THE INDUSTRIAL TRIBUNALS

CASE REF: 8162/20

CLAIMANT: **Kula Tigani**

RESPONDENT: **Huhtamaki Foodservice Delta Ltd**

JUDGMENT

The unanimous judgment of the tribunal is that the claimant's claims for race discrimination are dismissed in their entirety for the reasons set out in this judgment.

CONSTITUTION OF TRIBUNAL

Employment Judge:	**Employment Judge Sturgeon**
Members:	**Ms Gail Clarke** **Mr Paul Laughlin**
Interpreters:	**Ms Katarzyna Liggett and Mr Anthony Ojolola**

APPEARANCES:

The claimant represented himself.

The respondent was represented by Mr Peter Bloch of the Engineering Employers Federation.

BACKGROUND

1. The respondent is a limited company in the food packaging industry.

2. The claimant was initially engaged by the respondent as an agency worker, via Industrial Temps, from 17 December 2018 to 25 October 2019. The claimant was employed directly by the respondent from 28 October 2019 as a production operative. He remained in this role until his resignation on 2 January 2020. His last day of employment was 8 January 2020.

3. The claimant issued these proceedings on 7 March 2020 and he claims direct race discrimination, harassment and detriment contrary to the Race Relations (NI) Order 1997, as amended.

4. The ET3 response, presented on behalf of the respondent, denied all claims of race discrimination.

PROCEDURE AND SOURCES OF EVIDENCE

5. This case had been cased managed and witness statements were exchanged, as directed by the tribunal, for all witnesses.

6. At the substantive hearing, each witness swore or affirmed and then adopted their previously exchanged witness statement as their entire evidence-in-chief before moving on to cross-examination and brief re-examination.

7. The claimant gave evidence on his own behalf. While the tribunal had the services of a remote interpreter (Mr Ojolola) for the claimant, the tribunal was able to engage with the claimant to the mutual satisfaction of both the claimant and the tribunal without the assistance of Mr Ojolola.

8. On behalf of the respondent, the tribunal heard evidence from the following witnesses:-

   i. Adrian Ward (Production Manager with the respondent);
   ii. Eileen Moore (former HR Specialist with the respondent);
   iii. Stephen Moore (Business IT Manager with the respondent);
   iv. David McClelland (Shift Supervisor with the respondent);
   v. Thomas Murphy (Production Operative with the respondent);
   vi. Pawel Horla (Production Operative with the respondent);
   vii. Dariusz Trzuskawski (Production Operative with the respondent); and
   viii. Gemma Cleland (Senior Recruitment Coordinator with Industrial Temps).

9. The tribunal also received a core bundle of documents containing both parties' witness statements, all pleadings in the case and all discovery exchanged between the parties.

LEGAL AND FACTUAL ISSUES

10. The following legal and factual issues were agreed between the parties at a Case Management Preliminary Hearing on 4 June 2021. These issues were confirmed by both parties, at the outset of the hearing on the first day, as the issues to be determined by the tribunal.

Legal Issues

i. Did the respondent subject the claimant to:

   a. Less favourable treatment on grounds of race as defined in Article 3(1)(a) of the Race Relations (NI) Order 1997, as amended; and/or

   b. Harassment as defined in Article 4A of the Race Relations (NI) Order 1997, as amended; and/or

   c. A detriment contrary to Article 6(2)(c) of the Race Relations (NI) Order 1997, as amended.

ii. Can the respondent rely on the statutory defence contained in Article 32(5) of

the Race Relations (NI) Order 1997?

iii. Can the claimant bring a claim of unfair constructive dismissal in circumstances when his dates of employment were 28 October 2019 –10 January 2020?

iv. Did the claimant's resignation amount to a constructive discriminatory dismissal?

v. Have the constituent elements of the test for constructive dismissal been met, specifically:

   a. Was there a breach of the implied term of trust and confidence in the contract by the respondent;

   b. If so, was that breach sufficiently important to justify the claimant resigning? i.e. was it a fundamental, repudiatory breach of contract?

   c. Did the claimant resign in response to the alleged breach or did he resign for some other unconnected reason?

   d. Did the claimant delay in terminating the contract in response to the respondent's alleged breach i.e. did the claimant waive the alleged breach and thereby affirm the contract?

vi. If the claimant succeeds, what remedy is the claimant entitled to?

Factual Issues

i. From the commencement of the claimant working within the respondent company in December 2018 until his resignation, did Thomas carry out any of the alleged acts:

   a. Making monkey like sounds each time the claimant asked a question when training on the machines?

   b. A complaint to the supervisor that the claimant could not operate the machines?

   c. Complaints there was a smell from the claimant?

   d. Telling others he was smelly?

   e. Telling the claimant he was "mad in the head"?

   f. Making monkey like sounds on a continuing basis?

ii. If it is found that Thomas carried out any of the alleged acts at point (i) above:

   a. Was this an act or acts of harassment?

b. If so, was it on grounds of the claimant's race?

iii. Why was the claimant's workstation changed?

iv. Did the management make a complaint to the agency (Industrial Temps) about the claimant's smell/hygiene?

v. a. What steps did the respondent take to bring to the claimant's attention concerns about his personal hygiene?

b. What assistance was offered to the claimant by the respondent? Was the claimant offered a referral to OH?

vi. On 2 December 2019, the claimant's colleague Darius sprayed him with aftershave in the canteen in front of other workers.

a. What role, if any, did Thomas and Pawel Horla have in this incident?

b. When the claimant confronted Pawel, did Pawel say that the claimant was smelling? Did Pawel aggressively shout at the claimant that everybody knew he smelt, and that Thomas told him that the claimant doesn't bath?

c. Did a co-worker of the claimant, Lucas, witness the incident? Did he tell the claimant to report it?

vii. In relation to the incident in the canteen at point 6 above:

a. Was this an act or acts of harassment?

b. Was this on grounds of the claimant's race?

viii. Did the claimant report the incident to the Production Manager on 3 December 2019?

ix. If the claimant did report the incident to the Production Manager, what did the claimant report?

x. From 3 December 2019, was the claimant subjected to further acts of harassment? Did the claimant complain about this to the Production Manager?

xi. What was the outcome of the claimant's complaint?

xii. Was a corrective counselling meeting held with the claimant on 30 December 2019? What was the purpose of the meeting?

xiii. What was the outcome of the meeting on 30 December 2019?

xiv. What caused the claimant to resign from his job?

xv. Did the claimant inform management that he was resigning to take up a

course?

xvi. What steps, if any, were taken by the claimant to bring allegations of harassment and/or discrimination to the attention of the respondent?

xvii. If it is found the claimant was subjected to an act or acts of harassment, did the respondent take reasonable steps to prevent this?

xviii. At the time of the events giving rise to the claim, was the claimant the only black employee in the respondent's workplace?

THE RELEVANT LAW

Direct discrimination on grounds of race

11. The Race Relations (Northern Ireland) Order 1997 (as amended) provides, so far as is relevant to these proceedings, that:-

> *"Article 3(1) –*
>
> *A person discriminates against another in any circumstances for the purposes of any provision of this Order if –*
>
> *(a) on racial grounds he treats that other less favourably then he treats or would treat other persons;*
>
> *Article 5(1) of the 1997 Order is as follows:-*
>
> *"Subject to paragraphs (2) and (3), in this Order:-*
>
> *'Racial grounds' means any of the following grounds, namely colour, race, nationality or ethnic or national origins".*
>
> *Article 6(2)*
>
> *"It is unlawful for a person, in the case of a person employed by him at an establishment in Northern Ireland, to discriminate against that employee*
>
> *(a) in the terms of employment which he affords him; or*
>
> *(b) in the way he affords him access to opportunities for promotion, transfer or training, or to any other benefits, facilities or services, or by refusing or deliberately omitted to afford him access to them; or*
>
> *(c) by dismissing, or subjecting him to any other detriment.*

12. There are two elements in direct discrimination, firstly, the less favourable treatment and secondly, the reason for that treatment ***Glasgow City Council v Zafar 1998 IRLR 36.*** In the case of ***Shamoon v Chief Constable of the RUC 2003 UKHL 11*** at paras 7 & 8 - Lord Nicholls said that "*sometimes the less favourable treatment*

issue cannot be resolved without, at the same time deciding the reason why issue". Further, in his judgment in the case of ***Nagarajan v London Regional Transport 1999 IRLR 572,*** he observed that 'the reason why' is the crucial question.

Racial Harassment

13. Article 4A(1) of the Race Relations (Northern Ireland) Order 1997 ('the 1997 Order') states as follows:-

> *"A person ('A') subjects another person ('B') to harassment in any circumstances relevant to 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'.*
>
> *Conduct shall be regarded as having the effects specified at Sub-paragraphs (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."*

Shifting burden of proof

14. Article 52A of the Race Relations (Northern Ireland) Order 1997 (as amended) is headed "burden of proof" and provides:-

> *" ...*
>
> *Where on the hearing of the complaint, the complainant proves facts upon 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 ... against the complainant;*
>
> *(b) is by virtue of Article 32 or 33 to be treated as having committed such an act of discrimination ... 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."*

15. The burden is on the claimant to prove facts from which the tribunal could conclude that an act of discrimination on grounds of race occurred and, if he does so, the burden then shifts to the respondent to show that any adverse treatment was in no sense whatsoever influenced by the claimant's race.

16. The approach to be taken in applying the burden of proof provisions has been fully considered in the case of ***Igen Limited v Wong [2005] IRLR 258 CA*** and

subsequent cases such as **M*adarassy***. It was reviewed by the Northern Ireland Court of Appeal in the case of ***Nelson v Newry and Mourne District Council (2009) NICA*** 3 April 2009.

> *"22 This provision and its English analogue have been considered in a number of authorities. The difficulties which tribunals appear to continue to have with applying the provision in individual cases indicates that the guidance provided by the authorities is not as clear as it might have been. The Court of Appeal in **Igen v Wong [2005] 3 ALL ER 812** considered the equivalent English provision and pointed to the need for a tribunal to go through a two-stage decision-making process. The first stage requires the complainant to prove facts from which the tribunal could conclude in the absence of an adequate explanation that the respondent had committed the unlawful act of discrimination. Once the tribunal has so concluded, the respondent has to prove that he did not commit the unlawful act of discrimination. In an annex to its judgment, the Court of Appeal modified the guidance in **Barton v Investec Henderson Crosthwaite Securities Ltd [2003] IRLR 333**. It stated that in considering what inferences and conclusions can be drawn from the primary facts the tribunal must assume that there is no adequate explanation for those facts. Where the claimant proves facts from which conclusions could be drawn that the respondent has treated the claimant less favourably on the ground of sex then the burden of proof moves to the respondent. To discharge that onus, the respondent must prove on the balance of probabilities that the treatment was in no sense whatever on the grounds of sex. 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 be adduced to discharge the burden of proof. In **McDonagh v Royal Hotel Dungannon [2007] NICA 3** the Court of Appeal in Northern Ireland commended adherence to the **Igen** guidance.*
>
> *23 In the post-**Igen** decision in **Madarassy v Nomura International PLC [2007] IRLR 247** the Court of Appeal provided further clarification of the tribunal's task in deciding whether the tribunal could properly conclude from the evidence that in the absence of an adequate explanation that the respondent had committed unlawful discrimination. While the Court of Appeal stated that it was simply applying the **Igen** approach, the **Madarassy** decision is in fact an important gloss on **Igen**. The court stated:-*
>
> > *'The burden of proof does not shift to the employer simply on the claimant establishing a difference in status (eg sex) and a difference in treatment. Those bare facts only indicate a possibility of discrimination. They are not, without more, sufficient matter from which a tribunal could conclude that, on the balance of probabilities, the respondent had committed an unlawful act of discrimination; '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 claimant in support of the*

allegations of sex discrimination, such as evidence of a difference in status, difference in treatment and the reason for the differential treatment. It would also include evidence adduced by the respondent in contesting the complaint. Subject only to the statutory 'absence of an adequate explanation' at this stage, the tribunal needs to consider all the evidence relevant to the discrimination complaint such as evidence as to whether the act complained of occurred at all, evidence as to the actual comparators relied on by the claimant to prove less favourable treatment, evidence as to whether the comparisons being made by the complainant were of like with like as required by Section 5(3) and available evidence of all the reasons for the differential treatment.'

That decision makes clear that the words 'could conclude' is not be read as equivalent to 'might possibly conclude'. The facts must lead to an inference of discrimination. This approach bears out the wording of the Directive which refers to facts from which discrimination can be 'presumed'.

24 This approach makes clear that the complainant's allegations of unlawful discrimination cannot be viewed in isolation from the whole relevant factual matrix out of which the complainant alleges unlawful discrimination. The whole context of the surrounding evidence must be considered in deciding whether the tribunal could properly conclude, in the absence of an adequate explanation, that the respondent has committed an act of discrimination. In ***Curley v Chief Constable of the Police Service of Northern Ireland [2009] NICA 8****, Coghlin LJ emphasised the need for a tribunal engaged in determining this type of case to keep in mind the fact that the claim put forward is an allegation of unlawful discrimination. The need for the tribunal to retain such a focus is particularly important when applying the provisions of Article 63A. The tribunal's approach must be informed by the need to stand back and focus on the issue of discrimination."*

17. In ***S Deman v Commission for Equality and Human Rights & Others [2010] EWCA Civ 1279***, the Court of Appeal referred to ***Madarassy*** and the statement in that decision that a difference in status and a difference in treatment 'without more' was not sufficient to shift the burden of proof. In his judgment, Lord Justice Sedley stated:-

"We agree with both counsel that the 'more' which is needed to create a claim requiring an answer need not be a great deal. In some instances it will be furnished by a non-response, or an evasive or untruthful answer, to a statutory questionnaire. In other instances it may be furnished by the context in which the act has allegedly occurred." (Sedley L J at paragraph 19).

18. Further clarification was provided in the EAT decision in ***Laing v Manchester City Council [2006] IRLR 748***, the EAT stated at Paragraphs 71 - 76:-

*"(71) There still seems to be much confusion created by the decision in **Igen v Wong**. What must be borne in mind by a tribunal faced with a race claim is that ultimately the issue is whether or not the employer has committed an act of race discrimination. The shifting in the burden of proof simply recognises the fact that there are problems of proof facing an employee which it would be very difficult to overcome if the employee had at all stages to satisfy the tribunal on the balance of probabilities that certain treatment had been by reason of race.*

...

*(73) No doubt in most cases it would be sensible for a tribunal to formally analyse a case by reference to the two stages. But it is not obligatory on them formally to go through each step in each case. As I said in **Network Road Infrastructure v Griffiths-Henry**, it may be legitimate to infer he may have been discriminated against on grounds of race if he is equally qualified for a post which is given to a white person and there are only two candidates, but not necessarily legitimate to do so if there are many candidates and a substantial number of other white persons are also rejected. But at what stage does the inference of possible discrimination become justifiable? There is no single answer and tribunals can waste much time and become embroiled in highly artificial distinctions if they always feel obliged to go through these two stages.*

...

(75) The focus of the tribunal's analysis must at all times be the question whether they can properly and fairly infer race discrimination. If they are satisfied that the reason given by an employer is a genuine one and does not disclose either conscious or unconscious racial discrimination, then that is an end of the matter. It is not improper for a tribunal to say, in effect, 'there is a real question as to whether or not the burden has shifted, but we are satisfied here that even if it has, the employer has given a fully adequate explanation as to why he believed or he did and it has nothing to do with race'.

*(76) Whilst, as we have emphasised, it will usually be desirable for a tribunal to go through the two stages suggested in **Igen**, it is not necessarily an error of law to fail to do so. There is no purpose in compelling Tribunals in every case to go through each stage."*

Detriment

19. The authorities on "detriment" were recently considered by the Northern Ireland Court of Appeal in the case of ***Diane Rice v Dignity Funerals Ltd (STE10804 December 2018)***:-

"[46] … The courts have given the term "detriment" a wide meaning. However as the statutory cause of action is discrimination in the field of employment the requirement is that 'detriment' has arisen in that field. For there to have been detriment it is not necessary to establish that there has

been some physical or economic consequence as a result of the discrimination. In ***Ministry of Defence v Jeremiah [1979] 3 All ER 833 at 841, [1980] QB 87*** *at Brightman LJ said that "a detriment exists if a reasonable worker would or might take the view that the [treatment] was in all the circumstances to his detriment". As May LJ put it in* ***De Souza's case [1986] ICR 514 at 522****, the court or Tribunal must find that by reason of the act or acts complained of a reasonable worker would or might take the view that he had thereby been disadvantaged in the circumstances in which he had thereafter to work. In* ***Shamoon v Chief Constable of the Royal Ulster Constabulary*** *Lord Hope, with whom Lord Hutton and Lord Rodger of Earlsferry agreed, articulated the test of detriment as being "Is the treatment of such a kind that a reasonable worker would or might take the view that in all the circumstances it was to his detriment?" Undermining the role and position of an employee, marginalising an employee, reducing the standing or demeaning an employee in the eyes of those over whom she was in a position of authority can amount to detriment, see Shamoon at paragraphs [35] and [37]".*

[47] An unjustified sense of grievance cannot amount to 'detriment': ***Barclays Bank plc v Kapur (No 2) [1995] IRLR 87*** *and Shamoon at paragraph [35].*

Constructive Dismissal

20. By Article 127(1)(c) of the Employment Rights (Northern Ireland) Order 1996 ("the Order"), a resignation by an employee can, in defined circumstances, constitute a dismissal by the employer. This is generally known as constructive dismissal. Article 127(1)(c) of the Order states as follows:-

> "(1) *For the purposes of this part an employee is dismissed by his employer if …*
>
> *(c) the employee terminates the contract under which he is employed (with or without notice) in circumstances in which he is entitled to terminate it without notice by reason of the employer's conduct."*
>
> *…*

21. Article 140 of the Employment Rights (Northern Ireland) Order 1996 further provides:-

> ***"Qualifying period of employment***
>
> *140.—(1) Article 126 does not apply to the dismissal of an employee unless he has been continuously employed for a period of not less than one year ending with the effective date of termination.*
> *…."*

22. Harvey on Industrial Relations and Employment Law ("Harvey") at Div DI 3 para 403 states as follows:-

> *"In order for the employee to be able to claim constructive dismissal, four*

conditions must be met:

1. *There must be a breach of contract with the employer. This may be either an actual breach or an anticipatory breach – see* ***Western Excavating (ECC) Ltd v Sharp 1978 IRLR 27.***

2. *That breach must be sufficiently important to justify the employee resigning, or else it must be the last in a series of incidents which justify his leaving. Possibly a genuine, albeit erroneous, interpretation of the contract by the employer will not be capable of constituting a repudiation in law.*

3. *He must leave in response to the breach and not for some other unconnected reason.*

4. *He must not delay too long in terminating the contract in response to the employer's breach, otherwise he may be deemed to have waived the breach and agreed to vary the contract."*

23. Under the "last straw" principle, an employee can be justified in resigning following a relatively minor incident if it is the last in a series of acts, one or more of which amounted to a breach of contract, and cumulatively the acts amounted to a sufficiently serious breach of contract to warrant resignation amounting to dismissal.

24. Breaches of contract can be a breach of an express term of the contract or a breach of an implied term, or both.

25. It is well established that an implied term of an employment contract is the term that the employer will not conduct itself in a manner likely to damage the relationship of trust and confidence between the employer and the employee. This is generally known as the implied duty of trust and confidence. If the employer breaches that term, it can amount to a repudiation of the contract.

26. A breach of the implied duty of trust and confidence always amounts to a fundamental breach of contract and will entitle the employee to resign in response to that breach.

RELEVANT FINDINGS OF FACT

Background

27. During the course of the hearing, the tribunal considered all the evidence and documentation presented to it. The tribunal found much of the evidence given by the claimant and the respondent's witnesses to be directly contradictory. The tribunal therefore had to carefully assess those aspects of the respective accounts which were directly contradictory to each other whilst giving appropriate weight to surrounding aspects of the case. The tribunal made the following findings of fact insofar as relevant and material to the determination by the tribunal of the claimant's claims.

28. The claimant worked for the respondent company as an agency worker from 20 December 2018 to 25 October 2019 supplied by Industrial Temps. Industrial

Temps is the respondent's sole provider of temporary agency workers. The tribunal accepts that there can be up to 150 temporary agency workers at the respondent organisation at any one time.

29. The Gluing Department, which is the department in which the claimant worked, is the largest department and is a department that relies heavily on agency workers.

30. The claimant became a permanent employee of the respondent company on 28 October 2019. The claimant's job title was General Operative in Gluing. He was contracted to work 37½ hours per week.

31. The tribunal accepts that the respondent employed a diverse workforce. The diversity reports for the respondent for the periods December 2018 to December 2019 showed a diverse workforce with agency workers supplied to the respondent from many different countries including Poland, Lithuania, Romania, Latvia, Hungary, Somalia, Sudan, Brazil, Ghana, Nigeria and the Philippines. Within the Gluing Department, where the claimant worked, the nationalities of the workers included Romanian, Polish, Dutch, Portuguese, Phillipino, Tunisian, Hungarian, Nigerian, Sudanese and Indian.

32. The tribunal also accepts that, in 2019, the claimant was one of 7 black employees within the Gluing department of the respondent.

Matters arising during the period the claimant was an agency worker – December 2018 to October 2019

33. In early 2019, shortly after the claimant became an agency worker for the respondent, Mr McClelland (Shift Supervisor) made Mr Ward (Production Manager) aware of an issue with the claimant's personal hygiene. Mr McClelland informed Mr Ward that the claimant's colleagues were complaining about working alongside him. Mr McClelland informed Mr Ward that some were finding it unbearable to work with him because of his body odour.

34. Following this complaint, Mr Ward contacted Ms Cleland, Senior Recruitment Co-ordinator, at Industrial Temps and informed her of the complaint made.

35. Ms Cleland had a meeting with the claimant, together with Roisin Thompson, HR Manager, at Industrial Temps' office in Belfast, in January 2019. At this meeting, the claimant's hygiene was discussed with him, he was reminded that there were showers available at the respondent company, if he needed to use them, and the claimant was offered extra work t-shirts. The claimant does not dispute that this meeting took place. The claimant accepted that he took the comments, arising from the meeting, on board.

36. Ms Cleland reported back to Mr Ward, following this meeting, and she informed Mr Ward that the meeting with the claimant had gone well. Ms Cleland made Mr Ward aware that if the claimant was able to be given a locker, it would certainly help his situation as he could carry extra clothing with him to work to put in the locker.

37. It is common case between the parties that the claimant was moved, by Mr McClelland, from the Masterfold 1 machine to the Masterfold 3 machine in February

2019. The tribunal accepts the evidence of Mr McClelland that the reason for the claimant's move was two-fold: firstly, because Masterfold 1 and Masterfold 3 were identical machines, it was normal practice for people to be swapped around on these machines. The second reason for the move was because people had complained to Mr McClelland about the claimant's body odour and they were finding it difficult to work alongside the claimant (as identified at paragraph 33 above).

Meeting about hygiene when the claimant became an employee

38. The claimant became a direct permanent employee of the respondent from 28 October 2019.

39. The tribunal accepts that the respondent had a further meeting with the claimant, shortly after be became a permanent employee, in October 2019, about his personal hygiene following further complaints from several employees. It was an informal meeting and no notes were taken of the conversation. On this occasion, Ms Moore (from Human Resources) and Mr Ward met with the claimant and explained to him that issues about his body odour had been raised before but there were still complaints being made about it. At this meeting, the claimant confirmed that he was cycling to work. It was explained to the claimant, at this meeting, that he could use showers in work, after he cycled into work, and the claimant was asked if he needed anything else like deodorant. The claimant was provided with extra t-shirts and a large locker. The tribunal finds that this was a supportive meeting and that the claimant was receptive to what was discussed with him.

Incident on 2 December 2019

40. It is common case between the parties that, on 2 December 2019, Mr Trzuskawski sprayed the claimant with Armani aftershave. However, the motive for this action is disputed by the parties. The claimant alleges that the incident was initiated by Mr Murphy and that Mr Horla told Mr Trzuskawski to spray the claimant with aftershave because of his race. Both Mr Trzuskawski and Mr Horla deny this. Mr Horla confirmed in evidence that he did not tell Mr Trzuskawski to spray the claimant. Mr Trzuskawski also confirmed in evidence that Mr Horla did not tell him to spray the claimant. Mr Trzuskawski confirmed that he sprayed the claimant because he had been speaking to the claimant, prior to the incident, about his aftershave.

41. When faced with two conflicting opinions as to the reason for the spraying of the aftershave, the tribunal prefers the evidence of Mr Horla. The tribunal found Mr Horla to be a very sincere and genuine witness. The tribunal finds that Mr Horla did not tell Mr Trzuskawski to spray the claimant. Rather, the tribunal finds that, on the balance of probabilities, Mr Trzuskawski sprayed the claimant because of the issues with regard to the claimant's body odour.

42. An investigation into the incident, on 2 December 2019, took place on 4 December and 6 December 2019. As part of this investigation, Mr Ward spoke with the claimant, Mr Horla, Mr McClelland, Mr Trzuskawski and Mr Murphy. As a result of this investigation, Mr Trzuskawski was counselled on the matter, on 16 December 2019. At this counselling meeting, it was explained to Mr Trzuskawski the importance of how people feel and that his behaviour towards the claimant could have been deemed a conduct issue and resulted in disciplinary action.

Meeting on 30 December 2019

43. It is common case between the parties that, on 30 December 2019, the claimant was receiving Code of Conduct training, as part of a larger group, and that this training was being facilitated by Ms Moore. The tribunal accepts the unchallenged evidence, of Ms Moore, that she was overcome by a very bad body odour, from the claimant, at this training. At the end of the training session, Ms Moore spoke to Mr Ward. Both Ms Moore and Mr Ward agreed that they should meet with the claimant again to document the situation as the previous meeting had been dealt with informally.

44. Mr Ward and Ms Moore met with the claimant, also on 30 December 2019, to discuss with him his ongoing body odour issue. At this meeting, the tribunal accepts that it was explained to the claimant that the body odour issue had been raised before but still needed to be addressed. The claimant was asked if there was any medical issue the respondent should be aware of. The claimant was informed that, if so, an Occupational Health appointment could be arranged. The tribunal accepts that the claimant did not raise any underlying medical issue and that he also confirmed that he did not need support from Occupational Health.

45. The claimant was informed, at this meeting, that if there was no improvement with the claimant's hygiene situation, it could potentially lead to formal action in line with the company disciplinary policy. The tribunal rejects the claimant's assertion that he was told, by Mr Ward, that he had one week to clean himself or else he would get fired.

Monkey Like Noises

46. The claimant asserts that Mr Murphy repeatedly made monkey like sounds, in the presence of the claimant, throughout the claimant's employment. The claimant asserts that such noises were made by Mr Murphy on the claimant's first day of work. However, the claimant was unable to provide the tribunal with any other specific dates or occasions when Mr Murphy made these sounds.

47. The claimant was also unable to provide the tribunal with any evidence of when he had complained to the respondent about Mr Murphy making these sounds. The claimant had ample opportunity to do so throughout his time both as an agency worker and as an employee for the respondent. He did not do so. Indeed, the tribunal finds it odd that the claimant, even when he became a permanent employee, chose not to make any formal complaint about Mr Murphy and the making of monkey-like sounds. The tribunal accepts that the claimant was trained on code of conduct issues and therefore would have been aware of the procedure to follow to make a complaint.

48. At an investigation meeting into the aftershave incident (see paragraphs 40-42 above), the claimant complained that Mr Murphy had initiated the incident and he complained that Mr Murphy didn't like him because he was black. However, the claimant made no reference, within this meeting, to the monkey like noises he alleges Mr Murphy made. When also asked if Mr Murphy had made any comment to the claimant about his race, the claimant replied, *"Not to my face."* This would

have been the perfect opportunity for the claimant to raise such allegations of discrimination and harassment.

49. All of the respondent's witnesses, in their evidence, stated that they never witnessed Mr Murphy making the monkey like sounds which the claimant alleges he made. Unfortunately, from the claimant's point of view, the absence of supporting evidence that must exist, if his account is correct, has the consequences of making it more difficult for him to prove his contentions. In the absence therefore of evidence to corroborate the claimant's allegations in this regard, the tribunal finds no persuasive evidence that such alleged actions, by Mr Murphy, took place.

Claimant's resignation

50. On 2 January 2020, Ms Eileen Moore received a telephone call from the claimant stating that he was resigning. There is a dispute between the parties as to the reason for the claimant's resignation. The claimant's evidence to the tribunal was that he resigned due to the abusive and racist behaviour of his co-workers. Ms Moore's evidence was that the claimant told her he was resigning to pursue a course. The claimant denies he said this. The tribunal is therefore presented with two conflicting accounts. The tribunal finds, on the balance of probabilities, that the claimant did not raise any issues of race discrimination with Ms Moore on 2 January 2020. The tribunal makes this finding for the following reason:

    i. Ms Moore was clear and consistent in her evidence that the claimant had not raised allegations of racism, bullying or harassment;

    ii. Ms Moore kept a contemporaneous note of her telephone call with the claimant on 2 January 2020. There is no allegation of racism, bullying or harassment contained therein. The tribunal accepts Ms Moore's evidence that, if such a serious allegation had been raised, she would have recorded it;

    iii. Ms Moore sent Mr Ward an email, immediately after her phone call with the claimant, on 2 January 2020 and, again, no allegation of racism, bullying or harassment is recorded. The tribunal accepts that Ms Moore would have recorded such a serious allegation.

51. The claimant's last day of employment was 8 January 2020.

CONCLUSION

52. At the substantive hearing, the claimant relied upon the following events to ground his claim for both race discrimination and racial harassment:-

    (a) complaints from various employees with regard to the claimant's smell/hygiene and counselling on 30 December 2019;

    (b) the making of monkey like sounds, by Mr Murphy, on a continuing basis;

    (c) changing of the claimant's workstation;

(d) the spraying of aftershave, on the claimant, in the canteen in front of the claimant's co-workers;

(e) the only black employee employed in the Gluing department.

Direct Race Discrimination

53. (a) **Complaints of a smell and counselling on 30 December 2019**

As per the findings of fact, the claimant was spoken to on several occasions regarding his body odour. The claimant does not deny that this took place. The question for the tribunal is whether or not the claimant was spoken to, about his body odour, because of his race. The claimant's comparator is a hypothetical comparator in this instance, i.e. a white man with body odour issues. The tribunal concludes, however, that a white man, with similar body odour issues, would also have been spoken to in the same manner as the claimant. Accordingly, there has been no difference in treatment between the claimant and the hypothetical comparator and so the claimant's complaint of direct discrimination fails on this count.

(b) **Making monkey like sounds on a continuing basis**

It was a repeated theme of the claimant's evidence that Mr Murphy made monkey like sounds about the claimant throughout his employment. If this act happened, it would amount to detrimental treatment. The respondent denies the treatment occurred. Other than the claimant's evidence to the tribunal, that these actions by Mr Murphy occurred, there was no further evidence adduced, from any other witness, to support the claimant's allegation in this regard. As per the findings of fact, the tribunal also found that the claimant never made any complaint about such noises made despite having the opportunity to do so. In the absence therefore of any evidence to corroborate the claimant's evidence in this regard, the tribunal concludes that such actions, by Mr Murphy, did not take place and there is therefore no prima facie evidence of race discrimination.

(c) **Changing of the Workstation**

The claimant alleged that he was moved workstation (i.e. from Masterfold 1 to Masterfold 3) because he was black. As per the findings of fact, the claimant was moved to a different workstation for operational reasons. The tribunal accepts the unchallenged evidence of David McClelland that Masterfold 1 and 3 are identical and that the only reason for moving the claimant was because of complaints from other work colleagues about his body odour. The tribunal was not presented with any persuasive evidence to suggest that the claimant was moved because he was black. Accordingly, there is no prima facie evidence of race discrimination and therefore the burden of proof does not pass to the respondent in this aspect of the claimant's case.

(d) **Aftershave Incident**

As per the findings of fact, there is no dispute that the claimant was sprayed with aftershave by Mr Trzuskawski. There is also no dispute that Mr Trzuskawski was later counselled for his action. The claimant asserts, throughout his case, that Mr

Trzuskawski sprayed him because he was black. The tribunal concludes that Mr Trzuskawski's actions, in this regard, were a difference in treatment but there was no persuasive evidence, before this tribunal, that the difference of treatment was on the grounds of the claimant's race. Given the previous complaints raised to the respondent, from work colleagues, about the claimant's body odour, and also taking into account the fact that meetings were held between the claimant and the respondent to discuss the issue, the tribunal concludes that the claimant, on the balance of probabilities, was sprayed by Mr Trzuskawski, because of his body odour. Accordingly, the burden of proof has not shifted to the respondent and the tribunal concludes that claimant has not been directly discriminated against, on the grounds of his race, in this regard.

(e) **Only black employee employed**

As per the finding of fact above at paragraph 32, the claimant was not the only black employee employed by the respondent in the Gluing department in 2019. There were seven other black employees that year. Given that the respondent employed other black employees, there is therefore no prima facie case of race discrimination and the burden of proof does not pass.

54. The tribunal is therefore satisfied, on the grounds of all of the above, that there is not any persuasive evidence that the claimant suffered less favourable treatment on the grounds of the claimant's race.

Racial Harassment

55. Given that the claimant relies upon the same acts, as set out above, for both his direct discrimination claim and racial harassment claim, by reason of the difficulties set out above, the claimant has not proved, on the balance of probabilities, that the catalogue of bad treatment, of which he complains, has occurred because of the claimant's race. It is therefore unnecessary to consider the ground for any such treatment in order to determine his claim of harassment on racial grounds.

56. The deficiencies and the evidence adduced in support of the claimant's claims, as set out above, are such are that the tribunal cannot conclude that any unwanted conduct was done on racial grounds, even with the benefit of the shifting of the burden of proof under Article 52A of the Race Relations (NI) Order 1997.

57. The claims for race discrimination and racial harassment are therefore dismissed against the respondent.

Constructive dismissal

58. As per the findings of fact, the claimant was not an employee of the organisation for one year and therefore lacks the qualifying service to bring a constructive unfair dismissal claim under Article 127 of the Employment Rights (Northern Ireland) Order 1996.

59. However, as per the agreed legal and factual issues, the claimant is also pleading constructive discriminatory dismissal which requires no qualifying service. The claimant's case is that he was forced to resign following acts of race discrimination and harassment by employees of the respondent. As the tribunal has not made any

finding of race discrimination or racial harassment, there has therefore been no repudiatory breach of the claimant's contract. Accordingly, the claimant's claim for constructive discriminatory dismissal cannot succeed and is dismissed. It is not necessary therefore to consider the other elements of a constructive discrimination dismissal claim.

SUMMARY

60. The tribunal concludes that the claimant's race discrimination claims are not proven. The tribunal is satisfied that the claimant did not adduce persuasive evidence of less favourable treatment, on account of the claimant's race, nor was there persuasive evidence of racial harassment.

61. The tribunal concludes that the claimant lacked the necessary qualifying service to bring a constructive unfair dismissal claim.

62. The tribunal also concludes that there has been no repudiatory breach of the claimant's contract. Accordingly, the claimant's claim for constructive discriminatory dismissal cannot succeed.

63. For all of the reasons set out above, all of the claimant's claims are dismissed in their entirety.

Employment Judge:

Date and place of hearing: 6,7,8 and 9 June 2022, Belfast.

This judgment was entered in the register and issued to the parties on: