The claimant had been repeatedly told that he personally required to 'phone in to report his absence. Graham Peoples' recollection was that the claimant had previously been in Poland and had not returned on

his due date because his car had broken down. On that occasion, his son had telephoned on his behalf. Graham Peoples was concerned by the delay between the date of the injury and the claimant's absence and wanted to ensure that the claimant was at home in Scotland. There had been two occasions when Graham Peoples had asked other employees to attend personally at the office when they had 'called in sick'. One was an employee who had a bad attendance record over two months and had been fined. The other employee had a pattern of absence on a Monday and Graham Peoples was suspicious about that and asked him to come in personally.

The Thermos Flask Issue

4.9 Shortly after the claimant's employment began with the respondent, Alex Francis told the claimant that he was not permitted to use a thermos flask within the work area. It was the respondent's policy that no one was allowed hot drinks at their place of work on the shop floor.

The Angle Grinder and Tig Torch Issues

4.10 A fabricator, Allan Sterling approached Alex Francis with an angle grinder that was not working and asked for a replacement. Alex Francis did not have one to hand but was able to source an alternative and left it on Mr Sterling's workbench. Mr Sterling returned later to say that it was now not working and he was told that the one he had been given was new and he then left. Ultimately it appeared that a fellow employee John McSherry had been using Mr Sterling's grinder. The claimant had been asked by Allan Sterling if he had the missing grinder. The claimant felt that he had been accused of stealing a grinder when Mr McSherry had had it all along. The claimant reported the issue to Alex Francis and latterly to Graham Peoples and no action was taken. All the fabricators have their own functioning angle grinders and if it is broken then the grinder is generally replaced upon request.

4.11 On 23 December 2016 Alex Francis accused the claimant of swapping Tig torches between machines and workstations. In 2016 the respondent had purchased two new Tig welding parts. One was in the area that the claimant works and the other was in the area of another welder, John Gough. When Mr Francis looked at the torch on the weld set, he could see that it was not the one that had been there previously. He therefore approached the claimant and accused him of swapping the Tig torch. Mr Francis took the Tig torch away because it was not being used at the time and because it would allow him to get another fabricator to carry out the required work. Mr Francis genuinely believed that the claimant had swapped torches and he had to take the functioning torch away so as to enable another fabricator to carry out his work.

The Kallan Tocher Issue (8 September 2016)

4.12 Kallan Tocher was an apprentice/trainee who had been working with Alex Francis to develop a method to produce a particular product to a required quality. Kallan Tocher had experience of doing the job and therefore had been asked to show others, including the claimant, how to perform the task. The claimant felt diminished by an employee with less experience showing him how to do something that he felt he well knew how to do.

The Heating Issue (13 January 2017)

4.13 The heating in the fabrication area is provided by exposed elements in the roof space. It is therefore fairly localised to the particular fabricator. The claimant's workbench was moved on at least one occasion because he was either too hot or too cold. Because there were localised controls, it was possible for the individual fabricator to turn the heating on or off. The claimant complained to Graham Peoples that whenever he switched the heating on, another fabricator would switch it off. Mr Peoples spoke to all of the fabricators (including the claimant) and told them that they required to work together to agree

whether the heating should be off or on and not simply switch it off or on at their own whim. The claimant was no more directly affected by the heating than the other employees, having regard to the location of his workbench.

The Lorraine Reilly Issue

4.15 Lorraine Reilly was in the habit of telling off employees who were standing idle during a period that was not a break period. On one occasion the claimant was told off by Lorraine Reilly for standing around talking with others at a time that was not the allocated break period.

The Speed of the Claimant's Work Issue

4.16 The employees within the pre-production area were given a specified amount of time to carry out work on a particular item. All fabricators were asked to speed up work from time to time. There were occasions when the claimant was asked by Graham Peoples to speed up his work or ensure he was completing the part within the time allocated.

The Mediation Session on 29 March 2017

4.17 At the mediation meeting on 29 March 2017 the claimant was told that each employee is given three sets of overalls when they start in the role and those are replaced when required. The claimant was invited to speak directly with Nina MacDonald in the event that he considered that there was anything unfair about a refusal to replace work clothes. The claimant indicated that that would be fine and the issue was treated as closed. In relation to the heating issue, the claimant described the actions of Allan Sterling in switching the heating on and off as "banter" and also said "it could be seen as harassment". Nina MacDonald said that in order to resolve the matter it would be discussed at the team meeting and if it happened again it should be brought up at the time and resolved with management. Nina MacDonald asked the claimant if he was happy with this as an outcome

and he indicated that he was and therefore the issue was treated as closed. At the mediation meeting the claimant raised the issue of the thermos flask and was advised that the respondent does not like employees to have hot drinks at workstations. The claimant indicated that he had had problems with his throat but did not raise this at the time. The claimant was told by Mr Francis that if there was a medical reason for having a hot drink at the workstation that would be taken into consideration.

4.18 A copy of the minutes of the mediation was provided to the claimant by post. The claimant read through the minutes of the meeting with his son. He did not raise any issues about inaccuracy of the minutes with the respondent.

5. Observations on the Evidence

Timecard Issue

5.1 The claimant's allegation is that he was the only fabricator asked to fill out a time card manually in respect of shifts occurring over a 3-day period by Danyal Hussain, on the instruction of Graham Peoples. He accepts that he did not do it and that there were no repercussions for him failing to do it. Graham Peoples said that he would not have instructed Danyal Hussain to require a fabricator to complete the time card because he would not expect a fabricator to recall what work he had been doing over an eight hour shift period, let alone a three day period. We preferred the evidence of Graham Peoples that he did not and would not issue an instruction of that kind to any of the fabricators for the reasons given by him. We found him to be credible and reliable and we accept his evidence without hesitation. We also note that as there were no repercussions from the claimant's failure to fill out the time card.

Speed of the Claimant's Work Issue

5.2 The claimant is particularly aggrieved that the respondent has continually refused to sign his welding certificates and he is concerned that will prevent him securing employment elsewhere. The claimant said that had the welding certificates been signed, he would not have made his complaint to the Employment Tribunal. We believe that the minutes of the mediation meeting on 29 March are broadly accurate. They are contemporaneous and a copy was provided to the claimant within two to three weeks of the meeting date. The claimant told us that he had checked the minutes with his son upon receipt. The claimant maintained that he had noticed at the time of checking them that there were inaccuracies but had not raised the inaccuracies with the respondent because he believed there would be a follow up meeting. He was unable to specify what those inaccuracies were. There was no follow up meeting. The claimant did not raise the fact that there was no follow up meeting with the respondent. When it was clear that there would be no follow up meeting neither did the claimant raise any issues he had with the minutes. In his evidence the claimant at one point accepted the minutes were accurate and then departed from that position. He was inconsistent and often vague about what he remembered discussing at the meeting and his recollection was therefore unreliable. The minutes of the meeting were the best evidence before us as to what had been discussed during the mediation.

The pre-production department works to very tight timescales. Often the deadlines change at short notice and parts are urgently required meaning that when any fabricator is completing a batch of parts, it is not possible to await completion of the whole batch and parts require to be passed over to the production area as soon as they have been completed. We accept the evidence of Alex Francis and Graham Peoples that all fabricators were often asked to produce parts urgently and to interrupt the work they were doing. We accept that those

requests were made of all fabricators and were not made of the claimant more frequently than any other fabricators. We note the claimant did not raise this issue at the mediation meeting, and we draw the inference that it was not a matter of significance to him at the relevant time.

The Training Issue

5.3 The claimant states that he had asked to undergo training and that that had been postponed several times. He has not alleged that the postponement was less favourable treatment as compared to other employees or that it had been applied to him because of his race.

The Work Clothes Issue

5.4 The claimant said in evidence that his landlord had taken issue with him using the washing machine to wash his work clothes. The claimant did not challenge the respondent's evidence that he was allocated the same number of overalls as other fabricators and that everyone was required to wash their overalls at home. The issue was discussed at the mediation meeting and was resolved, with the opportunity being given to the claimant to raise the issue in future with Nina MacDonald in the event that he was unhappy with a refusal to provide him with another set of work clothes.

The Welding Certificates Issue

5.5 This is the issue that lies at the heart of the claimant's grievance. He is naturally concerned that his ability to secure other employment is made significantly more difficult because of the absence of the signed certificates. However we accept without hesitation the evidence of Graham Peoples and Alex Francis that there was no requirement to sign these certificates to demonstrate the claimant was fit to carry out the work with the respondent, and that such certificates are not signed in respect of other fabricators. There was a system in place that an external agency would determine the fitness of each fabricator to carry

out the relevant work with the respondent. We accept Mr Francis' evidence that he did not feel equipped to sign these certificates and that Mr Peoples told him he did not require to do so. We accept Graham Peoples' evidence that he genuinely believed there was no requirement to sign these certificates. We note that the matter was discussed at the mediation meeting and that that message was reinforced. The claimant said in evidence that he had been told at the mediation meeting that the welding certificates would be signed. We do not accept the claimant's evidence in this regard. That is not what is reflected in the minutes nor is it borne out by the evidence given by Mr Francis or Mr Peoples. We do not accept that the claimant is telling the truth about that matter.

Thumb Injury and Request to Attend the Workplace

5.6 Whilst Graham Peoples initially indicated that the reason why he had asked the claimant to attend personally at work was because of the "duty of care" issue we find that the real reasons are:-

5.6.1 There had been a previous occasion when the claimant had stayed on in Poland because his car required to be repaired and,

5.6.2 There was a company policy in place that required the claimant to speak personally with Mr Peoples or with Lorraine Reilly when he was to be absent from work and,

5.6.3 By speaking with the claimant's son, Mr Peoples was unable to ascertain where the claimant physically was and,

5.6.4 Mr Peoples wanted the claimant to attend personally so that he could satisfy himself that the claimant was genuinely ill and was not, for example, in Poland and,

5.6.5 Mr Peoples' suspicions had been aroused because the injury to the claimant's thumb had occurred more than 2 days earlier and the claimant had attended at work in the intervening period.

We are also satisfied that there had been previous occasions concerning two employees who had been asked to attend personally because either Mr Peoples believed there was a suspicious pattern in their absence record or their absence record was significant. The claimant said that Mr Peoples did not see him when he attended personally. Graham Peoples and Lorraine Reilly's evidence was that Mr Peoples did see him and we accept that evidence. We found both witnesses to be credible and reliable. Mr Peoples was ultimately candid about his reasons for calling Mr Gorski in and we find it difficult to believe that, having done so, he would not meet with the claimant. Lorraine Reilly told us that she saw Mr Peoples and the claimant in discussions, and we found her evidence to be credible and reliable. Ms Reilly struck us as a straightforward individual who relayed matters as she saw them

<u>The Thermos Flask Issue</u>

5.7 There was no dispute between the claimant and the respondent as regards the evidence. The claimant accepts that there is a policy in place to the effect that employees are not permitted to have hot drinks or food within the shop floor area. Mr Gorski accepts he attended work with a thermos flask, that Mr Francis assumed it contained hot liquid and told the claimant he was not permitted to have that on the shop floor. The claimant did not take issue that this was a provision applied to all employees. This was a matter discussed at the mediation meeting and apparently resolved.

<u>The Angle Grinder and Tig Torch Issues</u>

5.8 Once again there appeared to be no difference in the evidence but simply the interpretation of what had happened. In each case the

claimant contends that he was treated in the way that he was because of his race. Mr Francis denies that. We see the claimant's interpretation of both incidents as somewhat typical of how he gave his evidence before us. The claimant had a tendency to exaggerate what had happened and to insist on a conclusion (at least before us) that treatment had been meted out to him because of his race. One such example was a recording the claimant had made of a discussion he had with Graham Peoples about the correct time it should take to complete a piece of work. That recording was played to us. The claimant invited us to believe that Mr Peoples was attempting to push the claimant to complete the job in a time period shorter than that normally provided, and to thus treat him unfavourably and in a way that he did not treat other fabricators. What we heard was a perfectly reasonable discussion between the claimant and Graham Peoples of the kind that might take place daily with all employees in an environment of this kind. We accept Mr Peoples evidence that that was the case. Another example is the claimant's interpretation that he was being 'hurried' to complete work when what was in fact happening was a perfectly reasonable distinction being made in the finishing required of products that would be seen or unseen on the vehicle, with less time taken to finish those that would be unseen. Another such example is the Kallen Tocher issue that we deal with below. We find the claimant's interpretation of events to be unreliable because of his tendency to exaggerate events. About the angle grinder issue, the claimant said that 'the whole time Allan Stirling had been suspecting me of theft'. We accept that Mr Stirling may have asked the claimant repeatedly if he had or had seen the grinder as part of his search for it, but that is quite different from an accusation of theft having been made. On the tig torch issue, Mr Francis believed the claimant had swapped tig torches and raised that with him. In his witness statement the claimant gives an account of what seems to us to be a perfectly normal occurrence in a pre-production area where equipment breaks down and replacements are required quickly (even if borrowed from others) to complete a job.

The Heating Issue

5.9 Once again there is no material difference in the evidence given in relation to the heating issue but rather the interpretation of it. It is notable that the claimant's witness statement says "*the heating problem became a subject of jokes and pranks for other employees; whenever a new employee came, several people would stand in the centre of the hall and demonstrated (sic) by switching the heating on in summer how to harass a Pole all the while laughing and joking."* The employment Judge asked Mr Gorski when he maintains several people stood in the centre of the hall and demonstrated "how to harass a Pole". Mr Gorski said that no one had used those words and it was simply his conclusion that the heating was being switched on and off because those present wanted to demonstrate how to harass a Pole. Mr Gorski's effectively said that the motivation behind other employees switching the heating on and off was to harass him, rather than to meet their own individual needs for the temperature setting. We accept Graham Peoples' evidence that the issue of the heating being switched on and off according to the different requirements of the various fabricators had been raised with him and he had spoken to the team about it and asked them to consult with one another and make a joint decision on what the heating requirements were. We also accepted his evidence that the matter was not raised with him by the claimant thereafter. At no point did the claimant tell Mr Peoples he thought this conduct was personally directed at him. The claimant accepted in cross-examination that he had said during the mediation, "I am pretty sure it was just banter" and he accepted that his preferred explanation for the event was "banter". The claimant did not have his personal heating point that others were interfering with, rather the heating components served the common area and the fabricators switched the heating on an off depending on their personal preference, which did not always match the preference of others. We do not believe that the actions of the other fabricators in switching the heating off and on were directed at the claimant. At no time did the claimant allege that was the

case, except before us. We find that this is another example of the claimant drawing a conclusion from conduct directed towards everyone that it was personal to him.

The Lorraine Reilly Issue

5.10 We accept without hesitation Lorraine Reilly's evidence that she would often interrupt a group of fabricators who were standing idle or talking on occasion when it was not break time. It was part of her role to make sure the fabricators were working during their working time. Once again, we find that the claimant has taken behaviour that was directed towards everyone and concluded it was personal to him.

The Kallan Tocher Issue

5.11 The claimant's position was that Kallan Tocher had been asked to show him how to make a part (indicated at page 221 of the bundle). It was Mr Peoples' position that the part that Kallan Tocher was showing the claimant was not that displayed at page 221 but rather a different part that he had been working with Alex Francis on to develop a method to produce the product to the required quality when larger quantities were required. We accept Mr Peoples' evidence on this point; he was credible and appeared to have a clear recollection of what prompted the relatively unusual occurrence of a more junior employee demonstrating to a more senior employee how to undertake work on a part. Once again, we believe that the claimant has drawn an incorrect conclusion and taken the issue personally when there was otherwise a good reason for this having occurred.

The Speed of the Claimant's Work Issue/Urgent Work

5.6 On the question of whether urgent jobs were evenly distributed or not we note that the claimant said that he had no evidence as to whether they were or not. We have therefore made no findings to that effect, the claimant having failed to discharge the initial onus upon him.

Alleged Racist Remarks

5.12 The claimant accepted in cross-examination that he did not raise the issue of racist remarks at the mediation. He then said *"I can't recall whether we discussed any racist remarks"*. We note that the minutes of the mediation do not record such a discussion, and we have found that the minutes are broadly accurate. The allegations of racist remarks noted in the further and better particulars are as follows:-

- "*I like pumping Polish guys*" – John McSherry discussing and jestering sexual activities (no date given).
- "*Polish bastard*" -John McSherry (no date given)
- "*Fucking cheaper worker"* – "Greg" (no date given)
- *"Fucking Pole*" – Warehouse Manager (no date given)
- *"For Pest"* – this was in the inscription on gloves wrap that lay at Adam's workstation (no date given)
- *"Fucking Polish baby"* – Bill yelled that several times in the hall (no date given)

At paragraph 12 of his witness statement is set out *"John McSherry often used vulgar insults against me as well as other employees. One is John also slapped me in the face for no reason"*. The statement then refers to the document in the bundle and we were directed to page 44. At page 44 is contained the wording set out above. However the claimant gave no oral evidence concerning these allegations even in the limited way that they are set out at page 44. Accordingly, we have heard no evidence from the claimant or from any other witness about these allegations. We are therefore unable to make findings in fact as to whether these alleged statements were made or not.

6. Submissions

Submissions for the Claimant

6.1 The parties were allowed a period of 14 days within which to make written submissions and a period of 7 days thereafter to comment on the submissions produced by the other party. Ms Szarapow on behalf of the claimant produced a set of written submissions and thereafter produced a document entitled "Appeal from respondent's written submission" which we understand to be a response to the written submissions produced by the respondent.

6.2 In the claimant's written submissions Ms Szarapow essentially attempts to reiterate or supplement the evidence given by the claimant. That is not the purpose of submissions. As we explained to Ms Szarapow, in preparing submissions, a party should refer to the evidence and invite the Tribunal to make certain findings of fact. Thereafter the parties should refer to the relevant law and the issues to be determined and invite the Employment Tribunal to make certain findings based on that. We did advise Ms Szarapow that we would not expect an exhaustive articulation of the law given that she is not legally qualified. However we have not taken into account those parts of the written submissions which essentially operate as the reiteration of evidence or the giving of new evidence. We have taken into account those aspects of the submissions which point to inconsistencies in the evidence given by the respondent's witnesses. The claimant's representative produced documents with the submissions which had not formed part of the joint bundle. The Employment Tribunal did not take into account those documents when considering the submissions. Once again the document entitled "appeal from respondent's written submission" contains additional evidence and that has not been taken into account by the Employment Tribunal in reaching its decision.

Submissions for the Respondent

6.1.1 The respondent's submissions set out the relevant provisions of the Equality Act 2010 and refers to each of the allegations made by the claimant, inviting the Employment Tribunal to make certain findings in relation to each of them. The respondent makes submissions in relation to time bar and argues that the claimant has provided no evidence to support a finding by the Employment Tribunal that it would be just and equitable to extend time in the event that the allegation of 13 January 2017 is unfounded.

7. Relevant Law

7.1 Section 13 (1) of the Equality Act 2010 ('EqA') provides that an employer directly discriminates against a person if:

- it treats that person less favourably than it treats or would treat others, and

- the difference in treatment is because of a protected characteristic.

7.2 In order to claim direct discrimination under section 13, the claimant must have been treated less favourably than a comparator who was in the same, or not materially different, circumstances as the claimant. It is for the Tribunal to decide as a matter of fact what is less favourable. The fact that a claimant believes that he or she has been treated less favourably does not of itself establish that there has been less favourable treatment. That said, the claimant's perception of the effect of treatment upon him is likely to significantly influence the Tribunal's conclusion as to whether, objectively, that treatment was less favourable. In the course of giving Judgment in *Chief Constable of the West Yorkshire Police v Khan 2001 ICR 1065, HL,* Lord Scott stressed that a claimant who simply shows that he was treated differently than others in a comparable situation were, or

would have been, treated will not, without more, succeed with a complaint of unlawful direct discrimination. The EqA outlaws less favourable, not different, treatment and the two are not synonymous.

7.3 The key to establishing direct discrimination is often the construction of the correct comparator. Section 13 of the EqA focuses on whether an individual has been treated 'less favourably' because of a protected characteristic. It is not necessary for the claimant to point to an actual person who has been treated more favourably in comparable circumstances. Whether the comparator is actual or hypothetical, the comparison must help to shed light on the reason for the treatment. However, the comparator test, namely asking whether someone without the claimant's protected characteristic would have been treated in the same way as the claimant, will only help the Tribunal in determining whether there was direct discrimination if the situation of the claimant resembled that of the comparator in material respects. For this purpose, section 23(1) stipulates that there must be 'no material difference between the circumstances relating to each case' when determining whether the claimant has been treated less favourably than a comparator.

7.4 Paragraph 3.23 of the EHRC Employment Code makes it clear that it is not necessary that all the circumstances relating to the case must be the same. It expressly states that the circumstances of the claimant and the comparator need not be identical in every way. Rather 'what matters is that the circumstances which are relevant to the 'claimant's treatment' are the same or nearly the same for the 'claimant' and the comparator'. In ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** 2003 ICR 337, HL, Lord Rodger said that a circumstance may be relevant if the employer in fact attached some weight to it, whether or not the Tribunal thinks a reasonable employer ought to have done so. That approach was reaffirmed by the House of Lords in ***Macdonald v Ministry of Defence; Pearce v***

Governing Body of Mayfield Secondary School 2003 ICR 937, HL where Lord Hope held that, with the exception of the prohibited factor, 'all characteristics of the complainant which are relevant to the way his case was dealt with must be found also in the comparator'. This applies regardless of whether the comparator that is used is actual or hypothetical.

7.5 In ***Shamoon***, the House of Lords took the view that, by tying themselves in knots attempting to identify an appropriate actual or hypothetical comparator, tribunals run the risk of failing to focus on the primary question; namely, why was the complainant treated as he was? If there were discriminatory grounds for that treatment then, as Lord Nicholls pointed out, there will 'usually be no difficulty in deciding whether the treatment… was less favourable than was or would have been afforded to others'. His Lordship viewed the issue as essentially boiling down to a single question: did the complainant, because of a protected characteristic, receive less favourable treatment than others? In ***Stockton on Tees Borough Council v Aylott*** 2010 ICR 1278 CA, Lord Justice Mummery stated: *"I think that the decision whether the claimant was treated less favourably than a hypothetical employee of the council is intertwined with identifying the ground on which the claimant was dismissed. If it was on the ground of disability, then it is likely that he was treated less favourably than the hypothetical comparator not having the particular disability would have been treated in the same relevant circumstances. The finding of the reason for his dismissal supplies the answer to the question whether he received less favourable treatment."* Therefore, where the identity of the comparator is an issue, tribunals may find it helpful to consider whether they should postpone the question of less favourable treatment until after they have decided why the particular treatment was afforded to the claimant. As pointed out by Mr Justice Elias in the ***Law Society and others v Bahl*** 2003 IRLR 640, EAT one of the consequences of this approach is that where the Tribunal

has addressed the primary question, it will not generally be necessary for it actually to formulate the precise characteristics of the hypothetical comparator. Once it is shown that race, sex, age etc had a causative effect on the way the complainant was treated, it is almost inevitable that the effect will have been adverse and therefore the treatment will have been less favourable than that which an appropriate comparator would have received. Similarly, if it is shown that race played no part in the decision-making then the complainant cannot succeed and there is no need to construct a comparator.

7.6 The definition of direct discrimination requires the complainant to show that he received less favourable treatment 'because of a protected characteristic'. The EHRC Employment Code states that the phrase 'because of' has the same meaning as 'on the grounds of' a protected characteristic (paragraph 3.11).

7.7 A complaint of direct discrimination will only succeed where the Tribunal finds that the protected characteristic was the reason for the claimant's less favourable treatment. In ***R (on the application of E) v Governing Body of JFS and the Admissions Appeal Panel of JFS and others*** 2010 IRLR 136 SC, Lord Phillips, President of the Supreme Court, emphasised that in deciding what were the 'grounds' for discrimination, a court or tribunal is simply required to identify the factual criteria applied by the respondent as the basis for the alleged discrimination.

7.8 The general definition of harassment is set out in section 26(1) of the EqA. It states that a person (A) harasses another (B) if:

- A engages in unwanted conduct related to a relevant protected characteristic – section 26 (1) (a); and

- 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 – section 26 (1)(b).

7.9 In the guidance in ***Richmond Pharmacology Ltd v Dhaliwal*** **[2009] IRLR 336**, Underhill P set out the three essential elements of a harassment claim, namely:

1. did the respondent engage in unwanted conduct?
2. did the conduct have either a) the purpose or b) the effect of either i) violating the claimant's dignity or ii) creating an offensive environment?
3. does the conduct relate to a relevant protected characteristic?

Sitting in the Court of Appeal, Underhill LJ endorsed and revisited this test in the light of a slight change of wording in the Equality Act in ***Pemberton v Inwood*** **[2018] EWCA Civ 564** and added that, when considering whether the conduct had the proscribed effect, the Tribunal must take the following factors into account:

i. whether the putative victim perceives themselves to have suffered the effect in question (the subjective question) AND

ii. whether it was reasonable for the conduct to be regarded as having that effect (the objective question AND

iii. all the other circumstances of the case.

7.10 <u>Extension of time limits</u>

Employment Tribunals have discretion to extend the time limit for presenting a complaint where they think it is "just and equitable" to do so (Section 123(1)(b)) of the EqA 2010. In ***Robertson v Bexley***

Community Centre t/a Leisure Link 2003 IRLR 434, CA, the Court of Appeal stated that "*there is no presumption that (the Employment Tribunal) should (exercise discretion) unless they can justify failure to exercise the discretion." Quite the reverse, a Tribunal cannot hear a complaint unless the applicant convinces it that it is just and equitable to extend time so that the exercise of the discretion is the exception rather than the rule."*

8. Determination of the issues

The claimant characterises his claims as direct and indirect discrimination, without specifying which allegation is made under which provision of the EqA. It is clear to us that the allegations made are framed as direct discrimination claims, with the exception of the 'Heating Issue' and the alleged statements about which we heard no evidence, which are made under the harassment provisions. In essence, whilst 'indirect discrimination' has been referred to, the claims are not framed in that way. We will therefore address the claims in the context of direct discrimination, with the exception of the 'Heating Issue,' which we will additionally address with the Harassment provisions in mind.

The claimant had some difficulty with the comparator issue. He essentially named comparators but gave no evidence about the circumstances that applied to those named, or the treatment afforded to them (or not) by the respondent. We bear in mind, however, that where the identity of the comparator is an issue, tribunals may find it helpful to consider whether they should postpone the question of less favourable treatment until after they have decided why the particular treatment was afforded to the claimant, because where the tribunal has addressed the primary question, it will not generally be necessary for it actually to formulate the precise characteristics of the hypothetical comparator. If it is shown that race played no part in the decision-making then the complaint cannot succeed and there is no need to construct a comparator.

8.1 The Heating Issue

The treatment complained of is that the heating was switched on and off by other fabricators to harass the claimant because of his race. We find that the heating was localised to each bench and was switched on and off according to the individual needs of the fabricator, but within an open area that naturally had an impact on others. We find that the reason why the heating was switched on and off was in response to the temperature preference of the individual fabricator. That was Mr Peoples' understanding and we accept that evidence. When the claimant complained to Mr Peoples he did not allege this conduct was to harass him. We believe that is because the claimant did not believe at that time that was the reason why. At the mediation, he described it as 'banter' though he did say it *could* amount to harassment, but not that it did. Sticking with the direct discrimination test for a moment, we note that Graeme Peoples dealt with it as an issue that affected all fabricators equally. The claimant did not subsequently complain. We find that this was a problem affecting all fabricators with no evidence to support the allegation that it was directed at Mr Gorski in particular. The reason why the heating was switched on and off has nothing whatsoever to do with the claimant's race but was because of the individual temperature preferences of those fabricators who controlled the switch. We accept the evidence of Mr Peoples that the actions did not have any greater impact on the claimant than others because of where his workstation was located. The claimant has not given evidence about a particular comparator and so we cannot make findings in relation to that. If we were to construct a hypothetical comparator, it would be a fabricator whose work station was in the same work area as that of the claimant and who had similar access to the heating switches but was of a different race. Measured against such a comparator, the claimant did not suffer less favourable treatment. The claim of direct discrimination therefore fails. As for the claim of harassment, we shall address each of the following in turn;

8.1.1 Did the respondent engage in unwanted conduct? We accept that the conduct of switching the heating on and off at times amounted to unwanted conduct in that the claimant would have preferred the heating to be either on or off (as the case may be). This is confirmed by the fact that he complained about the issue to Graham Peoples.

8.1.2 Did the conduct have either a) the purpose or b) the effect of either i) violating the claimant's dignity or ii) creating an offensive environment? The claimant described the conduct as 'banter' in the mediation meeting. We do not accept that the conduct was directed specifically at the claimant. It did not therefore have the purpose of creating the proscribed effect. Neither do we find that the conduct had the effect of violating the claimant's dignity or creating an offensive environment for him. We are mindful of the need to take account of the claimant's perspective, and to approach the matter objectively. We do not accept that the claimant at the relevant time saw this as creating an offensive environment for him – but rather an uncomfortable environment. We say that because he did not say that to Mr Peoples at the time, or at the mediation meeting. Even had we found that was his genuine view, we do not find that it is reasonable to conclude it had that effect.

8.1.3 Does the conduct relate to a relevant protected characteristic? In any event we find that the conduct does not relate in any way whatsoever to race.

As this claim has failed, the remainder of the claimant's claims have not been lodged within the normal time limit.

8.2 Extension of Time

The onus rests with the claimant to show that it would be just and equitable to extend time. The claimant led no evidence upon which the Tribunal could make findings of fact as to the reasons for the

claimant's failure to lodge the claim within the normal time limit in respect of the remaining claims. Accordingly, the claimant has failed to discharge the onus upon him and the remainder of the claimant's claims are out of time and accordingly the tribunal has no jurisdiction to hear those claims. We discussed at length whether we would set out our findings in relation to those claims that we have no jurisdiction to determine. We decided to do so because we are conscious the claimant is still employed by the respondent and we hope that by setting out our findings it will give parties a basis upon which to move on with the employment relationship.

8.3 The Timecard Issue

We have found that on occasion fabricators were asked to complete timecards manually when the computer system ceased to work. We accepted the evidence of Graham Peoples who said that he would not expect a fabricator to remember what he was doing over the course of an 8-hour shift, let alone over a three day period. We accepted Graham Peoples' evidence therefore that he did not ask the claimant to do it. Accordingly, we do not find that the treatment was applied to the claimant as alleged.

8.3 Speed of the claimant's work

The reason why the claimant was encouraged to complete certain parts quickly that he otherwise might (though still within the allotted time) was because those parts would not be seen and therefore did not need to be finished perfectly. This was therefore in no way related to his race.

8.4 Training Issue

The claimant makes no allegation that he was subjected to less favourable treatment in relation to this issue. In any event, there is no evidence upon which to make such a finding.

8.5 Work Overalls Issue

The claimant accepts that he was treated in the same way as other employees and makes no allegations of less favourable treatment.

8.5 The Welding Certificate Issue

There is no allegation that the claimant was treated less favourably than other employees. The evidence that he was treated in the same way as others was not challenged.

8.6 Thumb Injury and Request to Attend the Workplace

We do not find that the request for the claimant to attend the workplace was in any way related to his race. Rather Graham Peoples made the request based on those factors identified at section 5 above, none of which are related to the claimant's race.

8.7 The Thermos Flask Issue

The refusal to allow the claimant to have a thermos flask at his work station was in no way related to his race but rather in compliance with the policy that applied to all employees.

8.7 The Angle Grinder and Tig Torch Issues

We do not find that the claimant was subjected to less favourable treatment. Even had we so found, we would not have found it to be by reason of race**.**

8.9 The Kallen Tocher Issue

We do not find that the treatment of the claimant was in any way related to his race but rather because Kallen Tocher had worked with Alex Frances and the respondent wished him to share the knowledge and skills gained from that experience with other fabricators.

8.10 The Loraine Reilly Issue

The claimant was spoken to by Lorraine Reilly because he was talking with others when it was not his break period. That was for a reason not related to his race. We do not accept that he was spoken to more frequently or harshly than others.

8.11 The Speed of the Claimant's Work/Urgent Work

The claimant was not given work that required to be done urgently any more frequently than it was allocated to others.

8.12 The claimant's claims fail and are accordingly dismissed.

Employment Judge: EJ Bell
Date of Judgment: 19 September 2018
Entered in register: 19 September 2018
and copied to parties