THE EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr R Nyandwi	**v**	International Students House

Heard at: London Central **On**: 2-4 August 2017

Before: Employment Judge Baty

Members: Mrs C I Ihnatowicz
Mr S Ferns

Representation:
Claimant: Mr I Nwabueze (Friend)
Respondent: Ms S Chan (Counsel)

RESERVED JUDGMENT

1. **The Claimant's complaints of direct race discrimination/harassment related to race in relation to the two allegations of 25 September 2015 and his allegation of direct religious discrimination/harassment related to religion were presented out of time and it was not just and equitable to extend time. The Tribunal therefore has no jurisdiction to hear those complaints and they are dismissed.**

2. **The Claimant's remaining complaints of direct race discrimination/harassment related to race all fail.**

3. **The Respondent's costs application succeeds and an award of costs of £300 is made, payable by the Claimant to the Respondent.**

REASONS

The Complaints

1. By a claim form presented to the Employment Tribunal on 16 January 2017, the Claimant brought complaints of discrimination because of race, religion or belief and disability. The Respondent defended the complaints.

The Issues

2. The claim form was not well particularised. The Claimant duly forwarded to the Respondent, in response to a request for Further and Better Particulars from the Respondent, an email of 2 May 2017 giving some further particulars. Having received this, the Respondent put together a draft list of issues for the case management preliminary hearing on 9 May 2017 before Employment Judge Auerbach. At that hearing, there was discussion of the complaints and the issues and the draft list of issues was considered; the Claimant, who remains in the employment of the Respondent, confirmed that his claims were of race discrimination (he is black) and religious discrimination (he is Christian); he also confirmed that, although the claim form referred to disability discrimination, and the Claimant said he had asthma and mental health issues, that he had raised this in the claim because it was his case that one or more of the episodes of race and/or religious discrimination about which he claimed had an effect on one or other of those conditions; and that he was not claiming that any of the treatment was because of his health conditions as such. It was, therefore, confirmed at that preliminary hearing that there was no complaint of disability discrimination.

3. At that preliminary hearing, the Claimant agreed that paragraph 10 of the draft list of issues fairly captured the particular alleged episodes of race discrimination and paragraph 14 identified the particular alleged episode of religious discrimination and that all of these allegations were of direct discrimination or harassment. He also confirmed that he did not seek to compare his treatment to that of any specific colleague not of his race or religion.

4. In addition, one further issue was added as an allegation of direct race discrimination/harassment related to race, namely the allegation that the Respondent had “changed rules” and “made [the Claimant] homeless”. It was confirmed that this was about the fact that the Respondent had, for a time, provided the Claimant with paid accommodation, but at a certain point this was ended.

5. The draft list of issues also contained sections in italics where the Respondent sought further specifics of the allegations made and the Claimant was ordered to provide that information. In fact, although the

Claimant provided a further email of 16 May 2017, which appeared to include different allegations, the particulars of the existing allegations were not provided.

6. At the start of the present hearing, the Judge asked the Claimant and Mr Nwabueze whether the issues agreed at the hearing of 9 May 2017 remained the issues of the claim. There was then a somewhat convoluted discussion during which it was difficult to ascertain precisely what Mr Nwabueze was seeking. However, having referred to various documents, he indicated that he sought to add a complaint of disability discrimination. However, the discussion then proceeded along the lines that it appeared to have proceeded in the original preliminary hearing as the issues to do with disability appeared to be the effects of other discrimination on the Claimant's alleged conditions rather than separate allegations of discrimination/harassment. Therefore, when asked again by the Judge whether he was seeking to add additional allegations to the list of issues, Mr Nwabueze stated that he was not and the issues were agreed on the basis previously agreed.

7. It was also agreed that, if the Tribunal attempted to ascertain at this point from the Claimant all the additional particulars which had been requested previously in relation to some of the allegations, it was likely to take a considerable amount of time and, pragmatically, the allegations as they stood were clear enough for a fair hearing even without that particularisation.

8. The agreed issues were therefore as follows:-

Time

1. Is the claim presented on 16 January 2017 out of time in respect of the two allegations relating to Mr Ahmed of 25 September 2015?

2. Has there been a continuing act of discrimination?

3. If not, would it be just and equitable to extend the time for the submission of these elements of the claim?

Direct Race Discrimination/Harassment Related to Race

4. The following allegations of fact are relied on by the Claimant, which the Tribunal is invited to determine:

    4.1 Did Omer Ahmed say to the Claimant at work behind the bar "I'll get you later you fucking nigger" on 25 September 2015?

    4.2 Did Mr Ahmed attack the Claimant at Tesco on the evening of 25 September 2015?

4.3 Did Stuart Ellerker call the Claimant a "spook"?

4.4 Did Mr Ellerker send a discriminatory email to the Claimant?

4.5 Did Mr Ellerker cause the Claimant to receive fewer shifts?

4.6 Did Mr Ellerker "stalk" the Claimant?

4.7 Did Carol Sutcliffe respond to the Claimant's allegation of racial abuse by saying "but that's what you are"?

4.8 Did Mr Ahmed overload the Claimant with work?

4.9 Did the Respondent "change the rules" and "make the Claimant homeless" in that it had, for a time, provided the Claimant with paid accommodation, but at a certain point this was ended.

5. If any of these allegations of fact occurred, did this amount to less favourable treatment? In this respect the Claimant relies upon a hypothetical comparator only.

6. If any of these allegations amounted to less favourable treatment, was this because of the Claimant's race?

7. Alternatively, did any of these allegations amount to harassment related to the Claimant's race?

Direct Religious Discrimination/Harassment Related to Religion

8. Was the Claimant asked to remove a scarf which says "I love Jesus" by Mr Ahmed?

9. Was this less favourable treatment? In this respect the Claimant relies upon a hypothetical comparator only.

10. If so, was this because of the Claimant's religion?

Representation

9. Although at the start of the hearing, Mr Nwabueze introduced himself merely as the Claimant's friend and someone there to support him, he did in fact represent the Claimant throughout the hearing, addressing the Tribunal on the Claimant's behalf and conducting all of the cross examination of the Respondent's witnesses and delivering the Claimant's oral submissions. This was clearly with the Claimant's consent, the Claimant sitting beside Mr Nwabueze for the entire hearing.

The Evidence

10. Witness evidence was heard from the following:-

For the Claimant:

The Claimant himself.

For the Respondent:

Mr Omer Ahmed, a Bar Supervisor employed by the Respondent since December 2013;

Mr Stuart Ellerker, the Respondent's Venue Manager, employed by the Respondent since 1996;

Ms Carol Sutcliffe, the Respondent's Human Resources and Development Manager, employed by the Respondent since 1987, who heard the Claimant's grievance; and

Mr Peter Anwyl, an Executive Director of the Respondent from 1993 until his retirement in December 2016, who heard the Claimant's grievance appeal.

11. An agreed bundle of documents numbered pages 1 - 146 was produced to the hearing.

12. Prior to the hearing, there had been much correspondence between the parties in relation to the provision by the Claimant of his witness statement. Whilst the Respondent had disclosed its four witnesses' statements in accordance with the Tribunal's orders, it was not clear even at the start of the hearing what the Claimant's witness statement was. The Respondent had previously, in relation to the failure to provide his witness statement, applied for an order for strike out of the Claimant's claim. This had been reserved for the Tribunal to consider at the start of this hearing. However, at the start of the hearing, the Claimant and Mr Nwabueze stated that the Claimant's witness statement was the document at page 61 of the bundle (a one page document). Whilst this was news to the Respondent, it was a document which had been in the Respondent's possession for several weeks and the Respondent would not therefore be prejudiced. Ms Chan therefore did not pursue the application for strike out.

13. In addition, although the Respondent had previously sent the Claimant a copy of the bundle in electronic form and had delivered a hard copy bundle to the Claimant's address (which had not been signed for and was sent back to the Respondent), the Claimant did not attend the Tribunal with a bundle. The Respondent had a spare copy of the bundle which it gave to the Claimant at the start of the hearing.

14. The Tribunal read in advance the witness statements and any documents in the bundle which were referred to in those statements.

Timetabling

15. At the start of the hearing, the Tribunal explained the timetable that would need to be applied in order to complete the hearing within the requisite 3 days on both liability and remedy (the note of the preliminary hearing indicated that the hearing was due to cover both liability and remedy). A timetable for cross-examination and submissions was therefore agreed with the representatives at the start of the hearing. In particular it was agreed that Ms Chan could have half a day to cross-examine the Claimant and Mr Nwabueze could have three quarters of a day to cross-examine the Respondents' witnesses.

16. Ms Chan kept to her timetable. However, despite reminders from the Tribunal about the timetable and interjections by the Tribunal in relation to lines of questioning which were not relevant to the issues, Mr Nwabueze did not keep to the time allocation for his cross-examination.

17. During his evidence, the Claimant repeatedly failed to answer even simple questions which were put to him and the Judge had to remind him on numerous occasions to answer the questions put.

18. In addition, when Mr Nwabueze came to re-examine the Claimant, he started asking questions which amounted to opportunities for the Claimant to expand on his examination-in-chief. The Judge was initially liberal with the first couple of these questions. However, they resulted in further allegations being made which had not been made before (for example allegations of further examples of Mr Ellerker "staring" at the Claimant) which, of course, Ms Chan had not had the opportunity to cross-examine the Claimant on. The next question which Mr Nwabueze asked was in a similar vein and the Judge therefore disallowed it on the basis that it amounted to an opportunity to expand examination-in-chief, explaining that, if this was allowed, an opportunity for further cross-examination would also need to be given, and that this was not the purpose of re-examination. Nonetheless, when asked by the Judge, Ms Chan confirmed that she did not need to cross-examine the Claimant further in relation to the answers to the first re-examination questions.

19. As noted, during his cross-examination of the Respondent's witnesses, Mr Nwabueze frequently went down lines of questioning which were not relevant to the issues which the Tribunal had to decide and also frequently repeated questions or passages of cross examination which had already been put. The Judge had to interject on numerous occasions to ask him to move on in these circumstances.

20. The Tribunal had read the documents on the morning of the first day and the Claimant's evidence was completed on the afternoon of the first day. At the beginning of the second day, Mr Nwabueze made two applications.

Application to play a recording

21. The first of these was an application to play an audio recording, lasting around 10 minutes, in relation to the alleged incident of 25 September 2015 at Tesco. The recording had been provided by the Claimant to the Respondent at the Claimant's grievance appeal hearing. As it had been difficult to hear at that hearing, the Respondent had agreed to produce a transcript of it later, which it duly did. The transcript was three pages long. This transcript had not, however, been provided to the Claimant nor contained in the Tribunal bundle. Ms Chan, whilst acknowledging that it was a disclosable document, on taking instructions informed the Tribunal that the Respondent had not disclosed it because it had been covertly recorded and was concerned about the data rights in these circumstances of Mr Ahmed, who was one of the two parties (along with the Claimant) whose voices were heard on the recording. The Claimant had not therefore seen the transcript. Mr Nwabueze stated that he felt the language on the transcript was relevant and the Tribunal should hear it. The Respondent did not object in principle to the Tribunal hearing the recording, although inevitably for it to do so at this stage would impact upon the timetable for the hearing.

22. The Tribunal therefore agreed to get copies of the three page transcript, which the Respondent had, and to take a short break so that the Claimant could read that, but also, by agreement with Mr Nwabueze, to allow the recording to be played, but on the condition that, because this was something produced at the last minute by the Claimant, that the time spent listening to it be taken out of the cross-examination time which had been agreed for cross-examination of the Respondents' witnesses. The Tribunal duly heard the recording, which Mr Nwabueze was able to play on a device which he had brought in.

Application to amend the claim

23. In addition, Mr Nwabueze made an application to amend the claim and consequently the list of issues. The application was opposed by Ms Chan. Both parties made submissions and the Tribunal adjourned briefly to consider its decision.

24. It gave its reasons orally to the parties at the time.

25. The leading case on amendments is the case of Selkent Bus Co Ltd v Moore [1996] ICR 836. In determining whether to grant an application to amend, an Employment Tribunal must always carry out a careful balancing exercise of all the relevant factors, having regard to the interests of justice and to the relative hardship that would be caused to the parties in granting or refusing

the amendments. In Selkent, the then President of the EAT, Mr Justice Mummery, explained that relevant factors would include the nature of the amendment; the applicability of time limits; the timing and manner of the application; and the balance of hardship.

26. The Tribunal turned down the application to amend for the following reasons.

27. Firstly, in terms of the nature of the amendment, Mr Nwabueze was fairly vague about what the amendment should be. There was no written paragraph of what the amendment to the claim should be before us. The Judge had to work out what Mr Nwabueze was seeking to introduce. In short, Mr Nwabueze appeared to be seeking to bring the existing allegations of less favourable treatment as allegations of disability discrimination as well and to add a Section 15 Equality Act 20110 (discrimination arising for disability) complaint regarding one of the employees of the Respondent referring to the Claimant as paranoid and converting the allegation about the alleged assault at Tesco's to a Section 15 Equality Act 2010 complaint as well. The proposed amendment was therefore vague. In addition, it was not exclusively a matter of relabeling as at least one new allegation was brought in and, in terms of disability discrimination, further evidence would be required as to whether in fact the Claimant was a disabled person and indeed precisely what conditions he was relying on as a disability, all of which would require more time. It was therefore a significant amendment.

28. Furthermore, the proposed amendments were all out of time, being well outside the 3 month Tribunal time limit.

29. Furthermore, the timing and manner of the amendment application pointed against the granting of it. This application was brought at the beginning of the second day of the hearing; the issues had been agreed at what appeared to have been a very careful preliminary hearing before Employment Judge Auerbach; similarly agreement to those issues had been confirmed after some discussion at the beginning of this hearing; and the Claimant's evidence was already completed.

30. In terms of prejudice, there would be considerable prejudice to the Respondent as, in order to cater for the disability discrimination complaints, this hearing would almost certainly need to be adjourned and the Respondent would need to bring fresh evidence on the new allegations. There would therefore be considerable prejudice to the Respondent in terms of cost and delay. By contrast, the Claimant already had his existing claims and, even on a preliminary view of the proposed new allegations, they did not appear to be ones which had obvious strength, so the prejudice to the Claimant in not being able to proceed with them was not great.

31. Therefore, for these reasons, the application to amend was refused.

Respondent's Cost Application

32. In accordance with the timetable agreed at the start of the hearing, it was expected that cross-examination and submissions on liability would be completed within the first two days. Because Mr Nwabueze exceeded his time allocation for cross-examination of the Respondent's witnesses, exacerbated by the time spent in hearing the recording and in hearing the application to amend, that evidence on liability was not completed until about 4.30 on the second day.

33. Nonetheless, the Tribunal stated that it was prepared to sit late and hear that evening the parties' submissions (for which they had agreed in the timetable that they would need no more than half an hour each at the end of the second day) and would deliberate on its decision the next day and give a reserved decision, such that the parties did not need to come into the Tribunal on the third day of the hearing.

34. Ms Chan said that she would welcome this, particularly because it would save the Respondent the cost of incurring her £1,250 refresher fee for attending the next day. She indicated that she had some written submissions (amounting to nine pages) which she would hand out and that, on the basis of this, she would in fact only need 10 minutes for her oral submissions.

35. The Tribunal therefore offered the parties the option of it sitting late to hear the submissions at the end of the second day or, given the time constraints, of starting earlier at 9.30 on the final day of the hearing to hear the submissions.

36. Mr Nwabueze said that he wanted more time to prepare and therefore wanted to do submissions at 9.30 the next morning.

37. At this point, Ms Chan stated that she thought that this was unreasonable and that it would unnecessarily incur further cost for the Respondent in terms of her brief fee, that the Respondent was a charity, and that the reason that things had reached a late stage on the second day was because of the Claimant's failure to abide by the timetable for cross-examination of the Respondent's witnesses, coupled with the time wasted as a result of the application to amend and the playing of the recording and that, if they had to come back for submissions the next morning, they would make a costs application in relation to her refresher fee of £1,250 plus VAT.

38. The Judge therefore asked Mr Nwabueze whether or not he still wanted to come back at 9.30 the next morning as opposed to dealing with submissions on the evening of the second day. Mr Nwabueze confirmed that he did.

39. The Tribunal therefore adjourned briefly to consider what to do.

40. In the light of Mr Nwabueze's request, the Tribunal acknowledged that there would be an additional cost to the Respondent of attending the next day and that the reason for the delay was the time wasted as a result of Mr Nwabueze exceeding his time limit for cross-examination and the application to amend and the hearing of the tape. However, in view of the fact that the Claimant was a litigant in person and Mr Nwabueze, as far as the Tribunal was aware, was not a lawyer or legally qualified but the Claimant's friend, and in view of the fact that some time would be needed to be given to them to read Ms Chan's nine page submissions properly before oral submissions commenced, the Tribunal was prepared to accede to Mr Nwabueze's request and to hear the submissions at 9.30am on the final morning of the Hearing. The Judge stressed that the Claimant and Mr Nwabueze should read the Respondent's submissions before then and that no further time would be allowed the next morning for reading the Respondent's submissions.

41. Ms Chan then reiterated that, although she acknowledged that the decision would be reserved on liability, she would be making an application the following morning for the Respondent's costs of £1,250 plus VAT as indicated.

42. After the parties had delivered their submissions on the morning of the third day of the hearing, Ms Chan, as she had indicated the previous evening she would do, duly made an application for the costs of her refresher fee which became due because she had to attend the hearing on the third and final day. That refresher fee was £1,250 plus VAT (total £1,500). The Respondent is partially exempt from VAT and cannot therefore recover the VAT on legal fees. Hence the application was for £1,500.

43. Before hearing the application, the Judge went through the law on costs applications for the benefit of the Claimant and Mr Nwabueze.

44. The Tribunal's powers to make awards of costs are set out in the Employment Tribunal Rules of Procedure 2013 at Rule 74-84. The test as to whether to award costs comes in two stages:-

    1. Firstly, has a party (or that party's representative) acted vexatiously, abusively, disruptively or otherwise unreasonably in either the bringing of the proceedings (or part) or the way that the proceedings (or part) have been conducted or did the claim or the response have no reasonable prospect of success? If that is the case, the Tribunal must consider making a costs order against that party.

    2. Secondly, if that is the case, should the Tribunal exercise its discretion to award costs against that party? In this respect the Tribunal may, but is not obliged to, have regard to that party's ability to pay.

45. The application was made on the basis of unreasonable conduct by the Claimant/his representative. It was opposed by Mr Nwabueze. Both

representatives made submissions and the Judge asked the Claimant some questions about his means.

46. The Tribunal adjourned to consider its decision and, when the parties returned, gave its decision and the reasons for it orally.

Stage One

47. We considered that there was unreasonable conduct by the Claimant/his representative in two respects.

48. Firstly, we considered that various things that occurred on the second day of the hearing were unreasonable. Firstly, it was unreasonable for Mr Nwabueze to make an application to amend the claim and the list of issues before the Tribunal on the morning of the second day of the hearing, after the Claimant had completed his evidence, and particularly in light of the fact that the issues had been agreed at the preliminary hearing and then again at the beginning of this hearing. That application took time to dispose of and that time was unnecessary. Secondly, it was also unreasonable to seek at the beginning of the second day of the hearing to have the recording introduced as evidence and played to the Tribunal. The application in this respect and the playing of the recording also wasted further time. In addition, the Tribunal had been scrupulous in setting out a timetable at the start of the hearing for the parties, which they had agreed to be bound to. Ms Chan had stuck to her timetable allocation for cross examination. However, Mr Nwabueze did not. Despite the Tribunal reminding him of the timetable at the start of the day and again at lunchtime (by which time he had only managed to cross-examine the first of the Respondent's witnesses, Mr Ahmed) and despite the Tribunal repeatedly advising him that questions that he was asking were either irrelevant to the issues of the claim or a repetition of questions that had already been asked, he persisted in the same way with the result that the evidence was not completed until 4.30 which, ordinarily, would be the time at which the hearing would adjourn for the day. All this conduct was unreasonable. However, no costs would have been incurred due to this because the Tribunal, knowing that the parties would have to come back just for submissions the next day, offered to sit late in order for the parties to make their submissions such that they did not have to come back the next day.

49. The second element of unreasonableness was the Claimant and Mr Nwabueze's refusal to accede to this offer by the Tribunal. The Tribunal had offered to sit late. Ms Chan on behalf of the Respondent said that she would appreciate this because otherwise her refresher fee would be unnecessarily incurred. She had produced a nine page written submissions document and said that, given that she had done that, her own submissions would be far less than the half hour which she had originally asked for (which in due course they were). There would be opportunity for the Claimant and the Tribunal to read those written submissions. The Tribunal was prepared to sit late on that basis.

50. It gave the parties the choice of sitting late and doing this or starting at 9.30 the following morning.

51. However, Mr Nwabueze and the Claimant said they wanted to start at 9.30 this morning. This was notwithstanding the fact that, in accordance with the timetable, they were aware that it was expected that submissions would take place at the end of the evidence on the second day so they should have been prepared for it in any event.

52. Furthermore, on hearing this, Ms Chan said that, in that event, she would be making an application for her wasted costs. The Judge had asked the Claimant and Mr Nwabueze, in the light of that, whether or not their still did not want to do submissions that evening and they confirmed that they wanted to come back at 9.30 the next morning.

53. Therefore, for both these reasons, there was unreasonable conduct by the Claimant/his representative.

Stage Two

54. One fact that we take into account is the fact the Claimant is not legally qualified and, whilst he was represented by Mr Nwabueze and whilst Mr Nwabueze had clearly done some research (quoting cases to us in his submissions), he was not a qualified lawyer either. In relation to the first element of unreasonableness (the overrunning of the timetable and the unnecessary applications etc), we took that into account and would not have made an award of costs on that basis alone.

55. However, in relation to the refusal to make submissions on the evening of the second day of the hearing, we did not consider that that unreasonableness was mitigated by the fact that neither Mr Nwabueze nor the Claimant were lawyers. They knew that submissions were expected and the decision not to do so was in no way mitigated by the fact that they were not lawyers.

56. We took into account the Claimant's means of paying. Essentially, the Claimant is paid around £280 per week but has outgoings of £250. He does not therefore have a great deal of money to pay these costs and can certainly not pay them straightaway. However, when asked by the Judge whether the Respondent would, if a costs award was made, seek to make the Claimant bankrupt or would seek to arrange a repayment schedule to enable him to pay those costs, Ms Chan said that the Respondent would do the latter. The Claimant is a young man with earnings potential. Therefore, we considered that an award of £300 in relation to costs would be something which, over time, he would be able to pay. Accordingly, we made an award of costs payable by the Claimant to the Respondent of £300.

Findings of Fact

57. We make the following findings of fact. In doing so, we do not repeat all of the evidence, even where it is disputed, but confine our findings to those necessary to determine the agreed issues.

58. The Respondent is a charity registered with the Charity Commission and provides accommodation for University students in the United Kingdom. It has premises in Central London, specifically the live entertainment venue known as "229 The Venue" and "The Bar" in Great Portland Street. In terms of the bars which the Respondent operates, there is a student bar, which is open most of the time, and two further bars on the premises, which are used for functions and conferences and, consequently, are frequently not in use.

59. The Respondent has around 140 employees, of whom around 90 are permanent employees and 50 employed on zero hours contracts (the latter being mainly student staff). It has around 40 different nationalities amongst its staff. The Respondent has an equal opportunities policy, conducts diversity training and has received awards from "investors in people" and others.

60. The Claimant commenced employment with the Respondent on 1 October 2014. The Claimant describes himself as black and Christian. The Claimant has at all times been employed on a zero hours contract and works as a bar tender. He remains employed by the Respondent.

61. At a staff party at the Respondent in January 2015, the Claimant was warned by a manager, Ivan Ilic, about looking drunk at the work place; about an hour later the Claimant proceeded to insult a fellow employee, Ms Angel Irvine, who threw her glass at him in retaliation. Ms Irvine left the Respondent's employment shortly afterwards.

62. Mr Omer Ahmed is a Bar Supervisor at the Respondent who has been employed by the Respondent since December 2013. Mr Ahmed is mixed race, his mother being white and his late father black. Mr Ahmed also worked on a zero hours contract.

63. There was a tense relationship between the Claimant and Mr Ahmed from an early stage after the point at which they were both working for the Respondent.

64. On 25 September 2015, Mr Ahmed was working as Bar Supervisor at the Respondent and the Claimant was working as a bar tender, as well another employee, Ms Lea Korinth. Mr Ahmed was laughing over something with Ms Korinth and the Claimant said "what the fuck are you laughing at, stop making jokes about me". In fact, Mr Ahmed and Ms Korinth were not laughing about the Claimant and Mr Ahmed responded "I will laugh at whatever I like, you are just paranoid". Given the tension between them, Mr

Ahmed asked for the Claimant to be in a different bar from himself that evening.

65. One of the Claimant's allegations at this Tribunal is that, when he was working behind the bar that evening, Mr Ahmed said "I'll get you later, you fucking nigger". Mr Ahmed denies this was said and we will return to this later.

66. There is a Tesco over the road from the Respondent's premises and employees frequently go across there to buy goods. On the evening of 25 September 2015, after the altercation in the bar described above, Mr Ahmed went over the road to Tesco to buy Red Bull and cigarettes. The Claimant was also at Tesco and there was then a heated exchange between them. Unbeknown to Mr Ahmed, the Claimant was recording their conversation on his mobile phone.

67. (As noted, this is the recording which was played to us during the Tribunal. The recording was not in fact produced to the Respondent until the Claimant's grievance appeal on 7 November 2016. Although at the grievance appeal meeting, when asked by Mr Anwyl, the Claimant stated that he did not ask Mr Ahmed's position to record the conversation, he contradicted this at the Employment Tribunal in response to questions by Mr Ferns, telling him that he did inform Mr Ahmed that he was recording him and got his agreement to this. He went on to say in his response to Mr Ferns that, notwithstanding that Mr Ahmed was aware that he was recording it, Mr Ahmed went on to deliver a tirade of abuse against him and physically assault him by dragging him down the road and tried to steal his mobile phone, which seems an unlikely way to proceed if he knew he was being recorded. In addition to the contradiction, we have also heard the recording and read the transcript of it and there is nothing in either where the Claimant does ask for permission to record or reveals to Mr Ahmed that he is recording. By contrast, it is clear from the recording that, about two thirds of the way through the altercation, Mr Ahmed becomes suspicious that the Claimant might be recording him. We therefore find that the Claimant did not ask Mr Ahmed's permission to record the conversation and did so covertly.)

68. During the altercation, Mr Ahmed uses a tirade of abusive language to the Claimant. However, although the Claimant has maintained that he was scared during that interchange, the recording reveals that the Claimant is quite calm throughout. He repeatedly asks Mr Ahmed questions like "why don't you like me" and "what did I do wrong". Whilst clearly he could have walked away from that conversation, he did not do so and indeed, right at the end of this 10 minute interchange, he specifically asks Mr Ahmed to come back. We do not, therefore, find that the Claimant was intimidated by Mr Ahmed. By contrast, we consider that, in covertly recording Mr Ahmed and in repeatedly asking questions of this nature, what the Claimant was in fact doing was, as Mr Ahmed submitted in his evidence, trying to entrap Mr Ahmed into saying something incriminating. Whilst Mr Ahmed is clearly feeling very frustrated with the Claimant and uses some very abusive

language, he does not at any stage use any racist or race related language in what he says to the Claimant.

69. The Claimant has also submitted that Mr Ahmed physically assaulted him by dragging him down the road and trying to steal his mobile phone. However, there is nothing in the tape which evidences this. Mr Ahmed denies it. We therefore find that Mr Ahmed did not assault the Claimant or attempt to steal his mobile phone. Mr Ahmed asked questions about the phone; however, this is at the point where he becomes suspicious that the Claimant might be using his phone to record the conversation. Mr Ahmed eventually just walked away.

70. The Claimant also submitted before this Tribunal that Mr Ahmed followed him home on this occasion. However, he admitted in the grievance appeal that Mr Ahmed did not follow him home; he then resurrected this allegation at this Tribunal. We find the Claimant's evidence inherently unreliable in this respect and therefore find that Mr Ahmed did not follow him home.

71. The Claimant maintains that he reported the incident at Tesco to a manager, Mr Gauthier Flavigny, and showed him the tape of the recording. However, when the Claimant suggested this at the grievance appeal hearing, Mr Anwyl asked Mr Flavigny to attend and, despite Mr Anwyl asking him repeatedly whether he had heard the recording before, Mr Flavigny said that he had not. Furthermore, if indeed he had played the recording to Mr Flavigny at the time, it is surprising that there is no record of that. Furthermore, for all the other reasons of inconsistent evidence from the Claimant, we do not accept that he did himself tell Mr Flavigny about the incident or showed him the tape at the time. As we shall come to, Mr Flavigny appears to have heard via a third party manager (Gerry) about some sort of altercation around this time, but the Claimant did not report it to Mr Flavigny or make a complaint to him about it at the time.

72. Well before the incident of 21 August 2016 which we will come to, there was a further incident involving the Claimant and Mr Ahmed. The Claimant was not able to put a precise date upon when he said this took place, nor could Mr Ahmed; however, Mr Ahmed confirmed that it was a considerable amount of time prior to the incident of 21 August 2016. The earlier incident concerned Mr Ahmed asking the Claimant to remove a scarf which he was wearing.

73. The Respondent has an all black dress code for its bar staff and they are not permitted to wear large accessories. Jewellery is permitted, but large items such as scarves or baseball caps are not. Staff are aware of this because the policy is discussed at team meetings on a regular basis.

74. The Claimant was wearing a scarf at work and Mr Ahmed asked him to remove it.

75. The Claimant maintains that the scarf he was wearing had a logo with "I love Jesus" on it. However, Mr Ahmed was not aware at the time as to whether or not there was any logo on it at all; rather, he simply recalls it as having been a black scarf with some gold trim on it. We have no reason to doubt his evidence and accept that he was not aware as to whether or not it had a logo on it at all.

76. On the night of 21 August 2016, Mr Ahmed was working in the Respondent's main bar. The Claimant had been working in the bar downstairs and came to the main bar at 2.20am for his complimentary drink at the end of the night and to sign against his hours. Two other bar staff, Ms Jasmine Okorougo and Ms Rachel Leaf, arrived just before the Claimant. They asked if they should use a glass or a plastic glass to have their complimentary drink. Mr Ahmed asked them to use a plastic glass as he had just cleaned the bar taps and switched off the glass washer (which meant that it was not practicable from then on to use glasses as opposed to plastic glasses), to which they happily obliged. The Claimant was within ear shot of them when this discussion took place. The Claimant then proceeded to take a glass and pour himself a pint. Mr Ahmed asked him to use a plastic glass and he refused. The Claimant said he wanted to be treated the same as everyone else and continued to pour his drink. Mr Ahmed asked him why he should be exempt from the rules. He replied that he wanted to be treated like everyone else and added "I want to be treated like Abhishek" (an ex staff member) "and your acquaintances".

77. Around this point Ms Okorougo and Ms Leaf let the bar.

78. Ms Okorougo is of mixed African parentage and Ms Leaf is mixed race (she has a black mother and a white father).

79. The Claimant finished pouring his drink and as he turned towards the bar he spilt some beer in the area underneath the taps which had already been cleaned. Mr Ahmed pointed out the spill and said "look at what you are doing". The Claimant took a sip from his beer, then took a plastic cup and poured his drink from the glass to plastic, spilling more beer on the back bar areas which Mr Ahmed had also cleaned. Mr Ahmed told him he was making a mess and the Claimant reiterated that he wanted to be treated the same as everyone else. Mr Ahmed pointed out that Ms Okorougo and Ms Leaf had both used plastic glasses. The Claimant then topped up his pint. Mr Ahmed then got angry and said that he should not be filling up the glass after drinking from it and he responded that he had never finished the process. At this point Mr Ahmed asked him to leave the bar as he had finished his shift (and was therefore off duty). The Claimant replied "this is bullshit and I want to be treated like everyone else" and sat down at a table to finish his beer. He then returned to write his hours on the timesheet behind the bar. Mr Ahmed told him not to go behind the bar and that he would write his hours down for him. The Claimant told Mr Ahmed that was not his job. Mr Ahmed told him to go away and gently pushed him away from the bar. He walked into the foyer and then back into the bar. The window by the table where the

Claimant had left his belongings was open and a gust of wind blew the curtain which spilled his drink. When the Claimant saw that his drink was spilled, he grabbed his belongings and left the bar.

80. There was CCTV footage available of what took place.

81. The Claimant, by email of 24 August 2016, complained about this incident.

82. Mr Stuart Ellerker, the Respondent's Venue Manager, sought to arrange a mediation meeting between the Claimant and Mr Ahmed to resolve matters. The meeting was delayed somewhat because Mr Ahmed was away in Egypt for a while following a family bereavement and Mr Ellerker himself had been away on holiday. It took place on 4 October 2016. Mr Ellerker was present as were two other bar managers, Mr Flavigny and Mr Chris Jozefczyk, along with Mr Ahmed and the Claimant. The meeting lasted 2 hours, and, as is evident from the minutes of it, was thorough. The main point of the discussion was the alleged assault of the Claimant on the night of 21 August 2016. Having listened to both the Claimant and Mr Ahmed's version of events and viewed the CCTV images and spoken to the other staff present at the time, Mr Ellerker felt that, although he could see that Mr Ahmed had tried to shepherd the Claimant away from the bar area, the Claimant's allegation of assault was unfounded. He attempted to mediate between the Claimant and Mr Ahmed and did advise Mr Ahmed that, despite his frustrations, he should not have acted in the way that he did and that there was no need for the physical action of pushing the Claimant away from the bar. Mr Ahmed accepted this and apologised for his actions on three separate occasions during that meeting. Mr Ellerker also advised the Claimant that he needed to show more respect towards his supervisors. He offered a solution which was that the Claimant would need to respect Mr Ahmed's authority, listen to his requests and not question each decision. Equally, Mr Ahmed needed to work on a friendlier approach to his team and apply the same rules to all. Mr Ellerker emphasised that everyone needed to get along and work with each other. He told the Claimant that in future he should inform his managers of any further issue and if any such issues were not dealt with properly, he should contact Mr Ellerker directly. (There was no allegation by the Claimant that any treatment of him by Mr Ahmed in relation to this incident was because of his race or religion).

83. At this meeting, the Claimant also raised an allegation in relation to the 25 September 2015 incident at Tesco referred to above. He alleged that at that incident he was "grabbed by the arm and dragged down the street"; however, whilst the transcript contained a threat by Mr Ahmed to "drag you down the road", he did not in fact do this. The allegation by the Claimant that he actually grabbed him by the arm and dragged him down the street was therefore untrue. As noted, the recording of the incident had not been provided to Mr Ellerker either at the time of the incident or during the meeting of 4 October 2016.

84. Mr Flavigny was asked at the meeting about this incident and said that the Claimant did mention something verbally to Gerry, (the Claimant's previous Line Manager) and that he, Mr Flavigny, recalled an issue of sorts but could not recall anything referring to physical attack or robbery. Mr Ellerker asked the Claimant whether, if it was serious, why he did not raise the issue further and the Claimant told him that trusted Mr Flavigny to deal with the job.

85. The Claimant appeared unwilling to accept Mr Ahmed's apology in relation to the 21 August 2016 incident and was not happy with the outcome. Mr Ellerker explained that, if he was not happy, then a formal meeting would have to be scheduled.

86. On 5 October 2016, the Claimant raised a grievance by email to the Respondent. He alleged disability discrimination, breach of duty of care and harassment. He claimed that he had undergone a systematic campaign of harassment which exacerbated his asthma, and that he was at palpable risk of harm from Mr Ahmed and that he could no longer work with Mr Ahmed.

87. Ms Carol Sutcliffe, the Respondent's Human Resources and Development Manager, arranged a grievance hearing. It was held on 17 October 2016. It was chaired by Ms Sutcliffe. Ms Gabriela Kalauz, a Human Resources Assistant/Secretary for the Respondent, who was also a professional note taker, was present to take the minutes. Statements had also been taken from Mr Ahmed, Ms Leaf and Ms Okorougo. The hearing lasted 2 hours and the Claimant was given every opportunity to present his evidence.

88. Ms Sutcliffe concluded that the grievance would not be upheld. She concluded that the Claimant had not been suffering from systematic harassment from Mr Ahmed. She watched CCTV evidence of the incident of 21 August 2016 and concluded that the Claimant refused to obey a reasonable instruction and subsequently provoked Mr Ahmed which led to Mr Ahmed pushing him away from the bar to go home. The Claimant also raised at the Grievance Hearing the alleged incident between himself and Mr Ahmed which he said had occurred on 25 September 2015 during which he alleged that he was stalked, and verbally and physically attacked by Mr Ahmed. No proof was provided of the incident (although, as we have found, the Claimant had in his possession the recording he had made on his phone).

89. Ms Sutcliffe concluded that the Claimant was not in danger from Mr Ahmed, as Mr Ahmed had made no threats against the Claimant on 21 August 2016 and he apologised for pushing him away from the bar. Furthermore, as the Claimant was staying at the Respondent's premises as a temporary resident at the time and frequenting the bar as a customer when Mr Ahmed was working and at times sitting at the bar when Mr Ahmed was working and the Claimant continued to work in the same department, this suggested to Ms Sutcliffe that the Claimant was not afraid of Mr Ahmed. She also concluded that there was no evidence of disability discrimination.

90. She wrote to the Claimant on 24 October 2016 informing him that she did not uphold his grievance and that he had a right of appeal to Mr Anwyl. Again, both in his grievance email and at the lengthy grievance hearing, the Claimant did not at any stage allege that any of the treatment of him was because of his race or religion.

91. In evidence before this Tribunal in cross examination, the Claimant alleged that he did in fact raise allegations of race discrimination at this hearing but that these had been deliberately left out of the note. We do not accept this. We have already indicated several other incidences where we have found the Claimant's evidence unreliable. Furthermore, Ms Kalauz was a professional minute taker and the notes are very thorough. In addition, the Claimant has not challenged the accuracy of the transcript made of the recording of the 25 September 2015 incident, which was also done by Ms Kalauz, and which accurately transcribes the recording which we heard. In addition, it is highly surprising that, if the grievance minutes, which were sent to the Claimant shortly after the grievance outcome, were indeed missing key things which occurred such as allegations of race discrimination, the Claimant would not have said something sooner. For all these reasons, we do not find that the minutes were tampered with but find that they were an accurate record of what happened at the grievance hearing.

92. At the grievance hearing, in relation to the incident of 25 September 2015, the Claimant stated that "I have an audio, it was taped at Tesco, I am not saying I taped it, but it was taped". The Claimant was therefore being at best cagey here as he did tape it. Ms Sutcliffe asked if he could provide the tape, given that it could be relevant. She specifically asked if he could bring it to her by 21 October 2016. However, the Claimant never produced the tape to her. She cross refers to this in her grievance outcome letter of 24 October 2016.

93. On 28 October 2016, the Claimant appealed against the grievance outcome.

94. In between the grievance and the grievance appeal, the Claimant contacted the Police on the grounds that he had been assaulted by Mr Ahmed on 21 August 2016. The Police visited the Respondent's premises asking to view the CCTV footage. Ms Sutcliffe showed two Police Officers the footage of the incident in question, where Mr Ahmed pushed the Claimant. After viewing the footage, one Officer stated that he would not be "wasting any further tax payer's money" on the allegation, which suggested to Ms Sutcliffe that he saw absolutely no merit in what the Claimant was alleging.

95. The appeal was heard on 7 November 2016. It was chaired by Mr Anwyl. Ms Sutcliffe was present along with Ms Kalauz to take the minutes. Ms Sutcliffe was there to explain the reasons why she had not upheld the Claimant's grievance. It was at this point that the Claimant said that he had recorded the incident of 25 September 2015 and produced the recording. However, when they tried to play it at the hearing, it was inaudible. Mr Anwyl suggested that the recording be transcribed and asked the Claimant to provide it to the

Respondent so that he could consider that evidence when considering the appeal.

96. The Claimant said that Mr Flavigny had heard the tape. As Mr Flavigny was working at the Respondent's premises at the time of the hearing, Mr Anwyl asked Ms Sutcliffe to call him into the hearing. He arrived shortly after and, despite being asked several times by Mr Anwyl, said that he had never heard the recording before. The Claimant again alleged that Mr Ahmed had attacked him at the incident of 25 September 2015.

97. Mr Anwyl asked the Claimant why he continued to attend the bar as a guest when Mr Ahmed was on duty if he was scared of him. The Claimant said that he had told Mr Flavigny that Mr Ahmed had threatened him. Mr Anwyl therefore recalled Mr Flavigny to the hearing room and he denied that the Claimant had informed him of any such threats.

98. Mr Flavigny confirmed that there had been a number of arguments between the Claimant and Mr Ahmed but said that the Claimant did not like to be given instructions by Mr Ahmed. Mr Anwyl asked the Claimant if he accepted Mr Ahmed's authority and he replied that it would depend and said that he was a "free man". He at no stage, despite being asked repeatedly about accepting authority, stated that he did accept Mr Ahmed's authority.

99. In relation to the 21 August 2016 incident, the Claimant was referred by Mr Anwyl to the two witness statements of Ms Leaf and Ms Okorougo, which corroborated Mr Ahmed's version of events. The Claimant suggested variously that they were inaccurate and then that there was collusion between the two witnesses to the incident.

100. Before concluding the hearing, Mr Anwyl told the Claimant that he would consider the transcript before arriving at any conclusions on his appeal. He duly did so.

101. Having viewed the transcript, Mr Anwyl considered that Mr Ahmed had behaved aggressively towards the Claimant during the September 2015 incident and he undertook to raise this with him. However, in his view there was a certain degree of provocation in the way the Claimant had behaved. For instance, the Claimant had called him back when Mr Ahmed attempted to walk away. In Mr Anwyl's view this detracted from the Claimant's claim that he felt in danger when he was in Mr Ahmed's presence. Furthermore, in his view the recording showed no evidence of the assault and attempted theft alleged by the Claimant.

102. Furthermore, he considered the Claimant found it difficult to accept instructions from Mr Ahmed and that this has led to a number of the confrontations between them and mutual lack of respect. However, he did not find evidence of any harassment of the Claimant by Mr Ahmed.

103. In addition, there seemed to Mr Anwyl to be a number of discrepancies between the Claimant's account and the accounts of the various incidents supplied independently by other members of staff. These included discrepancies as to whether the Claimant had suffered online bullying, whether he had played Mr Flavigny the recording of the incident outside Tesco in 2015, the Claimant contradicting himself as to whether Mr Ahmed had followed him home, and the Claimant's account of the August 2016 incident when he had been asked by Mr Ahmed to use a plastic cup. As a result, he concluded that a number of statements that the Claimant had made as part of his grievance had been untruthful.

104. He turned down the appeal and set out his conclusions in a detailed letter to the Claimant dated 9 November 2016.

105. At no point in his written appeal, or at the appeal meeting itself, did the Claimant suggest that any of the treatment that he alleged he had suffered was because of his race or religion.

106. As a result of having heard the recording and viewed the transcript of it, disciplinary action was taken against Mr Ahmed. He was issued with a verbal warning for his actions on 25 September 2015 to the Claimant outside Tesco. In addition, he had been due to be promoted to Assistant Bar Manager, which would also involve a 40 hour a week full time salaried position on a permanent contract (as opposed to the zero hours contract that Mr Ahmed had been on); as a result of his actions, the Respondent did not give him that promotion and he remains to this day a Bar Supervisor on zero hours.

107. The Claimant is not a student and is therefore not entitled to reside at the Respondent's premises on a long term basis. He stayed in short term accommodation at the Respondent for periods between September to November 2016, and on several occasions previously. The regulation for all short term guests was changed in November 2016 to require them to have breaks of 21 days between bookings and for the bookings themselves to be for no more than 21 days. This regulation, which is the norm in the hostel industry, including the YHA where the Claimant currently resides, was brought in to deter guests from effectively living in the dormitories. This regulation is for all guests, not just for the Claimant. The Respondent has now decided to close completely all short term dormitory accommodation and to convert the dormitories into bedrooms in September 2017. It was never a condition of the Claimant's job that the Respondent provide accommodation. The Claimant could, and indeed did, stay at other hostels.

108. The Claimant's shifts working at the Respondent reduced from November 2016. This was for two main reasons. The first was that the Claimant stated on many occasions that he could not work with Mr Ahmed and did not wish to be on the rota with him; this greatly reduced the shifts available to him as Mr Ahmed worked as a Bar Supervisor and, although on a zero hours contract, worked a lot of hours; this was particularly so because he held a

liquor licence and there always had to be someone with a liquor licence on duty and there were times when Mr Ahmed was the only person present (and could not be replaced by someone else who did not hold a liquor licence). In addition, in December 2016, the Claimant started working in the Albany Pub across the road from the Respondent, which reduced his availability further. The Claimant told us that he was working around 30 hours a week at the Albany (although this had reduced to around 20 hours a week in the period prior to this hearing because the Claimant was concentrating on the litigation). Furthermore, the Respondent's busy times are the evenings of Thursday, Friday and Saturday night. The Respondent has a policy that those individuals who are prepared to work those hours get first choice when it comes to being allocated the "easy" shifts at lunchtimes. The Claimant indicated to the Respondent that he could offer some lunchtime shifts; however, he was not offering the busy shifts at weekends which meant that those who were prepared to work those shifts got priority when it came to the lunchtime shifts. Furthermore, in January 2016, when Mr Jozefczyk was hired as a bar manager, lunchtime shifts were covered by one of the bar managers from Monday to Thursday, which greatly reduced lunchtime shifts available. In addition, as complaints were received from customers about the Claimant's rudeness and at lunchtime the bar person was in sole charge of the bar, the Claimant was not given many lunchtime shifts to work (this was a further, if less significant, reason as to why there were fewer shifts available for the Claimant).

109. The individuals responsible for the rota for bar shifts were Mr Jozefczyk and Mr Flavigny. Mr Ellerker was not involved with this.

110. On 19 November 2016, the Claimant was in the bar at the Respondent at 3.20am having been in the bar drinking for 3 hours after his shift finished. All the lights were off and all staff and customers had left half an hour ago. The Duty Manager at the time, Mr Ilic, asked him to leave. The Claimant disobeyed him and remained. Mr Ilic asked him to leave several times over the course of the next hour but he refused. Eventually, he left at 4.45am after making some threats. Mr Ilic made a contemporaneous report of this.

111. On 1 December 2016, Mr Ellerker observed the Claimant having a heated discussion with Mr Ilic. Mr Ellerker stepped in to defuse the situation and politely advised the Claimant to leave to avoid any further confrontation. He did. Mr Ellerker then followed up the incident the following day with an email to explain the Respondent's position. The email, of 2 December 2016, states:-

> "… In order to avoid any further confrontation you should only come to ISH at the times you are rostered to work a bar shift. Please refrain from being on ISH premises at any other time. In addition to this, I would also ask you not to go into the main bar at the end of a shift and instead to leave the premises immediately. This will be in place until further notice.
>
> The reason for this is to prevent any more confrontation with other staff members. If you are not on site, then these conflicts, disagreements and arguments will not take place, which will be better for all of us.

Please adhere to this request so that we can avoid any further incidents. If you do not, it may result in disciplinary procedures."

112. As noted, the Claimant worked at the Albany Pub as well as at the Respondent, which was located across the street from the Respondent's premises. The Albany is one of the Respondent's competitors and as many of the Respondents' customers take alcoholic refreshment in the Albany prior to entering the Respondent's premises for a specific event (such as a music event), it is prudent that the Respondent keeps an eye on its competitor and useful to observe how busy it is, as it can sometimes indicate how many customers the Respondent might expect to have in attendance later on when customers come over for the event at the Respondent. Secondly, and as part of the terms and conditions of the Respondent's premises licence, the Respondent is obliged to protect the interests of its neighbours, specifically Park Crescent Mews East, a private residence immediately opposite the Albany. The Respondent therefore regularly patrols that area when it has events taking place. This is to make sure that none of their patrons are drinking or making a nuisance in the area. In order to get to the Mews, one has to walk down the road opposite the Albany. Therefore, for these reasons, staff are often in close proximity to the Albany Pub. The Respondent's security patrol carry out this task but Mr Ellerker himself also regularly does this patrol as it is his own interest as he is the responsible officer.

113. The Claimant has alleged that Mr Ellerker stared at him through the window of the Albany on one occasion (as a result of questions put to him in re-examination, the Claimant expanded his evidence to say that this had happened on other occasions as well). However, Mr Ellerker denies it. We find that, particularly in the light of our concerns regarding the reliability of the Claimant's evidence, it is likely that, whilst Mr Ellerker almost certainly passed by the Albany Pub at a time or times when the Claimant was working, he did not stare at the Claimant.

114. The Claimant submitted his claim form on 16 January 2017. Up until this point he had never at any stage raised allegations of race discrimination. Even in the claim form, whilst the Claimant has ticked the boxes for race and religious discrimination and made a reference to race and religious discrimination in the narrative, he does not set out the serious allegations of racial language which now form the basis of many of his allegations before this Tribunal.

115. It is only in response to the Respondent's solicitors request for Further and Better Particulars that, in his email of 2 May 2017, the Claimant first mentioned some of the very serious allegations of what would be overt race discrimination, including the comment "Ill get you later, you fucking nigger", that Mr Ellerker called him a "spook", that in response to these comments Ms Sutcliffe just laughed and said "but that's what you are".

116. Then, in response to the order for Further and Better Particulars following the preliminary hearing, the Claimant in a further email to the Respondent's solicitor of 16 May 2017 added several further previously unmentioned allegations of highly discriminatory racial language.

The Law

Direct discrimination and harassment (race and religion)

117. Under section 13(1) of the Equality Act 2010 (the Act), a person (A) discriminates against another person (B) if, because of a protected characteristic, A treats B less favourably than A treats or would treat others (direct discrimination).

118. Under section 26(1) of the Act, a person (A) harasses another person (B) if A engages in unwanted conduct related to a relevant protected characteristic and the conduct has the purpose or effect of violating B's dignity or creating an intimidating, hostile, degrading, humiliating or offensive environment for B.

119. In deciding whether conduct has the effect referred to above (but not the purpose referred to above), each of the following must be taken into account: the perception of B; the other circumstances of the case; and whether it is reasonable for the conduct to have that effect.

120. Race and religion are each protected characteristics in relation to both discrimination and harassment as referred to above.

121. For the purposes of the comparison required in relation to direct discrimination between B and an actual or hypothetical comparator, there must be no material difference between the circumstances relating to B and the comparator. By contrast, there is no requirement for such a comparison in establishing harassment.

122. Under sections 39(2) of the Act, an employer must not discriminate against an employee of his on various grounds, including subjecting him to a detriment. Under section 40(1) of the Act, an employer must not harass an employee of his. Where conduct constitutes harassment, it cannot also constitute a detriment as defined in the Act and therefore cannot be direct discrimination as well as harassment.

123. Where there are facts from which the tribunal could decide, in the absence of any other explanation, that the employer did contravene one of these provisions, and no such explanation is proven by the employer, we must hold that that provision was contravened.

Time limits

124. The Act provides that a complaint under the Act may not be brought after the end of the period of three months starting with the date of the act to which the complaint relates or such other period as the employment tribunal thinks just and equitable.

125. It further provides that conduct extending over a period is to be treated as done at the end of the period and that failure to do something is to be treated as occurring when the person in question decided on it.

126. In Hendricks v Commissioner of Police for the Metropolis [2003] IRLR 96 CA, the Court of Appeal stated that, in determining whether there was "an act extending over a period", as distinct from a succession of unconnected or isolated specific acts, for which time would begin to run from the date when each specific act was committed, the focus should be on the substance of the complaints that the employer was responsible for an ongoing situation or a continuing state of affairs. The concepts of policy, rule, practice, scheme or regime in the authorities were given as examples of when an act extends over a period. They should not be treated as the indicia of "an act extending over a period". The burden is on the Claimant to prove, either by direct evidence or by inference from primary facts, that alleged incidents of discrimination were linked to one another and were evidence of a continuing discriminatory state of affairs covered by the concept of "an act extending over a period".

127. As to whether it is just and equitable to extend time, it is for the Claimant to persuade the tribunal that it is just and equitable to do so and the exercise of the discretion is thus the exception rather than the rule. There is no presumption that time will be extended, see Robertson v Bexley Community Centre [2003] IRLR 434 CA.

Conclusions on the Issues

128. We make the following conclusions, applying the law to the facts found in relation to the agreed issues.

Race discrimination/harassment

Did Omar Ahmed say to the Claimant at work behind the bar "I'll get you later, you fucking nigger" on 25 September 2015?

129. This allegation is emphatically denied by Mr Ahmed. We note that the first time reference is made anywhere in the documentation to this allegation is in the Claimant's Further and Better Particulars dated 2 May 2016, some 19 months after this is alleged to have been said. The Claimant certainly did not raise a written grievance about it at the time, despite the obvious seriousness of such an incident if it had happened. Although the Claimant does appear

to have told "Gerry" at the time of the altercation at Tesco on 25 November 2017, there is no record or suggestion that he told anyone about such an obviously offensive racial slur as this. We accept Ms Chan's submission that it is inconceivable that, if this event occurred, the Claimant would not have sought to make a complaint about it in writing, whether to Mr Flavigny or someone else at the Respondent. The Claimant certainly did not hesitate after the "beer in glass" incident on 21 August 2016 to make a written complaint shortly afterwards dated 24 August 2016 and to follow this up with a formal grievance when mediation did not resolve matters to a satisfaction.

130. Furthermore, the Claimant did not mention the use of the term "nigger" on any of the seven occasions one would have expected him to raise it, namely: at the mediation meeting between himself and Mr Ahmed on 4 October 2016; in his grievance letter of 5 October 2016; in a further email to the Respondent of 10 October 2016; in the grievance hearing of 17 October 2016; in his appeal letter of 28 October 2016; in the grievance appeal hearing of 7 November 2016; and in his original ET1 claim form.

131. We therefore accept the Respondent's submission that this failure to mention the racial abuse contemporaneously or on any occasion where one would reasonably expect him to raise such a serious complaint about Mr Ahmed is because that it did not happen and that the Claimant has just invented this to add to his complaints some 19 months later, perhaps because he appreciated by then that the Employment Tribunal has no jurisdiction to entertain general "bullying" complaints not related to a protected characteristic.

132. None of the documents referred to contains an allegation of race discrimination, as opposed to general harassment. There is only one discussion of "discrimination" in the broader sense at the mediation hearing when the Claimant claims that not allowing him to use a glass instead of a plastic container constitutes "discrimination".

133. The Claimant has sought to explain the lack of reference in the written records to any suggestion of racial abuse, by saying that those minutes are inaccurate and/or have been altered. However, we have already found that the minutes were not inaccurate; rather they were extremely comprehensive, and involved three different meetings, with the minutes of the grievance and the appeal hearings taken by a professional minute taker. Furthermore, the chairs of those meetings absolutely deny that the minutes do not accurately reflect the content of the meeting and also deny that there were any discussions about the use of the term "nigger" in these meetings.

Did Mr Ahmed attack the Claimant at Tesco on the evening of 25 November 2015?

134. In relation to this allegation, the suggestion that the minutes were altered is again conveniently used by the Claimant whenever a document contradicts

an assertion that he has made. For example, the Claimant told the Tribunal that Mr Flavigny had agreed at that appeal hearing that the Claimant had played him the mobile phone recording of 25 September 2015 of the argument with Mr Ahmed. However, upon being taken to the appeal hearing minutes in which Mr Flavigny emphatically denied ever having heard the tape recording, the Claimant's explanation was again that the minutes were wrong. For the reasons already stated, the Claimant suggestions that these minutes are all fabricated is implausible and unsupported by any evidence and is rejected by the Tribunal.

135. As to the incident at Tesco, Mr Ahmed denied that he attacked the Claimant, and we have already found that he did not. The recording and the transcript back this up. Mr Anwyl, unsurprisingly, also came to the same conclusion when he listened to the tape. We have already referred in our findings of fact to further untruths/contradictions in the evidence of the Claimant in connection with this allegation, in particular as to whether or not he told Mr Ahmed that he was recording the conversation and his allegation that Mr Ahmed "followed him home".

Did Stuart Ellerker call the Claimant a "spook"?

136. Despite being asked to provide further details of this in terms of Further and Better Particulars, the Claimant never did so. In fact, the allegation was not in his witness statement and was not put to Mr Ellerker by Mr Nwabueze (it was in fact the Judge who had to put the allegation to Mr Ellerker). Mr Ellerker emphatically denied it. In the light of the fact that the Claimant has brought no evidence of this and Mr Ellerker denies it, we simply find that the comment was not made. Furthermore, we would add, that if such a racially offensive comment were made (and the Claimant in his email to the Respondent's solicitor of 16 May 2017 is himself emphatic that the word is an older word for the "N" word), it is again inconceivable that no complaint would have been raised by the Claimant at the time. Again, just as in relation to the first allegation above, we find that the allegation was simply made up by the Claimant at a later stage.

Did Mr Ellerker send a discriminatory email to the Claimant?

137. Whilst no evidence was led about this allegation and the allegedly discriminatory email was never specified, the Respondent assumed that the email in question was the email sent by Mr Ellerker to the Claimant on 2 December 2016, which we have quoted in our findings of fact. On a reading of that email there is clearly nothing discriminatory about it. The email simply sets out for the Claimant the Respondent's instruction to him based on his recent misconduct and failure to follow reasonable management requests, in particular in relation to Mr Ilic. As it is not a discriminatory email or related to race, this allegation is also not made out.

Did Mr Ellerker cause the Claimant to receive fewer shifts?

138. This allegation as pleaded fails from the start because Mr Ellerker is not responsible for the allocation of shifts; rather Mr Jozefczyk and Mr Flavigny are responsible for allocating shifts.

139. The Claimant did receive fewer shifts, however, from late 2016 onwards. However, the full reasons for this are set out above in our findings of fact. These reasons are clearly nothing whatsoever to do with the Claimant's race. This allegation therefore fails.

Did Mr Ellerker "stalk" the Claimant?

140. Again, it is assumed that this allegation is a reference to the Claimant's allegation that Mr Ellerker "stared" at him. However, we found in our findings of fact that Mr Ellerker did not stare at him. This allegation therefore fails.

141. Even if he had stared at him, there is no evidence that any such stare was anything whatsoever to do with the Claimant's race.

Did Carol Sutcliffe respond to the Claimant's allegation of racial abuse by saying "but that's what you are"?

142. This allegation was made for the first time in the further particulars contained in the Claimant's email to the Respondent's solicitor of 2 May 2017. The same points apply about the Claimant's failure to mention such a serious allegation of race discrimination and harassment earlier than May 2017 (and the Claimant, in evidence, was emphatic that what he meant by this allegation was that Ms Sutcliffe said this in relation to the alleged references to him as "nigger" and "spook", so this is again an allegation of the utmost seriousness). In particular, one would have expected him to raise it in his grievance appeal to Mr Anwyl (both in the appeal letter and at the appeal hearing), if it was supposed to have sent by Ms Sutcliffe. One would also reasonably expect it have been mentioned in the claim form.

143. In addition, the Claimant's account of Ms Sutcliffe's comment changes from the further particulars to his witness statement, as the statement says that "when I disclosed all of this abuse [i.e. the "N" word] to the management, they said that he has the right because he is the supervisor". That allegation, if it were true, would be similarly of the utmost seriousness. However, it is the fact that the account of the circumstances and Ms Sutcliffe's response to being told of the "nigger" insult (allegedly), is inconsistent even with the Claimant's own account. We accept Ms Chan's submission that this is indicative of the fact that the Claimant is simply inventing events as he goes along.

144. Finally, we accept her submission that it is implausible that any experienced human resources manager of a charitable organisation which prides itself on its multiculturalism, diversity and relationships with international students of all races and religions would make such an offensive racist comment. We therefore find that this comment was not made.

Did Mr Ahmed overload the Claimant with work?

145. The Claimant has produced no evidence of Mr Ahmed overloading him with work, nor even, in response to the order for Further and Better Particulars, specified in what respect Mr Ahmed is said to have done this. The allegation was not put to Mr Ahmed by Mr Nwabueze. When the Judge put it to Mr Ahmed, Mr Ahmed denied that he had overloaded the Claimant with work. Therefore, we find that this allegation is not made out and this complaint also fails.

146. We would also note that the allegation in itself appears potentially to be contradictory to the Claimant's other allegation that the Respondent did not give him enough work by not providing him with shifts.

Did the Respondent "change the rules" and "make the Claimant homeless" in that it had, for a time, provided him with paid accommodation, but at a certain point this was ended?

147. We have set out in our findings of fact above the reasons why the Respondent's rules in relation to staying at its premises changed. The maximum stay for non student visitors was 21 days. However, there had been no minimum "break" between stays such that one night away from the Respondent was sufficient to start another stay. In November 2016, this was changed such that a 21 day minimum break was imposed between stays, which reflected the norm at hostels. The Claimant himself acknowledged in evidence that the hostels that he had stayed at in the past had rules about the maximum number of nights one could stay and minimum times between stays, although these would change. The change in November 2016 was brought in to deter guests from effectively living in dormitories. It was applied to all guests. It was, therefore, nothing to do with the Claimant's race.

148. Furthermore, the Claimant cannot have been "caused to" become homeless by the Respondent, given that he was at liberty to reside in any other accommodation (whether hostel or longer term) in London. The Claimant gave evidence to the Tribunal that he had indeed stayed at other hostels. The Respondent did not, therefore, make him homeless.

Religious discrimination/harassment

Was the Claimant asked to remove a scarf which said "I love Jesus" by Mr Ahmed?

149. The Claimant was asked to remove a scarf by Mr Ahmed. However, Mr Ahmed did not realise whether or not the scarf had a logo stating "I love Jesus" on it. Therefore, he could not have asked the Claimant to remove the scarf because of that logo.

150. Furthermore, the Claimant was aware of the Respondent's uniform policy. Accessories such as scarves were not permitted. Mr Ahmed was therefore only enforcing the Respondent's uniform policy. His treatment of the Claimant was therefore not because of the Claimant's religion nor related to the Claimant's religion. These complaints therefore fail.

151. In summary, all of the allegations of discrimination/harassment fail.

Time Limits

152. The two allegations from 25 September 2015 and the allegation regarding the scarf are said to have taken place on occasions such that the claim in respect of them was presented way out of time. There are no successful in time acts of discrimination to which any of these allegations could be linked such as to produce a continuous course of conduct such as to bring them within time.

153. No good reason has been put forward by the Claimant as to why it would be just and equitable to extend time and the burden of proof is on him in this respect. We do not therefore consider it to be just and equitable to extend time. Therefore, in relation to these allegations, the Tribunal has no jurisdiction to hear them and they are dismissed.

Other conclusions

154. Furthermore, as we have already indicated, we consider that the allegations of racial language (the "N" word, "spook" and "but that's what you are") (coupled with the further allegations of similarly offensive language set out in the Claimant's email of 16 May 2017, which did not form part of the issues of this claim) were simply made up by the Claimant at a later stage, presumably because he realised that allegations of bullying on their own were not enough to form the basis of an Employment Tribunal claim.

155. We want also to address a few of the points raised by Mr Nwabueze in his submissions.

156. Mr Nwabueze submitted that the fact that the three page transcript of the 25 September 2015 recording was produced only on request on the morning of the second day of the hearing was a deliberate attempt to withhold vital evidence. Firstly, in terms of whether or not this was indeed vital evidence, the only purpose it served was to further confirm that no racist language was used during that interchange and that, contrary to the Claimant's allegation, Mr Ahmed did not assault the Claimant. Whilst Mr Nwabueze sought to place lots of emphasis on the offensive language which Mr Ahmed used, that did not assist in terms of the issues of the claim. In this respect, the transcript was not "material evidence".

157. In addition, the Claimant himself had the recording, which he himself had of course made so he was fully aware of the contents of it, regardless of the absence of the transcript. The Claimant himself, as was evident from the minutes of the various meetings, was very cagey about the transcript himself and clearly wondered if he was doing something wrong by taking that recording (for example from his equivocal response to how the recording was obtained when asked by Ms Sutcliffe and a further response as to needing to check legally if he could disclose it). The Respondent knew of the Claimant's concern and was also under the impression that it could not use a transcript that was illegally obtained without consent and so did not disclose it. However, the Claimant was fully aware that the Respondent had a transcript because it had told him. There was therefore no prejudice to the Claimant and this was not a deliberate attempt to withhold information.

158. Mr Nwabueze referred to an email of 2 February 2017 at page 132 of the bundle from Mr Flavigny to Ms Sutcliffe regarding the Claimant which contained a reference to a meeting he had with the Claimant that day and at which the Claimant made a tirade of allegations against him and others including, amongst other things, stating that he was being "discriminated" against and submitted that it showed that the Claimant was making allegations of discrimination. Firstly, the email records an encounter after the events which are the subject of this claim but, more importantly, the reference is not to race or religious discrimination but simply discrimination in general. There is still no reference to discriminatory treatment because of a protected characteristic.

159. Mr Nwabueze referred us to paragraph 14 of Ms Sutcliffe's statement in which Mr Ahmed was described as working as a "full time bar supervisor". He suggested that this was inconsistent with the Respondent's suggestion that he had always been on a zero hours contract and was denied promotion to a permanent position as a result of the contents of the recording of the 25 September 2015 incident. However, this was an allegation made in submissions and it was never put to Ms Sutcliffe as to what she meant by that. It could just as easily have been the fact that Mr Ahmed did tend to work full hours, notwithstanding that he was on a zero hours contract, particularly as he was a license holder who needed to be there a lot anyway. We therefore draw no inference from this, especially as it was never put to Ms Sutcliffe.

160. Mr Nwabueze also made the point that he thought that the Claimant was denied the opportunity to comment on the appeal meeting minutes because they were sent to him with the outcome letter, which was the final stage of the grievance process. Mr Anwyl did send the minutes with the outcome letter, which is not an uncommon practice. However, that in no way prevented the Claimant, had he wanted to, from reverting to Mr Anwyl if he thought the minutes were inaccurate; however he did not do so. In any event, this submission has no bearing on our findings in relation to the allegations of race/religious discrimination which we have set out above.

161. Therefore, for all of the above reasons, those complaints which are not dismissed because they are out of time fail.

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Employment Judge Baty
20 September 2017