CASE NO: 2601557/2018

EMPLOYMENT TRIBUNALS

Claimant: Mr L Zhuwao

Respondent: SD Design (UK) Ltd

Heard at: Nottingham
On: 7 – 9 October 2019
12 November 2019 (in chambers)

Before: Employment Judge D Faulkner
Members: Mrs G Howdle
Mr Z Sher

Representation
Claimant: In person
Respondent: Mr J Heard of Counsel

RESERVED JUDGMENT

1. The unanimous decision of the Tribunal is that the Claimant was not discriminated against by the Respondent because of his race. His complaints of direct discrimination are therefore dismissed.

2. The unanimous decision of the Tribunal is that the Claimant was not harassed by the Respondent. His complaint of harassment is also dismissed.

RESERVED REASONS

Complaints

1. The Claimant complains of direct race discrimination and race harassment contrary to the Equality Act 2010 ("the Act").

Issues

2. We made clear to the parties that we would deal initially with liability only, dealing separately with remedy if any of the Claimant's complaints were successful. The issues to be decided were therefore agreed at the outset to be as follows.

Race discrimination

3. The Claimant was dismissed on 16 April 2018. The first issue was whether, in addition to dismissing him, the Respondent subjected the Claimant to all or any of the following detriments, or as it may be in relation to the first matter, denied him access to an opportunity for training:

3.1. not paying for AutoCAD training in October 2017;

3.2. not issuing a written contract of employment in November 2017;

3.3. failing to enquire whether the Claimant had worked overtime and failing to recognise his overtime, between September and November 2017;

3.4. not paying him for overtime worked on Saturday 2 December 2017;

3.5. removing from him in January 2018 a licence to use a software package known as Tekla;

3.6. in January 2018 following an incident with a printer, Mr Murray Smart (one of the Respondent's directors) describing the Claimant as a "bloody idiot, useless individual, good for nothing";

3.7. in February 2018 failing on two occasions to invite the Claimant to leave work early during adverse weather;

3.8. in February 2018 failing to allocate a newly-purchased computer to the Claimant;

3.9. in March 2018, Mr Smart stating to the Claimant in response to work-related questions, "So we can pack everything and close the business and go home".

4. In respect of the Claimant's dismissal and any of the above detriments the Claimant is able to establish, the second issue is whether the Respondent treated him less favourably than it treated or would treat a comparator. In relation to the nine matters listed above, the Claimant relies on (using the same order):

4.1. David Duncan, a 2D technician/3D Modeller employed by the Respondent;

4.2. Mr Duncan, David Jameson (also a 2D technician/3D Modeller employed by the Respondent) and Tia Affleck who worked for the Respondent on an occasional basis as an administrator;

4.3. Mr Duncan, Mr Jameson and Ms Affleck;

4.4. Mr Duncan, Mr Jameson and Ms Affleck;

4.5. Mr Przemyslaw Skowron (employed by the Respondent as a 3D Modeller) and Mr Jameson;

4.6. Mr Jameson;

4.7. Mr Skowron;

4.8. Mr Jameson, Mr Duncan, Mr Skowron, Mr Smart and the Respondent's other director Ms Deirdra (Dee) Dowling;

4.9. Mr Duncan, Mr Jameson, Ms Affleck and Mr Skowron;

4.10. As to dismissal, Mr Duncan, Mr Jameson, Ms Affleck and Mr Skowron.

5. If so, the third issue is whether that was because of the Claimant's race.

Race harassment

6. The first issue in relation to the single complaint of harassment is whether Ms Dowling made the following comment in December 2017 in respect of an Asian employee of Techrete, the Respondent's main client: "He is lazy, he wants us to do his job, he is useless".

7. If so, was that unwanted conduct?

8. If so, was it related to race?

9. If so, did it have the purpose or effect of violating the Claimant's dignity or of creating an intimidating, hostile, degrading, humiliating, or offensive environment for him?

10. Time limits are also in issue. The Respondent says that any complaint about something prior to 10 February 2018 was brought out of time and was not part of conduct extending over a period ending with those complaints brought within time, such as to be treated as done at the end of that period. Although not raised until mentioned by Mr Heard at the outset of this Hearing, as a matter which goes to the Tribunal's jurisdiction, we are bound to consider it.

Facts

11. The parties agreed a bundle of documents of around 150 pages. We made clear to the Claimant that the Tribunal would not, without the Respondent's consent, consider documents he might wish to submit outside of the Hearing. We also made clear that it was not for the Tribunal to guess which documents might be relevant to the parties' cases and it was therefore for them to draw relevant documents to our attention during the course of the evidence. There was a small dispute at the start of day about whether we should admit an additional document, namely what the Respondent asserts was the Claimant's appraisal record from July 2017. The Claimant objected to its admission. Whilst concerned about its late disclosure, we did not think that the Claimant could be said to be prejudiced by its introduction, because the document was very short; it did not change the Respondent's case as to what it says happened at the appraisal, being consistent with their witness statements on the point; and most importantly it seemed to us that it could potentially support either party's case or neither, in other words it was not a document which

self-evidently harmed the Claimant's position. On that basis we were prepared to admit it.

12. Witness statements were prepared by the Claimant and, for the Respondent, Ms Dowling and Mr Smart, both directors and working respectively as a 2D Technician and Structural Engineer, Mr Skowron and Mr Jameson. We heard oral evidence from all five witnesses and submissions from Mr Heard and the Claimant; Mr Heard also provided written submissions. Submissions concluded shortly before 4.00 pm on day 3; judgment was therefore reserved. As advised to the parties, the Tribunal met to consider its decision on 12 November 2019.

13. On the basis of the above, we make the following findings of fact. Where the parties gave different accounts, we make clear how we resolve those conflicts of evidence, where it is necessary for us to do so. Otherwise, our findings of fact are based on evidence which was unchallenged. Page references below are of course references to the bundle.

14. The Respondent is a small design company providing two main services to its clients, namely structural engineering calculations and support, and 3D modelling and detailing. Its clients are architectural precast manufacturers, architectural precast being essentially the panels attached to structures to provide their aesthetic finish. The projects the Respondent is involved in concern large commercial buildings; they can take a long time to secure and typically last for between six months and two years. The Respondent has two directors, Ms Dowling and Mr Smart. They began the business in 2009. It has only ever had a small number of employees, six or seven in total, including the directors. There is no HR professional within the business. The vast majority of its work comes from one client, Techrete. Its annual turnover is around £250,000.

15. The Claimant was employed from 27 March 2017 to 16 April 2018. His job title was Structural Engineer. He was recruited to assist Mr Smart who also worked as a structural engineer, as the Respondent foresaw a significant increase in work in the circumstances we describe below. The Claimant says he knew that Mr Smart was a director but did not know that he was a structural engineer. Given that Mr Smart supervised all of his work, in our view this was or should reasonably have been clear to him.

16. Ms Dowling says that the Claimant came across well in interview and that she and Mr Smart both liked him. Their plan, Mr Smart says, was that the Claimant would have time to be trained in some of the basic tasks of precast structural engineering before work picked up significantly. We accept that uncontested evidence, not least because the Claimant agrees that he was welcomed into the business. It is also agreed that during his first week he was taken to lunch with the rest of the team. The Claimant says that everything went well for the first three months. Thereafter, he says, he remained friendly with the employees, but not with the directors.

17. It is agreed that the Claimant shadowed Mr Smart during his first six months. In fact, the Claimant says that he shadowed Mr Smart for the whole of his employment. No one else did so. It is agreed he was taken to the Techrete factory to meet its

production team, introduced as the Respondent's structural engineer and treated with respect. He also went to a design meeting for a project in London and to the Techrete office in Leicester to learn certain aspects of the role using their systems.

18. The Claimant describes his own race as Black African. He referred to himself during the Hearing as "the only person of colour" in the Respondent's workforce. Techrete employs people from many different backgrounds and parts of the world.

Training

19. The Claimant's first complaint is that he enrolled on an AutoCAD course in October 2017 but the Respondent refused to pay for it.

20. The Claimant says in his Claim Form that at his job interview with the Respondent's directors he was promised training in AutoCAD, training in Tekla (a design software) and support to achieve chartered engineer status. Specifically, as to AutoCAD training, he says that the Respondent suggested he enrol on a college course. The Respondent says that no mention was made of training at the interview, although Ms Dowling says that the Claimant described experience of AutoCAD. We think it unnecessary to resolve whether or not training was discussed at this point.

21. What is clear is that at his appraisal in July 2017, there was a discussion about the Claimant furthering his knowledge of Auto CAD (page 156), it being agreed that he was struggling to use it. Although the Respondent's case is that more than a basic understanding of AutoCAD was not required for the Claimant to fulfil his role, the directors agreed to pay for a course.

22. At Page 66B it can be seen that the Claimant forwarded to Ms Dowling on 23 October 2017 an email he had received from a college, it appears some days before. The college's email informed the Claimant that due to staffing levels and half term he could not be enrolled on 24 October for a City & Guilds AutoCAD course, but a new enrolment date falling within the same week would be notified to him. Ms Dowling replied to the Claimant, "Hi Lee, I think we'll have to leave it for now. We can revisit it again in the future. It's a bit short notice to get something in place for tomorrow. Kind regards, Dee". Ms Dowling's oral evidence was that she felt the Claimant had landed this on her. She said that she told the Claimant orally it was too short notice to work out what was happening. Her evidence was that she questioned whether the course would go ahead given previous cancellations of enrolment days and that the Claimant was not clear what was happening either.

23. The Claimant questions why the money was available in September but not in late October when all that was needed was a deposit of £114. Ms Dowling says that she was not told about a deposit, but knew that the overall cost would be around £800, from her previous experience of booking training for Mr Duncan. She says that whilst the cost had been allocated for September, by late October, because a number of new projects were coming in, the company needed to prioritise paying recruitment agencies. She also said that the weeks leading to Christmas are a difficult time of year for the business financially, because the imminent shutdown period means invoice payments are delayed and the company has a lot of bills to pay in January. It is therefore a time at which she feels they have to be very careful.

She accepted that cost was not mentioned in her e-mail; her evidence was that she did not think she needed to say this was an issue. Notwithstanding this omission, we accept Ms Dowling's unchallenged description of the financial issues which arise for the business at that time of the year.

24. Some years before, the Respondent paid for training for David Duncan to study AutoCAD. It also paid for Mr Jameson to study Tekla for a week. The Claimant says that 85% of his work for the Respondent required him to use AutoCAD. In his oral evidence he referred to drawing fixings, front elevations and panels and producing sketches. It is agreed he struggled to use the package. Put simply, his case is that when David Duncan struggled to use it, he was sent for training, but the Respondent did not afford the same privilege to him.

25. Ms Dowling says that Mr Duncan enrolled himself on the second year of an AutoCAD course without the Respondent's knowledge. When the directors found out, it was decided that he should be reimbursed the cost because it was specific to his role and would improve his skills for the benefit of the business. He was at that point employed as a trainee CAD technician and so the course was seen as necessary to enable him to carry out his role. Similarly, two CAD Technicians – one of whom was Mr Jameson – were sent on a course to learn 3D modelling (using the Tekla software) as this was required for them to transition from their roles as 2D technicians to 3D modellers. We accept Ms Dowling's unchallenged evidence in these respects.

26. Ms Dowling refutes the idea that 85% of the Claimant's work required him to use AutoCAD. She describes it as a drafting tool, not something that is used for design work and preparing calculations, which are the essential tasks of a structural engineer. She estimated that the Claimant would have needed to use it for only around 10 to 20% of his work. Similarly, Mr Smart says that as a structural engineer the Claimant needed basic knowledge in AutoCAD, for example in order to take measurements from drawings. The Claimant did not however need to create detailed drawings of building elevations as that was the job of the CAD technicians and 3D modellers. Mr Jameson for his part says that it is "not too important" for a structural engineer to be competent in using AutoCAD; whilst it helps, it is not essential for preparing calculations. Mr Jameson also says that he was asked by Ms Dowling and Mr Smart to give the Claimant informal training on the basic skills of AutoCAD software and it is agreed that he did so.

27. Given the significant sector experience of Mr Smart, Ms Dowling and Mr Jameson and their combined and consistent testimony on this point, we accept their evidence that the role for which the Claimant was employed did not require him to use AutoCAD to the same extent as his colleagues who were 3D Modellers. We understand however the Claimant's point that he wanted to be able to use AutoCAD more effectively, to be able to interpret drawings in the same way as Mr Smart. The Respondent appears to have recognised that by mentioning it in his appraisal.

28. The Claimant says in his Claim Form that the Respondent's refusal to fund the training was because he stood up to bullying by Ms Dowling and raised questions about the legality of the Respondent's AutoCAD software. He says an altercation

took place with Ms Dowling when he had to use her computer and she did not like him doing so because he was a bit slow. Although not recorded in his Claim Form or witness statement, he put to her in cross-examination that she had shouted a number of things at him at 8.00 one morning, including, "We spent money on you doing the training; you're not doing this correctly, and now you are spending lots of time on my computer; you need to get a grip on things", or words to that effect. He also asserted that he told her she was completely out of order and asked her to stop shouting and hurting his ears. Ms Dowling says that this simply did not happen, not least because she is generally not in the office at 8.00 am and the Claimant was able to use her computer because they took lunch at different times. The Claimant says that if there had been a similar altercation involving a white employee, they would still have had their training paid for.

29. As to the AutoCAD software, the Claimant appeared to suggest that he raised concerns that the Respondent was using a pirate copy. Whilst Ms Dowling agrees they were not the most up to date, she says that the AutoCAD programme on the Claimant's computer was the same as that on all other employees' computers. The disc used to load this software was purchased second-hand; it is not updated, nor does it give access to AutoDesk, which we assume is a help desk. She frankly admitted in her oral evidence that the Respondent would need to look into whether a licence was required for each employee, but was firm in asserting that the Claimant did not at any point raise this with her.

30. On balance, we prefer Ms Dowling's evidence for two reasons. First, what the Claimant put to Ms Dowling regarding the alleged altercation did not appear to us to be a convincing recollection on his part; as noted, it was also absent from his Claim Form and statement. Secondly, we noted Ms Dowling's frank admission before the Tribunal of the potentially serious matter of not having properly used the disc. Whilst as we made clear that is not a matter for us to adjudicate upon, it does indicate Ms Dowling's willingness to admit matters which were not in her favour. We therefore conclude on the balance of probabilities that there was no altercation in the terms described by the Claimant and that he did not raise with her any concerns about the AutoCAD software.

Contract

31. The only document referring to the Claimant's terms and conditions of employment with the Respondent was a letter from the directors dated 17 March 2017 (page 57). It began, "Following your interview at our offices recently, we write to confirm our offer for the position of Structural Engineer for SD Design (UK) Ltd". It then specified the Claimant's salary, details of his probation period, notice periods, working hours, holiday entitlement and start date. The Claimant says that in November 2017 he asked Ms Dowling and Mr Smart about a written contract, i.e. something more substantial and comprehensive, which he believes had been issued to his comparators. He had completed his probation around 27 June 2017 and expected to get a letter confirming this and detailing his rights and benefits. He says he was promised during the July appraisal meeting that a contract would be issued.

32. Although in his statement the Claimant says that his colleagues spoke to him about flexibility options mentioned in their employment contracts but not mentioned in his, he accepted in oral evidence that his offer letter did refer to the possibility of working flexibly and that on some occasions he did so. He thus accepted in cross-examination that he was not treated differently to his comparators in this regard. The Respondent says that no request was made for a contract. It says its standard practice is to provide only a letter such as that given to the Claimant. It also says that he received the same benefits and rights as other employees.

33. Mr Skowron was careful to say that he could not be certain, but he believed that the letter he received prior to joining the Respondent in January 2018 was similar to that given to the Claimant. For immigration reasons related to his wife, after three months of employment he asked the Respondent to provide him with a further document confirming that his employment was permanent. Again, doing his best to recall, he says that this was similar, though probably not identical, to the earlier letter. Ms Dowling says that the letter to Mr Skowron was particular to the circumstances of his case and the exception to the Respondent's usual practice.

Comments December 2017

34. Given its importance to its business, the Respondent works closely with employees of Techrete. The Claimant says that when white employees of Techrete called the Respondent asking for drawings, they were provided without complaint. If, however, an Asian project manager did the same, comments were made about him to the effect that, "he is lazy, he wants us to do his job, he is useless". The Claimant alleges that this created a hostile, degrading, humiliating and/or offensive environment for him, being as he put it the only person of colour in the office. The Claim Form says that similar comments were made on drawings received by the Respondent from its subcontractors in India. In his evidence before us however, the Claimant focused solely on the alleged comments about the employee of Techrete.

35. The Respondent said in its Response (page 33), "If this comment or any other comment happened or was made, then it is a comment on the person's work capability, not their race". In his oral evidence Mr Smart says that he has known the individual in question for around 20 years, and describes him as a very nice man, good at his job, and someone who is very well known to the Respondent's team. He says that there have never been any demeaning remarks made about him and emphasises in his statement the multinational nature of the Techrete workforce. Mr Jameson refuted ever hearing comments of this nature. Ms Dowling says that it frustrates her when anyone at Techrete calls to obtain a drawing, because there is an established arrangement for formally issuing them to clients. She thus says that many of the Techrete employees could be said to be "getting [the Respondent] to do their jobs". As for the Asian employee specifically, she says that she gets on very well with him, that they have a very good relationship and that he has been very helpful to the Respondent in relation to a number of projects. We will deal with the conflict of evidence on this matter in our analysis below.

Overtime

36. The Claimant says that he regularly worked overtime for the Respondent but was not paid for it, whereas Mr Jameson, Mr Duncan and Ms Affleck were. His case is that they were also asked by Ms Dowling whether they had worked any overtime, whereas he was not. He also says that he was not "recognised" for his overtime, by which he means being thanked and paid. The Claimant says that he regularly worked overtime because the amount of work he had to do required it, even though he was not asked to do so by the directors, and also because of his difficulties getting to grips with his work, something which would have been ameliorated had he been given the training he believes was promised.

37. The Claimant's general allegation is that at the end of both September and October 2017, Ms Dowling asked Messrs Duncan and Jameson about overtime but did not ask him. He also alleges that throughout his employment, they were paid for any time worked outside of normal office hours, but he was not. The Claimant also says that Ms Affleck, whilst only working for the Respondent outside of term time, was sometimes asked to work extra days, for which she too was paid. He makes a specific allegation regarding the first weekend of December 2017 that Messrs Duncan and Jameson were asked about overtime by Ms Dowling and paid for it, but he was not. The Claimant says that as a result of a request from Mr Smart to complete a particular task by first thing on Monday, he worked 8 hours on Saturday 2 December; he was not asked how long he had worked for, nor was he paid.

38. Ms Dowling says that the Respondent's invariable practice is only to ask and pay for overtime when schedules are tight. It is only on those occasions that at the end of the month she asks colleagues for overtime sheets so that the hours can be paid. In December 2017 because of tight schedules on two projects, Mr Jameson and Mr Duncan were asked to help out by doing some overtime specific to the production of additional drawings. The Respondent says that no engineering overtime was required but agrees that the Claimant requested to work on the Saturday, even though Ms Dowling said she was not sure why and that no discussion took place regarding overtime pay. Mr Smart's evidence was that he understood the Claimant wanted to come into the office because he wanted to do a little extra work to familiarise himself with calculations. Ms Dowling says that voluntary overtime, i.e. just staying over to get work done, is not paid for.

39. Mr Jameson could only recall one period of overtime about four or five years ago. The only time he recalls being asked about overtime at the end of the month was in December 2017 when schedules were tight on a particular project, though he says that in the end no overtime was needed. He does not accept that Ms Dowling regularly checked with him what overtime he had worked. Again, we will deal with relevant conflicts of evidence in our analysis.

Printer

40. In January 2018 an incident occurred involving the printer in Mr Smart's office which had stopped working due to a paper jam. The Claimant and Mr Jameson tried to help. Mr Jameson suggested that the printer be turned on its side so that the

paper jam could be removed; Mr Smart said not to do so. The printer was turned on its side anyway and began to leak ink, including over drawings.

41. In his Claim Form (page 12, paragraph 5) and in his statement at paragraph 12, the Claimant says that when Mr Jameson left the office to get paper towels Mr Smart said to, or about, the Claimant, "Bloody idiot, useless individual, you are good for nothing". The Claimant's oral evidence was somewhat different. He was insistent that Mr Smart called both him and Mr Jameson "bloody idiots" and then made the further comments only after Mr Jameson had left the room. The Claimant does not suggest that this comment was related to race; rather his complaint is one of direct discrimination because the words were not used to Mr Jameson.

42. The Respondent's account is different. Whilst Mr Jameson describes Mr Smart as "mildly annoyed" and does not remember Mr Smart using the phrase "bloody idiots" (he says he was flustered at the time and only remembers Mr Smart saying, "This is why I told you not to turn it on the side"), Mr Smart himself agrees he was frustrated and that he raised his voice to both the Claimant and Mr Jameson, calling both of them "bloody idiots". He says he is not proud of his reaction, but did not say the Claimant was useless or good for nothing. In fact, he says in his statement that he said nothing at all once Mr Jameson had left the office to get paper towels, because he was busy trying to clean up the mess. He says that Ms Dowling came in and subsequently told both the Claimant and Mr Jameson to go back to the main office whilst she cleared up what was left.

43. Ms Dowling says that she entered the room whilst both Mr Jameson and the Claimant were present and sought to calm Mr Smart down, at which point Mr Jameson left the room to obtain paper towels. She says that Mr Smart was equally angry with the Claimant and with Mr Jameson. She assisted Mr Jameson and the Claimant in cleaning up and when Mr Jameson returned told them both that she would sort it out, at which point Mr Jameson left the office followed by the Claimant. Again, we will deal with the relevant evidential conflicts in our analysis.

Tekla Licence

44. Tekla software is used in 3D Modelling. The Claimant accepts that although other businesses might take a different approach, within the Respondent's business he did not need to use the software to carry out his duties, though he was keen to use it to advance his learning. His complaint of discrimination is that in January 2018 he was left only able to use an unlicensed copy that didn't work properly, though the complaint was modified somewhat during the Hearing to the effect that he was left unable to access the software altogether.

45. The Respondent agrees that the Claimant did not need to use 3D Tekla modelling to carry out his work but says that he was able to use what is known as BIM site software on his computer whenever he needed to open 3D models, which the Claimant accepts. When the Claimant expressed at his appraisal an interest in knowing more about 3D Tekla modelling, the Respondent informed him that he could download a student licence, which he did. He was also assisted with the use of the Tekla software by his colleagues. It is agreed that all Tekla licences are held on the Respondent's server. All employees can log in and use the licences, but only one

person can use a licence at any one time. The Claimant accepts that it was right to give priority to those employees who needed them for their work and that he was thus in a materially different position to the 3D Modellers in this regard.

46. What the Claimant describes as a removal of the licence occurred when Mr Jameson approached him and said words to the effect of, "I need to take the licence from you". Mr Jameson says that all he did was disconnect the Claimant's computer from its engagement with the Tekla software at that point, so that Mr Jameson could use it for his work. The Claimant accepts that Mr Jameson "did not act racially" in this respect, though in his submissions he asserted that Mr Jameson was acting on the instructions of the directors who were racially motivated. The Claimant's oral evidence was that he could not access the software at all thereafter, though he accepts he had access to the student licence.

Leaving early

47. The Claimant's case is that in February 2018 Mr Skowron was invited twice to leave work early due to adverse weather and he was not. He says that on the first occasion Mr Smart came into the main office and asked Ms Dowling whether she could let Mr Skowron go home because he had finished what he was doing; two or three hours later, Mr Smart simply said that everyone needed to go home. He says that on the second occasion Ms Dowling herself said to Mr Skowron that he would have to go home because of the weather. The Claimant insists that she used Mr Skowron's name in making this comment which was not therefore addressed to him.

48. The Respondent's case is that it advised both employees to leave early and both in fact did. Ms Dowling could only clearly recall one such occasion. She says that either she or Mr Smart said to both employees, words to the effect, "Finish up whatever you're doing and we'll all go home early". Mr Skowron's evidence is consistent with that. He says he is completely sure that Ms Dowling, or as it may have been Mr Smart, said to everyone in the office that they needed to go home because of the bad weather, though he accepts that he left first which was partly because he was not yet involved in big projects and also because he had further to travel than the Claimant. We will return to this matter in our analysis.

Computer

49. In March 2018, the Respondent leased a number of new computers with larger monitors. The Claimant was not given one and thus continued to use an old computer which he says looked inferior to those of his colleagues.

50. This matter was explored at length in the Claimant's oral evidence. It is agreed that Mr Jameson did not get a new computer either, though the Claimant says that Mr Jameson did get a bigger screen and worked with two screens, whereas the Claimant only had one small one. He also accepts that Ms Affleck did not get a new computer but says that she was not working at the time. He says that the difference between him and his colleagues was stark; he was the only one with an old desktop computer and a smaller screen. He clarified that his complaint is not about the functionality of his computer, but how it appeared.

51. Ms Dowling's oral evidence was that she is surprised the Claimant saw it like that. The Respondent leased new computers for five employees, based on the upgrades it believed were needed for each person to carry out their work. Three members of staff, including the Claimant, did not receive a new computer because the specification of the one they were using was better than those being replaced for the other staff. It is agreed that the Claimant took home one of the computers no longer being used.

52. Mr Jameson confirmed that he did not get a new computer, but like the Claimant he was gifted one of the obsolete ones. Apparently on his own initiative, he took one of the screens previously used by one of his colleagues on an old computer and used it so that he now had two larger screens as opposed to one small one and one larger one. Ms Dowling says that Mr Jameson's computer was the same as the Claimant's, apart from his extra screen; she says that he turns the computer box itself on one side as he prefers it like that, which is why his looked different to the Claimant's. We accept that uncontested evidence.

Comments March 2018

53. The Claimant says that in March 2018 and on other occasions, when the Claimant asked work-related questions of Mr Smart, specifically asking him to check some drawings, the reply was something along the lines of, "So we can pack everything up, close the business and go home". The Claimant accepts that he has no evidence of other people going to Mr Smart with work that was wrong, although he says that he overheard one conversation between Mr Smart and Mr Jameson in which it became apparent that Mr Jameson had made mistakes on one of his AutoCAD drawings and Mr Smart simply told him to go and correct it.

54. The Respondent said in its Response that it was not sure what this comment was in relation to. In his oral evidence however, Mr Smart said that a comment was made along these lines but only on one occasion. He says that the Claimant had been working on calculations for a couple of days. When he presented them for supervision, Mr Smart wanted to emphasise the safety-critical importance of getting them right and it was in this context that he said words to the effect of, "If we do not get these drawings right, we may as well pack up and go home". He says that he believes he said similar words to Mr Duncan in similar circumstances a few years previously. His evidence is that if any employee makes a significant mistake, he will speak to them about it privately, so that the Claimant would have no knowledge of similar discussions with other employees.

55. The Claimant accepts that it is vital calculations are made correctly and accepts that Mr Smart would be entitled to emphasise the importance of getting them right, though only if he had received the correct training. During his oral evidence he eventually accepted that he could not say that Mr Duncan or Mr Jameson had made similar errors to his nor does he have any evidence that they made repeated mistakes, unlike him. He accepted in submissions that there is no comparator for the purposes of this complaint.

Dismissal

56. From the time of the Claimant's recruitment, the Respondent's workload increased as a number of projects in London came on stream, all involving Techcrete. In June 2017 it began working on a project called Strand R1 which it was anticipated would take around nine months to complete. It was also doing some preliminary design work on Strand R2 in late July 2017, with a view to that project commencing in October 2017. In Autumn 2017 Techrete announced that there were two more projects it wanted the Respondent to take on, Strand R3 and Strand R4.

57. Ms Dowling says that it was on being given the news of the Strand R3 and Strand R4 projects that it was decided that the Respondent should recruit another 3D Modeller. This led to the arrival of Mr Skowron from Poland, as all of the projects were to be modelled in 3D. He was recruited in December 2017 and began work in January 2018. The Respondent was also actively looking to recruit someone else to a similar role.

58. Both directors say in their statements that in March 2018 they were informed by Techrete of a sudden and substantial loss of work. Strand R2, which the Respondent was already working on, was lost and the Strand R3 and R4 projects were to be put on hold. Mr Smart says that whilst the construction industry is known to be volatile, this was in his view exceptional: the six projects the Respondent was working on had been reduced to three, namely one project in Newcastle, a project called Duncan House in London and Strand R1.

59. About 90% of the Respondent's work comes from Techrete. On 2 August 2019, Techrete's Head of Design and Engineering, Derek Russell, wrote to the Respondent the letter which appears at page 148, plainly for the purposes of these proceedings. It reads: "We can confirm that Techrete UK Ltd were (sic) unsuccessful in securing the following projects in March 2018 and as a result of this we no longer required SD Design UK Ltd to carry out the design, modelling and detailing of these projects: //Strand R2 //Strand R3 //Strand R4. //Should you require further information please do not hesitate to contact the writer". There is no other, and thus no contemporaneous, evidence relating to the cancellation of the various projects; both Ms Dowling and Mr Smart say that they were given the news verbally. The Claimant was not able to produce any evidence to call that into question. Of the three remaining projects, Mr Smart says that Strand R1 had pretty much concluded in November 2017; the Newcastle project completed in around May 2018 and the Duncan House project continued until about October 2018. The Respondent estimates that its projected income was set to decrease by around 40 to 50%. Again, we have no reason not to accept that account. The Claimant was not willing to accept in evidence that the news from Techrete was a major blow for the Respondent. Whilst he accepted that there were only three active projects as a result, his case is that there was still sufficient work for him to do.

60. Mr Smart says that he and Ms Dowling concluded that all outsourced work would have to stop immediately. There is evidence of communication to this effect with the contractors in India at page 86A, sent by Ms Dowling on 30 May 2018 in response to enquiries on 3 April and 7 May as to whether any further work would be forthcoming.

We also accept the Respondent's case that no more work was given to Ms Dowling's brother in Ireland. It was hoped that these measures would give the Respondent's employed 3D Modellers sufficient work for a few more months giving enough time to obtain new projects. Ms Dowling said in her evidence, and we accept, that in time the Respondent actively took work back from the contractors as well.

61. The Respondent also put a stop on further recruitment. At Page 76A there is an email from the Respondent's recruitment agent to Ms Dowling dated 28 March 2018, giving her details of a 3D Modeller who was interested in joining the business. Ms Dowling did not reply until 11 April (page 77A), in which she outlined the loss of work and stated, "We are no longer in a position to consider employing anyone else at this current time". The Claimant suggests it is convenient that Ms Dowling sent this email the day after he had written to her challenging his redundancy (see below). It is not necessary for us to resolve the details of what was communicated between the Respondent and the recruitment agency and when; we are satisfied that the Respondent ceased all recruitment after it received the news from Techrete.

62. The directors also decided that the Respondent would no longer be able to employee two structural engineers. We accept Mr Smart's evidence that of the three remaining projects, one was virtually complete from a design engineering point of view, effectively meaning that one engineer could cover what was left. The Respondent's case is that this inevitably meant that the Claimant would have to be dismissed, given Mr Smart's position as a director. As Ms Dowling put it, the Respondent saw no point in carrying out a formal selection exercise between them.

63. No other employee was made redundant. The Claimant says in his Claim Form that he was dismissed because he stood up to bullying by Ms Dowling and raised questions about the AutoCAD software licence; we have made our findings of fact on those points above. Ms Dowling's unchallenged evidence was that she and Mr Smart prepared a matrix for the redundancy selection of one of Mr Duncan, Mr Jameson and Mr Skowron. In the end however it was not necessary to implement the results of that selection matrix because a combination of a couple of projects remaining live and the return of work from the outside contractors meant that they were able to "muddle on". Eventually, new work started to arrive.

64. The Claimant questions why Ms Affleck was not made redundant. Ms Dowling's evidence, again not seriously challenged, was that Ms Affleck is not employed by the Respondent but comes and goes on a casual basis to do administrative work, contacting Ms Dowling whenever she is available, without any commitment on the Respondent's part. She was not actually working in March 2018.

65. The directors met with the Claimant on 16 March 2018. There are no notes of that meeting. Mr Smart says that the Claimant was told about the news the Respondent had received from Techrete, that the business had thus lost about 50% of its work, including 50% of the engineering work. He says that he explained that this left three projects and that although they had called a number of clients, the usual long lead in time meant there was nothing imminent by way of new business. Mr Smart says that he then explained that, as a result, they no longer needed two structural engineers and unfortunately therefore the Claimant would have to be made

redundant. He says that either he or Ms Dowling referred to the Claimant's notice period and explained that they did not require him to work it.

66. The Claimant says that he was not given any opportunity to comment on the proposed selection criteria – though as we have already noted, there were none – nor adequately warned and consulted before the dismissal was confirmed. His oral account of the meeting was similar to Mr Smart's, although he says he was not told that there was insufficient engineering work. Nothing turns on that conflict.

67. The Respondent says that on the basis that there was a lot for the Claimant to take in, he was told he could meet again with Mr Smart and Ms Dowling or call if he had any other questions. The Claimant says no second meeting was mentioned. What is clear is that no date was set; the directors say they wanted to leave it up to the Claimant to decide what he wanted to do. Whilst Ms Dowling accepted that she and Mr Smart had decided by the time of the meeting that the Claimant would have to be dismissed, she did not accept that there was an absence of consultation as the termination date was still a month away because he was being given notice.

68. The Claimant says he was escorted from the premises. The Respondent says the Claimant returned to his desk to collect his belongings, both directors walking with him to the exit from the building thereafter. They say they reminded him to contact them with any questions, shook his hand and wished him well, also confirming that if he needed a reference, they would be happy to provide one. We do not find it necessary to resolve the conflicting evidence about these details.

69. The Respondent gave a letter to the Claimant at the meeting – see page 76. The material parts of the letter stated: "We regret to inform you that due to an unexpected downturn in workload and in particular the loss of the Strand R2 project together with the lack of new projects forthcoming to fill the gap, unfortunately has (sic) resulted in your position within the company becoming redundant. //This has been a very difficult decision for us to make, please be assured that we have made every effort in trying to secure new products but unfortunately we have been unsuccessful". The letter went on to thank the Claimant for his work and to confirm relevant practical details, as well as wishing him well.

70. The Claimant wrote to the directors on 10 April 2018 (page 77) regarding the redundancy process, saying he felt the process was of a "potentially discriminatory nature". He requested written information detailing the process that had led to his dismissal. He says that he saw no need to mention the history of discrimination he now complains of before the Tribunal. The Claimant says that the Respondent refused to provide the information requested. Ms Dowling's evidence was that the reasons for the redundancy had been provided in the 16 March letter. On 13 April 2018 the Respondent wrote to the Claimant (page 78B) saying (in material part), "As we discussed with you in our meeting on 16 March 2018, you are entitled to a second redundancy meeting to discuss further any more questions you may have". It went on to invite the Claimant to a meeting on 20 April. In his email reply of 16 April (page 78C), the Claimant said he was unable to attend a meeting because his focus was to prepare for interviews for a new role.

71. The Claimant's written evidence is that although he was employed as a structural engineer, this was just a title and that his duties and responsibilities were akin to those of Mr Duncan, Mr Jamieson and Ms Affleck, even though their job titles were different. The Claimant also says that Mr Skowron often asked him questions about his work, particularly when the directors were not present, and so he thought that they too were doing similar work. Mr Skowron made the obvious point that asking questions of the Claimant was nothing unusual, as he asked questions of all of the Respondent's staff when he was new to the business.

72. In the bundle at pages 68 to 70, there are job descriptions for the engineering role, the 2D CAD Technician role and the 3D Modeller role. They were prepared for this Hearing and did not exist at the time of the Claimant's employment. As we were not taken to them at all during the evidence, we base our findings of fact in relation to job content on the oral evidence instead.

73. The Claimant accepted that he carried out a different job to the CAD Technicians and 3D Modellers "to an extent", but said that he could have carried out their roles had he been given opportunity to do the AutoCAD training. In terms of the tasks he actually carried out, he accepts that calculations and analyses were a significant part of his work and that they were provided to the CAD Technicians and 3D Modellers for them to do their work, after being checked by Mr Smart. As well as calculations, it is agreed that the Claimant prepared fixing drawings, worked out fixing details, produced bracket drawings and made calculations relating to the weight of panels.

74. The Claimant accepted that it was not part of his role to produce General Arrangements drawings (which show all sides of a structure), Bay Elevation drawings (which show part of a structure with six to eight panels attached), nor Unit drawings (a drawing of an individual panel), nor was it his role to create 3D models. These were the jobs carried out by Mr Skowron, Mr Jameson and Mr Duncan. The Claimant was taken during oral evidence to some more simple drawings that he had prepared (page 97) and more complex drawings (pages 95 and 96) carried out by the CAD technicians. He accepted the substantial difference in the work shown on those pages, but said that he would have wished to be able to carry out the more complex drawings but was denied the opportunity to be trained to do so.

75. Mr Jameson and Mr Skowron gave evidence to the same effect, namely that they and the Claimant did not do similar jobs. Mr Skowron said that a structural engineer's role is all about making the structure safe. His job was then to follow the Claimant's or Mr Smart's guidelines and model the structure using the Tekla software. He accepted that there is some crossover between roles as colleagues help each other when working on the same project, but was absolutely clear that the roles were very distinct.

76. As noted above, the Claimant says that Ms Affleck should also have been put at risk. He says that her duties should have been shared amongst the team, just as they were during term time when she was not working. There was very little attention paid to this argument during the course of the Hearing, unsurprisingly given the casual nature of Ms Affleck's arrangement with the Respondent and the fact that her role was administrative.

77. Ms Dowling says that she and Mr Smart had previously had to make someone redundant in similar circumstances, namely a sudden loss of work. This was an employee of Asian origin who was made redundant following a selection exercise also involving Mr Duncan and Mr Jameson, in which she was assessed as having the least AutoCAD experience. When work picked up, Ms Dowling contacted her and she was re-engaged by the Respondent for a further period of time until she left on getting married. Ms Dowling also reflects in her statement on the discrimination she says she was subjected to as a woman from Ireland working in the UK in a male-dominated business.

78. Mr Smart says, and we accept, that the business has not returned to the full complement of staff engaged when the Claimant was employed. The contract workers based in India and Ireland no longer work for the business.

The law

Direct discrimination

79. Section 39 of the Act provides, so far as relevant to this case, "*(2) An employer (A) must not discriminate against an employee of A's (B)— … (a) as to B's terms of employment; (b) in the way A affords B access, or by not affording B access, to opportunities for … training or for receiving any other benefit, facility or service; (c) by dismissing B; (d) by subjecting B to any other detriment*". In determining whether B has been subjected to a detriment, "one must take all the circumstances into account. This is a test of materiality. Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment? An unjustified sense of grievance cannot amount to 'detriment'" (**Shamoon v Chief Constable of the RUC [2003] UKHL 11**).

80. Section 13 of the Act provides, again so far as relevant to this case, "*(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". The protected characteristic relied upon in this case is race, which according to section 9 of the Act includes nationality and ethnic or national origins. Section 23 provides, as far as relevant, "*(1) On a comparison of cases for the purposes of section 13 … there must be no material difference between the circumstances relating to each case*".

81. Section 136 of the Act provides as follows:

(1) This section applies to any proceedings relating to a contravention of this Act.

(2) If there are facts from which the court [which includes employment tribunals] *could decide, in the absence of any other explanation, that a person (A) contravened the provision concerned, the court must hold that the contravention occurred.*

(3) But subsection (2) does not apply if A shows that A did not contravene the provision".

82. Whichever limb of section 39(2) is relied on, and in relation to (d) assuming where relevant that an employee can establish that he has been subjected to a detriment, it must first be considered whether the employee has been less favourably treated than his comparator, having regard to section 23. If he has, the Tribunal must then consider whether that less favourable treatment was because of his race – "this is the crucial question" (**Nagarajan v London Regional Transport [1999] IRLR 572**). As was also observed in **Nagarajan**, whilst in some cases, the ground, or the reason, for the treatment complained of is inherent in the act itself, in other cases – such as the present – the act complained of is not in itself discriminatory but may be rendered discriminatory by the mental processes which led the alleged discriminator to act as they did.

83. Establishing the decision-maker's mental processes is not always easy. What tribunals must do is draw appropriate inferences from the conduct of the alleged discriminator and the surrounding circumstances, where necessary with the assistance of the burden of proof provisions. In determining the reason why the alleged discriminator acted as they did, the Tribunal does not have to be satisfied that the protected characteristic was the only or main reason for the treatment. It is enough for it to be significant in the sense of being a more than trivial factor in the treatment (again, **Nagarajan**).

84. Direct evidence of discrimination is rare and tribunals frequently have to consider whether it is possible to infer discrimination from all the material facts. This has led to the adoption of a two-stage test, the workings of which were described in the annex to the Court of Appeal's judgment in **Wong v Igen Ltd [2005] ICR 931,** updating and modifying the guidance that had been given by the Employment Appeal Tribunal in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] ICR 1205.** The Claimant bears the initial burden of proof. The Court of Appeal held in **Ayodele v Citylink Limited and anor [2017] EWCA Civ. 1913** that "there is nothing unfair about requiring that a Claimant should bear the burden of proof at the first stage. If he or she can discharge that burden (which is one only of showing that there is a prima facie case that the reason for the Respondent's act was a discriminatory one) then the claim will succeed unless the Respondent can discharge the burden placed on it at the second stage".

85. At the first stage, the tribunal does not have to reach a definitive determination that there are facts which would lead it to the conclusion that there was an act of unlawful discrimination. Instead, it is looking at the primary facts to see what inferences of secondary fact could be drawn from them**.** As was held in **Madarassy v Nomura International plc [2007] IRLR 246** "could conclude" refers to what a reasonable tribunal could properly conclude from all evidence before it, including evidence as to whether the acts complained of occurred at all and evidence related to comparators. In considering what inferences or conclusions can thus be drawn, the tribunal must assume that there is no adequate explanation for those facts. It is important however for the Tribunal to bear in mind, as Mr Heard emphasised, that it was also said in **Madarassy** that "the bare facts of a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which an

employment tribunal 'could conclude' that, on the balance of probabilities, the Respondent had committed an unlawful act of discrimination". The something "more" which **Madarassy** says is needed may not be especially significant, and may emerge for example from the context considered by the Tribunal in making its findings of fact.

86. If the burden of proof moves to the Respondent, it is then for the Respondent to prove that it did not commit, or as the case may be, is not to be treated as having committed, the allegedly discriminatory act. To discharge that burden it is necessary for the Respondent to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the grounds of race. That would require us to assess not merely whether the Respondent has proved an explanation for the facts from which the relevant inferences can be drawn, but also that the explanation is adequate to discharge the burden of proof on the balance of probabilities, for which a tribunal would normally expect cogent evidence.

87. All of the above having been said, the courts have warned tribunals against getting bogged down in issues related to the burden of proof – **Hewage v Grampian Health Board [2012] ICR 1054**. In some cases it may be appropriate for the tribunal simply to focus on the reason given by the employer and if it is satisfied that this discloses no discrimination, then it need not go through the exercise of considering whether the other evidence, in the absence of a satisfactory explanation, would have been capable of amounting to a prima facie case of discrimination.

Harassment

88. We can set out the relevant law in relation to harassment much more briefly, not least because what is said above regarding the burden of proof will also be relevant in this regard. Harassment is proscribed by section 40 of the Act. Section 26 of the Act states as far as relevant:

(1) A person (A) harasses another (B) if –

(a) A engages in unwanted conduct related to a relevant protected characteristic [which includes race]; 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.*

(4) In deciding whether conduct has the effect referred to in subsection (1)(b), each of the following must be taken into account –

(a) the perception of B;

(b) the other circumstances of the case;

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

89. It is again for the Claimant to establish the necessary facts which go to satisfying the first stage of the burden of proof. If he does, then it is plain that A can harass B even if it is not its purpose to do so, though if something is done innocently that may be relevant to the question of reasonableness under section 26(4)(c). It is also clear that the requirement for the conduct to be "related to" race entails a broader enquiry than whether conduct is because of or on the ground of race. Accordingly, as Mr Heard accepted, conduct need not have been directed at the Claimant in order for it to be "related to race" or to have the requisite purpose or effect, though the fact that conduct was not directed at the Claimant may be a relevant consideration when assessing whether it was reasonable for the conduct to have the required effect. It is also clear that stereotyping can be sufficient to amount to conduct related to race.

Analysis

90. It has not been necessary for us to resolve every factual dispute between the parties, but where factual conclusions are required on disputed matters, including those resolved above, we reach those conclusions on the balance of probabilities. In relation to some of those matters, there is little directly related evidence that is of assistance. We therefore take into account contextual and background matters, to assist us in reaching our conclusions.

91. In analysing the Claimant's complaints, we bear in mind the burden that is on him to prove facts from which the Tribunal could conclude, in the absence of an adequate explanation, that he was discriminated against. We are also conscious that there is rarely categoric evidence of discrimination and have therefore looked carefully at each allegation in turn, before stepping back and looking at how broader matters of relevance sit with our specific conclusions. We are mindful that discrimination does not have to be deliberate or conscious to be unlawful, whilst equally a conclusion that an employer has acted unreasonably or unfairly does not necessarily mean that it has acted in a discriminatory manner.

Training

92. What we are dealing with here is the Claimant's complaint that the Respondent did not pay for him to register on an AutoCAD course. His complaint is not about not being sent on a Tekla course, and he did not pursue at the Hearing any arguments related to working towards chartered status.

93. The main facts of relevance are clear. The Respondent agreed that the Claimant should register on an AutoCAD course – whatever was discussed at interview, that much is clear from the July appraisal. It is equally clear in our view that what Ms Dowling said in her email of 23 October 2017 (page 66B) is that she did not support the Claimant registering for the training at that point. She was not denying him the

opportunity to undertake the training altogether; on the face of it at least, her decision was, “not yet”, rather than “not at all”.

94. We understand why this seems to have been a frustrating experience for the Claimant. It meant a delay in registering on a course which he felt would have been of help to him. It also has to be said that Ms Dowling’s email did not provide a clear explanation for her decision. There seems to us nothing in what the college had said to the Claimant, forwarded to her, which required her to “get something [or anything] in place” for the next day. The college was unable at that point to specify a registration date and so it is far from clear what Ms Dowling thought had to be arranged so quickly. It is unsurprising if this contributed to confusion and uncertainty on the Claimant’s part. We have also noted, as was put to Ms Dowling in evidence, that the email did not give to the Claimant the financial explanation that she gave to the Tribunal. Although offered as the explanation in the Response, it needs to be carefully considered whether an explanation offered only after the event is evidence of an employer seeking to disguise the fact that a protected characteristic played some part in its decision.

95. There is however significant contextual information which leads us to decide that the Claimant has not proved facts from which we could conclude in the absence of an adequate explanation that he was discriminated against by Ms Dowling’s decision.

96. First, we accept that the AutoCAD course was not essential to enable the Claimant to carry out his work, or at least the vast majority of it. Doubtless it would have been helpful, as the course might have assisted him to better analyse drawings for example, as he observed Mr Smart was able to do, but the evidence of all of the Respondent’s witnesses was clear: use of AutoCAD was not essential to the role for which he was employed. The differences between the drawings produced by the Claimant and those produced by his colleagues in other roles make that clear. Being told the Respondent would not pay for him to carry out a course that would have been helpful, even if only in a limited way, could amount to a detriment to the Claimant, taking the broad approach required by **Shamoon**. The fact remains however that whereas Mr Jameson and Mr Duncan (plainly the Claimant’s closest comparator) needed to attend their courses because they were essential to enable them to carry out their roles, the Claimant did not. The comparators were thus not in sufficiently similar circumstances for the purposes of section 23 of the Act.

97. That would be sufficient to dispose of this allegation but for completeness, we are confirmed in our view that the Claimant has not discharged the initial burden of proof when we consider the reason why Ms Dowling decided as she did. The Claimant blames the altercation about the use of her computer. We have already concluded that if there was any such exchange it did not happen in the way the Claimant describes. We have considered very carefully Ms Dowling’s explanation that it came down to money, and having done so, we accept it. In her oral evidence she explained very clearly the cost challenges for the Respondent at that particular time of year, which we find unsurprising for a small business. It was as the Claimant points out a small cost, but the fact that the Respondent offered to pay for the course before Ms Dowling's email, and that she was not closing the door to it being paid for in future, fits

her case as to timing, as does the fact that the Respondent did not regard the Claimant's attendance on the course as essential. Further, the evidence clearly shows that the Respondent supported the Claimant's learning and development in other ways, namely the informal training provided by Mr Jameson and providing access to the Tekla student licence even though that was plainly not relevant to his role. This too suggests that the Respondent's account of why it did not support the Claimant's attendance on the course at that time was in fact the true reason why.

98. In summary therefore, whilst the decision not to support the Claimant's attendance on the AutoCAD course was not especially well handled by the Respondent, that is plainly not the same as discrimination. The Claimant was not in materially the same circumstances as his comparators, and the reason for the Respondent's decision was financial, and not his race. The Claimant's complaint is not made out.

Contract

99. This matter can be dealt with more briefly. We can understand why the Claimant might have thought that a more detailed contract would have been helpful to him and indeed standard practice, perhaps not least from previous employment. Again however, he has not proved facts from which a reasonable Tribunal could conclude in the absence of an adequate explanation that he was discriminated against, principally because the evidence is clear that he got the same contractual documentation as everybody else. There was no less favourable treatment.

100. Mr Skowron was the exception, but this was in the particular circumstances of confirming his permanent status for immigration reasons. It is possible that the Claimant may have seen that and thought that he too should have been given something more than his initial letter. As the Claimant himself fairly accepted however, his circumstances and those of Mr Skowron were not comparable. The Claimant also accepted that he was not treated less favourably than his comparators in respect of his contractual benefits, as like them he did work flexibly from time to time.

101. Given the above we do not need to decide whether a fuller contract was promised or requested. This complaint of discrimination also fails.

Comments December 2017

102. This is the complaint of harassment. We have referred above to Mr Heard's submission that the Claimant would have to connect what was said to himself for the alleged comments to be related to race. We do not accept that argument. As Mr Heard eventually conceded, particularly in an "effect" case, comments related to race can violate dignity, and certainly create the proscribed environment, even if not directed at the complainant. That is so particularly in a case such as this where the Claimant was the only person of colour, as he described it, in the office. We do accept Mr Heard's further point however, that a comment not being directed at the Claimant himself or at someone of the same race as him might be relevant to whether it was

reasonable for the alleged comments to have the proscribed effect (section 26(4) of the Act).

103. Our principal task is to determine the comments that were made, and in particular the broader context in which they were made. We plainly have to take into account that both Mr Smart and Ms Dowling have worked with the Asian employee in question for 20 years, that the workforce of Techrete, by far the Respondent's largest client, is racially diverse, and that both witnesses were complimentary about their relationship with the employee. Equally, we recognise that this contextual evidence is not determinative of the matter, particularly given that showing respect for an employee of a key client publicly does not always fully reflect what goes on privately within a business.

104. There is little to assist us in determining the evidential conflict between Ms Dowling and the Claimant. We note however that Ms Dowling did not seek to deny that she made a comment about laziness, or at least about having to do others' jobs for them, which necessarily lends credibility to her evidence. That combined with the contextual factors referred to above leads us to conclude on the balance of probabilities that this was, as Ms Dowling says, a comment made about a number of Techrete employees, expressing her frustration that they had ignored the agreed arrangements for issuing drawings and thus increased the Respondent's administrative burden. We accept that the comments in question were heard by the Claimant, and it may be that he was particularly sensitised to hearing it made about the Asian employee. Given however that these were comments made about Techrete employees generally, we conclude that they were not related to race. Although not necessary for us to decide, we are also far from clear whether a comment about laziness or having to do others' work for them constitutes a stereotype of persons of Asian race; neither party led more than fleeting evidence on that point.

105. That is sufficient to deal with the matter, but for completeness we would add that our findings of fact inevitably lead to the conclusion that Ms Dowling's comments did not have the purpose of violating the Claimant's dignity or creating the proscribed environment. Further, the fact that they were made about everybody means that it would not have been reasonable in our view for it to have that effect. We acknowledge the Claimant's point that he was the only person of colour in the business, but conclude that it would be unduly sensitive to assert that one's dignity was violated or the proscribed environment created when an ostensibly race-neutral comment was made across the board. For the reasons we have given, the complaint of harassment fails.

Overtime

106. The Claimant complains about not being asked about, paid for or recognised for overtime. Having heard his case, being "recognised" for overtime does not seem to us to add anything to being asked about and paid for it. We therefore focus our analysis on those two features of his case.

107. The Respondent's general practice according to Ms Dowling and Mr Smart was that overtime had to be requested and sanctioned by them as directors in order to generate a later enquiry about time worked and, eventually, overtime pay, and that this would only arise in the case of a tight schedule on a particular project. That was also the evidence of Mr Jameson who could only think of one period of overtime, and that some years ago. That seems to us unsurprising for a small business. The picture that emerges is that such overtime as was required was undertaken by the 3D Modellers, which on our understanding of how the business works would be the logical result of the fact that their work followed that of the Claimant and Mr Smart before the drawings and/or models went to the Respondent's clients. In other words, the schedules would become tight on occasions when the 3D Modellers still had client work to complete.

108. On the Claimant's general case regarding overtime therefore, there were material differences between his position and that of Mr Jameson and Mr Dunn. They were doing a different job to him, which meant that on the rare occasions when overtime was required it was because their work was needed, and the Claimant's was not, whilst Ms Affleck is not a valid comparator given the casual nature of her working arrangements. Accordingly, apart from December 2017, the Claimant produced no evidence of enquiries about or pay for overtime in circumstances similar to his. His complaint in this general respect must therefore fail.

109. As for December 2017, it is common ground that the Claimant worked on the Saturday in question and was not asked about or paid for it. Did that amount to less favourable treatment? Mr Jameson's evidence, which we accept, is that in the end he did not in fact work that weekend, and so whilst he might have been asked about it, he would not have been paid for it. The events in December 2017 were a particular illustration of the general position. The Respondent needed, or thought it needed, Mr Jameson to work overtime. As for the Claimant, particularly given that he was not specific about the work he says was expected of him and in the overall factual context of the case, including the Claimant's struggles with his work and the Respondent's general overtime practice, we think it highly likely that Mr Smart's account is correct, namely that the Claimant wanted to catch up and to work on improving his skills. Whilst commendable, this was of his own volition and was not overtime the Respondent would normally pay for. It may well have been that the Claimant heard Ms Dowling asking Mr Jameson about overtime and wondered why the same request was not made of him, but their circumstances were materially different. There was no less favourable treatment, and therefore again the Claimant has not proved facts from which we could conclude that a prima facie case has been made out.

Printer

110. Once again, we are required to resolve conflicting accounts. It is common ground that Mr Smart used the phrase "bloody idiots" following the ink spillage. The core factual issue is whether he afforded the same treatment to Mr Jameson and the Claimant or whether, as the Claimant alleges, he also described the Claimant as a

"useless individual" and "good for nothing", words which he did not use about Mr Jameson.

111. There are inconsistencies in both parties' accounts. The Respondent initially said in its Response (page 33) that Mr Smart "may well have called" the Claimant and Mr Jameson "bloody idiots", but in oral evidence Mr Smart candidly agreed that he had. The Claimant's statement at paragraph 12 says that Mr Smart called him a "bloody idiot" after Mr Jameson left the room, whilst in oral evidence he said that both were spoken to in those terms before Mr Jameson left and that the additional comments were made afterwards.

112. That does not take us any further forward. When we take other relevant matters into account however, we prefer the evidence of Mr Smart. First, we note his unsolicited and frank admission that he was not proud of using the phrase "bloody idiots", which is to his credit, though we can well understand his frustration at what happened. Secondly, his insistence that he said nothing after Mr Jameson left the room is consistent with Ms Dowling's evidence that he was muttering to himself at his computer. Thirdly, Mr Jameson says that Mr Smart said to both him and the Claimant, "I told you not to turn it over"; that is consistent with comments being addressed to both, at least while Mr Jameson was in the room, although we also accept his evidence that he did not register everything that took place because he was so flustered.

113. As we have noted, there is often little material for the Tribunal to go on in reaching its conclusions, but on balance, the frank and contrite evidence of Mr Smart and the overall weight of the evidence of the Respondent's witnesses lead us to prefer its account. Accordingly, the Claimant has not proved facts that show that he was less favourably treated than his comparator and this complaint too must fail.

Tekla licence

114. We have no reason to doubt Mr Jameson's evidence that he disconnected the Claimant's computer from the Tekla licence so that he could use it instead. Indeed, the Claimant himself agreed that Mr Jameson's actions were not influenced by considerations of race. He later suggested that Mr Jameson acted on instructions from Ms Dowling and Mr Smart, and that they were influenced by considerations of race, but he did not lead any evidence to support that assertion and the point was only made during his closing submissions. We therefore attach no weight to it.

115. In any event, it is agreed that the Claimant did not need the Tekla software to carry out his job. Both he and Mr Smart used the student licence and the Claimant agrees that the Respondent was right to give priority to the 3D Modellers. We are doubtful therefore that the Claimant could establish even that he was subjected to a detriment in this particular respect, but even if he could, it is plain that his comparators – the 3D Modellers – were in materially different circumstances to him given that they needed the licence for their work and he did not.

116. Accordingly, whilst it may well have been that the comment made to him by Mr Jameson led the Claimant to conclude that the licence was being taken away from him on a permanent basis, he has not established less favourable treatment. If we were required to decide it, we would in any event conclude that the reason why the Respondent acted as it did was the proper conduct of its business, namely Mr Jameson's need to access the software, and not the Claimant's race. That conclusion is confirmed by the fact that the Respondent expressly alerted the Claimant to the student licence, so supporting his learning and development and not cutting off his access to the software altogether. For all of these reasons, this complaint also fails.

Leaving early

117. With only four of the Respondent's staff in the office on the two days of harsh winter weather and two being the directors, the Claimant rightly identified Mr Skowron as his comparator. All members of the Tribunal found Mr Skowron to be a highly persuasive witness, demonstrating independence of thought and precise recollection. In short therefore we have no hesitation in accepting his evidence of what happened on these occasions, which was that both employees were invited to leave early. We conclude that the Claimant has not demonstrated on the balance of probabilities that he was less favourably treated. Even if one of the directors said subsequently to Mr Skowron that he really ought to leave, and even though he did leave before the Claimant, it is agreed he had further to go and that was overwhelmingly likely to be the reason, not the Claimant's race. This complaint also fails.

Computer

118. The allocation of computer equipment is clearly something the Claimant felt very strongly about. Ms Dowling could only say she was surprised the Claimant saw it like he did, but we are satisfied that having computer equipment which appears inferior to one's colleagues – even though there is no complaint about functionality – could in principle be a detriment taking the wide interpretation provided in **Shamoon,** and the Claimant clearly saw it as such.

119. The Claimant was less favourably treated than Mr Duncan and Mr Skowron, but as we have noted, less favourable treatment and a difference in race is not enough (**Madarassy**) to establish discrimination. The Claimant has not suggested "something more" to support his case that the treatment was because of his race; in fact, the Respondent's uncontested evidence demonstrates that it was not. The replaced computers were of a lower specification than the computers which remained allocated to the Claimant, Mr Jameson and Ms Affleck; that was the reason for the difference in treatment. That conclusion is amply supported by the fact that Mr Jameson was treated in the same way (Ms Affleck is a much less helpful comparator); any differences between the appearance of his computer equipment and the Claimant's were down to him taking the initiative to add a replacement second screen and his preference for having his computer positioned in a certain way. The Claimant was given one of the computers the Respondent was no longer using, as was Mr Jameson.

That too tends to suggest that race was not a factor in the decisions made by the Respondent when introducing new hardware. This complaint too is not made out.

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120. We note that in its Response (page 34) the Respondent did not accept that comments about packing up the business and going home were made, nor spell out the context in which they were made. That first emerged in Mr Smart's evidence and therefore merits some scrutiny as to where the balance of probabilities lies. That said, the Claimant agrees that he had no evidence of what Mr Smart said to others when they made mistakes, an admission which tallies with Mr Smart's testimony that he dealt with any such matters in private. The Claimant also agrees that other employees were not in a comparable situation to him; he alone was regularly making mistakes. Of course, that was probably to be expected in his first few months of employment, but it is clear that the Claimant was not able to establish a prima facie case of less favourable treatment.

121. Mr Smart was frank in oral evidence that he made a similar comment to Mr Duncan, the context being his wish to stress the importance of the work. If one were to be very critical, one might say that a comment that, "We might as well pack up and go home" is not the most advisable way to make the point, but the need to stress the importance of a colleague getting things right explains the comment, whatever the rights and wrongs of it. And in fairness to Mr Smart, we are in no doubt that the Claimant's role as an engineer was even more safety critical than Mr Duncan's. This complaint too is dismissed.

Dismissal

122. We come finally to the crucial question of the Claimant's dismissal. Again, there is a lot of contextual information which it is important to note in explaining our conclusions.

123. The Respondent is a small company. Although the Claimant was unwilling to admit it, we accept that it experienced a very significant, sudden and unexpected loss of contracts. We are not at all inclined to doubt that assessment simply because the Respondent had no contemporaneous letters or emails from Techrete setting out what had happened. The loss of contracts created clear and significant financial problems for the Respondent and it is wholly unsurprising that it looked to reduce its costs accordingly. It reduced its contractor costs in India and in Ireland and it is equally unsurprising that it also looked to cut staff costs, including at one point assessing whether to lose one of Mr Jameson, Mr Duncan and Mr Skowron. It put a stop to recruitment (Mr Skowron was recruited before the Respondent received the bad news) and it was unchallenged evidence that the Claimant has still not been replaced.

124. The key question therefore in deciding whether the Claimant has established facts from which we could conclude that his dismissal was discriminatory is to assess

why he was dismissed and nobody else. That question needs to be answered in two parts.

125. The first is whether the Respondent discriminated in putting the Claimant in a pool of one and so not selecting who should be dismissed from a pool consisting of him, Mr Jameson, Mr Duncan and Mr Skowron (again, what happened or did not happen with Ms Affleck is of no assistance in making our assessment). Based on all of the evidence put before us, we are in no doubt that the Claimant's role was very distinct from that of his comparators. As a starting point, this is confirmed by his job title (set out in his offer letter, page 57). It is reinforced by what happened during his induction, particularly his being introduced as the engineer, and his shadowing of Mr Smart, both of which were unique to him. The distinctiveness of his position is confirmed by what all of the Respondent's witnesses say were the differences between his and his comparators' work in practice – and the Claimant effectively agreed: he did not do the drawings the others did. In short, he may ideally have wanted to be multi-skilled, but the Respondent operated with a clear division of labour, which it was entitled to have regard to in making its cost-cutting decisions.

126. The second part of considering whether the fact that only the Claimant was dismissed gives rise to an inference of discrimination is to assess why none of the comparators were dismissed anyway, in addition to the Claimant. We are satisfied by the Respondent's explanation that it decided it could keep the 3D Modellers/Technicians "ticking over" whilst it looked for more work. After all, it had stopped the outsourcing of that work to Ireland and India and eventually brought some of the already outsourced work back in-house, which explains why there would be work for the 3D Modellers/Technicians to be filled up to do whilst the company waited for new projects. As for Ms Affleck, again she cannot be considered a proper comparator, but in any event, she was not working at the time and so dispensing with her services was unlikely to produce any, or any significant, saving.

127. Given the material differences in the roles carried out by, and the ongoing need for, his comparators, and given the business reasons for the Respondent's decisions, the Claimant has not established facts from which we could conclude that he was discriminated against in the decision to select him for redundancy. We also accept of course that once it was clear an engineer had to be removed, it was never going to be Mr Smart.

128. That said, it is unsurprising the Claimant has raised questions to be considered by this Tribunal about the process the Respondent adopted in effecting his dismissal. We are conscious this is not a case of unfair dismissal, but the fact that there was in effect no consultation with the Claimant and no immediate written offer of a further meeting is regrettable, not least because these things would have been helpful to the Claimant's understanding of the decision even if ultimately they made no difference to the outcome. It is not an answer to the Claimant's criticism about consultation to say that he could be consulted during his notice period; by then the decision had been made.

129. If this had been an unfair dismissal case, it is highly likely the Claimant would have succeeded, on procedural grounds. Unreasonable means of effecting a dismissal are not however, without more, evidence of discrimination. We have already made clear why we conclude that the Claimant's comparators were not in materially similar circumstances to him. In addition, we are satisfied that the reason why the Claimant was dismissed was nothing to do with race. He was dismissed because of the financial pressures on the Respondent and the consequent need to cut costs, retaining staff where it could by bringing outside work in-house; that unfortunately was never going to provide a sufficient workload to retain the Claimant. The Claimant's dismissal was not discriminatory. This complaint must also fail.

General

130. Having assessed each allegation individually, we conclude by standing back and examining more general background issues which are relevant in testing our analysis to this point. When we do, our conclusions are confirmed.

131. The Respondent took the Claimant on and introduced him to its key client as its new engineer, just months before the various matters giving rise to allegations of discrimination, including dismissal, took place. By itself of course that is not determinative, but particularly in a situation where he was being managed by one of the people who recruited and introduced him, it is unlikely his race would so quickly have become a reason for the same people to want to get rid of him or otherwise treat him less favourably than his colleagues.

132. Secondly, it is noteworthy that the Respondent did not warn or seek to dismiss the Claimant despite the obvious problems with his performance, until it encountered a significant loss of business. That too tends to suggest that whilst the Respondent did not act fairly towards the Claimant in all respects and in particular did not always communicate with him clearly, the directors were not influenced in their decision-making by considerations of race.

133. Thirdly, there is the position of the former Asian employee, who was also made redundant some years ago but then invited back when business picked up. Although of course of a different race to the Claimant, she too would have been the only person in the business who would not have described her ethnicity as White. Her reintroduction to the business is also suggestive of the directors being motivated by considerations of business rather than of race when deciding to dismiss the Claimant.

134. For these and all of the reasons given above, all of the Claimant's complaints of discrimination are dismissed.

Time limits

135. As a result, we have not considered time limit points in any detail. For completeness however, in general terms we would have had little hesitation in finding that, if any of the complaints had been made out, they would have constituted conduct

extending over a period ending with the dismissal, the complaint about which was in time. Mr Heard did not vigorously argue the point. The same individuals – Mr Smart and Ms Dowling – were the decision-makers in each instance, and on the Claimant's case, everything stemmed from the failure to pay for his AutoCAD training in October 2017, though of course, this would only have assisted the Claimant were his complaint about the dismissal itself to have been upheld.

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Employment Judge D Faulkner

Date: 9 December 2019

JUDGMENT SENT TO THE PARTIES ON

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FOR THE TRIBUNAL OFFICE

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