EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Son Kim Do	**v**	**NSL Ltd**

Heard at: London Central
On: 21 – 23 February 2023

Before: Employment Judge Hodgson
Mr Martin Simon
Mr Richard Miller

Representation

For the Claimant: in person
For the Respondent: Mr G Baker, counsel

JUDGMENT

1. **The claim of unfair dismissal fails and is dismissed.**
2. **All claims of direct discrimination fail and are dismissed.**
3. **All claims of harassment fail and are dismissed.**

REASONS

Introduction

1.1 The claimant brought proceedings on 19 November 2021. He alleged unfair dismissal, direct discrimination and harassment. The claimant relied on the protected characteristic of race. He relies on his Vietnamese nationality.

The Issues

Unfair dismissal

2.1 It is the respondent's position the claimant was dismissed for misconduct, in particular for assaulting a member of the public. The claimant accepts the assault occurred, but argues that the dismissal was not within the band of reasonable responses.

Direct discrimination/harassment

2.2 The following acts are relied on as allegations of race discrimination and in the alternative harassment.

- 2.2.1 Allegation one - on 22 September 2020, by the claimant's colleague, Mr Abdul Sharif, when accepting a mint from the claimant saying, "does it have coronavirus?"
- 2.2.2 Allegation two – on 2 October 2020, by Mr Abdul Sharif demonstrating a kung fu pose and making a "Bruce Lee" sound in the locker room.
- 2.2.3 Allegation three - on 6 November 2021, by Mohamed Kamara, whilst walking past the claimant in the main dining room, calling the claimant "Kim Jong-un."
- 2.2.4 Allegation four - on 21 December 2020, at the end of the working day, by Mr Mohamed Kamara, when handing the claimant a clock card, using the words "ching chong."
- 2.2.5 Allegation five - on 5 March 2021 by Mr Sheikh Chand and Mr Stelio Martin's calling the claimant "Kim Jong- un" again.
- 2.2.6 Allegation six - on 10 June 2021 by Mr Olayiwola Sabowale saying to Mr Ndolua Kinkela, whilst in the equipment room, and unaware of the claimant's presence, that he "hates the Chinese."

Evidence

3.1 We received an agreed bundle. The respondent filed a chronology and a cast list.

3.2 The claimant gave evidence, In addittoin he relied on the written statements of Mr Aklas Hussain and Mr Rashid Abdelrahim. They were not called to give oral evidence.

3.3 The respondent called the following witnesses: Mr Masum Miah, Mr Stelio Martins, Mr Walid Zai, Mr Mohmed Kamara, Mr Murphy Kwaning, Mr Olusegun Bankole, Mr Sheik Sheik Chand, and Mr Ndokua Kinkela.

Concessions/Applications

4.1 On day one, we considered the issues. The parties referred to some issues which have been exhibited to the case management order of EJ Nicklin.

4.2 We considered those issues and noted that they were unclear. They purported to be an agreed list of issues. It appeared the list had not been sent to EJ Nicklin for further consideration, as required by the order of 20 May 2022.

4.3 We considered whether the individual allegations of discrimination and harassment were identified adequately or at all. They were drafted by reference to the numerous paragraphs in the document entitled "claimant's particulars of claim addendum letter." We considered whether that document had been included by way of amendment, and it was clear that it had not. Nevertheless, we considered the paragraphs referred to and sought to identify whether the allegations were sufficiently clear.

4.4 As for the list of issues, it referred to the "particulars of claim addendum letter," and identified the "issues" as follows:

4.4.1 For direct discrimination "During the pandemic: 1, 27, 34?"

4.4.2 For harassment "Before the pandemic: one – six? During the pandemic: two – 24, 26, 28 – 35?"

4.5 We considered the claimant's addendum letter and sought to understand whether the allegations were clear from that letter, and whether they were consistent with, or in addition to, the allegations in the original claim form. It was apparent that the claimant had introduced numerous new allegations which, themselves, lacked proper particularisation and clarity.

4.6 It was clear EJ Nicklin had not considered these issues sufficiently or at all. No consideration had been given to whether they raised new matters requiring amendment or whether they identified the claims set out in the claim form.

4.7 Having regard to the unclear nature of the allegations, it could only be assumed that in initially adopting the list of issues, he had not fully considered if amendment was required, or considered if the allegations themselves were fundamentally unclear. It is likely this is why EJ Nickiln wished to see the list again.

4.8 In the circumstances, we considered the claim form and identified the six allegations of direct discrimination/harassment relied on. We confirmed that those allegations could proceed, together with the allegation of unfair dismissal. We confirmed that if the claimant wished to bring any further allegations of discrimination or harassment, it would be necessary for him to identify the specific allegations, set them out in writing, and apply for amendment. We confirmed that he should do so by 9:00 on the morning of day two, and if he made an application to amend, we would consider it.

4.9 The claimant specifically confirmed that the dismissal itself was not advance as an allegation of discrimination or harassment.

4.10 No application to amend was made.

4.11 On day two, the claimant confirmed that he had not received the witness statements until Monday evening. Neither party gave an adequate explanation for this. The claimant specifically asked whether he wished to proceed or if he wished to adjourn. He elected to proceed.

The Facts

5.1 NSL Ltd, the respondent, employed the claimant as a civil enforcement officer (CEO) working on the Camden Council contract. He was based in Guilford Street, London. The respondent has many functions, including providing parking services. It employs over 4,000 staff in 250 locations across the UK.

5.2 The claimant's duties included issuing penalty charge notices (PCNs) for vehicles parked in contravention of regulations. He was required to liaise with members of the public.

5.3 The claimant was familiar with the respondent's procedures. The respondent's disciplinary policy states the use of "aggressive behaviour, including violent or intimidating conduct which reflects negatively on the company" and "acts which cause a significant breach of the trust and confidence of the company and clients" may be examples of gross misconduct.

5.4 On 18 August 2021, the claimant was involved in an incident with a member of the public. Following the incident, he returned to the base and completed a report, which he signed on 18 August 2021. He confirmed that on Drummond Street he had noticed a grey Volkswagen which had overstayed by 26 minutes. The claimant identified the driver and requested a further payment. The driver approached the claimant and started to video him and said he was taking the claimant's number to report the claimant. The claimant reported he became angry at being filmed. He took the details of the vehicle, and thereafter he lashed out at the driver and smacked the phone onto the floor. The police were contacted and attended. The claimant told the police that because of his race, he had more harassment from members of the public.

5.5 On 18 August 2021, the claimant attended an investigation meeting with Mr Sheik Sheik Chand, the on street supervisor. The meeting was minuted. The claimant was aware of the code yellow and code red procedure which are used to call for assistance. The code yellow procedure deals with threatening behaviour. The code red procedure deals with violence. The claimant was aware of the codes, but thought neither were engaged. He was aware that members of the public were permitted to film him. Mr Chand was aware the claimant he been referred to the employment assistance programme for mental health support. Being unable to bring his wife and children to the UK caused the claimant

stress. The claimant stated that coronavirus had made him feel worthless, and members of the public picked on him because, as a Vietnamese national, members of the public see him as Asian. He is is a Vietnamese national. The claimant confirmed he had received support but had not followed up on it. He reiterated his account, as set out in his first statement. Whilst the claimant stated that members of the public picked on him because he was Asian, he gave no suggestion that he had suffered any form of harassment, discrimination, or poor treatment from any colleague.

5.6 On 19 August 2021, the claimant was suspended with immediate effect by Mr Massum Miah, enforcement manager.

5.7 By letter of 20 August 2021, the claimant was invited to a disciplinary hearing on 25 August. The allegations were as follows:

> **i. The use of aggressive behaviour which reflects negatively on the Company, and brings the Company into disrepute; and**
> **ii. An act which causes a significant breach of trust and confidence in the Company and our client.**

5.8 The letter confirmed the relevant incident was the altercation with a member of public on 18 August 2021.

5.9 Prior to the disciplinary hearing, the claimant sent an email with a further explanation. The claimant attended the disciplinary. Mr Uddin, a client account manager, dealt with the disciplinary; he was the decision maker The claimant accepted that he was required to stay calm and professional when challenged by members of the public. The claimant said he had felt harassed since the start of the pandemic and in particular by the reaction of the public to people they see as Chinese who were assumed to have the Covid 19 virus or be responsible in some manner. The claimant said he felt colleagues were treating him differently. The claimant did refer to discrimination in the work place, but he did not go into the detailed allegations of discrimination he now raises before this tribunal. He did make reference to being called "Jackie Chan," a matter that is not before us. The claimant accepted that he had assaulted a member of the public by knocking his phone to the ground.

5.10 Mr Uddin adjourned the meeting to consider his decision and to consider the comments of discrimination with Mr Miah. Mr Miah confirmed the claimant had raised in March 2020 that he felt staff were unnecessarily keeping their distance and this led to action in the form of staff being briefed that such behavior was inappropriate. Mr Miah had san ent email on 2 March 2020 reflecting his concerns. The claimant had reported no other discrimination.

5.11 Mr Uddin concluded the appropriate sanction was dismissal, which he confirmed by letter of 1 September 2021. He confirmed that the allegations had been made out. He found the claimant's conduct to amount to gross misconduct and dismissal to be the justified sanction. In

deciding to dismiss the claimant, he considered mitigation, but reached a view that dismissal was appropriate. In particular he relied on the following: the claimant had lost his composure, resulting in altercation with a member of the public; the claimant had lashed out and struck the mobile phone because he was being filmed; the claimant had ignored his training to remain calm and professional; the claimant knew the recommended processes; the claimant failed to call for backup, which he could have done; the claimant had received racial comments from the public; the claimant had a difficult family situation; the claimant did not utilise the company support processes; and the claimant had apologised. He concluded that striking a member of the public was not acceptable. In all the circumstances he concluded dismissal was appropriate.

5.12 The claimant appealed by email of 8 September 2021. He confirmed he did not dispute the actual incident. He believed that greater emphasis should be placed on his mitigation, particularly his personal health issues. He asserted the sanction of dismissal was too harsh.

5.13 The appeal was chaired by Ms Kiki Kim-Bajko, client account manager. There is no criticism of the appeal process, but we should outline it. Ms Ms Kim-Bajko read the claimant's statement and other relevant documents. She asked the claimant to describe the incident and in general sought explanation for all relevant matters. The claimant confirmed that he was aware of the relevant procedures. She considered the medication the claimant had received, and whether that had any effect. She considered the report of racism in March 2020. She was unable to identify any other allegation of racism made by the claimant. The member of the public had made a formal complaint, and she was able to review the relevant footage, and found it to be consistent with the claimant's description of the incident.

5.14 Ms Kim-Bajko confirmed her outcome decision in a letter of 5 October 2021. Having taken all matters into account, she upheld the decision to dismiss.

5.15 We will consider the additional facts relevant to the claims of race discrimination and harassment when we consider our conclusions.

The law

6.1 Under section 98(1)(a) of the Employment Rights Act 1996 it is for the employer to show the reason (or, if more than one, the principal reason) for the dismissal. Under section 98(1)(b) the employer must show that the reason falls within subsection (2) or is some other substantial reason of a kind such as to justify the dismissal of an employee holding the position which the employee held. A reason may come within section 98(2)(b) if it relates to the conduct of the employee. At this stage, the burden in showing the reason is on the respondent.

6.2 In **Abernethy v Mott, Hay and Anderson** [1974] ICR 323 the Court of Appeal held -

> **A reason for the dismissal of an employee is a set of facts known to the employer, or it may be of beliefs held by him, which cause him to dismiss the employee.**

6.3 In considering whether or not the employer has made out a reason related to conduct, in the case of alleged misconduct, the tribunal must have regard to the test in **British Home Stores v Burchell** [1980] ICR 303, and in particular the employer must show that the employer believed that the employee was guilty of the conduct. This goes to the respondent's reason. Further, the tribunal must assess (the burden here being neutral) whether the respondent had reasonable grounds on which to sustain that belief, and whether at the stage when the respondent formed that belief on those grounds it had carried out as much investigation into the matter as was reasonable in all the circumstances. This goes to the question of the reasonableness of the dismissal as confirmed by the EAT in **Sheffield Health and Social Care NHS Foundation Trust v Crabtree** EAT/0331/09.

6.4 In considering the fairness of the dismissal, the tribunal must have regard to the case of **Iceland Frozen Foods v Jones** [1982] IRLR 439 and have in mind the approach summarised in that case. The starting point should be the wording of section 98(4) of the Employment Rights Act 1996. Applying that section, the tribunal must consider the reasonableness of the employer's conduct, not simply whether the tribunal consider the dismissal to be fair. The burden is neutral. In judging the reasonableness of the employer's conduct, the tribunal must not substitute its own decision, for that of the respondent, as to what was the fair course to adopt. In many, though not all, cases there is a band of reasonable responses to the employee's conduct within which one employer might reasonably take one view and another quite reasonably take another view. The function of the tribunal is to determine whether in the circumstances of each case the decision to dismiss the employee fell within the band of reasonable responses which a reasonable employer might have adopted. If the dismissal falls within that band, the dismissal is fair. If the dismissal falls outside that band, it is unfair.

6.5 The band of reasonable responses test applies to the investigation. If the investigation was one that was open to a reasonable employer acting reasonably, that will suffice (see **Sainsbury's Supermarkets Ltd v Hitt [2003] IRLR 23**.)

6.6 Direct discrimination is defined by section 13 Equality Act 2010.

> **13(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.**

6.7 **Anya v University of Oxford** CA 2001 IRLR 377 is authority for the proposition that we must consider whether the act complained of actually occurred (see Sedley LJ at paragraph 9). If the tribunal does not accept that there is proof on the balance of probabilities that the act complained of in fact occurred, the case will fail at that point.

> **9 This reasoning has been valuably amplified by Mummery J in *Qureshi v Victoria University of Manchester* (EAT 21 June 1996), a decision which Holland J in the present case in the Employment Appeal Tribunal understandably described as 'mystifyingly unreported'. It is therefore worth quoting at length from Mummery J's judgment.**
>
> **....**
>
> **The industrial tribunal only has jurisdiction to consider and rule upon the act or acts of which complaint is made to it. If the applicant fails to prove that the act of which complaint is made occurred, that is the end of the case. The industrial tribunal has no jurisdiction to consider and rule upon other acts of racial discrimination not included in the complaints in the originating application. See *Chapman v Simon* [1994] IRLR 273 at paragraph 33(2) (Balcombe LJ) and paragraph 42 (Peter Gibson LJ). In this case, the principal complaints made by Dr Qureshi were the decision of the FRC not to support a recommendation for his promotion to the post of senior lecturer in October 1992 and the decision of the Dean of the Law Faculty in October 1993 not to put his name forward to the APC with a favourable recommendation for promotion to senior lecturer. The considerations of the tribunal and their decision should, therefore, focus on those complaints and on the issues of fact and law which have to be resolved in order to decide whether the complaints are well founded or not…**

6.8 The burden of proof is found at section 136 Equality Act 2010

> **Section 136 Equality Act 2010 - Burden of proof**
>
> **(1) This section applies to any proceedings relating to a contravention of this Act.**
>
> **(2) If there are facts from which the court 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.**

6.9 In considering the burden of proof the suggested approach to this shifting burden is set out initially in **Barton v Investec Securities Ltd [2003] IRLR 323** which was approved and slightly modified by the Court of Appeal in **Igen Ltd & Others v Wong [2005] IRLR 258.** We have particular regard to the amended guidance which is set out at the Appendix of **Igen**. We also have regard to the Court of Appeal decision in **Madarassy v Nomura International plc [2007] IRLR 246.** The approach in **Igen** has been affirmed in **Hewage v Grampian Health Board 2012 UKSC 37**

6.10 Harassment is defined in section 26 of the Equality Act 2010.

> **Section 26 - Harassment**
>
> **(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.**
>
> **…**
> **(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.**

6.11 In **Richmond Pharmacology v Dhaliwal [2009] IRLR 336** the EAT (Underhill P presiding) in the context of a race discrimination case, made it clear that the approach to be taken to harassment claims should be broadly the same. The EAT observed that 'harassment' is now defined in a way that focuses on three elements. First, there is the question of unwanted conduct. Second, the tribunal should consider whether the conduct has the purpose or effect of either violating the claimant's dignity or creating an adverse environment for him or her. Third, was the conduct on the prohibited grounds?

6.12 In **Nazir and Aslam v Asim and Nottinghamshire Black Partnership UKEAT/0332/09/RN, [2010] EqLR 142**, the EAT emphasised the importance of the question of whether the conduct related to one of the prohibited grounds. The EAT in **Nazir** found that when a tribunal is considering whether facts have been proved from which a tribunal could conclude that harassment was on a prohibited ground, it was always relevant, at the first stage, to take into account the context of the conduct which is alleged to have been perpetrated on that ground. That context may in fact point strongly towards or against a conclusion that it was related to any protected characteristic and should not be left for consideration only as part of the explanation at the second stage.

6.13 In **Dhaliwal** the EAT noted harassment does have its boundaries:

> **We accept that not every racially slanted adverse comment or conduct may constitute the violation of a person's dignity. Dignity is not necessarily violated by things said or done which are trivial or transitory, particularly if it should have been clear that any offence was unintended. While it is very important that employers, and tribunals, are sensitive to the hurt that can be caused by racially offensive comments or conduct (or indeed comments or conduct on other grounds covered by the cognate legislation to which we have referred), it is also important not to encourage a culture of hypersensitivity or the imposition of legal liability in respect of every unfortunate phrase. We accept that the facts here may have been close to the borderline, as the Tribunal indeed indicated by the size of its award.**

6.14 Harassment may be unlawful if the conduct had either the purpose or the effect of violating the complainant's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for him.

6.15 A claim based on 'purpose' requires an analysis of the alleged harasser's motive or intention. This may, in turn, require the Employment Tribunal to draw inferences as to what that true motive or intent actually was: the person against whom the accusation is made is unlikely to simply admit to an unlawful purpose. In such cases, the burden of proof may shift, as it does in other areas of discrimination law.

6.16 Where the claimant simply relies on the 'effect' of the conduct in question, the perpetrator's motive or intention even if entirely innocent does not in itself afford a defence. The test in this regard has both subjective and objective elements to it. The assessment requires the tribunal to consider the effect of the conduct from the complainant's point of view: the subjective element. It must also ask, however, whether it was reasonable of the complainant to consider that conduct had that effect: the objective element. The fact that the claimant is peculiarly sensitive to the treatment does not necessarily mean that harassment will be shown to exist.

6.17 The requirement to take into account the complainant's perception in deciding whether what has taken place could reasonably be considered to have caused offence reflects guidance given by the EAT in **Driskel v Peninsula Business Services Ltd [2000] IRLR 151**, which concerned the approach to be taken by employment tribunals in determining whether alleged harassment constituted discrimination on grounds of sex. In **Driskel** the EAT held that although the ultimate judgment as to whether conduct amounts to unlawful harassment involves an objective assessment by the tribunal of all the facts, the claimant's subjective perception of the conduct in question must also be considered.

6.18 Section 123 Equality Act 2010 sets out the time limits for bringing a claim.

> **(1) Subject to section 140A proceedings on a complaint within section 120 may not be brought after the end of--**
>
> > **(*a*) the period of 3 months starting with the date of the act to which the complaint relates, or**
> > **(*b*) such other period as the employment tribunal thinks just and equitable.**
>
> **…**
> **(3) For the purposes of this section--**
>
> > **(*a*) conduct extending over a period is to be treated as done at the end of the period;**
> > **(*b*) failure to do something is to be treated as occurring when the person in question decided on it.**
>
> **(4) In the absence of evidence to the contrary, a person (P) is to be taken to decide on failure to do something--**
>
> > **(*a*) when P does an act inconsistent with doing it, or**
> > **(*b*) if P does no inconsistent act, on the expiry of the period in which P might reasonably have been expected to do it.**

6.19 It is possible to extend time for presentation of discrimination and harassment . The test is whether the tribunal considers in all the circumstances of the case that it is just and equitable to extend time.

6.20 It is for the claimant to convince the tribunal that it is just and equitable to extend the time limit. The tribunal has wide discretion but there is no presumption that the tribunal should exercise its discretion to extend time (see **Robertson v Bexley Community Centre TA Leisure Link 2003 IRLR 434 CA**).

6.21 It is necessary to identify when the act complained of was done. Conduct extending over a period is deemed done at the end of the act. Single acts are done on the date of the act. Specific consideration may need to be given to the timing of omissions. In any event, the relevant date must be identified.

6.22 The tribunal can take into account a wide rage of factors when considering whether it is just and equitable to extend time.

6.23 The tribunal notes the case of **Chohan v Derby Law Centre 2004 IRLR 685** in which it was held that the tribunal in exercising its discretion should have regard to the checklist under the Limitation Act 1980 as modified by the Employment Appeal Tribunal in **British Coal Corporation V Keeble and others 1997 IRLR 336**. A tribunal should consider the prejudice which each party would suffer as a result of the decision reached and should have regard to all the circumstances in the case particular: the reason for the delay; the length of the delay; the extent to which the cogency of the evidence is likely to be affected by the delay; the extent to which the party sued had cooperated with any request for information; the promptness with which the claimant acted once he or she knew of the facts giving rise to a cause of action; and the steps taken by the claimant to obtain appropriate advice once he or she knew of the possibility of taking action.

6.24 This list is not exhaustive and is for guidance. The list need not be adhered to slavishly. In exercising discretion the tribunal may consider whether the claimant was professionally advised and whether there was a genuine mistake based on erroneous advice or information. We should have regard to what prejudice if any would be caused by allowing a claim to proceed.

6.25 Tribunal's may, if they consider it necessary in exercising discretion, also consider the merits of the claim, but if the tribunal does so the party should be invited to make submissions.

Conclusions

Unfair dismissal

7.1 We first consider the reason for dismissal. We accept that Mr Uddin dismissed the claimant. It was his decision alone. Mr Uddin believed the

claimant had assaulted a member of the public on 18 August 2021 by knocking from the individual's hand the mobile phone on which he was filming the claimant. We accept this was his reason for dismissal. We accept he honestly believed the incident occurred.

7.2 Did Mr Uddin have grounds for the belief? The claimant had reported the incident. There had been an investigation meeting during which the claimant fully described the incident. During the disciplinary meeting, the claimant reiterated the circumstances of the incident. There were grounds.

7.3 At the time he formed the belief that the incident occurred had there been a reasonable investigation supporting those grounds? The claimant has not sought to suggest that the incident was unclear, or that he did not know which incident was in question. He has not suggested that there was a material failure of investigation about the incident itself. The nature of an investigation may be dictated by the nature of any dispute. The reality here is there was no dispute. The claimant had admitted his action and fully described the circumstances. The respondent was entitled to rely on the claimant's account and it is clear the respondent accepted the claimant's account. The investigation was one open to a reasonable employer.

7.4 Was dismissal a reasonable sanction? In considering this, we remind ourselves that we must apply the band of reasonable responses. It is not for the tribunal to substitute its decision as to what it may have done. The claimant was a civil enforcement officer. Members of public who receive PCNs, or who see CEOs operating, can be unpleasant or even aggressive. This is recognised by the respondent. The employees received specific training in how to remain calm and professional. If there were verbal threats, there was a code yellow procedure. If there were physical threats, there was a code red procedure. Th respondent is entitled to expect the CEOs to refrain from physical or verbal abuse of members of the public. It was clear the claimant acted unprofessionally; he assaulted a member of the public.

7.5 Mr Uddin did consider whether there were any relevant mitigating circumstances. He was aware the claimant has suffered from some stress, particularly because of his family circumstances. He was reasonable to take the view that any potential racism that had occurred was not significant. He had no reason to believe racism in the work place caused the claimant to behave inappropriately to the member of public. Further, there was no specific suggestion that the member of the public, who was assaulted by the claimant, had abused the claimant because of his race or for any other reason. In the circumstances, this was an assault which the claimant could have avoided; it occurred because the claimant became annoyed when a member of the public filmed him, which he was legally entitled to do. The claimant could have walked away and showed poor judgement in failing to do so. Striking a member of the public was potential gross misconduct. We do not take this to be a case where the

respondent simply dismisses because an action may amount to gross misconduct. The respondent properly considered all the circumstances, including the mitigation, and decided it was appropriate sanction in all the circumstances. We find that dismissal was within the band of reasonable responses.

7.6 There is no suggestion that there was any breach of procedure which could be rectified by the appeal. There is no suggestion that the appeal in any manner rendered an otherwise fair dismissal unfair. The appeal was properly conducted.

7.7 In the circumstances, we find that the dismissal was fair.

Discrimination/harassment

7.8 The claimant is of Vietnamese nationality. There are six allegations of detrimental treatment which are put as either allegations of direct race discrimination or harassment. The claimant is of Vietnamese nationality.

7.9 The only allegation brought in time is from 10 June 2021 (allegation 6). It is possible that this allegation could form the last incident in a course of conduct. The claimant has not specifically alleged that the allegations form part of continuing course of conduct, but it is appropriate that we should consider whether they do. It is also necessary to consider whether time should be extended for any claim which may be out of time.

Allegation six - on 10 June 2021 by Mr Olayiwola Sabowale saying to Mr Ndolua Kinkela, whilst in the equipment room, and unaware of the claimant's presence, that he "hates the Chinese."

7.10 We first consider the allegation of 10 June 2021. It is apparent from the allegation that the claimant alleges Mr Sabowale stated, when in the equipment room, that he hates the Chinese. The exact words are not set out by the claimant and nor is the context. However, it is implicit from the allegation that the claimant was standing behind Mr Sabowale and he was unobserved, because Mr Sabowale "looked shocked" when he turned around and saw the claimant.

7.11 The claimant's evidence on this has been very poor. In addition to the claim form itself, the matter is dealt with in the claimant's statement, which itself is a commentary on the respondents ET3.

7.12 The ET3 states:

> **34. The Respondent denies that OS made the statement alleged. Kinkela, the purported witness, has no recollection of such a statement ever being made. It is noted that the Claimant did not raise any concerns regarding this matter at the relevant time.**

7.13 The claimant's response to paragraph 34 states

> **34: Sabowale did say it very clearly to Kinkela. Kinkela can see me standing behind Sabowale but he didn't know Sabowale was going to say that so he failed to stop his friend.**

7.14 The claimant was asked to clarify this allegation by the tribunal during his oral evidence. The claimant confirmed that he had been in the room for several minutes. He was unable to explain why Mr Sabowale was unaware of his presence. He confirmed there had been a continuing discussion between Mr Sabowale and Mr Kinkela. The claimant was unable to give any detail of the conversation or to provide any other context. The claimant denied that the conversation continued after the use the offensive words. The claimant did not confirm the exact words used. The claimant stated he took no part in the conversation and neither he, nor anyone else, said anything after the alleged offensive words. The claimant did not report the matter.

7.15 We did not hear from Mr Sabowale. We understand he is no longer employed. The claimant did identify a witness, Mr Kinkela. We heard from Mr Kinkela who denied there had been any such conversation and confirmed that he believed he would have remembered any offensive words about Chinese people, and would have reported them.

7.16 We must first consider whether the words were used. In doing so, we must have regard to the context, which is relevant in deciding whether the words were used, as well as being relevant to whether they could amount to either discrimination or harassment. We should have regard to the relevant documentary evidence, and all the relevant circumstances.

7.17 We have no reason to doubt Mr Kinkela's evidence.

7.18 There is reason to doubt the accuracy of the claimant's account. In his claim form, the claimant alleges that this incident, together with the other incidents being allegations of discrimination before this tribunal, were "described… in detail at his disciplinary hearing." This is untrue. No complaint was made at the time. However, the claimant alleges that he was at that time, and had been for some time, keeping a diary setting out specific allegations of harassment or discrimination. Before us, the claimant initially indicated that the allegations of discrimination he relied on were not raised, because they were not serious. He resiled from that position, when he stated that some of them, including the one from 10 June 2021 were serious. His initial comment that they were not serious, is inconsistent with his alleging that he kept a diary. On the assumption he kept a diary, it is unclear why he failed to report the alleged incident at the time. In September 2020, the claimant joined a union, but he did not report the alleged discrimination to his union, despite alleging he kept a diary.

7.19 The claimant suggested he was afraid to report incidents of discrimination. This is unconvincing, in March 2020 he reported potential discrimination in the form of individuals distancing themselves from him because of an inappropriate assumption that his race made it more likely he was infected

with Covid 19. When he did report the incident, it was dealt with and appropriate warnings were issued. In no sense whatsoever was the claimant victimised for it. He had no rational basis to believe that he would be victimised. In any event this does not explain why he did not confide in his union representative, or in any one of a number of individuals he has described as “trusted.”

7.20 We have heard from many witnesses for the respondent. No witness supports the claimant's contention that he suffered racial comments over a long period of time.

7.21 We have not heard from either of the witnesses the claimant relies on. Neither of them gives any specific evidence, and at best each makes general assertions. We give no weight to their evidence.

7.22 It is not credible that the claimant cannot remember any of the context of the conversation leading up to the alleged comment. It is not credible that Mr Sabowale did not observe the claimant's presence in the room, given how long he was present.

7.23 Finally, the claimant has failed to produce the contemporaneous note, being the dairy, which he said he drafted. The claimant was obliged to produce the document and this is a serious omission. The note may have been consistent, or inconsistent, with the account that he now gives.

7.24 We find, on the balance of probability, that Mr Sabowale did not say he hates the Chinese.

7.25 As the allegation is not made out, there is no conduct capable of being either discrimination or harassment. The allegation fails.

7.26 It follows all of the allegations are out of time. We have considered whether there could be a continuing course of conduct, lest we be wrong about the allegation of 10 June 2021. The allegation of 10 June 2021 was an entirely isolated matter, Mr Sabowale does not feature in any of the other allegations. We reject any suggestion that the allegations were part of a state of affairs.

7.27 The next most recent allegation was from 4 March 2021. It is some three months out of time. It is for the claimant to establish why he delayed. The claimant has failed to give any proper evidence as to why he delayed. We find there is no good reason for the delay. On the claimant's case, he was keeping a diary of discrimination for a period. He was aware that he could bring a claim. He was aware that racial discrimination is unlawful, and he had raised race discrimination in March 2020. He was aware of the general procedure. The claimant could have sought advice. He joined the union. He was able to obtain advice. He could have sought advice at an early stage from the union, but chose not to. Further, in relation to a number of the allegations, he chose not to pursue them because he

believed them not to be serious.

7.28 If we allowed the out of time allegations to proceed, there could be serious prejudice to the respondent. This is a case where the allegations are obscure and fact specific. They date back to September 2020 and may involve incidents which appear to be either disputed or innocuous. These are the type of incidents that fade from memory and there is no good reason for the individuals involved to remember the specific circumstances. Moreover, a number of the individuals said to be now directly involved, or to have been witnesses, have left the respondent's employment. It will be difficult to get the relevant evidence. In the circumstances, there is serious prejudice to the respondent in allowing the allegations to proceed. We do not consider it just and equitable to exercise our discretion to extend time.

7.29 Lest we be wrong, we should consider briefly the allegations themselves.

Allegation one - on 22 September 2020, by the claimant's colleague, Mr Abdul Sharif, when accepting a mint from the claimant saying, "does it have coronavirus?"

7.30 There is insufficient evidence to prove that this happened on the balance of probability. In terms of direct discrimination, in any event, the comment itself does not appear to be because of race and there is nothing which would turn the burden. There is no basis for finding that it had the purpose to harass. There is no basis for finding that it could reasonably be said to have the effect of harassment. In any event, it does not, on its face, relate to race. No doubt, at the time, there were many references to coronavirus and contamination. Comments would range from seriously aggressive to flippant, and it is more likely this is one of the latter, if it occurred at all.

Allegation two – on 2 October 2020, by Mr Abdul Sharif demonstrating a kung fu pose and making a "Bruce Lee" sound in the locker room.

7.31 As for the kung fu pose and the Bruce Lee sound. We find on the balance of probability that if this had happened and was because of the claimant's race or it was offensive and related to his race he would have reported it. We find it did not happen. This is an example of an allegation that is stale and demonstrates prejudice to the respondent because of the difficulty securing relevant evidence.

Allegation three - on 6 November 2021, by Mohamed Kamara, whilst walking past the claimant in the main dining room, calling the claimant "Kim Jong-un."

7.32 There are a number of references to use of the name Kim Jong-un. None of the respondent's witnesses say that it was used by any employee to describe the claimant. If it had been used, on the balance of probability, one of the witnesses would have observed it. We have noted that the claimant did purchase and wear a Kim Jong-un mask. His

explanation for doing so was unsatisfactory. He suggested he bought it, and wore it in front of Mr Kamara, as some form of silent protest. By wearing it, he wished to emphasise how different he looked. However, if that were his intention, he did not express it. He did not explain it. Mr Kamara found it strange, but did not explore it. It is possible the name was used by someone. However, it is also possible it may have been used as a reaction to the claimant wearing the mask. If that were the case, it would neither relate to race nor be because of race. It would be because the claimant had worn the mask. It is difficult to be sure. The claimant does not deal adequately in his written evidence with when he wore the Kim Jong-u nmask or why. His oral evidence was unsatisfactory.

7.33 In this case we find that Mr Kamara never used the name Kim Jong-un. We find the claimant has failed to prove the allegation occurred. It follows the allegation fails. In any event, he could not succeed because there is nothing which could lead us to conclude it was the direct discrimination or harassment. It was neither because of race, nor related to race.

Allegation four - on 21 December 2020, at the end of the working day, by Mr Mohamed Kamara, when handing the claimant a clock card, using the words "ching chong."

7.34 We have heard from Mr Kamara. On the balance of probability, if this event had occurred, there would have been some independent witness, and in any event, the claimant would have made a complaint. To the extent there is independent evidence, it does not support the various allegations of direct discrimination and harassment. It supports Mr Kamara's version, and we reject this allegation. We find it did not occur.

Allegation five - on 5 March 2021 by Mr Sheikh Chand and Mr Stelio Martin's calling the claimant "Kim Jong- un" again.

7.35 We reject this allegation of the same reasons as we reject allegation three.

7.36 For all the reasons we have given, the claims of direct discrimination and harassment fail and are dismissed.

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Employment Judge Hodgson
Dated: 8 March 2023

Sent to the parties on:
.08/03/2023

For the Tribunal Office