

THE INDUSTRIAL TRIBUNALS

CASE REF: 4128/17

CLAIMANT: Woiciech Kleinschmidt

RESPONDENT: Westwood Marine Leisure Limited

DECISION

The decision of the tribunal is that the claimant's claims are dismissed.

Constitution of Tribunal:

Employment Judge: Employment Judge Ó Murray

Members: Mr I Atcheson
Mrs E Gilmartin

Interpreter: Ms Hamilton

Appearances:

The claimant represented himself.

The respondent was represented by Ms Maguire, Barrister-at-Law, instructed by CQ Solicitors.

THE CLAIM

1. The claimant's claim was for unfair dismissal in the form of constructive dismissal; for discrimination and harassment on grounds of sexual orientation; for failure to provide terms and conditions of employment.
2. The claimant made an application, shortly before the hearing, to amend his claim to include a claim of race discrimination in respect of an allegation that on one occasion on 13 December 2016 he was told to speak in English rather than in

Polish with his Polish colleague Mr Kuzian. This application was dealt with during the hearing after we heard all the evidence.

3. During the case management process prior to the hearing the claimant confirmed that he was not pursuing a claim for sex discrimination.
4. The respondent's case was that the claimant resigned and was not dismissed and that there was no discrimination. The respondent also stated that a contract was provided to the claimant. A time point was also raised in relation to some, or all, of the claimant's claims.

THE ISSUES

5. The issues for the tribunal were as follows:
 - (1) Was there a breach of contract justifying the claimant resigning and did the claimant resign in response without undue delay?
 - (2) Was the claimant subjected to discrimination and/or harassment on grounds of sexual orientation in the form of being referred to on numerous occasions as "gaylord", "banana-man" and "pervert" by fellow workers?
 - (3) Was the claimant provided with a statement of main terms and conditions of employment?
 - (4) Should the claim be amended to include a claim of race discrimination in that it is just and equitable to extend the time limit for such a claim to be made?
 - (5) If the claim of race discrimination is deemed to be in time was the claimant discriminated against in the form of direct or indirect discrimination on grounds of being Polish in the incident on 13 December 2016.

CASE MANAGEMENT

6. There were CMDs on 4 October 2017 and on 16 November 2017 and at both of those hearings the claimant was legally represented. There were subsequent CMDs when the claimant was unrepresented and the purpose of those hearings was to consider special measures and to provide appropriate directions and adjustments to facilitate the claimant's preparation for, and participation in, the hearings.
7. The relevant adjustments put in place for the hearing and during the hearing were as follows:
 - (1) The claimant did not have to provide a witness statement for the hearing but gave evidence orally.
 - (2) The claimant's evidence and that of his witness Mr Kuzian were given on the first two days of the hearing on 5 and 6 March 2018. The parties had been notified at a CMD on 13 February 2018 that the hearing would proceed in two parts with a gap of some weeks between them.
 - (3) The second part of the hearing was therefore listed for 23-25 May 2018 with

that gap before the second hearing to enable the claimant: to read and absorb the respondent's witness statements, to prepare his questioning of the respondent's witnesses, and to prepare any legal submissions he might wish to make.

- (4) During the hearing the claimant was given breaks to compose himself and to review the questions which he had prepared.

SOURCES OF EVIDENCE

9. The tribunal heard oral evidence from the claimant and his witness Mr Piotr Kuzian who attended the hearing on witness summons. The tribunal also heard from the claimant's counsellor Ms Abkanar who attended to stand over her report but was not questioned or cross-examined by any party.
10. For the respondent the tribunal had witness statements and oral evidence from Tom Leonard, Director of the respondent company, his daughter Louise Leonard who worked in the respondent company together with two employees who worked alongside the claimant namely Edward Allen and Mark Gravill.
11. The tribunal had regard to all documentation to which it was referred together with the witness statements and the oral evidence in reaching its findings of fact on a balance of probabilities. This decision records the principal findings of fact drawn from all the evidence.

THE LAW

12. The right not to be unfairly dismissed is contained within the Employment Rights (Northern Ireland) Order 1996 (as amended). In a constructive dismissal claim the burden is on the claimant to prove a breach of contract.
13. The case of *Western Excavating v Sharp Limited [1978] IRLR 27* outlines the four key elements of constructive dismissal which the claimant must prove as follows: -
 - (i) There must be a breach of contract by the employer;
 - (ii) The breach must be sufficiently serious to justify the employee resigning;
 - (iii) The claimant must leave in response to the breach and not for some other unconnected reason; and
 - (iv) The employee must not delay too long in terminating the contract in response to the employer's breach as otherwise he may be deemed to have waived the breach of contract.
14. As regards the delay point there is no fixed time within which an employee must make up his mind to resign in response to a breach of contract; the surrounding circumstances are key.
15. Under the "last straw" principle, an employee can be justified in resigning following a relatively minor event 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. (*Omilaju*).

16. The case of *Malik [1997] 3 All ER 1* confirms that there is an implied term in the employment contract 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. If the employer breaches that term, it can amount to repudiation of the contract.
17. Discrimination and harassment on grounds of sexual orientation is rendered unlawful by the Employment Equality (Sexual Orientation) Regulations (NI) 2003.
18. Discrimination on the grounds of race is rendered unlawful by Race Relations (NI) Order 1997.
19. Detriment is determined using the *Shamoon* test which is whether a reasonable worker would or might take the view in all the circumstances that the treatment was to the claimant's detriment in the sense of being disadvantaged.
20. The burden of proof in relation to both types of discrimination requires that the claimant proved facts from which a tribunal could conclude that an act of unlawful discrimination occurred. If the claimant proves the necessary primary facts the burden of proof shifts to the employer to show that discrimination in no sense whatsoever tainted relevant acts.
21. Any race discrimination claim was outside the relevant three-month time-limit and the issue for the tribunal therefore was whether time should be extended on just and equitable grounds. In this regard the tribunal must have regard to the nature of any amendment and whether it is substantial or not, the timing of any application, the reasons for delay in bringing that aspect of the claim, whether legal advice was sought and whether the claimant was represented at any point. It is then for the tribunal to decide whether it would be just and equitable to extend time to enable any such discrimination claim to be considered.

FINDINGS OF FACT AND CONCLUSIONS

22. The respondent's business is that of a boat builder. The claimant is Polish and he worked as a boat fitter from April 2014 until he resigned by letter sent by his solicitor on 19 June 2017.
23. The claimant's claim (set out in his claim form dated 21 June 2017) stated that his first two years with the company were fine. He stated that Tom Leonard and Louise Leonard then became unduly familiar in that Mr Leonard would touch the claimant, put his face in his, and Louise would put her face in his face. The claimant alleged that both of the Leonards called him names such as "gaylord" and that there were gestures and suggestions made by them. The claimant's case in his claim form was that he started turning up late to work because of this alleged treatment. The claim presented in hearing differed in key respects from the claim as originally formulated.
24. The claim as set out in the claim form and the replies was prepared with the aid of the claimant's solicitor who was on record at that time. The claimant had a solicitor on record for the three CMDs and it was only at the third CMD that the issue of a

possible race discrimination was raised in the form of the allegation about the incident on 13 December 2016 when it was agreed by all concerned that Miss Leonard asked the claimant and Mr Kuzian to speak in English (see below).

Timekeeping and Absenteeism

25. There had been problems with the claimant's timekeeping in that it was common case that he was about 15 minutes late for work on most days. We accept the evidence of the Leonards which was that they told the claimant that they had no problem with the claimant being late as long as he could make up the time at the end of the day by working beyond 5.30 pm. The claimant refused to do so and continued to arrive late for work.
26. The claimant's evidence was that the Leonards had agreed that he be late yet he denied that they had asked him to make the time up. We accept the Leonard's evidence particularly as it is in accordance with their increasing concerns about his lateness and absenteeism which is evidenced by the contemporaneous HR notes. It also accords with the verbal warning which was given to the claimant in October 2016 and related to these issues. The claimant's evidence was inherently implausible namely that he was told that he could be late on an ongoing basis without any consequence whatsoever.
27. The reason given by the claimant to the Leonards and at tribunal hearing was that the claimant's wife would sometimes be late home from work and he would have to wait with his child or that he had to bring his child to school and that these were reasons for the lateness. This differed from the account given in the claim form which was that he was late because the Leonards had started calling him names and treating him badly. In tribunal the claimant also alleged that the name calling was by his co-workers rather than the Leonards. These material changes in the claimant's case tainted the reliability of his evidence generally for us.
28. The Leonards agreed to pay the claimant to take time off for counselling. Despite the claimant not adhering to this and taking excessive time off on his appointment days and not giving enough notice for those appointments, the Leonards were extremely patient in trying to deal with him despite his poor attendance, absenteeism and lateness.
29. Due to the claimant's persistent timekeeping issues he ultimately received a verbal warning which was recorded in writing in October 2016.

Chronology of HR Action

30. We accept the accuracy of the HR records of Miss Leonard which set out the following problems encountered with the claimant, any complaints made by him and the action taken by the Leonards.
31. HR records in a note of 18 November 2015 that the claimant had complained a few days before about Edward calling him 'gaylord'. The Leonards investigated this, spoke to the staff (who denied the accusation) and to the claimant and noted that no further action was requested by the claimant. The Leonards thereafter ensured that they were on the workplace floor to ensure that there was no "foul play".
32. On 6 February 2016 the claimant asked Miss Leonard if there was a problem with

his work because he felt that “the boys were watching him” when he worked in the cabin.

33. On 7 April 2016 there is a note that damage levels had risen to an unacceptable standard and that this was due to two individuals in particular namely L McC (a local worker) and the claimant. This led to a notice in the staff tearoom about excessive amounts of damage and faulty work.
34. On 19 June 2016 the airport manager (responsible for the industrial estate where the respondent’s premises were located) complained of the claimant’s “unruly driving” on several occasions. This followed similar complaints by three other third parties on previous occasions and the claimant was spoken to about this.
35. On 24 August 2016 there was an incident when the claimant returned from holidays when he accused Edward of vandalising his car or knowing who had done so. The report to Miss Leonard was that the claimant had accused Edward in the encounter of telling him to go back to Poland but this was not reported by the claimant to them.
36. On 23 September 2016 the claimant rang in sick and said he had a two week sick note. When he called into the office later that day he said to the Leonards “If you want to just sack me”. He mentioned at that point that he had been called ‘gaylord’. The Leonards investigated this again and the follow up was to monitor what was going on in the workshop.
37. On 28 October 2016 the claimant was spoken to about his absenteeism and lateness and about the fact that his work was still being damaged by him. This was an informal discussion to try to improve things.
38. On 3 December 2016 the claimant was spoken to about absenteeism and lateness and it was during this meeting that he confided in Mr Leonard about the difficult nature of events in his background and asked again to be sacked. The Leonards response was that the matter would be kept confidential, that the claimant would be supported in attending counselling and that he would be paid for the hour he was planning to take off for counselling.
39. On 16 December 2016 HR notes that despite the claimant being paid for one hour of counselling he took the entire day off and was uncontactable.
40. On 6 January 2017 the claimant was due to return after the Christmas break on 3 January but did not turn up until 5 January and was uncontactable. When he returned to work he did not give any explanation.
41. On 10 March 2017 Miss Leonard notes that there was a notable deterioration in the claimant’s behaviour and attitude in that his aggression was increasing and he was throwing tools around and had been witnessed that day by Mr Leonard throwing a knife in a rage towards a screw box causing damage to it.
42. On 28 March 2017 Mr Leonard spoke to the claimant about his work on 21 March and the fact that doorframes he had put in were damaged on installation with kick marks on them on 23 March 2017, and that the claimant acted aggressively in his work and then was aggressive to Mr Leonard.

43. The HR record of 30 March 2017 relates to the incident on 28 March 2017 (see below). The third party who had been in the factory when the altercation happened had rung later “to see if Edward was ok” as he believed that the claimant had struck Edward. The record of the meeting that occurred later that day with the Leonards accords with their evidence and the claimant was given an invitation to a disciplinary meeting at that point.

Incident 28 March 2017

44. This was a key incident in this case. There were two opposing accounts given by the claimant on the one hand and by Mr Allen, Mr Gravill, Mr Leonard and Miss Leonard on the other hand.
45. We found Mr Gravill’s evidence to be particularly honest and compelling and we therefore accept his account of the events which took place as follows. We also accept as truthful the accounts given by the Leonards and Mr Allen.
46. Mr Allen and Mr Gravill and the claimant were working on a boat. Mr Leonard had asked the claimant to work at the rear of the boat and the two other men were working on a ceiling panel above the dashboard at the front of the boat.
47. The claimant came to the front of the vessel and pushed past Mr Allen. Mr Allen said “I’m sorry” and the claimant lifted either a piece of tape or paper and threw it towards Mr Allen, missing his face. Mr Gravill’s evidence was that at first he thought the claimant was joking but realised when he threw something at Mr Allen that he was being aggressive and could not understand what had caused this. He was adamant that the only thing said by Mr Allen was “I’m sorry” because the claimant had bumped into him on his way past to get into the front of the vessel. Mr Gravill was puzzled about why the claimant had to go to the front of the boat at all as there was no reason for him to do so.
48. Mr Leonard’s evidence was that he was with a visitor in the office and it was the visitor who drew his attention to a commotion taking place on the boat in the workshop. This caused Mr Leonard to go to the boat to find out what was happening. Both he and Miss Leonard spoke to the claimant after the incident to ask why he had become aggressive. The claimant alleged that Edward Allen had called him a name but he refused to reveal that name to the Leonards at that time. We find this reaction of the claimant to be inexplicable in circumstances where he had previously accused all of his workmates of calling him ‘gaylord’.
49. The Leonards called the claimant to a meeting after work that day after they had spoken to Mr Allen and Mr Gravill and had ascertained from them their account that the claimant had become aggressive for no reason. This followed a period when the claimant had acted in an aggressive manner over the previous few weeks and this had caused Mr Leonard to speak to him more than once about this for example about kicking a panel on a boat and about throwing a knife on a boat damaging the wood and upholstery.
50. We accept the Leonards’ account of the meeting on 28 March 2017 which is that the claimant became very aggressive when they were speaking to him to the extent that he lunged across the table causing Miss Leonard to be frightened and that her father had to stand up to tell the claimant to sit down and calm himself. We accept their evidence which was that they then gave the claimant a letter they had

prepared which required him to attend a disciplinary hearing because of his bad timekeeping, his aggressive behaviour and because of the altercation with Mr Allen that morning.

51. We reject the claimant's account which emerged in the second half of the tribunal hearing which was that he told them on that day that he had been subjected to "mobbing" by Mr Allen and that he was called names. Despite being questioned by the Employment Judge on this point as to what happened in that meeting during his evidence-in-chief, the claimant did not give that detail which, later in the tribunal hearing he relied upon heavily to support his case that he was treated badly in the meeting.
52. On the claimant's own case everything was fine for the first two years. This accorded with the Leonards' evidence which was that everything was fine for the first 18 months or so except that sometimes the claimant's standard of work was variable but that nevertheless the claimant received a pay rise and encouragement in relation to his workmanship.
53. The claimant then started to isolate himself from the other workers preferring to take his lunch on his own in his car rather than engaging with the other workers. We accept that Mr Leonard spoke to him several times to try to encourage him to feel part of a team. The complaints made by the claimant to the Leonards that he was being called names by other employees were dealt with in a reasonable fashion by them in that they investigated the matters and spent more time on the shop floor to keep an eye on things. They were entitled to conclude in the context of all their dealings with him that the claimant had not, in fact, been called names.
54. It is clear from our assessment of all of the evidence (and we so find) that the claimant had serious personal issues stemming from difficulties in his past and this may have been what led him to act in an unreasonable and increasing aggressive way in work. We find that this was dealt with flexibly and sympathetically by the Leonards.
55. We can understand why the Leonards became increasingly concerned in March 2017 in relation to the claimant's increasingly erratic and aggressive behaviour. We can also understand why they considered disciplinary action for that behaviour and for the persistent timekeeping and absenteeism issues. The claimant however went off sick and then resigned before disciplinary action could be progressed.

Sick Leave and Resignation

56. The claimant went off sick from 29 March 2017 (the day after the incident with Mr Allen and the meetings on 28 March 2017) and did not return to work until his letter of resignation dated 19 June 2017 which was sent by his solicitor. His sick lines expired before that point in that his last sick line was sent in on 26 May.
57. During the claimant's absence from work his employer tried to engage with him to have him attend a welfare meeting and this was rejected by two letters from his solicitor in April and May 2017 and culminated in the letter of resignation sent by his solicitor which was dated 19 June 2017 and stated as follows:

"Dear Sirs

RE: YOUR FORMER EMPLOYEE: WOJTEK KLEINSCHMIDT

We write to advise that since we have not received a satisfactory reply from either your Firm or from your Lawyers to our letters of the 5 April and 10 May.

Our client has instructed us to write that it is not his intention to return to work with your Firm.

He considers that he has been unjustly and unfairly treated and discriminated against on the grounds of his sexual orientation and that he has suffered bullying and abuse to which no remedy has been forthcoming.

He will not be returning to work with your Firm.”

58. The reason given in the resignation letter of 19 June 2017 for the resignation was therefore that the claimant had not received a satisfactory reply to the solicitor's letters of 5 April and 10 May 2017. The body of those letters state as follows:

Letter of 5 April 2017

“Dear Sirs

RE: YOUR EMPLOYEE, WOJTEK KLEINSCHMIDT

This Firm has been consulted on a professional basis by your above named employee.

Our client has handed to us a letter dated the 28 March 2017, which advises our client that he is on notice to attend a disciplinary meeting on the 30 March 2017 at 9.30 am.

Our client consulted us on the 29 March 2017 and advised that he had been suffering from depression and has been attending his Doctor.

He also advised us that it was his intention to discuss his present state of health with his Doctor in the context of your letter.

With regard to the proposed disciplinary meeting and the contents of your letter of the 28 March 2017:-

1. *Our client does not dispute that recently his time keeping and absenteeism (limited) has not been what he would like it to be – it is for this reason that he is attending his Doctor. Any breaches of his time keeping our client ascribes to his present state of health.*
2. *He disputes that he has been behaving aggressively towards individuals or that he has caused damage to Company property. He states that if there has been any such behaviour it has been the result of bullying, provocation and lack of respect shown to him by individuals in the Company.*
3. *He has also asked us to require from the Company details of the so*

called "altercation" which is alleged to have taken place on the 28 March 2017.

4. He advises us that recently he has been the subject of a number of childish and disturbing incidents from other employees and from the management of the Company. He has been called disrespectful and insulting names directed towards his sexual orientation which have resulted in him becoming isolated and belittled and which taken altogether amount to nothing less than bullying.

The sort of behaviour that has been shown to him has aggrieved his [redacted] condition and our client requires that it is brought to a stop forthwith.

5. He notes that this disciplinary meeting is to be conducted by Tom Leonard and Louise Leonard. We consider this to be inappropriate, as both those names have been given to us as having been involved in the types of behaviour described above.

He advised us that Westwood Marine Leisure Ltd is a very small Company with only three other employees.

Disciplinary Hearing

He has not been able to attend the Disciplinary Hearing because of his health.

He advises that he will hold himself ready to attend such a meeting provided he is given reasonable notice. He would like to have a friend with him at the hearing.

Written Contract

Our client also advises us that he does not have a written Contract of Employment and has instructed us to formally make application for such.

We should be obliged if you would prepare a Contract of Employment and send it to this Office for our consideration. Thanking you."

Letter of 10 May 2017

"Dear Sirs

RE: OUR CLIENT: WOJTEK KLEINSCHMIDT

We wrote to you on the 5 April 2017 on our above named client's instructions – we enclose herewith for ease of reference a copy of the letter that was sent from this Office.

We are disappointed that we have not received either an acknowledgement or reply to the letter.

We have now taken our client's further instructions. Our client advises us

that he is still receiving attention and advices [sic] on his health from his Doctor and that he has not returned to work since the 28 March 2017.

Our client advises that he has been working with Westwood Marine Limited for in excess of three years. In our letter of the 5 April, we requested that your Company send to us a draft of a written Agreement which our client is legally entitled to, in order that we can advise our client of the contents thereof and if necessary amend.

We also challenged a number of the issues that your Firm raised in your letter to him of the 8 March 2017. It is noted that there is no response to the points our client makes.

We also advise that our client was prepared (when he is fit enough) to attend a disciplinary hearing, but that he did not think the persons named as the conductors of that hearing were appropriate in the circumstances in which the alleged complaints arise.

The purpose of this letter is to advise that we cannot advise our client to return to work unless these matters are addressed in an appropriate fashion.

Our client expects to be fit enough to be returning to work in the near future. He is not however, prepared to go back to a workplace that he perceives as having been hostile to him for some time and has not accorded him the respect which he has earned during his period with your Firm.

We have to advise that unless these matters are responded to by your Firm without further delay that our client will be left with no alternative, but to assume that he is not welcome by your Company and that your Company is not prepared to address the issues that he raises. He will be required to terminate his employment – in which case, we will be advising him that he has a right of action for constructive dismissal and for other breaches of his rights.

We propose to wait a further seven days from the date of this letter, after which date we advise that we have instructions to terminate our client's employment and to commence legal proceedings."

59. In essence therefore the letters raised issues about the claimant's allegation that he has been subjected to bullying and disrespectful and insulting names directed towards his sexual orientation. He also asks for a copy of his contract of employment.
60. The contract of employment was received by the claimant's solicitor by email of 15 June 2017.
61. At the tribunal hearing the claimant stated that it was the receipt of that contract by his lawyer which was a reason for him resigning by letter of 19 June 2017 because it was the claimant's case that the contract was a false document. We reject the claimant's point on this as set out below.

Alleged Breach of Contract

62. It was not clear in tribunal as to what the claimant alleged the breach of contract was which led him to resign. When asked what was it that made him decide to resign the claimant stated that it was the receipt of the false contract via his solicitor. The resignation letter makes no reference to that but does refer to a failure to deal with the matters raised by the solicitor in previous correspondence (i.e. the letters of 5 April 2017 and 10 May 2017).
63. The incident of 28 March 2017 (ie, the encounter with Mr Allen) which immediately preceded the claimant going off sick had occurred some months before the resignation which was by letter dated 19 June 2017.
64. What we have to decide is whether or not there was a breach of any contractual term or a cumulative breach of the implied term of trust and confidence which justified the claimant resigning in response. If we find a breach of contract we then have to decide whether there was any delay in resignation and whether the claimant resigned in response to any breach of contract.
65. The claimant's evidence about his contract was equivocal and changed during the course of the hearing. Whilst on the one hand the claimant said that the signature on the contract which was dated 11 April 2014 looked like his signature and might have been his, he also stated that he never signed such a document. The claimant at other points said that he might have signed the document but could not remember doing so. The claimant's equivocation on this point tainted the reliability of his evidence.
66. Miss Leonard was very specific and clear in her evidence which was that she handed the document to the claimant at a meeting and went through the terms of it with him at the time and watched him sign and date the contract.
67. We accept Miss Leonard's evidence on this due, firstly, to the claimant's equivocation about whether the signature was his and, secondly, due to our concerns about the reliability of the claimant's evidence generally.
68. We therefore accept Miss Leonard's evidence which was that the claimant received his contract of employment and signed for it in April 2014. Our primary reason for so finding is that the claimant stated in evidence that the signature might be his. We therefore reject the claimant's account that it was a false contract which was received by his solicitor. The receipt of that contract via his solicitor therefore does not amount to a breach of contract at all never mind a sufficiently serious one warranting the claimant resigning in response.
69. The claimant had complained of being called 'gaylord' twice namely around September 2015 and in September 2016. The second incident of this was therefore approximately 6 months before the claimant went off sick and 9 months before the letter of resignation. We find that the Leonards dealt with the claimant's complaint that he was called "gaylord" when that was raised by him some time before he resigned. We find that there was too big a gap between that happening and the resignation for it to form part of a course of conduct amounting to a breach of contract justifying resignation.
70. In summary we find that the claimant resigned and was not dismissed in that there

was no breach of contract warranting his resignation. Even if there had been a breach of contract, on his own evidence we find that he delayed too long in resigning.

Name Calling

71. In the replies to the respondent's notice for additional information, the claimant stated that he was called "gaylord, fag, faggot, poof" by all the workers and that he was called "banana-man". He further alleged that Edward Allen called him "pervert" in the incident on 28 March 2017. The respondent's witnesses denied that these terms were used at all. The first issue is whether or not the claimant was actually referred to by these terms as he alleged.
72. We accept the evidence of Mr Gravill which was he never heard the use of the word "gaylord" by anyone in the workplace. This is supported by the claimant's own witness Mr Kuzian who was in the workplace for four months working closely alongside all the other three employees and he was very clear that he had never heard that term used.
73. We therefore accept that that term was not used to, or about, the claimant nor was it used at all in the workplace.
74. The term "banana-man" was said by the claimant to have been used about him. The claimant stated that he did not know that this was a term which could be related to sexual orientation until he did research and asked his friends. Mr Gravill was very clear in his evidence that he once used the term "bent as a banana" to refer to a piece of plywood which he was working with which was very warped. He said that the claimant must have misunderstood what was said, and attributed this to a language barrier. The respondent's witnesses denied calling, or referring to, the claimant as 'banana-man'.
75. We accept Mr Gravill's account which is that he used the phrase "bent as a banana" to do with a warped piece of plywood and we accept that the claimant may have misconstrued this when he overheard it. This is quite aside from whether or not the term 'banana-man' could be viewed as a term of homophobic abuse. None of the witnesses were aware of this as a term of homophobic abuse and neither is this panel aware of that. Indeed the claimant was not aware that this could be a form of homophobic abuse until as he conducted 'research' into the point.
76. We do not accept that Mr Allen called the claimant "pervert" in the course of the altercation on 28 March 2017. Our principal reasons for so finding are that we accept Mr Gravill's evidence; we also accept Mr Leonard's evidence which was that the claimant would not say what name he had been called; and we had concerns about the claimant's reliability as a witness generally.
77. Mr Kuzian's evidence was that the claimant preferred to work alone. Whilst Mr Kuzian stated that he had heard other employees call the claimant a "weirdo" and a "pervert", he could not specify which of those employees said these things. He was also clear that they had not been said in the claimant's presence and that he did not complain about this but that he told the claimant at the time. We found this aspect of Mr Kuzian's evidence to be unsatisfactory as he could not give detail which we would have expected and there was no reason for him to be reluctant to give that detail given that he no longer works for the employer. We also note the

background which is that his family is very friendly with the claimant.

78. In these circumstances we accept the evidence of the Leonards and their two employees that the claimant preferred for his own reasons to work alone and, for example to take his lunch and tea break alone, after the initial period when everything had been fine and he had engaged with his colleagues. It is our assessment that the claimant's behaviour changed probably due to medical issues related to difficulties he unfortunately had suffered in the past.
79. It is clear from the medical evidence that the claimant has a significant history of mental health issues for reasons which were alluded to in the report from the counsellor. It is not necessary for the detail of those reasons to be recorded in this decision but in summary those serious issues in the past led to the claimant having psychological and psychiatric health issues.
80. We find that the Leonards were very tolerant of the claimant's absenteeism and lateness because they were sympathetic to the difficult background which the claimant recounted to Mr Leonard in early December 2016. We do not accept that the Leonards went on to reveal to anyone the confidential information that they were given as they emphatically denied doing so. In addition the claimant's allegation of the commencement of poor treatment related to alleged events before December 2016 so they precede his confiding in them. We therefore reject the case that the Leonards treated him badly after he confided in them. As we have found that there was no such alleged breach of confidentiality, this cannot contribute to any alleged breach of contract.
81. The claimant made reference in his evidence to the following: being locked out of the industrial estate; being shouted at by the Leonards; and to Mr Leonard touching him on the back and inappropriately "invading his space". We reject the claimant's case that these incidents occurred and/or amounted to detrimental treatment as set out below.
82. Mr Leonard agreed that he might have patted employees including the claimant on the back in the close confines of a boat to see if he could look at their work. It was common case that the working area on the boats was very cramped and that several employees could be working in a very small area at the same time. In these circumstances it is entirely plausible and reasonable for there to have been some physical contact between Mr Leonard and employees and we entirely reject the claimant's allegation that Mr Leonard in some way touched him inappropriately when he touched his back or that Mr Leonard 'invaded his space' in any inappropriate way.
83. We therefore do not accept that Mr Leonard touched the claimant inappropriately nor that he and Miss Leonard spoke into his face on a regular basis as firstly we accept their emphatic denials of this behaviour and, secondly, we had serious concerns about the reliability and veracity of the claimant's evidence generally.
84. On the claimant's own evidence Mr Leonard shouted at everybody about workmanship and their level of work. On the claimant's own evidence therefore there was no less favourable treatment in that regard whether on grounds of sexual orientation or any other discriminatory ground. That aspect of the claimant's claim for discrimination or harassment therefore fails on that basis.

85. We find that the claimant's allegation about being locked out of the industrial estate does not constitute detrimental or less favourable treatment in circumstances where the claimant was late for work on an ongoing basis, the gates were managed by the managers of the industrial estate and not the Leonards, the claimant could and did ring for the code if it had changed and/or he entered the estate by another gate.

Race Discrimination Claim

86. The proposed amendment was first raised by the claimant's solicitor at a CMD on 16 November 2017. The allegation of race discrimination was that on 13 December 2016 the claimant was told to speak in English when talking to Mr Kuzian and that Miss Leonard admonished him for this.
87. The scope of the amendment was outlined in an email from the claimant dated 13 December 2017 as follows:

"My report regarding the events of 13 December 2016.

On 13 December 2016. In the morning I started to work on the assembly upholstered panel below the window in the bout C405 therefore it was very long I needed assistance in the installation. In this activity helped me Piotr Kazan Which began his apprenticeship in the Westwood carpenter in September 2016 year. Our cooperation was working well and while we speak Polish. Around 12 o'clock to the both came Louise Leonard and ordered to stop work, saying it raised voice very strongly, later he said that the conversation in Polish is not allowed in the Westwood factory. In the workplace we have to speak only in English, if you do not adapt to this prohibition will be drawn the consequences. I am on the ban that said there is no law forbid us to talk in our native language, Louise Leonard said that it does not wish us to talk in Polish in the factory and returned to biura. Po lunch again came to the bout, Leonard and Louise yet more firmly and loudly forbade us to talk in Polish If you do not adapt to the consequences of the ban will be drawn financial consequences. After this incident, I felt even more isolated and this company intolerable, which resulted in a deepening of ill psychophysical my person.

Wojciech Kleinschmidt"

88. The claimant alleged that his solicitor omitted to include it in the claim form.
89. We heard evidence about this incident from the claimant, Mr Kuzian and from Miss Leonard.
90. We preferred Miss Leonard's evidence on this incident given our concerns about the reliability of the claimant's evidence generally. We assessed Mr Kuzian's evidence and noted that his family is very friendly with the claimant's family and we found him reluctant to say anything to detract from the claimant's case.
91. Mr Kuzian's statement for the tribunal states as follows as regards this incident:

"From time to time they put me to work with WK, they did this because they knew that I was Polish. I can remember one occasion when we were conversing in Polish and Louise Leonard came round and stated that the

Factory management did not allow us to converse in Polish. She told us you should be speaking in English. I explained that WK's English was not good and he found it easier to talk in Polish.

I was told not to be cheeky and that if you don't like it, you know where the door is".

92. There was a gap of almost a year from the date of the incident on 16 December 2016 and when this was first raised by the claimant's solicitor at a CMD on 16 November 2017. We are not persuaded that time should be extended because this is a substantial amendment with too long a gap between the date of the incident and the date of the proposed amendment being raised and because the claimant had the benefit of legal advice throughout the matter.
93. Even if time had been extended the claimant would have failed on the merits as we have accepted Miss Leonard's account. Miss Leonard's account was that she did indeed say civilly to the claimant that he should speak in English to Mr Kuzian as she had a concern, in the context of the claimant's aggressive behaviour in the period preceding this incident, that Mr Kuzian (a young trainee) might be subjected to aggressive treatment by the claimant and she would not be in a position to know what was being said. In these circumstances the claimant has failed to prove detriment or less favourable treatment.
94. If this was an act of indirect discrimination in that the provision, criterion or practice applied was that the claimant should speak in English, we do not find particular disadvantage in the circumstances. We, also find that the actions of Miss Leonard were a proportionate means of achieving a legitimate aim namely the monitoring and protection of a junior employee when working with a colleague who was known to have been aggressive in the recent past.

Summary

95. The allegation by the claimant that there was a course of conduct where he was treated badly by the Leonards leading to him resigning is not borne out by the facts we have found.
96. Our assessment of the Leonards is that they were extremely patient and flexible in relation to the claimant particularly after they became aware of his requirement for counselling and the difficult background which he recounted in confidence to them. They were very patient in dealing with the claimant's aggressive behaviour and were rightly concerned about the potential effect of any such behaviour on other staff and on Mr Kuzian.
97. We find that the claimant was not dismissed as there was no breach of contract and no last straw event. The claimant also delayed too long in reacting to any alleged breach of contract. The unfair dismissal claim therefore fails.
98. The alleged comments which the claimant says were related to sexual orientation did not occur at all on our assessment of all the evidence of all of the witnesses including that of the claimant's own witness. We do not accept that the claimant was treated less favourably nor was he treated adversely on grounds of sexual orientation.

99. We accept that the claimant received his contract and signed for it in 2014. The claim for failure to receive written terms and conditions of employment is therefore dismissed.
100. The race discrimination claim fails as set out above.
101. The claimant's claims are therefore dismissed in their entirety.

Employment Judge:

Date and place of hearing: 5, 6 March 2018 and 22, 23 May 2018, Belfast.

Date decision recorded in register and issued to parties: