Case Number: 3321028/2019

EMPLOYMENT TRIBUNALS

Claimant		**Respondent**
Mr Jakub Kolawa	**v**	(1) Great Bear Distribution Limited (2) Mr Katanganika Thom Nymienda

Heard at: Bury St Edmunds (by CVP)

On: 04, 05 and 21 May 2021
11 June 2021 (In Chambers – no parties present)

Before: Employment Judge Laidler

Members: Mr C Grant and Ms W Smith

Appearances

For the Claimant: Mr L Werenowski, Solicitor.

Assisted by an Interpreter: Ms M Maniak-Griffiths (Translation: Polish)

For the Respondent: Mr A MacPhail, Counsel.

RESERVED JUDGMENT

1. **The complaint of harassment on the grounds of sexual orientation against the second respondent was submitted outside the requisite time period. No evidence was advanced by the claimant as to why it would be just and equitable to extend time. The tribunal has no jurisdiction to determine the complaint which is dismissed.**

2. **As the complaint against the second respondent is dismissed, no liability can attach to the first respondent and all claims are dismissed.**

REASONS

1. The ET1 in this matter was received on the 30 July 2019 in which the claimant brought a complaint of harassment on the grounds of sexual orientation against the second respondent. He further claimed against the first respondent under section 109 Equality Act 2010 that it was liable as the employer of the second respondent for discriminatory acts carried out in the course of his employment.

2. The second respondent has not responded to the claim (as set out further below).

The Issues

3. When this matter was before Employment Judge Palmer on 14 October 2020 there was discussion about the position regarding the second respondent. The judge did not have the tribunal file and it was uncertain if the proceedings had been served upon the second respondent. An order had however been made that the first respondent release details of the second respondent's address. It can now be recorded that no response has ever been entered by him.

4. The judge noted at the hearing on 14 October that it was "possible" that in such circumstances a default judgement could be entered. It was however not entered at that hearing and has not been entered subsequently.

5. The judge specifically set out in his summary: -

> "(18) It may be necessary at the outset of the full merits hearing in this matter, for the tribunal to consider whether the claims against the second respondent are out of time, or whether they constitute acts continuing over a period of time presumably terminating on 17 January 2019 when the last incident occurred, or whether the tribunal should exercise its discretion to extend the time in respect of those claims against the second respondent. That may be something that will need to be dealt with at the sweep up preliminary hearing fixed for 6 April 2021, a month before the full merits hearing in this matter. It may be something to be dealt with at the outset of the full merits hearing.
>
> (19) that issue has not been before me today and I have heard no representations or submissions in respect of it."

6. The judge went on to note that the only application before him related to the claim against the first respondent and the fact that the act of dismissal constituted a failure by the first respondent to deal appropriately with the actions of the second respondent against the claimant. He made it clear he did not have enough information before him to deal with any out of time points against the second respondent.

7. The judge had a skeleton argument put forward by Mr Werenowski and as already noted the respondent was not present at that hearing. Reference

was made to that skeleton argument at this Hearing, but it was not before the tribunal. By email of the 28 May 2021 the claimant's solicitor forwarded it to the tribunal and copied it to the respondent. He had not been asked to do so. His email was not sent to the judge until the 15 July 2021 after which time the tribunal had concluded its deliberations. The skeleton argument has not been considered.

8. E J Palmer noted that the claimant was dismissed on 11 February 2019 and presented his ET1 on 30 July 2019. He calculated that the time for presentation of the claim expired on 10 June 2019 and therefore the claimant was a month and 20 days out of time.

9. As has been noted by counsel for the respondent appearing at this hearing the judge miscalculated that date. The claimant did not obtain any benefits from entering into ACAS Early Conciliation for one day on 25 July 2019 as by that date his claim was already out of time. The three months within which it should have been submitted (subject to the granting of any extension) was in fact 10 May and not June as stated above.

10. On what he heard however the judge determined that it was just and equitable to extend time in relation to the claim that the act of dismissal constituted a failure on behalf of the first respondent to adequately deal with the homophobic abuse suffered by the claimant.

11. There was detailed discussion about this at this Hearing. The claimant's solicitor accepted that such a claim had never been pleaded and that the sole issue for this tribunal in relation to the first respondent was whether it was liable for the acts of the second respondent pursuant to section 109 of the Equality Act 2010.

12. This tribunal however accepted the submissions made on behalf of the respondent that before it could even considered the section 109 point it had to determine whether there was harassment by the second respondent against the claimant and whether it was related to sexual orientation. Only if such harassment is found to have occurred does the point arise of liability by the first respondent and whether it can rely upon the defence in section 109.

13. There was then further discussion about whether the time point as against the second respondent remained to be determined. The claimant's solicitor stated that was not the impression he had on the day but when taken to the relevant paragraphs of the judges summary, which had been referred to above, he accepted that this tribunal did indeed still have to deal with whether the claim against the second respondent was in time and he would address it as to why it was in time.

14. At the end of his summary Employment Judge Palmer set out issues of fact to be determined and for the sake of completeness they are now set out below.

"The Issues of Fact against the Second Respondent

September 2018 to January 2019:

(32) The Second Respondent, without justification or provocation, said to the Claimant and his work colleagues Mr Stefan Bobkowski, *"what's up gay boys?"* and / or said, *"gays"* or *"poofs"* to both the Claimant and Mr Bobkowski.

(33) The Second Respondent spoke in a provocative face to face manner and enjoyed the offence he was causing; such comments were not made in jest.

(34) These comments occurred regularly at the Respondent's warehouse picking area when the Second Respondent was in his 'reach truck'.

(35) It is the Claimant's case that these slurs occurred on no less than a total of 60 separate occasions during this period. There is no further particularity provided by the Claimant.

(36) The Claimant did not report such conduct above to the First Respondent as he did not believe that the First Respondent's employees and the Claimant's Line Manager would take such complaints seriously.

17 January 2019:

(37) At 2155 hours when the Claimant, Mr Stefan Bobkowski and other employees at the First Respondent were signing out after completing their shift, the Second Respondent barged in front of the Claimant and attempted to sign out from work without queueing or properly awaiting his turn to do so.

(38) The Claimant objected to this, but other than speaking under his breath, the Second Respondent ignored the Claimant.

(39) Mr Stefan Bobkowski also voiced his objection to the Second Respondent but was also ignored.

(40) The Claimant refused to be treated in this manner and approached the key pad being used by the Second Respondent and pressed the Home button.

(41) The Second Respondent reacted violently and threatened the Claimant with physical violence if he did that again.

(42) On the Second Respondent resuming to type in his pass code to sign out of work, the Claimant pressed the Home key button again.

(43) The Second Respondent then physically attacked the Claimant, including slapping him hard in the face three times resulting in the Claimant hitting his head against a wall as he was being physically assaulted by the Second Respondent.

(44) The Claimant did not retaliate or fight with the Second Respondent at all. Such an attack was, the Claimant avers, a homophobic motivated attack in view of the constant homophobic words and insults used by the

Second Respondent against the Claimant and Mr Bobkowski for the previous four and a half months.

(45) Such an attack by the Second Respondent against the Claimant was witnessed by:

45.1 Mr Stefan Bobkowski; and

45.2 Mr Harry Pettifer, Shift Manager.

(46) The Claimant immediately wished to call the Police after such an attack so that evidence of the Claimant's injuries could be properly recorded but was dissuaded from doing so by employees of the First Respondent.

(47) The First Respondent acting through its employees, did not offer the Claimant any first aid despite it being clear that he had just endured a physical assault by the Second Respondent and had been hurt.

(48) The Second Respondent was allowed to leave the First Respondent's premises unchallenged.

18 January 2019:

(49) The Claimant returned home and later vomited that night and had a reddened bruised face and head. The Claimant's injuries were such that he could not return to work or participate with ease in any investigation until such time as he had recovered and knew that the Second Respondent had been dismissed by the First Respondent.

11 February 2019:

(50) The Claimant was initially suspended from work and then summarily dismissed by the First Respondent."

Additional documents and witness statements sought to be relied upon by the respondent.

15. On the first morning of this Hearing the tribunal had to deal with the issue of the respondent wishing to rely on additional documents and redrafted statements of its two main witnesses Steve Candelin and Adrian Ferrante. It also wished to rely upon a new statement of Harry Pettifer submitting that it was needed to answer an allegation that appeared for the first time in the claimant's witness statement. The additional documents included witness statements taken during the investigation prior to the claimant's dismissal but not previously disclosed.

16. Counsel explained that he had only become involved the previous Wednesday and in having a conference with his clients it was realised that further documentation was required. His instructing solicitors however had been instructed just prior to the last preliminary hearing heard on 6 April 2021 by which time witness statements had already been

exchanged on 1 March 2021. Counsel was not clear why the claimant's representative had had to chase his clients but believed it might have been due to the use either by him or the Employment Tribunal of an incorrect address.

17. The original witness statements had been prepared when the respondent was in effect acting in person and it was suggested were not materially different to the new statements. The new statements set out matters in a more appropriate chronological order rather than just addressing allegations in the ET1 and nothing in them would take the claimant and his representative by surprise. One striking matter they deal with is management training regarding equal opportunities.

18. The additional documents the respondent wished to rely upon were initially provided as appendices to the new witness statements but had by the time of this Hearing had been put in an additional bundle of 58 pages by the respondent. When solicitors were instructed just prior to the last preliminary hearing this led to more disclosure. It was acknowledged it had been late because it took some time to collate although Counsel was not involved in that.

19. Counsel had a conference with his client the previous Thursday to this hearing and during that he instructed that a further search for documents be made and that gave rise to further documents. They were obliged to disclose these and therefore did although Counsel recognised it was late. It seemed to the respondent that the claimant must have a lot of this material anyway.

20. Dealing with the documents in the additional document list by reference to the number of the document Counsel submitted as follows: -

    1-6 – The respondent has now attached all the witness statements that it believes were attached to the invite to the disciplinary hearing and only a couple of these were in the claimant's bundle. The respondent believes the claimant had all of these and therefore there is no prejudice.

    7-8 – investigation notes of the claimant and the disciplinary hearing invite. The respondent believes these would have gone with the witness statements to the claimant at the time so there is no prejudice.

    9-11 – the claimant would not have had this documentation about disciplinary action taken against the second respondent. This is relatively brief, and the claimant's representative has had sufficient time to consider it.

    12-14 – it is accepted the claimant would not have had these documents but there are no surprises there. Included is an electronic confirmation referred to as 'onboarding sign off' which the respondent states shows that the claimant received the relevant policies when he started employment. He knows that he did, and this will not be news to him.

15-16 – the claimant's appeal. The claimant had the appeal outcome letter, and the respondent would have thought but cannot say definitely if he got the minutes so it was accepted that these may be new to him.

18 – Ian Melling investigation statements - the respondent does not think the claimant would have seen these before.

19-20 – further witness statements taken January 2019 - the respondent thought that the claimant had these.

21 – transcript of text messages – these are same texts as in the claimant's bundle but some at the end are new. The respondent conceded it would not make much difference if it was not in the bundle.

22 – Notice above clock out machine after incident - this is new to the claimant.

21. The respondent submitted that there is not a lot that is new to the claimant or will take him by surprise. The documentation is highly relevant. This includes what the second respondent had to say at his disciplinary hearing. It is fundamental otherwise the tribunal will be hearing the case without a significant part of the evidence.

22. Counsel stated he did not have a good explanation for the delay and cannot say there is a good one. That is only one factor and is far outweighed by the relevance of these documents. The employment tribunal needs to have sight of the full picture. There has been time for the claimant's representative to get up to speed on these documents. Representatives are used to dealing with matters received late and these were disclosed prior to the date of the hearing. The claimant will have time to consider the documents while the tribunal is reading.

23. The claimant's representative is in essence saying that the material should not be allowed in and the full merits hearing should proceed. That would not however be in accordance with the overriding objective. The matters now sought to be relied upon go to the heart of the issues and the reason for dismissal. They also deal with what happened on the day of the dismissal. It would not be in accordance with the overriding objective to refuse leave to allow the witness statements in. Mr Pettifer's statement is not long. The documents do need to be read and it would not be appropriate to refuse the respondent permission to rely upon them.

Objections on behalf of the claimant

24. The claimant's representative objected to the new witness statements and documents being allowed to be relied upon. He had already put his arguments in writing in emails of the 29 & 30 April 2021 and expanded upon those at the Hearing orally. He had been involved from the beginning

of the case and submitted that the first respondent had been late and disruptive in the matter.

25. At the preliminary hearing on 14 October 2020 the Employment Judge informed the claimant's representative that the respondent had made an application to adjourn. He tried to contact the respondent's representative but with no success. The Employment Judge went ahead and made clear directions for the future conduct of the matter.

26. The first respondent ignored the claimant's representative's emails about the list of documents and the preparation of the bundle. The claimant's representative had to prepare the bundle. He submitted that the respondent is a large organisation and would have had access to solicitors if it needed them. He suggested that it also appeared from the ET3 that Rachel Shinton, who had completed it for the respondent had some legal knowledge. It is a matter for the respondent as to when it chose to instruct legal representatives.

27. The claimant's representative received no response to his bundle and no request to add documents to it and that was served in November 2020. He does not know anything about an incorrect email address. Witness statements were supposed to be exchanged on 16 December, but the claimant's solicitor had not wanted to give the respondent's his witness statement so that they had an advantage. He eventually got a call from Miss Shinton and they agreed an exchange date of 1 March 2021. Witness statements were then exchanged.

28. The preliminary hearing on 6 April 2021 was a "catch up" hearing to ensure orders had been complied with. On 1 April the claimant's solicitor received an email advising that Ellis Whitham had been instructed. They are not believed to be a firm of solicitors although they do employ solicitors. The respondent was represented by a Mr McDevitt of Counsel at the hearing on 6 April 2021. No application was made on behalf of the respondent and no notification that there was an issue about witness statements or documents until last Thursday. There is no evidence that they could not provide the documents when ordered to. The claimant's solicitor had received approximately 50 new pages and two new witness statements.

29. At the end of Friday, 29 April a further email was sent adding additional documents. Another witness statement was sent on Saturday, 1 May forcing the claimant's solicitor to work during the weekend. It was obvious that Mr Pettifer could have given a witness statement last year. Despite all of the claimant's solicitors' efforts to get the case back on track the first respondent would not respond. He therefore was bound to object to the way that the first respondent had been dealing with the case and the way in which they had not furthered the overriding objective.

30. The document which appears at page 174 of the additional documents the respondent wishes to rely upon headed "on boarding details" is a very

important document. In relation to the Equal Opportunity and Dignity at Work policy the claimant says that he did not sign for it. There is no email saying it was sent. His evidence will be he only received it with the disciplinary hearing documents in January 2019. He is taken by surprise by this document and there was nothing stopping the respondent complying with the orders to do a list of documents last November. Despite having legal representation since 1 April, they left it until the last working day before the hearing to try and slip these documents in. There is significant prejudice to the claimant as there is no proof that the documents were given to him. It is highly prejudicial and should not be in the bundle.

31. There was a duty on the first respondent to comply with the orders and if they have failed to do so they should not be given another opportunity. To put these documents in so late is wrong and should not be permitted. Orders should be complied with and not breached.

32. In relation to other documents whether they will assist matters or not they will enlarge the time needed to hear the case. This case has only been listed for two days to include the tribunal's deliberations and these late documents are bound to expand the matter. If it is not dealt with in the two days, the claimant will be prejudiced. Any difficulties for the respondent are entirely of its making. One hearing they did not even attend. It is a large company with access to lawyers and the claimant as an individual has managed to comply with the orders that were made.

The tribunal's decision on documents and late witness statements

33. The ET1 in this matter was received on 30 July 2019. There was a preliminary hearing by telephone on 6 April 2020 during the first national lockdown. It was adjourned to give the claimant's representative time to obtain medical evidence relied upon in support of his contention that the claimant should be given an extension of time within which to submit the claim. At the subsequent hearing on 14 October 2020 the respondent did not attend and was not represented. There was no real explanation as to why.

34. The claimant sent documents to the respondent on 26 November 2020 and the tribunal saw emails from the claimant's representative trying to engage with the respondent but without success. Eventually 1 March 2021 was agreed as the date for the exchange of witness statements. The respondent was therefore well aware of the allegations made by the claimant. There was no application made by it at the hearing on 6 April 2021 for leave to rely upon additional witness statements or to rely on new documents. In fact, it was actually said that no further orders were needed, and the matter was ready for trial.

35. Despite that the respondent did not disclose additional documents until Thursday and Friday of last week and another witness statement on Saturday. The tribunal must accept the submissions made on behalf of the

claimant that these documents and witness statements should not be allowed to be relied upon due to the breach by the respondent of all of the tribunal orders. There will be considerable disadvantage to the claimant who has prepared based on the information that had been disclosed and there has been no real explanation for the delay.

36. The respondent's counsel has said that the documents arose following a conference with him last week, but the fact is that previous counsel had been instructed for the 6 April 2021 preliminary hearing. Whilst it may be for the respondent to decide if and when to instruct a legal representative if it chooses not to do so it is still incumbent on it to deal with the proceedings. Many parties do that yet still comply with tribunal orders. The respondent will be limited to relying upon the original witness statements of Mr Candelin and Mr Ferrante and the documents already in the tribunal bundle. It will not be permitted to rely on the witness statement of Mr Pettifer and the newly drafted witness statements of Messrs Ferrante and Candelin.

37. The tribunal heard from the claimant and from Stefan Bobkowski on his behalf. The claimant gave his evidence through an interpreter, although it was quite clear and he accepted that he had a good understanding of English, sometimes answering in English.

38. For the respondent the tribunal heard from Mr Steve Candelin and Mr Adrian Ferrante (relying solely on the first witness statements produced by them and not the new ones recently served).

39. The tribunal had a bundle of documents of approximately 150 pages (as the new documents the respondent sought to rely upon were excluded).

40. From the evidence heard the tribunal finds the following facts.

The Facts

41. The claimant was employed by the first respondent as a Warehouse Picker/PPT Operative at its Kettering Depot from 9 July 2018 to the date of his summary dismissal on 11 February 2019.

42. The following policies were applicable to the claimant's employment: -

<u>Disciplinary Policy and Procedure</u>

43. Under the policy the first respondent agreed not to take any formal disciplinary action without having first carried out a prompt investigation and then having given the employee a letter inviting him or her to attend a disciplinary hearing which also set out the basis upon which the company

contemplated taking action and warning the employee of the possible outcome of the hearing including where appropriate dismissal.

44. The Policy set out a non-exhaustive list of examples of gross misconduct which would normally result in dismissal without notice or payment in lieu.

45. The respondent also had an Equal Opportunities and Dignity at Work Policy stating it was committed to providing equal opportunities in employment and to avoiding unlawful discrimination in employment and against customers. This gave examples of inappropriate behaviour and explained the nature of harassment and bullying. It provided that employees who felt they were the victim of harassment or bullying could raise the issue with Human Resources. The matter would be treated in the strictest confidence. Guidance would be given on the range of options available, and the objective would be to stop any harassment as swiftly as possible and to prevent its recurrence. If a formal resolution was not possible then the employee may make a formal complaint to their manager. This would be investigated promptly and impartially usually within 5 working days insofar as practicable in confidence. The policy set out both the responsibilities of employees and those of managers. The employees had a responsibility to adhere to the policy in their relationship with other employees, customers, and suppliers, and to notify the appropriate manager of incidents of harassment or bullying occurred or they witnessed another individual being subjected to such.

<u>Comments allegedly made by the second respondent – September 2018 to January 2019</u>

46. As set out in the list of issues above it is the claimant's case the second respondent said to him and his colleague Mr Bobkowski "what's up gay boys?" and/or called them "gays" and/or "poofs". The claimant alleges this happened on at least 60 separate occasions but did not report it.

47. The tribunal does not find the claimant's evidence consistent about what was being said and the number of times it happened. It does not dispute that some comments may have been made by the second respondent (particularly as he has not taken part in these proceedings to deny the allegation). The tribunal however does not accept it as credible that this occurred on at least 60 occasions. For that to have occurred at least 60 times during what was a relatively short period of less than 5 months it would have been happening consistently. The tribunal does not accept that neither the claimant nor Mr Bobkowski would have complained if it had been happening with that regularity. Also, that it would not have been made known by for example other work colleagues to the management.

48. The tribunal found the respondent's witnesses to be most credible. They had considerable experience within the organisation and knew the place very well. Mr Candelin explained how he had worked his way up within

the organisation and had been General Manager since 1999. The tribunal accepts that he had a considerable shop floor presence. Employees could then catch up with him. He had an open-door policy and in particular invited staff to meet with him on a Friday afternoon in his office. There was plenty of opportunity for the claimant or Mr Bobkowski or other employees if they had heard such comments to raise it with him. The Friday afternoon surgery was timed to be 1 hour at the beginning of the claimant's shift so it would have been possible for him to attend.

49. There are other inconsistencies with the claimant's evidence which go to his lack of credibility so far as the tribunal is concerned. He stated in his witness statement that in about November/December 2018 he had another incident with a different employee, a Romanian called Dragos. He had allegedly called the claimant an "f…ing pussy" whilst at work in the warehouse. The claimant reported this to his line manager Harry Pettifer but alleges nothing was done. He states there was no investigation or other meeting, and it was "brushed under the carpet and forgotten about by Mr Pettifer". He stated this taught him that raising a grievance was a waste of time as the first respondent was simply uninterested. He acknowledges however that it was a one-off incident and Dragos did not bother him again. He is not therefore able to say whether that was as a result of Mr Pettifer taking some action.

50. The claimant was cross examined about his interaction with Mr Pettifer. Initially he stated that he did raise the homophobic comments by the second respondent verbally with Mr Pettifer. He stated this was in November/December at the same time as he spoke to Mr Pettifer about Dragos. When taken to his witness statement the claimant became confused and asked for the question to repeated stating he had not understood it. The tribunal does not accept that this was anything to do with language issues but because he had realised the inconsistencies in his evidence. He then said he had spoken to shift manager Mr Pettifer and he did not do anything to resolve the issue. He was taken to his particulars of claim seen in the bundle at page 25 where he stated at the top of the page that he did not know how to report the conduct and did not in any event believe that the respondent's employees or his line manager would take such complaints seriously. It was put to him that his assertion now that he had spoken to Mr Pettifer contradicted what was in his ET1. To this the claimant answered that he only knew what to do when he had a problem that he needed to speak to Mr Pettifer, and he did that, but he did not do anything to help. When it was again put to him whether he was now saying contrary to his witness statement that he also spoke to Mr Pettifer about the second respondent when he spoke to him about Dragos the claimant said no he was not. He went to talk to Mr Pettifer about the Dragos matter and the fact that he did not do anything about it taught him a lesson and that he would not do anything about the homophobic remarks. He only complained about Dragos and not the second respondent. He accepted he had never complained about the second respondent. The incident about Dragos told him that the respondent would not do anything about it if he complained.

51. This therefore means that on the claimant's own evidence the homophobic abuse from the second respondent had started in September but even though he went to talk to his line manager in November/December about another homophobic insult he did not then raise the matter of the second respondent. This leads the tribunal to the conclusion that although probably something was said by the second respondent of a homophobic nature, it was not as often nor as upsetting to the claimant as he has alleged.

52. There were other inconsistencies in the claimant's evidence that the tribunal has taken into account. He confirmed at the outset of the hearing that he had a good understanding of English but would appreciate the assistance of the interpreter when being cross examined. He confirmed he did not need her to interpret at the outset of the hearing when the tribunal was dealing with case management issues. He sometimes answered the questions in cross examination in English. He confirmed that although his solicitor had helped with grammar in his witness statement he understood it when read it in English. Not withstanding this the claimant purported not to understand when counsel asked him about HR and/or Personnel. In re examination he did acknowledge he knew what HR was. This did not assist with his credibility.

53. It was suggested by the respondent that the second respondent had encouraged the claimant and other colleagues to call him 'Mr Chocolate'. Both the claimant and his witness Mr Bobkowski acknowledged that was what he called himself but stated they never called him that and the tribunal accepts that evidence.

The incident on 17 January 2019.

54. On 17 January 2019 an altercation took place between the claimant and the second respondent. An investigation took place into what occurred which revealed that the second respondent had priority in the queue that evening as he had a green exit light issued and the claimant had a red light. The claimant denies knowing that the second respondent had a green light. The claimant asserts they had a system so that when you press the button and had a red light you had to stand in the queue to be searched. The claimant had a red light and was searched. The second respondent stood in the queue to go to the machine and enter a code and leave work. The claimant alleges that he jumped the queue.

55. The claimant's own witness at this hearing stated in his investigative interview seen in the bundle at page 107 that "J went first and Tom was behind him. Tom got a green light and J got searched. Tom cut in front of J and jumped the queue. I remember he should be behind J." He went on that the second respondent wanted to clock out and the claimant pressed the home button. The second respondent said to the claimant "Do that again and I will slap you". The second respondent tried to clock out again

and again the claimant pressed the home button. At that point Stefan states that the second respondent slapped the claimant twice with his hand (not his fist) and security pulled them apart. The claimant did not dispute that he had pressed the home button twice after being warned by the second respondent not to do so.

56. Stefan's evidence was clear that it was an open hand slap. The claimant disputed that and stated he was hit with a fist.

57. Following investigation and his disciplinary hearing the claimant was dismissed for gross misconduct. Mr Ferrante believed that it constituted a breach of the Equal Opportunities and Dignity at Work Policy on the basis that the claimant had obstructed the second respondent from clocking out on that evening.

58. It was only during the investigation that the claimant stated the second respondent had called him homophobic names. However, the tribunal has seen no evidence that there were any homophobic comments on the 17 January 2019. In a letter he wrote dated the 5 February 2019, with the help he stated of online translation, he referred to the comments as 'racially aggravated' which he acknowledged in cross examination was a mistake.

59. The dismissal was confirmed to the claimant in a letter dated 11 February 2019 from Mr Ferrante. The claimant had admitted to him that he had prevented the second respondent more than once from clocking out. The investigation had shown that the second respondent had priority over the claimant in the queue to leave. He considered the claimant's conduct provocation. He had found no evidence that the second respondent's actions were due to any racial or homophobic motivation. The claimant had at no time accepted responsibility for his actions or shown any remorse or offered an apology for his behaviour. The respondent had a duty of care to its employees and an obligation to report to the customer, the reasons for any employee disputes. This type of behaviour could put the reputation of the respondent at risk and they could not tolerate this level of misconduct. He had therefore decided to terminate the claimant's employment.

60. The claimant appealed the decision in a letter of the 21 February 2019 which the claimant confirmed he had written himself. His focus was that he was the victim and whether he provoked or not he should not have been hit and consequently not dismissed.

61. The appeal was heard by Steve Candelin. The tribunal accepts his evidence that he has no recollection of the claimant saying that the incident was related to homophobic abuse. All the claimant's focus was on the assault and that he had been struck and had not provoked the situation. Mr Canelin recalled the claimant being very passionate about that and did not have any recollection of name calling being discussed.

62. Having reviewed the investigation and the action taken Mr Candelin was satisfied that there had been provocation by the claimant in the run up to the incident and upheld the decision to dismiss.

Relevant Law

63. Section 26 Equality Act 2010:

> 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.
>
> (5) The relevant protected characteristics are—
>
> age;
> disability;
> gender reassignment;
> race;
> religion or belief;
> sex;
> sexual orientation.

64. In Richmond Pharmacology v Dhaliwal [2009] ICR 724 the EAT emphasised that it was necessary for the tribunal to address each of the following:

- Unwanted conduct
- That it had the proscribed effect
- That it related to a relevant protected characteristic.

65. Guidance is given in the Code of Practice on Employment (2011) at Chapter 7. 'Unwanted conduct' covers a wide range of behaviour including 'mimicry, jokes and pranks' (7.7) The word 'unwanted' is said to have essentially the same meaning as 'unwelcome' or 'uninvited'.

66. The Code makes it clear that the conduct can be related to the worker's own protected characteristic or 'any connection with a protected characteristic', whether that worker has that protected characteristic themselves. This includes situations where the worker is wrongly perceived as having the protected characteristic.

67. Section 109 of the Equality Act 2010 provides: -

> "(1) anything done by a person (A) in the course of A's employment must be treated as also done by the employer…
>
> (3) it does not matter whether that thing is done with the employers or principles knowledge or approval
>
> (4) in proceedings against A's employer (B) in respect of anything alleged to have been done by A in the course of A's employment it is a defence for B to show that B took all reasonable steps to prevent A -
>
> (a) from doing that thing, and
>
> (b) from doing anything of that description."

68. The EHRC Code of Practice on Employment (2011) indicates as follows:-

> "10.51 An employer would be considered to have taken all reasonable steps if there were no further steps that they could have been expected to take. In deciding whether a step is reasonable, an employer should consider its likely effect on whether an alternative step could be more effective. However, as step does not have to be effective to be reasonable.
>
> 10.52 reasonable steps might include:
>
> Implementing an equality policy;
>
> Ensuring that workers are aware of the policy;
>
> Providing equal opportunities training;
>
> Reviewing the equality policy as appropriate; and
>
> Dealing effectively with employee complaints."

69. The EAT has issued guidance in the case of Canniffe v East Riding of Yorkshire Council [2000] IRLR 555 as to the approach that Tribunals

should take in determining whether an employer has satisfied the reasonable steps defence. It should identify: -

> "First, whether there were any preventative steps taken by the employer, and
>
> Secondly, whether there were any further preventative steps that the employer could have taken that were reasonably practicable."

70. The tribunal may also wish to consider whether equal opportunities training delivered some while before the alleged act of discrimination but not followed up upon was likely to meet the reasonable steps defence.

71. In Croft v Royal Mail Group plc [2003] ICR 1425 the Court of Appeal accepted that it was permissible to take into account the extent of the difference, if any, which the action contended for by the complainant was likely to have made. Steps which require time, trouble and expense may not be reasonable steps if, on assessment, they are likely to achieve nothing.

Conclusions

Limitation

72. As set out at the outset of these reasons the tribunal was satisfied that it was still a matter for it as to whether the claims against the second respondent were in time. This was not considered by Employment Judge Palmer as was clear from his decision that has been referred to above.

73. There has been no evidence put before this tribunal from the claimant as to why it would be just and equitable to extend time and the tribunal cannot therefore find that time should be extended. The complaint therefore of discrimination against the second respondent is out of time and must be dismissed.

74. This tribunal is not bound by the conclusions of E J Palmer in relation to the claim against the first respondent. That was in fact not a claim being brought by the claimant in any event and the primary limitation date had been incorrectly calculated.

75. The tribunal has concluded that there was no connection between homophobic comments that had been made by the second respondent and the events which took place on 17 January 2019. There was nothing from the claimant's own witness that it was so related. The claimant had provoked the second respondent. It was not part of any ongoing harassment and there was certainly no reference to any homophobic name calling at that time. That means therefore that the last act would be prior to that date which makes the claim even further out of time.

76. With regard to the alleged homophobic comments, the tribunal is satisfied from the evidence that the claimant was called names by the second respondent but not the number of times that he alleges, and the tribunal does not accept they had the adverse impact upon him as alleged. He did not complain about it and had every opportunity to do so. In his appeal document he even stated that his dismissal had been "racially aggravated" and gave no credible explanation as to why he had used that term.

77. The tribunal does not accept that the name calling had the effects upon the claimant as set out in s.26(1) (b) of the Equality Act as if they had then the claimant would have complained. Section 26(4) EA makes it clear that in determining this question the tribunal must take into account the perception of the claimant, the circumstances of the case and whether It was reasonable for the conduct to have that effect. The claimant was inconsistent in his evidence about complaining about the second respondent. He tried to lead the tribunal to believe that he had complained. Then he changed his evidence to only complaining about Dragos. Then that as 'nothing happened' about Dragos this led him not to complain about the second respondent. None of this was credible and was in some respects misleading. As a result the tribunal concludes that the name calling, which it must acknowledge was related to the claimant's sexual orientation did not have the purpose or effect of violating his dignity or creating a hostile environment.

78. The tribunal does not find that the incident on 17 January 2019 was related to the claimant's sexual orientation. It occurred due to provocation by the claimant. There is no evidence that any homophobic words were used by the second respondent or that it was part of a pattern of behaviour by the second respondent of harassment towards the claimant. The reason the assault occurred was because the claimant provoked the second respondent. It did not amount to harassment contrary to the Equality Act.

79. If the tribunal had found harassment it would have found that the respondent had complied with its obligations and is entitled to rely on the defence set out in s.109 of the Equality Act 2010.

80. The tribunal found the respondent's witnesses particularly Mr Candelin to be credible witnesses. He was often on the shopfloor and available to employees. He operated an open-door policy.

81. The respondent's policies are available online which they need to do so that they are constantly updated. It is much more commonplace to train the managers and rely on self-learning and self-teaching by the employees. As the industrial jury this tribunal knows that knowledge comes more from a link to reading documents themselves rather than being sent a hard copy.

82. The claimant knew how to complain as he reported Dragos to Mr Pettifer. He did not complain about the second respondent as the alleged

harassment was not occurring as often as the claimant now alleges and it was not something that caused him the level of concern, he now states. His evidence in relation to reporting was inconsistent.

83. It follows that as the complaint against the second respondent is dismissed as out of time, no liability can attach to the first respondent. All complaints are dismissed.

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Employment Judge Laidler

Date: 28 July 2021

Sent to the parties on: …4 August 2021

.....THY
For the Tribunal Office