

# THE INDUSTRIAL TRIBUNALS

CASE REF: 390/19

**CLAIMANT:** Carlos Rafael Mujia-Zambrana

**RESPONDENTS:** Citybus Limited

## DECISION

The decision of the tribunal is that the claimant's claims of racial discrimination and harassment are dismissed on the basis that these claims were brought outside the three month time limit and the tribunal is not satisfied that it is just and equitable to extend time.

### Constitution of Tribunal:

**Employment Judge:** Employment Judge Wimpres

**Members:** Mr Murtagh  
Mr McCreight

### Appearances:

The claimant was unrepresented and appeared in person.

The respondent represented by Mr Sean Doherty Barrister at Law instructed by Carson McDowell LLP Solicitors.

### Sources of Evidence

1. The tribunal received witness statements from the claimant, Mr Michael Dornan, Mr Chris McCullough and Mrs Jana Rabikova and heard oral evidence from them by way of cross-examination. The tribunal also received a bundle of documents together with one additional document, a note made by Mr Dornan, which was produced in the course of the hearing.

### The Claim and the Response

2. The claimant complained in his claim form that he had been subjected to racial comments and remarks by Inspector McCullough over a period of 18-24 months. Specifically, the claimant alleged as follows: - "In June 2017 while I was working Inspector McCullough made a comment about me needing a work permit soon like the rest of the foreigners, or soon it will be no foreigners in this country and you would have to leave. In asking me about political unrest of Spain saying that I will be a foreigner here and in Spain or why the colour of my skin wouldn't change

coming back from Holidays. At the time these comments were made I tried to ignore them but in the last 5 months the attitudes of Mr McCullough changed for the worst in the month of August this year after two incidents in work I raised my concerns with management and lodged a formal complaint of harassment. I had a meeting with management on three occasions and in every single one I was told by the manager that she knew that Inspector McCullough from before within the company and he wouldn't be like that but she would interview myself and Mr McCullough and try to get a solution to my complaint. After all interviews were finished I was told by the manager literally that after interviewing Mr McCullough that all the comments were made in a bit of a banter and were light-hearted. My response was that I felt humiliated and never had any social interaction with Mr McCullough and I didn't think of those comments as a banter and I was not happy with all the situation. The manager's response was that although Mr McCullough says he has nothing to apologise for because all those comments were just that banter and light-hearted. At that point I said to the manager that I was going to take my case further and only the management contact HR and they again interviewed myself and Mr McCullough and after four weeks they said that they have no witnesses or evidence to substantiate this and why not raised at the time. At the last two meetings with management I had a Trade Union representative with me and in both meetings it was made clear that Mr McCullough was willing to apologise for those comments made before. Yet in the letter from HR they deny anything was said." The claim form is dated 23 November 2018 and was received in the tribunal office on 29 November 2018.

3. In its response the respondent denied that the claimant had been discriminated against on the grounds of his race and that if it was found that any of its employees had discriminated against the claimant the respondent would contend that it took all reasonable steps to prevent them from so doing. The response then went on to set out in some detail what occurred during the grievance process and concluded by denying the specific allegations made against Inspector McCullough or that Mrs Rabikova told the claimant that "all the comments were made in a bit of a banter and were light hearted." According to the response Inspector McCullough had a good working relationship with the claimant and that he had explained to Mrs Rabikova that any discussion that he would have had with the claimant outside the context of their working relationship would have been done in good spirit.
4. In his replies to a notice for additional information the claimant stated that his race was Latin American. The specific allegations of racial discrimination against Inspector McCullough were described as follows:

### **Direct Race Discrimination**

Around June 2017 - "Now that this country is leaving the EU you are going to need a work permit because you are a foreigner." This comment was made outside the ticket office in the Short Strand Depot. No other people were around and the claimant did not report the incident.

### **Specific Allegations**

In June 2017 - Inspector McCullough said in the Short Strand Depot – "Soon all the foreigners will be out of here and you are going to need a work permit". There were

no witnesses and the claimant did not raise a formal complaint.

Summer time 2018 - outside the ticket office in the Short Stand Depot Inspector McCullough said – “Now that all those troubles in Barcelona and all over Spain soon you will be a refugee”. There were no witnesses and the claimant did not raise a formal complaint.

## **THE ISSUES**

5. Two case management discussions took place in advance of this hearing. In addition, there was a hearing to determine whether the claimant should be permitted to amend his claim form to include a claim of victimisation and to add Inspector McCullough as a respondent. The application to amend was refused. A draft list of legal and factual issues was appended to the record of a Case Management Discussion on 28 June 2019. It was not agreed between the parties but we are content to adopt it for the purposes of this hearing together with time limit issues which emerged in the course of the claimant’s cross-examination. The issues are as follows:

### **Legal Issues**

#### **Discrimination**

- (i) Did the respondent subject the claimant to less favourable treatment on the grounds of his race contrary to Article 3 of the Race Relations (Northern Ireland) Order 1997?

#### **Harassment**

- (ii) Did the respondent unlawfully harass the claimant for a reason related to his race, namely did the respondent engage in unwanted conduct which had the purpose or effect of either:
- (a) violating the claimant’s dignity, or
  - (b) creating an intimidating, hostile, degrading, humiliating or offensive environment for the claimant?
- (iii) Can the conduct identified above reasonably be considered to have the effect referred to at 2(a) and 2(b) above?

#### **Factual Issues**

- (iv) Did Inspector McCullough make a comment to the claimant in June 2017 that he would be “needing a work permit soon like the rest of the foreigners or soon it will be no foreigners in this country and you would have to leave”?
- (v) Did Inspector McCullough ask the claimant about the “political unrest” of Spain?

- (vi) Did Inspector McCullough ask the claimant “why the colour of my skin wouldn’t, change coming back from holidays”?
  - (vii) Was the claimant told by one of the respondent’s managers that “she knew Inspector McCullough from before within the Company and he wouldn’t be like that”?
  - (viii) Was the claimant told by one of the respondent’s managers that the comments made by Inspector McCullough were “made in a bit of banter and were light-hearted”?
  - (ix) Was the claimant told that Inspector McCullough “was willing to apologise for those comments made before”?
  - (x) Were the claimant’s claims of racial discrimination and harassment brought within the 3 month time limit?
  - (xi) If not, would it be just and equitable for the tribunal to extend time?
6. The claimant has been employed by the respondent for approximately 17 years and continues to be so employed. At the time of the tribunal hearing the claimant was off work following an assault in the course of his duties. He will return to work once Occupational Health advise that he is fit to do so. The claimant’s job is given in his contract of employment as a bus driver but his present role is as a shunter which as the word suggests mainly involves moving buses.
7. In his evidence to the tribunal the claimant gave his race as Latin American and said that he was born in Bolivia and had lived in Spain. His parents were Spanish and Bolivian and he was brought up in Spain. He had a Spanish passport and Spanish citizenship.
8. In his witness statement the claimant alleged that over a period of eighteen months to two years he received comments and remarks from Inspector McCullough because of his nationality and the colour of his skin. The specific remarks complained of are set out below:

Around June 2017 Inspector McCullough allegedly said to him - “Now that this country is leaving the EU you’re going to need a work permit because you are a foreigner.” This comment was made when the claimant was standing outside the ticket office in the Short Strand Depot. The claimant did not reply and walked away.

After June 2017 to 2018 Inspector McCullough allegedly said to him – “Why are you in the sun you don’t change colour”. This comment was made when the claimant was sitting outside in the sunshine during his lunch break. The claimant did not reply. He stayed where he was and Inspector McCullough walked away.

In 2018, Inspector McCullough allegedly said to him – “Soon all the foreigners will be out of here”. This comment was made when the claimant was working at the Short Strand Depot. The claimant did not reply and stayed where he was. Inspector McCullough walked away.

In 2018 Inspector McCullough allegedly said – “With all the political unrest in Spain soon you will be a refugee”. This comment was made when the claimant in the ticket office in the Short Strand Depot. The claimant thought that there were a few people discussing demonstrations being held in Spain. The claimant did not know if anyone else heard his remarks and he did not recall who else was there.

9. It is common case that two incidents occurred shortly before the claimant decided to bring his claim and it is important to understand these before looking in detail at the claimant’s allegations of racism.
10. In July 2018 an issue arose about safety checks on buses. A union agreement was apparently in place to the effect that shunters would undertake First Use Safety Checks (“FUSC”) on three buses per day which were kept ready to go out in case of emergency. Inspector McCullough told the Shunters to carry out these checks on all buses and they refused citing the union agreement. They also had an issue with how Inspector McCullough had spoken to them and Mrs Rabikova was informed that he had a bad attitude. Inspector McCullough confirmed to Mrs Rabikova that he had overstepped the mark and she asked him to ensure that he spoke to them professionally. Mrs Rabikova informed the shunters that Inspector McCullough did not feel that he had done anything wrong but that they should come and speak to her if they had any other issues.
11. On 4 August 2018 an incident took place at the Short Strand Depot where the claimant was based. The incident was first reported by Ed Dinnen to Mrs Rabikova on the same date by telephone. Mr Dinnen informed Mrs Rabikova that that the claimant was going home due to an alleged inappropriate verbal exchange with an inspector. Mrs Rabikova asked to speak with the claimant. She subsequently phoned him at home and the claimant gave his account as follows:

*“Chris came into the Shunters office and asked John [Montgomery] to take a battery pack to a mobile car at the City Hall.” He allegedly said “I hope the way I spoke to you is not upsetting you” with a side glance at the claimant. The claimant then said - “If that’s aimed at me Chris, it’s duly noted.” Chris went angry and said “I am not talking to you, stop butting into my conversations. The claimant said “You are having a dig at me”. Mr McCullough then said “who do you think you are interrupting me. I am talking to John. Stay quiet.”*
12. We pause to note the importance of the date of this incident – 4 August 2018. In cross-examination the claimant explicitly conceded that no racial comments were made to him either on or after 4 August 2018.
13. Mrs Rabikova subsequently interviewed Mr Montgomery at the depot. He confirmed that Inspector McCullough came in with an attitude but was ok when Mr Montgomery informed him that he couldn’t carry out the task. He felt that Inspector McCullough wasn’t being professional.
14. The claimant felt that there was a direct link with a FUSC incident a few weeks back as he had a conversation with Inspector McCullough on that day and felt that he was being singled out. The claimant questioned whether it was because of what was said or because he was not from here.

15. On 6 August 2018 the claimant informed Mrs Rabikova that he was raising a grievance against Inspector McCullough.
16. On 8 August 2018 the claimant submitted a formal grievance but this was not received by Mrs Rabikova until 13 August 2018. The letter read as follows:

*“Following a sequence of incidents in the depot I want to raise a formal grievance against Insp Chris McCullough because of the way he has treated me whilst working.*

*There has been a sequence of events over a short period of time in which he has been ignorant, aggressive and very intimidating when addressing me. It is now beginning to distress me knowing that I am coming to work to face this barrage of abuse.*

*I have some witnesses who were present when this inspector spoke to me and I will furnish you with their names during the grievance process.*

*Please could you take this as a formal grievance and deal with my grievance through the Dignity at Work policy section relating to bullying and Harassment in the Workplace.”*

17. On 8 August 2018 Mrs Rabikova interviewed Inspector McCullough about the events on 4 August 2018. Inspector McCullough denied aiming any comments towards the claimant and said that he only spoke to Mr Montgomery. According to Inspector McCullough the claimant was agitated and kept interrupting him and started to take out his phone saying that he was recording the conversation. Inspector McCullough stated that he had never been racist towards the claimant, never had an issue with him, felt they got on really well and that he would be unreservedly apologetic if he ever said anything to the claimant that would be deemed offensive. He was not however apologising for Saturday as in his opinion he had done nothing wrong.
18. On 10 August 2018 Mrs Rabikova spoke to the claimant about the investigation and explained Inspector McCullough’s perception of the events on the day. The claimant was not happy that Inspector McCullough was not willing to apologise to him and stated that had he apologised he would not have taken this any further. The claimant told Mrs Rabikova that he was taking it further and that he kept replaying every conversation he had with Inspector McCullough and wondered whether the comments made to him were done out of racism. The claimant stated that he had no other explanation why Inspector McCullough wouldn’t acknowledge that he had done something wrong and that there had to be more to this than just what had happened on the day.
19. As indicated above Mrs Rabikova received the claimant’s formal grievance on 13 August 2018. In accordance with the respondent’s policy the grievance was dealt with by Mrs Rabikova as she was the claimant’s line manager.
20. On 21 August 2018 Mrs Rabikova wrote to claimant and confirmed the receipt of his grievance. Mrs Rabikova invited the claimant to attend his first stage grievance meeting on 4 September 2018.

21. Mrs Rabikova conducted a first stage grievance meeting with the claimant on the 4 September 2018. According to her note the claimant said that he felt that it was carrying on from before – nationality, colour, accent. It started from the FUSC buses and feels worse since then there was just the claimant and Mr Montgomery in the room. Inspector McCullough was okay with Mr Montgomery but not the claimant. Inspector McCullough shouted at the claimant to be quiet. The claimant didn't see any reason why he was spoken to like that. The claimant expressed surprise that Inspector McCullough felt that there is nothing wrong with the way you've spoken to them, with the way he addressed them. The claimant said they didn't know what he wants next and Inspector McCullough didn't think he had done anything. The claimant further stated that shunters jobs had been advertised and he was awaiting an interview date.
22. Mrs Rabikova's note further records that she interviewed Inspector McCullough again in relation to the grievance and he answered all points as during the verbal grievance investigation. He said that he had done nothing wrong, he didn't have a go at the claimant, and that he was talking to Mr Montgomery. Inspector McCullough said that the claimant was agitated and was trying to provoke a reaction rate of him and took out his phone to record it. Inspector McCullough stated that he had nothing against the claimant and certainly wasn't racist against him. Inspector McCullough maintained that he never said anything racist to the claimant.
23. On 17 September 2018 Mrs Rabikova, having completed her informal investigation, spoke with the claimant who made clear that he wanted to take the matter further. The claimant did not want to pursue the mediation option as he did not feel that this would solve his complaint. Mrs Rabikova also wrote to the claimant on the same day and recommended that he pursue the matter formally with Human Resources and provided him with a copy of the respondent's Dignity at Work policy. Mrs Rabikova also advised the claimant of his right of appeal to the Belfast Area Manager.
24. On 18 September 2018 Mrs Rabikova completed a Dignity at Work complaint form in which she set out the details of the complaint and the action taken by her to date. She described the nature of the complaint as encompassing bullying and racial discrimination by ticking appropriate boxes on the form.
25. On 21 September 2018 Mrs Rabikova wrote to the claimant and advised that given the nature of the complaint and that the claimant was not satisfied with the outcome she felt that it was appropriate to deal with the matter formally under the dignity at work policy. She went on to advise that the formal grievance process would now be closed and the matter would be dealt with under that policy. She invited the claimant to attend with herself and Kate Fisher HR advisor on 27 September 2018 in order to discuss his complaint. She further advised that the claimant could be accompanied by a colleague from Translink or a Trade Union representative. Mrs Rabikova also advised the claimant to as far as possible avoid direct contact with Inspector McCullough.
26. On 27 September 2018 the claimant was interviewed by Mrs Rabikova and Mrs Fisher. The claimant's trade union representative, Mr Dornan, attended with

him. Mrs Fisher asked the claimant to talk them through his complaint the note of the interview recorded his response as follows:

*“18 months of unwanted comments about nationality, my colour and status of Spain within the EU. Racist comments. I always try to ignore it. 9 weeks ago he threw a sheet of paper at me in the fuel bay and said I need to check 13 buses, I said no, I can’t check 13 buses. The agreement between the trade union and management was that we are not supposed to check any buses. He said that the company pays your wages, not the trade union. He said are you refusing to do it, I said yes. He then left. (Kevin Crossan and John Montgomery were there.) I started washing buses, getting ready for the morning. Inspector McCullough said “why are you wasting my water cleaning buses that are clean? It’s the cleaner’s job. I said, if I am washing a bus it’s because it’s dirty. I am a shunter cleaner. There was an attitude when he threw the sheet out at me. Jana said that she was going to have a word. Thought it was all done.*

*On 4 August I was in the shunters again, he walked in and asked John [Montgomery] to take a booster pack into City Hall and stay in the van with it. He said to John, I don’t want you to think that I am being bad to you, not treating you in a nice way. I said is this about me. He said “shut up I’m not talking to you.” I said, “Chris if you have anything to say to me, say it to my face.” He shouted “butt out, shut up, it’s nothing to do with you”. I said to John that I’m going home, I feel bullied. He laughed and said “you’re not going anywhere.” I said yes I am and left. I was annoyed and hurt. I spoke to Inspector Ed Dinnen. I wanted my manager’s number (Mrs Rabikova).*

*Mrs Rabikova phoned me, I explained what was said. John Montgomery was in the room and heard. I said I don’t feel safe coming back to work – if he shouted like that with someone else in the room, what would it be like alone with him, with no CCTV or no audio on CCTV. I came in on Monday, told Mrs Rabikova what happened, and I said I don’t understand why he would take that action unless Mrs Rabikova spoke to him. Mrs Rabikova said she didn’t mention any names. Not just about anger with what Mrs Rabikova said him; put it together with the racist comments, it’s more. Not just banter. No social contact with Chris. No joke a conversation with him.”*

27. Mrs Fisher then asked what racist comments he made and the claimant provided two comments.

- (i) Now foreigner what are you going to do – with Brexit, no passport?
- (ii) What tan are you going to get, you’re almost black.

The claimant also stated that he had no social dealings, banter or jokes with Inspector McCullough.

28. Mrs Fisher next asked him to provide dates and details of the allegations. The claimant was unable to give exact dates/details and said that it was the beginning of year January, February and maybe March. The claimant was asked if he



responded and said that he didn't and there were no witnesses as it was outside the shed, there was noise and no one would have heard.

29. The claimant was asked about the second comment and said that it was in the summer of 2017 after his holidays and indicated that it was outside the ticket office with no one close enough [to hear]. The claimant didn't have the exact date and indicated that Inspector McCullough said something like 'Being Bolivian and being Spanish, you shouldn't be in this country.' The claimant stated that he could not give an exact date for this.
30. Mr Dornan then commented - "The point is that they have been 18 months of flippant comments, he has just let it go, Carlos has banter with others but not him. Letting it go and then that happened nine weeks ago. There was chat with JR [Mrs Rabikova] – way of asking for something, not with aggression. It was against the agreement. Ensure the early run goes out on time. Responsible people – do one first use safety check so that there is one bus ready and available for replacement. Inappropriate to say the Trade Union doesn't pay his wages, neither does he. Absurd comment – "shouldn't be washing buses". Hygiene. Chris acknowledged they did say bits of those things – he said it was only banter (to Jana)."
31. Mrs Rabikova stated that the claimant was disappointed that Inspector McCullough was not willing to apologise and the claimant responded that he didn't think Inspector McCullough was intending to be racist. Mrs Rabikova then stated that Inspector McCullough said that he was not aware that he was being offensive. Mr Dornan commented that Inspector McCullough didn't tell the claimant that. Mr Dornan went on to say that Inspector McCullough failed by not apologising and being flippant. This suggested (to Mr Dornan) that there was an issue that Inspector McCullough should be answerable for. Mrs Fisher then asked Mr Dornan what he wanted as an outcome and Mr Dornan replied that a sincere and meaningful apology should be sufficient. A discussion then ensued about previous incidents where people had been moved a resolution and training. The claimant stated that at the start he had said that he wanted an apology and that Inspector McCullough had told Mrs Rabikova that he had nothing to apologise for and that it was all banter and light-hearted. The claimant reiterated that he didn't have banter with Inspector McCullough and it was not banter to tell someone to shut up and shout at them. The claimant then went on to state that he was worried about working with Inspector McCullough when he said that he has done nothing wrong. Mr Dornan went on to talk about the requirement to treat each other equally and stated that Inspector McCullough should champion and ensure this. Mr Dornan also suggested obtaining statements from Mr Crossan and Mr Montgomery and commented that the claimant should be able to work in an environment where he was not threatened or harassed. Mr Dornan stated that Inspector McCullough should be moved as this was the only way that the matter could be resolved.
32. The meeting then closed and Mrs Fisher explained that the matter be investigated and they will get back to them as soon as possible but that Mrs Rabikova was on holiday for a couple of weeks so that will delay things.
33. Mr Crossan was interviewed on the 25 of October 2018. He couldn't remember the incident. According to Mr Crossan it was two men having a word and Inspector

McCullough had his back up and he had heard worse. Mrs Rabikova asked if it was a bit heated and Mr Crossan replied that it was a trade union dispute about first use checks he thought. Mrs Fisher asked again if it was heated and Mr Crossan replied that the two of them were back at each other. Mrs Fisher asked if there was anything that he thought was inappropriate and he replied that to him it wasn't a big issue it was just two guys having an argument at work. He wasn't aware of any issues between the claimant and Inspector McCullough and he got on with both of them.

34. Mr Montgomery was also interviewed on 25 October 2018. Mrs Rabikova explained that he was named as a witness to the alleged incident on the recovery of the inspector's car. Mr Montgomery stated that the claimant explained what they were doing and Inspector McCullough came in and said that it needed to be done right away because a car had broken down and needed the jump leads. Mr Montgomery was only back from holiday and Inspector McCullough said "it's not the way I'm telling you, it's the way I'm asking you" which is exactly what the claimant said to Mrs Rabikova. Inspector McCullough then said to the claimant - "No I'm not talking to you, I am talking to John." Mr Montgomery told Mrs Rabikova that you could have cut the tension with a knife. The claimant then said "I am away home". Mr Montgomery added that it all started by safety checks and Inspector McCullough was a bit out of order.
35. Mrs Fisher then questioned Mr Montgomery about the July incident. Mr Montgomery said that Inspector McCullough was showing his authority by throwing the paper down and that there are other events that led up to it. Mr Montgomery commented that Mr McCullough was an inspector and that everything was built up. Mrs Rabikova asked Mr Montgomery why he felt that and he replied that it was over the top and he thought that it was an opportunity to get out of the way. Mrs Rabikova asked whether the claimant felt this way and Mr Montgomery replied that Inspector McCullough stated - "I said you're talking to me and not him. Inspector McCullough then said "shut up, I am getting out." Mr Montgomery opined that this comment was at him but maybe directed towards the claimant. The claimant made the same comment about the safety checks and was word for word. Mr Montgomery thought the claimant was joking when he went home. Mr Montgomery was on his own for two hours. Mrs Rabikova probed him further about whether is heated and whether there was a history of events. Mr Montgomery agreed that it was heated and there were a number of events building up and one man didn't take it well. Mr Montgomery clearly did not want to answer any further questions and was worried about having to work with both of them and about being moved due to involvement in a harassment case. It was clear that Mr Montgomery didn't want anything to do with the matter and was concerned about his own welfare.
36. Inspector McCullough was also interviewed by Mrs Rabikova and Mrs Fisher on the 25 October 2018. Inspector McCullough was first asked about the incident on 4 August 2018. Inspector McCullough explained that Control got in touch about the broken down bus and rather than call on the radio. Inspector McCullough asked Mr Montgomery to take the jump leads down and asked him if he was being rude. Mrs Fisher asked him why he said that and Inspector McCullough explained that they told the claimant that this was a private conversation and they were bantering but he went to interrupt again. Inspector McCullough denied telling the claimant to

shut up or that there was any aggression. Inspector McCullough said that he sent people home early on a Sunday whenever they were finishing up - the claimant got this too and shunters always get the same treatment. Alan McKay said that they were not doing it. Mr McKay, the claimant and the other cleaner asked about the first use checks. Inspector McCullough believed that the comment about being rude could have been about July and it could've been in relation to speaking to the cleaners. Mrs Rabikova intervened to say that she'd spoken to him [Inspector McCullough] and explained that someone complains about being rude to you, you need to be extra nice. Inspector McCullough said that he had been there for 33 years and if he had a bad day he apologised, the claimant didn't get treated any differently and that it was ridiculous to suggest that he played the race card. Mrs Fisher explained that there was no race card claim initially and going back there were two complaints. Mrs Fisher said that Inspector McCullough needed to address why the claimant felt this way is why he was picking up on this. Inspector McCullough replied that according to colleagues the claimant was using this as a ploy to get a shunter job in the railways. The tribunal notes in passing that there was no supporting evidence for this. Mr Weir who was accompanying Inspector McCullough pointed out that some of the allegations were out of date and the claimant had no proof. Mr Weir also raised concerns about Inspector McCullough's feelings and emotions and suggested that the interviewers were covering their backs for legal reasons. He also queried how the matter got this far. Mrs Fisher replied that it was always going to be a case of 'he said she said'. Further discussion ensued and Inspector McCullough stated that he couldn't understand where the claimant was coming from and the only thing he could think of was first use checks.

37. Mrs Rabikova then read the following extract from the claimant's interview:

*"Now foreigner what are you going to do – with Brexit, no passport?*

*What tan are you going to get, you're almost black."*

Inspector McCullough denied using the word 'foreigner'. Mrs Fisher asked him if he remembered saying anything about Brexit and he replied 'Shunters in the hut, I walked in and said "Is this the front for Catalanian?". Mrs Fisher then asked whether the claimant joined in the banter and he replied that the claimant did not.

38. Mrs Fisher then read the portion of the claimant's interview notes in which he alleged that Inspector McCullough said -"Being Bolivian and being Spanish you shouldn't be in this country." Inspector McCullough responded that this was pure and utter lies and that he didn't have to prove anything to anyone but that this was vile. Mrs Fisher asked when I could think of anything that night that might have been perceived that way and he replied that this was lies and that he didn't call anyone a liar. Mrs Fisher suggested that the claimant might be thinking that someone had got something against him because of his race. Inspector McCullough replied that he could put in a report about many others. Mrs Fisher then commented that from the complaints in August the claimant thought that maybe it had a racist motive. Mrs Rabikova commented that Inspector McCullough had mentioned that 'Catalonian' was part of the investigation and said that he would apologise. When Mrs Rabikova mentioned this to the claimant he said that he didn't find racism funny. She quickly stopped him and said that

Inspector McCullough wasn't being racist. Mrs Fisher suggested that this all stemmed from around July/August and how the claimant was spoken to. Inspector McCullough repeated that it was lies and blatant lies and suggested that it was the claimant trying to get someone.

39. Mrs Fisher then asked Inspector McCullough whether if race was left out of it in July/August he felt that the way that he spoke to the claimant was inappropriate. Inspector McCullough disagreed and said that he was loud even when he was on the phone. Mrs Fisher asked whether he could be perceived as aggressive and Inspector McCullough replied 'No – If they don't know me then maybe', and said that he would apologise if needed but that he would not be apologising now when someone was lying.
40. Mr Weir then raised queries about what would happen in the event of someone making a vexatious complaint and again referred to the impact on Inspector McCullough and his well-being. Mrs Fisher advised that it would have to be proved that it was a vexatious complaint and it would have to stop. Mrs Rabikova explained the process and closed the meeting and advised Inspector McCullough that they would try to complete the investigation and let him know the outcome.
41. On 22 November 2018 Mrs Rabikova accompanied by Mrs Fisher met with the claimant and informed him that his complaint of harassment was rejected. Mrs Rabikova followed this up with a letter dated 23 November 2018 which read as follows:

*“Further to your letter informing the company of your intention to raise a complaint against Mr Chris McCullough, under the company's dignity at work policy, Kate Fisher and I met with you on 27 September 2018, to discuss the matter further, and after investigation our findings are as follows :*

*At our meeting you raised that you have been subjected to 18 months of unwanted comments about your nationality, colour and the status of Spain within the EU and provided to examples of racist comments. However there were no witnesses to support your accusations and Mr McCullough denied making such statements. Therefore there is no evidence to substantiate your complaints regarding racist comments and given the serious nature of the complaints, I would question why they were not raised at the time.*

*There appears to have been a heated discussion in July regarding bus checks and the way in which Mr McCullough approached this was not appropriate and has been addressed with him.*

*On 4 August there was another heated discussion with Mr McCullough asked Mr Montgomery to take a booster pack into City Hall and said to him, “I don't want you to think I am being bad to you, not treating you in a nice way.” Whilst I do believe that this was inappropriate, a careless use of words, it was due to a sensitivity over accusations made regarding his behaviour in July, Mr McCullough did not know that you have made the accusation and I do not believe the comment was directed at you. This has now been addressed with Mr McCullough.*

*Therefore in relation to your complaint against Mr McCullough I am able to advise you the best of the evidence available to me, your complaint has not been upheld. Furthermore, To suggest that this was racially motivated was a very serious and unsubstantiated allegation and I would like to advise you of any further unsubstantiated, serious or fictitious claims would be treated very seriously.”*

The claimant was further advised that he had a right of appeal which must be paid in writing stating the reasons for the appeal to Liz McKernon the HR operations manager within seven days of receipt of the letter. The claimant did not appeal.

42. On the same day as the claimant received the letter of 23 November 2018 he completed and signed a claim form which he posted to the tribunal office by recorded delivery. The claim form was received in the tribunal office on 29 November 2018.
43. During the course of his evidence to the tribunal Inspector McCullough was asked whether he had any banter with the claimant. Inspector McCullough replied that he had banter with the bus drivers but not with the claimant or any of the shunters. According to Inspector McCullough the claimant did not engage in any banter with his co-workers either. In this context Inspector McCullough made reference to two other employees – Mr Billy Edwards and Mr Louis Gray whom the claimant had made reports about. Inspector McCullough was not aware of the details of these incidents. In re-examination the claimant provided his own accounts of these incidents. According to the claimant in 2017 or earlier Mr Edwards said to him – “You foreigners shouldn’t be working here.” The claimant reported this to the Inspector in charge who said that he would have a word with Mr Edwards and would speak with the claimant afterwards. The Inspector spoke with the claimant an hour later and said that Mr Edwards was willing to apologise and if the claimant was not happy he could take it to management. Mr Edwards knew that he was in the wrong and the claimant accepted his apology. In relation to Mr Gray the claimant said that this was a personal problem which was sorted out between the Inspector in charge and Mr Gray and there was nothing racist about it. Mr Doherty indicated that he was content with the claimant’s evidence about these matters and did not pursue them further.

## **THE LAW**

44. Article 4A of the Race Relations (Northern Ireland) Order 1997 (“RRO” provides as follows:

*“4A.—(1) A person (“A”) subjects another person (“B”) to harassment in any circumstances relevant for the purposes of any provision referred to in Article 3(1B) where, on grounds of race or ethnic or national origins, A engages in unwanted conduct which has the purpose or effect of—*

- (a) violating B’s dignity, or*
- (b) creating an intimidating, hostile, degrading, humiliating or*

*offensive environment for B.*

*(2) Conduct shall be regarded as having the effect specified in subparagraphs (a) and (b) of paragraph (1) only if, having regard to all the circumstances, including, in particular, the perception of B, it should reasonably be considered as having that effect.”*

45. Article 52 of the RRO sets out the jurisdiction of industrial tribunals as follows:

*“52.—(1) A complaint by any person (“the complainant”) that another person (“the respondent”) —*

*(a) has committed an act ... against the complainant which is unlawful by virtue of Part II [Article 72ZA or, (in relation to discrimination on grounds of race or ethnic or national origins, or harassment), Article 26]; or*

*(b) is by virtue of Article 32 or 33 to be treated as having committed such an act ... against the complainant”*

46. The Employment Appeal Tribunal (Underhill P presiding) set out the correct approach to harassment claims in **Richmond Pharmacology v. Dhaliwal [2009] IRLR 336** in the context of section 3A of the Race Relations Act 1976. At paragraph 10 of the judgment Underhill J broke down the necessary elements of liability under section 3A as follows:

*“(1) The unwanted conduct. Did the respondent engage in unwanted conduct?*

*(2) The purpose or effect of that conduct. Did the conduct in question either:*

*(a) have the purpose or*

*(b) have the effect*

*of either (i) violating the claimant's dignity or (ii) creating an adverse environment for her? (We will refer to (i) and (ii) as "the proscribed consequences".)*

*(3) The grounds for the conduct. Was that conduct on the grounds of the claimant's race (or ethnic or national origins)?”*

### **Time-Limits**

47. The relevant time limit is set out in Article 65 of the RRO:

*“65. - (1) An industrial tribunal shall not consider a complaint under Article 52 unless it is presented to the tribunal before the end of*

(a) *the period of 3 months beginning when the act complained of was done; or*

...

(7) *A court or tribunal may nevertheless consider any such complaint, claim or application which is out of time if, in all the circumstances of the case, it considers that it is just and equitable to do so.*

(8) *For the purposes of this Article —*

(a) *when the inclusion of any term in a contract renders the making of the contract an unlawful act, that act shall be treated as extending throughout the duration of the contract; and*

(b) *any act extending over a period shall be treated as done at the end of that period; and*

*a deliberate omission shall be treated as done when the person in question decided upon it.”*

48. In ***British Coal Corporation v Keeble [1997] IRLR 336 EAT*** the Employment Appeal Tribunal suggested that tribunals may find the checklist of factors in section 33 of the Limitation Act 1980 helpful -

*"8 ... It requires the Court to consider the prejudice which each party would suffer as the result of the circumstances of the case and, in particular, inter alia, to:-*

(a) *the length and reasons for the delay;*

(b) *the extent to which the cogency of the evidence is likely to be affected by the delay;*

(c) *the extent to which the party sued had co-operated with any requirements for information;*

(d) *the promptness with which the plaintiff acted once he or she knew of the facts giving rise to the cause of action;*

(e) *the steps taken by the plaintiff to obtain appropriate professional advice once he or she knew of the possibility of taking action.”*

49. While the checklist is helpful it is not a requirement that a tribunal go through the check list and failure to consider a significant factor will amount to an error of law: ***London Borough of Southwark v Afolabi [2003] IRLR 220 CA*** paragraph 33 per Peter Gibson LJ.

50. In ***Lindsay v London School of Economics and Political Science [2014] IRLR 218*** the Court of Appeal held that:-

*"An extension of time will not automatically be granted simply because it results in no prejudice to the respondent in terms of a fair trial. If a claim is brought out of time it is for the claimant to show that it is just and equitable for the extension to be granted. This is a multifactorial assessment where no single factor is determinative."*

51. In addition, a claim of this nature may fall within time if the act of discrimination is shown to be a continuing act in that it extends over a period. In order to establish a continuing act, the claimant has to prove that (a) the incidents are linked to each other, and (b) that they are evidence of a 'continuing discriminatory state of affairs'. This will constitute 'an act extending over a period'. The leading case on this is ***Hendricks v Metropolitan Police Commissioner [2002] EWCA Civ 1686, [2003] IRLR 96*** at para 51-52 as referenced in the commentary in ***Harvey on Industrial Relations and Employment Law ("Harvey")*** at T para 118.01.

### **Burden of Proof**

52. The reverse burden of proof applies to both FETO and RRO. The relevant provisions are in identical terms and the FETO version which is contained in Article 52A of the RRO is set out below:

*"52A. — (1) This Article applies where a complaint is presented under Article 52 and the complaint is that the respondent—*

*(a) has committed an act of discrimination, on grounds of race or ethnic or national origins, which is unlawful by virtue of any provision referred to in Article 3(1B) (a), (e) or (f), or Part IV in its application to those provisions, or*

*(b) has committed an act of harassment.*

*(2) Where, on the hearing of the complaint, the complainant proves facts from which the tribunal could, apart from this Article, conclude in the absence of an adequate explanation that the respondent—*

*(a) has committed such an act of discrimination or harassment against the complainant,*

*(b) is by virtue of Article 32 or 33 to be treated as having committed such an act of discrimination or harassment against the complainant,*

*the tribunal shall uphold the complaint unless the respondent proves that he did not commit or, as the case may be, is not to be treated as having committed, that act."*

53. The Tribunal considered the guidance provided by the Court of Appeal in ***Igen -v-***



**Wong [2005] IRLR 258** on the application and the application of the Burden of Proof Regulations which apply to cases brought under the Race Relations (Northern Ireland) Order 1997 by virtue of Article 52A, above.

- (i) Pursuant to Section 63A of the 1975 Act it is for the claimant who complains of sex discrimination to prove on the balance of probabilities *facts* from which the Tribunal could conclude, in the absence of an adequate explanation, that the employer has committed an act of discrimination against the claimant which is unlawful by virtue of Part 2, or which, by virtue of Section 41 or Section 42 of the 1975 Act, is to be treated as having been committed against the claimant. These *facts* are referred to below as “such facts”.
- (ii) If the claimant does not prove such facts he or she will fail.
- (iii) It is important to bear in mind in deciding whether the claimant has proved such facts that it is unusual to find direct evidence of (sex) discrimination. Few employers would be prepared to admit such discrimination, even to themselves. In some cases the discrimination will not be an intention but merely based on the assumption that “he or she would not have fitted in”.
- (iv) In deciding whether the claimant proved such facts, it is important to remember that the outcome at this stage of the analysis by the Tribunal will therefore usually depend on what inferences it is proper to draw from facts found by the Tribunal.
- (v) It is important to note the word “could” in Section 63A(20). At this stage the Tribunal does not have to reach a definitive determination that such facts would lead to the conclusion that there was an act of unlawful discrimination. At this stage the Tribunal is looking at the primary facts before it to see where inferences of secondary fact could be drawn from them.
- (vi) In considering what inferences or conclusions can be drawn from the primary facts. The Tribunal must assume that there is no adequate explanation for those facts.
- (vii) These inferences can include, in appropriate case, any inferences that it is just and equitable to draw in accordance with Section 74(2)(b) of the 1975 Act from an evasive or equivocal reply to a questionnaire or any other questions that fall within Section 74(2) of the 1975 Act.
- (viii) Likewise, the Tribunal must decide whether any provision of any relevant Code of Practice is relevant and, if so, take it into account in determining such facts pursuant to Section 56A(1) of the 1975 Act. This means that inferences may also be drawn from any failure to comply with any relevant Code of Practice.
- (ix) Where the claimant has proved facts from which conclusions could be drawn that the employer has treated the claimant less favourably on the ground of sex, then the burden of proof moves to the employer.

- (x) It is then for the employer to prove that he did not commit, or as the case may be, is not to be treated as having committed, that act.
- (xi) To discharge that burden it is necessary for the employer to prove, on the balance of probabilities, that the treatment was in no sense whatsoever on the ground of sex, since "no discrimination whatsoever" is compatible with the Burden of Proof Directive.
- (xii) That requires a Tribunal to assess not merely whether the employer has proved an explanation for the facts from which such inferences can be drawn, but further that it is adequate to discharge the burden of proof on the balance of probabilities that sex was not a ground for the treatment in question.
- (xiii) Since the facts necessary to prove an explanation would normally be in the possession of the respondent, a Tribunal would normally expect cogent evidence to discharge that burden of proof. In particular, the Tribunal will need to examine carefully explanations for failure to deal with the questionnaire procedure and/or Code of Practice.

54. The proper approach to the **Igen Guidelines** has been the subject of some helpful comments by the Employment Appeal Tribunal in **Laing v Manchester City Council [2006] IRLR 748** and by the Court of Appeal in **Madarassy v Nomura International PLC Neutral Citation Number [2007] EWCA Civ 33**. In **Laing**, Elias J stated at the first stage the burden rests on the claimant to satisfy the Tribunal, after a consideration of all the facts, that a prima facie case exists sufficient to require an explanation. The facts include evidence adduced by the respondent though this should not be confused with any explanation offered by the respondent for the claimant's treatment. This approach was approved by the Court of Appeal in **Madarassy**, in the following part of the judgment of the Court of Appeal, per Mummery LJ reads (at paragraphs 56, 57, 71 and 72) as follows:-

"56. *The court in **Igen v Wong** expressly rejected the argument that it was sufficient for the complainant simply to prove facts from which the tribunal could conclude that the respondent "could have" committed an unlawful act of discrimination. The bare facts of a difference in status and a difference in treatment only indicate a possibility of discrimination. They are not, without more, sufficient material from which a tribunal "could conclude" that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination.*

57. *"Could conclude" in section 63A(2) must mean that "a reasonable tribunal could properly conclude" from all the evidence before it. This would include evidence adduced by the complainant in support of the allegations of sex discrimination, such as evidence of a difference in status, a difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent contesting the complaint. Subject only to the statutory "absence of an adequate explanation" at this stage .... the tribunal would need to consider all the evidence relevant to the discrimination complaint; for example, evidence as to whether the act complained of occurred at*

*all; evidence as to the actual comparators relied on by the complainant to prove less favourable treatment; evidence as to whether the comparisons being made by the complainant were of like with like as required ..... and available evidence of the reasons for the differential treatment.*

...

71. *Section 63A(2) does not expressly or impliedly prevent the tribunal at the first stage from hearing, accepting or drawing inferences from evidence adduced by the respondent disputing and rebutting the complainant's evidence of discrimination. The respondent may adduce evidence at the first stage to show that the acts which are alleged to be discriminatory never happened; or that, if they did, they were not less favourable treatment of the complainant; or that the comparators chosen by the complainant or the situations with which comparisons are made are not truly like the complainant or the situation of the complainant; or that, even if there has been less favourable treatment of the complainant, it was not on the ground of her sex or pregnancy.*
72. *Such evidence from the respondent could, if accepted by the tribunal, be relevant as showing that, contrary to the complainant's allegations of discrimination, there is nothing in the evidence from which the tribunal could properly infer a prima facie case of discrimination on the proscribed ground. As Elias J observed in **Laing** (at paragraph 64), it would be absurd if the burden of proof moved to the respondent to provide an adequate explanation for treatment which, on the tribunal's assessment of the evidence, had not taken place at all"*

## **SUBMISSIONS**

55. Both parties made oral submissions.

### **Claimant's Submissions**

56. In his evidence to the tribunal the claimant was clear that all of the offending remarks were made prior to 4 August 2018. His claim of racial discrimination and harassment was therefore on its face outside the 3 month time limit. For this reason the claimant focused his submissions on persuading the tribunal to extend time. During the course of his submissions the claimant introduced new evidence without objection by Mr Doherty.
57. The claimant explained that he had decided to represent himself as trade union support was limited to 30 minutes free legal advice and he would have had to pay for representation. He received advice on this basis from a solicitor at the beginning of 2019 but not at the time of the events that led to these proceedings. There was no discussion of time limits during this meeting. The solicitor asked him to print all of the material that he had in relation to his claim to the tribunal and all correspondence from the respondent. The solicitor told the claimant that if he wanted to proceed he would have to pay out of his own pocket. In answer to a

question from the tribunal the claimant stated that the trade union did not mention time limits to him. The claimant said that he also made use of the internet and libraries. At one library a member of staff told him that he should obtain advice. The claimant also went to the Equality Commission between September 2018 and January 2019. They looked at the papers that he provided but took 4 months to say that they could not support him and did not provide him with any legal advice. They advised that the legal team at the School of Law in the University of Ulster might be able to assist but he did not pursue this although he thought now that perhaps he should have. The claimant commented that he did not expect to be making a claim that Inspector McCullough was racist and looking back he should have written down every detail and the time and place that incidents took place. He did not know what the time limits were and was shamed by his ignorance. When comments were made towards him he tried to ignore them rather than writing down dates, times, witnesses and everything that could corroborate his claims. The claimant accepted that he could have researched time limits better. The claimant believed that racism was a crime and it did not matter how long ago it was. After the incident on 4 August 2018 Mrs Rabikova asked him why he thought it was happening and thinking back over the last 18 months to 2 years and all the comments that had been made he thought that these were not just comments that he decided that he should ignore at the time and that was when he decided to take the case.

58. In relation to the facts the claimant stated that he was not making false and fictitious claims. When the claimant reported his claims to management that Inspector McCullough made these comments he was told that they were made in banter and were light hearted. At the conclusion of the grievance the claimant asked why Inspector McCullough was willing to apologise if he had nothing to apologise for. The claimant went on to state that he was not here to bring the company to court for something that didn't happen. The claimant told the tribunal that he was off on sick pay as a result of an assault and had just been signed off for another 4 weeks. The claimant was grateful to the company.
59. In relation to compensation the claimant suffered no loss of wages and he therefore only sought compensation for injury to feelings. The claimant submitted that as his case was not about an isolated incident and was serious. Therefore he submitted an award in the middle band of Vento would be appropriate.

### **Respondent's Submissions**

60. On behalf of the respondent Mr Doherty submitted that the claimant's case was very clearly and firmly based on comments allegedly made by Inspector McCullough over the last 18 to 24 months. There is no allegation that the grievance investigation was discriminatory. Accordingly, issues about the minutes taken of meetings, reports produced or whether the person chosen to conduct the investigation was the correct person are not relevant to the primary issue of liability. Mr Doherty submitted that the protection against harassment under Article 4A of the RRO was narrower than direct discrimination which requires to be on racial grounds which includes colour and nationality which is not protected by Article 4A and referred the tribunal to paragraph 408.02 of **Harvey** in this regard. Mr Doherty also referred the tribunal to **Richmond Pharmacy** case which sets out the precise steps in paragraph 10 per Underhill J's judgment (see above). Mr Doherty submitted that

a step by step analysis was helpful and commended the guidance provided by Underhill J in paragraphs 14, 15 and 16 of his judgment.

61. With regard to the evidence Mr Doherty reminded the tribunal that the claimant's witness statement set out four separate comments made by Inspector McCullough. No precise dates were given for the comments and the only information the tribunal has is that the comments were made before 4 August 2018. There were no witnesses to the comments. Mr Doherty submitted that this does not prove that the comments were not made but sounds on the assessment of the credibility of the evidence. Mr Doherty submitted that the claimant needed to prove that the comments were made and if he did not do so the reverse burden of proof provisions do not apply. Mr Doherty stated that the respondent's case was that the comments were not made. Mr Doherty did not seek to rely on the investigation undertaken by the respondent as it was not probative. Mr Doherty drew attention to Inspector McCullough's forthright and assertive oral evidence that he did not make the comments. Mr Doherty also relied on other evidence in the case which suggested that the comments were not made. In particular Mr Doherty relied on the incident on 4 August 2018 as demonstrating that the claimant was not prepared to be spoken to in an inappropriate manner his reaction being to walk out of work. The claimant gave a firm response twice and it was clear that he was not prepared to tolerate inappropriate behaviour in the workplace. Mr Doherty also referred to the immediate action taken by the claimant in relation to comments made by Mr Edwards. This was not a criticism of the claimant whose behaviour Mr Doherty described as commendable. However, in Mr Doherty's submission it begged the question as to why the claimant did nothing when the four alleged comments were made. He did not complain to management and he didn't walk out or make a mental note of the details. Mr Doherty submitted that this did not sit comfortably with the incident on 4 August 2018 or the Billy Edwards incident. Mr Doherty submitted that it was appropriate to take Inspector McCullough's evidence into account in deciding whether to believe the claimant. In this regard he placed reliance on comments made in *Laing v Manchester City Council [2006] IRLR 748* and *Madarassy v Nomura International PLC Neutral Citation Number [2007] EWCA Civ 33* as referred to above as well as comments made by the Northern Ireland Court of Appeal in *Nelson v Newry & Mourne District Council [2009] NICA 24 (03 April 2009)*. Mr Doherty submitted that the claimant had not established facts from which the tribunal could conclude in the absence of inadequate explanation that the respondent had committed the unlawful act of discrimination. Therefore the respondent was not called upon to provide an explanation. Mr Doherty submitted that the tribunal should stand back and focus on the issues and ask what actually happened. If the tribunal concluded that Inspector McCullough was truthful it would be difficult to find that the comments were made. Mr Doherty submitted that the tribunal also had to consider that the allegations made were not consistent. The first allegation was contained in the minutes of the Dignity at Work meeting on 27 September 2018. There were two specific comments and another referring to claimant being Bolivian and Spanish and that he shouldn't be in this country. Thus at the meeting on 27 September 2018 the claimant made three specific allegations about racial comments which are not in his witness statement. Furthermore, the claimant's replies to the Notice for Additional Information give a slightly different version again of the allegations. Mr Doherty submitted that this undermined the credibility of the allegations made as racist comments are not easily forgotten and are seared into the victim's mind.

Mr Doherty further pointed out that the claimant's recall of racist comments had changed over time. Returning to the **Richmond Pharmacology** guidance Mr Doherty submitted that if the tribunal felt that the comments had been made it then needed to consider the intention of the comments and their effect. Mr Doherty submitted that if the comments were made they could not have had any particular effect on the claimant as he could not remember key comments and has been inconsistent in his account of the comments.

### Limitation

62. Mr Doherty pointed out that the allegations were not just a month out of time and moreover the tribunal did not know the extent of the default as it did not know when the comments were made other than some time in 2018. If the comments were made in July 2018 the claim would be a month out of time. On the other hand if the comments were made in February 2018 they would be 6 months out of time. Mr Doherty submitted that either way the comments are clearly out of time and reminded the tribunal that there had been no application for an extension of time.
63. Mr Doherty also addressed the Keeble Guidance at the invitation of the tribunal. In relation to the cogency of the evidence Mr Doherty submitted that the impact of the claimant bringing the claim within 3 months of the alleged discrimination would have been that there would have been a much clearer timeframe within which the alleged comments were made and the tribunal would have a much better idea of what actually happened. Mr Doherty drew attention to Inspector McCullough's evidence which was a straightforward denial that the comments were made and submitted that it was difficult for Inspector McCullough as he was not faced with any actual dates on which the comments were said to have been made. Thus Inspector McCullough was deprived of a proper opportunity to deal with the allegations. Mr Doherty, however, accepted that if an individual made racist comments he might still come to the tribunal and deny having made them. Mr Doherty asked the tribunal to consider Inspector McCullough's demeanour and submitted that he had shown insight into what discrimination was and referred to Inspector McCullough's comment in his evidence that one man's joke might offend another person. Mr Doherty also drew attention to Inspector McCullough's witness statement in which he said that he was now even more aware now of comments that he makes around the claimant.
64. In relation to the reasons for the delay Mr Doherty submitted that the claimant's ignorance of tribunal time limits is not a defence or an excuse and referred the tribunal to **Walls Meats v Khan 1979 ICR 52, CA** in submitting that the question is whether the claimant made reasonable enquiries to enable him to understand what his rights were. Mr Doherty submitted that this was an insurmountable hurdle for the claimant since he was a member of a trade union; received trade union advice; had access to the internet and was able to make enquiries as to what to do. He was able to contact the Equality Commission which referred him to the UU Law Clinic which provides pro bono representation. The claimant was in contact with the Equality Commission from September 2018 onwards at a point when he was already out of time. From January to August 2018 the claimant had access to his trade union and it was unreasonable for the claimant not to pick up the phone and ask the trade union what to do. Mr Doherty submitted that the claimant had not put forward sufficient explanation for the delay to permit the tribunal to extend time in

his favour and drew the tribunal's attention to **paragraph 279.05 of Harvey** which emphasizes the need for tribunals to identify the cause of the claimant's failure to bring the claim in time. Mr Doherty pointed out that here could be a host of valid reasons. There is no erroneous advice and no issue of serious ill health. Mr Doherty submitted that the claimant also had the means to find out what he had to do and if did not avail of this it was difficult for the tribunal to extend time and the same principles apply as are relevant to the 'not reasonably practicable' escape clause [**paragraph 279.02 of Harvey**].

65. In relation to remedy Mr Doherty submitted that any award lay at the lower end of mid Vento range. Mr Doherty pointed out that the claimant had presented no medical evidence; did not visit his General Practitioner and did not walk out of work as a result of his alleged treatment. Furthermore, there was no evidence of injury to feelings and the absence of medical evidence or seeking assistance tended to suggest that the claimant was not affected greatly.

## CONCLUSIONS

66. There is no dispute that all of the alleged offending remarks were made prior to 4 August 2018. As a result the tribunal must address the issues of whether the claimant's claims of racial discrimination and harassment were brought within the 3 month time limit and if not whether it would be just and equitable to extend time.
67. These issues would conventionally either be dealt with as a preliminary issue and it therefore seems best to us to address these issues first before considering the main legal and factual issues. It is necessary of course to determine whether the behaviour complained of occurred but for the purposes of the limitation issue we consider that the best and fairest approach in this case is to take the claimant's case at its height and address the time issue on the basis that the matters complained of occurred on the dates alleged insofar as these are known.
68. In the claimant's claim form he identifies June 2017 as being when comments were made by Inspector McCullough. In his grievance interview the claimant identified the relevant dates as being January, February and maybe March 2018. These dates are clearly well out of time. The claimant also referred to comments made after June 2017 to 2018. This is very vague but on the basis of the claimant's evidence that nothing of note occurred after 4 August 2018 we can be satisfied that if these incidents took place it was before that date and therefore out of time. In reply to the respondent's Notice for Additional Information the claimant again relied on incidents of racial discrimination or harassment which are alleged to have occurred in June 2017 and added an incident which is said to have occurred in the summer of 2018. A similar range of dates is contained in the claimant's witness statement. None of these advance the claimant's complaints beyond 4 August 2018 and several precede it, many by some distance. In his claim form the claimant refers to Inspector McCullough's attitude changing for the worse in August 2018 after two incidents at work (one in July and the other on 4 August 2018) neither of which had any racial element notwithstanding the claimant's suspicions. There is no evidence, however, of any racial discrimination or harassment taking place after 4 August 2018.

69. Accordingly, the only matter that is certain is that everything that the claimant complained about of this nature took place on or before 4 August 2018. As the claim form was received in the tribunal office on 29 November 2018 the claim is outside the 3 month time limit by at least 25 days.
70. Mr Doherty reminded the tribunal the claimant's explanation for delay was a combination of ignorance and his failure to seek or obtain appropriate advice. However, the claimant did have the support of his trade union and access to the internet. There was a feint suggestion that the solicitors whom the claimant consulted were at fault in not advising him about time limits but the claimant only went to them in early 2019 which was well past the time for lodging a claim. The tribunal has scant information about the claimant's engagement with solicitors and is in no position to form any view about their advice. It is surprising that the claimant's engagement with the Equality Commission appears not to have resulted in any advice about time limits but again the tribunal may not have the full picture. The only evidence we have about this is that after a number of months the claimant was informed by the Equality Commission that it could not take on his case. The Equality Commission suggested to the claimant that he should avail of pro bono assistance but he failed to follow up this helpful advice. In summary, the claimant had plenty of resources from which he could easily have obtained information about time limits but failed to do so. Accordingly, we conclude that the claimant has failed to make reasonable enquiries to enable him to understand what his rights were and has not shown good reason for his delay.
71. Looking at the Keeble factors as a check list we do not believe that the delay greatly affected the cogency of the evidence. Even if the claimant had brought his case within time having listened to his evidence we doubt very much whether he would have been able to pin down his dates any more accurately and thus Inspector McCullough would not have been in a very much better position to deal with the allegations. It is not as if the allegations went back a long way and the fact that the claim was made outside the 3 month time limit did not put him in a materially worse position as at least some of the most significant allegations were put to him during both the informal and formal stages of the grievance and Dignity at Work procedures. The real prejudice, if any, was due to the inconsistencies in the claimant's accounts but this does not sound on time.
72. It could not be said that the claimant acted promptly when he was in possession of facts that could give rise to a claim. It seems to us that the claim was prompted not by racial discrimination or harassment but by two incidents in July 2018 and on 4 August 2018 which were more to do with trade union issues and work practices.
73. It is also necessary to consider whether the claimant's claim is a continuing act which extends over a period. In his claim form the claimant stated that the discrimination was ongoing. Notwithstanding this assertion the claimant produced no evidence that the alleged discrimination was ongoing and there is no evidence that any racial discrimination or harassment took place after 4 August 2018. Therefore although at one point the discrimination may have been ongoing it was not ongoing when he completed his claim form on 23 November 2018.
74. In view of our findings the tribunal is satisfied that the claim was not brought within the 3 month time limit and it would not be just and equitable to extend time.



75. Strictly speaking therefore it is not necessary to make any determination in relation to the claimant's allegations. However, having heard the evidence and assessed the demeanour of the witnesses the tribunal considers that it ought to say something about their evidence.
76. As the tribunal has already commented the claimant's evidence of racial discrimination and harassment was replete with inconsistencies. The claimant accepted that he ought to have written down details of the various incidents about which he complained when they occurred and we accept that without recourse to such records a degree of inconsistency is perhaps inevitable as memories fade and recollection becomes blurred. Nonetheless we found him to be a credible witness and there is also a degree of support for him in what Inspector McCullough said during his Dignity at Work interview. In particular, Inspector McCullough accepted that he said - "Is this the front for Catalanian?" and this chimes with one of the claimant's allegations that Inspector McCullough made comments about political unrest in Spain. It is doubtful whether this constitutes racial discrimination or harassment but it does rather suggest that Inspector McCullough was not unduly careful or sensitive about what he said to fellow workers.
77. We have also looked closely at the apology issue. We were not impressed with Inspector McCullough's evidence. It seems clear, however, that he was prepared to offer a limited apology but not one that matched the claimant's allegations. Thus the inconsistency that Mr Dornan drew attention to in the Dignity at Work interview and in his evidence to the tribunal was rather contrived. We firmly believe however that Inspector McCullough knew that he had made some comments that he should not have and offered an apology to defuse the situation and protect himself.
78. We are also concerned with some of the contents of Mrs Rabikova's letter of 22 November 2018 and in particular the statement that "any further unsubstantiated, serious or fictitious claims would be treated very seriously." As we have indicated we found the claimant to be a credible witness and we do not consider that this comment was warranted. Just because the claimant was unable to provide supporting witnesses and Inspector McCullough's denied the claims made against him does not mean that there was no basis for the allegations or they were fictitious. We are, however, satisfied that the incidents in July and 4 August 2018 had no racial connotations.
79. Thus while the claimant may well have succeeded to some degree had he brought his claim within time he failed to do so and we do not consider that it would be just and equitable to extend time. The claim must therefore be dismissed.

**Employment Judge:**

**Date and place of hearing: 11-12 September 2019, Belfast.**

**Date decision recorded in register and issued to parties:**