Case Number: 2207154/2018

EMPLOYMENT TRIBUNALS

BETWEEN

Claimant	**and**	**Respondents**
Mr G Elms		**Rendall & Rittner Ltd**

JUDGMENT OF THE EMPLOYMENT TRIBUNAL

SITTING AT: London Central **ON: 13-18 June 2019**

BEFORE: Employment Judge A M Snelson **MEMBERS: Mr D Kendall**
Mr J Carroll

On hearing the Claimant in person and Ms B Omotosho, solicitor, on behalf of the Respondents, the Tribunal adjudges that:

(1) Pursuant to the Equality Act 2010 ('the 2010 Act'), s123(1)(b), time for presenting the dismissal-based complaint is extended by one day and the Tribunal has jurisdiction to consider it.
(2) The complaints under the 2010 Act of direct racial discrimination and race-related harassment are not well-founded.
(3) With the exception of the dismissal-based complaint, the claims fail for the further reason that they were brought out of time and the Tribunal has no jurisdiction to consider them.
(4) Accordingly, the proceedings as a whole are dismissed.
(5) The Respondents' application for a preparation time order is refused.

REASONS

Introduction

1 The Respondents are a property management company which employs some 1800 people in Great Britain

2 The Claimant, who is 36 years of age, is a British-born man of mixed race, the son of a woman of mixed Cuban/Jamaican African-Caribbean descent and a white British man. He was employed by the Respondents and their predecessors (there was a TUPE transfer during his employment) as a security concierge at a

residential site in Kensington from 5 March to 21 August 2018, when he was dismissed with pay in lieu of notice on the ground that he had failed his probation.

3 By a claim form presented on 20 December 2018 the Claimant brought complaints which have been interpreted without complaint as allegations of direct racial discrimination and race-related harassment, together with a claim for unfair dismissal. All claims were resisted.

4 The unfair dismissal claim was subsequently struck out for want of jurisdiction, the Claimant having been employed for less than the qualifying period of two years.

5 At a Preliminary Hearing (Case Management) on 24 May 2019, Employment Judge Tayler identified the claims in these terms:

> **2. The Claimant describes his race as Afro-Caribbean and Latin descent and being British-born.**
>
> **3. Was the Claimant subject to direct race discrimination (the Claimant compares his treatment to Eszter, Mercedes, Dora, Maria, Ariel and Amir and/or a hypothetical comparator); or harassed by:**
>
> **3.1 The day that a colleague of black/Latin ethnicity started work, Isaac Salcedo told him "don't ever (f word) with me". Isaac Salcedo also said on the Claimant's first day in Kensington Row words to the effect "don't you ever lie to me, don't ever mess with me".**
> **3.2 Throughout employment being "ignored or frowned upon with disgust" when greeting Isaac Salcedo.**
> **3.3 Throughout employment being forced to do dirty and difficult jobs that were not in his job description e.g. clean extremely unhygienic mess ie. wheelie bins from bin rooms and dog mess and lift heavy items i.e. boxes in basement and material from contractors.**
> **3.4 Isaac Salcedo asking Ariel to take notes about the Claimant's behaviour throughout employment.**
> **3.5 When residents discussed the Claimant's nationality and ethnicity in front of Isaac Salcedo he would become furious and spend the rest of the day nit-picking every little thing that the Claimant did. The Claimant says this happened on a number of occasions throughout his employment at the concierge desk …**
> **3.6 When a new black employee named Eugene started work Isaac Salcedo said to the Claimant that "I need to keep a close eye on him" and often asked the Claimant to check on CCTV to see what he did during the night shift.**
> **3.7 When "people of black origin" were driving nice cars and visited residents Isaac Salcedo referred to them as drug dealers. The Claimant specifically relies on [comments] made to him by Isaac Salcedo about a black person driving a Mercedes in or about early July 2018 and made to Eugene about the Claimant's car in or about late July 2018.**
> **3.8 Isaac Salcedo raising an extremely large number of negative issues listed for the Claimant's probation reviews in an attempt to have him dismissed.**
> **3.9 being dismissed by Isaac Salcedo.**

6 The case came before us on 13 June this year with four days allowed. The Claimant appeared in person and represented himself with skill. The Respondents had the advantage of being represented by Ms B Omotosho, a solicitor.

7 The morning of day one was given to reading into the case. That afternoon we addressed a jurisdictional point raised for the first time at the hearing, namely whether the claim had been presented out of time. After receiving evidence from the Claimant and submissions from both sides, we arrived at the view that the claim form had been presented several hours outside the primary period of three months plus the additional time allowed pursuant to the Early Conciliation provisions, but that, in all the circumstances, it would be just and equitable to extend the period by one day. We exercised our discretion in the Claimant's favour principally because (a) we were (just) persuaded that he had made a genuine error in misunderstanding how the Early Conciliation provisions operate, believing that he had until the end of 20 December to present his claim; (b) he was a litigant in person without the benefit of legal advice; (c) although his cognitive functions may not have been impaired, he was experiencing a substantial degree of stress which may have affected his judgement; (d) the delay was minimal; (e) the balance of prejudice favoured him.

8 Having heard evidence and argument on liability over day two, we devoted the afternoon of day three (a member was required to sit on another case that morning) and part of the morning of day four to our private deliberations. We then gave an oral judgment with reasons, dismissing the claims. Ms Omotosho then made a preparation time application, which we refused.

9 These reasons are supplied in writing pursuant to a request by the Claimant at the hearing.

The Legal Framework

Harassment

10 The 2010 Act defines harassment in s26, the material subsections being the following:

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

> **(4) The relevant protected characteristics are –**
> **…**
> **race**

11 In *R (Equal Opportunities Commission)-v-Secretary of State for Trade & Industry* [2007] ICR 1234 HC, it was accepted on behalf of the Secretary of State that the 'related to' wording (in the Sex Discrimination Act 1975) did not require a 'causative' nexus between the protected characteristic and the conduct under consideration: an 'associative' connection was sufficient. Burton J did not doubt or question the concession. The EHRC Code of Practice on Employment (2011) (not, of course, binding upon us) deals with the 'related to' link at paras 7.9 to 7.11. It states that the words bear a broad meaning and that the conduct under consideration need not be 'because of' the protected characteristic.

12 Despite the ample 'related to' formulation, sensible limits on the scope of the harassment protection are, we think, ensured by the other elements of the statutory definition. Two points in particular can be made. First, the conduct must be shown to have been unwanted. Some claims will fail on the Tribunal's finding that the claimant was a willing participant in the activity complained of.

13 Secondly, the requirement for the Tribunal to take account of all the circumstances of the case and in particular whether it is reasonable for the conduct to have the stated effect (subsection (4)(b) and (c)) connotes an objective approach, albeit entailing one subjective factor, the perception of the complainant (s26(4)(a)). Here the Tribunal is equipped with the means of weighing all relevant considerations to achieve a just solution.

14 Central to the objective test is the question of gravity. Statutory protection from harassment is intended to create an important jurisdiction. Successful claims may result in very large awards and produce serious consequences for wrongdoers. Some complaints will inevitably fall short of the standard required. To quote from the judgment of Elias LJ in *Land Registry-v-Grant* [2011] ICR 1390 CA (para 47):

> **Furthermore, even if in fact the disclosure was unwanted, and the Claimant was upset by it, the effect cannot amount to a violation of dignity, nor can it properly be described as creating an intimidating, hostile, degrading, humiliating or offensive environment. Tribunals must not cheapen the significance of these words. They are an important control to prevent trivial acts causing minor upsets being caught by the concept of harassment. The Claimant was no doubt upset … but that is far from attracting the epithets required to constitute harassment. In my view, to describe this incident as the Tribunal did as subjecting the Claimant to a 'humiliating environment' … is a distortion of language which brings discrimination law into disrepute.**

In determining whether actionable harassment has been made out, it may be necessary for the Tribunal to ascertain whether the conduct under challenge was intended to cause offence (*ibid*, para 13). More generally, the context in which the conduct occurred is likely to be crucial (*ibid*, para 43).

15 Employees are protected against harassment by the 2010 Act, ss40(1).

Direct discrimination

16 The Equality Act 2010 ('the 2010 Act') protects employees and applicants for employment from discrimination based on a number of 'protected characteristics', including race. Race includes colour, nationality and national or ethnic origins (s9(1)).

17 Direct discrimination is defined by s13 in (so far as material) these terms:

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

By s23(1) and (2)(a) it is provided that there must be no material difference between the circumstances of the claimant's case and that of his or her comparator and that (for these purposes) the 'circumstances' include the claimant's and comparator's abilities.

18 In *Nagarajan*-v-*London Regional Transport* [1999] IRLR 572 Lord Nicholls construed the phrase 'on racial grounds' in the Race Relations Act 1976, s1(1)(a), in these words:

> **If racial grounds … had a significant influence on the outcome, discrimination is made out.**

In line with *Onu-v-Akwiwu* [2014] EWCA Civ 279, we proceed on the footing that introduction of the 'because of' formulation under the 2010 Act (replacing 'on racial grounds', 'on grounds of age' etc in the pre-2010 legislation) effected no material change to the law.

19 Discrimination is prohibited in the employment field, relevantly here by s39(2)(c) and (d).

Oral Evidence and Documents

20 We heard oral evidence from the Claimant and, on behalf of the Respondents, Mr Juan Garcia and Mr Isaac Salcedo. All gave evidence by means of witness statements.

21 In addition to the testimony of witnesses we read the documents to which we were referred in the two bundles produced (one by each side).

The Facts

22 The evidence sometimes strayed outside the narrow issues in dispute. We have had regard to all relevant material put before us. Nonetheless, it is not our function to recite an exhaustive history or to resolve every evidential conflict. The facts essential to our decision, either agreed or proved on a balance of probabilities, we find as follows.

23 The Claimant's employment was subject to a probationary period of three months (extendable), during which the notice period on each side was one week.

24 The Claimant's line manager was Mr Salcedo, Front Desk Manager.

25 The Claimant started working nights but after a little while moved to daytime working. He worked a pattern of four nights (or days) on and four off. His shifts started at 7 p.m. (or a.m.) and ended 12 hours later. He often worked overtime shifts as well.

26 The Claimant's job description describes the aim of his post in the following terms:

> **The purpose of the Day Concierge is to provide superior levels of customer service to residents and guests … by carrying out day-to-day duties that may involve operation of the Concierge Desk and monitoring of on-site security.**

"Role-specific accountabilities" included being the main point of contact responsible for "quality customer service to residents and guests" carrying out security inspections and operations, assisting in "required on-site duties" and providing "excellent concierge services as prescribed by Property Manager". Among the "general accountabilities was the requirement to "develop and maintain constructive working relationships with team members, on-site staff, residents and guests, working collaboratively to achieve overall business outcomes".

27 One complaint addressed to us by the Claimant was that he was called upon to lift and carry items including some heavy items, and that this did not form part of his job role. He did not explain to us why he felt that assisting with such duties fell outside the scope of his function as Security Concierge. We find in any event that he was not required to lift heavy items and that other staff were on hand to perform duties of that sort. He was expected to assist as and when necessary in order to ensure that the estate was kept in proper order. Generally, however, the appropriate means of achieving that end was to draw attention to any work that needed to be performed within the scope of the Estate Operative's general maintenance and cleaning duties.

28 The Claimant complains that he was required to move wheelie bins and to clear dog mess. He also mentioned used disposable nappies. We do not accept that he was ever instructed to perform such work. Attached to Mr Salcedo's witness statement is an email 8 May 2018 by the Claimant referring to what appeared to him to be a bag containing dog mess left by the main entrance to the site. Mr Salcedo replied thanking the Claimant to the information and asking him to refer the matter for action by the Estate Operative.

29 We do not recall the Claimant alleging in terms that he was required to pick up litter. For the avoidance of doubt we find that no such requirement was imposed upon him. A further email (dated 16 July 2018) attached to Mr Salcedo's witness statement reminded the Claimant and the other Security Concierge to keep an eye on litter and, if a problem arose, draw the attention of the Estate Operative to it.

30 It was not in dispute that, from early on in his employment, the Claimant was habitually late to work and frequently left work before the end of his shift. This made an effective handover to the incoming Concierge (or by the outgoing

Concierge) problematical or even impossible. It also led to a degree of natural resentment on the part of the Claimant's colleagues.

31 Timekeeping was by no means the only issue which became apparent during the initial weeks of the Claimant's employment.

32 4 June 2018 Mr Salcedo advised the Claimant by email of the "interim" extension of his probationary period and, the same day, Ms Elaine Higgins, HR Business Partner, invited him to attend a probationary review meeting to be held on 7 June 2018 to discuss his performance. The letter drew attention to a number of concerns summarised in bullet points as follows:

- **poor timekeeping**
- **"unprofessional behaviour"**
- **not controlling the fence line**
- **not following up on waste left on the estate for over 12 hours**
- **not adhering to approved break times**
- **not updating staff about the whereabouts of a key**
- **forgetting to make an email record of contractors signing in and signing out keys**
- **not using the "online portal" as instructed**
- **not producing appropriate "Defect Notices" for communal areas**
- **failing to report estate issues as required and notify "management"**

The "unprofessional conduct" was particularised as giving out a personal mobile phone number to residents and contractors, giving information to a contractor before informing "management", failing to keep "management" informed about an issue to do with the door, being "overly friendly in general", encouraging contractors to offer favourable terms to residents and spending too long in residents' apartments.

33 The probation review meeting was duly held on 7 June 2018. It was attended by Mr Salcedo, Ms Raquel Fernandez, a concierge at another site, and the Claimant. Ms Fernandez took a note. There was some controversy about the record of the meeting. This was not easily understood because it was common ground at the time that the meeting was being recorded. The Claimant pointed to discrepancies between the record produced by the Respondents and his own. He also agreed that when Mr Salcedo approached him requesting his recording (apparently with a view to perfecting the Respondents' transcript) he refused. The confusion here is regrettable and the product of an entirely avoidable failure to agree a suitable arrangement for sharing the Claimant's record of the meeting and we will not agonize over the proper explanation for that failure or attribute blame to either side. But in so far as the Claimant seeks to suggest that the Respondents somehow sought to "doctor" or manipulate the record, that we reject as implausible in circumstances where they were aware throughout that the Claimant would be in a position to produce his own recording and rely upon it.

34 In the course of the meeting the various performance issues were raised with the Claimant. He disputed most of them and said that he did not recognise some at all. Generally, he complained that most did not touch upon his core duties as a Security Concierge and amounted to "nit-picking". He stated that in the course of his employment he had felt "picked on" and had been upset by personal

comments about “physical things”. We have compared the selected extracts from his recording (contained in his bundle) with the note made by Ms Fernandez. Having done so we are satisfied that the references to the Claimant’s physical appearance were allusions to his powerful physique. There is nothing in either record which points to any racial component and we are satisfied that, although he now suggests otherwise, he was and is aware that the was no reference (express or implied) to any racial characteristic. According to his recording, he complained that Mr Salcedo and another employee had made a remark about his arms looking “funny” in a particular shirt. In Ms Fernandez’s record he is noted as having complained of being offended by someone laughing about his muscles.

35 The meeting ended with Mr Salcedo announcing that he would give his decision in due course after carrying out any further investigation that might be required.

36 On 19 June 2018 Ms Higgins wrote to the Claimant to announce the outcome of the probationary review meeting. The letter begins by surprisingly referring to the meeting “with me”. As we have noted, Ms Higgins was not present. She summarised the main exchanges at the meeting, noting the Claimant’s challenges to some of the points raised and admissions of others. She concluded by announcing “her” decision to extend the probationary period by three months until 5 September 2018. She added that a decision might have been taken to end his employment then and there, that he would continue to be reviewed over the coming months and that if appropriate improvements were not made during the extended period the result could be dismissal.

37 In broad terms, the Respondents’ position was that the Claimant’s performance did not materially improve during the extended period. For his part, the Claimant did not really say otherwise, no doubt because, on his case, his performance was already satisfactory and no particular improvement was required.

38 By an email of 28 June 2018, Ms Maria Stefanaki, a daytime Concierge who worked from 8 am to 5 pm daily, informed Mr of a number of concerns about the Claimants performance in his role. She criticised his lack of “professionalism”, citing “inappropriate comments” about females. She referred to him giving his personal telephone number to residents, contractors and clients despite her advising him that he should not do so. She said that he failed to follow company procedure, for example in respect of key management. She complained that he did not conduct proper patrols. She alleged that he had knowingly given misleading information to residents resulting in frustration and confusion. Finally, she referred to his poor timekeeping. The Claimant suggested that this message was solicited. We have no evidence to that effect. It is right to point out that Ms Stefanaki left the organisation the day after sending the message.

39 Mr Salcedo told us that he continued to be concerned about the Claimant’s performance and readily agreed that he had approached other staff members in order to obtain relevant feedback. Further criticisms of the Claimant resulted, from Mr Germaine Patrick and Mr Zeershan Zulfiqar, which, at the behest of Mr Salcedo, were reduced to writing in the form of emails, both dated 11 July 2018. Mr Patrick confined himself to details of the Claimant’s recent habit of visiting the site

in the evening and spending time there chatting. Mr Zeershan gave much fuller information describing the Claimant's activities on site late at night, holding inappropriate conversations with residents (including asking for their telephone numbers and supplying them with his), and otherwise fraternising with residents. Mr Zeershan described this behaviour as making him feel "extremely uncomfortable" and unable to trust the Claimant. He added:

> **He made it clear to me that he does not take this role seriously and that he sees Kensington Row as a "playground" to mess around in.**

Mr Ariel Zerrudo (see the list of claims above, para 3.4) may well have been among those invited by Mr Salcedo to offer feedback.

40 A further probation review meeting was held on 25 July 2018. As at the earlier meeting, those present were Mr Salcedo, Ms Fernandez and the Claimant. The list of concerns set out in the letter of invitation dated 20 July was explored in detail. Matters discussed included the Claimant's continuing pattern of poor timekeeping (he was late on eight working days between 30 June and 11 July), allegedly inappropriate behaviour towards females, allegedly giving his personal contact details to residents, contractors and clients, allegedly attempting to obtain information relating to the sale of apartments, allegedly attending the site outside his hours of work and disturbing others in the performance of their duties, and allegedly failing to comply with key management procedures. The Claimant admitted attending work late and suggested that a personal issue (which could be explored in private) would explain it. The other matters were largely denied or dismissed as minor and instances of "nit-picking". At the end of the meeting Mr Salcedo promised to review the case before issuing "his" decision.

41 By a letter dated 20 August 2018 Ms Fola Elufowoju who is variously described in the paperwork before us as HR Manager and an Employee Relations Advisor, notified the Claimant of "her" decision on the probationary review. She summarised the main concerns and concluded that he had failed to make satisfactory progress during his probationary period. She drew attention in particular to the timekeeping issue, the fact that he had disclosed his personal mobile phone number to residents and his failure to adhere to the key management procedures. She also referred to a concern about health and safety (during the meeting an allegation that he had failed to deal appropriately with the fact that a resident was seen using a barbecue on a balcony had been debated). The letter gave notice that the employment would end on 21 August and that the Respondents would make a payment in lieu of the Claimant's entitlement to one week's notice. Attention was drawn to his right to appeal within seven days.

42 On receipt of the letter of dismissal, the Claimant sent a text message to Mr Salcedo in these terms:

> **Hi Isaac, I had just received the unfortunate news. Thank you for all the fun times, smiles and great work experience at Kensington Row. It was a pleasure working under yourself and Debbie and I wish you guys all the best for the future!**

43 The Claimant attempted to appeal against the decision to dismiss but did so outside the seven-day period mentioned in the letter of 20 August. The proposed appeal was rejected as being out of time.

44 The Claimant told us in evidence that he endured "torment" at the hands of Mr Salcedo and painted a picture of a deeply miserable and distressing experience as an employee of the Respondents. We found this hard to reconcile with the conspicuously cheerful and friendly text messages exchanged by him and Mr Salcedo, among others, not only on work matters but also on shared interests such as cars and football.

45 Some evidence was given over to consideration of the Respondents' CCTV policy. The document is in the bundle. Recourse to CCTV records is permitted for "disciplinary" purposes but that word is not defined and it is not clear whether it is intended to stretch to any internal proceedings which may and in dismissal or only those based upon some form of disciplinary charge. The policy requires a log to be kept of reviews of CCTV records. It is not in dispute that Mr Salcedo searched the CCTV records and that no log of this activity was kept.

46 As we have mentioned, the Claimant relied on written supporting evidence from Mr Lozano, a handyman, Mr Ohai, a security officer, Mr Eugine Malefane, night concierge, and Mr Germaine Patrick (already mentioned). Mr Lozano stated that he and the Claimant had been treated badly by Mr Salcedo and that he attributed the treatment to the fact that both were born in the United Kingdom and had "Afro and Latin roots/ethnicity." Mr Ohai offered comments supportive of the Claimant and said that he felt uncomfortable about the way in which "management" treated him. There was a real doubt as to whether Mr Malefane's statement had been signed by him.[1] We read it in any event. It alleged discriminatory treatment of employees of black or "Afro" descent. Mr Patrick (who had, it will be recalled, written earlier to criticise the Claimant) was now critical of Mr Salcedo and alleged that the Claimant had suffered bullying. He stated that he had eventually left his job because of how Mr Salcedo had treated "staff like myself in comparison to others". As we understand it, Mr Lozano worked daytime shifts and the other three witnesses were night workers.

47 The first discernible allegation or suggestion by the Claimant of racial discrimination was made in the claim form.

Secondary Findings and Conclusions

Harassment or detrimental treatment?

48 Many of the factual allegations on which the claims hang were simply denied. We start by considering whether those which are disputed actually happened. We adopt the paragraph numbering in Judge Tayler's order. As to para 3.1 we are not persuaded that the events relied on ever occurred. As to para 3.2 we interpret the complaint as being an allegation that Mr Salcedo consistently treated the Claimant in the way alleged. So interpreted, we reject it. We find that

[1] We were shown a text message from him suggesting that the Claimant should put his (Mr Malefane's) initials on it.

the relations between the two were generally cordial. No doubt on occasions they were more cordial and on occasions, less. It is not true that Mr Salcedo routinely ignored the Claimant or greeted him with a frown. There was no detriment and nothing capable of amounting to harassment. Para 3.3 is covered by our factual findings above. It is not true that the Claimant was forced to do dirty and difficult jobs. No detriment is shown and nothing capable of constituting harassment. As to para 3.4, we have found that Mr Salcedo may have asked Mr Zerrudo for information about the Claimant. It is plain that he was concerned about the way in which the Claimant was performing and he approached other staff for the same purpose. There was no detriment. Harassment does not even theoretically arise. Turning to para 3.5, it is plain from the evidence that one concern of Mr Salcedo was his perception that the Claimant tended to be unduly friendly and familiar with residents. The subject was raised but there is no sign of the Claimant's behaviour changing. There may well have been instances when Mr Salcedo witnessed conversations involving the Claimant in which the proper boundaries (as he saw them) were not observed. Such conversations may, as the Claimant claims, on occasion have touched upon his personal characteristics or background. We have little doubt that Mr Salcedo would have been irritated to see his subordinate engaging in personal conversations or otherwise behaving in a familiar fashion towards residents. If so, no doubt his irritation was evident and perceived by the Claimant but we are satisfied that his reaction fell far short of being capable of constituting unlawful harassment or even a detriment. The allegations in paras 3.6 and 3.7 are not made out in fact. Those in paras 3.8 and 3.9 are.

Related to race or 'because of' race?

49 Our reasoning so far results in the elimination of all allegations other than those in paras 3.8 and 3.9. There is in any event no basis for the Claimant's contention that the matters complained of are explained to any extent by his racial characteristics (or any of them) or are related to those characteristics. The complaints in paras 3.2 and 3.4-3.5 are explained by the fact that the Claimant's performance was unsatisfactory and Mr Salcedo was determined to address it and, if possible, bring about an improvement. The deficiencies in performance (as Mr Salcedo saw them) no doubt led to a degree of tension on occasions but had nothing to do with race. As to paras 3.8 and 3.9, there were many concerns and that explains the lengthy lists which the Claimant was presented with on the occasions of both probation reviews. The dismissal was the natural consequence of the judgment, genuinely made by, we find, by Mr Salcedo (probably in conjunction with HR), that his performance had not reached an acceptable standard. There was ample evidence for that conclusion. In any event, there is no possible basis for the theory that his race played any part in the decision to dismiss or in the process which led to it. The Claimant has not identified any relevant comparator and there is no reliable evidence showing a tendency on the part of any decision-maker within the Respondents to discriminate against him on the grounds of his race.[2]

50 These conclusions are fatal to the entire case. The Claimant has failed to establish facts on which it would be possible to base an inference of unlawful

[2] The statements of the Claimant's supporting witnesses amount to mere assertion and, not having been tested by cross-examination, carry very little weight in any event.

discrimination or of a racial component to any act of harassment. The burden does not shift to the Respondents and in any event they have amply demonstrated that their actions were not to any extent influenced by his racial characteristics.

Time (again)

51 The logic of our reasoning so far is that the complaints which predate the dismissal are out of time and accordingly fall outside our jurisdiction (our initial decision on jurisdiction was only that the dismissal-based claim and any other claim brought within time as part of a series of 'acts extending over a period' was within time, as extended by one day). Since we have found that the prior claims have no merit there can be no question of extending time further in order to bring them within the jurisdiction. Accordingly all claims other than that based on the dismissal itself also fail as being out of time.

Preparation Time

52 Having heard our adjudication on liability, Ms Omotosho made an application for a preparation time order. She is a qualified solicitor who is employed by a consultancy and explained her reasons (unimportant for our purposes) for limiting her application to a preparation time award. The grounds for the application are summarised in our discussion below.

53 The Claimant gave evidence about his means and resisted the application.

The law

54 The power to make costs or preparation time awards is contained in rule 76 of the Employment Tribunals Rules of Procedure 2013, the material part of which is the following:

> **(1) A Tribunal may make a costs order … , and shall consider whether to do so, where it considers that –**
>
> **(a) a party … has acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted; or**
> **(b) any claim or response had no reasonable prospect of success.**

As the authorities explain, the rule poses two questions: first, whether the Tribunal has power to make an order; second, if so, whether the discretion should be exercised.

55 When our rules of procedure were revised in 2001 several important changes were brought in, the most significant being (a) that the Tribunal was for the first time not merely permitted, but obliged, to consider making a costs order where any of the prescribed conditions (vexatiousness, abusiveness etc) was fulfilled, and (b) that a new and wider criterion of unreasonableness was added. It seems to us that these innovations, preserved in both subsequent revisions of the rules, indicate a desire on the part of the legislature to encourage Tribunals to exercise their costs powers more freely than they did in the past, where

unmeritorious cases are pursued or where the manner in which litigation is conducted is improper or unreasonable. These things having been said, we are mindful of the fact that orders for costs in this jurisdiction are, and always have been, exceptional. Employment Tribunals exist to provide informal, accessible justice for all in employment disputes. We recognise that, if Tribunals resorted to making costs orders with undue liberality, the effect might well be to put aggrieved persons, particularly those of modest means, in fear of invoking the important statutory protections which the law affords them. It would be contrary to the purpose of the Tribunals if parties to disputes declined to exercise their right to bring (or contest) proceedings as a result of unfair economic pressure.

56 Ms Omotosho began her application with the argument that the claim was vexatious and/or misconceived. She accused the Claimant of "playing the race card", which we take to mean that the claim was tactical. We certainly found that there was no substance to his allegations of racial discrimination (whether in the form of direct discrimination or harassment) but we stopped short of finding the claim insincere. We were mindful of the dangers of relying on hindsight (see *eg ET Marler v Robertson* [1974] ICR 72 EAT, at p74). And although the case was weak, it was not, to our minds, so weak as to merit the damning adjective 'misconceived'.

57 Next Ms Omotosho argued that the Claimant had acted unreasonably in bringing the claim, alternatively in the manner in which he has conducted it. On the latter point she complained of his alleged failure to comply fully with certain case management directions. Largely for the reasons already given, we did not find that he acted unreasonably in bringing the claim. As to the manner in which it had been conducted, we took the points that were made but they did not come close to showing unreasonable conduct of the sort which could move this case into costs risk territory. We bore in mind that the Claimant was a litigant in person and that proper allowance needed to be made for that.

58 Ms Omotosho also said that the Claimant had acted unreasonably by not taking advantage of an offer which would have given him a safe exit either before the hearing or perhaps even on day one of it. But this part of the application could not work because the Respondents' position was not safeguarded by means of a *Calderbank* letter containing an offer to settle the proceedings and reserving the right to refer to the letter later in support of a costs (or preparation time) application.

59 In all the circumstances, we concluded that this case did not fall into the exceptional category in which a costs or preparation time order would be an option. None of the necessary conditions was satisfied. We accordingly dismissed the application.[3] The Claimant was fortunate that the second stage of the analysis (see para 54 above) did not arise. Had we been faced with an exercise of discretion, we might have been forced to grapple with, and make findings on, the notably unimpressive evidence which he gave on the subject of his means.

[3] It now appears that a much shorter route to the same outcome should have been taken. By r75(2) of the 2013 Rules, a preparation time order is defined as an order in respect of a party's preparation time while not legally represented. It seems to us that the Respondents *were* legally represented and that the Tribunal had no jurisdiction to make the order sought. We are sure that Ms Omotosho's omission to draw r75(2) to our attention was entirely accidental.

Outcome and Postscript

60 For the reasons given the claims are dismissed and the preparation time application is refused.

61 Finally we would add this. Ms Omotosho remarked more than once that this was not an unfair dismissal claim. Her clients should count themselves fortunate on that score. We have noted the remarkable procedural handling of the case and in particular the mixed messages as to who was to take, and who did take, decisions following each of the two probation review meetings. To say that the Respondents would do well to learn lessons from this case and to revise their procedures in order to avoid the danger of being criticised in future cases and exposed to avoidable risk, is to state the obvious.

_____

EMPLOYMENT JUDGE SNELSON
28 June 2019

Reasons entered in the Register and copies sent to the parties on 28 June 2019

..... for Office of the Tribunals